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 *AMICI CURIAE* THE CATO INSTITUTE, REASON FOUNDATION, AND THE CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government and to secure those rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends the Institute and the Center undertake a wide variety of publications and programs. The instant case is of central interest to Cato and the Center because it addresses the further collapse of constitutional protections for the freedom to support speech and association voluntarily, and not as a result of state coercion, which lies at the very heart of the First Amendment.

Reason Foundation is a nonpartisan and nonprofit 501(c)(3) organization, founded in 1978. Reason's mission is to promote liberty by developing, applying, and communicating libertarian principles and policies, including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing *Reason Magazine*, as well as commentary on its website, reason.com, and by issuing policy research reports, which are available at reason.org. Reason also communicates through books and articles in newspapers and journals, and appearances at conferences and on radio and television. Reason's personnel consult with public officials on the national, state, and local level on public policy issues. Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues. This case involves a serious threat to freedom of speech and association – and con-

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

travenes Reason's avowed purpose to advance "Free Minds and Free Markets."

The Center for Individual Freedom (the Center) is a non-profit organization with the mission to investigate, explore, and communicate in all areas of individual freedom and individual rights, including, but not limited to, free speech rights, property rights, privacy rights, the right to bear arms, freedom of association, and religious freedoms. Of particular importance to the Center are constitutional protections for the freedom of speech, including each citizen's freedom from being compelled to support the speech of others.

STATEMENT

The State of Washington permits a union that negotiates an agency shop agreement with an employer to collect agency fees from nonmember employees at a level equal to the amount that members of the union pay as dues. RCW 41.59.060 & -.100. Such amount, however, represents more than just the pro-rata costs of collective bargaining, contract administration, and grievance adjustment, and includes the costs of political contributions and other non-germane activities that have nothing to do with the collective bargaining process and that are not "chargeable" to nonmembers. A nonmember employee of an agency shop previously could only recover such non-chargeable portion of their agency fee by annually objecting to that portion of the fee in response to a misdescribed so-called "*Hudson* packet" identifying the excess charges and giving the employee a limited opportunity to opt-out of such charges. That system effectively enabled the union to automatically take money to which it had no proper entitlement and then place the burden on the nonmembers of taking action to recover money that was rightfully theirs to begin with. The constitutionality of such a system is highly suspect and, in any event, is wholly inconsistent with the purposes for which agency fees are allowed at all.

Recognizing this profound, unfair, and potentially fatal, flaw in the agency-shop system, the people of Washington adopted by initiative a provision that forbids a union from using excess agency fees for political purposes without the affirmative consent of the nonmembers from whom the excess fees were taken. The relevant provision, RCW 42.17.760 ("§ 760"), provides:

> 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.

Instead of the opt-out system previously in effect, the law thus requires an "opt-in" system in order for the union to convert excess fees taken without employee consent into voluntary political contributions to the union.

Such an opt-in system for excess fees unrelated to the union's collective bargaining function basically requires the union to do what every other organization in the country must do when they seek contributions from nonmembers – it must get such strangers to affirmatively *make* such contributions. *See* Opinion Below ("Op.") ¶ 19 ("The plain language seems to indicate a nonmember must provide an expression of positive authorization. Failure to respond to the *Hudson* packet may be considered acquiescence, but it would not fulfill the affirmative authorization requirement. The difference is that affirmative authorization seems to indicate that the [non]member must say 'yes,' instead of failing to say 'no.'"). Nonmember authorization, however, need not be in writing, and any affirmative indication of consent to use the excess portion of the agency fee will suffice to allow the union to keep such portion of the fee. Op. ¶ 20 (§ 760 does "not require written authorization").

The decision below struck down the opt-in requirement of § 760 on the ill-conceived grounds that it abridged the First

Amendment rights of the union to engage in political association with nonmembers who simply fail to respond to the *Hudson* packet, and that any competing rights of dissenting nonmembers were adequately protected by the *Hudson* opt-out procedure, which served as a less restrictive means of protecting their rights without burdening the supposed First Amendment rights of the union. Op. ¶¶ 58-60.

While there are a plethora of conceptual and legal errors in the decision below, this brief will focus primarily on: (1) the unconstitutionality, at the outset, of exacting and keeping that portion of the agency fee that is admittedly not germane to collective bargaining activities and hence that does not advance the only state interests that justify agency fees in the first place; (2) the complete absence of any protected association between the union and *non*members who have not affirmatively and voluntarily entered into such an association; and (3) the inconsistent First Amendment standards applied by the court below when evaluating the rights of nonmember employees and the supposed rights of the union.

