No. 20-1643

IN THE

Supreme Court of the United States

ARTHUR BAISLEY,

Petitioner,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT

The Petitioner, Arthur Baisley, works for United Airlines in a craft represented by the International Association of Machinists and Aerospace Workers, AFL-CIO ("IAM"). Pet. App. 10. The collective bargaining relationship between United and the IAM is governed by the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq*.

RLA § 2, Eleventh permits a carrier and a labor organization representing a class or craft of the carrier's employees "to make agreements, requiring, as a condition of continued employment, that . . . all employees shall become members of the labor organization representing their craft or class" to the extent of paying "the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership" in the labor organization. 45 U.S.C. § 152, Eleventh (a). The collective bargaining agreement between United and the Machinists contains such a provision generally requiring covered employees to pay an agency fee equal to union dues. Pet. App. 10.

In *International Association of Machinists v. Street*, 367 U.S. 740 (1961), the Supreme Court held "that § 2, Eleventh is to be construed to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes." *Id*. at 768-69. In so holding, the Court emphasized that "[t]he safeguards of § 2, Eleventh were added for the protection of dissenters' interest,

but dissent is not to be presumed – it must affirmatively be made known to the union by the dissenting employee." *Id*. at 774.

The IAM has adopted written procedures through which employees can make known their dissent to paying the portion of contractually required agency fees spent on activities that are not germane to collective bargaining. Pet. App. 11. *See id*. at 21-26 (notice to employees describing the procedures). Using the IAM procedures, the Petitioner registered a continuing objection to paying the full agency fee in November 2018. *Id*. at 11. The amount charged to him in agency fees has been reduced since that time to reflect the portion of IAM expenditures that are not germane to collective bargaining. *Ibid*.

The Petitioner alleges that the IAM objection procedure violates either RLA § 2, Eleventh or the First Amendment to the Constitution of the United States, because the procedure does not automatically treat all nonmember agency fee payers as having registered an objection. The courts below dismissed these claims on strength of this Court's construction of the RLA in *Machinists v. Street*, *supra*. Pet. App. 3. Relying on the Court's recent public sector decision in *Janus v. AFSCME*, 585 U.S. ___, 138 S.Ct. 2448 (2018), the Petitioner argues that the courts below should not have followed *Street* but instead should have applied First Amendment scrutiny to the IAM's objection procedures. *Janus* does not apply here, however, and refutes the Petitioner's attempt to conflate the law governing public and private sector agency fee arrangements.

REASONS FOR DENYING THE PETITION

Without expressly invoking this Court's rules, the petition for certiorari argues that review is warranted, because "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c). The question of federal law at issue in this case was settled by this Court's decision in *Machinists v. Street, supra*, which construed the RLA to grant dissenting employee the right to object to providing financial support to union activities that are not germane to collective bargaining.

The premise of the petition is that *Street*'s longstanding construction of the RLA was unsettled by the Court's recent decision in *Janus v. AFSCME*, 585 U.S. ___, 138 S.Ct. 2448 (2018). However, *Janus* rests on the proposition that the First Amendment rights of public sector employees, as defined in that decision, are entirely distinct from the statutory rights of private sector employees under the RLA. There is, therefore, no conflict between the court of appeals' decision in this case, which faithfully follows *Street*'s construction of the RLA, and any decision of this Court.

I. THE IAM OBJECTION PROCEDURE DOES NOT VIOLATE RLA § 2, ELEVENTH.

Section 2, Eleventh authorizes agreements requiring that "*all* employees" pay "the periodic dues, initiation fees, and assessments (not including fines and penalties) *uniformly required* as a condition of acquiring or retaining [union] membership." 45 U.S.C. § 152, Eleventh (a) (emphasis added).[1] Because the section "contains only one explicit limitation to the scope of the union shop agreement: objecting employees may not be required to tender 'fines and penalties' normally required of union members," it could reasonably be inferred "that all other payments obtained from voluntary members can also be required." *Ellis v. Bhd. of Ry. Clerks*, 466 U.S. 435, 445 (1984). What is more, in enacting § 2, Eleventh, "Congress was adequately informed about the broad scope of [rail] union activities aimed at benefiting union members, and, in light of the absence of express limitations in § 2, Eleventh it could be plausibly argued that Congress purported to authorize the collection from involuntary members of the same dues paid by regular members." *Id.* at 446.

