No. 19-51

IN THE

Supreme Court of the United States

BEN BRANCH, *et al.*,

Petitioners,

v.

MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF FOR PIONEER INSTITUTE AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether Mass. Gen. Laws ch. 150E § 4, which endorses a public-sector union as an exclusive bargaining representative, unduly coerces Petitioners' First Amendment free speech and association rights by preventing them from having a voice and vote in the terms of their employment unless they pay for union membership.

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INTEREST OF AMICUS CURIAE[1]

Pioneer Institute ("Pioneer") is an independent, non-partisan, privately funded research organization that seeks to improve the quality of life in Massachusetts through civic discourse and intellectually rigorous, data-driven public policy solutions. Pioneer seeks to change policies that negatively affect freedom of association, freedom of speech, economic freedom, and government accountability. Pioneer believes that the First Amendment protects individuals from being forced to associate with or subsidize political speech with which they disagree. That protection promotes a diverse and robust public discourse in service of the common good, where individuals are free to follow and express their own opinions rather than be involuntarily pressed, as a condition of their right to earn a living, to support causes with which they disagree.

INTRODUCTION AND SUMMARY OF ARGUMENT

Massachusetts has an exclusive representation scheme for public employees that permits unions to exclude non-union members from participating in discussions regarding the terms of their employment. Mass. Gen. Laws ch. 150E § 4 ("Exclusive Representation Scheme" or "Mass. Gen. Laws ch. 150E § 4") ("Public employers may recognize an employee organization

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief.

Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

designated by the majority of the employees in an appropriate bargaining unit as the exclusive representative of all the employees in such unit for the purpose of collective bargaining."). That scheme cannot withstand constitutional scrutiny under the logic and analysis of this Court's decision in *Janus* v. *American Fed'n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2483 (2018) (holding that a non-union public employee must freely consent before any agency fee is exacted).

In particular, the Exclusive Representation Scheme impermissibly gives unions the ability to deny non-union members any voice or vote on the terms of their employment. That grant of authority from the Commonwealth of Massachusetts—and the unions' use of it—infringes the non-union employees' First Amendment rights not to be forced to endorse or subsidize political speech, and not to associate with groups or opinions with which they disagree.

In sum, the state grants a union the exclusive right to bargain for public employees. Those employees then face a Hobson's Choice—either follow their conscience and refuse to subsidize the union's political speech (in which case they will have no say whatsoever in the terms and conditions of their job), or subsidize the union's political speech with which they disagree in order to have a say relating to their employment conditions. This political coercion granted by state statute leaves the First Amendment rights of employees who disagree with the union's political speech in tatters.

Indeed, because the public employer—the state—is required to reach an agreement with the collective bargaining agent, the state cannot (even if it wanted to) consider the concerns of non-union members related to the terms of their public employment. *Cf. Janus*, 138 S.

Ct. at 2469 ("[D]esignating a union as the exclusive representative of nonmembers substantially restricts the nonmembers' rights.").

By permitting the exclusive bargaining representative to preclude non-union members from effectively communicating with their employers on matters of personal concern and communicating with the government about matters of public concern, it is more than "likely" that non-union members will face significant pressure to forgo their rights not to associate with and subsidize speech they disagree with, and join the union against their wishes in order to preserve their voice. *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 462-463 (1958) (explaining that laws impair First Amendment rights when they "entail[] the likelihood of a substantial restraint upon the exercise … of [the] right to freedom of association," are "likely to affect adversely the ability of [individuals] to pursue their collective effort to foster beliefs which they admittedly have the right to advocate," or "may induce members" to forgo First Amendment freedoms); *see also Healy* v. *James*, 408 U.S. 169, 183 (1972) (explaining that courts "are not free to disregard the practical realities" that may indirectly impair First Amendment rights). In fact, the respondent unions in this case freely acknowledge that membership is the price of admission for retaining "First Amendment rights." *See*, *e.g.*, Massachusetts Teachers' Ass'n, *Good Reasons to Belong to MTA*, https://massteacher.org/about-the-mta/good-reasons-to-belong-to-mta (visited Aug. 7, 2019) (explaining that joining a union "[p]rovides legal protection of your First Amendment rights to speak freely").

As set forth below, the Supreme Judicial Court of Massachusetts (the "SJC") erred in finding constitutional the respondent unions' application of Mass. Gen.

