No. 05-1657

In The
Supreme Court of the United States

STATE OF WASHINGTON,

Petitioner,

v.

WASHINGTON EDUCATION ASSOCIATION,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Washington

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the requirement in Wash. Rev. Code § 42.17.760 that nonmembers must affirmatively consent (opt in) before their fees may be used to support the union's political agenda violate the union's First Amendment rights?

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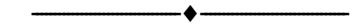
AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief in support of Petitioner. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all the parties.[1]



IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every State of the Nation, including Washington.

MSLF has actively litigated a number of cases involving questions of constitutional law and preservation of individual rights, including *Concrete Works of Colorado, Inc. v. City and County of Denver, Colorado*, 540 U.S. 1027 (2003) (*certiorari* denied); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001) (*certiorari* dismissed as improvidently granted); *Adarand Constructors, Inc. v. Slater*,

[1] Copies of Petitioner's and Respondent's consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

528 U.S. 216 (2000); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

OPINIONS BELOW AND JURISDICTION

Amicus hereby adopts Petitioner's description of the opinions below and statement of jurisdiction. Petition at 1-14.

STATEMENT OF THE CASE

Pursuant to Washington statute, public educators who choose not to belong to the Washington Education Association ("WEA") must, nonetheless, pay "agency shop fees," equivalent to the "dues" paid by union members, in exchange for the collective bargaining service provided by the WEA. Wash. Rev. Code § 41.59.100; Wash. Rev. Code § 41.56.122. *Washington v. Washington Education Association*, 130 P.3d 352, 354 (Wash. 2006). In addition to its collective bargaining activities, however, the WEA also supports political and ideological causes. *Id*. Therefore, to protect the rights of fees-paying nonunion members ("nonmembers"), the voters of Washington passed Wash. Rev. Code § 42.17.760, which 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.

Wash. Rev. Code § 42.17.760 (emphasis added). Thus, in Washington, it is not a nonmember's responsibility to opt out of the WEA's political activities; instead, it is the responsibility of the union to convince each nonmember to opt in, thereby allowing the WEA to use the nonmember's fees for political purposes.

The WEA does not, however, acquire the affirmative authorization of nonmembers before those nonmembers fees are used for political purposes. Instead, it merely sends each nonmember a "*Hudson* packet" (*see Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986)) twice a year and assumes that nonmembers consent to the WEA using their fees for political purposes unless they affirmatively opt out. In a challenge to the WEA's failure to obtain the affirmative authorization of nonmembers, the Supreme Court of Washington held that Wash. Rev. Code § 42.17.760 violates the WEA's First Amendment rights. *Washington*, 130 P.3d 352.

SUMMARY OF THE ARGUMENT

The Washington statute at issue, Wash. Rev. Code § 42.17.760, is constitutional because it meets or exceeds the minimum nonmember protections mandated by the Constitution, and does not infringe upon the constitutional rights of the WEA or supporting nonmembers. The Washington Supreme Court misconstrued this Court's precedent when it held that "dissent is not to be presumed" in any circumstance. *Washington*, 130 P.3d at 358-59. Instead, this Court's precedent reveals that an opt-out policy is all that is required to protect nonmembers' First Amendment

rights, but that states may enact laws to further protect individual rights of speech and association.

By enacting Wash. Rev. Code § 42.17.760, Washington permissibly provided additional protection of individuals' speech and association rights, without infringing in any way on the rights of the WEA or supporting nonmembers. In fact, opt-in procedures, such as those mandated by Wash. Rev. Code § 42.17.760, are necessary to protect dissenting nonmembers' First Amendment rights. This Court should hold that Wash. Rev. Code § 42.17.760 is constitutional and that its opt-in requirements are necessary to protect First Amendment rights.

ARGUMENT

I. THIS COURT'S PRECEDENT REVEALS THAT AN OPT-OUT PROCEDURE IS THE MINIMUM STANDARD FOR PROTECTING NONMEMBERS' FIRST AMENDMENT RIGHTS, THOUGH STATES MAY FURTHER PROTECT NONMEMBERS' SPEECH AND ASSOCIATION RIGHTS.

