

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: JAMES P. LEHNERT, ET AL., Petitioners
v. FERRIS FACULTY ASSOCIATION, ET AL.

CASE NO: 89-1217

PLACE: Washington, D.C.

DATE: November 5, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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JAMES P. LEHNERT, ET AL., :
Petitioners :
v. : No. 89-1217
FERRIS FACULTY ASSOCIATION, :
ET AL. :

----- X
Washington, D.C.
Monday, November 5, 1990

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:05 a.m.

APPEARANCES:

RAYMOND J. LaJEUNESSE, JR., ESQ., Springfield, Virginia;
on behalf of the Petitioners.
ROBERT H. CHANIN, ESQ., Washington, D.C.; on behalf of the
Respondents.

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 89-1217, James Lehnert v. Ferris Faculty.

Let's try to move along, Mr. Kneedler.

Mr. LaJeunesse, you may proceed whenever you're ready.

ORAL ARGUMENT OF RAYMOND J. LAJEUNESSE, JR.

ON BEHALF OF THE PETITIONERS

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

Professor Jim Lehnert and his fellow petitioners in 1981-82 were nonunion faculty members at Ferris State College, a 4-year institution of higher education in the State of Michigan. They were compelled by the college to pay as a condition of their employment a service fee to their exclusive bargaining representative, the Ferris Faculty Association. The lower courts, with Justice Merritt of the court of appeals vigorously dissenting as to all but one activity, held that Professor Lehnert and his colleagues' First Amendment rights were not violated when those service fees were used for certain activities of the association and at State and national affiliates, the Michigan and National Education Associations.

Two basic questions are before the Court.

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1 First, may Professor Lehnert and his colleagues be
2 required to subsidize financially activities which are not
3 conducted on behalf of their bargaining unit but on behalf
4 of individuals elsewhere in other bargaining units in
5 Michigan and in other States, on behalf of employees who
6 are not faculty members in higher education but teachers
7 in kindergarten through 12th grade, educational support
8 personnel, or nurses.

9 The second major issue is whether Professor
10 Lehnert and his nonunion colleagues can be required to
11 support financially political and ideological activities
12 that are not part of the bargaining process anywhere.

13 What activities are we talking about? Most of
14 the activities at issue on this appeal both do not concern
15 the Ferris bargaining unit and are not integral to the
16 bargaining process anywhere. For example, two of the
17 primary expenditures at issue are the costs of millage
18 campaigns to increase millage property taxes and lobbying
19 against State legislation that would have provided
20 property tax relief.

21 Ferris State College receives not 1 cent from
22 millages or from property taxes, so therefore, Ferris
23 State College was not affected by these activities at all.
24 The only effect on Professor Lehnert and his colleagues
25 was as competitors for scarce public resources, and if

1 they lived in the district where the taxes were raised,
2 their taxes went up. They're affected as taxpayers.

3 Another example of an issue or an activity in
4 this category was the study that the National Education
5 Association conducted of school finance in Arizona. That
6 had to be a political and ideological activity and it
7 wasn't related to Ferris State College because Arizona did
8 not even permit collective bargaining for educational
9 employees at the time in question.

10 QUESTION: Why do you say it had to be a
11 political or ideological activity?

12 MR. LaJEUNESSE: It could not be part of the
13 political bargaining process in Arizona, because
14 bargaining was prohibited by the State of Arizona for
15 educational employees.

16 QUESTION: Well, so, you define any political
17 and ideological as meaning any activity that does not
18 accrue to the benefit of the bargaining unit?

19 MR. LaJEUNESSE: No, Your Honor, political and
20 ideological is any public advocacy or dealing with
21 Government outside the bargaining process, petitioning of
22 government speech and association.

23 QUESTION: Well, I thought this was just a study
24 out in Arizona?

25 MR. LaJEUNESSE: It was a study of school

1 finance, and school finance in Arizona was accomplished
2 only through legislation, not through bargaining.

3 QUESTION: Well, I would think your argument
4 would be, not that that was political or ideological, but
5 since it didn't benefit the members of the bargaining unit
6 it was no good. I would think there's a category of
7 things --

8 MR. LAJEUNESSE: Our argument, Your Honor, is
9 that it's both. It neither concerned this bargaining unit
10 nor was it part of the bargaining process anywhere.

11 QUESTION: But if, if one sets out to do a
12 neutral study that just doesn't have much to do with what
13 the person is at, I would not think that's political or
14 ideological. I think it's more better defined as
15 something that is, is not perhaps germane to the
16 bargaining process.

17 MR. LAJEUNESSE: Your Honor, I think it related
18 to the question of taxes and educational appropriations in
19 the State of Arizona as well as being outside the
20 bargaining unit in this case.

21 QUESTION: May I, may I just ask you a little
22 more about this millage point? Supposing the lobbyists
23 for the national union sought more money for faculty
24 salaries in colleges. They either wanted a minimum wage
25 or just wanted more appropriations to expand the faculties

1 and new curricula and so forth. Would you say that was
2 permissible or impermissible?

3 MR. LaJEUNESSE: Impermissible, Your Honor.

4 QUESTION: Because it's --

5 MR. LaJEUNESSE: It's outside the bargaining
6 process. It's an activity which is at the core of the
7 First Amendment as equally as the support of candidates
8 for public office, as this Court said in Meyer v. Grant.

9 QUESTION: So, so you really don't rely
10 particularly on the fact that the millage happened to be
11 for grammar schools and so forth rather than colleges?

12 MR. LaJEUNESSE: Well, Your Honor, I'm saying
13 that there's a bright-line test --

14 QUESTION: I mean, your argument -- let me put
15 this way. Your argument on that point is much like your
16 argument on anything outside the bargaining unit is
17 impermissible. I mean, you know, conventions and for the
18 national organization and the like.

19 MR. LaJEUNESSE: Your Honor, I think there's a
20 bright-line test. There are two standards which this
21 Court has consistently applied and which in fact are the
22 -- based on a statute, and that is if an activity is
23 either outside the bargaining process or does not concern
24 the bargaining unit then it's not within the governmental
25 interest that this Court has found to underlie a

1 constitutional agency shop.

2 The governmental interest which this Court found
3 to underlie a constitutional agency shop in Abood, which
4 involved the same statute that's at issue here, are the
5 same interests that the Court has found with regard to the
6 Federal labor statutes in the cases from Hanson through
7 Beck and that is to advance labor peace within the
8 bargaining units by having one bargaining agent to make --
9 make and enforce a single contract for the employees in
10 that unit to prevent the conflict which would arise if you
11 had more than one representative trying to represent the
12 employees in the same unit.

