A MACKINAC CENTER REPORT

Davenport v. Washington and Washington v. Washington Education Association

An Amicus Curiae Brief to the Michigan Supreme Court

Patrick J. Wright

A Mackinac Center "friend of the court" filing to the U.S. Supreme Court in a case involving unions' use of nonmembers' fees for political activity

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ABOUT THIS DOCUMENT:
A BRIEF OF AMICUS CURIAE

On Nov. 13, 2006, the Mackinac Center for Public Policy filed a brief of amicus curiae* with the United States Supreme Court in two consolidated cases, *Davenport v. Washington* and *Washington v. Washington Educ. Ass'n*. The legal dispute centers on a state of Washington law, Wash. Rev. Code § 42.17.760, that prohibits labor unions from using fees from nonmembers to either operate a political committee or to influence an election.

The law was one of many enacted in a 1992 initiative that dealt in large part with campaign finance issues. It was meant to protect the First Amendment right of a nonunion employee not to subsidize political speech he disagrees with, but ironically, the Washington Supreme Court held that the law violated the union's free speech rights. The Center's brief, which was authored by Senior Legal Analyst Patrick J. Wright, contained arguments both that the Washington law was constitutional and that the First Amendment extends even more protections to nonunion workers than the Washington law provides.

This matter began after the Washington Education Association admitted that it serially violated § 42.17.760 by only giving refunds to nonmembers who requested them. This led to two lawsuits. In the first, the state of Washington sued the union seeking civil penalties. In the second, some nonunion teachers sued the union and claimed that they were entitled to civil damages from the union.

In holding that § 42.17.760 was unconstitutional, the Washington Supreme Court relied on a phrase from a 1961 United States Supreme Court decision, "dissent is not to be presumed." The Washington Supreme Court held that

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* "Amicus curiae" means "friend of the court." Thus, the Mackinac Center is not a litigant in these cases, but rather an interested observer supplying additional legal reasoning for the U.S. Supreme Court to consider.

§ 42.17.760 presumes that nonmembers do not want to support the union's political activity and that this violates the union's right to communicate with the nonmembers. The United States Supreme Court granted certiorari, and oral argument occurred on Jan. 10, 2007. A decision is expected by the end of June 2007.

EXECUTIVE SUMMARY

The Center's brief contained two main arguments. The first was that the Washington Supreme Court misapplied the "dissent is not to be presumed" phrase and that the U.S. Supreme Court should hold that under the First Amendment, the absolute maximum fee that a state can compel a nonmember to pay to a union is the nonmember's proportionate share of the union's collective bargaining costs. The second argument was that even if the U.S. Supreme Court did not address the broad question of the limit of permissible fees, the court should hold § 42.17.760 was a permissible exercise of the state's discretion.

The dispute regarding what fees a nonmember can be compelled to give to a union is a long-running one and is an outgrowth of compulsory unionism. The first case to address this issue was decided in 1956. At the time, it was still an open question whether "union shop" agreements, which require an employee to formally join a union within a certain period of time after being hired, were permissible. This was still undecided in 1961, when the U.S. Supreme Court took up the issue of union members who did not want to finance union political stands with which they disagreed. The Supreme Court needed a rough method to segregate those union members who supported the union's political aims from those union members who did not and had joined the union as a requirement of the job. The court held that union members could not be forced to support political causes that they disagreed with, but that "dissent is not to be presumed." In other words, union members could prevent their dues from being spent on political causes they disagreed with, but they had to make their feelings known.

The phrase was repeated in later Supreme Court cases discussing the propriety of a union charging fees to employees who were covered by a collective bargaining agreement but who did not want to join the union. By this time, the Supreme Court had clarified that all that was required for "membership" was that a person covered by a collective bargaining agreement pay whatever compulsory fees a state

allows a union to charge (if any).† Thus, there is no longer a need for the rough sorting that was done by the old rule, where "members" who joined only in order to be employed had to dissent. Now, the very act of the nonmember refusing to join the union should be sufficient to indicate that the nonmember does not want to support the union politically.

Failure to limit the union to collecting agency fees related to collective bargaining would imperil the nonmember's First Amendment right to silence. Making a nonmember affirmatively voice dissent causes that employee to annually draw attention to his or her politics. The current interpretation of the presumption means that a nonunion employee who does not want to contribute to political causes with which he or she disagrees, is forced to take a public stand, instead of having the opportunity to just ignore a political solicitation as most other individuals can do. A Supreme Court ruling that limited fees a union could charge to those necessary to cover collective bargaining costs would eliminate this problem.

