IN COURT OF APPEALS OF WISCONSIN
DISTRICT I

PHYLLIS ANN BROWNE, DOROTHY ACKERMAN, T.C. #750-002, OREBA ALEXANDER, SHERI L. BARTOLI, BETTY C. BASSETT, JOANNE BECK, JOANN M. BEHLING, JEANETTE A. BENNETT, DONNA J. BOROWSKI, RUTH BUENGER, RUTH BURBA, IVONA M. BURETA, THERESE BURGER, JUDITH CAMPEAU, ROSALIE J. CHERRONE, MARGARET CIESZYNSKI, YETTA DIETCH, LAVERNE DUGAN, BEVERLY ENGELLAND, DOROTHY H. GAUS, DORIS A. GOHLKE, JUDITH D. COSS, BEVERLY A. GRAY, CORINNE T. GROSS, KATHERINE L. HANNA, MARY J. HANSON, NORA R. HERRIGES, DONNA J. HOLSTEIN, MILDRED L. HUDSON, NOREEN M. JACOBI, INEZ L. KILES, JOYCE KNIPPEL, LINDA KOEBERT, HERMINE A. KUNDA, VIRGINIA LEMBERGER, EVELYN E. MARKOWSKI, FLORENCE MARKWIESE, MARY MARINETTO, HELEN MARX, BARBARA A. MORBECK, CHRISTINE M. MUSIAL, CHRISTINE R. NAULT, ESTHER PALSGROVE, ELEANORE PELISKA, FAYE M. POHL, JOSEPHINE PON, LORRAINE RICHARDSON, ANNIE L. RILEY, SANDRA SCHUELLER, ESTHER L. SCHUENEMAN, VIRGINIA A. SCHWERM, ROSEMARIE SCHWERTFEGER, DOROTHY STRAUSS, DEBORAH J. STRELECKI, NINETTE SUNN, LORRAINE TESKE, GRACE C. VOELZ, IRENE B. WAGNER, AUDREY A. WICKERT, DOROTHY E. WILKES, DOROTHY A. KOCH, WALTER J. JOHNSON, EDWARD L. BARLOW, ERNA BYRNE, LYNN M. KOZLOWSKI, CHERRY ANN LACKEY, GERALD LERANTH, IRVING E. NICOLAI, DORIS M. PIPER, CHRISTINA PITTS, MILDRED PIZZINO, HELEN RYZNAR, MARSHALL M. SCOTT, JOHN P. SKOCIR, ANNE C. TEBO, OLIVER J. WALDSCHMIDT, ANNABELLE WOLTER, BARBARA BARRISH, DORIS M. CONNER, TERESE G. FABIAN, KATHLEEN S. FLEURY, MARY E. JAEGER, REGINA S. KARPOWITZ, CAROLYN LOHMILLER, KENNETH E. MULTHAUF, MILDRED NOFFZ, TERESA PATZKE, CAROL S. PETERS, DOROTHY E. RIEDEL, CYNTHIA SCHNEIDER, RUTH CHERYL THOMPSON, IONE TRACHSEL, AND DOLORES V. WINTER,

Petitioners-Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Respondent.

THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, DISTRICT COUNCIL 48, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, JOHN PARR, Director of District Council 48, LOCAL 1053, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, MARGARET SILKEY, as President of Local 1053, FLORENCE TEFELSKE, as Treasurer of Local 1053, LOCAL 594, AFSCME, affiliated with District Council 48,

LOCAL 645, AFSCME, LOCAL 882, AFSCME, LOCAL 1055, AFSCME, LOCAL 1654, AFSCME, LOCAL 1656, AFSCME, all- affiliated with District Council 48,

Petitioners-Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Respondent.

No. 89-1094
Decision No. 18408-H and 19545-H

CERTIFICATION

Before Moser, P.J., Sullivan and Fine, JJ.

Pursuant to sec. 809.61, Stats., this court certifies this appeal to the Wisconsin Supreme Court for its review and determination.

This consolidated appeal seeks review of a judgment of the circuit court on a petition for review under ch. 227, Stats., affirming a final decision of the Wisconsin Employment Relations Commission regarding constitutional and statutory claims arising out of "fair-share" agreements.

ISSUES

This appeal presents significant policy matters of first impression in Wisconsin encompassed in the following 12 issues.

(1) Whether the courts are required to give deference to the Wisconsin Employment Relations Commission's determinations concerning the purposes for which union fairshare fees may be lawfully collected, the procedures prerequisite to collection of those fees, and the appropriate remedies if those fees are unlawfully collected.

(2) Whether the constitutional procedural safeguards for fair-share employees announced in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), should be applied retroactively.

(3) Whether the WERC acted beyond its authority by ordering 100% escrow of all fair-share fees deducted from all fair-share payors, including those employees who did not challenge the fair-

share deductions.

(4) Whether a union is entitled to retain compulsory fair-share fees from nonunion employees, unless there has been full compliance with *Hudson's* procedural safeguards.

(5) Whether the WERC properly vacated the arbitration award based on "technical defects" in the unions' notice and procedures where the suing nonunion employees were ordered "challengers" as a matter of law under the unions' procedures, and where the suing nonunion employees refused to participate in the arbitration.

