

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 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

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?

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

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

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

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

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

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 --

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

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.

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

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

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.

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

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

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

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

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

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

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

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

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

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

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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