Nos. 05-1589 & 05-1657 (consolidated)

In The

Supreme Court of the United States

GARY DAVENPORT, ET AL., *Petitioners,*

v.

WASHINGTON EDUCATION ASSOCIATION, *Respondent.*

WASHINGTON, *Petitioner,*

v.

WASHINGTON EDUCATION ASSOCIATION, *Respondent.*

On Certiorari to the Supreme Court of Washington

Brief of Amicus Curiae National Federation of Independent Business Legal Foundation Supporting Petitioners

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James Bopp, Jr.
Counsel of Record
Richard E. Coleson
BOPP, COLESON & BOSTROM
THE JAMES MADISON CENTER
FOR FREE SPEECH
1 South 6th Street
Terre Haute, IN 47807-3510
812/232-2434 telephone
812/235-3685 facsimile

November 8, 2006

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Statement of Interest[1]

The NFIB Legal Foundation, a 501(c)(3), tax-exempt public-interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business (NFIB), the nation's leading small-business advocacy association, with offices in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. To fulfill this role as the voice for small business, the NFIB Legal Foundation frequently files amicus briefs in the courts "tell[ing] judges how the decision they make in a given case will impact small businesses nationwide." *See* http://www.nfib.com/page/aboutLegal.html. NFIB's members own and operate many of America's independent businesses, which create two-thirds of the new jobs in the United States. NFIB has worked to defend limitations that protect non-union employees from unwittingly or unwillingly financially supporting political causes with which they do not agree.

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[1]No "counsel for a party authored th[is] brief in whole or in part," and no "person or entity, other than the *amicus curiae*, its members, or its counsel, . . . made a monetary contribution to the preparation or submission of the brief." Rule 37.6. Letters of consent from all parties to the filing of this brief have been filed with the Clerk.

Summary of Argument

The two present cases are not campaign finance cases because the Washington Education Association ("WEA") is free to use general funds not received as the result of government compulsion for any lawful purpose, including political activity. So campaign finance decisions do not control this case.

WEA should be free to use money received from individuals who voluntarily associate with it for any lawful purpose, just as any voluntary association, including corporations (for-profit and nonprofit) and unions, should be free to do without any special notification to donors, members, or shareholders that funds received might be used for political purposes. In a voluntary association, the remedy for persons displeased with associated parties is persuasion if possible or terminating the relationship.

Because there is no constitutionally cognizable burden on WEA's association or expression rights, rational basis scrutiny should be applied, not strict scrutiny. The lower court erroneously relied on the third party rights of nonmembers of WEA who might wish to "associate" with WEA by having the nonchargeable portion of their agency shop fees used for WEA's political activity. But on this record, there is no evidence that such nonmembers even exist or that WEA should be permitted to assert jus tertii rights. All that would be necessary to vindicate the asserted association right of such hypothetical nonmembers would be for them to call WEA and give affirmative consent to such use of their nonchargeable fees. Such a ready remedy entirely eliminates WEA's jus tertii associational-interest argument and, along with it, the derivative argument that there is some heavy burden on WEA to vindicate that jus tertii associational interest. There is no burden on WEA's constitutional rights at all under these facts, so we need

only look for a rational basis for Washington's opt-in requirement.

The rational basis for an opt-in requirement is found in the specific context of the state compulsion present in Washington's decision to enact mandatory collection from nonmembers of agency shop fees that include nonchargeable amounts that WEA uses for political activity. In such a context of compulsion, there is a rational basis for including the opt-in provision to assure the protection of the free association and expression rights of nonmembers.

Argument

I. The Present Cases Are Not Campaign Finance Cases.

These cases are not about campaign finance because Washington has chosen not to prohibit corporate and political activity.[2] Since it has not asserted any interest in so restricting corporate and union political activity, WEA is absolutely free to spend its money for express political communications and political contributions.

A. Washington Has Not Asserted a Prohibition Interest.

While it may seem self-evident that the present consolidated cases are not campaign finance cases because the State of Washington has not asserted any interest in prohibiting corporations and unions from engaging in political activity, the Campaign Legal Center has sought to frame the issue as being about campaign finance. It devoted Part II of its brief urging this Court to grant certiorari to the argument that this Court's decision in *McConnell v. FEC*, 540 U.S. 93 (2003), mandates

[2] *Political activity* is used herein to encompass *independent expenditures*, *electioneering communications*, and *contributions*, as those terms of art are defined in the Federal Election Campaign Act ("FECA").

an opt-in requirement. Brief *Amicus Curiae* of the Campaign Legal Center Supporting Petitioner at 8-12, *Washington v. Washington Education Association* (No. 05-1657). And it recited a history of campaign finance regulation, *id.* at 9-10, and a collection of campaign finance cases that supposedly support an opt-in requirement. *Id.* at 12.

