

1           IN THE SUPREME COURT OF THE UNITED STATES

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3   BEN YSURSA, IDAHO SECRETARY           :

4   OF STATE, ET AL.,                    :

5                    Petitioners                    :

6                    v.                                 :   No. 07-869

7   POCATELLO EDUCATION                 :

8   ASSOCIATION, ET AL.                 :

9   - - - - - x

10   Washington, D.C.

11   Monday, November 3, 2008

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13   The above-entitled matter came on for oral  
14 argument before the Supreme Court of the United States  
15 at 11:08 a.m.

16 APPEARANCES:

17 CLAY R. SMITH, ESQ., Deputy Attorney General, Boise,  
18 Idaho; on behalf of the Petitioners.

19 JEREMIAH A. COLLINS, ESQ., Washington, D.C.; on behalf  
20 of the Respondents.

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P R O C E E D I N G S

(11:08 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 07-869, Ysursa v. Pocatello Education Association.

Mr. Smith.

ORAL ARGUMENT OF CLAY R. SMITH

ON BEHALF OF THE PETITIONERS

MR. SMITH: Mr. Chief Justice, and may it please the Court:

This case is narrowed to a single, but from the Petitioner's perspective a critical, dispute over the scope of internal State sovereignty: whether the First Amendment trumps the otherwise existing authority of the Idaho legislature to direct political subdivisions of the State to take an action, here restricting access to their payroll systems, that the subdivisions could take independently without violating the Amendment.

The genesis of this dispute is Idaho Code Section 44-2004(2), which was adopted in 2003. That provision prohibits State and local government public employers from deducting amounts for political activities from the payroll checks due to their employees and remitting those amounts to third parties.

1 JUSTICE STEVENS: Didn't the statute also  
2 prohibit private employers from doing that?

3 MR. SMITH: As construed by the district  
4 court, it did. The base legislation in this, the  
5 Voluntary Contribution Act, excluded from application an  
6 employee -- an employer subject to the two major labor  
7 -- Federal labor relations statutes, the NLRA and the  
8 RLA.

9 But there was obviously a group of  
10 Employers -- private employers, in -- who were not  
11 engaged in commerce, as well as the agricultural sector.

12 JUSTICE STEVENS: And you concede the  
13 statute was unconstitutional as applied to them?

14 MR. SMITH: The district court concluded  
15 that the -- yes, Your Honor, we did.

16 JUSTICE STEVENS: And you agree with that  
17 conclusion?

18 MR. SMITH: We do.

19 JUSTICE STEVENS: And what is the difference  
20 between the private employer and the county agency?

21 MR. SMITH: Well, the principal difference  
22 is that one is a private employer -- that is to say,  
23 engaging in private speech -- while the public employer  
24 is a -- is a subdivision of the State of Idaho, subject,  
25 we would argue, to the plenary control, pursuant to the

1 Idaho Constitution, of the Idaho legislature.

2 CHIEF JUSTICE ROBERTS: I think Justice  
3 Stevens's question highlights for me one of the  
4 confusing parts of this case. You've sort of pared off  
5 a number of the people who would otherwise be covered,  
6 and you are left with the county employees. If you  
7 had started with the county employees, is this how you  
8 would have gone about telling them they can't do this?  
9 I mean the county employers. Would you have passed a  
10 law saying that the county employers are not allowed to  
11 have this checkoff? If you think they are part of the  
12 State, I guess you could have just written them a letter  
13 and say don't do this, right?

14 MR. SMITH: Your Honor, in a word, the  
15 answer is no. I don't believe we, referring to the  
16 Petitioners in this case, could have written the -- the  
17 political subdivisions of a State to direct them to take  
18 an action unless there was a legislative basis for doing  
19 so.

20 In this instance, the -- the legislature  
21 concluded that it wanted all public employers, among  
22 others, to not allow access to their payroll systems.

23 JUSTICE STEVENS: Do I understand that the  
24 counties, if they elected to, could decide not to -- not  
25 to do the checkoff?

1           MR. SMITH: Prior to the adoption of the  
2 statute in 2003, yes.

3           JUSTICE STEVENS: And so why should counties  
4 be different from -- from -- I'm still puzzled about why  
5 counties -- county employers are different from private  
6 employers in terms of the State interest in preventing  
7 the checkoff.

8           MR. SMITH: Well, there is a fundamental  
9 difference, Your Honor. And -- and it rests in the  
10 notion that the State has no interest in the -- in  
11 private employers' determination to be involved or not  
12 involved in political matters. The State legislature,  
13 however, has a very concrete interest in avoiding either  
14 the reality or the appearance --

15           JUSTICE STEVENS: And what is that interest?

16           JUSTICE KENNEDY: If you -- if you think of  
17 the case as a principal-agent case so that the principal  
18 can direct the agent as to what to do, the agent being  
19 the county, then it seems to me that the unions might  
20 still have an argument that this is an unconstitutional  
21 condition.

22           I've been looking for ways to examine this  
23 case. The public forum doesn't really work for me.  
24 Subsidy doesn't really work for me. It seems to me to  
25 be an unconstitutional-condition case. At least that's

1 the argument.

2 That doesn't mean you necessarily can't  
3 prevail. But suppose the State told the city: You  
4 can't have a parade that you sponsor for this particular  
5 cause. That would raise an unconstitutional-conditions  
6 argument; wouldn't it?

7 MR. SMITH: It might, Your Honor, but that  
8 situation, of course, is not the situation presented  
9 here.

10 JUSTICE KENNEDY: Why isn't it? And I say  
11 that because I think that follows on Justice Stevens's  
12 line of questioning. I didn't mean to interrupt him,  
13 but it seems to me that is consistent with what he is  
14 asking.

15 MR. SMITH: Because the statute at issue  
16 here, Justice Kennedy, speaks across the board to a  
17 specific kind of conduct, political activities. It does  
18 so in the a viewpoint-neutral fashion. To prohibit a  
19 particular parade might well raise viewpoint  
20 non-neutrality issues.

21 CHIEF JUSTICE ROBERTS: Yes, because the  
22 State couldn't --

23 JUSTICE KENNEDY: Well, isn't the union  
24 going to stand up and say that this isn't viewpoint --  
25 that this is -- that this is viewpoint-based. Isn't

1 that what we're going to hear from the union -- and  
2 aren't they right about that?

3 MR. SMITH: Your Honor, they are incorrect  
4 about that. The district court concluded that the  
5 statute is viewpoint-neutral. Indeed --

6 JUSTICE GINSBURG: But does it get at any  
7 speech other than union speech? I mean you say, yes, it  
8 is content-based, but it's viewpoint neutral. But it  
9 seems that what is banned by the statute is union  
10 speech. Is any other organization affected? Does the  
11 ban affect any other organization? Isn't it simply  
12 union speech that's at stake?

13 MR. SMITH: The answer is no. It -- the --  
14 the statute just -- does not just affect union speech by  
15 its literal terms.

16 JUSTICE GINSBURG: But, practically, is  
17 there any other application?

18 MR. SMITH: Well, there is no evidence in  
19 the record, Your Honor, as to any other entity who is  
20 affected by the statute. But that is hardly -- that's  
21 hardly remarkable, given the fact that the plaintiffs in  
22 the litigation are six labor organizations. I should  
23 add that --

24 JUSTICE SCALIA: Are there -- are there in  
25 counties some charitable drives that occur annually and

1 that permit employees to donate to those charities  
2 through deductions from their wages?

