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 Writ Of Certiorari To The Supreme Court Of Washington

BRIEF OF *AMICUS CURIAE* CAMPAIGN LEGAL CENTER IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Amicus curiae Campaign Legal Center, Inc. (CLC) is a nonpartisan, nonprofit organization which works in the area of campaign finance law, generating public policy proposals and participating in state and federal court litigation throughout the nation regarding disclosure, political advertising, contribution limits, enforcement issues, and many other matters. In addition to participating as *amicus curiae* in many campaign finance-related cases throughout the nation, the CLC served as counsel to defendant-intervenors Senator John McCain, Senator Russell Feingold, *et al.*, in *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003) [hereinafter *McConnell*], in this Court. The CLC has a longstanding, demonstrated interest in campaign finance law, and this case directly implicates the CLC's interest.

SUMMARY OF ARGUMENT

Federal law has long prohibited labor unions and corporations from using treasury funds to make political contributions or expenditures in connection with federal elections. *See* 2 U.S.C. § 441b. However, labor unions and corporations are permitted by federal law to establish a "separate segregated fund" (a.k.a. "PAC") into which union members or corporate employees and shareholders may contribute funds (*i.e.*, "opt-in") to financially support a

[1] No counsel for a party authored any part of this brief. No person or other entity other than *amicus* Campaign Legal Center contributed monetarily to the preparation and submission of this brief. Letters of consent from all parties to the filing of this brief have been filed with the Clerk of this Court.

union's or corporation's political activities. This Court has stated its "unanimous view" that the federal law separate segregated fund "opt-in" procedure provides unions and corporations with a "constitutionally sufficient" opportunity to engage in political speech. *See McConnell*, 540 U.S. at 203.

By comparison to federal law, Washington state law is less restrictive in several respects regarding labor union political activity. First, unlike federal law, Washington state law permits unions to use treasury funds to make political contributions and expenditures. Second, whereas federal law permits a union's PAC to accept contributions only from its members (not from nonmembers), Washington law allows unions to use the funds of both members and nonmembers for political purposes – provided that nonmembers *affirmatively authorize* the use of their funds for political purposes. *See* Wash. Rev. Code § 42.17.760.[2]

This Washington law, § 42.17.760, which requires union nonmembers to affirmatively consent ("opt-in") before their funds can be used for political purposes, is the subject of this lawsuit. Despite this Court's long line of cases upholding the more restrictive federal "opt-in" law,

[2] Washington state law permits unions to include a "union security" provision in collective bargaining agreements – requiring individuals who are not members of the union, but who are part of the collective bargaining unit, to pay an "agency shop fee" to the union to cover the costs of collective bargaining. *See* Wash. Rev. Code §§ 28B.52.045(2), 41.59.100, and 41.56.122. Washington law further provides that "[a] labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless *affirmatively authorized* by the individual." Wash. Rev. Code § 42.17.760 (emphasis added).

the Supreme Court of Washington purportedly relied on this Court's decisions to invalidate the less restrictive state "opt-in" law on First Amendment grounds. The Washington Supreme Court majority opinion "turns the First Amendment on its head" and "distorts [this Court's] cases delineating the requirements protecting dissenting union members and nonmembers from having their dues used to support political activities with which they disagree to do the opposite: limit the State's ability to protect such dissenters." *Wash. v. Wash. Educ. Ass'n*, 156 Wash. 2d 543, 571, 574-75 (Wash. 2006) (Sanders, J., dissenting) [hereinafter *WEA*].

The State of Washington has chosen to confer a *statutory right* on labor unions both to collect "agency shop fees" from nonmembers (*i.e.*, fees to cover the costs of collective bargaining) and to spend union treasury funds to influence state elections. *See* Wash. Rev. Code §§ 28B.52.045(2), 41.56.122 and 41.59.100. Absent this statutory mechanism for compelling payment of fees by nonmembers, a union has no right, constitutional or otherwise, to compel payment of such fees.

