
United States Court of Appeals
for the
First Circuit

Case Nos. 19-1490,
19-1602

UNITED NURSES & ALLIED PROFESSIONALS (KENT HOSPITAL),

Petitioner/Cross-Respondent,

– against –

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

JEANETTE GEARY,

Intervenor.

ON APPEAL FROM THE NATIONAL LABOR RELATIONS BOARD

**PETITION FOR REHEARING *EN BANC* FOR
PETITIONER/CROSS-RESPONDENT**

CHRISTOPHER CALLACI
UNITED NURSES & ALLIED
PROFESSIONALS
*Attorneys for Petitioner/Cross-
Respondent*
375 Branch Avenue
Providence, Rhode Island 02904
(401) 831-3647

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RULE 35 STATEMENT

The panel decision in the instant case conflicts with a number of United States Supreme Court decisions, which provide that private sector unions may charge nonmember objectors for lobbying expenses so long as those expenses are germane to collective bargaining, contract administration and grievance adjustment. See International Association of Machinists v. Street, 367 U.S. 740 (1961), Ellis v. Brotherhood of Railway, Airline & Steamboat Clerks, 466 U.S. 435 (1984), Communications Workers of America v. Beck, 487 U.S. 735 (1988) and Lehnert v. Ferris Faculty Association, 500 U.S. 507 (1991). Consideration is therefore necessary to secure and maintain uniformity of the Court's decisions.

This case also involves a question of exceptional importance. By misinterpreting this well settled body of law, the panel held that such expenses are categorically nonchargeable. As such, unions will no longer be permitted to exercise their longstanding right under 29 U.S.C 158(a)(3), to charge nonmember objectors for lobbying expenses that satisfy the Supreme Court's germane test.

INTRODUCTION

The United Nurses & Allied Professionals (hereinafter "UNAP" or "Union") is a federation of fifteen local unions, which are located in the states of Rhode Island, Vermont and Connecticut. Add. 3. In 2009, the Union charged nonmember objectors for expenses it incurred lobbying in support of legislation pending before

the Rhode Island and Vermont legislatures. Add. 3-4. Jeannette Geary challenged the Union's decision to charge her for such expenses. Agreeing with Geary, the National Labor Relations Board (hereinafter "NLRB") held that lobbying expenses are categorically nonchargeable. The Union petitioned for review; the panel denied the petition in its entirety.

Street and its progeny, as well as the Court's subsequent decisions in Beck and Lehnert, have consistently held that private sector unions may charge nonmember objectors for those expenses that are germane to collective bargaining, contract administration and grievance adjustment. That's the test. Here, the panel found that 1) lobbying can be necessary to a union's performance of its collective bargaining duties, 2) an expense can both qualify as lobbying and be germane and 3) the lobbying expenses in issue were germane. Add. 11-13. Notwithstanding, it held that the germane test does not apply to lobbying expenses in the private sector and that such expenses, therefore, are categorically nonchargeable. Add. 13.

BACKGROUND

The lobbying activity in issue here was highlighted by the panel and involves the Union's lobbying in support of the Hospital Payments Bill in Rhode Island and a measure calling for increased mental health care funding in Vermont. Add. 12. Both were undertaken to acquire appropriations for, and to implement wage provisions in, approved collective bargaining agreements.

The Hospital Payments Bill required the State of Rhode Island to make \$500,000 payments to hospitals located in Washington County, Rhode Island, JA 357, where Westerly hospital is located. JA 59. There is a wage provision in the collective bargaining agreements between UNAP Local 5104 and Westerly Hospital and UNAP Local 5075 and the hospital that requires that hourly employees get one-time wage payments depending upon the hospital's net operating loss:

“If the Hospital's net operating loss for fiscal year 2007 goes below \$2.5 million (“the 2007 Benchmark”), all scheduled hour employees (excluding senior leadership) will receive a one-time payment equal to 50% of each dollar below the 2007 benchmark divided by the number scheduled hour employees (prorated for those working less than full-time). The 2008 benchmark will be \$1.5 million and the 2009 benchmark will be \$500,000, and the same formula as above shall apply.”

JA 214, 258 (emphasis added).

At trial, a union witness explained how this contractual provision works.

Applying the 2009 benchmark, if the hospital:

“lost less than \$500,000, then for every dollar that they lost less than \$500,000 half of it would go into a pool of money that would be distributed equally among the employees. So, just in the way of example, if they lost \$100,000 that year, that means they were \$400,000 under the benchmark. That \$400,000 would be divided in two to make \$200,000, and that \$200,000 would be distributed in a bonus check to the employees.”

JA. 116 (emphasis added).

The lobbying in support of increased mental health care funding in Vermont was also undertaken to acquire appropriations for, and to implement a wage

provision in, a collective bargaining agreement at Healthcare & Rehabilitation Services of Southeastern Vermont (hereinafter “HCRS”).

UNAP Local 5051 and HCRS negotiated two wage related provisions into their collective bargaining agreement, one that called for joint labor management lobbying for state funding, and a companion provision that provided a mechanism to distribute state funds to address pay inequities among bargaining unit employees. The first provision reads in relevant part: “(d)uring this agreement, both parties agree to cooperate with each other in achieving favorable legislation and regulation to enhance the funding available to the Agency which is currently subject to flat funding.” JA 396-397 (emphasis added).

The second provision calls for the parties to reopen the contract to address employee pay inequities if new money becomes available as a result of joint lobbying efforts:

“(i)n the event, the State provides HCRS with new money earmarked for personnel costs over and above that which is already covered by the current state budget, either party may ask to reopen the agreement solely on the issue of utilizing the portion of such funds apportioned to the bargaining unit to help address internal pay equity issues among and between bargaining unit employees in the same bargaining unit job classification. Upon such limited reopener, both sides agree to meet at least twice a month to discuss whether and to what extent such funds may be used to rectify such issues.”

