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P R O C E E D I N G S

(11:08 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 07-610, Locke v. Karass.

Mr. Young.

ORAL ARGUMENT OF W. JAMES YOUNG

ON BEHALF OF THE PETITIONERS

MR. YOUNG: Mr. Chief Justice, and may it please the Court:

This case addresses whether the First and Fourteenth Amendments permit public employers to compel nonunion employees to subsidize the union's expressive speech of a political nature in a public forum, specifically litigation in courts and before administrative agencies not involving their bargaining unit.

We submit that the answer to this question is no, a result supported by the Court's unanimous, unambiguous, and categorical holding in Ellis. In Ellis, this Court held that, to avoid constitutional problems, nonmembers under the Railway Labor Act could not be forced to subsidize any litigation not arising within their bargaining unit, not even litigation to enforce another bargaining unit's agreement in bankruptcy proceedings.

1 JUSTICE SCALIA: But, of course, they
2 wouldn't be subsidizing it if -- if, indeed, it is some
3 kind of a -- essentially an insurance scheme. They --
4 they contribute to the national union, and in exchange
5 the national union defends their interests just as it
6 defends the interests of other unions. You didn't
7 address that -- that pooling argument.

8 MR. YOUNG: I would respectfully disagree,
9 Justice Scalia, but my answer to your question --

10 JUSTICE SCALIA: It doesn't seem to me fair
11 to call it "subsidizing" if, in fact, that's what's
12 going on.

13 MR. YOUNG: Well, it is also not fair,
14 Justice Scalia, to call it "insurance." It's
15 affiliation, and the answer to the question --

16 JUSTICE SCALIA: I don't know because that
17 wasn't inquired into by the court below. I guess we
18 really -- we really don't know, do we, when -- whether
19 the local union can make any demands upon the -- upon
20 the national union for -- for litigation defense?

21 MR. YOUNG: Well, I think we can rely,
22 Justice Scalia, on the admissions contained in MSEA's
23 brief, which freely concedes that, in fact, SEIU has no
24 enforceable obligations under its affiliation
25 arrangement with MSEA.

1 JUSTICE KENNEDY: Well, if we don't call it
2 "insurance," can we call it "pooling"?

3 MR. YOUNG: Well, of course, that -- that is
4 what they call it, Justice Kennedy. And -- and -- and
5 pooling is -- is certainly something that we believe the
6 Court rejected in Ellis when it set forth a categorical
7 rule.

8 The pooling argument was raised in the
9 briefs in Ellis, and this Court did not see fit to --

10 JUSTICE GINSBURG: Mr. Young, I thought that
11 in Ellis the litigation -- the Ellis Court said that
12 that litigation did not have as its subject matter
13 "negotiation or administration of a collective
14 bargaining contract."

15 MR. YOUNG: I don't believe that's the case,
16 Justice Ginsburg, because Ellis dealt with enforcing a
17 bargaining agreement.

18 JUSTICE GINSBURG: I'm quoting from -- I'm
19 quoting from that decision at page 453. The case
20 involved litigation "not involving negotiation or
21 administration of a collective bargaining contract."

22 MR. YOUNG: Well, of course, Justice
23 Ginsburg, the -- some of the litigation did involve
24 enforcing another bargaining unit's agreement in
25 bankruptcy proceedings. I don't know how that is not

1 enforcing --

2 JUSTICE GINSBURG: Well, are you saying the
3 Court got it wrong? I mean, the words that I'm quoting
4 are from the opinion: "Not involving negotiation or
5 administration of a collective bargaining contract."

6 MR. YOUNG: Well, that -- that --

7 JUSTICE GINSBURG: That's the only thing
8 that could be germane. If it doesn't relate to that,
9 then your case is solid.

10 MR. YOUNG: Well, I'm trying -- I'm -- I'm
11 trying to find the specific language, Justice Ginsburg,
12 and I apologize for my inadequacy in this regard. But I
13 think the point that we -- I think the point that we
14 would rely on in *Ellis* in -- in -- in the very paragraph
15 you referred to is the specificity with which this Court
16 discussed what was chargeable. It referred to the
17 contract, for instance. It referred to the exclusive
18 representative twice; not an exclusive representative,
19 but the exclusive representative. It referred to the
20 bargaining unit not less than five times in that single
21 paragraph in discussing what was permissible under the
22 Railway Labor Act.

23 JUSTICE ALITO: Do you want to stand or fall
24 on the all-or-nothing argument that nonmembers can never
25 be required to pay for any extra-unit litigation

1 expenses, or do you have an -- an additional argument?

2 MR. YOUNG: Well, no, Justice Alito. We
3 believe -- we believe that the -- the Ellis standard is
4 the constitutional standard as both principal opinions
5 in Lehnert discuss.

6 In -- in Lehnert, Justice Blackmun
7 specifically recognized it in his -- in his plurality
8 opinion; and Justice Scalia himself said there was good
9 reason -- good cause to treat Ellis as stating the
10 constitutional rule.

11 JUSTICE SOUTER: Well, do you take -- do you
12 take that as -- as -- as meaning that the union couldn't
13 buy litigation insurance?

14 MR. YOUNG: Real insurance, Justice Souter?
15 I think that -- obviously that would be a --

16 JUSTICE SOUTER: Some of those -- some of
17 those premiums are going to subsidize defense in -- in
18 -- in cases beyond this bargaining unit. In fact, most
19 of it will.

20 MR. YOUNG: Well -- but the distinction,
21 Justice Souter, I think is discussed in the brief,
22 amicus brief, filed by Pacific Legal Foundation. For
23 one thing, it would not be the labor union that would be
24 -- another labor union receiving those insurance funds.
25 It would be a third-party insurer, presumably. There

1 would be --

2 JUSTICE SOUTER: So -- so in your view,
3 then, even if the agreement with the -- with the parent
4 union in this case involved an explicit obligation on
5 the part of the parent to come in and defend in -- if
6 litigation arose in this unit, that would still be bad?

7 MR. YOUNG: It would add the -- the insult
8 of the --

9 JUSTICE SOUTER: Well, I'm not interested in
10 insults. Is it -- is it constitutional, or isn't it?

11 MR. YOUNG: We believe it would not be if
12 the international affiliate were the insurer, Justice
13 Souter.

14 JUSTICE SOUTER: Then -- and -- you do take
15 the position that a -- a genuine insurance policy issued
16 by an insurer would not violate the constitutional
17 standard?

18 MR. YOUNG: That -- that is the -- that is
19 our argument, Justice Souter.

20 CHIEF JUSTICE ROBERTS: Even though -- even
21 though there may be a great disconnect between the
22 premiums and the needs of the particular unit? I mean,
23 let's say the particular unit has -- I don't know -- has
24 always had a history of good relations with the
25 employer. It has never had to call upon litigation in

1 20 years, and they don't anticipate it, and yet their
2 insurance premiums rise dramatically because of very
3 hostile and extended litigation by another unit. Do you
4 -- do you concede that case?

5 MR. YOUNG: I -- I don't think -- well, I
6 don't think I would concede the premise of your
7 question, Mr. Chief Justice. The -- and I think that
8 point is -- is discussed fairly thoroughly in Pacific
9 Legal Foundation's brief.