Even if the Supreme Court were not to adopt this standard, it should still overturn the Washington Supreme Court's decision. The Washington court, relying on the United States Supreme Court's statement that "dissent is not to be presumed," held that it was unconstitutional for Washington to require a union to get affirmative authorization before a nonmember's political fees could be spent. But this holding ignores the fact that a state need not allow a public employee union to become a collective bargaining representative or allow a collective bargaining representative to charge an agency fee. A state that has decided to act on a discretionary power should not be compelled to exercise that power to the full extent constitutionally possible. Here, the state of Washington put a condition on the union's power to collect agency fees, a condition that was meant to protect the nonmembers' First Amendment rights. This was perfectly proper, and the Supreme Court should therefore overrule the lower court's ruling.

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† States that do not require a nonunion employee to pay a fee are known as right-to-work states.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

INTEREST OF AMICUS CURIAE[1]

The Mackinac Center for Public Policy is a Michigan-based, nonprofit, nonpartisan research and educational institute that advances policies fostering free markets, limited government, personal responsibility and respect for private property. The Center is a 501(c)(3) organization founded in 1988.

Compulsory unionism increases the costs of education and decreases the money available for education items not related to personnel. It discourages the treatment of teachers as professionals and discourages qualified individuals from becoming teachers. Compulsory unionism also increases the politicization of public schools through the adversarial nature of union bargaining.

SUMMARY OF ARGUMENT

The State of Washington allows unions to be the exclusive bargaining agent for all educational employees who work in a bargaining unit. The Washington Education Association is the union involved in the instant cases. The state allows a certified education union to bargain for a union security clause that allows the union to collect an agency fee from educational employees who are in the bargaining unit but do not want to join the union. Wash. Rev. Code § 41.59.100. This type of agreement is known as

[1] This brief is filed with the written consent of all parties. No counsel for a party authored the brief in whole or in part, nor did any person or entity, other than amicus curiae, its members or its counsel make a monetary contribution to the preparation or submission of this brief.

an agency shop agreement, and this Court has indicated that it might be the most restrictive form of compulsory unionism that still meets constitutional muster.

In a long line of cases, starting with *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961), this Court has recognized that employees who do not want to join the union do not have to provide financial support for the union's political activities. In *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), it was recognized that the nonmember's right was based on the First Amendment.

The next logical step in this Court's jurisprudence is a recognition that there is no obligation on a nonmember to dissent before First Amendment protections can be invoked. A dissent requirement is improper, since it takes away a nonmember's right to silence, and since it is not narrowly tailored to advance the government's interests in promoting labor peace and in fairly apportioning the costs related to collective bargaining.

In his partial dissent and concurrence in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), Justice Scalia stated that only those fees related to the statutory duties imposed on the union could be charged to nonmembers. This Court should adopt this standard, which respects nonmembers' individual rights and precludes the possibility that a nonmember could be charged for political expenditures with which he or she does not agree.

But even if this Court does not adopt this standard, it should reverse the Washington Supreme Court's ruling. The statute that the Washington Supreme Court addressed was not the statute allowing for an agency fee; rather, it was Wash. Rev. Code § 42.17.760, which requires

a teachers union to obtain affirmative authorization from a nonmember before using that nonmember's fee for expenditures related to political causes. The Washington Supreme Court held that this affirmative authorization requirement was unconstitutional.

This Court should hold that § 42.17.760 is firmly within the state's constitutional powers. After all, the State of Washington is not constitutionally required to enact a statute that allows a fee to be charged to a nonmember; the state is not even required to allow a teachers union to become an exclusive bargaining agent in the first place. Given that Washington has the ability to eliminate collective bargaining and agency fees altogether, the state most certainly can enact a statute that allows such fee payments only under certain conditions.

ARGUMENT

I. Introduction

The State of Washington allows a union to become the exclusive bargaining agent for education employees. A permissible item in a contract between the education employees and the employer is an agency shop requirement:

> A collective bargaining agreement may include union security provisions including an agency shop, but not a union or closed shop. If an agency shop provision is agreed to, the employer shall enforce it by deducting from the salary payments to members of the bargaining unit the dues required of membership in the bargaining representative, or, for nonmembers thereof, a fee equivalent to such dues.

Wash. Rev. Code § 41.59.100. As part of Initiative 134, Washington's voters enacted Wash. Rev. Code § 42.17.760, which states "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."

