

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 GARY DAVENPORT, ET AL., :

4 Petitioners :

5 v. : No. 05-1589

6 WASHINGTON EDUCATION ASSOCIATION; :

7 and :

8 WASHINGTON, :

9 Petitioner :

10 v. : No. 05-1657

11 WASHINGTON EDUCATION ASSOCIATION :

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13 Washington, D.C.

14 Wednesday, January 10, 2007

15 The above-entitled matter came on for oral
16 argument before the Supreme Court of the United States
17 at 11:08 a.m.

18 APPEARANCES:

19 ROBERT M. MCKENNA, ESQ., Attorney General, Olympia,
20 Wash.; on behalf of Petitioners.

21 PAUL D. CLEMENT, Solicitor General, Department of
22 Justice, Washington, D.C.; on behalf of the United
23 States, as amicus curiae, supporting Petitioners.

24 JOHN M. WEST, ESQ., Washington, D.C.; on behalf of the
25 Respondent.

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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 non-member employees to pay an agency shop fee or lose their job. The union's authority to select 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 4217.620.
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 only an election law
2 interest?

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

8 JUSTICE SCALIA: But you just said 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 send this little bit
10 of your money to contribute in a campaign, but if the
11 local swimming team wants to, or the bar association or
12 the corporation, if they want to spend money that people
13 have given them for totally other purposes, the
14 compulsory bar association, well, they can do that.
15 It's just the labor unions that can't spend the money
16 that these people forced to belong -- you know, they
17 have to object affirmatively -- but all the other
18 similar organizations, they can't.

19 MR. MCKENNA: Your Honor, beginning with the
20 Railway Labor Act case 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 is 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 intend. 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. Oh well, we're just going to follow
20 the plain language?

21 MR. MCKENNA: No, no.

22 JUSTICE KENNEDY: Like the says that 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 Teller, 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 observed

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 practical
6 effects of the Wisconsin statute at issue there.

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

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

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

25 MR. MCKENNA: Your Honor --

1 JUSTICE BREYER: So does he get this money
2 back if they violate the statute.

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

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

1 Wouldn't that apply to its intuition as to what the
2 intent of the people who enacted this statute were?

3 MR. MCKENNA: Yes, sir --

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

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

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

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

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

24 MR. MCKENNA: Yes, Your Honor, it is. Your
25 Honor, I'd like to make the further point that -- and I

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

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

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

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

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

23 CHIEF JUSTICE ROBERTS: Thank you, General.

24 General Clement.

25 ORAL ARGUMENT OF GENERAL PAUL D. CLEMENT, ESQ.

1 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE
2 IN SUPPORT OF THE PETITIONERS

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

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

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

25 I think the starting problem with the

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

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

20 GENERAL CLEMENT: I think it might well. I
21 mean, I think there might be an argument at that point
22 that somehow the Federal Constitution requires more than
23 opt-out rights. Certainly some of the amici have made
24 that argument. The Davenport Petitioners have made that
25 argument, and I suppose you could at that point confront

1 a second petition in this case. But at least as a
2 starting matter, I think that's an option that's
3 available to the Washington Supreme Court.

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

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

15 JUSTICE SCALIA: Are the courts in
16 Washington State elected, do we know that? Are they
17 elected?

18 GENERAL CLEMENT: They are elected.

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

24 GENERAL CLEMENT: It might be a harder call,
25 Justice Scalia. I seem to recall a reference -- it

1 might have actually been in the court of appeals opinion
2 rather than in the State Supreme Court opinion -- that
3 as a general matter the Washington courts have not
4 construed their First Amendment, State constituent First
5 Amendment to be radically different than the Federal
6 Constitution. So I would imagine there's going to be
7 some State law that may limit their ability to do that.
8 I'm certainly not an expert on the Washington State law
9 of the First Amendment.

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

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

24 I think, if I can sketch an answer as to why
25 it is that the opt out is the constitutional minimum and

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

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

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

23 MR. CLEMENT: I wouldn't think so, Justice
24 Alito. And I think that there are two separate
25 questions, I would think. One is, what is an adequate

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

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

20 JUSTICE GINSBURG: Is it relevant, General
21 Clement, that the legislature didn't seem to be, or the
22 ballot initiative didn't seem to be focused at all on
23 beefing up the rights of the non-member of the union?
24 It seemed to be concerned with the integrity of the
25 election process, because they left the same old Hudson

1 in place for union nongermane spending that didn't have
2 to do with elections.

