

# *KNOX V. SERVICE EMPLOYEES INTERNATIONAL UNION: BALANCING THE FIRST AMENDMENT WITH FAIRNESS UNDER UNION-SHOP AGREEMENTS*

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## I. INTRODUCTION

Imagine that your employer, without notice, garnished your wages to pay for a political campaign that you did not support. What if, when you voiced your objection, your employer told you there was nothing you could do about it because the political cause was desperate for funding?

Many Americans would immediately recognize this scenario as an infringement of their First Amendment rights. The First Amendment's protection encompasses not only freedom of speech, but also other forms of expression, including freedom of implied speech and the freedom to make political contributions.<sup>1</sup> It ensures that speech-related regulations are seldom allowed, and when they are, that they must be minimally restrictive.<sup>2</sup> The First Amendment thus balances individual and state interests—and weighs that balance heavily in favor of individual rights.

*Knox v. Service Employees International Union*<sup>3</sup> presents the question of what procedure is constitutionally required to protect First Amendment interests when a union decides to implement a

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1. *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 233 (1977).

2. *Brown v. Kingsley Books, Inc.*, 1 N.Y.2d 177, 181 (1956), *aff'd*, 354 U.S. 436 (1957) (stating that restrictions on speech “must find justification in some overriding public interest, and that restricting legislation must be narrowly drawn to meet an evil which the state has a substantial interest in correcting”).

3. *Knox v. SEIU*, No. 10-1121 (U.S. argued Jan. 10, 2012).

midyear temporary assessment—especially when it intends to use the proceeds for political purposes.<sup>4</sup> In *Chicago Teachers Union, Local No. 1 v. Hudson*,<sup>5</sup> the Supreme Court laid out the procedures that public-sector labor unions are constitutionally required to follow when collecting annual service fees from employees who are not members of the union—“nonmembers.”<sup>6</sup> Before collecting these fees, unions must now issue a *Hudson* notice containing certain information about the amount and purpose of the fees.<sup>7</sup>

In *Knox*, the Supreme Court must decide how to balance First Amendment and union interests in light of the procedures already required under *Hudson*. The Court will clarify what procedures unions must follow when raising additional funds mid-year, especially if those funds are to be used for ideological expenditures. Additionally, the outcome of *Knox* may have the practical effect of eliminating the ability of public-sector unions to finance their political activities through midyear assessments. This commentary will discuss the facts of *Knox*, the legal doctrines involved, the lower courts’ decisions, and the likely outcome in the Supreme Court. The discussion will focus on public-sector unions.<sup>8</sup>

## II. FACTS

The State of California recognizes the Service Employees International Union (SEIU) as the exclusive bargaining agent for state employees.<sup>9</sup> California and the SEIU have entered into several Memoranda of Understanding establishing the terms and conditions of employment for the Petitioners and other state employees.<sup>10</sup> One such condition is that all state employees in specified bargaining units—which include the *Knox* Petitioners—must either join the SEIU as formal members or have agency fees deducted from their pay.<sup>11</sup>

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4. *Knox v. SEIU*, 628 F.3d 1115, 1120 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3061 (U.S. June 27, 2011) (No. 10-1121).

5. 475 U.S. 292 (1986).

6. *Id.* at 310.

7. *Id.* at 306.

8. This article does not address labor unions representing only private-sector employees. The word “union” will refer to public-sector unions only.

9. *Knox v. Westly*, 2008 WL 850128, at \*1 (E.D. Cal. Mar. 28, 2008), *rev’d sub nom.* *Knox v. SEIU*, 628 F.3d 1115, 1120 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3061 (U.S. June 27, 2011) (No. 10-1121).

10. *Id.*

11. *Id.*

The SEIU determines how much it will charge nonmembers in agency fees by using a calculation called the “prior-year method.”<sup>12</sup> The SEIU first analyzes its audited expenditures from the prior year and determines whether they are “chargeable” or “nonchargeable.”<sup>13</sup> Chargeable expenses are those reasonably made to fulfill the union’s duties as the exclusive bargaining representative, and nonmembers must contribute to those expenses.<sup>14</sup> Conversely, nonmembers cannot be required to pay nonchargeable expenses, including expenditures made in support of ideological or political activities.<sup>15</sup>

Once the categories of expenditures are determined, the SEIU determines the amount that it will charge nonmembers.<sup>16</sup> The SEIU may initially charge nonmembers for any expenditures it made the previous year, chargeable or not.<sup>17</sup> If a nonmember subsequently objects to paying nonchargeable expenses, however, the SEIU must charge that individual a “reduced fair share fee” made up of only chargeable expenses.<sup>18</sup>

Every June, the SEIU issues a *Hudson* notice, which “is meant to provide nonmembers with, *inter alia*, an adequate explanation for the basis of the agency fee.”<sup>19</sup> Within thirty days, nonmembers can object to paying the full dues and can instead elect to pay the reduced fair share fee for that year.<sup>20</sup> They may also object to the SEIU’s calculation of chargeable and nonchargeable expenses.<sup>21</sup> These challenges are resolved by an “impartial decisionmaker.”<sup>22</sup>

In June of 2005, the SEIU issued its annual *Hudson* notice, wherein the agency fee to be deducted from nonmember employees’

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12. *Id.* at \*8.

