In the
SUPREME COURT OF THE UNITED STATES

No. 05-1589

GARY DAVENPORT, et al., Petitioners,

v.

WASHINGTON EDUCATION ASSOCIATION, Respondent.

On Writ of Certiorari to
The Supreme Court of Washington

OPPOSITION OF THE *DAVENPORT* PETITIONERS TO RESPONDENT'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 21.4, Petitioners Gary Davenport, *et al*., file their response to the May 11, 2007, motion of Respondent Washington Education Association ("WEA") "for leave to file a supplemental brief in order to bring to the Court's attention newly enacted legislation amending the statute[, Wash. Rev. Code § 42.17.760 ("§ 760"),] that is at issue in this matter." Mot. at 1. For the reasons stated below, the *Davenport* petitioners oppose the motion as applied to their case.[1]

1. Neither the amendment to § 760, nor the statute as amended, changes anything of relevance to the Questions Presented in *Davenport*. They provide no basis for altering this Court's consideration of this case as currently briefed and argued.

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[1]The *Davenport* case was consolidated with No. 05-1657, involving the State of Washington's enforcement of § 760. For the purpose of this motion, the two cases present unique issues and facts best addressed separately by the petitioners in each consolidated case.

2. Respondent WEA admits that "the amendment to Section 760 does not moot the case, because both retrospective and prospective applications of the statute are at issue in this litigation." Mot. at 2. However, the *Davenport* petitioners and the class of nonunion teachers they represent sought *only* retrospective damages for violation of unamended § 760 for the period of March 19, 1996, through and including August 31, 2001. Joint Appendix ("J.A.") at 3-12; *Davenport* Pet. for Cert., App. C at 47a. They sought no injunctive or other prospective relief. *Id*. This Court knew that only retrospective relief was sought in *Davenport* when it granted certiorari. As the WEA admits, the amendment to § 760 does not affect the period of time involved in *Davenport*. Consequently, the amendment cannot affect or change this Court's analysis of the unamended statute at issue in *Davenport*, which still presents important First Amendment questions in light of the Washington Supreme Court's decision striking down § 760 as unconstitutional. The amendment does nothing to affect the rights and remedies sought by the *Davenport* petitioners.

3. *Davenport* also raised the issue of whether the dissent of nonmembers to the political and other nonbargaining expenditures of labor organizations should be "presumed" in the seizure of dues-equivalent fees. *Davenport* Merits Br. at 31-38; Reply Br. at 4-15. Neither the amendment nor the law as amended speaks to or affects that issue or the Court's analysis thereof. Thus, contrary to the WEA's claim, Mot. at 2, this Court need not consider the amendment in deciding the unique issues raised in *Davenport*.

4. The WEA admits that the amendment does not moot the case. *Id*. Nevertheless, the union contends that the law as amended is now constitutional when viewed prospectively.[2]

[2]Although the amendment is irrelevant and should not be before the Court in *Davenport*, the amendment itself, but not the original statue, is unconstitutional, because it authorizes the use

Id. Yet, nowhere does the union abandon its position that the judgment below be affirmed, thereby necessitating this Court's decision on the constitutionality of the unamended statute. The absurdity of the WEA's urging this Court to consider the amendment in deciding this case is demonstrated by the fact that if the Court affirms, as the WEA seeks, § 760 will cease to exist – whether unamended or as amended: "The bill [amending § 760] does not interfere with the [United States] Supreme Court case. If the statute[, unamended § 760,] is struck down, then this bill also fails." House Bill Report HB 2079, page 3 at http://www.leg.wa.gov/pub/billinfo/2007-08/Pdf/Bill%20Reports/House/2079.HBR.pdf (last visited May 14, 2007). Thus, the WEA wants this Court to consider an amendment to support the union's position that the unamended statute was properly struck down. However, that position would also nullify the very amendment the WEA presents to this Court as supplemental authority.

For these reasons, § 760 as amended has no application to *Davenport*, and is not relevant to any issue that is properly before this Court in this case.[3] The Court should deny the motion and proceed to decide this case as briefed, argued and submitted.

Respectfully submitted,

/s/

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of nonconsenting nonmembers' forced fees for politics. *See Abood v. Detroit Bd. Of Educ.*, 431 U.S. 209, 237 n.35 (1977); *see also Davenport* Reply Br. at 17 & n.14.

[3]This Court can decide prospective issues, if necessary, in a subsequent case.