

# Casting an Overdue Skeptical Eye: *Knox v. SEIU*

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Dean Erwin Chemerinsky declared *Knox v. Service Employees International Union, Local 1000*,<sup>1</sup> the term's "biggest sleeper case."<sup>2</sup> Why? Because the Court increased First Amendment protections for workers in public-sector forced-unionism schemes<sup>3</sup> in at least two crucial ways.

First, the Court reaffirmed and emphatically embraced the principle that state statutes compelling citizen association are subject to strict scrutiny under the First Amendment. There is no "union exception" to this basic principle of First Amendment law; it is just as applicable when employees are forced to associate with labor unions

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<sup>1</sup> 132 S. Ct. 2277 (2011).

<sup>2</sup> UC Irvine Law School Dean Chemerinsky also declared *Knox* "a major change in the law." Leigh Jones, Blockbuster Supreme Court Term Included Some Sleeper Cases, National Law Journal, July 18, 2012, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202563543485&slreturn=20120701151634>. Elsewhere, he called it "a dramatic change in the ability of public employee unions to participate in the political system." Of course, the "major change" to which he referred is that *Knox* makes it more difficult for government-employee unions to subsidize their politics with fees extracted involuntarily from nonmembers. Erwin Chemerinsky, High Court's Union Dues Case May Change the Political Landscape, ABA Journal, July 2, 2012, [http://www.abajournal.com/news/article/chemerinsky\\_high\\_courts\\_union\\_dues\\_case\\_may\\_change\\_the\\_political\\_landscape](http://www.abajournal.com/news/article/chemerinsky_high_courts_union_dues_case_may_change_the_political_landscape).

<sup>3</sup> These are euphemistically deemed "fair share" or "union security" agreements by labor unions and their apologists, but are more properly called forced-unionism agreements because they compel individuals who are not union members—and who may not want union representation at all—to subsidize at least some of the activities of the labor union representing their bargaining unit of employees.

as it is in other instances of forced association. Second, and potentially more far-reaching, the majority questioned precedents requiring nonmembers affirmatively to object (“opt out”) to forced union dues if they want to avoid subsidizing the unions’ political speech. The Court suggested that only “opt-in” procedures are consistent with the paramount First Amendment protections against forced speech. If expanded, the “opt-in” theory could limit the collection of forced union dues that artificially subsidize certain political activities and distort the political process.

At issue in *Knox* was a “Temporary Special Assessment to Create a Political Fight-Back Fund” that a California public employee union imposed upon both members and nearly 40,000 nonmembers in order to oppose Governor Arnold Schwarzenegger’s efforts to address California’s perennial budget crisis. In California, a non-Right to Work state (or forced-unionism state), nonunion workers are forced to pay union “agency fees” as a condition of employment.

In 2005, Governor Schwarzenegger proposed four ballot initiatives, sending California’s government-employee labor unions into high dudgeon. In response, Service Employees International Union, Local 1000, the union representing nearly 100,000 state employees, imposed a 25 percent dues surcharge for a period of 16 months beginning in September 2005. The assessment applied to both union members and nonmembers alike. With this program, SEIU hoped to amass a \$12 million war chest. However, because nearly 40 percent of the employees in the bargaining units represented by SEIU were not union members, a substantial portion of this war chest was extracted from employees who were legally compelled to support the union. And because the union failed to comply with the requirements of the National Right to Work Legal Defense Foundation’s victory in *Chicago Teachers Union, Local No. 1 v. Hudson*,<sup>4</sup> the nonmembers were forced to loan SEIU funds for its political program, violating both the First Amendment and decades of the Court’s forced-unionism jurisprudence.<sup>5</sup>

<sup>4</sup> 475 U.S. 292 (1986).

<sup>5</sup> 132 S. Ct. at 2292–93 (citing *Hudson*, 475 U.S. at 305; *Ellis v. Ry. Clerks*, 466 U.S. 435, 444 (1984)).

## **I. Hudson and Its Significance**

Since 1968, the National Right to Work Legal Defense Foundation has provided free legal aid to plaintiffs in almost every reported case dealing with workers' rights not to subsidize union political activities, including every such case before the Supreme Court.<sup>6</sup> The most renowned is *Communication Workers of America v. Beck*,<sup>7</sup> which involved private-sector employees. For public-sector employees, the most important is *Chicago Teachers Union, Local No. 1 v. Hudson*.

Labor unions are not entitled to act as collective-bargaining agents for public employees absent monopoly bargaining power granted by state statute.<sup>8</sup> Likewise, the state-granted monopoly bargaining privilege does not by itself carry authority to force nonmembers financially to support the representative's bargaining activities. That, too, is a statutorily granted privilege, "an act of legislative grace,"<sup>9</sup> which the Court has "termed 'unusual' and 'extraordinary.'"<sup>10</sup> Thus, certain well-defined conditions must be satisfied before a public-employee union may compel nonmembers to subsidize even its basic bargaining activities.

<sup>6</sup> *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Ellis v. Ry. Clerks*, 466 U.S. 435 (1984); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Comm'n Workers of Am. v. Beck*, 487 U.S. 735 (1988); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998); *Marquez v. Screen Actors Guild*, 525 U.S. 33 (1998); *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177 (2007); *Locke v. Karass*, 555 U.S. 207 (2009).

<sup>7</sup> In *Beck*, the Supreme Court held that the National Labor Relations Act "authorizes the exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'" 487 U.S. at 762-63 (quoting *Ellis*, 466 U.S. at 448).

<sup>8</sup> The Supreme Court has plainly held that there is no federal constitutional "right" to monopoly bargaining. *Smith v. Ark. State Highway Employees, Local 1315*, 441 U.S. 463, 465, 465 n.2 (1979) ("the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it") (per curiam) (citing *Hanover Twp Fed'n of Teachers v. Hanover Cmty Sch. Corp.*, 457 F.2d 456, 461 (7th Cir. 1972) (quoting *Indianapolis Educ. Ass'n v. Lewallen*, 72 L.R.R.M. (BNA) 2071, 2072 (7th Cir. 1969) ("there is no constitutional duty to bargain collectively with an exclusive bargaining agent"))).

