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 FIREFIGHTERS OF IDAHO, INC.; SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 687; IDAHO STATE AFL-CIO, and MARK L. HEIDEMAN, in his official capacity as Bannock County Prosecuting Attorney,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMERICANS FOR LIMITED GOVERNMENT, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, *amicus curiae*, Americans for Limited Government, hereby submits the following brief in support of Petitioners Ben Ysursa, in his official capacity as Idaho Secretary of State, and Lawrence G. Wasden, in his official capacity as Idaho Attorney General.

Based in Virginia, Americans for Limited Government is an organization that is dedicated to the philosophy of limited government. It works with local groups across the nation to promote limited government and the original principles of the United States Constitution. As explained in the brief, Americans for Limited Government urges the Court to reverse the lower court's ruling because a state legislature's decision not to allow public resources to be used for political purposes is a legitimate measure to keep the marketplace of ideas evenly balanced and free of improper government influence. Further, the lower court's ruling that a state legislature must

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[1] Pursuant to Rule 37 of the Supreme Court Rules, the undersigned counsel affirms that the parties, specifically Mr. Clay Smith, Idaho Deputy Attorney General, who represents the Petitioners, and Mr. Jeremiah Collins, Esquire, who represents the Respondents, have consented to the filing of this brief. Further, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. This brief was authored by counsel listed on the brief cover.

pervasively manage the operations of its political subdivisions in order to stay in bounds of the First Amendment operates as an undesirable directive to state governments to extensively regulate matters that they would normally leave to the sound judgment of local government units.

SUMMARY OF ARGUMENT

Idaho passed a viewpoint-neutral law that bars the use of taxpayer-funded payroll systems, at both the state- and local-government levels, for political fundraising purposes. Because government payroll systems are not generally accessible to the public, and because Idaho has not purposefully opened the systems for private speech, they are nonpublic fora from which the government can deny access on content-based grounds. And because Idaho passed the law for the laudable goal of divorcing the government from the appearance of political favoritism, the statute is constitutional. In short, the First Amendment does not require the government to devote taxpayer-funded resources to facilitating the political speech of its workers, their preferred political organizations, or anyone else.

The Ninth Circuit, however, did not apply this Court's established forum-based jurisprudence to the Idaho law. Instead, the Ninth Circuit held that if Idaho wants to regulate the type of speech activity that occurs in the payroll systems of its political subdivisions, then the State must commandeer those payroll systems and "pervasively manage" them. The lower court's use of the First Amendment as a wedge between a state government and its political subdivisions has no basis in this Court's

jurisprudence. To the contrary, this Court has previously employed the traditional forum analysis when scrutinizing the constitutionality of state statutes as they are applied by local entities. Never before has it held that a state government must lord over a political subdivision's operations in order to regulate the speech uses to which the subdivision's property may be devoted. In fact, this Court has repeatedly recognized that the United States Constitution (much less the First Amendment) plays no role in state-level separation-of-powers law. To this end, the Court has always given a state "absolute discretion" when dividing up power between itself and its political subdivisions. The Ninth Circuit failed to account for any of these considerations in striking Idaho's law as applied at the local level.

Ultimately, the Ninth Circuit's decision invites the state government, at taxpayer expense, to undertake responsibilities that are delegated to local governments so that it does not lose the ability to regulate the uses of public resources in a uniform, statewide fashion. Such an inefficient, wasteful outcome is not envisioned by any prior decision of this Court, and the Ninth Circuit's ruling should be reversed accordingly.

ARGUMENT

I. IDAHO'S DECISION NOT TO DEVOTE PUBLIC RESOURCES TO AID THE POLITICAL SPEECH OF SOME PRIVATE PARTIES PASSES CONSTITUTIONAL MUSTER UNDER THE NONPUBLIC FORUM DOCTRINE.

