COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT
No. 2017-P-0784

BEN BRANCH, WM. CURTIS CONNER,
DEBORAH CURRAN, AND ANDRE MELCUK,
CHARGING PARTIES-APPELLANTS,

V.

DEPARTMENT OF LABOR RELATIONS,
COMMONWEALTH EMPLOYMENT RELATIONS BOARD,
AGENCY-APPELLEE,

AND

MASSACHUSETTS SOCIETY OF PROFESSORS/MTA/NEA,
HANOVER TEACHERS ASSOCIATION/MTA/NEA, PROFESSIONAL
STAFF UNION/MTA/NEA
INTERVENOR-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)

CHARGING PARTIES-APPELLANTS, BRANCH, CONNER, CURRAN AND MELCUK'S

APPELLANTS' REPLY BRIEF

BRUCE N. CAMERON (BBO 543142)
BNC@NRTW.ORG
C/O NATIONAL RIGHT TO WORK LEGAL
DEFENSE FOUNDATION, INC.
8001 BRADDOCK ROAD, SUITE 600
SPRINGFIELD, VIRGINIA 22160
TEL: 703-321-8510
ATTORNEY FOR CHARGING PARTIES-APPELLANTS

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REPLY ARGUMENT

This is a combined reply to both the Appellee's and Intervenors' briefs.

I. The U.S. Supreme Court May Impact This Appeal.

On September 28, 2017, the United States Supreme Court granted certiorari in *Janus v. AFSCME, Council 31*, 851 F.3d 746 (7th Cir. 2017), *cert. granted*, No. 16-1466, 2017 WL 2483128 (U.S. Sept. 28, 2017). *Janus* presents the question whether *Abood v. Detroit Board*

of Education, 431 U.S. 209 (1977) should be overruled and public sector agency fee arrangements declared unconstitutional under the First Amendment.

Of the seven issues presented in the Appellant Educators' appeal, a decision in *Janus* would likely control issues 1 and 4. It would likely not or certainly not control issues 2, 3, 5, 6 and 7. (See Appellant Educators' Brief (''Ed. App. Br.'') 5-6.)

II. Introduction.

Running throughout the Commonwealth Employee Relations Board's (''Board'') brief is a very odd argument. Because all agree that the Board has no authority to declare unconstitutional the statute it administers, the Board extrapolates that limit to argue that the Educators must lose this appeal. If the Board could not provide the relief sought in this appeal, it claims it has done nothing wrong.

This case is about the validity of compulsory union fees, the procedures by which they are collected, and exclusive representation. At the most fundamental level of logic, the Board's odd argument is incompatible with administrative exhaustion

requirements and the authority of this Court. If the Board's odd argument were accepted, this Court could never pass on a constitutional claim that arose out of a statute supervised by an administrative agency.

Not wanting to be outdone by the Board in the ''odd argument'' department, the Appellee-Intervenor unions (''Union'') assert that the Educators ''are not subject to any nonconsensual payment of agency fee.'' (Brief of Intervenor-Appellees (''Un. Br.'') 6.) Presumably, the Union believes that the payment of income taxes is ''consensual'' because citizens have the choice between paying and going to jail. Agency fees are compulsory because they are a condition of employment.[1]

III. The Appellant Educators Have Not Waived Any Legal or Factual Claims Made Below.

As part of its odd argument, the Board broadly asserts the Educators waived any claim that the Board made legal and factual errors because the Educators

[1] G.L.c. 150E §§ 12, R.A.III 173 & 175. Appellant Educator Deborah Curran's contract excludes dismissal or suspension, but allows her union to "pursue payment through whatever legal means it deems appropriate." R.A.III 174.

agree the Board lacks authority to declare unconstitutional the laws it administers. (Brief of the Commonwealth Employment Relations Board (''Bd. Br.'') 9-10.)