<sup>9</sup> 132 S. Ct. at 2291 (quoting *Knox v. Cal. State Employees Ass'n, Local 1000*, 628 F.3d 1115, 1126 (9th Cir. 2010) (Wallace, J., dissenting)).

<sup>10</sup> *Id.* (quoting *Davenport*, 551 U.S. at 184, 187); cf. *City of Charlotte v. Local 660, Int'l Ass'n of Firefighters*, 426 U.S. 283, 286-88 (1976) (city not required to allow employees to sign wage assignments for union dues).

First, the legislature must authorize so-called “union security”—that is, forced-unionism—agreements.<sup>11</sup> Second, under most statutory schemes, a union and employer must agree to impose such a requirement in their monopoly bargaining agreement.<sup>12</sup> *Hudson* imposes a third requirement: The union and employer must comply with “the constitutional requirements for the . . . collection of agency fees.”<sup>13</sup> Absent satisfaction of any of these three prerequisites, unions lack lawful authority to exact monies from nonmembers for any purpose.

The Constitution imposes this third requirement because forced-unionism schemes heavily impinge on nonmembers’ First Amendment rights:

To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests. . . . To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee’s freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit.<sup>14</sup>

Nonunion public employees can be compelled, consistent with the Constitution, to bear only their *pro rata* share of the costs of collective bargaining, contract administration, and grievance adjustment.<sup>15</sup> Moreover, *before* a union and/or a public employer are entitled to enforce such an obligation, they must comply fully with “the

<sup>11</sup> *Wessel v. City of Albuquerque*, 299 F.3d 1186, 1190 (10th Cir. 2002). Examples of such legislative authorizations are 29 U.S.C. § 159(a) (2012) (National Labor Relations Act); 45 U.S.C. § 152, Eleventh (2012) (Railway Labor Act). See also *Abood*, 431 U.S. at 223–25 (explaining governmental interests held to justify allowance of agency shop).

<sup>12</sup> At least three states impose forced unionism upon public employees represented by an exclusive bargaining agent without the necessity of the employer’s agreement. Haw. Rev. Stat. § 89-4(a) (2012) (all public employees); N.Y. Civ. Serv. Law § 208.3(b) (McKinney 2012) (same); Cal. Gov. Code §§ 3543(a) (school employees), 3563.5 (university employees) (Deering 2012).

<sup>13</sup> *Hudson*, 475 U.S. at 310. The Court explicitly recognized that meeting the “constitutional requirements” is a joint responsibility: “Since the agency shop itself is ‘a significant impingement on First Amendment rights,’ *the government and the union* have a responsibility to provide procedures that minimize that impingement and that facilitate a nonunion employee’s ability to protect his rights.” *Id.* at 307 n.20 (quoting *Ellis*, 466 U.S. at 455) (emphasis added).

<sup>14</sup> *Abood*, 431 U.S. at 222.

<sup>15</sup> *Id.* at 232–37.

constitutional requirements for the . . . *collection* of agency fees.”<sup>16</sup> The First and Fourteenth Amendments require that certain procedural protections be provided to public employees—“potential objectors”<sup>17</sup>—who have exercised their right to refrain from membership in employee organizations, but are subjected to a forced-unionism agreement by their public employer.<sup>18</sup>

The four procedural safeguards that “the government and union have a responsibility to provide”<sup>19</sup> to all nonmembers are: (1) a good-faith advance reduction of the fee to no more than that portion of the union’s expenditures that is used to perform its duties as the nonmembers’ exclusive bargaining representative; (2) financial disclosure adequate to allow nonmembers to gauge the propriety of the union’s fee and to decide intelligently whether to challenge the fee calculation; (3) an opportunity to challenge the calculation before an impartial decisionmaker; and (4) an escrow of the amounts reasonably in dispute during such challenges.<sup>20</sup>

Procedural safeguards serve two goals. First, they ensure that the fees collected include only the employee’s *pro rata* share of constitutionally chargeable costs. *Hudson’s* holding—setting forth “the constitutional requirements for the Union’s *collection* of agency fees”<sup>21</sup>—ensures against both misuse of collected funds and excessive collections.<sup>22</sup> Second, procedural safeguards “facilitate a nonunion employee’s ability to protect his rights.”<sup>23</sup>

Like all Supreme Court decisions, however, *Hudson* is not self-enforcing. The Court recognized the danger that labor unions will “leav[e] nonunion employees in the dark about the source of the figure of the agency fee,” “requiring them to object in order to

<sup>16</sup> *Hudson*, 475 U.S. at 310 (emphasis added).

<sup>17</sup> *Id.* at 306.

<sup>18</sup> *Tierney v. City of Toledo*, 824 F.2d 1497, 1502 (6th Cir. 1987); see also *Hudson*, 475 U.S. at 304 n.13 (“in this context, the procedures required by the First Amendment also provide the protections necessary for any deprivation of property”).

<sup>19</sup> *Hudson*, 475 U.S. at 307 n.20.

<sup>20</sup> *Id.* at 306–10. Escrow alone is insufficient to render collection of fees constitutional. *Id.* at 309.

<sup>21</sup> *Id.* at 310 (emphasis added).

<sup>22</sup> See *Air Line Pilots Ass’n v. Miller*, 523 U.S. at 876 n.4; *Prescott v. County of El Dorado*, 177 F.3d 1102, 1108 (9th Cir. 1999).

<sup>23</sup> *Hudson*, 475 U.S. at 307 n.20. *Id.* at 306.

receive information.”<sup>24</sup> Thus, a significant portion of the Foundation’s litigation program in the 26 years since *Hudson* has been devoted to ensuring that public-sector labor unions comply with *Hudson*’s requirements.

But as the facts of *Knox* demonstrate, unions’ creativity in seeking to evade these elementary requirements is boundless.<sup>25</sup> Thankfully, the Supreme Court’s decision in *Knox* demonstrates a renewed commitment by the Court to protect nonmembers’ rights.