It is the right of "every citizen to believe as he will and to act and associate according to his beliefs. . . ." *Abood v. Detroit Board of Education*, 431 U.S. 209, 243 (1977) (Rehnquist, J., concurring). This freedom of association includes the converse right not to be compelled to associate. *Minnesota State Bd. For Community Colleges v. Knight*, 465 U.S. 271, 310 (1984). Therefore, it is clear that the First Amendment protects nonmember public educators against compelled subsidization of a union's political activities. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507,

522 (1991). To protect this individual right, this Court has held that the Constitution prohibits unions from using the fees of objecting nonmembers to fund political activities. *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 306-09 (1986); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 774 (1961).

This standard merely provides a minimum level of constitutional protection for First Amendment rights, and States have the power to provide greater protection of speech and non-associational rights than is required by the First Amendment. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578-79 (1977) (A state may provide additional protections to the freedom of speech than are mandated by the Constitution.); *see also California v. Ramos*, 463 U.S. 992, 1013-14 (1983); *Brigham City, Utah v. Stuart*, ___ U.S. ___, 126 S.Ct. 1943, 1950 (2006) (Stevens, J., concurring). Indeed, this Court explicitly authorized states to provide protections that are "stricter than the federal baseline." *Kelo v. City of New London, Conn.*, 545 U.S. 469, 125 S.Ct. 2655, 2668 (2005). With Wash. Rev. Code § 42.17.760, the State of Washington did just that; the statute exceeds the constitutionally required protections of nonmembers' speech and non-associational rights by requiring each nonmember to "affirmatively authorize[ ]" the union to spend his agency fees for political purposes. Wash. Rev. Code 42.17.760.

In its analysis of Wash. Rev. Code § 42.17.760, the Supreme Court of Washington misconstrued this Court's precedent. The Court cited *Street, Brotherhood of Railway and Steamship Clerks v. Allen*, 373 U.S. 113 (1963), and Abood for the proposition that opt-out procedures were, in fact, "*constitutionally required* to safeguard the First

Amendment rights of . . . dissenting employee[s]." *Washington*, 130 P.3d at 359 (emphasis added). In the Washington Supreme Court's view, apparently, no more and no less protection of individual rights is permitted because the opt-out procedure perfectly balances the First Amendment rights of both individual nonmembers and the union itself. *Id*. at 358-61. The Supreme Court of Washington then used this theory to justify its conclusion that Wash. Rev. Code § 42.17.760, which requires nonmembers to opt-in before their fees are used for political purpose, is unconstitutional. *Id*. at 360-61.

This Court's precedent reveals, however, that an opt-out policy is merely a minimum constitutional standard for protecting the speech and non-associational rights of individuals. First, in *Abood*, a group of teachers sued their union for spending their dues for political purposes that they opposed in violation of their right to free association. 431 U.S. 209. To protect their freedom of association, this Court concluded, "the Constitution requires *only* that [a union's political expenditures] be financed . . . by employees who do not object to advancing those ideas. . . ." *Id*. at 235 (emphasis added). The use of the word "only" implies that other procedures that provide additional protection are permissible, though not necessarily required, by the Constitution.

This interpretation comports with this Court's construction of *Abood* in *Ellis* in which this Court wrote that the union cannot, "consistently with the Constitution," use objectors' fees for political purposes. *Ellis v. Brotherhood of Railway, Airline, and Steamship Clerks, Freight Handlers, Express and Station Employees*, 466 U.S. 435, 447 (1984). Indeed, the Court pointed out that in *Street*, *Allen*, and *Abood*, the Court "did not, nor did they purport to, pass

upon the statutory or constitutional adequacy of the suggested remedies." *Id*. at 443. To be sure, rather than requiring a specific procedure, this Court explicitly permitted the union in *Abood* to implement its own internal procedures, so long as the constitutional minimums were satisfied, to protect the rights of dissenters.[2] *Abood*, 431 U.S. at 242.

Subsequently, in *Hudson*, nonmembers objected to the union's procedures through which fees were deducted from their salary to finance political activities. *Hudson*, 475 U.S. at 297. The primary issue in *Hudson* was whether the union's procedure "was constitutionally sufficient." *Id*. at 304. This Court held, *inter alia*, that an opt-out procedure that placed the burden of objection on the objecting nonmember sufficiently protected the nonmember's First Amendment rights. *Id*. at 306. Notably, however, this Court did not hold that a State could not provide greater protection for nonmembers' speech and non-associational rights. Indeed, this Court has never invalidated such a procedure on grounds that it provided too much protection to dissenting nonmembers, thereby infringing on a union's rights. Therefore, this Court's precedent indicates that an opt-out procedure is the constitutionally required minimum standard for protecting nonmembers' rights and that States are free to provide additional protection.

