Supreme Court, U.S.
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IN THE OFFICE OF THE CLERK

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

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED

In *Ellis v. Railway Clerks*, this Court unanimously "determined that the [Railway Labor Act], as informed by the First Amendment, prohibits the use of dissenters' [union] fees for extraunit litigation." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 528 (1981) (opinion of Blackmun, J., *citing Ellis*, 466 U.S. 435, 453 (1984)). In *Lehnert*, a four-member plurality therefore held "that the Amendment proscribes such assessments in the public sector." *Id.* Moreover, Justice Scalia's separate opinion, concurring in part in the judgment announced by Justice Blackmun, reasoned that "there is good reason to treat [*Ellis* and the Court's other statutory cases] as merely reflecting the constitutional rule." *Id.* at 555.

May a State, nonetheless, consistent with the First and Fourteenth Amendments, condition continued public employment on the payment of agency fees for purposes of financing a monopoly bargaining agent's affiliates' litigation outside of a nonunion employee's bargaining unit?

PARTIES TO THE PROCEEDINGS BELOW

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

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

Because no Petitioner is a corporation, no corporate disclosure statement is required under Supreme Court Rule 29.6.

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Petitioners Daniel B. Locke, Hazel Dyer, Denise D. Gilbert, Robert Hoey, William A. Elliot, Kathleen M. Heath, Ratnasiri Liyanage-Don, Jeanne F. Locke, Kathleen Maguire, Rickey K. McKenna, Judith Melanson, Faith Mouradian, Gina M. Pelletier, Patricia W. Rolfe, Margaret P. Rudolf, Katherine B. Rugan, Sean P. Scully, Michael R. Smith, Tricia L. Thompson, and Beth Weirich, for themselves and the class they seek to represent ("the Nonmembers"), respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered on 8 August 2007.

OPINIONS BELOW

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

JURISDICTION

The United States Court of Appeals for the First Circuit entered its judgment on 8 August 2007. This petition is timely under Supreme Court Rule 13.1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (West 1993). The notifications required by Rule 29.4(b) have been made.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution. *See* App. C, *infra* 67a and App. D, *infra* 68a.

STATEMENT OF THE CASE

In *Lehnert v. Ferris Faculty Ass'n.*, 500 U.S. 507 (1991), Justice Scalia — joined by Justices O'Connor, Souter, and Kennedy — vigorously warned that the plurality's test "both expands and obscures the category of expenses for which a union may constitutionally compel contributions from dissenting nonmembers in an agency shop." *Id.* at 550 (dissenting in part). He noted that the test "provides little if any guidance to parties contemplating litigation or to lower courts. It does not eliminate past confusion, but merely establishes new terminology to which, in the future, the confusion can be assigned." *Id.* at 551.

This case vindicates Justice Scalia's prediction. It presents the question whether, under this Court's judgment in *Lehnert*, the First and Fourteenth Amendments are violated when a state and a union force nonunion public employees to subsidize litigation activities undertaken by affiliated labor organizations for bargaining units other than the nonunion employee's bargaining unit.

I. The Facts

The Nonmembers are twenty current or former public employees in four bargaining units within the

State of Maine's executive branch who are not members of the labor organization designated as their monopoly bargaining representative, the Maine State Employees Association ("MSEA"), Local 1989, Service Employees International Union ("SEIU"). The Nonmembers are required by the monopoly bargaining agreements governing their terms and conditions of employment to pay to MSEA "a service fee equal to their pro-rata share of the costs to MSEA-SEIU that are germane to collective bargaining and contract administration as defined by law."[1]

MSEA prepared and distributed two "*Hudson*" notices[2] to nonmembers to address the fact that members' dues exceed the amount expended for providing its monopoly bargaining "services." App. A at 2a-6a; 498 F.3d at 51-53. These excess fees represent what are referred to in the case law and in MSEA's "*Hudson*" notice as "nonchargeable expenses." App. A at 4a n.5; 498 F.3d at 51 n.5. These notices revealed that portions of the fees treated as chargeable by MSEA are paid over to the SEIU to subsidize the latter's litigation concerning bargaining units other than the Nonmembers', including units outside Maine. *Id.* at 5a; 498 F.3d at 52.