## II. The Facts

The petitioners in *Knox*, Dianne Knox and the more than 37,000 class members she and the other named plaintiffs represent, are employees of the State of California who are not members of their monopoly bargaining representative, the Service Employees International Union, Local 1000. California law and SEIU’s contracts with the state require the nonmembers to pay compulsory agency fees to the SEIU as a condition of their employment.<sup>26</sup>

In June 2005, SEIU sent its annual *Hudson* notice to the nonmembers. SEIU set the agency fee for July 1, 2005, through June 30, 2006, at 56.35 percent of dues for those nonmembers who objected within 30 days to paying anything more than the cost of bargaining. That 56.35 percent was the portion of union expenditures in the prior year used for collective bargaining (or “chargeable”) activities. Nonmembers who did not object or who resigned from membership subsequent to the notice were subject to deductions of 99.1 percent of dues from their wages. SEIU’s *Hudson* notice did not indicate that

<sup>24</sup> *Id.* at 306.

<sup>25</sup> “[F]or decades, organized labor has engaged in a campaign of ‘massive resistance’ against these decisions, consciously refusing to follow their mandates of these cases, or tailoring their responses to obstruct and frustrate the implementation of workers’ rights.” See Brief Amicus Curiae of Pacific Legal Foundation, Center for Constitutional Jurisprudence, Mountain States Legal Foundation, and Cato Institute in Support of Petitioners at 14–15, *Knox v. Service Employees Int’l Union, Local 1000*, 132 S. Ct. 2277 (2012) (No. 10-1121) (citing Harry G. Hutchison, Reclaiming the First Amendment through Union Dues Restrictions?, 10 U. Pa. J. Bus. & Emp. L. 663 (2008); Jeff Canfield, What a Sham(e): The Broken *Beck* Rights System in the Real World Workplace, 47 Wayne L. Rev. 1049 (2001); Brian J. Woldow, The NLRB’s (Slowly) Developing *Beck* Jurisprudence: Defending a Right in a Politicized Agency, 52 Admin. L. Rev. 1075 (2000) (documenting refusal of unions and government to abide by *Beck* and similar cases) (other citations omitted)).

<sup>26</sup> Cal. Gov. Code § 3513(k) (Deering 2012).

later a temporary assessment would be added to the 2005–2006 dues and fees, which were set at 1 percent of salary, with a cap of not more than \$45 per month. The notice merely said that dues *could* be increased.

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 became governor. During the summer of 2005, Governor Schwarzenegger called for a special statewide election to consider four ballot initiatives designed, among other things, 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 expiration of the 30-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. The SEIU Executive Council boldly stated its intent 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.’ ”<sup>27</sup> 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.’ ”<sup>28</sup> SEIU’s goal was to raise \$12 million for its political campaign.

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.’ ”<sup>29</sup> This letter “did not provide an explanation for the basis of the additional fees being imposed, and it

<sup>27</sup> Knox, 132 S. Ct. at 2286.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

did not provide nonmembers with an opportunity to object to the additional fees.”<sup>30</sup>

Deduction of the assessment began with the state employees’ September 2005 paychecks, and continued throughout 2006. The assessment increased the total compulsory fees deducted from the nonmembers’ wages by approximately 25–33 percent. The state deducted 56.35 percent of the assessment from those who had objected after the June 2005 notice, and 99.1 percent from those who had not.

With the money garnered from its political assessment, SEIU spent the money on political activities opposing the November 2005 state-wide ballot initiatives. Thus, 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,’ ” in opposition to the ballot initiatives.

### III. The Proceedings Below

On November 1, 2005, the Nonmembers filed a class action lawsuit alleging that the collection and use of the \$12 million special assessment seized from them was unconstitutional because the union had not provided a new *Hudson* notice and opportunity to object and opt out of paying the assessment. The complaint sought declaratory and injunctive relief and equitable restitution for violations of the nonmembers’ rights under the First and Fourteenth Amendments. The district court certified two 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 a plaintiff who resigned from membership after adoption of the political assessment.

After more than two years of proceedings—and well after the 2005 elections were held and the assessment by its terms expired, the district court entered summary judgment for the nonmembers.

<sup>30</sup> Knox v. Cal. State Employees Ass’n, Local 1000, 628 F.3d at 1129 (Wallace, J., dissenting).

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 to object to the Assessment," and that "the 2005 *Hudson* notice was inadequate to provide a basis for the Union's Assessment."<sup>31</sup> The court emphasized that "[i]t is hard to imagine any circumstances in which it could be more clear that an Assessment was passed for political and ideological purposes."<sup>32</sup>

SEIU appealed, and a three-judge panel of the Ninth Circuit reversed. Former Chief Judge J. Clifford Wallace dissented at length.

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.<sup>33</sup> 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."<sup>34</sup> 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."<sup>35</sup>

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."<sup>36</sup> SEIU's expenditures to oppose Proposition 76 were then held to be lawfully chargeable to the nonmembers because Proposition 76 purportedly "would have effectively permitted the Governor to

<sup>31</sup> *Knox v. Westly*, No. 2:05-cv-02198-MCE-KJM, 2008 U.S. Dist. LEXIS 25579, at \*29 (E.D. Cal. Mar. 27, 2008).

<sup>32</sup> *Id.* at \*21.

<sup>33</sup> *Knox*, 628 F. 3d at 1119–23.

<sup>34</sup> *Id.* at 1120 (citing *Grunwald v. San Bernardino City Unified Sch. Dist.*, 994 F.2d 1370, 1376, n.8 (9th Cir. 1993) (Kozinski, J.)).

<sup>35</sup> *Id.* at 1117.

<sup>36</sup> *Id.* at 1119 n.2.

abrogate the Union's collective bargaining agreements under certain circumstances."<sup>37</sup>

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."<sup>38</sup> Judge Wallace found "that the majority's 'reasonable accommodation test' is misguided and is inconsistent with case law we are required to follow"<sup>39</sup> because it "ignores *Hudson's* instruction 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.'" <sup>40</sup>

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."<sup>41</sup>

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."<sup>42</sup> It contained *no* language, however, that would have given the governor any authority to abrogate bargaining agreements.<sup>43</sup>

The Supreme Court granted the nonmembers' petition for a writ of certiorari on June 26, 2011, and heard oral argument on January 10, 2012. The Court's decision was issued on June 21, 2012. Justice Samuel Alito (joined by Chief Justice John Roberts and Justices Antonin Scalia, Anthony Kennedy, and Clarence Thomas) authored

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 1123 (Wallace, J., dissenting).

