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 EXCHANGE COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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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.

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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.[1]

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.

[1] 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

discriminate against them. *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1 (1989); *Rosenberger* v. *Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995); see also *Locke* v. *Davey*, 540 U.S. 712, 728–729 (2004) (Scalia, J., dissenting).

But before creating such a zone of lawmaker powerlessness in a different area of the law, courts should be sure that the constitutional constraints pressing on lawmakers from both sides are genuine, not fictitious.[2] Here, the non-union-members have a genuine First Amendment right not to have their money used for political causes with which they disagree. The Court has repeatedly and unanimously reaffirmed this right in *Abood*, *Hudson*, and *Ellis* v. *Brotherhood of Railway Clerks*, 466 U.S. 435 (1984). On the other hand, any rival right on the union's part is entirely illusory.

1. The Union and Its Members Have No Constitutional Right To Spend Nonmembers' Money Without Affirmative Authorization.

A union, like any expressive association, has the right to fund political expression out of dues paid by voluntary members and contributions affirmatively authorized by nonmembers. But no association has a First Amendment right to fund election advocacy using money that was coercively extracted from nonmembers who have not affirmatively authorized its expenditure for that purpose. No case from this Court even

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[2] *Cf., e.g.*, *Thomas* v. *Review Board of Indiana Employment Security Division*, 450 U.S. 707, 722 (1981) (Rehnquist, J., dissenting) (criticizing then-existing "tension" between the Free Exercise Clause and the Establishment Clause—tension that often left legislatures with little room to maneuver between the constraints of the two Clauses—on the grounds that it was "largely of this Court's own making"); *Walz* v. *Tax Comm'n*, 397 U.S. 664 (1970) (noting "general principle" that "there is room for play in the joints" between the constraints of the Establishment Clause and of the Free Exercise Clause); *Locke*, 540 U.S. at 718 (likewise).

hints at any such right, and there is no justification for this Court to create such a right now.

To the contrary, this Court has accurately identified the only genuine First Amendment associational issue implicated by this case: the one that results from "allowing the union shop"—or an agency shop—"at all." *Ellis*, 466 U.S. at 455. *That* is "a significant impingement on First Amendment rights" because "[t]he dissenting employee is forced to support financially an organization with whose principles and demands he may disagree." *Ibid.*

The Washington Supreme Court thus was mistaken to suggest that "[b]ecause sec. 760 regulates the relationship between the union and agency fee payers with regard to political activity, the analysis [from *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000)] should be applied here." 130 P.3d at 362 (¶ 50). Section 760 regulates the relationship between the union and its nonmembers only in the sense that it embodies the traditional principle that an association can engage in electioneering only using money voluntarily paid to it. *Dale* would have been on point only if the Boy Scouts had claimed some right to take *non*members' money unless the nonmembers affirmatively objected. In fact, however, the Boy Scouts in *Dale* were interested in *limiting* membership—in avoiding forced association—rather than taking money forcibly extracted from nonmembers. *Dale* accordingly says nothing about this case.

Nor are union members' First Amendment rights violated simply because Section 760 requires the union to bear the cost of getting affirmative authorization, as the Washington court believed. See 130 P.3d at 359–360 (¶¶ 37, 38). The majority's "interest in stating its views without being silenced by the dissenters" may preclude an injunction against all political activity by a union that extracts funds from nonmembers. *Street*, 367 U.S. at 773 (suggesting that such an injunction "might" violate the First Amendment). But nothing in Section 760 stops the WEA from speaking through the

use of its members' funds; the statute at most raises the cost of using *non*members' money for *non*bargaining activity. It might be cheaper for members to take nonmembers' money and spend it for electioneering unless the nonmembers expressly opt out of this practice, and more expensive to ask the nonmembers first to opt in. But that's a cost savings that the First Amendment does not guarantee.

2. Union Nonmembers Have No Constitutional "Right" To Have Their Money Spent Without Their Approval.

Equally unfounded is the suggestion that the Washington law's protection of nonmembers "violates the First Amendment rights of nonmembers" themselves. 130 P.3d at 360 (¶ 39). Surely "there are numerous and varied reasons why employees choose not to join a union" (*ibid.*), just as there are varied reasons why citizens choose not to join the ACLU or the NRA. No one, however, would say that "[a] presumption of dissent" (*ibid.*)—which is to say a presumption that nonmembers of those groups don't want to contribute to those groups unless they affirmatively authorize the contribution—"violates the First Amendment rights of nonmembers."

This Court has concluded, in interpreting the Railway Labor Act, that under that particular Act "dissent is not to be presumed." *Street*, 367 U.S. at 774 (construing 45 U.S.C. § 152, Eleventh). But nothing in *Street* or any other decision suggests that *no* legislative body has the power to presume nonmembers' dissent under an entirely different statutory scheme, such as that authorizing the collection of agency shop fees under Washington law.