13 And secondly to avoid the risk of the free
14 rider, the employee who doesn't join the union and is not
15 paying his pro rata share of the costs of the statutory
16 functions which the union as bargaining representative
17 performs for the employees in that bargaining unit in
18 making and enforcing the labor contract.

19 So both of those interests come back to that
20 dual bright-line test.

21 QUESTION: Well, Mr. LaJeunesse, I'm not sure
22 that Abood drew a so-called bright-line test for public
23 sector employees. The argument made on the other side is
24 that multi-unit unions effectively strengthen the local
25 bargaining unit and that it's just like buying an

1 insurance policy and spreading the risk that those
2 expenses outside the bargaining unit can strengthen the
3 local unit as the need occurs locally. How do you answer
4 that?

5 QUESTION: Justice O'Connor, two answers.

6 First, the argument that the local is strengthened by the
7 activities elsewhere is the same argument the railway
8 clerks' union made in the Ellis case for organizing --
9 compelling support of organizing and compelling support of
10 litigation concerning bargaining -- other bargaining
11 units, and the Court rejected it in Ellis. The Court
12 established a standard which says that what is chargeable
13 is only those activities that are part of the performance
14 of the statutory functions of representing the employees,
15 in dealing with the employer on labor management issues.

16 QUESTION: Or germane -- not part of. It
17 doesn't have to be part of, does it?

18 MR. LAJEUNESSE: Germane -- the definition of
19 germane under both law and --

20 QUESTION: But anyway it has to be germane --

21 MR. LAJEUNESSE: Germane is closely related,
22 Justice White.

23 QUESTION: It has to be germane to the services
24 under the particular bargaining contract.

25 MR. LAJEUNESSE: That's correct.

1 QUESTION: And the particular unit.

2 MR. LaJEUNESSE: Germane and closely related,
3 Your Honor.

4 And the second answer to Justice O'Connor's
5 question is that affiliation is not an insurance policy.
6 It's not a service contract. There is no legally
7 enforceable contract between the local and the State and
8 national organizations which specifies as service
9 contracts do and as insurance policies do what services
10 will be provided, what specific services will be provided.

11 QUESTION: If there were --

12 MR. LaJEUNESSE: The contingencies --

13 QUESTION: -- would it make a difference?

14 MR. LaJEUNESSE: If -- if you had a legally
15 enforceable contract spelling out the bargaining services
16 that had to be provided and when they had to be provided,
17 and you had the allocation necessary to separate -- and
18 this is the second distinction between the service
19 contract and affiliation -- if you had the necessary
20 recordkeeping to separate out the nonbargaining functions
21 of the union, then the answer might be that the costs
22 would be chargeable. But it would be costs that the union
23 approved, actual costs that there was a basis in actual
24 costs for the charge.

25 But this Court has said in the cases beginning

1 with Street not that affiliation itself is a cost of
2 collective bargaining that can be charged, but that there
3 must be a breakdown of the services provided by the state
4 or national affiliate that can be charged to the
5 nonmembers.

6 QUESTION: Going back to lobbying for a minute,
7 I suppose in the public sector if the union is out
8 lobbying to try to get increased health benefits, for
9 example, for public employees including those in the
10 bargaining unit or a tax increase to fund payment of
11 teachers' salaries Statewide that would affect those in
12 the bargaining unit as well. Now you say none of that is
13 chargeable?

14 MR. LAJEUNESSE: That's correct, Your Honor. I
15 don't --

16 QUESTION: And why not?

17 MR. LAJEUNESSE: I -- because, number one, we're
18 dealing with an activity which the state has excluded from
19 the special bargaining process and has left in the normal
20 political processes. It's a matter of subject to decision
21 of the State legislature. In the case of millages, the
22 electorate at large. So the State has decided that it's
23 not within that special process of collective bargaining
24 and therefore as to that process, the employee must be
25 treated not as an employee but a citizen, a taxpayer, a

1 consumer, a competitor for scarce public resources, and in
2 the case of some of these matters, as a parent. That's
3 how he's affected.

4 The in -- when you get outside that narrow,
5 special process which the State has set up for collective
6 bargaining, you're infringing on core First Amendment
7 rights, which this Court has said are the same as the
8 rights that exist with regard to the support of
9 candidates.

10 If -- if you don't draw the line at the process,
11 what are the limits? The same thing could be said with
12 regard to a private sector labor union that when it
13 lobbies Congress for minimum wage legislation, that could
14 be chargeable. But this Court has said in Street and in
15 Ellis and in Beck that can't be charged in the private
16 sector, and the Court has said in Abood and in Keller that
17 the First Amendment rights of public employees and private
18 employees are the same.

19 So I don't think there's any place you can draw
20 the line except at the process because it's a slippery
21 slope. If lobbying is chargeable, why shouldn't support
22 of candidates be chargeable? The election of a school
23 member is probably more important to the education union
24 than any other decision that occurs. But it's in a
25 process which the State has excluded from bargaining. And

1 I think we have to go back to the basic question of what
2 type of scrutiny this Court applies when we're dealing
3 with infringements on First Amendment rights. The Court
4 has said that even requiring the employee to pay for the
5 costs of bargaining on his own behalf significantly
6 impacts on his First Amendment rights.

7 Here we're talking about making him pay for
8 bargaining on behalf of other employees. Therefore, as to
9 him those aren't his terms and conditions of employment.
10 Those are matters of industrial relations and. in the
11 public sector, politics.

12 QUESTION: Mr. -- Mr. LaJeunesse, what if their
13 pending in the Michigan legislature a bill that would have
14 directed the 10-percent reduction in the appropriation for
15 all colleges like Ferris State College? Do you think the
16 bargaining unit, the respondent here, could charge to the
17 agency shop people the -- whatever costs they spent in
18 lobbying against that?

19 MR. LAJEUNESSE: No, Your Honor, I don't believe
20 so because it's outside the process. It's still in the
21 normal political processes. If you say that they can
22 lobby on that, then why can't they lobby against an
23 increase in the budget for social welfare programs,
24 because if those increase the amount of money available
25 for education is decreased? Why can't they lobby for

1 increased in the income tax, because that money can be
2 spent for education?

3 QUESTION: Could -- could the -- the union --

4 QUESTION: Also, what about a program to
5 register and vote?

6 MR. LAJEUNESSE: A program to register and vote,
7 Your Honor?

8 QUESTION: Uh-huh.

9 MR. LAJEUNESSE: I think that clearly would be
10 nonchargeable. I think it is under this Court's prior
11 decisions.

12 QUESTION: You think it's what?

13 MR. LAJEUNESSE: Not constitutionally
14 chargeable to the objecting employee -- program to
15 register and vote, as I understood the Court's question.