Idaho's Voluntary Contributions Act ("VCA") provides, in relevant part, that state and local government payroll systems cannot serve as conduits for public employees' political contributions. *See* Idaho Code Ann. § 44-2004(2) (2008) ("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."). As explained below, this regulation case presents a classic example of the government restricting access to nonpublic fora in a reasonable, viewpoint-neutral manner. The Legislature's desire to avoid any appearance of favoring certain political causes within Idaho's borders provides firm constitutional footing for the VCA, and the Ninth Circuit's ruling to the contrary should be reversed.

A. Public payroll systems are nonpublic fora.

It is well established that for First Amendment purposes, government property can be classified as a public forum, a designated public forum, a nonpublic forum, or no forum at all. *See Ark. Educ. Tele. Comm'n v. Forbes*, 523 U.S. 666, 677–79 (1998) (discussing the various designations

of government property under the traditional forum analysis). This forum analysis extends to attempts by private speakers to access property under governmental control. *See, e.g.*, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390 (1993) (explaining that the government may "legally preserve the property under its control for the use to which it is dedicated"); *Greer v. Spock*, 424 U.S. 828, 836 (1976) (explaining that the First Amendment vests the government with the "power to preserve the property under its control for the use to which it is lawfully dedicated" (quoting *Adderley v. Florida*, 385 U.S. 39, 47 (1966))). As the Court frequently recognizes, the property that the private speaker is attempting to access does not need to be a physical location in order for the forum analysis to apply. *See, e.g.*, *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, 830 (1995) ("The [Student Activities Fund] is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable."); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801–06 (1985) (finding a charity drive to be a nonpublic forum); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (holding that a school district's internal mail system was a nonpublic forum).

A public forum is a government-maintained area that has traditionally been open to speech activities, such as a public park or street. *Forbes*, 523 U.S. at 677. When the government attempts to restrict speech in a public forum, the regulation will be evaluated under strict scrutiny. *See Burson v. Freeman*, 504 U.S. 191, 198 (1992) (plurality

opinion) (applying strict scrutiny to speech regulation that restricted political speech on sidewalks and streets). Similarly, a designated public forum arises when the government intentionally opens a medium that is traditionally unavailable to putative speakers. *Forbes*, 523 U.S. at 677. Like regulations of public fora, speech regulations in designated public fora are subject to strict scrutiny. *Id.*

A nonpublic forum, on the other hand, is public property that is neither by tradition nor designation generally accessible to private speakers. *See Cornelius*, 473 U.S. at 803–04. The Court has been clear that the state is free to make content-based choices as to what speech will be allowed in a nonpublic forum. *See id.* at 806 (explaining that a "speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum"). Accordingly, the nonpublic forum doctrine recognizes that the government is not required to subsidize private speech by allowing the speaker to use taxpayer-funded resources for purposes to which they are not devoted. *See id.* at 809 ("The First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker's message."); *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 282 (1984) (explaining that the nonpublic forum doctrine involves the "government's authority to provide assistance" for private speakers); *cf. Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 780 (1988) (White, J., dissenting) ("[T]hose seeking to distribute materials protected by

the First Amendment do not have a right to appropriate public property merely because it best facilitates their efforts."); *Regan v. Taxation Without Representation of Wash.*, 461 U.S. 540, 546 (1983) ("We again reject the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.'" (quoting *Cammarano v. United States*, 358 U.S. 498, 515 (1959) (Douglas, J., concurring))). Any content-based distinctions in a nonpublic forum must only be "reasonable in light of the purpose served by the forum and viewpoint neutral." *Cornelius*, 473 U.S. at 806; *see also Perry Education Association*, 460 U.S. at 46 (explaining that the state may restrict access to a nonpublic forum "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").

This case presents a clear example of the government restricting access to a nonpublic forum. As the *Cornelius* Court explained, the boundaries of a forum are defined by the access sought by a putative speaker. 473 U.S. at 801. Here, there is no dispute that the relevant fora are the payroll systems of Idaho's political subdivisions.[2]

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[2] The district court held that the VCA's restrictions on payroll systems of the state government itself were constitutional. *Pocatello Educ. Ass'n v. Heideman*, Case No. CV-03-0256-E-BLW, 2005 U.S. Dist. LEXIS 34494, at *7–9 (D. Idaho Nov. 23, 2005) ("*Pocatello Education Association I*"). This ruling was not challenged on appeal.