Only if a nonmember timely responds to MSEA's notice — or "objects" to the fees charged — does MSEA

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

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

refrain from collecting that portion of union dues identified in its notice as "nonchargeable." App. B at 53a-55a; 425 F.Supp. 2d at 145. Nonmembers failing to file a timely objection receive no advance reduction of the fee and must subsidize the MSEA's and its affiliates' nonchargeable activities. *Id.* At issue here is that portion of the fee expended for MSEA's affiliates' extra-unit litigation activities, which MSEA claims to be fully chargeable to objecting nonmembers.

II. The Proceedings Below

On 16 June 2005, the Nonmembers filed this class action law suit alleging, *inter alia*, that MSEA and the State Defendants[3] were collecting and/or were attempting to collect agency fees that included portions that:

> will be used by Defendant MSEA and/or its affiliates for purposes that are not "germane" to collective-bargaining activity, not justified by the government's vital policy interest in labor peace and avoiding "free riders," and/or significantly add to the burdening of free speech that is inherent in the allowance of an "agency shop," including, but not limited to:
>
> ****

[3] The State Defendants are Edward A. Karass, Controller for the State of Maine, Rebecca M. Wyke, Commissioner of its Department of Administrative and Financial Services, and Kenneth A. Walo, Director of the Maine Bureau of Employee Relations, who enforced, for MSEA's benefit, the forced-unionism provisions authorizing the exaction of agency fees.

> c. litigation that does not concern the dissenting nonmember's bargaining unit and union literature reporting on such activities;

Record ("R.") 1: Complaint, ¶ 33.

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

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

The trial court reasoned that Justice Blackmun's plurality opinion in *Lehnert* holding extra-unit litigation nonchargeable "was joined only by Chief Justice Rehnquist and Justices White and Stevens," and therefore "does not state a majority opinion that is binding on this Court." App. B at 57a; 425 F. Supp. 2d at 146. The trial court instead found more persuasive decisions of the Third and Sixth Circuits that also declined to follow Justice Blackmun's opinion and the Court's ruling in *Ellis* that Justice Blackmun had applied to public employees. App. B at 58a, 425 F. Supp. 2d at 147, *citing Reese v. City of Columbus*, 71 F.3d 619, 624 (6TH CIR. 1995), *and Otto v. Pennsylvania Education Ass'n*, 330 F.3d 125, 138 (3D CIR. 2003).

The district court therefore entered judgment for Defendants. R. 91: Judgment.

Petitioners timely appealed, and a three-judge panel of the United States Court of Appeals for the First Circuit affirmed. App. A at 34a; 498 F.3d at 66.[4]

Unlike the District Court,[5] the panel acknowledged that this Court held in *Ellis* that:

> The expenses of litigation incident to negotiating and administering the contract or to settling grievances and disputes arising in the bargaining unit are clearly chargeable to petitioners as a normal incident of the duties of the exclusive representative. The same is true of fair representation litigation arising within the unit, of jurisdictional disputes with other unions, and of any other litigation before agencies or in the courts that concerns bargaining unit employees and is normally conducted by the exclusive representative. ***The expenses of litigation not having such a connection with the bargaining unit are not to be charged to objecting employees.***

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[4] Petitioners also appealed from their timely Motion for Class Certification, R. 55, which had been denied as moot. App. B at 44a; 425 F. Supp. 2d at 151. Because the First Circuit affirmed the district court in all of its particulars, it did not reach this issue. App. A at 7a n.8; 498 F.3d at 53 n.8.