3 MR. SMITH: There are, Your Honor.

4 JUSTICE SCALIA: And would they presumably  
5 be covered by this? United Fund drives, so-called, my  
6 -- my recollection is that usually the contributions to  
7 that simply come out of -- are deducted from the wages.  
8 And if they existed in the counties, presumably they  
9 would have been covered. But we don't know if they  
10 would.

11 MR. SMITH: Well, to the extent that the --  
12 the contribution was for political activities as defined  
13 in the --

14 JUSTICE SCALIA: Oh, it's only political  
15 activities?

16 MR. SMITH: That's correct.

17 JUSTICE SCALIA: I see. Well, none of those  
18 would allow that --

19 JUSTICE BREYER: So, if in fact there is a  
20 charity, which charity in Idaho is a charity that makes  
21 all of its contributions to help support right-to-work  
22 laws. All right. So that charity goes and says, could  
23 you -- we'd like a payroll deduction. Can they get it,  
24 or not?

25 MR. SMITH: Your Honor, again, it depends.

1 I -- I don't know the answer to your question, because  
2 it really does depend on --

3 JUSTICE BREYER: You don't know. Okay. So,  
4 then, we do know this. We do know -- what I'm wondering  
5 is: Isn't this case, to me, quite confused about  
6 something fairly simple? The question would be: Look,  
7 one, do you or do you not in Idaho allow anybody to have  
8 payroll deductions for anything? And I take it your  
9 answer to that question is: Yes, we do allow some  
10 payroll deductions for some things. Okay?

11 So then we look at this one, and it says:  
12 No payroll deductions for union activities that are  
13 political. All right? Now, you either do have or you  
14 do not have a justification for that difference. If you  
15 have a reasonable, or whatever the sufficient test is,  
16 justification for the difference, you win. And if you  
17 don't, you lose. And, indeed, whether you are the State  
18 or the county could have to do with the plausibility of  
19 the justification.

20 Here we are, end of case, traditional. You  
21 just -- you didn't argue it that way, I guess, below.  
22 Now, what's wrong with that?

23 MR. SMITH: Your Honor, in fact, we argued  
24 below that there was no constitutional right of access  
25 to the payroll system for purposes of making political

1 contributions. And let me reiterate at this --

2 JUSTICE BREYER: There certainly, I would  
3 think, would be a problem if the right-to-work people  
4 can get there. And you are not going to let the unions  
5 get there. But I don't know the facts. So shouldn't we  
6 just send this case back and say: Please look at what  
7 the situation is? If they have to treat some people one  
8 way, some people another, bad; if they don't, everybody  
9 is treated alike for good reason, probably okay.

10 MR. SMITH: Well, the -- I would suggest  
11 that a remand for that purpose would be futile. The  
12 district court, as I said before, concluded that the  
13 statute is viewpoint neutral. And let me stress that  
14 the term "political activities" does not -- is not  
15 defined with reference to unions or speech by other  
16 entities that might be controlled by unions.

17 It addresses political contributions for  
18 electoral matters, independent expenditures, and  
19 expenditures to political parties.

20 JUSTICE SCALIA: Would -- would they include  
21 contributions to an organization that makes  
22 contributions to political parties --

23 MR. SMITH: Yes, to the extent --

24 JUSTICE SCALIA: -- such as a right-to  
25 work-organization?

1           MR. SMITH: To the extent that the -- the  
2 organization is, for example, a political action  
3 committee, it would.

4           And let me go back to Justice Ginsburg's  
5 question for a moment. Had the legislature intended  
6 44-2004(2) to apply only to unions, they would have --  
7 it would have been engaging in a redundancy because  
8 under another provision of the same legislation,  
9 44-2603(1)(b)(iv), which appears at petition appendix  
10 70, the Idaho legislature proscribed amounts being --  
11 amounts -- required all amounts to be paid -- paid to a  
12 separate segregated fund which was established pursuant  
13 to the legislation that was invalidated by the district  
14 court, required those kinds of contributions to be made  
15 directly by the employee and not through -- or not by  
16 the employee's employer.

17           JUSTICE SCALIA: Does the State give some  
18 particular favor to unions? I mean, does it allow --  
19 what -- what is the situation? Can you be forced to  
20 contribute to the union even though you're not a union  
21 member?

22           MR. SMITH: No, Your Honor. The --  
23 44-2004(2) is part of the Idaho Right to Work Act, which  
24 was adopted in the mid 1980s. It allows amounts to be  
25 deducted through payroll checkoffs for union dues.

1 JUSTICE SCALIA: But unions do have a  
2 special prerogative which -- which no other  
3 organizations, as far as you're aware, have in the  
4 State, which is to have money deducted from people's  
5 payrolls?

6 MR. SMITH: That's -- that's correct. The  
7 --

8 CHIEF JUSTICE ROBERTS: No other  
9 organization other than the Federal, State, and local  
10 governments.

11 JUSTICE SCALIA: True.

12 MR. SMITH: But let -- let me -- let  
13 me continue with my response to Justice Scalia's  
14 question.

15 The special prerogative that, for example,  
16 the Pocatello Education Association or the firefighters  
17 union has is the ability to engage in collective  
18 bargaining pursuant to State statute as the exclusive  
19 bargaining representative of, for example, the Pocatello  
20 School District's teachers.

21 That exclusivity which is granted to a  
22 limited number of -- of -- in fact, two areas under  
23 Colorado -- excuse me -- under Idaho law, namely,  
24 firefighters and teachers, is the extraordinary benefit  
25 that unions have.

1                   JUSTICE SCALIA:  Yes.  The point of my  
2 question is it doesn't seem to be terribly  
3 discriminatory if indeed the only organizations in the  
4 State that are given the right, whether by Federal or  
5 State law, to deduct, private organizations, given the  
6 right to deduct from the salary a municipal or private  
7 employer pays.  It doesn't seem to me particularly  
8 discriminatory to say that, moreover, in making those  
9 deductions, no part of it will be given for political  
10 activities.  I mean you're only addressing a narrow  
11 class, but it's a narrow class that has a special  
12 benefit.

13                   MR. SMITH:  Well, I would agree that -- that  
14 unions have, and particularly these -- particularly the  
15 Respondents have a special benefit.  But again, I go  
16 back to the basic point that 2004(2) addresses all  
17 public employers or public employees and is not limited  
18 to political activity contributions.  That might be, for  
19 example, as the situation is here, to a union-sponsored  
20 political action -- political action committee.

21                   JUSTICE STEVENS:  May I ask you a question  
22 about, say, an attempt to deduct contributions to a  
23 charity like the United Fund?  Do counties have a choice  
24 to either do that or not do it, or does State law  
25 require them to accept such requests?

1 MR. SMITH: Local governments have the  
2 discretion.

3 JUSTICE STEVENS: They have discretion to do  
4 that?

5 MR. SMITH: That's correct.

6 JUSTICE STEVENS: With respect to the union  
7 situation, the statute takes away that discretion.

8 MR. SMITH: With respect --

9 JUSTICE STEVENS: And the question is why is  
10 there -- why is there a State interest in taking away  
11 that discretion for unions, but not as to charities.

