Nos. 05-1657 and 05-1589

In the

Supreme Court of the United States

STATE OF WASHINGTON
and GARY DAVENPORT, et al.,

Petitioners,

v.

WASHINGTON EDUCATION ASSOCIATION,

Respondent.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

To prevent labor unions from subsidizing their political activities with agency fees exacted from the paychecks of nonmember workers, Washington State enacted a law requiring unions to obtain affirmative consent from workers before using this money for political activism. Does this law violate the First Amendment rights of the union?

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37.3(a), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the petition for a writ of certiorari. Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

PLF was founded 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. Among other matters affecting the public interest, PLF has repeatedly litigated in defense of the right of workers not to be compelled to make involuntary payments to support political or expressive purposes with which they disagree. To that end, PLF attorneys were counsel of record in *Brosterhous v. State Bar of Cal.*, 906 P.2d 1242 (Cal. 1995); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); and *Cumero v. Pub. Employment Relations Bd.*, 778 P.2d 174 (Cal. 1989), and PLF has participated as amicus curiae in all of the most important cases involving labor unions compelling workers to support political speech, including *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986), *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Employees*, 466 U.S. 435 (1984), and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). PLF attorneys have also published articles on compelled speech issues, including Deborah J. La Fetra, *Recent Developments in Mandatory Student Fee Cases*, 10 J.L. & Pol. 579 (1994). Further, PLF participated as amicus curiae in this case in the Washington

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than Amicus Curiae, its members or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

Court of Appeals and Supreme Court, as well as in this Court in support of the petition for certiorari.

SUMMARY OF ARGUMENT

This Court should hold as a matter of First Amendment law that labor unions must obtain affirmative consent from workers *before* using expropriated funds for purposes of ideological speech or political campaigns. Although the Court has previously declared that it "is not to be presumed" that workers object to such exactions and expenditures. *Hudson*, 475 U.S. at 306 (quoting *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 774 (1961)), recent history has demonstrated that unions are abusing their powers and spending both union dues and agency shop fees on ideological campaigns without fee payers' consent; are adopting refund procedures designed to deter dissent; and are engaged in a conscious campaign of "massive resistance" against this Court's worker-rights decisions, including *Hudson*, 475 U.S. 292; *Beck*, 487 U.S. 735, and *Abood*, 431 U.S. 209. This Court's position in *Abood* and other cases—that courts should not presume that workers object to the spending of their earnings on political campaigns—is partly responsible for these abuses. The Court should reverse this position and presume that workers dissent, until the state or the union demonstrates otherwise.

Presuming dissent is warranted by basic First Amendment principles. This Court has long held that individuals must not be presumed to have waived their fundamental constitutional rights, *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999), and that the state, not the individual, bears the burden of establishing the constitutionality of laws that infringe on fundamental rights such as speech. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973) ("[L]egislative judgments that interfere with fundamental constitutional rights [are] . . . not entitled to the usual presumption of validity, [and] the State rather

than the complainants must carry a 'heavy burden of justification . . . .' "). Placing the burden on workers to assert their objections violates those basic rules of law.

The analysis employed in procedural due process cases such as *Mathews v. Eldridge*, 424 U.S. 319 (1976), and *Parratt v. Taylor*, 451 U.S. 527 (1981), as well as the analysis employed in self-incrimination cases like *Miranda v. Arizona*, 384 U.S. 436 (1966), provide helpful templates for this Court to follow. Analogously to those cases, the Court should find that when the state allows a labor union to deduct earnings from a worker's paycheck, it must create a *pre-deprivation* procedure to protect the worker's right to dissent whenever doing so is feasible. The reasons this Court found to justify requiring protective procedures *before* taking a person's life, liberty, or property, are also applicable in a case like this one, in which the state and the union are requiring workers to give up a portion of their earnings to support the union's activities. Requiring affirmative consent is the most efficient method of assuring pre-deprivation protection for workers.

The Washington law challenged here—"section 760"—creates a pre-deprivation requirement that rightly places the burden on the taking entity to demonstrate the legitimacy of its actions before using a worker's earnings for political campaigns. This concrete constitutional guideline is needed to minimize "the risk that [dissenters'] funds will be used, even temporarily, to finance ideological activities" with which they disagree. *Abood*, 431 U.S. at 244. Thus, the decision of the court below should be reversed.

I

DISSENTING WORKERS HAVE AN IMPORTANT FIRST AMENDMENT RIGHT NOT TO CONTRIBUTE TO POLITICAL ACTIVITIES WITH WHICH THEY DISAGREE

The most important part of freedom of expression is the right to disagree. It is dissent, and not conformity, that needs constitutional protection. Conformity is relatively easy to create through political, legal, and social pressures—and it can prevail even in spite of the law—but the nonconformist can only rely on the Constitution for protection. *See*, *e.g.*, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). To disagree, or to refuse to support institutions with which one disagrees, are often lonely and courageous acts, more in need of legal protection than the right to join or to support an organization or movement. Dissent is by definition counter-majoritarian, which means that dissenters need the security of institutions that shield them from majoritarian political processes. *See*, *e.g.*, Cass R. Sunstein, *Why Societies Need Dissent* 98 (2003) ("[A]t its core, [the First Amendment] is designed to protect political disagreement and dissent.").