The Campaign Legal Center relied in particular on a statement in *McConnell* to the effect (as the Campaign Legal Center put it) that "this Court, in *McConnell*, made clear the Court's 'unanimous view' that such an 'opt-in' procedure provides unions with a 'constitutionally sufficient' opportunity to engage in political speech." *Id.* at 11. But this Court's statement in *McConnell* had the specific precondition of a prohibition on corporate and union express advocacy:

> Since our decision in *Buckley* [*v. Valeo*, 424 U.S. 1 (1976)], Congress' power to *prohibit corporations and unions* from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law. The ability to form and administer separate segregated funds authorized by FECA § 316, 2 USC § 441b (main ed. and Supp 2003), has provided corporations and unions with a constitutionally sufficient opportunity to engage in *express advocacy*. That has been this Court's unanimous view, and it is not challenged in this litigation.

McConnell, 540 U.S. at 203 (footnote omitted) (emphasis added). So *McConnell*'s statement regarding "sufficien[cy]" had only to do with the PAC option where corporations and unions were prohibited from making independent expenditures,

i.e., communication which "expressly advocate the election or defeat of a clearly identified candidate." 2 U.S.C. § 431(17)(A) (definition of "independent expenditure"); *see FEC v. Massachusetts Citizens for Life* ("*MCFL*"), 479 U.S. 238, 249 (1986) (prohibition on independent expenditures at 2 U.S.C. § 441b requires express advocacy construction to avoid vagueness and overbreadth).

But Washington has not prohibited corporations and unions from making independent expenditures or "electioneering communications" (some of which were facially held to be the "functional equivalent of express advocacy"). *Id.* at 206. The precondition (i.e., a prohibition) for this Court's statement in *McConnell* does not exist, and Washington has not required a PAC option for corporations and unions.

Since Washington has not asserted the interests that this Court has held may justify prohibiting corporate and union political activity, the present consolidated cases are not about the sufficiency of a PAC option to protect the First Amendment interests of corporations and unions. And the *McConnell* statement is inapplicable.

Rather, these cases are about Washington's effort to protect the rights and interests of individuals who are not union members in the unique context of Washington's compulsion of individuals who are not members of the union to pay "agency shop fees" that the union, the State, and the court below acknowledge include "nonchargeable expenses," i.e., union expenses used "to support political and ideological causes, which are unrelated to the union's collective bargaining activities on behalf of all employees." *State ex rel. Public Disclosure Commission v. Washington Education Association* ("*PDC*"), 130 P.3d 543, 549-50 (Wash. 2006) (en banc),

Appendix to Petition for Cert. in No. 05-1657 at 3a-4a [hereinafter "PDC App."].

While it is true that Washington may protect these nonmembers as it has done, it is not because *McConnell* approved the PAC option as sufficient to protect corporate and union express advocacy rights where a state prohibits them from express advocacy. Rather it is because Washington has a rational basis for extending this protection to nonmembers in order to protect their rights and interests in avoiding compelled association with the union and compelled expression in support of the union (by use of the nonchargeable portion of the nonmembers' agency shop fees). *See* Part III.

B. Unions and Corporations May Use Funds from Those Voluntarily Associating with Them for Any Lawful Purpose, Including Political Purposes.

The Campaign Legal Center did not state why it has attempted to frame these cases as campaign finance cases. Given the Center's ideological purpose, it is likely promoting an agenda that no corporation or union should be able to use money properly in its general fund for political activity (where not prohibited) unless it obtains express permission from any members, donors, or shareholders. Indeed, such a proposal was made when "paycheck protection" legislation similar to Washington's opt-in provision has been proposed in Congress. *See*, *e.g.*, 47 Cong. Rec. S2631-51 (2001)[3]

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[3]Tabled Amendment No. 134 to the Bipartisan Campaign Act of 2001 would have required corporations and unions to obtain prior consent before using funds received from shareholders and union members and nonmembers for "political activity," defined to include voter registration, get out the vote activity, express advocacy, and advertizing or polling for political activities. For corporations, the prohibition on the use of its general funds for political activity without stockholder prior consent would have been applied (continued...)

This agenda should be rejected. Unions and corporations should be able to use funds received from those who *voluntarily* associate with them for any lawful purpose (which includes political activity in the absence of a prohibition). Where there is voluntary association with (including voluntary payment of money to) a corporation or union, the consent of members, donors, or shareholders should be assumed. The issue in the present cases revolves around voluntariness in the context of State adoption of agency shop law and compulsion of nonmembers to pay agency shop fees including nonchargeable expenses (although these may then be recovered by those willing to do what is required to recover what, for most individuals, would be considered a modest amount of money). This in turn raises the issues of compelled nonmember "association" with the union and compelled nonmember speech (by funding union speech). Apart from this unique compulsion context, WEA is, and should be, free to use any funds properly in its general fund for any lawful purpose (just as any union or corporation should be).

