

**In The
Supreme Court of the United States**

BEN YSURSA, in his official capacity as Idaho
Secretary of State; and LAWRENCE G. WASDEN,
in his official capacity as Idaho Attorney General,

Petitioners,

v.

POCATELLO EDUCATION ASSOCIATION; IDAHO
EDUCATION ASSOCIATION; INTERNATIONAL
ASSOCIATION OF FIRE FIGHTERS LOCAL 743;
PROFESSIONAL FIRE FIGHTERS OF IDAHO, INC.;
SERVICE EMPLOYEES INTERNATIONAL UNION
LOCAL 687; IDAHO STATE AFL-CIO; and
MARK L. HEIDEMAN, in his official capacity
as Bannock County Prosecuting Attorney,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

**BRIEF OF *AMICI CURIAE* EVERGREEN FREEDOM
FOUNDATION, AMERICAN LEGISLATIVE
EXCHANGE COUNCIL, AND INDEPENDENCE
INSTITUTE IN SUPPORT OF PETITIONERS**

MICHAEL J. REITZ
Counsel of Record
JONATHAN D. BECHTLE
EVERGREEN FREEDOM FOUNDATION
2403 Pacific Ave. SE
Olympia, WA 98501
(360) 956-3482

Counsel for Amici Curiae

QUESTION PRESENTED

Does the First Amendment to the United States Constitution prohibit a state legislature from removing the authority of state political subdivisions to make payroll deductions for political activities under a statute that is concededly valid as applied to state government employers?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iv
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	2
I. COURTS HAVE GRANTED STATE LEGISLATURES GREAT DEFERENCE IN REGULATING STATE LABOR RELATIONS	4
A. Legislatures have adopted a wide variety of labor-management laws, which both restrict and enhance union entitlements	4
1. Unions are granted substantial statutory entitlements when representing workers	6
2. State legislatures have adopted many labor-management restrictions on union powers	14
B. Courts have upheld many laws and policies that affect a union's First Amendment speech	18
II. THE NINTH CIRCUIT'S RULING WILL UNDERMINE STATE LABOR RELATIONS AND OVERINFLATE UNION RIGHTS.....	26

TABLE OF CONTENTS – Continued

	Page
A. The ruling will prevent Idaho and other states from regulating labor relations and protecting employee rights in a uniform manner.....	27
B. The decision overinflates the burden on unions, forcing states to subsidize union speech	32
CONCLUSION	35

TABLE OF AUTHORITIES

Page

CASES

<i>Abood v. Detroit Bd. of Educ.</i> , 431 U.S. 209 (1977).....	10, 21, 24
<i>American Fed'n of Labor v. American Sash & Door Co.</i> , 335 U.S. 538 (1949).....	20
<i>Board of Educ. of Community Unit School Dist. No. 2 v. Redding</i> , 207 N.E.2d 427 (1965)	24
<i>Branch v. City of Myrtle Beach</i> , 532 S.E.2d 289 (2000).....	14
<i>Chicago Teacher's Union, Local 1 v. Hudson</i> , 475 U.S. 292 (1986).....	21, 24
<i>City of Charlotte v. Firefighters Local 660</i> , 426 U.S. 283 (1976).....	23
<i>City of Fort Smith v. Arkansas State Council No. 38</i> , 433 S.W.2d 153 (1968).....	23
<i>City of Manchester v. Manchester Teachers Guild</i> , 131 A.2d 59 (1957).....	24
<i>Consolidated Edison Co. v. Public Service Commission</i> , 447 U.S. 530 (1980).....	27
<i>Dade County Classroom Teachers Ass'n v. Legislature</i> , 269 So.2d 684 (1972)	24
<i>Davenport v. Washington Educ. Ass'n</i> , 127 S. Ct. 2372 (2007).....	<i>passim</i>
<i>District of Columbia v. John R. Thompson Co.</i> , 346 U.S. 100 (1953).....	14

TABLE OF AUTHORITIES – Continued

	Page
<i>Ellis v. Bhd. of Ry., Airline & S.S. Clerks</i> , 466 U.S. 435 (1984).....	21, 28
<i>Int’l Ass’n of Machinists v. Street</i> , 367 U.S. 740 (1961).....	21, 28
<i>J.I. Case Co. v. N.L.R.B.</i> , 321 U.S. 332 (1944)	24
<i>Lehnert v. Ferris Faculty Ass’n</i> , 500 U.S. 507 (1991).....	10, 21, 24
<i>Lincoln Federal Union v. Northwestern Iron & Metal Co.</i> , 335 U.S. 525 (1949)	20, 21
<i>Meyer v. Grant</i> , 486 U.S. 414 (1988).....	34
<i>New Jersey Bd. of Educ. v. N.J. Educ. Ass’n.</i> , 247 A.2d 867 (1968).....	24
<i>Perry Education Ass’n v. Perry Local Educators Ass’n</i> , 460 U.S. 37 (1983)	25, 29, 30
<i>Pocatello Educ. Ass’n v. Heideman</i> , 504 F.3d 1053 (2007).....	27, 29, 31, 32, 34
<i>Port of Seattle v. Int’l Longshoremen’s & Warehousemen’s Union</i> , 324 P.2d 1099 (1958)	24
<i>Railway Empl. Dep’t v. Hanson</i> , 351 U.S. 225 (1956).....	5, 18
<i>Regan v. Taxation without Representation of Washington</i> , 461 U.S. 540 (1983)	34, 35
<i>Smith v. Arkansas State Highway Employees Local 1315</i> , 441 U.S. 463 (1979).....	5, 18, 19, 28
<i>South Carolina Educ. Ass’n v. Campbell</i> , 883 F.2d 1251 (4th Cir. 1989)	30, 31, 33

TABLE OF AUTHORITIES – Continued

	Page
<i>St. Louis Teachers Ass’n v. Board of Educ.</i> , 544 S.W.2d 573 (1976).....	24
<i>Toledo Area AFL-CIO Council v. Pizza</i> , 154 F.3d 307 (6th Cir. 1998)	33
 FEDERAL STATUTES	
29 U.S.C. § 152(2)	5
29 U.S.C. § 157	5
 STATUTES & CONSTITUTIONAL PROVISIONS	
5 ILL. COMP. STAT. 315/3(g)	15, 31
5 ILL. COMP. STAT. 315/6(e-f).....	10
5 ILL. COMP. STAT. 315/14(m).....	17
ALA. CODE § 11-43-143	17
ALASKA STAT. § 15.13.067.....	16
ALASKA STAT. § 15.13.074.....	16
ALASKA STAT. § 15.13.400(8)	16
ALASKA STAT. § 23.40.200(b)	17
ALASKA STAT. § 23.40.220.....	10
ARIZ. REV. STAT. § 16-919.....	16
ARIZ. REV. STAT. § 16-920.....	16
ARIZ. REV. STAT. § 16-921.....	16
ARIZ. REV. STAT. § 23-1412.....	17
ARK. CODE ANN. § 7-1-103(a)(2)(A-B)	16