JA 393 (emphasis added).

It is this lobbying activity and indeed all lobbying activity that the panel held to be categorically nonchargeable.

REASONS FOR GRANTING THE PETITION

I. The Panel Decision Conflicts With Supreme Court Precedent

According to the panel, “[t]he primary issue in this proceeding is whether the Union’s lobbying expenses are properly chargeable to the dissenting nurses.”

Add. 4.

The panel correctly found that lobbying by a private sector union can be necessary to its performance of its collective bargaining duties:

“we do agree with the Union that there is no conceptual reason for concluding that lobbying by a private sector union could never be necessary to the union’s performance of its collective bargaining duties.”

Add. 11-12 (emphasis added).

The panel correctly found that lobbying activity can be germane to collective bargaining:

“The Board [] points to no reason why the expense of trying to help the employer secure payment to fund success at the bargaining table would not be germane to collective bargaining. That same expense aimed at influencing the source of funds would likely be called “lobbying” if the source, as here, were the government. And such expenses would become no less germane merely because the source of funding might be the government. So we are indeed left to conclude that, in theory, there exist instances in which an expense could reasonably be called both a form of lobbying and germane to collective bargaining.”

Add. 12-13 (emphasis added).

The panel also found the lobbying activity in issue to be germane. Add. 12.

The panel ran afoul of Supreme Court precedent, however, when it concluded that “nothing in the Supreme Court’s actual holdings compels us to conclude either that such expenses are properly chargeable to dissenters, or not,” Add. 13 (emphasis added). Worse, after making this sweeping declaration, the panel declared the opposite. Relying on dicta in the Supreme Court’s decision in Lehnert, it held that such expenses are categorically nonchargeable. Add. 13, 15.

a. The Meaning Of the term “Political And Ideological Activities” Can Be Found In The Supreme Court’s Decision In Street, Not, As The Panel Insists, In The Dictionary.

The panel points to one sentence of dicta taken out of context from the Supreme Court’s decision in Lehnert to support the erroneous conclusion that lobbying expenses in the private sector are categorically nonchargeable:

“[Street, Allen, and Ellis] make clear that expenses that are relevant or “germane” to the collective-bargaining functions of the union generally will be constitutionally chargeable to dissenting employees. They further establish that, at least in the private sector, those functions do not include political or ideological activities.”

Add. 13 (quotations, emphasis in original).¹

The panels’ failure to interpret the term “political or ideological activities” in its proper context (Street and its progeny), and instead assign meaning to it based on isolated dictionary definitions of the words “political” and “lobby,” Add. 15, is

¹ The second sentence of this passage is necessarily dependent on the first – the meaning of the term “political or ideological activities,” referred to by the Court in Lehnert, can be found in the Court’s prior decisions in Street, Allen and Ellis.

fatal. See, Yates v. United States, 135 S.Ct. 1074, 1082 (2015) (“it is a fundamental principle of statutory construction and, indeed, of language itself that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used”) (quoting Deal v. United States, 508 U.S. 129, 132 (1993) (emphasis added)). The Yates Court further observed that “[o]rdinarily, a word’s usage accords with its dictionary definition. In law as in life, however, the same words, placed in different contexts, sometimes mean different things.” Yates, 135 S.Ct. at 1082.

The Lehnert Court’s observation that a union’s “political and ideological activities” in the private sector are not germane to collective bargaining is simply a restatement of the Court’s prior holding in Street, 367 U.S. 740 (1961). It is in that context, in the Court’s opinion in Street, that the limited meaning of such term can be found.

The issue before the Court in Street was whether or not the union could compel an employee to “finance the campaigns of political candidates whom he opposed, and to promote the propagation of political and economic doctrines, concepts, and ideologies with which he disagreed.” *Id.* at 740 (emphasis added).

There, the union provided financial support to “the political campaigns of candidates for the offices of President and Vice President of the United States, and for the Senate and House of Representatives of the United States,” “direct and

indirect financial contributions and expenditures on the political campaigns of candidates for State and local public offices,” and expenditures to “propagate political and economic doctrines, concepts and ideologies and to promote legislative programs.” Id. fn. 2 (emphasis added).

Critically, the union was *not* engaged in legislative activity involving the maintenance and administration of collective bargaining agreements concerning, as in the instant case, rates of pay and wages. Indeed, the lower court, the Supreme Court of Georgia, described the “legislative activity” in issue as including “miscellaneous general legislation not confined to legislation involving the negotiation, maintenance and administration of agreements concerning rates of pay, rules and working conditions, or wages, hours, terms and other conditions of employment.” International Ass’n of Machinists v. Street, 108 S.E.2d 796, 800 (Ga. 1959)(emphasis added).

The Street Court did not take up the chargeability of such *legislative activity* because that subject matter was not before the lower courts:

“We do not understand, in the view of the findings of the Georgia courts and the question decided by the Georgia Supreme Court, that there is before us the matter of expenditures for activities in the area between the costs which led directly to the complaint as to “free riders” and the expenditures to support union political activity.”

Street, 367 U.S. at 769-770 (quotations in original). See also Ellis, 466 U.S. at 447 (“the Court expressed no view on other union expenses not directly involved in negotiating and administering the contract”).

