COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. 12603

BEN BRANCH, WM. CURTISS CONNER,
DEBORAH CURRAN, AND ANDRE MELCUK,
Appellants,

v.

DEPARTMENT OF LABOR RELATIONS,
COMMONWEALTH EMPLOYMENT RELATIONS BOARD,
Appellees.

On Appeal from a Decision of the
Commonwealth Employment Relations Board
of the Department of Labor Relations
(Nos. ASF-14-3744, ASF-14-3919, ASF-14-3920)

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AND MACKINAC CENTER FOR PUBLIC POLICY IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to S. J. C. Rule 1:21(a), Amici Curiae, Pacific Legal Foundation and Mackinac Center for Public Policy hereby state that they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

The NFIB Small Business Legal Center is a 501(c)(3) public interest law firm. We are affiliated with the National Federation of Independent Business, a 501(c)(6) business association, which supports the NFIB Small Business Legal Center through grants and exercises common control of the NFIB Small Business Legal Center through officers and directors. No publicly-held company has 10% or greater ownership of the NFIB Small Business Legal Center.

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IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. Among other things, PLF has repeatedly litigated in defense of the right of workers not to be compelled to make payments to support political or expressive activities with which they disagree. PLF attorneys were counsel of record in Keller v. State Bar of Cal., 496 U.S. 1 (1990), and Brosterhous v. State Bar of Cal., 12 Cal. 4th 315 (1995). PLF also has participated as amicus curiae in all of the most important cases involving labor unions compelling workers to support political speech, from Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), to Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298 (2012), Harris v. Quinn, 134 S. Ct. 2618 (2014), and Janus v. American Federation of State, County, and Municipal Employees, Council 31, 138 S. Ct. 2448 (2018).

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

The Mackinac Center for Public Policy is a Michigan-based, nonpartisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1987. Michigan passed both private-sector and public sector right-to-work

legislation in December 2012. The Mackinac Center has played a prominent role in studying and litigating issues related to mandatory collective bargaining laws.

INTRODUCTION AND SUMMARY OF ARGUMENT

Four educators filed "prohibited practices" charges against the union that, under state law, serves as the educators' "exclusive representative." The educators charged that the union violated their rights in a wide array of particulars, ranging from delayed Hudson notices, improper charges, falsifying documents, and, in the case Ms. Curran, outright retaliation for her failure to join the union. The Commonwealth Employment Relations Board held evidentiary hearings and held in favor of the Union on the basis of the laws then in effect. The educators appealed and while the appeal was pending, the United States Supreme Court decided Janus, which upholds the individual rights of public employees to refrain from subsidizing unions. 138 S. Ct. at 2478.

Janus restored the individual rights approach to compelled subsidies, demanding that states obtain an affirmative waiver of First Amendment rights before permitting a union to take money from worker paychecks. Id. at 2486. To the extent that the Massachusetts scheme conflicts with the compelled subsidization holdings of

Janus, the educators must prevail. Janus does not directly address the employees' challenge to the exclusive representation statute. Using the principles outlined in that case, however, this Court should emphasize that all statutes governing public employment must protect employees' political autonomy. Specifically, "exclusive representation" is incompatible with Janus because the union uses its status as exclusive representative to deny nonmember employees a vote and voice in their workplace conditions. See id. at 2464 ("When speech is compelled, . . . individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning."). Employees cannot constitutionally be forced to choose between their political autonomy and their ability to have a voice and vote in the terms of their own employment. See Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 604 (2013) ("the government may not deny a benefit to a person because he exercises a constitutional right.") (citation omitted); Bd. of Cty. Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996) ("the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . .

freedom of speech'") (citation omitted); Lefkowitz v. Cunningham, 431 U.S. 801, 807-08 (1977) (person cannot be required to forfeit First Amendment rights as the price for exercising other constitutional rights).