The Board confuses authority with waiver. While the Board has no authority to declare its statute unconstitutional, decisions the Board makes in reliance on an unconstitutional statute are error in the context of judicial review. *See, Lyons v. Labor Relations Commission*, 397 Mass. 498, 501, 507 (1986). When the Educators admit the limitation on the Board's authority, they are not waiving their rights; they are simply fulfilling an obligation of candor to the Board and this Court while at the same time exhausting their administrative remedies.

Unlike the failure in *Springfield v. Civil Service Commission*, 469 Mass. 370 (2014), the Educators meticulously raised their constitutionally based arguments in both their original charges (R.A.I 22-24, 29-30, 35-36), and their appeal from the Investigator's decision (R.A.III 201-231). The Educators then appealed the entire decision of the

Board when it passed upon the Educators' specific points of appeal. (R.A.III 263–265.)

In addition to its broad, generalized claims of waiver based on its limited jurisdiction, the Board makes a few specific claims of waiver, discussed next.

A. The Educators Preserved The Claim They Were Blocked from a Voice and a Vote by Their Exclusive Bargaining Representative.

The Board claims that the Educators presented ''no evidence'' that the union gagged them from having a voice and a vote in their working conditions (Bd. Br. 32), and they failed to challenge this as a factual or legal matter. (Bd. Br. 34, n. 15.)

This is flatly wrong. The Educators submitted to the Investigator the Union's official policy gagging them from a voice and vote (R.A.II 6–7), they provided sworn statements (R.A.I 104; R.A.III 79), and the Investigator specifically ruled on the Educators' claim about the gag (R.A. III 181–83). The Educators specifically appealed the Investigator's factual (R.A.III 209–10) and legal (R.A.III 211, 213–14) rulings on this issue. The Board thereafter specifically ruled on both the factual issue (R.A.III

260) and the legal issue (R.A.III 260-61.) The Educators thereafter appealed the decision of the Board. (R.A.III 263-65.)

B. The Educators Appealed the Exclusion of the Nerren and Podgursky Affidavits.

Contrary to the Board's statement, the Educators specifically appealed the exclusion of the affidavits of Drs. Nerren and Podgurksy (R.A.III 213, 217-218, 218, n.11), the Board specifically ruled on their exclusion (R.A.III 259-60), and the Educators thereafter appealed the decision of the Board. (R.A.III 263-65.)

With regard to these claims of waiver and failure to appeal, the Educators give the Board the benefit of the doubt. Since the undisputed facts of the record demonstrate that the Board is unquestionably wrong as shown by these specific citations to the record, the Board's claim of waiver must be an application of its odd argument, and not a false representation to this Court.

IV. The Board Is Entitled to No Deference.

Immediately after asserting that it was just following existing constitutional law, the Board

incongruously argues that this Court should defer to its decision (Bd. Br. pp. 13–15). No deferral is appropriate because the Board has no expertise on constitutional questions. *Sch. Comm. of Greenfield v. Greenfield Educ. Ass'n*, 385 Mass. 70, 76 (1982)(Questions of constitutional law not committed to agency discretion).

V. This Court Is Not Bound by *Abood.*

In their original brief (Ed. App. Br. 43–44), the Educators argued that this Court is not bound by past precedent because the standard of review for compulsory union fee challenges has been raised to ''exacting First Amendment scrutiny.'' *Harris v. Quinn*, 134 S. Ct. 2618, 2638, 2639 (2014).

The Board responds that the Educators have their timing wrong, the U.S. Supreme Court first held strict scrutiny was required in *Chicago Teachers Union, Local 1 v. Hudson*, 475 U.S. 292 (1986). (Bd. Br. 12, 42–43.)

Even if the Board were right about timing, its argument overlooks a critical fact: *Abood* was decided in 1977 and *Hudson* was decided in 1986. This Court is free to pass on the constitutionality of compulsory

union fees and the statutory opt-out requirement by distinguishing *Abood*. No Massachusetts or Supreme Court cases decided after 1986 passed on the constitutionality of compulsory union fees or the opt-out requirement decided in *Abood*.