Laws ch. 150E § 4 to deprive non-members of a voice and vote in the terms of their employment. This Court should grant certiorari to correct this constitutional error. Petitioners, and others similarly situated throughout the country, should not be forced to subsidize political speech with which they fundamentally disagree as the price of preserving their right to communicate with their employer about their job or on matters of importance. This Court has invalidated such a false choice in other contexts, and should do so again here. *See Rutan* v. *Republican Party of Ill.*, 497 U.S. 62, 73 (1990) (holding that an employer may not exclude or withdraw benefits from an employee based on political affiliation).

ARGUMENT

I. THE PETITION PRESENTS QUESTIONS OF GREAT AND RECURRING IMPORTANCE

The First Amendment precludes the government from coercing speech. *Janus* v. *American Fed'n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2463 (2018) ("Compelling individuals to mouth support for views they find objectionable violates [a] cardinal constitutional command, and in most contexts, any such effort would be universally condemned."). Coerced speech is not limited to forced speech, but also includes compulsory financial support of organizations with which one disagrees. *Id.* at 2464 ("Compelling a person to subsidize the speech of other private speakers raises similar First Amendment concerns. … As Jefferson famously put it, 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.'"). These protections apply equally to non-union public employees. *Id.* at 2473.

In *Janus*, this Court considered an Illinois provision requiring that non-union public employees "pay [to their exclusive bargaining representative] a fee which shall be their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment." Ill. Comp. Stat. ch. 5 § 315/6(a). Overruling *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977), this Court held the provision unconstitutional. *Janus*, 138 S. Ct. at 2486. The Court held that "[n]either an agency fee nor any other payment to the union may be deducted from a nonmember's wages … unless the employee affirmatively consents to pay" that fee. *Id.* That is because coercing a non-union employee to give financial support to union speech with which a non-union employee disagrees "violates [the] cardinal constitutional command" against compelled speech. *Id.* at 2463.

Despite this Court's holding that laws coercing non-union member public employee speech and association are unconstitutional, *see Janus*, 138 S. Ct. at 2483, non-union members who do not wish to associate with unions continue to be deprived of a voice and a vote in their employment conditions. Litigation on this issue is pervasive and lower courts have failed to apply *Janus* consistently, instead erroneously upholding exclusive bargaining arrangements that exclude non-members from having a say in the terms of their employment, often relying on *Minnesota State Bd. for Cmty. Colls.* v. *Knight*, 465 U.S. 271 (1984). *See, e.g.*, *Mentele* v. *Inslee*, 916 F.3d 783, 788 (9th Cir. 2019) ("We acknowledge that *Knight*'s recognition that a state cannot be forced to negotiate or meet with individual employees is arguably distinct from Miller's contention that employees' associational rights are implicated

when a state recognizes an exclusive bargaining representative with which non-union employees disagree"); *Bierman* v. *Dayton*, 900 F.3d 570, 574 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 2043 (2019); *Uradnik* v. *Inter Faculty Org.*, No. 18-1895, 2018 WL 4654751, at *3 (D. Minn. Sept. 27, 2018) (finding that plaintiff's compelled speech arguments had little chance of success based on an application of *Knight*); *cf. Berman* v. *New York State Pub. Emp. Fed'n*, No. 16-204, 2019 WL 1472582, at *1-2 (E.D.N.Y. Mar. 31, 2019) (granting motion for reconsideration on a damages claim arising out of agency fee collections after *Janus*). But nothing in *Knight* suggests—let alone compels—the conclusion that non-union members may be constitutionally deprived of any voice and vote in matters within the scope of their employment, unless they support the union's speech through a paid membership.