None of the parties contends that these systems are public fora, and with good reason. Courts agree that there is no inherent right of access to public payroll systems, *see, e.g.*, *City of Charlotte v. Local 660, Int'l Ass'n of Firefighters*, 426 U.S. 283, 289 (1976) (rejecting claim of access to a city's payroll system under the Equal Protection Clause); *S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1256 (4th Cir. 1989) (observing that "there is no constitutional right to payroll deductions"), and they certainly do not involve characteristics similar to a park or street corner.

Likewise, these payroll systems cannot be considered designated public fora. It is straightforward that the central purpose of a payroll system is to provide an efficient mechanism for compensating employees. As such, it is equally clear that public payroll systems are not designed to facilitate workers' political speech. *See United Black Cmty. Fund, Inc. v. St. Louis*, 800 F.2d 758, 759 (8th Cir. 1986) (observing that government payroll deductions occur in a setting that is "basically incompatible with general public expression"). Further, there is no indication that Idaho intended to open them for widespread speech purposes. *See Cornelius*, 473 U.S. at 802–04. In fact, even before the VCA, the Idaho Legislature placed restrictions on access to payroll systems, requiring that no deductions be made in the absence of an employee's direct written authorization. *See* 1985 Idaho Sess. Laws ch. 2, § 1 (codified at Idaho Code Ann. § 44-2004(1) (2008)). The characteristics of the fora, along with the absence of a clear directive from the

Idaho Legislature to open payroll systems to all private speech, indicate that the instant payroll systems are not designated public fora. *See Cornelius*, 473 U.S. at 802 ("The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."); *id.* at 804 ("In cases where the principal function of the property would be disrupted by expressive activity, the Court is particularly reluctant to hold that the government intended to designate a public forum.").

When the purpose of government payroll systems is considered with their general incompatibility with expressive activity and their general inaccessibility by the public, there can be little doubt that the payroll systems at issue here constitute nonpublic fora. In fact, several courts have specifically found payroll deduction programs to be nonpublic fora. *See, e.g.*, *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 84 (2d Cir. 2003); *Indep. Charities of Am., Inc. v. Minnesota*, 82 F.3d 791, 796 (8th Cir. 1996); *Pilsen Neighbors Cmty. Council v. Netsch*, 960 F.2d 676, 685 (7th Cir. 1992); *United Black Community Fund*, 800 F.2d at 759. Accordingly, the constitutionality of the VCA as applied to local government payroll systems is subject to rational-basis review. *See Perry Education Association*, 460 U.S. at 46.

B. Prohibiting the use of public payroll systems for politicking is both reasonable and viewpoint neutral.

Because public payroll systems are nonpublic fora, the Idaho Legislature is free to restrict access to them based on content as long as those restrictions are reasonable and not designed to suppress any particular viewpoint. *See Cornelius*, 473 U.S. at 806. The VCA, which is similar to the regulation held permissible in *Cornelius*, passes constitutional muster under this level of scrutiny.[3]

First, there can be no doubt that the VCA's regulations are reasonable. In passing this statute, the Idaho Legislature took steps to ensure that public resources would not be dedicated to political fundraising efforts. As a result, under the VCA, the government no longer serves as the go-between for selected political causes and public employees. Disassociating itself from the appearance of political favoritism has always been a legitimate basis for restricting speech in a nonpublic forum. *See id.* at 809 (holding that "avoiding the appearance of political favoritism is a valid justification for limiting

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[3] Despite holding part of the VCA unconstitutional, the Ninth Circuit actually acknowledged that the *Cornelius* Court held a similar restriction on political fundraising to be constitutional. *See Pocatello Educ. Ass'n v. Heideman*, 504 F.3d 1053, 1062 n.8 (9th Cir. 2007) ("In *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.") ("*Pocatello Education Association II*").

speech in a nonpublic forum"); *Greer*, 424 U.S. at 389 (explaining that the military may take viewpoint-neutral measures to avoid "the appearance of acting as a handmaiden for partisan political causes or candidates"); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (finding that minimizing "the appearance of favoritism" in a nonpublic forum is a "reasonable legislative objective[]").

