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No. 07-869

In The
Supreme Court of the United States

BEN YSURSA, *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

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION 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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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief in support of Petitioners.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a non-profit, public-interest law firm organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in every State in the country, including the State of Idaho and the States that are included within the jurisdiction of the U.S. Court of Appeals for the Ninth Circuit.

[1] In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus curiae*'s intention to file this brief.

MSLF has participated in a number of cases involving both labor unions and the First Amendment. Most notably, MSLF successfully litigated *MSLF v. Denver School District #1*, 459 F.Supp. 357 (D.Colo. 1978), and filed an *amicus curiae* brief in *Davenport v. Washington Education Association*, ___U.S.___, 127 S.Ct. 2372 (2007).

STATEMENT OF THE CASE

In 2003, Idaho enacted Idaho Code § 44-2004, which provides, in relevant part: "Deductions for political activities . . . shall not be deducted from the wages, earnings or compensation of an employee." Idaho Code § 44-2004. "Political activities" are defined 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 § 44-2602(1)(e); however, "[n]othing in this chapter shall prohibit an employee from personally paying contributions for political activities. . . . " Idaho Code § 44-2004(3).

The Pocatello Education Association and other labor unions filed suit challenging the constitutionality of the statute. They specifically sought declaratory and injunctive relief from enforcement of § 44-2004(2), which they claimed violates their rights to free speech and equal protection under the First and

Fourteenth Amendments. On cross-motions for summary judgment, the district court held that the payroll deduction prohibition violated the First Amendment to the extent it applied to local government employers and private employers. *Pocatello Educ. Ass'n v. Heideman,* 2005 WL 3241745 (D.Idaho 2005). It also held, however, that the payroll deduction ban could be applied constitutionally to the State's own payroll system, *i.e.,* to employees of the State of Idaho. *Id*. Accordingly, the court granted in part and denied in part both motions. *Id.*

On appeal, the Ninth Circuit affirmed this decision. *Pocatello Education Association v. Heideman*, 504 F.3d 1053 (9th Cir. 2007). The court first concluded that the payroll deduction prohibition was a content-based restriction on the union's speech. *Id*. at 1058. It then held that such a restriction was permissible in certain instances. Specifically, the State of Idaho had no obligation to subsidize the union's speech; thus, the State could prohibit, constitutionally, payroll deductions for its own state employees. *Id*. at 1059. The Ninth Circuit's analysis was different, however, for local government employees. After analyzing the differences amongst "traditional public fora," "designated public fora," and "nonpublic fora," the court held that the State was not actually subsidizing the union's speech through the payroll deduction of *local* government employees. *Id*. at 1059-68. Thus, the court held that the strict scrutiny test should be applied to determine the permissibility of Idaho's infringement of the First Amendment rights

of those union members. *Id*. at 1061-68. Because the Ninth Circuit held that Idaho lacked sufficient justification for the statute, the court held that Idaho had violated the First Amendment. *Id*. at 1068.

On December 28, 2007, Ben Ysursa, the Idaho Secretary of State, and Lawrence G. Wasden, the Idaho Attorney General, filed a Petition for Writ of Certiorari with this Court. On March 31, 2008, the Petition was granted. *Ysursa v. Pocatello Education Association*, ___U.S.___, 2008 WL 833273 (2008).

SUMMARY OF THE ARGUMENT

The Ninth Circuit spent little time analyzing whether Idaho Code § 44-2004 implicates the First Amendment rights of the trade union appellees. *Pocatello Education Association v. Heideman*, 504 F.3d at 1057-58. Instead, it adopted the reasoning of the district court, which concluded that Idaho Code § 44-2004 burdens unions' First Amendment rights because the statute "eliminates the easiest and least expensive way for unions to collect funds for political speech." *Pocatello Educ. Ass'n v. Heideman,* 2005 WL 3241745, *3 (D.Idaho 2005) (internal citations omitted). Without extensive analysis, the Ninth Circuit summarily concluded that, although "the law does not prohibit Plaintiffs from participating in political activities," the law nonetheless infringes upon the unions' First Amendment rights because it "hampers [the unions'] ability" to engage in political speech.

Pocatello Education Association v. Heideman, 504 F.3d at 1058.

The Ninth Circuit's injudicious conclusion that the First Amendment was implicated in this case conflicts with the intent of the Framers, with the holdings of this Court, and with the holdings of the other courts of appeals that have addressed this issue, and yields and unworkable precedent.