Moreover, both in anticipation of this Court's invalidation of agency fees and as a reaction to *Janus* itself, unions and state governments have enacted policies that fly in the face of this Court's decision in *Janus*. For example, unions have sought injunctions to prevent workers' rights groups from gaining access to membership rolls to prevent workers from learning about their options after *Janus*. *See* New York State Governor's Office, *In Response to Janus Decision, Governor Cuomo Signs Executive Order to Protect Union Members from Harassment and Intimidation* (June 27, 2018) (New York executive order preventing state agencies from sharing the names and contact information of public employees with outside groups, presumably associated with the right to work movement); Orenstein, *State Worker Unions Get Court Victory in Public Records Clash with Conservative Group*, News Tribune (Nov. 6, 2017), https://www-1.thenewstribune.com/news/

politics-government/article181986881.html (outlining a dispute between the AFSCME and right to work groups that sought access to union member lists to explain new rights to public employees). Unions have also imposed undue logistical burdens on members who hoped to end their membership following *Janus*. *See* Fisch, Yankee Institute, *AFSCME Defies* Janus, *Tells Members They Can't Leave* (Nov. 28, 2018), https://yankeeinstitute.org/2018/11/28/afscme-defies-janus-tell-members-they-cant-leave/ (describing an ongoing dispute between Connecticut workers and their union, which has placed severe restrictions around their contractual ability to leave the union).

Beyond internal union rules, legislation in New York, Delaware, Hawaii, and California, among other states, insulates unions from the impact of the *Janus* decision at the expense of the First Amendment rights of workers. These laws are not consistent with *Janus*. *See, e.g.*, N.J. Rev. Stat. § 52:14-15 (limiting opt-out period to 30-day window and prohibiting employees from discouraging others to leave a public union); Haw. Stat. Ann. § 89-4 (limiting opt-out period to 30-day window); R.I. Gen. Laws § 28-9.2-18 (permitting unions to cease representing non-union firefighters and police officers in workplace grievance cases, thus depriving them of a benefit of employment); Del. Code. Ann. tit. 19, § 1304 (limiting opt out period to 30-day window); *see also* Mass. H.B. 3854, 191st Gen. Assemb., Reg. Sess. (2019) (permitting unions access to new employees' contact information while limiting outside group access to union worker lists and allowing unions to charge non-members a "reasonable … fee []" for representation in grievance cases).

As these laws and policies demonstrate, although unions are no longer able to extract compulsory agency

fees, they have leveraged power in other ways, including as exclusive representatives, to coerce employees to join or remain in a union with which they do not wish to associate. The First Amendment questions raised by exclusive representation schemes like Mass. Gen. Laws ch. 150E § 4—including whether they violate non-members' free speech and associational rights—are "important question[s] of federal law that ha[ve] not been, but should be, settled by this Court." S. Ct. R. 10(c).

II. MASS. GEN. LAWS CH. 150E § 4 SHOULD BE SUBJECT TO STRICT SCRUTINY AS AN ENCROACHMENT ON FREEDOM OF SPEECH AND ASSOCIATION

Mass. Gen. Laws ch. 150E § 4 permits public sector unions—including the respondent unions in this case—to exclude non-union members from participating in union deliberations regarding the terms of their employment to be negotiated by the union on behalf of the public employees. *See, e.g.*, Pet. App. 78a ("WARNING: IF YOU ELECT [NOT] TO … BECOME A MEMBER … YOU WILL NOT BE ENTITLED TO THE FOLLOWING SERVICES[:] … [the] [a]bility to … vote on … contract proposals or bargaining strategy."). Such a scheme coerces employees to relinquish at least two First Amendment rights: (1) the right to freedom of association, *see Knox* v. *Service Emps. Int'l Union*, 567 U.S. 298, 309 (2012); and (2) the right to freedom of speech. *Janus*, 138 S. Ct. at 2475-2476.

The unions themselves acknowledge that union membership is the price of admission for retaining "First Amendment rights." Mass. Teachers' Ass'n, *Good Reasons to Belong to MTA*, https://massteacher.org/about-the-mta/good-reasons-to-belong-to-mta (visited Aug. 7, 2019) (explaining that joining a union "[p]rovides legal protection of your First Amend-

ment rights to speak freely"); Mass. Soc'y of Profs., *Why Join*, https://umassmsp.org/join/why-join/ (visited Aug. 7, 2019) ("When you join the MSP, you have a voice.").[2] But non-union members—like petitioners—have neither any interest in associating with their public sector unions nor any interest in subsidizing union speech. Pet. App. 6a (noting petitioner Dr. Ben Branch's aversion to the union because of his "belie[f] that he and the [union] have dissimilar views on political causes, political candidates, approaches to compensation, and rules for work, promotion and tenure"); *id.* 5a (petitioner Dr. William Conner explaining that union membership is not in his best interests and that he opposes the union's political and ideological views); *id.* 8a