The “political and ideological activities” referenced in Lehnert, which find there meaning in Street, were limited to financial support of political campaigns, the propagation of political ideologies and the promotion of legislative programs – *not* legislation involving the negotiation, maintenance and administration of agreements concerning, like here, rates of pay and wages.²

Given the proper context in which the Lehnert Court used the term “political and ideological activities,” a term defined by the Court in Street, it becomes abundantly clear that the panel’s isolated dictionary definition of that term is far more sweeping and unbounded, capturing any and all lobbying activity engaged in by a private sector union regardless of the subject matter.³

² This critical distinction was further explained by Justice Douglas in his concurring opinion: “(T)he collection of dues for paying the costs of collective bargaining of which each member is a beneficiary is one thing. If, however, dues are used, or assessments are made, to promote or oppose birth control, to repeal or increase taxes on cosmetics, to promote or oppose the admission of Red China into the United Nations, and the like, then the group compels an individual to support with his money causes beyond what gave rise to the need for group action. [] since the funds here in issue are used for causes other than defraying the costs of collective bargaining, I would affirm the judgment below [].” Street, 367 U.S. at 777-778.

³ It also ignores the Court’s instructive observation in Harris and Janus: “Assuming for the sake of argument that the First Amendment applies at all to private-sector agency-shop arrangements, the individual interests at stake still differ. In the public

b. Supreme Court Holdings Compel A Case-By-Case Analysis And The Application Of A Germane Test To Determine Whether Or Not Lobbying Expenses Are Chargeable.

The panel got it wrong when it concluded that the Supreme Court in Lehnert categorically rejected charging dissenters for lobbying expenses in private-sector unions.

The Lehnert dicta upon which the panel's decision is based rests on Street and its progeny, which includes Railway Clerks v. Allen, 373 U.S. 113 (1963) and Ellis v. Brotherhood of Railway, Airline & Steamboat Clerks, 466 U.S. 435 (1984).

Explaining the limited reach of the Court's holding in Street, the Ellis Court observed that while "those who objected could not be burdened with any part of the union's expenditures in support of political or ideological causes, the [Street] Court expressed no view on other union expenses not directly involved in negotiating and administering the contract []." *Id.* at 447 (emphasis added). In this regard, the Ellis Court distinguished between "political or ideological causes" and activities not directly related to contract negotiation and administration, observing further that while unions do not have "unlimited power to spend exacted money,"

sector, core issues such as wages [] are important political issues, but that is generally not so in the private sector." Janus v. AFSCME, Council 31, __ U.S. __, 138 S.Ct. 2448, 2480 (2019)(citing Harris v. Quinn, 573 U.S. 616, 636 (2014)(emphasis added).

“[u]ndoubtedly, the union could collect from all employees what it needed to defray the expenses entailed in negotiating and administering a collective agreement [].” Id. at 446 (emphasis added).

The Ellis Court also explained the reach of the Court’s holding in Allen: “*Railway Clerks v. Allen* [] reaffirmed the approach taken in *Street*, and described the union expenditures that could fairly be charged to all employees as those “germane to collective bargaining.”” Id. (emphasis added, italics, quotations in original). Indeed, the roots of the germane test, clearly enunciated in Allen, can be traced back to Street.

Relying on Street and Allen, the Ellis Court held, *inter alia*, that nonmember objectors may be charged for more than just the direct costs of administering a collective bargaining agreement:

“objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.”

Id. at 448 (Emphasis added).

Indeed, the Ellis Court held that expenses that are “incident to negotiating and administering the contract or to settling grievances and disputes arising in the bargaining unit are clearly chargeable () as a normal incident of the duties of the exclusive representative.” Id. at 453 (emphasis added).

In yet another private sector case, Communications Workers of America v. Beck, 487 U.S. 735 (1988), the Court restated its germane test where private sector union lobbying activity was issue.⁴

There, the lower court (4th Circuit) observed as follows:

“The second category of expenditures found by the special master to be impermissible were “labor legislation” expenditures. This disallowance was based on two grounds: First, he found that in large part these expenditures covered costs of “lobbying efforts” by CWA “far removed from collective bargaining, contract negotiation and grievance adjustment,” for instance, “lobbying efforts on behalf of the adoption of the Panama Canal Treaty, and the Equal Rights Amendment.” He suggested that there might have been some areas such as “the Telecommunications Act or Occupational Health and Safety Regulations” where “lobbying would have some relevance ().””

Beck v. Communications Workers of America, 776 F.2d 1187, 1210-1211

(emphasis added, quotations in original).

The special master did not disallow these lobbying expenditures because they are categorically nonchargeable. Rather, he applied a germane test, disallowing them because the subject legislation – the Panama Canal Treaty and the Equal Rights Amendment - was too far removed from collective bargaining, contract negotiation and grievance adjustment. Notably, he left the door wide open to what he described as “permissible lobbying activities,” making reference to the

⁴ The Beck Court took note of the allegation in the lower court regarding the chargeability of “lobbying for labor legislation” in its syllabus, Beck, 487 U.S. at 735, and elsewhere in its decision, *Id.* at 740, 741.

Telecommunications Act and Occupational Health and Safety Regulations. Id. at 1211.

Neither the district court nor the 4th Circuit took issue with the special master's analysis or his application of a germane test to the lobbying activity in issue. Indeed, the 4th Circuit went on to "affirm the decision of the district court in approving the special master's disallowance" of these expenditures. Id.

On certiorari, the Supreme Court framed the issue as follows: whether §8(a)(3) of the NLRA "permits a union, over the objections of dues-paying nonmember employees, to expend funds so collected on activities unrelated to collective bargaining, contract administration, or grievance adjustment." Id. at 738 (emphasis added).

Applying the germane test enunciated by Street and its progeny, the Court held that such nonmember employees may not be compelled "to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment." (Emphasis added). Id. at 745.

While noting Street's prohibition against "expend[ing] compelled agency fees on political causes," Id. at 745, conspicuously missing from the Court's decision in Beck was a holding that lobbying expenses in the private sector are categorically nonchargeable.

