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JAN 9 -2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

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, 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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did a public sector union violate the First Amendment by treating as chargeable in calculating its agency fee expenditures from pooled resources on "extra-unit litigation" concededly germane to collective bargaining, where those expenditures accounted for less than 2% of the agency fee and the complaining nonmember feepayers were required to pay only half of the fee?

CORPORATE DISCLOSURE STATEMENT

Respondent Maine State Employees Association, SEIU Local 1989, Service Employees International Union is organized as a nonprofit corporation. It has no parent corporation, nor does any publicly held company own any stock in it.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

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Respondent Maine State Employees Association, SEIU Local 1989, Service Employees International Union ("MSEA") respectfully urges the Court to deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The sole question presented by the *certiorari* petition—concerning the legality of treating a union's

expenses on "extra-unit litigation" germane to collective bargaining as chargeable in computing the agency fee to be paid to the union by nonmember employees the union represents—arises here in the following *sui generis* setting.

A. Respondent Maine State Employees Association ("MSEA"), an affiliate of the Service Employees International Union ("SEIU"), is the designated exclusive bargaining representative of employees in four bargaining units within the State's executive branch.[1] Petitioners are employees in those bargaining units who have chosen not to become dues-paying members of MSEA. Pet. App. 3a.

As permitted by law, the collective bargaining agreements between MSEA and the State provide as a general matter that all nonmember employees covered by the agreements are to pay MSEA a "service fee" (also known as a "fair share" or "agency" fee), in an amount less than full union dues, based on the nonmember's pro rata share of MSEA's expenditures "related to its services as the exclusive bargaining agreement," and excluding "those MSEA expenditures that are not related to bargaining and contract administration," Pet. App. 4a—*i.e.*, a service fee equal in amount to the fee that can, consistent with the Constitution, be charged to nonmember employees who have made known their objection to paying a fee equal to full union dues. *See generally Lehnert v. Ferris Faculty Ass'n.*, 500 U.S. 507 (1991) (establish-

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[1] The reference in the caption to "Maine State Employees Association, SEIU Local 1989, Service Employees International Union" is solely to MSEA; there is no other union respondent.

ing standards for determining which union expenditures are chargeable to objecting nonmembers).[2]

Moreover, the collective bargaining agreements in force for the entire period at issue in this litigation provided that nonmember employees who had been hired prior to July 2, 2003—including all of the Petitioners—were to pay only 50 percent of the reduced service fee as so determined. Pet. App. 47a, 4a n.6.

MSEA and other affiliates receive services and assistance from SEIU, and in return they pay an affiliation fee to SEIU. Pet. App. 5a, 36a. The activities for which MSEA incurs expenses include litigation; and the services provided to MSEA and other state and local affiliates by SEIU include conducting litigation for and on behalf of the affiliates. Pet. App. 5a. In determining the service fee to be paid by nonmembers, MSEA treated as chargeable the litigation conducted by MSEA and the litigation conducted by SEIU on behalf of SEIU's affiliates, if

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[2] Although as a matter of First Amendment law a union may set its agency fee for nonmember employees who are not "objectors" at an amount equal to full union dues, MSEA sets its agency fee for all nonmember employees, whether the employee is an objector or not, at the reduced amount legally chargeable to objectors. Pet. App. 3a-4a, 46a. Petitioners' assertion that, absent an objection, MSEA requires a nonmember to pay an amount equal to full dues, including "that portion of union dues identified in [MSEA's] notice as 'nonchargeable,'" Pet. 4, is incorrect: the MSEA "objection" process to which Petitioners refer is *not* one that a nonmember must pursue in order to pay the reduced service fee rather than a fee equal to full dues; it is a process by which a nonmember who is required to pay the reduced amount of the service fee may challenge MSEA's determination of the amount of the reduced fee. Pet. App. 6a, 53a, 55a.

the litigation "was germane to collective bargaining," *id.*, whether or not it had been "undertaken specifically for [an MSEA feepayer's] own bargaining unit," *id.* In contrast, "[c]osts of litigation that was not related to collective bargaining" were treated as nonchargeable and thus "were not included in the service fees assessed to MSEA's nonmembers." *Id.*

During the period at issue in this case, the service fee charged by MSEA to all nonmembers hired after July 2, 2003 was set at 49.13% of full union dues. Pet. App. 6a, 37a. Petitioners, as pre-July 2003 hires, were charged only half of that fee—that is to say, 24.57% of full union dues. The biweekly dues amount was $18.20, so the biweekly amount of the service fee for post-2003 hires was set at $8.94, and the biweekly amount for the Petitioners was $4.47. Pet. App. 37a.