This Court has long recognized that the freedom of expression guaranteed by the First Amendment protects "the decision of both what to say and what not to say," *Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 782 (1988), and for that reason has repeatedly upheld the principle that people have the right not to be coerced into subsidizing messages with which they disagree. In *Wooley v. Maynard*, 430 U.S. 705 (1977), this Court held that the State of New Hampshire could not prohibit a dissenter from covering up the state motto on his state license plate. In *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), it held that agricultural producers could not be required to subsidize a commercial message. And in many cases, the Court has recognized that it

would violate the First Amendment for workers' earnings to be taken by the state, and transferred to labor unions for use in promoting political messages with which the workers disagree. *See Lehnert*, 500 U.S. at 522; *Beck*, 487 U.S. at 745; *Abood*, 431 U.S. at 244. *See also Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1253 (6th Cir. 1997) ("[T]he right not to contribute to political causes that they do not favor is as central a First Amendment right as is the right to solicit funds. The protection of this right is certainly at least 'important or substantial,' if not compelling." (citation omitted)).

Dissenting workers in unionized public employers are especially in need of constitutional protections. Unions rely heavily on peer pressure, intimidation, coercion, and inertia to prevent dissenting members or non-members from opposing union political activities. *See* Murray N. Rothbard, *Man, Economy, and State* 626 (1970) (1962); Friedrich A. Hayek, *The Constitution of Liberty* 274 (1960); Linda Chavez & Daniel Gray, *Betrayal: How Union Bosses Shake Down Their Members and Corrupt American Politics* 44-46 (2004).[2] Workers often feel either compelled to join the union, or to stifle their dissent, lest their beliefs lead to friction in the workplace, or incur retaliation by union leaders or coworkers. As this Court has recognized, it is particularly important to enforce First Amendment protections in environments where heavy peer pressure might otherwise stifle dissent. *Cf. Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000) ("'[T]he government may no more use social pressure to enforce orthodoxy than it may use more direct means.'" (quoting *Lee v. Weisman*, 505 U.S. 577, 594 (1992))). *See also NAACP v. State*

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[2] One indication of the effectiveness of this peer pressure is that after Washington passed section 760, some 83 percent of teachers took advantage of its provisions. R. Bradley Adams, *Note: Union Dues and Politics: Workers Speak Out Against Unions Speaking for Them*, 10 U. Fla. J.L. & Pub. Pol'y 207, 219 (1998).

of Alabama ex rel. Patterson, 357 U.S. 449, 462 (1958); *United States v. Rumely*, 345 U.S. 41, 57 (1953).

The judiciary has a special duty to intercede on behalf of political minorities who cannot hope for protection from the majoritarian political process. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982). Workers who disagree with the political views of labor unions are in precisely this situation. They are exposed to social, political, and even legal pressure to conform to the prevailing political atmosphere of the unionized workplace. Protecting their freedom to disagree in such an environment requires this Court strictly to enforce the rights of dissenting workers.

II

LABOR UNIONS HAVE REPEATEDLY ABUSED THEIR POWER TO TAKE WORKERS' EARNINGS

A. Unions Routinely Use Their Authority to Fund Political Campaigns Contrary to Workers' Beliefs

Labor unions spend as much as $800 million per year on political campaigns, more than both the Republican and Democratic parties combined. Chavez & Gray, *supra*, at 29. The exact amount is hard to obtain, however, because unions take pains to conceal the actual figures. According to one rough estimate, unions spent somewhere between $300 million and $500 million on the 1996 election alone. Leo Troy, Nat'l Inst. for Labor Relations Research, *Freedom of Choice, Business Climates, and Right to Work Laws* 3 (2006).[3]

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[3] *Available at* http://www.nilrr.org/Freedom%20of%20Choice%20and%20Business%20Climates.pdf?storyId=4834393 (last visited Nov. 2, 2006).

These contributions are often contrary to the views of the workers themselves. Although a 1996 poll revealed that 62 percent of union members opposed the AFL-CIO's decision to spend $35 million purchasing advertisements promoting the Democratic party, the union leadership went ahead with the plan. Chavez & Gray, *supra*, at 45. In fact, polls show that at least 30 percent, and perhaps 40 percent, of union members vote Republican. *See Framing the Issue: AFL-CIO: A "Business" in Trouble?*, 2 No. 11 Fed. Emp. L. Insider 5 (July 2005); Paycheck Protection Act, 144 Cong. Rec. H1748 (daily ed. Mar. 30, 1998) (statement of Rep. Cunningham). Yet unions overwhelmingly support the Democratic party. *See* Thomas Stratmann, *How Reelection Constituencies Matter: Evidence from Political Action Committees' Contributions and Congressional Voting*, 39 J.L. & Econ. 603, 604 (1996) ("In the 1980s . . . labor PACs made almost 90 percent of their contributions to Democrats."). Typical of union attitudes toward political spending is a 1996 comment by a Teamsters official: "the union gave $56 million to Clinton . . . after an independent, outside poll the union paid for showed the membership responses preferred Perot, then Bush, with Clinton in third place." F.C. Duke Zeller, *Devil's Pact: Inside the World of the Teamsters Union* 346 (1996).

This dissonance between union workers and their leadership leads to serious abuses when union leaders are empowered to seize workers' earnings and put them to use in political causes which the workers do not support.

