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

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986), recognizes that all workers represented by a public employee union may be required to pay their fair share of union expenditures germane to collective bargaining representation, but requires that the union provide nonmembers with an opportunity to object to paying for the union's nongermane political and ideological expenditures. Under *Hudson*, nonmembers are entitled to "an adequate explanation" of how the union calculated the percentage of membership dues that will be charged to objectors and "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker . . . ." *Id.* at 310. *Hudson* provides that the percentage of membership dues that are chargeable to objectors each year may be calculated on the basis of the union's total chargeable and nonchargeable "expenses during the preceding year." *Id.* at 307 n.18.

1. If a public employee union has already issued an annual *Hudson* notice establishing an objector fee based upon its auditor-verified expenditures in the preceding year, must the union, when instituting a temporary increase in membership dues that will not change the objector fee rate, issue a supplemental notice that predicts how the funds generated by the increase will be used, establishes a new objector fee rate solely for the increase based upon those predictions, and provides nonmembers with a separate opportunity to object to paying the predicted nonchargeable portion of the increase?

2. (a) Can nonmembers of a public employee union pursue in this Court a chargeability challenge to the union's spending to oppose a ballot initiative, where they disavowed and never litigated such a claim below, where the decision below did not decide such a claim, and

where there is no evidence that objectors' fees were spent to support the union's opposition to the initiative?

(b) If so, is a public employee union's opposition to a ballot initiative that would give a state's governor the power to abrogate the union's collective bargaining agreements sufficiently related to "contract . . . implementation," *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991), and consistent with the other elements of the *Lehnert* standard, *see id.* at 519, that the costs of that opposition are chargeable to all nonmembers?

CORPORATE DISCLOSURE STATEMENT

Respondent Service Employees International Union, Local 1000 is organized as a California nonprofit mutual benefit corporation. It has no parent corporations in the sense of ownership, although it is affiliated with the California State Employees Association, which is also organized as a California nonprofit mutual benefit corporation, and with the Service Employees International Union, which is organized as an unincorporated association. There is no publicly held company that owns 10% or more of Respondent's stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Statutes

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STATEMENT OF THE CASE

I. Facts

June 2005* Hudson *Notice: In June 2005, Respondent Service Employees International Union, Local 1000 ("Respondent") issued its annual fair share fee or "*Hudson*" notice to the state employees whom it represents in collective bargaining, but who choose not to become dues-paying members ("nonmembers").[1] Joint Appendix ("JA") 94, 96-151. That notice reported that Respondent's actual spending in the most-recently audited prior year, calendar year 2004, was 56.35% chargeable to fee objectors – i.e., incurred for activities that non-

[1] The term "*Hudson* notice" refers to the fee notice required by this Court in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986).

members can constitutionally be compelled to support – and 43.65% nonchargeable. Based on that figure, the notice informed nonmembers that during the coming fee year (July 2005 through June 2006) they would be charged fair share fees at a rate no greater than 56.35% of membership dues if they submitted a timely objection to paying for nonchargeable expenditures (hereinafter "objectors"), and 99.1% of dues if they chose not to do so (hereinafter "nonobjectors"). JA 98-111.[2] The notice disclosed the types of nonchargeable activities (including nonchargeable political activities) that Respondent had undertaken previously and that could be financed with nonobjectors' fees absent objection. *Id.*

The notice informed nonmembers that their fees were a percentage of membership dues – at that time, 1.0% of gross wages – and that dues (and hence fair share fees) were subject to increase during the fee year without further notice. JA 98; Petition Appendix ("Pet. App.") 5a.[3]

Petitioners Dianne Knox, *et al.* ("Petitioners") concede the constitutional adequacy of the June 2005 *Hudson* notice as of its issuance. Ninth Circuit Opposition Br. at 39 n.23. 3,351 nonmembers, constituting 11.83% of all nonmembers, submitted objections after receiving that notice. JA 314, 319.

September 2005 Dues Increase: At the end of July 2005, Respondent's Budget Committee proposed an emergency temporary dues increase (the "increase"), which

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[2] The nonobjector fee is less than 100% because nonmembers are not charged for certain member-only benefits. JA 98.

[3] Nonmembers who do not wish to contribute to Respondent's Political Action Fund may request a corresponding reduction in their fees even if they choose to pay the nonobjector fee rate. *See, e.g.*, JA 104-05. They can request that reduction at any time during the fee year.

was approved by Respondent's democratically-elected Council in late August 2005 and implemented in September 2005. Pet. App. 5a-6a; JA 25-28, 31-32, 68. There is no evidence that the increase was under consideration when the June 2005 *Hudson* notice was issued, or that the increase was timed to avoid disclosure in that notice. The increase expired by its terms at the end of December 2006. Pet. App. 5a; JA 31, 314, 319.

The increase raised membership dues by one-quarter of one percent (0.25%) of gross wages, from 1.0% to 1.25% of gross wages, and thereby raised the dollar amount of nonmembers' fair share fees, which are based on dues. JA 31, 68, 314, 318. The increase, however, did not change the percentage of membership dues nonmembers paid. Instead, the increase collected from nonmembers reflected the percentages set forth in the June 2005 *Hudson* notice: Objectors paid 56.35% of the increase to dues, and nonobjectors paid 99.1%. Petitioners' Brief ("Pet. Br.") at 5; *see also* JA 309-10.

Petitioners recount statements by Respondent suggesting that funds raised by the increase were intended for "political" activities. *See* Pet. Br. at 4-5, 9, 22 & n.8, 23 n.9. However, Respondent never stated that those funds would be devoted *exclusively* to "political" or nonchargeable activities. Instead, "in response to inquiries, [Respondent] specifically stated it intended to split the increase 'between political actions and collective bargaining actions.'" Pet. App. 6a; *see also* Record 6 (Declaration of Petitioners' Counsel) at Exh. A.[4]

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[4] Petitioners emphasize Respondent's statement that the increase "'w[ould] not be used for regular costs of the union – such as office rent, staff salaries or routine equipment replacement.'" Pet. Br. at 4, 9, 22. Funds generated by the increase, however, could be and were used for chargeable activities that do not constitute such "overhead" costs. For example, they financed union meetings and a membership

The funds generated by the increase were not placed in a separate bank account or otherwise segregated from other funds. JA 303. There is no evidence that the deduction for the increase was reflected on employee paychecks separately from other dues and fee deductions.

When Respondent's independent auditors subsequently traced the expenditures from the increase, they determined that 27.35% of Respondent's 2005 spending from the increase and 18.77% of its 2006 spending from the increase were attributable to chargeable activities. JA 190, 259.

June 2006* Hudson *Notice: In June 2006, Respondent issued its next annual *Hudson* notice. JA 94, 152-215. That notice reported that Respondent's actual spending – including its spending from the increase – in the most-recently audited year, calendar year 2005, was 68.80% chargeable and 31.20% nonchargeable, and informed nonmembers that during the coming fee year (July 2006 through June 2007) they would be charged fees at a rate no greater than 68.80% of dues if they submitted a timely objection, and 99.1% of dues if they chose not to do so. JA 154-66.[5] The notice included an audited financial report regarding the spending from the increase, which was also included in its statement of total, chargeable, and nonchargeable expenses, showing that the

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survey, the chargeability of which (in whole or in part) cannot reasonably be disputed. JA 188-97. Further, although Petitioners equate "political" activities with "nonchargeable" activities, "not all of the political activities [funded by the increase] fell into the 'non-chargeable' category. 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." Pet. App. 6a.

[5] Respondent subsequently exercised its discretion to charge objectors a lesser rate of only 66.30% of membership dues during that fee year. JA 305.

increase was spent on both chargeable and nonchargeable activities. JA 166, 188-97.

The financial report reveals that, even if Respondent's 2005 spending from the increase were deemed 100% nonchargeable, the chargeable percentage of Respondent's actual annual expenditures would still have been higher in 2005 than in 2004: 66.26% chargeable in 2005 vs. 56.35% in 2004.[6]

In response to the June 2006 *Hudson* notice, 3,094 nonmembers, constituting 10.50% of all nonmembers, submitted objections, fewer in both absolute and percentage terms than submitted objections following the June 2005 *Hudson* notice. JA 314, 319.

June 2007 **Hudson** ***Notice:*** In June 2007, Respondent issued its next annual *Hudson* notice. JA 94, 216-91. That notice disclosed that actual spending – including spending from the increase – in the most-recently audited year, calendar year 2006, was 60.36% chargeable and 39.64% nonchargeable, and informed nonmembers that during the coming fee year (July 2007 through June 2008) they would be charged fair share fees at a rate no greater than 60.30% of dues if they submitted a timely objection, and 99.3% of dues if they chose not to do so. JA 219-32. At the time of the notice, dues had permanently increased to 1.5% of gross wages. JA 219.

The June 2007 *Hudson* notice included an audited financial report regarding spending from the increase, which was also included in the statement of total, chargeable, and nonchargeable expenses, showing that the

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[6] Respondent's total 2005 expenditures were $40,045,409. JA 166. Its total chargeable expenditures were $27,552,746. *Id.* If the 2005 expenditures from the increase were deemed *entirely* nonchargeable, the total chargeable expenditures would instead be $26,533,740, yielding an overall chargeable percentage of 66.26. *Id.*

increase was spent on both chargeable and nonchargeable activities. JA 232, 256-72.

The financial report discloses that, even if Respondent's 2006 spending from the increase were deemed 100% nonchargeable, its actual expenditures during 2006 would still have been 57.38% chargeable – higher than the 2004 percentage (56.35%).[7]

II. Proceedings

Petitioners filed suit on November 1, 2005, asserting that the increase was entirely nonchargeable to objectors and that Respondent was constitutionally required, before collecting the increase, to issue a supplemental notice providing nonmembers with a new opportunity to object to paying the increase. Pet. Br. at 5-6. The District Court agreed that Respondent was required to provide a supplemental notice, and entered summary judgment for Petitioners. *Id.* at 6. The court determined, however, that Respondent's disclosure of the increase in its June 2006 *Hudson* notice was constitutionally adequate, and therefore limited the remedial period to September 2005 through June 2006, when the 2005-2006 fee year ended. Pet. App. 73a.

On appeal, the Ninth Circuit reversed the District Court's grant of summary judgment to Petitioners, holding that Respondent's June 2005 *Hudson* notice was adequate to protect nonmembers' First Amendment rights. Pet. App. 10a-16a.

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[7] Total 2006 expenditures were $42,204,170. JA 232. Total 2006 chargeable expenditures were $25,475,361. *Id.* If the 2006 expenditures from the increase were deemed *entirely* nonchargeable, Respondent's total chargeable expenditures in 2006 would have been $24,215,042, yielding an overall chargeable percentage of 57.38. JA 232, 258-59.

This Court granted *certiorari* on June 27, 2011. On October 3, 2011, Respondent moved to dismiss this case as moot, after providing the class members with all of the relief ordered by the District Court and that would be available to them following any favorable decision by this Court. On November 7, 2011, this Court deferred its consideration of Respondent's motion to the hearing of the case on the merits.

SUMMARY OF ARGUMENT

1. To protect nonmembers' First Amendment rights, *Hudson* establishes certain procedures that a public employee union must implement in collecting fair share fees. Respondent here issued a June 2005 *Hudson* notice that Petitioners concede was constitutionally sufficient at the time it was issued, and observed all of *Hudson*'s procedural requirements in collecting fair share fees during the 2005-2006 fee year.

The specific procedural requirements established in *Hudson* fully protected the rights of Respondent's fee payers. Respondent's June 2005 *Hudson* notice provided nonmembers with a description of the types of nonchargeable political and ideological activities engaged in by Respondent, an audited report of the monetary amounts Respondent devoted to those activities in the prior calendar year, and notice of their right to object to the use of their fees for such purposes in the coming fee year. The notice thus provided nonmembers with all of the information necessary to exercise their First Amendment right not to support Respondent's nonchargeable ideological and political activities – including any such activities subsequently funded by the increase. In addition, during the July 2005-June 2006 fee year – both before and after the increase was implemented – objectors actually paid *less* for *chargeable* expenses than Respondent expended on their behalf. Thus, rather than

subsidizing Respondent's nonchargeable ideological and political activities, objectors did not even pay their proportionate share of Respondent's chargeable expenses. The facts of this case demonstrate the adequacy of *Hudson*'s "carefully tailored" procedures to protect nonmembers' constitutional rights. 475 U.S. at 303.

Petitioners nonetheless suggest that the First Amendment required Respondent to issue a supplemental notice establishing a new objector fee applicable to the increase based on *subjective* predictions about its future spending. That approach, however, would provide less protection to nonmembers' First Amendment rights than the *Hudson* system, in which objector fees are based upon the union's actual, audited expenses in the prior year. It would also needlessly increase the burden on public employee unions, spur wasteful litigation, and require this Court to abandon a central premise of fair share fee jurisprudence: that money is fungible and thus the amount of the objector fee must be based on the union's *total* annual expenditures.

2. There is likewise no reason for this Court to replace the well-established legal standards governing the substantive and procedural First Amendment rights of fair share fee payers with "strict scrutiny." Doing so would be inconsistent with this Court's prior fair share fee decisions, which have never applied strict scrutiny, *see*, *e.g.*, *Hudson*, 475 U.S. at 302 (establishing procedures to protect nonmembers' rights "without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities") (citation omitted), and its other decisions involving public employee speech and procedural First Amendment rights, *see*, *e.g.*, *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (O'Connor, J.) (procedural First Amendment rights measured by considering "the cost of the procedure and the

relative magnitude and constitutional significance of the risks it would decrease and increase"); *Pickering v. Board of Ed.*, 391 U.S. 563, 568 (1968) (in public employee speech cases, courts must balance "the interests of the [employee] . . . in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees").

3. Petitioners' claim that nonmembers were unconstitutionally compelled by the increase to subsidize Respondent's opposition to "Proposition 76" is not properly presented to this Court. Petitioners never litigated, and the Ninth Circuit did not rule upon, such a claim below, and such a challenge cannot be litigated on behalf of a class that includes nonobjectors. In any event, no nonmember was compelled against his or her objection to support Respondent's Proposition 76 expenditures, and those expenditures related directly to contract implementation and were chargeable under the standard established in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991).

