Nos. 05-1657, 05-1589

In The Supreme Court of the United States

WASHINGTON,

Petitioner,

v.

WASHINGTON EDUCATION ASSOCIATION,

Respondent.

DAVENPORT,

Petitioner,

v.

WASHINGTON EDUCATION ASSOCIATION,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Washington

BRIEF OF INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS

Pursuant to Rule 37.3 of this Court, the Institute for Justice (the "Institute") respectfully submits this amicus curiae brief in support of Petitioners State of Washington Public Disclosure Commission and Gary Davenport, *et al*.[1]

The Institute is a nonprofit public interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. The Institute litigates First Amendment cases throughout the country and files amicus curiae briefs in important cases nationwide, including this Court's decisions in *Randall v. Sorrell,* __ U.S. __, 126 S. Ct. 2479 (2006), *Wisconsin Right to Life, Inc. v. Federal Election Commission,* __ U.S. __, 126 S. Ct. 1016 (2006), and *McConnell v. Federal Election Commission,* 540 U.S. 93 (2003). The Institute regularly brings cases on behalf of individuals whose right to speak and associate has been infringed by the actions of the government. In particular, the Institute has represented plaintiffs in a number of actions challenging governmental regulations that compel individuals to finance speech with which they disagree. *See Cochran v. Veneman,* 359 F.3d 263 (3d Cir. 2004), *vacated and remanded sub nom. Johanns v. Cochran,* 544 U.S. 1058 (2005) (suit challenging Dairy Promotion Stabilization Act); *May v. McNally,* 55 P.3d 768 (Ariz. 2002), *cert. denied*, 538 U.S. 923 (2003)

[1] The Institute has received consent from counsel of record pursuant to Sup. Ct. R. 37.3, as submitted with this brief. The Institute affirms, pursuant to Sup. Ct. R. 37.6, that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

(suit challenging public financing of campaigns under Arizona's Citizens Clean Elections Act).

The Institute believes that its legal perspective and experience will provide additional considerations regarding this issue that are not contained in the briefs of the parties.

SUMMARY OF ARGUMENT

This case concerns statutory protections of workers in an "agency shop" who (i) chose not to join the union, and (ii) refuse to support that union's political agenda. The Institute will show that the rationale urged by Respondent Washington Education Association (the "WEA") and adopted by the Washington Supreme Court below undermines steps the State of Washington has taken to ensure that such workers are not forced to support political activities to which they object. The WEA seeks a new "right" to have unions obtain, by the most convenient means possible, the fees of nonmembers for use in political activities. To give birth to this right, the union radically misinterprets decisions of this Court concerning the use of agency shop fees and the right of individuals to be free from government compulsion to associate with a political viewpoint that they reject. The touchstone in this Court's decisions regarding agency shops has been a concern for protecting the *nonmember,* not the union. In contrast to the union's arguments and the Washington Supreme Court's conclusion, this Court has never recognized that a union possesses any right at all in having the government be its political fundraiser and collection agency. Indeed, the Washington statute at issue here does not implicate, much less violate, any right possessed by the union.

Additionally, the Institute will demonstrate that the position of the WEA is inconsistent with the right of individuals to keep their political beliefs private, especially in the face of possible coercion and retaliation. A procedure under which a nonmember has the burden to object to the union's use of her fees for political purposes requires the nonmember to identify herself to that same union as a person who does not affirmatively support and likely disagrees with the union's political activity. This violates the nonmember's right to refuse to announce or express her political views. The procedure created by the State of Washington, on the other hand, does not require nonmembers to announce to the union that they do not support its political agenda; instead, the nonmember may simply not respond to the union's request for permission. Under such an "opt-in" procedure, it is unclear to the union and others whether the nonmember opposes, supports, or is disinterested in the union's political activities, or whether the nonmember simply does not want to take the time to fill out the permission form. Washington's procedure thus preserves at least some aspect of the nonmember's right to keep her political views private.

