Nos. 05-1657 & 05-1589

In the Supreme Court of the United States

STATE OF WASHINGTON, PETITIONER

v.

WASHINGTON EDUCATION ASSOCIATION

GARY DAVENPORT, ET AL., PETITIONERS

v.

WASHINGTON EDUCATION ASSOCIATION

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

LAWRENCE H. NORTON
General Counsel

RICHARD B. BADER
Associate General Counsel

DAVID KOLKER
Assistant General Counsel

STEVE N. HAJJAR
Attorney
Federal Election Commission
Washington, D.C. 20463

HOWARD M. RADZELY
Solicitor

KATHERINE E. BISSELL
Associate Solicitor

NORA CARROLL
Senior Attorney
Department of Labor
Washington, D.C. 20210

PAUL D. CLEMENT
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

GREGORY G. GARRE
Deputy Solicitor General

DARYL JOSEFFER
Assistant to the Solicitor General

DOUGLAS N. LETTER
AUGUST E. FLENTJE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Under Washington law, 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 Ann. § 42.17.760 (West 2006). The question presented is whether such an affirmative-authorization or opt-in requirement violates the First Amendment rights of labor organizations.

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INTEREST OF THE UNITED STATES

This case presents a First Amendment challenge to a state law that requires labor unions to obtain the permission of nonmembers before using compelled agency shop fees to make contributions or expenditures to influence elections. The United States has a substantial interest in the validity of such a provision. The Federal Election Commission is charged with enforcing federal election laws, including laws that generally prohibit unions from using nonmembers' agency shop fees for political activities. 2 U.S.C. 441b (2000 & Supp. IV 2004). In addition, the Secretary of Labor is responsible for help-

ing "to foster, promote, and develop the welfare of the wage earners of the United States." 29 U.S.C. 551.

STATEMENT

1. States have the flexibility to permit or prohibit "union shop" and "agency shop" arrangements in the workplace. See *Railway Employees' Dep't* v. *Hanson*, 351 U.S. 225, 233, 238 (1956). Under a "union shop" arrangement, a union and employer enter into a collective bargaining agreement that requires all employees who benefit from collective bargaining to join the union. By contrast, under an "agency shop" agreement, employees do not have to join the union, but must nonetheless pay an "agency shop" fee to the union for representational activities. Even when a union-shop or agency-shop arrangement is permitted, workers have a right to a refund of the portion of their fees or dues that would otherwise subsidize a union's political activities. *Chicago Teachers Union, Local No. 1* v. *Hudson*, 475 U.S. 292, 301-302, 310 (1986).

Washington State generally forbids public-sector employers and unions from entering into union-shop arrangements, but it has chosen to permit agency-shop agreements under which employees who do not join the union must pay the union a fee equal to the dues paid by members. *E.g.*, Wash. Rev. Code Ann. §§ 41.56.122(1), 41.59.100 (West 2006). Under Washington law, if a public education employer enters into such an agency-shop agreement, it must deduct union dues and agency shop fees from its employees' paychecks. *Id.* § 41.59.100.

The Washington statute at issue in this case further provides, however, that "[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 Ann. § 42.17.760 (West 2006). Washington voters approved that opt-in requirement in 1992 as part of an omnibus campaign-finance ballot initiative. 05-1657 Pet. App. 8a.

2. Respondent Washington Education Association (WEA) is the bargaining representative for approximately 70,000 Washington teachers and other educational employees. 05-1657 Pet. App. 3a. Under its collective bargaining agreement, the WEA collects agency shop fees from nonmembers, *i.e.*, employees who chose not to join the union. *Id.* at 3a. Nonmembers comprise approximately 5% of the bargaining unit. *Id.* at 4a. The union uses a portion of each worker's fees for political purposes unless the worker affirmatively objects to that use—or opts *out* of the union's political funding scheme—in which case the employee may obtain a rebate of the relevant portion of the fees. See *id.* at 3a-5a.

3. Petitioner State of Washington filed suit against WEA in state court, alleging that for five years the union had used nonmembers' agency shop fees for political purposes without their affirmative authorization, in violation of Section 42.17.760. 05-1657 Pet. App. 5a. After finding that WEA had done so, the trial court fined WEA $400,000, required the union to pay the State's costs and fees, and entered permanent injunctive relief. *Id.* at 81a-83a, 84a-91a. The Washington Court of Appeals reversed. *Id.* at 48a-78a. It concluded that the affirmative-authorization requirement "unduly burdens unions" by "requir[ing] a union to protect nonmembers who disagree with a union's political expenditures but are unwilling to voice their objections." *Id.* at 68a, 69a.

In the meantime, the *Davenport* petitioners—public educators in Washington who are not members of WEA, but are covered by the agency-shop agreement—filed a class action seeking recovery of the portion of their agency shop fees that the union had used for political purposes. 05-1657 Pet. App. 7a. The trial court declined to dismiss the complaint, but stayed further proceedings pending interlocutory appeal. 05-1589 Pet. App. 45a-49a. After the court of appeals held the affirmative-authorization requirement unconstitutional in the enforcement action discussed above, it remanded the *Davenport* case to the trial court for dismissal. *Id*. at 42a-44a.

4. The Supreme Court of Washington consolidated the two cases and affirmed the court of appeals' ruling that the State's affirmative-authorization requirement is unconstitutional. 05-1657 Pet. App. 1a-47a.

a. The court first interpreted Section 42.17.760 to require an "expression of positive authorization" before a union may use a worker's agency shop fees for political purposes. 05-1657 Pet. App. 10a. That is, the court observed, the statute requires "that the member must say 'yes,' instead of failing to say 'no.'" *Ibid*. The court also agreed with the State that such authorization need not be in writing. *Id*. at 11a.

