No. 10-1121

IN THE
Supreme Court of the United States

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

v.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000,
Respondent.

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

PETITIONERS' REPLY BRIEF ON THE MERITS

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INTRODUCTION

Petitioners' opening Brief discussed the *reduction ad absurdum* of Respondent SEIU's theory of the case: a union could impose a massive mid-year assessment expressly designed to support a presidential candidate; could collect that assessment from nonmembers; and could spend every penny to support the candidate—all without offering nonmembers any mechanism to avoid the exaction. Rather than disagreeing, SEIU concedes that this is exactly what its

approach means. SEIU's Br. 19 n.9. But not to worry, it assures the Court; that is acceptable because money is "fungible" and in the long run it all comes out in the wash. *Id.* at 21-25.

SEIU is dead wrong. This Court's forced-unionism cases are unambiguous: nonmembers cannot be forced, "'*even temporarily*, to finance ideological activities unrelated to collective bargaining.'" *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 305 (1986) (emphasis added) (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 244 (1977) (Stevens, J., concurring)). That is so because "'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.'" *Abood*, 431 U.S. at 235 n.31 (quoting I. Brant, *James Madison: The Nationalist* 354 (1948)). SEIU practices what these authorities forbid. The Court should reject SEIU's novel approach, and adopt the approach set forth in Petitioners' opening Brief, and endorsed by the District Court.

In particular, this Court should apply strict scrutiny to determine what safeguards are required to protect nonmembers' First Amendment rights. The Court applies strict scrutiny in compelled-association cases, and it repeatedly has held that compelled union dues constitute compelled association—which no doubt explains why *Hudson* required "careful[ ] tailor[ing]" and cited numerous strict-scrutiny cases to support its conclusion. 475 U.S. at 303 & n.11.

SEIU resists this approach, but to do so it must distort the law, arguing that compelled-dues cases do not implicate associational freedoms. SEIU's Br. 34-35. This Court has squarely held that they do. *E.g.*, *Abood*, 431 U.S. at 234. SEIU also argues that strict scrutiny is inappropriate in cases involving

"procedural First Amendment rights," SEIU's Br. 38-39, but that argument manufactures a distinction where none exists. It should be rejected.

Applying a high degree of scrutiny, this Court should adopt the rule set forth in the opening Brief: "When a union increases the amount . . . it collects from nonmembers between its annual *Hudson* notices," it "(1) cannot collect the increase from those nonmembers who have already objected; and (2) must not collect the increase from other nonmembers until it has ascertained their wishes by providing them with a new notice and opportunity to object." Pet. Br. 11. This bright-line rule is appropriate because, when a union increases its exactions mid-year, the only way to ensure the additional monies extracted from objecting nonmembers will not be spent on ideological causes is to bar collection of the assessment from them. That safeguards associational freedoms and would have minimal impact on unions' collective-bargaining resources.

At a minimum, this Court should recognize why SEIU is obviously wrong: when a union imposes a special assessment with the *stated intent* of spending it on political advocacy,[1] it cannot collect that assessment from objecting nonmembers. Anything less would topple *Hudson*'s "careful[ ] tailor[ing]" requirement.

On the second Question Presented, SEIU studiously downplays the merits and argues that the issue is not properly before the Court. SEIU is incorrect. The

[1] This is such a case, despite SEIU's attempt to muddy the facts. SEIU made quite clear that it would spend the special assessment on political advocacy, and *only* political advocacy. *See infra* at 12-13.

Nonmembers raised chargeability in their Complaint, and the Ninth Circuit opined on the issue. Indeed, it could not have avoided doing so: chargeability is inextricably intertwined with the *Hudson* analysis because the special assessment's obvious non-chargeability is what made the *Hudson* violation so egregious, and it is a necessary part of the remedy. This Court should reach that question and reverse, reaffirming that objecting nonmembers cannot be compelled to fund union political spending unless it is tied directly to "ratification or implementation of a dissenter's collective-bargaining agreement." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 520 (1991).

ARGUMENT

I. STRICT SCRUTINY APPLIES TO FORCED-UNIONISM CASES.

Disregarding decades of First Amendment precedent, SEIU urges that nonmembers' rights to be free from coerced participation in union speech and association are attenuated and not protected by strict scrutiny. SEIU's Br. 31-42. That is incorrect. This is a compelled-association case, and it should be treated like any other compelled-association case. That is how the Court has approached forced-unionism cases in the past; it should reaffirm that approach here.