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

Ellis, 435 U.S. at 453 (emphasis added), *quoted at* App. A at 13a; 498 F.3d at 54 (without emphasis). The panel likewise recognized that the expenditures at issue in this case are "litigation expenses incurred by its national affiliate" for "litigation on behalf of, or by, a union entity other than the local which represents the nonmember employees." App. A at 2a & n.1; 498 F.3d at 50 & n.1. Nevertheless, purporting to rely upon *Lehnert*, the panel held that:

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

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

REASONS FOR GRANTING THE WRIT

This Court has regularly granted review to consider questions of the chargeability to objecting nonmembers of union expenses, either under the First Amendment, or to avoid serious doubts as to the constitutionality of a monopoly bargaining scheme. *See Railway Employes' Dep't. v. Hanson*, 351 U.S. 225 (1956); *Machinists v. Street*, 367 U.S. 740 (1961); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). However, the lower courts are in disarray over this Court's most recent pronouncement on the topic: its 1991 *Lehnert* decision.[6]

"Because of the importance of the issues," this Court granted *certiorari* in *Lehnert* to decide whether objecting nonmembers could constitutionally be compelled to subsidize six types of union activities, including extra-unit litigation. 500 U.S. at 514. The Court there held that "chargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Id.* at 519.

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[6] Circuit Judge Lynch concurred with her colleagues, but wrote separately to express her belief that the issue herein was "left unanswered" in *Lehnert*, and that it is one on which circuit courts differ. App. A at 35a; 498 F.3d at 66. Recognizing this dispute, she noted that "[d]ecision of this issue by the Supreme Court would provide needed clarity." App. A at 41a; 498 F.3d at 69.

However, rejecting a narrowly-focused bargaining-unit standard of chargeability of "non-political expenses," 500 U.S. at 519, this Court concluded:

> 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. Justice Blackmun, joined by Chief Justice Rehnquist and Justices White and Stevens, explicitly recognized one exception to this conclusion:

> This rationale does not extend, however, to the expenses of litigation that does not concern the dissenting employees' bargaining unit or, by extension, to union literature reporting on such activities.

Id. at 528 (plurality opinion).

Moreover, Justice Scalia's partial concurrence explicitly relied upon *Ellis*' holding that extra-unit litigation is not chargeable and found that "there is good reason to treat" *Ellis* "as reflecting the constitutional rule." *Lehnert*, 500 U.S. at 555 (*quoting Ellis*, 466 U.S. at 453).

Nonetheless, since *Lehnert*, there has been confusion among the lower courts as to: (1) whether a majority of this Court held that the First Amendment prohibits the extraction from dissenting nonmembers of fees for extra-unit litigation, and thus, binds the

courts of appeals; and (2) if not, whether extra-unit litigation satisfies *Lehnert*'s three-prong chargeability test. Indeed, the panel's decision below acknowledged "the uncertainty about the constitutionality of charging nonmembers of a union for the costs of extra-unit litigation." App. A at 33a, 498 F.3d at 66.

This confusion on the first point enabled the First Circuit to depart from the Court's holdings "regarding what the First Amendment will countenance in the realm of [state-compelled] union support." *Lehnert*, 500 U.S. at 516.[7]

Thus, notwithstanding the categorical rule stated unanimously by this Court in *Ellis*, 435 U.S. at 453, the panel below contrived to further expand the extraordinary privilege granted Maine's public employees labor unions to seize and use nonmembers' wages. Consequently, the Nonmembers must not only subsidize MSEA's activities for their bargaining units; in addition, the panel granted MSEA license to compel the Nonmembers to subsidize an international affili-

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[7] This Court has repeatedly recognized the significant constitutional interests implicated in compelling employees to support their monopoly bargaining representative. As recently as last Term, this Court unanimously noted the "extraordinary *state* entitlement to acquire and spend *other people's* money." *Davenport v. Washington Educ. Ass'n.*, — U.S. —, 127 S. Ct. 2372, 2380 (2007) (original emphasis); *see also Lehnert*, 500 U.S. at 516 ("To force employees to contribute, albeit indirectly, to the promotion of [a wide range of social, political, and ideological viewpoints] implicates core First Amendment concerns"); *Abood*, 431 U.S. at 222 ("To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests").

ate's litigation activities far afield from and not related to their bargaining unit or, indeed, even the State of Maine.

