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P R O C E E D I N G S

(11:08 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in 05-1589, Davenport versus Washington Education Association, and 05-1657 consolidated, Washington versus Washington Education Association.

General McKenna.

ORAL ARGUMENT OF ROBERT M. MCKENNA

ON BEHALF OF THE PETITIONERS

MR. MCKENNA: Mr. Chief Justice, and may it please the Court:

Washington law authorizes union security agreements which permit unions to enter into collective bargaining agreements that require nonmember employees to pay an agency shop fee or lose their job. The union's authority to collect these compelled fees is based solely on statute and the subject of statutory conditions. Section 760, as adopted by Washington voters in 1992, requires unions to obtain the affirmative consent from non-members before their fees may be used to influence an election or operate a political committee. 760 serves the State's interest in election integrity by means of ensuring that union election activity is funded by voluntary contributions, just like every other organization that seeks political

1 funds. 760 is a valid condition on the union statutory
2 authority and does not violate the union's First
3 Amendment rights.

4 760 serves the State's interests specified
5 in the adopted initiative, which were -- which are found
6 at petition appendix 138a codified as RCW 42.17.620.
7 Three interests in election integrity are stated, or
8 three means of serving an interest in election integrity
9 are stated in this portion, the intent portion of the
10 statute.

11 First, to ensure that individuals have a
12 fair and equal opportunity to influence elections;
13 second, to reduce the influence of large organizational
14 contributors; third, to restore public trust in the
15 election process. The Washington Supreme Court,
16 petition appendix 22a-23a, agreed that the intent of
17 Initiative 134 was to protect the integrity of the
18 election process from the perception that individuals
19 have an insignificant role to play.

20 JUSTICE SCALIA: I'm surprised that that's
21 the -- I would have thought its primary purpose would be
22 to spare individuals the necessity of supporting causes
23 that they don't support. Was there no First Amendment
24 interest?

25 MR. MCKENNA: Justice Scalia, I --

1 JUSTICE SCALIA: Is it purely an election
2 law interest?

3 MR. MCKENNA: Actually, Justice Scalia, we
4 believe that section, section 760 accomplishes both
5 purposes. The overall intent of a ballot initiative was
6 as I stated found by the State supreme court, but
7 clearly from the plain language of section 760 --

8 JUSTICE SCALIA: But you say the State
9 supreme court was wrong. I mean, why do you believe it
10 on this if you don't believe it on everything else?
11 You're appealing from it, aren't you?

12 MR. MCKENNA: We believe that the integrity
13 of the election process, Justice Scalia, is in fact
14 served by helping ensure that individuals make voluntary
15 contributions. We think that in fact it does help the
16 integrity of the election process, yes, sir.

17 JUSTICE ALITO: Well, how can the State
18 supreme court determine what is the purpose, the intent,
19 of the ballot initiative?

20 MR. MCKENNA: I'm not certain, Your Honor.
21 They referred to the --

22 JUSTICE ALITO: A lot of people voted for
23 it.

24 MR. MCKENNA: Right.

25 JUSTICE ALITO: But is the State supreme

1 court in a position to determine why they voted for it?

2 MR. MCKENNA: They simply hold, Your Honor,
3 in their opinion that this is what the voters intended.

4 JUSTICE ALITO: How do they know that?

5 MR. MCKENNA: I don't know how they know it,
6 Your Honor.

7 JUSTICE BREYER: If that's what they
8 intended, then how can a State say, well, it's the
9 union's money, we don't want you to spend this little
10 bit of your money to contribute in a campaign, but if
11 the local swimming team wants to -- or the bar
12 association or the corporation, if they want to spend
13 money that people have given them for totally other
14 purposes, the compulsory bar association, well, they can
15 do that. It's just the labor unions that can't spend
16 the money that these people forced to belong -- you
17 know, they have to object affirmatively -- but all the
18 other similar organizations, they can't.

19 MR. MCKENNA: Your Honor, beginning with the
20 Railway Labor Act cases and continuing up through the
21 public school teacher cases, Abood and Hudson, this
22 Court has recognized that compelling employees to pay
23 fees must be balanced against the need to protect them
24 from --

25 JUSTICE BREYER: Well, now you're talking

1 about this other purpose, but that other purpose, which
2 was rather interesting -- I take it that's one of the
3 main points on the other side -- the other purpose has
4 nothing to do with this case. If Washington wanted to
5 have a similar statute where it was worried about
6 protecting the interests of the compelled member or the
7 compelled payor, fine, fine, that would be a different
8 case. That isn't this case.

9 MR. MCKENNA: Your Honor --

10 JUSTICE BREYER: In this case they couldn't
11 care less about that.

12 MR. MCKENNA: Actually, Your Honor, I think
13 the plain language of 760 makes it clear that the
14 authors of the initiative intended to protect individual
15 interests. There is no meaningful distinction between
16 the use of individuals in 760, in section 760, than
17 there is in the Hudson, in the Hudson statute, for
18 example. The Hudson statute, the Illinois statute at
19 issue in Hudson, also required nonmembers to opt in in
20 order to make, not just political contributions but any
21 contributions. But the Court, this Court, found no
22 problem with Hudson or with the Illinois statute in that
23 case.

24 JUSTICE BREYER: That's true, but in that
25 case, in that case they didn't have a State supreme

1 court interpreting the statute which is just as you
2 started off saying it was, which has nothing to with the
3 rights of the nonmember, zero. It has to do with the
4 appearance of fairness in the election.

5 MR. MCKENNA: Your Honor, with due respect
6 that was the legal conclusion of the Washington Supreme
7 Court. It was not a construction of the statute. It
8 was a legal conclusion based on their reading or
9 divining of voter intent. But this Court is not bound
10 by such an assessment.

11 JUSTICE KENNEDY: Well, I wanted to ask
12 about that. Suppose Washington says that as a matter of
13 Washington law we are bound by our interpretation of
14 purpose and we interpret the statute according to that
15 purpose. You use the words "plain language" a few
16 minutes ago.

17 MR. MCKENNA: Yes. Yes.

18 JUSTICE KENNEDY: Are we free to disregard
19 that and to say, well, oh well, we're just going to
20 follow the plain language?

21 MR. MCKENNA: No, no.

22 JUSTICE KENNEDY: Like the case we -- was
23 argued, the first case this morning?

24 MR. MCKENNA: Your Honor, as Chief Justice
25 Roberts mentioned in the last case you heard this

1 morning, first look to the plain language, as the
2 Solicitor General has pointed out in numerous briefs --

3 JUSTICE KENNEDY: But that's a Federal, a
4 Federal statute and this is a State statute. If the
5 State court says, we're interested in purposes, we
6 decided, and you must as a matter of State law interpret
7 the statute according to the purpose as we found it,
8 aren't we bound by that?

9 MR. MCKENNA: I don't believe you are bound
10 by that, Your Honor. For example --

11 JUSTICE KENNEDY: What's your authority for
12 that?

13 MR. MCKENNA: Wisconsin v. Mitchell, Your
14 Honor. In that case the Wisconsin Supreme Court was
15 found by this Court not to have constructed the statute,
16 but to have made an assessment of its practical effects,
17 and this Court found it was not bound. Similarly in
18 Keller, a case more directly relevant to this case, the
19 State supreme court found that the Bar Association of
20 California is a governmental agency and this Court
21 declined to follow the State supreme court of California
22 and found that in fact it was not.

