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

REPLY IN SUPPORT OF MOTION TO DISMISS AS MOOT

Jeffrey B. Demain
Counsel of Record
P. Casey Pitts
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

Counsel for Respondent Service Employees International Union, Local 1000

October 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

INTRODUCTION

Petitioners' Opposition to Respondent's Motion to Dismiss as Moot ("Opp.") begins with the assertion that Respondent SEIU Local 1000's motion "is a classic 'attempt to manipulate the Court's jurisdiction to insulate a favorable decision from review.'" Opp. at 1 (quoting *City New & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 279 (2001)); *see also id.* at 19 (same). To the contrary, Respondent volunteered in its Motion that vacatur of the Ninth Circuit's decision might be appropriate when the case is dismissed as moot, and stated that it did not object to vacatur. Motion To Dismiss as Moot ("Motion") at 14 (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71-72 (1997)). Petitioners agree that vacatur would be appropriate here, *see* Opp. at 21 (arguing that the Court "should at a minimum issue an order directing vacatur of the Ninth Circuit's decision under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)"), so their characterization of Respondent's Motion as an effort to leave standing the unreviewed lower court decision is entirely false.

Respondent has eliminated the need for further litigation by providing Petitioners with all the relief they could receive if they were successful. Petitioners' Opposition fails to identify any "'personal stake in the outcome' of th[is] lawsuit" sufficient to prevent this case from being dismissed as moot. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 478 (1990) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983)). Petitioners do not dispute that the only relief available to them is the relief awarded by the District Court. That court ordered Respondent to provide all class members with an opportunity to claim a refund, with interest, of the non-chargeable portion of the temporary fair share fee increase paid by the class between September 1, 2005 and June 30, 2006, and awarded nominal damages in the amount of one dollar ($1.00) to

each class member. Motion at 4; Opp. at 6-7. Petitioners cannot dispute that Respondent has paid each class member one dollar, corresponding to the District Court's nominal damages award, and that Respondent has provided every class member with a notice giving them the opportunity to claim a refund, with interest, of the *entire* fee increase paid between September 1, 2005 and June 30, 2006. Opp. at 7-8. As of October 24, 2011, 5,814 class members have already been mailed such refunds.

Petitioners nonetheless ask this Court to resolve the case on the merits, arguing that such a decision by this Court would "be of true, tangible benefit" to them because "Respondent could at any time impose another supplemental assessment without a *Hudson* notice." Opp. at 2. However, Respondent's future conduct is not at issue in this case, which relates exclusively to the legality of a one-time, temporary fee increase instituted by Respondent from September 2005 through June 2006. Petitioners never asserted any claim (and long ago abandoned any potential claim they could have asserted) for prospective relief limiting Respondent's ability to implement other, different fee increases in the future, and Petitioners' cannot now rely on such a claim to avoid a finding of mootness. "[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). Because Petitioners have received all the relief they could obtain through a favorable decision by this Court, this case must be dismissed as moot.

///

///

///

///

ARGUMENT

I. The Voluntary Cessation Exception Is Inapplicable Here Because Petitioners Long Ago Abandoned Any Claim for Prospective Relief Limiting Future Fee Increases

Petitioners' primary argument against a finding of mootness is that "Respondent stopped its special assessment voluntarily and could begin another one at any time." Opp. at 9. However, the "special assessment" challenged by Petitioners ceased by its very terms nearly five years ago, at the end of 2006, and Petitioners have never sought any form of prospective relief limiting Respondent's ability to implement other, different fee increases in the future. Instead, Petitioners have always focused their claims and requests for relief exclusively on the 2005-2006 fee increase. Because Petitioners do not seek any prospective relief in this case, but merely seek retrospective relief for the violation of their rights in connection with the 2005-2006 fee increase, Petitioners cannot save their case from dismissal on the basis of the "voluntary cessation" exception.

