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

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BRIEF FOR RESPONDENT MAINE STATE EMPLOYEES ASSOCIATION, SEIU LOCAL 1989, SERVICE EMPLOYEES INTERNATIONAL UNION

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QUESTION PRESENTED

In *Lehnert v. Ferris Faculty Association,* 500 U.S. 507, 524 (1991), this Court held as a general rule "that a local bargaining representative may charge objecting employees 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."

The question presented in this case is whether the costs of litigation conducted by a state or national parent union on behalf of its affiliated local unions constitute a categorical exception to that rule, such that costs incurred in litigation by a parent union that would be chargeable to objecting employees in the local bargaining unit directly involved must be charged solely to those employees, rather than being charged on a pro rata basis to objecting employees in all of the parent union's affiliated local union bargaining units that may potentially receive litigation assistance from the parent union.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS Page

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STATEMENT OF THE CASE

1. Respondent Maine State Employees Association, SEIU Local 1989, Service Employees International Union ("MSEA," "MSEA-SEIU," or the "Union") is a labor organization that has been certified pursuant to the Maine State Employees Labor Relations Act, Me. Rev. Stat. Ann. tit. 26, § 979 *et seq.*, as the exclusive bargaining representative for approximately 10,000 employees in bargaining units of the

executive branch of the Maine state government. Joint Appendix ("JA") 105-106. MSEA is affiliated with a national labor organization, the Service Employees International Union ("SEIU"). JA 108. Petitioners are twenty current or former employees in the MSEA-represented bargaining units who have chosen not to become members of the Union.

The collective bargaining agreements ("CBAs" or "Agreements") between MSEA and the State of Maine Executive Branch applicable to petitioners during the time period involved in this case provided that bargaining unit employees who were not members of the Union would be required 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." JA 97. Both Maine law and the First Amendment permit charging such a service fee to nonmembers, including those who object to paying dues or fees to the union. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Opinion of the Justices*, 401 A.2d 135 (Me. 1979). [1]

The CBAs provided that "MSEA-SEIU shall calculate the amount of the fee after the close of its annual

[1] A fee in lieu of union membership dues such as is involved in this case is often referred to as an "agency fee" or "fair share fee." These terms generally refer to a fee charged to nonmembers in an amount equal to membership dues, and the lesser amount that is charged to *objecting* nonmembers then is referred to as the "reduced agency fee" or "reduced fair share fee." Because MSEA charges the reduced amount legally chargeable to objecting nonmembers to *all* nonmembers, *see infra* at 3, we will refer to what is in essence a "*reduced* service fee" simply as the "service fee."

audit, based on the expenditures reflected in the most recent available audited records." JA 99. "Once the audit is complete, MSEA-SEIU shall prepare a notice, consistent with applicable law, to all employees covered by this Agreement," which "shall include all information required by applicable law" concerning the determination of the amount of the fee to be charged to nonmembers. JA 100. The CBAs further provided that the amount of the fee "shall be subject to review pursuant to the American Arbitration Association's Rules for Impartial Determination of Union Fees," with MSEA responsible for paying the arbitrator's fee and the administrative expenses involved in the proceedings. JA 101-102. "Pending resolution of any such dispute, the disputed amount of the fees shall be placed in an interest-bearing escrow account." JA 101. *See also* JA 48-52, 59 (July 2005 notice to nonmembers, describing these procedures).

Although all nonmembers, and not only objecting nonmembers, paid the reduced amount of the service fee, MSEA determined the amount of the fee by examining its expenditures in light of the caselaw that defines what an *objecting* nonmember may constitutionally be required to pay. *See* JA 48, 53, 64, 97, 107-108.[2] By virtue of that caselaw, MSEA did not consider any expenditure that was not "germane to the Union's representation of nonmembers" to be

[2] It is well established that if a nonmember has not made known to the union that he objects to paying a fee equal to full membership dues, the union is constitutionally permitted to require the individual to pay that full amount. *See Abood*, 431 U.S. at 235-41; *Davenport v. Washington Education Ass'n*, __ U.S. ____, 127 S. Ct. 2372, 2379 (2007). In effect, MSEA treats *all* nonmembers as having rights which, under the caselaw, need only be recognized for *objecting* nonmembers.

chargeable to nonmembers. JA 107. *See also* JA 53-58, 60-62 (July 2005 notice to nonmembers, explaining which kinds of expenditures MSEA treated as chargeable and which were treated as nonchargeable). Thus, for example, MSEA's expenditures on "[l]itigation or legal services related to the union's representational activities (i.e., grievances, collective bargaining rights, etc.) [were treated as] chargeable," JA 54, while "[o]ther litigation [wa]s considered nonchargeable," *id.*

For the period from July 1, 2005 through July 31, 2006, MSEA's analysis (based on examining its audited expenditures for calendar year 2004) resulted in a determination that 49.13% of its expenditures were legally chargeable to nonmembers.[3] JA 60. The service fee therefore was set at 49.13% of membership dues. JA 49.[4]

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[3] In making that determination MSEA followed the conservative course of treating certain expenditures as "nonchargeable" despite caselaw indicating that the expenditures could lawfully be categorized as "chargeable." For example, MSEA elected to "treat[ ] essentially all of its communications as non-chargeable," JA 54, even though the portions of its publications that reported on chargeable activities could lawfully be treated as chargeable, *id.* MSEA also treated as nonchargeable all of its expenditures on organizing notwithstanding that at least some of those expenditures could lawfully be treated as chargeable. JA 55. *See infra* note 14.

[4] For full time employees, this meant that the biweekly service fee charged to nonmembers was $8.94, as compared to the $18.20 that members paid in biweekly dues. JA 50. However, the CBAs provided that, throughout this period, nonmembers who had been hired prior to July 2, 2003 would be required to pay only half of the service fee. JA 97-98. This included all of the petitioners, *see* Pet. App. 4a, so their biweekly fee payments came to only $4.47, or approximately $9.00 per month. JA 50, 60.

MSEA's expenditures included the per capita affiliation fees the Union was required to pay to its parent union, SEIU. JA 58. To determine the portion of MSEA's affiliation fee payments to SEIU that would be treated as chargeable to nonmembers, MSEA relied on SEIU's determination of the percentage of SEIU's expenditures that were "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." JA 58, 62, 89. For the year in question, SEIU's determination was that 23% of its expenditures satisfied that chargeability standard. JA 64.[5] And, as petitioners note, in making that determination SEIU calculated that 56% of its expenditures on "Professional fees and expenses," including the "extra-unit litigation" expenses at issue here, satisfied that standard. *See* Pet. Br. 5.

In dollar and cents terms what the foregoing meant is this. MSEA's total 2004 expenditures were $4,541,650. JA 64. MSEA determined that, of the total, its chargeable expenditures were $2,056,103. *Id.* In making that determination, MSEA included $285,057 of the $1,269,247 MSEA paid to SEIU in affiliation fees as chargeable expenditures, based on SEIU's chargeable/nonchargeable determination, and treated the remaining $984,190 of MSEA's affiliation fee payments to SEIU as nonchargeable. *Id*. Of the $285,057 that was treated as chargeable, 12.08% (*i.e.*, $34,435) was attributable to SEIU's chargeable "Pro-

[5] The expenditures analyzed by SEIU were for calendar year 2003, which was the most recent year for which SEIU's expenditures had been audited. JA 53.

fessional fees and expenses," which included the SEIU "extra-unit litigation" expenses at issue here. Pet. App. 37a.

Thus, the chargeable portion of MSEA's affiliation fee payments to SEIU amounted to just under 14% of MSEA's total chargeable expenditures, and the portion attributable to SEIU's chargeable "Professional fees and expenses" amounted to just under 1.7% of MSEA's total chargeable expenditures. In other words, of the approximately $9.00 per month that petitioners paid in service fees, *see supra* note 4, approximately 15¢ per month was attributable to SEIU's expenditures on "Professional fees and expenses," including the "extra-unit litigation" expenses at issue here.

2. On July 12, 2005, MSEA mailed to all nonmember employees a notice (JA 48-104) concerning the service fee to be charged for the 2005-2006 period. Upon receipt of the July 2005 Notice, petitioners, who had filed suit in June 2004 challenging the legal adequacy of an earlier MSEA service fee notice covering the determination of the amount of the fee to be charged to nonmembers, filed an amended complaint (JA 26-47) against the July 2005 Notice.[6] In an Order on Motion for Preliminary Injunction (JA 8-25), and subsequently in an order on cross-motions for summary judgment (Pet. App. 42a-67a), Chief Judge Singal found in favor of MSEA on all claims.

