TESTIMONY OF LAURENCE E. GOLD
ON BEHALF OF THE AMERICAN FEDERATION OF
LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
BEFORE THE SENATE COMMITTEE ON RULES AND ADMINISTRATION

April 12, 2000

Mr. Chairman and Members of the Committee:

My name is Laurence E. Gold, and I am Associate General Counsel of the AFL-CIO, the national federation of more than 13 million working men and women on whose behalf I am privileged to appear today. I thank you for this opportunity to speak with you about how union workers make their voices heard through political and legislative activities, and why various measures proposed in recent years to stifle their voices are unworthy of consideration and are particularly inappropriate to consider as elements of campaign finance law revision.

I. Introduction

The theme of today's hearing is "compelled political speech." We assume from previous hearings, bills and public statements that the inquiry concerns, with respect to organized labor, the relationships among unions, union members and other represented employees regarding union involvement in the political and legislative processes. It is our understanding that no legislation specifically identified for consideration at this series of hearings addresses that topic. However, S. 1593, the most recent version of the McCain/Feingold bill, includes a provision described as codifying the Supreme Court's decision in Communications Workers of America v. Beck.[1] Although a so-called "paycheck protection"[2] bill, H.R. 2434, is pending in the House, no such legislation has been introduced in the Senate during this Congress. But we are aware of Chairman McConnell's statement last Fall announcing these hearings in which he expressed support of paycheck protection legislation. And, of course, we are well aware that the presumptive presidential nominee of the Republican Party has made paycheck protection a central feature of his campaign finance law revision proposal.

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[1] 487 U.S. 735 (1988).

[2] As applied to the measures discussed in this testimony, the phrase "paycheck protection" is misleading in the Orwellian sense; but like its equally Orwellian sister phrase, "right to work," "paycheck protection" is a recognized shorthand label, and we use the phrase throughout without endorsing it, and spare the Committee the annoyance of seeing it in quotation marks each time.

I will address both paycheck protection and Beck issues in discussing the legal and practical context of how unions, union members and other represented employees interact with respect to union political and legislative activities. In the absence of specific legislation, my testimony generally applies to the full range of paycheck protection proposals that have been introduced since 1997. These have usually included a requirement of individual advance authorization by union members and other represented employees before the union may spend resources derived from those dues or fees on specified matters, always including at least political contributions and expenditures and other election-related activity, and often including lobbying and other public advocacy as well.

As I will explain, federal law already accords non-members represented by unions the option of withholding their financial support for union activities beyond those directly related to collective bargaining and contract administration; and, in 21 states, non-members can pay nothing at all despite the union's obligation to represent them with the same vigor as it does its members. Federal law also already guarantees that union members may participate fully in the democratic governance of their unions. "Paycheck protection" is an unfair and unconstitutional scheme to undermine union democracy and the institutional integrity of unions themselves, and to silence unions and the working families they represent in political and legislative affairs.

II. The Political and Legislative Activities of the Labor Movement

Ever since the labor movement took shape in the Nineteenth Century, unions have been vitally involved in the political and legislative spheres. Unions give voice to millions of Americans who otherwise could not hope to match the power of corporations and other powerful interests in influencing public policy.

Specifically, the AFL-CIO, its 68 national and international union affiliates, and their tens of thousands of local union affiliates engage in substantial legislative and issue advocacy at the federal, state and local levels on matters of particular concern to working families, such as Social Security, Medicare, education, labor standards, health care, retirement plans, workplace safety and health, trade, immigration, the right to organize, regulation of union governance and the role of unions and corporations in electoral politics. Unions also make substantial efforts to familiarize union households with these and other issues, the performances of officeholders in addressing them, and the positions candidates for public office have taken on them. And, unions regularly pursue efforts to register and encourage our members to vote, including substantial non-partisan programs. The labor movement uses every means of communication, including membership meetings, workplace leafleting, newsletters, mail, the Internet and both paid and "free" media, to articulate the issues of greatest concern to working families. And, we seek to build coalitions with allied organizations, such as civil rights groups, for advocacy on behalf of workers.

Unions and working families have no less stake in public affairs then other institutions and citizens. "[U]nions ha[ve] historically expended funds in the support of political candidates

and issues."[3] "It is not true in life," Justice Felix Frankfurter said, "that political protection is irrelevant to, and insulated from, economic interests. It is not true for industry or finance. Neither is it true for labor."[4] Justice Frankfurter further observed, "[t]o write the history of the [railroad] Brotherhoods, the United Mine Workers, the Steel Workers, the Amalgamated Clothing Workers, the International Ladies Garment Workers, the United Auto Workers, and leave out their so-called political activities and expenditures for them, would be sheer mutilation."[5]

Citing Justice Frankfurter's observations, the Supreme Court has held that the National Labor Relations Act (NLRA)[6] protects workers when they engage in concerted political activity to protect their employment interests. As Justice Lewis Powell expressed it in his opinion for the Court, "Congress knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context," and "employees' appeals to legislators to protect their interests as employees" are among the forms of "mutual aid and protection" workers engage in through their unions under the protective mantle of the NLRA.[7] Indeed, unions have just as great and legitimate an interest in public elections involving candidates and ballot measures, which determine lawmaking and public policy, as they do in collective bargaining and the legislative process.