The First Amendment protects a person's ability to engage in expression, particularly political speech, without "abridg[ment]." U.S. Const. amend. I; *see Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). Therefore, when a "free discussion of governmental affairs" takes place, the First Amendment is not impaired, even if the "easiest and least expensive" method of acquiring the money necessary to engage in that expression is prohibited. *Id*. To be sure, this Court has held that the First Amendment protects speech from being "silenced" by the government. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 654-55 (1981); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 773 (1961). Consistent with the holdings of this Court, the Second Circuit, the Eighth Circuit, and the Eleventh Circuit have all held that the First Amendment does not guarantee the easiest, least expensive method of engaging in speech.

The Ninth Circuit admitted that the Idaho statute "does not prohibit Plaintiffs from participating in political activities," *Pocatello Education Association v.*

Heideman, 504 F.3d at 1058, and the district court even listed a number of alternate, but slightly more onerous, methods the unions could employ to fund their political speech. *Pocatello Educ. Ass'n v. Heideman,* 2005 WL 3241745, *3-4. Thus, there is no issue over whether Idaho Code § 44-2004 effectively "silence[s]" the unions' speech; it clearly does not. Instead, the only issue is whether § 44-2004, by "eliminat[ing] the best method for unions to fund political speech," while leaving open countless other methods for funding such speech, implicates the First Amendment. Proper First Amendment analysis requires that this Court hold that no First Amendment impairment exists. Any other conclusion would yield ridiculous results whereby all politically-active organizations could claim a First Amendment violation whenever they are denied access to payroll deductions.

ARGUMENT

The Ninth Circuit glossed over the threshold issue in this case – whether the First Amendment is even implicated by Idaho Code § 44-2004 – and, instead, conducted a complicated, thorough, and, ultimately unnecessary analysis of "traditional public fora," "designated public fora," and "nonpublic fora." *Pocatello Education Association v. Heideman*, 504 F.3d at 1059-1068. In its cursory treatment of the primary issue, the Ninth Circuit summarily concluded that "[t]his restriction on voluntary political

contributions burdens political speech, which is protected by the First Amendment." *Id*. at 1058. Although the court conceded that "[t]he law does not prohibit Plaintiffs from participating in political activities," the court nonetheless concluded that the law "hampers their ability to do so by making the collection of funds for that purpose more difficult." *Id*.

In its attempt to justify this injudicious legal conclusion, the Ninth Circuit merely adopted the conclusions of the district court on the matter. *Id*. The district court likewise devoted little effort to its analysis of this primary issue. It held that, "[b]y banning the payroll deduction for political speech, the [Idaho statute] eliminates the easiest and least expensive way for unions to collect funds for political speech." *Pocatello Educ. Ass'n v. Heideman,* 2005 WL 3241745, *3 (internal citations omitted). Because "[u]nion members are reluctant to use alternatives such as electronic fund transfers or credit card payments due to concerns about identity theft . . . [and] face-to-face solicitations[,] . . . a substantially more time-consuming and expensive effort than payroll deduction" would be necessary. *Id*. As a result, the district court concluded that the statute would "significantly decrease the revenues available for, and increase the cost and administrative burden of . . . providing the funds needed . . . to communicat[e] to the public . . . views on . . . political issues." *Id*. (internal citations omitted).

I. THE FRAMERS DID NOT INTEND FOR THE FIRST AMENDMENT TO GUARANTEE THE EASIEST AND LEAST EXPENSIVE MEANS FOR EXPRESSING IDEAS.

"When interpreting the Free Speech and Press Clauses, [this Court is] guided by their original meaning, for '[t]he Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now.'" *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 359 (1995) (Thomas, J., concurring) (quoting *South Carolina v. U.S.*, 199 U.S. 437, 448 (1905)). Although it is difficult to discern precisely the original understanding of the Framers as to the First Amendment, "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. . . ." *Buckley v. Valeo*, 424 U.S. at 14 (quoting *Mills v. Alabama*, 384 U.S. at 218). More generally, the Framers intended to protect the "untrammeled dissemination of information." *Leathers v. Medlock*, 499 U.S. 439, 454 (1991) (Marshall, J., dissenting). Thus, the Amendment is implicated when speech is effectively "silenced." *International Ass'n of Machinists v. Street*, 367 U.S. at 773.

As a result, as it was originally understood, the text of the First Amendment proscribes the "abridg[ement]" of speech. U.S. Const. amend. I. The Amendment does not, however, guarantee the right to acquire, by the most convenient method possible, the money that will ultimately be used to engage in political speech, when other methods of funding are

readily available and often utilized by a myriad of organizations, and when the message being conveyed is neither prohibited nor curtailed.

