Nos. 05-1589 & 05-1657

IN THE
Supreme Court of the United States

GARY DAVENPORT, ET AL.,
Petitioners,
v.
WASHINGTON EDUCATION ASSOCIATION,
Respondent.

WASHINGTON,
Petitioner,
v.
WASHINGTON EDUCATION ASSOCIATION,
Respondent.

ON A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

BRIEF OF ASSOCIATION OF AMERICAN EDUCATORS AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Association of American Educators ("AAE"), a nonprofit professional association, is the largest national, non-union professional teacher association. AAE serves more than 30,000 at-large primary, secondary, and college educators in all 50 states. AAE has fourteen state affiliates, including Northwest Professional Educators ("NWPE"), which serves teachers in the state of Washington. NWPE's membership includes approximately 300 Washington educators. AAE and its affiliates provide professional liability insurance to it members, as well as professional development resources, teacher scholarships, and classroom mini-grants.

AAE and its state affiliates frequently participate in legislative, administrative, and judicial proceedings that present issues affecting the rights of non-union teachers who are agency fee payers. AAE believes that its participation as *amicus curiae* will offer the Court a distinct perspective on the questions presented.

This case presents the important questions: 1) whether labor union officials have a First Amendment right to seize and use, to advance their own political agenda, the wages of employees who have chosen not to become union members, and 2) whether Washington Revised Code § 42.17.760, which prohibits labor unions and their officials from seizing and using the wages of nonmembers for partisan political campaigns without obtaining the nonmembers' affirmative consent, violates the First Amendment rights of labor unions. The Court's resolution of these questions will directly impact AAE's

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[1] Letters from Petitioners and Respondent indicating consent to file this brief are on file with the Clerk. Pursuant to this Court's Rule 37.6, AAE states that no counsel for any party authored this brief in whole or in part. Nor did any person or entity, other than AAE, make a monetary contribution to the preparation or submission of this brief.

members. Accordingly, AAE has a strong interest in this matter. Moreover, AAE can provide the Court with an appreciation of the motivations driving teachers to disassociate from the Washington Education Association ("WEA") by becoming agency fee payers and offer examples of how the opt-out procedure from union dues works (or fails to work) in practice.

SUMMARY OF ARGUMENT

The Washington Supreme Court's decision is flawed in numerous respects. First, the opinion misinterprets this Court's decisions regarding the right to expressive association and union rights to collect agency fees. Second, it ignores the reality that nonmember teachers affirmatively have chosen to disassociate themselves from WEA and therefore cannot be classified as "nonmember supporters" of the union's political expenditures. Finally, the decision fails to appreciate that an agency fee payer has a constitutional right not to associate with the union and that Washington Revised Code § 42.17.760 reasonably protects that right.

ARGUMENT

I. THE WASHINGTON SUPREME COURT'S DECISION RESTS ON FUNDAMENTAL MISREADINGS OF THIS COURT'S DECISIONS.

It is well-established that the "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)). In *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974), this Court cited a dissent by Justice Douglas for the proposition that "[g]overnment may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires." *Id.* at

575. Moreover, in *Lathrop v. Donohue*, 367 U.S. 820 (1961), Justice Douglas wrote in dissent that "the right of association is an important incident of First Amendment rights. The right to belong – or not to belong – is deep in the American tradition." *Id.* at 881-82. *See also* Comment, *Freedom from Political Association: The Street & Lathrop Decisions*, 56 Nw. U. L. Rev. 777, 778 & 790 (1962) (when interests of group and individual clash regarding speech and association rights the law should seek to protect individual, who suffers greater injury in being compelled to speak than does group in being denied dissenter's funds). In *Good v. Associated Students of University of Washington*, 542 P.2d 762 (Wash. 1975), the Washington Supreme Court recognized that the "[f]reedom to associate carries with it a corresponding right to not associate." *Id.* at 766. Moreover, the decision below in this case recognizes the right of agency fee payers not to associate. *See State v. Washington Education Association*, 130 P.3d 352, 358 (Wash. 2006).

