No. 05-1657

In the

Supreme Court of the United States

STATE OF WASHINGTON,

Petitioner,

v.

WASHINGTON EDUCATION ASSOCIATION,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Washington

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

United States Constitution

Federal Statute

Rule of Court

TABLE OF AUTHORITIES—Continued

Page

Miscellaneous

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the petition for a writ of certiorari. Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

PLF was founded 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. Among other things, PLF litigates in defense of the right of workers not to be compelled to make involuntary payments to support political or expressive purposes with which they disagree. To that end, PLF attorneys were counsel of record in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Cumero v. Pub. Employment Relations Bd.*, 778 P.2d 174 (Cal. 1989); and *Brosterhous v. State Bar of Cal.*, 906 P.2d 1242 (Cal. 1995), and has participated as amicus curiae in several other compelled fee cases, including and *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). PLF attorneys have also published articles on compelled speech issues, including Deborah J. La Fetra, *Recent Developments in Mandatory Student Fee Cases*, 10 J.L. & Pol. 579 (1994). Further, PLF has participated as amicus curiae in this litigation in the Washington Court of Appeals and Supreme Court.

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

SUMMARY OF ARGUMENT

Almost thirty years after this Court's decision in *Abood*, 431 U.S. 209, organized labor remains steadfast in its refusal to implement that decision in any meaningful way. *See generally* Jeff Canfield, *What A Sham(e): The Broken Beck Rights System in the Real World Workplace*, 47 Wayne L. Rev. 1049, 1050 (2001) (noting that union behavior "makes it nearly impossible for average employees to successfully assert these rights granted by the Court."). This obstructionism can only be described as "massive resistance," a direct affront to this Court's repeated declarations that unions may not use money taken from workers without their consent for purposes of political activism. *See Virginia v. Black*, 538 U.S. 343, 394 (2003) (Thomas, J., dissenting) (describing "massive resistance").

In this case, the voters of Washington adopted a law, called I-134, which included a provision (section 760) requiring labor unions to obtain an "opt-in" agreement from workers before devoting their compulsory fees to political lobbying efforts. The court below found that this initiative, passed by an impressive 72 percent vote, violates the First Amendment rights of labor unions because it imposes an "administrative burden" on the unions which interferes with their lobbying activities. *State ex rel. Wash. State Pub. Disclosure Comm'n v. Wash. Educ. Ass'n*, 130 P.3d 352, 360 (Wash. 2006) (WEA) ("Dissenters may not silence the majority by the creation of too heavy an administrative burden.").

In brief, the court held that section 760's opt-in requirement decreases the union's financial power, due presumably to the number of people who overlook the need to sign necessary forms, or decline to state a preference for some other reason. The court concluded that the cost of obtaining consent for the use of shop fees for political activity decreases the union's political influence, in violation of the First Amendment. *Id.*

This decision adopts an indefensible reading of the First Amendment whereby unions are presumed to have a constitutional right to spend workers' money on union political advocacy. It also clashes with the decision of the Sixth Circuit Court of Appeals in *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1253 (6th Cir. 1997), and the D.C. Circuit in *United States v. Boyle*, 482 F.2d 755 (D.C. Cir. 1973), which held that affirmative consent requirements like that required by section 760 are consistent with the First Amendment.

Moreover, the decision below does serious damage to the legislative autonomy of states, which have the constitutional authority to adopt mechanisms for protecting citizens' rights above and beyond the requirements of the federal constitution. This Court has long insisted that states have the room to provide residents with greater protections than those provided by the federal government. *See*, *e.g.*, *Kelo v. City of New London*, 125 S. Ct. 2655, 2668 (2005) (states may adopt more restrictive definition of "public use" under state law to reduce government's ability to condemn property); *California v. Ramos*, 463 U.S. 992, 1014 (1983) ("States are free to provide greater protections in their criminal justice system than the Federal Constitution requires."). Washington State tried to do just this, and should not be barred by a perverse interpretation of the First Amendment.

