

No. 10-1121

IN THE

Supreme Court of the United States

Dianne Knox, *et al.*,
Petitioners,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000,
Respondent.

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

**BRIEF OF THE NATIONAL EDUCATION
ASSOCIATION AS AMICUS CURIAE IN SUPPORT
OF RESPONDENT**

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**BRIEF OF THE NATIONAL EDUCATION
ASSOCIATION AS AMICUS CURIAE IN
SUPPORT OF RESPONDENT**

INTEREST OF *AMICUS CURIAE*

This brief *amicus curiae* is submitted with the consent of the parties,¹ on behalf of the National Education Association (NEA), a nationwide employee organization with more than 3.2 million members, the vast majority of whom are employed as teachers in public schools and colleges throughout the United States. NEA operates through a network of affiliated organizations: it has as state affiliates an organization in each of the 50 states and the District of Columbia, and has approximately 14,000 local affiliates in individual school districts, colleges, and universities throughout the United States. Pursuant to procedures that comply with this Court's decision in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), NEA and its affiliates collect agency fees from nonmembers in 20 states.

Petitioners argue in this case that a public-sector union must adopt procedures above and beyond those specified in *Hudson* when it enacts certain kinds of special assessments. NEA and its affiliates have a strong interest in this issue not only in its own right, but because Petitioners have based their argument on the proposition that, in determining whether a union's agency fee system includes adequate "procedural safeguards," *Hudson*, 475 U.S. at 302, the courts should apply "strict scrutiny." Adoption of that proposition would cast the law in this area into disarray. NEA submits this brief to show that

¹ Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

Petitioners' attempt to subject agency fee procedural safeguards to "strict scrutiny" cannot be squared with *Hudson* and with the decades of union fee caselaw that preceded that decision, or with First Amendment jurisprudence generally.

SUMMARY OF ARGUMENT

Nearly fifty years ago, this Court declared in *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963), that courts should not impose agency fee requirements that are "likely to infringe the unions' right" to expend fees obtained from *all* employees "in support of activities germane to collective bargaining." Thus in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475, U.S. 292, 302 (1986), the Court held that in determining what procedures should be required to protect objecting feepayers' First Amendment rights, "the 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*" (emphasis added).

This Court's agency fee decisions do not treat the fashioning of procedural safeguards as a matter that is subject to "strict scrutiny," but as a pragmatic effort to provide a meaningful level of prophylactic protection of dissenters' First Amendment interests without imposing undue burdens that would impinge on a union's ability to require all employees to contribute to the cost of union activities germane to collective bargaining.

That mode of analysis is consistent with this Court's treatment of procedural safeguards in other First Amendment contexts. "[N]ot every procedure that may safeguard protected speech is constitutionally mandated." *Waters v. Churchill*, 511 U.S. 661, 670 (1994)

(plurality opinion). Rather, the Court has made clear that such requirements must be tempered by competing considerations, including in particular the costs and administrative burdens a proposed procedure would entail. *Id.*

Thus, the Court never has subjected proposed procedural safeguards of First Amendment rights to a regime of strict scrutiny. And to do so would be to apply First Amendment scrutiny to a question it is not designed to answer. First Amendment “scrutiny” – whether strict or otherwise – pertains to *substantive burdens* on speech, not to *procedural protections* of speech; it is a means of assessing whether a particular burden on speech is supported by an appropriate justification. Fashioning *prophylactic protections* for speech is a very different enterprise from scrutinizing *restrictions* on speech, and calls for a more nuanced calculus. To inject “strict scrutiny” into the fashioning of procedural safeguards, in the agency fee context or in other First Amendment contexts, would be to untether the law of strict scrutiny from its moorings.

ARGUMENT

In *Hudson*, this Court observed that two distinct forms of First Amendment questions are presented by agency fee systems established pursuant to governmental authorization.

First is the question of what kinds of union activities an employee who has chosen not to become a union member can be required to support financially and what kinds of activities are of such a nature that financial support cannot constitutionally be compelled of an objecting non-member. *See Hudson*, 475 U.S. at 301-02. The drawing of that line between “chargeable” and “nonchargeable” activities has been the subject of several decisions of this

Court, the most recent being *Locke v. Karass*, 555 U.S. 207 (2009) and *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). Petitioners' second Question Presented, regarding the chargeability *vel non* of expenditures incurred by a union in opposing a certain kind of ballot initiative, is in this category; but we do not address that question because it is not properly presented by this case. See Brief for Respondent at 43-48.