Finally, the Institute will demonstrate that the Washington Supreme Court's reliance on a statement from this Court that "dissent is not to be presumed" is neither constitutionally nor logically required. It is, instead, simply a description of a statutory structure dissimilar to the statutory protections for nonmembers adopted by Washington State.

ARGUMENT

I. PROVIDING ASSOCIATIONAL PROTECTIONS TO NONMEMBERS DOES NOT VIOLATE OR EVEN IMPLICATE A UNION'S FIRST AMENDMENT RIGHTS

In *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), this Court spelled out one of the most fundamental tenets of First Amendment jurisprudence: individuals, including public employees, cannot be compelled to fund speech with which they disagree. As *Abood* made clear, "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Id.* at 234-35. To ensure that this fundamental First Amendment protection is preserved for local government employees who are required, by law, to fund union collective bargaining activities, the people of Washington adopted a modest, commonsense requirement: before a union may use a nonmember's money to finance union political activity, the union must obtain the nonmember's affirmative consent.

The WEA seeks to dismantle this commonsense protection in order to ensure that it retains the ability to spend nonmember funds – money to which it is not constitutionally entitled – on the political causes of its choice. In a perverse distortion of this Court's many cases affirming the inviolability of a nonmember's right not to subsidize union political speech with which she disagrees, the WEA maintains that *it* has a First Amendment right to forcibly collect nonmember funds and spend them on political activity *without the nonmember's affirmative consent*. In other words, the union's position is that the First Amendment creates a right for the union to use someone else's

money to further a political agenda with which the owner of the money may disagree unless and until that person goes through certain administrative procedures to stop it. This imagined right flatly contravenes *Abood*'s holding that the First Amendment prohibits "requiring [an employee] to contribute to the support of an ideological cause he may oppose." *Id.* at 235.

The radical position urged by the union and adopted by the Washington Supreme Court grants to unions rights far beyond those possessed by other Americans. To be sure, both the union and the nonmember have a constitutional right to not have the government silence their speech, particularly on the basis of its content or subject matter. *See Police Dep't of Chicago v. Mosley,* 408 U.S. 92, 95 (1972) ("But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). Likewise, both parties have a constitutional right to not have the government compel them to speak. *See W. Va. Bd. of Educ. v. Barnette,* 319 U.S. 624, 634 (1943) (First Amendment does not permit authorities to compel a person to utter a message with which he does not agree). As is discussed above, both parties also have a right to not fund private speech with which they disagree. *See Johanns v. Livestock Mktg. Ass'n,* 544 U.S. 550, 558 (2005) (discussing cases holding that individuals have the right to refuse exactions that fund speech by private entities).

To this panoply of rights, the Washington Supreme Court and the WEA have added one more, which applies only to unions in states with union security clauses and to no other American: unions have the right to obtain, in the most convenient way possible, money from people who are not members in order to fund the union's political speech.

App. 19a. The court below was unable to point to any case law, from this Court or any other, in which such a right is acknowledged, much less used to strike down a properly enacted law. The union has likewise been unable to point to any decision holding that it is a violation of a union's rights to force a union to *ask permission* before it uses someone else's property for its own means.[2] This is because there is no such right. To concoct this "right," the court and the union fundamentally misinterpret this Court's precedent, a short review of which demonstrates that this Court has never suggested, much less recognized, such a right. In other words, the Washington law at issue here is not unconstitutional because it does not implicate – much less violate – any rights the union possesses under the First Amendment. Thus, any governmental conditions on the union's collection of fees from people who do not wish to associate with it are both fair and constitutional.