The panel below erroneously constructed out of this Court's splintered decision in *Lehnert* a result: (1) expressly disavowed by the *Lehnert* plurality; (2) implicitly rejected by Justice Scalia's concurrence; and (3) in direct conflict with this Court's categorical and undisturbed rule in *Ellis*.

I. The Panel's Decision Conflicts with Numerous Decisions of This Court.

The decision below directly conflicts with this Court's holdings that unions may not compel employees in one bargaining unit to subsidize litigation activities for other bargaining units.

In *Ellis*, 466 U.S. at 453, this Court unanimously held that the Railway Labor Act ("RLA")[8] prohibits a union from extracting such "extra-unit litigation expenditures" from objecting nonunion employees. This Court was quite specific in its holding:

> The expenses of litigation incident to negotiating and administering the contract or to settling grievances and disputes arising in the bargaining unit are clearly chargeable to petitioners as a normal incident of the duties of the exclusive representative. The same is true of fair representation litigation arising within

[8] 45 U.S.C. § 152, Eleventh.

> the unit, of jurisdictional disputes with other unions, and of any other litigation before agencies or in the courts that concerns bargaining unit employees and is normally conducted by the exclusive representative. ***The expenses of litigation not having such a connection with the bargaining unit are not to be charged to objecting employees.*** Contrary to the view of the Court of Appeals, therefore, ***unless the[ir] ... bargaining unit is directly concerned***, objecting employees need not share the costs of the union's challenge to the legality of the airline industry mutual aid pact; of litigation seeking to protect the rights of airline employees generally during bankruptcy proceedings; or of defending suits alleging violation of the nondiscrimination requirements of Title VII of the Civil Rights Act of 1964.

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

Seven years later, in *Lehnert*, a clear majority of the Court recognized that *Ellis*' holding was driven by constitutional concerns. Justice Blackmun, joined by three other Justices, explained that *Ellis* determined that "the RLA, as informed by the First Amendment, prohibits the use of dissenters' fees for extraunit litigation." *Lehnert*, 500 U.S. at 528 (plurality opinion). Moreover, Justice Scalia, also joined by three others, concluded that, although *Ellis* was a statutory case, "there is good reason to treat [it] as merely reflecting the constitutional rule." *Id.* at 555 (Scalia, J., concurring in part).

A majority in *Lehnert* adopted a "proverbial three-part test," *id.* at 550 (Scalia, J., concurring in the judgment, dissenting in part), for determining the constitutional limits on the authority of a union to extract from nonmember objectors fees for its activities:

> chargeable activities must (1) be "germane" to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

500 U.S. at 519.

In applying this test to affiliate activities, this Court held that "unions may bill dissenting employees for their share of general collective-bargaining costs of the state or national parent union," *Id.* at 527. However, Justice Blackmun (joined by Chief Justice Rehnquist and Justices White and Stevens) limited that broad holding:

> This rationale does not extend, however, to the expenses of litigation that does not concern the dissenting employees' bargaining unit or, by extension, to union literature reporting on such activities. While respondents are clearly correct that precedent established through litigation on behalf of one unit may ultimately be of some use to another unit, we find extra-unit litigation to be more akin to lobbying in both kind and effect. We long have recognized

> the important political and expressive nature of litigation. *See, e.g.*, *NAACP v. Button*, 371 U.S. 415, 431 (1963) (recognizing that for certain groups, "association for litigation may be the most effective form of political association"). Moreover, union litigation may cover a diverse range of areas from bankruptcy proceedings to employment discrimination. *See Ellis*, 466 U.S., at 453. When unrelated to an objecting employee's unit, such activities are not germane to the union's duties as exclusive bargaining representative. Just as the Court in *Ellis* determined that the RLA, as informed by the First Amendment, prohibits the use of dissenters' fees for extraunit litigation, *ibid.*, we hold that the Amendment proscribes such assessments in the public sector.

