No. 01-1867

In the Supreme Court of the United States

PHILLIP MULDER, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that organizing employees of employers in the competitive market is germane to a union's role as a collective bargaining representative under the National Labor Relations Act.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-24a) is reported at 284 F.3d 1099. The prior opinion of the court of appeals panel (Pet. App. 31a-39a) is reported at 249 F.3d 1115. The decision and order of the National Labor Relations Board (Pet. App. 40a-94a) and the supplemental decision of the administrative law judge (Pet. App. 95a-136a) are reported at 329 N.L.R.B. 730.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 2002. The petition for a writ of certiorari was filed on June 21, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(b)(1)(A) of the National Labor Relations Act (NLRA) makes it an unfair labor practice for a union "to restrain or coerce * * * employees in the exercise of the rights guaranteed in [S]ection 7." 29 U.S.C. 158(b)(1)(A). Section 7 of the NLRA affords employees the right to engage, or "to refrain from" engaging, in activities in support of collective bargaining. 29 U.S.C. 157. Under Section 8(a)(3) of the NLRA, however, an employer and a union may enter into an agreement requiring, as a condition of employment, that bargaining-unit employees maintain "membership" in the union, provided that membership is available to all and that it requires only "tender[ing] the periodic dues and the initiation fees uniformly required." 29 U.S.C. 158(a)(3); see *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963) ("'Membership' as a condition of employment is whittled down to its financial core."). The NLRA also permits an "agency shop" agreement, under which employees are not required to maintain "membership" in the union but are required, as a condition of continued employment, to pay to the union sums equal to the initiation fees and periodic dues paid by union members. *General Motors*, 373 U.S. at 743-744.

As construed in this Court's decisions, Section 8(a)(3) of the NLRA does not permit a union, over the objection of dues-paying nonmember employees, to expend funds so collected on union activities "beyond those germane to collective bargaining, contract administration, and grievance adjustment." *Communications Workers of Am.* v. *Beck*, 487 U.S. 735, 745 (1988). The Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*, contains a union-security provision which this Court has

characterized as a "statutory equivalent" of NLRA Section 8(a)(3). See 45 U.S.C. 152 Eleventh (a); *Beck*, 487 U.S. at 762. This Court has concluded that the RLA does not permit a union to spend funds collected from objecting nonmembers on "general organizing efforts." *Ellis* v. *Brotherhood of Railway Clerks*, 466 U.S. 435, 440 (1984).

The issue in this case is whether, consistent with *Beck* and *Ellis*, the National Labor Relations Board may craft a narrower rule that permits objecting nonmembers in industries covered by the NLRA to be charged for organizing efforts directed at employers in the same competitive market as their own employer.

2. Petitioners are objecting nonmember employees in bargaining units represented by locals of the United Food and Commercial Workers Union (UFCW) and are employed in the retail food (grocery) industry in the States of Michigan, Colorado, and California. Pet. App. 6a & n.7, 41a-42a, 43a-44a. In 1988 and 1989, petitioners resigned from membership in their respective UFCW locals and objected to the use of their dues in support of "nonrepresentational activities." *Id.* at 42a, 44a. On November 13, 1991, acting on charges filed by petitioners, the Board's General Counsel issued a second consolidated amended complaint alleging, in relevant part, that UFCW Locals 7 and 951 violated Section 8(b)(1)(A) of the NLRA, 29 U.S.C. 158(b)(1)(A), by expending on organizing activities dues and fees collected from objecting nonmembers. Pet. App. 6a, 41a.

Initially, after a hearing, an administrative law judge (ALJ) dismissed that allegation without reaching the merits. See Pet. 5 n.1. The Board, however, remanded the proceeding to the ALJ for further consideration in light of *California Saw & Knife Works*, 320 N.L.R.B. 224 (1995), enf'd *sub nom. Int'l Ass'n of Machinists* v.

NLRB, 133 F.3d 1012 (7th Cir.), cert. denied, 525 U.S. 813 (1998), a decision that post-dated the ALJ's dismissal order in the instant case. Pet. App. 95a.[1] On January 31, 1997, the ALJ issued a supplemental decision. *Id.* at 95a-136a. Applying *California Saw*, the ALJ found that organizing activities directed at employers who compete with an already-unionized employer "are a necessary incident of collective bargaining." *Id.* at 132a. The ALJ therefore dismissed the complaint in relevant part as to UFCW Locals 7 and 951. *Id.* at 134a.

