

*Appeal No. 06-4142*

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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UTAH EDUCATION ASSOCIATION; UTAH STATE AFL-CIO; AMERICAN  
FEDERATION OF TEACHERS-UTAH; AMERICAN FEDERATION OF STATE,  
COUNTY, AND MUNICIPAL EMPLOYEES, LOCAL 1004; UTAH SCHOOL  
EMPLOYEES ASSOCIATION; and PROFESSIONAL FIREFIGHTERS OF UTAH,

Plaintiffs and Appellees,

vs.

MARK SHURTLEFF, in his official capacity as Attorney General for the State of Utah,

Defendant and Appellant.

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**On Appeal from the United States District Court  
for the District of Utah, Central Division  
The Honorable Tena Campbell  
Trial Court Case No. 2:03CV-1100**

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**BRIEF OF THE SUTHERLAND INSTITUTE, UTAH TAXPAYERS  
ASSOCIATION, EVERGREEN FREEDOM FOUNDATION, PARENTS FOR  
CHOICE IN EDUCATION, AND NATIONAL RIGHT TO WORK LEGAL  
DEFENSE FOUNDATION, INC. AS AMICI CURIAE IN SUPPORT OF  
APPELLANT AND REVERSAL OF THE DISTRICT COURT**

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## INTEREST OF AMICI CURIAE

Amicus Curiae, the Sutherland Institute (“Sutherland”), the Utah Taxpayers Association (“Taxpayers Association”), the Evergreen Freedom Foundation (“Evergreen”), Parents For Choice in Education (“PCE”), and The National Right to Work Legal Defense Foundation, Inc. (“Right to Work”) hereby submit the following brief in support of Defendant/Appellant, Mark Shurtleff, in his official capacity as Attorney General for the State of Utah (“Utah” or “the State”).

Amicus Curiae, Sutherland, is a non-profit public policy think tank committed to shaping Utah law and policy based on a core set of governing principles. In this case, Sutherland is primarily concerned in promoting efficient and limited government and is of the strong opinion that the District’s Court’s decision would compromise those principled interests.

Amicus Curiae, Taxpayers Association, is a statewide association of approximately 2,500 Utah taxpayers, both individuals and businesses. For over 75 years, the Taxpayers Association has been instrumental in promoting sound tax policy and preventing waste of taxpayer dollars in Utah. In this case, the Taxpayers Association is concerned that the District Court’s decision, if not reversed, will set a dangerous precedent that public payroll systems are public forums to the detriment of efficient, fair and neutral administration and disbursement of public funds.

Amicus Curiae, Evergreen, is a non-partisan, public policy research organization with 501(c)(3) status, founded in 1991. Based in Olympia, Washington, Evergreen’s

mission is to advance individual liberty, free enterprise, and limited, accountable government. The Foundation is concerned that the District Court's decision could chill legislative efforts to properly regulate the use of government payroll systems for the collection of funds for private organizations.

Amicus Curiae, PCE, is dedicated to education reform in Utah through the introduction of meaningful parental choice in education. PCE envisions a vibrant education system, characterized by abundant choice, offering an excellent education to all students through diverse, competitive providers. PCE also supports the free and unfettered choice of all government employees to support whatever position on education they deem appropriate without government support or coercion. PCE believes that the District Court's opinion compromises such principles.

Amicus Curiae, Right to Work, is a charitable, legal aid organization formed to protect the right to work, freedoms of association, speech and religion, and other fundamental liberties of ordinary working men and women from infringement by compulsory unionism.

### **CONSENT OF THE PARTIES**

The parties have consented to the filing of this brief.

### **SUMMARY OF ARGUMENT**

The District Court's ruling that the Voluntary Contribution Act ("VCA"), as applied to counties, municipalities, and school districts, violates the First Amendment is incorrect and premised on specious reasoning. The District Court reached this decision primarily because it determined that property which political subdivisions of the State

control cannot be regulated in the same manner as property the State controls directly. This distinction makes no legal difference because political subdivisions of the State of Utah are nothing more than extensions of the State. The State grants these subdivisions their very existence and delegates their authority, which the State can revoke at any time.