TABLE OF AUTHORITIES – Continued

	Page
CAL. GOV'T CODE § 3508.5.....	10
COLO. CONST. art. XXVIII, §§ 3(4) and 6(2).....	16
COLO. REV. STAT. § 8-1-126	17
CONN. GEN. STAT. § 5-279.....	17
CONN. GEN. STAT. § 7-477.....	10
DEL. CODE ANN. tit. 19, § 1311(3)	9
DEL. CODE ANN. tit. 19, § 1316	17
FLA. CONST. art. I § 6	17
FLA. STAT. ANN. § 447.303.....	10
FLA. STAT. ANN. § 447.307(d)	9
GA. CODE ANN. § 45-19-2.....	17
HAW. REV. STAT. § 89-4.....	10
HAW. REV. STAT. § 89-12.....	17
IDAHO CONST. Art. IX, § 1.....	29
IDAHO CODE § 33-101	29
IDAHO CODE § 33-1271	14
IDAHO CODE §§ 33-1271 to 1276.....	11
IDAHO CODE § 33-1273	12
IDAHO CODE § 44-1801	14
IDAHO CODE §§ 44-1801 to 1812.....	11
IDAHO CODE § 44-1804	12
IDAHO CODE § 44-1811.....	17
IDAHO CODE § 44-2004	32

TABLE OF AUTHORITIES – Continued

	Page
IDAHO CODE § 44-2004(1)	12
IDAHO CODE § 48-107(1)(e)	12
IND. CODE § 20-7.5-1-2(1)	29
IND. CODE § 20-29-5-6	10
IND. CODE § 20-29-9-1	17
IND. CODE § 20-29-9-3	10, 28
IOWA CODE § 20.12	17
IOWA CODE § 400.29(1)	17
KAN. STAT. ANN. § 72-5430(c)(5)	17
KY. REV. STAT. ANN. § 78.470	17
MASS. GEN. LAWS ch. 150E, § 9A(a)	17
MD. CODE ANN., EDUC. § 6-410	17, 31
MD. CODE ANN., EDUC. § 6-410(b)(2)	10
MD. CODE ANN., EDUC. § 6-504(b)	15
MD. CODE ANN., EDUC. § 6-504(d)(3)(iv)(2)	15
MD. CODE ANN., STATE PERS. & PENS. § 3-303(b)	17
MICH. COMP. LAWS § 169.254(1)	16
MICH. COMP. LAWS § 169.255	16
MICH. COMP. LAWS § 423.202	17
MINN. STAT. § 179A.06(3)	15
MINN. STAT. § 179A.06(6)	10
MINN. STAT. § 179A.18-19	17
MISS. CODE ANN. § 25-1-105	17

TABLE OF AUTHORITIES – Continued

	Page
MISS. CODE ANN. § 37-9-75	17
MO. REV. STAT. § 105.530.....	17
MONT. CODE ANN. § 39-31-402.....	15
MONT. CODE ANN. § 39-31-501.....	17
N.C. GEN. STAT. § 95-98	14
N.C. GEN. STAT. § 95-98.1	17
N.C. GEN. STAT. § 163-278.19	16
N.D. CENT. CODE § 15.1-16-16.....	17
N.D. CENT. CODE §§ 16.1-08.1-01(1), (4)	16
N.D. CENT. CODE § 16.1-08.1-03.3	16
N.H. REV. STAT. ANN. § 273-A:13.....	17
N.J. STAT. ANN. § 34:11-4.4a(2)(e).....	17
N.J. STAT. ANN. § 34:13A-5.5	15
N.M. STAT. ANN. § 10-7E-2.....	17
N.M. STAT. ANN. § 10-7E-4(J)	15
N.Y. CIV. SERV. LAW § 210.....	17
NEB. REV. STAT. § 48-821	17
NEV. REV. STAT. § 288.230	17
OHIO REV. CODE ANN. §§ 3517.082, 3599.03, and 3599.031	16
OHIO REV. CODE ANN. § 3599.031(H)(2)	33
OHIO REV. CODE ANN. § 4117.18(C)	17
OKLA. STAT. tit. 11, §§ 51-101(B) and 51-217	17

TABLE OF AUTHORITIES – Continued

	Page
OKLA. STAT. tit. 19, § 901.30(A)	17
OKLA. STAT. tit. 70, § 509.8	17
OR. REV. STAT. § 243.736.....	17
PA. STAT. ANN. tit. 25, § 3253.....	16
PA. STAT. ANN. tit. 43, § 215.2.....	17
PA. STAT. ANN. tit. 43, § 1101.1701	16
PA. STAT. ANN. tit. 43, § 1102.2	15
PA. STAT. ANN. tit. 43, § 1102.4.....	10
R.I. GEN. LAWS §§ 17-25-10.1(h) and 17-25-3(1)	16
R.I. GEN. LAWS § 28-9.3-1(b)	18
R.I. GEN. LAWS § 36-11-6.....	18
S.C. CODE ANN. § 8-11-83.....	10
S.D. CODIFIED LAWS § 3-18-10.....	18
TENN. CODE ANN. § 7-56-109.....	18
TEX. ELEC. CODE ANN. §§ 253.094 and 253.100	16
TEX. GOV'T CODE ANN. § 617.003(a).....	18
TEX. LOC. GOV'T CODE ANN. § 146.008(a)	18
UTAH CODE ANN. § 34-20a-5.....	18
VA. CODE ANN. § 40.1-55	18
VA. CODE ANN. § 40.1-57.2	14
VT. STAT. ANN. tit. 3, § 902(19)	15
VT. STAT. ANN. tit. 3, § 903(b)	18
WASH. REV. CODE § 41.56.12.....	18

TABLE OF AUTHORITIES – Continued

	Page
WASH. REV. CODE § 41.59.060(2)	10
WASH. REV. CODE § 41.59.070(3)	9
WASH. REV. CODE § 42.17.760.....	15, 30
WIS. STAT. § 111.89.....	18
WYO. STAT. ANN. §§ 22-25-102(a) and (h)	16
 OTHER AUTHORITIES	
AFSCME, <i>Public-sector Collective Bargaining Laws</i> (last visited May 30, 2008) at http://www.afscme.org/members/11075.cfm	6
Bureau of Labor Statistics, U.S. Department of Labor, New Release, USDL 08-0092, available at http://www.bls.gov/news.release/union2.nr0.htm	11
Clyde W. Summers, <i>Exclusive Representation: A Comparative Inquiry into a “Unique” American Principle</i> , 20 Comp. Lab. L. & Pol’y J. 47 (1998).....	7
Clyde W. Summers, <i>Union Powers and Workers’ Rights</i> , 49 Mich. L. Rev. 805 (1951).....	8
Elise Gautier & Henry Willis, <i>Employee and Union Member Guide to Labor Law</i> (2005)	17
Ellen J. Dannin, <i>Working Free: The Origins and Impact of New Zealand’s Employment Contracts Act</i> (1997).....	8

TABLE OF AUTHORITIES – Continued

	Page
James Sherk, <i>What Do Union Members Want? What Paycheck Protection Laws Show About How Well Unions Reflect Their Members' Priorities</i> , THE HERITAGE FOUNDATION, August 30, 2006, available at http://www.heritage.org/Research/Labor/cda06-08.cfm	16
Keith H. Hylton, <i>Law and the Future of Organized Labor in America</i> , 49 Wayne L. Rev. 685 (2003)	11
Linda Chavez and Daniel Gray, <i>Betrayal</i> (2004)	9
National Right to Work Legal Defense Foundation, <i>Right to Work States</i> (last visited May 30, 2008) at http://www.nrtw.org/rtps.htm	15
<i>Negotiated Agreement, 2007-2008, The Board of Trustees of School District No. 25 and Pocatello Education Association</i> , available at http://www.d25.k12.id.us/hr/negotiation_agreement.pdf	12
Respondent's Brief in Opposition to Petition for Writ of Certiorari at 9, <i>Davenport</i> (No. 05-1589)	21
Richard A. Posner, <i>The Economic Analysis of Law</i> (2007)	8
Sylvester Petro, <i>Sovereignty and Compulsory Public-Sector Bargaining</i> , 10 Wake Forest L. Rev. 25 (1974)	6, 7
William B. Gould IV, <i>Labored Relations: Law, Politics, and the NLRB</i> (2000)	11

