No. 05-1657

In The
Supreme Court of the United States

WASHINGTON,

Petitioner,

v.

WASHINGTON EDUCATION ASSOCIATION,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Washington

BRIEF OF INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICUS

Pursuant to Rule 37.3 of this Court, the Institute for Justice (the "Institute") respectfully submits this amicus curiae brief in support of Petitioner State of Washington Public Disclosure Commission (WPDC).[1]

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

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

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

While the Institute concurs entirely with the WPDC's Petition, the Institute believes that its legal perspective and experience will provide additional points useful for this Court's analysis of this issue.

SUMMARY OF ARGUMENT

This case is significant because it concerns statutory protections of workers in an "agency shop" who (i) choose not to join the union, and (ii) refuse to support that union's political agenda. The Institute will show that the rationale adopted by the Washington Supreme Court below undermines steps the State of Washington has taken to ensure that such workers are not forced to support political activities to which they object. That court created a new "right" to have unions obtain, by the most convenient means possible, the fees of nonmembers for use in political activities. It did so by radically misinterpreting decisions of this Court concerning the use of agency shop fees to the point where the Washington Supreme Court's decision conflicts with and undermines this Court's decisions. The touchstone in this Court's decisions has been a concern for protecting the *nonmember*, not the union. In contrast to the Washington Supreme Court's conclusion, this Court has never recognized that a union possesses any right at all in having the government be its political fundraiser and collection agency.

Additionally, the Institute will demonstrate that the Washington Supreme Court's decision is inconsistent with the right of individuals to keep their political beliefs

private, especially in the face of possible coercion and retaliation. A procedure under which a nonmember has the burden to object to the union's use of her fees for political purposes requires the nonmember to identify herself to that same union as a person who disagrees with the union's political activity. This violates the nonmember's right to refuse to announce or express her political views. The procedure created by the State of Washington, on the other hand, does not require nonmembers to announce to the union that they do not support its political agenda; instead, the dissenting nonmember may simply not respond to the union's request for permission. Washington's procedure thus preserves at least some aspect of the nonmember's right to keep her political views private.

Third, the Institute will demonstrate the Washington Supreme Court's reliance on a statement from this Court that "dissent is not to be presumed" is neither constitutionally nor logically required.

Finally, the Institute believes that this Court should grant the Petition in order to set national guidelines regarding the constitutionality of "paycheck protection" acts. The Washington Supreme Court's decision, if allowed to stand, casts significant doubt on whether such acts are constitutional. This Court should accept review and set clear guidelines for Congress and the states when they consider this issue.

REASONS FOR GRANTING REVIEW

I. THIS COURT SHOULD RESOLVE THE QUESTION OF WHETHER PROVIDING PROTECTIONS TO NONMEMBERS VIOLATES OR EVEN IMPLICATES A UNION'S FIRST AMENDMENT RIGHTS

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

To this panoply of rights, the Washington Supreme Court has added one more, which it manufactured just for this proceeding: unions have the right to obtain, in the most convenient way possible, money from people who are not members in order to fund the union's political speech. App. 19a. The court was unable to point to any case law, from this Court or any other, in which such a right is acknowledged, much less used to strike down a properly enacted law. This is because there is no such right. As is

discussed below, the court has fundamentally misinterpreted this Court's precedent to concoct this previously unknown "right." Had the court properly read this Court's precedent, however, it would have concluded that the union does not possess such a right and that any governmental conditions on the union's collection of fees from people who do not wish to associate with it are both fair and constitutional. In other words, the Washington law at issue here is not unconstitutional because it does not implicate – much less violate – any rights the union possesses under the First Amendment.

A. Section 760 And Agency Shop Agreements

Washington law creates a system for union representation of local government employees in which a union and a local government employer may agree to an arrangement in which every employee represented by a union must pay, as a condition of employment, a service fee equal to the amount of union dues. Wash. Rev. Code § 28B.52.045(2), App. at 124a; Wash. Rev. Code § 41.56.122(1), App. at 129a; Wash. Rev. Code § 41.59.100, App. at 131a. This arrangement, known as an "agency shop" agreement, requires fee payment by every employee of any local government that has entered into such an agreement, regardless of whether the employee is a member of the union or not. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 211 (1977). Through a series of decisions dating back fifty years, this Court has made clear that, if the nonmember objects, a union may not use a nonmember's fees collected pursuant to an agency shop agreement for matters unrelated to collective bargaining. *Ry. Employees' Dept. v. Hanson*, 351 U.S. 225, 235 (1956); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 768-69 (1961); *Bhd. of Ry. & S.S. Clerks v. Allen*, 373 U.S.

