No. 10-1121

IN THE

Supreme Court of the United States

DIANNE KNOX, *et al.*,
Petitioners,
v.
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JEFFREY B. DEMAIN
Counsel of Record
PEDER J. THOREEN
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

Counsel for Respondent
Service Employees International Union, Local 1000

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INTRODUCTION

Unfortunately for Petitioners Dianne Knox, *et al.* (hereinafter "Petitioners"), neither of the Questions Presented set forth in their Petition is *actually* presented by this case. *See* Pet. at (I). For that reason alone, the Court should deny the Petition.

Petitioners' first Question Presented asks whether a state may, under the First and Fourteenth Amendments, "condition employment on the payment of a special union assessment intended solely for political and ideological expenditures without first providing a *Hudson* notice that includes information about that assessment and provides an opportunity to object to its exaction[.]" Pet. at (I).[1] As we discuss below in Section I(A) of the Argument, that question is not properly presented in this case because the record evidence is unequivocal that (1) the temporary dues and fees increase at issue (to which Petitioners refer as a "special union assessment") was used to fund both *chargeable* and non-chargeable expenditures, and was not "solely for political and ideological expenditures," (2) even if the *intent* in imposing the increase were relevant (as opposed to the expenditures it *actually* funded), there is *no* record evidence that it was "intended solely for political and ideological expenditures," and (3) fee payers who had submitted timely objections in response to the annual *Hudson* notice then in effect were charged only for that portion of the increase corresponding to the "chargeable" percentage set forth in that *Hudson* notice, rather than for the entire amount of the increase. As such, this case is simply not a proper vehicle for consideration of Petitioners' first Question Presented.

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[1] The term "*Hudson* notice" in Petitioners' first Question Presented refers to *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986) (hereinafter "*Hudson*").

Petitioners' second Question Presented asks whether a state may, under the First and Fourteenth Amendments, "condition continued public employment on the payment of union agency fees for purposes of financing political expenditures for ballot measures[.]" As we discuss below in Section II(A) of the Argument, that question is not properly presented in this case. Its resolution could only result in an advisory opinion that would not change the result below.

Petitioners' second Question Presented is intended to challenge the statement in footnote 2 of the decision below that Respondent's expenditures to oppose California Proposition 76, which would have permitted California's Governor to unilaterally abrogate Respondent's collective bargaining agreements, could be considered chargeable. Petitioners neither pleaded nor litigated any claim, however, to challenge Respondent's determination as to the chargeability of that expenditure. The only manner in which the chargeability of that expenditure came into the case was in connection with Petitioners' unfounded assertion, which is the subject of their first Question Presented, that the temporary dues and fees increase was devoted solely to financing non-chargeable activities. However, the undisputed record evidence in this case establishes that the funds raised by the increase were expended not just to oppose Proposition 76, but also on other indisputably chargeable activities such as union meetings, a survey of union members that was partially devoted to collective bargaining issues, and the cost of defending the present lawsuit. Thus, even if the expenditures to oppose Proposition 76 were deemed to be wholly non-chargeable, the existence of other indisputably chargeable expenditures financed from the increase entirely rebuts Petitioners' unfounded assertion that the increase was spent solely on non-chargeable activities, which underpins their entire case.

For that reason, even if this Court were to grant the Petition and hold that the Proposition 76 expenditures were non-chargeable, its decision would be nothing more than an advisory opinion. The existence of other indisputably chargeable expenditures financed from the increase amply supports the judgment below that Respondent did not violate the law by failing to issue a second, mid-year *Hudson* notice regarding the increase, and thus that judgment would have to be affirmed notwithstanding the chargeability *vel non* of the Proposition 76 expenditures.

Finally, as we also show below, the Petition should be denied because it fails to identify an actual conflict or important issue meriting this Court's attention.

STATEMENT OF THE CASE

Respondent hereby incorporates by reference the statement of facts set forth in Section I(B) of the decision below. Additionally, Respondent here addresses the following factual misstatements or mischaracterizations in the Petition.

1. To the extent that Petitioners intend to imply from the enactment of the temporary increase approximately three months after the issuance of the June 2005 *Hudson* notice that Respondent purposely delayed consideration and enactment of the increase until after the objection and challenge period under the *Hudson* notice had expired (*see* Petition at 5 & n.3), there is absolutely no evidence in the record to support such an implication or any other implication that this sequence of events was anything but coincidental.

2. Petitioners' description of the action in the district court is incomplete and misleading in that it seeks to portray that court as having been unequivocal in its condemnation of Respondent's failure to issue a mid-year *Hudson*

notice regarding the increase. Petitioners omit to mention that the district court held in its written Order vacating the restraining order and denying Petitioners' request for a preliminary injunction that Respondent's actions were "unquestionably permitted under the [Supreme Court's] *Hudson* holding." Docket No. 23 at 5:22. The district court's misunderstanding of the applicable jurisprudence is obvious from its inconsistent decisions.

3. Petitioners erroneously state that the court of appeals' opinion "held that the appropriate standard for adjudicating a union's actions in enforcing a forced-unionism agreement is 'the normal *Hudson* balancing and reasonable accommodation test we have used in the past when deciding challenges to *Hudson* notice procedures.'" Petition at 9 (quoting *Knox v. California State Employees Ass'n, Local 1000*, 628 F.3d 1115, 1120 (9th Cir. 2010)). In fact, it held that standard applicable only to resolving Petitioners' challenge to Respondent's compliance with *Hudson*'s procedural requirements, the only challenge Petitioners brought in this case. As we discuss below, Petitioners disputed neither the chargeability determinations contained in Respondent's *Hudson* notices nor, as the court below properly noted, "the Union's actual spending of the fees." *Knox*, 628 F.3d at 1122. As that court correctly concluded, Petitioners "explicitly concede theirs is only a procedural notice challenge . . . ." *Id.* Thus, the court of appeals did not reach the issue (which was not raised in this case) of the legal standard applicable to *other* challenges to a union's actions under a fair share fee agreement, such as its chargeability and spending decisions.