The claim that petitioners pursued on appeal to the First Circuit, as relevant here, is that MSEA violated their rights as nonmember feepayers by including in its chargeable expenditures SEIU's expenditures, "re-

[6] The July Notice superceded prior notices that had been issued for the 2005-06 period. *See* JA 48, 110-111.

gardless of the bargaining unit involved, for '[l]itigation or legal services related to the union's representational activities (i.e.: grievances, collective bargaining rights, etc.).'" Plaintiffs-Appellants' Brief in *Locke v. Karass*, 1st Cir. No. 06-1747, at 10, 12. Petitioners' position was "a categorical one," Pet. App. 38a (Lynch, J., joining and concurring), that none of SEIU's litigation in a non-MSEA bargaining unit that was "related to the union's representational activities (i.e.: grievances, collective bargaining rights, etc.)" could be charged to nonmembers in the MSEA bargaining units. *See* Plaintiffs-Appellants' Brief in *Locke v. Karass*, 1st Cir. No. 06-1747, at 19-25. According to petitioners, that is because "*all* extra-unit litigation [is nonchargeable]." Plaintiffs-Appellants' Reply Brief in *Locke v. Karass*, 1st Cir. No. 06-1747, at 7 (emphasis added).[7]

3. The First Circuit rejected petitioners' contention. The Court of Appeals explained that in *Lehnert*, this Court rejected the argument that objecting nonmembers "may be charged only for those collective-bargaining activities undertaken directly on behalf of their unit," and held that the fee charged to nonmembers may include "their pro rata share of the costs associated with otherwise chargeable activities of [the local union's] state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit." Pet. App. 17a-18a (quoting *Lehnert*, 500 U.S. at 522, 524). And, the First Circuit found no merit in petitioners' con-

[7] Given the categorical nature of their claim, petitioners presented no evidence identifying or describing any of the litigation in which SEIU had engaged that had been included in the calculation of the service fee, and the record is silent in that regard.

tention that otherwise chargeable extra-unit litigation expenses by a parent union should be categorically excluded from *Lehnert*'s holding that otherwise chargeable parent union "extra-unit" expenses generally are chargeable pro rata to objecting nonmembers in all bargaining units of the parent union's affiliates.

Observing that "litigation is not susceptible to a single label," Pet. App. 30a, the court below recognized that "[s]ome litigation may be purely expressive, and therefore clearly outside the scope of chargeable activities," *id.* at 30a-31a, but that "other litigation may be central to the negotiation and administration of a collective bargaining agreement," *id.* at 31a, and therefore clearly *within* the scope of chargeable activities. Recognizing that Justice Blackmun's opinion in *Lehnert* would have treated "extra-unit litigation" as an exception to this Court's holding as to extra-unit expenses generally, the Court of Appeals pointed out that Justice Blackmun's view did not command a majority of the Court. Pet. App. 18a-21a, 30a. And the court below noted that *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435 (1984), on which petitioners relied, did not address an affiliation fee resource-pooling arrangement for paying for litigation expenses such as was at issue in *Lehnert* and in this case. *See* Pet. App. 29a-30a.

Concurring, Judge Lynch stated that "[t]he First Amendment is not violated by allowing extra-unit litigation expenses to be charged according to the same criteria of germaneness as other extra-unit expenses," Pet. App. 38a, because such litigation expenses are "analytically identical" to other extra-unit expenses in terms of the principle established in *Lehnert*. *Id.*

Judge Lynch added that, if parent union extra-unit litigation is brought "to advance a political position"

or otherwise lacks a proper relationship to a local union's "collective bargaining duties," Pet. App. 39a, the litigation will be "exclude[d] . . . from the agency fee" of objecting nonmembers in other units because it will not meet the standard that determines whether a particular activity is chargeable at all. *Id.* But, to exclude from the service fee expenditures for litigation that is related to a local union's collective bargaining duties, merely because, during the particular year in question, the litigation was not conducted in a feepayer's own unit, "would result in significant practical detriment for both local and national unions." *Id.* It "would lead to reducing unions' ability to draw on funds for litigation related to collective bargaining," *id.* at 40a, and "[t]here would be a concomitant reduced capacity to bargain effectively on behalf of all employees," *id*.

SUMMARY OF ARGUMENT

In *Abood v. Detroit Board of Education,*, 431 U.S. 209 (1977), this Court held that all employees in a bargaining unit represented by an exclusive bargaining representative, including those who do not join the union and have ideological objections to the union's collective bargaining agenda and/or its political/social agenda, may constitutionally be required to contribute to financing the union by paying membership dues or a service fee in lieu of dues, so long as the objecting nonmembers are not required to contribute toward the union's ideological activities unrelated to its duties as exclusive bargaining representative. In so holding, the Court recognized that the tasks performed by an exclusive bargaining representative in negotiating, administering and enforcing collective bargaining agreements "often entail the expenditure of much time and money," requiring

the services of lawyers and other experts, and that objecting nonmembers do not have a right to obtain the benefits of union representation as "free riders."

Local unions that act as exclusive bargaining representatives generally cannot afford to meet the costs of negotiating, administering and enforcing collective bargaining agreements on their own at each and every critical juncture in the process. It therefore is common for such local unions to be affiliated with a state, national and/or international "parent union" under an arrangement whereby the local unions, as a condition of affiliation, pay the parent a required affiliation fee and the parent union, out of those pooled affiliation fee resources, provides its affiliates collective bargaining assistance and support.

In *Lehnert v. Ferris Faculty Association*, 500 U.S. 507, 524 (1991), this Court held that, under such a typical union affiliation arrangement, "a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates [that is to say, activities that would be constitutionally chargeable to objectors in the unit that receives the direct benefits of the activities], even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit."

Contrary to petitioners' contentions, neither *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435 (1984), nor *Lehnert* itself, holds that litigation expenses must be excluded from that rule. As Justice Kennedy noted in *Lehnert*, *Ellis* did not present the question "whether a local bargaining unit might choose to fund litigation . . . through a cost sharing arrangement under the auspices of the affiliate." And in *Lehnert*, while Justice Blackmun's plurality opinion

would have excluded litigation from the general rule adopted by the Court for "extra-unit" expenditures, that opinion did not command a majority and was criticized by other Members of the Court.

As the United States argues in its *amicus* brief, the logic of *Lehnert*'s general rule as to extra-unit expenditures is fully applicable to a parent union's expenditures on otherwise chargeable extra-unit litigation.

Litigation often is essential to the performance of a union's role as exclusive representative in the negotiation, administration and enforcement of collective bargaining agreements. For example, litigation may be necessary to compel an employer to engage in collective bargaining in the first place as required by law, or to comply with the resulting collective bargaining agreement. The costs involved in such litigation often are beyond the means of a local union. Hence, a parent union's expenditures, from pooled affiliation fee resources, in assisting affiliated local unions with such *otherwise chargeable* litigation are chargeable on a pro rata basis to objectors in all affiliated bargaining units for the same reason that the parent union's expenditures in assisting affiliated local unions with negotiating a collective bargaining agreement are chargeable.

To be sure, "union litigation may cover a diverse range of areas," *Lehnert*, 500 U.S. at 528 (plurality opinion), and some parent union extra-unit litigation is *not* "otherwise chargeable," because it is "political and expressive" in a way that is "akin to lobbying," *id*. Application of *Lehnert*'s general chargeablility rule to litigation would *not* require any objecting nonmember in *any* affiliated local union bargaining unit to provide funding for any political, ideological

or otherwise nonchargeable litigation, because the *Lehnert* chargeability rule is limited to parent union extra-unit expenditures on *otherwise chargeable* activities.

Petitioners argue that extra-unit litigation should be subject to a separate chargeability rule because litigation constitutes petitioning of the government. But this Court has refused to "elevate the Petition Clause to special First Amendment status." *McDonald v. Smith*, 472 U.S. 479, 485 (1985). In applying *Lehnert*'s teaching, there is no principled distinction between collective-bargaining-process litigation and the negotiation of a collective bargaining agreement with a government employer—which, as the Court recognized in *Abood*, often involves urging the government to take actions on controversial matters that run contrary to the beliefs of an objecting nonmember, but which unquestionably is an activity chargeable to objecting nonmembers nonetheless.

Unable to establish any basis for excluding litigation from *Lehnert*'s rule, petitioners ultimately argue that *Lehnert* should be overruled. We agree with the United States that that argument is not properly before the Court, as it is not fairly included within (indeed, it contradicts) the question presented in the petition for certiorari. In any event, the holding in *Lehnert* that is pertinent to this case—*viz.*, that parent union expenditures from pooled resources on otherwise chargeable activities may be charged to objectors in all of the parent union's affiliated local union bargaining units—was endorsed by every Member of the Court in *Lehnert*, and petitioners offer no reason for revisiting, much less for overruling, that holding.