INTEREST OF *AMICI CURIAE*

The Evergreen Freedom Foundation, founded in 1991, is a non-partisan, public policy research organization with 501(c)(3) status, based in Olympia, Washington.¹ The Foundation's mission is to advance individual liberty, free enterprise, and limited, accountable government. The Foundation's efforts center around core areas of state budget and tax policy, labor policy, welfare reform, education, citizenship and governance issues. To this end, the Foundation has promoted efforts to protect employees, including school teachers, from coerced political speech.

The American Legislative Exchange Council (ALEC) is the nation's largest bipartisan, individual membership association of state legislators, with 2,000 members. ALEC's mission is to advance the Jeffersonian principles of free markets, limited government, federalism, and individual liberty, through a non-partisan, public-private partnership between America's state legislators and concerned members of the private sector, the federal government and the general public. ALEC's Task Forces have approved

¹ The parties have consented to the filing of this brief. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or counsel, made a monetary contribution to its preparation or submission.

several model bills that protect the First Amendment rights of workers represented by labor organizations.

The Independence Institute, founded in 1985, was established upon the eternal truths of the Declaration of Independence. Based in Colorado, the Independence Institute is a non-partisan, non-profit public policy research organization dedicated to providing timely information to concerned citizens, government officials, and public opinion leaders. Active in the research of education and labor policy issues, the Independence Institute educates citizens about the values of personal freedom, individual responsibility, and limited government.



SUMMARY OF ARGUMENT

States have adopted a wide variety of laws regulating labor relations of state and local government employees, and unions in states that allow public-sector collective bargaining are the beneficiaries of significant entitlements and privileges. Unions representing public employees are granted an exclusive status that confers monopoly powers. Within the public-sector bargaining context, exclusive representatives are shielded from the competition of rival unions and can prevent employees from negotiating on their own behalf. Many states allow unions to automatically deduct employee dues, thereby relieving unions of the burden of income collection. Some states permit automatic deductions for additional

employee contributions that unions are able to use toward political and lobbying ends.

No constitutional obligation on the state exists, however, to assist, recognize, or enhance a public-sector union's status. Accordingly, states have adopted, and courts have upheld, numerous restrictions on unions' statutorily-conferred bargaining status. States may constitutionally refuse to allow public employees to bargain collectively, prohibit unions from charging employees mandatory fees, regulate the collection and use of union political funds, refuse to permit automatic payroll deductions for member dues, or prohibit public employee strikes. Courts have granted states significant discretion and flexibility when managing labor-relations with public-sector unions.

The Ninth Circuit's ruling below departs from this general practice of deference to state policymakers, and imposes a rigid prohibition on state governments. If upheld, the ruling could undermine the complex balance of public employee labor relations and could fragment the continuity of labor regulations within state borders. The Ninth Circuit ignored the "unique context of public-sector agency-shop arrangements," wherein unions are statutorily granted the ability to represent and negotiate on behalf of public employees. *Davenport v. Washington Educ. Ass'n*, 127 S. Ct. 2372, 2382 (2007).

The Idaho Voluntary Contributions Act, when understood in this framework, is a reasonable restriction on Respondents' bargaining status. Many of the

public-sector union entitlements and restrictions adopted by state legislatures are analogous to the Voluntary Contributions Act by regulating some aspect of labor relations within a state's political subdivision.

The Ninth Circuit erred by failing to apply this Court's well-established guidelines for speech restrictions in nonpublic fora. The decision below mistakenly used the First Amendment to erect a barrier between state and their political subdivisions, thereby preventing states from adopting reasonable, viewpoint-neutral labor laws for local government employees and their unions.

This brief discusses the unique context of public-sector bargaining, the variety of labor-management laws adopted by states, and the necessity for states to enjoy flexibility in regulating public-sector labor relations.

I. COURTS HAVE GRANTED STATE LEGISLATURES GREAT DEFERENCE IN REGULATING STATE LABOR RELATIONS

A. Legislatures have adopted a wide variety of labor-management laws, which both restrict and enhance union entitlements.

The National Labor Relations Act (NLRA) grants employees the right to "form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in

other concerted activities for the purpose of collective bargaining or other mutual aid or protection” 29 U.S.C. § 157.

The NLRA leaves regulation of labor relations within state and local governments to the individual states. *See* 29 U.S.C. § 152(2). Consistent with this delegation of authority, state legislatures have adopted a wide variety of laws governing public-sector labor relations. Regional considerations, state history, revenue projections, and political composition are all factors in determining how a state will manage its own employees. “The ingredients of industrial peace and stabilized labor-management relations are numerous and complex.” *Railway Empl. Dep’t v. Hanson*, 351 U.S. 225, 234 (1956).

Public-sector collective bargaining is a creature of state statute, and “the First Amendment is not a substitute for national labor relations laws.” *Smith v. Arkansas State Highway Employees Local 1315*, 441 U.S. 463, 464 (1979). Accordingly, the state legislatures are within constitutional bounds to prohibit or allow public-sector bargaining altogether, prohibit or allow automatic deduction of union dues, place conditional limitations on union political fundraising, and prohibit employees from engaging in strikes and work stoppages. Courts may restrain their interference with a union’s “statutory entitlement,” but this “does not imply that legislatures (or voters) themselves cannot limit the scope of that entitlement.” *Davenport v. Washington Educ. Ass’n*, 127 S. Ct. 2372, 2379 (2007).

Many of these public employee statutes are analogous to the Idaho Voluntary Contributions Act (VCA) in that the laws reach beyond the state's employees, and manage labor relations within the state's political subdivisions. The Ninth Circuit's ruling, if upheld, could endanger many of the statutes adopted for public-sector unions.

1. Unions are granted substantial statutory entitlements when representing workers.

The ability of unions to represent public employees is accompanied by substantial entitlements, and unions exercise "extraordinary power" over represented employees. *Davenport*, 127 S. Ct. at 2378. Many of these benefits are unavailable to other membership associations, corporations, political entities, and even other unions.

More than thirty-five states have extended collective bargaining rights to employees of the state or its local government entities.² The hallmark of these bargaining statutes is that the union is the "exclusive bargaining agent for all employees in that unit: for the employees who have voted in favor of the union, for those who have voted against it, and for those who have not voted at all." Sylvester Petro,

² See AFSCME, *Public-sector Collective Bargaining Laws* (last visited May 30, 2008) at <http://www.afscme.org/members/11075.cfm>.

