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

BRIEF *AMICI CURIAE* OF THE UTAH TAXPAYERS ASSOCIATION, SUTHERLAND INSTITUTE, NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. When government uses its employees' property and equipment to collect political action money for public employee unions, does this constitute a government subsidy of private speech?

2. Does the use of government resources to collect union political action money compel the speech of taxpayers who do not support union politics?

3. Does the government have the right to ban governmental collection of political action money from public employees?

4. Does government refusal to collect the political action money of public employee unions at taxpayer expense violate the unions' First Amendment right of free speech?

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IDENTITY AND INTEREST OF *AMICI CURIAE* [1]

Pursuant to Rule 37 of the United States Supreme Court Rules, *amici curiae*, the Utah Taxpayers Association ("Taxpayers Association"), the Sutherland Institute ("Sutherland"), the National Right to Work Legal Defense Foundation, Inc. ("NRTW") and the National Federation of Independent Business Small Business Legal Center ("NFIB") hereby submit the following *amici* brief on the merits in support of the Idaho Secretary of State, Petitioner Ben Ysursa, and Idaho Attorney General, Petitioner Lawrence G. Wasden, in *Ysursa et al. v. Pocatello Education Association*, No. 07-869, docketed January 3, 2008.

Amicus Curiae, Utah Taxpayers Association is a statewide Utah association of approximately 2,500 Utah taxpayers, both individuals and businesses.

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[1] Pursuant to this Court's Rule 37.3(a), the undersigned counsel affirms that the parties, specifically Mr. Clay Smith, Idaho Deputy Attorney General, who represents the defendants-appellants in *Pocatello Education Association v. Heideman*, 504 F.3d 1053 (9th Cir. 2007)(Petitioners herein), and Mr. Jeremiah Collins of Bredhoff & Kaiser, who represents the plaintiffs-appellees in the same case (Respondents herein), have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. Confirmatory letters from the parties' respective counsel have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *amici curiae* affirm that 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 *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The brief was authored by counsel listed on the brief cover, and Maxwell Alan Miller (not counsel of record), a research analyst for the Utah Taxpayers Association.

The Taxpayers Association has been an advocate for economy and efficiency in government and taxpayer rights since 1923.

Amicus Curiae, The Sutherland Institute is a conservative public policy think tank committed to influencing the promulgation of Utah law and policy based on a core set of governing principles such as the importance of personal responsibility, private property rights, the integrity of free markets, and limited government. The Sutherland Institute was founded in 1994.

Amicus Curiae, National Right to Work Legal Defense Foundation, Inc. ("NRTW"), is a nonprofit charitable organization providing free legal aid to employees whose human or civil rights have been violated by abuses of compulsory unionism. NRTW attorneys have represented employees in 12 cases decided by this Court. These include *Abood v. Detroit Bd. of Educ*., 431 U.S. 209 (1976), *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991), and *Davenport v. Washington Education Assoc*., 127 S. Ct. 2372 (2007). Currently, NRTW attorneys represent the petitioners in *Locke v. Karass*, No. 07-610, now pending before this Court for a decision on the merits. NRTW has an interest in this case because statutes, like that at issue here, which prohibit payroll deduction of contributions to union political committees, make it more likely that such contributions are voluntarily made by public employees. [2]

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[2] The Foundation notes that the Petition for Writ of Certiorari at 31 suggested that "with respect to a political subdivision's lack of authority to enter into [so-called] union security arrangements," a state Right to Work Act would not "satisfy the

Amicus Curiae, the National Federation of Independent Business Small Business Legal Center is a nonprofit public interest law firm established as the voice of the National Federation of Independent Business ("NFIB") in legal matters. NFIB's mission is to promote and protect the rights of small business. In pursuit of that goal, NFIB and the NFIB Small Business Legal Center (formerly known as the NFIB Legal Foundation) have participated as *amicus curiae* in several prior cases considered by this Court, including *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007), *Rapanos v. United States*, 547 U.S. 715 (2006), *Ballard v. Comm'r of Internal Revenue*, 544 U.S. 40 (2005), *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202 (1997), *Pierce v. Underwood*, 487 U.S. 552 (1988), and *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

Three of these same *amici*, the Taxpayers Association, Sutherland, and NRTW, filed a brief supporting these same Petitioners on their Petition for Certiorari in *Ysursa*, which this Court granted on March 31, 2008. These same *amici* also submitted a brief in *Utah Education Association v. Shurtleff*, 512 F.3d 1254 (10th Cir. 2008) urging the Tenth Circuit to uphold Utah's Voluntary Contributions Act ("Utah

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court of appeals' new standard." The Foundation does not doubt the inventiveness of union lawyers. However, the Petition's suggestion is foreclosed by this Court's decisions in *Davenport v. Washington Education Association*, 127 S. Ct. 2372 (2007), and *Lincoln Federal Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949), holding that state prohibitions of forced exaction of union fees from, respectively, public- and private-sector workers do not violate the First Amendment "for the simple reason that unions have no constitutional entitlement to the fees of nonmember-employees." *Davenport*, 127 S. Ct. at 2372.

