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

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

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

May a State, consistent with the First and Fourteenth Amendments, condition employment on the payment of a special union assessment intended solely for political purposes—a statewide ballot initiative campaign—without first providing a *Hudson* notice that includes information about that assessment and provides an opportunity to opt out of supporting those political exactions?

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

May a State, consistent with the First and Fourteenth Amendments, condition continued public employment on the payment of agency fees for purposes of financing a union's opposition to public ballot initiatives?

PARTIES TO THE PROCEEDINGS BELOW

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

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

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

2. R. Paul Ricker, an individual, originally named as a Plaintiff, who was dismissed upon stipulation. R. 43.

CORPORATE LISTING

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, Petition ("Pet.") Appendix ("App.") A at 1a, is reported at 628 F.3d 1115 (9th Cir. 2010). The decision of the United States District Court for the Eastern District of California, Pet. App. B at 50a, granting in part Plaintiffs' Motions for Summary Judgment and denying in part and granting in part Defendant's Motion for Summary Judg-

ment, is not officially reported but appears at 2008 WL 850128, 183 L.R.R.M. (BNA) 3232 (E.D. Cal. 2008).

JURISDICTION

The Ninth Circuit entered its judgment on December 10, 2010. The Petition for Writ of Certiorari was timely filed on March 10, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The **First Amendment to the United States Constitution** provides in pertinent part that "Congress shall make no law ... abridging the freedom of speech, ... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend I.

The **Fourteenth Amendment** provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

The state statute involved is the Ralph C. Dills Act, Cal. Gov't Code § 3512 *et seq.*, specifically §§ 3513(k) and 3515. *See* Pet. App. E at 77a.

STATEMENT OF THE CASE

I. The Facts

Background: Petitioners Dianne Knox *et al.*, and the 28,000 class members they represent ("Nonmembers"), are employees of the State of California who are not members of their monopoly bargaining representative, Respondent Service Employees International Union, Local 1000 ("SEIU"). California law and SEIU's contracts with the State require that the Nonmembers pay compulsory agency fees to the

SEIU as a condition of their employment. Cal. Gov't Code § 3513(k); Pet. App. E at 77a.

The Hudson Notice: Because union fees typically include more than collective bargaining costs, this Court in *Teachers Local No. 1 v. Hudson* determined that transparency is required to enable nonmembers to object and avoid subsidizing union political and other nonbargaining activities. It held that, as a constitutional precondition to collecting agency fees, "[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake, ... dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee." 475 U.S. 292, 306 (1986).

In June 2005, SEIU sent its annual *Hudson* notice to the Nonmembers. Joint Appendix ("JA") 96-151. SEIU set the agency fee for July 1, 2005, through June 30, 2006, at 56.35% of dues for those nonmembers who objected within thirty days to paying anything more than the cost of bargaining. Nonmembers who did not object or who resigned subsequent to the notice were subject to deductions of 99.1% of dues from their wages. SEIU's *Hudson* notice did not indicate that later a temporary assessment would be added to the 2005-06 dues and fees. Pet. App. B at 52a-53a.

The Special Assessment: The years 2003-2006 were a time of intense political controversy in California. In 2003, Governor Gray Davis was stripped of his office in an unprecedented recall election and Arnold Schwarzenegger was installed as Governor. During the summer of 2005, Governor Schwarzenegger called for a special statewide election to consider four ballot initiatives designed, *inter alia*, to limit the power of public-sector unions to collect dues and

agency fees for political activities without each employee's permission, and to permit the Governor, under specific circumstances, to reduce appropriations, including employee compensation and state contracts.

Shortly after the expiration of the thirty-day period for nonmembers to object under the June 2005 *Hudson* notice, SEIU's legislative bodies began discussing an "Emergency Temporary Assessment" to fund opposition to those four ballot initiatives. Pet. App. A at 27a, 628 F.3d at 1128 (Wallace, J., dissenting); *accord id.* at 5a-6a, 628 F.3d at 1118-19. The SEIU Executive Council intended to use the assessment "'for a broad range of political expenses, including television and radio advertising, direct mail, voter registration, voter education, and get out the vote activities in our work sites and in our communities across California.'" Pet. App. B at 53a. SEIU also warranted that "the fund 'will not be used for regular costs of the union—such as office rent, staff salaries or routine equipment replacement.'" Pet. App. A at 6a, 628 F.3d at 1118-19. SEIU's goal was to raise $12 million for its political campaign. *Id.* at 5a, 628 F.3d at 1118.

SEIU approved the assessment for its new "Political Fight-Back Fund" on August 27, 2005. It became effective on September 1, 2005. About August 31, 2005, SEIU informed its members and the Nonmembers about the imposition of the "temporary dues increase ... 'to defeat Propositions 76 and 75,' other future attacks on the Union pension plan, and other activities," including "'to elect a governor and legislature who support public employees and the services [they] provide.'" *Id.* at 6a, 28a, 628 F.3d at 1119, 1129. This letter "did not provide an explana-

tion for the basis of the additional fees being imposed, and it did not provide nonmembers with an opportunity to object to the additional fees." *Id.* at 28a, 628 F.3d at 1129 (Wallace, J., dissenting).

Deduction of the assessment began with the State employees' September 2005 paychecks. The assessment increased the total compulsory fees deducted from the 28,000 Nonmembers' wages by approximately 25-33%. Pet. App. B at 62a n.6, 63a n.7. The State deducted 56.35% of the assessment from those who had objected after the June 2005 notice, and 99.1% from those who had not.

With the money garnered from its political assessment, SEIU expended funds for political activities in opposition to the November 2005 statewide ballot initiatives. This assessment forced all Nonmembers—even those who had previously objected—to make a forced loan supporting "'a broad range of political expenses, including television and radio advertising, direct mail, voter registration, voter education, and get out the vote activities in our work sites and in our communities across California,'" *id.* at 64a, in opposition to the ballot initiatives. *See also* R. 99 at 4, lines 14-27.

II. The Proceedings Below

On November 1, 2005, the Nonmembers filed this class-action lawsuit alleging that the collection and use of the $12 million special assessment was unconstitutional in the absence of a new *Hudson* notice and opportunity to object and opt out of paying the assessment. JA at 16-17. The Complaint sought declaratory and injunctive relief and equitable restitution for violations of the Nonmembers' rights under

the First and Fourteenth Amendments and 42 U.S.C. § 1983. JA at 20-23.

The district court certified two discrete subclasses of nonmembers: (1) those "who have, at one time or another, specifically objected to the use of their agency fees for politics or other non-bargaining activities"; and (2) those "who have not at any time objected." The second subclass is represented by Plaintiff Robert Conover, who resigned from membership after adoption of the political assessment. JA at 62.

