No. 07-610

In The
Supreme Court of the United States

DANIEL B. LOCKE, *et al.*, on behalf of themselves and the class they seek to represent,

Petitioners,

v.

EDWARD A. KARASS, State Controller; REBECCA M. WYKE, Commissioner, Department of Administrative and Financial Services; KENNETH A. WALO, Director, Maine Bureau of Employment Relations; and MAINE STATE EMPLOYEES ASSOCIATION, SEIU LOCAL 1989, SERVICE EMPLOYEES INTERNATIONAL UNION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

ROBERT F. MCDONNELL
Attorney General
of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

STEPHEN R. MCCULLOUGH
Deputy State
Solicitor General

WILLIAM C. MIMS
Chief Deputy
Attorney General

OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-2436
(804) 786-1991 (facsimile)

Counsel for the
Commonwealth of Virginia

May 12, 2008

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QUESTION PRESENTED

This Court granted certiorari on the following question:

May a State, consistent with the First and Fourteenth Amendments, condition continued public employment on the payment of agency fees for purposes of financing a monopoly bargaining agent's affiliates' litigation outside a nonunion employee's bargaining unit?

However, an antecedent question, integral to the resolution of the granted question presented, is whether this Court should replace the open-ended and confusing three-part test set forth in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), with a more administrable standard.

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INTEREST OF AMICUS

The States employ a large proportion of the nation's public sector employees. Many States have enacted "agency shop" or "union shop" laws for their public employees. The Court's jurisprudence in this area has a significant impact on the States and on state employees. A simple, administrable standard is of great importance to State governments. The States would rather devote scarce resources to core state functions than to protracted litigation.

SUMMARY OF ARGUMENT

This case presents the Court with an opportunity to clarify a confusing area of the law. In a series of decisions, this Court struck a balance between the First Amendment rights of objecting nonmembers and the duty of a union to negotiate on behalf of those objecting nonmembers. Virginia does not suggest that the Court revisit these principles. In the Court's most recent decision on the subject, however, *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), a fractured Court introduced a confusing and amorphous three-part test that is very difficult to administer. That test should be set aside.

This brief will begin by sketching the Court's jurisprudence in the area. Virginia then will discuss

the problems associated with the three-part *Lehnert* test, including its inherent unpredictability and its open-ended nature. This test has led to confusion in practice and has been criticized by the lower courts and in academic commentary. Because of the problems associated with *Lehnert*, Virginia urges the Court to adopt an alternative test suggested by the concurring and dissenting opinion in *Lehnert*. This alternative test is simpler and more manageable for litigants and the lower courts.

ARGUMENT

I. THE THREE-PART TEST ADOPTED IN *LEHNERT* IS NOT COMPELLED BY PRECEDENT.

A. Requiring Objecting Nonmembers to Contribute to Labor Unions Constitutes a Significant Impingement on the First Amendment Rights of Nonmembers.

This Court has recognized that "implicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). "[A] corollary of the right to associate is the right not to associate." *California Democratic*

Party v. Jones, 530 U.S. 567, 574 (2000).[1] In addition, just as limitations upon an individual's right to make a financial contribution implicate that individual's First Amendment interests, *Buckley v. Valeo*, 424 U.S. 1, 22-23 (1976) (*per curiam*), the fact that individuals are compelled to make contributions that can be used for political purposes also implicates their First Amendment rights. *Abood v. Detroit Bd. of Educ.,* 431 U.S. 209, 222 (1977).

In light of these principles, forcing an objecting nonmember to pay dues to support a labor union interferes in two ways with his First Amendment rights. First, it forces the nonmember to support financially the labor union and the labor union's political activity relating to collective bargaining. Second, the employee is forced to associate with the union, thus violating his "freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit." *Id.* at 235.[2]

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[1] *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.").

[2] This basic premise has roots that run deep in our nation's history. For example, the Virginia Act for Religious Freedom, drafted by Thomas Jefferson in 1786, states that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *See Keller v. State Bar of California*, 496 U.S. 1, 10 (1990) (quoting the Act).

B. The First Amendment Sharply Limits Compulsory Assessments that Can Be Extracted from Nonmembers.

These First Amendment principles operate in tension with "agency shop" or "union shop" laws, which require dissenting nonmembers to contribute to the union.[3] In *Railway Employees Dep't v. Hanson*, 351 U.S. 225, 233 (1956), this Court held that Congress could require dissenting nonmembers to join a union shop.[4] The Court noted that while First Amendment problems might arise if "'assessments' are in fact imposed for purposes not germane to collective bargaining," those problems were not "presented by this record." *Id.* at 236-38.