[2] This Court "express[ed] no view as to the constitutional sufficiency of the internal remedy . . . *Abood*, 431 U.S. at 242 n.45.

II. AN OPT-IN POLICY DOES NOT INFRINGE UPON THE FIRST AMENDMENT RIGHTS OF EITHER THE WEA OR THE SUPPORTING NONMEMBERS.

Though a State is free to adopt statutes that provide greater protections of nonmembers' rights than is required by the Constitution, *see, e.g., Zacchini*, 433 U.S. at 578-79, a State may not do so if it infringes upon the constitutional rights of others. *See, e.g., Thomas v. Collins*, 323 U.S. 516 (1945) (A State statute was unenforceable because it infringed upon First Amendment rights). It is clear that unions have a First Amendment right to express their political views. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Street*, 367 U.S. at 773. It is equally clear that individuals have the right to express their political support for a political cause through a monetary contribution. *Buckley v. Valeo*, 424 U.S. 1 (1976).

The Washington Supreme Court concluded that Wash. Rev. Code § 42.17.760 impermissibly burdens these First Amendment rights. *Washington*, 130 P.3d at 364. In reality, though, it protects dissenting nonmembers' rights without any infringement upon the union's or the supporting nonmember's First Amendment rights.

This Court has held that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 549 (1983). Instead, First Amendment rights are violated when views are "silenced." *Street*, 367 U.S. at 773. This Court had the opportunity to determine whether certain administrative burdens constituted an infringement upon a group's First Amendment rights in *Federal Election Commission v. Massachusetts Citizens For Life, Inc.*, 479 U.S. 238 (1986). In that case a

nonprofit corporation argued that its First Amendment rights were violated by the Federal Election Campaign Act ("FECA"), which required corporations to adopt burdensome administrative procedures prior to any political advocacy in connection with a federal election. *Id*. These mandatory administrative procedures included, *inter alia*:

(a) The establishment of a separate segregated fund for political purposes;

(b) The appointment of a treasurer, who must be provided with any private donations within 10 or 30 days of receipt (depending on the amount of the contribution);

(c) The recordation of every contribution regardless of amount, the name and address of any person who makes a contribution in excess of $50, all contributions received from political committees, the name and address of any person to whom a disbursement is made regardless of amount, and receipts for all disbursements over $200;

(d) Filing a statement of organization containing the corporation's name, address, the custodian of records, its banks, safety deposit boxes or other depositories;

(e) Filing a report detailing any change made regarding any of the information in (d), above, within 10 days of the change;

(f) A requirement that solicitations for contributions are limited only to members.

(g) Filing monthly reports with the Federal Election Commission or reports on a particular schedule containing:

1) The amount of cash on hand;

2) The total amount of receipts, detailed by 10 different categories;

3) The identification of each political committee and candidate's authorized or affiliated committee making contributions, and any persons making loans, providing rebates, refunds, dividends, or interest or any other offset to operating expenditures in an aggregate amount over $200;

4) The total amount of all disbursements, detailed by 12 different categories;

5) The names of all authorized or affiliated committees to whom expenditures aggregating over $200 have been made;

6) Persons to whom loan repayments or refunds have been made;

7) The total sum of all contributions, operating expenses, outstanding debts and obligations, and the settlement terms of the retirement of any debt of obligation.

Id. at 253-54.

This Court concluded that the nonprofit corporation "may be unable to bear" these administrative burdens, which may "vastly reduce[ ] the sources of funding. . . ." *Id.* at 254. As a result, this Court held that the statute was unconstitutional.

In sharp contrast to the onerous burdens imposed by the FECA, Wash. Rev. Code § 42.17.760 merely requires

that the union obtain affirmative authorization from each nonmember prior to using a nonmembers' fees for political objectives. To satisfy this modest requirement, the union has two basic options, neither of which would effectively "silence" the union.

