

**IN THE SUPREME COURT OF
THE UNITED STATES**

WASHINGTON,

Petitioner,

v.

WASHINGTON EDUCATION ASSOCIATION,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

**MOTON FOR LEAVE TO FILE SUPPLEMENTAL
BRIEF**

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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May 15, 2007

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**MOTION FOR LEAVE TO FILE SUPPLEMENTAL
BRIEF**

Petitioner, State of Washington, respectfully moves, pursuant, to Rule 25.5, for leave to file the attached Supplemental Brief for the Petitioner.

This case was consolidated with *Davenport v. Washington Education Association*, Dkt. No. 05-1589, and argued on January 10, 2007. The Question Presented is whether the requirement in Wash. Rev. Code § 42.17.760 that nonmembers of a union must affirmatively consent (opt-in) before their fees may be used to support the union's political agenda violate the union's First Amendment right. Pet. i. On May 11, 2007, Washington Governor Christine O. Gregoire signed House Bill 2079 into law. HB 2079 prospectively amends Section 760. On May 11, 2007, respondent Washington Education Association (WEA) filed a motion for leave to file a supplemental brief and a supplemental brief bringing this development to the attention of the Court. The State's supplemental brief responds to that filed by the WEA and explains why the amendment to Section 760 has no bearing on the case currently pending before the Court.

Respectfully submitted,

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

Petitioner, State of Washington, submits this supplemental brief in response to the supplemental brief filed by the Washington Education Association (WEA) calling the Court's attention to H.B. 2079, 6th Leg., 2007 Reg. Sess. (Wash. 2007) (App. A), which amended Wash. Rev. Code § 42.17.760 (2006), the statute at issue in this case. We have three points to make.

First, we agree with the WEA that the amendment to Section 760 does not render this case moot. Supp. Br. Resp't at 3. The trial court found that the WEA violated prior Section 760 and granted judgment in favor of the state in the amount of \$590,375. This represents a civil penalty, costs, and attorney's fees. Pet. App. 96a ¶ 21; 98a ¶ 33; and Pet. App. 6a. The amendment to Section 760 does not affect this judgment. Thus, there continues to be a live case or controversy between the State and the WEA.

Second, the amendment to Section 760 is not relevant to the Question Presented—whether prior Section 760 violated the WEA's First Amendment rights. Prior Section 760 provided:

A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a

political committee, unless affirmatively authorized by the individual.

The WEA stipulated that it committed multiple violations of Section 760 during the 1999-2000 fiscal year. Pet. App. 122a. The trial court found that from fiscal year 1996 to 2000, the WEA used the fees of approximately 8,000 nonmembers for contributions or expenditures to influence an election or to operate a political committee without the nonmembers' consent. Pet. App. 96a ¶ 20-21. The amendment to Section 760 prospectively defines use by adding the following language to the statute:

A labor organization does not use agency shop fees when it uses its general treasury funds to make such contributions or expenditures if it has sufficient revenues from sources other than agency shop fees in its general treasury to fund such contributions or expenditures.

H.B. 2079, § 1(2), 6th Leg., 2007 Reg. Sess. (Wash 2007).

The amendment to Section 760 does not apply to the finding that the WEA violated the prior statute. While the WEA challenged the trial court's findings in state court, it has not done so in this Court. Thus, the only issue before this Court is the constitutionality of prior Section 760, not whether the WEA violated that statute.

Third, the WEA states that it urged the trial court to read the term "use" in Section 760 "along the lines of the statutory gloss provided by House Bill

2079 in order to avoid any question of the statute's constitutionality." Supp. Br. Resp't at 3. Under H.B. 2079, the WEA does "not use agency shop fees when it uses its general treasury funds to make such contributions or expenditures if it has sufficient revenues from sources other than agency shop fees[.]" H.B. 2079 § 1(2). In other words, if the WEA has sufficient member dues in its general treasury to make the expenditure, it will be deemed not to have used nonmember agency fees to make the expenditure. Nonmember agency fees will be deemed to be used exclusively for purposes other than influencing an election.

However, without H.B. 2079, the interpretation suggested by the WEA would not have been possible. As this Court explained in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 238 n.35 (1977), if "the union's total budget is divided between collective bargaining and institutional expenses and if nonmember payments, equal to those of a member, go entirely for collective bargaining costs, the nonmember will pay more of these expenses than his pro rata share." In that case, the "member will pay less and to that extent a portion of his fees and dues is available to pay institutional expenses. The union's budget is balanced. By paying a larger share of collective bargaining costs the nonmember subsidizes the union's institutional activities." *Id.*

This was the reason the trial court rejected the WEA's interpretation of the term "use" in prior Section 760. According to the trial court, the logical extension of such WEA's position is that the union "would, as a result of such fees, have more money to spend than if they had not collected them. If those

funds could be construed to be spent only for non-political purposes, the WEA would still, obviously, have more monies to spend from other funds for political purposes." Pet. App. 106a. The trial court concluded that this was "a clear-cut use of the total funds available for the given purposes in proportion to the source of the funds. While the percentage might be small, the agency fees are nevertheless used as a part of the over-all total expenditures, some of which were for prohibited purposes." Pet. App. 106a-107a.

The State continues to urge the Court to reverse the judgment below.

Respectfully Submitted.

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APPENDIX A

HOUSE BILL 2079

AN ACT Relating to use of agency shop fees; amending RCW 42.17.760; 2 and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. RCW 42.17.760 and 1993 c 2 s 16 are each amended to read as follows:

(1) A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.

(2) A labor organization does not use agency shop fees when it uses its general treasury funds to make such contributions or expenditures if it has sufficient revenues from sources other than agency shop fees in its general treasury to fund such contributions or expenditures.

NEW SECTION. Sec. 2. This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately.