No. 19-51

IN THE

# Supreme Court of the United States

BEN BRANCH, ET AL.,
*Petitioners,*

v.

DEPARTMENT OF LABOR RELATIONS, ET AL.,
*Respondents.*

**On Writ of Certiorari to the Massachusetts Supreme Judicial Court**

## BRIEF IN OPPOSITION OF UNION RESPONDENTS

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November 22, 2019

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## COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Under the Massachusetts public-sector labor law, once the majority of a unit of employees democratically selects a union representative, that union becomes the exclusive representative of the employees in negotiations with the public employer over the terms and conditions of employment. The union representative is obligated to carry out its duties without regard to the membership status of the represented employees. Nevertheless, as a private member organization, the union may exercise its own associational rights by establishing membership requirements and union-provided benefits that do not apply to nonmembers. Petitioners present two questions in challenging the right of unions to establish membership rules to the exclusion of nonmembers:

1. Does a public employee union engage in state action, triggering First Amendment strictures, when it establishes internal union rules that grant only to workers who choose to be union members the right to vote for union leaders and to participate in union governance and internal affairs, including union collective-bargaining activities?

2. If a public employee union does engage in state action when it establishes internal union rules, does the union somehow compel public employees to join their union, in violation of their rights under the First and Fourteenth Amendments, by failing to allow nonmembers to vote for union leaders and participate in union governance and internal affairs?

## CORPORATE DISCLOSURE STATEMENT

Respondents Massachusetts Society of Professors/MTA/NEA, Hanover Teachers Association/MTA/NEA, and Professional Staff Union/MTA/NEA have no parent corporation, and no corporation or other entity owns stock in any of them.

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## INTRODUCTION

Petitioners are four non-union employees who seek review of a decision of the Massachusetts Supreme Judicial Court. That decision rejected their First Amendment attack on a common public sector labor-relations arrangement under which the employer negotiates with a union selected democratically by the employees over the pay and other working conditions for all employees in the workplace, regardless of any individual employee's union membership status.

This arrangement—exclusive representation by a union—is the backbone of union-management relations in the United States in both the public and private sectors. Over the past several years, and as recently as this term, this Court has uniformly denied review of lower court cases that follow *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), to hold that exclusive representation is consistent with the First Amendment. *See* note 5, *infra*. This case is governed by the same precedent and does not warrant this Court's review.

As the state court below correctly held, the peculiar tact taken by Petitioners in this action—to challenge constitutionality of a union's private, internal membership rules and procedures, rather than challenge the laws that provide for exclusive representation—does not fare any better than the broad facial attacks that this Court has so far declined to hear. By focusing on the union's private, internal membership policies, Petitioners' challenge failed to establish the requirement of state action to support a constitutional claim. Moreover, their claim is squarely foreclosed by the settled precedent in *Knight*—which they have

not asked to be overruled. In any event, both the fact-bound nature of their claims and their failure to adequately present many of their arguments to the state court make this a poor vehicle for certiorari. The petition should be denied.

## STATEMENT OF THE CASE

### A. Background

1. States are generally "free to regulate their labor relationships with their public employees," *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 181 (2007), and to select an "organizational structure" for their workforces that they "deem[] the most efficient," *Kelley v. Johnson*, 425 U.S. 238, 246 (1976). To that end, a majority of states have "adopted, as unquestionably [they] constitutionally may adopt, a statutory policy that authorizes public bodies to accord exclusive recognition to representatives for collective bargaining chosen by the majority of an appropriate unit of employees." *City of Madison, Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 178 (1976) (Brennan, J. concurring).

Although states may create public-sector collective-bargaining regimes, they are not obligated to do so. The "First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it." *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 465 (1979) (per curiam) (citations omitted); *see also Waters v. Churchill*, 511 U.S. 661, 673 (1994) (plurality opinion) (explaining that, in managing its workforce, the government may prefer "a command economy" over "the free market of ideas").

By the same token, when a state adopts a collective-bargaining system, it does not violate the First Amendment by meeting only with an exclusive representative to discuss employment matters, even if employees must join the union to participate fully in that discussion. *See Knight*, 465 U.S. at 273 (reasoning that just as the government can refuse to listen to union representatives, it can decide to listen to only union representatives); *see also D'Agostino v. Baker*, 812 F.3d 240, 244 (1st Cir.) (Souter, J.) (holding that public-sector collective bargaining through an exclusive representative does not violate the First Amendment), *cert. denied*, 136 S.Ct. 2473 (2016).