[2] *See also* Bivens et al., Econ. Pol'y Inst., *How Today's Unions Help Working People: Giving Workers The Power To Improve Their Jobs And Unrig The Economy*, at 2 (Aug. 24, 2017) ("'Collective bargaining' is how working people gain a voice at work … Joining a union simply means you and your colleagues have a say …"); Hunter, Mackinac Ctr. for Pub. Pol'y, *Exclusive Representation*, (May 1, 1997), https://www.mackinac.org/1007 (noting that under an exclusive representation scheme, "[when] a union is selected to represent employees in an 'appropriate' unit of workers, the union alone has the legal authority to speak for all employees, including those who neither voted for nor joined the labor organization. No other union, individual or representative may negotiate terms and conditions of employment, and the individual employee is effectively deprived of the opportunity to represent his or her own interests. … [L]abor laws are usually portrayed as benefiting employees, but the laws take away legally and practically an individual's right to price his or her own labor and to work under conditions which are personally agreeable."); Alt & Grossman, Opinion, *It's Time to Stop Forcing Workers To Labor Under Exclusive Representation*, The Hill (Aug. 30, 2018), https://thehill.com/opinion/civil-rights/404246-its-time-to-stop-forcing-workers-to-labor-under-exclusive-representation (noting that "for workers who have not voluntarily joined a union, the government is literally appointing someone to speak for them, in their name and on their behalf").

(petitioner Dr. Andre Melcuk explaining that he has "philosophical, political, emotional, ethical, and psychological" objections to unions).

But given the unions' ability—delegated by statute—to deprive non-union members of a voice and vote on collective bargaining matters, petitioners' choice not to associate with the union precludes them from participating in the negotiation of the terms of their public sector employment, a subject that this Court in *Janus* recognized as having "great public concern." *Janus*, 138 S. Ct. at 2473 (finding negotiation of public sector contracts is "a category of speech that is of public concern" because, for example, "a 5% raise for the many thousands of employees … could have a serious impact on the budget of the government unit in question, and by the same token, denying a raise might have a significant effect on the performance of government services").

A. This Court Should Resolve The Distinct "Exacting" And "Strict" Standards At Issue In Compelled Speech Cases

This case also presents an appropriate opportunity to resolve an unanswered constitutional question: whether strict or exacting scrutiny should govern review of restrictions that public sector unions (acting under authority delegated by the state) place on the speech of non-union members regarding subjects of great public interest. In *Janus*, this Court held that agency fees could not survive the "exacting" scrutiny standard recognized in *Knox* and *Harris* v. *Quinn*, 573 U.S. 616, 651 (2014). *See Janus*, 138 S. Ct. at 2456. At the same time, this Court declined to decide whether exacting or strict scrutiny was the proper standard for restrictions placed on political speech by public union arrangements. *Harris*, 573 U.S. at 651.

Amicus urges the Court to adopt the strict scrutiny test here, as more than "commercial speech" is at stake in this case. *See Central Hudson Gas & Elec.* v. *Pub. Serv. Comm'n*, 447 U.S. 557, 562-564 (1980) (adopting an intermediate scrutiny standard where commercial speech is at stake). This Court in *Janus* questioned whether exacting scrutiny provides sufficient protection for free speech rights where a union compels speech, since "it is apparent that the speech compelled" in agency-fee cases "is not commercial speech." *Janus*, 138 S. Ct. at 2465 (quoting *Harris*, 134 S. Ct. at 2639) (internal quotation marks omitted).

B. Mass. Gen. Laws ch. 150E § 4 Cannot Withstand Even The Less Demanding Test Of Exacting Scrutiny

This Court in *Janus* ruled that when First Amendment rights are infringed in the context of public employment, that infringement can only be justified if the provision, at minimum, survives exacting scrutiny. *Janus*, 138 S. Ct. at 2472 n.9 ("[I]n public employment, a significant impairment of First Amendment rights must survive exacting scrutiny."); *see also Elrod* v. *Burns*, 427 U.S. 347, 362 (1976) ("It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny. … 'This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct.'").

