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 IN OPPOSITION FOR THE RESPONDENTS MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS AND COMMONWEALTH EMPLOYMENT RELATIONS BOARD

T. Jane Gabriel
Chief Counsel
Massachusetts Department of Labor Relations
19 Staniford Street
Boston, Massachusetts 02114
jane.gabriel@mass.gov
(617) 626-7139

MAURA HEALEY
Attorney General for the Commonwealth of Massachusetts
Timothy J. Casey*
David C. Kravitz
Cassandra Bolaños
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
timothy.casey@mass.gov
(617) 963-2043

**Counsel of Record*

QUESTIONS PRESENTED

In Massachusetts, as in many States, public employees in a bargaining unit are permitted to designate, by majority vote, an exclusive bargaining representative—often, a labor union—for that unit. The public employer then negotiates exclusively with the union with respect to terms and conditions of employment for all employees in the unit. However, no employee is required to join the union or support it financially. And unions have a duty, long recognized by this Court and by Massachusetts law, to fairly represent all employees within the bargaining unit regardless of union membership. The State does not regulate, and plays no role in, internal union matters such as the election of union officers, selection of bargaining teams, and bargaining strategy.

The questions presented are:

1. Whether, when a public employee union is democratically selected by a bargaining unit as the unit's exclusive bargaining representative under state law, the union's internal rules preventing employees in the bargaining unit who choose not to join the union from participating in internal decisions such as the election of union officers, selection of bargaining teams, and bargaining strategy, constitute "state action" for purposes of the First Amendment.

2. Whether the First Amendment requires a public-sector labor union to allow employees in the bargaining unit who choose not to join the union nonetheless to participate in internal decisions such as the election of union officers, selection of bargaining teams, and bargaining strategy.

TABLE OF CONTENTS

Page

Page

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Page

Page

Page

Page

Statutes

Page

Constitutional Provisions

Page

Rules and Regulations

INTRODUCTION

This petition does not present any question warranting this Court's review. To the extent petitioners challenge Massachusetts's system of exclusive representation in public-sector collective bargaining—and despite their purported disavowal of such a challenge, *see* Pet. 15, their case boils down to a claim that exclusive representation inevitably violates the First Amendment rights of bargaining unit employees who choose not to join the union—they allege no split in authority. Nor could they, given the decisions of this Court, and the unanimous view of the lower courts following those decisions, that exclusive representation does not violate non-union employees' constitutional rights. To the extent petitioners purport to challenge only the unions' internal rules, not imposed by the state, regarding participation in union decisions about leadership and strategy, petitioners again fail to allege any split of authority warranting this Court's attention. Petitioners' putative split regarding state action is not only overstated and stale but also directed to a different question whose relevance to public-sector unions has been mooted by this Court's decision in *Janus v. State, County and Municipal Employees*, 138 S. Ct. 2448 (2018); they do not, and could not, allege any split on the actual questions presented. Moreover, the SJC did not err either in its state action analysis or in its application of binding precedent from this Court that forecloses petitioners' constitutional claims. The petition should therefore be denied.

STATEMENT

1. Massachusetts, "like most states, allows public sector employees in a designated bargaining unit to elect a union by majority vote to serve as their exclusive representative in collective bargaining with their government employer." Pet. App. 41a; *see also* Mass. Gen. Laws ch. 150E, § 4, Pet App. 69a. A union elected as exclusive representative "shall have the right to act for and negotiate agreements covering all employees in the unit." *Id.* § 5, Pet. App. 73a.[1] It also has a statutory duty to represent "the interests of all such employees without discrimination and without regard to employee organization membership." *Id.*

Employees in a bargaining unit have a statutory right to join a union selected as the exclusive representative for their bargaining unit, and a right to refrain from joining such a union. *Id.* § 2. It is a prohibited labor practice for a public employer or a union to "[i]nterfere, restrain, or coerce" any employee in the exercise of any right guaranteed under Chapter 150E, including the right not to join a union. *Id.* §§ 10(a)(1), (b)(1); *accord id.* § 10(a)(3) (public employer may not "[d]iscriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization"); *id.* § 12 ("It shall be a prohibited labor practice for an employee organization or its affiliates to discriminate against an employee on the basis of the employee's membership, nonmembership or

[1] Chapter 150E was amended by the State Legislature in response to this Court's decision in *Janus*. *See* 2019 Mass. Acts ch. 73, §§ 2-3 (effective Sept. 19, 2019); *see also infra* p. 31 n.18. The amendments to the law do not bear on the questions presented.

agency fee status in the employee organization or its affiliates.").

Non-union employees in a bargaining unit have additional rights under the law. For example, should an employee have a grievance under the applicable collective bargaining agreement ("CBA") with her public employer, she may present it directly to the employer without union intervention, though the union has a right to be present during proceedings on the grievance, and any resolution of the grievance may not be inconsistent with the terms of the CBA. *Id.* § 5. And, at the expiration of a CBA—the terms of which last no longer than three years, *id.* § 7(a)—bargaining unit employees, regardless of union membership, have the right to seek an election to replace the union with another union, or no union at all, on the ground that the current union no longer has the support of a majority of employees in the bargaining unit. *See id.* § 4, ¶ 2; 456 Code Mass. Regs. § 14.04; *see also Town of Watertown v. Watertown Mun. Employees Ass'n*, 825 N.E.2d 572, 577-78 (Mass. App. Ct. 2005) ("[T]he employees' right to select new union representation" is "a collective bargaining right that is beyond the arbitrator's powers" to extinguish.).

Chapter 150E is silent as to the degree of participation a union must allow for non-union employees in the bargaining unit in the union's decisions regarding such internal matters as the election of officers, the selection of bargaining teams, and bargaining strategy.[2] *See generally* Mass. Gen.

---

[2] Indeed, the law makes it a prohibited practice for a public employer to "interfere" in the "administration of any employee organization." Mass. Gen. Laws ch. 150E, § 10(a)(2). Previously, the law required unions to allow all bargaining unit employees

Laws ch. 150E, §§ 1-15. Thus, under Massachusetts law, a public-sector union could choose to allow non-union employees in the bargaining unit full participation in decisions regarding union leadership and strategy, or no participation at all, or some amount of participation. None of these choices would be forbidden or required by state law.