The court then concluded that, because "[r]egulation of First Amendment rights is always subject to exacting judicial scrutiny," the Washington law was subject to strict scrutiny. 05-1657 Pet. App. 18a. Applying that analysis, the court held that the Washington law creates a "presumption of dissent" that "violates the First Amendment rights of both members and nonmembers." *Id*. at 19a. The court explained that the affirmative-authorization requirement unconstitutionally "transfers the burden of asserting First Amendment rights from

the dissenting nonmembers and places it on the supporting nonmembers and the union." *Id.* at 22a. In the court's view, "[d]issenters may not silence the majority by the creation of too heavy an administrative burden," and here "the State's position would require individual contact with each nonmember who did not respond to" a mailing. *Id.* at 20a. The court went on to hold that the Washington law violated "the First Amendment rights of nonmembers as well," because nonmembers may agree with the union's political activities. *Ibid.*

The court reasoned that its conclusion was required by *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000). 05-1657 Pet. App. 27a-34a. It construed *Dale* to hold that if a law applies to an organization that engages in expressive activity, and "significantly burdens the [organization's] ability to express its viewpoint," the law must be narrowly tailored. *Id.* at 29a-30a; see *id.* at 27a-28a. Giving "deference to the union's view of what would impair its political expression," *id.* at 32a, the court concluded that Washington's opt-in requirement significantly burdens the union's expression, *id.* at 31a-32a. It also held that the requirement is not narrowly tailored because it gives nonmembers greater protection than the Constitution requires. *Id.* at 27a-28a, 32a-33a.

b. Three Justices dissented. 05-1657 Pet. App. 34a-47a. In their view, "the majority turns the First Amendment on its head to invalidate a state statute enacted to further protect the constitutional rights of nonunion members who are required to pay agency fees as the price of their employment." *Id.* at 37a. They explained that, particularly since States may "eliminate the payroll deduction for collection of agency shop fees altogether," "there is no constitutional right to have the government deduct union dues (and, by logical extension,

agency dues) from paychecks." *Id.* at 38a-39a. Indeed, the dissenters explained, the law at issue simply places "a procedural condition on the collection of a small portion of such shop fees," namely, those that would be used by the union for political activities. *Id.* at 39a.

The dissenters also reasoned that the majority's reliance on this Court's cases was misplaced. As they explained, "[t]he holdings of all the cases cited by the majority amount to a simple proposition: the constitution requires *at least* an opt-out scheme to protect dissenters' rights." 05-1657 Pet. App. 41a. Those cases do not, the dissenters continued, "stand for the proposition that the constitution limits a different legislative approach to protecting dissenters' rights, including an opt-in scheme." *Ibid.* The dissent also disavowed the majority's reliance on *Dale*, explaining that here, unlike *Dale*, "nonunion employees have elected *not* to associate" with the union. *Id.* at 45a. "This does not violate the associational rights of the union or its members," the dissenters explained, because the union has "no constitutional right to compel membership much less monetary support from nonmembers in the first place." *Ibid.*

SUMMARY OF ARGUMENT

The First Amendment does not prevent a State from establishing an opt-in requirement for use of nonmembers' agency shop fees for political purposes. The decision below went far astray and interpreted a statute that furthers First Amendment values as violating the Amendment. That decision has far-reaching consequences and should be reversed.

I. The opt-in provision at issue in this case requires only that unions obtain nonmembers' consent before using their compelled agency shop fees for political pur-

poses. That requirement—the simple proviso that a "member must say 'yes,' instead of failing to say 'no,'" 05-1657 Pet. App. 10a—not only fails to raise any constitutional concern, but actually promotes First Amendment interests by protecting the freedom of speech and association of workers who chose *not* to join the union and may well oppose its political activities. The First Amendment requires that those workers be given an opportunity to "opt out"; and those same values are furthered, not threatened, by requiring that they affirmatively "opt in." In addition, such an affirmative-authorization requirement protects all participants in the political process from the distorting effects that result from permitting a speaker to amplify its voice with the money of others who do not actually support its message.

II. Far from abridging unions' freedom of speech, Washington's opt-in requirement leaves unions free to speak on any topic of their choosing, at any time or place, and in any manner. Nor does it restrict the amount of money unions can raise or spend on speech. The requirement certainly does not abridge union members' freedom of association, because union members remain free to associate and pool their (own) funds, to determine the content of their shared message and the means of communicating it, and to organize their internal affairs as they see fit. It simply requires a union to obtain nonmembers' affirmative consent before using their coercively collected fees for political purposes.

Nor do the administrative costs of securing nonmembers' consent unconstitutionally burden unions' First Amendment rights. The costs of requesting affirmative authorization are relatively modest—a mailing or perhaps a phone call—and are likely *less* than the costs faced by every other organization that seeks to use

other peoples' money for speech. While other organizations must solicit and collect donations without the government's assistance, Washington gives unions a significant advantage by (i) permitting them to impose agency shop fees on nonmembers and use those fees for political purposes (with nonmembers' affirmative authorization), and (ii) collecting those fees for the unions through payroll deductions. The union has no constitutional entitlement to additional advantages. And, of course, the unions face no possibility of suffering any net harm—if the costs of obtaining affirmative consent outweigh the funds generated, the unions can simply not pursue consent. But they lack any *a priori* entitlement to those funds and therefore can state no claim to constitutional injury from burdens on their ability to collect them.