By contrast, WEA and its members have no constitutionally protected right to associate with agency fee payers who have chosen not to associate with them. At its core, the Washington Supreme Court's decision is based on the mistaken assumption that there exists such a First Amendment associational right for union members, even though by becoming nonmembers the agency fee payers affirmatively have declined to associate with the union members.

In this regard, the lower court erred by relying on this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), for the proposition that "[t]he United States Supreme Court has held that a union has the right to use nondissenting nonmember fees for political purposes." *Washington Education Association,* 130 P.3d at 362. The error is evident when viewed in the context of the earlier precedent of this Court upon which *Abood* relied. *Abood* quoted *Brotherhood of Railway and*

Steamship Clerks v. Allen, 373 U.S. 112 (1963), which was concerned with the "infringe[ment of] the unions' right to expend uniform exactions under the *union-shop agreement*," *Abood*, 431 U.S. at 239 (quoting *Allen*, 373 U.S. at 122) (emphasis added), not under the *First Amendment*. Accordingly, reliance on *Abood* does not demonstrate that there is any general right under the First Amendment for unions to use nonmembers' fees for political purposes.

The lower court's opinion also incorrectly relies upon *International Association of Machinists v. Street*, 367 U.S. 740 (1961), for the proposition that "dissent is not to be presumed–it must affirmatively be made known to the union by the dissenting employee." *Washington Education Association*, 130 P.3d at 358-59 (quoting *Street*, 367 U.S. at 774). *Street* was decided on statutory grounds; the Court did not reach First Amendment issues. *See Street*, 367 U.S. at 770-71. Nothing in *Street* supports the Washington Supreme Court's conclusion that this Court invested its statutory interpretation in *Street* with the weight of a broad constitutional ruling.

In fact, once an employee has resigned from the union, dissent should be presumed. AAE is particularly well-placed to demonstrate from a practical standpoint the error manifest in the Washington Supreme Court's reasoning regarding the presumption of dissent.

II. THERE EXISTS NO FIRST AMENDMENT RIGHT FOR WEA TO ASSOCIATE WITH AGENCY FEE PAYERS BECAUSE, BY DEFINITION, AN AGENCY FEE PAYER HAS CHOSEN NOT TO ASSOCIATE WITH WEA.

The Washington Supreme Court relies on *Boy Scouts of America v. Dale* for the proposition that Washington Revised Code § 42.17.760 violates WEA's First Amendment right of expressive association. *See Washington Education Association*, 130 P.3d at 364

(citing *Dale*, 530 U.S. at 653). This conclusion requires one to recognize three categories of teachers: union members, "supporting nonmembers," and dissenting nonmembers (*i.e.*, individuals opposed to the union's political expenditures). The opinion below seeks to protect the right of union members to associate with "supporting nonmembers." The problem with this analysis is that, in the experience of AAE, "supporting nonmembers" do not exist.

The recognition of this analytical flaw highlights the nonsensical nature of assertions by the Washington Supreme Court such as "[Washington Revised Code §760] has the practical effect of inhibiting one group's political speech (the union and *supporting nonmembers*) for the improper purpose of increasing the speech of another group (the dissenting nonmembers)." *Washington Education Association*, 130 P.3d at 359 (emphasis added). *See also id.* at 360 (burden placed on "*supporting nonmembers* and the union") (emphasis added); *id.* at 363 ("This case involves . . . regulation of the relationship between the union and agency fee payers with regard to political speech."). There is no protected relationship between the union and agency fee payers because, as a practical matter, there is no such thing as a group of "supporting nonmembers."

