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, ET AL.,

Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the First Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

In *Ellis v. Railway Clerks*, this Court unanimously "determined that the [Railway Labor Act], as informed by the First Amendment, prohibits the use of dissenters' [union] fees for extraunit litigation." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 528 (1991) (opinion of Blackmun, J., *citing Ellis*, 466 U.S. 435, 453 (1984)). In *Lehnert*, a four-member plurality held "that the Amendment proscribes such assessments in the public sector." 500 U.S. at 528. Moreover, Justice Scalia's separate opinion, concurring in part in the judgment announced by Justice Blackmun, concluded that "there is good reason to treat [*Ellis* and the Court's other statutory cases] as merely reflecting the constitutional rule." *Id.* at 555.

May a State, nonetheless, 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 of a nonunion employee's bargaining unit?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed are listed below:

> Daniel B. Locke, Hazel Dyer, Denise D. Gilbert, Robert Hoey, William A. Elliot, Kathleen M. Heath, Ratnasiri Liyanage-Don, Jeanne F. Locke, Kathleen Maguire, Rickey K. McKenna, Judith Melanson, Faith Mouradian, Gina M. Pelletier, Patricia W. Rolfe, Margaret P. Rudolf, Katherine B. Rugan, Sean P. Scully, Michael R. Smith, Tricia L. Thompson, Beth Weirich, Edward A. Karass, Controller for the State of Maine, Rebecca M. Wyke, Commissioner of the Department of Administrative and Financial Services, and Kenneth A. Walo, Director of the Maine Bureau of Employee Relations, Maine State Employees Association, Local 1989, Service Employees International Union, AFL-CIO-CLC.

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is officially reported at 498 F.3d 49 (1ST CIR. 2007), and is reprinted as Appendix A to the Petition for *Certiorari* ("Pet. App.") at 1a. The decision of the United States District Court for the District of Maine granting Defendants' Motions for Summary Judgment and denying Plaintiffs' Motion for Summary Judgment, Pet. App. B at 42a, is reported at 425 F. Supp. 2d 137 (D. ME. 2006).

JURISDICTION

The United States Court of Appeals for the First Circuit entered its judgment on 8 August 2007. The Petition for a Writ of *Certiorari* was timely filed on 6 November 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1) (West 1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The **First Amendment of the United States Constitution** provides in pertinent part that "Congress shall make no law ... abridging the freedom of speech, ... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend I.

The **Fourteenth Amendment** provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

The state statute involved is Maine's State Employees Labor Relations Act, 26 ME. REV. STAT. ANN. § 979 *et seq*., which provides in pertinent part that "the public policy of th[e] State" and "the purpose of this chapter" is to provide "a uniform basis for recognizing the right of state or legislative employees to join labor organizations of their own choosing and to be represented by such organizations in collective bargaining for terms and conditions of employment." To that end, Maine law specifically recognizes that such a "[b]argaining agent" "has as its primary purpose the representation of employees in their employment relations with employers," § 979-A(1), "for the purposes of representation and collective bargaining," § 979-B, and provides specific definitions of "[c]ollective bargaining" and the "obligation ... to bargain." § 979-D.

STATEMENT OF THE CASE

I. The Facts

Petitioners Daniel Locke *et al.* ("the Nonmembers") are twenty current or former public employees in four bargaining units within the State of Maine's executive branch. The Maine State Employees Association ("MSEA"), Local 1989, Service Employees International Union, is designated as their collective bargaining representative, but they are not members of MSEA.

Nevertheless, the Nonmembers are required by the collective bargaining agreements governing their terms and conditions of employment to pay to MSEA "a service fee equal to their pro-rata share of the costs to MSEA-SEIU that are germane to collective bargaining

and contract administration as defined by law."[1] Joint Appendix ("Jt. App.") at 33-34, ¶ 22. MSEA is affiliated with various other labor unions, including—as its name suggests—the Service Employees International Union ("SEIU").

MSEA prepared and distributed two "*Hudson*" notices[2] to the Nonmembers to explain that members' dues exceed the amount expended for its collective bargaining "services." Pet. App. A at 2a-6a; 498 F.3d at 51-53. The excess fees are referred to in case law and in MSEA's "*Hudson*" notice as "nonchargeable" expenses; the collective bargaining fees are called "chargeable expenses." Pet. App. A at 4a n.5; 498 F.3d at 51 n.5.

MSEA's notices revealed that a portion of the fees treated as chargeable by MSEA is paid to the SEIU to subsidize its own and its affiliates' litigation concerning bargaining units other than the Nonmembers', including units outside Maine. *Id.* at 5a; 498 F.3d at 52;[3] *see also* Jt. App. at 54, and 57-58.

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[1]Certain nonmembers, including Petitioners, were initially subject to a "grandfather" clause limiting the fee to one-half paid by employees hired after 2 July 2003. Pet. App. A at 4a n.6; 498 F.3d at 52 n.6. That exception expired after one year, and since then all nonmember employees have been required to pay the full agency fee.

[2]This notification process stems from *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 306-10 (1986).

[3]The First Circuit stated that:

> MSEA included in its calculation of chargeable expenditures those costs of litigation (by both itself and SEIU) that was germane to collective bargaining. This meant that nonmembers contributed, through their service fees, to some

(continued...)

At issue here is that portion of the fee expended for MSEA affiliates' extra-unit litigation activities, which MSEA claims to be fully chargeable to objecting nonmembers. Jt. App. at 53, 58, 85, & 89.

II. The Proceedings Below

On 16 June 2005, the Nonmembers filed this class action lawsuit alleging, *inter alia*, that MSEA and the State Defendants[4] were collecting and/or were attempting to collect agency fees that:

> will be used by Defendant MSEA and/or its affiliates for purposes that are not "germane" to collective-bargaining activity, not justified by the government's vital policy interest in labor peace and avoiding "free riders," and/or significantly add to the burdening of free

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[3](...continued)
litigation that was not undertaken specifically for their own bargaining unit, but rather was conducted by or on behalf of other units or the national affiliate, sometimes in other states. Included within this general category of expenditures were the salaries of SEIU's lawyers, and other costs of providing legal services to bargaining units throughout the country.
Pet. App. A at 5a; 425 F.3d at 52.

[4]The State Defendants are Edward A. Karass, Controller for the State of Maine, Rebecca M. Wyke, Commissioner of its Department of Administrative and Financial Services, and Kenneth A. Walo, Director of the Maine Bureau of Employee Relations, who enforced, for MSEA's benefit, the contractual provisions authorizing the exaction of forced fees as a condition of continued employment.

> speech that is inherent in the allowance of an "agency shop," including, but not limited to:
>
> . . . .
>
> c. litigation that does not concern the dissenting nonmember's bargaining unit and union literature reporting on such activities;

Record ("R.") 1: Complaint, ¶ 33.

The Nonmembers later amended and supplemented their Complaint when MSEA issued a new "*Hudson*" notice in response to the lawsuit. Jt. App. at 26-104. MSEA's new notice persisted in claiming that its affiliates' extra-unit litigation expenditures were chargeable. *Id.* at 41, ¶ 36(c), 85, & 89. Specifically, MSEA's notice defines "Chargeable expenses" as:

> those incurred by the International Union [SEIU] that reflect the share of the costs of operations of the International Union which are considered necessarily and reasonably incurred for the purpose of assisting local unions and councils in the performance of their duties as a representative of the employees in dealing with the employer on labor management issues, including the costs of: ... settling grievances and disputes ... in arbitration, court or otherwise.

Jt. App. 89. As a result, MSEA's notice treated $4,819,767 in SEIU's "Professional fees and expenses," including litigation expenses, as "chargeable" to the Nonmembers. Jt. App. 85.

The Complaint sought declaratory and injunctive relief, equitable restitution, and attorneys' fees and costs for violations of the Nonmembers' rights under the First and Fourteenth Amendments and 42 U.S.C. § 1983. R. 1, ¶¶ 1, 3. Jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331, 1343. *Id.* at ¶¶ 2-3.

After discovery, and upon cross-motions for summary judgment, the trial court held "as a matter of law that the inclusion of the cost of extra[-unit] litigation does not violate Plaintiffs' constitutional rights." Pet. App. B at 58a; 425 F. Supp. 2d at 147.

The trial court reasoned that Justice Blackmun's plurality opinion in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 528 (1991), holding extra-unit litigation non-chargeable "was joined only by Chief Justice Rehnquist and Justices White and Stevens," and therefore "does not state a majority opinion that is binding on this Court." Pet. App. B at 57a-58a; 425 F. Supp. 2d at 146. The trial court, instead, found more persuasive the decisions of the Third and Sixth Circuits that declined to follow both Justice Blackmun's opinion and the Court's earlier ruling in *Ellis v. Railway Clerks*, 466 U.S. 435, 453 (1984) (Railway Labor Act ("RLA") case) upon which Justice Blackmun relied. Pet. App. B at 58a, 425 F. Supp. 2d at 147, *citing Reese v. City of Columbus*, 71 F.3d 619, 624 (6TH CIR. 1995), *and Otto v. Pennsylvania Education Ass'n*, 330 F.3d 125, 138 (3D CIR. 2003). The district court therefore entered judgment for Defendants. R. 91: Judgment.

