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Local 1000

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

DIANNE KNOX; WILLIAM L. BLAYLOCK; RODERT A. CONOVER; EDWARD L. DOBROWOLSKI, JR.; KARYN GIL; THOMAS JACOB HASS; PATRICK JOHNSON; JON JUMPER; AND R. PAUL RICKER, ON BEHALF OF THEMSELVES AND THE CLASS THEY SEEK TO REPRESENT,

Plaintiffs,

v.

STEVE WESTLY, Controller, State of California; AND CALIFORNIA STATE EMPLOYEES ASSOCIATION, LOCAL 1000, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO-CLC,

Defendants.

No. 2:05-CV-2198 MCE (KJM)

OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Date: November 4, 2005
Time: 10:00 a.m.
Ctrm: Courtroom 3, 15th Floor
(Hon. Morrison C. England Jr.)

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INTRODUCTION AND BACKGROUND

Plaintiffs include nonmembers of Defendant Service Employees International Union, Local 1000 (the "Union"), who, under a time-tested procedure that has been approved by the Supreme Court and Ninth Circuit for public employees and was enacted by the California Legislature specifically, are entitled to pay a reduced fee below the amount of dues paid by members of the Union, simply by objecting once a year. The nonmembers seek a preliminary injunction upsetting this carefully balanced system, repudiating Supreme Court and Ninth Circuit law, and preventing the Union from collecting a temporary fee increase because nonmembers have not been afforded an unprecedented mid-year notice and a new opportunity to object.

Plaintiffs' law firm filed a lawsuit seeking, among other relief, this same remedy against the California Faculty Association in *Liegmann v. California Teachers Association*, C 05-03828 (JW) (N.D. Cal.). By Order of October 7, 2005, the Honorable James Ware rejected the application for a Temporary Restraining Order in that case. That Order and carefully reasoned decision, which is attached to this brief as Exhibit A, rejects the very arguments Plaintiffs make in this case. In particular, with respect to harm to nonmembers of a union who object to a temporary increase in their fees, Judge Ware found that "the First Amendment also applies to unions and non-objecting members and nonmembers" and there was therefore not a sufficient showing on the balance of harms. *Liegmann* Order at 4. Likewise, with respect to the likelihood of success on the merits, Judge Ware found that a notice "following the increase in fees . . . is not constitutionally required." *Id.* at 5.

Having been unsuccessful in one federal court, Plaintiffs' law firm now seeks to obtain a contrary result in a different court. Plaintiffs do not dispute that they received notice of the temporary fee increase two months ago. *See* Complaint, Exh. D; Pls' Br. at 5:14-15, 6:12-13. Plaintiffs, however, did not serve their injunction papers until approximately 3:40 p.m. on November 2, 2005. Declaration of Jeffrey Demain, ¶2. This delay alone would be ground for declining to provide relief. The Court held a hearing less than an hour later at which it entered a Temporary Restraining Order and ordered the Union to file opposition papers with respect to

a preliminary injunction by 2:00 p.m. on November 3, 2005, with a hearing to follow at 10:00 a.m. on November 4, 2005. This deadline of less than 24 hours to file the opposition including any declarations – which was entered despite the issuance of a TRO – does not allow the Union adequate time to respond, in particular by gathering declarations with respect to the balance of harms. Nevertheless, the Union demonstrates below that the preliminary injunction should be denied or drastically limited in scope.

ARGUMENT

I. Plaintiffs Have Failed To Show A Likelihood Of Success On The Merits

A. Constitutional And Statutory Background

There is no question that unions may constitutionally charge fair share fee payers for their *pro rata* share of the costs incurred in obtaining the benefits of union representation. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 221-23 (1977). Further, unions may constitutionally charge fee payers the full equivalent of union dues, unless a fee payer objects to paying for certain types of expenditures that the law does not permit the union to charge over such an objection (so-called "non-chargeable" expenditures). And both the Supreme Court and the Ninth Circuit have clearly held that objection to paying the equivalent of union dues may not be presumed from the mere fact of the fee payer's non-membership in a union; rather, a fee payer must affirmatively object in order to be entitled to receive a reduction in the fair share fee. *See, e.g., Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 774 (1961); *Wagner v. Prof'l Engineers in Cal. Gov't*, 354 F.3d 1036, 1039 (9th Cir. 2004); *Mitchell v. Los Angeles Unified Sch. Dist.*, 963 F.2d 258, 260-63 (9th Cir. 1992).

