No. 07-610

IN THE

Supreme Court of the United States

DANIEL B. LOCKE ET AL., ON BEHALF OF THEMSELVES AND THE CLASS THEY SEEK TO REPRESENT,

Petitioners,

v.

EDWARD A. KARASS, STATE CONTROLLER; REBECCA M. WYKE, COMMISSIONER, DEPARTMENT OF ADMINISTRATIVE AND FINANCIAL SERVICES; KENNETH A. WALO, DIRECTOR, MAINE BUREAU OF EMPLOYMENT RELATIONS; AND MAINE STATE EMPLOYEES ASSOCIATION, SEIU LOCAL 1989, SERVICE EMPLOYEES INTERNATIONAL UNION,

Respondents.

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

PETITIONERS' REPLY BRIEF

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The Brief in Opposition of Respondent Maine State Employees Association, Local 1989, Service Employees International Union, AFL-CIO-CLC ("Opp.") demonstrates why Circuit Judge Lynch correctly observed that a decision by this Court on the Question Presented would resolve confusion among the lower courts and "provide needed clarity." Pet. App. A. at 41a, *Locke v. Karass*, 498 F.3d 49, 69 (1ST CIR. 2007) (Lynch, J., concurring).

I. The Case Is Not *Sui Generis*.

Respondent improbably asserts that this case is *"sui generis."* Opp. at 2.[1] This assertion begs the Question Presented. Respondent's consistent position has been that the categorical prohibition against charging nonmembers for extra-unit litigation established by *Ellis v. Railway Clerks*, 466 U.S. 435, 453 (1984), was somehow discarded or refined by *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). According to Respondent, *Lehnert* permits extraction of funds for such activities, so long as nonmembers' monies are adequately shuffled among a labor union's affiliates,

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[1] Leaping from the improbable to the simply false, Respondent repeats the First Circuit's error that "[Petitioners] have not, before the district court or on appeal, argued that the particular expenditures for which they were charged failed to satisfy th[e three-part *Lehnert*] test." Opp. at 6 n.5, *citing* Pet. App. A at 31a. The Record belies Respondent's claim. *See* Record in Civil Action No. 2:05-cv-112-GZS, Clerk's Docket No. 67: Mem. at 27; 1st Cir. Case No. 06-1747: Pls-Appellants' Br. at 19-25; Pls-Appellants' Reply Br. at 7-8 n.7.

and those affiliates provide creative rationalizations. Under Respondent's formulation, virtually **every** case would be *sui generis* for unions extracting monies from unwilling employees, and this Court's decisionmaking provides little meaningful guidance.

Respondent's reading of *Lehnert* is not and cannot be the law. Such an outcome would require, *inter alia*, the improbable happenstance that a majority of the *Lehnert* Court rejected *Ellis*' categorical teaching not only *sub silentio*, but while the entire Court — even Justice Marshall, the only Justice who clearly would have supported the decision below[2] — recognized the import of, and pledged fidelity to, *Ellis*!

Whether or not the First Circuit properly applied this Court's teachings, this Court should exercise its supervisory power to resolve the manifest confusion on this issue and "provide needed clarity." Pet. App. A. at 41a, 498 F.3d at 69 (Lynch, J., concurring); *see also* Pet. App. A at 33a; 498 F.3d at 66 ("In the aftermath of ... *Ellis* and *Lehnert,* we understand the uncertainty about the constitutionality of charging nonmembers of a union for the costs of extra-unit litigation.").

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[2] Justice Marshall joined Part II of the Court's *Lehnert* Opinion, 500 U.S. at 534 (Marshall, J., concurring in part), in which the Court concluded that "the RLA cases necessarily provide some guidance regarding what the First Amendment will countenance in the realm of union ... mandatory assessments." *Id.* at 516 (referring explicitly to *Ellis*). Significantly, Justice Marshall recognized that his opinion as to extra-unit litigation varied from the Court's majority: "I also **disagree with the Court's decision** that the costs of articles printed in MEA's employee journal about union litigation outside petitioners' bargaining unit are not chargeable." *Id.* at 534 (Marshall, J., dissenting in part) (emphasis added).

The notion that this case is *sui generis* is belied by the serious split among lower courts, evidenced by the conflicting cases cited in the decision below, Pet. App. A at 22a-25a, 498 F.3d at 60-62, the Petition, and the Opp. at 7-8, 15.

II. Respondent Re-Writes *Lehnert* As It Wishes It Had Been Decided, Rather Than Respecting This Court's Actual Conclusions.

Respondent asserts that "Petitioners miss the point of Justices Scalia's reference to *Ellis*," speculating that "Justice Scalia viewed *Ellis* as supporting a rule that only activities that a union is legally required to conduct ... are chargeable," Opp. at 11-12 n.6, but appearing oblivious to Justice Scalia's observation that "there is good reason to treat [*Ellis* and the Court's other statutory cases] as merely reflecting the constitutional rule." *Lehnert*, 500 U.S. at 555 (Scalia, J., concurring in part, dissenting in part).[3] It is not surprising that Respondent ignores Justice Scalia's conclusion, because that conclusion belies Respondent's assertion "that the *Ellis* Court's holding as to extra-unit litigation was a matter of statutory construction of one particular labor act (the Railway Labor Act), not a more general holding." Opp. at 13 (footnote omitted).