During this period, approximately 1.67% of the service fee charged by MSEA to post-July 2003 hires was attributable to expenses for litigation outside Petitioners' bargaining units. *Id.* Consequently, treating those expenses as nonchargeable would have reduced MSEA's service fee from $8.94 to approximately $8.79 biweekly—still an amount much higher than the $4.47 biweekly fee that was charged to the Petitioners.

B. Petitioners sued MSEA in June 2005, raising a number of claims, of which the only one still at issue is Petitioners' contention that MSEA improperly charged nonmember feepayers for "extra-unit litigation."[3] Petitioners did not dispute MSEA's repre-

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[3] Petitioners sought to represent a class, but upon entering summary judgment for MSEA on the merits, the district court denied the motion for class certification as moot, Pet. App. 67a,

sentation that the only litigation expenses that had been included in determining the service fee were expenses for litigation "germane to collective bargaining." Pet. App. 5a, 30a.[4] Indeed, Petitioners did not even identify or describe any "extra-unit" litigation in which MSEA or SEIU had engaged and which had been treated as chargeable by MSEA, much less attempt to demonstrate that any such litigation had not been germane to collective bargaining. Rather, Petitioners' position was that *no* "extra-unit" litigation expenses, no matter how germane to collective bargaining, can properly be treated as chargeable in determining the service fee a nonmember in a particular bargaining unit may be required to pay and that only litigation undertaken specifically for the nonmember's own bargaining unit is chargeable.

The district court rejected Petitioners' "extra-unit litigation" contention, Pet. App. 58a, and the First Circuit affirmed. 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 unit's] state and national affiliates, even if those activities were not performed for the direct benefit of the objecting

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and the Court of Appeals did not reach the issue, Pet. App. 7a, n.8.

[4] *See also* Pet. App. 32a (noting that Petitioners "did not dispute whether the litigation charges were 'germane,' as that term was defined in *Lehnert*").

employees' bargaining unit." Pet. App. 17a-18a (quoting *Lehnert*, 500 U.S. at 522, 524).[5]

The Court of Appeals rejected Petitioners' contention that "extra-unit litigation" expenses germane to collective bargaining should be categorically excluded from *Lehnert*'s holding as to extra-unit expenses germane to collective bargaining generally. Observing that "litigation is not susceptible to a single label," Pet App. 30a, the court below stated:

> Some litigation may be purely expressive, and therefore clearly outside the scope of chargeable activities. However, other litigation may be central to the negotiation and administration of a collective bargaining agreement. In this case, the [Petitioners] have not challenged MSEA's characterization of the litigation for which the nonmembers were charged as "related" to collective bargaining. [Pet. App. 30a-31a.]

And the Court of Appeals added 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] test [for chargeability articulated in *Lehnert*]." Pet. App. 31a.

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[5] *Lehnert* explains that an "otherwise chargeable" activity is one that is "1). . . 'germane' to collective bargaining activity; (2) is justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) [does] not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." Pet. App. 17a. As the Court of Appeals noted, "[Petitioners] have not, before the district court or on appeal, argued that the particular expenditures for which they were charged failed to satisfy this test." Pet. App. 31a.

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, dealt only with litigation "not involving the negotiation of agreements or settlement of grievances," Pet. App. 28a (quoting *Ellis*, 466 U.S. at 440), and did not address a union-resource-pooling arrangement for paying for litigation expenses such as was at issue in *Lehnert* and 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 chargeability as other extra-unit expenses," Pet. App. 38a, because such litigation expenses are "analytically identical" to other expenses insofar as *Lehnert*'s resource-pooling principle is concerned. *Id.* (quoting *International Ass'n. of Machinists v. NLRB*, 133 F.3d 1012, 1016 (7th Cir.) (Posner, J.), *cert. denied*, 525 U.S. 813 (1998)).

