No. 19-____

IN THE

Supreme Court of the United States

BEN BRANCH, WM. CURTIS CONNER, DEBORAH CURRAN, AND ANDRE MELCUK,

Petitioners,

v.

DEPARTMENT OF LABOR RELATIONS, COMMONWEALTH EMPLOYMENT RELATIONS BOARD AND MASSACHUSETTS SOCIETY OF PROFESSORS/MTA/NEA, HANOVER TEACHERS ASSOCIATION/MTA/NEA, PROFESSIONAL STAFF UNION/MTA/NEA,

Respondents.

On Petition for Writ of Certiorari to the Massachusetts Supreme Judicial Court

PETITION FOR WRIT OF CERTIORARI

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July 8, 2019

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

Government-designated unions representing everyone in a bargaining unit negotiate the wages and working conditions of Massachusetts public employees. Taxpayers play no part in these negotiations. Here, the union also excludes from negotiations all represented employees who do not financially support its partisan political activities.

1. When a public employee union uses its government-granted authority as employees' exclusive bargaining representative to compel employees to choose between a voice and a vote in their working conditions and their political autonomy, is that choice so attributable to the state as to trigger First Amendment protection?

2. Under the First and Fourteenth Amendments to the United States Constitution, may a state allow an exclusive bargaining representative to muzzle the speech of employees by denying them a voice and a vote in their working conditions if they choose to refrain from financially supporting partisan union politics?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners, Charging Parties-Appellants in the courts below, are Ben Branch, Wm. Curtis Conner, Deborah Curran, and Andre Melcuk.

Respondents in the courts below were the Massachusetts Department of Labor Relations, the Commonwealth Employment Relations Board, the Massachusetts Society of Professors/MTA/NEA, the Hanover Teachers Association/MTA/NEA, and the Professional Staff Union/ MTA/NEA.

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

There are no other cases directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Ben Branch, Wm. Curtis Conner, Deborah Curran, and Andre Melcuk ("Educators" or "Petitioners") respectfully petition for a writ of certiorari to review the judgment and order of the Massachusetts Supreme Judicial Court.

OPINIONS BELOW

The opinion of the Massachusetts Supreme Judicial Court, reported at 120 N.E.3d 1163, is reproduced in Appendix C (Pet. App. 40a-68a).

JURISDICTION

The Massachusetts Supreme Judicial Court entered judgment on April 9, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a).

PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in Appendix D (Pet. App. 69a-76a).

STATEMENT OF THE CASE

This Court in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), invalidated compulsory union fees imposed on public employees for bargaining purposes because they violate the speech rights of employees who decline to join the union. This petition challenges a parallel aspect of union compelled speech: barring public employees from a voice and a vote in their work-place conditions if they do not pay union dues. Both situations involve compulsion, but the violation of employee speech rights is more acute here. Employees who wish to participate in determining their working conditions are compelled to support not only union

collective bargaining expenses, but union partisan political expenses as well.

Payroll and other employee-related expenses at the local level of government are substantial, typically constituting up to 70% of the budget. This portion of the budget is determined through closed-door negotiations with public employee unions. Taxpayers have no role in these negotiations, and these unions are not politically accountable to taxpayers. Here, the union closes the door to democracy even further by blocking the employees it represents from having a voice or vote on their working conditions unless they agree to support financially the union's political activity.

Ben Branch, Wm. Curtis Conner and Andre Melcuk are University of Massachusetts employees. Dr. Branch is Professor of Finance in the Isenberg School of Management. Dr. Conner is Professor of Chemical Engineering. Dr. Melcuk is Director of Departmental Computing at the Silvio O. Conte National Center for Polymer Research. Deborah Curran is a middle school teacher in the Hanover Public Schools. These Educators are not union members, but all are exclusively represented for collective bargaining by affiliates of the Massachusetts Teachers Association and the National Education Association ("Unions").

The Unions have an official policy barring the Educators from a voice or vote in their workplace conditions. The Massachusetts Teachers Association sent the following "**WARNING**" to all nonmembers represented by its affiliates in Massachusetts: if you choose not to join the Unions and subsidize its partisan political expenses, "**YOU WILL NOT BE ENTITLED TO THE FOLLOWING SERVICES AND BENEFITS.**" Pet App. 78a. (emphasis in original). In

particular, the warning said, "nonmembers do not participate in the collective activities and decision-making of the association that influences the terms and conditions of [their] employment." *Id*.[1]

In the summer and fall of 2014, the Educators sought to secure their right to have a voice and a vote in their workplace conditions without giving up their political autonomy. Accordingly, they filed a series of prohibited practice charges with the Commonwealth Employment Relations Board of the Department of Labor Relations ("Board") raising their statutory and constitutional claims against the Unions and their employers, the University of Massachusetts and the Hanover School Committee.

The Board consolidated the claims and an Investigator dismissed all charges. Pet. App. 1a-24a (Appendix A). The Educators appealed to the Board, which affirmed the dismissal, Pet. App. 25a-39a (Appendix B), and then appealed to the Massachusetts Appeals Court. On its own motion, the Supreme Judicial Court of Massachusetts granted direct review and affirmed the dismissal by entering judgment for Respondents on April 9, 2019.[2] Pet. App. 40a-68a (Appendix C).

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[1] Omitted from the beginning of this quote is the phrase: "[t]herefore, apart from the ratification of the contract." After *Janus*, nonmembers can no longer vote on ratifying the contract because G.L.c. 150E § 12 requires their vote only if fees are compelled.

[2] The Educators' charges were filed before *Janus* and contained several other challenges associated with the validity of compulsory union fees and related procedures. The Supreme Judicial Court vacated as moot all prior decisions on these other issues based on the promise of the Unions and the Commonwealth of Massachusetts that they would no longer compel union fees. The ruling on these other challenges is not at issue.

REASONS FOR GRANTING THE PETITION

For decades, lower courts have disagreed about whether compulsion arising from government-granted union exclusive representation creates state action. Some courts have found state action in the private sector under the National Labor Relations Act. *Beck v. Commc'ns Workers*, 776 F.2d 1187, 1205 (4th Cir. 1985); *Linscott v. Millers Falls Co.*, 440 F.2d 14, 16-17 (1st Cir. 1971); *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1003-04 (9th Cir. 1970); *see Associated Builders & Contractors v. Carpenters Vacation & Holiday Tr. Fund*, 700 F.2d 1269, 1275 (9th Cir. 1983). Others do not. *White v. Commc'ns Workers*, 370 F.3d 346, 353 (3d Cir. 2004); *Price v. UAW*, 927 F.2d 88, 92 (2nd Cir. 1991); *Kolinske v. Lubbers*, 712 F.2d 471, 474-80 (D.C. Cir.1983)[3]; *Reid v. McDonnell Douglas Corp.*, 443 F.2d 408, 410 (10th Cir. 1971).

This Court has assumed state action under the NLRA. In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), for example, a bare majority decided that the NLRA did not apply to religious schools because otherwise "we would be required to decide whether that was constitutionally permissible." *Id.* at 499. A four member dissent contended that the NLRA did apply and "the constitutional questions presented would have to be reached." *Id.* at 518. And in a later case, *CWA v. Beck*, 487 U.S. 735 (1988), this Court avoided the issue by construing the NLRA "so as to avoid serious doubt" about its constitutionality. *Id.* at 761-62.

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[3] Although *Kolinske* rejected state action, the D.C. Circuit later assumed state action in the Board imposition of collective bargaining on a religious school. *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002).

Before *Beck*, this Court found state action in private sector union compulsion arising under the Railway Labor Act. *See Ellis v. Railway Clerks*, 466 U.S. 435, 455-56 (1984); *Ry. Emps.' Dep't v. Hanson*, 351 U.S. 225, 232 (1956). *Janus* nevertheless suggested the finding of state action under the RLA is "questionable today," citing the circuit conflict in NLRA cases, but did not resolve that conflict. 138 S. Ct. at 2479 & n.24.

The Supreme Judicial Court dove into this conflict by taking the extreme position that there is no state action involved with union compulsion even in the public sector. Pet. App. 64a-65a. As a result of this continuing and important conflict among the lower courts, this Court should resolve whether union compulsion linked to exclusive representation constitutes state action.

A second basis for review is that this Court might understandably believe that it finally resolved in *Janus* the long-standing dispute over compulsory union fees. Unfortunately, the Unions found another way to compel union fees in a more aggressive manner than that permitted even in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which *Janus* overruled, 138 S. Ct. at 2486. Using their state-granted power as the Educators' monopoly bargaining representative, the Unions block all but their members from any involvement in the negotiating process. The Unions forbid nonmembers to attend meetings to discuss bargaining proposals, ban them from holding a bargaining position, running for such a position, or even voting on those who bargain for them. Nonmembers also have no right to vote on the contract. This discrimination turns on one thing only: nonmembers' lack of financial support for the Unions' partisan political and ideological activities. Thus, the Unions have hit upon an extortionary

scheme to accomplish what they could not compel even under *Abood*: force nonmembers to subsidize the full array of union political and ideological activities.

I. THE CIRCUIT SPLIT ON STATE ACTION MAKES THIS AN IDEAL VEHICLE TO RESOLVE WHETHER AN INVOLUNTARY EXCLUSIVE BARGAINING REPRESENTATIVE MAY COMPEL NONMEMBERS TO CHOOSE BETWEEN THEIR POLITICAL AUTONOMY AND A VOICE AND A VOTE IN THEIR WORKING CONDITIONS.

If an organization can engage in a specific activity only by government empowerment, then that activity, by force of logic, must be one committed by the government. Here, the government created an empowerment system that extinguishes the Educators' right to represent themselves with their employers, grants monopoly representation power to the union, and then government negotiates solely with the union at the bargaining table. Further enhancing this exclusivity, Massachusetts makes "direct dealing" between government employers and individual employees unlawful. *SEIU, Local 509 v. Labor Relations Comm'n.*, 729 N.E.2d 1100, 1104 (2000).

This constitutes state action. The deprivation of non-union employees' rights is "caused by the exercise of some right or privilege created by" the state's granting the union exclusive bargaining power, making the union "a person for whom the State is responsible." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982). Thus, action taken by a public sector union to deprive non-union employees of a voice and a vote is state action.

Private action "can constitute state action." *Hallinan v. FOP*, 570 F.3d 811, 815 (7th Cir. 2009). And unions are usually private actors. *Id.* What has been inconsistent in the decisions of most courts (including this Court) is whether union compulsion in the collective bargaining context constitutes state action.

This Court's holdings in public sector cases assume state action. For example, *Janus* recognized that when the government makes a union the exclusive representative of all employees in a unit, it causes "a significant impingement on associational freedoms." 138 S. Ct. at 2478. The Unions' role as exclusive representative could not impinge employees' associational freedoms unless it constitutes state action. *See Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974) (noting that "private action is immune from the restrictions of the Fourteenth Amendment.")