2. Petitioners are public-sector employees who are not members of the unions that were elected to serve as the exclusive representatives of their bargaining units. Pet. App. 43a. Petitioners' unions maintained rules that non-union employees in the bargaining unit were not entitled to participate in union decisionmaking, attend union meetings, or "vote on the election of officers, bylaw modification, contract proposals or bargaining strategy." Pet. App. 43a-44a.

In Spring 2014, the unions requested that petitioners pay their annual agency fees for the 2013-14 academic year. Pet. App. 44a. In response, petitioners filed charges with the Massachusetts Department of Labor Relations ("DLR"), claiming as relevant here that the agency-fee provision of state law was unconstitutional as applied to them because it required them to pay agency fees "even though they are not entitled to attend union meetings or be

---

to vote on the ratification of any CBA that imposed an obligation to pay agency fees upon non-union employees in the unit as a condition of employment. *Id.* § 12. There is no dispute, however, that this provision is now a nullity as a result of this Court's invalidation of agency fees in *Janus*. *See* Pet. 3 n.1; *see generally* Pet. App. 47a-53a (opinion of Supreme Judicial Court, concluding that petitioners' challenge to agency-fee provisions of Chapter 150E, including § 12, was moot in light of Commonwealth's immediate action to cease collecting agency fees in compliance with *Janus*).

involved in any union activities such as having a voice or a vote on bargaining representatives, contract proposals or bargaining strategy." Pet. App. 45a; *see id.* at 19a (DLR decision dismissing petitioners' charges). Petitioners challenged the constitutionality of exclusive representation as codified at § 5 "for essentially the same reasons." Pet. App. 45a; *see id.* at 13a-14a.

DLR referred the matter to an investigator, *see* Mass. Gen. Laws ch. 150E, § 11(a), who, after taking evidence from the parties, dismissed petitioners' charges. Pet. App. 45a; *see generally id.* at 1a-24a. The investigator concluded that neither the unions' status as exclusive representatives for the employees, nor the unions' charging petitioners agency fees while denying them participation in internal union decisions, violated Chapter 150E. Pet. App. 14a-15a. DLR further concluded that the unions have a legitimate interest in "managing their internal affairs, including restricting the roles and positions available to non-members." Pet. App. 20a (citing *NLRB v. Financial Institution Employees*, 475 U.S. 192, 205 (1986)). On appeal, the Commonwealth Employment Relations Board ("CERB") affirmed the dismissal of petitioners' charges essentially for the reasons set forth in DLR's decision. Pet App. 38a-39a.

Petitioners then sought judicial review in the Massachusetts Appeals Court, *see* Mass. Gen. Laws ch. 150E, § 11(i), which allowed the respondent unions to intervene, and stayed the appeal pending this Court's decision in *Janus*. Pet. App. 46a-47a. After this Court decided that case, the Massachusetts Supreme Judicial Court ("SJC") transferred the

appeal to its own docket and ordered supplemental briefing. *Id.* at 47a.

3. The SJC affirmed CERB's decision in relevant part. *Id.* at 53a-68a.[3] Noting that petitioners "claim[] that exclusive representation compels them to associate with the unions in violation of the First Amendment," the court rejected the claim, concluding that "under controlling Supreme Court precedent, neither the exclusive representation provisions of [Chapter] 150E nor the unions' internal policies and procedures barring nonmembers from various collecting bargaining activities violate the First Amendment." Pet. App. 53a-54a.

The court drew guidance from "an uninterrupted line of decisions" from this Court "affirm[ing] its 'long and consistent adherence to the principle of exclusive representation tempered by safeguards for the protection of minority interests' provided by the duty of fair representation." Pet. App. 55a (quoting *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 65 (1975)). In particular, the SJC looked to this Court's decisions in *Knight v. Minnesota Community College Faculty Ass'n*, 460 U.S. 1048 (1983), *summarily aff'g* 571 F. Supp. 1 (D. Minn. 1982) (*Knight I*), *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984) (*Knight II*), and *Janus*—all cases in which "the majority and the dissents alike recognized

[3] The SJC vacated so much of CERB's decision as upheld the imposition of agency fees, concluding that the Commonwealth's and the unions' actions in immediately ceasing to collect agency fees in compliance with this Court's decision in *Janus* mooted that issue. Pet. App. 47a-53a. Petitioners are not challenging that aspect of the SJC's decision here. Pet. 3 n.2.

and respected the importance of exclusive representation in the collective bargaining process, at least in the negotiation of the terms and conditions of employment." Pet. App. 57a.

The SJC first recognized the significance of *Knight I*, in which "the Supreme Court summarily affirmed the portion of the lower court's decision concluding that it was constitutional to limit collective bargaining sessions (known as 'meet and negotiate' sessions) regarding the terms and conditions of employment to the faculty's exclusive representative." Pet. App. 57a. The SJC explained that, in summarily affirming, the correctness of the district court's conclusion as to the "'constitutionality of exclusive representation bargaining in the public sector'" was apparently "noncontroversial to the Court." *Id.* (quoting *Knight*, 571 F. Supp. at 4). Turning to *Knight II*, which dealt with "meet and confer" sessions regarding matters "outside the scope of the mandatory collective bargaining sessions" upheld in *Knight I*, the SJC recognized the importance of this Court's conclusions that "the First Amendment creates no 'governmental obligation to listen' to particular voices on policy questions," and that "such exclusive representation [even on 'meet and confer' sessions addressing issues beyond mandatory collective bargaining topics] did not impair the nonmember employees' associational freedoms, as the nonmembers were 'not required to become members of the [union].'" Pet. App. 58a (quoting *Knight II*, 465 U.S. at 288-89 & n.10).

The SJC then observed the resemblance between petitioners' First Amendment speech and association claim here—that the unions' internal rules pressured

them to join in order to have a "voice" and a "vote" in the terms and conditions of their employment, *see, e.g.*, Pet. 13-15—and the claims rejected by this Court in *Knight II*. The SJC noted this Court's recognition that "[a]lthough 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-59a (quoting *Knight II*, 465 U.S. at 289-90) (alterations in SJC opinion; emphasis added). As this Court explained in *Knight II*, the objecting employees' "associational freedom has not been impaired" because this sort of pressure "is inherent in our system of government" and in collective bargaining; "it does not create an unconstitutional inhibition on associational freedom." 465 U.S. at 289-90; *see* Pet. App. 59a.