In Lehnert, the chargeability of lobbying expenses was squarely in issue; and the Court held that legislative lobbying or other political activities in the context of contract ratification or implementation *is* chargeable. *Id.* at 522. In reaching that conclusion, the Court relied on Street and its progeny, observing that determinations as to chargeability are made on a case-by-case basis applying the germane test:

“Thus, although the Court’s decisions in this area prescribe a case-by-case analysis in determining which activities a union constitutionally may charge to dissenting employees, they also set forth several guidelines to be followed in making such determinations. *Hanson and Street* and their progeny teach that chargeable activities must (1) be “germane” to collective bargaining activity; (2) be justified by the government’s vital policy interest in labor peace and avoiding “free riders”; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.”

Id. at 519 (emphasis added, quotations, italics in original).

The Court went on to observe that lobbying activity may very well be necessary to the effectuation of a collective bargaining agreement: “the so-called “free rider” concern is inapplicable where lobbying extends beyond the effectuation of a collective bargaining agreement.” *Id.* (emphasis added, quotations in original). The Court observed further that “allowing the use of dissenters’ assessments for political activities outside the scope of the collective bargaining context would present “additional interference with the First Amendment interests of objecting employees.” *Id.* (quoting Ellis, 466 U.S. at 456)(emphasis added).

The panel's misinterpretation of the Court's decision in Lehnert is painfully obvious: according to the panel, public sector employees can be charged for lobbying expenses relative to contract administration and implementation; their counterparts in the private sector cannot. This glaring inconsistency, this double standard, makes no sense. Indeed, as the panel made clear, "[t]he element common to both private and public-sector caselaw regarding the chargeability of union expenses is a focus on the relationship between the expenses and the union's performance of its duties as the exclusive bargaining agent for all employees." Add. 10 (emphasis added).

CONCLUSION

The definition of the term "political and ideological activities" can be found in the Supreme Court's decision in Street and its progeny, and that definition should control here rather than isolated dictionary definitions of related terms. With the exception of the political and ideological activities described in Street, Street and its progeny, as well as Beck and Lehnert, teach us that lobbying expenses are chargeable if they are germane to collective bargaining, contract administration and grievance adjustment. That body of law cannot possibly be read to support the panel's sweeping and unbounded conclusion that lobbying expenses

of any kind, no matter their subject matter, are categorically nonchargeable.⁵ For these reasons, the instant Petition should be granted and the Union’s attendant rights should be restored.

Respectfully submitted,

Petitioner/Cross Respondent, United Nurses &
Allied Professionals,

By its attorney,

/s/ Christopher Callaci
Christopher Callaci [No. 1173725]
United Nurses & Allied Professionals
375 Branch Avenue
Providence, RI 02904
[401] 831-3647 [t]
[401] 831-3677 [f]
ccallaci@unap.org

⁵ The panel urges us to “take Lehnert’s dictum at face value” for practical reasons, baldly asserting that charging lobbying expenses “would apply rarely in the private sector,” “with little frequency,” and that “the transaction costs of establishing the chargeability of such expenses would likely outweigh the amounts involved.” The panel goes on to disparage labor – assuming that labor would “be tempted to press the margins” in determining the chargeability of its lobbying expenses in the “ordinary case.” Add. 16. There is not a shred of record evidence to support any of these assertions.

CERTIFICATE OF COMPLIANCE

I certify that this document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in a 14-point Times New Roman font. This brief contains 3,699 words excluding those parts exempted by the Federal Rules of Appellate Procedure.

Dated: September 29, 2020

/s/ Christopher Callaci
Christopher Callaci [No. 1173725]

CERTIFICATE OF SERVICE

I hereby certify that, on this same date, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system, which will send notifications of such filing to all CM/ECF counsel of record.

Dated: September 29, 2020

/s/ Christopher Callaci
Christopher Callaci [No. 1173725]

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United States Court of Appeals For the First Circuit

Nos. 19-1490, 19-1602

UNITED NURSES & ALLIED PROFESSIONALS,

Petitioner, Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent, Cross-Petitioner,

JEANNETTE GEARY,

Intervenor.

PETITION FOR REVIEW OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD AND CROSS-PETITION FOR
ENFORCEMENT

Before

Kayatta, Circuit Judge,
Souter,* Associate Justice,
and Selya, Circuit Judge.

Christopher Callaci for petitioner, cross-respondent.

Milakshmi V. Rajapakse, Attorney, National Labor Relations Board, with whom Julie Brock Broido, Supervisory Attorney, Peter B. Robb, General Counsel, Alice B. Stock, Associate General Counsel, and David Habenstreit, Acting Deputy Associate General Counsel, were on brief, for respondent, cross-petitioner.

Glenn M. Taubman, with whom Aaron B. Solem and National Right to Work Legal Defense Foundation, Inc. were on brief, for intervenor.

* Hon. David H. Souter, Associate Justice (Ret.) of the Supreme Court of the United States, sitting by designation.

September 15, 2020

KAYATTA, Circuit Judge. United Nurses and Allied Professionals ("the Union") is the exclusive bargaining representative of nurses and other employees at the Rhode Island hospital where Jeanette Geary works as a nurse. Geary, who is no longer a member of the Union, has challenged the Union's decision to charge her for some of its 2009 lobbying expenses and to refuse her a letter verifying that its expenses were examined by an independent auditor. The National Labor Relations Board ("the Board") agreed with Geary, ruling that lobbying expenses are categorically not chargeable to objecting employees and requiring the Union to provide Geary with an audit verification letter. The Union petitioned for review of the decision. For the following reasons, we deny the petition and grant the cross-petition for enforcement of the challenged order.

I.