Since Washington has not prohibited political activity for corporations and unions, there is no occasion to revisit the constitutionality of such a prohibition in these cases. But it is important to examine a support sometimes urged for such a prohibition, i.e, protection of minority stockholders (or dissenting members or donors), because it is relevant to the pivotal issue of compulsion and voluntariness in the present cases.

Preliminarily, it should be noted that (absent compulsion) every corporation and union is a form of voluntary association and no one forces anyone to buy and hold stock in any corporation. Individuals identify with a corporation or union—by

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[3](...continued)
"commensurate to the share of such stocks" in the general fund. 47 Cong. Rec. S2641 (2001).

membership or donation or shareholding—because they choose to do so. They choose to do so out of some perceived ideological or economic advantage to themselves, just as they decide whether or not to join a church, political party, civic league, food coop, or any other association. An astute observer of nineteenth-century America noted that "Americans of all ages, all conditions, and all dispositions constantly form associations." 2 Alexis de Toqueville, *Democracy in America* 106 (P. Bradley ed. 1948). And as to the corruption concerns that must underpin a prohibition on political activity, this Court held in *MCFL* that "[v]oluntary political associations do not suddenly present the specter of corruption merely by assuming the corporate form." *MCFL*, 479 U.S. at 263.

As information about incorporation and its advantages has become readily and inexpensively available, the number of these voluntary associations that choose to become corporations has mushroomed. *See* www.irs.gov/taxstats. By simply typing "how to incorporate" or similar words into an Internet search engine, an individual can now find numerous websites providing information on the benefits of incorporation (especially avoiding personal liability), and can do so without consulting a lawyer or even going to a library. At a very modest cost they can also obtain needed incorporation forms and actually incorporate through an online service. Incorporation is no longer the bailiwick of a few behemoths. It is now the preferred and most effective mode of existence for even mom-and-pop shops and diminutive advocacy groups. For these "little guys," most of their assets and readily available resources may be tied up in their corporations, so that political activity is best done through the corporation itself, not through yet another voluntary association (a PAC) that the corporation may establish, but which is not the *same* voluntary association that incorporated. *California Med. Ass'n v. FEC*, 453 U.S. 182, 196 (1981)

("[The] claim that [a PAC] is merely the mouthpiece of [the sponsoring organization] is untenable. [The PAC] instead is a separate legal entity that receives funds from multiple sources and that engages in independent political advocacy."). This Court in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 789 (1978), rightly eschewed the presumption that "corporations are wealthy and powerful and their views may drown out other points of view" and held, in 1986, that the burdens of such PACs could inhibit political activity, especially by groups of modest means. *MCFL*, 249 U.S. at 251-56 (plurality opin.); *id.* at 266 (O'Connor, J., concurring). That remains even more true today.

Many corporations, small and large, often perceive an advantage in engaging in political activity *as* a corporation, i.e., it is the corporation using its own assets to speak on some public issue concerning which the corporation itself has experience, expertise, and credibility.[4] This is especially true of

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[4]In his dissent in *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), Justice Scalia noted Alexis de Tocqueville's observation that "'[g]overnments . . . should not be the only active powers; associations ought, in democratic nations, to stand in lieu of those powerful private individuals whom the equality of conditions has swept away.'" *Id.* at 694 (citation omitted). Justice Scalia noted that in the *Austin* fact situation it was important for voters to hear the view of the Chamber *as* the Chamber providing the "information that private associations owning and operating a vast percentage of the industry of the State, and employing a large number of its citizens, believe that the election of a particular candidate is important to their prosperity." *Id.* Justice Kennedy, joined by Justices O'Connor and Scalia, also argued at length concerning the burdens and deficiencies of the PAC option, *id.* at 708-09, noting,

> The secondhand endorsement structure . . . debases the value of the voice of nonprofit corporate speakers. The public is not interested in what the PAC says; it does care about what the group itself says, so that the group itself can be given credit or blame for the

(continued...)

nonprofit, ideological corporations, whether or not they qualify for the exception to the prohibition on political activity that was recognized by this court in *MCFL*, 479 U.S. at 256-65, as woodenly applied by the Federal Election Commission ("FEC") to "qualified nonprofit corporations" ("QNCs"). *See* 11 C.F.R. § 114.10.

As to the question of voluntary association with an ideological nonprofit corporation, this Court in *MCFL* said that people associate with such corporations precisely because of their ideological advocacy. 479 U.S. at 259 ("The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace."). It developed this idea at length as follows:

> Individuals who contribute to [MCFL] are fully aware of its political purposes, and in fact contribute precisely because they support those purposes. It is true that a contributor may not be aware of the exact use to which his or her money ultimately may be put, or the specific candidate that it may be used to support. However, individuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction. Any contribution therefore necessarily involves at least some degree of delegation of authority to use such funds in a manner that best serves the shared political

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[4](...continued)
candidates it has endorsed or opposed. PAC's suffer from a poor public image.

Id. at 708.