The reason a union can compel such payments is because the union, as the exclusive bargaining representative, must fairly and equitably represent all employees, regardless of whether they belong to the union. *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 761 (1961). Otherwise, nonmembers could act as "free riders" that benefit from the union's efforts without contribution. Therefore, the Court noted, the

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[3] With an "agency shop," employees are not required to join the union, but they are required to pay the union an amount equal to union dues. In "union shops," employees are required to join a union within a short time after being hired. *Oil, Chemical & Atomic Workers, Int'l Union v. Mobil Oil Corp.*, 426 U.S. 407, 409 n.1 (1976).

[4] In *Hanson*, this Court found that state action was present. *Hanson*, 351 U.S. at 232.

"essential justification for authorizing the union shop was the desire [of Congress] to eliminate free riders—employees in the bargaining unit on whose behalf the union was obliged to perform its statutory functions, but who refused to contribute to the cause thereof." *Ellis v. Brotherhood of Ry., Airline & Steamship Clerks*, 466 U.S. 435, 447 (1984). A related justification is to effectuate congressional policy to "stabiliz[e] labor relations." *Street*, 367 U.S. at 760. The same justifications apply in the context of public sector unions. *Abood*, 431 U.S. at 232.

In subsequent cases, this Court has grappled with the question of what expenditures properly are deemed "germane" to the union's duty to bargain collectively. *Ellis*, 466 U.S. at 455. This Court recognized that political expenditures cannot be wrung from objecting nonmembers. Using assessments

> to support candidates for public office, and advance political programs, is not a use which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes. In other words, it is a use which falls clearly outside the reasons advanced by the unions and accepted by Congress why authority to make unionshop agreements was justified.

Street, 367 U.S. at 768.

Resolving the tension between other expenses by the union and the dissenters' First Amendment rights has proved more complex. In *Ellis*, this Court

examined whether certain expenses incurred by the union could be passed on to objecting nonmembers under the Railway Labor Act ("RLA"). This Court provided a more specific definition of germane expenses:

> [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. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

Ellis, 466 U.S. at 448.

Applying this test to various expenses, the Court first concluded that expenses relating to "conventions" were chargeable to objecting nonmembers. *Id*. The conventions at issue were "national convention[s] at which the members elect[ed] officers, establish[ed] bargaining goals and priorities, and formulate[d] overall union policy." *Id.* The conventions were germane to collective bargaining in the local unit because they "guide[d] the union's approach to

collective bargaining" and strengthened the union's "effectiveness in negotiating labor agreements." *Id.* at 449. The relationship between the conventions and the "union's discharge of its duties as bargaining agent" was sufficiently close that dissenting nonmembers could be charged for such expenses. *Id*.

This Court next examined the chargeability of expenses for social activities. The union had "purchas[ed] refreshments for union business meetings and occasional social activities." *Id.* at 449. The Court concluded that "[l]ike conventions, social activities [were] a standard feature of union operations." *Id.* at 450. Although these functions were "not central to collective bargaining," the Court found that they were germane "because they br[ought] about harmonious working relationships, promote[d] closer ties among employees, and create[d] a more pleasant environment for union meetings." *Id.* at 449-50. The relationship was sufficiently close to the union's duty of collective bargaining to allow the union to charge dissenting employees. *Id.* at 449.

The union also published a monthly magazine for union employees. *Id.* at 450. The union charged dissenting employees for a portion of the costs relating to "collective bargaining, contract administration, and employees' rights." *Id.* The Court found that the union properly could charge for such expenditures, reasoning that the articles constituted "the union's primary means of communicating information" on these relevant subjects. *Id.* However, expenditures that did not relate to articles about collective

bargaining, contract administration, or employees' rights were not chargeable. *Id.*

Turning to organizing expenses, this Court acknowledged that a stronger union throughout the nation would redound to more success for the local union. *Id.* at 451. Nevertheless, this Court found this connection too attenuated to collective bargaining in the nonmember's unit to allow the union to charge such expenses. *Id.* It reasoned that any benefit to the local collective bargaining process was achieved only through "the expansion of overall union power" and that such expansion was not the goal of the RLA. *Id*. at 451-52. Additionally, although the local employees may be free riders in the broad sense by benefitting indirectly from organizing activity, that was not the kind of free riding that the RLA was designed to prevent. *Id.* at 452-53. With respect to litigation, this Court set forth a simple test:

