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.                  :

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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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1                    C O N T E N T S

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1                P R O C E E D I N G S

2                                    (11:08 a.m.)

3          CHIEF JUSTICE ROBERTS:  We'll hear argument

4  next in Case 07-869, Ysursa v. Pocatello Education

5  Association.

6          Mr. Smith.

7          ORAL ARGUMENT OF CLAY R. SMITH

8          ON BEHALF OF THE PETITIONERS

9          MR. SMITH:  Mr. Chief Justice, and may it

10 please the Court:

11          This case is narrowed to a single, but from

12 the Petitioner's perspective a critical, dispute over

13 the scope of internal State sovereignty:  whether the

14 First Amendment trumps the otherwise existing authority

15 of the Idaho legislature to direct political

16 subdivisions of the State to take an action, here

17 restricting access to their payroll systems, that the

18 subdivisions could take independently without violating

19 the Amendment.

20          The genesis of this dispute is Idaho Code

21 Section 44-2004(2), which was adopted in 2003.  That

22 provision prohibits State and local government public

23 employers from deducting amounts for political

24 activities from the payroll checks due to their

25 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 engaged

11   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

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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 sort of paired off a

5   number of the people who would otherwise be covered, and

6   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 KENNEDY:  If you -- if you think of

16   the case as a principal-agent case so that the principal

17   can direct the agent as to what to do, the agent being

18   the county, then it seems to me that the unions might

19   still have an argument that this is an unconstitutional

20   condition.

21             I've been looking for ways to examine this

22   case.  The public forum doesn't really work for me.

23   Subsidy doesn't really work for me.  It seems to me to

24   be an unconstitutional-condition case.  At least that's

25   the argument.

1            That doesn't mean you necessarily can't

2    prevail.  But suppose the State told the city:  You

3    can't have a parade that you sponsor for this particular

4    cause.  That would raise an unconstitutional-conditions

5    argument; wouldn't it?

6            MR. SMITH:  It might, Your Honor, but that

7    situation, of course, is not the situation presented

8    here.

9            JUSTICE KENNEDY:  Why isn't it?  And I say

10   that because I think that follows on Justice Stevens's

11   line of questioning.  I didn't mean to interrupt him,

12   but it seems to me that is consistent with what he is

13   asking.

14           MR. SMITH:  Because the statute at issue

15   here, Justice Kennedy, speaks across the board to a

16   specific kind of conduct, political activities.  It does

17   so in the a viewpoint-neutral fashion.  To prohibit a

18   particular parade might well raise viewpoint

19   non-neutrality issues.

20           CHIEF JUSTICE ROBERTS:  Yes, because the

21   State couldn't --

22           JUSTICE KENNEDY:  You stand up and say that

23   this isn't viewpoint -- that this is -- that this is

24   viewpoint-based.  Isn't it where the union --  and

25   aren't they right about that?

1               MR. SMITH:  Your Honor, they are incorrect

2    about that.  The district court concluded that the

3    statute is viewpoint-neutral.  Indeed --

4               JUSTICE GINSBURG:  But does it get at any

5    speech other than union speech?  I mean you say, yes, it

6    is content-based, but it's viewpoint neutral.  But it

7    seems that what is banned by the statute is union

8    speech.  Is any other organization affected?  Does the

9    ban affect any other organization?  Isn't it simply

10   union speech that's at stake?

11              MR. SMITH:  The answer is no.  It -- the --

12   the statute just -- does not just affect union speech by

13   its literal terms.

14              JUSTICE GINSBURG:  But, in practice, is

15   there any other application?

16              MR. SMITH:  Well, there is no evidence in

17   the record, Your Honor, as to any other entity who is

18   affected by the statute.  But that is hardly -- that's

19   hardly remarkable, given the fact that the plaintiffs in

20   the litigation are six labor organizations.  I should

21   add that --

22              JUSTICE SCALIA:  Are there -- are there in

23   counties some charitable drives that occur annually and

24   that permit employees to donate to those charities

25   through deductions from their wages?

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1         MR. SMITH:  There are, Your Honor.

2         JUSTICE SCALIA:  And would they presumably

3  be covered by this?  United Fund drives, so-called, my

4  -- my recollection is that usually the contributions to

5  that simply come out of -- are deducted from the wages.

6  And if they existed in the counties, presumably they

7  would have been covered.  But we don't know if they

8  would.

9         MR. SMITH:  Well, to the extent that the --

10 the contribution was for political activities --

11        JUSTICE SCALIA:  Oh, it's only political

12 activities?

13        MR. SMITH:  That's correct.

14        JUSTICE SCALIA:  I see.  Well, none of those

15 would allow that --

16        JUSTICE BREYER:  But if in fact there is a

17 charity, which charity in Idaho is a charity that makes

18 all of its contributions to help support right-to-work

19 laws.  All right.  So that charity goes and says, could

20 you -- we'd like a payroll deduction.  Can they get it,

21 or not?

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

23 I -- I don't know the answer.

24        JUSTICE BREYER:  You don't know.  Okay.  So,

25 then, we do know this.  We do know -- what I'm wondering

1    is:  Isn't this case, to me, quite confused about

2    something fairly simple?  The question would be:  Look,

3    one, do you or do you not in Idaho allow anybody to have

4    payroll deductions for anything?  And I take it your

5    answer to that question is:  Yes, we do allow some

6    payroll deductions for some things.  Okay?

7              So then we look at this one, and it says:

8    No payroll deductions for union activities that are

9    political.  All right?  Now, you either do have or you

10   do not have a justification for that difference.  If you

11   have a reasonable, or whatever the sufficient test is,

12   justification for the difference, you win.  And if you

13   don't, you lose.  And, indeed, whether you are the State

14   or the county could have to do with the plausibility of

15   the justification.

16             Here we are, end of case, traditional.  You

17   just -- you didn't argue it that way, I guess, below.

18   What's wrong with that?

19             MR. SMITH:  Your Honor, in fact, we argued

20   below that there was no constitutional right of access

21   to the payroll system for purposes of making political

22   contributions.  And let me reiterate at this --

23             JUSTICE BREYER:  There certainly, I would

24   think, would be a problem if the right-to-work people

25   can get there.  And you are not going to let the unions

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1    get there.  But I don't know the facts.  So shouldn't we

2    just send this case back and say:  Please look at what

3    the situation is?  If they have to treat some people one

4    way, some people another, bad; if they don't, everybody

5    is treated alike for good reason, probably okay.

