No. 05-1589

IN THE

Supreme Court of the United States

GARY DAVENPORT, MARTHA LOFGREN, SUSANNAH SIMPSON, AND TRACY WOLCOTT,

Petitioners,
v.

WASHINGTON EDUCATION ASSOCIATION,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

I. Do labor union officials have a First Amendment right to take the wages of employees who have chosen not to become union members and use them for political purposes?

II. Does a state campaign finance law that prohibits labor unions and their officials from taking the wages of nonmembers and using them for partisan political campaigns without the nonmembers' affirmative consent violate the First Amendment rights of labor unions?

LIST OF ALL PARTIES

The caption contains the names of all parties in this Court. In addition to the four Petitioners named in the caption, the late Walt Pierson was a party to the proceedings below.

No corporate disclosure statement for any Petitioner is required under Supreme Court Rule 29.6.

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The opinion of the Washington Supreme Court is officially reported at 156 Wash. 2d 543 (2006), unofficially reported at 130 P.3d 352 (Wash. 2006), and reprinted in the Appendix to the *Davenport* Petition for Certiorari, No. 05-1589 ("Pet. App.") at page 1a. The unpublished opinion of the Washington Court of Appeals in *Davenport*, Pet. App. at 42a, is available at 117 Wash. App. 1035 (2003). The decision of the trial court in *Davenport*, Pet. App. at 45a, is not reported. The Court of Appeals' opinion in the consolidated case, *Washington v. Washington Education Ass'n*, No. 05-1657, is reported at 117 Wash. App. 625, 71 P.3d 244 (2003), Pet. App. at 50a. The decision of the trial court in *Washington*, Pet. App. at 77a, is not reported.

JURISDICTION

The Washington Supreme Court entered judgment on March 16, 2006. The Petition for a Writ of Certiorari was timely filed on June 13, 2006. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The **First Amendment of the United States Constitution** provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

The **Fourteenth Amendment** provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

The **Washington Fair Campaign Practices Act, § 760**, provides: "A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual." Wash. Rev. Code § 42.17.760 (2006).

STATEMENT OF THE CASE

I. Introduction

Section 760 of the Washington Fair Campaign Practices Act ("§ 760") protects the free speech and association rights of an employee who has chosen not to join a union. Although this Court has repeatedly determined that such an employee has a First Amendment right not to subsidize the union's politics, the Washington Supreme Court struck down the statute as unconstitutional, concluding that it impaired the "union's right of expressive association" for its members. Pet. App. at 29a.

Section 760 does not limit a union's use of ***voluntary members' dues*** for any purpose. It applies only to a union's use of ***nonmembers' compelled fees*** "to make contributions or expenditures to influence an election or to operate a political committee" ("politics" or "political"). Section 760. No authorization to use members' dues for political purposes is required. Thus, the First Amendment rights of a union and its members are not implicated by § 760.

The statute requires a union to obtain consent only from those employees who have not joined it. The only issue here is the procedures under which a union may use nonmembers' compelled fees for politics. *See* Permanent Injunction, Joint Appendix ("Jt. App.") at 208-15, which details the measures

the Washington Education Association ("WEA" or "the union") must take to comply with § 760.

There is no more of a constitutionally protected right for a union to use nonmembers' monies for its political purposes than there is for any other organization to use the funds of individuals who have not joined the organization. Nevertheless, the Washington Supreme Court majority struck down § 760's modest procedural requirement for a union's political use of nonmembers' compelled fees because it violated the court majority's novel and absurd proposition that, once a legislature creates a compelled-fee requirement, unions have a constitutional right to use nonmembers' fees for politics. *Compare* Pet. App. at 22a-23a (majority) *with* 32a-33a, 39a-41a (dissent).

II. The Facts

Petitioners are four current or former public school teachers who have chosen not to become members ("nonmembers" or "nonunion teachers") of their exclusive bargaining representatives, local affiliates of respondent WEA. The nonmembers are compelled by statute, Wash. Rev. Code §§ 41.59.100 & 41.56.122(1) (2006), to pay "fees" to the union that equal full membership dues ("agency shop").[1] Jt. App. at 34, 194. Part of members' dues and nonmembers' compelled fees is used to support political and ideological causes that are unrelated to the union's collective bargaining activities. Jt. App. at 194, 203-07; Pet. App. at 2a-3a, 6a.

Section 760, however, requires unions to secure a nonmember's "affirmative authorization" ("consent") before

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[1] "[A]n 'agency shop' [is an] arrangement, whereby every employee represented by a union – even though not a union member – must pay to the union, as a condition of employment, a service fee equal in amount to union dues." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 207, 211 (1977).

using his or her compelled fees on political campaigns. Pet. App. at 81a. The WEA stipulated with the Washington State Public Disclosure Commission ("PDC"), the state agency charged with enforcing Washington's campaign finance laws, including § 760, that the union violated § 760 by failing to obtain that consent.[2] Jt. App. at 13-14; Pet. App. at 5a.

This Court's rulings require "the government and union . . . to provide procedures that minimize th[e] impingement [of the agency shop on First Amendment rights] and that facilitate a nonunion employee's ability to protect his rights." *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 n.20 (1986) (citing *Ellis v. Ry. Clerks*, 466 U.S. 435, 455 (1984)).

The WEA developed, separate from § 760, a "*Hudson*" process to address the fact that the dues-equivalent fees it collects from nonmembers exceed what WEA needs for collective bargaining. Jt. App. at 99-100, 116, 194-207; Pet. App. at 3a-4a. The excess amounts are referred to in the case law and in the WEA's "*Hudson*" notice as "nonchargeable expenses." Jt. App. at 197, 203-05, 207; Pet. App. at 3a. These nonchargeable expenses include and exceed the political contributions and expenditures covered by § 760.[3] Jt. App. at 212; Pet. App. at 3a.

Under the WEA's *Hudson* process, the union sends out a notice and nonmembers must affirmatively object within thirty days to receive a refund of the part of the dues-equivalent fees

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[2]Although it held the statute unconstitutional, the Washington Supreme Court also determined that the WEA had failed to obtain the affirmative authorization required by § 760. Pet. App. at 11a.

[3]Only two of the fifteen nonchargeable code descriptions used by the WEA to calculate nonchargeable expenses cover § 760 activities. Jt. App. at 209, 215-17.

that the union admits is nonchargeable.[4] Jt. App. at 198; Pet. App. at 3a-4a. Nonmembers who fail to timely object receive no refund and must subsidize the union's nonchargeable expenses, including the political campaigns covered by § 760. Jt. App. at 197, 198; Pet. App. at 4a.

At issue in this case are the § 760 fees taken from the silent nonmembers that the WEA uses for partisan political campaigns without the nonmembers' consent.[5]

In school districts where an agency shop clause is in effect, all new employees begin paying nonmember dues-equivalent fees, unless they sign a membership enrollment form and authorize dues to be deducted from their wages. Jt. App. at 28-29, 34. Members must agree to "subscribe to the goals and objectives of the WEA." *Washington* Trial Exhibit ("Tr. Ex.") # 41 (Bates No. WEA 002500).

The nonunion teachers declined to join the union for various reasons including: not wanting to be part of the union, different philosophies, disagreement with the union on morals and values, differences over political issues, candidates and initiatives, wanting to choose for themselves what to support politically with their money and time, and opposition to strikes in education. Jt. App. at 49, 54-63, 65-66, 68-69. Many times, the nonunion teachers disagreed with the union's position on

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[4]The WEA gives the nonmember three choices: 1) do nothing and "pay the full amount equal to dues paid by members"; 2) object in writing with specified information within a specified time "to use of your agency fee for nonchargeable activities," "accept" the union's chargeable fee determination as explained in the notice, and not be charged for the nonchargeable activities; or 3) object *and* challenge before an impartial arbitrator the union's calculation of the chargeable amounts and/or characterization of items as chargeable. Jt. App. at 197-98.

[5]The Washington Supreme Court construed § 760 "as requiring more than a nonresponse to a *Hudson* packet." Pet. App. at 11a.

charter schools, school choice, school vouchers, and levies increasing property taxes.

One nonunion teacher explained her disagreement with the union's position against charter schools: "What's more important, the students or maintaining a public school system that may not be as good as it could be[?]" *Id*. at 57. Another nonmember explained her reasoning process in deciding how to vote on a school levy: "I would look at what the opposite side was, ... It would depend upon what the cost was." *Id*. at 68, 69.

The WEA imposes many disadvantages on nonmembers and reminds nonmembers of these disadvantages each year in its *Hudson* notice. For example, nonmembers who pay full dues-equivalent fees are denied: 1) coverage under a $1,000,000 liability insurance policy; 2) $35,000 for attorneys' fees if a teacher is charged with a crime related to employment; 3) discounts on personal legal services, such as wills, probate, domestic relations, and real-estate matters; and 4) an attorney to defend teachers when their employer seeks to discharge them or not renew their contracts. *Id*. at 196-97. Some nonmembers get the "cold shoulder" from their member colleagues and are denied the calendar book members receive. *Id*. at 30, 50. Nonmembers are not consulted on most union matters, including when the WEA decides what position to take on ballot propositions, even though the propositions affect members and nonmembers alike. *Id*. 151-53.