The SJC further concluded that this Court's recent decision in *Janus* did not disturb its prior decisions in *Knight I* and *Knight II* or the constitutionality of exclusive representation. Instead, the SJC relied upon language in *Janus* that it is "not disputed that the State may require that a union serve as exclusive bargaining agent for its employees," and that although States must cease imposing agency fees on non-union employees, otherwise "States can keep their labor-relations systems exactly as they are." Pet. App. 59a (citing *Janus*, 138 S. Ct. at 2478, 2485 n.27). Accordingly, the court's review of this Court's decisions led it to determine that exclusive representation, as a general matter, did not violate the speech or associational rights of the petitioners. The SJC noted that, while the duty of fair representation requires that a union "'may not

negotiate a collective-bargaining agreement that discriminates against nonmembers,'" Pet. App. 61a-62a (quoting *Janus*, 138 S. Ct. at 2468), the duty does not require unions to allow any particular quantum of input by non-union employees into leadership or strategy decisions, because "'[n]on-union employees have no voice in the affairs of the union.'" *Id.* at 62a (quoting *NLRB v. Financial Institution Employees*, 475 U.S. 192, 205 (1986), and *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 191 (1967)).

The SJC then turned from petitioners' challenge to exclusive representation "in the abstract" to their claim that exclusive representation, coupled with the unions' rules limiting decisionmaking regarding leadership and bargaining strategy to union members, violated their constitutional rights. Pet. App. 63a-64a. The court found this claim to be likewise without merit. *Id.* It first concluded that petitioners had not established the requisite state action to find a constitutional violation in these circumstances. *Id.* at 64a-65a. Surveying the caselaw regarding both private-sector and public-sector unions' membership rules, the SJC ruled that the "link" between exclusive representation and the unions' membership requirements was "too attenuated to constitute state action." *Id.* at 65a; *see id.* at 64a-65a (citing, *e.g.*, *United Steelworkers v. Sadlowski*, 457 U.S. 102, 104, 121 n.16 (1982), and *Hovan v. United Bhd. of Carpenters & Joiners*, 704 F.2d 641, 645 (1st Cir. 1983)).

The court then determined that, even if there were state action here, there was no constitutional violation. *Id.* at 66a-68a. "Employees in the bargaining unit received a vote on whether to form

their unions; those opposed to having a union lost that vote." *Id.* at 66a. Petitioners were thus subject to the "majority rule concept," which is "unquestionably at the center of our federal labor policy," and under which "'complete satisfaction of all those who are represented is hardly to be expected.'" *Id.* (quoting *Allis-Chalmers*, 388 U.S. at 180). Like voters whose preferred party or candidate lost a particular election, non-union employees "have another chance to vote: they can vote to decertify the union after a certain period of time." *Id.* (citing Mass. Gen. Laws ch. 150E, § 4). "In the meantime, their 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." *Id.*

The SJC described the alternative of having multiple representatives in collective bargaining as "not practicable." Pet. App. 67a. "[T]o have the employee representatives speak with one voice at the bargaining table is critical to the efficient resolution of labor-management disputes and protects … employees from divide-and-conquer tactics by employers." *Id.* The court heeded this Court's conclusion in *Knight II* that exclusive representation serves the state's interest in "'ensuring that its public employers hear one, and only one, voice presenting the majority view of its professional employees on employment-related policy questions.'" Pet. App. 67a (quoting 465 U.S. at 291); *see also* Pet. App. 59a-60a (noting that *Janus* "assumed that 'labor peace' … was a 'compelling state interest,'" and that "[i]t was this 'compelling state interest' that apparently justified the 'significant impingement on associational

freedoms that would not be tolerated in other contexts.'") (quoting *Janus*, 138 S. Ct. at 2465, 2478).

Finally, as noted above, the court recognized that petitioners remain protected by the duty of fair representation, but concluded that "it is not a breach of the duty of fair representation to prevent nonmembers from participating in the selection of bargaining committees or the development of bargaining proposals." *Id.* at 68a. On these terms, "[t]he Supreme Court has deemed such exclusive representation to be constitutional." *Id.*

REASONS FOR DENYING THE PETITION

Petitioners have not identified any compelling reason to grant certiorari. *See* Sup. Ct. R. 10. The only dispositive question here is whether public-sector exclusive representation violates the First Amendment by preventing non-union employees in the bargaining unit from participating in internal union matters. Petitioners do not claim a circuit split on this question. Nor could they, as every lower court to address this issue has reached the same conclusion as the SJC: that constitutional challenges to exclusive representation are foreclosed by this Court's decisions in *Knight I* and *II*.

Instead, petitioners argue that the lower courts are divided on the predicate issue of whether the unions' internal rules restricting non-union employees from participating in matters of internal union policy constitute state action. *See* Pet. 4. They are not: the decades-old circuit split identified by petitioners is on a different issue and thus does not answer the question here, and, indeed, none of the cases in that split conflicts with the SJC's holding

below. It is unnecessary to resolve that stale split here, where, in addition to the split being on a different issue, the threshold state-action issue does not even determine the outcome of this case.

I. There is No Split of Authority That Requires This Court's Attention.

A. There is No Split Over the Constitutionality of Exclusive Representation.

There is no circuit split on the only dispositive question before the Court, which is whether exclusive representation in the public sector violates the First Amendment rights of bargaining unit employees who elect not to join the union. To the contrary, the SJC's decision is consistent with that of the five circuit courts that have addressed exclusive representation—three of them in decisions post-dating *Janus*. This Court has recently denied petitions for certiorari in each of those cases, and should do the same here.