VCA"), Utah Code Ann. § 34-32-1 because, among other reasons, "a blanket prohibition by the State on the use of union dues by public employees for politics has been repeatedly upheld by the Supreme Court." *Utah Education Association v. Shurtleff*, Appeal No. 06-4142, Brief of *Amici Curiae* in Support of Appellant and Reversal of the District Court, p. 4. Nonetheless, the Tenth Circuit held that Utah's VCA was unconstitutional because it is not "closely drawn" to serve an important government interest of political neutrality. The Tenth Circuit agreed with the union arguments that "[b]y removing the arrow of automatic payroll deductions from the Unions' quiver, the VCA may well force Unions to rely increasingly on repeated, in-person solicitations of its members," 512 F.3d at 1266, rather than government sponsored and subsidized payroll systems.

Virtually identical to the Tenth Circuit rationale, the Ninth Circuit in *Pocatello Education Association v. Heideman*, 504 F.3d 1053 (9th Cir. 2007) held that Idaho's VCA, Idaho Code Ann. § 44-2004(2) was unconstitutional because "Restricted funding will, therefore, diminish Plaintiff's ability to engage in political speech[.]" 504 F.3d at 1058. That essentially means, from the Ninth Circuit's perspective, that Idaho has a constitutional obligation to facilitate payroll deductions for government employees who choose to make political contributions.

The Tenth and Ninth Circuit holdings stand in stark and irreconcilable contrast in all material respects with the Sixth Circuit decision in *Toledo Area AFL-CIO v. Pizza*, 154 F.3d 307 (6th Cir. 1998), which held that "the wage check off ban of Ohio Rev. Code Ann. § 3599.031(H) simply does not impinge, in a constitutionally significant manner, on any First

Amendment rights. The First Amendment does not impose any duty on a public employer to affirmatively assist, or even to recognize a union." 154 F.2d at 319.

Undoubtedly, Petitioners' briefs will articulate multiple legal reasons why this Court should reverse the Ninth Circuit decision in *Pocatello Education Association*. Therefore, consistent with this Court's Rule 37 advising *amici* to avoid duplication of the parties' principal arguments, this *amici* brief will focus upon, and conclusively demonstrate three reasons why the Tenth Circuit and Ninth Circuit decisions, holding that states must facilitate and support government payroll deductions for political causes espoused by the Pocatello Education Association and the Utah Education Association, should be reversed: (1) the Ninth and Tenth Circuit rulings are inconsistent with the Sixth Circuit ruling in *Pizza,* as *amici* demonstrated in its prior brief supporting Idaho's Petition for Certiorari in *Pocatello Education Association*; (2) these decisions sanction compelled speech in violation of the First Amendment rights of taxpayers who disagree with the education associations' political causes; and (3) the Ninth and Tenth Circuit decisions fail to take account of the states' historical interest in shielding their own employees from the political corruption that results when those employees seek to utilize the levers of government to aid a particular participant in the political process.

INTRODUCTION AND SUMMARY OF ARGUMENT

The case in which this Court granted certiorari, *Ysursa v. Pocatello Education Association*, involves a constitutional dispute over a section of the Idaho

Voluntary Contributions Act ("Idaho VCA"). In *Pocatello Education Association v. Ysursa*, 504 F.3d 1053 (9th Cir. 2007), the Ninth Circuit held that the Idaho VCA, which bans state and local government employee payroll deductions for "political activities," violates the First Amendment of the United States Constitution, but only to the extent the Idaho VCA applies to local government employers. Idaho Code Ann. § 44-2004(2) of the Idaho VCA states:

> 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.

Idaho Code Ann. § 44-2602(e) of the Idaho VCA defines political activities:

> 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.

At the outset of this brief, *amici* stress and invite this Court to recognize the similarity between the Idaho VCA, and the Utah VCA, Utah Code Ann. §34-32-1.1(2), which states:

> [A] public employer may not deduct from the wages of its employees any amounts to be paid to: (a) a candidate. . .; (b) a personal campaign committee. . .; (c) a political action committee. . .; (d) a political issues committee. . .; (e) a registered political party. . .; (f) a political fund. . .; or (g) any entity established by a labor organization to solicit, collect or distribute monies primarily for political purposes as defined in this chapter.

The Tenth Circuit in *Utah Education Association* issued its decision on January 10, 2008, holding that the Utah VCA was unconstitutional. When the Tenth Circuit later learned that this Court granted certiorari in *Ysursa* on March 31, 2008, the Tenth Circuit, on its own initiative, converted Utah's Motion for Stay into a request for an abatement, and issued an Order abating its own decision. This is undoubtedly because the facts, circumstances, and statutes involved in the Idaho VCA case are so similar to the Utah case. The Tenth Circuit abatement Order states:

> This matter is before the court on appellant's unopposed *Motion To Stay further Proceedings*. We have construed the request as a motion to abate pending the United States Supreme Court's issuance of a decision in *Ysursa v. Pocatello Education Ass'n*, No. 07-869, 2007 WL 833273 (cert. granted March 31, 2008). As construed, the motion is granted. The clerk is directed to abate these proceedings.[3]

It appears likely, therefore, that this Court's decision in *Ysursa* will control the ultimate outcome in *Utah Education Association*, and will set impor-