10 A rate setting in an insurance context is --
11 is radically different than the affiliations fee setting
12 in this context. Rate -- and -- and much more about
13 insurance than, frankly, I know; but it -- it certainly
14 is --

15 JUSTICE SCALIA: Yes, but it's based on the
16 experience of the whole -- the whole cohort of insureds.

17 MR. YOUNG: It's also --

18 JUSTICE SCALIA: And the Chief Justice's
19 question says: Can a -- can a -- a local that is
20 certainly on the basis of past experience not going to
21 need this insurance nearly as much as other locals --
22 can it enter into an insurance arrangement with other
23 locals to buy the insurance for all of the locals even
24 though it knows that it won't benefit very much from
25 that insurance policy?

1 MR. YOUNG: I'm sorry. I misunderstood.

2 JUSTICE SCALIA: That was -- he was trying
3 to help you.

4 MR. YOUNG: And I'm sorry, Chief Justice
5 Roberts.

6 JUSTICE SCALIA: You should have said, yes,
7 Chief Justice.

8 (Laughter.)

9 MR. YOUNG: And -- and I -- and I appreciate
10 the help, Mr. Chief Justice, and your pointing that out,
11 Justice Scalia. My -- I -- I misunderstood the
12 question, and I apologize.

13 Yes, Mr. Chief Justice. The -- the -- our
14 point would be, however, that in that type of
15 relationship and I -- as I said, that's --

16 JUSTICE STEVENS: Does that mean that each
17 time they buy an insurance policy they have to
18 investigate which locals are going to get the most
19 benefit out of it?

20 MR. YOUNG: Well, I don't think that's a --
21 that's a decision for the locals. That's the insurer
22 setting rates, and -- and I -- I don't know of a market,
23 quite honestly, Justice Stevens, for that type of
24 insurance.

25 JUSTICE STEVENS: Would you give one answer

1 to the Chief Justice on the facts he gave and a
2 different one if the record showed that everybody got a
3 proportional benefit out of the group policy?

4 MR. YOUNG: I don't -- no, Justice Stevens.
5 I don't think my question -- my answer would differ. I
6 think, however --

7 JUSTICE STEVENS: So your answer doesn't
8 depend, then, on the facts that he included in that
9 question?

10 CHIEF JUSTICE ROBERTS: He is not trying to
11 help you.

12 (Laughter.)

13 JUSTICE STEVENS: I'm not sure he was,
14 either.

15 MR. YOUNG: Well, one looks for it where one
16 can find it, Justice Stevens and Mr. Chief Justice.

17 The differing -- I think that the
18 distinction has to be made here between insurance on the
19 one hand and affiliation. There -- in -- in the
20 insurance context you have --

21 JUSTICE STEVENS: Does that mean all
22 insurance policies are bad?

23 MR. YOUNG: No, no, no. I -- I -- I concede
24 insurance, Justice Stevens. I -- my point -- if it is
25 true insurance, insurance where there is mutuality of

1 obligation.

2 The difficulty that this Court, I believe,
3 found in the Ellis case when it set a bright-line test
4 was that it was public -- and I -- and I think can be
5 discerned from the Court's other cases, including
6 Glickman -- is we're talking about public speech, speech
7 of a political nature in a public forum.

8 JUSTICE SOUTER: Well, there was -- there
9 was mutuality of obligation in the hypothesis that I
10 gave you in which the agreement with the parent union
11 required an affirmative obligation of the parent union
12 to come in and defend if litigation arose. And you said
13 that still would not be constitutional.

14 MR. YOUNG: And I -- and I --

15 JUSTICE SOUTER: So the -- so the criterion
16 has got to be something other than mutuality of
17 obligation, right?

18 MR. YOUNG: And it assuredly is, Justice
19 Souter.

20 JUSTICE SOUTER: And what is the
21 distinction?

22 MR. YOUNG: The other distinction has to be
23 that it is not -- it is -- the problem also arises from
24 the nature of the forced relationship. As this Court
25 has recognized in cases such as Ellis and Abood,

1 allowing the agency shop at all works an infringement on
2 First Amendment rights.

3 JUSTICE SOUTER: We -- we -- we start with
4 that premise, but what is the other distinction, then?
5 If it is not mutuality of obligation, what -- what is
6 the -- what is the -- the -- the point that separates
7 the -- the sheep from the goats here?

8 MR. YOUNG: Well, the mutuality of
9 obligation coupled with true rate setting in the sense
10 that there is a -- there is --

11 JUSTICE SOUTER: What -- what is -- what has
12 rate setting got to do with -- with your basic point?
13 Your basic point, as I understand it, is that some of
14 the money that's being taken from the -- from the local
15 union and in our example subsidized by the service fee
16 is being used to subsidize litigation for other unions.
17 And that is, it seems to me, exactly true in the
18 insurance case.

19 Some of those premiums will subsidize
20 litigation -- speech -- involving speech in -- in other
21 union bargaining areas. What's the distinction?

22 MR. YOUNG: Well, the distinction, Justice
23 Souter, would be that there is -- it doesn't seem to me
24 that there is a -- there is a larger pool created than
25 just a union litigation pool in the insurance context.

1 Furthermore, the -- the money, in fact, is spread about
2 --

3 JUSTICE SOUTER: I don't know whether that's
4 true or not. I mean, if you buy labor litigation
5 insurance I suppose it is not. Don't they set their
6 rates with respect to the experience in labor
7 litigation, not in -- on their experience with
8 automobile accidents.

9 MR. YOUNG: I don't know of an insurance
10 company that's quite that specific, Justice Souter, nor
11 have I ever heard of labor -- labor union insurance --
12 labor litigation insurance. So I'm not sure that such a
13 market actually exists.

14 JUSTICE SOUTER: Neither do I.

15 MR. YOUNG: Certainly there is not on this
16 record that would suggest so, sir.

17 JUSTICE KENNEDY: I just want to understand
18 your position. Suppose there is a statewide contract
19 for public employees and one union brings a suit to
20 interpret a provision of that collective bargaining
21 agreement having to do with overtime or holidays or
22 something. And then it notifies the other union, we're
23 going to have to drop this litigation because we can't
24 afford it. Even though it ultimately may affect you
25 down the line, you're not a party. I don't see the harm

1 in allowing the other union to subsidize or
2 contribute -- use whatever verb you want -- that
3 litigation -- that litigation.

4 MR. YOUNG: Well, of course if the other
5 union --

6 JUSTICE KENNEDY: What -- what -- what harm
7 are we trying to prevent here?

8 MR. YOUNG: Well, obviously First Amendment
9 harm, Justice Kennedy. But I think understanding -- if
10 I understand your hypothetical --

11 JUSTICE KENNEDY: The First Amendment can
12 be -- can be a sword or a shield. This union wants to
13 use it as a sword in order to promote, in order to
14 protect its rights under the collective bargaining
15 agreement. I don't see the harm.

16 MR. YOUNG: Excuse me, Justice Kennedy. I'm
17 sorry for interrupting you.

18 Certainly the union has the right to
19 associate as it sees fit. The First Amendment protects
20 that right. We are not suggesting that it doesn't have
21 the right to go out and ask other labor unions to
22 contribute to its litigation activities.

23 What the First Amendment -- the -- the First
24 Amendment right to not speak is -- is involved when, in
25 the words of the Ninth Circuit in one of these cases,

1 "they seek to mulch from the unwilling moneys for their
2 speech activities in a public forum."

