No. 05-1589

IN THE

Supreme Court of the United States

GARY DAVENPORT, MARTHA LOFGREN,
WALT PIERSON, SUSANNAH SIMPSON,
AND
TRACY WOLCOTT,

Petitioners,

v.

WASHINGTON EDUCATION ASSOCIATION,

Respondent.

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

PETITIONERS' REPLY BRIEF

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ARGUMENT

I. THE OPPOSITION BRIEF TOTALLY IGNORES THE REAL SECTION 760 AND, THUS, PROVIDES NO ARGUMENTS AGAINST GRANTING THE PETITIONS.

The Brief in Opposition ("Opposition" or "Opp.") of the Respondent Washington Education Association ("WEA") is based on two related fallacies: 1) that Wash. Rev. Code § 42.17.760 ("§ 760") is so broad that it bans **all** union political contributions and expenditures from a union's general treasury, including the **dues of union members**, unless **every nonmember** who pays agency fees into the general fund affirmatively consents to the union's making such contributions or expenditures; and 2) that this "unique draconian restriction," Opp. at 9, is so *sui generis* that the Washington Supreme Court's decision invalidating § 760 has no direct application to, nor threatens, any other federal or state statute regulating union political advocacy or any decision construing other such statutes and regulations.[1]

Seeking to "justify" the Washington Supreme Court's implausible 6-3 decision, which "turns the First Amendment on its head," Pet. App. at 30a (Sanders, J., dissenting), WEA turns § 760 into a monster, thereby creating the ultimate "Straw Man." Section 760 actually states:

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[1]Part of this second fallacy, that "the State of Washington *alone*," Opp. at i & 9, *accord id*. at 8-9, 11-12, 18-19, has an "opt-in" restriction on the use of union members' dues for politics, is aptly refuted by the excellent Brief *Amicus Curiae* of the Campaign Legal Center Supporting [the State] Petitioner filed in No. 05-1657 ("CLC Amicus Brief"), which discusses the federal "opt-in" statute and at least fourteen state "opt-in" laws restricting union political activities that are in many cases more restrictive of union political activities than the real § 760.

> 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**.

Opp. at 4 (emphasis added).

Although quoting the text of § 760 in the Opposition, WEA always describes § 760 in a disingenuous, false way, even injecting this untruthfulness into the Question Presented.[2] WEA does so because it knows that the plain meaning and effect of § 760 easily passes constitutional muster. It attempts to mislead the Court in hopes that the Court will be duped into denying the Petitions.

Section 760 only applies to nonmembers' compelled agency fees, yet WEA falsely describes § 760 as applying to union members' voluntary dues. Moreover, § 760 only requires the unions to get the affirmative authorization of an

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[2]Here are some of the falsehoods on which the Opposition is built: "[T]hrough Section 760 the State of Washington *alone* * * * make[s] it unlawful for a union to finance what would otherwise be lawful political advocacy out of a **general fund** made up primarily of its **members' dues** and secondarily of [non-members'] agency fee moneys – unless the union has secured the affirmative consent of **each individual payer of an agency fee** to the financing of the union's political advocacy through the union's treasury.

* * * *

"In practical terms, Section 760 would **silence the political advocacy** of the unions like WEA that finance their advocacy out of general funds that consist overwhelmingly of **members' dues money**, by creating the 'insurmountable . . . hurdle[],' Pet. App. 1[6]a, of securing the affirmative consent to engage in such advocacy of **each and every [nonmember**] who pays an agency fee into the union's general fund." Opp. at 9 (italics emphasis in original, bolded emphasis added), *accord id*. at i (Question Presented), 12, 17.

individual nonmember in order to use **that** nonmember's compulsory fees "to make contributions or expenditures to influence an election or to operate a political committee" ("§ 760 politics"). *Id.* Nevertheless, WEA misleadingly states that § 760 "bans **all union** * * * political contributions and expenditures" and political advocacy, "unless **each individual who** pays agency fees * * * affirmatively consents to the union's making of such contributions or expenditures." Opp. at 17 (emphasis added); *see also id*. at 13 ("issue is the union's right to engage in political expression financed out of the member dues and agency fees").

