No. 10-1121

In the

Supreme Court of the United States

DIANNE KNOX, *et al.*,
Petitioners,
v.
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CENTER FOR CONSTITUTIONAL JURISPRUDENCE, MOUNTAIN STATES LEGAL FOUNDATION, AND CATO INSTITUTE IN SUPPORT OF PETITIONERS

*DEBORAH J. LA FETRA
HAROLD E. JOHNSON
TIMOTHY SANDEFUR
*Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
E-mail: djl@pacificlegal.org
Counsel for Amicus Curiae Pacific Legal Foundation

JOHN C. EASTMAN
ANTHONY T. CASO
Center for Constitutional Jurisprudence
One University Drive
Orange, CA 92886
Telephone: (714) 628-2530
Counsel for Amicus Curiae Center for Constitutional Jurisprudence

J. SCOTT DETAMORE
Mountain States Legal Foundation
2596 South Lewis Way
Lakewood, CO 80227
Telephone: (303) 292-2021
Counsel for Amicus Curiae Mountain States Legal Foundation

ILYA SHAPIRO
Cato Institute
1000 Massachusetts Ave. NW
Washington, DC 20001
Telephone: 202-842-0200
Counsel for Amicus Curiae Cato Institute

QUESTIONS PRESENTED

1. In *Teachers Local No. 1 v. Hudson*, this Court held that "[b]asic considerations of fairness, as well as concern for the First-Amendment rights at stake, ... dictate that the potential objectors be given sufficient information to gauge the propriety of the union's [agency] fee" extracted from nonunion public employees. 475 U.S. 292, 306 (1986).

May a State, consistent with the First and Fourteenth Amendments, condition employment on the payment of a special union assessment intended solely for political and ideological expenditures without first providing a *Hudson* notice that includes information about that assessment and provides an opportunity to object to its exaction?

2. In *Lehnert v. Ferris Faculty Ass'n*, this Court held that "the State constitutionally may not compel its employees to subsidize legislative lobbying or other political union activities outside the limited context of contract ratification or implementation." 500 U.S. 507, 522 (1991) (opinion of Blackmun, J.); *accord id.* at 559 (opinion of Scalia, J.) (concurring as to "the challenged lobbying expenses").

May a State, consistent with the First and Fourteenth Amendments, condition continued public employment on the payment of union agency fees for purposes of financing political expenditures for ballot measures?

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation, the Center for Constitutional Jurisprudence, Mountain States Legal Foundation, and the Cato Institute respectfully submit this brief amicus curiae in support of Petitioners.[1]

Pacific Legal Foundation (PLF) was founded over 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. Among other matters affecting the public interest, PLF has repeatedly litigated in defense of the right of workers not to be compelled to make involuntary payments to support political or expressive purposes with which they disagree. To that end, PLF attorneys were counsel of record in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Brosterhous v. State Bar of Cal.*, 906 P.2d 1242 (Cal. 1995); and *Cumero v. Pub. Employment Relations Bd.*, 778 P.2d 174 (Cal. 1989), and PLF has participated as amicus curiae in all of the most important cases involving labor unions compelling workers to support political speech, from *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), to *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177 (2007).

The Center for Constitutional Jurisprudence was founded in 1999 as the public interest law arm of the Claremont Institute, the mission of which is dedicated

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

to upholding the principles of the American Founding to their rightful and preeminent authority in our national life, including the proposition that compelled speech and political participation is as much an affront to the First Amendment as are restrictions on speech and political participation. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *United States v. Morrison*, 529 U.S. 598 (2000); and *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

Mountain States Legal Foundation is a nonprofit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preparation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every state of the nation. Since its inception in 1977, MSLF and its attorneys have engaged in litigation to protect the individual right to freedom of speech to support whatever political party, cause, or candidate that individual chooses without interference. MSLF has also been engaged in litigation to oppose state-compelled political speech through the imposition of union agency fees on nonmembers to support political causes with which they disagree, thereby subverting the political process itself. *See*, *e.g.*, *Mountain States Legal Found. v. Denver Sch. Dist. No. 1*, 459 F. Supp. 357 (D. Colo. 1978); *Campbell v. Arapahoe County Sch. Dist.*, 90 F.R.D. 189 (D. Colo.

1981); *Campbell v. Joint Dist. 28-J*, 704 F.2d 501 (10th Cir. 1983); *Mountain States Legal Found. v. Office of the Sec'y of State, State of Colo.*, 946 P.2d 586 (Colo. App. 1997); and *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177 (2007) (amicus curiae).

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs. This case is of central concern to Cato because it implicates so many individual rights, including speech, property, and choice of employment.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners represent 28,000 current and former California state employees who do not belong to the recognized bargaining representative, Service Employees International Union, Local 1000. *Knox v. California State Employees Ass'n, Local 1000*, 628 F.3d 1115, 1124 (9th Cir. 2010). The nonmembers are required to pay to the union a "fair share fee" in lieu of union dues, to defray the union's costs regarding collective bargaining. In June, 2005, the union sent out its annual *Hudson* notice setting out the union's finances and giving employees 30 days in which to object to the calculation of the fair share fee. *Id.* at 1118.

Shortly after the time for objection expired, the union sent out a second notice, announcing that a new fee would be taken from state employees' paychecks, to fund the "Emergency Temporary Assessment to Build a Political Fight-Back Fund." *Id.* This fund was specifically designated to be used for a broad range of political expenses, including advertisements advocating the defeat of two ballot initiatives related to California's overall budget. The state Controller began paycheck deductions in September, 2005, and the deductions continued for about a year, constituting a 25%-33% increase over the deduction stated in the June *Hudson* notice. *Id.* at 1129-30 (Wallace, J., dissenting).

Cases in which labor unions deduct money—whether dues or agency shop fees—from workers' paychecks and spend the money on political activities implicate important issues of free speech, freedom of association, and freedom of choice. Labor unions often complain that restricting their access to such monies diminishes their effectiveness and imposes substantial hardships on them. But this Court's focus should not be on the difficulties faced by unions when the law compels them to ask permission from workers before taking their money. Instead, the focus must be on the freedom of choice of individual workers. *Cf. Davenport*, 551 U.S. at 187 (emphasis added) ("For purposes of the First Amendment, it is entirely immaterial that [a law] restricts a union's use of funds only after those funds are already within the union's lawful possession . . . . What matters is . . . the union's extraordinary *state* entitlement to acquire and spend *other people's* money.").

