

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DIANNE KNOX, ET AL., :

4 Petitioners :

5 v. : No. 10-1121

6 SERVICE EMPLOYEES INTERNATIONAL :

7 UNION, LOCAL 1000. :

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9 Washington, D.C.

10 Tuesday, January 10, 2012

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12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:19 a.m.

15 APPEARANCES:

16 WILLIAM J. YOUNG, ESQ., Springfield, Virginia; for
17 Petitioners.

18 JEREMIAH COLLINS, ESQ., Washington, D.C.; for
19 Respondent.

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P R O C E E D I N G S

(10:19 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 10-1121, Knox v. The Service Employees International Union.

Mr. Young.

ORAL ARGUMENT OF WILLIAM J. YOUNG

ON BEHALF OF THE PETITIONERS

MR. YOUNG: Mr. Chief Justice, and may it please the Court:

Before addressing SEIU's motion to dismiss for mootness, it is important to remember the underlying facts of this case. For 10 months in 2005 and 2006, more than 36,000 nonmembers, or nearly 40 percent of those employees represented by SEIU employed by the State of California, were compelled to contribute to SEIU's \$12 million Political Fight-Back Fund without being provided the opportunity to challenge the amount of the fee and to object to its exaction, required by the First Amendment.

Adding insult to that injury, the Ninth Circuit said that nonmembers could never say no to contributing to SEIU's political expenditures for ballot propositions, at least Proposition 76. They have no right to refuse to bankroll that element of SEIU's

1 political speech. This defies this Court's decisions,
2 distorting the political process on a massive scale.

3 JUSTICE KAGAN: Mr. Young, could I ask you
4 to speak to the mootness question first?

5 MR. YOUNG: I was just addressing that.

6 JUSTICE KAGAN: As -- as I understand your
7 brief, you're essentially saying that it's impossible to
8 moot a claim for nominal damages. Is -- is that a
9 correct reading of your position?

10 MR. YOUNG: I'm not sure I would go that
11 far, Justice Kagan. I think in this case, the
12 wishy-washiness, as it were, of the language used by
13 SEIU when it distributed this pasted-on dollar to the
14 class -- or dollars, more accurately -- was inadequate
15 because it failed to represent the importance of the
16 judgment that the nonmember class had won.

17 JUSTICE KAGAN: So, that's a different
18 point, right, which is that the notice was inadequate?

19 MR. YOUNG: That would be correct.

20 JUSTICE KAGAN: And -- and when you say
21 "inadequate," I read you to be saying sort of not
22 apologetic enough. And -- in other words, not saying,
23 look, you had a claim against us, we think you're right;
24 it was a valid claim; here is your judgment in
25 satisfaction of that claim. That it didn't forthrightly

1 say that. But do you think if it had forthrightly said
2 that, we would be living in a different Article III
3 universe?

4 MR. YOUNG: Not in this case, Justice Kagan.

5 Turning to the adequacy of the notice, of
6 the financial disclosure, that did not comply with the
7 district court's judgment, either. If -- if the only
8 question were the distribution of nominal damages, then
9 perhaps we would be living in that different Article III
10 universe. But this case is about the judgment of the
11 district court that the SEIU was attempting to comply
12 with. They failed to do so in virtually all of its
13 elements.

14 JUSTICE KAGAN: And how is that? How did
15 they fail to comply, other than, you know, the question
16 of whether they were forthright enough about the fact
17 that they were satisfying a claim?

18 MR. YOUNG: The -- the district court had
19 ordered -- described the type of notice that it
20 anticipated. The district court specifically determined
21 that SEIU's subsequent 2006 financial disclosure was
22 inadequate to cure the problem that was caused by the
23 seizure of fees starting in September 2005. And that's
24 on 73a of the -- the Petition Appendix B.

25 The union in this case merely sent the same

1 financial disclosure in the notice that it sent, to try
2 to moot the case, that it had sent in June of 2006.
3 Well, the district court had already said this is
4 inadequate. That seems to me to -- to end the inquiry.

5 Obviously, the district court did not
6 contemplate that the notice that was sent in June 2006
7 satisfied the obligations of its judgment; else it
8 hardly could have ordered a -- a useless act in ordering
9 a new type of notice go out.

10 CHIEF JUSTICE ROBERTS: And the reason
11 that's important in terms of the content of the notice,
12 the inadequacy, is what?

13 MR. YOUNG: The reason that is important,
14 Justice -- Mr. Chief Justice, excuse me -- is that the
15 SEIU is asserting that the case has become moot because
16 it has now complied with the district court's judgment.

17 CHIEF JUSTICE ROBERTS: I thought your --

18 MR. YOUNG: It has --

19 CHIEF JUSTICE ROBERTS: I thought your
20 argument was that the -- a different type of notice
21 would have resulted in more members electing to opt out,
22 to demand the refund of their assessments?

23 MR. YOUNG: And that's certainly one of the
24 possible consequences. Obviously, I -- we would --
25 that's speculative to some extent. But since the

1 purpose of the notice is to provide the information
2 necessary to -- to object, one of the purposes, then we
3 certainly anticipate that there would be more objectors
4 were there to be an -- an adequate notice that complies
5 with the district court's judgment.

6 JUSTICE ALITO: If the special assessment
7 requires a different kind of notice and possibly a
8 different kind of opt-in or opt-out regime, would the
9 case be moot?

10 MR. YOUNG: If the notice -- I'm sorry. I
11 didn't understand.

12 JUSTICE ALITO: Well, we're not dealing here
13 with the kind of notice -- with the typical Hudson
14 notice given at the beginning of the year, when the
15 annual dues are collected. We're dealing with a special
16 assessment. Now, if a different kind of notice is
17 constitutionally required in that context, would this
18 case be moot?

19 MR. YOUNG: No, it would not. Obviously, we
20 have -- we -- we still have the nominal damages question
21 and the adequacy of the payment --

22 JUSTICE ALITO: My question is whether
23 the -- the different requirements, which presumably were
24 not met here in the context of the special assessment,
25 if there are different requirements in that context,

1 would that be enough to preserve this case as a live
2 controversy?

3 MR. YOUNG: So long as the union failed to
4 provide them, and at least in this case, the district
5 court's judgment, we believe, provides a -- an adequate
6 respect for Hudson's underlying requirements,
7 Justice Alito.

8 JUSTICE GINSBURG: Mr. -- Mr. Young --

9 MR. YOUNG: Yes, Justice --

10 JUSTICE GINSBURG: -- as I understand, the
11 union recognizes that a consequence of mootness would be
12 that the Ninth Circuit judgment is vacated. Now, if the
13 union would also recognize that that means the district
14 court judgment stays in place, so if the Ninth Circuit
15 judgment is worked out and you're left with the district
16 court judgment as the law of the case, then I think it
17 is moot, isn't it?

18 MR. YOUNG: No, Justice Ginsburg, and this
19 is why: The union would remain free to return to its
20 old ways, the -- the very type of reason that this Court
21 declined to find mootness in *W.T. Grant*. The union has
22 made much -- much of a showing -- or much of a show,
23 more accurately, of the fact that it has changed its
24 internal policy. It won't do this for 180 days. But
25 that can hardly be sufficient for this Court to find

1 mootness in this case. The union made this wonderful
2 and meaningful policy change on 6 days' notice.