Nothing is further from the truth, and there is nothing in the record to suggest such a "great breadth of application," *id*. at 12 n.8, of § 760 by the State of Washington. Neither the Washington Court of Appeals nor the Supreme Court ever suggested, much less found, that § 760 impaired the use of member dues for politics. In fact, the Washington Supreme Court had specifically held six years earlier that Initiative 134, the Fair Campaign Practices Act, of which § 760 is a part, places no restrictions on the use of union member dues in politics. *State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n*, 999 P.2d 602, 605, 616 (2000). "There is **no statutory prohibition** against a labor organization using general treasury funds **obtained from members' dues** for [§ 760 politics]." *Id*. at 616 (emphasis added).

The successful party securing this green light for using union member dues in Washington politics was Respondent WEA, and it twice cited this case in the Opposition at 9 & n.7, and at 15 n.9. It even correctly admitted that the case held that Initiative 134 "did not restrict a union's use for political purposes of funds from its general treasury." *Id*. at 15 n.9.

An examination of § 760's text reveals a limited "time and place" restriction on union political activities that does not directly affect the union and its members. The Opposition at 8, 9-10, 11-12, 18-19, repeatedly commends the Washington Supreme Court for protecting the union and its members' First Amendment rights of association by striking down § 760. However, it is inconsistent to argue that a statute that only deals with nonmembers of a union violates the First Amendment rights of union members.[3] What is remarkable and unprecedented is that the majority thought it a violation of the union members' rights for the union to have to ask the nonmember's permission before it could take and use his or her money for § 760 politics.

II. THE "OPT-IN" REQUIREMENTS OF § 760 DO NOT BURDEN THE UNION'S ASSOCIATIONAL RIGHTS AND ARE, IN FACT, NARROWLY TAILORED TO SUPPORT THE STATE'S COMPELLING INTEREST.

The issue here is not "the union's right to engage in political expression financed out of the member dues and [all] agency fees." Opp. at 13. On its face, and as definitively construed by the state courts in this case, the section only places restrictions on the political use of the monies of nonmembers who do not affirmatively consent, not the monies

[3]The real § 760 cannot cut "deeply," Opp. at 9, into WEA's First Amendment associational rights because it only applies to nonmembers' compulsory agency fees, which make up less than five per cent of the revenue for the union's general fund. *Id*. at 4. This case is really about the money coerced from nonmembers that is used for the unions' favorite political advocacy.

of members or consenting nonmembers. *See, e.g.,* Pet. App. at 1a, 7a, 9a, 15a-16a, 23a, 25a-27a.[4]

The only "hurdle" that the statute imposes is a slight administrative one, *i.e.*, that the union must make "individual contact with each nonmember," *id.* at 17a, to get the nonmember's affirmative consent to use **his** or **her** fees for politics. That is hardly an "insurmountable . . . hurdle."[5] Indeed, as the nonmember Petitioners point out, that burden can easily be

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[4]The trial court's injunctive remedy, State App. at 84a-91a, is consistent with this interpretation of the statute. It does not enjoin the collection or spending of dues from union members or consenting nonmembers. It does not enjoin the union from making any political contributions and expenditures financed by union treasury money at all. It merely enjoins collection of the § 760 political portion of nonmembers' agency fees absent consent.

"For WEA fiscal year 2003-2004, and every fiscal year thereafter, WEA shall reduce the agency fees chargeable to [nonmember] agency fee payers [who have not affirmatively authorized * * * the use of their fees for § 760 politics] from an amount equivalent to 100 percent of the member dues by (i) the percentage of the WEA's total expenditures that are analyzed to have been used for § 760 expenses in [a prior] fiscal year ***, (ii) plus a cushion of 3 percent." *Id*. at 88a-89a.

This remedy is similar to the remedy suggested by this Court in *Machinists v. Street*, 367 U.S. 740, 774-75 (1961) and *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963), albeit for objectors in a union shop. "Such a decree would order (1) the refund to him of a portion of the exacted funds in the same proportion that union political expenditures bear to total union expenditures, and (2) a reduction of future such exactions from him by the same proportion." *Allen*, 373 U.S. at 122.

