No. ____

In the Supreme Court of the United States

ARTHUR BAISLEY,

Petitioner,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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May 21, 2021

QUESTION PRESENTED

The Court in *Knox v. SEIU, Local 1000* recognized that opt-out procedures for collecting the nonchargeable portion of compelled union fees create constitutional problems, and that the Court's apparent approval of these procedures in prior cases was "dicta," which did not carefully apply "First Amendment principles." 567 U.S. 298, 312–14 (2012) (discussing *Machinists v. Street*, 367 U.S. 740, 774 (1961), and later cases). After *Knox*, the Court in *Janus v. AFSCME, Council 31*, effectively held opt-out requirements unconstitutional under the First Amendment by holding affirmative employee consent is required for unions to constitutionally collect union dues or fees from employees. 138 S. Ct. 2448, 2486 (2018).

The question presented is:

Whether opt-out procedures for collecting union fees for ideological and political activities violate the First Amendment or the Railway Labor Act.

PARTIES TO THE PROCEEDING

Petitioner is Arthur Baisley, a United Airlines employee. Petitioner was Plaintiff-Appellant below.

Respondent, the International Association of Machinists and Aerospace Workers, is a labor union that represents employees in the airline industry. Respondent was Defendant-Appellee below.

RULE 29 STATEMENT

A corporate disclosure statement is not required under Supreme Court Rule 29.6 because petitioner is not a corporation.

STATEMENT OF RELATED PROCEEDINGS

There are no other proceedings directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Arthur Baisley respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 983 F.3d 809 (5th Cir. 2020) and reproduced at App. 2–6. The United States District Court for the Western District of Texas' unpublished Order is reproduced at App. 9–17.

JURISDICTION

The Fifth Circuit entered judgment on December 22, 2020. On March 19, 2020, this Court extended the deadline to file any petition for a writ of certiorari due on or after that date to 150 days. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution's First Amendment and 45 U.S.C. § 152, Eleventh are reproduced at App. 18–20.

INTRODUCTION

This case provides the Court with an ideal vehicle to decide whether private-sector employees covered by the Railway Labor Act enjoy the same protections from having to opt out of subsidizing an expressive-association's ideological and political activity as public-sector employees do. In 2012, this Court recognized that "[b]y authorizing a union to collect fees from nonmembers and permitting the use of an opt-out system for the collection of fees levied to cover nonchargeable

expenses, our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate." *Knox,* 567 U.S. at 314. Six years later, the Court found all opt-out systems in the public sector do cross the limit of what the First Amendment can tolerate. In *Janus*, the Court held that to comply with the First Amendment, public-sector unions and public employers must get an employee's affirmative consent before they can exact union dues or fees from employees' wages—because "[b]y agreeing to pay, nonmembers are waiving their First Amendment rights." 138 S. Ct. at 2486.

Petitioner Arthur Baisley is a United Airlines employee who, despite not being a union member, is forced by the RLA to accept respondent International Association of Machinist and Aerospace Workers as his exclusive bargaining representative. In its exclusive representative capacity, IAM contracted with United to compel Baisley and other employees to pay an amount equal to union dues to keep their jobs. Under the RLA, that agreement cannot legally require nonmembers to fund the union's ideological and political activities. IAM, though, adopted a procedure requiring Mr. Baisley, and other nonunion members, to affirmatively opt out before they can exercise their rights to not subsidize the union's politics.

Mr. Baisley sued IAM under the First Amendment and RLA for himself and similarly situated employees. He alleged IAM's opt-out procedure violated his rights recognized by this Court's precedents in *Knox* and *Janus*. He alternatively alleged that IAM's opt-out procedures are illegal under this Court's RLA precedents and the statute's implicit Duty of Fair Representation.