Second, there is no indication that the VCA's regulations are designed to suppress a particular viewpoint. Idaho Code § 44-2004(2) disallows deductions for "political activities." This term is broadly defined elsewhere in the Code as "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." Idaho Code Ann. § 44-2602(1)(e) (2008) (emphasis added). On its face, the VCA does not prohibit payroll deductions only for some candidates or organizations while concurrently allowing them for others. The district court recognized as much. *See Pocatello Education Association I*, 2005 U.S. Dist. LEXIS 34494, at *10 (observing that "[t]he ban applies equally to conservatives and liberals, Republicans and Democrats" while remarking that "the VCA is not viewpoint-based"). Because the VCA easily passes a rational-basis review, the Court should reverse the Ninth Circuit's decision and uphold the challenged aspect of the VCA as a

reasonable content-based restriction on private uses of public payroll systems.[4]

II. THE NINTH CIRCUIT'S EFFORTS TO DISTINGUISH BETWEEN PROPERTY OF IDAHO'S STATE GOVERNMENT AND PROPERTY OF ITS POLITICAL SUBDIVISIONS FOR PURPOSES OF THE FIRST AMENDMENT ARE CONTRARY TO PRIOR DECISIONS OF THIS COURT.

The Ninth Circuit avoided the conclusion that the VCA is a constitutional speech regulation by simply dismissing the applicability of the traditional forum analysis to the VCA insofar as it regulates Idaho's political subdivisions. *See Pocatello Education Association II*, 504 F.3d at 1063–67 (declining to apply forum analysis to the VCA's mandates regarding permissible uses of Idaho's political subdivisions' payroll systems). The Ninth

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[4] Importantly, such an outcome does not "raise[] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace," which the Court recently identified as the primary concern of the general prohibition against content-based regulations. *Davenport v. Wash. Educ. Ass'n*, 127 S. Ct. 2372, 2381 (2007) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992)). The VCA specifically provides that employees are free to make whatever political contributions they wish, consistent with federal and state campaign-finance law, but they must write the checks themselves rather than relying on the government to serve as a bagman. *See* Idaho Code Ann. § 44-2004(3) (2008) ("Nothing in this chapter shall prohibit an employee from personally paying contributions for political activities . . . to a labor organization unless such payment is prohibited by law."). Under such circumstances, there is no constitutional abridgment of speech.

Circuit reasoned that the State of Idaho had no legal interest in regulating access to local government payroll systems and, therefore, used the First Amendment as a separation-of-powers check on the state's authority over its political subdivisions. In reaching this conclusion, the Ninth Circuit stretched two prior decisions of this Court, *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980), and *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) ("*ISKCON*"), far beyond their intended scope to create a prerequisite that the government "pervasively manage" public property before it can regulate speech on the property. In addition to finding no support in either of those cases, the Ninth Circuit's conclusion is inconsistent with the settled principle that the United States Constitution is not a tool for dictating how states should manage their internal governmental affairs. Each of these errors is discussed below in turn.

A. The Ninth Circuit distorted the Court's decisions in *Consolidated Edison* and *ISKCON* in order to avoid applying forum analysis.

1. *Consolidated Edison* speaks only to when private property may be considered public property for First Amendment purposes.

The lower court based its decision in large part on an expansive reading of *Consolidated Edison*, from which the Ninth Circuit excerpted a

single passage regarding government regulations of speech on ***private*** property and improperly stretched it to reach speech regulations involving ***public*** property. *Consolidated Edison*, however, has no impact on the constitutionality of the VCA as applied to the payroll systems of local governments.

