

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 AMERICAN FEDERATION
OF LABOR AND CONGRESS OF INDUSTRIAL
ORGANIZATIONS AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENT**

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**BRIEF OF THE AMERICAN FEDERATION OF
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INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 57 national and international labor organizations with a total membership of approximately 12.2 million working men and women.¹ This case concerns the constitutional requirements for a union's collection of agency fees pursuant to a union security clause in a collective bargaining agreement with a public employer. The AFL-CIO has numerous affiliates that represent public employees and, where allowed by state law, it is common for these affiliates to negotiate contract clauses requiring all represented employees to share the costs of collective bargaining by paying an agency fee based on the amount of regular membership dues.

STATEMENT

In accord with this Court's decision in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), Service Employees International Union Local 1000 annually sends all nonmembers covered by the union's agency shop clause a notice explaining their right to object to paying the portion of agency fees going for activities that are not germane to collective bargaining.² Local 1000 sent such a *Hudson* notice in June 2005, explaining that the

¹ Counsel for the petitioners and counsel for the respondent have each consented to the filing of this *amicus* brief. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

² *Hudson* held that "the constitutional requirements for the Union's collection of agency fees include an adequate explanation of

agency fee for the period July 1, 2005 through June 30, 2006 would be “no more than 99.1% of regular membership dues,” JA 98, and that objecting nonmembers would be charged “no more than 56.35% of regular membership dues,” JA 102. The reduced fee charged to objecting nonmembers was based on an audit of Local 1000’s expenditures during its most recent fiscal year ending December 31, 2004, which was included in the *Hudson* notice. JA 107.

The June 2005 *Hudson* notice explained that Local 1000’s “[r]egular monthly membership dues are currently 1.0% of monthly gross salary and are presently capped at a maximum of \$45 per month” but that “[d]ues are subject to change without further notice to fee payers.” JA 98. Thereafter, Local 1000 did “increase[] the regular membership dues in an amount equal to .0025 (two and one-half tenths of one percent) of gross wages.” JA 31.³ While Local 1000 characterized this as “a temporary dues increase” that would apply “during the pay periods between September 1, 2005 and December 31, 2006,” JA 31, the Local 1000 dues in fact increased further in 2007 to “1.5% of monthly gross salary,” “capped at a maximum of \$90 per month,” JA 219.

Local 1000 did not issue a second *Hudson* notice at the time of the September 2005 dues increase. Rather, as the union’s first *Hudson* notice contemplated, the union simply charged those nonmembers who had objected in

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.” *Id.* at 310.

³ “The \$45 per month cap on [the] regular dues of 1% of gross . . . continue[d] in effect, but [did] not apply to th[e] additional .0025 temporary increase.” JA 31.

response to the June 2005 notice an agency fee equal to 56.35% of the increased dues amount and charged those nonmembers who had not objected an agency fee equal to 99.1% of the increased dues amount. Local 1000's June 2006 *Hudson* notice did reflect the increased dues amount, and the fee reduction for objectors during the July 2006 – June 2007 period covered by that notice was based on all of the union's expenditures during the fiscal year ending in December 2005, including the expenditures of funds generated by the September 2005 increase in dues. JA 154, 165-66, 190.

Characterizing the September 2005 dues increase as “a special assessment for opposition to ballot initiatives,” the petitioners maintain that the Ninth Circuit “erred in holding that SEIU’s June 2005 *Hudson* notice covering ordinary dues collections sufficed to cover the special political assessment commencing in September 2005.” Pet. Br. 20.⁴ Because “[t]he June 2005 notice only concerned regular dues and fees,” the petitioners assert that “[i]t gave no notice concerning the later political assessment, much less an opportunity to make an informed objection to paying that assessment.” *Ibid.*

SUMMARY OF ARGUMENT

The petitioners’ brief addresses the question whether a union that has negotiated an agency fee agreement with a public employer and has already provided a *Hudson* notice informing agency fee payers of their right to object to paying the full agency fee and of the amount that will be charged objectors during the coming year may “condi-

⁴ In characterizing the September 2005 increase as “a special assessment,” the petitioners rely solely on an internal union communication describing the increase as a “temporary assessment,” JA 25, however, the union’s statements to its members and to the fee payers accurately described it as a “dues increase,” JA 28 & 31.