ARGUMENT

I. Respondent's *Hudson* Notices Complied with this Court's Decisions and Provided Nonmembers with All Necessary Procedural Protections for their First Amendment Rights

In *Hudson*, this Court established specific procedural requirements for a public employee union's collection of fair share fees. The *Hudson* procedures "'prevent[] 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.'" 475 U.S. at 302. In collecting fair share fees from July 2005 through June 2006, Respondent

complied with the specific procedural requirements established by this Court in *Hudson* in all respects. *See*, *e.g.*, Petitioners' Ninth Circuit Opposition Br. at 39 n.23 (conceding constitutional sufficiency of Respondent's June 2005 *Hudson* notice at the time of its issuance); Record 99 at 14 (acknowledging that Respondent complied with "the usual *Hudson* notice and procedure").

The *Hudson* procedures implemented by Respondent provided constitutionally sufficient protection for nonmembers' First Amendment rights. Respondent's June 2005 *Hudson* notice informed nonmembers of the nature of Respondent's nonchargeable political and ideological activities, provided them with a constitutionally-adequate opportunity to object to supporting those activities, and informed them that their fees could increase without further notice during the fee year. The increase in dues and fees implemented by Respondent in September 2005 did not fund types of nonchargeable activities different from those disclosed in the June 2005 *Hudson* notice, nor did it significantly change the proportion of Respondent's annual spending devoted to nonchargeable activities. Indeed, objectors paid *less* under Respondent's *Hudson* procedures than they would have paid had Respondent charged objectors a fee that accurately reflected the chargeable percentage of its expenditures during the entire 2005-2006 fee year.

Accordingly, the theoretical possibility that a union's strict compliance with *Hudson*'s procedures could nonetheless compel nonmembers to subsidize its political activities through an "involuntary loan" is not presented by the facts of this case. Nonobjectors acquiesced in the use of their fees for nonchargeable political activities during the 2005-2006 fee year. Objectors did not subsidize Respondent's nonchargeable political expenditures, and indeed did not even pay their proportionate share of

Respondent's chargeable expenses. Because nonmembers' substantive rights were not infringed, there is no reason for this Court to revisit *Hudson* in this case.

Were this Court nonetheless to do so, Petitioners' proposed substitute for the *Hudson* procedures should be rejected. That substitute is impractical, provides less protection to nonmembers than the *Hudson* procedures, and is contrary to two basic principles underlying this Court's fair share fee jurisprudence: (1) money is fungible, so a union's total annual expenditures must be evaluated in calculating the objector fee; and (2) objective, independently-verified financial reports disclosing actual expenditures are more reliable than subjective predictions about how funds will be spent.

A. Respondent's Fee Collection Procedures Were Consistent with *Hudson*

The precedents governing a public employee union's constitutional obligations to its nonmembers are well-established. The requirement that employees provide financial support for the union that represents them in collective bargaining – i.e., an agency or fair share fee – "does not violate either the First or the Fifth Amendments." *Railway Employees' Dep't. v. Hanson*, 351 U.S. 225, 238 (1956); *accord Lehnert*, 500 U.S. at 517. Nonetheless, First Amendment concerns are "implicate[d]" when such payments fund "social, political, and ideological viewpoints" that "might bring vigorous disapproval from individual employees." *Lehnert*, 500 U.S. at 516. Thus, "[T]he local union cannot charge the nonmember for certain activities, such as political or ideological activities (with which the nonmembers may disagree). But . . ., the local can charge nonmembers for activities more directly related to collective bargaining." *Locke v. Karass*, 555 U.S. 207, 213 (2009); *see generally Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

Nonmembers, however, have the affirmative duty to object to supporting nonchargeable activities. "[D]issent is not to be presumed – it must affirmatively be made known to the union by the dissenting employee." *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 774 (1961); *accord Hudson*, 475 U.S. at 306 n.16; *see also* Cal. Gov't Code §§3515, 3515.7, 3515.8.

These principles define nonmembers' substantive First Amendment rights. To protect those rights, *Hudson* established prophylactic procedures that public employee unions must implement in collecting fair share fees. Specifically, unions must provide nonmembers with "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Hudson*, 475 U.S. at 310. In explaining the basis for the fee, the union "need not provide nonmembers with an exhaustive and detailed list of all its expenditures," but must simply disclose its "major categories of expenses" as verified "by an independent auditor." *Id.* at 307 n.18.

Because it is impossible to predict future expenses accurately at the beginning of a fee year, "'absolute precision' in the calculation of the charge to nonmembers cannot be 'expected or required.'" *Id.* (quoting *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963)). *Hudson* instead permits objectors' fair share fee to be calculated on the basis of the union's "expenses during the preceding year." *Id.* Unions must base that calculation on the chargeable percentage of their total annual expenditures, *see*, *e.g.*, *Hudson*, 475 U.S. at 306 (reduction in objector fee must reflect "'the proportion of political to total union expenditures'") (quoting *Abood*, 431 U.S. at 239 n.40), and must treat the funds they collect from members and nonmembers as fungible; they cannot avoid reducing the objector

fee simply by ensuring that "the actual dollars collected from dissenting employees" are devoted exclusively "to collective-bargaining purposes," *Abood*, 431 U.S. at 238 n.35.

Hudson's "prior year" system is admittedly imprecise, since a union's breakdown of chargeable and nonchargeable spending is unlikely to be replicated from one year to the next. Yet, as Winston Churchill said of democracy, it is less bad than any of the other methods that might be used.

The necessary effect of *Hudson*'s "prior year" system is to create a lag between the time when a union incurs expenditures and the time when those expenditures are audited, reported to nonmembers, and used to calculate the objector fee. If a union increases its spending on chargeable activities in a given year, it will during that year charge fee payers *less* than is required to recoup the cost of its chargeable activities, and will not recoup those expenses until the *following* year when the objector fee is revised to reflect that spending. Significant fluctuations in the chargeable and nonchargeable proportions of a union's spending are inevitable. A union may, for example, bargain a three-year collective bargaining agreement in year one, the cost of which is fully chargeable; make substantial, nonchargeable partisan political donations in the second, presidential election year; and do neither in the third year. The union's chargeable spending would be relatively high in year one, relatively low in year two, and in between in year three, but the objector fee in each year would be based upon the *prior* year's different spending pattern. Over time, however, the annual adjustment system ensures that objectors are charged only their proportionate share of chargeable expenditures.

Here, Respondent followed the procedures established in *Hudson* to the letter. In June 2005, Respondent sent nonmembers its annual *Hudson* notice. The notice

included an audited report of Respondent's chargeable and nonchargeable 2004 expenditures. JA 109-11. The notice informed nonmembers that, if they objected to the use of their fees for nongermane political or ideological purposes, their fees would be no more than 56.35% of dues, reflecting the chargeable percentage of Respondent's 2004 expenditures. JA 98, 102. The notice informed nonmembers of their right to object or to challenge Respondent's chargeability determinations, and that fees could increase without further notice. JA 98-104. Respondent honored all timely objections.

After issuing that notice, Respondent considered and decided to implement the increase at issue in this case. Consistent with its prior *Hudson* notice, objectors paid an increase amounting to 56.35% of the dues increase paid by members. JA 309-10.

In June 2006, Respondent issued another annual *Hudson* notice based on the prior year's audited expenditures (including those from the increase). The notice provided nonmembers with another opportunity to object to paying for nonchargeable activities and to challenge the fee calculation. JA 94, 152-215.

As Petitioners admit, Respondent's procedures complied in all respects with the specific procedural requirements established in *Hudson*. *See* Record 119 at 2 ("the procedures normally followed by [Respondent]" were "endorsed by the Supreme Court in [*Hudson*]"); *see also* Record 99 at 14 (acknowledging that Respondent complied with "the usual *Hudson* notice and procedure").

B. The *Hudson* Procedures Did Not Compel Objectors To Subsidize Respondent's Nonchargeable Activities

Petitioners do not dispute that the *Hudson* procedures are adequate to protect nonmembers' First

Amendment rights in the ordinary case. They contend, however, that Respondent's reliance upon *Hudson*'s procedures in this particular case violated the First Amendment because nonmembers were compelled to give Respondent an "involuntary political loan." Pet. Br. at 21. Rather than providing Respondent with such a loan, however, objectors in fact paid *less* than their proportionate share of Respondent's chargeable expenses during the relevant time period.

The objector fee from July 2005 through June 2006 (both before and after the increase) was 56.35% of membership dues, reflecting the chargeable portion of Respondent's actual expenditures in 2004 – a presidential election year in which only 56.35% of Respondent's expenditures were chargeable. As the June 2006 and June 2007 *Hudson* notices reported, however, chargeable expenditures in both 2005 and 2006 *exceeded* 56.35% of Respondent's total expenditures. *See* discussion, *supra*, at 4-6. Had Respondent been omniscient and able to charge an objector fee reflecting the actual percentage of its spending during the 2005-2006 fee payer year that was ultimately devoted to chargeable activities, the objector fee would have been *higher* than 56.35%. The *Hudson* procedure thus worked to objectors' advantage during the time period in question; they did not provide Respondent with an "involuntary loan" of any kind.[8]

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[8] This case thus does not involve a temporary "spike" in dues and fees timed to take advantage of a relatively high objector rate in a particular fee year. The objector rate applied to the increase during the 2005-2006 fee year was lower than the objector rate in subsequent fee years, and the increase spanned multiple fee years, so that any increase in nonchargeable spending associated with the increase would have been reflected in a reduced objector rate while the increase remained in effect.

Even if the facts of this case were different and the chargeable portion of Respondent's expenditures during the 2005-2006 fee year had ultimately fallen below the 56.35% objector fee, such a discrepancy between the objector fee and the fee year's actual chargeable spending would not have constituted an "involuntary loan" as discussed in *Hudson*, 475 U.S. at 304-06. *Hudson* disapproved of a "pure rebate" system in which the union collected *full* membership dues from objectors and later issued "a rebate equal to the amount improperly expended" for nonchargeable purposes. 475 U.S. at 305-06; *cf. Ellis v. Railway Clerks*, 466 U.S. 435, 444 (1984) (union "exact[ed] and us[ed] full dues, then refund[ed] months later the portion that it was not allowed to exact in the first place"). Under that system, objectors always "subsidize[d] the propagation of political or ideological views that they oppose[d]," *id.* at 305, and both the union and the objectors were fully aware of the subsidy.

Hudson contrasted this impermissible "pure rebate"/"involuntary loan" system with the constitutionally permissible "advance reduction" system used by Respondent here, in which the objector fee is reduced *in advance* to an amount reflecting the union's chargeable spending in the most-recently audited year (here, 56.35%). 475 U.S. at 304, 309. As explained above, the advance reduction system ensures that, over time, the fees paid by objectors are roughly equal to their fair share of the union's chargeable expenses. *See* discussion, *supra*, at 12-13. The yearly fluctuations between chargeable expenses and the objector fee even out over time so that objectors never "subsidize" the union's nongermane activities, and neither the objectors nor the union know how the objector fee compares to the union's actual chargeable spending in the course of any particular year.

C. The *Hudson* Procedures Did Not Deny Nonmembers a Fair Opportunity To Object

Petitioners assert that a supplemental notice regarding the increase was "more critical as to the non-objecting employees" than to objectors because the former might have chosen to object "upon learning that SEIU intended to increase their financial burden . . . and use that increase for political purposes . . . ." Pet. Br. at 20-21. Respondent's 2005 *Hudson* notice, however, provided nonmembers with all of the information they needed to decide whether to opt out of paying for Respondent's nongermane political and ideological activities from July 2005 through June 2006.

The 2005 *Hudson* notice informed nonmembers that Respondent intended to use their fees for nongermane political and ideological purposes and, indeed, that more than 43% of 2004 expenditures were for nongermane activities, including nongermane political activities. Nonmembers were thus aware in June 2005 that, unless they objected, Respondent would spend a significant portion of their fees in the upcoming fee year on nongermane political and ideological activities. The notice also informed them of their right to object to supporting such expenditures, and that dues could be raised during the fee payer year without further notice, resulting in a proportionate increase in fees. The notice contained everything nonmembers required to make an informed decision whether to object.

A nonmember's exercise of the right to object cannot depend upon advance notice of the *specific* expenditures a union will make in the upcoming year, which the union cannot predict with any accuracy because spending will depend upon external events. To the contrary, the *Hudson* procedures that Petitioners acknowledge are constitutionally sufficient when applied to "general operating expens-

es funded by regular dues and fees," Pet. Br. at 21-22, never include such advance notification of specific expenditures. "The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures," but only a report of its "major *categories* of expenses" in "the *preceding* year." *Hudson*, 475 U.S. at 307 n.18 (emphases added); *see also id.* at 306-07 (financial disclosure requirement protects only the right to verify "the proportionate share" objectors can lawfully be compelled to pay). *Abood* emphasized that nonmembers' right to object depends not upon advance notification of a union's specific expenditures but upon their objection to "ideological expenditures of *any* sort," and that nonmembers should not bear "the considerable burden of monitoring all of the numerous and shifting expenditures made by the Union that are unrelated to its duties as exclusive bargaining representative." 431 U.S. at 241 (emphasis added).

A mere increase in the *dollar amount* of dues or fair share fees at some point after the issuance of an annual *Hudson* notice without any change in the fee rate as a percentage of membership dues – which occurs every time a nonmember receives a salary increase – does not deny nonobjectors a fair opportunity to object, or otherwise render the annual notice inadequate, because it has no impact on the First Amendment rights protected by *Hudson* and *Abood*. The prophylactic procedural safeguards established in *Hudson* protect nonmembers' right not to subsidize the union's ideological activities. *Hudson*, 475 U.S. at 301-02. This right is grounded in freedom of conscience and belief, and protects nonmembers who are opposed to "ideological expenditures *of any sort* that are unrelated to collective bargaining." *Abood*, 431 U.S. at 235, 241 (emphasis added). "*[W]hatever the amount*, the quality of respondents' interest in not being compelled to subsidize the propagation of political or ideological views that they oppose is clear." *Hudson*, 475 U.S. at 305 (emphasis

added). Because *Abood* and *Hudson* protect the right of employees who object to *any* use of their fees for nongermane purposes, a mere increase in the dollar amount of the fair share fee cannot require a supplemental notice and opportunity to object. *Abood* and *Hudson* protect the conscience, not the pocketbook.