SUMMARY OF ARGUMENT

1. The exaction of agency fees in amounts exceeding the pro-rata costs of collective bargaining and germane related activities violates the First Amendment rights of employees who are not members of the union, regardless whether they have affirmatively demanded the return of monies unconstitutionally withheld. Agency fees are constitutional only because they serve an asserted state interest of fairly distributing the costs of collective bargaining and workplace representation to all employees (whether union members or not) who benefit from such activities. The corollary of that limited justification for agency fees is that where the fees admittedly include a component that is *not* germane to collective bargaining activities, such component may not be exacted from nonmembers of the union *at all* in that there is no state interest whatsoever supporting such excess fees.

The various opt-out procedures endorsed by this Court in the past relate to very different situations where either all employees were obliged to become members of the union, and hence it was impossible to distinguish whether any individual membership was voluntary or not, or the unions in question had *already excluded* all obvious non-chargeable expenses and reduced the agency fee at the front-end, and any remaining objections were to expenses the germaneness of which was at least fairly debatable. In those two situations, an opt-out remedy may well be appropriate and a presumption of dissent inappropriate. But here, where there is no dispute that the political expenditures at issue are not germane and not chargeable, and the opt-in requirement only applies to employees who are *not* members of the union and hence are not presumptively associated with the union, an opt-in procedure is constitutionally required.

2. In contrast to the clear First Amendment rights of nonmembers to remain silent and unassociated with the union's political activities, the union itself has no First Amendment right to extract excess agency fees and simply *presume* an expressive association with nonmembers who have conspicuously declined to join the union. While the court below based its new-found union rights on this Court's decision in *International Association of Machinists* v. *Street*, 367 U.S. 740 (1961), and related cases, the essential difference between those cases and the present case is that they involved *union* shops in which all employees were *members* of the union (albeit some unknown number of them involuntarily so), whereas in this case we have an *agency* shop that does not compel union membership and the opt-in requirement applies only to nonmember fees, not member dues.

While a presumption of protected free association may be appropriate as between a union and its *members*, and hence dissent should not be presumed as to such *members* even in a union shop environment, the exact opposite presumption should apply here. As to nonmembers, while the union has

the right to *solicit* their support, it has no claim to any protected actual association with them absent some affirmative action by the nonmembers themselves to associate with the union. Because § 760 does nothing more than require some minimal evidence of such voluntary association before a union may keep excess agency fees, it does not even remotely implicate, much less burden, any of the union's First Amendment rights.

3. Even assuming that § 760's opt-in requirement somehow implicates the union's First Amendment rights, the court below applied an improper double standard when evaluating the alleged abridgement of such rights as compared to the rights of nonmembers who desire to remain silent and unassociated with the union. In connection with both the claimed burdens on First Amendment rights and the potential availability of less restrictive means for advancing any valid state interests, the court below treated what are essentially two sides of the same coin in very different manners. That disparity in treatment yielded a result that both lacks internal coherence and is absurd on its face.

ARGUMENT

This case presents the question whether a union has the right to extract and keep, without affirmative consent from nonmembers, excess agency fees when it knows, *ex ante*, that a portion of those fees will go to non-chargeable, non-germane, expenses having nothing to do with collective bargaining, contract administration, or grievance procedures. The court below initially held that the so-called *Hudson* opt-out procedure used by the union was the *only* proper means of protecting nonmember employee First Amendment rights. The court then manufactured a diametrically opposed right of the union to charge nonmembers for non-germane activities and to presume that such nonmembers consented to those unconstitutional charges absent affirmative objection.

Based on the court's misconceptions regarding the First Amendment rights at issue, it concluded that this case involved "*competing* rights – the right to freely associate for the purpose of political speech and the right to be free from forced association – in the context of the political speech of labor organizations." Op. ¶ 29. In doing so it set up a false dichotomy, and sought to "strike[] a balance between those who disagree with the labor organization's political activities and those who support the political activities." *Id*.

Relying primarily on *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292 (1986), and *International Association of Machinists* v. *Street,* 367 U.S. 740 (1961), the court below erroneously determined that an "employee who is given a simple and convenient method of registering dissent has not been compelled to support a political cause and has not suffered a violation of his or her First Amendment rights." Op. ¶ 34. It then concluded that § 760 was unconstitutional because "the union's expressive activity is significantly burdened by § 760's opt-in requirement" and that "any compelling state interest in protecting dissenters' rights[] could be met by less restrictive means other than the § 760 opt-in procedure," such as the union's *Hudson* procedures, which "amount to a constitutionally permissible alternative that adequately protects both the union and dissenters." Op. ¶ 50.