Given § 2, Eleventh's sweeping permission to negotiate agreements requiring payment of "the

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[1] The RLA's authorization to charge "periodic dues, initiation fees *and assessments,"* 45 U.S.C. § 152, Eleventh (a), is broader than the parallel provision in the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq*., which authorizes charging only "the periodic dues and the initiation fee," 29 U.S.C. § 158(a)(3).

periodic dues, initiation fees and assessments" "uniformly required as a condition of . . . [union] membership," 45 U.S.C. § 152, Eleventh (a), "a construction [wa]s 'fairly possible' which denies the authority to a union, over the employee's objection, to spend his money for political causes which he opposes," *Street*, 367 U.S. at 750, only because Congress had "incorporated safeguards in the statute to protect dissenters' interests," *id*. at 765. Indeed, it was only at the end of a lengthy section of the opinion titled, "The Safeguarding of Rights of Dissent," *ibid*., which reviewed various statutory manifestations of "congressional concern over possible impingements on the interests of individual dissenters from union policies," *id*. at 766, that *Street* reached the conclusion that § 2, Eleventh does not contemplate the "use of exacted funds to support political causes objected to by the employee," *id*. at 770. The Court explained that this "construction . . . involves no curtailment of the traditional political activities of the railroad unions" but "means only that those unions must not support those activities, against the expressed wishes of a dissenting employee, with his exacted money." *Ibid*.

Against that background, the *Street* Court determined that "[t]he safeguards of § 2, Eleventh were added for the protection of dissenters' interest, but dissent is not to be presumed – it must affirmatively be made known to the union by the dissenting employee." *Street*, 367 U.S. at 774. The Court emphasized that these safeguards "would properly be granted only to employees who have made known to the union officials that they do not desire

their funds to be used for political causes to which they object" and not "an employee who makes no complaint of the use of his money for such activities." *Ibid.*

The Plaintiff argues that the Court's decision in *Janus* changes all of this. However, *Janus* concerned the First Amendment rights of public employees and thus did not involve any construction of RLA § 2, Eleventh. Overruling *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), *Janus* held that public agency fee agreements violate the First Amendment. To demonstrate that "*Abood* was poorly reasoned" and "should be overruled," the *Janus* majority observed that "*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." 138 S.Ct. at 2479 (emphasis in original; quotation marks and citation omitted). Significantly, the *Janus* majority criticized *Abood* for failing to appreciate that "*Street* was decided as a matter of statutory construction, and so did not reach any constitutional issue." *Ibid.* The Plaintiff commits the same analytical error in asserting that the constitutional ruling in *Janus* altered *Street*'s construction of RLA § 2, Eleventh.

The right of dissent defined in *Street* "stem[med] not from constitutional limitations on Congress' power to authorize the union shop, but from § 2, Eleventh itself." *Street*, 367 U.S. at 771. Thus, *Janus*' application of the First Amendment to public

sector agency fee clauses has no effect on *Street*'s interpretation of the RLA.[2]

II. THE PROCEDURE ADOPTED BY THE IAM FOR REGISTERING AGENCY FEE OBJECTIONS DOES NOT VIOLATE THE FIRST AMENDMENT.

The Petitioner acknowledges that *Street* "interpreted the [RLA] to forbid unions from spending *objecting* nonmembers' money on political activities." Pet. 11 (emphasis added). Thus, his central contention is *not* that the courts below misapplied *Street*'s statutory construction but, rather, that those courts "should have applied First Amendment scrutiny to IAM's opt-out requirement . . . and held it unconstitutional." Pet. 10. The Petitioner's First Amendment claim is focused solely on the "procedures [the IAM] uses to collect compulsory fees." *Id*. at 12. He is *not* "challenging RLA § 2, Eleventh as unconstitutional." *Id*. at 9 n. 2.