The U.S. Constitution does not require that labor unions be permitted to demand fees from nonmember workers as a condition of employment. This Court has upheld state laws prohibiting unions from compelling workers to become members and pay fees as a condition of employment. *See Lincoln Fed. Labor Union No. 19129 v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949) [hereinafter *Lincoln Fed.*]; *Am. Fed'n of Labor v. American Sash & Door Co.*, 335 U.S. 538 (1949) [hereinafter *American Sash*].

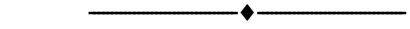
Nor does the U.S. Constitution require that labor unions be permitted to spend treasury funds to influence elections. This Court has upheld the longstanding federal law ban on labor union and corporation use of treasury funds to influence elections – finding that the separate segregated fund "opt-in" provision sufficiently protects a union's constitutional rights. *See McConnell*, 540 U.S. 93, 203-09.

The Supreme Court of Washington conflated Washington unions' statutorily-conferred rights with constitutional rights and invalidated the state law restricting the election-related use of nonmember agency shop fees on the ground that the "opt-in" requirement violates the First Amendment rights of labor unions and their members. *WEA*, 156 Wash. 2d at 571. In so ruling, the Washington Court misconstrued this Court's decisions in *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961) [hereinafter *Street*]; *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) [hereinafter *Abood*]; *Ellis v. Brotherhood of Railway, Airline And Steamship Clerks, Freight Handlers, Express And Station Employees*, 466 U.S. 435 (1984) [hereinafter *Ellis*]; and *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986) [hereinafter *Hudson*]. The Washington Court mistakenly interpreted these decisions as establishing the *maximum* First Amendment rights possessed by workers, rather than recognizing these decisions as establishing the *minimum* First Amendment rights possessed by workers.

The Supreme Court of Washington's decision below invalidating Washington's "opt-in" provision misconstrues this Court's decisions in *Street*, *Abood*, *Ellis* and *Hudson*. Further, the decision below directly conflicts with this Court's decision in *McConnell* upholding the "opt-in"

provision of 2 U.S.C. § 441b. Moreover, the Washington Court's decision will undoubtedly be relied upon as persuasive authority in efforts to invalidate "opt-in" laws in a number of other states – in fact, a Colorado appellate court cited the Washington Court's *WEA* decision in September in striking down a Colorado regulatory "opt-in" requirement. *See Sanger v. Dennis*, No. 06CA1944, 2006 Colo. App. LEXIS 1619 (Colo. Ct. App. Sept. 28, 2006).

This Court's decisions in *Street*, *Abood*, *Ellis* and *Hudson* establish the *minimum*, not the *maximum*, First Amendment rights possessed by dissenting workers. The Washington state law "opt-in" requirement is a constitutionally permissible means for the state to further protect the First Amendment rights of dissenting workers to be free from compelled political speech and association. This Court's decision in *McConnell* makes clear that similar federal "opt-in" restrictions do not violate the constitutional rights of unions and their members. Nevertheless, the Washington Court's misconstruction of this Court's decisions has rendered unenforceable Washington's "opt-in" law, and will undermine state "opt-in" laws around the nation. For these reasons, we respectfully urge this Court to reverse the decision of the Supreme Court of Washington.



ARGUMENT

I. THIS COURT'S DECISIONS IN *STREET*, *ABOOD*, *ELLIS* AND *HUDSON* ESTABLISH THE *MINIMUM*, NOT THE *MAXIMUM*, FIRST AMENDMENT RIGHTS POSSESSED BY DISSENTING WORKERS.

This Court has never held that a labor union possesses a constitutional right to demand financial support from nonmembers for any purpose. While some state legislatures have enacted statutes prohibiting unions from compelling workers to become members and pay fees as a condition of employment (so-called "open shop" laws), other legislative bodies have chosen to confer upon unions the statutory right to compel financial support from nonmembers (so-called "agency shop" laws).

Laws of both types – "open shop" laws and "agency shop" laws – have been challenged before this Court on constitutional grounds. The Court has upheld the constitutionality of "open shop" laws prohibiting compelled union membership. *See Lincoln Fed.*, 335 U.S. at 531 ("There cannot be wrung from a constitutional right of workers to assemble to discuss improvement of their own working standards, a further constitutional right to drive from remunerative employment all other persons who will not or can not, participate in union assemblies."); *see also American Sash*, 335 U.S. 538, 540 (applying reasoning of *Lincoln Fed.* in upholding Arizona "open shop" law); *see also Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 233 (1956) [hereinafter *Hanson*] (upholding federal "closed shop" law, but noting: "In the absence of conflicting federal legislation, there can be no doubt that it is within the police power of a State to prohibit the union or the closed shop.").