The facts of this case do not require this Court to determine whether a supplemental notice could be required, for example, where a union with no history of significant nonchargeable political spending imposes a special assessment for that purpose. Respondent has a history of significant nonchargeable political spending of which nonmembers are made aware in each *Hudson* notice, and Respondent in fact *reduced* its annual spending on nonchargeable activities from 2004 to 2005 and 2006. Thus there was no departure from its "normal spending regime," as the dissent below suggested. Pet. App. 40a. Petitioners have not provided any evidence that *other* unions have abused *Hudson*'s procedures under such circumstances.[9]

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[9] Because nonmembers are fully informed in the annual *Hudson* notice that Respondent may spend their fees on nongermane political and ideological activities unless they object, there is no merit to Petitioners' assertion that the Ninth Circuit's decision would permit Respondent to "levy a massive assessment on the Nonmembers in August 2012 to influence the upcoming presidential election, thereby forcing those Nonmembers who had not previously objected to support financially that presidential campaign . . . *without giving them an opportunity to object* . . . ." Pet. Br. at 23-24 (emphasis added). Nonmembers would be given an opportunity to object in Respondent's annual *Hudson* notice, and it defies common sense to postulate that a nonmember who is informed of Respondent's significant political spending in the June 2012 *Hudson* notice will be surprised when a portion of his or her fee is later used for purposes relating to the presidential election.

Having been informed in June 2005 that their fees could be used for nongermane purposes (including nongermane political or ideological activities), and that their fees could increase without further notice, nonmembers who declined to object received all of the procedural protections required by the First Amendment and waived any challenge to their subsequent payment of the increase. They acquiesced as a matter of law in the use of their fees for such activities, and therefore were not compelled to provide Respondent with an "involuntary loan." *See Street*, 367 U.S. at 774 ("[D]issent . . . must affirmatively be made known to the union by the dissenting employee."); *Cumero v. Public Employment Relations Bd.*, 49 Cal.3d 575, 590 (1989) (under California law, the right to object "must be affirmatively asserted or else it is waived"); Cal. Gov't Code §§3515, 3515.7, 3515.8; *see also* discussion, *infra*, at 45-46.[10] Tellingly, fewer nonmembers filed objections in response to Respondent's June 2006 *Hudson* notice – which disclosed Respondent's use of the

[10] Amici Pacific Legal Foundation, *et al.*, urge the Court to abandon this rule and to require instead that nonmembers affirmatively authorize the use of their fees for nongermane purposes. Brief Amicus Curiae of Pacific Legal Foundation, *et al.*, at 17. This Court, however, does not consider a claim "raised by an amicus curiae where the petitioner has not pursued that claim in the petition for certiorari." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 96 n.4 (1991); *United States v. Dion*, 476 U.S. 734, 736 n.3, 746 (1986). Considering such a claim would be particularly inappropriate here because amici ask this Court to both overrule well-established precedent and hold unconstitutional the California state laws authorizing Respondent's opt-out system. *See* Cal. Gov't Code §§3515, 3515.7, 3515.8. Amici offer no compelling justification for this Court to abandon its decision just four years ago that the First Amendment permits states to adopt *either* an opt-in *or* an opt-out system. *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 181, 185 (2007). Amici's concerns about "non-conforming" employees are particularly misplaced in this case, which involves a sizable class of nonmembers, not a lone dissenter.

funds generated by the increase – than had done so in response to the June 2005 *Hudson* notice. *See* discussion, *supra*, at 5. There is thus no basis in the empirical evidence or the law to conclude that nonobjectors were deprived of information necessary to choose whether to object.

D. Petitioners' Proposed Revision of the *Hudson* Procedures Offers Less Protection to Nonmembers and Would Be Unworkable To Administer

When Respondent's expenditures are considered as a whole, the *Hudson* procedures followed here adequately protected nonmembers' First Amendment rights. Accordingly, the only questions before the Court are (1) whether a temporary dues and fee increase or a "special assessment" is constitutionally distinct from a "permanent, across-the-board increase in dues and fees for general purposes," Pet. Br. at 22-23, such that nonmembers must have a separate opportunity to object to supporting any nonchargeable activities funded thereby, and (2) whether, for the same reason, the applicable objector rate must be based on the union's predictions as to how those funds will be used, rather than on the prior year's actual, audited expenses. Because distinguishing temporary fee increases or assessments from other dues and fees paid by nonmembers would contravene fundamental principles of fair share fee jurisprudence while offering less protection to nonmembers than the existing *Hudson* procedures, the answer to both questions is "no."

1. This Court's Fee Jurisprudence Correctly Recognizes the Fungibility of Union Funds

As noted above, the objector fee rate charged by Respondent from July 2005 through June 2006 reflected

the chargeable portion of Respondent's audited 2004 expenditures (56.35%), and during that period objectors paid *less* than their proportionate share of Respondent's total chargeable expenses. Nonetheless, Petitioners urge this Court to consider the increase in isolation, focusing solely on the fact that the objector rate exceeded the chargeable portion of Respondent's spending of the funds generated by the increase. This approach is contrary to the reality that a union's funds are fungible and to this Court's consequent recognition that whether objectors are being compelled to support nongermane activities cannot be determined by tracing the specific funds financing those activities.

The Court first recognized this fungibility principle in *Street*, explaining that, because money is fungible, a system in which a union collects fees from objectors in the amount of full member dues but spends those funds exclusively on chargeable activities does not adequately protect objectors' right to refrain from supporting nonchargeable activities. Instead, it "shift[s] a disproportionate share of the costs of collective bargaining to the dissenter and ha[s] the same effect of applying his money to support such political activities." 367 U.S. at 775. The Court applied the fungibility principle in *Retail Clerks v. Schermerhorn*, 373 U.S. 746, 753 (1963), holding that a union accounting system in which "all collections from nonmembers [were] directly committed to paying bargaining costs" was "of bookkeeping significance only rather than a matter of real substance."

> If the union's total budget is divided between collective bargaining and [nonchargeable] expenses and if nonmember payments, equal to those of a member, go entirely for collective bargaining costs, the nonmember will pay more of these

> expenses than his pro rata share. The member will pay less and to that extent a portion of his fees and dues is available to pay [nonchargeable] expenses. . . . By paying a larger share of collective bargaining costs the nonmember subsidizes the union's [nonchargeable] activities.

Id. at 753-54; *see also Abood*, 431 U.S. at 238 n.35 ("It is plainly not an adequate remedy to limit the use of the actual dollars collected from dissenting employees to collective-bargaining purposes[.]").

These decisions establish that a union's funds are fungible; that its spending of the actual dollars received from nonmembers (to the extent they can be traced) is "of bookkeeping significance only;" *Schermerhorn*, 373 U.S. at 753; and that, accordingly, the question whether nonmembers have been compelled to support nonchargeable expenditures does not depend upon the specific source of the funds used by the union, but instead upon "the total union budget," *Street*, 367 U.S. at 775.

Petititioners ignore these fungibility principles as to the increase at issue here, but they cannot have it both ways. If objectors' fees must be reduced to reflect only their proportionate share of the union's total chargeable expenditures – regardless of the particular activities funded directly with objector fees – then objectors paying that reduced, proportionate fee cannot complain if the specific funds they contribute can be traced through the union's general account to spending on particular nonchargeable activities.[11]

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[11] *Street* specifically recognized that "assessments" are not constitutionally distinct from "regular dues and fees," and thus are not subject to a different objector fee rate. *Contra* Pet. Br. at 21. *Street* held that objector fees are properly defined as a percentage of "the dues, initiation fees and *assessments* uniformly required as a condition of acquiring or retaining union membership," and that the refund owed to objectors following an improper use of their fees should be based

Petitioners' disregard for the fungibility principle is particularly misplaced here. The fee paid by objectors – both before and after the increase – reflected their proportionate share of Respondent's chargeable expenditures, calculated on the basis of Respondent's audited 2004 expenditures. If the funds generated by the increase (which were not separately deducted from employee paychecks or placed into a separate bank account) were disproportionately spent on nonchargeable activities, Respondent consequently committed a proportionally greater proportion of its remaining funds to *chargeable* activities. After all, Respondent's total chargeable spending went up, not down, while the increase was in place, and the fee paid by objectors was ultimately *less* than their proportionate share of Respondent's chargeable activities during the 2005-2006 fee year. Moreover, Petitioners never appealed the District Court's conclusion that, from July through December 2006, Respondent properly applied the objector rate established in its June 2006 *Hudson* notice – reflecting Respondent's *total* chargeable expenditures in 2005 – to the increase. That Respondent paid for certain expenses with funds generated by the increase is "of bookkeeping significance only,"

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upon the "proportion that the expenditures for [nonchargeable] purposes which [they] had advised the union [they] disapproved bore *to the total union budget*." *Street*, 367 U.S. at 743-44, 775 (emphases added).

Even if "special assessments" were somehow constitutionally distinct from "dues and fee" increases, however, the increase at issue here was a temporary dues and fee increase, not a special assessment. The increase was collected over sixteen months, not as a one-time assessment, and the funds generated thereby were not legally restricted to specific purposes. Shortly after the increase expired, Respondent's dues *permanently* increased to 1.5% of gross wages, JA 219 – higher than the 1.25% rate while the increase was in effect.

not constitutional significance. *Schermerhorn*, 373 U.S. at 753.[12]

2. The Court's Fee Decisions Correctly Recognize the Superiority of a System Based on Objective, Independently-Verifiable Financial Reports Rather than Subjective Predictions

The other flaw in Petitioner's proposed substitute for the *Hudson* procedures is that the objector rate for a "special assessment" or temporary dues and fee increase would be determined not by the union's verified prior chargeable spending but on the basis of the union's *predictions* about how the funds generated thereby will be used in the future. That approach protects nonmembers less than the existing *Hudson* procedure, while needlessly burdening the union's statutory and contractual right to collect fair share fees.

As explained above, *Hudson* permits a union to base its objector fee on the chargeable percentage "of its expenses during the preceding year." 475 U.S. at 307 n.18. This "prior year" system benefits both nonmembers and unions by providing an objective, verifiable measure for objectors' fees. Rather than relying upon subjective pre-

[12] To the extent Petitioners contend that Respondent's "publicly-stated intention[]" to use the funds generated by the increase solely for purportedly nonchargeable political purposes made those funds non-fungible, Pet. Br. at 23 n.9, they both disregard Respondent's contemporaneous statements to the contrary, *see* Pet. App. 6a, and suggest a rule unrelated to the actual use of a union's funds and easily evaded by making different statements or remaining silent. Indeed, unions could make special assessments 100% *chargeable* by declaring that the funds generated thereby would be dedicated exclusively to chargeable activities, even if they simultaneously increased by a corresponding amount the percentage of their remaining income spent on nonchargeable activities.

dictions about how the union is likely to use its funds, the "prior year" system pegs the objector fee to the union's historical spending. The union's report of its expenditures in the prior year, and their chargeability or nonchargeability, is verified by an independent auditor. The report and the auditor's verification are sent to nonmembers with the union's annual *Hudson* notice and used to calculate the objector fee charged in the following year. *Id.*[13]

This system serves nonmembers' First Amendment interests in several ways. It provides them with concrete, verifiable information to help them determine whether to object or to challenge the union's chargeability determinations. *See Hudson*, 475 U.S. at 306. Verification by an independent auditor at the union's expense – possible *only* in a "prior year" system because future expenditures cannot be audited – eliminates the risk that unions will manipulate their expense reporting, and relieves nonmembers of the burden of challenging the union's accounting practices. The system enables nonmembers to focus their attention on the two constitutionally relevant issues: whether they object to supporting nongermane activities, and whether the union has properly calculated the objector fee.

For unions, this "prior year" system has both costs and benefits. It forces unions to maintain careful financial accounting records, to pay for an annual audit, and to send nonmembers a verified

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[13] For extremely small public employee unions with few expenditures, *Hudson*'s "independent verification" requirement may be satisfied by providing nonmembers with "adequate accessible information using an auditor verifiable methodology," rather than a full-blown audit. *See, e.g.*, *Harik v. Cal. Teachers Ass'n*, 326 F.3d 1042, 1049 (9th Cir. 2003), *cert. denied*, 540 U.S. 965 (2003).

annual report of those expenditures. It also prevents unions from increasing the objector fee above the chargeable proportion of their most-recently audited year's expenditures, even if they expect that the chargeable proportion of their expenditures during the coming fee year will be significantly higher. The system is practicable, however, because it does not put unions to the impossible task of predicting accurately how they will spend their funds in the future. It also enables them to spend their existing funds as needed – i.e., to exercise their "right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining and, as well, to expend nondissenters' such exactions in support of political activities," *Abood*, 431 U.S. at 240 n.40 (citation omitted) – without fear of litigation if their expenditures ultimately differ from their projections.

The fee paid by objectors during any given year will inevitably differ from the union's actual chargeable expenses during that time under this "prior year" system. However, this consequence (which is also inherent in any "predictive" approach) is outweighed by the benefits of having an objective measure for calculating objector fees that is independently verifiable, accounts for all of the union's spending, and cannot easily be manipulated.

