No. 05-___

IN THE

Supreme Court of the United States

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

Petitioners,

v.

WASHINGTON EDUCATION ASSOCIATION,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

PETITION FOR WRIT OF CERTIORARI

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June 2006

QUESTIONS PRESENTED

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

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

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed are listed below:

Gary Davenport, Martha Lofgren, Walt Pierson, Susannah Simpson, Tracy Wolcott, and the Washington Education Association.

Because no Petitioner is a corporation, no corporate disclosure statement is required under Supreme Court Rule 29.6.

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Other Authorities

Petitioners Gary Davenport, Martha Lofgren, Walt Pierson, Susannah Simpson, and Tracy Wolcott respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Washington entered on March 16, 2006.

OPINIONS BELOW

The opinion of the Washington Supreme Court, Appendix ("App.") A, *infra* 1a, is reported at 130 P.3d 352 (Wash. 2006). That opinion decided two consolidated cases: the instant case, *Davenport v. Washington Education Association,* docket number 74316-9 in the court below; and *State ex rel. Public Disclosure Commission v. Washington Education Association* ("*PDC*"), docket number 74268-5. The unpublished opinion of the Washington Court of Appeals in *Davenport*, App. B, *infra* 42a, is reported at 117 Wash. App. 1035 (2003). The decision of the trial court in *Davenport*, App. C, *infra* 45a, is not reported. The decision of the Washington Court of Appeals in the consolidated case, *PDC*, App. D, *infra* 50a, is reported at 117 Wash. App. 625, 71 P.3d 244 (2003). The decision of the trial court in *PDC*, App. E, *infra* 77a, is not reported.

JURISDICTION

The Washington Supreme Court entered judgment on March 16, 2006. The petition is timely under Supreme Court Rule 13.1. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a). Although in *Davenport* neither the State of Washington nor any agency, officer, or employee thereof is a party, the Public Disclosure Commission, which is an agency

of the State, is a party to the consolidated case below, *PDC*. Accordingly, 28 U.S.C. § 2403(b) may apply and this initial document shall be served on the Attorney General of the State of Washington. The notifications required by Rule 29.4(b) have been made.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution and the Washington Fair Campaign Practices Act, § 760; RCW 42.17.760. *See* App. F, *infra* 81a.

STATEMENT OF THE CASE

This case presents the question whether a state campaign finance statute that requires labor union officials to get a **nonmember's** affirmative consent before using the nonmember's wages for partisan political campaigns violates the First Amendment rights of labor unions and their members.

Respondent Washington Education Association ("WEA"), a labor union, was the defendant in both consolidated cases below. In *PDC*, WEA challenged the constitutionality of § 760 of the Washington Fair Campaign Practices Act in its motion for summary judgment at the trial court. The trial court found § 760 constitutional. App. E at 78a. The WEA appealed that ruling to the court of appeals, which held § 760 unconstitutional because its "affirmative authorization requirement unduly burdens unions." App. D at 69a.

In *Davenport*, the court of appeals reversed and remanded Petitioners' suit for dismissal "[b]ecause we hold today in [*PDC*] that RCW 42.17.760 is unconstitutional[. Thus]

plaintiffs, as non-objecting, nonunion employees, lose standing to sue for their un-refunded agency fees." App. B at 43a. Davenport and the State separately petitioned for review in the Washington Supreme Court, defending the constitutionality of § 760. App. A at 2a, 7a.

I. The Facts

Petitioners are five current or former public educators who are not members of the monopoly bargaining representative, WEA. Nonmembers are required by statute, RCW 41.59.100 and RCW 41.56.122(1), to pay fees to the union that equal member dues. A portion of members' dues and nonmembers' fees goes to support political and ideological causes that are unrelated to the union's collective bargaining activities. App. A at 2a-3a, 6a.

However, Washington's campaign finance law, RCW 42.17.760, prohibits unions from using the compulsory fees seized from the wages of any nonmember on political campaigns, unless the nonmember has affirmatively authorized such use. App. F at 81a. The WEA stipulated with the PDC that it had violated § 760 by failing to get the affirmative authorization of all nonmembers before using their fees for political purposes. App. A at 5a.

The WEA developed its "*Hudson*" process[1] to address the fact that the dues-equivalent fees charged nonmembers exceed what the WEA needs for collective bargaining. App. A at 3a-4a. These excess fees are referred to in the case law and in the WEA's "*Hudson*" process as "nonchargeable expenses."

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[1] This process stems from the guidelines stated in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

App. A at 3a. Nonchargeable expenses include and exceed the political contributions covered by § 760. *Id.*

Only if a nonmember timely objects to the fees charged does the WEA refund to that person the percentage of the fees that it considers nonchargeable. *Id.* at 3a-4a. Nonmembers who fail to file a timely objection receive no rebate and must subsidize the nonchargeable expenses, including the political campaigns covered by § 760. App. A at 4a. At issue are the fees nonobjecting nonmembers paid that WEA used for partisan political campaigns without the nonmembers' affirmative authorization.[2]

II. The Proceedings Below

In March 2001, Petitioners brought this class action law suit to recover agency shop fees that the WEA collected and used for partisan political purposes without the nonmembers' affirmative authorization, in violation of RCW 42.17.760. App. A at 6a.

