No. 10-1121

IN THE

Supreme Court of the United States

DIANNE KNOX; WILLIAM L. BLAYLOCK; ROBERT A. CONOVER; EDWARD L. DOBROWOLSKI, JR.; KARYN GIL; THOMAS JACOB HASS; PATRICK JOHNSON; AND JON JUMPER, ON BEHALF OF THEMSELVES AND THE CLASSES THEY REPRESENT,

Petitioners,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000,

Respondents.

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

PETITIONERS' REPLY BRIEF

W. JAMES YOUNG
Counsel of Record
RAYMOND J. LAJEUNESSE, JR.
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
wjy@nrtw.org

Attorneys for Petitioners

May 24, 2011

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 10-1121

DIANNE KNOX; WILLIAM L. BLAYLOCK; ROBERT A. CONOVER; EDWARD L. DOBROWOLSKI, JR.; KARYN GIL; THOMAS JACOB HASS; PATRICK JOHNSON; AND JON JUMPER, ON BEHALF OF THEMSELVES AND THE CLASSES THEY REPRESENT,

Petitioners,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000,

Respondents.

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

PETITIONERS' REPLY BRIEF

ARGUMENT

Respondent Service Employees International Union, Local 1000's ("Local 1000") Brief in Opposition ("Opp.") echoes a theme inherent in its arguments throughout this case: "Ignore what the union said it would do; adjudicate this case based solely upon what the union claims—after the fact—to have done."

However, compliance with *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 306-10 (1986), is not adjudi-

cated in accord with *post hoc* justifications, as the court below has recognized:

> the purpose of a *Hudson* notice is not so that the federal courts can review the union's accounting after the fact; it is to provide the employee with "sufficient information to gauge the propriety of the union's fee." *Hudson*, 475 U.S. at 306. Thus, we must look at the form and content of the notice from the perspective of the employee at the time the employee receives it.

Knight v. Kenai Peninsula Borough Sch. Dist., 131 F.3d 807, 813 (9th Cir. 1997); *accord Hudson v. Teachers Local No. 1*, 743 F.2d 1187, 1192 (7th Cir. 1984) ("The question here is whether the plaintiffs have a federal right to challenge a procedure that may not have resulted in any improper expenditures. . . . We think they can. . . ."), *aff'd*, 475 U.S 292 (1986); App. B at 65a ("the adequacy of *Hudson* notices should not be viewed through a lens skewed by the benefit of hindsight").

I. The First Question Presented Is Properly Preserved and Presented.

Local 1000 suggests a disjunction between the first Question Presented and the "argument in support of that question." It claims that the latter "relates to an entirely different issue," *i.e.*, the standard of review the court below applied. Opp. at 1, 7-12. Local 1000 therefore concludes that "the legal standard applicable to a challenge to a union's compliance with *Hudson*'s procedural requirements" is "not properly presented. . . ." Opp. at 7. This conclusion is belied by the considerable portion of the decision below devoted to the standard of review.

The "statement of any question presented is deemed to comprise every subsidiary question fairly included therein." SUP. CT. R. 14(1)(a). Obviously, the standard of review applied by the lower court is a "subsidiary question fairly included therein." *See also* FED. R. APP. P. 28(a)(9)(B) & (b)(5) (briefs require a "concise statement of the applicable standard of review"); *see, e.g.*, 9th Cir. Rule 28-2.5 (same). As those rules make clear, the appropriate standard of review is a predicate to virtually *every* adjudication.

Moreover, Local 1000 attempts to hide what it must concede: that Petitioners' ("the Nonmembers") argument that Local 1000's "*intent* in imposing the" special union assessment, as both the district court and dissenting Circuit Judge Wallace agreed, must govern its duties under *Hudson*. Opp. at 1.[1]

---

[1] Local 1000 discusses at length how its *post hoc* determination that it had not spent the special assessment as it had announced justifies its failure to provide a new *Hudson* notice and opportunity to object. Opp. at 8-12. That begs the question of the appropriate *advance* notice, which must be adjudicated with reference to what is known at the time (*i.e.*, "in advance"), not with the benefit of hindsight. Local 1000 quibbles with the Nonmembers' description, asserting that "Respondent *never* stated that the increase would be devoted 'solely' or 'exclusively' to financing non-chargeable activities." The Non-members concede this point: Local 1000 did not use those *specific* words; however, it announced that it would be used for "a broad range of political expenses," R. 1 at 15, and it disclaimed that it would "be used for regular [union] costs." R. 1, Exhibit A.