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[3] The Federal Rules of Appellate Procedure and the Tenth Circuit Rules do not mention "abatement" *per se.* Rule 41.1 of the Tenth Circuit Rules provides that a "Stay [which Utah sought in the case] is not routinely granted," and that "A motion to stay the mandate in a civil case will not be granted unless the court finds there is a substantial possibility that a petition for writ of certiorari would be granted." In this instance, the Tenth Circuit made an intentional distinction between an abatement and a "stay," which it converted to an "abatement" of its prior decision issued January 10, 2008. *Utah Education Association v. Shurtleff*, No. 06-4142, Order (April 8, 2008).

tant precedent for other states considering similar campaign finance reform legislation. As referenced above, Ohio, like Utah and Idaho, passed a similar statute, Ohio Rev. Code Ann. § 3599.031(H), identical in all material respects to the Utah and Idaho VCAs, which the Sixth Circuit upheld as constitutional in *AFL-CIO v. Pizza.*

Amici contend such state VCAs are constitutional. This brief conclusively demonstrates that the states of Idaho and Utah have a compelling interest to protect Idaho and Utah taxpayers from having their constitutional rights against compelled speech violated by overturning prohibitions on government subsidized transfers of private funds to teacher unions or other political entities that promote private political preferences. No one has ever suggested that those wishing to support such union politics may not freely contribute to such entities whenever they like. However, the overriding issue this brief addresses is whether government payroll systems must provide a public collection service for private political associations that use the collected funds to facilitate political speech that many of their own members and taxpayers oppose.

The state VCA statutes at issue in the *Pocatello Education Association* and *Utah Education Association* cases confirm the conclusion that the respective state governments wish to remain neutral in political matters. There is a fundamental and compelling difference between state infringement of political speech, upon which the Ninth and Tenth Circuits based their respective decisions striking down the Idaho and Utah VCAs, and withdrawal of state support for partisan political speech. As demonstrated herein, the latter (withdrawal of state sup-

port of political speech), and not the former (state infringement of political speech) is a more accurate and appropriate description of the state VCAs' function. Because of this obvious fundamental difference, state governments may withdraw a subsidy, or support of speech from a private party, such as a public employee union, without infringing on that party's freedom of speech.

To prove these conclusions, *amici* will demonstrate, as their initial premise in this brief, that the government, whether federal, state or local, subsidizes private individuals and/or associations when it provides private payroll deductions from government payrolls for politics. Such a government subsidy encompasses more than money. Certainly, it is a privilege for a government employee to donate his or her money to a political cause from his or her government issued paycheck. Traditionally, government paychecks have not been used to facilitate donations for the political arms of associations like the Pocatello Education Association. But as a result of the Ninth and Tenth Circuit decisions, government payroll systems must now subsidize personal and private politics.

Yet that is not the end of *amici*'s inquiry. *Amici* will then demonstrate how and why government subsidization of political speech, whether "right wing" or "left wing," actually compels other private citizens /taxpayers who disagree with such political causes to "speak" in support of such causes, in derogation of their own First Amendment rights to freedom of speech. Because this Court has repeatedly held that compelled speech is unconstitutional, those states that enact VCA statutes have a significant interest in prohibiting government payroll deductions for dona-

tions to political causes, whether such governments are state or local.

Perhaps more important is the government's historical interest in shielding its own employees from the political intimidation that results when those employees seek to use the levers of government to aid one side or the other in politics.

After discussing the state's interest in ensuring political neutrality, *amici* will then demonstrate the critical difference between infringement and withdrawal of a subsidy, and subsequently prove that the Idaho VCA in Y*sursa* (and the Utah VCA in *Utah Education Association*) violate no rights to speech and are, therefore, constitutional.

ARGUMENT

I. THE IMPACT OF THE NINTH CIRCUIT DECISION IN *POCATELLO EDUCATION ASSOCIATION* AND THE TENTH CIRCUIT DECISION IN *UTAH EDUCATION ASSOCIATION* FORCES STATE TAXPAYERS TO SUPPORT UNION POLITICS IN DEROGATION OF STATE TAXPAYERS' FIRST AMENDMENT RIGHTS AGAINST COMPELLED SPEECH.

A. The Ninth Circuit's decision in *Pocatello Education Association* wrongly holds that government payroll deduction systems for political contributions are not state subsidies of political speech.

Amici's arguments begin with a summary of the Ninth Circuit's reasoning in *Pocatello Education Association*, as follows:

(1) The Idaho VCA regulates speech and is content-based discrimination because "on its face [it] prohibits payroll deductions only for political activities," which the Ninth Circuit concludes is "subject matter discrimination." 504 F.3d at 1058.

(2) "[T]here is no subsidy by the state of Idaho for the payroll deduction systems of local governments." *Id.* at 1059. From that premise, the Ninth Circuit concludes the subsidy exception can only apply to those payroll systems the state itself administers, and not those a school district, or other government subsidiary, administers. "Mere governmental regulation of the property of others [also government entities] is not enough to permit the government [the state legislature] to control expressive content . . ." *Id*. at 1067.

(3) The property in question does not belong to the state and the state is not the proprietor of the payroll systems. Therefore "the non-public forum regulation exception 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." *Id*. at 1068.