The Fifth Circuit affirmed a district court decision dismissing Mr. Baisley's case. The Fifth Circuit panel felt bound by this Court's prior suggestion (dicta) in *Street* that when employees do not want to pay for a union's political and ideological activities, those employees must make it known to the union that they object. App. 4–6 (citing *Street*, 367 U.S. at 774). So the panel held it could not extend this Court's holdings in *Knox* and *Janus* to the RLA context. The panel also questioned whether the First Amendment applied to Mr. Baisley's case at all, noting *Janus* had distinguished compelled unionism arrangements in the public and private sector. App. 5–6. And because they felt bound by *Street*, they found no First Amendment infirmity with IAM's opt-out procedures. The panel also dismissed Mr. Baisley's RLA and Duty of Fair Representation claims. App. 6.

The Fifth Circuit's decision cannot be squared with the Court's recent precedents. This case thus warrants the Court's review. *First*, the Fifth Circuit's apprehension in applying the Constitution to Mr. Baisley's case conflicts with this Court's long history of holding the First Amendment applies in the RLA context. Starting with *Railway Employees Department v. Hanson*, the Court recognized 45 U.S.C. § 152, Eleventh (RLA § 2, Eleventh) implicates the First Amendment. 351 U.S. 225, 232 (1956). The Court reaffirmed this implication in *Ellis v. Railway Clerks*, 466 U.S. 435, 444, 455 (1984). If RLA § 2, Eleventh implicates the First Amendment, then this Court's First Amendment precedents in *Knox* and *Janus* control this case—and the Fifth Circuit's decision upholding IAM's opt-out scheme must be overruled.

Second, the Fifth Circuit's decision conflicts with this Court's precedents construing the RLA to avoid conflict with First Amendment principles. This Court has recognized the RLA causes an "impingement" of employees' First Amendment freedoms that warrants a narrow statutory construction to protect employees' rights. *See, e.g.*, *Street*, 367 U.S. at 773–75; *Ellis*, 466 U.S. at 444, 455. In this way, the Court has long held the statute requires procedures that conform to First Amendment principles. Yet the Fifth Circuit did not apply these precedents to IAM's opt-out requirements.

Third, the Fifth Circuit's decision conflicts with this Court's precedents applying the RLA's Duty of Fair Representation. The Duty of Fair Representation is an implicit statutory duty requiring unions to not act in an arbitrary manner. *See Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 67 (1991). In *Knox*, this Court found there is no "justification" for putting the burden on objecting employees to opt out of paying for a union's ideological and political activities rather than placing that burden on the expressive association that has no legal entitlement to those nonchargeable fees. 567 U.S. at 312. That principle applies here, making IAM's requirement that Mr. Baisley opt out of paying for the union's political causes arbitrary—even if the First Amendment does not apply to his case.

This case is an ideal vehicle to resolve the exceptionally important question whether the First Amendment or the RLA protects hundreds of thousands of railway and airline employees from having to opt out of subsidizing expressive associations' political and ideological activities. It is a foundational principle that courts "do not presume acquiescence in the loss of fundamental rights." *Id.* (citation omitted). That

principle should apply to all employees subject to forced associations—no matter whether in the public or private sector and no matter whether under the First Amendment or RLA. The petition for a writ of certiorari should be granted.

STATEMENT OF THE CASE

A. Legal Background

1. Congress enacted the RLA in 1926 to provide a comprehensive federal framework to resolve labor disputes in the railroad industry. *See* 45 U.S.C. § 151 et seq.[1] From the beginning, Congress enshrined in the statute's purpose an intent "to forbid any limitation upon freedom of association among employees[.]" 45 U.S.C. § 151a. But Congress amended the RLA in 1951 to allow a limited form of compulsory unionism. RLA § 2, Eleventh, 45 U.S.C. § 152. RLA § 2, Eleventh permits a union and employer, "[n]otwithstanding any * * * provision[] * * * of any State, * * * to make agreements, requiring, as a condition of continued employment, * * * all employees [to] become members of the labor organization representing their craft or class[.]" Even so, an employer cannot fire employees under this provision for any other reason than their failure to "tender the periodic dues, initiation fees, and assessments * * * uniformly required as a condition of acquiring or retaining membership." *Id.*

2. Shortly after Congress amended the RLA, this Court decided *Hanson*, addressing whether Congress had the power under the Commerce Clause to enact RLA § 2, Eleventh, and whether that section violated,

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[1] Congress later amended the RLA to cover employees employed by "common carrier[s] by air." *See* 45 U.S.C. § 181.

among other things, the First Amendment. 351 U.S. at 234–38. In its analysis, the Court found that when Congress preempts a state right-to-work law through RLA § 2, Eleventh, the Constitution is implicated, *id.* at 231–32, but held that the mere authorization of fees for bargaining services on its face does not violate the First Amendment. *Id.* at 236–38.

