No. 10-____

IN THE

Supreme Court of the United States

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

Petitioners,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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

Attorneys for Petitioners

March 2011

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

QUESTIONS PRESENTED

1. In *Teachers Local No. 1 v. Hudson*, this Court held that "[b]asic considerations of fairness, as well as concern for the First-Amendment rights at stake, . . . dictate that the potential objectors be given sufficient information to gauge the propriety of the union's [agency] fee" extracted from nonunion public employees. 475 U.S. 292, 306 (1986).

May a State, consistent with the First and Fourteenth Amendments, condition employment on the payment of a special union assessment intended solely for political and ideological expenditures without first providing a *Hudson* notice that includes information about that assessment and provides an opportunity to object to its exaction?

2. In *Lehnert v. Ferris Faculty Ass'n*, this Court held that "the State constitutionally may not compel its employees to subsidize legislative lobbying or other political union activities outside the limited context of contract ratification or implementation." 500 U.S. 507, 522 (1991) (opinion of Blackmun, J.); *accord id.* at 559 (opinion of Scalia, J.) (concurring as to "the challenged lobbying expenses").

May a State, consistent with the First and Fourteenth Amendments, condition continued public employment on the payment of union agency fees for purposes of financing political expenditures for ballot measures?

PARTIES TO THE PROCEEDINGS BELOW

Defendant Service Employees International Union, Local 1000, was identified by its earlier name—California State Employees Association, Local 1000, Service Employees International Union, AFL-CIO, CLC—in the caption of the original Complaint. Record ("R.") 1. Its correct name is stated in the caption herein.

In addition to the parties listed in the caption, the other parties to the proceedings below were:

1. The Controller of the State of California (in his official capacity only). Steve Westly held that office at the outset of this case, and the office is currently held by John Chiang, automatically substituted as a Defendant pursuant to Rule 25(d)(1), FED. R. CIV. P.; and

2. R. Paul Ricker, an individual, who was originally named as a Plaintiff herein, and was dismissed upon stipulation of the parties. R. 43.

CORPORATE LISTING

Because no Petitioner is a corporation, no corporate disclosure statement is required under Supreme Court Rule 29.6.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

CONSTITUTIONS, STATUTES, AND RULES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 10-____

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

Petitioners,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Petitioners Dianne Knox, William L. Blaylock, Robert A. Conover, Edward L. Dobrowolski, Jr., Karyn Gil, Thomas Jacob Hass, Patrick Johnson, and Jon Jumper, for themselves and the classes they represent ("the Nonmembers"),[1] respectfully pray

[1] While the captions on the reported decisions use the phrase "and the class they seek to represent," the district court certified the Nonmembers as representatives of two classes of nonunion employees: those who objected to Local 1000's 2005 *Hudson*

that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on 10 December 2010.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, Appendix ("App.") A, *infra* 1a, is reported at 628 F.3d 1115 (9th Cir. 2010). The decision of the United States District Court for the Eastern District of California, App. B, *infra* 50a, granting in part Plaintiffs' Motions for Summary Judgment and denying Plaintiffs' Motion for Summary Judgment, is not reported but appears at 2008 WL 850128, 183 L.R.R.M. (BNA) 3232 (E.D. CAL. 2008).

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment on 10 December 2010. This petition is timely under Supreme Court Rule 13.1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The notifications required by Rule 29.4(b) have been made.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution. *See* Apps. C & D, *infra* 75a & 76a. This case also involves the provisions of the Ralph C. Dills Act, CAL. GOV'T CODE § 3512 *et seq*., and specifically § 3513(k) and § 3515 thereof. *See* App. E, *infra* 77a.

---

notice ("objectors") and those who did not ("nonobjectors"). R. 81, *reported as Knox v. Westly*, 2006 WL 3147683 (E.D. CAL. 2006). The distinction between the two sub-classes is not material to this Petition.

STATEMENT OF THE CASE

In *Teachers Local No. 1 v. Hudson*, this Court unanimously held that "the constitutional requirements for the Union's collection of agency fees include 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." 475 U.S. 292, 310 (1986).

The first Question Presented addresses whether *Hudson* requires an independent or supplemental notice and opportunity to object when a union—after promulgating its normal annual *Hudson* notice for regular dues—imposes a temporary special assessment designated solely or primarily "for a broad range of political expenses, including television and radio advertising, direct mail, voter registration, voter education, and get out the vote activities." App. B at 53a.

In *Lehnert v. Ferris Faculty Ass'n*, this Court limited union political and lobbying expenditures to those for the "ratification or implementation of a dissenter's collective-bargaining agreement." 500 U.S. 507, 520 (1991) (opinion of Blackmun, J.); *accord id*. at 559 (opinion of Scalia, J.) (concurring as to "the challenged lobbying expenses").

Lehnert thus decided the second Question Presented contrary to the Ninth Circuit's ruling here, *i.e*., whether the First and Fourteenth Amendments are violated when a state and union force nonunion public employees to subsidize a labor union's political activities regarding ballot measures.

I. THE FACTS

The Nonmembers are 28,000 current and former public employees of the State of California who are represented by the named Petitioners. They are not or were not members of the labor organization designated as their monopoly bargaining representative, Respondent Service Employees International Union, Local 1000. The Nonmembers are required by California statute and the monopoly bargaining agreements governing their terms and conditions of employment to pay to Local 1000 a "fair share fee . . . 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." CAL. GOV'T CODE § 3513(k); App. E at 77a.

During June 2005,[2] Local 1000 sent a notice ("the *Hudson* Notice") to the Nonmembers. That notice set the agency fee to be seized from 1 July 2005, through 30 June 2006 ("2005-06 fiscal year"), at 99.1% of full union dues, but informed the Nonmembers that a reduced agency fee of 56.35% of Local 1000's annual dues would be charged to nonmembers who objected within thirty days. However, "[t]his notice did not indicate that a temporary assessment would be included in the 2005-06 dues and fees, but stated instead that '[d]ues are subject to change without further notice to fee payers.'" App. B at 52a-53a.

On or about 30 July, Local 1000's Budget Committee proposed an "Emergency Temporary Assessment to Build a Political Fight-Back Fund." It was intended to be "used for a broad range of political expenses,

---

[2] Unless otherwise noted, all dates referenced are for the year 2005.

including television and radio advertising, direct mail, voter registration, voter education, and get out the vote activities in our work sites and in our communities across California." Record ("R.") 1 at 15; *accord* App. A at 4a; App. B at 53a. Local 1000 specified that "the fund 'will not be used for regular costs of the union—such as office rent, staff salaries or routine equipment replacement.'" App. A at 5a-6a & 27a; 628 F.3d at 1118-19 & 1128. The assessment was approved by Local 1000 on or about 27 August, effective 1 September.[3]

Deduction of the assessment began with the September paychecks issued to State employees. With the money garnered from its assessment, Local 1000 expended funds for political activities in relation to various Propositions placed on the November ballot in California.

Local 1000's 2005 *Hudson* Notice, R. 1, Exhibit C, preceded the proposal to impose the assessment by more than one month, and the vote to impose it by about two months. That *Hudson* notice contained no information that a special assessment solely for political and ideological activities would be imposed during the impending fee year. Local 1000 later reported to the California Secretary of State numerous and substantial political contributions in the months prior to the election for which it imposed its special assessment. R. 99, at 4, lines 14-27.

---

[3] Judge Wallace's dissent pointedly draws attention to the fact that "shortly after the expiration of the period for objection to the June 2005 *Hudson* notice, the Union's legislative bodies began discussing a temporary dues increase." App. A at 27a, 628 F.3d at 1128.

On or about 31 August, well after the *Hudson* notice's deadline for objecting to paying the full agency fee, Local 1000 sent a letter addressed to "Local 1000 Members and Fair Share Fee Payers." App. B at 53a. That letter announced the imposition of the "temporary dues increase . . . 'to defeat Propositions 76 and 75,' other future attacks on the Union pension plan, and other activities," including "'to elect a governor and legislature who support public employees and the services [they] provide.'" App. A at 6a, 28a; 628 F.3d at 1119, 1129. The letter "did not provide an explanation for the basis of the additional fees being imposed, and it did not provide nonmembers with an opportunity to object to the additional fees." *Id*. at 28a; 628 F.3d at 1129 (Wallace, J., dissenting).

Beginning with wages paid in September, the Nonmembers found that the compulsory fees deducted from their wages increased by approximately 25-33%. App. B at 62a n.6 & 63a n.7. Because the assessment was intended for "a broad range of political expenses, including television and radio advertising, direct mail, voter registration, voter education, and get out the vote activities in our work sites and in our communities across California," *id*. at 64a, the Nonmembers found themselves giving Local 1000 a forced loan spent on the ballot propositions and other political and nonbargaining activities to which they objected.

II. THE PROCEEDINGS BELOW

On 1 November 2005, the Nonmembers filed this class-action lawsuit alleging that the imposition of the special assessment triggered a duty under *Hudson* to provide a new notice and opportunity to object. It further alleged that Local 1000 and the State of

California were collecting the assessment—which had been "imposed solely for nonchargeable political and ideological purposes, resulting in a forced loan from them that will be spent on the ballot propositions and other political and nonbargaining activities to which they object"—in the absence of "the constitutional requirements for the . . . collection of agency fees," *Hudson*, 475 U.S at 310. R. 1, at 9, ¶ 34.

The Complaint sought declaratory and injunctive relief and equitable restitution for violations of the Nonmembers' rights under the First and Fourteenth Amendments and 42 U.S.C. § 1983. R. 1, at 12-14. Jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 and 1343. R. 1, at 2-3, ¶ 5.

After discovery, the trial court rendered its judgment on cross-motions for summary judgment. The district court found that the assessment "represents a material change in the amount of funds nonunion employees were required to contribute to Union expenditures," and that "[i]t is hard to imagine any circumstances in which it could be more clear that an Assessment was passed for political and ideological purposes." The district court, therefore, held that Local 1000's "2005 *Hudson* Notice could not possibly have supplied the requisite information with which nonmembers could make an informed choice of whether or not to object to the Assessment," and that "the 2005 *Hudson* Notice was inadequate to provide a basis for the Union's Assessment." App. B at 63a, 64a, 70a.

The trial court reasoned that adoption of Local 1000's argument that its prior *Hudson* notice was adequate to protect the Nonmembers' rights against its post-notice assessment would leave unions "free to . . . trample on the First-Amendment rights of dissenters." *Id*. at 65a. The court rejected as irrele-

vant the union's claim that a portion of the assessment was later used for constitutionally-chargeable purposes:

> Following Defendants' reasoning, there could never exist an assessment for purely political purposes because it is quite likely that some small portion of such a fund would, from a practical perspective, always be chargeable. It would follow that all post-notice, post-objection period assessments would be considered dues and fees increases, covered by an already issued *Hudson* notice. Unions would then be permitted to pass any such future assessments as long as those funds built in the most minute chargeable cushion, a cushion that is, from a practical perspective, almost inevitable.

Id.

The district court entered judgment for Plaintiffs, and ordered relief. R. 140: Judgment; R. 159: Amended Judgment.

Local 1000 timely appealed,[4] R. 155 and 161, and a three-judge panel of the United States Court of Appeals for the Ninth Circuit reversed, App. A at 2a-16a; 628 F.3d at 1117-23 (Thomas, J.). Former Chief Judge Wallace dissented vigorously. *Id.* at 16a-49a; 628 F.3d at 1123-39.

The panel majority characterized Local 1000's temporary special assessment as "a temporary, mid-term fee increase," and found it unnecessary for Local 1000 to provide a notice and opportunity to object to the assessment. The majority held that *Hudson*'s "safe-harbor" provisions—requiring a union to base

[4] California's State Controller did not participate in the appeal.

its fee calculation upon "its expenses during the preceding year," 475 U.S. at 307 n.18—adequately protected the Nonmembers' rights. App. A at 2a, 8a-16a; 628 F.3d at 1117, 1120-23.

The panel majority balanced "the right of a union, as the exclusive collective bargaining representative of its employees, to require nonunion employees to pay a fair share of the union's costs" against "the First Amendment limitation on collection of fees from dissenting employees for the support of ideological causes not germane to the union's duties as collective-bargaining agent." *Id*. at 2a; 628 F.3d at 1117.

The panel majority held that the appropriate standard for adjudicating a union's actions in enforcing a forced-unionism agreement is "the normal *Hudson* balancing and reasonable accommodation test we have used in the past when deciding challenges to *Hudson* notice procedures." *Id*. at 9a; 628 F.3d at 1120 (citations omitted).

The panel majority acknowledged Local 1000's internal representations—adopting the assessment—that its purpose was to be "'used for a broad range of political expenses,'" and that "the fund 'will not be used for regular costs of the union—such as office rent, staff salaries or routine equipment replacement.'" *Id*. at 5a-6a; 628 F.3d at 1118-19. Applying its "balancing test," the majority nonetheless reasoned that Local 1000's *post hoc* determination that a portion of the assessment was utilized for chargeable activities justified Local 1000's application to the fund of its fee calculation for the year prior to that in which the "Political Fight Back Fund" was spent. *Id*. at 8a-15a; 628 F.3d at 1120-22.

Former Chief Judge Wallace dissented, criticizing the majority for a lack of fidelity to "the principles guiding th[is] Court's decision" in *Hudson*, "begin[ning] from an inaccurate account of the interests at stake, and appl[ying] the procedures set forth in *Hudson* without due attention to the distinguishing facts of this case." *Id*. at 16a; 628 F.3d at 1123.

Judge Wallace sharply drew attention to two principles he derived from this Court's relevant decisions: (1) this Court's repeated holding barring unions from "collect[ing] from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent," *id*. at 18a; 628 F.3d at 1124; and (2) the Nonmembers' constitutional right to "'prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative.'" *Id*. at 18a; 628 F.3d at 1124 (citations omitted).

Judge Wallace rejected the majority's conclusion that *Hudson* provided a "balancing and reasonable accommodation test" to adjudicate union compliance with its First-Amendment dues process requirements. *Id*. at 9a; *id*. at 22a. Judge Wallace recognized that:

> there is a wide gap between taking "any and all steps demanded by fee payers"—that is, a least-restrictive means test—and what the majority endorses. While *Hudson* does not require a union to adopt procedures that impose the least intrusive burden on fee payers possible, the majority affords the union undue leniency. The majority ignores *Hudson*'s instruction that, because employees' First Amendment interests are implicated by the collection of an agency fee, "the pro-

> cedure [must] be *carefully tailored* to minimize the infringement."

Id. at 25a; 628 F.3d at 1127-28 (original emphasis; citation omitted), quoting *Hudson*, 475 U.S. at 302-03.

For that reason, he concluded "that the majority's 'reasonable accommodation test' is misguided and is inconsistent with case law that we are required to follow." App. A at 26a; 628 F.3d at 1127-28.

The panel majority also held that "not all political expenses are automatically non-chargeable. Rather, if germane to collective bargaining, they can be chargeable just like any other expense." *Id*. at 6a-7a n.2; 628 F.3d at 1119 n.2. Applying this holding, which conflicts with *Lehnert*'s holding concerning political activities, the panel majority concluded that Local 1000's expenditures to oppose Proposition 76 were chargeable to the Nonmembers because it "would have effectively permitted the Governor to abrogate the Union's collective bargaining agreements under certain circumstances." *Id*. at 6a-7a n.2; 628 F.2d at 1119 n.2.

Judge Wallace dissented from this conclusion, as well. Recognizing that "there are some limited circumstances where a union's political activities can be deemed chargeable," *id*. at 43a n.4; 628 F.3d at 1136 n.4, Judge Wallace hewed to the line this Court drew in *Lehnert*:

> lobbying or other political activities are chargeable when they directly relate to "ratification of negotiated agreements by the proper . . . legislative body" or "to acquiring appropriations for approved collective-bargaining agreements." Where, however . . . the "challenged . . . activities relate . . . to financial support of . . . public employees

> generally, the connection to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees."

Id. at 43a-44a n.4; 628 F.3d at 1135 n.4 (quoting *Lehnert*, 500 U.S. at 520).

The purpose of Proposition 76 "was to limit the annual amount of total state spending." To that end, it "would have given the Governor limited 'authority to reduce appropriations' for future state contracts, collective bargaining agreements, and entitlement programs." *Id*. at 43a; 628 F.3d at 1135 n.4. Consequently, Judge Wallace concluded that "any connection between the Union's challenge [to Proposition 76] was too attenuated to its collective bargaining agreement to be considered a chargeable expense." *Id*.; 628 F.3d at 1135 n.4.

REASONS FOR GRANTING THE WRIT

Since its decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court has regularly granted review to consider various questions related to the enforcement of forced-unionism provisions pursuant to monopoly bargaining statutes in both the private or the public sectors. *See Ellis v. Ry. Clerks*, 466 U.S. 435 (1984); *Teachers Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Communications Workers of Am. v. Beck*, 487 U.S. 735 (1988); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998); *Marquez v. Screen Actors Guild*, 525 U.S. 33 (1998); *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177 (2007); *Locke v. Karass*, 555 U.S. 207 (2009).