The district court entered summary judgment for the Nonmembers. R. 140: Judgment; R. 159: Amended Judgment. It found that SEIU's June "2005 *Hudson* Notice could not possibly have supplied the requisite information with which nonmembers could make an informed choice of whether or not to object to the Assessment," and that "the 2005 *Hudson* notice was inadequate to provide a basis for the Union's Assessment." Pet. App. B at 70a. The court emphasized that it "is hard to imagine any circumstances in which it could be more clear that an Assessment was passed for political and ideological purposes." *Id.* at 64a.

SEIU appealed. R. 155, 161. A three-judge panel of the Ninth Circuit reversed. Pet. App. A at 2a-16a, 628 F.3d at 1117-23. Judge Wallace dissented. *Id.* at 16a-49a, 628 F.3d at 1123-39.

First, the panel majority held it unnecessary for SEIU to provide Nonmembers with notice and opportunity to object to the political assessment, asserting that those expenses would be accounted for in the union's next annual *Hudson* notice. *Id.* at 8a-16a, 628 F.3d at 1119-23. In reaching this conclusion, the

panel used what it characterized as "the normal *Hudson* balancing and reasonable accommodation test we have used in the past when deciding challenges to *Hudson* notice procedures." *Id.* at 9a, 628 F.3d at 1120 (footnote omitted). That test balances "the right of a union, as the exclusive collective bargaining representative ... to require nonunion employees to pay a fair share of the union's costs" against "the First Amendment limitation on collection of fees from dissenting employees for the support of ideological causes not germane to the union's duties as collective-bargaining agent." *Id.* at 2a, 628 F.3d at 1117.

Second, the panel majority held that "not all political expenses are automatically non-chargeable. Rather, if germane to collective bargaining, they can be chargeable just like any other expense." *Id.* at 6a-7a n.2, 628 F.3d at 1119 n.2. SEIU's expenditures to oppose Proposition 76 were held to be lawfully chargeable to the 28,000 Nonmembers because Proposition 76 purportedly "would have effectively permitted the Governor to abrogate the Union's collective bargaining agreements under certain circumstances." *Id.*, 628 F.3d at 1119 n.2.

In dissent, Judge Wallace first criticized the majority for a lack of fidelity to "the principles guiding the Court's decision" in *Hudson*, "begin[ning] from an inaccurate account of the interests at stake, and appl[ying] the procedures set forth in *Hudson* without due attention to the distinguishing facts of this case." *Id.* at 16a, 628 F.3d at 1123. Judge Wallace found "that the majority's 'reasonable accommodation test' is misguided and is inconsistent with case law we are required to follow," *id.* at 26a, 628 F.3d at 1128, because it "ignores *Hudson*'s instruc-

tion that, because employees' First Amendment interests are implicated by the collection of an agency fee, 'the procedure [must] be *carefully tailored* to minimize the infringement.'" *Id.* at 25a, 628 F.3d at 1127-28 (original emphasis), quoting *Hudson*, 475 U.S. at 302-03.

Second, Judge Wallace found that "any connection between the Union's challenge [to Proposition 76] was too attenuated to its collective bargaining agreement to be considered a chargeable expense." Pet. App. A at 43a n.4, 628 F.3d at 1135 n.4. He noted that Proposition 76 was not directly related to contract ratification or implementation, as its purpose "was to limit the annual amount of total state spending." It "would have given the Governor limited 'authority to reduce appropriations' for future state contracts, collective bargaining agreements, and entitlement programs." *Id.*, 628 F.3d at 1135 n.4. However, it contained *no* language that would have given the Governor any authority to abrogate bargaining agreements. *See* page 36 and nn.16 & 17, *infra*.[1]

SUMMARY OF ARGUMENT

Ordinarily, only the sovereign possesses the power to tax. An extraordinary exception to this power, however, is tolerated for labor unions that seek to recoup their collective bargaining expenses from nonmembers they represent. *See Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 184 (2007) (unions representing public employees given "extraordinary power," an "extraordinary benefit," "in essence, to tax

[1] *See also* Official Voter Information Guide, http://vote2005.sos.ca.gov/voterguide/ballot_measure_summary.shtml#Prop76 (last visited Aug. 30, 2011).

government employees"); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977).

This case concerns 28,000 employees forced by the State of California to make, out of their monthly wages, a multi-million-dollar political loan to SEIU. This Court's decisions protecting individuals from being forced by government to promote the political and ideological views of others require the application of strict scrutiny. Such restrictions on the core First Amendment freedoms of speech and association are unconstitutional unless they further a compelling governmental interest and must be narrowly tailored to achieve that interest.

It follows that Judge Wallace's dissenting opinion below, eschewing the "balancing and reasonable accommodation test," is correct: *Hudson*'s procedural protections do not create a balance; they create a barrier protecting against forced political speech. Therefore, the Ninth Circuit's interpretation of *Hudson* that allows the use of the Nonmembers' money, even temporarily, for SEIU's politics cannot be valid.

The "Emergency Temporary Assessment" here at issue was, by its terms, "a *Political* Fight-Back Fund" to be used "for a broad range of political expenses, including television and radio advertising, direct mail, voter registration, voter education, and get out the vote activities in our work sites and in our communities across California." Pet. App. B at 64a (emphasis added). Moreover, SEIU warranted that the fund would "'not be used for regular costs of the union—such as office rent, staff salaries or routine equipment replacement.'" Pet. App. A at 6a, 628 F.3d at 1118-19.

Yet SEIU extracted the political assessment from the 28,000 Nonmembers without providing any additional notice or opportunity to opt out, thus depriving the Nonmembers of their right to "'*avoid the risk* that [nonmembers'] funds [would] be used, even temporarily, to finance ideological activities unrelated to collective bargaining.'" *Hudson*, 475 U.S. at 305 (emphasis added), quoting *Abood*, 431 U.S. at 244 (Stevens, J., concurring). This was an involuntary political loan. When the Ninth Circuit applied a "balancing and reasonable accommodation test," it failed in its duty to apply strict scrutiny, and improperly reversed the district court's judgment vindicating the Nonmembers' paramount First Amendment rights.

The governmental interest that sustains laws authorizing labor unions to extract fees from nonmembers begins and ends with government's interest in "labor peace and avoiding 'free riders.'" This Court has therefore limited chargeable political expenditures to those related to the "ratification or implementation of a dissenter's collective-bargaining agreement." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 520 (1991). When the Ninth Circuit held that the Nonmembers could be compelled, as a condition of their public employment, to subsidize SEIU's political expenditures opposing a ballot initiative relating to laws of general application, and not to ratification or implementation of their collective-bargaining agreement, it again failed to apply these standards, or to protect the Nonmembers' paramount First Amendment interests.