State action is present here in the Unions' decision to exclude non-members from having a voice and a vote in their workplace conditions for at least three reasons. First, this Court found state action in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), and there is no reason to distinguish that case from this one on that question. Second, state action is present when an exclusive representative performs a traditional "state function" by setting hours, wages and other terms and conditions of employment for public employees. Third, under the "entwinement" theory of *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 298 (2001), there is sufficient intermingling between the state and the Unions to satisfy the state action requirement.

A. State action is present because this Court found state action in *Knight*, and there is no reason to distinguish between that case and this case on that point.

"The ultimate issue in determining whether a person is subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights 'fairly attributable to the State?'" *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) (quoting *Lugar*, 457 U.S. at 937).

Given that principle, this Court's opinion in *Knight* conspicuously lacks any discussion of state action. State action must be present for any constitutional claim, and because the *Knight* Court decided the merits of the constitutional claims asserted there, the Court obviously assumed state action was present. Moreover, the Court assumed state action not just for union exclusive representation as to "meet and negotiate" provisions over terms and conditions of employment, but also for the "meet and confer" process over only loosely connected employment policy. 465 U.S. at 291–92.

Here, the employees seek a voice and a vote in the collective bargaining process. Since before *Janus*, in their role as exclusive bargaining representative, the Unions have prohibited non-members from "'participat[ing] in affiliate decision-making,' specifically to attend union meetings (other than contract ratification meetings) or 'vote on election of officers, bylaw modifications, *contract proposals or bargaining strategy*.'" SJC Op. at 5. (Pet. App. 44a (emphasis added).) This is specifically authorized by the State. G.L.c. 150E § 12. Since *Janus*, because a contract cannot compel union fees, nonmembers have no right to attend contract ratification meetings and vote on

the contract. The decision below that there is no state action here conflicts with *Knight* on that question.

B. State action is present because public sector union exclusive representatives perform a traditional state function by determining terms and conditions of governmental employment.

Public sector employers "have traditionally *and* exclusively performed the function," *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1929 (2019), of setting their employees' terms and conditions of employment. *Janus*, 138 S. Ct. at 2483 ("Public-sector unionism was a relatively new phenomenon in 1977. The first state to permit collective bargaining by government employees was Wisconsin in 1959. R. Kearney & P. Mareschal, Labor Relations in the Public Sector 64 (5th ed. 2014)."). When the state delegates control over those terms and conditions to a third party (here, the Unions), that third party performs a government function. This Court has long held that performance of a traditional government function by a private entity constitutes state action. *Id.*; *see Jackson v. Metro. Edison Co.*, 419 U.S. at 352; *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158–60 (1978).

In *Manhattan Community Access Corp.*, this Court referenced "running elections and operating a company town" as signature examples of state action. 139 S. Ct. at 1929. And in *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 202 (1944), exclusive representation was compared to the power of a "legislative body." Here the issue is how the Unions exercise their "legislative body" authority to run elections (Pet. App. 78a) which set the terms and conditions of employment for the Educators. When unions undertake setting the terms and conditions of employment by rigging the

underlying elections to force political contributions, that corrupts the traditional and exclusive role of the state to determine employee wages.

C. State action is present because of pervasive "entwinement" between the State and the Unions.

In *Brentwood Academy*, this Court found that private organizations become state actors when their actions are pervasively entwined with public institutions. 531 U.S. at 298. Pervasive entwinement exists here. The state and the union are entwined in these ways:

1. Massachusetts law (G.L.c. 150E § 5) creates exclusive representation.
2. Massachusetts law mandates that public employers bargain in good faith with the exclusive representative. G.L.c. 150E §§ 6 & 10(a)(5).
3. Massachusetts prohibits public employers from dealing directly with employees (other than those the union authorizes to deal with an employer) about wages and employment benefits. *SEIU, Local 509*, 729 N.E.2d at 1104.
4. Massachusetts supervises and enforces collective bargaining with the exclusive bargaining representative and the resulting contract. G.L.c. 150E §§ 10 & 11.
5. Massachusetts collects members' dues for exclusive representatives and limits when and how employees can terminate their authorization of dues collection. G.L.c. 180 §17A.
6. Massachusetts law (G.L.c. 150E § 12) only obliges unions to allow nonmembers to vote on a contract which contains a clause making union fees compulsory.

In *Brentwood*, Tennessee had essentially granted exclusive control over high school athletics to a private association. 531 U.S. at 291–93. Eighty-four percent of the schools involved were public. *Id.* at 291. The state legislature officially "designat[ed]" the association as "the organization to supervise and regulate the athletic activities in which the public junior and senior high schools in Tennessee participate on an interscholastic basis." *Id.* at 292. Although the state later repealed this designation, the association continued to enforce rules adopted and approved by the State Board of Education. *Id.* at 301. The association's employees were not state employees but had a right to participate in the state's retirement system. *Id.* at 291.

This Court held that the association's conduct constituted state action. This was because the association included "most public schools located within the State, acts through their representatives, draws its officers from them, is largely funded by their dues and income received in their stead, and has historically been seen to regulate in lieu of the State Board of Education's exercise of its own authority." *Id.* at 290–91.

Like the association in *Brentwood*, the Unions draw their exclusive authority from the members of the bargaining unit they represent, who are state employees, and from the state itself. Massachusetts does not merely endorse the existence of the union as the state board did in *Brentwood*, it enforces the union's authority as the exclusive representative of a bargaining unit. Moreover, the Unions draw their income from the government employees they represent, and the state collects that money for the Unions. And exclusive representation "regulate[s] in lieu of" the state's authority to unilaterally control wages and

hours and other terms and conditions of employment for state employees.

Just as the association in *Brentwood* was granted authority by the state schools and the state board to regulate high school athletics, here the Unions have been granted authority by the state to regulate the terms and conditions of employment for all bargaining unit employees, whether they desire it or not. Like the association's authority and conduct in *Brentwood Academy*, that exclusive authority and its exercise constitutes state action.

II. A UNION MAY NOT CONDITION AN EMPLOYEE'S VOICE AND VOTE ON WORK-PLACE CONDITIONS UPON PAYMENT FOR UNION POLITICAL ACTIVITIES.

A. The Massachusetts Supreme Judicial Court's opinion conflicts with this Court's precedents in *Janus* and *Rutan*.

It is a "bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris v. Quinn*, 573 U.S. 616, 656 (2014). Here, the Unions seek to "produce a result which [they] [can]not command directly" by conditioning the benefit of a voice and a vote on workplace conditions on support for their politics. *See Speiser v. Randall*, 357 U.S. 513, 526 (1958); *see also Elrod*, 427 U.S. at 358 n.11 ("This Court's decisions have prohibited conditions on public benefits, in the form of jobs or otherwise, which dampen the exercise generally of First Amendment rights, *however slight the inducement* to the individual to forsake those rights) (emphasis added).

Two of this Court's precedents finding compelled speech violations are especially instructive here: *Janus* and *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990). *Janus* holds that political compulsion in the form of mandatory union fees violates the First Amendment rights of public employees. 138 S. Ct. at 2459–60. And both *Janus* and *Rutan* stand for the principle that more subtle forms of political coercion also violate public employees' First Amendment rights.

First, *Janus* recognizes that the "government may not 'impose penalties or *withhold benefits* based on membership in a disfavored group' where doing so 'ma[kes] group membership less attractive.'" 138 S. Ct. at 2468 (emphasis added) (quoting *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 69 (2006)). *Janus* emphasized that *any* subsidization of union politics must be "freely given." *Id.* at 2486. Yet the Unions here are withholding the benefits of a voice and a vote on terms and conditions of employment, thus making non-membership less attractive, to coerce employees into membership and financial support of the Unions' politics.

Second, *Rutan* holds that "promotions, transfers, and recalls after layoffs based on political affiliation or support" are impermissible infringements on public employees' right to free expression. 497 U.S. at 75. But it also notes that "the First Amendment . . . protects state employees not only from patronage dismissals but also from 'even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights.'" *Id.* at 75 n.8 (citation omitted).

In short, the test adopted by this Court is "whether the government, without sufficient justification, is pressuring employees to discontinue the free exercise

of their First Amendment rights." *Id*. at 79. It is governmental "pressure" that unconstitutionally "chill[s] the exercise of protected belief and association by public employees." *Id*. at 73 (public employees "will feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold, in order to progress up the career ladder.")

The *Rutan* Court reasoned that public employers violate the First Amendment when they condition employment benefits on the support of political viewpoints. Such is the case here. The Unions explicitly condition the benefit of a voice and a vote on workplace matters on joining the Unions and financially supporting the Unions' political viewpoints, which effectively "discontinue[s] the [nonmembers'] free exercise of their First Amendment rights." *Id*. at 79.

Although *Rutan* dealt with the political patronage practices of public employers, and this case involves labor relations between public sector unions and non-member public employees, this Court has treated public sector labor relations as closely analogous to the patronage context. In *Janus*, this Court expressly aligned its public sector union First Amendment jurisprudence with the patronage line of cases. *See Janus*, 138 S. Ct. at 2483–84. The Court suggested that, if anything, these labor relations cases warrant *greater* First Amendment scrutiny than do the patronage line of cases due to the historical pedigree of patronage practices. *Id*. at 2484 ("It is an odd feature of our First Amendment cases that political patronage has been deemed largely unconstitutional, while forced subsidization of union speech (which has no such [historical] pedigree) has been largely permitted."). The Court, consequently "end[ed] the oddity of privileging compelled

union support over compelled party support and br[ought] a measure of greater coherence to our First Amendment law." *Id*.

This case presents an ideal vehicle to bring an even greater coherence to the Court's First Amendment jurisprudence. Indeed, given those observations in *Janus*, it would be inconsistent to, on the one hand, protect public employees from being denied benefits—e.g., promotions or transfers—for exercising their First Amendment freedoms in the patronage context, yet on the other hand allow public employees to be denied benefits—a voice and a vote on workplace conditions—for exercising their First Amendment freedoms in the labor-relations context. As *Janus* recognized, it makes no historical sense to shield public employees from being pressured to support political parties while not shielding them from pressure to support politically active labor unions which promote political candidates.

If this Court grants review, exclusive representation will remain unchanged throughout the United States. The Educators do not argue that the regime of exclusive representation is facially unconstitutional. Rather, they contend that the Union here has weaponized its status as a monopoly bargaining representative to coerce support for its political and ideological activities.