6              MR. SMITH:  Well, the -- I would suggest

7    that a remand for that purpose would be futile.  The

8    district court, as I said before, concluded that the

9    statute is viewpoint neutral.  And let me stress that

10   the term "political activities" does not -- is not

11   defined with reference to unions or speech by other

12   entities that might be controlled by unions.

13             It addresses political contributions for

14   electoral matters, independent expenditures, and

15   expenditures to political parties.

16             JUSTICE SCALIA:  Would -- would they include

17   contributions to an organization that makes

18   contributions to political parties --

19             MR. SMITH:  Yes, to the --

20             JUSTICE SCALIA:  -- such as a right-to

21   work-organization?

22             MR. SMITH:  To the extent that the -- the

23   organization is, for example, a political action

24   committee, it would.

25             And let me go back to Justice Ginsburg's

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1   question for a moment.  Had the legislature intended

2   44-2004(2) to apply only to unions, they would have --

3   it would have been engaging in a redundancy because

4   under another provision of the same legislation,

5   44-2603(1)(b)(iv), which appears at petition appendix

6   70, the Idaho legislature proscribed amounts being --

7   amounts -- required all amounts to be paid -- paid to a

8   separate segregated fund which was established pursuant

9   to the legislation that was invalidated by the district

10  court, required those kinds of contributions to be made

11  directly by the employee and not through -- or not by

12  the employee's employer.

13              JUSTICE SCALIA:  Does the State give some

14  particular favor to unions?  I mean, does it allow --

15  what -- what is the situation?  Can you be forced to

16  contribute to the union even though you're not a union

17  member?

18              MR. SMITH:  No, Your Honor.  The --

19  44-2004(2) is part of the Idaho Right to Work Act, which

20  was adopted in the mid 1980s.  It allows amounts to be

21  deducted through payroll checkoffs for union dues.

22              JUSTICE SCALIA:  But unions do have a

23  special prerogative which -- which no other

24  organizations, as far as you're aware, have in the

25  State, which is to have money deducted from people's

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1    payrolls?

2            MR. SMITH:  That's -- that's correct.  The

3    --

4            CHIEF JUSTICE ROBERTS:  No other

5    organization other than the Federal, State and local

6    governments.

7            MR. SMITH:  True.  But let -- let me -- let

8    me continue with my response to Justice Scalia's

9    question.

10           The special prerogative that, for example,

11   the Pocatello Education Association or the firefighters

12   union has is the ability to engage in collective

13   bargaining pursuant to State statute as the exclusive

14   bargaining representative of, for example, the Pocatello

15   School District's teachers.

16           That exclusivity which is granted to a

17   limited number of -- of -- in fact, two areas under

18   Colorado -- excuse me -- under Idaho law, namely,

19   firefighters and teachers, is the extraordinary benefit

20   that unions have.

21           JUSTICE SCALIA:  Yes.  The point of my

22   question is it doesn't seem to be terribly

23   discriminatory if indeed the only organizations in the

24   State that are given the right, whether by Federal or

25   State law, to deduct, private organizations, given the

1    right to deduct from the salary a municipal or private

2    employer pays.  It doesn't seem to me particularly

3    discriminatory to say that, moreover, in making those

4    deductions, no part of it will be given for political

5    activities.  I mean you're only addressing a narrow

6    class, but it's a narrow class that has a special

7    benefit.

8              MR. SMITH:  Well, I would agree that -- that

9    unions have, and particularly these -- particularly the

10   Respondents have a special benefit.  But again, I go

11   back to the basic point that 2004(2) addresses all

12   public employers or public employees and is not limited

13   to political activity contributions.  That might be, for

14   example, as the situation is here, to a union-sponsored

15   political action -- political action committee.

16             JUSTICE STEVENS:  May I ask a question

17   about, say, an attempt to deduct contributions to a

18   charity like the United Fund?  Do counties have a choice

19   to either do that or not do it, or does State law

20   require them to accept such requests?

21             MR. SMITH:  Local governments have

22   discretion.

23             JUSTICE STEVENS:  They have discretion to do

24   that?

25             MR. SMITH:  That's correct.

1              JUSTICE STEVENS:  With respect to the union

2    situation, the statute takes away that discretion.

3              MR. SMITH:  With respect --

4              JUSTICE STEVENS:  And the question is why is

5    there -- why is there a State interest in taking away

6    that discretion for unions, but not as to charities.

7              MR. SMITH:  Well, it takes away that

8    discretion with respect to any third party who might

9    receive amounts for political activities.

10             JUSTICE STEVENS:  For political activities.

11   But what is -- what is the reason for differentiating

12   political activities from charities?

13             MR. SMITH:  The reason, as we articulate in

14   our brief, is the desire to avoid either the appearance

15   or the reality of public employer involvement in, in

16   this instance, electoral politics.

17             JUSTICE STEVENS:  I see.

18             CHIEF JUSTICE ROBERTS:  Are there other

19   areas in which the State exercises the authority you're

20   asserting here with respect to county employers, telling

21   them what they can and can't do?

22             MR. SMITH:  Outside the area of elections,

23   not with respect to payroll deductions.

24             CHIEF JUSTICE ROBERTS:  I mean more

25   generally.  Your assertion is that this is part of the

1   State, and therefore, as I gather, it's conceded on the

2   other side, this is acceptable with respect to State

3   employees but not other public employers.  Are there

4   other areas in which you act like the counties are part

5   of the State?

6              MR. SMITH:  Your Honor, the -- the county --

7   counties in Idaho and I suppose in most States act as

8   political subdivisions of the State.  And whatever

9   authority they have or don't have derives, if not

10  exclusively, virtually exclusively from State law.

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

12             JUSTICE SOUTER:  No.  Please.

13             CHIEF JUSTICE ROBERTS:  I'm looking for a

14  specific example.  I mean, maybe counties or

15  municipalities, you know, contract for trash collection

16  or water services and maybe the State tells them, look,

17  you've got to deal with these people, you've got to do

18  it by open bidding, whatever.

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

20  the election context for a moment to try to address that

21  question.  Prior to its amendments pursuant to the

22  legislation at hand, Idaho Code Section 67-6605, which

23  is part of Idaho's election campaign finance and

24  reporting statute or general statutes, allowed payroll

25  deductions to be made for contributions to political

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1    committees.  In that sense, it allowed counties, as well

2    as other public employers, to make deductions of the

3    kind at issue today.

4             Now, that authority was rescinded by virtue

5    of the amendment to 2004(2).  The point simply is that

6    if necessary, we -- we could describe in detail various

7    kinds of -- of requirements that exist with respect to

8    counties or school districts or cities.