By upholding "open shop" laws in *Lincoln Fed.* and *American Sash*, this Court made clear that labor unions do not possess a constitutional right to compel financial support from workers. Nevertheless, although unions have *no constitutional right* to compel financial support from any worker, some jurisdictions (*e.g.*, the State of Washington) have granted unions a *statutory right* to compel nonmembers to pay fees to support union costs of collective bargaining.[3] A union's right to compel financial support from nonmembers – where it exists – is one of statutory law, not constitutional law.

Furthermore, although a state may authorize unions to compel financial support from nonmembers for its collective bargaining activities through enactment of "agency shop" statutes, this Court has repeatedly held that a labor union may not, consistent with the Constitution, use nonmember funds for political purposes when the nonmember explicitly objects to such use. *See Hanson*, 351 U.S. at 238; *Street*, 367 U.S. at 770; *Abood*, 431 U.S. at 222-23; *Ellis*, 466 U.S. at 447; and *Hudson*, 475 U.S. at 294.

In *Hanson*, for example, this Court upheld a federal Railway Labor Act requirement that workers pay fees to a union – *but only to the extent such fees are used to pay the costs of collective bargaining*: "We hold only that the requirement for financial support of the collective bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce

[3] Of course, there is no need for a jurisdiction to create a statutory right for unions to compel *members* to pay fees – as such individuals, by definition, do so voluntarily through payment of member dues.

Clause. . . ." *Hanson*, 351 U.S. at 238. Several years later, in *Street*, this Court directly addressed a question left unanswered by the *Hanson* decision – whether funds paid by a worker pursuant to the Railway Labor Act could be used by the union to support political activities despite the worker's objection to funding such political activities. This Court in *Street* rejected the unions' claim that the Railway Labor Act empowered the unions to use "exacted funds to support political causes objected to by the employee. . . ." *Street*, 367 U.S. at 770. The Court ruled that the "unions must not support those [political] activities, against the expressed wishes of a dissenting employee, with his exacted money." *Id*.

This Court in *Street* established the *minimum* constitutional right of employees compelled to pay fees to unions – the right to "opt-out" of funding a union's political activities. The Court reiterated this *minimum* constitutional right in *Abood*, wherein nonmembers of a teacher's union, who were required by state law to pay agency shop fees to cover the costs of collective bargaining, successfully challenged on constitutional grounds the use of their agency shop fees for political purposes. *Abood*, 431 U.S. at 234.

This Court again reiterated this *minimum* constitutional "opt-out" right in *Ellis*, where the Court found the only justification for exacting fees from workers not wishing to support a union is "to eliminate free riders – employees in the bargaining unit on whose behalf the union was obliged to perform its statutory functions, but who refused to contribute to the cost thereof." *Ellis*, 466 U.S. at 447. The test, according to the Court, as to whether a worker may constitutionally be compelled to fund certain union expenditures, "must be whether the challenged

expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." *Ellis*, 466 U.S. at 448.

Finally, in *Hudson*, the Court considered a constitutional challenge to a union's procedures for ensuring that the agency shop fees of dissenting nonmembers were not used to fund political activity – and found that the union's procedures did not adequately protect the *minimum* constitutional "opt-out" rights of nonmembers. *Hudson*, 475 U.S. at 304-310.

The common thread between these cases – *Hanson*, *Street*, *Abood*, *Ellis* and *Hudson* – is the absence of a statutory safeguard against the use of a dissenting worker's funds for political purposes. In the absence of such a statutory safeguard, this Court articulated and reiterated the *minimum* constitutional rights of dissenting workers: the right to "opt-out" of supporting such activities. In none of these decisions did the Court purport to establish the maximum extent to which a state or Congress could legislate in an effort to safeguard dissenting workers' rights – the Court had no reason to analyze the constitutionality of safeguards that did not exist.