16 QUESTION: Could, could a union publish in its
17 own publication the voting record of, say, the school
18 board or state legislators with respect to issues that
19 affect the bargaining unit?

20 MR. LAJEUNESSE: Justice Kennedy, they could
21 publish it. We're not talking --

22 QUESTION: Well, I mean with the fees of the
23 dissenters?

24 MR. LAJEUNESSE: But I do not believe they could
25 use the dissenters' dues for that, Your Honor. No, I

1 don't think so. I think that answer is clear under Abood
2 and this Court's decisions in the private sector. That's
3 not even as close as the question of funding of higher
4 education.

5 QUESTION: Mr. LaJeunesse, one category of
6 charges that you say were improper really is quite
7 different from the others in that you concede that they're
8 -- that they're not part of the legislative process and
9 you can see that they do narrowly affect the particular
10 bargaining in the bargaining unit. But you nonetheless
11 say they are not chargeable, and I'm referring to the
12 costs of preparing for an illegal strike which never
13 occurs.

14 MR. LAJEUNESSE: Yes, Justice Scalia. I --

15 QUESTION: Now, why are they not chargeable? Is
16 it illegal to prepare for an illegal strike?

17 MR. LAJEUNESSE: I don't think the activity has
18 to be illegal for it to be not chargeable. The point is
19 for an activity to be chargeable to the dissenting
20 nonmember it has to be justified by a governmental
21 interest. And the State of Michigan has no interest in
22 compelling nonmembers to make threats of an illegal act.
23 The fact that --

24 QUESTION: Well, it -- it has no governmental
25 interest -- I mean, it -- by parity of reasoning you can

1 say it has no governmental interest in paying higher wages
2 to public employees.

3 MR. LaJEUNESSE: I think that's correct, Your
4 Honor.

5 QUESTION: So then nothing is chargeable,
6 because --

7 MR. LaJEUNESSE: No, what --

8 QUESTION: -- you don't want these bargaining
9 units to be successful. There's no governmental interest
10 in having these --

11 MR. LaJEUNESSE: The governmental interest, Your
12 Honor, is in reimbursing the employee -- the union for its
13 cost of performing its statutory functions. If the State
14 interest were in higher wages and benefits for public
15 employees, it could accomplish that purpose without an
16 agency fee. It could simply pass legislation increasing
17 wages and benefits.

18 QUESTION: But one of its statutory functions is
19 conducting -- conducting negotiations with all of the
20 maneuvering and feinting and what not that negotiations
21 entail. Certainly if they walk out of a meeting 1 day,
22 drag on the meeting for 5 days when it could have lasted
23 only one, but that's part of their tactics, you say that's
24 chargeable, wouldn't you?

25 MR. LaJEUNESSE: But that's not --

1 QUESTION: So what about this phony preparation
2 for a strike which would never occur? Why isn't that just
3 part of -- it's part of the negotiating process.

4 MR. LAJEUNESSE: Your Honor, I don't think it's
5 part of the negotiating process any more than it would be
6 if the Ferris Faculty Association had gone out and hired
7 the Mafia to threaten Ferris State College that they would
8 break the legs of the members of the Board of Control --

9 QUESTION: Now you're making a different
10 argument. Now you're making a different argument. Now
11 you're saying it's illegal to prepare for an illegal
12 strike.

13 MR. LAJEUNESSE: Well, I'm saying --

14 QUESTION: Or illegal to threaten an illegal
15 strike.

16 MR. LAJEUNESSE: The Michigan Court of Appeals
17 and the Michigan Supreme Court have held in the Male case,
18 which we cite in the briefs, that it was against the
19 public policy of Michigan to require the nonmembers to
20 contribute to a fund, a strike fund, which would in the
21 future be used to fund strikes. And the existence of that
22 fund obviously threatens employers just as much as the
23 threats in this case, yet it was held to be against the
24 public interest of Michigan to require the nonmembers to
25 support that preparation for a strike which would be

1 illegal under Michigan law.

2 And I would also add, Justice Scalia, that the
3 record directly contradicts -- the record as to the -- the
4 internal union documents which are in evidence, directly
5 contradict the testimony of the union witness who said
6 that this was merely a bargaining employee. If you read
7 those documents which are cited in that part of our brief
8 you will see that, when they are talking to each other in
9 private, the union intended to go out on strike, that
10 those were real preparations for a real strike which just
11 happened not to occur.

12 QUESTION: May I -- may I -- this -- your asking
13 us to look at the testimony and so forth, brings to mind
14 this question. To what extent do you think the question
15 of whether an activity is germane is a question of law or
16 a question of fact? And the reason I ask that is I guess
17 we have two courts who have wrestled with an awful lot of
18 detail. And as I understand -- now maybe -- maybe my
19 recollection is incorrect, that with respect to the local
20 union, you -- about 80 percent or something like that of
21 their activities were held okay to be charged, but as
22 respect to the Michigan union and the national unit,
23 something like 95 percent of those were held to be
24 impermissible. So you substantially won the case as to
25 Michigan and any -- is that -- is my recollection right on

1 that?

2 MR. LAJEUNESSE: That's correct, Your Honor.
3 But the question of what kind of activity, whether a
4 particular type of activity is a question of law. In
5 fact, is a content-based regulation of speech, as the
6 Court said in Riley v. National Federation of the Blind,
7 when you are making a decision as to whether somebody
8 would be compelled to make a speech that they would not on
9 their own make, that by definition is a content-based
10 regulation of speech.

11 QUESTION: But nobody is being compelled to make
12 a speech. They're being compelled to pay money to a union
13 representative who primarily is representing their
14 collective bargaining -- interest and may incidentally say
15 something that you disagree with.

16 MR. LAJEUNESSE: But this Court held in Abood --

17 QUESTION: Yeah.

18 MR. LAJEUNESSE: -- and in Elrod that requiring
19 those financial contributions which are then used to speak
20 on issues as to which the employee is in opposition is
21 tantamount to coerce belief. It is coerce speech. The
22 fact that it was done through -- through a contribution
23 makes it no less protected by the First Amendment, as the
24 Court said in Abood.

25 QUESTION: So you say it's a pure question --

1 each of these issues is a pure question of law in your
2 view?

3 MR. LAJEUNESSE: That's correct. Whether a
4 particular expenditure fits within one of the categories,
5 once the category are defined --

6 QUESTION: Well, again, on this strike business,
7 I mean, a lot of the money was in a pot there that they
8 said might -- might finance a strike and might finance
9 negotiation. It's kind of mixed the little bit, the use
10 of that fund I think.

11 MR. LAJEUNESSE: Well, Your Honor, I don't
12 believe it was. I believe that the monies that are at
13 issue here were used to pay for a strike headquarters
14 which they didn't need to have union meetings.