9             CHIEF JUSTICE ROBERTS:  Well, that's --

10   since I asked the question, I think it's necessary.  So

11   what's the best example where the State exercises

12   control over what the counties would otherwise have

13   discretion to do?  You mentioned school districts.  Is

14   that -- is that an area?

15            MR. SMITH:  Well, Your Honor, for example,

16   with respect to -- take open meetings, for example, take

17   public records, for example.  Those are general kinds of

18   statutes that impose requirements on all levels of State

19   government.  So, for example, with respect to open

20   meetings, the Idaho law requires essentially all

21   meetings, except for certain exclusions, to be open to

22   the public.  In that sense, it's akin to the Wisconsin

23   statute.

24            JUSTICE SCALIA:  What about a Hatch Act?

25   Does -- does -- does the State allow State employees to

17

1    engage in political activity?

2              MR. SMITH:  Your Honor, it does, but not --

3    not in connection with their public employment

4    activities.

5              JUSTICE SCALIA:  I don't know -- I don't

6    know what that means.

7              MR. SMITH:  It means that there is no

8    prohibition under State law, for example, for a public

9    employee to engage in political activity.  If -- but our

10   statute in Idaho applies actually only to State

11   employees.  It doesn't govern those kinds of activities

12   by local government.

13             JUSTICE SCALIA:  That's interesting.  Why

14   not?

15             JUSTICE KENNEDY:  The general proposition

16   that underlies your argument that the local entities are

17   creatures of State law and they cannot receive Federal

18   powers from the Federal Government when the States

19   object, is that -- is that an acceptable proposition?

20             MR. SMITH:  It would be an acceptable

21   proposition to the extent that Federal law doesn't

22   pre-empt State law, Your Honor.

23             JUSTICE KENNEDY:  Right.

24             MR. SMITH:  In this instance, we would argue

25   that the First Amendment does not interpose some kind of

1  barrier to essentially vulcanize local government from

2  State legislative control.

3          JUSTICE KENNEDY:  There is -- there is a

4  case out of the Ninth Circuit, and it was affirmed by

5  this Court on a procedural point, but not on a -- not on

6  the merits -- out of the neighboring State of

7  Washington, where the State says a locality cannot build

8  a dam more than 25 feet high.  The locality then gets a

9  license from the Federal Power Commission, and the State

10  said, well, you still don't have this authority.  And

11  the Ninth Circuit said you do.  The Federal power then

12  supersedes.

13          Would you agree that that case is valid?

14          MR. SMITH:  Depending on -- on the facts, I

15  -- I would agree that it is certainly possible for the

16  State law to --

17          JUSTICE KENNEDY:  Because there the local

18  entity has powers greater than what the State wants to

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

20          MR. SMITH:  Well, but -- but, Your Honor,

21  that is, I think, beyond cavil; that is to say that

22  Federal law --

23          CHIEF JUSTICE ROBERTS:  I -- I didn't hear

24  you.  You think that's what?

25          MR. SMITH:  Beyond cavil, beyond --

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1                JUSTICE KENNEDY:  Really, if the State can

2  -- can opt not to do something, it can't tell its

3  subdivisions, we don't want you to do it, either?  And

4  the subdivision can then go to the -- directly to the

5  Federal Government and say, please let us do this, even

6  if the State would be free to reject it on its own?

7                MR. SMITH:  Well, it -- it depends on --

8                JUSTICE KENNEDY:  It seems to me that that

9  is the argument you should be making here.

10               MR. SMITH:  Your Honor, perhaps it was  --

11  it was an argument that we don't have to make in this

12  instance.  Needless to say, by virtue of the Supremacy

13  Clause, there may be instances where Federal law --

14               JUSTICE GINSBURG:  But I thought your whole

15  argument was that the counties are simply

16  instrumentalities of the State, and the State has full

17  power over them.  It chooses to delegate to them

18  autonomy, but it holds the control rein.  And now you're

19  saying no, that the Federal Government can give the

20  State local-unit authority that the State, itself,

21  chooses not to give.  And you say that's beyond cavil.

22  I really don't understand your argument.

23               MR. SMITH:  It is beyond cavil if the

24  Federal law, in fact, supersedes State law.  There may

25  be issues --

1           CHIEF JUSTICE ROBERTS:  That depends -- I

2    mean the whole case turns on -- and the response to

3    Justice Kennedy, I think, would be -- if the Federal

4    Government is simply saying you can do it if you want,

5    that's one thing.  If the Federal Government is saying

6    you must do it because it's covered by the Federal Power

7    Act, or whatever, that's different.

8           If it's just a grant of permission, I would

9    suppose the State can say, well, fine, it's okay with

10   the Feds, but you can't do it because we don't want you

11   to.

12           MR. SMITH:  That's correct.

13           JUSTICE SOUTER:  And don't -- don't you

14   suffer from -- doesn't your position suffer from a -- a

15   more serious problem that doesn't even implicate the

16   pre-emption doctrine?  And that is, as I understand your

17   argument, the -- the local governments are creatures of

18   the State.  Their powers are the powers that the State

19   gives them by statute, as -- as you were pointing out.

20           The same thing is true for corporations.

21   Corporations are creatures of the State.  They have the

22   powers, and only the powers, that the State gives to

23   them.  It -- it seems to me, going back to Justice

24   Stevens's initial question, that I don't see where the

25   distinction lies between the -- in effect, the position

1       of the local-government units and corporations, and --

2       and between the local-government units and the

3       corporations.  And it seems to me that that's a problem

4       for you quite apart from any application of Federal law.

5                   MR. SMITH:  I disagree, Justice Souter.  The

6       -- as I stated in response to Justice Stevens, the

7       difference is a central one.  That is to say, a

8       corporation is a private entity with -- with distinct

9       rights under the First Amendment.

10                  JUSTICE SOUTER:  Well, it has distinct

11      rights under the First Amendment if State law creates a

12      corporate form of -- of -- of business organization.

13      And the -- the -- when -- when it comes into existence,

14      it then does acquire some rights under the national

15      Constitution.  But if in the first instance it's a

16      creature of State law, its powers, generally speaking,

17      are the powers that State law gives it.  And that is --

18      that same proposition is true of counties and towns and

19      -- and other sub-State governmental units.

20                  MR. SMITH:  I disagree to the extent that

21      there is any attempt to equate a private corporation

22      with essentially an agent or an arm of the State such as

23      a county, which has been delegated governmental

24      functions.

25                  JUSTICE SOUTER:  All right.  Then -- then it

22

1      seems to me that your argument is not that State law

2      controls what it may do and defines its powers.  Your

3      argument, it seems to me, has to rest upon the fact that

4      what it is doing is a public, as opposed to a private,

5      function.  And that's the extent of the argument.  Isn't

6      that true?