However, Local 1000 overplays its hand—and the court below presumed too much—when it asserts that "in response to inquiries, the Union specifically stated it intended to split the increase 'between political actions and collective bargaining actions.'" Opp. at 10, *citing* App. A at 6a; 628 F.3d at 1119. The document cited, R. 6, makes *no* representations about how the special assessment will be spent, but only about how Local

This is particularly true where, as here, the stated purpose for imposing the assessment is for political expenditures, rather than in accord with previous union spending patterns.[2] Local 1000 may claim that it was lying to itself when it passed the "Emergency Temporary Assessment to Build a Political Fight-Back Fund," but it cannot credibly misrepresent the record claiming that no evidence supports the conclusion that the assessment was intended solely for non-chargeable political and ideological purposes. That "record evidence" is Local 1000's own representations.[3] Local 1000's contrary assertion, Opp. at 1, is false.

1000's "campaign" is to be split "between political actions and collective bargaining actions." *Id.*

[2] The purpose of the "Emergency Temporary Assessment [was] to Build a Political Fight-Back Fund" for "use[] for a broad range of *political* expenses, including television and radio advertising, direct mail, voter registration, voter education, and get out the vote activities in our work sites and in our communities across California," and further, that "[t]he Fund will *not* be used for regular costs of the union--such as office rent, staff salaries or routine equipment replacement, etc." R. 1, ¶ 23 & Exhibit A (emphasis added); R. 28, ¶ 23 (admitting authenticity of document). This representation constituted a portion of the factual basis for the district court's decision and judgment. Petition ("Pet."), App. B at 53a-54a & n.2; *id.* at 63a-64a.

[3] Local 1000 also suggests nonexistent concessions by the Nonmembers arising out of their "distinction between [Local 1000]'s 'special assessment' (allegedly) devoted exclusively to non-chargeable activities and an 'across-the-board' general increase in fees." Opp. at 7 n.2. The distinction made is one well-founded in the law. *NLRB v. Food Fair Stores, Inc.*, 307 F.2d 3, 14-16 (3d Cir. 1962) (an assessment differs from normal dues and fees, which are used for normal operating purposes, and is for a specific purpose(s) and of limited duration).

When Local 1000 addresses the legal argument, Opp. at 12, it asserts that there is no genuine conflict on the first Question Presented.

Local 1000 says little about this Court's general First Amendment, forced-speech jurisprudence with which the decision below conflicts, Pet. at 14-15, implying that there is some amorphous "union exception" to these generally-applicable legal principles. Opp. at 15.[4] Instead, Local 1000 merely defends the decision below as an application of *Hudson* to the facts of this case. Opp. at 13-14.

Local 1000's discussion of this Court's decisions profoundly disregards this Court's jurisprudence concerning forced union dues. Thus, while conceding that *Davenport v. Washington Education Ass'n*, 551 U.S. 177, 185 (2007), holds that "unions have no constitutional entitlement to the fees of nonmember-employees," Opp. at 14, *citing* 551 U.S. at 185, Local 1000 immediately asserts "that does not mean that unions have *no* **right** of any kind to collect such fees." Opp. at 14 (emphasis added).

Actually, it does, for what this Court said in full was that "[t]hose cases were not balancing *constitutional rights* in the manner respondent suggests, for the simple reason that unions have *no constitutional entitlement* to the fees of nonmember-employees." *Davenport*, 551 U.S. at 185 (emphasis added). Were

[4] Local 1000 misrepresents the nature of the Nonmembers' claim, asserting that their "claim in this case has never been that Respondent failed to follow the procedure mandated by *Hudson*." Opp. at 13; *but see* R. 1, ¶¶ 40, 45. The Nonmembers' claim is *precisely* that Local 1000 "failed to follow the procedures mandated by *Hudson*" with regard to the imposition of its Emergency Temporary Assessment, and that it must be considered separately from its ordinary union dues.

Local 1000's union "rights" rhetoric valid, this Court hardly would have observed in *Davenport* that "it is uncontested that it would be constitutional for Washington to *eliminate agency fees entirely*." *Id.* at 184 (emphasis added), citing *Lincoln Federal Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949). Plainly, collection of forced union dues is merely a statutory privilege, not a "right."

While Local 1000 criticizes the Nonmembers' reliance upon general First-Amendment jurisprudence as "decisions rendered in areas outside of [this] context," Opp. at 15, it relies itself upon a decision rendered by this Court in another context, *i.e.*, *United States v. United Foods, Inc.*, 533 U.S. 405, 409-10 (2001). Opp. at 15 (contending that *United Foods* holds that forced union dues jurisprudence applies a lesser standard than commercial speech jurisprudence).