These inescapable points are further strengthened by the obvious fact that political subdivisions of the State are regulated much more stringently than private parties; and, like all government entities, enjoy the protections afforded the sovereign, such as governmental immunity under statutorily prescribed circumstances.

The District Court's decision would effectively equate these political subdivisions with private parties for First Amendment purposes. Such an aberrant view has never been the law. Instead, for First Amendment purposes, State regulation of payroll systems that the State's political subdivisions control is no different than State regulation of payroll systems it controls. The State is not required to use its property or means to aid private parties in exercising their free speech rights. The State is only prohibited from placing obstacles in the way of exercising such rights.

Here, the State's refusal to allow payroll deductions for political purposes may well make collection of funds more difficult for Appellee labor organizations because the State does not aid their political fundraising. But that resultant private hardship is not relevant for First Amendment purposes. The State is not preventing anyone from donating to the Utah Education Association or any of Appellees' multiple political causes, or even discouraging such donations. The State is only requiring individuals to

make donations on their own, without the government's assistance. This type of regulation does not implicate the First Amendment.

Finally, the payroll system of a public employer is a non-public forum. Which division of the government controls a given forum has no bearing on whether the forum is public or not. Rather, the test is whether the objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted by the government indicate that expressive activity would be appropriate. Because a blanket prohibition by the State on the use of union dues by public employees for politics has been repeatedly upheld by the Supreme Court, the decision of the State of Utah to refrain from promoting the political power of public employee unions certainly passes constitutional muster.

It is difficult to imagine a more private type of government property than a payroll system, which must be closed to outside access for obvious reasons. Additionally, the objective function of a payroll system is to disburse funds; it does not have any expressive characteristics. Because a payroll system is a non-public forum, the State's regulation of expressive activity must only be reasonable. The State has more than adequately met this standard, and the District Court decision should be reversed.

### **ARGUMENT**

The issue to be decided on this appeal is whether public employee unions have a First Amendment right to compel the State to aid them in their political fundraising; or, stated differently, whether the State may prohibit automatic deductions for political purposes from government payroll systems. Utah's Voluntary Contribution Act ("VCA")

prohibits public employers from deducting any amount from employee wages that is designated for payment to, among other entities, any entity established by a labor organization for political purposes. Utah Code Ann. § 34-32-1.1(2)(g) (2006).

Appellees are labor organizations made up of employees of municipalities, counties, and school districts. They brought suit in the District Court claiming the VCA infringes on their First Amendment rights. The District Court granted summary judgment in favor of Appellees, and this appeal ensued. The central failure of the District Court's decision was its refusal to consider the payroll systems of public employers a non-public forum due to the perceived difference between property owned by the State and property owned by political subdivisions of the State. The District Court's application of strict scrutiny and ensuing invalidation of the VCA was incorrect as a matter of law. Because the State is free to regulate government payroll systems as it sees fit, this Court should reverse the District Court's decision.

**I. THE DISTINCTION BETWEEN POLITICAL SUBDIVISIONS OF THE STATE AND THE STATE ITSELF IS ARTIFICIAL.**

The linchpin of the District Court's decision was its determination that property of counties, cities, and school districts is not State property. Thus, the reasoning goes, the State may not prohibit its political subdivisions from allowing paycheck deductions for political purposes, although it may bar such deductions from its own payroll. *See Utah Educ. Ass'n v. Shurtleff*, 2006 U.S. Dist. LEXIS 27007, \*7 (D.Utah 2006) ("The significant factual distinction ... is that the payroll systems at issue here are not the property of the State of Utah.") Based solely on this faulty premise, the District Court

held the Voluntary Contribution Act unconstitutional as applied to municipalities, counties, school districts, and other local public employers. *Id.* at \*2-\*3.

The District Court's attempt to distinguish between the State and its political subdivisions cannot survive rational analysis. The State has delegated its authority to various subdivisions in order to allow the government to function more efficiently; these subdivisions have power only to the extent delegated by the State. *See* Utah Const., art. XI, § 8; *Johnson v. Sandy City Corp.*, 497 P.2d 644, 645 (Utah 1972); *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991).