The WEA admitted that it violated § 42.17.760, which led to two lawsuits. In the first, *Washington v. WEA*, No. 05-1657, the state filed an action against WEA seeking civil penalties. In the second, *Davenport v. WEA*, No. 05-1589, individual teachers who were not union members claimed that the violation of § 42.17.760 provided them a private cause of action against the union.

The Washington Supreme Court asked three questions: (1) Does the WEA's *Hudson* process[2] satisfy Wash. Rev. Code § 42.17.760? (2) Does the requirement of affirmative authorization render Wash. Rev. Code § 42.17.760 unconstitutional? and (3) Does chapter 42.17 of the Washington Revised Code create a private cause of action? The court answered "no" to the first question and "yes" to the second. The answer to the second question obviated any need to answer the third.

Both the Davenport petitioners and the Washington petitioner contend that Washington's opt-in statute is constitutional – i.e., that the Washington Supreme Court answered its second question incorrectly. But the Davenport petitioners also present the more fundamental question of

[2] The *Hudson* process refers to minimal procedures required before a union may spend the full amount of a nonmember's agency fee. *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986). This process is discussed below.

whether unions *ever* have a right to collect fees intended for political use from nonmembers. Amicus curiae will address this broader question first.

II. A union should be allowed to charge only those fees that are related to its statutory duties as the exclusive bargaining agent. This Court should create a prophylactic rule that would prevent government compulsion from being used to facilitate collection of fees unrelated to those duties. This rule would necessarily exclude the collection of agency fees related to political causes.

A nonmember's First Amendment speech rights include two "negative" rights: the right not to be compelled to speak, and the right not to be compelled to support political causes to which he or she is opposed. The state's interest in labor peace and its lesser interest in fairly apportioning the costs related to labor peace between union members and nonmembers is insufficient to overcome a nonmember's First Amendment speech rights.

In order to protect the right to silence, it must be presumed that the nonmember objects to the use of his or her money for political purposes. In the absence of such a presumption, nonmembers must forfeit their right to silence and express their objection, or they will lose their right to withhold their wages from the support of political activities with which they may disagree. The coercive power of the state should be used only to allocate fees related to duties that the union has been assigned by statute. Fees related to political causes are not part of a union's statutory duties; therefore, such fees could not be charged to nonmembers. Thus, Wash. Rev. Code § 41.59.100 should be held unconstitutional to the extent

that it allows a union to deduct fees unrelated to the union's statutory duties from a nonmember's paycheck.

A basic concept of labor law in the public employer context is that individual members of society have an associational right to join a union, but there is no constitutional obligation for a government to recognize the union and to bargain with it. In *Smith v Arkansas State Highway Employees, Local 1315*, 441 U.S. 463 (1979), a union challenged a state practice whereby a disgruntled employee had to submit a written complaint directly to a government representative rather than to the union. This Court held there was no violation of the First Amendment:

> The First Amendment right to associate and to advocate "provides no guarantee that a speech will persuade or that advocacy will be effective." The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so. But the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.
>
> . . .
>
> . . . Far from taking steps to prohibit or discourage union membership or association, all the Commission has done in its challenged conduct is simply to ignore the union. That it is free to do.

Id. at 465-66 (citations omitted).

There is no requirement that a union be an exclusive bargaining agent; it is a choice that a government can

make, not one that it is compelled to make.[3] One example of a compulsory union statute is the National Labor Relations Act (NLRA or Wagner Act), which was passed in 1935 and made the union the exclusive bargaining agent for all employees within its bargaining unit.

At first, the Wagner Act allowed the unions to negotiate for "closed shops," which meant that only those workers who were already union members could be hired. *Communication Workers of America v. Beck*, 487 U.S. 735, 747 (1988). But in passing the 1947 Taft-Hartley Act, Congress determined that the closed-shop arrangement

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[3] Some labor leaders believed that voluntary unionism as opposed to compulsive unionism was the better policy course. In 1881, Samuel Gompers helped found the American Federation of Labor (from 1881 until 1886, the AFL was known as the Federation of Organized Trades and Labor Union). Except in 1895, Gompers was the president of the AFL from its inception, when it had thousands of members, until his death in 1924, when it had millions. Samuel Gompers believed in voluntarism:

> There may be here and there a worker who for certain reasons unexplainable to us does not join a union of labor. That is his right no matter how morally wrong he may be. It is his legal right and no one can or dare question his exercise of that legal right.

