NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON,

Petitioner,

v.

WASHINGTON EDUCATION ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where state law does not prohibit the practice, collective bargaining agreements may contain a union security provision, which requires employees, who are not members of the union, to pay an agency shop fee to the union as a condition of employment. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1986), held that, to protect these nonmembers' First Amendment rights, the union is prohibited from using these fees to support its political agenda if the nonmember objects (opt-out). Wash. Rev. Code § 42.17.760 provides additional protection for nonmembers by requiring them to affirmatively consent (otp-in) before their fees may be used for political purposes.

Does the requirement in Wash. Rev. Code § 42.17.760 that nonmembers must affirmatively consent (opt-in) before their fees may be used to support the union's political agenda violate the union's First Amendment rights?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Washington, on behalf of the State of Washington, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Washington in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Washington (App. at 1a) is reported at 156 Wash. 2d 543, 130 P.3d 352. The opinion of the Washington Court of Appeals (App. at 48a) is reported at 117 Wash. App. 625, 71 P.3d 244. The trial court's Order Regarding Cross-Motions For Summary Judgment (App. at 115a), Letter Opinion (App. at 102a), Findings Of Fact And Conclusions Of Law (App. at 92a), Permanent Injunction (App. at 84a), and Judgment (App. at 81a) are unpublished.

JURISDICTION

The judgment of the Supreme Court of Washington was entered March 16, 2006. App. at 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides in part that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

The Fourteenth Amendment to the United States Constitution provides in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

Wash. Rev. Code § 42.17.760 provides: "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." App. at 138a.

Other relevant statutes and regulations are set out in the Appendix. App. at 124a–156a.

STATEMENT

1. Background

Under Washington law, a collective bargaining agreement may include a union security provision. 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. A union security provision requires a nonmember of the union to pay an agency shop fee to the union, and the employer agrees to discharge nonmembers who refuse to pay the fee.

The United States Constitution does not require states to permit union security agreements. The Court has sustained so-called "right to work" laws that prohibit an employer from discharging employees because they refuse to either join the union or pay an agency shop fee. *Lincoln Fed. Labor Union 19129 v. Northwestern 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 assembly or will agree to abide by the assembly's plans.").

A union may place the dues paid by members and the agency shop fees paid by nonmembers into its general treasury. Subject to the First Amendment and the requirements of state and federal law, the treasury may be used for a variety of purposes, including collective bargaining, contract admini-stration, grievance adjustment, litigation, as well as charitable and social activities. In Washington, a union may also use its general treasury to make contributions or expenditures to influence elections or to operate a political committee.

The United States Constitution does not require a state to allow unions to use general treasury funds to make a contribution or expenditure in connection with an election for political office. At the federal level, unions, national banks, and certain corporations prohibited from making contributions or expenditures from their general treasuries in connection with elections to certain federal offices. 2 U.S.C. § 441b(a). App. at 140a. Such contributions and expenditures can only be made from a separate segregated fund supported by voluntary contributions. 2 U.S.C. § 441b(b)(4). App. at 143a. The Court has ruled that these restrictions do not violate the First Amendment. *Fed. Election Comm'n v. Nat'l Right To Work Comm.*, 459 U.S. 197, 207 (1982) ("we conclude that the associational rights

asserted by respondent may be and are overborne by the interests Congress has sought to protect in enacting § 441b").

To compel nonmembers to financially support a union by paying an agency shop fee impacts the nonmembers' First Amendment rights. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977). Requiring payment of the agency shop fee does not violate the nonmembers' First Amendment rights when it "is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment . . . ." *Id.* at 225-26. This interference with the nonmembers' First Amendment rights has two justifications. The first is the government's interest in labor peace. The second is that an agency shop fee used to support collective bargaining activities eliminates the "free rider" problem. Unions that are the exclusive bargaining representative are required to fairly and equitably represent all employees—members and nonmembers alike. The agency shop fee pays for the representation of the nonmember. *Id.* at 221-26. Without this payment, the nonmember is a free rider. However, nonmembers' First Amendment rights are violated if the agency shop fee is used for activities unrelated to collective bargaining such as litigation that does not concern the nonmembers' bargaining unit or expenditures for general public relations. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 528-29 (1991).