There is *no* merit to this contention. In fact, this Court conspicuously declined to "enter into the controversy" over whether "commercial speech [i]s entitled to lesser protection." Instead, it held that "even viewing commercial speech as entitled to lesser protection," 533 U.S. at 410, "the compelled funding for advertising must pass First Amendment scrutiny." *Id.* at 411.

Local 1000 also vehemently disclaims that there is a split among the circuits. Nevertheless, whereas other Circuits have required that procedures be "narrowly drawn," Pet. at 18-19, the Ninth Circuit here self-consciously applied a "balancing and reasonable accommodation test," App. A at 9a; 628 F.3d

at 1120, thereby creating a genuine, substantial conflict.[5]

II. The Second Question Presented Is Properly Presented, and Does Not Seek an Advisory Opinion.

Opposing the first Question Presented, Local 1000 defends its failure to provide a *Hudson* notice regarding its imposition of a special assessment with a *post hoc* argument that the funds derived from it were "used to fund both *chargeable* and non-chargeable expenditures." Opp. at 1. However, Local 1000 then argues that the Petition should be denied on the second Question Presented because it "seeks an advisory opinion" regarding its treatment of some of its expenditures as chargeable to the Nonmembers. Opp. at 19.

Local 1000 cannot have it both ways. If its *post hoc* determination that a portion of the special assessment was expended on chargeable activities sustains a finding that it complied with *Hudson*'s requirements, then its treatment of a portion of those expenditures as chargeable is plainly a "case or controversy," Const., art. III, reviewable by this Court. As dissenting Circuit Judge Wallace said with regard to the

---

[5] Denial of the petition for certiorari in *Grunwald v. San Bernardino City Unified School District*, 994 F.2d 1370 (9th Cir. 1993), *cert. denied*, 510 U.S. 964 (1993), *cited in* Opp. at 18, is meaningless to this determination. "[S]uch a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated." *Singleton v. C.I.R.*, 439 U.S. 940, 943-44 (1979) (Stevens, J., opinion respecting the denial of the petition for writ of certiorari), *quoting Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-19 (1950) (Frankfurter, J., opinion respecting the denial of the petition for writ of certiorari).

majority's ruling on this issue, "it is peculiar that the majority even makes the assertion that the Union's political expenses would be chargeable if, as the majority avers, 'chargeability is immaterial' to the instant case." App. A at 44a n.4 (*quoting* App. A at 13a n.4). Certainly, Circuit Judge Wallace did not find the majority's footnote on this issue merely "advisory," or "dicta." Rather, he took pains to rebut it in a lengthy footnote. App. A at 43a-44a n.4.

Moreover, this Court's decision in *Locke v. Karass*, 555 U.S. 207, ___ (2009), implicitly rejects the argument, Opp. at 20-21, that a challenge to a union's notice and procedures under *Hudson* cannot challenge the standards for chargeability stated in the notice. *Locke* was plainly the former, but challenged the standards for chargeability stated in the notice. *See Locke v. Karass*, 498 F.3d 49, 52 (1st Cir. 2007), *aff'd*, 555 U.S. 207 (2009) ("MSEA included in its calculation of chargeable expenditures those costs of litigation . . . . that was not undertaken specifically for their own bargaining unit, but rather was conducted by or on behalf of other units or the national affiliate, sometimes in other states"); *id.* at 65-66 (noting that challenge to chargeability of extra-unit litigation was raised as to the notice).

Moreover, Local 1000 still misrepresents the record here.[6] Plaintiffs' Complaint plainly states a free-

[6] The court of appeals presumed too much when it concluded that "chargeability is immaterial to their challenge," and constituted a concession that "theirs is only a procedural notice challenge." App. A at 13a n.4; 628 F.3d at 1122 n.4. As noted *supra*, the Nonmembers challenged the utter *lack* of notice regarding the special assessment; they could hardly challenge Local 1000's standards for chargeability when they had received no notice from the union regarding the assessment.

speech claim for the union's "use[ ] and spen[ding] on ballot propositions and other political and nonbargaining activities." R. 1, ¶ 48 ("Second Claim for Relief"). The Complaint also sought an injunction against that use of the assessment. *Id.* at 12-13 (prayers for temporary and permanent injunction relief).

Local 1000 relies upon its accountant's determination that some of its special assessment were expended for chargeable activities. The court of appeals specifically ruled that expenditures from these funds for a ballot proposition were properly chargeable to the Nonmembers. App. A at 6a-7a n.2; 628 F.3d at 1119 n.2. The Nonmembers cannot be seeking an advisory opinion when a reversal by this Court upon the Petition would require refunds of illegally-seized fees to thousands of the Nonmembers on remand. *But see* Opp. at 21. As the court below's error is substantively remediable, this issue is properly reviewable by this Court.