This case provides the Court with the opportunity both to reaffirm that state-sanctioned involuntary political loans are inconsistent with free speech and

association, and to clarify its holdings in *Hudson* and *Lehnert*. When a union increases the amount of fees it collects from nonmembers between its annual *Hudson* notices, especially when that increase is solely or primarily for political and ideological activities, the least restrictive means of protecting nonmembers' First Amendment rights mandates that the union: (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 and not pay the increase.

ARGUMENT

I. This Court Applies Strict Scrutiny to Laws Burdening Expressive Association and Political Speech.

A. Infringements on the First Amendment Right of Free Expressive Association Are Subject to Strict Scrutiny.

The First Amendment guarantees individuals the right to associate for the expressive purposes of "speech" and "petition[ing] the Government for a redress of grievances." U.S. Const. amend. I; *see*, *e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622-23 (1984); *Elrod v. Burns*, 427 U.S. 347, 356-57 (1976). "'The established elements of speech, assembly, association, and petition, though not identical, are inseparable.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982), quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

"Freedom of association ... plainly presupposes a freedom not to associate." *Roberts*, 468 U.S. at 623. Compelling association for expressive purposes there-

fore runs afoul of First Amendment guarantees. *See Elrod*, 427 U.S. at 359-60 (compelling employees to associate with a political party); *see also United States v. United Foods, Inc.*, 533 U.S. 405, 410-11 (2001) (compelling employers to associate with marketing cooperatives); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (compelling private groups to associate with individuals); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 714-15 (1996) (compelling contractors to associate with a political party); *Keller v. State Bar*, 496 U.S. 1 (1990) (compelling lawyers to associate with state bars). The right to refrain from supporting the political beliefs of others is "at the heart of the First Amendment." *Hudson*, 475 U.S. at 302 n.9; *see Abood*, 431 U.S. at 236.

Infringements on the right to expressive association are subject to strict scrutiny: "the right to expressive association" may be "overridden '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.'" *Dale*, 530 U.S. at 648, quoting *Roberts*, 468 U.S. at 623. This standard is sometimes stated as "exacting scrutiny," under which the government "interest advanced must be paramount, one of vital importance," and the "government must 'emplo[y] means closely drawn to avoid unnecessary abridgment.'" *Elrod*, 427 U.S. at 362-63, quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976); *see also Rutan v. Republican Party*, 497 U.S. 62, 72 (1990) (infringements on expressive association must be "narrowly tailored to further vital government interests").

The same standard applies when public employees are compelled to support financially a union as their mandatory, exclusive bargaining representative. *See Hudson*, 475 U.S. at 303 n.11; *see also Locke v. Karass*, 555 U.S. 207, 219 (2009); *Lehnert*, 500 U.S. at 519; *cf. Ellis v. Railway Clerks*, 466 U.S. 435, 455-56 (1984); *Abood*, 431 U.S. at 233-34.

Abood recognized that "[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests." 431 U.S. at 222; *accord Locke*, 555 U.S. at 215. The Court nonetheless held that "*important* government interests ... support the impingement upon associational freedom created by the agency shop here at issue." 431 U.S. at 225 (emphasis added); *see also id.* at 255 ("the State ... bear[s] the burden of proving that any union dues or fees that it requires of nonunion employees are needed to serve *paramount* governmental interests") (Powell, J., concurring in the judgment) (emphasis added).[3] The governmental interests that justify the infringement on employees' First Amendment rights are maintaining "labor peace" in the workplace and avoiding "free riders." *Id.* at 224. It follows that whether employees can be compelled to support any particular union activity turns upon whether these two governmental interests justify the constitutional infringement.

The Court applied this logic in *Ellis* and *Lehnert*, utilizing a three-part test, the second and third prongs of which focus on whether compelling support

[3] *Abood* relied heavily on cases regarding the freedom to associate for the purpose of advancing beliefs and ideas, such as *Elrod*. *See* 431 U.S at 233-35.

for union activity is narrowly-tailored to achieve the labor peace interest. *See Ellis*, 466 U.S. at 448, 455-56 (union expenses that meet the minimal requirement of being "incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues" must also pass the constitutional test of whether the expense "involve[s] additional interference with the First Amendment interests of objecting employees and, if so, whether they are nonetheless adequately supported by a government interest"); *Lehnert*, 500 U.S. at 519 (chargeable union expenses "must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's *vital policy interest* in labor peace and avoiding 'free riders'; and (3) *not significantly add* to the burdening of free speech that is inherent in the allowance of an agency or union shop") (emphasis added). The second and third prongs of the *Ellis* and *Lehnert* test are functionally identical to the compelled expressive association tests stated in *Dale*, 530 U.S. at 648, and *Elrod*, 427 U.S. at 362-63. All require a compelling or vital state interest, and that the means be least restrictive of free speech.

For these reasons, *Hudson* held that the procedures attendant to the collection of compulsory union dues must "be carefully tailored to minimize the infringement." 475 U.S. at 303. The Court relied upon several leading cases protecting the right of expressive association. *Id.* at 303 n.11.[4]

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[4] *Hudson* quoted *Roberts*, 468 U.S. at 623 ("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.'"); *Elrod*, 427 U.S. at

These cases establish three important principles. First, the Court has long treated compulsory unionism as a species of compelled expressive association. This is logical, for the practice compels association for the *very purpose* of expressive activities.[5]

Forcing employees to support a union as their exclusive representative for dealing with a governmental body inherently compels employees to support: (1) "speech" directed to their government employers and others; and (2) efforts to "petition the Government for a redress of grievances," ostensibly for the employees, within the meaning of the First Amendment, U.S. Const. amend. I. These activities are at the core of constitutional and democratic freedoms. *See Borough of Duryea v. Guarnieri*, ___ U.S. ___, ___, 131 S. Ct. 2488, 2495 (2011). So, too, is the freedom of individuals to choose with whom they associate for these purposes. *See Claiborne Hardware*, 458 U.S. at 911; *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294-95 (1981);

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363 ("government means must be 'least restrictive of freedom of belief and association'"); *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973) ("'[E]ven when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty'"); and *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("'Precision of regulation must be the touchstone' in the First Amendment context.") (quotations in parentheses are from *Hudson*, 475 U.S. at 303 n.11).

[5] It makes no sense to exclude compulsory unionism from this Court's line of compelled expressive association jurisprudence. There is no principled difference between compelling an expressive organization to associate with an individual—as *Dale* and *Roberts* prohibited—and in compelling an individual to associate with an expressive organization like a union. Both must necessarily be subject to the same level of scrutiny, *i.e.*, strict scrutiny.

California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972); *DeJonge v. State of Oregon*, 299 U.S. 353, 364-65 (1937).