The Nonmembers timely appealed, and a three-judge panel of the United States Court of Appeals for the First Circuit affirmed. Pet. App. A at 34a; 498 F.3d at 66.[5]

Unlike the district court,[6] the panel acknowledged that this Court held in *Ellis* that:

> The 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 petitioners 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. ***The expenses of litigation not having such a connection with the bargaining unit are not to be charged to objecting employees.***

466 U.S. at 453 (emphasis added), *quoted at* Pet. App. A at 13a; 498 F.3d at 56 (without emphasis).

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[5]The Nonmembers also appealed from the denial of their Motion for Class Certification, R. 55, which had been found to be moot. Pet. App. B at 67a; 425 F. Supp. 2d at 151. Because the First Circuit affirmed the district court in all of its particulars, it did not reach this issue. Pet. App. A at 7a n.8; 498 F.3d at 53 n.8.

[6]The trial court referred to *Ellis* only for the proposition that "'advance reduction of dues and/or interest-bearing escrow accounts' would protect nonmembers from any First Amendment violations." Pet. App. B at 59a n.5; 425 F. Supp. 2d at 147 n.5.

The panel likewise recognized that the expenditures at issue here are "litigation expenses incurred by [MSEA's] national affiliate" for "litigation on behalf of, or by, a union entity other than the local which represents the nonmember employees." Pet. App. A at 2a & n.1; 498 F.3d at 50 & n.1.

Nevertheless, purporting to rely upon *Lehnert* instead of *Ellis*, the panel held that:

> *Lehnert* addressed a different factual context —a pooling arrangement—and explored the reasons that pooled expenditures for litigation fall outside the rule articulated in *Ellis*.... *Ellis* continues to be good law, and to mean what it literally says, in cases involving a unit's direct expenditures to support litigation by other bargaining units. But where monies are spent in a pooling arrangement, as described by *Lehnert*, *Ellis* does not bar the chargeability of extra-unit litigation expenses, and *Lehnert*'s definition of germaneness, applicable generally to pooling arrangements, applies sensibly to litigation expenses funded by such a pooling arrangement.

Pet. App. A at 29a; 498 F.3d at 63-64, *citing* 500 U.S. at 523-24.

SUMMARY OF ARGUMENT

Twice—in *Ellis*, and again in *Lehnert*—this Court has held that litigation expenses for which nonmembers may be compelled to support their exclusive-bargaining representative are limited to litigation arising within the nonmembers' bargaining unit, *i.e.*, 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." *Ellis*, 466 U.S. at 453; *accord Lehnert*, 500 U.S. at 528 (Blackmun, J.); *see id.* at 555 (Scalia, J.).

The extra-unit litigation activities of union affiliates at issue here violates this standard, and significantly adds to the infringement on the Nonmembers' First-Amendment rights. Union litigation for bargaining units far afield from the Nonmembers' State of Maine bargaining units is not germane to the bargaining process established by Maine statute, nor to the Nonmembers' statutorily- and/or contractually-established grievance procedures.

The narrow rule prohibiting charges for extra-unit litigation stated in *Ellis* and followed in *Lehnert* is consistent with this Court's standard that infringements on the freedoms not to speak, associate, and petition government are permissible only when narrowly tailored to serve a compelling state interest. In the context of union forced fees cases, the governmental interest served is to reimburse an exclusive representative for costs incurred in performing its

duties in dealing with the employees' employer on labor-management issues in the employees' bargaining unit. Nonunion public employees cannot be compelled to subsidize activities which add significantly to the serious infringement on their First-Amendment rights already inherent in the coerced support of bargaining-unit collective bargaining, contract administration, and grievance adjustment with their employer.

The confusion which misled the lower courts in this case and others arises from this Court's badly-splintered decision in *Lehnert*, in which this Court established standards by which **other** extra-unit activities could be measured. The multiple opinions in *Lehnert* led to this confusion among the lower courts, with numerous courts reaching conflicting opinions on critical chargeability issues.

The lower courts' treatment of extra-unit litigation expenditures is symptomatic of the larger problem created by the Court's failure in *Lehnert* to apply explicitly the "strict-scrutiny" analysis normally applied in analogous cases relating to compelled speech, which always constitutes content-based regulation of speech.

This case provides the Court with an opportunity to clarify the standards to be applied to this confused area of the law, and establish a uniform standard by which the compelled speech inevitable in any compelled-dues scheme can be appropriately limited to the bargaining unit.

ARGUMENT

I. This Court Prohibited the Use of Forced Dues for Extra-Unit Litigation More Than Two Decades Ago in *Ellis*.

In *Ellis v. Railway Clerks*, 466 U.S. 435, 453 (1984), this Court unanimously and categorically held that "the RLA,[7] as informed by the First Amendment, prohibits the use of dissenters' fees for extraunit litigation." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 528 (1991) (Blackmun, J.). This Court's *Ellis* holding was unequivocal:

> The 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 petitioners 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. ***The expenses of litigation not having such a connection with the bargaining unit are not to be charged to objecting employees.*** Contrary to the view of the Court of Appeals, therefore, ***unless the[ir] ... bargaining unit is directly concerned***, objecting employees need not share the costs of the union's challenge to

[7] 45 U.S.C. § 152, Eleventh.

> 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.

466 U.S. at 453 (emphasis added).

In evading this categorical holding, the First Circuit made two erroneous findings as to why *Ellis* is not controlling here. First, disingenuously relying upon a general formulation of the issue appearing earlier in the *Ellis* opinion, the First Circuit asserted "that *Ellis* addressed only 'litigation *not* involving the negotiation of agreements or settlement of grievances.'" Pet. App. A at 28a; 498 F.3d at 63 (*quoting Ellis*, 466 U.S. at 440) (emphasis added).

But this Court explicitly held nonchargeable in *Ellis* "litigation seeking to protect the rights of airline employees generally during bankruptcy proceedings." 466 U.S. at 453. That litigation was "intervention in an employer's bankruptcy proceedings [that] protected the union members' wages and **ensured continued compliance with the collective bargaining agreement** while the employer underwent reorganization." *Ellis v. Railway Clerks*, 685 F.2d 1065, 1068, 1074 (9TH CIR. 1982) (emphasis added), *rev'd in pertinent part*, 466 U.S. at 453.

"[D]efending suits alleging violation of the nondiscrimination requirements of Title VII of the Civil Rights Act of 1964" undoubtedly also is "a normal

incident of the duties of the exclusive representative." Nevertheless, such expenditures, too, were held nonchargeable by *Ellis*, unless the nonmembers' "bargaining unit is directly concerned." 466 U.S. at 453.

In *Lehnert,* Justice Blackmun confirmed *Ellis*' holding that bargaining-related litigation on behalf of other units was nonchargeable. He specifically mentioned "union litigation" involving "bankruptcy proceedings" and "employment discrimination," when he ruled that the general principle permitting pooling of otherwise chargeable parent-union expenditures does not apply to extra-unit litigation, even if bargaining related. 500 U.S. at 528, *citing Ellis*, 466 U.S. at 453.

Second, the First Circuit reasoned that:

> the *Ellis* court was not confronted with a pooling arrangement ...; its decision pertained only to direct contribution of local union monies to litigation efforts by other units (or a national affiliate)—meaning contributions to litigation expenses given without expectation of reciprocal contributions at a later time.

Pet. App. 27a-28a, 498 F.3d at 63. But *Ellis* also involved a "pooling arrangement" —that is, the aggregation of nonmembers' forced fees in a national affiliate's general treasury from which litigation could be funded in any bargaining unit, including the dissenting nonmembers'—not direct contributions of a local's monies to litigation in other units without expectation of later reciprocal contributions. *See* p. 22, *infra*.

Thus, the First Circuit's "pooling" argument is a red herring, because the underlying and specific

chargeability standard for litigation expenses applies equally to "pooled" expenses and direct contributions. Nor does "pooling" change the need for the government to justify the forced fees by a showing that compelling these Maine State employees to subsidize litigation on behalf of other bargaining units in other states and under other labor statutes (or in other sectors of the economy) is the least restrictive means to serve a compelling State interest. The "pooling" argument fails to satisfy that standard.

Coerced subsidies of litigation expenses not directly concerning the Nonmembers' bargaining unit compel association with other groups of employees, a form of petition and speech that is fully protected by the First Amendment. *See In re Primus*, 436 U.S. 412, 426-28 (1978) (litigation).