First, the WEA could circumvent the administrative costs associated with seeking affirmative authorization from nonmembers by automatically refunding to each nonmember the portion of his fees that would have been used for political purposes. This process would avoid what the Washington Supreme Court referred to as the "extremely costly" administrative burdens associated with seeking affirmative authorization. *Washington*, 130 P.3d at 360. In so doing, the administrative burdens on the WEA would be inconsequential. Even under an opt-out procedure, which is the constitutional minimum, the WEA must calculate the amount of the refund, so this would not constitute an additional burden imposed by Wash. Rev. Code § 42.17.760. Thus, should the WEA adopt this procedure, the only administrative costs would be the cost of issuing and mailing checks to each nonmember.

By adopting this procedure, the WEA'S ability to support political causes would not be hindered. During the years 1996-2000, the WEA collected approximately $4,200,000, which it spent on political objectives.[3] Yet,

[3] During the years 1996-2000, there were approximately 3,500 nonmembers per year, which constitutes about 5 percent of the total number of persons represented by the WEA. *Washington*, 130 P.3d at 550-51. Thus, there must be approximately 70,000 persons represented by the WEA. In that same time period, WEA refunds ranged from $44 to $76, for a rough average of $60 per year. *Id*. at 550. Thus, each year the WEA spent about $60 per person for political purposes. Multiplying

(Continued on following page)

approximately only $210,000 of that was collected from nonmembers.[4] If the WEA were to refund automatically all $210,000, $3,990,000 would still be available for spending on political causes.[5] Even once the nominal costs of printing and mailing checks are considered, it is difficult to argue that the union's political voice is effectively being "silenced." Certainly this is not a burden that the WEA would be "unable to bear." This is particularly true given that the WEA would no longer be required to send out *Hudson* packets twice annually. Further, this would not affect the nonmembers' First Amendment rights because they would be free to support the same political causes as the WEA either indirectly, by sending an additional contribution to the WEA, or directly through independent contributions to the causes supported by the WEA.

Second, the WEA could call or mail each nonmember and seek his affirmative authorization. The Washington Supreme Court concluded that it was "disingenuous" to argue that such solicitation would have "no impact on members' ability to assert their collective political voice." *Washington*, 130 P.3d at 359. The absolutely "no impact" test is not, however, the proper standard to determine whether the union's First Amendment rights are being violated. Instead, a court must determine if solicitation would effectively "silence" the WEA by creating a burden that it would be "unable to bear."

70,000 persons by $60 per person yields a total allocation of approximately $4,200,000 for political purposes.

[4] During the years 1996-2000, approximately 5 percent of the total number of people paying dues or fees were nonmembers; 5 percent of $4,200,000 is $210,000.

[5] $4,200,000 - $210,000 = $3,990,000.

Many political organizations seeking money call people either at random or using a list of several thousand names. Yet, such a burden is far from a First Amendment violation; it is simply the cost of doing business. The burden on the WEA is far less significant. The WEA need only contact the 3,500 nonmembers and seek affirmative authorization. Although the WEA would incur some administrative costs related to this solicitation, these costs would surely be offset by the voluntary contributions received by those nonmembers who opt in. If it were otherwise, the WEA would, logically, decide to refund automatically the money of each nonmember which, as discussed above, would be constitutional.

Further, the *Hudson* packet, which the WEA currently disseminates twice per annum, could simply be replaced by a packet requesting affirmative authorization. As a result, the net administrative cost, if any, of sending an affirmative authorization packet instead of a *Hudson* packet would be *de minimis*.

III. PROPER FIRST AMENDMENT JURISPRUDENCE WOULD PLACE THE BURDEN ON THE UNION TO OBTAIN AFFIRMATIVE AUTHORIZATION PRIOR TO USING NONMEMBERS' FEES FOR POLITICAL PURPOSES.

A. Though This Court Ought To Defer To Precedent, It Must Reject Precedent When There Is A Special Justification To Do So.

"The doctrine of *stare decisis* is essential to the respect accorded to the judgments of this Court and to the stability of the law," *Lawrence v. Texas*, 539 U.S. 558, 577 (2003)

(wherein the Court expressly overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986)); however, that doctrine is "not an inexorable command, particularly when . . . interpreting the Constitution." *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (expressly overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968)); *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (abandoning a strict application of *stare decisis*). Instead, it is a mere "principle of policy." *Lawrence*, 539 U.S. at 577. Therefore, "[i]n prior cases, when this Court has confronted wrongly decided, unworkable precedent calling for some further action by the Court, [the Court has] chosen not to compound the original error, but to overrule the precedent." *Payne v. Tennessee*, 501 U.S. 808, 842-43 (1991) (Souter, J., concurring) (wherein the Court partially overruled *Booth v. Maryland*, 482 U.S. 496 (1987), *South Carolina v. Gathers*, 490 U.S. 805 (1989)).