Given the substantial disadvantage dissenting workers face when dealing with the social, legal, and political institutions governing organized labor, this

Court must above all act to protect dissenting individual workers from a system that exploits them and violates their rights of property, expression, and choice.

ARGUMENT

I

WORKERS' FREEDOM TO CHOOSE HOW THEIR EARNINGS ARE SPENT SHOULD GUIDE THIS COURT'S ANALYSIS

The most important part of freedom of expression is the right not to conform. It is relatively easy to create an enforced unity through political, legal, and social pressures, but the nonconformist must rely on the Constitution for protection. *See*, *e.g.*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). To differ, or to refuse to support speakers or campaigns with which one disagrees, is often a lonely and courageous act, more in need of legal security than the right to join or to support an organization or movement. Dissent is by definition counter-majoritarian, which means that dissenters need the protection of institutions that shield them from majoritarian political processes. *See*, *e.g.*, Cass R. Sunstein, *Why Societies Need Dissent* 98 (2003) ("[A]t its core, [the First Amendment] is designed to protect political disagreement and dissent.").

This Court has long recognized that the freedom of expression guaranteed by the First Amendment protects choice in "the decision of both what to say and what not to say," *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 782 (1988), and for that reason has repeatedly upheld the principle that people have the right to refrain from subsidizing messages with which they disagree. *See*, *e.g.*, *United States v.*

United Foods, Inc., 533 U.S. 405, 410 (2001); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). In many cases, the Court has recognized that it would violate the First Amendment for workers' earnings to be taken by the state, and transferred to labor unions for use in promoting political messages with which the workers disagree. *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991); *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 745 (1988); *Abood*, 431 U.S. at 244. *See also Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1253 (6th Cir. 1997) (citation omitted) ("[T]he right not to contribute to political causes that they do not favor is as central a First Amendment right as is the right to solicit funds. The protection of this right is certainly at least 'important or substantial,' if not compelling.").

Moreover, the judiciary has a special duty to intercede on behalf of political minorities who cannot hope for protection from the majoritarian political process. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982). Workers who disagree with the political views of labor unions are in precisely this situation, and this Court must therefore focus principally on protecting the right of workers to determine how their earnings—essential both to their private property as well as their expressive rights—will be spent.

This Court has routinely recognized the central importance of choice in the context of union workers free speech rights. When a state union compels its workers to make contributions for political purposes, it is "an infringement of their constitutional rights." *Abood*, 431 U.S. at 234. Given that the right at issue is the freedom of political expression, which this Court regards as a fundamental right subject to strict scrutiny, the Court should be particularly keen to preserve individual freedom of choice in cases involving

the compulsory support of labor union activities. "To preserve the protection of the Bill of Rights for hardpressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights." *Glasser v. United States*, 315 U.S. 60, 70 (1942). Among other reasons for presuming against such a waiver are that the opposite presumption, or a scrutiny less than strict, could too easily blind courts to subtle coercion, or might allow workers, accidentally or through ignorance or duress, to waive vital constitutional liberties. Thus the analysis in all union fees/expression cases must begin with and follow the expressive rights of individual workers.

In *Davenport*, this Court reinforced the central place of worker choice in cases involving compulsory union support. Giving a private entity—the labor union—"the power, in essence, to tax government employees," was "unusual," the Court noted, 551 U.S. at 184, and the First Amendment would allow a state to "eliminate . . . entirely" the "extraordinary benefit" of allowing the union to take money from the paychecks of workers to support union activities. *Id.* Moreover, the Court repeatedly emphasized that states have broad discretion to tailor this "benefit" so long as they do so in a manner that is above the "constitutional floor" established by cases like *Beck*, *Hudson*, and *Abood*. *Id.* at 185. In *Davenport*, which assessed the constitutionality of Washington's "paycheck protection" statute that required workers' consent before unions could garnish their wages to fund political activities, the state had established a constitutionally permissible mechanism to protect individual rights, given "the union's extraordinary *state*[-granted] entitlement to acquire and spend *other people's* money." *Id.* at 187. Thus the constitutional validity of the union's procedure in this case should be judged by reference to

the worker's constitutional right to be free from compelled speech.

II

UNIONS USE A VARIETY OF LEGAL TACTICS, PERSONAL PRESSURES, AND THREATS TO VIOLATE THE RIGHTS OF WORKERS

A. Unions Have a Long History of Violating the First Amendment by Compelling Workers To Support Speech with Which They Disagree

Unions rely heavily on peer pressure, intimidation, coercion, and inertia to prevent dissenting members or nonmembers from opposing union political activities. *See* Joe Knollenberg, *The Changing of the Guard: Republicans Take on Labor and the Use of Mandatory Dues or Fees for Political Purposes*, 35 Harv. J. on Legis. 347, 364 (1998) (Dues objectors are likely to find the path of dissent "marked by threats of life and family, intimidation, insults and coercion."); Linda Chavez & Daniel Gray, *Betrayal: How Union Bosses Shake Down Their Members and Corrupt American Politics* 44-46 (2004). Workers often feel either compelled to join the union, or to stifle their beliefs, lest their disagreement incur retaliation by union leaders or coworkers. As this Court recognizes, it is particularly important to enforce First Amendment protections in environments where heavy peer pressure might otherwise prevent the free expression of ideas. *See*, *e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000) (citations omitted) ("[T]he government may no more use social pressure to enforce orthodoxy than it may use more direct means.").