3 JUSTICE GINSBURG: But it wasn't -- this --
4 this case is about a completed episode. It's about a
5 special assessment that is long over.

6 MR. YOUNG: That is true, Justice Ginsburg.
7 But it is also about the declaratory relief that was
8 ordered by -- that was entered by the district court.
9 It is about the -- which was virtually injunctive relief
10 in this case.

11 It is also about the effect of that judgment
12 for future activities and -- and how that will affect
13 the way SEIU operates.

14 JUSTICE KAGAN: Does it have --

15 JUSTICE KENNEDY: Well, are you saying that
16 this is capable of repetition, yet evading review? I'm
17 not quite sure.

18 MR. YOUNG: It would certainly be so in this
19 case, Justice Kennedy. The union set a very short
20 time -- well, a relatively short time period, given the
21 length of time a case comes up from the courts as a rule
22 in this Court.

23 JUSTICE KENNEDY: Does the injunction have
24 future -- future terms? Is it a permanent injunction or
25 is it just an injunction that relates to the notice

1 that's required in this case?

2 MR. YOUNG: Just -- just to be clear, there
3 is -- I'm talking about something that's tantamount to
4 an injunction, Justice Kennedy. It's -- it wasn't
5 actually phrased as an injunction. It was an
6 affirmative -- an act -- ordering an affirmative act.

7 JUSTICE KAGAN: But isn't that important,
8 Mr. Young, because usually where we've talked about
9 capable of repetition or where we've talked about the
10 same thing could happen again, it's where an injunction
11 has been before us rather than a suit for damages as to
12 a past act?

13 MR. YOUNG: Yes, Justice Kagan, I think that
14 has been generally the case. I -- in my research, I
15 could find very few cases where it wasn't clear to me
16 that this Court was addressing injunctive relief.
17 Hudson itself, it seems to me, did not specifically
18 discuss the entry of injunctive relief in the lower
19 court, and Hudson itself addressed a mootness issue.

20 I mean, if we -- if we talk about these
21 cases in their -- in their strictest sense, the union's
22 notices are all annual. So, by the theory that it
23 becomes moot when those notices expire, or potentially
24 moot when those notices expire, this Court would never
25 address these issues because it would -- I can't imagine

1 one of these cases ever getting up to this Court in as
2 little as a year.

3 But the -- this Court in Hudson, in -- I
4 believe it was footnote 12, said that this Court reviews
5 the policy, the procedure, the acts as they were
6 defended in the district court. And the union's policy
7 and procedure and acts here were defended in the
8 district court. And, therefore, cases like this should
9 not become moot, because it is capable of repetition and
10 would be evading review simply by the mere limits of how
11 long these policies and procedures are in effect.

12 JUSTICE KENNEDY: Do you make that argument
13 in your opposition?

14 MR. YOUNG: It's -- it seems to me,
15 Justice Kennedy, it is implicit in our argument,
16 although clearly our main point in that argument is that
17 this is a -- a paradigm case of voluntary cessation of
18 allegedly unlawful activity. Until cert was granted in
19 this case, until the Petitioners' merits brief was
20 filed, SEIU was vigorously defending its practice. It
21 remains free to impose that practice.

22 JUSTICE GINSBURG: That's another --
23 something quite different than the capable of returning
24 to old ways, because here we do have a discrete episode
25 that's over. And there was no question that, even

1 though that -- what was it, in 2005 -- that the period
2 in 2005-2006, when the special assessment was in effect,
3 that was long over, but you were -- you were continuing
4 to litigate it. And nobody suggested that it would
5 become moot simply because the period was over.

6 MR. YOUNG: That's -- that's true, Justice
7 Ginsburg. Pardon me.

8 This argument -- this argument was not
9 raised until we were before this Court, the union's
10 argument that the case had somehow become moot, and
11 until it issued a notice --

12 JUSTICE GINSBURG: Well, they said that it
13 had become moot because they gave you all the relief you
14 requested; so, there was nothing left to the case.

15 MR. YOUNG: Well, "all the relief," Justice
16 Ginsburg, implies that they had complied with the
17 district court's judgment. As to the notice, we believe
18 that they have not, and we believe that's clear because
19 of the very fact that the district court rejected the
20 2006 financial disclosure as adequate. And --

21 CHIEF JUSTICE ROBERTS: Maybe it's a good
22 point for you to move to the merits.

23 MR. YOUNG: Yes, thank you,
24 Mr. Chief Justice.

25 JUSTICE SOTOMAYOR: Could I ask you a

1 question about the merits?

2 MR. YOUNG: Yes, certainly, Justice
3 Sotomayor.

4 JUSTICE SOTOMAYOR: Are you attacking the
5 normal system of basing assessments moving forward,
6 based on past accounting and chargeability and
7 non-chargeability? Or are you just attacking the
8 special assessment?

9 MR. YOUNG: I -- I appreciate the question,
10 Justice Sotomayor. No, we are not attacking the normal
11 Hudson procedures. On --

12 JUSTICE SOTOMAYOR: All right. So,
13 articulate for me what's -- borrowing a phrase from one
14 of my colleagues yesterday, how do we write this
15 opinion? When is a second Hudson notice required?
16 Let's presume for the sake of argument that the union
17 had cost overruns. Labor salaries went up; printing
18 costs went up, not for lobbying; but generally there was
19 a 10 percent increase in their expenses across the board
20 because various contracts that they were involved in
21 required it. Would you require a second notice in that
22 circumstance?

23 MR. YOUNG: Yes, Justice Sotomayor. We
24 would -- we believe -- pardon me -- that a new Hudson
25 notice is required whenever there is a material

1 alteration in the obligations that are imposed upon
2 nonmembers. The values that this --

3 JUSTICE SOTOMAYOR: Articulate that again.

4 A material change --

5 MR. YOUNG: A material increase or --
6 increase in general terms, in the obligation imposed
7 upon the nonmembers. In this case, I don't think
8 anybody would dispute the 25 percent --

9 JUSTICE SCALIA: A material new assessment?

10 MR. YOUNG: A material new assessment.

11 JUSTICE SCALIA: Okay.

12 MR. YOUNG: Yes, Justice --

13 JUSTICE SCALIA: That's -- we're talking
14 about money here, right?

15 MR. YOUNG: Yes, we are.

16 JUSTICE SCALIA: Okay.

17 MR. YOUNG: Yes. Certainly --

18 CHIEF JUSTICE ROBERTS: Without -- but
19 without regard to the reason for the assessment?

20 MR. YOUNG: I think as a matter of principle
21 I would have to say yes, Mr. Chief Justice. The
22 nonmember --

23 CHIEF JUSTICE ROBERTS: Well, I'm not sure
24 that -- this may just simply be repeating Justice
25 Sotomayor's question, but if they say we have to raise

1 the assessment 10 percent because, as she said, you
2 know, we estimated the printing costs for the union
3 newsletter, whatever, was going to be this and it turns
4 out they raised it, it's going to be that; so, we know
5 we're going to have to get additional money, for things
6 that are indisputably chargeable, why do you need
7 special procedures in that case?