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

14 JUSTICE SCALIA: Or even nongermane
15 political expenses.

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

21 But I don't think that there is certainly
22 anything problematic about that. It's not like the
23 interest in protecting electoral integrity is some sort
24 of forbidden government interest that makes this a
25 suspicious piece of legislation. And I think at the

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

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

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

23 If I could make just one note about the fact
24 that this targets unions and not other entities, I think
25 two points are relevant. The first is that argument was

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

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

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

22 If there are no further questions, thank
23 you.

24 CHIEF JUSTICE ROBERTS: Thank you, General.
25 Mr. West.

1 ORAL ARGUMENT OF JOHN M. WEST,
2 ON BEHALF OF RESPONDENT

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

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

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

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

24 JUSTICE KENNEDY: I mean, you -- you begin
25 by talking about the First Amendment but you, you

1 proceed as if there are no First Amendment rights of, of
2 workers involved at all.

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

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

17 MR. WEST: The States --

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

24 MR. WEST: Well, what the State is
25 protecting, Justice Kennedy, is not the First Amendment

1 right itself which by definition is protected through
2 the Hudson process.

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

6 MR. WEST: The State --

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

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

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

23 MR. WEST: The scheme restricts the, the use
24 of funds that are, are properly collected from agency
25 fee payers by the union and --

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

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

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

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

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

22 MR. WEST: Justice Souter, the --

23 JUSTICE SOUTER: That would, that would
24 create an issue? You know, what if they say: Nothing?
25 Maybe, maybe the statute does not deal adequately with

1 that. But does that raise a constitutional problem that
2 in effect would be, would be of equal parity with the
3 one that is, that is raised on behalf of the, the, the
4 dissenting workers?

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

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

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

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

25 MR. WEST: Certainly, Justice Ginsburg.

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

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

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

17 JUSTICE SOUTER: You're -- you're back to
18 its funds again.

19 MR. WEST: Whether they're --

20 JUSTICE SOUTER: And you're saying, first
21 you said well, segregating the funds does not answer the
22 problem. And I thought the reason it didn't answer the
23 problem was that the, that it was, that the purposes of
24 the, of the act were underinclusive. And now you're
25 responding to Justice Ginsburg by going back to making

1 the assumption that the segregated funds would be the
2 union's funds.

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

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

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

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

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

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

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

23 MR. WEST: No, because this is Government
24 funding. This is --

25 JUSTICE SCALIA: Okay. Now let's assume

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

6 MR. WEST: I believe it is, Justice Scalia,
7 because --

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

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

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

24 MR. WEST: Well, I don't believe the Court
25 has ever put it quite that way in the Government speech

1 cases, the Government funding cases.

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

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

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

12 MR. WEST: Certainly. Well, the answer is
13 yes and no. The answer is, if you're talking about --
14 (Laughter.)

15 JUSTICE STEVENS: At least insofar as your
16 argument under inclusiveness, the answer would have to
17 be that was, that statute would be okay.

18 MR. WEST: If -- if the -- if you're -- if
19 what you're doing is talking about the, an election
20 statute like --

21 JUSTICE STEVENS: I'm talking about a
22 statute that the individuals say I don't want to spend
23 any more money, give any more money to the union than I
24 absolutely have to. And the legislature decides to
25 protect the right, that right by saying you cannot use

1 agency sock fees for any non-germane purpose. What's
2 wrong with that?

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

8 JUSTICE STEVENS: If that's perfectly
9 constitutional, this is a fortiori okay.

10 MR. WEST: It's not --

11 JUSTICE STEVENS: And it's less of a burden
12 on the union and there's less protection to the
13 employee.

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

21 CHIEF JUSTICE ROBERTS: Why isn't that a
22 content-based restriction? You've got to look at it and
23 see if it's germane.

24 MR. WEST: The purposes that -- the purposes
25 for which the -- that are being excluded in that case

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

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

22 Now, did -- I can't recall, I just don't
23 recall. What you're saying now, I take it, is that the
24 word "election," you can't use it for elections, and
25 elections involve candidates and they also involve

1 ballot issues.

