No. 05-1589

IN THE

Supreme Court of the United States

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

Petitioners,

v.

WASHINGTON EDUCATION ASSOCIATION,

Respondent.

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

PETITIONERS' REPLY BRIEF ON THE MERITS

MILTON L. CHAPPELL
Counsel of Record
GLENN M. TAUBMAN
c/o National Right to Work
Legal Defense Foundation, Inc.
8001 Braddock Rd., Suite 600
Springfield, VA 22160
(703) 321-8510

STEVEN T. O'BAN
Ellis, Li, & McKinstry PLLC
Two Union Square
601 Union St., Suite 4900
Seattle, WA 98101-3906
(206) 682-0565

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Counsel for Petitioners

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ARGUMENT

I. The Real Section 760 Is Subject to Scrutiny under the Deferential Rational-Basis Test Because It Places No Restrictions on the Use of Union Member Dues and Consenting Nonmember Fees.

Respondent Washington Education Association ("WEA") in its Brief ("WEA Br.") misrepresents the trial court's judgment. WEA claims that that court forbid use of its entire general treasury, including member dues, on political advocacy. WEA Br. at 19. Nothing could be further from the truth. To effectuate Washington Revised Code § 42.17.760 ("§ 760"), the trial court ruled only that the "WEA shall return to [and in future years not collect from] all *agency fee payers who have not affirmatively authorized* . . . . the use of their fees for expenditures or contributions to influence an election or operate a political committee a percentage of the annual fees charged to the fee payer" ("§ 760 politics") representing the union's expenditures for those purposes. Joint Appendix ("J.A.") at 210-12 (emphasis added). The trial court's injunction, J.A. at 208-17, does not enjoin the collection or spending of dues from union members or consenting nonmembers. It does not enjoin the union from making any political contributions and expenditures financed by union treasury money. It merely enjoins collection and use of the § 760 political portion of a nonmember's compelled fees absent consent, consistent with the limited scope of the statute.

Thus, the injunction is similar to that which this Court suggested in *Machinists v. Street*, 367 U.S. 740 (1961), albeit for a class that included union member objectors in a union shop:

> an injunction against expenditure for political causes opposed by each complaining employee of a sum, from those moneys to be spent by the union for political purposes, which is so much of the moneys exacted from

> him as is the proportion of the union's total expenditures made for such political activities to the union's total budget.

Id. at 774-75; *accord Ry. Clerks v. Allen*, 373 U.S. 113, 122 (1963) ("and a reduction of future such exactions from him by the same proportion").

The Washington Supreme Court's claim that § 760 unduly burdens unions, *see supra* p. 1, and violates the unions' First Amendment rights is undercut by *Street*. There this Court found that a remedy similar to that required by § 760 protects both the "majority and dissenting interests in the area of political expression . . . to the maximum extent possible without undue impingement of one on the other," and "may be enforced with a minimum of administrative difficulty and with little danger of encroachment on the legitimate activities or necessary functions of the unions." 367 U.S. at 773-74 (footnote omitted).[1]

Since the conduct § 760 requires does not directly impinge on union members' political interests and imposes only a minimal administrative burden, *i.e.*, that a union ask nonmembers for permission to use their agency fees for § 760

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[1]WEA's "heavy administrative burden" here is similar to the "extraordinary burden" found by the California Supreme Court on the State Bar in complying with *Hudson*-like procedures, which this Court rejected in *Keller v. State Bar*, 496 U.S. 1 (1990). "Since the bar already is statutorily required to submit detailed budgets to the Legislature . . . , the argument that the constitutionally mandated procedure [in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986)] would create 'an extraordinary burden' for the bar is unpersuasive." *Id*. at 16. Since WEA already is constitutionally required to send each nonmember a *Hudson* notice, the argument that seeking the affirmative authorization of the nonmember is excessively burdensome is unpersuasive. "While such a procedure would likely result in some additional administrative burden to the bar and perhaps prove at times to be somewhat inconvenient, such additional burden or inconvenience is hardly sufficient to justify contravention of the constitutional mandate." *Id.* at 16-17.

politics, as all other organizations must do, then § 760's "opt-in" requirement does not significantly burden the union's right of expressive association. The Washington Supreme Court's view that the First Amendment is violated by requiring the common courtesy of asking permission defies reason and good sense.