A. Strict Scrutiny Applies Here, as in Any Other Compelled-Association Case.

Strict scrutiny applies here for a simple reason: This is a compelled-association case. *Abood* explained that "the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments" and that the fact that nonmembers "are compelled to make, rather

than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights." 431 U.S. at 233-234. Citing that portion of *Abood*, the Court reiterated in *Roberts v. U.S. Jaycees* that "[f]reedom of association . . . plainly presupposes a freedom not to associate." 468 U.S. 609, 623 (1984). And *Roberts* squarely held that the right not to associate—a right it relied upon *Abood* to define—is protected by strict scrutiny. *Id.* Lest there be any doubt, *Hudson* explained that "careful[ ] tailor[ing]" is required to protect nonmembers' rights, and for that proposition cited *Roberts* and *quoted its strict scrutiny language in full*. 475 U.S. at 303 & n.11. Finally, in *Lehnert*, nine Justices recognized that a "vital" or "compelling" government interest is required to justify charging nonmembers for any particular union activity. *See* 500 U.S. at 519 (majority opinion); *id.* at 556-57 (Scalia, J., joined by Kennedy, Souter, and O'Connor, J.J., concurring in part).

The conclusion is inescapable: union exactions from nonmembers must satisfy strict scrutiny. That test may be satisfied when it is clear that exactions are used solely to support collective bargaining activities; then the Court has seen an important governmental interest in "labor peace," *Abood*, 431 U.S. at 224, when the collection is narrowly tailored. It is not satisfied, however, where—as here—the union adopts procedures that allow exactions from nonmembers to flow directly to ideological causes. Obviously, there are "means significantly less restrictive of associational freedoms," *Roberts*, 468 U.S. at 623, that SEIU could adopt that would still allow it to fully fund its collective-bargaining activities.

B. SEIU's Contrary Arguments Are Meritless.

SEIU offers three contrary arguments. None has merit.

1. SEIU asserts that *Hudson* addresses "procedural First Amendment rights," and that such "*procedural* rights" are generally subject to a lesser degree of constitutional scrutiny than "substantive" First Amendment rights. SEIU's Br. 8, 32, 38-42. This distinction defies this Court's cases. *See Washington v. Harper*, 494 U.S. 210, 220 (1990) ("procedural protections must be examined in terms of the substantive rights at stake"); *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 309 (1986) (rejecting argument that prior decisions established a "two-tiered system of constitutional rights, with substantive rights afforded greater protection than 'mere' procedural safeguards"). It also defies logic. No clean line can be drawn between procedure and substance here. They are inextricably intertwined; the right to avoid compelled association is the substantive right, and the need for careful tailoring to protect that right undergirds the procedure requiring a "*Hudson* notice." There is no separate "procedural First Amendment right" at issue.

Nor do this Court's cases suggest the contrary. SEIU relies heavily on Justice O'Connor's plurality opinion in *Waters* v. *Churchill*, 511 U.S. 661 (1994). That opinion, which did not command five votes, addressed a completely different subject. *Waters* concerned procedures required "in proceedings that may penalize protected speech," *id.* at 669, an issue bearing no relationship to what might constitute narrow tailoring in a compelled-association case. Indeed, Justice Scalia concurred, joined by Justices

Kennedy and Thomas, emphasizing how "circumspect" the Court has been "about acknowledging procedural components of the First Amendment" and collecting the prior examples of which he was aware. *Id.* at 686-87 (Scalia, J., concurring in judgment). "Almost all" involved constitutional "limitation[s] on defamation suits." *Id.* Forced-unionism cases were not mentioned. Significantly, Justice Scalia's concurrence marks the only appearance of the phrase "procedural First Amendment rights" in this Court's decisions. *Id.* at 689. SEIU, in short, draws an analytical distinction where none exists.[2]

2. SEIU next argues that forced union fees are "constitutionally distinct from 'compelled speech'" and that they have "no effect on non-members' ability to express messages of their own choosing, or to express no message if they prefer." SEIU's Br. 35-36. That is a bold argument given that this Court has squarely and repeatedly held the contrary. *Abood* held that "[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests" and "*impinge[s] upon associational freedom.*" 431 U.S. at 222, 225 (emphasis added). The Court accepted the nonmembers' argument that they "fall within the

