No. 07-610

In the Supreme Court of the United States

DANIEL B. LOCKE, ET AL., PETITIONERS

v.

EDWARD A. KARASS, STATE CONTROLLER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

PAUL D. CLEMENT
Solicitor General
Counsel of Record

GREGORY G. KATSAS
Acting Assistant Attorney General

GREGORY G. GARRE
Deputy Solicitor General

DARYL JOSEFFER
Assistant to the Solicitor General

DOUGLAS N. LETTER
JEFFRICA JENKINS LEE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

GREGORY F. JACOB
Solicitor

KATHERINE E. BISSELL
Associate Solicitor

MARK S. FLYNN
Counsel for Advice and Statutory Programs

NORA CARROLL
Senior Attorney
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether or to what extent a public-sector union may, consistent with the First Amendment, charge nonmembers for litigation funded through a pooling arrangement with other unions.

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INTEREST OF THE UNITED STATES

This case concerns the extent to which the First Amendment prohibits a union representing public-sector employees from charging nonmembers for litigation funded through a pooling arrangement with other unions. The Secretary of Labor is responsible for advising the President with respect to national labor policy and carrying out Congress's purpose "to foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment." 29 U.S.C. 551. The United States has participated as an amicus in other litigation presenting constitutional questions concerning nonmembers' compelled fees. *E.g.*, *Davenport* v. *Washington Educ. Ass'n*, 127 S. Ct. 2372, 2377 (2007). For those reasons, the United States has a

substantial interest in the resolution of the question presented.

BACKGROUND

1. Under this Court's decisions, States have flexibility to permit or prohibit "union shop" and "agency shop" arrangements in public and private workplaces. See *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 225-226 (1977); *Railway Employees' Dep't* v. *Hanson*, 351 U.S. 225, 233 (1956). Under a "union shop" arrangement, a union and employer enter into a collective bargaining agreement that requires all employees who benefit from collective bargaining to join the union. By contrast, under an "agency shop" agreement, employees do not have to join the union, but must nonetheless pay a "service" or "agency" fee to the union for representational activities. Even when such arrangements are permitted, however, a union may not use an objector's compelled fees, against his will, for activities that are not germane to collective bargaining. *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991); *Ellis* v. *Brotherhood of Ry. Clerks*, 466 U.S. 435, 448 (1984).

2. Respondent Maine State Employees Association, Service Employees International Union Local 1989 (MSEA) is the exclusive bargaining representative for certain workers employed in Maine's executive branch. Pet. App. 3a. It operates pursuant to an agency-shop arrangement. Under its collective bargaining agreement, MSEA is required to represent all workers in the bargaining unit, including nonmembers, and in return is permitted to collect a service fee from the nonmembers. *Ibid.*; see *Opinion of the Justices*, 401 A.2d 135, 147 (Me. 1979). Between April and July 2005, MSEA sent a series of notices to nonmembers that ultimately informed them that, effective July 1, 2005, their biweekly

service fee would be $8.94, approximately 49% of the amount that each MSEA member paid in dues. See Pet. App. 4a-6a; J.A. 50.[1]

MSEA's final notice explained that, in calculating the service fee, the union charged nonmembers for representational activities but not for non-representational activities such as public relations, lobbying, and other political activity. See Pet. App. 5a; J.A. 53-59, 61-62. MSEA also charged nonmembers for the portion of the affiliation fee that it paid to its international union, the Service Employees International Union (SEIU), that was attributable to SEIU's representational activities. See Pet. App. 5a; J.A. 58, 62. Litigation by both MSEA and SEIU was charged to nonmembers if it was "related to the union's representational activities (i.e., grievances, collective bargaining rights, etc.)." J.A. 54; see Pet. App. 5a. Although the record does not specify the precise amount of fees attributable to such litigation, it does reflect that the amount is no more than 30 cents per month for each nonmember paying agency fees. Pet. App. 37a.

3. Petitioners are 20 nonmembers who must pay service fees to MSEA. See J.A. 28-29. They filed this suit in June 2005, alleging violations of the First, Fifth, and Fourteenth Amendments, and seeking declaratory and injunctive relief as well as damages and restitution from MSEA and state officials. J.A. 27-29, 44-46. As pertinent here, petitioners alleged that they should not have been charged for SEIU's "litigation that does not concern [a] dissenting nonmember's bargaining unit." J.A. 41. On cross-motions for summary judgment, the

[1] Through June 2006, some nonmembers were required to pay only 50% of the service fee. All nonmembers must now pay the full fee. Pet. App. 4a n.6.

district court held that "inclusion of the cost of extra-[unit] litigation" in the service fee "does not violate [petitioners'] constitutional rights." Pet. App. 58a.

4. The court of appeals affirmed. Pet. App. 1a-41a.

a. The court of appeals determined that "the chargeability of extra-unit litigation 'lies in the intersection of the *Ellis* and *Lehnert* holdings.'" Pet. App. 27a (quoting *Otto* v. *Pennsylvania State Educ. Ass'n-NEA*, 330 F.3d 125, 135 (3d Cir.), cert. denied, 540 U.S. 982 (2003)). This Court's decision in *Ellis*, the court explained, held that "nonmembers cannot be charged for litigation that does not "'concern' their own bargaining unit." *Ibid*. The court of appeals emphasized, however, that "the *Ellis* Court was not confronted with a pooling arrangement"—*i.e.*, "an agreement between a local union and a state or national union, by which the local contributes money to the state or national union, with the understanding that the latter will provide services, personnel, and resources to the local unit when that local needs them." *Id*. at 2a n.2; see *id.* at 27a. Rather, the court of appeals determined, *Ellis* "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." *Id*. at 27a-28a.