The court's entire approach, however, stems from the false – in fact, absurd – premises that non-union employees have nothing more than a right to *dissent* from the union's use of portions of the agency fee that it should never have been allowed to charge in the first place, and that the union has a presumptive right to exact fees from nonmembers for nonchargeable expenses. No such right exists and, in fact, charging nonmembers for such known expenses is an unequivocal violation of the First Amendment.

Street and *Hudson* set the essential parameters and lay the foundation for how to deal with the rights of union members and nonmembers and teach that the court below got it exactly

backwards in this case because (1) it involves an agency shop, rather than a union shop, where an employee's voluntary association or non-association with the union can be seen from that employee's membership or lack thereof in the union, and (2) it involves a portion of fees that are, without dispute, not germane to the collective bargaining enterprise, yet there has been no prior effort to exclude that non-chargeable component of expenses from the amount of the agency fee at the outset. Only a deep misunderstanding, or a profound contempt, for the First Amendment could lead to the completely backwards conclusion that the union not only is *allowed* to extract and keep such excess fees having nothing to do with the interests supporting agency fees in the first place, but actually has a First Amendment *right* to keep such excess nonmember fees absent an affirmative objection made according to the narrow opt-out procedures.

I. The Decision Below Incorrectly Disparages the First Amendment Rights of Non-Union Employees.

Misunderstanding the teachings of this Court's decisions in *Hudson* and *Street*, the court below held that nonmembers' First Amendment rights relative to non-chargeable expenses unrelated to collective bargaining were limited to a narrow opportunity to opt-out of paying for such expenses on an annual basis. Op. ¶¶ 58, 60. But that approach ignores the very limited state interests that can justify agency fees in the first place, ignores the actual details of the process discussed in *Hudson* (under which clearly non-chargeable expenses were deducted in advance and the agency fee reduced accordingly), and ignores the very different context of *Street* (a *union* shop where all employees were forced to be union *members*, as opposed to an *agency* shop where union membership is not required).

The two essential facts of this case thus are (1) the opt-in requirement of § 760 applies only to such portion of the agency fee attributable to political activities that are *indis-*

putably non-germane and hence non-chargeable, unlike the portion of the fees at issue in *Hudson*, regarding which the union made a good faith assertion of their being germane to collective bargaining, and (2) the opt-in requirement here applies only to excess fees taken from *nonmembers* who, unlike the union members in *Street*, cannot be presumed to support the non-germane activities of a union they refuse to join. Such excess amounts should never have been included in the agency fee charged to nonmembers in the first place, and it mangles the First Amendment to place the burden of recovering such facially unconstitutional fees on the nonmembers from whom they were effectively stolen.

This Court's long line of cases regarding compelled support for union activities have identified only two related government interests that can justify the First Amendment burdens created by such compelled support. The first interest is the promotion of labor peace that is thought to stem from an increased use of collective bargaining and related contract administration and grievance procedures that apply to all employees, regardless whether they are union members. *See Hudson*, 475 U.S. at 302 n. 8; *Ellis* v. *Railway Clerks*, 466 U.S. 435, 455-56 (1984); *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 219 (1977). The second related interest is that of allowing unions to negotiate for a fair distribution of the *costs* of such collective bargaining and related procedures, which benefit all employees and hence should be borne by members and nonmembers alike – often referred to as eliminating the "free-rider" problem. *See Hudson*, 475 U.S. at 294-95; *Abood*, 431 U.S. at 221-22; *Street*, 367 U.S. at 761, 763.

Those are the sole interests that support the imposition of agency fees, and any agency fee arrangement must be narrowly tailored to such interests. *Abood*, 431 U.S. at 220, 237.[2] Excess agency fees that do not support collective bar-

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[2] *Cf. Street*, 367 U.S. at 767, 768 ("[I]t is abundantly clear that Congress did not completely abandon the policy of full freedom of choice embodied

gaining and related activities thus are not narrowly tailored to the state interests. In this case, the mere collection of that portion of the agency fee that represents expenditures for political activities rather than collective bargaining – the admittedly non-chargeable expenses – violates the First Amendment on its face, regardless whether employees are allowed to seek reimbursement by jumping through the former procedural hoops for opting out each year.

The court below effectively ignored the inherent limits on the exaction of agency fees by claiming that "there is no compelled support if the union utilizes the *Hudson* procedures" and hence there is no "governmental interference with First Amendment rights of nonmembers for § 760 to protect against." Op. ¶ 48. That reasoning badly misreads this Court's decision in *Hudson*, ignores this Court's teachings that the exaction of agency fees creates a First Amendment burden regardless whether such burden is outweighed by narrowly defined state interests, and ignores that here there is no state interest whatsoever to support even the initial collection of a plainly non-chargeable component of the agency fee.