[2] Nor does this case bear any relationship to cases like *Pickering v. Board of Education*, 391 U.S. 563 (1968). *See* SEIU's Br. 40-41. *Pickering* and its progeny imposed a balancing test so that courts could respect the need for a trade-off between an employee's First Amendment rights and a government employer's obligation to supervise and control its employees. *See Pickering*, 391 U.S. at 568. Here, the Nonmembers do not work for SEIU, nor is SEIU a governmental employer. The state interest leading to a balancing test in the public employee speech cases—the government employer's "interest[ ] as an employer in regulating the speech of its employees," *id.*—is completely absent.

protection" of the freedom-of-association cases "because they have been prohibited, not from actively associating, but rather from refusing to associate." *Id.* at 234. And *Ellis* v. *Railway Clerks* reiterated that the union shop "countenance[s] a significant impingement on First Amendment rights" because "[t]he dissenting employee is forced to support financially an organization with whose principles and demands he may disagree." 466 U.S. 435, 455 (1984). The infringement is particularly acute in the public sector, where the state compels individuals to support the union as their "exclusive representative" to petition the state over certain matters. SEIU's Br. App. 1a-10a; CAL. GOV'T CODE §§ 3513(a), (b), & (k), 3515.5, 3515.7 & 3516. *Abood* and *Ellis* foreclose SEIU's argument that this is not a case of compelled expressive association.

SEIU cites several cases for the contrary proposition. SEIU's Br. 35. But the language SEIU quotes cannot trump this Court's square holdings that compelled-fee cases are about compelled association, *see supra* at 4-5. The cited cases also do not help SEIU.

Rumsfeld v. *FAIR* addressed a law primarily regulating *conduct*; the Court distinguished situations where "the complaining speaker's own message was affected by the speech it was forced to accommodate." 547 U.S. 47, 63 (2006). "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 (1988).

As for *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), and *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), both cited *Abood* as a situation of compelled expressive association. *Johanns*, 544 U.S. at 558; *Glickman*, 521 U.S. at 471. Moreover, *Johanns* concerned government speech,

544 U.S. at 560-61, and *Glickman* involved compelled economic association, which this Court specifically *distinguished* from its union-fee decisions. 521 U.S. at 470 n.14.

3. SEIU next argues that the compelled-fee cases must be read to reject application of strict scrutiny. SEIU's Br. 31-34. But *Abood* and *Hudson* both are best read to apply strict scrutiny, as discussed *supra* at 4-5, and SEIU's contrary contentions are demonstrably incorrect.

First, SEIU claims that under *Abood* and its progeny, "expenditures for core collective-bargaining activities are not subject to *any* constitutional scrutiny." *Id.* at 32 n.15. That is simply not so. *Abood* explained that the "impingement upon associational freedom created by the agency shop" is justified by the "important government interests" in "labor peace" and avoiding "free riders." 431 U.S. at 224-25. Later cases reinforced the point, explaining that the "interference with First Amendment rights" created by forced fees is "justified by the governmental interest in industrial peace." *Ellis*, 466 U.S. at 455-56; *accord Hudson*, 475 U.S. at 309 ("the agency shop itself impinges on the nonunion employees' First Amendment interests"). These holdings foreclose the argument that *some* compulsory union fees are not subject to scrutiny. All are. And while they survive that scrutiny when "carefully tailored" to ensure that objecting nonmembers are not forced to contribute to ideological activities, *Hudson*, 475 U.S. at 303, they fail when not so tailored. That is an application of "constitutional scrutiny," SEIU's Br. 32 n.15, under any definition.

Second, SEIU unconvincingly deems *Hudson*'s citation of numerous strict-scrutiny cases irrelevant

because "*Hudson* nowhere stated that, by citing substantive First Amendment cases, it intended to invoke strict scrutiny." *Id.* at 33 n.17. This Court did not invoke strict scrutiny cases accidentally. Quite the contrary, reliance on them flowed naturally from *Abood* and *Roberts*, which recognized that compelled-fee cases involve compelled association and that the constitutionality of compelled association is measured using strict scrutiny. *See supra* at 4-5.