At issue in this case is precisely this question of whether a state may go beyond this minimum constitutional protection of nonmembers' rights, to provide additional statutory protection for nonmembers by requiring a union to obtain affirmative authorization from nonmembers before using such individuals' funds for political purposes. *Amicus* believes that a state may constitutionally do so, in order to protect nonmembers' well-established First

Amendment freedom from compelled political association and speech.[4]

In the decision below, the Supreme Court of Washington correctly recognized this Court's long line of cases establishing that "compulsory union dues may not be used to support political causes if the member disagrees with those causes." *WEA*, 156 Wash. 2d at 558. The Washington Court then went on to misconstrue this Court's decisions in *Street* and *Abood* as establishing – as a matter of constitutional law – "that the burden is on the employee to make his objection known." *Id.* at 559.

The Washington Court confused this Court's articulation of what the Constitution *requires* with regard to nonmembers' rights, as a statement of the extent to which the Constitution *permits* states to protect nonmembers' rights. Put differently, the Washington Court misconstrued this Court's decisions as establishing the *maximum* First Amendment rights possessed by union nonmembers, when, in fact, the decisions established their *minimum* First Amendment rights.

[4] "The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Abood*, 431 U.S. at 234-35 (footnote omitted); *see also Hurley v. Irish-American Gay, Lesbian, & Bisexual Group*, 515 U.S. 557 (1995); *Keller v. State Bar of Calif.*, 496 U.S. 1 (1990).

As explained by Washington Supreme Court Justice Sanders in dissent:

> The majority turn[ed] the First Amendment on its head. Unions have a statutory, not a constitutional, right to cause employers not only to withhold and remit membership dues but also to withhold and remit fees from nonmembers in an equivalent amount. Absent this statutory mechanism for withholding and remission of agency fees (or membership fees for that matter), there is no right, constitutional or otherwise, for the union to require it.

WEA, 156 Wash. 2d at 571-72 (Sanders, J., dissenting). Justice Sanders further explained that the majority "distort[ed]" this Court's decisions "delineating the requirements protecting dissenting union members and nonmembers from having their dues used to support political activities with which they disagree to do the opposite: limit the State's ability to protect such dissenters." *Id*. at 574-75.

The Washington Court's decision invalidating the state law "opt-in" requirement, Wash. Rev. Code § 42.17.760, is based on an erroneous interpretation of this Court's decisions in *Street*, *Abood*, *Ellis* and *Hudson*. For this reason, we respectfully urge this Court to make clear that the Court's decisions in *Street*, *Abood*, *Ellis* and *Hudson* establish the minimum, not the maximum, First Amendment rights of dissenting workers – and to reverse the decision of the Supreme Court of Washington in this case.

II. THIS COURT'S DECISION IN *MCCONNELL* UPHOLDING THE FEDERAL "OPT-IN" REQUIREMENT MAKES CLEAR THAT THE WASHINGTON "OPT-IN" REQUIREMENT IS CONSTITUTIONAL.

The Supreme Court of Washington held that the state law "opt-in" requirement for union funding of political activity violates the union's federal constitutional rights. The state court's ruling is inconsistent with this Court's decision in *McConnell*, which upheld the even-more-restrictive federal separate segregated fund "opt-in" requirement, and undermines more than 50 years of congressional regulation of labor union use of treasury funds to influence elections.

The Hatch Act, enacted more than 65 years ago, is widely recognized as the first congressional restriction on labor union political activity. *See*, *e.g.*, *McConnell*, 540 U.S. at 116. This Court, in *McConnell,* approvingly detailed Congress' long history of regulating labor union political activities. The Court began its analysis by reviewing Congress' regulation of *corporate* political activity dating back to 1907, underscoring that restrictions on corporate and labor union political activity are cut from the same cloth. The Court explained at length:

> Congress' historical concern with the "political potentialities of wealth" and their "untoward consequences for the democratic process," has long reached beyond corporate money. During and shortly after World War II, Congress reacted to the "enormous financial outlays" made by some unions in connection with national elections. Congress first restricted union contributions in the Hatch Act, 18 U.S.C. § 610, and it later prohibited "union contributions in connection with federal