There are many valid work-related reasons to deny benefits to employees in the public workplace. Holding the wrong political viewpoints is not one of them. "The First Amendment . . . does not permit a public-sector union to *adopt procedures* that have the effect of requiring objecting nonmembers to lend the union money to be used for political, ideological, and other purposes not germane to collective bargaining." *Knox v. SEIU, Local 1000*, 567 U.S. 298, 302–303 (2012)

(citing *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 305 (1986)) (emphasis added).

"[T]his Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

B. The Massachusetts Supreme Judicial Court failed to subject coerced speech to any level of First Amendment scrutiny.

In *Janus*, this Court subjected compulsory union fees to "'exacting' scrutiny." 138 S. Ct. at 2465. Under that standard, compulsion to support a union will not survive unless it "'serve[s] a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Id.* (quoting *Knox*, 567 U.S. at 310). The Court on several recent occasions has expressed trepidation about continuing to apply exacting scrutiny to the labor relations context, because the speech at issue in this context is "not commercial speech." *See*, *e.g., Janus*, 138 S. Ct. at 2465 (questioning "whether [exacting scrutiny] provides sufficient protection for free speech rights"); *Harris*, 573 U.S. at 648 ("it is apparent" that the speech involved in agency fee cases "is not commercial speech").

In *Rutan*, the Court applied strict scrutiny to coerced speech. 497 U.S. at 70 n.4, 74. For the reasons just discussed, it would make little sense to provide the highest level of First Amendment protection to public

employees in the patronage context while simultaneously providing them with less protection in the labor relations context. Although the Unions' coercive tactics cannot survive either strict or exacting scrutiny, this case nonetheless presents an ideal vehicle for this Court to set a uniform standard on which level of First Amendment scrutiny applies in the labor relations context. *See* Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. of App. Prac. & Process 91, 92 (2006) (emphasizing that the Supreme Court is a body tasked with "providing a uniform rule of federal law in areas that require one.").

Unlike this Court's contemplation of whether the highest standard of scrutiny applies, the Massachusetts Supreme Judicial Court did not apply *any* level of First Amendment scrutiny to the coerced speech involved here. Rather than apply even the lower level of First Amendment protection under exacting scrutiny, the Massachusetts Supreme Judicial Court simply asserted that there were "no constitutional problems," reasoning that the State and the Unions' interest in union "majority rule" and the Unions' duty of fair representation overrode any First Amendment interest held by the Educators. Pet. App. 63a-68a.

This Court should clarify the applicable level of First Amendment scrutiny to this Court's labor relations jurisprudence.

C. *Knight* is inapposite to the present case.

Despite the Massachusetts Supreme Judicial Court's holding, this Court's decision in *Knight*, 465 U.S. 271 (1984), is inapposite. *Knight* affirmatively disclaimed that partisan activity fees and associated union compulsion were involved in the Court's central holding

and analysis. *Id*. at 289 n.11, 291 n.13 (union fees were "not at issue in this lawsuit," and "this case involve[d] no claim that anyone is being compelled to support [the union's] activities"). To the extent that *Knight* spoke to the issue of union fees, it supports the Educators' position where it observed and reiterated *Abood's* holding that "employees may *not be compelled to support a union's ideological activities* unrelated to collective bargaining." *Id*. at 291 n.13.

The Educators want to voice their own views on wages, vacation time, workplace proposals, and who sits at the negotiating table representing them without having to give up their political autonomy. The court below was concerned that this would allow "divide-and-conquer tactics by employers" against the Unions. Pet. App. 67a. That misapprehends the nature of union representation. A union is not an entity separate from the views of the members of the bargaining unit. Rather, it is supposed to be the agent for receiving, resolving, and conveying their views to the employer. *Steele v. Louisville & N. R.R.*, 323 U.S. 192, 204 (1944). Presumably, persuasive argument and majority vote will carry the day within the Unions, and if most Union members agree with the Educators' voice (or even if they do not), the original purpose of the Unions as representative of employee views is fulfilled, not impaired.

The Massachusetts Supreme Judicial Court's "divide-and-conquer" argument reveals yet another defect in its analysis of the Educators' constitutional claims. It labeled formulating bargaining positions and choosing which employees sit at the bargaining table as an "internal" policy, Pet. App. 54a, cited several cases referring to them as internal union matters, *id*. at 62a-64a, and expressed concern about protecting "majority rule." *Id.* at 66a. It then quoted *Knight* to equate union

elections with majority rule in democratic government. Pet. App. 66a. This is a false analogy for two reasons. First, the winning political party in American elections cannot demand political contributions from those who lost. Second, the idea that the state has an interest in protecting unions runs headlong into *Rutan's* determination that the state has no interest in protecting political parties. The state has no more interest in protecting labor unions than it does political parties. This American election comparison suffers from the additional defect that American elections are held regularly, while union decertification elections are rare. James Sherk, *Unelected Representatives: 94 percent of Union Members Never Voted for a Union*, The Heritage Foundation (August 30, 2016) https://www.heritage.org/jobs-and-labor/report/unelected-representatives-94-percent-union-members-never-voted-union.

The Massachusetts Supreme Judicial Court painted the Educators' claim as a facial challenge to the regime of exclusive representation, and consequently followed *Knight* in adjudicating their case. Implicit in the lower court's opinion is the belief that any constitutional challenge that remotely involves the regime of exclusive representation is automatically barred by *Knight*. That belief ignores the distinction between a union's statutory right to be the exclusive representative in the collective bargaining process and how the union uses that statutory right. Only the second consideration is involved here, and the lower court erred in entertaining the first.

CONCLUSION

This Court should take this case to resolve the split among the lower courts on state action, clarify the level of First Amendment scrutiny that applies in labor relations cases which involve infringement on speech and association rights, and hold that no state interest justifies allowing unions to weaponize their state-granted authority as exclusive representative to force public employees to choose between having a voice and a vote in their working conditions and preserving their political autonomy.

The writ of certiorari should be granted on both questions presented.

Respectfully submitted,

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APPENDIX

APPENDIX A

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November 18, 2014

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RE: ASF-14-3744, Massachusetts Society of Professors/ MTA/NEA, the University of Massachusetts and Ben Branch and William Curtis Conner, Jr.

ASF-14-3919, Hanover Teachers Association/MTA/ NEA, Hanover School Committee and Deborah Curran

ASF-14-3920, Professional Staff Union/MTA/NEA, the University of Massachusetts, and Andre Melcuk

Dear Ms. Davidson, Ms. Bryant, Mr. Cameron, and Mr. Mutschler:

On June 2, 2014, Ben Branch (Branch) filed a charge with the Department of Labor Relations (DLR), alleging that the Massachusetts Society of Professors/ MTA/NEA (MSP) had demanded an agency service fee from him that exceeded his pro-rata share of the costs of collective bargaining and contract administration ("amount allegation"). On August 6, 2014, Branch filed an amended charge to rescind the amount allegation and substitute an allegation that the MSP had demanded an invalid agency service fee, and his amended charge included three other charging parties: William Curtis Conner, Jr. (Conner), Deborah Curran (Curran), and Andre Melcuk (Melcuk)

(collectively, the Charging Parties).[1] All four Charging Parties allege that the unions representing them violated Massachusetts General Laws, Chapter 150E (the Law), Sections 12 and 10(b)(1), and the United States Constitution. They also allege that by virtue of their contractual agreement to an agency service fee provision, their employers have violated Sections 2, 12, 10(a)(3), 10(a)(1), and the United States Constitution.

Procedural Background

Because Branch's and Conner's positions are both in the MSP bargaining unit, the DLR separated their allegations from those that Curran and Melcuk raised. Pursuant to Section 11 of the Law, as amended by Chapter 145 of the Acts of 2007, and Section 15.04 of the DLR's Rules, I investigated the Branch/Conner allegations on August 21, 2014, and investigated the Curran/Melcuk allegations on October 22, 2014.[2]

The Charging Parties submitted affidavits from Branch, Conner, Curran, Melcuk, and four experts: John Balz (Balz), Emily Pitts Dixon (Dixon), Michael Podgursky (Podgursky), and George Nerren

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[1] Branch, Conner and Melcuk are employed by the University of Massachusetts (University). Branch and Conner are in a bargaining unit represented by the MSP, and Melcuk is in a bargaining unit represented by the Professional Staff Union/ MTA/NEA (PSU). Curran works for the the Hanover School Committee (HSC) and her position is in a bargaining unit represented by the Hanover Teachers Association/MTA/NEA (HTA).

[2] Curran and Melcuk subsequently filed separate charges (ASF-14-3919/ASF-14-3920 respectively) but confirmed at the October 22 investigation that they were raising the same issues and arguments as did Branch and Conner.

(Nerren).[3] The Unions and the University objected to all of the affidavits. I admitted the Charging Party and Balz/Dixon affidavits, but gave all of the Respondents time to file a response to the Balz/Dixon affidavits. The Unions subsequently filed a Motion to Strike the Affidavits, which the Charging Parties opposed. I issued a ruling on October 16, 2014, denying the Unions' Motion to Strike. The Unions subsequently filed responsive affidavits on or about November 14, 2014.[4]

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[3] The Charging Parties only submitted the Podgursky and Nerren affidavits in the Curran/Melcuk case. I did not accept those affidavits into the record because neither one contained any information concerning agency service fee payment, issues, or procedures in Massachusetts. I also denied the Charging Parties' request to accept them as an offer of proof. The DLR's rules and procedures for in-person investigations do not require acceptance of offers of proof for rejected evidence, and the in-person investigation was not an adjudicatory proceeding under G.L. c.30A. *See Educational Association of Worcester/MTA/NEA*, 14 MLC 1240, MUPL-3063-71/MUPL-3104 (October 20, 1987). Nevertheless, the Charging Parties filed a post-investigation written offer of proof on October 23, 2014. The PSU and the HTA opposed inclusion of the Podgursky and Nerren affidavits in the record as an offer of proof and, on October 27, 2014, submitted a Motion to Exclude the affidavits. The Charging Parties filed a Reply to the Motion to Exclude that same day. I have not reconsidered either decision.

[4] On November 14, 2014, the Unions submitted affidavits from Susan Lee Weissinger, Esq., Michelle Gallagher, Stephen Lovell, and Maura Sweeney. Because I had only left the record open at that point for affidavits to respond to the Balz/Dixon affidavits, I only accepted into the record the portions of the Weissinger and Gallagher affidavits that corresponded to information in the Balz/Dixon affidavits. I excluded the remainder of the Weissinger and Gallagher affidavits, as well as the Lovell and Sweeney affidavits.

Additionally, all Respondents filed separate motions to dismiss, and the Charging Parties filed oppositions to each motion. Because I have incorporated the arguments contained in the motions and oppositions into this dismissal letter, I do not address these motions separately.