Review is appropriate in this case because the Ninth Circuit has demonstrated an utter lack of fidelity to this Court's mandate in *Hudson* "to protect

adequately the First Amendment rights of nonmembers from whom it collected an agency fee," App. A at 32a; 628 F.3d at 1131 (Wallace, J., dissenting), and to this Court's pronouncements regarding the limits applicable to chargeable union political and ideological expenditures in its 1991 *Lehnert* decision. Review is also appropriate because the Ninth Circuit's decision has created serious splits among the circuits and other lower courts on both Questions Presented.

I. THE FIRST QUESTION PRESENTED

A. The Panel's Decision Conflicts with This Court's Decisions as to the Standard of Review for Compelled Speech and with *Hudson* Itself.

The decision below directly conflicts with this Court's holdings in *Hudson* that a "'Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining,'" 475 U.S. at 305 (quoting *Abood*, 431 U.S. at 244 (Stevens, J., concurring)); and that "potential objectors [must] be given sufficient information to gauge the propriety of the union's fee." 475 U.S. at 306.

This Court granted certiorari in *Hudson* "'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 collective-bargaining activities.'" 475 U.S. at 302 (quoting *Abood*, 431 U.S. at 237). The Court held that:

> Procedural safeguards are necessary to achieve this objective for two reasons. First, although the

> government interest in labor peace is strong enough to support an "agency shop" notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that *the procedure be carefully tailored to minimize the infringement*. Second, *the nonunion employee*—the individual whose First Amendment rights are being affected—*must have a fair opportunity to identify the impact of the governmental action on his interests* and to assert a meritorious First Amendment claim.

475 U.S. at 302-03 (footnotes omitted, emphasis added).

The panel majority engaged in a "balancing and reasonable accommodation" of the union's interest in collecting fees against the Nonmembers' interests in not being forced to subsidize the union's political activities. *See* App. A at 8a-9a; 628 F.3d at 1119-20. That type of balancing test was rejected by this Court a short time ago in *Davenport v. Washington Education Ass'n*, 551 U.S. 177 (2007). There the issue was the validity of a state statute establishing a procedural protection for nonmembers forced to pay union fees as a condition of employment, *i.e.*, a requirement that unions get nonmembers' affirmative consent before using their forced fees for political purposes.

This Court reversed the Washington Supreme Court's decision that the statutory affirmative-consent requirement violated the First Amendment, because the state court had mistakenly "believed that our agency-fee cases . . . balanced the constitutional rights of unions and of nonmembers." *Id.* at 184-85. The Court flatly and unanimously rejected that type of balancing, because "[t]hose cases were not balancing constitutional rights in the manner respondent

suggests, for the simple reason that unions have no constitutional entitlement to the fees of nonmember-employees." *Id*.; *see also* App. A at 23a; 628 F.3d at 1126 ("The Union's collection of fees from nonmembers is authorized by an act of legislative grace, not by any inherent 'right' of the Union to the possession of nonmembers' funds") (Wallace, J., dissenting).

Davenport demonstrates that the appropriate analysis for forced-dues cases is the same as in any other government-mandated speech case. In such cases this Court has long applied the most rigorous analysis—"strict scrutiny"—in adjudicating infringements on First-Amendment freedoms.

When forced dues are used for politics or ideological purposes, that is forced political speech. *See Abood*, 431 U.S. at 431-35. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795, 798 (1988). Content-based regulation of speech triggers the highest level of judicial evaluation, "strict scrutiny." *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 827-29 (1995) (content-based discrimination is presumptively unconstitutional). "Under strict scrutiny, the Government must prove that applying [the act] to [the speech in question] furthers a compelling interest and is *narrowly tailored* to achieve that interest." *FEC v. Wis. Right to Life, Inc*., 551 U.S. 449, 464 (2007) (Roberts, C.J.) (emphasis altered).

Narrow tailoring in applying *Hudson*'s First-Amendment due process mandates—not a balancing of union versus employee interests—is precisely what *Hudson* requires: "that [nonmembers'] rights are protected by the First Amendment requires that the procedure be *carefully tailored* to minimize the

infringement." *Hudson*, 475 U.S. at 303 (emphasis added). Any doubt that the Court intended strict scrutiny is dispelled by the footnote to that statement in which the *Hudson* court cited several cases holding that strict scrutiny is required in the First-Amendment context. *Id*. at 303 n.11.

Nevertheless, the panel majority below held that a union's duty under *Hudson* to provide "sufficient information to gauge the propriety of the union's fee," *id*. at 306, did not require Local 1000 to provide a *Hudson* notice when it imposed its special assessment. App. A at 14a-16a; 628 F.3d at 1122-23. In so doing, the panel majority explicitly rejected application of strict scrutiny and ignored *Hudson*'s narrow tailoring requirement. *Id*. at 8a-9a; 628 F.3d at 1119-20.

The panel majority glossed over Local 1000's own, pre-adoption representations about the purely political purposes for which it was imposing the special assessment. *See id*. at 5a-6a; 628 F.3d at 1118-19. It then concluded no *Hudson* notice about the assessment was necessary, because this Court "recognized the impossibility of determining the chargeability of a union's anticipated expenditures at the outset of the fee year, and specifically approved calculating the present year's objector fee based on the prior year's total expenditures." *Id*. at 10a; 628 F.3d at 1120.

The panel majority erroneously assumed that this Court's discussion of a union's treatment of its *normal* annual dues for purposes of calculating an agency fee was *equally* applicable to a temporary assessment to create a special segregated fund specified as entirely or primarily for political purposes. But when a union imposes a special, additional assessment that is, by its own terms, dedicated to nonchargeable purposes, surely a notice about that assessment—giving

nonmembers an opportunity to object—is required to satisfy the union's obligation to provide "sufficient information to gauge the propriety of the union's fee." *Hudson*, 475 U.S. at 306.

The need for such a notice is most acute with regard to those nonmembers who chose not to object based on the regular *Hudson* notice,[5] but might have objected and paid a reduced fee had they known that the union was increasing the fee to engage in political activities. Only an additional notice about the assessment could give them a "a fair opportunity to identify the impact of the governmental action on [their] interests and to assert a meritorious First Amendment claim," as well as prevent the union from "'obtain[ing] an involuntary loan for purposes to which the employee objects.'" *Id*. at 303, 305 (quoting *Ellis*, 466 U.S. at 444).

In these circumstances, it is hardly narrow tailoring to hold that the earlier, regular *Hudson* notice, which contained no information about the assessment, was adequate to enable the Nonmembers to decide whether to object to paying the full agency fee that they would pay during the coming fee year. As Judge Wallace explained, "because the Union refused to give nonmember employees an opportunity to object when information about the temporary assessment was disclosed, these nonmembers were essentially left in the 'dark' about the nature of the agency fee during the time period in which they were required to file objections." App. A at 36a; 628 F.3d at 1132 (quoting *Hudson*, 475 U.S. at 306).

---

[5] This is the subclass of "nonobjectors" that was certified by the district court. R. 81 at 9; *Knox*, 2006 WL 3147683, at *4.

In sum, the Court of Appeals' decision conflicts with this Court's many cases requiring strict scrutiny in the First-Amendment context and with *Hudson*'s mandate that union forced-fee procedures be "carefully tailored" and give nonmembers "a fair opportunity to identify the impact" of the fee demanded on their interests. 475 U.S. at 303.

B. There Is a Serious Split Among the Circuits.

There is a serious split among the circuits on the question of the appropriate standard to be applied when adjudicating a union's compliance with *Hudson*. Although no circuit has expressly applied strict scrutiny, every other circuit squarely to address this issue—the Second, Fourth, Fifth, and Sixth Circuits—has explicitly held that under the First Amendment, forced-fee procedures must be "'narrowly drawn' to comply with the strictures imposed by *Hudson*." *Seidemann v. Bowen*, 499 F.3d 119, 124 (2d Cir. 2007) (quoting *Andrews v. Educ. Ass'n of Cheshire*, 829 F.2d 335, 339-40 (2d Cir. 1987)).[6]

---

[6] Other cases to the same effect include, *e.g., Dashiell v. Montgomery Cty*., 925 F.2d 750, 754 (4th Cir. 1991) ("Because First Amendment freedoms are compromised by a state-authorized union or agency shop, any impingement must be drawn as narrowly as is consistent with the state's interest in permitting an exclusive representative to represent all employees for collective bargaining purposes."); *Shea v. Int'l Ass'n of Machinists & Aerospace Workers*, 154 F.3d 508, 515-17 (5th Cir. 1998) ("'the procedure [must] be *carefully* tailored to *minimize* the infringement'") (quoting *Hudson*, 475 U.S. at 303) (original emphasis); *Tierney v. City of Toledo*, 824 F.2d 1497, 1502 (6th Cir. 1987); *Damiano v. Matish*, 830 F.2d 1363, 1369 (6th Cir. 1987).

The split among the circuits is most clearly highlighted in *Andrews*. There, the Second Circuit held that the district court erred in determining the adequacy of the union's fee procedures "with a balancing test in which the cost to the union and the practicality of the procedures were to be weighed against the dissenters' First Amendment interests." 829 F.2d at 339.

Only the Ninth Circuit applies a "balancing and reasonable accommodation test," App. A at 9a; 628 F.3d at 1120. This test was first applied in *Grunwald v. San Bernardino City Unified School District*, 994 F.2d 1370, 1376 n.7 (9th Cir. 1993). As here, however, the panel in *Grunwald* was sharply divided over the test for determining the adequacy of the union's fee collection procedure. Judge Brunetti not only dissented, but expressly found that the union's procedure in that case was inadequate because "it is not 'carefully tailored to minimize the infringement' on nonmembers' First Amendment rights." *Id*. at 1378, quoting *Hudson*, 475 U.S. at 303.[7]

Because the standard the Ninth Circuit applies conflicts with this Court's decisions in *Hudson* and other First-Amendment cases, and is contrary to the standard applied by other circuits that have addressed the issue, this Court should grant review to settle the split in the circuits.

---

[7] Although Judge Wallace did not adopt a "least-restrictive means" test here, he criticized the majority's balancing and "'reasonable accommodation test'" as "unfaithful to *Hudson*," and "misguided." App. A at 23a-26a; 628 F.3d at 1126-28 (Wallace, J., dissenting).

II. THE SECOND QUESTION PRESENTED

Declaring that "not all political expenses are automatically non-chargeable," the panel majority determined that the Nonmembers could constitutionally be required to subsidize Local 1000's expenditures for a ballot proposition which, it said, "would have effectively permitted the Governor to abrogate the Union's collective bargaining agreements under certain circumstances." App. A at 6a-7a n.2; 628 F.3d at 1119 n.2. This holding is contrary to this Court's limitations on the use of forced union fees, and with the conclusion reached by other circuits as to lobbying and electoral activities.

A. The Panel's Decision Conflicts with Both Tests for Chargeability Enunciated in *Lehnert*.

From its earliest cases, this Court has recognized that a union's "authority to impose dues and fees was restricted at least to the 'extent of denying the unions the right, over the employee's objection, to use his money to support political causes which he opposes.'" *Ellis*, 466 U.S. at 447 (quoting *Machinists v. Street*, 367 U.S. 740, 768 (1961)). Seven years later, in *Lehnert*, "[b]ecause of the importance of the issues," this Court granted certiorari to decide whether objecting nonmembers could constitutionally be compelled to subsidize six types of union activities, including lobbying and electoral politics. 500 U.S. at 514.

In *Lehnert*, the Court held that "chargeable 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." *Id*. at 519 (emphasis added). Applying this test, Justice Blackmun, joined by Chief Justice Rehnquist and Justices White and Stevens, ruled that nonmembers "may not be charged over their objection for lobbying activities that do not concern legislative ratification of, or fiscal appropriations for, their collective-bargaining agreement." *Id*.

One of the specific expenses at issue in *Lehnert* was the costs of a "program designed to secure funds for public education in Michigan," which the petitioner nonmembers argued "went beyond lobbying activity and sought to affect the outcome of ballot issues and 'millages' or local taxes for the support of public schools." *Id*. at 527. Justice Blackmun found it "of little consequence" whether the program just involved lobbying or also involved electoral politics. His opinion held that, because "[n]one of these activities was shown to be oriented toward the ratification or implementation of petitioners' collective-bargaining agreement . . . . none may be supported through the funds of objecting employees." *Id*.

Justice Scalia, joined by Justices O'Connor, Souter, and Kennedy, adopted a slightly different general test for the chargeability of union expenses: "to be constitutional a charge must at *least* be incurred in the performance of the union's statutory duties" as a bargaining agent. *Id*. at 558 (Scalia, J., dissenting in part; original emphasis). In applying this test, Justice Scalia's opinion "agree[d] that the challenged lobbying expenses are nonchargeable," because, "though they may certainly affect the outcome of negotiations, [they] are no part of [the] collective bargaining process." *Id*. at 559 (concurring in relevant part).

Justice Blackmun noted that there is a "'somewhat hazier' line between bargaining-related and purely ideological activities in the public sector." *Id*. at 520 (quoting *Abood*, 431 U.S. at 236). However, his opinion was clear that:

> Where . . . the challenged lobbying activities relate not to the ratification or implementation of a dissenter's collective-bargaining agreement, but to financial support of the employee's profession or of public employees generally, the connection to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees.

500 U.S. at 520.

The Ninth Circuit's decision here is directly contrary to this Court's holding in *Lehnert* that the lobbying and electoral politics at issue there are constitutionally nonchargeable. Proposition 76 did not ratify or implement any collective bargaining agreement, much less those for the Nonmembers' bargaining units.

Even as mis-described by the panel majority, Proposition 76 merely "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." App. A at 6a-7a n.2; 628 F.3d at 1119 n.2. Like the lobbying and ballot-proposition activity "to secure funds for public education" held nonchargeable in *Lehnert*, 500 U.S. at 527 (opinion of Blackmun, J.), though the union's opposition to Proposition 76 might have "affect[ed] the outcome of [future] negotiations," *id.* at 559 (opinion of Scalia, J.), "any connection between the Union's challenge was too attenuated to its collective bargaining agreement

to be considered a chargeable expense," as Judge Wallace concluded. App. A at 43a n.4; 628 F.3d at 1135 n.4.

B. There Is a Serious Split, and Confusion, Among the Circuits.

There is a serious split, and confusion, among the circuits on the chargeability of union political and lobbying activities. The District of Columbia Circuit has held that *Lehnert*'s narrow exception for "ratification or implementation of a dissenter's collective-bargaining agreement," 500 U.S. 520, cannot be extended beyond its precise terms.

However, the Second and Ninth Circuits have concluded that *Lehnert*'s narrow and specific limitation upon the chargeability of union political, lobbying, and ideological activities is open to expansion. Moreover, the Sixth Circuit has confused the issue in a muddled opinion.

In *Miller v. Air Line Pilots Ass'n*, the union argued that the *Lehnert* exception for lobbying for contract ratification and implementation permitted it to charge objecting nonmembers for "its contacts with government agencies and Congress concerning the union's views as to appropriated federal regulation of airline safety," because those "government relations activities are interconnected with those airline safety issues that animate much of its collective bargaining." 108 F.3d 1415, 1422 (D.C. Cir. 1997), *aff'd on other grounds*, 523 U.S. 866 (1998).[8]

---

[8] First-Amendment cases such as *Lehnert* are controlling under the Railway Labor Act, because this Court held in *Railway Employes' Department v. Hanson*, that "agency shop agreements under the RLA carried the imprimatur of federal law." 108 F.3d at 1419, citing *Hanson*, 351 U.S. 225, 232, 238 (1956).

The District of Columbia Circuit, unlike the Ninth Circuit here, rejected extension of *Lehnert*'s "limited exception" even though, as was the case with Proposition 76, "government action . . . may foreclose" collective bargaining. *Id*. at 1423. The court explained that such an "extension of the *Lehnert* exception would swallow the *Lehnert* rule," *id*., for, "if the union's argument were played out, virtually all of its political activities could be connected to collective bargaining." *Id*. at 1422.

In direct contrast, in *Seidemann v. Bowen*, the Second Circuit expanded *Lehnert*'s limited exception. It declined to read *Lehnert* as holding that "a public-sector union may charge dissenters for political activity only in the context of legislative ratification or implementation of a collective bargaining agreement." 584 F.3d 104, 111-12 (2d Cir. 2009). That court, like the Ninth Circuit here, concluded that "the relevant inquiry is whether a union's political activities were . . . 'germane' to collective bargaining." *Id*. at 112.[9]

The Sixth Circuit's view as to the chargeability of lobbying is unclear. In *Reese v. City of Columbus*, the Sixth Circuit concluded that it must apply the position of Justice Blackmun and the three other Justices who joined his opinion. Moreover, the court recognized that those four Justices "'held' that a state could constitutionally charge dissenters for lobbying expenses only in 'the limited context of contract

[9] Under that standard, of course, the "program designed to secure funds for public education in Michigan" held constitutionally nonchargeable by eight Justices in *Lehnert* could be charged to objecting nonmembers. *See* 500 U.S. at 527 (opinion of Blackmun, J.); *accord id.* at 559 (opinion of Scalia, J., concurring in relevant part).

ratification or implementation,'" and that "the first two prongs of the [*Lehnert* Court's three-part] test were met only if the lobbying related to the dissenters' collective bargaining agreement." 71 F. 3d 619, 625 (6th Cir. 1995) (emphasis added) (quoting *Lehnert*, 500 U.S. at 522).