2 MR. WEST: Correct.

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

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

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

11 MR. WEST: The lower court, no, did not
12 discuss the --

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

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

19 JUSTICE BREYER: But this thing about the
20 ballot issue is not there.

21 MR. WEST: And the reason -- this is a
22 reason I think the Washington Supreme Court took note of
23 the fact of what the funds were spent on, on balloting
24 initiatives solely, not on candidate elections.

25 JUSTICE BREYER: In fact, you want to us

1 decide that question, and was there another one that --
2 you just said there were two reasons basically.

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

17 CHIEF JUSTICE ROBERTS: That's the argument
18 that the State Supreme Court in footnote 6 expressly
19 said you did not raise.

20 MR. WEST: I think that would be a valid
21 argument if we were attempting to raise an equal
22 protection claim here, Mr. Chief Justice. That's not
23 what we're doing. What we're saying, we are making an
24 argument based on what the State Supreme Court held,
25 namely that this is a violation of the -- the union's

1 right to engage in political speech, and this is one of
2 the reasons for it. Granted, that particular
3 justification for the ruling was not argued below, but
4 this is not like we were attempting to argue equal
5 protection, a totally new basis.

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

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

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

1 MR. WEST: Absolutely -- absolutely not,
2 Justice Kennedy. We recognize --

3 JUSTICE KENNEDY: But that's been your whole
4 argument so far.

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

15 JUSTICE STEVENS: So it's a First Amendment
16 right that is waived by failing to make a timely
17 objection.

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

20 JUSTICE STEVENS: It's gone under your
21 theory.

22 MR. WEST: No. It's -- Justice Stevens,
23 it's what the right is. The constitutional right is a
24 right against being required to -- to engage in
25 compelled speech.

1 JUSTICE SCALIA: Which no longer exists if
2 you don't make a timely objection.

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

9 JUSTICE ALITO: It's not exactly the same
10 situation. These are teachers who have chosen not to
11 join the Washington Education Association; isn't that
12 right?

13 MR. WEST: These are teachers who have not
14 joined the Washington Education --

15 JUSTICE ALITO: Isn't it overwhelmingly
16 likely that they, if you spoke to them and you said
17 would you like to give money to the union to spend on
18 elections, they would say no?

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

21 JUSTICE ALITO: Explain to me the thinking
22 of somebody who chooses not to join, the 5 percent who
23 choose not to join, and yet they would like to make this
24 contribution. Now maybe there's some, but what would be
25 the thinking of such a person?

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

5 JUSTICE ALITO: What's the difference
6 between that?

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

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

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

18 CHIEF JUSTICE ROBERTS: Well surely, they
19 get to make that decision, don't they? Under the
20 statute, it's their decision whether or not -- you don't
21 get to say, well, this is in your interests, or whether
22 you'd want to spend the money or not.

23 MR. WEST: No, but I'm responding to the
24 suggestion that there should be some kind of presumption
25 that they would, would decline to authorize this.

1 That's -- the question you raised, Mr. Chief Justice, is
2 exactly the question before the Court, whether the State
3 can, constitutionally can insist that the union obtain
4 affirmative authorization for this particular type of
5 speech and for no other type of speech. Let me -- let
6 me suggest --

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

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

20 JUSTICE GINSBURG: Is this all hypothetical,
21 Mr. West, or is there any empirical evidence about what
22 the people who are non-union members, if they had their
23 druthers, would they say not a penny more goes into the
24 union till than we are forced to put there? Is there
25 any empirical evidence that divides up the universe of

1 people who don't, deliberately don't join unions?

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

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

14 MR. WEST: Yeah.

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

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

20 JUSTICE SCALIA: Only if the State has given
21 you the power to exact the money from these people.
22 That changes everything. If this was money that they
23 had contributed themselves, you'd have a different
24 argument, but the State compels them to give you that
25 money and the State says however, you will not use this

1 money for this purpose without their consent.

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

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

21 MR. WEST: Justice Scalia, imagine, if I may
22 take a little bit starker example, imagine that what the
23 government said in the statute that the union must
24 obtain affirmative authorization if it is going to use
25 agency fee funds to support Democratic candidates, but

1 not if it's going to support Republican candidates.
2 Obviously it couldn't do that.