13. *Id.*

14. *Foster v. Mahdesian*, 268 F.3d 689, 692 n.6 (9th Cir. 2001) (explaining the prior-year method of calculation).

15. *Id.*

16. *See Knox v. Westly*, 2008 WL 850128, at \*2 (E.D. Cal. Mar. 28, 2008), *rev’d sub nom. Knox v. SEIU*, 628 F.3d 1115, 1120 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3061 (U.S. June 27, 2011) (No. 10-1121). The SEIU initially set nonmember fees at 99.1% of union dues. This number does not correlate with any identifiable measure of fees and appears to be a unilateral determination by the Union.

17. *See id.* (“The 56.35% was based on the Union’s actual expenditures for the year ending December 31, 2004, in which the Union calculated chargeable expenditures to be 56.35% of its total expenditures.”).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

paychecks was set at 99.1% of member dues.<sup>23</sup> If a member objected to paying this rate, he or she paid the fair share fee of 56.35% of member dues.<sup>24</sup> The notice did not say that an additional temporary assessment would be included in that year's dues and fees.<sup>25</sup> The only indication that such an assessment could arise was a clause that said: "Dues are subject to change without further notice to fee payers."<sup>26</sup>

On July 30, 2005, the SEIU proposed an "Emergency Temporary Assessment to Build a Political Fight-Back Fund" to be "use[d] for a broad range of political expenses," rather than for regular union expenses.<sup>27</sup> In August, SEIU delegates implemented the temporary dues increase of 0.25% of salary.<sup>28</sup> Nonmembers who had objected to the original *Hudson* notice were charged a percentage of the increase equal to the percentage of dues they were already paying.<sup>29</sup>

On August 31, the SEIU distributed a letter stating that "the \$45 per month cap on . . . regular dues of 1% gross pay would continue in effect, but would not apply to [the] additional .0025 temporary increase."<sup>30</sup> This letter stated several reasons for the increase, including "elect[ing] a governor and a legislature who support public employees and the services they provide" and "defeat[ing] Proposition 76 and Proposition 75," propositions that the Union felt would allow the governor to "attack [the SEIU's] pension plan."<sup>31</sup>

Petitioner Dobrowolski called the SEIU's office to object to the temporary increase.<sup>32</sup> The SEIU's Area Manager told Dobrowolski that even if he had objected to paying the full agency fee and was currently paying the reduced fair share fee, there was nothing he could do to avoid paying the temporary assessment.<sup>33</sup> The Area Manager said that they were "in the fight of [their] lives" and that the assessment was necessary to fund the political expenditures that the SEIU intended to make.<sup>34</sup>

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23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at \*6.

30. *Id.* at \*2.

31. *Id.*

32. *Id.* at \*3.

33. *Id.*

34. *Id.*

Knox, Dobrowolski, and six others filed a claim against the SEIU in the Eastern District of California.<sup>35</sup> They claimed the SEIU's 2005 *Hudson* notice was inadequate to cover the temporary assessment because it "did not provide an adequate explanation of the basis of the assessment."<sup>36</sup> The District Court granted summary judgment in favor of the Plaintiffs on those grounds and required the SEIU to issue a new *Hudson* notice.<sup>37</sup> The Ninth Circuit reversed, holding that the annual *Hudson* notice was adequate because it provided nonmembers with enough information to decide whether to object.<sup>38</sup>

### III. LEGAL BACKGROUND

#### A. Nonmember Payment of Union Dues

Under California statute, a public agency may enter into an "agency shop"<sup>39</sup> agreement with a union that has been recognized as the exclusive bargaining unit for a particular class of employee.<sup>40</sup> An agency-shop agreement requires an employee to either join a union or to pay the union a service fee.<sup>41</sup>

As the officially recognized and exclusive bargaining representative of a particular class of employee, a union is required to bargain on behalf of all workers in that class, including nonmembers.<sup>42</sup> Thus, if a union were unable to collect funds from nonmembers to finance its bargaining activities, members would have to finance the entire cost of the union's activities while nonmembers would receive its benefits for free.<sup>43</sup>

A union may require nonmembers to pay "chargeable" expenses, which include the costs of negotiating and administering a collective-

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35. *Id.* at \*1.

36. *Id.* at \*4.

37. *Id.* at \*11.

38. *Knox v. SEIU*, 628 F.3d 1115, 1120 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3061 (U.S. June 27, 2011) (No. 10-1121).

39. Otherwise known as a "union shop" agreement.

40. Cal. Gov. Code § 3502.5(a) (West 2011). The requirements for a union to become officially recognized as the exclusive bargaining unit for a class of public employee are unimportant for the purposes of this commentary.

41. *Id.*

42. *See Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 294 (1986) (referring to the Chicago Teachers Union as the "exclusive collective-bargaining representative" of the 27,500 employees in the bargaining unit, only 95% of which were members of the union).