Likewise, when a state decides to listen primarily to a union concerning employment matters, courts have long acknowledged that the union will privately decide who will do the talking and that only union members vote on union leaders and contract ratification. *See, e.g.*, *Pattern Makers' League v. NLRB*, 473 U.S. 95, 107 n.18 (1985) ("[b]y resigning [from the union], the worker surrenders his right to vote for union officials [and] to express himself at union meetings") (internal quotations and citations omitted). Even though such an arrangement may make some employees "feel some pressure to join the exclusive representative in order to give them the opportunity to serve on [negotiating] committees or to give them a voice in the representative's adoption of positions on particular issues," such "pressure is no different from the pressure to join a majority party that persons in the minority always feel." *Knight*, 465 U.S. at 289–90. This sort of pressure "is inherent in our system of government; it does not create an unconstitutional inhibition on associational freedom." *Id*. at 290.

2. This is precisely the type of labor-relations regime the Commonwealth of Massachusetts created in 1973, when it enacted a comprehensive system of collective bargaining and exclusive representation for managing its workforce in the public sector. The law provides that a unit of public employees may select a union to serve as their exclusive representative, Mass. G.L. ch. 150E, § 4, which has "the right to act for and negotiate agreements covering all employees in the unit," *id.* § 5. All employees in the unit may participate in selecting, changing, or decertifying the exclusive representative. *Id.* § 4. No employee is required to join or financially support a union that represents her bargaining unit, and the union is obligated to provide fair representation for all employees in the unit "without discrimination and without regard to employee organization membership." *Id.* § 5. Moreover, regardless of membership status, any employee "may present a grievance to [the] employer and have such grievance heard without intervention by the exclusive representative." *Id.* The law also established the Commonwealth Employment Relations Board to administer the law by adjudicating claims that employers or unions have committed "prohibited practices" that interfere with rights guaranteed by the law. *Id.* §§ 10–11.

The Massachusetts legislature's choice to use this system of labor relations reflects the almost universal judgments of Congress and state legislatures as to how best to structure collective-bargaining systems. The federal government, some 40 states, the District of Columbia, and Puerto Rico all authorize collective bargaining for public employees through exclusive representatives selected by a majority of employees. Congress also adopted exclusive-representation sys-

tems based on such majority rule in the National Labor Relations Act and Railway Labor Act. *See* 29 U.S.C. § 159; 45 U.S.C. § 152, Fourth.

This Court, in turn, has reaffirmed labor policy's "long and consistent adherence to the principle of exclusive representation tempered by safeguards for the protection of minority interests." *Emporium Capwell Co. v. W. Addition Cmty Org.*, 420 U.S. 50, 65 (1975). Though "[t]he complete satisfaction of all who are represented is hardly to be expected . . . [a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967) (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)).

3. Petitioners Ben Branch, William Curtis Connor, Jr., Deborah Curran, and Andre Melcuk are Massachusetts public employees working in bargaining units represented by affiliates of the Massachusetts Teachers Association (MTA)—itself an affiliate of the National Education Association (NEA)—namely, Respondents Massachusetts Society of Professors/Faculty Staff Union, MTA/NEA, the Professional Staff Union, MTA/NEA, and the Hanover Teachers Association, MTA/NEA (collectively, "the Unions"). Pet. App. 5a-9a. The Petitioners have not become members of their respective unions.[1]

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[1] Petitioners were required to pay an agency fee pursuant to Massachusetts law, Mass. G.L. ch. 150E, § 12, and the provisions of the relevant collective-bargaining agreements. Those agency-fee requirements ceased, however, after this Court declared such arrangements unconstitutional in the public sector. (*continued . . .*)

Because Petitioners are not members of the Unions, they are not entitled to certain services and benefits available to members, such as access to various union-provided insurance plans. Pet. App. 9a. The MTA also maintains a rule that only union members may attend certain union meetings, participate on union bargaining teams, run for union office, or vote on the election of officers, bylaw modifications, contract proposals, or bargaining strategy. *Id.* MTA's affiliates may, however, choose to permit nonmembers to play a role in developing bargaining proposals. For instance, Respondents Professional Staff Union and Hanover Teachers Association each distribute surveys to all bargaining-unit employees, including nonmembers, to solicit their input prior to collective-bargaining negotiations. Pet. App. 7a–8a, 19a n.16. And the Professional Staff Union invites nonmembers to attend bargaining status update meetings. *Id.* at 19a n.16.

**B. The Proceedings Below**

1. The current litigation has its roots in a dispute over agency fees. In 2014, Ben Branch filed an administrative prohibited-practice charge with the Massachusetts Department of Labor Relations (DLR) to challenge the amount of fees assessed by the Massachusetts Society of Professors. *Id.* at 2a. He amended the charge to challenge the constitutionality of Massachusetts's agency-fee law, and added petitioners William Curtis Connor, Jr., Deborah Curran, and Andre Melkuk. *Id.* The amended charge alleged that

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*See Janus v. AFSCME, Council 31*, 138 S.Ct. 2448, 2486 (2018) (declaring that "States and public-sector unions may no longer extract agency fees from nonconsenting employees").