Once the "basic distinction," *Hudson*, 475 U.S. at 302, between chargeable and nonchargeable activities has been drawn, a second question remains: "whether the procedure used by [a union to collect agency fees] adequately protects th[at] basic distinction," *id.* This matter of "procedural safeguards," *id.*, is the subject of Petitioners' first Question Presented.

Petitioners argue the fashioning of such procedural safeguards is subject to "strict scrutiny." But as we will show in Part I, this Court's union fee decisions going back some fifty years and culminating in *Hudson* have never suggested that strict scrutiny governs the formulation of procedures for assessing and collecting fees from objecting nonmembers; rather, those decisions adopt a mode of analysis that is fundamentally different from strict scrutiny.

In Part II, we show that this Court's treatment of First Amendment procedural safeguards in the agency fee context, and in particular the Court's recognition of the need to avoid "impos[ing] an undue burden on the union," *Hudson*, 475 U.S. at 306 n.17, is fully consistent with the manner in which the Court has approached the fashioning of procedural safeguards in other First Amendment contexts. Strict scrutiny, which pertains to certain kinds of *substantive burdens* on speech but not to *procedural safeguards* for speech, has no place in that endeavor.

I. FOR NEARLY FIFTY YEARS, THIS COURT HAS ANALYZED AGENCY FEE PROCEDURAL SAFEGUARDS WITHOUT RESORT TO STRICT SCRUTINY, PURSUING THE DUAL OBJECTIVE OF PREVENTING COMPULSORY SUBSIDIZATION OF IDEOLOGICAL ACTIVITY BY EMPLOYEES WHO OBJECT THERETO WITHOUT RESTRICTING A UNION'S ABILITY TO REQUIRE EVERY EMPLOYEE TO CONTRIBUTE TO THE COST OF ACTIVITIES GERMANE TO COLLECTIVE BARGAINING

A. Since *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956), which arose under the agency fee provisions of the Railway Labor Act, 45 U.S.C. § 152, Eleventh, this Court has recognized as a general principle that requiring “financial support of the collective-bargaining agency by all who receive the benefits of its work . . . does not violate . . . the First . . . Amendment[.]” 351 U.S. at 238.

In *Hanson*, however, there was no indication that the fee at issue was used for political or other purposes unrelated to collective bargaining, or that affected employees objected to the use of the fee for such purposes. Such circumstances were presented soon after in *International Association of Machinists v. Street*, 367 U.S. 740 (1961). This Court there concluded that, in light of the First Amendment's protections against compelled speech and association, the agency-fee provisions of the Railway Labor Act must be “construed to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes.” *Id.* at 768-69. The *Street* Court recognized, however, that because a substantive violation of the First Amendment arises only when funds are used for political purposes opposed by the feepayer, any remedy “would properly be granted

only to employees who have made known to the union officials that they do not desire their funds to be used for political causes to which they object.” *Id.* at 774. And, because “dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee,” a union “should not in fairness be subjected to sanctions in favor of an employee who makes no complaint of the use of his money for such activities.” *Id.*

In *Railway Clerks v. Allen*, 373 U.S. 113 (1963), this Court gave more concrete consideration to fashioning a system that adequately addressed both the substantive protection of objecting feepayers’ rights and the union’s legitimate interest in the use of funds from members and nonobjecting feepayers. The Court observed that “[a]bsolute precision” in the calculation of the chargeable portion of the fee “is not, of course, to be expected or required,” and added that “no decree would be proper which appeared likely to infringe the unions’ right to expend uniform exactions . . . in support of activities germane to collective bargaining and, as well, to expend nondissenters’ such exactions in support of political activities.” *Id.* at 122. In light of those considerations, the *Allen* Court envisioned a “practical decree” that would give objecting feepayers an advance rebate “of a portion of the exacted funds in the same proportion that union political expenditures bear to total union expenditures.” *Id.* The Court also “encourage[d] . . . unions to consider the adoption by their membership of some voluntary plan by which dissenters would be afforded an internal union remedy.” *Id.* at 122.