A proper reading of *Hudson* demonstrates not only that the court below misunderstood that case, but also shows that the political spending component of the agency fee should never have been collected at all.

In *Hudson*, the Illinois law under review allowed the union to charge only "proportionate share payments" as an

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in the 1934 Act, but rather made inroads on it for the *limited purpose* of eliminating the problems created by the 'free rider.'"; The power given to unions to spend exacted money is not "unlimited," and "[i]ts use to support candidates for public office, and advance political programs, is not a use which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes. In other words, it is a use which falls *clearly outside the reasons* advanced by the unions and accepted by Congress *why authority to make unionshop agreements was justified*.") (emphasis added).

agency fee from nonmembers, and specified that such payment amounts "could not exceed the members' dues." 475 U.S. at 295. Consistent with the cost-sharing and free-rider justifications for the agency fee, the union "identified expenditures unrelated to collective bargaining and contract administration," calculated the percentage of such unrelated expenditures relative to its total expenditures, and set the agency fee at 95% of the amount of union dues. *Id*. Only *after* deducting all plainly non-chargeable amounts off the top did the union's procedure for objecting to the remaining, presumptively chargeable, fee kick in. *Id*. at 296. Furthermore, any subsequent successful objections to items included in the fee calculation resulted in "an immediate reduction in the amount of future [fees] for all nonmembers and a rebate for the objector." *Id*.

On a subsequent legal challenge to the procedures adopted by the union, the district court upheld those procedures in part because, *inter alia*, the fee charged "represented a good-faith effort by the Union" to calculate a proper fee. *Id*. at 298. The Seventh Circuit reversed and struck down the procedures as insufficiently protective of nonmember rights not to be compelled to subsidize union activities that were not germane to the collective bargaining process. *Id*. at 299.

This Court affirmed the Seventh Circuit, finding the procedures constitutionally inadequate. Based on its earlier decision in *Ellis*, this Court held that a "'pure rebate approach is inadequate'" because the union was not entitled to an "'involuntary loan'" and there were "'readily available alternatives, such as *advance reduction of dues* and/or interest-bearing escrow accounts.'" *Hudson*, 475 U.S. at 303-04 (quoting *Ellis*, 466 U.S. at 443-44) (emphasis added). This Court further held that "'the Union 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.'" 475 U.S. at 304 (quoting *Abood*, 431 U.S. at 244 (Stevens, J., concurring)).

Hudson concluded that even the advance reduction of dues, without the necessity of prior objection by nonmembers, was constitutionally inadequate because it did not provide nonmembers with sufficient information about what other charges were *included* in the fee calculation as supposedly germane to collective bargaining. 475 U.S. at 306. The problem even with the advance reduction in fees thus was that it did not go *far enough* in that it only "identified the amount that it admittedly had expended for purposes that did not benefit dissenting nonmembers," and provided no information that would enable nonmembers to challenge allegedly germane expenditures that *were* included as part of the fee. *Id*. at 307. "An acknowledgment that nonmembers would not be required to pay any part of 5% of the Union's total annual expenditures was not an adequate disclosure of the reasons why they were required to pay their share of 95%." *Id.* (footnote omitted).

Because "the agency shop itself is 'a significant impingement on First Amendment rights,' *Ellis*, 466 U.S., at 455, the government and union have a responsibility to provide procedures that minimize that impingement * * *." *Hudson*, 475 U.S. at 307 n. 20; *id*. (procedures failed to fulfill the union's front-end obligation "to minimize the risk that nonunion employees' contributions might be used for impermissible purposes," and "failed to provide adequate justification for the advance reduction of dues"). This Court concluded that the Constitution required, among other things, "an adequate explanation for the advance reduction of dues," and a prompt and impartial procedure for challenging the union's claims that the remaining *reduced* fee represents only properly chargeable expenses. 475 U.S. at 309; *id*. at 310 (describing "constitutional requirements" for collection of agency fee).

In that context this Court's comment regarding the nonmember's "burden of raising an objection" takes on a very

different meaning – it is a burden of challenging portions of the fee that the union in good faith claims are indeed chargeable, not the burden of challenging amounts that are indisputably *not* chargeable. Quoting *Abood*, this Court in *Hudson* reiterated

> "that the nonunion employee has the burden of raising an objection, but that the union retains the burden of proof: ' "Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion." ' *Abood*, 431 U.S., at 239-240, n. 40, quoting *Railway Clerks* v. *Allen*, 373 U.S. 113, 122 (1963)."