7                  MR. SMITH:  Well, that is -- certainly is

8      the distinction between a private corporation and, for

9      example, a county.

10                 JUSTICE SOUTER:  That's the only distinction

11     that you can maintain.  You can't maintain the

12     distinction based upon the superiority of State law in

13     defining the -- the extent of the governmental unit's

14     powers and so on, because that is just as true of a

15     corporation.  So your distinction has simply got to be a

16     distinction based on the nature of the function that is

17     being performed.

18                 MR. SMITH:  And -- and the very nature of

19     the entity, itself, Your Honor.  A county --

20                 JUSTICE SOUTER:  What -- what do you mean by

21     the "nature of" --

22                 MR. SMITH:  A county or school district

23     performs functions assigned to it by the State

24     legislature to carry out the function, to carry out

25     activities that are public in nature.

23

1              JUSTICE SOUTER:  Yes, it's doing -- it's

2    doing a governmental job.

3              MR. SMITH:  That's correct.

4              JUSTICE SOUTER:  We understand what that is,

5    so I understand that point.

6              MR. SMITH:  Your Honor, I -- I can only

7    repeat that the distinction between the private

8    corporation and the -- and a political subdivision of

9    the State is that, in fact, one is an entity created by

10   the legislature for the very purpose of carrying out

11   State governmental functions.  That -- that, I think, is

12   entirely consistent with the position argued throughout

13   this case.

14             JUSTICE SOUTER:  No.  But -- it -- it is,

15   but I mean when you say, as I think you are now saying,

16   the -- the law for the State to be the law for the

17   subdivision because they are both governmental, the

18   counter-argument is, in fact, there are resemblances to

19   private organizations, too.  And those resemblances are,

20   in effect, their creation and definition by State law;

21   their enjoyment of the powers, and only those powers,

22   which State law gives them; so that, in fact, there

23   is -- there is not only an analogy with the State

24   government, there is an analogy with private

25   corporations, too.  And the question is why should we

24

1    choose one analogy rather than the other analogy?

2            MR. SMITH:  And Your Honor, I think I

3    responded.

4            JUSTICE ALITO:  You don't think that under

5    our Federal system, the States have greater powers

6    deciding how they are going to organize themselves than

7    they have with respect to the regulation of artificial

8    private entities that they choose to permit under State

9    law?

10            MR. SMITH:  Yes.  States -- of course States

11    do have that authority.

12            CHIEF JUSTICE ROBERTS:  Counsel, we'll give

13    you a minute for rebuttal --

14            MR. SMITH:  Thank you.

15            CHIEF JUSTICE ROBERTS:  Since our

16    questioning has taken away from your time.

17            CHIEF JUSTICE ROBERTS:  Mr. Collins.

18          ORAL ARGUMENT OF JEREMIAH A. COLLINS

19            ON BEHALF OF THE RESPONDENTS

20            MR. COLLINS:  Mr. Chief Justice and may it

21    please the Court:

22            This case turns on three points.  First, the

23    statute at issue is a content-based restriction on

24    speech which is therefore presumptively invalid,

25    requires heightened scrutiny, which Petitioners

1   acknowledge they have not satisfied, unless one of the

2   exceptions to heightened scrutiny is applicable here,

3   those being exceptions which as the Court has explained

4   in R.A.V. and Davenport, are limited to circumstances

5   where there is no real risk of viewpoint suppression.

6            JUSTICE SCALIA:  Mr. Collins, suppose -- I

7   gather Idaho doesn't have it, but suppose Idaho wanted a

8   Hatch Act similar to the Federal Hatch Act that

9   prohibits Federal employees from engaging in political

10  activity, and suppose it decided that not only should

11  the State employees at the capital not engage in

12  political activities, but it's a problem for any

13  governmental employee to do that; they ought to be

14  neutral and we don't want patronage to be passed out on

15  the basis of whether they are campaigning for one party

16  or another, and we don't want them to be coerced into

17  campaigning for one party or another.  Now, I assume

18  that such a law would violate the First Amendment if it

19  were extended to all employers.  Saying no -- no company

20  employee, no private employee can engage in political

21  activity would surely violate the First Amendment.

22  Would it violate the First Amendment if it was extended?

23  Certainly, it doesn't when it's applied to State

24  employees because there are a lot of State Hatch Acts.

25  And you're saying it would violate the First Amendment

26

1  as applied to county and municipal employees?

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

3          JUSTICE SCALIA:  Why not?

4          MR. COLLINS:  We don't take that position at

5  all, because, as the Court has indicated in Letter

6  Carriers and Broadrick and other cases, there is a

7  compelling interest in a statute which says that

8  government employees -- and it could be State or local

9  -- will not be performing their jobs as servants of

10  politics.

11          JUSTICE SCALIA:  You're saying -- you're

12  analogizing these to private entities.  That's your

13  whole point.

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

15          JUSTICE SCALIA:  This is not a creature of

16  the State.  You're saying what the First Amendment -- as

17  the First Amendment applies to private individuals, so

18  it applies here.  This is regulation by the State,

19  rather than the State's control of State government.

20          MR. COLLINS:  We are saying that, Your

21  Honor, because the only defense that the State can

22  possibly offer here to this content discrimination is

23  the forum notion that the State has introduced.  In the

24  case of --

25          JUSTICE KENNEDY:  Now --

1                MR. COLLINS:  It's not a forum analysis.

2          JUSTICE KENNEDY:  Let me just establish something at

3    the outset.  You had conceded below, and I thought I saw

4    this in your brief as well, that as to the State of

5    Idaho, its determination not to allow the deductibility

6    is permissible.

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

8                JUSTICE KENNEDY:  All right.  So, we begin

9    with the proposition that a State may do this if it

10   chooses; i.e., this -- refused on its own to have the

11   payroll deduction.

12               MR. COLLINS:  Yes.  And the reason for that

13   is that, under Regan and Finley and Rust and the other

14   cases, the State has perfect freedom to decide not to

15   devote its own resources and expenditure.  But

16   interestingly and very much on point here --

17               JUSTICE KENNEDY:  And if -- and if a State

18   had a system in which all payroll deductions were -- by

19   local entities -- were routinely controlled by the

20   State, the State did all the pay roles for the local

21   entities, then it -- in that case the nondeductibility

22   would also be permitted, I take it.

23               MR. COLLINS:  Yes, Your Honor, and let me

24   explain because those are two -- the answer to both

25   questions is "yes" but for two very different reasons.

