

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DANIEL B. LOCKE, ET AL. :

4 Petitioners :

5 v. : No. 07-610

6 EDWARD A. KARASS, STATE :

7 CONTROLLER, ET AL. :

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9 Washington, D.C.

10 Monday, October 6, 2008

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 11:08 a.m.

15 APPEARANCES:

16 W. JAMES YOUNG, ESQ., Springfield, Va.; on behalf of
17 the Petitioners.

18 JEREMIAH A. COLLINS, ESQ., Washington, D.C.; on behalf
19 of the Respondents.

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| 1 | C O N T E N T S | |
| 2 | ORAL ARGUMENT OF | PAGE |
| 3 | W. JAMES YOUNG, ESQ. | |
| 4 | On behalf of the Petitioners | 3 |
| 5 | JEREMIAH A. COLLINS, ESQ. | |
| 6 | On behalf of the Respondents | 27 |
| 7 | REBUTTAL ARGUMENT OF | |
| 8 | W. JAMES YOUNG, ESQ. | |
| 9 | On behalf of the Petitioners | 52 |
| 10 | | |
| 11 | | |
| 12 | | |
| 13 | | |
| 14 | | |
| 15 | | |
| 16 | | |
| 17 | | |
| 18 | | |
| 19 | | |
| 20 | | |
| 21 | | |
| 22 | | |
| 23 | | |
| 24 | | |
| 25 | | |

1 P R O C E E D I N G S

2 (11:08 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear

4 argument next in Case 07-610, Locke v. Karass.

5 Mr. Young.

6 ORAL ARGUMENT OF W. JAMES YOUNG

7 ON BEHALF OF THE PETITIONERS

8 MR. YOUNG: Mr. Chief Justice, and may it

9 please the Court:

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

17 We submit that the answer to this question
18 is no, a result supported by the Court's unanimous,
19 unambiguous, and categorical holding in Ellis. In
20 Ellis, this Court held that, to avoid constitutional
21 problems, nonmembers under the Railway Labor Act could
22 not be forced to subsidize any litigation not arising
23 within their bargaining unit, not even litigation to
24 enforce another bargaining unit's agreement in
25 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 interest just as it
6 defends the interest 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 clearly 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 bargaining
14 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 that you referred to is the specificity with which this
16 Court 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 the defense in --
18 in -- in cases beyond this bargaining unit. In fact,
19 most 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. That

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 -- and -- and
15 you do take the position that a -- a genuine insurance
16 policy issued by an insurer would not violate the
17 constitutional 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 other
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 -- the point that
7 separates 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 -- the money, in fact, is spread
2 about --

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

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

13 JUSTICE SOUTER: Neither do I.

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

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

1 contribute -- use whatever verb you want -- that
2 litigation -- that litigation.

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

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

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

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

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

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

22 What the First Amendment -- the -- the First
23 Amendment right to not speak is -- is involved when, in
24 the words of the Ninth Circuit in one of these cases,
25 "they seek to mulch from the unwilling moneys for their

1 speech activities in a public forum."

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

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

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

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

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

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

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

5 MR. YOUNG: Yes, Justice Kennedy.

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

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

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

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

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

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

24 MR. YOUNG: Under Lehnert, Justice Breyer,
25 the expenditures which you posit would be chargeable and

1 are not at issue here. `

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

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

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

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

17 JUSTICE BREYER: I said there is no politics
18 in any of these expenditures. 42 bishops would swear
19 there is nothing here that has anything to do with
20 politics.

21 JUSTICE ALITO: Why does it have to be
22 political speech? Isn't it enough that it is simply
23 speech that certain people don't want to subsidize, or
24 speech, so that the commemoration in Hawaii may be
25 something that 99.999 percent of the population would

1 find very commendable, but someone is being forced to
2 pay for that?

3 MR. YOUNG: And I may --

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

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

17 JUSTICE STEVENS: I'd be interested in your
18 comments on this dialogue.

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

1 nonmembers are compelled to accept the union as
2 bargaining representative.

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

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

20 The dispute here is only over expenditures
21 on behalf of other bargaining units, where we believe
22 Ellis said it was too attenuated, but because it is
23 not -- my point would be that the litigation which is
24 acceptably chargeable -- I think the presumptive -- I
25 think the default value in this Court's decisionmaking

1 on litigation is that it's nonchargeable. However, the
2 Court has drawn a narrow exception for that public
3 speech in public forum which is related to the union's
4 duties as, not related to but in performance of the
5 union's duties as bargaining agent the duties for which
6 law imposes the union as a bargaining agent.

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

13 MR. YOUNG: I think that would go back as
14 far as Justice Marshall and Marbury. It would be an
15 empty right if the union were able to negotiate an
16 agreement it wouldn't be permitted to enforce. Begins
17 begins that's, that's my point. I can't see the
18 difference between saying pooling is okay when we're
19 dealing with negotiating an agreement, but it's not okay
20 when we're dealing with enforcing it.

21 The distinction is, Justice Ginsburg, that
22 the negotiation of the agreement does not occur in a
23 public forum, whereas litigation does, and that's the
24 distinction we would draw.

25 CHIEF JUSTICE ROBERTS: I thought the

1 distinction you were drawing was whether or not the
2 collective bargaining agreement applies to the
3 particular union. If it's a different unit with a
4 different agreement I thought you were saying that that
5 can't be charged, but if it's the bargaining agreement
6 that binds the particular unit, I thought you said that
7 was chargeable.

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

12 CHIEF JUSTICE ROBERTS: Of the particular
13 unit.

14 MR. YOUNG: Of the particular unit. That is
15 not in dispute here.

16 CHIEF JUSTICE ROBERTS: And I suppose you
17 would also concede that if the bargaining agreement is
18 exactly the same, you know a number of units have
19 exactly the same bargaining agreement, which I would
20 suppose is a not uncommon situation, but litigation with
21 respect to the terms of the bargaining agreement even
22 though it happens to involve a different unit is also
23 chargeable to the particular unit.

24 MR. YOUNG: No, Mr. Chief Justice, we would
25 not concede that. We believe that this Court in Ellis

1 drew a bright line, and I think that's clear in Ellis'
2 discussion of the mutual aid pact which was not
3 chargeable in Ellis, found not chargeable in Ellis. The
4 distinction that I think this Court has drawn or that
5 should I would respectfully suggest should be drawn is
6 that -- is a narrow one. It's consistent with strict
7 scrutiny and this Court's jurisprudence in that area.
8 Only for speech which is narrowly related to the union's
9 duties as bargaining agent and performance of those
10 duties can public speech -- can charging nonmembers for
11 public political speech in a public forum be justified.

12 JUSTICE STEVENS: Does that mean, because I
13 want to be sure -- you exclude the librarian example of
14 Justice Breyer?

15 MR. YOUNG: The librarian I think would fall
16 under the general Lehnert test.

17 JUSTICE STEVENS: So which side? You have
18 to be clear with me.

19 MR. YOUNG: There were a lot of sides there,
20 Justice Stevens.

21 JUSTICE STEVENS: I understand you to be
22 saying they could not charge the nonmember for the
23 expenses of the Hawaiian librarian.

24 MR. YOUNG: I think it was the Hawaiian
25 commemoration that Justice Breyer referred to that I

1 think I had to rethink, because it was a public speech
2 in a public forum. The librarian researching bargaining
3 issues at the union headquarters in downtown Washington
4 or -- well, in downtown Washington of the international
5 affiliate I think is chargeable under Lehnert.

6 JUSTICE STEVENS: The librarian in Hawaii
7 researching something that the plaintiff has no interest
8 in spending money on, would that be prohibited.

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

14 JUSTICE KENNEDY: Could you tell us two
15 hypotheticals. One is the librarian, two is the public
16 celebration. Would nonunion, would participating unions
17 be allowed to contribute to either of those activities?

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

20 JUSTICE KENNEDY: Against nonmembers?
21 Against members, there has to be a pro-ration, they has
22 to be a pro-ration. A with the librarian, B with the
23 celebration.

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

1 JUSTICE SOUTER: You have several times
2 mentioned the public forum as having a significance in
3 drawing the line and I'm not sure I follow you there.
4 Why did you say that?

5 MR. YOUNG: Well, I think -- well, Justice
6 Souter, that arises from the Court's determinations on
7 things like public relations and lobbying and the
8 distinction it makes, the distinction for instance in
9 Lehnert between the teacher's voice articles and the
10 reserve public education program. The distinction drawn
11 from that, the different, differing results is that
12 where internal union communications regarding
13 nonpolitical matters were treated as chargeable by a
14 majority of this Court and where the, outward looking
15 speech activities is treated as not chargeable.

16 JUSTICE SOUTER: Let me ask you this. If an
17 employer and a union local decided that you know they
18 would really let the sunshine in and they would conduct
19 their collective bargaining in a theater with
20 microphones and anybody could drop in and hear, would
21 that change the chargibility of, as against the
22 dissenting nonmembers.

23 MR. YOUNG: No Justice Souter because the
24 speech would still be directed at the public employer
25 not ex--- I would like to reserve the balance of my

1 time, Mr. Chief Justice.

2 CHIEF JUSTICE ROBERTS: Thank you counsel.
3 Mr. Collins?

4 ORAL ARGUMENT OF JEREMIAH A. COLLINS
5 ON BEHALF OF THE RESPONDENTS

6 MR. COLLINS: Mr. Chief Justice and may it
7 please the Court:

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

19 CHIEF JUSTICE ROBERTS: But that's not what
20 we are talking about. It doesn't have to go it alone.
21 It simply can't force members of another unit that can
22 decide they are happy to support it but the members who
23 don't want to support it who don't like unions, they
24 can't be forced to pay for it if it does not relate to
25 their collective bargaining agreement.

1 MR. COLLINS: But the question Mr. Chief
2 just is whether that, I should add if that unit wants
3 to not neither go it alone nor give a free ride to
4 objecting nonmembers can they avail itself.

5 CHIEF JUSTICE ROBERTS: If the litigation is
6 not germane to the unit where people object to that
7 unit's collective bargaining agreement they are not free
8 riding on anything.

9 MR. COLLINS: They are free riding on the
10 same thing that Lehnert says they cannot free ride on.
11 Lehnert as Mr. Young acknowledges certainly holds that
12 as a general proposition when a local union bargaining
13 agent is determining how to finance germane expenditures
14 that it will incur germane to its unit, it can either
15 obviously go it alone rely on its own resources or it
16 can enter into an affiliation relationship where it will
17 pay an affiliation fee the -- of which will be measured
18 by the total chargeable expenditures incurred by the
19 National Union in other bargaining units as well as when
20 it's the local's own unit. What Lehnert teaches is that
21 that situation cannot fairly be described as requiring
22 the objective nonmember to subsidize other units.

23 CHIEF JUSTICE ROBERTS: What if there is no
24 -- I guess I'm getting into the solace that the general's
25 position here. What if the unit with the objective

1 members does not have a right to call upon the pool?
2 Either, or has never called upon the pool in its
3 unlikely that it will. Isn't there, it's not simply
4 subsidization. It's their compelled fees being used for
5 something that doesn't Ben fate their collective
6 bargaining arrangement.