The issue before the Court in this case is not, as Petitioners contend in their Opposition, whether Respondent could "at any time impose another supplemental assessment without a *Hudson* notice," or whether "a special assessment without a new *Hudson* notice is unlawful." Opp. at 2, 9. Rather, as Petitioners acknowledge in their Opening Brief on the Merits, the issue is whether the specific fee increase implemented and collected by Respondent in 2005 and 2006 was consistent with the First Amendment. *See, e.g.*, Petitioners' Opening Brief at 21-23 & nn.8-9 (arguing that the 2005-2006 temporary fee increase cannot "be analogized to normal fluctuations in general union expenses" because it was a "special assessment for specific purposes, for a limited time, and not for general union functions," based in part on specific

statements made by Respondent at the time of its implementation). The sole issue in this case has *always* been the constitutional propriety of that temporary fee increase, which as Petitioners admit ended according to its terms more than a year before the District Court entered judgment. Opp. at 7 n.2.[1/] Although Petitioners originally sought an injunction barring collection of that increase, they abandoned that request for relief after the denial of their motion for a preliminary injunction, and never sought *any* form of prospective relief restricting Respondent's ability to implement other, different fee increases in the future.

The purely retrospective nature of the relief sought in this case distinguishes it from those cases in which the Court has applied the "voluntary cessation" exception, all of which included claims for prospective relief against future violations of the law. In *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000), for example, the Court expressly based its finding that the case was not moot on the continuing existence of a valid claim for prospective relief. *Id.* at 192-93. Likewise, *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982), involved a request for injunctive relief barring the enforcement of a purportedly unconstitutional city statute, *id.* at 287-88; *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953), involved a request to enjoin future violations of the Clayton Act's prohibition on interlocking corporate directorates, *id.* at 630-31; and *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), involved a claim for injunctive relief against the union's purportedly unconstitutional fee collection procedures, *see Hudson v. Chicago Teachers Union*, 743 F.2d 1187, 1197 (7th Cir. 1984); *see also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 54

[1/] Indeed, the purportedly *unlawful* collection of the increase ended in June 2006, after Respondent issued its nonmembers a new annual *Hudson* notice that disclosed the amount of and basis for the temporary fee increase. J.A. at 73a.

(1987) (plaintiffs sought declaratory and injunctive relief and civil penalties). In each of these cases, the plaintiffs sought forward-looking prospective relief in the form of declaratory relief, an injunction, or civil penalties, in order to prevent future violations of the law. The Court appropriately refused to find those cases moot because the very purpose of each lawsuit was to prevent such future violations of the law, but a finding of mootness would have permitted the defendants to evade the lawsuit while remaining "'free to return to [their] old ways.'" *Laidlaw*, 528 U.S. at 189 (quoting *Aladdin's Castle*, 455 U.S. at 289 n.10).

Here, by contrast, Petitioners abandoned any claims for such forward-looking relief in the District Court many years ago, choosing to instead focus their claims on retrospective relief relating to the 2005-2006 fee increase. Because Petitioners abandoned any claim for forward-looking prospective relief against future fee increases, the concerns about a defendant's future conduct that underlie the Court's "voluntary cessation" cases are irrelevant here. The only relief that could be awarded by this Court through a decision on the merits would relate to whether Respondent violated Petitioners' constitutional rights under the unique and specific circumstances surrounding the temporary 2005-2006 fee increase.[2/] Relief from hypothetical future fee increases under different circumstances, for different purposes, collected through different procedures is simply not at issue.

Petitioners do not meaningfully challenge the common-sense conclusion that the "voluntary cessation" exception to mootness applies only in cases where the plaintiffs seek

---

[2/] As Respondent explained in its Motion, even a desire for declaratory relief cannot save this case from mootness because Petitioners did not appeal the District Court's failure to grant them a declaratory judgment and do not ask this Court to revive their claim for such relief or assert that such a claim has been preserved. And, in any event, even a properly presented claim for declaratory relief would not prevent a finding of mootness here, in the absence of any ongoing controversy between the parties. *See* Motion at 10 n.3.

