

NO. 05-1657

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IN THE SUPREME COURT OF  
THE UNITED STATES

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WASHINGTON,

*Petitioner,*

v.

WASHINGTON EDUCATION ASSOCIATION,

*Respondent.*

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ON WRIT OF CERTIORARI  
TO THE SUPREME COURT OF WASHINGTON

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**REPLY BRIEF FOR THE PETITIONER**

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**REPLY BRIEF FOR THE PETITIONER****1. The WEA Has Abandoned The Constitutional Underpinning Of The Decision Below**

In our opening brief we explained that *International Association of Machinists v. Street*, 367 U.S. 740 (1961), *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435 (1984), and *Chicago Teacher’s Union Local 1 v. Hudson*, 475 U.S. 292 (1986), do not confer any First Amendment rights on a union to use nonmember fees to influence an election or support a political committee. Br. Pet’r 21–29. The Washington Education Association (WEA) agrees that this is a correct statement of the law. Br. Resp’t 20 (“[O]ur contention that Section 760<sup>1</sup> does not pass constitutional muster is not in any way dependent on the proposition that unions have some constitutionally protected right to collect and use agency fees for political activity.”) Thus, the WEA has abandoned the constitutional underpinning of the decision below.<sup>2</sup>

The decision below was based on the Washington Supreme Court’s conclusion that the WEA had a First Amendment right to use nonmember fees to influence an election or operate a political committee. Pet. App. 26a. The court based this conclusion on its analysis of *Street*, *Abood*, *Ellis*, and *Hudson*. Pet. App. 15a–17a. With regard to public sector employees, like those involved in this case, the WEA agrees that states have plenary

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<sup>1</sup> Wash. Rev. Code § 42.17.760.

<sup>2</sup> The WEA has also abandoned the alternative holding of the Washington Supreme Court that Section 760 violates the WEA’s right of expressive association under *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). We explained in our opening brief that this holding was incorrect. Br. Pet’r 36 n.8. The WEA offers no argument on this point.

authority to regulate the agency fee unions may collect from nonmembers. According to the WEA:

“There is no question that a state is acting within its constitutional authority in imposing such limits on the extent to which it is willing to provide by law for a required payment of an agency fee to the exclusive representative by bargaining-unit employees who have elected not [sic] join the union.” Br. Resp’t 47.

The WEA agrees that states have the authority to prohibit unions from collecting an agency fee from nonmembers or to limit the agency fees a public employee may be required to pay as part of a union security agreement. The WEA concedes that the State could limit the nonmember fee to an amount necessary to pay only for activities germane to collective bargaining. Br. Resp’t 46–47. Section 760 is actually more favorable to unions. Instead of prohibiting the WEA from collecting nonmember fees that could be used to influence an election or operate a political committee, Section 760 permits the WEA to use nonmember fees for these activities, if it receives the nonmembers’ affirmative consent. Since that is what Section 760 does, the WEA’s concession should end this case, and the decision of the Washington Supreme Court below should be reversed.

Of course, the WEA does not concede that it loses this case. Rather, the WEA argues that Section 760 is not a public employee labor relations statute of the sort that it acknowledges is within the State’s authority. The WEA instead characterizes Section 760 as an expenditure limit on the WEA’s use of funds in its possession for political purposes.<sup>3</sup> Br. Resp’t 48. The WEA bases this argument

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<sup>3</sup> The fact that the WEA is in possession of the nonmember fees does not mean that it owns the fees or has the authority to spend the fees for any purpose. It collects the fees subject to the statutes governing the fees—including the

on the fact that, by its terms, Section 760 applies to both the public and private sector, and the WEA claims that the state has no role in regulating private sector agency fees. Br. Resp't 24, 48.

This argument is flawed on several levels. First, this case is limited to application of Section 760 to public sector employees. How Section 760 applies to private sector employees is not before the Court. Moreover, the WEA cites no authority for the proposition that Section 760 cannot apply to both the public and private sectors, or that it cannot be both a labor relations law and a law that protects the integrity of Washington's electoral processes by ensuring that fees compelled from nonmembers are not spent for political purposes with which nonmembers disagree.