113, 118 (1963); *Abood*, 431 U.S. at 234; *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 448 (1984); *Chicago Teachers Union Local 1 v. Hudson*, 475 U.S. 292, 303 (1986); *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 762-63 (1988); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519-22 (1991). Among the activities that do not fall within the "collective bargaining" umbrella is a union's use of such fees to promote its political agenda. *Abood*, 431 U.S. at 234.

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

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

The Washington Supreme Court, however, relying on *Street, Abood, Hudson, Allen*, and *Ellis*, held that the "opt-in" system in Section 760 violates the First Amendment rights of the union. App. at 19a. It held that these cases mandate a procedure by which the *nonmembers* must affirmatively state that they do not wish the union to use their fees for political purposes – that is, that a nonmember *must* "opt-out." *Id.* The court's decision badly misconstrued this Court's holdings in these cases. None of these cases concerned a First Amendment right of unions to

have the government construct a system under which individuals are forced to associate with the union and have government withhold *political* funds for them, regardless of the procedure used. Indeed, absent other sections of Washington law, the unions have no right to expect this governmentally mandated relationship to exist in the first place. *See* App. at 36a (Sanders, J., dissenting) ("Should the legislature of the State of Washington choose to repeal the mandatory withholding provisions of RCW 41.59.060 and .100, there would be no constitutional impediment to doing so. And no party to this proceeding claims there is."). Instead of focusing on any constitutional right the union allegedly possesses to have the government appoint it a collective bargaining unit and withhold funds on its behalf, these cases focus on minimizing the harm the agency shop agreements have on *nonmembers* who are compelled to pay agency fees to the union as a condition of employment.

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

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

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

Under this Court's precedents, however, these concerns may be overcome by two governmental goals that justify any burdens on a nonmember's First Amendment rights: the desirability of labor peace and eliminating the problem of "free riders" who benefit from the union's collective bargaining activities but do not financially shoulder the cost. *Id.* at 517. This Court has identified *only* these two interests as being sufficiently compelling to justify the impact on the nonmember's freedom to not associate with the union. In none of these cases has this Court held that the union has a First Amendment right to use the government's creation of a collective bargaining unit as a short cut for raising funds for political purposes.

C. Section 760 Does Not Implicate Any Constitutional Rights Possessed By The Union

To be sure, a union may constitutionally spend funds for the expression of political views, to promote candidates, or to engage in other ideological activities not germane to the union's duties as a collective-bargaining representative. *Abood*, 431 U.S. at 235-36. But Section 760

impacts none of these activities. Under Section 760, the union may still engage in all of them. *See Street*, 367 U.S. at 770 ("Our construction therefore involves no curtailment of the traditional political activities of the railroad unions. It means only that those unions must not support those activities, against the expressed wishes of a dissenting employee, with his exacted money."). What Washington requires, however, is that the union get permission from the people who are forced to pay fees as a condition of their employment before it uses this money for political purposes.

Nonetheless, the Washington Supreme Court held that an "opt-in" procedure violates the union's First Amendment rights because of the "obvious, significant expense involved in complying with" Section 760. App. at 19a. However, Section 760 creates no burden for the union at all. The activities the Washington Supreme Court described as unduly burdensome consist of identifying individuals who may contribute to the union's political activities, contacting them, persuading them of the attributes of the union's political goals, and requesting that they grant their consent to the use of their funds for these purposes. This is what every other political organization in the United States, from the Sierra Club to the National Rifle Association to the Socialist Workers Party, must do in order to get people to contribute funds. Contacting a discrete subset of individuals (*i.e.*, employees of local governments in Washington who are not members of the union) and trying to persuade them to grant permission to collect fees for political purposes is not an undue burden on the union – if anything, Washington's agency shop law makes the union's task easier than most. The union has no right – and should not have any expectation – to have the

government construct a procedure that permits the union to obtain money from people who do not wish to associate with it *and* that this procedure be as easy for the union to use as possible. Quite simply, Section 760 does not violate the union's constitutional rights because no rights are impacted by it.