12 MR. SMITH: Well, it takes away that  
13 discretion with respect to any third party who might  
14 receive amounts for political activities.

15 JUSTICE STEVENS: For political activities.  
16 But what is -- what is the reason for differentiating  
17 political activities from charities?

18 MR. SMITH: The reason, as we articulate in  
19 our brief, is the desire to avoid either the appearance  
20 or the reality of public employer involvement in, in  
21 this instance, electoral politics.

22 JUSTICE STEVENS: I see.

23 CHIEF JUSTICE ROBERTS: Are there other  
24 areas in which the State exercises the authority you're  
25 asserting here with respect to county employers, telling

1 them what they can and can't do?

2 MR. SMITH: Outside the area of elections,  
3 not with respect to payroll deductions.

4 CHIEF JUSTICE ROBERTS: I mean more  
5 generally. Your assertion is that this is part of the  
6 State, and therefore, as I gather, it's conceded on the  
7 other side, this is acceptable with respect to State  
8 employees but not other public employers. Are there  
9 other areas in which you act like the counties are part  
10 of the State?

11 MR. SMITH: Your Honor, the -- the county --  
12 counties in Idaho and I suppose in most States act as  
13 political subdivisions of the State. And whatever  
14 authority they have or don't have derives, if not  
15 exclusively, virtually exclusively from State law.

16 JUSTICE SOUTER: Well, but if that's true --

17 CHIEF JUSTICE ROBERTS: I'm looking for --

18 JUSTICE SOUTER: No. Please.

19 CHIEF JUSTICE ROBERTS: I'm looking for a  
20 specific example. I mean, maybe counties or  
21 municipalities, you know, contract for trash collection  
22 or water services and maybe the State tells them, look,  
23 you've got to deal with these people, you've got to do  
24 it by open bidding, whatever.

25 MR. SMITH: Your Honor, let me go back to

1 the election context for a moment to try to address that  
2 question. Prior to its amendment, pursuant to the  
3 legislation at hand, Idaho Code Section 67-6605, which  
4 is part of Idaho's election campaign finance and  
5 reporting statute or general statute, allowed payroll  
6 deductions to be made for contributions to political  
7 committees. In that sense, it allowed counties, as well  
8 as other public employers, to make deductions of the  
9 kind at issue today.

10 Now, that authority was rescinded by virtue  
11 of the amendment to 2004(2). The point simply is that  
12 if necessary, we -- we could describe in detail various  
13 kinds of -- of requirements that exist with respect to  
14 counties or school districts or cities.

15 CHIEF JUSTICE ROBERTS: Well, that's --  
16 since I asked the question, I think it's necessary. So  
17 what's the best example where the State exercises  
18 control over what the counties would otherwise have  
19 discretion to do? You mentioned school districts. Is  
20 that -- is that an area?

21 MR. SMITH: Well, Your Honor, for example,  
22 with respect to -- take open meetings, for example, take  
23 public records, for example. Those are general kinds of  
24 statutes that impose requirements on all levels of State  
25 government. So, for example, with respect to open

1 meetings, the Idaho law requires essentially all  
2 meetings, except for certain exclusions, to be open to  
3 the public. In that sense, it's akin to the Wisconsin  
4 statute.

5 JUSTICE SCALIA: What about a Hatch Act?  
6 Does -- does -- does the State allow State employees to  
7 engage in political activity?

8 MR. SMITH: Your Honor, it does, but not --  
9 not in connection with their public employment  
10 activities.

11 JUSTICE SCALIA: I don't know -- I don't  
12 know what that means.

13 MR. SMITH: It means that there is no  
14 prohibition under State law, for example, for a public  
15 employee to engage in political activity. If -- but our  
16 statute in Idaho applies actually only to State  
17 employees. It doesn't govern those kinds of activities  
18 by local government.

19 JUSTICE SCALIA: That's interesting. Why  
20 not?

21 JUSTICE KENNEDY: The general proposition  
22 that -- the general proposition that underlies your  
23 argument that the local entities are creatures of State  
24 law and they cannot receive Federal powers from the  
25 Federal Government when the States object, is that -- is

1 that an acceptable proposition?

2 MR. SMITH: It would be an acceptable  
3 proposition to the extent that Federal law doesn't  
4 pre-empt State law, Your Honor.

5 JUSTICE KENNEDY: Right.

6 MR. SMITH: In this instance, we would argue  
7 that the First Amendment does not interpose some kind of  
8 barrier to essentially vulcanize local government from  
9 State legislative control.

10 JUSTICE KENNEDY: There is -- there is a  
11 case out of the Ninth Circuit, and it was affirmed by  
12 this Court on a procedural point, but not on a -- not on  
13 the merits -- out of the neighboring State of  
14 Washington, where the State says a locality cannot build  
15 a dam more than 25 feet high. The locality then gets a  
16 license from the Federal Power Commission, and the State  
17 said, well, you still don't have this authority. And  
18 the Ninth Circuit said you do. The Federal power then  
19 supersedes.

20 Would you agree that that case is right?

21 MR. SMITH: Depending on -- on the facts, I  
22 -- I would agree that it is certainly possible for the  
23 State law to be pre-emptive --

24 JUSTICE KENNEDY: Because there the local  
25 entity has powers greater than what the State wants to

1 give it, even over the State's objection.

2 MR. SMITH: Well, but -- but, Your Honor,  
3 that is, I think, beyond cavil; that is to say that  
4 Federal law --

5 CHIEF JUSTICE ROBERTS: I -- I didn't hear  
6 you. You think that's what?

7 MR. SMITH: Beyond cavil, in other words,  
8 beyond dispute --

9 JUSTICE KENNEDY: Really, if the State can  
10 -- can opt not to do something, it can't tell its  
11 subdivisions, we don't want you to do it, either? And  
12 the subdivision can then go to the -- directly to the  
13 Federal Government and say, please let us do this, even  
14 if the State would be free to reject it on its own?

15 MR. SMITH: Well, it -- it depends on -- the  
16 answer to that -- it's difficult --

17 JUSTICE KENNEDY: It seems to me that that  
18 is the argument you should be making here.

19 MR. SMITH: Your Honor, perhaps it was --  
20 it was an argument that we don't have to make in this  
21 instance. Needless to say, by virtue of the Supremacy  
22 Clause, there may be instances where Federal law --

23 JUSTICE GINSBURG: But I thought your whole  
24 argument was that the counties are simply  
25 instrumentalities of the State, and the State has full

1 power over them. It chooses to delegate to them  
2 autonomy, but it holds the control rein. And now you're  
3 saying no, that the Federal Government can give the  
4 State local-unit authority that the State, itself,  
5 chooses not to give. And you say that's beyond cavil.  
6 I really don't understand your argument.

7 MR. SMITH: It is beyond cavil if the  
8 Federal law, in fact, supersedes State law. There may  
9 be issues --

10 CHIEF JUSTICE ROBERTS: Yes, but that  
11 depends -- I mean the whole case turns on -- and the  
12 response to Justice Kennedy, I think, would be -- if the  
13 Federal Government is simply saying you can do it if you  
14 want, that's one thing. If the Federal Government is  
15 saying you must do it because it's covered by the  
16 Federal Power Act, or whatever, that's different.

