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14 ATTORNEYS FOR PLAINTIFFS AND
15 THE CLASS THEY SEEK TO REPRESENT

16 UNITED STATES DISTRICT COURT
17 FOR THE EASTERN DISTRICT OF CALIFORNIA

18 DIANNE KNOX; *et al.*, ON BEHALF OF
19 THEMSELVES AND THE CLASS THEY SEEK TO
20 REPRESENT,

21 Plaintiffs,

22 v.

23 STEVE WESTLY, Controller, State of California;
24 *et al.*,

25 Defendants.

CASE NO. 2:05-cv-02198 MCE KJM

**PLAINTIFFS' MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
THEIR *EX PARTE* APPLICATION FOR A
TEMPORARY RESTRAINING ORDER
AND/OR A PRELIMINARY INJUNCTION**

**HEARING DATE: TBD
TIME: TBD
COURTROOM OF JUDGE ENGLAND,
COURTROOM 3, 15TH FLOOR**

26 **I. STATEMENT OF FACTS**

27 Plaintiffs Dianne Knox, William L. Blaylock, Robert A. Conover, Edward L. Dobrowolski, Jr.,
28 Karyn Gil, Thomas Jacob Hass, Patrick Johnson, and Jon Jumper are, and were at all times mentioned
herein, individuals employed by various instrumentalities of the State of California. As such, they are
“state employees” within the meaning of the Ralph C. Dills Act, CAL. GOVT. CODE, § 3513(c). Most
of the Plaintiffs are employed in a bargaining unit designated as “Bargaining Unit 1,” which is one
bargaining unit of State employees among several represented, exclusively for purposes of collective
bargaining with their employer, by Defendant California State Employees Association, Local 1000,

1 Service Employees International Union, AFL-CIO, CLC (hereinafter “CSEA”). All Plaintiffs save
2 Mssrs. Conover and Ricker are not members of CSEA and have not, at any time material hereto, been
3 members of CSEA and/or its affiliates, and nevertheless have been and are subject to the automatic
4 seizure of agency fees, including the temporary assessment. Until on or after 1 October 2005, when he
5 resigned from union membership, Plaintiff Conover was a member of CSEA and/or its affiliates, and
6 full union dues were deducted monthly from his wages.

7 Defendant Steven Westly (hereinafter “Westly”) is the Controller of the State of California. As
8 such, he is charged with the responsibility of issuing wages to employees of the State and/or its
9 Departments, including Plaintiffs, and processing all deductions therefore, including for union dues
10 and so-called “fair share” fees pursuant to “agency shop” agreements. Defendant California State
11 Employees Association, Local 1000, Service Employees International Union, AFL-CIO, CLC
12 (“CSEA” or “the union”) is an “employee organization” as defined in the Ralph C. Dills Act, CAL.
13 GOVT. CODE, § 3513(a), and has been recognized as the exclusive representative under said law for
14 collective bargaining purposes of all State employees in Bargaining Units 1, 3, 4, 11, 14, 15, 17, 20,
15 and 21. On information and belief, Defendant CSEA is a nonprofit corporation formed and existing
16 under the laws of the State of California.

17 Acting in concert under color of state law — to-wit, the Ralph C. Dills Act, CAL. GOVT. CODE
18 § 3512, *et seq.* — the State of California has recognized CSEA as the exclusive bargaining agent for
19 the Plaintiffs and other State employees in bargaining units designated as Bargaining Units 1
20 (Professional, Administrative, Financial, and Staff Services bargaining unit), 3 (Education and Library
21 bargaining unit), 4 (Office and Allied workers bargaining unit), 11 (Engineering and Scientific
22 Technician bargaining unit), 14 (Printing Trades bargaining unit), 15 (Allied Services bargaining unit),
23 17 (Registered Nurses bargaining unit), 20 (Medical and Social Services Specialists bargaining unit),
24 and 21 (Education, Library, and Maritime bargaining unit). CSEA and the State of California have
25 entered into a series of Memoranda of Understanding (“MOUs”) controlling the terms and conditions
26 of employment for Plaintiffs and the class and subclasses of State employees Plaintiffs seek to
27 represent. Pursuant to the Ralph C. Dills Act, CAL. GOVT. CODE § 3512, the MOUs governing these
28 bargaining units include a provision requiring that all State employees in Bargaining Units 1, 3, 4, 11,

1 14, 15, 17, 20, and 21 join CSEA as formal union members, or have deducted from their wages agency
2 fees, as a condition of continued public employment.

3 On or about 30 July 2005,¹ the Local 1000 (CSEA) Council proposed an “Emergency
4 Temporary Assessment to Build a Political Fight-Back Fund” for “use[]d for a broad range of political
5 expenses, including television and radio advertising, direct mail, voter registration, voter education,
6 and get out the vote activities in our work sites and in our communities across California,” specifically
7 stating that “The Fund will not be used for regular costs of the union -- such as office rent, staff
8 salaries or routine equipment replacement, etc.” Complaint, Exhibit A. On or about 27 August, CSEA
9 General Council delegates voted to impose a “temporary dues increase (1/4th of 1 percent of salary)”
10 or assessment, effective 1 September, to create what CSEA characterizes as “a Political Fight Back
11 Fund to be used for advertising, mail, voter registration and education, and get-out-the-vote
12 activities...” *CSEA Unity*, September 2005, page 1, Complaint, Exhibit B.

13 CSEA’s temporary assessment, which actually ranges from 25% to 36% depending on the job
14 classification and monthly salary, began with the 30 September, paycheck issued to State employees,
15 and is targeted primarily, if not wholly, at the defeat of certain ballot propositions in a special election
16 to be held on 8 November, fighting, *inter alia*, the Governor’s electoral and political financing
17 policies, and to support other political and nonbargaining actions. Specifically, the temporary
18 assessment will “be used specifically in the political arenas of California to defend and advance the
19 interests of members of Local 1000 and the important public services they provide,” and will be “used
20 for a broad range of political expenses, including television and radio advertising, direct mail, voter
21 registration, voter education, and get out the vote activities in ... work sites and in ... communities
22 across California.” CSEA has represented specifically that “The Fund will not be used for regular
23 costs of the union — such as office rent, staff salaries or routine equipment replacement, etc.,” and that
24 this temporary assessment will generate approximately \$12 million for CSEA’s political activities.
25 Complaint, Exhibit A.

