No. 20-1378

In The
Supreme Court of the United States

LINDA RIZZO-RUPON; SUSAN MARSHALL;
and NOEMIO OLIVEIRA,

Petitioners,

v.

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL-CIO DISTRICT 141, LOCAL 914, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

REPLY BRIEF

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REASONS FOR GRANTING THE PETITION

Petitioners make a First Amendment challenge to the agency-fee provision of the Railway Labor Act (RLA). 45 U.S.C. § 152, Eleventh. There are two main questions: (1) whether the exacting scrutiny standard applied in reviewing agency fees in *Janus v. AFSCME*, ___ U.S. ___, 138 S.Ct. 2448 (2018) will apply to matters involving private-sector employees governed by the Railway Labor Act; and (2) whether this Court's repeated holdings over the last 65 years that indicate there is state action present when private-sector RLA plaintiffs challenge agency fees remains good law.

A. Merits of *Janus*

Respondents do not address the exacting scrutiny standard that this Court applied to agency-fee challenges in both *Janus* and *Harris v. Quinn*, 573 U.S. 616 (2014). In *Janus*, this Court noted that *Hanson* relied on a "legislative assessment of the importance of the union shop [i.e., a mandatory bargaining with agency fees arrangement]." 138 S.Ct. at 2480. It continued: "Such deference to legislative judgments is inappropriate in deciding free speech issues." *Id*.

Since this Petition and the Brief in Opposition have been filed, a number of Circuits have looked at the exacting scrutiny standard in the context of post-*Janus* challenges to mandatory bar dues. As Judge Thapar of the Sixth Circuit noted, "As far as the [Supreme] Court was concerned, state bars and public-sector unions seemed to go hand-in-hand." *Taylor v.*

Buchanan, 4 F.4th 406, 410 (6th Cir. 2021) (Thapar, J., concurring). Essentially, the theory is that state bar cases like *Lathrop v. Donohue*, 367 U.S. 820 (1961) and *Keller v. State Bar of California*, 496 U.S. 1 (1990), operate quite similarly in the state-bar context as *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) operated in the public-sector-union context pre-*Janus*.

In *Schell v. Chief Justice and Justices of the Oklahoma Supreme Court*, ___ F.3d ___, 2021 WL 3877404 (10th Cir. August 25, 2021), the Tenth Circuit recognized that *Janus* may have "enfeebled" *Keller*, but held *Keller* was still controlling. *Schell*, 2021 WL 3877404 at * 8. In *Taylor*, the Sixth Circuit recognized *Janus*' use of exacting scrutiny standard, but held it must follow directly controlling precedent of this Court even where "intervening . . . decisions have undermined the reasoning of an earlier decision." *Taylor*, 4 F.4th at 408. Judge Thapar implied that without the directly controlling rule, the challenge to mandatory bar dues could be considered an "easy case." *Id*. at 410 (Thapar, J., concurring). In *Boudreaux v. Louisiana State Bar Association*, 3 F.4th 748 (5th Cir. 2021), the Fifth Circuit noted "*Lathrop* and *Keller* heavily relied on cases governing union membership and dues" and that this Court has either "overruled those union cases or seriously called their reasoning into question." *Id*. at 755. Despite these "weakened foundations," *Lathrop* and *Keller* still controlled. *Boudreaux*, 3 F.4th at 755. In a separate bar-dues case, a different Fifth Circuit panel colorfully stated that *Keller* remained binding even

with "its increasingly wobbly, moth-eaten foundations." *McDonald v. Longley*, 4 F.4th 229, 253 (5th Cir. 2021).

In the instant matter, the Third Circuit stated that *Hanson* had "not yet" been overruled despite *Knox v. Service Employees*, 567 U.S. 298 (2012), *Harris*, and *Janus*. Pet. App. 3. Thus, the Circuit Courts that have considered *Janus* in the RLA context present here or in the bar-dues cases discussed above, all recognized that *Janus*, at a bare minimum, throws into question previous holdings of this Court that had allowed compelled financial support to RLA unions or state bars.

Having ignored the exacting scrutiny standard and its implications, the entirety of Respondents' arguments presented on the merits are that *Janus* only applied to public-sector employees and that public-sector and private-sector bargaining are different. Further, no mention is made of *Janus* disparaging the First Amendment analysis in both *Railway Employees v. Hanson*, 351 U.S. 225 (1956) and *Machinists v. Street*, 367 U.S. 740 (1961): "[N]either *Hanson* nor *Street* gave careful consideration to the First Amendment." *Janus*, 138 S.Ct. at 2479. *Abood*'s reliance on those cases drew criticism: "Surely a First Amendment issue of this importance deserved better treatment." *Janus*, 138 S.Ct. at 2479 (citing *Harris*, 573 U.S. at 636).