(4) Under a strict scrutiny test, the Idaho VCA is an unconstitutional violation of free speech. *Id.*

As conclusively shown hereinafter, the Ninth Circuit's reasoning is flawed. The Idaho and Utah VCAs merely remove a state subsidy of political speech for certain government employees. Such removal does not constitute regulation of speech or its content, nor does it violate partisan political entities' freedom of speech.

B. Government facilitated payroll contributions constitute a government subsidy.

The primary purpose of any payroll system, whether government or private, is to pay employees for their labor. For specific reasons, an employee may request a deduction from his or her paycheck, the foremost of which is to comply with federal and/or state government withholding tax liabilities. Many other uses of payroll deductions are in some form linked to the federal or state tax code. Traditionally, however, these deductions are provided not only to facilitate tax collections, but to help an employee's personal finances, such as deductions for health insurance premiums. Deductions from a government payroll system have heretofore rarely been used to facilitate donations to private political entities. *See* Subpart D of this brief, which discusses the United States government's historical, and constitutionally upheld, prohibitions against public employees requesting, giving or receiving money for "political purposes."

It should be beyond dispute that no constitutional imperative obligates governments to provide a payroll deduction service for any reason, least of all for an employee to make a private political contribution. In *Toledo Area AFL-CIO Council v. Anthony G. Pizza*, the Sixth Circuit confirmed this legal conclusion: "All parties, the court below, and this court agree that there is no constitutional right to wage checkoffs to support political causes." 154 F.2d at 319. Even in this case, *Ysursa*, all parties appear to agree on this point, insofar as it applies to the state government itself.

> In general, government may refrain from paying for speech with which it disagrees. . . Applying this doctrine, the district court held that the State of Idaho could properly forbid payroll deductions of its own employees to be used for union activities, as the First Amendment imposes no obligation to subsidize union and employee speech by paying for the administration of the payroll deductions. *See, e.g. Regan v. Taxation With Representation*, 461 U.S. 540, 544-46(1983)(explaining that Congress may make content-based distinction when its subsidizes speech, in that case by granting to qualifying organizations the amount of income taxes they would otherwise owe); . . . The 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. *See Regan*, 461 U.S. at 549-50. . . The parties appear to be in agreement as to this point, and the holding is unchallenged on appeal.

Pocatello Education Association, 504 F.3d at 1059.

Given the foregoing rationale, expressly based upon this Court's prior decisions, both the Ninth Circuit in *Pocatello Education Association* and the Tenth Circuit in *Utah Education Association* held that the respective state VCA statutes are constitutional as applied to the state government itself, but not local governments, which were deemed totally separate, independent entities. Such thinking necessarily ignores the fact that common tax revenues fund both state and local governments, and are hence subject to state regulation and constitutional restrictions against compelled speech. Because taxpayers fund

both state and local governments, the attempted distinction between the two is spurious.

The Ninth Circuit in *Pocatello Education Association* and the Respondents in *Ysursa* claim there is no Idaho state subsidy for the payroll deduction systems local governments operate, and therefore the subsidy exception against compelled speech ought not to apply to school districts and other local government entities. Fleshed out, the argument is that "neither the payroll deduction programs nor the local workplaces are 'property' of the state of Idaho in any sense, and the state of Idaho therefore cannot assert an interest in protecting the fora." 504 F.3d at 1062. Under this faulty reasoning, only the school district, for instance, subsidizes the payroll contributions of school district employees (and therefore is protected from legislative control of the state). Because the Ninth Circuit believes the Idaho VCA is a form of speech regulation, it applies forum doctrine and is persuaded by the Pocatello Education Association's argument that the state is not the proprietor of local and subsidiary government payroll systems, and therefore the state is constitutionally forbidden to enforce the Idaho VCA.

Such flawed thinking raises two very important antecedent questions: (1) Can a political subdivision of the state government, such as a school district, subsidize speech independently from and even in defiance of state statutes to the contrary? The answer to this question should be an unqualified "no" because the United States Constitution does not preclude such state statutes, and most state constitutions expressly authorize regulation of local school districts, as explained herein. (2) Does the state government, meaning the state legislative body, have

legal authority to remove subsidies among the political subdivisions subject to its legislative power? If the state statute does not violate free speech, meaning that the statute does not preclude government employees from personally and privately funding whatever political causes whenever they like, the answer to the second question is "yes."

The Ninth Circuit's entire reasoning in *Pocatello Education Association* stems from its unwarranted assumption that the Idaho VCA is an infringement upon free speech. If, however, the Idaho VCA violates no union rights to free speech, as proven hereinafter, it necessarily follows that the foundation for the Ninth Circuit conclusions and holding evaporate: (a) forum analysis does not apply; (b) proprietorship is not relevant; and (c) the state legislature possesses the legal prerogative to enact statutes that affect state political subsidiaries, including school districts, especially when such statutes do not infringe upon free speech rights.

Article IX, Section 1 of the Idaho Constitution expressly vests the legislature with the power and responsibility "to establish and maintain a general, uniform and thorough system of public, free common schools." Idaho Const. art. IX, § 1. Utah's Constitution includes a virtually identical provision. Utah Const. art. X, § 1. Idaho Code § 33-1019 mandates school districts to "allocate [public] moneys for school building maintenance from any source available to the district equal to at least two percent (2%) of the replacement value of school buildings, less the receipt of state funds provided in this section." No one has argued or implied that this or similar Idaho or Utah statutes and/or state constitutional provisions run

afoul of the United States Constitution and First Amendment free speech guarantees.