The exclusive representation statute, Mass. Gen. Laws ch. 150E, § 5(2006), unconstitutionally silences public employees. The decision below should be reversed.

ARGUMENT

I

EXCLUSIVE REPRESENTATION UNCONSTITUTIONALLY SILENCES WORKERS

A. Freedom of Speech and Freedom of Association Demand Equally Rigorous Constitutional Protection

Protection of the right to associate derives from the First Amendment's guarantees of speech, assembly, petition, and free exercise of religion; and the scope of this protection corresponds to the constitutional scrutiny applied to the mode of First Amendment expression in which a particular group seeks collectively to engage. Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984). "The 'freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment,

which embraces freedom of speech.' Freedom of association is a limit on the power of State government." Attorney General v. Bailey, 386 Mass. 367, 379 n.12 (1982) (quoting NAACP v. Alabama, 357 U.S. 449, 460 (1958), and Shelton v. Tucker, 364 U.S. 479, 490 (1960)). It extends beyond associations for political goals to encompass goals related to "social, legal, and economic benefit[s]." Caswell v. Licensing Comm'n for Brockton, 387 Mass. 864, 872 (1983) (citing Griswold v. Connecticut, 381 U.S. 479, 483 (1965)). The right to associate has a corresponding right not to associate. Knox, 567 U.S. at 309 ("Freedom of association . . . plainly presupposes a freedom not to associate." (citation omitted)); Donaldson v. Farrakhan, 436 Mass. 94, 102 (2002) (state could not force inclusion of women in the mosque's men-only meeting by application of the public accommodation statute without violating the religious association's First Amendment rights).

The state cannot "place obstacles" to a person's exercise of these collaborative freedoms. Regan v. Taxation with Representation of Wash., 461 U.S. 540, 549-50 (1983). The Court's focus therefore must be on the nonunion members forced to associate with the union through exclusive representation. Unlike individual

workers, who have constitutionally protected rights to present their own views on an equal basis with others, "'[c]ollective bargaining is not a fundamental right,' and a union and its members 'are not suspect classes.'" Sweeney v. Pence, 767 F.3d 654, 669 (7th Cir. 2014) (citation omitted).

The union's speech, via collective bargaining, reflects the interests of its membership. Blauvelt v. AFSCME Council 93, Local 1703, 74 Mass. App. Ct. 794, 797-98 (2009) (a union is "an organization existing for the primary benefit of its membership" even when its activities may be consistent with broader public policies). When the state authorizes a union to bargain on behalf of nonunion members, it is forcing those nonunion employees to "associate" with that union against their will and in violation of the rights protected by the First Amendment. See, e.g., The American Heritage Dictionary of the English Language 112 (3d. ed. 1992) (associate defined as "to join as a partner, ally, or friend;" "to connect in the mind or the imagination;" "to keep company;" "a person united

with another or others in an act, an enterprise, or a business").[1]

An association takes on the characteristics and preferences of its membership. See Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 448 n.10 (2001) ("We have repeatedly held that political parties and other associations derive rights from their members."). A union may assert associational standing when it suffers an injury mirroring that of its membership. New Bedford Educators Ass'n v. Chairman of Massachusetts Bd. of Elementary and Secondary Educ., 92 Mass. App. Ct. 99 (2017). Yet a union also has rights and interests separate from those of the employees it represents. Service Employees Int'l Union, Local 509 v. Dep't of Mental Health, 469 Mass. 323, 333 (2014); cf. Mass. Elec. Co. v. Mass. Comm'n Against Discrimination, 375 Mass. 160, 177–78 (1978) (union members' individual claims of sex discrimination did not translate to any injury to the union itself). The educators in this case are not union members and oppose the union's policies. Their interests are therefore distinct from the union,

[1] Words should be construed according to the "ordinary understanding" of how language works. Weyerhaeuser v. United States Fish and Wildlife Serv., No. 17-71, 2018 WL 6174253 at *7 (U.S. Nov. 27, 2018).

which should not be deemed to have any right——much less an exclusive right——to speak on their behalf.