Third, SEIU asserts that *Hudson* cannot be a strict-scrutiny case because it rejected several requirements that would have been consistent with a least-restrictive-means test and exhibited "deference to legislative judgments" inconsistent with strict scrutiny. SEIU's Br. 33-34. Not so. *Hudson* mandated a procedure, on the facts there presented, to prevent *any* of an objecting nonmember's fees from being used for nonchargeable activities. That procedure and outcome is consistent with strict scrutiny, which is why the Court relied on previous strict-scrutiny cases. And *Hudson*'s supposed "deference to legislative judgments," *id.*, was merely an identification of governmental interest in promoting "labor peace" and avoiding "free riders" that the Court has long recognized as compelling. 475 U.S. at 301 n.8.

Fourth, this case does not address "the 'enhancement' of a group's speech through a viewpoint-neutral state regulation," SEIU's Br. 37-38 (as SEIU inaccurately casts forced-unionism statutes), a government decision to "subsidize the political activities of some organizations but not others," *id.* at 38, or the responsive enhancement of a group's speech with *state* money as in *Arizona Free Enterprise Club's Freedom Club PAC*

v. Bennett, 131 S. Ct. 2806, 2822 (2011).[3] *See* SEIU's Br. 37-38. This case involves an entirely different question: The union's attempt "to acquire and spend *other people's* money," *Davenport v. Washington Education Ass'n*, 551 U.S. 177, 187 (2007), on a political cause they do not support. That is subject to strict scrutiny.

* * *

SEIU's fundamental theme is that strict scrutiny is inapplicable because (i) the fees extracted from the Nonmembers only supported collective bargaining activities and (ii) extractions to support those activities are of no constitutional concern. SEIU's factual premise is incorrect, as we discuss below. Moreover, SEIU conceptually misunderstands how the First Amendment applies in these cases. The cases beginning with *Abood* make clear that *any* forced association triggers exacting scrutiny. The only difference between chargeable and non-chargeable activities is that the Court found that a compelling state interest justifies compelled support of the former, but not the latter. That is why agency-shop procedures must be narrowly tailored to ensure that nonmembers are not forced to contribute to non-chargeable political activities. There was no such tailoring here, as we next explain.

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[3] *Regan v. Taxation With Representation* distinguishes cases in which Congress has subsidized private speech "out of public monies" from those in which an ordinance "regulated First Amendment activity by limiting individuals' expenditures out of their own money on political speech." 461 U.S. 540, 545, 546 n.7 (1983).

II. SEIU'S PROCEDURE CANNOT BE SQUARED WITH *HUDSON* BECAUSE IT ALLOWS THE VERY EVILS *HUDSON* SOUGHT TO PREVENT.

SEIU spills much ink explaining why its special assessment for a "Political Fight-Back Fund" conformed with *Hudson*. SEIU's Br. 9-31. Its arguments miss the forest for the trees. The heart of the matter is this: *Hudson* and its progenitors squarely "prohibit[ ]" compelled contributions for "ideological activities unrelated to collective bargaining," *Abood*, 431 U.S. at 236, yet SEIU's "Political Fight-Back Fund" was a compelled contribution for ideological activities unrelated to collective bargaining. The case is no different than if union officials had approached nonmembers and demanded $20 to support a particular candidate for public office. That is impermissible, regardless of the fungibility of money and whether SEIU's total chargeable percentage for 2005 ended up higher or lower than the year before. SEIU's attempt to elevate *Hudson*'s facts above its logic should be rejected.

1. SEIU relies heavily on the observation in *Hudson* that "'absolute precision' in the calculation of the charge . . . cannot be 'expected or required,'" and that accordingly unions can, in the normal course, calculate the compelled fee based on "'expenses during the preceding year.'" SEIU's Br. 12 (quoting *Hudson*, 475 U.S. at 307 n.18). Those principles justify SEIU's course here, it says, because SEIU's overall chargeable spending percentage increased during 2005-06, such that objecting nonmembers "in fact paid *less* than their proportionate share of . . . chargeable expenses during the relevant time period." SEIU's Br. 15. SEIU thus asserts that the "theoretical possibility"

that a union could comply with *Hudson*'s requirements and "nonetheless compel nonmembers to subsidize its political activities through an 'involuntary loan' is not presented by the facts of this case." *Id.* at 10.

We pause to emphasize just how far this argument strays from common sense. This case involves a "Political Fight-Back Fund" imposed to "defeat Propositions 76 and 75," "elect a governor and legislature who support public employees," and fund "a broad range of political expenses, including television and radio advertising" and "get out the vote activities." Pet. App. A 6a, 28a. SEIU enacted a special assessment and collected it from the Nonmembers for the stated purpose of funding that political endeavor. And yet SEIU now implausibly argues that it did not "compel nonmembers to subsidize its political activities." SEIU's Br. 10.

