

Nos. 05-1589 & 05-1657

---

In the Supreme Court of the United States

---

GUY DAVENPORT, ET AL.

*Petitioners,*

v.

WASHINGTON EDUCATION ASSOCIATION

*Respondent.*

---

WASHINGTON

*Petitioner,*

v.

WASHINGTON EDUCATION ASSOCIATION

*Respondent.*

---

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

---

**BRIEF OF THE AMERICAN LEGISLATIVE EX-  
CHANGE COUNCIL AS *AMICUS CURIAE* IN SUP-  
PORT OF PETITIONERS**

---

EUGENE VOLOKH

*UCLA Law School*

*405 Hilgard Avenue*

*Los Angeles, California*

*90095*

*(310) 206-3926*

DONALD M. FALK

*Counsel of Record*

*Mayer, Brown, Rowe &*

*Maw LLP*

*Two Palo Alto Square,*

*Suite 300*

*Palo Alto, California 94306*

*(650) 331-2000*

*Counsel for Amicus Curiae*

*American Legislative Exchange Council*

**QUESTION PRESENTED**

Whether the First Amendment bars a State from requiring a union that has been empowered by state law to exact agency fees from nonmembers first to obtain those nonmembers' affirmative authorization before spending their fees on election-related political activity.

---

---

---

**TABLE OF CONTENTS**

	<b>Page</b>
QUESTION PRESENTED .....	i
TABLE OF AUTHORITIES.....	iii
INTEREST OF THE <i>AMICUS CURIAE</i> .....	1
INTRODUCTION AND SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	4
A. Section 760 Regulates Only How Unions Spend Other People’s Money.....	4
B. This Case Presents No Genuine Conflict Between Constitutional Rights.....	5
1. The Union and Its Members Have No Constitutional Right To Spend Nonmembers’ Money Without Affirmative Authorization.....	6
2. Union Nonmembers Have No Constitutional “Right” To Have Their Money Spent Without Their Approval.....	8
C. Section 760 Falls Comfortably Within The Scope Of State Legislative Discretion.....	9
CONCLUSION .....	12

## TABLE OF AUTHORITIES

Page(s)

## CASES

<i>Aboud v. Detroit Board of Education</i> , 431 U.S. 209 (1977) .....	<i>passim</i>
<i>Austin v. Mich. Chamber of Commerce</i> , 494 U.S. 652 (1990) .....	10
<i>Boy Scouts of America v. Dale</i> , 530 U.S. 640 (2000) .....	7
<i>Cammarano v. United States</i> , 358 U.S. 498 (1959) .....	11
<i>Caplin &amp; Drysdale, Chartered v. United States</i> , 491 U.S. 617 (1989) .....	10
<i>Chicago Teachers Union, Local No. 1 v. Hudson</i> , 475 U.S. 292 (1986) .....	3, 6
<i>Cutter v. Wilkinson</i> , 544 U.S. 709 (2005) .....	9
<i>Ellis v. Brotherhood of Railway Clerks</i> , 466 U.S. 435 (1984) .....	6, 7, 10
<i>Hudgens v. NLRB</i> , 424 U.S. 507 (1976) .....	10
<i>International Ass'n of Machinists v. Street</i> , 367 U.S. 740 (1961) .....	5, 8, 9
<i>Locke v. Davey</i> , 540 U.S. 712 (2004) .....	6, 9
<i>Regan v. Taxation With Representation</i> , 461 U.S. 540 (1983) .....	11
<i>Rosenberger v. Rector &amp; Visitors of the University of Virginia</i> , 515 U.S. 819 (1995) .....	6
<i>State of Washington ex rel. Washington State Public Disclosure Comm'n v. Washington Education Ass'n</i> , 130 P.3d 352 (2006) .....	7, 8
<i>Texas Monthly, Inc. v. Bullock</i> , 489 U.S. 1 (1989) .....	6