Sovereignty and Compulsory Public-Sector Bargaining, 10 Wake Forest L. Rev. 25, 44 (1974). As the exclusive agent, the union plays a “dominant role in the . . . employment destinies of all the employees in the unit” *Id.* Individual employees are prohibited from selecting their own representative agent or from representing themselves in matters within the scope of collective bargaining. Regardless of the quality of service provided by a union, employees are “rigidly governed by the collective agreement. They cannot seek or be given better, worse, or different terms.” Clyde W. Summers, *Exclusive Representation: A Comparative Inquiry into a “Unique” American Principle*, 20 Comp. Lab. L. & Pol’y J. 47, 49 (1998).

The power wielded by unions in exclusive bargaining arrangements has been likened to that of a government entity.

Unions, in bargaining, are not private organizations but are governmental agencies garbed with the cloak of legal authority to represent all employees in the unit and armed with the legal right to participate in all decisions affecting terms and conditions of employment. . . .

A union, in bargaining, acts as the representative of all workers within an industrial area. It weighs alternatives and determines policies which vitally affect all those whom it represents. It negotiates a contract which becomes the basic law of that industrial community. In making those laws, the union acts as the worker’s economic legislature. After

the laws have been made, the union is charged with their enforcement, and through its grievance process helps judge their interpretation and application. It is the worker's policeman and judge. The union is, in short, the employee's economic government. The union's power is the power to govern.

Clyde W. Summers, *Union Powers and Workers' Rights*, 49 Mich. L. Rev. 805, 811, 815-816 (1951).

The exclusive bargaining status effectively shields the union from rival unions that might offer competing services, thus depriving employees of other options for representation. As Judge Posner recently wrote, the NLRA (and similarly, state bargaining statutes) is "a kind of reverse Sherman Act, designed to encourage cartelization of labor markets." Richard A. Posner, *The Economic Analysis of Law* 344 (2007).³ The process for selecting a union representative is also designed to entrench the union by avoiding frequent replacement. Once selected, the union remains indefinitely, unless "decertified" by a majority of employees. Further, it is possible for a union to represent a unit where no current employees actually voted for the union if the election occurred years

³ Compare exclusive bargaining in American labor law to the New Zealand Employment Contracts Act of 1991, which abolished compulsory union representation and gave individual employees the choice to negotiate directly with the employer or to join a labor union. Ellen J. Dannin, *Working Free: The Origins and Impact of New Zealand's Employment Contracts Act 3* (1997).

before. Linda Chavez and Daniel Gray, *Betrayal* 220 (2004).

Union-represented employees who wish to rescind a union's exclusive status must do so through a decertification election. Many public employee bargaining laws limit the frequency of decertification elections and mandate that elections occur within a specific window of time – thereby insulating the union even further. *See* DEL. CODE ANN. tit. 19, § 1311(3) (no decertification petition will be entertained unless filed not more than 180 days nor less than 120 days prior to the expiration of an existing multi-year agreement); FLA. STAT. ANN. § 447.307(d) (no decertification request shall be filed within one year of certification; decertification elections may only be requested during the period extending from 150 days to 90 days immediately preceding the expiration date of a valid agreement); WASH. REV. CODE § 41.59.070(3) (no question of representation may be raised within one year of certification; decertification elections may only be requested not more than ninety nor less than sixty days prior to the expiration date of multi-year bargaining agreements).

Unlike other membership associations and political entities, public employee unions are often assisted with their income collection through use of the government's payroll system. Numerous state

statutes authorize political subdivisions to collect dues through automatic payroll deductions.⁴

The labor laws of many states authorize a union and a government employer to negotiate an agency-shop agreement, which allows the union to collect dues from every employee in the bargaining unit. *Davenport*, 127 S. Ct. at 2376. Compelling employees to financially support a union “has an impact upon their First Amendment interests.” *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 516 (1991), citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977). Last session this Court noted the great advantage unions enjoy in agency-shop arrangements: “it is undeniably unusual for a government agency to give a private entity the power, in essence, to tax government employees.” *Davenport*, 127 S. Ct. at 2378.

A union’s ability to exclusively represent workers and to mandate payments is particularly advantageous

⁴ See ALASKA STAT. § 23.40.220 (employees of state and its political subdivisions); CAL. GOV’T CODE § 3508.5 (governmental subdivisions); CONN. GEN. STAT. § 7-477 (municipal employees); FLA. STAT. ANN. § 447.303 (state and political subdivisions); HAW. REV. STAT. § 89-4 (state, counties, and other employers); 5 ILL. COMP. STAT. 315/6(e-f) (state and political subdivisions); IND. CODE § 20-29-5-6 (school employees); MINN. STAT. § 179A.06(6) (state and political subdivisions); PA. STAT. ANN. tit. 43, § 1102.4 (political subdivisions); WASH. REV. CODE § 41.59.060(2) (educational employees). Several states penalize public-sector unions that engage in strikes by rescinding the privilege of dues deductions. IND. CODE § 20-29-9-3; MD. CODE ANN., EDUC. § 6-410(b)(2); S.C. CODE ANN. § 8-11-83.

given that “the central and inescapable fact of American unionism in our time is decline.” Keith H. Hylton, *Law and the Future of Organized Labor in America*, 49 *Wayne L. Rev.* 685, 686 (2003). Union membership has been declining steadily since the 1950s, when unions represented 35 percent of American workers. William B. Gould IV, *Labored Relations: Law, Politics, and the NLRB* 7 (2000). In 2007, only 12.1 percent of wage and salary workers were members of a union, down from 20.1 percent in 1983, when the Department of Labor began tracking comparable union data. Bureau of Labor Statistics, U.S. Department of Labor, New Release, USDL 08-0092, *available at* <http://www.bls.gov/news.release/union2.nr0.htm>. Additionally, modern attitudes toward unionization appear increasingly ambivalent. Workers ages sixteen to twenty-four are far less likely to be union members (4.8%) than workers ages forty-five to fifty-four (15.7%) and ages fifty-five to sixty-four (16.1%). *Id.* Whatever the cause of the decline in union membership, the exclusive bargaining status enjoyed by unions no doubt slows and insulates unions from more rapid attrition. Public-sector unions are thus created and sustained by the quasi-monopoly status conferred by state legislatures.

Many of the statutory entitlements enjoyed by unions have also been granted to public-sector unions in Idaho. The State of Idaho has authorized collective bargaining for public school teachers (IDAHO CODE §§ 33-1271 to 1276) and firefighters (IDAHO CODE §§ 44-1801 to 1812). Labor organizations representing

school teachers negotiate with the government employer as the “exclusive representative” of the employees. IDAHO CODE § 33-1273. Unions representing firefighters are the “sole and exclusive bargaining agent” for purposes of negotiation. IDAHO CODE § 44-1804. The collective bargaining statutes obligate Idaho government entities to negotiate with the union representative. IDAHO CODE § 33-1273; IDAHO CODE § 44-1804.

The Respondent labor organizations are assisted by government entities in their income collection through the use of automatic payroll deductions from the wages of member employees in order to collect dues, if so authorized by the employee. IDAHO CODE § 44-2004(1). Additionally, labor organizations are exempted from the state’s antitrust law. IDAHO CODE § 48-107(1)(e).

Within the bargaining context, unions enjoy additional benefits not granted to most other membership or charitable organizations. For example, the Pocatello Education Association and its representatives are granted considerable access to and use of school property for union business. *Negotiated Agreement, 2007-2008, The Board of Trustees of School District No. 25 and Pocatello Education Association, available at http://www.d25.k12.id.us/hr/negotiation_agreement.pdf*. Union representatives are permitted to use school buildings for association meetings (§ 3.2); transact association business on school property (§ 3.3); use school facilities, equipment, and computer networks (§ 3.4); and post notices on school

bulletin boards and use mail boxes for communication (§ 3.5).