That would suggest that the Sixth Circuit disagrees with the Ninth and Second Circuit's expansive reading of the *Lehnert* lobbying exception. On the other hand, however, the *Reese* court remanded for a determination whether the lobbying expense involved, which was "for the negotiation, ratification, or implementation of a collective bargaining agreement," *id*., "*benefitted* the objector's *unit*." *Id*. at 626 (emphasis added). Whether the lobbying in question "benefitted the objector's unit" is a far more expansive standard than that stated by Justice Blackmun: whether it was "*related to* the dissenters' collective bargaining *agreement*." *Id.* at 625 (emphasis added). In short, the Sixth Circuit's decision is internally inconsistent.

C. The Panel's Decision Conflicts with State Supreme Court Decisions.

The Ninth Circuit's decision in this case conflicts directly with the decisions of the highest courts of not fewer than three states.

There is a direct conflict between the decision of the Ninth Circuit in this case and the Indiana Supreme Court in *Albro v. Indianapolis Education Ass'n*, 585 N.E.2d 666 (IND. CT. APP.), *adopted sub nom. Fort Wayne Education Ass'n v. Aldrich*, 594 N. E. 2d 781 (IND. 1992). In *Albro*, the Indiana Court of Appeals applied *Lehnert* to hold that "any lobbying expenses unrelated to the bargaining unit's collective bargaining agreement are not chargeable expenses."

585 N.E.2d at 672. The court specifically adopted as "persuasive" the *Lehnert* plurality's conclusion "that lobbying expenses unrelated to the unit's collective bargaining agreement do not survive the Court's three-prong chargeability standard." *Id*. Determining that the Court of Appeals was "correct in the *Albro* case," the Indiana Supreme Court affirmed and adopted "by reference that opinion in its entirety." *Aldrich*, 594 N.E.2d at 781.

Similarly, the Ninth Circuit's decision conflicts directly with that of the Wisconsin Supreme Court in *Browne v. Wisconsin Employment Relations Commission*, 169 Wis. 2d 79, 485 N.W.2d 376 (WIS. 1992). The Commission had "held that lobbying 'for collective bargaining legislation or regulations or to effect changes therein' or 'for legislation or regulations affecting wages, hours and working conditions of employes generally,'" was properly chargeable to nonmembers. *Id*. at 107; 485 N.W.2d at 387. Reversing in pertinent part, the Wisconsin Supreme Court reasoned that Justices Blackmun's and Scalia's opinions, taken together, limit chargeable union lobbying activities to only those "related to contract ratification or implementation. *Id*.; 485 N.W. 2d at 387.

Likewise, the Ninth Circuit's decision conflicts directly with that of the Supreme Judicial Court of Massachusetts in *Belheumer v. Massachusetts Labor Relations Commission*. That court reasoned that "the limited context in which political activities are chargeable" is when they are for "'the ratification or implementation of [the petitioners'] collective-bargaining agreement.'" 432 Mass. 458, 471, 735 N.E.2d 860, 871 (MASS. 2000) (quoting *Lehnert*, 500 U.S. at 520 (opinion of Blackmun, J.)). The court held that, therefore, as in *Lehnert*, a teacher union's

"advocating for funding of public education in general," which obviously could benefit the nonmembers' bargaining unit, "is the type of political speech for which the union may not charge." *Id*.; 735 N.E.2d at 871.

CONCLUSION

The Ninth Circuit's decision clearly conflicts with this Court's compelled-speech jurisprudence generally, and with its decision in *Hudson* as to the standard to be applied when considering the obligation to provide notice and disclosure when extracting compelled fees. Moreover, the loose standard the Ninth Circuit uses conflicts with the stricter standard applied by other circuits.

Consequently, the circuit in which an individual is employed now determines whether a nonmember subject to a forced-unionism clause is entitled to notice when a labor union significantly increases the amount of fees extracted in order to engage in political and ideological activities. Moreover, where the question has not yet been determined by a circuit, uncertainty and confusion are likely to continue, as unions in those circuits have now been provided with a virtual roadmap for *Hudson* evasion, of how to "[l]eav[e] the nonunion employees in the dark about the source of the figure for the agency fee," and how to insure that "nonunion employees' contributions might be used for impermissible purposes." *Hudson*, 475 U.S. at 306, 309.

Similarly, the Ninth Circuit's decision clearly conflicts with this Court's decision in *Lehnert*, where an eight-Justice majority plainly limited chargeable union political and lobbying activities to those for ratification or implementation of an objecting non-

members' collective bargaining agreement. Yet the circuits and state highest courts are in conflict and confusion about what this Court actually held concerning compelled financial support of "the discussion of governmental affairs, which is at the core of our First Amendment freedoms." *Lehnert*, 500 U.S. at 522.

Therefore, this Court should exercise its supervisory power to resolve the conflicts and confusion that now exist, and to insure that the lower courts protect adequately the First-Amendment rights of non-members forced to pay union fees to keep their jobs.

For the reasons stated above, certiorari should be granted, and the case set for plenary briefing and argument on both important questions presented.

Respectfully submitted,

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

March 2011

APPENDIX A

[628 F.3d 1115]

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 08 16645.

DIANNE KNOX; WILLIAM L. BLAYLOCK; ROBERT A. CONOVER; EDWARD L. DOBROWOLSKI, JR.; KARYN GIL; THOMAS JACOB HASS; PATRICK JOHNSON; JON JUMPER, On Behalf of Themselves and the Class They Seek to Represent,
Plaintiffs Appellees,
v.
CALIFORNIA STATE EMPLOYEES ASSOCIATION, LOCAL 1000, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO-CLC,
Defendant Appellant,
and
STEVE WESTLY, CONTROLLER, STATE OF CALIFORNIA,
Defendant.

Argued and Submitted Oct. 9, 2009.
Filed Dec. 10, 2010.

Appeal from the United States District Court for the Eastern District of California, Morrison C. England, District Judge, Presiding. D.C. No. 2:05 CV 02198 MCE KJM.

[1117] Before: J. CLIFFORD WALLACE, DAVID R. THOMPSON and SIDNEY R. THOMAS, Circuit Judges.

Opinion by Judge THOMAS;
Dissent by Judge WALLACE.

OPINION

THOMAS, Circuit Judge:

This appeal presents the question of whether a union is required, pursuant to *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), in addition to an annual fee notice to nonmembers, to send a second notice when adopting a temporary, mid-term fee increase. Under the circumstances presented by this case, we conclude that a second notice is not required, and we reverse the judgment of the district court.

I.

A.

Congress has long recognized the "important contribution of the union shop to the system of labor relations." *Locke v. Karass*, 555 U.S. 207, 129 S.Ct. 798, 803, 172 L.Ed.2d 552 (2009) (*quoting Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 222, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977)). The Supreme Court has underscored this Congressional policy by enforcing the right of a union, as the exclusive collective bargaining representative of its employees, to require nonunion employees to pay a fair share of the union's costs. *Ellis v. Bhd. of Ry., Airline and S.S. Clerks, Freight Handlers, Express and Station Employees*, 466 U.S. 435, 448, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984). However, the Supreme Court has also recognized the First Amendment limitation on collection of fees from dissenting employees for the support of ideological causes not germane to the union's duties as collective bargaining agent. *Id.* at 447, 104 S.Ct. 1883.

In *Hudson*, the Supreme Court established certain procedural safeguards to balance these interests by requiring "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision-maker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Id*. at 310, 106 S.Ct. 1066. Notices issued pursuant to this language have become known as "*Hudson* notice[s]." *Wagner v. Prof'l Eng'rs in Cal. Gov't*, 354 F.3d 1036, 1039 (9th Cir. 2004).

After receiving a *Hudson* notice, "the nonunion employee has the burden of raising an objection, but . . . the union retains the burden of proof" as to the appropriate proportion of fair share fees. *Hudson*, 475 U.S. at 306, 106 S.Ct. 1066. It is the policies underlying *Hudson* that inform the determination of whether a *Hudson* notice is adequate: "Basic considerations of fairness, as well as concern for the First Amendment rights at stake, . . . dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee." *Id*.

B

This appeal involves the adequacy of a *Hudson* notice given by SEIU Local 1000 (the "Union"), the exclusive bargaining agent for California state employees. The Union and the State of California have entered into a series of Memoranda of Understanding controlling the terms and conditions of employment for employees, including a provision requiring that all State employees in these bargaining units join the Union as formal Union members, or if opting not to join, pay an "agency" or "fair share" fee to the Union for its representational efforts on their behalf. *Id*. (known as an "agency shop agree-

ment"). The agency fee is calculated as a percentage of the Union dues paid by members of the Union.

[1118] The Union issues a *Hudson* notice to all nonmembers every June. The constitutionally required notice is meant to provide nonmembers with an adequate explanation of the basis of the agency fee. *Hudson*, 475 U.S. at 310, 106 S.Ct. 1066. The notice contains information regarding the Union's expenditures from the most recently audited prior year, broken down by major category of expense and then, within each category, allocated between "chargeable" and "non chargeable" classifications. "Chargeable" expenses are those that are "germane" to the union's representational functions, and can be charged to all nonmembers of the union. *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991 (Blackmun, J., plurality opinion). "Non chargeable" expenses are those unrelated to the union's representational functions, such as partisan political expenditures or purely ideological issues. *Id*. The union may charge nonmembers for non chargeable expenses, but the nonmember has the option to object, and only be charged a reduced agency fee based upon the percent of the union's total expenditures that can be classified as "chargeable." In addition, the nonmember is not charged for certain union sponsored benefits, such as a credit union credit card, that are not available to nonmembers.

The financial information in the notice forms the basis for calculating the fee to be paid by nonmembers during the ensuing fee year. The notice also provides that for thirty days after the notice is issued, nonunion employees can object to the collection of the full agency fee, and elect instead to only pay a reduced rate during the upcoming fee year

based on the percentage ratio of chargeable expenditures to total expenditures. During that thirty day period, nonmembers can challenge the Union's calculation of its chargeable and non-chargeable expenses, to be resolved by an impartial decision maker. *Knox v. Westly*, No. 2:05 CV 02198, 2008 WL 850128, at *2 (E.D.Cal. Mar. 28, 2008).

A given agency fee is in effect from July 1 through June 30 of the following year (the "fee year"), at which point the agency fee set forth in the Union's next *Hudson* notice goes into effect. The 2005 *Hudson* notice set the agency fee to be paid by nonunion employees as 99.1% of the Union dues.[1] The reduced agency fee of 56.35% of Union dues would be charged to nonmembers who objected to paying the full agency fee, and who requested a reduction pursuant to the procedures and deadlines outlined in the notice. The notice explicitly stated dues and fees were subject to change without further notice to fee payers.

During the summer of 2005, the legislative bodies within the Union debated and approved a temporary assessment (also referred to as a dues and fees increase) equal to .0025, or .25% of Union members' gross wages. The increase took effect at the end of September 2005 and terminated at the end of December 2006, and was expected to raise $12 million for the Union.

Specifically, on July 30, 2005 the Union's Budget Committee proposed an emergency temporary assessment to create what was termed in the agenda item introducing it as a "Political Fight Back Fund." This agenda item stated the Fund "will be used for a

---

[1] As noted, the gap between 99.1% and 100% represents the value of member restricted benefits.

broad range of political expenses" in response to several "anti union" propositions on the November 2005 special election ballot in California, and that the fund "will not be used for regular costs of the union-such as office rent, staff salaries or [1119] routine equipment replacement." *Id*. On August 27, 2005 Union delegates voted to implement the temporary dues increase. On August 31, 2005, the Union sent a letter to all members and agency fee payers stating that they were subject to the new increase, and that the fund would be used "to defeat Propositions 76 and 75," other future attacks on the Union pension plan, and other activities.

The Union material indicated that the fund would be used for political activities. Yet, in response to inquiries, the Union specifically stated it intended to split the increase "between political actions and collective bargaining actions." Further, not all of the political activities fell into the "non-chargeable" category. The assessment 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.[2] Pursuant to the increase, the

---

[2] The district court and dissent both conflate political expenses and non chargeable expenses when condemning the assessment as "purely political" and a drastic departure from usual Union spending. Yet, this is not supported by the record. The later audit revealed the assessment included both chargeable and non-chargeable expenses, and the chargeable percentage for the 2006 *Hudson* notice, which included the spending from the assessment, was actually larger than that from the 2005 notice.

> In addition, not all political expenses are automatically non-chargeable. 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;

Controller began collecting additional fees from Plaintiffs at the end of September 2005.

Plaintiffs represent two classes of nonunion employees, those who objected to the Union's 2005 *Hudson* notice ("objectors") and those who did not ("nonobjectors") (collectively "Plaintiffs"). *Knox*, 2008 WL 850128, at *2. Plaintiffs initiated this action in November 2005, alleging the assessment violated their First, Fifth, and Fourteenth Amendment rights under 42 U.S.C. § 1983. Plaintiffs filed for summary judgment, and the Union filed a cross-motion for partial summary judgment. The district court granted Plaintiffs' motion in its entirety, and partially granted and partially denied the Union's motion. This timely appeal followed.

We review *de novo* a district court's grant of summary judgment on the sufficiency of the *Hudson* notice. *Cummings v. Connell*, 316 F.3d 886, 890 (9th Cir.2003). On review, we must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir.2004).

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.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.

II

A.

In reviewing the adequacy of the *Hudson* notice, we employ our usual standard of review, as dictated by *Hudson*. In that case, the Supreme Court articulated the legal standard to be applied in this analysis as a balancing test, stating that "[t]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object [1120] thereto without restricting the Union's ability to require every employee to contribute to the cost of collective bargaining activities." *Hudson*, 475 U.S. at 302, 106 S.Ct. 1066 (quoting *Abood*, 431 U.S. at 237, 97 S.Ct. 1782).

The Plaintiffs argue we should abandon the balancing test established in *Hudson*, in favor of strict scrutiny review. They argue that this case involves compelling their speech on political issues, and that therefore the government mandated speech cases, and their application of strict scrutiny should apply, citing *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988) and *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 827 29, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). We disagree.

First, *Hudson* itself articulated the legal standard to be applied, and we are not free to reject the balancing test mandated by the Supreme Court.

Second, we articulated the test in *Grunwald v. San Bernardino City Unified Sch. Dist*., 994 F.2d 1370 (9th Cir.1993). We noted in that case that in challenges to the First Amendment procedure used by unions, the union need not employ procedures that "would minimize further the burden on agency fee

payers." *Grunwald*, 994 F.2d at 1376 n. 7. "The test, after all, is not whether the union and the [employer] have come up with the system that imposes the least burden on agency fee payers, regardless of cost (a test no system could possibly satisfy); rather we inquire whether the system reasonably accommodates the legitimate interests of the union, the [public employer] and nonmember employees." *Id*.

Therefore, we will apply the normal *Hudson* balancing and reasonable accommodation test we have used in the past when deciding challenges to *Hudson* notice procedures.[3] *See, e.g., Wagner*, 354 F.3d at 1039; *Cummings*, 316 F.3d at 890.

---

[3] The dissent takes issue with the characterization of *Hudson* requirements as a balancing test, focusing instead on language requiring unions to minimize impingement on nonmembers' rights and emphasizing the Union has no "right" to agency fees to be balanced by such a test. The dissent insists a balancing test is inappropriate, yet, there is no other way to faithfully characterize the procedure set out in *Hudson*. *Hudson* acknowledges that competing interests are at play, and describes a particular set of constitutionally acceptable procedures for attempting resolve with conflict with fairness to both sides. That is a balancing test.

> In addition, we have consistently recognized that unions have a legitimate interest and "settled" ability to charge agency fees. *See, e.g., Cummings*, 316 F.3d at 889. We do not intimate this rises to the level of a constitutional "right," but that does not mean the union does not have any rights at all in such a situation. *Hudson*, 475 U.S. at 302, 106 S.Ct. 1066 (affirming union's right to "require nonunion employees, as a condition of employment" to pay fair share fees).

B

Applying the balancing test, we conclude that the Union did not violate the *Hudson* requirements. The Supreme Court in *Hudson* recognized the impossibility of determining the chargeability of a union's anticipated expenditures at the outset of the fee year, and specifically approved calculating the present year's objector fee based on the prior year's total expenditures. The Supreme Court explained, "We continue to recognize that there are practical reasons why absolute precision in the calculation of the charge to nonmembers cannot be expected or required. Thus, for instance, the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year." *Hudson*, 475 U.S. at 307 n. 18, 106 S.Ct. 1066 (internal quotation marks and citations omitted). *Hudson* thus struck a balance between the rights and burdens in this context, acknowledging that a union is [1121] not constitutionally required to take any and all steps demanded by fee payers to insure that its annual fee notice accurately predicts its actual spending in the upcoming year.