Over the years, the labor movement has led crusades for enactment of the minimum wage and the forty-hour work week, and for laws protecting occupational safety and health, assuring the security of pensions, and prohibiting invidious discrimination in employment. It has done so because union members, acting through the democratic processes of their unions, decided that it was right and proper to do so -- for the sake not just of union members but of all working Americans. Working class and middle class Americans in particular simply can't compete in the political arena with wealthy individuals and large corporations unless they band together through their own organizations. And, today, we in the labor movement continue to advance the interests of working families by leading the effort to preserve and strengthen employee-protective laws; to protect the system of social insurance on which workers and older Americans depend; to put a human face on globalization by promoting fair conditions on international trade; and to stand against proposals that would mute or intimidate the voices of working Americans.

III. Federal Regulation of Political Activity of Unions, Corporations

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[3] Ellis v. Brotherhood of Railway and Airline Clerks, 466 U.S. 435, 447 (1984).

[4] International Ass'n. of Machinists v. Street, 367 U.S. 740, 814-15 (1961) (dissenting opinion).

[5] Id. at 800.

[6] 29 U.S.C. § 151 et seq.

[7] Eastex, Inc. v. NLRB, 437 U.S. 556, 565-66 (1978).

and Other Membership Organizations

The Federal Election Campaign Act (FECA)[8] contains parallel provisions governing the political activities of unions and corporations in connection with federal elections, and to a substantial degree those rules also govern other kinds of membership organizations. FECA precludes unions and corporations from using their treasury funds to make contributions to federal candidates or to make independent expenditures expressly advocating election or defeat of clearly identified federal candidates. But FECA also -- in part in consequence of the Supreme Court's landmark decision in Buckley v. Valeo[9] -- expressly permits union or corporate treasury money to be used for the following activities: communications by a labor organization directed at its members, executive and administrative personnel, and their families on any subject, and the same communications right for a corporation to its shareholders, executive and administrative personnel, and their families; non-partisan voter registration and get-out-the-vote campaigns directed by unions and corporations at these same persons, respectively; and the establishment, administration and solicitation of contributions to a separate segregated fund -- commonly known as a political action committee, or PAC -- to be used by the union or corporation to make contributions or independent expenditures.[10]

The federal ban on union treasury contributions to federal candidates (also applicable to state and local candidates under the laws of a substantial minority of states) means that unions must secure voluntary contributions from their members to their sponsored PACs in order to direct contributions to federal candidates. This strict division between "hard" and "soft" money is often blurred in the public mind when paycheck protection is discussed, in no small measure because proponents of these schemes misleadingly describe dues-based political expenditures as primarily consisting of direct contributions to candidates.[11]

Unmentioned in FECA, but equally as important as the lawful activities described above, unions and corporations can also use their treasury money to engage in public communications other than the express advocacy of the election or defeat of a clearly identified federal candidate. Commonly referred to as "issue advocacy," these communications may concern legislation, elections or both. The Supreme Court and the lower courts have properly recognized substantial protection for such advocacy.[12]

FECA also treats incorporated membership organizations -- which include virtually all significant membership organizations in the country -- in the same manner as for-profit

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[8] 2 U.S.C. §§ 431 et seq.

[9] 424 U.S. 1 (1976).

[10] 2 U.S.C. § 441b.

[11] See, e.g., www. georgwbush.com/issues/domestic/campfin.points.asp.

[12] See, e.g., Buckley v. Valeo, 424 U.S. at 43-44, 76-80; FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 249-50 (1986); FEC v. Christian Action Network, 110 F.3d 1049 (4th Cir. 1997).

corporations with capital stock, and they are subject, then, to the same prohibitions against contributions and independent expenditures but enjoy the same ability to communicate and otherwise engage in political and other associational activity. Any membership organization, whether for-profit or non-profit and whether incorporated or unincorporated, can engage in partisan internal communications and solicitations so long the organization is composed of actual members – that is, those who may be "defined, at least in part, by analogy to stockholders of business corporations and members of labor unions," and therefore whose relationship with their group entails "some relatively enduring and independently significant financial or organizational attachment."[13]

IV. The Democratic Nature of Labor Organizations

Unions are America's most vibrant private mass democratic institutions, daily empowering the millions of workers who combine together to govern them. The decisions unions make to support or oppose legislation or candidates for public office, and the decisions unions make to expend resources in support of these decisions, reflect the views of the majority of union members.

Indeed, the very inception of a union occurs through democratic decisionmaking processes: under Section 9(a) of the NLRA,[14] the predicate for workplace representation by a labor organization is its "designat[ion] or select[ion] for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes." An actual secret ballot election conducted by the National Labor Relations Board (NLRB) typically is held to test that support. And, under NLRA § 9(c),[15] a union that loses the support of the majority of the employees can be decertified, also through an NLRB representation election.

That unions, after their voluntary formation, actually operate democratically is also guaranteed by federal law, primarily the Labor-Management Reporting and Disclosure Act (LMRDA) of 1959.[16] The LMRDA provides that local union officers must be elected at least every three years by secret ballot election, and national union officers must be elected at least every five years either by secret ballot or at a convention of delegates themselves chosen by secret ballot; that member dues may be increased only by these same methods; and, that all union members have an equal right to nominate candidates to run for union office, vote in union elections without fear, favor or discrimination, and exercise the freedoms of speech and association within their unions. The LMRDA assures, then, that decisions in unions are made by either the membership as a whole or by individuals who are both democratically elected by and accountable to that membership

V. The Voluntary Nature of Union Membership

Membership in a union is completely voluntary; there is no such thing as that oft-repeated canard, "compulsory unionism," a phrase that is misapplied to "union security" provisions in

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[13] FEC v. National Right to Work Committee, 459 U.S. 197, 204 (1982).

[14] 29 U.S.C. § 159(a).

[15] 29 U.S.C. § 159(c).

[16] 29 U.S.C. § 401 et seq.

collective bargaining agreements that require *non*-members of unions to pay their fair share of the costs of the union's representation of them. To be sure, Section 8(a)(3) of the NLRA,[17] read literally, permits unions to require "membership" as a condition of employment in the 29 non-right-to-work states. But almost 40 years ago the Supreme Court construed the term to mean only an employee's payment of fees to the union that represents him or her.[18] And, employees who choose full union membership may resign that membership at any time, without restriction.[19]

As for *non*-members, unions must adhere to a "duty of fair representation" of them. "The designation of a union as exclusive representative carries with it great responsibilities," and "in carrying out these duties, the union is obliged 'fairly and equitably to represent all employees . . ., union and nonunion,' within the relevant unit."[20] This means that in the 29 states where union security clauses are lawful, covered employees pay their fair share of that representation and receive *all* of its benefits, including full access to grievance and arbitration processes. But in the 21 "right-to-work" states where union security is unlawful, employees may refuse to pay *anything* to support the union, yet they too are entitled to all the benefits and prerogatives of union representation.

As the Supreme Court has observed, "[a] union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become 'free riders' -- to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees."[21] The requirement that non-members pay their fair share does not infringe these workers' First Amendment rights.[22]

In a series of decisions dating from 1961, the Supreme Court has formulated a set of rules governing the enforcement of such union security agreements in order to "attain the appropriate reconciliation between majority and dissenting interests in the area of political expression," recognizing that "the *majority* . . . has an interest in stating its views without being silenced by

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[17] 29 U.S.C. § 158(a)(3). See also 45 U.S.C. § 152, Eleventh (Railway Labor Act).

[18] NLRB v. General Motors Corp., 373 U.S. 734 (1963). See also Marquez v. Screen Actors Guild, 525 U.S. 33 (1998).

[19] Pattern Makers League v. NLRB, 473 U.S. 95 (1985).

[20] Abood v. Detroit Board of Education, 431 U.S. 209, 221 (1977), quoting International Assn. of Machinists v. Street, 367 U.S. at 761. See also Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 204 (1944).

[21] Abood, 431 U.S. at 221-22. See also Ellis, 466 U.S. at 447.

[22] Railway Employees Dept. v. Hanson, 351 U.S. 225, 238 (1956).

the dissenters."[23] Importantly, the Court stated at the outset of these cases that "dissent is not to be presumed -- it must affirmatively be made known to the union by the dissenting employee."[24]

Under the Court's decisions, employees who choose to be non-member "agency fee payers," as opposed to full union members, cannot be compelled to contribute toward a union's partisan political activity or its ideological and other activities unrelated to collective bargaining and contract administration -- even though these employees benefit from *all* of the union's activities on their behalf.[25] In fact, under the NLRA, workers who believe that a union is acting improperly in processing a Beck request may file a charge against the union with the NLRB; no lawyer is necessary to do so. If the NLRB finds merit in the charge, it will prosecute a complaint against the union -- at no cost to the worker -- and, if it prevails, secure for the worker an appropriate agency fee refund and a future fee reduction.

Separately from the issue of union membership itself, no employee is required to have money automatically withdrawn from his or her paycheck to finance *any* of the union's activities. The NLRA permits unions and employers to negotiate payroll check-off authorization clauses, providing that employees -- as a matter of their own convenience -- *may* authorize the employer to deduct dues or fees from their paychecks and remit them directly to the union, rather than having the employees make the payments personally. Without the employee's express authorization, however, such deductions from pay, and transfers of money from the employer to the union, are illegal.[26] A union member or other represented employee who declines to authorize a payroll deduction for membership dues or agency fee payments, respectively, may fulfill his or her financial obligation by other means of payment, such as mailing a check or paying at a monthly membership meeting.

Most recently, the NLRB and the Courts have been addressing the specifics of the requirements applicable to unions that collect agency fees from non-members under union security clauses. In California Saw & Knife Works,[27] the NLRB (affirmed by the U.S. Court of Appeals for the Seventh Circuit) held that before a union may require a non-member to pay such a fee, the union must inform the non-member of his or her right to object to paying for activities "not germane to the union's duties as bargaining agent" and his or her right to "obtain a reduction in fees for such activities"; and, that a non-member who exercises this right by submitting an objection must be charged a reduced fee reflecting the union's calculation of the

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[23] International Assn. of Machinists v. Street, 367 U.S. at 773 (emphasis added).

[24] Id. at 774.

[25] See generally Abood, supra, (public sector); Ellis, supra (Railway Labor Act); Beck, supra (National Labor Relations Act); Air Line Pilots Assn. v. Miller, 523 U.S. 866 (1998); Lehnert v. Ferris Faculty Assn., 500 U.S. 507 (1991); Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986).

[26] See 29 U.S.C. § 186(c)(4).

[27] 320 NLRB 224 (1995), enf'd sub nom. International Ass'n. of Machinists v. NLRB, 133 F.3d 1012 (7th Cir.), cert. denied, 525 U.S. 813 (1998).

percentage of its overall expenditures devoted to activities germane to collective bargaining. The Board further held that the objecting non-member must be "apprised of the . . . basis for the calculation," must be notified of his or her right to challenge the union's calculations, and is entitled to an impartial decision-maker to resolve any such challenge.