Several years later, the Court in *Street* construed RLA § 2, Eleventh, to not authorize compulsory union fees for union political and ideological causes. 367 U.S. at 764. *Street* recognized allowing a union to exact fees from nonunion employees for political and ideological causes would create constitutional problems "of the utmost gravity," but avoided the constitutional issue by holding the RLA prohibits this practice. *Id.* at 749–50. The Court, however, said employees who do not want to pay the union compelled fees for political and ideological expenses, must object because "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." *Id.* at 774. As this Court would later recognize in *Knox*, this statement was "dicta"—an "offhand remark"—which did not "consider the broader constitutional implications of an affirmative opt-out requirement." 567 U.S. at 313.

In 1984, in *Ellis*, the Court again confronted the issue of whether compulsory fees for certain union activities were permissible under the First Amendment and RLA. 466 U.S. at 444–45. Consistent with *Street*, *Ellis* first construed RLA § 2, Eleventh, when it could, to avoid determining whether the fees violated the First Amendment. *Id.* Then, consistent with *Hanson*, it applied First Amendment scrutiny to the compelled

fees it found were permissible under the statute. *Id.* at 455–57.

3. In 2012, the Court held in *Knox* that a union's opt-out procedures for collecting a special assessment violated the First Amendment. 567 U.S. at 310–17. In doing so, the Court first observed, "[w]hen a State establishes an 'agency shop' that exacts compulsory union fees as a condition of public employment, '[t]he dissenting employee is forced to support financially an organization with whose principles and demands he may disagree.'" 567 U.S. at 310 (citing *Ellis*, 466 U.S. at 455). The Court then rhetorically found that because the Court's cases have held nonmembers "cannot be forced to fund a union's political or ideological activities," there is no "justification" for placing the "burden" on nonmembers to "opt out" of paying for a union's politics. *Id.* at 312. And the "default rule" should "comport with the probable preferences of most nonmembers[]" who likely "prefer not to pay the full amount of union dues[.]" Thus, a "[u]nion should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." *Id.* (internal quotation marks omitted) (citing *Chi. Tchrs. Union, Local 1 v. Hudson,* 475 U.S. 292, 294, 305 (1986)).

The *Knox* Court also found prior cases accepting that nonmembers must dissent—in other words, opt out—of paying for a union's ideological and political activities came about by a "historical accident." *Id.* at 312. This history traced to *Street*'s "dicta" that "dissent is not to be presumed," and that the dissenting employees must "affirmatively" inform a union that

they do not want to support its politics. *Id.* And the Court found this "dicta" "did not pause to consider the broader constitutional implications of an affirmative opt-out requirement." *Id.* at 313.

Six years later, *Janus* effectively declared all opt-out procedures in the public sector unconstitutional. 138 S. Ct. at 2486. The Court held that for unions to compel fees from nonmembers—fees for political or ideological activities—they must receive affirmative employee consent before any demand for those fees is made. *Id.*

B. Factual Background and Procedural History

1. Respondent IAM exclusively represents a nationwide craft or class of United fleet service employees. This includes petitioner Mr. Baisley. App. 10. Although Mr. Baisley is not an IAM member, he and other nonmembers are compelled, as a condition of their employment, to pay fees to IAM pursuant to an agency fee clause authorized by RLA § 2, Eleventh. App. 10–11. This includes fees for IAM's political and ideological activities unless Mr. Baisley and other nonmembers affirmatively opt out—object—to paying for those expressive activities. App. 11. To opt out, nonmembers must mail a written objection letter to IAM during the month of November. *Id.* Unless that letter states that the objection is continuing in nature, the nonmember must renew the objection the next year in November to avoid paying for union political and ideological activities. *Id.*

To avoid subsidizing IAM's politics, Mr. Baisley sent the union an objection letter in November 2018. *Id.* The union responded and acknowledged his objection and promised to reduce his fees by the amounts it

determined were not legally chargeable to nonmembers. *Id.*

2. Mr. Baisley sued IAM for himself and similarly situated employees in the District Court below. He alleged that neither the First Amendment nor the RLA allow IAM to adopt an opt-out procedure presuming nonmembers consent to support a labor union's political activities. App. 12–14.