A. Section 760 And Agency Shop Agreements

Washington law creates a system for union representation of local government employees in which a union and a local government employer may agree to an arrangement in which every employee represented by a union must pay, as a condition of employment, a service fee equal to the

[2] Outside of the labor law context, using another person's money without that person's express permission is known as "misappropriation" and is generally considered unlawful or at least unethical. *See In re Harrison,* 461 A.2d 1034, 1036 (D.C. App. 1983) ("misappropriation" consists of any unauthorized use of funds, including not just stealing but also unauthorized temporary use, for one's own purpose). Essentially, the Washington Supreme Court elevated what is typically a crime and grounds for disbarment – using someone else's money without their express permission – to the level of a constitutional right.

amount of union dues. Wash. Rev. Code § 28B.52.045(2), App. at 124a; Wash. Rev. Code § 41.56.122(1), App. at 129a; Wash. Rev. Code § 41.59.100, App. at 131a. This arrangement, known as an "agency shop" agreement, requires fee payment by every local government employee of any local government that has entered into such an agreement, regardless of whether the employee is a member of the union or not. *See Abood,* 431 U.S. at 211. Through a series of decisions dating back fifty years, this Court has made clear that, if the nonmember objects, a union may not use a nonmember's fees collected pursuant to an agency shop agreement for matters unrelated to collective bargaining. *Ry. Employees' Dept. v. Hanson,* 351 U.S. 225, 235 (1956); *Int'l Ass'n of Machinists v. Street,* 367 U.S. 740, 768-69 (1961); *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. Allen,* 373 U.S. 113, 118 (1963); *Abood,* 431 U.S. at 234; *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Employees,* 466 U.S. 435, 448 (1984); *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson,* 475 U.S. 292, 303 (1986); *Commc'ns Workers of Am. v. Beck,* 487 U.S. 735, 762-63 (1988); *Lehnert v. Ferris Faculty Ass'n,* 500 U.S. 507, 519-22 (1991). Among the activities that do not fall within the "collective bargaining" umbrella is a union's use of such fees to promote its political agenda. *Abood,* 431 U.S. at 234.

The Washington law at issue here provides additional protections to nonmembers on top of the constitutional protections recognized in the case law cited above. Under the Washington law, a union may not use a nonmember's fees for political purposes unless the nonmember gives the union affirmative authorization for it to do so. Wash. Rev. Code § 42.17.760 ("Section 760"). In other words, Section 760 mandates that a union may only use a nonmember's

fees for political purposes if the nonmember "opts-in" to the union's political program.

B. The Washington Supreme Court's Decision Misinterpreted This Court's Holdings

The Washington Supreme Court, however, relying on *Street, Abood, Hudson, Allen,* and *Ellis,* held that the "opt-in" system in Section 760 violates the First Amendment rights of the union. App. at 19a. It held that these cases mandate a procedure by which the *nonmembers* must affirmatively state that they do not wish the union to use their fees for political purposes – that is, that a nonmember *must* "opt-out." *Id.* The court's decision badly misconstrued this Court's holdings in these cases. None of these cases concerned a First Amendment right of unions to have the government construct a system under which individuals are forced to associate with the union and have the government withhold a nonmembers' funds for the union's political use, regardless of the procedure used. Indeed, absent other sections of Washington law, the unions have no right to expect this governmentally mandated relationship to exist in the first place. *See* App. at 36a (Sanders, J., dissenting) ("Should the legislature of the State of Washington choose to repeal the mandatory withholding provisions of RCW 41.59.060 and .100, there would be no constitutional impediment to doing so. And no party to this proceeding claims there is."). Instead of focusing on any constitutional right the union allegedly possesses to have the government appoint it a collective bargaining unit and withhold funds on its behalf, these cases focus entirely on minimizing the harm the agency shop agreements have on *nonmembers* who are compelled to pay agency fees to the union as a condition of employment.