The Pocatello Education Association also has access to detailed school district information and is granted a voice in district decision-making. The school district is obligated to furnish the union, upon request, all available information regarding financial reports, budgetary requirements and allocations, agendas and minutes of board meetings, treasurer's reports, school census information, and names and contact information of all teachers (§ 3.6). A representative of the union is permitted to participate in annual budget preparations (and is released from teaching duties at no cost to the union or the individual) (§ 3.7); participate in plans that affect curricula or programs (§ 3.8); make announcements at faculty meetings (§ 3.9); participate in orientation programs for new teachers (§ 3.10); and participate in regular board meetings (§ 3.11). The local union president can be released from teaching duties for up to one year in order to conduct union business (§ 3.12).

Whether Idaho unions are exercising monopoly power over public employees, utilizing government property and equipment not otherwise available to the public, or crafting public policy, the unions enjoy substantial influence and privileges as a result of the entitlement conferred by the Idaho Legislature.

2. State legislatures have adopted many labor-management restrictions on union powers.

While employees are free to associate with labor unions, public-sector collective bargaining is a statutory right conferred by individual state legislatures. As a result, states can adopt restrictions on the statutory right to bargain. “The repeal of laws is as much a legislative function as their enactment.” *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 113 (1953). States have therefore adopted a wide variety of labor-management laws that affect the unions’ statutory entitlement.

Significantly, many states do not grant public employees the right to bargaining, and several states prohibit bargaining altogether. Virginia explicitly prohibits collective bargaining by all state and local public employees. VA. CODE ANN. § 40.1-57.2. North Carolina declares state and local public employee collective bargaining contracts to be “illegal.” N.C. GEN. STAT. § 95-98. South Carolina public employees “do not have the right to collective bargaining.” *Branch v. City of Myrtle Beach*, 532 S.E.2d 289, 292 (2000). Other states authorize collective bargaining for particular sectors of public employees and decline to allow bargaining for other sectors. For example, Idaho allows bargaining for public school teachers and firefighters, but does not authorize bargaining for municipal or state agency employees. IDAHO CODE §§ 33-1271, 44-1801.

Twenty-two states, including Idaho, have adopted right-to-work laws, which prohibit unions from negotiating agency-shop arrangements that would allow the union to collect a fee from all employees in the represented bargaining unit. See National Right to Work Legal Defense Foundation, *Right to Work States* (last visited May 30, 2008) at <http://www.nrtw.org/rtps.htm>. These statutes affect both state employees and employees of the state's political subdivisions.

A number of states have restricted unions' collection and use of agency-shop fees, including unions that represent local government employees. Some states require the agency fee to be kept separate from any political contributions. 5 ILL. COMP. STAT. 315/3(g); MD. CODE ANN., EDUC. § 6-504(d)(3)(iv)(2). Other states limit the amount that may be charged so nonmembers pay only a percentage of regular membership dues. MD. CODE ANN., EDUC. §§ 6-504(b); MINN. STAT. § 179A.06(3); N.J. STAT. ANN. § 34:13A-5.5; N.M. STAT. ANN. § 10-7E-4(J); PA. STAT. ANN. tit. 43, § 1102.2; VT. STAT. ANN. tit. 3, §§ 902(19). Montana prohibits the use of agency-shop fees for political contributions. MONT. CODE ANN. § 39-31-402. Washington requires nonmembers to affirmatively authorize use of the agency-shop fee for political activity. WASH. REV. CODE § 42.17.760.

Many states regulate a union's collection and use of political funds. Similar to federal campaign finance law, several states prohibit unions from making political contributions or expenditures from general treasury funds. Unions may establish political action

committees, which rely on voluntary contributions from union members and other contributors.⁵ Incidentally, laws that require unions to seek member approval for political spending provide an opportunity to analyze whether union spending is consistent with members' intent. When workers are given a choice about whether their dues will be used for political activity, union political spending falls by forty to fifty percent. *See James Sherk, What Do Union Members Want? What Paycheck Protection Laws Show About How Well Unions Reflect Their Members' Priorities*, THE HERITAGE FOUNDATION, August 30, 2006, available at <http://www.heritage.org/Research/Labor/cda06-08.cfm>. Given this disparity, states have a valid interest in removing themselves from collection of political funds, thereby allowing union members to contribute only if they so choose.

Other states prohibit political activity or campaign solicitations on public property, which could limit a union's political fundraising. *See* ARK. CODE ANN. § 7-1-103(a)(2)(A-B) (unlawful for public servants to work on campaigns or circulate initiatives or

⁵ *See* ALASKA STAT. §§ 15.13.067, 15.13.074, and 15.13.400(8); ARIZ. REV. STAT. §§ 16-919, 16-920, and 16-921; COLO. CONST. art. XXVIII, §§ 3(4) and 6(2); MICH. COMP. LAWS §§ 169.254(1), 169.255; N.C. GEN. STAT. § 163-278.19; N.D. CENT. CODE §§ 16.1-08.1-01(1), (4) and 16.1-08.1-03.3; OHIO REV. CODE ANN. §§ 3517.082, 3599.03, and 3599.031; PA. STAT. ANN. tit. 25, § 3253; PA. STAT. ANN. tit. 43, § 1101.1701; R.I. GEN. LAWS §§ 17-25-10.1(h) and 17-25-3(1); TEX. ELEC. CODE ANN. §§ 253.094 and 253.100; WYO. STAT. ANN. §§ 22-25-102(a) and (h).

referenda during usual office hours); IOWA CODE § 400.29(1) (local government employees shall not solicit contributions for political parties or candidates during working hours); N.J. STAT. ANN. § 34:11-4.4a(2)(e) (“No solicitation shall be made for employee contributions on the job or at the workplace.”).

The right to strike as an employee has been called a “fundamental political right . . . the ultimate and most powerful weapon that workers have to force concessions from employers.” 1 Elise Gautier & Henry Willis, *Employee and Union Member Guide to Labor Law*, § 4:1 (2005). Nevertheless, forty-two state legislatures have either explicitly prohibited strikes by specific classifications of public employees (including employees of political subdivisions), or have withheld the right to strike from public employees.⁶

⁶ See ALA. CODE § 11-43-143; ALASKA STAT. § 23.40.200(b); ARIZ. REV. STAT. § 23-1412; COLO. REV. STAT. § 8-1-126; CONN. GEN. STAT. § 5-279; DEL. CODE ANN. tit. 19, § 1316; FLA. CONST. art. I § 6; GA. CODE ANN. § 45-19-2; HAW. REV. STAT. § 89-12; IDAHO CODE § 44-1811; IND. CODE § 20-29-9-1; IOWA CODE § 20.12; KAN. STAT. ANN. § 72-5430(c)(5); KY. REV. STAT. ANN. § 78.470; 5 ILL. COMP. STAT. 315/14(m); MD. CODE ANN., STATE PERS. & PENS. § 3-303(b) and MD. CODE ANN., EDUC. § 6-410; MASS. GEN. LAWS ch. 150E, § 9A(a); MICH. COMP. LAWS § 423.202; MINN. STAT. § 179A.18-19; MISS. CODE ANN. §§ 25-1-105 and 37-9-75; MO. REV. STAT. § 105.530; MONT. CODE ANN. § 39-31-501; NEB. REV. STAT. § 48-821; NEV. REV. STAT. § 288.230; N.H. REV. STAT. ANN. § 273-A:13; N.M. STAT. ANN. § 10-7E-2; N.Y. CIV. SERV. LAW § 210; N.C. GEN. STAT. § 95-98.1; N.D. CENT. CODE § 15.1-16-16; OHIO REV. CODE ANN. § 4117.18(C); OKLA. STAT. tit. 11, §§ 51-101(B) and 51-217, tit. 19, § 901.30(A), tit. 70, § 509.8; OR. REV. STAT. § 243.736; PA. STAT. ANN. tit. 43, § 215.2; R.I. GEN. LAWS

(Continued on following page)

As a matter of public policy, government employees providing essential services to taxpayers are not permitted to withhold these services as a tactic for strengthening the union's bargaining position.