ARGUMENT

Over the past dozen years, four Courts of Appeals (the First, Third, Sixth and Seventh Circuits) have considered whether a union's expenses on "extra-unit litigation" germane to collective bargaining and paid out of pooled union resources are chargeable to nonmember agency feepayers. All four have concluded in full and carefully reasoned decisions that, under this Court's *Lehnert* decision, the answer is yes: just as expenses for extra-unit *negotiation* of collective bargaining agreements are chargeable under *Lehnert's*

union-resource-pooling principle, so are expenses for extra-unit *enforcement* of such agreements and for other litigation germane to collective bargaining. *See* Pet. App. at 1a-41a; *Otto v. Pennsylvania State Educ. Ass'n,* 330 F.3d 125 (3d Cir.) (First Amendment), *cert. denied,* 540 U.S. 982 (2003); *International Ass'n of Machinists v. NLRB*, 133 F.3d 1012 (7th Cir.) (National Labor Relations Act), *cert. denied,* 525 U.S. 813 (1998); *Reese v. City of Columbus*, 71 F.3d 619 (6th Cir. 1995) (First Amendment), *cert. denied*, 519 U.S. 964 (1996). The National Labor Relations Board has reached the same conclusion, in the decision that was enforced by the Seventh Circuit in the *Machinists* case. *California Saw & Knife Works*, 320 N.L.R.B. 224 (1995).

These four Court of Appeals decisions are sound in principle and in their reading of the multiple opinions in *Lehnert,* as well as in their recognition that the question presented here was not presented or decided in *Ellis*. And the unanimity in the Courts of Appeals over the last dozen years shows that Petitioners' claim of a live conflict in the lower courts that warrants this Court's attention—which is based on two earlier and largely conclusory state court decisions and an earlier Tenth Circuit decision that erroneously treats *Ellis* as the controlling precedent—rings hollow.

A. *Lehnert* holds as a general rule that, where a local union is affiliated with a state and/or national parent union that makes services generally available to affiliates as needed, expenses on activities germane to collective bargaining that are incurred by the parent union and paid for out of pooled resources are chargeable to nonmember agency feepayers "even if those activities were not performed for the direct

benefit of the [feepayer's] bargaining unit." *Lehnert,* 500 U.S. at 524. That is so, this Court explained, because "that part of a local's affiliation fee [to the parent union] which contributes to the 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.* at 523. See also *id.* at 562 (opinion of Scalia, J.) ("It is a tangible benefit . . . to have . . . services on call, even in the years they are not used."); *id.* at 563 (opinion of Kennedy, J.) ("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 . . . legal services plan").

Lehnert thus establishes that, as a rule, there is no "extra-unit" limitation on chargeability. For example, if a parent union assists an affiliate by providing experts to negotiate a legally enforceable collective bargaining agreement for that affiliate, the expenses thus incurred may be included on a pro rata basis in the agency fee that is charged to feepayers in all affiliated units, because the availability of such negotiating assistance is a "protection," *Lehnert*, 500 U.S. at 523 (opinion of the Court) and a "tangible benefit," *id.* at 562 (opinion of Scalia, J.), for all units.

Petitioners do not dispute that proposition, and yet their submission is that a parent union that assists an affiliate by providing attorneys to *enforce* such a collective bargaining agreement in arbitration or in agency or court proceedings cannot include the costs thus incurred in the agency fees that are charged by its affiliates, even though the costs incurred by the parent union *in negotiating that same agreement* could be charged on that basis. The Court of Appeals

in this case rejected Petitioners' argument, reasoning that there is no principled basis for excluding extra-unit litigation from *Lehnert's* core holding that a parent union's expenses incurred in providing an otherwise chargeable service that is available to all affiliated units as needed can properly be charged to feepayers in all units, "even if it is not actually expended on [a particular fee payer's] unit in any particular membership year." *Lehnert,* 500 U.S. at 523. *See* Pet. App. 27a-32a.