17 If it's just a grant of permission, I would  
18 suppose the State can say, well, fine, it's okay with  
19 the Feds, but you can't do it because we don't want you  
20 to.

21 MR. SMITH: That's correct.

22 JUSTICE SOUTER: Isn't -- don't -- don't you  
23 suffer from -- doesn't your position suffer from a -- a  
24 more serious problem that doesn't even implicate the  
25 pre-emption doctrine? And that is, as I understand your

1 argument, the -- the local governments are creatures of  
2 the State. Their powers are the powers that the State  
3 gives them by statute, as -- as you were pointing out.

4           The same thing is true for corporations.  
5 Corporations are creatures of the State. They have the  
6 powers, and only the powers, that the State gives to  
7 them. It -- it seems to me, going back to Justice  
8 Stevens's initial question, that I don't see where the  
9 distinction lies between the -- in effect, the position  
10 of the local-government units and corporations, and --  
11 and between the local-government units and the  
12 corporations. And it seems to me that that's a problem  
13 for you quite apart from any application of Federal law.

14           MR. SMITH: I disagree, Justice Souter. The  
15 -- as I stated in response to Justice Stevens, the  
16 difference is a central one. That is to say, a  
17 corporation is a private entity with -- with distinct  
18 rights under the First Amendment.

19           JUSTICE SOUTER: Well, it has distinct  
20 rights under the First Amendment if State law creates a  
21 corporate form of -- of -- of business organization.  
22 And the -- the -- when -- when it comes into existence,  
23 it then does acquire some rights under the national  
24 Constitution. But it's -- in the first instance, it's a  
25 creature of State law, its powers, generally speaking,

1 are the powers that State law gives it. And that is --  
2 that same proposition is true of counties and towns and  
3 -- and other sub-State governmental units.

4 MR. SMITH: I disagree to the extent that  
5 there is any attempt to equate a private corporation  
6 with essentially an agent or an arm of the State such as  
7 a county, which has been delegated governmental  
8 functions.

9 JUSTICE SOUTER: All right. Then -- then it  
10 seems to me that your argument is not that State law  
11 controls what it may do and defines its powers. Your  
12 argument, it seems to me, has to rest upon the fact that  
13 what it is doing is a public, as opposed to a private,  
14 function. And that's the extent of the argument. Isn't  
15 that true?

16 MR. SMITH: Well, that is certainly is  
17 the distinction between a private corporation and, for  
18 example, a county.

19 JUSTICE SOUTER: That's the only distinction  
20 that you can maintain. You can't maintain the  
21 distinction based upon the superiority of State law in  
22 defining the -- the extent of the governmental unit's  
23 powers and so on, because that is just as true of a  
24 corporation. So your distinction has simply got to be a  
25 distinction based on the nature of the function that is

1 being performed.

2 MR. SMITH: And -- and the very nature of  
3 the entity, itself, Your Honor. A county --

4 JUSTICE SOUTER: What -- what do you mean by  
5 the "nature of" --

6 MR. SMITH: A county or school district  
7 performs functions assigned to it by the State  
8 legislature to carry out the function, to carry out  
9 activities that are public in nature.

10 JUSTICE SOUTER: In other words, it's doing  
11 -- it's doing a governmental job.

12 MR. SMITH: That's correct.

13 JUSTICE SOUTER: We understand what that is,  
14 so I understand that point.

15 MR. SMITH: Your Honor, I -- I can only  
16 repeat that the distinction between the private  
17 corporation and the -- and a political subdivision of  
18 the State is that, in fact, one is an entity created by  
19 the legislature for the very purpose of carrying out  
20 State governmental functions. That -- that, I think, is  
21 entirely consistent with the position argued throughout  
22 this case.

23 JUSTICE SOUTER: No. But -- it -- it is,  
24 but I mean when you say, as I think you are now saying,  
25 the -- the law for the State to be the law for the

1 subdivision because they are both governmental, the  
2 counter-argument is, in fact, there are resemblances to  
3 private organizations, too. And those resemblances are,  
4 in effect, their creation and definition by State law;  
5 their enjoyment of powers, and only those powers,  
6 which State law gives them; so that, in fact, there  
7 is -- there is not only an analogy with the State  
8 government, there is an analogy with private  
9 corporations, too. And the question is why should we  
10 choose one analogy rather than the other analogy?

11 MR. SMITH: And Your Honor, I think I  
12 responded.

13 JUSTICE ALITO: But you don't think that  
14 under our Federal system, the States have greater powers  
15 deciding how they are going to organize themselves than  
16 they have with respect to the regulation of artificial  
17 private entities that they choose to permit under State  
18 law?

19 MR. SMITH: Yes. States -- of course States  
20 do have that authority.

21 CHIEF JUSTICE ROBERTS: Counsel, we'll give  
22 you a minute for rebuttal --

23 MR. SMITH: Thank you.

24 CHIEF JUSTICE ROBERTS: -- since our  
25 questioning has taken away from your time.

1 CHIEF JUSTICE ROBERTS: Mr. Collins.

2 ORAL ARGUMENT OF JEREMIAH A. COLLINS

3 ON BEHALF OF THE RESPONDENTS

4 MR. COLLINS: Mr. Chief Justice and may it  
5 please the Court:

6 This case turns on three points. First, the  
7 statute at issue is a content-based restriction on  
8 speech which is therefore presumptively invalid,  
9 requires heightened scrutiny, which Petitioners  
10 acknowledge they have not satisfied, unless one of the  
11 exceptions to heightened scrutiny is applicable here,  
12 those being exceptions which as the Court has explained  
13 in R.A.V. and Davenport, are limited to circumstances  
14 where there is no real risk of viewpoint suppression.

15 JUSTICE SCALIA: Mr. Collins, suppose -- I  
16 gather Idaho doesn't have it, but suppose Idaho wanted a  
17 Hatch Act similar to the Federal Hatch Act that  
18 prohibits Federal employees from engaging in political  
19 activity, and suppose it decided that not only should  
20 the State employees at the capital not engage in  
21 political activities, but it's a problem for any  
22 governmental employee to do that; they ought to be  
23 neutral and we don't want patronage to be passed out on  
24 the basis of whether they are campaigning for one party  
25 or another, and we don't want them to be coerced into

1 campaigning for one party or another. Now, I assume  
2 that such a law would violate the First Amendment if it  
3 were extended to all employers. Saying no -- no company  
4 employee, no private employee can engage in political  
5 activity would surely violate the First Amendment.  
6 Would it violate the First Amendment if it was extended?  
7 Certainly, it doesn't when it's applied to State  
8 employees because there are a lot of State Hatch Acts.  
9 And you're saying it would violate the First Amendment  
10 as applied to county and municipal employees?

11 MR. COLLINS: Not at all, Your Honor.

12 JUSTICE SCALIA: Why not?

13 MR. COLLINS: We don't take that position at  
14 all, because, as the Court has indicated in Letter  
15 Carriers and Broadrick and other cases, there is a  
16 compelling interest in a statute which says that  
17 government employees -- and it could be State or local  
18 -- will not be performing their jobs as servants of  
19 politics.