Nor does this case present the question, posed only by the Government and not by the petitioners, as to

whether *Lehnert*'s holding should be limited to cases where there has been a showing that a parent union and its local union affiliates are parties to a "bona fide pooling arrangement" under which "each participating unit . . . ha[s] some reasonable assurance that, when needed, the pool will pay for its germane litigation." That argument by the Government as *amicus* is not properly before the Court, and is wholly lacking in merit in any event. Although the Government claims that the showing it proposes to require is mandated by *Lehnert*, the *Lehnert* Court approved the chargeability of parent union extra-unit expenditures at issue in that case without requiring any such showing. *Lehnert*'s holding covers unions, like the unions in that case and this one, that operate under a "unified-membership structure" with a typical "affiliation relationship." The holding is *not* confined to unions that operate under the heretofore unheard of "bona fide pooling arrangement" structure proposed by the Government.

ARGUMENT

I. *LEHNERT*'S GENERAL RULE ON THE CHARGEABILITY OF PARENT UNION "EXTRA-UNIT" EXPENDITURES FROM POOLED AFFILIATION FEES COVERS OTHERWISE CHARGEABLE LITIGATION EXPENDITURES

A. *Lehnert*'s General Chargeability Rule and Its Foundation

1. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court held that the First Amendment permits a public employer and a union acting as an exclusive collective bargaining representative to enter into a an "agency shop" collective bargaining

agreement requiring that all the employees covered by the agreement—including those who "may very well have ideological objections to [the union's] activities," *id.* at 222—must contribute to financing the union by paying union membership dues or a service fee in lieu of dues.

As the Court explained:

> The designation of a union as exclusive representative carries with it great responsibilities. The 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. They often entail expenditure of much time and money. . . .The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required. Moreover, in carrying out these duties, the union is obliged "fairly and equitably to represent all employees . . . , union and non-union," within the relevant unit. . . . 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.

Id. at 221-22 (citations omitted).

At the same time, the *Abood* Court concluded that objecting nonmember employees covered by an agency shop agreement "may constitutionally prevent the Union's spending a part of their required service fees

to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." *Id.* at 234.

Against that background the *Abood* Court added that the courts, in providing for the implementation of agency shop agreements, must "devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Id.* at 237. As to specifics, the *Abood* Court only went so far as to repeat, as the Court had stated in *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113 (1963), that "[a]bsolute precision in the calculation of [the] proportion [of union expenditures an objecting nonmember must help finance] is not, of course, to be expected or required," and to admonish, as it had in *Allen*, that courts should not impose on unions obligations "which appear[ ] likely to infringe the unions' right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining." *Abood*, 431 U.S. at 239 n.40 (quoting *Allen*, 373 U.S. at 122).

Thereafter, in *Chicago Teachers Union, Local 1 v. Hudson*, 475 U.S. 292 (1986), the Court filled in the specifics left open in *Abood* by holding that a union satisfies its First Amendment obligation to objecting nonmembers by charging those nonmembers a service fee set at a percentage of the dues paid by the union's members, equal to the percentage of the union's expenses—which may be "calculate[ed] . . . on the basis of its expenses during the preceding year," *id*. at 307 n.18—that are for activities constitutionally chargeable to objectors. *See id.* at 306-07. In articulating that requirement, the Court recognized

once again "that there are practical reasons why '[a]bsolute precision' in the calculation of the charge to nonmembers cannot be 'expected or required.'" *Id.* at 407 n.18 (quoting *Abood*, 432 U.S. at 240 n. 40, and *Allen*, 373 U.S. at 122).

2. As the Court recognized in *Abood*, effective local union negotiation, administration and enforcement of collective bargaining agreements "often entail[s] . . . [t]he services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel." *Abood*, 431 U.S. at 221. Given their limited size and limited resources, local unions that act as exclusive collective bargaining representatives normally cannot provide, or afford to provide, for such services on their own at each and every critical juncture in the process of negotiating, administering and enforcing collective bargaining agreements. It therefore is common for such local unions to be affiliated with a state, national and/or international union (*i.e.*, a "parent union") under an arrangement whereby the local unions, as a condition of affiliation, pay the parent a required affiliation fee, generally on a per capita basis, and the parent union, out of those pooled affiliation fee resources, provides its affiliates collective bargaining assistance and support.[8]

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[8] *See, e.g.,* M. Estey, *The Unions: Structure, Development, and Management* 74 (3d ed. 1981) (noting that "the growing complexity of collective bargaining problems . . . has led unions, like their business counterparts, to make increasing use of staff specialists—economists, lawyers, accountant, etc.," and that "[t]he sheer expenses of maintaining such staff is beyond the resources of most local unions; . . . only national unions can afford it"); D. Bok & J. Dunlop, *Labor and the American Community* 150-151,153-154 (1970) (discussing the importance of "economies of scale" to effective union representation).

This common affiliated union structure naturally raises the question whether, in determining the service fee to be paid by a local union's objecting nonmembers, the local union's affiliation fee payments to its parent union are to be treated as a chargeable expenditure in whole or in any part. In *Lehnert* this Court answered that question in the following terms:

> We . . . conclude that a local bargaining representative may charge objecting employees 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. [500 U.S. at 524.]

By the critical phrase "otherwise chargeable activities" the *Lehnert* Court referred to activities that are chargeable to the objecting employees in the bargaining unit that receives the direct benefit of the activities. And *Lehnert* states a three-pronged test to determine when an activity is thus "otherwise chargeable": the activity must be "(1) . . . 'germane' to collective-bargaining activity; (2) . . . 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.

In holding that parent union "costs associated with otherwise chargeable activities" may be charged on a pro rata basis to objecting nonmembers in all bargaining units of the parent union's affiliated local unions, *Lehnert* began by noting that the Court had "never . . . require[d] a direct relationship between the expense at issue and some tangible benefit to the dissenters' bargaining unit," *id.* at 522, because "to

require so close a connection would be to ignore the unified-membership structure under which so many unions . . . operate," *id.* And, because "[t]he essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable economic, political, and informational resources when the local is in need of them," *id.* at 523, it followed that "that part of a local's affiliation fee which contributes to the [parent union's] pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year," *id.*

As the United States observes, the Court in *Lehnert* was unanimous on the proposition that a local union that pays its required affiliation fee to a parent union may properly "charge objecting employees for their pro rata share of the costs associated with [the parent's] otherwise chargeable activities" for all of its affiliated local units. Brief for the United States as Amicus Curiae ("U.S. Br.") at 17-18 (quoting *Lehnert*, 500 U.S. at 54 (opinion of the Court)). *See also Lehnert*, 500 U.S. at 562 (Scalia, J., concurring in the judgment in part and dissenting in part) (agreeing that otherwise chargeable expenses of a parent union may be charged to all affiliates, because "[i]t is a tangible benefit . . . to have . . . services on call, even in the years they are not used"); *id.* at 563 (Kennedy, J., concurring in the judgment in part and dissenting in part) ("we permit charges for affiliate expenditures because such expenditures do provide a tangible benefit to the local bargaining unit, in the nature of a prepaid consulting or legal services plan").

The *Lehnert* rule gives proper recognition to the benefits that a local union obtains from paying an

"affiliation fee which contributes to the [parent union's] pool of resources," *id.* at 523, in the form of access to those pooled resources which would not otherwise be available to the local union when needed to effectively negotiate, administer or enforce the local's collective bargaining agreements. In years when the parent union provides such assistance, doing so may entail the expenditure of very substantial amounts per employee. If the parent union were not permitted to spread those costs over the employees in all of the bargaining units represented by all of its affiliated local unions, each employee in the local bargaining unit that received the assistance would have to pay a very large amount in a single year, far in excess of the employee's normal local union dues or service fee.

The United States correctly points out that "[t]hat approach could cause fees to fluctuate wildly from year to year . . ., because a unit might have low . . . costs in most years, but . . . costs might spike in certain years, such as when a strike occurs." U.S. Br. 15-16. In fact, the "spikes" resulting from such a "pay as you go" system might easily be so high as to be prohibitive, with the result that the local union might find itself unable to muster the resources needed for effective representation of the bargaining unit. Thus, as the United States aptly puts it, "a unit-by-unit funding mechanism imposes financial risks on members and nonmembers alike," U.S. Br. 16, whereas "[e]ven objectors may benefit from spreading out . . . costs rather than facing a substantial assessment in a single period," *id*. at 20.