If this Court's decisions respecting the rights of dissenting workers not to be coerced into supporting union political advocacy are to be meaningfully implemented, the decision below cannot stand. The petition should be granted.

ARGUMENT

I

THE WASHINGTON SUPREME COURT'S DECISION CONFLICTS WITH SETTLED PRECEDENT THAT THE FIRST AMENDMENT GUARANTEES A DISSENTING WORKER'S RIGHT TO REMAIN SILENT

In *Abood*, 431 U.S. at 234-35, this Court held that every person has a constitutional right not to subsidize union political lobbying with which he disagrees. That basic right—best encapsulated by Thomas Jefferson's statement that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical," Thomas Jefferson, *Virginia Statute for Religious Freedom* (1786) *in* JEFFERSON: WRITINGS 346 (Merrill D. Peterson ed., 1984)—has been repeatedly affirmed by this Court. *See*, *e.g.*, *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001); *Keller*, 496 U.S. at 9-10; *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Employees*, 466 U.S. 435 (1984). Of course, this Court's decisions made it clear that if a worker does *not* object to such expenditures, nothing in the Constitution prohibits them. *Abood*, 431 U.S. at 235-36. But unions, like all government-empowered semi-public institutions, must respect the right of dissenters not to utter or endorse messages with which they disagree. *Cf. Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *United Foods*, 533 U.S. at 410.

Nonetheless, recognizing that they stand to lose a significant amount of their coerced income, labor unions have sought ways to minimize dissenters' opportunities to withhold their earnings from union expropriation. *See generally* Canfield, *supra*. The union's primary method of accomplishing this is to make it so difficult for dissenters to assert and

vindicate their rights that they ultimately give up. The more burdensome the procedure imposed on potential dissenters, the fewer dissenters who make the effort, and the more the union stands to gain in the aggregate.

In *Hudson*, the teachers' union sought to protect its income by setting up a prohibitively difficult procedure for dissenting agency shop fee payers.[2] The union withheld a certain amount of money from nonmembers, and required those who objected to undergo a long and complicated three-step internal union process, culminating in arbitration, to get their money back. 475 U.S. at 296. The Court unanimously found this procedure unconstitutional, because it did not adequately protect the First Amendment rights of dissenters. Procedural safeguards, this Court explained, must minimize infringement of dissenters' right to be free from compelled speech, *id.* at 303, and minimize "the risk that dissenters' funds will be used, even temporarily, to finance ideological activities" with which they disagree. *Id.* at 305 (quoting *Abood*, 431 U.S. at 244). But the teacher's union's scheme "merely offer[ed] dissenters the possibility of a rebate" at the end of a complicated procedural gauntlet. The Court found that this "forced exaction followed by a rebate" was "not a permissible response" to the dissenters' objections. *Id.* at 305-06.

Hudson, like many of this Court's decisions, recognized that procedures and legal presumptions often can be fashioned to impose such a severe burden on an affected party that they render the party's substantive constitutional guarantees hollow. *See*, *e.g.*, *Mills v. Habluetzel*, 456 U.S. 91 (1982) (unreasonably short statute of limitations period violated due process);

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[2] "Dues" are paid by union members. "Agency shop fees" are the same as dues except that they are paid by *non*members against their will, pursuant to this Court's decision in *Beck* that nonmembers may be forced to support unions from whose collective bargaining they are presumed to benefit.

Williams v. Rhodes, 393 U.S. 23, 24 (1968) ("a series of election laws has made it virtually impossible for a new political party [to form]" violated substantive guarantees of Fourteenth Amendment); *Shaw v. Reno*, 509 U.S. 630, 639 (1993) ("Ostensibly race-neutral devices such as literacy tests with 'grandfather' clauses and 'good character' provisos were devised to deprive black voters of the franchise."); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 162-63 (1969) (burdensome permit requirement for civil rights demonstration violated First Amendment.).

