No. 19-51

IN THE

Supreme Court of the United States

BEN BRANCH, WM. CURTIS CONNER,
DEBORAH CURRAN, AND ANDRE MELCUK,

Petitioners,

v.

DEPARTMENT OF LABOR RELATIONS,
COMMONWEALTH EMPLOYMENT RELATIONS BOARD AND
MASSACHUSETTS SOCIETY OF PROFESSORS/MTA/NEA,
HANOVER TEACHERS ASSOCIATION/MTA/NEA,
PROFESSIONAL STAFF UNION/MTA/NEA,

Respondents.

On Petition for Writ of Certiorari to the Massachusetts Supreme Judicial Court

REPLY BRIEF

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December 5, 2019

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTRODUCTION

Respondents argue that coerced speech is acceptable. They admit that the Union forces employees to choose between their political autonomy and a voice and vote in their working conditions. But they assert that this coercion is unobjectionable, because this Court permits government pressure to financially support a union's political activities. Respondents are wrong. Coerced political speech is never permissible.

The Union's scheme to pressure public employees to subsidize the Union contravenes the First Amendment and subverts this Court's holding in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018). In *Janus*, this Court declared that coerced speech is insufferable in a democratic society. Free speech is more than an important value—it is a nonnegotiable precondition for democracy.

REPLY ARGUMENT

I. RESPONDENTS ARE WRONG ABOUT THE ISSUE: COMPELLED POLITICAL SPEECH, NOT EXCLUSIVE REPRESENTATION, IS AT ISSUE.

Respondents are wrong about the questions presented to this Court. They constantly try to recast this Petition as a challenge to union exclusive representation. Yet this contention is contradicted by the Petition and the record below.

The questions presented here exclude any challenge to exclusive representation. As stated in the Petition, Petitioners do not ask this Court to overturn the Union's statutory right to act as the exclusive bargaining representative. Instead, Petitioners argue that the *manner* in which the Union has exercised its exclusive

authority violates their First Amendment rights. Rather than challenging exclusive representation, the questions presented here depend on it.

The court below understood and correctly identified the nature of this challenge to forced partisan political speech. Pet. app. 63a–64a. ("[T]hey 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 in their workplace conditions' . . . unless they join the unions and support their politics.").

Respondents are thus incorrect when they claim that this case is about exclusive representation. If the Court grants certiorari and rules for Petitioners, exclusive representation as a statutory scheme would remain untouched in Massachusetts (and throughout the nation). *See* Pet. 15, 18.

Respondents misidentify the questions here to avoid this Court's ruling in *Janus*. There, the Court invalidated legal arrangements that allow unions to compel public employees to subsidize speech. Because Respondents recognize that coerced speech exists here, they have sought to circumvent *Janus*.

Under the current Massachusetts scheme, both the Union and the government leverage nonmembers' interest in their employment to force their political speech. In *Janus*, the union and the state made the support of union politics a condition of employment. In this case, Respondents made support of Union politics a condition to having a say in the terms of employment—how much employees are paid, how much they work, and how much insurance is offered—matters of supreme importance to workers and their families. While the *mechanism* of coercion is different

here than in *Janus*, the existence of coercion is the same.

However, Petitioners here are not only coerced into reimbursing the Union for collective bargaining, they are forced to support Union partisan politics. In exchange for a voice and vote, employees must become union members. Union membership entails association and endorsement of the full panoply of union politics, including candidate endorsement and candidate support through union publications and in-kind contributions. The coercion here is even more egregious than the coercion in *Janus*.

While this Court held in *Janus* that government-sanctioned unions cannot compel nonunion members to subsidize private speech, unions across the country are currently able to achieve the same result. By simply modifying the punishment—to a denial of a voice or vote in matters of employment instead of a denial of employment—unions can compel non-members to subsidize private speech on matters of substantial public concern. If *Janus* permits that, free speech means very little.

II. RESPONDENTS ARE WRONG ABOUT THE LAW.

Respondents are also wrong about the law. On top of their failure to identify the proper legal issue, Respondents are wrong that no circuit split exists, no state action exists, and that governmental coercion is lawful.

A. The Circuit Split Exists.

By recasting the Petition as a challenge to exclusive representation, Respondents can attack the existence of the circuit split. Board Op. brf. at 12. The Petition

contains no circuit split claim on exclusive representation. Rather, it shows a circuit split on whether coerced union speech constitutes state action.

The Board argues that the circuit conflict is “stale,” but it does not contest that it exists. Bd. Op. brf. at 15–17. “Stale” presumably means “long standing.” That is a reason to cure this conflict, especially since the court below took the most radical position in this conflict by holding that there is no state action where a government and union agree that nonmembers have no voice or vote in their working conditions.

The Board attempts to distinguish this case from the circuit conflict by arguing that it makes a difference that agency fees were expressly authorized and are no longer legal after *Janus*. Bd. Op. brf. at 17–18. However, exclusive representation is also expressly authorized, is currently legal, and is used here to compel the support of union partisan politics.