In situations where Congress or a state legislature has given unions a statutory right to enter into collective bargaining agreements permitting unions to collect and use agency shop fees, this Court has held that unions may constitutionally use the fees for political purposes unless a dissenter objects to such use. But nothing in this Court's precedents suggests that the government may not insist that nonmembers affirmatively consent to the use of their dues for political purposes. The Washington Supreme Court fundamentally erred by treating the constitutionally required procedures for *protecting* dissenters' rights as a constitutional ceiling, rather than a floor, on the protections the government may afford individuals who decline to join a union.

III. The constitutionality of Washington's affirmative-authorization requirement is underscored by this Court's decisions upholding campaign-finance laws that impose *more* burdensome requirements on unions. Under federal law, unions generally may not finance fed-

eral political activities with general treasury funds derived from nonmembers' fees, or even from members' dues, regardless of whether the member or nonmember would consent to that use. Instead, unions must: establish separate segregated funds; solicit separate voluntary contributions to those funds; and observe strict limits on their solicitation of contributions from nonmembers. Because the constitutionality of those federal restrictions is well-settled, it follows *a fortiori* that Washington's more modest affirmative-authorization requirement is constitutional as well.

ARGUMENT

This Court long ago established that the First Amendment prohibits unions from using for political purposes fees collected under a state-imposed union-shop or agency-shop arrangement from nonmembers who object to the union's political activities. In many States, that constitutional prohibition is given effect by permitting nonmembers to opt out of any regime in which their dues are used for political purposes. The basic question in this case is whether the Constitution prohibits a State from imposing an opt-*in* requirement that prevents a union from using nonmembers' fees for political purposes unless workers affirmatively authorize it. The answer is clearly no. Far from violating the First Amendment, such a requirement actually advances First Amendment values by safeguarding the interests of nonmembers in not having to pay for union political activities with which they disagree. The added protections afforded nonmembers in no way intrude on the First Amendment interests of unions. Indeed, unions have no First Amendment interest at all in using nonmembers' dues for political activities with which they disagree.

I. WASHINGTON'S AFFIRMATIVE-AUTHORIZATION REQUIREMENT PROMOTES THE LEGITIMATE FIRST AMENDMENT INTERESTS OF NONMEMBERS AND THE INTEGRITY OF THE ELECTION PROCESS

A. Union-shop and agency-shop arrangements directly impact the First Amendment interests of workers who are compelled by state law to pay dues or fees to the union. As this Court has recognized, because "[u]nions traditionally have aligned themselves with a wide range of social, political, and ideological viewpoints," *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 516 (1991), "[a]n employee may very well have ideological objections to a wide variety of activities undertaken by the union." *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977). In order to further the government's interest in labor peace, the government may nonetheless authorize union-shop or agency-shop arrangements. *Railway Employees' Dep't* v. *Hanson*, 351 U.S. 225, 233-235 (1956). But as this Court has emphasized, "allowing the union shop at all" is "a significant impingement on First Amendment rights." *Ellis* v. *Brotherhood of Ry. Clerks*, 466 U.S. 435, 455-456 (1984); see *Chicago Teachers Union* v. *Hudson, Local No. 1*, 475 U.S. 292, 301 (1986); *Abood*, 431 U.S. at 222. As a result, "[t]here can be no doubt that it is within the police power of a State to prohibit the union * * * shop." *Hanson*, 351 U.S. at 233; accord *Lincoln Fed. Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525, 531 (1949).

If the government authorizes a union or agency shop, employees may be required to pay only their fair share of "the work of the union in the realm of collective bargaining," work from which all employees benefit. *Hanson*, 351 U.S. at 235. The First Amendment prohibits

the government from requiring workers to support a union's political activities over their objection. *Hudson*, 475 U.S. at 301-302; *Abood*, 431 U.S. at 234. Thus, union- or agency-shop fees "must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Lehnert*, 500 U.S. at 519.[1]

B. The federal and state governments have adopted various approaches to balancing their interest in promoting labor peace with their interest in protecting workers who would prefer not to associate with a union. The National Labor Relations Act, 29 U.S.C. 151 *et seq.*, generally authorizes private-sector employers and unions to enter into union-shop or agency-shop agreements, 29 U.S.C. 158(a)(3), but also permits States to ban such arrangements, 29 U.S.C. 164(b). See *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 742-744 (1963). Approximately half of the States have enacted "right-to-work" laws restricting or prohibiting private-sector union or agency shops. See Employment Standards Admin., U.S. Dep't of Labor, *State Right-to-work Laws* (last modified Dec. 2005) <http://www.dol.gov/esa /programs/whd/ state/righttowork.htm>; 05-1657 Pet. App. 35a-36a n.3 (collecting state laws).

Federal and state governments have also adopted a variety of approaches to union and agency shops in the

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[1] This Court's decisions concerning public-sector workers, such as the nonmembers at issue here, are grounded in the First Amendment. *E.g.*, *Hudson*, 475 U.S. at 301-302. This Court has also construed federal labor statutes to confer the same rights on private-sector workers, in order "to avoid serious doubt of their constitutionality." *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 749 (1961).

context of public-sector employment. The federal government, for example, does not permit federal employers and unions to enter into union-shop or agency-shop arrangements at all. See generally 5 U.S.C. 7102 (granting each employee the right to "refrain" from "assist-[ing] any labor organization"). In contrast, Washington, like several other States, generally authorizes public-sector employers and unions to enter into agency-shop (but not union-shop) agreements. *E.g.*, Wash. Rev. Code Ann. §§ 41.56.122(1), 41.59.100 (West 2006).

