No. 20-1378

IN THE

Supreme Court of the United States

LINDA RIZZO-RUPON, *et al.*,
Petitioners,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *et al.*,
Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioners are three employees of United Airlines, who paid agency fees to the International Association of Machinists ("IAM") pursuant to the United-IAM collective bargaining agreement. Pet. App. 31 ¶s 8-10. At the Petitioners' request the amount of their agency fee payments was reduced to their pro rata share of the IAM's expenditures on collective bargaining. *Id*. at 35-36 ¶ 25. The Petitioners elected to pay their agency fees directly to IAM affiliates rather than have the fees deducted from their pay. *Id*. at 31 ¶s 8-10. The Petitioners worked in New Jersey. *Id*. at 28 ¶ 1.

The Petitioners claim that their First Amendment rights were violated by the collectively bargained obligation to pay agency fees. To advance this claim, the Petitioners rely on the threshold finding in *Railway Employes' Dep't v. Hanson*, 351 U.S. 225 (1956), that a justiciable First Amendment claim could be stated with regard to private sector agency fee agreements covered by the Railway Labor Act ("RLA"), 45 U.S.C. § 152, Eleventh, but they ask the Court to overrule *Hanson*'s substantive holding that such a claim is without merit so long as the collected fees are limited to those used to support collective bargaining.

I. To challenge *Hanson*, the Petitioners rely heavily on *Janus v. AFSCME*, 585 U.S. ___, 138 S.Ct. 2448 (2018). But *Janus* firmly rejects the very equation drawn by the Petitioners between private agency fee agreements permitted by the RLA and

public-sector agency fee agreements entered into by government employers. Indeed, it was the acceptance of that equation in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), that led the *Janus* majority to conclude that "*Abood* went wrong at the start" and was "poorly reasoned." *Janus*, 138 S.Ct. at 2479. The *Janus* majority stated that *Abood*'s error in this regard "*is* a reason to overrule it." *Id.* at 2481 n. 25. Like the Petitioners here, "*Abood* failed to appreciate that a very different First Amendment question arises when a State *requires* its employees to pay agency fees" than arises from "Congress's *bare authorization* of *private-sector* union shops under the Railway Labor Act." *Id.* at 2479 (emphasis in original; quotation marks and citation omitted).

To the extent the *Janus* opinion says anything about *Hanson*, the later opinion strongly suggests that no substantial First Amendment issue is raised by private-sector agency fee agreements under the RLA. In the first place, *Janus* observed that "[n]o First Amendment issue could have properly arisen . . . [under the RLA] unless Congress's enactment of a provision allowing, but not requiring, private parties to enter into union-shop arrangements was sufficient to establish governmental action," a "proposition [that] was debatable when *Abood* was decided, and is even more questionable today." *Janus*, 138 S.Ct. at 2479 n. 24. "Assuming for the sake of argument that the First Amendment applies at all to private-sector agency-shop arrangements," *Janus* went on to stress that "the individual interests at stake still differ," because "[i]n the public sector, core issues such as wages, pensions, and benefits are important political

issues, but that is generally not so in the private sector." *Id.* at 2480 (quotation marks and citation omitted).

II. This case does not present the occasion to reconsider *Hanson* for the simple reason that the Petitioners' place of employment – New Jersey – has not enacted any law prohibiting the negotiation of agency fee agreements. Thus, the basis for perceiving a constitutional question in *Hanson* does not apply to the Petitioners' employment.

In *Hanson*, "[e]mployees who did not want to join the union brought suit in state court, contending that the union-shop provision [in the agreement covering their employment] violated a provision in the Nebraska Constitution banning adverse employment actions because of refusal to join or affiliate with a labor organization." *Harris v. Quinn*, 573 U.S. 616, 629 (2014) (quotation marks and citation omitted). "The employer countered that the RLA trumped the Nebraska provision" relying on "the provision of the RLA that authorized union-shop agreements." *Ibid.* In response, "[t]he employees . . . raised what amounted to a facial constitutional challenge to the same provision of the RLA." *Ibid.* "The employees' First Amendment claim necessarily raised the question of governmental action, . . . and the *Hanson* Court . . . concluded that governmental action was present . . . , because the union-shop provision of the RLA *took away a right that employees had previously enjoyed under state law*." *Id.* at 629 n. 4 (emphasis

added).[1]

Harris' understanding of the basis for finding state action in *Hanson* is confirmed by the reliance of both the United States Supreme Court and the Nebraska Supreme Court on the governmental action analysis in *Otten v. Baltimore & Ohio Railroad Co.*, 205 F.2d 58 (2d Cir. 1953). *See Hanson*, 351 U.S. at 232; *Hanson v. Union Pac. R.R. Co.*, 160 Neb. 669, 71 N.W.2d 526, 535 (1955). *Otten* rejected the proposition that "Subsection Eleventh is unconstitutional because it repealed Subsection Fifth," which had prohibited union security agreements, finding "there can be no plausible argument that to repeal such a statute was unconstitutional." 205 F.2d at 60. *Otten* then remarked that "a challenge to its constitutionality . . . might not be 'unsubstantial,'" if "Subsection Eleventh did indeed positively and affirmatively establish its validity" in a state where "a 'union shop' agreement was invalid at common law." *Ibid.* However, "in New York, where the plaintiff was employed and where the [union security] agreement impinged upon him, a