Reconsideration of earlier decisions is especially important in constitutional cases because in such cases "correction through legislative action is practically impossible." *Payne*, 501 U.S. at 828 (citing *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting)). Ultimately, precedent should be overruled if there is a "special justification" for doing so. *Adarand*, 515 U.S. at 231 (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)).

B. Because The Opt-Out Procedure Previously Endorsed By This Court Infringes Upon The First Amendment Rights of Dissenting Nonmembers, It Must Be Replaced With An Opt-In Procedure.

A special justification for overturning precedent exists because the procedure adopted by this Court to protect

First Amendment rights is inadequate. As established in Part I, *supra*, this Court has held that an opt-out policy, at a minimum, is required by the First Amendment to protect the speech and non-associational rights of nonmembers. However, this Court should reject this precedent and hold that First Amendment rights require, at a minimum, affirmative authorization from nonmembers before their fees may be used for political purposes.

Unquestionably, dissenting nonmembers have a First Amendment associational right not to be compelled to support political causes with which they disagree. *Abood*, 431 U.S. at 234; *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 471-72 (1997). Making a political contribution serves to affiliate a person with a political cause. *Buckley*, 424 U.S. at 22. As a result, when a public union seeks to use nonmembers' fees for political purposes, the government must protect nonmembers' rights by "employ[ing] means closely drawn to avoid unnecessary abridgement. . . ." *Id*. at 25.

In the context of the WEA, as with most unions, there is but one way for the government to satisfy this obligation: government must require unions to obtain affirmative authorization before using nonmembers' fees for political purposes. As demonstrated above, a simple opt-in policy does not adversely affect the First Amendment rights of the union or the supporting nonmembers. However, for two reasons, any additional burden, such as an opt-out policy, placed on dissenting nonmembers constitutes an "unnecessary abridgement" of their rights.

First, the Washington Supreme Court, relying on *Street*, concluded that First Amendment protection is only warranted for "those employees who had made known to

the union that they did not desire their funds be used for political causes to which they object." *Washington*, 130 P.3d at 358. This statement comports with this Court's conclusion in *Hudson* that the employee's burden is to "make his objection known." *Hudson*, 475 U.S. at 306 n.16.

However, this Court overlooked the fact that whenever an employee refuses to join a union he has implicitly voiced his objection to the union's activities in some form. "Certainly, a nonmember employee who prefers that a union not represent him or her in matters germane to collective bargaining, such as wages and benefits, would not wish to pay that union a fee, a portion of which will be applied to distant political causes at the union's whim." R. Bradley Adams, *Union Dues and Politics: Workers Speak Out Against Unions Speaking For Them*, 10 U. Fla. J.L. & Pub. Pol'y 207, 218 (1998) (internal citations omitted). Therefore, requiring a nonmember to opt out infringes upon the nonmember's First Amendment rights.

Second, assuming, *arguendo*, that a nonmember has not already voiced his objection by refusing to join the union, an opt-out procedure violates the First Amendment rights of nonmembers by requiring them to announce their objections. This Court concluded that there is a "vital relationship between freedom to associate and privacy in one's associations." *NAACP v. Alabama*, 357 U.S. 449, 462 (1958). Likewise, the "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Id*.

Only 5 percent of the employees represented by the WEA are nonmembers. Concealment of these nonmembers' dissenting opinions is necessary to protect their First

Amendment rights, and to avoid any "unnecessary abridgement" of these rights this Court should interpret the First Amendment as imposing, at a minimum, an opt-in requirement for unions.

CONCLUSION

This Court should reverse the decision of the Washington Supreme Court because Wash. Rev. Code § 42.17.760 satisfies and exceeds the constitutional minimum requirement as established by this Court but does not infringe upon the First Amendment rights of the WEA or the supporting nonmembers. In addition, this Court should overturn precedent and hold that the First Amendment requires, at a minimum, an opt-in policy, similar to that in Wash. Rev. Code § 42.17.760, to protect the rights of nonmembers.

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