In their complaint, Petitioners alleged an implied private right of action under § 760, and three tort claims: conversion, fraudulent concealment, and breach of fiduciary duty. App. A at 6a. Petitioners sought a refund of that portion of nonmembers' fees used for political expenditures in violation of § 760. The WEA moved to dismiss. The trial court denied the motion, except as to the breach of fiduciary duty claim. The trial court also determined the applicable statute of limitations and certified Petitioners' class. Finally, the trial court stayed further proceedings pending an interlocutory appeal. App. A at 6a; App. C at 47a-49a.

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

The WEA sought discretionary review of the trial court's denial of its motion to dismiss. Division II of the court of appeals accepted review. At the WEA's request, the court of appeals set oral argument both for this case and *PDC* before the same panel.[3] In light of holding § 760 unconstitutional in *PDC* on June 24, 2003, that same day a majority of the court of appeals panel in *Davenport* reversed the trial court and remanded for dismissal of Petitioners' claims. App. A at 6a-7a.

The 2-1 appellate majority recognized that the "only authority that a union has to compel nonmembers to pay agency fees is statutory." App. D at 57a. Yet they found the campaign finance law unconstitutional because § 760's 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." App. D at 68a, 69a.

Then Chief Judge Hunt dissented. She noted that this Court's propositions that an "opt in" provision is not constitutionally required[4] do not support the converse, *i.e.*, that an "opt

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[3]Prior to the commencement of *Davenport*, the Public Disclosure Commission, through the Attorney General, brought a civil enforcement action against the WEA in superior court for violations of § 760. During the PDC's pre-filing investigation, the WEA admitted in a written stipulation to violations of RCW 42.17.760. After a two-week bench trial, the trial court found that the WEA violated § 760, awarded the State $200,000, and then doubled that amount based on its finding that the WEA intentionally violated the law. A 2-1 majority of the court of appeals panel reversed the trial court based on the conclusion that § 760 is unconstitutional. App. A at 4a-6a; App. D at 53a-57a, 69a.

[4]*See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235-36, 237-38, 244 (continued...)

in" provision such as Washington's is constitutionally barred. App. D at 71a. She also noted that none of this Court's agency fee decisions held "that the Constitution *mandates* that [the] burden [of objecting] rest[s] on the employee." *Id*. at 73a.

Both the State and the *Davenport* plaintiffs timely petitioned for review in the Washington Supreme Court. The court granted both petitions for review, consolidated the two cases, and in a 6-3 decision affirmed the court of appeals' holding that § 760 is unconstitutional. App. A at 7a, 29a. The majority found that the campaign finance statute imposes an unconstitutional restriction on the political speech of the union, its members, and its nonmembers.

> [T]he statute is unconstitutional because its requirement of affirmative authorization amounts to an impermissible presumption that each nonmember objects to the union's use of his or her fees for political activities. * * * [B]y presuming the dissent of nonmembers, § 760 upsets the **balance** of members' and nonmembers' constitutional rights in the context of a union's expenditures for political activities.

App. A. at 16a (emphasis added).

Chief Justice Sanders, joined by two other justices, strongly dissented:

> The majority turns the First Amendment on its head. Unions have a statutory, not constitutional, right to

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[4](...continued)
(1977); *Railway Clerks v. Allen*, 373 U.S. 113, 121-22 (1963); *Machinists v. Street*, 367 U.S. 740, 770, 772-74 (1961).

> cause employers not only to withhold and remit membership dues but also to withhold and remit fees from nonmembers in an equivalent amount. Absent this statutory mechanism for the withholding and remission of agency fees (or membership fees for that matter), there is no right, constitutional or otherwise, for the union to require it. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 223 * * *.
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> * * *
>
> From the majority's misconstruction of the "dissent is not to be presumed"[5] 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. Again, if the elimination of a payroll deduction does not abridge the constitutional rights of union members and nonobjecting nonmembers to associate, it is inconceivable that requiring assent as a precondition to using funds generated by a payroll deduction abridges such rights.
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> * * *
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> But there is *no* association between the union and agency fee payers because by definition these individuals have refused to join (associate with) the union. 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. Rather it puts in jeopardy the

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[5] *Abood*, 431 U.S. at 238; *Street*, 367 U.S. at 774.

> 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 RCW 42.17.760.

App. A at 30a, 36a-37a (footnote omitted), 40a-41a (emphasis in original).

REASONS FOR GRANTING THE WRIT

Without any support on point from this Court, a majority of the Washington Supreme Court concocted, from the statutory privileges granted labor unions to seize and use nonmembers' wages, a "constitutional right," under color of the First Amendment, for unions to spend those fees for partisan politics unless the nonmember affirmatively "opts out" by invoking a union's *Hudson* procedures. Thus, this Court's *Hudson* protections have been transmogrified from a First Amendment shield for nonunion employees into a First Amendment sword for unions.

The majority below erroneously turned the shield this Court provides nonmembers from the full reach of statutes compelling them to financially support all of the unions' varied activities[6] into a dagger piercing the State's statutory protection of nonmembers from involuntarily supporting the unions' partisan political campaigns. This turning of the First Amendment on its head was based on nonexistent "constitutional rights" of union officials and members. *See infra* pp. 10-20.