23 JUSTICE KENNEDY: Well, that's because the
24 characterization had a Federal consequence.

25 MR. MCKENNA: Your Honor, I simply observe

1 that this Court did not find it was bound by the
2 California Supreme Court's finding that the bar
3 association is a government agency, nor did it find in
4 Wisconsin v. Mitchell that it was bound by the Wisconsin
5 Supreme Court in regards to its assessment of the
6 practical effects of the Wisconsin statute at issue
7 there.

8 JUSTICE BREYER: Do they get their money
9 back? If this is upheld and I'm an agency member, I
10 hate the union, can't stand it, gave them the \$20 for
11 this and they spent it on a political candidate I hate
12 even more and you win, do I get my \$20 back or can the
13 union just spend my \$20 on something else?

14 MR. MCKENNA: Your Honor, if it is a 760
15 expense they should get the money back. If it is a
16 non-760 expense which is not germane, then they would
17 opt out at that -- they would have to opt out to get
18 that kind of money back, unless Your Honor is referring
19 to what happens on, if the statute is upheld, what
20 happens when we go back and have a further trial on the
21 issues in this case. I'm not sure which scenario you
22 were envisioning, but --

23 JUSTICE BREYER: I'm trying to get at the
24 question is this the union's money or is this the
25 workers', the teachers' money?

1 MR. MCKENNA: Your Honor --

2 JUSTICE BREYER: Does he get his money back
3 if they violate the statute?

4 MR. MCKENNA: Your Honor, the 760 money --
5 excuse me. The 760 money is not the union's money until
6 they have satisfied the conditions laid out in the
7 statute, in this case section 760. Possession of the
8 fees does not entitle the WEA or any union to use those
9 fees to influence an election or operate a political
10 committee until after they have satisfied the condition
11 on that collection, the condition being in this case
12 they have to obtain affirmative authorization. This
13 Court held in Phillipson and Brown that, analogizing to
14 that money, that non-members own the fees until the
15 statutory conditions are satisfied.

16 JUSTICE SCALIA: Let, let's assume that it
17 makes a difference whether the purpose of the statute
18 was at least in part to protect the First Amendment
19 rights of the non-union members or whether, as the
20 Washington Supreme Court seemed to say -- at least they
21 said its principal purpose was to protect the voting
22 process. Elsewhere in its opinion, however, the
23 Washington Supreme Court says "where a statute is
24 ambiguous and this court is able to construe it in a
25 manner which renders it constitutional the court is

1 obliged to do so," which sounds to me like good law.
2 Wouldn't that apply to its intuition as to what the
3 intent of the people who enacted this statute were?

4 MR. MCKENNA: Yes, sir --

5 JUSTICE SCALIA: Wouldn't the Washington
6 Supreme Court be obliged to intuit that purpose which
7 would make it constitutional rather than
8 unconstitutional?

9 MR. MCKENNA: Yes, Your Honor, it would if
10 in fact section 760 were ambiguous. It is, however, not
11 ambiguous. It is plain on its face, and in fact the
12 Supreme Court did not state that any term or phrase in
13 section 760 is ambiguous. Instead they referred to
14 their divination of voter intent. And I believe, Your
15 Honor --

16 JUSTICE KENNEDY: Do you agree with the
17 court's conclusion that constitutionality is at issue
18 here?

19 MR. MCKENNA: The constitutionality of the
20 statute with regard to the union's First Amendment
21 rights is not at issue here, Your Honor, no.

22 JUSTICE KENNEDY: Isn't it your position
23 that this statute is constitutional either way you
24 interpret it?

25 MR. MCKENNA: Yes, Your Honor, it is. Your

1 Honor, I'd like to make the further point that -- and I
2 think this is a fairly obvious point, but we think that
3 since under your decisions the State can prohibit a
4 union from collecting an agency fee altogether, that it
5 is reasonable for the State to impose a condition on
6 that collection which falls, falls far short of actually
7 prohibiting it. We further point out that in the Hudson
8 case the Illinois statute at issue was effectively an
9 opt-in statute, a statute under which no amount that was
10 not germane could be collected in advance, unlike the
11 more generous Washington State statute which allows the
12 union, permits the union, to collect a fee in an amount
13 equal to dues or would permit it to collect a fee which
14 had been reduced in advance to reflect non-germane or
15 reduced just to reflect 760 expenses.

16 It seems to us that it is within the power
17 of the State to establish such a condition in the
18 interest of an election's integrity by means of
19 protecting the First Amendment interests of the
20 non-members, and we think the statute does that very
21 well without imposing in fact a substantial
22 administrative burden on the union in this case or
23 unions in general. For example, the, the way that the
24 WEA or any union can comply with section 760 would be to
25 simply place an additional form in the Hudson packet

1 they send out. Now, recognizing that the Hudson packet
2 is about this thick, that it is received by the teachers
3 in September, the busiest month of the year for
4 teachers, and that there is no form currently provided
5 in that packet whatsoever to allow people to opt out,
6 but rather a statement that you must send a letter to
7 the union to opt out, we think it's quite easy. And we
8 look to the WEA PAC for instruction on what they could
9 do. But now. Because the WEA has chosen to form a PAC
10 and is required to solicit members and non-members if
11 they choose in order to contribute to that PAC, they do
12 a very good job of soliciting members. They include a
13 very convenient form encouraging people to check off and
14 send their dues in to the PAC to support candidate
15 elections. They provide no such form for the opt-out
16 process, but it would be easy for them to do so.

17 The burden imposed on them is not great
18 administratively, as they suggest, any more than the
19 burden on the other teachers unions in Abood or in
20 Hudson because it can easily be met through these simple
21 means.

22 If there are no further questions, Your
23 Honor, I'd like to reserve the balance of my time.

24 CHIEF JUSTICE ROBERTS: Thank you, General.
25 General Clement.

1 ORAL ARGUMENT OF GENERAL PAUL D. CLEMENT, ESQ.
2 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE
3 IN SUPPORT OF THE PETITIONERS

4 GENERAL CLEMENT: Mr. Chief Justice and may
5 it please the Court:

6 The statute at issue here imposes only a
7 narrow limitation on the union's use of agency fees,
8 namely by requiring the affirmative assent of the
9 non-members before the union may use those funds for
10 non-germane political expenditures. The statute does
11 not limit the union's ability to spend its own money on
12 political causes and every avenue that is available to
13 any other organization in the State to solicit
14 contributions from non-members remains available to the
15 union.

16 The court below nonetheless struck the
17 statute down only by treating the workers' minimum
18 constitutional rights as a constitutional ceiling as
19 well as a floor. In the process, the court below
20 rigidly constitutionalized an area of labor law in which
21 the States and the Federal Government have, at least
22 since the *Lochner* era, enjoyed substantial discretion to
23 make labor policy. We would request that the Court
24 reverse the decision below, but also reverse and restore
25 room for play in the joints in this area of labor law.

1 I think the starting problem with the
2 court's analysis below is that the rights that are at
3 issue in this area principally are the rights of the
4 individual workers. This Court has recognized that the
5 agency shop itself raises significant First Amendment
6 issues and First Amendment impingements and so the
7 forced extraction of fees is justified only to the
8 extent that it can be justified by the Government's
9 interest in maintaining labor peace or in avoiding free
10 ridership. So as a minimum constitutional matter, the
11 workers have to have an opt-out right. The question is
12 whether the States can go further and either do an
13 opt-in regime or do what was at issue in the Hudson case
14 and not even allow the union to collect the non-germane
15 funds in the first place from non-members.