Massachusetts' system of agency fees and exclusive representation violated the First and Fourteenth Amendments of the United States Constitution, particularly when only union members are permitted to attend internal union meetings or participate on union bargaining teams. *Id.* at 44a–45a. Petitioners raised those challenges despite acknowledging that the DLR lacked authority to address the constitutionality of Massachusetts law because the agency's authority extends only to rulings on "an employee's rights guaranteed under [Mass. G.L. ch.] 150E and not on an employee's constitutional rights." *Id.* at 10a.

Before this Court had decided *Janus*, *supra* note 1, a DLR investigator summarily dismissed Petitioners' facial challenges to Massachusetts law to the extent it authorized exclusive representation and the collection of agency fees. *Id.* at 13a–15a. The investigator also dismissed Petitioners' claim that it violated Massachusetts law for the Unions to assess agency fees against nonmembers while maintaining membership rules limiting to members the right to select the union's bargaining team, establish bargaining strategy, and vote on contract proposals. *Id.* at 19a. The investigator found "no probable cause to believe that the [Unions'] membership rule unlawfully interferes with, restrains, or coerces the [Petitioners] in the exercise of their rights" and therefore did not constitute a prohibited practice under the Commonwealth's public-sector labor law, Mass. G.L. ch. 150E. *Id.* at 23a. The investigator reasoned that the Unions' membership rules were "within the legitimate domain of internal union affairs" and that "prioritiz[ing] the [Petitioners'] interests over the Unions' interests would effectively require the Unions to cede the dis-

cretionary, decision-making power of the committee that governs their primary representational role to employees who either oppose the Unions or decline to support them financially. The Law does not compel this result." *Id*. at 20a–21a.

2. Following an administrative appeal by the Petitioners, Respondent Commonwealth Employment Relations Board adopted the DLR investigator's decision. In response to Petitioners' claim that they had been denied a "voice and vote" in the Unions' affairs, the Board explained that "non-members may influence terms and conditions of employment in other ways that are not dependent on union membership, including, through having a right to speak out in the workplace, file grievances and seek union representation for workplace issues related to terms and conditions of employment." *Id.* at 37a. The Board went on to note that "employees who speak out and distribute literature urging employees not to ratify a contract proposed by a union's bargaining team are engaged in protected, concerted activity." *Id*.

3. Petitioners sought judicial review of the Board's decision in the Massachusetts Appeals Court. While that case was pending, however, this Court granted certiorari in *Janus*, prompting the Appeals Court to stay its review of the Board's decision. After this Court issued its decision in *Janus*, the Massachusetts Supreme Judicial Court chose to transfer the case to itself. *Id*. at 40a.

The Supreme Judicial Court dismissed as moot the Petitioners' challenge to the Massachusetts agency-fee statute, finding that the Unions "voluntarily complied with *Janus* by no longer permitting the nonconsensual collection of agency fees." *Id*. 47a–49a.

The court also dismissed Petitioners' facial challenge to exclusive representation, finding the issue foreclosed by the Supreme Court's "long and consistent adherence to the principle of exclusive representation." *Id.* at 55a (citing *Emporium Capwell Co.*, 420 U.S. at 65).[2]

The Supreme Judicial Court then addressed Petitioners' argument that "they are not challenging exclusive representation 'in the abstract,' but only insofar as the unions use exclusive representation to deprive them of 'a voice and a vote'" by only allowing union members to participate in certain union meetings or sit on union bargaining teams. Pet. App. 63a. As an initial matter, the Supreme Judicial Court found the Unions' membership rules did not involve state action sufficient to subject those rules to constitutional scrutiny. *Id.* The court reasoned that "while exclusive representation is a creature of statute, internal union rules not dictated by statute do not constitute State action" because the "'link between the union's [government-created] bargaining power and its membership requirements is too distant to impose constitutional restrictions,' . . . and holding otherwise 'would radically change not only the legal, but the practical, nature of the union enterprise.'" *Id.* at 64a (citing *Hovan v. United Bhd. of Carpenters*, 704 F.2d 641, 642–45 (1st Cir. 1983) (Breyer, J.)). The court also noted that federal courts of appeals facing similar claims had likewise found no state action. *See*

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[2] Petitioners do not seek review of the Supreme Judicial Court's conclusion that the claims for declaratory and injunctive relief relative to agency fees are moot, Pet. at 3 n.2, nor do they seek review of the court's rejection of any facial attack to the principle of exclusive representation, *id.* at 15, 19.