Shortly after the school year begins, the WEA sends out its *Hudson* packet of approximately 100 pages to the school employees who have not signed membership enrollment forms. *Id*. at 194; *see also* Tr. Ex. # 41 (Bates Nos. WEA 002594-99, 002619-713). The packet informs the nonmembers that, if they affirmatively object to the union's spending of their dues-equivalent fees on political, ideological, and other nonbargaining activities, they will not be charged for those

costs. The packet does not mention § 760. Jt. App. at 99-100, 116, 197.

The nonmembers are given three choices. *See supra* note 4. If they fail to respond within thirty days, they "waive [their] ability to object" for that school year and are charged the full dues-equivalent fee. *Id*. at 198. The WEA requires nonmembers to object each year in order to pay only the reduced fee covering its collective bargaining or "chargeable" costs because, as explained by WEA Executive Director James S. Seibert, the union does "not . . . allow nonmembers to be permanent objectors," *id*. at 123, and just reimburse the union for its bargaining costs. *Id*. at 122.

The local associations supervise membership recruitment and must send the WEA two nonmember fee payer rosters: one on October 10, the other on December 15. *Id*. at 32; Tr. Ex. # 41 (Bates No. WEA 002510). A second *Hudson* packet is distributed in December to those "new" fee payers who are on the October and December fee rosters and were not sent the first *Hudson* packet. Jt. App. at 114-15, 157. Some nonmembers fail to respond to the *Hudson* packet because they do not receive it, the packet comes at the busiest time of the school year, they do not understand it, or they put it away for later. *Id*. at 51, 64-65, 155-57.

The WEA has numerous forms that it submits to the employees it represents throughout the school year, including forms for membership enrollment, cash member renewal, notification of cancellation, agency shop employees, WEA-PAC authorization, and NEA-Fund for Children in Public Education [NEA's PAC] authorization. *Id*. The WEA does not solicit or deduct PAC contributions from nonmembers. *Id*. at 34-35, 194-95. It also does not deduct Community Outreach dues for political education from nonmembers. *Id*. The WEA only deducts PAC contributions from members who sign a PAC membership authorization each year ("opt in"). *Id*. at 36-

39, 45. It has no forms or procedures to secure the "affirmative authorization" of nonmembers to use their fees for politics. *Id*. at 102-03, 116, 120.

Thomas Ray Baier, WEA Supervisor of Membership Systems, testified that "it wouldn't be a problem" to add a form and instructions for securing § 760 authorization to the annual Membership Enrollment Guide sent to the 360 local associations and other affiliates and employees of the WEA. *Id*. at 103. Although he asserted that changing the fee amount deducted from nonmembers' wages to comply with § 760 "could be very difficult to administer," *id*. at 108, *see also id*. at 106-10, 111-12, Mr. Baier admitted that it could be done by refunding the § 760 portion of the fee to nonmembers who do not sign § 760 authorizations. *Id*. at 110-11.

An expert witness, certified public accountant Jeffrey L. Baliban, suggested that the easiest way to comply would be to refund to a nonmember who has not authorized § 760 expenditures the portion spent on politics, just as the WEA does in refunding the nonchargeable portion in its *Hudson* process. *Id*. at 138-39. Moreover, in negotiating the terms of the lower court's § 760 injunction, the WEA decided not to obtain affirmative authorizations from nonmembers, but instead, to provide all nonmembers with an advance rebate of its § 760 expenditures. *Id*. at 189-90, 212-13.

III. The Proceedings Below

On March 19, 2001, the nonunion teachers brought this class action lawsuit to recover the part of dues-equivalent fees that the WEA collected and used for partisan political purposes without nonmembers' affirmative authorization, in violation of § 760. Jt. App. at 1; Pet. App. at 6a. In their complaint, the nonunion teachers alleged an implied private right of action under § 760, and three tort claims: conversion,

fraudulent concealment, and breach of fiduciary duty. *See* Jt. App. at 10-11; Pet. App. at 6a.

The WEA moved to dismiss. The trial court denied the motion except as to the breach of fiduciary duty claim, determined the applicable statute of limitations, and certified the nonunion teachers' class. Finally, the trial court stayed further proceedings pending an interlocutory appeal. Jt. App. at 1; Pet. App. at 6a; 47a-49a.

The WEA sought discretionary review of the trial court's denial of its motion to dismiss. The court of appeals accepted review. At the WEA's request, the court of appeals set oral argument for both this case and *Washington* before the same panel. Jt. App. at 1-2. On June 24, 2003, a 2-1 majority reversed the *Davenport* trial court and remanded the nonmembers' claims for dismissal because it held in *Washington* that § 760 is unconstitutional. Thus, "plaintiffs, as non-objecting, nonunion employees, lose standing to sue for their un-refunded agency fees." Pet. App. at 43a, *accord* Jt. App. at 2; Pet. App. at 6a-7a.

In *Washington*, a majority of the court of appeals recognized that the "only authority that a union has to compel nonmembers to pay agency fees is statutory." Pet. App. at 57a. Nevertheless, it held that § 760 was unconstitutional because the affirmative authorization requirement, or opt-in procedure, upset[s] the balance between nonmembers' rights and the rights of the union and the majority," "ignores a union's right to use non-objectors' agency fees on political expenditures," and "unduly burdens unions." *Id*. at 68a, 69a.

Chief Judge Hunt dissented. She found that even if an opt-out provision is constitutionally required,[6] that does not

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[6]*See Abood*, 431 U.S. at 235-38, 244; *Ry. Clerks v. Allen*, 373 U.S. 113, (continued...)

support the converse, *i.e.*, that an opt-in provision such as § 760's is constitutionally barred. *Id*. at 71a-72a. She also noted that none of this Court's compelled-fee decisions held "that the Constitution *mandates* that [the] burden [of objecting] rest[s] on the employee." *Id*. at 73a.

The nonunion teachers and the State of Washington each timely petitioned for review in the Washington Supreme Court to defend the constitutionality of § 760. Jt. App. at 2, 74; Pet. App. at 2a, 7a. The court granted both petitions for review, consolidated the cases, and affirmed the court of appeals' decision. Jt. App. at 2, 74; Pet. App. at 7a, 29a.

The 6-3 majority held that the statute imposes an unconstitutional restriction on the political speech of the union, its members, and nonmembers because "a union has the [First Amendment] right to use non dissenting nonmembers' fees for political purposes." Pet. App. at 22a. The majority opined that a "presumption of dissent violates the First Amendment rights of both members and nonmembers." *Id*. at 16a.

The majority's holding rested on four points. First, that it was bound by this Court's statement in *Machinists v. Street*, 367 U.S. 740, 774 (1961), that "dissent is not to be presumed –it must affirmatively be made known to the union by the dissenting employee." Pet. App. at 13a-15a. "As the Supreme Court has held," the majority reasoned, "there is no compelled support if the union utilizes the *Hudson* procedures. Given that there is no compelled support, it does not appear that there is any governmental interference with First Amendment rights of nonmembers for § 760 to protect against." *Id*. at 23a.

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[6](...continued)
121-22 (1963); *Machinists v. Street*, 367 U.S. 740, 770, 772-74 (1961).

Second, the majority held that *Hudson*'s opt-out or objection procedure is constitutionally required, because this Court held that a nonmember must "register his dissent to the union's political activities." *Id*. at 15a.

Third, the majority held that § 760's opt-in requirement constituted an undue burden on the union's First Amendment right to expressive association. It opined that the procedures required to comply with § 760 "would be extremely costly and would have a significant impact on the union's political activities." *Id*. at 17a. The majority also contended that the rights of nonmembers would be violated, because for "those nonmembers who agree with the union's political expenditures, [§] 760's opt-in presumption of dissent presents an unconstitutional burden on their right to associate themselves with the union on political issues." *Id*. at 17a-18a. Although it conceded that "our state may provide greater protection to its citizens, such as dissenting nonmembers, than is provided by the federal constitution," the majority argued that "it cannot do so at the expense of the rights of other citizens, such as members and supporting nonmembers." *Id*. at 19a.

Fourth, the majority reasoned that, because § 760 "regulates the relationship between the union and [nonmember] agency fee payers with regard to political activity, the . . . analysis [in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000),] should be applied." Pet. App. at 27a. Applying strict scrutiny, the majority held that this Court's "opt-out alternative . . . reveals that protection of dissenters' rights can be achieved through means significantly less restrictive of the union's associational freedoms than [§] 760's opt-in requirement." *Id*. at 28a. "[T]hus, the statute is unconstitutional." *Id*. at 29a.

Justice Sanders, joined by Chief Justice Alexander and Justice Fairhurst, strongly dissented. First, the dissent rejected

the majority's claim that the WEA had a First Amendment right to use nonmembers' fees for politics. "[T]he majority turns the First Amendment on its head to invalidate a state statute enacted to further protect the constitutional rights of nonunion members who are required to pay agency fees as the price of their employment." *Id*. at 32a.