8 MR. YOUNG: Well, it wouldn't be so much a
9 special procedure as a new opportunity to object and
10 challenge the amount of the fee, Mr. Chief Justice.

11 Certainly, one of the elements -- and we
12 recognize, of course, that the primary reason
13 individuals object is political expenditures, but this
14 Court said very clearly in Abood that people can object
15 for any reason, for no reason, for a good reason, for a
16 bad reason; nobody can inquire as to why someone
17 objects.

18 And certainly when a material alteration --
19 there has been a material increase in the obligation
20 imposed upon nonmembers, they may choose to make an
21 economic decision that heretofore they chose not to
22 make. They may choose to minimize -- particularly the
23 non-objectors. They may choose that they want to
24 minimize the financial obligation that they are paying
25 to the union at that time. And --

1 JUSTICE BREYER: It's peculiar because in
2 the circumstance where the extra assessment is all going
3 to go to chargeable activities, in fact that means
4 economically speaking the following year the objector
5 will be better off, not worse off, because there is a
6 higher percentage of the total fee that's being paid to
7 chargeable activities.

8 So, this special assessment that Justice
9 Sotomayor and the Chief Justice were talking about is
10 one that will benefit the objector, if he keeps quiet
11 and says nothing. So, it's a little hard to imagine the
12 frame of mind that would say I need the notice because
13 now I might object, whereas I wouldn't have before.

14 MR. YOUNG: Well, Justice Breyer, the reason
15 for the notice is these people may not trust the union.
16 They -- they may choose to challenge the amount of the
17 fee.

18 JUSTICE BREYER: Yes, I see that point. Can
19 I ask you -- oh, are you -- you want to pursue that
20 further, or are we --

21 CHIEF JUSTICE ROBERTS: Go ahead.

22 JUSTICE BREYER: All right. Let me give you
23 this example.

24 MR. YOUNG: Sure.

25 JUSTICE BREYER: And now I -- but I think I

1 see what your answer is. Imagine it's year two. In
2 year one, expenditures broke down so that it was
3 70 percent chargeable, 30 percent not chargeable. Got
4 that?

5 MR. YOUNG: Yes, sir.

6 JUSTICE BREYER: And normally, under Hudson,
7 that means in year two the deal is the objectors pay
8 70 percent, right?

9 MR. YOUNG: Yes.

10 JUSTICE BREYER: In the middle of year two,
11 surprisingly, something comes up. Something comes up.
12 A surprise to the union, and they want to have a special
13 assessment. And you're saying they just can't without
14 going through this procedure all over again?

15 MR. YOUNG: That would be correct,
16 Justice Breyer. The -- I'm now talking about --

17 JUSTICE SOTOMAYOR: And take the money that
18 they collected?

19 MR. YOUNG: I'm sorry.

20 JUSTICE SOTOMAYOR: Can they take the money
21 that they collected under the first notice, and, instead
22 of doing the special assessment, in the middle of it,
23 this campaign gets announced by the governor, and can
24 they then divert the chargeable amount that they had
25 predicted and spend it on the non-chargeable amount? Or

1 are you -- or does that require a second Hudson notice?
2 Without a special assessment.

3 MR. YOUNG: I understand, Justice Sotomayor.
4 And no, under that case, I don't believe it would.

5 JUSTICE BREYER: All right. So, this is a
6 peculiar rule that you have asked us to adopt. The rule
7 is that where there is a special assessment and it will
8 make all the objectors better off, they have to have a
9 special notice that they can object. But where the rule
10 is that we're going to take money we already collected
11 from them and spend it for a totally political purpose,
12 we don't give them a special notice and they don't have
13 to object.

14 Now, that seems totally backwards, but I
15 understand why you get there, and my suspicion is --
16 which you can confirm, is that's the only administrable
17 system you can think of.

18 JUSTICE SCALIA: Do you concede that it's
19 going to make them better off? I would -- I would
20 assume that that's your principal objection. They don't
21 know whether this new assessment is indeed going to be
22 divided the way the original one was or not. They might
23 want to challenge --

24 MR. YOUNG: That's --

25 JUSTICE SCALIA: -- whether -- whether it's

1 all going to be used for -- for assessable activities or
2 not. And they have no -- you're telling me they have
3 no --

4 JUSTICE BREYER: Right. But in my
5 hypothetical --

6 JUSTICE SCALIA: At the very least, they
7 have to make a -- an interest-free loan to the -- to the
8 union until such time as they can challenge it.

9 MR. YOUNG: Well, that's exactly correct,
10 Justice Scalia. And I understand --

11 JUSTICE BREYER: Yes, but the hypothetical,
12 if I could continue with it, is -- is perhaps
13 unrealistic, but they have 20 bishops and 14 most honest
14 people in the United States, and they've all absolutely
15 guaranteed, and everybody agrees, that this goes to
16 chargeable activity. And where I was going with my
17 question, which you see where I was -- you're with me on
18 this, right?

19 MR. YOUNG: Yes, I am, Justice --

20 JUSTICE BREYER: And combine the two. What
21 I'm trying to point out and get your response is that
22 you've been forced into this position to create a
23 workable system. Now, why is that workable system one
24 whit better than the workable system we already have,
25 which is all this washes out in a fair manner the

1 following year, that there is an inevitable year's lag?
2 It doesn't work perfectly, but it's as good as any
3 other, and all we have to say is it's better than yours.
4 Now, why is yours better than that?

5 MR. YOUNG: Well, I recall the bishops from
6 the last time I was here, Justice Breyer. I think they
7 made an appearance then.

8 JUSTICE BREYER: They're useful to me.

9 (Laughter.)

10 MR. YOUNG: They are, I'm sure.

11 JUSTICE SCALIA: I assume we wouldn't need a
12 Hudson notice at all, if -- if bishops affirmed all of
13 these things, right?

14 (Laughter.)

15 MR. YOUNG: You anticipate my next point,
16 Justice Scalia. These -- these aren't bishops, and with
17 due respect to our litigation opponents in this case,
18 these are people that nonmembers don't trust. These are
19 people with whom nonmembers do not wish to affiliate.
20 And these are people that the nonmembers do not wish to
21 support, and --

22 JUSTICE SOTOMAYOR: The problem is in -- in
23 this system, and going back to Justice Breyer's
24 practicality, they will get a chance to object. It just
25 won't be at the moment of the special assessment; it

1 will be the following year. So, when the union gives
2 its new notice, it's going to set forth its chargeable
3 and non-chargeable amounts as audited, and it will say,
4 as it did -- as it's done in the briefs before us, on
5 Proposition 76, we're going to take 50 percent as
6 chargeable. And the union members can come in and give
7 a Lehnert objection, those who want to. Those who
8 don't, know it's happened, and they agree to it.

9 Isn't that correct? They do get a chance to
10 object; the question is the timing.

11 MR. YOUNG: Then the problem is, Justice
12 Sotomayor, understanding the --

13 JUSTICE SOTOMAYOR: Is there an answer to
14 that? They will get a chance to object then?

15 MR. YOUNG: Well, they'll get a chance to
16 object after they've already paid the interest-free
17 loan.

18 JUSTICE SOTOMAYOR: Well, but that's true of
19 the first example I gave you. If something happens in
20 the middle of the year and the union needs to divert
21 already-assessed funds to challenge a election, they can
22 do it. And you said that's okay.