*Hallinan v. Fraternal Order of Police Lodge No. 7*, 570 F.3d 811, 817 (7th Cir. 2009) ("union actions taken pursuant to the organization's own internal governing rules and regulations are not state actions"); *Kidwell v. Transp. Commc'ns Int'l Union*, 946 F.2d 283, 299 (4th Cir. 1991) ("the internal membership and procedural decisions of a union . . . do[] not constitute state action").

The court next held that even if the Unions' membership rules constituted state action, the court "would still discern no constitutional problems" under the First Amendment. Pet. App. 65a–66a. In so holding, the court relied on this Court's reasoning in *Knight*. *Id.* at 57a. There, a group of nonunion college faculty members brought a First Amendment challenge to provisions of a Minnesota law that allowed a democratically selected union to represent the faculty in "meet and confer" negotiations with the university. 465 U.S. at 278–80. The union that represented the faculty in *Knight* selected only union members to represent the union on these "meet and confer" committees. *Id.* at 276. This Court found that such exclusive representation did not impair the nonmembers' associational freedoms, since nonmembers were "not required to become members of the [union]." *Id.* at 289. Citing *Knight*, the Supreme Judicial Court similarly reasoned that "although the nonmembers '[might] well [have felt] some pressure to join the exclusive representative' to gain a 'voice' in the 'meet and confer' sessions, such pressure was 'no different from the pressure to join a majority party that persons in the minority always feel.'" Pet. App. 58a (citing *Knight*, 465 U.S. at 289–90). The Supreme Judicial Court reasoned that "this sort of pressure . . . is inherent both in majority rule . . . and in the collective bar-

gaining process." *Id.* at 59a (citing *Knight*, 465 U.S. at 290).

The Supreme Judicial Court relied on Supreme Court precedent placing majority-rule exclusive representation "at the center of our federal labor policy" such that the "complete satisfaction of all who are represented is hardly to be expected." *Id.* at 66a (quoting *Allis-Chalmers Mfg. Co.*, 388 U.S. at 180); *see also Emporium Capwell Co.*, 420 U.S. at 62. Here, employees voted on whether to form a union; the majority won and those opposed lost, but the opponents retained the right to attempt to select a different union or decertify the union. Pet. App. 66a. The court reasoned that Petitioners' "inability to select bargaining representatives or participate in bargaining sessions is a consequence of losing the election regarding union representation and choosing not to join the union after having lost. This is an intended and expected feature of exclusive representation." *Id.* The court pointed out that even having lost the election, the minority is still protected by the duty of fair representation. *Id.* at 67a. Accordingly, the court affirmed the Board's dismissal and rejected Petitioners' First Amendment challenge to the Unions' membership rule. *Id.* at 68a.

## REASONS FOR DENYING THE PETITION

### A. This Court Should Decline Review of Petitioners' State-Action Question Because It Was Not Properly Preserved Below, It Does Not Implicate a Conflict with Decisions from this Court or any Other Court, and It Was Correctly Decided by the Supreme Judicial Court

The Constitution's protections of individual liberties and its requirement for equal protection apply only to government—not private—conduct. *See, e.g., Manhattan Cmty. Access Corp. v. Halleck*, 139 S.Ct. 1921, 1928 (2019) (explaining that the First Amendment "prohibits only *governmental* abridgment of speech," but does not prohibit "*private* abridgment" of the same) (emphases in original); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 53 (1999) (noting the "essential dichotomy" between "public and private acts that our cases have consistently recognized"). "Careful adherence" to this requirement for state action "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power," *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982), and it promotes important federalism values by "avoid[ing] the imposition of responsibility on a State for conduct it could not control," *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988). The state-action requirement thereby allows power in our society "to be exercised not only by governmental entities, subdivisions, and individuals, but also by a host of other entities, firms, organizations, and associations . . . [so that] individuals [may] counterbalance the power of governments and of each other." *Hovan*, 704 F.2d at 645 (Breyer, J.).

Given the importance of protecting a sphere of individual liberty, this Court has recognized that a private entity can qualify as a state actor for constitutional purposes only in "a few limited circumstances." *Manhattan Cmty. Access Corp.*, 139 S.Ct. at 1928. To begin with, "[f]aithful adherence to the 'state action' requirement . . . requires careful attention to the gravamen of the plaintiff's complaint." *Blum v. Yaretsky*, 457 U.S. 991, 1003 (1982). In other words, a plaintiff cannot expect to have an otherwise private party considered a state actor simply because it has *some* involvement with the government. *See Manhattan Cmty. Access Corp.*, 139 S.Ct. at 1931–33 (warning that if mere involvement with the government were enough to find state action, "a large swath of private entities in America would suddenly be turned into state actors and be subject to a variety of constitutional constraints on their activities"). Rather, the proper inquiry focuses on whether state action is present in "the specific conduct of which the plaintiff complains." *Sullivan*, 526 U.S. at 51; *see also Blum*, 457 U.S. at 1004.