In contrast, the court of appeals explained, *Lehnert* subsequently held that unions can charge nonmembers for contributions to a pooling arrangement "even if [the] activities [funded through the pooling arrangement] were not performed for the direct benefit of the objecting employees' bargaining unit." Pet. App. 17a-18a. The court of appeals reasoned that such an arrangement is "akin to insurance, whereby the local unit contributes

certain amounts to a larger fund in order to ensure that the larger fund will provide resources (in the form of services or money) in return, when the local unit needs them." *Id.* at 29a. For a pooling arrangement to be legitimate under *Lehnert*, the court determined, "charged expenditures must be (1) substantively related to collective bargaining, and (2) 'for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.'" *Id.* at 18a (quoting *Lehnert*, 500 U.S. at 524).

In the court of appeals' view, therefore, "[t]he funding mechanism used is critical." Pet. App. 30a. *Ellis* governs contributions made to other units' litigation efforts with "no reasonable expectation of any return benefit," *id.* at 29a-30a, the court held, while *Lehnert* applies when the contributing unit has "specific reassurance that future litigation directly relating to [its] unit would be funded by other units," *id.* at 22a n.13.

In this case, the court of appeals understood petitioners to "have argued only that, as a matter of law, * * * the costs associated with [other units' litigation] could not be charged to nonmembers" under any circumstances. Pet. App. 31a. Having rejected that categorical contention, the court of appeals affirmed the judgment of the district court. *Id.* at 32a.

b. In a concurring opinion (Pet. App. 35a-41a), Judge Lynch emphasized that "[e]xtra-unit litigation expenses are not analytically different from other pooled extra-unit expenses," and should therefore be governed by the same standards that govern the pooling of other expenses under *Lehnert*. *Id.* at 38a.

SUMMARY OF ARGUMENT

A. A State may require public employees within a bargaining unit to contribute to their own unit's collective-bargaining costs, in part because members and nonmembers alike benefit from collective bargaining. But the First Amendment limits the types of other expenses that nonmembers may be required to pay. As pertinent here, in *Ellis* v. *Brotherhood of Railway Clerks*, 466 U.S. 435 (1984), this Court held that objectors could not be compelled to contribute to costs of other units' litigation—litigation that workers who do not wish to associate with a union in the first place typically do not want to fund.

B. The question in this case, however, is not whether dissenters can be charged for *other units'* litigation. Instead, it is whether a unit that funds its *own* litigation through an insurance or other risk-sharing arrangement may charge dissenters for their pro rata share of the cost of the arrangement. While *Ellis* did not address that question, this Court subsequently held in *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507 (1991), that, in at least some circumstances, a union can use compelled fees to enter into pooling arrangements with other units. Under such arrangements, local bargaining units pay fees to a state, national, or international affiliate, which then assists with the local's collective-bargaining activities, as needed. Such arrangements can benefit members and nonmembers alike by enabling each unit to spread risk and smooth out payments over time.

There is no reason to treat a unit's litigation costs differently from its other expenses for this purpose. Whether the pooled costs relate to the negotiation of collective bargaining agreements (as in *Lehnert*) or the litigation of disputes arising under them, the legal prin-

ciple is the same, because each unit is essentially buying an insurance policy to cover its own future expenses. As long as a union can use compelled fees to purchase litigation insurance from a commercial insurer, there is no reason it cannot use such fees for a bona fide litigation pooling arrangement with affiliated unions.

C. That constitutional justification for litigation pooling arrangements imposes important limits on their scope. As *Lehnert* held, such an arrangement must concern activities "associated with otherwise chargeable activities." 500 U.S. at 524. If the unit involved in a particular case could not charge *its own* objectors for the litigation because it was not germane to collective bargaining, objectors in *other units* certainly could not be expected to contribute to a pooling arrangement covering the litigation. In addition, a bona fide pooling arrangement requires that each participating unit pay its fair share of the costs, and that each have a reasonable assurance that, when needed, the national or international affiliate will assist with its germane litigation. If a pooling arrangement is designed to address some but not all germane litigation, it must have reasonably ascertainable standards for determining which litigation is included and which is not. In other words, the arrangement must be a bona fide risk-sharing one, analogous to an insurance policy, as opposed to a vehicle for some units to subsidize other units' litigation with compelled fees. And "as always, the union bears the burden of pro[of]" on the chargeability of expenses, including pooled expenses. *Lehnert*, 500 U.S. at 524.

D. Petitioners here carried their threshold burden by objecting to SEIU's litigation expenses insofar as they do not concern petitioners' bargaining unit. At that point, the burden shifted to respondents to prove that

the pooling arrangement is bona fide under the standard discussed above. Because the court of appeals applied a different standard in reviewing the validity of the fees at issue, and because the record before this Court does not disclose whether the proper standard is satisfied, the Court should remand the case so that the lower courts may review the fees at issue under the proper standard.

ARGUMENT

UNIONS MAY USE COMPELLED FEES FOR BONA FIDE POOLING ARRANGEMENTS UNDER WHICH A PARENT UNION AGREES TO COVER THE COSTS OF ITS AFFILIATES' GERMANE LITIGATION

A. Public Employees Cannot Be Compelled To Support Litigation That Does Not Directly Concern Their Own Bargaining Unit

The court of appeals correctly held that, if MSEA were simply funding the litigation efforts of other units, it could not use compelled fees for that purpose. Pet. App. 27a-28a.