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[6] *Hudson*, 475 U.S. at 301-11; *Abood*, 431 U.S. at 234-36.

Never before has a court suggested that a campaign finance statute requiring unions to secure the affirmative consent of **nonmembers** before using their compelled moneys on partisan politics violates a union's freedom of association, because freedom of association has never before been interpreted as broadly as the courts did below. The majority's decision striking down the "opt in" requirement that limited the union's unfettered use of the compelled wages of nonmembers for politics as violative of the First Amendment did not misapply a properly stated rule of law, it turned the First Amendment rule of law on its head.

Moreover, the majority's holding assumes that unions have a "constitutional right" to an "agency fee" equivalent to full union dues from all represented employees, members and nonmembers alike, as long as unions allow dissenting nonmember employees to "opt out" of the unions' political spending. Accordingly, unless reversed by this Court, the decision below jeopardizes numerous federal and state statutes that limit or prohibit a union's unfettered collection and use of nonmembers' coerced fees, including statutes governing campaign finance,[7] compulsory unionism,[8] and the Right to

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[7] *See infra* pp. 25-26, 28 & note 22.

[8] Like Washington's campaign finance law, some states' compulsory unionism statutes require voluntary political contributions to be separate from the compelled fee. 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) (LexisNexis Supp. 2004); Mont. Code Ann. §§ 39-31-402(3), 39-32-109(2)(d) (2005). Unlike Washington, not all state compulsory unionism statutes allow the union to compel 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) (LexisNexis Supp. 2005). Others limit

(continued...)

Work[9]. These jeopardized statutes have all been previously upheld by this Court or various state and federal courts against similar First Amendment attack.[10]

I. The Washington Supreme Court's Decision That Labor Unions Have a Constitutional Right to Seize and Use the Wages of Nonmembers Conflicts with Decisions of This Court and Numerous Decisions of the United States Courts of Appeals and State Courts.

The decision below is in direct conflict with this Court's holdings that unions and individuals who associate with them have no First Amendment associational right to monopoly (collective) bargaining or payroll deduction of full union dues (and, by logical extension, nonmember agency fees).

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[8](...continued)
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) (LexisNexis 2003). Still others limit the fee to the constitutionally chargeable amount. N.M. Stat. Ann.§ 10-7E-4(J) (Michie Supp. 2003); Pa. Cons. Stat. Ann. §§ 1102.2 & 1102.4 (West Supp. 2005). Some even allow the bargaining unit members to rescind or deauthorize the compulsory unionism 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), 111.85(2)(a) (West Supp. 2002), 111.81(16) (West Supp. 2005); *see also* 29 U.S.C. § 159(e).

[9]*See* Sections 9(e) and 14(b) of the National Labor Relations Act, 29 U.S.C. §§ 159(e) and 164(b) (providing for deauthorization of compulsory unionism requirements and state prohibitions of such requirements by Right-to-Work provisions); Okla. Const. Art. 23, § 1A; and the twenty-one other constitutional and statutory Right-to-Work provisions listed in App. A at 31a n.3.

[10]*See infra* pp. 10-20.

In *City of Charlotte v. Local 660, International Association 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. As Chief Justice Sanders notes in his dissent: "Should the legislature of the State of Washington choose to repeal the mandatory withholding provisions [dues checkoff], there would be no constitutional impediment to doing so. **And no party to this proceeding claims there is.**" App. A at 31a (emphasis added).

Nevertheless, the majority struck down § 760 of the State's campaign finance law, which merely requires labor unions to secure the affirmative authorization of nonmembers before using the nonmembers' mandatory fees for political campaigns, as a violation of the unions and their members' First Amendment right of association. The majority mistakenly believed that this Court's holdings, involving the **constitutional rights of nonunion employees** who dissent to the use of their fees for politics, that nonmembers are adequately protected by an opportunity to "opt out" of paying for those activities means that the **First Amendment rights of unions and their members** are violated if the State further protects nonmembers by a statute that requires an "opt in" provision before their fees can be used for politics.

If a law prohibiting dues checkoff for a union does not violate the right of association,[11] a law that merely places a procedural requirement before unions can use nonmembers' mandatory checkoff for politics surely cannot violate the unions' First Amendment rights. The existence of a constitutional floor protecting First Amendment rights of nonmembers

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[11] *See Brown v. Alexander*, 718 F.2d 1417, 1421-22 (6th Cir. 1983).

does not provide unions with constitutional rights that this Court has found do not exist for unions and their members. As Justice Sanders explained in his dissent:

> Given that the legislature could constitutionally repeal the whole statutory scheme allowing withholding in the first place, I find it nearly beyond comprehension to claim that the legislature, or the people acting through their sovereign right of initiative, could not qualify these statutes to ensure their constitutional application.
>
> In short, the 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.
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> * * *
>
> [I]t would be perfectly constitutional if the State chose to eliminate the payroll deduction for collection of agency shop fees altogether. How then could merely placing a procedural condition on the collection of a small portion of such shop fees (those that would be used to influence an election or to operate a political committee) violate the constitution?
>
> **The majority chooses not to address this line of cases.** Instead it distorts 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.