[5]Neither the injunction of December 3, 2001, nor the supposedly "insurmountable . . . hurdle" of § 760, has prevented WEA from spending more than $2,042,979.19 of union member dues on § 760 politics during the past five years. *See* http://www.pdc.wa.gov/servlet/ContServlet, the "in kind contributions" database maintained by the Washington Public Disclosure Commission. This fact alone explodes WEA's exaggeration that "Section 760's unique restrictions on union political expenditures cannot withstand the strict scrutiny that the Constitution requires." Opp. at 18.

met by putting a box for nonmembers to consent in the *Hudson* packet that the WEA already annually sends all nonmembers. Pet. at 23-24. What could be easier and less of a hurdle? Who, trying to obtain money from another, would consider it a burden to have to actually ask for the money?

Forty-five years ago, this Court rejected the flawed reasoning used by the WEA and the Washington Supreme Court majority to strike down § 760, *i.e.*, that it "significantly burdens the union's right of expressive association" by "doubl[ing] the complexity of the dues collection system" and "impos[ing] further administrative burden." Pet. App. at 27a; *see also* Opp. at 8. This Court found that a remedy similar to the § 760 remedy adopted by the trial court here, *see supra* note 4, protects both the "majority and dissenting interests in the area of political expression * * * to the maximum extent possible without undue impingement of one on the other * * * with a minimum of administrative difficulty and with little danger of encroachment on the legitimate activities or necessary functions of the unions." *Machinists v. Street*, 367 U.S. 740, 773, 774 (1961) (footnote omitted).

If the remedy § 760 requires does not directly impinge on the political interests of the union member majority and imposes only a minimum of administrative burden, *i.e.*, that the union ask the nonmember for permission to use his or her agency fees for § 760 politics, then the "opt-in" requirements of § 760 do not burden, much less significantly burden, the union's right of expressive association. This remedy is, in fact, narrowly tailored to support the State's compelling interest in protecting nonmembers' rights and their voluntary participation in politics, as the Sixth Circuit held when considering a similar, but more restrictive, statute involving union members in *Michigan State AFL-CIO v. Miller*, 103

F.3d 1240, 1253 (6th Cir. 1997). *See* Pet. at 20-25. Yet the Washington Supreme Court found that the common courtesy of asking permission violates the First Amendment!

III. THE WASHINGTON SUPREME COURT'S DECISION DIRECTLY CONFLICTS WITH THE DECISIONS AND STATUTES PETITIONERS AND AMICI CITE.

Contrary to WEA's argument, Opp. at 11 n.8, the real § 760 is less restrictive than the Maryland, Montana, New Mexico and Pennsylvania statutes discussed in the Petition at 9-10 n.8, because it restricts only the use of nonconsenting nonmembers' monies, not all nonmembers' compelled fees. If the Washington Supreme Court's invalidation of § 760, the less restrictive campaign finance law, is left standing, those four more restrictive laws along with the other statutes identified in the Petition at 9-10 nn.8-9, at 28 n.22, and the CLC Amicus Brief at 12-13 & n.4, will be called into question.[6]

The issue here is not the union's "own funds, which it has lawfully collected." Opp. at 14; *accord id*. at 10, 13-15. If that were the case, this Court in *Abood v. Detroit Board of Education*, 431 U.S. 209, 234, 235-36 (1977), would not have held that a union cannot use objectors' fees for politics, because unions in Michigan, unlike unions in Washington under § 760, could lawfully collect fees equal to full dues, and spend them for politics, under the statute at issue in *Abood*, *id*. at 232.

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[6]The fact that this Court has upheld the far more restrictive Hatch Act, 5 U.S.C. § 7324, and state "little Hatch Acts," against claims that they violate the political rights of union members and others, *see Broadrick v. Oklahoma*, 413 U.S. 601, 606 (1973); *United Pub. Workers of Am. (CIO) v. Mitchell*, 330 U.S. 75, 99-103 (1947), supports granting the Petitions and striking down the Washington Supreme Court's decision.