23 MR. YOUNG: And the nonmembers would have
24 the chance to challenge that, but it would be within the
25 normal system of ordinary union dues.

1 We -- we, and I believe this Court in
2 Hudson, presume that any reasonable -- reasonably
3 competent union management would -- would have
4 relatively stable expenditures over the years.

5 JUSTICE SCALIA: Isn't -- isn't the premise
6 of Hudson that you give the notice before, before -- you
7 receive the notice before you have to cough up the
8 money?

9 MR. YOUNG: Yes.

10 JUSTICE SCALIA: And what's now proposed is,
11 well, for -- if there's an additional assessment, you
12 cough up the money first, and then later you straighten
13 it out. And I -- do you get -- do you get the interest?

14 MR. YOUNG: That seems to me to be the
15 problem, Justice Scalia. The people who got the June --
16 June 2005 notice were left in the dark -- indeed, the
17 union may have been in the dark -- as to this special
18 assessment. But once the union agreed to -- decided to
19 impose the special assessment, the union was required by
20 Hudson's principles to shed some light. You know,
21 perhaps it is less predictive, less accurate, to say we
22 intend to spend the money this way. But when you have
23 an assessment which is purely intended for politics, and
24 that's what the union said, to create a Political
25 Fight-Back Fund, that's not, you know --

1 JUSTICE BREYER: Do you get -- does your
2 Hudson notice tell you about what's going to happen next
3 year? I thought your Hudson notice told you this was
4 the breakdown for the last year, and as far as we can
5 tell, that's what it will be next year, but -- but
6 things could change. What does the Hudson notice tell
7 you?

8 MR. YOUNG: The Hudson notice provides you
9 with an opportunity to object and some assurance,
10 because of the audit requirement --

11 JUSTICE BREYER: But am I right in my
12 description of it?

13 MR. YOUNG: I think -- I think that would be
14 a fair description, Justice Breyer.

15 JUSTICE BREYER: All right.

16 CHIEF JUSTICE ROBERTS: Do they -- do they
17 carry over from one year to the next, or do you have to
18 refile your objection to the union expenditures every
19 year?

20 MR. YOUNG: Most unions, Mr. Chief Justice,
21 require an annual objection. Now, of course, there
22 would be nothing -- we find nothing wrong with an annual
23 challenge requirement if you choose to challenge that
24 year's figures, because obviously it's a specific event.
25 But most unions seem to require annual objection. So,

1 you have to say again and again: I don't want to pay
2 for your politics.

3 JUSTICE SOTOMAYOR: Well, but what
4 happens --

5 MR. YOUNG: But that's not raised in this
6 case.

7 JUSTICE SOTOMAYOR: But going back to the --
8 forget about special assessments. I think in one of the
9 briefs, I know in one of the briefs, someone says
10 elections happen every 4 years. So, in the normal cycle
11 of union activities, in an election year they're going
12 to divert more of whatever accessible moneys they have
13 to their lobbying efforts, and the following year
14 they'll go back to normal for 3 years.

15 You're not challenging that normal variation
16 in the -- in the distribution of the moneys, correct?

17 MR. YOUNG: Correct, Justice Sotomayor. And
18 that, too, may vary from union to union, from State to
19 State even. As some of the Justices I'm sure know,
20 Virginia has called for --

21 JUSTICE SOTOMAYOR: So, I guess my problem
22 is I don't see how that, given your argument, is any
23 less alone than this special assessment where the
24 labor -- where the objecting members at the end of the
25 year will get notice of what has happened that year,

1 will have an opportunity to place their Lehnert
2 challenges and get them ruled upon, and will, as
3 Justice Breyer said, have a benefit because they're
4 going to either pay more if the Lehnert -- pay less if
5 the Lehnert challenges are upheld or pay more if -- if
6 they're not.

7 But I'm not quite sure how this is a
8 different loan.

9 MR. YOUNG: Well, we disagree with the
10 union's characterization of its supposed benefit. But I
11 -- Justice Sotomayor, I see my time has expired, and I'd
12 like to reserve a balance for rebuttal. I will try
13 address your question more thoroughly when I stand up
14 again.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.
16 Mr. Collins.

17 ORAL ARGUMENT OF JEREMIAH COLLINS

18 ON BEHALF OF THE RESPONDENT

19 MR. COLLINS: Mr. Chief Justice, and may it
20 please the Court:

21 Justice Ginsburg is absolutely correct
22 that what we have suggested to the Court is that the
23 court of appeals decision be vacated, with the
24 consequence of reinstating the district court judgment.

25 CHIEF JUSTICE ROBERTS: Why do -- why did

1 you give up once the case was granted here? You didn't
2 consider that until the case came before this Court.

3 MR. COLLINS: That's correct, Your Honor,
4 and the reason for that is when the events in this
5 matter were new and the then union officers' actions
6 were being challenged, the instinct was we're going to
7 defend the case. And, as time went on, there was no
8 rethinking of that situation. When the case was granted
9 here over our opposition, noting that we didn't think
10 that the questions presented were really presented, the
11 officers of the union, who are not the ones involved in
12 the original case, thought about the situation and came
13 to the realization that they have no stake in the
14 procedures that are at issue here. This is a local that
15 had never done a mid-year increase in the past. The --
16 what was contemplated as a temporary increase here
17 turned into a permanent increase. The dues went up to
18 1.5 percent of salary a year after this increase ended.

19 JUSTICE ALITO: What does this local, and
20 what will the other locals, do in the future when
21 special assessments are made? Will they provide notice
22 or will they go back to the old system?

23 MR. COLLINS: This local -- and I won't
24 belabor the term "special assessment" at the moment, but
25 when we get to the merits, I think there's a

1 misunderstanding around that, Justice Alito. But this
2 local has put in a procedure which frankly would satisfy
3 the Petitioners' concerns for the future if future
4 conduct was legitimately at issue here. But it is not,
5 for two reasons.

6 First, when we state that the district court
7 judgment be reinstated, that's a judgment that was not
8 appealed by the Petitioners. That defines the limits of
9 what they can attain from this case, whatever this Court
10 may decide, and that decision gives whatever protection
11 it gives against future conduct. Now, it gives
12 essentially none for a very good reason. This was a
13 case, as has been noted, brought only about a one-time
14 event. There were no allegations of an ongoing
15 practice. There was no request for declaratory or
16 injunctive relief to prevent --

17 JUSTICE KAGAN: Mr. Collins, as I understand
18 Mr. Young's argument, there is a serious dispute about
19 the adequacy of this notice, and it might be a dispute
20 about whether it was clear enough, about that it was
21 satisfying claims, or it might be a dispute about
22 whether it allowed refunds easily enough, but that Mr.
23 Young is contesting whether the notice complied with the
24 district court's order.

25 Now, as long as that's true, don't we have a

1 live case before us? Somebody has to answer that
2 question about whether your notice complied with the
3 order, and if it's the case that a court has to answer
4 that question, doesn't that depend on the questions
5 presented here, the substantive questions?