The WEA is also incorrect in asserting that states have no role with regard to agency fees in the private sector. In the private sector, Section 14(b) (29 U.S.C. § 164(b)) of the "Taft-Hartley Act make[s] it even clearer than the National Labor Relations Act that the States are left free to pursue their own more restrictive policies in the matter of union-security agreements." *Algoma Plywood & Veneer Co. v. Wisconsin Empl. Relations Bd.*, 336 U.S. 301, 313–14 (1949). In *Algoma*, the Court upheld a state law requiring approval of a union security provision in a private labor contract by two-thirds of the employees voting, a requirement more stringent than federal law. Section 760 is similar. It is more restrictive of private union security agreements than federal law by requiring affirmative consent before nonmember fees may be used to influence an election or operate a political committee.

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requirement in Section 760 that it obtain the nonmembers' affirmative consent. *See infra* p. 4–7.

**2. The WEA Has No Other First Amendment Right Implicated By Section 760 And Thus Has No Support For Its Claim To Strict Scrutiny**

Having expressly abandoned any First Amendment right to collect or use nonmember fees for political expression, the underpinning of the Washington Supreme Court's decision, the WEA offers a new rationale to support the judgment below. Under its new rationale, the WEA never directly asserts that it has some other First Amendment right with respect to nonmember fees, but nonetheless argues that strict scrutiny applies to Section 760. The WEA offers three reasons for this assertion.

First, the WEA repeatedly states that it was in lawful possession of the nonmember fees and tacitly assumes that lawful possession includes an unfettered right to spend those fees as it wishes. Second, the WEA argues that Section 760 restricts how the WEA can spend the dues of its members. Third, the WEA relies on decisions of this Court applying strict scrutiny to statutes that, unlike Section 760, actually burdened First Amendment rights. None of these arguments establishes a First Amendment right with respect to nonmember fees or demonstrates any burden on the union's First Amendment rights with respect to member fees.

**a. The WEA's Statutorily Authorized Possession Of Nonmember Fees Creates No First Amendment Right In The WEA To Spend The Fees For Ideological Purposes**

The WEA argues that strict scrutiny applies because "Section 760 restricts a union's use of funds lawfully in its treasury for certain election-related purposes." Br. Resp't 21. Throughout its brief, the WEA

emphasizes that it is properly in possession of the nonmember fees. Br. Resp't 15–16, 19–23, 25, 48.

The fact that, by statute, the WEA has the authority to possess the nonmember fees does not mean that those fees belong to the union or that the WEA can spend the fees for any purpose. The WEA agrees that it has no First Amendment right to finance its political agenda through compelled fees from nonmembers and that its authority to collect and use the fees is based solely on statute. Thus, the WEA is subject to restrictions, procedural or otherwise, imposed by statutes that affect its dominion over the fees. Section 760 provides a legitimate procedural condition precedent to the union's "ownership" of agency fees for the union's political purposes—affirmative authorization by the nonmember.

This principle was firmly established in *Ellis*. *Ellis* dealt with the Railway Labor Act, which "does not authorize a union to spend an objecting employee's money to support political causes." *Ellis*, 466 U.S. at 438. In *Ellis*, the union collected money from employees, placed the money in its treasury, and if an employee objected, the union rebated the money to the employee. Under the WEA's theory, this would be proper because the union was in possession of the funds. However, the Court concluded that the rebate program was not valid. The Court held that "[b]y exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place, *the union effectively charges the employees for activities that are outside the scope of the statutory authorization*". *Ellis*, 466 U.S. at 444 (emphasis added). The Court concluded that the rebate procedure amounted to an "involuntary loan for purposes to which the employee objects." *Id.*

The fact that the railway union was in possession of the funds did not give the union the authority to use

the funds. The Court held that the union could place the funds in an “interest-bearing escrow account . . . .” *Id.* Similarly, in *Hudson*, 475 U.S. at 310, the Court required “an escrow for the amounts reasonably in dispute . . . .” Under *Ellis* and *Hudson*, the funds would be properly in the union’s possession—but the union was not entitled to spend the funds until it determined whether employees objected. Similarly, in this case, the WEA had the authority to possess the nonmember fees but, until it had the nonmembers’ affirmative consent, it could not spend the funds to influence an election or operate a political committee.