The salient point to draw from the foregoing state constitutional provisions and statutes is that they authorize government support and subsidies of education. State subsidies exist on all levels of state government. Although the Tenth Circuit, like the Ninth Circuit, held that Utah's VCA was unconstitutional, it did acknowledge that "setting up an individual payroll deduction carries a 'marginal, although slight' expense." 512 F.3d at 1257. That Tenth Circuit language implies that "slight" government subsidies do not trigger any constitutional restraints on compelled speech of taxpayers who disagree with union politics. *Amici* contend, however, that the quantity of state subsidy or expense is irrelevant. A subsidy is a subsidy no matter how large or small. The forced expression of political opinion creates a special concern. "The amount at stake for each individual dissenter does not diminish this concern. . . Thomas Jefferson and James Madison [agreed] about the tyrannical character of forcing an individual to contribute even 'three pence' for the 'propagation of opinions which he disbelieves.'" *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 305 (1986). The state subsidy or expense for union politics would be supported by public funds raised from state taxpayers, and apportioned among the various governmental subdivisions by the state legislature, in this instance the Idaho State Legislature.

The Ninth Circuit's narrowly compartmentalized view of what constitutes a subsidy ignores (1) the source of all government funding, *i.e.,* the taxpayers, and (2) the state apportionment of much, if not all, of

the government funds each state political subdivision receives. Perhaps an argument could be made that the Ninth Circuit view could apply in a narrow context where the political subdivision itself (the school district) collects its own funds. Yet even that hypothetical ignores the fact that the funds in question are still public funds, derived from common taxpayers, the use of which is subject to legislative protection of First Amendment rights.

If a state political subdivision receives any funding from the state, or another public source, the Ninth Circuit's compartmentalized view necessarily fails. To the extent that any subsidiary of government uses state apportioned money for a subsidy, it is as if the state itself provides the subsidy. When any subsidiary of the state uses state money, the state has an interest in the application of the subsidiary's funds. As the *amici* explained in their Petition for Certiorari, "The Ninth and Tenth Circuits' reasoning is akin to saying no subsidy exists because the money came from the right pocket instead of the left (of course after being transferred to the right from the left)." *Ysursa v. Pocatello Education Association*, No. 07-869, Brief of the Utah Taxpayers Association et al. in Support of Petitioners' Petition for Writ of Certiorari, p. 17.

To dodge the state subsidy argument, Respondents have suggested that the donors or recipients of political contributions could themselves bear the expense of the government payroll deduction system. Brief of Respondents in Opposition to Petition for Certiorari, p. 2. This argument fails for at least two reasons:

First, Respondents' offer to have donors or recipients pay for government payroll deductions is

internally inconsistent with Respondents' assertion that their freedom of speech has been infringed. If a public payroll system is a public forum, as the Ninth Circuit held, then all should have access to the forum, no matter who pays for the speech. Respondents' argument actually concedes that the payroll deduction of union political action money is a subsidy to the union. The governments in both Idaho and Utah already subsidize the teachers' unions by collecting their union dues at taxpayer expense through payroll deductions. Government collection of union dues for such purposes as collective bargaining is not the equivalent of dues collection for union politics. On what basis must the taxpayers of those states go even further and subsidize the collection of the unions' political action money?

Second, the state government, at its option, may legally establish a government payroll system, yet government has no obligation to provide its employees a means to support the Pocatello Education Association, or any other political or private group. On this point, the Sixth Circuit in *Pizza,* in reviewing the Ohio statute that is functionally identical to the Idaho VCA and Utah VCA, states "the wage check-off ban [which precludes government payroll system use for political contributions] simply does not impinge, in a constitutionally significant manner, on any First Amendment rights [of government employees who chose to make political contributions]. This is clear from cases such as *Brown v. Alexander* [718 F.2d 1417, 1422 (6th Cir. 1984)] which held that 'the First Amendment does not impose any duty on a public employer to affirmatively assist or even to recognize a union.'" 154 F.3d at 319. It is significant that *Pizza* applies to all state government subsidiaries because all were included as "public employers"

in the Ohio statute the Sixth Circuit upheld as constitutional.

In Idaho, the "middleman" (meaning local government) subsidy likewise exists on all levels of government. When the Pocatello School District, or the Municipal Government of Pocatello, or the state of Idaho, administers payroll contributions through payroll deductions it acts as the collector for whichever person or group is the recipient of the employees' donation. In doing so, the government, ANY form of government, subsidizes the political speech of its employees. In such a case, the state has a compelling interest to protect objecting citizens/ taxpayers against compelled speech.

To this issue *amici* now turn their attention.

C. Idaho, Utah and all states have a legal obligation to protect citizens/taxpayers against compelled speech.

Among many reasons for its VCA, the state of Idaho protects the constitutional rights of its citizens from compelled speech. This includes the rights of citizens who are also government employees. This conclusion is demonstrable from this Court's analysis and holdings in *Abood. v. Detroit Board of Education*, 431 U.S. 209 (1977), and *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991).