> purposes of the organization and contributor. In addition, an individual desiring more direct control over the use of his or her money can simply earmark the contribution for a specific purpose, an option whose availability does not depend on the applicability of § 441b. Cf. [2 U.S.C.] § 434(c)(2) (C) (entities other than political committees must disclose names of those persons making earmarked contributions over $200). Finally, a contributor dissatisfied with how funds are used can simply stop contributing.

MCFL, 479 U.S. at 260-61. In sum, people voluntarily associate with and donate to nonprofit ideological corporations. And the same logic applies whether or not they fit the FEC's overly-restrictive definition of a QNC. Therefore, such nonprofits should be free to use donations (and membership dues if applicable) for any lawful purpose (which in the present case would include political activity because Washington has not prohibited it).[5]

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[5] *MCFL* addressed a related concern as follows:

> The Commission maintains that, even if contributors may be aware that a contribution to appellee will be used for political purposes in general, they may not wish such money to be used for electoral campaigns in particular. That is, persons may desire that an organization use their contributions to further a certain cause, but may not want the organization to use their money to urge support for or opposition to political candidates solely on the basis of that cause. This concern can be met, however, by means far more narrowly tailored and less burdensome than § 441b's restriction on direct expenditures: simply requiring that contributors be informed that their money

(continued...)

A key case as to voluntariness is *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), although the voluntariness was only a secondary consideration in the Court's analysis and not the compelling state interest on which this Court relied to find Michigan's prohibition constitutional as applied to the Chamber. *Austin* approved Michigan's prohibition on corporate (but not union) independent expenditures as applied to the Chamber, even though it was a nonprofit corporation.

The *Austin* majority employed strict scrutiny because the PAC option "burden[ed] expressive activity." *Id.* at 658. For a compelling state interest, *Austin* relied solely on the potential for "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 660. *Austin* only addressed dissenting member issues in stating that the Chamber was not entitled to the *MCFL*-corporation exception, deciding that because of various member benefits

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[5](...continued)

may be used for such a purpose.

479 U.S. at 261. *MCFL* only held that the prohibition on independent expenditures could not be justified with the FEC's rationale because a less restrictive means was readily identifiable. The FEC, however, created a rule requiring that "[w]henever a qualified nonprofit corporation solicits donations, the solicitation shall inform potential donors that their donations may be used for political purposes, such as supporting or opposing candidates." 11 C.F.R. § 114.10(e). This rule has not been tested as to constitutionality and amicus curiae does not concede it, believing that the immediately preceding rationale in *MCFL* would have adequately answered the FEC's argument, i.e., that individuals pool their money in advocacy organizations precisely for the purpose of most effectively advocating ideas, which advocacy may reasonably be expected to include independent expenditures (a common activity of ideological nonprofits), and that if donors do not like what the nonprofit is doing they can simply stop donating.

"the Chamber's members are more similar to shareholders of a business corporation than to the members of MCFL." *Id.* at 663.

Although this Court in *Austin* did not rely on protection of minority viewpoints (at the expense of majority viewpoints) as the compelling interest in deciding the case, "Justice Brennan's concurrence," as Justice Scalia described it, "would have us believe that the prohibition adopted by Michigan and approved by the Court is a paternalistic measure to protect the corporate shareholders." *Id.* at 685-86. Justice Scalia responded that this view was, first, "implausible":

> But such solicitude is a most implausible explanation for the Michigan statute, inasmuch as it permits corporations to take as many ideological and political positions as they please, so long as they are not "in assistance of, or in opposition to, the nomination or election of a candidate." Mich. Comp. Laws § 169.206(1) (1979). That is indeed the Court's sole basis for distinguishing First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), which invalidated restriction of a corporation's general political speech. The Michigan law appears to be designed, in other words, neither to protect shareholders, nor even (impermissibly) to "balance" general political debate, but to protect political candidates. Given the degree of political sophistication that ought to attend the exercise of our constitutional responsibilities, it is regrettable that this should come as a surprise.

Id. at 686.

He added, second, that even shareholders of for-profit corporations "know" of such a possibility to which "the shareholder exposes himself":

> But even if the object of the prohibition could plausibly be portrayed as the protection of shareholders (which the Court's opinion, at least, does not even assert), that would not suffice as a "compelling need" to support this blatant restriction upon core political speech. A person becomes a member of that form of association known as a for-profit corporation in order to pursue economic objectives, *i.e.,* to make money. Some corporate charters may specify the line of commerce to which the company is limited, but even that can be amended by shareholder vote. Thus, in joining such an association, the shareholder knows that management may take any action that is ultimately in accord with what the majority (or a specified supermajority) of the shareholders wishes, so long as that action is designed to make a profit. That is the deal. The corporate actions to which the shareholder exposes himself, therefore, include many things that he may find politically or ideologically uncongenial: investment in South Africa, operation of an abortion clinic, publication of a pornographic magazine, or even publication of a newspaper that adopts absurd political views and makes catastrophic political endorsements. His only protections against such assaults upon his ideological commitments are (1) his ability to persuade a majority (or the requisite minority) of

> his fellow shareholders that the action should not be taken, and ultimately (2) his ability to sell his stock. (The latter course, by the way, does not ordinarily involve the severe psychic trauma or economic disaster that Justice BRENNAN's opinion suggests.) It seems to me entirely fanciful, in other words, to suggest that the Michigan statute makes any significant contribution toward insulating the exclusively profit-motivated shareholder from the rude world of politics and ideology.