In *Consolidated Edison*, this Court addressed the constitutionality of a state agency's ban on the ability of utility companies, including privately-owned utilities, to place messages relating to nuclear energy in mailings to their respective customers. 447 U.S. at 532–33. In holding such a restriction unconstitutional, the Court reiterated that a regulation that dictates how a private entity uses its own property to convey its own messages is subject to strict scrutiny. *Id.* at 540. The Court devoted much of its discussion to the fact that the regulation at issue was designed to suppress debate among the citizenry over a controversial issue of the day and that such censoring was not narrowly tailored to serve a compelling government interest. *See id.* at 536–38 (explaining that the agency promulgated the challenged rule because it did not consider discussion of nuclear energy to be "'useful' information" for consumers); *id.* at 540–44 (discussing constitutional shortcomings of the challenged regulation). Only in response to the lower court's reliance on *Greer* and *Lehman* did the Court note that simply being subject to government regulation does not convert a private entity's assets into public property for First Amendment purposes. *Id.* at 538–40.

The Ninth Circuit seized on this final point, which played a relatively minor role in the *Consolidated Edison* ruling, and inflated it to create a constitutional barrier to a state government's ability to regulate its own political subdivisions. *See Pocatello Education Association II*, 504 F.3d at 1065 (arguing that Idaho's ability to control its political subdivisions is "analogous to the New York Public Service Commission's regulatory powers over Consolidated Edison" in support of the conclusion that Idaho lacks a "proprietary relationship with the local government workplace").[5] When kept in context, though, the *Consolidated Edison* decision has no meaningful application to a law such as the VCA that regulates speech on government property.

Critically, in *Consolidated Edison*, the government attempted to prohibit certain uses of private property by the property's owner; here, on the other hand, the Idaho Legislature has only reined in uses of taxpayer-funded resources. In fact, the *Consolidated Edison* Court specifically drew this distinction when declining to apply the *Greer* or *Lehman* decisions to those facts. *See* 447 U.S. at 539–40 (observing in multiple places that there was no attempt by a private party to access "public facilities" and, therefore, cases involving nonpublic fora were inapplicable). Given this crucial factual difference between that case and the present one, *Consolidated Edison* adds nothing to the evaluation of the VCA. Where, as here, the property at issue is

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[5] The Tenth Circuit similarly strained this aspect of the *Consolidated Edison* decision in *Utah Education Ass'n v. Shurtleff*, 512 F.3d 1254, 1260 (10th Cir. 2008).

not privately held, there is simply no call to evaluate whether it has been converted into public property for First Amendment purposes.

At bottom, *Consolidated Edison* supports the basic proposition that the First Amendment more closely scrutinizes a restriction on a speaker's ability to use a private soapbox than it does a restriction on a speaker's ability to use taxpayer-funded resources in order to deliver his or her message. Nothing in the decision envisions an extension of this reasoning to subdivide public resources into those that are, as the Ninth Circuit put it, "pervasively managed" by the state and those that are not when the legislature passes a statute like the VCA that uniformly regulates ***all*** public resources within the state's borders.

2. The Court has previously used forum analysis to evaluate state-level speech regulations on property managed by local government units, and *ISKCON* is consistent with those cases.

The Ninth Circuit similarly overreached with its reliance on *ISKCON* as supporting the conclusion that forum analysis is inapplicable when a state government seeks to regulate property managed by its political subdivisions. In *ISKCON*, the Court held constitutional a ban on solicitations in terminals within airports that were operated by the Port Authority of New York and New Jersey. 505 U.S. at 684–85. As part of its general statement of

the law of forum analysis, the Court summarized: "Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject." *Id.* at 678. Here, the Ninth Circuit isolated this sentence from the remainder of the *ISKCON* opinion and interpreted it as a requirement that the state government exercise managerial control over local government property in order for the property to be considered a nonpublic forum. *See Pocatello Education Association II*, 504 F.3d at 1062–65 (declining to find that Idaho was the "proprietor" of local governments' payroll systems because the state government did not "own and control" the systems). Such an understanding of *ISKCON*, however, is inconsistent with prior decisions of this Court that place no such "managerial" responsibility on state governments with regard to the property of their political subdivisions.