To survive exacting scrutiny, the respondent unions must show that coercing non-union member public employees to pay for union membership or else lose their voice and vote in the terms of their employment somehow "'serve[s] a compelling state interest that

cannot be achieved through means significantly less restrictive of associational freedoms.'" *Janus*, 138 S. Ct. at 2465 (quoting *Knox*, 567 U.S. at 310); *see also Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 648 (2000) (discussing the balancing test required under exacting scrutiny).

Here, by permitting the exclusion of non-members from a voice and vote regarding the terms and conditions of their employment, Massachusetts' statute impermissibly coerces public employees to join a union just to be able to express their views about the terms of their employment, which is of significant public interest. In effectively forcing employees to join the union to express their constitutionally protected views about a matter of significant personal importance and public interest, Mass. Gen. Laws ch. 150E § 4 forces employees who do not wish to join a union to forgo their constitutional right to the freedoms of association and speech. That coercion is unconstitutional, as none of the purported "compelling reasons" offered by the unions—and relied on by the SJC—justifies such a serious deprivation of rights.

First, the SJC cited the government's need to promote labor peace as a compelling interest on which the government's use of exclusive representation rests. Pet. App. 55a. But even conceding that the government has a compelling interest in employing an efficient and peaceful workforce, that efficiency inheres in having an exclusive representative; it does not justify depriving non-union members of a vote on the strategy for negotiation or the terms to be negotiated by the exclusive representative. *See Janus*, 138 S. Ct. at 2465 (disaggregating the question whether exclusive representation served a compelling interest from the question whether the exclusive representative charging agency fees similarly served that interest, and concluding

ing the latter did not); *Harris*, 134 S. Ct. at 2640 ("A union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked.").

Moreover, the state's interest in maintaining peaceful labor relations may be achieved through less restrictive means than presenting employees with the impossible choice of joining a union they disagree with or losing all say in the conditions of their employment. For example, this Court has found that sole reliance on agency fees to promote labor peace lacks empirical foundation. The same is true here. There is no evidence that peaceful labor relations turns on allowing unions to compel workers to fund political speech they disagree with by otherwise depriving them of a voice and vote in the terms of their employment. Indeed, at least 27 states have enacted right to work laws and have not seen significant issues with labor relations. *See* Nat'l Right to Work Legal Def. Found., *Right to Work Frequently Asked Questions*, https://www.nrtw.org/right-to-work-frequently-asked-questions/ (visited Aug. 7, 2019).

Second, the SJC feared that permitting non-union members a voice and vote on the strategy for negotiation, or the terms to be negotiated, will destroy the respondent unions' ability to successfully negotiate with employers and would disrupt "labor peace." Pet. App. 56a n.21. But employees join unions "to more effectively pursue their shared interests—such as improved compensation and better working conditions." Malkus, Am. Enter. Inst., *The Janus Case and the Future of Teachers Unions*, http://www.aei.org/spotlight/the-janus-case/ (visited Aug. 7, 2019). Unions will continue to serve that fundamental purpose even if non-union members are afforded a voice and vote on the terms of their employment to be negotiated by a union.

See Educators for Excellence, *Awaiting Janus v. AFSCME Decision, Teachers Weigh in on Unions* (May 23, 2018), https://e4e.org/blog-news/press-release/awaiting-janus-v-afscme-decision-teachers-weigh-unions (discussing a recent study showing that "teachers largely regard their unions as essential," and that of those teachers, the majority believe it is "critically important" for unions to "prioritize wages, benefits, and job protections over politics"). Moreover, public employees will retain the right to band together to pursue more effectively their shared interests by electing an exclusive bargaining representative.

Instead of applying strict, or even exacting, scrutiny, the SJC erroneously analyzed the Massachusetts scheme under rational basis review. *Abood*'s use of rational basis review was an outlier in this Court's First Amendment jurisprudence, which was cured by its overruling. *See Janus*, 138 S. Ct. at 2458-2459 (finding that *Abood*'s application of rational basis review was an "anomaly" in speech law, and "[o]verruling *Abood* [to] end the oddity of allowing public employers to compel union support (which is not supported by any tradition) but not to compel party support (which is supported by tradition)."). There is no longer any justification to apply rational basis review to public sector unions in First Amendment cases.[3]

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[3] The lower courts have refused to subject exclusive representation schemes to strict or exacting scrutiny, primarily because of this Court's holding in *Minnesota State Board for Community Colleges* v. *Knight*, 465 U.S. 271 (1984); *see also* Pet. App. 6a-7a. amicus agrees with petitioners, Pet. 17-19, that *Knight*'s holding does not support the conclusion that exclusive representation is subject only to rational basis review. Such a conclusion cannot reasonably be squared with *Janus*, nor is it in line with established First Amendment precedents.