26 CSEA’s temporary assessment began with the 30 September paychecks issued to State
27

28 ¹ Unless otherwise noted, all dates stated herein are 2005.

1 employees. The normal \$45.00 per month dues cap does not apply to this temporary assessment, and
2 monthly dues now range from \$29.78 for a janitor to \$61.25 for an education consultant. Union dues
3 in the amount of \$66.77 was deducted from Plaintiff Conover's September paycheck. CSEA opposes
4 Propositions 75 & 76. The Alliance for a Better California, a coalition of the State's public employee
5 labor unions, of which CSEA is a member which it actively supports, also opposes Propositions 74,
6 77, & 78, and supports Propositions 79 & 80. CSEA has contributed to the Alliance and other political
7 committees opposing Propositions 75 & 76. However, Plaintiffs support some or all of the
8 propositions CSEA opposes, oppose some or all of the propositions CSEA supports, and/or do not
9 believe that their dues or forced fees should be used on any ballot proposition and other political and
10 nonbargaining activities.

11 CSEA has reported to the California Secretary of State the following contributions, set forth in
12 reports available at [http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1271482&](http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1271482&session=2005&view=contributions)
13 [session=2005&view=contributions](http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1271482&session=2005&view=contributions)):

14 a. Since 1 September 2005, direct monetary contributions in the amount of \$1.75
15 million in opposition to Proposition 75, and \$750,000 in Opposition to Proposition 76;

16 b. Since 1 January 2005, direct monetary contributions in the amount of \$1.5
17 million to the "Alliance for a Better California," whose website (<http://www.betterca.com/>)
18 reports opposition to Propositions 74, 75, 76, 77, and 78, and supports Propositions 79 and 80;
19 and

20 c. Since 1 August 2005, non-monetary contributions in the amount of \$59,590.74
21 to the "Alliance for a Better California," whose website (<http://www.betterca.com/>) reports
22 opposition to Propositions 74, 75, 76, 77, and 78, and supports Propositions 79 and 80.

23 Plaintiffs also have a First Amendment right to adequate procedures which will, *inter alia*, give
24 the employees adequate advance notice of the political and other nonbargaining uses to which the
25 temporary assessment is targeted. Such notice would allow them to make an informed decision on
26 whether their union dues and/or agency fees are (or will be) used for political and other nonbargaining
27 activities which conflict with their own personal preferences so that they can prevent the use of their
28 moneys for ballot propositions and other political and nonbargaining activities that they oppose. See

1 *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 306-10 (1986); *Cummings v. Connell*, 177 F.Supp.2d
2 1060 (E.D.CAL. 2001).

3 During the month of June, CSEA sent a notice (“CSEA’s Notice”) to most or all of its
4 nonmember employees. This notice preceded the vote for a temporary assessment by approximately
5 two-to-three months, contained no notice that a political dues and fees increase would be included in
6 the 2005-06 dues and fees, and stated that “Dues are subject to change without further notice to fee
7 payers.” Complaint, Exhibit C. CSEA’s Notice set the agency fee to be seized from 1 July 2005,
8 through 30 June 2006 (“2005-06 fiscal year”), at 99.1% of dues. CSEA’s Notice also informed
9 nonmembers that a reduced agency fee of 56.35% of CSEA’s annual dues, or 0.5635% of pay, would
10 be charged to nonmembers who objected to paying the full agency fee and requested a rebate pursuant
11 to the procedures and deadlines outlined in CSEA’s Notice. The 56.35% is based on CSEA’s actual
12 expenditures for the year ending 31 December 2004, in which CSEA calculated chargeable
13 expenditures to be 56.35% of its total expenditures.

14 On or about 31 August, CSEA sent another letter, addressed to “Local 1000 Members and Fair
15 Share Fee Payers.” As it affected union members, *inter alia*, said letter announced the dues increase,
16 and stated that “The \$45 per month cap on our regular dues of 1% of gross pay will continue in effect,
17 but will not apply to this additional .0025 temporary increase.” As it affected nonmember objectors,
18 *inter alia*, said letter announced that “Fair Share fees will rise by .002478 of gross monthly salary.”
19 Complaint, Exhibit D.

20 Since 1 September, the agency fee deducted from the wages of all nonmember objectors by
21 Westly and transmitted to CSEA for its political and ideological spending has been increased by at
22 least 0.2478% of salary, a 24.78% - 35.75% or more increase of monthly fees paid. Thus, the actual
23 reduced agency fee charged objecting nonmembers in 2005-06 includes 99.12% of the 25% temporary
24 assessment, which increase has been imposed solely for nonchargeable political and ideological
25 purposes, resulting in a forced loan from them that will be spent on the ballot propositions and other
26 political and nonbargaining activities to which they object. Since 1 September, the agency fee
27 deducted from the wages of nonmembers failing to object by Westly and transmitted to CSEA for its
28 spending has been increased by 0.2478% of salary, a 24.78% - 35.78% increase of monthly fees paid.

1 Moreover, CSEA’s pre-1 September, spending on the ballot propositions and other political
2 and nonbargaining activities facilitated by the temporary assessment will not be included in setting the
3 new reduced agency fee percentage until 2006, more than six months after the initial seizures; and the
4 1 September through 8 November, spending on the ballot propositions and other political and
5 nonbargaining activities facilitated by the fee increase will not be included in setting the new reduced
6 agency fee percentage until 2007, eighteen months later. CSEA’s usual agency fee procedure allows
7 CSEA to force nonmembers to loan it the increased fee amount to spend and use on the ballot
8 propositions and other political and nonbargaining activities, which CSEA will not begin to “repay”
9 for six months and not fully “repay” until eighteen months after the first seizures. In addition, CSEA’s
10 repayment of the forced loan is contingent upon the nonmember remaining employed by the State in a
11 bargaining unit represented by CSEA, and objection in both of the subsequent years.