AAE is familiar with the reasons why teachers become "nonmembers." Suffice it to say, they do *not* do so to "support" WEA. Under Washington law, a nonunion agency fee payer must pay 100% of union dues unless the individual files a timely objection to the political portion of the agency fee. Upon resigning from the union, a teacher loses important workplace rights and professional liability coverage; moreover, he or she may be subjected to threats and a hostile workplace. To suggest that one would pay 100% of union dues, affirmatively forfeit important rights, sacrifice liability coverage, run the gauntlet of hostile coworkers, and still seek to support the

union's political speech makes no sense. There would be nothing to gain from such a situation and everything to lose. As a practical matter, teachers resign from WEA because they disagree with the union's politics and they want to have the right to receive a refund of the political portion of their dues. Both of these reasons are inconsistent with the Washington Supreme Court's conclusion that these members wish to support the union's political agenda.

A. Resignation From WEA With Intent To "Support" WEA Makes No Sense And Does Not Happen In Practice.

In light of the fact that, as discussed below, resignation from WEA results in the loss of workplace rights and liability insurance, accompanied by significant pressure from WEA not to become an agency fee payer and potential hostility from colleagues, a teacher in Washington who becomes an agency fee payer must have a very good reason for doing so. In some cases, an individual may be motivated by the possibility of recovering from WEA approximately 20 to 25% of dues. For example, Seattle public school teachers pay the union more than $1,000 annually and receive a rebate of approximately $250. *See* Cindy Omlin, *Not That Easy to Opt Out of Union Politics*, Seattle Post Intelligencer, Sept. 24, 2006. In the experience of AAE, it is more often the case that individuals go to all the trouble and endure the attendant hardships in order to stand by their principles and to object to the union's spending their money on political causes that they oppose.[2] Both frugal

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[2] AAE member Jeff Leer of Sedro-Woolley, Washington, put the matter succinctly: "Teachers simply want the freedom that all other Americans enjoy–the freedom to associate with people who share their values, and the freedom to have their hard-earned money support candidates and issues they believe in." Evergreen Freedom Foundation, *Barrier to Learning: How the National Education* (...continued)

nonmembers and political dissenters alike seek to have the political portion of their agency fee refunded, thus disassociating themselves from the union. This disassociation from the union for political purposes excludes both of these classes from the alleged group of "supporting nonmembers" identified by the Washington Supreme Court.

It is important to recognize that a teacher who has resigned from union membership to become an agency fee payer still must pay 100% of union dues unless he or she affirmatively objects to the political portion of the agency fee. *See* Wash. Rev. Code § 41.59.060(2). Therefore, for the Washington Supreme Court's associational rights analysis to make sense, one must posit the existence of individuals who affirmatively choose: 1) to become nonunion agency fee payers, 2) to forfeit their workplace rights, 3) to lose their professional liability insurance, 4) to pay the same fee as union members, and 5) to incur the scorn of coworkers, even though they in fact support the union's political agenda and wish to associate with the union members.[3] In AAE's experience, there is no such class of "supporting nonmembers." Accordingly, Washington Revised Code § 42.17.760 cannot be said to infringe any right of the union members to associate.

Association Prevents Students and Teachers From Achieving Academic and Professional Excellence 8 (July 2004), *available at* http://www.effwa.org/NEA-Magazine.pdf.

[3] Because of numerous restrictions imposed on agency fee payers trying to recover a refund of political dues, some agency fee payers may be denied a refund of the portion of their dues supporting the union's political agenda. But this does not mean that such individuals "support" WEA in the sense of agreeing with and seeking to fund the political activity of the union. *See infra* Part III.

B. Resignation From WEA Results In A Loss Of Workplace Rights.

If a teacher in Washington wants to exercise his or her right not to associate with WEA for political purposes, the teacher is required to resign from membership in the union. This action brings with it significant consequences. The agency fee payer can no longer vote on his or her employment contract; he or she cannot vote for union officials and negotiators; the objector loses the right to sit on some school policymaking committees; the objector often loses the union's representation in filing a grievance regarding an adverse job action under the collective bargaining agreement; and the objector loses the professional liability insurance protection provided by the union. *See* H.R. Rep. No. 105-397, at 5 (1997) (finding that to assert a refund to non-collective bargaining dues "the union may require the employee to resign from the union and, in the process, the employee loses critical workplace rights such as the right to ratify a contract or vote to go on strike"); *Campaign Finance–Are Political Contributions Voluntary?: Hearing Before the S. Comm. on Rules and Administration*, 105th Cong. (1997) (unpublished testimony on file with AAE), *available at* http://www.nwpe.org/pdf_files/omlin_senate_rules_testimony_06-25-1997.pdf [hereinafter "*Campaign Finance*"] (statement of Cindy Omlin, who is now Executive Director of NWPE, AAE's Washington affiliate, testifying regarding rights lost by Washington teachers that object to political fees).