7 MR. COLLINS: There are three problems with
8 that contention by the solace the -- general which the
9 petitioners have adopted for the first time in their
10 reply brief. The first problem was precisely that. It
11 was not raised in the Court of Appeals, it's not raised
12 in the petition for certiorari. The second problem is I
13 should add it's not been raised in any other post
14 Lehnert case and I think the reason this issue is not
15 being raised is it's understood I think incorrectly that
16 Lehnert itself did not solve a situation where the kind
17 of showing that the solicitor general and now with the
18 Petitioners would require. In Lehnert where this court
19 did approve pooling of a wide range of expenses the
20 court simply referred to the fact that the union in that
21 case had a unified membership structure which as the
22 court put it under which so many unions operate and the
23 court talked about the essence of an affiliation
24 relationship between that locals can draw on
25 international for services but there was no record, this

1 was no showing, this was no finding, there was no
2 discussion of any notion that that local union in
3 Lehnert had an enforceable right for any --

4 CHIEF JUSTICE ROBERTS: Exactly -- I'm
5 sorry. I was just going to say exactly so I regard that
6 issue as still open. It was not addressed at all in
7 Lehnert.

8 MR. COLLINS: It was raised in the reply
9 brief in Lehnert. The Petitioners in Lehnert complained
10 that a problem with pooling is that there are no
11 guarantees and no standards. That -- that's why there's
12 a discussion that's reflected in Justice Scalia's
13 separate opinion, a discussion of the fact that it was
14 acknowledged that there is no contractual relationship,
15 but that there were certain customs and -- and
16 practices. But there was no evidence and certainly no
17 determination by this Court --

18 JUSTICE GINSBURG: But what did the Court
19 mean in Lehnert when it said there must be some
20 indication the payment is for service that may
21 ultimately inure to the benefit of members of the local
22 union by virtue of their membership in the parent
23 organization?

24 MR. COLLINS: What -- what the Court meant
25 by that, I believe, Justice Ginsburg, is that -- well,

1 look at the examples the Court gave of what does not --
2 or the Court referred to certain kinds of payments a
3 local union could make which are not part of an
4 affiliation fee payment.

5 The Court talks about direct payments to
6 other locals. The Court -- the other example given was
7 a payment to a -- a national union that wasn't required
8 by affiliation but was like a charitable contribution.

9 What the Court did not dispute in Lehnert is
10 that, to the extent that an affiliation fee is providing
11 a pool of resources used by the national union for
12 otherwise chargeable services, the potential
13 availability of those services does satisfy the
14 inurement requirement.

15 JUSTICE ALITO: Suppose, let's say, that one
16 or more locals someplace else in the country are
17 involved in very, very expensive litigation; and, as a
18 result, the international assesses all of the locals a
19 fee to pay -- to pay for that litigation but at the same
20 time adopts a position that it is extremely unlikely in
21 the future that the international will ever subsidize
22 any other local union litigation expenses.

23 Would the local -- would a -- would a local
24 union not involved in that litigation -- would they --
25 would it be permissible for them to charge their

1 nonmembers?

2 MR. COLLINS: If it were a special
3 assessment for a specific purpose, I think under -- it
4 is not embraced by Lehnert's rationale. It might not
5 well not be chargeable, because what Lehnert -- Lehnert
6 does not arise in a vacuum. Lehnert talks about the
7 typical affiliation fee relationship. And there have
8 been various submissions, treatise articles about that.

9 So the notion is that a National Union
10 charges an affiliation fee for all of the various
11 services it provides, and local unions can draw upon
12 those resources as needed. If you then talk about a
13 special assessment --

14 JUSTICE ALITO: Well, if you concede that,
15 then aren't you conceding there has to be some standard
16 by -- under which to assess whether the local union that
17 is being required to pay the fee for extra-unit
18 litigation expenses is getting something back in return?

19 MR. COLLINS: I think not, Your Honor, for
20 -- for two reasons. First, I do think that Lehnert did
21 approve --

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

1 MR. COLLINS: Not beyond -- and again the
2 question isn't presented, but not beyond what Lehnert
3 found necessary. Lehnert found it important -- and I
4 would say necessary to its decision -- that the union in
5 that case had what Lehnert described as a typical,
6 unified, membership-affiliation-fee arrangement; and it
7 talks about a typical affiliation fee where locals pay
8 money to go to the pools of otherwise chargeable
9 expenditures of the national union.

10 CHIEF JUSTICE ROBERTS: So if you have a
11 situation where there is a provision in the collective
12 bargaining agreement that the union thinks requires the
13 employer to provide air conditioning in the plant, the
14 local up in Nome, Alaska has to support that extra --
15 extra-unit litigation even though it will never have any
16 benefit for it?

17 MR. COLLINS: Just as Lehnert plainly holds
18 that local would have to support the negotiation of that
19 provision in the first place in Nome, Alaska. That's
20 the holding of Lehnert. The question is whether
21 litigation is different, and there is no way that
22 litigation is different in any principled way as relates
23 to the ruling.

24 CHIEF JUSTICE ROBERTS: I thought it meant
25 -- I didn't think Lehnert held that the unit would have

1 to support that type of extra-unit litigation. I mean,
2 I --

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

5 CHIEF JUSTICE ROBERTS: Yes. Yes, there is
6 a provision that is ambiguous, which frequently happens,
7 and the union says that requires air conditioning, and
8 the company says no, and there is a big fight about
9 that.

10 MR. COLLINS: Well, I think my answer is
11 still correct, Your Honor. Lehnert does not hold --
12 well, it does not provide the answer as to litigation;
13 but Lehnert says if the union in the first instance says
14 we want to go to Nome, Alaska and negotiate something
15 about air conditioning, that that, even though it only
16 affects the unit in Nome, Alaska, becomes part of the
17 pool of chargeable expenditures that all units can be
18 part of.

19 CHIEF JUSTICE ROBERTS: Well, sure, because
20 that negotiation is germane to the Nome, Alaska
21 collective bargaining agreement, if they are negotiating
22 it there for that unit.

23 MR. COLLINS: But the litigation is equally
24 germane. Petitioners do not dispute that litigation can
25 be germane and chargeable within a particular unit.

1 They acknowledge that; there is no dispute about that.
2 So both the negotiation of the air conditioning right in
3 Nome, Alaska and the enforcement of that negotiated
4 agreement through litigation are equally germane within
5 the unit; the same interests are involved --

6 JUSTICE SOUTER: But aren't they, aren't
7 they equal chargeable? Isn't the unspoken premise of
8 your argument and what Lehnert is getting at -- they are
9 not only germane, but isn't there an unspoken premise
10 that just as the union will support -- the union of the
11 dissident objectors in negotiating a collective
12 bargaining agreement, the union will also presumably
13 support them if litigation is necessary later on to
14 enforce it?

15 So that the so-called standard by which the
16 union's obligation to support the litigation and the
17 unit that includes the dissidents is not somehow
18 precisely spelled out. The assumption is that they do
19 have some obligation to support the litigation if it
20 comes to the dissidents' unit. And isn't that -- isn't
21 that the point of your argument?

22 MR. COLLINS: That's correct, Your Honor,
23 and I want to make clear when the Court spoke in Lehnert
24 of the essence of an affiliation agreement, an
25 affiliation agreement is a contractual relationship. We

1 would certainly view that as creating a covenant of good
2 faith and fair dealing that the national union will deal
3 fairly with its various units.

4 JUSTICE SOUTER: Which is a covenant, in
5 effect, of support.

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

10 CHIEF JUSTICE ROBERTS: Do you think as a
11 covenant of support you have -- however many -- about a
12 thousand individual units. You think each of those, you
13 have a covenant to support them when they all get -- get
14 involved in separate litigation? You can't possibly.

15 MR. COLLINS: No, Mr. Chief Justice, what I
16 said was a covenant of good faith and fair dealing. And
17 that --

18 CHIEF JUSTICE ROBERTS: So it's quite
19 unlike, for example, insurance. If you have insurance
20 and you as the unit have a particular obligation, you
21 have a right to have that covered. There is no similar
22 right here.

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

1 JUSTICE SOUTER: Okay, so there is no, there
2 is no covenant of support. There is what? A covenant
3 of support if the litigation in the local unit that
4 includes the dissidents has wide significance, and
5 therefore could affect other units? Is that what the --
6 is that what the obligation is?

7 MR. COLLINS: No, Justice Souter. I would
8 not --

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

14 MR. COLLINS: That the --

15 JUSTICE SOUTER: Right?

16 MR. COLLINS: Yes.

17 JUSTICE SOUTER: Okay.

18 MR. COLLINS: That the National Union --

19 JUSTICE SOUTER: And how do we articulate
20 what that obligation is? If it's not covenant to
21 support regardless of what the litigation is, how do we
22 articulate what the degree of the obligation of support
23 is?

24 MR. COLLINS: The way I would articulated
25 it, and then I would like to take a step backward and

1 compare it to the nonaffiliated situation. I would
2 articulate it as follows, that there is no any First
3 Amendment requirement, that there is in reality in the
4 affiliation agreement simply a covenant of good faith
5 and good dealing that one local will be treated with
6 respect to litigation needs as others would be treated.

7 JUSTICE SOUTER: Yes, but the trouble with
8 saying that is exactly the point that the Chief Justice
9 raised. You don't take the position that no matter what
10 the litigation is, the parent union has got to support
11 it. Therefore, how do we identify the litigation that
12 they will support? How do we know that they have any
13 obligation at all?

14 MR. COLLINS: They -- they don't have a
15 First Amendment obligation, but, Your Honor, that is
16 true in the case of agency fees all together. We have
17 to take a step back and remember that we are trying to
18 perform an exercise the court has said can't be done to
19 perfection of trying to distinguish between making
20 individuals who object support collective bargaining
21 activities not support other things.

22 In Hudson itself, in the basic situation --
23 let's assume there is no affiliation agreement, simply a
24 local union, a fee is charged based on the percentage of
25 expenses in the prior year that went for chargeable

1 activities, including, let's say, litigation. That
2 creates no guarantee that when the year -- in the year
3 that we are now in, when fees are being paid, that if
4 litigation is demanded, requested by a nonmember or
5 anyone else, that that local union will provide --

6 JUSTICE SOUTER: Well, it doesn't create a
7 guarantee expressed like the terms of an insurance
8 policy, but there is, in fact, a local practice to which
9 one can refer. And it seems, it would seem reasonable
10 in a case like that to say, okay, you can force the
11 dissident to pay a fair share on the expectation that
12 the same kind of enforcement litigation will take place
13 if there is a dispute this year or next year.

14 We don't have, as I understand it, a clear
15 sort of expectation standard when we are talking about
16 affiliation agreements that involve a parent and many,
17 many other locals. And the point here, it seems to me,
18 is to determine whether there is any obligation at all
19 whether the dissident is getting anything or can expect
20 to get anything for the fee. And what I want to know is
21 how do we describe that obligation?

22 MR. COLLINS: I think, at most, the
23 obligation is parallel to the duty of fair
24 representation in the sense that the entity that's
25 responsible for determining what services are going to

1 be provided to the employees has to treat, in the case
2 of the local union members and nonmembers in the unity
3 plea, in the case of the national union it's a different
4 affiliated entity fairly -- the reason --

5 CHIEF JUSTICE ROBERTS: So we are talking
6 about an infringement on the objecting members' first
7 amendment rights, and your answer is trust us, we'll
8 treat you fairly? I understand that it's a different
9 answer if you say you've got a right. We can impose the
10 contribution requirement on you, even though you object
11 to it because under this agreement, you have a right to
12 call upon our services. That's a different case. But
13 if your answer is simply trust us we'll treat you
14 fairly, that's not the usual standard we apply to
15 infringements of First Amendment rights.