3 JUSTICE BREYER: What I don't understand
4 about --

5 MR. YOUNG: I'm sorry, Justice Breyer.

6 JUSTICE BREYER: Finish because there's
7 something --

8 MR. YOUNG: Thank you, sir. And my point
9 would be under the hypothetical as I understand it, you
10 posed a union in -- within the State under the same
11 bargaining agreement being asked to support for
12 litigation under one of the other locals. I can think
13 of a number of cases where that's actually the case, two
14 locals under one bargaining agreement just in my own
15 experience. And so you're not suggesting something
16 that's unusual.

17 I think under that circumstance that would
18 fall squarely within Ellis's rule. It involves the
19 bargaining agreement. It may not involve the specific
20 bargaining unit, but it is concerning the bargaining
21 agreement.

22 JUSTICE KENNEDY: That's not quite the
23 hypothetical. Let's say there are two bargaining
24 agreements but they're identical, and that this
25 litigation that's underway will have persuasive force

1 for the union that's thinking about entering, and then
2 the union decides that it is going to enter to help the
3 union involved in the suit, and the members of the -- of
4 the contributing union object, and you say they have a
5 First Amendment right. That's your point?

6 MR. YOUNG: Yes, Justice Kennedy.

7 JUSTICE KENNEDY: I don't see why the
8 objects of collective bargaining, the objects of
9 union -- of the union are not being fulfilled.

10 MR. YOUNG: Because that goes beyond the
11 free rider rationale which justifies the agency shop in
12 the earlier cases such as Hansen and Street. The free
13 rider that the Congress was concerned with -- and of
14 course, it's been adopted through Abood to apply to the
15 States -- the free rider that Congress was concerned
16 with is the free rider that is required to accept the
17 union's services and refuses to subsidize those
18 services. And the -- this Court in discussing that in
19 terms of lobbying and public relations activities found
20 that the relationship was too attenuated.

21 Obviously judicial decision-making and
22 administrative decision-making is good for its
23 persuasive effect in many different contexts. But that
24 -- that relationship was found to be too attenuated in
25 Ellis and with regard to litigation and certainly in

1 Lehnert with regard to public relations --

2 JUSTICE BREYER: That's the part I don't
3 understand. It's not your fault. I don't understand it
4 in the cases either. What First Amendment right are we
5 talking about? There is an individual who, under the
6 agency shop, pays dues to a union. Now, suppose the
7 union uses some of that money in a way that has nothing
8 to do with politics, nothing to do with speech, but it
9 doesn't happen to benefit that particular member.

10 For example, you can have a central union
11 headquarters 4,000 miles away where there's a librarian
12 who's doing research on a matter that will help lots of
13 people, but nobody in this area. Or you could have a
14 program to commemorate the people who were hurt in the
15 State of Hawaii at a union uprising or strike of some
16 kind where nobody in this particular area is ever going
17 to go.

18 Now, both of those activities are totally
19 legitimate union activities that have nothing to do with
20 politics. But this particular place won't benefit from
21 them. Okay, what in the First Amendment prohibits the
22 union from paying for such an activity out of general
23 union dues assessed on everybody? And why would the
24 First Amendment prohibit such a thing?

25 MR. YOUNG: Under Lehnert, Justice Breyer,

1 the expenditures which you posit would be chargeable and
2 are not at issue here.

3 JUSTICE BREYER: Fine. If they are
4 chargeable because they have nothing to do with
5 politics, perfectly legitimate, why isn't it also
6 chargeable to pay for the costs of a lawsuit which has
7 nothing to do with politics, totally for a union
8 purpose, it just doesn't happen to benefit that person
9 who's miles away in a different local?

10 MR. YOUNG: Because benefit has never been
11 the touchstone. And under Ellis and under Lehnert and
12 certain pluralities --

13 JUSTICE BREYER: I don't want you to tell me
14 about cases. I'm abstracting from -- I want to know the
15 reasoning. I want to know why.

16 MR. YOUNG: Because we are talking about
17 public -- political speech of a public nature.

18 JUSTICE BREYER: I said there is no politics
19 in any of these expenditures. Forty-two bishops would
20 swear there is nothing here that has anything to do with
21 politics.

22 JUSTICE ALITO: Why does it have to be
23 political speech? Isn't it enough that it is simply
24 speech that certain people don't want to subsidize --

25 MR. YOUNG: That is --

1 JUSTICE ALITO: -- or speech, so that the
2 commemoration in Hawaii may be something that 99.99999
3 percent of the population would find very commendable,
4 but someone is being forced to pay for that?

5 MR. YOUNG: And may I --

6 JUSTICE BREYER: But that's the reasoning
7 that you seem to accept, and I guess all human activity
8 is banned because, to my knowledge, all human activity
9 takes place through speech with a few exceptions that
10 are not here relevant.

11 JUSTICE SCALIA: Well, it isn't banned.
12 It's just -- just -- you know, you don't force the
13 nonunion member who indeed may be anti-union to pay for
14 it. And he doesn't want to subsidize the union
15 librarian. He doesn't like unions here. He doesn't
16 like unions in Hawaii. And for the government to force
17 him to -- to support the union is, I thought, part of
18 the reasoning behind --

19 JUSTICE STEVENS: I'd be interested in your
20 comments on this dialogue.

21 MR. YOUNG: I'd be happy to jump in here
22 somewhere, Justice Stevens. I appreciate the colloquy.
23 And I think the distinction -- getting back to the point
24 Justice Alito raised -- and the sharp distinction that
25 has been made in the compelled speech and compelled dues

1 cases is between the activities -- certainly in the
2 compelled union dues cases, is activities for which
3 nonmembers are compelled to accept the union as
4 bargaining representative.

5 JUSTICE GINSBURG: But why isn't
6 litigation -- what I don't understand is how you draw a
7 line between the -- the negotiation of an agreement,
8 where Lehnert said this kind of pooling is okay, and the
9 enforcement of the agreement. I mean, we're not talking
10 about litigation unrelated to collective bargaining. It
11 is only litigation that deals with the meaning of a term
12 in the contract, whether what the employer has done is
13 an unfair labor practice, whether there has been a
14 contractual violation.

15 MR. YOUNG: For the -- I'm sorry, Justice
16 Ginsburg. For the agreement, for the unit, we concede
17 that the union may charge for that public speech of a
18 political nature in a public forum. We have no dispute
19 over charging for enforcing or -- or -- enforcing the
20 collective bargaining agreement. That is not our
21 dispute.

22 The dispute here is only over expenditures
23 on behalf of other bargaining units, where we believe
24 Ellis said it was too attenuated, but because it is
25 not -- my point would be that the litigation which is

1 acceptably chargeable -- I think the presumptive -- I
2 think the default value in this Court's decision-making
3 on litigation is that it's nonchargeable. However, the
4 Court has drawn a narrow exception for that public
5 speech in a public forum which is related to the union's
6 duties as -- not related to but in performance of the
7 union's duties as bargaining agent, the duties for which
8 law imposes the union as a bargaining agent.

9 JUSTICE GINSBURG: I don't understand why
10 enforcing -- one thing is making the agreement and there
11 you agree as you must because of our Lehnert decision
12 you can't have these pooling arrangements. What's the
13 difference between negotiating an agreement and
14 litigation to enforce it?

