TESTIMONY BY DAVID S. FORTNEY
ON COMPELLED POLITICAL SPEECH BEFORE THE
UNITED STATES SENATE COMMITTEE ON RULES AND ADMINISTRATION
APRIL 12, 2000

Mr. Chairman and distinguished Members of the Committee, my name is David Fortney. It is a privilege to appear before this Committee to address the law regarding "compelled political speech." In my testimony, I want to address three areas. First, I want to discuss what "compelled political speech" means, and to identify the circumstances in which First Amendment protections arise. Next, I want to turn to the substantive area in which compelled political speech has been most fully developed, in the context of the federal labor law interpretations by the courts and the National Labor Relations Board. Finally, I want to briefly comment on several bills that are pending, and discuss how these measures address compelled political speech.

From the outset, the founding fathers of our great country recognized that compelling individuals to support views with which they disagree is antithetical to the basic First Amendment concepts that an individual is entitled to his or her own beliefs. Indeed, Thomas Jefferson stated that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."[1] Mr. Jefferson's admonition is as compelling today as when he spoke those words over 200 years ago.

I. What is Compelled Political Speech?

As stated by the Supreme Court, "at the heart of the First Amendment is the notion that an individual should be free to believe as he will." *Abood v. Detroit Board of Education*, 431 U.S. 209, 234-235 (1977) (citations omitted). In tandem with the freedom of an individual to believe in what he chooses, the First Amendment also guarantees an individual the "freedom to associate for the purpose of advancing beliefs and ideas," *id.* at 233, as well as the freedom "to refrain from doing so, as he sees fit." *Id.* at 222. Accordingly, an individual has the constitutional right to decide what he wants to believe and how he wants to express those beliefs, whether individually or collectively.

The term "speech" is very broadly defined under the First Amendment, and includes both expression and conduct. "Speech" clearly includes the expression of beliefs and views. It also

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[1] *Abood v. Detriot Board of Education*, 431 U.S. 209, 234 n.31 (1977) (*quoting* I. Brant, James Madison: The Nationalist 354 (1948)).

includes the use of financial resources for a political purpose, *see, Abood*, 431 U.S. at 234 (citing *Buckley v. Valeo*, 424 U.S. 1 (1976) (holding that the First Amendment protects contributions to an organization used to disseminate a political message)), as well as the decision to support a particular political candidate, *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 657 (1990), and to lobby on a legislative level for a particular issue, *Lehnert, et. al. v. Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991).

Generally, an individual who joins an organization subscribes to, or is perceived to subscribe to, the organization's viewpoints and ideologies. Thus, by joining an organization, the individual has chosen to exercise his or her freedom to choose the individual's beliefs and to express the individuals' views in conjunction with like-minded individuals. On the other hand, compulsory membership in an organization "impact[s] upon [individuals'] First Amendment interests." *Abood*, 431 U.S. at 222. Compulsory membership fosters "compelled speech," which, by definition, interferes with an individual's freedom to choose his beliefs and how he wants to express those beliefs to his own satisfaction. Thus, instead of shaping his beliefs with "his mind and his conscience," *Abood*, 431 U.S. at 235, an individual is forced to adopt a viewpoint with which the individual may disagree, or is perceived as having adopted a viewpoint with which the individual may disagree. *See Keller v. State Bar of California*, 496 U.S. 1, 17 (1990) (plaintiffs' request for an injunction "prohibiting the State Bar from using its name to advance political and ideological causes or beliefs").

II. The Application of the Compelled Political Speech Limitations in the Labor Law Context and Other Areas

There have been numerous judicial decisions that have developed and applied the compelled political speech doctrine, particularly under the nation's labor laws.