The Union is a group of fifteen local unions in Rhode Island, Vermont, and Connecticut. One of the hospitals for which the Union is nurses' exclusive bargaining representative is an acute-care hospital in Warwick, Rhode Island. In late September 2009, Jeannette Geary and others at that hospital resigned membership in the Union and objected to dues for activities they claimed were unrelated to collective bargaining, contract administration, or grievance adjustment. The Union lowered the objectors' fees but still required them to contribute to covering

expenses for lobbying for several bills in the Vermont and Rhode Island legislatures. The Union reported in writing that its expenses had been verified by an independent auditor, but the Union declined to provide a verification letter from the auditor. Geary brought her complaint to the Board.

II.

A.

The primary issue in this proceeding is whether the Union's lobbying expenses are properly chargeable to the dissenting nurses. The Board determined that the dissenting nurses should not have to pay for any of the Union's lobbying expenses, reasoning that "relevant Supreme Court and lower court precedent compel[led] holding [that] lobbying costs are not chargeable as incurred during the union's performance of statutory duties as the objectors' exclusive bargaining agent." *United Nurses and Allied Professionals (Kent Hospital)*, 367 N.L.R.B. No. 94, at *7 (2019). The Union contends that the Supreme Court has never adopted such a bright-line rule in interpreting the National Labor Relations Act of 1935 ("NLRA"), 29 U.S.C. §§ 151-69, and asks us to overturn the Board's decision.

When presented with the Board's rational choice between two reasonable interpretations of the NLRA, we defer to the Board's chosen interpretation. See Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 42 (1987) ("If the Board adopts a rule that is

rational and consistent with the Act, then the rule is entitled to deference from the courts." (citations omitted)). In this case, though, the Board has made no claim to have brought to bear its authority and expertise to resolve an ambiguous law. Rather, it determined that it had no choice in the matter because both Supreme Court and lower court precedent "compel[led]" the Board to rule as it did, obviating, for example, any need for the Board to explain prior agency decisions arguably contrary to the rule applied in this case.¹ As we have previously explained, we are "not obligated to defer to an agency's interpretation of Supreme Court precedent." NLRB v. U.S. Postal Serv., 660 F.3d 65, 68 (1st Cir. 2011) (quoting N.Y., N.Y., LLC v. NLRB, 313 F.3d 585, 590 (D.C. Cir. 2002)). We therefore conduct de novo our own review of the precedent that the Board found compelling. See id.

The core principles at play here come from Communications Workers v. Beck, in which the Supreme Court clarified that employees have the right to refuse to pay union fees for activities other than those "necessary to '[the union's performance of] the duties of an exclusive representative of the

¹ Cf. Transport Workers, 329 N.L.R.B. 543, 544-45 (1999) (finding chargeable certain activities involving communication with government entities, including telephone calls and other conversations with Air Force and NASA Labor Relations personnel about working conditions and other representation issues, where the employer was a contractor and the employees were contracted to work at the Air Force or NASA).

employees in dealing with the employer on labor-management issues.'" 487 U.S. 735, 762-63 (1988) (quoting Ellis v. Bhd. of Ry., Airline & S.S. Clerks, 466 U.S. 435, 448 (1984) (evaluating a parallel provision of the Railway Labor Act)); see also id. at 745 (asking whether charges are permitted for "activities beyond those germane to collective bargaining, contract administration, and grievance adjustment.").

The expenses found to be nonchargeable by the circuit court in Beck included those for "lobbying efforts." Beck v. Commc'ns Workers, 776 F.2d 1187, 1210-11 (4th Cir. 1985), aff'd. 487 U.S. at 742. But the record made clear that the Union made no attempt to show that the lobbying was germane to collective bargaining. Id. at 1211. Indeed, the special master's conclusion as affirmed by the Fourth Circuit suggested that some types of lobbying, not at issue in Beck, might be chargeable. Id. (approving a special master's determination that, while "there might have been some areas" in which "'lobbying' would have some relevance" to collective bargaining, the union "had made no effort to identify any such permissible 'lobbying activities'"). So Beck's ultimate affirmance of the lower court ruling, 487 U.S. at 742, provides us with no rule categorically dealing with lobbying expenses.

While Beck provides the only Supreme Court holding evaluating the chargeability of lobbying expenses in the context

of private-employer unions governed by the NLRA, the Court's earlier decision interpreting the Railway Labor Act in International Association of Machinists v. Street can be read as perhaps categorically treating as nonchargeable amounts spent "to support candidates for public office, and advance political programs." 367 U.S. 740, 768 (1961); see id. at 744 & n.2, 768-70 (discussing funds used to "promote legislative programs" and determining that the Railway Labor Act did not allow unions to use non-members' fees "to support political causes objected to by the employee"). By 1963, however, the Court did not seem to presume that it had already limned a clear boundary between political expenses and those germane to collective bargaining. See Bhd. of Ry., Airline & S.S. Clerks v. Allen, 373 U.S. 113, 121 (1963) (declining in a Railway Labor Act case to "attempt to draw the boundary between political expenditures and those germane to collective bargaining" where the courts below had declined to do so). And to the extent that boundary is more of an overlap consisting of expenses that can be called both political and germane to collective bargaining, the court offered no view in either case, or subsequently in Beck, on how to resolve the conflict.