Because a fee payer has an affirmative duty to object to paying the equivalent of full union dues, the Ninth Circuit has held that even so-called "non-chargeable" expenditures can constitutionally be charged to fee payers who do not object. *Wagner*, 354 F.3d at 1039. For that reason, the term "non-chargeable" is misleading to the extent that it implies that fee payers cannot be charged for such expenditures – they can, if they do not object. *Id.* Thus, "non-chargeable" means only that fee payers cannot be charged for such expenditures *over their objection*. To facilitate fee payers' choice regarding whether to object, public employee unions

must provide them with a notice, which classifies the unions' expenditures as chargeable or non-chargeable. *Id.* That notice has come to be called a *Hudson* notice after the seminal case of *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986).

That is precisely the scheme that the California Legislature has adopted. Under the Dills Act, the California state employee collective bargaining statute, a union is permitted to charge its fee payers for their pro rata share of union expenditures, but it must provide them with an annual written statement of its expenditures and permit them to object to paying for certain types of expenditures that are unrelated to the union's representational functions. *See* Cal. Gov. Code §§3513(k), 3515.7(a), (b), (e), 3515.8.

In June 2005, the Union issued its annual *Hudson* notice, which complied with these constitutional and statutory requirements. *See* Declaration of Cathy Hackett, Ex. A. The notice informed fee payers that fees may be used for political purposes. *See id.* It also informed fee payers of their "right to object to the use of any portion of your fees for what you believe are activities not germane to the collective bargaining functions of SEIU Local 1000, i.e., partisan political or ideological causes only incidentally related to the terms and conditions of employment or the provision of benefits available only to members." *Id.* The notice also notified fee payers of their right to challenge the Union's calculation of the amount of the fair share fee, and to obtain a reasonably prompt resolution of that challenge from an impartial third-party decisionmaker. *Id.* The notice further stated that the full fair share fee of all challengers would be placed into an interest-bearing escrow account pending resolution of the challenge. *Id.* The notice also provides that all fee payers that object to nonchargeable expenditures will be charged "a fee of no more than 56.35% of regular membership dues for that salary level." *Id.* This is just as true for the temporary fee increase as for regular fees. Declaration of Lee King, ¶3. If fee payers do not object, their fee will be no more than 99.1% of regular membership dues, again for both fees. *Id.* Moreover, the notice informs fee payers that the dues upon which their fee is calculated "are subject to change without further notice to fee payers." Declaration of Cathy Hackett, Ex. A.

Thus, fee payers who received this notice in June of this year were aware of, among other things, (1) their right to object, (2) the percentages to be used in calculating their fees, whether they object or not, and (3) that membership dues – and thus their fees – may be increased without further notice. Under settled Supreme Court and Ninth Circuit law, those fee payers who failed to object *consented* to the use of their fees for non-chargeable political purposes, with full knowledge that the amount of their fee may be increased. *See Street*, 367 U.S. at 774; *Wagner*, 354 F.3d at 1039; *Mitchell*, 963 F.2d at 260-63.

B. The Union Has Complied With Its *Hudson* Notice Responsibilities

Plaintiffs' request for a preliminary injunction is premised on alleged inadequacies of the Union's procedures for issuing its *Hudson* notice and affording nonmembers the opportunity to object to non-chargeable expenditures. Specifically, Plaintiffs claim that the Union has violated nonmembers' rights by failing to issue a second *Hudson* notice prior to the temporary fee increase and allowing agency fee payers to object to the increase prior to its effective date. Instead, the Union adhered to its usual practice, based on *Hudson*, of calculating the percentage of dues chargeable to fair share fee payers on the basis of the prior year's expenditure and issuing its *Hudson* notice in June 2005, prior to the fee year that began on July 1, 2005. Declaration of Cathy Hackett, Ex. A. Under this practice, any increased non-chargeable expenditures resulting from the temporary fee increase will be reflected in the calculations of the agency fee amount for the next fee year.

This is *precisely* the procedure contemplated by the Supreme Court in *Hudson* and it is the procedure public employee unions have followed since that decision in 1986. The *Hudson* Court recognized the practical realities involved in its efforts to "'devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.'" *Hudson*, 475 U.S. at 302 (quoting *Abood*, 431 U.S. at 237). The Court acknowledged:

> there are practical reasons why "[a]bsolute precision" in the calculation of the charge to nonmembers cannot be "expected or required." *Thus, for instance, the*

> *Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year.*

Id. at 307 n.18 (citations omitted; emphasis added). In other words, the *Hudson* Court expressly approved a procedure that applies to the current year's fee obligation a chargeable percentage derived from the preceding year's ratio of chargeable to nonchargeable expenditures.