16 MR. COLLINS: But I have two answers to
17 that, Mr. Chief Justice. First, it is essentially the
18 answer that's supplied under Hudson, where the court
19 says simply use the prior year's percentages. We don't
20 know whether this year we'll have the same percentage
21 breakdown. We also don't know whether this year the
22 union will have enough money to provide any particular
23 service or not. But we don't --

24 CHIEF JUSTICE ROBERTS: That's different.
25 That's a little bit more stringent than saying trust us.

1 That's saying let's look at the last year and we'll
2 figure it out.

3 MR. COLLINS: But we look at the -- but --
4 but we look at the national union typical affiliation
5 type arrangement, as the court described it in Lehnert,
6 and what we understand is this is a union that's not
7 making a profit, it's not piling up fees and putting
8 them somewhere. It exists to provide services to local
9 affiliates.

10 Those affiliates, if they are not provided
11 with services, it's not just the nonmember, the objector
12 who's being harmed, the members want those services by
13 definition.

14 JUSTICE GINSBURG: But couldn't it be,
15 couldn't the national say, local, you have asked for
16 assistance with such-and-such litigation. We think your
17 case is what this Court sometimes calls a bad vehicle.
18 We don't want to finance your litigation, the issue is
19 important and we are going to wait for a case that
20 presents it in a better light, is more likely to win.

21 MR. COLLINS: Absolutely, Your Honor, that's
22 one thing a national union can properly do. Another
23 thing a national union can properly do is to say we've
24 just had an unexpected economic crisis, all of a sudden
25 midterm we have to change our priorities and we are

1 going to have to protect people from a lot of layoffs.

2 But the second point I want to make --

3 JUSTICE SCALIA: The issue is not whether
4 that's a fair thing for the national union to do. The
5 issue is whether the person who is being compelled
6 against his will to pay dues to the union is getting
7 anything back for that compelled payment. And even
8 though the national union may be acting in an entirely
9 fair fashion, given its national objectives, the -- the
10 compelled payment is not doing what our cases seem to
11 say it must do. It has to be paying for services
12 rendered.

13 MR. COLLINS: What -- the value the -- the
14 objector is getting is not have a guarantee of services.
15 He has the potential for services far beyond what could
16 ever be paid for out of the local's own affiliation
17 fees.

18 And I would add if a national union were to
19 act in some improper way in terms of how it doles out
20 assistance -- and by the way, one doesn't see cases on
21 this, it's really not in the nature of how national
22 unions operate, because again, we are talking about
23 members and nonmembers equally in terms of who's going
24 to get benefits. So it's not a problem in the real
25 world of national unions treating a particular local

1 unfairly for some reason and not giving them services
2 that are given to others. There are certainly a lot of
3 judgments involved, as Justice Ginsburg's question
4 elicited.

5 But if a national union were to treat
6 affiliates unfairly, it's quite possible that if and
7 when that occurred, that it might have implications
8 under a number of possible causes of actions and
9 including possibly the right to object. Justice
10 Scalia's opinion in Lehnert noted that if and when
11 services aren't provided, there might be ground for
12 objection.

13 The question here is is this a basis under
14 the First Amendment to have a prophylactic rule that
15 says we are so concerned that even though we have no
16 rule under Hudson that provides assurance that an
17 unaffiliated local union will provide any particular
18 services to its members and nonmembers, we have such a
19 concern that somehow national unions won't deliver the
20 goods, that we are going to set up the hierarchy of
21 either guarantees, standards, which if the issue had
22 been presented here and we had created a record, we
23 would show the Court -- I think no union in this country
24 has and for good reason, both because of the virtual
25 infinitude of legitimate factors one could consider also

1 because of the constant changes in needs of local
2 unions --

3 JUSTICE ALITO: If certain -- if certain
4 fees are are being assessed on the theory that this is a
5 pooling arrangement, I don't understand why you're
6 resisting any effort to impose any standards or any
7 inquiry as to whether it's really a pooling arrangement?

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

18 We'll consider whether it's going to be an
19 important precedent, whether it's the kind of thing a
20 local can't afford on its own, whether it's important
21 now that we have pressing economic problems and everyone
22 is being laid off, is this a good test case or a bad
23 test case, how broad will the implications of this be.
24 One could list 50 factors, but they wouldn't guide any
25 inquiry in a meaningful way.

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

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

8 CHIEF JUSTICE ROBERTS: Lehnert didn't
9 address the question of litigation.

10 MR. COLLINS: Well, but if -- but there has
11 been no argument made that would explain why if you --
12 if one can pool -- if the union negotiates an agreement
13 with a very controversial provision that a nonmember has
14 a very legitimate objection to, Lehnert holds that can
15 be pooled. Lehnert does not say the standard --

16 JUSTICE ALITO: Your argument seems to be
17 that the whole analogy of a pooling arrangement is
18 invalid. That was unrealistic, because there really is
19 no way of telling whether any of these things is a
20 pooling arrangement. There is no standard that could
21 possibly be articulated that would be meaningful to
22 determine whether something that is labelled a pooling
23 arrangement really is in any way a pooling arrangement.
24 That seems to me argument. That would seem to cut
25 against the whole idea of pooling arrangements not only

1 for litigation expenses, but for everything else.

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

13 JUSTICE SCALIA: Well, it doesn't have to do
14 that. It can use the money of its union members any way
15 it wants. It can contribute to the national all of
16 their money if it wishes. We are only talking about
17 that portion of the union income which comes from people
18 who don't want to join the union.

19 MR. COLLINS: Well, then it either has to
20 allow for -- the union has to either conclude we are
21 going to support all of our germane activities, all of
22 our chargeable activities through our own funding and
23 our own resources, and if that's just inadequate and
24 therefore litigation needs to be conducted, we can't do
25 it; the employer knows that so it can take advantage of

1 us in bargaining; we are just going to have to live with
2 it; or we can say our members will pay for that but the
3 nonmembers won't, because the only solution other than
4 using the local's own money is to pay a fee to the
5 national. And as I've indicated in Lehnert as in this
6 case, the arrangement is not one that provides
7 guarantees --

8 JUSTICE KENNEDY: Well, one of the
9 difficulties it seems to me is the Petitioner's position
10 with the sort of all or nothing approach. But you
11 seemed to be taking the mirror position of that. Your
12 argument is all or nothing on your side. I don't get
13 much help from either side as to what the standard
14 should be. I know germane is obviously a malleable
15 word, but we are looking to see if there is some test
16 that we can use that's not all or nothing.

17 MR. COLLINS: Well --

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

20 MR. COLLINS: The -- the question, Justice
21 Kennedy, is whatever the test is if it's satisfied as to
22 expenditures within the unit where the services are
23 provided, can those services be pooled or is there a
24 different test that has to be applied to the pooling?
25 My submission is that Lehnert makes clear there is no

1 separate test.

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

15 There has also been no confusion, contrary
16 to Petitioner's contention, under the Lehnert test. The
17 only issue that's given the courts difficulties is the
18 specific issue here as to why the plurality in Lehnert
19 seemed to indicate that litigation might be in a
20 different status under pooling. So there is no basis in
21 this case for reconsidering the basic Lehnert test of
22 chargeability.

23 I will simply note, however, that the
24 statutory duties test which -- for which Petitioners
25 argue really doesn't make the situation clearer than

1 the -- than the germaneness test because the
2 Government -- both the germaneness test and the
3 statutory duties test acknowledge that the union's right
4 to charge objecting nonmember stems from its function as
5 exclusive bargaining representative; but there is no way
6 to sustain logically the notion that that means that
7 only those things that are done in that exclusive
8 representative capacity are chargeable; because the same
9 Government interests that allow for charging when the
10 union is acting as the exclusive bargaining agent have
11 to also allow for charging for those things that are
12 necessary in order for the union to play that role, and
13 to enforce that role which includes things like the
14 headquarters; it includes things like litigation to
15 enforce an agreement, even though in those areas when
16 performing those functions, the union very often does
17 not have an exclusive representational duty or duty of
18 fair representation.

19 JUSTICE BREYER: Is there a rule or a reg
20 somewhere in the Labor Department that says if the
21 national union takes its money from its local, spends it
22 in a way that has nothing to do with politics
23 whatsoever, zero -- but either wastes it or they build
24 too big a building, or they do something that doesn't
25 benefit Local Number 432, does 432 have any remedy?

1 MR. COLLINS: There is no Labor Department
2 regulation.

3 JUSTICE BREYER: There is no remedy at all.

4 MR. COLLINS: No, and I --

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

7 MR. COLLINS: I would say there would be a
8 breach of covenant of faith and fair dealing under the
9 affiliation relationship in some of those situations;
10 and of course if a union used an illegal basis for
11 determining whether it would provide services to the --

12 JUSTICE BREYER: Right. Are you saying you
13 could bring a lawsuit or not?

14 MR. COLLINS: You could bring a lawsuit
15 alleging that the union violated its covenant of good
16 faith and fair dealing to its affiliates, if the union
17 acted on the basis of say, race, for example, you could
18 certainly bring a lawsuit then.

19 JUSTICE BREYER: So either -- in these cases
20 everybody in the union whether they're forced or not,
21 has this kind of remedy or nobody does? That's your --

22 MR. COLLINS: Right. And the reason for
23 that is -- what we always have to understand here, is
24 the interest in seeing to it that a local union that
25 pays an affiliation fee will receive services in a fair

1 way from the national is an interest that's shared
2 equally by the members and the nonmembers. It's not
3 something that creates a First Amendment concern.

4 CHIEF JUSTICE ROBERTS: Well, that's not
5 right. Again we have to postulate that we are dealing
6 with members who don't like unions at all. So while the
7 members may think this is perfectly fair, the nonmembers
8 whenever their money is forced to be used for union
9 activities, it's unfair.

10 MR. COLLINS: But a -- a member equally with
11 a nonmember would, Mr. Chief Justice, have the view that
12 if it's predictable year after year that for some reason
13 his local doesn't get services from the national union,
14 the national union sends it elsewhere, that member is
15 going to be no more happier -- happy than the nonmember.
16 That's why those things don't happen in the real world.
17 That's why we certainly don't need a prophylactic rule
18 and there would certainly be no First Amendment basis
19 for a prophylactic rule that requires the union to
20 establish what no union in this country to my knowledge
21 has, which is either a clear guarantee or specific
22 standards for providing services.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 Mr. Collins.

25 Mr. Young, you have four minutes.

1 REBUTTAL ARGUMENT OF W. JAMES YOUNG

2 ON BEHALF OF THE PETITIONERS

3 MR. YOUNG: Thank you, Mr. Chief Justice. I
4 think it's appropriate to note the apocalyptic
5 predictions that are suggested from the rule that the
6 Petitioners are advancing are avoidable by easily --
7 readily available alternatives. International unions
8 would of course be free to make loans to local
9 affiliates engaged in massive litigation or other speech
10 activities where they think it's appropriate.

11 But the alternative is not between
12 prohibiting pooling arrangements which have no
13 standards, no enforceability and no predictability, and
14 allowing the nonmembers to become free riders on
15 legitimate litigation expenditures funded through the
16 international affiliate. The choice is between a
17 malleable -- a malleable unpredictable and ultimately
18 unenforceable agreement and a standard which would allow
19 the international to subsidize such litigation and allow
20 the true -- only the costs of that litigation to be
21 extracted from nonmembers.

22 JUSTICE BREYER: And the case -- the case
23 that says that a union member, person forced into the
24 union agency shop -- and I guess a lawyer who has to pay
25 to be an integrated bar and I guess a doctor who has to

1 join a medical association -- the case that says that
2 these people have a First Amendment right to get back
3 money that's being wasted, is what?