**TABLE OF AUTHORITIES—continued**

**Page(s)**

**CASES**

*Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981) ..... 6

*Walz v. Tax Comm'n*, 397 U.S. 664 (1970) ..... 6

**STATUTES, RULES AND REGULATIONS**

26 U.S.C. § 501(c)(3) ..... 11

45 U.S.C. § 152 ..... 8

Rev. Code Wash. § 41.59.100 ..... 4

Rev. Code Wash. § 41.56.122 ..... 4

Rev. Code Wash. § 42.17.760 ..... *passim*

---

**BRIEF OF THE AMERICAN LEGISLATIVE  
EXCHANGE COUNCIL AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONERS**

---

**INTEREST OF THE *AMICUS CURIAE***

The American Legislative Exchange Council (ALEC) is the Nation's largest individual membership association of state legislators, with more than 2,400 members. ALEC's mission is to advance the Jeffersonian principles of free markets, limited government, federalism, and individual liberty, through a nonpartisan, public-private partnership between America's state legislators and concerned members of the private sector, the federal government, and the general public.<sup>1</sup>

ALEC and its members have an acute interest in this case because of its federalism implications. ALEC has created Task Forces that draft model legislation in a wide variety of fields to advance the principles outlined above. In particular, ALEC Task Forces have approved several model bills that are designed to protect the First Amendment rights of workers represented by labor organizations. These include the Employee Rights Reform Act, the Public Employee Freedom Act, the Prohibition on Compensation Deductions Act, the Prohibition of Negative Check-off Act, the Voluntary Contributions Act, and the Political Funding Reform Act. These bills address their goals through a variety of approaches, including opt-in mechanisms similar to the one at issue in this case, as well as other procedural safeguards aimed at transparency and promptness that exceed the minimums stated in this Court's decisions.

---

<sup>1</sup> Pursuant to Rule 37.6, *amicus* ALEC affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

In addition, ALEC Task Forces are active in many legislative areas besides labor regulation in which constitutional constraints may be implicated directly or indirectly. Among the affected Task Forces are those for Civil Justice, Criminal Justice, and Telecommunications & Information Technology. In these and other fields, state legislators routinely address subject matter covered by this Court's precedents, not only under the First Amendment, but under provisions ranging from the Due Process Clause to the Fourth Amendment to the Commerce Clause.

The decision in this case may determine the permissible scope of judicially imposed constraints on legislative freedom of action in the States, including any limitations on state laws designed to protect federal constitutional rights. The state legislators who craft and then seek to enact ALEC's model legislation have a particularly strong interest in ensuring that misapprehensions of federal constitutional principles do not unduly constrain state legislation that is designed to advance individual freedom.

#### **INTRODUCTION AND SUMMARY OF ARGUMENT**

This case is about federalism as well as free speech. Can a State that provides for union security contracts also impose innovative conditions that protect the expressive rights of nonmembers who are coerced into paying a union to represent them? Under a federal system, it surely can. The decision below, which struck down such a provision, rests on a distorted view of the First Amendment that undervalues the ability of states to innovate within our federal system.

Different states have implemented different ideas about the proper balance between union power and the rights of nonmembers who work within bargaining units represented by unions. Some states have chosen to enact right-to-work legislation that precludes any collection of compulsory union fees from nonmembers. Others have chosen to allow these fees but provide an opt-out from political or ideological ex-

penditures, the minimum that the First Amendment requires. See *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). And some states, like Washington, have chosen to allow the fees but provide an opt-in remedy instead. This Court should not constrain state lawmakers by taking the opt-in solution off the table.

Nothing in the opt-in statute challenged here (Rev. Code Wash. § 42.17.760 (“Section 760”)) affects how a union may spend its *members’* money. But because Washington state law authorizes union security contracts, a union such as respondent Washington Education Association (WEA) may force employees who do *not* belong to it to pay an “agency shop fee” to cover the union’s costs of serving as the nonmembers’ bargaining agent. Employees who voluntarily join a union have made the choice to provide at least financial support to the union’s full range of activities. A nonmember whom state law forces to pay a union to serve as her bargaining agent has made no such choice.