Since *Hudson* was decided in 1986, this methodology has been recognized by courts and adhered to by public employee unions. *See, e.g., Liegmann* Order at 5:16-17 ("The Supreme Court in *Hudson* expressly found that such a procedure for calculating the reduced fair share fee is permissible for Constitutional purposes."); *Robinson v. Pa. State Corr. Officers Ass'n*, 363 F. Supp. 2d 751, 759 (M.D. Pa. 2005) ("[The *Hudson* notice] should list the *prior year's* expenditures, reasonably categorized to indicate their use.") (emphasis added); *Fell v. Indep. Ass'n of Cont'l Pilots*, 26 F. Supp. 2d 1272, 1283 (D. Colo. 1998) (noting that use of preceding year's expenditures is part of *Hudson*'s recognition of the "practical side of establishing a constitutionally adequate procedure"); *Prescott v. County of El Dorado*, 915 F. Supp. 1080, 1086 n.9 (E.D. Cal. 1996) ("'Thus, for instance, the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year.'") (quoting *Hudson*, 475 U.S. at 307 n.18); *Laramie v. County of Santa Clara*, 784 F. Supp. 1492, 1496 (N.D. Cal. 1992) ("Recognizing the difficulty in requiring exact figures from a union engaging in on-going operations, the [*Hudson*] Court permitted the union to extrapolate from prior fiscal data as the basis for future charges."); *see also* Cal. Public Sector Labor Relations §31.31[1][c] (Kirsten L. Zerger et al. eds., 2005) ("An agency fee may be calculated based on the prior year's expenditures."). Indeed, Plaintiffs can cite *no* case from any court holding that it is ever improper (much less, unconstitutional) to calculate the percentage of dues chargeable to fair share fee payers on the basis of the prior year's expenditure. Plaintiffs are thus seeking a dramatic departure from nearly 20 years of case law and established practice.

The novel argument Plaintiffs advance here was soundly rejected less than one month ago in *Liegmann*. The nonmember plaintiffs in *Liegmann* contested a mid-year fee increase by

the California Faculty Association, contending that that union "did not provide adequate notice to its nonmembers because the *Hudson* Notices were issued prior to the fee increase and thus did not mention the increase in fees." *Liegmann* Order at 5:4-6. Like here, there the "accounting procedure involve[d] calculating the percentage of dues chargeable to fair share fee payers on the basis of the prior year's expenditure data rather than the current year's revenue." *Id.* at 5:14-15. Judge Ware correctly recognized that, by asking for additional notice, the plaintiffs sought "*a departure from the procedure approved in* Hudson." *Id.* at 6:8 (emphasis added). Judge Ware denied the requested injunctive relief. *Id.* at 5:7-8, 6:5-6, 8:8. This holding is correct as there is no basis in existing case law or the First Amendment for the requested departure from *Hudson*.

Further, the practice endorsed in *Hudson* and followed by the Union – calculating chargeable and non-chargeable expenditures on the basis of the prior year's actual expenditures – is the only logical, practical way for unions to provide an accurate *Hudson* notice to their nonmembers. As the court indicated in *Laramie v. County of Santa Clara*, 784 F. Supp. 1492, 1496 (N.D. Cal. 1992), for an "ongoing" union there is simply no other way to arrive at a precise chargeable percentage than to derive it from the prior year's complete record of expenditures. The amount a union will spend on political activities will vary from year to year and from month to month, as circumstances warrant. A union simply cannot accurately anticipate its political expenditures and provide advance notice of such expenditures to its agency fee payers.

Moreover, the advance-notice rule proposed by Plaintiffs provides no clear answer to the obvious question of when, exactly, such notices might be required. Would a union be required to issue such a notice in advance of *every* discrete non-chargeable expenditure it contemplates that was not raised in a prior notice? Such a system would eviscerate the actual-expenditure, backward-looking procedure expressly endorsed in *Hudson*, and it would impose an incredible administrative burden on unions. These practical difficulties indicate that Plaintiffs' proposed system is utterly unworkable – a conclusion the Supreme Court recognized

in 1986 when in *Hudson* it expressly permitted unions to calculate the percentage of dues chargeable to fair share fee payers on the basis of the prior year's expenditure.

In addition, the Ninth Circuit's decision in *Harik v. California Teachers Association*, 326 F.3d 1042, 1048-49 (9th Cir. 2003), makes clear that in a union of the size at issue here the chargeable/non-chargeable expense breakdown must be based on figures *audited* by an independent auditor. This indicates that the fair share fee is to be determined once a year, based upon the prior year's audited financial statements. An auditor cannot audit expenditures in advance, that is, before they have been made.

Finally, even if it were possible and practical for the Union to go beyond the procedures endorsed in *Hudson* and *Wagner* and provide a mid-year notice to its agency fee payers regarding the temporary fee increase, the Union is not constitutionally required to take any and all steps demanded by fee payers. As the Ninth Circuit has commented:

> It is possible, of course, to devise a more complex system that would minimize further the burden on agency fee payers. . . . [But t]he test, after all, is not whether the union and the school district have come up with the system that imposes the least burden on agency fee payers, regardless of cost (a test no system could possibly satisfy); *rather, we inquire whether the system reasonably accommodates the legitimate interests of the union, the school district and nonmember employees*.