Subsequently, in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court affirmed that the principles articulated under the Railway Labor Act in *Hanson*, *Street*, and *Allen* applied with equal force to agency-fee arrangements in public-sector collective bargaining. In

particular, the *Abood* Court held that public-sector unions may collect an agency fee from nonmembers for activities germane to collective bargaining, but that the First Amendment forbids compelling contributions from objecting feepayers for “ideological activities unrelated to collective bargaining.” 431 U.S. at 236.

But the Court held in *Abood* that protecting that right of objecting feepayers cannot be the sole consideration in determining the elements of an agency fee system. Rather, “the 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.*” *Id.* at 237 (emphasis added). To that end, this Court reiterated the statement in *Allen* that “no decree would be proper which appeared likely to infringe the unions’ right to expend uniform exactions ... in support of activities germane to collective bargaining and, as well, to expend nondis-senters’ such exactions in support of political activities.” *Id.* at 239 n.40 (quoting *Allen*, 373 U.S. at 122).

Thus the law stood until *Hudson*, where this Court articulated a set of minimum procedures required by the First Amendment for the collection of an agency fee by a public-sector union.

The procedural safeguards elaborated by the *Hudson* Court had three components: (1) a notice requirement for giving nonmembers “an adequate explanation of the basis for the fee”; (2) a hearing requirement providing nonmembers “a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker”; and (3) an escrow requirement “for the amounts reasonably in dispute while [objecting feepayer] challenges are pending.” 475 U.S. at 310. Adhering to *Abood’s* teaching that “[t]he objective must be to devise a way of prevent-

ing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities," *Hudson*, 475 U.S. at 302 (quoting *Abood*, 431 U.S. at 237), in defining the contours of each of those three requirements the *Hudson* Court took into account both the benefit of each proposed safeguard to feepayers and the burdens that would be imposed on the union.

First, with respect to the notice requirement, the 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 fee." *Id.* at 306. At the same time, the Court was careful to note that such a requirement would be "limited" so as not to "impose an undue burden on the union." *Id.* at 306 n.17. Accordingly, the fee calculation contained in the union's notice could be calculated "on the basis of its expenses during the preceding year," and the accompanying explanation for the fee did not require "an exhaustive and detailed list of all its expenditures," but only "the major categories of expenses, as well as verification by an independent auditor." *Id.* at 307 n.18.

Second, with respect to the hearing requirement, *Hudson* reasoned that an impartial decisionmaker was necessary because the objecting feepayer "is entitled to have his objections addressed in an expeditious, fair, and objective manner." *Id.* at 307. The Court nonetheless rejected as too burdensome the kinds of "special judicial procedures" that are required in certain First Amendment contexts. *Id.* at 307 n.20 (citing *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Blount v. Rizzi*, 400 U.S. 410 (1971); *Freedman v. Maryland*, 380 U.S. 51 (1965)). The Court also rejected the notion "that

a full-dress administrative hearing, with evidentiary safeguards, is part of the ‘constitutional minimum,’” and instead indicated that the hearing requirement would be satisfied by “an expeditious arbitration . . . , so long as the arbitrator’s selection did not represent the [u]nion’s unrestricted choice.” *Hudson*, 475 U.S. at 308 n.21.

Finally, although the *Hudson* Court required that a union place in escrow “the amounts reasonably in dispute while [an objecting feepayer’s] challenges are pending,” it expressly rejected the notion that “a 100% escrow is constitutionally required,” *id.* at 310, reasoning that such a requirement would have “the serious defect of depriving the Union of access to some escrowed funds that it is unquestionably entitled to retain.” *Id.*

In all of these respects, far from imposing the most protective possible procedures, *Hudson* established a “constitutional floor for unions’ collection and spending of agency fees,” *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 185 (2007), leaving individual public employers and unions free to decide whether to adopt additional procedures which, even if they would be more protective of dissenters’ interests, are not constitutionally mandated, *id.*