prospective relief to deter future legal violations. Opp. at 13. Instead, they assert that they in fact seek such relief because the District Court's order required Respondent to "perform affirmative acts – namely, issue a proper *Hudson* notice and process and issue subsequent refunds." Opp. at 14. These "affirmative acts," however, are not a form of prospective relief against future legal violations. They are simply the means of implementing the purely retrospective relief awarded by the court. Petitioners alleged only that they had been denied notice and an opportunity to object before collection of the temporary fee increase began in 2005, and the District Court ordered Respondent to provide the class with that notice and opportunity to object and thereby claim a refund. This procedure was merely the mechanism by which the Court could provide the class with monetary relief for past fee deductions, which can be awarded only to nonmembers who affirmatively object to the use of their fees for non-germane purposes. *See Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 774 (1961); *Bhd. of Ry. & S.S. Clerks v. Allen*, 373 U.S. 113, 119 (1963). Accordingly, the notice and objection required by the District Court did nothing to place Respondent's collection of different fee increases in the future before this Court, such that the "voluntary cessation" exception to mootness might apply, but was simply part of the retrospective relief awarded by the District Court. *Cf. Green v. Mansour*, 474 U.S. 64, 71-73 (1985) (where plaintiffs had no valid claim for prospective relief, "notice relief" and declaratory judgment related solely to past violations of the law).[3/]

[3/] Tellingly, all of the cases cited by Petitioners in arguing that the "affirmative acts" required by the District Court constituted prospective relief included the very kinds of forward-looking relief entirely absent in this case. *See, e.g., Aberdeen & Rockfish R.R. v. S.C.R.A.P.*, 422 U.S. 289, 306 (1975) (district court order required Interstate Commerce Commission to prepare a new Environmental Impact Statement, hold hearings, and reconsider prior decision); *Los Angeles County v. Humphries*, _ U.S. _, 131 S.Ct. 447, 449-50 (2010) (plaintiffs sought declaratory and injunctive relief for failure to provide procedural mechanism by which to challenge individual's inclusion in Child Abuse Central Index); *Christian Legal Soc'y v. Martinez*, _ U.S. _, 130 S.Ct. 2971, 2981 (2010) (continued...)

Likewise, Petitioners' now-satisfied claim for nominal damages is not the kind of "prospective relief" addressing future fee increases that would make the voluntary cessation exception potentially applicable. The mere fact that such an award, like *any* damages award, could affect the parties' future dealings does not transform its purpose from one of remedying past legal violations to one of restricting future violations. "Since the future is unknown, one can never be certain that findings made in a decision concluding one lawsuit will not some day (if allowed to do so) control the outcome of another suit. But if that were enough to avoid mootness, no case would ever be moot." *Commodity Futures Trading Comm'n v. Bd. of Trade of City of Chicago*, 701 F.2d 653, 656 (7th Cir. 1983) (Posner, J.).

For all of these reasons, the "voluntary cessation" exception cannot save this case from being dismissed as moot. Even if that exception were applicable here, however, the case would still have to be dismissed because it is absolutely clear that Respondent's purportedly unlawful behavior cannot *reasonably* be expected to recur. *See, e.g., S.E.C. v. Medical Committee for Human Rights*, 404 U.S. 403, 406 (1972). Petitioners challenge a one-time fee increase, implemented under unique circumstances, that expired by its own terms nearly five years ago and that has not been repeated since then. Indeed, Respondent has since amended its internal policies to ensure that, before collecting any future special assessments, nonmembers will receive the very notice and opportunity that Petitioners contend is constitutionally required.[4/] In addition,

---

[3/] (...continued)
(plaintiffs sought injunctive and declaratory relief for law school's failure to accord Christian group registered student organization status).

[4/] Contrary to Petitioners' assertion that "Respondent's policy could change with the tides; it could vote to revert to its old policy at a moment's notice," Opp. at 11, the amended policy expressly provides that it cannot be repealed "within 180 days prior to a vote to approve the institution of an assessment," Mot. App. at 51a & 52a. The (continued...)

Respondent has incurred significant expenses both in defending itself in this litigation and in issuing full refunds of the fee increase, with interest, to all class members who filed objections in response to Respondent's 2005 *Hudson* notice and to all non-objecting class members who have requested such a refund. The group receiving such refunds now includes more than 5,800 people. Under these circumstances, Petitioners' contention that the dispute presented by this case is likely to recur is nothing but a "speculative contingenc[y]" insufficient to establish this Court's Article III jurisdiction. *Hall v. Beals*, 396 U.S. 45, 49 (1969).