The First Circuit's justification for these serious infringements on First-Amendment freedoms was its assessment that:

> litigation is not susceptible to a single label. Some litigation may be purely expressive, and therefore clearly outside the scope of chargeable activities. However, other litigation may be central to the negotiation and administration of a collective bargaining agreement. In this case, the appellants have not challenged MSEA's characterization of the litigation for which the nonmembers were charged as "related" to collective bargaining. There is no contention that the litigation at issue is purely expressive or political.

Pet. App. A at 30a-31a; 498 F.3d at 65. The First Circuit then concluded that, rather than apply *Ellis*' specific categorical rule, it would apply the general three-part test in *Lehnert*.[8] *Id.* at 31a; 498 F.3d at 65.

The First Circuit's conclusion that some distinction exists between litigation "'related' to collective bargaining" on behalf of other units and "purely expressive or political" litigation is wholly unsupported by *Ellis* or any other decision of this Court. Indeed, that argument is essentially the "union strength and bargaining power" argument that *Ellis* rejected with regard to organizing and extra-unit litigation. *See* 466 U.S. at 441, 451-53.

Ellis rejected the argument that "litigation seeking to protect the rights of [represented] employees generally" was chargeable, holding that there must be a "connection to the bargaining unit" even for litigation that is not "purely expressive or political" (in the First Circuit's view), such as "bankruptcy proceedings" or "suits alleging violations of the nondiscrimination provisions of Title VII." *Id.* at 453.

The reason is simple: litigation is petitioning of government protected by the First Amendment. *NAACP v. State of Alabama ex rel. Patterson*, 357 U.S.

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[8]The *Lehnert* majority held that "chargeable activities 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." 500 U.S. at 519.

449, 460 (1958) (recognizing litigation as a form of petition under the First Amendment).

Nothing in this Court's opinions suggests that union costs related to core First-Amendment activities may be taxed to unwilling nonmembers simply because union members in more than one unit choose to affiliate. *Cf. Davenport v. Washington Educ. Ass'n*, ___ U.S. ___, 127 S. Ct. 2372, 2380 n.2 (2007) (rejecting notion that union's "improvident accounting practices" impact the constitutionality of statutory protection of nonmembers' rights). Nor is sufficient justification provided by the union's self-serving assertion that litigation about a bargaining unit far removed from Maine (perhaps in California, or Washington, or in private-sector bargaining units under the National Labor Relations Act, 29 U.S.C. § 141 *et seq.*) might somehow benefit the Nonmembers' State of Maine bargaining units.[9]

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[9]Maine law does not support such an argument, either. When Maine's Supreme Judicial Court ("SJC") decided that an "agency shop" provision is permissible in State employment, it did so narrowly. Citing the employees' "obligation, statutorily imposed, to accept the services of that bargaining agent for representational and collective bargaining purposes," and the union's correlative "obligation, statutorily imposed, to represent all the employees within the bargaining unit 'without regard to membership in the organization certified as bargaining agent,'" Maine's SJC held:

> It is fairly within the compass of this mutuality of obligation established by statute that each employee within the bargaining unit share in defraying **the costs of the representational and collective bargaining services that the bargaining agent is required to provide** without discrimination.

(continued...)

The First Circuit's attempts to distinguish *Ellis* are unavailing, because *Ellis* unanimously held all extra-unit litigation nonchargeable. Later, writing in *Lehnert*, both Justices Blackmun and Scalia, between them writing for a majority of the Court, recognized that the *Ellis* holding on extra-unit litigation has a constitutional basis. *Lehnert*, 500 U.S. at 528 (Blackmun, J.); *id.* at 555 (Scalia, J.). Consequently, that holding is controlling here, and the First Circuit should have applied and followed it.

The Court's conclusion in *Ellis*, 466 U.S. at 453, and its application of that bright-line rule in *Lehnert*, 500 U.S. at 528 (Blackmun, J.); *id.* at 555 (Scalia, J.), are hardly surprising. As Justice Blackmun recognized, litigation is an activity fraught with First-Amendment implications. 500 U.S. at 528 ("extraunit litigation [is] more akin to lobbying in both kind and effect"); *see Patterson*, 357 U.S. at 460 (recognizing litigation as a form of petition under the First Amendment). Likewise, association for the purpose of pursuing litigation is subject to First-Amendment protections.[10]

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[9](...continued)
Opinion of the Justices, 401 A.2d 135, 147 (ME. 1979) (emphasis added).

[10]*See NAACP v. Button*, 371 U.S. 415, 431 (1963) (for certain groups, "association for litigation may be the most effective form of political association") (*cited in Lehnert*, 500 U.S. at 528); *Brotherhood of R.R. Trainmen v. Va. State Bar*, 377 U.S. 1, 6 (1964) (striking down bar action against union legal aid program on First-Amendment grounds); *United Mine Workers, Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 221-22 (1967) (same).

Thus, litigation is a form of petition, association, and expression protected by the First Amendment. *In re Primus*, 436 U.S. at 428; *United Transp. Union v. State Bar*, 401 U.S. 576, 580 (1971); *Button*, 371 U.S. at 429, 431. Indeed, litigation "related to labor issues will frequently constitute political activity which lies at the core of first amendment protections." *UAW v. Nat. Right to Work Legal Def. & Educ. Found., Inc.*, 590 F.2d 1139, 1147-48 (D.C.CIR. 1978).

The issue presented here, *i.e.*, whether activities freighted with First-Amendment concerns may be financed with compelled union fees outside of the narrow context of the bargaining unit, is correlative to the issues this Court addressed in *Patterson* and *Button*.

However, under this Court's standards, litigation activities for the Nonmembers' bargaining unit may be financed from compelled union fees. "[B]y allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights." *Ellis*, 466 U.S. at 455. But as *Ellis* recognized, litigation on behalf of the bargaining unit is "germane"—*i.e.*, closely akin, or at once relevant and appropriate—to the purpose for which the Court has countenanced the impingement. It is also closely related to a union's status as the employees' bargaining representative under state law.[11]

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[11]The governing statute—the State Employee Labor Relations Law—defines a "bargaining agent" as "any lawful organization, association or individual representative of such organization or association which has as its primary purpose the representation of employees in their employment relations with (continued...)

In this sense, litigation on behalf of the bargaining unit is akin to another form of union speech in a public forum that *Lehnert* found chargeable: "legislative lobbying or other political union activities" for "ratification or implementation of *petitioners' collective-bargaining agreement*." 500 U.S. at 522, 527 (emphasis added). However, "[w]here ... the challenged lobbying activities relate not to the ratification or implementation of a dissenter's collective-bargaining agreement," *i.e.*, extra-unit lobbying, *Lehnert* found "the connection to the union's function as bargaining representative too attenuated to justify compelled support by objecting employees," *id.* at 520, noting that "[t]he burden upon freedom of expression is particularly great where ... the compelled speech is in a public context." *Id.* at 522; *see id.* at 559 (Scalia, J.).

Similarly, litigation involving other bargaining units bears no such relation—and is therefore not "germane"—to the purposes for which MSEA has been imposed as the Nonmembers' exclusive bargaining representative, nor is it within the scope of the duties owed by MSEA to the Nonmembers. 26 ME. REV. STAT. ANN. § 979 (specifying duties owed under statute); *see also Opinion of the Justices*, 401 A.2d at 147 (holding that "[i]t is fairly within the compass of this mutuality of obligation established by statute that each employee within the bargaining unit share in defraying *the costs of the representational and collective*

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[11](...continued)
employers." 26 ME. REV. STAT. ANN. § 979-A(1). Maine law also defines the obligation imposed upon such a bargaining agent. *See generally* 26 ME. REV. STAT. ANN. § 979-D.

bargaining services that the bargaining agent is required to provide without discrimination.") (emphasis added).

This Court's forced-fees jurisprudence does not support the proposition that employees who desire to have no voluntary relationship with a union can be compelled to subsidize its litigation activities for unions and bargaining units far afield from their own. Such litigation may advance the interests of other unions and bargaining units, often in other jurisdictions. But the Nonmembers' employment interests are not advanced by such litigation, except, perhaps, in the "too attenuated" way that support for political candidates, lobbying, public relations, or organizing might advance their interests. *See Lehnert*, 500 U.S. at 520, 528 (Blackmun, J.); *id.* at 559 (Scalia, J.).

Indeed, extra-unit litigation might well **directly conflict** with the interests of the State employee Nonmembers. For example, the litigation could involve bargaining units of local government employees an MSEA affiliate represents in a locality in which a Nonmember resides. Under these circumstances, such litigation would not only not be "germane" to the Nonmember's employment relations, but would directly impact his or her interests as a citizen, taxpayer, and/or competitor for scarce public resources. Thus, just as with lobbying and public-relations activities, "[b]y utilizing [the Nonmembers'] funds ..., the union would use each dissenter as 'an instrument for fostering public adherence to an ideological point of view he finds unacceptable.'" *Lehnert*, 500 U.S. at 522 (Black-

mun, J.), *quoting Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

II. *Lehnert* Neither Alters Nor Diminishes the Authority of This Court's Existing Bar on the Use of Forced Dues for Extra-Unit Litigation.