(6) Whether the WERC's order requiring verification by an independent auditor of the local unions' expenditures, and its rejection of a "local presumption" in the absence of an audit, is consistent with *Hudson's* requirement that there be financial disclosure of the unions' expenditures.

(7) Whether nonunion employees of a public employer can be compelled to pay for publicity directed at the public instead of the bargaining unit, organizing efforts, representation of other bargaining units, as well as general lobbying and litigation expenses.

(8) Whether nonunion employees must affirmatively object to the unions' expenditures before sec. 111.70(1)(f)'s "proportionate share" limitation can be applied.

(9) Whether the WERC properly held four features of the unions' procedures to be constitutional where the WERC found that: 1) the breakdown of the unions' expenses as chargeable or non-chargeable was not verified by an independent auditor; 2) the American Federation of State, County and Municipal Employees (AFSCME) International's financial disclosures were constitutionally sufficient; 3) it was reasonable to require that nonunion employees be charged a fee equal to full union dues unless the nonunion employee objects annually, within 30 days after the date of the notice; and 4) that the arbitration process is limited to those employees who take formal steps to "challenge" the unions' fair-share assessments.

(10) Whether an employer commits a prohibited practice under the Municipal Employment Relations Act, and violates the First Amendment rights of its nonunion employees, if it does not ensure or establish adequate fair-share procedures before it deducts union dues from the wages of the nonunion employees.

(11) Whether the WERC properly found that the District Council 48's account was not a "true escrow" because it was not independently controlled by neutral third parties.

(12) Whether, in the absence of full compliance with *Hudson's* procedural safeguards, restitution and a cease-and-desist order is the appropriate remedy rather than escrow of the fair-share fees.

RELEVANT STATUTE

111.70 Municipal employment.

. . . .

(2) RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and such employes shall have the right to refrain from any and all such activities except that employes may be required to pay dues in the manner provided in a fair-share agreement ....

111.70 Municipal employment. (1) DEFINITIONS.

. . . .

(f) "Fair-share agreement" means an agreement between a municipal employer and a labor organization under which all or any of the employes in the collective bargaining unit are required to pay their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required of all members. Such an agreement shall contain a provision requiring the employer to deduct the amount of dues as certified by the labor organization from the earnings of the employes affected by said agreement and to pay the amount so deducted to the labor organization.

FACTS

In the early 1970's, the Milwaukee Board of School Directors and Milwaukee County entered into fair-share agreements with the Milwaukee District Council 48 of the American Federation of State, County and Municipal Employees and its affiliated locals that required all nonunion employees to make a monthly payment to the unions for the cost of collective bargaining and contract administration. This fair-share fee was equal to the dues paid by union members. Subsequently, the nonunion employees filed two separate actions challenging the constitutionality of sec. 111.70(1)(f) [formerly (h) under the 1972-73 statutes] and (2), Stats., which permits the collection of fair-share fees from nonunion employees. 1/

In 1978, the Wisconsin Supreme Court held that sec. 111.70 was constitutional. 2/ The cases were remanded to the WERC to make findings of fact and conclusions of law, and to determine how much of the fair-share fees had been used for purposes unrelated to collective bargaining or contract administration.

In April, 1986, the nonunion employees requested the WERC to review the fair-share agreements in light of *Chicago Teachers Union* ***v.*** *Hudson*, 475 U.S. 292 (1986), in which the United States Supreme Court announced constitutionally-required procedural safeguards for the collection of fair-share fees. The Supreme Court declared:

> [T]he constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

Hudson, 475 U.S. at 310. Pursuant to *Hudson,* the unions published a "NOTICE TO ALL NONMEMBER FAIRSHARE PAYORS," to provide nonunion employees the opportunity to assess the basis for the fee, and to give them the opportunity to object or to challenge the feels calculation.

On May 19, 1986, the WERC consolidated *Browne* and ***Johnson.*** After an arbitration hearing, the WERC determined, among other things, that the unions committed prohibited practices under sec. 111.70(3)(b), Stats., by providing only some of the procedural safeguards announced in *Hudson.*

The WERC ordered, *inter alia,* that: (1) the unions refund, at a seven percent interest rate, to the complainants, at percentages established in the various stipulations, the fair-share fees paid from the time the complainants became subject to the fair-share deductions; (2) the unions escrow an amount equal to the fair-share fees deducted from January 1, 1983, through March 4, 1986, with seven percent annual interest from the date the fees were taken until the date when the fees were placed in escrow; (3) the unions rectify the deficiencies in the fair-share procedures to comply with *Hudson;* (4) the unions continue to rebate in advance non-chargeable sums for both objectors and challengers, and escrow in an interest-bearing account any and all fair-share fees deducted from all fair-share fee payors from the date of the Hudson decision, plus seven percent annual interest, until the WERC finds that the unions are capable of providing adequate notice to all fair-share fee payors in the bargaining unit and have established proper procedures.

The unions and nonunion employees appealed. The circuit court upheld the WERC's decision. Both parties appeal the circuit court's affirmance of the WERC's decision.

DISCUSSION

I. *Standard of Review.* The circuit court denied the nonunion employees' request for *de novo* review of the WERC's decision. The court stated: "The facts are not in dispute. Therefore, the issue is whether the WERC erred in applying the law." The circuit court noted that a reviewing court will sustain the WERC's conclusions of law if they are reasonable, and "will defer to the administrative agency's special expertise in the construction and interpretation of a given law" even when "the questions raised are of issues of first impression."