16 JUSTICE STEVENS: Mr. Clement, do you think
17 if we reverse as you suggest and the State supreme court
18 said, well, I guess we were wrong under the First
19 Amendment, we just realized our State constitution
20 requires the same result, would that judgment stand, do
21 you think?

22 GENERAL CLEMENT: I think it might well. I
23 mean, I think there might be an argument at that point
24 that somehow the Federal Constitution requires more than
25 an opt-out right. Certainly some of the amici have made

1 that argument. The Davenport Petitioners have made that
2 argument, and I suppose you could at that point confront
3 a second petition in this case. But at least as a
4 starting matter, I think that's an option that's
5 available to the Washington Supreme Court.

6 JUSTICE SCALIA: But Washington --

7 JUSTICE KENNEDY: But -- at a minimum, I
8 would assume that the Washington Supreme Court would not
9 have constitutional avoidance as a crutch in order to
10 reach that, reach that conclusion, because there is no
11 constitutional issue here under your view.

12 GENERAL CLEMENT: Right, though I mean -- I
13 don't mean to be able to constrain the Washington
14 Supreme Court's ability to find a State constitutional
15 problem that it would then think there's a need to
16 avoid.

17 JUSTICE SCALIA: Are the members of the
18 Washington State courts elected, do we know that? Are
19 they elected?

20 GENERAL CLEMENT: They are elected.

21 JUSTICE SCALIA: They are elected, so it's
22 easier to blame it on us than it is for them to say, we
23 hold as a matter of Washington law that this can't be
24 done and we disallow what the people have voted for.
25 That would be harder, a harder call, don't you think?

1 GENERAL CLEMENT: It might be a harder call,
2 Justice Scalia. I seem to recall a reference -- it
3 might have actually been in the court of appeals opinion
4 rather than the State supreme court opinion -- that as a
5 general matter the Washington courts have not construed
6 their First Amendment, State constituent First Amendment
7 to be radically different than the Federal Constitution.
8 So I would imagine there's going to be some State law
9 that may limit their ability to do that. I'm certainly
10 not an expert on the Washington State law of the First
11 Amendment.

12 JUSTICE ALITO: Well, if this money is the
13 non-union member's money and if -- an opt-out -- I'm
14 sorry -- opt-in scheme is not much of a burden on the
15 unions, why should the First Amendment permit anything
16 other than an opt-in scheme?

17 MR. CLEMENT: Well, Justice Alito, it's a
18 fair question. As I say, it's a question that's
19 certainly raised by the Davenport Petitioners. I think
20 there's an answer to it and I'll get to it in a minute.
21 But I would say in fairness to Mr. -- one of the
22 anomalies of this case is that in many respects I think
23 that's a more difficult constitutional question than the
24 one that the Washington Supreme Court answered adversely
25 to Petitioners in this case.

1 I think, if I can sketch an answer to why it
2 is that the opt out is the constitutional minimum and
3 there isn't as a matter of constitutional law required
4 to be an opt-in right, I think it goes back to what the
5 Court has construed as the relevant First Amendment
6 interest here. And the Court has seemingly construed
7 the relevant First Amendment interest here in not having
8 a compelled extraction, and as part and parcel of the
9 constitutional violation, it seems to have assumed
10 there's a need for a stated objection. And I think
11 that's where you get the opt-out right.

12 And so if you put it in the analogy, an
13 analogous compelled speech context like Wooley against
14 Maynard and the New Hampshire license plate, in that
15 context, part and parcel of the violation is the
16 objection to having "Live Free or Die" on your license
17 plate. And the Court hasn't construed the compelled
18 speech there to be that everybody has a compelled speech
19 violation because they are presumptively forced to have
20 the license plate on the back of their car. So I think
21 that --

22 JUSTICE ALITO: The union can make it as
23 difficult as it wants for somebody to opt out. They can
24 send a packet that's this thick and not provide a form.

25 MR. CLEMENT: I wouldn't think so, Justice

1 Alito. And I think that there are two separate
2 questions, I would say. One is, what is an adequate set
3 of procedures and protections for exercising the opt-out
4 right? And then a separate question would be, do you
5 actually have to go all the way to an opt-in right? And
6 I think that there may well be many cases where the
7 Hudson notice that's provided doesn't provide a
8 sufficient constitutional opportunity. I mean, you have
9 in a case like this, a 100-page packet, I'm told, that
10 has no -- no form in it that you're supposed to return
11 to opt out. You basically have to go to the third page,
12 find the address of the president of the union, and then
13 send in a letter.

14 And I think it's instructive if you look in
15 the joint appendix, I think it's at page joint appendix
16 45, you have the form that's available to union members
17 to opt in to PAC contributions, and have payroll
18 deductions made for the PAC contributions. The union
19 certainly makes it much easier to opt in to PAC
20 contributions than it makes it to opt out vis-a-vis the
21 Hudson packet.

22 JUSTICE GINSBURG: Is it relevant, General
23 Clement, that the legislature didn't seem to be, or the
24 ballot initiative didn't seem to be focused at all on
25 beefing up the rights of the non-member of the union?

1 It seemed to be concerned with the integrity of the
2 election process, because they left the same old Hudson
3 in place for union nongermane spending that didn't have
4 to do with elections.

5 MR. CLEMENT: That's absolutely right,
6 Justice Ginsburg, and I think the way we look at it is
7 that this whole debate about the purpose of the
8 provision is a little bit of a red herring, because at
9 the bottom, at end of the day it's clearly a hybrid. If
10 you look at the text, it's hard to understand how it
11 does not have at least the effect of protecting workers.
12 On the other hand, you're absolutely right that it
13 doesn't address the entirety of germane -- of nongermane
14 expenses. It addresses a subset that have the most
15 direct impact on the election process.

16 JUSTICE SCALIA: Or even nongermane
17 political expenses.

18 MR. CLEMENT: That's true. That's true, I
19 mean, for example, a nongermane lobbying expense which
20 you might construe to be political in some broad sense,
21 is not covered by the opt-in and remains subject to the
22 Hudson opt-out right.

23 But I don't think that there is certainly
24 anything problematic about that. It's not like the
25 interest in protecting electoral integrity is some sort

1 of forbidden government interest that makes this a
2 suspicious piece of legislation. And I think at the
3 end, if you again put the text of the relevant provision
4 together with the overall purpose, it's clear that it's
5 trying to protect the rights of workers but it's doing
6 so in service of a broader intent of improving electoral
7 integrity, and if I could suggest where maybe the
8 Washington Supreme Court went awry in its analysis, it
9 focused almost exclusively on the three stated purposes
10 that were included in the text of Initiative 134, which
11 were all focused more on electoral integrity.

12 That's not surprising, because there were 36
13 sections in Initiative 134 that dealt with the whole
14 manner of different campaign finance initiatives.
15 Before this initiative was passed by the voters of
16 Washington there weren't any campaign contribution
17 limits in the State of Washington.

18 So this initiative is doing a lot more work,
19 just besides section 760. I think 760 isn't unrelated
20 to those broader purposes because it does make sure that
21 the contributions of the workers here are voluntary, and
22 I think that is certainly something that's very similar
23 to what Federal law accomplishes through the separate
24 segregated fund requirements.