Petitioners' Opposition makes it apparent that they have a strong ideological interest in the subject matter of this case and greatly desire a decision on the merits. However, this Court does not issue "advisory opinions" having no impact on the concrete rights of the parties before it. *Rice*, 404 U.S. at 246. Because Petitioners' only ongoing interest in this dispute is their interest in procuring an advisory opinion regarding the legality of Respondent's 2005 and 2006 fee increase, the motion to dismiss should be granted.

II. Petitioners' Nominal Damages Claim Cannot Save This Case from Mootness Because Respondent Has Paid All Class Members the Nominal Damages Awarded by the District Court

The District Court awarded nominal damages in the amount of one dollar ($1.00) to each class member, *see* District Court Record ("Record") 150, which Petitioners admit Respondent has now paid, *see* Opp. at 3, 8, 16. Petitioners nonetheless assert that their claim for nominal damages prevents this case from being moot. Opp. at 15-17. They are wrong.

---

[4] (...continued)
180-day waiting period effectively prohibits the repeal of the notice requirement during the time between the qualification of an initiative measure for the ballot and the vote on that measure.

First, none of the decisions on which Petitioners rely for their argument that "'a claim for nominal damages avoids mootness' in cases alleging a constitutional deprivation," Opp. at 15, involved the situation presented here, where the assertion of mootness was made *after* nominal damages had been both *awarded and paid*. Rather, those cases had been dismissed as moot by the district courts for reasons unrelated to the satisfaction of any nominal damages judgment, and the appellate courts found that plaintiffs' *unadjudicated* claims for nominal damages were not moot. The present case is fundamentally different, since the nominal damages award here has been paid in full. If Petitioners were correct in arguing that the importance of vindicating rights through an award of nominal damages always saves a constitutional case from mootness, no defendant – including but not limited to public entities – could ever take effective action to moot a constitutional case that included a request for nominal damages, even by paying the full nominal damages award.

The reason why a nominal damages claim generally prevents a challenge to an alleged past constitutional violation from becoming moot is that the plaintiff's entitlement to a monetary payment from the defendant, however small, gives the plaintiff a sufficient stake in the case to provide Article III jurisdiction. By contrast, the mere desire for a court determination of the legality of a past action, no matter how deeply felt, is not sufficient by itself to create an Article III case or controversy, which is likely part of the reason that the law of nominal damages developed. In the present case, the class members have already received the nominal damages payments from Respondent to compensate them for the past constitutional violation Petitioners alleged, thereby winning their symbolic point (when Respondent mailed them the dollar bills) and receiving the full concrete relief of a nominal damages award, in addition to the refund

notice and the right to request a larger monetary refund of their fee increase payments. Petitioners' desire for *additional* vindication through a court order passing on the legality of the past fee increase is precisely the desire that by itself does not trigger Article III jurisdiction, under two centuries of case law. Moreover, because the nominal damages payment was affixed to and explained in Respondent's offer to fully refund the fee increase payments upon request, Petitioners in this case were not in any way deprived of the symbolism of victory.

Next, notwithstanding their disavowal of any "quibble over the contents" of Respondent's notice, Opp. at 8, Petitioners contend that something was wrong with what Respondent *told* class members in that notice about the nominal damages award: "Respondent did not purport to pay the dollar in satisfaction of each Nonmember's [nominal damages] claim," but "[i]nstead told the class members that the dollar 'correspond[s] to the district court's order with regard to nominal damages,' . . . all the while denying that the Nonmembers have been 'fully successful in the lawsuit.'" *Id.* at 16 (citations to Respondent's notice and emphasis omitted); *see also id.* at 8. This argument is meritless for at least two reasons.

First, Respondent's notice was entirely accurate about the proceedings below and the payment of the nominal damages award. The notice briefly, fairly, and neutrally summarized the background, procedural history and both sides' contentions in the lawsuit. Motion Appendix ("Mot. App.") at 7a-9a.[5/] It stated clearly, *inter alia*, that "[t]he District Court . . . ordered Local

---

[5/] Petitioners assert that the refund notice "offers [Respondent's] views of this litigation, and an inaccurate rendering of the case as filed." Opp. at 8. They fail to identify any manner in which Respondent's "views of this litigation" or its "rendering of the case as filed" are inaccurate. To the contrary, the refund notice sets forth in an accurate and dispassionate manner a one-sentence summary of Petitioners' Complaint and a one-sentence summary of Respondent's defenses thereto. Mot. App. at 8a. Petitioners also fault the refund notice for repeating Respondent's "litigation contention that some expenditures 'funded chargeable . . . activities.'" Opp. at 8 (quoting Mot. App. at 10a). However, the quoted portion of the refund notice actually states, "The refund shall consist of all

(continued...)