Section 760 seeks to create a "constitutionally adequate" remedy that avoids such problems. It simply requires unions to obtain consent before spending workers' money on political activities. The alternatives between (a) requiring dissenters to assert their disagreement, and (b) requiring loyalists to assert their agreement, are not interchangeable. Because some workers inevitably will fail to return a signed consent form, intentionally or accidentally, a presumption against dissent guarantees a higher income for the union than a presumption that requires the union to persuade its supporters to sign a consent form. As one district court explained in a case similar to this one, "what is really at stake here is whether the union can collect more money as a benefit of the decisionmaker's inertia." *Lutz v. Int'l Ass'n of Machinists & Aerospace Workers*, 121 F. Supp. 2d 498, 506 (E.D. Va. 2000). Simply put, requiring dissenters to go through a refund procedure, as opposed to requiring those who do agree with the lobbying to signify that agreement, can practically nullify many dissenters' First Amendment rights.

Requiring affirmative consent was a sensible response to the apparent conflict between the union's *statutory* right to require agency shop fees from nonmembers, and the *constitutional* right of nonmembers to refrain from supporting the union's political speech. Moreover, it was a logical solution

to the concerns expressed in *Hudson*, that unions might bury workers' rights in complicated procedural schemes.

But the decision below declares that the opt-in requirement is unconstitutional because it will impose "administrative burdens" on—*i.e.,* decrease the financial wherewithal of—the union, dampening its lobbying strength. *WEA*, 130 P.3d at 359. This holding betrays the promise of *Hudson* by declaring that measures which protect a dissenter's rights must not be overly "burdensome" on the power of a union which desires to finance its activities through expropriations. By a similar logic, a court might also hold that it is unconstitutional for the owner of a television station to charge a person for advertising time, because doing so "inhibit[s]" the advertiser's "political speech." *Id.* at 560. Of course, such a decision would be in error, since it would ignore the initial layout of rights; *nobody has the constitutional right to finance his or her speech at someone else's expense. Cf. Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 795 (1961) (Black, J., dissenting) ("[R]elieving protesting workers of all payment of dues . . . . would interfere with the union's activities only to the extent that it bars compulsion of dues payments from protesting workers to be used in some unknown part for unconstitutional purposes, and I think it perfectly proper to hold that such payments cannot be compelled."). This is the principle that the court below ignored, rendering its decision squarely in conflict with *Abood*, *Hudson*, and other cases.

II

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE COURTS OF APPEALS OF THE SIXTH CIRCUIT AND THE D.C. CIRCUIT

In *Miller*, 103 F.3d 1240, the Sixth Circuit affirmed the constitutionality of a law which "requir[ed] labor unions to obtain affirmative consent at least once per year from members

utilizing an automatic payroll deduction to make contributions to their union for political purposes." *Id.* at 1243. The court found that because the law was not a content-based speech restriction, only intermediate scrutiny applied, *id.* at 1252, and therefore the law need only further an important government interest, do it in a way unrelated to the suppression of speech, and do it in the least restrictive way possible, *id.* at 1253. Although the union claimed in that case, as does the union in this case, "that the administrative burden" would be "crushing," the court found no reason to agree with that claim: "[a]n annual mailing to a union's contributing members, asking them to check a box and to return the notice to the union, would seem to suffice under the statute." *Id.* Thus the burden, if any, would not "rise to the level of a constitutional violation." *Id.* By contrast, the danger of the opposite presumption was that it could lead to dissenting members being forced to subsidize speech with which they disagreed. Compared to that realistic danger to First Amendment principles, the argument that the opt-in requirement violated the union's free speech rights "border[ed] on the frivolous." *Id.*

The court below distinguished *Miller* on the grounds that *Miller* dealt only with member dues and not with agency shop fees, *see WEA*, 130 P.3d at 361-62. But this distinction is untenable, as the dissent noted. *See* 130 P.3d at 368. Actually, that this case involves agency shop fees is all the *more* reason to follow *Miller*, because agency shop fees are paid by those who choose (with almost no financial benefit to themselves) *not* to join the union. Such people probably are not willing to see their money used to support union political activities.