43. *Id.*

bargaining agreement, the costs of settling grievances and disputes, and other expenses reasonably made to fulfill the union's duties as the exclusive bargaining representative.<sup>44</sup> Nonmembers are not required, however, to pay "nonchargeable" expenses, including expenditures made in support of ideological or political activities.<sup>45</sup>

The union may determine the amount that will be deducted from nonmembers' paychecks as a fair share fee, provided that this fee does not exceed union dues.<sup>46</sup> This fee may be comprised of both chargeable and nonchargeable expenses.<sup>47</sup> Nonmembers must, however, be given a chance to object to paying the full fee; any objecting nonmember may be charged only a reduced fair share fee comprised exclusively of chargeable expenses.<sup>48</sup>

### *B. First Amendment Considerations*

The First Amendment protects implied speech<sup>49</sup> and the right to make political contributions.<sup>50</sup> Agency-shop agreements, absent safeguards, create the potential for unions to trample nonmembers' First Amendment rights by using nonmembers' fees for political purposes unrelated to collective bargaining.<sup>51</sup> As the Court explained in *Abood v. Detroit Board of Education*,<sup>52</sup> an employee might have a number of ideological objections to union activity: "One individual might disagree with a union policy of negotiating limits on the right to strike . . . while another might have economic or political objections to unionism itself."<sup>53</sup> Allowing the union to forcibly collect dues from these nonmembers would violate the nonmembers' long-recognized

44. *Foster v. Mahdesian*, 268 F.3d 689, 692 n.6 (9th Cir. 2001).

45. *Id.*

46. *Knox v. Westly*, 2008 WL 850128, at \*8 (E.D. Cal. Mar. 28, 2008), *rev'd sub nom.* *Knox v. SEIU*, 628 F.3d 1115, 1120 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3061 (U.S. June 27, 2011) (No. 10-1121).

47. *See id.* at \*2 (describing a "reduced fair share fee" consisting of only chargeable expenses).

48. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 236 (1977) (explaining that activities not germane to the SEIU's duties as a collective-bargaining agent must be financed by members and nonmembers who do not object to those expenditures).

49. Unlike spoken words or writing, implied speech is expression that is not explicit, but can be inferred from the speaker's actions. *Id.* at 233. For example, an individual may express his or her opposition to a message by refusing to participate in demonstrations or refusing to contribute to certain funds or causes. *See id.*

50. *Id.*

51. *Id.* at 222.

52. 431 U.S. 209 (1977).

53. *Id.*

First Amendment right to make—or refuse to make—contributions for political purposes.<sup>54</sup>

In *Abood*, the Supreme Court held that compelling a nonmember to finance political activities unrelated to collective bargaining violates the First Amendment.<sup>55</sup> A union may, however, collect fees from nonmembers to finance union activities related to collective bargaining.<sup>56</sup>

Because *Knox* implicates First Amendment rights, the Court will need to determine what level of scrutiny to apply. Although public-sector unions are non-governmental organizations, they are the exclusive bargaining agents for state employees; their actions therefore qualify as “government action” subject to First Amendment review.<sup>57</sup> When reviewing governmental action that abridges First Amendment rights, the level of scrutiny a court must apply depends on whether the government action is content-based or content-neutral.<sup>58</sup> If the government action distinguishes speech based on its content, it is a content-based restriction and must be reviewed under strict scrutiny.<sup>59</sup> To survive strict scrutiny, the government action must serve a compelling government interest, and it must be the least restrictive means of serving that interest.<sup>60</sup> Laws that compel speech are subject to the same strict scrutiny standard.<sup>61</sup>

### C. Hudson Notice

There are two competing interests at stake when a *Hudson* notice is required—nonmembers’ First Amendment right to refuse to fund ideological activities must be balanced against the union’s ability to collect a fair share fee to fund collective bargaining. Nonmembers cannot be allowed to free ride on a union’s bargaining efforts, but a union cannot force nonmembers to contribute funds to union activities that do not benefit them, including political activities

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54. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 302 n.9 (1986).

55. *Abood*, 431 U.S. at 254.

56. *See id.* (“[C]ompelling an employee to finance any union activity that may be ‘related’ in some way to collective bargaining is permissible under the First Amendment.”).

57. *Id.* at 226.

58. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994).

59. *Id.* at 642–43.

60. *Id.* at 653.

61. *Id.* at 642. The standard of review applied to content-neutral regulations is not discussed here because the SEIU action in question is content-based—the SEIU required nonmembers to contribute to a political fund used to advocate a specific message.

unrelated to collective bargaining.<sup>62</sup> In *Hudson*, the Supreme Court devised a procedural solution to balance these interests: before collecting annual fees, a union must issue a notice, the requirements of which protect nonmembers who object to paying the nonchargeable portion of the union-determined fair share fee.<sup>63</sup> Under *Hudson*, the notice must include “an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.”<sup>64</sup>

The purpose of explaining the basis for the agency fee is to provide nonmembers with enough information to “identify the impact on [their] rights and to assert a meritorious First Amendment claim.”<sup>65</sup> The *Hudson* opinion also mentions that “adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor.”<sup>66</sup>

The union must also provide nonmembers with “a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker.”<sup>67</sup> *Hudson* does not provide any guidance as to how much time may elapse between a nonmember’s objection and the hearing date, but a period of five months was considered reasonably prompt in one Minnesota case.<sup>68</sup> By contrast, in *Tavernor v. Illinois Federation of Teachers*,<sup>69</sup> the Seventh Circuit held that a period of one year was “far from prompt.”<sup>70</sup> The *Hudson* Court did, however, provide a small explanation of the “impartial decisionmaker” requirement: a union may not exercise an unrestricted choice among arbitrators on the state list.<sup>71</sup>

Finally, during these procedures, the union must place any funds reasonably in dispute into an escrow account.<sup>72</sup> This requirement ensures that the union is unable to use wrongfully collected funds as a

62. *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 524 (1991).

63. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 302 (1986).

64. *Id.* at 310.

65. *Id.* at 294.

66. *Id.* at 307 n.18. The agency need not go as far as providing an exhaustive itemized list of all expenditures.

67. *Id.* at 310.

68. *Kuehn v. American Fed’n of State, Cnty. & Mun. Emps.*, 435 N.W.2d 130, 135 (Minn. App. 1989).

69. 226 F.3d 842 (7th Cir. 2000).

70. *Id.* at 848.

71. *Hudson*, 475 U.S. at 308.

72. *Id.* at 310.



type of forced loan while resolution of the objection is pending.<sup>73</sup> Such procedures are necessary to maintain the balance between nonmembers' First Amendment rights and a union's interest in avoiding free riders.<sup>74</sup>

#### IV. HOLDING

The Ninth Circuit reversed the District Court's ruling in *Knox v. Westly*<sup>75</sup> and remanded with orders to deny Petitioners' motion for summary judgment.<sup>76</sup> Reviewing the grant of summary judgment de novo, the Ninth Circuit employed a balancing test to determine the adequacy of the SEIU's *Hudson* notice: they sought to "prevent compulsory subsidization of ideological activity by employees who object thereto without restricting the SEIU's ability to require every employee to contribute to the cost of collective-bargaining activities."<sup>77</sup> The Ninth Circuit explicitly rejected strict scrutiny review because it felt that it was bound by the standard set forth in *Hudson*.<sup>78</sup> Applying that balancing test, the Ninth Circuit decided that SEIU met the *Hudson* requirements because its annual notice warned that "[d]ues [were] subject to change without further notice."<sup>79</sup>

In so deciding, the Ninth Circuit assigned great weight to the fact that unions are required to base the calculation of their fair share fees on audited figures.<sup>80</sup> Because expenditures from the prior year were the most recent audited figures available, it would have been impossible for the SEIU to use any other method or to precisely calculate the chargeable expenses for the upcoming year.<sup>81</sup> The calculation in the June 2005 *Hudson* notice was therefore a reasonable accommodation of nonmembers' First Amendment rights under the balancing test.<sup>82</sup>

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73. *Id.* at 309.

74. *Id.* at 294.

75. 2008 WL 850128, at \*8 (E.D. Cal. Mar. 28, 2008), *rev'd sub nom.* *Knox v. SEIU*, 628 F.3d 1115, 1120 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3061 (U.S. June 27, 2011) (No. 10-1121).

76. *Knox v. SEIU*, 628 F.3d 1115, 1123 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3061 (U.S. June 27, 2011) (No. 10-1121).

77. *Id.* at 1119–20 (quoting *Hudson*, 475 U.S. at 302).

78. *Id.*

79. *Id.* at 1120.

80. *Id.* at 1121.

81. *Id.*

82. *Id.* at 1121.

Additionally, the court stated that the political nature of the temporary assessment was irrelevant because the Petitioners brought a procedural *Hudson* challenge rather than a challenge to the chargeability of the assessment.<sup>83</sup> The Ninth Circuit pointed out that the following year's audited figures would reflect the assessment's chargeability.<sup>84</sup> The following year's fair share fee, then, would be discounted by the amount of nonchargeable expenses that were included in the assessment.<sup>85</sup> The Ninth Circuit also noted that nonmembers who objected to the initial *Hudson* notice and were paying a reduced fair share fee were not charged 100% of the assessment, but a reduced percentage of 56.35%.<sup>86</sup>

Finally, the Ninth Circuit rejected as "unworkable" the District Court's holding that a union must issue a second *Hudson* notice whenever it intends to drastically depart from its typical spending regime.<sup>87</sup> The prior-year method, the court said, assumes that a union has no typical spending regime because expenditures vary from year to year and are accounted for in the following year's fees.<sup>88</sup> The Ninth Circuit therefore rejected the District Court's framework because it would require a procedural scheme that places the least burden on fee-payers rather than merely reasonably accommodating their First Amendment rights.<sup>89</sup>

The Supreme Court granted certiorari on two issues: first, whether a state, consistent with the First and Fourteenth Amendments, may condition employment on the payment of a special union assessment intended for political expenditures without the union first providing a *Hudson* notice and an opportunity for nonmembers to object; and second, whether political expenditures for ballot measures are chargeable to nonmembers.<sup>90</sup> On October 3, 2011, the SEIU filed a motion to dismiss the case as moot.<sup>91</sup> The Supreme Court deferred its decision on mootness until it heard oral argument on the merits.<sup>92</sup>

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83. *Id.* at 1122 n.4.

84. *Id.*

85. *Id.* at 1122.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 1123.

90. Petition for Writ of Certiorari at i, *Knox v. SEIU*, No. 10-1121 (U.S. Mar. 10, 2011).

91. Respondent's Motion to Dismiss as Moot, *Knox v. SEIU*, No. 10-1121 (U.S. Oct. 3, 2011).

92. *Knox v. SEIU* Proceedings and Orders, SUPREMECOURT.GOV (Last visited Mar. 23, 2012) <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-1121.htm>.