> elections altogether." Congress subsequently extended that prohibition to cover unions' election-related expenditures as well as contributions, and it broadened the coverage of federal campaigns to include both primary and general elections. Labor Management Relations Act, 1947 (Taft-Hartley Act), 61 Stat. 136. During the consideration of those measures, legislators repeatedly voiced their concerns regarding the pernicious influence of large campaign contributions. See 93 Cong. Rec. 3428, 3522 (1947); H.R. Rep. No. 245, 80th Cong., 1st Sess. (1947); S. Rep. No. 1, 80th Cong., 1st Sess., pt. 2 (1947); H.R. Rep. No. 2093, 78th Cong., 2d Sess. (1945). *As we noted in a unanimous [Nat'l Right to Work] opinion recalling this history, Congress' "careful legislative adjustment of the federal electoral laws, in a 'cautious advance, step by step,' to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference."*

McConnell, 540 U.S. at 116-17 (footnote omitted) (citations and quotation marks omitted) (emphasis added) (quoting *U.S. v. Automobile Workers,* 352 U.S. 567, at 577-84 (1957); *Fed. Election Comm'n v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209 (1982) [hereinafter *Nat'l Right to Work Comm.*]).

The *McConnell* Court reviewed the history of congressional regulation of labor union political activity as a preface to its consideration of a constitutional challenge to a then-recent amendment to the longstanding ban on labor union use of treasury funds for political contributions and expenditures, which was enacted by Congress as part of the Bipartisan Campaign Reform Act of 2002 (BCRA), § 203,

Pub. L. No. 107-155, 116 Stat. 81 (codified at 2 U.S.C. § 441b).

BCRA § 203 (codified at 2 U.S.C. § 441b) prohibits labor unions and corporations from using treasury funds to pay for "electioneering communication." *See* 2 U.S.C. §§ 441b(a) and (b)(2). "Electioneering communication," in turn, is defined to mean any broadcast, cable, or satellite communication that refers to a clearly identified candidate for federal office, made within 30 days of a primary election or 60 days of a general election, and targeted to the relevant electorate. *See* 2 U.S.C. §§ 441b(c)(1) and 434(f)(3).

The *McConnell* Court began its analysis of the constitutionality of this BCRA restriction on labor union political activity by noting:

> Since our decision in *Buckley,* Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law. The *ability to form and administer separate segregated funds* authorized by FECA § 316, 2 U.S.C.A. § 441b (main ed. and Supp. 2003), *has provided corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy. That has been this Court's unanimous view, and it is not challenged in this litigation*.

McConnell, 540 U.S. at 203 (footnote omitted) (emphasis added).

The *McConnell* Court reasoned that BCRA's ban on labor union use of treasury funds to pay for "electioneering

communication" intended to influence voters' decisions is the "functional equivalent" of the longstanding ban on labor union use of treasury funds to pay for "express advocacy" political advertising. *McConnell*, 540 U.S. at 206. The Court upheld the BCRA labor union restriction as constitutional, finding the federal law "opt-in" PAC provision constitutionally sufficient to protect a union's First Amendment rights in both the "express advocacy" and "electioneering communication" contexts.

Like the Washington "opt-in" provision invalidated by the Supreme Court of Washington, federal law allows labor union political activity only to the extent that workers "opt-in" to a union's political activities by contributing to a labor union PAC. *See* 2 U.S.C. § 441b(b). However, the federal "opt-in" law upheld by this Court in *McConnell* is significantly more restrictive than the state law invalidated below. Under federal law, only *union members may "opt-in" to supporting a union's political activities*. *See* 2 U.S.C. § 441b(b)(4)(A)(ii). By contrast, under the invalidated Washington law, unions are permitted to freely spend treasury funds obtained from members and to receive financial support for their political activities from nonmembers – so long as the nonmembers "opt-in" to supporting the union's political activities.