3. On September 30, 1999, the Board issued a decision affirming the ALJ in pertinent part. Pet. App. 40a-94a. Addressing the question for the first time, the Board held that, "with respect to organizing within the same competitive market as the bargaining unit employer, organizing expenses are chargeable to bargaining unit employees under the *California Saw* standard." *Id.* at 53a. The Board therefore concluded that Locals 7 and 951 did not violate their duty of fair representation under Section 8(b)(1)(A) by charging objecting nonmembers for organizing expenses incurred in the same competitive market. *Id.* at 53a & n.20, 59a.

In reaching that conclusion, the Board relied on "abundant evidence" developed in the administrative

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[1] In *California Saw*, the Board, applying this Court's decision in *Beck*, concluded that an expenditure incurred by a union outside of an objecting nonmember's bargaining unit is chargeable to the objector if the expenditure (1) is germane to the union's role in collective bargaining, contract administration, or grievance adjustment, and (2) is incurred for "services that may ultimately inure to the benefit of the members of the local union." *California Saw*, 320 N.L.R.B. at 239 (quoting *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 524 (1991)); see also Pet. App. 52a.

record that "in collective bargaining, unions are able to obtain higher wages for the employees they represent, whether union members or not, when the employees of employers in the same competitive market are unionized." Pet. App. 54a. The Board explained that the expert testimony in this case established general agreement among economists that "represented employees' wage rates increase or decline as the percentage of employees who are unionized increases or declines." *Ibid.*

The Board in addition relied on "persuasive" record evidence demonstrating that "the positive relationship between the extent of unionization of employees and negotiated wage rates exists specifically in the retail food industry," the industry in which petitioners are employed. Pet. App. 55a. That specific economic linkage, the Board explained, is established both by expert evidence and by evidence bearing on the actual experience of UFCW Locals 7 and 951 in collective bargaining with retail food industry employers. *Id.* at 55a-59a.[2]

The Board also took account of the findings and policies set forth by Congress in the text of the NLRA itself. Pet. App. 53a. For example, the Board noted Congress's finding that the inequality of bargaining power between employers and unorganized employees "prevent[s] the stabilization of competitive wage rates and working conditions within * * * industries." *Ibid.*

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[2] For example, the Board found that, in the Denver, Colorado supermarket industry, Local 7 was forced to accept wage reductions in negotiations with organized employers after a nonunion chain with significantly lower labor costs began operations in that market. After successfully organizing the nonunion competitor, however, Local 7 was able to negotiate wage increases from the unionized employers. Pet. App. 57a.

(quoting 29 U.S.C. 151). Such congressional findings and statements of policy, the Board concluded, evince Congress's understanding that "organization of multiple groups of employees, not just a single bargaining unit or the employees of a single employer in an industry, was necessary to achieve its goals of stabilizing wage rates and preventing depression of employees' wage rates and purchasing power." *Id.* at 54a.

Based on such considerations, the Board concluded that, under the NLRA, "organizing is both germane to a union's role as a collective-bargaining representative and can benefit all employees in a unit already represented by a union." Pet. App. 59a. Whether or not particular employees have chosen to be "members of the union that represents them," the Board explained, unions are "able to negotiate higher wages for the employees they represent when the employees of employers in the same competitive market are organized, and unions are less able to do so when they are not organized." *Ibid.* Accordingly, the Board concluded that a union may, consistent with the NLRA, charge objecting nonmembers for "their fair share of the union's organizing expenses" incurred in the competitive market. *Ibid.*[3]

4. Petitioners filed a petition for review of the Board's order. Initially, a panel of the court of appeals granted the petition for review. Pet. App. 31a-39a. An en banc panel of the court then reheard the case. The

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[3] A case currently pending before the Board presents the organizing-expenses issue raised in the instant case and related issues. See *Teamsters Local 75 (Schreiber Foods)*, No. 30-CB-3077, 2002 WL 1635454 (NLRB Dec. 12, 2001) (supplemental ALJ decision). Two of the three current members of the Board have not yet had an opportunity to express their views on the issue raised in the present case.

en banc panel unanimously denied the petition for review and enforced the Board's order. *Id.* at 1a-24a.