28

 1  The answer to the second question is that our contention

 2  is not that the State is never a proprietor and never

 3  entitled to the kind of deference that goes with the

 4  proprietor when it's dealing with local government

 5  programs.  As the Court noted in the Council of

 6  Greenberg case, a government can become a proprietor

 7  with respect to property or programs it doesn't actually

 8  own.  Our point is quite simply that the State has not

 9  done that here.  That's why, if the State had done it,

10  if the State said we are going to dictate the nature of

11  payroll deduction systems for and local governments, the

12  State could do that, and it would be then --

13            CHIEF JUSTICE ROBERTS:  Did you have any

14  doubt how they would?  I mean, they passed a law

15  dictating that with respect to everybody.  And then it's

16  pared down by litigation and concessions.  So, we don't

17  have any real question of what the State is wanting to

18  do here.  It's --

19            MR. COLLINS:  What I'm suggesting, Mr. Chief

20  Justice, is that since we are beginning with a

21  content-based restriction -- and I do want to emphasize

22  it's a law here which says that for all employers --

23  public, private, or State -- the only expenditure you

24  can't make through payroll deduction is for political

25  activities, and also the only resource of an employer

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1    that can't be used for any kind of political activity is

2    payroll deduction, this being in a statute targeted at

3    employee support of union activity.  So, we have a

4    content-based restriction, and the question is:  Can it

5    come within an exception to the heightened scrutiny that

6    Petitioners acknowledge they can't satisfy?

7            But when I'm suggesting that the State could

8    come within reduced scrutiny if it were actually

9    managing the payroll system, I'm referring to situations

10   like Council of Greenburg, where the government with

11   respect to a particular kind of facility or program

12   says, we don't own it, but we -- it's an integral part

13   of a system that we are managing, establishing, not just

14   saying -- not just to say all we care about is one kind

15   of speech we don't want to go on there.  If the

16   government says we have -- we want to be the manager,

17   the operator of a particular kind of local government

18   operation, the State is free to do that --

19            JUSTICE GINSBURG:  Well, if the State wants

20   to, it's because it can exercise a heavy hand and

21   control its local units, but if it wants to give the

22   local units discretion, then it has to leave it to the

23   local units whether or not they want to enact such a

24   ban.  That's your position?

25            MR. COLLINS:  No.  It's not a question of

1    whether the State has the power to regulate.  The

2    question is if the State regulation is in the form of a

3    content-based restriction on speech, can it elude

4    heightened scrutiny?  And --

5              JUSTICE GINSBURG:  My question really is, if

6    you look at this at the most basic level, we have two

7    important concessions.  You don't question the

8    constitutionality of the ban as to State employees.  And

9    the other side doesn't question that it is

10   unconstitutional as to private employees.  So here we

11   have State local employees.  Do we bracket them with

12   with State employees or with private employees as

13   essential --

14             MR. COLLINS:  Your Honor, functionally

15   that's the question, but I think analytically we don't

16   see it that way because the question is, as we see it,

17   is the State, with regard to this challenged statute in

18   its application to the local governments, acting in a

19   capacity that entitles it to be free from the normal

20   First Amendment scrutiny that it acknowledges it would

21   fail--  and that's where our point is.  The reason it is

22   free from that scrutiny as to its own employees is

23   because of the cases that say the government doesn't

24   have to spend its money.

25             JUSTICE BREYER:  It's at that part, just

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 1    where you are, that I've always had a hard time not for

 2    lack of trying.  I don't understand what the word

 3    "content-based" means, and I know it's all over the law,

 4    but I've never understood it and maybe since you're

 5    relying on it 15 times you can explain it.  And the

 6    thing I don't understand it about is it seems to me

 7    government engages in thousands of different kinds of

 8    activity, and there isn't some special test.  When they

 9    say that in the jury room, the jury room is there for

10    juries; it's not to show movies of Steven Spielberg.

11    And there isn't some special test when you say the

12    purpose of the biology class is to teach biology, and we

13    don't want people coming in here teaching some other

14    thing.  I don't understand what this special test called

15    "content-based" is, and that's rather a deep

16    misunderstanding on my part, but since you're depending

17    on it, why don't you take 30 seconds or 45 seconds to

18    see if you can help me?

19              MR. COLLINS:  Well, Justice Breyer, the --

20    the concept of content discrimination may blur on some

21    edges, but one thing that the Court has been clear on is

22    that when a government says speech -- one form of speech

23    will not be allowed and that will be political speech,

24    that is treated as requiring heightened scrutiny.  And I

25    should say --

 1                JUSTICE BREYER:  It doesn't -- for example,

 2    in biology class, the school board says:  You know,

 3    biology teacher, I want you to teach biology; I don't

 4    want you to teach politics.  And then there is some

 5    special scrutiny about how the biology teacher is to

 6    teach or -- but they say just face it.  The jury room is

 7    for juries.  It's not for politics.  All that is subject

 8    to some special First Amendment test?

 9                MR. COLLINS:  Well, first of all, Your

10    Honor, all of those would pass muster either because --

11                JUSTICE BREYER:  They might.  They might.

12    But you know a lot of them, you know you could show

13    movies in jury rooms in the evening and people might

14    find it much better.

15                (Laughter.)

16                MR. COLLINS:  They would pass muster either

17    because they are within exceptions to heightened

18    scrutiny -- because not all content distinctions require

19    heightened scrutiny -- or they would pass muster even

20    under heightened scrutiny.  But one kind of content

21    distinction that the Court consistently has indicated

22    requires heightened scrutiny is in -- well, in Burson, a

23    majority court at least, you can talk about anything you

24    want near the polling place but not politics.  That was

25    content.  Consolidated Edison -- you can talk about

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1    anything -- billing envelopes but not controversial

2    issues.  Davenport, very recently -- from fees that

3    individuals are required to pay to you -- and in this

4    case we are not talking about any compelled fees -- but

5    with compelled fees, you can use them for anything you

6    want but not politics.

7            CHIEF JUSTICE ROBERTS:  Since we are in

8    confessional mode, I've never understood forum analysis.

9    I don't understand how --

10           (Laughter.)

11           CHIEF JUSTICE ROBERTS:  -- how you can say

12   that this payroll deduction system is some kind of a

13   forum.  A forum is, you know, the corner at Hyde Park or

14   something.  This is -- this is something that

15   governmental entities and private entities do, and they

16   can either exclude this type of activity or they can't.

17   And the problem with the forum analysis is it's all or

18   nothing.  I mean -- and both parties seem to agree:  If

19   it's a State forum, you could do it; if it's a private

20   forum or if it's an open forum, you can't.  That's not

21   how we usually analyze these things.