This case concerns using nonmembers' fees to support the WEA's political agenda. This "implicates core First Amendment concerns." *Id.* at 516. The First Amendment prohibits the state "from requiring

[a nonmember] to contribute to the support of an ideological cause he may oppose as a condition of holding a job . . ." *Abood*, 431 U.S. at 235. Union expenditures "for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative" may only "be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." *Id*. at 235, 236.

In *Chicago Teacher's Union Local 1 v. Hudson*, 475 U.S. 292, 310 (1986), the Court held that "the constitutional requirements for the Union's collection of agency fees include [1] an adequate explanation of the basis for the fee, [2] a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and [3] an escrow for the amounts reasonably in dispute while such challenges are pending." *Hudson*, 475 U.S. at 310. *Hudson* "outlined a *minimum set of procedures* by which a union in an agency-shop relationship could meet its requirement" to use nonmember fees for political purposes. *Keller v. State Bar of California*, 496 U.S. 1, 17 (1990) (emphasis added).

Essentially, *Hudson* held that the First Amendment requires unions to give nonmembers the opportunity to opt-out of having a portion of their agency fee used for political purposes to which they object.

Washington law does not impede a union's ability to use nonmembers' fees for political purposes. State law permits union security agreements, instead of prohibiting them, and permits unions to make political contributions or expenditures from their general treasuries, instead of requiring a separate segregated fund supported by voluntary contributions. However, the state does impose an additional procedural requirement—beyond the opt-out procedure required by *Hudson*—before a union can use a nonmember's fees for political purposes. This requirement applies only to use of the nonmember fees for political purposes. It does not apply to other uses of the same fees that are not related to collective bargaining.

Wash. Rev. Code § 42.17.760 requires that nonmembers must give their affirmative consent before their agency fee can be used for political purposes. Wash. Rev. Code § 42.17.760 provides:

> "A labor organization may not use *agency shop fees paid* by an individual who is *not a member* of the organization to make contributions or expenditures to *influence an election or to operate a political committee*, unless *affirmatively authorized* by the individual." Wash. Rev. Code § 42.17.760 (emphasis added). App. at 138a.

Thus, Wash. Rev. Code § 42.17.760 establishes an opt-in procedure before nonmembers' fees may be used by the union for political purposes.

2. Proceedings Below

Respondent Washington Education Association (WEA) is a labor union that represents educational employees in Washington's common schools (K-12), community colleges, and universities. The WEA is an affiliate of the National Education Association (NEA). The WEA has entered into collective bargaining agreements with public employers that contain union security provisions requiring nonmembers to pay an agency shop fee as a condition of continued employment. As part of the process of collecting fees from nonmembers, the WEA sends out a "*Hudson* packet" notifying them of their right to object to paying fees for non-chargeable expenditures and to challenge WEA's calculation of the fee. When non-members object, they are given a refund of the percentage of the annual fee that the union's computations indicate were not used for collective bargaining activities. When nonmembers challenge the union's computations, an arbitrator decides what part of the fee was used for collective bargaining purposes to determine the appropriate refund. Pending the outcome of the arbitration, WEA escrows any fees that are reasonably in dispute.

The Washington State Public Disclosure Commission (PDC) is the state agency charged with enforcing Washington's campaign finance laws. The PDC received a complaint alleging that the WEA was not complying with Wash. Rev. Code § 42.17.760. That is, that the WEA was using nonmembers' fees for political purposes without the affirmative consent of the nonmembers. After an investigation, the PDC and the WEA entered into a stipulation that provided that the WEA's "general fund money was

used to make contributions and expenditures to influence an election and to operate a political committee," and that the WEA "did not have affirmative authorization from agency fee payers to use their money for these purposes." App. at 121a ¶¶ 3, 4. The PDC and the WEA agreed that the WEA "committed multiple violations of [Wash. Rev. Code §] 42.17.760." App. at 122a. This stipulation applied to the WEA 1999–2000 fiscal year.