The central issue here—whether the First Amendment requires the state to presume that workers prefer to support union political activities—is directly and contrarily decided in *Miller*. Such a division of authority warrants this Court's grant of certiorari. *See Florida v. White*, 526 U.S. 559, 563 (1999) (division between State Supreme Court and Federal Court of

Appeals warrants certiorari); *Lakeside v. Oregon*, 435 U.S. 333, 336 (1978) (same); *Taylor v. Simmons-Harris*, 533 U.S. 976 (2001) (same).

Similarly, in *Boyle*, 482 F.2d 755, the court upheld an opt-in requirement similar to that involved here, against the claim that it violated the First Amendment. The defendant in that case was charged with violating 18 U.S.C. § 610, which at the time prohibited unions from making political expenditures to candidates out of funds taken from workers, unless the worker consented. The defendant argued that this law "impose[d] an unconstitutional limitation on the union's freedom of speech," 482 F.2d at 763, because it "substantially restrict[ed] the union's right to present its views by supporting candidates of its choice." *Id.* In particular, the defendant argued that a less-restrictive alternative would have been for the government to impose an opt-out requirement, instead of an opt-in requirement, like that required here. *See id.* at 763-64. The court rejected this argument, noting that there was, in fact, "no . . . viable less restrictive alternative" which would "protect union minority interests." *Id.* at 764. Thus, the court concluded that the opt-in requirement was constitutional.

The decision below, however, holds that the state may not require an opt-in provision because doing so is too burdensome for a labor union. This holding directly conflicts with *Boyle,* creating a division of authority that justifies a grant of certiorari.

III

THIS CASE INVOLVES IMPORTANT FEDERAL CONSTITUTIONAL RIGHTS AND THE CONSTITUTIONAL AUTHORITY OF STATES

Washington State law gives unions the legal privilege to force those workers who choose not to join the union to pay an "agency shop fee"—a monetary fine almost equal to union

dues—to the union. This fee is deducted from the worker's paycheck. This Court has held that the Constitution allows states to extend such privileges to unions. *See Communications Workers of Am. v. Beck*, 487 U.S. 735, 749-50 (1988); *Lehnert*, 500 U.S. at 520. But unions have no *constitutional right* to such deductions. *Id.*; *Ky. Educators Pub. Affairs Council v. Ky. Registry of Election Fin.*, 677 F.2d 1125, 1134 (6th Cir. 1982) ("[the union] has no constitutional right to a check-off or payroll deduction system for political fund raising."); *cf. Lincoln Fed. Labor Union No. 19129 v. Nw. Iron & Metal Co.*, 335 U.S. 525, 531 (1949) ("The constitutional right of workers to assemble, to discuss and formulate plans for furthering their own self interest in jobs cannot be construed as a constitutional guarantee that none shall get and hold jobs except those who will join in the [union] or will agree to abide by the [union]'s plans."). State laws authorizing automatic deductions of agency shop fees are neither constitutionally required nor constitutionally prohibited; rather, they are an example of what this Court has called "play in [the] joints" between constitutional provisions. *See Bain Peanut Co. of Texas v. Pinson*, 282 U.S. 499, 501 (1931). *See also City of Charlotte v. Local 660, Int'l Ass'n of Firefighters*, 426 U.S. 283, 287 (1976) ("Within the limitations of the Equal Protection Clause . . . the choice of those standards [for determining when union dues will be withheld] is for the city and not for the courts.").

But while states are free to grant unions the *privilege* of deducting agency shop fees from workers' paychecks, workers have a *constitutional right* not to be compelled to support political campaigns with which they disagree. *Abood*, 431 U.S. at 222-23; *Keller*, 496 U.S. at 10-11. Thus, when a union's statutory privilege collides with the constitutional rights of the worker, the union's privilege must yield. *Cf. Beck*, 487 U.S. at 751 ("[by authorizing unions to deduct money from dissenters' pay,] Congress did not intend 'to provide the unions

with a means for forcing employees, over their objection, to support political causes which they oppose.' " quoting *Street*, 367 U.S. at 764). Accordingly, the Court found in *Hudson* that procedures which make it prohibitively difficult for workers to object to union expropriations of their earnings for political purposes must yield to the worker's First Amendment rights. 475 U.S. at 308.