In sum, this Court should grant the Petition because the Washington Supreme Court's decision so radically misapplies this Court's decisions in *Street, Abood, Hudson* and *Lehnert* that it conflicts with the holdings of those cases, despite purporting to follow them. *See* Sup. Ct. R. 10(c).

II. REVIEW IS NECESSARY BECAUSE THE WASHINGTON SUPREME COURT'S HOLDING THAT "OPT-OUT" PROVISIONS ARE CONSTITUTIONALLY MANDATED IMPLICATES THE RIGHTS OF NONMEMBERS TO REFUSE TO ANNOUNCE THEIR POLITICAL VIEWS

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

In *NAACP v. Alabama*, 357 U.S. 449, 462 (1958), this Court recognized the "vital relationship between freedom to associate and privacy in one's associations." This Court made clear that the "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly

where a group espouses dissident beliefs." *Id.* That concern is equally applicable here.

An "opt-out" program requires the dissenting nonmember to publicly identify herself to the union as a person who, at the least, does not support the union's political goals or, at the most, actively opposes them. It requires the dissenting nonmember to inform her coworkers, her bosses, her subordinates, her employer, and the labor organization representing her in collective bargaining that her political views are not aligned with the union. It compels her to announce a political position that she may desire to keep private. It also identifies the objecting nonmember as a troublemaker and opens her to coercion or other forms of pressure to support the union's objectives. Unfortunately, this is not an idle concern and coercion is not something that occurred solely in the distant past. As testimony offered before a Congressional committee in 1997 demonstrates, coercion still plays a part in some union interactions with nonmembers:

> Several workers appearing before the Committee testified as to the coercion and intimidation they experienced once they began to question the orthodoxy of full union membership and dues payment. Again, Kerry Gipe told the Committee: "... the union began an almost immediate smear campaign against us, led by our Local President ... portraying us as scabs, and freeloaders. ... We had our names posted repeatedly on both union property and company property accusing us of being scabs. We were thrown out of our local union hall, and threatened with physical violence. ... We were accosted at work, we were accosted on the street. We were harassed, intimidated, and threatened. We were told

> our names were being circulated among all union officials in order to prevent us from every being hired into any other union shop at any other location. The union membership was told that we were refusing to pay any union dues which created a very hostile environment among our fellow workers."
>
> James Cecil of Clarkston, Michigan, testified that "the union agent wanted to know why I would not sign the check-off and join . . . he became angry and asked me who the hell I thought I was? Did I think I was some kind of intellectual? Did I think I was better than the other workers out there? I told him no, but I know what my rights are and I intend to defend them. . . . He promised me in no uncertain terms that he would bring the full force of his and the other unions down on me if I dared to do that . . . I was greatly concerned about retaining my job and for my physical well-being."

H.R. Rep. No. 105-397, at 8-9 (1997) (omissions in original). For workers in unions such as these, an "opt-out" requirement essentially means that they must raise their hand and possibly expose themselves to such treatment. The possibility of retaliation or coercion creates a powerful disincentive for the expression of fundamental First Amendment rights.

In contrast, an "opt-in" procedure maintains a level of uncertainty about the political views of a nonmember who does not "opt-in." It gives the nonmember, like every other citizen, the option of being an enigma. *See* Aron Greg, *The Constitutionality of Requiring Annual Renewal of Union Fee Objections in an Agency Shop*, 78 Tex. L. Rev. 1159, 1177 (2000) (under the "opt-out" system, a union objector

must go to some lengths to refute the presumption that he supports the union's views). Does the nonmember actively oppose the union or are they simply disinterested in its political activities? Does the nonmember support the union's political activities but believe that her financial situation requires her to keep the money that would otherwise go to the union? While Washington's law does not completely preserve the dissenting nonmember's ability to keep her political views private, it does not require her to disclose the precise nature of her political beliefs to those around her.