25 If I could make just one note about the fact

1 that this targets unions and not other entities, I think
2 two points are relevant. The first is that argument was
3 very clearly waived, and if you look at footnote 6 of
4 the Washington Supreme Court opinion which is at 25a of
5 the -- of the State's petition appendix, it's clear that
6 any argument about the, the disparate treatment of
7 unions versus corporations or other entities was not
8 before that court.

9 JUSTICE SCALIA: Well, are there any other
10 such entities that are given the power by the State to
11 collect money from people against their will?

12 GENERAL CLEMENT: You've anticipated my
13 second point, which is the power that's being -- I mean,
14 it's no accident that they targeted this particular
15 power or this particular issue because it has always
16 been understood to be an anomaly in this area. That the
17 unions have a right to effectively take a claim on the
18 paycheck of people who are nonmembers of the union.
19 These are individuals who have already opted out of
20 union membership, and that is a sufficient anomaly and
21 sufficiently unlike any other context that I think there
22 is nothing that prevents the State of Washington from
23 targeting that problem and that problem alone.

24 If there are no further questions, thank
25 you.

1 CHIEF JUSTICE ROBERTS: Thank you, General.
2 Mr. West.

3 ORAL ARGUMENT OF JOHN M. WEST,
4 ON BEHALF OF RESPONDENT

5 MR. WEST: Thank you, Mr. Chief -- Mr. Chief
6 Justice, and may it please the Court:

7 Our submission that section 760
8 unconstitutionally burdens the union's First Amendment
9 right to engage in political advocacy rests on three
10 points. One, the statute before the Court is a campaign
11 finance law that was enacted for the purpose of
12 protecting the public's interest in the integrity of the
13 electoral process. Two, it is a content-based
14 restriction on speech, which cannot be justified by the
15 State's authority to limit agency fees in the first
16 place. Three, the statute does not serve a compelling
17 State interest both because it is overbroad in
18 restricting, restricting speech on ballot propositions
19 and because it's underinclusive in regulating the
20 campaign speech of unions but not of other comparably
21 situated entities.

22 JUSTICE KENNEDY: Are the First Amendment
23 rights of the union members, of the workers who are
24 non-union members relevant?

25 MR. WEST: Uh, the First Amendment rights --

1 JUSTICE KENNEDY: I mean, you -- you begin
2 by talking about the First Amendment but you, you
3 proceed as if there are no First Amendment rights of, of
4 workers involved at all.

5 MR. WEST: The -- the -- the nonmember
6 employees certainly have a First Amendment right not to
7 be compelled to -- finance, help finance political,
8 ideological and other nongermane expenditures over their
9 objection. And that right is fully protected
10 independently of 760 by the Hudson process, and as the
11 Washington Supreme Court held, when there is the
12 availability of a ready means for opting out of that
13 participation in, in financing those causes, there is no
14 compelled speech. And this is what the, what the First
15 Amendment gives to the nonmember fee payers.

16 JUSTICE KENNEDY: Well, I take it States
17 have considerable discretion in determining how to
18 protect Federal constitutional rights.

19 MR. WEST: The States --

20 JUSTICE KENNEDY: And absent some direction
21 that we have to consider this as only being for a, for
22 purposes of election transparency, it seems to me that
23 Washington acted quite properly in saying we will use
24 this mechanism in order to protect our workers' First
25 Amendment constitutional rights.

1 MR. WEST: Well, what the State is
2 protecting, Justice Kennedy, is not the First Amendment
3 right itself which by definition is protected through
4 the Hudson process.

5 JUSTICE SOUTER: Well, why can't the State
6 protect it more? I mean the fact that Hudson would be
7 adequate -- it --

8 MR. WEST: The State --

9 JUSTICE SOUTER: -- from that it does not
10 follow that the State is not protecting the rights.

11 MR. WEST: The State can certainly protect
12 the interest that is protected by the First Amendment
13 right more, or to a greater degree, but if it does so,
14 it can only do so if it does not infringe on other
15 constitutional rights. And if it does then the question
16 is whether the State's regulation that infringes on
17 other constitutional rights, in this case the union's
18 First Amendment right of political advocacy, whether
19 that infringement is justified by a compelling State
20 interest.

21 JUSTICE SOUTER: And your claim as I take
22 it, that there is an infringement with the union's right
23 of political advocacy, is that in effect the scheme
24 restricts the union's use of its own funds?

25 MR. WEST: The scheme restricts the, the use

1 of funds that are, are properly collected from agency
2 fee payers by the union and --

3 JUSTICE SOUTER: All right. You agree that
4 the union could segregate these funds as opposed to
5 commingling them, and that would cure, that would in
6 effect answer your, your constitutional objection?

7 MR. WEST: Well, it wouldn't, because then
8 the question is what do you do after you've segregated
9 them. If the statute --

10 JUSTICE SOUTER: Well, it's clear from the
11 statute that, that what you would do would be leave them
12 subject to the opt-in determination, but all other
13 funds, i.e., the funds that you are constitutionally
14 entitled to protect, would be unencumbered.

15 MR. WEST: Certainly Justice Souter, but
16 then the question is, for those fee payers, and
17 certainly there are going to be some out of three or
18 four thousand who do not give affirmative authorization,
19 then what do you do with their funds?
20 And the, the --

21 JUSTICE SOUTER: Do you think that would
22 create an independent constitutional problem assuming
23 that you did segregate the funds?

24 MR. WEST: Justice Souter, the --

25 JUSTICE SOUTER: That would, that would

1 create an issue? You know, what if they say nothing?
2 Maybe, maybe the statute does not deal adequately with
3 that. But does that raise a constitutional problem that
4 in effect would be, would be of equal parity with the
5 one that is, that is being raised on behalf of the, the,
6 the dissenting workers?

7 MR. WEST: Justice Souter, the reason it
8 raises a constitutional problem is because of the
9 content discrimination issue. What the State is saying
10 is that you have a right to collect an agency fee that
11 is the full equivalent of union dues, but if you choose
12 to spend any money from your treasury for electoral
13 advocacy, you may spend whatever you want from your
14 treasury for -- for legislative lobbying, for public
15 relations, for all kinds of other issues, forms of
16 speech that are not chargeable to objectors. But if you
17 choose to spend any for one particular type of speech,
18 namely electoral advocacy, then you must segregate and
19 refund a portion of the --

20 JUSTICE GINSBURG: But that's, under --

21 MR. WEST: -- to the fee payers.

22 JUSTICE GINSBURG: Under the Federal law you
23 can't even have this opt-in system. You have to have a
24 separate organization as I understand, for the election.
25 So there would be no, no possibility that the nonmember

1 of the union, that funds would go to election financing.

2 MR. WEST: Certainly, Justice Ginsburg.

3 JUSTICE GINSBURG: And that's much harder on
4 the union, I would think, isn't it?

5 MR. WEST: Well, it is much harder on the
6 union in that respect but not in the respect that's
7 critical here, and that is the Federal law as well as
8 the laws of all the other States who have, have required
9 separate segregated funds limit that requirement to
10 candidate elections.

11 The, the reason this statute is
12 unconstitutional, the reason it does not -- consist of a
13 compelling, does not provide a compelling governmental
14 interest in regulating elections, is because it goes far
15 beyond the permissible realm of regulating expenditures
16 on candidate elections, and prohibits the union without
17 affirmative authorization from spending its funds for
18 ballot propositions.