However, whereas this Court, in *McConnell,* made clear the Court's "unanimous view" that the more-restrictive federal law "opt-in" procedure provides unions with a "constitutionally sufficient" opportunity to engage in political speech, the Supreme Court of Washington's decision below held that the less-restrictive state law "opt-in" procedure violates the federal constitutional rights of labor unions. By comparison to the federal law "opt-in" requirement that prohibits financial support of union

political activity by nonmembers, Washington law reasonably facilitates nonmember political speech by permitting nonmembers to "opt-in" to financially supporting union political activity. Yet the Washington Court remarkably held that the state law "presumption of dissent *violates the First Amendment rights of* both members and *nonmembers*." *WEA*, 156 Wash. 2d at 560 (emphasis added); *but cf. Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1253 (6th Cir. 1997).[5] Given that nonmembers are nonmembers precisely because they have declined to join the union, it is difficult to comprehend how a presumption of dissent violates the First Amendment of such dissenters. Indeed, a presumption of dissent for nonmembers seems to be the most appropriate interpretation.

The Supreme Court of Washington's decision in this case invalidating Washington's "opt-in" provision on the ground that the provision violates the First Amendment rights of unions (as well as nonmembers who refuse to join the union) is wholly inconsistent with this Court's decision in *McConnell*, where the Court upheld the "opt-in" provision of 2 U.S.C. § 441b, as well as the other decisions of this Court that have upheld the "opt-in" provision of 2 U.S.C. § 441b against constitutional challenge. *See*, *e.g.*, *Nat'l Right to Work Comm.*, 459 U.S. 197; *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146 (2003); *see also Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)

[5] The Sixth Circuit Court of Appeals in *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997), upheld as constitutional a state law requiring unions to obtain annual affirmative authorization from members for a political committee contribution payroll deduction plan – and commented that the union's argument that the affirmative authorization plan violates the First Amendment rights of contributors "borders on the frivolous." *Id.* at 1253.

(upholding as constitutional a state law "opt-in" requirement for corporate political spending).

This Court's decision and reasoning in *McConnell* provides ample support that "opt-in" laws such as the one at issue in this case, Wash. Rev. Code § 42.17.760, are constitutional. For this reason, we respectfully urge the Court to reverse the decision of the court below.

III. THE WASHINGTON SUPREME COURT'S DECISION UNDERMINES STATE "OPT-IN" LAWS THROUGHOUT THE NATION.

The Supreme Court of Washington's decision in this case is not only inconsistent with longstanding federal law restrictions on labor union use of treasury funds to influence elections, but it also undermines the laws of at least fourteen other states that have followed Congress' lead – approved by this Court – by similarly restricting labor union and corporate candidate-related political activity.[6]

The appendix to this brief contains descriptions of fourteen states' "opt-in" laws restricting union and corporate political activity, all of which would seemingly be

[6] *See*, *e.g.*, Alaska Stat. §§ 15.13.067, 15.13.074 and 15.13.400(8) (2006); Ariz. Rev. Stat. Ann. §§ 16-919, 16-920, and 16-921 (West 2006); COLO. CONST. art. XXVIII, §§ 3(4) and 6(2); Ind. Code Ann. §§ 3-9-2-4 and 3-9-2-5(b) (West 2006); Mich. Comp. Laws Ann. §§ 169.254(1) and 169.255 (West 2006); Mont. Code Ann. § 39-31-402 (2006); N.C. Gen. Stat. § 163-278.19 (2006); N.D. Cent. Code §§ 16.1-08.1-01 and 16.1-08.1-03.3 (2006); Ohio Rev. Code Ann. §§ 3517.082, 3599.03 and 3599.031 (West 2006); Pa. Stat. Ann. tit. 25, § 3253 and Pa. Stat. Ann. tit. 43, § 1101.1701 (West 2006); R.I. Gen. Laws §§ 17-25-3(1) and 17-25-10.1(h) (2006); S.D. Codified Laws §§ 12-25-1(1) and 12-25-2 (2006); Tex. Elec. Code Ann. §§ 253.094 and 253.100 (Vernon 2006); and Wyo. Stat. Ann. § 22-25-102 (2006).

subject to challenge and invalidation if the reasoning of the Washington Supreme Court was followed.