As can be seen, states benefit from having a wide collection of labor-management tools at their disposal, and the flexibility to enact measures like Idaho's VCA allows states to efficiently operate their functions. Moreover, states have not restrained themselves from managing labor relations within their political subdivisions.

B. Courts have upheld many laws and policies that affect a union's First Amendment speech.

Not only have states exercised sovereignty in regulating public-sector labor relations, but courts have traditionally shown great deference for states' labor-management practices. As this Court said in *Hanson*, "[t]he decision rests with the policy makers, not with the judiciary." 351 U.S. at 234.

The fundamental question of whether to allow public employee bargaining at all is one of legislative discretion. In *Smith v. Arkansas State Highway*

§§ 28-9.3-1(b), 36-11-6; S.D. CODIFIED LAWS § 3-18-10; TENN. CODE ANN. § 7-56-109; TEX. GOV'T CODE ANN. § 617.003(a) and TEX. LOC. GOV'T CODE ANN. § 146.008(a); UTAH CODE ANN. § 34-20a-5; VT. STAT. Ann. tit. 3, § 903(b); VA. CODE ANN. § 40.1-55; WASH. REV. CODE § 41.56.12; and WIS. STAT. § 111.89.

Employees, state employees and their union brought action against the Arkansas State Highway Commission for the Commission's refusal to allow the union to initiate a grievance on behalf of an employee. While the highway employees were free to join a union and advocate particular ideas, this Court said unions possessed no constitutional entitlement to compel recognition from the government body. "The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so. But the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it." *Smith*, 441 U.S. at 464 (citation omitted).

The Court noted that such a refusal by the Commission may well reduce the union's effectiveness in "representing the economic interests of its members." *Id.* at 466. But this impairment – contrasted with an outright prohibition of union membership – was not forbidden by the Constitution. The Commission's decision to "ignore the union" was permissible. *Id.*

Similarly, Idaho's VCA does not prohibit union members from voluntarily contributing money to the union's political action committee. The Act does not penalize unions or their members for making political contributions. Nor does the Act place onerous preconditions on union political activity. The state and its political subdivisions are merely "ignoring" the union by declining to act as the union's political rainmaker.

As discussed above, many states, including Idaho, have adopted right-to-work laws, which give workers a choice about whether to join or pay a union for its services. Unions can and do point out the burden of representing employees who have not contributed financially to the union's operations. Regardless, this Court has upheld right-to-work laws against constitutional challenges. *Lincoln Federal Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949); *American Fed'n of Labor v. American Sash & Door Co.*, 335 U.S. 538 (1949). More recently the Court unequivocally stated that "unions have no constitutional entitlement to the fees of nonmember-employees." *Davenport*, 127 S. Ct. at 2372.

In *Lincoln*, unions brought challenges against laws in North Carolina and Nebraska that prohibited discrimination against non-union workers. The challengers argued the laws indirectly infringed upon the union workers' constitutional rights because of the unions' interest in "eliminating the competition of the non-union worker." *Lincoln*, 335 U.S. at 530. Justice Black, writing for the Court, characterized the unions' argument as "rather startling," *id.* at 531, and the Court rejected the challenge. "Because the outlawed contracts are a useful incentive to the growth of union membership, it is said that these laws weaken the bargaining power of unions and correspondingly strengthen the power of employers. This may be true. But there are other matters to be considered." *Id.* at 532.

In striking down the Idaho VCA, the Ninth Circuit failed to consider “other matters,” as Justice Black suggested. *Id.* Specifically, the Ninth Circuit failed to recognize that Respondents’ ability to bargain is statutorily conferred and can constitutionally be repealed. A union’s ability to collect *any* funds through automatic deduction is an advantage of its bargaining status. The state, however, is not obligated to allow this collection.

This Court has also ruled numerous times that employees cannot be forced to pay for a union’s ideological expenses that are unrelated to collective bargaining functions. See *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740 (1961); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435 (1984); *Chicago Teacher’s Union, Local 1 v. Hudson*, 475 U.S. 292 (1986); and *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507 (1991).

Most recently in *Davenport v. Washington Educ. Ass’n*, this Court upheld a law that prohibited unions from using a nonmember’s agency-shop fees for political activity unless “affirmatively authorized” by individual nonmembers. 127 S. Ct. at 2377. The challenging union claimed the law “would silence the political advocacy of unions” and created an “insurmountable hurdle” to engage in advocacy. Respondent’s Brief in Opposition to Petition for Writ of Certiorari at 9, *Davenport* (No. 05-1589).

Given the “unique context of public-sector agency-shop arrangements,” *Davenport*, 127 S. Ct. at 2382, this Court rejected the constitutional challenge, noting the State of Washington could have gone much further in regulating the union’s statutory benefits.

The notion that this modest limitation upon an extraordinary benefit violates the First Amendment is, to say the least, counterintuitive. Respondent concedes that Washington could have gone much further, restricting public-sector agency fees to the portion of union dues devoted to collective bargaining. Indeed, it is uncontested that it would be constitutional for Washington to eliminate agency fees entirely.

Id. at 2378 (citations omitted).

The Court also noted that Washington’s “affirmative authorization” law survived a First Amendment analysis. “We do not believe that the voters of Washington impermissibly distorted the marketplace of ideas when they placed a reasonable, viewpoint-neutral limitation on the State’s general authorization allowing public-sector unions to acquire and spend the money of government employees.” *Id.* at 2381.