Because the unions undisputedly have other methods of collecting funds to be used for political speech, which, though slightly more onerous, do not "infring[e]" upon the "untrammeled dissemination of information," the First Amendment, as it was originally understood, is not impaired by Idaho Code § 44-2004.

II. THE FIRST AMENDMENT JURISPRUDENCE OF THIS COURT AND FEDERAL APPELLATE COURTS SHOULD NOT BE INTERPRETED AS GUARANTEEING THE EASIEST AND LEAST EXPENSIVE MEANS FOR EXPRESSING IDEAS WHEN THERE IS NO ACTUAL SILENCING OF SPEECH.

A. The First Amendment Does Not Guarantee A Right To The Least Expensive Means of Expression.

The Ninth Circuit correctly concluded that the Idaho statute "does not prohibit Plaintiffs from participating in political activities, but it . . . mak[es] the collection of funds for that purpose more difficult." *Pocatello Education Association v. Heideman*, 504 F.3d at 1058. Admittedly, the statute "eliminates the easiest and least expensive way for unions to collect funds for political speech." *Pocatello Educ. Ass'n v.*

Heideman, 2005 WL 3241745, *3 (internal citations omitted).

The Ninth Circuit fundamentally erred, however, by failing to recognize that "the First Amendment does not guarantee a right to the least expensive means of expression." *Gannet Satellite Information Network, Inc. v. Metropolitan Transportation Authority*, 745 F.2d 767, 774 (2nd Cir. 1984) (citing *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 654-55 (1981) (state need not provide free access to fairgrounds for solicitation); *Kovacs v. Cooper*, 336 U.S. 77, 88-89 (1949) (plurality opinion) (city may restrict sound trucks even though they are the easiest and cheapest means of communication); *see also Atlanta Journal and Constitution v. City of Atlanta Department of Aviation*, 322 F.3d 1298, 1308 (11th Cir. 2003) ("[T]he First Amendment does not guarantee the least expensive method of distribution."); *Jacobsen v. Harris*, 869 F.2d 1172, 1174 (8th Cir. 1989) (city need not provide least expensive method of exercising First Amendment freedoms).

B. The First Amendment Does Proscribe The Silencing Of Speech; Nonetheless, The Idaho Statute Does Not Silence The Expression Of Ideas.

Although the Constitution does ensure that "[t]here is no restriction upon the communication of ideas or discussion of issues . . . ," *Kovacs v. Cooper*, 336 U.S. at 89, the First Amendment is implicated only when speech is effectively "silenced." *International*

Ass'n of Machinists v. Street, 367 U.S. at 773. The Ninth Circuit, in support of its holding that the Idaho law infringes on the First Amendment, cited but one case, *Meyer v. Grant*, 486 U.S. 414, 420-23 (1988), for the proposition that impositions on the method of fundraising necessarily implicate the First Amendment. *Pocatello Education Association v. Heideman*, 504 F.3d at 1058. *Meyer v. Grant*, however, is easily distinguishable and clearly inapposite. In *Meyer*, proponents of a voter initiative petition drive in Colorado brought suit challenging Colorado's prohibition against paying circulators of initiative petitions as a violation of their First Amendment rights. *Meyer v. Grant*, 486 U.S. 414. Though this Court held that the Colorado law did, indeed, infringe on the initiative proponents' First Amendment rights, the reasons underlying that holding are not present in *Ysursa*.

In *Meyer*, this Court concluded that "[t]he circulation of an initiative petition . . . involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Id*. at 421. Indeed, petition circulators are required to explain "the nature of the proposal and why its advocates support it." *Id*. As a result, "the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Id*. at 421-22. Because the Colorado statute prohibited payments to petition circulators – the people who were actually engaged in the protected speech – the "number of voices who [would] convey" the political

message and the "audience they [could] reach" would be limited. *Id*. at 422-23. This would ultimately result in the conveyance of the political message to "cease." *Id*. at 422.

The Idaho statute, by contrast, prohibits payroll deductions for political activities, but does not "prohibit an employee from personally paying contributions for political activities . . . " Idaho Code § 44-2004(3). The statute would not limit the number of voices who will convey the political message; therefore, it does not necessarily cause the conveyance of the unions' political message to "cease." Unions simply oppose any alternate, less convenient method of acquiring funds; however, unlike the plaintiffs in *Meyer*, unions can still acquire the funds from the same sources (the employees) through alternate means.