VI. This Court Is Not Bound by *Greenfield*.

For the same reason that *Abood* does not control because it used the wrong constitutional test, *Greenfield* does not control, for it relied upon *Abood*. 385 Mass. at 78, 81. *Greenfield*, a cutting edge decision in its day, assumed both the validity of agency fees and an affirmative objection requirement. *Id.* at 78, 82. Indeed, the objecting teachers in *Greenfield* argued for a general objection and a reduced union fee, and argued against a choice between discharge and using the union's cumbersome rebate procedure. *Id.* at 79.

What continues to be relevant is *Greenfield's* insistence that the burden on employees must be minimized because their constitutional rights may not be sacrificed for the Union's contractual rights. *Id.*

at 84-85. That theory is central to the Educators' current opt in argument. (Ed. App. Br. 30-36.)

VII. The Educators' Expert Affidavits Go to the Heart of the Constitutional Issues.

The Board claims that the Educators ''offer no support for their argument that the expense of litigation invalidates [compulsory union fees].'' (Bd. Br. 11.) What the Board means by ''no support'' is unclear, because it refers to the Educators' Dixon affidavit showing that the process of ''challenging a fee is expensive and complex.'' (Bd. Br. 28.)

The Union's response to the Dixon affidavit, with its showing of enormous expenses, is that the typical agency fee amount challenges ''involve only one or two days of hearing.'' (Un. Br. 10.) The Union cites two cases, both brought by *pro se* challengers. One of them (*Massachusetts State College Ass'n and William A. Rust*, 12 MLC 1389 (1985)) was not a challenge to the amount of the agency fee at all.

The Dixon affidavit, in contrast, refers to cases in which both sides had the benefit of counsel, and the facts were sufficiently developed so that the following landmark Supreme Court decisions concerning

the proper division of the compulsory union fee resulted: *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Communications Workers v. Beck*, 487 U.S. 735 (1988); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984). (R.A.I 112.)

After complaining that these cases and *Belhumeur v. Labor Relations Commission,* 432 Mass. 458 (2000) were over-litigated,[2] the Union reverses course and argues that the instant case is so under-litigated that this Court cannot possibly decide it. The Union argues: ''Due to NRTW's [sic] litigation decisions, the factual record below is [inadequate to decide the constitutional issues].'' (Un. Br. 15-16.) This assertion contains at least two misstatements. First, it was litigation error on the part of the Union which resulted in the majority of its affidavit-supported facts being excluded. (R.A. III 173, n. 4, 255-259.) The Union never appealed to this Court the exclusion of its affidavits.

[2] To streamline and simplify *Belhumeur*, the objectors agreed to resolve the five contested years by litigating the amount for only one year and one affiliate. *Id.* at 460.

Second, and most importantly, the Union's claim that a full record with live testimony and ''cross examination'' is required to resolve these legal issues (Un. Br. 16–17) is nonsense. *Abood*, the landmark Supreme Court decision validating compulsory union fees forty years ago, was decided on summary judgment. *Abood*, 431 U.S. at 213. When the U.S. Supreme Court took up these issues last term in *Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 1083 (2016), and then split 4 to 4 on whether to overrule *Abood*, the trial court decided the case on plaintiffs' motion for judgment on the pleadings, *Friedrichs v. California Teachers Ass'n*, No. SACV 13-676-JLS, 2013 WL 9825479 (C.D. Cal. Dec. 5, 2013), at *6, and thereafter affirmed on the Ninth Circuit appellants' motion for summary affirmance. *Friedrichs v. California Teachers Ass'n*, No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014), at *3.