These consequences are not limited to Washington teachers. *See, e.g.,* Rep. Joe Knollenberg, *The Changing of the Guard: Republicans Take on Labor and the Use of Mandatory Dues or Fees for Political Purposes*, 35 Harv. J. on Legis. 347, 361 (1998) (explaining that employee who resigns from union "loses considerable workplace rights, such as the right to ratify a contract or to go on strike"); *Mandatory Union Dues: Hearing Before the H.*

Subcomm. on Employer-Employee Relations of the Comm. on Education and the Workforce, 105th Cong. 15 (1997) [hereinafter "*Mandatory Union Dues*"] (statement of Kerry Gipe) (explaining that political fee objectors were stripped of the right to vote on contracts or whether to enter into a strike). In exchange for surrendering these important workplace rights, the agency fee payer is entitled to claim the political portion of the agency fee, which amounts to a small refund.

C. Resignation From WEA Frequently Leads To Threats, Intimidation, And A Hostile Workplace.

In addition to forfeiting workplace rights, political objectors often are subject to verbal and physical harassment. Cindy Omlin, who is now Executive Director of NWPE, AAE's Washington affiliate, testified before the Washington Legislature that "[n]umerous teachers who object to the [WEA's] political activity have shared with me that they would rather forfeit their Constitutional rights than face the blackballing, harassment, intimidation, and potential property damage they fear from some union members. This fear is legitimate–both myself and one other teacher in my building have been retaliated against with offensive letters and ostracism after challenging the union's political views." *Providing Employees Notice of Rights Regarding Union Security Agreements: Hearing on H.B. 1738 Before H. Commerce & Labor Comm.*, 54th Leg., Reg. Sess. (Wash. 1995) (testimony of Cindy Omlin). *See id.* (stating that when Washington teachers exercise their rights to object, they are "harassed as 'freeloaders' and 'enemies of public education'"). *See also* H.R. Rep. No. 105-397, at 8-9 (summarizing testimony of individuals as to coercion and threats received upon resignation from unions); Knollenberg, *The Changing of the Guard*, 35 Harv. J. on Legis. at 364 (detailing how employees who resign from unions as political objectors are often subject to "threats

of life and family, intimidation, insults and coercion"); *Mandatory Union Dues,* 105th Cong. at 15 (statement of Kerry Gipe) (political fee objectors were "accosted at work, . . . accosted on the street, . . . harassed, intimidated and threatened").

A Washington teacher, who chose to remain anonymous because of fear of reprisal, summed up the matter well, stating that "[t]hese people (the local association) can be quite intimidating. Being outnumbered about a hundred-and-fifty to one, what it really comes down to is a lack of time – I don't have the time to fight with them or keep looking over my shoulder." Evergreen Freedom Foundation, *Barrier to Learning: How the National Education Association Prevents Students and Teachers From Achieving Academic and Professional Excellence* 16 (July 2004), *available at* http://www.effwa.org/NEA-Magazine.pdf.