In practice, the WEA recognizes that legal possession of nonmember fees does not make the WEA the legal owner of those fees or authorize the WEA to spend the fees for ideological activities. Consistent with *Ellis* and *Hudson*, the WEA begins making deductions from the nonmembers’ paychecks at the end of September and places those funds in a separate escrow account. J.A. 97–98. The WEA is in legal possession of the escrowed funds, but it does not transfer those funds to its general account to spend until the nonmembers object or thirty days pass from the mailing of the *Hudson* packet at which time the WEA deems nonmembers to have waived the right to object. J.A. 94, 98. The same principle applies with regard to Section 760. The WEA is authorized to collect nonmember fees and they are properly in the WEA’s possession. However, until the WEA complies with Section 760 and receives affirmative consent from the nonmembers, it does not have the authority to use the fees to influence an election or operate a political committee. The WEA’s authority to possess and use the fees is the same as in the *Hudson* process, except that Section 760 requires nonmembers to opt-in instead of opt-out.

The flaw in the WEA’s argument is further demonstrated by the fact that, under its theory, the

Railway Labor Act, the statute at issue in *Ellis*, would also violate the union's First Amendment rights. According to the WEA, Section 760 is subject to strict scrutiny because "Section 760 restricts a union's use of funds lawfully in its treasury for certain election-related purposes." Br. Resp't 21. Exactly the same argument could be made with regard to the Railway Labor Act, which requires fees to be held in escrow until nonmembers have the opportunity to object. Thus, the Railway Labor Act, like Section 760, "restricts a union's use of funds lawfully in its treasury for certain election-related purposes." Br. Resp't 21. Neither the Railway Labor Act nor Section 760 violates a union's First Amendment rights because the union has no such rights with regard to statutorily authorized nonmember fees.

**b. Section 760 Does Not Apply To Members' Dues And Thus Implicates No First Amendment Rights With Respect To Those Dues**

The WEA's second claim is that Section 760 restricts the WEA from spending funds in its general treasury, paid by members, to influence an election or operate a political committee unless the WEA receives consent from all nonmembers. Br. Resp't 15, 21. This claim is not accurate. By its terms, Section 760 applies to only "*an individual who is not a member of the [labor] organization . . .*" Pet. App. 138a (emphasis added).

The WEA's argument that Section 760 applies to dues paid by members is based on testimony by the State's expert witness that the WEA takes out of context. According to the State's expert, when the WEA commingled member dues and nonmember fees in like amounts without a reduction or rebate to the nonmembers, and used the commingled funds to make a political expenditure, "a proportionate share [of the

expenditure] was paid for by fee payer money.” J.A. 132. Since a proportionate share of all nonmember fees was used to make the political expenditure, all of the nonmembers would have to consent. J.A. 134. From this, the WEA argues that it cannot use member dues to influence an election or operate a political committee without affirmative authorization from all nonmembers.<sup>4</sup>

This problem is not a consequence of Section 760; rather, it is a consequence of the WEA’s decision to commingle member dues with nonmember fees before complying with Section 760. Under *Ellis* and *Hudson*, the same problem with commingling of fees and dues would exist if a union spent commingled funds in its general treasury for ideological purposes without first determining whether the nonmembers objected. The WEA readily avoids this problem by keeping the nonmember fees in escrow as required by *Hudson*. After the *Hudson* packets go out, the WEA waits thirty days; if no objection is received, the right to object is deemed waived, and the WEA puts the fees in its spending account. If a nonmember objects, the WEA provides a refund and avoids using a proportional share of nonmember fees for activities that may be financed only with member dues.