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

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

8 MR. YOUNG: Unfortunately no, Justice
9 Breyer.

10 CHIEF JUSTICE ROBERTS: The test is not
11 whether it's political, is it? It's not a negative
12 test. It's an affirmative requirement in which the
13 burden is on the union that they have to show the
14 expenditure is germane to the particular collective
15 bargaining agreement?

16 MR. YOUNG: Yes, Mr. Chief Justice, that's
17 exactly correct, and -- and the test in determining
18 whether or not it is a -- can be charged across
19 bargaining unit lines is a bright-line test of whether
20 it is a speech activity.

21 CHIEF JUSTICE ROBERTS: Well, do you have a
22 response to Justice Kennedy's concern? Do you have a
23 fallback position or are you also in the all or
24 nothing --

25 MR. YOUNG: I'm afraid you've got two

1 principled advocates before you Mr. Chief Justice who
2 are holding firm to their positions. I would however
3 like to address one more point. I think it's
4 appropriate to recall, get us back again to the focus on
5 this is compelled speech subject to the Court's strict
6 scrutiny jurisprudence. The test suggested by MSEA is
7 that a union's activities are subject to a, subject to
8 the duty of fair representation and to the covenant of
9 good faith and fair dealing under the duty of fair
10 and/or under the duty of fair represent which of course
11 is that wide range of reasonableness cannot be sustained
12 where this court's standard is the least restrictive
13 means. Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you counsel.
15 The case is submitted.

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

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|-------------------------|---------------------------|-------------------------|-------------------------|-------------------------|
| A | administration | 16:18,20 21:5 | 53:2 | arises 12:23 |
| ability 46:12 | 5:13,21 6:5 | 21:7,14,18 | Amendments | 26:6 |
| able 22:15 | administrative | 22:8,11,16,19 | 3:11 | arising 3:22 |
| Abood 12:25 | 3:15 17:21 | 22:22 23:2,4,5 | amicus 7:22 | arose 8:6 12:12 |
| 17:13 27:8 | admissions 4:22 | 23:11,17,19,21 | analogous 36:7 | arrangement |
| above-entitled | adopted 17:13 | 27:25 28:7 | analogy 45:17 | 4:25 9:22 29:6 |
| 1:12 54:17 | 29:9 | 33:12 34:21 | and/or 54:10 | 33:6 41:5 44:5 |
| Absolutely | adopts 31:20 | 35:4,12,24,25 | answer 3:17 4:9 | 44:7,11 45:17 |
| 41:21 | advancing 52:6 | 38:4,23 40:11 | 4:15 10:25 | 45:20,23,23 |
| abstracting | advantage 46:25 | 45:12 49:15 | 11:5,7 34:10 | 47:6 |
| 19:13 | advocates 54:1 | 52:18 53:15 | 34:12 40:7,9 | arrangements |
| accept 17:15 | affect 14:23 37:5 | agreements | 40:13,18 | 22:10 45:25 |
| 20:5 21:1 | 48:14 | 16:23 39:16 | answers 40:16 | 52:12 |
| acceptably | affiliate 8:12 | aid 24:2 | anticipate 9:1 | articles 26:9 |
| 21:24 | 25:5,11 52:16 | air 33:13 34:7 | anti-union | 32:8 |
| accidents 14:7 | affiliated 40:4 | 34:15 35:2 | 20:11 | articulate 37:19 |
| acknowledge | affiliates 41:9,10 | AL 1:3,7 | anybody 26:20 | 37:22 38:2 |
| 35:1 49:3 | 43:6 50:16 | Alaska 33:14,19 | apocalyptic 52:4 | articulated |
| acknowledged | 52:9 | 34:14,16,20 | apologize 6:12 | 37:24 45:21 |
| 30:14 45:7 | affiliation 4:15 | 35:3 | 10:12 | asked 16:10 |
| acknowledges | 4:24 11:19 | Alito 6:23 7:2 | Appeals 29:11 | 41:15 |
| 28:11 | 25:11 28:16,17 | 19:21 20:22 | APPEARAN... | assess 32:16,23 |
| act 3:21 6:22 | 29:23 31:4,8 | 31:15 32:14,22 | 1:15 | assessed 18:22 |
| 42:19 | 31:10 32:7,10 | 44:3 45:16 | applied 47:24 | 44:4 |
| acted 50:17 | 33:7 35:24,25 | 46:3 | 48:5 | assesses 31:18 |
| acting 42:8 | 38:4,23 39:16 | alleging 50:15 | applies 23:2 | assessment 32:3 |
| 49:10 | 41:4 42:16 | allow 46:20 49:9 | apply 17:13 | 32:13 |
| actions 43:8 | 50:9,25 | 49:11 52:18,19 | 40:14 | assistance 41:16 |
| activities 15:21 | affiliations 9:11 | allowed 25:17 | appreciate 10:9 | 42:20 |
| 16:1 17:18 | affirmative | 25:19 | 20:20 | associate 15:18 |
| 18:17,18 20:24 | 12:11 53:12 | allowing 13:1 | approach 47:10 | association 53:1 |
| 20:25 25:17 | afford 14:23 | 14:25 52:14 | appropriate | assume 38:23 |
| 26:15 38:21 | 44:20 | all-or-nothing | 52:4,10 54:4 | assumption |
| 39:1 46:21,22 | afraid 53:25 | 6:24 | approve 29:19 | 35:18 |
| 51:9 52:10 | agencies 3:15 | alternative | 32:21 | assurance 43:16 |
| 54:7 | agency 13:1 | 52:11 | area 18:12,15 | assuredly 12:18 |
| activity 18:21 | 17:10 18:5 | alternatives | 24:7 | attenuated |
| 20:5,6 53:20 | 38:16 52:24 | 52:7 | areas 13:21 | 17:19,23 21:22 |
| actual 48:4 | agent 22:5,6 | ambiguous 34:6 | 49:15 | automobile 14:7 |
| add 8:7 28:2 | 24:9 27:14 | amendment | argue 48:25 | avail 28:4 |
| 29:13 42:18 | 28:13 49:10 | 13:2 15:7,10 | argument 1:13 | availability |
| additional 7:1 | agents 27:9 | 15:18,22,23 | 2:2,7 3:4,6 4:7 | 31:13 |
| 48:11 | agree 22:9 | 17:4 18:3,20 | 5:8 6:24 7:1 | available 52:7 |
| address 4:7 45:9 | agreement 3:24 | 18:23 36:24 | 8:19 27:4 35:8 | avoid 3:20 |
| 54:3 | 5:17,24 8:3 | 38:3,15 40:7 | 35:21 44:9 | avoidable 52:6 |
| addressed 30:6 | 12:10 14:20 | 40:15 43:14 | 45:11,16,24 | a.m 1:14 3:2 |
| addresses 3:10 | 15:14 16:10,13 | 45:2 51:3,18 | 47:12 52:1 | |

| | | | | |
|--|--|---|---|---|
| <p>B</p> <p>B 1:3 25:22</p> <p>back 20:21</p> <p>22:13 32:18,24</p> <p>32:25 38:17</p> <p>42:7 53:2 54:4</p> <p>backward 37:25</p> <p>bad 8:6 11:22</p> <p>41:17 44:22</p> <p>balance 26:25</p> <p>bankruptcy</p> <p>3:25 5:25</p> <p>banned 20:6,9</p> <p>bar 52:25</p> <p>bargaining 3:15</p> <p>3:23,24 5:13</p> <p>5:17,21,24 6:5</p> <p>6:20 7:18</p> <p>13:21 14:19</p> <p>15:13 16:10,13</p> <p>16:18,19,19,22</p> <p>17:7 21:2,8,18</p> <p>21:21 22:5,6</p> <p>23:2,5,10,17</p> <p>23:19,21 24:9</p> <p>25:2 26:19</p> <p>27:9,14,16,25</p> <p>28:7,12,19</p> <p>29:6 33:12</p> <p>34:21 35:12</p> <p>38:20 47:1</p> <p>49:5,10 53:15</p> <p>53:19</p> <p>based 9:15</p> <p>38:24</p> <p>basic 13:12,13</p> <p>38:22 44:15</p> <p>48:21</p> <p>basis 9:20 43:13</p> <p>48:20 50:10,17</p> <p>51:18</p> <p>beast 46:6</p> <p>begins 22:16,17</p> <p>behalf 1:16,18</p> <p>2:4,6,9 3:7</p> <p>21:21 27:5</p> <p>52:2</p> | <p>believe 5:5,15</p> <p>7:3,3 8:11 12:2</p> <p>21:21 23:25</p> <p>25:25 30:25</p> <p>Ben 29:5</p> <p>benefit 9:24</p> <p>10:19 11:3</p> <p>18:8,19 19:7,9</p> <p>30:21 33:16</p> <p>49:25</p> <p>benefits 42:24</p> <p>better 41:20</p> <p>beyond 7:18</p> <p>17:9 33:1,2</p> <p>42:15</p> <p>big 34:8 49:24</p> <p>binds 23:6</p> <p>bishops 19:18</p> <p>bit 40:25</p> <p>Blackmun 7:6</p> <p>breach 50:8</p> <p>breakdown</p> <p>40:21</p> <p>Breyer 16:2,4,5</p> <p>18:1,24 19:2</p> <p>19:12,17 20:4</p> <p>24:14,25 49:19</p> <p>50:3,5,12,19</p> <p>52:22 53:5,6,9</p> <p>brief 4:23 7:21</p> <p>7:22 9:9 29:10</p> <p>30:9</p> <p>briefs 5:9</p> <p>bright 24:1</p> <p>bright-line 12:3</p> <p>53:19</p> <p>bring 50:13,14</p> <p>50:18</p> <p>brings 14:18</p> <p>broad 44:23</p> <p>build 49:23</p> <p>building 49:24</p> <p>burden 53:13</p> <p>buy 7:13 9:23</p> <p>10:17 14:4</p> | <p>C 2:1 3:1</p> <p>call 4:11,14 5:1</p> <p>5:4 8:25 29:1</p> <p>40:12</p> <p>called 29:2</p> <p>calls 41:17</p> <p>capacity 49:8</p> <p>case 3:4,10 5:15</p> <p>5:19 6:9 8:4</p> <p>9:4 12:3 13:18</p> <p>16:12 27:14</p> <p>29:14,21 33:5</p> <p>38:16 39:10</p> <p>40:1,3,12</p> <p>41:17,19 44:22</p> <p>44:23 47:6</p> <p>48:21 52:22,22</p> <p>53:1 54:15,16</p> <p>cases 7:18 12:5</p> <p>12:25 15:24</p> <p>16:12 17:11</p> <p>18:3 19:13</p> <p>20:24,25 42:10</p> <p>42:20 50:19</p> <p>categorical 3:19</p> <p>5:6</p> <p>cause 7:9</p> <p>causes 43:8</p> <p>celebration</p> <p>25:16,23,24</p> <p>central 18:9</p> <p>certain 19:11,23</p> <p>30:15 31:2</p> <p>44:3,3</p> <p>certainly 5:5</p> <p>9:13,20 14:14</p> <p>15:17 17:24</p> <p>20:24 28:11</p> <p>30:16 36:1</p> <p>43:2 50:18</p> <p>51:17,18</p> <p>certiorari 29:12</p> <p>change 26:21</p> <p>41:25</p> <p>changes 44:1</p> <p>charge 21:15</p> <p>24:22 31:25</p> | <p>49:4</p> <p>chargeability</p> <p>48:22</p> <p>chargeable 6:16</p> <p>18:25 19:3,5</p> <p>21:24 23:7,10</p> <p>23:23 24:3,3</p> <p>25:5 26:13,15</p> <p>28:18 31:12</p> <p>32:5 33:8</p> <p>34:17,25 35:7</p> <p>38:25 46:22</p> <p>49:8</p> <p>charged 23:5</p> <p>38:24 53:18</p> <p>charges 32:10</p> <p>chargibility</p> <p>26:21</p> <p>charging 21:17</p> <p>24:10 49:9,11</p> <p>charitable 31:8</p> <p>Chief 3:3,8 8:20</p> <p>9:7,18 10:4,7</p> <p>10:10,13 11:1</p> <p>11:10,16 22:25</p> <p>23:8,12,16,24</p> <p>27:1,2,6,19</p> <p>28:1,5,23 30:4</p> <p>33:10,24 34:5</p> <p>34:19 36:10,15</p> <p>36:18 38:8</p> <p>40:5,17,24</p> <p>45:1,8 51:4,11</p> <p>51:23 52:3</p> <p>53:10,16,21</p> <p>54:1,14</p> <p>choice 52:16</p> <p>choices 44:10</p> <p>Circuit 15:24</p> <p>circumstances</p> <p>16:16</p> <p>clear 24:1,18</p> <p>32:24 35:23</p> <p>39:14 47:25</p> <p>48:7 51:21</p> <p>clearer 48:25</p> <p>clearly 4:23</p> | <p>cohort 9:16</p> <p>collective 5:13</p> <p>5:21 6:5 14:19</p> <p>15:13 17:7</p> <p>21:8,18 23:2</p> <p>26:19 27:25</p> <p>28:7 29:5</p> <p>33:11 34:21</p> <p>35:11 38:20</p> <p>53:14</p> <p>Collins 1:18 2:5</p> <p>27:3,4,6 28:1,9</p> <p>29:7 30:8,24</p> <p>32:2,19 33:1</p> <p>33:17 34:3,10</p> <p>34:23 35:22</p> <p>36:6,15,23</p> <p>37:7,14,16,18</p> <p>37:24 38:14</p> <p>39:22 40:16</p> <p>41:3,21 42:13</p> <p>44:8 45:5,10</p> <p>46:2,19 47:17</p> <p>47:20 50:1,4,7</p> <p>50:14,22 51:10</p> <p>51:24</p> <p>colloquy 20:20</p> <p>come 8:5 12:12</p> <p>comes 35:20</p> <p>46:17</p> <p>commemorate</p> <p>18:13</p> <p>commemorati...</p> <p>19:24 24:25</p> <p>commendable</p> <p>20:1</p> <p>comments 20:18</p> <p>communicatio...</p> <p>26:12</p> <p>company 14:9</p> <p>34:8</p> <p>compare 38:1</p> <p>compel 3:11</p> <p>compelled 20:23</p> <p>20:23,25 21:1</p> <p>29:4 42:5,7,10</p> <p>54:5</p> |
|--|--|---|---|---|