<sup>39</sup> *Id.* at 1128.

<sup>40</sup> *Id.* at 1127–28 (quoting *Hudson*, 475 U.S. at 302–03) (emphasis in original, citation omitted).

<sup>41</sup> *Id.* at 1135 n.4.

<sup>42</sup> *Id.*

<sup>43</sup> See also Ballotpedia.org, California Proposition 76, Cap on Growth of State Budget (2005), [http://ballotpedia.org/wiki/index.php/California\\_Proposition\\_76,\\_Cap\\_on\\_Growth\\_of\\_State\\_Budget\\_\(2005\)](http://ballotpedia.org/wiki/index.php/California_Proposition_76,_Cap_on_Growth_of_State_Budget_(2005)) (last visited Aug. 7, 2012).

the opinion for the Court. Justice Sonia Sotomayor, joined by Justice Ruth Bader Ginsburg, concurred in the judgment, but vigorously questioned the scope of the remedy the majority mandated, while Justice Stephen Breyer, joined by Justice Elena Kagan, dissented from all but that portion of the Court's opinion regarding mootness.

#### **IV. SEIU's Futile Diversion into Mootness**

In late September 2011, more than four months after defending the Ninth Circuit's decision on the merits in opposing the petition for certiorari, more than two weeks after the nonmembers' brief was filed with the Court, more than three months after certiorari was granted, more than three years after the district court entered judgment, and nearly six years after the elections in which the nonmembers' forced fees were expended against their will, SEIU mailed to nonmembers a 10-page document offering dues refunds and nominal damages.

SEIU then filed with the Supreme Court a motion to dismiss the case as moot, contending that its actions constituted voluntary compliance with the district court's judgment, and therefore mooted the case because its notice "provide[s] Petitioners and the class they represent with all of the relief that the District Court ordered in this case, and indeed more." The district court had ordered SEIU to "issue a *proper Hudson* notice as to the Assessment, with a renewed opportunity for nonmembers to object to paying the nonchargeable portion of the fee," and "to issue nonmembers who, pursuant to this *proper* notice, object to the Assessment a refund, with interest, of that amount."<sup>44</sup>

Moreover, the district court had specifically *rejected* the proposition that SEIU's *post hoc* fee calculation was appropriate: "the adequacy of *Hudson* notices should not be viewed through a lens skewed by the benefit of hindsight."<sup>45</sup>

The Supreme Court unanimously rejected SEIU's effort to moot the case, expressing a high degree of skepticism toward the union's post-certiorari machinations. Noting that "SEIU defended the decision below on the merits" in opposing the petition for certiorari, the Court unanimously stated that "[s]uch postcertiorari maneuvers

<sup>44</sup> Knox, 2008 U.S. Dist. LEXIS 25579, at \*31 (emphasis added).

<sup>45</sup> *Id.* at \*21.

designed to insulate a decision from review by this Court must be viewed with a critical eye."<sup>46</sup> The Court gave two reasons why a finding of mootness could not be sustained in this case.

First, the Court recognized that SEIU's argument failed under its "voluntary cessation" jurisprudence. "The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed."<sup>47</sup> The emptiness of SEIU's argument was particularly acute because the union "continue[d] to defend the legality of the Political Fight-Back fee," causing the Court to conclude that "it is not clear why the union would necessarily refrain from collecting similar fees in the future."<sup>48</sup>

Second, the Court was highly skeptical of whether SEIU's claimed compliance with the district court's judgment was adequate because the notice given after certiorari was granted contained "a host of 'conditions, caveats, and confusions as unnecessary complications aimed at reducing the number of class members who claim a refund,'"<sup>49</sup> including a refusal "to accept refund requests by fax or e-mail" and conditioning refunds "upon the provision of an original signature and a Social Security number."<sup>50</sup> Dismissing the case as moot under these circumstances, the Court recognized, would permit SEIU "to dictate unilaterally the manner in which it advertises the availability of the refund."<sup>51</sup> The Court therefore concluded that "a live controversy remains," and proceeded to the merits.

## V. Framework for Analysis: Strict Scrutiny Is the Standard

Turning to the merits, Justice Alito's opinion for the Court first applied the Court's well-established—but sometimes ignored—jurisprudence regarding forced association and forced speech. Alito returned to a theme discussed in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, which was decided on the same day that *Knox* was granted certiorari: "Laws that burden [financial support

<sup>46</sup> 132 S. Ct. at 2287.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 2287–88.

<sup>51</sup> *Id.* at 2288.

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.”<sup>52</sup>

The Court began with a familiar discussion of the “close connection between our Nation’s commitment to self-government and the rights protected by the First Amendment,” and the purpose of First Amendment liberties in creating “an open marketplace” of ideas.<sup>53</sup> Applying these values to the context of forced-unionism schemes, the Court reiterated the two-sided nature of First Amendment protections, that the “government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves.”<sup>54</sup>

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.”<sup>55</sup> Moreover, the “established elements of speech, assembly, association, and petition, though not identical, are inseparable.”<sup>56</sup> With these principles in mind, the Court’s prior cases have also made clear that “[f]reedom of association . . . presupposes a freedom not to associate.”<sup>57</sup> Compelling association for expressive purposes therefore runs afoul of First Amendment guarantees.<sup>58</sup>

Prior decisions of the Court in other contexts have made clear that infringements on the right to expressive association are subject to

<sup>52</sup> *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2817 (2011) (quoting *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (internal quotation marks omitted)).

<sup>53</sup> 132 S. Ct. at 2288 (citing *Brown v. Hartlage*, 456 U.S. 45, 52 (1982)).