By contrast, an approach based upon predictions about the union's future spending is subjective, non-verifiable, and subject to manipulation. Under such a predictive approach, objectors must rely upon the union's subjective predictions about its future spending to determine whether the objector fee is "accurate," because there is no way for a union to base its fee calculation on predictions about future spending while also complying with *Hudson*'s instruction that its notice must include "verifi-

cation by an independent auditor." 475 U.S. at 307 n.18.[14]

Because it cannot be independently verified, a predictive approach is easily manipulable – a problem exacerbated by its failure to base the objector fee on *total* union expenditures. Under *Hudson*'s "prior year" system, that fee is calculated on the basis of "'total union expenditures'" during the preceding year. *Id.* at 306 (quoting *Abood*, 431 U.S. at 239 n.40); *see also Lehnert*, 500 U.S. at 524. If a union increases its nonchargeable spending in a particular year – through funds from a "special assessment" or otherwise – that increase is reflected in the next *Hudson* notice and causes a corresponding reduction in the objector fee. A "predictive" approach is more prone to manipulation because the union can pick and choose which categories of spending to fund with "regular dues and fees" subject to the usual objector fee rate, and which to fund through special assessments subject to a different rate. A union could implement a "special assessment" to fund entirely *chargeable* activities and collect *one hundred percent* of that assessment from nonmembers – even if its prior *Hudson* notice establishes a much lower objector fee rate – thereby evading *Street*'s requirement

[14] Even if this predictive approach were limited to situations in which there are clear reasons to expect a change in the chargeable percentage of the union's expenditures, that exception to the prior year system would offer no more protection to nonmembers; the prior year system already ensures that, over time, objectors pay no more than their proportionate share of the union's chargeable expenses. Moreover, such an exception would necessarily apply to annual *Hudson* notices as well as mid-year changes. In this case, the exception would have permitted Respondent to establish a *higher* objector fee, because it was foreseeable both when Respondent's June 2005 *Hudson* notice was issued and when the increase was implemented that its nonchargeable expenditures in 2005 and 2006 would be lower than they were in 2004, a presidential election year.

that the objector fee reflect the chargeable percentage of a union's *total* expenditures.

The "predictive" approach would also impose significant burdens on the statutory and contractual right of public employee unions to collect and use fair share fees. Predicting accurately how funds collected through an assessment or increase will be spent is an impossible task, given the inevitable fluctuations in union spending and the emergencies to which unions often must respond. As a result, that approach would engender significant litigation over the "accuracy" of a union's predictions.

The facts of this case demonstrate the difficulty of establishing a workable standard of "accuracy." Petitioners have asserted throughout this litigation that Respondent intended to devote the funds raised by the increase *exclusively* to Respondent's purportedly nonchargeable opposition to two ballot initiatives, and that Respondent should be taken "at its word" as to how the funds were to be spent. Pet. Br. at 5, 22 n.8. However, the funds generated by the fee increase were never devoted exclusively to nonchargeable activities, but to a mix of chargeable and nonchargeable activities, as Respondent made clear at the time. Pet. App. 6a ("[T]he Union specifically stated it intended to split the increase 'between political actions and collective bargaining actions.'"); Record 6 at Exh. A. Indeed, both initiatives appeared on the November *2005* ballot, while the fee increase was collected through December *2006* – long after the initiatives failed to pass. Subsequent audits confirmed that the funds were in fact used for a mix of chargeable and nonchargeable activities, including nearly $1 million in indisputably chargeable spending for collective bargaining negotiations and ratification. Pet. App. 6a; JA 258.

The majority and the dissenting opinions below differed in the proper weight to give Respondent's state-

ments and its actual use of the funds. The predictive approach would require this Court to determine, at the very least, what statements by a union are admissible and relevant as evidence of an increase's "intended" use; whether the actual use of the funds is relevant in evaluating the adequacy of a union's predictions; and whether the standard for assessing those predictions is good faith, ultimate accuracy, reasonable accuracy, or another standard. Even if these questions were resolved, unions and objectors would disagree about the application of that standard to particular cases and burden the courts with the resulting litigation.

These problems are inherent in any "predictive" approach. Significant additional burdens would be created, however, if the courts were to *bind* unions to their predictions in such a supplemental notice. Such a rule would prevent unions from responding to unforeseeable emergencies requiring spending different from that predicted in the supplemental notice, and thereby significantly restrain the exercise of their First Amendment rights. *Hudson*'s "prior year" system ensures that objectors pay only their proportionate share of the union's chargeable expenditures while leaving unions free to respond to changing circumstances in a timely fashion. *See, e.g.*, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring) (because "timing is of the essence in politics . . . . it is often necessary to have one's voice heard promptly, if it is to be considered at all").

In short, the "predictive" approach both ignores the reality that a union's funds are fungible and offers less protection for nonmembers' First Amendment rights, while imposing significant additional burdens on unions and creating numerous roadblocks to the efficient resolution of fee-related disputes. Petitioners' proposed alter-

native to the procedure established in *Hudson* is both unnecessary and counterproductive.

II. This Court's Fair Share Fee Decisions and its Other Decisions Involving Procedural First Amendment Rights and Public Employee Speech Demonstrate that Strict Scrutiny Is Inapplicable Here

The narrow dispute here is whether the specific procedures approved by this Court in *Hudson* and implemented by Respondent in this particular case were adequate to protect nonmembers' First Amendment rights. Nonetheless, Petitioners offer an abstract argument that First Amendment "strict scrutiny" applies to a union's procedures for collecting fair share fees, concluding that considerations of practicality and administrability have no place in that analysis. Pet. Br. at 11-19. Applying strict scrutiny in this manner, however, would be contrary to this Court's prior fair share fee precedents and its other relevant precedents involving procedural First Amendment rights and public employee speech.

A. Fair Share Fee Precedents

As an initial, dispositive matter, this Court's fair share fee precedents do not apply "strict scrutiny" to determine the constitutional adequacy of the procedures used to collect public employee fees.

To begin with common ground, no party disputes the substantive First Amendment right of fee payers not to subsidize ideological activities they oppose. *Abood*, 431 U.S. at 235. In evaluating whether that right has been infringed, this Court applies the "germaneness" standard: Is the expenditure of nonmembers' fees "germane to [the union's] duties as collective-bargaining representative"? *Id.* As *Lehnert* subsequently elaborated, "[C]hargeable activities must (1) be 'germane' to collective-bargaining

activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." 500 U.S. at 519.[15] This standard governs objectors' substantive First Amendment challenges. If an expenditure satisfies the *Lehnert* standard, it may constitutionally be charged to objectors; if the expenditure does not, it may not. No application of "strict scrutiny" is required.[16]

The dispute regarding Petitioners' rights under *Hudson* does not involve their substantive First Amendment rights, however. *Hudson* rights are prophylactic *procedural* rights that "insure that the government treads with sensitivity in areas freighted with First Amendment concerns." 475 U.S. at 303 n.12. In establishing those rights, *Hudson* did not apply any form of "strict scrutiny." Instead, the Court asked what procedures would provide "adequate[]" protection, 475 U.S. at 302, in light of both nonmembers' substantive First Amendment rights, *id.* at 305-07, and practical reality, *id.* at 307 n.18. The Court's goal was "'to devise 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 col-

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[15] *Lehnert* did not alter the fundamental holding in *Hanson* and *Abood* that expenditures for core collective-bargaining activities are not subject to *any* constitutional scrutiny, let alone "strict scrutiny."

[16] Petitioners' suggestion that the second and third prongs of the *Lehnert* test are "functionally identical" to strict scrutiny, Pet. Br. at 14, is too facile. The third prong prohibits only those fees that *significantly* add to the infringement of First Amendment rights, rather than prohibiting all fees going *any* further than necessary to serve a compelling interest. Likewise, the second prong does not require proof of a "compelling government interest," but simply prohibits fair share fees for purposes other than furthering labor peace and alleviating the free rider problem.

lective-bargaining activities.'" *Id.* at 302 (quoting *Abood*, 431 U.S. at 237).

Applying this framework, *Hudson* articulated the elements of a constitutionally sufficient fee collection procedure, while rejecting several requirements that were impractical or that gave too little consideration to union interests – but that would have been necessary were the court applying strict scrutiny's "least restrictive means" test. *See*, *e.g.*, *id.* at 307 n.18 (rejecting requirement that nonmembers receive "exhaustive and detailed list of all its expenditures" and that union ensure "absolute precision in the calculation of the charge to nonmembers"); 308 n.21 (rejecting assertion that the "constitutional minimum" includes "a full-dress administrative hearing, with evidentiary safeguards"). The "carefully tailored" procedures established by *Hudson* define fee payers' procedural rights – not strict scrutiny.[17]

Any residual doubt about the scrutiny applied in this Court's prior fee decisions is dispelled by the deference they exhibit to legislative judgments about the benefits of agency shop agreements. *See*, *e.g.*, *Hudson*, 475 U.S. at 301 n.8 (Court has always "accorded great weight to the

[17] Petitioners emphasize *Hudson*'s statement that a union's fee collection procedures should be "carefully tailored to minimize the infringement" of First Amendment rights, and its citation, in a footnote, of decisions applying heightened scrutiny to laws infringing *substantive* First Amendment rights. *Id.* at 303 & n.11; *see* Pet. Br. at 14 & n.4. The mode of analysis actually employed in *Hudson*, however, was inconsistent with strict scrutiny, and *Hudson* nowhere stated that, by citing substantive First Amendment cases, it intended to invoke strict scrutiny or eliminate any distinction between substantive First Amendment rights (which are sometimes measured by strict scrutiny) and procedural First Amendment rights (which never are). That footnote simply cataloged areas in which the First Amendment requires the government to "tread[] with sensitivity." 475 U.S. at 303 n.12.

congressional judgment that it would promote peaceful labor relations to permit a union and an employer to conclude an agreement requiring employees who obtain the benefit of union representation to share its cost") (citation omitted); *Abood*, 431 U.S. at 224-25 (Court's "province is not to judge the wisdom of [a state's] decision to authorize the agency shop in public employment"); *Hanson*, 351 U.S. at 234 ("[t]he decision [whether to permit agency shop agreements] rests with the policy makers, not with the judiciary," because "[t]he ingredients of industrial peace and stabilized labor-management relations are numerous and complex" and "may well vary from age to age and from industry to industry"). Such deference to legislative judgments, though reflecting the constitutional separation of powers, is inconsistent with any contention that those decisions apply "strict scrutiny."

B. Expressive Association and Compelled Speech

Largely ignoring these decisions, Petitioners argue that strict scrutiny applies to a public employee union's fee collection procedures because any compulsory payment of fair share fees to such a union constitutes a form of "compelled expressive association." *See*, *e.g.*, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984); Pet. Br. at 12. Petitioners' reliance on those decisions is misplaced in the first instance because the *Hudson* notice dispute here centers not on Petitioners' substantive First Amendment right to decline to support nonchargeable activities, but on the prophylactic procedures that unions must implement to protect that right. Even as to fee payers' substantive First Amendment rights, however, Petitioners' reliance upon this Court's "expressive association" decisions is misplaced.

More than fifty years ago, this Court held in *Hanson* that "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work . . . does not violate either the First or the Fifth Amendments." 351 U.S. at 238. *Hanson* specifically rejected the claim that such a requirement "forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights." *Id.* at 236. This Court has repeatedly affirmed that holding. *See, e.g.*, *Locke*, 555 U.S. at 209-10; *Lehnert*, 500 U.S. at 517. Under this Court's precedents, "compelled subsidies" such as fair share fees are constitutionally distinct from "compelled speech," *see Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 565 & n.8 (2005), and do not warrant strict scrutiny under the First Amendment, *see, e.g.*, *United States v. United Foods, Inc.*, 533 U.S. 405, 409-10, 413-16 (2001); *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 473-74 (1997).

These decisions reflect the significant difference between the statutes at issue in *Dale* and *Roberts* and the payment of fair share fees to a public employee union. Those statutes infringed upon rights of expressive association because, by prohibiting the plaintiff groups from excluding certain individuals, they interfered with the groups' "ability to express [their own] message[s]." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 69 (2006) ("*FAIR*"). In *Dale*, "'the forced inclusion of [a homosexual scoutmaster in the Boy Scouts] significantly affect[ed] [the Boy Scouts'] expression.'" *Id.* at 68 (quoting *Dale*, 530 U.S. at 655-59). In *Roberts*, the requirement that the Jaycees extend membership to certain excluded individuals "impair[ed] the ability of the original members to express only those views that brought them together." 468 U.S. at 623.

In *FAIR*, by contrast, the requirement that law schools "associate" with military recruiters did not violate the schools' right of expressive association because the "compelled association" did not affect their ability to communicate their message of nondiscrimination. *FAIR*, 547 U.S. at 69-70. Petitioners' invocation of the right to expressive association is misplaced for the same reason. The requirement that employees provide financial support to their bargaining representative has no impact or effect upon their ability to express any message they choose and does not interfere with the ability of any expressive association to communicate its chosen message. Nonmembers are individuals, not groups, and do not allege that they comprise an expressive association whose ability to communicate its message is impaired by the compulsory payment of fair share fees. Nonmembers remain free to communicate their opinions, to join expressive associations, and to engage in whatever other First Amendment-protected activity they wish.[18]

Petitioners' reliance on compelled-speech precedents, *see* Pet. Br. at 17, is similarly misplaced. A compelled-speech violation occurs only where "the complaining speaker's own message [is] affected by the speech it [is] forced to accommodate." *FAIR*, 547 U.S. at 63. A requirement that nonmembers provide financial support to their collective bargaining representative has no effect on nonmembers' ability to express messages of their own choosing, or to express no message if they prefer. Because there

[18] The "compelled association" here poses even less of a risk that Petitioners will be associated with a disfavored message than the statute in *FAIR*. The schools in *FAIR* had to provide military recruiters with access to their recruiting services, to allow recruiters on campus, and to send emails and distribute flyers on behalf of recruiters. *Id.* at 60-61. Fee payers simply have a fee deducted from their wages and forwarded to the union; they have no public association with the union.

is no risk that the union's views will be attributed to nonmembers, Petitioners also are not forced to accommodate speech with which they disagree. *Id.* at 65; *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 88 (1980) (no compelled speech violation where plaintiffs were "free to publicly dissociate themselves from the views of the speakers or handbillers" on their property); *see also Johanns*, 544 U.S. at 565 & n.8 (distinguishing "compelled speech" precedents from "compelled subsidy" cases).[19]

Finally, Petitioners argue that strict scrutiny is required because nonmembers' payment of the increase constituted an involuntary "political loan" that "enhance[d] SEIU's political speech." Pet. Br. at 18-19. Nonmembers, however, made no such loan to Respondent. *See* discussion, *supra*, at 14-16. And in any event, there is no merit to Petitioners' claim that actions by the State that purportedly enhance a particular group's political speech are subject to the same level of scrutiny as regulations that substantially *burden* core political speech, such as the Arizona statute struck down in *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, __ U.S. __, 131 S.Ct. 2806 (2011). To the contrary, *Bennett* emphasized that the "enhancement" of a group's speech through a viewpoint-neutral state regula-

[19] Petitioners cite *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781 (1988), to suggest that fair share fee arrangements constitute content-based regulations of speech. Pet. Br. at 18. The statute at issue in *Riley* required "professional fundraisers" to "disclose to potential donors, *before an appeal for funds*, the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charity." 487 U.S. at 795 (emphasis added). That statute was content-based not simply because it compelled certain disclosures of information, but because the compelled disclosures were *triggered by the content* of the fundraisers' non-compelled speech. Here, the requirement to pay fair share fees is not triggered by, and has no relation to, the content of nonmembers' speech.

tion – here, a statute permitting fair share fee payments to the bargaining representative chosen by a majority of the employees in a public sector bargaining unit – has never triggered strict scrutiny. *See id.* at 2822 (distinguishing cases involving viewpoint-neutral subsidies for political speech that did not burden others' speech); *id.* at 2837 (Kagan, J., dissenting) ("We have never, not once, understood a viewpoint-neutral subsidy given to one speaker to constitute a First Amendment burden on another."). Indeed, the government may subsidize the political activities of some organizations but not others, *Regan v. Taxation With Representation*, 461 U.S. 540, 546-51 (1983), or confer a privileged position in "the policymaking process" on particular collective bargaining representatives, *Minn. State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 288-90 (1984); *cf. Buckley v. Valeo*, 424 U.S. 1, 57, 92-108 (1976) (upholding federal statute providing for public financing of presidential elections, including provisions granting "major parties" greater funding than "nonmajor parties").