B. Workers Are Being Denied the Protections Promised by This Court's Rulings in Dues and Fees Cases

In a series of clear decisions, this Court has held that labor unions may not use union dues or agency shop fees to support political campaigns which workers do not wish to support. *See*

Abood, 431 U.S. at 235; *Beck*, 487 U.S. at 745; *Hudson*, 475 U.S. at 301-02; *Lehnert*, 500 U.S. at 522.

Yet for some 20 years, organized labor is engaged in a campaign of "massive resistance" against these decisions, consciously refusing to follow their mandates, or tailoring their responses to obstruct and frustrate the implementation of workers' rights. *See generally* Jeff Canfield, *What A Sham(e): The Broken Beck Rights System in the Real World Workplace*, 47 Wayne L. Rev. 1049 (2001); Brian J. Woldow, *The NLRB's (Slowly) Developing Beck Jurisprudence: Defending a Right in a Politicized Agency*, 52 Admin. L. Rev. 1075 (2000) (documenting refusal of unions and government to abide by *Beck* and similar cases). *See also Monson Trucking Inc.*, 324 N.L.R.B. 933, 935 (1997) (union failed to provide employee *Beck* rights notice); *Local 74, Serv. Employees Int'l Union*, 323 N.L.R.B. 289, 290 (1997) (same); *Chauffeurs, Teamsters, Warehousemen & Helpers Union, Local No. 377*, Case No. 8-CB-9415-1, 2004 WL 298352 (N.L.R.B. Feb. 11, 2004) ("I find that the membership application with the 'Notice' hidden on the second and third page did not serve to adequately apprise newly-hired employees of their *Beck* rights.").

As one expert testified to Congress,

> [t]he first hurdle that employees face [when asserting their rights not to subsidize union political activities] is that they are lied to by union leaders who purport to represent them. I use a stark term, and I mean it. That's right. They are lied to regularly, clearly as a matter of course.

Hearings Before the Subcommittee on Employer-Employee Relations of the Committee on Economic and Educational Opportunities, on H.R. 3580, The Worker Right to Know Act, Serial No. 104-66 (104th Cong. 2d Sess. 1996) at 111 (Statement of W. James Young).

Even the National Labor Relations Board has been criticized for participating in the unions' campaign of resistance toward worker rights established in *Beck*, *Abood*, and *Hudson*. *See*, *e.g.*, Hearings on H.R. 3580, *supra*, at 88 (Statement of Chairman Fawell: "It's been eight years since *Beck* and the NLRB . . . only recently has issued its first enunciation on the subject. Unbelievable . . . that organized labor should do this to you and that the NLRB should even to a degree, for whatever reason, be a part of the discrimination."); *id.* at 298 (letter from Raymond J. LaJeunesse, Jr.: "the NLRB's General Counsel and the Board itself . . . have failed to prosecute vigorously and enforce strictly worker's rights under *Beck*.").

The NLRB has adopted delay tactics so extreme that some cases asserting workers' rights under *Beck*, *Hudson*, and *Abood* have waited nearly a decade for resolution. *See*, *e.g.*, *American Fed'n of Television & Recording Artists*, 327 N.L.R.B. 474 (1999). *Cf. NLRB v. Ancor Concepts, Inc.*, 166 F.3d 55, 59 (2d Cir. 1999) ("[T]he Board stands out as a federal administrative agency which has been rebuked before for what must strike anyone as a cavalier disdain for the hardships it is causing."). Only in 1995 did the NLRB first apply the 1988 *Beck* decision, in *California Saw & Knife Works*, 320 N.L.R.B. 224, 224 (1995), a case in which the NLRB determined that when workers demand an audit detailing how much of their money is spent on political campaigning, they are entitled only to the union's in-house audit, and not an independent audit. The District of Columbia Circuit later called this ruling inconsistent with "any rational interpretation" of "*Hudson*'s 'basic considerations of fairness' language." *Ferriso v. NLRB*, 125 F.3d 865, 869 (D.C. Cir. 1997).

Union efforts to circumvent the law are exemplified by the behavior of the Washington Education Association (WEA). *See generally* Michael C. Kochkodin, *A Good Politician Is One That Stays Bought: An Examination of Paycheck Protection Acts and Their Impact on Union Political Campaign Spending*,

2 U. Pa. J. Lab. & Emp. L. 807, 824-29 (2000) (describing WEA's evasive response to section 760). In 1994, knowing that the law challenged in this case would soon take effect and bar the WEA from collecting money to finance political activities from nonconsenting workers, the union collected the upcoming year's assessments in advance. Michael Reitz, *Paychecks Unprotected*, Labor Watch, Jan. 2006, at 3.[4] Then, after the law went into effect, the union "lent" more than $162,000 from its general fund to its political action committee, later forgiving the "loan." *See* Settlement Agreement between State of Washington and WEA, Feb. 26, 1998.[5] The union spent another $120,000 to pay for its political action committee's "administrative costs," without reporting these expenditures, and spent another $730,000 from its general fund to support the passage of two ballot measures. Reitz, *supra*, at 3-4. The union then established a euphemistically named "Community Outreach Program," which raised and spent more than $2 million on political activities without permission from WEA members. Reitz, *supra*, at 4; *see also* Lynne K. Varner & David Postman, *WEA Suit Follows Dues Dispute*, Seattle Times, Feb. 13, 1997, at B1, *available at* 1997 WLNR 1483331. During this time, the full amount of the union's income from dues that had actually been authorized for political expenditures by workers was only about $144,000 per year. Reitz, *supra*.