Lehnert, 500 U.S. at 528. Justice Scalia, joined by Justices O'Connor, Souter, and Kennedy, concurred in part with the result. He explicitly dissented only from the majority's holdings concerning the portions of the union's magazine reporting on general educational and similar miscellaneous matters that "have nothing whatever to do with bargaining," *id.* at 559-60, conventions "of *another* organization with which the union-bargaining agent chooses to affiliate," *id.* at 560, and strike-preparation activities, *id.* at 562.

Justice Scalia did not dissent from Justice Blackmun's ruling on extra-unit litigation. To the contrary, Justice Scalia viewed as "reflecting the constitutional rule" this Court's holding in *Ellis* that lawfully chargeable litigation expenses are "only those for litigation

'incident to negotiating and administering ***the contract*** or to settling grievances and disputes ***arising in the bargaining unit***, and 'other litigation . . . ***that concerns bargaining unit employees*** and is normally conducted by the exclusive representative.'" 500 U.S. at 555 (emphasis added) (*quoting* 466 U.S. at 453).[9]

Nevertheless, the panel below held that dues supporting such activities could be extracted from nonunion State of Maine employees. App. A at 33a; 498 F.3d at 66.

The panel mistakenly believed that *Lehnert* permits a union to do through creative accounting and shell games what it may not do directly: charge nonmembers for extra-unit litigation. The panel, opining that *Lehnert* represented the "first time" that this Court had addressed "the chargeability of 'pooled expenses,'" App. A at 16a; 498 F.3d at 57, concluded that the *Lehnert* Court "adopted a different standard of germaneness than that used by the *Ellis* Court." *Id.* at 18a; *id.* at 58. According to the First Circuit, "*Lehnert* defined germaneness more broadly to take account of the nature of affiliation relationships and the pooling of resources characteristic of such relationships." *Id.* at 18a; *id.* at 58-59.

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[9] Although he agreed with Justice Blackmun's three-part test, Justice Marshall specifically noted his "disagree[ment] 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 panel concluded that "[a]lthough a majority of the Justices agreed on this general standard for evaluating the chargeability of pooled expenses, they did not reach agreement on the permissibility of charging nonmembers for extra-unit litigation funded through a pooling arrangement." *Id.* at 18a-19a; *id.* at 58-59. For this proposition, the panel cited Justice Marshall's lone dissent on this issue, *Lehnert*, 500 U.S. at 544-47 (disagreeing with the plurality on extraunit litigation), and Justice Scalia's concurrence, *id.* at 550-62 , mistakenly stating that "Justice Scalia did not mention extra-unit litigation specifically." *Id.* at 21a; *id.* at 59-60. As already noted, in fact Justice Scalia **quoted** *Ellis*' holding on extra-unit litigation and considered it as "reflecting the constitutional rule." *Lehnert*, 500 U.S. at 555.

Moreover, joining only the Third Circuit, *see infra* at 20-21, the panel below constructed ambiguity out of *Ellis*' categorical holding:

> While the language in *Ellis* suggests, at first blush, that only litigation by or for the particular bargaining unit involved can be charged to nonmembers, a closer reading of the opinion reveals a more limited holding. As *Otto* noted, the *Ellis* court was not confronted with a pooling arrangement, 330 F.3d at 136; 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.

App. A at 27a-28a; 498 F.3d at 63 (*citing Otto v. Pennsylvania Educ. Ass'n*, 330 F.3d 125, 136 (3D CIR. 2003)).