1000 to pay 'nominal damages' to each class member in the amount of one dollar ($1.00) per class member," *id.* at 8a-9a, leaving no ambiguity as to either the fact or amount of the District Court's nominal damages award. It subsequently stated, "Also inclosed with this notice is one dollar ($1.00), corresponding to the district court's order with regard to nominal damages. This is yours to keep whether or not you request a refund of your payments of the fee increase." *Id.* at 11a. Petitioners' protest regarding the notice's reference to the enclosed dollar as "corresponding to" rather than being "in compliance with" the District Court's nominal damages award, *id.* at 8, indeed amounts to no more than a "quibble," especially given that the notice clearly set forth both the existence and amount of that award.[6/]

Second, satisfaction of a nominal damages award requires only the payment of the damages. Petitioners assert that Respondent's payment of the nominal damages award "ignores

---

[5/] (...continued)
payments of the fee increase you made during the refund period, *regardless of whether they funded chargeable or non-chargeable activities*, plus interest at the rate established by the district court's decision for the period between your payments and the issuance of the refund." Mot. App. at 10a (emphasis added). Moreover, the refund notice expressly sets forth *Petitioners'* contention that "the fee increase would be solely devoted to funding political activities." *Id.* at 8a.

[6/] Petitioners' complaint that the notice "all the while den[ies] that the Nonmembers have been 'fully successful in the lawsuit,'" *id.* at 16, is simply puzzling. Certainly, it is indisputable that Petitioners were *not* "fully successful in the lawsuit," since they are the Petitioners in this Court, having lost below on all claims. Moreover, it is also undeniable that they did not even prevail in full before the District Court, which rejected their claim on behalf of union members, Record 60, and which limited the remedy to the time period from September 2005 through June 2006, Pet. App. at 73a, 74a, rejecting Petitioners' position that it should extend through December 2006, Record 116 at 22.

Most puzzling, however, is that the portion of the notice to which Petitioners refer merely states, "By issuing this notice to all class members in the pending case, Local 1000 is providing all class members with all of the relief they could obtain if they were fully successful in the lawsuit, specifically, nominal damages and the opportunity to obtain a refund, with interest, of their payment of the fee increase during the period between September 1, 2005 and June 30, 2006 (hereinafter the 'refund period')." Mot. App. at 9a. In this passage, Respondent does *not* "deny[] that Nonmembers have been 'fully successful in the lawsuit,'" Opp. at 16, although it is indisputable that they have not. Rather, Respondent is merely stating that its intent in providing the refund is to provide the nonmembers with all of the relief they could obtain if they *were* fully successful in the lawsuit, that is, if they were fully successful on all issues in this Court. How that relates to mootness, much less is determinative of that issue, is not explained by Petitioners.

the import of nominal damages" because nominal damages are awarded "as an 'appropriate means of vindicating rights.'" Opp. at 16 (quoting *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986), (internal quotations omitted)). Even if that is the *purpose* behind an award of nominal damages, Petitioners cite no authority for the proposition that, in order to be effective, the payment of nominal damages by the defendant must be accompanied by an explanation so informing the recipients. Indeed, they cite no authority holding that the payment of a nominal damages award must be accompanied by any writing at all, much less one that contains certain "magic words." The District Court awarded "nominal damages to Plaintiffs and each member of the classes they represent to be paid by Defendant California State Employees Association, Local 1000, Service Employees International Union, in the amount of one dollar ($1.00) to each Plaintiff and member of the classes." Record 150 at 2. It did not order Respondent to take some additional action in paying the nominal damages award, nor did Petitioners appeal its failure to do so. Thus, contrary to Petitioners' unsupported assertion that their "nominal damages claim remains justiciable," Opp. at 17, even if this Court were to reach the merits and uphold the nominal damages award, there would be nothing left to order Respondent to do because that award has been paid in full.[7/]