12 In early September, after receiving CSEA’s 31 August letter, Complaint, Exhibit D, Plaintiff
13 Dobrowolski called CSEA’s Sacramento office, and was told to call its Riverside office. He did so,
14 and left a message for Jodi Smith, area manager, asking that she call him back. Smith returned his call
15 and stated that, even if Dobrowolski objected to the payment of the full agency fees, *via* a letter in
16 June, there was nothing he could do about the September increase for the temporary assessment. She
17 also stated that “we are in the fight of our lives,” and that the temporary assessment was needed, and
18 that there was nothing that could be done to stop CSEA’s expenditure of the temporary assessment for
19 political purposes.

20 As a result of the timing of CSEA’s increase in their dues and fees, the minimum procedures
21 required by the First and Fourteenth Amendments to the United States Constitution, as explained in
22 *Hudson*, have not been provided to the employees and the class they seek to represent, all of whom are
23 potential objectors to CSEA’s use of the increase in the dues and fees primarily, if not wholly, for
24 ballot propositions, political and other nonbargaining purposes. Specifically, CSEA has not provided
25 Plaintiffs Knox, Blaylock, Dobrowolski, Gil, Hass, Johnson, Jumper, and other nonmember State
26 employees with an opportunity to object to the use of the fee increase on the ballot propositions,
27 politics and other nonbargaining activities; and an immediate refund or reduction of the increased fee
28 amount. Absent such immediate procedural protections, the nonmember State employees are forced to

1 loan the increase in their fees to CSEA for its use and spending on the ballot propositions, politics and
2 other nonbargaining activities which they oppose and which they cannot constitutionally be required to
3 subsidize.

4 Furthermore, since the Complaint was prepared, CSEA has sent to nonmembers objecting to
5 the dues/fees increase a letter, dated 27 October, stating that the increased fees will be expended upon
6 a “campaign with aspects that focus on political actions and initiatives....” Declaration of W. James
7 Young, Exhibit A. Said letter further falsely states that “the Supreme Court has stated that [its *Hudson*
8 audit] must occur *at the end* of the fiscal year in which the activities take place, because next year’s
9 objecting fee-payer must be based on that audit.” *Id.* Said letter further states that “This campaign
10 will entail much workplace organizing....” *Id.*

11 12 **II. STANDARD FOR GRANTING A TEMPORARY RESTRAINING ORDER**

13 In the Ninth Circuit, to qualify for a restraining order, the movant must show: “either (1) a
14 combination of probable success on the merits and the possibility of irreparable harm, or (2) that
15 serious questions are raised and the balance of hardships tips sharply in the moving party’s favor.”
16 *Mayo v. United States Gov’t Printing Office*, 839 F.Supp. 697, 700 (N.D.CAL. 1992), **aff’d**, 9 F.3d
17 1450 (9TH CIR. 1993); *Senate of State of California v. Mosbacher*, 968 F.2d 974, 977 (9TH CIR. 1992)
18 (preliminary injunction standard); **see also** *Patterson v. Anchorage School District*, 145 LRRM (BNA)
19 2932 (D.AK. 1994) (granting a temporary restraining order prohibiting termination of non-paying non-
20 members because “fair share fee” procedures were likely to be held unlawful); *cf.* *Prescott v. County of*
21 *El Dorado*, 915 F.Supp. 1080, 1084-92 (E.D.CAL. 1996) (preliminary injunction granted against likely
22 unlawful procedures regarding “fair share fee” seizures); *Lucid v. City of San Francisco*, 136 LRRM
23 (BNA) 2877, 2879-81 (N.D.CAL. 1991) (same); *Lowary v. Lexington Local School Board*, 854 F.2d
24 131, 134-35 (6TH CIR. 1988) (same). These standards have been applied to issue temporary restraining
25 orders and/or preliminary injunctions in the context of the seizure of agency fees in the absence of full
26
27
28

1 *Hudson* compliance in ten reported cases, five in California.²

2
3 **III. ARGUMENT**

4 **A. Authority And Requirements For Enforcement Of An Agency Shop.**

5 The authority of public employee unions to act as collective bargaining agents arises from
6 statute, for they possess no entitlement to the authority to bargain exclusively or collectively with a
7 public employer. *City of Charlotte v. Firefighters Local 660*, 426 U.S. 283, 286-88 (1976). Likewise,
8 a monopoly bargaining representative's authority to force nonmembers to support its collective
9 bargaining activities is a privilege, not a matter of right. Certain conditions precedent must be satisfied
10 before a public employee union may compel nonmembers to provide them with support even of its
11 bargaining activities.

12 First, a statute must authorize entry into agency shop agreements. *See, e.g.*, 29 U.S.C.
13 § 158(a)(3) (National Labor Relations Act); 45 U.S.C. § 152, Eleventh (Railway Labor Act); Ralph C.
14 Dills Act, CAL. GOVT. CODE § 3512, *et seq.*; *see also Abood v. Detroit Board of Education*, 431 U.S.
15 209, 223-25 (1977) (explaining governmental interests justifying allowance of agency shop). Second,
16 a union and employer must agree to impose such a requirement in their collective bargaining