A. Labor Law's "Germaneness" Standard Protects Individual's Rights and Balances Other Interests

In the labor and employment setting, "compelled speech" most often arises within the context of a union shop or agency shop wherein nonunion members are required, as a condition of employment, to pay a service or agency fee in lieu of a union membership fee. By way of brief background, the compelled speech issue arises in nthe labor law context because of the application of union security clauses, which are permitted under the National Labor Relations Act ("NLRA" or "Act"), as amended, and generally provide that employee who works for the employer must become a member of the union and pay dues as a condition of continued employment. See Section 8(a)(3) of the Act, included as Appendix "A" hereto. The states are permitted by Section 14 of the NLRA, as amended, to prohibit union security agreements. Currently 21 states, commonly known as right to work states, prohibit union security agreements. See Appendix "B" for the text of Section 14, and a listing of the right to work states. Although Section 8(a)(3) provides that unions may negotiate a clause requiring "membership" in the union, the membership condition can be satisfied by paying the union an amount equal to the union's initiation fees and dues. *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 37 (1998). Such

agency fees are often referred to as the "financial core" of support that may be required for the Union. *NLRB v. General Motors Corp.*, 37 U.S. 734, 745 (1963). In negotiating the union security agreements, the union must satisfy its statutorily implied duty of fair representation "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). In response to nonmembers objections to the union's use of their mandatory fees for activities not related to collective bargaining, the Supreme Court balanced Congress' interest in promoting industrial peace and alleviating the problem of "free riders"[2] against the infringement on a nonmember's First Amendment rights by compulsory membership. The Court held that the fees paid by nonmembers could not be used by the union "for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to [the union's] duties as collective bargaining representative." *Abood,* 431 U.S. at 235 (public sector union); *Communication Workers of Am. v. Beck*, 487 U.S. 735 (1988) (private sector union).

Instead, the Supreme Court developed a constitutional rule that limits the use of any required subsidies to speech "germane" to the purposes of the organization requiring support. The Court's holding was based in part on "the proposition that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment," and that an individual had a right to contribute to an organization for the purpose of "spreading a political message" which he supported and the right to not contribute to an organization because he did not subscribe to that particular viewpoint. *Abood*, 431 U.S. at 234. The Court noted that "[a]n employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative" and held that to compel an individual to provide financial support for an activity undertaken by the union to advance a position which it chose to advocate but which he did not support or for the expression of a view by the union (for example, political candidates or pending legislation) with which he disagreed -- thereby compelling speech as a consequence of membership -- impermissibly interfered with his freedom to believe as he chose. *Abood*, 431 U.S. at 222. *See also Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Ellis v. Railway Clerks,* 466 U.S. 435 (1984) (holding the same under the Railway Labor Act).

B. The Application of the "Germaneness" Standard in Nonlabor Contexts

The Supreme Court's decision in *Abood* has been applied in other contexts. For example, in *Keller v. State Bar of California*, 496 U.S. 1 (1990), the Court, relying on *Abood*, held that the state bar could not use compulsory membership dues to fund activities which were not germane to the goals and purposes of the state bar, which included regulating the legal profession and improving the quality of legal services. To underscore its holding, the Court stated that compulsory dues could not be "expended to endorse or advance a gun control or nuclear weapons freeze initiative" and that the dues could be "spent for activities connected with

[2] "Free riders" are individuals who enjoy the benefits of union representation, but do not pay union dues or agency fees in lieu of dues. *See Machinists v. Street,* 367 U.S. 740, 764 (1961) and *Communications Workers v. Beck,* 487 U.S. 735, 753-754 (1988).

disciplining members of the bar or proposing ethical codes for the profession." *Keller*, 496 U.S. at 16.

Consistent with the case-by-case approach it follows, the Supreme Court has recognized that the standard of "germaneness" is not always workable. For example, within the last month, the Court in *Board of Regents of the University of Wisconsin System v. Southworth*, No. 98-1189, 2000 U.S. LEXIS 2196 (March 22, 2000) concluded that the "germane" standard was unworkable in sustaining students' compulsory student activity fees at a state university. The activity fees were made available to various student activities and organizations, including those advocating views with which the objecting students disagreed. The Court ruled that the proper measure, and the principal standard of protection for objecting students, is the requirement of viewpoint neutrality "in the allocation of funding support." 2000 U.S. LEXIS 2196, *27. The Supreme Court distinguished *Abood* and *Keller* based on the different context in which *Southworth* arose – an academic setting which was suppose to foster exposure to many, sometimes conflicting, views from which the students could choose not to associate. In contrast, the union shop setting in *Abood* and the bar association in *Keller* compelled membership in an organization which, by law, acted as the non-members advocate and exclusive representative. The provision of educational experience in which students are exposed to many views, including ones with which they disagreed, resulted in the germaneness standard not being workable.

