No. 07-610

In the

Supreme Court of the United States

DANIEL B. LOCKE, et al.,
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

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, MACKINAC CENTER FOR PUBLIC POLICY, NORTHWESTERN LEGAL FOUNDATION, SOUTHEASTERN LEGAL FOUNDATION, AND ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to this Court's Rule 37.3(b), Pacific Legal Foundation, the National Federation of Independent Business Small Business Legal Center, Mackinac Center for Public Policy, Northwestern Legal Foundation, Southeastern Legal Foundation, and Atlantic Legal Foundation respectfully request leave of the Court to file this brief amicus curiae in support of Petitioners.

Written consent to the filing of this brief has been granted by counsel for the Petitioners. Counsel for Maine State Employees Association, SEIU Local 1989, and Service Employees International Union did not respond to Amici's request for consent, and counsel for Respondents Edward A. Karass, Rebecca M. Wyke, and Kenneth A. Walo declined consent, necessitating the filing of this motion.

DATED: May, 2008.

Respectfully submitted,

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QUESTION PRESENTED

Did the First Circuit err in determining that the costs of litigation brought on behalf of, or by, a union entity other than the local bargaining representative, and which litigation is funded through a "pooling agreement," may be charged to nonmember employees as part of an "agency shop fee" as long as the litigation meets the *Lehnert v. Ferris Faculty Ass'n* chargeability test, to wit, that such litigation (1) is germane to collective bargaining, (2) is justified by the government's vital policy interest in labor peace and avoiding free riders, and (3) does not significantly add to the burdening of free speech that is inherent in the allowance of an agency shop arrangement?

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INTEREST OF AMICI CURIAE[1]

Pacific Legal Foundation (PLF) was founded 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. Among other things, PLF litigates in defense of the right of workers to refrain from making involuntary payments to support political or expressive purposes with which they disagree.

PLF is submitting this brief because it believes its public policy perspective and litigation experience in the area of agency shop fees will provide an additional viewpoint with respect to the issues presented. PLF has participated in numerous cases before this Court including amicus curiae participation in *Davenport v. Wash. Educ. Ass'n*, 127 S. Ct. 2372 (2007); *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986); and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). PLF attorneys represented the petitioners in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) (limiting the integrated bar's ability to spend objecting members' dues for political

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[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

activities). PLF believes the lower court's opinion incorrectly analyzed the holdings of this Court, resulting in objecting nonmembers being compelled to finance, by subsidizing litigation that does not impact the objecting nonmembers' own bargaining unit, the political and ideological activities of a private labor organization with which they disagree. This compelled financing abridges their First Amendment rights of speech and association.

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) (formerly known as the NFIB Legal Foundation), a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's leading small-business advocacy association, with offices in Washington, D.C., and all 50 state capitals. NFIB represents over 350,000 members nationally, including over 3,600 members in the State of Maine. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. To fulfill this role as the voice for small business, the NFIB Legal Center frequently files briefs amicus curiae in cases that will impact small businesses nationwide.

In pursuit of its goal to support small business in America, NFIB and the NFIB Legal Center have participated as amicus curiae in several cases before this Court including *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007), *Rapanos v. United States*, 547 U.S. 715 (2006), *Ballard v. Comm'r of Internal Revenue*, 544 U.S. 40 (2005), *Walters v.*

Metro. Educ. Enters., Inc., 519 U.S. 202 (1997), *Pierce v. Underwood*, 487 U.S. 552 (1988), and *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

The issue of whether national unions can charge nonunion workers legal fees for litigation that does not involve the local chapter is of great importance to the constituency NFIB represents. NFIB members own and operate many of America's independent businesses, which create two-thirds of the new jobs in the United States. NFIB works to defend limitations that protect nonunion employees from unwittingly or unwillingly financially supporting political causes with which they disagree. Nonunion workers who are required to subsidize unrelated union lawsuits face undue financial hardships and violations of their First Amendment freedoms.