Strict scrutiny is the appropriate standard in this case, and the respondent unions' application of Mass. Gen. Laws ch. 150E § 4 fails to meet that standard. Indeed, Mass. Gen. Laws ch. 150E § 4 even fails to meet the lesser demanding standard of exacting scrutiny.

C. Mass. Gen. Laws ch. 150E § 4 Is An Unconstitutional Encroachment On Petitioners' First Amendment Rights That Involves State Action

An infringement of First Amendment freedoms need not be the direct result of state conduct itself. Instead, "a private entity can qualify as a state actor in a few limited circumstances—including, for example, … when the private entity performs a traditional and exclusive public function, … when the government compels a private entity to take a particular action, … when the government acts jointly with the private entity," when "private action is attributable to the state," and when the state delegates authority to a private entity. *Manhattan Cmty. Access Corp.* v. *Halleck*, 139 S. Ct. 1921, 1928 (2019); *see Lugar* v. *Edmonson Oil Co.*, 457 U.S. 922, 939 (1982). The action taken by the respondent unions in this case is authorized by the state government and is at the very least an action taken pursuant to government delegated authority. Massachusetts enables the unions to negotiate exclusively with a public employer, thereby empowering them to deny nonmembers a voice and vote in the terms and conditions of their employment if they do not pay union dues and join the union.

Mass. Gen. Laws ch. 150E § 4 impermissibly delegates authority to a union to do something that Massachusetts itself could not constitutionally do. The deprivation of constitutional rights by private associations

pursuant to a delegation of authority by the state is no less a constitutional violation than if expressly commanded by state law. *Brentwood Acad.* v. *Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) ("We have treated a nominally private entity as a state actor when … [the private party] has been delegated a public function by the State"). And the state cannot delegate to a private organization the power to effectuate what the Constitution precludes the state itself from doing. *Lugar*, 457 U.S. at 939 (holding that state action turns in part on "whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority"); *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 749, 760 (1961) (finding questions are of the "utmost [constitutional] gravity" when "'Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents'" (quoting *Steele* v. *Louisville & Nashville Ry. Co.*, 323 U.S. 192, 202 (1944))). That principle holds true irrespective of whether the statute delegating authority to the private entity makes express reference to—or expressly approves of—the discretionary practice engaged in by the private association. What is determinative is whether the power delegated to the private association may be used to infringe constitutional rights. *Cf. Brentwood*, 531 U.S. at 301 (holding that the repeal of an express grant of authority did not render constitutional a practice that "now [operates] by winks and nods").

A statutory scheme empowering a union or other association to be an exclusive bargaining representative is subject to constitutional scrutiny to the extent it enables the exclusive bargaining representative to en-

gage in conduct that, if engaged in by the state itself, would be unconstitutional. *See Railway Emp't Dep't* v. *Hanson*, 351 U.S. 225, 232-233 (1956) (holding that an exclusive bargaining representative's effort to force non-union members to support ideological and political positions against their will violated the First Amendment); *Street*, 367 U.S. at 749, 750, 760-762 (similar); *Abood*, 431 U.S. at 220-222 (1977) (similar), *rev'd on other grounds*, *Janus*, 138 S. Ct. 2448; *see also Janus*, 138 S. Ct. at 2464-2465 (implicitly holding that a public employee union's use of its exclusive bargaining position to force non-members to support political speech of the union was state action for purposes of constitutional analysis); *Knox*, 567 U.S. at 314-317 (considering the constitutionality of an opt-out requirement for a union's special assessment fee).

Here, Massachusetts has provided by statute that public employers—state actors—"may recognize" an exclusive bargaining representative, in turn empowering that exclusive bargaining representative to negotiate exclusively on behalf of public employees. Mass. Gen. Laws ch. 150E § 4. That exclusive power affords the union substantial discretionary authority to determine the terms and conditions upon which employees may engage with their employers regarding the terms and conditions of their employment. To the extent that the exclusive bargaining representative uses that authority to prevent non-union members from exercising their First Amendment rights—which the respondent unions are doing here—the statute's empowerment of the exclusive bargaining representative to engage in that practice is state action and therefore subject to constitutional challenge.