App. A at 32a, 33a-34a (emphasis added).

The majority also found that § 760 violates the First Amendment rights of unions and their members, because it believed that the statute's "opt in" requirement limited the unions' efficiency in raising and using nonmembers' fees for politics. App. A at 16a-18a, 27a-29a. In holding that unions are not entitled to payroll deductions, the Fourth and Sixth Circuits, in conflict with the majority below, found that such impairment does not violate the First Amendment.

The Fourth Circuit admitted that the loss of payroll deductions could impair the effectiveness of a union in representing its members and result in less money for engaging in First Amendment protected lobbying activities, legal advocacy, and other programs. *South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1256 (4th Cir. 1989). Nevertheless, "such 'impairment' * * * is not one that the First Amendment proscribes," because the constitution does not entitle unions to the funds necessary to realize all the advantages of First Amendment freedoms. *Id*. at 1257 (citing *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 465 (1979)). The state's decision not to subsidize the free association and free speech rights of the union and its members did not infringe these rights. *Campbell,* 883 F.2d at 1257.

The Sixth Circuit in *Brown v. Alexander*, 718 F.2d 1417, 1421, 1423, 1429 (6th Cir. 1983), held that even if denial of payroll deductions, which the statute conferred on one union but not another, burdened the deprived union, "such a burden in the form of 'impairing the effectiveness' of plaintiff local unions was constitutionally permissible * * *. " *Id*. at 1421 (citation omitted).

Just as dues checkoff is not a fundamental right, collective bargaining is not guaranteed by the First Amendment. *Smith*, 441 U.S. at 464-65 & n.2. Although the First Amendment

rights of association and advocacy protect the right of unions to exist and the right of employees to join together in unions and to advocate, those rights cannot be stretched to impose an obligation on the government to recognize a union, bargain with it, or allow the union to process grievances. *Id*. Requiring unions to get the affirmative authorization of nonmembers to use their compelled fees for politics does not impede the right to join together in a group of like-minded individuals and exercise free speech rights.

This Court found that First Amendment rights were not involved or violated in a state's refusal to deal with a union over member grievances. *Id.* at 464. Likewise, § 760's requirement that unions secure the affirmative authorization of nonmembers before using their compelled fees for partisan political campaigns neither prevents union membership nor voluntary participation with the union. A law does not violate an organization's right of freedom of association just because the law makes more difficult, rather than prohibits, the organization's political fund raising. *See McConnell v. FEC*, 540 U.S. 93, 203-04 (2003).

The majority below is in conflict with two courts of appeals on this point. The Fourth Circuit upheld against First Amendment attack a city charter provision providing that no employee organization would be recognized as a bargaining representative for city employees. *Fraternal Order of Police v. Mayor & City Council*, 916 F.2d 919, 923 (4th Cir. 1990). The court of appeals concluded that the provision did not violate either the union or its members' First Amendment rights, as "the city officials were free to refuse to speak with whomever they chose – be it private individuals or representative associations." *Id*. Thus, there is no constitutional right to

bargain collectively[12] and statutes prohibiting monopoly bargaining do not violate the First Amendment.

The Eighth Circuit held that "the First Amendment does not impose any duty on a public employer **to affirmatively assist**, or even to recognize a union." *Arkansas State Highway Employees Local 1315 v. Kell*, 628 F.2d 1099, 1102 (8th Cir. 1980) (emphasis added).

While the power to persuade is protected by the First Amendment, the power to compel conformity (and financial support) is not. *Michigan State AFL-CIO v. Employment Relations Comm'n*, 453 Mich. 362, 370, 551 N.W.2d 165, 169 (1996). Section 760 does not impair the ability of individuals to participate in the partisan political contributions of unions, because it allows unions to persuade nonmembers to support the unions' partisan political spending and secure their 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.[13]

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[12]Collective bargaining is a statutory right. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 313-14 (1979). Collective bargaining as a statutory right requires both parties to confer in good faith – to listen to each other. The First Amendment does not. Moreover, public employees are not a protected class. *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 322 (6th Cir. 1998); *Michigan State AFL-CIO v. Employment Relations Comm'n*, 453 Mich. 362, 380, 381, 551 N.W.2d 165, 173 (1996).

[13] [A] look at some statistics in this case supports the conclusion that reverse check-off ["opt out"] results in some unknowing, and therefore, involuntary, [political] contributions. * * * Implicit in an exchange between counsel for [the union] and the Court that occurred during oral argument herein is an acknowledgment that something other than a willingness by the member to be associated with the

(continued...)

If an ordinance banning monopoly bargaining does not violate the associational right of unions and their members, how can a campaign finance law that merely requires unions to get the affirmative consent of nonmembers before using their compelled fees for political campaigns violate the First Amendment?

In an analogous case, the Third Circuit upheld against First Amendment attack by city employees a city ordinance denying them any mechanism to choose a different bargaining representative from the one designated in that ordinance thirty-six years earlier. *Philadelphia Fraternal Order of Corr. Officers v. Rendell*, 1997 WL 1161146 (3d Cir. 1997). Because "there is no constitutional right to bargain collectively," the court of appeals found "that the First Amendment's freedom of association provides [no] * * * right to choose a bargaining representative." *Id*. at *1, *3.