The panel below purported to rely heavily upon this Court's divided decision in *Lehnert*, but then found a distinction, reasoning that:

> *Lehnert* addressed a different factual context —a pooling arrangement—and explored the reasons that pooled expenditures for litigation fall outside the rule articulated in *Ellis*.... *Ellis* continues to be good law, and to mean what it literally says, in cases involving a unit's direct expenditures to support litigation by other bargaining units. But where monies are spent in a pooling arrangement, as described by *Lehnert*, *Ellis* does not bar the chargeability of extra-unit litigation expenses, and *Lehnert*'s definition of germaneness, applicable generally to pooling arrangements, applies sensibly to litigation expenses funded by such a pooling arrangement.

Pet. App. A at 29a; 498 F.3d at 63-64, *citing Lehnert*, 500 U.S. at 523-24. However, the panel created a distinction where none exists on the facts or the law.

In fact, the litigation expenditures at issue in *Ellis* were not from "local union monies" contributed to other

units or the national affiliate. They were litigation expenditures of the national affiliate (Grand Lodge) to which the plaintiff nonmembers paid part of their dues directly.[12] In short, they were "pooled" monies. Indeed, *Lehnert* noted that the Court recognized the pooling arrangement in *Ellis*. *See* 500 U.S. at 523.

Even accepting the dubious proposition that this Court in *Lehnert* abandoned its categorical holding in *Ellis sub silentio*, or wrote exceptions into *Ellis* just seven years after its unanimous and categorical holding, extra-unit litigation fails the *Lehnert* plurality's general test. 500 U.S. at 524.

This was, after all, Justice Blackmun's conclusion. *Id.* at 528. Justice Blackmun's application of his own test is certainly more authoritative than that of any lower courts. Justice Blackmun made clear that extra-unit litigation expenses are never chargeable: "Just as the Court in *Ellis* determined that the RLA, as informed by the First Amendment, prohibits the use of dissenters' fees for extraunit litigation, we hold that the Amendment proscribes such assessments in the public sector." *Id.* (citation omitted).

All extra-unit litigation fails at least two elements of the three-part *Lehnert* test, 500 U.S. at 519, as Justice Blackmun's plurality opinion ruled. First, "extra-unit litigation [is] more akin to lobbying in both

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[12]*See Ellis v. Railway Clerks*, 91 L.R.R.M. (BNA) 2339, 2341 (S.D. CAL. 1976), *further proceedings*, 108 L.R.R.M. (BNA) 2648, 2650 (S.D. CAL. 1980), *aff'd in part, rev'd in part*, 685 F.2d 1065, 1068, 1073 (9TH CIR. 1982), *aff'd in part, rev'd in part,* 466 U.S. 435 (1984).

kind and effect," and thus adds significantly to the burden of the agency shop on free speech, the third prong. Second, Justice Blackmun recognized that which the courts below refused to recognize: "When unrelated to an objecting employee's unit, such activities are not germane to the union's duties as exclusive bargaining representative," the first prong. *Id.* at 528.

Thus, extra-unit litigation is akin to the organizing found completely nonchargeable in *Ellis*, 466 U.S. at 451. There, the Court held organizing to be nonchargeable to objecting nonmembers based upon "several considerations." *Id.*

First, the Court noted that "the notion that [RLA] § 2, Eleventh would be a tool for the expansion of overall union power appears nowhere in the legislative history." Moreover, "where a union shop provision is in place and enforced, all employees in the relevant unit are already organized. By definition, therefore, organizing expenses are spent on employees outside the collective-bargaining unit already represented." 466 U.S. at 452. A "union's organizing efforts outside the bargaining unit" are not directed at "the employee the union was required to represent and from whom it could not withhold benefits obtained for its members."

Moreover, the benefits from organizing—where "money is spent on people who are not union members, and only in the most distant way works to the benefit of those already paying dues"—is roughly comparable to that resulting from union contributions to pro-labor political candidates. The nonmember thus is, with

regard to organizing, "a far cry from the free-rider ... with which Congress was concerned." *Id.* at 452-53.[13]

Similarly, extra-unit litigation is akin to the extra-unit lobbying expenditures also found nonchargeable in *Lehnert*, 500 U.S. at 519-22. Two factors were important in assessing that activity: the nature and content of the activity; and the forum in which it occurs.

The Court focused on the fact that "the challenged lobbying 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." Consequently, the Court held that "the connection to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees." *Id.* at 520.

The Court expressed particular concern with the fact that "our national and state legislatures, the media, and the platform of public discourse are public fora open to all." *Id.* at 521. In light of this fact, the Court held that "the so-called 'free-rider' concern is inapplicable where lobbying extends beyond the effectuation of a collective-bargaining agreement." *Id.* at 521.

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[13]The Court also rejected charging nonmembers for the union's efforts to persuade employees **within** the union to join the union, albeit for a different reason: "it would be perverse to read [the RLA] as allowing the union to charge to objecting nonmembers part of the costs of attempting to convince them to become members." *Id.* at 452 n.13.

Moreover, as with litigation expenditures, the Court recognized the "'additional interference with the First Amendment interests of objecting employees'":

> The burden upon freedom of expression is particularly great where, as here, the compelled speech is in a public context. By utilizing petitioners' funds for political lobbying and to garner the support of the public in its endeavors, the union would use each dissenter as "an instrument for fostering public adherence to an ideological point of view he finds unacceptable." The First Amendment protects the individual's right of participation in these spheres from precisely this type of invasion. Where the subject of compelled speech is the discussion of governmental affairs, which is at the core of our First Amendment freedoms, the burden upon dissenters' rights extends far beyond the acceptance of the agency shop and is constitutionally impermissible.

Id. at 521-22 (citations omitted), *quoting Ellis*, 466 U.S. at 456.

Based upon these principles, the Court concluded that lobbying expenditures for purposes other than "ratification or implementation of [the nonmembers'] collective bargaining agreement" may not properly be charged to them. *Id.* at 527 (opinion of Blackmun, J.); *see also id.* at 559 (opinion of Scalia, J.) (agreeing "that the challenged lobbying expenses are nonchargeable").

All of the considerations that apply to organizing and lobbying also apply to extra-unit litigation activi-

ties. Consequently, recognizing the "important political and expressive nature of litigation," *i.e.*, that it "entail[s] speech of a political nature in a public forum," and that extra-unit litigation is "not germane to the union's duties as exclusive bargaining representative," the *Lehnert* plurality concluded that the First Amendment "proscribes such assessments in the public sector." *Id.* at 528.

Extra-unit litigation fares no better under Justice Scalia's "statutory duties" and "duty of fair representation" test:

> I would hold that to be constitutional a charge must *at least* be incurred in performance of the union's statutory duties. I would make explicit what has been implicit in our cases since [*Machinists v.*] *Street*[, 367 U.S. 740, 774 (1961)]: A union cannot constitutionally charge nonmembers for any expenses except those incurred for the conduct of activities in which the union owes a duty of fair representation to the nonmembers being charged.

Id. at 558 (Scalia, J., concurring in the judgment in part, dissenting in part) (original emphasis).

In applying his "statutory duties" test, Justice Scalia agreed with the majority that nonmembers can be compelled to subsidize "a pro rata assessment of NEA's costs in providing collective-bargaining services ... to its affiliates ...." *Id.* at 561. However, Justice Scalia's opinion nowhere said that extra-unit litigation is among those "chargeable, on-call services," listing only "negotiating advice, economic analysis, and

informational assistance." *Id.* Notably, although his opinion primarily discussed his disagreements with Justice Blackmun, Justice Scalia did **not** say that he disagreed with Justice Blackmun's conclusion about extra-unit litigation.

Most importantly, Justice Scalia quoted with approval the holding of *Ellis* that nonmembers can be charged "*only* [expenses] for litigation 'incident to negotiating and administering *the contract* or to settling grievances and disputes *arising in the bargaining unit*,' and 'other litigation ... *that concerns bargaining unit employees* and is normally conducted by the exclusive representative.'" *Id.* at 555 (emphasis added) (*quoting Ellis*, 466 U.S. at 453).

Justice Scalia then concluded that "there is good reason to treat [*Ellis* and other private-sector cases] *as merely reflecting the constitutional rule*." *Id.* (emphasis added). Justice Scalia thus implicitly concluded extra-unit litigation is not constitutionally chargeable, under his general test.[14]

Thus, under either the *Lehnert* plurality's test, or that of Justice Scalia, reversal of the court below is mandated.