Factual Background

Branch and Conner

Branch and Conner are professors employed at the University of Massachusetts and their positions are in the MSP bargaining unit. The collective bargaining agreement between the University and the MSP, which was in effect by its terms from July 1, 2012 through June 30, 2014, contains an agency service fee provision which requires that each bargaining unit member who elects not to join or maintain membership in the MSP shall be required to pay an agency service fee to the MSP as a condition of employment.

In the 2013-2014 school year, as in prior years, Branch and Conner have declined to join the MSP. Conner believes that union representation is not in his best interests, and he does not need or want the MSP to represent him. He believes that the MSP advocates for political causes which are inconsistent with his views, supports political candidates whom he does not support, and he opposes supporting activities that are contrary to his political and ideological preferences. Conner participated in an earlier agency service fee case at the Labor Relations Commission (LRC),[5] *(Springfield Education Association*

[5] The LRC was the predecessor agency to the DLR. Pursuant to Chapter 145 of the Acts of 2007, the DLR has all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the LRC. The Commonwealth

et. al. and James J. Belhumeur et. al., 23 MLC 233, ASF-2143 et. al. (April 23, 1977), *aff'd in part*, *rev'd in part*, *sub nom.*, *Belhumeur v. Labor Relations Commission*, 432 Mass. 458 (2000), *cert. denied* 532 U.S. 904 (2001) (*Belhumeur*)), and is aware of the duration of the litigation of that case. Similarly, Branch believes that he and the MSP have dissimilar views on political causes, political candidates, approaches to compensation, and rules for work, promotion and tenure. Branch was also involved in the *Belhumeur* litigation.

Branch and Conner have filed agency service fee charges with the DLR in prior years and have settled those cases with the MSP. In their settlements, Branch and Conner have agreed to pay a fee that constitutes 55% of the MSP dues. This amount is less than the agency service fees that the MSP had initially demanded in those years.

On April 14, 2014, the MSP demanded that Branch and Conner pay an agency service fee for the 2013-2014 school year. The demands were apportioned as follows: MSP: $203.90; MTA: $325.84; NEA: $64.76.

Curran

Deborah Curran is a middle school teacher in the Hanover public school system. In or about 2002, Curran discontinued her membership in the HTA because she opposes its politics and policies and believes that they clash with her religious and political beliefs. In 2010, she had a dispute with the HTA surrounding her use of sick time. This dispute prompted Curran to file a prohibited practice charge

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Employment Relations Board (CERB) is the DLR agency charged with deciding adjudicatory matters, and references to the CERB include the LRC.

at the DLR against the HTA alleging that the HTA had breached its duty to represent her fairly in that situation.[6]

Although the HTA had sought the inclusion of an agency service fee provision in prior successor contract negotiations, the 2012-2015 collective bargaining agreement between the HSC and the HTA is the first contract that contains a provision requiring non-members to pay an agency service fee. The HSC agreed to it as part of a package of proposals that settled that contract, and there was no connection between the HSC's decision to accept the proposal and Curran. The agency service fee provision states that: "[t]he Committee shall not be obligated to take any action in regard to the employment of employees delinquent in the payment of such fees. Bargaining unit members who fail to pay the agency service fee shall not be subject to dismissal or suspension, but the Association may pursue payment through whatever legal means it deems appropriate."

The HTA distributes surveys to all bargaining unit members, including non-union members, prior to successor collective bargaining negotiations. Curran has only received one such survey, and that was during the most recent round of negotiations.

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[6] The HTA asked me to take administrative notice of the record in Curran's prohibited practice case (MUPL-10-4676, HTA), and Curran did not oppose this request. Curran charged the HTA with breaching its duty of fair representation when the HTA president notified the Hanover school superintendent that Curran was allegedly using sick leave in a contractually improper way and asked the Superintendent to intervene. The DLR issued a complaint of prohibited practice which the parties subsequently settled.

On April 10, 2014, the HTA demanded a fee from Curran that it apportioned as follows: HTA: $0[7]; MTA: $325.84; NEA: $64.76.

Melcuk

Melcuk is employed as Director of Departmental IT at UMass Amherst and is in the PSU bargaining unit. Melcuk has declined to join or financially support the PSU because he has "philosophical, political, emotional, ethical, and psychological" objections to labor unions. Melcuk believes that he earns a lower salary because his position in a bargaining unit, and that the contract between the University and the PSU has hindered salary increases for him. The PSU challenges Melcuk's claim that he could negotiate a higher salary if his position was not in the PSU bargaining unit because there is an "equity review" procedure in the contract by which unit members can advocate for a salary increase directly with the University. The initial step in the equity review process does not require PSU involvement, but if the University denies the requested increase, the PSU must participate in any appeal. The PSU acknowledged at the investigation that some department managers have cited the PSU contract as a reason for denying requested salary increases.

The PSU distributes surveys to all bargaining unit members, including non-union members, prior to successor collective bargaining negotiations.[8] The PSU also holds bargaining status update meetings for bargaining unit members, and those meetings are open to non-members.

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[7] The HTA did not demand a fee because it did not conduct the requisite independent audit of its revenue and expenses.

[8] Melcuk did not recall receiving this survey.

The collective bargaining agreement between the PSU and the University contains a provision requiring non-members to pay an agency service fee. Melcuk has objected to the amounts that the PSU has demanded in previous years, and he and the PSU have resolved the disputes by agreeing to a 55% reduction from full dues – an amount which is less than what the PSU initially demanded. On March 7, 2014, the PSU demanded a fee that was apportioned as follows: PSU: $106.36; MTA: $325.84; NEA: $64.76.

Common Facts

The MTA maintains a rule stating that that if bargaining unit members elect to pay an agency fee rather than become a member of the local association, MTA, and NEA, the non-member will not be entitled to certain services and benefits which are available only to MTA/NEA members, such as attendance at union meetings or involvement in any other union activities. These activities and meetings include participating on local bargaining teams; and voting on the election of officers, bylaw modifications, contract proposals and/or bargaining strategy.

None of the Charging Parties are facing discipline from their employer in connection with the agency service fee demands.[9]

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[9] The University raises the disciplinary issue to argue that the charges are prematurely filed against it since the University has not sought to discipline Conner, Branch, or Melcuk. However, DLR Rule 17.16(2), 456 CMR 17.16(2) prohibits employers from sanctioning fee payers for failing to pay the fee once they file a charge and establish any necessary escrow account. Also, as previously noted, the 2012-2015 contract between the HTA and the HSC does not require the HSC to

General Allegations

The Charging Parties acknowledge that the Law mandates dismissal of their charges; their goal here is to change the Law. Their charges are a facial challenge to the system of compulsory service fees contained in Section 12 of the Law, which they argue is unconstitutional for various reasons.[10] They also challenge the constitutionality of the scheme of exclusive representation embodied in Section 5. The Charging Parties recognize that the DLR can only rule on allegations that the Respondents violated G.L. c.150E and cannot separately address their constitutional allegations. *See Town of West Springfield*, 21 MLC 1216, 1222-1223 MUP-7465 (August 19, 1994) (not all constitutional claims arising out of agency fee disputes are properly brought before the CERB; CERB's role is to determine the effect of conduct on an employee's rights guaranteed under Chapter 150E and not on an employee's constitutional rights.) Consequently, I limit my analysis to whether the Unions' demands violated G.L. c.150E.

As a threshold issue, I address the Respondents' claim that the DLR has no jurisdiction over the Charging Parties' charges. As previously noted in my ruling on the Motion to Strike, I disagree. Although the Charging Parties readily admit that their charges are a facial challenge to the constitutionality of Section 12, they raised allegations at the investigation that the service fees demanded violate specific

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impose sanctions on fee payers who fail to pay the fee demanded.

[10] The Charging Parties do not allege that the 2013-2014 demands were excessive or deficient in any other way, and presented no evidence to that effect.

provisions of the Law, i.e. that prohibiting non-members from joining a union negotiating team, while simultaneously requiring service fees, violates Section 10(b)(1) of the Law by coercing employees in the exercise of their rights to non-membership; and that the employers' agreement to a contractual service fee provision violated Section 10(a)(3) by unlawfully retaliating against employees for non-membership. Further, the fact that the Charging Parties raise constitutional issues does not necessarily divest the DLR of jurisdiction because the CERB's practice is to apply Section 12 of the Law constitutionally, using decisions of the United States Supreme Court to guide its construction of the Law. *See Malden Education Association*, 15 MLC 1429, 1432, MUPL-2951 (February 2, 1989). Despite a preference for judicial resolution of certain claims, *see Harrison v. Massachusetts Society of Professors*, 405 Mass. 56, 60 n.5 (1989), the SJC has not held that the DLR has no jurisdiction to handle cases that challenge service fees on constitutional and statutory grounds. Finally, these cases contain factual issues that are appropriate for the agency's consideration, i.e. the extent to which the unions allow or prohibit fee payers from participating in the negotiations process, or Melcuk's ability to seek a salary increase directly from his employer through the equity review process.

I also dismiss the Employers' arguments that the charges are untimely. All four charges were filed within six months of the date of the service fee demand, and the period of limitations runs from the date of the demand, not the date that the contractual service fee provision was ratified. *See* DLR Rule 17.06(2), 456 CMR 17.06(2).

1. Specific Allegations against the Employers

In *Chicago Teachers Union, Local 1, AFT, AFL-CIO v Hudson*, 475, U.S. 292, 307, n. 20 (1986), the U.S. Supreme Court stated that since the agency shop itself is a significant impingement on 1st Amendment rights, *the government and union* have a responsibility to provide procedures that minimize that impingement and that facilitate a nonunion employee's ability to protect his rights (emphasis added). The Charging Parties cite this language to argue that employers share a union's obligation to ensure the lawfulness of any agency service fee demanded and also share liability for unlawful conduct. The Charging Parties argue that without an employer's contractual agreement to an agency service fee provision, unions could not demand a fee, and they note that including a fee provision in a collective bargaining agreement empowers a union to initiate a debt suit against a non-member for non-payment. Consequently, the Charging Parties contend that the Employers here have violated Sections 2, 12, 10(a)(1), 10(a)(3) of the Law, and the 1st and 14th Amendments to the U.S. Constitution.

I disagree. In *Mary Hogan v. Labor Relations Commission*, 430 Mass. 611 (2000), a decision that issued after the *Hudson* decision, the SJC addressed the question of whether the employer violated G.L. c.150E by proposing to suspend an employee for nonpayment of a fee that the union unlawfully sought to collect. Mary Hogan specifically cited the *Hudson* reference to joint employer/union liability, yet the SJC decided that an employer does not violate G.L. c.150E by following the agency service fee provisions of its collective bargaining agreement. *Hogan v. LRC*, 430 Mass at 615. In *Town of West*

Springfield, 21 MLC at 1222, the CERB similarly and expressly rejected the Charging Parties' argument that *Hudson's* "government and union" language makes public employers liable for a union's unlawful agency service fee collection procedures. Therefore, even if I found probable cause to believe that the Unions violated the Law by the fees they demanded for the 2013-2014 school year, I would dismiss the allegations against the University and the HSC.