That argument is risible. More importantly, it misses *Hudson*'s point. *Hudson*'s animating principle is that nonmembers "have a constitutional right to 'prevent the Union's spending a part of their required service fees to . . . express political views unrelated to its duties as exclusive bargaining representative.'" 475 U.S. at 301-02 (quoting *Abood*, 431 U.S. at 234). *Hudson*'s objective was to "avoid the risk that [nonmembers'] funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." *Id.* at 305 (quoting *Abood*, 431 U.S. at 244).

Hudson accepted the practical reality that a union may calculate its compulsory fee for an upcoming year based on "expenses during the preceding year." *Id.* at 307 n.18. That simply reflects that fact that, usually, the best the union can do is to extrapolate from the prior year's spending. *Id.* It does not

absolve the union from taking further protective steps where—as here—it imposes a new assessment that *will, in fact, force nonmembers to contribute to nonchargeable political activities.* In that circumstance, SEIU must do more. If it does not, it commits the constitutional violation lying at *Hudson*'s core. And it fails to engage in the "careful tailoring" *Hudson* requires.

That SEIU's overall non-chargeable spending percentage for the year happened to end up lower, SEIU's Br. 12-15, changes nothing. The fact remains that with respect to *this assessment* (that lacked *Hudson* protections) SEIU knew and stated that the spending would be political, and yet it still extracted that money from the Nonmembers. That cannot be squared with *Hudson*.

2. Money is sometimes fungible, as SEIU emphasizes. SEIU's Br. 21-25. That does not help its case. The precedents SEIU cites explain that a union cannot solve the forced-association problem by collecting full union dues from objectors and segregating that money so that it is used only for collective bargaining, while non-objectors' dues are used for political activities. *See*, *e.g.*, *Abood*, 431 U.S. at 238 n.35. That segregation is unacceptable, the Court said, because more of member dues will be available for non-chargeable activities than they would be otherwise, with the effect that "the nonmember subsidizes the union's institutional activities." *Id.* (citation omitted). This is consistent with *Hudson*: it offers yet another protection to ensure that objecting nonmembers' money cannot be used for non-germane political causes, even indirectly.

That principle is hardly honored by holding—as SEIU would—that objectors can be forced to contribute to a fund *explicitly created to pay for political activity*, on the theory that money is fungible. In that circumstance, the objecting nonmember is being forced to contribute earnings directly to a disagreeable political cause. There is no need even to reach the fungibility question to determine that the nonmember is being compelled "'to furnish contributions of money for the propagation of opinions which he disbelieves.'" *Hudson*, 475 U.S. at 305 n.15 (quoting I. Brant, cited *supra* at 2).

Most of the funds SEIU collected during the special assessment went directly to nonchargeable political activity, as SEIU concedes. SEIU's Br. 4. The constitutional harm created by that forced exaction cannot be remedied *ex post*. *Hudson* recognized that the First Amendment requires not *ex post* remedies, but *ex ante* prophylaxis, rules designed to eliminate the risk that someone's hard-earned dollars would be taken for disagreeable political activity.

3. SEIU denies that it implemented the special assessment "solely" to fund political activities. SEIU's Br. 3-4 & n.4, 10, 25 n.12, 29. That contention does not withstand scrutiny. SEIU named its new fee an "Emergency Temporary Assessment to Build a Political Fight-Back Fund" and said it would be used for "a broad range of political expenses." *Supra* at 12-13. Although SEIU clings to the Ninth Circuit majority's statement that SEIU planned to "split the increase 'between political actions and collective bargaining actions,'" SEIU's Br. 29 (quoting Pet. App. A 6a), the dissenting opinion correctly recognized that the majority mischaracterized the record.

In fact, the letter to which the majority referred "does not state that the *fee increase* would be split between political and collective bargaining activities." It merely indicates that the yearlong political campaign as a whole would have non-political components. Pet. App. A 39a n.2 (Wallace, J., dissenting). Moreover, the agenda for the meeting to approve the fee stated that "[t]he funds from this emergency temporary assessment will be used specifically in the political arenas of California." *Id.* at 27a. SEIU consistently represented that it would spend its new fee on political advocacy—wholly non-chargeable advocacy, as we explain *infra* at 12-13.