Dissenting workers in offices where public employee unions have substantial power to govern the terms of employment and even to deduct funds from the paychecks of nonmembers, are particularly in need of constitutional protections. Rules governing public employee unions differ from state to state, but they are usually quite distinct from the rules that govern unions in the private sector. *See* Harvard Law Review Ass'n, *Collective Bargaining in the Public Sector*, 97 Harv. L. Rev. 1676 (1984). Given government's monopolistic status, public employee unions are in a unique position to exploit workers who have less freedom to choose alternative employers or alternative union representation. This monopoly position also means that public employee unions are likely to exert more coercion and intimidation against dissenting workers than are private sector workers, given the fact that such workers cannot readily find similar jobs in the private sector. *See, e.g.*, *Martel v. Dep't of Transp., FAA*, 735 F.2d 504, 509-10 (Fed. Cir. 1984) (employee of FAA was intimidated by union members into joining strike); *Ferrando v. Dep't of Transp., FAA*, 771 F.2d 489, 492-93 (Fed. Cir. 1985) (noting that FAA union would "monitor[ ] the work of non-participating [workers] and report[ ], and even invent[ ], infractions until the [worker] lost his job or was suspended"). Public employee unions are also in a uniquely powerful position to influence the adoption of public policies, John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 Wm. & Mary L. Rev. 365, 463 (1999), which means that government workers dissatisfied with the policies of a union have less ability to obtain redress in the political arena than do their counterparts in the private sector.

Most disturbing of all, public employee unions—unlike their private-sector counterparts—are

exempt from the Labor-Management Reporting & Disclosure Act (LMDRA), 29 U.S.C. §§ 401, *et seq.*, 73 Stat. 519 (1959), the primary federal mechanism for policing the abuses of organized labor. Under LMDRA, unions are required to file financial reports with the government disclosing how they spend their money, but the statute excludes public employee unions. 29 U.S.C. § 402(e); *Brock v. Southern Region, Region III of the Civil Service Employees Association, Inc.*, 808 F.2d 228, 231 n.3 (2d Cir. 1987).

The political atmosphere of the unionized workplace puts an extremely heavy burden on workers to join the union or remain silent about their own opposition to union policies. The history of unionism is replete with examples of threats, coercion, intimidation, and violence directed at workers who do not agree with union goals, policies, or tactics. *See generally* Chavez & Gray, *supra*, at 44-46; Herbert R. Northrup, *The Teamsters' Union Attempt to Organize Overnite Transportation Company: A Study of a Major Union Failure*, 30 Transp. L.J. 127, 155-68 (2003).[2] Precise statistics are hard to come by, since much—perhaps most—union violence is not reported, *id.* at 155, but the National Institute for Labor Relations Research (NILRR) maintains a database of union violence and counted more than 9,000 incidents from 1975 to 2008—only 258 (less than 3%) of which led to convictions. *See* NILRR, *Violence Event Data File.*[3] Short of violence, unions use intimidation, peer pressure, and threats to push workers into contributing

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[2] Union violence is frequently immune from prosecution under anti-racketeering laws. *United States v. Enmons*, 410 U.S. 396, 410 (1973).

[3] *Available at* http://www.nilrr.org/node/54 (last visited Sept. 1, 2011).

to union efforts, or at least remaining silent about their opposition to them. In fact, a search of the NLRB's own online database reveals that in just the years between 2000 and 2007, workers brought 1,325 complaints to the NLRB alleging that the unions had made threatening statements to them, 546 complaints of harassment, and 416 complaints of "violence/assaults." *See* Center for Union Facts, *When Voting Isn't Private: The Union Campaign Against Secret Ballot Elections* 19 (2007).[4]

Among other things, unions routinely use high-pressure tactics to manipulate workers into contributing money for union political campaigning. In case after case, federal courts have been required to intercede to protect the rights of dissenting workers who do not want their money taken from them to support union political activities. *See*, *e.g.*, *Lutz v. Int'l Ass'n of Machinists & Aerospace Workers*, 121 F. Supp. 2d 498, 506 (E.D. Va. 2000); *Penrod v. NLRB*, 203 F.3d 41, 46 (D.C. Cir. 2000); *Tavernor v. Ill. Fed'n of Teachers*, 226 F.3d 842, 851 (7th Cir. 2000); *Shea v. Int'l Ass'n of Machinists & Aerospace Workers*, 154 F.3d 508, 515 (5th Cir. 1998); *Damiano v. Matish*, 830 F.2d 1363, 1370-71 (6th Cir. 1987). Yet unions continue to drag their feet, fail to inform workers about their rights under *Beck* and other cases, and intimidate workers into paying to support political activism by the unions contrary to their actual desires. In *Davenport*, for example, after the State of Washington enacted a provision requiring a public employee union to obtain consent from workers before taking their money to pay for political activities, the union saw the amount of monies contributed for such activities drop by some 85%. Bob Williams, *WEA-PAC Donations Drying Up:*

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[4] *Available at* http://www.unionfacts.com/downloads/report.cardCheck.pdf (last visited Sept. 1, 2011).

Teachers Taking Their Political Dollars Elsewhere, Evergreen Freedom Foundation, (July 6, 1998).[5] Similarly, in Indiana, Gov. Mitch Daniels signed an executive order limiting collective bargaining for state workers resulting in a reduction in the number of union members from 16,408 in 2005, when Daniels signed the order, to 1,490 today. Katrina Trinko, *Opting Out of Unionization*, National Review Online (Apr. 13, 2011).[6] These numbers indicate the degree to which union members acquiesce in the violation of their expressive rights thanks to the peer pressure, intimidation, and dilatory tactics of labor unions.

Labor unions spend as much as $800 million per year on political campaigns, more than both the Republican and Democratic parties combined. Chavez & Gray, *supra*, at 29. The exact amount is hard to substantiate, however, because unions take pains to conceal the actual figures. Just one union—the SEIU —spent $33,083,433.20 in independent expenditures targeted at the 2008 presidential election. Federal Election Commission, Summary Report of Independent

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[5] The union responded by successfully urging the Washington legislature to amend the statute to declare that the union can "spend freely as long as enough money remains to refund nonmembers . . . . The Washington legislature endorsed an accounting of complete fungibility, with no accountability on the WEA's part to trace sources of income to nonmember agency fees." Daniel A. Himebaugh, *Consider the Source: A Note on Public-Sector Union Expenditure Restrictions Upheld in* Davenport v. Washington Education Association, 28 J. Nat'l Ass'n L. Jud. 533, 569 (2008) (describing amendment to Wash. Rev. Code Ann. § 42.17.760).