Second, government compulsion to support a particular representative to speak to and petition government grievously infringes on the freedom of expressive association guaranteed by the First Amendment. *See United Foods*, 533 U.S. at 411 ("First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors ...."); *Elrod*, 427 U.S. at 357. This Court has repeatedly recognized as much in this context, acknowledging that "by allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights." *Ellis*, 466 U.S. at 455; *accord Hudson*, 475 U.S. at 301 & n.8, 307 n.20.

Third, it follows that, like all other forms of compelled expressive association, government-compelled association with a union agent is subject to the most exacting levels of constitutional scrutiny. The infringement must be justified by a compelling or vital government interest, and be the least restrictive means for satisfying that interest. *See, e.g., Dale*, 530 U.S. at 648; *Lehnert*, 500 U.S. at 519; *Rutan*, 497 U.S. at 72; *Hudson*, 475 U.S. at 303; *Roberts*, 468 U.S. at 623; *Ellis*, 466 U.S. at 455-56; *Elrod*, 427 U.S. at 362-63.

Thus, the Ninth Circuit was wrong to apply a "balancing test" instead of the exacting test of strict scrutiny. The governmental policies at issue here, and the forced political loans mandated by SEIU and the State of California, do not meet this exacting standard.

B. This Court's Jurisprudence Regarding Compelled Speech and Political Speech Requires the Application of Strict Scrutiny.

Here, 28,000 Nonmembers are being compelled to give a multi-million dollar loan for political speech to a union that the State designated as their exclusive representative. That strict scrutiny is mandated is also demonstrated by analogous compelled-speech cases, which apply that standard to situations in which the government compels an individual or entity to promote or associate with the speech of others. *See Pacific Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 17-18 (1986) (unconstitutional for state agency to require that a utility company include a third-party newsletter in its billing envelope); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 577-78 (1995) (state law requiring that parade include group with message with which parade's organizer does not wish to associate is unconstitutional).

The reason for strict scrutiny is self-evident, because compelled political speech corrupts the political process. *See, e.g.*, *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 258-60 (1986). A practice that "compels or restrains belief and association is inimical to the process which undergirds our system of government and is 'at war with the deeper traditions of democracy embodied in the First Amendment.'" *Elrod*, 427 U.S. at 357, quoting *Illinois State Employees Union v. Lewis*, 473 F.2d 561, 576 (7th Cir. 1972). That is why government may not "increase the speech of some at the expense of others," particularly not political speech. *Arizona Free Enter. Club's Free-*

dom Club PAC v. Bennett, ___ U.S. ___, ___, 131 S. Ct. 2806, 2821 (2011); *see id.* at 2820-22.

Moreover, "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech" and is therefore "a content-based regulation of speech." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795, 798 (1988). "Restrictions on speech based on its content are 'presumptively invalid' and subject to strict scrutiny." *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, ___, 129 S. Ct. 1093, 1098 (2009), citing *Davenport*, 551 U.S. at 188.

Just last Term, this Court reaffirmed the well-established proposition that "'[l]aws that burden [financial support for] political speech are ... subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Bennett*, 131 S. Ct. at 2817, quoting *Citizens United v. FEC*, ___ U.S. ___, ___, 130 S. Ct. 876, 898 (2010) (internal quotation marks omitted). Naturally, compelling nonmembers to support political speech of others is subject to the same standard of review as restrictions on political speech. *See Abood*, 431 U.S. at 234 (that nonmembers "are compelled to make, rather than prohibited from making contributions for political purposes works no less an infringement of their constitutional rights").

Bennett is instructive, as it addressed the State of Arizona inserting itself into political campaigns by providing additional funds to publicly-financed candidates at the expense of privately-financed candidates and groups. 131 S. Ct. at 2813. In striking down that scheme, this Court reversed the Ninth Circuit's failure to apply strict scrutiny. *Id.*, citing

McComish v. Bennett, 611 F.3d 510, 513, 525 (9th Cir. 2010).

Here, as Arizona financed candidates in *Bennett*, the State of California enhances SEIU's political speech in two ways: by compelling all employees SEIU represents to pay a "tax" (agency fees), Cal. Gov't Code § 3513(k); and by involuntarily deducting the fees and assessments from the Nonmembers' wages, *id.* at § 3515.7(b) (providing for automatic deduction of union dues and agency fees by the State). The result is that 28,000 Nonmembers made a compelled multi-million dollar political loan to SEIU. This, of course, comes not only at the Nonmembers' expense, but also at the expense of individuals (including some of the Nonmembers, JA 14-15, ¶ 28) and organizations supporting the ballot initiatives that SEIU opposed.

California's conduct is even more egregious than Arizona's in *Bennett*, because the money the State gives SEIU comes directly from the Nonmembers' wages, not from general public accounts. That fact places this case squarely within the conceptual framework of the campaign-finance decisions. *See First Nat'l Bank v. Bellotti*, 435 U.S. 765, 786 (1978) (applying strict scrutiny to law governing monetary contributions for speech about public ballot initiatives).

II. Temporary Political Assessments Are Not Exempt from *Hudson*'s Prophylactic Procedures.

Whenever a union imposes upon nonmembers a new financial obligation, it must adhere to *Hudson* by providing "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge

the amount of the fee before an impartial decision-maker, and an escrow for the amounts reasonably in dispute while such challenges are pending." 475 U.S. at 310.[6] These procedures allow nonmembers to identify and opt out of paying political, ideological, and other nonbargaining expenses.

Here, SEIU compelled 28,000 Nonmembers to pay a special assessment for opposition to ballot initiatives without a *Hudson* notice giving them the opportunity to object to that political contribution. It thus stripped the Nonmembers of their First Amendment right to "avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." *Id.* at 305, quoting *Abood*, 431 U.S. at 244.

The panel majority 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, after that notice's "opt out" period had expired. Pet. App. A at 10a-15a, 628 F.3d at 1119-23. The June 2005 notice only concerned regular dues and fees. It gave no notice concerning the later political assessment, much less an opportunity to make an informed objection to paying that assessment. JA 96-151.

The lack of notice and opportunity to object is even more critical as to the non-objecting employees in the

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[6] Insofar as it allows pre-hearing collection of agency fees, *Hudson* substantially departs from this Court's repeated holdings that an "essential principle of due process is that a deprivation of life, liberty, or property 'be *preceded* by notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (emphasis added), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

subclass of Nonmembers who—while they failed to object under SEIU's June 2005 *Hudson* notice—may well have objected upon learning that SEIU intended to increase their financial burden by 25%-33% and use that increase for political purposes, as Plaintiff Conover did. JA at 8, ¶ 8(b). That SEIU failed to provide such notice and procedures when it imposed this compelled political contribution means that it forced Nonmembers to provide an involuntary political loan in violation of their First Amendment rights.