Only by ignoring that fundamental point can petitioners complain that the *Lehnert* rule forces nonmembers "to subsidize . . . activities for unions and bargaining units far afield from their own," Pet. Br.

20, and constitutes "some grand scheme to spread the benefits and burdens of public sector unionization broadly among [all of the] states of the Union," *id.* at 44, through "creative accounting and shell-game-like shifting of nonmembers' funds among union affiliates," *id.* at 42. A person might as reasonably complain that, in years when she needs no medical services, her premium payment for a medical insurance policy provides her nothing of value and forces her to "subsidize" medical services for others as part of a "grand scheme" to spread healthcare into every state through "shell-game-like shifting of funds among various [policyholders]."

By holding that "a local bargaining representative may charge objecting employees 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," 500 U.S. at 524 (emphasis added)—but *not* for the costs associated with a parent union's *nonchargeable* activities in other bargaining units—*Lehnert* fully protects the First Amendment rights of objecting nonmembers. For the service fee each objecting nonmember pays includes only his pro rata share of the local union's payment to the parent for the availability of assistance from the parent union on the local union's *chargeable* activities, and does *not* include a pro rata share of the local union's payment for the availability of assistance from the parent union on the local union's *non*chargeable activities. *See* U.S. Br. 25.[9]

[9] To be sure, in an affiliation relationship, a local union does not have a guarantee that, in any particular year, it will receive assistance from the parent union at a level of cost equal to the

B. *Lehnert*'s General Chargeability Rule Properly Applies to Litigation Expenditures

There is no opinion for the Court in *Lehnert* as to whether a parent union's litigation expenditures for and on behalf of its affiliated local unions from pooled resources generated by the local unions' affiliation fees are governed by *Lehnert*'s rule as to the chargeability of such parent union expenditures generally. But as the United States correctly observes—and as we will elaborate—"the logic of *Lehnert* strongly suggests that using compelled fees for the pooling of litigation expenses is permissible for the same reasons that it is permissible for other expenses." U.S. Br. 20-21.

1. Given petitioners' insistence that this Court held such pooled litigation expenditures to be nonchargeable both in *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435 (1984), and in *Lehnert* itself, we pause at the outset to show that neither case so held.

a. As Justice Kennedy stated in *Lehnert*, "*Ellis* . . . contains no discussion of whether a local bargaining unit might choose to fund litigation . . . through a cost sharing arrangement under the auspices of the affili-

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local's affiliation fee payments. But under *Hudson*, since a local union's service fee for objecting nonmembers is based on its expenditures for a prior year, *see supra* at 15, there is never a guarantee that, in any given year, the service fee paid by an objector will correspond to the costs of the chargeable activities in which the local union engages in the year for which the fees are paid. This may cause some objectors "[to] feel that their money is not being well-spent, but that does not mean they have a First Amendment complaint." *Lehnert*, 500 U.S. at 525 (quoting *Ellis v. Brotherhood of Ry. Clerks*, 416 U.S. 435, 456 (1984)).

ate." *Lehnert*, 500 U.S. at 564 (opinion of Kennedy, J.). *See* Pet. App. 27a-28a (making the same point); *Otto v. Pennsylvania State Educ. Ass'n*, 330 F. 3d 125, 136 (3d Cir. 2003) (same). And the reason there was no such discussion is that *Ellis* did not present that issue. The issue presented in *Ellis* was whether the specific litigation there, which did not in terms concern the objectors' bargaining unit, nonetheless conferred a sufficient direct benefit on that unit to be properly chargeable to those objectors.[10] And the *Ellis* Court's ruling was that the "extra-unit" litigation there did not confer a sufficient direct benefit on the objectors' bargaining unit to be chargeable on that basis. *See Ellis*, 466 U.S. at 453.

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[10] *See* Brief for Respondents, *Ellis v. Brotherhood of Ry. Clerks*, O.T. 1983, No. 82-1150, at 31 (arguing that "[i]t is relatively rare that labor litigation has consequences for this train or this air line only," and that the union's litigation concerning the legality of an airline industry mutual aid pact "affected the Union's bargaining strength *vis-à-vis all* air carriers") (emphasis in original). Furthermore, in discussing the litigation expenditures at issue in *Ellis*, the Court determined only "whether *the statute* [that is, the Railway Labor Act] permits the union to charge [objecting nonmembers] for any of the challenged expenditures." 466 U.S. at 445 (emphasis added). The court addressed *constitutional* issues in Part VI of the opinion in *Ellis* "only . . . with regard to the three activities for which [the Court] held [the statute] allows the union to use [objectors'] contributions." *Id.* at 455. *See also id.* at 458 (Powell, J. concurring in part and dissenting in part) ("The First Amendment . . .is not the basis for the Court's decision except to the extent this was addressed in Part VI"). Litigation expenses were not addressed in Part VI of the opinion in *Ellis*, so *Ellis* does not constitute a First Amendment holding as to such expenses. Nevertheless, if *Ellis* were regarded as a statement of First Amendment law, it remains the case that *Ellis* did not involve the question presented here.

b. Nor did the Court hold in *Lehnert* that parent union "extra-unit" litigation expenses from pooled affiliation fee resources are not chargeable as a categorical matter. To be sure, four Justices did espouse that view, *see* 500 U.S. at 528 (plurality opinion), but on grounds that do not bear up under scrutiny, *see* pp. 25-35 *infra;* and none of the other Justices joined in the plurality opinion on this point or expressed agreement with it.

Justice Kennedy expressly disagreed with the plurality, stating that "remov[ing] litigation . . . from . . . the Court's holding that a local bargaining unit may charge employees for their pro rata share of the costs associated with 'otherwise chargeable' expenses of affiliate unions . . . makes little sense if we acknowledge, as Justice Scalia articulates . . . , that we permit charges for affiliate expenditures because such expenditures do provide a tangible benefit to the local bargaining unit, in the nature of a prepaid but not contractual consulting or legal services plan." *Lehnert*, 500 U.S. at 563 (Kennedy, J., concurring in the judgment in part and dissenting in part.)

And, as the United States notes and as is evident from the foregoing statement of Justice Kennedy (who joined Justice Scalia's separate opinion in *Lehnert*), "Justice Scalia's reasoning *supports* the use of compelled fees for litigation pooling arrangements; it certainly does not *preclude* such use." U.S. Br. 22 (emphasis in original). For Justice Scalia stated in his *Lehnert* opinion that the majority's analysis of the pooling principle was "correct," 500 U.S. at 561 (Scalia, J., concurring in the judgment in part and dissenting in part), because "[i]t is a tangible benefit . . . to have expert consulting services on call, even in the years when they are not used." *Id.* at 562. As Justice Kennedy

noted, that analysis is fully applicable to a parent union's litigation services.[11]

2. The United States is correct in stating that "[under] the logic of *Lehnert* . . . using compelled fees for the pooling of litigation expenses is permissible for the same reasons that it is permissible for other expenses." U.S. Br. 20-21.

The first element of *Lehnert*'s logic is the Court's recognition that affiliation fees paid by a local union to a parent union, insofar as those fees "contribute[ ] to the pool of [parent-union] resources potentially available to the local," *Lehnert*, 500 U.S. at 523, are "assessed for the [local union's] bargaining unit's protection, even if . . . not actually expended on that unit in any particular membership year," *id.* And the second element of *Lehnert*'s logic is the Court's recogni-

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[11] Petitioners make an unavailing effort, Pet. Br. 27, to press into their service Justice Scalia's statement that "[*IAM v.*] *Street*, [367 U.S. 740 (1961),] *Ellis*, and [*Communications Workers v.*] *Beck*, [476 U.S. 735 (1988)] were statutory cases, but there is good reason to treat them as merely reflecting the constitutional rule suggested in [*Railway Employees' Dept. v.*] *Hanson*, [351 U.S. 225 (1956)] and later confirmed in *Abood.*" *See Lehnert*, 500 U.S. at 555 (Scalia, J., concurring in the judgment in part and dissenting in part). That statement has nothing to do with the question presented here, which, as we have shown, was not presented in *Ellis*, and which petitioners do not even suggest was presented in the other cases cited by Justice Scalia (*Street*, *Beck, Hanson* and *Abood*). Justice Scalia cited those cases in addressing the entirely *separate* question as to whether, instead of the three-pronged test adopted by the Court in *Lehnert*, *see supra* at 17, chargeability should depend on whether an expenditure was incurred in "performing the union's statutory duties as exclusive bargaining agent." *Id.* at 550 (Scalia, J., concurring in the judgment in part and dissenting in part). That question is not presented for decision in this case. *See infra* at 38.

tion that this "protection" for a local union's bargaining unit is properly chargeable to objectors in that unit *as long as it covers parent union assistance that is in the form of "otherwise chargeable expenditures*," *id.* at 524, that is to say, assistance to a local union in an activity related to collective bargaining that benefits that local union's bargaining unit and is properly chargeable to the objecting nonmembers in that unit. The upshot is this: because (for example) it would be a chargeable expenditure for an affiliated local union to hire a professional negotiator to assist the local in negotiating a collective bargaining agreement, it likewise is a chargeable expenditure for an affiliated local union to pay to a parent union the portion of its required affiliation fee that goes to enabling the parent union to hire negotiators to assist affiliated local unions with their collective bargaining. The chargeable portion of the affiliation fee is determined by the sum of the parent union's expenditures on such *otherwise chargeable* activities; no expenditures on *non*chargeable activities are included.