The court of appeals explained that, under *Beck*, the issue in this case is whether "the function of organizing other employers in a competitive market [is] germane to collective bargaining with the nonmembers' employer." Pet. App. 6a. Because "[t]he germane versus non-germane issue requires an informed assessment of the practical relationship between the challenged activity and the bargaining process," the court "d[id] not hesitate to defer to the Board's determination here." *Id.* at 11a. Noting petitioners' failure "substantially to contest the Board's actual factfinding in this case," the court of appeals concluded that the Board's judgment—that "for NLRA industries, organizing within the competitive market is germane to collective bargaining"—is reasonable, supported by substantial evidence, and "completely in accord with the economic realities of collective bargaining, as well as with the language and purposes of the NLRA." *Id.* at 12a-14a; see *id.* at 23a.

The court of appeals (as had the Board) rejected petitioners' contention that *Beck* and *Ellis* "foreclose[ ] the possibility that extra-bargaining unit organizing is germane to collective bargaining." Pet. App. 14a; see *id.* at 59a n.24, 60a-67a. Declining petitioners' invitation to "overread[]" this Court's decisions (*id.* at 22a), the court of appeals found it "clear" that, when the *Beck* Court described the respective union-security provisions of the RLA and the NLRA as being "statutory equivalents," the Court "did not intend that 'statutory equivalen[ce]' be applied at the level of specificity" urged by petitioners. *Id.* at 17a (bracketed material added by court of appeals). Rather, those provisions are equivalents in that each permits a union to require

nonmember objectors to pay for "only those expenditures that are germane to the collective bargaining function." *Ibid.* Because the Board reasonably determined that organizing within the competitive market is germane to the union's role as a collective bargaining representative, the court concluded that "[t]he result reached by the Board is not precluded by the language of *Beck*, but is fully consistent with it." *Id.* at 22a-23a.

The court explained that the holding of *Ellis* on the non-chargeability of organizing expenses rested on a "close review" of the particular legislative history of the RLA. Pet. App. 19a. The *Ellis* Court emphasized "the fact that the president of a major railway labor union specifically represented to Congress at the time of the enactment of § 2, Eleventh of the RLA that the union shop would have no effect on the bargaining power of unions covered by the [RLA], and that it would serve only to make those unions stronger generally." *Id.* at 14a-15a. Moreover, the RLA was "adopted in order to provide a labor relations structure for the railroad industry—an industry that was highly organized, and in which the process of collective bargaining was significantly different from that which exists under the NLRA." *Id.* at 19a.

ARGUMENT

In this case of first impression, the en banc court of appeals unanimously upheld the Board's determination that, under the NLRA, organizing the employees of employers in the competitive market is germane to a union's role as a collective bargaining representative. The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review by this Court is therefore not warranted.

1. The task of "effectuat[ing] national labor policy" by "striking th[e] balance" among competing interests in the work place is "often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *NLRB* v. *Truck Drivers Local Union No. 449 (Buffalo Linen)*, 353 U.S. 87, 96 (1957). As this Court has explained, deference to the Board is particularly warranted "where Congress likely intended an understanding of labor relations to guide the [NLRA's] application." *NLRB* v. *Town & Country Elec., Inc.*, 516 U.S. 85, 89-90 (1995). See *e.g.*, *NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822, 829 (1984) (a reasonable Board rule is entitled to "considerable deference" where the issue "implicates its expertise in labor relations"); *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 500-501 (1978). Accord *Brown* v. *Pro Football, Inc.*, 518 U.S. 231, 250 (1996) (noting importance of Board's "detailed views" on questions relating to multi-employer bargaining) (citing *Buffalo Linen*, 353 U.S. at 96).

In this case, the Board found that "abundant" and "persuasive" empirical evidence, as well as the findings and policies set forth by Congress in the text of the NLRA itself, established that organizing other employers in the competitive market is germane to a union's role as an exclusive collective bargaining representative. Pet. App. 53a-59a. The empirical evidence demonstrated—both as a general matter and specifically with respect to the retail food industry in which petitioners are employed—that "[u]nions are able to negotiate higher wages for the employees they represent when the employees of employers in the same competitive market are organized." *Id.* at 59a; see *id.* at 13a, 54a-59a.