Following *Hudson* the Courts of Appeals for the Seventh, Ninth, and Fifth Circuits, each found certain objection procedures to be too burdensome, violating dissenters' First Amendment rights. *See Tavernor v. Ill. Fed'n of Teachers*, 226 F.3d 842, 848 (7th Cir. 2000) (union's procedure of collecting full amount of union dues from nonmembers rather than 85 percent associated with collective bargaining, and requiring year-long process for rebate, violated *Hudson*); *Cummings v. Connell*, 316 F.3d 886, 890-91 (9th Cir. 2003) (confusing and incomplete notice of *Hudson* rights was unconstitutional); *Shea v. Int'l Ass'n of Machinists & Aerospace Workers*, 154 F.3d 508, 515 (5th Cir. 1998) (requiring workers to object to paycheck deductions annually in writing, rather than to assert continuing objection violated *Hudson*).

None of these courts has gone so far as to declare that unions *must* employ opt-in procedures like the Washington law. *See Ellis*, 466 U.S. at 444 ("there are readily available alternatives, such as advance reduction of dues and/or interest-bearing escrow accounts, that place only the slightest additional burden, if any, on the union."). But, again, while the First Amendment does not *require* an opt-in procedure, *neither does it prohibit it*. States remain free to devise additional ways to protect dissenting workers' rights, or even to expand those rights beyond the minimum protection offered by the Federal Constitution. *See, e.g., PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980); *Locke v. Davey*, 540 U.S. 712, 725 (2004).

One of the most important features of the federalist system is that it allows states to devise statutory mechanisms that will best protect individual rights. *See Skinner v. Oklahoma*, 316 U.S. 535, 539-40 (1942) ("Under our constitutional system the States in determining the reach and scope of particular legislation need not provide abstract symmetry . . . . [T]he machinery of government would not work if it were not allowed a little play in its joints.") (citations and quotation marks omitted). If, for example, a state believes that police procedures routinely fail to protect a suspect's freedom from self-incrimination, it may institute procedures that will more effectively protect their rights. *Oregon v. Hass*, 420 U.S. 714, 719 (1975). Likewise, if a state believes that administrative agencies do not adequately protect the rights of religious exercise, it may implement more protective procedures, so long as the procedures do not violate the free exercise of religion. *Locke*, 540 U.S. at 725. The people of the states may choose to limit the use of eminent domain if they find that the protections afforded by the Federal Constitution are not effective enough. *Kelo*, 125 S. Ct. at 2668. Or a state may allow citizens to send their children to schools of their choice, including religious schools, and to spend government education grants there. *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002). *See further* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977).

The importance of this case with regard to state autonomy is another reason that this Court should grant certiorari. *Cf. State of New York v. United States*, 326 U.S. 572, 574 (1946) (judicial restriction on state autonomy especially warranted a grant of certioriari); *State of Alaska v. Arctic Maid*, 366 U.S. 199, 202 (1961) (same).

IV

LOWER COURTS NEED GUIDANCE AS TO THE SCOPE OF *HUDSON*'S PROTECTIONS FOR DISSENTERS

The decision below is indicative of confusion in the lower courts as to the degree of protection that workers are entitled to under *Hudson*. Although *Abood* makes it clear that unions and states must adopt procedures whereby dissenting workers can prevent unions from subsidizing political speech through paycheck deductions, and *Hudson* further explains that such procedures must not be unduly burdensome, lower courts have struggled to define the standards to which such procedures must conform.