In the statute at issue here, Washington mitigated the impact of the agency-shop arrangement on nonmembers' freedom of association and speech by requiring unions to obtain nonmembers' affirmative authorization before using their fees for political purposes. Wash. Rev. Code Ann. § 42.17.760. That provision grants workers greater procedural protection than the constitutional floor by requiring unions to obtain nonmembers' affirmative authorization before using their compelled agency shop fees for political purposes, instead of putting the burden on nonmembers to opt out. Although not constitutionally required, the provision directly serves First Amendment values by protecting the rights of nonmembers, while ensuring that the unions' political activities reflect the views of those who fund them.

Washington thereby struck a reasonable balance between the two competing government interests. It chose to permit agency shops notwithstanding their "significant impingement on First Amendment rights" of workers, *Ellis*, 466 U.S. at 455-456, but conditioned that permission on the modest, and highly germane, requirement that unions obtain nonmembers' affirmative authorization before using their fees for political purposes, Wash. Rev. Code Ann. § 42.17.760. That require-

ment ensures that nonmembers' contributions to the political activities of the unions are made knowingly and voluntarily, in part by "remind[ing] those persons that they are giving money for political purposes and counteract[ing] * * * inertia." *Michigan State AFL-CIO* v. *Miller*, 103 F.3d 1240, 1253 (6th Cir. 1997). Striking such a balance between competing government interests is a quintessentially appropriate exercise of the State's police power in this area.

C. As the Washington Supreme Court recognized, the affirmative-authorization requirement also "protect[s] the integrity of the election process from the perception that elected officials are improperly influenced by monetary contributions and the perception that individuals have an insignificant role to play." 05-1657 Pet. App. 12a. This Court has long recognized the government's authority to protect against the corruption or appearance of corruption that can accompany unions' political contributions, as well as the potential that workers' union dues or fees will be used to support political causes that they oppose. *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 208 (1982) (*NRWC*); see pp. 25-27, *infra*. Washington law directly promotes that weighty interest by ensuring that any spending of nonmember dues on political activities actually reflects the will of the nonmembers because, like the contributions of nonmembers in virtually any other context, they involve the affirmative authorization of the workers.

II. THE AFFIRMATIVE-AUTHORIZATION REQUIREMENT DOES NOT ABRIDGE FREEDOM OF SPEECH OR ASSOCIATION, BUT INSTEAD PROMOTES IT

The Washington law at issue in no way impedes the First Amendment rights of unions. Indeed, unions re-

ceive preferential treatment under Washington law compared with other speakers. Washington requires only that unions obtain affirmative authorization from *nonmembers* before using their fees for political purposes—a practical requirement faced by everyone else who seeks to use other peoples' money for speech. Even so, unions are still favored vis-a-vis other speakers. Other groups must identify and seek out contributors, and even if they receive an affirmative pledge of support, they still face uncertain prospects of collecting. By contrast, Washington law authorizes unions to impose fees on nonmembers and requires employers to collect those fees through payroll deductions, which almost certainly increases the amount collected while reducing the union's collection costs. See, *e.g.*, Wash. Rev. Code Ann. §§ 41.56.122(1), 41.59.100. The First Amendment does not entitle unions to even more preferential treatment.

A. The Washington Law Does Not Infringe Union Members' Freedom Of Speech Or Association

1. The Washington Supreme Court held that Washington's affirmative-authorization requirement must satisfy strict scrutiny because "[r]egulation of First Amendment rights is always subject to exacting judicial scrutiny." 05-1657 Pet. App. 18a. But the level of scrutiny varies depending on the type of restriction at issue. See, *e.g.*, *United States* v. *O'Brien*, 391 U.S. 367 (1968) (applying intermediate scrutiny). Here, there is no cognizable restriction on the union's speech, and certainly none triggering strict scrutiny. The Washington law does not prohibit the union from speaking, regulate the content of the union's speech, or even limit the time, place, or manner of the union's speech. Nor does the statute limit the amount of money the union can raise or

spend on speech. Instead, having authorized unions to collect fees from nonmembers, it merely requires the union to ensure that nonmembers "say 'yes'" to the use of those compelled fees for political purposes, instead of merely ascertaining that they "fail[ed] to say 'no.'" 05-1657 Pet. App. 10a.

That affirmative-authorization requirement imposes no restriction on the First Amendment rights of unions, and furthers First Amendment values overall. Indeed, it is beyond dispute that unions may not compel the payment of dues from nonmembers for political activities with which those workers disagree. See pp. 10-11, *supra*. Unions enjoy no First Amendment right to take and use workers' wages to fund their own political agenda unless and until the workers object.

2. Nor is union members' freedom of association meaningfully implicated, much less violated. Because "[t]he right to speak is often exercised most effectively by combining one's voice with the voices of others," this Court has recognized "a First Amendment right to associate for the purpose of speaking." *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297, 1311-1312 (2006) (*FAIR*). The Washington statute, however, in no way infringes on that right. Union members are free to associate and pool their (own) funds. They remain free to determine the content of their shared message and the means of communicating it. And their ability to organize the union's internal affairs is likewise unaffected by the Washington law.

The opt-in requirement only restricts the unions' unique and state-enabled ability to compel fees from *nonmembers* and then use them for political purposes. It does not even bar that use of nonmembers' fees—it only requires the union to obtain their permission. Far

from abridging the freedom of association, that requirement supports it by protecting nonmembers' freedom not to associate with the union. "Freedom of association * * * plainly presupposes a freedom not to associate," especially when it comes to political activities. *Roberts* v. *United States Jaycees*, 468 U.S. 609, 623 (1984).