California Saw thus provides dissident workers, who do not agree with the majority's decisions to pursue certain legislative or political ends, with a fully-developed set of rules to protect their rights. Those rules are far more elaborate than anything that exists to protect, for example, dissident corporate shareholders or members of other organizations. And, since California Saw, the NLRB and the courts have vigorously enforced those rules through a series of decisions holding unions liable for violating the law where the unions had failed either to give a Beck notice to all non-members, to establish adequate procedures through which non-members could object to paying for activities unrelated to collective bargaining, or to provide non-members who submitted objections with an adequate breakdown of union expenditures.[28]

Under this legal regime, then, a union member who is so dissatisfied with the decisions of the majority -- concerning political or legislative action, collective bargaining or anything else -- can take the extra Beck step of resigning from membership, and reducing his or her dues obligation to a representation fee alone. These ex-members withdraw all personal financial support for the union's legislative, political, community and charitable programs, shifting a greater burden of paying for them to their fellow workers who remain members, just like any other Beck objector. Yet, even as non-members, they continue to benefit from the union's workplace representation and all its other programs.

The Beck rules offer union-represented workers more financial choices in their union than they enjoy as taxpayers in the society at large. A taxpayer, like a union member, has full political rights in society and can't reduce his or her taxes in order not to pay for a particular disfavored government program. But a union member, unlike a taxpayer, can take the extra step of relinquishing political rights within the union in order to cease dues support for union programs that extend beyond basic workplace representation. Of course, every member who takes that step weakens the union -- the chief reason why the National Right to Work Committee, the Chamber of Commerce and other groups that oppose unions favor the spread of so-called "right-to-work" laws that encourage full free-riding by non-members.

VI. Anti-Union Groups' Concerted Campaign to Enact Paycheck Protection in the States

The proponents of paycheck protection, like the purveyors of right-to-work, speak with high-minded fervor of the need to protect the rights of individual union members and other workers to be free of compulsion to pay for speech with which they disagree. But, in fact, paycheck protection is not a workers' right cause. Rather, it is a strategy of retaliation against working families and their unions for opposing a corporate and anti-worker agenda in Congress and for energizing public opinion against it. The paycheck protection scheme arose as a direct

[28] As Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit has pointed out, the National Right to Work Committee is "merely trying to hamstring the union" in pushing for the most onerous requirements in the wake of Beck. See Gilpin v. AFSCME, 875 F.2d 1310, 1316 (7th Cir.), cert. denied, 493 U.S. 917 (1989).

response to the AFL-CIO's aggressive education and mobilization efforts among working families that in 1996 and 1998 energized millions of members of union households to vote for pro-worker Members of Congress.

Let us not mince words about this: organized labor's revitalized grassroots mobilization and public policy advocacy since 1996 has had a demonstrable and significant impact. It is envied by Labor's adversaries, who have changed their tactics to emulate us, and then have gone further by exploiting newly-discovered means to influence the political process without limitation or disclosure -- and, in all this, sought to overwhelm Labor with their relative financial might. But many of Labor's antagonists aren't satisfied to engage in public debate and political contests on anything approaching a level playing field, or even according to similar rules; instead, they want to cripple the labor movement with "paycheck protection."

Just who is behind paycheck protection? A sprawling network that includes the Chamber of Congress, Americans for Tax Reform, the American Legislative Exchange Council, the Heritage Foundation, the Richard Mellon Scaife apparatus, and numerous other conservative foundations, activists and politicians. These persons and groups have much in common, not the least of which is an absence of any history of support for workers' rights in dealing with their employers. I commend to the Committee a comprehensive and scrupulously researched report about this network prepared by the National Education Association, "The Real Story Behind 'Paycheck Protection': The Hidden Link Between Anti-Worker and Anti-Public Education Initiatives: An Anatomy of the Far Right" (September 1998).

In 1998, this network embarked on a highly publicized crusade to enact paycheck protection bills and initiatives in all 50 states -- and, as explained by Americans for Tax Reform President Grover Norquist, they presented a no-lose proposition: if they prevailed, unions would find it much harder to participate politically; and even if they lost, union resources would be depleted by the campaigns to defeat them.

As paycheck protection proponents continue to learn, however, public opinion is decidedly against them; their plan fell 50 states short. The most dramatic electoral rebuff occurred in June 1998, when Californians voted to reject Proposition 226, a ballot initiative that would have required employees to execute a state-prescribed annual written authorization form before any payroll-deducted monies could be used for a contribution or expenditure to support or oppose either a candidate for state or local office or a ballot measure; precluded unions from using dues and other fees for these purposes absent these authorizations; and reduced the dues or fees paid by those who didn't execute one. Even more tellingly, this direct attack on California labor, funded by Americans for Tax Reform, the Golden Rule Insurance Company and other business and right-wing interests, was decisively rejected by the persons the initiative was supposedly intended to benefit: union members voted 71% to 29% against Proposition 226.