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18 ² *Swanson v. University of Hawaii Prof'l Assembly*, 269 F.Supp.2d 1252, 1260-61 (D.HAW.
19 2003); *Cummings v. Connell*, 163 LRRM (BNA) 2086, 2094-95 (E.D.CAL. 1999); *DeBont v. City of*
20 *Poway*, 158 LRRM (BNA) 2754, 2757-59 (S.D.CAL. 1998); *Prescott v. County of El Dorado*, 915
21 F.Supp. 1080, 1092 (E.D.CAL. 1996); *Reese v. City of Columbus*, 798 F.Supp. 463, 472 (S.D.OHIO
22 1992), **continuation of the preliminary injunction**, 826 F.Supp. 1115, 1122 (S.D.OHIO 1993); *Lucid*
23 *v. City of San Francisco*, 136 LRRM (BNA) 2877, 2879-81 (N.D.CAL. 1991); *Cramer v. Matish*, 129
24 LRRM (BNA) 2489, 2489-90 (W.D.MICH. 1988); *Fort Wayne Educ. Ass'n v. Aldrich*, 527 N.E.2d
25 201, 209 (IND.CT.APP. 1988); *Damiano v. Matish*, 122 LRRM (BNA) 3158, 3158-59 (W.D.MICH.
26 1986); *Perry v. City of Fort Wayne*, 542 F.Supp. 268, 274 (N.D.IND. 1982), **aff'd sub nom.** *Perry v.*
27 *Local 2569, Machinists*, 708 F.2d 1258 (7TH CIR. 1983); *see also Weaver v. University of Cincinnati*,
28 970 F.2d 1523, 1534 (6TH CIR. 1992) (where "fees have been collected under a plan that does not
comport with *Hudson*, the proper remedy is an injunction"); **earlier ruling**, 942 F.2d 1039, 1045 (6TH
CIR. 1991) (a "court must issue a preliminary injunction when a union's notice or objection procedures
are constitutionally deficient under *Hudson*."); *Lowary v. Lexington Local Board of Education*, 854
F.2d 131, 134-35 (6TH CIR. 1988) (once "the district court has found it likely that the procedures will
be found ... to violate *Hudson*, it constitutes an abuse of discretion for the court to allow fairshare
fees to be collected even if the collected fees are placed in an escrow account").

1 agreement.

2 Third — and most relevant to this case — as it applies to public employment, the union and
3 employer must comply with “the constitutional requirements for the ... collection of agency fees.” 475
4 U.S. at 310.³ Absent satisfaction of any one of these requirements — including the last — unions lack
5 any lawful authority to exact monies from nonmembers. *Knight v. Kenai Peninsula Borough School*
6 *District*, 131 F.3d 807, 815 (9TH CIR. 1997) (“Because it provided inadequate notice, [the union] failed
7 to satisfy *Hudson*’s requirements and was not entitled to the fees that it collected”); *cf. Dean*, 924 F.2d
8 at 809 (nonmember under RLA is privileged to withhold dues from union failing to comply with
9 *Hudson*’s requirements).

10 Thus, nonunion public employees can be compelled, consistent with the Constitution, to bear
11 only their *pro rata* share of the costs of collective bargaining, contract administration, and grievance
12 adjustment. *Abood*, 431 U.S. at 222. However, before a union and/or a public employer are entitled to
13 take any action to enforce such an obligation, they must comply with “the constitutional requirements
14 for the ... collection of agency fees,” *Hudson*, 475 U.S. at 310, for the First, Fifth, and Fourteenth
15 Amendments require that certain notice and procedural protections be provided to public employees
16 exercising their right to refrain from membership in employee organizations but subjected to the
17 seizure of agency or “service fees” when their employer agrees to such a clause in the agreement
18 governing their terms and conditions of employment. *Id.*, 475 U.S. at 306; **see also** *Abood, supra*;
19 *Tierney II*, 824 F.2d at 1502.

20 The four procedural safeguards which “the government and union have a responsibility to
21 provide [to all ‘potential objectors’]... that minimize that impingement [on First Amendment rights]
22 and that facilitate a nonunion employee’s ability to protect his rights,” *Hudson*, 475 U.S. at 307 n.20 &
23 306, are: (1) the good-faith advance reduction of the fee to no more than that portion of the union’s
24 expenditures required for its execution of its duties as the nonmembers’ exclusive bargaining
25

26 ³ The Court explicitly recognized that this a joint responsibility. “Since the agency shop itself
27 is ‘a significant impingement on First Amendment rights,’ *Ellis [v. Railway Clerks]*, 466 U.S. [435,] at
28 455 [(1984)], **the government and the union** have a responsibility to provide procedures that
minimize that impingement and that facilitate a nonunion employee’s ability to protect his rights.”
Hudson, 475 U.S. at 307 n.20 (emphasis added).

1 representative, *Hudson*, 475 U.S. at 305-06, 310; (2) financial disclosure given prior to any demand for
2 or collection of the reduced fee adequate to allow nonmembers to gauge the propriety of the union’s
3 fee and to make an intelligent decision whether to challenge the fee calculation before an impartial
4 decisionmaker, 475 U.S. at 306-07, 310; (3) opportunity to challenge the fee calculation before an
5 impartial decisionmaker, 475 U.S. at 307-09, 310; and (4) an escrow of the amounts reasonably in
6 dispute pending such challenges. 475 U.S. at 309-10.

7 Two goals are served by procedural safeguards. First, they insure that the fees seized include
8 only the employee’s *pro rata* share of constitutionally chargeable costs. *Hudson*’s holding — that the
9 decision set forth “the constitutional requirements for the Union’s collection of agency fees” — insures
10 against both misuse of seized funds and excessive collections. 475 U.S. at 310 (emphasis added).
11 Second, procedural safeguards “facilitate a nonunion employee’s ability to protect his rights.” 475
12 U.S. at 303 & 307 n.20.

13 Moreover, the agency shop clearly impinges on Nonmembers’ First-Amendment rights:

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

17 *Aboud*, 431 U.S. at 232. The Supreme Court also has noted that “Mandating speech that a speaker
18 would not otherwise make necessarily alters the content of the speech. We therefore consider the Act
19 as a content-based regulation of speech.” *Riley*, 487 U.S. at 795. Of course, content-based regulation
20 of speech triggers the highest level of judicial evaluation, “strict scrutiny.” *Rosenberger v. Rector &*
21 *Visitors of the University of Virginia*, 515 U.S. 819, 828 (1995) (content-based discrimination is
22 presumptively unconstitutional); *Burson v. Freeman*, 504 U.S. 191, 197-98 (1992) (content-based
23 restrictions are subject to “exacting scrutiny,” “strict scrutiny,” with a showing that the “regulation is
24 necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end”)
25 (citations omitted).