Use of the prior year method is a practical necessity because, for large public sector unions, the *Hudson* notice must be based on audited financial statements, with the union's chargeable percentage calculation verified by an independent auditor, and the union must send its fee payers the independent auditor's report with its *Hudson* notice. *Hudson*, 475 U.S. at 307 n. 18, 106 S.Ct. 1066. The audit requirement renders impossible any method of determining the chargeability of the upcoming fee year's expenditures other than basing it on the prior year's actual expenditures, because one cannot audit anticipated future expenditures. Until the money has been spent,

the auditor cannot determine whether the expenditures which the union claims it made for certain expenses were actually made for those expenses. *Prescott v. County of El Dorado*, 177 F.3d 1102, 1107 (9th Cir.1999), *vac'd & remanded on other grounds*, 528 U.S. 1111, 120 S.Ct. 929, 145 L.Ed.2d 807, *reinstated in relevant part*, 204 F.3d 984 (9th Cir.2000).

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

C

The district court faulted the Union for failing to make an accurate prediction in its June 2005 *Hudson* notice of its actual expenditures in the remainder of that fee year due to the subsequent enactment of the temporary increase. Yet, under the normal *Hudson* procedure, any payments over and above the Union's actual chargeable expenditures in the 2005 fee year would be incorporated into the rate for the next fee year. The Supreme Court has determined that this is

sufficiently accurate to comply with the constitutional restrictions. There is no principled distinction to be drawn between the paradigmatic *Hudson* procedure and the one employed here.

Indeed, in the usual *Hudson* notice situation, the actual chargeable percentage of a union's actual spending in any given year, as well as the precise dollar amount of dues and fees, will likely vary from the prior year's figures set forth in the applicable *Hudson* notice. The Plaintiffs allege the Union did not provide a procedure that would avoid the risk that nonmembers' funds from the special assessment would be used, even temporarily, to finance non-chargeable activities, but merely offered dissenters the possibility of a rebate. Therefore, the Plaintiffs reason, the procedure is unconstitutional. This construction takes the central *Hudson* concepts completely out of context and applies them in a way that would not only invalidate the fee increase, but would invalidate the very procedural system decreed by the Supreme Court in *Hudson*. Plaintiffs appear to argue that because the assessment was [1122] to be used for "purely" political reasons, it could not be constitutionally collected from nonmembers in the first place, and that any collection and then later incorporation of the non chargeable amount into a future agency fee objector rate would be tantamount to an impermissible rebate of the earlier fee. Yet, the Union had *already* reduced the fee for objecting nonmembers, and has demonstrated that the assessment was not purely non-chargeable, nor intended to be so. Further, the record belies the assertion that

the charges were used "purely" for non chargeable expenses.[4]

The section of *Hudson* discussing rebates did not condemn the advance reduction procedure the Union used here, but rather a "pure rebate" system where the union collects a fee that is equal or nearly equal to full dues, and then provides a rebate of the non chargeable portion to objectors only at the end of the fee year. *See Hudson*, 475 U.S. at 305, 106 S.Ct. 1066; *see also Ellis*, 466 U.S. at 443 44, 104 S.Ct. 1883. Here the Union charged objectors only 56.35% of the temporary increase, the chargeable percentage set forth in the June 2005 notice, rather than 100% of the increase followed by a later rebate.

Additionally, the district court's direction that a union must issue a second *Hudson* notice when it intends "to depart drastically from its typical spending regime and to focus on activities that [are] political or ideological in nature," *Knox*, 2008 WL 850128 at *8, is practically unworkable. Union spending may vary substantially from year to year-in one year there may be a new collective bargaining agreement negotiated, resulting in a high chargeable percentage for

---

[4] The district court and dissent argue the 2005 *Hudson* notice is inadequate partly because the prior year method does not speak to the "political" nature of the assessment or the propriety of the Union's chargeability determinations. Yet, we have held there is a fundamental difference between "chargeability" challenges and "procedural" *Hudson* notice challenges. *Wagner*, 354 F.3d at 1046 47. Plaintiffs explicitly concede theirs is only a procedural notice challenge, not a challenge to the Union's actual spending of the fees. Since, according to Plaintiffs, chargeability is immaterial to their challenge, their chief argument (and that of the dissent) premised upon the alleged non chargeability of the increase (its *purely* political nature), must fail.

objectors that is followed by an election year that results in a low chargeable percentage for objectors. In fact, for example, the chargeable percentage for 2006, the year incorporating the fee increase spending, was *higher* than that for the 2005 Hudson notice.

Hudson's prior year method assumes and accepts that a union has no "typical spending regime," and that even though spending might vary dramatically, a single annual notice based upon the prior year's audited finances is constitutionally sufficient. Otherwise, a union's *Hudson* notice for an upcoming partisan political election year, following a negotiating year, could not be based upon the union's actual total expenditures in the previous year because the union would intend in the coming fee year to "depart drastically from its previous spending regime and to focus on activities that are political or ideological in nature." Yet, this is the system set out by *Hudson*, and no following case has questioned its continuing vitality. The fact that a projection of expenditures may differ from actual expenditures should surprise no one. The key analytic point for *Hudson* purposes is that proper notice is given and subsequent adjustments made.

The district court's conclusion was also at odds with our precedent. The district court required the Union to come up with a system that imposes the least burden on agency fee payers. However, the legal requirement for unions in this situation is [1123] to establish a system that merely "reasonably accommodates the legitimate interests of the union, the [public employer] and nonmember employees," as is the Union's obligation under *Grunwald*, 994 F.2d at 1376 n. 7; *accord Andrews v. Educ. Ass'n of Cheshire*, 829 F.2d 335, 340 (2d Cir.1987) ("When the union's plan

satisfies the standards established by Hudson, the plan should be upheld even if its opponents can put forth some plausible alternative less restrictive of their right not to be coerced to contribute funds to support political activities that they do not wish to support."). The 2005 notice satisfied the standards established by *Hudson*.

The Supreme Court's decision in *Davenport v. Washington Education Ass'n*, 551 U.S. 177, 127 S.Ct. 2372, 168 L.Ed.2d 71 (2007), does not lead us to a contrary conclusion. In *Davenport*, the Supreme Court held the *Hudson* requirements outline a minimum set of procedures by which a public sector union in an agency shop relationship could meet its constitutional requirements, and that state *legislatures* may place limitations on a union's entitlement to fees above those laid out in *Hudson*. *Davenport* arose in the context of the state of Washington enacting legislation requiring unions to give all nonmembers the objector fee rate unless they affirmatively agreed to be charged for non chargeable activities (in contrast to the California rule where silence equals consent, rather than dissent). *Id*. at 182-83, 127 S.Ct. 2372. *Davenport* held that while the "silence equals consent rule" is constitutional, it is *also* constitutional for a state to make a "silence equals dissent" rule. *Id*. at 190-91, 127 S.Ct. 2372. Under *Davenport*, it is state legislatures, rather than courts, that have the power to implement higher standards. This holding does not alter our conclusion in this case that the 2005 notice was adequate to cover the subsequent dues increase, as *Davenport* does not speak to such a situation.

III

The Union's notice in this case complied with the *Hudson* procedural requirements. Therefore, we reverse the district court, and remand with instructions to deny the Plaintiffs' motion for summary judgment. We also reverse the denial of defendant's motion for partial summary judgment regarding the consent of nonobjectors under California law, and remand with instructions to grant the motion. We reverse the award of nominal damages to Plaintiffs.

REVERSED AND REMANDED.

WALLACE, Circuit Judge, dissenting:

I dissent from the majority's opinion because it is not faithful to the principles guiding the Court's decision in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). The majority begins from an inaccurate account of the interests at stake, and applies the procedures set forth in *Hudson* without due attention to the distinguishing facts of this case. The result is contrary to well-established First Amendment principles.

I.

I begin with the legal authorization for the agency shop system because it provides the framework for my evaluation of the issues in this case, and because I am of the view that the majority's opinion presents an incomplete account of the relevant legal principles.

A.

The National Labor Relations Act allows the states to regulate their labor relationships with public sector employees. *See* 29 U.S.C. § 152(2). Many states, including California, allow public sector unions and government employers to enter into "agency-shop"

arrangements. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 511, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991); [1124] Cal. Gov't Code § 3502.5(a). Defendant SEIU Local 1000 (Union) is the designated bargaining representative for California state employees, pursuant to such an agency shop arrangement. The Union is legally obligated to represent equally all employees in the bargaining unit. *Lucas v. NLRB*, 333 F.3d 927, 931 32 (9th Cir.2003). The Union levies a fee on every employee whom it represents in collective bargaining, even if the employee refuses to join the Union. *See, e.g., Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 760 764, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961). The fees paid by bargaining unit employees who are not members of the Union are commonly known as "agency fees" or "fair share fees." Plaintiffs in this case are eight nonmembers of the Union, representing a class of approximately 28,000 public employees, who are required to pay an agency fee.

Agency-shop arrangements present First Amendment concerns. *See id*. at 749, 81 S.Ct. 1784 (union shop presents First Amendment "questions of the utmost gravity"); *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 236 38, 76 S.Ct. 714, 100 L.Ed. 1112 (1956). These concerns are particularly sharp in the public sector: "agency shop arrangements in the public sector raise First Amendment concerns because they force individuals to contribute money to unions as a condition of government employment." *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 181, 127 S.Ct. 2372, 168 L.Ed.2d 71 (2007). The Court explained in *Davenport* that "[r]egardless of one's views as to the desirability of agency-shop agreements, . . . it is undeniably unusual for a government agency to give a private entity the power, in essence,

to tax government employees." *Id*. at 184, 127 S.Ct. 2372, citing *Abood v. Detroit Bd. of Educ*., 431 U.S. 209, 255, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977).

Despite the infringement of First Amendment rights engendered by the agency shop arrangement, the Supreme Court has deemed such arrangements to be constitutionally permissible in principle. *See Locke v. Karass*, 555 U.S. 207, 129 S.Ct. 798, 801, 172 L.Ed.2d 552 (2009) (holding that "in principle, the government may require this kind of payment [i.e. agency fees] without violating the First Amendment"). The Court has determined that agency shop arrangements are "justified by the government's interest in promoting labor peace and avoiding the 'free rider' problem that would otherwise accompany union recognition." *Lehnert*, 500 U.S. at 520 21, 111 S.Ct. 1950; *see also Abood*, 431 U.S. at 222, 97 S.Ct. 1782.

Importantly, however, a union "[may] not, consistently with the Constitution, collect from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent." *Ellis v. Bhd. of Ry., Airline, & S.S. Clerks*, 466 U.S. 435, 447, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984). Instead, nonmembers may only be compelled to contribute a fair share of costs germane to collective bargaining. *See Bhd. of Ry. & S.S. Clerks v. Allen*, 373 U.S. 113, 118-20, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963). As a corollary, nonmembers have a constitutional right to "prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." *Abood*, 431 U.S. at 234, 97 S.Ct. 1782; *see also*, *e.g*., *Commc'ns Workers v. Beck*, 487 U.S. 735,

762 63, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988); *Price v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers*, 927 F.2d 88, 90-91 (2d Cir.1991). "The amount at stake for each individual dissenter does not diminish this concern. For, whatever the amount, the quality of respondents' interest in not being [1125] compelled [to subsidize the propagation of political or ideological views that they oppose is clear." *Hudson*, 475 U.S. at 305, 106 S.Ct. 1066.

B.

In addition, procedural protections are constitutionally required in connection with a union's assessment and collection of an agency fee. In *Hudson*, the Court considered whether a union's procedure for the collection of agency fees adequately protected the distinction between germane collective bargaining costs and nonchargeable political expenditures. The Court explained that procedural protections were constitutionally required in this context for two reasons:

> First, although the government interest in labor peace is strong enough to support an "agency shop" notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement. Second, the nonunion employee—the individual whose First Amendment rights are being affected—must have a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim.

Hudson, 475 U.S. at 302 03, 106 S.Ct. 1066. The Court held that, "[s]ince the agency shop itself is "a significant impingement on First Amendment rights," . . . the government and union have a responsibility to provide procedures that minimize that impingement and that facilitate a nonunion employee's ability to protect his rights." *Id*. at 307 n. 20, 106 S.Ct. 1066 (emphasis added), *quoting Ellis*, 466 U.S. at 455, 104 S.Ct. 1883.

In *Hudson*, the defendant, a teacher's union, had implemented a fair share fee calculated as the proportion of chargeable expenditures in the preceding fiscal year, that is, those expenses related to collective bargaining and contract administration. The union also established a procedure for the consideration of nonmembers' objections. The union failed, however, to provide nonmembers with any explanation of how the fair share fee was calculated or explanation of the union's procedures. The Court held that the union's procedure was inadequate for three reasons: "because it failed to minimize the risk that nonunion employees' contributions might be used for impermissible purposes, because it failed to provide adequate justification for the advance reduction of dues, and because it failed to offer a reasonably prompt decision by an impartial decisionmaker." *Id*. at 309, 106 S.Ct. 1066.

First, the procedure at issue in *Hudson* was constitutionally deficient because it merely offered dissenters the possibility of a rebate; it failed to minimize the possibility that dissenters' funds would be used for an improper purpose in the first place. The Court stressed that the union should not be permitted to exact an agency fee from dissenters "without first establishing a procedure which will avoid the risk

that their funds will be used, *even temporarily*, to finance ideological activities unrelated to collective bargaining." *Id*. at 305, 106 S.Ct. 1066 (emphasis added; internal quotation marks omitted), *citing Abood*, 431 U.S. at 244, 97 S.Ct. 1782 (concurring opinion).

Second, the union's procedures were held constitutionally deficient because employees had not been provided with sufficient information about the basis of the proportionate share: "[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake, also dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee." *Id*. at 306, 106 S.Ct. 1066. In *Abood*, the Court had stated [1126] that it was a union's duty to provide "the facts and records from which the proportion of political to total union expenditures can reasonably be calculated." 431 U.S. at 239-40, n. 40, 97 S.Ct. 1782, *quoting Allen*, 373 U.S. at 122, 83 S.Ct. 1158. The Court went further in *Hudson*, holding that the union was required to provide this information without awaiting an objection. *Hudson*, 475 U.S. at 306, 106 S.Ct. 1066.

Third, *Hudson* held that there must be a dispute resolution procedure. The Court stated that a union must provide both "a reasonably prompt *opportunity* to challenge the amount of the fee" as well as "a reasonably prompt decision by an *impartial decisionmaker*." *Id*. at 307, 310, 106 S.Ct. 1066 (emphasis added). The procedure at issue in *Hudson* was inadequate because it was controlled by the union and did not provide for an impartial decisionmaker. *Id*. at 308, 106 S.Ct. 1066 (describing the "'most conspicuous feature of the procedure is that from start to finish it is entirely controlled by the union'"). The

Court further held that a union must provide an "escrow for the amounts reasonably in dispute while such challenges are pending." *Id*. at 310, 106 S.Ct. 1066.

Drawing on these considerations, *Hudson* outlined three requirements for a union's collection of an agency fee: (1) "an adequate explanation of the basis for the fee," (2) a "reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker," and (3) "an escrow for the amounts reasonably in dispute while such challenges are pending." *Id*. at 310, 106 S.Ct. 1066.

C.

Surprisingly, in the case before us the majority characterizes the *Hudson* "test" as a "balancing test" or "reasonable accommodation test." The majority chooses, moreover, to highlight the Union's interests, stating that Congress has recognized the "important contribution of the union shop to the system of labor relations," and that "[t]he Supreme Court has underscored this Congressional policy by enforcing the *right* of a union, as the exclusive collective bargaining representative of its employees, to require nonunion employees to pay a fair share of the union's costs."

The majority puts its finger on the wrong side of the scale. A union has no "right" to the collection of agency fees, and *Hudson* does not call for merely a "reasonable accommodation" of employees' constitutional rights. From the framework described above, I view the Union's procedures much differently than the majority. I fear that the majority's account of the interests at stake, compounded by its view of the operative legal test, invites confusion. Indeed, it

tampers with vitally important First Amendment principles.

1.

I cannot begin from the proposition that we are required to balance the "rights" of the Union against the rights of the employees it represents. While the majority insists that the only way "to faithfully characterize the procedures set out in *Hudson*" is to "balance" the Union's "right" to collect agency fees against the first amendment rights of non union employees [Maj. Op. __ n.3], it is the majority that is unfaithful to Hudson and her progeny. The Union's collection of fees from nonmembers is authorized by an act of legislative grace, not by any inherent "right" of the Union to the possession of nonmembers' funds. *See Davenport*, 551 U.S. at 185, 127 S.Ct. 2372. This should be clear to all. In *Davenport*, the Court explained that its agency fee cases "were not balancing constitutional rights in the manner [the union] suggests, for the simple reason that unions have no constitutional entitlement to the fees of nonmember employees." *Id*. Along similar lines, [1127] the Second Circuit has held that it is error to approach the agency fee issue "with a balancing test in which the cost to the union and the practicality of the procedures were to be weighed against the dissenters' First Amendment interests." *Andrews v. Educ. Ass'n of Cheshire*, 829 F.2d 335, 339 40 (2d Cir.1987).