The nonunion employees argue no deference should be given to the WERC's conclusions concerning the purposes for which fair-share fees may lawfully be collected, the procedures requisite to collection, and the appropriate remedies for unlawful collection, because these matters involve statutory and federal constitutional issues of first impression. They point out that the WERC's expertise lies in the area of labor-management relations and not First Amendment rights, and urge *de novo* judicial review.

The WERC states in rebuttal that "the issue of whether or not the subject of this dispute is one of 'first impression' is

debatable," and argues that reviewing courts should defer to its decision because of its "substantial expertise" in fair-share agreements, and its "more generalized expertise in the fields of public sector
collective bargaining and statutory application." The unions did not address this issue.

II. *Retroactivity of Hudson.* The WERC and the circuit court retroactively applied the procedural safeguards announced in *Hudson* to the fair-share agreements in dispute.

Questions involving retroactivity are resolved by application of the three-part analysis set forth in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Id. at 106-107 (citations omitted).

The unions argue that WERC erred in retroactively applying *Hudson's* procedural requirements because *Hudson's* financial disclosure or detailed notice requirement was not clearly foreshadowed in pre-*Hudson* case law.

The WERC argues its retroactive application of *Hudson's* constitutionally required fair-share procedures is entitled to substantial judicial deference as an administrative act of statutory interpretation and policymaking, and should be affirmed. WERC also argues its order retroactively applying Hudson should be affirmed as a proper interpretation of federal legal doctrine involving the application of recent case law. The WERC contends

Hudson does not satisfy the "first impression" criterion discussed in *Chevron* because *Hudson* merely refined what was required to protect the constitutional rights of fair-share employees.

The nonunion employees argue that the procedural requirements announced in *Hudson* were clearly foreshadowed. They also address the two other *Chevron* factors. First, they contend that retroactive application of *Hudson* advances First Amendment rights, pointing out that restitution of unlawfully collected fees will restore the *status quo ante,* and will provide the necessary incentives for unions to establish necessary safeguards for nonmembers in the future. Second, they argue that retroactive application of *Hudson* does not impose any substantial inequity. Finally, the nonunion employees claim the majority of authority retroactively applies *Hudson's* procedural safeguards. See *Lehnert v. Ferris* ***Faculty*** *Ass'n*, 685 F. Supp. 1.64, 166 (W.D. Mich. 1987); *Gilpin* ***v.*** *American Fed'n of State, County and Mun. Employees,* 643 F. Supp. 733, 736-738 (C.D. Ill. 1986); *Harrison v. Massachusetts Soc'y of Professors' Faculty Staff Union*, 537 N.E.2d 1237, 1241 n.7 (Mass. 1989); *see also Abernathy v. San Jose Teachers Ass'n,* 475 U.S. 1063 (1986) (mem.) (vacating 700 P.2d 1252, 215 Cal. Rptr. 250 [Cal. 1985] and remanding in light of *Hudson*); *Tierney v. City of* ***Toledo,*** 824 F.2d 1497, 1500 (6th Cir. 1987) (Supreme Court, 475 U.S. 1115 [19861 [mem.], vacated earlier appeal of this case, 785 F.2d 310 [N.D. Ohio 1986], and remanded for consideration in light of *Hudson*); *Ellis v. Western Airlines, Inc.*, 652 F. Supp. 938 (S.D. Cal. 1986); *McGlumphy v. Fraternal* ***Order of Police,*** 633 F. Supp. 1074, 1082-1083 (N.D. Ohio 1986); ***contra Lowary v.*** *Lexington Local Bd. of Educ.,* 704 Supp. 1476, 1477-1480 (N.D. Ohio 1988).

III. *WERC's "Jurisdiction" to Order 100% Escrow of Fair-Share Fees Paid by All Nonunion Members.* The WERC ordered the unions to escrow all fair-share fees deducted from all fair-share payors in the bargaining units represented by the unions, including those employees who did not challenge the fair-share fees, until the WERC determined that the unions were prepared to provide adequate notice to all fair-share payors and established proper fair-share procedures.

The unions argue that the WERC acted beyond its "jurisdiction" by creating a "class" consisting of all nonunion-member fee payors, and not just those who challenged the deductions. The unions further contend that this "defacto certification" is outside the WERC's jurisdiction because the circuit court certified only a limited class in *Browne*, and denied certification in *Johnson.*

The unions also argue the WERC acted beyond its power and contrary to law by expanding the class authorized by the circuit court in *Browne*, and by affording relief to non-parties. Additionally, the unions argue that the 100% grant of relief to all fair-share payors ignores a potential conflict of interest within the "class" between nonunion employees who are hostile to unionism on political and ideological grounds, and those employees who are not hostile toward unions but just do not want to pay more than their "fair-share." *See Gilpin v. AFSCME,* 875 F.2d 1310, 1313 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 278.

The WERC argues that, in the absence of a specific statute that applies judicial class action procedures to the WERC, the WERC is given substantial powers to remedy situations where prohibited practices have taken place.