In *Abood*, several teachers objected to compulsory union fees, authorized by an agency-shop agreement, because the teachers were ideologically opposed to the union itself, or political causes the union supported. Highly relevant to this case, this Court in *Abood* addressed the question of whether agency-shop fees could be used for political purposes, and held that plaintiffs could constitutionally prevent the

unions from spending a part of their required service fees to contribute to political candidates and to express political views unrelated to their duties as exclusive bargaining representative. This Court recognized that being compelled to make and being prohibited from making contributions for political purposes equally infringe upon First Amendment rights. 431 U.S. at 234. Constitutional principles "thus prohibit the [the teachers unions] from requiring any of the [public school teachers] appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher." *Id.* at 235.

The Court analyzed the issue at even greater length in *Lehnert*, where the union charged nonmember public college professors for lobbying and other political activities "designed to secure funds for public education," 500 U.S. at 527. Both Justice Blackmun, writing for a plurality, and Justice Scalia, writing for a separate plurality, held that those charges were unconstitutional under the First Amendment. *Id.* at 527, 559. Justice Blackmun gave three reasons why, two of which are implicated here: (1) "worker and union cannot be said to speak with one voice" as to political activities; and, (2) the "burden upon freedom of expression is particularly great where . . . the compelled speech is in a public context." *Id.* at 521-522.

This Court has continually reaffirmed the principle that the First Amendment protects citizens against being compelled to speak. *See, e.g., John J. Hurley and South Boston Allied War Veterans Council v. Irish American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 581 (1995) (holding that to require private citizens who organize a parade to include among the marchers a group imparting a

message that the organizers do not wish to convey violates the First Amendment, and that "Disapproval of a private speaker's statement does not legitimize use of the Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others."); *Davenport v Washington Education Association*, 127 S. Ct. 2372, 2383 (2007) ("It does not violate the First Amendment for a state to require its public sector unions to receive affirmative authorization from a nonmember before spending that nonmembers agency fees for election-related purposes.").

In *Abood, Lehnert* and *Davenport*, public employees were compelled to speak, in violation of First Amendment freedom of speech, because their money, forcibly collected, was being used for political purposes without authorization. It was as if Mr. Abood, for instance, was forced to donate to a political party he did not endorse.

In this case, *amici* have established, as an initial premise, that all government entities, both state and local, subsidize speech when they allow payroll contributions to union politics. *Amici* have also established that a government subsidy includes not only money *per se*, but government aid as broad principle. To illustrate the significance of these concepts, consider a hypothetical: John Doe, an Idaho taxpayer, who might himself be an employee of the Pocatello School District. Mr. Doe pays his state taxes dutifully to Idaho. Suppose Idaho apportions dollars of Mr. Doe's tax payments to a school district in Pocatello. Further suppose that Mr. Doe's paid Idaho tax dollars (in combination with other Idaho taxpayers), are used by the Idaho school district for three purposes: (1) some part is used to pay the cost

of setting up a payroll contribution system, which, in this example, will facilitate donations to the Pocatello Education Association; (2) another portion of taxes pays the public employee who sets up the payroll deduction; and (3) another portion pays for printing paychecks, which show all payroll deductions, including private contributions to Pocatello Education Association politics.

Further suppose Mr. Doe does not support the Pocatello Education Association. So far, this hypothetical case is substantially similar to *Abood*. Money is forcibly transferred from an individual to a political cause to which that individual taxpayer objects. Not only is Mr. Doe compelled to subsidize speech when his money is used to facilitate donations to the Pocatello Education Association, but Mr. Doe, reasonably, has no idea that his tax payments are being used to facilitate a donation to association politics. Yet it is important to highlight that Mr. Doe's money would be used to subsidize the Association's politics that he opposes, even if the government subsidiary, in this instance the local school district, collected its own funds. The Association collection of its own funds is the only situation in which the Ninth Circuit's compartmentalized view of subsidization can apply. Still, Mr. Doe would be compelled to speak in derogation of his First Amendment rights.

A reported survey and prior litigation involving the Utah VCA and the teachers' union proves that these concerns are not merely hypothetical. A 1997 internal membership survey by the Utah Education Association ("UEA"), conducted by Dan Jones & Associates, determined that 43% of UEA members identified themselves as Republicans, 27% identified

themselves as Independents, and 24% identified themselves as Democrats. *Sutherland Update*, Sutherland Institute (December, 2002). This Court may take judicial notice of the record in *Utah Education Assn. v. Leavitt* (Utah 3d Dist. Ct. Nos. 010903293 & 010903586), two cases before Utah's Third Judicial District Court in which the teachers' unions (among others) filed suit challenging the constitutionality of the Utah VCA. The individual employees who intervened in that litigation submitted evidence on how the teachers' union dislocated the political process. Although 70% of the UEA members (according to the survey) described themselves as Republicans or Independents, 74.6% of the amount the UEA contributed through its political action committee was to candidates who identified themselves as Democrats. (UEA response to Intervenors' Interrogatories, First set, #5.)

Moreover, this Court's past decisions reflect the ongoing concern about the corruption of the political process that flows from organizations using their members' dues for association politics that the individual member might not support. *See, e.g., Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 656, 659-60 (1990); *Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238, 258-60 (1986).