22           MR. COLLINS:  Well, two points in response

23   to that, Mr. Chief Justice.  First, we are not the ones

24   who say that this must be looked at under forum

25   analysis.  We'd be quite happy, and I think the most

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1    sensible way actually to approach the case is that this

2    is a content distinction, and it's presumptively

3    invalid, and there is no sufficient justification.

4              The other side says wait a minute; there is

5    a line of cases that says that when there is a forum

6    involved of the government, and the government is

7    restricting speech in that forum, there can be an

8    exception to heightened scrutiny.  In Davenport --

9              JUSTICE ALITO:  You say there is a

10   sufficient -- presumably you concede there is a

11   sufficient justification for this content-based

12   restriction as to State employees.

13             MR. COLLINS:  What we say as the State

14   employees, Justice Alito, is that if falls under the

15   Regan-Findley line of cases; that you don't even get to

16   a First Amendment scrutiny because it's under the

17   doctrine that when the government says we won't spend

18   our money on something, that's not an infringement of

19   speech in the first place.  And interestingly --

20             JUSTICE ALITO:  So if there is State money

21   involved in these payroll systems that would be

22   sufficient?

23             MR. COLLINS:  If the State said you can't

24   use our money for payroll deductions of this kind then

25   it would arguably be into that category.  But I think

1    what's important to recognize --

2              JUSTICE GINSBURG:  Isn't there -- isn't

3    there some State tax money that goes to fund local

4    units?  I mean, you say here there are State taxpayers'

5    funds involved; therefore the State doesn't have to pay

6    for what it doesn't want to buy.  But are there State

7    funds that fund local government entities?

8              MR. SMITH:  There is State funding, but the

9    reason, I believe, why the Respondents -- excuse me the

10   Petitioners -- have conceded that the subsidization case

11   law does not apply to this statute in its application to

12   the local governments, is that what the subsidization

13   cases are talking about -- cases like Regan, Rust,

14   Findley -- are situations where we'll say the State is

15   involved in developing a program which it will pay for,

16   and it says because we are paying for that, our

17   priorities are to be honored.

18             The government in this instance, it's been

19   conceded, as the Court of Appeals pointed out, there is

20   no actual subsidization to the payroll systems.  In

21   effect the State says we have some money we give to our

22   local governments -- by no means, all revenue, but they

23   get some money.  But we -- the State does not set the

24   kinds of budget priorities that are protected by the

25   Regan line of cases.  Specifically, the State in effect

1    says that as far as payroll systems and in fact as far

2    as most employment matters and most administrative

3    matters are concerned, here's some money for you, local

4    government.  The only thing we say about it is don't use

5    it for political payroll deductions.

6              JUSTICE SOUTER:  No, but another way of

7    looking at it is to say in each of these instances --

8    whether we are talking about the State taxing in order

9    to perform functions at the State level or whether the

10   State is authorizing taxation for functions for

11   functions to be performed at the local level -- in all

12   of these instances, the State is in the position to say

13   not that it is sort of our money, but to say it is

14   public money.  And our decision is that public money

15   will not be used to -- by a public entity to underwrite

16   political activity.

17             And why isn't the State in exactly the same

18   position in making that judgment, whether it's talking

19   about money that goes directly into the State coffer or

20   public tax money that happens to be going into a -- a

21   town coffer?

22             MR. COLLINS:  Because, Your Honor, I think

23   the courts never applied the Regan subsidization

24   analysis in that kind of --

25             JUSTICE SOUTER:  But I'm -- I'm asking you

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1    why shouldn't --

2              MR. COLLINS:  It shouldn't --

3              JUSTICE SOUTER:  Why shouldn't we, on the

4    theory that what is important is not which particular

5    coffer the penny goes into, but the fact that it is

6    public money, i.e., money being raised from taxpayers

7    under a statute passed by the State authorizing

8    taxation; and it is going to -- and its justification

9    for taxation is the performance of public functions.

10   And if the State can say it is not a proper public

11   function when the money is being filtered through our

12   particular treasury, why isn't it equally valid for the

13   State legislature to say that when the money is being

14   filtered through a local treasury?

15             MR. COLLINS:  For the following reason, I

16   think, Justice Souter.  That -- the doctrine that says

17   when a government is refusing to subsidize something

18   there is no violation in the first place in the First

19   Amendment, and therefore except in the rarest, rarest of

20   cases -- the rarest of cases there can be no First

21   Amendment claim; that's very powerful medicine and it

22   turns on the notion that -- somewhat alike but different

23   from in detail the proprietor concept -- but it turns on

24   the notion that the government is making judgments about

25   how its money is going to be used.  It decides what it

1    wants its money to be used for, and we are going to

2    honor that --

3                    JUSTICE SOUTER:  Yes, but what you're saying

4    is, I -- you're saying in effect that I -- that you

5    reject my -- my hypothetical assumption here, that what

6    we ought to regard as the proper characterization of the

7    money is not "our" State money, but public money raised

8    under a system of public taxation; and you're saying you

9    should not go -- you should not characterize the funds

10   that way.

11                   Of course that's your position --

12                   MR. COLLINS:  No, I --

13                   JUSTICE SOUTER:   -- because if you do

14   characterize the funds that way, it seems to me you're

15   in trouble.

16                   MR. COLLINS:  Now --

17                   JUSTICE SOUTER:  But why shouldn't I

18   characterize them that way?

19                   MR. COLLINS:  The -- even characterizing --

20   even characterizing it that way, the reason that I think

21   the analysis breaks down as to applying subsidization

22   law, is that the subsidization law doctrine,

23   subsidization doctrine -- Regan and those cases -- as

24   the Court has explained it, it is to protect the

25   prerogatives of the government that is making decisions

1    about how it wants particular programs to be operated.

2            JUSTICE SOUTER:  The State -- the State

3    legislature is making a decision as to how it wants the

4    -- the programs which comprise local government to be

5    operated.

6            MR. SMITH:  But the difference, Your Honor,

7    in all of the other cases one could look at Regan and

8    the like, there is a program where the government is

9    involved in its manifold details.  The government

10   determines the purpose of the program; it has an

11   overriding interest in the program; and it says in the

12   course of that, in the course of dealing with this

13   program, we don't want government money to be used for

14   the following things.

15           If you -- if that were extended to say that

16   there will be essentially no First Amendment claim

17   whenever the government says as to some program that it

18   has no other involvement and that it has no other

19   interest in, we don't want the following speech, and

20   over here we don't have the following speech --

21           JUSTICE SOUTER:  Well, but the point in the

22   case that you concede that the government may make that

23   choice is that the government is subsidizing it by the

24   activity which the government is refusing to perform.