Grunwald v. San Bernardino City Unified School Dist., 994 F.2d 1370, 1376 n.7 (9th Cir. 1993) (emphasis added). The Supreme Court in *Hudson* already determined that the method employed by the Union reasonably accommodates those interests, and Plaintiffs can cite no authority to the contrary.[1/] To the contrary: "When the union's plan satisfies the standards established by *Hudson*, the plan should be upheld even if its opponents can put forth some plausible alternative less restrictive of their right not to be coerced to contribute funds to support political activities that they do not wish to support." *Andrews v. Educ. Ass'n of Cheshire*, 829 F.2d 335, 340 (2d Cir. 1987).

[1/] Indeed, Plaintiffs rely primarily on citations to the general guiding principles *from which* the *Hudson* Court derived the procedure that the Union has followed. These principles must be read in light of the procedure endorsed in *Hudson* and followed in numerous cases.

In sum, the Union has complied with the First Amendment's requirements as articulated by the Supreme Court in *Hudson* and re-affirmed in numerous cases since *Hudson.*

C. There Is No Basis On Which To Issue A Mid-Year *Hudson* Notice

As a separate reason why Plaintiffs are unlikely to succeed on the merits, their argument assumes that all of the expenditures that the temporary fee increase was enacted to fund are non-chargeable to objecting fee payers. But even assuming that the sole purpose of the temporary fee increase was for lobbying against initiative propositions appearing on the November 2005 statewide ballot, particularly Propositions 75 and 76, we show below that Plaintiffs would be incorrect that such expenditures are entirely non-chargeable. To the contrary, the governing law applicable in the public sector permits unions to charge all fee payers for certain "political" lobbying expenditures. And because a portion of the monies collected from the temporary fee increase will be spent on expenditures that are at least potentially chargeable, the Union cannot determine before the money has been spent what proportion of the temporary fee increase will go to support chargeable expenditures versus nonchargeable expenditures. That can only be determined *after* the money has been spent. For that reason, as well, the normal *Hudson* rule that the Union is obligated only to issue an agency fee notice annually, with the fee determined on the basis of the Union's expenditures in the most recently-audited prior fiscal year and applied to the fee calculation in the following fiscal year, must apply here.

In *Abood*, the Supreme Court held that unions can constitutionally compel agency fee payers to support collective-bargaining activities, but not "ideological activities *unrelated to collective bargaining*." 431 U.S. at 236 (emphasis added). The case also recognized that "in the public sector the line [between the two] may be somewhat hazier" than in the private sector, due to the nature of employment relations in the public sector. *Id.* Unlike the private sector, in the public sector a collective bargaining agreement must not only be negotiated but subsequently approved and implemented by the legislature (including appropriating sufficient funding through the budget process to pay the wages and benefits established in the agreement), and thus some activities that might be considered "political" in nature, such as lobbying, are

intrinsic to public sector unions' ability to bargain effectively. As *Abood* observed, the "process of establishing a written collective bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process." *Id.*

Following *Abood*, the Ninth Circuit upheld the constitutionality of a provision of the state collective bargaining statute that governs state employees (the very kind of employees at issue in the present case), which permits unions to charge all fee payers for lobbying to obtain "advantages in wages, hours and other conditions of employment" (Cal. Gov. Code §3515.8). *Champion v. State of California*, 738 F.2d 1082 (9th Cir. 1984). In that case, the plaintiffs argued that that provision violated the First Amendment by permitting state employee unions to charge fee payers for "political" expenditures. In rejecting that argument, the Ninth Circuit stressed the inherent importance of lobbying to the public sector collective bargaining process:

> . . . . The determination of whether certain expenditures are proper depends on the nature of the bargaining process. See Ellis [v. Ry. Clerks, 466 U.S. 435, 104 S.Ct. 1883] 1892 [(1984)]; Abood, 431 U.S. at 236 & n. 33, 97 S.Ct. at 1800 & n. 23.
>
> Section 3515.8 of [the Government Code], which plaintiffs challenge as impermissibly broad, is based on the understanding that collective bargaining in the public sector requires resort to the legislature on various employment-related questions. . . .
>
> Because public employees work for the state, matters which are ordinarily left to direct negotiation in the private sector are covered by statute. [Numerous examples omitted.] See generally [Gov't Code] § 3517.6 for a list of statutes affecting public employees. These statutes create a status quo from which the bargaining representatives start negotiations for their particular units. The importance of legislation affecting public employment, enacted in a forum apart from the meet-and-confer sessions authorized by statute, Cal. Gov't Code § 3517, requires that public employee representatives be given broad authority to protect their members' interests before the legislature.