In creating these subdivisions, the State has not ceded away control of these entities or spawned independent creations of co-equal authority. The lesser is part of the greater, and the State retains power to control its subdivisions as it sees fit. *See Salt Lake City v. Tax Comm'n of Utah*, 359 P.2d 397, 398-99 (Utah 1961) ("We have indicated that cities are the creatures and agencies of the state, which latter possesses plenary power over them. It would be paradoxical to say that such offspring could force their parents to exercise no regulation or restraint or incidental burden over or upon their operation, not constitutionally interdicted."). Whether the State delegated authority to own or control certain property is inconsequential. Any State action in regulating its political subdivisions is the same as the State regulating itself.

In their briefing before the District Court, Appellees conceded that the State is free to prohibit political deduction from payroll systems it directly controls. (*See* Pls.' Reply Mem. Supp. Mot. Summ. J. at 2; Pls.' Mem. Supp. Mot. Summ. J. at 8.) A case Appellees heavily rely upon observed that "[c]ertainly any local governmental entity

could decide on its own not to subsidize speech and accordingly refuse to provide a payroll deduction program.” See *Pocatello Educ. Ass’n v. Heideman*, 2005 U.S. Dist. LEXIS 34494, \*9 n.3 (D.Idaho 2005).

Thus, Appellees’ argument, accepted by the District Court, boils down to this: a) the State can validly prohibit political deduction from payroll systems it controls; and, b) a political subdivision of the State can validly prohibit political deductions from payroll systems it controls. Yet, says the District Court, it is unconstitutional for the State to prohibit payroll deductions from the payroll systems political subdivisions of the State control. Following such logic, a subdivision that owes its very existence to the State can ban political deductions, but the State itself cannot exercise such authority over the subdivision. The pivotal point upon which the District Court’s decision rests is irrational. Such a distinction simply makes no sense.

The only case law the District Court cites to support its holding is the United States Supreme Court decision in *Consolidated Edison Co. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530 (1980). In *Consolidated Edison*, the Supreme Court held that a ruling by a state public service commission prohibiting a utility company from using bill inserts to discuss political matters violated the First Amendment. *Id.* at 544. That case is inapposite because the Commission was attempting “to restrict the free expression of a *private party*,” it was not a case involving government oversight and use of government property. *Id.* at 540 (emphasis added).

The District Court (as well as Appellees in their memoranda before the District Court) employed a strained interpretation of *Consolidated Edison*, citing it for the

proposition that state restrictions of its own property are viewed differently than state restrictions of local government property. *See Utah Educ. Ass'n*, 2006 U.S. Dist. LEXIS 27007 at \*5-\*6. This is a misrepresentation of *Consolidated Edison*, and is not what *Consolidated Edison* holds. Although the party whose speech was restricted was a private company with a government-granted monopoly, it was nonetheless a private party. *Consolidated Edison*, 447 U.S. at 540 (“Where a government restricts the speech of a **private person**,” strict scrutiny is employed.) (emphasis added). This holding has no application to a State’s restriction of its political subdivisions, which are indisputably governmental bodies.

In essence, the District Court’s decision equates State regulation of a political subdivision with State regulation of a private party. Such a result is nonsensical and contrary to established law. The obvious difference is that the State can impose regulation or extinction upon a political subdivision of the State at any time. *See Salt Lake City*, 359 P.2d at 398-99; Utah Code Ann. § 10-1-201 (2006) (“Municipalities shall be political subdivisions of the State of Utah, municipal corporations, and bodies politic with perpetual existence **unless disincorporated** according to law.”) (emphasis added); *Id.* § 53A-2-101 (“School districts may be created, merged, **dissolved**, or their boundaries changed only as provided in this chapter.”) (emphasis added). The State clearly could not do the same to a private company.

Another example of the dichotomy between public and private entities is apparent from the State-implemented procedures that govern the termination of public school teachers. Such procedures require orderly dismissal, a written statement of cause,