15 MR. YOUNG: I think that would go back as
16 far as Justice Marshall and Marbury. It would be an
17 empty right if the union were able to negotiate an
18 agreement it weren't be permitted to enforce.

19 JUSTICE GINSBURG: That's --

20 CHIEF JUSTICE ROBERTS: Do you think --

21 JUSTICE GINSBURG: That's my point. I can't
22 see the difference between saying pooling is okay when
23 we're dealing with negotiating an agreement, but it's
24 not okay when we're dealing with enforcing it.

25 MR. YOUNG: The distinction is, Justice

1 Ginsburg, that the negotiation of the agreement does not
2 occur in a public forum, whereas litigation does, and
3 that's the distinction we would draw.

4 CHIEF JUSTICE ROBERTS: I thought the
5 distinction you were drawing was whether or not the
6 collective bargaining agreement applies to the
7 particular union. If it's a different unit with a
8 different agreement, I thought you were saying that that
9 can't be charged, but if it's the bargaining agreement
10 that binds the particular unit, I thought you said that
11 was chargeable.

12 MR. YOUNG: Mr. Chief Justice, I'm sorry if
13 I was confusing. I thought I was very specific. It is
14 chargeable for litigation involving the bargaining
15 agreement. We don't dispute that.

16 CHIEF JUSTICE ROBERTS: Of the particular
17 unit.

18 MR. YOUNG: Of the particular unit. That is
19 not in dispute here.

20 CHIEF JUSTICE ROBERTS: And I suppose you
21 would also concede that if the bargaining agreement is
22 exactly the same, you know, a number of units have
23 exactly the same bargaining agreement, which I would
24 suppose is a not uncommon situation, but litigation with
25 respect to the terms of the bargaining agreement, even

1 though it happens to involve a different unit, is also
2 chargeable to the particular unit.

3 MR. YOUNG: No, Mr. Chief Justice, we would
4 not concede that. We believe that this Court in *Ellis*
5 drew a bright line, and I think that's clear in *Ellis*'s
6 discussion of the mutual aid pact which was not
7 chargeable in *Ellis*, found not chargeable in *Ellis*. The
8 distinction that I think this Court has drawn or that
9 should -- I would respectfully suggest, should be drawn
10 is that -- is a narrow one. It's consistent with strict
11 scrutiny and this Court's jurisprudence in that area.
12 Only for speech which is narrowly related to the union's
13 duties as bargaining agent and performance of those
14 duties can public speech -- can charging nonmembers for
15 public political speech in a public forum be justified.

16 JUSTICE STEVENS: Does that mean -- because
17 I want to be sure -- you exclude the librarian example
18 of Justice Breyer?

19 MR. YOUNG: The librarian I think would fall
20 under the general *Lehnert* test.

21 JUSTICE STEVENS: So which side? You have
22 to be clear with me.

23 MR. YOUNG: There were a lot of sides there,
24 Justice Stevens.

25 JUSTICE STEVENS: I understand you to be

1 saying they could not charge the nonmember for the
2 expenses of the Hawaiian librarian.

3 MR. YOUNG: I think it was the Hawaiian
4 commemoration that Justice Breyer referred to that I
5 think I had to rethink, because it was a public speech
6 in a public forum. The librarian researching bargaining
7 issues at the union headquarters in downtown Washington
8 or -- well, in downtown Washington of the international
9 affiliate I think is chargeable under Lehnert.

10 JUSTICE STEVENS: The librarian in Hawaii
11 researching something that the plaintiff has no interest
12 in spending money on, would that be prohibited?

13 MR. YOUNG: Well, here, Justice Stevens, we
14 are simply talking about of course the international
15 affiliate. As far as cross-unit affiliation, I'm not
16 sure. I think that would fall under, again, general --
17 Lehnert's general test.

18 JUSTICE KENNEDY: Could you tell us -- two
19 hypotheticals. One is the librarian, two is the public
20 celebration. Would nonunion -- would participating
21 unions be allowed to contribute to either of those
22 activities?

23 MR. YOUNG: Well, of course they'd be
24 allowed to. Can they force nonmembers --

25 JUSTICE KENNEDY: Against nonmembers?

1 Against members -- there has to be a pro-ration. Would
2 there have to be a pro-ration (a) with the librarian,
3 (b) with the celebration?

4 MR. YOUNG: The public celebration, no; the
5 librarian, I believe so, yes.

6 JUSTICE SOUTER: You have several times
7 mentioned the public forum as having a significance in
8 drawing the line, and I'm not sure that I follow you
9 there. Why did you do that?

10 MR. YOUNG: Well, I think -- well, Justice
11 Souter, that arises from the Court's determinations on
12 things like public relations and lobbying, and the
13 distinction it makes -- the distinction for instance in
14 Lehnert between the Teacher's Voice articles and the
15 Preserve Public Education program. The distinction
16 drawn from that -- the different -- differing results is
17 that where internal union communications regarding
18 nonpolitical matters were treated as chargeable by a
19 majority of this Court and where the outward-looking
20 speech activity is treated as not chargeable.

21 JUSTICE SOUTER: Let me ask you this: If an
22 employer and a union local decided that, you know, they
23 would really let the sunshine in and they would conduct
24 their collective bargaining in a theater with
25 microphones and anybody could drop in and hear, would

1 that change the chargeability of -- as against the
2 dissenting nonmembers.

3 MR. YOUNG: No, Justice Souter, because the
4 speech would still be directed at the public employer,
5 not outward-looking.

6 I would like to reserve the balance of my
7 time, Mr. Chief Justice.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 MR. YOUNG: Thank you.

10 CHIEF JUSTICE ROBERTS: Mr. Collins.

11 ORAL ARGUMENT OF JEREMIAH A. COLLINS

12 ON BEHALF OF THE RESPONDENTS

13 MR. COLLINS: Mr. Chief Justice and may it
14 please the Court:

15 When this Court in *Abood* described the kinds
16 of expenditures that bargaining agents are required to
17 engage in and that necessitate a rule that requires all
18 represented employees, including objecting nonmembers,
19 to pay their share services of lawyers is what the court
20 first mentioned. The single narrow question presented
21 in this case is whether a local bargaining agent that's
22 confronted with the need to pay for those services of
23 lawyers to draw upon legal expertise in
24 bargaining-related matters is required to go it alone,
25 rely solely on its own resources and its own expertise

1 or whether --

2 CHIEF JUSTICE ROBERTS: But that's not what
3 we are talking about. It doesn't have to go it alone.
4 It simply can't force members of another unit that can
5 decide they are happy to support it, but the members who
6 don't want to support it, who don't like unions, they
7 can't be forced to pay for it if it does not relate to
8 their collective bargaining agreement.

9 MR. COLLINS: But the question, Mr. Chief
10 Justice, is whether that -- I should add, if that unit
11 wants to not neither go it alone nor give a free ride to
12 objecting nonmembers, can they avail itself --

13 CHIEF JUSTICE ROBERTS: If the litigation is
14 not germane to the unit where people object, to that
15 unit's collective bargaining agreement, they are not
16 free riding on anything.