25   So it's not nearly a case of saying there shall be this

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1    kind of speech and not that kind of speech.  In each

2    instance there is a decision being made in my

3    hypothetical that the government will not subsidize that

4    kind of activity, that kind of speech, by using public

5    money.

6                    MR. COLLINS:  But the difference for First

7    Amendment analysis, I would submit, Your Honor, and the

8    reason why I think the subsidization doctrine has been

9    confined in the areas it's been confined, is when we are

10   talking in this case, for example, about the State, the

11   State determines whether it's going to have a payroll

12   deduction system.  It determines whether it's going to

13   allow deductions for charities; whether it's going to

14   allow deductions for this that and the other.  It

15   determines who -- who's going to administer the program,

16   how expensive it's going to be, all of those things.

17   Its money is going into that program and it is as to

18   that program making all of these decisions about how its

19   money is going to be spent.  That is -- and if the

20   course of that it says we don't want this one, this

21   element as part of it just as we do want charitable, we

22   don't want political; maybe we don't want charitable

23   either -- it is a different situation in items of basic

24   First Amendment analysis, I believe, if you have a

25   government that's saying we don't care anything about

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1    government payroll systems.

2            JUSTICE STEVENS:  Mr. Collins, may I

3    interrupt you and ask you the converse of the question I

4    asked your opponent?

5            He conceded that it was unconstitutionally

6    what you call it, content discrimination -- whatever --

7    to have the deduction from the private sector, but the

8    counties were different; and he justified the counties

9    on the ground that the State's interest in avoiding

10   taking a position with regard to union matters justifies

11   it.  But that's the only justification for the -- it's

12   not the administrative justification -- this statute

13   wasn't enacted to save the government administrative

14   expenses.  The purpose of the statute is perfectly

15   clear, and I'm surprised that you concede that it's

16   constitutional as applied to the State government, when

17   there's no evidence whatsoever that it serves the

18   purpose that everybody is talking about.

19           MR. COLLINS:  Your Honor, we conceded that

20   reluctantly under the view that where the question is

21   whether the State -- our claim against the State would

22   say we are -- we are going to require the State to start

23   devoting money that it doesn't want to spend as we -- we

24   have chosen given the force of cases like Regan, not to

25   make that contention, but to accept the ruling that the

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1  State's refusal to spend money on its own programs is in

2  a different category.

3          JUSTICE STEVENS:  But this is not a case

4  involving a State's decision not to spend the time and

5  energy to do payroll deductions because they do them for

6  everybody else.  It's simply based on the reason for the

7  payroll deduction, which is, in your view, an

8  impermissible reason.  Is that not correct.

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

10  And if it were clear that as to what kinds of reasons

11  are considered impermissible under subsidization --

12          JUSTICE STEVENS:  How can it not be clear?

13  It enacted a general statute that had the same

14  justification throughout the State.  And now you're

15  justifying on the ground it doesn't apply to all their

16  other government activities because they allow payroll

17  deductions.

18          MR. COLLINS:  Well, in Davenport, Your

19  Honor, the Court did indicate that a statute that

20  applies to public and private, even though it's a

21  unitary statute, you have to analyze it separately in

22  the two contexts.

23          But our point, though -- I think the point

24  that is being lost, we don't see this as a question

25  about what can the State do with respect to its own

1   operations as such and what can it do with respect to

2   local government operations.  We see it as a case that

3   asks the question whether a content distinction directed

4   at certain kinds of political activities that would

5   normally require heightened scrutiny gets the pass from

6   that scrutiny because it's in a "forum"?

7            And we -- our position is quite simply that

8   if the State were, in fact, managing these local

9   government payroll systems, which it would have a

10  perfect right to do, that then it could avail itself of

11  that analysis, but because it doesn't, it cannot.

12           JUSTICE STEVENS:  I see your argument.

13           JUSTICE KENNEDY:  Suppose the State at the

14  State level says this is a contentious area, we want to

15  stay out of it.  We are going to be neutral.  We are

16  simply not allowing payroll deduction for right to work

17  clauses, for union clauses.  We don't want this.  If the

18  State can say that, and your concession indicates to me

19  that it can, then why can't it tell its subdivisions you

20  have to be efficient, we don't want arguments from one

21  city to the next city about payroll deduction that's

22  going to consume the time of the city council's, the

23  time of the citizens, we want to take this off the table

24  for you just the way we've taken it off the table for

25  us?

1                 MR. COLLINS:  Because I think the difference

2    here, Your Honor, as I understand the case law, is that

3    when the State is simply saying we choose not to spend

4    our own money on this activity, it does not have the

5    same burden of explaining why it's made that choice that

6    it has when it reaches out and says, and by the way, we

7    don't want local government or even private government

8    --

9                 JUSTICE KENNEDY:  Well, of course, that's

10   the interest.  This is a very strong Federal interest in

11   allowing the States to organize their governmental

12   systems the way they choose.  Our gun control

13   registration case, where we said the Federal Government

14   cannot tell the counties that it has certain duties for

15   gun control.

16                MR. COLLINS:  And we have no quarrel at all

17   with that notion.  Our position in no way dictates, in

18   no way has the First Amendment dictating how a State is

19   going to structure its government.  It simply says,

20   look, we begin with the proposition that normally this

21   restriction on public speech would be heightened to

22   public scrutiny.

23                JUSTICE KENNEDY:  I -- I -- I'm not sure

24   that's right.  I'm not sure the State isn't saying we

25   want to determine how our government is structured in

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1    this respect.

2              MR. COLLINS:  If the -- if the State wants

3    to have a uniform law for itself -- for public

4    employer -- employees, its own employees and local

5    government employees because of some unitary interest

6    that the State wants to pursue, there is nothing wrong

7    with the state pursuing that objective.  But when it

8    does it through restricting political speech, it has to

9    either satisfy heightened scrutiny or come within one of

10   the exceptions.

11             And the distinction -- maybe I can put it

12   this way, Justice Kennedy.  The reason why for First

13   Amendment scrutiny analysis, there is a sharp

14   distinction in this case between what the State's

15   treatment of its own employees and the State treatment

16   of local governments is -- I think it's basically

17   threefold.