6 MR. COLLINS: No, it doesn't, Justice Kagan.
7 And the Court's explained in a number of cases,
8 beginning I think with Walling v. Reuter and also,
9 obviously, Munsingwear and U.S. Bancorp, a case can be
10 in a posture where this Court, in disposing of it, needs
11 to grant certain relief or clarification of the status
12 of prior orders; and yet, the case is moot on the merits
13 such that the Court cannot appropriately reach the
14 merits.

15 That's what we have here. If there is a
16 dispute -- and I'll explain in a moment why there really
17 isn't. But if there is a dispute, for example, as to
18 whether an individual failed to get their refund because
19 the notice was inadequate, that dispute is not affected
20 by and requires no decision of this Court.

21 If the district court judgment is
22 reinstated, then the question of whether we have fully
23 provided all relief called for by that judgment, which
24 we believe we have, would be before the district court
25 for decision, unaffected by --

1 CHIEF JUSTICE ROBERTS: But this is not --
2 this is not an incidental matter. I mean, the whole
3 point of your friend's argument with the Hudson notice
4 is they want people to understand what's happening with
5 the -- their union money. And they say this notice
6 didn't let people know that. And if the case is not
7 moot and if they prevail, they will have a right to be
8 heard on what the notice should say. And that will make
9 a difference in how many people opt out or how many
10 people don't.

11 And I guess I'm following up on Justice
12 Kagan's question. That's a very important part of this
13 case, what the notice is going to say, and if we accept
14 your view that it's moot, that issue goes by the
15 wayside.

16 MR. COLLINS: I think that's incorrect,
17 Mr. Chief Justice, for two reasons: First of all, the
18 district court required a certain kind of notice to be
19 given. We are stating the district court judgment
20 should be reinstated. If the notice we have given does
21 not comport with what the district court judgment, which
22 was not appealed by the Petitioners, requires, it will
23 be provided by the district court.

24 We are -- we are not contesting -- the
25 Petitioners are looking a gift horse in the mouth.

1 CHIEF JUSTICE ROBERTS: I'm sorry. I don't
2 see how that -- I don't see how that works.

3 The notice is only required by the district
4 court if the case is not moot. If the case is moot by
5 the notice you sent out, the district court doesn't have
6 a case on the basis of which to order a different
7 notice.

8 MR. COLLINS: No, I don't think that's
9 correct, Your Honor. A case can be moot in this Court
10 -- and this is what I believe *Munsingwear*, *Walling v.*
11 *Reuter*, and the other cases, U.S. Bancorp more recently,
12 explain. And, at first, it seems paradoxical, but it is
13 not paradoxical. A case -- there can be remaining
14 issues potentially in the district court, such as
15 whether the check that the plaintiff paid bounced or
16 not, that could potentially have to be resolved by a
17 district court. And it -- but it means, at least in
18 terms of prudential mootness, there is not a substantive
19 merits issue remaining for the court to be deciding.
20 And it's really quite simple. The Petitioners, as I
21 say, are looking a gift horse in the mouth.

22 The apex, the acme, that they can achieve in
23 this case, is what they got from the district court, and
24 it was reversed. We are saying give it back to them.
25 Take back the reversal, reinstate the judgment.

1 Whatever they won, they will have. We believe we have
2 already given them everything they want. If we have
3 not, the district court will do that.

4 But let me explain the second point, if I
5 may, Mr. Chief Justice, which is that there is no
6 legitimate issue here about whether the notice was
7 adequate. Mr. Young stated quite incorrectly that the
8 notice we have provided is the same as the notice the
9 district court struck down. That's absolutely
10 incorrect. The district court said that the 2005 notice
11 issued before the dues increase obviously did not give
12 specific notice of the dues increase, although it stated
13 that dues could be increased.

14 The district court specifically held, at
15 Petition Appendix 73a, that the 2006 notice, which
16 described the so-called fund and the dues increase, and
17 the purposes of it, was completely adequate. And the
18 notice the district court -- one also has to realize the
19 district court was requiring the union to refund only
20 the non-chargeable portion of activities attributed to
21 this increase.

22 A certain kind of notice would be needed for
23 that to justify how the union was computing what it was
24 saying with the chargeable portion to refund. But what
25 the union has done here is provide greater relief than

1 the district court ordered. We have refunded every
2 penny that anyone who requests had paid during the
3 increase.

4 So, there's no serious question that the
5 notice that the union sent out, which explained what the
6 increase had been spent on, sufficiently informed
7 individuals as to whether they now want to get back
8 every penny, as we've offered them, of what they paid
9 under the increase.

10 CHIEF JUSTICE ROBERTS: But -- I want you to
11 move to the merits. It may be a good time to do that.

12 MR. COLLINS: Fine. Turning to the
13 merits --

14 JUSTICE SOTOMAYOR: Can I clarify a point?
15 I thought I heard and maybe I just didn't look at the
16 union regulations, the new ones -- is it limited to
17 180 days? I thought I heard your adversary say that
18 the --

19 MR. COLLINS: It -- no, it has a provision
20 that it can't be repealed without 180-day notice. There
21 can't be a sudden repeal of the new procedure.

22 JUSTICE SOTOMAYOR: I see.

23 MR. COLLINS: But I do want to make clear,
24 we think nothing -- our position on mootness is not
25 dependent on the Court determining that the new

1 procedure will be in effect forever. Our position --

2 JUSTICE SOTOMAYOR: Could you tell me what
3 the burden is on a union to give a second Hudson notice
4 whenever there is a special assessment? Meaning do you
5 happen to know how frequently unions impose special
6 assessments --

7 MR. COLLINS: Well --

8 JUSTICE SOTOMAYOR: -- and what the
9 incremental cost is to the union of giving such notice?

10 MR. COLLINS: That requires a fairly
11 extensive answer, I believe, Justice Sotomayor, partly
12 because --

13 JUSTICE SOTOMAYOR: Try to summarize it. I
14 wasn't looking to monopolize you.

15 MR. COLLINS: I understand, but I believe --
16 I believe the word "special assessment" is being used
17 here with a meaning that doesn't correspond to what this
18 union did. I can say this much: There's never --
19 there's been only one other case in any Federal court
20 that I'm aware of, and only in a district court, there's
21 been no other appellate court, dealing with any kind of
22 assessment, a temporary dues increase, and how it
23 affects Hudson rights.

24 So, this is a -- a non-event in the real
25 world. There are -- there are no challenges that have

1 -- that have been made previously to any kinds of
2 assessments or increases.

3 But unions use assessments in two -- in many
4 different ways. And let me contrast one way with what
5 happened here, and I think it will show why there's no
6 serious question here about a need for a notice.

7 Some unions have a dues structure which
8 covers only certain kinds of activities. And they
9 contemplate a new kind of activity that they would not
10 normally pay for out of dues or fees. They say often
11 with -- with a vote, which was not required here. There
12 was -- there was no vote required or taken here of
13 bargaining unit members for what occurred in this
14 instance.

15 But you may have a union that says: We want
16 to make a kind of expenditure that's really
17 unanticipated. It's not what we normally do with our
18 dues. We're going to put it to a vote. If you approve
19 it, we'll collect it. We'll probably put it in a
20 segregated fund separate from our treasury.