The dissent cited the undisputed fact that unions "have a statutory, not constitutional, right to cause employers not only to withhold and remit membership dues but also to withhold and remit fees from nonmembers in an equivalent amount." *Id*. at 30a. "Should the legislature . . . choose to repeal the mandatory withholding provisions . . . , there would be no constitutional impediment to doing so. And no party to this proceeding claims there is." *Id*. at 31a.

Second, the dissent rejected the majority's conclusion that the opt-out procedure mentioned in *Hudson* was constitutionally required. *Id*. at 35a-36a.

> From the majority's misconstruction of the "dissent is not to be presumed" language a false "balance" requirement is invented. Other than general paeans to the right of association, the majority cites no other precedent for its holding that the "balance" between the associational rights of dissenters and non-dissenters is upset by requiring one to register assent, rather than register dissent.

Id. at 36a.

Third, the dissent categorically rejected the majority's reliance on *Boy Scouts,* because that case protects the rights of nonassociation, not the rights of organizations to compel membership or financial support. Pet. App. at 39a-41a. Section 760 "does not apply to union members[,] only nonmembers who must pay agency fees because of their *refusal* to join the union." *Id*. at 40a. "The absence of

membership defeats any claim that the regulation of statutorily required monetary support can possibly violate the right of union members to freely associate with one another for political advocacy." *Id*. at 41a.

Finally, the dissent identified both the majority's confusion and the decision's great harm: "[I]t puts in jeopardy the First Amendment right of nonmembers to refuse to associate with a union which uses their money to advance a political agenda with which they might disagree. *That* is the concern of the First Amendment in this context, as it is the even more protective concern of [§] 760." *Id*. at 41a.

SUMMARY OF ARGUMENT

Question I: In striking down § 760's affirmative authorization requirement, the Washington Supreme Court majority repeatedly misapplied and misinterpreted the First Amendment. Most notably, the majority misread this Court's case law in order to manufacture a First Amendment right for unions to use nonmembers' compelled fees to support political causes. This Court has never recognized such a right. The majority also applied strict scrutiny and profoundly overstated the burden that § 760 imposes upon unions' political speech. Either of these flaws in the majority's reasoning is sufficient to compel reversal.

While acknowledging that the authority to collect and use nonmember fees is purely statutory, the majority misapplies this Court's compelled-fee cases and transmutes the statutory right to compel fees from nonmembers' wages into a First Amendment guarantee that unions may use those fees for politics. This Court has never held that unions have a constitutional right to collect or use any fees from nonmembers, let alone fees that will be used for politics.

Nevertheless, the majority decided that unions have a constitutional right to use nonmembers' wages on politics without securing their affirmative authorization. This ruling contravenes this Court's consistent holdings that unions and individuals who associate with them have no First Amendment associational right: 1) to compel employees to join or financially support the union; 2) to collective bargaining; or 3) to payroll deduction of full union dues (and, by logical extension, nonmember fees).

Although the power to persuade is protected by the First Amendment, the power to compel conformity (and financial support) is not. Thus, it is the nonmembers, not unions and their members, who have constitutional rights at stake when it comes to the use of compelled fees to further the unions' political agendas.

Section 760's opt-in requirement is applicable only to nonmembers and places no burden on a union or its members. Because no fundamental right protected by the First Amendment is implicated, the proper level of review is the deferential, rational basis test. Section 760 clearly satisfies this test by increasing the likelihood that nonmembers' political contributions are voluntary and not compelled. Here, the State has provided the union with unique powers not given to other politically active organizations, such as the power of exclusive representation and the power to compel dues-equivalent fees from nonmembers as a condition of their employment. Requiring an opt-in procedure for political contributions from nonmembers places the union on a more level political playing field with other organizations. The union must persuade nonmembers to contribute; it may not rely on the human tendency not to act. These facts provide more than a rational basis to uphold § 760.

Another basis for the Washington Supreme Court majority's invalidation of § 760 is its misapplication to

nonmembers of the "dissent is not to be presumed" phrase this Court first used in *Machinists v. Street*, 367 U.S. 740, 744 (1961) and repeated in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 306 n.16 (1986). *Street* addressed an overly broad injunction that prevented the union from using for politics the dues contributed by voluntary union members. This Court properly held that dissent is not to be presumed in the case of these voluntary members.

This Court's subsequent compelled-fee cases did not establish a constitutional rule that nonmembers–who have already chosen to stand apart from the union at great cost to themselves–must further object to prevent the collection and use of their fees for political activities. *Hudson* referenced *Street*'s "dissent" phrase only in connection with nonmembers' newly-recognized option to initiate a post-collection *challenge* to a union's calculation of a reduced fee before an impartial decisionmaker. This Court's decision in *Airline Pilots Ass'n v. Miller*, 523 U.S. 866, 876-78 (1998), confirms that this Court did not endorse a constitutional requirement that nonmembers must dissent to prevent the collection and use of their fees for political purposes.

Question II: Even if this Court should conclude that the "dissent" phrase applies to nonmembers, this requirement is a constitutional minimum that a union must afford nonmembers, not the constitutional maximum imposed by the majority below. States are free to erect greater protections of nonmember rights, such as repealing the union's power to collect any nonmember fees. Through § 760, Washington State provides nonmembers greater protection than constitutionally mandated. Contrary to the Washington Supreme Court's conclusion, there is nothing in this Court's precedent that establishes constitutional restrictions on the use of an opt-in system for nonmembers' political contributions.

Section 760 is a reasonable and permissible protection of nonmember rights.

Additionally, § 760 passes constitutional muster because requiring nonmembers' affirmative consent is far less burdensome on any possible First Amendment rights of unions than the limitations placed on union political solicitations by the Federal Campaign Finance Act ("FECA"), 2 U.S.C. § 441b(a). FECA prohibits unions from using their general funds for political expenditures, requires that such expenditures be made only from a segregated fund financed by voluntary contributions (an opt-in procedure), and prohibits a union from even soliciting funds from nonmembers. This Court is "unanimous" that, despite the FECA's opt-in requirement, unions and corporations have been provided a "constitutionally sufficient" opportunity to engage in political speech, express advocacy, and electioneering communication. *McConnell v. FEC*, 540 U.S. 93, 203 (2003).

If the administrative burdens associated with establishing a PAC and soliciting voluntary contributions from members do not impermissibly burden a union's First Amendment right to engage in political speech, then the much more modest opt-in requirement of § 760, which could be satisfied by requesting consent in the *Hudson* notice the union already sends nonmembers, is certainly constitutional. For this reason alone, the Washington Supreme Court's decision must be reversed and § 760 permitted to guarantee that participation in Washington politics is a matter of choice and not compulsion.

ARGUMENT

I. Labor Unions Do Not Have a Constitutional Right to Use the Wages of Nonmembers for Any Activity, Much Less to Fund the Political Agenda of the Union.

The WEA and the courts below all agree that unions have no constitutional right to collect fees from nonmembers.[7] The arguments of the unions and the Washington Supreme Court's majority are therefore premised exclusively upon a statutorily created right to collect dues-equivalent fees from nonmembers. As forcefully laid out by the dissent, "[s]hould the legislature of the State of Washington choose to repeal the mandatory withholding provisions . . . , there would be no constitutional impediment to doing so. *And no party to this proceeding claims there is*." Pet. App. at 31a (emphasis added). Yet the Washington Supreme Court majority nonetheless transmutes this statutory right to automatically deduct fees from nonmembers' wages into a constitutional right to use those fees for politics by misapplying this Court's compelled-fee cases.

This Court has held that compelling employees to support financially their collective bargaining representative for the purposes of collective bargaining, contract administration, and

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[7] "[A] union has no constitutional right to collect an agency fee in the first place. That rule of law is . . . undisputed . . . . [T]he right of unions to *collect* an agency fee from nonmembers . . . is established by Washington statutory law . . . ." *Davenport* Brief of Respondent WEA in Opposition at 13 (filed Aug. 14, 2006). The Court of Appeals majority admitted that "[t]he only authority that a union has to compel nonmembers to pay agency fees is statutory." Pet. App. at 57a. The Washington Supreme Court majority noted that Washington law "provides that if an agency shop agreement becomes effective, a fee that is equivalent to union dues will be deducted from the salary of employees in the bargaining unit." Pet. App. at 26a. This Court agrees that collective bargaining, which is the basis for compelling agency fees, is only a statutory right. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 313-14 (1979).

grievance adjustment is "constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977). This Court has never held, however, that collecting compelled fees is *constitutionally required*. In fact, nearly half of the states do not authorize the assessment of compelled fees at all in the public sector. The other states, including Washington, have granted unions a statutory right to take agency fees from nonmembers. That grant differs in form and scope from state to state.[8]

Nevertheless, the Washington Supreme Court majority decided that unions have a constitutional right to use nonmembers' wages on politics without securing their affirmative authorization. This ruling directly conflicts with this Court's consistent holdings that unions and individuals who associate with them have no First Amendment associational right: 1) to compel employees to join or