15 QUESTION: But they did have union meetings at
16 the strike headquarters?

17 MR. LAJEUNESSE: To discuss going out on strike.

18 QUESTION: Well, and their bargaining position.

19 MR. LAJEUNESSE: It was -- the only purpose of
20 having a separate strike headquarters instead of their
21 normal meeting place was to threaten the college with what
22 would be an illegal act had it occurred.

23 QUESTION: Was there any finding one way or the
24 other on whether they discussed informational picketing,
25 which I take it is not unlawful, I would assume.

1 MR. LAJEUNESSE: Your Honor, there was -- there
2 were expenditures on informational picketing.

3 QUESTION: Was this part of the union hall
4 meeting?

5 MR. LAJEUNESSE: Those expenditures -- we don't
6 have the minutes of the meeting in the record, Your Honor.
7 There was informational picketing that went on during this
8 period, but our -- that informational picketing was
9 directed at the general public. And therefore, under this
10 Court's decisions in Pickering and Madison Joint School
11 District, is public discussion of matters of public
12 concern as to which the nonmember must be treated for
13 First Amendment purposes as a citizen, not just an
14 employee.

15 In fact in Madison Joint School District the
16 situation was essentially the same. The employee wanted
17 to -- spoke publicly on an agency shop proposal then in
18 negotiation. And this Court held that he had an absolute
19 right to make that speech, that it was a matter of public
20 concern, not just a matter of employer/employee relations.

21 QUESTION: Well, suppose there's informational
22 picketing at the headquarters of the school board, is that
23 -- in front of the building. It's obviously directed both
24 ways, isn't it? You don't just pick up the board members
25 by going to their house, tell the public what your concern

1 is with board members' policy. That's not permissible in
2 your view -- with the public union?

3 MR. LaJEUNESSE: I think not if they're
4 picketing publicly, Your Honor. And we're not just
5 talking about that picketing here, Your Honor. We're
6 talking about buying ads in the local newspaper, as the
7 record shows.

8 QUESTION: Can I ask you --

9 MR. LaJEUNESSE: It was not -- it was
10 advertising not just picketing at the school board
11 meeting.

12 QUESTION: Could I ask you one other
13 hypothetical? Supposing your teachers' salaries were
14 fixed by statute, would it be impermissible under your
15 view to lobby for a change in the statutory provisions?

16 MR. LaJEUNESSE: Your Honor, that's not this
17 case --

18 QUESTION: I know it isn't --

19 MR. LaJEUNESSE: I don't know the specifics of
20 it --

21 QUESTION: -- but our salaries are fixed by
22 statute and I can -- if not --

23 MR. LaJEUNESSE: -- and I think the specifics of
24 it might make a difference. But if the unions --

25 QUESTION: Why would it make a difference?

1 MR. LaJEUNESSE: -- were merely involved in the
2 technical process of providing testimony at a State
3 legislative hearing --

4 QUESTION: No, they do everything you object to.

5 MR. LaJEUNESSE: -- that might be one thing.
6 But if the union doing, as it was here, not just
7 testifying at a hearing, but engaged in a grassroots
8 lobbying campaign, putting together coalitions of citizens
9 and teachers --

10 QUESTION: Yes, that's exactly what I'm --
11 that's my --

12 MR. LaJEUNESSE: -- buying advertising, that is
13 core First Amendment activity and it can't be charged --

14 QUESTION: And you --

15 MR. LaJEUNESSE: -- to the dissenter.

16 QUESTION: Even in -- even in my hypothetical?

17 MR. LaJEUNESSE: Even in your hypothetical, Your
18 Honor.

19 If I -- if I may, I would like to reserve the
20 balance of my time.

21 QUESTION: Very well, Mr. LaJeunesse.

22 Mr. Chanin, we'll hear from you.

23 ORAL ARGUMENT OF ROBERT H. CHANIN

24 ON BEHALF OF THE RESPONDENTS

25 MR. CHANIN: Thank you, Mr. Chief Justice, and

1 may it please the Court:

2 To help establish a context I would like to
3 begin by very briefly commenting about the nature of the
4 three unions that are involved in this case. The first --
5 and to clarify my acronyms also. The Ferris Faculty
6 Association, FFA, is the bargaining representative for a
7 unit of 500 faculty members at the college. It is a small
8 local union which in the year in question, 1981 and '82,
9 had a budget of some \$18,000.

10 FFA is affiliated with two much larger unions
11 with substantially greater and more diverse resources. At
12 the State level it's affiliated with the Michigan
13 Education Association, MEA, which in that year had a
14 budget in excess of \$18 million; and at the national
15 level, it's affiliated with the National Educational
16 Association, the NEA, which had resources in excess of \$70
17 million.

18 The courts below held that the petitioners may
19 be charged for the course of certain activities engaged in
20 by MEA and NEA. Because these activities did not directly
21 involve the collective bargaining process at Ferris State
22 College, petitioners contend that they are in effect being
23 asked to subsidize employees in other bargaining units
24 represented by MEA and NEA to pay for services provided to
25 these other employees which is of no benefit to the

1 members in their own bargaining unit.

2 The petitioners are wrong. That --

3 QUESTION: They don't say as of no benefit.
4 They say does not pertain to their bargaining process.

5 MR. CHANIN: They're wrong -- they're wrong in
6 that as well, Your Honor. Their characterization --

7 (Laughter.)

8 MR. CHANIN: Their characterization
9 fundamentally misstates the situation, and it totally
10 misses the point of union affiliation and its purpose.
11 Affiliation is essentially a pre-paid delivery service by
12 which larger parent organizations help its local
13 affiliates to carry out their representational
14 responsibilities, not in the sense that Justice O'Connor
15 asked, not merely to strengthen the local unions in a
16 general sense. It is to provide them with resources and
17 services in the collective bargaining area on an as-
18 needed basis.

19 In Abood, this Court --

20 QUESTION: Is that in the contract?

21 MR. CHANIN: Which contract?

22 QUESTION: Is that in the contract of
23 association between --

24 MR. CHANIN: It's in the essence of affiliation,
25 Your Honor, in three respects. One, the contract of

1 affiliation is indeed a contract between parent
2 organizations and locals. The guidelines and the policies
3 of the parent organizations, many of which are in the
4 record in this case, obligate the parent organization to
5 provide assistance to the local in a variety of collective
6 bargaining-related areas.

7 And the most important enforcement mechanism
8 here is political reality. If a parent organization
9 failed to respond to one of our locals when it needed us
10 in a collective bargaining crisis, we would not be the
11 parent organization as soon as that crisis ended. So we
12 must indeed respond, and I think the answer to your
13 question is, yes, it is built into the very nature of the
14 affiliation relationship.