REASONS FOR DENYING THE WRIT

The Petition should be denied because (1) neither of the Questions Presented is properly presented in this case, (2) it presents no important issue that requires the

attention of this Court and (3) identifies no square conflict between the circuits or between the court of appeals' decision and a decision of this Court.

Before discussing these reasons in detail, we note briefly what this case was about. Each year in June, in compliance with this Court's decision in *Hudson*, Respondent sends its non-members a fair share fee notice. That notice discloses Respondent's major categories of expenditure from its most recently audited prior year, broken down into chargeable and non-chargeable classifications. The notice encloses a verification by an independent auditor, and informs the non-members of their rights to object to paying for non-chargeable expenditures and to challenge Respondent's calculation of the chargeable amount, as well as the procedures for so doing. Respondent sent its non-members such a *Hudson* notice in June 2005, based on its expenditures during its most recently audited prior year (calendar year 2004), which Plaintiffs have admitted was constitutionally adequate. *See* Docket 99 at 14 n.11; Ninth Circuit Answering Brief at 39 n.23.

A month or so after sending that *Hudson* notice, Respondent's leadership began to discuss, and subsequently enacted, a temporary increase in union dues and hence fair share fees (which are calculated as a percentage of union dues), that went into effect at the end of September 2005. Because the increase was not even contemplated at the time of the issuance of the June 2005 *Hudson* notice, and because, in any event, that notice was based upon Respondent's actual expenses in 2004, the notice did not mention the increase. The June 2005 *Hudson* notice did inform the non-members, however, that dues (and hence fees) were subject to change without further notice to fee payers. Further, the increase altered neither the non-objector rate nor the objector rate

(which remained at 99.1% and 56.35% of union dues, respectively), but only the dollar amount of the fee, which increased because the dues rate upon which it is based increased.

The issue that this case raised below is simply stated: having complied with *Hudson* by issuing its June 2005 *Hudson* notice, which Petitioners conceded was constitutionally adequate, was Respondent legally obligated to issue a second notice giving non-members a new opportunity to object in advance of paying for the increase? Petitioners said yes, but the court below disagreed. We discuss that court's decision, and the reasons why it was correct, in greater depth in Section III, below. In short, it began with this Court's decision "in *Hudson* [that] recognized the impossibility of determining the chargeability of a union's anticipated expenditures at the outset of the fee year, and specifically approved calculating the present year's objector fee based on the prior year's total expenditures." *Knox*, 628 F.3d at 1120. The court of appeals then concluded that the logic of that retrospective method of calculating the objector fee on the basis of the union's audited actual prior expenditures compels the conclusion that, having already complied with *Hudson*'s requirements before the beginning of the fee year, Respondent was not legally obligated to issue a second, mid-year notice based upon speculation as to the how the increase might be spent, prior to the implementation of the increase. *Id.* at 1120-23.

I. PETITIONERS' FIRST QUESTION PRESENTED IS NOT PROPERLY PRESENTED AND IS UNCONNECTED WITH THE ARGUMENT THEY PRESENT IN SUPPORT THEREOF, WHICH (IN ANY CASE) DOES NOT PRESENT ANY ISSUE WORTHY OF THIS COURT'S REVIEW

Petitioners' first Question Presented asks whether a state may, under the First and Fourteenth Amendments,

"condition employment on the payment of a special union assessment intended solely for political and ideological expenditures without first providing a *Hudson* notice that includes information about that assessment and provides an opportunity to object to its exaction[.]" Pet. at (I). As we discuss below in Section I(A), that question is not properly presented in this case. Moreover, Petitioners' argument in support of that question relates to an entirely different issue, as to which they do not request review: the legal standard applicable to a challenge to a union's compliance with *Hudson*'s procedural requirements, that is, to a so-called "*Hudson* notice challenge." And, as we discuss below in Section I(B), not even that inquiry presents an important issue or a square conflict warranting this Court's attention.

A. Petitioners' First Question Presented Is Not Properly Presented Under the Undisputed Facts of this Case. The question Petitioners seek to litigate under the first Question Presented (or, at least, the only question they actually attempted to litigate below) is whether a union that issues a timely and concededly constitutionally adequate *Hudson* notice prior to the fee year is legally required to issue a *subsequent Hudson* notice during the fee year if it enacts a mid-year temporary dues and fees increase not discussed in the original *Hudson* notice, where that increase is devoted "solely for political and ideological expenditures." Petition at (I).[2] The undisputed

[2] Below, Petitioners drew a distinction between what they characterize as Respondent's "special assessment" (allegedly) devoted exclusively to non-chargeable activities and an "'across-the-board' general increase in fees." Docket No. 99 at 12:11. They contended that the former required the issuance of a mid-year *Hudson* notice, but conceded that the latter would not: "For regular dues and fees, it makes sense to permit the union to 'calculat[e] its fee on the basis of its expenses during the preceding year,' *Hudson*, 475 U.S. at 307 n.18, because the precise usage of those fees throughout the year

record evidence, however, reveals that the factual predicate of that question is absent from this case: the increase here was *not* devoted solely to financing "political and ideological expenditures" (*id.*), much less to financing entirely non-chargeable expenditures.[3] Rather, the increase was devoted to financing a mix of chargeable and non-chargeable expenditures, including such indisputably chargeable activities such as union meetings, a survey of union members partially devoted to collective bargaining issues, and the cost of defending the present lawsuit. Docket No. 65 at 5, ¶ 24; Docket No. 83 at 7, ¶ 24.