Although the Supreme Court of Washington's decision is not controlling law in other states, courts in other states have already begun citing the Washington Court's *WEA* decision when analyzing similar "opt-in" restrictions on labor union political activity. A Colorado state appellate court, for example, recently issued a decision invalidating a state administrative rule establishing an "opt-in" requirement for union member contributions to a union political committee. In so ruling, the Colorado appellate court approvingly cited the Washington Court's *WEA* decision, noting: "[T]he Supreme Court of Washington, applying strict scrutiny review, declared unconstitutional a statute that, like the Secretary's definition here, imposed an 'opt in' procedure." *Sanger v. Dennis*, No. 06CA1944, 2006 Colo. App. LEXIS 1619, at *30 (Colo. Ct. App. Sept. 28, 2006). Although the Colorado court applied intermediate, rather than strict scrutiny to the Colorado regulation, it reached the same conclusion as the Washington Court, striking down as unconstitutional a state "opt-in" requirement.

Given that the Supreme Court of Washington relied exclusively on its misconstruction of this Court's decisions as the basis for its invalidation of Wash. Rev. Code § 42.17.760, and that this misconstruction will undoubtedly be relied upon by other courts to strike down constitutional state law "opt-in" requirements, we urge this Court to reverse the Washington Court's decision in this case. A reversal of the decision below will make clear that "opt-in" restrictions on union political activities in states around the nation do not violate the First Amendment rights of unions.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the judgment of the Supreme Court of Washington should be reversed.

Dated: November 7, 2006

Respectfully submitted,

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APPENDIX

The following are brief descriptions of the laws of fourteen states which, like the State of Washington and the federal government, have established "opt-in" restrictions on labor union political activity.

ALASKA. Under Alaska law, labor unions and corporations are prohibited from using treasury funds to make candidate-related political contributions and expenditures. However, labor unions may make contributions and expenditures through a PAC (called a "group" under Alaska law) to the extent that individuals "opt-in" to such political activity by making contributions to the PAC. *See* Alaska Stat. §§ 15.13.074, 15.13.067, and 15.13.400(8) (2006).

ARIZONA. Likewise, Arizona law prohibits labor unions and corporations from making candidate-related political contributions or expenditures using treasury funds. However, as under federal law, an Arizona union or corporation is permitted to establish a PAC that may make political contributions and expenditures to the extent that salaried corporate employees and shareholders, or union members, "opt-in" to such political activity by contributing to the PAC. *See* Ariz. Rev. Stat. Ann. §§ 16-919, 16-920, and 16-921 (West 2006).

COLORADO. The Colorado Constitution prohibits unions and corporations from making contributions to candidates or political parties, and also prohibits unions and corporations from making expenditures or payments

for electioneering communication, using treasury funds.[1] A Colorado union or corporation is permitted to establish a PAC, which may accept "opt-in" contributions from employees, members and shareholders. COLO. CONST. art. XXVIII, §§ 3(4) and 6(2).[2]

INDIANA. Under Indiana law, though political contributions from individuals are unlimited, contributions from union and corporate treasuries are strictly limited. For example, a union may only contribute an aggregate of $5,000 apportioned in any manner among all candidates for state office, and an aggregate of $5,000 apportioned in any manner among all state political party committees. *See* Ind. Code Ann. § 3-9-2-4 (West 2006). However, a union or corporation may establish and pay the administrative costs of a PAC and encourage individuals to "opt-in" to supporting the PAC by voluntarily contributing to it. *See id*. at § 3-9-2-5(b). Unlike contributions

[1] The application of these state constitutional provisions were recently challenged on federal constitutional grounds by a nonprofit 501(c)(4) corporation that receives "approximately $50 of corporate funding per year." *Colo. Right to Life v. Davidson*, 395 F. Supp. 2d 1001, 1014 (D. Colo. 2005). The district court found that the plaintiff was entitled to an exemption from the state laws under this Court's decision in *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986). *Colo. Right to Life*, 395 F. Supp. 2d at 1014-15. The district court's decision in *Colo. Right to Life* is presently on appeal and has no bearing on the application of Colorado's "opt-in" requirement to labor unions.