| | | | | |
|---|---|--|--|---|
| complained 30:9 | contrary 48:15 | 37:2,2,20 38:4 | Department 49:20 50:1 | 31:9 34:24 |
| concede 9:4,6 11:23 21:14 23:17,25 32:14 | contribute 4:4 15:1,21 25:17 46:15 | 50:8,15 54:8 | depend 11:8 | 35:1 39:13 |
| concedes 4:23 | contributing 17:3 | covered 36:21 | describe 39:21 | dissenting 26:22 |
| conceding 32:15 | contribution 31:8 40:10 | create 36:24 39:6 | described 27:8 28:21 33:5 41:5 | dissident 35:11 39:11,19 |
| concept 48:14 | CONTROLL... 1:7 | created 13:24 43:22 | despite 46:10,11 | dissidents 35:17 35:20 37:4 |
| concern 43:19 51:3 53:22 | controversial 45:13 | creates 39:2 51:3 | determination 30:17 | distinction 7:20 11:18 12:21,22 13:4,21,22 |
| concerned 17:12 17:14 43:15 | correct 34:11 35:22 36:6,23 53:17 | creating 36:1 | determinations 26:6 | 20:21,22 22:21 22:24 23:1 24:4 26:8,8,10 |
| concerning 16:19 | costs 19:5 52:20 | crisis 41:24 | determine 39:18 45:1,22 | distinguish 38:19 |
| conclude 46:20 | counsel 27:2 54:14 | criterion 12:15 | determining 28:13 39:25 50:11 53:17 | doctor 52:25 |
| concurrence 46:11 | country 31:16 43:23 51:20 | cross-unit 25:11 | dialogue 20:18 | doing 18:11 42:10 46:10,12 |
| conditioning 33:13 34:7,15 35:2 | coupled 13:9 | customs 30:15 | differ 11:5 | doles 42:19 |
| conduct 26:18 | course 4:1 5:3 5:22 15:3 17:13 25:10,18 50:10 52:8 54:10 | cut 45:24 | difference 22:11 22:18 | downtown 25:3 25:4 |
| conducted 46:24 | court 1:1,13 3:9 3:20 4:17 5:6,9 5:11 6:3,16 12:2,24 17:17 22:2 23:25 24:4 26:14 27:7,8,12 29:11,18,20,22 29:23 30:17,18 30:24 31:1,2,5 31:6,9 35:23 38:18 40:18 41:5,17 43:23 | D | different 9:11 11:2 17:22 19:8 23:3,4,22 26:11 33:21,22 40:3,8,12,24 47:24 48:9,20 | dramatically 9:2 |
| confronted 27:15 | courts 3:14 48:17 | D 3:1 | differing 11:17 26:11 | draw 21:4 22:24 27:16 29:24 32:11 |
| confusing 23:9 | court's 3:18 12:5 21:25 24:7 26:6 54:5 54:12 | DANIEL 1:3 | difficulties 47:9 48:17 | drawing 23:1 26:3 |
| confusion 48:15 | covenant 36:1,4 36:11,13,16 | deal 36:2 | difficulty 12:2 | drawn 22:2 24:4 24:5 26:10 |
| Congress 17:12 17:14 | | dealing 22:19,20 36:2,16 37:11 37:12 38:5 50:8,16 51:5 54:9 | dire 46:11 | drew 24:1 |
| consider 43:25 44:17,18 | | deals 21:9 | direct 31:5 | drop 14:22 26:20 |
| consistent 24:6 | | dealt 5:16 | directed 26:24 | dues 18:5,22 20:23,25 42:6 |
| constant 44:1 | | decide 27:22 48:4 | disagree 4:8 | duties 22:4,5,5 24:9,10 48:7 48:12,24 49:3 |
| constitutional 3:20 7:4,10 8:10,17 12:13 | | decision 5:19 10:21 22:9 33:4 | discerned 12:5 | duty 36:7 39:23 49:17,17 54:8 54:9,10 |
| contained 4:22 | | decisionmaking 17:20,21 21:25 | disconnect 8:21 | D.C 1:9,18 |
| contention 29:8 48:16 | | default 21:25 | discuss 7:5 | |
| context 9:10,12 11:20 13:25 | | defend 8:5 12:12 | discussed 6:16 7:21 9:8 | E |
| contexts 17:22 | | defends 4:5,6 | discussing 6:21 17:17 | E 2:1 3:1,1 |
| contract 5:14,21 6:5,17 14:17 21:10 | | defense 4:20 7:17 | discussion 24:2 30:2,12,13 | earlier 17:11 |
| contractual 21:12 30:14 35:25 | | definition 41:13 48:8 | dispute 21:16,19 21:20 23:11,15 | easily 52:6 |

| | | | | |
|--|--|--|--|--|
| <p>economic 41:24 44:21 education 26:10 EDWARD 1:6 effect 17:22 36:5 effort 44:6 either 11:14 18:3 25:17 28:14 29:2 43:21 46:4,19 46:20 47:13,19 49:23 50:19 51:21 elicited 43:4 Ellis 3:19,20 5:6 5:9,11,11,16 6:14 7:3,9 12:3 12:25 16:17 17:23 19:10 21:22 23:25 24:1,3,3 embraced 32:4 employees 3:12 14:18 27:11 40:1 employer 8:25 21:10 26:17,24 33:13 46:25 employers 3:11 empty 22:15 enforce 3:24 22:12,16 35:14 49:13,15 enforceability 52:13 enforceable 4:24 30:3 46:4 enforcement 21:7 35:3 39:12 enforcing 5:16 5:24 6:1 21:17 21:17 22:8,20 engage 27:10 engaged 52:9 enter 9:22 17:1 28:16</p> | <p>entering 16:25 entirely 42:8 entity 39:24 40:4 equal 35:7 44:15 equally 34:23 35:4 42:23 51:2,10 ESQ 1:16,18 2:3 2:5,8 essence 29:23 35:24 essentially 4:3 40:17 establish 51:20 ET 1:3,7 everybody 11:2 18:22 50:20 evidence 30:16 ex 26:25 exactly 13:17 23:18,19 30:4 30:5 38:8 53:17 example 13:15 18:9 24:13 31:6 36:19 50:17 examples 31:1 exception 22:2 exceptions 20:7 exchange 4:4 exclude 24:13 exclusive 6:17 6:18,19 49:5,7 49:10,17 Excuse 15:15 exercise 38:18 exists 14:12 41:8 expect 39:19 expectation 39:11,15 expenditure 53:14 expenditures 18:25 19:18 21:20 27:9</p> | <p>28:13,18 33:9 34:17 47:22 52:15 expenses 7:1 24:23 29:19 31:22 32:18 38:25 46:1 expensive 31:17 experience 9:16 9:20 14:6,7 16:14 expertise 27:16 27:18 46:9 explain 45:11 explicit 8:4 expressed 39:7 expressive 3:12 extended 9:3 extent 31:10 extra 33:14 extracted 52:21 extra-unit 6:25 32:17 33:15 34:1 extremely 31:20</p> <hr/> <p>F</p> <p>fact 4:11,23 7:18 14:1 29:20 30:13 39:8 factors 43:25 44:24 facts 11:1,8 fair 4:10,13 36:2 36:8,16 37:11 37:12 39:11,23 42:4,9 49:18 50:8,16,25 51:7 54:8,9,9 54:10 fairly 9:8 28:21 36:3 40:4,8,14 fairness 44:15 faith 36:2,16 38:4 50:8,16 54:9 fall 6:23 16:17</p> | <p>24:15 25:12 fallback 53:23 far 22:14 25:11 42:15 fashion 42:9 45:4 fate 29:5 fault 18:2 fee 9:11 13:15 28:17 31:4,10 31:19 32:7,10 32:17 33:7 38:24 39:20 47:4 50:25 fees 29:4 38:16 39:3 41:7 42:17 44:4 fight 34:8 figure 41:2 filed 7:22 finance 28:13 41:18 find 6:11 11:16 20:1 finding 30:1 Fine 19:2 Finish 16:5 firm 54:2 first 3:10 13:2 15:7,10,18,22 15:22 17:4 18:3,20,23 27:13 29:9,10 32:20 33:19 34:13 36:24 38:2,15 40:6 40:15,17 43:14 45:2 46:3 51:3 51:18 53:2 fit 5:9 15:18 five 6:20 focus 54:4 follow 26:3 follows 38:2 force 16:24 20:10,14 25:19 27:21 39:10</p> | <p>forced 3:22 12:24 20:1 27:24 50:20 51:8 52:23 forth 5:6 forum 3:13 12:7 16:1 21:16 22:3,23 24:11 25:2 26:2 found 12:3 17:18,23 24:3 33:3,3 Foundation 7:22 Foundation's 9:9 four 51:25 Fourteenth 3:11 frankly 9:13 free 17:10,11,14 17:15 28:3,7,9 28:10 52:8,14 frequently 34:6 fulfilled 17:8 function 49:4 functions 49:16 funded 52:15 funding 46:22 funds 7:24 Furthermore 14:1 future 31:21</p> <hr/> <p>G</p> <p>G 3:1 general 18:21 24:16 25:12,13 28:12 29:8,17 general's 28:24 genuine 8:15 germane 6:8 28:6,13,14 34:20,24,25 35:4,9 46:21 47:14 53:14 germaneness 48:11 49:1,2</p> |
|--|--|--|--|--|