## V. ARGUMENTS

The parties present arguments regarding two issues: the *Hudson* requirements for temporary assessments and the chargeability of the SEIU's midyear assessment.<sup>93</sup> Petitioners argue that a union must issue a new *Hudson* notice in the event of a temporary assessment,<sup>94</sup> while Respondent argues that a separate notice is not required if the original notice warned nonmembers that fees were subject to increase.<sup>95</sup> Petitioners contend that even if the SEIU's procedures were adequate, the temporary assessment was nonchargeable because the expenses were unrelated to collective bargaining.<sup>96</sup> Respondents argue that while the assessment was used for political expenses, those expenses were nonetheless related to collective bargaining because the particular ideological causes on which they were spent implicated the stability of collective-bargaining agreements.<sup>97</sup>

### A. Hudson Requirements for Midyear Temporary Assessments

#### 1. Petitioners' Arguments

Petitioners argue that the Ninth Circuit's ruling is inconsistent with both *Hudson* and the strict scrutiny standard of review applied to compelled speech in other contexts.<sup>98</sup> Petitioners begin by arguing that strict scrutiny applies in this case and that the SEIU's actions did not satisfy this exacting standard. First, in *Boy Scouts of America v. Dale*,<sup>99</sup> the Court established the principle that First Amendment rights may only be abridged by regulations that are narrowly tailored to serve compelling state interests and that are unrelated to the suppression of ideas.<sup>100</sup> Second, Petitioners assert that strict scrutiny applies to the procedures surrounding the collection of union dues because unionism is a type of "compelled expressive association" subject to First Amendment strict scrutiny review.<sup>101</sup> Therefore, "government-compelled association with a union agent is subject to the most exacting levels of constitutional scrutiny," and the Ninth

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93. Petition for Writ of Certiorari, *supra* note 90, at i.

94. Brief for Petitioners at 19, *Knox v. SEIU*, No. 10-1121 (U.S. Sept. 12, 2011).

95. Brief for Respondent at 31, *Knox v. SEIU*, No. 10-1121 (U.S. Nov. 21, 2011).

96. Brief for Petitioners, *supra* note 94, at 24.

97. Brief for Respondent, *supra* note 95, at 49–50.

98. Brief for Petitioners, *supra* note 94, at 10.

99. 530 U.S. 640 (2000).

100. *Id.* at 648.

101. Brief for Petitioners, *supra* note 94, at 15.

Circuit was wrong to have applied a balancing test.<sup>102</sup> The “self-evident” reason for applying strict scrutiny in cases of compelled political speech—that such compelled speech corrupts the democratic process—requires that strict scrutiny be applied in this case because the assessment was used for political expenses.<sup>103</sup>

Petitioners then argue that temporary assessments are not exempt from *Hudson* requirements, and the SEIU’s actions thus do not pass strict scrutiny.<sup>104</sup> When a union imposes any new financial obligation on employees, it must comply with *Hudson* requirements because to do otherwise would strip the employees of their First Amendment right to avoid the risk that their money will be used, even temporarily, for activities unrelated to collective bargaining.<sup>105</sup>

This risk is especially acute with regard to nonmembers who did not object to paying the normal agency fee, but who would have if they had known the SEIU was going to issue a temporary assessment for political purposes.<sup>106</sup> They argue that the Ninth Circuit’s holding required nonmembers opposed to the temporary assessment to have objected to the original *Hudson* notice—a month in advance of when the assessment was even proposed—based only on the SEIU’s statement that “[d]ues are subject to change without further notice to fee payers.”<sup>107</sup> That statement did not provide sufficient information for nonmembers to gauge whether to object to the temporary increase and was thus inconsistent with *Hudson* and strict scrutiny review.

## 2. Respondent’s Arguments

Respondent claims that the Petitioners’ argument for strict scrutiny ignores concerns of practicality and administrability.<sup>108</sup> According to Respondent, Petitioners’ concerns are not about substantive First Amendment rights, but rather procedural rights, which merit only a balancing analysis.<sup>109</sup> *Hudson*’s balancing test attempts to avoid “compulsory subsidization of ideological activity by

102. *Id.*

103. *Id.* at 17.

104. *Id.* at 19.

105. *Id.* at 20 (citing *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 305 (1986)).

106. *Id.* at 21.

107. *Id.*

108. Brief for Respondent, *supra* note 95, at 31.

109. *Id.*

employees who object thereto without restricting the SEIU's ability to require every employee to contribute to the cost of collective bargaining."<sup>110</sup> The Petitioners' invocation of the right of expressive association is misplaced, Respondent argues, because Petitioners rely solely on cases in which compelled association interfered with a group's right to express its message.<sup>111</sup> By contrast, Petitioners are individuals who do not comprise an expressive association, and their affiliation with the SEIU does not interfere with the expression of any particular message.<sup>112</sup> Petitioners' compelled-speech argument is similarly misplaced because "[a] compelled speech violation occurs only where 'the complaining speaker's own message [is] affected by the speech it [is] forced to accommodate.'"<sup>113</sup> Finally, Respondent argues that strict scrutiny does not apply in this case because "a statute permitting fair share fee payments to [a] bargaining representative . . . has never triggered strict scrutiny."<sup>114</sup>