The WEA could use essentially the same process to comply with Section 760. While the nonmember fees are

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<sup>4</sup> In fact, the State’s expert also opined that fees and dues could be commingled, and the commingled fund could be used for the union’s political expenditures, *if* the union implemented “accounting systems to track” revenues and political expenditures and made proportionate rebates or reduction in fees for nonmembers. Report of Proceedings 378–79, 430–31; J.A. 137. This methodology is, in fact, the means adopted by the trial court’s injunction to bring about WEA’s compliance with Section 760. J.A. 210–13 (providing for rebates or advance reduction in fees, without any prohibition on commingling or limits upon the WEA’s political expenditures).

in escrow, it could include an authorization form in the *Hudson* packet explaining the nonmembers' rights under Section 760. If the WEA received the nonmember's consent, it could transfer the fees to its spending account and use them to influence an election or operate a political committee. If no affirmative authorization is received within thirty days, the WEA could deem the nonmember to have declined to consent, provide refunds, and transfer the remaining fees to its spending accounts. Of course, the WEA could choose to wait longer than thirty days for the nonmembers to opt-in. As long as the fees are in escrow, there is no violation of Section 760. The WEA could also comply with Section 760 by providing an advance reduction in the nonmember fees by the amount that would otherwise go to influence an election or operate a political committee. In that case, the WEA could spend the funds in its general treasury for activities subject to Section 760 because it had complied with the statute. That is precisely what the permanent injunction calls for. J.A. 212–13.

Section 760 does not apply to member dues and so does not implicate any First Amendment right of the WEA or its members. The requirement of the statute is limited to nonmember fees. The WEA violated Section 760 only because the WEA spent a proportionate share of nonmember fees when it spent commingled money in its general fund to influence an election without complying with Section 760.

**c. *MCFL, Austin, And Bellotti Are Inapposite And Provide No Basis For Strict Scrutiny Of Section 760***

The WEA relies on *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), to support its claim that

Section 760 is subject to strict scrutiny. Br. Resp't 22–25. These decisions are inapposite because, unlike Section 760, they involved campaign expenditure limits and those limits burdened the First Amendment rights of the entities subject to them.

The WEA's claim that Section 760 burdens its First Amendment rights is based on the same two faulty arguments discussed in Parts 2a and 2b above. The first faulty argument is that the WEA owns the nonmember fees and may spend them for any purpose because the fees are in its possession pursuant to statute. The second faulty argument is that Section 760 applies to member dues. Neither of these arguments is well taken. *See supra* p. 4–9.

Nor is Section 760 an expenditure limit. The statutes considered in *MCFL*, *Austin*, and *Bellotti* each prohibited the entities subject to them from using funds that they owned for political speech. In contrast, Section 760 does not preclude the WEA from using its funds for political purposes. Rather, it is a procedural statute that, very much like the *Hudson* process, merely requires a nonmember's consent before the union may use the nonmember's fees to influence an election or operate a political committee—activities that nonmembers cannot be required to support under the First Amendment. Indeed, the WEA can comply with Section 760 by following the *Hudson* procedure, except that nonmembers must opt-in instead of opt-out. The *Hudson* procedure surely is not an expenditure limit on the union and is not subject to strict scrutiny. Neither is Section 760.

That the statutes considered in *MCFL*, *Austin*, and *Bellotti* are wholly different from Section 760 is evident from a review of those cases. *MCFL* involved application of the Federal Campaign Finance Act, 2 U.S.C. § 441b, which prohibits certain corporations and unions from making contributions or expenditures in connection with

an election for federal office, except through a separate segregated fund supported by the voluntary contributions of members and employees. MCFL was a nonprofit, nonstock corporation. Its resources came from “voluntary donations from ‘members,’ and from various fund-raising activities . . . .” *MCFL*, 479 U.S. at 242. Thus, the funds in question belonged to MCFL. MCFL prepared a newsletter urging voters to support pro-life candidates and identifying candidates who voted for or against what MCFL regarded as the correct position. *Id.* at 243–44. MCFL had not established a separate segregated fund, and the question before the Court was whether § 441b violated MCFL’s First Amendment rights.