The panel's conclusion that Nonmembers had to wait a year, until the issuance of the next year's *Hudson* notice, to object to the special assessment is untenable. This forced the Nonmembers to make a multi-million dollar political loan to SEIU, in blatant disregard of the Nonmembers' own political beliefs and ideologies. *Hudson* recognizes that a "forced exaction followed by a rebate equal to the amount improperly expended is ... not a permissible response to the nonunion employees' objections." 475 U.S. at 305-06. Such a rebate policy permits unions to obtain "'an involuntary loan for purposes to which the employee objects.'" *Id.* at 304, quoting *Ellis*, 466 U.S. at 444. Yet, such a rebate policy is precisely what the Ninth Circuit adopted with respect to the SEIU's political assessment, *i.e.*, that the Nonmembers could recoup next year their forced contribution to SEIU's "Political Fight-Back Fund," well after the elections influenced by the Fund were decided.

Nor can a special political assessment be analogized to normal fluctuations in general union expenses. As to general operating expenses funded by regular dues and fees, it may be reasonable to permit a union to "calculat[e] its fee on the basis of its expenses during the preceding year," because those

expenses are likely to remain relatively constant. *Hudson*, 475 U.S. at 307 n.18. But SEIU did not impose a permanent, across-the-board increase in dues and fees for general purposes. Instead, it imposed a special assessment for specific purposes, for a limited time, and not for general union functions. R. 65 at 5, ¶ 20.[7]

Here, the special assessment was specifically designated as a "Political Fight-Back Fund," which the union asserted "will not be used for regular costs of the union — such as office rent, staff salaries or routine equipment replacement, etc." JA 26; *see also* JA 28; *see also* Pet. App. A at 42a, 628 F.3d at 1135 ("The temporary assessment was contemplated as a political fundraising vehicle....").[8] The procedure *Hudson* approved for regular dues and fees simply

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[7] "Assessments" are, by definition, distinguishable from union dues. *See NLRB v. Food Fair Stores, Inc.*, 307 F.2d 3, 14-16 (3d Cir. 1962).

[8] Notwithstanding SEIU's clear and unambiguous statements describing the political purposes of the temporary special assessment when it was adopted and collected, the Ninth Circuit opined that "the Union had *already* reduced the fee for objecting nonmembers, and has demonstrated that the assessment was not purely non-chargeable, *nor intended to be so*." Pet. App. A at 12a, 628 F.3d at 1122 (second emphasis added). Although *Hudson* recognizes that "there are practical reasons why '[a]bsolute precision' in the calculation of the charge to nonmembers cannot be 'expected or required,'" 475 U.S. at 307 n.18, quoting *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963), it did not endorse considered imprecision. The best response to this type of "veil of ignorance" situation, J. Rawls, *A Theory of Justice* § 24 (Belknap 1971), is to take the union at its word as to the purpose for which the assessment was to be used, and require notice and opportunity to opt out of paying it, as Judge Wallace recognized. *See* Pet. App. A at 43a-44a, 628 F.3d at 1135-36, quoting Pet. App. B at 65a-66a.

"does not avoid the risk that dissenters' funds may be used temporarily for an improper purpose," 475 U.S. at 305, when the union levies a special assessment to fund a particular political campaign.[9]

Therefore, when a union imposes a special assessment—especially one created to support nonchargeable political and ideological activities—the "least restrictive means" of protecting nonmembers' rights mandates that the union: (1) cannot collect that assessment from those who already have objected; and (2) must not collect the special assessment from other nonmembers until it has ascertained their wishes by providing them with a new notice and an opportunity to opt out.

The Ninth Circuit's contrary result is unacceptable. It permits unions to exact from those who might object involuntary loans, by simply timing political assessments to occur after the issuance of their regular *Hudson* notices. For example, SEIU could levy a massive assessment on the Nonmembers in August 2012 to influence the upcoming presidential election, thereby forcing those Nonmembers who had not previously objected to support financially that presidential campaign, whether they liked it or not, without giving them an opportunity to object until

[9] The Ninth Circuit majority claimed that it would have been "impossible" for the union to create a financial disclosure for the special assessment before the expenditures were incurred. Pet. App. A at 10a-11a, 628 F.3d at 1121. That is incorrect. SEIU knew before it collected a dime for its "Political Fight-Back Fund" that the Fund would be used for electoral politics that are obviously nonchargeable to Nonmembers. It did not need to conduct an after-the-fact accounting to determine its own, publicly-stated intentions.

the following year, long after the election had been decided.

Nonmembers enjoy a constitutional right to refrain from subsidizing a union's political campaigns for or against public ballot initiatives. SEIU clearly violated that right by failing to provide the Nonmembers with notice and opportunity to object to paying a special political assessment *before* the assessment was collected and used to influence an election. The Ninth Circuit and its "balancing" test should be reversed on the first Question Presented.

III. Employees Cannot Constitutionally Be Compelled to Support Union Political Expenditures.

The Ninth Circuit panel majority applied a "germane to collective bargaining" test to SEIU's expenditures opposing Proposition 76. It deemed them chargeable because the proposition's passage "would have effectively permitted the Governor to abrogate the Union's collective bargaining agreements under certain circumstances." Pet. App. A at 6a-7a n.2, 628 F.3d at 1119 n.2. Both this conclusion and its premise are erroneous.

Foremost, union expenses are not chargeable to nonunion employees if merely "germane to collective bargaining"—they must also be justified by a vital government interest and not additionally burden free speech. *See* § III(A), *infra*. Moreover, except for the very narrow context of "contract ratification or implementation," union political expenses are presumptively nonchargeable. *See* § III(B), *infra*. Therefore, the Nonmembers' constitutional rights were violated by compelling them to support SEIU's opposition to Proposition 76. *See* § III(C), *infra*.

A. Chargeable Union Expenditures Must Satisfy Strict Scrutiny, Even If They Are Germane to Collective Bargaining.

As demonstrated in § I, *supra*, government may constitutionally compel association with expressive organizations only if the compulsion is justified by a compelling state interest and the compulsion does not burden speech beyond that necessary to achieve that interest (*i.e.*, be a "least restrictive means"). *Dale*, 530 U.S. at 648; *Rutan*, 497 U.S. at 72; *Roberts*, 468 U.S. at 623; *Elrod*, 427 U.S. at 362-63. This test must likewise be satisfied when the government compels association with a labor union. *See Hudson*, 475 U.S. at 303 & n.11; *Lehnert*, 500 U.S. at 519; *Ellis*, 466 U.S. at 455-56.

Lehnert is the Court's most recent decision to consider the chargeability to nonmembers of specific types of union activities. It is particularly relevant here because it considered the chargeability of "lobbying and electoral politics." 500 U.S. at 514.[10] Two different tests were applied in *Lehnert* to reach the same conclusion: forced support of political expenditures like those in this case is constitutionally impermissible.