By comparison, the Idaho VCA merely removes one mechanism for collecting funds – a mechanism that is unavailable to other political actors. The law involves “no suppression of ideas,” as the Respondent unions “remain[] as free as any other entity to participate in the electoral process with all available

funds.” *Id.* at 2382. *Davenport* also rejects the argument the Ninth Circuit used to invalidate Idaho’s VCA: a state government is unable to adopt labor-management regulations that affect union speech in a political subdivision. The Court upheld Washington’s affirmative authorization law as applied to public-sector unions, specifically one that represents local government employees. *Id.*

In *City of Charlotte v. Firefighters Local 660*, 426 U.S. 283 (1976), this Court upheld a city’s refusal to withhold union dues from the paychecks of members. While *City of Charlotte* involved a city’s decision to deny dues deductions – presumably allowed under the Ninth Circuit’s reasoning in this case – the ruling notes that the city’s practice “has been to allow check-offs from employees’ pay to organizations or programs *as required by law*. . . .” *Id.* at 285 (emphasis added). The Court said it would have rejected an argument by the unions that their “status as union members or their interest in obtaining a dues checkoff is such as to entitle them to special treatment under the Equal Protection Clause.” *Id.* at 286. Accordingly, the Court applied a “relatively relaxed standard of reasonableness” and upheld the city’s practice as legitimate. *Id.*

As noted above, nearly every state has prohibited government employee strikes, and these laws as applied to employees of political subdivisions have been upheld in numerous decisions. *See City of Fort Smith v. Arkansas State Council No. 38*, 433 S.W.2d 153, 154 (1968) (“municipal employees . . . do not have the right to strike against the government”);

Dade County Classroom Teachers Ass'n v. Legislature, 269 So.2d 684, 686 (1972) (public school teachers “shall not have the right to strike”); *Board of Educ. of Community Unit School Dist. No. 2 v. Redding*, 207 N.E.2d 427, 430 (1965) (“a strike of municipal employees for any purpose is illegal”); *St. Louis Teachers Ass'n v. Board of Educ.*, 544 S.W.2d 573, 575 (1976) (ending an “illegal strike by the public school teachers”); *New Jersey Bd. of Educ. v. N.J. Educ. Ass'n*, 247 A.2d 867, 871 (1968) (“It has long been the rule in our State that public employees may not strike.”); *City of Manchester v. Manchester Teachers Guild*, 131 A.2d 59 (1957) (a strike by public employees under contract is illegal); *Port of Seattle v. Int'l Longshoremen's & Warehousemen's Union*, 324 P.2d 1099, 1103 (1958) (“the right to strike is subordinate to the port's immunity therefrom”).

Courts have also upheld the statutory benefits granted unions, many of which affect employees in political subdivisions. For example, a union's ability to collect mandatory payments from local government employees when authorized by state law is clearly recognized in *Abood*, *Hudson*, *Lehnert*, and other agency-shop cases.

In 1944 the Supreme Court upheld the “exclusive” status granted unions, ruling that the NLRA prohibits individual employees from negotiating their own contracts. *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). The exclusive status, and all its concomitant benefits, has since been replicated in state labor laws.

This Court affirmed the competitive advantages exclusive representatives hold over other unions in *Perry Education Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983). A union's bargaining agreement with the local board of education provided that no other union would have access to the interschool mail system and teacher mailboxes. A rival teachers union, which had once enjoyed access to teachers in the district, challenged the agreement as violating the First and Fourteenth Amendments.

While noting that "constitutional interests are implicated" by denying a union use of interschool mail, the Court rejected the notion that "students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for . . . unlimited expressive purposes." *Id.* at 44 (citation omitted). The Court categorized the school mail system as a non-public forum and emphasized that the school district had "no constitutional obligation" to let *any* organization use the system. *Perry*, 460 U.S. at 48. Exclusion of the rival union was a "permissible labor practice in the public-sector," *id.* at 51, and the Court upheld the practice as one of the privileges enjoyed by the exclusive bargaining representative. *Id.* at 55. The Court also noted that similar exclusive access policies have been upheld in most federal and state decisions. *Id.* at 43, n.6.

Reading the cases above, courts have long allowed state legislatures to determine the practices governing labor relations in the public-sector. Government

bodies have no constitutional obligation to bargain with public employee unions, no obligation to allow unions to use their internal systems for private activity, and no obligation to collect a union's income. If these restrictions on bargaining power are within the proper ambit of legislative regulation, Respondents can hardly claim a First Amendment entitlement to utilize governmental payroll systems for political fundraising.

None of these cases stands for the proposition adopted by the Ninth Circuit's ruling that the First Amendment erects a "wall of separation" between a state and its political subdivisions, thereby prohibiting the state from adopting a reasonable labor-management device the local government could itself constitutionally adopt. At a minimum, the Ninth Circuit decision deprives states of a tool in managing public labor relations, and could ultimately jeopardize many reasonable restrictions on labor unions.

II. THE NINTH CIRCUIT'S RULING WILL UNDERMINE STATE LABOR RELATIONS AND OVERINFLATE UNION RIGHTS

If upheld, the Ninth Circuit's decision to erect a wall between the state of Idaho and its political subdivisions will undermine labor regulations in Idaho and many other states, frustrating their carefully constructed systems of labor relations and their ability to protect the rights of workers. Furthermore, the Ninth Circuit's over-inflation of the burden on

Respondents' First Amendment rights will force states to give unique help to unions' fundraising efforts above and beyond that given to other political organizations.

A. The ruling will prevent Idaho and other states from regulating labor relations and protecting employee rights in a uniform manner.

The Ninth Circuit leaned heavily on the case of *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980), in finding that Idaho must act as a "proprietor" of local payroll systems in order to restrict their use by unions. *Pocatello Educ. Ass'n v. Heideman*, 504 F.3d 1053, 1066 (2007). But the Consolidated Edison Company was a private corporation. It was a regulated government monopoly, to be sure, but not an entity created or removable by the state. But if Idaho and other states are forced to treat their political subdivisions as private companies, their ability to create a uniform, carefully-balanced system of labor relations will be hamstrung. Instead of having one set of rules applying to both state and local workers, they will have to set different rules for each, creating as many variations as there are local governments.

This Balkanization of labor relations will undermine a state's ability to achieve the desired balance of protecting the First Amendment rights of both workers and unions in the context of a collective

bargaining agreement. Some collective bargaining agreements involve “a significant impingement on First Amendment rights,” and states have always had broad discretion to carefully formulate labor relations in the best way to protect these rights. *Ellis v. Brotherhood of Ry.*, at 455.

As discussed in Section I, every state has set up a system suited to its particular public employment climate. Such systems are carefully prescribed by state statutes, as is appropriate because “once an association with others is compelled by the facts of life, special safeguards are necessary lest the spirit of the First, Fourth, and Fifth Amendments be lost and we all succumb to regimentation.” *Machinists v. Street*, 367 U.S. 740, 776 (1961) (Douglas, J., concurring). States don’t even have an obligation to allow collective bargaining agreements in the first place. *Smith v. Arkansas State Highway Emp., Local 1315*, at 465. If they do, their complex labor regulations often include micro-management details like punishing public school employee strikes by revoking payroll deduction benefits. See IND. CODE § 20-29-9-3. With the power to both create and manage labor relations it is not a stretch of the imagination to characterize state governments as the proprietors of the labor relationship between unions and state and local government bodies. Not only does the state create the bargaining status, but it also creates the local governments, can remove them by state action, and subsidizes them in whole or part from the state

coffers. See IDAHO CONST. Art. IX, § 1; IDAHO CODE § 33-101.

Rather than focusing on Idaho's comprehensive involvement in the creation and management of labor relations, however, the Ninth Circuit focused on its lack of day-to-day involvement in local payroll systems in finding that the state couldn't withdraw a piece of the extraordinary privileges it grants to labor unions: "In sum, the State's broad powers of control over local government entities are solely those of a regulator, analogous to the New York Public Service Commission's regulatory powers over Consolidated Edison." *Pocatello Educ. Ass'n*, at 1066. But if states must treat local governments like private corporations, and must exercise hands-on management of local payroll systems in order to prescribe the level of privileges given to public-sector unions, many of the statutes and court decisions described in Section I are invalid.