Hudson, 475 U.S. at 306 (footnote omitted). "[B]ecause the agency shop itself impinges on the nonunion employees' First Amendment interests, and because the nonunion employee has the burden of objection," the "appropriately justified *advance reduction* and the prompt, impartial decisionmaker are *necessary* to minimize both the impingement and the burden." *Id.* at 309 (footnote omitted).

Hudson thus makes clear that an advance reduction of the agency fee to exclude non-chargeable expenses was necessary, but not sufficient, and that the *nonmember's* burden of objection to an agency fee arises only *after* the initial deduction of expenses that are plainly not related to collective bargaining. While a nonmember may have the burden of initiating a challenge to parts of the fee included in good faith, it is the *union* that bears the initial burden of removing obviously non-chargeable amounts from the fee before it is even exacted.

The perversely-named *Hudson* procedures that previously existed in Washington, and that the court below imagined adequate to protect nonmember rights, do not even remotely satisfy *Hudson*'s constitutional requirements because they

required no advance reduction of obviously non-chargeable amounts for political activities and placed the burden on nonmembers to object to such facially improper charges. Section 760's opt-in procedure does nothing more than partially restore the safeguards discussed in *Hudson* itself by requiring a deduction of non-chargeable amounts absent a voluntary and affirmative contribution of such amounts by the nonmembers.

Rather than properly enforcing the requirements of *Hudson*, the court below relied on this Court's decision in *Street*, handed down a generation earlier, for the propositions that the interests of both the union and the dissenters must be protected "'to the maximum extent possible without undue impingement of one on the other,'" and that "dissent is not to be presumed – it must be affirmatively made known to the union by the dissenting employee." Op. ¶ 32 (quoting *Street*, 367 U.S. 773-74).

The court's reliance below on *Street* fails to recognize the different context of that case and the unusual difficulties this Court was trying to avoid therein. Unlike this case, *Street*, arose in the context of a *union*-shop agreement, where all employees were required to *join* the union, 367 U.S. at 749, as opposed to an *agency*-shop agreement where employees have the option of merely paying agency fees *without* joining the union.

The challenge in *Street* was brought by certain (apparently involuntary) union members who objected to the union spending their coerced dues on political activities. The obvious dilemma in *Street*, of course, was that because *all* employees were union members, it was difficult or impossible to tell which members had joined voluntarily and which had been coerced by the union shop agreement. It was that inability to distinguish between voluntary and involuntary union members, and the apparent (and likely accurate) assumption that most union members had joined of their own accord, that led

this Court to place the burden of dissent on the union *members*.[3]

But *Street*'s concern for the expressive interests of the union and its *voluntary members* has no applicability in *this* case given that § 760 does not apply to the use of union membership dues, but only to the use of nonmember agency fees. Such nonmembers – persons who have not, by definition, voluntarily associated with the union – are easily and properly distinguished from union members whose associational rights *inter se* are entirely unaffected by § 760. Unlike in *Street*, there is no need here for involuntary payors to raise their hands and object in order to separate themselves from the majority of voluntary union members – they are readily distinguished by their nonmembership. A presumption that they object to associating with the union for political purposes is entirely justified by their decision not to join the union, and such a presumption in no way burdens those whose support for the union can be presumed by the fact of their voluntary membership.[4]

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[3] And, even so, such burden-shifting language was actually *dicta*, given that the *Street* case was brought by union members who had in fact actively dissented, 367 U.S. at 768, and hence this Court had no proper occasion to comment on the rights or obligations of persons who had not so dissented, but merely preferred silence.

[4] The court below also relies on *Abood* for the proposition that "the burden is on the employee to make his objection known." Op. ¶ 33. (citing 431 U.S. at 235-36). *Abood* held no such thing, however, and later, 431 U.S. at 237-40, merely described the holdings of *Street* and *Railway Clerks* v. *Allen*, 373 U.S. 113 (1963), both of which involved union shops, not agency shops. What *Abood* did hold was that the nonmembers had a constitutional right to "prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." 431 U.S. at 234. As for what remedy should be crafted to protect nonmembers, the court did not adopt the *Street* procedure but rather left the question unresolved, a point emphasized by Justice Stevens in his concurrence. *See* 431 U.S. at 242 n. 45 ("We express no view as to the constitutional sufficiency of the internal remedy described by the appellees."); *id*. at 244