Even the *Janus* case, which the U.S. Supreme Court has now accepted to decide whether *Abood* should be overturned, was decided at the trial court on a motion to dismiss. *Janus v. AFSCME, Council 31*, 851 F.3d 746,

747-49 (7th Cir. 2017), *cert. granted*, No. 16-1466, 2017 WL 2483128 (U.S. Sept. 28, 2017). The 758 page record here, with its four sworn expert affidavits, four sworn Educators' affidavits, and two Union affidavits is more complete than the record in *Janus* or *Friedrichs*.

The Union contends that this Court should not consider any of the Educators' expert affidavits because they are ''self-serving'' and from ''purported experts'' who ''never testified.'' (Un. Br. 17.) This argument has the same level of rigor as the one the Union makes about an inadequate record. Nowhere does the Union show that the Educators' experts have a personal stake in this litigation, therefore their statements are not ''self-serving.'' Cases are routinely resolved without live testimony.

As to the Union's ''purported experts'' attack (*Id.*), consider the recent report relevant to the Educators' expert Dr. John Balz. Dr. Balz was the lead researcher for the New York Times best-selling book *Nudge*, and he drafted two of its chapters for authors Richard Thaler and Cass Sunstein. In addition, he co-

authored the paper ''*Choice Architecture*'' with Thaler and Sunstein. (R.A.I 138.) Close to the time this brief was filed, Richard Thaler won the Nobel Memorial Prize in Economic Sciences for his work on how individuals make choices – the subject of both Balz's affidavit here and his joint work with Thaler.[3]

This leads to the reason why the opinions of Dr. Balz and the Educators other experts are important for this Court, but not for the Board. While the Investigator and the Board had no authority to declare unconstitutional the statute they administer, this Court has that authority. Thus, Dr. Balz's affidavit explains the science showing that the statutory default in compulsory union fees disfavors speech protected by the First Amendment (Balz, Ed. App. Br. 19–22), Dr. Podgursky's affidavit reveals that exclusive union representation disadvantages some teachers and creates financial viability problems for government (Podgursky, Ed. App. Br. 16–17), Dr. Nerren's affidavit shows the ''free-rider'' claim is

[3] Binyamin Appelbaum, *Nobel in Economics Is Awarded to Richard Thaler, N.Y.Times*, October 9, 2017, https://www.nytimes.com/2017/10/09/business/nobel-economics-richard-thaler.html

demonstrably false (Nerren, Ed. App. Br. 17-18), and Ms. Dixon's affidavit discloses that competently challenging the Union's fee claim is beyond the financial ability of most wage earners (Dixon, Ed. App. Br. 22-23). These are precisely the facts the judiciary must consider in determining whether compulsory union fees and exclusive representation survive ''exacting First Amendment scrutiny.'' *Harris*, 134 S.Ct. at 2638 and 2639.

While these facts might be irrelevant to the Board with its limited authority, it is clear error for the Board to attempt to blind this Court to facts central to whether the statute survives exacting scrutiny. Had the Educators failed to raise their constitutional claims (and their supporting affidavits) before the Board, they would be barred from raising those claims now. *Janus,* 851 F.3d at 748.

VIII. Employers are Liable.

In finding employer liability in a union fee challenge, the Supreme Judicial Court determined that an "employer cannot ignore an employee's assertion of a constitutionally protected right [not to associate

with a union] which is valid on its face." *Conley v. Mass. Bay Transp. Auth.*, 405 Mass. 168, 177 (1989). *Conley* is arguably in conflict with *Hogan v. Labor Relations Commission*, 430 Mass. 611 (2000). In the Educators' original brief they not only distinguished *Hogan*, they argued that the ruling of the U.S. Supreme Court in *Chicago Teachers Union, Local 1 v. Hudson*, 475 U.S. 292, 307 n.20 (1986) controls. (Ed. App. Br. 45-46.)

The Board's response is to dismiss *Hudson* because the Educators rely on ''a single footnote'' and to distinguish it because *Hudson* ''merely requires the union and employer to provide procedures that minimize the impingement on First Amendment rights.'' (Bd. Br. 39-40.)