> [t]he expenses of litigation incident to negotiating and administering the contract or to settling grievances and disputes arising in the bargaining unit are clearly chargeable to [objecting nonmembers] as a normal incident of the duties of the exclusive representative. The same is true of fair representation litigation arising within the unit, of jurisdictional disputes with other unions, and of any other litigation before agencies or in the courts that concerns bargaining unit employees and is normally conducted by the exclusive representative.

Id. at 453. However, "[t]he expenses of litigation not having such a connection with the bargaining unit are not to be charged to objecting employees." *Id.* As examples,

> objecting employees need not share the costs of the union's challenge to the legality of the airline industry mutual aid pact; of litigation seeking to protect the rights of airline employees generally during bankruptcy proceedings; or of defending suits alleging violation of the nondiscrimination requirements of Title VII of the Civil Rights Act of 1964.

Id.

Following its examination of whether the expenses associated with conventions, social activities, and publications were permitted by the RLA, the Court turned to the question of whether these activities infringed on the nonmembers' First Amendment rights. This Court held that these expenses did not infringe their First Amendment rights. With respect to social activities,

> the communicative content [of being forced to contribute to these activities] is not inherent in the act [of contributing], but stems from the union's involvement in it. The objection is that these are *union* social hours. Therefore, the fact that the employee is forced to contribute does not increase the infringement of his first amendment rights already resulting from the compelled contribution to the union.

Id. at 456. Charges for union conventions and publications distributed to union members were consistent with the First Amendment for the same reason. *Id.* Although conventions and publications certainly "have direct communicative content and involve the expression of ideas," this entailed "little additional infringement of First Amendment rights beyond that already accepted" because the "communicative content" and the "expression of ideas" were not in any way directed outside the union. *Id.*

C. The Fractured Opinion in *Lehnert* Sows Confusion.

This Court revisited these issues in *Lehnert*. *Lehnert* again posed the question of what expenses a union could impose on objecting nonmembers, in this instance faculty members of a public college. *Lehnert,* 500 U.S. at 512. Justice Blackmun, joined by Chief Justice Rehnquist, and Justices White and Stevens, announced the judgment of the Court and delivered the Opinion of the Court with respect to certain portions. *Id.* at 507. Justice Marshall joined the Opinion of the Court, but dissented from certain aspects of Justice Blackmun's opinion. *Id.* at 533-50 (Marshall, J., concurring and dissenting). Justice Scalia, joined by Justices O'Connor, Kennedy, and Souter, agreed with some of the conclusions reached by the majority with respect to particular expenses, but disagreed with the new standard articulated by the majority and suggested a different test. *Id.* at

550-62 (Scalia, J., joined by O'Connor, Kennedy, and Souter, JJ., concurring).

Lehnert purported to distill the following test from the Court's cases to determine whether a particular charge is permissible: the activity must "(1) be 'germane' to collective bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Id.* at 519. The Court then applied that test to various categories of union expenditures on a "case-by-case analysis" for each charge. *Id.* at 519, 527-32 (Blackmun, J., joined by Rehnquist, C.J., White, & Stevens, JJ., announcing the judgment of the Court).

Justice Blackmun, setting forth the reasoning for a four-Justice plurality on this point, first addressed the chargeability of lobbying expenses. *Id.* at 519-22 (Blackmun, J., joined by Rehnquist, C.J., White, & Stevens, JJ., announcing the judgment of the Court). The plurality found that where such activities "relate not to the ratification or implementation of a dissenter's collective bargaining agreement, but to financial support of the employee's profession or of public employees generally, the connection to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees," *Id.* at 520 (Blackmun, J., joined by Rehnquist, C.J., White, & Stevens, JJ., announcing the judgment of the Court). Lobbying fees amounted

to "assessments for political activities outside the scope of the collective-bargaining context" in part because they "would present 'additional interference with the First Amendment interests of objecting employees.'" *Id.* at 521 (Blackmun, J., joined by Rehnquist, C.J., White, & Stevens, JJ., announcing the judgment of the Court). However, Justice Marshall disagreed with this conclusion. In his view, such activities could be charged to objecting nonmembers. *Id.* at 534 (Marshall, J., concurring and dissenting).