Therefore, the correct standard of review for § 760 is the deferential rational-basis test. WEA's lengthy discussion of strict scrutiny, WEA Br. at 19-26, is without merit. Strict scrutiny has no application to the state's withdrawal of its grant of authority to unions to compel political speech from nonmembers. Indeed, only the nonmembers are due the protection of strict scrutiny because "compel[ling] employees financially to support their collective-bargaining representative has an impact on their First Amendment interests." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232 (1977). Thus, the strict scrutiny due nonmembers requires restoring § 760 to its rightful place of protecting nonmembers' right.

WEA argues that the "restrictions imposed by Section 760 on WEA's use" of nonmembers' compelled fees are "not narrowly tailored to further any compelling governmental interest." WEA Br. at 15; *see id.* at 15-45. However, the state's *only* legitimate purpose in forcing nonmembers to pay union fees is to reimburse the union for its costs of collective bargaining, contract administration and grievance adjustment. *Abood*, 431 U.S. at 222, 232. The state also has a valid, indeed compelling, interest in ensuring that its compulsion does not exceed that limited legitimate purpose, unless nonmembers affirmatively consent to additional exactions from their wages. In other words, it is rational for the state to conclude that requiring affirmative consent furthers the legitimate state interest of ensuring that nonmembers knowingly and voluntarily contribute to the political activities of an organization they have declined to join but are compelled to support. *See infra* pp. 27-29.

II. The Statutory "Dissent" Requirement for Union Members Does Not Logically Apply in the Constitutional Context to Nonmembers.

The core of the Washington Supreme Court's error in striking down § 760 is its belief that this "Court affirmed that the burden is on the employee to make his objection known [and] to register his dissent to the union's political activities." Appendix to Petition for Certiorari in No. 05-1589 ("Pet. App.") at 14a-15a; *see id*. at 22a-24a. The court below consequently declared that "there is no indication that in voting for I-134, the voters intended to provide more protection for nonmembers [by requiring them to opt in] than that offered under federal constitutional principles [which requires them to opt out]." *Id*. at 19a.

This ruling shows the need for this Court to clarify the meaning of the "dissent is not to be presumed" phrase first given life in *Street*, as Petitioners argue in the *Davenport* Merits Brief ("Pet. Br.") at 31-38. If this Court clarifies that it has not held that *nonmembers* must register their dissent (opt out) to a union's political activities to prevent it from spending their compelled fees on politics, such as § 760 politics, the Washington Supreme Court's decision collapses. Section 760 would not "provide more protection for nonmembers than offered under federal constitutional principles," J.A. at 19a. Instead, it would provide a statutory remedy for some of the activities nonmembers cannot constitutionally be compelled, by inaction or otherwise, to support.

The unions argue, and the Washington Supreme Court agreed, that because the WEA complied with the procedures required by *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), the State cannot require other procedures to protect nonmembers' First Amendment rights. However, for the reasons detailed in *Davenport* Petitioners Brief at 34-37, WEA's reliance on *Hudson* is misplaced. The scheme here –

under which fees equal to dues are collected unless a nonmember objects – is not the scheme this Court approved in *Hudson*. *See* Pet. Br. at 4-5 & n.4, 6-7, 34. Had WEA collected only the reduced fee necessary for collective bargaining, as the union claimed to have done in *Hudson*, there would be no case here because WEA would not have collected (and, therefore, could not have used) fees for politics in violation of § 760.

In *Hudson*, nonmembers were not required to object to receive a reduction from dues-equivalent fees, because the compelled fee already excluded the union's political and other nonbargaining expenditures ("proportionate fee"). Nonmembers had to "object" only if they wished to challenge the union's calculation of the proportionate fee amount and to invoke the impartial decisionmaker process. 475 U.S. at 295-96 & n.1, 306 & n.16. In contrast, WEA compels nonmembers to pay a dues-equivalent fee that includes the union's political and other nonbargaining expenditures unless the nonmember timely notifies WEA of his or her objection to paying for the union's political and other nonbargaining activities. J.A. 197-98; *accord* WEA Br. at 4.

Hudson requires that the procedures used to collect agency fees must "facilitate a nonunion employee's ability to protect his [First Amendment] rights." 475 U.S. at 307 n.20. Requiring nonmembers to object in order to pay only their proportionate share of bargaining costs does not facilitate their First Amendment right not to be compelled, by inaction or otherwise, to pay for the union's political and other nonbargaining expenditures.[2]

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[2] WEA incorrectly claims that "the Davenport petitioners are members of a class that previously brought [challenge-to-the-calculation] litigation against WEA, and the *Hudson* procedures WEA currently employs are those prescribed in a 1998 settlement agreement that resolved that lawsuit." WEA Br. at 42 n.18. Nonmembers who had invoked WEA's

(continued...)