The Third Circuit also repudiated the theory underlying the court below's reliance on the "difficulties" § 760 might place on a union's ability to effectively obtain use of nonmembers' fees for political campaigns. "What appellants demand

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[13](...continued)

> union's political activities operates to make reverse check-off so advantageous to the union's funding mechanism. * * * [There] appears to be a curtain of indifference that envelopes the NEA's members when finances are involved. With respect to their dues, [the union] raise[s] this curtain through payroll deduction. While it is still up, they add to the deduction the additional dollar for their political action fund. Then through reverse check-off, they lower the curtain back around its members to cause that indifference to insulate the union from requested refunds. * * * In this Court's view, "knowing free-choice" means an act intentionally taken and not the result of inaction when confronted with an obstacle.

FEC v. National Educ. Ass'n, 457 F. Supp. 1102, 1107, 1108, 1109 (D.D.C. 1978).

is a Constitutional right to effective advocacy of their viewpoints. That right simply does not exist. 'The First Amendment * * * provides no guarantee that a speech will persuade or that advocacy will be effective.' * * * Moreover, not all means of expression have been foreclosed." *Id*. at *3 (citations omitted).

If the First Amendment does not guarantee effective advocacy, how can a campaign finance law that merely requires unions to get the affirmative consent of nonmembers before using their compelled fees for political campaigns violate the First Amendment? Although the Washington Supreme Court found such a violation, it never answered these questions, because it never discussed any of these cases or the settled rule of law they reflect.

The majority's decision also conflicts with this Court's decisions upholding state Right-to-Work laws that "were challenged as violations of the right of freedom of speech, of assembly, and of petition guaranteed unions and their members by the First Amendment." *Lincoln Fed. Labor Union No. 19129 v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 528-31 (1949); *accord American Fed'n of Labor v. American Sash & Door Co.*, 335 U.S. 538, 540 (1949); *see also Railway Employes' Dep't v. Hanson*, 351 U.S. 225, 233 (1956). Like the campaign finance law struck down by a majority below, "[n]othing in the language of the [Right-to-Work] laws indicates a purpose to prohibit speech, assembly, or petition." *Lincoln Fed.,* 335 U.S. at 530. As previously noted, § 760 allows a union to persuade nonmembers to support its partisan political spending and ensures that such support is voluntarily given by requiring affirmative authorization.

This Court specifically rejected the argument adopted by the majority below that the right to association entails an effective union movement and sufficient membership:[14]

> 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 * * * [or] a constitutional guarantee that none shall get and hold jobs except those who will join in * * * the assembly's plans. For where conduct affects the interests of other individuals and the general public, the legality of that conduct must be measured by whether the conduct [c]onforms to valid law, even though the conduct is engaged in pursuant to plans of an assembly.[15]

Lincoln Fed., 335 U.S. at 531.

A union's making partisan political contributions clearly "affects the interests of other individuals and the general public." *Id.* Moreover, the union's constitutional right of

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[14]The unions argued in *Lincoln Federal* that the right to a closed shop is:

> "indispensable to the right of self organization and the association of workers into unions" * * * [and] to achievement of sufficient union membership to put unions and employers on a full equality for collective bargaining[. Thus,] a closed shop is consequently "an indispensable concomitant" of "the right of employees to assemble into and associate together through labor organizations."

335 U.S. at 530 (citation omitted).

[15]A*ccord Finney v. Hawkins*, 189 Va. 878, 881-84, 54 S.E.2d 872, 874-75 (1949); *Lincoln Fed. Labor Union No. 19129 v. Northwestern Iron & Metal Co.*, 149 Neb. 507, 519-21, 538, 31 N.W.2d 477, 485-86, 494 (1948); *Mascari v. Teamsters*, 187 Tenn. 345, 215 S.W.2d 779 (1948).

association does not provide a further constitutional right to use for politics the mandatory fees of nonmembers who have not undertaken the burden of "opting out" of partisan political contributions in response to the union's *Hudson* notice.

More than fifty years ago the Supreme Court of Virginia cogently observed:

> Legislation that protects the citizen in his freedom to disagree and to decline an association which a majority would thrust upon him on the ground that it knows what is best for him, does no violence to the spirit of our fundamental law. The protection of minorities is the boast of our institutions and a basis of their asserted superiority over totalitarian regimes. The results have demonstrated the value of the democratic process.

Finney v. Hawkins, 189 Va. 878, 888, 54 S.E.2d 872, 877 (1949). Sadly, in the early years of the 21st century, a majority of the Washington Supreme Court has failed to maintain our fundamental law.

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 or the amount of, or procedures for, agency fees. In other words, because "[t]he only authority that a union has to compel nonmembers to pay agency fees is statutory," App. D at 57a, 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.

This Court has conclusively held that the First Amendment rights of labor unions and their members are not violated

by statutes that deny them 1) collective bargaining, 2) payroll deduction of union dues and fees, and 3) the ability to require all employees to either become a union member or pay union fees. Therefore, it is inconceivable how a campaign finance law which merely requires unions to get the affirmative authorization of **non**union employees who are compelled to pay fees to the union before using any of those forced fees on partisan politics violates the associational rights of unions and their **members**!