As the Seventh Circuit has noted, most circuit courts of appeals have held that unions may deduct the full amount of an agency shop fee plus the union political speech subsidy from a worker's paycheck so long as the worker may obtain a rebate after a prompt and impartial procedure. *Tavernor,* 226 F.3d at 848 (citing *Grunwald v. San Bernardino City Unified Sch. Dist*., 994 F.2d 1370, 1373-76 (9th Cir. 1993); *Pilots Against Illegal Dues v. Air Line Pilots Ass'n*, 938 F.2d 1123, 1132-33 (10th Cir. 1991); *Gibson v. The Florida Bar*, 906 F.2d 624, 631 (11th Cir. 1990); *Crawford v. Air Line Pilots Ass'n Int'l*, 870 F.2d 155, 161 (4th Cir. 1989); *Hohe v. Casey*, 868 F.2d 69, 72 (3d Cir. 1989); *Andrews v. Educ. Ass'n of Cheshire*, 829 F.2d 335, 339 (2d Cir. 1987)). *See also Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1017 (7th Cir. 1998) (noting that Third and Sixth Circuit decisions regarding certain *Hudson* requirements "are in tension with the cases (often the same cases!) that hold that dissenters are not entitled to the highest level of audit services that the market offers.").

Yet other circuits have held that unions must inform workers of what amount of their paycheck deduction will be spent on political activism, and allow dissenters to receive that

money back *before* the union engages in political activity. *See Tierney v. City of Toledo*, 824 F.2d 1497, 1504-05 (6th Cir. 1987); *Damiano v. Matish*, 830 F.2d 1363, 1370 (6th Cir. 1987). The *Tierney* court explained that in its view, *Hudson* prohibits the union from "deduct[ing] any amount, for however short a time, which represents monies clearly expended for ideological purposes. The union simply cannot exact from the dissenter this proportionate amount, and must instead allow him an advance reduction of that part of the union's fee immediately upon objection." 824 F.2d at 1504.

These cases indicate that lower courts need direction as to the exact meaning of *Hudson*'s holding with regard to undue burdens on workers. Here, the state of Washington adopted a procedure designed to meet and even exceed the minimal constitutional guarantees recognized in *Hudson*. The court below, however, declared that "the burden [is] on the dissenting nonmember to *assert* his or her First Amendment rights," and that it is not "constitutionally permissible . . . to shift the burden to the union to *protect* the First Amendment rights of dissenting nonmembers." *WEA*, 130 P.3d at 359. Only this Court can resolve the issue of whether *Hudson* is compatible with the state's decision to require unions to obtain permission before subsidizing political speech with money taken from workers.

V

THE COURT MUST GRANT CERTIORARI TO END THE UNION'S "MASSIVE RESISTANCE" TO DISSENTING WORKERS' EXERCISE OF THEIR FIRST AMENDMENT RIGHTS

In the nearly 30 years since *Abood,* organized labor has adopted a concerted resistance toward this Court's decisions with regard to workers' rights. *See generally* Canfield, *supra*; Brian J. Woldow, *The NLRB's (Slowly) Developing Beck Jurisprudence: Defending a Right in a Politicized Agency*, 52 Admin. L. Rev. 1075 (2000) (documenting refusal of unions

and government to abide by *Beck* and similar cases). *See also Monson Trucking Inc.*, 324 N.L.R.B. 933, 935 (1997) (union failed to provide employee *Beck* rights notice); *Local 74, Serv. Employees Int'l Union*, 323 N.L.R.B. 289, 290 (1997) (same); *Chauffeurs, Teamsters, Warehousemen & Helpers Union, Local No. 377*, Case No. 8-CB-9415-1, 2004 WL 298352 (N.L.R.B. Feb. 11, 2004) ("I find that the membership application with the 'Notice' hidden on the second and third page did not serve to adequately apprise newly-hired employees of their *Beck* rights."). As one expert testified to Congress, "[t]he first hurdle that employees face [when asserting their rights not to subsidize union political activities] is that they are lied to by union leaders who purport to represent them. I use a stark term, and I mean it. That's right. They are lied to regularly, clearly as a matter of course." Hearings before the Subcommittee on Employer-Employee Relations of the Committee on Economic and Educational Opportunities, on H.R. 3580, The Worker Right to Know Act, Serial No. 104-66 (104th Cong. 2d Sess. 1996) at 111 (Statement of W. James Young).