The harm this Court sought to alleviate in each of these cases, of course, is the impact agency shop agreements have on the rights of nonmembers to not associate with the union and not be forced to financially support a political agenda with which they disagree. These are both key First Amendment concerns. *See Abood,* 431 U.S. at 234-35 ("For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."). In that regard, this Court has been clear that the payment of agency fees in and of itself "'has an impact upon [nonmembers'] First Amendment interests.'" *Lehnert,* 500 U.S. at 516 (quoting *Abood,* 431 U.S. at 222). As this Court has stated:

> Unions traditionally have aligned themselves with a wide range of social, political, and ideological viewpoints, any number of which might bring vigorous disapproval from individual employees. To force employees to contribute, albeit indirectly, to the promotion of such positions implicates core First Amendment concerns.

Lehnert, 500 U.S. at 516. Thus, the agency shop agreement, especially in the public sector, raises considerable First Amendment issues by requiring an employee to contribute funds to an organization to which he does not wish to belong.

Under this Court's precedents, however, these concerns may be overcome by two governmental goals that justify any burdens on a nonmember's First Amendment rights: the desirability of labor peace and eliminating the problem of "free riders" who benefit from the union's collective bargaining activities but do not financially

shoulder the cost. *Id.* at 517. This Court has identified *only* these two interests as being sufficiently compelling to justify the impact on the nonmember's freedom to not associate with the union. In none of these cases has this Court held that the union has a First Amendment right to use the government's creation of a collective bargaining unit as a short cut for raising funds for political purposes.

C. Section 760 Does Not Implicate Any Constitutional Rights Possessed By the Union And No First Amendment Scrutiny Is Necessary

To be sure, a union may constitutionally spend funds for the expression of political views, to promote candidates, or to engage in other ideological activities not germane to the union's duties as a collective-bargaining representative. *Abood,* 431 U.S. at 235-36. But Section 760 impacts none of these activities. Under Section 760, the union may still engage in all of them. *See Street*, 367 U.S. at 770 ("Our construction therefore involves no curtailment of the traditional political activities of the railroad unions. It means only that those unions must not support those activities, against the expressed wishes of a dissenting employee, with his exacted money."). What Washington requires, however, is that the union get permission from the people who are forced to pay fees as a condition of their employment before it uses this money for political purposes.

Nonetheless, the Washington Supreme Court held that an "opt-in" procedure violates the union's First Amendment rights because of the "obvious, significant expense involved in complying with" Section 760. App. at 19a. The court accepted the WEA's argument that Section 760 creates an insurmountable hurdle to their political

advocacy. App. at 19a. However, Section 760 creates no burden for the union at all. The activities both the union and the Washington Supreme Court describe as unduly burdensome consist of identifying individuals who may contribute to the union's political activities, contacting them, persuading them of the attributes of the union's political goals, and requesting that they grant their consent to the use of their funds for these purposes. This is what every other political organization in the United States, from the Sierra Club to the National Rifle Association to the Socialist Workers Party, must do in order to get people to contribute funds. Contacting a discrete subset of known individuals (*i.e.*, employees of local governments in Washington who are not members of the union) and trying to persuade them to grant permission to withhold additional fees for political purposes is not an undue burden on the union – if anything, Washington's agency shop law makes the union's task easier than most. The union has no right – and should not have any expectation – to have the government construct a procedure that permits the union to obtain money from people who do not wish to associate with it *and* that this procedure be as easy for the union to use as possible. Despite the conclusion of the Washington Supreme Court, the government is not constitutionally mandated to construct a short cut for unions to raise political funds.

Under Section 760, unions may still contribute funds, purchase advertising, mail letters, and engage in other forms of political advocacy. They simply must do this with money that has been voluntarily and affirmatively contributed for that purpose. Because Section 760 does not implicate the union's right to engage in political advocacy, this Court need not apply the "strict scrutiny" standard to