The government already has granted the teachers' unions a special power and privilege by making them the monopoly bargaining agent. If the government allows only the public employee unions to have the government collect their political action funds, the government crosses the line from neutrality to political favoritism. This corrupts the political process. When the government (any form of it) is involved in aiding and facilitating political contributions, the

perception of neutrality and equal representation among citizens diminishes. Taxpayers/Citizens would reasonably expect a school district to devote its time, energy and resources to teaching their children, and likely would not want the school district involved in political affairs.

These are compelling reasons for the Idaho Legislature to withdraw any government subsidy of political speech by passing the Idaho VCA, as it did.

D. Idaho, Utah and all states have the right to protect government employees from the corrupting influence of politics in government.

The Ninth Circuit decision is logically at odds with this Court's long history of approving limitations on the political activities of public employees to prevent political corruption. For more than 120 years, Congress has recognized the importance of limiting both the solicitation and contribution of political funds from public employees. In the Appropriation Act of 1876, Congress prohibited public employees from requesting, giving or receiving money for "political purposes." *Ex parte Curtis*, 106 U.S. 371 (1882). Consider the breadth of the exact language before the Supreme Court in *Curtis*:

> That all . . . employees of the United States . . . are prohibited 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; and any such officer or employee, who shall offend against the provisions of this section, shall be at once discharged from the service of the United States; and he shall also be deemed guilty of a

> misdemeanor, and on conviction thereof shall be fined in a sum not exceeding $500.

Ex parte Curtis, 106 U.S. at 371.

This Court upheld the Appropriations Act of 1876 against constitutional attack. Why? Because protecting public employees from being forced to support political purposes with which they disagreed was considered a sufficient governmental reason to uphold the statute. *Id.* at 373-75.

Curtis is not an historical anomaly. Sixty years later, in *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), this Court was again called upon to determine whether a public employee had the constitutional right to engage in political activities that included being politically active on election day. In upholding the Hatch Act prohibition, this Court noted the *Curtis* decision and opined that if the state can constitutionally prohibit a public employee from contributing money for politics, it can certainly prohibit him from contributing his labor to politics. *Mitchell*, 330 U.S. at 97-99.

Twenty-five years after *Mitchell*, this Court again upheld the limitations on political activities by federal public employees in the Hatch Act, 5 U.S.C. § 7324(a)(2), and cited *Curtis* with approval. *U.S. Civil Service v. National Ass'n of Letter Carriers*, 413 U.S. 548, 555 (1973). In describing the federal government's long-term policy of limiting the political activities of public employees, and the Court's long-standing approval of these limitations in the face of constitutional attack, this Court recited the following from an earlier opinion: "[t]he conviction that an actively partisan governmental personnel threatens good administration has deepened since . . . *Curtis.*" *Id.,* quoting *Mitchell*, 330 U.S. at 97-98.

At the same time *Letter Carriers* approved the restrictions on federal public employees' political activity in the Hatch Act, this Court, in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), approved similar restrictions on state employees. Indeed, the restrictions contained in the Oklahoma Merit System of Personnel Administration Act included a blanket prohibition on soliciting or receiving funds for "political purpose." *Id.* at 605-06.

If blanket prohibitions on political activity by public employees have been upheld by this Court, on what basis can the teachers' union claim to have the right for it and its teacher members not simply to be involved in partisan politics, but have the government collect its political action money?

E. Withdrawal of the privilege for a government employee to have political contributions deducted from his or her paycheck does not violate that employee's constitutional free speech.

Amici here reaffirm a critical principle that infringement of speech is fundamentally, factually, practically and legally, distinct and different from withdrawal of public support of speech. Respondents and the Ninth Circuit have correctly reasoned that political groups and private individuals use money to effect speech. But that is an irrelevant fact. Money can be used, for example, to lobby, to air commercials or donate to a favorite candidate for political office. It does not logically follow from this undisputed fact that government must fund speech if free speech is to exist.

This point can be illustrated using an analogy to tax law. Congress has provided a "renewable energy

production credit" under Section 45 of the Internal Revenue Code of 1986 to promote wind power generating facilities. The allowable credit is against the federal income tax liability of the taxpayer. Similarly, the Utah State Legislature has provided a state "renewable energy tax credit" against Utah income taxes pursuant to Utah Code Ann. § 59-7-614(2)(c). Although it may be considered desirable for government to subsidize wind generated electric power, there is no constitutional right for such subsidy, regardless that the absence of tax credits makes it more difficult for wind power companies to construct their power plants, and/or assuming for purposes of argument that the wind power company has a constitutional or at least a statutory right to build such a facility. Government subsidies are not constitutionally compelled.

Seemingly unaware of the foregoing principle, the Ninth Circuit reasoned that "Idaho Code § 44-2004(2) burdens speech by diminishing Plaintiffs' ability to conduct any of the activities defined by the Idaho Code as 'political . . . The law does not prohibit Plaintiffs from participating in political activities but it hampers their ability to do so by making the collection of funds for that purpose more difficult . . . The district court found that the payroll deduction ban would decrease the revenues available to Plaintiffs to use for political speech. Restricted funding will, therefore, diminish Plaintiffs ability to engage in political speech. . . " 504 F.3d at 1058 (emphasis added). Essentially, the Ninth Circuit concludes that the Idaho statute is unconstitutional because not having the public employer's assistance makes collection of money for politics harder, and the unions thus would have less money available to spend on association politics.