20 JUSTICE SCALIA: You're saying -- you're  
21 analogizing these to private entities. That's your  
22 whole point.

23 MR. COLLINS: That's not our point.

24 JUSTICE SCALIA: This is not a creature of  
25 the State. You're saying what the First Amendment -- as

1 the First Amendment applies to private individuals, so  
2 it applies here. This is regulation by the State,  
3 rather than the State's control of State government.

4 MR. COLLINS: We are saying that, Your  
5 Honor, because the only defense that the State can  
6 possibly offer here to this content discrimination is  
7 the forum notion that the State has introduced. In the  
8 case of the Hatch Act --

9 JUSTICE KENNEDY: Now --

10 MR. COLLINS: -- it's not a forum analysis.

11 JUSTICE KENNEDY: Let me just establish  
12 something at the outset. You have conceded below, and I  
13 thought I saw this in your brief as well, that as to the  
14 State of Idaho, its determination not to allow the  
15 deductibility is permissible.

16 MR. COLLINS: That's correct, Your Honor.

17 JUSTICE KENNEDY: All right. So, we begin  
18 with the proposition that a State may do this if it  
19 chooses; i.e., this -- refused on its own to have the  
20 payroll deduction.

21 MR. COLLINS: Yes. And the reason for that  
22 is that, under Regan and Finley and Rust and the other  
23 cases, the State has perfect freedom to decide not to  
24 devote its own resources to that expenditure. But  
25 interestingly and very much on point here --

1                   JUSTICE KENNEDY:  And if -- and if a State  
2 had a system in which all payroll deductions were  
3 routine -- by local entities -- were routinely  
4 controlled by the State, the State did all the pay roles  
5 for the local entities, then it -- in that case the  
6 nondeductibility would also be permitted, I take it.

7                   MR. COLLINS:  Yes, Your Honor, and let me  
8 explain because those are two very -- the answer to both  
9 questions is "yes" but for two very different reasons.  
10 The answer to the second question is that our contention  
11 is not that the State is never a proprietor and never  
12 entitled to the kind of deference that goes with the  
13 proprietor when it's dealing with local government  
14 programs.  As the Court noted in the Council of  
15 Greenberg case, a government can become a proprietor  
16 with respect to property or programs it doesn't actually  
17 own.  Our point is quite simply that the State has not  
18 done that here.  That's why, if the State had done it,  
19 if the State said we are going to dictate the nature of  
20 payroll deduction systems for local governments, the  
21 State could do that, and it would be then --

22                   CHIEF JUSTICE ROBERTS:  Did you have any  
23 doubt how they would?  I mean, they passed a law  
24 dictating that with respect to everybody.  And then it's  
25 pared down by litigation and concessions.  So, we don't

1 have any real question of what the State is wanting to  
2 do here. It's --

3 MR. COLLINS: What I'm suggesting, Mr. Chief  
4 Justice, is that since we are beginning with a  
5 content-based restriction -- and I do want to emphasize  
6 it's a law here which says that for all employers --  
7 public, private, or State -- the only expenditure you  
8 can't make through payroll deduction is for political  
9 activities, and also the only resource of an employer  
10 that can't be used for any kind of political activity is  
11 payroll deduction, this being in a statute targeted at  
12 employee support of union political activity. So, we  
13 have a content-based restriction, and the question is:  
14 Can it come within an exception to the heightened  
15 scrutiny that Petitioners acknowledge they can't  
16 satisfy?

17 But when I'm suggesting that the State could  
18 come within reduced scrutiny if it were actually  
19 managing the payroll systems, I'm referring to  
20 situations like Council of Greenburg, where the  
21 government with respect to a particular kind of facility  
22 or program says, we don't own it, but we -- it's an  
23 integral part of a system that we are managing,  
24 establishing, not just saying -- not just to say all we  
25 care about is there's one kind of speech we don't want

1 to go on there. If the government says we have -- we  
2 want to be the manager, the operator of a particular  
3 kind of local government operation, the State is free to  
4 do that --

5 JUSTICE GINSBURG: So, if the State wants  
6 to, it's because it can exercise a heavy hand and  
7 control its local units, but if it wants to give the  
8 local units discretion, then it has to leave it to the  
9 local units whether or not they want to enact such a  
10 ban. That's your position?

11 MR. COLLINS: No. It's not a question of  
12 whether the State has the power to regulate. The  
13 question is if the State regulation is in the form of a  
14 content-based restriction on speech, can it elude  
15 heightened scrutiny? And --

16 JUSTICE GINSBURG: My question really is, if  
17 you look at this at the most basic level, we have two  
18 important concessions. You don't question the  
19 constitutionality of the ban as to State employees. And  
20 the other side doesn't question that it is  
21 unconstitutional as to private employees. So here we  
22 have State local employees. Do we bracket them with  
23 State employees or with private employees as  
24 essentially --

25 MR. COLLINS: Your Honor, functionally

1 that's the question, but I think analytically we don't  
2 see it that way because the question is, as we see it,  
3 is the State, with regard to this challenged statute in  
4 its application to the local governments, acting in a  
5 capacity that entitles it to be free from the normal  
6 First Amendment scrutiny that it acknowledges it would  
7 fail -- and that's where our point is. The reason it is  
8 free from that scrutiny as to its own employees is  
9 because of the cases that say the government doesn't  
10 have to spend its money.

11 JUSTICE BREYER: It's at that part, just  
12 where you are, that I've always had a hard time not for  
13 lack of trying. I don't understand what the word  
14 "content-based" means, and I know it's all over the law,  
15 but I've never understood it and maybe since you're  
16 relying on it 15 times you can explain it. And the  
17 thing I don't understand it about is it seems to me  
18 government engages in thousands of different kinds of  
19 activity, and there isn't some special test. When they  
20 say that in the jury room, the jury room is there for  
21 juries; it's not to show movies of Steven Spielberg.  
22 And there isn't some special test when you say the  
23 purpose of the biology class is to teach biology, and we  
24 don't want people coming in here teaching some other  
25 thing. I don't understand what this special test called

1 "content-based" is, and that's rather a deep  
2 misunderstanding on my part, but since you're depending  
3 on it, why don't you take 30 seconds or 45 seconds to  
4 see if you can help me?

5 MR. COLLINS: Well, Justice Breyer, the --  
6 the concept of content discrimination may blur on some  
7 edges, but one thing that the Court has been clear on is  
8 that when a government says speech -- one form of speech  
9 will not be allowed and that will be political speech,  
10 that is treated as requiring heightened scrutiny. And I  
11 should say both --

12 JUSTICE BREYER: It doesn't -- for example,  
13 in biology class, the school board says: You know,  
14 biology teacher, I want you to teach biology; I don't  
15 want you to teach politics. And then there is some  
16 special scrutiny about how the biology teacher is to  
17 teach or -- but they say just face it. The jury room is  
18 for juries. It's not for politics. All that is subject  
19 to some special First Amendment test?

20 MR. COLLINS: Well, first of all, Your  
21 Honor, all of those would pass muster either because --

22 JUSTICE BREYER: They might. They might.  
23 But you know a lot of them -- you know you could show  
24 movies in jury rooms in the evening and people might  
25 find it much better.

1 (Laughter.)