the statute. Rather, as a general law regulating labor relations, Section 760 is not subject to First Amendment scrutiny at all. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 572 (1991) (Scalia, J., concurring) (because state indecency statute did not regulate speech, it should not be subject to First Amendment scrutiny). To be sure, if Section 760 did regulate the union's ability to engage in political advocacy, it would be subject to the highest standard of justification and rightly so. *See id.* at 578 (Scalia, J., concurring) (when a statute regulates expression, strict scrutiny applies; when it does not, that is the end of the inquiry). But because Section 760 simply requires that the union seek permission before it uses other people's money for its own purposes, it does not affect the union's ability to engage in political advocacy. Indeed, without other sections of Washington law creating agency shops, the union would have no claim to or interest in this money at all. Thus, this Court's inquiry should begin – and end – with the acknowledgment that Section 760 does not implicate any free speech rights possessed by the union.

II. SECTION 760 PROTECTS THE RIGHTS OF NONMEMBERS TO REFUSE TO ANNOUNCE THEIR POLITICAL VIEWS

The Washington Supreme Court below held that the Constitution mandates an "opt-out" procedure for dissenting nonmembers and that a "presumption of dissent" violates the First Amendment rights of both the union and nonmembers. App. at 20a. This conclusion is contrary to this Court's decisions holding that an individual has a right to refrain from announcing her political beliefs,

especially when that act may result in ostracism, coercion, threats or worse.

"The Constitution protects against the compelled disclosure of political associations and beliefs. Such disclosures 'can seriously infringe on privacy of association and belief guaranteed by the First Amendment.'" *Brown v. Socialist Workers '74 Campaign Comm.,* 459 U.S. 87, 91 (1982) (quoting *Buckley v. Valeo,* 424 U.S. 1, 64 (1976)). In *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 462 (1958), this Court recognized the "vital relationship between freedom to associate and privacy in one's associations." This Court made clear that 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.* As Professor Tribe has explained:

> [A]nonymity has long been recognized as absolutely essential for the survival of dissident movements; the glare of public disclosure, so healthy in other settings, may operate in the context of protected but unpopular groups or beliefs as a clarion call to ostracism or worse. Thus the Court has had little difficulty in recognizing . . . that "compelled disclosure . . . may constitute a restraint of freedom of association."

Laurence H. Tribe, *American Constitutional Law* § 12-26 at 1019 (2d ed. 1988) (omission in original; footnotes omitted; quoting *NAACP,* 357 U.S. at 462). These concerns apply here.

An "opt-out" program requires the nonmember to publicly identify herself to the union as a person who, at the least, does not support the union's political goals enough to pay to further them, and, at the most, actively

opposes them. It requires the nonmember to inform her coworkers, her bosses, her subordinates, her employer, and the labor organization representing her in collective bargaining that her political views are not aligned with the union. It compels her to announce a political position that she may desire to keep private. It also identifies the objecting nonmember as a troublemaker and opens her to coercion, threats, or other forms of pressure to support the union's objectives.

Unfortunately, this is not an idle concern and coercion is not something that occurred solely in the distant past. As testimony offered before a Congressional committee in 1997 demonstrates, coercion still plays a part in some union interactions with nonmembers:

> Several workers appearing before the Committee testified as to the coercion and intimidation they experienced once they began to question the orthodoxy of full union membership and dues payment. Again, Kerry Gipe told the Committee: '. . . the union began an almost immediate smear campaign against us, led by our Local President . . . portraying us as scabs, and freeloaders. . . . We had our names posted repeatedly on both union property and company property accusing us of being scabs. We were thrown out of our local union hall, and threatened with physical violence. . . . We were accosted at work, we were accosted on the street. We were harassed, intimidated, and threatened. We were told that our names were being circulated among all union officials in order to prevent us from ever being hired into any other union shop at any other location. The union membership was told that we were refusing to pay any union dues which

> created a very hostile environment among our fellow workers.'
>
> James Cecil of Clarkston, Michigan, testified that 'the union agent wanted to know why I would not sign the check-off and join . . . he became angry and asked me who the hell I thought I was? Did I think I was some kind of intellectual? Did I think I was better than the other workers out there? I told him no, but I know what my rights are and I intend to defend them. . . . He promised me in no uncertain terms that he would bring the full force of his and the other unions down on me if I dared to do that . . . I was greatly concerned about retaining my job and for my physical well-being.'