The Sixth Circuit's response to the Ninth Circuit make-weight argument is dispositive:

> "[The plaintiffs] contend, the state's refusal to continue to administer checkoffs for political causes unconstitutionally impairs the employees' and the unions' right to free association and political expression. The problem with this reasoning is that it confuses what citizens and the associations they form may do to support and disseminate their views with what citizens and groups they form may require the government to do in this regard." 154 F.3d at 314. Hence, none of the Ninth Circuit's points, as analyzed below, withstand scrutiny.

1. Decline in Revenue

The Ninth Circuit simply assumed, erroneously, that a negative effect on revenue necessarily means violation or infringement of a constitutional right to speech. The Sixth Circuit further addressed this point, quoting *South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251 (4th Cir. 1989): "'although the loss of payroll deductions may economically burden the SCEA . . . such a burden is not constitutionally impermissible.'" 154 F.3d at 315. Furthermore, the Sixth Circuit reasoned, "the protections accorded to fundamental First Amendment rights do not extend to imposing a duty on government to assist the exercise of First Amendment rights no matter how much the withdrawal of such assistance undercuts the effect of exercising such rights. *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 545, 76 L. Ed. 2d 129, 103 S. ct. 1997 (1983) and *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 465-66, 60 L. Ed. 2d 360, 99 S. Ct. 1826 (1979). 154 F.3d at 320.

The Ninth Circuit's contrary reasoning (that a decline in collections for association politics violates the association's freedom of speech) necessarily imposes a "pecuniary interest" test, thus inventing a freedom of speech scale (in which the units are dollars). Such a sliding scale test would force this Court to answer the question: "How much?" How much revenue can be lost before constitutional rights have been violated? An answer to that question would likely be arbitrary, and engender massive First Amendment challenges.

2. No Significant Burden

The Ninth and Tenth Circuits also imply that the unions' difficulty in collecting money without payroll deductions has some First Amendment significance. Reportedly, union members have "concerns over identity theft associated with other electronic transactions," and the unions themselves are concerned about "the time consuming nature of face to face solicitation." *Pocatello Education Association*, 504 F.3d at 1058. "Many of [the UEA's] members prefer to contribute using payroll deductions because they find it to be the 'easiest, least expensive and most reliable way to do so.'" *Utah Education Association*, 512 F.3d at 1257. The Ohio Court of Appeals similarly concurred that "it is easier for people with limited amounts of available funds to contribute an amount in numerous small increments." *United Auto Workers* Local Union *1112 v. Philomena*, 700 N.E.2d 936, 945 (Ohio App. 1998).

Even assuming the relevance of such observations to First Amendment principles (which *amici* dispute), the foregoing examples are not significant burdens on government employees when state statutes forbid government payroll deductions for union politics

This point is, once again, easily demonstrated. Because no political group, or anyone else (except for the IRS) for that matter, can remove money from an employee's paycheck without his or her informed consent, the employee must first sign a contract agreeing to allow the withdrawals. This is not unlike signing a contract to allow a cell phone company, cable company, insurance company, etc. to withdraw funds from a checking or credit card account. The process is just as simple, and an individual can specify the amount to be deducted each month. Automatic withdrawals without any government involvement are one option government employees still have to donate to whatever political causes they favor.

Other options government employees have to donate include cash, checks in person or through the mail, and credit cards over the phone or through the mail, or donations via the internet. None of these methods of donation is burdensome to an individual. Quite the contrary, hundreds of millions of Americans use each of these methods of payment each and every day, likely including Pocatello Education Association members. Clearly such methods of payment other than through payroll deductions are neither burdensome nor unsafe.

3. No Rights Are Violated

Amici have demonstrated that loss of revenue does not constitute constitutional infringement of speech. They have also demonstrated that no significant burden is placed on solicitation of funds. Therefore Idaho Code §44-2004(2) simply does not impinge, in any constitutional manner, on any First Amendment rights. The state of Idaho, therefore, acted perfectly within its authority to enact the Idaho VCA, which

removes a speech subsidy from political groups, because the removal violates no free speech rights.

CONCLUSION

This Court should reverse the Ninth Circuit decision in *Pocatello Education Association* for the following reasons as explained in this brief:

1. The Ninth Circuit decision is logically defective because it ignores the fact that all government aid, whether state or local, is derived from taxpayers, and hence constitutes a government subsidy.

2. Any and all local Idaho school districts subsidize the Pocatello Education Association by facilitating teacher employee payroll deductions for political causes.

3. Idaho, and all states, have a constitutional duty to protect against compelled speech and a corruption of the political process. In this case, taxpayers must subsidize public teacher employee payroll deductions for political causes unless the Idaho VCA is upheld. The Ninth Circuit decision striking down the Idaho VCA compels taxpayers who disagree with the Pocatello Education Association politics to subsidize the Association's partisan politics in derogation of such taxpayers' First Amendment rights to freedom of speech.

4. Idaho's removal of political subsidies to the Pocatello Education Association through the Idaho VCA does not violate anyone's First Amendment rights to freedom of speech because state governments have no constitutional obligation to fund speech, and because

all government employees, both state and local, remain free to contribute whatever and whenever they wish to the Association through private contributions.

Respectfully submitted,

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