Nonetheless, in some instances, funding and administrative burdens may implicate the First Amendment by effectively silencing speech. This Court had the opportunity to determine whether certain administrative burdens constituted such an infringement in *Federal Election Commission v. Massachusetts Citizens For Life, Inc.*, 479 U.S. 238 (1986). In that case, a nonprofit corporation argued that its First Amendment rights were violated by the Federal Election Campaign Act ("FECA"), which required corporations to adopt burdensome administrative procedures prior to any political advocacy in connection with a federal election. *Id*. These mandatory administrative procedures included, *inter alia*:

(a) The establishment of a separate segregated fund for political purposes;

(b) The appointment of a treasurer, who must be provided with any private donations within 10 or 30 days of receipt (depending on the amount of the contribution);

(c) The recordation of every contribution regardless of amount, the name and address of any person who makes a contribution in excess of $50, all contributions received from political committees, the name and address of any person to whom a disbursement is made regardless of amount, and receipts for all disbursements over $200;

(d) Filing a statement of organization containing the corporation's name, address, the custodian of records, its banks, safety deposit boxes or other depositories;

(e) Filing a report detailing any change made regarding any of the information in (d), above, the within 10 days of the change;

(f) A requirement that solicitations for contributions are limited only to members.

(g) Filing monthly reports with the Federal Election Commission or reports on a particular schedule containing:

1) The amount of cash on hand;

2) The total amount of receipts, detailed by 10 different categories;

3) The identification of each political committee and candidate's authorized or affiliated committee making contributions, and any persons making loans, providing rebates, refunds, dividends, or interest or any other offset to operating expenditures in an aggregate amount over $200;

4) The total amount of all disbursements, detailed by 12 different categories;

5) The names of all authorized or affiliated committees to whom expenditures aggregating over $200 have been made;

6) Persons to whom loan repayments or refunds have been made;

7) The total sum of all contributions, operating expenses, outstanding debts and obligations, and the settlement terms of the retirement of any debt of obligation.

Id. at 253-254.

Based on these burdens, this Court concluded that the nonprofit corporation "may be unable to bear" these administrative burdens, which may "vastly reduce[ ] the sources of funding" to such an

extent that the corporation would conclude that "political activity was simply not worth it." *Id*. at 254-55. That the "practical effect" of these administrative burdens was "to discourage protected speech [was] sufficient to characterize [the relevant statute] as an infringement on First Amendment activities." *Id*. at 255.

In sharp contrast to the onerous burdens imposed by FECA, Idaho Code § 44-2004 merely requires that unions acquire their political funding from personal contributions, rather than from payroll deductions. Unions could employ a virtually unlimited panoply of prerogatives to procure this money from its members. Indeed, political advocacy organizations regularly seek personal contributions from their members.

The unions even admit that there are numerous options available to them, such as electronic fund transfers or credit card payments, but they, naturally, prefer the "easiest and least expensive way" of acquiring funds: salary deductions. These other options, while not the unions' preferred funding methods, would not result in administrative burdens that the unions would be "unable to bear," nor is it likely to "vastly reduce[ ] the sources of funding" to such an extent that political advocacy would no longer be worthwhile, effectively "silenc[ing]" the unions. Indeed, it is unlikely that political speech would be discouraged at all; it would simply be paid for by funds acquired by more traditional means.

Ultimately, this Court's jurisprudence clearly provides that prohibitions on the "easiest and least expensive way" to collect funds for political speech do not result in an infringement of First Amendment rights so long as there are other viable and efficient alternatives available such that speech is not silenced. The Idaho law is neither a restriction upon the communication of ideas nor a discussion of issues; it merely proscribes the easiest and least expensive method for collecting funds to engage in speech. Thus, the law does not infringe upon any First Amendment rights.

III. A FIRST AMENDMENT RIGHT TO THE EASIEST AND LEAST EXPENSIVE MEANS OF EXPRESSIVE CONDUCT WOULD YIELD AN ABSURD AND UNWORKABLE PRECEDENT.

Should this Court uphold the Ninth Circuit's opinion, other political organizations could legitimately claim that their First Amendment rights are being violated whenever a government declines to provide its employees an option to have deductions made directly from their salary to the organization *du jour*. Indeed, each political organization could argue that its fundraising would be far easier and less expensive if only the government would provide it an option for payroll deductions, too.

Just as ludicrous, unions could claim that engaging in political speech would be easier and less expensive if

the government had the affirmative duty, not only to deduct monies from the payroll, but also to assist in organizing for, catering to, and cleaning up after union meetings during which its members exercised their First Amendment rights. The notion that the First Amendment requires the government to make speech as easy as possible is preposterous when there are other reasonable, readily available means for engaging in expressive conduct.

CONCLUSION

This Court should reverse the decision of the Ninth Circuit.

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