After an investigation of these activities, the state's Political Disclosure Committee concluded that WEA had violated several sections of the state's campaign finance laws, and urged the Attorney General to take action. *See* Michael W. Lynch, *The Summer of Reform: Campaign Finance Laws*

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[4] *Available at* http://www.capitalresearch.org/pubs/pdf/LW0106.pdf (last visited Nov. 2, 2006).

[5] *Available at* http://www.atg.wa.gov/pubs/wea_setl.html (last visited Nov. 2, 2006).

Return to the Congressional Agenda, Reason, Aug. 18, 1998, at 7, *available at* 1998 WLNR 4378163.[6] The Attorney General then filed a lawsuit against the union, but settled before trial, in exchange for the union paying a $100,000 fine, agreeing to reduce dues by $5 per member, and promising to abide by a set of permissive "guidelines" under which the union can still transfer dues money from its general fund to its political action committee. *Id.*; *see further* Tom Brown & Ryan Blethen, *State's Campaign Cleanup a Washout?*, Seattle Times, Aug. 3, 1997, at A1, *available at* 1997 WLNR 1453262.

Incidents like this are unfortunately typical of what can only be described as a conscious, bad-faith effort to resist protecting workers' rights. This recalcitrance must not be suffered to continue any longer.

C. Unions Are Engaged in "Massive Resistance" Against This Court's Rulings

In case after case, workers are forced to rely on federal courts to resolve complaints against union rules that unfairly burden their right not to be compelled to subsidize political speech. *See*, *e.g.*, *Shea v. Int'l Ass'n of Machinists & Aerospace Workers*, 154 F.3d 508 (5th Cir. 1998); *Tavernor v. Ill. Fed'n of Teachers*, 226 F.3d 842 (7th Cir. 2000); *Cummings v. Connell*, 316 F.3d 886 (9th Cir. 2003); *Lutz v. Int'l Ass'n of Machinists & Aerospace Workers*, 121 F. Supp. 2d 498 (E.D. Va. 2000); *Masiello v. U.S. Airways, Inc.*, 113 F. Supp. 2d 870, 875 (W.D.N.C. 2000); *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987); *Damiano v. Matish*, 830 F.2d 1363 (6th Cir. 1987); *Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000). Yet unions remain obstinate in refusing to accord workers the rights to which they are entitled. A poll conducted in 1996 revealed that 78 percent of union members were not even aware of their

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[6] These guidelines are *available at* http://www.atg.wa.gov/pubs/wea_exhibit_a.html (last visited Nov. 2, 2006).

rights under the *Beck* decision, and political leaders since the Reagan Administration have refused to implement *Beck* in a meaningful way. David M. Burns, *Requiring Unions to Notify Covered Employees of Their Right to Be an Agency Fee Payer in the Post Beck Era*, 48 Cath. U. L. Rev. 475, 481-82, 502 n.200 (1999); Hearings, *supra*, at 365. *See also* Joe Knollenberg, *The Changing of the Guard: Republicans Take on Labor and the Use of Mandatory Dues or Fees for Political Purposes*, 35 Harv. J. on Legis. 347, 349 (1998) ("[N]ineteen percent of union members knew they have a right to object to their unions' use of their dues for political purposes."). A 1998 report found that "[g]overnmental enforcement of *Beck* rights . . . has been virtually nonexistent." Robert P. Hunter, Mackinac Ctr. for Pub. Policy, *Paycheck Protection in Michigan* 6 (1998).[7] Nothing has changed since. *See* George C. Leef, *Free Choice for Workers: A History of the Right to Work Movement* 171 (2005); Chavez & Gray, *supra*, at 223.

In their campaign of resistance against this Court's decisions, unions have adopted techniques of bureaucratic delay intended to prevent workers from effectively protecting their rights. For example, in *Office & Prof'l Employees Int'l Union, Local 29, AFL-CIO*, 331 N.L.R.B. 48 (2000), the union promulgated rules requiring an objecting employee to specify exactly the amount of fees she believed were wrongly withheld and what the money had been spent on—information most workers would find too difficult to obtain. Further, the union "treat[ed] the failure to [provide such information] . . . as a waiver of the right to challenge the expenditures." *Id.* at 49. The National Labor Relations Board found that this was unreasonable and arbitrary because "the Union simply place[d] too high a burden on the objector's exercise of her right to challenge the Union's figures." *Id.*

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[7] *Available at* http://www.mackinac.org/archives/1998/s1998-05.pdf (last visited Nov. 2, 2006).

In *Shea*, too, the Fifth Circuit noted that the procedure created for objecting dissenters was intended to prevent them from vindicating their rights:

> It seems to us that the unduly cumbersome annual objection requirement is designed to prevent employees from exercising their constitutionally-based right of objection, and serves only to further the illegitimate interest of the [union] in collecting full dues from nonmembers who would not willingly pay more than the portion allocable to activities germane to collective bargaining.

154 F.3d at 515.

Organized labor in general, and the WEA in particular, are willing to go to extreme lengths to avoid complying with this Court's rulings regarding workers' rights. Such a systematic pattern of abuse requires firm resolution by this Court, so that the subversion of its authority as expositor of the Constitution does not continue. *Cf. Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430, 438 (1968) ("This deliberate perpetuation of the unconstitutional . . . system can only have compounded the harm . . . . Such delays are no longer tolerable, for 'the governing constitutional principles no longer bear the imprint of newly enunciated doctrine . . . .' ").