[6] *Available at* http://www.nationalreview.com/articles/264545/opting-out-unionization-katrina-trinko# (last visited Sept. 1, 2011) (also noting the number of union members donating to the political arm of the Utah Education Association decreased from 68% to 6.8% after that state enacted paycheck protection).

Expenditures for the 2008 Presidential Campaigns.[7] According to filings made to the California Secretary of State, the SEIU also spent just under $2 million in California political contributions.[8] These, of course, represent the expenditures of a single union—the total amount of dollars spent on politicking by all unions combined is exponentially more.[9]

These contributions are often made contrary to the views of the workers themselves. Frank Luntz polled 760 union members in October, 2010, and found that 60% opposed their union's political spending in that year's midterm elections, viewing it a wasteful use of union dues and treasuries to protect incumbent Democrat politicians in Washington, D.C.[10] This gibes with a 1996 poll that revealed that 62% of union members opposed the AFL-CIO's decision to spend $35 million purchasing advertisements promoting the Democratic party. Chavez & Gray, *supra*, at 45. In fact, polls show that more than 40% of union members

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[7] *Available at* http://www.fec.gov/press/press2008/2008indexp/2008iebycommittee.pdf (last visited Sept. 1, 2011).

[8] *Available at http*://cal-access.sos.ca.gov/Campaign/Committees (last visited Sept. 1, 2011).

[9] *See* Brody Mullins & John D. McKinnon, *Campaign's Big Spender*, Wall St. J. (Oct. 22, 2010) (noting that the American Federation of State, County and Municipal Employees ranked first among spenders on the 2010 elections, spending $87.5 million on television advertisements, phone calls, campaign mailings, and other political efforts). *Available at* http://online.wsj.com/article/SB10001424052702303339504575566481761790288.html (last visited Sept. 1, 2011).

[10] The Word Doctors, *Benchmark Study of Union Employee Election Year Attitudes* (Oct. 2010), *available at* http://www.nrtw.org/files/nrtw/Luntz_NRTW_Union_Member_Survey_Oct2010.pdf (last visited Sept. 1, 2011).

vote Republican. Nate Silver, *The Effects of Union Membership on Democratic Voting*, The New York Times (Feb. 26, 2011),[11] yet unions' political expenditures "overwhelmingly support" the Democratic party and candidates. *See* Open Secrets, Public Sector Unions (2011-2012).[12] This dissonance between union workers and their leadership leads to serious abuses when unions are empowered to seize workers' earnings and put them to use in political causes which the workers do not support. Of course, it makes no difference whether the beneficiary of the unions' largesse is the Democratic Party, the Republicans, Libertarians, or the Greens—the key constitutional principle remains constant regardless of the political goals sought.

B. Workers Are Being Denied the Protections Promised by This Court's Rulings in Dues and Fees Cases

This Court has consistently held that labor unions may not use dues or agency shop fees to support political campaigns which workers do not wish to support. *See Abood*, 431 U.S. at 235; *Beck*, 487 U.S. at 745; *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 301-02 (1986); *Lehnert*, 500 U.S. at 522. Yet for decades, organized labor has engaged in a campaign of "massive resistance" against these decisions, consciously refusing to follow their mandates of these cases, or tailoring their responses to obstruct and frustrate the implementation of workers' rights. *See generally* Harry

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[11] *Available at* http://fivethirtyeight.blogs.nytimes.com/2011/02/26/the-effects-of-union-membership-on-democratic-voting/ (last visited Sept. 1, 2011).

[12] *Available at* http://www.opensecrets.org/industries/ indus.php?ind=p04 (last visited Sept. 1, 2011).

G. Hutchison, *Reclaiming the First Amendment Through Union Dues Restrictions?*, 10 U. Pa. J. Bus. & Emp. L. 663 (2008); Jeff Canfield, *What a Sham(e): The Broken Beck Rights System in the Real World Workplace*, 47 Wayne L. Rev. 1049 (2001); Brian J. Woldow, *The NLRB's (Slowly) Developing Beck Jurisprudence: Defending a Right in a Politicized Agency*, 52 Admin. L. Rev. 1075 (2000) (documenting refusal of unions and government to abide by *Beck* and similar cases). *See also Monson Trucking Inc.* [*v.*] *Anderson*, 324 N.L.R.B. 933, 935 (1997) (union failed to provide employee *Beck* rights notice); *Chauffeurs, Teamsters, Warehousemen & Helpers Union, Local No. 377*, [*v.*] *Blanchard*, Case No. 8-CB-9415-1, 2004 NLRB LEXIS 57, *14 (N.L.R.B. Feb. 11, 2004) ("I find that the membership application with the 'Notice' hidden on the second and third page did not serve to adequately apprise newly-hired employees of their *Beck* rights.").

Even the National Labor Relations Board has been criticized for participating in the unions' campaign of resistance toward worker rights established in *Beck*, *Abood*, and *Hudson*. *Cf. NLRB v. Ancor Concepts, Inc.*, 166 F.3d 55, 59 (2d Cir. 1999) ("[T]he Board stands out as a federal administrative agency which has been rebuked before for what must strike anyone as a cavalier disdain for the hardships it is causing."). The NLRB has adopted delay tactics so extreme that some cases asserting workers' rights under *Beck*, *Hudson*, and *Abood* have waited nearly a decade for resolution. *See, e.g.*, *Am. Fed'n of Television & Recording Artists* [*v.*] *Weissbach*, 327 N.L.R.B. 474, 476 (1999) (challenging 1989 expenditures). Only in 1995 did the NLRB first apply the 1988 *Beck* decision, in *Cal. Saw & Knife Works* [*v.*] *Podchernikoff*, 320 N.L.R.B. 224, 224 (1995), a case in which the NLRB determined that when workers demand an audit

detailing how much of their money is spent on political campaigning, they are entitled only to the union's in-house audit, and not an independent audit. The District of Columbia Circuit later called this ruling inconsistent with "any rational interpretation" of "*Hudson*'s 'basic considerations of fairness' language." *Ferriso v. NLRB*, 125 F.3d 865, 869 (D.C. Cir. 1997).