B. The Administrative Cost Of Obtaining Nonmembers' Authorization Is Not An Unconstitutional Burden

The Washington Supreme Court nonetheless held that the affirmative-authorization requirement is subject to strict scrutiny because the administrative costs of securing nonmembers' authorization "significantly burden the union's expressive activity." 05-1687 Pet. App. 27a; see *id.* at 31a-32a. That conclusion is fundamentally flawed as both a practical and legal matter. In reality, the administrative costs are minimal and, in any event, are better understood as a minor reduction in the administrative advantage conferred by the agency-shop arrangement, rather than the imposition of any burden.

1. The negligible administrative costs imposed by the Washington law do not approach a constitutional dimension. The requisite consent may be obtained through a routine mailing (and does not even have to be in writing, 05-1657 Pet. App. 11a). No additional mailing would even be necessary, because the union already sends a packet to nonmembers twice each year informing them of the right to object to paying fees for political expenses. *Id.* at 4a. The Washington court expressed concern that the need to obtain advance authorization would complicate the union's book-keeping, but as that court acknowledged, the union can simply "hold the

amount allocated to political activity in escrow while seeking affirmative authorization." *Id.* at 32a.[2]

The Washington Supreme Court expressed concern that "the lack of access to those funds could impact the timeliness of the union's political speech" while the union sought authorization. 05-1657 Pet. App. 32a. But that concern only underscores the extent to which the Washington court "turn[ed] the First Amendment on its head." *Id.* at 37a. This Court has long rejected similar arguments, explaining that such "union borrowing" would violate nonmembers' First Amendment rights by requiring them to subsidize political activities with which they might disagree, even if only temporarily. *Ellis*, 466 U.S. at 444; accord *Hudson*, 475 U.S. at 305. Thus, especially where there are "readily available alternatives" (here, obtaining consent before using money for political purposes), this Court has held that such borrowing cannot be justified by "administrative convenience." *Ellis*, 466 U.S. at 444. The union's administrative convenience is simply not a constitutional right, especially when contrasted against a nonmember's interest in not subsidizing the union's political speech.

That is particularly true because the challenged provision is better understood as a minor reduction in the unique advantages the State gives unions when it comes to nonmembers' political contributions in the agency-shop context, rather than the imposition of a burden, however small. Washington law as a whole *relieves* un-

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[2] The Washington statute at issue does not require public disclosure of an organization's members or contributors. See, *e.g.*, *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 453-454, 462-463 (1958). Nor does it impose any penalties on group members or withhold generally applicable benefits from them. See, *e.g.*, *Healy* v. *James*, 408 U.S. 169, 180-184 (1972).

ions of administrative burdens faced by most if not all other speakers. As discussed, Washington permits unions to collect mandatory fees from nonmembers through paycheck withholding, and thereby reduces unions' collection costs while likely increasing the amount collected. See p. 14, *supra*. Every other organization needs to seek out contributions and, even if a potential contributor "opts in" with a pledge of support, it faces the difficult task of collecting the pledge. Far from *burdening* unions, Washington therefore *favors* them vis-a-vis other speakers.

Any remaining doubt is dispelled by this Court's decisions holding that far more serious burdens do not abridge union members' freedom of association. As discussed, unions have no First Amendment right to compel nonmembers to pay *any* agency shop fees, even when collective bargaining benefits the nonmembers. See p. 10, *supra*. It follows *a fortiori* that the First Amendment is not violated by the far lesser burden of obtaining nonmembers' consent before using a *portion* of their compelled fees for political activity.[3]

2. Citing this Court's decision in *Dale*, *supra*, the Washington court concluded that it must "give deference to the union's view of what would impair its political ex-

[3] Respondent's position is further undermined by this Court's holding that denial of food stamps to striking workers imposes no undue burden. *Lyng* v. *International Union*, 485 U.S. 360 (1988). As this Court explained, "strikers' right of association does not require the Government to furnish funds to maximize the exercise of that right," even though "[i]t would be difficult to deny that [the prohibition] works at least some discrimination against strikers and their households." *Id.* at 368, 371. If the government can discriminatorily deny the generally available benefit of food stamps to striking union members, it can deny unions a benefit *not* available to other speakers—the right to use nonmembers' wages for political purposes without their authorization.

pression." 05-1657 Pet. App. 32a; see *id.* at 30a. That was error. At the outset, the court's reliance on *Dale* only underscores its inversion of the First Amendment. *Dale* upheld the Boy Scouts' right *not* to associate with individuals whose participation would impair the group's ability to express its message. 530 U.S. at 648. Here, the union is not complaining that a forced association—*i.e.*, an association forced on it by state laws—is interfering with its ability to communicate its message. To the contrary, the union seeks a greater degree of forced association between the nonmembers (or at least their fees) and the union to facilitate the dissemination of the union's message. Recognizing that claim would turn both *Dale* and the First Amendment on their heads.[4]

3. The Washington Supreme Court's conclusion that the affirmative-authorization requirement "violates the First Amendment rights of *nonmembers*" is inexplicable. 05-1657 Pet. App. 20a (emphasis added). The court observed that some nonmembers may support the union's political expenditures. *Ibid.* That is certainly possible, though it seems likely that the 5% who chose *not* to join the union will choose *not* to support the union's political activities, either. See *id.* at 4a. Even so, Washington does not prevent any nonmember from associat-

[4] In any event, the *Dale* Court did not simply defer to the Boy Scouts' assessment of the law's interference with its message. Rather, the Court found that the law actually required the organization to convey a message contrary to its beliefs. *Dale*, 530 U.S. at 648, 653-654. In *FAIR*, this Court similarly declined to defer to the law schools' views of what impaired their freedom of association, explaining that "a speaker cannot 'erect a shield' against laws requiring access 'simply by asserting' that mere association 'would impair its message.'" 126 S. Ct. at 1312 (quoting *Dale*, 530 U.S. at 653). There is no greater basis for deference to the union's views here.

ing with the union, authorizing the union to use his agency shop fees for political purposes, or otherwise contributing to the union. All such a worker must do is inform the union—the organization whose political activities he wants to support—of his consent. Such a simple notification requirement places no more of a burden on the freedom of association than a requirement that those employees who wish to join a union sign up. And it imposes less of a burden than the nonmembers face in supporting any other cause or group they might wish to support. That is, it imposes no constitutionally cognizable burden at all.

