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Labor Watch

Knox v. SEIU

A new hope for restraining Big Labor's forced dues power

By Patrick Semmens and Will Collins

Summary: *One woman's refusal to let union bosses take her money to spend on their political agenda has been vindicated by the U.S. Supreme Court after nearly a decade of legal battles. Even better, the Court suggested it is open to further restraints on union money grabs.*

James Young, Nat'l Right to Work Legal Defense Foundation, argued *Knox v. SIEU*

I strongly supported one of the [ballot] propositions and was angry that I was forced to pay to oppose it," said Dianne Knox, reflecting on what became her seven-year legal struggle against one of the most powerful unions in America.

Knox was referring to Proposition 75, a 2005 California ballot initiative that would have required union officials to gain nonmember employees' consent before charging the employees fees that would be used to conduct political activities. To a layperson, that requirement sounds like a modest constraint, but to union officials, Proposition 75 represented a serious threat to their lucrative forced-dues-funded empire, in which they can even have nonmembers like Knox fired for failure to pay dues or fees to the union.

Ironically, union officials responded to the Prop 75 threat with precisely the kind of coerced money-taking the initiative meant to end. They charged union and nonunion workers alike a "special assessment" for a political action fund, which set in a motion a legal battle that lasted for most of a decade.

This June, the U.S. Supreme Court issued a groundbreaking decision in a case brought by Knox and eight other California civil servants on behalf of tens of thousands of their colleagues. The Court's ruling limits union power and safeguards nonunion workers' First Amendment rights, while allowing almost 40,000 public employees to reclaim up to $5 million in illegally seized union dues.

The result is extraordinary; the fight was long and hard. And the broader implications of the Supreme Court's Knox decision may take years to fully realize.

Nonunion Civil Servants Fight SEIU Political Spending

Knox, an affable, grandmotherly figure who happens to be a career civil servant, is an unlikely standard-bearer in the fight to constrain California unions' overweening political influence and reassert workers' First Amendment rights. But by seizing money from her paycheck over her objections, the Service Employees International Union (SEIU) forced Knox's hand. She was charged "in spite of filing the yearly

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letter objecting to any fees not germane to collective bargaining and specifically any political action fees," Knox said when asked to explain why she didn't want to pay for the union's anti-Proposition 75 campaign.

In fall 2005, the SEIU's top California operatives were spooked. Then-Governor Schwarzenegger was pushing for a series of ballot initiatives intended to constrain their special privileges, and Proposition 75 was the most important proposed constraint. Union officials responded to Schwarzenegger's effort by launching a massive political campaign to discredit the reforms, financed in part by dues seized from nonunion employees.

Although SEIU lawyers would later claim the "special assessment" paid for a variety of workplace activities, the union's rhetoric before it was sued tells a different story. Prior to the lawsuit, the union declared the assessment was for a "political fight back fund" with the aim of raising $12 million to oppose Governor Schwarzenegger's reforms. In the letter to workers announcing the special dues hike, SEIU officials were also quite open about the fact that their collection would pay "for a broad range of political expenses, including television and radio advertising, direct mail, voter registration, voter education, and get-out-the-vote activities in our work sites and in our communities across California."

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Labor Watch is published by Capital Research Center, a non-partisan education and research organization classified by the IRS as a 501(c)(3) public charity. Reprints are available for $2.50 prepaid to Capital Research Center.

Worker Rights and the Legal Framework of Forced Unionism

In California and the 26 other states that lack Right to Work laws, public- and private-sector employees can be forced to pay union dues or fees as a condition of employment. What they can't be forced to do, however, is pay for activities unrelated to workplace bargaining. Union political spending falls squarely in this category.

In a series of cases for workers brought by attorneys from the National Right to Work Legal Defense Foundation, the Supreme Court had already placed some limits on compulsory unionism. In 1977, the Court ruled in *Abood v. Detroit Board of Education* that nonunion government employees cannot be forced to pay for union politics unrelated to workplace bargaining. In the 1988 case *Communication Workers v. Beck*, the High Court similarly ruled that nonmember private-sector employees, forced under the National Labor Relations Act into union-controlled bargaining units, are exempt from paying for union politics and other "non-chargeable" activities.