In short, this Court's expressive association and compelled-speech precedents do not suggest that the compulsory payment of fair share fees, standing alone, triggers heightened First Amendment scrutiny. Under *Abood* and its progeny, nonmembers' substantive First Amendment rights are infringed only where such compulsory fees are used to support "ideological activities unrelated to collective bargaining." 431 U.S. at 236.

C. Procedural First Amendment Rights and Public Employee Speech

Although the non-fair share fee precedents upon which Petitioners rely in invoking strict scrutiny are irrelevant, several First Amendment precedents outside of the fair share fee context are relevant to the issue presented here and further counsel against applying strict scrutiny.

Under this Court's general approach to procedural First Amendment rights, the constitutional necessity of a particular procedure "turn[s] on the particular context in which the question arises – on the cost of the procedure and the relative magnitude and constitutional significance of the risks it would decrease and increase." *Waters*, 511 U.S. at 671 (O'Connor, J.). In considering the limitations imposed by the First Amendment upon state defamation lawsuits, for example, the Court "balance[s] the State's interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757 (1985) (Powell, J.); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974) (seeking a "balance between the needs of the press and the individual's claim to compensation for wrongful injury"). Accordingly, when procedural First Amendment rights such as fee payers' "notice" rights are at issue, the Court does not apply "strict scrutiny" but instead takes account of all relevant interests – as it did in *Hudson*.[20]

Waters v. Churchill is particularly instructive. Like *Hudson* and the present case, it involved the procedural First Amendment rights of public employees – specifically, whether public employees have the right to a reason-

[20] The Court's defamation decisions demonstrate that this approach applies even where the interests opposing recognition of a procedural right arise not under the Constitution but under statute, contract, or common law. *Gertz* accounted for both the substantive First Amendment rights of defamation defendants and "the strong and legitimate" – but certainly not constitutional – "state interest in compensating private individuals for injury to reputation." 418 U.S. at 348. Thus, the fact that nonmembers have a First Amendment right not to support nonchargeable activities does not mean that a union's statutory and contractual right to collect fair share fees can be disregarded when assessing the adequacy of its fee procedures.

able investigation before they are disciplined for speech that might have been protected by the First Amendment. 511 U.S. at 677-78. The *Waters* Court was deeply fractured as to that right, but no Justice contended that public employees have a right to employment procedures imposing the least possible burden on their First Amendment rights. To the contrary, Justice Scalia argued in a concurrence joined by Justice Thomas and Justice Kennedy that the procedural right recognized by the plurality was improper because the Court had previously recognized such rights *only* in cases involving "alleged governmental deprivation of the freedom of speech specifically *through the judicial process*." *Id.* at 686-89 (Scalia, J., concurring in the judgment).[21]

Applying strict scrutiny here would also be contrary to this Court's public employee speech cases. The Court has long recognized that "there is a crucial difference, with respect to constitutional analysis, between the government exercising the power to regulate or license, as lawmaker, and the government acting as proprietor, to manage its internal operation." *Engquist v. Or. Dep't of Ag.*, 553 U.S. 591, 598 (2008) (citations omitted). In cases involving public employee speech, this Court does not apply strict scrutiny but instead seeks "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. The courts employ "a fact-sensitive and deferential weighing of the government's legitimate interests." *Bd. of County Comm'nrs v. Umbehr*, 518 U.S. 668, 677 (1996).

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[21] Justice Stevens dissented from the plurality's decision regarding the substantive scope of the First Amendment, but did not challenge the plurality's failure to apply strict scrutiny. *Id.* at 694-99 (Stevens, J., dissenting).

The present dispute is covered by the *Pickering* standard. Petitioners' constitutional claims arise only because their employer, the state of California, is a public entity. The California laws authorizing Respondent's fair share fee help the state maintain "industrial peace and stabilized labor-management relations." *Hanson*, 351 U.S. at 234. "The desirability of labor peace is no less important in the public sector [than elsewhere], nor is the risk of 'free riders' any smaller." *Abood*, 431 U.S. at 224. The interest justifying Respondent's fair share fee arrangement is therefore the exact government interest involved in other public employee speech cases – the interest in providing government services in an efficient and effective manner. *Engquist*, 553 U.S. at 598. *Abood* and *Hudson* consequently applied a test consistent with the *Pickering* standard. *Abood* held that public employers' interests in labor peace and stability overcome any purported impact of fair share fees on public employees' First Amendment rights, 431 U.S. at 222, while *Hudson* accommodated both the public employees' substantive First Amendment rights and the union's statutory and contractual right "to require every employee to contribute to the cost of collective-bargaining activities," *Hudson*, 475 U.S. at 302. There is no principled reason to distinguish those decisions and their progeny from this Court's other public employee speech decisions.[22]

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[22] Petitioners rely heavily upon *Elrod v. Burns*, 427 U.S. 347 (1976), in which a plurality of the Court argued that strict scrutiny, not *Pickering* balancing, applies in public employee speech cases. *See id.* at 363 (Brennan, J.). That approach to public employee speech, however, has never commanded a majority of this Court, and this Court has never extended *Elrod*'s application of strict scrutiny to contexts other than political patronage in public employment. To the contrary, the Court has since clarified that *Pickering*'s balancing test – *not* strict scrutiny – applies even in the patronage context. *See Umbehr*, 518 U.S. at 673.

Finally, applying strict scrutiny here would be inconsistent with the manner in which this Court has applied *Abood* and *Hudson* in other contexts, most notably mandatory state bar associations. *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990), found a "substantial analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of employee unions and their members, on the other," *id.* at 12, and held on that basis that state bars can "fund activities germane to [their statutory purpose] out of the mandatory dues of all members," *id.* at 14. *Keller* also explained that applying *Abood*'s "germaneness" standard to state bars bar would not be overly onerous because "an integrated bar could certainly meet its *Abood* obligation by adopting the sort of procedures described in *Hudson*." *Id.* at 17.

Adopting Petitioners' argument for strict scrutiny would require this Court to revisit and overturn *Keller*'s ruling that integrated bar associations are permitted to charge members for germane activities. *Keller* recognized that the interest justifying the creation of an integrated bar is the organized bar's preference for "a large measure of self-regulation to regulation conducted by a government body which has little or no connection with the profession," *id.* at 12, an interest almost certainly not "compelling" for purposes of strict scrutiny. Moreover, *Keller* noted that "members of the State Bar concededly do not benefit as directly from its activities as do employees from union negotiations with management," *id.*, suggesting that the integrated bar requirement is not adequately tailored to the government's interests. And if strict scrutiny applies to the *procedural* rights of fee payers, as Petitioners contend, every state bar will have to revisit the procedures it implemented based on *Keller*'s holding, reached without applying strict scrutiny, that the specific procedures established in *Hudson* were "certainly" sufficient. *Id.* at 17.

III. Petitioners' Argument that Nonmembers Were Impermissibly Charged Proposition 76 Expenditures Is Not Properly Presented and Is Meritless

Petitioners contend that nonmembers were compelled to pay for Respondent's opposition to Proposition 76, an initiative on California's November 2005 ballot, and contend that those expenditures were nonchargeable. Pet. Br. at 24-39. However, Petitioners never pursued such a claim below, but disavowed it, as is apparent from the fact that the text of Proposition 76 and its legislative history are not contained anywhere in the record of this case. Instead, Petitioners direct the Court to the internet. *See* Pet. Br. at 36 nn.17-19; *id.* at 37 n.20. The Ninth Circuit addressed the issue in a passing footnote suggesting (without holding) that such expenditures *might* be chargeable, but the issue is not properly presented here. If the Court does reach the chargeability claim, however, it should reject the claim on the merits.

A. Petitioners Never Pursued a Chargeability Claim

There is a fundamental difference between procedural challenges to the collection of fair share fees and substantive challenges to the spending of those fees. The former, known as "notice" or "*Hudson*" challenges, contest whether a union provided appropriate procedural protections to nonmembers, under the standards announced in *Hudson*. The latter, known as "chargeability," "spending," or "*Lehnert*" challenges, contest whether a union can compel nonmembers, over their objection, to pay for certain expenditures without violating their substantive First Amendment rights. *See Lehnert*, 500 U.S. 507. The two inquiries are separate, and mischaracterizing an expenditure as "chargeable" does not render the *Hudson* notice inadequate. "*Hudson* governs the adequacy of information, while *Lehnert* governs chargeability. There is a procedure for challenging the amount of the fees, but this procedure is

not encompassed in a *Hudson* challenge." *Wagner v. Professional Engineers in California Gov't*, 354 F.3d 1036, 1047 (9th Cir. 2004); *see generally id.* at 1046-47; *Jibson v. Mich. Educ. Ass'n-NEA*, 30 F.3d 723, 730 (6th Cir. 1994); *Hudson v. Chicago Teachers Union, Local No. 1*, 922 F.2d 1306, 1314 (7th Cir. 1991). Even a notice containing an incorrect chargeability determination provides nonmembers with all the "notice" that *Hudson* requires: the major categories of the union's actual expenditures and the union's chargeability determinations, the right to object to paying for nonchargeable expenditures, and the procedure to challenge chargeability.

At no time in the present case did Petitioners litigate a "chargeability" claim; rather, they litigated only a "notice" claim and eschewed any "chargeability" claim. "Plaintiffs explicitly concede theirs is only a procedural notice challenge, not a challenge to the Union's actual spending of the fees." Pet. App. 13a n.4. Petitioners asserted that "[t]his case . . . is *solely* about whether Defendants have complied with *Hudson*," Docket No. 45 at 6 (emphasis added), and reiterated their exclusive concern with *Hudson*'s procedural protections, *see*, *e.g.*, *id.* at 15 ("Defendants' imposition of an increase in dues and fees in the absence of proper notice forms the basis of Plaintiffs' Complaint."); *see also id.* at 8, 10. Petitioners thereby waived any chargeability claim and cannot raise it for the first time in this Court. *See*, *e.g.*, *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (claim under Civil Rights Act of 1875 cannot be raised for the first time before the Supreme Court, where complaint raised only claims under the Civil Rights Act of 1871).

Nonmembers have ample avenues to pursue chargeability challenges. First, they can submit a challenge in response to Respondent's *Hudson* notice, which will promptly be resolved under the American Arbitration

Association's rules. *See* JA 103, 159, 224-25; *see also Hudson*, 475 U.S. at 307-08. Indeed, the 2005 arbitration of class members' challenges addressed both the propriety of the increase and the applicable objector rate. *See* Record 66 at Exh. B. Second, nonmembers can file an administrative charge with the Public Employment Relations Board, pursuant to Cal. Gov't Code §3515.8. Finally, nonmembers can pursue a chargeability challenge under 42 U.S.C. §1983, but, unlike Petitioners here, they actually have to litigate that challenge in the district court. The present case involves none of these procedures.

Petitioners' new chargeability claim is particularly inappropriate as to nonobjectors, for whom it would not be cognizable even if properly asserted and preserved below. Unions may charge nonmembers the equivalent of union dues, absent an affirmative objection. "[D]issent is not to be presumed – it must affirmatively be made known to the union by the dissenting employee," and for that reason a union cannot "in fairness be subjected to sanctions in favor of an employee who makes no complaint of the use of his money for such activities." *Street*, 367 U.S. at 774; *accord Hudson*, 475 U.S. at 306 n.16; *Abood*, 431 U.S. at 238; *Allen*, 373 U.S. at 119.

Chargeability challenges cannot be brought on behalf of a class of all nonmembers, or indeed any class containing nonobjectors, because objection cannot be presumed and many nonmembers do not object to paying for nonchargeable expenditures. This has been the settled law since *Street*, in which this Court refused to award relief to a class including all nonmembers: "Any remedies . . . would properly be granted only to employees who have made known to the union officials that they do not desire their funds to be used for political causes to which they object. . . . *[O]nly those who have identified themselves as opposed to political uses of their funds are entitled to*

relief in this action." 367 U.S. at 774 (emphasis added); *accord Allen*, 373 U.S. at 119 (chargeability challenge "is not and cannot be a class action").

Nor does Petitioners' *Hudson* "notice" claim depend on whether Respondent's Proposition 76 expenditures were chargeable. The accuracy of a union's application of the *Lehnert* standard for chargeability as to one particular expense is irrelevant to the adequacy of its *Hudson* notice. For that reason, Petitioners not only disavowed any chargeability claim, but expressly repudiated even the *issue* of whether Respondent's Proposition 76 expenditures were chargeable, asserting that it was "not relevant to consideration of the Employees' 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)." Ninth Circuit Opposition Br. at 44-45 n.25. Moreover, Respondents did not dispute on summary judgment the accuracy of Respondent's chargeability determinations, including those in the June 2006 *Hudson* notice disclosing the expenditures funded by the increase. *See* JA 67, 71-72, 76. On the basis of Petitioners' concessions, the Ninth Circuit properly concluded, "Plaintiffs explicitly concede theirs is only a procedural notice challenge, not a challenge to the Union's actual spending of the fees. . . . [A]ccording to Plaintiffs, chargeability is immaterial to their challenge . . . ." Pet. App. 13a at n.4.