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[3] Respondent makes much of Justice Kennedy's observation about application of Justice Scalia's preferred test. Opp. at 9, 11, & 15 n.11. However, what Justice Kennedy said clearly does not establish what Justice Scalia meant. Had that been the case, Justice Kennedy would not have had to write separately, for Justice Scalia would have said what Justice Kennedy, only for himself, wrote.

Even more telling is the fact that, like Justice Scalia, Justice Blackmun viewed *Ellis*' teaching as the constitutional rule: "Because the Court expressly has interpreted the RLA 'to avoid serious doubt of [the statute's] constitutionality,' ... the RLA cases necessarily provide some guidance regarding what the First Amendment will countenance in the realm of union ... mandatory assessments." 500 U.S. at 516 (opinion of Blackmun, J.) (*quoting Machinists v. Street*, 367 U.S. 740, 749 (1961), *and citing Ellis*, 466 U.S. at 444); *accord id.* at 528 ("the Court in *Ellis* determined that the RLA, **as informed by the First Amendment**, prohibits the use of dissenters' fees for extra-unit litigation") (emphasis added).

III. Like the Court Below, Respondent Seriously Misapprehends *Ellis*.

Although *Ellis* is key to the Petition, only a brief portion of the Opposition is devoted to the proposition that Petitioners "misread" *Ellis*. Opp. at 13-14. To the contrary, however, it is Respondent — like the First Circuit — that misreads *Ellis*.

Ellis categorically held that "expenses of litigation not having such a connection with the bargaining unit [*i.e.*, litigation before agencies or in the courts **that concerns bargaining unit employees** and is normally conducted by the exclusive representative] are not to be charged to objecting employees." 466 U.S. at 453 (emphasis added). Respondent nevertheless maintains that *Ellis* really did not decide categorically that unions cannot compel nonmembers to subsidize any extra-unit litigation.

Respondent makes two erroneous arguments as to why *Ellis* is not controlling here. First, disingenuously relying upon a general formulation of the issue appearing earlier in the *Ellis* opinion, it contends "that *Ellis* addressed only 'litigation not involving the negotiation of agreements or settlement of grievances.'" Opp. at 13-14 (*quoting Ellis*, 466 U.S. at 440).

This Court explicitly held nonchargeable in *Ellis* "litigation seeking to protect the rights of airline employees generally during bankruptcy proceedings." 466 U.S. at 453. That litigation was "intervention in an employer's bankruptcy proceedings [that] protected the union members' wages and **ensured continued compliance with the collective bargaining agreement** while the employer underwent reorganization." 685 F.2d 1068, 1074 (9TH CIR. 1982) (emphasis added), *rev'd in pertinent part*, 466 U.S. 435, 453 (1984).

"[D]efending suits alleging violation of the nondiscrimination requirements of Title VII of the Civil Rights Act of 1964" undoubtedly is "a normal incident of the duties of the exclusive representative." Nevertheless, it, too, was held nonchargeable by *Ellis*, unless the nonmembers' "bargaining unit is directly concerned." 466 U.S. at 453.

In *Lehnert*, Justice Blackmun recognized *Ellis*' holding that bargaining-related litigation on behalf of other units was nonchargeable by specifically mentioning "union litigation" involving "bankruptcy proceedings" and "employment discrimination," when he ruled that the general principle permitting pooling of otherwise chargeable parent union expenditures does not

apply to extra-unit litigation. 500 U.S. at 528, *citing* *Ellis*, 466 U.S. at 453.

Second, Respondent argues:

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

Opp. at 14, *quoting* Pet. App. 27a-28a, 498 F.3d at 63. Not surprisingly, because it cannot do so, Respondent makes no attempt to rebut Petitioners' showing, Pet. at 17, that *Ellis* also involved a "pooling arrangement" — that is, the aggregation of nonmembers' forced fees in a national affiliate's general treasury from which litigation could be funded in any bargaining unit, including the dissenting nonmembers' — not direct contributions of a local's monies to litigation in other units without expectation of later reciprocal contributions.

In short, Respondent's attempts to distinguish *Ellis*, Opp. at 8-11, are unavailing, because *Ellis* unanimously held all extra-unit litigation nonchargeable. **Both** Justices Blackmun and Scalia recognized that the *Ellis* holding on extra-unit litigation has a constitutional basis. *Lehnert*, 500 U.S. at 528 (Blackmun, J.); *id.* at 555 (Scalia, J.). Consequently, that holding is controlling here, and should have been applied and followed by the First Circuit.

CONCLUSION

Petitioners end where they began: Justice Scalia's prediction that *Lehnert* established a test that "obscures the category of expenses for which a union may constitutionally compel contributions from dissenting nonmembers in an agency shop"; "provides little if any guidance to parties contemplating litigation or to lower courts"; and "does not eliminate past confusion, but merely establishes new terminology to which, in the future, the confusion can be assigned." 500 U.S. at 550-51 (dissenting in part). Respondent exploited this confusion to persuade the courts below to evade this Court's existing prohibition against extraction of forced dues for extra-unit litigation, thus defying *Ellis'* proscription.

Therefore, for the reasons stated in the Petition and above, the Petition for a Writ of *Certiorari* should be granted, and the case set for plenary briefing and argument on the important question presented.

Respectfully submitted,

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