B. As the foregoing recital makes plain, in none of the Court’s decisions addressing procedural safeguards for the payment of agency fees by dissenting nonmembers has the Court treated those safeguards as subject to “strict scrutiny.” Having declared nearly fifty years ago that courts may not impose requirements “which appear[] likely to infringe the unions’ right,” *Allen*, 373 U.S. at 122, to require objectors to pay their fair share of activities germane to collective bargaining, this Court’s subsequent decisions have admonished against “restricting the Union’s ability to require every employee to contribute to the cost of collective-bargaining activities.” *Hudson*, 475 U.S. at 302; *Abood*, 431 U.S. at 237. The corollary articu-

lated in *Allen*, that “[a]bsolute precision” cannot be required in determining the chargeable portion of a union fee, 373 U.S. at 122, likewise is reiterated in *Hudson*, see 475 U.S. at 307 n. 18, and informs *Hudson’s* recognition that procedural requirements should be “limited” so as not to “impose an undue burden on the union,” *Hudson*, 475 U.S. at 306 n.17, or to engender “the serious defect of depriving the Union of access to ... funds that it is unquestionably entitled to retain,” *id.* at 310.

Hudson thus stands squarely on the shoulders of this Court’s union fee decisions extending back some fifty years, none of which has invoked “strict scrutiny” in determining the procedures unions must adopt to safeguard the First Amendment rights of objecting feepayers, and all of which have emphasized that objectors’ rights not to be required to support nonchargeable union activities must be protected through procedures that do not restrict the *union’s* right, under a constitutional agency fee arrangement, to require objectors to pay their *pro rata* share of the union’s chargeable expenditures, through practical measures that do not subject the union to undue burdens.

II. THIS COURT’S AGENCY FEE JURISPRUDENCE IS CONSISTENT WITH THE APPROACH THE COURT HAS FOLLOWED IN FASHIONING PROCEDURAL SAFEGUARDS IN OTHER FIRST AMENDMENT CASES, NONE OF WHICH HAS TREATED SUCH SAFEGUARDS AS SUBJECT TO STRICT SCRUTINY

Nor has strict scrutiny been applied when, in other contexts, this Court has addressed procedural protections for First Amendment interests. On the contrary, the emphasis in this Court’s agency fee decisions on the need to avoid “restricting,” *Abood*, 431 U.S. at 237, or “infring[ing],” *Allen*, 373 U.S. at 122, a union’s ability to collect from all employees fees to support activities ger-

mane to bargaining is of a piece with the consideration of competing legitimate interests that has always guided the Court's formulation of First Amendment procedural safeguards.

A. In evaluating the procedures that should be considered to be mandated by the First Amendment in the context of an agency fee system, the *Hudson* Court recognized that the Court had dealt with similar questions in a number of other areas of First Amendment law, adopting "procedural safeguards ... to insure that the government treads with sensitivity in areas freighted with First Amendment concerns." 475 U.S. at 303 n.12.

For instance, although prior restraints on speech are not unconstitutional *per se*, this Court has required governmental entities to maintain stringent administrative and judicial-review procedures before imposing such restraints on the distribution of obscene publications or the showing of obscene films or plays. See *Southeastern Promotions*, 420 U.S. at 558-62; *Freedman*, 380 U.S. at 58-59; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70-72 (1963). Similarly, where judicial proceedings threaten to penalize protected speech, this Court has required additional safeguards such as a particular allocation of the burden of proof, a particular quantum of proof, or a particular type of appellate review. See *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (holding that, in a proceeding to determine tax liability, the government must bear burden of proving that speech is unprotected); *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) (holding that, in a public figure's libel action, actual malice must be proven by clear and convincing evidence); *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 503-11 (1984) (holding that, in a product disparagement case raising First Amendment concerns, an appellate court must make an independent judgment about the presence of actual malice).

The fashioning of First Amendment procedural safeguards has not been limited to administrative or judicial proceedings. For example, this Court has held that a public employer must give an employee the procedural protection of a “reasonable investigation” before she is discharged or punished for engaging in constitutionally unprotected speech. *Waters v. Churchill*, 511 U.S. 661, 668-82 (1994) (plurality opinion); *id.* at 682-83 (Souter, J. concurring). And, in a context that closely parallels a unions’ collection of agency fees from nonmembers, this Court has held that an integrated bar association must erect notice-and-objection procedures that allow objecting lawyers the opportunity to prevent a portion of their bar dues from being used for political activities that are not germane to regulating the legal profession and improving the quality of legal services. *Keller v. State Bar of Cal.*, 496 U.S. 1, 13-17 (1990).