[7/] Petitioners also quote *Farrar v. Hobby*, 506 U.S. 103 (1992), for the proposition that a nominal damages award "'render[s] a plaintiff a prevailing party by allowing him to vindicate his absolute right to procedural due process through enforcement of a judgment against the defendant.'" Opp. at 17 (quoting *Farrar*, 506 U.S. at 115 (internal quotations omitted)). *Farrar* did not address mootness, but rather the circumstances under which a litigant could be considered a prevailing party for purposes of an attorneys' fee claim under 42 U.S.C. § 1988. Nothing in *Farrar* indicates that the effect of a nominal damages award emanates from anything other than the award itself, and certainly not from the words used, if any, by the defendant in the course of paying that award. The portion of *Farrar* that Petitioners quote refers specifically to the claim in *Carey v. Piphus*, 435 U.S. 247 (1978), a case in which the underlying claim was one for violation of procedural due process. *Farrar* did not say that there is any procedural due process right to enforcement of a judgment against a defendant when nominal damages are awarded, but merely noted that *Carey* permitted nominal damages to be awarded to vindicate the *underlying* procedural due process rights. *Farrar*, 506 U.S. at 115.

In any event, as discussed above, Respondent's notice to the nonmembers left no ambiguity regarding either the fact or amount of the District Court's nominal damages award, and further informed them that the dollar bill included with the notice corresponded to that award. That certainly went beyond the requirements of the award itself, which imposed no informational obligation. The nominal damages award here has been fully satisfied and, as such, cannot save Petitioners' nominal damages claim from mootness.

III. This Case Is Moot Because the Nonmembers Have Received Everything They Could Recover By a Judgment In this Court In Their Favor

Petitioners admit that "cases are often deemed moot where the plaintiff 'already has obtained everything that [he] could recover . . . by a judgment of this court in [his] favor.'" Opp. at 17 (quoting *Hall v. C.I.A.*, 437 F.3d 94 (D.C. Cir. 2006) (internal quotations omitted)). They contend that this principle does not apply where the defendant has merely promised to provide such relief to the plaintiff at some future time, Opp. at 17, or where "the relief the plaintiff seeks is 'different from what the [defendant] is prepared to allow,'" Opp. at 18 (quoting *Marin-Rodriguez v. Holder*, 612 F.3d 591, 596 (7th Cir. 2010)). Neither of these exceptions is applicable here, however.

As to the first exception, Respondent has done far more than merely *promise* to provide relief at some unspecified future date. Respondent has already satisfied the nominal damages award in full. Moreover, Respondent has already paid refunds to all nonmembers who submitted objections to paying for activities not germane to collective bargaining activities in response to Respondent's May 2005 *Hudson* notice. *See* Supplemental Appendix in Support of Motion to Dismiss As Moot at 4a, ¶ 7. Respondent is paying refunds to the non-objectors as their requests

come in and, as of October 24, 2011, had paid a total of 2,508 such requests, in addition to providing automatic refunds to 3,306 fee objectors.

To be sure, Respondent may not yet have finished paying the refunds, but that is only because the 45-day period ordered by the District Court for nonmembers to submit requests for refunds has not yet expired. Respondents mischaracterize by omission the District Court's order when they assert that it "ordered Respondent to issue objecting Nonmembers 'a refund, with interest' of the non-chargeable portion" of the fee increase. Opp. at 18 (quoting Pet. App. at 72a). Rather, it ordered Respondent to issue a new notice "offering nonmembers a forty-five (45) day period in which to object" and "thereafter issue to those nonmembers who object . . . a refund of the nonchargeable portion" of the fee increase. Pet. App. at 73a. Respondent has indeed gone beyond that order by providing *more* relief than ordered by the District Court: it is refunding the entire increase (not merely the nonchargeable portion), and it has provided refunds automatically to all nonmembers who objected to paying for activities not germane to collective bargaining activities in response to Respondent's May 2005 *Hudson* notice. By providing the notice and the forty-five day request period, Respondent is merely following the procedure ordered by the District Court, which (since Petitioners did not appeal the District Court's order) is all they could get if they were to prevail fully in this Court.