The court's reliance below on *Street* and *Hudson* for the conclusion that the opt-out "approach accommodates the dissenting nonmember by providing an easy and prompt method of registering his or her objection and recouping any portion of fees which might otherwise be used by the union for political purposes," Op. ¶ 29, simply ignores the burden such an approach places on nonmember employees of having to recoup money that should never have been taken from them in the first place, ignores *Hudson*'s holding that a pure rebate approach is inadequate, 475 U.S. at 303-05, and utterly fails to accommodate the employee who would prefer to remain silent but instead is compelled to affirmatively repudiate the union and thus publicly take a stand in a workplace environment that is, by definition, already hostile to the nonmember employee. *Cf. Hurley* v. *Irish-American Gay, Lesbian, & Bisexual Group*, 515 U.S. 557, 575 (1995) ("whatever the reason" for parade organizers not wanting to include a particular viewpoint in their parade, "it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control").

By setting up a false dichotomy between nonmembers who silently *support* the union's political speech and those who *dissent*, the court below effectively denigrates those who

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(Stevens, J., concurring) ("By joining the opinion of the Court, including its discussion of possible remedies, I do not imply nor do I understand the Court to imply that the remedies described in [*Street* and *Allen*] would necessarily be adequate in this case or in any other case. More specifically, the Court's opinion does not foreclose the argument that the Union 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."). The proper procedures for protecting nonmember rights were subsequently outlined in *Hudson*, discussed in detail above, and hence any mere implications the court below seeks to draw from *Abood*'s description of prior cases was plainly superseded by the holding in *Hudson*.

would simply prefer to exercise their right to silence *per se*. The proper inference from silence is *neither* assent to, nor dissent from, the union's political activities, but rather that silence is simply silence – the *absence* of speech and the *absence* of association. To the extent that silence in response to the *Hudson* packet represents a choice, it is the choice not to speak at all, to neither affirmatively associate nor affirmatively disassociate from the union, which is a choice equally protected by the First Amendment.

In the end, not only is an opt-in requirement, at a minimum, a *permissible* obligation to impose on the union relative to obviously non-germane fees, it in fact may be *insufficient* to protect nonmembers from paying such excess agency fees because the First Amendment forbids even the initial *collection* of such amounts in the first place.

II. The Union Has No Competing Associational Rights Relative to Nonmembers Who Have Not Elected to Associate with It.

Having substantially understated the nonmembers' First Amendment rights and protections, the court below then manufactured a supposedly competing union right to tax and spend such excess agency fees absent affirmative dissent from nonmembers. According to the court below, this Court supposedly "has held that a union has the right to use nondissenting nonmember fees for political purposes." Op. ¶ 47 (citing *Abood*, 431 U.S. at 240; *Allen*, 373 U.S. at 122). The court below inferred therefrom that a "presumption of dissent violates the First Amendment rights of both members and nonmembers." Op. ¶ 37.

But this Court has held no such thing regarding *nonmembers* of a union, and that manufactured right dramatically misunderstands *Street* and its brethren and the fact that those cases dealt with a union shop in which *all* employees were union members and there was no facial means of distinguishing voluntary members from involuntary ones absent an ex-

pression of dissent. *Street*'s concern with the expressive rights of the majority of (voluntary) union members stemmed precisely from that inability to identify the involuntary members without their speaking up, and, combined with *Hudson*, *Street* teaches the exact opposite lesson when dealing with nonmembers.

In contrast to the situation in *Street*, the statute here deals with *agency* shops, the employees protected by § 760 are all nonmembers, and there is no possibility whatsoever of intruding on the association rights of the union and its voluntary *members*. Whatever association rights a union has relative to its members, it has no such rights vis-à-vis employees who have conspicuously declined to join the union. The union is not entitled to any presumption of *assent* to its political use of excess agency fees that were compelled from the nonmembers and that are thus quite unlike potentially voluntary union dues. In *Street*, any remedy that applied *ex ante* to all union members would indeed burden the rights of voluntary members and the union, and placing the burden on dissenting union members would seem a simple matter of necessity given the difficulty of distinguishing voluntary from involuntary members.[5] In this case there is simply is no comparable diffi-

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[5] Precisely because compelled membership, as opposed merely to compelled support, clouds the question of free association for purposes other than collective bargaining, one wonders whether union-shop arrangements are indeed constitutional. While *Hanson* and *Street* are often read as endorsing the constitutionality of union shop arrangements, this Court in *Abood* observed that "*Hanson* was concerned simply with the requirement of financial support for the union, and did not focus on the question whether the additional requirement of a union-shop arrangement that each employee formally join the union is constitutionally permissible. See *NLRB* v. *General Motors*, *supra*, 373 U.S. at 744 ('Such a difference between the union and agency shop may be of great importance in some contexts . . .') * * *. As the agency shop before us does not impose that additional requirement, we have no occasion to address that question." 431 U.S. at 217 n. 10. The questionable validity of compelling union *membership* casts doubt on *Street*'s concern for protecting the association rights of voluntary union members. Surely a less restrictive means of pro-

culty given that § 760 does not apply to union *members* at all. And nonmembers, of course, have plainly manifested their unwillingness to associate with the union by the simple fact that they have not joined the union. *Res ipse loquitur*.