<sup>54</sup> *Id.* (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992); *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (per curiam); *W. Va Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705, 713–15 (1977); *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988) (The First Amendment protects “the decision of both what to say and what not to say”) (emphasis deleted)).

<sup>55</sup> 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).

<sup>56</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982) (citation omitted).

<sup>57</sup> *Roberts*, 468 U.S. at 623.

<sup>58</sup> See *Elrod*, 427 U.S. at 359–60 (compelling employees to associate with a political party). In the context of forced-unionism agreements, the Court had made clear that the right to refrain from supporting the political beliefs of others is also “at the heart of the First Amendment.” *Hudson*, 475 U.S. at 302 n.9; *Abood*, 431 U.S. at 236–37.

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.’”<sup>59</sup>

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.’”<sup>60</sup> The same standard applies where public employees are compelled to financially support a union as their mandatory, exclusive bargaining representative.<sup>61</sup>

In *Knox*, rather than following the Supreme Court’s clear mandate to apply strict scrutiny, the Ninth Circuit held that *Hudson* requires a “balancing and reasonable accommodation test” to determine the adequacy of a union’s efforts to comply with “the constitutional requirements for the . . . collection of agency fees.”<sup>62</sup> The Court flatly rejected this test, recognizing that there was nothing to “balance” between the nonmembers’ constitutional rights and SEIU’s mere pecuniary interests:

Contrary to the view of the Ninth Circuit panel majority, we did not call for a balancing of the “right” of the union to collect an agency fee against the First Amendment rights of nonmembers. As we noted in *Davenport*, “unions have no constitutional entitlement to the fees of nonmember-employees.” A union’s “collection of fees from nonmembers is authorized by an act of legislative grace”—one that we have termed “unusual” and “extraordinary.” Far from calling for a balancing of rights or interests, *Hudson* made it clear that any procedure for exacting fees from unwilling contributors must be “carefully tailored to minimize the infringement” of free speech rights. And to underscore the meaning of this careful tailoring, we followed that statement with a citation to cases holding that measures burdening the freedom of

<sup>59</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (quoting *Roberts*, 468 U.S. at 623).

<sup>60</sup> *Elrod*, 427 U.S. at 362–63 (citations & footnote omitted); see also *Rutan v. Republican Party*, 497 U.S. 62, 74 (1990) (infringements on expressive association must be “narrowly tailored to further vital government interests”).

<sup>61</sup> See *Hudson*, 475 U.S. at 303 n.11; *Lehnert*, 500 U.S. at 519; *Abood*, 431 U.S. at 233–34; *Locke*, 555 U.S. at 219.

<sup>62</sup> *Knox*, 628 F.3d at 1120.

speech or association must serve a “compelling interest” and must not be significantly broader than necessary to serve that interest.<sup>63</sup>

The Court thus rejected the Ninth Circuit’s effort to carve out from the Court’s line of compelled expressive association jurisprudence, and treat with lesser scrutiny, compulsory unionism. There is no principled difference between compelling an expressive organization to associate with an individual—as *Boy Scouts of America v. Dale*<sup>64</sup> and *Roberts v. U.S. Jaycees*<sup>65</sup> 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, that is, strict scrutiny.

## **VI. Applying Strict Scrutiny to the “Special Assessment”**

The Ninth Circuit majority held that SEIU’s June 2005 *Hudson* notice covering ordinary dues collections sufficed to cover the special political assessment commenced in September 2005, after the *Hudson* notice’s “opt-out” period had expired. The June 2005 notice only concerned regular dues and fees. It gave no notice concerning the political assessment imposed just a few months later, much less an opportunity to make an informed objection to paying that assessment.

The Court flatly rejected the Ninth Circuit’s conclusion that nonmembers had to wait until next year’s *Hudson* notice to object to the special assessment:

By authorizing a union to collect fees from nonmembers and permitting the use of an opt-out system for the collection of fees levied to cover nonchargeable expenses, our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate. The SEIU, however, asks us to go farther. It asks us to approve a procedure under which (a) a special assessment billed for use in electoral campaigns was assessed without providing a new opportunity for nonmembers to decide whether they wished to contribute to this effort and (b) nonmembers who previously

<sup>63</sup> 132 S. Ct. at 2291 (internal citations & footnote omitted).

<sup>64</sup> 530 U.S. 640 (2000).

<sup>65</sup> 468 U.S. 609 (1984).

opted out were nevertheless required to pay more than half of the special assessment even though the union had said that the purpose of the fund was to mount a political campaign and that it would not be used for ordinary union expenses. *This aggressive use of power by the SEIU to collect fees from non-members is indefensible.*<sup>66</sup>

Seven justices endorsed this principle, with only Justice Breyer and Justice Kagan departing from the Court's holding.<sup>67</sup>

The Court credited SEIU's pre-litigation representations that the special assessment was specifically designated as a "Political Fight-Back Fund," which the union had asserted "will not be used for regular costs of the union—such as office rent, staff salaries or routine equipment replacement, etc."<sup>68</sup> In short, the majority took SEIU at its word:

The special assessment in this case was billed for use in a broad electoral campaign designed to defeat two important and controversial ballot initiatives and to elect sympathetic candidates in the 2006 gubernatorial and legislative elections. There were undoubtedly nonmembers who, for one reason or another, chose not to opt out or neglected to do so when the standard *Hudson* notice was sent but who took strong exception to the SEIU's political objectives and did not want to subsidize those efforts. These nonmembers might have favored one or both of the ballot initiatives; they might have wished to support the reelection of the incumbent Governor; or they might not have wanted to delegate to the union the authority to decide which candidates in the 2006 elections would receive a share of their money.<sup>69</sup>

<sup>66</sup> 132 S. Ct. at 2291 (emphasis added); see also *id.* at 2296–97 (Sotomayor, J., concurring in the judgment). *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).

<sup>67</sup> 132 S. Ct. at 2286. Justice Breyer's dissent focused on *Hudson's* observation "that the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year." 132 S. Ct. at 2299 (Breyer, J., dissenting) (quoting *Hudson*, 475 U.S. at 307 n.18).