III

THE COURT SHOULD ADOPT A PRESUMPTION OF DISSENT IN LABOR UNION COMPELLED SPEECH CASES

This Court has stated that, although a worker cannot be compelled to support the promulgation of a political message with which she disagrees, nevertheless, a worker's "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." *Abood*, 431 U.S. at 238; *Hudson*, 475 U.S. at 306 (citation omitted). This conclusion

ought to be overruled. First, it is inconsistent with the longstanding rule that laws infringing on free speech are presumptively invalid, and that individuals are not presumed to have waived fundamental rights. Second, it chills dissent which needs constitutional protection. Third, a presumption of dissent would be logically and legally more consistent with a regime of free speech than the presumption of conformity inherent in the requirement that workers announce their dissent. Finally, abandoning the *Street* presumption of conformity would not implicate *stare decisis* concerns, because it originated in dicta, in cases involving statutory interpretation rather than the First Amendment.

A. Requiring Workers to Assert Dissent Is Inconsistent With the Strict Scrutiny Standard

The requirement that workers affirmatively make known their dissent, which originated in *Street*, 367 U.S. at 774, creates a presumption that workers wish to conform—a presumption which sits uneasily beside the long-standing rule that laws infringing fundamental rights are presumptively invalid. *See Rodriguez*, 411 U.S. at 16 ("[L]egislative judgments that interfere with fundamental constitutional rights . . . . [are] not entitled to the usual presumption of validity . . . [and] the State . . . must carry a 'heavy burden of justification.' "). The presumptive invalidity of laws limiting the freedom of speech means that when the law requires a worker to subsidize political activity, the state (or the union exercising state power) should bear the burden of justifying this law. The individual challenging such a scheme should not.

The presumption of conformity also violates the long-standing rule that courts " 'do not presume acquiescence in the loss of fundamental rights.' " *Coll. Sav. Bank*, 527 U.S. at 682 (quoting *Ohio Bell Tel. Co. v. Pub. Utilities Comm'n of Ohio*, 301 U.S. 292, 307 (1937)). This Court has repeatedly

held that "[t]o preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights," *Glasser v. United States*, 315 U.S. 60, 70 (1942). Among other reasons for presuming against such a waiver are that doing so would too easily blind courts to subtle coercion, or would too easily allow workers, accidentally or through ignorance, to waive vital constitutional liberties. Yet the presumption of conformity created by *Street* requires courts to assume that workers are willing to waive their right to stop their earnings from supporting political speech with which they disagree; that presumption threatens precisely the same harms.

The rule of strict scrutiny, which presumes that laws infringing on free speech are invalid, is based on the extreme importance of free speech in a system of participatory democracy. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). *See also Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996) (plurality opinion) ("[T]he First Amendment embodies an overarching commitment to protect speech from government regulation through close judicial scrutiny, thereby enforcing the Constitution's constraints, but without imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems."). Requiring a worker to affirmatively make known her dissent from being forced to subsidize a union's political activities is to presume that the worker intends to waive that fundamental right, unless the contrary is proven. This inconsistency cannot stand, especially given the importance of protecting a worker's right to dissent.

B. The Presumption That Workers Acquiesce in Supporting Unions Violates the Logical Presumption of Liberty

Presumptions perform important roles in legal thinking: most especially, they allocate the risk of error in the most responsible way, and they protect important interests from disturbance in the absence of a compelling reason for changing the status quo. *See* Murl A. Larkin, *Presumptions*, 30 Hous. L. Rev. 241, 243-44 (1993). In criminal law, the presumption of innocence helps prevent the punishment of the innocent, although it may allow some of the guilty to go free. *In re Winship*, 397 U.S. 358, 363 (1970). Likewise, in the First Amendment context, the presumption against the constitutionality of laws infringing on freedom of expression is justified by the fact that more speech is to be preferred over less speech. *Cf. Texas v. Johnson*, 491 U.S. 397, 419 (1989) ("'[T]he remedy [for untruth] is more speech, not enforced silence.'" (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring))). *See also* Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1, 128 ("[T]he thumb of the Court [must] be on the speech side of the scales.").

The text of the Constitution warrants a general presumption that individuals may act freely unless and until those seeking to limit their freedom provide convincing justification for doing so. *See generally* Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2004). For example, the Fifth and Fourteenth Amendments prohibit government from "depriv[ing]" individuals of certain rights, and the First Amendment declares that the freedom of speech shall not be "abridged"—terms which imply that governmental authority must be regarded as secondary to, and limited by, the basic presumption that "in pursuing happiness, persons may do whatever is not justly prohibited." *Id.* at 268. Although the case was later overruled with regard to certain

"non-fundamental" freedoms, the Court's words in *Adkins v. Children's Hosp. of the Dist. of Columbia*, 261 U.S. 525, 546 (1923), remain true with regard to free speech: freedom, the Court said, is "the general rule and restraint the exception, and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances." *See also Lawrence v. Texas*, 539 U.S. 558, 574-75 (2003) (liberty is to be presumed, and abridged only where legitimate justification exists).