Florence C. Thorne, Samuel Gompers – American Statesman 24 (Philosophical Library Inc. 1957). He also stated:

> I want to urge devotion to the fundamental of human liberty – to the principles of voluntarism. No lasting gain has ever come from compulsion . . . the workers of America adhere to voluntary institutions in preference to compulsory systems which are held to be not only impractical, but a menace to their rights, their welfare and their liberty.

Quoted by Fr. Edward A. Keller, The Case for Right to Work Laws: A Defense of Voluntary Unionism 90 (The Heritage Foundation, Inc., 1956).

was abusive and that it "create[d] too great a barrier to free employment to be longer tolerated." *Id*. at 748 (citation omitted). Therefore, Congress amended the NLRA to allow – though not require – agreements whereby an employee had to become a "member" within a certain time frame. *Id*. at 749. This type of agreement is known as a union-shop agreement.[4]

But the formal union-shop agreement described above merely exists in theory at this time. In *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), this Court indicated that, under federal law, the payment of the necessary fee is all that is needed to satisfy the membership requirement and thereby prevent the enforcement of a union security agreement:[5]

> Under a union-shop agreement, an employee must become a member of the union within a specified period of time after hire, and must as a member pay whatever union dues and fees are uniformly required. Under both the National Labor Relations Act and the Railway Labor Act, "(i)t is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues." [*NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963)]. See 29 U.S.C. § 158(a)(3); 45 U.S.C. § 152 Eleventh. . . . Hence, although a

[4] Another federal law, the Railway Labor Act, allows a union to act as the exclusive bargaining agent for the bargaining unit. It also allows for a union shop agreement.

[5] The security agreement allows for the union to ask that an employee not in compliance with the security agreement's requirements, in this case payment of an agency fee, be fired.

> union shop denies an employee the option of not formally becoming a union member, under federal law it is the "practical equivalent" of an agency shop, [*NLRB v. General Motors Corp.*, supra, at 743]. See also [*Lathrop v. Donohue*, 367 U.S. 820, 828 (1961)].

Abood, 431 U.S. at 217 n. 10.

In *Abood*, this Court noted that a strict requirement that "each employee formally join the union" could be unconstitutional. *Id*. This Court did not explicitly mention the theory on which this claim would rest, but given the context, it seems likely that the Court meant that such a requirement might infringe on a nonmember's freedom of association – in this case, the right not to associate with the union. Thus both the formal union shop and the stricter closed shop are of dubious constitutionality, and it may be that an agency shop is the strictest form of compulsory unionism that passes constitutional muster.

This Court began examining the free-speech rights of employees who have not joined a union in *Ry. Employes' Dep't v. Hanson*, 351 U.S. 225 (1956). In that case, the plaintiffs were "not members of the defendant labor organizations and desire[d] not to join." *Id*. at 227. The plaintiffs, Nebraska residents, challenged § 2, Eleventh of the Railway Labor Act (RLA), 45 U.S.C. § 152, which permitted union-shop agreements to be entered into by a union and an employer, and plaintiffs claimed that § 2, Eleventh violated the Nebraska Constitution's right-to-work provision. The Nebraska Supreme Court had held that "the union shop agreement violates the First Amendment in that it deprives the employees of their freedom of association and violates the Fifth Amendment in that it requires the members to pay for many things besides the cost of collective bargaining." *Id*. at

230. This Court noted that while there were strong policy considerations against allowing union-shop agreements, the matter was for Congress to decide. *Id*. at 233-34. In regard to free speech, this Court held that the union could seek fees, but left open the question of which fees would be proper. *Id.* at 238.

The first case from this Court that squarely addressed that question was *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961). In *Street*, the plaintiffs were six railroad union members who claimed that § 2, Eleventh of the RLA was unconstitutional to the extent that the provision allowed a union to charge its members for fees that would be used to support political candidates.

The five-member majority construed § 2, Eleventh so as to avoid any constitutional controversy.[6] It noted that a union that is the exclusive bargaining unit also has the duty to represent fairly all employees within the bargaining unit regardless of whether those employees were members of the union. The majority held that the statutory history of § 2, Eleventh indicated that Congress merely meant to have each employee pay his or her share for certain union functions, not to force an employee to support political causes he or she opposed:

> § 2, Eleventh contemplated compulsory unionism to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes [but was not meant] to provide the

[6] Justice Douglas believed that § 2, Eleventh violated the First Amendment to the extent that an employee protested against the use of his or her money for political causes, but he joined the majority so that there would be an opinion that garnered five votes.