Once the complained-of conduct has been identified with particularity, it will not qualify as state action unless it arises in a specific context where "it can be said that the State is *responsible* for the . . . conduct." *Blum*, 457 U.S. at 1004 (emphasis in original). These contexts are limited to "(i) when the private entity performs a traditional, exclusive public function; (ii) when the government compels the private entity to take a particular action; or (iii) when the government acts jointly with the private entity." *Manhattan Cmty. Access Corp.*, 139 S.Ct. at 1928 (citations omitted).

Here, Petitioners have expressly disclaimed any broad facial attack on exclusive representation, *see* Pet. at 15, 19, and have instead focused their argument entirely on the claim that the Unions' enforcement of their own internal membership policies—specifically, the policies that exclude non-members from certain forms of voting and participation in determining the Unions' positions in collective bargaining—violate the First Amendment. The petition addresses purely private conduct and does not raise any state-action issue worthy of this Court's consideration.

1. Petitioners' lead argument on the state-action question is that the Supreme Judicial Court's decision in some way conflicts with this Court's decision in *Knight*. Pet. at 8–10. The problems with this argument are manifold.

As a threshold matter, Petitioners never argued to the Supreme Judicial Court that the state-action question—or, for that matter, *any* issue in the case—was controlled by *Knight*. Instead, Petitioners' entire state-action argument below consisted of a handful of broad assertions with no developed argumentation or relevant case citation. Where issues are not properly presented for consideration below, this Court will not ordinarily consider them on a petition for certiorari. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *see United States v. Sevilla-Oyola*, 770 F.3d 1, 13 (1st Cir. 2014) ("Arguments raised in only a perfunctory and undeveloped manner are deemed waived . . . .").

In any event, Petitioners themselves acknowledge that "this Court's opinion in *Knight* conspicuously lacks any discussion of state action," Pet. at 8, so

their claim of a conflict is based solely on the notion that the *Knight* Court "obviously *assumed* state action was present," *id.* (emphasis added). This Court's decisions make clear, however, that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.'" *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)). Whether the decision below conflicts with a mere assumption made in a previous decision of this Court is therefore not the kind of cleanly presented split of authority that warrants review.[3]

But even if the *Knight* Court had gone out of its way to hold explicitly that the practice being challenged there amounted to state action, there would be no conflict here that requires this Court's review. In *Knight*, the plaintiffs challenged the constitutionality of exclusive representation itself. *See* 465 U.S. at 278. In that circumstance, the direct challenge to the au-

[3] Of course, after asking this Court to grant certiorari based on what it claims to be an *implicit* holding of *Knight*, Petitioners quickly turn around and tell this Court to ignore *Knight*'s *actual* holding. As we explain in greater detail *infra* at 21–23, *Knight* squarely rejected an argument—indistinguishable from the Petitioners' claim here—that non-members of the union had a First Amendment right to serve on union committees that meet with the employer about employment-related policy issues. *See* 465 U.S. at 290 (explaining that any pressure nonmembers may feel to join in such circumstances "is inherent in our system of government" and "does not create an unconstitutional inhibition on associational freedom"). Although Petitioners declare this holding of *Knight* to be "inapposite" to the issues presented by their petition, Pet. at 17, it is both controlling and fatal to their claims.

thority of state officials carrying out a state statute "plainly provide[d] the state action essential" for the claim. *Adickes*, 398 U.S. at 152; *see also* Laurence H. Tribe, *American Constitutional Law* 1688 (2d ed. 1988) ("If litigants challenge a federal or state statute . . . in a case where the validity of the statute is necessarily implicated, state action is obvious, and no formal inquiry into the matter is needed.") Here, however, Petitioners have expressly disclaimed such a challenge. Pet. at 15, 19. Instead, "the specific conduct of which [they] complain[]," *Sullivan*, 526 U.S. at 51, is the quintessentially private activity of a union enforcing its own internal membership rules.

Petitioners' failure to recognize the difference between these two circumstances—a challenge to a statute and a challenge to a private association's internal membership rules—reflects their confusion about the proper focus of state-action inquiry. Although Petitioners claim that this case implicates a split of authority on questions of state action, none of the cases they invoke deal with challenged conduct that involves, or is even analogous to, the enforcement of internal union membership requirements.[4]

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[4] *See Beck v. Commc'ns Workers*, 776 F.2d 1187, 1205 (4th Cir. 1985) (enforcement of a union's agreement with a private-sector employer to require the payment of agency fees); *Linscott v. Millers Falls Co.*, 440 F.2d 14, 16–17 (1st Cir. 1971) (same); *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1003–04 (9th Cir. 1970) (same); *White v. Commc'ns Workers*, 370 F.3d 346, 353 (3d Cir. 2004) (same); *Price v. United Auto Workers*, 927 F.2d 88, 92 (2d Cir. 1991) (same); *Kolinske v. Lubbers*, 712 F.2d 471, 474–80 (D.C. Cir. 1983) (same); *Reid v. McDonnell Douglas Corp.*, 443 F.2d 408, 410 (10th Cir. 1971) (same). *See also NLRB v. Catholic Bishop*, 440 U.S. 490 (1979) (enforcement of a federal statute against a religious organization).