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[14]This inference has been drawn by the lower courts in *Browne v. Wisconsin Employment Relations Commission*, 485 N.W.2d 376, 388 (WISC. 1992), *Albro v. Indianapolis Educ. Ass'n*, 585 N.E.2d 666, 673 (IND. CT. APP. 1992), *adopted sub nom. Fort Wayne Educ. Ass'n v. Aldrich*, 594 N.E.2d 781 (IND. 1992), and *Pilots Against Illegal Dues ("PAID") v. Air Line Pilots Ass'n*, 938 F.2d 1123, 1129-31 (10TH CIR. 1991).

III. Compelled Speech Is Subject to Strict Scrutiny.

There is a reason that extra-unit litigation is deemed nonchargeable: this activity, in essence, compels the Nonmembers to speak against their will in a public forum, and is therefore subject to a "strict scrutiny" analysis.

In its government-mandated speech cases, this Court has long applied the most rigorous analysis—"strict scrutiny"—in adjudicating infringements on First-Amendment freedoms. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795, 798 (1988). Content-based regulation of speech triggers the highest level of judicial evaluation, "strict scrutiny." *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 827-29 (1995) (content-based discrimination is presumptively unconstitutional); *Madsen v. Women's Health Center*, 512 U.S. 753, 790-91 (1994) (content-based regulations receive strict scrutiny); *Burson v. Freeman*, 504 U.S. 191, 197-98 (1992) (content-based restrictions are subject to "exacting scrutiny," "strict scrutiny," requiring a showing that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end") (citations omitted); *cf. Carey v. Brown*, 447 U.S. 455, 461-62 (1980) (for the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end). "Under strict scrutiny, the *Government*

must prove that applying [the act] to [the speech in question] furthers a compelling interest and is narrowly tailored to achieve that interest."[15]

Strict scrutiny is necessary here because this Court has already recognized that the "agency shop" itself infringes on the Nonmembers' First-Amendment rights, and that compelled speech results from the imposition of the "agency shop." *Ellis*, 466 U.S. at 455 ("by allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights").

Indeed, this Court has repeatedly recognized the constitutional implications of the public-sector agency shop. *Abood v. Detroit Board of Education* held that compelling "contributions for political purposes works ... an infringement of ... constitutional rights." 431 U.S. 209, 234 (1977). It also recognized that "[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests," even when the union is engaged in bargaining and contract administration. *Id.* at 222.

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[15] *FEC v. Wisconsin Right to Life, Inc.*, — U.S. —, 127 S. Ct. 2652, 2664 (2007) (Roberts, C.J.) (original emphasis), *citing First Nat'l Bank v. Bellotti*, 435 U.S. 765, 786 (1978) ("Especially where, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, ...'the burden is on the Government to show the existence of [a compelling] interest'") (footnotes omitted); *cf. Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 473 n.16 (1997) (distinguishing between union forced dues cases and generic advertising program, with the latter "even less likely to pose a First Amendment burden").

As Justice Powell noted in *Abood*, "*any* withholding of financial support for a public-sector union is within the protection of the First Amendment," and "the State ... bear[s] the burden of proving that any union dues or fees that it requires of nonunion employees are needed to serve paramount governmental interests." *Id.* at 255 (Powell, J., concurring in the judgment) (emphasis added). "Compelling a government employee to give financial support to a union in the public sector — regardless of the uses to which the union puts the contribution — impinges *seriously* upon interests in free speech and association protected by the First Amendment." *Id.* (emphasis added). Those principles are implicit in the Court's opinion in *Abood*, and were confirmed in later decisions.[16]

Abood held that public-sector forced fees are constitutionally valid only "insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes." *Id.* at 232. It also recognized that "to compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment rights." *Id.* at 222.

Abood therefore held that nonmembers "may constitutionally prevent the Union's spending a part of their required service fees to contribute to political

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[16]Justice Powell's formulation of the principle was adopted in *Ellis*: "by allowing the union shop at all, we have already countenanced a *significant* impingement on First Amendment rights." 466 U.S. at 455 (emphasis added); *see also Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 301 & n.8, 307 n.20 (1986) (repeated twice).

candidates and to express political views unrelated to its duties as exclusive bargaining representative," and for "other ideological causes not germane to its duties as collective-bargaining representative." *Id.* at 234-36. A constitutional line is drawn when "activities fall outside the Union's duties as exclusive representative or involve constitutionally protected rights of association." *Id.* at 236-37 & n.33.

Abood further established that First-Amendment strict scrutiny is required in deciding when nonmembers can be compelled to pay union fees. In holding that a union may not constitutionally expend compulsory fees for "ideological activities unrelated to collective bargaining," *Abood* relied upon decisions prohibiting government from infringing on free association or requiring relinquishment of First-Amendment rights as a condition of public employment unless a vital governmental interest is served directly and narrowly. *Id.* at 233-36.

The case cited most often in *Abood* was *Elrod v. Burns*, which recognized that, in public employment, "a significant impairment of First Amendment rights must survive exacting scrutiny." 427 U.S. 347, 362 (1976) (plurality opinion); *see also id.* at 363 (government means must be "least restrictive of freedom of belief and association"). Thus, implicit in the majority opinion in *Abood* is the principle that "even in public employment, 'a significant impairment of First Amendment rights must survive exacting scrutiny.'" 431 U.S.

at 259 (citing *Elrod*, 427 U.S. at 362, 381 (Powell, J., dissenting in part)).[17]

The "exacting scrutiny" standard was applied in *Ellis*. While arising under § 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152, Eleventh, *Ellis* applied a constitutional standard "to avoid the constitutional difficulty" raised by the argument that the disputed expenditures violated the First Amendment.[18]

In deciding whether particular union expenditures are constitutionally chargeable, *Ellis* said that the issue is whether they "involve additional interference with the First Amendment interests of objecting employees, and, if so, whether they are nonetheless

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[17]Although Justice Powell believed that patronage serves a compelling state interest, he agreed with the majority in *Elrod* and in a dissent in *Branti v. Finkel*, 445 U.S. 507, 527-28 (1980) (Powell, J., dissenting), that it is—like state-coerced support of unions—unconstitutional unless the exacting test is met. Lower courts also have concluded that "[i]mplicit in Justice Stewart's opinion in *Abood* is the recognition that, when the government impinges on an individual's associational rights—either by prohibiting or compelling association—such action cannot be sustained unless it is justified by a compelling governmental interest." *Galda v. Bloustein*, 686 F.2d 159, 164 (3D CIR. 1982) (student fee case); *accord*, *e.g.*, *Gibson v. Florida Bar*, 798 F.2d 1564, 1569 (11TH CIR. 1986) (mandatory bar dues).

[18]*Ellis*, 466 U.S. at 444-48 & 455-56; *see also Roberts v. United States Jaycees*, 468 U.S. 609, 637-38 (1984) (O'Connor, J., concurring); *Lehnert*, 500 U.S. at 528 ("the Court in *Ellis* determined that the RLA, as informed by the First Amendment, prohibits the use of dissenters' fees for extraunit litigation") (Blackmun, J.), *citing Ellis*, 466 U.S. at 453, & *id.* at 555 ("there is good reason to treat [*Ellis* and the Court's other statutory cases] as merely reflecting the constitutional rule") (Scalia, J.).

adequately supported by a *governmental interest*." 466 U.S. at 455-56 (emphasis added). *Ellis* applied heightened scrutiny to all disputed activities that "have direct communicative content and involve the expression of ideas" (conventions, publications, organizing, and litigation). The Court then determined whether each activity directly served the governmental interest underlying § 2, Eleventh, *i.e.*, "to require all *members of a bargaining unit* to pay their fair share of the costs of *performing the function of an exclusive bargaining agent*." 500 U.S. at 446, 456 (emphasis added).

After *Abood* and *Ellis*, the Court next addressed these issues in *Lehnert*. There, the Court considered the chargeability of a number of categories of union expenditures, including most notably for purposes of this case, "bargaining, litigation, and other activities on behalf of persons not in petitioners' bargaining unit." 500 U.S. at 514.

However, in so doing, the Court was splintered. Justice Blackmun, writing for a four-Justice plurality, held that "chargeable activities 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.

Rejecting a narrowly-focused bargaining-unit standard of chargeability of "non-political expenses," Justice Blackmun concluded "that a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with other-

wise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit." 500 U.S. at 524.

The Court justified this conclusion based upon its earlier holding in *Ellis* that unions may charge non-members for the costs of national conventions, by which it "maintain[s] its corporate or associational existence, ... elect[s] officers to manage and carry on its affairs, and ... consult[s] its members about overall bargaining goals and policy." 500 U.S. at 523, *quoting Ellis*, 466 U.S. at 448

However, Justice Blackmun, joined by Chief Justice Rehnquist and Justices White and Stevens, explicitly recognized extra-unit litigation as one of the exceptions to this general conclusion, also consistent with *Ellis*:

> This rationale does not extend, however, to the 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 (plurality opinion).[19] The plurality did so in recognition of "the important political and expressive nature of litigation."[20]

Similarly, Justice Scalia's partial concurrence in *Lehnert* explicitly relied upon *Ellis*' holding that extra-unit litigation is not chargeable and found that "there is good reason to treat *Ellis* 'as reflecting the constitutional rule.'" *Lehnert*, 500 U.S. at 555.