Justice Blackmun, writing for the majority, held that "chargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the

[10] The more recent decision in *Locke* is not on point on this issue, because the only issue there was the chargeability of "national litigation activity for which [a] local charges nonmembers [that] concerns only those aspects of collective bargaining, contract administration, or other matters that the courts have held chargeable." 555 U.S. at 220. *Locke* did, however, acknowledge that "nonchargeable union activities [include] political, public relations, or lobbying activities." *Id.* at 211.

government's vital policy interest in labor peace and avoiding 'free riders'; *and* (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." 500 U.S. at 519 (emphasis added). As shown *supra* pp. 13-14, this test is a specific application of traditional First Amendment strict scrutiny.

Justice Scalia, writing for himself and Justices O'Connor, Kennedy, and Souter, applied an alternative "statutory duties" test in which a union expenditure is chargeable only if "incurred for the conduct of activities in which the union owes a duty of fair representation to the nonmembers being charged." 500 U.S. at 558 (Scalia, J., concurring in part, dissenting in part).

Under either of these tests, the Ninth Circuit panel majority erred in holding that a union expenditure is chargeable if merely "germane to collective bargaining." Pet. App. A at 6a-7a n.2; 628 F.3d at 119 n.2. This singular test ignores the fact that the *Lehnert* majority's three-prong test used the conjunctive "and," not the disjunctive "or." Therefore,

> "germaneness" is not the be-all/end-all question in the constitutional analysis, but rather is only the first prong: Under *Lehnert*, not only must the mandatory fee be germane to some otherwise legitimate economic or regulatory scheme, the compelled funding must also be justified by vital interests of the government, and not add significantly to the burdening of free speech inherent in achieving those interests.... [I]n a case such as this involving the forced funding of political and ideological speech, those factors obtain the utmost significance.

Southworth v. Grebe, 151 F.3d 717, 727 (7th Cir. 1998), *rev'd on other grounds*, 529 U.S. 217 (1999).

In short, the majority below ignored the two more important tests uniformly required to compel association, *i.e.*, the compelling governmental interest and the least restrictive means. It is only because of government's interest in maintaining "labor peace" within its workplaces that employees can be compelled to associate with a union in any respect. *Abood*, 431 U.S. at 220-21.[11] If compelled support for a union activity is not necessary to achieve this state interest, or it adds significantly to the burden on nonmembers' free speech, then the state cannot override employees' First Amendment right to withhold their support, irrespective of the activity's "germaneness" to collective bargaining.

The "germaneness" and "statutory duties" tests merely serve a gatekeeper function: if a union expenditure fails to meet this minimal requirement of being directly related to the statutory scheme causing the compelled association, there is no need to proceed to the second and third elements of the *Lehnert* three-part test. "Germaneness" is the first issue to be considered under the majority test in *Lehnert*; likewise, "a charge must *at least* be incurred in performance of the union's statutory duties" under

[11] The "free rider" interest is derivative of the "labor peace" interest. According to this Court, government's interest in ensuring "labor peace" within a workforce justifies the imposition of exclusive representation on employees. That, in turn, spawns a so-called "free rider" interest in requiring employees to pay for this monopoly representation. *See Abood*, 431 U.S. at 221-22. Absent a "labor peace" interest that justifies forced association with a union, there is no derivative interest in avoiding "free riding" on that representation.

Justice Scalia's test. 500 U.S. at 558 (opinion of Scalia, J.) (original emphasis).

The order of *Ellis*' analysis is instructive. There, this Court first evaluated whether union expenses fell within the union's statutory duties as an exclusive representative. 466 U.S. at 448-55. Only those union expenses that passed this screening test were evaluated to determine if they were "supported by a governmental interest" and did not "involve additional interference with the First Amendment interests." *Id.* at 455-57. A union activity being "germane" to collective bargaining is only the beginning of the constitutional analysis, not its end, as the Ninth Circuit believed.

For this reason, the Ninth Circuit's singular "germaneness" standard should be rejected. Moreover, the "statutory duties" test should be adopted for performance of this initial screening function in lieu of the "germaneness" test. The "statutory duties" test is more directly rooted in the state action causing the compelled association, more consistent with *Ellis*, and more clearly defined and thus easier to administer. *See Lehnert*, 500 U.S. at 552-58 (opinion of Scalia, J.). In contrast, as Justice Scalia predicted in *Lehnert*, *id.* at 551, the amorphous nature of the "germaneness" standard has led to uncertainty and burdensome litigation, as unions repeatedly contend that virtually all of their activities are somehow "germane" to collective bargaining and thus chargeable.[12]

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[12] Not only have unions argued, as here, that public political campaigns concerning ballot initiatives are chargeable, they also have argued that: organizing is chargeable, *Scheffer v. Civil Service Employees Ass'n, Local 828*, 610 F.3d 782, 787-91 (2d Cir. 2010), despite *Ellis*' holding to the contrary, 466 U.S. at

This Court should resolve the issue which so divided the Court in *Lehnert*, and expressly clarify that nonmembers can only be constitutionally compelled to pay for union activities that: (1) are incurred in performance of the union's statutory duties for which the union owes a duty of fair representation to the employees; (2) are necessary to satisfy the government's interests in maintaining labor peace in the workplace and avoiding free riders; and (3) do not burden speech or association beyond that necessary to achieve those interests.[13]

451-53; and that lobbying the federal government is chargeable, *Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415, 1422-23 (D.C. Cir. 1997), *aff'd on other grounds*, 523 U.S. 866 (1998), *Lehnert* notwithstanding. 500 U.S. at 520. These arguments, of course, expand the term "germane" beyond its normal definitions of "closely related" and "closely connected," *Webster's New Universal Unabridged Dictionary* 767 (Deluxe 2d ed. 1979).

[13] The Court should not eliminate the requirements of a vital state interest and narrow tailoring. That would be inconsistent with this Court's compelled expressive association jurisprudence, and could result in a standard that could easily be manipulated by governments granting unions and other groups the statutory duty to engage in: (1) conduct not necessary to achieve a vital state interest; or (2) core expressive activities such as politics. For example, if the test were solely statutory duties, California could try to compel employees to pay for SEIU political expenses by simply giving the union the statutory power to act as their political representative. The government's mere designation of a representative for individuals cannot itself justify compelling support for that entity. An underlying vital state interest for the compulsion is necessary to justify the infringement on individuals' First Amendment rights.

B. Chargeable Union Political Expenses Are Limited to Contract Ratification or Implementation.

Whether or not the Court clarifies the *Lehnert* test, the Ninth Circuit majority's conclusion that non-members may constitutionally be compelled to subsidize union political expenses defies the judgment of eight Justices in *Lehnert.* With only a very narrow exception in the public sector, political and lobbying expenditures fail all of the tests that must be met to justify compelling expressive association.