The District Court dismissed his complaint, reasoning that neither *Knox* nor *Janus* applies to Mr. Baisley's First Amendment or RLA claims because those cases involved public-sector rather than private-sector unions. App. 14–15. The court also relied on the Court's language in *Street* that "dissent is not to be presumed" when nonmembers object to subsidizing a union's political speech, and therefore held that the RLA permits IAM to charge employees for its political activities unless an employee affirmatively and timely dissents. App. 15–16.[2]

The Fifth Circuit affirmed because it felt bound to follow *Street* and a pre-*Knox* circuit precedent based on *Street* implicitly approving opt-out requirements. App. 2–6. The Fifth Circuit acknowledged "*Street*'s opt-out language may be 'dicta' and constitutionally infirm in the wake of *Knox* and *Janus*," App. 5, but found it unclear whether *Knox* and *Janus* apply to the RLA because "it remains to be seen how the Supreme

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[2] The District Court wrongly interpreted Mr. Baisley's complaint as challenging RLA §, 2, Eleventh as unconstitutional. App. 12. Mr. Baisley, however, is only challenging the RLA as applied to IAM's opt-out procedure for collecting nonchargeable political and ideological union fees under the statute—not § 2, Eleventh's requirement that he contribute to IAM's bargaining costs.

Court will interpret that distinction in a private-sector dispute." App. 5–6. The court determined that it had to follow *Street*'s dicta unless this Court directs otherwise. App. 6. The court therefore concluded "the settled decisions of the Supreme Court and this Circuit" precluded Mr. Baisley's First Amendment claim and "[b]y extension, Baisley's constitutional-avoidance statutory and Duty of Fair Representation claims also fail." *Id.*

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit's Decision Conflicts with this Court's Binding Precedents.

A. Opt-out procedures are unconstitutional because this Court's precedents hold First Amendment scrutiny applies to compulsory union fees exacted from employees covered by the RLA.

The Fifth Circuit's decision conflicts with this Court's precedents holding that the First Amendment applies to forced fees exacted from employees under RLA § 2, Eleventh. *Hanson*'s holding, that RLA § 2, Eleventh implicates the First Amendment, bound the lower court and it thus should have applied First Amendment scrutiny to IAM's opt-out requirement. Instead, the Fifth Circuit found "no constitutional infirmity in the IAM's opt-out procedures under the settled decisions of the Supreme Court." App 6. But the First Amendment protects against all schemes under the RLA that compel speech and association. Under *Hanson*, the lower court should have applied *Knox* and *Janus* to IAM's opt-out requirement and held it unconstitutional.

1. Shortly after Congress enacted § 2, Eleventh, the provision was challenged as unconstitutional because it was outside Congress' power to enact under the Commerce Clause and, among other things, violated nonunion employees' First Amendment rights. *Hanson*, 351 U.S. at 230, 235. *Hanson* affirmatively held that RLA § 2, Eleventh implicates the Constitution when it overrides a state right-to-work law, because it "is the source of the power and authority by which any private rights are lost or sacrificed." *Id.* at 232 (citations and footnote omitted). And the "enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction." *Id.* Thus, the First Amendment is triggered when Congress enacts a law invading state-provided private rights protecting speech and association.

A few years after *Hanson*, employees brought another First Amendment challenge against RLA § 2, Eleventh because it appeared to allow a union to spend nonmembers' forced fees for political purposes. *Street*, 367 U.S. at 744–66. *Street* recognized that issue presented constitutional questions of the "utmost gravity," *id.* at 749, and then interpreted the statute to forbid unions from spending objecting nonmembers' money on political activities. *See id.* at 766–67.