Worse yet, Petitioners completely ignore the large and uniform body of lower-court caselaw holding that a union's internal rules and processes do *not* constitute state action. *See*, *e.g.*, *Hallinan*, 570 F.3d at 818 (explaining that "membership regulations . . . are quintessentially internal affairs" and that the union was designated as the officers' exclusive representative "does not consequently make every union activity so imbued with governmental action that it can be subjected to constitutional restraints"); *Kidwell*, 946 F.2d at 299 ("internal membership and procedural decisions of a union . . . , although having an impact on those who may participate in the union's duties in carrying out its role as collective bargaining representative, do[] not constitute state action"); *Jackson v. Temple Univ. of Commonwealth Sys. of Higher Educ.*, 721 F.2d 931, 933 (3d Cir. 1983) (union's decision not to bring public employee's discharge grievance to arbitration did not constitute state action); *Hovan*, 704 F.2d at 642–45 (union's rule requiring that individual swear oath to become member was not state action); *Driscoll v. Operating Eng'rs Local 139*, 484 F.2d 682, 690 (7th Cir. 1973) ("[G]overnmental regulation or participation in some of the affairs of unions does not consequently make every union activity so imbued with governmental action that it can be subjected to constitutional restraints."); *Turner v. Machinists Air Transport Lodge 1894*, 590 F.2d 409, 413 n.1 (2d Cir. 1978) (Mulligan, J., concurring) ("since union constitutions and rules are formulated and enforced by the union, a private entity, no federal constitutional right of free speech is . . . involved").

2. Petitioners' other state-action arguments fare no better. In particular, they argue that the Unions'

internal membership rules should be attributed to the government on a "public function" or "entwinement" theory. Pet. at 9–12. Petitioners did not raise or develop either theory before the Supreme Judicial Court, and this Court should not consider them for the first time here. *See Adickes*, 398 U.S. at 147 n.2. In any event, neither theory would present an issue worthy of certiorari.

a. Petitioners claim that the Unions should be considered state actors because the state has "delegate[d] control" to them over the "traditional government function" of "setting [public] employees' terms and conditions of employment." Pet. at 9. This argument fundamentally misunderstands both the collective-bargaining process and the "government function" test for state action.

Like the public-sector bargaining laws of most every state, Massachusetts law does not delegate to an exclusive-representative union the authority to set the terms and conditions of public employees. Rather, it imposes on both the union and public employer a duty to meet and negotiate in good faith but does not require either party to agree to a proposal or to make a concession. *See* Mass. G.L. ch. 150E, § 6; *School Comm. of Newton v. Labor Relations Comm'n*, 447 N.E.2d 1201, 1211 (Mass. 1983). Moreover, if negotiations between the parties over a contract reach an impasse and various statutory mediation procedures are exhausted, a public employer can unilaterally impose its final bargaining position over the union's objection. *See* Mass. G.L. ch. 150E, § 9.

The Unions therefore do not control public-employee terms and conditions of employment in the way Petitioners suggest. Unions simply negotiate

with the employer—either in an adversarial or a collaborative manner—in the hope of reaching agreement. *Cf. Polk County v. Dodson*, 454 U.S. 312, 320 (1981) (holding that a public defender is no state actor when representing criminal defendants because "it [is] peculiarly difficult to detect any color of state law" in "adversarial functions"). Public-sector collective bargaining did not itself emerge until the mid-20th century, *see Janus*, 138 S.Ct. at 2471, so the bargaining functions the Unions performed here cannot be considered something that has been traditionally *and* exclusively done by the government, *see Manhattan Cmty. Access Corp.*, 139 S.Ct. at 1929.

b. Nor is certiorari warranted on Petitioners' claim that state action exists on an "entwinement" theory under this Court's 5-4 decisions in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001). *See* Pet. at 10–12. As an initial matter, it is hardly clear that "entwinement" is a stand-alone test for state action, or "whether, as is more likely, it is a variant of the long-established joint activity state action test," 1 Sheldon H. Nahmod, *Civil Rights & Civil Liberties Litigation: The Law of Section 1983* § 2:16 (2019)—a test that Petitioners have not argued even belatedly here. Moreover, *Brentwood Academy* is best viewed as limited to its peculiar facts, given that its result "departed so dramatically from . . . earlier state-action cases." *Tennessee Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 551 U.S. 291, 306 (2007) (Thomas, J., concurring).