First, unions do not have a general statutory duty to engage in political and lobbying activities for exclusively represented employees. SEIU has no such duty here.[14] Justice Blackmun's plurality explicitly recognized that political and lobbying activities other than for contract ratification and implementation are not germane to collective bargaining:

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

[14] The governing statute defines the authority of an exclusive bargaining representative as "the right to represent [an appropriate] unit in employment relations with the state." Cal. Gov't Code § 3515.5.

500 U.S. at 520.[15] Justice Scalia agreed, finding that "the challenged lobbying expenses are nonchargeable" because, like public relations activities, "though they may certainly affect the outcome of negotiations, [they] are no part of th[e] collective-bargaining process." *Id*. at 559 (Scalia, J., concurring).

Second, as the plurality opinion in *Lehnert* also recognized, compelling support for political or lobbying activities is not "justified by the government's vital policy interest in labor peace and avoiding 'free riders,'" *id.* at 519 (opinion of Blackmun, J.):

> Labor peace is not especially served by allowing such charges because, unlike collective-bargaining negotiations between union and management, our national and state legislatures, the media, and the platform of public discourse are public fora open to all. Individual employees are free to petition their neighbors and government in opposition to the union which represents them in the workplace. Because worker and union cannot be said to speak with one voice, it would not further the cause of harmonious industrial relations to compel objecting employees to finance union political activities as well as their own.

Id. at 521 (opinion of Blackmun, J.).

This conclusion is certainly correct, as government's concern for "labor peace" has no application in

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[15] Although Justice Marshall concurred as to Justice Blackmun's three-part test, making it the majority test, he dissented from Justice Blackmun's application of it to lobbying and politics. *Lehnert*, 500 U.S. at 533-34 (Marshall, J., concurring in part, dissenting in part).

"public fora" outside of the workplace. *Id.* "Labor peace" is an interest in avoiding workplace disruptions that might be caused by employees making "conflicting demands" on their employer through multiple unions. *Abood*, 431 U.S. at 220-21; *see id.* at 224. The Court saw designation of a single, exclusive representative to speak for all employees *vis-a-vis* their public employer as a permissible solution to the perceived problem of diverse expressive association *within* the workplace. *Id.* at 220-21; *see Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 52 (1983).

Whatever its merits within the workplace, the "labor peace" rationale has no application to the "public fora" where political and lobbying activities occur. *Lehnert*, 500 U.S. at 519-22 (opinion of Blackmun, J.). Government has no legitimate interest in suppressing "conflicting demands" from multiple individuals or associations regarding political or public affairs by requiring that they speak through a government-designated representative. *See Abood*, 431 U.S. at 230 (discussing *City of Madison, Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm'n*, 429 U.S. 167 (1976)).

Indeed, the First Amendment favors such diversity of expressive association, because "[c]ompetition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms." *Williams v. Rhodes*, 393 U.S. 23, 32 (1968); *see also City of Berkeley*, 454 U.S. at 295 ("The Court has long viewed the First Amendment as protecting a marketplace for the clash of different views and conflicting ideas. That concept has been stated and restated almost since the Constitution was drafted."). Indeed, this constitutional principle

predates the First Amendment. *Cf.* James Madison, *The Federalist* No. 51 at 281 (Global Affairs Publ'g Co. 1987) ("Ambition must be made to counteract ambition" to preserve liberty).

For example, if State employees supported multiple organizations, some on opposite sides of the battle over Proposition 76, this is not a "problem" that California may solve by compelling all State employees to support the position of one organization, such as SEIU. It is not a problem at all. Rather, it reflects the diversity of expressive association and viewpoints the First Amendment fully protects. Although government may have an interest in compelling association to ensure workplace "labor peace," it has no legitimate, let alone compelling, interest in forced association on one side or the other of any political controversy.

Third, the *Lehnert* plurality recognized that "[w]here the subject of compelled speech is the discussion of governmental affairs, which is at the core of our First Amendment freedoms, ... the burden upon dissenters' rights extends far beyond the acceptance of the agency shop and is constitutionally impermissible." 500 U.S. at 522 (opinion of Blackmun, J.) (citations omitted). That the "burden upon freedom of expression is particularly great where ... the compelled speech is in a public context," *id.*, is so manifestly correct as to require no further discussion. This Court has never "upheld compelled subsidies for speech in the context of a program where the principal object is speech itself." *United Foods*, 533 U.S. at 415.

The *Lehnert* plurality opinion recognized a narrow exception to the rule barring compulsory support for union lobbying in the "limited context of contract

ratification or implementation." 500 U.S. at 522 (opinion of Blackmun, J.). The four-Justice concurrence did not expressly adopt this ratification exception, stating only that "the challenged lobbying expenses are nonchargeable." *Id*. at 559 (Scalia, J., concurring in part). Logically, this exception can only pass the statutory duties test to the extent that a union has a legal duty to "secur[e] ratification of negotiated agreements by the proper state or local legislative body" or "to acquire appropriations for approved collective-bargaining agreements." *Id.* at 520 (opinion of Blackmun, J.). If such a duty exists here at all, it does not extend to lobbying and political campaigns concerning legislation or ballot propositions of general application that merely *might* affect bargaining or contract implementation. *See id*. at 559 (Scalia, J., concurring in part).[16]

Moreover, the vital governmental interest and narrow-tailoring tests do not permit extension of the exception to require forced subsidization of any lobbying or political activity somehow related to a contract's terms or the economic solvency of the

[16] The political activities here are "germane to collective bargaining" in the same way as the airline union's "contacts with government agencies and Congress concerning the union's views as to appropriate federal regulation of airline safety" are in *Miller*. The D.C. Circuit rejected the argument that such expenditures were properly chargeable, recognizing that a contrary conclusion would lead to the exception swallowing the rule, for if merely taking a subject up in collective bargaining is sufficient to render a union's government-relations expenditures on that subject chargeable, then "virtually all of [the union's] political activities could be connected to collective bargaining." *Miller*, 108 F.3d at 1422. For example, "[u]nder that reasoning, union lobbying for increased minimum wage laws or heightened government regulation of pensions would also be germane." *Id.*

government. *See id*. at 520-22 (opinion of Blackmun, J.). Only contract ratification and implementation bear any relation to government's interest in ensuring "labor peace" within its workplaces, as it puts into place and implements "agreements and settlements that are not subject to attack from rival labor organizations." *Abood*, 431 U.S. at 221. In contrast, union lobbying for any other purpose does nothing to quell "conflicting demands" by multiple unions within the workplace, *id.*, and is indistinguishable from the lobbying and politics that other advocacy groups engage in for their constituents.

C. It Is Unconstitutional to Compel Nonmembers to Support SEIU's Political Activities in Opposition to a Ballot Initiative.