The court of appeals properly afforded deference to the Board's position in this case. As the court explained, the determination whether organizing is germane to collective bargaining is "a complex and difficult one for the layman, member of the judiciary or not," precisely because such a judgment requires "a sophisticated understanding of labor relations and the collective bargaining process" and "an informed assessment of the practical relationship between the challenged activity and the bargaining process." Pet. App. 11a, 18a. Having satisfied itself that the Board's holding in this case is reasonable and "completely in accord with the economic realities of collective bargaining," the court of appeals correctly deferred to the Board's view. *Id.* at 13a-14a.

2. In this Court, petitioners do not challenge the empirical evidence upon which the Board based its holding, nor do they contend that the Board's holding is inconsistent with the relevant findings and policies set forth by Congress in the NLRA. Rather, petitioners' principal contention before this Court is that the court of appeals should have afforded no deference to the Board's position because it is foreclosed by this Court's decisions in *Ellis* and *Beck*. See Pet. 9-20. Petitioners' contention, however, is based on an "overreading" of *Ellis* and *Beck*. Pet. App. 22a.

a. In *Ellis*, this Court did not address the question that was before the Board in this case, that is, whether organizing other employers *in the competitive market* may be regarded as germane to a union's role as a collective bargaining representative. Rather, the *Ellis* Court addressed "general organizing efforts," *i.e.*, activity that "strengthened the union as a whole and helped it to run more smoothly." 466 U.S. at 440-441. The court of appeals in *Ellis* had found that the

expenses of such generalized organizing were chargeable to the objectors in that case on the theory that "organizing efforts are aimed toward a stronger union, which in turn would be more successful at the bargaining table." *Id.* at 451. See Pet. App. 15a, 64a-65a.

Rejecting the court of appeals' reasoning, this Court held in *Ellis* that organizing expenses for the purpose of generally strengthening a union have an "attenuated connection with collective bargaining" that is insufficient to render such organizing expenses chargeable to nonmember objectors under the RLA. 461 U.S. at 451. That holding does not address, much less resolve, the question whether organizing aimed at the employees of employers in the same competitive market as the objector's employer is germane to collective bargaining. In addressing that different question in this case, the Board reasonably found, based on academic research, empirical data, and other specific evidence, that "there is a direct, positive relationship between the wage levels of union-represented employees and the level of organization of employees of employers in the same competitive market." Pet. App. 65a; see *id.* at 13a-14a.

Contrary to petitioners' contention (Pet. 11-15), the considerations that led the *Ellis* Court to reach its holding with respect to general organizing expenses are not dispositive in the different circumstances here. For example, the Court cited the legislative history of Section 2, Eleventh of the RLA. See 466 U.S. at 451-452. The Court emphasized that, although the court of appeals had found that "organizing expenses could be charged to objecting employees because organizing efforts are aimed toward a stronger union, which in turn would be more successful at the bargaining table," *id.* at 451, Congress had not authorized the union shop for that purpose. To the contrary, in testifying before

Congress in support of amending the RLA to provide for union security, the president of the Brotherhood of Railway, Airline, and Steamship Clerks "expressly disclaimed" that "the union shop was sought in order to strengthen the bargaining power of unions." *Id.* at 452. There is no comparable disclaimer in the legislative history of the NLRA.

The Court also noted that the legislative history of the RLA revealed no claim that the union shop was "necessary to hold or increase union membership." 466 U.S. at 452 (quoting *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 763 n.13 (1961)). That statement reflects the Court's earlier recognition that, when the RLA was amended to provide for union security, the "decisive" argument with Congress was that the railroad industry was already highly organized, and that union security was sought to more fairly spread the unusually high costs of administering the pre-existing collective bargaining machinery in that industry. See 367 U.S. at 761-762; see also Pet. App. 19a-21a.

By contrast, as the Board explained here, union security was "from the outset * * * an integral part" of the NLRA's statutory design "to promote organization" in industries that are typically "thinly organized." Pet. App. 63a-64a. Moreover, as the Board noted, while Congress restricted union-security agreements in 1947 to eliminate "the most serious abuses of compulsory unionism," at the same time it rejected a proposal that would have prohibited industry-wide bargaining. *Ibid.* (quoting *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 740 (1963)). Congress's rejection of that proposal "showed that the [NLRA's] objective of fostering organizing across employer lines remained intact." Pet. App. 64a; see *id.* at 12a-13a n.12.