Respondent then asserts that the SEIU complied with the requirements in *Hudson* and that any further procedural requirements would cripple the SEIU's ability to collect fair share fees.<sup>115</sup> *Hudson's* prior-year calculation requires only that the SEIU calculate its fees using expenditures verified by an independent auditor and an accurate prediction of the upcoming year's expenditures is not expected.<sup>116</sup> Respondent asserts that the *Hudson* procedures were followed "to the letter" because the original notice contained a warning that dues were subject to increase.<sup>117</sup> Furthermore, because objectors to the original notice were charged a reduced percentage, the temporary increase did not require objectors to subsidize the SEIU's nonchargeable expenses.<sup>118</sup>

Finally, Respondent argues that it is irrelevant that some non-objectors might have objected had they known about the temporary increase.<sup>119</sup> Potential objectors had access to the original *Hudson* notice, which clearly stated that a significant portion of dues was to be

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110. *Id.* at 32 (quoting *Hudson*, 475 U.S. at 302).

111. *Id.* at 36.

112. *Id.*

113. *Id.* (quoting *Rumsfeld v. Forum for Academic and Inst. Rights, Inc.*, 547 U.S. 47, 63 (2006)).

114. *Id.* at 38.

115. *Id.* at 11.

116. *Id.* at 12.

117. *Id.* at 13.

118. *Id.* at 16.

119. *Id.*

spent on nonchargeable political expenditures.<sup>120</sup> And because *Hudson* does not require advance notice of specific expenditures, notice of significant nonchargeable political expenditures, along with notice of the potential for a midyear increase, was sufficient for employees to decide whether to object.<sup>121</sup> In other words, employees who did not object to the original notice have missed their chance because *Hudson* procedures are meant to shield only “nonmembers who are opposed to ‘ideological expenditures of *any sort* that are unrelated to collective bargaining.’”<sup>122</sup>

## B. Chargeability of Political Expenditures for Ballot Measures

### 1. Petitioners’ Arguments

Petitioners also argue that compelling employees to pay a temporary assessment to fund nonchargeable expenses violated their First Amendment rights.<sup>123</sup> Petitioners assert that chargeable union expenditures must not only be germane to collective bargaining, but must also satisfy strict scrutiny.<sup>124</sup> The germaneness standard, according to Petitioners, merely serves a gatekeeping function in a court’s analysis of whether a particular union expenditure is chargeable—it does not substitute for a strict scrutiny analysis of that expenditure.<sup>125</sup> Therefore, the Ninth Circuit erred in holding that the expenditures were chargeable on the sole basis that they were germane to the SEIU’s collective-bargaining duties.<sup>126</sup>

Petitioners challenge the Ninth Circuit’s suggestion that the expenditures made to defeat Proposition 76 were chargeable.<sup>127</sup> They argue that these expenditures were not germane to the SEIU’s collective bargaining duties because the only reference to collective bargaining in Proposition 76 “addressed the way that the general

120. *Id.*

121. *Id.*

122. *Id.* at 18 (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 235, 241 (1977)). Here, Respondent seems to be interpreting the phrase “any sort” to mean that *Hudson* procedures are meant to protect nonmembers who are opposed to the SEIU spending money on ideological activities *at all*, and that the protection does not extend to content-based objections. However, this language is ambiguous and could be interpreted to mean that nonmembers may object to any individual ideological expenditures that are unrelated to collective bargaining.

123. Brief for Petitioners, *supra* note 94, at 24.

124. *Id.* at 25–26 (citing *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 519 (1991)).

125. *Id.* at 27.

126. *Id.* at 26.

127. *Id.* at 35.

revenue stream for the entire State government might be altered” and “placed no particular collective bargaining agreement . . . in specific jeopardy of abrogation” by the Governor.<sup>128</sup> And, even if Proposition 76 had a relationship to the SEIU’s collective-bargaining duties, these expenses would still be nonchargeable; compelling employees to pay these expenses would constitute an egregious infringement of their First Amendment rights because the expenses were related to political speech.<sup>129</sup>

## 2. Respondent’s Arguments

Respondent counters that Petitioners do not properly present their claims as to the chargeability of the expenditures. First, Respondent argues that Petitioners’ claim is strictly a procedural challenge and not a substantive challenge to the spending of the fees in question.<sup>130</sup> Respondent bases this argument on the fact that “the text of Proposition 76 and its legislative history are not contained anywhere in the record of [the] case.”<sup>131</sup> The Ninth Circuit did not hold that the expenses were chargeable, Respondent argues, but rather mentioned in passing that they *might* be chargeable and that the question was not properly litigated.<sup>132</sup>

Second, Respondent argues that even if the Court were to reach the chargeability claim, it should reject it on the merits.<sup>133</sup> The expenses used to defeat Proposition 76 were germane to the SEIU’s collective-bargaining duties because Proposition 76 “would have effectively permitted the Governor to abrogate the SEIU’s collective-bargaining agreements under certain circumstances.”<sup>134</sup> The SEIU further argues that the expenditures pass strict scrutiny because the defeat of Proposition 76 was necessary to avoid the government cutting employees’ bargained-for wages and benefits. Also, the opposition to Proposition 76 did not significantly burden any First Amendment rights because disagreements with the SEIU’s strategy are inherent in agency-shop arrangements; Petitioners may not refuse to pay simply because they disagree with the SEIU’s strategy.<sup>135</sup>

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128. *Id.* at 37.

129. *Id.* at 38.