Both courts erroneously assumed that *Ellis* did not involve a pooling arrangement. The litigation expenditures at issue in *Ellis* were not from "local union monies" contributed to other units or the national affiliate. They were litigation expenditures of the national affiliate (Grand Lodge) to which the plaintiff nonmembers paid part of their dues directly. *See Ellis v. Railway Clerks*, 91 L.R.R.M. (BNA) 2339, 2341 (1976), *further proceedings*, 108 L.R.R.M. (BNA) 2648, 2650 (S.D. CAL. 1980), *aff'd in part, rev'd in part*, 685 F.2d 1065, 1068, 1073 (9TH CIR. 1982), *aff'd in part, rev'd in part*, 466 U.S. 435 (1984). Indeed, *Lehnert* noted that the Court recognized the pooling arrangement in *Ellis*. *See* 500 U.S. at 523.

If a nonmember may only be charged for "expenses of litigation incident to negotiating and administering ***the*** contract or to settling grievances and disputes arising in ***the*** bargaining unit," *Ellis*, 466 U.S. at 453 (emphasis added), then he/she surely cannot be indirectly charged for "[t]he expenses of litigation not having such a connection with the bargaining unit," *id.*, regardless of how those monies are transmitted from his or her forced fees. The panel's elevation of union form over constitutional substance is contrary to this Court's decisions in both *Ellis* and *Lehnert*.

II. There Is A Serious Split Among the Circuits.

There is a serious split among the Circuits on the chargeability of extra-unit litigation. The Tenth Circuit, and a substantial minority of judges of the *en banc* Fourth Circuit, have found that compelling nonmembers to subsidize extra-unit litigation violates the First and Fourteenth Amendments. The First Circuit panel, on the other hand, joined the Third and Sixth Circuits in holding that such forced-exactions are constitutional.

In the immediate aftermath of *Lehnert*, the Tenth Circuit agreed that extra-unit litigation is constitutionally nonchargeable. *Pilots Against Illegal Dues v. Air Line Pilots Ass'n ("PAID")*, 938 F.2d 1123, 1129-31 (10TH CIR. 1991).

The Tenth Circuit did so by applying the plain language of *Ellis*. 938 F.2d at 1129-30. Moreover, the Tenth Circuit discerned in *Lehnert* no retreat from the position this Court took in *Ellis* with regard to extra-unit litigation. To the contrary, the Tenth Circuit held that its "reading of *Ellis* is ***bolstered*** by the recent *Lehnert* decision" insofar as that decision "suggested" "further constitutional problems" in charging for extra-unit litigation. *Id.* at 1130 (emphasis added). Although conceding that "this section of Justice Blackmun's opinion was not adopted by a majority of the Court, some uncertainty may remain as to whether the Constitution forbids charging dissenting employees for extra-unit litigation," the Tenth Circuit concluded that construction of the RLA to "relieve doubts concern-

ing the statute's constitutionality" mandated treating extra-unit litigation as nonchargeable. *Id.*

Extra-unit litigation expenditures were also challenged in *Crawford v. Air Line Pilots Ass'n*, 992 F.2d 1295 (4TH CIR. 1993). There, five judges of the *en banc* Fourth Circuit[10] vigorously dissented from the majority's holding that the issue was not properly preserved for review.[11] However, every judge reaching the issue had no doubt that this Court's decisions hold extra-unit litigation expenditures to be nonchargeable. "In *Ellis* and *Lehnert*, the Supreme Court, in positive, clear-cut terms, declared as bluntly as it could that expenses for litigation outside of a dissenter's unit ('extra-unit litigation') were not chargeable against the dissenter." 992 F.2d at 1304 (Russell, J., dissenting) (citations omitted); *see also id.* at 1312, 1316.

The five Fourth Circuit judges also rejected the argument that Justice Scalia was silent about extra-unit litigation, and thus there was no binding decision of this Court. Instead, the judges noted that Justice Scalia began his opinion by stating that he "would hold that contributions can be compelled only for the costs of performing the union's statutory duties as exclusive bargaining agent. *Lehnert*, 500 U.S. at 550 (Scalia, J., dissenting)." Then the judges held that "supporting litigation in other units is not a 'duty' that the [statute]

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[10] Judges Russell, Widener, Niemeyer, Hamilton, and Luttig. *Crawford*, 992 F.2d at 1303, 1318.