In case after case, workers are forced to rely on federal courts to resolve complaints against union rules that unfairly burden their right not to be compelled to subsidize political speech. *See, e.g., Shea*, 154 F.3d 508; *Tavernor*, 226 F.3d 842; *Cummings*, 316 F.3d 886; *Lutz*, 121 F. Supp. 2d 498; *Masiello v. U.S. Airways, Inc.*, 113 F. Supp. 2d 870, 875 (W.D.N.C. 2000); *Tierney*, 824 F.2d 1497; *Damiano*, 830 F.2d 1363; *Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000).

For example, in *Office & Prof'l Employees Int'l Union*, 331 N.L.R.B. 48 (2000), the union promulgated rules requiring an objecting employee to specify exactly the amount of fees she believed were wrongly withheld and what the money had been spent on. Moreover, the union "treat[ed] the failure to submit challenges that specified a category of expenditures as a waiver of the right to challenge the expenditures." *Id.* at 49. The National Labor Relations Board found that this was

unreasonable and arbitrary because "the Union simply place[d] too high a burden on the objector's exercise of her right to challenge the Union's figures." *Id.*

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

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

154 F.3d at 515.

In spite of judicial decisions striking down organized labor's obstructionist tactics, unions and their political representatives remain obstinate in their refusal to accord workers the rights to which they are entitled under *Abood*, *Hudson*, and similar cases. A poll conducted in 1996, revealed that 78 percent of union members are not even aware of their rights under the *Beck* decision, and political leaders since the Reagan Administration have refused to implement *Beck* in a meaningful way. David M. Burns, *Requiring Unions to Notify Covered Employees of Their Right to Be an Agency Fee Payer in the Post Beck Era*, 48 Cath. U. L. Rev. 475, 502 n.200, 481-82 (1999); Hearings, *supra*, at 365. A 1998 report found that "[g]overnmental enforcement of *Beck* rights . . . has been virtually nonexistent." Robert P. Hunter, *Paycheck Protection in Michigan* 6 (1998).[3]

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[3] *Available at* http://www.mackinac.org/archives/1998/s1998-05.pdf (last visited June 29, 2006).

Union efforts to circumvent the law are exemplified by the behavior of the Washington Education Association. *See generally* Michael C. Kochkodin, *A Good Politician Is One That Stays Bought: An Examination of Paycheck Protection Acts and Their Impact on Union Political Campaign Spending*, 2 U. Pa. J. Lab. & Emp. L. 807, 824-29 (2000) (describing WEA's evasive response to I-134). In 1994, knowing that I-134 would soon take effect and bar the WEA from collecting money to finance political activities from nonconsenting workers, the union collected the upcoming year's assessments in advance. Michael Reitz, *Paychecks Unprotected*, Labor Watch, Jan. 2006, at 3.[4] Then, after I-134 went into effect, the union "lent" more than $162,000 from its general fund to its political action committee, later forgiving the "loan." *See* Settlement Agreement between State of Washington and WEA, Feb. 26, 1998.[5] The union spent another $120,000 to pay for its political action committee's "administrative costs," without reporting these expenditures, and spent another $730,000 from its general fund to support the passage of two ballot measures. *Id.* The union then established a euphemistically named "Community Outreach Program," which raised and spent more than $2 million on political activities without permission from WEA members. *Id.; see also* Lynne K. Varner & David Postman, *WEA Suit Follows Dues Dispute*, Seattle Times, Feb. 13, 1997, at B1, *available at* 1997 WLNR 1483331. During this time, the full amount of the union's income from dues that had been authorized for political expenditures was only about $144,000 per year. Reitz, *supra.*

After an investigation of these activities, the state's Political Disclosure Committee concluded that WEA had

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[4] *Available at* http://www.capitalresearch.org/pubs/pdf/LW0106.pdf (last visited May 31, 2006).