C. The Constitutional Floor For Protecting Nonmembers' First Amendment Rights Is Not Also A Constitutional Ceiling On Such Protections

The Washington Supreme Court's decision is premised on its erroneous belief that the constitutional *floor* that this Court has established for protecting the First Amendment rights of nonmembers against being compelled to pay for union political activities with which they disagree also establishes a constitutional *ceiling* on how far States can go in protecting those rights.

As discussed, unions have no constitutional right to compel membership or to collect agency shop fees from nonmembers. See p. 10, *supra*. If the government nonetheless authorizes unions and employers to enter into agreements requiring employees to pay such fees, dissenting workers have a constitutional right to "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute." *Hudson*, 475 U.S. at 310. Under that procedure, dissenting workers may

not be compelled to pay for union political activities with which they disagree, but the burden generally falls on a dissenter to object to the payment of any fees that would be used for political purposes. *Id*. at 306.

In outlining that constitutionally sufficient remedy, this Court did not so much as suggest that greater protection of nonmembers' First Amendment rights would violate unions' First Amendment rights. See *Keller* v. *State Bar*, 496 U.S. 1, 17 (1990) (noting that *Hudson* "outlined a *minimum* set of procedures") (emphasis added). In situations where a union had a statutory right to collect a union or agency shop fee, this Court described its remedial objective as "devis[ing] a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Hudson*, 475 U.S. at 302 (quoting *Abood*, 431 U.S. at 237). That objective protects only the union's statutory right to collect "the cost of collective-bargaining activities," *ibid.*; it does not provide an entitlement to some degree of windfall (generated by the laws of inertia) to cover the cost of political activities. Because Washington's affirmative-authorization requirement does not affect in any way the union's collection and use of agency shop fees for collective bargaining activities, it falls well within the broad remedial parameters identified by this Court in *Hudson* and *Abood*.

The Washington Supreme Court reached a contrary conclusion only by overreading statements in this Court's decisions to the effect that "[d]issent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." 05-1657 Pet. App. 16a (quoting *Street*, 367 U.S. at 774). But those state-

ments were premised on the relevant state of the law in *Street*, not a statement of constitutional law. Because the union in *Street* had an unconditional *statutory* right to use agency shop fees for political purposes in the absence of a worker's objection, this Court explained that the union should be able to rely on that right without fear of being penalized with broad injunctive or other relief in a class action. *Street*, 367 U.S. at 774. That concern is absent here because the affirmative-authorization requirement puts unions on notice that they have no right to use nonmembers' fees for political purposes without their approval. Thus, there is no concern about fair notice and no reason whatsoever to think that the opt-out, as opposed to opt-in, regime is constitutionally compelled.

To the contrary, the State's discretion to permit or prohibit agency shops logically entitles it to condition the statutory benefit to the union of an agency shop on greater protection for nonmembers than the Constitution requires. Governments may condition the availability of statutory benefits on private parties' willingness to forego even activities the First Amendment would otherwise protect. See, *e.g.*, *Regan* v. *Taxation with Representation*, 461 U.S. 540, 545 (1983) (Congress may condition tax exemption on abstention from otherwise protected political activity); *Buckley* v. *Valeo*, 424 U.S. 1, 57 n.65 (1976) (Congress "may condition acceptance of public funds on an agreement by [a candidate for federal office] to abide by specified expenditure limitations" that would otherwise be unconstitutional). Washington's opt-in requirement is a reasonable and highly germane condition on unions' acceptance of the statutory right to

enter into collective bargaining agreements that compel nonmembers to pay agency shop fees.[5]

III. THIS COURT'S CAMPAIGN-FINANCE DECISIONS UNDERSCORE THE CONSTITUTIONALITY OF THE AFFIRMATIVE-AUTHORIZATION REQUIREMENT

The Washington Supreme Court's decision invalidating the State's opt-in requirement is also fundamentally out of step with this Court's decisions upholding *more* burdensome campaign-finance laws against First Amendment challenges. That disconnect provides an additional basis for overturning the decision below.

A. Under the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, it is unlawful for a union or corporation "to make a contribution or expenditure in connection with any election" for federal office. 2 U.S.C. 441b(a). Although a union or corporation may establish "a separate segregated fund [SSF] to be utilized for political purposes," 2 U.S.C. 441b(b)(2) (Supp. IV 2004), such an SSF generally may not use "dues, fees, or other moneys required as a condition of membership

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[5] The Washington Supreme Court asserted that "there is no indication that * * * the voters intended to provide more protection for nonmembers than that offered under federal constitutional principles" when they voted in favor of the ballot initiative that included the affirmative-authorization requirement. 05-1657 Pet. App. 22a. That is clearly wrong, because on its face the affirmative-authorization requirement does just that and, of course, that view of the referendum not only reflects its text, but is the premise of the decision invalidating the provision. The Washington court may be correct that "the principal thrust of" the ballot initiative as a whole "was to protect the integrity of the election process." *Ibid.* But the way in which the affirmative-authorization requirement furthers that purpose is by protecting nonmembers (as well as the public) against the use of their compelled fees for political purposes they do not support.