> unions with a means for forcing employees, over their objection, to support political causes which they oppose.

Id. at 764 (footnote omitted). But, in order for this protection to apply, the employee was required to object to the use of his or her money for political causes:

> Any remedies, however, would properly be granted only to employees who have made known to the union officials that they do not desire their funds to be used for political causes to which they object. The safeguards of § 2, Eleventh were added for the protection of dissenters' interest, *but dissent is not to be presumed* – it must affirmatively be made known to the union by the dissenting employee. The union receiving money exacted from an employee under a union-shop agreement should not in fairness be subjected to sanctions in favor of an employee who makes no complaint of the use of his money for such activities.

Id. at 774 (emphasis added).

Justice Black recognized that the government's decision to use compulsory unionism is what triggers the First Amendment speech issues:

> Probably no one would suggest that Congress could, without violating this Amendment, pass a law taxing workers, or any persons for that matter . . . , to create a fund to be used in helping certain political parties or groups favored by the Government to elect their candidates or promote their controversial causes. Compelling a man by law to pay his money to elect candidates or advocate laws or doctrines he is against differs only in degree, if at all, from compelling him by

> law to speak for a candidate, a party, or a cause he is against. The very reason for the First Amendment is to make the people of this country free to think, speak, write and worship as they wish, not as the Government commands.
>
> There is, of course, no constitutional reason why a union or other private group may not spend its funds for political or ideological causes if its members voluntarily join it and can voluntarily get out of it. Labor unions made up of voluntary members free to get in or out of the unions when they please have played important and useful roles in politics and economic affairs. How to spend its money is a question for each voluntary group to decide for itself in the absence of some valid law forbidding activities for which the money is spent. But a different situation arises when a federal law steps in and authorizes such a group to carry on activities at the expense of persons who do not choose to be members of the group as well as those who do. Such a law, even though validly passed by Congress, cannot be used in a way that abridges the specifically defined freedoms of the First Amendment.

Id. at 788-89 (Black, J., dissenting) (footnotes omitted). He noted that the Government lacks the power to compel an individual to support political causes, and he would have limited the fees that can be collected with the assistance of government to those fees related to collective bargaining:

> In my view, § 2, Eleventh can constitutionally authorize no more than to make a worker pay dues to a union for the sole purpose of defraying the cost of acting as his bargaining agent. Our Government has no more power to compel individuals to support union programs or union

> publications than it has to compel the support of political programs, employer programs or church programs. And the First Amendment, fairly construed, deprives the Government of all power to make any person pay out one single penny against his will to be used in any way to advocate doctrines or views he is against, whether economic, scientific, political, religious or any other.

Id. at 791.

But Justice Black would not have approved an injunction to prevent the union from taking political money on a classwide basis. Instead, he too would have limited relief to the six plaintiffs who made their objection known. He believed that class relief was not possible since it was not possible to know which, if any, employees objected until they actually did so. He stated, "Other employees who have not protested are of course in the entirely different position of voluntary or acquiescing dues payers, which they have every right to be, and since they have asked for no relief this decree should not affect them." *Id*. at 794-95.

In *Bhd. of Ry. and S.S. Clerks, Freight Handlers, Express and Station Employes v. Allen*, 373 U.S. 113 (1963), two plaintiffs, who had not joined the union at the time they initiated their suit, alleged that they should not have to pay fees that could be used to support political causes to which they were opposed. The trial court had entered an injunction prohibiting the union from collecting any money from the plaintiffs unless and until the union could show that the money taken would be related to collective bargaining.

This Court, again basing its decision on the RLA, rather than the First Amendment, held that an employee

had a duty to object and that classwide relief was improper. But this Court also clarified that an employee does not have an obligation to identify each union political expenditure with which he or she disagrees: "It would be impracticable to require a dissenting employee to allege and prove each distinct union political expenditure to which he objects; it is enough that he manifests his opposition to any political expenditures by the union." *Id*. at 118.

The injunction entered into by the trial court was improper since it might have interfered with the functions and duties assigned to the union under the RLA. *Id*. at 120. This Court held that where there was a factual dispute about the proportion of fees or dues being used for political purposes, the union had the burden of proving that the expenditure was not political.