<sup>68</sup> 628 F.3d at 1135 ("The temporary assessment was contemplated as a political fundraising vehicle . . .").

<sup>69</sup> 132 S. Ct. at 2292.

Therefore, the Court held that a union midterm special assessment creates union obligations not contemplated by *Hudson's* focused consideration of annual union dues:

Giving employees only one opportunity per year to make this choice [to object or not] is tolerable if employees are able at the time in question to make an informed choice. But a nonmember cannot make an informed choice about a special assessment or dues increase that is unknown when the annual notice is sent. When a union levies a special assessment or raises dues as a result of unexpected developments, the factors influencing a nonmember's choice may change. In particular, a nonmember may take special exception to the uses for which the additional funds are sought.<sup>70</sup>

Moreover, the "procedure accepted in *Hudson* is designed for use when a union sends out its regular annual dues notices."<sup>71</sup> It is "predicated on the assumption that a union's allocation of funds for chargeable and nonchargeable purposes is not likely to vary greatly from one year to the next. No such assumption is reasonable, however, when a union levies a special assessment or raises dues as a result of events that were not anticipated or disclosed at the time when a yearly *Hudson* notice was sent."<sup>72</sup>

The Ninth Circuit's majority authorized unions to exact involuntary loans for political campaigns from those who might object to those loans by simply timing political assessments to occur after the issuance of their regular annual *Hudson* notices. This, the Court held, provides "cold comfort" to nonmembers who object to supporting financially a union's political and ideological activities.

## **VII. The Court Reaffirms That Political Expenditures Are Always Nonchargeable to Objecting Nonmembers**

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

<sup>70</sup> *Id.* at 2291–92.

<sup>71</sup> *Id.* at 2293.

<sup>72</sup> *Id.* (footnote omitted).

have effectively permitted the Governor to abrogate the Union's collective bargaining agreements under certain circumstances."<sup>73</sup>

*Lehnert* was the Court's most recent decision to consider the chargeability to nonmembers of "lobbying and electoral politics."<sup>74</sup> In that case, the Court applied two different tests to reach the conclusion that forced support of political expenditures like those in *Knox* is constitutionally impermissible.

Justice Harry Blackmun, writing for the *Lehnert* majority, held that "chargeable activities 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."<sup>75</sup> Applying that test, Justice Blackmun, joined by Chief Justice William Rehnquist and Justices Byron White and John Paul Stevens, ruled that the Michigan teachers' union's "program designed to secure funds for public education in Michigan" was constitutionally nonchargeable to nonmembers because "[n]one of these activities was shown to be oriented toward the ratification or implementation of [the plaintiff nonmembers'] collective-bargaining agreement."<sup>76</sup>

Justice Scalia, writing for himself and Justices Sandra Day O'Connor, Kennedy, and David 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."<sup>77</sup> But that opinion, too, agreed "that the challenged lobbying expenses are nonchargeable."<sup>78</sup>

<sup>73</sup> *Knox*, 628 F.3d at 1119 n.2.

<sup>74</sup> *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 514 (1991). The more recent decision in *Locke* is not on point on this issue because there the only issue 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.

<sup>75</sup> 500 U.S. at 519 (emphasis added).

<sup>76</sup> *Id.* at 527.

<sup>77</sup> *Id.* at 558–59 (Scalia, J., concurring in part, dissenting in part).

The Ninth Circuit's holding that SEIU could compel Dianne Knox and the other nonmembers to subsidize the union's expenditures to oppose a ballot proposition seems erroneous under either standard applied in *Lehnert*. Sure enough, the Supreme Court found SEIU's argument in support of the Ninth Circuit's ruling "unpersuasive," and reaffirmed that strict scrutiny, not a balancing test, applies to forced-unionism schemes, which are no less compelled speech and compelled association.<sup>79</sup>

First, the Court criticized "SEIU's understanding of the breadth of chargeable expenses" as "so expansive that it is hard to place much reliance on its statistics."<sup>80</sup> It cited SEIU's brief as arguing "broadly that all funds spent on 'lobbying . . . the electorate' are chargeable" to nonmembers.<sup>81</sup> The Court countered that "'lobbying . . . the electorate' is nothing but another term for supporting political causes and candidates."<sup>82</sup> The Court has "never held that the First Amendment permits a union to compel nonmembers to support such political activities," and the majority pointed out that, in the earliest case on the subject, the Court "noted the important difference between a union's authority to engage in collective bargaining and related activities on behalf of nonmember employees in a bargaining unit and the union's use of nonmembers' money 'to support candidates for public office' or 'to support political causes which [they] oppos[e].'"<sup>83</sup>

Second, turning to the specific union expenditures at issue in *Knox*, the Court explained, "If we were to accept [SEIU's] broad definition of germaneness, it would effectively eviscerate the limitation on the use of compulsory fees to support unions' controversial political activities."<sup>84</sup> The Court identified the consequences of accepting such a "broad definition of germaneness":

Public-employee salaries, pensions, and other benefits constitute a substantial percentage of the budgets of many States and their subdivisions. As a result, a broad array of ballot

<sup>78</sup> *Id.* at 559.

<sup>79</sup> *Id.* at 2294, 2288–91.

<sup>80</sup> *Id.* at 2294.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* (quoting *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 768 (1961)).

<sup>84</sup> *Id.* at 2295.

questions and campaigns for public office may be said to have an effect on present and future contracts between public-sector workers and their employers. If the concept of “germaneness” were as broad as the SEIU advocates, public-sector employees who do not endorse the unions’ goals would be *essentially unprotected* against being compelled to subsidize political and ideological activities to which they object.<sup>85</sup>

After *Lehnert* and *Knox*, it is clear that union political, lobbying, and ideological activities are not chargeable to objecting nonmember public employees merely because those activities affect a union’s collective bargaining and contract administration. It is unclear, however, where this leaves the Court’s general *Lehnert* test for chargeability. The Ninth Circuit panel majority considered *only* whether an expenditure was “germane to collective bargaining.” The panel ignored the fact that the *Lehnert* majority’s three-prong test used the conjunctive “and,” not the disjunctive “or.” That fact is significant, as the Seventh Circuit recognized in applying the *Lehnert* three-part test:

“[G]ermaneness” 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.<sup>86</sup>

Although the nonmembers strongly argued that the Court should clarify its *Lehnert* test as a whole, the Court declined that invitation.<sup>87</sup>

<sup>85</sup> *Id.* at 2295 (emphasis added).