In the 1986 *Chicago Teachers Union v. Hudson* decision, the Court held unanimously that the First Amendment requires certain procedural safeguards before compulsory union dues can be collected from public employees. These safeguards include adequate advance notice of the fee's basis (including an independent audit), an advance reduction of the fee, a reasonably prompt and impartial review of any nonmember's challenge to the legitimacy of that basis, and escrow of "amounts reasonably in dispute" while challenges are pending.

Although precedents like *Abood*, *Beck*, and *Hudson* mean workers are technically entitled to information about union expenditures and an opportunity to withdraw their financial support from union politics, union officials often discourage employees from opting out by withholding information about their rights or throwing up bureaucratic roadblocks to any attempt to stop paying for union politics.

Proposition 75 was intended to shift the burden from nonunion employees, whose First Amendment rights are at stake, to union officials, whose only interest at stake is their government-granted privilege to extract forced-dues cash. Instead of requiring workers to jump through a series of bureaucratic hoops to stop paying for union politics, union operatives would have had to receive affirmative consent from nonunion workers before spending their forced dues on political activities.

Golden State Crisis

The SEIU's fears of Schwarzenegger's reform effort were well-founded. The Governor's attempt to require consent from nonunion employees threatened a key component of union officials' forced-dues collection racket.

The SEIU's power to collect forced dues for politics has helped perpetuate a vicious circle of insider double-dealing that continues to stymie any effort to reform California's troubled finances. Public-sector unions donate lavish sums to pro-forced unionism politicians, who in turn protect and expand union officials' special privileges. This cozy relationship helps to minimize public scrutiny of everything from bloated pension funds to unnecessary public works projects to inefficient union work rules. It also ensures that union officials' power to collect mandatory dues from nonmember employees remains unchallenged. Union bosses and their political allies profit immensely from this relationship, while taxpayers and nonunion workers are left to foot the bills.

Schwarzenegger's immediate predecessor, Gray Davis, was notorious for his close relationship with California's large government-worker unions, and those unions, enjoying their entrenched position within the state's political ecosystem, were determined to protect their special privileges at all costs. Davis finally exhausted the public's patience by 2003, when he lost a historic recall election—the first in California's history—by an overwhelming margin.

But Schwarzenegger's attempts to curtail union officials' prerogatives provoked a Big Labor counter-attack. With Proposition

75 on the ballot, SEIU operatives swung into action, unleashing a blizzard of ads and get-out-the-vote drives to protect their force-dues machine.

The makeup of SEIU Local 1000—the union to which Dianne Knox is forced to pay fees—reveals why Proposition 75 terrified union officials. Although nearly 100,000 state employees are subject to the union's monopoly bargaining, roughly 40 percent of those workers have chosen to refrain from formal union membership. These workers can be fired for refusing to pay dues—which are deducted automatically from their paychecks without their permission—but they're technically entitled to opt out of supporting union political activism.

SEIU bosses feared, with good reason, that if they were required to get affirmative consent from 100,000 workers before spending their money on politics, the union's political crusades would be hobbled. Not only would most of the 38,000 nonmembers refuse to give permission, but a significant number of members might also refuse. Suddenly, employees who either didn't know previously that they had a choice, or who didn't think it was worth the effort to fight the union bureaucracy, would begin to exercise their *Hudson* rights. They would be able to withhold support for the SEIU's politics simply by doing nothing.

The union conducted a massive campaign against Prop 75, and it paid off. Early polls had shown overwhelming support for Proposition 75, but a colossal infusion of SEIU cash and a barrage of misleading union-funded ads persuaded Californians to reject Schwarzenegger's ballot initiative. The margin was 54 percent to 46 percent, the closest margin for any of the Governor's four reform initiatives on the ballot that year.

Union bosses had taken by force Dianne Knox's money—and the money of thousands of her fellow state employees—and used it to protect their forced-dues fiefdom. Neither Knox nor any other employee could refuse to contribute; the union's special assessment was automatically deducted from their paychecks by union-friendly state officials.