[1] In subjecting the union shop agreements authorized by the Railway Labor Act to First Amendment scrutiny on that ground, *Hanson* relied upon *Public Utility Comm'n v. Pollak*, 343 U.S. 451, 462-63 (1952), which held that the action of a private party, "together with the action of . . . [a federal agency] in permitting such operation, amounts to sufficient Federal Government action to make the First and Fifth Amendments applicable thereto." *See Hanson*, 351 U.S. at 232. That sweeping state action analysis was squarely rejected in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974). Indeed, both dissenting opinions in *Jackson* cited *Hanson* as contrary to the majority opinion. *Id.* at 362 (Douglas, J., dissenting) & 366-67 (Marshall, J., dissenting).

'union shop,' and perhaps even a 'closed shop,' agreement was valid at the common law." *Ibid.* "Therefore, from no view can the constitutionality of Subsection Eleventh be considered to be involved." *Ibid. Accord Wicks v. S. Pac. Co.*, 231 F.2d 130, 136-37 (9th Cir. 1956) (following *Otten* in dismissing a similar claim arising in California).

Otten is significant here because it stands for the proposition that a constitutional challenge to RLA § 2, Eleventh is completely "unsubstantial" in a state that allows union shop agreements. New Jersey, where this case arose, is such a state. And, thus, *Otten*, which was followed in *Hanson*, would require dismissal of the Petitioners' claim, because the RLA § 2, Eleventh has not "t[aken] away a right that … [Petitioners] had previously enjoyed under state law." *Harris*, 573 U.S. at 629 n. 4.

III. Tacitly acknowledging that *Hanson*'s state action analysis does not apply in the circumstances of their employment, the Petitioners suggest, "[a]lternatively, the very creation of an exclusive-representation scheme triggers state action allowing agency-fee challenges by private-sector employees." Pet. 4-5. Stated simply, their argument is "that the state action is created via the government choice to allow exclusive bargaining." *Id.* at 13. As the 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

collective-bargaining matters" in the private sector. *Id*. at 19.

As the Court noted in *Janus*, the proposition that "Congress's enactment of a provision allowing, but not requiring, private parties to enter into union-shop arrangements was sufficient to establish government action . . . was debatable when *Abood* was decided, and is even more questionable today." 138 S.Ct. at 2479 n. 24, *citing Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 53 (1999), and *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357 (1974). Two circuit court opinions cited favorably in *Janus* – *White v. Communications Workers of America, Local 13000*, 370 F.3d 346, 350 (3d Cir. 2004), and *Kolinske v. Lubbers*, 712 F.2d 471, 477-78 (D.C. Cir. 1983) – explain why *Jackson* and *Sullivan* foreclose the Petitioners' alternative state action theory.

In *Jackson*, "a public utility was granted the exclusive right to provide electricity to customers within the franchise area," but, "[n]evertheless, the Court in *Jackson* found no state action in the fact that the utility operated pursuant to a government franchise." *Kolinske*, 712 F.2d at 478. "Similarly, the NLRA grants unions something of an exclusive franchise through majority representation," but there is "no direct government influence in the decision by two private parties . . . to adopt any agency shop clause." *Ibid*. "*Jackson* . . . forecloses the argument that a private party negotiating a contract must be viewed as a state actor if the state has furnished the party with more bargaining power than it would have otherwise possessed." *White*, 370 F.3d at 351.

In *Sullivan*, "the Supreme Court rejected the argument that a legislature's express permission of a practice is sufficient to make the act of engaging in that practice state action." *White*, 370 F.3d at 353-54. The argument "that Congress's authorization of agency-shop clauses renders actions taken pursuant to such provisions state action cannot be squared with *Sullivan*'s rejection of the notion that the express legislative authorization of an act makes that act state action." *Id.* at 354.

This Court has recently emphasized that "the state-action doctrine enforces a critical boundary between the government and the individual, and thereby protects a robust sphere of individual liberty." *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. ___, 139 S.Ct. 1921, 1934 (2019). That being so, "[e]xpanding the state-action doctrine beyond its traditional boundaries would expand governmental control while restricting individual liberty and private enterprise." *Ibid.*

The Petitioners' "[a]lternative[]" theory that "the very creation of an exclusive-representation scheme triggers state action allowing agency-fee challenges by private-sector employees" would "apply to the millions of private-sector employees covered by the NLRA" and "constitutionalize all collective-bargaining matters." Pet. at 4-5, 17 & 19. This Court has previously refused to constitutionalize private sector collective bargaining. *See Steelworkers v. Weber*, 443 U.S. 193, 200 (1979). The Petitioners have presented no sound arguments for second-guessing that decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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