Further, the charging parties in *Hogan* and *West Springfield* alleged, like the Charging Parties here, that the Employers' actions violated Sections 10(a)(3) and 10(a)(1) of the Law. But even if those decisions were not controlling, the Charging Parties did not provide evidence here to establish that the Employers' involvement in the agency service fee demand was specifically motivated by a desire to penalize or discourage the Charging Parties from engaging in protected, concerted activity. The HSC presented evidence that there was no nexus between Curran and the new agency service fee provision in its 2012-2015 collective bargaining agreement, and that the service fee provision was part of a package of proposals that the HSC accepted to conclude the contract. Thus, the Charging Parties have not established a prima facie case of unlawful discrimination. *See generally, Trustees of Forbes Library v. Labor Relations Commission*, 384 Mass. 559 (1981).

2. Specific Allegations against the Unions

A. Exclusive Representation

The Charging Parties challenge the concept of exclusive representation as a burden on their 1st Amendment right of association, and argue that they should not be encumbered by the collective bargain-

ing agreement or otherwise prohibited from negotiating terms and conditions of employment unilaterally and individually with their employers. However, Section 5 of the Law expressly gives unions the power of exclusive representation, which the SJC has characterized as a "basic building block of labor law policy under G.L. c.150E." *Service Employees International Union, AFL-CIO, Local 509 vs. Labor Relations Commission*, 431 Mass. 710, 715 (2000). Consequently, I dismiss this allegation.[11]

B. Compulsory Agency Service Fees

The Political Nature of Public Sector Collective Bargaining

The Charging Parties argue that Section 12 of the Law is unconstitutional under the 1st Amendment because it requires the Charging Parties to pay compulsory union fees as a condition of employment even though they have decided not to join or financially support the union. They contend that forced payments severely impinge on their 1st Amendment rights because the Unions' chargeable expenses concern matters of great public importance due to the

[11] Also, Section 5 of the Law allows employees to present disputes over contractual terms and conditions of employment to the employer and have such disputes heard without union intervention, provided that the union receives the opportunity to be present at such conferences, and that any adjustment made is not inconsistent with the collective bargaining agreement between the employer and the union. *See Avon School Committee*, 7 MLC 2106, MUP-3864 (May 6, 1981). Consequently, the statutory scheme of exclusive representation does not prohibit all direct communication between individual employees and the employer regarding terms and conditions of employment.

inherently political character of collective bargaining in the public sector.

I summarily dismiss this allegation because the SJC recognizes that the statutory agency service fee requirement burdens fee payers' 1st amendment rights, yet still requires fee payers to pay their fair share of certain political expenses. *James J. Belhumeur et. al. v. Labor Relations Commission*, 432 Mass. at 469, 472 (funds used to reimburse the local union for expenses incurred in connection with a local Proposition 2 1/2 override campaign were chargeable because the union sought to obtain the public money necessary to fund the teachers' collective bargaining agreement; overhead expenses such as rent and accounting fees pose no additional burden on the non-member's 1st Amendment rights other than that imposed by the agency shop itself.) Nevertheless, "it is well settled that public employees who are not union members may be required, as a condition of their employment, to pay an agency fee to their collective bargaining representative to support the costs of the bargaining process, contract administration, and grievance adjustment." *Id*. Because the SJC acknowledges that there are political overtones to public sector collective bargaining that are properly reflected in certain chargeable expenses, there is no probable cause to believe that the Unions violated the Law in the manner alleged, and I dismiss this allegation.

Permissible Use of the Opt-out System

The Charging Parties next argue that Section 12 is unconstitutional on its face because it requires non-members to pay an agency fee unless the employee affirmatively and annually objects. At the investigation, the Charging Parties characterized this as an

"opt-out" system, because the employees must take affirmative action to avoid paying monies that support the Unions' political activities.[12]

In *Knox et. al. v. Service Employees International Union, Local 1000*, 567 U.S. 132 S. Ct. 2277, 2291 (2012), the U.S. Supreme Court noted that its prior decisions had permitted the use of an opt-out system for the collection of fees to cover non-chargeable expenses. In *School Committee of Greenfield v. Greenfield Education Association*, 385 Mass. 70, 85 (1981), the SJC stated that "[w]e construe Section 12 to give the dissenting employee the option of bringing a prohibited practice complaint before the [CERB] if the employee wishes to challenge the fee amount." Because these cases uphold the practice of requiring non-members to take affirmative action to avoid payment of non-chargeable expenses, there is no probable cause to believe that the Unions violated the Law by requiring that they do so here.[13]

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[12] The Charging Parties characterize the existing agency service procedure as an opt-out system because non-union members must pay the fee demanded unless they file a charge to challenge the fee and any non-chargeable expenses that they believe it contains. The Charging Parties contend that under an opt-in system, they would not be required to pay anything or challenge anything unless the Unions first establish at the DLR that the fee does not include any non-chargeable expenses. At the investigation, the Unions questioned the characterization of the current procedure as an opt-out system. However, there is no dispute that a non-member is obligated to pay the amount of the fee unless the fee payer challenges the fee at the DLR. Consequently, I assume for purposes of this probable cause dismissal that the existing procedure is what the Charging Parties characterize as an "opt-out" system.

[13] My conclusion that the Law permits the use of an opt-out system renders any consideration of the Balz affidavit unnecessary. Consequently, I have not relied on any facts or

Nor did the Union violate the Law by settling prior agency service fee cases with the Charging Parties for less than the fee initially demanded. The Charging Parties argue that this practice requires them to not only object to the fee demanded, but initiate litigation to procure the lowest possible payment. Questions of timeliness aside, there is no probable cause to believe that this process or result is unlawful. An employee who objects to the amount of the fee must voice that objection by filing a prohibited practice charge with the DLR; it is the minimal burden necessary to signal their complaint. There is nothing unlawful about offering and accepting a lesser amount to compromise claims and avoid litigation and thereby ensure that disputed fees are not tied up any longer than necessary in escrow.

The Complex Nature of Agency Service Fee Litigation

The Charging Parties next argue that the agency fee demand is a prohibited practice under Sections 2, 12, and 10(b)(1) of the Law and is unconstitutional under the 1st and 14th Amendments because it requires public employees who oppose joining or financially supporting the union to pay the amount of fees demanded unless the employee engages in expensive and protracted litigation to challenge it.

In *Belhumeur*, 432 Mass. at 463, the SJC noted that the CERB had issued its initial decision nearly eight years after the fee payers in that case had filed their prohibited practice charges. The SJC issued its decision three years after the CERB decision, noting that the litigation required the CERB to receive and

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opinions that it contains and have given it no weight. For the same reason, I have not considered the counter affidavits that the Unions submitted in response.

examine a "great deal" of evidence: approximately 1,400 documents from the Charging Parties alone. *Id*. at 464. I take administrative notice of the fact that the parties subsequently sparred over compliance issues for an extended period of time before the case was finally concluded and payments were released from escrow in or about 2002. [14] However, the *Belhumeur* Court ultimately found that the eight year time span from charge to CERB decision was a "reasonably prompt" decision, and did not find that the complexity of the litigation rendered the fees unconstitutional. *Id*. at 463. The Charging Parties have cited no case, and I know of none, that holds that the time and expense of litigation to challenge particular conduct renders the conduct unlawful under G.L. c.150E.[15] Consequently, I find that the

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[14] The SJC's commentary as well as the DLR's own records adequately demonstrates the complexity of the *Belhumeur* case; consequently, I need not consider the facts and opinions expressed in the Dixon affidavit regarding that case. I also need not and have not relied on the facts and opinions expressed regarding the U. S. Supreme Court cases cited. The complexity of an agency service case largely depends on the issues raised, i.e. the procedures surrounding ratification of a contract with a service fee provision, the information provided with the demand, the expenses that a union seeks to charge, as well as those that a fee payer decides to challenge, and not every case requires or involves agency or judicial resolution. Consequently, I have not relied on any facts or opinions in the Dixon affidavit and have given it no weight. For the same reason, I have not considered the counter affidavits that the Unions submitted in response.

[15] Melcuk states that in 2013, the PSU demanded service fees for four years at one time, and he asserts that this practice makes service fee payment unconstitutionally burdensome. I decline to consider the lawfulness of the earlier 2013 demand because challenges to it are untimely. *See* DLR Rule 17.06(2), 456 CMR 17.06(2).

administrative procedures necessary for challenging a service fee are not unlawful.

The Union's Membership Rules

Finally, the Charging Parties argue that Section 12 is unconstitutional as applied under the 1st and 14th Amendments because it requires the Charging Parties to pay fees to the Unions for collective bargaining and contract administration even though they cannot participate in Union activities such as having a voice or a vote on selecting bargaining representatives, contract proposals or bargaining strategy that influences their terms and conditions of employment.[16] Because the DLR only adjudicates alleged violations of G.L. c.150E and not constitutional claims, I consider whether the Union's practice of excluding the Charging Parties from bargaining teams, or meetings that address contract proposals or bargaining strategy violates Section 10(b)(1) of the Law.

Generally, the CERB will not interfere with union rules or actions that are within the legitimate domain of internal union affairs. *National Association of Government Employees*, 13 MLC 1525, 1526, SUPL-2343, 2344, 2345, 2346 and 2347 (March 12, 1987); *Bertram Switzer v. Labor Relations Commission*, 36

[16] The PSU and the HTA presented evidence that they distribute surveys to all bargaining unit members, including non-union members, prior to successor collective bargaining negotiations. The PSU also holds bargaining status update meetings for bargaining unit members, and those meetings are open to non-members. However, even if Curran and Melcuk could have communicated their views by returning the survey form, or if Melcuk had attended a bargaining status update meeting, they still could not have participated on the team that made strategic decisions during the give and take of negotiations.

Mass. App. Ct. 565, 568 (1994). However, a union's freedom to regulate its internal affairs must give way to certain overriding interests implicit in the Law. *NAGE*, 13 MLC at 1526. The CERB has found such an overriding statutory policy in: testimony on behalf of an employer at a DLR proceeding, *Brockton Education Association*, 12 MLC 1497, MUPL-2740, 2777, 2778 (January 7, 1986); the CERB's role in determining appropriate bargaining units, *Johnson and McNulty*, 8 MLC 1993, MUPL-2049, 2050 (March 23, 1982), aff'd sub nom. *Boston Police Patrolmen's Association v. Labor Relations Commission*, 16 Mass. App. Ct. 953 (1983); and prohibiting strikes, *Luther E. Allen, Jr.*, 8 MLC 1518, 1524, SUPL-2024, 2025 (November 13, 1981). The legitimacy of a union's action turns on the relative weight to accord the various issues at state. *NAGE*, 13 MLC at 1527.