Indeed, were Respondent to do otherwise by imposing a shorter request period so that all refunds could be paid sooner, Petitioners would undoubtedly object that Respondent had failed to provide all of the procedural protections ordered by the District Court. The procedure Respondent is following, pursuant to which no fewer than 5,814 refunds have already been paid, cannot fairly be characterized as "a mere (unenforceable) promise of future payment," Opp. at

18, especially in light of the fact that Yvonne Walker, Respondent's President, has filed a declaration in this Court stating, under penalty of perjury, that Respondent "will issue all other refunds on a rolling basis, as the written requests are received," Mot. App. at 5a (¶ 7). The remaining refunds will have been paid by mid-December 2011, before the Court hears argument in this case, much less before it issues a decision on the merits.[8/]

Equally unconvincing are Petitioners' quibbles with the notice. *See* Opp. at 18-19. Contrary to Petitioners' hyperbole, Respondent's refund notice does *not* "feature[] all manner of conditions, caveats, and confusions to which the Nonmembers would object if they had a binding judgment to use as a benchmark." Opp. at 18. Rather, it merely requires them to provide some basic identifying information and an original signature, which – in a class comprised of tens of thousands of members (Record 81 at 4) – is an entirely reasonable precaution to prevent anyone from obtaining a refund that does not belong to him or her. Indeed, the same identifying information is requested from objectors in Respondent's annual *Hudson* notices, *see* Joint Appendix at 103, 159 & 224, the propriety of which was never challenged below by Petitioners.[9/]

Further, Petitioners simply mischaracterize the refund notice when they claim that it "provides that a refund request must: . . . (2) include the requester's social security number." Opp. at 18-19. To the contrary, although the refund notice states that certain identifying information (not including the requester's social security number) "must" be provided, it continues that the request merely "*should* include, for identification purposes, your social

---

[8/] Having promised to pay refunds upon request to eligible class members, Respondent would subject itself to potential claims for breach of contract and of the duty of fair representation should it fail to do so.

[9/] Although Petitioners complain that the refund notice "forbids requests by facsimile or email," Opp. at 19, that is a mere concomitant of the reasonable requirement for an original signature to prevent fraudulent requests.

security number," Mot. App. at 9a (emphasis added). Nowhere does it state or even imply that a refund request will be denied for failure to provide a social security number.

Petitioners also complain that the refund notice "offers a lengthy, complex description of this litigation's procedural history before finally getting around to informing class members of the refund offer." Opp. at 19. Again, Petitioners are quibbling with the notice, contrary to their prior assurance that they would not do so. *See* Opp. at 8. The refund notice begins by notifying the recipients: "This Notice Contains Important Information Regarding Your Rights. Please Read It Carefully." Mot. App. at 7a. It then provides background information regarding the lawsuit's procedural history, clearly labeled as such, so that the recipients will have the context necessary to understand why they are receiving it. *Id.* at 7a-9a. Immediately thereafter it sets forth the refund offer in a separate section bearing the underlined title, in italics, initial capitals, "Notice of Opportunity to Claim Refund." *Id.* at 9a-11a.[10/]

In sum, the refund notice is, and was intended to be, informative. It does not hide the refund offer in fine print, but clearly sets it forth in a separately-labeled section. It requests reasonable identifying information to prevent fraudulent claims, and does not include "unnecessary complications aimed at reducing the number of class members who claim a refund," as Petitioners claim. Opp. at 19. Indeed, the proof of the pudding is in the tasting: In response to the notice, at least 2,508 class members have already requested and received refunds, through October 24, 2011.

[10/] Petitioners question whether the refund notice is a "proper" *Hudson* notice, without asserting that it is not. Opp. at 19. Notwithstanding that the refund notice does not limit the refund to the non-chargeable portion of the fee increase, but instead expressly states that Respondent will refund the *entire* fee increase, *see* Mot. App. at 10a, Respondent enclosed with the notice the auditor's reports and audited financial statements of the spending of the funds collected through the increase, *id.* at 12a-37a. Certainly, this constitutes "proper" and sufficient financial disclosure, and Petitioners do not contend otherwise.