4. SEIU repeatedly asserts that the Nonmembers seek a "substitute for the *Hudson* procedures." SEIU's Br. 11, 25. But that formulation assumes that *Hudson* developed one set of procedures invariably, universally, and perpetually sufficient, no matter the facts.

That assumption finds no support in *Hudson*. Rather, the question presented was whether the procedures the union used in that case were "constitutionally sufficient" to "minimize the infringement" created by the agency shop. 475 U.S. at 303-04. The Court concluded that "an adequate explanation of the basis for the fee," "a reasonably prompt opportunity to challenge the amount of the fee," and "an escrow for the amounts reasonably in dispute" were the minimum necessary procedures. *Id.* at 310. But the Court also considered whether other sorts of tailoring—for example, a 100% escrow—might be necessary and decided that they were not "[*o*]*n the record before us*." *Id.* (emphasis added). That suggests that on a different record, different procedures might be required to "minimize the infringement," *id.* at 303.

This is such a case. SEIU's procedures abjectly failed to provide "an adequate explanation of the basis" for the special assessment. *Id.* at 310. And they failed, most importantly, to "minimize the risk that nonunion employees' contributions might be used for impermissible purposes." *Id.* at 309. The result was a forced loan for SEIU's political activities—exactly what *Hudson* forbids.

5. Finally, SEIU disparages the Nonmembers' proposed rule as "subjective," requiring "predictions" about chargeable percentages. SEIU's Br. 25-28. SEIU misunderstands the proposed rule. The union would not have to guess the percentage of its fee increase to be dedicated to non-chargeable activities. Instead, the union would be foreclosed from collecting *any* of the mid-year increase from (i) already-objecting nonmembers and (ii) nonmembers who had not objected to the most recent *Hudson* notice but who object on being informed of the mid-year increase. *See supra* at 3; Pet. Br. 11.

That practical rule makes good sense because nothing less provides what *Hudson* demands: careful protection against "'the risk that dissenters' funds may be used temporarily for an improper purpose.'" 475 U.S. at 305 (quoting *Abood*, 431 U.S. at 244). After all, a mid-year fee increase is a new financial obligation unanticipated by the previous *Hudson* notice. Under *Hudson*, its imposition triggers the same need for disclosure as for the pre-existing financial obligation. If a union cannot make that disclosure, then the least restrictive means of protecting nonmembers' constitutional rights is to bar collection of the new obligation from objecting nonmembers until that information is available.

This rule would not, contrary to SEIU's lament (Br. 29), burden unions in their collection of compelled fees. Unions should infrequently need to impose mid-year fee increases anyway. SEIU and its *amici* provide no evidence that such increases are often used or essential. In those instances when a union does levy a mid-year exaction, the proposed rule merely means it could not collect the increase—a modest sum in most cases—from objecting nonmembers until the next *Hudson* notice. That such a small impediment would cause a union hardship is highly unlikely. If it did, the union would have multiple options—solicitation of voluntary donations; a short-term loan; a request to its international affiliate to "bring to bear its often considerable . . . resources," *Lehnert*, 500 U.S. at 523—that could provide the funds without simultaneously risking widespread infringement of nonmembers' associational rights.

As for the Nonmembers' narrower alternative rule—that a union cannot collect a mid-year fee increase from objecting nonmembers where its stated intent is political advocacy, *see supra* at 3—SEIU objects that a union could "easily evade[ ]" it by "making different statements or remaining silent." SEIU's Br. 25 n.12. Perhaps. But the Nonmembers would hope unions would be more forthright about the reasons for a mid-year fee increase—after all, they have to sell it to their members. Indeed, large unions follow quasi-legislative processes to adopt rule changes. That would render it difficult for them to hide under a veil of silence or misrepresentation.

In any event, that a union theoretically could "evade[ ]" the Nonmembers' proposed rule does not change the fact that *here*, SEIU was quite forthright: it announced that it was enacting a "Political Fight-Back Fund" to spend on "'political expenses.'" Pet.

App. A 6a. It should be held to its word, and required to ensure that such electioneering funds do not come out of objecting nonmembers' pockets.

III. REVERSAL ON THE SECOND QUESTION PRESENTED IS APPROPRIATE.

This Court should reach the chargeability question and hold that SEIU's political spending was not chargeable to objecting nonmembers.