The Board's approach fails in two ways. First, the SJC in *Conley* relied on that same *Hudson* footnote. 405 Mass. at 177. Second, this is a constitutional challenge to agency fee procedures. *Hogan* ruled that if an employee ''still desired to pursue constitutional claims against the employer, the employee could seek redress in the courts.'' *Hogan*,

430 Mass. at 615. That is what the Educators are doing here.

IX. *Knight* Does Not Control.

Both the Board and the Union cite *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984) to argue that unions can use exclusive representation to force employees to choose between a voice and a vote in their working conditions and coerced support for union politics. (Un. Br. 38-41; Bd. Br. 31.)

Knight held that there was no constitutional impediment to the state deciding to listen to one point of view (the union point of view). *Knight* did not hold that the state could listen only to the union point of view *and also* force employees who want to be heard to support union political activities.

Instead, *Knight* specifically disclaimed passing on this issue. *Knight*, 465 U.S. at 289 & n.11. (''This requirement [to pay union fees] is not at issue in this lawsuit.'') Rather, the majority opinion in *Knight* observed that the *Abood* decision ''held that employees may not be compelled to support a union's

ideological activities unrelated to collective bargaining.'' *Knight*, 465 U.S. at 291 n.13.

The practice of the Union here, to use its status as exclusive representative to force an employee to pay full union dues or suffer the loss of a voice on his or her working conditions (R.A.II 6-7) was not at issue in *Knight*. Rather, *Knight* specifically acknowledged the right of employees to avoid having to make such a choice by citing *Abood.*

X. *Pickering* Is Inapplicable.

The Union ends its brief with a new argument. It posits the Educators are not entitled to claim strict or exacting scrutiny because, as public employees, they only have watered down constitutional rights according to the *Pickering v. Board of Education*, 391 U.S. 563 (1968) line of cases. The Union claims the Supreme Court applies *Pickering* to the ''payment of union dues and agency fees.'' (Un. Br. 48.)

The Union fails to mention that it borrowed its *Pickering* argument from the dissent in *Harris*, 134 S.Ct. at 2653-2656. Worse, the majority opinion in *Harris* specifically rejected the application of

Pickering to union fees. *Id.* at 2641–2643. It should go without saying that the *Harris* Court could hardly have prescribed ''exacting First Amendment scrutiny'' and at the same time thought *Pickering's* watered down standard was applicable. *Id.* at 2639.

CONCLUSION AND DESIRED RELIEF

The Educators request the same conclusion and relief as they did in their original brief.

Respectfully submitted,

/s/Bruce N. Cameron
Bruce N. Cameron (BBO 543142)
bnc@nrtw.org
c/o National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
Tel: 703-321-8510

Attorney for Charging Parties-Appellants

DATED: October 24, 2017

Certificate of Compliance

I, Bruce N. Cameron, Counsel for the Charging Parties-Appellants, hereby certify that this brief complies with the rules of Court that pertain to the filing of briefs, including, but not limited to, Mass. R. A. P. 16(a) (6), Mass. R. A. P. 16(e), Mass. R. A. P. 16(f), Mass. R. A. P. 16(h), Mass. R. A. P. 18, and Mass. R. A. P. 20.

/s/ Bruce N. Cameron
Bruce N. Cameron

Certificate of Service

I, Bruce N. Cameron, attorney for the Charging Parties-Appellants, hereby certify that on October 24, 2017, a copy of the foregoing Appellants' Brief was sent by first class pre-paid mail to: T. Jane Gabriel, Chief Counsel, Commonwealth Employment Relations Board, Department of Labor Relations, Charles F. Hurley Building, 19 Staniford Street, 1st Floor, Boston, MA 02114; John M. Becker, Esq. and Amy Laura Davidson, Esq., Sandulli Grace, PC, 44 School Street, Suite 1100, Boston, MA 02108, counsel for Intervenors.

/s/Bruce N. Cameron
Bruce N. Cameron