H.R. Rep. No. 105-397, at 8-9 (1997) (omissions in original; footnotes omitted). Similarly, a worker testified before a House Subcommittee regarding his experiences as a prominent union opponent:

> When the Culinary Union walked through the door they immediately began telling union followers whom they could talk to and whom they could not associate with. The union representatives had soon divided the workers into two groups, union and non-union, which they quickly labeled as 'anti-union'. This label was quickly followed by 'welfare recipients', 'freeloaders' and of course 'liars', were a few of the many.
>
> . . . .
>
> Another gentleman came to me and apologized for signing the card because union representatives had told him, "We know where you live, we know where your kids go to school and

> we know where your wife works. If you do not sign that card, 'accidents' can happen."

Compulsory Union Dues and Corporate Campaigns: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Education and the Workforce, 107th Cong. 62-63 (2002).

For workers represented by unions such as these, choosing to fill out the "opt-out" form can act as a "clarion call" for such treatment. The nonmember who "opts-out" is doubly suspect – she both refuses to join the union and publicly refuses to financially support its political activity. The very real possibility of retaliation or coercion in such circumstances creates a powerful disincentive for the nonmember to express her fundamental First Amendment right to refuse to fund a political cause with which she does not agree. In addition to outright coercion, the nonmember may believe that publicly proclaiming herself as a troublemaker could have subtle, but considerable, impacts on her career prospects and economic livelihood. "In respect to all persons but those whose pecuniary circumstances make them independent of the good will of other people, opinion, on this subject, is as efficacious as law; men might well be imprisoned, as excluded from the means of earning their bread." John Stuart Mill, *On Liberty*, in *Mill: A Norton Critical Edition* 65 (1997). In such circumstances, "the pressure upon a teacher to avoid any ties which might displease those that control his professional destiny would be constant and heavy." *Shelton v. Tucker,* 364 U.S. 479, 486 (1960). In short, the "opt-out" system is ripe for the abuse of the nonmembers' associational and free speech rights.

In contrast, an "opt-in" procedure maintains a level of uncertainty about the political views of a nonmember who does not "opt-in." It gives the nonmember, like every other citizen, the option of being an enigma. *See* Aron Gregg, *The Constitutionality of Requiring Annual Renewal of Union Fee Objections in an Agency Shop,* 78 Tex. L. Rev. 1159, 1177 (2000) (under the "opt-out" system, a union objector must go to some lengths to refute the presumption that he supports the union's views). Does the nonmember actively oppose the union or is she simply disinterested in its political activities? Does the nonmember support the union's political activities but believe that her financial situation requires her to keep the money that would otherwise go to the union? Is the nonmember just disinterested in anything but her professional responsibilities? Does the nonmember support the union's political objectives but object to other expenditures unrelated to collective bargaining? While Washington's law does not completely preserve the dissenting nonmember's ability to keep her political views private, it does not require her to disclose the precise nature of her political beliefs to those around her.

While this Court has never addressed the constitutionality of an "opt-in" procedure, it is clear that requiring people to affirmatively "opt-out" of contributing agency fees to a union's political activities presents serious constitutional problems. Section 760 resolves these problems. It does so while preserving the right of the union to request financial support from nonmembers and engage in political advocacy. In short, Section 760 does not violate the Constitution – instead, it may be constitutionally *required.*

III. A CONCLUSION THAT "DISSENT IS NOT TO BE PRESUMED" IS NEITHER CONSTITUTIONALLY NOR LOGICALLY REQUIRED

Like the Washington Supreme Court, App. at 16a, the WEA may argue that this Court's statement in *Street* that "dissent is not to be presumed" means that this issue is settled. *See Street,* 367 U.S. at 774. This is wrong for several reasons.