19 JUSTICE SOUTER: No but, you're -- you're
20 back to its funds again.

21 MR. WEST: Whether they're --

22 JUSTICE SOUTER: And you're saying, first
23 you said well, segregating the funds does not answer the
24 problem. And I thought the reason it didn't answer the
25 problem was that the, that it was, that the purposes of

1 the, of the act were underinclusive. And now you're
2 responding to Justice Ginsburg by going back to making
3 the assumption that the segregated funds would be the
4 union's funds.

5 MR. WEST: Justice Souter, if they are
6 segregated, if the union segregates them, assuming they
7 don't -- for those for whom they don't receive
8 affirmative authorization, they keep them in escrow
9 indefinitely, or they put them in a locked box and never
10 do anything with them, certainly the union would satisfy
11 the statute in -- in that way.

12 But what, what the statute says as
13 interpreted by the trial court, if then the union puts
14 those funds back into its general treasury, or even if
15 it doesn't, and spends them in some way for some purpose
16 whatever, that it's violating the statute. And the only
17 way that the union can comply is by not only segregating
18 the funds, but then if affirmative authorization is not
19 received, by rebating a certain portion of the fund to
20 the individual fee payers.

21 CHIEF JUSTICE ROBERTS: And I thought that
22 approach was exactly what we held was required in the
23 Street decision, the International Association of
24 Machinists versus Street, so that you can't get around
25 this requirement by saying, oh well, we'll use the

1 objectors' funds for collective bargaining and we'll use
2 the others for that.

3 MR. WEST: Sure. Exactly. And that's --
4 and that's why I think that that interpretation of the
5 statute may be correct. But the problem we have here is
6 this is a statute, and why it's unconstitutional is this
7 is a statute that is saying this only with respect to a
8 particular kind of speech. It's saying the union may
9 collect a hundred percent of dues and it may spend them
10 in whatever way it deems appropriate for --

11 CHIEF JUSTICE ROBERTS: Doesn't that
12 objection apply whether it's opt in or opt out?

13 MR. WEST: No, it doesn't, Mr. Chief
14 Justice, because the -- the -- in -- in the Street and
15 Aboud decisions, the Court has -- has said that there is
16 -- all -- has talked in terms of expenditures that are
17 not germane to collective bargaining.

18 JUSTICE SCALIA: Is it content
19 discrimination which subjects legislation to strict
20 scrutiny if the Government -- Federal Government or a
21 State -- designates certain funds for use by school
22 districts to teach patriotism, American history,
23 something like that? Is that subject to strict
24 scrutiny?

25 MR. WEST: No, because this is Government

1 funding. This is --

2 JUSTICE SCALIA: Okay. Now let's assume
3 it's not Government funding. Instead of doing that the
4 Government says, you will have authority to collect
5 money from certain people only for a particular purpose.
6 Is that content discrimination which calls into play
7 strict scrutiny?

8 MR. WEST: I believe it is, Justice Scalia,
9 because --

10 JUSTICE SCALIA: I don't see why the one is
11 any worse than the other. The Government has a
12 particular purpose in mind and in one case it gives out
13 money with that purpose in mind, which discriminates of
14 course; in the other case it allows this extraordinary
15 power to exact funds from people, but only for certain
16 purposes. That's not the kind of content discrimination
17 that they calls strict scrutiny into play, it seems to
18 me.

19 MR. WEST: It's strict scrutiny if it's not
20 the Government acting as the speaker, and the Government
21 is acting here as --

22 JUSTICE SCALIA: It is the Government acting
23 as a coercer. It's because of the Government that
24 you're allowed to get this money from these non-union
25 members.

1 MR. WEST: Well, I don't believe the Court
2 has ever put it quite that way in the Government speech
3 cases, the Government funding cases.

4 JUSTICE STEVENS: May I ask this question on
5 your overinclusive, or underinclusive rather, argument?
6 Supposing the statute was broader and said the union may
7 not use any non-member agency fee collections for any
8 non-germane purpose at all without an affirmative
9 consent? Would that solve all the constitutional
10 problems?

11 MR. WEST: I think the problem here -- let
12 me say two things in response to that, Justice Stevens.

13 JUSTICE STEVENS: Could you just tell me yes
14 or no, and then explain?

15 MR. WEST: Certainly. Well, the answer is
16 yes and no. The answer is, if you're talking about --

17 (Laughter.)

18 JUSTICE STEVENS: Yes or no. At least
19 insofar as your argument underinclusiveness, the answer
20 would have to be that was, that statute would be okay.

21 MR. WEST: If -- if the -- if you're -- if
22 what you're doing is talking about the, an election
23 statute like --

24 JUSTICE STEVENS: No, I was talking about a
25 statute that the individuals say I don't want to spend

1 any more money, give any more money to the union than I
2 absolutely have to. And the legislature decides to
3 protect the right, that right by saying you cannot use
4 agency shop fees for any non-germane purpose. What's
5 wrong with that?

6 MR. WEST: That, Justice Stevens, if this is
7 what the state is saying with respect to the public
8 sector employees as to which it has the authority to
9 regulate the agency fee. This is perfectly
10 constitutional. This is the kind of --

11 JUSTICE STEVENS: It seems to me if that's
12 perfectly constitutional, this is a fortiori okay.

13 MR. WEST: It's not --

14 JUSTICE STEVENS: And it's less of a burden
15 on the union and there's less protection to the
16 employee.

17 MR. WEST: No, it's not. It's a different
18 case for two reasons, Justice Stevens. First of all,
19 because it's content discriminatory. It's not saying
20 the -- it's not saying you -- we limit the agency fee to
21 the nonchargeable, the non-germane, or to the purposes
22 that are germane to collective bargaining. The State
23 can permissibly do that because it's making --

24 CHIEF JUSTICE ROBERTS: Why isn't that a
25 content-based restriction? You've got to look at it and

1 see if it's germane.

2 MR. WEST: The purposes that -- the purposes
3 for which the -- that are being excluded in that case
4 are a wide variety of different kinds of speech and
5 non-speech activities, not only political speech but
6 public relations. Many courts have interpreted
7 organizing activities to be non-germane to collective
8 bargaining. Membership benefits that are not available,
9 non-members are put in that category. Donations to
10 charities. International activities. There's a whole
11 variety of union expenditures that the courts have held
12 are not germane to collective bargaining and cannot be
13 charged over a non-member's objection, and a State would
14 be perfectly free, as several states like Pennsylvania
15 and New Mexico have, to say our judgment is that our
16 interest in labor peace does not extend further than in
17 authorizing an agency fee that includes purposes germane
18 to collective bargaining.

19 JUSTICE BREYER: I'm just curious below in
20 the opinion, I didn't notice in footnote 6, which I
21 hadn't taken in, that the court explicitly says that you
22 did not make any argument about underinclusiveness and
23 overinclusiveness in respect to other organizations,
24 corporations and so forth.

25 Now, did -- I can't recall, I just don't

1 recall. What you're saying now, I take it, is that the
2 word "election," you can't use it for elections, and
3 elections involve candidates and they also involve
4 ballot issues.

5 MR. WEST: Correct.

6 JUSTICE BREYER: And you're saying that the
7 real problem with this statute is that it throws in
8 ballot issues along with candidate elections.