In applying that rule, parent union extra-unit litigation *that is in fact "otherwise chargeable*" is "analytically identical," Pet. App. 38a (Lynch, J., joining and concurring) to other chargeable parent union extra-unit activities insofar as *Lehnert*'s chargeability rule is concerned. If the expenditures for a particular kind of litigation—for example, litigation to enforce provisions of a local union's collective bargaining agreement that the parent union assisted the local in negotiating—would be chargeable to objectors in a particular local bargaining unit when and if such litigation were to be conducted on behalf of that unit, then the potential availability of parent union assistance with respect to such litigation is a chargeable benefit to the objectors' unit in precisely the same way and

for precisely the same reasons as the potential availability of parent union assistance with respect to negotiating the collective bargaining agreement in the first place is a chargeable benefit.

3. In arguing that parent union extra-unit litigation expenditures should be categorically excluded from *Lehnert*'s rule as to parent union extra-unit expenditures generally, petitioners do *not* assert that litigation expenses are never "otherwise chargeable." On the contrary, petitioners have not disputed that *all* of the SEIU litigation that was considered chargeable by SEIU and MSEA—which was undertaken "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," *see supra* at 5—was properly chargeable to objecting nonmembers in the local union bargaining units on whose behalf the litigation was conducted.[12]

Such litigation is, after all, at the core of the union activities that *Abood* recognizes as chargeable to objectors: "[t]he tasks of 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 (emphasis

[12] Petitioners' challenge relates solely to litigation conducted "for bargaining units far afield from the [petitioners'] State of Maine bargaining units." Pet. Br 9. Thus this case does not raise any challenge to the chargeability, on a pro rata basis to objecting employees in all of a parent union's affiliated local union bargaining units, of the parent union's expenditures on litigation that does not pertain to any specific local union's bargaining unit—for example, litigation to enable the parent union to "maintain its corporate or associational existence," *Ellis*, 466 U.S. at 448.

added). If a local union is to perform those tasks successfully, it must have both the means to negotiate effectively with the employer that comes to the bargaining table *and* the means to compel the employer, through litigation before an agency or a court, to come to the table and bargain in good faith when the employer has unlawfully refused to do so,[13] and to compel the employer, again through litigation, to arbitrate a grievance arising under the collective bargaining agreement and to abide by the arbitrator's award. In many cases a local union that lacked the capacity to bring and prosecute such collective-bargaining-process litigation would lack the capacity to be an effective exclusive bargaining representative. Such litigation is unquestionably chargeable to objectors in the local bargaining unit where it is conducted. Nor do petitioners argue otherwise.

But, securing "[t]he services of lawyers," *Abood*, 430 U.S. at 221, for such collective-bargaining-process litigation may be totally beyond the means of a local union, or may require the local union to raise its membership dues and service fee to a prohibitive level on an emergency basis. *See supra* at 16, 19. Consequently, were it not for the potential availability of assistance from the parent union for such litigation,

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[13] *See, e.g.*, Me. Rev. Stat. Ann. tit. 26, § 979-C.1.E (prohibiting public employers from "[r]efusing to bargain collectively with the bargaining agent of its employees as required by section 979-D"); *id.* § 979-D (defining the duty to bargain to include, *inter alia*, the duty to negotiate in good faith and to participate in good faith in the mediation, fact finding and arbitration procedures required by the statute to resolve bargaining impasses); *id.* §§ 979-C.3, 979-H (conferring on the Maine Labor Relations Board the authority to adjudicate complaints of violations of those provisions, subject to judicial review).

many local unions would go into collective bargaining negotiations as neuters—and with the employer fully aware of their impotence.

Thus, resource pooling through local union affiliation fee payments to a parent union to finance otherwise chargeable litigation activity stands on the same footing, as a matter of logic and First Amendment principle, as resource pooling through affiliation fee payments to a parent union to finance other kinds of otherwise chargeable activities. Indeed, because litigation is such an expensive activity, and one that cannot be conducted by non-lawyer union representatives, Judge Lynch was correct in observing below that, if litigation expenditures were excluded from *Lehnert*'s general chargeability rule as to "extra-unit" parent union expenses, the result would be "a concomitant reduced capacity to bargain effectively on behalf of all employees." Pet. App. 40a.[14]

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[14] Because MSEA relies solely on *Lehnert*'s cost-pooling holding as just described and has not attempted to establish that any particular litigation in which SEIU engaged was "for the direct benefit of" the MSEA units, *id*., "[t]his case presents no occasion to consider [how] a unit may establish a direct interest in litigation involving other parties." U.S. Br. 11 n. 2. It therefore is gratuitous for the United States to declare that "[t]he fact that one unit's litigation may create a precedent that could affect other units is insufficient to establish that the litigation directly concerns those units." *Id.* *See also id.* at 12 (repeating this assertion). It also is wrong. For example, if two units were engaged in similar disputes with their respective employers over the meaning of language that was identical in their respective CBAs, and one of the units engaged in successful litigation over the question, the other unit might find it unnecessary to litigate because the employer might accede to the result reached in the first unit's litigation. In such a situation—and there are many others—both units would properly be understood as having a direct interest in the litigation.

4. With respect to parent union litigation in connection with the collective bargaining process such as we have described, the statement in the *Lehnert* plurality opinion on which petitioners rely—that extra-unit litigation is so "political and expressive" in nature as to be "akin to lobbying in both kind and effect," 500 U.S. at 528—is simply incorrect. Such litigation is no more "political and expressive" or "akin to lobbying" than the plainly chargeable activity of negotiating the very collective bargaining agreement that is the subject or the object of the litigation.

To be sure, "union litigation may cover a diverse range of areas," *id.*, and some of that litigation may correctly be deemed to be so "political and expressive" in nature and "akin to lobbying" as to be nonchargeable. But as Judge Lynch explained in her concurring opinion, the parent union expenditures for such litigation would be "exclude[d] . . . from the agency fee" at the threshold. Pet. App. 39a. For such litigation expenditures would be nonchargeable to objectors in the units directly involved in the litigation and thus would not constitute "otherwise chargeable"

And, because both MSEA and SEIU treated organizing expenditures as *nonchargeable, see supra* note 3, this case likewise does not present any occasion to address the chargeability of *organizing* expenditures, despite the apparent desire of the petitioners (*see* Pet. Br. 23-24) and the United States (*see* U.S. Br. 13) to do so. We merely note that, in contrast to *Ellis*, where the Court found that the organizing expenses at issue in that case were not chargeable under the Railway Labor Act, 466 U.S. at 452, the NLRB, in a decision affirmed unanimously by the Ninth Circuit en banc, has held that under the National Labor Relations Act expenses for certain kinds of organizing, different from what was involved in *Ellis*, are properly chargeable to objecting nonmembers. *UFCW Local 1036 v. NLRB*, 307 F.3d 760 (9th Cir. 2002) (en banc), *enforcing* 329 N.L.R.B. 730 (1999).

expenditures that could be included in calculating the portion of the affiliation fee to be charged to objecting nonmembers in other bargaining units.[15]

This case does not present any occasion to determine which kinds of litigation are "otherwise chargeable." Petitioners did not dispute—and could not reasonably have disputed—that the litigation SEIU treated as chargeable in determining the chargeable portion of its affiliation fee was in fact "otherwise chargeable." Petitioners' claim was and is that extra-unit expenditures for "otherwise chargeable" litigation cannot be charged to objecting nonmembers in any bargaining unit other than the unit directly involved in the litigation. That submission is due to be rejected as a matter of law.