B. Exclusive Representation Deprives Nonunion Members of the Right to Communicate with the State

Exclusive representation allows a union, and the union alone, to determine the employment terms and conditions of nonmember personal care providers, and purports to represent the entire workforce in its intertwined lobbying and bargaining efforts.[2] See NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967); Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 401 (1950) ("[I]ndividual employees are required by law to sacrifice rights which, in some cases, are valuable to them" under exclusive representation, and "[t]he loss of individual rights for the greater benefit of the group results in a tremendous increase in the power of the representative of the group——the union."). Labor organizations "have no constitutional entitlement to the fees of nonmember-employees," Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 185 (2007), nor should they be constitutionally entitled to association with nonmember-

[2] Janus noted that "the political debate over public spending and debt they have spurred, have given collective-bargaining issues a political valence that Abood did not fully appreciate." 138 S. Ct. at 2483.

employees. It would be an inconsistent application of First Amendment law for the Constitution to prevent forced financial contributions, and to allow public employee unions to demand the forced association of nonmember employees. See Martin H. Malin, The Legal Status of Union Security Fee Arbitration After Chicago Teachers Union v. Hudson, 29 B.C. L. Rev. 857, 870 n.87 (1988) ("One cannot distinguish the constitutional validity of the fee from the constitutional validity of the exclusive representation principle.").

The court below found no infringement on the educators rights because they were not required to become members of the union. The educators refusal to join the union, however, cannot resolve the constitutional issue because the statute explicitly deprives any nonunion provider, or association of nonunion providers, of any role whatsoever in negotiations. See Mass. Gen. Laws ch. 150E, § 5 ("The exclusive representative shall have the right to act for the negotiate agreements covering all employees in the unit . . . ."). Even if the educators leased a billboard prominently placed within view of university administrators, declaring their opposition to the union's positions, the university is compelled to ignore

it in favor of the union's positions. Nonunion educators' voices are silenced, and any attempt to speak contrary to the union would be futile. See Minter v. Beck, 230 F.3d 663, 666 (4th Cir. 2000) (defining "futile" as "incapable of producing any result; ineffective; useless; [or] not successful" (citation omitted)); Essex Trust Co. v. Averill, 321 Mass. 68, 70 (1947) (People act with the presumption that their acts will "accomplish something" and not be a "futile act."); Bump v. Robbins, 24 Mass. App. Ct. 296, 312-13 (1987) (recognizing that people will not, "as a practical matter," spend "time and money in a futile effort"). Cf. Cohen v. Cal., 403 U.S. 15, 25 (1971) (futile speech is protected by the First Amendment).

Justice Stevens expanded on this point in his dissent in Minn. State Bd. for Cmty. Colleges v. Knight, 465 U.S. 271 (1984), the case relied upon by the union and Board in this case. While the majority in Knight rested on a unique theory that the government is not bound to listen just because people choose to speak, 465 U.S. at 283, the dissenting Justices' view reflected the reality that a prohibition on "listening" means that speakers can have "no meaningful impact." Id. at 314 (Stevens, J., dissenting). "The notion that there is a

state interest in fostering a private monopoly on any form of communication is at war with the principle that 'the desire to favor one form of speech over all others' is not merely trivial; it 'is illegitimate.'" Id. at 322 (quoting Carey v. Brown, 447 U.S. 455, 468 (1980)). For this reason, the dissent would have held, as the educators request in this case, that "the First Amendment does not permit any state legislature to grant a single favored speaker an effective monopoly on the opportunity to petition the government." Id. at 301. See also Whitney v. Cal., 274 U.S. 357, 375 (1927) ("[I]t is hazardous to discourage thought, hope and imagination; [the Founders understood] that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies[.]" (Brandeis, J., concurring)).