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1 **B. Defendants Provided No Opportunity To Object And Challenge After Imposing A**
2 **Dues Increase Solely For Political Spending.**

3 As this Court is keenly aware, CSEA is already subject to a judgment declaring that it violated
4 constitutional standards by seizing agency fees in violation of *Hudson*'s requirements. *Cummings v.*
5 *Connell*, 177 F.Supp.2d 1060, 1073 (E.D.CAL. 2001). Importantly, this Court found that "injunctive
6 relief is no longer warranted" when, after four unsuccessful efforts, CSEA finally provided to a class of
7 approximately 37,000 nonmembers adequate notice and procedures under *Hudson*.

8 This case, however, goes beyond CSEA's mere failure to provide adequate notice and
9 procedural protections under *Hudson* regarding its special assessment, which is specifically, self-
10 consciously, and totally devoted to nonchargeable political and ideological expenditures for CSEA's
11 campaign against the impending electoral propositions. Complaint, Exhibits A, B, & D.

12 CSEA's monthly dues and fees increase, which began with the 30 September paycheck, and
13 continued with the 31 October paycheck, is targeted wholly at the defeat of certain ballot propositions
14 in a special election to be held on 8 November, to fight the Governor's education policies, and take
15 other political and nonbargaining actions. Complaint, Exhibit A (motion proposing increase, stating
16 that the funds raised will be used for an "Emergency Temporary Assessment to Build a Political Fight-
17 Back Fund" to be "use[d] for a broad range of political expenses, including television and radio
18 advertising, direct mail, voter registration, voter education, and get out the vote activities in our work
19 sites and in our communities across California," and specifically stating that "The Fund will not be
20 used for regular costs of the union -- such as office rent, staff salaries or routine equipment
21 replacement, etc.").

22 CSEA opposes Propositions 74, 75, 76 and 77 and supports Propositions 79 and 80, and is a
23 member of and has contributed funds to the Alliance for a Better California ("ABC"), a coalition of the
24 state's public labor unions. Young Decl., ¶ 6. Since 1 January, CSEA has given more than \$1.5
25 million to ABC. *Id.* Since 1 September, CSEA has made additional contributions of \$2.5 million for
26 the defeat of Propositions 75 & 76. *Id.*

27 *Hudson* requires unions to provide "an adequate explanation for the advance reduction of
28 dues," 475 U.S. at 309, including notice of the political and other nonbargaining expenditures so that

1 “potential objectors,” *id.* at 306, can make an informed decision whether to object and prevent the use
2 of their moneys for political and other nonbargaining activities that they oppose. This notice is
3 commonly referred to as the “*Hudson*” notice.

4 During the month of June, CSEA sent out its *Hudson* notice to nonmember State employees
5 that it represents and from whom it seizes agency fees. Complaint, Exhibit C. This notice preceded the
6 decision to impose an increase in the compulsory fees by approximately two to three months, and
7 contained no notice that an increase in the fees to pay wholly for campaigns related to ballot
8 propositions, political, and other nonbargaining activities would be included in the last third of the
9 2005 fee year.

10 CSEA’s June notice set the agency fee to be seized from 1 July 2005, through 30 June 2006
11 (“2005-06 fiscal year”), at 99.1% of dues. CSEA’s 2005 Notice also informed nonmembers that a
12 reduced agency fee of 56.35% of CSEA’s annual dues, or 0.5635% of pay, would be charged to
13 nonmembers who objected to paying the full agency fee and requested a rebate pursuant to the
14 procedures and deadlines outlined in CSEA’s 2005 Notice. The 56.35% is based on CSEA’s actual
15 expenditures for the year ending 31 December 2004, in which CSEA calculated chargeable
16 expenditures to be 56.35% of its total expenditures.

17 Since 1 September, the agency fee seized from the wages of all nonmember objectors by
18 Westly and transmitted to CSEA for its spending has been increased by 0.2478% of salary, a 24.78% -
19 35.75% or more increase of monthly fees paid. Thus, the actual reduced agency fee charged objecting
20 nonmembers in 2005-06 includes 99.12% of the 25% temporary assessment, which increase has been
21 imposed solely for nonchargeable political and ideological purposes, resulting in a forced loan from
22 them that will be spent on the ballot propositions and other political and nonbargaining activities to
23 which they object. Complaint, ¶ 34.

24 However, CSEA’s pre-1 September 2005, spending on the ballot propositions and other
25 political and nonbargaining activities facilitated by the temporary assessment will not be included in
26 setting the new reduced agency fee percentage until 2006, more than six months after the initial
27 seizures; and the 1 September through 8 November 2005, spending on the ballot propositions and
28 other political and nonbargaining activities facilitated by the fee increase will not be included in setting

1 the new reduced agency fee percentage until 2007, eighteen months later. CSEA’s usual agency fee
2 procedure allows CSEA to force nonmembers to loan it the increased fee amount to spend and use on
3 the ballot propositions and other political and nonbargaining activities, which CSEA will not begin to
4 “repay” for six months and not fully “repay” until eighteen months after the first seizures. In addition,
5 CSEA’s repayment of the forced loan is contingent upon the nonmember remaining employed by the
6 State in a bargaining unit represented by CSEA, and objection in both of the subsequent years.

7 In order to discharge its constitutional obligations, a labor union representing public employees
8 must provide a notice to all “potential objectors,” *Hudson*, 475 U.S. at 306, including all nonunion
9 employees, in the bargaining unit alerting them to all of their rights under *Hudson*, including the right
10 to prevent the union from using their dues and fees on political matters, and how those rights can be
11 effected. *Hudson*, 475 U.S. at 305-06, 310. These requirements must be strictly followed. *Prescott*,
12 915 F.Supp. at 1092; *Lucid*, 136 LRRM at 2881; *Tierney v. City of Toledo*, 824 F.2d 1497, 1507 (6TH
13 CIR. 1987).