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[8]Like § 760, some states' agency shop statutes require voluntary political contributions to be separate from the compelled fee. *E.g.*, 5 Ill. Comp. Stat. Ann. 315/3(g) (West 2005); 115 Ill. Comp. Stat. Ann. 5/11 (West 1998). Others prohibit the use of nonmember fees on political activities or contributions. Md. Code Ann., Educ. § 6-504(d)(3)(iv)(2) (2006); Mont. Code Ann. §§ 39-31-402(3), 39-32-109(2)(d) (2005). Not all state compelled-fee statutes allow the union to require nonmembers to pay an amount equal to dues. Some limit the amount to the costs of representing the members of the bargaining unit, Md. Code Ann., Educ. §§6-504(b), (d)(1) & (d)(3)(iv)(1) (2006). Others limit the fee to no more than 85% of dues. Minn. Stat. Ann. § 179A.06(3) (West Supp. 2006); N.J. Stat. Ann. § 34:13A-5.5(b) (West Supp. 2005); Vt. Stat. Ann. tit. 3, §§ 902(19), 1011(4) (2003). Still others limit the fee to the constitutionally chargeable amount. N.M. Stat. Ann. § 10-7E-4(J) (West Supp. 2003); Pa. Cons. Stat. Ann. §§ 1102.2, 1102.4 (West 2006). Some even allow bargaining unit members to rescind or deauthorize the compelled-fee requirement. Cal. Gov't Code §§ 3515.7(d), 3546(d)(1) (West Supp. 2006); Cal. Pub. Util. Code § 99566.1(d)(1) (West Supp. 2006); Wis. Stat. Ann. §§ 111.02(10m), 111.70(1)(n) & (2), 111.81(16), 111.85(2)(a) (West 2006).

financially support the union; 2) to collective bargaining; or 3) to payroll deduction of full union dues (and, by logical extension, nonmember fees).

The First Amendment rights of labor unions and their members recognized by this Court are the rights of workers to peacefully assemble, to discuss improvement of their own working conditions, and to petition government – rights enjoyed by all Americans. *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464-65 & n.2 (1979). A union's constitutional right of association is simply that: the right to associate. This Court has refused to expand these rights because to do so would infringe on the First Amendment rights of individual workers or the authority of the state to protect the general public, including nonunion workers. There is nothing in the union's right to associate that includes a constitutional right to use for politics the compelled fees of nonmembers who have already demonstrated their objection to associating with the union by declining membership.

More than fifty years ago, organized labor, seeking to compel employees to join or financially support unions, challenged state Right to Work laws[9] "as violations of the right of freedom of speech, of assembly, and of petition guaranteed unions and their members by the First Amendment."[10] This

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[9]A Right to Work law guarantees that no person can be compelled, as a condition of employment, to join or not to join, or to pay dues or fees to a labor union. *See* section 14(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §164(b) (allowing state prohibitions of compelled union membership or financial support); Okla. Const. art. 23, § 1A; and the twenty-one other constitutional and statutory Right to Work provisions listed in Pet. App. at 31 n.3; *see also* section 9(e) of the NLRA, 29 U.S.C. § 159(e) (providing for deauthorization of compelled union membership or financial support requirements in non-Right to Work states).

[10]*Lincoln Fed. Labor Union v. Nw. Iron & Metal Co.*, 335 U.S. 525, 528-

(continued...)

Court responded that "[n]othing in the language of the [Right to Work] laws indicates a purpose to prohibit speech, assembly, or petition." *Lincoln Fed. Labor Union v. Nw. Iron & Metal Co.,* 335 U.S. 525, 530 (1949). It also specifically rejected the argument adopted by the majority below that the right to association includes a constitutional right to compel nonmembers' support to achieve an effective union. *Id.*

This Court has also held that collective bargaining is not guaranteed by the First Amendment. *Smith*, 441 U.S. at 464-65 & n.2. A union's rights of association cannot be stretched to impose a constitutional obligation on the government to recognize a union, bargain with it, or allow the union to process grievances. *Id*.

Similarly, just as collective bargaining is not a fundamental right, neither is the deduction of union dues ("dues check off") guaranteed by the First Amendment. In *City of Charlotte v. Local 660*, *Int'l Ass'n of Firefighters,* 426 U.S. 283 (1976), this Court held that the First Amendment imposes no obligation on the government to deduct union dues or fees from public employees' wages.[11]

These cases teach that labor union officials have no First Amendment right to use the government to collect from their own members money to pay for collective bargaining. It

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[10](...continued)
29 (1949) (internal quotation mark omitted); *accord Am. Fed'n of Labor v. Am. Sash & Door Co.*, 335 U.S. 538, 540 (1949); *see also Ry. Employes' Dep't v. Hanson*, 351 U.S. 225, 233 (1956).

[11]*See also South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1256-57 (4th Cir. 1989) (the constitution does not entitle unions to the funds necessary to realize all the advantages of First Amendment freedoms); *Brown v. Alexander*, 718 F.2d 1417, 1421, 1423, 1429 (6th Cir. 1983) (a burden impairing the effectiveness of local unions was constitutionally permissible).

follows that unions have no First Amendment right to use the government to take money from nonmembers and use it for politics without their permission. As this Court has repeatedly recognized:

> "[T]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests." . . . . Unions traditionally have aligned themselves with a wide range of social, political, and ideological viewpoints, any number of which might bring vigorous disapproval from individual employees. To force employees to contribute, albeit indirectly, to the promotion of such positions implicates core First Amendment concerns.[12]

Although the power to persuade is protected by the First Amendment, the power to compel conformity (and financial support) is not. Thus, it is the nonmembers, not unions and their members, who have constitutional rights at stake when it comes to the use of compelled fees to further the union's political agenda.[13]

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[12]*Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 516 (1991) (quoting *Abood*, 431 U.S. at 222) (citation omitted); *accord Lehnert*, 500 U.S. at 511, 514-18; *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 309 (1986) ("We reiterate . . . that the agency shop itself impinges on the nonunion employees' First Amendment interests.").

[13]*See Hudson*, 475 U.S. at 301-10; *Abood*, 431 U.S. at 234-37. Thomas Jefferson would agree. He wrote: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." I. Brant, *James Madison: The Nationalist* 354 (1948); (quoted by this Court in *Abood*, 431 U.S. at 234 n.31 and *Hudson*, 475 U.S. at 305).

The Washington Supreme Court majority was similarly mistaken in its holding that § 760 restricts the First Amendment associational rights of the WEA and nonmembers who allegedly seek to support its political causes. That erroneous determination is premised upon a radical and unprecedented expansion of this Court's decision in *Boy Scouts*, which held that the First Amendment protects the right of an organization not to associate with individuals whom the group does not desire to include among its membership. The majority transformed *Boy Scouts*' right of nonassociation into a previously unknown associational right authorizing an organization to use for its own political purposes the funds of individuals who have specifically chosen not to associate with that group.

As the dissent below recognized, the freedom of association cannot possibly be implicated under such circumstances because no association exists between an organization and those individuals who have affirmatively elected not to join. *See* Pet. App. at 39a. In other words, because the nonmembers have explicitly chosen not to become union members, and because the union does not have the right to compel membership,[14] there is no associational connection between the union and the nonmembers who are compelled by state law to pay agency fees. Thus, *Boy Scouts*' framework protecting a group's associational rights is wholly inapplicable here.

Accordingly, this Court must reverse the Washington Supreme Court and hold that § 760's protection of nonmembers' political rights, by requiring that they authorize

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[14] *See*, *e.g.*, *Lincoln Fed.*, 335 U.S. at 531 ("There cannot be wrung from a constitutional right of workers to assemble to discuss improvement of their own working standards, a further constitutional right to drive from remunerative employment all other persons who will not or can not, participate in union assemblies.").

a union's use of their compelled fees for politics, does not violate the First Amendment rights of unions and their members.

II. Because There Is No First Amendment Right of Unions and Their Members to Collect or Use Nonmembers' Fees for Politics, Section 760 Need Only Satisfy the Rational Basis Test, Which It Does.

The Washington Supreme Court majority erred in concluding that § 760 is a restriction on constitutionally protected political speech that must be evaluated under strict scrutiny. The First Amendment is not implicated by § 760's affirmative authorization requirement because, as discussed above, there is no constitutional right for unions to collect agency fees from nonmembers, or to use those fees that it does collect for political purposes.

The WEA's right to assess agency fees is purely statutory in nature, and the State of Washington is therefore free to restrict that right in any way that it deems appropriate, or even to extinguish it entirely, as Indiana did several years ago, without any constitutional impediment. Ind. Code Ann. § 20-7.5-1-6 (2006). The majority's assertion that this Court "has held that a union has the right to use nondissenting nonmember fees for political purposes," Pet. App. at 22a (citing *Abood*, 431 U.S. at 240), is thus thoroughly misplaced.

Section 760's opt-in requirement, applicable only to nonmembers, places the same burden on a union that already exists on everyone in a free society. No candidate is entitled automatically to the citizens' votes or money. Certainly labor unions are no exception to the political rules that apply to everyone else. Here, there is no prohibition on speech, no limit on expenditures or even on contributions. There is merely a procedural requirement for obtaining political contributions from workers who have rejected union membership. Therefore

§ 760 needs to satisfy only a rational basis review. *Lyng v. UAW*, 485 U.S. 360, 368 & n.6, 370-71 (1988).