Davenport considered a Washington state law prohibiting labor unions from using the agency-shop fees of nonmembers for election-related purposes unless the nonmember affirmatively consented. 551 U.S. at 185, 127 S.Ct. 2372. The Court considered whether this restriction on a union's spending of agency fees, as applied to public sector labor unions,

violated the First Amendment. The Court emphatically determined that the restriction did not: "[t]he notion that this modest limitation upon an extraordinary benefit violates the First Amendment is, to say the least, counterintuitive." *Id*. at 184, 127 S.Ct. 2372. The union had no right to the funds; instead, "[w]hat matters is that public-sector agency fees are in the union's possession only because Washington and its union-contracting government agencies have compelled their employees to pay those fees." *Id*. at 187, 127 S.Ct. 2372.

Viewed properly, the collection of agency fees is authorized by legislative policy considerations pertaining to labor relations. *Locke*, 129 S.Ct. at 803; *Abood*, 431 U.S. at 222, 97 S.Ct. 1782. There are several justifications for an agency shop, but only one is implicated in this case: to prevent free riding by nonmembers who benefit from the union's collective bargaining activities. *See Davenport*, 551 U.S. at 181, 127 S.Ct. 2372 (describing the "primary purpose" of agency shop arrangements as prevention of free riding by nonmembers); *see also Abood*, 431 U.S. at 222, 97 S.Ct. 1782; *Ellis*, 466 U.S. at 447-48, 104 S.Ct. 1883. Political and ideological expenditures fall outside "the reasons advanced by the unions and accepted by Congress why authority to make union shop agreements was justified." *Lehnert*, 500 U.S. at 554, 111 S.Ct. 1950, *quoting Street*, 367 U.S. at 768, 81 S.Ct. 1784.

Thus, the majority is mistaken. The Union's interest in this case is not a "right" to nonmembers' funds. The Union's interest lies in receiving a fair contribution to its collective bargaining expenses. The Union has no legitimate interest, however, in collecting

agency fees from nonmembers to fill its political war-chest.

2.

The majority describes *Hudson* as a "reasonable accommodation test." The majority points to the following statement from *Hudson*: "[t]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." 475 U.S. at 302, 106 S.Ct. 1066. The majority also states that a union need not take "any and all steps demanded by fee payers." The majority looks to our decision in *Grunwald v. San Bernardino City Unified School District*, which stated: "[t]he test . . . is not whether the union and the [employer] have come up with the system that imposes the least burden on agency fee payers, regardless of cost." 994 F.2d 1370, 1376 n. 7 (9th Cir.1993).

But there is a wide gap between taking "any and all steps demanded by fee payers"—that is, a least-restrictive means test—and what the majority endorses. While Hudson does not require a union to adopt procedures that impose the least intrusive burden on fee payers possible, the majority affords the union undue leniency. *See, e.g., Andrews*, 829 F.2d at 339-40. The majority ignores *Hudson*'s [1128] instruction that, because employees' First Amendment interests are implicated by the collection of an agency fee, "the procedure [must] be *carefully tailored* to minimize the infringement." *Hudson*, 475 U.S. at 302-03, 106 S.Ct. 1066 (emphasis added). To eliminate any doubt, in the footnote appended to this statement, the Court cites several cases holding that

when First Amendment rights are implicated, the government must avoid burdening those rights. *Id*. at 303, n. 11, 106 S.Ct. 1066, *citing Roberts v. United States Jaycees*, 468 U.S. 609, 637, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984); *Elrod v. Burns*, 427 U.S. 347, 363, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *Kusper v. Pontikes*, 414 U.S. 51, 58-59, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973); *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

Hudson emphasized, moreover, that "procedural safeguards often have a special bite in the First Amendment context." 475 U.S. at 302 n. 12, 106 S.Ct. 1066 (internal quotation marks and alteration omitted). In the agency fee context, *Hudson* described the goal of procedural protections as to "minimize the risk that nonunion employees' contributions might be used for impermissible purposes" *even temporarily*, *id*. at 305, 309, 106 S.Ct. 1066, and to "facilitate a nonunion employee's ability to protect his rights," *id*. at 307 n. 20, 106 S.Ct. 1066. I therefore conclude that the majority's "reasonable accommodation test" is misguided and is inconsistent with case law that we are required to follow.

II.

The Union's procedures in this case should be evaluated in light of the principles set forth in *Hudson* and the legitimate interests at stake. As the majority has already set forth the facts of this case in some detail, I recite them only where particularly relevant to my views or where additional detail is warranted. I also seek to draw more attention to the well reasoned decision of the district court.

A.

Pursuant to *Hudson*, the Union issues a notice to agency fee payers every June. At issue in this case is the Union's June 2005 *Hudson* notice. That notice set the agency fee to be extracted from nonmember's paychecks at 99.1% of full union membership dues. Nonmembers who objected to paying for nonchargeable expenses would pay a reduced agency fee, set at 56.35% of full union membership dues. The agency fees described in the notice were in effect until the following July, when a new *Hudson* notice was to become effective. The June 2005 *Hudson* notice also provided an objection period of thirty days, during which nonmember fee payers could object to the collection of the full agency fee and elect to pay the reduced agency fee. Some of the plaintiffs in this action objected to the June 2005 *Hudson* notice, while others did not.

In the Summer of 2005, shortly after the expiration of the period for objection to the June 2005 *Hudson* notice, the Union's legislative bodies began discussing a temporary dues increase. The proposal was described as an "Emergency Temporary Assessment to Build a Political Fight-Back Fund." The agenda for a July 30, 2005 Council Meeting described the purpose of the assessment as follows: "[t]he funds from this emergency temporary assessment will be used specifically in the political arenas of California to defend and advance the interests of members of Local 1000. . . ." The agenda continued to describe:

> These temporary emergency assessments are made necessary by political attacks on state employees and other public workers launched by Governor Schwarzenegger and his allies which threaten the wages, benefits and working [1129]

> conditions of Local 1000 members, and undermine the services they provide to the people of California.

The Union contemplated that the "Political Fight-Back Fund" would not be used for the "regular costs of the union . . . such as office rent, staff salaries or routine equipment replacement." Instead, the Fund would be used "for a broad range of political expenses."

The Union approved the temporary assessment at the end of August 2005. The Union's yearly *Hudson* notice had been issued in June 2005, and that notice did not mention the possibility of the later-enacted temporary assessment. After passage of the temporary assessment, the Union sent a letter to members and nonmembers, dated August 31, 2005, informing them that "Local 1000 delegates voted overwhelmingly for a temporary dues increase to create a Political Fight-Back Fund." The letter stated that the funds collected from the dues increase would be used for several political purposes: (1) to defeat two propositions appearing on the November 2005 ballot (Propositions 75 and 76); (2) to "defeat another attack on [the] pension plan" in June 2006; and (3) "[i]n November 2006 . . . to elect a governor and legislature who support public employees and the services [they] provide." The letter explained that the $45 per month cap on dues would not apply to the temporary assessment. For sake of clarity, I point out that this letter did not constitute "notice" as contemplated in *Hudson*. The letter did not provide an explanation for the basis of the additional fees being imposed, and it did not provide nonmembers with an opportunity to object to the additional fees.

After receiving the Union's letter, some nonmembers attempted to object to the temporary assessment. For example, plaintiff Dobrowolski contacted the Union to lodge his objection to the "Political Fight-Back Fund." He was told, in effect, that there was nothing he could do about it; he was not allowed to object. The Union thereafter sent a letter to nonmembers, like plaintiff Dobrowolski, who attempted to object to the increase in fees. That letter, dated October 27, 2005, stated in part:

> The Union has received your objection to the dues increase. We understand that you are a political objector and a fee payer in the Union and that you have raised an objection to paying this increase because you believe the money will be directed solely to political activities by the Union. We understand your frustration about paying a little more to the Union when you have not seen a new contract with a pay increase. However, we hope that by explaining the Union's position concerning this dues and fees increase, you will better understand our position. . . .
>
> When we have a campaign that is split between political actions and collective bargaining actions the Union is required by law to annually audit the expenditures for those activities; the Union will fully comply with this requirement. However, the Supreme Court has stated that this audit must occur at the end of the fiscal year in which the activities take place, because next year's objecting fee-payer rate must be based on that audit.
>
> This campaign will entail much workplace organizing divided over two fiscal years. At the end of each year, the Union's expenses for these activi-

> ties will be audited, and the amount of expense which is not germane to collective bargaining will be used to set the objecting fee-payer rate for the next year. Presently you are an objecting fee payer who pays the audited rate for this year. Next year, you will be able to exercise your objection again and pay the audited [1130] rate set for that year, based on the Union's expenditures this year. That rate will fully account for any political actions of the nature to which you have objected.

The temporary assessment took effect at the end of September 2005. At that time, the Controller of the State of California, defendant Steve Westly, began deducting the additional fees automatically from all nonmember employees' paychecks. Although the assessment was "temporary," it was certainly not of short duration, lasting from September 2005 until the end of December 2006.

B.

In November 2005, plaintiffs initiated this action in the United States District Court for the Eastern District of California, contending that the temporary assessment violated their First, Fifth and Fourteenth Amendment rights. Plaintiffs alleged, among other things, that the temporary assessment constituted a seizure of their money for nonchargeable political expenses, without constitutionally required procedural safeguards. The district court granted a preliminary injunction to plaintiffs. On cross motions for summary judgment, the district court entered summary judgment in plaintiffs' favor.

There are several important features of the district court's summary judgment. First, the district court addressed the burden imposed by the temporary

special assessment. The Union argued that nonmembers who had objected to the June 2005 *Hudson* notice were assessed only a 14.09% increase in the deduction from the objector's salary. The district court opined that the figure was "somewhat misleading" because it ignored the fee increase imposed on nonunion employees who had not objected to the Union's June 2005 *Hudson* notice. The district court indicated that the Union's quantification of the temporary assessment was misleading in other respects as well, and that the actual increase in fair share fee for nonmembers ranged, on average, from 25% to 33%. The district court deemed this "a material change in the amount of funds nonunion employees were required to contribute to Union expenditures." The district court concluded, "the fair share fees paid by both objectors and nonobjectors actually increased by a much greater margin than Defendants would like to suggest."

Second, the district court discussed the characterization of the temporary special assessment. Plaintiffs asserted that the fund was intended solely for political and ideological purposes. The Union characterized the assessment as "an ordinary dues and fees increase" because, in retrospect, some of the expenses funded through the temporary assessment were eventually deemed chargeable to nonmembers. The district court thought the Union's position "def [ied] logic." The Union had described the proposed assessment as a political fund, and specifically stated that the fund was not to be used for regular costs.

Third, taking all of the above together, the district court concluded that the June 2005 notice did not provide potential objectors with sufficient information to gauge the propriety of the Union's fee, in light

of the temporary special assessment. The June 2005 *Hudson* notice could not provide adequate notice as to the temporary assessment because it relied on categories that were not relevant to the temporary assessment. According to the Union's statements, the temporary special assessment was intended for a specific purpose and would not be used for regular expenses. The district court pointed out that, "after implementing the increase, the Union took the position that nonunion employees [1131] had already been given an opportunity to make an informed decision as to the Assessment by means of the 2005 *Hudson* notice. The Union now turns a blind eye to the inconsistency inherent in asking non-union employees to compare apples, in the form of the prior year's financials, to oranges, in the form of a new Assessment."

Finally, the district court concluded that the appropriate remedy was a second *Hudson* notice, relying on *Wagner v. Professional Engineers in California Government*, 354 F.3d 1036, 1041 (9th Cir. 2004). This remedy had to be made available to nonmembers regardless of whether they had objected to the June 2005 *Hudson* notice, because: "[i]n order for any nonunion employees' failure to object to have any legal significance, the 2005 *Hudson* Notice must have been valid and sufficient to cover the Assessment." The district court held that objectors to the second *Hudson* notice would be entitled to a refund, with interest, of any withheld amounts.

III.

In this case, the Union failed to protect adequately the First Amendment rights of nonmembers from whom it collected an agency fee. In collecting agency fees from nonmembers, the Union is subject to

constraints that are both procedural and substantive in nature. *See Grunwald*, 994 F.2d at 1373. Procedurally, the Union did not provide nonmembers with sufficient information to gauge the propriety of the agency fee. The Union's June 2005 *Hudson* notice was insufficient in light of the temporary assessment. Notably, the Union adopted no other procedures to protect nonmembers' First Amendment rights upon imposition of the temporary assessment. Nonmembers were provided no additional notice, opportunity to object, dispute resolution procedure, and so forth. Compounding these procedural failures, there is a substantive problem. The temporary assessment is suspect, because it was instituted shortly after the June general *Hudson* notice and was explicitly and exclusively intended to fund the Union's political activities. The temporary assessment was a special purpose fund that would not be used for regular Union costs and therefore represented a departure from the Union's typical spending regime.[1] I do not believe the Union sufficiently minimized the risk that nonmembers' funds would be used to subsidize political and ideological activities in light of these circumstances.

---

[1] The majority avers that the special assessment does not represent a substantial departure from the Union's ordinary spending. Subsequent audits, however, revealed that a very substantial portion of the Union's assessment, 72.6% in 2005 and 81.2% in 2006, was used for non chargeable purposes. In contrast, 31.2% of the Union's total expenses was determined to be non-chargeable in 2005, and 39.6% was deemed non-chargeable in 2006. The special assessment, therefore, cannot be described as being consistent with the Union's usual spending—especially when the Union explicitly stated that the assessment was necessary for political purposes.

A.

I first consider the adequacy of the Union's June 2005 *Hudson* notice in light of the temporary assessment. The June 2005 Hudson notice provided, in part:

> Effective July 1, 2005 through June 30, 2006, the fee will be no more than 99.1% of regular membership dues. Regular monthly membership dues are currently 1.0% of monthly gross salary and are presently capped at a maximum of $45 per month. Dues are subject to change without further notice to fee payers.
>
> Effective July 1, 2005 through June 30, 2006 (the "2005 6 Fee Payer Year") [the Union] will charge fee payers who object to expenditures not germane to [1132] collective bargaining a fee of no more than 56.35% of regular membership dues for that salary level.

The notice provided, in addition, for a "Political Action Reduction:" "Fee payers are also entitled to have their fees reduced by the pro rata portion of the fee that goes to the Political Action Fund that [the Union] sets aside for contributions to candidates and initiative campaigns, and other partisan political activities."

To provide a point of comparison, the Union's June 2006 Hudson notice, issued after the temporary assessment had been enacted, provided as follows:

> Effective July 1, 2006 through June 30, 2007, the fee will be no more than 99.1% of regular membership dues. Regular monthly membership dues are currently 1.0% of monthly gross salary and are presently capped at a maximum of $45

> per month. Additionally, a temporary assessment of 1/4 of 1% of monthly gross salary is being collected through December 31, 2006. Dues are subject to change without further notice to fee payers.
>
> Effective July 1, 2006 through June 30, 2007 (the "2006-7 Fee Payer Year") [the Union] will charge fee payers who object to expenditures not germane to collective bargaining a fee of no more than 68.8% of regular membership dues for that salary level.

Regarding the "Political Action Fund," the 2006 *Hudson* notice provided that fee payers were also entitled "to have their fees reduced by the pro rata portion of the fee that goes to the Political Action Fund. . . ."

The Union submits that the Supreme Court has approved the retrospective method by which it calculates the yearly agency fee: a "look-back" procedure, by which the Union sets the agency fee for the upcoming year according to the proportion of chargeable versus nonchargeable expenditures in the prior year. However, the Union's June 2005 *Hudson* notice was not adequate to provide an explanation of the basis for the agency fee extracted from nonmembers' paychecks for the temporary assessment. To reiterate the obvious, the June 2005 *Hudson* notice provided no information regarding the temporary assessment, as it was enacted subsequently, in August 2005. The Union would respond that the notice was adequate to cover such future contingencies. How could that be? The temporary special assessment resulted in approximately a 25% increase in fair share fees—a fairly substantial increase. Because the temporary assessment was exempted from the dues cap, higher

earning employees might experience an effective or actual increase that was even greater. Moreover, while the assessment was "temporary," it was in effect for the bulk of the 2005 fee year, from the end of September 2005 until commencement of the next fee year in July 2006.