Respondents' claim that the existence of state action turns on the chosen mechanism of coercion rings false. If coercion is present, and if it arises from a partnership between the government and the Union, then state action exists. So obvious is state action in the *mechanism* at issue here (denying a voice and a vote), that this Court did not previously consider it a matter worthy of debate. *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271 (1984). Unfortunately, the state action conflict in the lower courts shows that it has not been obvious to them.

Respondents' attack on the circuit split presumes that coercing employee speech by threatening employment is different than coercing employee speech by threatening participation in determining workplace conditions. However, that premise is false. The method

of coercion is immaterial. Respondents' attack therefore fails to undermine the existence of the circuit split.

B. State Action Exists.

Respondents and the lower court are wrong that no state action exists. In *Janus*, this Court set about curing a clearly identified historical problem: union fee cases had not been treated like other forced speech cases and were specifically at odds with political patronage decisions. The latter was particularly troubling because both address insulating government employees from pressure to support politics. *Janus* 138 S. Ct. at 2484. In the patronage case of *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 77 (1990), this Court addressed a question of "constitutional magnitude" that is at the heart of Respondents' argument. Must the pressure on employees reach the level of discharge? This Court answered "no," and it determined that pressure even as trivial as withholding a birthday party is prohibited if the goal is to punish free speech. *Id.* at 75 n.8.

Rutan dooms Respondents' argument here. The *Rutan* rule that no punishment is permissible to compel speech destroys the distinction Respondents make over the mechanism of coercion. Contrary to Respondents' claim, barring Petitioners from participation in setting their level of income, required hours, place of work, standards of work, and conditions for discharge are not, under any understanding of English, a matter internal to the Union. Rather, it is an external punishment regarding every aspect of Petitioners' employment.

Petitioners are forced to accept the Union as their agent. Massachusetts law specifically prohibits Petitioners from direct dealing with their employer. *SEIU Local 509 v. Labor Relations Commission*, 729

N.E.2d 1100, 1104 (Mass. 2000). Thus, both the Union *and the government* agree that the punishment for Petitioners' decision to refuse to join the Union is a denial of the right to a voice and vote on workplace conditions. It is not an internal matter.

If public-sector union procedures and rules are immune from constitutional review by merely labeling them internal union matters, *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012), makes little sense. In *Knox*, the entire controversy centered on the procedures that a public-sector union (not the state legislature) used to extract nonmembers' fees and use them for political purposes. *Id.* at 302. As *Knox* declared "[t]he First Amendment . . . does not permit a public-sector union to *adopt procedures* that have the effect of requiring objecting nonmembers to lend the union money to be used for political, ideological, and other purposes not germane to collective bargaining." *Id.* at 302–03 (emphasis added).

Respondents argue that the Union's duty of fair representation, and the employees' right to decertify the Union, somehow offset the punishment of being denied a voice and vote.[1] Union Op. brf. at 25. However, the Board rejected Petitioners' duty of fair representation claim below. Pet. app. 19a–22a. The right to decertify a union requires winning an election. The First Amendment stands as a bulwark against the will of the majority.

Respondents correctly argue that not everything an exclusive representative does carries the force of the

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[1] The Union also makes the incredible assertion that the issue of state action was not properly preserved. Yet the issue was presented and addressed extensively by the lower court. Pet. App. 64a–65a.

state. They cite, as did the court below, private sector cases like *Hovan v. Brotherhood of Carpenters & Joiners*, 704 F.2d 641 (1st Cir. 1983), where an employee sued to become a union member without taking a union oath. They also cite *Hallinan v. FOP*, 570 F.3d 811 (7th Cir. 2009), where union members objected to being expelled from membership. And they cite *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), for the proposition that private organizations cannot be forced to admit into membership individuals they reject. These cases are irrelevant because Petitioners are undisputedly not seeking to become members of the Union. They are not seeking to control the Union. They are not seeking to bargain separately with their employer. They are only requesting a voice and a vote in Union meetings without having to compromise their political autonomy. Giving them a voice and a vote simply allows them to influence decision making.

C. *Knight* Does Not Sanction Compelled Speech or Foreclose the Decision Here.

While lowering their voices about how *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), might have been able to pass on the constitutional issues absent state action (the first issue in this petition), Respondents shout the merits of *Knight*'s constitutional rulings as foreclosing the second issue raised in the Petition—using exclusive representation as the mechanism to coerce partisan political speech. The constitutional rulings in *Knight* do not sanction the political coercion here for three reasons.

First, *Knight* specifically disclaimed coercing non-member support for union politics. *Knight*, 465 U.S. at 289 and 289 n.11 ("This requirement [to pay union

fees] is not at issue"), 291 n.13 ("[T]his case involves no claim that anyone is being compelled to support [union] activities."). The Court prefaced the "pressure" passage from *Knight*, which Respondents heavily rely on, with a disclaimer that the plaintiffs did not challenge any "monetary contribution[s]" to the union's ideological activities. *Id.* at 289. And the Court was careful to note that *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), would have applied if forced fees were raised. *Knight* at 291 n.13. Because *Janus* has now replaced *Abood*, the updated version of *Knight* would agree with Petitioners' argument here: the compelled support of union politics is forbidden regardless of the mechanism used for the coercion.