The First Amendment operates here only to protect dissenters' rights not to have the state force them to fund political or ideological speech. No real First Amendment interest constrains states' ability to protect those rights by going beyond the opt-out system that is the bare constitutional mini-

mum, and instead insisting on an opt-in system that is more protective of individual freedom.

C. Section 760 Falls Comfortably Within The Scope Of State Legislative Discretion.

Although a majority of this Court has yet to hold that a "[u]nion should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the *risk* that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining," neither has the Court "foreclose[d] the argument." *Abood*, 431 U.S. at 244 (Stevens, J., concurring) (emphasis added). Much less has the Court even hinted that the First Amendment forecloses a statutory system that *does* "avoid the risk" that nonmember funds will be used to finance nonbargaining activity without the nonmembers' consent.

Even where two constitutional rights pull in opposite directions, as at the intersection of the Free Exercise and Establishment Clauses, there remains considerable "room for play in the joints." *Locke*, 540 U.S. at 718. See also *Cutter* v. *Wilkinson*, 544 U.S. 709, 720 (2005) (noting that there is a "corridor between the Religion Clauses"). That flexibility, the Court has held, permits Congress "to accord religious exercise heightened protection from government-imposed burdens." *Cutter*, 544 U.S. at 714. Surely a state government may likewise accord individual public employees the same "heightened protection" from the "government-imposed burdens" that otherwise would result if the employees' forcibly extracted agency shop fees were used for electioneering.

Here the proper "play in the joints" is particularly great. The only legitimate interest weighing against giving nonmembers the utmost ability to prevent the expenditure of forced agency shop fees for political purposes without their consent is the government interest behind the agency shop itself. See *Ellis*, 466 U.S. at 456 ("union shop" context).

Unless state law compelled nonmembers to pay agency shop fees, this case would not exist, as only the voluntary dues of union members would be at issue. Here, however, Washington has decided that its interest in preserving the agency shop did not reach far enough to justify the use of nonmembers' compelled payments for political purposes without the nonmembers' express consent. Nothing compelled Washington to allow unions to force payment of agency shop fees at all. Washington surely has the leeway to limit the use of those fees in the way it has here.

Section 760 puts the WEA in no worse a position than the one in which many other expressive associations constantly operate. The ACLU, the Sierra Club, the NRA, and the Republican Party, among others, likewise subsist on member dues, coupled with contributions affirmatively authorized by nonmembers. Yet these organizations' inability to forcibly collect funds for electioneering from nonmembers without the nonmembers' express permission is entirely consistent with the First Amendment.[3] No one has the "right to spend another person's money" to further one's own exercise of a constitutional right. *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 626 (1989) (Sixth Amendment does not encompass right to use others' funds to pay for counsel, "even if those funds are the only way that that defendant will be able to retain the attorney of his choice").

Like other unions that benefit from state laws permitting union security provisions, the WEA is actually far better off than nonunion expressive groups: The government forces

[3] See *Hudgens* v. *NLRB*, 424 U.S. 507 (1976) (holding that speakers generally have no First Amendment rights to use others' private property, even for their political speech); *Austin* v. *Mich. Chamber of Commerce*, 494 U.S. 652, 674 (1989) (Brennan, J., concurring) (arguing that state may protect corporate stockholders from having their assets used against their wishes to support or oppose political candidates, even though the assets were provided with no government coercion).

nonmembers to pay the WEA money that will be used for purposes other than politics. But as to money that would be used for electioneering, the WEA is in the same position as the other associations: It has no right to use nonmembers' money for election-related speech without the nonmembers' permission.

This Court has repeatedly held that the Constitution permits a government to ensure that tax subsidies—which flow from coercively levied taxes—are not used for electioneering.[4] The State of Washington surely has similar flexibility here to ensure that the coercively levied agency shop fee is not used for electioneering, at least without the payer's affirmative authorization. Like a tax, the agency shop fee is extracted under legal compulsion to pay for benefits that reach a defined group (here, the bargaining units that the WEA represents). And, as with a tax, those who are forced to pay the agency shop fee—which is to say those people who have deliberately chosen not to join the union—quite likely wouldn't pay the union any money at all in the absence of government coercion.

Having provided unions with the means to coerce payment of the fee, the State of Washington surely may limit unions' ability to use that fee for electioneering. Unions remain free to get all the electioneering funds they want from members, or from nonmembers who affirmatively approve that use of such funds. And though getting such approval takes time and effort, this is no more than the time and effort all expressive associations must invest to raise political funds.

[4] See, *e.g.*, *Regan* v. *Taxation With Representation*, 461 U.S. 540, 546 (1983) (upholding the 26 U.S.C. § 501(c)(3) restriction on lobbying using tax-deductible contributions, using logic that would equally justify § 501(c)(3)'s similar restrictions on electioneering using tax-deductible contributions); *Cammarano* v. *United States*, 358 U.S. 498 (1959) (upholding a restriction on the deductibility of business expenses for "the promotion or defeat of legislation," including ballot measures).

Principles of federalism and the First Amendment alike require reversal here.

CONCLUSION

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

Respectfully submitted.

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