What WEA demands is not just a constitutional right to effective advocacy of its viewpoints. It demands that the political playing field be tilted in its favor. That right simply does not exist. "The First Amendment . . . provides no guarantee that a speech will persuade or that advocacy will be effective." *Smith,* 441 U.S. 463, 464-65 (1979). Moreover, not all means of expression have been foreclosed.

The rational basis for enacting § 760 is to ensure that everyone, including unions, has to secure the affirmative authorization from outsiders or nonmembers for political funds. The need for government to level the playing field is consistent with this Court's view that the enhancement of the speech of some elements of our society by the government is wholly foreign to the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). However, as one noted professor of economics explained:

> Citizens of a free country are free to spend their own money on the political causes and candidates they wish to support. But in the 60 years since the enactment of the National Labor Relations Act, union officials have extracted hundreds of billions of dues dollars as a condition of employment from the paychecks of America's working people. No religious, trade, or any other private association, has the same power to confiscate the earnings of unwilling individuals.[15]

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[15]Charles W. Baird, *The Tip of the Iceberg: PACs & the Forced-Dues Base of Big Labor's Political Machine*, The Smith Center for Private Enterprise Studies (2001) http://www.cbe.csueastbay.edu/~sbesc/tipoftheiceberg.html (last visited Nov. 1, 2006).

Here, the State of Washington provides a funding benefit to unions by permitting them to collect dues-equivalent fees from nonmembers. The State, in § 760, places a procedural condition on the use of those fees for politics. Section 760 is analogous to the conditional funding statutes regularly upheld by this Court against constitutional challenges.

Even if § 760 regulates the WEA's political speech, it does so indirectly and properly by placing a reasonable condition on the funding of exclusive bargaining through the automatic deduction of dues-equivalent fees from nonmembers' wages. When the Constitution restrains direct government regulation, government may nevertheless condition its assistance in ways that indirectly regulate that activity. For instance, even if the 21st Amendment eliminates Congress' power to regulate drinking ages, Congress may still condition state highway funding on states' adoption of minimum drinking-age laws. *South Dakota v. Dole*, 483 U.S. 203 (1987). States may not forbid sectarian education, but states may elect to exclude religious education from private education funding entitlements. *Locke v. Davey*, 540 U.S. 712 (2004).

States may not forbid abortions, but state-run hospitals may refuse to perform abortions. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 507-11 (1989). The government's "refusal to fund protected activity, without more, cannot be equated to the imposition of a 'penalty' on that activity." *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980) (upholding limit on use of federal funds to reimburse cost of abortions under Medicaid program). Government may not regulate speech on abortion, but may require elimination of abortion-related content from state-funded family-planning education. *Rust v. Sullivan*, 500 U.S. 173, 192-200 (1991).

Congress did not impose an impermissible condition on subsidies to public libraries by requiring libraries to use

Internet filters to block obscenity. *United States v. Am. Library Ass'n*, 539 U.S. 194, 210-12 (2003). Government, though disabled from restraining the political activity of nonprofit organizations, may restrict the tax deductibility of donations to charities on the condition that the charities abstain from political activity. *Regan v. Taxation with Representation*, 461 U.S. 540, 545-46 (1983).

Similarly, although the State of Washington may not forbid unions from engaging in political activity, the State can condition its assistance–in the form of compelling union subsidies from nonmembers–on the union acquiring a nonmember's consent before the union uses his or her state-compelled fees on political activity. If the union deems these conditions too onerous, it is free to reject that unique assistance and solicit funds like any other politically active group.

Even if the State of Washington had adopted a scheme that might arguably implicate a union's First Amendment interest, such as an opt-in requirement for the union to use its *members*' dues for politics, such a law would be subject to intermediate scrutiny, not the strict scrutiny the Washington Supreme Court majority used to strike down § 760. *See Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1250-53 (6th Cir. 1997) (holding that a statute that required unions to obtain annual consent from political contributors did not warrant strict scrutiny because the regulation was content-neutral, and concluding that the measure withstood intermediate scrutiny).

The Washington Supreme Court majority nevertheless erroneously concluded that § 760's affirmative authorization requirement imposes an unconstitutional burden on the First Amendment rights of the union and nonmembers who allegedly support the union's politics. Pet. App. at 17a-18a. Section 760's opt-in provision creates a *de minimis* limitation on the union's statutory right to collect agency fees and on any

other right that it may have to use those fees for political speech.

Furthermore, a union may satisfy § 760's affirmative authorization requirement through a variety of procedures, including by telephone or e-mail, *see* Pet. App. at 17a, or by simply including an additional postcard in the union's annual *Hudson* mailing to nonmembers, as a union witness admitted. Jt. App. at 110-11. Contrary to the Washington Supreme Court majority's exaggerated prose, these means of obtaining authorization constitute, at most, a minor administrative task.

In similar circumstances, the Sixth Circuit found the administrative burdens of an opt-in requirement to be minimal:

> [R]equiring the unions to make space in their files or databases for the inclusion of one more piece of information seems minimal, certainly a burden insufficient to rise to the level of a constitutional violation. Similarly, the suggestion that asking people to check a box once a year unduly interferes with the speech rights of those contributors borders on the frivolous.

Miller, 103 F.3d at 1253.

The only "hurdle" that § 760 imposes on a union is a slight administrative one–that it must make "individual contact with each nonmember," Pet. App. at 17a, to get the nonmember's actual consent to use his or her fees for politics. As both a matter of fact and of law, the majority below errs in finding that the simple act of asking permission is an "insurmountable . . . hurdle." *Id.* at 16a.

It is difficult to call this a "hurdle" at all, much less an "insurmountable"one. The "hurdle" is the same one faced by every political interest group – having to ask contributors for

contributions. The "hurdle" is even smaller for the WEA because it already has to notify all nonmembers annually of their *Hudson* rights.

This Court has repeatedly called it a "corruption" of the political process to use a citizen's money for a candidate or cause that he does not support. *See, e.g.*, *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 656, 659-60 (1990)*; FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 258-60 (1986). Under either a rational basis or intermediate scrutiny test, § 760 survives because it helps eliminate corruption in politics and promotes voluntary political participation. These are worthy goals for government. The "burden" imposed by § 760 to prevent this corruption is slight and is more than rationally related to the State's interests.

In addition to misreading this Court's cases, the majority below also ignores the "real world" ramifications of setting the default to opt out. Whether political spending, class actions, or 401(k) retirement plans are involved, setting the default to opt out rather than opt in is intended to maximize participation in the activity while eliminating the need for voluntary support of it. The result of an opt-out default in this case is to compel nonmembers' unwitting, accidental or unwilling support of union political spending, which the State may rationally conclude corrupts the political process.

This was demonstrated in *FEC v. National Education Ass'n ("NEA")*, 457 F. Supp. 1102 (D.D.C. 1978), a case involving WEA's parent affiliate, the National Education Association. The court there recognized the self-serving and coercive nature of an opt-out system similar to the one imposed on nonmembers by the WEA and majority below–in which nonmembers must act to prevent the use of their deducted wages for political activities. *Id*. at 1107-10. After switching from opt in to opt out, the union in *FEC* collected

400% more political money from its members.[16] The court concluded that changing the default from opt in to opt out inherently "results in some unknowing, and therefore involuntary, contributions." *Id*. at 1107. "In this Court's view, 'knowing free-choice' means an act intentionally taken and not the result of inaction when confronted with an obstacle." *Id*. at 1109, (citing *Pipefitters v. United States*, 407 U.S. 385, 439 (1972)).

The State has a rational basis to enforce § 760. Numerous studies in the fields of psychology and behavioral economics confirm the power of human inertia: because deviating from the status quo position requires action, people often irrationally refrain from choosing options that are of objective benefit to them.[17] The State may rationally mandate the default

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[16]This case involved union members, who have clearly authorized the union to speak for them. *NEA*, 457 F. Supp. at 1103. Here, the question is whether the "dissent is not to be presumed" or opt-out impingement is warranted for nonmembers, who have chosen to stand apart and have given the union no authority to speak for them on any issue, especially not any political or other nonbargaining issues.