130. Brief for Respondent, *supra* note 95, at 43.

131. *Id.*

132. *Id.* at 45.

133. *Id.*

134. *Id.* at 49–50.

135. *Id.* at 53.

## VI. ANALYSIS

The Supreme Court is faced with a loophole left by *Hudson's* incomplete coverage of union financing methods. Barring a finding of mootness, the Court is likely to use this case to close that gap by reversing the Ninth Circuit. To do otherwise would allow unions, which are meant to protect employees from the superior bargaining power of employers, to take advantage of those very same employees to finance union leaders' political agendas. Reversing the Ninth Circuit would be consistent with the text and purpose of *Hudson* as well as the strict scrutiny standard of review used in other areas of First Amendment jurisprudence.

The Supreme Court will first have to address the Ninth Circuit's reliance on the balancing test. The Ninth Circuit did not employ strict scrutiny review because it interpreted *Hudson* to require a balance between nonmembers' First Amendment rights and unions' ability to collect fair share fees.<sup>136</sup> The Court could find two flaws in the Ninth Circuit's analysis. First, the Ninth Circuit improperly weighed these interests equally; the SEIU's ability to collect its fair share fees was subject to only a reasonable accommodation of nonmembers' First Amendment rights.<sup>137</sup> These interests, though, are not equal in importance. Nonmembers' First Amendment rights must outweigh the SEIU's interests because a union does not have a constitutional right to collect fees from nonmembers for expenses other than those associated with collective bargaining.<sup>138</sup>

Second, the Ninth Circuit's interpretation of *Hudson* ignores that case's facts and text, which indicate that the *Hudson* requirements are an acceptable way to *satisfy* strict scrutiny rather than a *substitute* for that standard. Strict scrutiny review is, after all, a balancing of government and First Amendment interests; the framework merely makes sure that courts weigh individual First Amendment interests more heavily than the government's interest.

The union action at issue in *Hudson*, like the action at issue here, would have triggered a strict scrutiny analysis based on the fact that it

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136. *Knox v. SEIU*, 628 F.3d 1115, 1119–20 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3061 (U.S. June 27, 2011) (No. 10-1121).

137. *See id.* at 1120 (employing a "reasonable accommodation" test as articulated in *Grunwald v. San Bernardino City Unified Sch. Dist.*, 994 F.2d 1370 (9th Cir. 1993)).

138. *See Chicago Teacher's Union, Local No. 1 v. Hudson*, 475 U.S. 292, 302–03 (1986) (explaining that nonunion employees have an interest in having their fees used principally for collective-bargaining purposes).



involved compelled political contributions.<sup>139</sup> The *Hudson* Court did not fashion an entirely new standard of review for First Amendment actions simply because it was dealing with union dues.<sup>140</sup> The Ninth Circuit ignored language requiring fee collection procedures to be “carefully tailored to minimize” infringement of nonmembers’ First Amendment rights.<sup>141</sup> Admittedly, *Hudson* did not explicitly employ the usual strict scrutiny formulation. However, footnote eleven in *Hudson* demonstrates that the Court did, in fact, apply a strict scrutiny analysis.<sup>142</sup> The Court cited *Roberts v. United States Jaycees*<sup>143</sup> for the proposition that “infringements on freedom of association ‘may be justified by regulations adopted to serve *compelling* state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.’”<sup>144</sup> Footnote eleven also references *Elrod v. Burns*,<sup>145</sup> which held that government means must be “least restrictive of freedom of belief and association.”<sup>146</sup> The *Hudson* Court’s reliance on these cases indicates that *Hudson*, rather than creating a new balancing test, merely articulates procedural requirements that satisfy a strict scrutiny standard of review.

The Ninth Circuit’s ruling is also inconsistent with the purpose of *Hudson*: to allow non-union employees “a *fair* opportunity to identify the impact of the governmental action on [their] interests and to assert a meritorious First Amendment claim.”<sup>147</sup> Here, the SEIU’s *Hudson* notice mentioned only that fees were subject to increase; it

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139. See *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994) (stating that regulations compelling an individual or entity to speak in order to avoid the appearance of agreement with the expressed message trigger strict scrutiny). Here, objecting nonmembers could very well feel compelled to express their individual views on Proposition 76 in order to avoid appearing like they agree with the SEIU’s view. Respondent argues that compelled speech violations only occur when the objector’s own message is affected, but this is unpersuasive—by forcing nonmembers to contribute funds to ideological causes they disagree with, the expression of their personal beliefs is inherently affected as those funds are no longer available for them to spend on their own personal expression.

140. See *Hudson*, 475 U.S. at 303 (“[T]he fact that those rights are protected by the First Amendment requires that the procedure be *carefully tailored to minimize* the infringement.” (emphasis added)).

141. *Id.*

142. *Id.* at 303 n.11.

143. 468 U.S. 609 (1984).

144. *Hudson*, 475 U.S. at 303 n.11 (quoting *Roberts*, 468 U.S. at 623 (1984)) (emphasis added).

145. 427 U.S. 347 (1976).

146. *Hudson*, 475 U.S. at 303 n.11 (quoting *Elrod*, 427 U.S. at 363 (1976)).