The nonunion employees argue the WERC has authority to order relief for employees who are not parties in a proceeding when their statutory rights have been violated. They contend that escrow is a form of injunctive relief, and that the scope of injunctive relief is dictated by the extent of the violation and not by the plaintiff class, and thus can benefit those employees who did not sue.

IV. *100% Escrow as a Deprivation of Fair-Share Fees Unions Entitled to Retain*. The unions argue that the WERC's order requiring 100% escrow of all fair-share fees denies them monies they are entitled to retain as compensation for the statutorily-mandated chargeable services they are required to provide to all members of the bargaining unit, including nonunion members. The unions argue that relief should have been confined to only those fair-share payors who affirmatively challenged the unions' expenditures of their fair-share fees. The unions, quoting *Hudson*, argue the WERC's order requiring 100% escrow is inconsistent with the objective of "'preventing compulsory subsidization of ideological activity by employees *who object* thereto without restricting the Union's ability to require every employee to contribute to the cost of [chargeable] activities.'" *Id.*, 475 U.S. at 302, (emphasis added) (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 237 [1977]).

The WERC argues that while the unions are entitled to receive fair-share fees from nonunion employees for the costs of collective bargaining, they "'should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even

temporarily, to finance ideological activities unrelated to collective bargaining.'" *Id.*, 475 U.S. at 305, (emphasis added) (quoting *Abood,* 431 U.S. at 244 [Stevens, J., concurring]). The WERC contends that absent review of the unions' expenditures by an independent auditor, 100% escrow is required. *See Hudson* at 310 & n.23.

The nonunion employees argue that the unions are not entitled to retain any of the fair-share fees because the unions failed to have constitutionally adequate procedures in place prior to the deductions. The employees further contend that 100% escrow is proper since the union violates the rights of all nonunion fair-share payors, and not just those who sued, when any of *Hudson's* constitutionally-required safeguards are absent.

V. *Vacation of Arbitration Based on "Technical Defects" in the Unions' Procedures and Notice, and the Challengers' Failure to Participate in the Arbitration.* The WERC vacated the earlier arbitration award and ordered that a new arbitration be held, in part, due to "technical defects" in the unions' notice and procedures. Although the WERC found that the AFSCME International and District Council 48 (but not the local affiliate) had provided sufficient financial information to permit fair-share payors to assert a claim, the WERC ordered that all of the members of the *Browne* class and all of the complainants in the *Johnson* case were to be treated as "objectors and challengers." The WERC ruled that the notice was unclear as to the consequences of "objecting" rather than "challenging," and that the notice imposed various "unwarranted obstacles," such as the $5.00 filing fee and certified mail requirement. No objectors or challengers participated in the arbitration hearing.

The unions argue that because the complaining nonunion employees were ordered "objectors and challengers" as a matter of law, the nonunion employees could not be prejudiced by the defects in the unions' objection procedures or notice. They argue that none of the "technical defects" could have confused or detracted from the nonunion members' ability to challenge the accuracy of the fair-share fees before an impartial decision-maker. The unions also argue that the new arbitration should have been ordered only if the arbitration process itself was defective. Additionally, the unions claim that the complainants are estopped from challenging the arbitration by their refusal to participate in the arbitration.

The nonunion employees argue that, in *Hudson,* the Supreme Court

implicitly held that the failure to use the union's objection procedure does not estop employees from obtaining relief where the rights of all plaintiffs, including potential objectors, were violated. *See id.*, 475 U.S. 296-7, 304-11 & n.22; *Hudson*, 743 F.2d 1187, 1194 (7th Cir. 1984). They claim that they did not participate in the arbitration because of procedural defects, and therefore the arbitration was "ex parte" and not an "adversary" proceeding.

The WERC argues that ineffective participation in the arbitration process, because of constitutionally defective notice, taints the entire arbitration process. Thus, it submits, the non-union employees should not be held to the results of an arbitration process that was defective from the start.

VI. *Verification of Local Union Expenditures by Independent Auditor and the "Local Presumption."* The unions' notice did not contain specific financial data for the local unions' disbursements. The notice stated: "Council 48 has determined that the percentage of chargeable activities of these local unions is at least as great as the percentage of chargeable activities of Council 48." Although the WERC determined that the financial information in the notice for the AFSCME International and District Council 48 met the Hudson requirements, the WERC ordered the local unions to have their financial information audited by an independent auditor. The WERC also stated that it would accept a presumption that the chargeable expenses of the local unions is at least as great as District Council 48, provided an independent auditor were to take a random sampling of a representative number of the local unions and audit their records, and if such sampling established to the auditor's satisfaction that the local expenditures always had a lesser percentage of non-chargeable expenses.

The unions argue that requiring verification of the expenses of each local union by an independent auditor is burdensome and unnecessary. The unions argue that the Supreme Court did not require "absolute precision" in financial disclosures. *See Hudson,* 475 U.S. at 307 n.18. They further assert that Hudson held that the unions were not required to provide nonunion employees with an "exhaustive and detailed list of all its expenditures" and that disclosure of "major categories of expenditures" is adequate. *See ibid.*

The WERC argues that inconvenience is not a valid ground for avoiding constitutionally-required procedures. The WERC further

asserts that requiring a verified audit of the local unions' expenditures is within the WERC's broad remedial authority, and is consistent with constitutional doctrine.