in a labor organization or as a condition of employment," 2 U.S.C. 441b(b)(3)(A); see 11 C.F.R. 114.5(a)(1). Rather, the SSF operates as an opt-in requirement, barring a union or corporation from using workers' contributions for political purposes unless an employee affirmatively contributes funds to the SSF. See *ibid.*

Moreover, in addition to that opt-in requirement, it is generally unlawful for a union or its SSF to "solicit contributions * * * from any person other than its members and their families." 2 U.S.C. 441b(b)(4)(A)(ii). The only exception is that unions and their SSFs, like corporations and their SSFs, may "make 2 written solicitations for contributions during a calendar year" from employees and certain other individuals. 2 U.S.C. 441b(b)(4)(B); see 11 C.F.R. 114.6(a).

Such solicitations are carefully regulated to ensure that contributions are voluntary. Solicitations of a nonmember must be made by mail to the person's residence, and must be designed to prevent the labor organization or corporation conducting the solicitation from determining which recipients do not contribute or contribute $50 or less. 2 U.S.C. 441b(b)(4)(B). All potential donors, including union members, must also be informed of "the political purposes of [the] fund" and their "right to refuse to * * * contribute without any reprisal." 2 U.S.C. 441b(b)(3)(B) and (C); see 11 C.F.R. 114.6(c). The Federal Election Commission's regulations protect the anonymity of solicited nonmembers by requiring contributions to be sent to a custodian, who must keep detailed records of contributions and make various disclosures to the Commission. 11 C.F.R. 114.6(d).

To protect the voluntariness and anonymity of contributions, the Commission has also forbidden the use of payroll deductions to collect contributions from non-

members. 11 C.F.R. 114.6(e)(1). Unions and SSFs may use employers' payroll deduction systems to facilitate members' regular contributions (11 C.F.R. 114.5(k)(1)), but even when such systems are used "there must be an affirmative authorization by the contributor in order to permit the deduction." FEC Advisory Opinion 2001-04, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 6360.

Like the Washington statute, Section 441b therefore permits a union to use a nonmember's wages for political purposes only if the nonmember has affirmatively authorized that use. Moreover, Section 441b is *more* restrictive than the Washington statute in several important respects. Under Washington law, a union may fund political activities with its general treasury funds, including funds derived from members' dues and nonmembers' agency shop fees (with the nonmembers' consent). Under federal law, however, a union may not do so with respect to federal elections. Instead, it must: incur the costs of establishing an SSF with a custodian who is subject to record-keeping and reporting obligations; solicit separate political contributions from members and nonmembers alike; and refrain from using payroll deductions to collect any contributions from nonmembers.[6]

B. Significantly, the constitutionality of Section 441b is well-settled. This Court has upheld the constitutionality of Section 441b in decisions that indicate, *a fortiori*, that Washington's less burdensome affirmative-authorization requirement is constitutional. For example, in

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[6] The Washington statute exempts from its reach the financing of all campaigns "for a federal elective office." Wash. Rev. Code Ann. § 42.17.030 (West 2006). That provision underscores that funds raised in compliance with state laws must also comply with more demanding provisions of FECA to the extent the funds are spent on federal elections.

NRWC, in which this Court upheld Section 441b's solicitation limits, the Court explained that Section 441b "protect[s] the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." 459 U.S. at 208. The Court further explained that Section 441b protects the public against unions' and corporations' ability to amass "substantial aggregations of wealth" that may "be used to incur political debts from legislators" but may not reflect contributors' actual support for an organization's message. *Id.* at 207.

Although *NRWC* involved a corporation without capital stock rather than a union, this Court drew no distinction between the different types of organizations in upholding Section 441b's solicitation limits in light of the long history of congressional regulation of unions' and corporations' political contributions and expenditures. 459 U.S. at 208; see *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 401-414 (1972) (detailing history of regulation of union political activity and longstanding rule that unions' participation can be limited to voluntary contributions to an SSF).

This Court later drew on *NRWC* in upholding Section 441b's ban on political contributions, noting that the statute protects "individuals who have paid money into a corporation or union for [non-political] purposes" while also "permit[ing] some participation of unions and corporations in the federal election process by allowing them to establish and pay the administrative expenses" of SSFs. *FEC* v. *Beaumont*, 539 U.S. 146, 154, 162-163 (2003) (quoting *NRWC*, 459 U.S. at 201, 208). For those reasons, this Court upheld Section 441b's ban on political contributions, notwithstanding the "administrative

burdens" required to establish and administer an SSF. *Id.* at 163; see *McConnell* v. *FEC*, 540 U.S. 93, 203-209 (2003) (upholding amendments that broadened Section 441b to prevent circumvention of its prohibitions); *Austin* v. *Michigan State Chamber of Commerce*, 494 U.S. 652, 660 (1990) (upholding state-law prohibition on corporate expenditures, in part because it "ensures that expenditures reflect actual public support for the political ideas espoused by corporations").