[11] Having found the issue not properly preserved, the panel majority "express[ed] no view about it." *Crawford*, 992 F.2d at 1301.

required the union here to perform." *Crawford*, 992 F.2d at 1316 (Russell, J., dissenting).[12]

However, the First Circuit followed two circuits in holding extra-unit litigation to be chargeable. The Sixth Circuit in *Reese v. City of Columbus*, 71 F.3d 619, 624 (6TH CIR. 1995), likewise applied *Lehnert*'s general test to evade *Ellis*' categorical and specific holding and treated an affiliate's extra-unit litigation expenditures as chargeable to nonmembers. Indeed, *Ellis* is cited nowhere in the Sixth Circuit's decision.

More recently, in *Otto v. Pennsylvania Education Ass'n*, 330 F.3d 125, 135-39 (3D CIR. 2003), the Third Circuit refused to follow *Ellis* based upon its speculative — and erroneous — doubts that: (1) the litigation expenses in *Ellis* were "incurred by an affiliate bargaining unit pursuant to an expense-pooling arrangement"; and (2) the *Ellis* Court "intended" to state a *per se* rule against the chargeability of extra-unit litigation expenses." 330 F.3d at 136.

Additionally, although agreeing that Justice Blackmun's plurality of four held that "dissenting employees may not be charged for the costs of union literature

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[12] Judge Silberman also has discussed this Court's holding on extra-unit litigation, stating that the "Supreme Court has held that non-members cannot be charged for general union organizing costs, for lobbying activities, ***or for litigation expenses not directly associated with their collective bargaining unit*** (the latter since the Supreme Court understands such litigation to be 'political')." *Beckett v. Air Line Pilots Ass'n*, 59 F.3d 1276, 1280-81 (D.C.CIR. 1995) (emphasis added) (Silberman, J., concurring *dubitante*) (*citing Ellis*, 466 U.S. at 448; *Lehnert*, 500 U.S. at 519-22, 528 and *id.* at 555 (Scalia, J., concurring in the judgment)).

reporting on extra-unit litigation because they cannot be charged for such litigation itself under *Ellis*," 330 F.3d at 137, the Third Circuit reasoned that Justice Scalia did not "apply his preferred test to the question whether dissenting employees could be charged ... (for the expenses of extra-unit litigation itself)." *Id.* Declaring itself therefore free from any "definitive Supreme Court guidance," *id.* at 137-38, the Third Circuit applied *Lehnert*'s three-part chargeability test and reached a conclusion contrary to that of the test's author: "Unlike the Justice Blackmun camp in *Lehnert*, we discern no compelling reason to treat litigation expenses incurred pursuant to a pooling arrangement differently from any other pooled expenses." *Id.* at 139.

In following the Third and Sixth Circuits, and declining to follow the contrary decision of the Tenth Circuit, the First Circuit here had to repudiate one of its own prior decisions. In *Romero v. Colegio de Abogados de Puerto Rico*, the First Circuit noted that *Ellis* held "that it was error to permit the union 'to spend compelled dues for its general litigation and organizing efforts.'" 204 F.2d 291, 298 (1ST CIR. 2000) (*quoting Ellis*, 466 U.S. at 440).

Romero recognized that the *Ellis* "Court was clear that its interpretation was required to avoid constitutional difficulty," and that "[l]ater [Supreme Court] cases have interpreted *Ellis* as setting forth constitutional rules." *Romero*, 204 F.3d at 298 (*citing Lehnert*, 500 U.S. at 516). *Romero* explicitly explained that the "Court also said that the union could not compel payment for litigation expenses not arising out of the contract or not normally conducted by an exclusive

bargaining agent, despite the fact that there could be some indirect benefit to union members." *Id.* at 299 (*citing Ellis*, 466 U.S. at 453). The panel below dismissed *Romero*'s contrary interpretation of *Ellis* as "*dicta.*" App. A at 27a n.15; 498 F.3d at 63 n.15.

