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PRESS RELEASE
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Supreme Court Asked to Reject Effort to Extend *McConnell v. FEC* to Govern Union "Opt-In" Requirement

On November 8, the James Madison Center for Free Speech asked the Supreme Court to reject an effort to extend a statement in *McConnell v. FEC*, 540 U.S. 93 (2003), into a union-regulation context where it has no application. The Madison Center made its argument in an amicus curiae brief that it filed on behalf of the National Federation for Independent Business Legal Foundation in the consolidated cases of *Davenport v. Washington Education Association* ("*WEA*") (No. 05-1589) and *Washington v. WEA* (No. 05-1657). The Campaign Legal Center made the effort to extend *McConnell* in its own amicus curiae briefs (one before and one after the Court accepted the case for review).

At issue in these consolidated cases is Washington State's requirement that unions obtain consent from nonmembers before using the "nonchargeable" portion of the nonmembers' "agency fees" for political activity. "Agency fees" are amounts equal to union dues that Washington compels non-union-member employees in union shops to pay to the union. Included in the mandatory agency fee is a "nonchargeable" amount, i.e., the amount not used by the union for collective bargaining but for other activity such as political activity. Nonmembers willing to make public their objection to the union's use of nonchargeable amounts may receive a refund. For those nonmembers unwilling to publicly state this objection (which could be for a range or reasons), Washington has implemented the opt-in requirement to assure that nonmembers' rights are not violated by compelled association (with the union) and compelled speech (by having their money fund union speech).

The Campaign Legal Center ("CLC") relied heavily on campaign finance cases and especially on *McConnell's* statement that the PAC alternative "provided corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy." 540 U.S. at 203). The Madison Center advised the Court that, while the opt-in requirement was constitutional, it was not because of *McConnell* or any campaign finance decision. The *McConnell* statement was limited to the unique context where the government had prohibited corporations and unions from political activity. But since Washington did not ban corporations and unions from direct involvement in political activity the premise of *McConnell's* statement was absent. So *McConnell* did not govern.

The Madison Center suggested that the CLC appeared to be pursuing an agenda requiring that all corporations and unions obtain express consent from any shareholders, donors, or members before using money for political purposes. However, where people voluntarily associate with a corporation or union, such consent should be assumed, the Madison Center argued. Only in the context of state-mandated compulsion for nonmembers to pay nonchargeable amounts would this assumption change, due to questionable voluntariness.

The Madison Center proceeded to show that on the facts of these consolidated cases, WEA was in no way prohibited from free speech or association, or even burdened in its exercise, so that these are not properly campaign finance cases and the proper standard of review for the opt-in requirement is the low-level rational basis test (not strict scrutiny). The context of compulsion readily provided the rational basis for the op-in requirement.

James Bopp, Jr., attorney for the NFIB Legal Fund in drafting this brief, comments: "Where people voluntarily associate with a corporation or union by paying money, that corporation or union is free to use that money for any lawful purpose, which in this case includes political activity. A similar effort to require consent for political activity from person who provide money as voluntary members, shareholders, and donors has been repeatedly rejected in Congress, including as an amendment to the Bipartisan Campaign Reform Act of 2001. It was rejected then and should be now. It is not required by *McConnell* or the Constitution."

The amicus curiae brief is available at the James Madison Center for Free Speech website, www.jamesmadisoncenter.org under the "Campaign Finance Reform" tab.

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