Id. at 686-87. *See also id.* at 687 (Justice Scalia arguing that "the individual member's ideological trauma" would be as great if the incorporated association with which he was associated endorsed a candidate of whom he disapproved whether it was a business corporation or an *MCFL*-corporation, so that such trauma did not support the prohibition).

Justice Kennedy, joined by Justices O'Connor and Scalia, similarly disputed any reliance on an "interest in protecting members." *Id.* at 709-10. They noted that Americans form associations, which incorporate, and that silencing such groups "is to silence some of the most significant participants in the American public dialogue." *Id.* at 710. "To the extent that members disagree with a nonprofit corporation's policies," they argued, "they can seek change from within, withhold financial support, cease to associate with the group, or form a rival group of their own." *Id.* at 710. They also argued that

> Abood v. Detroit Board of Education, 431 U.S. 209 (1977)[,] . . . does not apply here, as the disincentives to dissociate are not comparable. Bellotti, [435 U.S.] at 794, n. 34 (noting "crucial distinction" between union members and

> shareholders). One need not become a member of the Michigan Chamber of Commerce or the Sierra Club in order to earn a living.

Id. at 709-10.

This brings us back to the focus on the present case, which is on union activity. Just as nonprofit and for-profit corporations are free to spend their general treasury funds for any lawful purpose, so are unions—with a limited exception when nonvoluntariness is present, which is the topic of Part III. Thus, to the extent that association with and payments to a union are fully voluntary, unions too are free to spend their general funds for any lawful purpose, which in Washington includes political activity.

II. Rational Basis Scrutiny Applies.

The challenged provision in no way limits the speech or associational rights of WEA. It simply declares:

> 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.

This provision does not prohibit WEA from freely using money properly in its general treasury for any lawful purpose, including political activity that Washington has not prohibited. It does not limit in any way the ability of the union and individuals who have voluntarily chosen to associate with the union, i.e., union members, to associate, pay and receive membership

dues, take joint actions, and express themselves publicly and politically.

A. There Is No Nonmember Associational Interest.

The lower court, however, found an association interest between WEA and individuals who have chosen not to associate with the union by becoming members: "For those nonmembers who agree with the union's political expenditures, § 760's presumption of dissent presents an unconstitutional burden on their right to associate themselves with the union on political issues." *PDC*, 130 P.3d at 562, PDC App. at 20a. But it was wrong.

Preliminarily, the lower court's phrase "presumption of dissent" in the quoted passage is not proper because the phrase itself contains a presumption—a presumption that the only reason that a nonmember might not want her dues used for the union's political expenditures is dissent. The nonmember might actually agree with what the union is doing or have no opinion, but in any event want to simply stay out of involvement with political activity in this fashion (for whatever personal reason she might have, out of a vast range of possibilities). The lower court actually acknowledged this, but it failed to comprehend the implications of its argument for its own analysis:

> A presumption of dissent violates the First Amendment rights of nonmembers as well. A presumption of dissent fails to respect the nonmember's First Amendment rights as "running both ways." *Wagner v. Prof'l Eng'rs in Calif. Gov't*, 354 F.3d 1036, 1043 (9th Cir. 2004). It assumes that because an employee has not joined the union, he or she disagrees with the union's political expenditures. However, there are numerous and varied reasons why employ-

> ees choose not to join a union. *Leer v. Wash. Educ. Ass'n*, 172 F.R.D. 439, 446-47 (W.D. Wash.1997) (nonmembers do not have unanimity of purpose). Employees may choose to remain nonmembers for many reasons unrelated to political expression. For those nonmembers who agree with the union's political expenditures, § 760's presumption of dissent presents an unconstitutional burden on their right to associate themselves with the union on political issues.

PDC, 130 P.3d at 561-62, PDC App. at 20a-21a. Although it acknowledged that a presumption of dissent was improper factually, the lower court repeatedly argued that the State was deploying a presumption of dissent in § 706. *Id.* at 560-62, PDC App. at 17a-21a. But, as the court itself argued, there is no basis for presuming "dissent," and doing so is improper.

If an assumption of dissent is groundless and improper, then there is similarly no basis to presume the desire of some nonmembers to associate with and financially support WEA's political activities. The lower court assumed that some *non*-members actually agree with the union's political expenditures and want to associate with it by having the nonchargeable portion of their agency shop fees used by the union for political activities. The lower court pointed to no evidence that nonmembers who support the union's political expenditures even *exist*, let alone that they would want to express that support by associating with the union after they chose not to be members and that they would want to express that association by having

their compelled fee payments used for WEA's political activity.[6] On this record, such members do not exist.

No such secretly-financially-supportive-nonmember has been identified, and none has come forward to assert her right to associate with WEA in these cases. As with unrequited love, it is difficult to identify any associational relationship (or constitutionally cognizable interest or right) when only WEA wants to associate and the nonmember, by definition, has already rebuffed WEA's advances.

B. Jus Tertii Interests May Not Be Raised.

This raises the question of why the lower court was even considering the association right of such nonmembers. There are standards for asserting the rights of third parties not before this Court. Neither WEA nor the lower court have provided any argument as to why the rights of secretly-financially-supportive-nonmembers should be considered under traditional jus tertii rules, especially in a context where no such nonmember has been identified as actually existing and there is no evidence of any such nonmember asserting in any way (or being unable to assert) an "associational" right or interest in funding WEA's political speech.[7]

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[6]There is no evidence of such nonmembers in the Stipulation of Facts, Violations and Recommendations into which the WEA entered before the Washington Public Disclosure Commission. PDC App. at 121. The trial court made no finding that such nonmembers exist and did not even discuss them hypothetically in any opinion, order, or judgment. PDC App. at 115a, 102a, 84a, 81a, 79a. In particular, the trial court's Findings of Fact and Conclusions of Law made no such finding. PDC at 92a. As noted in text, the State Supreme Court cited no evidence for them. WEA's Brief in Opposition to the certiorari petitions before this Court likewise pointed to no evidence for them.

[7]If any such members actually exist, amicus curiae has not discovered (continued...)

An example of jus tertii analysis is *Singleton v. Wulff*, 428 U.S. 106 (1976). In that case, this Court determined that physicians could raise the rights of patients in an action challenging Missouri's refusal to fund abortions not "medically indicated" under its Medicaid program. *Id.* at 108 (four-Justice plurality); *id.* at 121-22 (Stevens, J., concurring) (questioning the logic of the other four but concurring because the physicians already had standing of their own).

Justice Blackmun, writing the plurality opinion, noted that "[f]ederal courts must hesitate before resolving a controversy . . . on the basis of the rights of third persons . . . ." *Id.* at113. The first reason was that unnecessary adjudication of such rights should be avoided and the holders of the rights might not wish to assert them or might be able to enjoy them regardless of the litigation outcome. *Id.* at 113-14 (*citing Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring)). The second reason was that the best defenders of jus tertii were usually the third parties themselves. *Id.* at 114. Third parties might have a preference for defending their own rights, as they would be bound by stare decisis. *Id.*

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[7](...continued)
any reason why they could not just give the amount of money in question to the union for political activities—or simply call WEA and give oral consent to the use of the nonchargeable portions of their agency shop fees— thereby engaging in the partial "association" they allegedly desire without the fuller association of membership. Evidence of people doing this would provide some evidence of (a) the existence of such members and (b) an actual desire to associate as the lower court presumes that they do—but it would also undercut any argument based on protecting such nonmembers' interest in such partial "association" because the evidence would show that they may easily "associate" in this fashion if desired. The absence of any such evidence in the record—or of an explanation of why it would not be possible to produce it—is telling.

Justice Blackmun noted that from these two considerations came the general rule: "Ordinarily one may not claim standing in this court to vindicate the constitutional rights of some third party." *Id.* (*citing McGowan v. Maryland*, 346 U.S. 249, 255 (1953), *quoting Barrows v. Jackson*, 366 U.S. 420, 429 (1961); *Flast v. Cohen*, 392 U.S. 83, 99 n.20 (1968)). Justice Blackmun continued, stating that the general rule should not apply when its underlying rationale is missing. *Id.* at 114. There are two elements this Court examines to determine if an exception should be made. First, the court examines the relationship of the litigant and the third party to see if the latter's "right is inextricably bound up with the activity the litigant wishes to pursue." *Id.* Second, the Court determines whether "some genuine obstacle" exists to prevent the third party from asserting its own right." *Id.* at 116.

As to the "relationship" test, in *Singleton* the plurality relied on the traditional confidential nature of the doctor-patient relationship and the necessity of a physician to the performance of an abortion to determine that the physician was uniquely qualified to advocate the right of patients seeking an abortion with state funding. *Id.* at 117. As to the "obstacle" test, the plurality noted that (a) women might be chilled from asserting their own rights by a desire to protect their privacy and (b) mootness was always at least a technical problem with pregnancy. *Id.* at 117-18.

In the present case, there is no special "relationship" between WEA and persons who have expressly rejected a relationship by remaining nonmembers. The rights of such nonmembers are in no way inextricably intertwined with WEA's political activity. As noted above, if such nonmembers want their nonchargeable fees used by WEA (and there is no evidence that anyone does) the nonmembers can simply call up WEA and give affirmative consent. That none have apparently

done so indicates that they have no interest in doing so, not that WEA now gets to assert these nonmembers' purported rights in an association relationship that they have formally rejected.