Not only does the teacher face potential threats from co-workers, teachers unions themselves have threatened and have in some cases brought legal action against individual teachers who have attempted to challenge political fees or sought to inform Washington teachers of their right to become agency fee payers and to opt out of paying the political portion of the fee. AAE member and Washington elementary school teacher Jeff Leer's case provides an example. Mr. Leer requested that his school district stop deducting from teachers' paychecks expenditures for WEA's "community outreach program," which assessment he believed was being used to fund impermissible political expenditures. Mr. Leer received a letter from the General Counsel of the WEA, which stated, "You have repeatedly and forcefully asked [your district] to stop collecting $1.00 per month political education dues from WEA members." Letter from Kathy O'Toole, WEA General Counsel, to Jeff Leer (Mar. 12, 1997), *available at* http://tpp.effwa.org/wea_misdeeds/WEA_1997_Leer_Letter.pdf. The letter went on to "warn"

Mr. Leer that WEA would sue him if he continued his allegedly tortious behavior of trying to make the district stop collecting these fees. *Id.* It turns out that Mr. Leer was right about the assessments. WEA's lobbyist has since admitted under oath that the community outreach program was "an internal ploy to raise more WEA-PAC money." Jeff Leer, *Why I'm Suing My Union*, Wall St. J., July 31, 1997, at A18.

As another example of WEA's use of litigation to threaten teachers, Washington educators and AAE members Cindy Omlin and Barbara Amidon were sued personally by WEA in retaliation for their publication of a homemade newsletter titled the *WEA Challenger Network News*, which sought to inform teachers of their rights to become agency fee payers and to opt out of paying the political portion of their agency fees. The union eventually dismissed the action after a year and a half of litigation. *See* Evergreen Freedom Foundation, *Barrier to Learning* at 13.

The use of threats and lawsuits to intimidate prospective agency fee payers and dues objectors is not limited to Washington. Kathleen Klamut, a school psychologist in Ohio, testified before a congressional committee that, in response to her request to be deemed a religious objector regarding the payment of union dues, "[m]y employer reported to me via e-mail that the [Ohio Education Association] representative . . . was going to take legal action against me because of my request for religious accommodation. Her exact quote was they were going to come after me. I'm not sure what that means, but it sounds pretty menacing, when you're part-time personnel." *An Assessment of the Use of Union Dues for Political Purposes: Is the Law Being Followed or Violated?: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Education and the Workforce*, 107th Cong. 8 (2002).

Another effective tactic used to intimidate and discourage people from becoming agency fee payers is the identification and distribution of lists of agency fee payers to union employees. Publication of such lists creates a hostile environment for political objectors. *See Mandatory Union Dues*, 105th Cong. at 15 (statement of Kerry Gipe) (explaining that union political fee objectors "had [their] names posted immediately on both union property and company property accusing [them] of being scabs," resulting in a "very hostile environment among [] fellow workers"); *id.* at 21-22 & 42 (examples of lists of political fee objectors signed by the president of the local union or published in local newsletter). AAE members in Washington have experienced forms of this singling out by WEA, resulting in harassment by union members. *See, e.g.,* Letter from Lynn Jones, Spokane Education Association President, to Spokane Education Association Building Representatives (Oct. 16, 1996) (listing names of agency fee payers challenging the WEA), *available at* http://www.nwpe.org/pdf_files/union_AFP_reveal_Letter.pdf.

III. WASHINGTON REVISED CODE § 42.17.760 REASONABLY PROTECTS THE THREATENED FIRST AMENDMENT RIGHTS OF AGENCY FEE PAYERS NOT TO ASSOCIATE WITH WEA.

The Washington statute at issue represents a reasonable accommodation of non-union members' First Amendment rights and an acknowledgement of the significant burdens imposed on agency fee payers seeking to secure a refund of political dues. It has been well-documented that a majority of union members are unaware of their rights to have political expenses refunded under *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), and *Communications Workers of America v. Beck*, 487 U.S. 735 (1988). *See* H.R. Rep. No. 105-397, at 6-8; Jeff Canfield, Comment, *What a*

Sham(e): The Broken Beck Rights System in the Real World Workplace, 47 Wayne L. Rev. 1049 (2001). For practical examples, one can review the collective bargaining agreements of the Spokane and Seattle school districts and see that while the agreements reference the ability to become agency fee payers, they contain no reference to any right of agency fee payers to object and receive a refund of political fees. *See, e.g.*, Spokane Collective Bargaining Agreement, at 8 (Sept. 1, 2003 to Aug. 31, 2006), *available at* http://www.spokaneschools.org/CBA/agreements/2003-2006/SEA/Certificated.pdf; Seattle Public Schools Collective Bargaining Agreement, at § H (2004-2009), *available at* http://www.seattlewea.org/Cert%20CBA/CertCBAArt1.htm#12.