14 In other words, implementation of the adequate procedural safeguards is a precondition to the
15 constitutional collection and use of the increase in dues and fees imposed by Defendants here. To date,
16 Defendants have failed to provide **any** of the procedural safeguards required by *Hudson* for the
17 increases.

18 This failure is compounded by the fact that the increases are targeted wholly to defeat certain
19 ballot propositions, and take other political and nonbargaining actions. These Supreme Court cases
20 and their progeny make clear that, when a union increases its dues and fees solely for political
21 purposes, it must treat that increase in the existing nonchargeable percentage, notwithstanding the
22 usual procedure that the chargeable amount is calculated “on the basis of [the union’s] expenses during
23 the preceding year.” *Hudson*, 475 U.S. at 307 n.18. In this extraordinary circumstance, to follow
24 normal procedures would fail to meet *Hudson*’s standard that the procedure used by the unions must
25 adequately protect the basic distinction drawn in *Abood*.

26 “(T)he objective must be to devise a way of **preventing compulsory subsidization of**
27 **ideological activity by employees who object thereto** without restricting the Union’s
28 ability to require every employee to contribute to the cost of collective-bargaining
activities.” [*Abood*, 432 U.S.], at 237.

1 *Hudson*, 475 U.S. at 302 (emphasis added).

2 Because the sole purpose of CSEA’s increase here is nonchargeable ideological activities, there
3 are no collective-bargaining activities that need to be protected or balanced. Indeed, most *Hudson*
4 cases present the Court with protection of nonmembers’ procedural rights, *i.e.*, addressing their
5 “federal right to challenge a procedure that may not have resulted in any improper expenditures —
6 whether, in other words, even if the union has not used any of the money it has collected from
7 objecting employees to promote political activities unrelated to its role in collective bargaining, the
8 plaintiffs can still complain that they have been deprived of the liberty secured them by the
9 Constitution,” *Hudson v. Teachers Local No. 1*, 743 F.2d 1187, 1192 (7TH CIR. 1984), **aff’d** 475 U.S.
10 292 (1986). However, this Court presents, **in addition to** that *Hudson* procedural claim, the fact that
11 CSEA is violating at least some of Plaintiffs’ and the nonmembers’ **substantive** right to prevent CSEA
12 from using their funds for its political and ideological activities. *Grunwald v. San Bernardino City*
13 *Unified School District*, 994 F.2d. 1370, 1373-74 (9TH CIR. 1993). Therefore, the only relevant
14 consideration here regarding the increase is to prevent the “compulsory subsidization of ideological
15 activity by the employees who object.”⁴ CSEA’s normal procedures do not prevent the subsidization
16 of ideological activity caused by the increase; to the contrary, CSEA insists that it possesses some sort
17 of entitlement to force objecting nonmembers to subsidize its instant campaigns. Young Decl., Exhibit
18 A. Accordingly, the collection of the increase by CSEA on 30 September and 31 October have caused
19 irreparable harm to the “potential objectors.” *Hudson*, 475 U.S. at 306. “Irreparable harm will result if
20 ... a preliminary injunction is not issued.” *Damiano*, 122 LRRM at 3158.

21
22 **C. Plaintiffs Demonstrate A High Degree of Probability Of Success On The**
23 **Merits Of Their Claim.**

24 Existing authority demonstrates that Plaintiffs demonstrate a high degree of probability of
25

26 ⁴ The “dollar amount in [*sic*] issue is irrelevant. Because no fees may be collected in the
27 absence of constitutionally adequate notice and procedures, the district court erred in determining that
28 “[a] withholding of approximately ... \$100.00 per month in total from five plaintiffs in an escrow
account for a period of a few months does not constitute irreparable injury.” *Weaver*, 942 F.2d at
1045 (emphasis in original).

1 success on the merits of their claim that when an increase in fees directed political and ideological
2 purposes must be added to the existing rebate/reduction so it is not charged to objecting nonmembers
3 and a *Hudson* notice must be distributed to all nonmembers before a union can have access to the
4 increase from those who do not object after receiving notice of the purpose(s) of the increase.

5 Accordingly, when an increase becomes effective during the dues/fee year, like CSEA's, then
6 the union must either not collect the increase from all nonmembers or inform all "potential objectors"
7 through a new or supplemental *Hudson* notice that they may object to and have their fees reduced, and
8 thus, prevent the union's spending of the increase on politics and other nonbargaining activities. Like
9 the union in *Hudson*, CSEA "merely offer[s] dissenters the possibility of a rebate." *Hudson*, 475 U.S.
10 at 305. But "[a] forced exaction followed by a rebate equal to the amount improperly expended is thus
11 not a permissible response to the nonunion employees' objections." *Id.* at 305-06. Therefore,
12 "[a]mounts which indisputably cannot be retained by the union over a member's objection should be
13 promptly refunded with interest from the date of objection. The union must ... pay any amount
14 refundable beyond reasonable dispute as soon as it receives ... the member's objection." *Breaux v.*
15 *Agricultural Labor Relations Bd.*, 265 Cal. Rptr. 904, 918, 919 (CT.APP. 1990); *accord Dean v. TWA*,
16 924 F.2d 805, 809 (9TH CIR. 1991) (failure to reduce fees is inconsistent with the Supreme Court's
17 rejection of any type of rebate remedy). Here, Plaintiffs have shown that they are likely to succeed on
18 their claim that Defendants have taken the increase in fees in violation of the First Amendment, and
19 threaten to continue to do so. Together with the earlier showing of irreparable harm, this is sufficient
20 to support the granting of a temporary restraining order. *Patterson v. Anchorage School Dist.*, 145
21 LRRM (BNA) 2832 (D.AK. 1994); *Cramer*, 129 LRRM at 2489-90.⁵