The Proposition 226 campaign revealed the true motives of many paycheck protection backers. For example, as the California Restaurant Association explained in a memorandum to its members why it spent $125,000 (matched "dollar-for-dollar by the National Restaurant Association") to support Proposition 226:

> The Association took this action because restaurant owners and operators have been under attack for years by labor union officials, most notably when unions sponsored Proposition 210 that added $1.50 to the minimum wage . . . . Union officials are also

> sponsoring . . . increased unemployment compensation, increased workers' comp. benefits, mandatory benefits for part-time employees, and imposition of the eight-hour overtime rule, among others.

I dare say that the restaurant industry trade associations would have bristled at the notion that they could spend to promote Proposition 226 only insofar as they had previously secured the prior written authorizations of their members.

The following November, Oregon voters defeated a variation of paycheck protection in an initiative that would have precluded state public employees from authorizing payroll-based deductions for union dues and political contributions to union and other PACs. As in California, union members voted overwhelmingly, by a two-to-one margin, against the ballot measure.

Legislatively, too, paycheck protection was shut out completely in 1998, introduced in bill form in 29 states but passing nowhere. During 1999, largely an electoral off-year, paycheck protection bills were introduced in 18 states, but again not a single one was enacted. And, to date in 2000, in only six states has paycheck protection legislation been introduced, and none have passed.

The proponents of paycheck protection often claim that some states have already adopted legislation like Proposition 226 -- claims the press has sometimes repeated as fact -- but the truth is that *no* state has done so. No state requires unions to gather members' separate individual written permission in order to expend dues-derived income on political activity on behalf of the membership. The legislation that has been enacted in recent years concerns separate, voluntary contributions to separate political action committees and does *not* address the use of union dues.[29] Just as, under FECA, federal PACs sponsored by unions can be funded only by

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[29]In 1992, Washington voters passed I-134, an initiative that extensively revised many aspects of the state's election law. This measure established limits on contributions to state candidates; restricted state officials and legislators from certain solicitations of funds; barred contributions from out-of-state businesses and unions; and precluded public funding for political campaigns. Two of the 36 sections of this sweeping referendum provided that employers could not honor payroll-deducted contributions to political action committees absent annual written re-authorization and barred PAC checkoffs outright for public employees. The state's election commission has confirmed that these rules do *not* apply to union dues collection or union treasury expenditures. And, I-134 was heralded by its backers as a clean government measure. Unlike the California campaign on Proposition 226 -- a proposal that was aimed almost solely at union political participation -- the general campaign debate on I-134 rarely, if ever, discussed that measure's impact on unions.

In 1997, the Idaho legislature enacted an amendment to its election law requiring that political action committees only accept contributions that are deducted from an employee's pay if they are authorized on a yearly basis. This statute too does not affect union dues payments or union treasury expenditures. Idaho Code § 67-6605.

voluntary individual contributions separate from other member payments such as union dues, so many states also bar the use of union dues for contributions to state candidates, and impose varying rules for these state PACs. (The same is true for corporate state PACs.)

It is clear that in the absence of support among the purported beneficiaries of paycheck protection, union members themselves, or any genuine popular or grassroots demand, voters and legislators have come to realize the truth: so-called "paycheck protection" is a non-solution in search of a problem that doesn't exist.

VII. "Paycheck Protection" Is Unwanted By Union Members, And Is Unnecessary, Unfair and Unconstitutional

In sharp contrast to their rejection of paycheck protection, union members strongly support organized labor's increased grassroots mobilization and widely publicized public advocacy since 1996. Independent surveys conducted by Peter D. Hart Associates provide empirical confirmation: 71% of union members supported the special assessment voted at an AFL-CIO convention in March 1996 to fund an especially active effort at member mobilization and public advocacy that year. Additionally, 88% of union members approved of unions urging members to contact their Members of Congress on important issues; 84% approved of union voter guides comparing candidate's positions; 72% approved of running radio and television ads to inform members and other voters about how their representatives voted in Congress; and 90% approved of unions communicating with their members about the elections and encouraging them to vote. Significantly, strong union member support for these activities was bipartisan: of Republican leaning union members, 89% approved of union activities to get out the vote, 76% approved of union voting guides and 65% approved of broadcast ads. The survey research we have commissioned since 1996 reflects similar results, and the daily experience at union meetings, conventions and workplace conversations and other anecdotal evidence regularly demonstrate overwhelming support throughout the labor movement.

Similarly, in 1994, the Michigan legislature enacted an amendment to the state's election law requiring that corporate and union political action committees accept payroll-deducted contributions only from those who give their consent on an annual basis. This statute does not affect union dues payments or treasury expenditures either. Mich. Comp. Laws § 169.255, Sec. 55(6).

Finally, in 1998 the Wyoming legislature enacted extensive amendments to its election law, affecting such matters as record-keeping, registration, write-ins, referenda, initiatives, contributions and enforcement. Also included was a provision similar to those in the three other states that barred political action committees and candidate committees from securing payroll-deducted contributions unless the employee gives annual written authorization. Union dues collection and spending are not affected; in fact, Wyoming already bars unions and corporations from using treasury money to contribute to political candidates and parties. Wyo. Stat. § 22-25-102.

Indeed, the relationship between union political and legislative activity and worker economic interests is something that virtually every union-represented worker knows. Our members know that their unions work to advance their interests through political and legislative action. They know this when they vote for union representation; when they elect their leaders; when they vote to approve collective bargaining agreements containing union security clauses; when they vote on the level of dues they are willing to pay; and when they vote to authorize union programs and activities. Workers make these decisions with their eyes wide open about how their unions participate in the political and legislative spheres. Certainly no one contends that the labor movement makes a secret of these activities. The labor movement is front and center in that regard, and there are no stealth operations or covert front groups when unions communicate with their members, legislators or the public at large.