[2] An administrative regulation promulgated by the Colorado Secretary of State, establishing procedures to implement the state law "opt-in" requirement for contributions by union members to a union political committee, was recently challenged on constitutional grounds and invalidated in *Sanger v. Dennis*, No. 06CA1944, 2006 Colo. App. LEXIS 1619 (Colo. Ct. App. Sept. 28, 2006). The lawsuit did not, however, challenge or impact the state constitution provisions referenced here.

from union and corporate treasuries which are strictly limited, contributions to candidates and parties from union and corporate PACs are unlimited.

MICHIGAN. Michigan prohibits unions and corporations from making political contributions and expenditures using treasury funds. *See* Mich. Comp. Laws Ann. § 169.254(1) (West 2006). Michigan law does permit a union or corporation to establish a PAC to engage in political spending, but further provides that a union may only finance such a PAC with "opt-in" contributions from members. *See id.* at § 169.255(1)-(4). Specifically, Michigan law provides that a union may solicit contributions from a member "on an automatic basis, including but not limited to a payroll deduction plan, *only if the individual* who is contributing to the fund *affirmatively consents* to the contribution at least once in every calendar year." *Id.* at § 169.255(6) (emphasis added).

MONTANA. Montana flatly prohibits labor unions from using agency shop fees to make political contributions. *See* Mont. Code Ann. § 39-31-402 (2006).

NORTH CAROLINA. The State of North Carolina prohibits labor unions and corporations from using treasury funds to make candidate-related contributions or expenditures. Unions and corporations may, however, establish PACs in order to make contributions and expenditures to the extent that individuals "opt-in" to financially supporting union and corporate political activities by contributing to such PACs. *See* N.C. Gen. Stat. § 163-278.19 (2006).

NORTH DAKOTA. North Dakota prohibits unions and corporations from using treasury funds to make contributions to candidates and parties. However, state

law permits unions and corporations to establish PACs for political purposes, which workers may "opt-in" to supporting by making contributions. *See* N.D. Cent. Code §§ 16.1-08.1-01(1), (4) and 16.1-08.1-03.3 (2006).

OHIO. Ohio law prohibits unions and corporations from using treasury funds to make political contributions or expenditures supporting or opposing candidates. *See* Ohio Rev. Code Ann. § 3599.03 (West 2006). A union or corporation may, however, establish a PAC and solicit "opt-in" contributions for such a PAC from members, employees, and shareholders; any deduction of political contributions from employee wages requires *written authorization* by the employee. *See id*. at §§ 3517.082 and 3599.031.

PENNSYLVANIA. Pennsylvania law prohibits unions and corporations from using treasury funds to make political contributions or expenditures, but permits such entities to establish PACs, which individuals may "opt-in" to supporting by making voluntary contributions. *See* Pa. Stat. Ann. tit. 25, § 3253 (West 2006); *see also id.* at tit. 43, § 1101.1701.

RHODE ISLAND. Rhode Island law prohibits unions and corporations from using treasury funds to make political contributions or expenditures, but permits such entities to administer "opt-in" payroll deduction schemes through which employees may voluntarily "opt-in" to making contributions to political committees and candidates. *See* R.I. Gen. Laws §§ 17-25-10.1(h) and 17-25-3(1) (2006).

SOUTH DAKOTA. South Dakota law prohibits unions and corporations from using treasury funds to make political contributions, but permits such entities to establish PACs, which individuals may "opt-in" to supporting by

making voluntary contributions. *See* S.D. Codified Laws §§ 12-25-1(1) and 12-25-2 (2006).

TEXAS. The State of Texas prohibits unions and corporations from using treasury funds to make contributions to or expenditures in support of candidates. Unions and corporations are, however, permitted to establish PACs, and may only solicit "opt-in" contributions to such PACs from members and employees. *See* Tex. Elec. Code Ann. §§ 253.094 and 253.100 (Vernon 2006).

WYOMING. Finally, Wyoming law prohibits unions and corporations from using treasury funds to make political contributions. Such entities may solicit "opt-in" contributions to a PAC for political purposes, but a union's use of any payroll deduction scheme for the making of such contributions requires the contributing individual to "*affirmatively consent[] in writing* to the contribution at least once in every calendar year." *See* Wyo. Stat. Ann. §§ 22-25-102(a) and (h) (2006).