The First Circuit's conclusion and analysis is in complete accord with the conclusions and analysis of the three other Courts of Appeals that have considered this issue over the past dozen years, as well as with the views of the National Labor Relations Board. *See cases cited supra* at 8. Over this period, it has been the unanimous view that there is "no compelling reason to treat litigation expenses incurred pursuant to a pooling agreement differently from other pooled expenses," *Otto, supra*, 330 F.3d at 139, because litigation expenses are "analytically identical," *Machinists, supra*, 133 F.3d at 1016 (Posner, J.), to other expenses as respects the appropriateness *vel non* of allowing expenses that are germane to bargaining and are made from pooled resources to be charged to feepayers in all units that have access to those resources. *See also California Saw & Knife Works*, 320 N.L.R.B. at 239 (holding that the NLRB will "apply the same standard for determining the chargeability of [extra-unit] litigation expenses as we are required . . . to apply to all other expenses"); *Reese,* 71 F.3d at 623 (holding that *Lehnert's* reasoning on the chargeability of pooled expenses applies to germane-to-bargaining litigation as to other kinds of germane activities).

B. In holding that "extra-unit litigation" expenses germane to collective bargaining do not constitute an exception to *Lehnert's* teaching as to the chargeability of extra-unit expenses germane to collective bargaining generally, all four of the recent Court of Appeals decisions have rejected the contention, pressed here by Petitioners, that Justice Blackmun's discussion of this subject in *Lehnert* should be taken as controlling.

In the first place, as the First Circuit correctly observed, "Justice Blackmun's treatment of extra-unit litigation costs in *Lehnert* did not command a majority of the Court." Pet. App. 30a. And Petitioners' repeated suggestion that Justice Scalia's separate opinion in *Lehnert* supports Justice Blackmun's position, Pet. i, 9, 12, 14, 16, is incorrect. As the Third Circuit pointed out in *Otto*, Justice Kennedy, who joined in Justice Scalia's opinion, specifically explained that a categorical rule against the chargeability of extra-unit litigation would be inconsistent with Justice Scalia's analysis. *See Otto*, 330 F.3d at 137, citing *Lehnert*, 500 U.S. at 563 (opinion of Kennedy, J.) ("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 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.")[6]

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[6] Petitioners miss the point of Justice Scalia's reference to *Ellis*. *See* Pet. 16. Justice Scalia did not describe *Ellis* as having treated litigation as categorically different from other kinds of

Furthermore, all of the recent Court of Appeals decisions have agreed that the analysis in Justice Blackmun's *Lehnert* plurality opinion is unpersuasive on this issue and is inconsistent with *Lehnert's* core holding. In particular, Justice Blackmun declared that litigation should be subject to a special rule because it "may cover a wide range of areas," and may be "akin to lobbying" and of a "political and expressive nature." *Lehnert*, 500 U.S. at 528 (opinion of Blackmun, J.). But, as the First Circuit pointed out, this simply means that some union litigation—but by no means all—will fail to satisfy *Lehnert's* chargeability standard even with respect to the particular bargaining unit that is involved in the litigation. Pet. App. 30a-31a. It does *not* mean that *germane-to-bargaining* "extra-unit" litigation that *does* satisfy *Lehnert's* test must nevertheless be excluded from *Lehnert*'s core holding as to the chargeability of germane-to-bargaining activities that are funded out of pooled resources. *Id.*[7] *See California Saw & Knife Works,* 320 N.L.R.B. at 238 ("The kinds of extra-unit litigation that we contemplate as being properly chargeable to objectors . . . would not be the kinds of lawsuits that are 'akin to lobbying;'"); *Otto*, 330 F.3d at 139 ("[Where] extra-unit litigation expenditures. . .

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activities; rather, Justice Scalia viewed *Ellis* as supporting a rule that only activities that a union is legally required to conduct—be they litigation or anything else—are chargeable. *See Lehnert*, 500 U.S. at 554-55 (opinion of Scalia, J.). As Justice Kennedy correctly observed, under that approach extra-unit litigation expenses would *not* be categorically non-chargeable.

[7] As noted, Petitioners have not disputed that the litigation that was treated as chargeable by MSEA satisfied the three-pronged standard articulated by this Court in *Lehnert*. *See supra note* 5.

ensure the availability of resources for collective-bargaining-related litigation, those expenditures are germane to collective-bargaining activity . . . . [W]e discern no compelling reason to treat litigation expenses incurred pursuant to a pooling agreement differently from other pooled expenses").[8]

C. Petitioners' contention that the question presented here was decided in *Ellis* misreads that decision, as the decision below and the other recent Court of Appeals decisions have recognized.