The Court also reaffirmed in *Ellis*—a case also directly concerning RLA § 2, Eleventh—that "[t]he First Amendment does limit the uses to which the union can put funds obtained from dissenting employees." 466 U.S. at 455. And "by allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights," because

"[t]he dissenting employee is forced to support financially an organization with whose principles and demands he may disagree." *Id.*

What is more, the Court later relied on *Ellis* when analyzing the constitutionality of compelled speech and association schemes in the public sector. *See, e.g.*, *Hudson*, 475 U.S. at 294 (holding "[a] union, however, [cannot], consistently with the Constitution, collect from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent" (citing *Ellis*, 466 U.S. at 447)); *see also Knox*, 567 U.S. at 310–11 ("[C]ompulsory fees constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.'" (citing *Ellis*, 466 U.S. at 455)).

2. Taken together, this line of cases leaves no doubt First Amendment scrutiny applies to the procedures a union uses to collect compulsory fees exacted under RLA § 2, Eleventh. The Fifth Circuit flouted these precedents when it refused to apply *Knox* and *Janus* to IAM's opt-out requirements simply because those cases involved the public sector, and this case involves the private sector.

If *Knox* and *Janus* are applied here, RLA opt-out requirements are unconstitutional. *Knox* explained *Street*'s language, "dissent is not to be presumed," is dicta and inconsistent with the constitutional principle that courts "do not presume acquiescence in the loss of fundamental rights." *Id.* at 312–13 (citations and quotations omitted). *Janus* held opt-out requirements to be unconstitutional by holding unions cannot

exact agency fees from nonmembers "unless the employee affirmatively consents to pay." 138 S. Ct. at 2486.[3]

In short, *Hanson*, 351 U.S. at 230, 236–38, and *Ellis*, 466 U.S. at 455, hold the First Amendment applies to nonchargeable fees compelled from employees covered by the RLA. And *Knox* and *Janus* hold opt-out procedures violate the First Amendment. The Fifth Circuit thus defied this Court's precedents when refusing to apply *Knox* and *Janus* to IAM's opt-out requirement. This defiance warrants the Court's review.

B. This Court's precedents interpreting the RLA forbid opt-out procedures.

The Fifth Circuit also defied this Court's precedents holding RLA § 2, Eleventh should be interpreted, when possible, to avoid constitutional problems. After this Court's holdings in *Knox* and *Janus*, the lower court should have construed the statute not to permit opt-out requirements. Indeed, construing the statute in this way is not only reasonable, but is the most natural and logical interpretation of the exception to the statute's protection of freedom of association and free choice.

1. *Street* interpreted the RLA not to authorize the exaction of union fees for political and ideological expenses to avoid the First Amendment issues inherent in a contrary interpretation. 367 U.S. at 749–50. *Ellis*,

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[3] In the public sector, because of the governmental employer, affirmative consent is required for all fees because all fees are political. *See Janus*, 138 S. Ct. at 2486. Under the RLA, at this time, consent is only required for compelled fees unrelated to collective bargaining, like the portion that supports IAM's political and ideological activities. *Street*, 367 U.S. at 764.

when evaluating what activities are lawfully chargeable to nonmembers, likewise interpreted RLA § 2, Eleventh to avoid constitutional issues as much as it was possible. 466 U.S. at 444–45. The *Ellis* Court reiterated "[w]hen the constitutionality of a statute is challenged, this Court first ascertains whether the state can be reasonably construed to avoid the constitutional difficulty." *Id.* at 444 (citations omitted). The Court again followed this principle in *CWA v. Beck*, where it interpreted the National Labor Relations Act's agency fee provision not to permit the exaction of fees for political and ideological expenses to avoid resolving First Amendment issues. 487 U.S. 735, 762–63 (1988). [4]

Street, *Ellis*, and *Beck* make plain that the Fifth Circuit should have, if possible, construed RLA § 2, Eleventh to not authorize opt-out requirements because these requirements raise constitutional concerns; or it should have explained why such a construction was impossible. That statutory interpretation is more than possible even without the pressure of constitutional avoidance—it is the best interpretation of RLA § 2, Eleventh's text, given the statute's history, structure, and the broader statutory scheme.