15 QUESTION: You don't assert it's a legal
16 obligation. You assert it's a practical obligation.

17 MR. CHANIN: That's -- it's even questionable on
18 legal. I think it is unquestionably a practical
19 obligation. I am not sure that locals would not have a
20 cause of action under State law to enforce the policies
21 and guidelines of the parent organization. It never comes
22 to that, because it is overwhelmed by the political
23 reality. We must respond to those needs.

24 What this Court stated in Abood was that the
25 designation of a union as an exclusive representative

1 carries with it great responsibilities. It referred to
2 the difficult and continuing tasks and indicated that to
3 carry out these functions a bargaining representative
4 needs the service of lawyers, expert negotiators,
5 economists, a research staff, as well as general
6 administrative personnel.

7 What has happened here is by selecting as a
8 bargaining representative a local union that was
9 affiliated with larger parent organizations, the majority
10 of employees in the Ferris College bargaining unit have
11 chosen to provide and fund certain of those
12 responsibilities on a unit -- a cross unit basis with a
13 sharing of the risks in which all of the people who
14 benefit, the members and the feepayers, are charged a
15 periodic uniform flat fee.

16 QUESTION: You certainly make the union movement
17 sound like a very business-like operation. I've always
18 heard it called the movement. I thought that people in
19 one union would contribute to the international because
20 they believed in unionism. They don't care whether
21 they're getting back penny for penny an investment that
22 they're making in the international. There's none of that
23 here?

24 MR. CHANIN: Your Honor --

25 QUESTION: This is strictly a business

1 operation?

2 MR. CHANIN: It hurts me -- it hurts me to say
3 that --

4 (Laughter.)

5 QUESTION: Yes.

6 MR. CHANIN: -- that is not the sole basis for
7 affiliation. It is partially there, and it is part of why
8 people join unions --

9 QUESTION: Of course it is.

10 MR. CHANIN: But unionism is a competitive area.
11 There are unions competing on a day-to-day basis for the
12 allegiance of employees. The ones who get those
13 employees, the ones who are voted in, are the ones who can
14 deliver when they are called upon. And delivery in a
15 collective bargaining sense means when a local has a
16 crisis, a crisis beyond its own means to deal with, the
17 parent organizations are there. They are there with what
18 the Court referred to in Abood, the lawyers, the
19 negotiators, and the research people.

20 Now petitioners contend --

21 QUESTION: Mr. Chanin, can I interrupt for a
22 second? Your argument it seems to me would justify the
23 total assessment of the dues, a portion of the dues that
24 was charged to the MEA, and I understand the district
25 court found about 97 percent was impermissible.

1 MR. CHANIN: Well, the 97 --

2 QUESTION: Isn't that right?

3 MR. CHANIN: Yes.

4 QUESTION: And we're fighting about a little
5 squib at the tiny end of the thing.

6 MR. CHANIN: Let me just clarify the factual
7 finding of the court and then respond directly to your
8 question, Justice Stevens.

9 The lower courts held we only could get 3
10 percent and made it perfectly clear that it was quite
11 likely we put in substantially more in terms of chargeable
12 activity. The court's position was we blew it on the
13 proofs, on evidence.

14 QUESTION: You didn't meet your burden of proof.

15 MR. CHANIN: We didn't meet the burden.

16 The theory that you espouse, why don't we charge
17 them 100 percent, breaks down for this reason. The vast
18 bulk of the affiliation fee is for this availability.
19 That's what it's mostly for, but we all know that is not
20 the total of the affiliation fee. In addition, a small
21 portion of the affiliation fee pays for member-only
22 benefits that the parent organizations provide. It does
23 pay for some ideological or political activity that is
24 unrelated to collective bargaining.

25 If we charge the feepayers the full amount of

1 the fee, they would be paying a disproportionate
2 percentage for the availability component as compared to
3 the members. So what we need in essence is a pricing
4 mechanism. We need a discounting mechanism. How do we
5 take that affiliation fee to the parents and kick out that
6 small portion that isn't for availability?

7 There is in fact no perfect way to do it. What
8 we have in essence done is taken the guidance that this
9 Court has given us in a slightly different context of how
10 you analyze out a union's budget. And what we have said
11 about the parent organizations is we will discount out
12 those things that we really can charge for by looking at
13 what activities are germane to collective bargaining in
14 the generic sense.

15 In a conceptual way, Your Honor, what we say is
16 this. Those parent organizations constitute a pool of
17 resources, a pool that this local or any other local can
18 draw on in times of need. And what we do is we say, in a
19 generic way, what types of resources, what types of
20 skills, what types of activities, fit within that resource
21 pool, and that's why we make that kind of a deduction from
22 the affiliation fee.

23 QUESTION: Mr. Chanin, in the Ellis case this
24 Court held, with most Justices joining the opinion as I
25 recall, that objectors could not be charged for the costs

1 of general litigation unless the local bargaining unit was
2 directly involved. It seems to me that your argument
3 would lead one to conclude that that case was wrongly
4 decided.

5 MR. CHANIN: No, Your Honor, not at all. Let me
6 say about that holding in Ellis. That was a statutory
7 holding. The Court began by analyzing what of the
8 activities in question were chargeable under the Railway
9 Labor Act, and only as to those activities that it found
10 met the standard under the Railway Labor Act did it
11 address directly the constitutional issue. The litigation
12 never crossed that bridge.

13 So what we have with litigation then is
14 basically a statutory holding. But --

15 QUESTION: Well, it was construed to RLA ever
16 since Hanson very much in the light of the constitutional
17 provisions, have we not?

18 MR. CHANIN: Yes, you have, Your Honor. And I
19 have no question but that Ellis in many respects sets the
20 basic test for First Amendment adjudication and indeed
21 this Court recognized this last term in Keller when it
22 applied it to a constitutional base. But in Ellis itself,
23 as far as not the test, but the application of that test
24 to specific items, the Court only applied the
25 constitutional test to those items it had found chargeable

1 under the RLA and litigation of a general nature did not
2 make it.

3 But having answered it that way and attempted to
4 distinguish Ellis my answer to your question is yes.
5 Under -- first of all, I believe litigation may have a
6 different meaning in the public sector in any event. But
7 under our theory in which you are paying for the
8 availability of this service, I do believe the litigation
9 would be brought in. Because it's not relevant whether
10 the specific activity in the resource pool of the parent
11 organizations is done on behalf of Ferris. It is whether
12 it is an activity in the generic sense that is germane to
13 collective bargaining.

14 QUESTION: But I'm really in doubt whether that
15 rationale can be squared with Ellis on the so-called
16 statutory ground. It seems to me to go substantially
17 beyond what the Court said there.