It is telling 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,[9] and that *Ellis* addressed only "litigation not involving the negotiation of agreements or settlement of griev-

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[8] A rule treating extra-unit litigation as categorically non-chargeable without regard to its subject matter—and particularly without regard to its relationship to collective bargaining—would be inconsistent with this Court's recognition of the need for a "a case-by-case analysis in determining which activities a union constitutionally may charge to dissenting employees." *Lehnert,* 500 U.S. at 519. This rule has been applied to categories of activities that arguably are more purely expressive than litigation. For example, this Court held in *Lehnert* that the expenses incurred in publishing a statewide union publication (the "Teacher's Voice") were chargeable to the extent that the publication discussed activities related to collective bargaining, whether or not the activities occurred in a feepayer's own unit. *Id.* at 527.

[9] *See Ellis*, 466 U.S. at 445 (inquiring "whether *the statute* permits the union to charge [objecting nonmembers] for any of the challenged expenditures" (emphasis added); *id.* at 455 (addressing First Amendment issues "only . . . with regard to the three activities [, *not* including extra-unit litigation,] for which, we have held, the [statute] allows the union to use [objectors'] contributions").

ances." *Ellis,* 466 U.S. at 440.[10] Beyond that, the First Circuit was correct in concluding that *Ellis* is not on point for cases like this one because "the *Ellis* court was not confronted with a pooling arrangement . . . ; its decision pertained only to the direct contribution of local union monies to litigation efforts by other units (or by a national affiliate)—meaning contributions to litigation expenses given without expectation of reciprocal contributions at a later time." Pet. App. 27a-28a. In contrast, "*Lehnert* addressed a different factual context—a pooling arrangement—and explored the reasons that pooled expenditures for litigation fall outside the rule articulated in *Ellis*." Pet. App. 29a. See also *Lehnert*, 500 U.S. at 564 (opinion of Kennedy, J.) ("*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 affiliate"); *Otto*, 330 F.3d at 136 ("*Ellis* did not involve expenses incurred by an affiliate bargaining unit pursuant to an expense-pooling arrangement with that affiliate . . . . This presents a significantly different question than *Ellis*.")

D. In the face of this series of recent, consistent, thoughtful and fully reasoned Court of Appeals decisions explaining why *Lehnert's* holding on the chargeability of extra-unit expenses that are germane to collective bargaining does not admit of an "extra-unit

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[10] The extra-unit litigation that was found not to be chargeable in Ellis included "the union's challenge to the legality of the airline industry mutual aid pact; . . . litigation seeking to protect the rights of airline employees generally during bankruptcy proceedings; or . . . defending suits alleging violation of the nondiscrimination requirements of Title VII of the Civil Rights Act of 1964." *Id.* at 453.

litigation" exception, Petitioners seek to fashion a conflict out of three earlier decisions, two by state courts and one by the Tenth Circuit, none of which deals squarely with this Court's core holding in *Lehnert* and none of which has been found persuasive in any subsequent case.

Both of the state court decisions on which Petitioners rely do little more than to declare that Justice Blackmun's discussion of extra-unit litigation is "persuasive," *see Albro v. Indianapolis Educ. Ass'n*, 585 N.E.2d 666, 673 (Ind. Ct. App.), *adopted*, 594 N.E.2d 781 (Ind. 1992); *Browne v. Wisconsin Employment Relations Comm'n*, 485 N.W.2d 376, 388 (Wis. 1992), and to mischaracterize the opinions of the other Members of the Court in *Lehnert*. *See Albro,* 585 N.E.2d at 673 (claiming to rely on "the judgment of the Court in *Lehnert*" regarding extra-unit litigation); *Browne,* 485 N.W.2d at 388 ("infer[ring] from Justice Scalia's discussion of *Ellis*" that extra-unit litigation expenses are nonchargeable under Justice Scalia's analysis, without even noting Justice Kennedy's explanation as to why Justice Scalia's analysis does *not* lead to that result).