Here, the MTA's membership rules may interfere with the Charging Parties' right not to join the Unions because those rules prohibit non-members from participating on the Unions' bargaining teams and thereby having a voice in determining their terms and conditions of employment. The Unions have an interest in managing their internal affairs, including restricting the roles and positions available to non-members. *See N.L.R.B. v. Financial Institution Employees of America, Local 1182*, 475 U.S. 192, 205 (1986) (union members may properly control the shape and direction of their organization, and non-member employees have no voice in the affairs of the union); *see also*, *Southern Worcester County Regional Vocational School District vs. Labor Relations Commission*, 377 Mass. 897, 904 (1979) (selection of the union negotiating team was an internal union matter.) Thus, the MTA's rules prohibiting non-members from joining its bargaining team are within

the legitimate domain of internal union affairs. Although an employee's right to refrain from joining the union free from interference, restraint or coercion is an important policy consideration under the Law, it does not override the Unions' interests in maintaining this membership rule.

The Union interests that its membership rules seek to protect is selecting the team that plays a pivotal role in the bargaining process by assembling proposals; determining priorities and strategies; and accepting or rejecting individual proposals and tentative agreements, subject to ratification by the membership. To prioritize the Charging Parties' interests over the Unions' interests would effectively require the Unions to cede the discretionary, decision-making power of the committee that governs their primary representational role to employees who either oppose the Unions or decline to support them financially. The Law does not compel this result.

In *NAGE*, *supra*, the CERB balanced the charging parties' right to file a decertification petition against the union's interest in promulgating rules to preserve its status as the exclusive representative, and held that the union could lawfully exclude employees who had filed a decertification petition from membership. Though the Charging Parties here have not filed a decertification petition, their perspectives are comparable to the charging parties who opposed the union in *NAGE*. Conner believes that Union representation is not in his best interests and rhetorically questions why he would need or want a labor union to represent him. Branch states that he and the MSP have dissimilar views on political causes, political candidates, approaches to compensation, and rules for work, promotion and tenure. Melcuk has philo-

sophical, political, emotional, ethical, and psychological objections to labor unions. Curran has similar concerns, and has charged the HTA with breaching its duty to represent her fairly because of her non-membership. Here as in *NAGE*, the Unions' interests in establishing membership rules governing the composition of the committee that determines the parameters, strategic direction, and results of bargaining outweighs the interests of non-members. *See generally, Daniel A. George vs. Local Union No. 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO*, 134 L.R.R.M. 3241(1990) *aff'd in part and rev'd in part on other grounds*, 100 F. 3d 1008 (D.C. Cir.1996) (union did not breach duty of fair representation by failing to appoint a self-proclaimed dissident to its negotiating committee); *see also, Minnesota State Board for Community Colleges et. Al. v. Leon Knight et. al. v. Minnesota Community College Faculty Association et. al.*, 465 U. S. 271, 289 (1984) (union could lawfully refuse to appoint non-members to "meet and confer" committees to discuss non-mandatory subjects of bargaining with the employer). Section 2 of the Law allows the Charging Parties to decline Union membership, but it does not simultaneously entitle them to assume a leadership role in the Union.

Finally, I note that the Charging Parties are not shut out of the process altogether since they can vote on whether or not to ratify the collective bargaining agreement that a union's bargaining team negotiates. *See* DLR Rule 17.03(1), 456 CMR 17.03(1). Consequently, their involvement in determining their terms and conditions of employment is no more limited than that of any union member who is not on the bargaining team.

Therefore, the Charging Parties' interests in declining Union membership do not prevail over the Unions' interests in setting membership rules restricting non-member participation on bargaining teams. Accordingly, there is no probable cause to believe that the MTA's membership rule unlawfully interferes with, restrains or coerces the Charging Parties in the exercise of their rights under the Law.

Conclusion

For the reasons stated above, there is no probable cause to believe that the Unions' demands for an agency service fee from the Charging Parties for the 2013-2014 school year violated the Law. Nor is there probable cause to believe that any action of the Employers violated the Law. Accordingly, I dismiss all of the allegations in the Charging Parties' charges.

Very truly yours,

DEPARTMENT OF LABOR RELATIONS
/s/ Susan L. Atwater, Esq.
Susan L. Atwater, Esq.
Investigator

APPEAL RIGHTS

The charging party may, within ten (10) days of receipt of this order seek a review of the dismissal by filing a request with the Commonwealth Employment Relations Board, pursuant to Department Rule 456 CMR 15.04(3). The request shall contain a complete statement setting forth the facts and reasons upon which such request is based. The charging party shall include a certificate of service indicating that it has served a copy of its request for review on the opposing party or its counsel. Within seven (7) days of receipt of the charging party's request for review, the respondent may file a response to the charging party's request.

APPENDIX B

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
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19 STANIFORD STREET
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[LOGO]

February 23, 2015

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RE: ASF-14-3744, Massachusetts Society of Professors/ MTA/NEA, the University of Massachusetts and Ben Branch and William Curtis Conner, Jr.

ASF-14-3919, Hanover Teachers Association/MTA/ NEA, Hanover School Committee and Deborah Curran

ASF-14-3920, Professional Staff Union/MTA/NEA, the University of Massachusetts, and Andre Melcuk

Dear Ms. Davidson, Mr. Cameron, Mr. Mutschler and Ms Bryant:

The Commonwealth Employment Relations Board (CERB) has reviewed the dismissal letter that a Department of Labor Relations (DLR) Investigator (Investigator) issued in the above-captioned matters on November 18, 2014. After reviewing the investigation record, the dismissal and the Charging Parties' arguments on review, the CERB affirms the dismissal in its entirety.

Background

The three charges set forth above were consolidated for dismissal and review.[1] Although each charge was brought by different charging parties (Charging Parties)[2] against different unions (Unions)[3] and employers,[4] the charges raise identical allegations and arguments, i.e., that the agency service fee demands the Union made violate Sections 2, 12, and 10(b)(1), of M.G. L. c. 150E (the Law) and the U.S. Constitution. The charges also allege that their respective employers violated Sections 2, 12, 10(a)(1) and 10(a)(3) of the Law and the U.S. Constitution by entering into collective bargaining agreements (CBAs) that contain agency service fee provisions. The Charging Parties do not allege, however, that the specific 2013-2014 demands that the Unions made were excessive or deficient under Chapter 150E and its regulations. *See*, *generally*, Section 12 of the Law; 456 CMR 17.00, *et. seq*. Nor are any of the Charging Parties facing discipline in connection with an agency service fee demand.

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[1] The November 18, 2014 dismissal letter sets forth the exact dates on which the various charges were filed or amended.

[2] Ben Branch (Branch) and William Conner (Conner), who are both professors at the University of Massachusetts (University) and represented by the Massachusetts Society of Professors/ MTA/NEA (MSP); Deborah Curran (Curran), a teacher employed by the Hanover School Committee (School Committee) and represented by the Hanover Teachers Association/MTA/ NEA (HTA); and Andre Melcuk, who is employed by the University and represented by the Professional Staff Union/MTA/NEA (PSU).

[3] The MSP, HTA and PSU.

[4] The University and the School Committee (collectively, the Respondents).

The same Investigator investigated all three charges. She conducted an in-person investigation of ASF-14-3744 (Branch/Conner charge) on August 21, 2014, and ASF-14-3920 (Melcuk charge) and ASF-14-3919 (Curran charge) on October 22, 2014. She issued the dismissal letter addressing all three charges on November 18, 2014. The Charging Parties filed a single appeal and supporting supplementary statement on November 25, 2014 pursuant to DLR Rule 456 15.04(3).[5] After requesting and receiving an extension of time in which to reply to the appeal, the Unions filed an opposition to the request for reconsideration on December 12, 2014. On the same day, they filed a motion for the CERB to consider affidavits and portions of affidavits that the Investigator did not consider for reasons described below. The Charging Parties filed a motion to strike the Unions' motion on December 16, 2014 and the Unions filed an opposition to the motion to strike on December 18, 2014. The Respondent Employers did not file responses to any of post-dismissal pleadings filed by the Unions or the Charging Parties.

Before turning to the merits of the appeal, the CERB addresses the evidentiary issues raised by the Unions and the Charging Parties.

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[5] DLR Rule 15.04 (3) states in pertinent part:

> If, after a charge has been filed the [DLR] declines to issue a complaint, it shall so notify the parties in writing by a brief statement of the procedural or other ground for its determination. The charging party may obtain a review of such declination to issue a complaint by filing a request therefor with the [CERB] within ten days from the date of receipt of notice of such refusal. Within seven days of service of the request for review, any other party to the proceeding may file a response with the CERB. . . .

Unions' Motion to Consider Affidavits

The Unions ask the CERB to include in the investigatory record and consider the affidavits it submitted from HTA President Stephen Lovell (Lovell), PSU Consultant Maura Sweeney (Sweeney), MSP Consultant Michele Gallagher (Gallagher) and MTA General Counsel Susan Lee Weissinger (Weissinger). The Investigator accepted certain portions of the Gallagher and Weissinger affidavits and excluded others, but declined to accept the Lovell and Sweeney affidavits at all. For the reasons set forth below, the CERB upholds the Investigators' rulings on the affidavits in question.

Background

During the in-person investigation of the Branch/Conner charge on August 21, 2014, the Charging Parties submitted affidavits from Branch and Conner, as well as two individuals who are not charging parties, economist Dr. John Balz (Balz) and Emily Pitts Dixon (Dixon).[6] The Investigator accepted

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[6] As described in the Ruling on the Motion to Strike, Balz's affidavit contains his "professional" opinion that the default "opt out" choice structures at issue in this case affects agency fee payers' conduct such that "an unknown number of employees are giving up their legal interests and political money that they would not otherwise give."

Dixon works for the National Right to Work Legal Foundation (Foundation), which represents the Charging Parties in this case. The Foundation also represented the charging parties in *Springfield Educ. Association, MTA/NEA, et. al. and James J. Belhumeur et. al*, 23 MLC 233, AFS-2143 *et. seq*. (April 23, 1997) *aff'd in part, rev'd in part, sub. nom., Belhumeur v. Labor Relations Commission*, 432 Mass. 458 (2000) (*Belhumeur*). *Belhumeur* was a challenge to an agency service fee imposed by the MTA and its local affiliate that, as the SJC described, involved "a large number of factual and legal issues involving

the affidavits over the objection of the MSP and the University,[7] but allowed them time to file a response. The MSP filed a motion to strike the Charging Parties' affidavits on September 23, 2014. Branch and Conner filed a response. The Investigator issued a ruling denying the motion to strike on October 16, 2014 and the MSP did not ask for reconsideration or review.