| | | | | |
|---|---|---|--|---|
| getting 20:21 28:24 32:18,24 32:25 35:8 39:19 42:6,14 Ginsburg 5:10 5:16,18,23 6:2 6:7,11 21:3,14 22:7,21 30:18 30:25 41:14 Ginsburg's 43:3 give 10:25 28:3 given 31:6 37:11 42:9 43:2 48:17 giving 43:1 Glickman 12:6 go 15:20 18:16 22:13 27:17,20 28:3,15 33:8 34:14 goats 13:7 goes 17:9 44:10 going 4:12 7:17 9:20 10:18 14:22 17:1 18:15 30:5 39:25 41:19 42:1,23 43:20 44:18 46:21 47:1 51:15 good 7:8,9 8:24 17:21 36:1,16 38:4,5 43:24 44:22 50:15 54:9 goods 43:20 govern 44:14 government 20:14 49:2,9 great 8:21 ground 43:11 group 11:3 guarantee 39:2 39:7 42:14 51:21 guarantees 30:11 43:21 | 44:13 46:4 47:7 guess 4:17 20:5 28:24 52:24,25 guide 44:24 gypped 50:6 <hr/> H <hr/> hand 11:19 Hansen 17:11 happen 18:8 19:7 46:8 51:16 happens 23:22 34:6 happier 51:15 happy 20:19 27:22 51:15 harm 14:24 15:5 15:8,14 harmed 41:12 Hawaii 18:14 19:24 20:14 25:6 Hawaiian 24:23 24:24 headquarters 18:10 25:3 49:14 hear 3:3 26:20 heard 14:10 47:18 held 3:20 33:25 48:11 help 10:3,10 11:11 17:1 18:11 47:13 hierarchy 43:20 history 8:24 hold 34:11 holding 3:19 33:20 54:2 holds 28:11 33:17 45:14 holidays 14:20 honestly 10:23 Honor 32:19 | 34:11 35:22 36:24 38:15 41:21 44:8 hostile 9:3 Hudson 38:22 40:18 43:16 human 20:5,6 hurt 18:13 hypothesis 12:9 hypothetical 15:9 16:8,22 hypotheticals 25:15 <hr/> I <hr/> idea 45:25 identical 16:23 identify 38:11 illegal 50:10 impact 46:11 implications 43:7 44:23 implied 46:5 important 33:3 41:19 44:19,20 impose 40:9 44:6 imposes 22:6 improper 42:19 inadequacy 6:12 inadequate 46:23 included 11:8 includes 35:17 37:4 49:13,14 including 12:5 27:11 39:1 43:9 income 46:17 incorrectly 29:15 incur 28:14 incurred 28:18 indicate 48:19 indicated 47:5 48:13 indication 30:20 | individual 18:4 36:12 individuals 38:20 infinitude 43:25 infringement 13:1 40:6 infringements 40:15 inquired 4:17 inquiry 44:7,25 instance 6:17 26:8 34:13 insult 8:7 insults 8:10 insurance 4:3,14 5:2 7:13,14,24 8:15 9:2,10,13 9:21,22,23,25 10:17,24 11:18 11:20,22,24,25 11:25 13:18,25 14:4,8,10,11 36:19,19 39:7 insureds 9:16 insurer 7:25 8:12,16 10:21 integrated 52:25 interest 4:5,6 25:7 50:24 51:1 interested 8:9 20:17 interests 35:5 49:9 internal 26:12 international 8:12 25:4,10 29:25 31:18,21 52:7,16,19 interpret 14:19 interrupting 15:16 inure 30:21 inurement 31:14 invalid 45:18 | investigate 10:18 involve 5:23 16:18 23:22 39:16 involved 5:20 8:4 15:23 17:2 31:17,24 35:5 36:14 43:3 involves 16:17 involving 3:15 5:20 6:4 13:20 23:10 issue 19:1 29:14 30:6 41:18 42:3,5 43:21 48:17,18 issued 8:16 issues 25:3 <hr/> J <hr/> JAMES 1:16 2:3 2:8 3:6 52:1 JEREMIAH 1:18 2:5 27:4 join 46:18 53:1 Judge 46:10 judgments 43:3 judicial 17:20 jump 20:19 jurisprudence 24:7 54:6 Justice 3:3,8 4:1 4:9,10,14,16 4:22 5:1,4,10 5:16,18,22 6:2 6:7,11,23 7:2,6 7:8,11,14,16 7:21 8:2,9,12 8:14,19,20 9:7 9:15,18 10:2,4 10:6,7,10,11 10:13,16,23,25 11:1,4,7,10,13 11:16,16,21,24 12:8,15,18,20 13:3,11,22 |
|---|---|---|--|---|

| | | | | |
|---|--|--|--|--|
| 14:3,9,13,16 15:5,8,10,15 16:2,4,5,21 17:5,6 18:1,24 19:2,12,17,21 20:4,9,17,20 20:22 21:3,13 22:7,14,21,25 23:8,12,16,24 24:12,14,17,20 24:21,25 25:6 25:9,14,20 26:1,5,16,23 27:1,2,6,19 28:5,23 30:4 30:12,18,25 31:15 32:14,22 33:10,24 34:5 34:19 35:6 36:4,10,15,18 37:1,7,9,15,17 37:19 38:7,8 39:6 40:5,17 40:24 41:14 42:3 43:3,9 44:3 45:1,8,16 46:3,13 47:8 47:18,20 48:6 49:19 50:3,5 50:12,19 51:4 51:11,23 52:3 52:22 53:5,6,8 53:10,16,21,22 54:1,14 Justice's 9:18 justified 24:11 justifies 17:10 | 53:22 kind 4:3 18:15 21:6 29:16 37:10 39:12 44:19 50:21 kinds 27:8 31:2 46:4 know 4:16,18 5:25 8:23 9:13 10:22 14:3,8 19:13,14 20:10 23:18 26:17 38:12 39:20 40:20,21 47:14 knowledge 20:6 51:20 knows 9:24 46:25 <hr/> L <hr/> labelled 45:22 labor 3:21 6:22 7:23,24 14:4,6 14:10,10,11 15:20 21:11 49:20 50:1 laid 44:22 language 6:11 larger 13:24 Laughter 10:8 11:12 law 22:6 45:2 lawsuit 19:5 50:13,14,18 lawyer 52:24 lawyers 27:12 27:16 layoffs 42:1 legal 7:22 9:9 27:16 legitimate 18:18 19:4 43:25 45:14 52:15 Lehnert 7:5,6 17:24 18:24 19:10 21:6 22:9 24:16 | 25:5 26:9 28:10,11,20 29:14,16,18 30:3,7,9,9,19 31:9 32:5,5,6 32:20 33:2,3,5 33:17,20,25 34:11,13 35:8 35:23 41:5 43:10 45:6,8 45:14,15 47:5 47:25 48:6,12 48:16,18,21 Lehnert's 25:13 32:4 let's 8:23 16:22 31:15 36:8 38:23 39:1 41:1 librarian 18:10 20:13 24:13,15 24:23 25:2,6 25:15,22,25 light 41:20 line 14:24 21:5 24:1 26:3 lines 53:19 list 44:24 litigation 3:14 3:22,23 4:20 5:11,12,20,23 6:25 7:13 8:6 8:25 9:3 12:12 13:16,20,25 14:4,6,11,22 15:2,2,21 16:11,24 17:24 21:4,8,9,23 22:1,12,23 23:10,20 28:5 31:17,19,22,24 32:18 33:15,21 33:22 34:1,4 34:12,23,24 35:4,13,16,19 36:14 37:3,13 37:21 38:6,10 | 38:11 39:1,4 39:12 41:16,18 45:9 46:1,24 48:19 49:14 52:9,15,19,20 little 40:25 live 47:1 loans 52:8 lobbying 17:18 26:7 local 4:19 9:19 13:14 19:8 26:17 27:14 28:12 30:2,21 31:3,22,23,23 32:11,16 33:14 33:18 36:9 37:3 38:5,24 39:5,8 40:2 41:8,15 42:25 43:17 44:1,10 44:20 46:8 48:5 49:21,25 50:24 51:13 52:8 locals 9:21,23,23 10:18,21 16:11 16:13 29:24 31:6,16,18 33:7 39:17 44:15 local's 28:20 42:16 47:4 Locke 1:3 3:4 logically 49:6 look 31:1 41:1,3 41:4 looking 26:14 47:15 looks 11:15 lose 45:3,5,6 lot 24:19 42:1 43:2 lots 18:11 Lynch 46:10 <hr/> M <hr/> | majority 26:14 making 22:8 38:19 41:7 malleable 47:14 52:17,17 Marbury 22:14 market 10:22 14:12 Marshall 22:14 massive 52:9 matter 1:12 5:12 18:11 37:12 38:9 45:2 54:17 matters 26:13 27:17 mean 6:3 8:22 10:16 11:21 21:7 24:12 30:19 34:1 meaning 7:12 21:9 meaningful 44:13,25 45:21 46:4 means 49:6 54:13 meant 30:24 33:24 measured 28:17 medical 53:1 member 18:8 20:11 51:10,14 52:23 members 17:2 25:21 27:21,22 29:1 30:21 40:2,6 41:12 42:23 43:18 46:14 47:2 50:5 51:2,6,7 membership 29:21 30:22 membership--- 33:6 mentioned 26:2 27:13 |
|---|--|--|--|--|