Next, the plurality reasoned that expenses associated with the costs of a program to obtain funds in support of public education in Michigan—which, presumably, would increase the funds available to Ferris College—could not be justified because "[n]one of these activities was shown to be oriented toward the ratification or implementation of petitioner's collective-bargaining agreement." *Id.* at 527 (Blackmun, J., joined by Rehnquist, C.J., White, & Stevens, JJ., announcing the judgment of the Court). Justice Marshall did not join this portion of the opinion, concluding that this expense was germane and, therefore, chargeable to nonmembers. *Id.* at 543 (Marshall, J., concurring and dissenting).

Regarding extra-unit litigation expenditures, the plurality concluded that the union could not force objecting nonmembers to pay for "expenses of litigation that does not concern the dissenting employees' bargaining unit or, by extension, to union literature reporting on such activities." *Id.* at 528

(Blackmun, J., joined by Rehnquist, C.J., White, & Stevens, JJ., announcing the judgment of the Court). The plurality found

> extra-unit litigation to be more akin to lobbying in both kind and effect. We long have recognized the important political and expressive nature of litigation. Moreover, union litigation may cover a diverse range of areas from bankruptcy proceedings to employment discrimination. When unrelated to an objecting employee's unit, such activities are not germane to the union's duties as exclusive bargaining representative. Just as the Court in *Ellis* determined that the RLA, as informed by the First Amendment, prohibits the use of dissenters' fees for extra-unit litigation, we hold that the Amendment proscribes such assessments in the public sector.

Id. (Blackmun, J., joined by Rehnquist, C.J., White, & Stevens, JJ., announcing the judgment of the Court) (citations omitted). Justice Marshall, however, noted in his opinion that this portion of the opinion was dicta, because "no such costs are at issue in this case." *Id.* at 544 (Marshall, J., concurring in part and dissenting in part).

The Court approved of "strike benefits" in the context of the negotiations at issue. The union at the time was "engaged in negotiating a new collective-bargaining agreement." *Id.* at 530 (Blackmun, J., joined by Rehnquist, C.J., White, & Stevens, JJ., announcing the judgment of the Court).

Because the negotiations were stalled, the union prepared "to go out on strike" as a means of promoting progress in the negotiations. *Id.* (Blackmun, J., joined by Rehnquist, C.J., White, & Stevens, JJ., announcing the judgment of the Court). The lower court had upheld these expenses as "fall[ing] within the range of reasonable bargaining tools available to a public sector union during contract negotiations." *Id.* (Blackmun, J., joined by Rehnquist, C.J., White, & Stevens, JJ., announcing the judgment of the Court). Thus, the context of this particular ruling was that the union was engaged in contract negotiations involving the unit to which the dissenting employee plaintiffs belonged.

Finally, the Court rejected as germane "[p]ublic relations expenditures designed to enhance the reputation of the teaching profession." *Id.* at 528 (Blackmun, J., joined by Rehnquist, C.J., White, & Stevens, JJ., announcing the judgment of the Court). After noting that such expenditures entailed "speech of a political nature in a public forum," the plurality also reasoned that

> public speech in support of the teaching profession generally is not sufficiently related to the union's collective-bargaining functions to justify compelling dissenting employees to support it. Expression of this kind extends beyond the negotiation and grievance-resolution contexts and imposes a substantially greater burden upon First Amendment rights than do the latter activities.

Id. at 528-29. (Blackmun, J., joined by Rehnquist, C.J., White, & Stevens, JJ., announcing the judgment of the Court). In contrast, Justice Marshall concluded that this program was chargeable to dissenting nonmembers. *Id.* at 539-42 (Marshall, J., concurring and dissenting).

From the outset in *Lehnert*, four members of the Court expressed their concern about the three-part test articulated by the fractured majority opinion. Justice Scalia, joined by Justices O'Connor, Souter, and Kennedy, noted that the Court's three-part test "both expands and obscures the category of expenses for which a union may constitutionally compel contributions from dissenting nonmembers in an agency shop." *Lehnert*, 500 U.S. at 550 (Scalia, J., joined by O'Connor, Kennedy, & Souter, JJ., concurring and dissenting). Justice Scalia wrote that the three-part test was "unhelpful" and "neither required nor even suggested by our earlier cases." *Id.* at 551 (Scalia, J., joined by O'Connor, Kennedy, & Souter, JJ., concurring and dissenting). Similarly, Justice Kennedy, in a separate opinion, criticized the standard articulated in the majority opinion as excessively malleable and for drawing "lines with no principled basis." *Id.* at 563 (Kennedy, J., concurring and dissenting).