After considering the stipulation, the PDC referred the matter to the Washington Attorney General because the maximum statutory penalty that the PDC could impose was inadequate in light of the apparent violations. App. at 120a. Washington law authorizes a court to impose higher penalties. Wash. Rev. Code § 42.17.390.

a. Trial Court

The Attorney General filed a complaint against the WEA in superior court for violating Wash. Rev. Code § 42.17.760.[1] The complaint sought civil penalties, treble damages, if the violation was intentional, and costs and attorney's fees. The trial court entered summary judgment in favor of the state that Wash. Rev. Code § 42.17.760 was constitutional, that Wash. Rev. Code § 42.17.760 required affirmative authorization from the

[1] The PDC also received a complaint alleging that the NEA was violating Wash. Rev. Code § 42.17.760. The PDC referred this complaint to the Attorney General, who filed a complaint against the NEA. That action is stayed pending the outcome of this case. *State of Washington ex rel. Washington State Pub. Disclosure Comm'n v. National Educ. Ass'n*, Thurston County Docket No. 05-2-01709-3.

nonmembers, and that the WEA's *Hudson* procedure did not satisfy the requirement of Wash. Rev. Code § 42.17.760. App. at 117a ¶¶ 1, 3. A bench trial followed on whether the WEA used nonmember fees to influence an election or to support a political committee. App. at 117a ¶ 5.

After the trial, the court issued a letter opinion and entered findings of fact and conclusions of law. App. at 102a, 92a. The trial court found that for each fiscal year from 1996 to 2000 the WEA used nonmembers' fees for contributions or expenditures to influence an election or to operate a political committee. App. at 96a ¶ 20. The court found approximately 8000 nonmembers did not give their consent during this time and imposed a civil penalty of $25 per nonmember for a total civil penalty of $200,000. App. at 96a ¶ 21. The court also found that the WEA "intentionally chose not to comply with [Wash. Rev. Code §] 42.17.760." App. at 98a ¶ 29. Based on the intentional violation, the trial court doubled the civil penalty to $400,000. App. at 98a ¶ 30. The court also awarded the state its costs and attorney's fees. App. at 98a ¶ 33. The amount of the costs and attorney's fees was $190,375. Thus, the total judgment against the WEA was $590,375. App. at 6a. The trial court also entered a permanent injunction setting out the manner in which the WEA was to comply with Wash. Rev. Code § 42.17.760. App. at 84a.

b. Court Of Appeals

The WEA appealed to the Washington Court of Appeals. A divided three judge panel reversed the

trial court and held that Wash. Rev. Code § 42.17.760 was unconstitutional. App. at 48a.

The majority began by reviewing *International Association of Machinists v. Street*, 367 U.S. 740 (1961), *Abood*, 431 U.S. 209, and *Hudson*, 475 U.S. 292. The majority concluded that these cases stand for the proposition that "nonmembers who do not want the union to use their fees for non-chargeable expenditures must make their objection known to the union." App. at 61a. The majority reasoned that "[Wash. Rev. Code §] 42.17.760 relieves nonmembers of their burden of objection" by creating "an 'opt-in' procedure—nonmembers must give their authorization before the union may use their fees on political expenditures." App. at 63a, 63a–64a. The majority concluded that this opt-in procedure "does not follow the Court's carefully crafted and balanced approach" set out in *Street*, *Abood*, and *Hudson*. App. at 64a.

Having concluded that the opt-out procedure in *Hudson* was constitutionally required, the majority held that the opt-in procedure authorized by Wash. Rev. Code § 42.17.760 was unconstitutional because it "would unduly require a union to protect nonmembers who disagree with a union's political expenditures but are unwilling to voice their objections. The procedures imposed on unions by federal law fully protect nonmembers' First Amendment rights. Further restrictions, such as an opt-in procedure, upset the balance between nonmembers' rights and the rights of the union and the majority." App. at 68a.

The dissent also began by reviewing *Street*, *Abood*, and *Hudson*. And the dissent agreed with the majority that these cases stand "for the proposition that an 'opt in' provision is not constitutionally required . . . ." App. at 72a. However, the dissent concluded that these decisions did "not support the converse, advanced by the majority here, that an 'opt in' provision such as Washington's is constitutionally barred." App. at 72a.