As to the "obstacle" test, the presence of nonmembers asserting their own rights in the present *Davenport* case (No. 05-1598) indicates that there is no obstacle to these nonmembers asserting their rights. And the rights that these nonmembers are asserting are not the rights that WEA says at least some nonmembers want to assert. As to an interest in privacy mentioned in *Singleton*, that interest cuts against WEA's argument. The opt-in requirement is the most private way for members to assert their interest concerning association with WEA's political activity. Under an opt-in requirement, a nonmember does not have to say anything in order to be excluded. Under an opt-out scheme, the nonmember must stand up amid disagreeing peers, her boss, and union officials and state yet again a desire to not "associate" with WEA and its political activity. To avoid this decidedly un-private moment, many likely take the path of least resistance (a common trait of human beings). By contrast, the most "private" thing one can do in a union setting is to just be a member, so as not to stick out from the crowd. If one decides to not be a member, the next most private thing to do is to not fuss about WEA using your nonchargeable money.

It is readily seen from this brief discussion that the rights of these hypothetical nonmembers should not have even been considered by the lower court. There is no basis for considering any association rights of nonmembers in these cases.[8]

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[8]Perhaps WEA will argue, as the lower court did, that the burden of proof is on the Petitioners here. So maybe it should be Petitioners' duty to show that there are *not* secretly-financially-supportive-nonmembers out there. But burdens start shifting to Petitioners only if there is a con-

(continued...)

C. WEA Has No Cognizable Burden.

This leaves only one other possible constitutional burden—the alleged burden on WEA's First Amendment rights resulting from having to ask for permission from these hypothetical, secretly-financially-supportive-nonmembers to use the nonchargeable portion of their agency dues for WEA's political activity. WEA cannot properly complain of not being able to use anyone else's money because (a) they already have the money of members, (b) they cannot have the money of persons who have chosen to go public through the opt-out *Hudson* procedure, and (c) they should not be heard to complain about not being able to use the funds of those who secretly oppose the union's political activity (or for any of a range reasons do not want the union using their money for political activity even if they do not oppose the union's activity) because that would violate the rights and interests of those nonmembers (which WEA surely would not wish to do). So WEA's alleged burden extends only to getting consent from those secretly-financially-supportive-nonmembers, if they exist. And this "burden" interest is analytically derivative of the "association" interest, i.e., if the alleged association interest of nonmembers can be

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[8](...continued)
stitutionally-cognizable burden on WEA's rights. WEA must establish that burden, which seems impossible on these facts, and in any event has not been done. Only after that burden is established would any burdens shift to the State to prove narrow tailoring to a compelling interest. To establish that there even is a burden its First Amendment rights, WEA must demonstrate that there actually are secretly-financially-supportive-nonmembers whose third-party rights may legitimately be asserted here and whose interest in "association" with WEA may not be easily accommodated by actions that impose a near-weightless burden. So WEA cannot shift the burden before that point and Washington need not prove the absence of secretly-financially-supportive-nonmembers.

readily accommodated without any cognizable burden, then the "burden" interest entirely evaporates.

The lower court described WEA's burden in attempting to solicit secretly-financially-supportive-nonmembers as onerous, citing, inter alia, *MCFL*, 479 U.S. 238. *PDC*, 130 P.3d at 560-61, 569-70, PDC App. at 19a-20a, 31a-32a. But the burden *MCFL* described was the full burden of PAC compliance, which is not in any way at issue here. WEA has no such burden. As shown next, it does not even have a constitutionally cognizable burden.

Since WEA already sends out *Hudson* packets twice a year, *Id.* at 550, PDC App. at 4a, it only needs to add a checkbox on a return card in that packet seeking the required affirmative consent. Or it could mail that response card to the approximately 3,500 nonmembers. *Id.*, PDC App. at 4a. Or it could call the nonmembers to see if they will consent. PDC App. at 138a (§ 760 does not require that consent be in writing). Or it could simply add one printed line in its *Hudson* materials asking nonmembers to call WEA to approve use of the nonchargeable portion of their agency shop fees for political activity. This is a minuscule burden, but it can be made infinitesimal.

If the foregoing options are yet too great a "burden" in WEA's eyes, it could simply advise nonmembers (in writing or orally) one time at the beginning of the nonmember's employment that any time the nonmember wants to have the nonchargeable amount of her agency shop fees used for WEA's political activity she needs only to call WEA and say so. Or the employer could even do this if WEA believes this momentary statement of the option is yet too heavy a burden.

Any of these listed options would provide fully adequate protection for the asserted interests of secretly-financially-supportive-nonmembers and WEA in asking them to please

reconsider "association" with WEA at some level by allowing WEA to use nonchargeable fees for political activity. The fact that WEA may not like these options (as evidenced by the present lawsuit),[9] does not eliminate the fact that the asserted "associational" interest between such likely-hypothetical nonmembers and WEA can readily be accommodated with an infinitesimal "burden." This eliminates both the nonmember "associational" interest and the "burden" on WEA argument entirely.