18 MR. CHANIN: Well, Your Honor, I don't think so.
19 But let me look at the other points of Ellis if I may.
20 What Ellis did, and I think the focus when we look at
21 Ellis should be on the three items that the Court did
22 indeed find chargeable under the Railway Labor Act and
23 clearly within the constitutional range as well.

24 And there are three activities there. One was a
25 national convention, that is, a convention that dealt with

1 all of the bargaining units represented by BRAC, not
2 simply Western Airlines. It allowed social activities.
3 These were not social activities that took place in San
4 Diego, wherever Western Airlines is located. These were
5 social activities of the international union. And it
6 allowed chargeable -- as chargeable the national
7 publication which reported on a variety of activities
8 engaged in by the International, many or indeed most of
9 which had nothing whatsoever to do with the Western
10 Airlines bargaining unit.

11 Now in the briefing, the petitioners attempt to
12 distinguish that publication point. What they say is the
13 literal language of Ellis was you can only charge -- you
14 can only charge for writing up what you can charge for
15 doing. And therefore, to say they sustained a national
16 publication doesn't make our point. But it does, if you
17 read the holding in the case. Of course, at the very
18 point where the Court in Ellis said you can only charge
19 for what you have in that publication that you can
20 actually charge for doing, it dropped a footnote. And the
21 footnote was, and therefore, you cannot charge for the
22 litigation and the organizing, both of which it took out.

23 And the holding in the case was to remand to the
24 lower court simply to excise out of chargeability to two
25 activities it had incorrectly held chargeable under the

1 RLA: organizing and general litigation.

2 The Petitioners contend in this case that this
3 multi-unit cost-sharing system violates their First
4 Amendment rights, and that they can only be required to
5 pay their share of the actual services delivered by the
6 parent organizations to them on a pay-as-you-go basis.
7 Whatever we have -- may have put in in a particular year
8 in dealing with their employer is all that they can pay.

9 Let me make clear here what the legal issue is.
10 The issue is not whether the type of pay-as-you-go
11 delivery system that the petitioners urge is
12 constitutional. The question is rather whether the
13 Constitution requires every bargaining unit to use that
14 system or whether the State of Michigan can
15 constitutionally conclude that it would like to reject
16 that system and that a cross unit, a risk-sharing type of
17 system as we have here fulfills or advances the State's
18 interest in labor peace and stability.

19 We think that if you look at the purpose of
20 affiliation, the answer to this question is clear. The
21 aggregated payments that MEA and NEA get are not used
22 simply to defray the actual cost of providing services to
23 the Ferris local or to other locals. They are used to
24 establish and maintain the type of institution with an
25 expert staff of lawyers, of negotiators, and of

1 researchers that is available when called upon by Ferris
2 or any other local to provide these services on an as-
3 needed basis.

4 Now, if in fact the petitioners simply paid for
5 the services that they received in a particular year, they
6 would really be freeloading or free riding on two specific
7 values of affiliation. They would be not contributing to
8 the costs incurred by a parent union in assembling and
9 maintaining the type of institution that is necessary to
10 be available when called upon. And indeed the mere fact
11 that it has large affiliates and that it has resources to
12 call upon is itself of present value to the union. It
13 affects its day-to-day operation. We don't have to
14 squirrel away money as a reserve fund for the year in
15 which we may have catastrophic costs, a year we bargain a
16 contract, a year we have major arbitrations. We can do
17 our day-to-day services knowing we have that to call on.

18 And the fact that we have that to call on has an
19 impact on the employer. Any prudent employer, knowing we
20 are backed by the MEA and the NEA, will take that into
21 account in its dealing with the local union.

22 We are aware, Your Honors, of no First Amendment
23 principle which would require the State of Michigan to
24 adopt a unit-by-unit pay-as-you-go-system. We think it is
25 a reasonable and constitutionally allowable judgment for

1 the State of Michigan to conclude that a cross unit risk-
2 sharing system of providing services through affiliation
3 is constitutional. And I would note to you that every
4 other legislature which has looked at this question has
5 made the same judgment, and that is why the overwhelming
6 majority of employees and the overwhelming majority of
7 bargaining units in this country have chosen to carry out
8 their representational functions by an affiliation
9 arrangement where they operate on a multi-unit cost basis
10 and share the risk.

11 Let me turn now, if I may, to the second issue
12 presented. The specific activities that the court below
13 charged the petitioners for. Because this Court indicated
14 that an agency shop has an impact on the First Amendment
15 rights of objecting feepayers, petitioners argue that they
16 can only be required to pay for those activities that are
17 essential or necessary to the union's performance of its
18 statutory functions. Phrased otherwise, we can only
19 charge them for things that the local union must do
20 pursuant to a statutory obligation or its duty of fair
21 representation.

22 But that argument, Your Honors, is squarely at
23 odds with the position taken by this Court in Abood, in
24 Ellis, and in Keller. As those cases make abundantly
25 clear, the test is not essential or necessary. The test

1 is as Justice White asked in the question, is it germane?
2 Is it reasonably related to the function of the bargaining
3 representative in collective bargaining?

4 QUESTION: So, it -- what is your answer to the,
5 to the hypothetical questions that Mr. LaJeunesse asked?
6 Specifically, can the union charge to nonunion members the
7 funds necessary to mount a campaign against certain
8 candidates for the school board? The people that --

9 MR. CHANIN: No.

10 QUESTION: -- that they will be negotiating
11 with. Surely, that's germane. I want, I want a real
12 softy on the school board, so I mount, you know, a
13 campaign to get that person elected. Is that germane?

14 MR. CHANIN: It's germane, but the answer is
15 still now. It's the only one of your hypotheticals that
16 it's no to, by the way, Justice Scalia.

17 The Court -- this Court and the legislators have
18 always treated campaigns for elective office differently.
19 Since the earliest railway labor cases right up through
20 Keller, this Court has carved out electoral politics as a
21 nonchargeable item.

22 QUESTION: All right, now what do you mean by
23 electoral politics?

24 MR. CHANIN: I mean --

25 QUESTION: My next question was going to be what

1 about a nonpublic union. It's just a -- it's not a
2 school. Nonpublic union and according to Mr. LaJeunesse,
3 what if -- can they be compelled to contribute to a
4 campaign in support of minimum wage laws or an increased
5 in the amount of the minimum wage?

6 MR. CHANIN: Are you talking in the public
7 sector or the private sector?

8 QUESTION: As I said, it's a private sector
9 union, not a public sector union.

10 MR. CHANIN: I think the question in the private
11 sector is a more difficult one. I could not answer it
12 unless I was familiar with the industry and the particular
13 legislation.