Moreover, once WEA recognizes that an employee is a nonmember, it not only knows that the employee does not want to associate with it at all, but it also takes affirmative steps to disassociate from the nonmember. WEA prohibits nonmembers from voting on the collective bargaining agreement, from attending union meetings, and from participating in union-provided liability insurance coverage. J.A. at 196-97; WEA Br. at 34 n.15. Thus, WEA denies nonmembers all benefits of union membership while self-servingly imposing upon them the financial obligations of supporting the political and ideological activities union members have chosen. J.A. at 151-53. At the very least, this should trigger a presumption that the nonmember's dissent *is* presumed.

A union can compel infringement upon a nonmember's constitutional rights not to associate and not to speak only by "the legislative assessment of the important contribution of the union shop to the system of labor relations," *Abood*, 431 U.S. at 222, and then only to the extent necessary for it as the exclusive bargaining representative to perform its statutory duties of collective bargaining, contract administration, and grievance adjustment, *id*. at 232. Otherwise, a nonmember's affirmative act is necessary to bring about association with the union, *i.e.*, becoming a member or waiving his or her constitutional right not to subsidize the union's politics.[3]

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[2](...continued)
Hudson procedures by either objecting to or challenging the amount of the chargeability calculations are explicitly excluded from the *Davenport* class because the *Davenport* Petitioners did not invoke WEA's *Hudson* procedures or receive refunds. J.A. at 4-5, ¶¶ 6, 11. Moreover, neither the lawsuit nor the settlement agreement in *Leer v. Washington Educ. Ass'n*, 172 F.R.D. 439, 442-44 (W.D. Wash. 1997), questioned or changed WEA's objection requirement.

[3] WEA's contempt for nonmembers' core First Amendment rights is evident. This Court has protected those rights for more than forty-five years, since *Street*. Yet, WEA describes the nonmembers' First Amend- (continued...)

This Court's "dissent is not to be presumed" phrase was central to and used throughout the Washington Supreme Court's decision, *see supra* p. 4, and thus is a critical issue here. Yet, WEA devotes only a footnote to this issue, WEA Br. at 41 n.17, while outsourcing the substantive response concerning "dissent" to *amici* AFL-CIO and Change to Win. *See* AFL-CIO Br. at 16-26.

Disingenuously attempting to marginalize Petitioners' argument, the unions attribute support for their conclusion that the "dissent it not to be presumed" rule "is firmly established" to the United States and the State of Washington:

> [T]he United States correctly recognizes . . . "unions may constitutionally use the fees for political purposes *unless a dissenter objects to such use*." United States Br. at 8 (emphasis added). The State agrees: "[N]onmembers are required to object in order to claim First Amendment protection, and 'dissent is not to be presumed.'" State Br. at 29.

WEA Br. at 41 n.17; *accord* AFL-CIO Br. at 17 n.10. The unions presume too much.

The State's alleged "agreement" is contrived from a quotation of the State's characterization of the Washington

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[3](...continued)
ment rights as merely "an exemption to which they are entitled," WEA Br. at 43, as though the nonmembers, the only parties with First Amendment rights at stake here, seek to exploit a "loophole." To the contrary, this Court described these rights as follows:

> [C]ompelled contributions for political purposes unrelated to collective bargaining implicate[] First Amendment interests because they interfere with the values lying at the "heart of the First Amendment [–] the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."

Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 472 (1997) (quoting *Abood*, 431 U.S. at 234-35).

Supreme Court's position on the "dissent" requirement, *not* a statement of its own position. Moreover, the State specifically inserted a footnote at the end of the quoted sentence to clarify that the State does *not* support the unions and the court below concerning "dissent." What the State actually said is:

> Although the Court has repeated in passing the phrase "dissent is not to be presumed" in agency fee cases, it is not clear that the Court intended this phrase to apply to nonmembers. . . . [I]n the context of an agency shop, it is reasonable to conclude that employees who have chosen to pay fees instead of join the union have, in fact, made their dissent known.

State Br. at 29 n.8; *see id*. at 29-31.