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

5 MR. WEST: And that -- it goes further than
6 this. That's viewpoint discrimination. But this is
7 content discrimination and the Court has held in
8 Consolidated Edison and a number of other cases that
9 that is also a constitutional problem.

10 JUSTICE BREYER: What you're saying right
11 now, if it is, is ballots versus candidates under the
12 word "election."

13 MR. WEST: Exactly.

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

17 MR. WEST: Exactly.

18 JUSTICE BREYER: And the lower court didn't
19 consider it, and is this open now, if it's going back
20 for other things such as the State Constitution, for
21 them to consider this matter on remand?

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

25 JUSTICE BREYER: And I don't know, perhaps

1 you don't know, what the implication of a decision say
2 in your favor here would have for Vermont's campaign
3 finance law or California's or some other.

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

10 It's our submission, Mr. Chief Justice, that
11 what you have here is a content-based restriction on
12 WEA's ability to engage in political speech on issues of
13 educational policy that are of vital importance to the
14 70,000 teachers that it represents.

15 JUSTICE KENNEDY: Could the State have a
16 restriction requiring affirmative authorization for all
17 union expenditures that fall within the Abood-Machinist
18 line of cases?

19 MR. WEST: Yes. If this were --
20 particularly if this were --

21 JUSTICE KENNEDY: If this were across the
22 board as to all First Amendment rights an objecting
23 member has, then the statute would be void -- would be
24 valid, rather?

25 MR. WEST: Certainly if this were done in

1 the statute that authorized the agency fee in the first
2 place.

3 JUSTICE KENNEDY: No, it's done in this
4 statute.

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

10 JUSTICE KENNEDY: Well, my hypothetical is
11 that there's a Washington statute or a Washington
12 constitutional referendum provision, initiative
13 provision, which says that as to all protected speech
14 for non- union members who have moneys taken out, there
15 must be affirmative authorization.

16 MR. WEST: The State could do that, at least
17 if it limited it to the public sector, where the State
18 has the authority to authorize the amount of the agency
19 fee. I believe the State could do that. The State
20 could certainly -- some people have talked about the
21 size of the Hudson notice. The State could impose
22 requirements that the notice be clearer, that it be
23 shorter. The state could impose that affirmative
24 authorization requirement. The State could limit the --

25 JUSTICE STEVENS: Back to your example about

1 the political party saying you can't use it for
2 Democrats, what if they said, as they might have in the
3 1940s, you can use it for anybody except communist
4 candidates?

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

7 JUSTICE STEVENS: Okay.

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

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

16 General McKenna, you have 7 minutes
17 remaining.

18 REBUTTAL ARGUMENT OF ROBERT M. MCKENNA, ESQ.

19 ON BEHALF OF PETITIONERS

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

21 First of all, I wanted to get back to a
22 question raised by Justice Breyer concerning whether
23 they get their money back. I took your question to
24 refer to a hypothetical, but allow me to address the
25 real circumstances in this case by referring to the

1 joint appendix at 210-212. These are the pages covering
2 the permanent injunction that was entered by the trial
3 court. Under that permanent injunction, the WEA shall
4 return to all agency fee payers who have not
5 affirmatively authorized the use of their fees for
6 expenditures, and it lays out the means of doing that.
7 For the first 2 years there's an agreed-upon amount.
8 For the next 3 years of the injunction there's another
9 amount. But they do get their money back under that
10 injunction.

11 Referring to the issue of whether they waive
12 or not, under the current process used by the WEA,
13 referring to JA-198, which is the letter sent out on
14 September 15, 2000, by the WEA to the non-members,
15 you'll note the statement, quote: "If such written
16 objection has not been postmarked by October 16, 2000,
17 you will waive your ability to object." The State of
18 Washington's position is that non-members should not be
19 required to say no twice. They said no when they chose
20 not to join the union. The union's position now is,
21 well, we get to use your money for political purposes
22 unless you say no a second time. That does not seem to
23 be a reasonable default position to take and certainly
24 we believe the State --

25 JUSTICE GINSBURG: But the State of

1 Washington seems to think that's fine for everything
2 other than election expenses.

3 MR. MCKENNA: Yes, Your Honor, in terms of
4 Section 760 the State of Washington does think that's
5 fine because of the purpose of the statute and the
6 purpose of Section 760, the purpose being to protect the
7 integrity of the elections by several different means
8 involving protecting --

9 CHIEF JUSTICE ROBERTS: Well, do you see an
10 underlying constitutional problem as to non-election
11 expenditures that are still political expenditures?