Local 1000's argument that the Nonmembers present no "square conflict" on the second Question Presented, Opp. at 12, implicitly concedes that there are conflicts among the lower courts, but has no more merit than its "advisory opinion" argument. Opp. at 21-25.

Local 1000 first suggests that there is "no serious conflict" with this Court's decision in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). Opp. at 22. The *Lehnert* Court was quite specific in limiting its exception to the general rule that nonmembers cannot be forced to subsidize union political and ideological activities. *See* Pet. at 22. There, as here, the union charged nonmembers for lobbying and political activities concerning laws of general application, not

directly for "the ratification or implementation of [their] collective-bargaining agreement." 500 U.S. at 520. The holding of the court below clearly conflicts with this limitation. Nevertheless, Local 1000 attempts to re-write *Lehnert*. Opp. at 22-23.

While conceding the Sixth Circuit's confusion in *Reese v. City of Columbus*, 71 F. 3d 619, 625 (6th Cir. 1995), Local 1000 dismisses as somehow not "square" the conflict of the decision below with other lower courts. Opp. at 24. Even if true, the differences between the decision below and the decision of the District of Columbia Circuit in *Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415, 1422-23 (D.C. Cir. 1997), are insufficient to be dismissed as "no square conflict." Opp. at 23-24. That *Miller* was rendered concerning a private-sector union is of no import, for it squarely applied *Lehnert*'s principles to reach a conclusion contrary to that of the court below. Likewise, the conflict between the court below and other state courts, Pet. at 25-27, lies in the latters' narrow *application* of *Lehnert*'s principle limiting chargeable lobbying activities, as opposed to the Ninth Circuit's expansive reading here.

III. Like the Court Below, Local 1000 Seriously Misapprehends *Hudson*'s Requirements and the Interests This Court's Decision Sought to Protect.

Local 1000 briefly discusses *Hudson*'s determination of the protections necessary when agency fees are calculated as a portion of ordinary union dues. Opp. at 25-29.

Like the Ninth Circuit, this treatment begs the questions raised by this case, which addresses a special assessment imposed for a specific purpose;

"for a broad range of political expenses," and specifically that "not . . . for regular costs of the union." App. B at 53a. Like the Ninth Circuit's decision, Local 1000's argument is notable for its failure to consider "the careful distinctions drawn in *Abood*." *Hudson*, 475 U.S. at 306, *citing Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

Abood and *Hudson* both require that notice gives employees "a fair opportunity to identify the impact of the governmental action on [their] interests and to assert a meritorious First Amendment claim," as well as prevent the union from "'obtain[ing] an involuntary loan for purposes to which the employee objects.'" *Hudson*, 475 U.S. at 303, 305, *quoting Ellis v. Railway Clerks*, 466 U.S. 435, 444 (1984). The Nonmembers discussed these principles in their Petition, particularly the "acute" for notice to previously non-objecting Nonmembers. Pet. at 17.

Local 1000 defends the decision below with entirely *post hoc* reasoning, asking this Court to ignore the assessment's intended purpose. The district court's judgment applies *Hudson*'s principles, while the court appeals shoehorns the inapposite facts of this case into *Hudson*'s facts.

CONCLUSION

The court below focused narrowly upon the application of *Hudson*'s principles to its specific facts and failed to give due regard to the core mandate of both *Hudson* and *Abood*: to require a "procedure . . . carefully tailored to minimize the infringement" on First Amendment rights, and to provide a notice which gives "the nonunion employee . . . a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First

Amendment claim." *Hudson*, 475 U.S. at 303. Thus, as found by the district court, when Local 1000 "depart[ed] drastically from its typical spending regime and to focus on activities that were political or ideological in nature . . . . represent[ing] a material difference from that contemplated under the standard dues structure to which the [normal, annual] *Hudson* notice was directed," Local 1000 "rendered the *Hudson* notice obsolete as to that Assessment," App. B. At 65a-66a, and triggered an obligation to provide a new notice and opportunity to object.

Therefore, for the reasons stated in the Petition and above, the Petition for a Writ of *Certiorari* should be granted, and the case set for plenary briefing and argument on the important questions presented.

Respectfully submitted,

W. JAMES YOUNG
Counsel of Record
RAYMOND J. LAJEUNESSE, JR.
c/o NATIONAL RIGHT TO
WORK LEGAL DEFENSE
FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
wjy@nrtw.org

Attorneys for Petitioners

May 24, 2011