Champion, 738 F.2d at 1086.[2/]

Thus, public sector unions are *not* prohibited by the First Amendment from charging all fee payers for "political" expenditures. Rather, they are only prohibited from charging all fee

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[2/] The California Court of Appeal has also upheld the right of state employee unions to charge fee payers for such activities. *Lillebo v. Davis*, 222 Cal. App. 3d 1421, 1442 (1990).

payers (i.e., including objectors) for "ideological activities *unrelated to collective bargaining*." *Abood*, 431 U.S. at 236 (emphasis added).

The Supreme Court's subsequent decision in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), did not overrule this pre-existing jurisprudence. First, there was no majority opinion in *Lehnert* as to "political" expenses. The opinion announcing the judgment of the Court on that issue was that of Justice Blackmun, in which only three other Justices concurred. *See Lehnert*, 500 U.S. at 519-32 (1991). Under Ninth Circuit law, plurality decisions are not controlling. *See, e.g., Jacobsen v. U.S. Postal Serv.*, 993 F.2d 649, 665 (9th Cir. 1992).

But even if Justice Blackmun's opinion had been a majority opinion, at least a portion of the expenditures for which the temporary fee increase was enacted would be deemed chargeable under that opinion. Thus, Justice Blackmun's opinion endorsed the Court's prior comments in *Abood* regarding the nature of public sector bargaining and the consequences for the chargeability determination. *Lehnert*, 500 U.S. at 518. Indeed, Justice Blackmun's opinion elaborated on and went beyond *Abood*'s observations regarding public sector bargaining:

> The Court of Appeals determined that unions constitutionally may subsidize lobbying and other political activities with dissenters' fees so long as those activities are "'pertinent to the duties of the union as a bargaining representative.'" 881 F.2d, at 1392, *quoting Robinson v. New Jersey*, 741 F.2d 598, 609 (CA3 1984), *cert. denied*, 469 U.S. 1228 (1985). In reaching this conclusion, the court relied upon the inherently political nature of salary and other workplace decisions in public employment. "To represent their members effectively," the court concluded, "public sector unions must necessarily concern themselves not only with negotiations at the bargaining table, but also with advancing their members' interests in legislative and other 'political' arenas." 881 F.2d, at 1392.
>
> This observation is clearly correct. Public-sector unions often expend considerable resources in securing ratification of negotiated agreements by the proper state or local legislative body. *See* Note, Union Security in the Public Sector: Defining Political Expenditures Related to Collective Bargaining, 1980 Wis. L. Rev. 134, 150-152. Similarly, union efforts to acquire appropriations for approved collective bargaining agreements often serve as an indispensable prerequisite to their implementation. *See* Developments in the Law: Public Employment, 97 Harv. L. Rev. 1611, 1732-1733 (1984). It was in reference to these characteristics of public employment that the Court in *Abood* discussed the "somewhat hazier" line between bargaining-related and purely ideological activities in the public sector. 431 U.S., at 236. *The dual roles of government as employer and policymaker in such cases make the analogy between lobbying and collective bargaining in the public sector a close one.*

Id., 500 U.S. at 519-20 (emphasis added).

In the narrow context of the facts presented by the *Lehnert* case, however, Justice Blackmun found that the "political" expenditure there at issue – a lobbying campaign designed to increase public funding for public education generally (rather than the teachers union's members' wages specifically) – was not sufficiently related to the collective bargaining functions of the teachers union before the Court to render it chargeable:

> This, however, is not such a case [of chargeable "political" expenses]. Where, as here, 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.

Id. at 520.

Here, at least a portion of the anticipated expenditures at issue, are directly and critically related to collective bargaining. Proposition 76, which the Union opposes, will effectively permit the Governor to abrogate collective bargaining agreements with state employees under certain circumstances, by granting the Governor the power unilaterally to reduce previously-appropriated state monies to fund the agreement. *See* Proposition 76, Section 4 (amendment to Article IV, Section 10, of the California Constitution, enacting new Sections 10(g)(2) and (3)), available at http://www.voterguide.ss.ca.gov/prop76/title_summary.shtml. This relates directly to the implementation of the collective bargaining agreement. To defend the implementation of its collective bargaining agreement, i.e., to prevent the Governor from obtaining the power to abrogate/defund the agreement, the Union, which represents thousands of state employees, is opposing the enactment of Proposition 76 and should constitutionally be permitted to charge fee payers therefor, no less than it would be able to charge fee payers to lobby against a piece of legislation that would abrogate or defund the agreement.[3/]

[3/] There can be no argument that there is a constitutional difference with regard to the chargeability of lobbying the legislature over a pending piece of legislation and lobbying the electorate over a pending initiative measure. *See California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1106 (9th Cir. 2003) ("Voters act as legislators in the ballot-measure context, and interest groups and individuals advocating a measure's defeat or passage act as lobbyists; both groups aim at pressuring the public to pass or defeat legislation.").