Knox Heads to Court

But Knox, who was working as a program analyst with the California Department of Rehabilitation, didn't take the union's "special assessment" lying down. She called the SEIU to complain about being forced to contribute to the union's campaign. Not surprisingly, she was treated dismissively.

"I did call the SEIU office and was told that the fee was a special assessment that was allowed," said Knox, describing her frustration. "The person I talked to would not answer how the union could collect fees for a political fight-back fund from non-members who filed objection letters—just that our contract allowed for increases in fees."

Instead of accepting the SEIU's directive, Knox turned to the National Right to Work Legal Defense Foundation for help. The Foundation was set up in 1968 to provide free legal aid to employees victimized by compulsory unionism abuses. The amount of dues seized from Knox wouldn't have justified the cost of contacting a private attorney, let alone hiring one for a lengthy federal lawsuit, but the free legal assistance provided by Foundation litigators allowed Knox to stand on principle and take the fight to the SEIU.

Long Legal Struggle

Dianne Knox's courageous stand would eventually lead to a Supreme Court decision that begins to enshrine in American labor law the principle that nonunion workers must consent to union political spending. Eight other California civil servants eventually signed on to the case as co-plaintiffs. They represented a class of nearly 38,000 nonunion public employees for the purpose of challenging the SEIU's "special assessment."

At first, the case seemed to promise a swift resolution. In 2008, a federal district court ruled that the SEIU was required to provide a notice to nonunion employees about the assessment, allow them to opt-out of paying into the union political fund, provide a refund of monies spent on union-boss politics, and pay interest from the dates of the deductions to nonmembers who chose to opt out.

After SEIU lawyers appealed the case, a panel of judges on the Ninth Circuit Court of Appeals reversed that decision in December 2010 by a vote of two to one. Writing for the majority, Judge Sidney Thomas agreed with union lawyers that the union's "political fight back fund" was actually used in part for chargeable workplace activities.

In a powerful dissent, Judge J. Clifford Wallace criticized the majority for ignoring the spirit of the *Hudson* decision, which aimed to protect nonunion workers from paying for union political activism. Wallace added that the union's campaign against another of Governor Schwarzenegger's proposals, Proposition 76, had little tangible connection to workplace bargaining:

". . . Any connection between the Union's challenge [to Proposition 76] was too attenuated to its collective bargaining to be considered a chargeable expense," Wallace wrote in his dissent. "The purpose of the ballot measure was to limit the annual amount of total state spending . . . and the union's activities in opposition to it were 'core political activities.'"

After the Ninth Circuit issued its disappointing ruling, the only option left was to take Knox's case to the Supreme Court, which agrees to hear less than one percent of the over 10,000 petitions submitted annually. Knox's lead counsel, James Young, was no stranger to the high court. A veteran Foundation litigator, Young had argued the Foundation's *Locke v. Karass* case before the Court in 2008, when he unsuccessfully attempted to help twenty Maine state employees recover union dues spent on litigation outside their workplaces. Although his first experience before the Supremes ended in disappointment, Young was cautiously optimistic he'd get a second chance.

Moreover, Wallace's stirring dissent, the Ninth Circuit's record of frequent reversals by the Supremes, and the pertinence of the

issues presented gave Foundation litigators hope their arguments would be heard. On June 27, 2011, the Supreme Court vindicated Young's optimism by agreeing to review the case, which led several prestigious legal institutions, including the Pacific Legal Foundation and the Cato Institute, to throw their weight behind the case by filing "friend of the court" briefs in support of the Foundation's position.

Before the Supremes

On January 10, 2012, Dianne Knox finally made it to the Supreme Court. Attorney James Young vigorously argued that she and her co-workers should not be forced to financially support union political activism. Jeremiah Collins, the SEIU's lead counsel, suggested the union's annual opt-out procedures were sufficient to allow nonunion workers to reclaim, after the fact, any dues used for SEIU politics. But Justices Samuel Alito and Antonin Scalia noted that this belated "remedy" would effectively force nonunion workers to fork over an interest-free loan to the union in the midst of a hotly contested political campaign.