Thus, all that Section 760 limits is the power of a voluntary association of *some* employees to spend *other* people’s money for election-related purposes. A State has considerable discretion to impose such limits, discretion that the decision below failed to recognize.

This Court’s decisions in *Hudson* and *Abood* clearly outline the *minimum* a union must do to protect nonmembers’ rights. The union must provide nonmembers with an opt-out system with additional procedural safeguards.

But the constitutional minimum that lawmakers *must* do to protect rights only rarely defines the maximum that lawmakers *may* do to protect those rights. This Court has repeatedly emphasized the need for “play in the joints” even where two genuine constitutional constraints may nearly abut. Here, though, we have a real constitutional right—the right not to be coerced into funding a union’s electioneer-

ing—abutting a nonexistent one, the supposed right of the union to electioneer using nonmembers' coercively extracted money. Section 760 protects the real right, and thus falls well within the range of permissible state discretion.

### **ARGUMENT**

#### **This Court Should Not Unduly Constrain State Lawmakers' Discretion To Promote Legitimate First Amendment Interests.**

Washington law provides the means for a union to forcibly extract money from nonmembers. To limit the burden this scheme imposes on nonmembers, Washington mandates that the money cannot be used for election-related purposes unless the nonmembers expressly opt in. In striking down this sensible limitation, the Supreme Court of Washington relied on an illusory associational right to spend money extracted from forced contributors. Equally misguided was the lower court's disregard for the State's legitimate power to limit the scope and uses of the union contributions that state law compels nonmembers to pay. This Court should enunciate the correct First Amendment principles at issue here and confirm that the State acted well within its discretion to protect its public employees against compelled political speech.

#### **A. Section 760 Regulates Only How Unions Spend Other People's Money.**

The WEA is the exclusive bargaining agent for about 70,000 public employees in Washington. Of those, about 5% have deliberately chosen not to join the WEA.

Nonetheless, under Washington law, these 3500 nonmembers must pay the WEA "agency shop fees" that are intended to cover the costs related to collective bargaining, an activity that benefits non-members as well as members. Rev. Code Wash. §§ 41.59.100, 41.56.122; see *Abood*, 431 U.S. at 222, 224 (discussing "free rider" problem created when nonmembers do not pay for their own representation in bargaining). The WEA's ability to compel payment of these agency

shop fees derives entirely from state law. Without such a law, the WEA could not compel any type of contribution by public employees who do not wish to join it.

Standing alone, the authorization for the agency shop would permit a union to

take[] a part of the earnings of some \* \* \* and turn[] it over to others, who spend a substantial part of the funds so received in efforts to thwart the political, economic and ideological hopes of those whose money has been forced from them under authority of law.

*International Ass'n of Machinists v. Street*, 367 U.S. 740, 789 (1961) (Black, J., dissenting).

But Washington law balances the compulsion to contribute agency shop fees with safeguards to ensure that public employee unions cannot use those compelled contributions for political, nonbargaining activity unless the contributing nonmembers agree. Section 760 protects the nonmembers by providing that, before a union uses those fees to influence an election or to operate a political committee, it must get the nonmembers' affirmative authorization. The union of course remains free to spend without hindrance every penny of its *members'* dues, plus that portion of the agency shop fees *not* devoted to the excluded political activity.

**B. This Case Presents No Genuine Conflict Between Constitutional Rights.**

The decision below dramatically constrains state choice by holding that the opt-out solution is the only constitutionally permissible one—that it is both a floor and a ceiling. That rigidity wrongly straitjackets state lawmakers (in this instance, state voters enacting initiatives).

There are, it is true, some areas of constitutional law where constitutional constraints leave lawmakers very little room for discretion. Public universities, for instance, may neither give special preference to religious newspapers nor