1. Agency-shop and union-shop arrangements directly impact the First Amendment interests of workers who are compelled by state law to pay fees to a union they do not wish to join. *Davenport* v. *Washington Educ. Ass'n*, 127 S. Ct. 2372, 2377 (2007); see *Chicago Teachers Union, Local No. 1* v. *Hudson*, 475 U.S. 292, 301, 305 (1986). Individuals, including government employees, ordinarily have a First Amendment right not to associate with other private persons or entities—including the right not to be forced to provide financial support for other peoples' causes. See *Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550, 557-559 (2005); *Davenport*, 127 S. Ct. at 2378 ("[I]t is undeniably un-

usual for a government agency to give a private entity the power, in essence, to tax government employees."); *Hudson*, 475 U.S. at 301-302 & n.9. Moreover, because "[u]nions traditionally have aligned themselves with a wide range of social, political, and ideological viewpoints," *Lehnert*, 500 U.S. at 516, "[a]n employee may very well have ideological objections to a wide variety of activities undertaken by [a] union." *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977).

The right not to associate is, however, not absolute. And in order to further "the government's interest in promoting labor peace and avoiding the 'free-rider' problem that would otherwise accompany union recognition," the government may require public employees to pay agency- or union-shop fees. *Lehnert*, 500 U.S. at 520-521. This Court has explained that, because unions are legally obligated to represent *all* employees in a bargaining unit, even those who do not join the union, the government has a legitimate interest in requiring all such employees to contribute to the union's collective-bargaining activities. *Abood*, 431 U.S. at 221-222; see *Opinion of the Justices*, 401 A.2d 135, 147 (Me. 1979). Such union- and agency-shop arrangements promote labor peace by "prevent[ing] nonmembers from free-riding on the union's efforts, sharing the employment benefits obtained by the union's collective bargaining without sharing the costs incurred." *Davenport*, 127 S. Ct. at 2377; see *Abood*, 431 U.S. at 221-222, 224-225.

Nonetheless, because "allowing the union shop at all" is "a significant impingement on First Amendment rights," *Ellis*, 466 U.S. at 455-456; see *Hudson*, 475 U.S. at 301; *Abood*, 431 U.S. at 222, the constitutionally permissible scope of compelled fees is limited by the labor-peace and free-rider rationales on which they rest. See

Lehnert, 500 U.S. at 520-521; *id.* at 556-557 (Scalia, J., concurring in the judgment in part and dissenting in part); *Ellis*, 466 U.S. at 447-448. Thus, while a union may charge dissenting employees for the costs of its "collective bargaining, contract administration, and grievance adjustment," *Abood*, 431 U.S. at 225-226, "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." *Lehnert*, 500 U.S. at 519.

Unions are free to engage in other activities and to spend their voluntarily raised funds on those activities. But a union cannot take the "extraordinary" step of "acquir[ing] and spend[ing] *other people's* money," against their will, for such purposes. *Davenport*, 127 S. Ct. at 2380; see *Abood*, 431 U.S. at 235-236.

2. Under those standards, litigation costs can be charged to objecting employees only when the litigation *both* is germane to collective bargaining *and* "directly concern[s]" the employees' bargaining unit. *Ellis*, 466 U.S. at 453.

a. This Court unanimously held in *Ellis* that "[t]he expenses of litigation incident to negotiating and administering the contract or to settling grievances and disputes arising *in the bargaining unit* are clearly chargeable * * * as a normal incident of the duties of the exclusive representative." *Ellis*, 466 U.S. at 453 (emphasis added). The Court further held that "[t]he 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 con-

ducted by the exclusive representative." *Ibid*. (emphases added). However, the court continued, "[t]he expenses of litigation not having such a connection with the bargaining unit are not to be charged to objecting employees." *Ibid.* "[U]nless the [relevant] bargaining unit is directly concerned," the "objecting employees need not share the costs" of the litigation. *Ibid*. As the court of appeals explained, the upshot is that unwilling members of *one* bargaining unit cannot be charged for the costs of *other* units' litigation unless that litigation directly concerns the bargaining unit, even if the litigation were germane to the other units' collective bargaining and thus chargeable to objecting members of those specific units. Pet. App. 13a.[2]

Ellis directly interpreted the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*, not the First Amendment. But *Ellis* and this Court's other RLA cases rest on principles of constitutional avoidance, not on a parsing of the RLA's text. See *Ellis*, 466 U.S. at 444; *Abood*, 431 U.S. at 232 (discussing RLA cases); cf. *IAM* v. *Street*, 367 U.S. 740, 742 n.1, 750-770 (1961) (relegating text of RLA to a footnote and discussing legislative history and constitutional avoidance principles at length). Thus, "there is good reason to treat [*Ellis* and other statutory cases]

[2] Litigation directly concerns a bargaining unit when the unit is a party to the litigation. The fact that one unit's litigation may create a precedent that could affect other units is insufficient to establish that the litigation directly concerns those units. This case presents no occasion to consider whether a unit may establish a direct interest in litigation involving other parties based on other considerations, such as where a collective bargaining agreement expressly ties the non-party unit's rights to the rights of another unit under another collective bargaining agreement. In any event, as explained below, the union assessing the fees bears the burden of proving that the litigation directly concerns the unit responsible for the fees.