Far from supporting union First Amendment rights relative to nonmembers, *Street*'s reasoning amply demonstrates the *absence* of such rights as to nonmembers.

Beyond its misreading of *Street*, the court below makes the bold and utterly false leap of logic that simply because the union *spends* agency fees on political activities, § 760 therefore "regulates the union's expressive association with agency fee payers." Op. ¶ 54 (citation omitted). But spending someone else's money on politics does not, by itself translate into political association. A thief who steals my wallet and then contributes the money to a political cause has not thereby entered into an "expressive association" with me; at least not a protected one. And the situation is no different here. (The fact that the union gives nonmembers a limited opportunity to object to such theft after it has already begun hardly makes it permissible in the first instance.) Any protected "expressive association" has to be bilateral, with members (or contributors) and groups affirmatively accepting each other as associates. Coerced association of nonmembers does not create "free" association with the union. And, given that silence is as valid a First Amendment option for an individual as assent or dissent, any cogent First Amendment theory must place the burden of demonstrating "association" where it belongs – on the party claiming association.

The court's further reliance below on the fact that the underlying agency-fee statute gives the union initial "possession" of excess agency fees, Op. ¶¶ 56-57, simply misses the

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tecting the rights of both voluntary and involuntary members would be to use an agency shop rather than a union shop arrangement, whereby the difficulties of an overbroad restriction would be eliminated and the mere decision *not* to join the union would constitute dissent enough from compelling non-germane fees.

point. Even a statute granting such initial union possession of facially non-chargeable fees is itself unconstitutional as it fails to satisfy *Hudson's* "advance reduction" requirement. 475 U.S. at 303-04. Furthermore, even were such an initial overcharge a permissible, it still would not give the union any First Amendment rights to keep the money or to *presume* nonmember consent for such contributions. Mere initial possession in this context thus is no indication of any right or interest in the money – and the fact that nonmembers can opt out at all shows such excess amounts are not the union's money at all. The *timing* of the exercise of ultimate control cannot change ownership or give the union First Amendment rights it does not otherwise have.[6]

Aside from the fact that the union has no right to excess agency fees and no protected association with nonmembers absent their consent, it is also apparent that § 760 does not have the slightest chance of causing the majority to be "'silenced by the dissenters,'" Op. ¶ 31 (quoting *Street*, 367 U.S. at 773), because the majority – in this case the union members – remain free to pool their dues for whatever purpose they like. Section 760 does not silence the union or its membership, it merely denies them the use of *additional* monies that do not belong to them and which have not been freely given to them. This case thus does not involve the situation in *Street* where the interests of both the union and the dissenters must be protected "'to the maximum extent possible without undue impingement of one on the other.'" Op. ¶ 32 (quoting *Street*, 367 U.S. 773-74). Rather, § 760's opt-in requirement

[6] Furthermore, the initial agency-fee statute cannot be read alone, but must be read together with § 760, which negates the union's supposed rights absent nonmember consent. If the initial statute instead limited the union to exacting only chargeable expenses at the front end and then established a check-off option for the contribution of additional fees, the court's argument would be nonsensical. The fact that Washington does the same thing in a different order cannot change the constitutional analysis of excess fees to which the union has no entitlement in the end.

imposes no burden at all on the only valid association that exists – the association between the union and its members.

Similarly, any suggestion that the opt-in requirement burdens the union's rights to *solicit* the association of nonmembers is no less than Orwellian. Every association throughout society generally bears the burden of soliciting membership or contributions and of obtaining the affirmative consent of those being solicited. In this case, the union has already been given an unusual advantage in aid of their solicitation function by being given the contributions of nonmembers up front, rather than having to obtain affirmative action in the form of a donation. That they have to obtain some *affirmative* indicia of consent in order to keep the money they have thus extracted hardly places them at a disadvantage relative to the baseline faced by every other entity soliciting funds; it simply fails to give them the *further* advantage of a *presumption* of consent that does not operate in any other analogous circumstance. The State is under no obligation, constitutional or otherwise, to affirmatively facilitate the union's fundraising activities to give them greater advantages than all other associations. And the fact that they may have had such a greater advantage in the past (though it was unconstitutional), hardly gives them a claim of right to such special advantage when the State pares back on its gift.