[17]*The Marketplace of Perceptions*, Harv. Mag., Mar.-Apr. 2006, p. 50, Craig Lambert, at http://www.harvardmagazine.com/on-line/030640.html (last visited Nov. 1, 2006). For example, many workers fail to opt in to their employer's 401(k) retirement plan even though they are being offered, in essence, "free money." *The Influence of Automatic Enrollment, Catch-Up, and IRA Contributions on 401(k) Accumulations at Retirement*, Employment Benefit Research Institute, Issue Brief #283, July 2005, *available* at http://www.ebri.org/pdf/briefspdf/EBRI_IB_07-20054.pdf (last visited Nov. 1, 2006). Former U.S. Treasury Secretary Lawrence Summers recognized this fact of life, and stated:

> We pushed very hard for companies to choose opt-out [automatic-enrollment] 401(k)s rather than opt-in [self-enrollment] 401(k)s. In classical economics, it doesn't matter. But large amounts of empirical evidence show that defaults *do* matter, that people are inertial, and whatever the baseline

(continued...)

setting for nonmembers' political contributions to be set at opt in to protect their First Amendment rights of nonassociation and political freedom. Setting the default to opt in also prevents the corruption of the political process that occurs when the default is set to opt out, a default that maximizes compelled political support.[18]

Section 760 does not impair an individual nonmember's ability to support a union's politics. It allows unions to persuade nonmembers to support voluntarily their partisan political spending by giving affirmative authorization. It only reduces a union's power to compel financial political support from nonmembers through the opt-out system that inherently fails to indicate voluntary support. *See NEA*, 457 F. Supp. at 1107-09.

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[17](...continued)

settings are, they tend to persist.

The Marketplace of Perceptions at 55.

For similar reasons, Congress recently passed the "Pension Protection Act of 2006," which reset the default to encourage employers to automatically enroll employees in 401(k) plans unless they affirmatively opt out. *See* 26 U.S.C. § 401(13) (West, WESTLAW through P.L. 109-279 approved Aug. 17, 2006); Department of Labor "Proposed Regulation Relating to Default Investment Alternatives Under Participant Directed Individual Account Plans," Fed. Reg.: Sept. 27, 2006 (Vol. 71, No. 187), 29 C.F.R. Part 2550 at 56806.

[18]*Cf. Elrod v. Burns*, 427 U.S. 347, 370-72 (1976) (plurality opinion) (the First Amendment protection of individual belief, association, and the unfettered and free judgment on matters of political concern, at least in the setting of public employment, subordinates any First Amendment protected political campaigning and management rights); *accord Broadrick v. Oklahoma*, 413 U.S. 601, 606 (1973); *Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548, 564-66 (1973); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 99-103 (1949) (cases upholding the far more restrictive Hatch Act, 5 U.S.C. § 7324, and state "little Hatch Acts," against claims that they violate the political rights of union members and others).

Accordingly, this Court must reverse the Washington Supreme Court because it applied strict scrutiny, instead of a rational basis, to § 760. Under a rational basis analysis § 760's protection of nonmembers' political rights does not violate the First Amendment rights of unions and their members.

III. This Court's "Dissent Is Not to Be Presumed" Phrase Applies Only to Voluntary Union Members.

A primary basis for the Washington Supreme Court majority's flawed invalidation of § 760 is its misapplication to ***nonmembers*** of the "dissent is not to be presumed" phrase this Court first used in *Street*, 367 U.S. at 774, and repeated in *Hudson*, 475 U.S. at 306 n.16. *See* Pet. App. at 13a-16a, 22a-23a.

The majority declared that "the burden [is] on the dissenting nonmember to *assert* his or her First Amendment rights." It is not "constitutionally permissible for § 760 to shift the burden to the union to *protect* the First Amendment rights of dissenting nonmembers." Pet. App. at 16a. However, that constitutional interpretation is not supported by the factual context of either *Street* or *Hudson*.

The majority also failed to recognize that this Court's refusal in *Street* to presume that *voluntary union members* dissent from a union's political and ideological activities does not logically apply to nonmembers. Employees who have refused to join a union and authorize it to act for them have already registered their dissent by virtue of their nonmembership, despite having to suffer the disadvantages that unions impose on nonmembers.[19]

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[19]*See Minnesota State Bd. for Comty. Colleges v. Knight*, 465 U.S. 271, 277 n.4, 278-79 (1984) (nonmembers not allowed to participate in the "meet and confer" process because only union members, as selected by the (continued...)

Street was a class action in which the state court certified a mixed class of both union members and nonmembers threatened with discharge for not joining the union. *Machinists v. Street* 108 S.E.2d 796, 798-99 (Ga. 1959) The state court enjoined the unions and employers "from enforcing . . . the union shop agreements . . . and from discharging [employees] for refusing to become [union] members" or pay dues, unless the union withdrew from political and ideological activities. *Id*. at 803.

These rulings by the state court provide the context for this Court's statement in *Street* that "dissent is not to be presumed." The meaning of that phrase is readily apparent in light of the injunction. By enjoining *all* enforcement of the union shop clause until the union withdrew from all political and ideological activities, the Georgia state courts presumed the dissent of all employees–including voluntary union members who, by joining, had given the union the authority to speak for them in all matters, including political and ideological matters. *See Street*, 367 U.S. at 791-92 (Black, J., dissenting).

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[19](...continued)
union, could serve as faculty representatives for the "meet and confer" committees); *NLRB v. Fin. Inst. Employees*, 475 U.S. 192 (1982) (nonmembers not entitled to vote in union affiliation elections); *Kidwell v. Transp. Commc'n Int'l Union*, 946 F.2d 283 (4th Cir. 1991) (unions may place employees in the "Hobson's choice" of protecting their First Amendment rights not to support the union's politics by being nonmembers or protecting their participation in the setting of their conditions of work by being members, but not both; nonmembers are prohibited from voting on the members of the negotiating team, from participating in the resolution of disputes over employment conditions, and from voting on their terms and conditions of employment that the union negotiates); *Standard Fittings Co. v. NLRB*, 845 F.2d 1311 (5th Cir. 1988) (nonmembers not entitled to vote in contract ratification elections); *see* additional disadvantages discussed *supra* at 6.

This Court reversed because the injunction made no distinction between voluntary members and those compelled to join the union.[20] Importantly, this Court later explained that the Georgia courts' broad injunction violated the associational rights of "union *members* who do wish part of their dues to be used for political purposes . . . 'without being silenced by the dissenters.' [*Street*, 367 U.S.] at 772-73." *Abood,* 431 U.S. at 238 (emphasis added, other citations, and footnote omitted).

Presented with litigants who included union members seeking broad relief to enjoin all union political activities, this Court understandably required a showing that, to be entitled to relief, those union members must have "affirmatively made known" their objections to the union. 431 U.S. at 238. This Court derived the remedy in *Street* "not from constitutional limitations on Congress' power to authorize the union shop, but from the [statute] itself." 367 U.S. at 771. The "dissent is not to be presumed" doctrine is a statutory limitation under the Railway Labor Act, 45 U.S.C. § 151 *et seq*., not a constitutional one that applies to nonmembers in all cases.

Later, in both *Abood,* 431 U.S. at 213 n.2, and *Ellis,* 466 U.S. at 439 n.2, this Court was again presented with mixed groups of employees that included both union members who objected to supporting the union's political and ideological activities and nonmembers who also objected but did not

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[20]There is no difficulty in distinguishing voluntary members from compelled nonmembers in this case, because the option of remaining a nonmember is clearly set forth in the contract clause authorizing the compelled financial support and the annual *Hudson* notice the WEA sends nonmembers. Moreover, § 760, which only applies to nonmembers, does not involve the two types of employees present in *Street*, but only one distinct type of employee–the nonmember who has already chosen to stand apart from the union.

challenge the "objection requirement."[21] Accordingly, in those cases this Court merely repeated its phrase from *Street* that dissent is not presumed. By definition, nonmembers have already "object[ed] to public-sector unions as such," one of the bases of objection stated in *Abood*, 431 U.S. at 211.

In *Hudson,* there was no need for nonmembers to "dissent" within the meaning of *Street*. Unlike the collective bargaining agreement in *Street*, which required the payment of full union dues, the collective bargaining statute and agreement in *Hudson* authorized the public employer to exact from nonmembers' wages only the "proportionate share of the costs of the collective bargaining process and contract administration," not full union dues.[22] *Hudson*, 475 U.S. at 295 & n.1 (quoting Ill. Rev. Stat., ch. 122, ¶ 10-22.40a (1983, repealed 1984)); *Hudson v. Chicago Teachers Union*, 743 F.2d 1187, 1199-1200 (7th Cir. 1984) (Flaum, J., concurring). Accordingly, the union initially calculated the "proportionate share" for all nonmembers as 95% of full union dues. *Id*. 475 U.S. at 295-96.

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[21]None of the *nonmember* employees involved in this Court's compelled-fee cases has ever challenged the "requirement" that objection to subsidizing the unions' political, ideological, and other nonbargaining expenses is a condition of reducing the amount of fees being deducted from his or her wages. Indeed, unlike the nonunion teachers here, the nonmembers in the prior cases had made their objections known to the unions in one way or another. *Airline Pilots Ass'n v. Miller*, 523 U.S. 866, 869 (1998); *Lehnert,* 500 U.S. at 513; *Hudson,* 475 U.S. at 297; *Ellis v. Ry. Clerks*, 466 U.S. 435, 439 (1984); *Abood*, 431 U.S. 212-14; *Allen*, 373 U.S. at 118-19; *Street*, 367 U.S. at 744; *but see Weaver v. Univ. of Cincinnati,* 970 F.2d 1523, 1532 (6th Cir. 1992)*; Mitchell v. Los Angeles Unified Sch. Dist.,* 963 F.2d 258 (9th Cir. 1992) (class of nonobjecting nonmembers).