Street and *Allen* were statutory decisions. In *Abood*, this Court considered the question of agency shops in the context of government employment. Some Detroit teachers contended that agency shops were never proper in the public employment context, and that, even if agency shops were proper, the nonmember's agency fees were improperly being used to support political causes. This Court held that public employment agency shops were permissible. But in regard to free speech, this Court held "To compel employees financially to support their collective bargaining representative has an impact on their First Amendment interests." *Abood*, 431 U.S. at 222.

Abood addressed an issue that was not decided in *Street* or *Allen*: whether a union is entitled to collect fees for purposes other than collective bargaining. *Abood*, 431 U.S. at 232. This Court held that a union could spend funds on activities not related to collective bargaining, but

that it did not have the right to compel nonmembers to support these expenditures:

> We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.

Id. at 235-36 (footnote omitted). But the *Abood* majority accepted the claim that dissent by a nonmember is not to be presumed.

Writing for himself and two others, Justice Powell dissented. He correctly noted that the burden should be on the state to show that any fee that the state compels is in fact necessary to serve an overriding state interest:

> Before today it had been well established that when state law intrudes upon protected speech, the State itself must shoulder the burden of proving that its action is justified by overriding state interests. See [*Elrod v. Burns*, 427 U.S. 347, 363 (1976); *Healy v. James*, 408 U.S. 169, 184 (1972); *Speiser v. Randall*, 357 U.S. 513, 525-26, (1958)]. The Court, for the first time in a First Amendment case, simply reverses this principle. Under today's decision, a nonunion employee who would vindicate his First Amendment rights apparently must initiate a proceeding to prove that the union has allocated some portion of its budget to "ideological activities

> unrelated to collective bargaining." I would adhere to established First Amendment principles and require the State to come forward and demonstrate, as to each union expenditure for which it would exact support from minority employees, that the compelled contribution is necessary to serve overriding governmental objectives. This placement of the burden of litigation, not the Court's, gives appropriate protection to First Amendment rights without sacrificing ends of government that may be deemed important.

Id. at 263-64 (Powell, J., dissenting).

In *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986), this Court discussed the constitutionality of a process in which an objecting nonmember could recoup a portion of his or her fee that had been collected by a union and used to advance the union's political causes. While this Court recognized that infringements on an individual's First Amendment rights should be narrowly tailored and subject to strict scrutiny, this Court held that a nonmember has the burden of objecting to the improper use of his or her fees.

The collection of agency fees was recognized to infringe on both a nonmember's First Amendment associational rights and his or her First Amendment free-speech rights. *Id*. at 302 n. 9. Any procedure that impinges on First Amendment rights must be narrowly tailored:

> [A]lthough the government interest in labor peace is strong enough to support an "agency shop" notwithstanding its *limited infringement* on nonunion employees' constitutional rights, the fact that those rights are protected by the First

> Amendment requires that the procedure be carefully tailored to minimize the infringement.

Id. at 302-03 (footnote omitted and emphasis added).

This Court later noted that where a government has created an agency shop, both the union and the government must protect the nonmember's rights: "Since the agency shop itself is 'a *significant* impingement on First Amendment rights,' [*Ellis*, 466 U.S. at 455], the government and union have a responsibility to provide procedures that minimize that impingement and that facilitate a nonunion employee's ability to protect his rights." *Id*. at 307 n. 20 (emphasis added).[7]

This Court set forth the minimal constitutional requirements a union must satisfy before collecting an agency fee from nonmembers:

> We hold today that the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

Id. at 310.

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[7] Thus, in the span of five pages, this Court indicated that an agency shop causes a "limited infringement" on nonmembers' First Amendment rights and a "significant impingement" on nonmembers' First Amendment rights. The 50 years of litigation that began with *Hanson* and continues in the instant cases is evidence that the latter term is more accurate.

In *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991), this Court discussed whether certain union expenses could be charged to nonmembers. In a splintered decision, this Court held that charges like lobbying related to contract ratification or implementation could be assessed on both members and nonmembers, but that other lobbying charges could not be assessed on nonmembers. Similarly, this Court ruled that nonmembers could be charged that portion of fees that were passed on to the state or national union and related to collective bargaining, but could not be charged for litigation that was unrelated to the local bargaining unit.

