IN THE SUPREME COURT OF THE UNITED STATES

No. 07-610

DANIEL B. LOCKE; *et al.*, ON BEHALF OF THEMSELVES AND THE CLASS THEY SEEK TO REPRESENT,

Petitioners,

v.

EDWARD A. KARASS, *et al.*,

Respondents.

PETITIONERS' OPPOSITION TO THE MOTION OF THE ACTING SOLICITOR GENERAL FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AND FOR DIVIDED ARGUMENT

Petitioners, Daniel B. Locke, *et al.* ("the Employees"), pursuant to Rule 21 of the Rules of this Court, respectfully OPPOSE the Motion of the Acting Solicitor General to Participate in Oral Argument and for Divided Argument, as follows:

1. The Motion of the Acting Solicitor General was filed and docketed with this Court on 24 July 2008, within the time permitted by Rule 28.7 of the Rules of this Court. All parties have withheld their consent to the Motion.

2. The Brief for the United States as *Amicus Curiae* was filed by the Solicitor General and docketed on 12 May 2008, the date for submissions in support of the Employees. However, the Solicitor's Brief does not support the Employees. Rather the Solicitor's Brief primarily supports Respondent Maine State Employees Association, Local 1989, Service Employees International Union, AFL-CIO-CLC ("MSEA"), arguing that "a public-sector union may, consistent with the First

Amendment, charge nonmembers for litigation funded through a pooling arrangement with other unions." *Compare* Solicitor's Brief at I, 6-24 *with* MSEA's Brief at 9-40. Seventeen (17) of the twenty-two (22) pages of Argument in the Solicitor's Brief are devoted to opposing the Employees' position on the question of the chargeability of extra-unit litigation. Solicitor's Brief at 8-24.

3. Indeed, MSEA's Brief cites the Solicitor's Brief on not fewer than fourteen (14) occasions as supporting the MSEA's argument. MSEA's Brief at 11-12, 18-19, 21, 23-24, 35-36, 37 n.20, 40.

4. Nevertheless, the Acting Solicitor General seeks to participate in oral argument before this Court by denying the Employees part of the time to which they would otherwise be entitled pursuant to Rule 28.3 of the Rules of this Court, by requesting that half of the time he requests be deducted from the Employees' allotted time.

5. This Court permits divided argument "only in the most extraordinary circumstances." Rule 28.7. Although such requests by the Solicitor General are historically received more favorably than those of other *amici*, the Acting Solicitor General has failed to meet the "heavy burden" of demonstrating that his participation "would provide assistance to the Court not otherwise available." *Id.*; *see also* Gressman, Eugene, *et al.*, *Supreme Court Practice*, § 14.7, at 765-66 (9th ed. 2007).

6. This Court has denied such requests even where the United States has proclaimed interest in the interpretation of Federal statutes. *Martin v. Franklin*

Capital Corp., 545 U.S. 1162 (2005) (denying leave to participate where United States stated that it "may ... have a substantial interest in the removal to federal court of cases involving issues of importance to the federal government"); *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 543 U.S. 1135 (2005) (denying leave to participate where United States expressed "a significant interest in assuring a neutral federal forum for the adjudication of substantial disputes between persons of diverse citizenship and promoting the efficient resolution of disputes by permitting related claims to be resolved in one action" under 28 U.S.C. § 1367); *del Rosario Ortega v. Star-Kist Foods, Inc.*, 543 U.S. 1135 (2005) (denying leave to participate where United States expressed "a significant interest in the proper interpretation of the supplemental jurisdiction statute, and in ensuring that the statute allows for the efficient adjudication of lawsuits that satisfy the criteria for federal-court jurisdiction" under 28 U.S.C. § 1367); *Ford Motor Co. v. McCauley*, 536 U.S. 955 (2002) (denying leave to participate where United States expressed "a significant interest in an interpretation of the amount-in-controversy requirement" under 28 U.S.C. § 1332).