Further complicating matters is the fact that union members who wish to become agency fee payers must file their notice at the beginning of the school year, a particularly busy time for teachers. *See Mandatory Union Dues*, 105th Cong. at 44 (statement of Bob Williams) (stating that teachers were required to resign from the union between August 1 and August 31, a period when Washington teachers were on vacation). Once a teacher becomes an agency fee payer, to claim a refund he or she must decipher a thick packet containing numerous appendices replete with financial documents and determinations of whether certain activity is deemed a chargeable or nonchargeable expense. Additionally, in some cases letters requesting a refund of political fees or seeking to resign from the union are lost or the union deems the attempt to opt out to be insufficient. *See Field Hearing on Mandatory Union Dues and the Abuse of Worker Rights: Hearing Before the Subcomm. on Employer-Employee Relations of the H. Comm. on Education and the Workforce*, 105th Cong. 30 (1998) (testimony of Nadia Q. Davies) (California teacher detailing ordeal involved in resigning her membership in a teachers' union, which included numerous lost letters, a 15-day period to withdraw, some of the letters being

rejected as untimely, and others as not worded properly. Ultimately, the witness's husband had to hand deliver a letter and wait for it to be date and time stamped by the teacher's union office before she could exercise her right to withdraw.).

As further evidence of the challenges facing Washington teachers in declining to associate with WEA on political matters, agency fee payers wishing to challenge the union's calculation of the objector's refund under *Chicago Teachers Union, Local No. 1 v. Hudson* are confronted with considerable procedural obstacles.[4] To pursue this right a teacher must take off a day from teaching to attend a hearing before a decisionmaker appointed by WEA, which for some teachers will require considerable travel. This is a significant burden for conscientious teachers who are dedicated to their students and do not wish to disrupt the learning process. At the hearing the teacher is provided one hour to accomplish the Sisyphean task of reviewing 12 inches of documentation that he or she is viewing for the first time. The teacher must then convince the arbitrator that WEA's determination of chargeable expenditures is improper. Former Washington State Attorney General Ken Eikenberry found the process so unfair that he described it by writing: "[H]aving visited the old Soviet Union as a guest of the Procurator General, I believe their administrative hearings were more fair than the WEA process." Ken Eikenberry, *Teachers' Union Presides Over a Kangaroo Court*, Port Orchard Independent, Sept. 14, 2002.

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[4] Although Washington Revised Code § 42.17.760 does not address the right under *Hudson* for agency fee payers to challenge the union-determined refund, the inequity of this process provides insight as to why procedural protections such the statute at issue are important to protect agency fee payers' rights not to associate with the union.

In 1992, Washington voters passed an initiative that blocked unions from deducting contributions to a union's PAC without members' prior written consent. *See* Wash. Rev. Code § 42.17.680. After this law went into effect, teacher contributions to WEA-PAC dropped from approximately 45,000 to 8,000 members out of 65,000 total members. *See Campaign Finance*, 105th Cong. (statement of Cindy Omlin). This precipitous decline indicates that, when provided with an easy mechanism to choose to support the WEA's political message through contributions to the union's PAC instead of the former opt-out regime, only about 12% of union members chose to continue supporting WEA's political expenditures. Considering that so few union members choose to support WEA's political expenditures, the Washington statute at issue, Washington Revised Code § 42.17.760, is an eminently reasonable measure to protect the rights of non-union members to disassociate themselves from a union's political expenditures that they do not wish to support.

CONCLUSION

The decision of the Supreme Court of Washington should be reversed.

Respectfully submitted,

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