In the First Amendment cases in which this Court has adopted these kinds of prophylactic procedural safeguards, the Court has emphasized that “not every procedure that may safeguard protected speech is constitutionally mandated,” and that the assessment for “each procedure involves a different mix of administrative burden, risk of erroneous punishment of protected speech, and risk of erroneous exculpation of unprotected speech.” *Waters*, 511 U.S. at 670 (plurality opinion). “[T]he balance need not always be struck in th[e] direction” of providing greater insulation of protected speech. *Id.* “[The Court has] never, for instance, required proof beyond a reasonable doubt in civil cases where First Amendment interests are at stake, though such a requirement would protect speech more than the alternative standards would.” *Id.* “Likewise, the possibility that defamation liability would chill even true speech has not led [the Court] to require an actual malice standard in all libel cases.” *Id.* “Nor has the possibility that overbroad regulations might

chill commercial speech convinced [the Court] to extend the overbreadth doctrine into the commercial speech area.” *Id.*

As this Court’s decisions thus make plain, “[t]he propriety of a proposed procedure must turn on the particular context in which the question arises – on the cost of the procedure and the relative magnitude and constitutional significance of the risks it would decrease and increase.” *Id.* at 671. Indeed, in some cases, even where a challenged practice entails a “high potential for intrusion on . . . First Amendment rights,” the Court has found it practical and appropriate to require only minimal procedural protections. *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 232, 234 (2000) (holding that the only procedural safeguard necessary for a public university’s system of using mandatory fees to subsidize various student groups is to apply “viewpoint neutrality as the operational principle”).

B. Petitioners seek to replace the flexible and pragmatic approach this Court has followed in fashioning First Amendment procedural safeguards with a regime of “strict scrutiny.” But this Court has never held that the fashioning of First Amendment procedural safeguards is subject to strict scrutiny – or, for that matter, to *any* of the forms of scrutiny that the Court has held to be applicable to the review of *substantive burdens* on speech.

Rather, when this Court has spoken of First

² Nor has the Court viewed the fashioning of First Amendment procedural safeguards as turning upon the particular standard that would apply to a substantive restriction on the kind of speech at issue. *See Southeastern Promotions*, 420 U.S. at 562 (“The procedural shortcomings that form the basis for our decision are unrelated to the standard that the board applied The standard, whatever it may be, must be implemented under a system that [affords adequate procedural protections].”)

Amendment “scrutiny” – whether strict, intermediate, or of some other form – what the Court has subjected to scrutiny has been a *burden* that the government proposes to place on particular kind of speech; and the mode of scrutiny, whether strict³ or otherwise,⁴ has been calculat-

³ See, e.g., *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729, 2738 (2011) (applying strict scrutiny to a “restriction” on the content of protected speech); *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2817 (2011) (same with regard to “[l]aws that burden political speech”); *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (same); *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009) (noting that strict scrutiny applies to a “restriction” based on the content of the speech); *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 358 (2009) (same with regard to content-based “[r]estrictions” on speech); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007) (same with regard to a law that “burdens” political speech); *Ashcroft v. ACLU*, 542 U.S. 656, 670 (2004) (same with regard to a content-based “restriction”); *Republican Party of Minn. v. White*, 536 U.S. 765, 774 (2002) (same with regard to a “restriction” on political speech); *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000) (same with regard to a content-based speech “restriction”); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 346 (1995) (same with regard to a “limitation on political expression”); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) (same with regard to a “state-imposed restriction” on speech); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 582 (2000) (applying strict scrutiny to election regulations that placed a “heav[y] burden on a political party’s associational freedom”); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (noting that strict scrutiny applies to regulations that force a group to accept an unwanted member whose presence significantly impairs the ability of the group to express its views); *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (applying strict scrutiny to a “significant impairment” of association rights); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74 (1990) (applying strict scrutiny to “penalties” for the exercise of associational rights).