The free-speech implications of compelled-dues requirements were recognized again by this Court as recently as its last Term, in *Davenport v. Washington Educ. Ass'n*, ___ U.S. ___, 127 S. Ct. 2372 (2007). In *Davenport*, this Court addressed a challenge to a state statute (REV. CODE WASH. ANN. § 760) limiting the authority of unions to extract from nonmembers monies solely for limited political and ideological purposes. In a unanimous decision, the Court held constitutional a provision of state law protecting nonunion employees against collection and use of union

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[19]As previously noted, another narrow exception is lobbying for the ratification or implementation of a collective bargaining agreement in the dissenting nonmembers' bargaining unit. *See discussion supra* at p. 19. Like intra-unit litigation, such lobbying, although political speech, is permissibly charged to dissenting nonmembers because of its close relationship to bargaining for them, while other lobbying expenditures —including those for other bargaining units—are not. *Lehnert*, 500 U.S. at 519-22, 527 (Blackmun, J.), *see id.* at 559 (Scalia, J.).

[20]*Id.*, *citing Button*, 371 U.S. at 431 ("recognizing that for certain groups, 'association for litigation may be the most effective form of political association'"); *see also In re Primus*, 436 U.S. 412, 426-28 (1978) (litigation is a form of petition and speech fully protected by the First Amendment).

dues for limited political purposes in the absence of their affirmative consent.

Davenport is important here because the Court unanimously rejected the notion that "this Court's agency-fee jurisprudence established a balance between the First Amendment rights of unions and of nonmembers." It reiterated that "unions have no constitutional entitlement to the fees of nonmember-employees." 127 S. Ct. at 2378-79. The Court rejected balancing in cases such as these, because the statutes involved grant unions an "extraordinary *state* entitlement to acquire and spend *other people's* money." *Id.* at 2380 (original emphasis).

Thus, although this Court has not explicitly applied "strict scrutiny" to union forced-fee exactions, this Court's general jurisprudence regarding compelled speech mandates explicit application of "strict scrutiny" in this context, and the Court should do so here.

IV. Since the Divided Decision in *Lehnert*, the Lower Courts Have Been Confused.

The confusion among the lower courts that have attempted to apply *Lehnert* demonstrates that, as Justice Scalia warned, *Lehnert* "obscures the category of expenses for which a union may constitutionally compel contributions from dissenting nonmembers in an agency shop." 500 U.S. at 550 (dissenting in part). Indeed, not fewer than six Justices recognized as much in *Board of Regents v. Southworth*, in which the Court declined to impose on students and universities

procedures like those applicable to forced union fees, commenting that:

> different Members of the Court reached varying conclusions [in *Lehnert*] regarding what expressive activity was or was not germane to the mission of the association. If it is difficult to define germane speech with ease or precision where a union or bar association is the party, the standard becomes all the more unmanageable in the public university setting, particularly where the State undertakes to stimulate the whole universe of speech and ideas.

529 U.S. 217, 232 (2000).

This problem is reflected in much of the lower courts' post-*Lehnert* decisionmaking as to the chargeability of union expenditures. The lower courts' initial response was, in the main, to follow the *Lehnert* plurality's conclusion regarding extra-unit litigation expenditures.[21] Thereafter, one Circuit chose a different path.[22] Since then, two other Circuits— including

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[21]*PAID*, 938 F.2d at 1129-31 (extra-unit litigation non-chargeable); *Albro*, 585 N.E.2d at 673 (same); *Browne*, 485 N.W.2d at 388 (same); *see also Crawford v. Air Line Pilots Ass'n*, 992 F.2d 1295, 1303-04 (4TH CIR. 1993) (*en banc*) (Russell, J., dissenting) (dissenting from majority's holding that issue was not properly preserved for review and holding that "[i]n *Ellis* and *Lehnert*, the Supreme Court, in positive, clear-cut terms, declared as bluntly as it could that expenses for litigation outside of a dissenter's unit ('extra-unit litigation') were not chargeable against the dissenter").

[22]*Reese*, 71 F.3d at 624; *but see Bromley v. Mich. Educ.* (continued...)

the court below[23]—have applied *Lehnert*'s general test to evade *Ellis*' categorical and specific holding and treated an affiliate's extra-unit litigation expenditures as chargeable to nonmembers. *Otto v. Penn. Educ. Ass'n*, 330 F.3d 125, 135-39 (3D CIR. 2003).

Circuit Judge Silberman also has criticized the *Lehnert* test. Judge Silberman was dubious over the fact-finding exercise directed by his panel's majority in remanding a case, noting that "findings of fact are only useful if a court has available a legal framework into which to place those findings." He found such a framework lacking in *Lehnert*. *Beckett v. Air Line Pilots Ass'n*, 59 F.2d 1276, 1280-81 (D.C. CIR. 1995) (Silberman, J., concurring *dubitante*).

This case, therefore, presents an opportunity for this Court, applying the "strict scrutiny" standard in analyzing compelled speech, to both limit appropriately the categories for which a union may constitutionally compel contributions from dissenting employees, and to set a simple bright-line test facilitating nonmembers' efforts to protect their constitutional right against

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[22](...continued)
Ass'n, 82 F.3d 686, 695 (6TH CIR. 1996) (following *Reese*, but noting: "Whether the objecting employee can be required to contribute to the cost of such litigation proved to be a difficult question for our panel in light of the Supreme Court's fractured decision in *Lehnert*").

[23]Initially, the First Circuit noted that *Ellis* held that "it was error to permit the union 'to spend compelled dues for its general litigation and organizing efforts.'" *Romero v. Colegio de Abogados*, 204 F.2d 291, 298 (1ST CIR. 2000) (*quoting Ellis*, 466 U.S. at 441). The panel below dismissed that comment as "*dicta*." Pet. App. A at 26a-27a n.15; 498 F.3d at 63 n.15.

compelled speech. *Cf. Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 307 n.20 (1986) ("the government and union have a responsibility to provide procedures that minimize that impingement [on First-Amendment rights] and that facilitate a nonunion employee's ability to protect his rights").

V. The Existing General Standard of *Lehnert* Fails to Protect Nonmembers' First-Amendment Rights with the "Least-Restrictive Means."

The Question Presented here is narrow relative to the broad questions considered in *Lehnert*. Nevertheless, consideration of *Lehnert*'s broad standard is a "subsidiary question fairly included" in the Question Presented, Rule 14.1(a), as the First Circuit's views regarding the standard set in *Lehnert* form the basis for its decision, and its error.[24]

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[24] *See City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 214 n.8 (2005) (Ginsburg, J.) (considering question "inextricably linked to" question presented), *citing R.A.V. v. St. Paul*, 505 U.S. 377, 381, n.3 (1992), *Ballard v. C.I.R.*, 544 U.S. 40, 47 n.2 (2005) (same), *and* R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* 414 (8th ed. 2002) ("'Questions not explicitly mentioned but essential to analysis of the decisions below or to the correct disposition of the other issues have been treated as subsidiary issues fairly comprised by the question presented.' (internal quotation marks omitted)"; *see also Medellin v. Dretke*, 544 U.S. 660, 685 n.2 (2005) (*per curiam*) (Court should have considered issue where "the correct, independent interpretation ... was the central question in the ... proceedings below") (O'Connor, J., dissenting).

In *Street*, the majority justified its holding upon the prediction that a remedy for the aggrieved nonmembers could be constructed with "a minimum of administrative difficulty." 367 U.S. 740, 774 (1961). But Justice Black correctly anticipated the difficulties that arise from compelled subsidization of union activities, and the burdens on nonmembers' rights caused by a remedy limited to a refund of expenditures adjudicated to be "nonchargeable":

> It may be that courts and lawyers with sufficient skill in accounting, algebra, geometry, trigonometry and calculus will be able to extract the proper microscopic answer from the voluminous and complex accounting records of the local, national and international unions involved. It seems to me, however, that while the Court's remedy may prove very lucrative to special masters, accountants and lawyers, this formula, with its attendant trial burdens, promises little hope for financial recompense to the individual workers whose First Amendment freedoms have been flagrantly violated. Undoubtedly, at the conclusion of this long exploration of accounting intricacies, many courts could with plausibility dismiss the workers' claims as *de minimis* when measured only in dollars and cents

Id. at 795-96 (Black, J., dissenting); *see also id.* at 778-79 (Douglas, J., concurring) (anticipating a "practical problem" in the relief ordered).[25]

Although this Court has categorically rejected Justice Black's concern about treating these questions as "*de minimis*,"[26] the *Lehnert* formulation effectively leaves nonmember employees virtually "in the dark," *Hudson*, 475 U.S. at 306, about the classification of properly chargeable union expenditures and unable to protect their constitutional rights. It also places nonmembers in the untenable position of litigating for years or decades seeking refunds of money that should never have been collected from them.[27]

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[25]As this Court has observed, "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn.' *Speiser v. Randall*, 357 U.S. 513, 525 (1958). Error in marking that line exacts an extraordinary cost." *United States v. Playboy Entm't Group*, 529 U.S. 803, 817 (2000); *cf. Tavernor v. Illinois Fed. of Teachers*, 226 F.3d 842, 850 (7TH CIR. 2000) (noting that nonmembers, while compensated for the loss of their funds by interest, cannot be compensated for "the transaction costs they incur in order to obtain it").