There are several Supreme Court cases addressing the chargeability of lobbying expenses by public-sector unions. See, e.g., Lehnert v. Ferris Fac. Ass'n, 500 U.S. 507, 520 (1991)

(explaining that when "challenged lobbying activities relate not to the ratification or implementation of a dissenter's collective bargaining agreement, but to financial support of the employee's profession or of public employees generally, the connection to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees"); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36 (1977) (holding that objecting non-members could not be compelled to pay agency fees for "the advancement of other ideological causes not germane to [the union's] duties as collective-bargaining representative"). These holdings distinguishing chargeable from nonchargeable lobbying expenses incurred by public-sector unions no longer serve their intended purpose in the public-sector context, because the Supreme Court more recently decided that public-sector unions cannot require nonmember employees to pay any expenses at all. See Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., 138 S. Ct. 2448, 2486 (2018). The parties in this case nevertheless cite to and rely on pre-Janus public-sector lobbying cases as analogous authority for their respective positions.² And indeed, there is

² Thus, the Board points to Harris v. Quinn, 573 U.S. 616, 636-37 (2014), and Lehnert as supporting its position that "relevant Supreme Court . . . precedent compels holding that lobbying charges are not chargeable as incurred during the union's performance of statutory duties as the objectors' exclusive bargaining agent." The Union on the other hand cites to the same cases to back up its argument that lobbying may sometimes be a part of collective bargaining. See Harris, 573 U.S. at 636-37

nothing in Janus that purports to reject or modify Abood's assumption that some lobbying might be at least germane to collective bargaining by public-sector unions. See Janus, 138 S. Ct. at 2486 (explaining that Abood should be overruled given "that Abood's proponents have abandoned its reasoning, that the precedent has proved unworkable, that it conflicts with earlier First Amendment decisions, and that subsequent developments have eroded its underpinnings [seeking to promote labor peace and avoid free riders]" but saying nothing about the conceptual possibility that some lobbying could be germane to bargaining); see also Abood, 431 U.S. at 236 ("The process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process.").

We therefore consider the pre-Janus public-sector Supreme Court cases, but with a recognition that the concerns arising from compelled union fees differ markedly in the public

(explaining that "both collective-bargaining and political advocacy and lobbying are directed at the government"); Lehnert, 500 U.S. at 519-20 ("To represent their members effectively . . . public sector unions must necessarily concern themselves not only with negotiations at the bargaining table, but also with advancing their members' interests in legislative and other 'political' arenas.").

sector as compared to the private sector. On one hand, the Supreme Court has been clear that in the public sector, acting as a collective-bargaining representative often necessarily involves interaction with government officials in a way that is not often necessary in the private sector. Lehnert, 500 U.S. at 520 ("Public-sector unions often expend considerable resources in securing ratification of negotiated agreements by the proper state or local legislative body. Similarly, union efforts to acquire appropriations for approved collective-bargaining agreements often serve as an indispensable prerequisite to their implementation. . . . The dual roles of government as employer and policymaker in such cases make the analogy between lobbying and collective bargaining in the public sector a close one." (citations omitted)). On the other hand, the concerns about government-compelled political speech that dominate the question in the public-sector context, see Janus, 138 S. Ct. at 2478, are less potent in the private-sector context.

The element common to both private- and public-sector caselaw regarding the chargeability of union expenses is a focus on the relationship between the expenses and the union's performance of its duties as the exclusive bargaining agent for all the employees. See Lehnert, 500 U.S. at 519 (requiring that chargeable activities be "germane to collective-bargaining activity" (internal quotation marks omitted)); Beck, 487 U.S. at

745 (holding that non-members could not be charged "to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment"); Abood, 431 U.S. at 235-36 (holding that unions may not charge non-members for "the advancement of . . . ideological causes not germane to its duties as collective-bargaining representative").

The caselaw asks not whether challenged expenses are "incurred during" bargaining or the performance of other statutory duties, as the Board asked in this case, but whether the expenses are "necessary" for or "germane to" those duties. Beck, 487 U.S. at 745, 762-63. Further, the cases make clear that activities for which expenses are chargeable may consist of more than direct dealing and negotiation with employers. See, e.g., Ellis, 466 U.S. at 448-55 (in the context of the Railway Labor Act finding expenses chargeable for a national convention "at which the members elect officers, establish bargaining goals and priorities, and formulate overall union policy," "refreshments for union business meetings and occasional social activities," and publications including "articles about negotiations, contract demands, strikes, unemployment and health benefits, . . . and recreational and social activities," excluding the pro rata costs of any lines in the publications devoted to political issues).

We do agree with the Union that there is no conceptual reason for concluding that lobbying by a private sector union could

never be necessary to the union's performance of its collective bargaining duties. To illustrate, in collective bargaining the Union could attempt to secure a wage increase or other benefit contingent on the employer's receipt of revenues to fund the increase or benefit. In this very case, for example, the Union lobbied for a bill in Rhode Island that would have increased state payments to certain acute-care hospitals, which payments it believed one hospital would necessarily have to turn over at least in part to nurses per the terms of the applicable collective bargaining agreement. Similarly, in Vermont the Union lobbied for a bill to increase mental health care funding, which it believed would make more funds available for wages (and which it committed to lobbying for in the relevant collective bargaining agreements). Were those funds coming from a private source, we see no obvious reason why the Union might not reach out to urge that source to deal with the employer, especially if the Union had some influence with the source. The Board in turn points to no reason why the expense of trying to help the employer secure payment to fund success at the bargaining table would not be germane to collective bargaining. That same expense aimed at influencing the source of funds would likely be called "lobbying" if the source, as here, were the government. And such expenses would become no less germane merely because the source of funding might be the government. So we are indeed left to conclude that, in theory,

there exist instances in which an expense could reasonably be called both a form of lobbying and germane to collective bargaining. And nothing in the Supreme Court's actual holdings compels us to conclude either that such expenses are properly chargeable to dissenters, or not.

There is, though, the following statement in Lehnert:

[Street, Allen, and Ellis] make clear that expenses that are relevant or "germane" to the collective-bargaining functions of the union generally will be constitutionally chargeable to dissenting employees. They further establish that, at least in the private sector, those functions do not include political or ideological activities.