The Court explained that, under § 441b, MCFL would be required to establish a separate segregated fund and comply with the organizational requirements necessary to form a political committee. In addition, its ability to raise funds would be limited because § 441b limited solicitation to members; organizations like MCFL have few formal members. *MCFL*, 479 U.S. at 253, 255. The Court concluded that because “the statute’s practical effect may be to discourage protected speech [it] is sufficient to characterize § 441b as an infringement on First Amendment activities.” *Id.* at 255; *id.* at 266 (O’Connor, J., concurring).

In contrast to § 441b, Section 760 does not prohibit the WEA from making expenditures of its funds in connection with an election, and thus does not implicate the WEA’s First Amendment rights. Even if it did, Section 760 does not require the WEA to establish a separate segregated fund. The WEA argues that Section 760 imposes burdensome recordkeeping requirements. Resp’t Br. 23 n.8. In support of this claim, the WEA cites to the Permanent Injunction (J.A. 209–10) that requires the WEA to keep track of expenditures to influence an election or operate a political committee. However, this is no more burdensome than the *Hudson* opt-out procedure

that the WEA embraces. To comply with *Hudson*, the WEA must keep track of collective bargaining expenses that nonmembers can be compelled to pay under the First Amendment, and other union expenses, such as ideological activities—that nonmembers cannot be required to support. The WEA explains these chargeable and nonchargeable expenses in the *Hudson* packet. J.A. 203–05. There is no testimony that the bookkeeping required by Section 760 imposes any additional burden on the WEA.

*Austin* also involved a statute that prohibited corporations from making contributions and independent expenditures in connection with state candidate elections except through a segregated fund. *Austin*, 494 U.S. at 655. The Michigan Chamber of Commerce (the Chamber) challenged the statute to prevent it from being enforced with regard to a local newspaper advertisement supporting a candidate, paid for with funds from the Chamber’s general treasury, instead of a separate fund. *Id.* at 656. The Chamber was a nonprofit corporation with more than 8,000 members. Its general treasury was funded through annual dues the members paid to belong to the Chamber.

The Court held that the statute burdened the Chamber’s expressive activity because it imposed a burden on the Chamber’s free speech rights through “requirements similar to those in the federal statute involved in *MCFL*: a segregated fund must have a treasurer and its administrators must keep detailed accounts of contributions and file with state officials a statement of organization . . . .” *Id.* at 658 (citations omitted). The Court also pointed to the fact that “a nonprofit corporation like the Chamber may solicit contributions to its political fund only from members, stockholders of members, officers or directors of members, and the spouses of any of these persons.” *Id.*

Thus, unlike Section 760, the statute in *Austin* applied to voluntary contributions that were the Chamber's funds and prohibited the Chamber from using them for its political speech. Section 760 does not limit the WEA's right to speak with its own funds. Nor does it impose requirements of the sort at issue in *Austin*. Rather, Section 760 simply requires that the union obtain consent to use the government compelled payments of nonmembers for such purposes. As to any burden on the WEA, this requirement is no different from the *Hudson* opt-out process, a process that is not and has never been equated with an expenditure limit.

*Bellotti* is similar. It involved a state statute that prohibited banks and certain other business corporations from "making contributions or expenditures for the purpose of influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation." *Bellotti*, 435 U.S. at 768 (internal quotation marks omitted). The statute also provided that "no question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation." *Id.* The law was challenged by two national banking associations and three business corporations that wanted to spend money that they owned to publicize their views on a proposed constitutional amendment to permit a graduated tax on the income of individuals. *Id.* at 769.

The Court held that the statute burdened speech because it "permit[ted] a corporation to communicate to the public its views on certain referendum subjects—those materially affecting its business—but not others. It also single[d] out one kind of ballot question—individual taxation—as a subject about which corporations may never make their ideas public." *Id.* at 784.

Section 760 does not burden expressive activity as did the statute in *Bellotti*. It does not prohibit the WEA from using funds that it owns to express its views about any ballot measure.