147. *Id.* (emphasis added).

did not say for what purposes or by how much.<sup>148</sup> The SEIU then hastily put together its “Emergency Temporary Assessment to Build a Political Fight-Back Fund,” which it has conceded was not meant for regular union expenditures.<sup>149</sup> Through this misleading course of action, the SEIU was able to collect funds for nonchargeable expenses from nonmembers who did not have enough information to object to the original *Hudson* notice. It can hardly be said that such incomplete information afforded the nonmembers a fair chance to object.

The Ninth Circuit dismissed as unworkable the District Court’s requirement of a second *Hudson* notice upon “drastic departure” from a union’s typical spending regime. But it would not be unreasonable to require a union to issue a second *Hudson* notice when the union has new information about its spending regime to which nonmembers might reasonably object. By their very nature, temporary assessments are issued because the originally collected dues are inadequate to cover *specific* union expenses. When issuing a temporary assessment, the union will have information about what it wants to spend money on and how much money the temporary increase will raise—information withheld from the employees in the original *Hudson* notice. Further, the prior-year method is meant to substitute for the precise calculation of the upcoming figures.<sup>150</sup> In this case, that information is actually available, so Respondent does not need to rely on the prior-year method. *Hudson* does not require a union to predict the upcoming year’s finances with 100% accuracy, but it does require that the union divulge information it has about upcoming expenditures.<sup>151</sup> It is not fair for the union to use this information disparity to bulldoze nonmembers’ First Amendment rights and force them to finance activities to which they object.

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148. *Knox v. Westly*, 2008 WL 850128, at \*2 (E.D. Cal. Mar. 28, 2008), *rev’d sub nom.* *Knox v. SEIU*, 628 F.3d 1115, 1120 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3061 (U.S. June 27, 2011) (No. 10-1121).

149. *Id.*

150. *See Hudson*, 475 U.S. at 307 n.18 (“[T]here are practical reasons why absolute precision in the calculation of the charge to nonmembers cannot be expected or required. Thus, for instance, the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year.”).

151. *See id.* at 306 (“Since the unions possess the facts and records from which the proportion of political to total union expenditures may reasonably be calculated, basic considerations of fairness compel that they . . . bear the burden of proving such proportion.” (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 239–40 n.40 (1977))).

In addition, the fairness principle may indicate that the *Hudson* requirements are actually altogether inapplicable in the case of temporary assessments. The SEIU justifies its actions by noting that *Hudson* requires it to base its notices on audited figures.<sup>152</sup> But it does not follow that once a union issues its annual *Hudson* notice based on those audited figures, it is fair for the union to increase fees mid-year for political purposes simply because those figures will not be audited until the following year. Because of this inconsistency, the Supreme Court may be justified in finding that *Hudson* does not even address temporary assessments.

If the Court finds *Hudson* does not properly address temporary fee increases, it likely will apply a strict scrutiny analysis. Under this standard, the SEIU's actions are clearly unconstitutional. Under *Ellis v. Brotherhood of Railway, Airline, and Steamship Clerks*,<sup>153</sup> a union cannot constitutionally collect from dissenting nonmembers money that will be used in support of ideological causes not germane to its collective-bargaining duties.<sup>154</sup> Although Respondent argues that the chargeability of the increase is not properly presented,<sup>155</sup> in the event that the Court determines that *Hudson* does not address temporary assessments, chargeability will be a crucial element in deciding whether the SEIU's actions survive a traditional strict scrutiny analysis. If the Court determines that the expenses are nonchargeable, then it was unconstitutional for the SEIU to collect them in the first place, regardless of the procedures they used to do so.<sup>156</sup>

In addition, there are compelling practical reasons why the Supreme Court should rule in favor of the Petitioners. If the Court rules for Respondent, unions will only be required to issue *Hudson* notices that include a simple warning to nonmembers that "dues are subject to increase." A union could then obtain forced loans from nonmembers by issuing temporary assessments despite the fact that the union intends to use the increase on nonchargeable expenses. This loophole neutralizes nonmembers' constitutional right to avoid the risk that their money will be used, even temporarily, for political purposes to which they are opposed.

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152. Brief for Respondent, *supra* note 95, at 12.

153. 466 U.S. 435 (1984).

154. *Id.* at 447.

155. Brief for Respondent, *supra* note 95, at 43.

156. See *Ellis*, 466 U.S. at 447 (stating that unions cannot constitutionally collect any money for the support of ideological causes unrelated to their collective-bargaining duties).

Finally, allowing unions to raise political funds through midyear assessments could have negative effects on the function of agency-shop agreements. Members and nonmembers alike will begin to mistrust unions that take advantage of this loophole. Nonmembers will be forced to object to every single *Hudson* notice they receive because of the risk that the union will issue a temporary assessment. These objections will increase administrative costs for unions and decrease the funds that are available for *any* purpose. The effects may cut into unions' ability to perform their collective-bargaining functions. In its most extreme form, this mistrust may result in public employees choosing to decertify their unions, leaving them at the mercy of the superior bargaining power of their employers.

#### VII. LIKELY DISPOSITION

The Supreme Court will most likely rule in favor of the Petitioners in order to avoid the practical consequences of allowing unions to raise political funds by issuing midyear assessments without notice. In particular, the court will likely try to prevent the massive proceedings associated with the increased number of objections such a loophole would necessitate. In addition, a ruling for the Petitioners is the only outcome that would be consistent with *Hudson*, First Amendment jurisprudence, and the Constitution.