tion employment on the payment of a special assessment intended solely for political purposes . . . without first providing [an additional] *Hudson* notice that includes information about that assessment and provides an opportunity to opt out of supporting those political exactions?” Pet. Br. i. That question is not presented by this case, because what the petitioners characterize as “a special assessment” was, in fact, nothing more than an across-the-board increase in the regular membership dues.⁵

ARGUMENT

The legal question the petitioners pose to this Court is whether “[t]he [annual notice] procedure *Hudson* approved for regular dues and fees” is sufficient “when the union levies a special assessment to fund a particular political campaign” that had not been forecast and accounted for in its annual notice. Pet. Br. 22-23. The petitioners argue that the answer to this legal question is “no,” because such special “[a]ssessments’ are, by definition, distinguishable from union dues,” *id.* at 22 n. 7, in a way that is material to a union’s notice obligations under *Hudson*.

The factual predicate for the petitioners’ legal argument is that “SEIU did not impose a permanent, across-the-board increase in dues and fees for general purposes” in September 2005 but, “[i]nstead, . . . imposed a special assessment for specific purposes, for a limited time, and not for general union functions.” Pet. Br. 22. The petitioners have not established the factual predicate for making their legal argument. What the record shows is that the September 2005 increase was an across-the-board increase in regular membership dues and not a spe-

⁵ The second question posed by the petitioners is not even arguably presented by this case. *See* Resp. Br. 43-46.

cial assessment. Thus, the legal question posed by the petition for certiorari is not presented by this case.

1. The petitioners are correct that special “[a]ssessments’ are, by definition, distinguishable from union dues.” Pet. Br. 22 n. 7.⁶ The generally accepted definitions of these terms are as follows:

“In labor parlance it is generally recognized that dues contemplate regular, periodic and recurring payments imposed as part of the privilege of belonging to a Union. Assessments, on the other hand, are not collected as regular or continuing payments, but only when special circumstances give rise to the need for extra money. An assessment may also be defined as a charge levied by the Union on each of its members for a special purpose not covered by regular dues.” *Bemis Bros. Bag Co.*, 14 Lab. Arb. Rep. (BNA) 685, 687 (1950)(Lindquist, Arb.).⁷

⁶ For example, the Labor Management Reporting and Disclosure Act governing private sector unions distinguishes between “regular dues or fees or other periodic payments required to remain a member,” 29 U.S.C. § 431(a)(4), and the “levying of assessments,” 29 U.S.C. § 431(a)(5)(B). And, with respect to the “levying of assessments,” *ibid.*, that statute specifically takes account of both “general . . . assessment[s]” and “special assessment[s].” 29 U.S.C. § 411(a)(3).

⁷ *Accord NLRB v. Food Fair Stores, Inc.*, 307 F.2d 3, 11 (3d Cir. 1962) (“It is clear that the term ‘periodic dues’ in the usual and ordinary sense means the regular payments imposed for the benefits to be derived from membership to be made at fixed intervals for the maintenance of the organization. An assessment, on the other hand, is a charge levied on each member in the nature of a tax or some other burden for a special purpose, not having the character of being susceptible of anticipation as a regularly recurring obligation as in the case of ‘periodic dues.’”); *Pacific Northwest Newspaper Guild v. NLRB*, 877 F.2d 998, 1000 (D.C. Cir. 1989) (same).

The petitioners' argument that "[t]he procedure *Hudson* approved for regular dues and fees" does not provide adequate protection for objectors "when the union levies a special assessment to fund a particular political campaign," rests on the general understanding that "a special assessment" is a charge levied "for a limited time" to fulfill "specific purposes" that are not among "general union functions." Pet. Br. 22-23. In each of these three respects, the September 2005 increase represented an increase in "regular dues" and not a "special assessment." Thus, the petitioners' argument that special assessments require a different "procedure [than the one] *Hudson* approved for regular dues and fees" is irrelevant to this case.