5. Petitioners' argument that "the Nonmembers' employment interests are not advanced by . . . litigation [in other units]," Pet. Br. 20, is refuted by *Lehnert,* which recognizes that the *availability* of parent union assistance to affiliated local unions in the collective bargaining process advances the interests of all employees, including objecting nonmembers, in all of the bargaining units of the affiliated local unions, even in years where such parent union assistance is not provided to a particular unit. Nor

[15] Litigation is not unique in lending itself to both chargeable and nonchargeable expenses. A union publication, for example, may be devoted in part to reporting on collective bargaining and in part to political topics. *Lehnert* holds that the expenses attributable to the portion of the publication that reports on chargeable matters is chargeable, while expenses attributable to the portion of the publication that reports on nonchargeable matters is nonchargeable. *Lehnert*, 500 U.S. at 527 (opinion of the Court). There is no reason why litigation alone should be subjected to a categorical rule that ignores the nature of the litigation in which a union has actually engaged.

does petitioners' concern that expenditures on "extra-unit litigation might well *directly conflict* with . . . [an objecting nonmember's] interests . . . as a citizen, taxpayer, and/or competitor for scarce public resources," Pet. Br. 20 (emphasis in original), provide any basis for the categorical "litigation exception" they propose. As this Court recognized in *Abood*, a local union's negotiation and administration of collective bargaining agreements in the objector's own unit may often raise such a conflict, and such activity is nonetheless chargeable. *See Abood*, 431 U.S. at 233.[16]

6. Petitioners argue that the parent union extra-unit litigation expenditures at issue here must be treated differently from the parent union expenditures made chargeable by *Lehnert* in terms for the

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[16] The *Abood* Court, in upholding the constitutionality of union shop agreements that, at their core, require objecting nonmembers to finance the union's negotiation of a collective bargaining agreement covering the objectors' bargaining unit, noted that:

> [An employee's] moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. An employee might object to the union's wage policy because it violates guidelines designed to limit inflation, or might object to the union's seeking a clause in the collective-bargaining agreement proscribing racial discrimination. The examples could be multiplied. To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. [431 U.S. at 222.]

"simple" reason that "litigation is petitioning of government protected by the First Amendment." Pet. Br. 15. But that does not serve to provide a legal distinction between the two. This Court has refused to "elevate the Petition Clause to special First Amendment status," *McDonald v. Smith*, 472 U.S. 479, 485 (1985), because "there is no sound basis for granting greater constitutional protection to statements made in a petition to the [government] than other First Amendment expressions," *id.* *See also Keller v. State Bar of Cal.*, 496 U.S. 1, 12-13 (1990) (holding that a mandatory state bar could constitutionally charge objectors for "germane" activities that consisted principally of presenting recommendations to the courts).

This Court's recognition that petitioning activity is not on some plane above other First Amendment activities is dispositive of petitioners' argument. Assuming that petitioners are correct that negotiating a collective bargaining agreement in the public sector does not constitute "petitioning of government protected by the First Amendment," Pet. Br. 15—a proposition that is not self-evident[17]—it nevertheless is the

[17] Public sector collective bargaining consists of asking government officials to take action. And in Maine, if collective bargaining by state employees has not resulted in an agreement between a union and management's negotiators, other public agencies become involved. Fact-finding may be conducted under the auspices of the Maine Labor Relations Board, *see* Me. Rev. Stat. tit. 26, § 979-D.3; and if fact-finding does not resolve the dispute, "either party may petition the board to initiate compulsory final and binding arbitration," selecting an arbitrator through a process administered by the Labor Relations Board, *id.* § 979-D.4(B). Most states follow similar procedures. *See generally* Elkouri & Elkouri, *How Arbitration Works* 1366-1391 (A. Ruben, ed. 2003). Such a collective bargaining process is indistinguishable from petitioning activity. Indeed, it closely resembles litigation.

case, as this Court stated in *Abood*, that collective bargaining frequently involves controversial matters, often of public policy, as to which employees may have differing views. *See supra* at 31 and note 16. Indeed, determining what a union will seek from the government in collective bargaining generally involves *greater* room for ideological disagreements than, say, determining whether to enforce a provision of an existing collective bargaining agreement by bringing an action to compel arbitration or to enforce an arbitrator's award. *Lehnert* establishes that a nonmember's disagreement with the parent union's bargaining agenda, even as regards bargaining in other units, does not give the nonmember a First Amendment right not to pay a pro rata share of the national union's bargaining expenses. There is no logical reason why the result should be different with respect to "extra-unit" litigation in support of a union's bargaining efforts or to enforce a collective bargaining agreement.

That there is no meaningful distinction, in determining which parent union expenses may be charged to objecting nonmembers, between activities that involve petitioning the government and those that do not, is further borne out by the fact that a particular kind of activity in which a union engages in negotiating or enforcing a collective bargaining agreement may sometimes involve proceedings before the government and sometimes not, even though the nature of the activity is the same in both instances. For example, a state-employee union in Maine may provide in its CBA that grievances will be arbitrated before a private arbitrator, *see* Me. Rev. Stat. Ann. tit. 26, § 979-K, but if the CBA does not so provide, the grievance will be heard by the State Civil Service Appeals Board, *id.* *See also* Me. Rev. Ann. tit. 26, § 7083

(describing the Board's procedures). It would make no sense to treat a parent union's assistance in grievance resolution as chargeable on a cost-pooling basis in the one case but not the other.

Furthermore, petitioners do not suggest that, as to activities *within* the unit, litigation is subject to different rules than other activities, no matter how strongly a nonmember may disagree with particular litigation. If the fact that litigation entails petitioning the government does not require a special rule when the litigation involves a nonmember's own unit, there is no reason why a special rule confined to litigation expenses should be required in applying *Lehnert*'s holding as to "extra-unit" expenditures.[18]

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[18] Petitioners assert that the *Lehnert* Court, in holding that lobbying for ratification or implementation of a collective bargaining agreement is chargeable to objectors, allowed chargeability only as to such lobbying with regard to a nonmember's own collective bargaining agreement. *See* Pet. Br. 19, 24-25. That is not a correct reading of *Lehnert*. The passages to which petitioners refer are in Parts III-A and IV-A of Justice Blackmun's opinion, 500 U.S. at 522, 527 (*see* Pet. Br. 19) which were not part of the opinion of the Court. *See id.* at 511. To the extent that other Members of the Court understood the plurality opinion as proposing that expenses for otherwise chargeable lobbying should not be chargeable on an "extra-unit" basis, they did not agree with that position. On the contrary, Justice Kennedy stated that it "makes little sense" "[for] Justice Blackmun [to] remove[ ] litigation *and lobbying* from the scope of the Court's holding that a local bargaining unit may charge employees for their pro rata share of the costs associated with 'otherwise chargeable' expenses of affiliate unions." *Id.* at 563 (Kennedy, J., concurring in the judgment in part and dissenting in part) (emphasis added). Justice Kennedy added that such a holding would be inconsistent with the analysis in Justice Scalia's opinion, in which he joined. *Id.* Moreover, it is not even clear that the plurality opinion in *Lehnert* should be read as proposing a ban on "extra-unit" charges for lobbying that is

In sum, as the United States correctly concludes, *see* U.S. Br. 20-21, there is no principled basis for excluding litigation expenses from *Lehnert*'s unanimous rule that otherwise chargeable expenses of a parent union may be charged on a pro rata basis to members in all affiliated units.[19]

"otherwise chargeable" (*i.e.*, lobbying in support of ratification or implementation of a collective bargaining agreement); and the opinion certainly does not state any basis for such a limitation. The discussion of lobbying in Part III.A. of the plurality opinion *precedes* the discussion in Part III.B. of "[p]etitioners' contention that they may be charged only for those collective-bargaining activities undertaken directly on behalf of their unit." *Id.* at 522 (plurality opinion). In the discussion of lobbying, the plurality opinion sometimes refers to "ratification or implementation of a dissenter's collective-bargaining agreement," *id.* at 520; *see also id*. at 521 (referring to "objecting employees['] . . . collective-bargaining agreement"); but the plurality sometimes refers more broadly to lobbying for "the effectuation of *a* collective-bargaining agreement," *id*. (emphasis added), and to lobbying in the context of "contract ratification or implementation," *id.* at 522. Most to the point, in describing the kinds of lobbying that should not be chargeable, Justice Blackmun refers to lobbying for "financial support of the employee's profession or of public employees generally," *id.* at 520, and to lobbying concerning topics other than "the terms and conditions of employment," *id.* at 521. At no point does Justice Blackmun's opinion state directly that parent union expenditures for *otherwise chargeable* lobbying—that is to say, lobbying for "the effectuation of a collective-bargaining agreement," *id.*—should be chargeable only on a unit-by-unit basis. In any event, if the plurality's discussion of lobbying is read as petitioners would read it, that discussion, like the plurality's discussion of litigation, failed to command a majority.