The nonunion employees argue that Hudson requires the "burden of objection," *id.*, 475 U.S. at 309, be minimized, but that the burden here would be increased because, without financial information about local union expenditures, the potential objectors will lack a basis from which to determine whether they should challenge the chargeable fees. They also argue that the calculation of the fee must not only be disclosed, but must also be "appropriately justified" and "narrowly drawn" to minimize the impingement on nonunion employees' First Amendment rights. Finally, the nonunion employees argue that the WERC and circuit court correctly rejected use of the local presumption because, in reviewing the local unions' actual expenditure, eleven of thirteen locals had smaller percentages of chargeable expenditures than District Council 48.

VII. *Chargeability of Various Union Activities.* In *Abood,* 431 U.S. 209, the United States Supreme Court upheld the constitutionality of an agency shop agreement between a municipality and a teacher's union that required every employee in the bargaining unit to pay a "fair-share" fee to defray the costs of collective bargaining, contract administration, and grievance adjustment. The Supreme Court also stated that a union could not collect fees from dissenting employees for any expenditures not germane to the union's duties as exclusive bargaining representatives. *Id.* 431 U.S. at 234-236.

The nonunion employees argue that the WERC and circuit court erred in concluding that expenditures for public advertising, organizing efforts, representation of other bargaining units, general lobbying and litigation expenses not incident to the nonunion employees' bargaining unit were properly chargeable as a fair-share expense.

A. *Public Advertising.* The nonunion employees admit that coerced support of information directed to their bargaining units is a chargeable fair-share expense, but argue that advertising aimed at the public "is speech on matters of public concern" and does not relate to collective bargaining or contract administration.

B. *Organizing.* The circuit court sustained the WERC's holding that organizing in the nonmembers' units, organizing in and seeking recognition as bargaining agent for other units, including

units where another union is already certified, and defending against decertification or displacement efforts, can all be charged to the nonunion employees because, as the circuit court concluded, organizing "increases the union's overall size and therefore, enhances the union's ability to be more effective and provide better services on behalf of all employees." (Emphasis in original). The nonunion employees argue that in *Ellis v. Railway Clerks,* 466 U.S. 435 (1984), the United States Supreme Court rejected the theory that organizing should be chargeable because "a stronger union ... would be more successful at the bargaining table." *See id.,* 466 U.S. at 451.

C. *Exclusive Representation of Other Bargaining Units.* The WERC and circuit court concluded that nonunion members could be charged costs of representing other units. The nonunion employees contest the "ultimate benefit" rationale, and argue that the only benefits that justify fair-share fee compulsion are those the bargaining unit's exclusive agent must, pursuant to statutory mandate, perform on behalf of "'all employees ..., union and nonunion,, *within the relevant unit*" and that *"necessarily* accrue to all employees." *Abood,* 431 U.S. at 221-22 (emphasis added) (quoting *International Ass'n of Machinists v. Street*, 367 U.S. 740, 761 [1961]).

D. Lobbying. The WERC and the circuit court ruled that lobbying "for collective bargaining legislation or regulations or to effect changes therein" or "for legislation or regulations affecting wages, hours and working conditions of employees generally before Congress, state legislatures, and state and federal agencies" is a chargeable fair-share assessment. The nonunion employees reply that in bargaining and contract administration, the exclusive bargaining representative deals with the employer regarding the terms and conditions of employment that are within the employer's control. They argue that lobbying is primarily a political activity directed to the legislature, other governmental agency, or the public, on matters of public concern not within an employer's control. They assert the coerced subsidization of lobbying lacks statutory basis and constitutes a substantial interference with the First Amendment rights of nonunion workers.

E. *Litigation*. The WERC and circuit court ruled that AFL-CIO jurisdiction dispute proceedings, impasse mechanisms, and litigation "relating to concerted activity and collective bargaining" are chargeable, even if the nonmembers' units are not involved. The nonunion employees assert that this is contrary to *Ellis*, which held that nonunion members can only be charged for

litigation, including "jurisdictional disputes with other unions, ... that concerns bargaining unit employees and is normally conducted by the exclusive representative." *Ellis*, 466 U.S. at 453. They argue that unless the bargaining unit is directly concerned, objecting employees need not share the costs of union litigation. *See ibid.*

The WERC argues that, *Abood* and *Hudson* are the only Supreme Court decisions to deal with public sector labor relations and neither decision clearly defines exactly what constitutes a chargeable expense. The WERC contends that a substantial dichotomy exists between public sector and private sector collective bargaining, thus distinguishing the *Ellis'* chargeability test, 3/ and that "in the public sector the line may be somewhat hazier" between what is a chargeable versus nonchargeable expenditure. *Abood,* 431 U.S. at 236. The WERC also asserts that a broad definition of chargeability is "essential" as public employees are often dependent on politically controlled sources of public funding, and because many public-sector labor issues are nonbargainable. It concludes that chargeability of political expenses should be liberally construed so as to allow public sector bargaining units access to their employer -- the legislature.

The unions do not seek review of the WERC's determination on the chargeability of these categories except to say that we should defer to the WERC because the chargeability of these categories is "within the expertise of the WERC due to extensive knowledge in the area of public sector exclusive bargaining representation and contract administration."