The district court further held that the fee increase was material, and I agree. The temporary special assessment might therefore have affected a fee payer's decision to object pursuant to the June 2005 *Hudson* notice. *See, e.g., Dashiell v. Montgomery County*, 925 F.2d 750, 756 (4th Cir.1991) ("The test of adequacy of the initial explanation to be provided by the union is . . . whether the information is sufficient to enable the employee to decide whether to object"). Indeed, because the Union refused to give non-member employees an opportunity to object when information about the temporary assessment was disclosed, these nonmembers were essentially left in the "dark" about the nature of the agency fee during the time period in which they were required to file objections. *See Hudson*, 475 U.S. at 303, 106 S.Ct. 1066 (emphasizing that unions cannot leave "nonunion employees in the dark about the source of the figure for the agency fee"). In other words, even though the special [1133] assessment significantly altered the magnitude and intended use of the agency fee, the Union and the majority believe that non-member employees were required to object before the material information was revealed. Such an approach simply cannot be reconciled with the procedures set forth in *Hudson*. *See id.; cf. Locke v. Karass*, 382 F.Supp.2d 181, 190 (D.Me.2005) (explaining that the use of a previous year's financial audit to set the percentage of chargeable fees would violate *Hudson*, when a union "cherry pick[s]" certain financial data,

and fails to disclose other material information, in an effort to increase fees), *affirmed by* 498 F.3d 49 (2007) *and by* 555 U.S. 207, 129 S.Ct. 798, 172 L.Ed.2d 552 (2009).

The Union would respond, I venture, by asserting that the temporary assessment did not alter the agency fee as a percentage of total union dues. The June 2005 *Hudson* notice disclosed that the agency fee was 99.1% of membership dues, and that the objectors' agency fee was 56.35% of membership dues. The temporary assessment did not affect these percentages. But such an argument rests on the faulty premise that, if nonmembers' fees remain constant as a percentage of members' dues through a given fee year, any absolute increase in fees is protected from scrutiny by the yearly *Hudson* notice, that is, that the proportionate share is what matters, and because this was not altered there can be no constitutional violation.

I am not convinced that the proportionate share is all that matters in evaluating the adequacy of a *Hudson* notice. From the standpoint of a potential objector, the magnitude of the increase in fees imposed by the temporary assessment could very well be material. This increase, as an absolute amount, could affect a nonmember's decision to object or not to object even if the percentage fee remained static. And these nonmembers are the ones whose First Amendment rights are in jeopardy–not the Union's. Moreover, the temporary assessment was exempted from the cap on dues. Thus, even though the fair share fee remained constant as a basic percentage under the temporary assessment, because the assessment was *exempted* from the $45 per month cap on dues, some employees would in fact experience a proportionately

greater share in monthly fee deductions. This is inconsistent with a static-percentage justification for the Union's failure to provide additional notice regarding the temporary assessment.

Furthermore, by exempting the temporary assessment from the cap, the Union acted contrary to the June 2005 *Hudson* notice. The June 2005 *Hudson* notice, stated: "currently 1.0% of monthly gross salary and are presently capped at a maximum of $45 per month." Exceptions from the cap, or the elimination of it, was not contemplated in the June 2005 *Hudson* notice. The Union's June 2005 *Hudson* notice also stated: "[d]ues are subject to change without further notice to fee payers." I cannot put much weight in this sweeping reservation of assumed authority; in any event, the notice did not disclose that the cap could be eliminated. For these additional reasons, I conclude that the temporary assessment might be a material factor in a nonmembers' decision to object.

I conclude that the Union's June 2005 notice did not fulfill its obligations under *Hudson*. The purpose of a *Hudson* notice is to enable informed consent or objection. *See Cummings v. Connell*, 316 F.3d 886, 895 (9th Cir.2003), *cert. denied*, 539 U.S. 927, 123 S.Ct. 2577, 156 L.Ed.2d 604 (2003) (holding that the Hudson notice was designed to provide nonmembers with information necessary to evaluate whether to object to a union's calculation of chargeable expenses); *Hohe v. Casey*, 956 F.2d 399, 410 (3d Cir.1992) ("the issue is whether [1134] the notice provided nonmembers with . . . sufficient information to determine whether they were only being compelled to contribute to chargeable activities"). The Union's June 2005 *Hudson* notice was inadequate to provide

fee payers with a basis on which to adjudge the propriety of the Union's agency fee, and to decide whether or not to object.

Because the Union's June 2005 Hudson notice was inadequate, an employee's failure to object to it does not constitute an effective waiver, an abandonment of a known right. *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 430 (6th Cir.1990). Until *Hudson*'s requirements are satisfied, employees must be afforded subsequent opportunities to object. *See Mitchell v. L.A. Unif. Sch. Dist.*, 963 F.2d 258, 261 63 (9th Cir.1992).

The June 2005 *Hudson* notice was not adequate to provide notice as to the temporary assessment for an additional reason, which warrants separate attention. The temporary assessment was a special purpose fund. The Union envisioned the temporary assessment as a political fundraising vehicle, to build a "Political Fight Back Fund." The Union contemplated that the temporary assessment would provide a distinct source of capital for political activities and that it would not be used for the regular expenses of the union.[2] Recognizing the unique character of the temporary assessment has two implications.

---

[2] The majority acknowledges that the Union's August 2005 letter to members and agency fee payers specifically stated that the fee increase would be used for political activities. In fact, that letter makes no mention whatsoever of any non political reason for the increase. Nevertheless, based on the October 2005 letter, the majority reasons that the Union "intended to split the increase 'between political actions and collective bargaining actions.'" Maj. Op. at ___. The October letter, however, does not state that the fee increase would be split between political and collective bargaining activities. Instead, the letter indicates that the Union would be undertaking a "year long campaign" that

First, the June 2005 *Hudson* notice could not be adequate to enable nonmembers' informed objection to the agency fee. The June 2005 *Hudson* notice contemplated ordinary expenditures; the temporary special assessment stood apart from that. As the district court stated, the union asked nonmembers to compare "apples, in the form of the prior year's financials, to oranges, in the form of a new [a]ssessment, an [a]ssessment which was not to be utilized for Union operations but was instead earmarked for discrete political purposes." Even if agency fees remained constant as a percentage of total member dues, nonmembers might well object to paying increased fees for purely political purposes; for example, they might object in light of the departure from the Union's normal spending regime.

---

would be "split" between both political and non political functions. Nothing in the letter states that the "campaign" would be funded exclusively by the assessment. In fact, the Union's letter then identified a 2004 "Call the Governor" program, which apparently was funded by the Union's general fund from the previous year, as an example of a non political "campaign" activity. Thus, when the August and October letters are read together, it appears the Union intended to use the fee increase to fund political aspects of the campaign, while it intended to fund non political activities with general member and agency fees.

> Similarly, the majority misapprehends the record when it suggests that the fee assessment contained no spending limitations. Maj. Op. at __. When the Union decided to increase fees, its budget committee indicated that the increase would "not be used for regular costs of the [U]nion." The agenda for the counsel meeting, wherein the Union resolved to increase fees, further states that "[t]he funds from this emergency temporary assessment will be used specifically in the political arenas of California." These appear to be spending limitations.

[1135] Second, as a substantive matter, the Court has repeatedly stressed that a union may extract from nonmembers "only those fees and dues necessary to performing the duties of an exclusive representative of the employees in dealing with the employer on labor management issues." *Price*, 927 F.2d at 90 91 (internal quotation marks omitted). In *Lehnert*, the Court outlined a framework for evaluating whether an activity was germane to a union's role as exclusive bargaining agent: "chargeable 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, 111 S.Ct. 1950.

To protect the distinction between chargeable and non-chargeable activities, a union is required to adopt procedures that minimize the risk that nonmembers will be compelled to subsidize political or ideological activities with which they do not agree.[3] In *Hudson*,

---

[3] The majority incorrectly concludes that Plaintiffs' appeal "must fail" because chargeability of the assessment is "immaterial" to their procedural *Hudson* challenge. Maj. Op. at __ n.4. While it is true that the Plaintiffs in this case do not raise a direct challenge to the Union's chargeability determinations, this does not mean that the political nature of the Union's special assessment is irrelevant. Indeed, the *Hudson* procedures were adopted to provide nonunion employees with a fair opportunity to object to a union's use of agency fees for political, ideological, and otherwise non-chargeable activities. *See* 475 U.S. at 306, 106 S.Ct. 1066 ("Basic considerations of fairness, as well as concern for the First Amendment rights at stake, . . . dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee"). Here, the Union's decision to raise fees to fund political activities is relevant in determining whether the Union provided sufficient

the Court explained, "[t]he Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." *Hudson*, 475 U.S. at 305, 106 S.Ct. 1066; *Abood*, 431 U.S. at 244, 97 S.Ct. 1782 (concurring opinion).

The temporary assessment was contemplated as a political fundraising vehicle; it therefore cannot be justified by the interest in preventing nonmembers from free riding on the Union's collective bargaining efforts. The temporary assessment clearly burdened the speech of nonmembers. But the Union undertook no efforts, in connection with the imposition of the temporary assessment, to minimize the impact on nonmembers' First Amendment rights. Taking these considerations together, I conclude that, in connection with the imposition and collection of the temporary assessment, the Union did not fulfill its obligation to be mindful of nonmembers' First Amendment rights.

---

information for nonunion employees to "gauge" whether or not to object.

> The majority's reliance on *Wagner*, 354 F.3d at 1046 47, is mispled. While *Wagner* observed that a procedural *Hudson* challenge raises different questions than a challenge to a union's chargeability determinations, *Wagner* does not stand for the proposition that the potential chargeability of a union's mid-year fee increase cannot be considered in determining whether a union has satisfied the procedural requirements set forth in *Hudson*. *See id*.; *Hudson*, 475 U.S. at 306, 106 S.Ct. 1066.

The Union and the majority seek to evade the fact that the temporary assessment was enacted to fund political activities by arguing that the fund was ultimately used for some expenses that were chargeable to nonmembers.[4] I agree with the district court's

[4] The Union's ideological challenge to Proposition 76 cannot be categorized, as the majority attempts, as an expense chargeable to objecting agency-fee payers. According to the majority, expenses related to the Union's political challenge to this ballot measure might be considered chargeable because Proposition 76 "would have effectively permitted the Governor to abrogate the Union's collective bargaining agreements under certain circumstances." Maj. Op. at ___ n.2. A review of Proposition 76, however, reveals that any connection between the Union's challenge was too attenuated to its collective bargaining agreement to be considered a chargeable expense. The purpose of the ballot measure was to limit the annual amount of total state spending to the prior year's spending plus a reasonable amount of growth. *See* Sec'y of the St. of Cal., Official Voter Information Guide: Special Statewide Election 60 (2005). It also would have set aside budget surpluses for future use. *Id*. To achieve these initiatives, Proposition 76 allowed the governor to reduce spending under certain circumstances. For instance, if passed, the proposition would have given the Governor limited "authority to reduce appropriations" for future state contracts, collective bargaining agreements, and entitlement programs. *Id*. Thus, properly understood Proposition 76 was a ballot measure related to the allocation of tax revenue for funding government activities, which included the amount of financial support available to fund public employment. *See id*.

To be sure, there are some limited circumstances where a union's political activities can be deemed chargeable. According to the Supreme Court, lobbying or other political activities are chargeable when they directly relate to "ratification of negotiated agreements by the proper . . . legislative body" or "to acquiring appropriations for approved collective-bargaining agreements." *Lehnert*, 500 U.S. at 520, 111 S.Ct. 1950. Where, however, as in the instant case, the "challenged . . . activities relate . . . to financial support of . . . public employees generally, the connection to the union's function as bargaining represen-

assessment of the Union's [1136] post hoc rationalization: "[f]ollowing the union's logic it should be required only to show that some small fraction of this fund was used for chargeable purposes in order to justify subverting its *Hudson* responsibilities." The district court further reasoned that, even if the temporary assessment was not intended *solely* for political purposes, it was indeed intended *predominantly* for political purposes. As such, the district court continued, "it is clear that the Union's intent was to depart drastically from its typical spending regime and to focus [the temporary special assessment funds] on activities that were political or ideological in nature."

In sum, the Union's procedures were not adequate under the circumstances. The June 2005 *Hudson* notice was inadequate to provide nonmembers with sufficient information from which to evaluate the propriety of the Union's agency fee. After enacting the temporary special assessment, the Union made no effort whatsoever to minimize the infringement of nonmembers' rights. The Union did not provide notice regarding the temporary assessment; the Union also did not provide nonmembers with an opportunity to object to the temporary assessment.

---

tative is too attenuated to justify compelled support by objecting employees." *Id*. Accordingly, contrary to the majority's contention, the district court and I do not "conflate" political expenses with non chargeable expenses. Maj. Op. at ____ n.2. We simply recognize that the Union's intended uses for the assessment, all of which pertained to core political activities such as the Union's challenge to Proposition 76, cannot be construed as legally chargeable. Additionally, it is peculiar that the majority even makes the assertion that the Union's political expenses would be chargeable if, as the majority avers, "chargeability is immaterial" to the instant case. Maj. Op. at ___ n.4.

The Union did not provide a procedure for resolving disputes and did not place disputed amounts in escrow. Indeed, when nonmembers attempted to object to the temporary assessment, they were refused a forum for their dispute and were never provided with the opportunity to obtain the decision of a neutral hearing officer.

IV.

This brings me to the crux of the Union's argument: that *Hudson* approved [1137] calculating an agency fee as the proportion of chargeable to nonchargeable expenses in the prior fiscal year. The Union asserts that the prior-year method is virtually required here, as it is a large public sector union and must calculate its agency fee on the basis of audited financial reports. Because of the audit requirement, moreover, the Union asserts that it could not prospectively apportion the temporary assessment between chargeable and nonchargeable expenses.

The majority agrees that the Union complied with its obligations. The majority recites that "absolute" precision cannot be expected or required in the calculation of an agency fee, and that the Union cannot be "faulted" for calculating its agency fee on the basis of the prior fiscal year's expenditures. Further, the majority states that the Union could not deviate from the prior-year method of calculating the agency fee with respect to the special assessment. The majority explains that the prior year method makes lag inherent; in any given year, an objector might be "underpaying or overpaying," but "the inevitable effect of the *Hudson* method is that these over-and undercharges even out over time."

This strikes me as a strange argument when dealing with a First Amendment challenge. First, the *Hudson* notice procedure is not per se adequate to protect the rights of nonmembers in all situations. Instead, where, as here, there is a substantial deviation from the normal *Hudson* process, adaptation is required. Second, the prior year calculation method does not establish the adequacy of the June 2005 *Hudson* notice nor does it demonstrate that the Union's procedures were adequate when viewed as a whole.

A.

We should not measure the Union's conduct by the discrete *Hudson* procedures alone. *Hudson* establishes a floor. *See Keller v. State Bar of Cal.*, 496 U.S. 1, 17, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990). In *Davenport*, the Court stressed, "we have described *Hudson* as "outlin[ing] a minimum set of procedures by which a [public sector] union in an agency shop relationship could meet its requirement under *Abood*."" 551 U.S. at 185, 127 S.Ct. 2372.

Here, the temporary assessment was not like the Union's ordinary dues and not like the facts presented in *Hudson*. Several features of the special assessment distinguish this case. The temporary assessment was imposed mid year and not in the normal course of the *Hudson* process. The temporary assessment imposed a material increase in agency fees over those contemplated in the *Hudson* notice, and was exempt from the dues cap (which was inconsistent with the *Hudson* notice). *Hudson* did not consider a fee increase outside of a normal periodic notice process. Likewise, *Hudson* did not contemplate a special-purpose assessment, as here. Even assuming the Union did here what was done in *Hudson*, it

could not be sufficient to satisfy its duties in light of the unique circumstances of this case.

I cannot agree with the proposition that the Union's June 2005 *Hudson* notice satisfied the Union's obligations to nonmembers until issuance of the next yearly *Hudson* notice. The Union's mid-year conduct cannot be insulated from scrutiny. Rather, there must be some limitation on a union's imposition of fee increases between *Hudson* annual notices.

B.

The Union contends that it complied with the procedures set forth in *Hudson*, because the Court approved the calculation of an agency fee based on the proportion of the prior year's chargeable to non-chargeable expenditures. Indeed, in a footnote, the Court stated that a union "cannot be faulted for calculating its fee on [1138] the basis of its expenses during the preceding year." *Hudson*, 475 U.S. at 307 n. 18, 106 S.Ct. 1066. The Union represents, furthermore, that its hands were tied with regard to the temporary assessment, because it is required to base its agency fee calculation on audited financial statements. *See Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807, 812-13 (9th Cir.1997), *cert. denied*, 524 U.S. 904, 118 S.Ct. 2060, 141 L.Ed.2d 138 (1998); *Prescott v. County of El Dorado*, 177 F.3d 1102, 1106-09 (9th Cir.1999), *vacated and remanded on other grounds*, 528 U.S. 1111, 120 S.Ct. 929, 145 L.Ed.2d 807, *reinstated*, 204 F.3d 984 (9th Cir.2000).

The prior year calculation method used here does not satisfy all of the Union's obligations, however. The Union's allocation of expenses as chargeable or nonchargeable presents a distinct issue in the adequacy of its *Hudson* notice. *See*, *e.g.*, *Seidemann v.*

Bowen, 499 F.3d 119, 127 (2d Cir.2007) (there is a "clear distinction between the adequacy of a union's notice . . . and the propriety of a union's chargeability determinations"); *Hudson v. Chicago Teachers Union*, 922 F.2d 1306, 1309, 1314 (7th Cir.1991) (pointing out that a party had confused adequacy of the notice with the accuracy of the fee itself). Thus, even if the Union "cannot be faulted" for relying on prior year expenditures in calculating the agency fee, it is not relieved from its other *Hudson* obligations. The Union must still provide adequate notice to enable an informed decision, an opportunity to lodge objections, a prompt hearing on objections by a neutral decisionmaker, and escrow of any amounts in dispute. Even if we look only to compliance with *Hudson*, therefore, the Union still falls short of the mark.