The First, Second, Seventh, Eighth, and Ninth Circuits have all recently held that exclusive representation does not violate the free speech or associational rights of non-union employees. *Reisman v. Associated Faculties*, 939 F.3d 409 (1st Cir. Oct. 4, 2019); *Mentele v. Inslee*, 916 F.3d 783 (9th Cir.), *cert. denied sub nom. Miller v. Inslee*, 140 S. Ct. 114 (2019); *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018), *cert. denied sub nom. Bierman v. Walz*, 139 S. Ct. 2043 (2019); *Hill v. Service Employees 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 v. Baker*,

812 F.3d 240 (1st Cir.) (Souter, J., by designation), *cert. denied*, 136 S. Ct. 2473 (2016); *see also Uradnik v. Inter Faculty Org.*, No. 18-1895, 2018 WL 4654751 (D. Minn. Sept. 27, 2018), *summarily aff'd*, No. 18-3086 (8th Cir. Dec. 3, 2018), *cert. denied*, 139 S. Ct. 1618 (2019). Like the SJC, each court of appeals unanimously concluded that the First Amendment claims were foreclosed by *Knight II*.

Petitioners do not dispute this unanimity in the lower courts, nor do they ask this Court to overrule *Knight II*. Instead petitioners argue only that *Knight II* is "inapposite" because that decision supposedly does not address the "compulsion" that they feel to join the unions so that they can "have a voice and a vote in their workplace conditions." *See* Pet. 1-2, 17-18. But in *Knight II*, this Court considered and rejected this precise theory of associational harm. The Court recognized that non-union employees "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*," but concluded that "[s]uch pressure … does not create an unconstitutional inhibition on associational freedom." 465 U.S. at 289-90 (emphasis added). Thus, the lower courts have uniformly found *Knight II* controlling in rejecting the same First Amendment claims that petitioners make here. *E.g.*, *Bierman*, 900 F.3d at 572, 574 (concluding that there was "no meaningful distinction between this case and *Knight*" in rejecting public employees' claim that they were "unconstitutionally compel[led] … to associate with the exclusive negotiating representative"); *Jarvis*, 660 F. App'x at 74 (holding that *Knight*

foreclosed employees' claim that exclusive representation "compels union association"); *see also* Pet. App. 58a-59a.

The lower courts are also in agreement that *Janus* did not disturb *Knight*'s conclusion. As the Ninth Circuit observed, "[t]he cases presented different questions, … and *Janus* never mentions *Knight*." *Mentele*, 916 F.3d at 789 (noting also that "[t]he same passage [plaintiff] identifies as evidence that *Knight* did not survive *Janus* goes on to expressly affirm the propriety of mandatory union representation, which is consistent with *Knight*"). The First and Eighth Circuits have held similarly. *See Reisman*, 939 F.3d at 414 (holding that *Janus* did not undermine prior circuit precedent upholding exclusive representation on the basis of *Knight*); *Bierman*, 900 F.3d at 574 (holding that *Janus* "do[es] not supersede *Knight*" because "the decision never mentioned *Knight*, and the constitutionality of exclusive representation standing alone was not at issue"); *see also Uradnik*, 2018 WL 4654751, at *3-*4 (similar).[4]

[4] Five recent district court decisions have similarly upheld the constitutionality of exclusive representation after *Janus*. *Sweet v. California Ass'n of Psychiatric Technicians*, No. 2:19-CV-00349-JAM-AC, 2019 WL 4054105 (E.D. Cal. Aug. 28, 2019); *O'Callahan v. Regents of the Univ. of Cal.*, No. 19-02289, 2019 WL 2634484 (C.D. Cal. June 10, 2019) (denying motion for preliminary injunction); *Grossman v. Hawaii Gov't Employees Ass'n*, 382 F. Supp. 3d 1088 (D. Haw. 2019); *Akers v. Maryland State Educ. Ass'n*, 376 F. Supp. 3d 563 (D. Md. 2019), *appeal docketed*, No. 19-1524 (4th Cir. May 16, 2019); *Thompson v. Marietta Educ. Ass'n*, 371 F. Supp. 3d 431 (S.D. Ohio 2019) (denying motion for preliminary injunction).

Because the lower courts have uniformly upheld the constitutionality of exclusive representation in the public sector, there is no conflict for this Court to resolve on the dispositive question presented by the petition.

B. Petitioners' Alleged Split over the Predicate Issue of State Action Does Not Warrant This Court's Attention.

In asserting that the circuits are in conflict on the "state action" question, petitioners allege only a stale, decades-old split regarding private-sector employers that, post-*Janus*, no longer has any application in the public sector. Specifically, these cases concern whether unions or their *private* employers engaged in state action by requiring non-union employees to pay union fees pursuant to an "agency-shop" provision expressly authorized, though not required, by federal law.[5] Pet. 4 (comparing *White v. Communications Workers*, 370 F.3d 346, 354 (3d Cir. 2004) (Alito, J.) (holding that union's conduct pursuant to agency-shop provision did not constitute state action), *Price v. International Union*, 927 F.2d 88, 91-92 (2d Cir. 1991) (concluding that agency-shop agreement was product of private negotiations not attributable to the government), *Kolinske v. Lubbers*, 712 F.2d 471, 474-80 (D.C. Cir. 1983) (holding that the decision to adopt an agency-shop provision is not a government act),

[5] "A type of union security clause, an agency shop clause requires all employees covered by the collective bargaining agreement to pay dues or equivalent fees to the union, but does not require every employee to join the union as a condition of retaining employment." *Kolinske v. Lubbers*, 712 F.2d 471, 472 n.2 (D.C. Cir. 1983).

and *Reid v. McDonnell Douglas Corp.*, 443 F.2d 408 (10th Cir. 1971) (no state action arising from agency shop provision), with *Beck v. Communications Workers*, 776 F.2d 1187, 1208 (4th Cir. 1985) (holding that union's collection and use of fees from non-union employees pursuant to agency-shop provision constituted government action), and *Linscott v. Miller Falls Co.*, 440 F.2d 14, 16-17 (1st Cir. 1971) (concluding that company's termination of an employee for failure to pay union dues required by agency-shop provision is state action)).[6] But not only are agency-shop cases easily distinguishable, the Fourth Circuit's *Beck* opinion on which petitioners rely was superseded when the Fourth Circuit granted rehearing *en banc* and issued a decision (not noted by petitioners) that did not resolve the state action question. *See Beck v. Communications Workers*, 800 F.2d 1280, 1290 (4th Cir. 1986) (*en banc*) (Murnaghan, J., concurring) (noting that of the ten judges rehearing the case *en banc*, only two supported the panel opinion's state action holding, with five rejecting it and three not reaching it); *id.* at 1290 n.1 (Winter, C.J., dissenting) ("The in banc majority has declined to consider the issue of state action.").[7] And the First

---

[6] The Ninth Circuit has also assumed state action *arguendo* in these circumstances. *See Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1002-04 (9th Cir. 1970) (deciding a First Amendment challenge to a private-sector agency-shop agreement without specifically addressing the predicate question of state action).