The United States' position is not as clear, but implicitly supports the nonmembers, observing that this Court's remedial objective set out in *Hudson*, 475 U.S. at 302, "protects only the union's statutory right to collect 'the cost of collective-bargaining activities,' *ibid*.; it does not provide an entitlement to some degree of windfall (generated by the laws of inertia) to cover the cost of political activities." U.S. Br. at 21. The United States also criticizes the Washington Supreme Court for "overreading" this Court's "dissent is not to be presumed" statements. *Id*.; *see also id*. at 21-22 ("those statements were premised on the relevant state of the law in *Street*").

Although the WEA limits itself to a footnote on this critical issue, the AFL-CIO goes through a lengthy, tortuous analysis of *Street*, *Allen* and *Abood*, purporting to prove that, under the facts of those cases, the "dissent is not to be presumed" phrase is a rule that applies both to union members and nonmembers.[4] AFL-CIO Br. at 17-26. The AFL-CIO's

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[4] The AFL-CIO claims that the *Street* class "did not include any 'voluntary union members,'" and the "dissent is not to be presumed" phrase "certainly had nothing to do with 'voluntary union members,'" (continued...)

Brief so muddles the matter that it further emphasizes the need for this Court to clarify whether unions can apply a "dissent" rule to nonmembers.[5]

Significantly, the AFL-CIO utterly fails to convince that this Court should hold that a union may compel *nonmembers* to subsidize its political and other nonbargaining activities unless they dissent to such subsidization. AFL-CIO's Brief also makes several telling concessions on the "dissent" issue.

First, the AFL-CIO agrees that the "dissent" issue is decisive to the questions presented: "the requirement that 'dissent . . . must affirmatively be made known to the union by the dissenting employee' goes to the very nature of the right at issue." AFL-CIO Br. at 22.

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[4](...continued)
apparently parsing the word "voluntary" to twist its meaning. AFL-CIO Br. at 18; *see also id*. at 22-23. Most unions consist of truly voluntary members and involuntary members who are compelled to join the union under a union-shop agreement, as in *Machinists v. Street*, 108 S.E.2d 796, 805 (Ga. 1959) (quoting stipulation of facts) (class includes employees who "'have been compelled by the union shop agreement, against their wishes, to become members of the defendant labor union organizations in order to maintain their employment'"); *see also Abood*, 431 U.S. at 212 n.2 ("[s]ome of the plaintiffs were Union members and were paying agency-shop fees under protest; . . . others had joined the Union and paid the fees without any apparent protest"). Involuntary members cannot be distinguished from voluntary members without a showing of dissent. That is why this Court said "dissent is not to be presumed" in *Street* and *Allen*, and *Abood* simply reiterated that comment because it was not challenged by the nonmembers in the latter cases. However, there is no uncertainty with nonmembers, who, by their very status, clearly are not voluntary union members and have manifested *no* indicia of support for any aspect of union activities.

[5] Several other *amici* also ask this Court to rule that nonmembers cannot be required to "dissent" to a union's political and nonbargaining expenditures in order to escape compelled subsidization of those activities. *See* Ass'n of Am. Educators Br. at 3-4; Cato Inst. Br. at 5-6, 8-17; Inst. for Justice Br. at 3, 17-20; Mackinac Ctr. for Pub. Policy Br. at 2, 5-6, 10-22; Pac. Legal Found. Br. at 2, 13-23.

Second, the AFL-CIO concedes, as it must, that the "dissent is not to be presumed" standard arose from statutory construction, not constitutional interpretation:

> Because "*the safeguards of § 2 Eleventh* [of the Railway Labor Act, 45 U.S.C. § 152, Eleventh,] were added for the protection of dissenters' interests," the Court made clear that any remedies *under that section* "would be properly 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." *It was in this regard* that the Court emphasized that "dissent is not to be presumed."

Id. at 22-23 (quoting *Street*, 367 U.S. at 764) (emphasis added, citation omitted).[6]

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[6] *Marquez v. Screen Actors Guild* does not help the AFL-CIO's argument, because that case also involved statutory interpretation. The full quotation, truncated by the AFL-CIO Brief at 17, is that "§ 8(a)(3) [of the National Labor Relations Act, 29 U.S.C. § 158(a)(3),] allows unions to collect and expend funds over the objection of nonmembers only to the extent they are used for collective bargaining, contract administration, and grievance adjustment activities." 525 U.S. 33, 36 (1998) (citing *Communications Workers v. Beck*, 487 U.S. 735 (1988)). That says nothing about whether nonmembers must object to pay only the bargaining costs. In fact, later the *Marquez* Court seems to assume that nonmembers do *not* have to dissent:

> [in] *Beck*, we considered whether the employee's "financial core" obligation included a duty to pay for support of union activities beyond those activities undertaken by the union as the exclusive bargaining representative. We held that the language of § 8(a)(3) does not permit unions to exact dues or fees from employees for activities that are not germane to collective bargaining, grievance adjustment, or contract administration. As a result . . . , § 8(a)(3) permits unions and employers to require only that employees pay the fees and dues necessary to support the union's activities as the employees' exclusive bargaining representative.