as merely reflecting the constitutional rule." *Lehnert*, 500 U.S. at 555 (Scalia, J., concurring in the judgment in part and dissenting in part); see *id.* at 516; *Hudson*, 475 U.S. at 303-305 (relying on *Ellis*); *Abood*, 431 U.S. at 226, 232. Indeed, a four-Member plurality confirmed in *Lehnert* that, "[j]ust as the Court in *Ellis* determined that the RLA, as informed by the First Amendment, prohibits the use of dissenters' fees for extraunit litigation * * * the Amendment proscribes such assessments in the public sector." 500 U.S. at 528. Justice Scalia, in an opinion joined by three other Justices, likewise agreed that *Ellis* "reflect[s] the constitutional rule." *Id.* at 555 (concurring in the judgment in part and dissenting in part).

b. *Ellis*'s unanimous holding reflects the constitutional distinction between activities undertaken as part of negotiating and administering a unit's collective-bargaining agreement or settling disputes under that agreement, which are generally chargeable to objectors, and other activities undertaken to promote union interests more generally, which are not chargeable to workers who object to union membership in the first place. A unit might choose to contribute its voluntarily raised funds to another unit's litigation efforts on the theory that the litigation could have precedential significance for all units, and thus indirectly benefit the contributing unit. In a variety of contexts, however, this Court has made clear that the First Amendment precludes charging objectors for similar matters.

For example, political and lobbying activities concerning the election of pro-union candidates or enactment of pro-union legislation may well strengthen a union and improve its bargaining position. Under the First Amendment, however, lobbying activities are not

chargeable to objectors unless they specifically "relate * * * to the ratification or implementation of a dissenter's collective-bargaining agreement." *Lehnert*, 500 U.S. at 520 (plurality opinion); accord *id.* at 559 (Scalia, J., concurring in the judgment in part and dissenting in part). Similarly, public-relations expenses that are not "oriented toward the ratification or implementation of [a unit's] collective-bargaining agreement" are not chargeable to objectors, even though they may strengthen the union's bargaining position. *Id.* at 527 (plurality opinion); see *id.* at 559 (Scalia, J., concurring in the judgment in part and dissenting in part). This Court has likewise construed the RLA not to permit unions to charge objectors for union organizing activities, even though those activities may improve the union's bargaining position. *Ellis*, 466 U.S. at 451-453.

Such efforts to "expan[d] * * * overall union power," beyond the negotiation and administration of a unit's collective-bargaining agreement, or the settling of disputes under it, fall outside of the free-rider rationale for compelled agency fees. *Ellis*, 466 U.S. at 451, 452-453. So too here, litigation by affiliated unions may strengthen MSEA's position, but because such litigation is not part of the negotiation or administration of MSEA's own collective bargaining agreement, or the settling of disputes under that agreement, it is not chargeable to objectors. As the *Lehnert* plurality explained, litigation is "akin to lobbying" in that respect. 500 U.S. at 528.

In addition, charging objectors for other units' litigation would "significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Lehnert*, 500 U.S. at 519. This Court "long ha[s] recognized the important political and expressive

nature of litigation." *Id.* at 528 (plurality opinion) (citing *NAACP* v. *Button*, 371 U.S. 415, 431 (1963)). A union's position in litigation—especially litigation concerning the rights and obligations of unions—may well be offensive to workers who do not wish to associate with a union in the first place. While the very concept of an agency shop requires objectors to contribute to their own unit's germane litigation, it does not require objectors to support other units' litigation.[3]

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[3] The National Labor Relations Board (NLRB) has explained that this Court "considered in *Ellis* and *Lehnert* the question of extra-unit litigation expenses affecting employees governed by the [RLA] and public sector labor statutes, respectively, and has held those expenses nonchargeable to objectors." *California Saw & Knife Works*, 320 N.L.R.B. 224, 238 (1995) (footnotes omitted), enforced *sub nom. IAM* v. *NLRB*, 133 F.3d 1012, 1016 (7th Cir.), cert. denied, 525 U.S. 813 (1998). In administering the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, however, the NLRB has declined to apply that constitutional holding because the NLRB "find[s] precedent grounded in constitutional considerations not to be binding in the context of the NLRA." *California Saw*, 320 N.L.R.B. at 238; accord *United Food & Commercial Workers Locals 951, 7 & 1036 (Meijer, Inc.)*, 329 N.L.R.B. 730, 736 (1999), enforcement granted in part and denied in part *sub nom. United Food & Commercial Workers Union, Local 1036* v. *NLRB*, 307 F.3d 760 (9th Cir.) (en banc), cert. denied, 537 U.S. 1024 (2002).

As this Court has explained, state action triggering First Amendment protections is clearly present in the government-employment context and is also present under the RLA because that statute preempts state laws concerning union- and agency-shops. *Abood*, 431 U.S. at 218 n.12, 226; *Railway Employees' Dep't* v. *Hanson*, 351 U.S. 225, 232 (1956). But because the NLRA concerns private employment arrangements and does not preempt state law concerning the permissibility of union- and agency-shops, the NLRB has determined that the NLRA does not involve state action on this issue. See *California Saw*, 320 N.L.R.B. at 227-228. This Court has reserved that question while acknowledging that "the NLRA and RLA differ in certain crucial respects." *Commu-*

B. If A Bargaining Unit Funds Some Or All Of Its Own Germane Litigation Through A Bona Fide Pooling Arrangement, Nonmembers May Be Compelled to Contribute To The Pooling Costs

Although the First Amendment precludes public-sector unions from charging objectors for *other units'* litigation that does not directly concern the objector's unit, it does not preclude unions from using compelled fees to fund their *own* germane litigation either directly or through insurance or other bona fide pooling arrangements. In any given year, pooled funds might be used to fund the litigation of an objector's unit or another unit. But regardless of whether the objector's own unit calls on the pooled funds in a given year, a bona fide pooling arrangement is a constitutionally permissible way of funding the unit's own potential litigation. The bottom line is that the cost of other units' litigation that does not directly concern an objector's unit is not chargeable, but the cost of an insurance policy for the unit's own germane litigation costs is chargeable.