9 MR. WEST: Well, there are two problems.
10 There's the concept -- I mean, there's --

11 JUSTICE BREYER: But on that first one, did
12 they discuss that at some length in the lower court
13 opinion? I don't --

14 MR. WEST: The lower court, no, did not
15 discuss the --

16 JUSTICE BREYER: So this is really a ground
17 that they haven't considered.

18 MR. WEST: What the Washington Supreme Court
19 held is that the -- what was argued in the Washington
20 Supreme Court generally was that this is a violation of
21 the union's right to engage in political advocacy.

22 JUSTICE BREYER: But this thing about the
23 ballot issue is not there.

24 MR. WEST: And the reason -- this is a
25 reason I think the Washington Supreme Court took note of

1 the fact of what the funds were spent on, on balloting
2 initiatives solely, not on candidate elections.

3 JUSTICE BREYER: That's -- you want us to
4 decide that question, and was there another one that --
5 you just said there were two reasons basically.

6 MR. WEST: Well, the two reasons why the
7 statute fails to constitute a compelling Government
8 interest are the overbroad extension to ballot
9 propositions, unlike the Federal law and any other State
10 law. And secondly, the underinclusiveness that this is
11 a statute that is ostensibly intended to protect the
12 integrity of the elections by ensuring that the funds
13 that organizations spend for political electoral
14 purposes represent the views of the people from whom
15 those funds were derived. And the -- what the State has
16 chosen to regulate to advance that interest is solely
17 people who already have the opportunity to prevent the
18 use of their funds for purposes they disagree with,
19 while not regulating at all other entities in which --

20 CHIEF JUSTICE ROBERTS: That's the argument
21 that the State supreme court in footnote 6 expressly
22 said you did not raise.

23 MR. WEST: I think that would be a valid
24 argument if we were attempting to raise an equal
25 protection claim here, Mr. Chief Justice. That's not

1 what we're doing. What we're saying, we are making an
2 argument based on what the State supreme court held,
3 namely that this is a violation of the -- the union's
4 right to engage in political speech, and this is one of
5 the reasons for it. Granted, that particular
6 justification for the ruling was not argued below, but
7 this is not like we were attempting to argue equal
8 protection, a totally new basis.

9 JUSTICE GINSBURG: On what -- on what you
10 were arguing, you were very careful in your brief to say
11 funds lawfully possessed by the union, as distinguished
12 from what's in a corporate treasury or -- there is
13 something peculiar about this, and you recognized it by
14 saying we possess them, because if the non-member wants
15 it back, the non-member would be entitled. So it's not
16 like money in the corporate till.

17 MR. WEST: Well, it is, Justice Ginsburg, if
18 the -- this is why the purpose of the statute is so
19 important. If the purpose of the statute is to protect
20 the integrity of elections by ensuring that what
21 organizations spend for political purposes represents
22 the views of those who contributed the money, then it's
23 very much to the point that there are other
24 organizations. For example, the Michigan Chamber of
25 Commerce --

1 JUSTICE KENNEDY: You want us to consider
2 this case as if the First Amendment rights of non-union
3 members were not involved?

4 MR. WEST: Absolutely -- absolutely not,
5 Justice Kennedy. We recognize --

6 JUSTICE KENNEDY: But that's been your whole
7 argument so far.

8 MR. WEST: Absolutely not. I'm sorry,
9 Justice Kennedy, but that's certainly not what I intend
10 to be saying. We recognize that the nonunion members
11 have First Amendment rights. We also recognize that
12 those rights are protected by the Hudson procedures
13 which the union uses. The non-members have the absolute
14 right to prevent the use of their funds not only for
15 this kind of electoral speech but for any kind of
16 political ideological speech and other nonchargeable
17 activities with which they disagree simply by sending in
18 a letter.

19 JUSTICE STEVENS: So it's a First Amendment
20 right that is waived by failing to make a timely
21 objection.

22 MR. WEST: Well, it's not that a right is
23 waived. What it is --

24 JUSTICE STEVENS: It's gone under your
25 theory.

1 MR. WEST: No. It's -- Justice Stevens,
2 it's what the right is. The constitutional right is a
3 right against being required to -- to engage in
4 compelled speech.

5 JUSTICE STEVENS: Which no longer exists if
6 you don't make a timely objection.

7 MR. WEST: No, you have the -- but that
8 would be just like -- like the Solicitor General on the
9 -- the license plate case. Someone who receives in the
10 mail the license plate that says "Live Free or Die" or
11 "Taxation Without Representation" and puts it on his car
12 is not waiving a constitutional right by --

13 JUSTICE ALITO: It's not exactly the same
14 situation. These are teachers who have chosen not to
15 join the Washington Education Association; isn't that
16 right?

17 MR. WEST: These are teachers who have not
18 joined the Washington Education --

19 JUSTICE ALITO: Isn't it overwhelmingly
20 likely that they, if you spoke to them and you said
21 would you like to give money to the union to spend on
22 elections, they would say no?

23 MR. WEST: I absolutely disagree with you,
24 Justice Alito, because keep in mind --

25 JUSTICE ALITO: Explain to me the thinking

1 of somebody who chooses not to join, the 5 percent who
2 choose not to join, and yet they would like to make this
3 contribution. Now maybe there's some, but what would be
4 the thinking of such a person?

5 MR. WEST: It's not asking them to make a
6 contribution. It's asking them, is it okay with you if
7 your money is used for this purpose. But keep in mind
8 what the money is being used for here.

9 JUSTICE ALITO: What's the difference
10 between that?

11 MR. WEST: The money is being used --

12 JUSTICE ALITO: What's the difference
13 between saying would you like to make a contribution,
14 and would you like to allow us to use money that we
15 possess for our purposes rather than returning it to us?
16 What's the difference between those two?

17 MR. WEST: Well, whether there is a
18 difference or not, Justice Alito, the point is the union
19 here is using this money for purposes that it has every
20 reason to believe is in the interest of the vast
21 majority of teachers, including --

22 CHIEF JUSTICE ROBERTS: Well surely, they
23 get to make that decision, don't they? Under the
24 statute, it's their decision whether or not -- you don't
25 get to say, well, this is in your interests, so whether

1 you'd want to spend the money or not, we're going to
2 spend it.

3 MR. WEST: No, but I'm responding to the
4 suggestion that there should be some kind of presumption
5 that they would, would decline to authorize this.
6 That's -- the question you raised, Mr. Chief Justice, is
7 exactly the question before the Court, whether the State
8 can, constitutionally can insist that the union obtain
9 affirmative authorization for this particular type of
10 speech and for no other type of speech. Let me -- let
11 me suggest --

12 JUSTICE ALITO: I still don't understand the
13 thinking of these hypothetical people. If I'm a union
14 member, I get various benefits. If I choose not to be a
15 union member, I don't get those benefits. Why would I
16 choose to give up the benefits of union membership and
17 yet want to allow the union to spend my money for its
18 political purposes?

19 MR. WEST: Well, maybe Mr. -- Justice Alito,
20 if you knew that what the union was spending its money
21 for was to improve, to increase cost of living
22 adjustments for teachers or to reduce class size for
23 teachers, or to enact tax levies in local school
24 districts --

25 JUSTICE GINSBURG: Is this all hypothetical,

1 Mr. West, or is there any empirical evidence about what
2 the people who are non-union members, if they had their
3 druthers, would they say not a penny more goes into the
4 union till than we are forced to put there? Is there
5 any empirical evidence that divides up the universe of
6 people who don't, deliberately don't join unions?