The dissent concluded that all "the cases that the majority cites simply uphold opt out procedures as constitutional. None, however, hold that the Constitution *requires* an opt out procedure or that the burden of dissent must be on the objecting employee. Further, none of these cases hold that a statutory opt in procedure, such as the one in [Wash. Rev. Code §] 42.17.760 is constitutionally infirm . . . ." App. at 75a (internal quotation marks omitted).

c. Supreme Court Of Washington

The Supreme Court of Washington granted the state's petition for review of the Court of Appeals decision and affirmed that decision by a vote of six to three. App. at 1a.

The majority began by considering whether the WEA's *Hudson* procedure satisfied the requirements of Wash. Rev. Code § 42.17.760. The majority concluded that it did not. According to the majority, the plain language of Wash. Rev. Code § 42.17.760 "seems to indicate a nonmember must provide an expression of positive authorization. Failure to respond to the *Hudson* packet may be considered acquiescence, but it would not fulfill the

affirmative authorization requirement." App. at 10a. The majority reasoned that "[t]he difference is that affirmative authorization seems to indicate that the member must say 'yes,' instead of failing to say 'no.'" App. at 10a.

The Court next took up the question of whether Wash. Rev. Code § 42.17.760 violated the First Amendment of the United States Constitution.[2] The majority's conclusion that Wash. Rev. Code § 42.17.760 is unconstitutional rested on four points.

First, the majority held that the union had a First Amendment right to use nonmembers' fees for political purposes. According to the majority, the "United States Supreme Court has held that a union has the right to use nondissenting nonmember fees for political purposes. *Abood*, 431 U.S. at 240, 97 S. Ct. 1782 (quoting *Bhd. of Ry. & S.S. Clerks v. Allen,* 373 U.S. 113, 122, 83 S. Ct. 1158, 10 L. Ed. 2d 235 (1963))." App. at 26a. And the majority stated that the "State has failed to even attempt to justify [Wash Rev. Code § 42.17.]760, which it is required to do when regulating First Amendment rights." App. at 26a.

Second, the majority held that the burden is on the nonmember to object so that the opt-out

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[2] The Washington Supreme Court's decision was based solely on the federal constitution. According to the Court, neither party "provided an analysis or argument to show why, in this context, the state constitutional provision protecting the rights of free speech and association should be construed more broadly than the federal provision. Therefore, we interpret the state constitutional clause coextensively with its parallel federal counterpart." App. at 17a n.4.

procedure in *Hudson* was constitutionally required. The majority reviewed *Street*, 367 U.S. 740, *Abood*, 431 U.S. 209, *Hudson*, 475 U.S. 292, and *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435 (1984). According to the majority, these cases stand for the proposition that "the burden is on the employee to register his dissent to the union's political activities . . . ." App. at 17a. Thus, an "employee who is given a simple and convenient method of registering dissent has not been compelled to support a political cause and has not suffered a violation of his or her First Amendment rights." App. at 17a.

Third, the majority held that the opt-in procedure in Wash. Rev. Code § 42.17.760 violated the First Amendment because it burdened the First Amendment right of the union to use nonmembers' fees for political purposes and the First Amendment right of a nonmember to support the union's political agenda.

The majority reasoned that the affirmative authorization requirement of Wash. Rev. Code § 42.17.760 constituted a "presumption of dissent [that violated] the First Amendment rights of both members and nonmembers." App. at 19a. The rights of members were violated because "the procedures required by the State's interpretation of [Wash. Rev. Code § 42.17.760] would be extremely costly and would have a significant impact on the union's political activities." App. at 20a. The rights of nonmembers were also violated because a "presumption of dissent . . . assumes that because an employee has not joined the union, he or she disagrees with the union's political expendi-

tures." App. at 20a. Thus, for "those nonmembers who agree with the union's political expenditures, [Wash. Rev. Code § 42.17.]760's presumption of dissent presents an unconstitutional burden on their right to associate themselves with the union on political issues." App. at 20a–21a.

Fourth, the majority applied this Court's decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), to conclude that Wash. Rev. Code § 42.17.760 violated the WEA's right of expressive association. The majority reasoned that because Wash. Rev. Code § 42.17.760 "regulates the relationship between the union and agency fee payers with regard to political activity, the *Boy Scouts* analysis should be applied . . . ." App. at 27a.