21 That kind of an assessment can raise
22 potential issues, I would acknowledge, under Hudson.
23 It's worlds away from what we have here because all that
24 happened in this case was that the union increased, from
25 1 percent to 1.25 percent of salary, the regular

1 membership dues and the fees based on those dues that
2 were deducted by employers and paid into the union's
3 general treasury --

4 JUSTICE ALITO: Is it incorrect that this
5 was for what was termed a "Political Fight-Back Fund"?

6 MR. COLLINS: It was -- some union
7 communications described it as having that sole -- that
8 purpose. The October 27th letter, which was the most
9 detailed explanation, said it had two purposes,
10 basically to fight back at the bargaining table and to
11 fight back politically.

12 But what's essential, Justice Alito, it was
13 never suggested nor was it ever the case that this money
14 would be in any way segregated or treated as a separate
15 entity, so to speak. So, we have the Schermerhorn
16 problem here. Basically, Petitioners' position is based
17 on the fallacy exposed in Schermerhorn of trying to take
18 part of a unified general treasury and treat it as if it
19 were a distinct entity, because --

20 JUSTICE ALITO: Well, let me give you this
21 example, and maybe you'll say that this is different
22 from your case and the rules should be different in
23 these two cases. The annual dues for particular -- for
24 members of this union are 1 percent of their salaries,
25 and let's say that amounts to -- or it's a certain

1 percentage of their salaries, and let's say that amounts
2 to \$500 annual dues. And let's say that, in the prior
3 year, 90 percent of the money collected by the union was
4 used for chargeable purposes, 10 percent for
5 non-chargeable purposes. So, someone who objected, a
6 nonmember who objected, would be able to get back \$50.

7 Now, during the course of the year, the
8 union levies a special assessment or whatever you want
9 to call it, and for this 90 -- the percentages are
10 exactly reversed: 90 percent is for non-chargeable; 10
11 percent is for chargeable. So, now a nonmember who
12 potentially wants to object has \$450 at stake. Now, in
13 that situation, why shouldn't there be separate notice?
14 Aren't the economic incentives quite different?

15 MR. COLLINS: If I understand the
16 hypothetical, there could be a problem there if the
17 assumption is then that the union really is beginning a
18 kind of spending that's really foreign to the way it's
19 spent money in the past.

20 What needs to be explained here, though,
21 Justice Alito, I don't think one would guess from
22 anything that has been said today that we're talking
23 about a period of time when the union's chargeable
24 spending increased and its non-chargeable spending
25 decreased. We're talking about a period of time when

1 objecting nonmembers did not even pay their pro rata
2 share of the concededly chargeable expenditures, meaning
3 they did not pay one penny for any political activities.

4 JUSTICE ALITO: Well, as I said, my
5 hypothetical may be very different from what happened
6 here, and maybe it's an unrealistic hypothetical; and
7 you can answer that. But if -- if it were to occur,
8 should there not be Hudson notice?

9 MR. COLLINS: Well, the problem -- it would
10 be a closer question, but I think not, because, again,
11 it would be caught up in the subsequent year.

12 JUSTICE ALITO: But what if the money is
13 going to be used for an election campaign? What if it
14 is going to be used to weigh in, in favor of one
15 gubernatorial candidate against another, in favor of one
16 slate of legislative candidates against another? And on
17 those issues, the nonmembers may have very strong
18 partisan and ideological objections. So, why should
19 they not be given a notice at that time --

20 MR. COLLINS: It would depend --

21 JUSTICE ALITO: -- and given the opportunity
22 not to give what would be at a minimum a -- an
23 interest-free loan --

24 MR. COLLINS: Because --

25 JUSTICE ALITO: -- for the purpose of

1 influencing an election campaign?

2 MR. COLLINS: It would depend,
3 Justice Alito. I think in your hypothetical, one might
4 be able to say -- there might be more facts needed, but
5 one might be able to say that what is occurring is
6 something that could not be anticipated reasonably by
7 the person who got the notice.

8 In this case, however -- and this is crucial
9 to this case -- the notice in 2005 told every nonmember
10 that, of our \$38 million budget, we spent 43.6 percent
11 of it last year on non-chargeable activities. And if
12 you do not object, we will spend whatever amount out of
13 our roughly \$40 million budget in the coming year on
14 various activities as we perceive the need, including
15 specifically ballot initiatives, which were specifically
16 mentioned in the notice as one of the things the union
17 spent its money on.

18 Now --

19 CHIEF JUSTICE ROBERTS: I thought your
20 point, though -- this was a very special ballot
21 initiative. That's what the literature suggests, that
22 this was not sort of the normal run in the course --
23 every 2 years, every election cycle, we spend something.
24 That's why it's a special assessment.

25 MR. COLLINS: Well, I don't -- I wouldn't

1 call it a special assessment if one uses that term as
2 it's usually used, to mean a very short-term assessment
3 apart from general union functions for a new kind of
4 function.

5 CHIEF JUSTICE ROBERTS: No, it's not
6 short-term; it's just until November 7th or whatever.

7 MR. COLLINS: But it's nothing new under the
8 sun, Mr. Chief Justice. And we can see that -- for
9 example, the record reflects the audit for 2005 shows us
10 that, in addition to the money that was attributed to
11 the dues increase and spent in opposing these ballot
12 propositions, additional money, approximately
13 \$2 million, was spent on those same purposes from the
14 pre-increase dues.

15 So, ballot -- opposing ballot initiatives is
16 nothing new for this union.

17 JUSTICE BREYER: Can you think of for a
18 second -- to go back to Justice Sotomayor. Now, I would
19 like you to see, I think, why she asked the question.

20 As I understand it, the way it works now is
21 at the beginning of, say, September -- say it goes
22 September -- September. September of year two, we look
23 back to year one, and we see what the percentages were.
24 And now we in the union calculate a budget for year two.
25 And we go and get approval or opt-outs on that basis.

1 Now, what I thought coming in here is that
2 the problem was going to be, if you have to have a new
3 notice in the middle of the year for special political
4 assessments, you're going to discover that half the time
5 you don't know if they're special political assessments.
6 It's an impossible line to draw. It's really tough.

7 You're making the argument that however you
8 draw the line, we're on the right side of it, not the
9 wrong side. Isn't that what -- basically what you're
10 saying? It's not a special assessment. It wasn't
11 really -- et cetera. Okay.

12 Now -- but there's a new argument that's
13 come along that I hadn't focused on, that we can avoid
14 the administrative problem by saying all special
15 assessments require a new notice, whether they're for
16 political purposes or not. Hence the question that I
17 was trying to get -- I was very interested in your
18 answer. If we had that rule, which avoids the problem
19 of saying which is which, how does that affect the
20 union? Not necessarily yours but unions in general.
21 How often is it that you draw up your budget for year
22 two in September, you put it into effect, and then
23 during the year, you discover you need more money from
24 people for any reason, and, therefore, you change what
25 you thought they were going to contribute? How often,

1 if you can give us an estimate -- and you're in a better
2 position than I. Does it happen a lot, rarely, a
3 little? What do you want to say?