[22]The Washington statute, Wash. Rev. Code §§ 41.59.100 & 41.56.122(1), authorizes the employer to require or deduct full dues-equivalent fees from nonmembers.

Thus, a requirement for an affirmative objection ("dissent") to the exaction of dues-equivalent fees, including monies for political and ideological purposes, was not and could not have been adjudicated in *Hudson*. The Court in *Hudson* required labor unions, *for the first time*, to provide nonmembers with a formal opportunity to challenge the amount of a reduced fee before an impartial decisionmaker. 475 U.S. at 307 & n.19. *Hudson* referenced *Street's* "dissent is not to be presumed" requirement only in connection with nonmembers' newly-recognized option to initiate a post-collection *challenge* to a union's calculation of a reduced fee before an impartial decisionmaker. 475 U.S. at 306 n.16.

It makes perfect sense to require nonmembers, like all litigants, to take affirmative steps to invoke the quasi-adjudicative process required by *Hudson*. *See Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 877-78 (1998); *accord id*. at 876 n.4. *Hudson* demonstrates that the affirmative "objection" nonmembers must make is to "challenge" the reduced fee calculation before the "impartial decisionmaker," not to register dissent to the collection of fees for undisputedly political and ideological activities, as the majority below maintains.

Indeed, where *Hudson* speaks of the nonmembers' burden to raise an objection, it juxtaposes this requirement against the union's retention of the burden of proof,[23] which is operative only in an adversarial proceeding that a nonmember institutes before an "impartial decisionmaker" or a court. It would make no sense for a union to calculate a reduced fee for nonmembers and then be required to assume that all nonmembers object to that calculation and challenge it. Thus,

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[23] "[T]he nonunion employee has the burden of raising an objection but the union retains the burden of proof: . . . the burden of proving such proportion." *Hudson*, 475 U.S. at 306 (footnote and citations omitted).

the "objection requirement" only arises when particular nonmembers wish to challenge the reduced fee calculation before the impartial decisionmaker.

This Court's subsequent decision in *Miller*, also involving only nonmembers, confirms that *Hudson* did not endorse a constitutional requirement that nonmembers dissent in order to prevent the union from using their wages for politics and other clearly nonchargeable activities:

> An "agency-shop" arrangement permits a union, obliged to act on behalf of all employees in the bargaining unit, to charge nonunion workers their fair share of the costs of the representation. The purposes for which a union may spend the "agency fee" paid by nonmembers, however, are circumscribed by the First Amendment. . . . In . . . *Hudson* . . . we held that the First Amendment requires public-employee unions to accord workers who object to the agency fee "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker."
>
> . . . In the action now before us, nonunion pilots challenged the agency fee collected by the Union.

Miller, 523 U.S. at 868-69.

Like *Hudson*, *Miller* always mentions "objection" or "dissent" in the context of a "challenge" to the union's calculation of the chargeable amount, and the invocation of the impartial decisionmaker process or civil litigation. *Id*. at 876 n.4, 878, 889-90. Unlike the Washington Supreme Court majority, *Miller* refused to turn the shield of *Hudson* protecting the nonmember into a dagger wielded by the union to slash nonmember rights. "We resist reading *Hudson* in a manner that might frustrate its very purpose, to advance the swift, fair, and final settlement of objectors' rights." *Id*. at 877.

The majority below misread this Court's cases and wrongly held that once a state imposes a compelled-fee requirement on nonmembers, the Constitution requires it to only use an opt-out mechanism to prevent forced political subsidies. *Street* and *Hudson* did not create a constitutional requirement that nonmembers must always be presumed to assent to such speech unless they affirmatively object, a requirement this Court has never established.[24]

Interpreting a nonmember's silence as "consent" for compulsory political and ideological spending is inconsistent with the requirement that the government "tread with sensitivity in areas freighted with First Amendment concerns," *Hudson*, 475 U.S. at 303 n.12, and refrain from "hostility–or favoritism–towards the underlying message expressed," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1991).

In this delicate First Amendment context, the burden to demonstrate that the silent nonmember supports the union's political and ideological speech must rest with the solicitor of the funds, not the silent nonmember. Political support must always require an affirmative action, just as the Constitution cannot condone an election in which all nonvoters are presumed to vote for the Democratic candidate unless they affirmatively vote for the Republican.

This Court should reverse the majority's decision because it was based on a fundamental misapplication of the "dissent

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[24] The Sixth Circuit recognized the importance of the default opt-in setting for political matters. *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1253 (6th Cir. 1997) ("[Michigan's opt-in requirement] both reminds those persons that they are giving money for political purposes and counteracts the inertia that would tend to cause people to continue giving funds indefinitely even after their support for the message may have waned."); a*ccord Lutz v. Machinists*, 121 F. Supp. 2d 498, 506 (E.D. Va. 2000)("what is really at stake here is whether the union can collect more money as a benefit of the decisionmaker's inertia").

is not to be presumed" phrase, and clarify that nonmembers need not affirmatively object to paying the political and other nonbargaining portion of the compelled fees, but only to a union's calculation of that portion.

IV. Even if the "Dissent Is Not to Be Presumed" Phrase Applies to Nonmembers, the States Can Provide Statutory Protections to Nonmembers That Exceed the Constitutional Minimum Without Violating the Union's First Amendment Rights.

Section 760's opt-in protection for nonmembers is faithful to this Court's objective in *Abood* and *Hudson*: "preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Hudson*, 475 U.S. at 302 (quoting *Abood*, 431 U.S. at 237).

The existence of a constitutional floor protecting First Amendment rights of nonmembers does not provide unions with heretofore nonexistent constitutional rights. In dissent, Justice Sanders properly criticized the Washington Supreme Court majority for distorting this Court's compelled-fee cases, "delineating the requirements protecting dissenting union members and nonmembers from having their dues used to support political activities with which they disagree[,] to do the opposite: limit the State's ability to protect such dissenters." Pet. App. at 34a (dissent).

The majority erred in treating the "dissent is not to be presumed" phrase as delineating the maximum, instead of a minimum, protection required by this Court to protect the First Amendment rights of silent nonmembers. This is contrary to this Court's explanation that *Hudson* "outlined a minimum set of procedures by which a union in an agency-shop relationship

could meet its requirement under *Abood*." *Keller v. State Bar of Cal.*, 496 U.S. 1, 17 (1990).

Even *Hudson* referred to these protections as "part of the 'constitutional' minimum." 475 U.S. at 308 n.21. This is consistent with this Court's long history of allowing the states to provide their citizens greater protections than the minimums the Constitution provides.[25] Pet. App. at 32a-34a (dissent).

Because unions have no constitutional right to compel nonmembers to pay fees, the state imposes no unconstitutional burden on unions when it regulates the relationship between unions and nonmembers and establishes procedures for the union's use of agency fees. Because "[t]he only authority that a union has to compel nonmembers to pay agency fees is statutory," Pet. App. at 57a (*Washington* court of appeals' majority opinion), the state can prohibit entirely or restrict that authority without interfering with a union's constitutional rights. *See Lincoln Fed.*, 335 U.S. at 529-31.

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[25] *See, e.g., Kelo v. City of New London*, 545 U.S. 469 (2005) (states may limit the use of eminent domain if they find that the protections the Constitution affords are not effective enough); *Locke v. Davey*, 540 U.S. 712, 725 (2004) (states may implement more procedures to protect the rights of religious exercise so long as free exercise of religion is not violated); *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002) (states may allow citizens to send their children to schools of their choice, including religious schools, and to spend government education grants there); *California v. Ramos*, 463 U.S. 992, 1014 (1983) (states can provide greater protections in their criminal justice system than the Constitution requires); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980) (states may expand rights beyond the minimum protection the Constitution offers); *Oregon v. Hass*, 420 U.S. 714, 719 (1975) (states may offer additional police procedures to more effectively protect a suspect's freedom from self-incrimination than the Constitution requires); *Skinner v. Oklahoma*, 316 U.S. 535, 539-40 (1942) (federal system allows states reasonable latitude to adopt statutes that protect individual rights).

Just as § 760's opt-in provision does not unduly burden a union's speech, it does not impose an unconstitutional burden on nonmembers who must affirmatively opt in to have their agency fees fund the union's political activities. Many states do not even authorize unions to collect agency fees from nonmembers.[26] In those states, if nonmembers wish to contribute to a union's political efforts, they must affirmatively act, proactively approaching the union and voluntarily contributing money to its causes.

This "burden" on nonmembers is significantly more demanding than that imposed by § 760's opt-in provision, which merely requires nonmembers to respond affirmatively to a union's request for authorization to use for politics fees automatically deducted from the employees' paychecks. *See Miller*, 103 F.3d at 1253 ("the suggestion that asking people to check a box once a year unduly interferes with the speech rights of those contributors borders on the frivolous"). Because § 760 provides nonmembers with a simple and streamlined procedure for contributing to unions' political causes, it is fully consistent with the First Amendment.

Accordingly, the decision of the Washington Supreme Court must be reversed and § 760 reinstated to protect the rights of nonmembers to participate in Washington politics as a matter of choice and not compulsion.