In its turn, the earlier Tenth Circuit decision that Petitioners invoke mistakenly treated *Ellis* as the controlling authority in the context of a union-resource-pooling arrangement. *See Pilots Against Illegal Dues v. Air Line Pilots Ass'n*, 938 F.2d 1123, 1126-31 (10th Cir. 1991).[11]

Given those failings, none of these earlier decisions—each of which issued within a year of *Lehnert*

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[11] The Tenth Circuit also mistook the import of Justice Scalia's separate opinion, ignoring Justice Kennedy's statement in *Lehnert* on that precise point. *Id.* at 1130 n.4.

and each of which failed to come to grips with the underlying logic of *Lehnert's* union-resource-pooling principle and failed to articulate any reason why extra-unit litigation germane to collective bargaining should categorically be excluded from its application—has proved to have any current purchase.[12]

That being so, and with the fatal flaws in Petitioners' position now having been exhaustively demonstrated by four consecutive Court of Appeals decisions, the maturation of the law in the lower courts on the issue Petitioners seek to raise belies Petitioners' claim of a live conflict in the lower courts.

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[12] Petitioners state that the Indiana Court of Appeals "follow[ed]" its 1992 *Albro* decision in *Byrd v. AFSCME Council 62,* 781 N.E.2d 713, 722 (Ind. Ct. App. 2003). *See* Pet. 22. However, the question presented in *Byrd* was simply whether a state executive order was facially unconstitutional because it might be read to allow a union to charge nonmembers for all expenses other than "political contributions." 781 N.E.2d at 722. In holding that that was a misreading of the order, *id.* at 724, the Court did not adjudicate any challenges to particular types of expenditures.

Petitioners also make much of two Court of Appeals decisions *in which no issue of extra-unit litigation was presented.* The First Circuit's own earlier decision in *Romero v. Colegio de Abogados de Puerto Rico,* 204 F.3d 291 (1st Cir. 2000), discussed in the Petition at 21-22, involved bar dues, not union fees, and the challenged expenditures were for life insurance, not litigation. In *Crawford v. Airline Pilots Ass'n*, 992 F.2d 1295 (4th Cir. 1993), the majority held that no question of extra-unit litigation was presented. Plaintiffs' reliance on the *dissent* in *Crawford*, *see* Pet. 19-20, thus is beside the point; and in any event, that dissent is based on obvious misreadings of *Ellis* and *Lehnert.* See *Crawford,* 992 F.2d at 1313 1316 (Russell, J., dissenting) (mistakenly treating Justice Blackmun's discussion as the opinion of the Court).

E. We would be derelict if we did not add that in any event this case would present a poor vehicle in which to consider the question Petitioners raise in their *certiorari* petition.

In the first place, this is not a case in which the Petitioner agency feepayers were required to pay for extra-unit litigation expenses. During the entire period at issue in this suit—and the entire period as to which the record contains any evidence showing the fees that were charged by MSEA and the basis on which the amounts were determined—Petitioners were required to pay only half of the amount that MSEA had determined to be legally chargeable, and "extra-unit litigation" expenses comprised only a minuscule portion of the fee, thus falling well within the 50% cushion. *See supra* at 4. The amount Petitioners paid thus did not exceed, or even approach, the amount that would be constitutionally chargeable on Petitioners' own theory.

Of equal moment, in keeping with the abstract quality of their claim, Petitioners have never identified or described the litigation that MSEA treated as chargeable and that Petitioners contend was nonchargeable. Indeed, the record does not identify, much less describe, a single piece of litigation in which SEIU or MSEA engaged during the period at issue.[13] Nevertheless, Petitioners' argument against the chargeability of extra-unit litigation, such as it is,

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[13] Petitioners have not contended that MSEA had any obligation to specify the particular litigation it treated as chargeable. *See generally Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 n.18 (1986) ("The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures," but need only identify "the major categories of expenditures" and provide "an explanation" of how it determined chargeability).

is predicated on the notion that such litigation is "akin to lobbying" and of a highly "political and expressive nature." Pet 13-14 (quoting *Lehnert*, 500 U.S. at 528) (opinion of Blackmun, J.) Yet Petitioners acknowledge that "union litigation may cover a diverse range of areas," Pet. 14; and the *only* thing that is known from this record about the litigation activities that MSEA treated as chargeable is that the litigation was germane to collective bargaining. Pet. App. 5a, 31a-32a. There is no evidence in the record that could inform consideration of Petitioners' contention that this germane-to-bargaining litigation was somehow "political" or "akin to lobbying" in a way that other germane-to-bargaining activities are not. It makes no sense, we submit, for this Court to entertain a claim that depends entirely on such characterizations on a record that contains no description at all of the litigation activities that Petitioners claim should not be chargeable to them.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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