2 MR. COLLINS: They would pass muster either  
3 because they are within exceptions to heightened  
4 scrutiny -- because not all content distinctions require  
5 heightened scrutiny -- or they would pass muster even  
6 under heightened scrutiny. But one kind of content  
7 distinction that the Court consistently has indicated  
8 requires heightened scrutiny is in Davenport -- well, in  
9 Burson, a majority court at least, you can talk about  
10 anything you want near the polling place but not  
11 politics. That was content. Consolidated Edison -- you  
12 can talk about anything -- billing envelopes but not  
13 controversial issues. Davenport, very recently -- from  
14 fees that individuals are required to pay to you -- and  
15 in this case we are not talking about any compelled fees  
16 -- but with compelled fees, you can use them for  
17 anything you want but not politics.

18 CHIEF JUSTICE ROBERTS: Since we are in  
19 confessional mode, I've never understood forum analysis.  
20 I don't understand how --

21 (Laughter.)

22 CHIEF JUSTICE ROBERTS: -- how you can say  
23 that this payroll deduction system is some kind of a  
24 forum. A forum is, you know, the corner at Hyde Park or  
25 something. This is -- this is something that

1 governmental entities and private entities do, and they  
2 can either exclude this type of activity or they can't.  
3 And the problem with the forum analysis is it's all or  
4 nothing. I mean -- and both parties seem to agree: If  
5 it's a State forum, you could do it; if it's a private  
6 forum or if it's an open forum, you can't. That's not  
7 how we usually analyze these things.

8 MR. COLLINS: Well, two points in response  
9 to that, Mr. Chief Justice. First, we are not the ones  
10 who say that this must be looked at under forum  
11 analysis. We'd be quite happy, and I think the most  
12 sensible way actually to approach the case is simply  
13 that this is a content distinction, and it's  
14 presumptively invalid, and there is no sufficient  
15 justification.

16 The other side says wait a minute; there is  
17 a line of cases that says that when there is a forum  
18 involved of the government, and the government is  
19 restricting speech in that forum, there can be an  
20 exception to heightened scrutiny. In Davenport --

21 JUSTICE ALITO: You say there is a  
22 sufficient -- presumably you concede there is a  
23 sufficient justification for this content-based  
24 restriction as to State employees.

25 MR. COLLINS: What we say as to the State

1 employees, Justice Alito, is that it falls under the  
2 Regan-Findley line of cases; that you don't even get to  
3 a First Amendment scrutiny because it's under the  
4 doctrine that when the government says we won't spend  
5 our money on something, that's not an impingement of  
6 speech in the first place. And interestingly --

7 JUSTICE ALITO: So if there is State money  
8 involved in these payroll systems that would be  
9 sufficient?

10 MR. COLLINS: If the State said you can't  
11 use our money for payroll deductions of this kind then  
12 it would arguably be into that category. But I think  
13 what's important to recognize --

14 JUSTICE GINSBURG: Isn't there -- isn't  
15 there some State tax money that goes to fund local  
16 units? I mean, you say here there are State taxpayers'  
17 funds involved; therefore the State doesn't have to pay  
18 for what it doesn't want to buy. But aren't there State  
19 funds that fund local government entities?

20 MR. SMITH: There is State funding, but the  
21 reason, I believe, why the Respondents -- excuse me the  
22 Petitioners -- have conceded that the subsidization case  
23 law does not apply to this statute in its application to  
24 the local governments, is that what the subsidization  
25 cases are talking about -- cases like Regan, Rust,

1 Findley -- are situations where we'll say the State is  
2 involved in developing a program which it will pay for,  
3 and it says because we are paying for that, our  
4 priorities are to be honored.

5           The government in this instance, it's been  
6 conceded, as the Court of Appeals pointed out, there is  
7 no actual subsidization to the payroll systems. In  
8 effect the State says we have some money we give to our  
9 local governments -- it's, by no means, all revenue, but  
10 they get some money. But we -- the State does not set  
11 the kinds of budget priorities that are protected by the  
12 Regan line of cases. The -- the State in effect  
13 says that as far as payroll systems and in fact as far  
14 as most employment matters and most administrative  
15 matters are concerned, here's some money for you, local  
16 government. The only thing we say about it is don't use  
17 it for political payroll deductions.

18           JUSTICE SOUTER: No, but another way of  
19 looking at it is to say in each of these instances --  
20 whether we are talking about the State taxing in order  
21 to perform functions at the State level or whether the  
22 State is authorizing taxation for functions for  
23 functions to be performed at the local level -- in all  
24 of these instances, the State is in the position to say  
25 not that it is sort of our money, but to say it is

1 public money. And our decision is that public money  
2 will not be used to -- by a public entity to underwrite  
3 political activity.

4           And why isn't the State in exactly the same  
5 position in making that judgment, whether it's talking  
6 about money that goes directly into the State coffer or  
7 public tax money that happens to be going into a -- a  
8 town coffer?

9           MR. COLLINS: Because, Your Honor, I think  
10 the courts never applied the Regan subsidization  
11 analysis in that kind of context --

12           JUSTICE SOUTER: But I'm -- I'm asking you  
13 why shouldn't --

14           MR. COLLINS: It should not --

15           JUSTICE SOUTER: Why shouldn't we, on the  
16 theory that what is important is not which particular  
17 coffer the penny goes into, but the fact that it is  
18 public money, i.e., money being raised from taxpayers  
19 under a statute passed by the State authorizing  
20 taxation; and it is going to -- and its justification  
21 for taxation is the performance of public functions.  
22 And if the State can say it is not a proper public  
23 function when the money is being filtered through our  
24 particular treasury, why isn't it equally valid for the  
25 State legislature to say that when the money is being

1 filtered through a local treasury?

2 MR. COLLINS: For the following reason, I  
3 think, Justice Souter. That -- the doctrine that says  
4 when a government is refusing to subsidize something  
5 there is no violation in the first place of the First  
6 Amendment, and therefore except in the rarest, rarest of  
7 cases -- of legal services cases -- the rarest of cases  
8 there can be no First Amendment claim; that's very  
9 powerful medicine and it turns on the notion that --  
10 somewhat alike but different from in detail the  
11 proprietor concept -- but it turns on the notion that  
12 the government is making judgments about how its money  
13 is going to be used. It decides what it wants its money  
14 to be used for, and we are going to honor that --

15 JUSTICE SOUTER: Yes, but what you're saying  
16 is, I -- you're saying in effect that I -- that you  
17 reject my -- my hypothetical assumption here, that what  
18 we ought to regard as the proper characterization of the  
19 money is not "our" State money, but public money raised  
20 under a system of public taxation; and you're saying you  
21 should not go -- you should not characterize the funds  
22 that way.

23 Of course that's your position --

24 MR. COLLINS: No, I --

25 JUSTICE SOUTER: -- because if you do

1 characterize the funds that way, it seems to me you're  
2 in trouble.

3 MR. COLLINS: No, the --

4 JUSTICE SOUTER: But why shouldn't I  
5 characterize them that way?

6 MR. COLLINS: No -- even characterizing --  
7 even characterizing it that way, the reason that I think  
8 the analysis breaks down as to applying subsidization  
9 law, is that the subsidization law doctrine -- the  
10 subsidization doctrine -- Regan and those cases -- as  
11 the Court has explained it, it is to protect the  
12 prerogatives of the government that is making decisions  
13 about how it wants particular programs to be operated.