| | | | | |
|---|--|---|--|---|
| microphones 26:20 | necessary 32:22 33:3,4 35:13 45:3 49:12 | 51:2,7 52:14 52:21 | okay 18:20 21:6 22:18,19 32:25 37:1,10,17 39:10 | 20:2,11 27:12 27:15,24 28:17 31:19,19 32:17 33:7 39:11 42:6 47:2,4 52:24 |
| midterm 41:25 | necessitate 27:10 | nonpolitical 26:13 | open 27:18 30:6 | paying 18:21 42:11 |
| miles 18:10 19:8 | need 9:21 27:15 48:4 51:17 | nonunion 3:12 20:11 25:16 | operate 29:22 42:22 | payment 30:20 31:4,7 42:7,10 |
| minutes 51:25 | needed 32:12 | note 48:10,23 52:4 | opinion 6:4 7:8 30:13 43:10 48:6,6 | payments 31:2,5 |
| mirror 47:11 | needs 8:22 38:6 44:1 46:24 | noted 43:10 | opinions 7:4 | pays 18:5 50:25 |
| misconstrued 34:3 | negative 53:11 | notifies 14:21 | oral 1:12 2:2 3:6 27:4 | people 18:12,13 19:23 28:6 42:1 46:12,17 53:2 |
| misunderstood 10:1,11 | negotiate 22:15 34:14 | notion 30:2 32:9 49:6 | order 15:12,12 49:12 | percent 19:25 |
| Monday 1:10 | negotiated 35:3 | number 16:12 23:18 43:8 49:25 | organization 30:23 | percentage 38:24 40:20 |
| money 13:14 14:1 18:6 25:8 33:8 40:22 46:14,16 47:4 49:21 51:8 53:3 | negotiates 45:12 | <hr/> O <hr/> | outward 26:14 | percentages 40:19 |
| moneys 15:25 | negotiating 22:11,19 34:21 35:11 | O 2:1 3:1 | overtime 14:20 | perfection 38:19 |
| MSEA 4:25 54:6 | negotiation 5:13 5:20 6:4 21:5 22:22 33:18 34:20 35:2 | object 17:3 28:6 38:20 40:10 43:9 | owns 36:9 | perfectly 19:4 51:7 |
| MSEA's 4:22 | neither 14:13 28:3 | objecting 27:11 28:4 36:9 40:6 49:4 | <hr/> P <hr/> | perform 38:18 |
| mulch 15:25 | never 6:24 8:25 19:9 29:2 33:15 | objection 43:12 45:14 | P 3:1 | performance 22:4 24:9 |
| mutual 24:2 | Ninth 15:24 | objective 28:22 28:25 | Pacific 7:22 9:8 | performing 49:16 |
| mutuality 11:25 12:9,16 13:5,8 | Nome 33:14,19 34:14,16,20 35:3 | objectives 42:9 | pact 24:2 | permissible 6:21 31:25 |
| <hr/> N <hr/> | nonaffiliated 38:1 | objector 41:11 42:14 | page 2:2 5:19 | permit 3:11 |
| N 2:1,1 3:1 | nonchargeable 22:1 | objectors 35:11 | paid 39:3 42:16 | permitted 22:16 |
| narrow 22:2 24:6 27:13 | nonmember 24:22 28:22 39:4 41:11 45:13 49:4 51:11,15 | objects 17:7,7 | paragraph 6:14 6:21 | person 19:7 42:5 52:23 |
| narrower 48:7 | nonmembers 3:21 6:24 21:1 24:10 25:19,20 26:22 27:11 28:4 32:1 36:9 40:2 42:23 43:18 47:3 | obligation 8:4 12:1,9,11,17 13:5,9 35:16 35:19 36:20 37:6,9,10,20 37:22 38:13,15 39:18,21,23 | parallel 39:23 | persuasive 16:24 17:21 |
| narrowly 24:8 | | obligations 4:24 | parent 8:3,5 12:10,11 30:22 38:10 39:16 | petition 29:12 |
| national 4:4,5 4:20 28:19 31:7,11 32:9 33:9 36:2 37:18 40:3 41:4,15,22,23 42:4,8,9,18,21 42:25 43:5,19 44:14 46:6,15 47:5 49:21 51:1,13,14 | | obviously 7:15 15:7 17:20 28:15 47:14 | part 8:5 18:1 20:15 31:3 34:16,18 | petitioners 1:4 1:17 2:4,9 3:7 29:9,18 30:9 34:24 48:24 52:2,6 |
| nature 3:13 12:7 12:24 19:16 21:16 42:21 44:12 46:6 | | occur 22:22 | participating 25:16 | Petitioner's 47:9 48:16 |
| nearly 9:21 | | occurred 43:7 | particular 8:22 8:23 18:8,15 18:19 23:3,6 23:12,14,23 34:25 36:20 40:22 42:25 43:17 53:14 | piling 41:7 |
| | | October 1:10 | party 14:24 | place 18:19 20:7 |
| | | | pay 6:25 19:5 | |

| | | | | |
|---|--|--|---|---|
| <p>33:19 39:12 plainly 33:17 plaintiff 25:7 plant 33:13 play 49:12 plea 40:3 please 3:9 27:7 pluralities 19:11 plurality 7:7 48:18 point 6:13,13 9:8 10:14 11:24 13:6,12 13:13 16:7 17:4 20:21 21:23 22:17 35:21 37:13 38:8 39:17 42:2 54:3 pointed 46:10 pointing 10:10 policies 11:22 policy 8:16 9:25 10:17 11:3 39:8 political 3:13 12:7 19:16,22 21:16 24:11 53:6,11 politics 18:7,19 19:4,6,17,20 49:22 pool 13:24,25 29:1,2 31:11 34:17 45:12 pooled 45:15 47:23 48:9 pooling 4:7 5:2 5:5,8 21:6 22:10,18 29:19 30:10 44:5,7 45:17,20,22,23 45:25 47:24 48:8,14,20 52:12 pools 33:8 population</p> | <p>19:25 portion 46:17 posed 16:9 posit 18:25 position 8:15 14:17 28:25 31:20 38:9 47:9,11 53:23 positions 54:2 possible 43:6,8 44:12 possibly 36:14 43:9 45:4,21 post 29:13 postulate 51:5 potential 31:12 42:15 practice 21:11 39:8 practices 30:16 precedent 44:19 precisely 29:10 35:18 predictability 52:13 predictable 51:12 predictions 52:5 premise 9:6 13:4 35:7,9 premiums 7:17 8:22 9:2 13:19 presented 27:13 33:2 43:22 48:3,13 presents 41:20 pressing 44:21 presumably 7:25 35:12 presumptive 21:24 prevent 15:6 principal 7:4 principled 33:22 54:1 prior 38:25 40:19</p> | <p>priorities 41:25 problem 12:23 29:10,12 30:10 42:24 problems 3:21 29:7 44:21 proceedings 3:25 5:25 profit 41:7 program 18:13 26:10 prohibit 18:23 prohibited 25:8 prohibiting 52:12 prohibits 18:20 promote 15:12 prongs 48:11 properly 41:22 41:23 prophylactic 43:14 51:17,19 proportional 11:3 proposition 28:12 protect 15:13 42:1 protects 15:18 provide 33:13 34:12 39:5 40:22 41:8 43:17 44:14 50:11 provided 40:1 41:10 43:11 47:23 provides 32:11 43:16 47:6 providing 31:10 51:22 provision 14:19 33:11,19 34:6 45:13 pro-ration 25:21,22 public 3:11,13</p> | <p>12:4,6,7 14:18 16:1 17:18,25 19:16,16 21:15 21:16 22:2,3 22:23 24:10,11 24:11 25:1,2 25:15,24 26:2 26:7,10,24 purpose 19:7 32:3 put 29:22 50:6 putting 41:7 p.m 54:16</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>question 3:17 4:9,15 9:7,19 10:12 11:5,9 27:13 28:1 33:2,20 37:11 43:3,13 45:9 46:5 47:20 48:3,10,13 quite 10:23 14:9 16:21 36:7,18 43:6 quoting 5:18,19 6:3</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 3:1 race 50:17 radically 9:11 Railway 3:21 6:22 raised 5:8 20:22 29:11,11,13,15 30:8 38:9 range 29:19 54:11 rate 9:10,12 13:9,12 36:24 rates 10:22 14:5 rationale 17:10 32:4 readily 52:7 real 7:14 42:24</p> | <p>51:16 reality 38:3 really 4:18,18 26:18 42:21 44:7,9 45:18 45:23 48:25 reason 7:9 29:14 36:25 40:4 43:1,24 44:9 50:22 51:12 reasonable 39:9 reasonableness 54:11 reasoning 19:14 20:4,16 reasons 32:20 REBUTTAL 2:7 52:1 recall 54:4 receive 50:25 receiving 7:24 recognized 7:7 12:25 reconsidering 48:21 record 11:2 14:15 29:25 43:22 refer 39:9 referred 6:15,16 6:17,19 24:25 29:20 31:2 reflected 30:12 refuses 17:16 reg 49:19 regard 6:12 17:24,25 30:5 36:7 regarding 26:12 regardless 37:21 regulation 50:2 rejected 5:6 relate 6:8 27:24 related 22:3,4 24:8 27:17 relates 33:22 37:12</p> |
|---|--|--|---|---|

| | | | | |
|---|-----------------------------|-------------------------|--------------------------|--------------------------|
| relations 8:24 17:18,25 26:7 | reserve 26:10,25 | 40:5,24 45:1,8 | separate 30:13 | sis 28:2 |
| relationship 10:15 12:24 17:19,23 28:16 29:24 30:14 32:7 35:25 50:9 | resisting 44:6 | 51:4,23 53:10 | 36:14 48:1,5,6 | situation 23:20 |
| relevant 20:8 | resources 27:18 | 53:21 54:14 | separates 13:7 | 28:21 29:16 |
| rely 4:21 6:14 27:17 28:15 46:8 | 28:15 31:11 | role 49:12,13 | service 13:15 | 33:11 38:1,22 |
| remedy 49:25 | 32:12 46:9,23 | rule 5:7 7:10 | 30:20 40:23 | 48:25 |
| 50:3,21 | respect 14:6 | 16:17 27:10 | services 17:16 | situations 50:9 |
| remember 38:17 | 23:21 38:6 | 36:25 43:14,16 | 17:17 27:12,15 | solace 28:24 |
| rendered 42:12 | respectfully 4:8 | 49:19 51:17,19 | 29:25 31:12,13 | 29:8 |
| reply 29:10 30:8 | 24:5 | 52:5 | 32:11 39:25 | solely 27:17 46:8 |
| represent 46:12 | Respondents | ruling 33:23 | 40:12 41:8,11 | 46:9 |
| 54:10 | 1:19 2:6 27:5 | | 41:12 42:11,14 | solicitor 29:17 |
| representation 36:8 39:24 | response 53:22 | S | 42:15 43:1,11 | solid 6:9 |
| 49:18 54:8 | responses 46:2 | S 2:1 3:1 | 43:18 44:14 | solution 47:3 |
| representatio... 49:17 | responsible 39:25 | satisfied 47:21 | 47:22,23 50:11 | solve 29:16 |
| representative 6:18,18,19 | restrictive 54:12 | satisfy 31:13 | 50:25 51:13,22 | someplace 31:16 |
| 21:2 49:5,8 | result 3:18 | saying 6:2 22:18 | set 5:6 12:3 14:5 | sorry 10:1,4 |
| represented 27:11 | 31:18 | 23:4 24:22 | 43:20 44:12 | 15:16 16:4 |
| requested 39:4 | results 26:11 | 38:8 40:25 | setting 9:10,11 | 21:13 23:8 |
| require 29:18 | rethink 25:1 | 41:1 44:9 45:4 | 10:22 13:9,12 | 30:5 |
| required 6:25 | return 32:18,24 | 50:12 | 36:25 | sort 39:15 47:10 |
| 12:11 17:15 | 32:25 | says 9:19 28:10 | share 27:12 | Souter 7:11,14 |
| 27:9,17 31:7 | ride 28:3,10 | 34:7,8,13,13 | 39:11 | 7:16,21 8:2,9 |
| 32:17 | rider 17:10,12 | 40:19 43:15 | shared 51:1 | 8:13,14,19 |
| requirement 31:14 38:3 | 17:14,15 | 49:20 52:23 | sharp 20:22 | 12:8,15,19,20 |
| 40:10 45:3 | riders 52:14 | 53:1 | sheep 13:7 | 13:3,11,23 |
| 53:12 | riding 28:8,9 | Scalia 4:1,9,10 | shield 15:11 | 14:3,9,13 26:1 |
| requires 27:10 | right 12:17 | 4:14,16,22 7:8 | shop 13:1 17:10 | 26:6,16,23 |
| 33:12 34:7 | 15:17,19,20,23 | 9:15,18 10:2,6 | 18:5 52:24 | 35:6 36:4 37:1 |
| 51:19 | 17:4 18:3 | 10:11 20:9 | show 43:23 | 37:7,9,15,17 |
| requiring 28:21 | 22:15 29:1 | 42:3 46:13 | 53:13 | 37:19 38:7 |
| research 18:11 | 30:3 35:2 | Scalia's 30:12 | showed 11:2 | 39:6 |
| researching 25:2,7 | 36:21,22 37:13 | 43:10 48:6 | showing 29:17 | so-called 35:15 |
| | 37:15 40:9,11 | scheme 4:3 | 30:1 | speak 15:23 |
| | 43:9 49:3 | scrutiny 24:7 | side 24:17 47:12 | special 32:2,13 |
| | 50:12,22 51:5 | 54:6 | 47:13,19 | specific 6:11 |
| | 53:2,5,7 | second 29:12 | sides 24:19 | 14:9 16:18 |
| | rights 13:2 | 42:2 | significance | 23:9 32:3 |
| | 15:13 40:7,15 | see 5:9 14:24 | 26:2 37:4 | 48:18 51:21 |
| | rise 9:2 | 15:14 17:6 | similar 36:21 | specifically 3:14 |
| | Roberts 3:3 8:20 | 22:17 42:20 | simply 19:22 | 7:7 |
| | 10:5 11:10 | 47:15 | 25:10 27:21 | specificity 6:15 |
| | 22:25 23:12,16 | seeing 50:24 | 29:3,20 38:4 | speech 3:13 12:6 |
| | 27:2,19 28:5 | seek 15:25 | 38:23 40:13,19 | 12:6 13:20,20 |
| | 28:23 30:4 | sees 15:18 | 44:11 48:9,23 | 16:1 18:7 |
| | 33:10,24 34:5 | SEIU 4:23 | single 6:20 | 19:16,22,23,24 |
| | 34:19 36:10,18 | sends 51:14 | 27:13 | 20:7,23 21:15 |
| | | sense 13:9 39:24 | sir 14:15 16:7 | 22:3 24:8,10 |