The majority determined that the WEA engages in expressive activity because the "WEA engages in political and ideological activities not related to collective bargaining or contract administration." App. at 29a–30a. The majority concluded that the opt-in requirement burdened the WEA's expressive association because "under the agency shop provisions, the union is entitled to collect a fee equivalent to 100 percent of union dues from nonmembers in the bargaining unit." App. at 30a. The opt-in requirement "encumbers the use of such funds by prohibiting their expenditure for political speech absent affirmative authorization by the agency fee paying nonmember." App. at 30a. Finally, the majority held that the opt-in requirement was not narrowly tailored because the "opt-out alternative . . . reveals that protection of dissenters' rights can be achieved through means significantly less restrictive of the union's

associational freedoms than [Wash. Rev. Code §] 42.17.760's opt-in requirement." App. at 33a.

Three justices of the Washington Supreme Court dissented. First, the dissent rejected the majority's claim that the WEA had a First Amendment right to use nonmembers' fees for political purposes. The dissent explained that unions "have a statutory, not constitutional, right to cause employers not only to withhold and remit membership dues but also to withhold and remit fees from nonmembers in an equivalent amount." App. at 35a. "Absent this statutory mechanism for the withholding and remission of agency fees (or membership fees for that matter), there is no right, constitutional or otherwise, for the union to require it." App. at 35a. Thus, "it would be perfectly constitutional if the State chose to eliminate the payroll deduction for collection of agency shop fees altogether. How then could merely placing a procedural condition on the collection of a small portion of such shop fees (those that would be used to influence an election or to operate a political committee) violate the constitution?" App. at 39a.

Second, the dissent rejected the majority's conclusion that the *Hudson* opt-out procedure was constitutionally required. The dissent distinguished the federal cases relied on by the majority because they only stand for the proposition that "the constitution requires *at least* an opt-out scheme to protect dissenters' rights. None of these cases stand for the proposition that the constitution limits a different legislative approach to protecting dissenters' rights, including an opt-in [requirement]." App. at 41a (footnote omitted).

Finally, the dissent rejected the majority's reliance on *Boy Scouts*. The majority's reasoning was flawed because "there is *no* association between the union and agency fee payers because by definition these individuals have refused to join (associate with) the union. The absence of membership defeats any claim that the regulation of statutorily required monetary support can possibly violate the right of union members to freely associate with one another for political advocacy." App. at 46a.

REASONS FOR GRANTING THE PETITION

This case presents the intersection of two important branches of this Court's First Amendment jurisprudence—the right of union members to associate and the right of the individual not to be forced to support political speech with which he or she disagrees. The Court should grant review for two reasons.

First, there is no basis in the decisions of this Court for the Washington Supreme Court's holding that unions have a First Amendment right to use nonmembers' agency shop fees for political purposes. This conclusion is so far outside the mainstream of this Court's decisions that it demands to be corrected.

Second, the decision below conflicts with *Federal Election Commission v. National Right To Work Committee*, 459 U.S. 197 (1982) (*NRWC*), *United States v. Boyle*, 482 F.2d 755 (D.C. Cir. 1973), and *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997). All three of these decisions uphold statutes that established opt-in procedures for nonmembers to make contributions that a union

can use for political purposes. Given the importance of this issue, the Court should grant review to resolve this conflict.[3]

1. Unions Do Not Have A First Amendment Right To Use Nonmembers' Fees For Political Purposes

The decision below is based on the premise that a union has a constitutional right to use nonmembers' fees for political purposes. We are aware of no decision of this Court that recognizes such a constitutional right, and the majority below cites none. Rather, the majority stated that the "United States Supreme Court has held that a union has the right to use nondissenting nonmember fees for political purposes. *Abood*, 431 U.S. at 240, 97 S. Ct. 1782 (quoting *Bhd. of Ry. & S.S. Clerks v. Allen,*

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[3] The Washington Supreme Court's alternative holding that Wash. Rev. Code § 42.17.760 violates the WEA's right of expressive association is also incorrect. The parties never advanced this argument (App. at 45a), and the right of expressive association is not involved in this case because Wash. Rev. Code § 42.17.760 does not force the WEA to accept an unwanted person. The statute applies only to nonmembers—employees who have made a conscious decision not to join the union. The "forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000). Laws that do not force a group to accept an unwanted member or make membership in a group less attractive implicate the right of expressive association. *Rumsfeld v. Forum For Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297, 1312 (2006) ("Unlike the public accommodations law in *Dale,* the Solomon Amendment does not force a law school 'to accept members it does not desire.'").