Lehnert, 500 U.S. at 516 (emphasis added). While dictum (because Lehnert was a public-sector case), the above passage is Supreme Court dictum, and it also claims a provenance in the Court's earlier opinion in Street, which we have acknowledged can be read as perhaps categorically treating as nonchargeable amounts spent "to support candidates for public office, and advance political programs" (see p. 6-7, supra). Furthermore, two decades later the Supreme Court strongly suggested that it had drawn a "line" in the private sector between collective-bargaining and lobbying. See Harris v. Quinn, 573 U.S. 616, 636-37 (2014) ("In the private sector, the line is easier to see. Collective bargaining concerns the union's dealings with the employer; political advocacy and lobbying are directed at the government. But in the public sector,

both collective-bargaining and political advocacy and lobbying are directed at the government."). Certainly, too, Janus, while dealing only with public-sector unions, signals no increased tolerance for the compelled funding of lobbying by non-member dissenters in the private sector.

We are bound by the Supreme Court's "considered dicta." McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 19 (1st Cir. 1991) ("[F]ederal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when, as here, a dictum is of recent vintage and not enfeebled by any subsequent statement."); see also United States v. Moore-Bush, 963 F.3d 29, 39-40 (1st Cir. 2020) ("Carefully considered statements of the Supreme Court, even if technically dictum, must be accorded great weight and should be treated as authoritative when, as in this instance, badges of reliability abound." (quoting United States v. Santana, 6 F.3d 1, 9 (1st Cir. 1993))). Given the clarity of the Supreme Court's statement in Lehnert, its basis in the Court's analysis of its previous cases, and the suggestion in Harris that a line has been drawn, we cannot dismiss Lehnert's dictum as anything but "considered." It would appear, not surprisingly, that the Board may have to accord similar deference to considered Supreme Court dicta, see 800 River Rd. Operating Co., 369 N.L.R.B. No. 109, at *6 n.16 (2020) ("Even if properly characterized as dicta, the

meaning of the [Supreme] Court's language is clear, and we have serious doubts whether the Board has the authority to 'change its mind' in contravention of the Court's own mindset."). Neither party argues to the contrary.

Applying Lehnert's considered dictum to this case, we see no convincing argument that legislative lobbying is not a "political" activity -- at least as conducted here. See Political, Merriam-Webster Unabridged Dictionary, <https://unabridged.merriam-webster.com/unabridged/political> (last visited Sept. 10, 2020) (defining "political" as "of or relating to government, a government, or the conduct of governmental affairs"); see also Lobby, Merriam-Webster Unabridged Dictionary, <https://unabridged.merriam-webster.com/unabridged/lobbying> (last visited Sept. 10, 2020) (defining "lobby" as "to conduct activities (as engaging in personal contacts or the dissemination of information) with the objective of influencing public officials and especially members of a legislative body with regard to legislation and other policy decisions"). And in fact, the Supreme Court in Harris grouped "lobbying" with "political advocacy" as a presumably nonchargeable "activity directed at the government." Harris, 573 U.S. at 636.

There is added reason that may well inform Lehnert's categorical rejection of charging dissenters for lobbying expenses in private-sector unions. The best case for charging such expenses

would apply very rarely in the private sector precisely because the government is not the employer with whom the union bargains. A more flexible approach that nevertheless made room for charging such expenses only when the nexus to bargaining was especially clear would apply with little frequency, and would come with no easy-to-apply objective measure. As a result, the transaction costs of establishing the chargeability of such expenses would likely outweigh the amounts involved. Furthermore, in the ordinary case, the dissenting employees would lack the resources to press their objections. Unions, in turn, would be tempted to press the margins, figuring that sustained opposition might be unlikely. There is thus a certain practicality to drawing a brighter line, as Lehnert suggests and as the Board did here.³

Finally, the Board's decision also appears to be in accord with the decision of the only other circuit to address the issue at hand. See Miller v. Air Line Pilots Ass'n, 108 F.3d 1415, 1422-23 (D.C. Cir. 1997) (employing a different analysis but arriving at the same result, a "line between . . . collective

³ We cite this practicality as a reason to take Lehnert's dictum at face value. We do not rely on it as an alternative basis -- not adopted by the Board, though employed at oral argument by its counsel -- for sustaining the Board's ruling even if the caselaw left room for the Board to rule either way. See SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) ("[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.").

bargaining expenditures and those relating to the union's government relations," reasoning that "[i]f there is any union expense that . . . must be considered furthest removed from 'germane' activities, it is that involving a union's political actions").

Of course, the Supreme Court is not bound by its own dicta. And as our foregoing discussion illustrates, the Court might well regard its actual holdings and reasoning as leaving room for the Board to interpret the statute either way. Unless and until the Court does so, however, we must regard the matter as settled.⁴ We uphold the Board's decision on the Union's lobbying expenses.

B.

The Union also petitions for review of the Board's determination requiring it to provide Geary a letter signed by an auditor verifying that the financial information disclosed to the objectors had been independently audited (the "audit verification letter"). In Chicago Teachers Union v. Hudson, the Supreme Court held that "basic considerations of fairness . . . dictate that the potential objectors be given sufficient information to gauge the

⁴ Our agreement with the Board that the Supreme Court's decisions compel the Board's ruling that expenses germane to collective bargaining do not include lobbying eliminates any need to consider the Union's argument that the Board abused its interpretative discretion by failing to acknowledge that it was changing Board policy.

propriety of the union's fee." 475 U.S. 292, 306 (1986).⁵ The Board had determined well before it decided this case that, under Hudson, union expenditures provided to objecting employees must be verified by an independent audit. See United Food & Com. Workers Union, 363 N.L.R.B. No. 127, at *4 (2016); Am. Fed'n of Television & Rec'g Artists, 327 N.L.R.B. 474, 476 (1999). The Union does not challenge that baseline requirement. Instead, the Union argues that the additional requirement of providing a letter verifying that the audit took place is unreasonable.