Finally, the *Ellis* Court explained that "[a]ny free-rider problem here," *i.e.*, with respect to a union's "overall organizing efforts," is "roughly comparable to that resulting from union contributions to pro-labor political candidates," which "only in the most distant way works to the benefit of those already paying dues." 466 U.S. at 452-453. The Court's drawing of an analogy between the type of organizing expenses before it and political contributions having only an attenuated and indirect effect on particular bargaining units confirms that the Court was not addressing the issue decided by the Board here. As shown, that issue is the distinct and far narrower question of whether organizing expenses are chargeable to objectors where it can be empirically demonstrated that "there is a direct, positive relationship between the wage levels of union-represented employees and the level of organization of employees of employers in the same competitive market." Pet. App. 65a.[4]

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[4] Petitioners contend (Pet. 14) that the Board's rule in this case is inconsistent with the *Ellis* Court's statement that it would be "perverse" to read the RLA's union-security provision "as allowing the union to charge to objecting nonmembers part of the costs of attempting to convince them to become members." See 466 U.S. at 452 n.13. The Court in *Ellis*, however, made that statement with respect to organizing expenses that "were spent in part to recruit new union members *within the bargaining unit*." *Ibid.* (emphasis added). The "pervers[ity]" to which the Court referred was thus the oddity of requiring objecting nonmembers in an existing bargaining unit to pay the expenses of convincing them to change their minds. The Board's rule, however, does not address that situation. Instead, it addresses a union's effort to organize unrepresented workers *at other firms* in the competitive market. Unlike an objecting nonmember in an existing bargaining unit, an unorganized worker has not had occasion to decide whether—if a majority of his co-workers were to select union representation—he

b. Contrary to petitioners' contention (Pet. 14-16), *Beck* does not hold that, if a particular type of union expenditure (such as organizing expenses) is not chargeable to nonmember objectors for RLA purposes, then that expenditure is also not chargeable to objectors under the NLRA. Rather, as the court of appeals correctly found, the Court's holding in *Beck* does not operate at that "level of specificity." Pet. App. 17a. The court therefore properly declined petitioner's invitation "to extend, and thereby transform, the holding of *Beck* into a decision the Court did not make." *Id.* at 22a.

In *Beck*, this Court did not address whether any particular type of union expenditure is or is not properly chargeable to a nonmember objector under the NLRA. Rather, the *Beck* Court addressed the prior, and more general, question of the proper standard for making that chargeability determination. The Court concluded that NLRA Section 8(a)(3) and RLA Section 2, Eleventh are, textually speaking, "in all material respects identical," or "statutory equivalent[s]." 487 U.S. at 745-746 (quoting *Ellis*, 466 U.S. at 452 n.13). The Court therefore held that the chargeability test established in its RLA precedents—whether the union activity at issue is "germane to collective bargaining, contract administration, and grievance adjustment"—is likewise "controlling" under the NLRA. *Id.* at 745; see

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would choose nonmember objector status. Cf. *International Ass'n of Machinists* v. *Street*, 367 U.S. at 774 (explaining that "[t]he safeguards of [Section] 2, Eleventh were added for the protection of dissenters' interest, but dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee"). Nor, under the Board's rule, is that unorganized worker asked to pay the expenses of convincing him to join a union. Accordingly, the statement in *Ellis* on which petitioners rely is inapposite.

id. at 752, 753 n.8. As the court of appeals below correctly concluded (Pet. App. 22a-23a), the Board's decision in this case is fully consistent with *Beck*; the Board applied the general "germaneness" test, applicable in both the RLA and NLRA contexts, to the specific facts of this case, finding that organizing in the competitive market is "germane to a union's role as a collective-bargaining representative." *Id.* at 59a.