The Mackinac Center for Public Policy is a Michigan-based, nonprofit, nonpartisan research and educational institute that advances policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1988. The Mackinac Center for Public Policy believes that compulsory unionism increases the costs of industry, government, and education. This cost increase necessarily results in less money available for the substantive tasks that businesses, governments, and schools exist to accomplish. In government, it discourages the treatment of civil servants as professionals and discourages qualified individuals from becoming government employees. Compulsory unionism also increases the politicization of public employment through the adversarial nature of union bargaining. Fees and costs related to this concept

should be limited to those that directly relate to a union's statutory duties.

Northwestern Legal Foundation (NLF) was established in 1988 as a 501(c)(3) public interest legal foundation. NLF operates in both Washington State and North Dakota. Its focus is on private property rights, individual liberties, free speech, and limiting the excesses of governmental entities. NLF is particularly interested in the relationship between compulsory agency fees and the services that are being funded with such fees. NLF believes this case is particularly important as its outcome will directly impact the scope of unions' ability to exact compelled fees from employees who choose not to join the union.

Southeastern Legal Foundation (SLF) is a constitutional public interest law firm based in Atlanta, Georgia. SLF was founded in 1976 for the purpose of engaging in litigation, education, and public policy initiatives in support of free enterprise, individual rights, and the freedoms guaranteed by the United States Constitution. SLF has participated as amicus curiae in cases throughout the United States involving constitutional issues, including labor union matters.

Atlantic Legal Foundation (ALF) is a nonprofit, nonpartisan public interest law firm incorporated in Pennsylvania in 1977. Its mission is to advance the rule of law by advocating limited, effective government, free enterprise, individual liberty, school choice, and sound science in judicial and regulatory decisionmaking. ALF's goal is to advance the cause of economic and individual freedom by making government—federal, state, and local—more accountable and less intrusive. ALF seeks to advance

these goals through litigation, public advocacy, and education. ALF provides pro bono legal representation to individuals, corporations, trade associations, and similar groups.

ALF's supporters include individuals, business enterprises, law firms, and philanthropic foundations. ALF's board of directors and advisory council consist of legal scholars, corporate legal officers, business executives, prominent scientists, and attorneys. ALF has appeared in this Court and in numerous federal and state appellate courts as counsel to a real party in interest or as an amicus or as counsel to amici. Among the cases involving compelled speech and use of mandatory dues or fees are *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000) (amicus), and *Galda v. Rutgers*, 772 F.2d 1060, 1064 (3d Cir. 1985), *cert. denied sub nom. N.J. Pub. Interest Research Group, Inc. v. Galda*, 475 U.S. 1065 (1986) (representing plaintiff).

For the foregoing reasons, the motion of PLF, NFIB Legal Center, Mackinac Center for Public Policy, NLF, SLF, and ALF to file a brief amicus curiae should be granted.

SUMMARY OF ARGUMENT

This Court held in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), that the threshold requirement for determining whether the costs of certain union activities can be charged to dissenting nonmembers as part of their "agency fee" is whether the activity is "germane to collective-bargaining." *Id.* at 519 (plurality opinion of Blackmun, J., Rehnquist, C.J., White, J., and Stevens, J.). The *Lehnert* germaneness test has not provided consistent results. This Court

should construe the *Lehnert* plurality's germaneness test consistent with Part II of the concurring and dissenting opinion authored by Justice Scalia (*Lehnert*, 500 U.S. at 552-58) (joined by O'Connor, J., Souter, J., and Kennedy, J.), so as to allow unions to charge nonmembers only for those activities that are germane to the bargaining unit's statutory activities as exclusive bargaining representative. Such a test protects the First Amendment rights of dissenting nonmembers while allowing unions to provide the core services that the government believes will result in labor peace and stability.

Like the case at bar, *Lehnert* dealt with public employees who were compelled to contribute to activities of their local union's parent organization under a "pooling arrangement." *Lehnert* established a three-part test whereby 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" in order to be chargeable to dissenting nonmembers. *Id.* at 519 (plurality).