| | | | | |
|--|---|--|--|---|
| 24:11 25:1 26:15,24 52:9 53:20 54:5 spelled 35:18 spending 25:8 spends 49:21 spoke 35:23 spread 14:1 Springfield 1:16 squarely 16:17 stand 6:23 standard 7:3,4 8:17 32:15,23 35:15 39:15 40:14 44:15 45:15,20 47:13 52:18 54:12 standards 30:11 43:21 44:6,13 46:5 51:22 52:13 start 13:3 started 44:9 State 1:6 16:9 18:14 States 1:1,13 17:14 statewide 14:17 stating 7:9 status 48:20 statutory 48:7 48:12,24 49:3 stems 49:4 step 37:25 38:17 Stevens 10:16 10:23,25 11:4 11:7,13,16,21 11:24 20:17,20 24:12,17,20,21 25:6,9 Street 17:11 strict 24:6 54:5 strike 18:14 stringent 40:25 structure 29:21 subject 5:12 54:5,7,7 | submission 47:25 submissions 32:8 submit 3:17 submitted 54:15 54:17 subsidization 29:4 subsidize 3:12 3:22 7:17 13:16,19 14:25 17:16 19:23 20:12 28:22 31:21 52:19 subsidized 13:15 subsidizing 4:2 4:11 such-and-such 41:16 sudden 41:24 suggest 14:15 24:5 53:4 suggested 52:5 54:6 suggesting 15:19 16:14 suit 14:18 17:2 sunshine 26:18 supplied 40:18 support 16:10 20:15 27:22,23 33:14,18 34:1 35:10,13,16,19 36:5,11,13 37:2,3,13,21 37:22 38:10,12 38:20,21 46:21 supported 3:18 suppose 14:5,17 18:5 23:16,20 31:15 44:17 Supreme 1:1,13 sure 11:13 14:11 24:13 25:12 26:3 34:19 | sustain 49:6 sustained 54:11 swear 19:18 sword 15:11,12 system 46:7 <hr/> T T 2:1,1 take 7:11,12 8:15 37:25 38:9,17 39:12 46:25 taken 13:14 takes 20:7 49:21 talk 32:12 talked 29:23 talking 12:6 18:4 19:15 21:7 25:10 27:20 39:15 40:5 42:22 46:16 talks 31:5 32:6 33:7 teacher's 26:9 teaches 28:20 tell 19:12 25:14 telling 45:19 term 21:9 terms 17:18 23:21 39:7 42:19,23 test 12:3 24:16 25:13 44:22,23 45:4 47:15,21 47:24 48:1,2,4 48:8,12,16,21 48:24 49:1,2,3 53:10,12,17,19 54:6 tests 48:10 Thank 16:7 27:2 51:23 52:3 54:13,14 theater 26:19 theory 44:4 they'd 25:18 | thing 6:7 7:23 18:23 22:8 28:10 41:22,23 42:4 44:16,19 things 26:7 38:21 44:12,17 45:19 49:7,11 49:13,14 51:16 think 4:21 6:13 6:13 7:15,21 9:5,6,7 10:20 11:5,6,17 12:4 15:8 16:11,16 20:21 21:24,25 22:13 24:1,4 24:15,24 25:1 25:5,12 26:5 29:14,15 32:3 32:19,20 33:25 34:10 36:10,12 39:22 41:16 43:23 51:7 52:4,10 54:3 thinking 16:25 thinks 33:12 third-party 7:25 thor 28:24 thoroughly 9:8 thought 5:10 20:15 22:25 23:4,6,9 33:24 thousand 36:12 three 29:7 tick 44:17 time 10:17 27:1 29:9 31:20 times 6:20 26:1 totally 18:17 19:6 tote 28:18 touchstone 19:10 treat 7:9 40:1,8 40:13 43:5 treated 26:13,15 38:5,6 treating 42:25 | treatise 32:8 treatment 44:16 trouble 38:7 true 11:25 13:9 13:17 14:4 38:16 52:20 trust 40:7,13,25 try 44:16 trying 6:10,11 10:2 11:10 15:6 38:17,19 twice 6:18 two 16:12,22 25:14,15 32:20 40:16 44:10 46:2 48:11 53:25 type 10:14,23 34:1 41:5 typical 32:7 33:5 33:7 41:4 <hr/> U ultimately 14:23 30:21 52:17 unaffiliated 36:8 43:17 unambiguous 3:19 unanimous 3:18 uncommon 23:20 understand 13:13 14:16 15:9 16:2,8 18:2,2 21:4 22:7 24:21 39:14 40:8 41:6 44:5 50:23 understanding 15:8 understood 29:15 underway 16:24 unenforceable 52:18 |
|--|---|--|--|---|

| | | | | |
|---|---|---|---|---|
| unexpected 41:24 | 36:25 42:22,25 43:19 44:2,14 46:7 51:6 52:7 | 42:13 | wide 29:19 37:4 54:11 | 0 |
| unfair 21:11 51:9 | union's 3:12 17:16 22:3,5 24:8 35:16 49:3 54:7 | various 32:8,10 36:3 | win 41:20 | 07-610 1:5 3:4 |
| unfairly 43:1,6 | unit 3:16,23 6:20 7:18 8:6 8:22,23 9:3 16:19 21:14 23:3,6,13,14 23:22,23 27:21 28:2,6,14,20 28:25 33:25 34:16,22,25 35:5,17,20 36:20 37:3 47:22 53:19 | vehicle 41:17 | wishes 46:16 | 1 |
| Unfortunately 53:8 | United 1:1,13 | verb 15:1 | word 47:15 | 11:08 1:14 3:2 |
| unified 29:21 33:6 | units 21:21 23:18 28:19,22 34:17 36:3,12 37:5 | view 8:2 36:1 51:11 53:7 | words 6:3 15:24 | 12:08 54:16 |
| union 4:4,5,19 4:20 7:12,23 7:24 8:4 12:10 12:11 13:15,21 13:25 14:10,18 14:21,25 15:4 15:11,17 16:9 16:25 17:1,2,3 17:8,8 18:5,6,9 18:14,18,21,22 19:6 20:12,15 20:25 21:1,15 22:6,15 23:3 25:3 26:12,17 28:12,19 29:20 30:2,22 31:3,7 31:11,22,24 32:9,16 33:4,9 33:12 34:7,13 35:10,10,12 36:2,9 37:18 38:10,24 39:5 40:2,3,22 41:4 41:6,22,23 42:4,6,8,18 43:5,17,23 44:10 45:6,12 46:8,14,17,18 46:20 49:10,12 49:16,21 50:5 50:10,15,16,20 50:24 51:8,13 51:14,19,20 52:23,24 53:13 | unpredictable 52:17 | violate 8:16 | world 42:25 51:16 | 2 |
| unions 4:6 13:16 15:20 20:13,14 25:16 27:23 29:22 32:11 | unity 40:2 | violated 50:15 | wouldn't 4:2 22:16 44:24 | 20 9:1 2008 1:10 27 2:6 |
| | unit's 3:24 5:24 28:7 | violation 21:12 | wrong 6:3 | 3 |
| | unrealistic 45:18 | virtual 43:24 | X | 3 2:4 |
| | unrelated 21:8 | virtue 30:22 | x 1:2,8 | 4 |
| | unspoken 35:7,9 | voice 26:9 | Y | 4,000 18:10 42 19:18 432 49:25,25 453 5:19 |
| | unusual 16:15 | W | year 38:25 39:2 39:2,13,13 40:20,21 41:1 51:12,12 | 5 |
| | unwilling 15:25 | W 1:16 2:3,8 3:6 52:1 | years 9:1 | 50 44:17,24 52 2:9 |
| | uprising 18:14 | wait 41:19 | year's 40:19 | 6 |
| | use 15:1,12 40:19 46:14 47:16 | want 6:23 14:16 15:1 19:12,13 19:14,23 20:12 24:13 27:23 34:14 35:23 39:20 41:12,18 42:2 46:18 | Young 1:16 2:3 2:8 3:5,6,8 4:8 4:13,21 5:3,10 5:15,22 6:6,10 7:2,14,20 8:7 8:11,18 9:5,17 10:1,4,9,20 11:4,15,23 12:14,18,22 13:8,22 14:8 14:14 15:3,7 15:15 16:4,7 17:5,9 18:24 19:9,15 20:3 20:19 21:13 22:13 23:8,14 23:24 24:15,19 24:24 25:9,18 25:24 26:5,23 28:11 51:25 52:1,3 53:4,8 53:16,25 | 9 |
| | uses 18:6 | Washington 1:9 1:18 25:3,4 | | 99.999 19:25 |
| | usual 40:14 | wasn't 4:17 31:7 | | |
| | V | wasted 53:3 | | |
| | v 1:5 3:4 | wastes 49:23 | | |
| | Va 1:16 | way 18:6 33:21 33:22 37:24 42:19,20 44:14 44:25 45:19,23 46:14 49:5,22 51:1 | | |
| | vacuum 32:6 | went 38:25 | | |
| | value 21:25 | we'll 40:7,13,20 41:1 44:17,18 we're 12:6 14:21 21:7 22:18,20 we've 37:11 41:23 | | |
| | | whatsoever 49:23 | Z | |
| | | | zero 49:23 | |