In *Adderley v. Florida*, 385 U.S. 39 (1966), the Court examined the constitutionality of a Florida statute as it was applied by a county sheriff to the petitioners' demonstration on the premises of a county jail. The *Adderley* Court began its analysis by explaining that the standards governing a public forum were inapplicable because the jail was not generally open to the public. *See id.* at 41 (distinguishing the instant unlawful protest at the county jail from the lawful demonstrations at a state capitol in *Edwards v. South Carolina*, 372 U.S. 229 (1963), because "state capitol grounds are open to the public" while "[j]ails, built for security purposes,

are not"). Instead, the jail was a nonpublic forum, and the Court upheld the application of Florida's law to conduct on county property under rational-basis review. *See id.* at 47 (upholding the constitutionality of this application of Florida's law because the county sheriff had enforced the law to maintain the property for "jail uses" and his conduct was not based on the petitioners' viewpoint).[6] The county jail was analyzed as a nonpublic forum even though Florida, whose statute was under review, played absolutely no role in managing the jail. *See id.* at 40 (explaining that the county sheriff was the "legal custodian of the jail and jail grounds"); *id.* at 46 (describing the county sheriff as "jail custodian").

Importantly, it was against an identical factual posture as the VCA here—that is, a state law restricting speech on property managed by a political subdivision—that the *Adderley* Court issued the seminal statement regarding the rationale for applying a lower level of scrutiny to speech regulations in nonpublic fora:

> The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. . . . The

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[6] Despite applying principles only applicable to nonpublic fora, the *Adderley* Court did not use the specific phrase "nonpublic forum" when discussing the county jail. Nevertheless, *Adderley* is routinely cited as an example of this Court's nonpublic forum jurisprudence. *See, e.g.*, *ISKCON*, 505 U.S. at 688 (O'Connor, J., concurring); *Minnesota State Board*, 465 U.S. at 282; *Council of Greenburgh Civic Associations*, 453 U.S. at 129.

> United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose.

Id. at 47–48.[7] In writing this broad prescription for state legislative authority, the Court necessarily considered the county jail to be Florida's "own property" and under Florida's "control" for First Amendment purposes even though the jail was managed solely by the local sheriff. In short, the *Adderley* Court held that a state law is subject to forum analysis when it applies to public property, regardless of whether the public property is managed, controlled, or owned by state or local government.[8]

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[7] The Court frequently cites this portion of *Adderley* as the analytical foundation of the nonpublic forum doctrine. *See, e.g.*, *Lamb's Chapel*, 508 U.S. at 390–91; *United States v. Grace*, 461 U.S. 171, 178 (1983); *Perry Education Association*, 460 U.S. at 46; *Greer*, 424 U.S. at 836.

[8] Other instances where the Court has used forum analysis to evaluate the constitutionality of an access policy to the property of a political subdivision that is based on state law include *Good News Club v. Milford Central School*, 533 U.S. 98, 102, 106–12 (2001) (applying forum analysis to a school's uses of its property while recognizing that the available uses of school property were generally dictated by New York state law (citing N.Y. Educ. Law § 414 (McKinney 2000))), and *Perry Education Association*, 460 U.S. at 41, 46 (finding a school district's internal mail system to be a nonpublic forum even though the district's authority to prevent certain labor organizations from accessing the system derived from Indiana state law (citing Ind. Code § 20-7.5-1-10(c)(4) (1982))). These examples, like *Adderley* itself, make clear the state does not need to have any role in managing the property of its political subdivisions in order for the local government's property to be deemed a nonpublic forum when a putative speaker challenges a state law restricting access to the forum.