VIII. *Collection of Fair-Share Fee Equal to Full Union Dues from Nonmember Fee Payor*. Section 111.70(2) and (1)(f), Stats., requires that nonunion employees pay their "proportionate share" of collective bargaining costs measured by the "amount of dues uniformly required of all members." The WERC held that *Hudson,* sec. 111.70(1)(f), and sec. 111.70(2) "permit a union to collect and spend a fair-share fee equal to regular dues from the nonmember employes (sic] it represents as the exclusive collecting bargaining representative if those nonmembers have not made their dissent known to the union in the manner in time the union may lawfully require." The circuit court affirmed, holding that "[n]either 111.70 nor *Browne* restrict the fair-share fee deduction to an amount less than full union dues." The WERC and circuit court also relied on a proposed amendment to the fair-share statute that was never adopted that would have limited, without objection from nonunion employees, the amounts a union could

deduct from fair-share employees.

The nonunion employees argue that the failure of a legislature to explicitly state a restriction does not, by itself, establish that the restriction was not imposed by the more general, already-enacted language. The nonunion employees also argue that *Browne* held that the Municipal Employment Relations Act implicitly limited the fair-share fee that could be collected. *See id.*, 83 Wis.2d at 330-334, 265 N.W.2d 565-567. The nonunion employees also argue that under the fair-share statute all nonunion employees need pay only the "proportionate share," sec. 111.70(1)(f), and that the function of an objection is to challenge the unions' calculation of the fee, not to trigger the statute's prescription.

The WERC argues a nonunion member, fair-share payor must affirmatively object to a union's political expenditures before the "proportionate share" limitation is required. The WERC relies on the Supreme Court's statement that "the objective must be to devise a way of preventing compulsory subsidization of ideological activity by *employees who object* thereto .... *Abood,* 431 U.S. at 237 (emphasis added), *quoted in Hudson*, 475 U.S. at 302.

The unions did not address this issue separately but presumably rely on their arguments supporting the applicability of the arbitration decision to "challengers" -- that nonunion fair-share payors must affirmatively object to the collection of fair-share fees equal to full union dues.

IX. *Additional Challenges to Union Procedures Approved by the WERC and Circuit Court.* The WERC and circuit court concluded that the unions' post-*Hudson* procedures did not fully meet the constitutional requirements for the collection of fair-share fees. The nonunion employees also allege that four features of the unions' procedures that were approved are also unconstitutional and fail to "minimize the infringement" on their First Amendment rights. *Hudson,* 475 U.S. at 303.

A. Adequacy of the Advance Disclosure. In *Hudson,* the United States Supreme Court declared:

> Basic considerations of fairness, as well as concern for the First Amendment rights at stake, also dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee. Leaving the nonunion employees in the dark about the

> source of the figure for the agency fee -- and requiring them to object in order to receive information -- does not adequately protect the careful distinctions drawn in *Abood.*

Id. at 306. The Court, however, also noted:

> We continue to recognize that there are practical reasons why "[a]bsolute precision" in the calculation of the charge to nonmembers cannot be "expected or required." ... The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor.

Id. at 307 n.18 (quoting *Railway Clerks v. Allen,* 373 U.S. 113, 122 [19631).

1. *Calculation of the Fair-Share Fee Not Audited.* The breakdown of union expenses as chargeable or nonchargeable in the fair-share fee calculations was not verified by an independent audit. The WERC and circuit court concluded that an independent audit was unnecessary as long as the unions escrowed 100% of the fair-share deductions while challenges were pending before the impartial decision-maker.

The nonunion employees argue this is contrary to *Hudson,* which held that 100% escrow of the fair-share deduction was an inadequate remedy because the union failed to provide an "adequate justification" of the deduction. *Id.*, 475 U.S. at 309. The nonunion employees contend that "adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." *Id.*, 475 U.S. at 307 n.18. Although Hudson stated than an independent audit of the expenditures might relieve the imposition of a 100% requirement, 4/ the nonunion employees argue that the 100% escrow requirement does not remove the requirement that a deduction must be "appropriately justified." The nonunion employees also argue that verification would improve the quality and quantity of information, and thus allow employees to make more informed decisions on whether to object. This, they submit, would eliminate unnecessary challenges.

The WERC argues that the role of the independent auditor should be

restricted to a traditional accounting function, i.e., how the unions spend their funds. The WERC argues that the role of the auditor should not be expanded to include making legal judgments about the characterization of expenditures that might be charged to an objector.

The unions argue that the impartial arbitrator is the proper person to decide chargeability of expenditures, but only after the unions' calculation of the fair-share fee has been challenged.

2. *Sufficiency of the AFSCME International's Disclosures.* The WERC concluded that AFSCME International's financial information was "the minimum of what is required." The disclosure lists categories of chargeable and nonchargeable activities, but without corresponding amounts. A schedule, however, lists eighteen different general line-item expenses.

The nonunion employees contend that most items in AFSCME's disclosures are "neither explained nor sub-divided sufficiently." The nonunion employees also argue that this violates Hudson since the purpose of notice is not to require employees to object in order to get the information that they should receive as a matter of right.