17 MR. COLLINS: They are free riding on the
18 same thing that Lehnert says they cannot free ride on.
19 Lehnert, as Mr. Young acknowledges, certainly holds that
20 as a general proposition when a local union bargaining
21 agent is determining how to finance germane expenditures
22 that it will incur, germane to its unit, it can either
23 obviously go it alone, rely on its own resources, or it
24 can enter into an affiliation relationship where it will
25 pay an affiliation fee, the amount of which will be

1 measured by the total chargeable expenditures incurred
2 by the national union in other bargaining units as well
3 as when it's the local's own unit. What Lehnert teaches
4 is that that situation cannot fairly be described as
5 requiring the objecting nonmember to subsidize other
6 units.

7 CHIEF JUSTICE ROBERTS: What if there is no
8 -- I guess I'm getting into the solicitor general's
9 position here. What if the unit with the objecting
10 members does not have a right to call upon the pool,
11 either -- or has never called upon the pool and it's
12 unlikely that it will? Isn't there -- it's not simply
13 subsidization. It's their compelled fees being used for
14 something that doesn't benefit their collective
15 bargaining arrangement.

16 MR. COLLINS: There are three problems with
17 that contention by the solicitor general, which the
18 Petitioners have adopted for the first time in their
19 reply brief. The first problem was precisely that. It
20 was not raised in the Court of Appeals; it's not raised
21 in the petition for certiorari. The second problem -- I
22 should add, it's never been raised in any other
23 post-Lehnert case, and I think the reason that this
24 issue is not being raised is that it's understood I
25 think correctly that Lehnert itself did not involve a

1 situation where the kind of showing that the solicitor
2 general and now with the Petitioners would require. In
3 Lehnert, where this Court did approve pooling of a wide
4 range of expenses, the Court simply referred to the fact
5 that the union in that case had a unified membership
6 structure which, as the Court put, it under which so
7 many unions operate and the Court talked about the
8 essence of an affiliation relationship being that locals
9 can draw on international for services, but there was no
10 record, there was no showing, there was no finding,
11 there was no discussion of any notion that that local
12 union in Lehnert had an enforceable right for any --

13 CHIEF JUSTICE ROBERTS: Exactly -- I'm
14 sorry. I was just going to say exactly. So I regard
15 that issue as still open. It was not addressed at all
16 in Lehnert.

17 MR. COLLINS: It was raised in the reply
18 brief in Lehnert. The petitioners in Lehnert complained
19 that a problem with pooling is that there are no
20 guarantees and no standards. That -- that's why there's
21 a discussion that's reflected in Justice Scalia's
22 separate opinion, a discussion of the fact that it was
23 acknowledged that there is no contractual relationship,
24 but that there were certain customs and -- and
25 practices. But there was no evidence and certainly no

1 determination by this Court --

2 JUSTICE GINSBURG: But what did the Court
3 mean in Lehnert when it said there must be some
4 indication the payment is for service that may
5 ultimately inure to the benefit of members of the local
6 union by virtue of their membership in the parent
7 organization?

8 MR. COLLINS: What -- what the Court meant
9 by that, I believe, Justice Ginsburg, is that -- well,
10 look at the examples the Court gave of what does not --
11 or the Court referred to certain kinds of payments a
12 local union could make which are not part of an
13 affiliation fee payment.

14 The Court talked about direct payments to
15 other locals. The Court -- the other example given was
16 a payment to a -- a national union that wasn't required
17 by affiliation but was like a charitable contribution.

18 What the Court did not dispute in Lehnert is
19 that, to the extent that an affiliation fee is providing
20 a pool of resources used by the national union for
21 otherwise chargeable services, the potential
22 availability of those services does satisfy the
23 inurement requirement.

24 JUSTICE ALITO: Suppose, that the -- that
25 one or more locals someplace else in the country are

1 involved in very, very expensive litigation; and, as a
2 result, the international assesses all of the locals a
3 fee to pay -- to pay for that litigation but at the same
4 time adopts a position that it is extremely unlikely in
5 the future that the international will ever subsidize
6 any other local union litigation expenses.

7 Would the local -- would a -- would a local
8 union not involved in that litigation -- would they --
9 would it be permissible for them to charge their
10 nonmembers?

11 MR. COLLINS: If it were a special
12 assessment for a specific purpose, I think under -- it
13 is not embraced by Lehnert's rationale. It might well
14 not be chargeable, because what Lehnert -- Lehnert does
15 not arise in a vacuum. Lehnert talks about the typical
16 affiliation fee relationship. And there have been
17 various submissions, treatise articles about that.

18 So the notion is that a national union
19 charges an affiliation fee for all of the various
20 services it provides, and local unions can draw upon
21 those resources as needed. If you then talk about a
22 special assessment --

23 JUSTICE ALITO: Well, if you concede that,
24 then aren't you conceding there has to be some standard
25 by -- under which to assess whether the local union that

1 is being required to pay the fee for extra-unit
2 litigation expenses is getting something back in return?

3 MR. COLLINS: I think not, Your Honor, for
4 -- for two reasons. First, I do think that Lehnert did
5 approve --

6 JUSTICE ALITO: It's not necessary for there
7 to be any standard under which to assess that they are
8 getting anything back in return? If it's clear they are
9 not getting anything back in return, it's still okay?

10 MR. COLLINS: Not beyond -- and again the
11 question isn't presented, but not beyond what Lehnert
12 found necessary. Lehnert found it important -- and I
13 would say necessary to its decision -- that the union in
14 that case had what Lehnert described as a typical,
15 unified, membership-affiliation-fee arrangement; and it
16 talked about a typical affiliation fee where locals pay
17 money to go to the pooled otherwise chargeable
18 expenditures of the national union.

19 CHIEF JUSTICE ROBERTS: So if you have a
20 situation where there is a provision in the collective
21 bargaining agreement that the union thinks requires the
22 employer to provide air conditioning in the plant, the
23 local up in Nome, Alaska, has to support that extra --
24 extra-unit litigation even though it will never have any
25 benefit for it?

1 MR. COLLINS: Just as Lehnert plainly holds,
2 that local would have to support the negotiation of that
3 provision in the first place in Nome, Alaska. That's
4 the holding of Lehnert. The question is whether
5 litigation is different, and there is no way that
6 litigation is different in any principled way as relates
7 to the ruling.

8 CHIEF JUSTICE ROBERTS: I thought it meant
9 -- I didn't think Lehnert held that the unit would have
10 to support that type of extra-unit litigation. I mean,
11 I --

12 MR. COLLINS: Well, I may have misconstrued
13 your -- it was litigation over --

14 CHIEF JUSTICE ROBERTS: Yes. Yes, there is
15 a provision that is ambiguous, which frequently happens,
16 and the union says that requires air conditioning, and
17 the company says no, and there is a big fight about
18 that.

19 MR. COLLINS: Well, I think my answer is
20 still correct, Your Honor. Lehnert does not hold --
21 well, it does not provide the answer as to litigation;
22 but Lehnert says if the union in the first instance says
23 we want to go to Nome, Alaska, and negotiate something
24 about air conditioning, that that, even though it only
25 affects the unit in Nome, Alaska, becomes part of the

1 pool of chargeable expenditures that all units can be a
2 part of.

3 CHIEF JUSTICE ROBERTS: Well, sure, because
4 that negotiation is germane to the Nome, Alaska,
5 collective bargaining agreement, if they are negotiating
6 it there for that unit.