A. The Issue Is Properly Presented.

1. Issues are properly presented when they are "discussed in the courts below," raised "in [the] petition for certiorari," and substantively addressed in the merits briefing. *Snyder* v. *Phelps*, 131 S. Ct. 1207, 1214 n.1 (2011). The chargeability question fully satisfies these criteria. The Complaint stated a free-speech claim contesting SEIU's "spen[ding] on ballot propositions and other political and nonbargaining activities." Joint Appendix 20-23. The Nonmembers' "chief argument" below, as the Ninth Circuit majority recognized, was "*premised upon the alleged non-chargeability of the increase* (its *purely* political nature)." Pet. App. A 13a n.4 (first emphasis added). The majority squarely ruled on chargeability, holding that SEIU's expenditures to campaign against Proposition 76 were "not purely non-chargeable." *Id.* at 39a-40a n.2.[4] The dissent also reached the issue, finding SEIU's "challenge to [Proposition 76] . . . too

[4] That is neither "suggest[ion]" nor "passing footnote," contrary to SEIU's claim (Br. 43); it is an explicit conclusion of law. And it was necessary to the opinion because the majority relied on it to reject the Nonmembers' "chief argument," Pet. App. A 13a n.4: that when a union imposes an assessment for political purposes providing no opportunity to object, *Hudson*'s core prohibition is violated.

attenuated to [its] collective bargaining agreement to be considered a chargeable expense." *Id.* at 43a n.4 (Wallace, J., dissenting). Finally, the Nonmembers included chargeability in their certiorari petition as a Question Presented for review, Pet. i, and the Court granted certiorari on both questions over SEIU's objection. *See* Br. Opp. 19-20. The question is properly presented.

2. SEIU argues that this Court cannot reach the chargeability question because the Nonmembers did not pursue a separate "*Lehnert* challenge," in addition to their "*Hudson* challenge." SEIU's Br. 43-46. SEIU argues, in other words, that this Court cannot rule on chargeability unless a plaintiff presses an entirely separate "'chargeability' claim" throughout a case. *Id.* at 44. To support that argument, SEIU asserts that the Nonmembers affirmatively waived any chargeability claim by stating, for example, that "[t]his case . . . is *solely* about whether Defendants have complied with *Hudson*." *Id*.

SEIU misunderstands the nature of a *Hudson* challenge. *Hudson* is not simply about adequate notice. It is about the principle that unions *cannot force nonmembers to subsidize a union's ideological activities*. *See* 475 U.S. at 303-05. That is why the Nonmembers advanced chargeability arguments to support their *Hudson* challenge, and why the court below necessarily addressed those arguments. The issues are inextricably intertwined. That makes chargeability a "necessary predicate to a correct evaluation of [the Nonmembers'] federal claim." *Employment Div.* v. *Smith*, 485 U.S. 660, 672 (1988).

Indeed, *Hudson*'s progeny make clear that the distinction SEIU posits is no barrier to this Court's review. In *Locke* v. *Karass*, 555 U.S. 207 (2009), for

example, the complaint contained a single count advancing a *Hudson* challenge. *See* Complaint ¶ 40, *Locke* v. *Karass*, 2005 WL 2864196 (D. Me. 2005). Yet the plaintiffs also challenged the union's chargeability decisions as part of that claim, *see Locke* v. *Karass*, 498 F.3d 49, 66 (1st Cir. 2007), and both the court of appeals and this Court reached and decided the chargeability issue. *See id.*; *Locke*, 555 U.S. at 212, 221. The situation here is no different. SEIU's distinction between "notice challenges" and "chargeability challenges" is illusory.

That explains the Nonmembers' statements below now trumpeted by SEIU—in misleadingly excerpted form—as evidence of "waive[r]." SEIU's Br. 44. SEIU says, for example, that the Nonmembers told the district court that "[t]his case . . . is *solely* about whether Defendants have complied with *Hudson*." *Id.* What the Nonmembers actually said is: "This case . . . is solely about whether Defendants have complied with *Hudson in seizing the increase in dues and fees which has been earmarked primarily for political and other nonbargaining activities*." Docket No. 45 at 6 (emphasis added). SEIU conveniently omits the emphasized words, failing to include an ellipsis showing their omission. SEIU's Br. 44. The full statement demonstrates—as does the rest of the record—that the Nonmembers have always contested the chargeability of the special assessment as part of their lawsuit.