2. Congress did not permit unions and employers to compel fees under RLA § 2, Eleventh until about twenty-five years after it enacted the RLA. During

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[4] The *Beck* court, relying on *Ellis*, held the scope of the NLRA's forced fee provision, "like its statutory equivalent, § 2, Eleventh of the RLA, authorizes the *exaction of only* those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'" 487 U.S. at 762–63 (emphasis added) (citing *Ellis*, 466 U.S. at 448).

those first twenty-five years, the statute reflected total voluntary unionism and employee free choice. *See Street*, 367 U.S. at 750. By narrowly altering that long-standing tradition, Congress created a narrow exception to the RLA's general protections and prohibitions. *See* 45 U.S.C. § 152, Fourth; *see also Brady v. Trans World Airlines, Inc.*, 401 F.2d 87, 95 (3rd Cir. 1968) ("[RLA] 2 (Eleventh), which permits union shop agreements within prescribed limits, was intended as a proviso to Section 2, (Fourth) (Fifth), which prohibited all employer conduct designed to influence or coerce employees to join or maintain membership in a labor organization."); *see also id.* at 102 (RLA, § 2, Eleventh "is an exception to the anticoercion provisions of section 2, (Fourth).").

In other words, Congress' original purpose was to protect employee free choice, and thus any coercion not authorized by RLA § 2, Eleventh is prohibited. This interpretation is supported by the statutory language, "any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter *shall be permitted* (a) to make agreements, requiring, as a condition of continued employment." 45 U.S.C. § 152, Eleventh (a) (emphasis added).

Thus, after the 1951 amendments, the only lawful requirements are those specifically authorized by RLA § 2, Eleventh. Nowhere in its language is there any specific or implicit authorization of opt-out schemes.

3. If compelled unionism agreements are an exception to the voluntary unionism rule, then the statute is susceptible to limiting how unions collect those

forced fees. That is the principle that animated this Court's holdings in both *Street* and *Ellis*.

While the statutory language does not forbid unions from collecting fees for ideological or political causes, Congress' intent, combined with the constitutional background, made clear that compelled political and ideological fees could not be squared with the statute. *Street* could avoid the constitutional issue because, after finding constitutional issues arise when unions exact compelled fees, and after reviewing the "legislative history" in the context of the RLA's "regulatory scheme," it was entirely "reasonable" to conclude Congress did not intend to give unions the right to spend nonmembers' money on political causes. 367 U.S. 766–69; *see also Ellis*, 466 U.S. at 438.

So too here. Opt-out procedures inherently presume nonmember employees want to support a labor union's political and ideological causes—a presumption that exceeds what Congress envisioned in § 2, Eleventh. Indeed, opt-out procedures contradict a statute animated by Congress' desire to "forbid any limitation upon freedom of association among employees." 45 U.S.C. § 151a.

At bottom, opt-out requirements conflict with the totality of the RLA scheme and the narrow exception RLA § 2, Eleventh grants. Those requirements likewise conflict with this Court's precedents applying constitutional principles to the RLA's text, history, and structure. The Fifth Circuit thus defied this

Court's precedents when it applied no statutory analysis to IAM's opt-out requirements. This defiance warrants this Court's review.

C. This Court's Duty of Fair Representation precedents forbid opt-out procedures.

The Fifth Circuit's decision also conflicts with this Court's precedents applying the RLA's Duty of Fair Representation. The Duty of Fair Representation is an implicit statutory protection that prevents unions from engaging in arbitrary conduct towards nonmembers. The lower court's judgment, however, flouted this principle by not applying *Knox*'s holding to Mr. Baisley's claim. Not because *Knox* applied the First Amendment to opt-out procedures, but because *Knox* recognized that there is no "justification" for placing a burden on nonmembers to opt out of paying for a union's ideological and political activity. With no "justification" for opt-out requirements, IAM's opt-out scheme is a breach of its duty to fairly represent Mr. Baisley and all other nonmembers. Yet the lower court summarily dismissed Mr. Baisley's Duty of Fair Representation claim. App 6.