Indeed, even if lobbying against an initiative to give the Governor the power unilaterally to abrogate/defund public employees' collective bargaining agreements were not chargeable (which it indeed is), the Union may well utilize monies raised through the temporary fee increase to lobby the Governor not to exercise that power, should the initiative pass. Such a use of these fees would constitute a chargeable activity.

The fact that *Lehnert* does not mean that at least some of the uses to which the temporary fee increase will or may be put cannot be considered chargeable is shown by the Ninth Circuit's only relevant post-*Lehnert* decision, *Gardner v. State Bar of Nevada*, 284 F.3d 1040, 1043 (9th Cir. 2002). In *Gardner*, the Ninth Circuit applied *Lehnert* to uphold the chargeability of a public relations campaign by an integrated state bar to improve the public image of lawyers. In so doing, it made clear that the existence of *some* ideological content to an expenditure is not fatal to chargeability under *Lehnert* as long as the expenditure is germane to the organization's purpose and is not *exclusively* ideological:

> Undoubtedly every effort to persuade public opinion is political in the broad sense of that term. However, what *Keller* [*v. State Bar*, 496 U.S. 1 (1990)] found objectionable was not political activity but partisan political activity as well as ideological campaigns unrelated to the bar's purpose. What the Supreme Court held objectionable in *Lehnert* was education about the teaching profession unconnected to the collective bargaining function of the union. *Lehnert*, 500 U.S. at 528. In contrast, the activity here is highly germane to the purposes for which the State Bar exists.

Gardner, 284 F.3d at 1042-43.

Here, an effort to persuade public opinion not to enact a constitutional amendment that would give the Governor unilateral power to abrogate/defund a state employee union's collective bargaining agreement is "highly germane to the purposes for which the [union] exists" (*Gardner*, 284 F.3d at 1043), i.e., to establish and maintain terms and conditions of public employment through collective bargaining. Indeed, it is beyond dispute that a lobbying campaign to persuade the Governor not to exercise such a power, if Proposition 76 is enacted, would be chargeable. *Gardner* thus confirms that at least a portion of the temporary fee increase will or may be devoted to chargeable activities. In short, if a public relations campaign by an integrated state bar to improve the public image of lawyers is chargeable because it is

germane to the bar's purpose, a lobbying campaign by a public employee union to defend the implementation of its collective bargaining agreement and prevent that agreement's abrogation or defunding is also chargeable because it is *central* (not merely germane) to the union's purpose.

Because it is premature to determine the proportion of chargeable versus nonchargeable expenses, the Union cannot be required to issue a *Hudson* notice at this time.

II. The Balance Of Hardships Weighs Against A Preliminary Injunction

A. Plaintiffs Have Failed To Show Irreparable Harm

Plaintiffs' claim of irreparable injury is that their money will be spent on political activities to which they object under the First Amendment. Pls' Br. at 16:2-7. This argument contradicts Supreme Court and other case precedent that contemplate that deductions for nonmembers will be based on the *prior year's* expenditures. *See, e.g., Hudson*, 475 U.S. at 1076 n.18. Because the percentage of chargeable expenditures will vary from year to year, the system for objection contemplated by the Supreme Court and lower courts necessarily means that in those years when nonchargeable expenditures exceed the amounts in the prior year, nonmembers will be paying for certain nonchargeable expenses – which will then be refunded the next year when the new percentage is calculated. This is not a harm of *constitutional* magnitude, but simply a result of the practical trade-off the Supreme Court recognized in *Hudson*: To have a system that balances the rights of objecting employees and a union's right to require employees to pay their fair share. 475 U.S. at 302. In other words, Plaintiffs' purported harm is a necessary feature of the approved system.

To the extent Plaintiffs rely on the simple loss of the use of their money, this does not rise to the level of a First Amendment injury. *See Grunwald*, 994 F.2d at 1374-75. "Purely monetary injuries are not normally considered irreparable." *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984). Rather, where non-members received inadequate notice from their union such that their First Amendment rights were compromised, "[t]he proper remedy is an order requiring . . . proper notice, with a renewed opportunity for

nonmembers to object" and a refund for objectors, with interest. *Wagner v. Prof'l Eng'rs in Cal. Gov't*, 354 F.3d 1036, 1043 (9th Cir. 2003).