As the court of appeals properly found from the undisputed evidence, the increase "itself included no spending limitations, and the money was actually used for a range of activities, both political and not, and both chargeable and not." *Knox*, 623 F.3d at 1119. Indeed, as it also noted, the audit of the Respondent's expenditures revealed that "the chargeable percentage for the 2006 *Hudson* notice, which included the spending from the [increase], was actually *larger* than that from the 2005 notice" which did not include spending from the increase. *Id.*

The only record evidence regarding the actual expenditures of the funds raised from the increase consisted of the independent audits and the testimony of the Respondent's Chief Financial Officer. In their response to the Respondent's Statement of Undisputed Facts on sum-

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is unknown and ever changing." *Id.* at 12:17 – 13:2. By Petitioners' own concession, then, if the temporary dues and fee increase was *not* devoted solely to funding non-chargeable activities, the normal *Hudson* retrospective notice procedure was applicable and no second notice was required.

[3] Non-chargeable expenditures are an even narrower category of expenditures, since this Court's cases clarify that *some* "political" expenditures are indeed chargeable in the public sector. *See*, *e.g.*, *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 520 (1991).

mary judgment, which was based on that evidence, Petitioners failed to dispute the facts regarding the chargeable spending from the funds raised by the increase and the chargeability determinations set forth in Respondent's *Hudson* notices, but instead merely raised meritless hearsay objections. Docket No. 83 at 7:4-11; *see also* Ninth Circuit Opening Brief at 10 n.4 (Respondent's analysis of Petitioners' admissions and hearsay objections); Ninth Circuit Answering Brief at 44-45 n.25 (conceding that the chargeability of the expenditures from the increase is "not relevant to consideration of [Petitioners'] claim for violation of the pre-seizure notice and procedural safeguards mandated by *Hudson* (and therefore, not material to a summary judgment motion in such a case)").

As such, Respondent's evidence of chargeable spending from the increase was entirely unrebutted in the record. For that reason, this case does *not* present the question whether a union must issue a second *Hudson* notice prior to collecting fees under a mid-year fee increase devoted solely to financing non-chargeable expenditures, because the undisputed record in the present case shows that the increase here was not so devoted. Rather, it was devoted to financing a mix of chargeable and non-chargeable expenditures, just as is a union's normal collection of fees.[4]

Since Petitioners' repeated assertion that the increase was devoted solely to financing non-chargeable expenditures is demonstrably false and contrary to the undisput-

[4] Further, the only competent evidence in the record shows that Respondent "charged objectors only 56.35% of the temporary increase, the chargeable percentage set forth in the June 2005 notice, rather than 100% of the increase followed by a later rebate." *Knox*, 628 F.3d at 1122; *see* Docket No. 112 at ¶ 4; Docket No. 66 at ¶ 9; *see also* discussion in Ninth Circuit Reply Brief at 8-12.

ed record evidence, they rely on Respondent's pre-expenditure statements about the uses to which the increase would be put, rather than on the *actual* spending of the increase. *See* Petition at 4-6, 16. That approach is meritless for several independent reasons.

First, in light of *Hudson*'s retrospective method of basing fee notices on the union's audited expenditures from the most-recently audited prior year, the union's *intended* spending is speculative and thus irrelevant. What matters is how the union *actually* spent its funds, as verified by an independent auditor, since, as Petitioners admitted below, anticipated expenditures cannot be audited. *See* Docket No. 99 at 13 n.10; Docket No. 119 at 8 n.7; Ninth Circuit Answering Brief at 37 n.22.

Second, and in any event, Respondent never stated that the increase would be devoted "solely" or "exclusively" to financing non-chargeable expenditures. Petitioners do not and cannot cite any evidence that Respondent ever committed to spend the increase exclusively on the specific activities listed in Union-issued literature, even though that is how they repeatedly mischaracterize Respondent's statements. Indeed, as the court below noted, "[I]n response to inquiries, the Union specifically stated it intended to split the increase 'between political actions and collective bargaining actions,'" the latter of which are, of course, fully chargeable. *Knox*, 638 F.3d at 1119. The activities identified in the statements regarding the purposes of the increase relied upon by Petitioners were merely illustrative, and not exhaustive, of the activities to which the increase would be dedicated. When the increase was implemented, Respondent could not, and did not attempt to, predict all of the activities the 16-month long, $12 million increase might support. Simply put, the central argument of Petitioners' case comes down to adding to the Respondent's state-

ments a word – "exclusively" – that incontestably is not there.[5]

Finally, even if there were evidence that the increase here had been devoted solely to financing non-chargeable expenditures (which, we reiterate, there is not), Petitioners' first Question Presented would not present a question worthy of this Court's attention because they have admitted that there is no circuit or other conflict as to such an issue and that it is so unique that it has arisen in *no other cases*: "Of course, the [Petitioners'] claim is 'novel' because the circumstances of this case are novel. . . . [N]o case, including *Hudson*, involved the imposition of a special assessment targeted solely to political and ideological activities shortly after the period for objection to such collection and use of agency fees had expired." Docket No. 116 at 18:7-12 (footnote omitted); *accord* Docket No. 99 at 17:3 – 18:7; Ninth Circuit Answering Brief at 43-45; *see also* Docket No. 116 at 18:3 (Petitioners' brief in opposition to Respondent's motion for partial summary judgment, informing the district court that it "writes on a clean slate" with regard to their challenge) (capitalization altered).[6] Their Petition presents no argu-

[5] Nor is Respondent's statement that the increase would "'not be used for regular costs of the union – such as office rent, staff salaries or routine equipment replacement'" (*Knox*, 628 F.3d at 1118-19, quoted in Petition at 5 & 9) a statement that the increase would not be used for *any* chargeable activities. Respondent did not in fact use the increase for such normal "overhead" expenses, but it did use a portion of the increase for non-overhead – yet chargeable – expenses including an extraordinary union meeting, a union member survey regarding chargeable issues, and the cost of defending the instant lawsuit, which was not inconsistent with its prior statements.

[6] The admitted novelty of their case rebuts Petitioners' contention that there is a need for this court to resolve "confusion" that exists as to "whether a nonmember subject to a forced-unionism clause is entitled to notice when a labor union significantly increases the amount of fees extracted in order to engage in political and

ment to the contrary and instead attempts to persuade the Court that there is a conflict over different issue: the legal standard applicable to a challenge to a union's compliance with *Hudson*'s procedural requirements (*see* Petition at 13-19), which we discuss next. As such, Petitioners' first Question Presented would not merit this Court's attention, even if it were properly presented here.