None of these listed options is a substantial burden for the chance of recovering between $154,000 and $266,000 per year for WEA to spend on political activity.[10] If, as WEA and the lower court assure us, there really are secretly-financially-supportive-nonmembers out there waiting to give their consent to use their money, WEA could readily offset any minuscule or infinitesimal expense with the bountiful dollars it will receive, and which it will then be able to use with a clear conscience, unconcerned over the possibility of having burdened any nonmember's rights and interests in not being compelled to associate and speak. The alleged burdens on WEA's First Amendment interests and hypothetical nonmembers are so low as to be constitutionally noncognizable. *See*, *e.g.*, *MCFL*, 479 U.S. at 256 ("When a statutory provision *burdens* First Amendment rights, it must be justified by a compelling state interest."

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[9]It may safely be presumed that the opt-*in* requirement reduces the amount of money that WEA might have to spend for political activity as a result of nonmember inaction if Washington instead had an opt-*out* requirement. But obtaining more nonchargeable portions of nonmembers' compelled agency shop fees for WEA is not a cognizable interest and has no place in the present analysis.

[10]There are approximately 3,500 nonmembers and the nonchargeable amounts vary from $44 to $76, resulting in the amounts calculated. *PDC*, 130 P.3d at 550-51.

(emphasis added)). *See also Austin*, 494 U.S. at 658 ("requirements . . . burden expressive activity" and so "must be justified by a compelling state interest").

Therefore, rational-basis inquiry is appropriate here. Absent any burden on association or expression rights, rational-basis review is required in these cases. *See*, *e.g.*, *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 345 (1995) (the "ordinary litigation" standard). "For protection against abuses by legislatures the people must resort to the polls, not to the courts." *Munn v. Illinois*, 94 U.S. 113, 134 (1884). So Washington and Davenport et al. have no burden of proving narrow tailoring to a compelling state interest. And any statements in the lower court's opinion about failure of proof may not be applied to the State but must be applied to WEA. *See*, *e.g.*, *PDC*, 130 P.3d at 565, PDC App. at 26a ("The State has failed to even attempt to justify § 760, which it is required to do when regulating First Amendment rights."). So what the lower court said first about the standard of review applies to these cases:

> A party challenging the constitutionality of a statute bears the burden of establishing its unconstitutionality beyond a reasonable doubt. A statute is presumed constitutional, and all doubts are resolved in favor of constitutionality.

Id. at 556, PDC App. at 4a (citations omitted). As shown next, Washington's opt-in requirement readily meets this standard.

III. A Nonmember Opt-In Requirement Is Rational in this Context of State Compulsion.

Washington's opt-in requirement has a rational basis. It is protecting nonmembers in the context of compulsion that Washington has created by mandating the payment of agency shop fees that include nonchargeable amounts and requiring

those who wish to opt-out of membership to go public in a workplace filled with those of a different view with the fact that they do not wish to belong to the union.

This context of compulsion makes rational an opt-in procedure designed to assure that there is no additional compulsion to "associate" with a union or support its political expression by having nonchargeable amounts used for union political activity unless the nonmember chooses to opt *out* of having her funds so used. It is rational in this context of compulsion to protect the free association and free expression rights and interests of nonmembers by requiring the WEA to get the nonmembers' affirmative assent before using nonmembers' nonchargeable agency shop fees for political purposes.

While it is true that WEA is, and should be, free to use the membership fees of those who voluntarily associate with it for any lawful purpose, nonmembers by definition have not voluntarily associated with the union. If a nonmember simply makes a phone call to WEA approving the use of her nonchargeable fees for WEA political activity, then she has voluntarily "associated" with WEA at least to that extent. An assumption of association by her inaction fails to take into account the social dynamics of sticking one's neck out in the midst of people hostile to one's position for a mere $44 to $76. *PDC*, 130 P.3d at 551, PDC App. at 4a. It is rational for Washington to believe that some nonmembers will not wish to take this additional step of disassociation from their peers for such a modest amount of money and will just let the money go despite the violation of their rights and interests in free association and expression. It is rational for Washington to protect these peoples, especially when the burden is so infinitesimal on WEA to simply give those who might actually want to let their funds by used (although they have never been proven to exist) the option to call WEA and give consent.

Conclusion

For the foregoing reasons, the Court should rule in Petitioners' favor and reverse the lower court.

Respectfully submitted,

James Bopp, Jr.,
Counsel of Record
Richard E. Coleson
BOPP, COLESON & BOSTROM
THE JAMES MADISON CENTER
FOR FREE SPEECH
1 South 6th Street
Terre Haute, IN 47807-3510
812/232-2434 telephone
812/235-3685 facsimile