While the First Amendment union cases have thus far focused largely on compelled financial subsidization, e.g., Janus, 138 S. Ct. at 2459-60, Knox, 567 U.S. at 302-03, Davenport, 551 U.S. at 181, Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 355 (2009), the exclusive representation aspect equally forces nonunion workers to be used as "'an instrument for fostering public

adherence to an ideological point of view [they] find[] unacceptable.'" Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 522 (1991) (quoting Wooley v. Maynard, 430 U.S. 705, 715 (1977)). Exclusive representation statutes can no longer survive as a carve-out from normal constitutional scrutiny of infringements on associational freedom. The government must provide compelling justifications for silencing those who would address their government. As this Court acknowledges, the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." Commonwealth v. Bigelow, 475 Mass. 554, 562 (2016) (citation omitted) (emphasis added).

II

EXCLUSIVE REPRESENTATION RESULTS IN INJUSTICE

As a matter of public policy, exclusive representation's silencing of certain employees to benefit others results in discrimination and injustice. As Professor Clyde W. Summers describes it, exclusive representation inherently conflicts with public policies

founded on individual rights: The "most critical characteristic of American style exclusive representation is the subservience of the individual employee to the majority union, and the total subordination of the individual contract of employment to the collective agreement." Clyde W. Summers, Exclusive Representation: A Comparative Inquiry into a "Unique" American Principle, 20 Comp. Lab. L. & Pol'y J. 47, 60 (1998). The union exercises total control. Id.

There are any number of reasons beyond those designated "political" or "ideological" why employee preferences may diverge from those of the union leadership. For example, an employee may object to associating with a union that exhibits hostility to part-time work, Conley v. Mass. Bay Transp. Auth., 405 Mass. 168, 175 (1989), or that calculates seniority differently depending on whether interim breaks in service were due to pregnancy or other reasons, Lynn Teachers Union, Local 1037, AFT, AFL-CIO v. Mass. Comm'n Against Discrimination, 406 Mass. 515, 522 (1990), or that metes out informal "discipline" that affects an employee's economic interests in order to "protect the interests of the union or its membership." Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6, 493

U.S. 67, 97 (1989) (Stevens, J., concurring in part and dissenting in part) (citation omitted).

The sublimation of individual rights through exclusive representation has had foreseeable, undesirable consequences. Historically, labor unions relied on their power to exclusively represent all employees as a means to discriminate against African-Americans. In Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975), the Supreme Court described a situation whereby a labor union, as exclusive representative, bargained for work conditions that discriminated against African-American employees. When the injured employees tried to bypass the union and bargain with their employer directly, they were fired. Id. at 60. The Court held that this result was entirely justified by the exclusive representation rule embodied in the National Labor Relations Act,[3] because Congress had "full awareness that the superior strength of some

[3] There is considerable overlap in the analysis in cases decided under the First Amendment and those decided under state and federal labor relations acts. See, e.g., Zuckerman v. Bevin, No. 2018-SC-000097-TG, 2018 WL 5994824, at *14 n.27 (Ky. Nov. 15, 2018) (declining to distinguish Janus in a private sector union case because of the similarities in the exclusive representation laws related to public and private sector unions).

individuals or groups might be subordinated to the interest of the majority." Id. at 62 (citation omitted).

Justice Douglas dissented, writing that the Court's opinions rendered the employees "prisoners of the Union," a "tragic consequence." Id. at 73 (Douglas, J., dissenting). See also, Cynthia Estlund, How the Workplace Constitution Ties Liberals and Conservatives In Knots: The Workplace Constitution from the New Deal to the New Right (book review), 93 Tex. L. Rev. 1137, 1142 (2015) (noting the role of "right to work" in the history of African-American gains in the labor market and the subsequent troubled——often contentious——relations with labor unions). Massachusetts public employee unions create the same conundrum. See Cosby v. Dep't of Social Services, 32 Mass. App. Ct. 392, 396 (1992) (union chooses among competing interests of members when developing seniority rules and affirmative action provisions; either way, some union members "will be displaced").

