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June 18, 2008

By First Class Mail & FAX

The Honorable Elaine L. Chao
Secretary of Labor
United States Department of Labor
Francis Perkins Building
200 Constitution Ave., N.W.
Washington, DC 20210

Re: *Locke v. Karass*, 128 S. Ct. 1224 (cert. granted Feb. 19, 2008) (U.S. No. 07-610)

Dear Madame Secretary:

In *Locke v. Karass*, National Right to Work Foundation attorneys represent twenty nonmember Maine state employees who are forced, as a condition of their employment, to pay union fees to the Maine State Employees Association, an affiliate of the Service Employees International Union ("SEIU").

In *Locke*, the United States Supreme Court will decide whether a State may constitutionally condition public employment on nonmembers' payment of union fees that subsidize litigation—petitioning of government, a core First Amendment activity—that does not even concern their own place of employment.

Based on Supreme Court precedent, the answer to that question should be clearly "No."

The Supreme Court has already held that such "extra-unit litigation" is lawfully not chargeable to nonmembers under the Railway Labor Act ("RLA") in *Ellis v. Railway Clerks*, an earlier Foundation-supported case. 466 U.S. 435, 453 (1984).

Further, in *Lehnert v. Ferris Faculty Association*, another Foundation case, a four-Justice plurality opinion explicitly applied that *Ellis* holding to public employees under the First Amendment, because of "the important political and expressive nature of litigation." 500 U.S. 507, 528 (1991) (opinion of Blackmun, J.). Moreover, Justice Scalia's separate opinion in *Lehnert* implicitly agreed, by quoting *Ellis*' holding on extra-unit litigation and concluding that "there is good reason to treat [*Ellis*] as merely reflecting the constitutional rule." *Id.* at 555.

Nonetheless, on May 12, 2008, the United States Solicitor General and the Solicitor of the Department of Labor filed a Brief for the United States as Amicus Curiae that argues that unions may constitutionally use compelled fees for litigation not involving their bargaining unit.

That your Department would file a brief effectively supporting the unions in *Locke* is inexplicable, given your oft-stated commitment to the principle established in *Communication Workers v. Beck*, the Foundation's most famous case, that the National Labor Relations Act, like the RLA, "authorizes the exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'" 487 U.S. 735, 762-63 (1988) (quoting *Ellis*, 466 U.S. at 448).

Our surprise and disappointment are only increased because we fail to see what conceivable interest your Department had in filing a brief in *Locke* that not only put you in opposition to the National Right to Work Legal Defense Foundation and Petitioner nonmember Maine state employees, but also in opposition to the Pacific, Northwestern, Southeastern and Atlantic Legal Foundations, National Federation of Independent Business Small Business Legal Center, and Mackinac Center for Public Policy, which filed a joint amicus brief supporting the nonmembers that unknowingly, but fortuitously, anticipated and rebuts your Department's argument.

Moreover, no federal agency is a party to *Locke*, no federal statute is at issue, neither the Court nor the Petitioners asked the Government to file a brief, and certainly the Bush Administration had no political reason for pleasing SEIU, which has been a constant and fierce critic and opponent of your Department's initiatives.

The Department's brief erroneously contends that *Ellis* is not controlling in *Locke*, because "*Ellis* addressed only the question whether objectors in one unit can be required to support other units' litigation, without addressing the pooling question presented here." U.S. Brief at 21.

To the contrary, in *Ellis*, the national affiliate, the Railway Clerks Grand Lodge, was itself the exclusive bargaining agent for the nonmembers' bargaining unit and negotiated, executed, and administered the bargaining agreement covering them. Respondents' Brief at 1, 25-27, *Ellis* (No. 82-1150); *see Ellis*, 466 U.S. at 439; *cf. Lehnert*, 500 U.S. at 560 (Scalia, J.) ("The conventions at issue in *Ellis* . . . were those of the union-bargaining agent *itself* . . . ."). Thus, unlike the SEIU in *Locke*, the national affiliate in *Ellis* owed a duty of fair representation to the employees in the local unit to engage in litigation for that unit concerning bargaining and contract administration—in short, the "pooling arrangement" in *Ellis* was more "bona fide" than that in *Locke*. Moreover, the "pooling" argument that your Department makes in *Locke* was also made by the unions in *Ellis*. Respondents' Brief at 39 n.24, 40-41, *Ellis*. Yet, the *Ellis* Court categorically and unanimously held that extra-unit litigation is not lawfully chargeable under the RLA to avoid constitutional questions.

To be blunt, Madame Secretary, did you authorize the filing of a brief in *Locke* by your Department? If you did, did you know that the brief would argue that nonmembers can constitutionally be forced to subsidize union litigation not involving their bargaining unit? Was the White House consulted about what the brief would argue before it was filed?

Given the considerations outlined above, we urge you to ask the White House to order the Solicitor General to withdraw the United States' brief before *Locke* is argued on October 6, 2008.

Sincerely,

Mark A. Mix