B. The Balance Of Hardships Tips Sharply In The Union's Favor

Counterbalanced against the lack of harm to Plaintiffs is the irreparable harm to the Union *and the large number of nonmembers who do not object to political expenditures*. There can be no question that the vast majority of nonmembers do not object to political expenditures. In the most recent year, of the approximately 28,000 nonmembers, fewer than 4,000 objected to contributing toward any kind of political expenditures. *See* Declaration of Cathy Hackett, ¶4. Thus, more than 24,000 nonmembers did *not* object to the political use of their fees when, in June, they were informed in the *Hudson* notice that the Union would use their fees to fund political expenditures unless they objected and were also informed that the fee could increase during the year. *Id.* The failure to object upon receiving this notice means that those nonmembers must be presumed to consent to the political use of their fees. *See Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 774 (1961); *Wagner v. Prof'l Engineers in Cal. Gov't*, 354 F.3d 1036, 1039 (9th Cir. 2004); *Mitchell v. Los Angeles Unified Sch. Dist.*, 963 F.2d 258, 260-63 (9th Cir. 1992). This is not just common sense, it is also the law. Regardless of whether they wish to be union members, these non-objecting, non-member employees represented by the union wish to be vigorously represented by the Union as to their wages and benefits.

As Judge Ware held, both those nonmembers who do not object to political expenditures and unions have First Amendment rights. *Liegmann* Order at 4:1-4; *see also Kidwell v. Transportation Communications Int'l Union*, 946 F.2d 283, 297 (4th Cir. 1991) (fee objection case noting "union's First Amendment right of expressive association"); *Int'l Ass'n of Machinists v. Street*, 367 U.S. at 773 (finding "the majority also has an interest in stating its views without being silenced by the dissenters").

Plaintiffs seek to prevent political expenditures by the Union and the large number of nonmembers who consent to supporting those expenditures. Such an injunction strikes at core First Amendment speech. "Certainly, the use of funds to support a political candidate is 'speech'; independent campaign expenditures constitute 'political expression "at the core of our

electoral process and of the First Amendment freedoms."'" *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990) (quoting *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976) (*per curiam*)). The injunction Plaintiffs seek would prevent the collection and use of funds from nonobjecting members who consent to the Union spending their fees for political purposes that are important to their interests. This would be true not only for the current initiative campaign, but also for future elections. Just as nonmembers may be concerned about the effect of an initiative on the Union, so too may they want to support or oppose certain candidates in the upcoming 2006 primary and general elections based on the positions those candidates take on issues affecting the terms and conditions of employment.

It is critically important that the Union be able to collect and spend money from those nonmembers who do not object on such matters, rather than presume they object. *See Liegmann* Order at 4:6-13. Once the election has passed, the Union and nonmembers who want their fees to be used for political purposes will have lost the chance to affect important policies; the results of the election cannot be undone. This is therefore a substantial and irreparable interference with First Amendment rights. Likewise, the public interest militates against the courts interfering with such rights. It would be particularly unwise to permit such an interference where, as here, the preliminary injunction seeks to upset years of settled Supreme Court and Ninth Circuit law.

An injunction that would interfere with the Union's and nonmembers' core First Amendment right to participate in political speech is subject to the most careful scrutiny. As the Ninth Circuit recently put it, "where, as here, there is at least some risk that constitutionally protected speech will be enjoined, only a particularly strong showing" is sufficient for an injunction. *Overstreet v. United Brotherhood of Carpenters*, 409 F.3d 1199, 1208 n. 13 (9th Cir. 2005) (citing cases). That showing has not been made here.

III. Any Injunction Should Be Strictly Limited

A. Any Injunction Should Be Limited To An Escrow Account And Effective Only Until There Is Notice

Plaintiffs' proposed preliminary injunction is overreaching. In their proposed order, Plaintiffs seek to prohibit the Union from "collecting" the temporary fee increase. This means that each month, the Union would have to forego the revenue from the fee increase and *would never be able to recoup that money* even if the Union ultimately prevailed in this lawsuit. To the extent the Court believes the Union should not be able to *spend* the temporary fee increase while a final decision is made on the merits of the case, the Court should still allow the increase to be collected and placed in an escrow account, at least as to nonmembers who have not objected in response to the June 2005 *Hudson* notice. Indeed, Plaintiffs themselves argue that the harm is the *spending* of money on politics. Pls' Br. at 16:2-7. Accordingly, any arguable harm can be completely remedied by placing the money in escrow so that it cannot be spent. Then, at the end of the case, the money can be released either to Plaintiffs or the Union. Providing Plaintiffs a refund is all that they are entitled as final relief under Ninth Circuit case law. *See Wagner*, 354 F.3d at 1043. There is no reason to give Plaintiffs a greater remedy at the preliminary stage than they could get at final judgment.

Additionally, any injunction should immediately expire if the Union provides a new notice regarding the temporary fee increase and an opportunity to object under *Hudson*. At that point, Plaintiffs' purported rights have been fulfilled. Indeed, Plaintiffs assert that the Union "holds the 'keys' to the enjoined money because the sooner it provides the *Hudson* notice, the sooner it can claim and use the enjoined money." Pls' Br. at 17:8-9. But their proposed injunction (and the TRO the Court has issued) omits any such provision. Any injunction should expire upon issuance of a new notice.