Although this Court examined several specific categories of union expenditures, the chargeability of extraunit litigation, or litigation undertaken by a union entity other than the dissenting nonmember's bargaining unit pursuant to a pooling agreement, was not at issue in *Lehnert*. These extraunit litigation costs are not "germane to collective bargaining" under the first part of the *Lehnert* test; moreover, the very phrase "germane to collective bargaining" should be limited to mean "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 and dissenting).

The agency shop arrangement constitutes a significant impingement on the First Amendment rights of dissenting employees. *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Employees*, 466 U.S. 435, 447 (1984). This impingement is justified only by the government's vital interest in the peaceful labor relations that flows from allowing employers to designate an exclusive bargaining representative. *Ry. Employees' Dep't v. Hanson*, 351 U.S. 225, 235-38 (1956); *Ellis*, 466 U.S. at 447; *see Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 223 (1977); *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 302-03 (1986). By divorcing the concept of germaneness from the bargaining unit's direct collective bargaining activity, the First Circuit leaves the domain of activities that a union might subsidize with nonmembers' compelled fees so broad and elastic as to extinguish dissenting nonmembers' protection against all but the most egregious First Amendment violations.

This is particularly true where the expenditure is for *inherently expressive* activity such as litigation. *See NAACP v. Button*, 371 U.S. 415, 431 (1963) (recognizing the effectiveness of litigation as a form of political association). When an exclusive bargaining unit spends the money that nonmembers are compelled to pay under the agency shop arrangement on activities that are "expressive" activities under the First Amendment, this Court should apply a more stringent analysis than the one that applies generally to activities paid for under a "pooling" agreement as

established by *Lehnert*. By limiting unions' right to spend nonmembers' compelled fees to those activities that are germane to the bargaining unit's own statutory duties as exclusive collective bargaining representative nonunion employees' First Amendment rights will be adequately protected.

ARGUMENT

I

THE FIRST AMENDMENT PROHIBITS USING DISSENTING NONMEMBERS' SERVICE FEES ON ACTIVITIES THAT DO NOT SUPPORT THE GOVERNMENT'S COMPELLING INTEREST IN PEACEFUL LABOR RELATIONS

By limiting chargeable activities to those that arise from the bargaining unit's statutory duties as exclusive bargaining representative, the government's interest in the labor peace and stability that results from collective bargaining is advanced without unnecessarily impinging upon the First Amendment rights of dissenting nonmembers.

Ever since this Court's first examination of the constitutional challenges to state compulsion of union dues, the analytical focus has been on the union's role as an exclusive bargaining agent. In 1951, Section 2, the Eleventh of the Railway Labor Act, 45 U.S.C.A. § 152, was amended to permit railway carriers to establish union or agency shops. In *Hanson*, 351 U.S. 225, this Court upheld the union shop agreement that was expressly authorized by the Railway Labor Act on grounds that "the requirement for financial support of the collective-bargaining agency by all who receive the

benefits of its work is within the power of Congress . . . and does not violate . . . the First . . . Amendment[]." *Id.* at 238. This was extended to agency shops in *Abood*, 431 U.S. 209, so long as the agency shop fees extracted from nonunion members were "used to finance expenditures by the Union for the purposes of *collective bargaining*, *contract administration*, and *grievance adjustment*." *Id.* at 225-26 (emphasis added). *See also Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 768-69 (1961) (fees or dues could be required of nonmembers only to the extent that they were related to the union's role as negotiator and administrator of the collective bargaining agreement, not for political or ideological purposes).

The narrowness of the germaneness test was emphasized in *Ellis*, 466 U.S. 435, which underscored the premise of these cases that when a state adopts an "agency shop" arrangement, the First Amendment rights of nonmember employees are impinged upon by the "agency fee" doctrine because nonmember employees are being required to "support financially an organization with whose principles and demands [they] may disagree." *Id.* at 455. "[B]y allowing the union shop at all, we have already countenanced a *significant impingement* on First Amendment rights." *Id.* (emphasis added). When determining whether a designated collective bargaining representative may charge dissenting employees for the union's litigation costs, only those litigation expenses that are incident to negotiating and administering the collective bargaining agreement and settling disputes arising in the bargaining unit are chargeable to dissenting employees, and that "[t]he expenses of litigation not having such a connection with the bargaining unit are not to be charged to objecting employees." *Id.* at 453.