The Board's conclusion here reasonably applied and extended the Hudson standard. As the Board pointed out, providing an audit verification letter to objecting employees avoids "requiring [employees] to accept the union's bare representations that the figures were appropriately audited." See Cummings v. Connell, 316 F.3d 886, 892 (9th Cir. 2003) (requiring the same and reasoning that an auditor's certification "that the summarized figures have indeed been audited and have been correctly reproduced from the audited report" would allow the objectors to rely safely on the union's figures). At oral argument, counsel for the Union acknowledged that the additional step of providing a letter

⁵ Although Hudson was a public-sector case and not an NLRA case, the Board has applied it to its analyses of unions' statutory duty of "fair representation" under NLRA § 8(b)(1)(A). See Cal. Saw & Knife Works, 320 N.L.R.B. 224, 233 (1995) (citing Abrams v. Commc'ns Workers, 59 F.3d 1373, 1379 n.7 (D.C. Cir. 1995)). Neither party contests Hudson's applicability to the issue here.

verifying the audit would cause no harm to a union, and of course the additional step might save both parties litigation costs. As a result, we see no reason why the Board erred in adopting a requirement that such an audit verification letter be included in the "information" to be supplied objectors under Hudson. Nor does the fact that no one in this case apparently had any reason to doubt the accuracy of the Union's factual assertions concerning both its expenditures and its audit give us pause. "Trust but verify" is a reasonable approach for the Board to take, especially when the Union can cite no good reason for not supplying an audit verification letter to confirm that an audit has been performed as claimed. See Fall River Dyeing & Finishing Corp., 482 U.S. at 42 ("If the Board adopts a rule that is rational and consistent with the Act, then the rule is entitled to deference from the courts." (citations omitted)).

The Union argues, alternatively, that even if we uphold the Board's ruling that unions must supply an audit verification letter as part of the information to be supplied under Hudson, it would be unfair -- that is, a manifest injustice -- to apply this rule to the Union in this very case.⁶ New rulings most often do

⁶ The Board argues that, by not raising it before the Board, the Union waived its retroactivity argument. Under section 10(e) of the NLRA, 29 U.S.C. § 160(e), "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." The Union,

apply to the parties in the case in which the rule is adopted. See SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) ("Every case of first impression has a retroactive effect").

To identify exceptions, the Board considers: (1) the parties' reliance on preexisting law, (2) the "effect of retroactivity on accomplishment of the purpose of the Act," and (3) "any particular injustice arising from retroactive application." Graymont PA, Inc., 364 N.L.R.B. No. 37, at *11 (2016). Here, the Union claims to have relied on preexisting law in refusing to provide the letter but points to no law clearly indicating that it need not produce the letter. See, e.g., Teamsters Local 75, 329 N.L.R.B. No. 12, at *30 (1999) (explaining that "[t]he Union's duty of fair representation . . . is met if it supplies its major categories of expenditures and supplies verified figures," but not clarifying whether or how a union might be required to show that the figured are indeed verified). The argument in favor of producing the audit verification letter -- described above -- was certainly foreseeable. Hoping that one wins a contested issue is hardly the type of reliance that provides

though, did argue in front of the Board that requiring an audit verification letter would amount to a new rule. Whether that contention preserved the retroactivity argument, we need not decide, given our finding that the argument fails. Cf. Seale v. INS, 323 F.3d 150, 155-57 (1st Cir. 2003) (explaining that we may bypass the question of statutory jurisdiction where there is a clear answer on the merits).

cause for not applying a ruling to the case in which it is issued. On the second factor, we acknowledge -- as the Union points out -- that no party has contended that Geary was unable to decide which expenses to challenge without the audit verification letter, nor does there appear to be any dispute as to whether the expenses actually were verified by an independent audit in this case. On the other hand, however, the Union has clearly acknowledged that it will suffer no injury at all by providing the audit verification letter. And the audit verification letter would clearly further the purposes of the NLRA, as described above. For those reasons, we find no injustice in the Board's application of its ruling in this case to the parties in this case.

Lastly, the Union argues that we may not reach the audit verification issue at all because it was not raised in Geary's amended complaint. This is untrue. That complaint alleges: "Since on or about September 30, 2009, Respondent has failed to provide Geary and other similarly situated employees with evidence beyond a mere assertion that the financial disclosure . . . was based on an independently verified audit."

III.

For the reasons explained above, we uphold the Board's decision on the lobbying expenses. On the issue of the audit verification letter, we uphold the Board's decision. Consequently,

we deny the Union's petition for review in its entirety and grant the Board's cross-petition for enforcement.

United States Court of Appeals For the First Circuit

Nos. 19-1490, 19-1602

UNITED NURSES & ALLIED PROFESSIONALS,

Petitioner, Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent, Cross-Petitioner,

JEANNETTE GEARY,

Intervenor.

JUDGMENT

Entered: September 15, 2020

This cause came on to be heard on a petition for review of an order of the National Labor Relations Board and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The United Nurses & Allied Professionals' petition for review is denied in its entirety, and the National Labor Relation Board's cross-petition for enforcement is granted.

By the Court:

Maria R. Hamilton, Clerk

cc: Christopher Callaci, David Habenstreit, Julie Brock Broido, Milakshmi V. Rajapakse, Glenn M. Taubman, Aaron B. Solem, Linda McDonald, Jeanette Geary