II. THE THREE-PART TEST IS CONFUSING AND SHOULD BE REPLACED WITH THE "STATUTORY DUTIES" TEST ARTICULATED BY THE CONCURRING AND DISSENTING OPINION IN *LEHNERT*.

A. On Its Own Terms, The *Lehnert* Test Is Cumbersome and Unpredictable.

That the new three-part test is confusing can be readily discerned from the disagreements among the justices. As is apparent from the plain terms of the *Lehnert* test, each of the three parts of the test is open ended. The first component of the test is a requirement that the labor union activity be "'germane' to the collective bargaining activity." *Lehnert*, 500 U.S. at 519. However, the fractured opinion provides little guidance concerning where this line should be drawn. It states that no direct relationship is required between the expenditure and the union's duty to bargain collectively. *Id.* at 522. This in turn begs the question of how indirect the connection must be between the activity and the benefit to the nonmember for the activity to be considered "germane."

Second, the expense must "be justified by the government's vital policy interest in labor peace and avoiding 'free riders.'" *Id.* at 519. In applying this part of the test, the Court first must determine whether the vital policy interest in labor peace is at stake. Precisely what this means is not clear. In addition, it must find that a "free rider" problem exists that needs to be avoided. Not just any kind of

free riding will do, however. It must be the kind "of free rider Congress had in mind." *Ellis*, 466 U.S. at 452.

Finally, the particular activity cannot "significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Lehnert*, 500 U.S. at 519. Courts must determine whether a particular activity represents an "additional burden" heaped upon the existing burden. Then, they must determine whether this additional burden is "significant" enough to transgress the invisible line that renders the activity non-chargeable.

As Justice Scalia noted, "each one of the three 'prongs' of the test involves a substantial judgment call (What is 'germane'? What is 'justified'? What is a 'significant' additional burden?), it seems calculated to perpetuate give-it-a-try litigation of monetary claims that are individually insignificant but cumulatively worth suing about. . . ." *Id.* at 551 (Scalia, J., concurring in part and dissenting in part).

B. *Lehnert* Has Led to Confusion in the Lower Courts.

Predictably, the three-part test is a source of confusion to the lower courts. The conflict in decisions provides ample evidence of this phenomenon. Some Circuits have concluded that extra-unit litigation

expenses are acceptable under a "pooling" arrangement.[5] Other courts have concluded that such expenses are categorically excluded.[6]

The problems associated with the open-ended *Lehnert* test are not confined to extra-unit litigation expenditures. For example, the Fourth Circuit was sharply divided concerning how to apply the *Lehnert* framework to a strike reserve fund and to strike preparation expenditures. *Crawford v. Air Line Pilots Ass'n Int'l*, 992 F.2d 1295, 1301, 1304-05 (4th Cir. 1993) (*en banc*).[7] As Judge Silberman noted, "it is impossible to detect in the Supreme Court cases—particularly *Lehnert*—a principled basis for distinguishing expenditures that are 'germane' from those that are not." *Beckett v. Air Line Pilots Ass'n*, 59 F.3d 1276, 1281 (D.C. Cir. 1995) (Silberman, J., concurring in remand for fact-finding).

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[5] *Locke v. Karass*, 498 F.3d 49, 63-65 (1st Cir. 2007); *Otto v. Pennsylvania State Educ. Ass'n-NEA*, 330 F.3d 125, 138-39 (3rd Cir. 2003); *Reese v. City of Columbus*, 71 F.3d 619, 624 (6th Cir. 1995).

[6] *Browne v. Wisconsin Employment Relations Comm'n*, 485 N.W.2d 376, 388 (Wis. 1992); *Albro v. Indianapolis Educ. Ass'n*, 585 N.E.2d 666, 673 (Ind. Ct. App. 1992).

[7] Five judges—Butzner, Ervin, Hall, Phillips, and Murnaghan—concluded that such expenses were chargeable. Two—Wilkinson and Wilkins—concurred. Five judges—Russell, Widener, Niemeyer, Hamilton, and Luttig—strongly disagreed.