373 U.S. 113, 122, 83 S. Ct. 1158, 10 L. Ed. 2d 235 (1963)).” App. at 26a. This statement is misleading. The right discussed in *Abood* and *Allen* was a right under the collective bargaining agreement. *Abood*, 431 U.S. at 239 n.40 (“no decree would be proper which appeared likely to infringe the unions’ right to expend uniform exactions under the union-shop agreement”).

The *Hudson* procedure was designed to protect the First Amendment rights of the nonmembers, not the union. This Court has recognized that unions “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). “To force employees to contribute, albeit indirectly, to the promotion of such positions *implicates core First Amendment concerns*.” *Id.* (emphasis added).

This Court has long held that unions have no First Amendment right to compel a worker to join or pay fees to the union. The Court established this principle when it rejected challenges to state right to work laws. A right to work law prohibits workers from losing their jobs because they refuse to join a union or pay fees to a union. In *Lincoln Federal Labor Union 19129 v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949), this Court upheld right to work laws in Nebraska and North Carolina. The union argued that “these state laws abridge the freedom of speech and the opportunities of unions and their members ‘peaceably to assemble and to petition the Government for a redress of grievances.’” *Lincoln Fed. Labor Union 19129*, 335 U.S. at 529.

The Court rejected this argument. It held that there

> "*cannot be wrung from a constitutional right of workers* to assemble to discuss improvement of their own working standards, *a further constitutional right to drive from remunerative employment* all other *persons who will not* or can not, *participate* in union assemblies." *Lincoln Fed. Labor Union 19129*, 335 U.S. at 531 (emphasis added).

Thus, the "constitutional right of workers to assemble . . . cannot be construed as a constitutional guarantee that none shall get and hold jobs except those who will join in the assembly . . . ." *Lincoln Fed. Labor Union 19129*, 335 U.S. at 531.

Thus, unions have no First Amendment right to require nonmembers to pay fees to the union. In fact, "the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it." *Smith v. Arkansas State Highway Employees Local 1315*, 441 U.S. 463, 465 (1979). Since the First Amendment does not require government to recognize or negotiate with unions, it surely does not give unions a right to collect fees from nonmembers.[4]

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[4] Courts have held that the First Amendment does not impose any obligation on government to assist unions in collecting union dues or agency shop fees by granting payroll deductions so that the fees and dues can be withheld from employees' pay by the employer and paid directly to the union. *South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1256 (4th Cir. 1989) ("Although loss of payroll deductions may

In Washington, the WEA's right to receive agency fees from nonmembers comes from state statutes that permit collective bargaining agreements to contain a union security provision. It is not a First Amendment right. The contrary premise of the majority below cannot be reconciled with this Court's decisions in *Lincoln Federal Labor Union 19129* and *Smith*.

2. The Decision Below Conflicts With Decisions Upholding Opt-In Requirements

The decision below invalidating the opt-in requirement in Wash. Rev. Code § 42.17.760 conflicts with decisions upholding opt-in statutes against First Amendment challenges.

a. *Federal Election Commission v. National Right To Work Committee*

The decision below conflicts with *NRWC*, which upheld an opt-in procedure for federal elections. 2 U.S.C. § 441b(a) provides that it "*is unlawful for . . . any labor organization*, *to make a contribution or expenditure* in connection with [certain federal elections.]" App. at 140a (emphasis

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economically burden the [union] and thereby impair its effectiveness, such a burden is not constitutionally impermissible."); *Toledo Area AFL-CIO Coun. v. Pizza*, 154 F.3d 307, 319 (6th Cir. 1998) ("wage checkoff ban simply does not impinge, in a constitutionally significant manner, on any First Amendment rights"); *Arkansas State Highway Employees Local 1315 v. Kell*, 628 F.2d 1099, 1102 (8th Cir. 1980) (while the highway department's refusal to deduct union dues "may impair the effectiveness of the union, this type of impairment . . . is not one that the First Amendment prohibits").

added). The terms "contribution" and "expenditure" are broadly defined, but they do not include *"the establishment, administration, and solicitation of contributions to a separate segregated fund* to be utilized for political purposes by a corporation, *labor organization*, membership organization, cooperative, or corporation without capital stock." 2 U.S.C. § 441b(b)(2)(C) (emphasis added). App. at 142a. Thus, unlike Washington, the federal government prohibits political contributions and expenditures from a union's general treasury—they can only be made from a separate segregated fund.

And with one limited exception, it is "*unlawful . . . for a labor organization, or a separate segregated fund* established by a labor organization, *to solicit contributions to such a fund from any person other than its members* and their families." 2 U.S.C. § 441b(b)(4)(A)(ii) (emphasis added). App. at 143a. Thus, federal law prohibits unions from soliciting nonmembers for contributions for political purposes. The only exception to this ban on soliciting nonmembers is that a union may "*make 2 written solicitations for contributions* during the calendar year *from any* stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons." 2 U.S.C. § 441b(b)(4)(B). App. at 143a. Nonmembers of the union must opt-in if they want to contribute to the union's political fund. The union or separate segregated fund "*may not use a payroll deduction plan, a check-off system, or other plan* which deducts contributions from an employee's paycheck as a method of facilitating the making of contributions

under this section." 11 C.F.R. § 114.6(e)(1) (emphasis added). App. at 154a.

The majority below concluded that Wash. Rev. Code § 42.17.760 violated the First Amendment because the opt-in provision imposed a burden on the union and nonmembers, who supported the union's political agenda, by making it more difficult to make political contributions. The court held that the procedures set out in *Hudson*, 475 U.S. 292, are constitutionally required and the state may not establish more stringent procedures. *Hudson* did not impose any such constitutional requirement. As this Court recognized in *Keller v. State Bar of California*, 496 U.S. 1, 17 (1990):

> "*Hudson* . . . outlined a *minimum set of procedures* by which a union in an agency-shop relationship could meet its requirement under *Abood*, [431 U.S. 209.]" (Emphasis added.)

NRWC establishes that *Hudson* does not impose a constitutional requirement on the state. The procedures in 2 U.S.C. § 441b go far beyond *Hudson* and would surely be unconstitutional under the majority's analysis in the decision below. But in *NRWC*, this Court rejected a First Amendment challenge to § 441b. In *NRWC*, the National Right to Work Committee challenged the requirement in 2 U.S.C. § 441b(b)(4)(C) that prohibited the committee from soliciting nonmembers to contribute to its separate segregated political fund.

The Court rejected a First Amendment challenge concluding "that the associational rights asserted by [the committee] may be and are overborne by the interests Congress has sought to

protect in enacting § 441b." *NRWC*, 459 U.S. at 207. The Court pointed to two interests. First, the "substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators who are aided by the contributions." *NRWC*, 459 U.S. at 207. Although *NRWC* spoke in terms of corporate "war chests," the Court has expressed the same concern about "huge war chests being maintained by labor unions . . . ." *United States v. Int'l Union United Auto., Aircraft & Agric. Implement Workers*, 352 U.S. 567, 579 (1957).

The second interest is "to protect 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." *NRWC*, 459 U.S. at 208. This is the same reason the Court required the procedures in *Hudson*. *Hudson*, 475 U.S. at 294 (the "union, however, could not, consistently with the Constitution, collect from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent"). But in *NRWC*, this interest supports a more stringent statutory procedure than *Hudson* or Wash. Rev. Code § 42.17.760—prohibiting solicitation from non-members. Simply put, the decision below cannot be reconciled with *NRWC*.

b. *United States v. Boyle*

The decision below also conflicts with *United States v. Boyle*, 482 F.2d 755 (D.C. Cir. 1973), a

decision of the District of Columbia Circuit. *Boyle* dealt with 18 U.S.C. § 610 (1970), the forerunner of 2 U.S.C. § 441b. 18 U.S.C. § 610 made it "unlawful for . . . any labor organization to make a contribution or expenditure in connection with any election [for certain federal offices.]" *Boyle*, 482 F.2d at 758 n.1.