C. The *Beck* Decision

The Supreme Court's seminal decision in *Communication Workers of America v. Beck,* 487 U.S. 735 (1988), is the pole star for charting the limits of compelled political speech via compulsory financial support required from any employee who is represented by a union as the employee's exclusive collective bargaining representative. In *Beck*, the Court interpreted Section 8(a)(3) of the National Labor Relations Act, as amended,[3] and clarified the breadth of support that may be required under the financial core obligations. The provisions in Section 8(a)(3) are, in all material respects, the statutory equivalent of Section 2, Eleventh of the Railway Labor Act, which governs industrial relations in the railroad and airline industries. 45 U.S.C. § 152, Eleventh.[4]

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[3] Section 8(a)(3), which is reproduced as Appendix "A" hereto, was added by the Labor Management Relations Act of 1947, commonly referred to as the Taft-Hartly Act. The addition of Section 8(a)(3) made "closed shop" agreements, requiring employers to hire only persons who already were union members, illegal. Section 8(3) of the original Wagner Act of 1935 (NLRA) permitted closed shop agreements. *Algoma Plywood Co. v. Wisconsin Employment Rel. Bd.*, 336 U.S. 301, 307-311 (1949). The *Beck* decision includes a detailed summary of the historical origins of the enactment of Section 8(a)(3), and the intended purposes of the Taft-Hartley Act were relied on by the Supreme Court in deciding *Beck*.

[4] Section 2 Eleventh is reproduced as Appendix "C" hereto. The Supreme Court's decision in *Beck* relied heavily on the prior decisions interpreting the RLA as not permitting the union, over the objections of non-members, to expend compelled agency fees on political causes. *Machinist v. Street,* 367 U.S. 740 (1961). Section 8(a)(3) and Section 2 Eleventh are

In *Beck,* the Supreme Court ruled that Section 8(a)(3) does not permit unions to exact dues or fees from objecting non-members for activities that are not "germane" to collective bargaining, contract administration, or grievance adjustments. *Beck*, 373 U.S. at 745. Accordingly, the Court defined the "financial core" obligations under Section 8(a)(3) which non-members must pay as the fees and dues necessary to support the union's activities as the employees' exclusive bargaining representative. The Court further held that if the union, over the objections of dues paying nonmember employees, expends funds on non-germane activities unrelated to collective bargaining, contract administration or grievance settlement, then such expenditures violate the union's duty of fair representation and the objecting employees' right to be free from compulsory political support of views which the employee does not freely support.

1. Attempts to Implement *Beck*

The twelve year period following the *Beck* decision has included efforts to implement *Beck* by Executive Order, regulations and judicial and legislative efforts.

a. The Short Lived Executive Order 12800

The first attempt to implement *Beck* was by Executive Order 12800, which was issued by President Bush in 1992. 57 Fed. Reg. 12985 (1992). The Executive Order required federal contractors to post workplace notices informing employees of the rights guaranteed to them under *Beck*, including the right to refrain from joining a union, the right of non-members to object to the use of their mandatory union payments for purposes such as political activities not related to matters associated with collective bargaining, and the right to seek appropriate refunds and reductions in future payments. The obligations under the Executive Order were to be administered by the Secretary of Labor, who was given authority to impose sanctions, including debarment from federal contract opportunities, for non-compliance.

Executive Order 12800 was short lived. On February 1, 1993, within a month of being sworn into office, newly-elected President Clinton rescinded President Bush's Executive Order stating that the recission was necessary to restore a balance in America's workplace. Executive Order 12836, 58 Fed. Reg. 7045 (1993). Following the recission of Executive Order 12800, there have been no further attempts to implement *Beck* using the Executive Order process.

b. Unsuccessful Rulemaking Efforts

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statutory equivalents, *Ellis v. Railway Clerks,* 466 U.S. 435, 452 n. 13, (1984). The Supreme Court in *Beck* interpreted Section 8(a)(3) as imposing the same limitations as exist under Section 2 Eleventh of the RLA. *Beck,* 487 U.S. at 762-763.