Any union right to solicit contributions thus is not in the least bit implicated by § 760, except to the extent that the usual and ordinary burdens of such solicitation are in fact greatly reduced by the State when it authorizes excess agency fees at all, regardless whether there is opt in or opt out. The State has no duty to minimize union fundraising or solicitation costs, and it is certainly not imposing any unique costs on unions relative to what they would face were they left to their own devices without the State acting to withhold agency fees on their behalf. Such ordinary burdens and costs of solicitation are inherent in the very notion of "free" association, and

are a necessary corollary of the individual's liberty to enter into associations or not as he sees fit.[7]

While the union certainly has a right to solicit nonmembers, it does not have a right to *presume* nonmembers' desire to contribute without any response to its solicitation at all. A contrary rule would just be a perversion of the First Amendment.

Just as there is no burden on the union's right to solicit, neither is there any burden on a nonmember's right to contribute. Requiring nonmembers who wish to contribute to the union to affirmatively do so does not assume that nonmembers "disagree[]" with or "object[]" to the union's political activities, Op. ¶¶ 26, 39; it makes no assumption other than that it is the nonmember who should decide whether to *part* with his or her money. Whatever the reason for a nonmember failing to affirmatively contribute to the union – whether because of disagreement, disinterest, or ambivalence – such inaction properly defaults to the benefit of the individual, not the union, given that the agency fee is coerced to begin with. An expectation that contributions involve an affirmative choice does not create a burden on the right to contribute, it simply seeks minimal evidence of a desire to contribute, particularly in the context of nonmembers who have refused to otherwise associate with the union by becoming members.

With the court below having already claimed that the opt-out procedure used by the union creates no burden whatsoever on nonmembers who do not wish to support the union's non-germane political activities, it is simply inexplicable for the court to hold that the precise converse of that procedure is too burdensome. Op. ¶¶ 37-38. That holding is particularly

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[7] To suggest that the ordinary incidents of solicitation that operate in every other context is a state-imposed burden on association rights gets the cart before the horse. There simply is no association at all until a nonmember has chosen to associate with the union, either by joining or by making a voluntary contribution.

strange given that it is far easier to opt in than to opt out. The opt-in decision need not be in writing, may be done at any time, and apparently need only be done once, not every year. The opt-out decision, however, must be in a written response to the *Hudson* packet, must be done within a narrow window of time, and must be repeated every year. Under such circumstances, it is absurd to claim that it is a greater burden for secretly supportive nonmembers to opt in to support for union political activities than it is for nonmembers who would prefer to remain silent and unassociated with the union to opt out.[8]

Finally, the suggestion that the union's previous opt-out procedures are constitutionally sufficient less restrictive alternatives for protecting nonmembers *assumes* that the union's rights are implicated in the first place and hence entitled to the benefit of such alternatives, and assumes the sufficiency of the prior opt-out procedures, which, as discussed in Part I, fail to satisfy the constitutional requirements set out in *Hudson*.[9]

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[8] The court's related suggestion, Op. ¶ 29, that the opt-out approach "makes it simple for one who supports the political causes of the union, whether member or nonmember, to assert his or her right of association," ignores the fact that nonmembers have no right to such simplified procedures – which reduce the inherent costs of ordinary solicitation and response, in effect subsidizing the union's political fundraising efforts – ignores the precisely parallel increase in difficulty opt-out creates for employees wishing to remain silent or unaffiliated (which *is* a matter of right).

[9] The court's reliance on *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000), which addressed control over membership, not relations with nonmembers, is particularly inapt in this case as, contrary to the claim below, § 760 does not "regulate[] the relationship between the union and agency fee payers with regard to political activity," Op. ¶ 50, because there is no *relationship*. The Boy Scouts asserting their own right to control membership is one thing, but one can hardly assert a right to presume everyone else in the world is a member unless they opt out.

If the court had given as much attention to the less restrictive alternatives for *protecting* nonmembers who have not consented to excess agency fees as it gave to imagining the need for alternatives to protect nonexistent union rights, it would have recognized that the opt-in procedure of § 760 *is* a less restrictive alternative *for nonmembers* – in that it reduces the burden of agency fees on their First Amendment rights and has no impact whatsoever on the State interest in collective bargaining or avoiding free riders. That is the proper analysis relevant to this case, not an attempt to protect a union's ability to keep coerced contributions to its political fund.

CONCLUSION

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

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