B. Petitioners' Discussion of the Legal Standard Applicable to a Challenge to a Union's Compliance with *Hudson*'s Procedural Requirements Presents Neither an Important Issue nor a Square Conflict That Warrants the Attention of this Court. As noted above, the Petition's argument nominally in support of the first Question Presented actually bears on an entirely different question: the legal standard applicable to a challenge to a union's compliance with *Hudson*'s procedural requirements (a so-called "*Hudson* notice challenge"). Petition at 13-19. As to that question, Petitioners fail to demonstrate a circuit or other conflict, or an important question, that merits this Court's attention.

First, Petitioners argue that this Court's decisions require the application of strict scrutiny to a *Hudson* notice challenge. Petition at 13-18. In fact, this Court's decisions make clear that strict scrutiny is *not* the appropriate standard. As the court below noted, this Court in *Hudson* "articulated the legal standard to be applied in this analysis as a balancing test, stating that '[t]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to

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ideological activities." Petition at 27. Petitioners cannot point to a *single* case in which that question has ever arisen, as mid-year fee increases devoted solely to financing non-chargeable expenses, like the Loch Ness Monster and Bigfoot, exist more in the imagination than in reality.

require every employee to contribute to the cost of collective-bargaining activities.'" *Knox*, 628 F.3d at 1119-20 (quoting *Hudson*, 475 U.S. at 302).[7]

Petitioners rely on this Court's statement in *Hudson* that the procedural protections required for agency fee collection must "be carefully tailored to minimize the infringement" on fee payers' rights. Petition at 14 & 15-16, 18 (quoting *Hudson*, 475 U.S. at 303). However, they fail to recognize that the very procedure that *Hudson* mandated – a regime of annual fee notices based upon the union's most recently audited prior year of actual expenditures, with fee payers' right to object to paying for nonchargeable expenditures, to challenge the union's calculation of the chargeable percentage, to receive a prompt resolution of such a challenge, and to have the reasonably disputed portion of their fees escrowed pending that resolution (*see Hudson*, 475 U.S. at 304-11) – *did* carefully tailor the procedure to minimize that infringement.

Petitioners' claim in this case has never been that Respondent failed to follow the procedure mandated by *Hudson*. Rather, it has always been that that procedure is not constitutionally sufficient under the facts presented by this case, *i.e.*, that *Hudson* does not apply here and additional procedural protections are required. *See* Docket No. 119 at 2:2-7; *see also* Docket No. 99 at 14:12 – 15:2; Docket No. 116 at 12:17-23. Since it is undisputed that Respondent in fact followed the procedures *Hudson* mandated (and Petitioners have conceded that Respondent's June 2005 *Hudson* notice was constitutionally adequate, *see* Docket 99 at 14 n.11; Ninth Circuit Answering Brief at 39 n.23), the "carefully tailored" lan-

[7] This formulation in *Hudson* quoted above was actually borrowed from this Court's earlier decision in *Abood v. Detroit Board of Education*, 431 U.S. 209, 237 (1977). Thus, the *Hudson* standard is the same as the *Abood* standard.

guage from *Hudson* on which Petitioners rely is of no assistance to them.

Petitioners next argue that this Court's decision in *Davenport v. Washington Education Ass'n*, 551 U.S. 177 (2007), mandates strict scrutiny. Petition at 14-15. It does not. *Davenport* concerned the ability of a state legislature to require unions representing state public employees to obtain the affirmative consent of their non-members before charging them for non-chargeable expenditures (as opposed to the "opt-out" system enacted in California and many other states that requires such employees to affirmatively object to paying for non-chargeable expenditures). The Washington Supreme Court had concluded that the legislative "opt-in" scheme violated the unions' constitutional right to collect fair share fees from their non-members. This Court corrected that error by making clear that "unions have no constitutional entitlement to the fees of nonmember-employees." *Davenport*, 551 U.S. at 185. But that does not mean that unions have *no* right of any kind to collect such fees. Respondent in the present case, for example, has a statutory right under California Government Code §3513(k) to do so, as well as a state law contractual right under its collective bargaining agreement. The court below clearly understood this:

> . . . [W]e have consistently recognized that unions have a legitimate interest and "settled" ability to charge agency fees. . . . [citation omitted] We do not intimate this rises to the level of a constitutional "right," but that does not mean the union does not have any rights at all in such a situation. *Hudson*, 475 U.S. at 302, 106 S.Ct. 1066 (affirming union's right to "require nonunion employees, as a condition of employment, to pay fair share fees").

Knox, 628 F.3d at 1120 n.3.

In short, the Washington Supreme Court's error, corrected by this Court, was not that unions and fee payers each have rights that must be accommodated in crafting the procedural requirements for the collection of fair share fees, but rather that state public sector unions have a federal constitutional right to collect such fees that the state legislature cannot alter. As such, *Davenport* says nothing relevant here regarding the applicability of a strict scrutiny standard to *Hudson* notice challenges.

Petitioners' argument does not cite any decisions of this Court applying strict scrutiny to such challenges, but only First Amendment decisions rendered in areas outside of that context. *See* Petition at 15. Nor is Respondent aware of any such decisions. However, there is a decision of this Court that is relevant to that issue, but it does not support Petitioners' position and they neglect to mention it.

