

IN THE SUPREME COURT OF THE UNITED STATES

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No. 07-610

DANIEL B. LOCKE, ET AL., PETITIONERS

v.

EDWARD A. KARASS, STATE CONTROLLER, ET AL.

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

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MOTION OF THE UNITED STATES FOR LEAVE TO  
PARTICIPATE IN ORAL ARGUMENT AS AMICUS CURIAE  
AND FOR DIVIDED ORAL ARGUMENT

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Pursuant to Rules 21 and 28 of the Rules of this Court, the Acting Solicitor General, on behalf of the United States, respectfully moves that the United States be granted leave to participate in oral argument in this case. The United States has filed a brief as amicus curiae in support of neither party, advancing a position that differs in certain respects from the positions advanced by both parties. The United States requests ten minutes of the 60 minutes of argument time allotted to this case.

The United States suggests that the remaining 50 minutes be divided equally between petitioners and respondents. Granting this motion therefore would not result in an enlargement of argument time. Petitioners and respondents oppose this request.

The question presented in this case is whether or to what extent a public-sector union may, consistent with the First Amendment, charge nonmembers for litigation funded through a pooling arrangement with other unions. The United States has a substantial interest in the correct resolution of that question.

The Secretary of Labor is responsible for advising the President with respect to national labor policy and carrying out Congress's purpose "to foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment." 29 U.S.C. 551. In addition, questions concerning the chargeability of litigation expenses to nonmembers arise under the National Labor Relations Act (NLRA), which is administered by the National Labor Relations Board (NLRB). The MSEA and the concurring opinion below rely on NLRA precedents, including decisions of the NLRB. Resp. Br. 28-29 n.14, 35-36 n.19; Pet. App. 38a. While the United States submits that questions arising under the NLRA are distinguishable because that Act does not involve state action on this issue, this Court has reserved that question. U.S. Br. 14-15 n.3. The United States has participated at oral argument in other

litigation presenting constitutional questions concerning nonmembers' compelled fees. E.g., Davenport v. Washington Educ. Ass'n, 127 S. Ct. 2372 (2007).

The United States' position in this case differs in certain respects from the positions advanced by both parties. Petitioners are state employees who, under state law and their employer's collective bargaining agreement, must pay a service fee to a union they chose not to join. They assert that the First Amendment bars the union from charging them for the costs of other units' litigation activities. Pet. Br. 11-13. The United States' brief agrees with that contention. U.S. Br. 8-14. Petitioners further assert that the First Amendment precludes their union from charging them for the costs of participating in a pooling arrangement -- i.e., an arrangement in which multiple affiliated unions contribute to a pool and the pool in turn provides litigation services for the units. See Pet. Br. 13-14, 21-22. The United States' brief disagrees with that contention and argues that a bona-fide pooling arrangement is a legitimate way for a unit to fund its own germane litigation, analogous to an insurance policy. U.S. Br. 15-24.

As the United States' brief explains, however, a bona fide pooling arrangement must require that each participating unit pay its fair share of the costs and have a reasonable assurance that, when needed, the pool will assist with its litigation; otherwise, in the United States' view, the pool would be an impermissible

vehicle for some units to subsidize other units' litigation with compelled fees. Id. at 24-28. Because the parties did not litigate this case under that legal standard, the United States' brief suggests that this Court remand the case for further proceedings. Id. at 28-29 & n.4.

Respondent Maine State Employees' Association, SEIU Local 1989, Service Employees International Union (MSEA), represents petitioners' bargaining unit. (The other respondents, who are state officials, have not filed a brief in this Court.) MSEA agrees with the United States that nonmembers may be charged for litigation pooling arrangements. Resp. Br. 13-40. MSEA disagrees with the United States, however, about what constitutes a legitimate pooling arrangement for that purpose, and whether this Court should reach that issue. Id. at 40-46. Contrary to the United States' view, MSEA argues that, if a national union has a unified membership structure, members of an affiliated unit may be charged for funds paid to the national union for litigation purposes even if the national union uses the money for other units' litigation and even if the national union has not provided the unit with any reasonable assurance that the pool will pay for the unit's own germane litigation. Id. at 42-43.

Because participation in oral argument by the United States will provide the Court with the government's unique perspective on the question presented (not shared by either party), the proposed

division of argument time will materially assist the Court in its consideration of this case.

Respectfully submitted.

GREGORY G. GARRE  
Acting Solicitor General  
Counsel of Record

JULY 2008