Worse, unions have demonstrated that they are perfectly willing to engage in coercion and retaliation against employees——members and nonmembers——who do not take a unified stand with the union. Moreover, in the union context, a decision that no constitutional

infringement arises if dissenters can speak on their own invites retribution from union loyalists if those dissenters do speak. Unions rely heavily on peer pressure, intimidation, coercion, and inertia to prevent dissenting members and nonmembers from opposing union political activities. See Murray N. Rothbard, Man, Economy, and State 626 (Nash ed., 1970) (1962); Friedrich A. Hayek, The Constitution of Liberty 274 (1960); Linda Chavez & Daniel Gray, Betrayal: How Union Bosses Shake Down Their Members and Corrupt American Politics 44-46 (2004). In fact, public employee unions are likely to exert more coercion and intimidation against dissenting workers than are private sector unions, because many public sector workers cannot readily find similar jobs in the private sector. See, e.g., Martel v. Dep't of Transp., FAA, 735 F.2d 504, 509-10 (Fed. Cir. 1984) (Federal Aviation Administration (FAA) employee was intimidated by union members into joining strike); Ferrando v. Dep't of Transp., FAA, 771 F.2d 489, 492-93 (Fed. Cir. 1985) (noting that FAA union would "monitor [] the work of non-participating [workers] and report [], and even invent [], infractions until the [worker] lost his job or was suspended").

In Brockton Education Association & Brockton School Committee, 1986-88 Pub. Bargaining Cas. (CCH) ¶ 44,477 (Mass. Lab. Rel. Comm'n Jan. 7, 1986), certain union members voluntarily appeared at a hearing before the Massachusetts Labor Relations Commission to testify on behalf of their employer. The union thereafter censured the employees for doing so, an illegal sanction. Id. Similarly, in Connecticut Employees Union Independent & Wallace C. Arseneault, 1986-88 Pub. Bargaining Cas. (CCH) ¶ 44,483 (Conn. St. Bd. of Lab. Rel. Mar. 19, 1986)) *described in* Maxine Kurtz & Alan Miles Ruben, Recent Developments in Public Employee Relations, 19 Urb. Law. 1021, 1048-49 (1987), a member who urged an investigation of mishandled union funds was expelled from the union, which then filed a defamation suit against him; other members who favored an audit were unlawfully threatened with legal action by the union, part of a "policy of intimidation against its members designed to stifle dissent and criticism of the union leadership." Id. *described in* Kurtz & Ruben, supra, at 1049.

This is why nonconformists must rely on the Constitution for protection. See, e.g., W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943); Wash. v.

Seattle Sch. Dist. No. 1, 458 U.S. 457, 486 (1982) (The judiciary has a special duty to intercede on behalf of political minorities who cannot hope for protection from the majoritarian political process.). Janus held that the First Amendment protects employees' political autonomy. Massachusetts case law and statutes, implemented to permit the union's policies deterring employees from making a choice not to join (and retaliating against those who do), are unconstitutional violations of nonunion public employees' First Amendment rights.

CONCLUSION

The decision below should be reversed.

DATED: December 11, 2018.

Respectfully submitted,

By s/ Brad P. Bennion

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DECLARATION OF SERVICE BY MAIL

I, Patricia R. Castillo, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 930 G Street, Sacramento, California 95814.

On December 11, 2018, true copies of **BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AND MACKINAC CENTER IN SUPPORT OF APPELLANTS** were placed in envelopes addressed to:

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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 11th day of December, 2018, at Sacramento, California.

s/Patricia R. Castillo
PATRICIA R. CASTILLO

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k), Massachusetts Rules of Appellate Procedure, I hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including without limitation M.R.A.P. 16(a)(6), 16(e), 16(f), 16(h), 18, and 20.

DATED: December 11, 2018.

s/ Brad P. Bennion
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