The chargeability issue was neither necessary to nor decided in the decision below. Resolving it here would constitute an advisory opinion. *See, e.g.*, *United States v. Evans*, 213 U.S. 297, 299-301 (1909).

B. Nonmembers Were Not Compelled To Support Respondent's Proposition 76 Expenditures

If the Court nonetheless addresses Petitioners' "chargeability" challenge, it should reject it on the merits

without reaching the issue whether the Proposition 76 expenses were chargeable. Even if those expenses – and indeed, all of the spending financed by the increase – were nonchargeable, no nonmembers were compelled over their objection to pay more than their proportionate share of Respondent's chargeable expenditures.

First, objectors' fair share fees both before and after the increase amounted to only 56.35% of members' dues during this period. Pet. Br. at 3, 5; *see also* JA 67, 309, 314, 318. However, no less than 66.26% of Respondent's expenditures during 2005 (the year that Proposition 76 was on the ballot) funded chargeable activities – even if all of the spending from the increase were deemed nonchargeable. *See* discussion, *supra*, at 5 & n.6.[23] Not only did objectors not subsidize Respondent's nonchargeable expenditures, they did not even pay their proportionate share of Respondent's *chargeable* spending. Even if Respondent's opposition to Proposition 76 and the other activities funded by the increase were considered nonchargeable, objectors simply did not provide financial support for those activities.

Second, the claim that nonmembers were compelled over their objection to pay for nonchargeable Proposition 76 expenditures must also fail as to nonobjectors. They were informed by Respondent's June 2005 *Hudson* notice that, absent an objection, they could be charged for nonchargeable expenditures (including nonchargeable politi-

[23] There is no evidence in the record that Respondent made any Proposition 76 expenditures in 2006, after its defeat in November 2005. Indeed, all political expenditures from the fee increase in 2006 were classified as nonchargeable. *See* JA 258. Even if Respondent had made Proposition 76 expenditures in 2006, however, the objector rate would still have been less than Respondent's chargeable expense rate in 2006 (56.35% vs. no less than 57.38%). *See* discussion, *supra*, at 6 & n.7.

cal expenditures), and that the dollar amount of their fee could increase during the fee year. *See* discussion, *supra*, at 2. Under both state law and *Street*, nonmembers who chose not to object after receiving that notice acquiesced in the use of their fees for such purposes. *See Street*, 367 U.S. at 774.; Cal. Gov't Code §§3515.7(a) & (b), 3515.8; *see also* discussion, *supra*, at 20, 45-46.[24]

C. The Ninth Circuit's Discussion Was Correct

For the foregoing reasons, there is no reason to consider the Ninth Circuit's passing footnote regarding the Proposition 76 expenditures. Nonetheless, that discussion was not erroneous.

The footnote reads, in relevant part:

> [N]ot all political expenses are automatically nonchargeable. Rather, if germane to collective bargaining, they can be chargeable just like any other expense. *See*, *e.g.*, *Lehnert*, 500 U.S. at 520, 111 S.Ct. 1950; *Foster v. Mahdesian*, 268 F.3d 689, 692 n.6 (9th Cir. 2001); *Nat'l Treasury Employees Union v. Chertoff*, 452 F.3d 839, 853, 859–60 (D.C.

[24] The rule limiting relief in chargeability actions to *actual* objectors would apply even if this Court concluded that Respondent should have issued a second 2005 *Hudson* notice to all nonmembers before instituting the increase. *Street* prohibits the conclusion that nonobjectors were unlawfully compelled to support Respondent's opposition to Proposition 76 simply because they did not receive a second *Hudson* notice. Instead, the proper remedy under such circumstances would be to provide nonmembers who failed to object in response to the June 2005 *Hudson* notice with a new notice and a new opportunity to object, to claim a refund of the nonchargeable amount paid, and to challenge Respondent's calculation of that amount. Here, however, Respondent has already provided the class with an opportunity to obtain a refund of the full amount paid, chargeable and nonchargeable, so there is no chargeability issue. *See* Respondent's Motion to Dismiss as Moot.

> 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). Here, Proposition 76 would have effectively 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.

Pet. App. 6a n.2. Nowhere did the Ninth Circuit *conclude* that the Proposition 76 expenditures were chargeable; rather, it merely suggested that those expenditures might be considered chargeable because Respondent cannot fulfill its role as collective bargaining representative unless it can be assured that the agreements it negotiates will be binding on the employer. Petitioners fault the Ninth Circuit for failing to apply all three prongs of the chargeability test set forth in *Lehnert*, *see* Pet. Br. at 25-29, but the Ninth Circuit's cursory analysis merely demonstrates that it did not actually resolve the chargeability question.

If analyzed under *Lehnert*, however, the Proposition 76 expenditures were chargeable. Unlike the expenditure at issue in *Lehnert* – a lobbying effort to raise funds for public schools in general, not tied to any funding for teachers represented by the union – Respondent's Proposition 76 expenditures were not "attenuated" from collective bargaining at all, but instead related directly to the "implementation of [Petitioners'] collective-bargaining agreement. *Lehnert*, 500 U.S. at 520, 527. Petitioners agree that political expenditures related to implementing a labor agreement are chargeable. Pet. Br. at 10.

"Proposition 76 would have effectively 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." Pet App. 7a n.2. Lobbying against abrogation of a union's agreements is certainly "*relate[d]* . . . to the . . . implementation of" those agreements, since an agreement that is abrogated will no longer be "implement[ed]." *Lehnert*, 500 U.S. at 520 (emphasis added). Moreover, giving the Governor authority to abrogate Respondent's agreements would have interfered with Respondent's *current* ability to fulfill its statutory obligation to negotiate the *next* agreement. *See Chertoff*, 452 F.3d at 853, 859–60.[25] As such, the Proposition 76 expenditures meet *Lehnert*'s "germaneness" test.[26]

Respondent's Proposition 76 expenditures also satisfy the second element of the *Lehnert* test: whether charging fee payers is "justified by the government's vital policy interest in labor peace and avoiding 'free riders.'" 500

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[25] The Ninth Circuit's characterization of the effect of Proposition 76 was fair. *Contra* Pet. Br. at 35-37. The Proposition would have given the Governor the authority "'to reduce appropriations of the Governor's choosing, including employee compensation/state contracts,'" *id.* at 36 (quoting the Official Title & Summary Prepared by the Attorney General), and this authority would apply to "'[a]ny General Fund spending related to contracts, collective bargaining agreements, or entitlements for which payment obligations arise after the effective date of this measure . . . .,'" *id.* at 37 (quoting the Legislative Analyst's "Proposition 76: School Funding; State Spending; Initiative Constitutional Amendment"). Since "payment obligations" under collective bargaining agreements do not arise until the work covered by those agreements is performed, the Proposition would have given the Governor the authority to reduce appropriations for the payment of wages and benefits for work performed after the Proposition was enacted, effectively eliminating positions funded under those agreements.

[26] Petitioners' reliance upon *Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415 (D.C. Cir. 1997), *see* Pet. Br. at 34 n.16, is misplaced because *Miller*, by its terms, applies only to private sector unions, *see* 108 F.3d at 1423.

U.S. at 519. Respondent's opposition to Proposition 76 furthered the "government's vital policy interest in labor peace" because authorizing the Governor to abrogate labor agreements could lead to labor unrest among the state's workforce, for example, by state employees striking to protest unilateral cuts in their collectively-bargained wages and benefits. Indeed, simply conferring that authority on the Governor could lead to labor unrest since the *quid pro quo* for labor peace – the negotiation of agreements equally binding on both sides – would be undermined by such authority.

Moreover, as the Court explained in *Abood*, the government has a vital policy interest in insuring that all bargaining unit members pay their fair share of the costs of representational services from which they benefit. 431 U.S. at 221-22. Under California law, these representational services extend beyond negotiating at the bargaining table with the state employer (the Governor or the Governor's representative) to include lobbying the Legislature (or, in the case of an initiative, the electorate, which is the legislative decisionmaker in that context, *see California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1106 (9th Cir. 2003)). Indeed, under California law, such lobbying is not only within the statutory scope of Respondent's representation, but within the statutory scope of chargeable expenses. *See* Cal. Gov't Code §§3512, 3513(j), 3513(k), 3515.8, 3517, 3517.5; *Cumero*, 49 Cal. 3d at 597-98; *Lillebo v. Davis*, 222 Cal. App. 3d 1421, 1442 & n.12 (1990), *cert. denied*, 501 U.S. 1205 (1991); *see also Champion v. State of California*, 738 F.2d 1082, 1086 (9th Cir. 1984).[27] Because under California law Respondent represents the bargaining unit in such lobby-

[27] This Court denied a petition for writ of certiorari in *Lillebo* only two weeks after issuing *Lehnert*. *Lillebo v. Davis*, 501 U.S. 1205 (1991).

ing, and because all bargaining unit members share in the benefits of this representation, requiring them to contribute their fair share of the cost of this representation is "justified by the government's vital policy interest in labor peace and avoiding 'free riders.'" *Lehnert*, 500 U.S. at 519.[28]

Respondent's Proposition 76 expenditures satisfy the third element of the *Lehnert* test: whether charging for the activity at issue "significantly add[s] to the burdening of free speech that is inherent in the allowance of an agency or union shop." 500 U.S. at 519. Some nonmembers may have disagreed with Respondent's opposition to Proposition 76, just as certainly as some may disagree with positions it advances in collective bargaining negotiations. As the Court recognized in *Abood*, a nonmember "may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative." 431 U.S. at 222 (listing examples). *Abood* held, however, that such disagreements are inherent in the agency shop and do not permit a nonmember to "withdraw his financial support merely because he disagrees with the group's strategy." *Id.* at 223.

Respondent's opposition to Proposition 76 did not involve partisan politics or purely ideological issues with no relation to the bargaining unit, nor did it entail any public attribution of Respondent's opposition to Proposition 76 to the individual nonmembers. Charging nonmembers for Respondent's opposition to a proposition authorizing the Governor to abrogate their collective

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[28] Because the California courts have conclusively determined that California law includes lobbying within the scope of union representation and permits public employee unions to charge nonmembers for such lobbying, Respondent's Proposition 76 expenditures are chargeable under the alternative test articulated by Justice Scalia in *Lehnert*. *See Lehnert*, 500 U.S. at 558 (Scalia, J.).

bargaining agreements does not "*significantly* add to the burdening of free speech that is inherent in the allowance of an agency or union shop," *Lehnert*, 500 U.S. at 519 (emphasis added), because in doing so the union is merely insuring that those agreements will be – and remain – implemented. That burden is no different from that inherent in allowing a union to charge nonmembers for lobbying to secure "ratification or implementation" (i.e., funding) of their collective bargaining agreements in the first place – a burden expressly approved by this Court in *Lehnert*, 500 U.S. at 520.

CONCLUSION

For the reasons discussed in Respondent's Motion to Dismiss, this case should be dismissed as moot. If it is not, the decision below should be affirmed.

Respectfully submitted,

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STATUTORY APPENDIX

The Ralph C. Dills Act

California Government Code §§3512-3524

3512. It is the purpose of this chapter to promote full communication between the state and its employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between the state and public employee organizations. It is also the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the State of California by providing a uniform basis for recognizing the right of state employees to join organizations of their own choosing and be represented by those organizations in their employment relations with the state. It is further the purpose of this chapter, in order to foster peaceful employer-employee relations, to allow state employees to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to permit the exclusive representative to receive financial support from those employees who receive the benefits of this representation.

Nothing in this chapter shall be construed to contravene the spirit or intent of the merit principle in state employment, nor to limit the entitlements of state civil service employees, including those designated as managerial and confidential, provided by Article VII of the California Constitution or by laws or rules enacted pursuant thereto.

3513. As used in this chapter:

(a) "Employee organization" means any organization that includes employees of the state and that has as one of its primary purposes representing these employees in their relations with the state.

(b) "Recognized employee organization" means an employee organization that has been recognized by the state as the exclusive representative of the employees in an appropriate unit.

(c) "State employee" means any civil service employee of the state, and the teaching staff of schools under the jurisdiction of the State Department of Education or the Superintendent of Public Instruction, except managerial employees, confidential employees, supervisory employees, employees of the Department of Personnel Administration, professional employees of the Department of Finance engaged in technical or analytical state budget preparation other than the auditing staff, professional employees in the Personnel/Payroll Services Division of the Controller's office engaged in technical or analytical duties in support of the state's personnel and payroll systems other than the training staff, employees of the Legislative Counsel Bureau, employees of the Bureau of State Audits, employees of the office of the Inspector General, employees of the board, conciliators employed by the State Conciliation Service within the Department of Industrial Relations, employees of the Office of the State Chief Information Officer except as otherwise provided in Section 11546.5, and intermittent athletic inspectors who are employees of the State Athletic Commission.

(d) "Mediation" means effort by an impartial third party to assist in reconciling a dispute regarding wages, hours and other terms and conditions of employment between representatives of the public agency and the recognized employee organization or recognized employee organizations through interpretation, suggestion and advice.

(e) "Managerial employee" means any employee having significant responsibilities for formulating or administer-

ing agency or departmental policies and programs or administering an agency or department.

(f) "Confidential employee" means any employee who is required to develop or present management positions with respect to employer-employee relations or whose duties normally require access to confidential information contributing significantly to the development of management positions.

(g) "Supervisory employee" means any individual, regardless of the job description or title, having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend this action, if, in connection with the foregoing, the exercise of this authority is not of a merely routine or clerical nature, but requires the use of independent judgment. Employees whose duties are substantially similar to those of their subordinates shall not be considered to be supervisory employees.