Given the politically weak positions of dissenting workers, the pervasive abuses of unions, the lack of protection in administrative agencies, and the fundamental importance of the expressive and associative rights at issue, protecting the individual's freedom to choose—and to dissent—in the environment of the unionized workplace must be the guiding principle in this case. *See also* Harry G. Hutchison, *Diversity, Tolerance, and Human Rights: The Future of Labor Unions and the Union Dues Dispute*, 49 Wayne L. Rev. 705, 717 (2003) (The "proper mooring" of "the union dues dispute" is "freedom of conscience."). At a minimum, the union was constitutionally required to provide the *Hudson* notice prior to the mid-year garnishment of wages for a political campaign.

III

IN LIGHT OF UNIONS' DISREGARD FOR DISSENTING WORKERS' RIGHTS, THE COURT SHOULD HOLD THAT THE CONSTITUTION DEMANDS THAT WORKERS "OPT-IN" PRIOR TO ANY GARNISHMENT OF THEIR WAGES

As discussed above, the most narrow holding this Court could offer in this case is to require the *Hudson* notice before mid-year garnishment of wages for political purposes. But Amici believe the real-life consequences presented by this case justify a broader holding. This Court should hold as a matter of First

Amendment law that labor unions must obtain affirmative consent from workers *before* using expropriated funds for purposes of ideological speech or political campaigns. Although the Court has previously declared that it "is not to be presumed" that workers object to such exactions and expenditures. *Hudson*, 475 U.S. at 306 n.16 (quoting *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 774 (1961) (presuming conformity, rather than dissent), recent history has demonstrated that unions are abusing their powers and spending both union dues and agency shop fees on ideological campaigns without fee payers' consent; are adopting refund procedures designed to deter dissent; and are engaged in a conscious campaign of "massive resistance" against this Court's worker-rights decisions, including *Hudson*, 475 U.S. 292; *Beck*, 487 U.S. 735, and *Abood*, 431 U.S. 209. This Court's position in *Abood* and other cases—that courts should not presume that workers object to the spending of their earnings on political campaigns—has not proved accurate in real world experience. The Court should reverse this position and hold that the Constitution requires a presumption that workers dissent, until the state or the union demonstrates otherwise.

A. The Court Should Adopt a Presumption of Dissent in Labor Union Compelled Speech Cases

This Court has stated that, although a worker cannot be compelled to support the promulgation of a political message with which she disagrees, nevertheless, a worker's "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." *Abood*, 431 U.S. at 238; *Hudson*, 475 U.S. at 306 n.16 (citation omitted). This conclusion should be corrected in light of

subsequent experience with how the process has worked in the real world. First, it is inconsistent with the longstanding rule that laws infringing on free speech are presumptively invalid, and that individuals are not presumed to have waived fundamental rights. Second, it chills dissent which needs constitutional protection. Third, a presumption of dissent would be more consistent with a regime of free speech than the presumption of conformity inherent in the requirement that workers announce their dissent. Finally, abandoning the *Street* presumption of conformity would not implicate *stare decisis* concerns, because it originated in dicta, in cases involving statutory interpretation rather than the First Amendment.

1. Requiring Workers To Assert Dissent Is Inconsistent with the Strict Scrutiny Standard

The requirement that workers affirmatively make known their dissent, which originated in *Street*, 367 U.S. at 774, creates a presumption that workers wish to conform—a presumption which sits uneasily beside the long-standing rule that laws infringing fundamental rights are presumptively invalid. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973) ("[L]egislative judgments that interfere with fundamental constitutional rights . . . . [are] not entitled to the usual presumption of validity . . . [and] the State . . . must carry a 'heavy burden of justification.' "). The presumptive invalidity of laws limiting the freedom of speech means that when the law requires a worker to subsidize political activity, the state (or the union exercising state power) should bear the burden of justifying this law. The individual challenging such a scheme should not have that burden.

The presumption of conformity also violates the long-standing rule that courts "'do not presume acquiescence in the loss of fundamental rights.'" *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (quoting *Ohio Bell Tel. Co. v. Pub. Utils. Comm'n of Ohio*, 301 U.S. 292, 307 (1937)). This Court has repeatedly held that "[t]o preserve the protection of the Bill of Rights for hardpressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights," *Glasser*, 315 U.S. at 70. Among other reasons for presuming against such a waiver are that doing so would too easily blind courts to subtle coercion, or would too easily allow workers, accidentally or through ignorance, to waive vital constitutional liberties. Yet the presumption of conformity created by *Street* requires courts to assume that workers are willing to waive their right to stop their earnings from supporting political speech with which they disagree; that presumption threatens precisely the same harms.

The rule of strict scrutiny, which presumes that laws infringing on free speech are invalid, is based on the extreme importance of free speech in a system of participatory democracy. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). *See also Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996) (plurality opinion) ("[T]he First Amendment embodies an overarching commitment to protect speech from government regulation through close judicial scrutiny, thereby enforcing the Constitution's constraints, but without imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems."). Requiring a worker to affirmatively make known her dissent from being forced to subsidize a union's political activities is to

presume that the worker intends to waive that fundamental right, unless the contrary is proven. This inconsistency should not stand, especially given the importance of protecting a worker's right to dissent.

2. The Presumption That Workers Acquiesce in Supporting Unions Violates the Presumption of Liberty

Presumptions perform important roles in legal thinking: most especially, they allocate the risk of error in the most responsible way, and they protect important interests from disturbance in the absence of a compelling reason for changing the status quo. *See* Murl A. Larkin, *Presumptions*, 30 Hous. L. Rev. 241, 243-44 (1993). In criminal law, the presumption of innocence helps prevent the punishment of the innocent, although it may allow some of the guilty to go free. *In re Winship*, 397 U.S. 358, 363 (1970). Likewise, in the First Amendment context, the presumption against the constitutionality of laws infringing on freedom of expression is justified by the fact that more speech is to be preferred over less speech. *Cf. Texas v. Johnson*, 491 U.S. 397, 419 (1989) ("'[T]he remedy [for untruth] is more speech, not enforced silence.'" (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring))). *See also* Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1, 128 ("[T]he thumb of the Court [must] be on the speech side of the scales.").[13]

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[13] In *Davenport*, 551 U.S. at 187, this Court rejected the argument that a state constitutional mandate that demands an opt-in arrangement places a thumb on the "non-speech" side of scale so far as the unions' own speech rights are concerned: The paycheck protection statute "is not fairly described as a restriction on how (continued...)