Second, this Court has clarified the level of constitutional scrutiny since *Knight*. *Janus* noted that various levels of scrutiny had been applied to free speech cases in the past, but now the Court would apply *exacting* scrutiny. *Janus* 138 S. Ct. at 2464–65. *Knight* was opaque about the level of scrutiny applied, mentioning only the rational basis test. 465 U.S. at 291. Exacting scrutiny, as *Janus* explained, applies the compelling interest, least restrictive alternative test. That level of scrutiny is notably absent from the *Knight* decision.

Critically important is that *Janus* signaled that *strict* scrutiny, a higher level of scrutiny, might be more appropriate to compelled union fee cases. *Janus* 138 S. Ct. at 2465. This case goes beyond *Janus*, which only involved forced agency fee reimbursement for collective bargaining. Here, Respondents mandate the payment of union dues, which requires forced payment for partisan politics, including candidate endorsement. The lower court clearly erred, because it applied no level of First Amendment scrutiny. *See* Pet. App.

63a–68a. *Knight* similarly failed to apply the proper level of scrutiny, although it did not involve coerced payment for politics. Strict scrutiny should be applied here.

Third, Respondents and the court below freely admit the pressure Petitioners feel to join the Union to obtain a voice and vote in their workplace conditions. Pet. App. 58a; Board Op. brf. at 13; Union Op. brf. at 3. This pressure is fine, according to Respondents, because *Knight* says it is fine. Yet, to the extent that *dicta* in *Knight* permits unions to "pressure" employees to abandon their own political views and subsidize the political views of the union, that dicta directly contradicts the political patronage line of cases. Those cases teach that state actors may not maintain environments that pressure employees to support political views. *Rutan*, 497 U.S. at 73, 79. The patronage line of cases is critical and bars this pressure. Therefore, when the correct precedent and proper level of scrutiny are applied, Respondents' conduct fails to pass constitutional muster.

Given that this Court protected individuals from coerced speech in the form of "pressure" in several other contexts—whether in public schools, *see, e.g.*, *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), or in patronage practices in public employment, *see, e.g.*, *Rutan*, 497 U.S. at 79—the Court should equally protect Petitioners here from the pressure exerted by Respondents to support Union politics.

If this Court believes that *Knight* has some applicability here, it should grant this Petition and clarify what the Court meant by signaling a new higher level of scrutiny in *Janus* and a desire to align the political patronage and union fee cases. Because

no justification exists to force citizens to support a specific political candidate, no level of judicial scrutiny or legislative justification saves Respondents' scheme here. Compelled political speech that fits under the new strict scrutiny standard should be *per se* unconstitutional.

III. RESPONDENTS ARE WRONG ABOUT THE FACTS.

Finally, Respondents are wrong about the facts. The Union argues that the Petition is "fact-bound," meaning that the issues presented here are unique to the parties and do not implicate a broader pattern of conduct. Union Op. brf. at 21. Yet the facts of this Petition denote a persistent problem. The Union's mandatory information to nonunion employees begins with a "**WARNING**" that if they refuse to join, they will "not participate in the collective activities and decision making of the association that influences the terms and conditions of [their] employment." Pet. App. 78a. The Union even inadvertently admitted that the facts here are common. "[C]ourts have long acknowledged that the union will privately decide who will do the talking and that only union members vote." Union Op. brf. at 3.

This admission of the widespread nature of the problem negates the Union's "fact bound" claim. And the problem will likely become more acute. Before *Janus*, unions could compel fees from nonmembers by threatening their employment. With the demise of mandatory union fees, the union practice at issue in

this Petition takes center stage as the main mechanism for employee coercion.[2]

Although this Court was clear in *Janus* that coerced speech is untenable, Respondents and the lower court agree that coerced speech is permissible here. Without intervention by this Court, the egregious practice of compelled political speech will continue, and it will occur on a broad level. This Court should clarify that coerced political speech is *per se* unconstitutional regardless of the mechanism of coercion. Otherwise, *Janus* will be relegated to mean that coerced speech is unconstitutional only if it is imposed as a condition of employment.

Free speech is essential to our democratic government, and this Court should not overlook its clear violation here. Coerced speech is antithetical to freedom and democracy.

CONCLUSION

This Court should take this case to resolve the split among the lower courts on state action, clarify the level of First Amendment scrutiny that applies in labor relations cases that involve infringement on speech and association rights, and hold that no state

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[2] The precise nature of coming coercion in Massachusetts is hard to predict. Although Petitioners' agency fee challenge was dismissed as moot post *Janus*, the State Legislature refused to repeal the statutory provisions permitting compulsory fees, instead passing new provisions giving unions greater workplace access to employees and invading employee privacy at home by mandating the disclosure to the union of employee personal cell phone numbers and email addresses. At the same time the legislature made it harder for employees to resign union membership and outside groups to inform employees of their rights. *See* 2019 Mass. Acts ch. 73, §§ 1–5 (effective Sept. 19, 2019).

interest justifies allowing unions to weaponize their state-granted authority as an exclusive representative to force public employee speech.

The writ of certiorari should be granted on both questions presented.

Respectfully Submitted,

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December 5, 2019