4 MR. COLLINS: I -- I --

5 JUSTICE SOTOMAYOR: And a footnote: And if
6 it happens a lot, how burdensome is it?

7 MR. COLLINS: I will get to that, Justice
8 Sotomayor. I have tried to determine how frequent it
9 is, and I've been unable. All I've been able to
10 determine is there's no litigation over it. How
11 often -- and I've been able to determine that so-called
12 assessments take many different forms from -- and I
13 think there are crucial distinctions -- from funding
14 what would -- a kind of charge that would not otherwise
15 be funded out of dues for some short period of time, to
16 the opposite extreme, what we have here and what I don't
17 think would be called an assessment frankly by anything
18 I've read, a temporary dues increase which became
19 permanent and which simply increased the total flow of
20 dues and fees into the general treasury and which went
21 for the usual -- the kinds of activities the union had
22 always funded. And in that regard, there's one --

23 JUSTICE SOTOMAYOR: Could you please answer
24 my question?

25 MR. COLLINS: The burden?

1 JUSTICE SOTOMAYOR: All right? The burden.

2 MR. COLLINS: The burden consists of two
3 things, Justice Sotomayor. The -- if a union has to
4 give a new Hudson notice in a situation like this,
5 whereas I've been trying to explain the spending that
6 went on is really not different from what one would have
7 reasonably anticipated given the notice, then we have
8 litigation and disputes about the need for new notices
9 whenever any number of things happen, because one thing
10 that happened here that is undisputed but hasn't been
11 discussed is that collective bargaining costs were up
12 six-fold in 2005 over 2004, and they were up six-fold in
13 2006 over 2005.

14 CHIEF JUSTICE ROBERTS: One reason -- I
15 mean, we're dealing with the situation where the union
16 is compelling nonunion members to give them money for
17 political activities. We allow, as I understand Hudson,
18 as I read it, because you can't figure out what that is,
19 you wait until the end of the year. In other words,
20 it's a compromise for administrative convenience.
21 Normally, you wouldn't allow it at all, as -- at least
22 under the law as I read it, you would not allow people
23 to take money -- you would not allow the union to take
24 money from people who don't want to spend it on
25 political activities so the union can spend it on

1 political activities. But we allow that in the course
2 of the year because it's impossible as you go on to sort
3 these things out. I thought the argument on the other
4 side was when you have a special assessment, an
5 additional charge, there you don't have the
6 administrative problem. You can tell it's .25 percent.
7 So, you can't take that until you tell them, do you want
8 to object or are you happy -- are you fine with having
9 this spent on political purposes?

10 MR. COLLINS: The reason, Mr. Chief Justice,
11 that it isn't that straight forward is quite simply that
12 all of these questions about it's a special assessment,
13 we can figure out what it is, we can treat it
14 separately, flounder when one realizes that the
15 so-called special assessment is simply a dues increase,
16 because if I were to try to imagine -- let's try to
17 imagine the notice that could have been given. If I was
18 giving a new notice in the fall of 2005 to explain to
19 all nonmembers how things look now compared to what
20 they -- how they may have looked when the Hudson notice
21 was given, I would say the following, completely
22 consistent with all the facts of record in this case as
23 revealed in the audits. I would say: We've determined
24 we need more income. Part of this is because we
25 anticipate \$3.7 million in fight-back expenses this

1 year. Another part is we expect more than \$3-1/2
2 million of additional bargaining costs this year, and we
3 expect a lot of other changes in our costs.

4 On the Petitioners' theory -- and this is
5 why Schermerhorn is the complete answer to their
6 theory -- there's a constitutional violation if the
7 union says we're going to view this increase as paying
8 for our additional political costs, and it's going to
9 free up our bargaining -- our general treasury for the
10 bargaining. That's a violation. But if you say we're
11 going to treat this increase as covering those new
12 bargaining costs we told you about, that's going to free
13 up our general treasury for the political costs --

14 CHIEF JUSTICE ROBERTS: But on the -- I'm
15 reading from the district court opinion. It said that
16 this assessment would be used -- and they're quoting
17 from union material -- "for a broad range of political
18 expenses, including television, radio advertising,
19 direct mail, voter registration, voter education, and
20 get out the vote activities in our work sites and in
21 communities across California." And it further said,
22 quote, "The fund will not be used for regular costs of
23 the union such as office rent, staff salaries or routine
24 equipment replacement."

25 MR. COLLINS: But two points,

1 Mr. Chief Justice: First, as the court of appeals
2 pointed out, there were other statements that said the
3 money would be used for both purposes.

4 But, as Schermerhorn points out,
5 Schermerhorn says even if you specifically say this part
6 of our dues income is going to be earmarked for this
7 purpose, it's artificial when you're dealing with a
8 general union treasury, not a separate segregated fund,
9 to give that separate legal status. And that -- because
10 that is why -- my point to you, Mr. Chief Justice, is
11 nothing in the world would have changed here.

12 JUSTICE ALITO: Suppose that the --

13 MR. COLLINS: If --

14 JUSTICE ALITO: Suppose that the proponents
15 of Propositions 75 and 76 had come to the union and
16 said, would you please give us an interest-free loan for
17 money because we want to use this money to -- to
18 persuade the electorate to enact these; but don't worry
19 because we're going to pay it back right after the
20 election, when we've achieved our electoral ends.

21 Would -- would the union provide the money
22 because it's all going to come out in the wash?

23 MR. COLLINS: I -- I really can't answer
24 that question. I don't know. I --

25 JUSTICE ALITO: Well, I -- gee, I really

1 doubt that you -- that they would. But what's the
2 difference? If you look at this from the perspective of
3 a nonmember who doesn't want those ballot initiatives to
4 be defeated, saying that we're going to give you your
5 money back -- we're going to use your money to achieve a
6 political end that you oppose, but don't worry because
7 we're going to give it back to you next year after we've
8 achieved our political end -- how does that solve the
9 problem?

10 MR. COLLINS: That's not the situation here,
11 Justice Alito. The nonmembers were told in June 2005 in
12 the Hudson notice that if you don't object, we may spend
13 millions of dollars on political activities, including
14 ballot initiatives. If a person didn't want to support
15 that, they merely need to object. What then happened --
16 and this is what gets lost in the messaging about the
17 dues increase. What actually happened in the real world
18 in the period that followed is that, compared to the
19 numbers in the 2004 Hudson notice, the union spent less
20 on non-chargeable matters and more on chargeable
21 matters. And the only reason there's a case here in the
22 Court is that the union, for whatever PR purposes,
23 whatever it may have been, instead of saying we're going
24 to treat the increase as covering our vastly increased
25 bargaining costs, thereby freeing up money for politics,

1 we're instead going to describe this increase as being
2 attributable to our political costs, thereby freeing up
3 money for bargaining. But what the union is spending
4 its -- its money on is bargaining. More money --

5 JUSTICE KENNEDY: It -- it seems to me that
6 this answer is -- is so confusing that the Court
7 probably should consider whether or not an opt-in
8 requirement is -- is preferable. I -- we're talking --
9 in the first exchange, you had with Justice Alito, he
10 gave you a very simple question: 90 percent and 10
11 percent. Then, it's reversed. Special assessment for
12 90 percent political. And the point there was that
13 you're taking someone's money contrary to that person's
14 conscience. And that's what the First Amendment stands
15 against. And you simply wouldn't answer that question.
16 You would -- and then you say, well, maybe that it's --
17 it's fungible, it's hard to --

18 MR. COLLINS: No, but --

19 JUSTICE KENNEDY: It seems to me that you're
20 avoiding --

21 MR. COLLINS: No.

22 JUSTICE KENNEDY: -- a very, very critical
23 question on the constitutional rights of these objecting
24 members.

25 MR. COLLINS: I won't avoid the -- I don't

1 believe -- I was not meaning to avoid it,
2 Justice Kennedy. What I thought I said is, if you are
3 springing something on someone that's not anticipated in
4 the notice that gave them their rights to object, then
5 there's a problem.