1. Unions may charge objectors for germane litigation expenses that are funded through insurance or other bona fide pooling arrangements

A unit might fund its own germane litigation in multiple ways. One approach would be to adjust fees every year to cover the costs of litigation incurred during that year. That approach could cause fees to fluctuate wildly from year to year, however, because a unit might have low litigation costs in most years, but litigation costs

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nications Workers of Am. v. *Beck*, 487 U.S. 735, 745, 761 (1988). Thus, NLRB precedents are inapposite in cases (like this one) that are controlled by constitutional principles.

might spike in certain years, such as when a strike occurs. A unit might try to even out members' and nonmembers' fees over time by establishing its own litigation reserve fund, but that approach would still expose the unit to the risk that, for unpredictable reasons, it might incur unusually high litigation costs compared to the average. Thus, a unit-by-unit funding mechanism imposes financial risks on members and nonmembers alike.

To protect against those risks, a unit might purchase a litigation insurance policy from a commercial insurer. Insurance is a common way of reducing risk and evening out payments over time. *E.g.*, *Adams* v. *Plaza Fin. Co.*, 168 F.3d 932, 934 (7th Cir. 1999). Like other entities, unions presumably purchase insurance policies to cover a variety of matters, such as fire or flood damage to a union's headquarters. A union's use of compelled fees to fund its own germane activities through insurance would present no constitutional question, because such a financial-management practice would not increase the intrusion on First Amendment interests that is inherent in the union- or agency-shop. See *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 472 (1997) ("The mere fact that objectors believe their money is not being well spent 'does not mean [that] they have a First Amendment complaint.'") (quoting *Ellis*, 466 U.S. at 456) (brackets in original); *Abood*, 431 U.S. at 223 (holding that an objector "cannot withdraw his financial support merely because he disagrees with the group's strategy").

As the court of appeals recognized, a similar analysis applies to bona fide pooling arrangements, "akin to insurance," under which multiple units make payments to a pool and the pool agrees in turn to "provide resources

(in the form of services or money) in return, when the local unit needs them." Pet. App. 29a. If a unit can use compelled fees to fund its own germane litigation by purchasing a commercial insurance policy, there is no constitutional impediment to its use of compelled fees to fund such litigation through a bona fide pooling arrangement administered by its national or international affiliate.

Indeed, a national or international union is well positioned to provide insurance-type services for its local affiliates. As this Court recognized in *Lehnert*, "[t]he essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable economic, political, and informational resources when the local is in need of them." 500 U.S. at 523. "Consequently," the Court explained, "that part of a local's affiliation fee 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." *Ibid*.

Lehnert therefore held that "a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit." 500 U.S. at 524. To be clear, "[t]his conclusion * * * does not serve to grant a local union *carte blanche* to expend dissenters' dollars for bargaining activities wholly unrelated to the employees in their unit." *Ibid*. Instead, "[t]here must be some indication that the payment is for services that may ultimately inure to the

benefit of the members of the local union by virtue of their membership in the parent organization." *Ibid.*

2. *There is no basis for overruling* Lehnert*'s unanimous endorsement of pooling arrangements*

Petitioners appear to suggest (Br. 39, 50-52) that this Court should overrule *Lehnert* and hold that units may not use compelled fees for *any* pooling arrangements. That position falls outside of the far narrower question presented, which affirmatively *relies* on *Lehnert*. Pet. (i); see *Yee* v. *City of Escondido*, 503 U.S. 519, 535-537 (1992) (holding that petitioners had excluded a related argument from the scope of the question presented by drafting it narrowly). The body of the petition for a writ of certiorari likewise relied heavily on *Lehnert*, without suggesting that it be overruled. See Pet. 1, 9, 12-15. Accordingly, this Court could decline to consider petitioners' attack on *Lehnert*. See Sup. Ct. R. 14.1(a).

In any event, *Lehnert*'s endorsement of pooling arrangements is entitled to stare decisis effect. While the *Lehnert* Court divided on some questions, every Member of the Court agreed that unions may pool compelled fees for at least some purposes. See *Lehnert*, 500 U.S. at 523-524; *id.* at 562 (Scalia, J., concurring in the judgment in part and dissenting in part) ("It is a tangible benefit * * * to have expert consulting services on call, even in the years when they are not used."); *id.* at 563 (Kennedy, J., concurring in the judgment in part and dissenting in part) ("[W]e permit charges for affiliate expenditures because such expenditures do provide a tangible benefit to the local bargaining unit, in the nature of a prepaid but noncontractual consulting or legal services plan.").

Petitioners primarily argue (Br. 22-23) that one unit's litigation is inherently not germane to another unit's collective bargaining. As discussed above, however, it does not follow that the costs associated with a unit's decision to buy insurance for its *own* litigation costs through an insurance policy or other pooling arrangement are not germane to its collective bargaining. While petitioners suggest (Br. 42) that unions should not be able to evade limitations on chargeability through "creative accounting and shell-game-like shifting of nonmembers' funds," risk-sharing agreements are not inherently sinister. They are commonly used commercial arrangements that provide important benefits to all participants. See pp. 15-16, *supra*. Moreover, the way to ensure that legitimate risk sharing does not become a cover for improper efforts to appropriate nonmembers' funds for nongermane activities is through a proper allocation of the burden of proof. See pp. 28-29, *infra*.