In addition to arguing that *Hudson* does not require a union's fair-share procedures be "least restrictive," the WERC submits that the courts should defer to its conclusion that the financial disclosure was satisfactory.

The unions argue that *Hudson* only requires "adequate explanation of the basis for the fee," *id.*, 475 U.S. at 310, and that it does not have to provide the nonunion employees with an "exhaustive and detailed list of all its expenditures," *id.*, 475 U.S. at 307 n.18.

B. *Unions' Objection Scheme and Protection of Employees' Rights.* *Hudson* requires that unions provide agency shop procedures that minimize the impingement of nonunion employees' First Amendment rights, and "that facilitate a nonunion employee's ability to protect his rights." *Id.*, 475 U.S. at 307-308 n.20.

1. *Objection Requirements as Burdensome.* The WERC and circuit court determined that nonunion employees could be charged a fee equal to dues unless they object annually within 30 days after the date of the notice.

The nonunion employees argue the annual objection requirement and the limited period within which objections and challenge must be made are impermissible under both the Municipal Employment Relations Act and the First Amendment. They argue that the Municipal Employment Relations Act limits collection for all nonunion employees to an amount less than the amount of dues, and, thus, an objection cannot be a condition to their paying only their "fair share." *See* sec. 111.70(1)(f) (Nonunion employees "are required to pay their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required of all members."). They also argue that the requirement for annual objection renewal, and the 30-day limit on the time for making an objection and challenge, contravene *Hudson*'s "least restrictive means" standard. They contend that the time limitation is unconstitutional because the nonmembers cannot know on what the union spent fair-share fees until the end of the year.

The WERC argues that the annual renewal requirement for objection/challenges to union expenditures is reasonable, since *Hudson* acknowledged that nonunion employees would be making objections based upon inexact information. *See Hudson,* 475 U.S. at 307 n.18 ("[T]he union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year.").

The unions reply to the nonunion employees' argument that the objection requirements are unduly burdensome by noting "[T]he nonmember's 'burden' is simply the obligation to make his objection known." *Hudson*, 475 U.S. at 306 n.16.

2. *Applicability of an Arbitration to only "Challengers" under the Unions' Procedures.* The WERC and the circuit court held that the unions may restrict the benefit of an arbitration to those nonunion employees who dissent *and challenge* the unions' computations ("the challengers" under the unions' notice and procedures), as opposed to those fairshare fee payors who dissent but agree to accept the unions' computations ("objectors"). All other nonunion employees, including "objectors," could continue to be charged a fee equal to dues if the nonunion fair-share payor failed to timely challenge the unions' collection of full dues. The WERC also justified limiting the effect of the arbitration by reasoning that the "objectors" would have made a "knowing and voluntary waiver" of the right to "challenge."

The nonunion employees argue that the Municipal Employment Relations Act statutorily limits what may be collected from all

nonunion employees to their proportionate share of collective bargaining costs. They also argue that waiver of arbitration should occur only if a nonunion employee explicitly states that he or she wishes to pay full dues or the fee calculated by the unions.

The WERC and the unions argue that nonunion employees must affirmatively make their dissent known to the union and that dissent may not be presumed. *See Hudson,* 475 U.S. at 306 ("the nonunion employee has the burden of raising an objection"); *Abood,* 431 U.S. at 238. The WERC contends that it is a "long-standing constitutional principle that a non-union member must object in order to trigger the protections of fair share fee procedures doctrine." The unions claim that *Hudson* establish[es] this procedure as the way that the constitution demands for settlement of disputes involving fair share fees."

X. Employer Collection of Fair-Share Fees Absent Full Compliance with Hudson's Procedural Safeguards. The WERC found that the employers did not provide or require the *Hudson* safeguards prior to the deduction of compulsory fees from nonunion employees' wages. Yet, the WERC and the circuit court held that, despite its findings that the *unions* committed a prohibited practice for noncompliance with Hudson, the *employers* did *not* commit any prohibited practices by deducting, over nonmembers' objections, and giving the unions fair-share fees equal to dues. The WERC concluded, and the circuit court affirmed, that: "[T]here is no evidence or argument that the [employers] have taken any action other than to comply with the terms of a provision of their respective collective bargaining agreements . . . , as required by law, by acting as a conduit for the Respondent Unions."

The nonunion employees argue that an employer "acting as a conduit" sustains liability under Wis. Stat. sec. 111.70(3)(a)1, *Browne*, and *Hudson.* Sec. 111.70(3)(a)1, Stats., provides: "It is a prohibited practice for a municipal employer individually or in concert with others... [t]o interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2)."

In *Browne*, 83 Wis.2d at 334, 265 N.W.2d at 567, the Wisconsin Supreme Court quoted sec. 111.70(3)(a)1, Stats., but did not specifically discuss employer obligations. A footnote to the court's discussion, however, states in pertinent part: "Moreover, we interpret the Wisconsin Statutes as providing that it is an unfair labor practice to require a municipal employee to

pay for anything more than their [sic] proportionate share of the cost of collective bargaining and contract administration." *Id.*, 83 Wis.2d at 334-335 n.9, 265 N.W.2d at 567 n.9. The nonunion employees argue that *Browne*, read in context, holds that any employer commits a prohibited practice by deducting a fee that will in part be used by a union for nonchargeable purposes.