The text of the Constitution warrants a general presumption that individuals may act freely unless and until those seeking to limit their freedom provide convincing justification for doing so. *See generally* Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2004). For example, the Fifth and Fourteenth Amendments prohibit government from "depriv[ing]" individuals of certain rights, and the First Amendment declares that the freedom of speech shall not be "abridged"—terms which imply that governmental authority must be regarded as secondary to, and limited by, the basic presumption that "in pursuing happiness, persons may do whatever is not justly prohibited." *Id.* at 268. Although the case was later overruled with regard to certain "non-fundamental" freedoms, the Court's words in *Adkins v. Children's Hosp. of the Dist. of Columbia*, 261 U.S. 525, 546 (1923), remain true with regard to free speech: Freedom, the Court said, is "the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances." *See also Stanley v. Illinois*, 405 U.S. 645, 656 (1972) ("But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.").

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[13] (...continued)
the union can spend 'its' money; it is a condition placed upon the union's extraordinary *state* entitlement to acquire and spend *other people's* money."

One important reason courts should presume in favor of individual liberty until the state justifies its interference with that liberty is that individuals often are unable to articulate their reasons for exercising their liberty in certain ways. They may be intimidated, uneducated, or only partly aware of their own reasons. This does not mean that their actions fall outside the range of their legitimate freedoms. An artist, for example, may be unable to explain his work in precise language, yet his freedom of expression is not therefore less protected. Supporters of politically unpopular causes may not wish to disclose their identities or their reasons, out of fear of retaliation, or for other reasons. Yet the state may not require organizations to divulge the identities of its supporters when there are real risks of violence and other coercive pressures that can be brought to bear. *NAACP v. Patterson*, 357 U.S. 449, 462-63 (1958). Perhaps more to the point, to have a right means to be free to act or refrain from acting, without being required to give a reason. *See Lutz*, 121 F. Supp. 2d at 507 (describing the annual objection procedure as "analogous to a governmental pronouncement that a citizen who fails to cast a ballot on election day will be considered to have voted for a previously designated 'default' candidate. The law does not permit such an imposition of an unconstitutional default.").

Moreover, a presumption that a worker wishes to dissent is an appropriate background rule for deciding cases. In the relationship between the worker and the union, the original position is that the union may not take the worker's earnings. This Court has held that unions have no constitutional right to deduct dues or shop fees from workers' paychecks. *Beck*, 487 U.S. at 749-50; *see also Ky. Educators Pub. Affairs Council v. Ky. Registry of Election Fin.*, 677 F.2d 1125, 1134 (6th Cir. 1982) ("[The union] has no constitutional right to

a check-off or payroll deduction system for political fund raising."). Any deviation from the original position must be justified by the party seeking to alter it, under the classic rule "*ei incumbit probatio qui dicit, non qui negat*" (i.e., "the burden is upon the one who asserts, not the one who denies"). *See further United States v. U.S. Gypsum Co.*, 67 F. Supp. 397, 446-48 (D.D.C. 1946), *overruled on other grounds*, 333 U.S. 364, 388 (1948); 1 Simon Greenleaf, *Evidence* § 74 at 103 (10th ed. 1860).

The party seeking to alter the *status quo* bears the burden of justifying such an alteration. *See* Anthony de Jasay, *Justice and Its Surroundings* 150-51 (2002). Here, this burden means that the union must provide justification for interfering with a worker's right to her pay. The Court has allowed states to alter the *status quo* in certain limited circumstances, by granting unions the privilege of deducting fees directly from nonmembers paychecks, but in the absence of justification, workers cannot be required to subsidize the union. A presumption of dissent parallels this basic logical schema.

3. Requiring Workers To Assert Objection Chills Dissent

It appears that the *Hudson* Court hoped to minimize the inconsistency between strict scrutiny and the *Street* presumption of conformity when it remarked that the burden on a worker is "simply" to make her objection known. *Hudson*, 475 U.S. at 306 n.16. But of course, this is precisely the burden that is indefensible, given this Court's refusal to presume that a person has waived her constitutional rights.

Nor is the *Street* requirement a "simple" matter. Given the pressure to conform that unions exert, as well as their record of violence against nonconforming

workers, *see*, *e.g.*, Chavez & Gray, *supra*, at 139-58, it is often extremely difficult and even dangerous for dissenting workers to voice their objection to union policies. *Id.*; *see also* George C. Leef, *Free Choice for Workers: A History of the Right to Work Movement*, 38-40 (2005). Requiring workers affirmatively to assert their objections, instead of requiring unions to obtain consent from workers who support the union's efforts, only exacerbates the social pressure that chills dissent in the workplace. There is a constitutional dimension to this chilling effect, because, as this Court has recognized, government can employ a combination of state action and private action so as to pressure dissenters and violate essential First Amendment interests. In *Patterson*, 357 U.S. 449, the state tried "simply" to require the NAACP to disclose its membership lists. The Court recognized that there was nothing "simple" about it:

> [C]ompelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as . . . governmental action . . . . This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. When referring to the varied forms of governmental action which might interfere with freedom of assembly, it said in *American Communications Ass'n v. Douds*, [339 U.S. 382, 402 (1950)]: "A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature." Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. *Inviolability of privacy in group association*

> *may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.*

Id. at 462 (emphasis added). For similar reasons, requiring a worker to make her objections known requires a worker to draw attention to herself, and raises the possibility of retaliation and hostile treatment. Although an opt-in provision need not guarantee anonymity, it would help prevent the union from using a combination of government and social pressures to stifle dissident beliefs.