Petitioners assert (Br. 14) that the First Amendment requires the government to use the least restrictive means to further its interest in promoting labor peace and preventing free riders. Cf. *Hudson*, 475 U.S. at 303 (holding that "the procedure" for protecting dissenters' First Amendment rights must "be carefully tailored to minimize the infringement"). Even assuming *arguendo* that a least-restrictive-means test applies, prohibiting unions from using compelled fees for pooling arrangements would require them to choose between foregoing an efficient means of spreading risk, on the one hand, or permitting free riders, on the other. That could give rise to the very type of labor friction that agency shops are designed to prevent.

Moreover, such pooling arrangements do not "significantly add to the burdening of free speech that is inher-

ent in the allowance of an agency or union shop" (*Lehnert*, 500 U.S. at 519), because objectors must pay for their unit's germane activities in any event. Even objectors may benefit from spreading out litigation costs rather than facing a substantial assessment in a single period. There is no reason to place objectors in a better position merely because a unit chooses to fund its own germane expenses through a risk-sharing mechanism as opposed to other means. Although it might be an appropriate policy judgment for a legislature to limit local unions to buying third-party insurance as a prophylactic means of ensuring that a national union does not use pooling as a cover for impermissible cost shifting, the First Amendment itself does not embody that prophylactic rule.

As *Lehnert* explained, unions are entitled to "some leeway" in exercising "the flexibility and discretion necessary to accommodate the needs of their constituents." 500 U.S. at 525 (quoting *Street*, 367 U.S. at 778 (Douglas, J., concurring)); see *Abood*, 431 U.S. at 222-223; *Ellis*, 466 U.S. at 456-457. Such leeway is particularly appropriate for financial-management decisions concerning the best way to fund germane activities. Nothing in the Constitution distinguishes between the use of compelled fees to pay a unit's costs directly, to purchase commercial insurance for such costs, or to enter into a bona fide pooling arrangement.

3. There is no reason to exclude litigation costs from the scope of permissible pooling arrangements

Petitioners argue (Br. 9) that *Ellis* and *Lehnert* excluded litigation costs from the scope of permissible pooling arrangements. But neither case so holds, and the logic of *Lehnert* strongly suggests that using com-

pelled fees for the pooling of litigation expenses is permissible for the same reasons that it is permissible for other expenses.

a. Relying on factual recitals in a district court decision in the *Ellis* litigation, petitioners argue (Br. 21-22 & n.12) that *Ellis* involved a pooling arrangement because the nonmembers paid part of their dues directly to the national union, which undertook the relevant litigation. Assuming that factual description is accurate, it does not follow that *Ellis* involved a bona fide risk-sharing arrangement among affiliated unions. Among other things, that would depend on whether the payments to the national union were made in return for the national's agreement to cover each unit's germane litigation, or instead were paid into a discretionary fund for the national to use as it pleased. See pp. 24-28, *infra*.

In any event, as Justice Kennedy has observed, "*Ellis* * * * contains no discussion of whether a local bargaining unit might choose to fund litigation * * * through a cost-sharing arrangement." *Lehnert*, 500 U.S. at 564 (concurring in the judgment in part and dissenting in part). Indeed, this Court's opinion in *Ellis* does not even indicate whether there was a pool in that case. Instead, *Ellis* addressed only the question whether objectors in one unit can be required to support other units' litigation, without addressing the pooling question presented here. Pet. App. 27a-28a; accord *Otto* v. *Pennsylvania State Educ. Ass'n-NEA*, 330 F.3d 125, 136 (3d Cir. 2003); see *Ellis*, 466 U.S. at 453.

b. Nor did *Lehnert* resolve the question whether litigation expenses may be pooled. Four Members of the *Lehnert* Court determined that objectors could not be charged for pooled litigation costs. 500 U.S. at 528 (plurality opinion). Justice Kennedy disagreed with that

conclusion. *Id.* at 563-564. Justice Marshall reserved judgment on it. *Id.* at 549. And the remaining Members of the Court did not specifically address the litigation-costs question, see generally *id.* at 558-559 (Scalia, J., concurring in the judgment in part and dissenting in part), evidently because no such costs were actually at issue in that case, see *id.* at 544-545 (Marshall, J., concurring in part and dissenting in part).

Petitioners argue (Br. 27) that Justice Scalia's opinion endorsed *Ellis*, and should therefore be read as "implicitly conclud[ing]" that pooled litigation costs cannot be financed with compelled fees. Justice Scalia cited *Ellis*, however, for the distinct proposition that compelled fees may be used only for services a union is obligated to perform on behalf of all employees in the bargaining unit, including the unit's own germane litigation. *Lehnert*, 500 U.S. at 554-555. Justice Scalia did not suggest, much less definitively state, that a union could not fund its germane litigation through a pooling arrangement. To the contrary, in discussing other types of expenditures, Justice Scalia agreed that a unit's payment to its national union for "on-call services for use in the bargaining process" is chargeable to objectors. *Id.* at 561. Thus, Justice Scalia's reasoning *supports* the use of compelled fees for litigation pooling arrangements; it certainly does not *preclude* such use.