[7] This Court subsequently granted the unions' petition for certiorari and affirmed the *en banc* court on statutory grounds, expressly declining to reach the state action question. *See Communications Workers v. Beck*, 487 U.S. 735, 761 (1987) ("We need not decide whether the exercise of rights permitted, though not compelled, by § 8(a)(3) involves state action.").

Circuit cabined its prior holding in *Linscott* by finding no state action in circumstances more closely analogous to those in this case. *See Hovan*, 704 F.2d at 643-44.[8]

Whatever remains of petitioners' alleged split addresses the narrow question of whether *private-sector* agency-shop agreements give rise to state action. *See, e.g., White*, 370 F.3d at 349. However, agency-shop agreements are no longer permitted in the *public sector* after *Janus*. *See* 138 S. Ct. at 2486 (declaring that "States and public-sector unions may no longer extract agency fees from nonconsenting employees").[9] Thus, the purported split does not at all speak to the different state-action question posed by this case, which is whether the unions' rules restricting non-union employees from participating in matters of internal union policy constitute government action subject to the First Amendment. *See* Pet. App. 64a-65a. On *that* question, petitioners have identified no split at all.

Moreover, the alleged split turns entirely on the significance that each court of appeals attributed to a

---

[8] Petitioners also contend that this Court's presumption of state action in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), favors granting this petition. Pet. 4. But state action was not disputed there because the case addressed the constitutionality of a decision made by the National Labor Relations Board, a federal agency that is indisputably a government actor. 440 U.S. at 501; *see also* 29 U.S.C. § 153.

[9] As noted *supra* p. 6 n.3, the SJC held that *Janus*, and the Commonwealth's immediate cessation of agency-fee collection in response to *Janus*, rendered moot petitioners' challenge to Massachusetts's agency-shop provision, Mass. Gen. Laws ch. 150E, § 12. *See* Pet. App. 47a-53a.

specific provision of the National Labor Relations Act ("NLRA"), which *expressly* authorizes private-sector agency-shop agreements. *Compare*, *e.g.*, *White*, 370 F.3d at 353-54 (concluding that Congress's "express permission" of agency-shop agreements in Section 8(a)(3) of the NLRA was insufficient to render those private agreements state action), *and Kolinske*, 712 F.2d at 472 ("[W]e find that the authorization provided by federal law in the agency shop clause used by the UAW does not transform the agency shop clause or the UAW's eligibility rules for strike benefits into state action."), *with Linscott*, 440 F.2d at 16 ("If federal support attaches to the union shop if and when two parties agree to it, it is the same support, once it attaches, even though the consent of a third party, the state, is a pre-condition.").[10] In contrast, no law, state or federal, expressly dictates or requires the internal union rules about which petitioners complain. Rather, as explained *supra* pp. 3-4, Massachusetts law is silent on this point and neither requires nor prohibits unions to allow participation by nonmembers in their internal affairs. For this reason

[10] The Fourth Circuit's panel opinion in *Beck* also concluded that state action was present, *see* 776 F.2d at 1205-08; *but see id.* at 1221 (Winter, C.J., dissenting) (arguing that no state action existed), but as noted *supra* p. 16, the panel opinion was superseded by the Fourth Circuit's opinion *en banc*, with a majority of the judges reaching the issue concluding that state action did not exist. *See* 800 F.2d at 1290 (Murnaghan, J., concurring) ("The constitutional grounds asserted as a basis for recovery by the plaintiffs have received support from [the two-judge majority in the panel opinion]. Five members of the Court … have concluded that no such constitutional basis for relief exists. Three Court members … have not reached the question….").

as well, petitioners' alleged split is inapposite to the questions presented here.

In any case, more recent First and Fourth Circuit decisions further undermine any contention that a live split exists and instead suggest that any lingering tension may be resolved by the lower courts themselves. For example, in *Kidwell v. Transportation Communications Int'l Union*, 946 F.2d 283 (4th Cir. 1991), the Fourth Circuit squarely addressed whether an internal union rule requiring its members to pay full union dues constitutes state action. *Id.* at 284-85, 298-99. The *Kidwell* plaintiffs claimed a First Amendment injury because they were compelled to financially support the union's political activities in order to participate in decisions that are germane to their employment. *Id.* The Fourth Circuit rejected the argument, concluding that the "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." *Id.* at 299.

Similarly, in *Hovan*, the First Circuit decided whether a private-sector union's requirement that its members take an oath of loyalty to the United States involves state action. 704 F.2d at 641-42 (Breyer, J.). In finding no state action, the court distinguished the NLRA's express allowance of the union-shop provision at issue in *Linscott* from the union's internal membership requirement, which was not the subject of any federal law. *Id.* at 643-44.[11] Notably,

[11] Indeed, both circuits have acknowledged that their earlier decisions in *Linscott* and *Beck* are outliers. *See Kidwell*, 946 F.2d at 298 (noting the "growing reluctance to find state action under

petitioners disregard these decisions, although the SJC relied on both *Hovan* and *Kidwell* in declining to find state action here. *See* Pet. App. 64a-65a.

In summary, even if anything remains of the split on agency-shop provisions after the Fourth Circuit's *en banc* decision in *Beck* and the First Circuit's cabining of *Linscott* in *Hovan*, it is neither squarely presented here nor worthy of this Court's attention on its own merits. *Cf. Janus*, 138 S. Ct. at 2479 n.24 (noting that a state-action argument of the kind advanced by petitioners here was "debatable" in the past, "and is even more questionable today").