One need look no further than *Perry* to see the effect of the Ninth Circuit's reasoning. The Court decided the unequal grant of union access to school mailboxes in that case was constitutional because of the preferred union's position as the exclusive bargaining representative under state law. *Id.* at 50-51; IND. CODE § 20-7.5-1-2(1). Without that state-granted designation the district would have had no legitimate interest in promoting one union's speech over the other. No mere regulation by the state, this statute was part of a carefully balanced system of labor relations that mandated speech restrictions by a local

school board. When this Court upheld the law it did not even mention a distinction between the state action and the local policy based on that action. But the Ninth Circuit would have required that discussion, and the outcome may have changed, upsetting the stability of labor relations in Indiana by allowing the local school house to become “a battlefield for inter-union squabbles.” *Perry*, 460 U.S. at 52.

Similarly, this Court’s recent decision in *Davenport* would likely have had a different result under the Ninth Circuit’s reasoning. The Washington statute at issue restricted the ability of a union – one that bargained for local public employees – to deduct money for union political activity from employee paychecks. WASH. REV. CODE 42.17.760. Rather than upholding the statute as constitutional, under the Ninth Circuit’s reasoning this Court may have found the statute invalid when applied to the local members of the union.

In another example of the potential fallout, the Fourth Circuit would likely have come to a different conclusion in *South Carolina Educ. Ass’n v. Campbell* if it had to follow the Ninth Circuit’s lead. 883 F.2d 1251 (4th Cir. 1989). South Carolina wrote a law setting up a series of criteria unions had to meet in order to use payroll deductions from state agencies or local school boards. This was more than mere regulation. It was a re-write of local school board policies that immediately stopped the thereto common practice of paycheck deductions for the plaintiff union. *Id.* Later South Carolina passed a law allowing a state

employee union to have access to the state payroll system, but continued to prohibit such access to local school employee unions. *Id.* If the Fourth Circuit had used the Ninth Circuit’s reasoning it quite possibly would have struck down the state prohibition on local union paycheck deductions.

Besides these past cases, the Ninth Circuit’s decision would also threaten many of the current state statutes listed in Section I. For example, Maryland has a county-specific provision requiring school districts to stop payroll deductions for unions who violate the state’s no-strike law – thereby using local payroll systems to punish the exercise of a “fundamental” labor right. MD. CODE ANN., EDUC. § 6-410. Illinois includes a provision in its labor statutes prohibiting public-sector unions from deducting “any fees for contributions related to the election or support of any candidate for political office” from employee paychecks. 5 ILL. COMP. STAT. 315/3(g). Both these laws restrict union expression through local payroll systems, and both would be endangered by the Ninth Circuit’s requirement for states to “pervasively” manage these systems in order to dictate their use by local unions. *Pocatello Educ. Ass’n*, at 1067. Looking directly at Idaho’s labor statutes, its whole system of collective bargaining (including the exclusive status some unions enjoy) could be undermined based on the circuit court’s decision to build a wall between the state and local governments.

These are just a few of the many examples demonstrating how radical the Ninth Circuit’s decision is

in light of case precedent and common practices. If upheld, its treatment of local governments as private entities not under state control will undermine states' ability to create and manage uniform labor relations, and moves away from states' goal of an orderly, efficient management of labor that protects First Amendment rights.

B. The decision overinflates the burden on unions, forcing states to subsidize union speech.

A section appears to be missing from the Ninth Circuit's ruling, an omission that, if copied by other courts, will inflate the Respondents' First Amendment protections above those enjoyed by other private organizations. As discussed in Section I, labor unions enjoy unique speech privileges, being granted a virtual monopoly by exclusive bargaining representative laws, wide-open access to internal governmental communication systems, and subsidies through use of government payroll systems. Yet with little discussion the Ninth Circuit declared that the Respondent unions' speech is burdened by IDAHO CODE § 44-2004 because it "hampers their ability" to collect money for political activities "by making the collection of funds for that purpose more difficult." *Pocatello Educ. Ass'n*, at 1058.

But the Ninth Circuit failed to include a section explaining how making it more difficult for unions to raise money by reducing their unique access to

government payrolls is an unconstitutional burden. The withdrawal of that benefit in no way affects Respondents' "right to associate, to speak, to publish, to recruit members, or to otherwise express and disseminate their views." *South Carolina Educ. Ass'n v. Campbell*, at 1257. And it does not burden a union if viewed in relation to other political groups. As the Sixth Circuit found in deciding an identical Ohio law was valid, "in the absence of the public employers administering checkoffs for political causes, all political candidates and funds, regardless of their persuasion, are left with at least the same range of options in deciding how to tap this sector of the population for contributions as they would have had if the state had chosen not to allow any employers to administer wage checkoffs." *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 321 (6th Cir. 1998).⁷

⁷ Unlike the Ninth, the Sixth Circuit found no constitutional violation in the Ohio law's application to local public employees. But Respondents have attempted to distinguish *Toledo* by misconstruing a phrase in the holding to claim the Sixth Circuit assumed the statute applied only "to the state itself." Respondent Pocatello Education Association's Brief in Opposition to Petition for Writ of Certiorari at 10-11, *Ysursa* (No. 07-869). In fact, the phrase reads, "it cannot be said that the state has impinged in any way on the First Amendment rights of public employees and their unions by prohibiting public employers (in effect, itself) from administering checkoffs," and the Ohio statute at issue defines "public employers" to include "a political subdivision of the state . . . a public or special school district, or any other public employer." 154 F.3d 321-22; OHIO REV. CODE ANN. § 3599.031(H)(2). The Sixth Circuit saw no

(Continued on following page)

Rather than comparing the respondent unions' "burden" to other political candidates or committees in Idaho, the Ninth Circuit improperly equated it with the burden on petition circulators in *Meyer v. Grant*, 486 U.S. 414 (1988). *Pocatello Educ. Ass'n*, at 1059. In *Meyer*, this Court found that a Colorado law burdened political expression by prohibiting initiative campaign sponsors from paying their petition circulators. But unlike the Pocatello Education Association, the petition circulators in *Meyer* were granted no subsidies or special access by government entities to help them obtain signatures. The Colorado law was a negative restriction on citizen-sponsored speech that demonstrably made it more difficult for initiatives to qualify for the ballot. *Meyer*, at 423-24. In contrast, Idaho's restriction on paycheck deductions merely reduces an affirmative government benefit granted to no other private political group.

The level of burden in the two cases would only be parallel if Colorado had been helping initiative campaigns by, for example, letting them put a check-off on state income tax returns for donations to the campaign, then passed a law prohibiting that practice. Certainly that new law would make it harder to raise money for the initiative, but campaigns would not be able to claim a First Amendment right to that government benefit. This Court rebuffed a similar claim by a private organization in *Regan v. Taxation*

difference between state and local public employers in the application of Ohio's checkoff law.

without Representation of Washington, saying, “Although TWR does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.” 461 U.S. 540, 550 (1983) (citation omitted).

If the Ninth Circuit’s decision is upheld, the benefits Idaho and many states have granted to unions will cease to be optional labor relations tools and become protected constitutional rights. Such an outcome would skew the First Amendment by conferring on unions an advantage over all other political organizations and candidates. States can choose to grant such an advantage, but the First Amendment does not compel it.



CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

MICHAEL J. REITZ

Counsel of Record

JONATHAN D. BECHTLE

EVERGREEN FREEDOM FOUNDATION

2403 Pacific Ave. SE

Olympia, WA 98501

(360) 956-3482

Counsel for Amici Curiae