In *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), this Court invalidated a portion of a federal marketing order that required growers to subsidize generic advertising promoting the types of crops they grew. Applying its fair share fee jurisprudence, the Court invalidated the challenged regulation under the *Abood* standard, which (as we noted above) is the standard that this Court borrowed in *Hudson*. The Court declined to reach the question whether the more stringent "intermediate scrutiny" standard applicable to commercial speech, set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), should apply. *United Foods*, 533 U.S. at 409-10. Since *United Foods* demonstrates that the *Abood/Hudson* standard is less stringent than the intermediate scrutiny standard applicable to commercial speech, it is clearly less stringent than the strict scrutiny standard that Petitioners urge. And it is the less stringent *Abood/Hudson* standard, not strict

scrutiny, that applies to *Hudson* notice challenges, as the court below recognized.[8]

Second, failing to show a conflict with any decision of this Court, Petitioners attempt to demonstrate a circuit conflict over the applicability of strict scrutiny to a *Hudson* notice challenge. Petition at 18-19. They are forced to admit, however, that "no circuit has expressly applied strict scrutiny" to such a challenge, and are therefore relegated to relying on language from circuit cases to the effect that the procedural protections accorded to fee payers must be "'narrowly drawn' to comply with the strictures imposed by *Hudson*.'" *Seidemann v. Bowen*, 499 F.3d 119, 124 (2d Cir.

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[8] Sandwiched into their strict scrutiny argument, Petitioners contend that a second, mid-year *Hudson* notice was necessitated by the increase as to "those nonmembers who chose not to object based on the regular [June 2005] *Hudson* notice, but might have objected and paid a reduced fee had they known that the union was increasing the fee to engage in political activities." Petition at 17 (footnote omitted). This argument is rebutted by the undisputed record evidence.

Both the increase and the expenditures therefrom *were* expressly disclosed to the non-members in Respondent's June 2006 *Hudson* notice. Docket No. 105 at 3, ¶ 9; *id.* at 4, ¶ 18; *id.* at 5, ¶ 21; Docket No. 117 at 3:10-12. If the non-objectors did not wish to pay for the non-chargeable expenditures from the increase, one would expect that Respondent would have received more objections in response to its June 2006 *Hudson* notice (in which those expenditures were disclosed) than it did in response to its June 2005 *Hudson* notice (in which they were *not* disclosed because the increase had not yet been enacted, much less implemented). But the undisputed facts are to the contrary: Respondent received 3,351 objections and challenges in response to its June 2005 *Hudson* notice (constituting 11.83 percent of all non-members), but only 3,094 in response to its June 2006 *Hudson* notice (constituting only 10.50 percent of all non-members). Docket No. 105 at 4, ¶ 20; Docket No. 117 at 3:10-12. In other words, Respondent received 257 *fewer* objections to paying for nonchargeable expenditures (including the non-chargeable expenditures from the increase) *after* it disclosed the existence of the increase and the expenditures therefrom than before it did so.

2007) (quoting *Andrews v. Educ. Ass'n of Cheshire*, 829 F.2d 335, 339-40 (2d Cir. 1987), quoted by Petitioners in Petition at 18). However, the mere use of such a formulation does not a circuit conflict make.

By Petitioners' own admission, "The split among the circuits is most clearly highlighted in *Andrews*." Petition at 19. But, far from creating a circuit conflict, the court below expressly *relied* on *Andrews*, from which it quoted the following statement: "When the union's plan satisfies the standards established by *Hudson*, the plan should be upheld even if its opponents can put forth some plausible alternative less restrictive of their right not to be coerced to contribute funds to support political activities that they do not wish to support." *Andrews*, 829 F.2d at 340, *quoted by Knox*, 628 F.3d at 1123. *See also Andrews*, 829 F.2d at 340 ("[W]e do not believe that *Hudson* stands for the proposition that a union's procedures are constitutionally infirm unless they constitute the least restrictive process imaginable"). Clearly, *Andrews* does not endorse a strict scrutiny standard for *Hudson* notice challenges, since a "least restrictive means" test is part and parcel of such a standard. *See, e.g., United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000).[9]

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[9] Petitioners see a conflict between the approach employed below and *Andrews*' statement that "the district court should not have approached this question with a balancing test in which the cost to the union and the practicality of the procedures were to be weighed against the dissenters' First Amendment interests." *Andrews*, 829 F.2d at 339, quoted in Petition at 19. The two situations are not comparable, however, so there is no conflict. By "this question," the *Andrews* court was referring to the fee payers' claim that the union failed to comply with *Hudson*'s requirement that it provide them with an independent audit of its expenditures. *Id.* Thus, *Andrews* rejected a "balancing" approach to determining the lawfulness of a union's failure to comply with an express requirement of *Hudson*. In the present case, on the other hand, Petitioners have made clear that

Rather than identify a true circuit conflict, Petitioners attempt to manufacture one by selectively quoting *dicta* out of context from various circuit cases, none of which actually applied a strict scrutiny standard to a *Hudson* notice challenge. *See* cases cited in Petition at 18-19 & n.6. They have not shown a circuit conflict, but at most argue that a "misapplication of a properly stated rule of law" has occurred, which is insufficient to warrant review by this Court. Supreme Court Rule 10. Indeed, as Petitioners admit, the legal standard applied below to this case "was first applied in *Grunwald v. San Bernardino City Unified School District*, 994 F.2d 1370, 1376 n.7 (9th Cir. 1993)." Petition at 19. They neglect to note, however, that this Court denied a petition for *certiorari* in *Grunwald* that raised the "strict scrutiny" and "carefully tailored" issue. *See Grunwald v. San Bernardino City Unified School District*, 510 U.S. 964 (1993); *Grunwald* Petition for Certiorari, 1993 WL 13075264 at *19-*20 (filed August 17, 1993). For the same reasons the Court declined to review *Grunwald*, it should deny the Petition in the present case.

they do not argue that Respondent failed to comply with *Hudson*, but rather that Respondent was obligated to provide procedural protections *above and beyond* what *Hudson* requires. *See* Docket No. 119 at 2:2-7; *see also* Docket No. 99 at 14:12 – 15:2; Docket No. 116 at 12:17-23. The court of appeals' approach to that very different question was faithful to *Hudson*'s approach of "devis[ing] a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities" (*Hudson*, 475 U.S. at 302, quoted in *Knox*, 628 F.3d at 1119-20), and was not in conflict with *Andrews*.