The *Patterson* Court cited Justices Douglas and Black's concurring opinion in *United States v. Rumely*, 345 U.S. 41, 57 (1953), as a further example of the combination of government and private action that can stifle freedom of speech. There, the Justices warned that requiring the press to identify its customers to the government on demand would lead to an alarming chilling of speech, because dissenters would "be subjected to harassment that in practical effect might be as serious as censorship." *Id.* Although "no legal sanction [was] involved" in the bookseller's refusal to disclose the information, "the potential restraint [was] . . . severe." *Id.*

Workers who do not wish to have their earnings taken from them to support political speech should not be forced to state their objections before exercising their right not to speak. Such a requirement forces dissidents to mark themselves for potential harassment and retaliation in a way that an "opt-in" requirement would not. Although workers who choose not to "opt-in" would not remain anonymous, the ability to make their decisions in private and register those decisions before a political campaign begins

would protect them from the individual exposure and peer pressure that the current presumption of conformity enshrines. The current presumption stifles dissent and should be overruled.

4. Abandoning the Requirement That Workers Affirmatively Object to the Spending of Their Money on Political Campaigns Would Not Implicate *Stare Decisis*

a. The *Street* Presumption of Conformity Was Dicta

The presumption of conformity originated in dicta in *Street*, and would implicate *stare decisis* concerns only if *Abood* converted the dicta to a holding, which is by no means clear. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 626 (1935). *Street* was a statutory interpretation case, in which the Court held that the Railway Labor Act did not authorize unions to spend members' dues on political speech with which workers disagreed. The Court declared that "[t]he safeguards of [section] 2, Eleventh [of the Act] were added for the protection of dissenters' interest, but dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." 367 U.S. at 774. Thus the requirement of asserting an objection was statutory, not constitutional. *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. Allen*, 373 U.S. 113, 119 (1963), was also a statutory interpretation case involving the Railway Labor Act.

In *Abood*, the Court appeared to recognize that the language in *Street* was dicta, when it held that workers are not required to identify with precision which political candidates and causes they wish not to support. *Abood*, 431 U.S. at 241. Such an exacting requirement "would confront an individual employee

with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure," the Court noted. *Id.* "It would also place on each employee the considerable burden of monitoring all of the numerous and shifting expenditures made by the Union that are unrelated to its duties as exclusive bargaining representative." *Id.*

It was not until *Hudson* that this Court suggested that "the nonunion employee has the burden of raising an objection" as a constitutional matter (since *Hudson* was brought under the First and Fourteenth Amendments rather than the statute interpreted in *Street*), 475 U.S. at 306, but even this was not essential to the holding in *Hudson*, which was that the procedures adopted by the union for dealing with objections was unreasonably burdensome. *See id.* at 309. In fact, this Court has simply held that the Railway Labor Act requires a worker to assert her rights, and, in *Hudson*, adopted regrettably imprecise language suggesting that the First Amendment requires workers to assert their objections. This dicta warrants no *stare decisis* effect.

b. Even If the Presumption of Conformity Is a Rule of Law, It Should Be Overruled

Even if it is not dicta that workers must bear the burden of asserting their objections to the spending of their monies on political campaigns, this Court should overrule that requirement. "Unless inexorably commanded by statute, a procedural principle of this importance should not be kept on the books in the name of *stare decisis* once it is proved to be unworkable in practice; the mischievous consequences to litigants and courts alike from the perpetuation of an

unworkable rule are too great." *Swift & Co., Inc. v. Wickham*, 382 U.S. 111, 116 (1965).

First, in the realm of constitutional interpretation, considerations of *stare decisis* are at their weakest. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). As the Court in *McLean Credit Union* noted, it is appropriate to overrule previous decisions when intervening changes have "removed or weakened the conceptual underpinnings from the prior decision." *Id.* at 173. This has happened with regard to the presumption of conformity created by *Street* and other cases: the unions' purposeful evasion of this Court's workers' rights decisions has proven that presumption to be unworkable.

In *Lawrence v. Texas*, 539 U.S. 558, 577 (2003), the Court held that it is appropriate to overrule a prior decision when it "does not withstand careful analysis," which the *Street* presumption does not. In addition, there has been no individual or social reliance on the presumption of conformity that would justify continuing to require workers to assert their objections rather than requiring unions to justify the taking of workers' earnings for political purposes. *Cf. id.* Many workers are unaware of the rules governing agency shop fees and union dues, and have no settled expectations with regard to them. While some unions have come to rely on the presumption of conformity, that reliance has led to abuse. Finally, in overruling a prior decision, the *Lawrence* Court found that the older case "itself cause[d] uncertainty, for the precedents before and after its issuance contradict its central holding." *Id.* The same can be said of the *Street* presumption. *Abood*, *Hudson*, and other cases have repeatedly found that labor unions have adopted burdensome procedures to restrict the rights of workers. In *Hudson*, 475 U.S. at 306 n.16, the Court

sought to minimize the *Street* presumption, by declaring that it "simply" required a worker to assert an objection, which again demonstrates the essential unworkability of the presumption of conformity. And the Court found that the burden imposed by the union on workers asserting their objections was, indeed, too severe.

Considerations of *stare decisis* should not lead this Court to require workers to assert their objection to the taking of their earnings for the subsidizing of union political speech. The burden should rest with the union to obtain consent at the outset.

B. Procedural Due Process Cases Suggest the Kind of Protections This Court Should Adopt in Compelled Speech Cases

Requiring the union to obtain consent from workers before taking their earnings for political purposes is warranted by the presumption against the waiver of fundamental rights; by the strict scrutiny applied when state laws interfere with First Amendment rights; and by the principles of fundamental fairness protected by several other clauses of the Constitution. Cases addressing these other clauses offer useful guidance in this case as well.

1. When Taking Property or Liberty from Citizens, Due Process Requires a Pre-deprivation Procedure Whenever Feasible

When government intends to deprive a person of a liberty or property right or even a benefit, the Due Process Clause requires the government to observe certain procedures to ensure that the person has a fair opportunity to object, present her side of the story, and

otherwise defend her interests. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), this Court held that when government intends to terminate welfare benefits, it must accord the recipient a pre-termination hearing. Protecting persons against "grievous loss," *id.* at 263, is best effected by providing such a hearing, because the risk of erroneous deprivation outweighs the benefit to the state that would be gained by providing only a post-deprivation opportunity to be heard. *Id.* And that was in a case dealing with benefits provided by the government, not income actually earned by the employee as is at issue here.