II. The Washington Supreme Court's Decision, That the State's Campaign Finance Law Prohibiting Labor Unions and Their Officials from Seizing and Using Nonmembers' Wages for Partisan Political Campaigns Without Obtaining Their Affirmative Consent Violates the First Amendment Rights of Labor Unions, Conflicts with Decisions of the United States Court of Appeals for the Sixth Circuit.

There is a direct conflict between the Washington Supreme Court in this case and the Sixth Circuit in *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997), concerning the constitutionality of similar campaign finance legislation. The district court in *Miller*, like the majority here, held that a state law requiring annual affirmative consent of union members[16] for checkoff contributions to a PAC violated the First Amendment rights of unions and their members,

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[16]The Washington statute only applies the "opt in" requirement to nonmembers, while the Michigan statute applies it to members. However, this difference does not justify the decision of the court below, because if a statute requiring affirmative consent from members does not violate the First Amendment, the union's freedom of association certainly is not implicated by a statute requiring affirmative authorization from only **nonmembers**.

because nonmembers' rights are "appropriately protected" by the "opt out" procedures this Court mandated in *Abood*. *Michigan State AFL-CIO v. Miller*, 891 F. Supp. 1210, 1218 (E.D. Mich. 1995), *rev'd*, 103 F.3d 1240 (6th Cir. 1997).

The Sixth Circuit reversed, finding that the Michigan "opt in" statute did not violate any First Amendment rights of the unions or their members. *Miller*, 103 F.3d at 1250-53. It did so because the "opt in" provision was merely a reasonable regulation of the time, place, and manner of speech subject to the less-exacting intermediate scrutiny standard, not a content-based statute subject to strict scrutiny.[17] Rather than limiting any political expression, an "opt in" statute merely ensures that the political contributions to separate segregated funds by means of mandatory or automatic payroll deductions are voluntary.[18] *Id*. at 1251.

The standard of scrutiny to be applied to the campaign finance statute is another area of direct conflict between the Sixth Circuit and the majority below. The majority below

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[17]The D.C. Circuit also applied an elevated (intermediate), but not strictest, standard to campaign finance restrictions that do not "directly * * * place limits on any individual's speech or participation in the electoral process." *Machinists v. FEC*, 678 F.2d 1092, 1106 (1982) (*en banc*); *see also id.* at 1107.

[18]Consistent with this Court's holding that unions have no constitutional right to payroll deduction for any reason, including for monopoly bargaining fees, the Sixth Circuit, in another case, held that "there is no constitutional right to wage checkoffs to support political causes." *Pizza*, 154 F.3d at 321-22. This holding is also in conflict with the majority's decision below that the First Amendment prohibits any regulation of the checkoff for partisan politics. If there is no constitutional right to wage checkoffs for political causes, there is no constitutional right to a political checkoff without regulations and conditions. But that is precisely what the majority below held.

improperly applied strict scrutiny, App. A at 22a-23a, 28a-29a, while the Sixth Circuit applied the intermediate scrutiny standard in accordance with this Court's clarification of the applicable tiers of review in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 640-43 (1994); *see also Madsen v. Women's Health Center*, 512 U.S. 753, 763 (1994); *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The majority below never claimed that § 760 restricts speech on the basis of content, which is a necessary finding for the application of strict scrutiny. By contrast, laws like § 760, "that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral." *Turner Broad.*, 512 U.S. at 643.

The Sixth Circuit made the following findings directly contrary to those of the majority of the Washington Supreme Court on these similar "opt in" statutes:

> [T]he Michigan statute does not impose any direct limits on speech. It does not determine who can speak, how much they can speak, or what they may say. [The unions] may continue to raise just as much money now as they could before the annual consent requirement was made applicable to them. * * * Even if contributions were to decline, however, the cause would be the exercise of informed choice by individuals, not the governmental suppression of political advocacy. The governmental interest at stake here is striking a balance between the right to solicit political contributions and the co-equal right not to contribute, an interest wholly unrelated to the suppression of free speech.

Miller, 103 F.3d at 1253.[19]

Likewise, the Sixth Circuit found the administrative burdens of the "opt in" requirement to be minimal, while the majority below found them to be substantial:[20]

> An annual mailing to a union's contributing members, asking them to check a box and to return the notice to the union, would seem to suffice under the statute. Labor unions surely maintain some sort of records on their members already, and requiring the unions to make space in their files or databases for the inclusion of one more piece of information seems

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[19]The Alaska Supreme Court also upheld its state campaign finance law prohibiting labor unions from making contributions to a political candidate, party, or committee against claims that the prohibitions offended the "political speech rights and associational rights of would-be contributors." *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 613 (Alaska 1999), *cert. denied*, 528 U.S. 1153 (2000); *see also id*. at 608-13. In direct conflict with the majority below the Alaska Supreme Court found that restraints on campaign expenditures by corporations and labor unions have long been part of federal law, and long upheld. *Id*. at 608, 609, 610. The Ninth Circuit also upheld Alaska's ban on corporate and union contributions for similar reasons. *Jacobus v. Alaska*, 338 F.3d 1095, 1122 (9th Cir. 2003). The court did so partly because "[i]n the context of contribution limits, the requirement of 'close tailoring' does not require 'the least restrictive alternative.' *See, e.g.*, *California Med. Ass'n* [*v. FEC*], 453 U.S. [182,] 199 n.20 [(1981)]." 338 F.3d at 1115.