6 My point is very simple. Anyone reading the
7 2005 Hudson notice, if that person was asked -- if I
8 don't -- if you -- if I don't object, might the union
9 spend \$3.7 million next year on ballot initiatives that
10 I may not want to oppose? The answer would be yes. The
11 notice made it perfectly clear.

12 JUSTICE KENNEDY: Let me ask you this --

13 MR. COLLINS: And the person can object.

14 JUSTICE KENNEDY: -- by way of background:

15 In collective bargaining negotiations, do the unions
16 consider the -- as one factor the importance of ensuring
17 that the governmental employer has fiscal stability?

18 MR. COLLINS: That's generally considered,
19 yes, by unions.

20 JUSTICE KENNEDY: Well, isn't that
21 ultimately a political judgment, so that even collective
22 bargaining involves a core political judgment?

23 MR. COLLINS: And that's exactly what the
24 Court said in Abood. And the reason that exclusivity
25 and agency fees are permitted in -- in serving an

1 important government purpose is that the government has
2 concluded that its interest lies in having an exclusive
3 spokesperson who -- with whom it can negotiate so that
4 it won't have an array of different employment relations
5 or different --

6 JUSTICE KENNEDY: But you -- you concede, in
7 ordinary collective bargaining, there are critical and
8 important political -- significant political judgments
9 that are being made by the union in the course of
10 collective bargaining with chargeable expenses?

11 MR. COLLINS: Absolutely. And Abood
12 explicitly says that, and Abood then says that,
13 nevertheless, the government -- we're talking about a
14 regulatory scheme to promote the government's interest
15 in orderly labor relations. The government needs to
16 make arrangements and agreements on terms of employment.
17 It has a vital interest in having an exclusive
18 representational arrangement where that can be
19 accomplished. And that, the Court held in Abood -- and
20 it's not challenged by Petitioners -- that justifies the
21 degree of impingement that's inherent in the fact that,
22 as Your Honor correctly says, all bargaining,
23 particularly in the public sector, has political
24 elements in it.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Young, you have 4 minutes remaining.

2 REBUTTAL ARGUMENT OF WILLIAM J. YOUNG

3 ON BEHALF OF THE PETITIONERS

4 MR. YOUNG: Thank you, Mr. Chief Justice.

5 JUSTICE SCALIA: Mr. Young, I hope this
6 won't use up much of your time, but I do have a pressing
7 question to make sure that we're just not spinning our
8 wheels here.

9 What if the union here had simply said all
10 this additional assessment will go to bargaining
11 activities, and then simply used its original
12 assessment, the portion that had been anticipated to be
13 used for bargaining, for political activities? It could
14 do that, couldn't it?

15 MR. YOUNG: It would --

16 JUSTICE SCALIA: I mean, it's not committed
17 to -- to, you know, an 80-20, or whatever the division
18 is, simply because that's what's given out in the first
19 notice. It can indeed use its -- the anticipated
20 portion for bargaining for political activities.

21 MR. YOUNG: It would be free to do so,
22 Justice Scalia.

23 JUSTICE SCALIA: So, why are we wasting our
24 time? I mean, all the unions are going to do is say
25 this is a general assessment for bargaining purposes,

1 and then use their -- their general funds for the
2 political thing.

3 MR. YOUNG: Because the nonmembers still
4 have that right to challenge, Justice Scalia.

5 JUSTICE SOTOMAYOR: But they don't lose it;
6 they're going to do it the following September. The
7 attractive part of your argument from the beginning was
8 that this is somehow a forced loan. And I understand
9 the attractiveness of that. But it goes back to what
10 Justice Breyer said from the beginning, which is, given,
11 as has been recognized, that money is fungible and that
12 you can't really often predict what's going to happen in
13 the future, it's been developed a system that cyclically
14 gets money to the people back.

15 MR. YOUNG: And money is fungible to a
16 degree, Justice Sotomayor -- Sotomayor -- excuse me.
17 And I respect that argument, but let's remember the
18 facts as we have them here. In the facts of this case,
19 it was a segregated fund. There's a separate portion, a
20 separate line item in the union's notice for both --

21 JUSTICE SCALIA: Okay. So, you win, and
22 it'll never happen again. It'll never again be called a
23 segregated fund for politics.

24 (Laughter.)

25 MR. YOUNG: I lose, Justice Scalia, and it

1 will happen all the time, I'm afraid.

2 JUSTICE BREYER: No, but the -- the problem
3 if you win in this case, and then there is this other
4 way of getting to the same -- the same result, is that
5 the other way of getting to the same result, while
6 permissible, is far less transparent. And people won't
7 understand it, and it -- it encourages a kind of slyness
8 that seems highly undesirable.

9 And the virtue of the present system is that
10 it does require some forced loans, that's true, but it
11 does wash out in the wash, and it ends up being fair to
12 the objectors. And it's simply hard to think of a
13 better system that doesn't provide more administrative
14 problems than the existing one.

15 MR. YOUNG: But --

16 JUSTICE BREYER: So, that's -- go ahead.

17 MR. YOUNG: And I thank you, Justice Breyer.
18 I'm sorry for interrupting.

19 It -- I understand that, Justice Breyer.
20 And for ordinary union dues, that's why when Justice
21 Sotomayor asked me at the beginning of the argument
22 whether we're challenging the ordinary Hudson system, I
23 answered no, because that system is perfectly adequate
24 for ordinary union dues.

25 JUSTICE SOTOMAYOR: The problem is that I'm

1 being told by your adversary -- and since we don't know,
2 I'm always afraid of writing a decision in a vacuum,
3 okay?

4 MR. YOUNG: Sure.

5 JUSTICE SOTOMAYOR: That unions structure
6 their business in a myriad number of ways, that some
7 have a very small due each year and a larger special
8 assessment for special projects. And I assume there's
9 endless variety.

10 You're proposing a rule that every single
11 time an assessment outside of annual dues is imposed,
12 that a new Hudson notice can be given. And you're
13 suggesting, Justice Scalia, that all they have to say is
14 we think it's going to be for chargeable effect.

15 MR. YOUNG: Well, the -- I'm sorry.

16 CHIEF JUSTICE ROBERTS: Briefly, counsel.

17 MR. YOUNG: Yes, and I thank you,
18 Mr. Chief Justice.

19 So, Justice Sotomayor, the answer is that
20 I'm saying it would -- it would be brief -- and my
21 friend Mr. Collins is saying that it doesn't happen that
22 often. So, the burden is minimal. Unions have other
23 options than extracting this money from unwitting
24 nonmembers -- interest-free loans, internationals.

25 And I thank the Court for its attention.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel,
2 counsel.

3 The case is submitted.

4 (Whereupon, at 11:20 a.m., the case in the
5 above-entitled matter was submitted.)

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