3. SEIU separately argues that the Nonmembers' chargeability argument "is particularly inappropriate as to nonobjectors" because they never opposed being charged for SEIU's political expenses. *Id.* at 45. This argument is doubly flawed. First, it again fails to recognize that the chargeability argument is, and

always has been, intertwined with the *Hudson* argument. Second, it ignores that the Nonmembers were left "in the dark about the source of the figure for the" special assessment, *Hudson*, 475 U.S. at 306, not informed that it would be used to oppose a ballot initiative, and not given the opportunity to object to its exaction because SEIU failed to provide them with the required *Hudson* notice.

For all of these reasons, the Court should decide the second Question Presented.

B. The Ninth Circuit's Chargeability Holding Should Be Reversed.

SEIU's contentions on the merits are equally unconvincing. It argues that expenditures to fight Proposition 76 were chargeable because they "related directly to the 'implementation of [the] collective-bargaining agreement.'" SEIU's Br. 49 (quoting *Lehnert*, 500 U.S. at 527). But as SEIU admits (Br. 50 n.25), Proposition 76 merely would have given the governor authority to reduce state spending across the board. SEIU's political expenditures fail all of *Lehnert*'s tests.

As to *Lehnert*'s first prong, the Court plurality explained that an activity must be "oriented toward *the ratification or implementation* of [the] collective-bargaining agreement" to be chargeable. 500 U.S. at 527 (emphasis added). It accordingly rejected attempts to charge nonmember public education employees for political activities to obtain "financial support of [their] profession," specifically, "funds for public education." *Id.* at 520, 527. But that is what SEIU wants here. Political action opposing an initiative that would give a governor authority to cut state funding from which state employees might be paid is,

precisely, political action favoring "financial support of the [state employees'] profession." *Id.* at 520. It is "too attenuated" from SEIU's "function as bargaining representative" to be chargeable. *Id.* Application of Justice Scalia's "statutory duties" test, *id.* at 558, yields the same result. SEIU has no statutory *duty* to campaign against gubernatorial authority to cut funding for state employees, even if it enjoys statutory *authorization* to do so. The statutes SEIU cites (Br. 51) are not to the contrary. Only one mentions anything remotely relevant, providing that the portion of union dues "subject to refund" to an objecting nonmember "shall not reflect . . . the costs of support of lobbying activities designed to foster . . . collective negotiations and contract administration." CAL. GOV'T CODE § 3515.8. This merely offers the state legislature's perspective on what counts as a non-chargeable expense, an issue on which this Court has the final say. *See Abood*, 431 U.S. at 232.

No matter which screening test is applied, SEIU's spending fails *Lehnert*'s second prong because it cannot be "justified by the government's vital policy interest in labor peace and avoiding 'free riders.'" 500 U.S. at 519. SEIU argues that "labor peace" is implicated here because "authorizing the Governor to abrogate labor agreements could lead to labor unrest among the state's workforce." SEIU's Br. 51. That utterly misconstrues this Court's "labor peace" rationale, which means "free[ing] the employer from the possibility of facing conflicting demands from different unions." *Abood*, 431 U.S. at 221. The Court certainly has never said the government can overbear nonmembers' rights based on some vague concern about "labor unrest among the . . . workforce." SEIU's Br. 51. If the "labor peace" rationale were so broad, then nonmembers could be forced to support union

opposition to any proposed law that could upset union officials. Chargeable expenditures would have no limit. That is not, and cannot possibly be, the law.

Likewise, SEIU's spending fails *Lehnert*'s third prong because it "significantly add[s] to the burdening of free speech . . . inherent in the agency shop." 500 U.S. at 519. Proposition 76, while it may have had incidental effect on SEIU's bargaining agreements, proposed a law of *general* application, a "monetary and other policy choice[ ]" with "ramifications that extend into diverse aspects of an employee's life." *Id.* at 521 (plurality opinion). SEIU's exaction thus compelled Nonmembers' speech "in a public forum" and on "the discussion of governmental affairs, which is at the core of our First Amendment freedoms." *Id.* at 522, 529. That sort of burden "extends far beyond the acceptance of the agency shop and is constitutionally impermissible." *Id.*

CONCLUSION

This Court should reverse the judgment below on both Questions Presented.

Respectfully submitted,

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