Writing for himself and three others, Justice Scalia indicated that only those charges that relate to a union's statutory duties could be charged to nonmembers. *Id*. at 552 (Scalia, J., concurring in part and dissenting in part). The state's interest in eliminating "free riders" is limited to those duties it imposed on the union. *Id*. Justice Scalia explained:

> Once it is understood that the source of the state's power, despite the First Amendment, to compel nonmembers to support the union financially, is elimination of the inequity that would otherwise arise from mandated free-ridership, the constitutional limits on that power naturally follow. It does not go beyond the expenses incurred in discharge of the union's "great responsibilities" in "negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances," [*Abood*, 431 U.S. at 221]; the cost of performing the union's "statutory functions," [*Ellis*, 466 U.S. at 447]; the expenses "necessary to 'performing the duties of

> an exclusive representative,'" [*Beck*, supra, 487 U.S. at 762]. In making its other disbursements the union can, like any other economic actor, seek to eliminate inequity by either eliminating the benefit or demanding payment in exchange for not doing so. In a public relations campaign, for example, it can, if nonmembers refuse to contribute, limit the focus of publicity to union members, or even direct negative publicity against nonmembers, or terminate the campaign entirely. There is no reason – and certainly no compelling reason sufficient to survive First Amendment scrutiny – for the state to interfere in the private ordering of these arrangements, for the state itself has not distorted them by compelling the union to perform.

Id. at 556-57. He suggested the following test:

> I would hold that to be constitutional a charge must at least be incurred in performance of the union's statutory duties. I would make explicit what has been implicit in our cases since *Street*: A union cannot constitutionally charge nonmembers for any expenses except those incurred for the conduct of activities in which the union owes a duty of fair representation to the nonmembers being charged.

Id. at 558.

Justice Scalia's formulation recognizes the reason that a nonmember's First Amendment rights are at issue: The state has allowed unions to charge workers for the costs of collective bargaining and to act as exclusive bargaining representatives, on the condition that the unions fairly represent union members and fee payers alike. In *Lehnert*,

as here, the state made the policy choice that it wanted the nonmembers to pay a fee equal to the union dues.

But a union is permitted to engage in activities that are not related to the union's statutory duties. Agency fee statutes, like Wash. Rev. Code § 41.59.100, allow too many fees to be charged to nonmembers.

Justice Scalia's formulation would rid this Court of the right-to-silence problem created by the *Street* court's suggestion that dissent should not be presumed. Elsewhere, this Court has recognized an individual's right not to be compelled to speak. *West Virginia State Bd. of Educ. v Barnette*, 319 U.S. 624 (1943) (holding that schoolchildren were not obligated to stand and recite the Pledge of Allegiance); *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that a resident of the state of New Hampshire could obtain a license plate that did not include the state's motto of "Live Free or Die"); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 559 (1985) ("The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily . . . a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in the affirmative aspect.") (citation to quote omitted).

The *Street* ruling prevents silence from being an option. A nonmember is now required to actively voice dissent. As Justice Black noted in *Street*, in the absence of a state statute enacting compulsory unionism and requiring an agency fee to be paid, no one would seriously believe that the state could compel an individual to support a political cause he or she disagreed with. If that

individual were solicited, he or she would have the right both to reject the solicitation and to just ignore it. The requirement that a nonmember dissent takes away that right to silence.

It may be that the *Street* court did not consider the silence problem because it was concerned with a different issue – determining who wanted to be a member of the union and who did not. *Street* was a RLA case, and the RLA allows for union shops. *Street* was decided before *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963); therefore, it was not clear that payment of the financial fees alone would be sufficient for membership. Thus, anyone who wanted to be employed had to join the union in all respects. By making a member dissent, this Court imprecisely was able to sort out those members who actually wanted to be in the union from those who did not. But since *NLRB v. General Motors Corp.* essentially reduced the union shop to an agency shop, there now exists an easy way to sort. Those who want to join the union do so, and those who do not want to join the union become fee payers. Therefore, there is no need for a requirement that a nonmember dissent before he or she is able to receive First Amendment protections.

By preventing a union from ever obtaining more fees than is necessary to meet its statutory duties, Justice Scalia's formulation would return the right of silence to the nonmember. A union is of course free to solicit political contributions from the nonmember, but the nonmember has the right to either say no or just ignore the solicitation. This puts the union in the same position as a political party, a charity or any other entity that may solicit the nonmember.