c. Indeed, under the logic of *Lehnert*, there is no basis for excluding litigation costs from the scope of pooling arrangements that can be funded with compelled fees. As Justice Kennedy explained, such an exclusion "makes little sense if we acknowledge * * * that we permit charges for affiliate expenditures because such expenditures do provide a tangible benefit to the local bargaining unit, in the nature of a prepaid but noncon-

tractual consulting or legal services plan." *Lehnert*, 500 U.S. at 563-564 (concurring in the judgment in part and dissenting in part). In other words, the rationale for permitting pooling of litigation costs is the same as the rationale for permitting pooling of any other costs—the unit benefits from the availability of support services, even if its need for those services fluctuates from year to year. As Judge Posner has explained, therefore, the pooling of litigation costs is "analytically identical" to the pooling of other expenses. *IAM* v. *NLRB*, 133 F.3d 1012, 1016 (7th Cir.), cert. denied, 525 U.S. 813 (1998); see Pet. App. 38a (Lynch, J., concurring); *Otto*, 330 F.3d at 138-139; *Reese* v. *City of Columbus*, 71 F.3d 619, 624 (6th Cir. 1995), cert. denied, 519 U.S. 964 (1996).

The *Lehnert* plurality gave two reasons for treating litigation costs differently from other expenses: "the important political and expressive nature of litigation" and the "diverse range of areas" covered by such litigation. 500 U.S. at 528. While there are sound reasons for suspecting that much litigation may be non-germane, neither of those considerations provides any basis for treating as non-germane the costs of insurance that smooths the incidence of expenses for litigation that is, in fact, germane over various assessment periods. If a commercial insurance company sold a litigation insurance policy to each of the bargaining units, and used the proceeds to cover each unit's germane litigation costs as they arose, the situation would not be materially different. Either way, a nonmember might argue that a portion of his fees contributed to a pool of funds that was used to pay other units' litigation expenses. But either way, that would only reflect the nature of risk sharing and insurance. As long as the objector is assessed only for truly germane expenses, the First Amendment

should be indifferent whether litigation expenses are spread evenly across assessment periods through insurance or assessed only when incurred.

To be sure, litigation costs differ in some respects from the costs of negotiating a collective bargaining agreement, which *Lehnert* permitted to be pooled. See 500 U.S. at 527. While the provision of core support services such as bargaining assistance is "[t]he essence of the affiliation relationship," *id.* at 523, neither litigation nor risk pooling is inherently a function for the national union, as *Ellis* helps to confirm. Moreover, union litigation can be quite expressive and ideological, and can be directed toward the expansion of union power generally. Those differences do not, however, provide a constitutional reason to preclude the use of compelled fees for litigation pooling arrangements. Instead, they underscore the importance of ensuring that, under the standards discussed below, a litigation pooling arrangement is actually a bona fide risk-sharing agreement similar to insurance, as opposed to a vehicle by which some units use compelled fees to subsidize other units' litigation, in violation of *Ellis*.

C. To Be Bona Fide, A Litigation Pooling Arrangement Must Cover Germane Costs And Have The Essential Attributes Of Any Genuine Risk-Sharing Agreement

Petitioners argue (Br. 51, 52) that *Lehnert*'s endorsement of pooling arrangements has led to a vacuum of "non-existent, non-enforceable standards." That is incorrect. The constitutional justification for requiring nonmembers to contribute to litigation pooling arrangements supplies the standards, and the nature of the constitutional interest suggests that the burden of any un-

certainty in the standards should fall in favor of the objectors whose First Amendment rights are at stake.

At the outset, as *Lehnert* and the court of appeals recognized, a pooling arrangement must cover costs "associated with otherwise chargeable activities." 500 U.S. at 524; see Pet. App. 31a-32a. If the unit involved in a particular case could not charge objectors for its litigation costs because the litigation was not germane to collective bargaining, a pooling arrangement could not be used to evade the First Amendment's prohibition against the use of compelled fees for that litigation. Thus, if 70% of a pool's revenues were used for germane litigation, with the remainder used for non-germane litigation, objectors could be charged for only 70% of their unit's payments to the pool.

In addition, a bona fide litigation pooling arrangement must have the essential features of any risk-sharing agreement: each participating unit must pay its fair share of the costs, and each must have some reasonable assurance that, when needed, the pool will pay for its germane litigation. If the national or international union assists with some but not all germane litigation, it must have reasonably ascertainable standards for determining which litigation is included in the pooling arrangement. In other words, the arrangement must be a bona fide risk-sharing one. If a unit paid into a pool without reasonable assurance that it would receive assistance with its own litigation, the pool would not be a legitimate risk-sharing arrangement, but instead would be a vehicle by which dissenters' compelled fees were used to subsidize other units' litigation, in violation of *Ellis*.

The *Lehnert* Court touched on those points. It explained, for example, that "[t]here must be some indication that the payment is for services that may ultimately

inure to the benefit of the members of the local union." 500 U.S. at 524. If a unit pays more than its fair share of litigation pooling costs, the excess contribution would not satisfy that test, but instead would be "in the nature of a charitable donation [that] would not be chargeable to dissenters." *Ibid*.

That is not to say that the Constitution micro-manages the details of such arrangements by establishing rigid rules for apportioning their costs. The Constitution no more requires one particular method of accounting than it enacts Herbert Spencer's social statics. The point is simply that a true risk-pooling arrangement offends no constitutional principle, and the proper standard and allocation of burden of proof should be sufficient to protect the important First Amendment rights of objectors. At least some national unions charge all workers the same amount, regardless of the identity of their local unit. See *Pilots Against Illegal Dues* v. *ALPA*, 938 F.2d 1123, 1127 (10th Cir. 1991). Some courts have likewise noted that each unit paid its "pro rata" share of the "costs of union programs available to all bargaining units." *Wessel* v. *City of Albuquerque*, 299 F.3d 1186, 1195 (10th Cir. 2002); accord *Reese*, 71 F.3d at 623. Such a pro rata approach is an appropriate way of allocating pooled litigation costs. There may be other reasonable approaches as well. Whatever apportionment methodology is used, however, it must reflect a genuine pooling of risk and, and as discussed below, the burden rests with the union. Otherwise, the pooling arrangement would impermissibly serve "as a cover" for charging objectors for other units' litigation, in violation of the First Amendment. See *Lehnert*, 500 U.S. at 515 (quoting *Hanson*, 351 U.S. at 238).