24 ⁵ This is also sufficient to support the granting of a TRO or preliminary injunction. *Prescott*,
25 915 F.Supp. at 1084-92; *Lucid*, 136 LRRM at 2879-81; *Cummings*, 163 LRRM at 2094-95; *Reese*, 798
26 F.Supp. at 472; *cf. DeBont*, 158 LRRM at 2757-59 (irreparable harm and the balance of hardship tips
27 sharply in the employee's favor); *Swanson*, 269 F. Supp.2d at 1260-61 (same); *Damiano*, 122 LRRM
28 at 3158-59 (irreparable harm and a fair ground for litigation); *Lowary*, 124 LRRM at 2520 (escrow of
the collected fees upon the showing of a likelihood of irreparable harm and the public interest favors
the injunction); *Perry*, 542 F.Supp. at 274 (reinstating plaintiff to her job and placing fees in the
registry of the court upon the showing of irreparable harm and reasonable likelihood of prevailing).

1 **D. The Balance Of Hardships Tips Decisively In Plaintiffs' Favor.**

2 The balance of hardships favors Plaintiffs. Unless a temporary restraining order and/or
3 injunction issues against the seizure and spending of the increase in dues and fees on the ballot
4 propositions and other political and nonbargaining activities is granted, Plaintiffs will suffer immediate
5 and continuing First Amendment injuries. Once the Nonmembers' monies are spent,⁶ contrary to their
6 wishes, to affect the outcome of the ballot propositions on the 8 November, ballot, the Nonmembers'
7 First Amendment rights are irretrievably lost. The results of the election cannot be undone.

8 On the other hand, an improperly-issued temporary restraining order and/or injunction will
9 affect Defendants not at all. Defendant Westly has no stake in these elections at all, other than the
10 same stake as any other California citizen. Defendant CSEA will merely be delayed in using the
11 increase from employees to which they only have a state law, not a constitutional, entitlement. It is
12 important to remember that the requested temporary restraining order and/or injunction would not
13 apply to most agency fees at all. It would only apply to the increase in dues and fees dedicated solely
14 for political purposes.

15 The requested temporary restraining order and/or injunction would prevent the continued
16 collection of that increase only from nonmembers,⁷ and it would only place the increase already seized
17 in the registry of the Court or a Court-supervised escrow account until CSEA distributes an appropriate
18 *Hudson* notice and determines which nonmembers object to the increase being spent on politics⁸ and
19 which do not. At that time, the increase in dues and fees from the nonobjectors will be released from

21 ⁶ We would remind the Court that no injunction is sought against the taking of the dues
22 increase as to union members, such as Plaintiff R. Paul Ricker.

23 ⁷ Several courts have issued preliminary injunctions against the collection of fees in the
24 absence of full *Hudson* compliance even when the union had already placed the fees in escrow.
25 *Weaver*, 942 F.2d at 1045-46; *Lowary*, 854 F.2d at 134-35; *Cummings*, 163 LRRM at 2094-95;
Lehnert v. Ferris Faculty Ass'n, 707 F.Supp. 1490, 1495 n.4 (W.D.MICH. 1989), **aff'd**, 893 F.2d 111
(6TH CIR. 1989).

26 ⁸ Under the First Amendment, the dues and fees of objectors cannot include money for a
27 union to use on its own political activities, but are limited to the bargaining activities of the
28 union. *Abood*, 431 U.S. at 235-36. **See also** *Cummings*, 163 LRRM at 2095 (“The strong
protections for First Amendment rights, however, outweigh [the unions’] potential short term
loss of fair share fees”).

1 the escrow and returned to CSEA and it will be permitted to collect the increase. Under the requested
2 temporary restraining order and/or injunction, CSEA risks no loss in the eventual use and spending of
3 the dues and fees from nonobjectors.

4 Moreover, CSEA will not be illegitimately prevented from spending money on the ballot
5 propositions and other political and nonbargaining activities during the pendency of the temporary
6 restraining order and/or injunction. If it is confident in the support of the employees in purports to
7 represent in their support for its political and ideological agenda, it will certainly be able to recover
8 that money. And CSEA holds the “keys” to the enjoined money because the sooner it provides the
9 *Hudson* notice, the sooner it can claim and use the enjoined money from those nonmembers who do
10 not object to CSEA’s use of their monies on ballot propositions and other political and nonbargaining
11 matters.

12 Furthermore, if CSEA had followed the constitutional requirements of *Hudson* back when it
13 imposed the fee increase in August, it would have had lawful access to the increase from those who
14 did not object when they began receiving it after 30 September. Now that it has failed to comply with
15 the “constitutional requirements for the Union’s collection of agency fees,” *Hudson*, 475 U.S. at 310, it
16 may have to endure a temporary denial in the use of the increase from those who eventually do not
17 object to CSEA’s use of their moneys for politics. This is a small price to pay for assuring that the
18 unions do not irreparably harm the First Amendment rights of those who do not want their moneys
19 used for politics.

20 “The strong protections for First Amendment rights outweighs [CSEA’s] short-term loss of
21 fees and any inconvenience suffered by [it].” Swanson, 269 F.Supp.2d at 1261. “[CSEA] can
22 demonstrate no injury of comparable importance which would result from the issuance of an
23 injunction. Defendants have no right to collect fees from nonmembers using an invalid collection
24 procedure.” Reese, 798 F. Supp. at 472. Numerous other courts in *Hudson* enforcement actions have
25 also found that “in balancing the harm between the parties, ... the scale tips in favor of the plaintiff.”
26 *Damiano*, 122 LRRM at 3158; *DeBont*, 158 LRRM at 2757-59; *Prescott*, 915 F.Supp. at 1092.