Nor is there ground to escrow amounts previously collected – and perhaps already spent – prior to issuance of injunctive relief. Such an injunction would not maintain the status quo, but require retroactive accounting and action. Plaintiffs have waited two months to bring this

motion and cannot now be heard to seek retroactive relief that they could have obtained prospectively had they brought the motion in a timely manner.

B. Class-Wide Relief Is Improper Prior To Class Certification

Plaintiffs have requested a class-wide preliminary injunction, notwithstanding that they have not moved for class certification and the Court has not yet certified a class. A class-wide preliminary injunction is precluded where, as here, no class has been certified. *Zepeda v. United States I.N.S.*, 753 F.2d 719, 727-29 & n.1 (9th Cir. 1985).

In *Zepeda*, the Ninth Circuit vacated as overly broad a preliminary injunction prohibiting warrantless searches without exigent circumstances targeted against persons of Hispanic appearance. *Id.* at 723. The Ninth Circuit noted that the case had been filed as a class action, but that class certification had never been granted (*id.* at 722), and held that "[w]ithout a properly certified class, a court cannot grant relief on a class-wide basis" (*id.* at 728 n.1).

The Ninth Circuit recognized only one exception – for situations in which class-wide relief was *necessary* to afford relief to the *individual moving parties*. *Id.* As an example of this exception, the court discussed a case where individual African-American plaintiffs sought desegregation of public transportation facilities. As the Ninth Circuit explained, an injunction broadly desegregating the facilities was necessary to afford relief to the individual plaintiffs, who did not seek to sit in the "whites-only" section of the buses, but rather to ride in desegregated buses. *Id.* at 728 n.1. Class-wide relief is unnecessary here to provide relief to the individual Plaintiffs who can be the subject of a narrow injunction.

The limitation on the scope of temporary or preliminary injunctive relief discussed in *Zepeda* is well-established in the Ninth Circuit, as it was announced prior to *Zepeda* (*see National Center for Immigrants Rights, Inc. v. INS*, 743 F.2d 1365, 1371 (9th Cir. 1984) ("in the absence of class certification, the preliminary injunction may properly cover only the named plaintiffs")), and has been reiterated in numerous decisions since *Zepeda* (*see, e.g., Immigrant*

Assistance Project v. INS, 306 F.3d 842, 868-69 (9th Cir. 2002); *Paige v. California*, 102 F.3d 1035, 1039 (9th Cir. 1996)).[4/]

C. Any Class-Wide Relief Should Be Limited To Objecting Nonmembers

Were the Court to order class-wide relief despite the ruling in *Zepeda*, the relief should be limited to nonmembers who objected to political expenditures at the last opportunity to do so – that is, in response to the June 2005 *Hudson* notice. Any other ruling would run afoul of the First Amendment rights of nonmembers to allow their fees to be used for political expenditures. *See supra* Part II.B. Moreover, an objection may not be presumed but must affirmatively be made. *See supra* Part I.A. For nonmembers who have not previously objected to political expenditures, there is no basis to presume that they would do so now and any injunction covering such nonmembers would be overbroad.

D. Plaintiffs Should Be Required To Post A Substantial Bond

Federal Rule of Civil Procedure 65(c) states that "[n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant." Plaintiffs request a minimal bond (or a waiver of the bond requirement altogether). In support of this request, they allege that "this case involves the threatened taking of a relatively small amount of money from each Nonmember." Pls' Br. at 19:20-21. But the *aggregate* amounts are what are at issue. Each month, the Union estimates it will receive $250,000 from nonmembers due to the temporary fee increase. Declaration of Lee King, ¶4. The loss of these fees will quickly exceed a million dollars. In these circumstances, it would be inappropriate to require a minimal bond. Plaintiffs should be required to post a bond of at least $1 million.

E. Any Injunction Should Be Stayed Pending Appeal

The Union requests that any injunction be stayed pending appeal to the Ninth Circuit. At the least, an injunction should be stayed for a short period of time – perhaps seven days – to

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[4/] The rule regarding class-wide relief without class certification is different with regard to a permanent injunction. *See, e.g., Bresgal v. Brock*, 843 F.2d 1163, 1169 (9th Cir. 1988); *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1490, 1501-02 (9th Cir. 1996). Here, however, Plaintiffs seek preliminary, not permanent, relief.

permit the Union to bring an emergency motion for a stay in the Ninth Circuit. Given that it is Plaintiffs' two month delay that has resulted in an extraordinarily speedy schedule to the detriment of the Union's interests, it is only fair to permit the Union a chance to seek appellate review before any injunction takes effect.

CONCLUSION

For the reasons set forth above, the Union respectfully requests that the Court deny the request for a preliminary injunction or at the very least limit its scope.

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Respectfully submitted,

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