C. This Case Is a Poor Vehicle for Resolving Petitioners' Alleged Split.

Even if this Court were inclined to resolve petitioners' alleged split, this case would present a poor vehicle to do so. Not only is the state-action issue here materially different from the one that is the subject of the putative circuit split, *see supra* pp. 15-19, but the Court's resolution of this threshold issue would not determine the outcome of this case. Rather, the SJC squarely confronted the petitioners' First Amendment challenge to the unions' internal rules in an alternative holding assuming state action, and discerned no constitutional violations in an analysis that, as just explained, itself implicates no split of authority and does not warrant review by this Court. *See supra* pp. 12-15; *see also* Pet. App. 65a-68a. Thus, the Court should deny review of this threshold

---

the NLRA"); *Hovan*, 704 F.2d at 643 (acknowledging that *Linscott* "went beyond" this Court's precedent and conflicts with the decisions of other circuits).

question of state action for the further reason that it would not be outcome-determinative here.

II. The SJC's Decision Is Correct.

This Court should deny the petition for the further reason that the SJC's decision is correct. The court properly concluded that, insofar as petitioners' challenge is understood as a challenge to exclusive representation generally, it must be rejected based on *Knight I* and *II* and *Janus*. And if petitioners' challenge is construed as a challenge to exclusive representation as it relates to the unions' policies—not dictated by the state—of barring non-union employees from participating in decisions regarding leadership and strategy, the court correctly rejected it, both for want of state action and because petitioners' speech and associational rights were not infringed.

A. The SJC Correctly Found No State Action Here.

The SJC correctly held that, here, "the link between exclusive representation and the unions' membership requirements" was "too attenuated to constitute State action." Pet. App. 65a. In so holding, the SJC relied on a lengthy line of cases (including one from this Court). Pet App. 64a-65a. Some of these cases arose in the private sector.[12] Others arose in the

[12] *See, e.g.*, *United Steelworkers v. Sadlowski*, 457 U.S. 102, 104, 121 n.16 (1982) (union's adoption of "outsider rule" prohibiting non-union employees from contributing to union elections did not violate "nonmembers' constitutional rights of free speech and free association" because "the union's decision to adopt an outsider rule does not involve state action"); *Kidwell*, 946 F.2d at 299; *Hovan*, 704 F.2d at 645; *Turner v. Air Transport Lodge*, 590 F.2d 409, 413 n.1 (2d Cir. 1978) (Mulligan, J.,

public sector.[13] All of them stand for the basic proposition that when a union serving as an exclusive bargaining representative applies its own internal rules that are neither dictated nor required by law, state action has not occurred. *E.g.*, *Hallinan*, 570 F.3d at 817 ("[U]nion actions taken pursuant to the organization's own internal governing rules and regulations are not state actions."); *Kidwell*, 946 F.2d at 299 (for purposes of First Amendment challenge, "the 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").

The SJC especially looked to *Hovan* for guidance. Pet. App. 64a. There, the First Circuit explained that deeming a union's enforcement of its internal rules (membership rules, in that case) to be state action "would radically change not only the legal, but the

---

concurring) ("[S]ince union constitutions and rules are formulated and enforced by the union, a private entity, no federal constitutional right of free speech is here involved."), *cert. denied*, 442 U.S. 919 (1979).

[13] *See, e.g.*, *Hallinan v. Fraternal Order of Police*, 570 F.3d 811, 817 (7th Cir.), *cert. denied*, 558 U.S. 1049 (2009); *Harmon v. Matarazzo*, 162 F.3d 1147 (2d Cir.) (unpublished) (police officer's Federal civil rights claim against police union "not actionable" because union "is not a state actor"), *cert. denied*, 525 U.S. 1042 (1998); *Messman v. Helmke*, 133 F.3d 1042, 1044 (7th Cir. 1998) ("[A] union's internal governing rules usually are not subject to First Amendment prohibitions."); *Jackson v. Temple Univ.*, 721 F.2d 931, 933 (3d Cir. 1983) (public employee's Federal civil rights claim against union not actionable where plaintiff failed "to set forth any facts suggesting that the state was responsible for the Union or that the Union was acting under color of state law in deciding not to bring [his] grievance to arbitration").

practical, nature of the union enterprise." 704 F.2d at 643. *Hovan* thus concluded that "the link between the union's federally created bargaining power and its membership requirements is too distant to impose constitutional restrictions." *Id.* at 645. The SJC properly applied the same analysis here. Pet. App. 64a-65a.

Petitioners do not even cite *Hovan* or most of the other cases on which the SJC relied. Nor do they apply this Court's two-part test for state action as set out in *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 50 (1999).[14] Instead, they argue that state action was present because (1) this Court assumed state action in *Knight*; (2) public-sector unions perform the "traditional governmental function" of setting terms and conditions of employment; and (3) the unions are "entwined" with the State. Pet. 7-12. Each argument lacks merit.

The first two arguments fail because, as the Seventh Circuit has explained in a similar case, "[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

---

[14] *Sullivan* reiterates this Court's "repeated insistence that state action requires *both* an alleged constitutional deprivation 'caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible,' *and* that 'the party charged with the deprivation must be a person who may fairly be said to be a state actor.'" 526 U.S. at 50 (emphasis in original) (quoting *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982)); *see, e.g., White*, 370 F.3d at 350 (applying *Sullivan* test and concluding that union's conduct pursuant to private-sector agency-shop agreement did not constitute state action).

restraints." *Hallinan*, 570 F.3d at 818 (emphasis added; citation and internal quotation marks omitted); *see also id.* at 817-18 (rejecting the proposition that "because state action is present when a state employer forces employees to associate with a union, every action the union takes becomes action taken under color of law"); *Hovan*, 704 F.2d at 645 (rejecting position that "would 'constitutionalize' virtually every activity of a union"). This principle—that the "state action" question generally concerns actions rather than entities, and therefore that the same entity can be deemed a state actor in one context but not in another—defeats petitioners' arguments. *See, e.g.*, *Sullivan*, 526 U.S. at 51 (Court's approach to second requirement for state action focuses on "the specific *conduct* of which the plaintiff complains") (emphasis added; citation and internal quotation marks omitted). Because the union actions at issue in *Knight*—exclusive "meet and confer" sessions with the public employer—were *expressly authorized by state law*, *see* 465 U.S. at 274-75, there was no need to undertake a state action inquiry. The same result obtains when a union negotiates the agreement setting terms and conditions of employment *pursuant to a law* authorizing it to be the exclusive bargaining representative. But that simply says nothing about the situation presented here, where state law is silent regarding the union actions at issue.