When confronted by Justice Alito with the SEIU's own rhetoric about the union's use of the fund for political purposes, Collins was forced to acknowledge that the union's "special assessment" was in fact intended to "fight back politically" against the Governor's ballot propositions. As Justice Kennedy noted, The "point . . . was that you're taking someone's money contrary to that person's conscience. And that's what the First Amendment stands against."

After sparring with SEIU lawyers for an hour, Knox and Young emerged from the Supreme Court building to address the media. "I'm always hopeful," said Young, when asked about Knox's prospects. "But I learned the last time I had the privilege of arguing a case before the Court to never predict what they will do."

A Moot Point?

On June 21, the Court ruled 7-2 in the plaintiffs' favor, striking down the SEIU's fundraising scheme and reaffirming the rights of government workers to refrain from financially supporting union politics.

The first part of the decision, on which all nine justices agreed, hinged on whether the Court would actually address the substantive issues at stake. In the end, every justice, including the two appointed by President Obama, did not fall for a last, desperate ploy by the SEIU to keep the Supreme Court from deciding Knox on the merits.

In September 2011, over six years after they imposed their "special assessment" on thousands of unwitting California civil servants—insisting the whole time that their scheme was completely legal—union operatives finally offered a refund, plus nominal damages, to all affected nonmembers. This "refund" took the form of a dollar bill glued to a letter offering reimbursement to the recipient if certain conditions were met. The conditions included handing over their Social Security numbers to the same union officials who had violated their rights earlier.

This was the union's scheme: By belatedly offering a reimbursement, SEIU lawyers hoped to render the Knox case moot, preventing any Supreme Court decision that could constrain union special privileges. Young, in a brief to the court on the issue and later in oral arguments, argued that this last-minute "relief" was insufficient, most obviously because it did nothing to prevent the union from engaging in the same practice again.

Fortunately, the Court declined to take the easy way out. ''The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed," declared the Justices. In other words, there was no guarantee the SEIU wouldn't immediately resume its questionable fundraising tactics if the Court declined to address their legality.

High Court Rebukes Union Political Fundraising Scheme

On the merits of the case, Justice Alito wrote an expansive five-member majority opinion that struck down the SEIU's "special assessment." Justices Sotomayor and Ginsburg issued a concurring opinion that held the SEIU's scheme illegal but declined to address the broader issue of whether unions should receive affirmative consent before collecting nonmembers' dues for politics.

The 7-2 decision reaffirmed that unions have no constitutional right to nonmembers' dues or fees (something the Court definitively settled in the 2007 *Davenport* case, also litigated by Right to Work Foundation staff attorneys). The Court also agreed 7-2 that the SEIU's opposition to the ballot initiatives was not "germane" (legally related) to the bargaining functions for which the union may charge employees. Justice Alito put it this way: "If we were to accept [the SEIU's] broad definition of germaneness, it would effectively eviscerate the limitation on the use of compulsory fees to support union's controversial political activities."

For the first time, the Court explicitly stated that an "exacting" or "strict" scrutiny standard applies to union dues deductions, because nonunion employees' First Amendment rights are at stake. Nonunion members, said Alito, were forced to fund the speech of a private organization (namely the SEIU), a practice which is "closely related to compelled speech and compelled association." Consequently, a union's dues collection procedures must minimize any infringement on nonunion employees' First Amendment rights.

Under the Court's "strict scrutiny" standard, the union's extraordinary special privilege to collect dues from nonmembers must be justified by a "compelling state interest." The Supreme Court has long held that union officials may use nonmembers' dues for purposes related to workplace bargaining because of the government's interest in preserving so-called "labor peace." Whether forced unionism actually preserves "labor peace" is certainly debatable, but the SEIU's assessment failed even to meet the "compelling state interest" test, because it involved a union political campaign unrelated to workplace negotiations.