The manufactured issue of "paycheck protection" didn't take root in California, and hasn't anywhere else, also due to the simple facts that union members already control how their unions engage in politics, through their own participation in union affairs and by electing the officers who are accountable to them; and, non-members who are represented by a union already may opt out of personal financial support for union political spending.

For non-members of unions in right-to-work states, paycheck protection measures are irrelevant because non-members can be complete free-riders at will. For non-members in other states working under union security clauses, their opportunity to choose what they personally finance is already assured by the Beck and Abood procedures enabling them to "opt out" of paying for union political and legislative expenditures by objecting. As the Ninth Circuit has held, this "opt-out" procedure is perfectly adequate to protect the rights of employees, but a

> burdensome "opt-in" requirement . . . *would unduly impede the union* in order to protect "the relatively rare species" of employee who is unwilling to respond to the union's notifications but nonetheless has serious disagreements with the union's support of its political and ideological causes.[30]

But paycheck protection proposals turn the "reconciliation between majority and dissenting interests" long established by the Supreme Court on its head. The Court has stated that "dissent is not to be presumed -- it must be affirmatively made known to the union by the dissenting employee,"[31] but paycheck protection *presumes* dissent and requires employees to affirmatively state their agreement with the union they have chosen to represent them before that union can accept their fees. Indeed, paycheck protection does *not* protect dissenters -- current law already does that -- but rather *forments* dissent and, in doing so, infringes the constitutional right of the majority to associate freely to advance their interests. As I will next discuss, the fundamental flaw and injustice in the paycheck protection notion is that unions would be forced

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[30] Mitchell v. Los Angeles Unified School Dist., 963 F.2d 258, 262-63 (9th Cir. 1992), cert. denied, 506 U.S. 940 (1992) (emphasis added). See also Weaver v. University of Cincinnati, 970 F.2d 1523, 1531-33 (6th Cir. 1992), cert. denied, 507 U.S. 917 (1993).

[31] International Assn. of Machinists v.Street, 367 U.S. at 744.

to recognize as members individuals who neither meet the union's basic membership requirements nor adhere to the principle of majority rule.

The core associational relationships within a union between and among the union's officers and members enjoy constitutional protection. The Supreme Court recognized over 50 years ago that construing the statutory prohibition on union treasury political contributions and expenditures to cover communications between a union and its members would create "the gravest doubt" as to the statute's constitutionality. Accordingly, the Court construed the law to exclude from its scope a union's expenditure of funds on its own internal newsletter urging union members to vote for a particular candidate for Congress.[32]

And, almost 30 years ago, the Court plainly stated that this exemption "allowing [unions and corporations] to communicate freely with members and shareholders on any subject" by using their general treasuries -- and not just solicited "hard money" contributions, as federal law permits for use for *external* political activity -- was "'required by sound policy *and the Constitution*.'"[33] The Court elaborated:

> "Every organization should be allowed to take the steps necessary for its growth and survival. There is, of course, no need to belabor the point that Government policies profoundly affect business and labor . . . . If an organization, whether it be the NAM, the AMA, or the AFL-CIO, believes that certain candidates pose a threat to its well-being or the well-being of its members or stockholders, it should be able to get its views to those members and stockholders. As fiduciaries for their members and stockholders, the officers of these institutions have a duty to share their informed insights on all issues affecting their institution with their constituents. Both union members and stockholders have a right to expect this expert guidance."[34]

A union engaged in political activities is "an archetype of an expressive association" protected by the First Amendment.[35] And, as the Supreme Court has stated:

> There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only

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[32] U.S. v. C.I.O., 335 U.S. 106, 121 (1948).

[33] Pipefitters Local 502 v. U.S., 407 U.S. 385, 431 (1972), quoting Rep. Hansen (emphasis added).

[34] Id. at 431 n. 42, quoting Rep. Hansen.

[35] Kidwell v. Transportation Communications International Union, 946 F.2d 283, 301 (4th Cir. 1991), cert. denied, 503 U.S. 1005 (1982).

> those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.[36]

Regarding state regulation of political parties, for example, the Supreme Court has made clear that an organization's "determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution."[37] And, "any interference with the freedom of [the organization] is simultaneously an interference with the freedom of its adherents."[38]

Unions, like political parties and other voluntary associations, operate on the principle that it is the majority's right to decide the duties of membership, and that those who desire to enjoy the privileges of membership are required to become members of the organization and accept the responsibilities that come with membership. Union members typically do not have a dues-reduction option like that of non-members under Beck because members choose to join the union in the first place and they exercise all participatory rights as members. Union members' rights are like those of members of any democratic organization: they choose their leaders in elections, speak out and vote on policy decisions, and participate in meetings and other events -- and they abide by the basic democratic principle of majority rule.

But paycheck protection measures would unfairly force unions to recognize full political rights within the union -- including even the right to run for and hold elected union office -- for "members" who pick and choose in advance for which union activities they will pay. The union could carry on programs vital to the workers it represents only to the extent that it could secure members' individual permission through a cumbersome and costly bureaucratic process. But under the First Amendment, "[f]reedom of association 'is diluted if it does not include the right to pool money through contributions, for funds are often essential if advocacy is to be truly or optimally effective.'"[39] And, pooled funds have substantially greater impact than contributions by individual members.