14 QUESTION: It's not electoral politics. It's
15 just a --

16 MR. CHANIN: Well, but the test is --

17 QUESTION: -- supporting a particular statute.

18 QUESTION: -- the test is it germane. The
19 electoral politics is indeed germane. It is germane.
20 There's no question that if a school board candidate to
21 us, vote for me, I'll give you a 10 percent increase. It
22 is germane. It is not chargeable for other reasons.
23 Because this Court has always treated campaigns for office
24 differently. There are other State interests involved in
25 campaigns --

1 QUESTION: Is that the reason? It's different
2 because we've always treated it differently. I mean, we
3 must have had some reason for treating it differently.

4 MR. CHANIN: There are reasons.

5 QUESTION: Okay, well, what are they?

6 MR. CHANIN: The reason it's been treated
7 differently is because when I vote for a candidate, I
8 don't vote on a single issue. That person will sit in an
9 office and will vote on a variety of other issues which
10 may have no bearing whatsoever on collective bargaining
11 for my position as a union.

12 QUESTION: Why is that different, Mr. Chanin,
13 from say a proposition on a ballot or a millage, a millage
14 vote? Is that any less free expression voting for a
15 candidate than voting for an electoral proposition?

16 MR. CHANIN: Your Honor, it is not a manner of
17 less or more free expression. The test is is it germane
18 to collective bargaining.

19 QUESTION: The test is it's germane. I mean,
20 that really does not give a lot of answers.

21 MR. CHANIN: The -- in this case, Your Honor, we
22 have not taken the position that we can simply go out and
23 become involved in any type of activity that may somehow
24 improve the economic posture of the employer. What we are
25 dealing with here are with specific activities that relate

1 to the funding of public education and educational
2 employees.

3 QUESTION: Yeah, well, let's get to some of the
4 precise questions we have here.

5 MR. CHANIN: Okay.

6 QUESTION: How about the lobbying on the millage
7 elections?

8 MR. CHANIN: Yes, Your Honor, let me tell you
9 why. In Abood, this Court referred to some of the unique
10 characteristics of public sector bargaining, and it stated
11 in Abood that the bargaining representative is the public
12 employer who sit at the table are not free agents
13 economically. It pointed out that they cannot make
14 commitments and carry them out. What the Court said in
15 Abood is whether or not you can get benefits and salaries
16 in the public sector is dependent upon tax rates and
17 governmental budgets and I think the Court's phrase was on
18 budgetary decisions by others.

19 Now the Court was not saying that simply as a
20 unique characteristic of public sector bargaining. It was
21 saying that that is a factor that determines whether we
22 will do what we're supposed to do in bargaining, whether
23 we will achieve for the people we represent salaries and
24 economic improvements. If in fact the people who sit at
25 the table cannot make those decisions without budgets,

1 without money, without millage, we must participate in
2 those activities to effectively carry out our job.

3 QUESTION: Well, yeah, but it's apparently
4 stipulated that millage has no direct effect on what
5 happens to the budget of the Ferris College.

6 MR. CHANIN: Well, that's true, Your Honor, but
7 we do not attempt -- if I -- you have to interplay here
8 our parent organization availability theory with what the
9 local does. We do not seek to sustain the millage
10 elections here because they will have a direct impact on
11 Ferris. We sustain them because they are germane to
12 collective bargaining of the unions involved in this case
13 and they are part of --

14 QUESTION: Well, they're germane to the parent
15 union.

16 MR. CHANIN: That's right. That's right, Your
17 Honor.

18 QUESTION: Well, does the parent union do
19 collective bargaining or does it just support local unions
20 which do collective --

21 MR. CHANIN: It supports the local unions that
22 do it.

23 QUESTION: So the Michigan Education Association
24 doesn't itself do any collective bargaining?

25 MR. CHANIN: No, it does not. But --

1 QUESTION: Well, I didn't realize that you're
2 arguing that just as you sort of buy insurance for the
3 expert negotiating skills needed and litigation skills, so
4 also you buy assurance -- insurance for millage elections
5 --

6 MR. CHANIN: No.

7 QUESTION: -- that since the -- this millage
8 doesn't relate to me, but it does relate to another union.
9 They pay for mine. I pay for theirs. It all comes out
10 even.

11 MR. CHANIN: No, no.

12 QUESTION: That is not the argument?

13 MR. CHANIN: No. Let me try it again --

14 QUESTION: All right.

15 MR. CHANIN: -- if I may. The argument is that
16 like insurance, not exactly but like insurance, when I
17 affiliate with these larger parent organizations I get
18 something. I know that in a year where I have very high
19 bargaining costs, a year I negotiate a contract, a year I
20 have major arbitrations, I can call on those parent
21 organizations to help me. In order to be there when I
22 need them, those parent organizations must maintain
23 themselves as an institution. They must have a staff of
24 lawyers, of negotiators, of research people, of whatever I
25 need, they must have that staff and those resources

1 available to provide to me.

2 Now taking Justice Stevens' point, in fact if I
3 carry that through I should charge the people in Ferris,
4 the objecting feepayers, the full amount of the
5 affiliation fee, because that fee goes to maintain that
6 institution. But then we have the problem of a
7 disproportionate charge. So we have to come up with a
8 pricing mechanism. How do I discount the affiliation fee
9 to reflect only the availability component? There is no
10 way to do that with absolute precision. So I look at the
11 budgets of the parent organization. I say what should I
12 take out? I will certainly take out member-only benefits.
13 I will take out that portion of the parent organization
14 budget that goes to political and ideological activity
15 that has no relation to collective bargaining in the
16 generic sense. But as I try to construct a pool of
17 resources, I say that what I will keep in are all of the
18 resources that go from those parent organizations to do
19 the kinds of things that would be germane to collective
20 bargaining if done in any kind of a bargaining unit, if
21 done in Ferris. And they are.

22 The costs of negotiation, the costs of research,
23 the costs of lobbying on funding public education and on
24 terms and conditions of employment. So we sustain those
25 charges, not because I can take a particular activity of a

1 State or national parent and say this activity had this
2 direct benefit on Ferris college. I keep it in because I
3 say it is the type of activity that is in the resource
4 pool that the local is paying for.

5 The only activities that I have to show under
6 our theory have a direct impact on bargaining at Ferris
7 are the expenditures of Ferris itself.

8 QUESTION: Mr. -- you're --

9 MR. CHANIN: Let me just take the millage if I
10 may because you mentioned that, Your Honor. In Abood,
11 this Court stated that funding to -- lobbying to fund
12 agreements that were made to subsequently fund them is a
13 chargeable expense and the petitioners concede that.