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

In deciding that an "opt-in" procedure was unconstitutional, the Washington Supreme Court decided an important federal question that has not been specifically settled by this Court. Moreover, it did so in a way that conflicts with the decisions of this Court recognizing a right to keep one's political beliefs private. This Court should therefore grant the WPDC's Petition. *See* Sup. Ct. R. 10(c).

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

Like the Washington Supreme Court, App. at 16a, the Respondents here may argue that this Court's statement in *Street* that "dissent is not to be presumed" means that this issue is settled. *See Street*, 367 U.S. at 774. This is wrong for two reasons. First, this Court in *Street* took great pains to avoid reaching the constitutional problems raised by the National Labor Relations Act (NRLA) and decided that case solely on statutory grounds. *Id.* at 765-71. Second, it is clear that, in that statement, this Court was merely recognizing that "dissent is not to be presumed" *under the NRLA.* This is because the NRLA does not contain an "opt-in" requirement similar to that in Section 760. Indeed, it would have been inconsistent with the intent of Congress to presume a nonmember automatically dissents from the union's use of their funds for political purposes. This does not mean, however, that this statement is a declaration of constitutional principle or that it should be relied upon outside the context of the interpretation of the NRLA.

Moreover, it is unclear why "dissent is not to be presumed" with regard to nonmembers. In that regard, the Seventh Circuit has identified two different types of employees who refuse to join a union: (i) an employee who is hostile to unions on political or ideological grounds, and (ii) an employee who is content with union representation, but who does not wish to pay any more for representation than he is forced to. *Gilpin v. Am. Fed'n of State, County, and Mun. Employees, AFL-CIO*, 875 F.2d 1310, 1313 (7th Cir. 1989). It is unclear why both types of employees should not be presumed to object to funding the union's

political agenda. While each group of employees has a different reason for objecting, the end result is the same – both sets of employees do not want their fees to be spent on political activities. Thus, a presumption of dissent *from the union's use of these funds for political purposes* is eminently reasonable. In contrast, a presumption of acquiescence ascribes to these employees a level of agreement with the union's activities that common sense and logic do not support.

By elevating the statement that "dissent is not to be presumed" to a constitutional principle, the Washington Supreme Court decided an unsettled federal question. This Court should grant the Petition to resolve this issue. *See* Sup. Ct. R. 10(c).

IV. THIS COURT SHOULD GRANT REVIEW TO DETERMINE THE CONSTITUTIONAL VIABILITY OF "PAYCHECK PROTECTION" LAWS

The issue of whether a state may constitutionally provide additional procedural protections to nonmembers who do not wish to have a union use their agency shop fees for political purposes is unsettled. This issue is of significant importance because, if the decision of the Washington Supreme Court were to stand, it would undermine efforts across the country to pass what are commonly called "paycheck protection" acts similar to Section 760. The goal of these legislative efforts is to provide workers who are not members of a union, but who must nonetheless pay fees to a union, the ability to make individual and informed choices regarding the political, social, or charitable causes to which the union wishes to devote those fees. *See* Joe Knollenberg, *The Changing of the Guard: Republicans*

Take on Labor and the Use of Mandatory Dues or Fees for Political Purposes, 35 Harv. J. on Legis. 347, 349-50 (1998) (describing efforts to pass paycheck protection acts in Congress); Michael C. Kochkodin, *A Good Politician Is One that Stays Bought: An Examination of Paycheck Protection Acts & Their Impact on Union Political Campaign Spending*, 2 U. Pa. J. Lab. & Emp. L. 807, 821-22 (2000) (describing arguments pro and con for paycheck protection acts).

Section 760 was the first paycheck protection act passed in the United States. R. Bradley Adams, *Union Dues and Politics: Workers Speak out Against Unions Speaking for Them*, 10 U. Fla. J.L. & Pub. Pol'y 207, 218-19 (1998). As such, resolution of its constitutionality by this Court will settle this issue on a national level and set clear guidance for Congress and state legislatures across the nation regarding the constitutionality of such acts.

CONCLUSION

For the foregoing reason's, amicus curiae Institute for Justice respectfully requests that this Court grant the WPDC's petition for a writ of certiorari.

DATED: August 14, 2006

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