7. No federal statute is involved in this case, only the constitutionality of the application of a state practice to state public employees. Thus, the most relevant precedent as to whether the Court should permit the Acting Solicitor to argue is *Stenberg v. Carhart*, 529 U.S. 1051 (2000), where this Court denied leave to participate in a case involving the constitutionality of a state statute regulating partial-birth abortion.

8. In this case, the Solicitor General has expressed no concrete interest of the United States. The Solicitor's Brief merely argues vaguely that the "Secretary of Labor is responsible for advising the President with respect to national labor policy and carrying out Congress's purpose 'to foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment.' 29 U.S.C. 551." Solicitor's Brief at 1; *accord* Motion at 2.

9. Perhaps recognizing how nebulous that supposed interest is, the Solicitor's Motion adds that "questions concerning the chargeability of litigation expenses to nonmembers arise under the National Labor Relations Act (NLRA), which is administered by the National Labor Relations Board (NLRB)." Motion at 2. However, the Solicitor's Brief is not filed on behalf of the NLRB. Moreover, the Solicitor immediately undercuts that supposed interest by asserting "that questions arising under the NLRA are distinguishable" from this case. *Id.*

10. In short, the purported federal interests cited by the Solicitor here are even more tenuous than those involved in cases which this Court has previously denied similar participation by the Solicitor.

11. The Employees respectfully submit that the question actually before this Court — and not as recast by the Acting Solicitor General and MSEA — suggests that the Acting Solicitor General's participation would not "provide assistance to the Court not otherwise available," Rule 28.7. Like *Stenberg*, this case involves only a state practice as to which the United States has no concrete

interest. Therefore, because the Acting Solicitor General's "assistance" would be at odds with the Employees' arguments, the Court should not deny the Employees their full opportunity to present their views by indulging the Acting Solicitor General's request at their expense.[1]

WHEREFORE, the Employees respectfully request that the Acting Solicitor General's Motion be DENIED in its entirety.

DATED: 28 July 2008

Respectfully submitted,

W. JAMES YOUNG*
RAYMOND J. LAJEUNESSE, JR.
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510
wjy@nrtw.org

ATTORNEYS FOR PETITIONERS
Counsel of Record

[1] Alternatively, the Court could, as it has on prior occasions, grant leave to the Solicitor General to participate in oral argument by extending the time for oral argument. *See, e.g., Ridgeway v. Ridgeway*, 452 U.S. 936 (1981); *Robbins v. California*, 450 U.S. 1039 (1981).

IN THE SUPREME COURT OF THE UNITED STATES

No. 07-610

DANIEL B. LOCKE; *et al.*, ON BEHALF OF THEMSELVES AND THE CLASS THEY SEEK TO REPRESENT,

Petitioners,

v.

EDWARD A. KARASS, *et al.*,

Respondents.

CERTIFICATE OF SERVICE

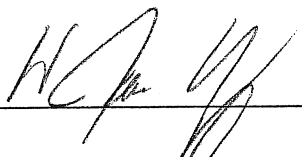
I, W. James Young, a member of the bar of this Court, hereby certify that, on this 28th day of July 2008, all parties required to be served have been served copies of the Opposition to the Motion of the Acting Solicitor General to Participate in Oral Argument and for Divided Argument in this matter by United States Mail, first-class postage pre-paid to the addresses listed below:

WILLIAM H. LAUBENSTEIN, III
Office of the Attorney General
6 State House Station
Augusta, Maine 04333-0006

JEREMIAH A. COLLINS, Esq.
ROBERT ALEXANDER, Esq.
Bredhoff & Kaiser, P.L.L.C.
805 Fifteenth Street, N.W.
Washington, D.C. 20005

PHILIP J. MOSS, Esq.
Moon, Moss & Shapiro, P.A.
400 Congress Street, 4th Floor
Portland, Maine 04101

JEFFREY NEIL YOUNG, Esq.
McTeague, Higbee, Case, Cohen, Whitney & Toker, P.A.
Four Union Park
Post Office Box 5000
Topsham, Maine 04086-5000



W. JAMES YOUNG
c/o National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510