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[2] Alternatively, the Petitioner asserts that the IAM has engaged in "arbitrary conduct" in breach of its duty of fair representation by not presuming that all fee payers object to paying the full agency fee. Pet. 17. "A union's conduct can be classified as arbitrary only when it is irrational, when it is without a rational basis or explanation." *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 46 (1998). As the Fifth Circuit noted, in providing a means for employees to register their objection to paying the full fee, the IAM was simply "following longstanding practice and established case law." Pet. App. 2. Doing so was far from "irrational." *See Int'l Union of Elec., Elec., Salaried, Machine and Furniture Workers v. NLRB*, 41 F.3d 1532, 1537-38 (D.C. Cir. 1994).

The Petitioner's First Amendment challenge to the IAM's objection procedure rests primarily on *Janus v. AFSCME*, *supra*.[3] *Janus* held that a "law [by which] public employees are forced to subsidize a union, even if they . . . strongly object to the positions the union takes in collective bargaining and related activities . . . violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." 138 S.Ct. at 2459-60.

The Petitioner acknowledges that, for First Amendment purposes, "the public sector" is distinguishable from private employment, "because of the governmental employer." Pet. 13 n. 3. Thus, the Petitioner does *not* challenge the "requirement that he contribute to IAM's bargaining costs." *Id*. at 9 n. 2. In other words, the Petitioner acknowledges that the constitutional holding in *Janus* does *not* apply to the agency fee provision of the privately negotiated United-IAM collective bargaining agreement.

Indeed, the *Janus* opinion all but forecloses application of the First Amendment to the private

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[3] The Petitioner also relies on *Knox v. Service Employees International Union, Local 1000*, 567 U.S. 298 (2012). *Knox* addressed "whether the First Amendment allows a public-sector union to require objecting nonmembers to pay a special fee for the purpose of financing the union's political and ideological activities." *Id*. at 302. In answering this question, the *Knox* Court distinguished "a union's regular annual fees" from "a special assessment or dues increase that is levied to meet expenses that were not disclosed when the amount of the regular assessment was set." *Id*. at 303. The instant case does not involve "a public-sector union" or a "special assessment."

agency fee agreements permitted by the RLA. As the Fifth Circuit observed, in this regard:

> "*Janus* itself says it is unclear whether 'the First Amendment applies *at all* to private-sector agency-shop arrangements' like this one. *Janus*, 138 S. Ct. at 2480 (emphasis added). It is 'questionable' whether 'Congress's enactment of a provision [of the RLA] allowing, but not requiring, private parties to enter into union-shop arrangements was sufficient to establish governmental action.' *Id*. at 2479 n.24." Pet. App. 5.

To show that "Congress's enactment of a provision allowing, but not requiring, private parties to enter into union-shop arrangements was sufficient to establish governmental action" is a "questionable" proposition, 138 S.Ct. at 2479 n. 24, *Janus* cited *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 53 (1999), and *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974). *Sullivan* and *Jackson* preclude any direct application of the First Amendment to the IAM objection procedure.

Sullivan and *Jackson* rejected constitutional challenges to private conduct that was specifically authorized by state law. *Sullivan*, 526 U.S. at 43; *Jackson*, 419 U.S. at 354-55. Each case concerned a "State's decision to provide [a private party] the option of [taking the challenged action]," and, in each, the Court held that "a finding of state action on this

basis would be contrary to the 'essential dichotomy,' *Jackson*, *supra*, at 349, between public and private acts that our cases have consistently recognized." *Sullivan*, 526 U.S. at 53.

RLA § 2, Eleventh expressly permits private employers and labor organizations to negotiate and apply agency fee agreements. But the statute does not require that they do so. And the RLA says even less about how a union should go about fulfilling its statutory duty to charge objecting employees only for the portion of agency fees that is germane to collective bargaining. The courts below, therefore, correctly declined to subject the IAM objection procedure to First Amendment scrutiny.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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