[19] That is the view of each of the four courts of appeals that have considered this question in the past several years. In addition to the decision below, *see Otto, supra; IAM v. NLRB*, 133 F.3d 1012, 1016 (7th Cir. 1998); *Reese v. City of Columbus,* 71 F.3d 619 (6th Cir. 1995). The National Labor Relations Board has reached the same conclusion, in the decision that was

II. PETITIONERS' SUGGESTIONS THAT *LEHNERT* SHOULD BE OVERRULED ARE NOT PROPERLY PRESENTED

As the United States points out, petitioners' Question Presented "affirmatively relies on *Lehnert*," U.S. Br. 18, and "the body of the petition for a writ of certiorari likewise relied heavily on *Lehnert*, without suggesting that it be overruled," *id*.

Nevertheless, in their brief, petitioners argue that *Lehnert* should be overruled—although it is not clear what part of *Lehnert* petitioners would jettison. At some points petitioners seem to confine their attack to *Lehnert*'s holding as to parent union "extra-unit" expenditures made from pooled resources. *See* Pet. Br. 43, 50; *see also* U.S. Br. 18 (reading petitioners' brief as suggesting "that this Court should overrule *Lehnert* and hold that units may not use compelled fees for *any* pooling arrangements") (emphasis in original). But at other points, petitioners appear to attack *Lehnert*'s three-pronged test for determining the chargeability of union expenditures generally. *See* Pet. Br. 36-37.

The United States correctly states that petitioners' attack on *Lehnert,* however it might be understood,

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enforced by the Seventh Circuit in the *IAM* case. *California Saw & Knife Works,* 320 N.L.R.B. 224 (1995). Petitioners cite cases from two state courts and the Tenth Circuit that have dealt with this issue. Pet. Br. 27 n.14. As petitioners' own characterizations of those cases indicates, none of them contains any analysis as to why the logic of *Lehnert*'s holding does not apply to litigation expenses; the cases cited by petitioners—which were decided in 1991 and 1992, and have not been followed by any other court in the ensuing sixteen years—merely declare, erroneously, that a majority of the Court in *Lehnert* adopted the position stated in Justice Blackmun's plurality opinion.

"falls outside of the far narrower question presented [by the petition for certiorari], which affirmatively *relies* on *Lehnert*." U.S. Br. 18 (emphasis in original). By framing their petition in that manner, petitioners "excluded [the] argument" they now seek to raise. *Id.*, citing *Yee v. City of Escondido*, 503 U.S. 519, 535-37 (1992). That argument is not "fairly included [with]in" the question presented in the petition, S. Ct. Rule 14.1(a), and it is this Court's practice not to consider such a question except in the "most exceptional cases." *Yee*, 503 U.S. at 535 (quoting *Stone v. Powell*, 428 U.S. 465, 481 n.15 (1976)).

This is not such a case. As we have seen, the *Lehnert* Court was unanimous on the proposition that otherwise chargeable parent union expenditures from pooled resources may be charged on a pro rata basis to objecting feepayers in all of the parent union's affiliated local unions. *See supra* at 18; U.S. Br. 18. There is no reason why the Court should revisit that unanimous holding.[20]

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[20] Petitioners make an argument that chargeability determinations are "subject to a 'strict scrutiny' analysis," Pet. Br. 28, but they do not explain where that principle should lead, except to suggest that *Abood*, *Ellis* and *Hudson* are consistent with their conception of strict scrutiny while *Lehnert* is not. *See* Pet. Br. 29-31 (discussing *Abood*); *id.* at 29, 32 (discussing *Ellis*); *id.* at 30 n.16 (citing *Hudson*). But as we have shown, this Court's decision in *Lehnert*, and the decision of the First Circuit in this case, are fully consistent with those earlier decisions. And, we agree with the United States that "[e]ven assuming *arguendo* that a least-restrictive-means test applies," U.S. Br. 19, it is satisfied here because "prohibiting unions from using compelled fees for pooling arrangements would require them to choose between foregoing [sic] an efficient means of spreading risk, on the one hand, or permitting free riders, on the other," *id.*, thereby undermining the compelling interests recognized in *Abood*.

To be sure, in *Lehnert* four Justices disagreed with the three-pronged test adopted by the Court for determining the chargeability of union activities generally, whether undertaken within or outside the affected bargaining unit, and those Justices proposed a "statutory duties" test which they maintained would be "more administrable." *See* 500 U.S. at 550-58 (Scalia, J., concurring in the judgment in part and dissenting in part). But the Justices who favored the "statutory duties" test made clear that under that test of chargeability, just as under the three-pronged test, parent union expenditures from pooled resources that are *otherwise chargeable* would be chargeable to all objecting feepayers. *See supra* at 18. What is more, the chargeability standard that both MSEA and SEIU applied, *see* Pet. Br. 5 (quoting JA 89), is very similar to the standard petitioners appear to be proposing, *see* Pet. Br. 50-51.

Thus this case is not a proper vehicle for revisiting the debate on whether a "statutory duties" test would be superior to *Lehnert*'s three-pronged test. And petitioners are wrong in any event in the basis they give for revisiting that debate—their contention that the *Lehnert* test has "confused" the lower courts. *See* Pet. Br. 36-37. In reality, the only confusion has been over the specific question presented here, as to whether litigation expenditures should be categorically excluded from *Lehnert*'s holding as to "extra-unit" expenditures generally. *See* cases cited in Pet. Br. 37-38.[21] It is true that this Court has recognized

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[21] In particular, Judge Silberman's complaint that *Lehnert* fails to provide "a principled basis for distinguishing expenditures that are 'germane' from those that are not," *Beckett v. Air Line Pilots Ass'n,* 59 F.3d 1276, 1281 (D.C. Cir. 1995) (Silberman, J., concurring *dubitante*), was based principally on what Judge

that it sometimes may be "difficult to define germane speech with ease or precision where a union or bar association is the party," *Board of Regents v.*

Silberman perceived as the incongruity of a rule (which he mistakenly read *Lehnert* to have adopted) that "litigation expenses incurred by the union in another unit on a matter that relates to collective bargaining—perhaps even an interpretation of a collective bargaining agreement identical to that of the objecting employees' unit—are not thought 'germane'," *id.*

It bears noting that the *amicus* brief complaining of a supposed lack of clarity in the *Lehnert* three-pronged chargeability test was submitted by the Commonwealth of Virginia, which has no experience whatsoever with administering service-fee systems because public sector agency shop agreements are prohibited by law in Virginia. *See* Va. Code Ann. §§ 40.1-58.1, 40.1-62. No governmental entity that is party to a collective bargaining agreement providing for service fees has submitted a brief arguing that the *Lehnert* test should be replaced.

Furthermore, Virginia's assertion that "the . . . *Lehnert* test . . . has been pilloried in academic publications," Brief for the Commonwealth of Virginia as Amicus Curiae at 19, is unfounded. The essay by Professor Farber that is cited by Virginia merely cites *Lehnert* in passing in a footnote to a text discussion in which Professor Farber rejects out of hand this Court's entire "public forum" jurisprudence. Daniel L. Farber, *Essay: Missing the "Play of Intelligence*," 36 Wm. & Mary L. Rev. 147, 155 and n.14 (1994). (And that essay does not pillory *Lehnert* so much as it pillories this Court's entire "current work product." *Id*. at 147, 148.) The other article cited by Virginia urges a position that petitioners certainly would not embrace, namely that "[t]he compelled subsidization of the speech of others violates the First Amendment only when the funds collected are used to promote the message of an identifiable viewpoint or interest in debate in a controversial political issue." Gregory Klass, *The Very Idea of a First Amendment Right Against Compelled Subsidization*, 38 U.C. Davis L. Rev. 1087, 1130 (2005). Under that approach, the *Lehnert* three-pronged chargeability test would be much too *narrow*, because, "so long as funded speech is neither political nor ideological, there is no First Amendment violation." *Id.* at 1131.

Southworth, 529 U.S. 217, 232 (2000), and that there can be "difficult problems in drawing lines" between chargeable and nonchargeable expenditures, *Abood*, 431 U.S. at 236; *see also Keller*, 496 U.S. at 15. But these statements simply acknowledge the difficulties that are inherent in the subject matter; they do not suggest or that there would be no such "difficult[ies]" and no such "problems in drawing lines" under a "statutory duties" test—much less that the Court has erred in regarding "germane[ness] to collective bargaining" as the touchstone of chargeability, as it has for more than fifty years, *see, e.g., Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 235 (1956); *Brotherhood of Ry. Clerks v. Allen*, 373 U.S. 113, 121 (1963).