III. The Panel's Decision Conflicts with State Supreme Court Decisions.

The First Circuit's decision in this case conflicts directly with the decisions of the highest courts of two States.

There is a direct conflict between the decision of the First Circuit in this case and the Indiana Court of Appeals and Supreme Court in *Albro v. Indianapolis Education Ass'n*, 585 N.E.2d 666, 673 (IND. CT. APP.), *adopted sub nom. Fort Wayne Education Ass'n v. Aldrich*, 594 N.E.2d 781 (IND. 1992); *accord Byrd v. AFSCME Council 62*, 781 N.E.2d 713, 722 (IND. CT. APP. 2003) (following *Albro*). In *Albro*, the Indiana Court of Appeals applied *Lehnert* to "hold that extra-unit litigation expenses are not chargeable fair share fee expenses." 585 N.E.2d at 673. The court first rejected the union's argument that extra-unit litigation is chargeable under Justice Scalia's test for chargeability: "Justice Scalia's concurring and dissenting opinion neither constitutes the opinion of the Court on this issue ***nor*** allows nonunion members to be charged for extra-unit litigation." *Id.* (emphasis added). The court then found that "the analysis in Justice Blackmun's opinion is persuasive" and adopted it. *Id.* Deter-

mining that the Court of Appeals was "correct in *Albro*," the Indiana Supreme Court affirmed and adopted "by reference that opinion in its entirety." *Aldrich*, 585 N.E.2d at 673.

Likewise, the First Circuit's decision conflicts directly with that of the Wisconsin Supreme Court in *Browne v. Wisconsin Employment Relations Commission*, 485 N.W.2d 376 (WISC. 1992). Addressing the issue of extra-unit litigation, the Wisconsin Supreme Court reasoned that, "there is no majority holding on this issue in *Lehnert*." However, it "found Justice Blackmun's plurality opinion persuasive." *Id.* at 388. Moreover, it "inferred from Justice Scalia's discussion of *Ellis* and from other early fair-share cases that a majority of the Court would find extra-unit litigation expenses nonchargeable." *Id.* The Wisconsin high court also concluded "that unless the litigation is directly related to the objecting employee's bargaining unit, it is nonchargeable," because "[e]xtra-unit litigation fails the first aspect of the *Lehnert* test — it is not germane to the collective bargaining activity of the local union." *Id.*

CONCLUSION

There is widespread confusion among the lower Federal and State courts over this Court's position on extra-unit litigation expenses. Consequently, the Circuit or State and/or type (*e.g.*, RLA or public-sector) of employment now determines whether extra-unit litigation expenses are chargeable to nonmembers, not the uniform decision of this Court. Where the question has not yet been determined, uncertainty and confusion are likely to continue as those Circuits and State courts must parse Justice Scalia's position on extra-unit litigation, and whether the *Lehnert* Court really meant what the Court said in *Ellis*, or whether *Lehnert* either reversed *sub silentio* or wrote exceptions into *Ellis* just seven years after the latter's unanimous and seemingly categorical holding.

That there is such confusion is mystifying because **all** of the Justices writing in *Lehnert* — except Justice Marshall, who specifically dissented from the Court's holding on this issue — pledged fidelity to *Ellis*, in which this Court issued a unanimous and categorical holding on the Question Presented. Nevertheless, the confusion exists, as the First Circuit conceded in this case. *See* App. A at 33a, 498 F.3d at 66; *id.* at 40a, 498 F.3d at 69 (Lynch, J., concurring). An individual's First Amendment rights should never depend upon geography or uncertainty a decade-and-a-half after a supposedly definitive ruling of this Court. Therefore, this Court should exercise its supervisory power to resolve that confusion and "provide needed clarity," as Circuit Judge Lynch recommended below, App. A. at 40a, 498 F.3d at 66.

For the reasons stated above, this petition for writ of *certiorari* should be granted, and as requested by Judge Lynch below, the case set for plenary briefing and argument on the important question presented.

Respectfully submitted,

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