(h) "Board" means the Public Employment Relations Board. The Educational Employment Relations Board established pursuant to Section 3541 shall be renamed the Public Employment Relations Board as provided in Section 3540. The powers and duties of the board described in Section 3541.3 shall also apply, as appropriate, to this chapter.

(i) "Maintenance of membership" means that all employees who voluntarily are, or who voluntarily become, members of a recognized employee organization shall remain members of that employee organization in good standing for a period as agreed to by the parties pursuant to a memorandum of understanding, commencing with the effective date of the memorandum of under-

standing. A maintenance of membership provision shall not apply to any employee who within 30 days prior to the expiration of the memorandum of understanding withdraws from the employee organization by sending a signed withdrawal letter to the employee organization and a copy to the Controller's office.

(j) "State employer," or "employer," for the purposes of bargaining or meeting and conferring in good faith, means the Governor or his or her designated representatives.

(k) "Fair share fee" means the fee deducted by the state employer from the salary or wages of a state employee in an appropriate unit who does not become a member of and financially support the recognized employee organization. The fair share fee shall be used to defray the costs incurred by the recognized employee organization in fulfilling its duty to represent the employees in their employment relations with the state, and shall not exceed the standard initiation fee, membership dues, and general assessments of the recognized employee organization.

3514. Any person who shall willfully resist, prevent, impede or interfere with any member of the board, or any of its agents, in the performance of duties pursuant to this chapter, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of not more than one thousand dollars ($1,000).

3514.5. The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. Procedures for investigating, hearing, and deciding these cases shall be devised and promulgated by the board and shall include all of the following:

(a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge,

except that the board shall not do either of the following: (1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge; (2) issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. However, when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary. The board shall have discretionary jurisdiction to review such settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the board finds that such settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely filed charge, and hear and decide the case on the merits; otherwise, it shall dismiss the charge. The board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery.

(b) The board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter.

(c) The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

3515. Except as otherwise provided by the Legislature, state employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. State employees also shall have the right to refuse to join or participate in the activities of employee organizations, except that nothing shall preclude the parties from agreeing to a maintenance of membership provision, as defined in subdivision (i) of Section 3513, or a fair share fee provision, as defined in subdivision (k) of Section 3513, pursuant to a memorandum of understanding. In any event, state employees shall have the right to represent themselves individually in their employment relations with the state.

3515.5. Employee organizations shall have the right to represent their members in their employment relations with the state, except that once an employee organization is recognized as the exclusive representative of an appropriate unit, the recognized employee organization is the only organization that may represent that unit in employment relations with the state. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership. Nothing in this section shall prohibit any employee from appearing in his own behalf in his employment relations with the state.

3515.6. All employee organizations shall have the right to have membership dues, initiation fees, membership benefit programs, and general assessments deducted pursuant to subdivision (a) of Section 1152 and Section 1153 until such time as an employee organization is recognized as the exclusive representative for employees in an appropriate unit, and then such deductions as to any employee in the negotiating unit shall not be permissible except to the exclusive representative.

3515.7.

(a) Once an employee organization is recognized as the exclusive representative of an appropriate unit it may enter into an agreement with the state employer providing for organizational security in the form of maintenance of membership or fair share fee deduction.

(b) The state employer shall furnish the recognized employee organization with sufficient employment data to allow the organization to calculate membership fees and the appropriate fair share fees, and shall deduct the amount specified by the recognized employee organization from the salary or wages of every employee for the membership fee or the fair share fee. These fees shall be remitted monthly to the recognized employee organization along with an adequate itemized record of the deductions, including, if required by the recognized employee organization, machine readable data. Fair share fee deductions shall continue until the effective date of a successor agreement or implementation of the state's last, best, and final offer, whichever occurs first. The Controller shall retain, from the fair share fee deduction, an amount equal to the cost of administering this section. The state employer shall not be liable in any action by a state employee seeking recovery of, or damages for, improper use or calculation of fair share fees.

(c) Notwithstanding subdivision (b), any employee who is a member of a religious body whose traditional tenets or teachings include objections to joining or financially supporting employee organizations shall not be required to financially support the recognized employee organization. That employee, in lieu of a membership fee or a fair share fee deduction, shall instruct the employer to deduct and pay sums equal to the fair share fee to a nonreligious, nonlabor organization, charitable fund approved by the California Victim Compensation and

Government Claims Board for receipt of charitable contributions by payroll deductions.

(d) A fair share fee provision in a memorandum of understanding that is in effect may be rescinded by a majority vote of all the employees in the unit covered by the memorandum of understanding, provided that: (1) a request for the vote is supported by a petition containing the signatures of at least 30 percent of the employees in the unit; (2) the vote is by secret ballot; and (3) the vote may be taken at any time during the term of the memorandum of understanding, but in no event shall there be more than one vote taken during the term. If the board determines that the appropriate number of signatures have been collected, it shall conduct the vote in a manner that it shall prescribe. Notwithstanding this subdivision, the state employer and the recognized employee organization may negotiate, and by mutual agreement provide for, an alternative procedure or procedures regarding a vote on a fair share fee provision.

(e) Every recognized employee organization that has agreed to a fair share fee provision shall keep an adequate itemized record of its financial transactions and shall make available annually, to the board and to the employees in the unit, within 90 days after the end of its fiscal year, a detailed written financial report thereof in the form of a balance sheet and an operating statement, certified as to accuracy by its president and treasurer or comparable officers. In the event of failure of compliance with this section, any employee in the unit may petition the board for an order compelling this compliance, or the board may issue a compliance order on its own motion.

(f) If an employee who holds conscientious objections pursuant to subdivision (c) requests individual representation in a grievance, arbitration, or administrative hearing from the recognized employee organization, the rec-

ognized employee organization is authorized to charge the employee for the reasonable cost of the representation.

(g) An employee who pays a fair share fee shall be entitled to fair and impartial representation by the recognized employee organization. A breach of this duty shall be deemed to have occurred if the employee organization's conduct in representation is arbitrary, discriminatory, or in bad faith.

3515.8. Any state employee who pays a fair share fee shall have the right to demand and receive from the recognized employee organization, under procedures established by the recognized employee organization, a return of any part of that fee paid by him or her which represents the employee's additional pro rata share of expenditures by the recognized employee organization that is either in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment, or applied towards the cost of any other benefits available only to members of the recognized employee organization. The pro rata share subject to refund shall not reflect, however, the costs of support of lobbying activities designed to foster policy goals and collective negotiations and contract administration, or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employer. The board may compel the recognized employee organization to return that portion of a fair share fee which the board may determine to be subject to refund under the provisions of this section.

3516. The scope of representation shall be limited to wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or

organization of any service or activity provided by law or executive order.

3516.5. Except in cases of emergency as provided in this section, the employer shall give reasonable written notice to each recognized employee organization affected by any law, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the employer, and shall give such recognized employee organizations the opportunity to meet and confer with the administrative officials or their delegated representatives as may be properly designated by law.

In cases of emergency when the employer determines that a law, rule, resolution, or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the administrative officials or their delegated representatives as may be properly designated by law shall provide such notice and opportunity to meet and confer in good faith at the earliest practical time following the adoption of such law, rule, resolution, or regulation.

3517. The Governor, or his representative as may be properly designated by law, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of recognized employee organizations, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

"Meet and confer in good faith" means that the Governor or such representatives as the Governor may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either

party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the state of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses.

3517.5. If agreement is reached between the Governor and the recognized employee organization, they shall jointly prepare a written memorandum of such understanding which shall be presented, when appropriate, to the Legislature for determination.

3517.6.

(a) (1) In any case where the provisions of Section 70031 of the Education Code, or subdivision (i) of Section 3513, or Section 14876, 18714, 19080.5, 19100, 19143, 19261, 19818.16, 19819.1, 19820, 19822, 19824, 19826, 19827, 19828, 19829, 19830, 19831, 19832, 19833, 19834, 19835, 19836, 19837, 19838, 19839, 19840, 19841, 19842, 19843, 19844, 19845, 19846, 19847, 19848, 19849, 19849.1, 19849.4, 19850.1, 19850.2, 19850.3, 19850.4, 19850.5, 19850.6, 19851, 19853, 19854, 19856, 19856.1, 19858.1, 19858.2, 19859, 19860, 19861, 19862, 19862.1, 19863, 19863.1, 19864, 19866, 19869, 19870, 19871, 19871.1, 19872, 19873, 19874, 19875, 19876, 19877, 19877.1, 19878, 19879, 19880, 19880.1, 19881, 19882, 19883, 19884, 19885, 19887, 19887.1, 19887.2, 19888, 19990, 19991, 19991.1, 19991.2, 19991.3, 19991.4, 19991.5, 19991.6, 19991.7, 19992, 19992.1, 19992.2, 19992.3, 19992.4, 19993, 19994.1, 19994.2, 19994.3, 19994.4, 19995, 19995.1, 19995.2, 19995.3, 19996.1, 19996.2, 19998, 19998.1, 20796, 21600, 21602, 21604, 21605, 22870, 22871, or 22890 are in conflict with the provisions of a memorandum of understanding, the memorandum of understanding shall be controlling without further legislative action.

(2) Notwithstanding paragraph (1), this paragraph shall apply only to state employees in State Bargaining Unit 5. In any case where the provisions of Section 70031 of the Education Code, or subdivision (i) of Section 3513, or Section 14876, 18714, 19080.5, 19100, 19143, 19261, 19576.1, 19818.16, 19819.1, 19820, 19822, 19824, 19826, 19827, 19828, 19829, 19830, 19831, 19832, 19833, 19834, 19835, 19836, 19837, 19838, 19839, 19840, 19841, 19842, 19843, 19844, 19845, 19846, 19847, 19848, 19849, 19849.1, 19849.4, 19850.1, 19850.2, 19850.3, 19850.4, 19850.5, 19850.6, 19851, 19853, 19854, 19856, 19856.1, 19858.1, 19858.2, 19859, 19860, 19861, 19862, 19862.1, 19863, 19863.1, 19864, 19866, 19869, 19870, 19871, 19871.1, 19872, 19873, 19874, 19875, 19876, 19877, 19877.1, 19878, 19879, 19880, 19880.1, 19881, 19882, 19883, 19884, 19885, 19887, 19887.1, 19887.2, 19888, 19990, 19991, 19991.1, 19991.2, 19991.3, 19991.4, 19991.5, 19991.6, 19991.7, 19992, 19992.1, 19992.2, 19992.3, 19992.4, 19993, 19994.1, 19994.2, 19994.3, 19994.4, 19995, 19995.1, 19995.2, 19995.3, 19996.1, 19996.2, 19998, 19998.1, 20796, 21600, 21602, 21604, 21605, 22870, 22871, or 22890 are in conflict with the provisions of a memorandum of understanding, the memorandum of understanding shall be controlling without further legislative action.

(3) Notwithstanding paragraph (1), this paragraph shall apply only to state employees in State Bargaining Unit 8. In any case where the provisions of Section 70031 of the Education Code, or subdivision (i) of Section 3513, or Section 14876, 18714, 19080.5, 19100, 19143, 19261, 19574, 19574.1, 19574.2, 19575, 19576.1, 19578, 19582, 19582.1, 19175.1, 19818.16, 19819.1, 19820, 19822, 19824, 19826, 19827, 19828, 19829, 19830, 19831, 19832, 19833, 19834, 19835, 19836, 19837, 19838, 19839, 19840, 19841, 19842, 19843, 19844, 19845, 19846, 19847, 19848, 19849, 19849.1, 19849.4, 19850.1, 19850.2, 19850.3, 19850.4, 19850.5, 19850.6, 19851, 19853, 19854, 19856, 19856.1, 19858.1,

19858.2, 19859, 19860, 19861, 19862, 19862.1, 19863, 19863.1, 19864, 19866, 19869, 19870, 19871, 19871.1, 19872, 19873, 19874, 19875, 19876, 19877, 19877.1, 19878, 19879, 19880, 19880.1, 19881, 19882, 19883, 19884, 19885, 19887, 19887.1, 19887.2, 19888, 19990, 19991, 19991.1, 19991.2, 19991.3, 19991.4, 19991.5, 19991.6, 19991.7, 19992, 19992.1, 19992.2, 19992.3, 19992.4, 19993, 19994.1, 19994.2, 19994.3, 19994.4, 19995, 19995.1, 19995.2, 19995.3, 19996.1, 19996.2, 19998, 19998.1, 20796, 21600, 21602, 21604, 21605, 22870, 22871, or 22890 are in conflict with the provisions of a memorandum of understanding, the memorandum of understanding shall be controlling without further legislative action.

(4) Notwithstanding paragraph (1), this paragraph shall apply only to state employees in State Bargaining Unit 12 or 13. In any case where the provisions of Section 70031 of the Education Code, or subdivision (i) of Section 3513, or Section 14876, 18670, 18714, 19080.5, 19100, 19143, 19261, 19574, 19574.1, 19574.2, 19575, 19578, 19582, 19583, 19702, 19818.16, 19819.1, 19820, 19822, 19824, 19826, 19827, 19828, 19829, 19830, 19831, 19832, 19833, 19834, 19835, 19836, 19837, 19838, 19839, 19840, 19841, 19842, 19843, 19844, 19845, 19846, 19847, 19848, 19849, 19849.1, 19849.4, 19850.1, 19850.2, 19850.3, 19850.4, 19850.5, 19850.6, 19851, 19853, 19854, 19856, 19856.1, 19858.1, 19858.2, 19859, 19860, 19861, 19862, 19862.1, 19863, 19863.1, 19864, 19866, 19869, 19870, 19871, 19871.1, 19872, 19873, 19874, 19875, 19876, 19877, 19877.1, 19878, 19879, 19880, 19880.1, 19881, 19882, 19883, 19884, 19885, 19887, 19887.1, 19887.2, 19888, 19990, 19991, 19991.1, 19991.2, 19991.3, 19991.4, 19991.5, 19991.6, 19991.7, 19992, 19992.1, 19992.2, 19992.3, 19992.4, 19993, 19994.1, 19994.2, 19994.3, 19994.4, 19995, 19995.1, 19995.2, 19995.3, 19996.1, 19996.2, 19998, 19998.1, 20796, 21600, 21602, 21604, 21605, 22870, 22871, or 22890 are in conflict with the provisions of a memorandum of understanding,

the memorandum of understanding shall be controlling without further legislative action.