In any event, certiorari is not warranted to test a novel "entwinement" theory of state action here. Petitioners list six different factors that in some combination allegedly create the required level of entwine-

ment, making this a fact-bound determination "that may have no effect on other cases." *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1302 (2010) (Scalia, J.); *see also Scenic Am., Inc. v. Dep't of Transp.*, 138 S.Ct. 2, 3 (2017) (statement of Gorsuch, J., respecting the denial of certiorari).

Furthermore, the factors Petitioners rely on do not realistically show "pervasive entwinement to the point of largely overlapping identity." *Brentwood Acad.*, 531 U.S. at 303. At most, these factors merely indicate extensive regulation of collective bargaining, coupled with a monopoly-like grant to the Unions of exclusive-representative status. As this Court emphasized as recently as last term, such regulatory grants and interventions are plainly insufficient to make an otherwise private actor public for constitutional purposes. *See Manhattan Cmty. Access Corp.*, 139 S.Ct. at 1931 ("[T]he fact that the government licenses, contracts with, or grants a monopoly to a private entity does not convert the private entity into a state actor—unless the private entity is performing a traditional, exclusive public function.").

* * *

This Court has consistently recognized that the state-action requirement must be strictly enforced. Here, the liberty concerns that animate the state-action doctrine are at their zenith. Just as the "Constitution does not disable private property owners and private lessees from exercising editorial discretion over speech and speakers on their property," *id.*, it does not disable private associations like the Unions from exercising their traditional prerogative to formulate their own decision-making processes and to establish the terms of membership in their own asso-

ciations. The Supreme Judicial Court's state-action holding is correct and does not require this Court's review.

### B. This Court Should Deny Review of Petitioners' Fact-Bound Claim that the Challenged Internal Union Policies Violate Their Constitutional Rights

Petitioners have expressly disclaimed any broad-based attack on exclusive representation. Pet. at 15, 19. That is no surprise, given that *Knight* resolved the question of whether exclusive representation in the public sector is constitutional, that each court of appeals to address the question is in agreement on that point, and that this Court has recently denied several petitions that raise the issue.[5] Petitioners' fact-bound challenge to the union's internal policies likewise requires no further review by this Court.

1. Even if this Court were to ignore the fact-specific nature of Petitioners' argument, *Knight* would still control. There, a group of nonunion college faculty members challenged, on First Amendment grounds, provisions of Minnesota's public-employee labor-relations law that allows a duly selected union to serve as the exclusive representative of employee

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[5] *See Knight*, 465 U.S. at 289–90*; see also Reisman v. Associated Faculties of Univ. of Me.*, 939 F.3d 409 (1st Cir. 2019); *Mentele v. Inslee*, 916 F.3d 783 (9th Cir.), *cert. denied sub nom. Miller v. Inslee*, 140 S.Ct. 114 (2019); *Uradnik v. Inter Faculty Org.*, No. 18-3086 (8th Cir. Dec. 3, 2018), *cert. denied*, 139 S.Ct. 1618 (2019); *Bierman v. Dayton*, 900 F.3d 570 (8th Cir.), *cert. denied sub nom. Bierman v. Walz*, 139 S.Ct. 2043 (2019); *Hill v. Serv. Emps. Int'l Union*, 850 F.3d 861 (7th Cir.), *cert. denied*, 138 S.Ct. 446 (2017); *Jarvis v. Cuomo*, 660 F. App'x 72 (2d Cir. 2016), *cert. denied*, 137 S.Ct. 1204 (2017); *D'Agostino*, *supra*.

bargaining units. 465 U.S. at 278–80. In an earlier decision, this Court summarily affirmed a district court's rejection of a constitutional challenge to Minnesota's exclusive-representation system to the extent that it permits a majority-selected union to represent a bargaining unit in "meet and negotiate" process over employees' terms and conditions of employment. *Knight v. Minn. Cmty. Coll. Faculty Ass'n*, 460 U.S. 1048 (1983); *see also Knight*, 465 U.S. at 279. The Court then affirmed Minnesota's exclusive-representation system in an even broader context, rejecting the derivative argument that Minnesota's system violated state employees' constitutional rights by granting unions the exclusive right to "meet and confer" with public officials on non-bargaining policy issues, thereby excluding nonmembers. *Id.* at 280.