II. PETITIONERS' SECOND QUESTION PRESENTED IS NOT PROPERLY PRESENTED BECAUSE IT SEEKS AN ADVISORY OPINION AND PETITIONERS FAIL TO IDENTIFY ANY SQUARE CONFLICT WARRANTING THIS COURT'S REVIEW

A. Petitioners' Second Question Presented Seeks an Advisory Opinion. Petitioners' second Question Presented asks whether a state may, under the First and Fourteenth Amendments, "condition continued public employment on the payment of union agency fees for purposes of financing political expenditures for ballot measures[.]" Petition at (I). By this question, Petitioners seek to obtain review of the second paragraph of footnote 2 of the decision below. But this Court does not review footnotes, even if they contain interesting legal questions. Its jurisdiction does not extend to issuing advisory opinions, that is, opinions on legal questions where the Court's resolution of the question would not alter the result below, regardless of which way the question was answered. *See*, *e.g.*, *United States v. Evans*, 213 U.S. 297, 299-301 (1909). Here, Petitioners seek such an advisory opinion and, compounding their error, do so with regard to a question that they waived below.

Petitioners' second Question Presented is intended to challenge the statement in the decision below that "not all political expenses are automatically non-chargeable." *Knox*, 628 F.3d at 1119 n.2. But, since Petitioners admit that *some* expenses that are considered "political" – some types of lobbying expenses – *are* chargeable under this Court's jurisprudence (*see* Petition at 20-22), their real challenge goes to the statement in the decision below that Respondent's *Hudson* expenditures to oppose California Proposition 76 could be considered chargeable. As the court of appeals stated, "Proposition 76 would have effec-

tively permitted the Governor to abrogate the Union's collective bargaining agreements under certain circumstances, undermining the Union's ability to perform its representation duty of negotiating effective collective bargaining agreements." *Knox*, 628 F.3d at 1119 n.2.

The only reason that the question of the chargeability of those expenditures came into the case at all was in connection with Petitioners' unfounded assertion that the increase was devoted solely to financing non-chargeable activities. As we have already discussed above, that assertion was contrary to the undisputed evidence in the record. But even if the court of appeals' statement regarding the chargeability of Respondent's expenditures to oppose Proposition 76 were incorrect, the result would not change.

First, Petitioners' solely "procedural notice challenge" (*Knox*, 628 F.3d at 1122 n.4) did not dispute the accuracy of the chargeability determinations set forth in the Respondent's *Hudson* notices, including those in the June 2006 notice disclosing the expenditures to oppose Proposition 76 and the other expenditures from the increase. *See* Docket No. 83 at 7:4-11; *see also* Ninth Circuit Opening Brief (Respondent's analysis of Petitioners' admissions). Indeed, Petitioners went even farther and expressly and deliberately eschewed any challenge to those chargeability determinations and to the spending of the fees raised by the increase, including those spent to oppose Proposition 76. *See* Ninth Circuit Answering Brief at 44-45 n.25. As the court below correctly found, "[Petitioners] explicitly concede theirs is only a procedural notice challenge, not a challenge to the Union's actual spending of the fees [raised by the temporary increase]. Since, according to [Petitioners], chargeability is immaterial to their challenge, their chief argument (and that of the dissent) premised upon the alleged

non-chargeability of the increase (its *purely* political nature) must fail." *Knox*, 628 F.3d at 1122 n.4. Thus, Petitioners have waived the very challenge that they request this Court to resolve – the chargeability *vel non* of Respondent's expenditures to oppose Proposition 76.

Second, even if Petitioners had not waived such a challenge, they failed to dispute the record evidence that the funds raised by the increase were expended not just to oppose Proposition 76, but also on other indisputably chargeable activities such as union meetings, a survey of union members partially devoted to collective bargaining issues, and the cost of defending the present lawsuit. *See* discussion, *supra*, at Section I(A). Even if the expenditures to oppose Proposition 76 were deemed to be wholly non-chargeable, the existence of other indisputably chargeable expenditures financed from the increase entirely rebuts Petitioners' unfounded assertion – which underpins their actual claim in this case – that the increase was spent solely on non-chargeable activities.

Thus, even if this Court were to grant the Petition and hold that the Proposition 76 expenditures were non-chargeable, its decision would be nothing more than an advisory opinion. The existence of other indisputably chargeable expenditures financed from the increase amply supports the judgment below that Respondent was not legally obligated to issue a second, mid-year *Hudson* notice regarding the increase. For that reason, the judgment below would have to be affirmed notwithstanding the chargeability *vel non* of the Proposition 76 expenditures.

B. Petitioners Fail to Identify Any Square Conflict with Regard to Their Second Question Presented. Petitioners assert that the decision below conflicts with the treatment of lobbying expenses in this Court's decision in *Lehnert*, 500 U.S. 507, and in several decisions of the fed-

eral circuits and state supreme courts. Petition at 20-27. Examination of Petitioners' authorities, however, reveals that there is no serious conflict worthy of this Court's review.

First, Petitioners assert that the decision below conflicts with *Lehnert*, 500 U.S. 507. Petition at 20-23. The lobbying expenditure that this Court considered in *Lehnert* was "a Preserve Public Education (PPE) program designed to secure funds for public education in Michigan," which "sought to affect the outcome of ballot issues and 'millages' or local taxes for the support of public schools." *Lehnert*, 500 U.S. at 527. The Court held that expense non-chargeable: "Where, as here, the challenged lobbying activities relate not to the ratification or implementation of a dissenter's collective-bargaining agreement, but to financial support of the employee's profession or of public employees generally, the connection to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees." *Id.* at 520.