This Court stated unambiguously in *Ellis* that, "when employees such as petitioners object to being burdened with particular union expenditures, the 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*." 466 U.S. at 448 (emphasis added). *See Abood*, 431 U.S. at 222-23; *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 754 (1988).

In *Lehnert*, 500 U.S. 507, a four-member plurality of this Court concluded that the expenses of litigation conducted by a union's national affiliate, which litigation does not concern the dissenting employee's bargaining unit, were "more akin to lobbying in both kind and effect," and that "[j]ust as the Court in *Ellis* determined that the RLA, as informed by the First Amendment, prohibits the use of dissenters' fees for extraunit litigation, *ibid.*, we hold that the Amendment proscribes such assessments in the public sector." *Id.* at 528 (Blackmun, J., joined by Rehnquist, C.J., White, J., and Stevens, J.). Four other Justices would have found extraunit litigation expenses nonchargeable under the test advocated by Amici herein, as set forth in the concurring and dissenting opinion authored by Justice Scalia, to wit, agency shop "contributions can be compelled only for the costs of performing the union's statutory duties as exclusive bargaining agent." *Id.* at 550 (Scalia, J., concurring and dissenting, joined by O'Connor, J., Souter, J., and Kennedy, J.).

All of these cases stand for the proposition that an exclusive representative may compel nonmembers to pay a service fee only when the fee is spent by the local

bargaining unit in its role as exclusive collective bargaining agent. The justification for an agency shop fee, e.g., requiring workers "to pay their part of the cost of actual bargaining carried on by a union selected as bargaining agent," is accomplished *only* where the expenditure is for the actual costs of collective bargaining to which nonmembers are obligated to contribute. *Street*, 367 U.S. at 787 (Black, J., dissenting). In order to be chargeable to dissenting nonmembers, particular union expenditures must remain tethered to the fundamental justification for the agency shop fee. As stated in *Abood*,

> [t]he tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones . . . . A union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become "free-riders" to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.

431 U.S. at 221-22.

Thus, "the state interest that can justify mandatory dues arises solely from the union's statutory duties." *Lehnert*, 500 U.S. at 553 (Scalia, J., concurring in part and dissenting in part).

Justice Scalia then stated:

> Once it is understood that the source of the state's power, despite the First Amendment,

> to compel nonmembers to support the union financially, is elimination of the inequity that would otherwise arise from mandated free-ridership, the constitutional limits on that power naturally follow. It does not go beyond the expenses incurred in discharge of the union's "great responsibilities" in "negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances," *Abood*, 431 U.S. at 221; the cost of performing the union's "statutory functions," *Ellis*, 466 U.S. at 447; [and] the expenses "necessary to 'performing the duties of an exclusive representative,' " *Beck*, *supra*, 487 U.S. at 762.

Lehnert, 500 U.S. at 556-57.

Because the intrusion on dissenting nonmembers' First Amendment rights can be justified only by a compelling government interest, unions are not permitted to use agency fees on activities that are not germane to the fundamental justification for the agency fee. In this case, however, the First Circuit permitted far greater intrusion by adopting a test for germaneness that broadly allows dissenting nonmembers' compelled fees to be used on litigation that is undertaken by or on behalf of an entity other than the dissenting nonmembers' own bargaining unit.