As for petitioners' third argument, the "entwinement" theory recognized by *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001), has even less relevance here. There, this Court found that a school athletic association engaged in state action "owing to the pervasive entwinement of state school officials in the

structure of the association." *Id.* at 291; *see also id.* at 299-300 ("the Association is an organization of public schools represented by their officials acting in their official capacity"); *id.* at 300 ("State Board [of Education] members are assigned ex officio to serve as members of the board of control and legislative council"). Petitioners point to no such facts in the record here, so the case has no application. Petitioners note the fact that the bargaining unit employees that the union *represents* are public employees, Pet. 11, but that is the wrong question. For *Brentwood*'s "entwinement" theory to apply here, there would have to be evidence that the leadership of the union *itself* consisted of public officials acting in their official capacity; plaintiffs identify no such evidence in this case.

Finally, although not noted by the SJC, other courts have recognized that accepting petitioners' argument would create a different sort of state action problem.[15] If the unions were required to accept the participation of nonmembers in their internal affairs, some of whom—like the petitioners—may oppose their objectives, that could very well violate the associational rights of the unions. *See, e.g.*, *Roberts v. United State Jaycees*, 468 U.S. 609, 622-23 (1984) (government may violate associational rights of organizations in "try[ing] to interfere with the internal organization or affairs of the group … [by] forc[ing] the group to accept members it does not desire … [which] may impair the ability of the original members to express only those views that brought

[15] Respondents raised this point before the SJC. *See* Brief for CERB, *Branch v. CERB*, No. SJC-12603, at 34-35 & n.13, *available at* https://www.ma-appellatecourts.org/docket/SJC-12603.

them together."); *accord Boy Scouts v. Dale*, 530 U.S. 640, 647-48, 653-59 (2000). The Fourth Circuit recognized precisely this problem in *Kidwell*, where a plaintiff claimed a constitutional right to remain a union member but pay only for collective bargaining activities. *See* 946 F.2d at 297 ("[W]e believe that adopting Kidwell's proposition could infringe on the union's First Amendment right of expressive association."). This further supports the SJC's conclusion that state action did not exist here.

B. The SJC Correctly Held That *Knight I* and *II* Compel Rejection of Petitioners' Claims.

The SJC further correctly concluded that even assuming the existence of state action, petitioners' claims must fail. The court recognized that "under controlling Supreme Court precedent, neither the exclusive representation provisions of [Mass. Gen. Laws ch.] 150E nor the unions' internal policies and procedures barring nonmembers from various collective bargaining activities violate the First Amendment." Pet. App. 54a.

This Court's decisions in *Knight I* and *Knight II* establish that exclusive representation does not violate the First Amendment, either in general or with respect to the particular alleged associational harms that petitioners claim. The *Knight* cases concerned a challenge to a union's right of exclusive representation in two contexts: (i) a "meet and negotiate" process requiring the public employer to negotiate with the union with regard to "terms and conditions of employment"—*i.e.*, the traditional subjects of "mandatory" collective bargaining; and (ii)

a "meet and confer" process requiring the employer to confer with the union on broader "employment-related questions not subject to mandatory bargaining." *Knight II*, 465 U.S. at 274. Massachusetts labor law contemplates only a "meet and negotiate" process involving terms and conditions of employment; it has no analogue to the "meet and confer" process.[16]

To the extent petitioners challenge exclusive representation in Massachusetts, *Knight I* defeats their claim. There, this Court summarily affirmed the portion of the district court's decision upholding the constitutionality of exclusive representation, as applied to the "meet and negotiate" process regarding the traditional subjects of mandatory bargaining.[17] *See Knight v. Minnesota Community College Faculty Ass'n*, 571 F. Supp. 1, 3-7 (D. Minn.), *summarily aff'd*, 460 U.S. 1048 (1982); *see also Knight II*, 465 U.S. at 279 (explaining that the Court's earlier summary

---

[16] Chapter 150E requires public employers to "meet … and [] negotiate in good faith [with the representative] with respect to wages, hours, standards or productivity and performance, and any other terms and conditions of employment," *id.*, § 6; it does not contain any requirement to "meet and confer" on other issues. *See, e.g.*, *City of Lynn v. Labor Relations Comm'n*, 681 N.E.2d 1234, 1237-40 (Mass. App. Ct. 1997) (noting that certain topics have been deemed excluded from collective bargaining under Massachusetts law, since "by statute, by tradition, or by common sense [they] must be reserved to the sole discretion of the public employer so as to preserve the intended role of the governmental agency and its accountability in the political process").

[17] That decision, which arose from an appeal of a three-judge district court ruling under 28 U.S.C. § 1253, is binding authority. *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975) ("[V]otes to affirm summarily … are votes on the merits of a case.") (citations omitted).

affirmance "rejected the constitutional attack on [the Minnesota statute's] restriction to the exclusive representative of participation in the 'meet and negotiate' process"). Thus, because exclusive representation in Massachusetts is similar to the "meet and negotiate" system that *Knight I* upheld, that case controls.

Although Massachusetts has no "meet and confer" process like that addressed in *Knight II*, this Court's opinion in that case confirms the correctness of the SJC's conclusion that petitioners' "voice and vote" theory also lacks merit. Petitioners claim they are pressured to join the unions because of the unions' private membership rules denying them participation in the unions' negotiating teams or in developing the unions' internal strategy and policy, and that *Knight II* is "inapposite" to this claim. Pet. 17-19. But, as noted *supra* p. 13, this Court in *Knight II* specifically considered and rejected the theory of associational harm advanced by petitioners here. The Court explained that nonmembers "may well feel some pressure to join the exclusive representative in order to … give them a voice in the representative's adoption of positions on particular issues." *Knight II*, 465 U.S. at 289-90. However, the Court concluded that such 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.* at 290; *see also id.* at 286 ("Appellees' status as public employees, however, gives them no special constitutional right to a voice in the making of policy by their government employer."). That is precisely the kind of putative associational harm the petitioners assert in this case.

See Pet. 13; Pet. App. 63a-64a. Under *Knight II*, it is insufficient to establish a constitutional violation.