The expenditure at issue in *Lehnert* was a lobbying effort to raise funds for public schools in the state generally, not tied to any funding for teachers represented by the union. In contrast, the expenditure Petitioners seek to have this Court consider is not "too attenuated," but rather *does* "relate . . . to the . . . implementation of [Petitioners'] collective-bargaining agreement." *Id.* As the court of appeals held, "Proposition 76 would have effectively permitted the Governor to abrogate [Respondent's] collective bargaining agreements under certain circumstances, undermining [Respondent's] ability to perform its representation duty of negotiating effective collective bargaining agreements." *Knox*, 628 F.3d at 1119 n.2. Lobbying to prevent the abrogation of Petitioners' collective bargaining agreements is certainly

"relate[d] . . . to the . . . implementation of" those agreements (*Lehnert*, 500 U.S. at 520), since an abrogated agreement will no longer be "implement[ed]." Moreover, giving the Governor the unilateral authority to abrogate those agreements interferes with Respondent's *current* ability to fulfill its statutory obligation of negotiating the *next* agreement. *See Nat'l Treasury Employees Union v. Chertoff*, 452 F.3d 839, 853, 859–60 (D.C. Cir. 2006) (regulation allowing employer to unilaterally abrogate collective bargaining agreements fundamentally diminishes a union's bargaining position and nullifies the right to collective bargaining).

There is thus no conflict between the decision below and *Lehnert*. Indeed, the Ninth Circuit *relied* on and cited *Lehnert* in the very portion of its decision that Petitioners assert conflicts with *Lehnert*. *Knox*, 628 F.3d at 1119 n.2. Again, Petitioners have not shown a circuit conflict, but at most argue the existence of a "misapplication of a properly stated rule of law," which is insufficient to warrant review by this Court. Supreme Court Rule 10.

Second, Petitioners assert that the decision below conflicts with several decisions of the federal circuits and state supreme courts. Petition at 23-27. Examination of those decisions, however, reveals no square conflict. *Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415, 1422-23 (D.C. Cir. 1997), *see* Petition at 23-24, held non-chargeable the expense incurred by a *private sector* union in lobbying government officials regarding federal regulation of airline safety. *Miller* expressly recognized the difference between private and public sector unions regarding lobbying expenses: "To be sure, in *Lehnert* the Supreme Court recognized an exception to this principle [of lobbying being non-chargeable] *for public sector unions* because '[t]he dual roles of government as employer and policymaker in such cases make the analogy between lob-

bying and collective bargaining in the public sector a close one.'" *Miller*, 108 F.3d at 1423 (quoting *Lehnert*, 500 U.S. at 519-20) (emphasis added). Since Respondent is a *public sector* union, there is no conflict with *Miller*.

The only other federal circuit decision Petitioners assert conflicts with the decision below is *Reese v. City of Columbus*, 71 F.3d 619, 625-26 (6th Cir. 1995). However, Petitioners admit that *Reese*'s treatment of the chargeability of lobbying activity "is unclear." Petition at 24. As such, it cannot be considered to create a clear conflict with the Ninth Circuit's decision below. Moreover, one of the reasons for the lack of clarity in *Reese* was the issue of the chargeability of extra-unit expenditures, which this Court subsequently clarified in *Locke v. Karass*, 555 U.S. 207 (2009). In sum, Petitioners can show no square conflict with any federal circuit decision.[10]

Finally, Petitioners fare no better in attempting to manufacture a conflict with state supreme court decisions. Both *Albro v. Indianapolis Educ. Ass'n*, 585 N.E.2d 666, 671-72 (Ind. Ct. App.), *adopted sub nom. Fort Wayne Educ. Ass'n v. Aldrich*, 594 N.E.2d 781 (Ind. 1992), and *Browne v. Wisconsin Employment Relations Comm'n*, 169 Wis. 2d 79, 107-08, 485 N.W.2d 376, 387 (Wis. 1992), cited in Petition at 25-26, noted that lobbying activities can be chargeable if they relate to implementation of a collective bargaining agreement. Neither of these decisions conflicts with the decision below because, as we have shown above in our discussion of *Lehnert*, Respondent's expenditures to oppose Proposition 76 *were* "related to" implementation of its bargaining agreements. Finally, *Belhumeur v. Labor Relations Comm'n*,

[10] Although Petitioners also cite *Seidemann v. Bowen*, 584 F.3d 104, 111-12 (2d Cir. 2009), they admit that *Seidemann* does not conflict with the decision below. *See* Petition at 24.

432 Mass. 458, 735 N.E.2d 860 (2000), cited in Petition at 26-27, is, if anything, even less on point. *Belhumeur* did not concern lobbying expenses at all, but rather "expenses related to implementing a Statewide strike in Massachusetts or reporting or discussing Statewide strikes in other States." *Id.*, 432 Mass. at 470, 735 N.E.2d at 870. Although the *Belhumeur* court noted that the *purpose* of the contemplated strike – "advocating for funding of public education in general" – was identical to the purpose of the lobbying expenditures in *Lehnert* (*id.*, 432 Mass. at 471, 735 N.E.2d at 871), that does not transform the *activities* at issue in *Belhumeur* – strike preparations, discussions and reporting – into lobbying.

As such, Petitioners have failed to demonstrate a conflict between the decision below and any decisions of this Court, the federal circuits or the state supreme courts, with regard to their second Question Presented.

III. THE DECISION BELOW WAS CORRECT

In any event, the case was correctly decided below. The court of appeals correctly found that the increase was devoted to both chargeable and non-chargeable expenses and held that the normal *Hudson* regime of a yearly fee notice based upon the union's *actual* spending during the most recently audited prior year provided all of the procedural protections the non-members were owed. As the court of appeals noted, *Hudson* itself "recognized the impossibility of determining the chargeability of a union's anticipated expenditures at the outset of a fee year, and specifically approved calculating the present year's objector fee based on the prior year's total expenditures." *Knox*, 628 F.3d at 1120. This is because large public sector unions' *Hudson* notices must be based on audited financial statements and "[t]he audit requirement renders impossible any method of determining the chargeability of the upcoming fee year's expenditures other than basing it on the prior

year's actual expenditures, because one cannot audit anticipated future expenditures." *Id.* at 1121. The court below properly concluded that the logic of this retrospective system renders the *Hudson* notice an *inherently imprecise* predictor of the upcoming fee year's chargeable and non-chargeable expenditures, with the result that, in some years, fee payers who object to subsidizing non-chargeable expenditures will necessarily end up doing so:

> The inevitable effect of the *Hudson* "prior year" method is a lag of at least one year between the time when a union incurs expenditures and when the audited ratio of its chargeable expenditures to total expenditures is applied to calculate the objectors' fee for the next year. Fluctuation is inherent in such a method: in each year, objectors may be "underpaying" or "overpaying" fees when compared to the chargeable percentage of the union's actual expenditures in that year because under *Hudson*'s "prior year" method the fee is based upon the chargeable percentage of the prior year's actual expenses, but the inevitable effect of the *Hudson* method is that these over- and undercharges even out over time. The *Hudson* notice can never be more than a prediction, which will inevitably be incorrect as to the union's actual expenditures. The *Hudson* notice is not, and cannot be expected to be, more than that.