<sup>86</sup> *Southworth v. Grebe*, 151 F.3d 717, 727 (7th Cir. 1998), rev’d on other grounds, 529 U.S. 217 (1999).

<sup>87</sup> The Court cited *Lehnert* *not once* in its discussion of the germaneness question and only twice in its opinion, and then, only generally. 132 S. Ct. at 2284, 2294. Justice Sotomayor, in her concurrence, cited it three times, *id.* at 2296, 2298 (Sotomayor, J. concurring in the judgment), but also did not address its general test.

### VIII. Questioning the Status Quo: "Opt-Out" May Not Satisfy Strict Scrutiny

Perhaps the most far-reaching aspect of *Knox* is the majority's questioning of whether the existing forced-unionism jurisprudence insufficiently protects the First Amendment rights of nonmembers, and Justice Alito's signal that perhaps some of the fundamental premises underlying that jurisprudence might be ripe for reconsideration. Although the Court disclaimed any intent to "revisit today whether the Court's former cases have given adequate recognition to the critical First Amendment rights at stake," the Court offered signals to give hope that a greater, more stringent regard for individual rights might be in the offing.<sup>88</sup>

First, the Court was clear it would continue to be skeptical toward nonmember fee exactions: "the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly—one that we have found to be justified by the interest in furthering 'labor peace.' But it is an anomaly nevertheless."<sup>89</sup>

The Court then questioned the long-standing requirement that nonmembers, in addition to declining to join the union, must also affirmatively object if they want to pay less than full union dues as a condition of employment. Noting that this requirement "represents a remarkable boon for unions," the majority asked a series of rather self-evident questions:

Once it is recognized, as our cases have, that a nonmember cannot be forced to fund a union's political or ideological

<sup>88</sup> *Id.* at 2289.

<sup>89</sup> 132 S. Ct. at 2290. According to the Supreme Court, government's interest in ensuring "labor peace" within a workforce justifies the imposition of exclusive representation on employees. "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, 224. It is not some generalized fear of labor unrest or union violence requiring appeasement of union officials. The Court saw designation of a single, exclusive representative to speak for all employees vis-à-vis their public employer as a permissible solution to the perceived problem of diverse expressive association *within* the workplace. *Id.* at 220–21; see also *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 52 (1983). That, in turn, spawns a "free rider" interest in requiring employees to pay for this monopoly representation. *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.

activities, what is the justification for putting the burden on the nonmember to opt out of making such a payment? Shouldn't the default rule comport with the probable preferences of most nonmembers? And isn't it likely that most employees who choose not to join the union that represents their bargaining unit prefer not to pay the full amount of union dues?<sup>90</sup>

In short, while asserting that “dissent is not to be presumed,” earlier cases had failed to ask a perhaps more relevant question: “Why should a *nonmember's* consent be presumed?” Notably absent from any of the criticism of the majority's conclusions by the concurrence and the dissent is any effort to explain why political speech—an affirmative act—should be sustained by monies collected by virtue of mere inertia.<sup>91</sup>

The danger of placing the burden on the nonmember to opt out is that it “creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree.”<sup>92</sup> In light of the fact that *Hudson* had pointedly condemned service fee exactions in the absence of “a procedure which will avoid the risk that [nonmembers'] funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining,”<sup>93</sup> Justice Alito concluded that:

Although the difference between opt-out and opt-in schemes is important, our prior cases have given surprisingly little attention to this distinction. Indeed, acceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment principles.<sup>94</sup>

<sup>90</sup> 132 S. Ct. at 2290.

<sup>91</sup> The objection requirement has been challenged and was struck down by at least one court. *Mitchell v. Los Angeles Unified Sch. Dist.*, 744 F. Supp. 938, 941–43 (C.D. Cal. 1990). However, that decision did not survive review by the Ninth Circuit, 963 F.2d 258, 262–63 (9th Cir. 1992), cert. denied 506 U.S. 940 (1992). Likewise, in another reported case from the Sixth Circuit, such a challenge was rejected by the district court, *Weaver v. Univ. of Cincinnati*, 764 F. Supp. 1241, 1246 (S.D. Ohio 1991), and affirmed by the Sixth Circuit. *Weaver v. Univ. of Cincinnati*, 970 F.2d 1523, 1532–33 (6th Cir. 1992), cert. denied 507 U.S. 917 (1993).

<sup>92</sup> *Id.* at 2290.

<sup>93</sup> *Hudson*, 475 U.S. at 305.

<sup>94</sup> *Knox*, 132 S. Ct. at 2290.

The opt-out approach was first accepted in *Street*: “dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee.”<sup>95</sup> However, despite seriously considering for the first time the difference between opt-out and opt-in procedures in the context of First Amendment principles, the *Knox* majority did not adopt the statement in *Street* as a holding of the Court, let alone a reliable constitutional principle.

Rather, the Court dismissed the prescription as mere “dicta,” “stated in passing” as an “offhand remark.”<sup>96</sup> More fundamentally, the basis for the current Court’s skepticism about the “dissent is not to be presumed” language is that the *Street* court “did not pause to consider the broader constitutional implications of an affirmative opt-out requirement . . . [n]or . . . explore the extent of First Amendment protection for employees who might not qualify as active ‘dissenters’ but who would nonetheless prefer to keep their own money rather than subsidizing by default the political agenda of a state-favored union.”<sup>97</sup>

Later decisions parroting *Street*’s dicta fared no better as reliable authority under the *Knox* Court’s close analysis:

In later cases such as *Abood* and *Hudson*, we assumed without any focused analysis that the dicta from *Street* had authorized the opt-out requirement as a constitutional matter. Thus in *Hudson* we did not take issue with the union’s practice of giving employees annual notice and an opportunity to object to expected political expenditures. At the same time, however, we made it clear that the procedures used by a union to collect money from nonmembers must satisfy a high standard.<sup>98</sup>

With these considerations in mind, the majority concluded that by “authorizing a union to collect fees from nonmembers and permitting the use of an opt-out system for the collection of fees levied to cover nonchargeable expenses, our prior decisions approach, if

<sup>95</sup> 367 U.S. at 740.