In *Parratt v. Taylor*, 451 U.S. 527 (1981), this Court explained that a post-deprivation proceeding may satisfy the Due Process Clause when "the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process [is] coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial [deprivation]." *Id.* at 539. The Court emphasized that only "impracticability" would justify dispensing with a pre-deprivation hearing. *Id.* at 540. In *Parratt*, for example, the petitioner complained of the negligent loss of his toy model kit, which was a "random and unauthorized act by a state employee." *Id.* at 541. It was "difficult to conceive" of how the state could provide a pre-deprivation hearing to prevent such harm. *Id.*

Goldberg, *Mathews*, and *Parratt* require that, when the state proposes to take property, or even a government-provided benefit, it must provide a person with an opportunity to object *before* the deprivation, unless doing so would be "impracticable," *Parratt*, 451 U.S. at 541, or where some exigency requires speedy action by the state. *Id.* at 539. The state may also substitute a post-deprivation remedy when the burden on the state would be severe, and the risk of serious harm to the injured party is not significant. *Mathews*, 424 U.S. at 333.

Although the present case is not a Due Process case, these decisions provide useful guidance when determining whether the *Street* presumption of conformity satisfies the demands of the First Amendment. The risk of harm here is significant—as this Court recognized in *Hudson*, the First Amendment does not tolerate the risk that a worker's money might be used, even temporarily, to subsidize speech with which the worker disagrees. Only a minimal burden would be imposed on the state if unions are required to obtain consent from workers before spending such exactions on political campaigns. *Cf. Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Employees*, 466 U.S. 435, 444 (1984) ("[A]lternatives, such as advance reduction of dues . . . place only the slightest additional burden, if any, on the union."); *Miller*, 103 F.3d at 1253 ("An annual mailing to a union's contributing members, asking them to check a box and to return the notice to the union, would seem to suffice under the statute."). And no exigency requires speedy action by the state. All of the reasons this Court has found to justify requiring *pre*-deprivation procedures are present in this case, militating in favor of requiring unions to obtain permission from workers *before* employing state power

to take workers' earnings for funding political expression.

2. Requiring Workers To "Opt-in" Is the Most Effective "Concrete Constitutional Guideline" for Assuring Pre-deprivation Protection for Workers

The most efficient way to provide a worker with protection and to abide by basic considerations of fairness is to adopt an "opt-in" requirement. Employing a presumption of dissent, and thus requiring unions to obtain consent *before* spending workers' money on political expression, would be an effective, inexpensive concrete constitutional guideline protecting workers' rights.

This Court has a long history of requiring such prophylactic devices as a means of securing important individual rights. For example, the requirement established in *Miranda v. Arizona*, 384 U.S. 436 (1966), is a means of protecting the freedom from self-incrimination in an age of "modern custodial police interrogation." *Dickerson v. United States*, 530 U.S. 428, 434 (2000). In *Dickerson*, the Court affirmed *Miranda*'s prophylactic requirement as a constitutional rule ensuring against the violation of an arrestee's right against self-incrimination. "[T]he advent of modern custodial police interrogation," the Court found, "brought with it an increased concern about confessions obtained by coercion," *Dickerson*, 530 U.S. at 434-35. This heightened risk of Fifth Amendment violations warranted the implementation of "'concrete constitutional guidelines for law enforcement agencies and courts to follow.'" *Id.* at 435 (quoting *Miranda*, 384 U.S. at 442).

A similar situation is presented here. Allowing unions with the active logistical support of the state to adopt post-deprivation remedies, such as administrative hearings and rebates, has not succeeded in protecting the rights of workers. The advent of modern union funding—through direct paycheck deductions, as opposed to requiring overt payment by a worker—as well as the conscious effort by unions to evade the requirements of this Court's decisions, bring with them an increased "risk that [dissenters'] funds will be used, even temporarily, to finance ideological activities" with which they disagree. *Abood*, 431 U.S. at 244. The Court should adopt a concrete constitutional guideline for unions and states to follow which will prevent violations of workers' First Amendment right not to subsidize union political activities.

The simplest and most efficient guideline available is to require unions to obtain affirmative consent from workers before taking their money for political activity. In *Miller*, 103 F.3d at 1253, the Sixth Circuit rejected a union's challenge to an "opt-in" requirement, pointing out that it served an important state interest in protecting the rights of the dissenting minority, and ensuring "that political contributions are in accordance with the wishes of the contributors." 103 F.3d at 1253. Moreover, the Court found that it "border[ed] on the frivolous" to claim that requiring workers to consent would impose a severe burden on the union. *Id.* at 1253. More importantly, whatever burden it imposes on the union is well justified, because it is the union that seeks to take the workers' funds for political purposes. It is legitimate to require it to bear the burden of assuring that it does so in a constitutional manner.

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be *reversed*.

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Respectfully submitted,

*DEBORAH J. LA FETRA
HAROLD E. JOHNSON
TIMOTHY SANDEFUR
**Counsel of Record*
Pacific Legal Foundation
3900 Lennane Drive, Ste. 200
Sacramento, CA 95834
Telephone: (916) 419-7111
E-mail: djl@pacificlegal.org
Counsel for Amicus Curiae Pacific Legal Foundation

JOHN C. EASTMAN
ANTHONY T. CASO
Center for Constitutional Jurisprudence
One University Drive
Orange, CA 92886
Telephone: (714) 628-2530
Counsel for Amicus Curiae Center for Constitutional Jurisprudence

J. SCOTT DETAMORE
Mountain States Legal Foundation
2596 South Lewis Way
Lakewood, CO 80227
Telephone: (303) 292-2021
Counsel for Amicus Curiae Mountain States Legal Foundation

ILYA SHAPIRO
Cato Institute
1000 Massachusetts Ave. NW
Washington, DC 20001
Telephone: 202-842-0200
Counsel for Amicus Curiae Cato Institute