Contrary to the Ninth Circuit's ruling, *ISKCON* does not signal any shift from *Adderley* concerning the level of managerial control a state government must exercise over the property of its political subdivisions in order to regulate speech at the local level. Indeed, the *ISKCON* Court quoted *Adderley*'s exact language in this regard: "[C]onsistent with the notion that the government—like other property owners—'has the power to preserve the property under its control for the use to which is it lawfully dedicated,' the government does not create a public forum by inaction." 505 U.S. at 679–80 (quoting *Greer*, 424 U.S. at 836, in turn quoting *Adderley*, 385 U.S. at 47). To be sure, *ISKCON*'s author, Chief Justice Rehnquist, elsewhere recognized *Adderley* as an example of "the government as proprietor." *Buckley v. Valeo*, 424 U.S. 1, 290–91 (1976) (Rehnquist, J., concurring in part and dissenting in part). Rather than breaking any new constitutional ground, the *ISKCON* Court simply restated a settled point: speech restrictions on public property not open to private speakers by tradition or designation—that is, when the government is "managing its internal operations" by preserving a nonpublic forum for its intended purposes—are subject to a lower level of scrutiny than are restrictions in areas where speakers have traditionally been free of regulations—that is, when the government acts as a "lawmaker" intruding on the private property of the citizenry. Accordingly, the Ninth Circuit fundamentally misunderstood and vastly overstated the significance of a lone sentence in *ISKCON*, and its decision should be reversed to ensure that forum analysis remains consistently

applied when states regulate matters involving their political subdivisions.

B. State legislatures have broad latitude when governing property held by political subdivisions, and the First Amendment is not designed to restrict a state government's ability to regulate its political subdivisions

In addition to misapplying *Consolidated Edison* and *ISKCON* with regard to the general forum analysis, the Ninth Circuit used selected excerpts from those cases to transform the First Amendment into a separation-of-powers check on state governments' authority over their political subdivisions. This Court, however, has recognized that political subdivisions generally serve as agents of state governments. *See United States v. Wheeler*, 435 U.S. 313, 320–21 (1978) (quoting *Reynolds v. Sims*, 377 U.S. 533, 575 (1964), and *Williams v. Eggleston*, 170 U.S. 304, 310 (1898)) (explaining that local governments are merely "subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions"). State governments, therefore, are given wide latitude when regulating local subdivisions without being scrutinized by the federal constitution. *See Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (observing that "a State is afforded wide leeway when experimenting with the appropriate allocation of state legislative power"). As the Court has repeatedly observed, "[t]he principle is well settled 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***." *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 433 (2002) (quoting *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 607–08 (1991), in turn quoting *Sailors v. Bd. of Educ. of Kent County*, 387 U.S. 105, 108 (1967)) (emphasis added).

The supremacy of state government control over the property of political subdivisions holds especially true in states like Idaho that structure their government according to "Dillon's Rule." This model of government reserves lawmaking primacy to the state legislature and prohibits local government entities from exercising any power not expressly or impliedly granted to them by the state constitution or state statute. *City of Grangeville v. Haskin*, 777 P.2d 1208, 1211 (Idaho 1989); *see also Plummer v. City of Fruitland*, 89 P.3d 841, 844 (Idaho 2003) (stating that, in Idaho, "policy decisions are left to the legislature," not to local governments). As Idaho's Supreme Court explains: "[U]nder Dillon's Rule, a [political subdivision] may exercise only those powers granted to it by either the state constitution or the legislature and ***the legislature has absolute power to change, modify or destroy those powers at its discretion***." *Caesar v. State*, 610 P.2d 517, 519 (Idaho 1980) (emphasis added). Accordingly, powers of Idaho's local governments are narrowly construed, *see City of Grangeville*, 777 P.2d at 1211, and any local regulation that conflicts with a statewide law is void, *see* Idaho Const. art. XII, § 2.

Because Dillon's Rule subordinates Idaho's local governments to the state government, it follows that the state government can exercise complete control over property held by Idaho's political subdivisions. *See Idaho Press Club, Inc. v. State Legislature of Idaho*, 132 P.3d 397, 399 (Idaho 2006) (recognizing that the "Legislature has plenary powers in all matters, except those prohibited by the Constitution" (quoting *Rich v. Williams*, 341 P.2d 432, 439 (Idaho 1959))). Regardless of the state's form of government, though, the extent of a state government's power over property maintained by its political subdivisions is a matter of state law and is of no concern to the United States Constitution in general or the First Amendment in particular. *See City of Columbus*, 536 U.S. at 428–29 (acknowledging that state-level separation-of-powers disputes are resolved "under [a state's] own constitution and laws"); *Hunter v. City of Pittsburgh*, 207 U.S. 161, 179 (1907) (discussing that the allocation of power between state and local government units is checked only by the state's own constitution and is "unrestrained by any provision of the Constitution of the United States").