In summary, the laws at issue in *MCFL*, *Austin*, and *Bellotti* all prohibited corporate campaign expenditures. And the laws applied to voluntary contributions to the corporations in *MCFL* and *Austin* and, in *Bellotti*, to corporate general funds acquired without government compulsion. In contrast, Section 760 does not limit the WEA’s right to speak using its own funds. Rather, it limits the ability of the WEA to use the fees of nonmembers—who are required to pay the WEA as a condition of employment—for the WEA’s speech to influence an election or operate a political committee. The WEA can comply with Section 760 simply by following the *Hudson* procedure that the WEA embraces, except the nonmembers must opt-in instead of opt-out.

### **3. Section 760 Satisfies The Requirements Of Strict Scrutiny**

Even if Section 760 is viewed as an expenditure limit, it satisfies the requirements of strict scrutiny. To meet strict scrutiny, the State must show a “subordinating interest which is compelling” and employ means “closely drawn to avoid unnecessary abridgment . . . .” *Bellotti*, 435 U.S. at 786. Section 760 meets both of these standards.

#### **a. Section 760 Satisfies A Compelling State Interest**

Section 760 was enacted by a vote of the people as part of Initiative 134. According to the Washington Supreme Court, the “intent of the people of this State in enacting Initiative 134 can be determined from the declarations in RCW 42.17.610 and .620.” *State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass’n*,

140 Wash. 2d 615, 637, 999 P.2d 602, 615 (2000). Wash. Rev. Code § 42.17.620 provides:

“By limiting campaign contributions, the people intend to:

“(1) Ensure that individuals and interest groups have fair and equal opportunity to influence elective and governmental processes;

“(2) Reduce the influence of large organizational contributors; and

“(3) Restore public trust in governmental institutions and the electoral process.”  
Pet. App. 138a.

Section 760 serves these purposes by ensuring that nonmembers voluntarily contribute to the WEA’s efforts to influence elections or support a political committee. Voluntary contributions ensure that nonmembers have a fair opportunity to influence the electoral process and that their resources are not devoted to advancing political positions that they do not support. In this way, Section 760 reduces the otherwise magnified yet unrepresentative influence that unions would have on elections. This, in turn, promotes the integrity of the State’s elections and helps to restore public trust in the election process.

These compelling interests are especially important with respect to the union’s use of nonmember fees. The only reason the WEA can collect nonmember fees in the first place is because the State has authorized union security provisions that compel their payment as a condition of employment. This statute-based compulsion provides the WEA with funds that it would not otherwise have. Since government action requires the nonmember to pay this fee, the government has a particularly strong interest in ensuring that the nonmember voluntarily chooses to support union election activities funded with the nonmember’s money.

It is true that the opt-out process of *Hudson* gives the nonmember the opportunity to object. But unlike the opt-in requirement of Section 760, the *Hudson* process does not ensure that the WEA will use nonmember fees for election activities only when the nonmember actually consents. For example, some of the *Hudson* packets are returned as undeliverable and, while the union makes an effort to determine the nonmembers' current addresses, the WEA has no way of knowing that all nonmembers received the *Hudson* packet. J.A. 155–156. In that case, the failure of a nonmember to opt-out would not constitute a voluntary contribution to the WEA. In addition, although the WEA belittles the interests of nonmembers who are too busy or who forget to opt-out (Br. Resp't 42–43), their interests are not so easily dismissed. It is important to recall that nonmembers are put in the position of having to take action to protect their own money only because the government has authorized the union to collect compulsory fees in the first place. No other entity enjoys this government created benefit. Particularly, under such circumstances, there is no reason to require nonmembers to bear the burden of affirmatively objecting to prevent the union from using their money to promote political ideas or candidates that they do not support.

**b. Section 760 Is Narrowly Tailored**

The WEA argues that Section 760 is not narrowly tailored because it applies to ballot measures and because it does not apply to corporations. Br. Resp't 28–35. In making these arguments, the WEA again abandons the reasoning of the Washington Supreme Court, which relied on neither assertion (Pet. App. 17a-23a), and offers these new theories to support the decision below. Indeed, with regard to the argument that Section 760 is somehow infirm because it does not apply to corporations, the court below explained that the “parties have not raised, and we do not address, any argument concerning [Section] 760's application solely to labor organizations while nonprofit,

corporate, and other groups are not similarly subject to affirmative authorization requirements.” Pet. App. 25a n.6. The WEA raised that argument for the first time in this Court.