The Investigator separately notified the parties that she was leaving the record open until November 14, 2014 for the Union to provide counter affidavits to the Dixon and Balz affidavits. The Unions submitted the Sweeney, Lovell, Gallagher and Weissinger affidavits on November 14, 2014. The Charging Parties did not object to the submission of any of these affidavits.

On November 17, 2014, the Investigator notified the parties by email that she was allowing those parts of the Weissinger and Gallagher affidavits that pertained to the Dixon and Balz affidavits[8] and excluding the remainder of the affidavits.

The Investigator also notified the parties that she was excluding the Lovell and Sweeney affidavits. These affidavits relate to the charges filed by Curran

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voluminous evidence." *Id.* at 463-464. Dixon's affidavit detailed the number of attorney hours, support staff hours and expenses incurred in various cases brought by the Foundation, including *Belhumeur*. The Investigator expressly declined to rely on any of the facts or opinions in the Dixon affidavit and, thus, gave it no weight.

[7] The Investigator made clear, however, that she gave no weight to the Balz affidavit because she did not consider it to be outcome determinative.

[8] The Investigator listed the numbered paragraphs she was accepting into the record.

and Melcuk. The Investigator stated and the Unions do not dispute that Curran and Melcuk had submitted affidavits "well before" the October 22, 2014 in-person investigation into their charges. Because both Lovell and Sweeney were present at the in-person investigation, the Investigator reasoned that Lovell and Sweeney could have provided the information contained in their affidavits at the investigation. The email further indicated that the record was now closed. The Investigator issued the dismissal letter the next day.

The Unions request that the CERB consider all the evidence presented to the Investigator. They specifically assert that the Charging Parties' stated goal is to exhaust their administrative remedies and have their matters reviewed in a federal appeals court. The Unions therefore argue that the record should be as complete as possible for this review. The Unions further argue that it was unfair or improper for the Investigator to:

1) Deny their motion to strike the Charging Parties' affidavits but exclude the Unions' affidavits, to which no party has objected;

2) Deny Lovell and Sweeney's affidavits on grounds that they were present at the in-person investigation, but accept affidavits from parties who were also present at the investigation, i.e., Curran, Melcuk, Branch and Conner;

3) Exclude portions of Gallagher and Weissinger's affidavits. The Unions claim that their affidavits "refute many of the allegations" submitted by the Charging Parties and there-

> fore the appellate body should have an opportunity to review all the evidence.

In response, the Charging Parties claim that the Unions' motion is untimely because it was not filed within ten days of the Investigator's dismissal as required by DLR rules.[9] The Unions reply that they did not file an appeal from the dismissal because the Investigator dismissed all of the Charging Parties' allegations and there was, therefore, nothing for them to appeal.

Ruling

Preliminarily, the CERB agrees with the Unions that their motion is not untimely but rather was appropriately raised after the Charging Parties filed their request for review. On the merits, however, the CERB has reviewed the Investigator's rulings and finds no error.

The DLR has established procedures that govern the conduct of in-person investigations (Investigation Procedures).[10] Part B.1 of the Investigation Procedures states that "the purpose of the In-Person investigation is to determine whether or not probable cause exists to issue a Complaint." Part B. 5 states

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[9] The Charging Parties mistakenly cite the operative rules as 456 CMR 13.15 (1) and (3). However, these rules relate to appeals of full hearing officer decisions, not pre-complaint dismissals of charges for lack of probable cause. As set forth in n. 5, and in the appeals language at the bottom of the dismissal letter, the rule governing appeals of an investigator's refusal to issue a complaint is Rule 15.04 (3). In both situations, however, the aggrieved party has ten days in which to file an appeal with the CERB.

[10] Available at: http://www.mass.gov/Iwd/labor-relations/procedures/investigation/ (last accessed on February 20, 2015).

that the investigator expects the parties at an investigation "to appear accompanied by individuals with first-hand knowledge of the facts and circumstances related to the charge." Part C.1, "Documentary Evidence," states, in part, that "parties are NOT REQUIRED to provide sworn affidavits from witnesses with personal knowledge of the facts alleged in the initial charge." (Emphasis in original). Part B.6 states that parties "may submit relevant documents for consideration by the Investigator" and that parties who do so "should do so well in advance of the In-Person Investigation." Part B.6 finally states that, "[a]bsent good cause, the Investigator will not accept or consider additional submissions after she or he has declared the Investigation is closed."

Here, when the Charging Parties submitted the Balz and Dixon affidavits for the first time at the Branch/Conner investigation, the Investigator reasonably allowed the Unions time to respond to them. The Unions responded with a motion to strike. Although the Investigator denied the motion, she then reasonably, if not generously, left the record open for another four weeks to allow the Unions time to file their responsive affidavits. Upon receiving them, and consistent with the grounds on which she left the record open, the Investigator allowed into the record only those portions that she found pertained to information in the Balz and Dixon affidavits and excluded the rest. Although the Unions claim, generally, that the excluded portions refute "many allegations" made by the Charging Parties, they do not contend that the excluded portions pertain specifically to the Balz and Dixon affidavits. Under these circumstances, the CERB finds no basis to overturn the Investigator's decision to exclude those portions of the affidavits that did not comport with

her instructions. The possibility that there will be judicial review of the dismissal decision exists in every matter that comes before the DLR and the CERB. See c. 150E, § 11(f) ("Any party aggrieved by a final order of the board may institute proceedings for judicial review in the appeals court within 30 days after receipt of the order."). Therefore, the Unions' general assertion that the Gallagher and Weissinger affidavits contain additional information that should be before the appellate body does not constitute good cause to allow parties to submit affidavits that exceed the express purpose for which the record was left open.

Lovell and Sweeney affidavits

Similar considerations inform our denial of the Unions' motion to admit the Lovell and Sweeney affidavits. The DLR's procedures make clear that parties are expected to make all of their arguments and provide all relevant evidence before or at the in-person investigation. Here, where the Charging Parties submitted the Melcuk and Curran affidavits before the in-person investigation, the Investigator did not err by excluding the Unions' counter affidavits that were filed months later and contained facts that could have been provided through live witnesses at the in-person investigation.

Finally, to the extent the Unions argue that the Investigator unfairly accepted the Charging Parties' affidavits but improperly excluded theirs, the CERB finds generally that the Investigator's thoughtful and reasoned basis for all of her rulings dispel any claims of unfairness. Further, the Investigator also rejected two affidavits that the Charging Parties submitted from Dr. Michael Podgursky (Podgursky) and Dr. George Nerren (Nerren). As explained below, the

CERB rejects the Charging Parties' assertion that this was improper.

Exclusion of Podgursky and Nerren Affidavits

The Charging Parties sought to submit these affidavits in connection with the Curran and Melcuk charges. As set forth in footnote 3 of the dismissal letter, the Investigator did not accept the affidavits because she concluded that neither one contained any information concerning agency service fee payment, issues or procedures in Massachusetts. She also rejected the Charging Parties' subsequent offers of proof and did not consider either the Unions' motion to exclude the affidavits or the Charging Parties' reply to that motion.[11]

The Charging Parties claim the Investigator's ruling was improper and argue that the information contained in the affidavits is relevant to their argument that avoiding the problem of free riders is no longer a valid justification for agency service fees. As the Investigator noted, however, neither affidavit addressed whether the respondents' actions violated specific provisions of the Law. Because the Investigator appropriately limited her investigation to that issue, and not to whether agency service fee demands violated the Charging Parties' constitutional rights, *see Town of W. Springfield*, 21 MLC 1216, 1222-1223,

[11] Although the Charging Parties do not specifically appeal from the Investigator's refusal to consider their offers of proof, the CERB agrees with the Investigator that she was not required to do so. In-person investigations are informal, non-adjudicatory proceedings. See Investigation Procedures, Part B.4, ("The In-Person Investigation is an informal conference...."); *Educational Association of Worcester/MTA/NEA*, 14 MLC 1238, 1240, MUPL-3063-71/MUPL-3104 (October 20, 1987).

MUP-7465 (August 19, 1994), the Charging Parties' arguments provide no basis to overturn this ruling.

Request for Reconsideration

Challenge to Facts

The Charging Parties challenged one of the Investigator's factual conclusions. During the in-person investigation, the Charging Parties argued that the Unions' exclusion of non-members from participation in certain Union activities was unconstitutional under the First and Fourteenth amendments because it conditioned non-members having a voice in their terms and conditions of employment on their having to pay union dues to support speech with which they disagree. The Investigator appropriately treated this argument as alleging a violation of Section 10(b)(1) of the Law, *see Town of West Springfield*, 21 MLC at 1222-1223, and concluded, among other things, that because non-members participate in ratification votes, their involvement is "no more limited than that of any union member who is not on the bargaining team." The Charging Parties acknowledge that a different finding would not result in the issuance of a complaint. They nevertheless challenge this statement, claiming that it ignores the fact that the written explanation provided by the Unions to fee payers explicitly sets forth a number of other activities from which non-members are excluded, i.e., vote on election of officers, by law modifications, and contract proposals or bargaining strategy. The written explanation further states, "[t]herefore apart from the ratification of the contract, nonmembers do not participate in the collective activities and decision-making of the association that influences the terms and conditions of employment."

Although the Investigator did not explicitly address the influence that participating in certain union activities other than contract ratification votes could have on the Charging Parties' terms and conditions of employment, the CERB agrees that the Unions' membership rules do not violate Section 10(b)(1) of the Law. First, as the Investigator pointed out, non-members have the right to vote in contract ratification elections. Second, as the Unions point out, non-members may influence terms and conditions of employment in other ways that are not dependent on union membership, including, through having a right to speak out in the workplace, file grievances and seek union representation for workplace issues related to terms and conditions of employment. Indeed, the CERB has held that employees who speak out and distribute literature urging employees not to ratify a contract proposed by a union's bargaining team are engaged in protected, concerted activity. *See Salem School Committee*, 35 MLC 199, 214, MUP-04-4008 (April 14, 2009) (citing *City of Lawrence*, 15 MLC 1162, 1165, MUP-6086 (September 13, 1988)(the protection to be accorded this conduct is determined by what the Law authorizes, rather than by what the union membership or its leadership authorizes)). An employer or union that interferes with or retaliates against such employees violates the Law. *Id*.