3. Nor are petitioners correct in contending (Pet. 21) that the court of appeals' decision in this case conflicts with the en banc decision of the Fourth Circuit in the *Beck* case. See *Beck* v. *Communication Workers of Am.*, 800 F.2d 1280 (1986) (per curiam), aff'd, 487 U.S. 735 (1988), cert. denied, 487 U.S. 1233 (1988). The en banc court in *Beck* did not address the issue first decided by the Board in this case and affirmed by the court below, *i.e.*, whether organizing activity in the competitive market is germane to the union's role as a collective bargaining representative. See 800 F.2d at 1281-1282. Rather, the principal issue before the en banc Fourth Circuit in *Beck* was whether the federal courts possessed jurisdiction over the objectors' claims. *Ibid.* The en banc court's only reference to expenditures was its statement, with no further discussion, that "[t]here was apparently no difference within the Court, assuming that federal jurisdiction was upheld, that the majority panel opinion's disposition of the allocation issue was properly resolved." *Id.* at 1282.

Like the en banc court, the panel in *Beck* also did not address whether organizing activity *in the competitive market* is germane to the union's role as a collective bargaining representative. See *Beck* v. *Communications Workers of Am.*, 776 F.2d 1187 (4th Cir. 1985), cert. denied, 487 U.S. 1233 (1988). There is therefore no reason to believe that, if presented with the question in

a future case, a panel of the Fourth Circuit would reject the Board's position in this case on the basis of the panel decision in *Beck*.[5]

4. Finally, petitioners contend (Pet. 23) that "[i]f the NLRA requires nonmembers to subsidize union organizing, the statute is unconstitutional as applied." That contention raises no issue warranting this Court's review. As this Court has explained, its precedents "make clear that expenses that are relevant or 'germane' to the collective-bargaining functions of the union generally will be constitutionally chargeable to dissenting employees." *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 516 (1991). Here, the Board, upheld by the court of appeals, reasonably concluded that organizing in the competitive market is germane to the union's role as a collective bargaining representative. See Pet. App. 13a-14a, 59a.

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[5] Petitioners assert (Pet. 22) that "the rule adopted *en banc* by the Ninth Circuit has been rejected by every federal and state court that has considered the issue." None of the cases cited by petitioners (Pet. 21-22), however, addresses whether solid empirical evidence demonstrates "a direct, positive relationship between the wage levels of union-represented employees and the level of organization of employees of employers in the same competitive market." Pet. App. 65a. See, *e.g.*, *Bromley* v. *Michigan Educ. Ass'n*, 82 F.3d 686, 696 (6th Cir. 1996) (Pet. 21) (addressing "defensive organizing" costs which serve solely the purpose of perpetuating the union's incumbent status as the representative of the bargaining unit), cert. denied, 519 U.S. 1055 (1997); *Albro* v. *Indianapolis Educ. Ass'n*, 585 N.E.2d 666, 673 (Ind. Ct. App.) (Pet. 22) (same), aff'd *sub nom. Ft. Wayne Education Ass'n* v. *Aldrich*, 594 N.E.2d 781 (Ind. 1992); *Cumero* v. *Public Employment Relations Bd.*, 778 P.2d 174, 191 (Cal. 1989) (Pet. 22) (addressing "possible relationship" between local public school salaries and those paid in other school districts).

Petitioners nonetheless suggest (Pet. 25-26) that, consistent with the First Amendment, they cannot be required to subsidize their union's organizing efforts because such activity is "ideological." That suggestion is unpersuasive. As the Board explained here, the cost of organizing employers in the same competitive market is fairly chargeable to nonmember objectors, because it is the means by which unions are "able to negotiate higher wages for the employees they represent," which includes the objectors. Pet. App. 59a. Organizing activity having such a straightforward economic purpose is not "ideological" in any relevant sense. Organizing for that economic purpose, moreover, is less "ideological" than is a union's conducting of periodic national conventions, or negotiating with employers over controversial issues relating to employment terms, both of which are established to be germane to a union's collective bargaining function. See *Ellis*, 466 U.S. at 448-449; *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977).[6]

[6] There is no merit to petitioners' suggestion (Pet. 23) that, absent this Court's intervention in this case, the Board's position will effectively become unreviewable. At least one case presenting the issue raised by this case is currently pending before the Board. See note 3, *supra*. Moreover, as the *Beck* litigation demonstrates, nonmember objectors may bring actions in federal court asserting that their union violates the duty of fair representation by charging them for organizational expenses incurred in the competitive market. That provides an additional mechanism by which courts would have occasion to address the legal issues presented by the Board's position here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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