First, the September 2005 increase undeniably "contemplate[d] regular, periodic and recurring payments." *Bemis Bros. Bag*, 14 Lab. Arb. Rep. at 687. What Local 1000 did – and the only thing the union did – was to change the amount of "[r]egular monthly membership dues" from "1% of monthly gross salary," JA 98, to 1.25% of monthly gross salary. The September 2005 increase did not take the form of "a charge levied" on the employees on a one-time basis but rather imposed "a regularly recur-

⁸ We would emphasize that, while establishing that the September 2005 increase had the nature of a special assessment is a necessary condition for the plaintiffs to advance their legal claim regarding the necessity for a second *Hudson* notice, it is not a sufficient condition to establish the validity of that claim. In *Machinists v. Street*, 367 U.S. 740 (1961), the Court noted that many rail unions "had only nominal dues" and imposed "assessments" to finance particular "activities" that could "vary month by month," *id.* at 766, yet the Court suggested that the amounts charged to objecting nonmembers be reduced by "the proportion of the union's *total* expenditures made for [objectionable] political activities to the union's *total* budget," *id.* at 775 (emphasis added). In other words, even in the setting where true special assessments were common, the Court clearly indicated that the special assessments did not need to be treated on a one-by-one basis in calculating the amount to be paid by objecting nonmembers.

ring obligation.” *Food Fair Stores*, 307 F.2d at 11. It is true that the increase was initially described as “temporary,” but the contemplated period of the “temporary” increase encompassed 16 months – from September 1, 2005 through December 31, 2006, JA 31 – long enough to establish the increased dues amount as “a regularly recurring obligation.” *Food Fair Stores*, 307 F.2d at 11. Moreover, the increase proved to be anything but “temporary,” as Local 1000 further increased the amount of regular dues to 1.5% of gross monthly salary in 2007. JA 219.

Second, the increase was *not* “a charge levied . . . for a special purpose,” *Bemis Bros. Bag*, 14 Lab. Arb. Rep. at 687, in the sense of being reserved for a specified purpose. Thus, Local 1000’s Chief Financial Officer testified that the income from the dues increase was *not* placed in “a special segregated fund.” JA 303. This undisputed testimony refutes the assertion by the dissent below that the increase went into “a special purpose fund.” Pet. App. 39a. While the proposal to increase dues did justify that action on the grounds that the increased revenues would be used for “a broad range of political expenses” and not “for the regular costs of the union,” JA 26, the resolution increasing dues did not bind the union with respect to the use of the additional income. And, the record evidence shows that the increased revenues were placed in the general fund and were used like other revenues placed in that fund to cover the full range of typical union activities. JA 165-66, 190, 230-32, 258-59.

Finally, the need advanced to justify the increase did *not* indicate “a special purpose” of a sort that was “not covered by ordinary dues.” *Bemis Bros. Bag*, 14 Lab. Arb. Rep. at 687. The dues proposal justified the increase as necessary to oppose a number of initiatives advanced by the Governor that Local 1000 believed would adversely affect the employment interests of the employees the union represents. JA 26. As the annual *Hudson* notices stated, Local 1000 rou-

tinely “[i]ntroduced, [s]upported and [o]pposed [l]egislation” that affected the interests of represented employees. JA 122. Thus, even if the extra revenue generated by the September 2005 dues increase had been devoted solely to fighting the initiatives – an extremely unlikely proposition, since the revenue from the increase would not begin arriving until October 2005 and the initiatives were on the ballot in early November 2005 – the net effect would have been to free the portion of “ordinary dues” that would have been otherwise spent on the initiatives for other uses. In other words, reserving the increased revenues for the initiative campaigns would have been a matter “of bookkeeping significance only rather than a matter of real substance.” *Retail Clerks v. Schermerhorn*, 373 U.S. 746, 753 (1963).

The petitioners do not deny that in each of these three respects the record evidence shows that, as implemented, the September 2005 increase was, in fact, an “across-the-board increase in dues and fees for general purposes” and not “a special assessment for specific purposes.” Pet. Br. 22. Rather, the petitioners depend entirely on the characterization of the increase contained in the proposal submitted by the Local 1000 Special Defense Budget Committee to the Local 1000 Council, which had to vote to approve the dues increase.⁹ Citing John Rawls’ concept of a “veil of ignorance” – which they seem to misunderstand – the petitioners assert that it is necessary “to