Knight II supports the SJC's conclusion in other ways as well. The Court found, for example, that the instructors had "no constitutional right to force the government to listen to their views," 465 U.S. at 283, and that the state had not restrained the instructors' "freedom to speak … or their freedom to associate or not to associate with whom they please, including the exclusive representative." *Id.* at 288; *see also, e.g.*, *City of Madison Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 176 n.10 (1976) ("[N]o one would question the absolute right of the nonunion [employees] to consult among themselves, hold meetings, reduce their views to writing, and communicate those views to the public generally … [or] directly to the [government]."). Massachusetts law is similar: although the state may not engage in so-called "direct dealing" and negotiate terms and conditions of employment directly with bargaining unit members represented by a union, *e.g.*, *Service Employees Int'l Union v. Labor Relations Comm'n*, 729 N.E.2d 1100, 1104-05 (Mass. 2000), the state has not imposed any restriction on non-union employees' ability to *speak* to their employers, and the state does not force dissenters to affiliate with the unions' positions. Indeed, as *Knight II* recognized, the state conducts negotiations with the exclusive representative with the understanding that not all bargaining unit members may agree with the "official [] view" presented by that representative. 465 U.S. at 276; *see also Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 521 (1991) ("[W]orker and union cannot be said to speak with one voice."); *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 62

(1975) (under federal labor law, the "complete satisfaction of all who are represented [by the exclusive representative] is hardly to be expected") (citation omitted).

In sum, as in *Knight II*, here the state has merely "restricted the class of persons to whom it will listen" in this context. 465 U.S. at 282. "That it is free to do." *Id.* at 286 (citation and internal quotation marks omitted).

C. The SJC Correctly Found That *Janus* Did Not Disturb *Knight I* and *II*.

This Court's recent *Janus* decision did not abrogate the *Knight* cases or in any way forestall the cases' foreclosure of plaintiffs' claims, as the SJC correctly concluded. Pet App. 59a-61a. *Janus* did not mention the *Knight* cases, let alone purport to cast doubt on the constitutionality of exclusive representation as it was upheld in *Knight I* and *II*. *See Bierman*, 900 F.3d at 574 (relying upon *Knight II* in rejecting challenge to exclusive representation after *Janus* was decided, in part because *Janus* "never mentioned" *Knight II*). Rather, several aspects of *Janus* affirmatively support the constitutionality of exclusive representation.

First, this Court acknowledged that a state's interest in "labor peace"—defined as the "avoidance of the conflict and disruption" in the workplace that would occur "if the employees in a unit were represented by more than one union"—is "compelling." 138 S. Ct. at 2465. But the Court concluded that the payment of agency fees was not necessary to achieve this compelling interest, and that avoiding "free riders" who might benefit from union

services without paying fees is not a similarly compelling interest. *Id.* at 2465-66. A central feature of the Court's decision, then, was its recognition of labor peace and exclusive representation as constitutional ends and means, while also concluding that they were not "inextricably linked" to either a state interest in avoiding free riders or imposing agency fees, which did not pass muster. *Id.*; *see also id.* at 2480.

Second, the Court cited with approval the experience of the federal government, where "a union chosen by majority vote is designated as the exclusive representative of all the employees, but federal law does not permit agency fees." *Id.* at 2466. To the Court, this meant that the compelling interest in labor peace "can readily be achieved through means significantly less restrictive of associational freedoms than the assessment of agency fees." *Id.* (citation and internal quotation marks omitted). As it happens, the "means" of which the Court approvingly spoke is exactly the arrangement dictated by Chapter 150E after *Janus*.

Third, the Court noted that a union as exclusive representative could permissibly require non-union employees in the bargaining unit to pay the union for representing them during grievance proceedings, or could simply deny them representation during such proceedings altogether, and either approach would be more narrowly tailored than imposing agency fees. *Id.* at 2468-69 & n.6.[18] Such alternatives would obviously

[18] The former is the legislative approach Massachusetts has taken in response to *Janus*. Mass. Gen. Laws ch. 150E, § 5, ¶ 2, as amended by 2019 Mass. Acts ch. 73, § 2.

be impermissible if exclusive representation itself constituted unacceptable associational injury.

Fourth, in rejecting a reliance-based argument for upholding agency fees, the Court noted that its decision would *not* require an "extensive legislative response" by states: "States can keep their labor-relations systems *exactly as they are*—only they cannot force nonmembers to subsidize public-sector unions." *Id.* at 2485 n.27 (emphasis added). The same would not be true of a decision that exclusive representation is unconstitutional. It would be impossible for employers, public and private, to respond to a ruling invalidating exclusive representation without a substantial and complex reordering of the entire labor-management relationship.

Petitioners' claim that *Janus* nonetheless changed the exclusive representation playing field is based on a brief phrase that petitioners pluck out of context. *See* Pet. 7. The Court's description of exclusive representation as "a significant impingement on associational freedoms that would not be tolerated in other contexts" came in the context of a passage that, like the rest of the Court's opinion, leaves the *Knight* cases intact:

> It is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees—itself a significant impingement on associational freedoms that would not be tolerated in other contexts. We simply draw the line at allowing the government to go further still and require all employees to support the union

> [financially] irrespective of whether they share its views.

138 S. Ct. at 2478. As the Ninth Circuit observed, to accept that this passage changed the legal landscape beyond agency fees, "we would have to conclude that the brief passage … (two sentences at most), which addresses a question that was not presented or argued and which was unnecessary to the Court's holding, was nevertheless intended to overrule the Court's earlier decision in *Knight* sub-silentio." *Mentele*, 916 F.3d at 789. For that reason, every court to have considered the issue, including the SJC below, has declined to read this passage to have called exclusive representation into question. *See* Pet. App. 59a-60a; *supra* pp. 12-15.

Accordingly, nothing in *Janus* disturbed the Court's approval of exclusive representation in *Knight I* and *II* and other prior cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MAURA HEALEY
Attorney General for the Commonwealth of Massachusetts

Timothy J. Casey*
David C. Kravitz
Cassandra Bolaños
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
timothy.casey@mass.gov
(617) 963-2043

T. Jane Gabriel
Chief Counsel
Massachusetts Department of Labor Relations
19 Staniford Street
Boston, Massachusetts 02114
jane.gabriel@mass.gov
(617) 626-7139

* *Counsel of Record*

November 22, 2019