One important reason courts should presume in favor of individual liberty until the state justifies its interference with that liberty is that individuals are often unable to articulate their reasons for exercising their liberty in certain ways. They may be intimidated, uneducated, or only partly aware of their own reasons. Yet this does not mean that their actions fall outside the range of their legitimate freedoms. An artist, for example, may be unable to explain his work in precise language, yet his freedom of expression is not therefore less protected. Supporters of politically unpopular causes may not wish to disclose their identities or their reasons, out of fear of retaliation, or for any other reasons. Yet the state may not require organizations to divulge the identities of its supporters. *Patterson*, 357 U.S. at 462-63. Perhaps more to the point, to have a right means to be free to act or refrain from acting, without being required to give a reason.

Moreover, a presumption that a worker wishes to dissent makes logical sense as a background rule for deciding cases. In the relationship between the worker and the union, the original position is that the union may not take the worker's earnings. This Court has held that unions have no constitutional right to deduct dues or shop fees from workers' paychecks. *Beck*, 487 U.S. at 749-50; *see also Ky. Educators Pub. Affairs Council v. Ky. Registry of Election Fin.*, 677 F.2d 1125, 1134 (6th Cir. 1982) ("[The union] has no constitutional right to a check-off or payroll deduction system for political fund

raising."). Any deviation from the original position must be justified by the party seeking to alter it, under the classic rule "*ei incumbit probatio qui dicit, non qui negat*" (i.e., "the burden is upon the one who asserts, not the one who denies"). *See further United States v. U.S. Gypsum Co.*, 67 F. Supp. 397, 446-48 (D.D.C. 1946), *overruled on other grounds*, 333 U.S. 364, 388 (1948); 1 Simon Greenleaf, *Evidence* § 74 at 103 (10th ed. 1860). Logic requires that the party seeking to alter the *status quo* bear the burden of justifying such an alteration. *See* Anthony de Jasay, *Justice and Its Surroundings* 150-51 (2002). Here, this burden means that the union must provide justification for interfering with a worker's right to her pay. The Court has allowed states to alter the *status quo* in certain limited circumstances, by granting unions the privilege of deducting fees directly from non-members paychecks, but in the absence of justification, workers cannot be required to subsidize the union. A presumption of dissent parallels this basic logical schema.

Presuming in favor of dissent with regard to workers makes constitutional, logical, and legal sense. A worker with the right not to support a political speaker should not be required to provide reasons for refusing to do so. The Constitution does not require speakers to give reasons for speaking or remaining silent; because such a requirement would "abridge" the freedom of expression; because such articulation is sometimes difficult for the speaker; and because forcing a person to account for her decision to exercise a freedom is to fundamentally change the nature of that freedom from a right into a permission.

C. Requiring Workers to Assert Objection Chills Dissent

It appears that the *Hudson* Court hoped to minimize the inconsistency between strict scrutiny and the *Street* presumption of conformity when it remarked that the burden on a worker is

"simply" to make her objection known. *Hudson*, 475 U.S. at 306 n.16. But of course, this is precisely the burden that is indefensible, given this Court's refusal to presume that a person has waived her constitutional rights.

Nor is the *Street* requirement a "simple" matter. Given the pressure to conform that unions exert, as well as their record of violence against nonconforming workers, *see*, *e.g.*, Chavez & Gray, *supra*, at 139-58, it is often extremely difficult and even dangerous for dissenting workers to voice their objection to union policies. *Id.*; *see also* Leef, *supra*, at 38-40. Requiring workers affirmatively to assert their objections, instead of requiring unions to obtain consent from workers who support the union's efforts, only exacerbates the social pressure that chills dissent in the workplace. There is a constitutional dimension to this chilling effect, because, as this Court has recognized, government can employ a combination of state action and private action so as to pressure dissenters and violate essential First Amendment interests. In *Patterson*, 357 U.S. 449, the state tried "simply" to require the NAACP to disclose its membership lists. The Court recognized that there was nothing "simple" about it:

> [C]ompelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as . . . governmental action . . . . This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. When referring to the varied forms of governmental action which might interfere with freedom of assembly, it said in *American Communications Ass'n v. Douds*, [339 U.S. 382, 402 (1950)]: "A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature." Compelled disclosure of membership in an organization engaged in advocacy

> of particular beliefs is of the same order. *Inviolability 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. at 462 (emphasis added). For similar reasons, requiring a worker to make her objections known requires a worker to draw attention to herself, and the possibility of retaliation and hostile treatment. Although an opt-in provision need not guarantee anonymity, it would help prevent the union from using a combination of government and social pressures to stifle dissident beliefs.

The *Patterson* Court cited Justices Douglas and Black's concurring opinion in *Rumely*, 345 U.S. at 57, as a further example of the combination of government and private action that can stifle freedom of speech. There, the Justices warned that requiring the press to identify its customers to the government on demand would lead to an alarming chilling of speech, because dissenters would "be subjected to harassment that in practical effect might be as serious as censorship." *Id.* Although "no legal sanction [was] involved" in the bookseller's refusal to disclose the information, "the potential restraint [was] . . . severe." *Id.*

Workers who do not wish to have their earnings taken from them to support political speech should not be forced to state their objections before exercising their right not to speak. Such a requirement forces dissidents to mark themselves for potential harassment and retaliation in a way that an "opt-in" requirement would not. Although workers who choose not to "opt-in" would not remain anonymous, the ability to make their decisions in private and register those decisions before a political campaign begins would protect them from the individual exposure and peer pressure that the current

presumption of conformity enshrines. The current presumption stifles dissent and ought to be overruled.