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[26]In fact, many states have enacted statutes *prohibiting* compulsory union fees. These states, known as "right-to-work" states, include Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wyoming and the territory of Guam. *See* Pet. App. at 31 n.3 (dissent).

V. Section 760's Limits on Using Silent Nonmembers' Wages for Politics Are Less Restrictive of Any Possible Union First Amendment Rights Than the Limits Placed on Unions by the Federal Campaign Finance Act That This Court Upheld Against Similar Constitutional Attack.

The Washington Supreme Court majority's decision cannot be sustained given this Court's long history of upholding, against First Amendment attack, campaign finance statutes that place greater restrictions than does § 760 on a union's ability to use members and nonmembers' monies for partisan politics.

The time and expense required to comply with § 760 are dwarfed by the onerous burdens that the FECA imposes upon unions' political speech. FECA prohibits unions from using their general funds for political contributions and expenditures and requires political expenditures to be made from a separate segregated fund (or political action committee ("PAC")) "fund[ed] by voluntary contributions." *Austin*, 494 U.S. at 671 (Brennan, J., concurring).

These political funds are governed by complex regulations and necessitate significant start-up costs. Indeed, the FEC's "Campaign Guide for Corporations and Labor Unions,"[27] spans nearly 100 pages, and the federal regulations governing PACs are equally extensive. *See* 11 C.F.R. Part 102. Moreover, in addition to requiring *members* to opt in to make political contributions to union PACs, FECA imposes a blanket prohibition on union PACs soliciting funds from nonmembers. 2 U.S.C. § 441b(b)(4)(A)(ii).

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[27] *Available at* http://www.fec.gov/pdf/colagui.pdf (last visited Nov. 7, 2006).

Notwithstanding FECA's significant restrictions on political speech, this Court is "unanimous" that, despite the federal opt-in requirement, unions and corporations have been provided a "constitutionally sufficient" opportunity to engage in political speech, "express advocacy" and "electioneering communication."[28] These limits on labor unions have been upheld against First Amendment attack[29] because the potential for disproportionate political influence by corporations and labor unions justifies the regulation. *See Austin*, 494 U.S. at 660-61.

Only a complete ban on political expression, not its mere regulation, raises serious First Amendment concerns. *McConnell v. FEC,* 540 U.S. 93, 204 (2003). Section 760 does not prevent unions from engaging in political speech, even with nonmembers' compelled fees, provided the nonmembers merely authorize that use. Unlike the federal law, § 760 permits unions to use general treasury funds to make political contributions and expenditures. Unions are even allowed to use members' dues without their affirmative consent, in contrast to the federal law.

In fact, unions have no constitutional right to spend their general treasury funds to influence elections. This Court has upheld the longstanding federal ban on union and corporate use of treasury funds to influence elections–finding that the separate segregated fund opt-in provision sufficiently protects a union's constitutional rights. *See id*. 540 U.S. at 203-09

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[28] *McConnell v. FEC,* 540 U.S. 93, 203 (2003); *see also FEC v. Nat'l Right to Work Comm. ("NRTWC")*, 459 U.S. 197, 207 (1982) (holding that FECA's prohibition against solicitation does not violate the First Amendment right to associate because that right is "overborne by the interests Congress . . . sought to protect in enacting § 441b").

[29] *See also FEC v. Beaumont*, 539 U.S. 146 (2003); *NRTWC*, 459 U.S. at 198-200; *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 (1978).

(detailing and approving Congress' history of regulating labor union political activities since 1907).

The federal PAC opt-in provision allows corporate and union political participation "'without the temptation to use corporate [or union] funds for political influence, quite possibly at odds with the sentiments of some shareholders or members, . . . without jeopardizing the associational rights of advocacy organizations' members.'" *Id*. at 204 (quoting *Beaumont*, 539 U.S. 146, 163 (2003)) (citations omitted); *accord Pipefitters*, 407 U.S. at 402. It also furthers the important governmental interest of protecting "the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed."[30]

In the federal system, the statutory protection of individual union members who might oppose the union leadership's political contributions is secured by prohibiting union treasury expenditures on federal elections and requiring voluntary opt-in contributions from union members for political activities, *see Pipefitters*, 407 U.S. at 402-13, not by the opt-out procedure the majority required here. As this Court noted: "The dominant concern in requiring that contributions be voluntary was, after all, to protect the dissenting . . . union member." *Id*. at 414-15. Here, the State of Washington has not even gone that far. The State has only protected nonmembers by requiring that their contributions be voluntary.

Under current federal law, union political contributions can only be made from a union PAC. Union member

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[30]*NRTWC*, 459 U.S. at 208; *accord United States v. CIO*, 335 U.S. 106, 113 (1948); *see also Austin*, 494 U.S. at 673-78 (Brennan, J., concurring); *Id*. at 659-60; *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 258-60 (1986).

contributions to the PAC must be voluntary, knowing, and intentionally given, and the union and its PAC may not solicit nonmembers.[31] The Federal Election Commission has specifically determined that an opt-out system violates the Act. 11 C.F.R. § 114.5(a)(1); *see also* 2 U.S.C. §§ 441b(a), 441b(b)(3)(A).

This Court has recognized that "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." *Austin*, 494 U.S. at 660. That applies equally to union wealth, because it too is accumulated with the state's help. The state certifies a union as employees' exclusive bargaining representative with the power to compel financial support from members and nonmembers alike.

Under any standard used to judge campaign finance laws, Washington State, like the federal government in the FECA, has a compelling interest, not just a rational interest, to require

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[31] 2 U.S.C. §§ 441b(a), 441b(b)(3), 441b(b)(4)(A)(ii); 11 C.F.R. §§ 114.5(a), 114.5(g)(2); *see also United States v. Boyle*, 482 F.2d 755, 763-64 (D.C. Cir. 1973); *NEA*, 457 F. Supp. at 1108-09. Many states have similar campaign finance laws that restrict union political solicitations and contributions. *See* Alaska Stat. §§ 15.13.074(f), 15.13.135 (2006); Ariz. Rev. Stat. Ann. §§ 16-919(B), 16-920, 16-921 (West 2006); Colo. Const. Art. XXVIII, §§ 3(4) & 6(2); Ind. Code Ann. §§ 3-9-2-4, 3-9-2-5(b) (West 2006); Iowa Code Ann. § 20.26 (West 2006); Md. Code Ann., Elec. Law §§ 13-242, 13-243 (2006); Mich. Comp. Laws Ann. §§ 169.254, 169.255 (West 2006); Neb. Rev. Stat. Ann. §§ 49-1469, 49-1469.06 (2006); N.C. Gen. Stat. Ann. § 163-278.19(a) & (b) (2006); N.D. Cent. Code §§ 16.1-08.1-01(1), 16.1-08.1-03.3 (2006); Ohio Rev. Code Ann. §§ 3517.082, 3599.03 (West 2006); Pa. Cons. Stat. Ann. § 1101.1701 (West 2006); S.D. Codified Laws Ann. §§ 12-25-1(1), 12-25-2 (2006); Tex. Elec. Code Ann. §§ 253.094, 253.100 (Vernon 2006); Utah Code Ann. §§ 20A-11-1403, 20A-11-1404 (2006); Wis. Stat. Ann. § 11.29 (West 2006); Wyo. Stat. Ann. § 22-25-102 (2006). Some states require written authorization of political deductions. Ohio Rev. Code Ann. § 3599.031(A) (West 2006); Wyo. Stat. Ann. § 22-25-102(h) (2006).

that political contributions by nonmembers be knowing and voluntary. This Court in *Pipefitters*, 407 U.S. at 439, interpreted a federal statute concerning solicitation of political contributions from union members to require "knowing free-choice donations." "'Knowing free-choice' means an act intentionally taken [opt in] and not the result of inaction when confronted with an obstacle [opt out]." *NEA*, 457 F. Supp. at 1109.

In light of this Court's campaign finance decisions, the modest restrictions § 760 imposes, which serve the compelling governmental interest of protecting nonmembers from being compelled to fund political speech with which they disagree, fall well within the First Amendment's bounds. *See Miller*, 103 F.3d at 1240 (rejecting a First Amendment challenge to a statute that required unions to obtain annually the affirmative consent of political contributors).

If the administrative burdens associated with establishing a PAC and soliciting voluntary contributions from members do not impermissibly burden a union's First Amendment right to engage in political speech, then the much less onerous opt-in requirement of § 760, which could be satisfied by requesting consent in the *Hudson* notice the union already sends nonmembers, is certainly constitutional. For these reasons alone, the Washington Supreme Court's decision must be reversed and § 760 permitted to protect the political process in the State of Washington.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court reverse the judgment below on both Questions Presented, rule that union officials do not have a First Amendment right to take and use for politics the wages of nonmembers, rule that § 760 and its requirement that unions obtain the nonmember's affirmative authorization to use his or her compelled fees for politics does not violate the First Amendment rights of labor unions, and remand this case back to the lower courts for further proceedings consistent with its ruling.

Respectfully submitted,

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