Although Petitioners object that the remedy they seek is "'different from what the [defendant] is prepared to allow,'" Opp. at 19 (quoting *Marin-Rodriguez*, 612 F.3d at 596), it is not different from what they would be entitled to if this Court were to sustain their position on the merits. Since they failed to appeal from the District Court's order, all that they are entitled to receive is what the District Court granted them: an opportunity to obtain a refund, with interest, of the non-chargeable portion of the fee increase they paid between September 2005 and June 2006, and nominal damages in the amount of one dollar per class member.[11/] Since they have received that, plus more, this Court can provide them no further or different relief and this case is moot.[12/]

///

///

///

[11/] *See United States v. Am. Ry. Exp. Co.*, 265 U.S. 425, 435 (1924) (party that has not filed a cross-appeal "may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below"); *Morley Const. Co. v. Maryland Cas. Co.*, 300 U.S. 185, 191 (1937) (describing "inveterate and certain" rule that, absent cross-appeal, appellate courts may not provide appellee with a form of relief different from that provided by judgment on appeal); *see also Greenlaw v. United States*, 554 U.S. 237, 244-45 (2008) (describing "unwritten but longstanding rule" that "an appellate court may not alter a judgment to benefit a nonappealing party" and "that it takes a cross-appeal to justify a remedy in favor of an appellee").

[12/] Petitioners' failure to appeal the District Court's order clearly distinguishes this case from the Seventh Circuit's decision in *Marin-Rodriguez*, on which they rely for their assertion that the difference between the remedy they seek and that which Respondent "'is prepared to allow'" can save this case from mootness. Opp. at 18 & 19 (quoting *Marin-Rodriguez*, 612 F.3d at 596). *Marin-Rodriguez* rejected the Board of Immigration Appeals' assertion that the removal from this country of the petitioner alien caused it to lose jurisdiction over his request for the Board to reconsider its prior decision in his administrative case. After so holding, the court noted the Board's request to remand the matter to it without reaching the jurisdictional question, but rejected that request on the ground that the Department of Justice expressly had not changed its view on the jurisdictional question. *Id.* at 595-96. The court continued as follows: "There is no point in remanding to a body that has already declared the absence of subject-matter jurisdiction, unless it has reconsidered that issue or is prepared to do so. The motion to remand does not moot the controversy. Marin-Rodriguez wants relief different from what the Attorney General is prepared to allow. So we deny the motion to remand." *Id.* at 596. There, because the petitioner had appealed to the court from the judgment below, he was not limited by what the Board had ordered. Nor did the Attorney General purport to have provided everything the Board *could* order on remand.

CONCLUSION

For the foregoing reasons, and those discussed in our opening brief, the instant motion should be granted and the case should be dismissed as moot.

Respectfully submitted,

Jeffrey B. Demain
Counsel of Record
P. Casey Pitts
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

By: _____
Jeffrey B. Demain

Counsel for Respondent Service Employees International Union, Local 1000

October 2011

CERTIFICATE OF SERVICE

CASE: *Dianne Knox, et al. v. Service Employees International Union, Local 1000*

CASE NO: U.S. Supreme Court Number 10-1121
(U.S. Court of Appeals, 9th Circuit, Case No. 08-16645;
U.S. District Court, E.D. Cal., No. 2:05-cv-02198-MCE-JFM)

I, Jeffrey B. Demain, a member of the Bar of this Court, hereby certify that on October 25, 2011, three copies of the **Reply in Support of Motion to Dismiss as Moot** in the above-entitled case were shipped via United Parcel Service, Priority Overnight Delivery, to:

W. James Young, Esq.
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22151
(703) 321-8510
wjy@nrtw.org

Counsel for Petitioners

Steven R. Burlingham, Esq.
Gary Till & Burlingham
5330 Madison Avenue, Suite F
Sacramento, CA 95841
(9160 332-8122
steveb@gtblaw.com

Counsel for Petitioners

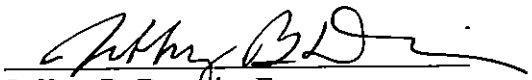
Neal Kumar Katyal
Dominic F. Perella
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com
dominic.perella@hoganlovells.com

Counsel for Petitioners

Douglas J. Woods, Esq.
Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 95814-2951
(916) 324-4663
Douglas.Woods@doj.ca.gov

Counsel for California State Controller John Chiang

I further certify that all parties required to be served have been served.



Jeffrey B. Demain, Esq.
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, CA 94108
415/421-7151

Attorney for Respondent
Service Employees International Union, Local 1000