II

EXTRAUNIT LITIGATION FUNDED BY A POOLING AGREEMENT IS NOT GERMANE TO THE LOCAL BARGAINING UNIT'S STATUTORY DUTIES AS EXCLUSIVE BARGAINING REPRESENTATIVE

A. A Pooling Arrangement Is Not Akin to Insurance

The First Circuit's decision relied heavily upon the distinction between union expenditures that are paid directly by the bargaining unit and those that are paid into a "pool" of resources that may or may not actually be spent upon the local bargaining unit, but that are purportedly sufficient to obligate the national affiliate to make its resources available to the local whenever they are needed. *Locke v. Karass*, 498 F.3d 49, 64 (1st Cir. 2007). The First Circuit did not try to justify the expenditure on grounds that the extraunit litigation itself bestowed a benefit upon dissenting nonmembers. The charge to nonmembers was deemed "connected" to the local bargaining unit by virtue of the "tangible benefit" that flowed from having the national affiliate's resources available "on call." *Id.*

This "tangible benefit" of the pooling arrangement was likened unto "insurance, whereby the local unit contributes certain amounts to a larger fund in order to ensure that the larger fund will provide resources (in the form of services or money) in return, when the local unit needs them." *Id.* The First Circuit also stated that" '[e]ven if a local union party to such an arrangement does not litigate in any given year, it still derives a tangible benefit from participating in an

expense-pooling agreement: the availability of on-call resources greater than those it could muster individually.' " *Id.* (quoting *Otto v. Pa. State Educ. Ass'n-NEA*, 330 F.3d 125, 136 (3d Cir. 2003)).

In the context of a First Amendment challenge to the use of compelled fees, the insurance analogy breaks down. The primary difference between the pooling arrangement and insurance has to do with the process of establishing a premium for the insurance coverage purchased. Typically, an insurer will consider several factors in determining the premium that will be charged for the chosen coverage. While the specific factors used will vary depending upon the type of insurance at issue, and different carriers will weigh factors differently, insurers must still weigh the risk of loss for which insurance is purchased against the cost of providing coverage should the loss occur. *See* F. Daniel Perkins, *Can "Sound Actuarial Principles" Be Found in Life Insurance Underwriting?*, 38 Tort Trial & Ins. Prac. L.J. 125 (2002) (describing, generally, the risk classification process for life insurance); Anthony F. Milano, *Evidence-Based Risk Assessment*, 33 J. Ins. Med. 239 (2001).

Although the precise factors that go into this calculation may differ, the price of insurance coverage is related to the likelihood that the policyholder will make a claim upon the insurer. Indeed, one of the factors an insurer will consider in setting a premium is whether the insured has implemented "risk management" protocols designed to reduce the risk that a claim will be made. *See* Edward J. Kionka, *Things to Do (or Not) to Address the Medical Malpractice Insurance Problem*, 26 N. Ill. U. L. Rev. 469, 505 (2006) (stating that insurers "may also offer

discounts on premiums for insured's participation in risk management activities").

Thus, in the insurance context, there is a clear connection between the amount the insurer is charging its policyholders, the benefit the policyholders expect to receive from the insurer, and the cost to the insurer for providing that benefit. The insurer's ability to stay in business is determined by its ability to accurately assess the likelihood and potential size of a claim being filed by a covered member of a particular group in order to set their premium at a price that will allow it to cover claimed losses and attract premium-payers. In the pooling arrangement, there is no such connection. The charge for extraunit litigation is made solely with respect to the litigation costs incurred by bargaining units other than the one that is compelling its nonmember to pay an agency fee. The local bargaining unit has no say in selecting, investigating, pursuing, or declining participation in these cases.

Without any real connection between the local unit and extraunit litigation, it is difficult to see how the existence of a "pooling agreement" transforms extraunit litigation into an activity that is germane to the collective bargaining activities of the local bargaining unit.