The Court first rejected the claim that nonmembers' free speech rights were unlawfully impaired, explaining that they had no right to an audience with the government. *Id.* at 282–88. The Court also rejected the plaintiffs' argument that granting a union the exclusive right to "meet and confer" with officials on behalf of all bargaining-unit employees infringed their associational freedom by pressuring them to join the union. The Court explained that the plaintiffs were "not required to become members" of the union and were "free to form whatever advocacy groups they like." *Id.* at 289. Exclusive representation "in no way restrained [their] freedom to speak on any education-related issue or their freedom to associate or not to associate with whom they please, including the exclusive representative." *Id.* at 288; *see also Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 69–70 (2006) (holding government did not violate associational rights of law

schools by conditioning federal funds on military recruiter access; "[s]tudents and faculty [were] free to associate to voice their disapproval of the military's message").

Critically, the *Knight* Court acknowledged that nonmembers "may well feel some pressure to join the exclusive representative in order to give them the opportunity to serve on the 'meet and confer' committees or to give them a voice in the representative's adoption of positions on particular issues." 465 U.S. at 289–90. "That pressure, however, is no different from the pressure [nonmembers] may feel to join" because the union serves as the exclusive representative in the "'meet and negotiate' process, a status the Court has summarily approved." *Id.* at 290. "Moreover, the pressure is no different from the pressure to join a majority party that persons in the minority always feel. Such pressure is inherent in our system of government; it does not create an unconstitutional inhibition on associational freedom." *Id.*

Petitioners do not ask this Court to overrule *Knight*, nor do they offer any "special justification" for overruling settled precedent and invalidating the collective-bargaining systems that have been used for many decades by the federal government and some 40 states. *Cf. Janus*, 138 S.Ct. at 2486. Instead, they disagree with how the state court interpreted this Court's precedents. *See* Pet. at 17–19. Absent any conflict in the lower courts, however, that provides no reason for this Court to grant review.

2. This Court's decision in *Janus* does not alter that result. *Janus* addressed a different issue—holding that public-sector agency-fee arrangements violate the First Amendment. 138 S.Ct. at 2486. In

reaching that conclusion, this Court made clear that its decision should not be read to undermine or otherwise call into question state laws designating unions as the exclusive representative of public-sector bargaining units.

After finding that agency-fee arrangements constitute "the compelled subsidization of private speech [that] seriously impinges on First Amendment rights," *id.* at 2464, this Court turned to and rejected the argument that fees serve a compelling state interest in maintaining labor peace, *id.* at 2465. This Court explained that although it assumes that the state has a compelling interest in maintaining labor peace—fostered by avoiding the conflict that would occur if employees in a bargaining unit were represented by more than one union, the rivalries among competing unions, and the confusion created if employers were confronted by multiple unions—that interest was not furthered through the extraction of agency fees. *Id.* For that reason, this Court uncoupled the collection of agency fees from the designation of a union exclusive representative, explaining the two are not "inextricably linked." *Id.*; *see also id.* at 2480 (noting "the serious mistake of assuming that . . . 'labor peace' . . . demanded, not only that a single union be designated as the exclusive representative of all the employees in the relevant unit, but also that nonmembers be required to pay agency fees"). And it made clear that it was "not in any way questioning the foundations of modern labor law." *Id.* at 2471 n.7.

Further distinguishing exclusive representation from agency fees, this Court explained in *Janus* that designating a union as the exclusive representative of a bargaining unit constitutes "a significant impingement on associational freedoms that would not be tol-

erated in other contexts," but it "dr[e]w the line" between permitting the government to confer that authority on a union, which could continue, and "allowing the government to *go further still* and require all employees" to subsidize the union. *Id.* at 2478 (emphasis added). To illustrate the point, this Court considered the experience of the federal government, and those states that have provided for exclusive representation yet prohibited agency-share fees prior to *Janus*. *Id.* at 2466. Far from throwing into doubt state laws providing for exclusive representation, the Court explained that states that previously permitted the collection of agency fees could follow the model of the federal government and those other states and otherwise "keep their labor-relations systems exactly as they are . . . ." *Id.* at 2485 n.27.

3. As a final matter, further review is unnecessary because Petitioners drastically overstate their fact-bound claims that they are subject to coercion based on the Unions' internal rules and status as exclusive representative. Both individually and in concert with other employees, Petitioners have the ability to exercise a "voice and vote" in their workplaces. The Commonwealth's public-sector bargaining law provides that an individual employee "may present a grievance to his employer and have such grievance heard without intervention by the exclusive representative." Mass. G.L. ch. 150E, § 5. Likewise, employees dissatisfied with their union can organize to vote for a new union or simply to decertify and remove the old union. *See id.* § 4*; see also Watertown v. Watertown Mun. Emps. Ass'n*, 825 N.E.2d 572, 578 (Mass. App. Ct. 2005). Furthermore, as this Court recognized in *Janus*, the unions' duty of fair representation gives nonmembers substantial protection

from discrimination and arbitrary treatment. *See* 138 S.Ct. at 2467–68. All of that makes this case a poor vehicle for this Court to review the questions presented in the petition.

## CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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November 22, 2019