D. Abandoning the Requirement That Workers Affirmatively Object to the Spending of Their Money on Political Campaigns Would Not Implicate *Stare Decisis*

1. The *Street* Presumption of Conformity Was Dicta

The presumption of conformity originated in dicta in *Street*, and therefore does not implicate *stare decisis* concerns. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 626 (1935). *Street* was a statutory interpretation case, in which the Court held that the Railway Labor Act did not authorize unions to spend members' dues on political speech with which workers disagreed. The Court declared that "[t]he safeguards of [section] 2, Eleventh [of the Act] were added for the protection of dissenters' interest, but dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." 367 U.S. at 774. Thus the requirement of asserting an objection was statutory, not constitutional. *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. Allen*, 373 U.S. 113, 119 (1963), was also a statutory interpretation case involving the Railway Labor Act.

In *Abood*, the Court appeared to recognize that the language in *Street* was dicta, when it held that workers are not required to identify with precision which political candidates and causes they wish not to support. *Abood*, 431 U.S. at 241. Such an exacting requirement "would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure," the Court noted. *Id.* "It would also place on each employee the considerable burden of monitoring all of the numerous and shifting expenditures made by the Union that are

unrelated to its duties as exclusive bargaining representative." *Id.*

It was not until *Hudson* that this Court stated that "the nonunion employee has the burden of raising an objection" as a constitutional matter, 475 U.S. at 306, but even this was not essential to the holding in *Hudson*, which was that the procedures adopted by the union for dealing with objections was unreasonably burdensome. *See id.* at 309. Thus the Washington Supreme Court erred in finding that this Court "has placed the burden on the dissenting nonmember to assert his or her First Amendment rights." *State ex rel. Washington State Pub. Disclosure Comm'n v. Wash. Educ. Ass'n*, 130 P.3d 352, 359 (Wash. 2006). In fact, this Court has simply held that the Railway Labor Act requires a worker to assert her rights, and, in *Hudson*, adopted regrettably imprecise language suggesting that the First Amendment requires workers to assert their objections. This dicta warrants no *stare decisis* effect.

2. Even if the Presumption of Conformity Is a Rule of Law, It Should Be Overruled

Even if it is not dicta that workers must bear the burden of asserting their objections to the spending of their monies on political campaigns, this Court should overrule that requirement. "Unless inexorably commanded by statute, a procedural principle of this importance should not be kept on the books in the name of *stare decisis* once it is proved to be unworkable in practice; the mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great." *Swift & Co., Inc. v. Wickham*, 382 U.S. 111, 116 (1965).

First, in the realm of constitutional interpretation, considerations of *stare decisis* are at their weakest. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). As the Court in *McLean Credit Union* noted, it is appropriate to overrule previous decisions when intervening changes have

"removed or weakened the conceptual underpinnings from the prior decision." *Id.* at 173. This has happened with regard to the presumption of conformity created by *Street* and other cases: the unions' purposeful evasion of this Court's workers' rights decisions has proven that presumption to be unworkable.

In *Lawrence*, the Court held that it is appropriate to overrule a prior decision when it "does not withstand careful analysis," which the *Street* presumption does not. *Lawrence*, 539 U.S. at 577. In addition, there has been no individual or social reliance on the presumption of conformity that would justify continuing to require workers to assert their objections rather than requiring unions to justify the taking of worker's earnings for political purposes. *Cf. id.* Many workers are unaware of the rules governing agency shop fees and union dues, and have no settled expectations with regard to them. While some unions have come to rely on the presumption of conformity, that reliance has led to abuse. Finally, in overruling a prior decision, the *Lawrence* Court found that the older case "itself cause[d] uncertainty, for the precedents before and after its issuance contradict its central holding." *Id.* The same can be said of the *Street* presumption. *Abood*, *Hudson*, and other cases have repeatedly found that labor unions have adopted burdensome procedures to restrict the rights of workers. In *Hudson*, 475 U.S. at 306 n.16, the Court sought to minimize the *Street* presumption, by declaring that it "simply" required a worker to assert an objection, which again demonstrates the essential unworkability of the presumption of conformity. And the Court found that the burden imposed by the union on workers asserting their objections was, indeed, too severe.

Considerations of *stare decisis* should not lead this Court to require workers to assert their objection to the taking of their earnings for the subsidizing of union political speech. The burden ought to rest with the union to obtain consent at the outset.

IV

PROCEDURAL DUE PROCESS CASES SUGGEST THE KIND OF PROTECTIONS THIS COURT OUGHT TO ADOPT IN COMPELLED SPEECH CASES LIKE THIS ONE

Requiring the union to obtain consent from workers before taking their earnings for political purposes is warranted by the presumption against the waiver of fundamental rights; by the strict scrutiny applied when state laws interfere with First Amendment rights; by basic standards of logic; and by the principles of fundamental fairness protected by several other clauses of the Constitution. Cases addressing these other clauses offer useful guidance in this case as well.

A. When Taking Property or Liberty from Citizens, Due Process Requires a Pre-Deprivation Procedure Whenever Feasible

When government intends to deprive a person of a liberty or property right or even a benefit, the Due Process Clause requires the government to observe certain procedures to ensure that the person has a fair opportunity to object, present her side of the story, and otherwise defend her interests. "The fundamental requirement of Due Process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), this Court held that when government intends to terminate welfare benefits, it must accord the recipient a pre-termination hearing. Protecting persons against "grievous loss," *id.* at 263, is best effected by providing such a hearing, because the risk of erroneous deprivation outweighs the benefit to the state that would be

gained by providing only a post-deprivation opportunity to be heard. *Id.* at 263.