Traditional First Amendment jurisprudence requires that the state justify any infringement on the First Amendment. Further, infringements on First Amendment rights are supposed to be narrowly tailored. It is the state's decision to allow compulsory unionism that jeopardizes a nonmember's First Amendment rights. It is also the state's decision to require nonmembers to pay a fee equal to a union's dues. Neither interest is sufficient to require a nonmember to support a political cause that he or she does not agree with, or to cause the nonmember to lose the right to silence. Thus this Court should hold that Wash. Rev. Code § 41.59.100 is unconstitutional to the extent it allows for the collection of a fee unrelated to the WEA's statutory duties.

III. The state is not obligated to use as much compulsion as is constitutionally permissible in order to allow the union to maximize the amount of money it can receive from nonmembers. The state, which does not have to grant a union exclusive bargaining power, may enact a statute that prevents nonmembers' fees from being used for political causes without their consent.

The Washington Supreme Court held that Wash. Rev. Code § 42.17.760 was unconstitutional because it impinged upon the First Amendment rights of union members. It suggested that since this Court had held that dissent is not to be presumed, it is not permissible for a state to enact a statute requiring a nonmember to affirmatively authorize the use of his or her fees for political purposes. The Washington Supreme Court indicated that some nonmembers may not disagree with the political causes

the union supports. Further, the court ruled that § 42.17.760 imposes a significant administrative cost on the union.

The administrative burden argument was summarily rejected by the Sixth Circuit in *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997). In that case, the Sixth Circuit upheld an affirmative authorization requirement for members and nonmembers alike. The Sixth Circuit indicated that the administrative burden argument presented by the union was without merit:

> While plaintiffs and amicus curiae, the Michigan Education Association, suggest that the administrative burden of the annual consent provision will be crushing, they offer no support for that claim. 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 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. at 1253.

An interesting analogy can be drawn between Washington's Initiative 134 and Proposition 209, the 1996 California initiative that eliminated race and gender preferences. Both generally dealt with long-standing controversial issues. I-134, in part, concerned labor law, while Proposition 209, in part, concerned race relations. In

both labor law and race relations, the Supreme Court had held that a state had a sufficient interest to overcome an individual's constitutional rights. The quest for labor peace was a sufficient interest to justify collective bargaining, which impinges on an individual's First Amendment right not to associate with a union. Further, the requirement that a nonmember pay an agency fee makes some nonmembers support political causes that they disagree with, which impinges on their First Amendment free-speech and silence rights. This Court has held that a state's interest in "diversity" is sufficient to overcome an individual's right to equal treatment in the college admissions process. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

Thus, in both instances there are state interests that can overcome core constitutional protections. But in both instances, there is no requirement that the state choose to enact those state interests. A state does not have to allow a union to become an exclusive bargaining agent, nor does it have to allow the union to negotiate a security agreement that requires nonmembers to pay an agency fee. In the race and gender context, there is no requirement that a university consider race and gender in college admissions. Just because a state acts on an interest that allows an impingement on an individual's constitutional rights, the state need not act on that interest to the full extent of its constitutional power.

In *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), the Ninth Circuit was faced with a constitutional challenge to Proposition 209. The plaintiffs, comprised of groups claiming to represent the interests of women and minorities, argued that the state had to come up with a compelling interest before it could prevent them

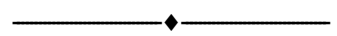
from receiving preferential treatment under the law. The Ninth Circuit rejected that argument:

> To hold that a democratically enacted affirmative action program is constitutionally permissible because the people have demonstrated a compelling state interest is hardly to hold that the program is constitutionally required. The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits.

Id. at 709. Therefore, California citizens acted properly in enacting a constitutional amendment that prevented the use of a state interest – diversity – that the Supreme Court had approved of.

Here, Washington citizens did not entirely prevent the use of collection of an agency fee; rather, they put a condition on it. That condition is that the union must seek the affirmative authorization of a nonmember before collecting and using an agency fee for political purposes.

In *Abood*, this Court indicated that an agency shop might be the strictest type of union security arrangement that is constitutionally permissible. Agency fees also raise serious constitutional issues. All § 760 does is make it less likely that a nonmember's constitutional rights will be infringed upon. By holding that § 760 is unconstitutional, the Washington Supreme Court in essence held that the First Amendment requires what it barely allows. This Court should reject this holding.



CONCLUSION

For the reasons set forth above, this Court should hold that a state may not enforce an agency fee statute that allows a union to collect fees unrelated to its statutory responsibilities. Alternatively, this Court should hold that § 760 is constitutional, since the statute is a permissible balance between allowing an agency fee to be collected and protecting the free-speech and silence rights of nonmembers.

Respectfully submitted,

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