Note that neither the NLRA nor the RLA governs the collective bargaining relationships of the employees of the States or any political subdivisions. *See* 29 U.S.C. §152(2) (definition of NLRA "employer" excludes States) and 45 U.S.C. §§151, First and 181 (definition of RLA-covered carriers).

The executive agencies also tried to implement *Beck* through various regulatory efforts, all of which proved to be ultimately unsuccessful. Initially, the U.S Department of Labor ("DOL") promulgated regulations to implement Executive Order 12800, 57 Fed. Reg. 49588, to be codified as 29 C.F.R. Part 470, which became effective on December 2, 1992. Following the February 1, 1993 issuance of Executive Order 12836 by President Clinton rescinding Executive Order 12800, the DOL removed the newly added Part 470 and withdrew the regulations implementing Executive Order 12800. 58 Fed. Reg. 15402 (March 22, 1993).

The DOL also issued regulations revising the annual financial reports that unions are required to file under the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"). The regulations, which were published as a final rule on October 30, 1992, modified the annual reporting forms known as LM-2 and LM-3 forms by adding more detailed functional reporting (57 Fed. Reg. 49282) and establishing a simplified form known as LM-4 forms for unions with less than $10,000 in annual receipts. (57 Fed. Reg. 49356). Consistent with the dismantling of Executive Order 12800 and the underlying regulations by the Clinton Administration, DOL postponed the effective date of the LMRDA reporting regulations from December 31, 1993 to December 31, 1994. 57 Fed. Reg. 28304. Thereafter, DOL published regulations on December 21, 1993 rescinding the functional category reporting, and other substantive modifications. 58 Fed. Reg. 67594. The rescissions were described by DOL as "hav[ing] the effect of retaining the general format and scope of the LMRDA labor organization reporting requirements as they have been since 1960." *Id.* The simplified LM-4 form was retained.

The National Labor Relations Board, which has primary jurisdiction over the interpretation and enforcement of the National Labor Relations Act, as amended, also initiated rulemaking to implement *Beck* rights. 57 Fed. Reg. 43635 (September 22, 1992). Ultimately, following a change in composition of the NLRB, the NLRB withdrew its proposed rulemaking. 61 Fed. Reg. 11167 (March 19, 1996). Instead of pursuing rulemaking, the NLRB decided to rely on the backlog of cases to implement *Beck*.

In summary, the attempts to issue regulations have failed to produce any substantive guidance or effective results to assist individuals in understanding and implementing their rights against compelled political speech.

c. Implementation of *Beck* by the NLRB

Following *Beck* and in lieu of issuing regulations, the NLRB has refined its analysis of union security clauses in several cases. The seminal decision was *California Saw & Knife Works*, 320 NLRB 224 (1995), *enf'd. sub nom., Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), *cert. denied sub nom., Strang. v. NLRB*, 119 S. Ct. 47 (1998). *California Saw* involved the discharge of employees who refused to pay any union dues pursuant to a union security clause in the collective bargaining agreement which conditioned employment on the payment of union dues. The Board decided that a union seeking to enforce a union security clause "has an obligation under the duty of fair representation to notify [employees] of their *Beck* rights before they become subject to obligations under the clause" and that the union violates its duty of fair representation if it fails to provide such notice. 220 NLRB at 231, 235.[5] In addition, the Board held that the union is obligated to provide accurate information to bargaining union employees regarding the extent of their financial obligations to the union. *See also Production Workers Union v. NLRB*, 161 F.3d 1047 (7th Cir. 1998) (relying on *California Saw,* the court confirmed the Board's determination the union violated its duty by seeking enforcement of the union's security clause and discharge of employees without first notifying employees of their right to object to the union's expenditures that are not germane to collective bargaining agreement).