7 MR. WEST: No. Justice Ginsburg, there's a
8 lot of speculation on both sides. I don't think there's
9 any empirical evidence, but there is plenty of reason to
10 think that there are many reasons that people choose not
11 to join the union, whether from a free rider motivation,
12 whether from just not being a joiner, any variety of
13 reasons. Some of them may be --

14 CHIEF JUSTICE ROBERTS: Well, you're free
15 under this system to send them the same sort of
16 materials you send about your PAC and say we do all
17 sorts of good things with the money from people who opt
18 in, you should opt in.

19 MR. WEST: Yes.

20 CHIEF JUSTICE ROBERTS: But you want to do
21 it without giving them that opportunity.

22 MR. WEST: Well, the question is whether the
23 State can compel us to, to obtain that authorization for
24 this limited type of speech.

25 JUSTICE SCALIA: Only if the State has given

1 you the power to exact the money from these people.
2 That changes everything. If this was money that they
3 had contributed themselves, you'd have a different
4 argument, but the State compels them to give you that
5 money and the State says however, you will not use this
6 money for this purpose without their consent.

7 MR. WEST: It doesn't change everything,
8 Justice Scalia, precisely for the reasons that you
9 discussed in your opinion for the court in RAV versus
10 St. Paul, the St. Paul cross-burning case, where you
11 pointed out that, that the greater includes the lesser
12 argument does not apply where you have content
13 discrimination. The State could justifiably ban all
14 symbols and displays that involve fighting words, but it
15 could not single out a particular --

16 JUSTICE SCALIA: That brings us back to the
17 question I asked earlier and I suggested in my answer to
18 that I don't think it's content discrimination of the
19 sort that triggers strict scrutiny when the government
20 gives money for a particular purpose only and not for
21 other purposes, and I also don't think it's content
22 discrimination of the sort that triggers strict scrutiny
23 when the government allows a private organization to use
24 governmental power to exact money from people for a
25 particular purpose only. That's a different ball game.

1 MR. WEST: Justice Scalia, imagine, if I may
2 take a little bit starker example, imagine that what the
3 government said in the statute is that the union must
4 obtain affirmative authorization if it is going to use
5 agency fee funds to support Democratic candidates, but
6 not if it's going to support Republican candidates.
7 Obviously it couldn't do that.

8 JUSTICE BREYER: And I see that you've put a
9 lot of weight on this argument.

10 MR. WEST: And that -- it goes further than
11 this. That's viewpoint discrimination. But this is
12 content discrimination and the Court has held in
13 Consolidated Edison and a number of other cases that
14 that is also a constitutional problem.

15 JUSTICE BREYER: What you're saying right
16 now, if it is, is ballots versus candidates under the
17 word "election."

18 MR. WEST: Exactly.

19 JUSTICE BREYER: And that has a lot of
20 implications for all kinds of campaign finance law that
21 has nothing to do, I think, with unions.

22 MR. WEST: Exactly.

23 JUSTICE BREYER: And the lower court didn't
24 consider it, and is this open now, if it's going back
25 for other things such as the State Constitution, for

1 them to consider this matter on remand?

2 MR. WEST: I think it would be open to them
3 to consider. I also think it's a matter that when we
4 get to that point at least --

5 JUSTICE BREYER: And I don't know, perhaps
6 you don't know, what the implication of a decision say
7 in your favor here would have for Vermont's campaign
8 finance law or California's or some other.

9 MR. WEST: Perhaps, but it's certainly true
10 that on this, at least on this point of the lack of any
11 compelling justification for restricting entities'
12 contributions and expenditures in support of or in
13 opposition to ballot propositions, the law, this Court's
14 law, is fully clearly on that point.

15 It's our submission, Mr. Chief Justice, that
16 what you have here is a content-based restriction on
17 WEA's ability to engage in political speech on issues of
18 educational policy that are of vital importance to the
19 70,000 teachers that it represents.

20 JUSTICE KENNEDY: Could the State have a
21 restriction requiring affirmative authorization for all
22 union expenditures that fall within the Abood-Machinist
23 line of cases?

24 MR. WEST: Yes. If this were --
25 particularly if this were --

1 JUSTICE KENNEDY: If this were across the
2 board as to all First Amendment rights an objecting
3 member has, then the statute would be void -- would be
4 valid, rather?

5 MR. WEST: Certainly if this were done in
6 the statute that authorized the agency fee in the first
7 place.

8 JUSTICE KENNEDY: No, it's done in this
9 statute.

10 MR. WEST: If it's done in this statute, the
11 problem that would remain, Justice Kennedy, is this is
12 an election law that presumably has to be justified on
13 the basis of whether it promotes the integrity of
14 elections. And when you have --

15 JUSTICE KENNEDY: No, my hypothetical is
16 that there's a Washington statute or a Washington
17 constitutional referendum provision, initiative
18 provision, which says that as to all protected speech
19 for non- union members who have moneys taken out, there
20 must be affirmative authorization.

21 MR. WEST: The State could do that, at least
22 if it limited it to the public sector, where the State
23 has the authority to authorize the amount of the agency
24 fee. I believe the State could do that. The State
25 could certainly -- some people have talked about the

1 size of the Hudson notice. The State could impose
2 requirements that the notice be clearer, that it be
3 shorter. The state could impose that affirmative
4 authorization requirement. The State could limit the --

5 JUSTICE STEVENS: Back to your example about
6 the political party saying you can't use it for
7 Democrats or Republicans. What if they said, as they
8 might have in the 1940s, you can use it for anybody
9 except communist candidates?

10 MR. WEST: Well, I think that would be a
11 problem, too. And that's --

12 JUSTICE STEVENS: It would be okay, I guess.

13 MR. WEST: That would be viewpoint
14 discriminatory, but here we have a -- legislative
15 statute that, that it's content discriminatory, that
16 can't be justified as a compelling State interest to
17 promote the integrity of the elections, and we believe
18 the judgment of the Washington Supreme Court should be
19 affirmed. Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you, Mr. West.

21 General McKenna, you have 7 minutes
22 remaining.

23 REBUTTAL ARGUMENT OF ROBERT M. MCKENNA, ESQ.

24 ON BEHALF OF PETITIONERS

25 MR. MCKENNA: Mr. Chief Justice, thank you.

1 First of all, I wanted to get back to a
2 question raised by Justice Breyer concerning whether
3 they get their money back. I took your question to
4 refer to a hypothetical, but allow me to address the
5 real circumstances in this case by referring to the
6 joint appendix at 210-212. These are the pages covering
7 the permanent injunction that was entered by the trial
8 court. Under that permanent injunction, the WEA shall
9 return to all agency fee payers who have not
10 affirmatively authorized the use of their fees for
11 expenditures, and it lays out the means of doing that.
12 For the first 2 years there's an agreed-upon amount.
13 For the next 3 years of the injunction there's another
14 amount. But they do get their money back under that
15 injunction.