Petitioners have cited to government databases that show hundreds of thousands of employees are governed by the RLA. To date, in this matter, there have been two unpublished short decisions that just generally point to *Hanson*. Surely a First Amendment issue

potentially affecting hundreds of thousands of employees deserves better treatment.

B. State Action

On state action, Respondents rely on *Hanson* for the proposition that there can only be state action from private-sector employees who are employed in a right to work state. Respondents ignore *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), wherein this Court considered a private-sector employee's RLA agency-fee challenge originating in California, which is *not* a right to work state.

Also ignored are the litany of cases from this Court indicating there is state action when private-sector employee's make agency-fee challenges. See Petition for Writ of Certiorari at 3-4.

Recognizing that in *Janus* this Court expressed some doubt about whether the state-action holding related to RLA agency-fee challenges for private employees remains valid, Petitioners presented some arguments it would likely make on this issue if certiorari were granted: (1) stare decisis; (2) state action exists under the RLA but might not under the NLRA since the RLA takes away all states' ability to have right to work for RLA employees (the NLRA, in contrast, does not); and (3) the very act of allowing exclusive representation creates state action. Acceptance of this third argument would likely mean that there would also be state action present for NLRA agency-fee challenges. This issue was specifically reserved by this Court in

Communication Workers of America v. Beck, 487 U.S. 735, 761 (1988).

Both Petitioners and Respondents agree that a holding that determined there was state action related to agency fees under both the RLA and necessarily the NRLA would be quite significant. Respondents contend such a holding would constitutionalize all collective bargaining.[1] Respondents offer a preview of

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[1] In making this argument, Respondents' brief could be read to imply that Petitioners agree. They do not. What Petitioners wrote on this is the following:

> Almost certainly, if the forced-association-triggers-state-action argument is considered, questions would arise on whether such a holding would constitutionalize all collective-bargaining matters. Similar questions were raised and overcome in *Janus* regarding what might occur if this Court did not accept [*Pickering v. Board of Education of Township High School District*, 391 U.S. 563 (1968)] as controlling. Petitioners believe that a future holding could be cabined to the issue of compelled financial support and would not lead to constitutionalizing all labor disputes.

Petition for Writ of Certiorari at 19. Here is how Respondents presented their argument:

> Petitioners correctly observe, "this second rationale would be quite significant, for it is difficult to see how it would not apply to the millions of private sector employees covered by the [National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq*.] *Id*. at 17. Indeed, "such a holding would constitutionalize all the collective bargaining matters" in the private sector. *Id*. at 19.

Brief in Opposition to Petition for Writ of Certiorari at 5-6. Respondents' use of the quote and the *Id*. in their second sentence follows the first sentence wherein Petitioners and Respondents do actually agree and might lead a reader to believe there is

some cases they would cite to on this topic if certiorari were granted, all of which were listed in *Janus*'s footnote 24, raising the state-action question under the RLA. But, as noted in the Petition for Certiorari, this Court has stated "our cases deciding when private action might be deemed that of the state have not been a model of consistency" and described the jurisprudence as "difficult terrain." *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995). If more clarity on the state-action question of private-sector employees making agency-fee challenges under the RLA is going to be considered, clearly some state-action jurisprudence will need to be revisited and clarified if not modified.

It may be that some peculiarities related to the RLA could keep a state-action holding focused only that statute. Petitioners have carefully been discussing private-sector employee RLA challenges to agency fees. But, the RLA is unique in that it applies to both private and government employees. See generally *California v. Taylor*, 353 U.S. 553 (1957); and *United Transportation Union v. Long Island R.R. Co.*, 455 U.S. 687 (1982). State and local employee bargaining laws, meanwhile, only apply to public employees (like the plaintiff in *Janus*). Finally, the NLRA only applies to private

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agreement on the matter of second sentence as well. To be clear, the question of whether all collective bargaining would be constitutionalized is important and was therefore clearly set forth by Petitioners, although they indicated a state-action holding on agency fees could be "cabined." Respondents can argue to the contrary, but Petitioners made their view explicit.

Regardless, whether Petitioner's brief was properly cited is not going to be dispositive on whether certiorari is granted.

employees. This Congressional mixing of employee pools (the private-sector Petitioners and others like them with government employees) could be said push the RLA more toward *Janus* and thereby leave the NLRA question for another day.

If left to the RLA, hundreds of thousands of employees could have their First Amendment rights affected. If this Court were to consider the broader questions, that number could affect millions and would largely resolve whether NLRA employees could make a First Amendment constitutional claim related to agency fees.

CONCLUSION

For the foregoing reasons, Petitioners urge the Court to grant their petition, issue a writ of certiorari to the United States Court of Appeals for the Third Circuit, and set the case for plenary briefing and argument on the important questions presented.

Respectfully submitted,

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