In *Parratt*, 451 U.S. 527, this Court explained that a post-deprivation proceeding may satisfy the Due Process Clause when "the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process [is] coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial [deprivation]." *Id.* at 539. The Court emphasized that only "impracticability" would justify dispensing with a pre-deprivation hearing. *Id.* at 540. In *Parratt*, for example, the petitioner complained of the negligent loss of his toy model kit, which was a "random and unauthorized act by a state employee." *Id.* at 541. It was "difficult to conceive" of how the state could provide a pre-deprivation hearing to prevent such harm. *Id.*

Goldberg, *Mathews*, and *Parratt* require that, when the state proposes to take property, it must provide a person with an opportunity to object *before* the deprivation, unless doing so would be "impracticable," *Parratt*, 451 U.S. at 541, or where some exigency requires speedy action by the state. *Id.* at 539. The state may also substitute a post-deprivation remedy when the burden on the state would be severe, and the risk of serious harm to the injured party is not significant. *Mathews*, 424 U.S. at 333.

Although the present case is not a Due Process case, these decisions provide useful guidance when determining whether the *Street* presumption of conformity satisfies the demands of the First Amendment. The risk of harm here is significant—as this Court recognized in *Hudson*, the First Amendment does not tolerate the risk that a worker's money might be used, even temporarily, to subsidize speech with which the worker disagrees. Only a minimal burden would be imposed on the state if unions are required to obtain consent from workers

before spending such exactions on political campaigns. *Cf. Ellis*, 466 U.S. at 444 ("[A]lternatives, such as advance reduction of dues . . . place only the slightest additional burden, if any, on the union."); *Miller*, 103 F.3d at 1253 ("An annual mailing to a union's contributing members, asking them to check a box and to return the notice to the union, would seem to suffice under the statute."). And no exigency requires speedy action by the state. All of the reasons this Court has found to justify requiring *pre*-deprivation procedures are present in this case, militating in favor requiring unions to obtain permission from workers *before* employing state power to take workers' earnings for funding political expression.

B. Requiring Workers to "Opt-In" Is the Most Effective "Concrete Constitutional Guideline" for Assuring Pre-Deprivation Protection for Workers

The most efficient way to provide a worker with protection and to abide by basic considerations of fairness is to adopt an "opt-in" requirement like the one embodied in section 760. Employing a presumption of dissent, and thus requiring unions to obtain consent *before* spending worker's money on political expression, would be an effective, inexpensive concrete constitutional guideline protecting workers' rights.

This Court has a long history of requiring such prophylactic devices as a means of securing important individual rights. Another helpful analogy is the requirement established in *Miranda*, 384 U.S. 436, as a means of protecting the freedom from self-incrimination in an age of "modern custodial police interrogation." *Dickerson v. United States*, 530 U.S. 428, 434 (2000). In *Dickerson*, the Court affirmed *Miranda*'s prophylactic requirement as a constitutional rule ensuring against the violation of an arrestee's right against self-incrimination. "[T]he advent of modern custodial police

interrogation," the Court found, "brought with it an increased concern about confessions obtained by coercion," *Dickerson*, 530 U.S. at 434-35. This heightened risk of Fifth Amendment violations warranted the implementation of "'concrete constitutional guidelines for law enforcement agencies and courts to follow.'" *Id.* at 435 (quoting *Miranda*, 384 U.S. at 442).

A similar situation is presented here. Allowing unions to adopt post-deprivation remedies, such as administrative hearings and rebates, has not succeeded in protecting the rights of workers. The advent of modern union funding—through direct paycheck deductions, as opposed to requiring overt payment by a worker—as well as the conscious effort by unions to evade the requirements of this Court's decisions, bring with them an increased "risk that [dissenters'] funds will be used, even temporarily, to finance ideological activities" with which they disagree. *Abood*, 431 U.S. at 244. The Court should adopt a concrete constitutional guideline for unions and states to follow which will prevent violations of workers' First Amendment right not to subsidize union political activities.

The simplest and most efficient guideline available is to require unions to obtain affirmative consent from workers before taking their money for political activity. In *Miller*, 103 F.3d at 1253, the Sixth Circuit rejected a union's challenge to an "opt-in" requirement, pointing out that it served an important state interest in protecting the rights of the dissenting minority, and ensuring "that political contributions are in accordance with the wishes of the contributors." 103 F.3d at 1253. Moreover, the Court found that it "border[ed] on the frivolous" to claim that requiring workers to consent would impose a severe burden on the union. *Id.* at 1253. More importantly, whatever burden it imposes on the union is well justified, because it is the union that seeks to take the workers' funds for political purposes. It is legitimate to require it to bear the burden of assuring that it does so in a constitutional manner.

CONCLUSION

Washington's section 760 embodies important First Amendment principles. In practice, the most effective way to secure the First Amendment rights of dissenting workers is to require unions to obtain consent *before* taking workers' earnings for political expression. The Court should adopt this requirement as a concrete constitutional guideline under the First Amendment, and uphold the constitutionality of section 760. The decision of the Washington Supreme Court should be *reversed*.

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Respectfully submitted,

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