First, in *Street*, this Court took great pains to decide the case solely on statutory grounds. *See id.* at 765-70. To be precise, *Street* at most recognized that "dissent is not to be presumed" *under the Railway Labor Act. See Abood*, 431 U.S. at 240 (noting that *Street* was "concerned with statutory rather than constitutional violations"); *id.* at 236 (noting that *Street* was resolved "as a matter of statutory construction"). After all, the Railway Labor Act did not contain a statutory "opt-in" requirement like that in Section 760, so it would have been inconsistent with congressional intent to presume nonmember dissent. That does *not* mean *Street*'s statement that "dissent is not to be presumed" is a declaration of constitutional principle or that it should be relied upon in the interpretation of statutory schemes dissimilar to the Railway Labor Act.[3]

[3] Arguably, *Street*'s statement that "dissent is not to be presumed" is not even an interpretation of the Railway Labor Act, but simply a *pleading* requirement for nonmembers seeking a *judicially* created and enforced remedy. *See Street*, 367 U.S. at 774 (stating, in discussion of appropriate judicial remedy, that "dissent is not to be presumed"); *Allen*, 373 U.S. at 118-19 (quoting *Street* in discussion of pleading and proof requirement for obtaining judicial remedy); *Abood*, 431 U.S. at 237-38 (quoting *Street* in discussion of appropriate judicial remedy).

In fact, this Court subsequently reviewed an agency shop arrangement that *did* presume nonmember dissent and the Court never questioned the constitutionality of such a practice. The teachers' union in *Hudson* charged nonmembers a "fair share fee" equal to 95 percent of regular union dues. *Hudson,* 475 U.S. at 294-95. That amount was calculated by reducing regular union dues by the amount the union conceded was spent on activity unrelated to collective bargaining, *i.e.*, political activity. *Id.* at 295. If an objector successfully used the union's objection procedure to challenge the calculation, the union prospectively reduced fees for *all* nonmembers, regardless of whether they actually objected. *Id.* at 296. Thus, the union *presumed* nonmember dissent and this Court expressed no concern about the constitutionality of that practice.

Indeed, it is illogical *not* to presume dissent with respect to nonmember employees. As the Seventh Circuit has made clear, "[t]wo distinct types of employee will decline to join the union." *Gilpin v. Am. Fed'n of State, County, and Mun. Employees, AFL-CIO,* 875 F.2d 1310, 1313 (7th Cir. 1989). "The first is the employee who is hostile to unions on political or ideological grounds. The second is the employee who is happy to be represented by a union but won't pay any more for that representation than he is forced to." *Id.* In either case, the employee is opposed to funding the union's political agenda. A presumption of dissent from the union's use of his funds for political purposes is therefore eminently reasonable. In contrast, a presumption of acquiescence ascribes to the employee a level of agreement with union activity that common sense does not support.

Finally, to not presume nonmember dissent is to presume nonmember consent, which the First Amendment

will not tolerate. *Abood*, after all, held that "the Constitution *requires* . . . that [union political] expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas." *Abood*, 431 U.S. at 235-36 (emphasis added). The only way to guarantee that this constitutional requirement is met – that is, the only way to guarantee that a union's political causes are financed solely "by employees who do not object to advancing those ideas" – is to affirmatively *obtain*, not presume, consent. *Id.* When consent is presumed, it is a virtual certainty that – because of the possibility of coercion, the fear of negative professional impacts, or simply a view that maintaining one's political principles is not worth the hassle of affirmatively objecting – union political activity will be financed in part by the compelled monies of persons politically or ideologically opposed to the activity. In other words, it is a virtual certainty that a constitutional violation will occur.

CONCLUSION

For the foregoing reasons, amicus curiae Institute for Justice respectfully requests that this Court reverse the decision of the Washington Supreme Court.

DATED: November 8, 2006

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