Id. at 37-38 (citations omitted).

Third, the AFL-CIO admits that "the *Abood* Court closely followed *Street* and *Allen*, expressly endorsing their basic proposition that 'dissent is not to be presumed.'" AFL-CIO Br. at 24. In other words, *Abood* did not give consideration to whether the statutory dissent requirement logically applies in the constitutional context.

In mechanically adopting the statutory "dissent" notion, *Abood* did not consider that, where First Amendment rights are at issue, as they were for the very first time in *Abood*, a strong presumption *against* waiver obtains. In such cases, "for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment of a known right or privilege.'" *Brookhart v. Janis*, 384 U.S. 1, 4 (1966). In other words, where constitutional rights are at issue, dissent to their surrender *is* to be presumed, until the opposite is clearly established.[7] This would further the long-standing rule that courts "'do not presume acquiescence in the loss of fundamental rights.'" *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (quoting *Ohio Bell Tel. Co. v. Pub. Utilities Comm'n*, 301 U.S. 292, 307 (1937).

That is particularly true here, as a matter of logic. By either resigning from or declining to join the union in the first

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[7] Justice Powell's concurring opinion in *Abood*, joined by Chief Justice Burger and Justice Blackmun, states that it would be unconstitutional to require affirmative dissent by a nonmember.

> [C]ompell[ing public employees] to pay full union dues to a union with which they disagree, subject only to a possible rebate or deduction if they are willing to step forward, [and] declare their opposition to the union . . . [is] a sweeping limitation of First Amendment rights [that] is not only unnecessary on this record; it is in my view unsupported by either precedent or reason.

431 U.S. at 245. In addition, Justice Stevens made it clear that he did not read the majority's discussion of the remedies in *Street* and *Allen* to mean that those statutory remedies "would necessarily be adequate in this [constitutional] case or in any other case." *Id*. at 244 (concurring opinion).

place, nonmembers have already exercised their First Amendment rights not to associate and not to speak. They cannot be deemed by silence to have consented to a deduction from their wages greater than that justified by the state interest in elimination of "free riders" on a union's bargaining activities. Here, spending on § 760 politics cannot constitutionally be justified by that interest. *Abood*, 431 U.S. at 232-36; *see Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519-22 (1991). Accordingly, the union's collection and use of such political moneys presents a core First Amendment problem and must trigger the *Brookhart* presumption against waiver of constitutional rights.[8]

Because First Amendment rights are at issue in every public-sector agency fee case, a presumption of waiver of those rights cannot be entertained under the slogan "dissent is not to be presumed" or otherwise. Neither *Abood* nor any nonmember union fee case following it addressed this issue. Thus, this Court must now articulate which rule prevails – *Brookhart*'s *constitutional* rule or the *statutory* rule of *Street* and *Allen*, as uncritically repeated in *Abood*.

In arguing that "nonmembers must affirmatively state their dissent in order to be entitled to restrict the union's use

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[8] This Court's jurisprudence regarding waiver of fundamental constitutional rights requires a two-pronged test. A waiver may be found only when (1) the failure to assert a known right is coupled with (2) a course of conduct consistent with waiver. *North Carolina v. Butler*, 441 U.S. 369, 373 (1979). Here a waiver can never be found without affirmative consent, because the dues equivalent fees are automatically deducted by the school district, Wash. Rev. Code § 41.59.100; *see* J.A. at 34. Thus, the second prong of the waiver analysis, *conduct*, cannot be satisfied. As this Court has recognized, "mere silence is not enough," "actions and words" are required. *Butler*, 441 U.S. at 373. The Washington Supreme Court also determined that affirmative authorization or consent requires "more than a nonresponse to a *Hudson* packet." Pet. Ap. at 11a. Consent means saying "'yes,' instead of failing to say 'no.'" *Id*. at 9a. Yet, WEA takes the nonmembers' silence or failure to object within 30 days as a "waive[r of their] ability to object." J.A. at 198.