I recognize that the Union, in relying on prior-year expenditures as the basis for its agency fee, is subject to an audit requirement. In my view, application of the audit requirement relates to the appropriate remedy in this case, a question we do not reach. A district court, with a proper record, could evaluate the audit requirement in light of the temporary assessment. Indeed, the purpose of an audit is to verify that a union actually spent the amount of money it claims; the audit is not intended to verify the union's allocation as a "legal, not an accounting, decision regarding the appropriateness of the allocation of expenses to the chargeable and non chargeable categories." *Andrews*, 829 F.2d at 340; *accord Gwirtz v. Ohio Educ. Ass'n*, 887 F.2d 678, 682 n. 3 (6th Cir.1989); *Ping v. Nat'l Educ. Ass'n*, 870 F.2d 1369, 1374 (7th Cir.1989). In any event, the audit requirement does not relate to the other *Hudson* protections implicated by this case, and is ultimately

of limited help to the Union. Even a temporary violation of the First Amendment is a significant violation.

V.

The majority construes the issue in this appeal as "whether a union is required . . . to send a second notice when adopting a temporary, mid-term fee increase." By framing narrowly the issue in this case, the majority shifts attention to the remedy adopted by the district court. But the district court's remedy is only one consideration in this case—one we do not even reach—and should not be set up as a strawman for attack.

In this case, the Union's provision of an annual *Hudson* notice was insufficient to enable nonmembers to protect their First Amendment rights upon imposition of the temporary assessment. The Union, furthermore, made no effort to minimize the infringement of nonmember's First Amendment rights despite substantially increasing the fees extracted from their paychecks. I believe that the majority's opinion [1139] does not carry out the principles of *Hudson*. I therefore dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
E.D. CALIFORNIA

No. 2:05 cv 02198 MCE KJM.

DIANNE KNOX; WILLIAM L. BLAYLOCK; ROBERT A. CONOVER; EDWARD L. DOBROWOLSKI, JR.; KARYN GIL; THOMAS JACOB HASS; PATRICK JOHNSON; and JON JUMPER, on Behalf of Themselves and the Class They Seek to Represent,
Plaintiffs,

v.

STEVE WESTLY, CONTROLLER, STATE OF CALIFORNIA; AND CALIFORNIA STATE EMPLOYEES ASSOCIATION, LOCAL 1000, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL CIO CLC,
Defendants.

March 28, 2008.

MEMORANDUM AND ORDER

MORRISON C. ENGLAND, JR., *District Judge*.

[1] Through the present action, Plaintiffs, state employees, seek redress against Defendants, Steve Westly, the Controller of the State of California ("Controller"), and California State Employees Association, Local 1000, Service Employees International Union, AFL-CIO, CLC ("the Union"), for violations of their First, Fifth, and Fourteenth Amendment rights

under 42 U.S.C. § 1983 by, *inter alia*, using Plaintiffs' monies to support political causes without satisfying constitutionally required procedural safeguards as compelled by *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986).

Plaintiffs seek Summary Judgment as to the case in its entirety, or, alternatively, Summary Adjudication of individual claims, arguing that Defendants failed to provide any notice to employees regarding the basis for the temporary assessment imposed by the Union from September 2005 through December of 2006. Defendants filed a cross motion seeking Partial Summary Judgment as to the nonobjecting class of Plaintiffs, arguing that those Plaintiffs consented to the use of their wages to fund the Union's temporary assessement when they failed to object after receiving the Union's annual *Hudson* notice. Defendants also ask that this Court grant Summary Adjudication limiting the relevant time period of Plaintiffs' claims to September 2005 through June 2006 (inclusive). For the reasons set forth below, Plaintiffs' Motion is granted, and Defendants' Motion is granted in part and denied in part.[1]

BACKGROUND

Though the following underlying facts material to the disposition of this Motion are undisputed, the Court is aware that the parties' characterizations of those facts diverge greatly.

Plaintiffs represent two classes of nonunion employees, those who objected to the Union's June

[1] Because it is determined that oral argument would not be of material assistance, the Court ordered this matter submitted on the briefing. E.D. Cal. Local Rule 78 230(h).

2005 *Hudson* Notice ("objectors") and those who did not ("nonobjectors") (collectively "Plaintiffs"). *See* Pls.' Statement of Undisputed Material Facts and Defs.' Response Thereto, No. 11 (UF). Defendants are the State Controller and the Union. *Id*., Nos. 8 9.

The State of California has recognized the Union as the exclusive bargaining agent for the Plaintiffs and other State employees in bargaining units designated as Bargaining Units 1, 3, 4, 11, 14, 15, 17, 20, and 21. *Id*., No. 16. The Union and the State of California have entered a series of Memoranda of Understanding ("MOUs") controlling the terms and conditions of employment for Plaintiffs. *Id*. One such MOU includes a provision requiring that all State employees in these Bargaining Units join the Union as formal Union members, or if opting not to join, have deducted from their wages a proportionate amount of agency fees. *Id*., No. 17.

The Union issues a notice pursuant to *Hudson* every June. This constitutionally required "*Hudson* notice" is meant to provide nonmembers with, *inter alia*, an adequate explanation of the basis of the agency fee. *Hudson* at 310.

[2] Additionally the notice provides that, for thirty (30) days after it is issued, nonunion employees can object to the collection of full union dues and can elect instead to have only the reduced rate deducted during the upcoming fee year. Finally, during that 30 day period, nonmembers can also challenge the Union's calculation of its chargeable and nonchargeable expenses. Such challenges are resolved by an impartial decisionmaker. *UF*, No. 18.

In June, 2005, the Union issued its annual *Hudson* notice ("2005 *Hudson* Notice"). This notice did not

indicate that a temporary assessment would be included in the 2005-06 dues and fees, but stated that "[d]ues are subject to change without further notice to fee payers." *Id.*, No. 27.

The 2005 *Hudson* Notice set the agency fee to be deducted from nonunion employee paychecks for the 2005-06 fiscal year at 99.1% of dues. That Notice also informed nonmembers that the reduced agency fee ("fair share fee") of 56.35% of the Union's annual dues, would be charged to nonmembers who objected to paying the full agency fee and who requested a rebate pursuant to the procedures and deadlines outlined in the Notice. The 56.35% was based on the Union's actual expenditures for the year ending December 31, 2004, in which the Union calculated chargeable expenditures to be 56.35% of its total expenditures. *Id*., No. 28.

On July 30, 2005, the Union proposed an "Emergency Temporary Assessment to Build a Political Fight-Back Fund" ("Assessment") for "use for a broad range of political expenses, including television and radio advertising, direct mail, voter registration, voter education, and get out the vote activities in our work sites and in our communities across California," specifically stating that "[t]he Fund will not be used for regular costs of the union-such as office rent, staff salaries or routine equipment replacement, etc." *Id*., No. 20.Additionally, the Union claimed that the Assessment was to "be used specifically in the political arenas of California to defend and advance the interests of members of the Union and the important public services they provide."[2] This Assessment was

[2] The Court notes Defendants' assertion that the Assessment was actually used "for a broad variety of expenditures, many of which were for chargeable activities." As is discussed, *infra*, this

expected to raise $12 million for the Union. *Id*., No. 23. On August 27, 2005, Union delegates to the CSEA General Council voted to implement the temporary dues increase of one-fourth of one percent of salary to create this "Political Fight Back Fund." *Id*., No. 22.

On August 31, 2005, the Union sent another letter, addressed to "Local 1000 Members and Fair Share Fee Payers." The letter stated that Union members were subject to a dues increase and that "[t]he $45 per month cap on . . . regular dues of 1% of gross pay [would] continue in effect, but [would] not apply to this additional .0025 temporary increase." *Id*., No. 29. That letter also claimed that the Union would use the funds from the Assessment to "defeat Proposition 76 and Proposition 75 on November 8." Additionally, according to the Union, it intended to "defeat another attack on [its] pension plan" in June of 2006, and "[i]n November 2006, [it would] need to elect a governor and a legislature who support public employees and the services [they] provide." Compl., Exh. D.

[3] After receiving this letter, Plaintiff Dobrowolski called the Union's Sacramento office, and was directed to its Riverside office where he left a message for Jodi Smith, area manager. Smith returned his call and stated that, even if Dobrowolski objected to the payment of the full agency fee, there was nothing he could do about the September increase for the Assessment. She also stated that "we are in the fight

---

is not material to the disposition of this Motion. Additionally, the Court is cognizant of Defendants' position that none of their publications at the time the Assessment was adopted actually stated that the Assessment would be used "exclusively" for purposes set forth in those quotations or "exclusively" for non-chargeable expenditures. This, too, is immaterial to the Court's disposition of the current Motion.

of our lives," that the Assessment was needed, and that there was nothing that could be done to stop the Union's expenditure of that Assessment for political purposes. UF, No. 34.

Pursuant to the Assessment, the Controller began deducting additional fees at the end of September, 2005. *Id*., No. 31.Plaintiffs subsequently initiated this action in November of that year.

STANDARD

The Federal Rules of Civil Procedure provide for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). One of the principal purposes of Rule 56 is to dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Rule 56 also allows a court to grant summary adjudication on part of a claim or defense. *See* Fed.R.Civ.P. 56(a) ("A party claiming relief may move . . . for summary judgment on all or part of the claim."); *see also Allstate Ins. Co. v. Madan*, 889 F.Supp. 374, 378-79 (C.D.Cal.1995); *France Stone Co., Inc. v. Charter Township of Monroe*, 790 F.Supp. 707, 710 (E.D.Mich.1992).

The standard that applies to a motion for summary adjudication is the same as that which applies to a motion for summary judgment. *See* Fed.R.Civ.P. 56(a), 56(c); *Mora v. ChemTronics*, 16 F.Supp.2d. 1192, 1200 (S.D.Cal.1998).

> Under summary judgment practice, the moving party always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact.

Celotex at 323 (quoting Rule 56(c)).

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 585-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *First Nat'l Bank v. Cities Serv. Co*., 391 U.S. 253, 288 89, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968).

In attempting to establish the existence of this factual dispute, the opposing party must tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. Fed.R.Civ.P. 56(e). The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248, 251 52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986*); Owens v. Local No. 169, Assoc. of Western Pulp and Paper Workers*, 971 F.2d 347, 355 (9th Cir.1987). Stated another way, "before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could

properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." *Anderson*, 477 U.S. at 251 (quoting *Improvement Co. v. Munson*, 14 Wall. 442, 448, 20 L.Ed. 867 (1872)).

[4] As the Supreme Court explained, "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 586-87.

In resolving a summary judgment motion, the evidence of the opposing party is to be believed, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party. *Anderson*, 477 U.S. at 255. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. *Richards v. Nielsen Freight Lines*, 602 F.Supp. 1224, 1244-45 (E.D.Cal.1985), *aff'd*, 810 F.2d 898 (9th Cir.1987).

ANALYSIS

I. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

A. The 2005 *Hudson* Notice Did Not Provide an Adequate Explanation of the Basis of the Assessment

The dispute in this case, while of great import, is over a relatively simple question: Did Defendants' June 2005 *Hudson* Notice provide "an adequate explanation of the basis" supporting the subsequent September 2005 Assessment?

This somewhat narrow issue is drawn against a broader backdrop of First Amendment jurisprudence. There is no question that "[r]equiring nonunion employees to support their collective-bargaining 'representative has an impact upon their First Amendment interests." *Hudson* at 301 (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977)). Nevertheless, it is constitutional for a "public employer to designate a union as the exclusive collective-bargaining representative of its employees, and to require nonunion employees, as a condition of employment, to pay a fair share of the union's costs of negotiating and administering a collective-bargaining agreement . . . . [H]owever, . . . nonunion employees do have a constitutional right to 'prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative.'" *Hudson* at 301 302 (quoting *Abood* at 234). The fees charged to nonunion employees for services related to a union's collective bargaining activities are termed "fair share" fees.

In *Hudson*, the Supreme Court elaborated "that the constitutional requirements for the Union's collection of agency fees include 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* at 310. Notices issued pursuant to this language have come to be known as "*Hudson* Notices." *Wagner v. Prof'l Eng'rs in Cal. Gov't*, 354 F.3d 1036, 1039 (9th Cir.2004).

[5] After receiving a *Hudson* notice, "the nonunion employee has the burden of raising an objection, but . . . the union retains the burden of proof" as to the appropriate proportion of fair share fees. *Hudson* at 306 (citing *Abood* at 239-240 ("Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of [proof]."')). Additionally, the important policies underlying *Hudson* inform the determination of whether a *Hudson* notice is adequate. "Basic considerations of fairness, as well as concern for the First Amendment rights at stake, . . . dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee." *Hudson* at 306. "Leaving the nonunion employees in the dark about the source of the figure for the agency fee-and requiring them to object in order to receive information-does not adequately protect the careful distinctions drawn in [prior case law]." *Hudson* at 306.

Hudson has been interpreted in later cases as setting the minimum constitutional protections that a union must provide nonunion employees. *See Davenport v. Wash. Educ. Ass'n*, —U.S.—, 127 S.Ct. 2372, 2379, 168 L.Ed.2d 71 (2007). Indeed, our Supreme Court has referred to the Hudson requirements as a "constitutional floor." *Id*.

To date, only the Northern District of California has had the opportunity to address the *Hudson* requirements on facts similar to this case. On two separate occasions that court determined that a union's annual *Hudson* notice provided adequate information to supply a basis for a newly imposed, post-objection period, 10% increase in fees and dues.

See Liegmann v. Cal. Teachers Ass'n, 395 F.Supp.2d 922 (N.D.Cal.2005) (addressing the question in the context of an application for a Temporary Restraining Order ("TRO")) (*Liegmann I*);*Liegmann v. Cal. Teachers Ass'n*, 2006 WL 1795123 (N.D.Cal.2006) (addressing the issue in the context of cross-motions for summary judgment) (*Liegmann II*).

In *Liegmann I*, that court was confronted with facts similar to those this Court considers today. That union issued its annual *Hudson* notice and subsequently implemented an approximately 10% increase in dues and fair share fees to be used either wholly or partially for political purposes. *Liegmann I* at 925-927. Under the standard for reviewing TRO applications, that court had to balance the potential hardships to the parties. *Liegmann I* at 925. The court balanced the union's and the nonobjectors' constitutional rights against those of the objectors and determined that the employee plaintiffs had failed to show that the balance tipped in their favor.[3] *Id*. at 926.

When examining the likelihood of success on the merits, the *Liegman I* court stated, "This Court declines to find nonmembers are further entitled to another *Hudson* Notice, in advance, detailing exactly how much of the additional revenue generated by a fee increase will be spent on which purpose. There is nothing in *Hudson* or subsequent authority which requires that Hudson Notices provide such advance detail." *Liegmann I* at 927.That court went on to

---

[3] To the extent the Northern District relied on an apparent need to protect the union's constitutional entitlement to non-union employees' fees, that decision cannot stand. *See Davenport v. Washington Education Association*,—U.S.—, 127 S.Ct. 2372, 2379, 168 L.Ed.2d 71 (2007).

determine that nothing in the facts indicated that the "increase [was] so extraordinary that it require[d] a departure from the procedure approved in *Hudson*." *Id*. at 927.

[6] In *Liegmann II*, the Northern District revisited the same facts in the more developed posture of cross motions for summary judgment. As in this case, that union argued, and that court agreed, that the standard *Hudson* notice provided adequate information regarding the subsequent dues increase. *Liegmann II* at *3. That court further determined that the assessment was not so extraordinary as to warrant a departure from customary *Hudson* procedures. Notably, that court did not have before it a case raising the "question of whether an assessment for purely political purposes would necessitate a deviation from *Hudson* because the facts of [that] case [did] not raise such a question." *Liegmann II* at *5.

This Court, too, need only engage in a straight forward *Hudson* analysis to determine whether, under traditional principles, the Union's 2005 *Hudson* Notice was adequate to provide a basis for its Assessment.[4]

Critical to the current endeavor, and hotly disputed between the parties, is the characterization of the Assessment. As a threshold issue, this Court will address the parties' disagreement regarding the actual magnitude of the Assessment's impact. Plaintiffs state that the Assessment resulted in a 25-35% increase in fees paid by nonmembers. Defendants,

---

[4] Because the Court finds the 2005 *Hudson* Notice legally inadequate under its traditional *Hudson* analysis, it is not necessary to consider whether the current facts, when compared to those in the *Liegmann* cases, present such an extraordinary set of circumstances as to warrant a departure from *Hudson*.

to the contrary, attempt to align their cause with *Liegmann*, where the court addressed a 10% increase in fair share fees, by arguing that current objectors only saw an increase of 14.09%. Defendants reach this conclusion by pointing out that, at least for those who objected to the 2005 *Hudson* Notice, the only portion of the increase they would be required to pay is 56.35% of the 25% increase, which equates to a 14.09% increase in the deduction from the objector's salary.[5] This figure is somewhat misleading, however, because it refers only to the increase in the percentage of salary deducted from objectors' wages and not to the percentage increase in fair share fees paid by nonunion employees.