The Ninth Circuit panel erred in declaring that the Nonmembers could constitutionally be compelled to subsidize SEIU's opposition to ballot Proposition 76. This political expenditure cannot survive any of the tests for chargeability. Like other political expenditures, it: (1) is neither incurred pursuant to the union's statutory duties nor germane to collective bargaining; (2) is not necessary to achieve the state's interest in maintaining "labor peace" and "avoiding free riders" within its workplaces; and (3) significantly burdens the Nonmembers' freedom of expression.

The panel majority determined that union expenditures to defeat Proposition 76 were "germane to collective bargaining" because the proposition "would have effectively permitted the Governor to abrogate the Union's collective bargaining agreements under certain circumstances." Pet. App. A at 6a-7a n.2, 628 F.3d at 1119 n.2. Primarily, this is incorrect because

the panel majority relied upon SEIU's hyperbolic representations about the proposal, rather than the text of the proposal itself.[17]

The California Secretary of State's official ballot measure summary made clear that Proposition 76's purpose was primarily, if not exclusively, *fiscal* in nature.[18] The more detailed official title and summary prepared by California's Attorney General likewise made only a generalized mention of the proposal's effect to allow the "Governor, under specified circumstances, to reduce appropriations of the Governor's choosing, including employee compensation/state contracts."[19] The measure made no mention of SEIU, or its collective bargaining agreements.

The only reference to collective bargaining in the official documents is general, appearing in an Analysis by the Legislative Analyst, and relates to state funding.

> The reductions may apply to *all* General Fund spending except for (1) expenditures necessary to comply with federal laws and

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[17] The text of the initiative appears at http://ag.ca.gov/initiatives/pdf/sa2005rf0067_amdt_1_ns.pdf (last visited Aug. 30, 2011).

[18] *See* Official Voter Information Guide, http://vote2005.sos.ca.gov/voterguide/ballot_measure_summary.shtml#Prop76 (last visited Aug. 30, 2011); *see also* Pet. App. A at 43a n.4, 628 F.3d at 1135 n.4 (Wallace, J., dissenting) ("properly understood Proposition 76 was a ballot measure related to the allocation of tax revenue for funding government activities, which included the amount of financial support available to fund public employment").

[19] Official Title & Summary Prepared by the Attorney General, http://vote2005.sos.ca.gov/voterguide/prop76/title_summary.shtml (last visited Aug. 30, 2011).

> regulations, (2) appropriations where the reduction would violate contracts to which the state is already a party, and (3) payment of principal and interest that is due on outstanding debt. Any General Fund spending related to contracts, collective bargaining agreements, or entitlements for which payment obligations arise after the effective date of this measure would be subject to these reductions.[20]

Proposition 76 placed no particular collective bargaining agreement—let alone the SEIU's collective bargaining agreements—in specific jeopardy of abrogation. This initiative merely addressed the way that the general revenue stream for the entire State government might be altered.

Thus, SEIU's political expenditures against Proposition 76 are directly analogous to the expenditures for millage elections held nonchargeable in *Lehnert*. 500 U.S. at 527. The union in *Lehnert* coerced funding for ballot issues on local taxes for the support of public schools in Michigan, called "millage" elections. The lower court in *Lehnert* held that expenditures for "millage and ballot campaigns" necessary to fund public education were chargeable because "such activities are directly related to collective bargaining." *Lehnert v. Ferris Faculty Ass'n*, 881 F.2d 1388, 1392 (6th Cir. 1989), *rev'd in pertinent part*, 500 U.S. 507 (1991). Eight members of this Court rejected the chargeability of these expenses, with the plurality finding it to be "of little consequence" that the millage

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[20] Proposition 76: School Funding; State Spending; Initiative Constitutional Amendment (Legislative Analyst's Office, July 2005), http://vote2005.sos.ca.gov/voterguide/prop76/analysis.shtml (last visited Aug. 30, 2011).

taxes supported public schools. 500 U.S. at 527 (opinion of Blackmun, J.); *accord id.* at 559 (Scalia, J., concurring). Because the activity was not for the "ratification or implementation of [the objector's] collective-bargaining agreement," it was not chargeable. *Id.* at 527 (opinion of Blackmun, J.)

Even if Proposition 76 had some tangential relationship to collective bargaining, the egregious constitutional infringement caused by compelling the Nonmembers to subsidize SEIU's opposition to it requires that these expenses be held nonchargeable. Speech regarding public ballot initiatives is inherently "at the heart of the First Amendment's protection" because it concerns informing and persuading the public with respect to a matter of public affairs. *Bellotti*, 435 U.S. at 776 (finding it unconstitutional to restrict corporate expenditures in opposition to ballot initiatives).

SEIU used the special assessment to generate speech to influence *the public* with respect to how they should vote on Proposition 76. *Lehnert* recognizes that it is impermissible to allow a "union ... [to] use each dissenter as 'an instrument for fostering public adherence to an ideological point of view he finds unacceptable.'" 500 U.S. at 522 (opinion of Blackmun, J.), quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).[21] Thus, SEIU's expenditures on

[21] This Court also has rejected union attempts to compel employees to subsidize union speech intended to convince others to support the union or its agenda outside of politics. *Ellis* held that union expenses to increase union membership are nonchargeable because, among other things, the "money is spent on people who are not union members, and only in the most distant way works to the benefit of those already paying dues." This is "a far cry from the free-rider problem with which Congress was concerned." 466 U.S. at 452-53.

Proposition 76 should be held nonchargeable to the Nonmembers, and the Ninth Circuit must be reversed on the second Question Presented, as well as the first.

CONCLUSION

This Court should reverse the judgment below on both Questions Presented. On the first, the Ninth Circuit's ruling is contrary to strict scrutiny and *Hudson*'s holding that a union must provide adequate notice and the opportunity to opt out before extracting forced fees from nonmembers. The Court should hold that, in addition to annual *Hudson* notices, when a union imposes a forced-fee increase primarily or solely for political purposes between notices, it may not collect the increase from nonmembers who have already objected, and it must not collect the increase from other nonmembers until it has ascertained their wishes by providing them with a new notice about the increase's purpose and an opportunity to opt out.

On the second Question Presented, the Ninth Circuit's ruling is contrary to *Lehnert*'s holding that nonmembers may not constitutionally be compelled to subsidize a union's political and lobbying expenditures outside the narrow context of contract ratification or implementation. The Court should reverse the Ninth Circuit's ruling and hold that, consistent with strict scrutiny, nonmembers may only be compelled to subsidize union activities that: (1) are incurred in performance of the union's statutory duties for which the union owes a duty of fair representation to the employees; (2) are necessary to satisfy the government's interests in maintaining labor peace in the workplace and avoiding free riders;

and (3) do not burden speech or association beyond that necessary to achieve those interests.

The Court should then remand the case for further proceedings consistent with its decision.

Respectfully submitted,

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