(b) In any case where the provisions of Section 19997.2, 19997.3, 19997.8, 19997.9, 19997.10, 19997.11, 19997.12, 19997.13, or 19997.14 are in conflict with the provisions of a memorandum of understanding, the terms of the memorandum of understanding shall be controlling unless the State Personnel Board finds those terms to be inconsistent with merit employment principles as provided for by Article VII of the California Constitution. Where this finding is made, the provisions of the Government Code shall prevail until those affected sections of the memorandum of understanding are renegotiated to resolve the inconsistency. If any provision of the memorandum of understanding requires the expenditure of funds, those provisions of the memorandum of understanding may not become effective unless approved by the Legislature in the annual Budget Act. If any provision of the memorandum of understanding requires legislative action to permit its implementation by amendment of any section not cited above, those provisions of the memorandum of understanding may not become effective unless approved by the Legislature.

3517.61. Notwithstanding Section 3517.6, for state employees in State Bargaining Unit 6, in any case where the provisions of Section 70031 of the Education Code, subdivision (i) of Section 3513, or Section 14876, 18714, 19080.5, 19100, 19143, 19261, 19818.16, 19819.1, 19820, 19822, 19824, 19826, 19827, 19828, 19829, 19830, 19831, 19832, 19833, 19834, 19835, 19836, 19837, 19838, 19839, 19840, 19841, 19842, 19843, 19844, 19845, 19846, 19847, 19848, 19849, 19849.1, 19849.4, 19850.1, 19850.2, 19850.3, 19850.4, 19850.5, 19850.6, 19851, 19853, 19854, 19856, 19856.1, 19858.1, 19858.2, 19859, 19860, 19861, 19862, 19862.1, 19863, 19863.1, 19864, 19866, 19869, 19870, 19871,

19871.1, 19872, 19873, 19874, 19875, 19876, 19877, 19877.1, 19878, 19879, 19880, 19880.1, 19881, 19882, 19883, 19884, 19885, 19887, 19887.1, 19887.2, 19888, 19990, 19991, 19991.1, 19991.2, 19991.3, 19991.4, 19991.5, 19991.6, 19991.7, 19992, 19992.1, 19992.2, 19992.3, 19992.4, 19993, 19994.1, 19994.2, 19994.3, 19994.4 19995, 19995.1, 19995.2, 19995.3, 19996.1, 19996.2, 19998, 19998.1, 20796, 21600, 21602, 21604, 21605, 22870, 22871, or 22890 are in conflict with the provisions of a memorandum of understanding, the memorandum of understanding shall be controlling without further legislative action. In any case where the provisions of Section 19997.2, 19997.3, 19997.8, 19997.9, 19997.10, 19997.11, 19997.12, 19997.13, or 19997.14 are in conflict with the provisions of a memorandum of understanding, the terms of the memorandum of understanding shall be controlling unless the State Personnel Board finds those terms to be inconsistent with merit employment principles as provided for by Article VII of the California Constitution. Where this finding is made, the provisions of the Government Code shall prevail until those affected sections of the memorandum of understanding are renegotiated to resolve the inconsistency. If any provision of the memorandum of understanding requires the expenditure of funds, those provisions of the memorandum of understanding may not become effective unless approved by the Legislature in the annual Budget Act. If any provision of the memorandum of understanding requires legislative action to permit its implementation by amendment of any section not cited above, those provisions of the memorandum of understanding may not become effective unless approved by the Legislature.

3517.63.

(a) Any side letter, appendix, or other addendum to a properly ratified memorandum of understanding that

requires the expenditure of two hundred fifty thousand dollars ($250,000) or more related to salary and benefits and that is not already contained in the original memorandum of understanding or the Budget Act, shall be provided by the Department of Personnel Administration to the Joint Legislative Budget Committee. The Joint Legislative Budget Committee shall determine within 30 days after receiving the side letter, appendix, or other addendum if it presents substantial additions that are not reasonably within the parameters of the original memorandum of understanding and thereby requires legislative action to ratify the side letter, appendix, or other addendum.

(b) A side letter, appendix, or other addendum to a properly ratified memorandum of understanding that does not require the expenditure of funds shall be expressly identified by the Department of Personnel Administration if that side letter, appendix, or other addendum is to be incorporated in a subsequent memorandum of understanding submitted to the Legislature for approval.

3517.7. If the Legislature does not approve or fully fund any provision of the memorandum of understanding which requires the expenditure of funds, either party may reopen negotiations on all or part of the memorandum of understanding.

Nothing herein shall prevent the parties from agreeing and effecting those provisions of the memorandum of understanding which have received legislative approval or those provisions which do not require legislative action.

3517.8.

(a) If a memorandum of understanding has expired, and the Governor and the recognized employee organization have not agreed to a new memorandum of under-

standing and have not reached an impasse in negotiations, subject to subdivision (b), the parties to the agreement shall continue to give effect to the provisions of the expired memorandum of understanding, including, but not limited to, all provisions that supersede existing law, any arbitration provisions, any no strike provisions, any agreements regarding matters covered in the Fair Labor Standards Act of 1938 (29 U.S.C. Sec. 201 et seq.), and any provisions covering fair share fee deduction consistent with Section 3515.7.

(b) If the Governor and the recognized employee organization reach an impasse in negotiations for a new memorandum of understanding, the state employer may implement any or all of its last, best, and final offer. Any proposal in the state employer's last, best, and final offer that, if implemented, would conflict with existing statutes or require the expenditure of funds shall be presented to the Legislature for approval and, if approved, shall be controlling without further legislative action, notwithstanding Sections 3517.5, 3517.6, and 3517.7. Implementation of the last, best, and final offer does not relieve the parties of the obligation to bargain in good faith and reach an agreement on a memorandum of understanding if circumstances change, and does not waive rights that the recognized employee organization has under this chapter.

3518. If after a reasonable period of time, the Governor and the recognized employee organization fail to reach agreement, the Governor and the recognized employee organization may agree upon the appointment of a mediator mutually agreeable to the parties, or either party may request the board to appoint a mediator. When both parties mutually agree upon a mediator, costs of mediation shall be divided one-half to the state and one-half to the recognized employee organization. If the board appoints

the mediator, the costs of mediation shall be paid by the board.

3518.5. A reasonable number of employee representatives of recognized employee organizations shall be granted reasonable time off without loss of compensation or other benefits when formally meeting and conferring with representatives of the state on matters within the scope of representation.

This section shall apply only to state employees, as defined by subdivision (c) of Section 3513, and only for periods when a memorandum of understanding is not in effect.

3518.7. Managerial employees and confidential employees shall be prohibited from holding elective office in an employee organization which also represents "state employees," as defined in subdivision (c) of Section 3513.

3519. It shall be unlawful for the state to do any of the following:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and confer in good faith with a recognized employee organization.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage

employees to join any organization in preference to another.

(e) Refuse to participate in good faith in the mediation procedure set forth in Section 3518.

3519.5. It shall be unlawful for an employee organization to:

(a) Cause or attempt to cause the state to violate Section 3519.

(b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

(c) Refuse or fail to meet and confer in good faith with a state agency employer of any of the employees of which it is the recognized employee organization.

(d) Refuse to participate in good faith in the mediation procedure set forth in Section 3518.

3520.

(a) Judicial review of a unit determination shall only be allowed: (1) when the board, in response to a petition from the state or an employee organization, agrees that the case is one of special importance and joins in the request for such review; or (2) when the issue is raised as a defense to an unfair practice complaint. A board order directing an election shall not be stayed pending judicial review.

Upon receipt of a board order joining in the request for judicial review, a party to the case may petition for a writ of extraordinary relief from the unit determination decision or order.

(b) Any charging party, respondent, or intervenor aggrieved by a final decision or order of the board in an unfair practice case, except a decision of the board not to issue a complaint in such a case, may petition for a writ of extraordinary relief from such decision or order.

(c) Such petition shall be filed in the district court of appeal in the appellate district where the unit determination or unfair practice dispute occurred. The petition shall be filed within 30 days after issuance of the board's final order, order denying reconsideration, or order joining in the request for judicial review, as applicable. Upon the filing of such petition, the court shall cause notice to be served upon the board and thereupon shall have jurisdiction of the proceeding. The board shall file in the court the record of the proceeding, certified by the board, within 10 days after the clerk's notice unless such time is extended by the court for good cause shown. The court shall have jurisdiction to grant to the board such temporary relief or restraining order it deems just and proper and in like manner to make and enter a decree enforcing, modifying, or setting aside the order of the board. The findings of the board with respect to questions of fact, including ultimate facts, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The provisions of Title 1 (commencing with Section 1067) of Part 3 of the Code of Civil Procedure relating to writs shall, except where specifically superseded herein, apply to proceedings pursuant to this section.

(d) If the time to petition for extraordinary relief from a board decision has expired, the board may seek enforcement of any final decision or order in a district court of appeal or a superior court in the district where the unit determination or unfair practice case occurred. If, after hearing, the court determines that the order was

issued pursuant to procedures established by the board and that the person or entity refuses to comply with the order, the court shall enforce such order by writ of mandamus. The court shall not review the merits of the order.

3520.5.

(a) The state shall grant exclusive recognition to employee organizations designated or selected pursuant to rules established by the board for employees of the state or an appropriate unit thereof, subject to the right of an employee to represent himself.

(b) The board shall establish reasonable procedures for petitions and for holding elections and determining appropriate units pursuant to subdivision (a).

(c) The board shall also establish procedures whereby recognition of employee organizations formally recognized as exclusive representatives pursuant to a vote of the employees may be revoked by a majority vote of the employees only after a period of not less than 12 months following the date of such recognition.

3520.7. The state employer shall adopt reasonable rules and regulations for all of the following:

(a) Registering employee organizations, as defined by subdivision (c) of Section 1150, and bona fide associations, as defined by subdivision (d) of Section 1150.

(b) Determining the status of organizations and associations as employee organizations or bona fide associations.

(c) Identifying the officers and representatives who officially represent employee organizations and bona fide associations.

3521.

(a) In determining an appropriate unit, the board shall be governed by the criteria in subdivision (b). However, the board shall not direct an election in a unit unless one or more of the employee organizations involved in the proceeding is seeking or agrees to an election in such a unit.

(b) In determining an appropriate unit, the board shall take into consideration all of the following criteria:

(1) The internal and occupational community of interest among the employees, including, but not limited to, the extent to which they perform functionally related services or work toward established common goals; the history of employee representation in state government and in similar employment; the extent to which the employees have common skills, working conditions, job duties, or similar educational or training requirements; and the extent to which the employees have common supervision.

(2) The effect that the projected unit will have on the meet and confer relationships, emphasizing the availability and authority of employer representatives to deal effectively with employee organizations representing the unit, and taking into account such factors as work location, the numerical size of the unit, the relationship of the unit to organizational patterns of the state government, and the effect on the existing classification structure or existing classification schematic of dividing a single class or single classification schematic among two or more units.

(3) The effect of the proposed unit on efficient operations of the employer and the compatibility of the unit with the responsibility of state government and its employees to serve the public.

(4) The number of employees and classifications in a proposed unit and its effect on the operations of the employer, on the objectives of providing the employees the right to effective representation, and on the meet and confer relationship.

(5) The impact on the meet and confer relationship created by fragmentation of employees or any proliferation of units among the employees of the employer.

(6) Notwithstanding the foregoing provisions of this section, or any other provision of law, an appropriate group of skilled crafts employees shall have the right to be a separate unit of representation based upon occupation. Skilled crafts employees shall include, but not necessarily be limited to, employment categories such as carpenters, plumbers, electricians, painters, and operating engineers.

(c) There shall be a presumption that professional employees and nonprofessional employees should not be included in the same unit. However, the presumption shall be rebuttable, depending upon what the evidence pertinent to the citeria set forth in subdivision (b) establishes.

3521.5. The term "professional employee" means (a) any employee engaged in work (1) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (2) involving the consistent exercise of discretion and judgment in its performance; (3) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (4) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic educa-

tion or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or (b) any employee, who (1) has completed the courses of specialized intellectual instruction and study described in paragraph 4 of subdivision (a), and (2) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in subdivision (a).

3521.7. The board may, in accordance with reasonable standards, designate positions or classes of positions which have duties consisting primarily of the enforcement of state laws. Employees so designated shall not be denied the right to be in a unit composed solely of such employees.

3522.

(a) Physicians in any state bargaining unit may negotiate under this chapter for preauthorized travel outside the state for continuing medical education.

(b) The execution of a memorandum of understanding entered into pursuant to subdivision (a) shall constitute the approvals required under Sections 11032 and 11033, except that if the provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

3523.

(a) All initial meet and confer proposals of recognized employee organizations shall be presented to the employer at a public meeting, and such proposals thereafter shall be a public record.

All initial meet and confer proposals or counterproposals of the employer shall be presented to the recognized employee organization at a public meeting, and such pro-

posals or counterproposals thereafter shall be a public record.

(b) Except in cases of emergency as provided in subdivision (d), no meeting and conferring shall take place on any proposal subject to subdivision (a) until not less than seven consecutive days have elapsed to enable the public to become informed, and to publicly express itself regarding the proposals, as well as regarding other possible subjects of meeting and conferring and thereafter, the employer shall, in open meeting, hear public comment on all matters related to the meet and confer proposals.

(c) Forty-eight hours after any proposal which includes any substantive subject which has not first been presented as proposals for public reaction pursuant to this section is offered during any meeting and conferring session, such proposals and the position, if any, taken thereon by the representatives of the employer, shall be a public record.

(d) Subdivision (b) shall not apply when the employer determines that, due to an act of God, natural disaster, or other emergency or calamity affecting the state, and which is beyond the control of the employer or recognized employee organization, it must meet and confer and take action upon such a proposal immediately and without sufficient time for the public to become informed and to publicly express itself. In such cases the results of such meeting and conferring shall be made public as soon as reasonably possible.

3523.5. The enactment of this chapter shall not be construed as making the provisions of Section 923 of the Labor Code applicable to state employees.

3524. This chapter shall be known and may be cited as the Ralph C. Dills Act.