12 MR. MCKENNA: We don't take a position on
13 whether there's a constitutional problem with regard to
14 non-germane expenditures, Your Honor. But we do
15 believe --

16 CHIEF JUSTICE ROBERTS: Didn't we take one
17 in Abood?

18 MR. MCKENNA: I'm sorry?

19 CHIEF JUSTICE ROBERTS: Didn't we take a
20 position in Abood?

21 MR. MCKENNA: What I meant was --

22 CHIEF JUSTICE ROBERTS: I suppose the way
23 the statute works, you have to opt in for the election
24 expenditures, but you have to have a right to opt out
25 for other non-germane.

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

12 JUSTICE STEVENS: What do you say about his
13 hypothetical involving Democrats versus Republicans?

14 MR. MCKENNA: Well, Your Honor, that would
15 certainly seem to be viewpoint discrimination, and it
16 would implicate --

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

19 MR. MCKENNA: Your Honor, we do not agree
20 that this is content, content discrimination. This is
21 content neutral. 760 establishes a procedure, that is
22 to say a requirement that must be met before the money
23 may be used.

24 JUSTICE STEVENS: Well, but it's content in
25 the sense that only some speech has to be affirmatively

1 authorized.

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

14 JUSTICE STEVENS: Can I just go back to, you
15 mentioned my question.

16 MR. MCKENNA: Yes, sir.

17 JUSTICE STEVENS: Your point of your answer
18 to his hypothetical is, well, the viewpoint
19 discrimination would be impermissible, but the content
20 discrimination is permissible?

21 MR. MCKENNA: If it is content
22 discrimination, Your Honor, we believe it is
23 permissible, yes, sir. And if it were viewpoint -- in
24 the hypothetical, if there were viewpoint discrimination
25 that would not implicate any constitutional right of the

1 union, but it may very well implicate the Southworth
2 interests of the non-member fee payers.

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

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

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

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

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

18 JUSTICE SCALIA: That's my understanding,
19 too. I think you got to get out of it some other way.
20 I mean, you've got to say it's content but it doesn't
21 apply when it's the government contributing money or it
22 doesn't apply when you're applying it to money that's
23 being coerced by the government.

24 MR. MCKENNA: Yes, Your Honor.

25 JUSTICE BREYER: If that's yes, then the

1 category here is election speech. If you're going to
2 call a statute that treats election speech especially,
3 then all of campaign finance regulation would fall in
4 that category. And if you're going to use that
5 distinction to say strict scrutiny applies, then strict
6 scrutiny would apply to all campaign finance regulation.
7 And courts never to my knowledge apply strict scrutiny
8 to campaign finance regulation because there are speech
9 interests on both sides of the equation.

10 MR. MCKENNA: Yes, Your Honor. Of course,
11 we believe that --

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

14 (Laughter.)

15 MR. MCKENNA: Yes, Your Honor, I understand
16 your question.

17 (Laughter.)

18 MR. MCKENNA: And we believe that -- we
19 believe of course that Section 760 is not subject to
20 strict scrutiny, it is subject at most to a rationale
21 basis; and that clearly there is a rationale basis for
22 the State in this case to require the affirmative
23 authorization of non-member fee payers.

24 JUSTICE SCALIA: Can you get to the point
25 you were about to make, what the purpose of the thing

1 is?

2 MR. MCKENNA: Well, yes, Your Honor. Your
3 Honor, the Supreme Court of Washington found a purpose
4 of the entire law, Initiative 134, to be to protect
5 election integrity. But 760 is one means of achieving
6 that purpose by means of protecting individual
7 interests. Similarly, Section 680 of this law, which, I
8 apologize, is not in the joint appendix, but it's RCW
9 4217-680, which requires positive checkoff before an
10 employer may deduct PAC contributions for any employee.

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

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

24 JUSTICE SOUTER: So by articulating that the
25 election integrity is a purpose, the Washington Supreme

1 Court should not be understood as excluding the
2 protection of the non-member workers' interests?

3 MR. MCKENNA: Yes, Your Honor. I would
4 agree.

5 Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you, General.

7 The case is submitted.

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

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