The Seventh Circuit Court of Appeals enforced the Board's decision in *California Saw, International Association of Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), on grounds of *Chevron* deference to the Board's administrative expertise. The court affirmed the Board's ruling that the basic agency fee can be computed by pooling all expenditures incurred by the union (local and international) relating to collective bargaining and dividing that number by the number of workers. Thus, the court affirmed the Board's rejection of a more limited reading of "germaneness" that would have resulted in the basic agency fee being calculated based on expenses incurred by the union representing only the employees in a particular bargaining unit, not other units and not workers in other countries, including Canada. Similarly, the court deferred to the Board's ruling that the Union may rely on reports by the their own auditors as opposed to independent auditors or certified public accountants, to provide the financial data.[6]

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[5] The Board ruled that the Union must inform the employee that "he has the right to be or remain a non-member and that non-members have the right (1) to object to paying for union activities not germane to the union's duties as bargaining agent and to obtain a reduction in fees for such activities; (2) to be given sufficient information to enable the employee to intelligently decide whether to object; and (3) to be apprised of any internal union procedures for filing objections." 320 NLRB at 233.

[6] The courts have reached a decision at odds with the Board's decision in *California Saw*. *Ferriso v. NLRB*, 125 F.3d 865 (D.C. Cir. 1997) was premised on the Supreme Court's decision in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 n.18 (1986) in which the Supreme Court noted that a Union must verified the agency fee information that it gives the workers by an independent audit. *See also IAM v. NLRB, supra,* in which the Seventh Circuit, enforcing the NLRB decision in *California Saw*, seeks to distinguish *Ferriso* and *Hudson*.

Finally, in affirming the NLRB's decision in *California Saw*, the Seventh Circuit sustained the NLRB's ruling that the inclusion of the notification to individuals of their *Beck* rights in the monthly newsletter was sufficient. The court rejected the argument that the notice was improperly "buried" inside the newsletter among the articles regarding political candidates and was not designed to be seen by non-members. In reaching the decision, the court rejected arguments that notice by publication is generally considered improper when individual notice, normally by mail, is feasible. *See, e.g., Elmco Properties, Inc. v. Circuit National Federal Savings Association*, 94 F.3d 914, 920-921 (4th Cir. 1996).

The Board in *California Saw* invalidated the "window" provision of the Union's procedures, which provided that a union member who has been paying dues and who decides to quit must opt out of paying dues during a specified open season or wait until the following year to opt out. The Board held that the worker is entitled to start paying the lower amount as soon as he resigns. In affirming the decision, the Seventh Circuit distinguished its prior ruling in *Nielsen v. Int'i Ass'n of Machinists,* 94 F.3d 1107, 1116-1117 (7th Cir. 1996), in which the Seventh Circuit had approved the union's use of an opt out window provision.

Following the issuance of *California Saw*, there was a fairly extended hiatus in the NLRB's issuance of additional guidance. About four years after *California Saw* was decided, in 1999, the Board began to issue a stream of decisions interpreting and applying *California Saw*. For example, the Board recently reaffirmed the rejection of the right of bargaining unit members to resign union membership only during window periods in *Polymark Corp.*, 329 NLRB No. 7 (1999). Similarly, the Board recently affirmed the approach in *California Saw* that expenses need not be charged on a unit by unit basis in *Johnson Controls World Services, Inc.* 329 NLRB No. 56 (1999).

The Board has taken a broad view of "germane" collective bargaining expenses, which include organizing employees in other bargaining units. For example, in *Meijer, Inc.* 329 NLRB No. 69 (1999), the Board, in determining what expenses are properly chargeable to non-members with respect to organizing activities, stated that all active employees, whether or not they are members of the union which represents them, benefit from the organization of other employees. Similarly, in *Connecticut Limousine Services,* 324 NLRB 633 (1997), the Board indicated that organizing expenses may be appropriately charged to non-members if the expenditures were necessary to "preserve uniformity of labor standards in the organized workforce." *Id* at 637.

The language of the union security clause also has been an issue. The Supreme Court held, in *Marquez v. Screen Actors Guild,* 119 S. Ct. 2992 (1998), that tracking the "membership" language in Section 8(a)(3) adequately incorporates and notifies employees of the judicial refinements in *Beck* in its progeny. This rule that has been adopted by the Board in *Carlon, Lamson & Sessions Company*, 328 NLRB No. 154 (1999).