<sup>96</sup> 132 S. Ct. at 2290.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 2290–91.

they do not cross, the limit of what the First Amendment can tolerate.”<sup>99</sup> Although that statement suggests that, in a case squarely presenting the question, a majority of the current Court might find that an opt-out scheme for forced union fees is never permitted by the First Amendment, the Court did not have that question before it in *Knox*. However, the Court found it necessary to reach that question in the case before it because of SEIU’s overreaching. Moreover, for this case and its unique facts, the Court applied its skeptical view of the earlier cases’ acceptance of opt-out systems to conclude that:

To respect the limits of the First Amendment, the union should have sent out a new notice *allowing nonmembers to opt in to the special fee rather than requiring them to opt out*. Our cases have tolerated a substantial impingement on First Amendment rights by allowing unions to impose an opt-out requirement at all. Even if this burden can be justified during the collection of regular dues on an annual basis, *there is no way to justify the additional burden of imposing yet another opt-out requirement to collect special fees whenever the union desires*.<sup>100</sup>

The Court was even more adamant regarding the nonmembers who already had objected to SEIU’s annual notice for regular dues:

The SEIU’s treatment of nonmembers who opted out when the initial *Hudson* notice was sent [and had 56.35% of the special assessment seized from their wages] also ran afoul of the First Amendment. . . . [T]he union proclaimed that the special assessment would be used to support an electoral campaign and would not be used for ordinary union expenses. Accordingly, *there is no reason to suppose that 56.35% of the new assessment was used for properly chargeable expenses*. On the contrary, if the union is to be taken at its word, virtually all of the money was slated for nonchargeable uses.<sup>101</sup>

The Court, therefore, concluded that in “the new situation presented here . . . , when a public-sector union imposes a special assessment or dues increase, the union must provide a fresh *Hudson* notice

<sup>99</sup> *Id.* at 2291.

<sup>100</sup> *Id.* at 2293 (emphasis added).

<sup>101</sup> *Id.*

and may not exact any funds from nonmembers without their affirmative consent.”<sup>102</sup>

This holding was where Justices Sotomayor and Ginsburg parted company with Justice Alito and the other four justices voting with the majority. Although joining in the judgment, their concurrence criticizes the majority for “proceed[ing], quite unnecessarily, to reach significant constitutional issues not contained in the questions presented, briefed, or argued.”<sup>103</sup> The majority responded that the holding “falls within” the second question before the Court,<sup>104</sup> and “also addresses the primary remaining dispute between the parties, namely, the particular procedures that must be followed on remand in order to provide adequate assurance that members of the class are not compelled to subsidize nonchargeable activities to which they object.”<sup>105</sup>

## IX. Conclusions

*Knox*’s holding is limited, but its reasoning could be transformative. *Knox* forecloses the latest avenue of union evasion of the requirement that nonunion public employees not be kept “in the dark” about the monies forcibly extracted from them for union political activities. Unions are unlikely to attempt mid-term forced dues extractions where only those who “opt in” may be assessed, and they are unlikely to yield much in the way of voluntary support.

Additionally, *Knox* has vindicated the rights of nearly 40,000 California state employees, who may well receive full refunds of the money forcibly extracted by SEIU to defeat a ballot initiative that would have protected them from this type of overreaching in all circumstances.

<sup>102</sup> *Id.* at 2295, 2296.

<sup>103</sup> *Id.* at 2297 (Sotomayor, J., concurring in the judgment).

<sup>104</sup> “The second question on which we granted review broadly asks us to determine the circumstances under which a State may deduct from the pay of nonunion employees money that is used by a union for general electioneering . . . . Our holding—that this may be done only when the employee affirmatively consents—falls within that question.” 132 S. Ct. at 2296 n.9.

<sup>105</sup> 132 S. Ct. at 2296 n.9. Consistent with its conclusions that the prior precedents never considered the constitutional problems with opt-out requirements, the majority also notes that Justice Sotomayor’s reasoning would require the Court improperly to “proceed on the *assumption* that an opt-out regime is permitted.” *Id.* (emphasis in original).

On the other hand, the majority's skepticism about *Street's* "dissent is not to be presumed" dicta suggests that forced support of union political speech may become the exception, and not the rule. That bodes well for the interests of individual public employees. The forced speech and association being mandated for public employees under public-sector bargaining statutes in many states may eventually be curtailed by a decision limiting *compelled* exactions to only those purposes that serve a compelling state interest: the union's direct costs of collective bargaining, contract administration, and grievance adjustment.

Although intended as a warning, Justice Sotomayor's concurrence anticipates the possibility "that th[e] line [of decisions tolerating opt-out requirements] may not long endure."<sup>106</sup> If that is the case, then the Court's First Amendment jurisprudence will not only provide a greater degree of protection against forced speech and association to the nation's public employees. It will also eliminate a state-provided political advantage that has been given to one preferred class of political actors, public-sector labor organizations: the ability to extract political contributions from individuals who—while refusing to associate with them—may out of inertia or inadvertence fail affirmatively to object to those exactions.

<sup>106</sup> 132 S. Ct. at 2299. While the concurrence suggests procedural flaws in the Court's determination in this regard, Justice Breyer's dissent relies upon policy arguments, and would allow politicians to impose a regime of presumptions ("default rules") regarding nonmembers that would serve to impede the exercise of their First Amendment right to refrain from supporting a union. *Id.* at 2307 (Breyer, J., dissenting) (citing Sunstein & Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. Chi. L.Rev. 1159, 1161 (2003) (explaining that default rules play an important role when individuals do not have "well-defined preferences")). The dissent does not explain how allowing politicians to enlist the state in indulging their preference for union speech can survive strict scrutiny.