The nonunion employees also argue that *Hudson* supports public employer "conduit" liability. There, the Supreme Court rejected the unions' suggestion of sufficient available ordinary judicial remedies, and noted: "Since the agency shop is a significant impingement on First Amendment rights,' the government and 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 307-308 n.20 (quoting *Ellis*, 466 U.S. at 455). The nonunion employees maintain that subsequent case law has consistently read *Hudson* to impose a duty on employers.

The WERC's only argument in this regard is that the nonunion employees' argument should be rejected in deference to its policymaking function.

XI. *Third-Party Independently Controlled Escrow Accounts.* District Council 48 established an "escrow" account for 100% of the fair-share fees paid by challengers, minus the rebate paid to the challengers by the union. The WERC determined that the District Council 48's account, "while interest-bearing and adequately verifiable through bank statements, does not constitute a true 'escrow,' because it does not remove the fund from Respondent District Council 48's control."

The unions argue that there were no findings that the escrow account was a subterfuge for the unions' use of the fee, nor was there any finding that the fees were not being deposited or were incapable of being independently verified. The unions also argue that escrow of funds in a trust account is burdensome, expensive, and unnecessary.

The WERC and the nonunion employees argue generally accepted meaning and precedent support the WERC's ruling that the escrow account must be independently control-led by a neutral third party. They contend that a finding of "subterfuge" was not required, but only that the unions' scheme did "not avoid *the risk* that dissenters' funds may be used temporarily for an improper purpose." *Hudson,* 475 U.S. at 305. (emphasis added). The

nonunion employees argue that such a risk is present, based on the Executive Director of Council 48's testimony that the terms of the Unions' savings accounts for the dissenters' fees require the bank to release the funds to the council upon its unilateral demand.

XII. *Alternative Remedies Urged by Nonunion Employees.* The WERC concluded that the unions committed prohibited practices by deducting fair-share fees in the absence of all of *Hudson's* procedural safeguards. The only remedy ordered for the period beginning January 1, 1983, however, was the escrow of the fees pending the establishment, and WERC's approval, of revised procedures and an impartial determination of the portion that should be refunded as nonchargeable. The WERC denied restitution, concluding that the unions were entitled to the costs of exclusive representation and, therefore, full restitution would "result in a 'windfall' to Complainants and would be the equivalent of awarding 'punitive damages' against the Respondent Unions." The WERC also denied the nonunion employees' request for a cease-and-desist order because it believed that the unions "made a substantial and good faith effort to satisfy the requirements of *Hudson* after that decision was published."

The nonunion employees assert this escrow remedy is "woefully inadequate." They argue that the WERC should have ordered restitution of compulsory fees collected for improper purposes, and petitioned for a cease-and-desist order. The nonunion employees maintain that under *Hudson,* a bargaining representative is entitled to nothing, not even bargaining costs, from a nonunion member unless it first implements the necessary procedural safeguards. *See id.,* 475 U.S. at 305-306, 310. The employees argue the unions violate the rights of all nonunion members in the unit it represents, not just those who have sued, when it fails to fully comply with *Hudson's* procedural safeguards. *See Hudson,* 475 U.S. at 306 ("potential objectors" must be given sufficient financial disclosure).

The nonunion employees also argue that the unions did not substantially comply with *Hudson.* They allege the unions' post-*Hudson* procedures provided neither "an adequate explanation of the basis for the fee" nor "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker," *Hudson*, 475 U.S. at 310, because the notice provided no information as to the local unions and was designed to discourage challenges.

The WERC did not specifically address this issue. The unions,

however, argue that the relief sought by the nonunion employees is punitive and contrary to *Hudson.* They argue that the WERC has erred by extending the 100% escrow to people who have not objected, challenged, or otherwise made their dissent known to the unions.

CONCLUSION

We find no Wisconsin case law that addresses the issues raised in this appeal. All of these issues turn on policy analyses under sec. 111.70, Stats., *Hudson*, *Abood*, *Ellis*, and *Browne*. They require balancing the First Amendment rights of nonunion employees, the unions' right to receive compensation for the statutorily-mandated services it renders as the exclusive representation of all employees in the bargaining unit it represents, and the state's interest in stable and peaceful labor relations, as well as in protecting the rights of its citizens. The resolution of these issues extends beyond the limited, error-correcting function of this court. These issues are of statewide concern and will no doubt continue to arise. Therefore, we respectfully certify them to the Wisconsin Supreme Court for its review and determination, pursuant to Rule 809.61, Stats.

ENDNOTES

1/ Browne v. Milwaukee Board of School Directors, No. 410584 (Milw. Cir. Ct., filed May 29, 1973); *Johnson v. County of Milwaukee,* No. 411578 (Milw. Cir. Ct., filed July 10, 1973)

2/ *Browne v. Milwaukee Board of School Directors,* 83 Wis.2d 316, 265 N.W.2d 559 (1978).

3/ "[T]he test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." *Ellis,* 466 U.S. at 448.

4/ If "the original disclosure by the Union had included a certified public accountant's verified breakdown of expenditures, including some categories that no dissenter could reasonably challenge, there would be no reason to escrow the portion of the nonmember's fees that would be represented by those categories." *Hudson*, 475 U.S. at 310.