III. THERE IS NO BASIS FOR A REMAND TO DETERMINE WHETHER THE UNION HERE OPERATED UNDER THE GOVERNMENT'S PROPOSED "BONA FIDE POOLING ARRANGEMENT" STRUCTURE

The United States correctly states that the portion of a local union's affiliation fee that may properly be charged to a local union's objecting feepayers is only the portion that goes to financing a parent union's otherwise chargeable activities; and the Government acknowledges that "the court of appeals recognized" this legal requirement. U.S. Br. 25. So did MSEA. *See supra* at 5. The Government further recognizes that the court of appeals "correctly rejected" the only arguments petitioners have advanced in this case. U.S. Br. 29 n.4. But the Government suggests that petitioners should have asserted a position they never have asserted, namely, that *Lehnert*'s holding approving the chargeability to objectors in all affiliated local unions of a parent union's "otherwise chargeable"

extra-unit expenditures from pooled resources should be limited to cases where there has been a showing that a parent union and its local union affiliates are parties to a "bona fide pooling arrangement" under which "each participating unit. . . ha[s] some reasonable assurance that, when needed, the pool will pay for its germane litigation" and that, "[i]f the national or international union assists with some but not all germane litigation, it . . . ha[s] reasonably ascertainable standards for determining which litigation is included in the pooling arrangement." U.S. Br. 25. *See also id.* at 27-28.

A.

The United States' argument is not properly before the Court. In the courts below, in the petition for certiorari, and in petitioners' brief on the merits, petitioners have never raised this argument or anything remotely resembling it. Petitioners have never disputed that, as to activities other than litigation, the "extra-unit" expenditures that SEIU and MSEA have treated as chargeable would be chargeable under *Lehnert*; petitioners have argued only that *Lehnert*'s "standards by which *other* extra-unit activities could be measured," Pet. Br. 10 (emphasis in original), should not apply to extra-unit litigation. The suggestion now advanced by the Government that, to determine whether *any* of SEIU's expenses on "extra-unit" activities are chargeable, it is necessary to determine whether SEIU and MSEA have a "bona fide pooling arrangement" as the Government defines that term, comes only from an *amicus*, and should not be entertained by this Court. *See, e.g., Kamen v. Kemper Fin.*

Servs., Inc., 500 U.S. 90, 96 n.4 (1991); *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981).[22]

B.

1. Beyond that, we would be derelict if we did not add that the United States' contention that *Lehnert* rests on a "bona fide pooling arrangement" requirement could hardly be more wrong. Far from requiring examination of the manner and means by which a parent union decides when and to what extent it will devote pooled affiliation fee resources to providing particular services to a particular local union, the *Lehnert* Court based its decision on its understanding of "the unified-membership structure under which so many unions . . . operate," *id.* at 523, and the "essence of" the typical union "affiliation relationship," *id.* *Lehnert* upheld parent union affiliation fee resource-pooling by all unions that "operate" under a "unified-membership structure" that embodies the "notion" that the parent union "will bring to bear its often considerable . . . resources when [an affiliated] local is in need of them." *Id.* *Lehnert* did *not* limit its holding

[22] The United States argues that remand is appropriate because the legal standard it proposes "alters the playing field in some important respects." U.S. Br. 29 n.4 (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995)). In *Adarand*, however, the remand was as to issues that had been raised by the parties, but had not been addressed by the Court of Appeals because that court had applied a legal standard inconsistent with what this Court held to be appropriate. *Adarand* does not provide any warrant for a remand as to an issue never raised by a party, especially where the court of appeals correctly understood the law, as the United States acknowledges is the case here. *See* U.S. Br. at 25, 27 (stating that "the court of appeals recognized" and properly "explained" the principles applicable to the chargeability of parent union extra-unit expenditures from pooled expenses).

in that regard to unions that operate under the Government's heretofore unheard of "bona fide pooling arrangement" structure.

The Court's "conclu[sion]" was in the following general terms: "that a local bargaining representative may charge objecting employees 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." *Id.* at 524. And, of equal moment, the *Lehnert* Court held that it was proper for the local union in that case to charge objecting nonmembers for the parent union's extra-unit expenditures "germane to collective bargaining and similar support services," *id.* at 527, on the basis that the parent union operated under a "unified-membership structure," *id*. at 523—without requiring or finding that the union operated under a "bona fide pooling arrangement" structure such as the Government here proposes—because "unions may bill dissenting employees for their share of general collective-bargaining costs of the state or national parent union," *id.* at 527.[23]

2. The Government's argument for its proposed "bona fide pooling arrangement" requirement, aside from its false attribution of that requirement to the *Lehnert* Court, amounts to an assertion that, if a parent union does not guarantee to cover the costs of all the chargeable litigation that an affiliated local union that pays its required affiliation fees may conduct, or

[23] The record in *Lehnert* contained no evidence that the parent union in that case operated under anything like the Government's proposed "bona fide pooling arrangement" structure. *See* Joint Appendix in *Lehnert v. Ferris Faculty Ass'n*, O.T. 1990, No. 89-1217.

provide "ascertainable standards" for determining when and how it will assist its affiliated local unions with chargeable litigation, the parent union's use of pooled affiliation fee resources for extra-unit litigation expenses constitutes "a vehicle by which some units use compelled fees to subsidize other units' litigation." U.S. Br. 24. That is a *non sequitur*.

Each of the local unions that is party to a prototypical affiliation relationship of the kind at issue in *Lehnert* and this case knows that it potentially may receive assistance from its parent union with respect to the local union's chargeable activities that vastly exceeds in cost the amount that the local has paid in affiliation fees. All that it takes is one complex or protracted round of collective bargaining or one expensive piece of collective-bargaining-process-related litigation. That being so, the one point that is certain is that the cost pooling involved in a union affiliation relationship, whereby the parent union makes determinations based on its judgment and experience as to when and to what extent assistance will be provided to a local union affiliate, is *not* a scheme to compel "some units . . . to subsidize other units' litigation," U.S. Br. 24.

And there is an evident need for parent unions to make such determinations on the basis of judgment and experience. In any given year, the aggregate demand of affiliated local unions for assistance from the parent union in negotiating, administering and enforcing collective bargaining agreements is apt to outstrip the resources the parent union has at its disposal from the aggregate required affiliation fees its locals have paid. Thus, one of the benefits a local union receives through an affiliation relationship is the parent union's experience and judgment in determin-

ing how to allocate scarce resources to best assist local unions in their collective bargaining activities. That is a particular benefit where, as is true in this case, a local union could not afford to buy on the open market assistance of the levels the parent union potentially can provide—even if such potential assistance were in fact available for purchase on the open market. And the truth of the matter is that a parent union typically brings to bear a level of expertise with respect to providing assistance in collective bargaining that no third person could provide on the open market, and that is therefore available only to local unions that affiliate with the parent and pay the required affiliation fees.

3. The United States' proposed "bona fide pooling arrangement" requirement thus amounts to the kind of "prophylactic rule" that the Government acknowledges is *not* required by the First Amendment, under which a local union would be required to buy an insurance policy rather than be permitted to pay an affiliation fee to a parent, in order to "ensur[e] that [the] national union does not use pooling as a cover for impermissible cost shifting." *See* U.S. Br. 20. Fears that a parent union and its affiliated local unions might be tempted to engage in "impermissible cost shifting" do not justify intrusive prophylactic rules requiring parent unions to adopt the kinds of benefit schedules and claims standards that an insurance policy might provide, any more than they would justify requiring local unions to purchase an insurance policy in the first place rather than having a prototypical affiliation relationship with a parent union of the kind at issue in *Lehnert* and this case.

This Court's "repeated affirmation that courts have an obligation to interfere with a union's statutory

entitlement [to collect service fees] no more than is necessary to vindicate the right of nonmembers," *Davenport*, 127 S. Ct. at 2379 (emphasis deleted), which has guided this Court's service fee jurisprudence from the start, *see supra* at 15-16, does not countenance the "bona fide pooling arrangement" requirement the United States proposes, which would unnecessarily entangle the federal courts in matters of internal union governance and would fail "to provide unions the flexibility and discretion necessary to accommodate the needs of their constituents," *Lehnert*, 500 U.S. at 525. *See also Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65-66 (1991) (union must be afforded a "wide range of reasonableness" in representing employees) (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)). As the Government, in something of an irony, quite correctly observes, "[s]uch leeway is particularly appropriate for financial-management decisions concerning the best way to fund germane activities." U.S. Br. 20.

CONCLUSION

For the reasons stated, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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