The issue here is whether a state may place conditions on the use of nonmember fees that unions have only a statutory right to collect, and the collection of which the state could refuse to authorize entirely. *See* Pet. App. at 30a-32a (Sander, J., dissenting).

IV. THE STATE HAS A COMPELLING GOVERNMENTAL INTEREST TO FURTHER PROTECT THE RIGHTS OF NONMEMBERS NOT TO SUPPORT UNION POLITICS.

The state has a valid governmental interest in limiting § 760 to "only unions," Opp. at 17, *accord id*. at i (Question Presented), 9, 16, because only unions have a statutory privilege of collecting compulsory fees from nonmembers as a condition of employment. Corporations have no such compulsory power.

Under any standard used to judge campaign finance laws, see Opp. at 17-18, the State of Washington certainly has a compelling state interest to make sure that the collective bargaining fees nonmembers are compelled by state statute to pay are not involuntarily used by the union for political contributions or expenditures. In other words, the State, like the Federal Government through the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431 *et seq.*, has a compelling interest to require that political contributions from nonmembers of a union be knowing and voluntary. As one court put it in a case involving union members:

> The same interest advanced by [this Court in] *Buckley* [*v. Valeo*, 424 U.S. 1 (1976) (per curiam)] is also served by ensuring that every dollar in that political action fund is knowingly and intentionally given. To achieve that, the burden must be on the

> solicitor and not the [union member] dissenter. This limitation on the union's First Amendment rights is certainly far less severe than the amount of contribution limitation validated in *Buckley*.

FEC v. National Educ. Ass'n, 457 F. Supp. 1102, 1109 (D.D.C. 1978) ("*FEC*").

Moreover, this Court in *Pipefitters Local 562 v. United States*, 407 U.S. 385, 439 (1972), interpreted a federal statute dealing with the solicitation of political contributions from union members to require "knowing free-choice donations." "'Knowing free-choice' means an act intentionally taken [opt in] and not the result of inaction when confronted with an obstacle [opt out]." *FEC*, 457 F. Supp. at 1109. An "opt-out" procedure "results in some unknowing, and therefore, involuntary, contributions." *Id*. at 1107. Only an "opt-in" procedure, as § 760 requires, guarantees voluntary and knowing political contributions by compelled agency fee payers.

Unlike voluntary members, there is no basis in fact or logic to believe that all nonmembers voluntarily and knowingly consent to have the union use some of their compulsory fees for § 760 politics in accordance with the views and wishes of union officials and/or union members, unless they affirmatively object.[7] That nonmembers have chosen not to join the union, and support it financially only because of state compulsion, by definition, dispels any belief that they voluntarily and knowingly consent to § 760 political use of their forced fees.

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[7]Even among members, one court found that "something other than a willingness by the member to be associated with the union's political activities operates to make [the opt-out] so advantageous to the union's funding mechanism." *FEC*, 457 F. Supp. at 1108.

Thus, like the sections of the FECA this Court upheld in *Buckley* and later decisions, § 760's simple requirement that the union secure the affirmative authorization of its nonmembers before using their compulsory fees on § 760 politics "safeguard[s] the integrity of the electoral process," does not directly interfere with protected political expression, and does not perceptibly reduce "the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley*, 421 U.S. at 58.[8]

CONCLUSION

Because the Opposition totally ignores the **real** § 760, it provides no meaningful arguments against the Petitions for Certiorari. Accordingly, for the reasons stated here, in the Petitions, and the various Amicus Briefs in Support of the State's Petition, the Petitions in Nos. 05-1589 and 05-1657 should be granted, the cases consolidated, and the decision below summarily reversed; or the case set for plenary briefing and argument on the important questions presented.

Respectfully submitted,

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[8]The valid and important state interests that support the far more restrictive Hatch Act and state "little Hatch Acts" also support § 760. These include "attracting greater numbers of qualified people [to public employment] by insuring their job security, free from the vicissitudes of the elective process and by protecting them from 'political extortion.'" *Broadrick*, 413 U.S. at 606.