Another issue which has been addressed by the Board involves the timing of notification about *Beck* rights to existing and new nonmember employees. In *California Saw*, the Board concluded that the exercise of *Beck* rights is limited to unit employees who, under *General*

Motors, are not full union members but who pay dues and fees as a condition of employment pursuant to a union security clause and that without notification of both *Beck* and *General Motors* rights, these employees may be mistakenly led to believe that payment of full dues and assumption of full membership was required as a condition of employment. 320 NLRB at 233. *See also Schreiber Foods*, 329 NLRB No. 12 (1999); *Weyerhaeuser Paper Co.*, 320 NLRB 349 (1995). Consequently, the Board held in *California Saw* that newly hired nonmember employees had to be informed of their rights under *Beck* and *General Motors* at the time the union obligated them to pay dues.

The Board's *California Saw* notification requirements were extended to union members in *Weyerhaeuser Paper*, *supra* which held that if union members did not receive notice of their *Beck* and *General Motors* rights at the time they joined the bargaining unit, they had to receive such notice before they become subject to the obligations under the union security clause. The Board held that notice of *Beck* and *General Motors* rights only had to be given once and "is not a continuing requirement." 320 NLRB at 350. Interestingly, the Board's one-time notice requirement with respect to employee rights is at odds with a recent decision by the Court of Appeals for the Fourth Circuit, *Thomas v. Int'l Ass'n of Machinists*, 201 F.3d 517 (4th Cir. 2000). The *Thomas* decision involved a notice provision under Section 105 of the Labor Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 415, which requires every labor organization to inform its members concerning the provisions of the LMRDA. *Thomas* rejected the union's argument that its one-time publication of the LMRDA, in 1959, satisfied its notice provisions.

III. Pending Bills and Protections that Should Be Included If *Beck* is Codified

Some of the current campaign refinance reform bills include provisions purporting to codify *Beck*. The pending bills fall into one of two categories -- either the bills (1) amend the federal election laws, and do not attempt to codify *Beck*, or (2) purport to codify *Beck*, as does the McCain-Feingold Bill, S.26, but actually significantly limit the breadth of *Beck's* protections.

The bills to amend the Federal Election Campaign Act, including the Feinstein-Torricelli Bill, S.2269, and the Haggel Bill, S.1816, amend the Federal Election Campaign Act of 1971. These bills provide a number of enhanced reporting procedures for campaign financing and modifications of contribution limits. These pending bills, however, do not purport to codify *Beck* nor do the substantive provisions directly involve *Beck* rights.

The McCain-Feingold Bill, S.26, and the companion bill H.R.417, include a provision purporting to codify the *Beck* decision by adding a new subsection to section 8 of the NLRA. The *Beck* provisions, included in section 501 of S.26 and H.R. 417, limit objecting non-union members to having their fees reduced *only by the pro-rata share* that such fees are spent on *political and lobbying activities.* In contrast to the restrictive definition included in S.26, and H.R. 417, the Supreme Court's *Beck* decision ruled that objecting non-member employees only had to provide funding germane to "collective bargaining, contract administration and grievance adjustment." By adopting an unduly restrictive definition of *Beck* rights as involving only

political and lobbying activities, the proposed amendment in S.26 and H.R. 417 would allow unions subject to the NLRA to require objecting non-members to pay for union community service projects, union charitable donations, union organizing, strikes supporting other unions and administrative costs relating to these activities. Additionally, the proposed amendments would not affect employees who fall outside of the NLRA, including employees of rail and air carriers and public sector employees.

In contrast to the restrictive approach adopted in S.26 and H.R. 417, the activities that are exempt from compulsory funding are broader than political and lobbying activities, the exempt activities include a broad range of additional activities. For example, in the NLRB's aborted efforts to promulgate regulations to implement *Beck* rights, the Board proposed a definition of non-representational activities that were not germane to the union's performance of its duties as exclusive bargaining representative of the particular bargaining unit. The examples included in the proposed regulations would have exempted objecting non-members from contributing to:

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labor organization publication to the extent the publications report on non-representational activities;

- costs of benefits not available to all bargaining unit employees;
- costs of labor organization building fund;
- lobbying activities;
- promotion or defeat of legislation;
- political campaigns; and
- advertising related to non-chargeable matters and organizing activities

See 57 Fed. Reg. 43635. Clearly the limited protection afforded by S.26 and H.R. 417 would provide significantly reduced protections from what originally was proposed by the NLRB.