⁹ The Budget Committee’s proposal to the Council did misdescribe the increase as an “emergency temporary assessment to build a political fight-back fund.” JA 25 (capitalized in original). As nonmembers, the petitioners were not represented on the Council. See *Pattern Makers v. NLRB*, 473 U.S. 95, 108 n. 18 (1985) (“By resigning [union membership], the worker surrenders his right to vote for union officials, . . . and even to participate in determining the amount or use of dues he may be forced to pay under a union security clause.”). Thus, their claim is not that the Budget Committee misrepresented the dues increase to the Council but rather that the Budget Committee’s mischaracterization of the dues increase as an “assessment” is binding on Local 1000.

take the union at its word as to the purpose [of the] assessment.” Pet. Br. 22 n. 8. But, on that theory, the increase should be treated as “a temporary dues increase,” since that is how the union itself described the increase to the fee payers. JA 31. In any event, the petitioners cannot really mean that the union’s prior description of its expected actions substitutes for evidence of what the union actually did.

2. The correct characterization of the 2005 increase is not merely a matter of semantics. The difference between special assessments and periodic dues goes to the essence of the petitioners’ legal argument that “a special union assessment intended *solely* for political purposes” requires “a [separate] *Hudson* notice that includes information about *that* assessment and provides an opportunity to opt out of supporting *those* political exactions.” Pet. Br. i (emphasis added).

Precisely because the income from the 2005 increase was *not* set aside “solely for political purposes,” Local 1000 did not have any particular “information about [the future use of] that assessment” at the time of the increase. Pet. Br. i. Thus, the most that Local 1000 could have done would have been to reissue its June 2005 *Hudson* notice in September 2005, changing the statement that “[r]egular membership dues are currently 1.0% of monthly gross salary” to “[r]egular membership dues are currently 1.[25]% of monthly gross salary.” JA 98. However, the June 2005 notice had forecast the possibility of such a change in the amount of dues by carefully explaining that, while the dues were “*currently* 1.0% of monthly gross salary,” they “are subject to change without further notice to fee payers.” JA 98 (emphasis added).

Against that background, a second notice in September 2005 would have done nothing to “prevent[] compulsory subsidization of ideological activity by employees who

object thereto.” *Hudson*, 475 U.S. at 302, quoting *Abood v. Detroit Board of Education*, 431 U.S. 209, 237 (1977). On the other hand, requiring the issuance of a second notice would have “restrict[ed] the Union’s ability to require every employee to contribute to the cost of collective-bargaining activities.” *Ibid.* This is so, because requiring the issuance of a second notice and the processing of a second round of objections would have imposed a substantial “additional burden . . . on the union,” increasing the “administrative” expenses associated with requiring all employees to share the cost of collective bargaining. *Ellis v. Railway Clerks*, 466 U.S. 435, 444 (1984).

The *Hudson* opinion carefully delineated the “constitutional requirements for the Union’s collection of agency fees,” 475 U.S. at 310, in a manner that “does not impose an undue burden on the union,” *id.* at 306 n. 17. Thus, in setting the procedural requirements, the *Hudson* Court held: i) that “[t]he Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures,” *id.* at 307 n. 18; ii) that “a full-dress administrative hearing, with evidentiary safeguards,” is *not* required to review the union’s fee calculation, *id.* at 308 n. 21; and iii) that “a 100% escrow” of objectors’ fees is *not* required during the period before calculation disputes are resolved, *id.* at 310. Each of those measures would undoubtedly have advanced the interest of objecting fee payers to some degree, but each was rejected on the ground that the additional benefit to the objecting fee payers was outweighed by the additional cost to the union. Requiring Local 1000 to send out a second *Hudson* notice after the September 2005 dues increase would likewise “impose an undue burden on the union.” *Id.* at 306 n. 17.

In sum, the September 2005 increase was, in fact, an “across-the-board increase in dues and fees for general

purposes” and not “a special assessment for specific purposes.” Pet. Br. 22. That being so, the question of whether “[t]he procedure *Hudson* approved for regular dues and fees” is sufficient “when the union levies a special assessment to fund a particular political campaign,” *id.* at 22-23, is not presented by this case.

CONCLUSION

The Court should affirm the decision of the Ninth Circuit or dismiss the writ of certiorari as improvidently granted.

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