The SJC erroneously ruled that "the link between exclusive representation and the union's membership

requirements" is "too attenuated to constitute State action." Pet. App. 65a. That conclusion is unsustainable. Just like agency fees in *Janus*, which this Court implicitly found were state action, denying a voice and vote through the power granted by Mass. Gen. Laws ch. 150E § 4 is an equally coercive application of power delegated by the state. The coercion at issue—requiring paid union membership in order to have a voice and vote on the conditions of one's public employment—is no different from the use of agency fees to coerce non-union member public employees to relinquish their First Amendment speech and association rights, which this Court struck down in *Janus*. *See* 138 S. Ct. at 2483. Instead of a statutorily mandated agency fee, the state has delegated authority to the respondent unions to deny non-union members a voice and vote on the terms and conditions of employment. Contrary to the SJC's decision, this delegation of power is state action and cannot stand. *See Street*, 367 U.S. at 749, 760 (finding questions are of the "utmost [constitutional] gravity" when "'Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents'").

The cases cited by the SJC do not save its analysis. The SJC improperly relied on a number of cases involving *private* sector unions. Pet. App. 65a (citing *United Steelworkers of Am.* v. *Sadlowski*, 457 U.S. 102 (1982); *Kidwell* v. *Transportation Commc'ns Int'l Union*, 946 F.2d 283 (4th Cir. 1991); *Hovan* v. *United Bhd. of Carpenters & Joiners of Am.*, 704 F.2d 641 (1st Cir. 1983); *Turner* v. *Air Transp. Lodge 1984 of Int'l Ass'n of Machinists & Aerospace Workers*, 590 F.2d 409 (2d Cir. 1978). Private sector organizing lacks the essential

nexus to matters of public concern found when public employees negotiate with government employers.

The few public sector union cases the SJC did cite are distinguishable and do not support the SJC's analysis. *See Hallinan* v. *Fraternal Order of Police of Chi. Lodge No.7*, 570 F.3d 811, 817-818 (7th Cir. 2009) (finding the decision to fire plaintiffs was based entirely on the "Union's internal act" and implying that state action might be present if "the Union … was … acting with powers delegated to it by the City or state law"); *Jackson* v. *Temple Univ. of Commw. Sys. of Higher Educ.*, 721 F.2d 931, 933 (3d Cir. 1983) (affirming the district court's finding that "the Union's action could not be 'fairly attributed' to the state" because the "Union was [not] acting under color of state law"); *Messman* v. *Helmke*, 133 F.3d 1042, 1044-1045 (7th Cir. 1998) (assessing state action where the union denied firefighters the ability to volunteer for other departments under the authority of a collective bargaining agreement and union constitution, not a statute, and further assessing state action based on an argument that the union and the city "conspired to deprive them of their First Amendment rights"); *Harmon* v. *Matarazzo*, 162 F.3d 1147, 1147 (2d Cir. 1998) (finding the union was not a state actor where the plaintiff claimed that the union discriminated against him based on his race when it declined to reimburse him for legal fees incurred as a result of a failed drug test).

Where, as here, the state and union act to cut off access to the benefits of public employment based on a worker's political objection to union membership, they violate that worker's First Amendment rights. A union and a state government may not condition a benefit of employment—be it a voice in the terms of that employment or access to representation in grievance mat-

ters that other employees may access—on membership in, and financial support of, a union that engages in political activity that the public employee does not support. *See, e.g.*, *Rutan*, 497 U.S. at 75 n.8 ("the First Amendment … protects state employees … from … 'an act of retaliation … intended to punish her for exercising her free speech rights'").

* * *

The Exclusive Representation Scheme at issue is not tailored to be the least restrictive of associational freedoms. In the wake of *Janus*, public employees are now free from compelled subsidization of union speech through agency fees. But they continue to be forced to associate with state-designated unions via exclusive representation. It is illogical that public employees cannot be obligated to fund union advocacy with agency fees but are still compelled to associate with unions to facilitate that advocacy in order to have a voice in the terms of their employment. If anything, compelled association through an exclusive representative is an even more severe impingement on First Amendment freedoms than the agency fees found to be unconstitutional in *Janus*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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