1 **E. The Public Interest Favors Entry Of The Requested Relief.**

2 It is obvious that the public interest is served by requiring unions to comply with the *Hudson*'s
3 requirements, designed to protect First Amendment rights, prior to seizing monies from the workers'
4 paychecks. *Lowary*, 124 LRRM at 2520; *Perry*, 542 F.Supp. at 275; *Reese*, 798 F. Supp. at 472.
5 "[T]he public's interest in upholding first amendment freedoms of political expression favors the
6 granting of a preliminary injunction." *Swanson*, 269 F.Supp.2d at 1260-61. The Sixth Circuit found
7 that a preliminary injunction in these circumstances not only did not harm others, but it served the
8 public interest.

9 Because we have found [the union's] agency fee collection scheme in violation of the
10 requirements of *Hudson*, it follows that the First Amendment rights of other
11 nonmembers are also abridged. Thus, not only would a preliminary injunction in this
case not harm others, it would benefit many.... Not only would such an agreement be in
the public interest, it is constitutionally mandated in *Hudson*.

12 *Weaver*, 942 F.2d at 1047 (emphasis in original). The public interest is particularly keen here, where
13 CSEA is using fees from objecting employees for political purposes to distort the political process.

14
15 **F. Class-Wide Application Of The Temporary Restraining Order And/Or**
16 **Preliminary Injunction**

17 In *Reese*, 798 F. Supp. at 472, the court granted, prior to class certification, class-wide
18 preliminary injunctive relief against the taking of "fair share fees," based on a likely violation of
19 *Hudson*, protecting a proposed class of all non-union employees in those bargaining units affected by
20 the fee. The court reasoned that it was likely to certify the class on the merits. *Accord Damiano*, 122
21 LRRM at 3160 (exercising its equitable powers, court covered not only named plaintiffs but also
22 members of the class described in the complaint). Here, Plaintiffs anticipate promptly filing their
23 Motion for Class Certification, and Plaintiffs' counsel already has been certified as class counsel for at
24 least one class by this Court. *Cummings, supra*. For the reasons expressed in *Reese* and *Damiano*, this
25 Court should grant class-wide preliminary relief here.

26
27 **G. Waiver of Bond or Minimal Bond**

28 Ordinarily, the entry of preliminary relief requires the posting of security. Rule 65(c),

1 FED.R.CIV.P. In the Ninth Circuit, the trial court has discretion to determine the amount of the bond.
2 *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9TH CIR. 1999). In setting bond amounts, courts
3 generally take special precaution to ensure that plaintiffs bringing suit under 42 U.S.C. § 1983
4 are not thereby effectively denied access to judicial review. In some cases, courts have not required a
5 bond. See, e.g., *Smith v. Board of Election Comm'rs*, 591 F.Supp. 70, 72 (N.D.ILL. 1984) (no bond
6 required in § 1983 action because the vindication of a constitutional right should not depend upon a
7 plaintiff's financial status); *accord Cramer*, 129 LRRM at 2490 (temporary restraining order issued
8 without bond), **further proceedings**, 705 F.Supp. 1234 (W.D.MICH. 1988) (preliminary injunction);
9 **see also** *Swanson*, 269 F.Supp.2d at 1261 (court waived the bond requirement where union failed to
10 comply with *Hudson*); *Damiano*, 122 LRRM at 3160 (preliminary injunction without bond granted
11 against state employer's deduction of agency fees); *Damiano v. Matish*, 830 F.2d 1363, 1368 (6TH
12 CIR. 1987) (injunction against fee deduction pending appeal granted without bond); *Lucid*, 136 LRRM
13 at 2881 (preliminary injunction against fee deduction granted without bond). In other cases, only a
14 minimal bond was required. See *Lowary*, 124 LRRM at 2521 (preliminary injunction against fee
15 deduction granted with \$100 bond); *Prescott*, 915 F.Supp. at 1092 (same). In addition, courts are
16 generally more solicitous of the rights of access of individuals seeking relief, as opposed to
17 commercial entities. *Cupolo v. Bay Area Rapid Transit*, 5 F.Supp.2d 1078, 1086 (N.D.CAL. 1998)
18 (citing *Elliott v. Kiesewetter*, 98 F.3d 47, 59 (3D CIR. 1996)). Here, Plaintiffs are individual State
19 employees represented by a non-profit legal foundation. Neither the individual Plaintiffs nor their
20 legal representative will be able to post a substantial bond. Further, this case involves the threatened
21 taking of a relatively small amount of money from each Nonmember in alleged violation of the
22 Constitution. Moreover, the money already seized is being placed in the registry of the Court or a
23 Court-supervised escrow account, further reducing the need for any bond.

24

25 IV. CONCLUSION

26 Because Defendants are currently distorting the political process by seizing from objecting
27 nonmembers a "special assessment" and spending it solely for political and ideological purposes, and
28 because as to other nonmembers Defendants failed utterly to comply with "the constitutional

1 requirements for the ... collection of agency fees,” *Hudson*, 475 U.S. at 310, with regard to CSEA’s
2 special “assessment” solely for its political and ideological activities, this Court should immediately
3 issue, pending final adjudication of the Nonmembers’ prayer for permanent relief, a temporary
4 restraining order and/or preliminary injunction, restraining Defendants Westly, his agents, assistants,
5 successors, employees, attorneys, and all other persons acting in concert or cooperation with him or at
6 his direction or under his control, from seizing increased agency fees from Plaintiffs and the class
7 and/or subclass Plaintiffs seek to represent, and preliminarily enjoining Defendants, and all of them,
8 their agents, assistants, successors, employees, attorneys, and all other persons acting in concert or
9 cooperation with them or at their direction or under their control from taking any further steps to
10 enforce those portions of the so-called “Fair Share Agreements” or agency shop sections of the various
11 memoranda of understanding between the State of California and Defendant CSEA specified above,
12 until a constitutionally adequate notice has been provided and constitutionally adequate procedures are
13 in place and operating, and further order of this Court, and further restraining Defendant CSEA from
14 using any of the increases already seized and requiring that all increases in dues and fees be placed in
15 the registry of the Court or a Court-supervised escrow account until further order of the Court.

16 DATED: 2 November 2005

17 Respectfully submitted,

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