7 MR. COLLINS: But the litigation is equally
8 germane. Petitioners do not dispute that litigation can
9 be germane and chargeable within a particular unit.
10 They acknowledge that; there is no dispute about that.
11 So both the negotiation of the air conditioning right in
12 Nome, Alaska, and the enforcement of that negotiated
13 agreement through litigation are equally germane within
14 the unit; the same interests are involved --

15 JUSTICE SOUTER: But aren't they -- aren't
16 they equally chargeable? Isn't the unspoken premise of
17 your argument and what Lehnert was getting at -- they
18 are not only germane, but isn't there an unspoken
19 premise that just as the union will support -- the union
20 of the dissident objector in negotiating a collective
21 bargaining agreement, the union will also presumably
22 support them if litigation is necessary later on to
23 enforce it?

24 So that the so-called standard by which the
25 union's obligation to support the litigation and the

1 unit that includes the dissident is not somehow
2 precisely spelled out. The assumption is that they do
3 have some obligation to support the litigation if it
4 comes to the dissident's unit. And isn't that -- isn't
5 that the point of your argument?

6 MR. COLLINS: That's correct, Your Honor,
7 and I want to make clear when the Court spoke in Lehnert
8 of the essence of an affiliation agreement, an
9 affiliation agreement is a contractual relationship. We
10 would certainly view that as creating a covenant of good
11 faith and fair dealing that the national union will deal
12 fairly with its various units.

13 JUSTICE SOUTER: Which is a covenant, in
14 effect, of support.

15 MR. COLLINS: That's correct, and it's
16 actually quite analogous in that regard to the duty of
17 fair representation that, let's say, an unaffiliated
18 local union owes to its objecting nonmembers. The --

19 CHIEF JUSTICE ROBERTS: Do you think there
20 is a covenant of support? You have -- however many -- a
21 thousand individual units. You think each of those --
22 you have a covenant to support them when they all get --
23 get involved in separate litigation? You can't
24 possibly.

25 MR. COLLINS: No, Mr. Chief Justice, what I

1 said was a covenant of good faith and fair dealing. And
2 that --

3 CHIEF JUSTICE ROBERTS: So it's quite
4 unlike, for example, insurance. If you have insurance
5 and you and the unit have a particular litigation, you
6 have a right to have that covered. There is no similar
7 right here.

8 MR. COLLINS: That's -- that's correct, Your
9 Honor. The First Amendment does not create a rate
10 setting rule for unions. And the reason for that is --

11 JUSTICE SOUTER: Okay, so there is no --
12 there is no covenant of support. There is what? A
13 covenant of support if the litigation in the local unit
14 that includes the dissident has wide significance, and
15 therefore could affect other units? Is that what the --
16 is that what the obligation is?

17 MR. COLLINS: No, Justice Souter. I would
18 not --

19 JUSTICE SOUTER: Is this any obligation at
20 all? You said okay, there is an obligation of some kind
21 of fair dealing. Given the question that we've got,
22 that doesn't matter unless the fair dealing relates at
23 some point to support for litigation, right?

24 MR. COLLINS: That the --

25 JUSTICE SOUTER: Right?

1 MR. COLLINS: Yes.

2 JUSTICE SOUTER: Okay.

3 MR. COLLINS: That the national union --

4 JUSTICE SOUTER: And how do we articulate
5 what that obligation is? If it's not a covenant to
6 support regardless of what the litigation is, how do we
7 articulate what the degree of the obligation of support
8 is?

9 MR. COLLINS: The way I would articulate it
10 -- and then I would like to take a step backward and
11 compare it to the nonaffiliated situation. But I would
12 articulate it as follows: That there is not any First
13 Amendment requirement, that there is in reality in the
14 affiliation agreement simply a covenant of good faith
15 and fair dealing that one local will be treated with
16 respect to litigation needs as others would be treated.

17 JUSTICE SOUTER: Yes, but the trouble with
18 saying that is exactly the point that the Chief Justice
19 raised. You don't take the position that no matter what
20 the litigation is, the parent union has got to support
21 it. Therefore, how do we identify the litigation that
22 they will support? How do we know that they have any
23 obligation at all?

24 MR. COLLINS: They -- they don't have a
25 First Amendment obligation, but, Your Honor, that is

1 true in the case of agency fees all together. We have
2 to take a step back and remember that we are trying to
3 perform an exercise, which the court has said can't be
4 done to perfection, of trying to distinguish between
5 making individuals who object support collective
6 bargaining activities not support other things.

7 In Hudson itself, in the basic situation --
8 let's assume there is no affiliation agreement, simply a
9 local union. A fee is charged based on the percentage
10 of expenses in the prior year that went for chargeable
11 activities, including, let's say, litigation. That
12 creates no guarantee that when the year -- in the year
13 that we are now in, when fees are being paid, that if
14 litigation is demanded, requested by a nonmember or
15 anyone else, that that local union will provide --

16 JUSTICE SOUTER: Well, it doesn't create a
17 guarantee expressed like the terms of an insurance
18 policy, but there is, in fact, a local practice to which
19 one can refer. And it seems -- it would seem reasonable
20 in a case like that to say, okay, you can force the
21 dissident to pay a fair share on the expectation that
22 the same kind of enforcement litigation will take place
23 if there is a dispute this year or next year.

24 We don't have, as I understand it, a clear
25 sort of expectation standard when we are talking about

1 affiliation agreements that involve a parent and many,
2 many other locals. And the point here, it seems to me,
3 is to determine whether there is any obligation at all
4 whether the dissident is getting anything or can expect
5 to get anything for the fee. And what I want to know is
6 how do we describe that obligation?

7 MR. COLLINS: I think, at most, the
8 obligation is parallel to the duty of fair
9 representation in the sense that the entity that's
10 responsible for determining what services are going to
11 be provided to the employees has to treat, in the case
12 of the local union members and nonmembers in the unity
13 plea, in the case of the national union it's a different
14 affiliated entities, fairly -- the reason --

15 CHIEF JUSTICE ROBERTS: So we are talking
16 about an infringement on the objecting members' first
17 amendment rights, and your answer is trust us, we'll
18 treat you fairly? I understand that it's a different
19 answer if you say you've got a right. We can impose the
20 contribution requirement on you, even though you object
21 to it because under this agreement, you have a right to
22 call upon our services. That's a different case. But
23 if your answer is simply trust us, we'll treat you
24 fairly, that's not the usual standard we apply to
25 infringements of First Amendment rights.

1 MR. COLLINS: But I have two answers to
2 that, Mr. Chief Justice. First, it is essentially the
3 answer that's supplied under Hudson, where the court
4 says simply use the prior year's percentages. We don't
5 know whether this year we'll have the same percentage
6 breakdown. We also don't know whether this year the
7 union will have enough money to provide any particular
8 service or not. But we don't --

9 CHIEF JUSTICE ROBERTS: That's different.
10 That's a little bit more stringent than trust us. That's
11 saying let's look at the last year and figure it out.

12 MR. COLLINS: But we look at the -- but --
13 but we look at the national union typical affiliation
14 type arrangement, as the Court described it in Lehnert,
15 and what we understand is this is a union that's not
16 making a profit, it's not piling up fees and putting
17 them somewhere. It exists to provide services to local
18 affiliates.

19 Those affiliates, if they are not provided
20 with services, it's not just the nonmember, the objector
21 who's being harmed; the members want those services by
22 definition.