[5] *Available at* http://www.atg.wa.gov/pubs/wea_setl.html (last visited May 27, 2006).

violated several sections of the state's campaign finance laws, and urged the Attorney General to take action. The Attorney General then filed a lawsuit against the union, which settled before trial. In exchange for the union paying a $100,000 fine and agreeing to reduce dues by $5 per member, the Attorney General dropped the case, requiring only that the WEA promise to abide by a set of permissive "guidelines" under which the union can still transfer dues money from its general fund to its political action committee. *See* Michael W. Lynch, *The Summer of Reform: Campaign Finance Laws Return to the Congressional Agenda*, Reason, Aug. 18, 1998, at 7, *available at* 1998 WLNR 4378163.[6] *See further* Tom Brown & Ryan Blethen, *State's Campaign Cleanup a Washout?*, Seattle Times, Aug. 3, 1997, at A1, *available at* 1997 WLNR 1453262.

Similarly troubling is that laws giving special privileges to labor unions also give them a unique power to promote their interests outside the procedures followed by everyone else in American democracy. As one scholar has concluded, "[c]itizens of a free country are free to spend their own money on the political causes and candidates they wish to support. But in the 60 years since the enactment of the National Labor Relations Act, union officials have extracted hundreds of billions of dues dollars as a condition of employment from the paychecks of America's working people. *No religious, trade, or any other private association, has the same power to confiscate the earnings of unwilling individuals*." Charles W. Baird, *The Tip of the Iceberg: PACs & the Forced-Dues Base of Big Labor's Political Machine*, The Smith Center for Private Enterprise Studies, Mar. 15, 2001.[7]

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[6] These guidelines are *available at* http://www.atg.wa.gov/pubs/wea_exhibit_a.html (last visited May 31, 2006).

[7] *Available at* http://www.sbe.csuhayward.edu/~sbesc/tipoftheiceberg.html (last visited May 31, 2006).

The Executive Branch has been of little help to workers seeking protection of their rights. In the waning days of his Administration, the first President Bush finally signed an executive order which would have required the implementation of the *Beck* decision by unions engaged in federal government contracts—but that order was rescinded by President Clinton on his first day in office. Burns, *supra*, at 481-82. The current Bush Administration has done nothing. With union intransigence toward the requirements of *Abood*—requirements rooted in basic fairness principles—as well as executive branch indifference, workers must turn to this Court for protection. *Cf. Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982) (noting "the judiciary's special role in safeguarding the interests of those groups that are "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.").

CONCLUSION

A writer recently said of the South's "massive resistance" campaign toward *Brown v. Bd. of Educ.* that only vigilance by this Court "precipitated a steady desegregation of American schools." Lia B. Epperson, *True Integration: Advancing Brown's Goal of Educational Equity in the Wake of Grutter*, 67 U. Pitt. L. Rev. 175, 182 (2005). The intransigence of "the Southern power structure conceded only in response to the federal court demands." *Id.* at 183.

Today, unions are engaged in a similarly brazen refusal to abide by the clear mandates of *Abood*, *Beck*, and *Hudson*. Unions such as the WEA continue to fund political activities with moneys taken from nonmembers without their consent, either by violating the law outright, as with the "Community Outreach Program" or by skirting the law, as through its "loan forgiveness" scheme.

Washingtonians enacted I-134 to end such abuses. They were entitled to undertake such a measure to protect the rights of workers. *Cf. City of Charlotte*, 426 U.S. at 289 (government "is free to develop fair and reasonable standards" with regard to paycheck deductions.). The decision below upends this Court's First Amendment rulings with regard to worker rights—creating a direct conflict with the decision of the Sixth Circuit in *Miller* and the D.C. Circuit in *Boyle*—and unjustifiably limits the state's power to protect citizens. To protect the integrity of this Court's labor relations decisions, and the rightful discretion of the state to protect the First Amendment rights of its citizens, the petition for certiorari should be *granted*.

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