14 Millages in Michigan occur all through the year
15 under law. There is no principal reason we submit to
16 allow the unions to charge for activities to improve
17 funding that take place after bargaining to allow the
18 public employer to fund contingently agreed-to economic
19 items, as opposed to allowing the union to charge for
20 activities that are designed to produce the funding before
21 bargaining so that the public employer --

22 QUESTION: The millage -- the millage doesn't
23 produce any funding for Ferris.

24 MR. CHANIN: It produces funding for public
25 education generally.

1 QUESTION: That's what you're arguing?

2 MR. CHANIN: Yes, I am. In that sense, Your
3 Honor, what I am saying is it is the type of activity that
4 a parent organization legitimately can engage in in order
5 to have the institution ready to assist --

6 QUESTION: Because some --

7 QUESTION: Because some say Ferris' turn will
8 come. They'll -- they'll have a millage election.

9 MR. CHANIN: Your Honor, just because the fact
10 of the matter is, because I paid health insurance last
11 year and did not have a major illness, I do not consider
12 that premium to be wasted.

13 QUESTION: So the further away --

14 MR. CHANIN: Unfortunately, my time will come.

15 QUESTION: Counsel, the further away the
16 bargaining units gets from the employee, the less the
17 First Amendment protection the employee has.

18 MR. CHANIN: No, no.

19 QUESTION: It seems to me it should be the other
20 way around.

21 MR. CHANIN: No, the First Amendment justifies
22 our charging the parent organization expenditures because
23 those -- that expenditure, that affiliation fee is germane
24 in the most direct sense. It is a fee --

25 QUESTION: Yes, but Mr. Chanin --

1 MR. CHANIN: -- to provide something to help me
2 when I need it in collective bargaining.

3 QUESTION: What you're really arguing is who has
4 the burden of proof, because you're saying that everything
5 is presumptively support function except those things you
6 can identify as unrelated, and the stuff in the gray area
7 just generally is supporting affiliation.

8 MR. CHANIN: Well --

9 QUESTION: In the district court that was the --
10 the burden was just the opposite.

11 MR. CHANIN: No, the burden of proof is ours.

12 QUESTION: Yeah, but you say you carry it when
13 you've shown -- when you've excluded A, B, and C, which
14 are admittedly impermissible, everything else is
15 presumptively necessary to show that the organization is
16 available.

17 MR. CHANIN: No, we lost it in the district
18 court, because we had an activity of the parent
19 organization. The district court did not say we did not
20 sustain it because we did not show how it related to
21 Ferris. It said quite clearly we did not sustain it
22 because we did not show how that activity related to
23 collective bargaining in a generic sense.

24 QUESTION: Thank you, Mr. Chanin.

25 Mr. LaJeunesse, do you have rebuttal?

1 REBUTTAL ARGUMENT OF RAYMOND J. LaJEUNESSE, JR.

2 ON BEHALF OF THE PETITIONERS

3 MR. LEHNERT: Yes, I do, Your Honor.

4 One of the questions Mr. Chanin was asked was
5 whether there is a contract which guarantees the services
6 to the local affiliate. He didn't answer that question.
7 The affiliation agreements, the contract -- the
8 constitutions of the Michigan Education Association and
9 National Education Association are in the record. They
10 don't guarantee any services to this local, and in fact we
11 know there aren't services to this local even where -- a
12 guarantee of services -- even in the years where there is
13 this crisis, this catastrophe that Mr. Chanin talks about.

14 QUESTION: Well, certainly he suggested that it
15 was by custom if not by law. Would that make any
16 difference if it were shown by custom they did all these
17 things even though perhaps they could not have been
18 compelled to in a court?

19 MR. LaJEUNESSE: That doesn't make it analogous
20 to insurance or a service contract, Your Honor. There is
21 no legally enforceable right to receive the services. The
22 only legally enforceable right that the local has is to
23 participate in governance of the national and the State
24 organization.

25 QUESTION: So you object to charging any part of

1 the affiliation fee to the nonmembers?

2 MR. LAJEUNESSE: No, Your Honor, we do not. As
3 a matter of fact we stipulated that if the State and
4 national organization provide services directly to the
5 local --

6 QUESTION: Well, you mean so it's --

7 MR. LAJEUNESSE: -- that a portion of the
8 administrative --

9 QUESTION: -- so it's piece by piece. You have
10 to value each bit of service?

11 MR. LAJEUNESSE: That's correct, Your Honor. I
12 think that's the rule that this Court has laid down in the
13 cases all the way through Hudson, saying that the union
14 has to prove the chargeable cost.

15 QUESTION: Do you, do you think the First
16 Amendment draws that distinction between whether you have
17 a contractual right to get that -- you can pay out the
18 money and charge the nonunion members if you have
19 contractual right to get the assistance for it, but by
20 reason of the First Amendment you can't pay it out if it's
21 only very likely that de facto you're going to get the
22 assistance. That's a First Amendment line?

23 MR. LAJEUNESSE: I'm saying, Your Honor, that
24 the First Amendment requires a proven, compelling
25 governmental interest to infringe on the nonmember's right

1 not to associate with this union and in any way support
2 any of its activities. And the only compelling
3 governmental interest that's been identified by this Court
4 is reimbursing the union for its costs of performing its
5 statutory functions as exclusive representative of the
6 bargaining unit.

7 You talk about the hypothetical of a contract.
8 The question then becomes does this contract make rational
9 sense? Are there actual services that are being provided?
10 Is it a fraud and so on? But that's not this case. There
11 is not contract in this case.

12 QUESTION: But in this case isn't the actual
13 thing we're fighting about is how much of this publication
14 that they put out is useful to the local? Isn't that what
15 the big expense was?

16 MR. LAJEUNESSE: That was the largest -- one of
17 the larger expenses. There are others that are cited in
18 the briefs, Your Honor.

19 QUESTION: Was that -- were the -- all the
20 expenses in -- for lobbying that were charged to the
21 nonmembers was all that lobbying done by the -- by the
22 parent or by the affiliated union, Michigan or national?

23 MR. LAJEUNESSE: There was one payment by the
24 local to send members --

25 QUESTION: But most of it --

1 MR. LaJEUNESSE: -- to a conference held by the
2 State.

3 QUESTION: But most of it was by the parent?

4 MR. LaJEUNESSE: Most -- all -- except for that
5 one payment, it was all at the State or national level.

6 And I want to point out that, in answer to
7 Justice Scalia question, Ferris is never going to get its
8 opportunity to get support from the State organization for
9 a millage election, because Ferris never gets any money
10 for millages under State law.

11 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
12 LaJeunesse.

13 The case is submitted.

14 (Whereupon, at 12:05 p.m., the case in the
15 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#89-1217 - JAMES P. LEHNERT, ET AL., Petitioners v. FERRIS FACULTY

ASSOCIATION, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

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