23 JUSTICE GINSBURG: But couldn't -- couldn't
24 the national say, local, you have asked for assistance
25 with such-and-such litigation. We think your case is

1 what this Court sometimes calls a bad vehicle. We don't
2 want to finance your litigation, the issue is important
3 and we are going to wait for a case that presents it in
4 a better light, is more likely to win.

5 MR. COLLINS: Absolutely, Your Honor, that's
6 one thing a national union can properly do. Another
7 thing a national union can properly do is to say we've
8 just had an unexpected economic crisis, all of a sudden
9 midterm we have to change our priorities and we are
10 going to have to protect people from a lot of layoffs.

11 But the second point I want to make --

12 JUSTICE SCALIA: The issue is not whether
13 that's a fair thing for the national union to do. The
14 issue is whether the person who is being compelled
15 against his will to pay dues to the union is getting
16 anything back for that compelled payment. And even
17 though the national union may be acting in an entirely
18 fair fashion, given its national objectives, the -- the
19 compelled payment is not doing what our cases seem to
20 say it must do. He has to be paying for services
21 rendered.

22 MR. COLLINS: What -- the value the -- the
23 objector is getting he does not have a guarantee of
24 services. He has the potential for services far beyond
25 what could ever be paid for out of the local's own

1 affiliation fees.

2 And I would add, if a national union were to
3 act in some improper way in terms of how it doles out
4 assistance -- and by the way, one doesn't see cases on
5 this. It's really not in the nature of how national
6 unions operate because, again, we are talking about
7 members and nonmembers equally in terms of who's going
8 to get benefits. So it's not a problem in the real
9 world of national unions treating a particular local
10 unfairly for some reason and not giving them services
11 that are given to others. There are certainly a lot of
12 judgments involved, as Justice Ginsburg's question
13 elicited.

14 But if a national union were to treat
15 affiliates unfairly, it's quite possible that if and
16 when that occurred, it might have implications under a
17 number of possible causes of actions and including
18 possibly the right to object. Justice Scalia's opinion
19 in Lehnert noted that if and when services aren't
20 provided, there might be ground for objection.

21 The question here is, is there a basis under
22 the First Amendment to have a prophylactic rule that
23 says we are so concerned that even though we have no
24 rule under Hudson that provides assurance that an
25 unaffiliated local union will provide any particular

1 services to its members and nonmembers, we have such a
2 concern that somehow national unions won't deliver the
3 goods, that we are going to set up a hierarchy of either
4 guarantees, standards, which if the issue had been
5 presented here and we had created a record, we would
6 show the Court -- I think no union in this country has
7 and for good reason, both because of the virtual
8 infinitude of legitimate factors one could consider,
9 also because of the constant changes in needs of local
10 unions --

11 JUSTICE ALITO: If certain -- if certain
12 fees are being assessed on the theory that this is a
13 pooling arrangement, I don't understand why you're
14 resisting any effort to impose any standards or any
15 inquiry as to whether it's really a pooling arrangement.

16 MR. COLLINS: Because, Your Honor -- and the
17 reason I started my argument by saying there is really
18 two choices -- a local union goes it alone or has the
19 arrangement that we have here -- is that it simply would
20 not be possible in the nature of things to have a set of
21 standards and guarantees that would be -- that would be
22 meaningful in any way to govern how national unions
23 provide services to locals. A standard of basic
24 fairness and equal treatment is one thing, but to try to
25 say -- and one could tick off, I suppose, 50 things

1 we'll consider.

2 We'll consider whether it's going to be an
3 important precedent, whether it's the kind of thing a
4 local really can't afford on its own, whether it's
5 important now that we have pressing economic problems
6 and everyone is being laid off, is this a good test case
7 or a bad test case, how broad will the implications of
8 this be? One could list 50 factors, but they wouldn't
9 guide any inquiry in a meaningful way.

10 CHIEF JUSTICE ROBERTS: So if we determine
11 as a matter of First Amendment law that such a
12 requirement is necessary, then you lose, because you're
13 saying we can't possibly fashion the test?

14 MR. COLLINS: Then we lose and so does the
15 union in Lehnert lose. There was no -- it was
16 acknowledged that there was nothing like that.

17 CHIEF JUSTICE ROBERTS: Lehnert didn't
18 address the question of litigation.

19 MR. COLLINS: Well, but if -- but there has
20 been no argument made that would explain why if you --
21 if one can pool -- if the union negotiates an agreement
22 with a very controversial provision that a nonmember has
23 a very legitimate objection to, Lehnert holds that can
24 be pooled. Lehnert does not say the standard --

25 JUSTICE ALITO: Your argument seems to be

1 that the whole analogy of a pooling arrangement is
2 invalid. That was unrealistic, because there really is
3 no way of telling whether any of these things is a
4 pooling arrangement. There is no standard that could
5 possibly be articulated that would be meaningful to
6 determine whether something that is labeled a pooling
7 arrangement really is in any way a pooling arrangement.
8 That seems to be your argument. That would seem to cut
9 against the whole idea of pooling arrangements not only
10 for litigation expenses, but for everything else.

11 MR. COLLINS: I have two responses to that,
12 Justice Alito. First, the -- if one had to have the
13 kinds of either guarantees or meaningful enforceable
14 standards that are implied in your question, then in the
15 nature of the beast, it could not be done by national
16 unions, and we would be in a system then when all that
17 can happen is that a local union has to rely solely on
18 its own resources, solely on its own expertise. And
19 it's doing that despite, as Judge Lynch pointed out in
20 the concurrence, despite the dire impact that can have
21 on its ability to represent people, and it's doing it --

22 JUSTICE SCALIA: Well, it doesn't have to do
23 that. It can use the money of its union members any way
24 it wants. It can contribute to the national all of
25 their money if it wishes. We are only talking about

1 that portion of the union income which comes from people
2 who don't want to join the union.

3 MR. COLLINS: Well, then it either has to
4 allow for -- the union has to either conclude we are
5 going to support all of our germane activities, all of
6 our chargeable activities through our own funding and
7 our own resources, and if that's just inadequate and
8 therefore litigation needs to be conducted, we can't do
9 it; the employer knows that so it can take advantage of
10 us in bargaining; we are just going to have to live with
11 it; or we can say our members will pay for that but the
12 nonmembers won't, because the only solution other than
13 using the local's own money is to pay a fee to the
14 national. And as I've indicated, in Lehnert as in this
15 case, the arrangement is not one that provides
16 guarantees --

17 JUSTICE KENNEDY: Well, one of the
18 difficulties it seems to me of the Petitioners' position
19 was with the sort of all-or-nothing approach. But you
20 seemed to be taking the mirror position of that. Your
21 argument is all or nothing on your side. I don't get
22 much help from either side as to what the standard ought
23 to be. I know "germane" is obviously a malleable word,
24 but we are looking to see if there is some test that we
25 can use that's not all or nothing.

1 MR. COLLINS: Well --

2 JUSTICE KENNEDY: I haven't heard from
3 either side yet what that would be.

4 MR. COLLINS: The -- the question, Justice
5 Kennedy, is whatever the test is, if it's satisfied as
6 to expenditures within the unit where the services are
7 provided, can those services be pooled or is there a
8 different test that has to be applied to the pooling?
9 My submission is that Lehnert makes clear there is no
10 separate test.