[26]*See Abood*, 431 U.S. at 234 n.31 (*quoting* James Madison, 2 *The Writings of James Madison* 186 (Hunt ed. 1901), and Thomas Jefferson, I. Brant, *James Madison: The Nationalist* 354 (1948)); *see also Hudson*, 475 U.S. at 305 & n.15.

[27]*See, e.g., Communications Workers v. Beck*, 487 U.S. 735, 739 (1988) (case filed in 1976; decided by this Court in 1988); *Pirlott v. NLRB*, — F.3d —, 2008 WL 1757545 at *2 (D.C. CIR. 2008) (pending for nearly nineteen years before National Labor Relations Board); *Belheumer v. Labor Relations Comm'n*, 432 Mass. 458, 463-64 (2000) (holding that 53-day hearing conducted over eight years was "reasonably prompt" under *Hudson*).

As the disarray among the lower courts demonstrates, the *Lehnert* formulation provides little guidance even for attorneys and judges. Consequently, it allows labor unions and their affiliates to burden nonmembers' First-Amendment rights and satisfy their avarice through creative accounting and shell-game-like shifting of nonmembers' funds among various affiliates. *Cf. Davenport*, 127 S. Ct. at 2380 n.2 (rejecting notion that union's "improvident accounting practices" justify unconstitutionality of statutory protection of nonmembers' rights).

Worse, the *Lehnert* formulation makes it virtually impossible for workers unschooled in the pilpulism of labor law and federal constitutional standards to assess whether a coerced union fee is properly calculated, even assuming a union's scrupulous compliance with *Hudson*'s disclosure requirements. *Cf.* 475 U.S. at 306-10.

In permitting unions to charge nonmembers for their "pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit," *Lehnert*, 500 U.S. at 524, the Court has heavily burdened "a nonunion employee's ability to protect his rights," *Hudson*, 475 U.S. at 307 n.20, for, at a minimum, he or she knows nothing about those units and their activities.

As Justice Black recognized, nonmember employees are ill-positioned and lack the resources to determine, for example, whether union expenditures made

far afield from their bargaining unit are "'germane' to collective-bargaining activity." *Lehnert*, 500 U.S. at 519. Can the Nonmembers truly be expected to track SEIU's myriad litigation and other activities in California and elsewhere?

VI. This Court Should Not Only Apply Its Existing Bright-Line Test for Extra-Unit Litigation, But Should Also Revise and Clarify the Standard for All Extra-Unit Expenditures.

The notion that "the costs associated with *otherwise chargeable activities* of [a union's] state and national affiliates," *Lehnert*, 500 U.S. at 524 (emphasis added), can ever meet the standard of being "justified by the government's vital policy interest in labor peace and avoiding 'free riders,'" *id.* at 519, is problematic in providing a structure for vindicating nonmembers' rights. The imperative that infringements on free speech be construed strictly through application of the least-restrictive means, *e.g. Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997), mandates that the infringement go no further than the purposes for which the infringement is intended.

That purpose is, of necessity, set forth in the enabling legislation. The only relevant "vital policy interest" is that limited to and expressed in the authorizing statute, which revolves around the bargaining unit. In this case, that legislation is Maine's State Employees Labor Relations Act, 26 ME. REV. STAT. ANN. § 979 *et seq*.

The authority granted to a "[b]argaining agent" under Maine law, 26 ME. REV. STAT. ANN. § 979-A(1), is not some grand scheme to spread the benefits and burdens of public-sector unionization broadly among the other forty-nine states of the Union. Maine obviously cannot tell other States how to order their individual labor relations with their own government employees.

The relevant authorizing legislation here does not even constitute a grand scheme to order public employee relations in Maine generally. The statute's focus is limited to individual bargaining units, 26 ME. REV. STAT. ANN. § 979-A(1),[28] as are the duties and burdens imposed upon those subject to the law. 26 ME. REV. STAT. ANN. § 979-D(1) (setting forth the obligation to bargain imposed upon "the public employer and the bargaining agent"). Clarification and narrowing of the standards for chargeability would do much to provide the "needed clarity" prayed for by Judge Lynch in her concurrence below. Pet.App. A at 41a; 498 F.3d at 69.

That is not to say, however, that the appropriate test begins and ends with examination of a State's statutory limits. This Court recognized last Term that there is a "constitutional floor for unions' collection and

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[28] "'Bargaining agent' means any lawful organization, association or individual representative of such organization or association which has as its primary purpose the representation of employees in their employment relations with employers, and which has been determined by the public employer as defined in subsection 5 or by the executive director of the board to be the choice of the majority **of the unit** as their representative." 26 ME. REV. STAT. ANN. § 979-A(1) (emphasis added).

spending of agency fees." *Davenport*, 127 S. Ct. at 2379. Any State statutory scheme must rise at least to the level of that constitutional floor.

Hence, legislative imposition of an exclusive bargaining representative could not exceed the oft-repeated formulation—for purposes of "collective bargaining, contract administration, and grievance adjustment," and "performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues"—set forth in this Court's forced-dues cases. *See*, *e.g.*, *Abood*, 431 U.S. at 225-26; *Ellis*, 466 U.S. at 448; *Beck*, 487 U.S. at 745 & 762-63 (*quoting Ellis*).[29]

Constitutional limits would be violated if a legislature were to attempt to appoint a monopoly-bargaining representative as a public (or private-sector) employee's agent for purposes of something as nebulous and broad as all "employment-related matters" across the nation, including, for example, lobbying Congress and that legislature.[30]

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[29]Under forced-dues provisions authorized by Federal law, the Court has likewise limited unions' authority to "the exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with *the employer* on labor-management issues.'" *Beck*, 487 U.S. at 762-63, *quoting Ellis*, 466 U.S., at 448 (emphasis added). *Beck* limited chargeability to union activities related to "the employer," not every employer with whom a union—or its affiliates—have a collective bargaining relationship.

[30]For this reason, one element of the Blackmun plurality's criticism of Justice Scalia's "statutory duties" test in *Lehnert* is not well-taken. The Blackmun plurality thought that Justice Scalia's

(continued...)

As this Court has noted in identifying an interest that can justify coerced speech and association, "care must be taken not to confuse the interest of partisan organizations with governmental interests." *Elrod*, 427 U.S. at 362.

The governmental interest for forced-dues arrangements was narrowly defined more than three decades ago, in *Abood*, as limited to the goal of "eliminat[ing] 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 cost *thereof*." *Abood*, 431 U.S. at 221-22, 224 (emphasis added); *accord Ellis*, 466 U.S. at 447; *Street*, 367 U.S. at 764 & n.15.[31]

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[30](...continued)
"analysis turns our constitutional doctrine on its head. Instead of interpreting statutes in light of First Amendment principles, he would interpret the First Amendment in light of state statutory law." *Lehnert*, 500 U.S. at 526. The analysis of any compelled-dues requirement must begin with analysis of whether the statutory authorization is overbroad within the Court's constitutional First-Amendment framework. *See Street*, 367 U.S. at 749-50 (construing RLA to avoid constitutional issues); *Abood*, 431 U.S. at 220 (discussing the constitutional analysis in *Street*). Thus, Justice Scalia's test—while it limits chargeable costs to those within the union's statutory duties ("the state interest that can justify mandatory dues arises solely from the union's statutory duties."), is premised upon a valid constitutionally-limited statute in the first place. 500 U.S. at 553.

[31]The pejorative characterization of nonmembers as "free riders" ("a cynical opportunist capable of grabbing the benefits the union is compelled to extend without supporting the organization," John C. Moorehouse, *Compulsory Unionism and the Free-Rider Doctrine*, 2 Cato J. 619, 628 (1982)), has never received (continued...)

Indeed, *Abood* noted that Michigan's public-sector forced-dues statute "was specifically designed to authorize agency shops in order that 'employees in the bargaining unit ... share fairly in the financial support of *their* exclusive *bargaining* representative.'" 431 U.S. at 224 (*quoting* MICH. COMP. LAWS § 423.210(2)) (emphasis added). It was that limited interest alone that led the Court to hold that *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956), and *Street* were conclusive as to the constitutionality of the statute "insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes." 431 U.S. at 223-32.