18             That, first, when the State says, we don't

19   choose to allow certain speech in our own forum, it is

20   simply declining to facilitate speech that couldn't take

21   place without an affirmative grant.  When it says to

22   local governments, who in the state of nature can allow

23   whatever they want in the way of speech, when it says

24   that there we will not allow these kinds of deductions,

25   it's blocking speech that would take place but for the

1    government's intervention.  And so --

2              JUSTICE KENNEDY:  I'll read Russo again, but

3    I didn't think Pocatello, Idaho, was part of the state

4    of major.

5              MR. COLLINS:  I just meant that no -- it's

6    this simple, Justice Kennedy, and the point I'm trying

7    to make is that for someone to get access to

8    political -- to a payroll deduction system of the State

9    government, it needs an affirmative grant from the

10   State.  To have access to the use of payroll deduction

11   from local governments, it doesn't need an affirmative

12   grant from the State.  It simply needs the State not to

13   interfere and reject the local government.

14             So it's -- it's a different kind of action.

15   But equally important, the basis for the kind of relaxed

16   scrutiny that the -- that the Petitioners have argued

17   for, the forum cases like Cornelius, et cetera, those

18   are all situations where a government, that is, that has

19   established and managed a facility is determining on a

20   day-to-day basis what's the purpose of our program, what

21   are we going to allow --

22             JUSTICE KENNEDY:  Could you help me with

23   this?  Would you object if we analyzed this as a

24   constitutional condition case?  I don't know that you

25   would prevail or not.  But it -- the forum analysis

1      doesn't seem to me to quite fit.

2              MR. COLLINS:  It's fine with me, but if you

3      analyze it in any way that says that heightened scrutiny

4      is applicable and there is no exception --

5              JUSTICE KENNEDY:  Why is that?

6              (Laughter.)

7              MR. COLLINS -- the problem with

8      constitutional condition -- if it were a condition on

9      the local governments, then it's not really --

10             JUSTICE BREYER:  Are you saying -- is it

11     your view that heightened scrutiny applies whenever a

12     government tells any group that wants to raise money for

13     political purposes in any way they want involving the

14     government that it can't?

15             MR. COLLINS:  No, Your Honor.

16             JUSTICE BREYER:  No.  Okay.  I thought the

17     answer would be no.

18             Then, will you try to say in a sentence or

19     two if the answer is it heightened scrutiny doesn't

20     apply to any kind of an effort to raise money for

21     political purposes where they say to the government you

22     got to help me, when does it apply and when doesn't it?

23             MR. COLLINS:  The -- well, there are

24     exceptions to heightened scrutiny where the government

25     is acting as a proprietor.  There are exceptions to

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1    heightened scrutiny where the government --

2              JUSTICE BREYER:  But then you are making --

3    say it always applies except in a few little exceptions.

4    I mean I know there is one for government speech and so

5    forth.  But you're saying whenever the government tells

6    a person you can't, for example, go to the city hall and

7    raise money, you can't do it in the jury room, you can't

8    raise money here, you can't raise money there, dah, dah,

9    dah, or you can't speak there, you can't -- it's always

10   heightened scrutiny?

11             MR. COLLINS:  Well, if the government is

12   allowing other speech it would be heightened scrutiny.

13             JUSTICE BREYER:  You cannot -- you have to

14   use heightened scrutiny when the FDA, for example -- you

15   know, the case I wrote in -- the FDA says you cannot

16   advertise on a label for a drug.  We don't want

17   advertising.  We don't want advertising on the label.

18   That's heightened scrutiny.

19             MR. COLLINS:  It -- if it's -- if it's

20   commercial speech, it might fall under a different

21   standard.  It would easily pass it is the point.  I

22   mean, this is no question that a lot of situations

23   easily pass heightened scrutiny, and a lot of

24   circumstances are an exception.  And the problem in this

25   case is that the Petitioner's sole submission --

 1                JUSTICE BREYER:  And regulation of

 2   government employees is the same?

 3                MR. COLLINS:  It basically would trigger

 4   the -- the heightened scrutiny except where the

 5   government is involved.  When the government is involved

 6   in managing employees in just as when it's managing a

 7   forum, there -- there could be a different analysis.

 8                But the problem -- where the shoe doesn't

 9   fit the Petitioner's are trying to put on this case is

10   Petitioner's concede everything there is to concede

11   about this case and then say but it's just like

12   Cornelius, and it's just the government deciding what to

13   do with its own programs.  And our point is quite simply

14   that unlike every case where the court has applied

15   relaxed scrutiny in a proprietary situation, this is a

16   case where the government does not play any role with

17   respect to the -- to limit the speech.

18                CHIEF JUSTICE ROBERTS:  Why are you -- why

19   are you focusing on heightened scrutiny?  We have a

20   whole series of cases about employee speech Darcetti and

21   Pickering where it's quite different than heightened

22   scrutiny, and here we are talking about the employees

23   being able to deduct checkoffs from their paycheck for

24   political speech?

25                MR. COLLINS:  If I may answer that question,

1  Mr. Chief Justice?  It's correct that where a law is

2  based on employee behavior, that other kinds of scrutiny

3  can be involved.  Darcetti is, obviously if it's speech

4  in your capacity of doing your job.

5              But the Hatch Act cases, letter carriers use

6  the Pickering balance.  That's not a mere reasonableness

7  test by a long shot.  That's a comparison as in the

8  NT -- National Treasury Employees honoraria case, same

9  situation, a balancing test between the harm that's

10  perceived from allowing the speech and the benefits of

11  the speech to the individual.

12              So, there can be that separate analysis,

13  which if it were applied here, the State would also

14  fail.  The State, it says it only prevails under a

15  reasonableness test.  But none of those are near

16  reasonableness analyses.

17              CHIEF JUSTICE ROBERTS:  Thank you, counsel.

18              Mr. Smith, you have one minute.

19              REBUTTAL ARGUMENT OF CLAY R. SMITH

20                ON BEHALF OF THE PETITIONERS

21              MR. SMITH:  Two points that I think are

22  critical.  First, the concession with respect to the

23  State government employees based on Regan it itself

24  entails a concession as to the reasonableness and the

25  due point neutrality of the statute.

1          Two, Respondents' theory of government with

2   respect to the legislature having to speak in some kind

3   of specific term, we would suggest, ignores -- would ask

4   this Court to create entirely new case law.  But it also

5   ignores in this situation the fact that the Idaho

6   legislature contributes in 2006-2007 about half of the

7   funds used by school districts in the State.  And over

8   80 percent of those funds that go into what is known as

9   a general maintenance and operations fund from which

10  salary compensation is paid.

11          Thank you.

12          CHIEF JUSTICE ROBERTS:  Thank you, counsel.

13  The case is submitted.

14          (Whereupon, the case in the above-entitled

15  matter was submitted.)

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