Union members have a vital interest in enforcing their usual -- and democratically determined -- rule limiting union membership to persons who pay their full dues. Such a rule serves as an important predicate for collective action. In the first place, it discourages free-riding by those who may favor certain union activities (such as political action, lobbying, organizing and charity work), but -- so long as they believe the union will engage in these activities anyway -- prefer that their fellow members pay for them.

Second, the ability of some members to free ride would discourage other members from contributing their share because of the basic unfairness involved. Having members with voting rights who do not pay the dues set by the majority through the democratic process would tear at the fabric of the union, discouraging collective action on other issues and introducing internal

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[36] Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984).

[37] Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 224 (1986).

[38] Democratic Party of the United States v. Wisconsin, 450 U.S. 107, 122 (1981).

[39] Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 296 (1981), quoting Buckley v. Valeo, 424 U.S. at 65-66.

tensions that are wholly unnecessary. Unions depend on *solidarity*. Nothing would undermine solidarity more than differential treatment of members.

Third, by agreeing to abide by the rule that they pay dues, union members enhance their ability to act collectively by avoiding the heavy transaction costs of soliciting voluntary contributions (rather than using membership dues) to fund lawful union activities decided upon by the majority. This is particularly true where, as here, the transaction costs could be so high as to make these activities impracticable for the union to undertake at all[40] -- the principal objective, of course, of paycheck protection's backers.

Infringements on the right "not to associate" must "be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[41] There is no compelling public interest in according dissenting union *members* a privilege that undermines the associational interests of the majority. Rather, these dissenters' separate interest in not having to pay for union political and legislative activities is accommodated by the careful balance struck by the Supreme Court in Abood, Ellis, Beck and similar cases.

In light of that balance, paycheck protection failed its first, and to date only, constitutional test, just one week after Proposition 226 was defeated in June 1998. A Nevada state court ruled that a similar initiative, the "Paycheck Protection Act," violated the First Amendment rights of union members to freely associate with each other and to petition the government for redress of grievances, and the court ordered that the measure not be placed on the ballot.[42]

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[40] Unions would have to secure individual authorizations in advance from all their members, and calculate their ability to spend for particular purposes accordingly. Paycheck protection proposals routinely limit the effective period of authorizations, and impose various notice and specificity requirements, such as descriptions and amounts of particular intended expenditures. Each such requirement would entail substantial administrative burdens and expense, and ask of unions the impossible: gauging in advance what level and type of activity will be necessary on the political and legislative fronts as much as a year in advance. (And, insofar as *employers* would incur obligations, such as honoring only properly authorized reduced-dues checkoffs, they would be burdened as well.)

A similar specter caused the Supreme Court just a few weeks ago to decline to require universities to provide students with "some type of optional or refund system" for the portion of their mandatory fees that funded campus organizations with which they might disagree: "The restriction could be so descriptive and expensive that the program to support extracurricular speech would be ineffective." Board of Regents of the University of Wisconsin System v. Southworth, 68 U.S.L.W. 4220 (March 22, 2000).

[41] Roberts v. United States Jaycees, 468 U.S. at 623.

[42] Nevadans for Fairness v. Heller, No. A355931 (Clark County District Court, Nevada, June 10, 1998).

The courts have similarly held that union members' First Amendment associational rights would be breached by extending a Beck-type opt-*out* option to union members, because members and their unions are entitled under the Constitution to establish and enforce responsibilities applicable to all members, and cannot be compelled, then, "to admit as members only those who choose to pay only for collective bargaining activities."[43] The balance adopted by the Supreme Court protects the First Amendment rights of *all* employees; the First Amendment does not permit the destruction by a paycheck protection law of the associational freedom of union members.

VIII. The Considerable Political Activities and Comparatively Less Democratic Nature of Corporations and Other Membership Organizations

The perniciousness and inequity of paycheck protection are underscored by the fact that virtually all such proposals single out unions alone for these rules, and do not even purport to apply them to corporations or other membership organizations that also engage in political and legislative activity. Let me be clear on this point, however: the AFL-CIO would *not* support an "even-handed" paycheck protection law, even if one could be devised, because that would only expand the breadth of the First Amendment violation and the destruction of legitimate private associational activity. But let us compare unions with these other entities, which share with unions comparable political rights under FECA.

Corporate spending on political contributions and lobbying utterly dwarfs that of unions.[44] Yet, under state law, corporate assets are controlled by corporate officers and directors,

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[43] Kidwell v. Transportation Communications International Union, 946 F.2d at 301 (footnote omitted). See also Farrell v. International Assn. of Fire Fighters, 781 F. Supp. 647 (N.D. Cal. 1992).

[44]The following figures, for example, reflect just the contributions by unions and corporations to federal candidates and political parties, as compiled by the Federal Election Commission and the independent Center for Responsive Politics:

PAC "Hard Money" Contributions

	1998	1996
Business (B)	$166.5 million	$147.1 million
Labor (L)	50.2 million	49.0 million
Ratio (B:L)	3.1:1	3.0:1

and -- unlike union members vis-a-vis union policy -- it is virtually impossible for the average shareholder to affect corporate policy. Shareholders do not have equal votes; *money* determines voting power in a corporation. Shareholders typically are not even informed of the corporation's political activities. It is quite possible that a *majority* of corporate shareholders would stop or change the corporation's political activities if they had equal votes and a real opportunity to participate in the decisions of the corporation, just as union members do in their unions.