B. Litigation Is an Inherently Expressive Activity That Is Entitled to First Amendment Protection Independent of the Content of the Litigation

The First Circuit subjected litigation expenses paid for through a pooling agreement to the same general chargeability test that the *Lehnert* Court applied to all other activities paid for under such a cost

sharing mechanism. *Locke*, 498 F.3d at 64. In so doing, the First Circuit declined to follow that part of the opinion authored by Justice Blackmun in *Lehnert* which determined that because of the "important political and expressive nature of litigation," the rationale for requiring nonmembers to share in the general collective-bargaining costs incurred by the state or national parent union does not extend to the expenses of litigation that does not concern the nonmembers' bargaining unit. *Lehnert*, 500 U.S. at 528. The "statutory duties" test set forth in Justice Scalia's concurring and dissenting opinion recognizes the higher level of protection afforded by the First Amendment by explicitly requiring that any expenditure of compelled dues confer a direct and tangible benefit on the dissenters' bargaining unit. *Id.* at 562.

In *Ellis*, certain expenses were held to be constitutionally chargeable to nonmembers on the grounds that charging nonmembers for them does not "increase the infringement of his First Amendment rights already resulting from the compelled contribution to the union." *Ellis*, 466 U.S. at 456. This Court held that the activity at issue in *Ellis* (union social activities and their related costs) was not, in and of itself, an "expressive" activity that raised serious First Amendment concerns. *Id.* Charging the costs of such social activities to nonmembers was deemed constitutional because "the communicative content is not inherent in the act, but stems from the union's involvement in it." *Id.* The First Circuit distinguished *Ellis* as pertaining only to direct costs of a national affiliate rather than costs incurred under a pooling agreement. *Locke*, 498 F.3d at 63. In relying on this

distinction, the First Circuit ignored the "communicative content" factor considered in *Ellis*, and reached its conclusion by simply giving greater weight to the form of the charge than to the activity it produces.

Justice Scalia observed this distinction in his concurring/dissenting opinion in *Lehnert*, and would have disallowed charging nonmembers for the costs of the union's newsletter, because "the newsletter is inherently communicative; that the Court thinks what it communicates is 'for the benefit of all,' does not lessen the First Amendment injury to those who do not agree." *Lehnert*, 500 U.S. at 560 (citation omitted).

Justice Blackmun's plurality opinion in *Lehnert* observed that this Court has previously recognized the expressive nature of litigation. In *Button*, 371 U.S. 415, this Court concluded that in certain circumstances, "association for litigation may be the most effective form of political association." *Id.* at 431. In *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971), this Court interpreted *Button* as meaning that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *Id.* at 585.

By establishing a bright line—extraunit litigation that is not germane to the bargaining unit's statutory duties is not chargeable to a particular bargaining unit's dissenting nonmembers—this Court would avoid the uncertainty and inconsistency that is sure to continue under a rule that requires an examination of the nature of each case that is litigated under a pooling arrangement. The range of causes and subjects of litigation that is undertaken by both local and national

union organizations is so broad, and so often includes subjects that are patently political or ideological, that consistent application of such an *ad hoc* rule would be impossible.

Indeed, searching back a mere three years, SEIU[2] and/or its local affiliates have been involved, either as a party or as amicus, in the following cases, which constitute but a sampling of the universe of litigation activities conducted by the SEIU national and/or local organizations:

Golden Gate Rest. Ass'n v. City & County of S.F., 512 F.3d 1112 (9th Cir. 2008); as intervening appellants, SEIU challenges certain provisions of the newly enacted San Francisco Health Care Security Ordinance.

Pocatello Educ. Ass'n v. Heideman, 504 F.3d 1053 (9th Cir. 2007), *cert. granted sub nom. Ysursa v. Pocatello Educ. Ass'n*, No. 07-869, 2008 WL 833273 (U.S. Mar. 31, 2008); as co-plaintiff, SEIU challenges provisions of the Idaho Voluntary Contributions Act, which bans payroll deductions for political activities.

Ne. Ohio Coal. for the Homeless & SEIU, Local 1199 v. Blackwell, 467 F.3d 999 (6th Cir. 2006); SEIU and others brought an action against the Ohio Secretary of State challenging Ohio's absentee ballot

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[2] As one of the Respondents in this case, Service Employees International Union, as the parent union of co-Respondent SEIU Local 1989, is headquartered in Washington, D.C., and has over 300 local union affiliates, representing approximately 1.9 million workers in four job sectors: hospital systems, long term care-givers, property services, and public services. *See* http://www.seiu.org/index.cfm (and related links) (last visited May 6, 2008).

voter identification laws as violating the Due Process and Equal Protection Clauses of the United States Constitution.