In interpreting § 610, this Court held that the prohibition did not apply to a separate segregated fund and that union officials could solicit contributions to the fund "under circumstances plainly indicating that donations are for a political purpose and that those solicited may decline to contribute without loss of job, union membership, or any other reprisal within the union's institutional power." *Pipefitters Local Union 562 v. United States*, 407 U.S. 385, 414 (1972).

In *Boyle*, the union president was charged with using union dues to contribute to the separate segregated political funds in violation of § 610. The president argued that § 610 violated the union's freedom of speech and that the government's goal of protecting minority rights could be achieved by legislation requiring either

> "'*contracting in*,' in which *all members approving* of the proposed political assessment would be required to give *affirmative evidence of such approval*, or 'contracting out,' in which a union member objecting to the political use of a portion of his dues could refuse to tender that particular assessment." *Boyle*, 482 F.2d at 763–64 (emphasis added).

Essentially, the president was arguing that the First Amendment required that the union be allowed to

use dues for political purposes so long as members had the ability to "contract in" (opt-in) or "contract out" (opt-out).

The Court rejected the argument because it concluded that "§ 610, as interpreted in *Pipefitters,* does establish a system of 'contracting in' . . . ." *Boyle*, 482 F.2d at 764. Unions "are permitted to make contributions if assenting *members 'give affirmative evidence of such approval'* by assenting to having a deduction made from the member's pay check." *Id.* (emphasis added). Thus, the Court concluded that the contracting in requirement of § 610 did not violate the union's First Amendment rights.

The decision below directly conflicts with *Boyle*. *Boyle* held that the contracting in requirement in § 610, which provides that members give affirmative evidence of approval, did not violate the First Amendment. The decision below holds the opposite—that the requirement for affirmative approval in Wash. Rev. Code § 42.17.760 violates the First Amendment.

c. *Michigan State AFL-CIO v. Miller*

The decision below is also in conflict with *Miller*, 103 F.3d 307, a Sixth Circuit decision. Like Washington and the federal government, Michigan requires individuals contributing to a union's political fund to opt-in by affirmatively consenting to contribute to a union's political fund. Under Michigan law, a corporation or a union "*may solicit or obtain contributions for a separate segregated fund* . . . on an automatic basis, including but not limited to a payroll deduction plan, *only if the individual who is contributing to the fund*

affirmatively consents to the contribution at least once in every calendar year." *Miller*, 103 F.3d at 1248–49 (emphasis added). This is an opt-in procedure. The contribution ends unless the employee annually gives his or her consent. Under the opt-out procedure in *Hudson*, a contribution will continue unless and until the employee objects.

The union claimed that this requirement violated "the speech and associational rights protected by the Constitution." *Miller*, 103 F.3d at 1250. In particular, the union alleged that the "*annual consent requirement unduly interferes with their right to solicit funds* for the furtherance of protected speech, an activity recognized as falling within the scope of the First Amendment." *Id.* (emphasis added).

The court rejected this claim. The court concluded that the annual consent requirement "furthers an important or substantial governmental interest" which was "the right not to contribute to political causes that [a person does] not favor . . . ." *Miller*, 103 F.3d at 1253. The annual consent requirement advanced the state's interest because "verifying on an annual basis that individuals intend to continue dedicating a portion of their earnings to a political cause . . . reminds those persons that they are giving money for political purposes . . . ." *Id.* Also, unlike the *Hudson* opt-out procedure, the annual consent requirement "counteracts the inertia that would tend to cause people to continue giving funds indefinitely even after their support for the message may have waned." *Id.*

The court also concluded that "the governmental interest is unrelated to the

suppression of free speech." *Miller*, 103 F.3d at 1253. The "Michigan statute does not impose any direct limits on speech. It does not determine who can speak, how much they can speak, or what they may say." *Id*. The court recognized that the union might lose contributions but "if contributions were to decline . . . the cause would be the exercise of informed choice by individuals, not the governmental suppression of political advocacy." *Id*.

The decision below directly conflicts with *Miller*. The Michigan annual affirmative consent requirement and the Washington affirmative consent requirement are very similar. Both require a person to opt-in to making contributions to support the union's political agenda.

The Court should grant review to resolve the conflict between the decision below and *NRWC*, *Boyle*, and *Miller*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted.

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