The WEA’s argument that Section 760 is not narrowly tailored relies primarily on *Bellotti*. But the state’s interest and the regulation challenged in *Bellotti* are decidedly different from the State’s interest and regulation challenged in this case. For these reasons, *Bellotti*’s conclusions have little to say about the narrow tailoring of Section 760.

*Bellotti* prohibited banks and certain business corporations from making contributions or expenditures to influence the outcome of some—but not all—ballot measures submitted to the people. The state argued that the statute served its compelling interest in “protecting the rights of shareholders whose views differ from those expressed by management on behalf of the corporation.” *Bellotti*, 435 U.S. at 787. Unlike the case in *Bellotti*, the State’s interest in Section 760 is not to protect shareholders, but to enhance the integrity of its election process. And, of course, unlike the case in *Bellotti*, Section 760 does not preclude a union from spending on any ballot measure that it chooses.

This Court found that the statute in *Bellotti* was not narrowly tailored to protecting shareholders whose views differed from those of management because it did not apply to “lobbying” or “prohibit a corporation from expressing its views, by the expenditure of corporate funds, on any public issue” that shareholders might disapprove. *Id.* at 793. The Court also found that the statute in *Bellotti* was not narrowly tailored because it was “limited to banks and business corporations . . . .” *Bellotti*, 435 U.S. at 793. The Court concluded that minorities of other entities such as business trusts and labor unions “may have interests with respect to

institutional speech quite comparable to those of minority shareholders in a corporation.” *Id.* Finally, the Court held that the statute was not narrowly tailored to the state’s interest in protecting shareholders from supporting the political views of management with which they might disagree because it prohibited “a corporation from supporting or opposing a referendum proposal even if its shareholders unanimously authorized the contribution or expenditure.” *Id.* at 794.

Section 760 is decidedly unlike the statute at issue in *Bellotti* and suffers from none of its infirmities. Rather, it is precisely targeted to the State’s interest in protecting the integrity of the election process by ensuring that contributions to election campaigns are voluntary, and so reflect the actual support of those funding the message. Contrary to the WEA’s assertion, in this respect, the fact that Section 760 does not apply to legislative lobbying actually demonstrates its narrow tailoring to the State’s interest in the integrity of its election system. Section 760 simply is not concerned with the lawmaking process of Washington’s legislature. The same is true with respect to Section 760’s applicability to ballot propositions as well as candidates. Section 760 would be underinclusive if it excluded ballot propositions. The State’s interest in protecting the integrity of the election process, by ensuring that contributions and expenditures actually reflect the support of those who provide the funds, applies equally to candidates *and* ballot measures.

The WEA’s argument that Section 760 is underinclusive because it does not apply to corporations is similarly unsound. Unlike the state’s interest in *Bellotti*, the state’s interest here is not in protecting minority shareholders; it is in protecting the integrity of Washington’s election system by ensuring that support for political speech is voluntarily provided. This interest is particularly acute with respect to unions. By allowing

union security agreements, the State authorizes unions to collect compulsory fees from nonmembers—who must pay them or lose their jobs. No corporation has this kind of state-created authority to acquire wealth through compulsion. As the Court explained in *Bellotti*, the “critical distinction here is that no shareholder has been ‘compelled’ to contribute anything. . . . [C]ompulsion by the State is wholly absent, the shareholder invests in a corporation of his own volition and is free to withdraw his investment at any time and for any reason.” *Bellotti*, 435 U.S. at 794 n.34. Since only unions have the ability to collect compulsory fees from nonmembers, Section 760 is properly tailored to them.

Finally, unlike the statute at issue in *Bellotti*, Section 760 would not prohibit contributions or expenditures even if the shareholders approved. Under Section 760, if nonmembers give their affirmative consent, the WEA is free to use their fees to influence an election or operate a political committee.

#### 4. Conclusion

For the foregoing reasons, the judgment of the Washington Supreme Court should be reversed.

Respectfully Submitted.

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*January 2, 2007*

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