of their agency fee payments," AFL-CIO Br. at 19, the unions wrongly suggest that the nonmember's right to be free from compelled speech – the right to refrain from political speech and association, *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) – does not survive the government's imposition of a dues equivalent fee requirement. Under this Court's First and Fourteenth Amendment jurisprudence, a nonmember's pre-existing right to refrain from supporting a union's political, ideological, and nonbargaining activities cannot be burdened further by requiring the nonmember to affirmatively object each year to supporting those activities.[9] By definition, a nonmember has already refrained from or refused to support *any* of the union's activities. The First Amendment cannot allow mere government fiat to countenance burdening the exercise of the right to be free from compelled association – even to the extent of requiring nonmembers to voice an objection. "[T]he requirement of disagreement finds no legal warrant in our compelled-speech cases." *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 488 (1997) (Souter, J., dissenting).

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[9] To presume that the nonmember, who has never authorized the union to speak for him or her on political, ideological, and nonbargaining matters (and indeed, has not even authorized the union to speak on collective bargaining matters, that authority being derived from statute), assents to association for politics just because the union provided him or her with a *Hudson* notice is utterly absurd and without evidentiary or rational basis, notwithstanding AFL-CIO's attempts to suggest otherwise, AFL-CIO Br. at 25-26. *Abood* recognizes that there are "government employees who object to public-sector unions as such," 431 U.S. at 211, or to "activities undertaken by the union in its role as exclusive representative," *id*. at 222. *See also Glickman*, 521 U.S. at 472 ("employees who objected to unions"); *Miller v. Air Line Pilots*, 108 F.3d 1415, 1422 (D.C. Cir. 1997) (Silberman, J.) ("it would certainly not be unexpected that pilots would have varying views as to the desirability of government regulation – including those regulations of airlines that pertain to safety"), *aff'd on other grounds*, 523 U.S. 866 (1998).

Even assuming *arguendo* that the "dissent is not to be presumed" notion can rightly be applied to nonmembers where First Amendment rights are at stake, which the nonmembers' previous analysis and the analysis set out in Petitioners' Brief at 31-38 confutes, nothing precludes a state from explicitly adopting the very opposite presumption in an agency fee scheme. As WEA itself concedes, "a state is of course free . . . to 'provide greater protection to its citizens' than the federal Constitution demands." WEA Br. at 42 n.19.

The state certainly has the plenary power to apply the *Brookhart* rule by statute to nonmembers' compelled fees because it could outlaw all collection of such fees. That is plainly an acceptable view of what § 760 does – requires that the nonmember's "intentional relinquishment of a known right or privilege" be "clearly established" by the employee's affirmative authorization. Another view is that the state may also "dissent" or "object" for nonmembers and restrict a union's collection and use of compelled fees, as § 760 does. Either way, the state is not tied to the judicial construct that "dissent is not to be presumed," but instead, can mandate that nonmembers possess a rebuttable presumption of dissent to a union's § 760 politics.[10]

WEA notes that inertia can also mean that supporters of politics will fail to give their authorization to causes like smaller class size with which they agree. WEA Br. at 43 & n.20. Even if "inertia" could work both ways, the state can determine how it wants to set the default. Why is it right for the union to set the default in a way that favors it and maxi-

[10] That this Court believed that "dissent is not to be presumed" in situations in which the statute *sub judice* says nothing about "dissent" or where the statute arguably requires "dissent" does not mean that a state cannot explicitly include in its agency fee scheme a presumption of dissent against union politics that can be overcome only by a nonmember's affirmative authorization of the union's use of those fees on § 760 politics.

mizes its political viewpoint,[11] but wrong for the state to re-set it in a way that fosters more voluntary choice and assures that group political speech reflects the actual interests of the individuals that support the group? Essentially, WEA argues its "First Amendment rights" dictate to states what the default setting must be. Yet, contradictorily, WEA concedes it has no First Amendment right that prevents states from prohibiting collection of compelled fees, in full or in part, from nonmembers in the first place. WEA Br. at 20.

III. It Is Not Rational to Argue That the State Constitutionally Can Prohibit, or Limit the Amount of, the Compelled Fee That Can Be Collected, but Then Cannot Condition the Use of That Same Fee.

The issue here is not the union's right "to use funds lawfully in its possession for political speech." WEA Br. at i; *accord* AFL-CIO Br. at 14. If that were the case, *Abood*, 431 U.S. at 234, 235-36, would not have held that a union cannot use or collect objectors' fees for politics, because unions in Michigan could under the statute at issue there lawfully collect from nonmembers fees equal to full dues and spend them for politics, *id*. at 232.