14 JUSTICE SOUTER: The State -- the State  
15 legislature is making a decision as to how it wants the  
16 -- the programs which comprise local government to be  
17 operated.

18 MR. SMITH: But the difference, Your Honor,  
19 in all of the other cases one could look at Regan and  
20 the like, there is a program where the government is  
21 involved in its manifold details. The government  
22 determines the purpose of the program; it has an  
23 overriding interest in the program; and it says in the  
24 course of that, in the course of dealing with this  
25 program, we don't want government money to be used for

1 the following things.

2           If you -- if that were extended to say that  
3 there will be essentially no First Amendment claim  
4 whenever the government says as to some program that it  
5 has no other involvement and that it has no other  
6 interest in, we don't want the following speech, and  
7 over here we don't have the following speech --

8           JUSTICE SOUTER: Well, but the point in the  
9 case that you concede that the government may make that  
10 choice is that the government is subsidizing it by the  
11 activity which the government is refusing to perform.  
12 So it's not nearly a case of saying there shall be this  
13 kind of speech and not that kind of speech. In each  
14 instance there is a decision being made in my  
15 hypothetical that the government will not subsidize that  
16 kind of activity, that kind of speech, by using public  
17 money.

18           MR. COLLINS: But the difference for First  
19 Amendment analysis, I would submit, Your Honor, and the  
20 reason why I think the subsidization doctrine has been  
21 confined in the areas it's been confined, is when we are  
22 talking in this case, for example, about the State, the  
23 State determines whether it's going to have a payroll  
24 deduction system. It determines whether it's going to  
25 allow deductions for charities; whether it's going to

1 allow deductions for this that and the other. It  
2 determines who -- who's going to administer the program,  
3 how expensive it's going to be, all of those things.  
4 Its money is going into that program and it is as to  
5 that program making all of these decisions about how its  
6 money is going to be spent. That is -- and if the  
7 course of that it says we don't want this one, this  
8 element as part of it just as we do want charitable, we  
9 don't want political; maybe we don't want charitable  
10 either -- it is a different situation in terms of basic  
11 First Amendment analysis, I believe, if you have a  
12 government saying we don't care anything about  
13 government payroll systems.

14 JUSTICE STEVENS: Mr. Collins, may I  
15 interrupt you and ask you the converse of the question I  
16 asked your opponent?

17 He conceded that there was -- it's  
18 unconstitutional what you call it, content  
19 discrimination -- whatever -- to have the deduction from  
20 the private sector, but the counties were different; and  
21 he justified the counties on the ground that the State's  
22 interest in avoiding taking a position with regard to  
23 union matters justifies it. But that's the only  
24 justification for the -- it's not the administrative  
25 justification -- this statute wasn't enacted to save the

1 government administrative expenses. The purpose of the  
2 statute is perfectly clear, and I'm surprised that you  
3 concede that it's constitutional as applied to the State  
4 government, when there's no evidence whatsoever that it  
5 serves the purpose that everybody is talking about.

6 MR. COLLINS: Your Honor, we conceded that  
7 reluctantly under the view that where the question is  
8 whether the State -- our claim against the State would  
9 say we are -- we are going to require the State to start  
10 devoting money that it doesn't want to spend as we -- we  
11 have chosen given the force of cases like Regan, not to  
12 make that contention, but to accept the ruling that the  
13 State's refusal to spend money on its own programs is in  
14 a different category.

15 JUSTICE STEVENS: But this is not a case  
16 involving a State's decision not to take -- not to spend  
17 the time and energy to do payroll deductions because  
18 they do them for everybody else. It's simply based on  
19 the reason for the payroll deduction, which is, in your  
20 view, an impermissible reason. Is that not correct?

21 MR. COLLINS: That's correct, Your Honor.  
22 And if it were clear that as to what kinds of reasons  
23 are considered impermissible under subsidization --

24 JUSTICE STEVENS: How can it not be clear?  
25 It enacted a general statute that had the same

1 justification throughout the State. And now you're  
2 justifying on the ground it doesn't apply to all their  
3 other government activities because they allow payroll  
4 deductions.

5 MR. COLLINS: Well, in Davenport, Your  
6 Honor, the Court did indicate that a statute that  
7 applies to public and private, even though it's a  
8 unitary statute, you have to analyze it separately in  
9 the two contexts.

10 But our point, though -- I think the point  
11 that is being lost, we don't see this as a question  
12 about what can the State do with respect to its own  
13 operations as such and what can it do with respect to  
14 local government operations. We see it as a case that  
15 asks the question whether a content distinction directed  
16 at certain kinds of political activities that would  
17 normally require heightened scrutiny gets a pass from  
18 that scrutiny because it's in a "forum"?

19 And we -- our position is quite simply that  
20 if the State were, in fact, managing these local  
21 government payroll systems, which it would have a  
22 perfect right to do, that then it could avail itself of  
23 that analysis, but because it doesn't, it cannot.

24 JUSTICE BREYER: I see your argument.

25 JUSTICE KENNEDY: Suppose the State at the

1 State level says this is a contentious area, we want to  
2 stay out of it. We are going to be neutral. We are  
3 simply not allowing payroll deduction for right to work  
4 clauses, for union clauses. We don't want this. If the  
5 State can say that, and your concession indicates to me  
6 that it can, then why can't it tell its subdivisions you  
7 have to be efficient, we don't want arguments from one  
8 city to the next city about payroll deduction that's  
9 going to consume the time of the city council's, the  
10 time of the citizens, we want to take this off the table  
11 for you just the way we've taken it off the table for  
12 us?

13 MR. COLLINS: Because I think the difference  
14 here, Your Honor, as I understand the case law, is that  
15 when the State is simply saying we choose not to spend  
16 our own money on this activity, it does not have the  
17 same burden of explaining why it's made that choice that  
18 it has when it reaches out and says, and by the way, we  
19 don't want local government or even private government  
20 --

21 JUSTICE KENNEDY: Well, of course, that's  
22 the issue. This is a very strong Federal interest in  
23 allowing the States to organize their governmental  
24 systems the way they choose. Our gun control  
25 registration case, where we said the Federal Government

1 cannot tell the counties that it has certain duties for  
2 gun control.

3 MR. COLLINS: And we have no quarrel at all  
4 with that notion. Our position in no way dictates -- in  
5 no way has the First Amendment dictating how a State is  
6 going to structure its government. It simply says,  
7 look, we begin with the proposition that normally this  
8 restriction on public speech would be heightened to  
9 public scrutiny.

10 JUSTICE ALITO: Well, suppose that I decided  
11 to --

12 JUSTICE KENNEDY: I -- I -- I'm not sure  
13 that's right. I'm not sure the State isn't saying we  
14 want to determine how our government is structured in  
15 this respect.

16 MR. COLLINS: If the -- if the State wants  
17 to have a uniform law for itself -- for public  
18 employer -- employees -- its own employees and local  
19 government employees because of some unitary interest  
20 that the State wants to pursue, there is nothing wrong  
21 with the state pursuing that objective. But when it  
22 does it through restricting political speech, it has to  
23 either satisfy heightened scrutiny or come within one of  
24 the exceptions.