The Supreme Court has also addressed the parameters of an objecting non-member proper financial obligations, and has determined that the union is allowed to charge nonmembers for the following activities:

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The costs incurred by a state or national parent union for collective bargaining.

- Portions of a publication which provides information to bargaining unit employees which are neither political or public in nature (i.e., issues concerning teaching and education generally).

- Participation of delegates from the local union in the national convention of the parent union.

See Lehnert, 500 U.S. at 527-532. The Court has also determined that the following activities were not chargeable to a nonmember who objected to the activity:

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Political and electoral speech or contributions.

- Ideological views not germane to collective bargaining or the stated purpose of the organization.

- Lobbying efforts regarding the local taxes for support of public schools and that portion of the union publication which reported these lobbying activities.

- Litigation expenses not concerning the dissenter's bargaining unit and that portion of the union publication reporting such activities.

- Public relations or public speech in support of the profession in general (activities which included informational picketing, media exposure, signs, posters, and buttons).

- Expenses related to the planning of an illegal strike.

See Lehnert, 500 U.S. at 527-532; *Abood*, 431 U.S. at 235; *Keller*, 496 U.S. at 16.

These examples demonstrate that the scope of activities to which nonmembers may object under *Beck* is not solely limited to political campaigns and contributions. By expressly stating, by statutory amendment, that *Beck* rights only apply to political and lobbying activities, the current legislation is, in effect, providing an avenue for unions to compel nonmembers to provide support for other activities to which they might object, contrary to *Beck* and their First Amendment interests.

I appreciate the opportunity to appear before this Committee today, and I would be happy to answer any questions you may have.

Appendix A

Section 8(a)(3) of the National Labor Relations Act, as amended

It shall be an unfair labor practice for an employer–

> (3) by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership [*37] in any labor organization: *Provided,* That nothing in this subchapter, or in any other statue of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization . . . if he has reasonable [***10] grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

29 U.S.C. § 158(a)(3).

Appendix B

Section 14(b) of the NLRA permits states to forbid union security agreements. Section 14(b) of the NLRA states:

> Nothing in the [Act] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which execution or application is prohibited by State or Territorial law.

State laws that prohibit union security agreements are termed "right-to-work" laws. Currently, there are 21 states with "right-to-work" laws in force. These states include: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming. See Ala. Code 25-7-6, 25-7-30 to 25-7-36 (Supp. 1992); Ariz. Rev. Stat. Ann. Const. art. XXV (West 1984) and 23-1301 to 23-1303 (West 1995); Ark. Code Ann. 11-3-301 to 11-3-304 (Michie Supp. 1996); Fla. Stat. Ann. Const. art. 1, 6 (West 1991); Ga. Code Ann. 34-6-20 to 34-6-28 (1998); Idaho Code 44-2001 to 44-2012 (1997); Iowa Code Ann. 731.1 to 731.5 (West 1993); Kan. Stat. Ann Const. art. 15, 12 (1988); La. Rev. Stat. Ann. 23:981 to 23:985 (West 1998); Miss. Code Ann. 71-1-47 (1995); Neb. Rev. Stat. Const. art. XV, 13 (1995); Nev. Rev. Stat. Ann. 613.230 to 613.300 (Michie 1996); N.C. Gen. Stat. 95-78 to 95-84 (1997); N.D. Cent. Code 34-01-14, 34-08-04 (1987); S.C. Code Ann. 41-7-10 to 41-7-90 (Law Co-op. 1986); S.D. Codified Laws Const. art. VI, 2 (Michie 1978) and 60-8-3 to 60-8-8 (Michie 1993); Tenn. Code Ann. 50-1-201 to 50-1-204 (1991); Tex. Lab. Code Ann. 101.051 to 101.053 (West 1996); Utah Code Ann. 34-34-01 to 34-34-17 (1997); Va. Code Ann. 40.1-58 to 40.1-69 (Michie 1994); Wyo. Stat. Ann. 27-7-108 to 27-7-115 (Michie 1997).

Appendix C

Section 2, Eleventh of the RLA states in pertinent part:

> any carrier or carriers as defined in this [Act] and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this [Act] shall be permitted - (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class ….

45 U.S.C. § 152, Eleventh.