With the understanding that they are restrained only by their respective state constitutions, state legislatures routinely regulate the ways in which property maintained or owned by political subdivisions may be used. Numerous states, for instance, limit the use of local government resources with regard to political activities. *See, e.g.*, Ala. Code § 17-17-5 (LexisNexis 2008); Ark. Code Ann. § 7-1-103(a)(3)(A) (2008); Cal. Gov't Code § 8314(a) (Deering 2007); Colo. Rev. Stat. § 1-45-

117(1)(a)(I) (2007); Conn. Gen. Stat. § 9-610(d) (2008); Fla. Stat. Ann. § 104.31(2) (LexisNexis 2008); Haw. Rev. Stat. Ann. § 11-203.5(a) (LexisNexis 2008); 10 Ill. Comp. Stat. Ann. 5/9-25.1(b) (LexisNexis 2008); Ky. Rev. Stat. Ann. § 67.870(4) (LexisNexis 2008); Neb. Rev. Stat. Ann. § 49-14,101.02(2) (LexisNexis 2008); Ohio Rev. Code Ann. § 3517.092(D)(1) (LexisNexis 2008); S.C. Code Ann. §§ 8-13-1346(A), (C) (2007); Tenn. Code Ann. § 2-19-206(b) (2008); Utah Code Ann. § 20A-11-1203(1) (2008); Wash. Rev. Code Ann. §§ 42.17.128, .130 (LexisNexis 2008); W. Va. Code Ann. § 3-8-12(c) (LexisNexis 2008); Wyo. Stat. Ann. § 9-13-105(b) (2007). Such restrictions wisely ensure both that 1) the virtually limitless public coffer is not used by the government to improperly skew the marketplace of ideas with regard to a campaign, a ballot initiative, or any other political matters; and 2) taxpayer dollars are used to provide public services rather than for electioneering activities.

Under the Ninth Circuit's reasoning, however, each of these statutes would be susceptible to a constitutional challenge regarding its applicability to a political subdivision's property. Because they regulate political speech, the Ninth Circuit would apply strict scrutiny to, and would likely invalidate, each of these statutes unless the state could show that it "pervasively manages" the property of its political subdivisions. This, in turn, would force a state to choose between two undesirable options: Either it may exponentially grow state government and take over the day-to-day operations of local governments in order to retain its general regulatory power, or it may refrain from exercising regulatory

powers reserved to it under the state constitution and cede all such power to the individual subdivisions. The former of these options would defeat the point of having political subdivisions altogether, as the state would ultimately have to perform at least some of the same functions it delegated to the subdivisions in the first place; the latter would likely result in a set of inconsistent ordinances and access policies that vary from city to city and county to county with regard to identically-situated property.

This result would be at odds with this Court's jurisprudence vesting states with "absolute discretion" to divide up regulatory responsibilities between state governments and their political subdivisions. *City of Columbus*, 536 U.S. at 433; *Wisconsin Public Intervenor*, 501 U.S. at 607–08. Instead, when a state government identifies a problem that is within its state constitutional or statutory authority to address (such as the use of public resources for campaign purposes, as in the states listed above, or the use of public resources to transfer political contributions, as in Idaho), the First Amendment simply does not make the property of local governments off-limits to such regulations. Neither *Consolidated Edison* nor *ISKCON* alter this established principle, and the Ninth Circuit's misapplication of this Court's forum jurisprudence to create a federal check on a state government's power vis-à-vis its political subdivisions should not be allowed to stand.

CONCLUSION

For the reasons stated above, the Ninth Circuit's ruling should be reversed.

Respectfully submitted,

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