The issue here is whether a state may condition the use of nonmember fees for political purposes upon actual and demonstrable consent. WEA admits the state could, consistent with the Constitution, refuse to authorize compelled fees entirely or only authorize them partially, WEA Br. at 19, 20, 46-49. WEA even agrees that:

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[11] "'I quite agree that the question what and how much good labor unions do, is one on which intelligent people may differ.'" *Abood*, 431 U.S. at 225 n.20 (quoting *Adair v. United States*, 208 U.S. 161, 191 (1908) (Holmes, J., dissenting)). "[E]spousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause." *Thomas v. Collins*, 323 U.S. 516, 538 (1945); *see also id*. at 532.

> a state has ample authority consistent with the First Amendment, to design an agency fee system for its public sector that ensures that no nonmember who pays an agency fee – whether or not an "objector" – will be required to support a union's political and other expenditures not germane to collective bargaining.

WEA Br. at 47; *accord id*. at 19. Because § 760 does not go even that far – allowing nonmembers to affirmatively authorize a union to spend their compelled fees for partisan politics – one cannot take seriously the arguments of the unions and the Washington Supreme Court that § 760 is unconstitutional.[12]

The rub according to WEA is that Washington chose in § 760 to restrict a union's right to use nonmember agency fees, rather than to restrict the collection of those fees for politics in the first place. It is not rational or logical to argue that the state can prohibit, or limit the amount of, the compelled fee that can be collected, but cannot condition the use of the fee. That is precisely what the unions irrationally urge. But without state authorization, WEA could not collect fees from nonmembers in the first place.[13] It follows that the state may condition its grant of authority as it has in § 760.

This Court has repeatedly held that the appropriate remedy for a statutory or constitutional prohibition on the use

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[12] WEA complains that § 760 "provides for hyper-vigilance on behalf of union nonmember fee payers who have not exercised their independent right to object to the union's electoral spending." WEA Br. at 32. However, § 760 provides less "vigilance" than would a Right to Work law or a "fee for collective bargaining only" statute.

[13] Apparently, the unions would have a hard time collecting dues from members without the state's help. "'[I]t is well recognized that if you take away the mechanism of payroll deduction you won't collect a penny from these people.'" *FEC v. NEA*, 457 F. Supp. 1102, 1109 (D.D.C. 1978) (quoting then NEA General Counsel, Robert H. Chanin, discussing dues payments by union members.)

of compelled union fees is an injunction against the collection of that part of the fees that would be used for prohibited purposes. In *Abood*, this Court found "meritorious" the employees' argument "that they may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." 431 U.S. at 234.

Moreover, in deciding the appropriate remedy to prevent *use* of the compelled dues and fees on politics, *Abood* held that "[i]t is plainly not an adequate remedy to limit the use of the actual dollars collected from dissenting employees to collective-bargaining purposes."[14] *Id*. at 237 n.35. Instead, the appropriate remedy to prevent misuse requires: "(1) the refund of a portion of the exacted funds in the proportion that union political expenditures bear to total union expenditures, and (2) the reduction of future exactions by the same proportion." *Id*. at 240. This is precisely the injunction the trial court issued to enforce § 760. J.A. at 212.

In other words, a statutory restriction on the use of compelled fees is necessarily a prohibition on collection for the restricted purposes, because a restriction on use can only be achieved by prohibiting collection of the restricted part of the fees. The difference between statutes prohibiting "use" and statutes prohibiting "collection" is a difference without a distinction. Accordingly, § 760's prohibition on use is necessarily a prohibition on collection. Being prohibited from

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[14] The Court based this holding on its conclusion in *Retail Clerks v. Schermerhorn* that any limitation only on use of nonmembers' dollars "is of bookkeeping significance only rather than a matter of real substance," because, if "nonmember payments [are] equal to those of a member," the nonmember would still subsidize the union's political activities. 373 U.S. 746, 753-54 (1963) (quoted in *Abood*, 431 U.S. at 237 n.35). The trial court and the State's expert witness, economist and CPA Jeffrey L. Baliban, thus properly relied on this principle. *See* J.A. at 17-19, 130-39.

collecting the § 760 political part of nonmember fees for which it does not have affirmative authorization, WEA cannot claim "lawful possession" of that portion of the fees.