By finding that the union's "special assess-

ment" did not minimize the infringement on nonunion workers' First Amendment rights, the Court determined that it failed to pass muster under the strict scrutiny standard. As noted in the concurring opinion, the SEIU should at least have given nonunion employees a new opportunity to opt out of the "special assessment" in 2005.

The five-Justice majority opinion, however, offered a more sweeping indictment of status quo union collection policies. "The First Amendment," wrote Alito, "does not permit a union to extract a loan from unwilling nonmembers even if the money is later paid back in full." According to Alito, the appropriate remedy is a procedure that requires unions to receive affirmative consent before collecting nonunion employees' dues for politics. "To respect the limits of the First Amendment, the union should have sent out a new notice allowing nonmembers to opt in to the special fee rather than requiring them to opt out," he concluded.

The Knox Decision and the Future of Employee Rights

Dean Erwin Chemerinsky of the Pepperdine School of Law called *Knox* "the biggest sleeper case" of the Supreme Court's last term. Garrett Epps, writing for the liberal *American Prospect*, suggested that Knox could lead to "a worse defeat" for unions "than anything that happened in Wisconsin" under Governor Scott Walker's reforms. (See "The Battle for Wisconsin" in the May 2012 *Labor Watch*).

So why is the *Knox* decision so significant? While the 7-2 decision invalidated the SEIU's fundraising scheme, the five-member majority opinion also raised the possibility that the Court may in the future *require* unions to ask nonmember employees for affirmative consent before collecting any dues for politics.

"Even a full refund would not undo the violation of 1st Amendment rights," wrote Justice Alito, explaining the logic of an opt-in procedure. "Therefore, when a public-sector union imposes a special assessment or dues increase, the unions must provide a fresh . . . notice and may not exact any funds from nonmembers without their affirmative consent."

For the moment, Knox allows nearly 40,000 California state nonmember employees to reclaim their illegally seized dues and makes it clear that similar special assessments cannot be imposed on nonunion workers. But Alito's reasoning suggests a seismic shift in the limits to union officials' power to seize dues from nonmembers.

If the Court extends its opt-in reasoning from *Knox* to a future decision requiring all public-sector unions to receive affirmative consent from nonmembers before collecting any dues for politics, government employees' First Amendment rights will be considerably strengthened.

Knox raises the possibility that public employees will no longer have to interpret complex opt-out procedures to refrain from supporting union politics. Instead, the burden would be shifted to union officials, who would have to persuade nonmembers to support their political agenda. Not only would this better safeguard workers' First Amendment rights, it would also help constrain public-sector union officials in the political sphere, where their special privileges have allowed them to protect their own interests at the expense of taxpayers and nonunion employees alike.

Governor Schwarzenegger's ill-fated attempt to reform California's crumbling finances is a case study in the dangers of unlimited union political spending. Ultimately, Right to Work laws are the surest way to resolve the conflict between monopoly unionism and the First Amendment rights of workers who disagree with union officials' agenda. Forcing employees to associate with or subsidize organizations they have no desire to join contradicts the very idea of freedom of association. Moreover, union cash is highly fungible, which means it's nearly impossible to ensure that employees' dues are only spent on workplace bargaining as opposed to, say, union politics.

Indiana's recently adopted Right to Work measures suggest more states will adopt such protections as they look for an economic leg up on their forced-unionism neighbors. Still, the prospect of all 50 states passing Right to Work laws is not likely in the near term. If state and local government employees are to be given a choice over whether to financially support unions, these laws are necessary.

In the meantime, *Knox* provides hope that the Supreme Court will expand First Amendment protections for civil servants and consequently limit the power of public-sector union bosses over workers who object to their activities. As nonmember employees continue to face obstructions when attempting to opt out of union politics, expect more legal challenges from employees who resent having to jump through hurdles to protect their fundamental rights.