C. *Lehnert* Has Been Criticized in Academic Publications.

Just as the Courts have struggled with the amorphous *Lehnert* test, it also has been pilloried in academic publications.[8] While these criticisms

[8] Daniel A. Farber, *Essay, Missing the "Play of Intelligence,"* 36 WM. & MARY L. REV. 147, 155 and n.48 (1994) (listing *Lehnert* as an example of a difficult-to-apply multi-prong test that fails to provide much illumination for the lower courts); Gregory Klass, *The Very Idea of First Amendment Right Against Compelled Subsidization*, 38 U.C. DAVIS L. REV. 1087, 1108 (2005) (noting that "[i]n practice . . . the *Lehnert* decision is difficult to apply."); Joseph A. Ciucci, Note, *Defining the Permissible Uses of Objecting Members' Agency Dues: Is the Solution Any Clearer After* Lehnert v. Ferris Faculty Ass'n*?*, 70 U. DET. MERCY L. REV. 89, 108 (1992) ("the Court [in *Lehnert*] has perpetuated uncertainty and confusion, and will in the future be required to reassess these problems"); W. Kearns Davis, Jr., Crawford v. Air Line Pilots Ass'n: *The Fourth Circuit Determines What Expenses a Union May Charge to Nonunion Workers*, 72 N.C. L. REV. 1732, 1747 (1994) (criticizing the *Lehnert* test and calling for its modification); Mia Guizzetti Hayes, Comment, *First Amendment Values at Serious Risk: The Government Speech Doctrine After* Johanns v. Livestock Marketing Ass'n, 55 CATH. U. L. REV. 795, 816 (2006) (criticizing *Lehnert* for failing to "offer[ ] [any] clarification of the slippery germaneness standard," and for failing to "address precisely which free speech interests a compelled subsidy burdens."); Monte Arthur Mills, Note, *The Student, The First Amendment and the Mandatory Fee*, 85 IOWA L. REV. 387, 424 (1999) (suggesting an alternative test to replace *Lehnert,* to avoid "the difficulties of unstructured judicial balancing and the substantial judgment calls inherent in the *Lehnert* analysis."); Calvin Siemer, Comment, Lehnert v. Ferris Faculty Ass'n: *Accounting to Financial Core Members: Much A-Dues About Nothing?*, 60 FORDHAM L. REV. 1057, 1059, 1073, 1076 (1992) (criticizing the three-part test as a "debacle" having "little logical consistency" and as a "confused holding.").

certainly are not dispositive, they do underscore the problems of the *Lehnert* test.

D. The Court Should Adopt A More Administrable Standard.

Virginia urges the Court to clarify its jurisprudence and to adopt the test proposed by Justice Scalia. *Lehnert*, 500 U.S. at 550 (Scalia, J., joined by O'Connor, Kennedy, Souter, JJ., concurring and dissenting). Although this Court respects precedent, "when governing decisions are unworkable or are badly reasoned," "this Court has never felt constrained to follow precedent." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).[9] The vague and open-ended framework articulated in the fractured *Lehnert* decision will continue to produce conflicting results and should be replaced.

The principal justification for *stare decisis* is to promote stability in the law. *See Lawrence v. Texas*, 539 U.S. 558, 577 (2003). Yet, when a test generates unpredictability and instability—and will continue to do so—the justification for upholding the existing standard evaporates.

Justice Scalia, joined by Justices O'Connor, Kennedy, and Souter, proposed the following test: "contributions can be compelled only for the costs of

[9] *See also Smith v. Allwright*, 321 U.S. 649, 665 (1944).

performing the union's statutory duties as exclusive bargaining agent." *Lehnert,* 500 U.S. at 550 (Scalia, J., joined by O'Connor, Kennedy, & Souter, JJ., concurring and dissenting). Furthermore, the test suggested by Justice Scalia would require "a direct relationship between the expense at issue and some tangible benefit to the dissenters' bargaining unit." *Id.* at 562 (Scalia, J., joined by O'Connor, Kennedy, & Souter, JJ., concurring and dissenting). This test is more workable. It should be adopted as the governing test.