Nevertheless, both WEA and the AFL-CIO rest their case on the notion that § 760 somehow improperly infringes on the use of the union's "general treasury funds." WEA Br. at 1, 16, 19; AFL-CIO Br. at 5, 11. For example, they complain: "the statute acknowledges that the fees are in the union's possession but places restrictions upon the *use* of the union's funds for political speech." WEA Br. at 13-14. However, not every possession permits every use. There are many situations, through contract, will, deed, attorney trust accounts, statute, or other legal means, in which an encumbrance is placed on the use of moneys as a condition that allows for their initial collection and possession.[15] The mere collection and possession by themselves do not allow unfettered use determined at the will of the possessor. Instead, collection and possession of encumbered moneys constitute evidence of acquiescence in the encumbrance by the possessor.

Here, WEA collects dues-equivalent fees from nonmembers knowing, and subject to, § 760's affirmative authorization command. There are not two distinct steps – the collection of fees equal to 100% of dues, *and only thereafter* a statutory limitation on their use. There is only collection, and subsequent possession, of moneys which the union intends to expend on political activism, but which are statutorily encumbered *from the very beginning* as to that use absent nonmembers' affirmative authorization. In operation, the agency-shop statute and § 760 are not separate and independent, but together form an integrated whole that prohibits collection of the § 760 political portion from nonmembers who have not affirmatively authorized such political use.

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[15] WEA and the Washington Supreme Court admit that § 760 encumbers the fees. WEA Br. at 13, 15, 16, 19, 21, 25; Pet. App. at 26a.

The legal status of such encumbered moneys distinguishes them from and disqualifies them for a union's "general treasury funds," because the union cannot put them to the use for which it collected them without the prior approval of the third party nonmembers. Indeed, in prudence, such moneys should not be commingled with the other moneys over which the union has discretion to spend as it sees fit. It was the union's ill-advised decision to commingle the political moneys in its general treasury, WEA Br. at 9-11, that led the trial court to find that WEA violated § 760.[16] Arguing that § 760 is unconstitutional because the union cannot be barred from using funds that it commingled, WEA Br. at 25-26, is like a thief arguing that he cannot make restitution because the stolen dollars in his pocket have been commingled with other dollars that were lawfully his.

A union never acquires a First Amendment right to use nonmember fees for its own political speech solely as a consequence of the mere collection of those fees. Section 760 makes such use contingent upon the nonmember's prior approval. WEA's First Amendment right, if it arises at all, depends upon and derives from the prior exercise of the nonmember's First Amendment right to permit his or her moneys to be so employed. For that reason alone, all the convoluted First Amendment analyses of WEA and the AFL-CIO are misplaced and irrelevant.

The *only* First Amendment right in this case is that of nonmembers to refrain from subsidizing the union's political activism. Under § 760 workers may waive this right by

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[16] "Any distinction between 'collecting' an[] agency fee (on the revenue side) and 'expending' monies for a particular purpose (on the expenses side) [is] forever obscured when the funds collected are 'commingled' into the general fund." J.A. at 17; *see also* testimony of CPA Baliban, *id*. at 135-39 ("You could use the general fund for anything you wanted to use [it for] so long as you didn't commingle the funds and you don't have fee payer money in there without affirmative authorization.") *Id*. at 139.

affirmatively authorizing such expenditures. If and when they do – but not before – the union acquires a privilege to use those moneys as part of its "general fund," and a First Amendment right not to have the state abridge such use. But, because § 760 operates only to require a voluntary waiver of nonmembers' First Amendment rights, which waiver facilitates the union's use of moneys to which it would never have any other entitlement pursuant to the agency fee scheme, § 760 actually *advances* the union's First Amendment rights. Therefore, the Washington Supreme Court erroneously deemed that § 760 abridged the union's First Amendment rights.

CONCLUSION

This Court should remind the Washington Supreme Court that: "[t]he ingredients of industrial peace and labor-management relations are numerous and complex. They may well vary from age to age and from industry to industry. What would be needful one decade might be anathema the next. *The decision rests with the policy makers, not with the judiciary*." *Abood*, 431 U.S. at 225 n.20 (quoting *Ry. Employes' Dep't v. Hanson*, 351 U.S. 225, 233-34 (1956)) (emphasis added).

Accordingly, the judgment below should be reversed on both Questions Presented and remanded as requested in Petitioners' Brief at 22-23, 31, 37-38, 40, 45-46.

Respectfully submitted,
MILTON L. CHAPPELL
Counsel of Record
GLENN M. TAUBMAN
National Right to Work Legal Defense Foundation, Inc.
STEVEN T. O'BAN
Ellis, Li & McKinstry PLLC

COUNSEL FOR PETITIONERS

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