Id.

The court of appeals properly rejected as "practically unworkable" the argument that a union must issue a mid-year *Hudson* notice "when it 'intends to depart drastically from its typical spending regime and to focus on activities that [are] political or ideological in nature.'" *Id.* at 1122 (quoting district court's decision). This is because "*Hudson*'s prior year method assumes and accepts that a union has no 'typical spending regime.'" *Id.* Rather,

> Union spending may vary substantially from year to year – in one year there may be a new collective bargaining agreement negotiated, resulting in a high chargeable percentage for objectors that is followed by an election year that results in a low chargeable percentage for objectors. . . . [¶] [Under *Hudson*] . . ., even though spending might vary dramatically, a single annual notice based upon the prior year's audited finances is constitutionally sufficient. Otherwise, a union's *Hudson* notice for an upcoming partisan political election year, following a negotiating year, could not be based upon the union's actual total expenditures in the previous year because the union would intend in the coming fee year to "depart drastically from its previous spending regime and to focus on activities that are political or ideological in nature." Yet, this is the system set out by *Hudson*, and no following case has questioned its continuing vitality. The fact that a projection of expenditures may differ from actual expenditures should surprise no one. The key analytic point for *Hudson* purposes is that proper notice is given and subsequent adjustments made.

Id.

Petitioners argue that the result below violates language from *Hudson* – which they pull out of context, thereby changing its meaning – prohibiting unions from "'obtain[ing] an involuntary loan for purposes to which the employee objects.'" Petition at 17 (quoting *Hudson*, 475 U.S. at 305); *see also id.* at 6 ("the Nonmembers found themselves giving Local 1000 a forced loan spent on the ballot propositions and other political and nonbargaining activities to which they objected"); *id.* at 7 (to same effect). Wrenched from its crucial context, however, the "forced loan" language Petitioners borrow from *Hudson* cannot not bear the weight they place upon it.

The danger of an involuntary loan, as that concept has been explained by this Court, arises in two situations. First, an "involuntary" or "forced" loan may occur if a union fails to offer its fee payers the opportunity to object and receive an "advance reduction" in fees at the outset of the fee year, so that they are paying only for expenses germane to collective bargaining as determined on the basis of the prior year's audited expenditures. The forced loan thus arises where the union collects a fee that is equal to full dues and provides a rebate to objectors only at the end of the fee year. *Ellis v. Bhd. of R.R., Airline & S.S. Clerks*, 466 U.S. 435, 443-44 (1984).

Second, a "forced exaction" may occur if a union freely takes and uses the fees of a non-member who has submitted a challenge to the union's calculation of the fee. *Hudson*, 475 U.S. at 305-06. In that situation, *Hudson* requires the union to escrow the disputed portion of the fee pending resolution of the challenge through arbitration. *Id.* at 309-10.

This case presents neither of these concerns. First, no "forced loan" can arise simply from Respondent's use of its actual prior year's expenditures to calculate the chargeable percentage. *Hudson* itself unequivocally endorsed this retrospective procedure for calculating fair share fees based on the ratio of chargeable to non-chargeable spending during the prior year. *Id.* at 307 n.18 ("[T]he Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year").[11]

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[11] A "forced loan" might arguably have occurred here if Respondent had charged objectors 100% of the increase, rather than the 56.35% objector rate set forth in the June 2005 *Hudson* notice. But, as we have already discussed, it did not; it "charged objectors only 56.35% of the temporary increase, the chargeable percentage set forth in the June 2005 notice, rather than 100% of the increase followed by a later rebate." *Knox*, 628 F.3d at 1122.

Petitioner's theory "proves too much" because it could easily (and inevitably would) result in a "forced loan" occurring under *Hudson*'s own retrospective method. According to Petitioners' theory, a "forced loan" would occur whenever a union's percentage of non-chargeable expenditures is greater than in the prior fee year, for example where a union that devoted 80% of its expenditures to chargeable activities in Fee Year 1, and therefore set the following fee year's objector rate at 80% of union dues, ultimately spent some lesser percentage, say 70%, of its total expenses in Fee Year 2 on chargeable activities. Under Petitioners' theory, the 10% difference that was actually spent on non-chargeable activities would constitute a "forced loan" from the fee objectors, but under *Hudson*'s retrospective method that is not and cannot be the law. *See also Knox*, 628 F.3d at 1121-22 (considering and rejecting Petitioners' argument).[12]

The decision below was correct and Petitioners' arguments to the contrary would invalidate *Hudson*'s retrospective system itself. Thus, Petitioners' disagreement is not with the decision below, but with *Hudson* itself.

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[12] The second situation contemplated by this Court, a "forced exaction" resulting from a union's failure to escrow the disputed portion of the fee pending arbitral resolution of a challenge to the union's calculation of the chargeable amount (*see Hudson*, 475 U.S. at 309-10), is clearly not implicated in the present case, either. This case has had nothing to do with such challenges, and there has been no claim that Respondent failed to escrow the fees of non-members who submitted timely challenges to its calculation of the chargeable amount in response to the June 2005 *Hudson* notice.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

JEFFREY B. DEMAIN
Counsel of Record
PEDER J. THOREEN
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

Counsel for Respondent
Service Employees International Union, Local 1000

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