Abood's use of the phrase quoted above to describe "the costs of exclusive representation," *id.* at 229, was neither casual nor careless. Under the Michigan statute, unions are "the exclusive representatives of all

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[31](...continued)
serious scrutiny from this Court. Even presuming *arguendo* that union representation confers a benefit (the *Lehnert* plurality specifically disclaimed the need to show "some tangible benefit to the dissenters' bargaining unit," 500 U.S. at 522), in fact, monopoly bargaining—or "exclusive representation"—is a **privilege** for which unions lobby, and which they jealously guard. Charles W. Baird, *Toward Equality and Justice in Labor Markets*, J. Soc. Pol. & Econ. Stud. (1995) http://www.sbe. csuhayward.edu/~sbesc/labour.html (last visited 24 Apr. 2008) ("[I]t is disingenuous for unions to claim that exclusive representation is a burdensome requirement. They fought long and hard to get government to grant them the privilege of exclusive representation."). The implication that this is a "problem" foisted upon unions against their will is simply a myth. The "free-rider problem" is one of the unions' own creation. Union complaints about "free riders" are analogous to complaints about the high price of gasoline from buyers of gas-guzzling SUVs, and are equally unsympathetic.

the public employees *in [an appropriate] unit for the purposes of collective bargaining* in respect to rates of pay, wages, hours of employment or other conditions of employment" and must be permitted to participate in the adjustment of employee grievances. MICH. COMP. LAWS § 423.211 (emphasis added).[32]

Maine's statutory scheme is remarkably similar. Under the Maine statute, a union "has as its primary purpose the representation of employees in *their* employment relations with employers, and which has been determined by *the* public employer as defined in subsection 5 or by the executive director of the board to be the choice of the majority *of the unit* as their representative." 26 ME. REV. STAT. ANN. § 979-A(1) (emphasis added).

Similarly, collective bargaining is defined as the mutual obligation of "the public employer and the bargaining agent":

> [t]o confer and negotiate in good faith with respect to wages, hours, working conditions and contract grievance arbitration, except that

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[32]Collective bargaining is defined as:

> the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising under the agreement, and the execution of a written contract, ordinance or resolution incorporating any agreement reached.

MICH. COMP. LAWS § 423.215.

> by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession. All matters relating to the relationship between the employer and employees shall be the subject of collective bargaining.

26 ME. REV. STAT. ANN. § 979-D.

The statute then provides a "laundry list" of "matters appropriate for collective bargaining," including "Wage and salary schedules ...; Work schedules relating to assigned hours and days of the week; Use of vacation or sick leave, or both; General working conditions; Overtime practices; Rules for personnel administration ...; Compensation system for [relevant] employees ...." *Id.*

Thus, the only functions the statute here imposes upon an exclusive representative are collective bargaining, contract administration, and grievance adjustment in the bargaining unit.

As under the Federal labor statutes, a union is an exclusive representative, and has a duty of fair representation, only for services that "gro[w] out of the collective bargaining relationship," not all "services that are employment-related."[33] Therefore, by defini-

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[33] *Chemical Workers Local 1 v. Pittsburgh Plate Glass*, 404 U.S. 157, 165-82 (1971) (Brennan, J.) (retirees' health benefits were not a mandatory subject of bargaining because those retirees were outside of the relevant bargaining unit); *United Mine Workers v. Pennington*, 381 U.S. 657, 666 (1965) ("there is nothing in the labor policy [of the United States] indicating that the union (continued...)

tion, there is no statutory obligation to perform any functions for, and no duty of fair representation owed to, anyone except the employees in one unit. *See Ellis*, 466 U.S. at 451-53; *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 375-76 & n.22 (1984).

Necessarily, then, under the First Amendment—and the RLA as construed to avoid constitutional difficulty—the test for chargeable expenditures is not and cannot be whether the activity relates to bargaining *somewhere* or that it *somehow* impacts on the Nonmembers' bargaining unit, no matter how attenuated that impact might be. Rather, it:

> 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 ... the direct costs of negotiating and administering *a* collective-bargaining contract and of settling grievances and disputes, [and] the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the

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[33](...continued)
and the employers in one bargaining unit are free to bargain about the wages, hours, and working conditions of other bargaining units or to attempt to settle those matters for the entire industry"); *see also National Treasury Employees Union v. FLRA*, 800 F.2d 1165, 1168-71 (D.C. CIR. 1986) (opinion by Bork, J.).

> duties of the union *as exclusive representative of the employees in the bargaining unit*.

Ellis, 466 U.S. at 448 (emphasis added); *accord Beck*, 487 U.S. at 762-63.

This standard might seem to be the test that the plurality led by Justice Blackmun rejected in *Lehnert*, 500 U.S. at 522, a conclusion with which Justice Scalia seemingly agreed. *Id.* at 561 ("I see no reason to insist that, in order to be chargeable, on-call services for use in the bargaining process be committed by contract rather than by practice and usage.").[34] When viewed through the prism of strict scrutiny, however, such non-existent, non-enforceable standards must fail.

Justice Scalia's doubt on this point illustrates the deficiency of this approach, as it leaves nonmembers with the Herculean task of monitoring those occasions when "requested assistance ... will not be forthcoming," and they will therefore "have cause to object to the charges," all concerning small amounts for each individual employee, and on a yearly basis. 500 U.S. at 561. It is impossible to reconcile this approach with a "narrow test" that removes the burden from the parties—nonmembers—most disadvantageously situated to vindicate their constitutional rights.

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[34]This comment seems inconsistent with Justice Scalia's basic concept that a union may charge "only for the costs of performing [its] statutory duties as exclusive bargaining agent." *Lehnert*, 500 U.S. at 550; *see also id.* at 532 n.6 (Blackmun, J.) (criticizing Justice Scalia's test because it was not "appl[ied] ... fully to the charges at issue in this case.").

Lehnert notwithstanding, a general "bargaining-unit only" standard is the only principled and consistent method of adjudicating the chargeability of union expenditures. It also is the only practical, workable method of providing useful, accessible (to the nonmembers forced to pay and monitor them), and understandable limits on compelled dues. It is the only test that can meet *Street*'s holding that the remedy must be constructed with "a minimum of administrative difficulty." 367 U.S. at 774.

As one comment on *Abood* pointed out, "[a]lmost any expenditure made by a union is connected in some way to its duties as collective bargaining representative." *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 70, 196-97 (1977). The article concluded that, to reconcile *Abood* with *Street*, the line must drawn so that only "expenditures incident to the negotiation and administration of [the] specific contract" could be deemed chargeable. *Id.*

Unions have every incentive—and precious few disincentives—to exploit ambiguities in this Court's decisionmaking in order to increase their income from nonmembers. Harry G. Hutchison, *Reclaiming the First Amendment Through Union Dues Restrictions*, 10 U. Penn. J. Bus. & Emp. Law 663, 694 (forthcoming 2008). That is certain to continue unless this Court clarifies a bright-line standard for chargeability.

Moreover, a "bargaining-unit standard" is actually Justice Scalia's "statutory duties" test, *Lehnert*, 500 U.S. at 550, with teeth, insofar as it takes cognizance of the constitutional limitations of authority and

responsibility necessarily inherent in Maine's and every collective-bargaining statute. As it now stands, *Lehnert*, with its three-part test and multiple opinions, has done little to provide predictable results, save for the predictable result that unions have self-servingly applied it and its ambiguities in a manner designed to maximize their income from nonmember employees.

In sum, this Court should use the opportunity provided by this case to correct the grievous error of the First Circuit in disregarding this Court's prior decisionmaking. Moreover, this Court should recognize that the First Circuit's effort to write its own exceptions to this Court's categorical rule arose out of a badly-splintered decision, and that application of dual standards to differing forms of extra-unit activities creates an untenable situation for nonmembers.

Clarification of these rules in a manner which comports with the Court's governing standards on compelled speech, and which will "facilitate a nonunion employee's ability to protect his rights," *Hudson*, 475 U.S. at 307 n.20, requires a strict bargaining-unit standard of measuring chargeable costs. Any other standard sacrifices individual rights to the whims of organizations that exercise the "extraordinary power," the "extraordinary benefit," "in essence, to tax government employees." *Davenport*, 127 S. Ct. at 2378. Due regard for the nonmembers' constitutional rights demands that the standard for exacting those forced dues be strictly and narrowly drawn.

CONCLUSION

At a minimum, this Court should reverse the judgment below as contrary to this Court's holdings in *Ellis* and *Lehnert*, that nonmembers may not lawfully or constitutionally be compelled to subsidize a union's extra-unit litigation. Petitioners respectfully suggest that the Court should also clarify the standard for the chargeability to nonmembers of union activities. The case then should be remanded for further proceedings consistent with the Court's decision.

Respectfully submitted,

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