1. In *Steele v. Louisville & N.R. Co.*, this Court recognized the RLA's exclusive representation regime poses constitutional problems. 323 U.S. 192 (1944). This regime raises constitutional concerns because "the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates[,] and which is also under an affirmative constitutional duty equally to protect those rights." *Id.*

at 198. The Court, though, avoided these constitutional questions by reading into the RLA a "duty" requiring a union to represent all employees fairly, regardless of membership status. *Id.* at 198–99.

Steele thus made an implicit bargain: it would uphold Congress' delegation to unions of legislative-like power affecting employees' private rights—but only if a "duty" to act fairly to nonmembers limited that power. *See id.*

2. But Duty of Fair Representation claims do not necessarily depend on constitutional avoidance. A union breaches its duty "if its actions are either 'arbitrary, discriminatory, or in bad faith.'" *O'Neill*, 499 U.S. at 67 (quoting *Vaca v. Sipes*, 386 U.S. 171, 190 (1967)). As already explained, *Knox* found that once the Court recognized a "nonmember cannot be forced to fund a union's political or ideological activities"—which the Court did in *Street*, *Ellis*, and *Beck*—there is no "justification for putting the burden on the nonmember to opt out" of paying for those activities. *Knox*, 567 U.S. at 312. Moreover, "the default rule" should reflect the likely preference of "most nonmembers" who "choose not to join the union" that they "prefer not to pay the full amount of union dues." *Id.*

If there is no "justification" for opt-out procedures, then IAM's opt-out procedure is by definition arbitrary and cannot be squared with its duty to fairly represent nonmembers. Yet the Fifth Circuit summarily disregarded and dismissed Mr. Baisley's legitimate Duty of Fair Representation claim. That result defies this Court's precedents and warrants the Court's review.

II. The Question Presented is Exceptionally Important.

The issue presented here is of national importance because it affects thousands of railway and airline employees throughout the country who may not want to fund a union's political causes. The RLA governs hundreds of thousands of employees who are subject to opt-out regimes. The RLA covers both railroads, 45 U.S.C. § 151, and "common carrier[s] by air," 45 U.S.C. § 181. There are over 700,000 employees in the airline industry alone.[5]

Moreover, as the District Court observed below, "[IAM] is one of the largest labor unions in North America." App. 10. It represents over 500,000 employees—many of whom are covered by the RLA.[6] Thus, this class action alone could directly implicate thousands of employees' rights.

The Court should not tolerate hundreds of thousands of employees being subject to opt-out regimes that are unconstitutional under *Knox* and *Janus*, that have no statutory support in the RLA, and that violate unions' duty to fairly represent nonmembers. This case is an ideal vehicle for the Court to address this injustice. The Court should thus grant this petition, reverse the Fifth Circuit's decision, and hold IAM's opt-out procedure violates the First Amendment or the RLA.

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[5] The data can be found at https://www.transtats.bts.gov/Employment/.

[6] The data can be found at https://olmsapps.dol.gov/query/orgReport.do?rptId=750360&rptForm=LM2Form.

CONCLUSION

This Court's long-standing precedents establish the First Amendment protects employees covered by the RLA. The Court's recent precedents recognize: (1) opt-out procedures violate the First Amendment; and (2) this Court never sanctioned opt-out procedures as constitutional or authorized by the RLA. Yet the lower courts here found they were bound by dicta—dicta this Court later repudiated—and could not apply to this case either the First Amendment or this Court's recent precedents finding these regimes illegal. For the same reasons, they failed to address this Court's RLA and Duty of Fair Representation precedents.

This leaves hundreds of thousands of railroad and airline employees in the dark about what constitutional and statutory protections they have against compelled expressive associations—expressive associations they are required to associate with by federal law. These employees deserve to know what their constitutional and statutory rights are. The Court should thus take this case and make clear to the lower courts that this Court's precedents, and not dicta, are binding.

This petition for a writ of certiorari should be granted.

* * * * *

Respectfully submitted,

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