⁴ See, e.g., *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1339-40 (2010) (applying “less exacting scrutiny” to commercial disclosure requirements that “reasonably related to the [Government’s] interest in preventing deception of consumers”);

Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 452-58 (2008) (holding that a statute imposing “modest burdens” on associational rights will survive First Amendment scrutiny if it advances “important regulatory interests” with “reasonable, nondiscriminatory restrictions”); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 534, 553-67 (2001) (holding that “restrictions on outdoor advertising, point-of-sale advertising, [and] promotions” for tobacco companies are subject to scrutiny under standard for “commercial speech,” requiring that the regulation “directly advances” a “substantial” governmental interest and that the regulation “is not more extensive than is necessary to serve that interest”); *International Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 683-85 (1992) (holding that “restrictions” on distribution of literature and solicitation of contributions in airport terminals that are not public fora “need only satisfy a requirement of reasonableness”); *Ward v. Rock Against Racism*, 491 U.S. 781, 791-803 (1989) (holding that “in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech,” provided that such restrictions are content-neutral, are “narrowly tailored to serve a significant governmental interest,” and “leave open ample alternative channels for communication of the information”); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50-55 (1986) (holding that zoning restrictions on adult-oriented businesses are subject to intermediate scrutiny that is satisfied if the zoning ordinance “is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication”); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (holding that governmental action that punishes public-employee speech on matters of public concern is subject to an intermediate form of scrutiny that “balance[s] between the interests of the [employee], as a citizen. . . and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees”); *United States v. O’Brien*, 391 U.S. 367, 376-77 (1968) (holding a regulation on conduct that entails “incidental limitations on First Amendment freedoms . . . is sufficiently justified if . . . it furthers an important or substantial governmental interest; if the governmental is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest”); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662-68 (1994) (applying *O’Brien* standard to law requiring cable television providers to carry local broadcast stations).

ed to assess whether that burden bears a sufficient relationship to an appropriate governmental interest.

Indeed, the demands of strict scrutiny – *i.e.*, showing that a regulation “furthers a compelling interest and is narrowly tailored to achieve that interest,” *Citizens United v. FEC*, 130 S.Ct. 876, 898 (2010) (citation and quotation marks omitted) – only make sense as applied to substantive burdens on speech or association, *not* as applied to “procedural safeguards” of speech, *Hudson* 475 U.S. at 303. To require that a regulation advances a “compelling” governmental interest presupposes that the governmental interest works at cross-purposes with free-speech rights, so the inquiry ensures that there is, not just an “actual problem in need of solving,” but one of sufficiently grave importance that “the curtailment of free speech must be actually necessary to the solution.” *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729, 2738 (2011) (citations and quotation marks omitted). The requirement of narrow tailoring acts in complementary fashion to minimize any substantive interference with free-speech rights by demanding that a regulation “targets and eliminates no more than the exact source of the ‘evil’ it seeks to remedy.” *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). By the same token, “the compelling-interest test may be one analytical device to detect, in an objective way, whether the asserted justification [for a burden on speech] is in fact an accurate description of the purpose and effect of the law.” *Burson v. Freeman*, 504 U.S. 191, 213 (1992) (Kennedy, J., concurring).⁵

Courts cannot and do not “scrutinize” *procedural safeguards* of First Amendment rights as they scrutinize *sub-*

⁵ See generally *Davenport*, 551 U.S. at 188 (discussing strict scrutiny as a means of evaluating the risk that a content-based restriction on speech may have a viewpoint-discriminatory impact).

stantive burdens that the government seeks to impose on those rights. Petitioners' contention that the adoption of procedural protections as called for by *Hudson* is subject to "strict scrutiny" is thus an attempt to fit a square peg into a round hole. And more than that, it is an attempt to foreclose consideration of the kinds of competing considerations – "the cost of the procedure and the relative magnitude and constitutional significance of the risks it would decrease and increase," *Waters*, 511 U.S. at 671 (plurality opinion) – that have always guided the Court in its assessment of procedures that are proposed to be required as safeguards for First Amendment interests.

There is no basis for Petitioners' contention that in agency fee cases, unlike other First Amendment cases, procedural safeguards should be assessed through a lens of strict scrutiny. Rather, *Abood* and *Hudson* are fully consistent with the broad stream of First Amendment jurisprudence in holding that any determination of the procedures a union must provide in its agency fee system to protect the rights of objecting feepayers must be guided by a *dual* objective: "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." *See supra* at 7-8.

The Brief for Respondent amply demonstrates that the procedures followed by the union in this case comported fully with that objective. No "scrutiny" that would suggest otherwise could be squared with *Hudson*, or with fifty years of union fee jurisprudence in this Court, or with the principles the Court consistently has brought to bear in fashioning procedural safeguards in other First Amendment contexts.

CONCLUSION

If the Court reaches the merits, it should affirm the decision of the Ninth Circuit.

Respectfully submitted,

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