11 As to what the test is within -- and
12 therefore, as to the question presented here, one
13 doesn't need to decide on the actual test that will be
14 applied within the local because as your separate
15 opinion and Justice Scalia's separate opinion in Lehnert
16 made clear, even under the narrower statutory duties
17 test there could still be pooling; the definition as to
18 what can be pooled would simply be different. I'd only
19 note on the question of whether the test should be
20 germaneness with the two additional prongs as held in
21 Lehnert, or the statutory duties test, that again is a
22 question that's not presented here. As I've just
23 indicated, it doesn't affect the concept of pooling.

24 There has also been no confusion, contrary
25 to Petitioners' contention, under the Lehnert test. The

1 only issue that's given the courts difficulties is the
2 specific issue here as to why the plurality in Lehnert
3 seemed to indicate that litigation might be in a
4 different status under pooling. So there is no basis in
5 this case for reconsidering the basic Lehnert test of
6 chargeability.

7 I will simply note, however, that the
8 statutory duties test which -- for which Petitioners
9 argue really doesn't make the situation clearer than
10 the -- than the germaneness test because the
11 Government -- both the germaneness test and the
12 statutory duties test acknowledge that the union's right
13 to charge objecting nonmember stems from its function as
14 exclusive bargaining representative, but there is no way
15 to sustain logically the notion that that means that
16 only those things that are done in that exclusive
17 representative capacity are chargeable, because the same
18 Government interests that allow for charging when the
19 union is acting as the exclusive bargaining agent have
20 to also allow for charging for those things that are
21 necessary in order for the union to play that role, and
22 to enforce that role which includes things like the
23 headquarters; it includes things like litigation to
24 enforce an agreement, even though in those areas when
25 performing those functions, the union very often does

1 not have an exclusive representational duty or duty of
2 fair representation.

3 JUSTICE BREYER: Is there a rule or a reg
4 somewhere in the Labor Department that says if the
5 national union takes some money from its local, spends
6 it in a way that has nothing to do with politics
7 whatsoever, zero -- but either wastes it or they build
8 too big a building, or they do something that doesn't
9 benefit Local Number 432, does Local 432 have any
10 remedy?

11 MR. COLLINS: There is no Labor Department
12 regulation.

13 JUSTICE BREYER: There is no remedy at all.

14 MR. COLLINS: No, and I have never seen --

15 JUSTICE BREYER: So union members who are
16 being gypped, they just have to put up with it.

17 MR. COLLINS: I would say there would be a
18 breach of covenant of good faith and fair dealing under
19 the affiliation relationship in some of those
20 situations, and of course if a union used an illegal
21 basis for determining whether it would provide services
22 to the --

23 JUSTICE BREYER: Right. Are you saying you
24 could bring a lawsuit or not?

25 MR. COLLINS: You could bring a lawsuit

1 alleging that the union violated its covenant of good
2 faith and fair dealing to its affiliates, if the union
3 acted on the basis of say, race, for example, you could
4 certainly bring a lawsuit then.

5 JUSTICE BREYER: So either -- in these cases
6 everybody in the union, whether they're forced or not,
7 has this kind of remedy or nobody does? That's your
8 view?

9 MR. COLLINS: Right. And the reason for
10 that is -- what we always have to understand here, is
11 that the interest in seeing to it that a local union
12 that pays an affiliation fee will receive services in a
13 fair way from the national is an interest that's shared
14 equally by the members and the nonmembers. It's not
15 something that creates a First Amendment concern.

16 CHIEF JUSTICE ROBERTS: Well, that's not
17 right. I mean, again we have to postulate we are
18 dealing with members who don't like unions at all. So
19 while the members may think this is perfectly fair, the
20 nonmembers think whenever their money is forced to be
21 used for union activities, it's unfair.

22 MR. COLLINS: But a -- a member equally with
23 a nonmember, Mr. Chief Justice, would have the view that
24 if it's predictable year after year that for some reason
25 his just local doesn't get services from the national

1 union, the national union sends it elsewhere, that
2 member is going to be no more happier -- happy than the
3 nonmember. That's why those things don't happen in the
4 real world. That's why we don't need a prophylactic rule
5 and why there is certainly no First Amendment basis for
6 a prophylactic rule that requires the union to establish
7 what no union in this country to my knowledge has, which
8 is either a clear guarantee or specific standards for
9 providing services.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 Mr. Collins.

12 Mr. Young, you have four minutes.

13 REBUTTAL ARGUMENT OF W. JAMES YOUNG

14 ON BEHALF OF THE PETITIONERS

15 MR. YOUNG: Thank you, Mr. Chief Justice. I
16 think it's appropriate to note the apocalyptic
17 predictions that are suggested from the rule that the
18 Petitioners are advancing are avoidable by easily --
19 readily available alternatives. International unions
20 would of course be free to make loans to local
21 affiliates engaged in massive litigation or other speech
22 activities where they think it's appropriate.

23 But the alternative is not between
24 prohibiting pooling arrangements which have no
25 standards, no enforceability, and no predictability, and

1 allowing the nonmembers to become free riders on
2 legitimate litigation expenditures funded through the
3 international affiliate. The choice is between a
4 malleable -- a malleable, unpredictable, and ultimately
5 unenforceable agreement and a standard which would allow
6 the -- the international to subsidize such litigation
7 and allow the true -- only the costs of that litigation
8 to be extracted from nonmembers.

9 JUSTICE BREYER: And the case -- the case
10 that says that a union member, person forced into the
11 union agency shop -- and I guess a lawyer who has to pay
12 to be an integrated bar and I guess a doctor who has to
13 join a medical association -- the case that says that
14 these people have a First Amendment right to get back
15 money that's being wasted, is what?

16 MR. YOUNG: We don't suggest that there is
17 such a right, Justice Breyer.

18 JUSTICE BREYER: So unless it's political in
19 your view, you don't have that right?

20 MR. YOUNG: Unfortunately no, Justice
21 Breyer.

22 CHIEF JUSTICE ROBERTS: The test is not
23 whether it's political, is it? It's not a negative
24 test. It's an affirmative requirement in which the
25 burden is on the union that they have to show the

1 expenditure is germane to the particular collective
2 bargaining agreement.

3 MR. YOUNG: Yes, Mr. Chief Justice, that's
4 exactly correct, and -- and the test in determining
5 whether or not it is a -- can be charged across
6 bargaining unit lines is a bright-line test of whether
7 it is a speech activity.

8 CHIEF JUSTICE ROBERTS: Well, do you have a
9 response to Justice Kennedy's concern? Do you have a
10 fallback position or are you also in the all-or-nothing
11 --

12 MR. YOUNG: I'm afraid you've got two
13 principled advocates before you, Mr. Chief Justice, who
14 are holding firm to their positions.

15 I would however like to address one more
16 point. I think it's appropriate to recall, get us back
17 again to the focus on this is compelled speech subject
18 to the Court's strict scrutiny jurisprudence. The test
19 suggested by MSEA is that a union's activities are
20 subject to a -- subject to the duty of fair
21 representation and to the covenant of good faith and
22 fair dealing, under the duty of fair and -- under the
23 duty of fair representation, which of course is that
24 wide range of reasonableness cannot be sustained where
25 this Court's standard is the least restrictive means.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 The case is submitted.

3 (Whereupon, at 12:08 p.m., the case in the
4 above-entitled matter was submitted.)

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