The Washington Supreme Court's decision in this case is irreconcilable with those cases. For example, because this Court recognized in *NRWC* that the government may limit solicitations of *voluntary* contributions, it follows that the government may condition the use of *involuntary* fees on nonmembers' consent. Similarly, because this Court recognized in *Beaumont* that the government may prohibit altogether the use of treasury funds for political activities, it follows that the government may condition the use of treasury funds derived from nonmembers' compelled fees for political activities on the nonmembers' consent.[7]

C. Respondent errs in arguing (Br. in Opp. 17-18) that *NRWC* is distinguishable because it involved a contribution limit, as opposed to an expenditure limit. While "restrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment," restrictions on political expenditures are subject

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[7] In opposing certiorari, respondent argued (Br. in Opp. 17) that Washington's statute discriminates against unions because it does not apply to corporations. That issue, however, is not properly before this Court because it was not pressed or passed on below. See 05-1657 Pet. App. 25a n.6 ("The parties have not raised, and we do not address, any argument concerning § 760's application solely to labor organizations.").

to strict scrutiny. *Beaumont*, 539 U.S. at 161. That distinction is irrelevant here because the Washington statute does not impose an expenditure limit within the meaning of this Court's cases.

The Washington law directly regulates neither contributions nor expenditures, but instead regulates the means by which the union solicits the subset of contributions facilitated by the State's agency-shop laws. In that sense, it is analogous to the solicitation restrictions upheld under a relatively deferential standard of review in *NRWC*. The effect of Washington's statutes, like the provisions upheld in *NRWC*, is to regulate political contributions (namely, by requiring nonmembers' affirmative authorization). Indeed, any effect the affirmative-authorization requirement might have on unions' political expenditures or contributions would result not from a State-imposed limit on unions' expenditures or contributions, but from a reduction in nonmembers' contributions to unions' political activities (or the minimal administrative costs of seeking authorization). Thus, the statute regulates at most contributions, not expenditures.

In *McConnell*, this Court analyzed as a contribution limit FECA's prohibition against political parties' *spending* of soft money. 540 U.S. at 138-139. Although the plaintiffs there argued that "provisions restrict[ing] not only contributions but also the spending and solicitation of funds raised outside of FECA's contribution limits" were expenditure limits subject to strict scrutiny, this Court disagreed. *Id.* at 138. The Court explained that "[t]he relevant inquiry is whether the mechanism adopted to implement the contribution limit * * * burdens speech in a way that a direct restriction on the contribution would not." *Id*. at 138-139. Because the limits on parties' spending of soft money did not "limit[] the

total amount of money the parties can spend," but instead "simply limit[ed] the source and individual amount of donations," they were contribution rather than expenditure limitations. *Id.* at 139. The Washington affirmative-authorization requirement imposes direct limits on neither contributions nor expenditures, but simply regulates the terms by which a unique subset of funds—those facilitated by the state agency-shop laws—can be solicited. In essence, it says that consent to use those funds for political purposes *must be solicited*, and should not be presumed. Under *NRWC* and *McConnell*, therefore, the affirmative-authorization requirement is not an expenditure limit, but rather is subject to much more complaisant review.[8]

D. Respondent also errs in arguing (Br. in Opp. 18) that Washington's affirmative-authorization requirement is unconstitutional because it applies to ballot initiatives as well as candidate elections. Although *NRWC* involved only contributions to political candidates and not ballot initiatives (see *NRWC*, 459 U.S. at 210 n.7), that point hardly supports the Washington Supreme Court's decision. That court invalidated the Washington statute in its entirety, not only as applied to ballot initiatives. See 05-1657 Pet. App. 34a.

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[8] While Washington's affirmative-authorization requirement is clearly not an expenditure limit subject to strict scrutiny, it is unclear whether it is even subject to the lesser scrutiny applicable to contribution limits. Washington does not prevent nonmembers from contributing to unions' political activities; does not limit the amount nonmembers can contribute (beyond providing that nonmembers' compelled agency shop fees must be the same as members' dues); and does not limit the uses to which contributions can be put. Thus, it is unclear whether *any* heightened First Amendment scrutiny applies here.

More fundamentally, the type of political expenditure (candidate or ballot initiative) has never mattered for purposes of the right not to have coerced fees used for political purposes and is of no moment here. Respondent relies (Br. in Opp. 18) on *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978), which invalidated a flat ban on the use of corporate funds (without even the option of financing expenditures through an SSF or political action committee) for advocacy related to ballot initiatives. See *id.* at 794. *Bellotti* did not suggest that corporate and union participation in referenda are wholly immune from regulation, and instead it affirmatively endorsed disclosure requirements. See *id.* at 792 n.32.

As discussed, Washington's affirmative-authorization requirement does not restrict unions' spending on ballot initiatives or, for that matter, on any particular political topics. It only requires unions to obtain nonmembers' consent before using their compelled fees for political purposes in general. The First Amendment requires an opt-out right in this context for the use of compelled fees for *political* purposes, not just for their use in candidate elections. The legitimate First Amendment values that are served by requiring affirmative consent are in no way limited to candidate elections, and so the provision is constitutional regardless of the subject matter of the unions' political speech. Cf. *Bellotti*, 435 U.S. at 794 n.34 (distinguishing between the corporate funds at issue there and funds raised from union members' compelled agency fees).

CONCLUSION

The judgment of the Supreme Court of Washington should be reversed and the cases remanded.

Respectfully submitted.

LAWRENCE H. NORTON
General Counsel

RICHARD B. BADER
Associate General Counsel

DAVID KOLKER
Assistant General Counsel

STEVE N. HAJJAR
Attorney
Federal Election Commission

HOWARD M. RADZELY
Solicitor

KATHERINE E. BISSELL
Associate Solicitor

NORA CARROLL
Senior Attorney
Department of Labor

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

GREGORY G. GARRE
Deputy Solicitor General

DARYL JOSEFFER
Assistant to the Solicitor General

DOUGLAS N. LETTER
AUGUST E. FLENTJE
Attorneys

NOVEMBER 2006