25 And the distinction -- maybe I can put it

1 this way, Justice Kennedy. The reason why for First  
2 Amendment scrutiny analysis, there is a sharp  
3 distinction in this case between what the State's  
4 treatment of its own employees and the State treatment  
5 of local governments is -- I think it's basically  
6 threefold.

7 That, first, when the State says, we don't  
8 choose to allow certain speech in our own forum, it is  
9 simply declining to facilitate speech that couldn't take  
10 place without an affirmative grant. When it says to  
11 local governments, who in the state of nature can allow  
12 whatever they want in the way of speech, when it says  
13 that there we will not allow these kinds of deductions,  
14 it's blocking speech that would take place but for the  
15 government's intervention. And so --

16 JUSTICE KENNEDY: I'll read Russo again, but  
17 I didn't think Pocatello, Idaho, was part of the state  
18 of major.

19 MR. COLLINS: I just meant that no -- it's  
20 this simple, Justice Kennedy, and the point I'm trying  
21 to make is that for someone to get access to  
22 political -- to a payroll deduction system of the State  
23 government, it needs an affirmative grant from the  
24 State. To have access to the use of payroll deduction  
25 from local governments, it doesn't need an affirmative

1 grant from the State. It simply needs the State not to  
2 interfere and reject the local government.

3 So it's -- it's a different kind of action.  
4 But equally important, the basis for the kind of relaxed  
5 scrutiny that the -- that the Petitioners have argued  
6 for, the forum cases like *Cornelius*, et cetera, those  
7 are all situations where a government, that is, that has  
8 established and managed a facility is determining on a  
9 day-to-day basis what's the purpose of our program, what  
10 are we going to allow --

11 JUSTICE KENNEDY: Could you help me with  
12 this? Would you object if we analyzed this as an  
13 unconstitutional condition case? I don't know that you  
14 would prevail or not. But it -- the forum analysis  
15 doesn't seem to me to quite fit.

16 MR. COLLINS: It's fine with me, but if you  
17 analyze it in any way that says that heightened scrutiny  
18 is applicable and there is no exception --

19 JUSTICE BREYER: Why is that?

20 (Laughter.)

21 MR. COLLINS -- the problem with  
22 unconstitutional condition -- if it were a condition on  
23 the local governments, then it's not really within the  
24 unconstitutional condition doctrine --

25 JUSTICE BREYER: Are you saying -- is it

1 your view that heightened scrutiny applies whenever a  
2 government tells any group that wants to raise money for  
3 political purposes in any way they want involving the  
4 government that it can't?

5 MR. COLLINS: No, Your Honor.

6 JUSTICE BREYER: No. Okay. I thought the  
7 answer would be no.

8 Then, will you try to say in a sentence or  
9 two if the answer is it heightened scrutiny doesn't  
10 apply to any kind of an effort to raise money for  
11 political purposes where they say to the government you  
12 got to help me, when does it apply and when doesn't it?

13 MR. COLLINS: The -- well, there are  
14 exceptions to heightened scrutiny where the government  
15 is acting as a proprietor. There are exceptions to  
16 heightened scrutiny where the government --

17 JUSTICE BREYER: But then you are making --  
18 say it always applies except in a few little exceptions.  
19 I mean I know there is one for government speech and so  
20 forth. But you're saying whenever the government tells  
21 a person you can't, for example, go to the city hall and  
22 raise money, you can't do it in the jury room, you can't  
23 raise money here, you can't raise money there, dah, dah,  
24 dah, or you can't speak here, you can't -- it's always  
25 heightened scrutiny?

1 MR. COLLINS: Well, if the government is  
2 allowing other speech it would be heightened scrutiny.  
3 But it would --

4 JUSTICE BREYER: You cannot -- you have to  
5 use heightened scrutiny when the FDA, for example -- you  
6 know, the case I wrote in -- the FDA says you cannot  
7 advertise on a label for a drug. We don't want  
8 advertising. We don't want advertising on the label.  
9 That's heightened scrutiny.

10 MR. COLLINS: It -- if it's -- if it's  
11 commercial speech, it might fall under a different  
12 standard. It would easily pass it is the point. I  
13 mean, this is no question that a lot of situations  
14 easily pass heightened scrutiny, and a lot of  
15 circumstances are an exception. And the problem in this  
16 case is that the Petitioner's sole submission --

17 JUSTICE BREYER: And regulation of  
18 government employees is the same?

19 MR. COLLINS: It basically would trigger  
20 the -- the heightened scrutiny except where the  
21 government is involved. When the government is involved  
22 in managing employees in just as when it's managing a  
23 forum, there -- there could be a different analysis.

24 But the problem -- where the shoe doesn't  
25 fit the Petitioner's are trying to put on this case is

1 Petitioner's concede everything there is to concede  
2 about this case and then say but it's just like  
3 Cornelius, and it's just the government deciding what to  
4 do with its own programs. And our point is quite simply  
5 that unlike every case where the court has applied  
6 relaxed scrutiny in a proprietary situation, this is a  
7 case where the government does not play any role with  
8 respect to these programs other than to limit the  
9 speech.

10 CHIEF JUSTICE ROBERTS: Why are you -- why  
11 are you focusing on heightened scrutiny? We have a  
12 whole series of cases about employee speech, Garcetti  
13 and Pickering, where it's quite different than  
14 heightened scrutiny, and here we are talking about the  
15 employees being able to deduct checkoffs from their  
16 paycheck for political speech?

17 MR. COLLINS: If I may answer that question,  
18 Mr. Chief Justice? It's correct that where a law is  
19 based on employee behavior, that other kinds of scrutiny  
20 can be involved. Garcetti is, obviously if it's speech  
21 in your capacity of doing your job.

22 But the Hatch Act cases, letter carriers use  
23 the Pickering balance. That's not a mere reasonableness  
24 test by a long shot. That's a comparison as in the  
25 NT -- National Treasury Employees honoraria case, same

1 situation, a balancing test between the harm that's  
2 perceived from allowing the speech and the benefits of  
3 the speech to the individual.

4 So, there can be that separate analysis,  
5 which if it were applied here, the State would also  
6 fail. The State says it only prevails under a  
7 reasonableness test. And none of those are near  
8 reasonableness analyses.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 Mr. Smith, you have one minute.

11 REBUTTAL ARGUMENT OF CLAY R. SMITH

12 ON BEHALF OF THE PETITIONERS

13 MR. SMITH: Two points that I think are  
14 critical. First, the concession with respect to the  
15 State government employees based on Regan in itself  
16 entails a concession as to the reasonableness and the  
17 due point neutrality of the statute.

18 Two, Respondents' theory of government with  
19 respect to the legislature having to speak in some kind  
20 of specific terms, we would suggest, ignores -- or asks  
21 this Court to create entirely new case law. But it also  
22 ignores in this situation the fact that the Idaho  
23 legislature contributes in 2006-2007 about half of the  
24 funds used by school districts in the State. And over  
25 80 percent of those funds that go into what is known as

1 a general maintenance and operation fund from which  
2 salary compensation is paid.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
5 The case is submitted.

6 (Whereupon, at 2:02 p.m., the case in the  
7 above-entitled matter was submitted.)

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