In *Lehnert*, Justice Scalia applied the "statutory duties" test to various expenditures. Although his opinion did not directly address extra-unit litigation, his analysis of the chargeability of various expenses is instructive.[10]

He noted that under Michigan law, the statutory duty of the union is to serve as "the exclusive representative of all the public employees in [its] unit for purposes of collective bargaining." *Id.* at 558 (Scalia, J., joined by O'Connor, Kennedy, & Souter, JJ., concurring and dissenting). Justice Scalia's

[10] Justice Kennedy, who otherwise agreed with Justice Scalia's articulation of the standard, wrote a separate opinion addressing the issue. Justice Kennedy indicated that he would approve of an arrangement whereby a local union purchases the legal equivalent of an insurance policy with the national union. *Lehnert*, 500 U.S. at 563 (Kennedy, J., concurring in part and dissenting in part). However, any litigation, to be chargeable to nonmembers, must be "undertaken in the course of the union's duties as exclusive bargaining representative." *Id.*

opinion rejected the chargeability of public relations activities, lobbying expenses and "parts of the union's magazine that concern teaching and education generally, professional development, unemployment, job opportunities, award programs . . . and other miscellaneous matters." *Id.* at 559 (Scalia, J., joined by O'Connor, Kennedy, & Souter, JJ., concurring and dissenting). In this view, these matters "are no part of this collective bargaining process." *Id*. (Scalia, J., joined by O'Connor, Kennedy, & Souter, JJ., concurring and dissenting).

Justice Scalia also rejected the chargeability of sending union delegates to the convention of a separate organization with which the union bargaining agent has affiliated. *Id.* at 560 (Scalia, J., joined by O'Connor, Kennedy, & Souter, JJ., concurring and dissenting). On the other hand, expenses associated with conventions such as the one in *Ellis*, where the delegates attend the convention of the union bargaining agent itself would be chargeable. *Id.* (Scalia, J., joined by O'Connor, Kennedy, & Souter, JJ., concurring and dissenting). The opinion noted that "attendance at certain meetings of [affiliated] organizations, where matters specifically relevant to the union's bargaining responsibilities are discussed, are properly chargeable, but attendance at all conventions seems to me clearly not." *Id.* (Scalia, J., joined by O'Connor, Kennedy, & Souter, JJ., concurring and dissenting).

Justice Scalia's opinion would permit a pro rata assessment of the national union's costs of providing

"collective bargaining services (such as negotiating advice, economic analysis, and informational assistance) to its affiliates nationwide, and in maintaining the support staff necessary for that purpose." *Id.* at 561 (Scalia, J., joined by O'Connor, Kennedy, & Souter, JJ., concurring and dissenting). In this view, "[i]t would also be appropriate to charge to nonunion members an annual fee charged by [the national union to the affiliate] in exchange for contractually promised availability of such services from NEA on demand." *Id.* at 561 (Scalia, J., joined by O'Connor, Kennedy, & Souter, JJ., concurring and dissenting).

Finally, Justice Scalia rejected the chargeability of strike preparations because "[i]n conducting a strike, a union does not act in its capacity as the government-appointed bargaining agent for all employees." *Id.* at 562 (Scalia, J., joined by O'Connor, Kennedy, & Souter, JJ., concurring and dissenting). Of course, "visible preparations for a strike strengthen the union's position in negotiations"—as does "the strike itself, and many other union activities, including lobbying." *Id.* (Scalia, J., joined by O'Connor, Kennedy, & Souter, JJ., concurring and dissenting). That, however, does not render the activity chargeable to objecting nonmembers, because "[t]he test of chargeability . . . is not whether the activities at issue help or hinder achievement of the union's bargaining objectives, but whether they are undertaken as part of the union's representational

duty." *Id.* at 562 (Scalia, J., joined by O'Connor, & Souter, JJ., concurring and dissenting).[11] For the sake of lower courts and litigants, the Court should jettison the three-part test articulated in *Lehnert*, adopt the statutory duties test, and remand the case for resolution of the narrow issue under the new test.

CONCLUSION

For the reasons stated above, the Court should **Vacate** and **Remand** the case for reconsideration under the "statutory duties" test.

Respectfully submitted,

ROBERT F. MCDONNELL
Attorney General
of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

STEPHEN R. MCCULLOUGH
Deputy State
Solicitor General

WILLIAM C. MIMS
Chief Deputy
Attorney General

OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-2436
(804) 786-1991 (facsimile)

Counsel for the
Commonwealth of Virginia

May 12, 2008

[11] Justice Kennedy did not join this portion of Justice Scalia's opinion. *See id*. at 563 (Kennedy, J., concurring and dissenting).