Diaz v. Sec'y of the State of Fla., No. 04-15539, 2005 WL 2402748, at *1 (11th Cir. Sept. 29, 2005); as a co-plaintiff, SEIU brought an action that addresses Florida voter registration law.

Futurewise v. Reed, 166 P.3d 708 (Wash. 2007); SEIU local 776NW and others sought to prohibit the Washington Secretary of State from placing an initiative on the ballot that would require two-thirds legislative approval or voter approval for certain tax increases.

In re Abbott Laboratories Norvir Anti-Trust Litigation, No. C 04-1511 CW, 2007 WL 4365506, at *1 (N.D. Cal. Dec. 13, 2007); SEIU and others brought an anti-trust action arising from a 400% increase for an anti-HIV drug manufactured by the defendant.

Bevona v. SEIU, AFL-CIO, No. 05 Civ. 1157(DLC), 2007 WL 1378425 (S.D.N.Y. May 10, 2007); a former Vice President of defendant SEIU resigned and then sued over disputes regarding his pension, benefits, and legal fees.

SEIU v. Comm'r Internal Revenue, 125 T.C. 63 (T.C. 2005); an action by SEIU challenging an IRS determination to proceed with collection by levy of penalty imposed against organizations for failure to file annual return.

Zamora v. Elite Logistics, Inc., 478 F.3d 1160 (10th Cir. 2007); SEIU joined in an amicus brief in an action brought under Title VII of the Civil Rights Act

for alleged discrimination because of race and national origin.

Because litigation so directly employs and impacts First Amendment rights, it deserves to be treated differently than other expenditures that purport to benefit those who are compelled to pay for it. Thus, in determining the test to apply to the chargeability of certain union activities, this Court should recognize the inherently expressive nature of litigation. While nonmembers certainly may derive a tangible benefit from litigation that is brought by or on behalf of the nonmembers' bargaining unit, and can therefore properly be charged for such litigation if it meets the "germane to the bargaining unit's statutory collective bargaining duties" criteria, the benefit of extraunit litigation is too speculative and far removed from the bargaining unit's core statutory duties to justify the added impingement on nonmembers' First Amendment rights.

Determining the scope of rights and responsibilities of individuals and the public under the First Amendment is an exercise that often requires "a delicate balancing of the competing interests surrounding the speech and its consequences." *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006). This Court recognizes the balance between the dues payers' rights of free speech and association on the one hand, and the government's interest in labor peace through collective bargaining on the other. This Court should now recognize that when one side of the scale contains inherently expressive activity, such as litigation, the scale is tipped toward requiring a heightened degree of "germaneness" to the union's collective bargaining activities than when the scale holds nonexpressive

activities that are objectionable only "from the union's involvement in it." *Lehnert*, 500 U.S. at 559 (citation omitted) (Scalia, J., concurring and dissenting).

Under the *Lehnert* concurrence, which Amici propose the Court adopt as controlling in this case, only the costs of a bargaining unit's statutory duties as collective bargaining representative may be charged to nonmembers—thus, extraunit litigation costs would not be chargeable to nonmembers, while the local bargaining unit would be allowed to charge nonmembers for those of its litigation costs that arise from its collective bargaining duties.

CONCLUSION

The test that the First Circuit used to determine the chargeability of extraunit litigation costs does not adequately protect the First Amendment rights of dissenting nonmembers because it is so broad and malleable. The test also fails to consider the inherently expressive nature of litigation. Thus, this Court should limit the amount of compelled fees that unions are entitled to extract from nonmembers to those that cover the bargaining unit's statutory duties as exclusive bargaining representative, as Justice Scalia advocated in his concurring and dissenting opinion in *Lehnert*.

For these reasons, the decision of the First Circuit should be reversed.

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Respectfully submitted,

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