Patrick Semmens is Vice President for Public Information at the National Right to Work Legal Defense Foundation. Will Collins is Deputy Director of Legal Information at the Foundation. National Right to Work Foundation staff attorneys provided free legal representation to nonmember employees in the Supreme Court's Knox v. SEIU *case.*

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The **Chicago Teachers Union** went on strike, leaving 350,000 students out of school. The walkout of more than 29,000 teachers and support staff was in protest of modest education reforms such as lengthening the school day and basing teacher pay more on performance. The union takes in nearly $30 million a year in dues from its members, who earn an average $76,000 a year in salary (plus far more in benefits, for a nine-month-a-year job). That's the most for teachers in any city, and compares to $47,000 income for the average family in Chicago, according to *National Review*. The union recently rejected a four-year pay raise of 16 percent. Nearly 80 percent of students in Chicago public schools are below grade level in reading. Only 58 percent of high school freshmen eventually graduate. Three percent of black males in the 9th grade go on to graduate from a four-year college.

The strike by the Chicago teachers union may be a harbinger of an increase in the number of strikes. Unions are becoming increasingly radicalized by the rise of a new, politically hardcore generation of labor leaders; by unions' decline among private sector workers and shift into the public sector; and by the polarization of the two major parties on union-related issues. In a **CNN.com** op-ed, **Chris Rhomberg**, a sociology professor at **Fordham University**, lamented that "The strike has almost disappeared from American life. . . . During the 1970s, an average of 289 major work stoppages involving 1,000 or more workers occurred annually in the United States. By the 1990s, that had fallen to about 35 per year. And in 2009, there were no more than five." He claimed that the decline cannot be explained solely by declining membership, noting a study which found that "unionization among private-sector full-time employees fell by 40% between 1984 and 2002. But the drop in total strike frequency was even greater, falling by more than two-thirds." America, he wrote, "would be better off if we had more strikes."

Once upon a time, a significant number of Republican politicians enjoyed the support of labor unions, and, in turn, supported the unions' positions on government policy. A large number of Democrats supported businesses and individual workers against compulsory unionism. Today, the two parties are far apart, which is reflected in their recently adopted platforms. **Democrats** declared "that the right to organize and collectively bargain is a fundamental American value . . . We oppose the attacks on collective bargaining that Republican governors and state legislatures are mounting in states around the country." **Republicans** "support the right of states to enact right-to-work laws and encourage them to do so to promote greater economic liberty. Ultimately, we support the enactment of a national right-to-work law to promote worker freedom and to promote greater economic liberty." The GOP opposes the use of card-check and salutes "Republican governors and state legislators who have saved their states from fiscal disaster by reforming their laws governing public employee unions. We urge elected officials across the country to follow their lead in order to avoid state and local defaults on their obligations and the collapse of services to the public."

Arizona's "secret ballot" amendment has survived a court challenge. In 2010, voters approved an amendment to the state constitution to guarantee the right to a secret ballot in union elections. The **National Labor Relations Board** sued, claiming that federal law preempts state laws on union balloting. The NLRB said that the secret ballot requirement might interfere with organizing by card-check, in which employees sign cards to indicate their interest in forming a union. But U.S. District Judge **Frederick Martone** said that any such federal-state conflict would occur only after the amendment is applied. The amendment was similar to amendments approved in 2010 in **South Carolina**, **South Dakota**, and **Utah**, although only the Arizona amendment was the subject of this case. Arizona Attorney General **Tom Horne** called the judge's decision "a stinging rebuke to an outrageous [NLRB] attack" on the secret ballot.

In **Wisconsin**, Dane County Circuit Court Judge **Juan B. Colás** declared parts of Gov. **Scott Walker**'s reforms to be unconstitutional. The reforms, limiting the power of public-employee unions, have withstood state supreme court review as well as recall campaigns aimed at state legislators, a supreme court justice, and Walker himself. Colás ruled that, with regard to city, county, and school district workers (but not state employees), the reforms violated union members' freedom of speech and association and the equal protection of the laws. Walker responded: "The people of Wisconsin clearly spoke on June 5th," when he beat back the recall effort. "Now, they are ready to move on. Sadly, a liberal activist judge in Dane County wants to go backwards and take away the law-making responsibilities of the legislature and the governor." The governor said he was confident of winning the appeal.