[20]App. A at 16a-18a, 27a-29a. The Sixth Circuit subsequently noted that, although the unions paraded a host of "burdens" in securing the greatest number of contributors, the statute "does not impose any specific method of compliance," and those burdens, even if real, "do not violate the Constitution." *Miller*, 215 F.3d 1327, 2000 WL 712539, at *1, *2 (6th Cir. 2000) (unpublished opinion). "[T]he Constitution, as historically and currently interpreted, does not afford any guarantee against one person or group's ability to fund more speech than can another." *Machinists*, 678 F.2d at 1109.

> 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.

Id.

In this case there is even less burden, because the union already has to notify all nonmembers annually of their *Hudson* rights. The union could simply include in that package the needed material to demonstrate affirmative consent. Moreover, the State conceded that § 760 does not require the affirmation to be in writing, App. A at 17a, so a telephone response could suffice.

As noted by the Sixth Circuit, another problem with the reasoning of the majority below, that any impairment of the ability of public employees and their unions to raise funds to promote their political agendas and favorite candidates violates the First Amendment, "is that it confuses what citizens and the associations they form may do to support and disseminate their views with what citizens and groups they form my *require* the government to do in this regard." *Pizza*, 154 F.3d at 319. What the unions and the majority below forget is that the First Amendment "'is a source of negative rights against the government, not a repository of positive entitlement to government favors.'" *Id.*, quoting Lillian R. Bevier, *Specious Arguments, Intractable Dilemmas*, 94 Colum. L. Rev. 1258, 1277 (1994).

The Sixth Circuit, not the majority below, is wholly consistent with this Court's cases acknowledging that the protections accorded to fundamental First Amendment rights do not extend to imposing a duty on the government to assist

the exercise of those First Amendment rights, no matter how much the lack of such assistance undercuts the effectiveness of exercising such rights. *See, e.g., Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 545 (1983); *Smith*, 441 U.S. at 465-66; *Pizza*, 154 F.3d at 321.

III. The Washington Supreme Court's Decision Also Conflicts with Relevant Decisions of This Court.

The majority's decision below conflicts with the principles of various decisions of this Court upholding against First Amendment attack campaign finance statutes that place greater restrictions on a union's ability to use members and nonmembers' wages for partisan politics than the limited time, place, and manner regulation that is § 760's affirmative authorization requirement.

The Federal Election Campaign Act of 1971 ("FECA"), 2 U.S.C. § 441b(a), prohibits making union political contributions and expenditures from general union funds. Instead, they must be made from a separate fund (or political action committee ("PAC")) "financed by voluntary contributions." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 671 (1990) (Brennan, J., concurring). Moreover, the FECA prohibits labor PAC solicitation of nonmember union employees. 2 U.S.C. § 441b(b)(4)(A)(ii). This Court has repeatedly upheld these prohibitions against First Amendment attack and spoken approvingly of them,[21] because the potential for disproportionate political influence of corporate and labor

[21] *See McConnell v. FEC*, 540 U.S. 93 (2003); *Austin*, 494 U.S. at 656 n.1, 661, 664-65 & n.4; *FEC v. National Right to Work Comm.*, 459 U.S. 197, 198-200 (1982); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 (1978).

union participation in the political process 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); see also *Machinists*, 678 F.2d at 1105-07, 1112. Congress' power to prohibit corporations and unions from using their treasury funds for express advocacy in federal elections has been upheld because corporations and unions can form and administer separate segregated funds or PACs, which provide them "with a constitutionally sufficient opportunity to engage in express advocacy." *McConnell*, 540 U.S. at 203; *cf. Washington Educ. Ass'n v. Smith*, 96 Wash. 2d 601, 607-08, 638 P.2d 77, 80-81 (1981) (although RCW 41.04 prohibits voluntary payroll deductions for political contributions and impairs a union's ability to take political action, it is constitutional, because state workers can contribute to PACs by other means). Likewise, § 760 does not prevent unions from engaging in express advocacy, even with nonmembers' agency fees, if nonmembers merely authorize such.

Moreover, the PAC option 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, and it lets the government regulate campaign activity through registration and disclosure * * * **without jeopardizing the associational rights of advocacy organizations' members**.'" *McConnell*, 540 U.S. at 204 (quoting *FEC v. Beaumont*, 539 U.S. 146, 163 (2003)) (emphasis added, citations omitted); *accord Pipefitters v. United States*, 407 U.S. 385, 402 (1972). In fact, the FECA, 2 U.S.C. § 431 *et seq.*, and related regulations that bar direct corporate and union contributions in

federal elections, are subject to relatively complaisant First Amendment review, only requiring that the provisions be closely drawn to match a sufficiently important governmental interest, rather than to strict scrutiny. *Beaumont*, 539 U.S. at 161-62.