16 Referring to the issue of whether they waive
17 or not, under the current process used by the WEA,
18 referring to JA-198, which is the letter sent out on
19 September 15, 2000, by the WEA to the non-members,
20 you'll note the statement, quote: "If such written
21 objection has not been postmarked by October 16, 2000,
22 you will waive your ability to object." The State of
23 Washington's position is that non-members should not be
24 required to say no twice. They said no when they chose
25 not to join the union. The union's position now is,

1 well, we get to use your money for political purposes
2 unless you say no a second time. That does not seem to
3 be a reasonable default position to take and certainly
4 we believe the State --

5 JUSTICE GINSBURG: But the State of
6 Washington seems to think that's fine for everything
7 other than election expenses.

8 MR. MCKENNA: Yes, Your Honor, in terms of
9 section 760 the State of Washington does think that's
10 fine because of the purpose of the statute and the
11 purpose of section 760, the purpose being to protect the
12 integrity of the elections by several different means
13 involving protecting --

14 JUSTICE KENNEDY: Well, do you see an
15 underlying constitutional problem as to non-election
16 expenditures that are still political expenditures?

17 MR. MCKENNA: We don't take a position on
18 whether there's a constitutional problem with regard to
19 non-germane expenditures, Your Honor. But we do
20 believe --

21 CHIEF JUSTICE ROBERTS: Didn't we take one
22 in Abood?

23 MR. MCKENNA: I'm sorry?

24 CHIEF JUSTICE ROBERTS: Didn't we take a
25 position in Abood?

1 MR. MCKENNA: What I meant was --

2 CHIEF JUSTICE ROBERTS: I suppose the way
3 the statute works, you have to opt in for the election
4 expenditures, but you have to have a right to opt out
5 for other non-germane.

6 MR. MCKENNA: Yes. Your Honor, the Chief
7 Justice is correct, of course. What I thought the
8 question was about was the question of whether or not
9 all, all non-germane expenses must be opt-in, must be
10 provided. That's all I meant. You're absolutely
11 correct. Of course, in your decisions opt-out is
12 satisfactory, and we're not saying that opt-out is not
13 satisfactory here as far as the State's position is
14 concerned. But what we are saying is that the State has
15 a right to impose this additional requirement of
16 affirmative authorization.

17 JUSTICE STEVENS: What do you say about his
18 hypothetical involving Democrats versus Republicans?

19 MR. MCKENNA: Well, Your Honor, that would
20 certainly seem to be viewpoint discrimination, and it
21 would implicate --

22 JUSTICE STEVENS: Well, he says, well, this
23 is content discrimination. Is that --

24 MR. MCKENNA: Your Honor, we do not agree
25 that this is content, content discrimination. This is

1 content neutral. 760 establishes a procedure, that is
2 to say a requirement that must be met before the money
3 may be used.

4 JUSTICE STEVENS: Well, but it's content in
5 the sense that only some speech has to be affirmatively
6 authorized.

7 MR. MCKENNA: Yes, Your Honor, that
8 additional affirmative authorization does apply to this
9 category of speech, influencing an election or operating
10 a political committee. But we don't believe that it is
11 problematic constitutionally any more than the argument
12 of Taxpayers With Representations in the Regan case was,
13 where they argued that they had a constitutional right
14 to receive tax deductible contributions and use them for
15 lobbying. The Court found to the contrary.
16 And indeed, Initiative 134 is about protecting
17 individuals. It's about protecting individuals in
18 section 760. It says in the intent section --

19 JUSTICE STEVENS: Can I just go back to, you
20 mentioned my question.

21 MR. MCKENNA: Yes, sir.

22 JUSTICE STEVENS: Your point of your answer
23 to his hypothetical is, well, the viewpoint
24 discrimination would be impermissible, but the content
25 discrimination is permissible?

1 MR. MCKENNA: If it is content
2 discrimination, Your Honor, we believe it is
3 permissible, yes, sir. And if it were viewpoint -- in
4 the hypothetical, if there were viewpoint discrimination
5 that would not implicate any constitutional right of the
6 union, but it may very well implicate the Southworth
7 interests of the non-member fee payers.

8 CHIEF JUSTICE ROBERTS: Is it content? I
9 mean, it doesn't say which way you're trying to
10 influence the election.

11 MR. MCKENNA: We don't believe it is
12 content-based, Your Honor. As I said, we don't believe
13 it is, because it's any election of any kind.

14 JUSTICE GINSBURG: Well, the content means a
15 category of speech as opposed to what is the political
16 position you're taking.

17 MR. MCKENNA: Yes, that is it's only in
18 regard to influencing elections or operating a political
19 committee, which is a second.

20 JUSTICE GINSBURG: But I thought that that
21 was content. You could do it, say, in the press, but
22 you couldn't do it over the air.

23 JUSTICE SCALIA: That's my understanding,
24 too. I think you got to get out of it some other way.
25 I mean, you've got to say it's content but it doesn't

1 apply when it's the government contributing money or it
2 doesn't apply when you're applying it to money that's
3 being coerced by the government.

4 MR. MCKENNA: Yes, Your Honor.

5 JUSTICE BREYER: If that's yes, then what
6 the category here is election speech. If you're going
7 to call a statute that treats election speech specially,
8 then all campaign finance regulation would fall in that
9 category. And if you're going to use that distinction
10 to say strict scrutiny applies, then strict scrutiny
11 would apply to all campaign finance regulation. And the
12 Court never to my knowledge applied strict scrutiny to
13 campaign finance regulation because there are speech
14 interests on both sides of the equation.

15 MR. MCKENNA: Yes, Your Honor. Of course,
16 we believe that --

17 JUSTICE BREYER: I'm glad you said yes to me
18 because that implies a no to the last question.

19 (Laughter.)

20 MR. MCKENNA: Yes, Your Honor, I understand
21 your question.

22 (Laughter.)

23 MR. MCKENNA: And we believe that -- we
24 believe of course that section 760 is not subject to
25 strict scrutiny, it is subject at most to rational

1 basis; and that clearly there is a rational basis for
2 the State in this case to require the affirmative
3 authorization of non-member fee payers.

4 JUSTICE SCALIA: Can you get to the point
5 you were about to make, what the purpose of the thing
6 is?

7 MR. MCKENNA: Well, yes, Your Honor. Your
8 Honor, the Supreme Court of Washington found a purpose
9 of the entire law, Initiative 134, to be to protect
10 election integrity. But 760 is one means of achieving
11 that purpose by means of protecting individual
12 interests. Similarly, section 680 of this law, which, I
13 apologize, is not in the joint appendix, but it's RCW
14 42.17.680, which requires positive checkoff before an
15 employer may deduct PAC contributions for any employee.

16 JUSTICE SOUTER: May I just -- I'm sorry.
17 May I just take you back to the point of the objective
18 being protection of election integrity. As I understand
19 it, so far as the protection of election integrity is
20 concerned, with respect to these contributions, that is
21 simply the obverse side or the flip side, if you will,
22 of protecting the right of the dissenting union member
23 or the non-joined -- strike that -- the non-union
24 worker, to control the use of the funds that would be
25 used for the political purposes. The one is simply the

1 obverse of the other. Do you agree?

2 MR. MCKENNA: Yes, Your Honor. We believe
3 they are two sides of the same coin.

4 JUSTICE SOUTER: So by articulating that the
5 election integrity is a purpose, the Washington Supreme
6 Court should not be understood as excluding the
7 protection of the non-member workers' interests?

8 MR. MCKENNA: Yes, Your Honor. I would
9 agree.

10 Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you, General.

12 The case is submitted.

13 (Whereupon, at 12:08 p.m., the case in the
14 above-entitled matter was submitted.)

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