Precisely because of the financial power of corporations and their lack of internal democratic accountability, the Supreme Court ten years ago upheld a Michigan's statute barring corporations – but not unions – from using treasury funds to make political contributions. The Court concluded that Michigan had a compelling interest in counteracting "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[45] According to the Court, the state's requirement that corporate political expenditures be made solely with specially solicited separate funds "ensures that expenditures reflect actual public support for the political ideas espoused by corporations" and, coupled with "the unique state-conferred corporate structure that facilitates the amassing of large treasuries," this is "a sufficiently compelling rationale to support [the] restriction on independent expenditures by corporations."[46]

The Court recognized "crucial differences between unions and corporations" because employees can decline to be union members and avoid paying for union political expenditures while still receiving the benefits of union representation; contrary to what a corporation may

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"Soft Money" Donations

	1998	1996
Business (B)	$167.2 million	$203.5 million
Labor (L)	10.3 million	9.5 million
Ratio (B:L)	16.3:1	21.4:1

[45] Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 660 (1990).

[46] Id.

require of its shareholders, "a union may not compel employees to support financially 'union activities beyond those germane to collective bargaining, contract administration, and grievance adjustments'":[47]

> An employee who objects to a union's political activities thus can decline to contribute to those activities, while continuing to enjoy the benefits derived from the union's performance of its duties as the exclusive representative of the bargaining unit on labor-management issues. *As a result, the funds available for a union's political activities more accurately reflect members' support for the organization's political views than does a corporation's general treasury*.[48]

However, few ever question the right of board of directors-appointed corporate officers to expend their revenues to advance their or their shareholders' interests by pressing for business-friendly legislation and seeking to elect their allies to public office -- yet we in the labor movement find ourselves regularly called upon to defend from legislative attack the right of elected union officials to decide, through democratic processes, to expend union revenues to advance the interests of working families.

Some shareholders have submitted corporate resolutions that would require shareholder authorization for corporate political expenditures, but corporate management has successfully argued to the Securities Exchange Commission that such notions are improper subjects for proxy statements. For example, when a proposal merely to require shareholder authorization for political party donations of more than $10,000 was placed before Boeing shareholders, management opposed it as "impractical" and an impairment of "the company's ability to support those government activities that are an important element of its business." SBC Communications opposed a similar shareholder proposal because "political participation is vital to the company and its shareholders and should not be impeded by unneeded and cumbersome restrictions"; and, BellSouth management opposed such a proposal because "it is critical that we maintain our access and visibility to the legislators who in effect control our future." Even shareholder proposals for greater disclosure by corporations regarding their political contributions have been opposed by the boards of directors of General Electric, United Technologies and Sprint.

Certainly, the Chamber of Commerce -- a strong proponent of paycheck protection for unions -- doesn't suggest that it needs special authorization from its members to engage in legislative and political advocacy, although among its "Key Policy Priorities for 2000" are to "[e]lect pro-business candidates who support trade and economic growth, and counter the political effort by unions and trial lawyers" and " [t]arget 35-40 key House candidates and 10-12

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[47] Id. at 665, quoting Communications Workers of America v. Beck, 487 U.S. at 745.

[48] Austin v. Michigan Chamber of Commerce, 494 U.S. at 665-66 (emphasis added).

Senate candidates, providing them with substantial fundraising, advocacy and grassroots political support."[49] The Chamber not only fails to suggest the need for a similar rule for its own members, but it is likewise silent regarding the shareholders of its business members whose dues finance the Chamber's political and legislative program -- including, of course, the Chamber's advocacy of paycheck protection for unions.

This Committee is also certainly familiar with the many other membership organizations whose diverse programs and activities include political, legislative and other advocacy: the National Federation of Independent Business, the National Association of Manufacturers, the Christian Coalition, the National Rifle Association, the Sierra Club and Common Cause, to name just a few. It is undeniable that none of these organizations operates through the democratic procedures that unions do, and that no federal or state law commands that they do so. We doubt that this Committee would consider legislating a requirement that these groups secure advance authorization from their members for the advocacy portion of their activities; and, the AFL-CIO would not support such a law.

Rather, if there is a problem of compelled political speech among private institutions in our nation, we suggest that the only appropriate legislative solution would be to confer the same rights upon shareholders and members of other membership organizations that union members now enjoy -- not to destroy the representative democracies that unions are now.

IX. Conclusion

Again, the motivation behind paycheck protection efforts is to remove from public policy debates the views of working families -- as expressed through their unions -- and leave the playing field to be dominated almost exclusively by corporations and right-wing interests. But the democratic principles on which our legislative and political processes are based support free access by all to the public debate, and government decisionmaking that accommodates competing interests. Our nation needs a more level playing field for working people and their unions in politics, not one that is more skewed in favor of corporations and other influential organizations lacking democratic accountability. The labor movement will continue to resist blatant attempts to punish it for having the temerity to stand up for the working families we are privileged to represent, and to protect the right of our members to participate on a full and equal basis in public decisions. There are many worthy policy options for revising our campaign finance laws to deter corruption and enhance the fairness, openness, responsiveness and integrity of our electoral system.[50] So-called "paycheck protection" is a cynical, dishonest and undemocratic gambit that would undermine every one of those goals.

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[49] www.uschamber.org.

[50] For the AFL-CIO's campaign finance law revision recommendations, see www.aflcio.org./pub/estatements/sep1997/finance.html.