In addition to preventing corruption or the appearance of corruption, the PAC system has always had a **further duty** and 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." *FEC v. National Right to Work Comm.* ("*NRWC*"), 459 U.S. 197, 208 (1982); *accord United States v. CIO*, 335 U.S. 106, 113 (1948); *see also Austin*, 494 U.S. at 673-78 (Brennan, J., concurring). Accordingly, the Act prohibits unions from financing political funds by "dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment." 2 U.S.C. § 441b(b)(3)(A); *accord* at § 441b(a).

Thus, 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 donations from union members for political contributions, *see Pipefitters*, 407 U.S. at 402-13, not by the "opt out" procedure the panel 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 dissenting **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 contributions to the PAC must be voluntary and knowingly and intentionally given, and the union and its PAC may **not** solicit **nonmembers**.[22] 2 U.S.C. §§ 441b(a), 441b(b)(3), 441b(b)(4)(A)(ii); 11 CFR §§ 114.5(a), 114.5(g)(2); *see also United States v. Boyle*, 482 F.2d 755, 763-64 (D.C. Cir. 1973); *FEC v. National Educ. Ass'n*, 457 F. Supp. 1102 (D.D.C. 1978). Moreover, the Federal Election Commission has specifically determined that an "opting out" system violates the Act. "[E]ven though [membership dues] are refundable upon request of the payor," they are still "monies required as a condition of membership in a labor organization or as a condition of employment," which the Act prohibits unions and their PACs from using for political contributions or expenditures. 11 CFR § 114.5(a)(1); *see also* 2 U.S.C. §§ 441b(a), 441b(b)(3)(A).

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[22]Many states have similar campaign finance laws that restrict union political solicitations and contributions. *See* Alaska Stat. §§ 15.13.074(f), 15.13.135 (LexisNexis 2004); Ariz. Rev. Stat. Ann. §§ 16-919(B), 16-920, 16-921 (West Supp. 2005); Iowa Code Ann. § 20.26 (West 2001); Md. Code Ann., Elec. Law §§ 13-242 (LexisNexis Supp. 2005), 13-243 (LexisNexis 2002); Mich. Comp. Laws Ann. §§ 169.254, 169.255 (West 2005); Neb. Rev. Stat. Ann. §§ 49-1469, 49-1469.06 (LexisNexis Supp. 2005); N.C. Gen. Stat. Ann. §§ 163-278.19(a) & (b) (LexisNexis 2005); N.D. Cent. Code § 16.1-08.1-03.3 (LexisNexis Supp. 2005); Ohio Rev. Code Ann. §§ 3517.082, 3599.03 (West Supp. 2006); Pa. Cons. Stat. Ann. § 1101.1701 (West 1991); S.D. Codified Laws Ann. §§ 12-25-1(1), 12-25-2 (LexisNexis Supp. 2003); Utah Code Ann. §§ 20A-11-1403 (LexisNexis 2003), 20A-11-1404 (LexisNexis Supp. 2005); Wis. Stat. Ann. § 11.29 (West 2004); Wyo. Stat. Ann. § 22-25-102 (LexisNexis 2005). Some states require written authorization of political deductions. Ohio Rev. Code Ann. § 3599.031(A) (West Supp. 2006); Wyo. Stat. Ann. § 22-25-102(h) (LexisNexis 2005).

Congress' limitation of solicitation of campaign contributions to members of a corporation or union was specifically upheld unanimously by this Court against claims that it violated associational rights. "[W]e conclude that the associational rights asserted by [the corporation] may be and are overborne by the interests Congress has sought to protect in enacting [the Act]." *NRWC*, 459 U.S. at 207. Those interests include protection of

> 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. **We agree with the government that these purposes are sufficient to justify the regulation.**
>
> * * *
>
> We are also convinced that the statutory prohibitions and exceptions we have considered are sufficiently tailored to these purposes to avoid undue restriction on the associational interests asserted by [the corporation].

Id. at 208 (emphasis added, citations omitted). Moreover, as the Court noted, "[t]his careful legislative adjustment of the federal electoral laws * * * to account for the particular legal and economic attributes of corporations and labor organizations **warrants considerable deference**." *Id*. at 209 (emphasis added, citations omitted).

What this Court said about corporate wealth applies equally to union wealth because it too is accumulated with the help of the state, which sets the union up as the monopoly bargaining representative with the power to compel financial support from members and nonmembers alike. "Corporate

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.

In sum, Congress can constitutionally 1) prohibit unions from contributing to federal candidates from dues monies, 2) require union members' political contributions to be knowingly and voluntarily made, and 3) prohibit solicitation of political contributions from nonmembers without violating the First Amendment rights of unions, their members, and agency fee payers. *McConnell*, 540 U.S. at 203-04; *NRWC*, 459 U.S. at 207-09; *Mariani v. United States*, 212 F.3d 761, 770-75 (3d Cir. 2000); *Boyle*, 482 F.2d at 763-64. It necessarily follows that the State of Washington is not prohibited from placing time and place restrictions on a union's political use of the compelled fees of nonmembers.

CONCLUSION

For the reasons stated above, this petition for writ of certiorari should be granted, and the case set for plenary briefing and argument on the important questions presented.

Respectfully submitted,

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