Plaintiffs' characterization of the percentage increase in fair share fees is more on point. Standard dues paid by those objectors earning $4500 per month would be capped at 1% of salary, or $45, per month. The Assessment was not subject to this cap. Therefore, someone earning $4500 would be assessed an additional .25% of his or her salary, or $11.25. Since this person was an objector, he or she would only be required to pay 56.35% of the above union dues. In this case, that equals an additional $6.34, which is approximately a 14% increase when compared to the $45 monthly dues. However, objectors would not have paid $45 in union dues. They would have paid only their pro rata share, 56.35% of $45, which is approximately $25.34. Therefore, the $6.34 increase actually equates to an increase of approximately 25% in fair share fees.[6]

---

[5] The percentage of salary deducted from nonobjectors increased by 24.775% (99.1% x 25%).

[6] A nonobjector would see the same increase (99.1% x $45.00 = $44.60; 99.1% x $11.25 = $11.15; $11.15/$44.60 = 25%).

Additionally, because the standard dues are capped at 1% of salary, and the Assessment was not subject to this cap, those objectors who earned in excess of $4500 per month, would see this proportion grow as their salaries increased.[7] Therefore, the fair share fees paid by both objectors and nonobjectors actually increased by a much greater margin than Defendants would like to suggest.

[7] This increase represents a material change in the amount of funds nonunion employees were required to contribute to Union expenditures.

More importantly, however, is a determination of the nature of the Assessment. Plaintiffs ask the Court to view the Assessment as a fund intended solely for political and ideological purposes. Defendants disagree and request this Court view it as an ordinary dues and fees increase. This distinction is relevant because there is no case law directly on point dealing with an assessment intended solely to fund political and ideological goals. However, this Court finds that the semantic arguments are not dispositive and engages in the current discussion only to clarify its opinion. Regardless of how the assessment is cast, the Courts' decision is the same.

Based on the Union's own initial characterization of the Assessment, the fund was intended for political

---

[7] As an example, an objector earing earning $6000 per month would pay only his pro rata share of 1% of his monthly salary, capped at $45, again $25.34. However, the cap would not limit the amount allocated to him for the Assessment. Therefore, he would be required to pay his pro rata share of .25% of 1% of his salary, in this case an additional $8.45. This equates to an increase in his fair share fee of approximately 33%. A nonobjector earning the same amount would see the same approximate increase.

purposes. The Court is cognizant of the fact that, in retrospect, the Union may be able to show that the entire fund was not used for nonchargeable, political or ideological purposes. Based on that, Defendants appear to argue that if any of the Assessment's funds were spent on chargeable activities, the Assessment should be treated as an ordinary dues and fees increase. This argument defies logic.

First and foremost, the Union specifically couched its proposed assessment as an "Emergency Temporary Assessment to Build a Political Fight-Back Fund" for "use for a broad range of political expenses, including television and radio advertising, direct mail, voter registration, voter education, and get out the vote activities in our work sites and in our communities across California." Additionally, the Union stated that the fund was not to be used "for regular costs of the union-such as office rent, staff salaries or routine equipment replacement, etc." Rather, it was to "be used specifically in the political arenas of California to defend and advance the interests of members of the Union and the important public services they provide." *See* UF, Nos. 20, 23.

When employees were officially notified of the Assessment, the Union stated that it intended to use the funds to "defeat Proposition 76 and Proposition 75," to "defeat another attack on [its] pension plan" in June of 2006, and to "elect a governor and a legislature who [would] support public employees and the services [they] provide" in November of 2006. *Id*., No. 29; *See* Compl., Exh. D. It is hard to imagine any circumstances in which it could be more clear that an Assessment was passed for political and ideological purposes.

Nevertheless, the Union argues that not all of the funds were used for political purposes, and, even if they were, not all political purposes are nonchargeable. However, the adequacy of *Hudson* notices should not be viewed through a lens skewed by the benefit of hindsight.

The undisputed facts surrounding the implementation of the Assessment evidence that the Union fully intended to use the 12 million additional dollars it anticipated to raise for political purposes. Following the Union's logic, it should be required only to show that some small fraction of this fund was used for chargeable purposes in order to justify subverting its *Hudson* responsibilities.

[8] Defendants call for the Court to be practical. However, they cannot simultaneously avoid that call for practicality themselves. The Union controls the categorization of its own expenses. Following Defendants' reasoning, there could never exist an assessment for purely political purposes because it is quite likely that some small portion of such a fund would, from a practical perspective, always be chargeable. It would follow that all post-notice, post-objection period assessments would be considered dues and fees increases, covered by an already issued *Hudson* notice. Unions would then be permitted to pass any such future assessments as long as those funds built in the most minute chargeable cushion, a cushion that is, from a practical perspective, almost inevitable. Without repercussion, Unions would be free to, even if inadvertently, trample on the First Amendment rights of dissenters.

This strategy must fail. Even if every cent of the assessment was not intended to be used for entirely political purposes, it is clear that the Union's intent

was to depart drastically from its typical spending regime and to focus on activities that were political or ideological in nature.

This shift represents a material difference from that contemplated under the standard dues structure to which the 2005 *Hudson* Notice was directed and rendered the *Hudson* notice obsolete as to that Assessment.

Defendants adamantly object to being required to provide a second *Hudson* notice. Since they are required to base such notices on audited figures, they argue that it is impossible to provide an advance notice. However, "advance" notice is exactly what *Hudson* requires. It is an advance notice provided to nonunion employees so that they may make an informed decision as to whether or not they object to the use of their funds for political or ideological purposes. The Supreme Court's recognition that these notices would necessarily depend on prior years' financials does not change the underlying function of the notice itself.

Defendants belabor the Supreme Court's nod to practicality in footnote 18 of the *Hudson* opinion. The Court there stated, "We continue to recognize that there are practical reasons why '[a]bsolute precision' in the calculation of the charge to nonmembers cannot be 'expected or required.'" *Hudson* at 307 n. 18. The Court went on, "Thus, for instance, the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year." *Id*. At no point did the Court state that this procedure was the only constitutionally mandated manner in which to prepare a *Hudson* notice. The Court simply noted that, in the case of an annual notice, it was understandable that the union relied on the prior year's figures.

Notably, however, there is at least some nexus between using the whole of the prior year's expenditures as a benchmark for the whole of anticipated current year's expenditures, which could reasonably be expected to remain at a similar level. In that instance, the nonunion employee is being asked to compare one year's apples to the next year's apples. However, in the current case, the nonunion employees were never given any opportunity to make such an informed decision as to the Assessment. Rather, after implementing the increase, the Union took the position that nonunion employees had already been given an opportunity to make an informed decision as to the Assessment by means of the 2005 *Hudson* Notice. The Union now turns a blind eye to the inconsistency inherent in asking nonunion employees to compare apples, in the form of the prior year's financials, to oranges, in the form of a new Assessment, an Assessment which was not to be utilized for Union operations, but was instead earmarked for discrete political purposes.

[9] Defendants' argument that it must rely on audited financial figures which the Assessment has not yet generated is inapposite. Defendants are correct that the *Hudson* Court stated "adequate disclosure surely would include . . . verification by an independent auditor." *Hudson* at 307 n. 18. However, the Ninth Circuit has held that "while a formal audit is not always required, the union must provide a statement of its chargeable and nonchargeable expenses, together with an independent verification that the expenses were actually incurred. *Harik v. Cal. Teachers Ass'n*, 326 F.3d 1042, 1046 (9th Cir.2003).

"This passage certainly indicates that, although the Union must provide a breakdown between chargeable

and nonchargeable expenses, the audit does not verify that the allocation is correct, but that the expenses were indeed spent the way the Union claims." *Cummings v. Connell*, 316 F.3d 886, 892 (9th Cir.2003) (rejecting the claim that an allocation audit was required). "What is required is a real independent verification of the financial data in question to make sure that expenditures are being made the way the union says they are." *Id*. (quoting *Prescott v. County of El Dorado*, 177 F.3d 1102, 1107 (9th Cir.1999), *vacated and remanded on other grounds*, 528 U.S. 1111, 120 S.Ct. 929, 145 L.Ed.2d 807 (2000), *reinstated in relevant part*, 204 F.3d 984 (9th Cir.2000)).

Defendants had audited financials from the prior year from which they were able to construct the requisite 2005 *Hudson* Notice. Those expenditures were not necessarily relevant, however, to allocations within the subsequent Assessment. It was within the Union's purview to determine which additional expenditures were chargeable or nonchargeable. *See Harik* at 1046. It follows that it was up to the Union to determine the relevant major categories of expenses as well. The auditor merely "make[s] sure that expenditures are being made the way the union says they are." *Prescott* at 1107. Therefore, the Union could have looked at the purpose of the Assessment and determined which of its major categories of expenses should be allocated to that fund. Those figures had been audited based on the prior year's information, as is acceptable under *Hudson*. The burden is on the Union to put forth the TYPE of relevant expenditures.

The Court's methodology provides the means by which the Union could have met that burden by issuing a second, verified *Hudson* notice, specific to

the Assessment, without estimating exact future revenue expenditures.

Ultimately, the crux of the analysis is "adequate information." The Supreme Court determined that, under the *Hudson* facts, use of prior year's financials was "adequate." *See Hudson* at 307 n. 18. The Union's use of its financials was not adequate here because the categories of expenses included in the 2005 *Hudson* Notice were not relevant to the purposes for which the funds in the Assessment were to be used. The Assessment, even according to the Union's own statements, was always intended to provide a stream of funds whose use departed drastically from standard Union spending.

[10] A contrary decision from the one reached today would allow unions to run roughshod over dissenting nonmembers by imposing a post-objection period, "almost" purely political assessment, holding the funds hostage, and then using those funds, even if temporarily, for impermissible purposes.

An advance reduction by the amount of the fair share percentage in the 2005 *Hudson* Notice does not alter this analysis. As the Supreme Court has emphasized, "[A] remedy which merely offers dissenters the possibility of a rebate does not avoid the risk that dissenters' funds may be used temporarily for an improper purpose." *Hudson* at 305.

"A forced exaction followed by a rebate equal to the amount improperly expended is thus not a permissible response to the nonunion employees' objections." *Hudson* at 305-306.[8]

---

[8] Defendants' attempt to dismiss constitutional concerns because everything worked out in favor of the nonmember

Regardless of whether couched in terms of the Constitution or in terms of common sense, the 2005 *Hudson* Notice could not possibly have supplied the requisite information with which nonmembers could make an informed choice of whether or not to object to the Assessment. Accordingly, this Court finds that the 2005 *Hudson* Notice was inadequate to provide a basis for the Union's Assessment.

B. New Notice is the Appropriate Remedy to Address the Harm to Plaintiffs as a Result of the Inadequate 2005 Hudson Notice

"An inadequate notice gives fee payers insufficient information with which to decide whether or not to object to paying portions of the fee that are unrelated to representational activities. A new, conforming notice, with a renewed opportunity for fee payers to object to paying nonchargeable amounts, addresses that harm.

Following a new, conforming notice, fee payers could object, and objectors would be entitled to a refund of the nonchargeable portion of the fee, with interest." *Wagner* at 1041. "[B]ecause the injury that fee payers suffer from an inadequate *Hudson* notice is the lack of an informed opportunity to object, the

---

employees after the fact is irrelevant. The question is not whether, in retrospect, nonunion employees actually benefitted by being "undercharged." Rather, the question is whether those employees were provided the constitutionally required minimum information to make a forward-looking decision. They were not. Additionally, Defendants' argument hinges on the fact that the chargeable funds expended overall increased. However, the chargeable expenditures attributed to the Assessment were 27.35% in 2005 and 18.77% in 2006, much lower than those attributed to the standard Union dues and fees. Union's Opp'n to Pls.' Motion for Summary Judgment, 12:13-15.

proper remedy is for the union to issue proper notice and give another *opportunity* for objection." *Id*. at 1042 (emphasis in original). These objectors will be entitled to receive a refund, with interest, of the nonchargeable amount.[9] *See Id*. at 1043.

C. Summary of Resolution of Plaintiffs' Motion

The 2005 *Hudson* Notice, which detailed expenditures regarding all Union activities, not just the limited activities to be covered by the Assessment, could, by no stretch of the imagination, have been applicable to this special fund. A second *Hudson* notice was required in the case of this Assessment, not because the 2005 *Hudson* Notice could not conceivably cover any assessment or dues increase, but because the actual notice in this case was inadequate to provide the requisite information regarding the specific Assessment. *See Hudson* at 307 ("[T]he original information given to the nonunion employees was inadequate.")

[11] Defendants essentially rely on the argument that *Hudson* and its progeny left them a convenient loophole, one which now allows them to subvert the central protections *Hudson* is meant to provide. However, no self-asserted loophole will allow Defendants to avoid the Constitution. The *Hudson* Court articulated the minimum protections required under the First Amendment. This Court will not undermine that interpretation by allowing Defendants to hollowly assert that they adhered to constitutional requirements by issuing a standard *Hudson* notice,

---

[9] The *Wagner* court considered it relevant that there was no evidence presented that the union had acted in bad faith. *Id*. at 1042. Since the same is true here, the Court need not engage in any further analysis on this point.

which, in actuality, failed to provide any adequate explanation as to how the subsequent Assessment would be used.

Accordingly, Plaintiffs' Motion for Summary Judgment is granted. The Union shall issue a proper *Hudson* notice as to the Assessment, with a renewed opportunity for nonmembers to object to paying the nonchargeable portion of the fee. The Union is ordered to issue nonmembers who, pursuant to this proper notice, object to the Assessment a refund, with interest, of that amount. *Wagner* at 1043.

II. DEFENDANTS' MOTION FOR SUMMARY ADJUDICATION

A. Nonobjectors Did Not Consent to the Assessment by Failing to Object to 2005 *Hudson* Notice

Defendants argue that nonobjectors have no claim against the Union for the wrongful use of funds exacted from their paychecks under the 2005 *Hudson* Notice since they did not object to that Notice. This is basically the same claim, though differently dressed, that Defendants' raised in their already denied first motion for summary judgment.

This Court need not address Defendants' argument that "silence equals consent" under the Constitution. In order for the nonunion employees' failure to object to have any legal significance, the 2005 *Hudson* Notice must have been valid and sufficient to cover the Assessment. *See Wagner* at 1043 ("Th[e] principle [that plaintiffs burden of objection attaches only on provision of proper notice] makes sense, for it would be unfair to require a nonmember to object when the nonmember has, as a matter of law, not been

adequately informed of the facts."). Because this Court holds that the 2005 *Hudson* Notice was not adequate as to the Assessment, nonobjectors could not have legally consented to the relevant subsequent deductions. Defendants' Motion for Summary Adjudication as to the class of nonobjectors is denied.

B. Plaintiffs' Claims Are Limited to the Time Period Encompassed by the Union's 2005 *Hudson* Notice

Defendants also argue that any alleged wrong that occurred due to the lack of an adequate *Hudson* notice was remedied when the Union issued its subsequent *Hudson* notice in June of 2006. *See Wagner* and discussion, *supra*.

Since the proper remedy for the current wrong is a new *Hudson* notice and since Plaintiffs have not challenged the adequacy of the Union's 2006 or 2007 *Hudson* notices, this Court agrees with Defendants that the only time period relevant to the current dispute is September 2005 through June 2006 (inclusive). Hence, Defendants' Motion for Summary Adjudication as to the relevant time period is granted.

CONCLUSION

[12] Plaintiffs' Motion for Summary Judgment is GRANTED. Defendants are ordered to issue, within sixty (60) days following the date of this Order, a proper *Hudson* notice as to the 2005 Assessment, offering nonmembers a forty-five (45) day period in which to object. The Union shall thereafter issue to those nonmembers who object to this new *Hudson* notice a refund of the nonchargeable portion of the Assessment. Pursuant to 28 U.S.C. § 1961, the Union shall further issue to those nonmembers all interest

accruing from the date(s) upon which nonchargeable deductions were taken.

Defendants' Motion for Summary Adjudication as to the nonobjector class is DENIED and Defendants' Motion asking the Court to limit the relevant time period to September 2005 through June 2006 (inclusive) is GRANTED.

The Clerk of the Court is directed to enter judgment in favor of Plaintiffs and close the file.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES CONSTITUTION

First Amendment

The First Amendment provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX D

UNITED STATES CONSTITUTION

Fourteenth Amendment

The Fourteenth Amendment provides in pertinent part:

> Section 1. . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E

RALPH C. DILLS ACT,
CAL. GOV'T CODE § 3512 *ET SEQ*.

§ 3513. Definitions

As used in this chapter:

> (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.

§ 3515. Employee organizational rights; maintenance of membership; fair share fee; self representation

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.