Similarly, each participating unit must have a reasonable assurance that, when it finds itself a party to germane litigation, the pool will cover its costs. If the pool covers only some litigation, it must have reasonably ascertainable standards for determining which litigation the pool will pay for (*i.e.*, the scope of the risk-sharing agreement). In the absence of such standards, *Ellis* would control and bar the use of compelled fees for the pooling arrangement, because nonmembers would be asked to fund other units' litigation without any assurance that the fund would cover their own unit's litigation.

As the court of appeals explained, "specific reassurance that future litigation directly relating to [an objector's] unit would be funded" by the pool "creat[es] the reciprocity that was necessary to the *Lehnert* Court's approval of pooling arrangements." Pet. App. 22a n.13. If a unit contributed to a pool with "no reasonable expectation of any return benefit," there would be no bona fide risk-sharing agreement, and dissenters in one unit would simply be compelled to support other units' litigation, in violation of *Ellis*. *Id.* at 29a-30a; see *id.* at 28a. "The essence of the affiliation relationship is the notion that the parent *will* bring to bear its * * * resources when the local is in need of them." *Lehnert*, 500 U.S. at 523 (emphasis added).

That does not mean that contractual formalities, such as the drafting of formal insurance policies, must be followed. Every Member of the *Lehnert* Court agreed that "there is 'no reason to insist that, in order to be chargeable, on-call services for use in the bargaining process be committed by contract rather than by practice and usage.'" 500 U.S. at 532 n.6 (quoting *id.* at 561 (Scalia, J., concurring in the judgment in part and dissenting in

part)); see *id.* at 563 (Kennedy, J., concurring in the judgment in part and dissenting in part). If compelled fees are to be paid into a litigation pool, however, participating units must have a reasonable assurance—by contract, by practice or usage, or by some other means—that the pool will pay for their litigation expenses when needed, and as explained below, the burden properly rests with the union on this point.

D. The Union Bears The Burden Of Proving That It Made The Challenged Expenditures Pursuant To A Bona Fide Pooling Arrangement

Petitioners argue (Br. 40-43, 51) that they would face hopeless practical problems in attempting to establish whether a union's expenditures were made pursuant to a bona fide pooling arrangement. "The nonmember's 'burden,'" however, "is simply the obligation to make his objection known." *Hudson*, 475 U.S. at 306 n.16. Once a worker raises an objection, "the union retains the burden of proof," in part because it possesses the relevant "facts and records." *Id.* at 306 (quoting *Abood*, 431 U.S. at 239 n.40); see *id.* at 307 n.18; *Brotherhood of Ry. Clerks* v. *Allen*, 373 U.S. 113, 118, 122 (1963). Thus, in distinguishing between legitimate and illegitimate pooling arrangements, *Lehnert* stressed that, "as always, the union bears the burden of proving the proportion of chargeable expenses to total expenses." 500 U.S. at 524; see *Wessel* v. *City of Albuquerque*, 463 F.3d 1138, 1144 (10th Cir. 2006).

Here, petitioners carried their threshold burden by objecting to SEIU's "litigation that does not concern [a] dissenting nonmember's bargaining unit." J.A. 41. At that point, the burden shifted to respondents to prove that the pooling arrangement is bona fide under the

standard discussed above. The court of appeals did not consider whether the standard described above was met, however, in part because it applied a different "germaneness" inquiry in determining that the expenses at issue were chargeable. See, *e.g.*, Pet. App. 31a-32a. In addition, the record before this Court does not disclose whether the standard discussed above is satisfied. Accordingly, this Court should vacate the decision below and remand for further proceedings to give the lower courts an opportunity to review the validity of the litigation expenses at issue under the proper standard.[4]

[4] Petitioners have argued throughout this litigation based on their interpretation of this Court's cases that litigation pooling arrangements are per se invalid—a contention the court of appeals correctly rejected. Pet. App. 31a-32a. Thus, in affirming the district court's dismissal of petitioners' suit, the court of appeals emphasized that it relied on petitioners' failure to "dispute whether the litigation charges were 'germane,' as that term was defined in *Lehnert*." *Id*. at 32a. Because the legal standard discussed above "alters the playing field in some important respects," however, remand is appropriate. *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 237 (1995). On remand, the court of appeals may consider whether or to what extent petitioners waived any arguments concerning the invalidity of the fees at issue.

CONCLUSION

For the foregoing reasons, the Court should dispose of this case in accordance with the principles discussed above and remand for further proceedings consistent with the Court's decision.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
GREGORY G. KATSAS
Acting Assistant Attorney General
GREGORY G. GARRE
Deputy Solicitor General
DARYL JOSEFFER
Assistant to the Solicitor General
DOUGLAS N. LETTER
JEFFRICA JENKINS LEE
Attorneys

GREGORY F. JACOB
Solicitor
KATHERINE E. BISSELL
Associate Solicitor
MARK S. FLYNN
Counsel for Advice and Statutory Programs
NORA CARROLL
Senior Attorney
Department of Labor

MAY 2008