Merits

Except as described above, the Charging Parties do not challenge the Investigator's findings, nor do they claim that the Investigator erroneously applied relevant Chapter 150E precedent to the facts before her. Indeed, for the most part, the Charging Parties' arguments, all of which are grounded in their view of

the First Amendment of the U.S. Constitution, do not address the particular facts of this case and could have been made in any jurisdiction that, like Massachusetts, requires public employees who elect not to join or maintain membership in the union that represents them for purposes of collective bargaining to pay an agency service fee to that union to support the chargeable costs of the bargaining process, contract administration and grievance adjustment, provided certain pre-conditions are met. *Belhumeur*, 432 Mass. at 461-462 (citing *Chicago Teachers Union Local No. 1 v. Hudson*, 475 U.S. 292, 306 (1986) ("a union must implement certain procedures before it may validly demand payment of an agency service fee")); *See generally*, M.G.L. c. 150E, §12; 456 CMR 17.05. Rather, the Charging Parties expressly state in the introduction to their Supplementary Statement that the purpose of their appeal to the CERB is to exhaust their administrative remedies so as to preserve their constitutional arguments on appeal. While acknowledging that the DLR is bound by existing precedent and without the authority to declare unconstitutional the statute it is mandated to enforce, the Charging Parties' stated goal is to change the existing precedent. Thus, they say that it is their full expectation that the CERB will affirm the Investigator's dismissal.

They are correct. The CERB has reviewed the Investigator's analysis of applicable Chapter 150E precedent and finds no error. Further, although the Charging Parties may wish to change existing law, they do not contend that any of the recent Supreme Court decisions to which they allude hold that Section 12 of the Law or similar legislation is unconstitutional insofar as it applies to the public employees at issue here. *See Harris v. Quinn*, 134

S.Ct. 2618, 2638 (2014) (Confining reach of *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 97 S. Ct. 1782 (1977) to "full-fledged state employees"). The CERB therefore summarily affirms the dismissal of Charging Parties' allegations for the reasons set forth in the dismissal letter.

Conclusion

For these reasons and those stated in the Investigator's dismissal, the Board affirms the Investigator's dismissal of these charges.

Very truly yours,

COMMONWEALTH EMPLOYMENT RELATIONS BOARD

/s/ Edward B. Srednicki
Edward B. Srednicki
Executive Secretary

APPEAL RIGHTS

Pursuant to the Supreme Judicial Court's decision in *Quincy City Hospital v. Labor Relations Commission*, 400 Mass. 745 (1987), this determination is a final order within the meaning of M.G.L. c. 150E, § 11. Any party aggrieved by a final order of the Board may institute proceedings for judicial review in the Appeals Court pursuant to M.G.L. c.150E, §11. To claim such an appeal, the appealing party must file a Notice of Appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.

APPENDIX C

NOTICE: All slip opinions and orders are subject to formal revision and are superseded by the advance sheets and bound volumes of the Official Reports. If you find a typographical error or other formal error, please notify the Reporter of Decisions, Supreme Judicial Court, John Adams Courthouse, 1 Pemberton Square, Suite 2500, Boston, MA, 02108-1750; (617) 557-1030; SJCReporter@sjc.state.ma.us

SJC-12603

BEN BRANCH & others[1] vs. COMMONWEALTH EMPLOYMENT RELATIONS BOARD & others.[2]

Suffolk. January 8, 2019. - April 9, 2019.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Constitutional Law, Union, Freedom of association. Voluntary Association, Labor union. Labor, Union agency fee, Fair representation by union, Public employment. Moot Question. Commonwealth Employment Relations Board.

Appeal from a decision of the Commonwealth Employment Relations Board.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Bruce N. Cameron (Aaron B. Solem, of Minnesota, also present) for the employees.

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[1] William Curtis Conner, Jr.; Deborah Curran; and Andre Melcuk.

[2] Massachusetts Society of Professors, MTA/NEA; Hanover Teachers Association, MTA/NEA; and Professional Staff Union, MTA/NEA, interveners.

Timothy J. Casey, Assistant Attorney General (T. Jane Gabriel also present) for Commonwealth Employment Relations Board.

Jeffrey W. Burritt, of the District of Columbia, for the interveners.

Mark G. Matuschak & Robert K. Smith, for Pioneer Institute, Inc., were present but did not argue.

The following submitted briefs for amici curiae:

Deborah J. La Fetra, of California, & Brad P. Bennion for Pacific Legal Foundation & others.

James A.W. Shaw & Donald J. Siegel for Massachusetts AFL-CIO.

Charlotte Garden, of the District of Columbia, & Brendan Sharkey for twenty-six labor law professors.

KAFKER, J. Massachusetts, like most States, allows public sector employees in a designated bargaining unit to elect a union by majority vote to serve as their exclusive representative in collective bargaining with their government employer. No eligible employee is required to join a union, but unions have historically collected mandatory "agency fees" from nonmembers in the bargaining unit to fund their operations as the exclusive representatives of members and nonmembers alike. In the instant case, four public employees raise challenges under the First Amendment to the United States Constitution to both the exclusive representation and the mandatory agency fee provisions of G. L. c. 150E.

The employees initially filed charges of prohibited practice before the Department of Labor Relations (DLR). A DLR investigator dismissed the case, and the Commonwealth Employment Relations Board (board), the three-member board within the DLR

responsible for reviewing investigator decisions, upheld the dismissal. The employees appealed to the Appeals Court, and while the case was on appeal, the United States Supreme Court, in *Janus* v. *American Fed'n of State, County, & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2486 & n.28 (2018), held that all State "agency-fee laws . . . violate the [First Amendment]" by compelling nonmembers of public sector unions to support their unions' speech. The employees argue that *Janus* requires us to overturn the board's decision dismissing their charges and declare the agency fee provision of the collective bargaining statute, G. L. c. 150E, § 12, unconstitutional on its face, and the exclusive representation provisions of the statute, G. L. c. 150E, §§ 2, 4, 5, 12, unconstitutional as applied to the employees.

We hold that the employees' constitutional challenge to the agency fee provision is moot because the unions voluntarily stopped collecting agency fees to comply with *Janus.* It is not reasonably likely that they will recommence collecting the fees, as the Attorney General and the DLR have issued guidance explaining that *Janus* categorically prohibits public sector unions from collecting agency fees from members of a bargaining unit who do not belong to the union and do not consent to pay the fees, and the question of law is now settled. We further hold that the employees' First Amendment challenge to the exclusive representation provisions of G. L. c. 150E is foreclosed by Supreme Court precedent and thus lacks merit. We accordingly vacate as moot the board's decision with respect to the constitutionality of the agency fee provisions of G. L. c. 150E and

affirm the board's decision with respect to the exclusive representation provisions of G. L. c. 150E.[3]

1. Facts and procedural history. The significant facts in this case are not disputed. As mentioned, the employees are public sector employees working in designated bargaining units. At all relevant times, however, they were not members of the unions that served as their exclusive bargaining representatives.[4] The collective bargaining agreements between the employers and the unions nonetheless contained provisions authorizing the unions to collect agency fees from nonmembers.[5] The unions also maintained rules

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[3] We acknowledge the amicus briefs submitted in support of the employees by the Pacific Legal Foundation, National Federation of Independent Business Small Business Legal Center, and Mackinac Center for Public Policy; and by the Pioneer Institute, Inc.; and the amicus briefs submitted in support of the Commonwealth Employment Relations Board and the interveners by twenty-six labor law professors and by the Massachusetts AFL-CIO.

[4] Two of the employees are faculty members represented by the Massachusetts Society of Professors (MSP), one is a university employee represented by the Professional Staff Union (PSU), and one is a middle school teacher represented by the Hanover Teachers Association (HTA). These three unions are affiliates of the Massachusetts Teachers Association (MTA). The MTA in turn is an affiliate of the National Education Association. The agency fee requests at issue in this case were imposed by the various unions, with the exception of the HTA.

[5] General Laws c. 150E, § 12, provides, in relevant part, that nonunion members may be required to pay "a service fee [(i.e., agency fee)] to the employee organization" when the "collective bargaining agreement requiring its payment as a condition of employment has been formally executed, pursuant to a vote of a majority of all employees in such bargaining unit present and voting." Section 12 further provides that the amount of the service fee shall be equal to membership dues, provided that the employee organization has a procedure to provide a rebate for

that nonmembers were "not entitled . . . to participate in affiliate decision-making," specifically to attend union meetings (other than contract ratification meetings) or "vote on election of officers, bylaw modifications, contract proposals or bargaining strategy."

In the spring of 2014, the unions requested that the employees pay their annual agency fees for the 2013-2014 academic year. In response, the employees filed complaints with the DLR alleging that these fee requests constituted a prohibited practice on the part of the unions and the employers.[6]

The employees alleged that the requirement that they pay agency fees constituted a prohibited practice under G. L. c. 150E, §§ 10 (a) (1), (3), (b) (1), and 12, because "compulsory union fees . . . are unconstitutional under the First and Fourteenth Amendments [to the United States Constitution]."[7] More specifi-

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political, ideological, or other expenses "not germane to the [organization's] governance or duties as bargaining agent." Finally, § 12 provides that "[i]t shall be a prohibited labor practice for an employee organization or its affiliates to discriminate against an employee on the basis of the employee's membership, nonmembership or agency fee status in the employee organization or its affiliates."

[6] One of the employees had earlier filed a charge challenging the calculation of the amount of his agency fee. The employee subsequently filed an amended charge that rescinded his earlier allegation and raised a challenge to the validity of the agency fee that was identical to that raised by the other three employees.

[7] Under G. L. c. 150E, § 10 (a) (1) and (3), it is a prohibited practice for a public employer to "[i]nterfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter" or to "[d]iscriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization." Under G. L. c. 150E, § 10 (b) (1), it is a prohibited practice for a union to

cally, the employees claimed that G. L. c. 150E, § 12, the statutory provision that authorizes public sector unions to collect agency fees, was unconstitutional on its face.[8] They also claimed that this statute was unconstitutional as applied to them because it required them to pay agency fees "even though they are not entitled to attend union meetings or be involved in any union activities such as having a voice or a on bargaining representatives, contract proposals or bargaining strategy." Finally, they challenged the constitutionality of the exclusive representation provisions of G. L. c. 150E, § 5, for essentially the same reasons.[9]

A DLR investigator took affidavits from the employees and the unions, and then issued a decision in November 2014 dismissing the charges.[10] In her

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"[i]nterfere, restrain, or coerce any employer or employee in the exercise of any right guaranteed under this chapter."

[8] The employees claimed that the agency fee provision was facially unconstitutional because it required them to (1) support the unions' political beliefs despite their opposition to those beliefs; and (2) affirmatively object to challenge the amount of the fee. They also claimed that the requirement that they affirmatively object to the imposition of an agency fee was unconstitutional as applied.

[9] General Laws c. 150E, § 5, provides that the "exclusive representative shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership."

[10] The employees submitted affidavits on their own behalf, as well as from four experts. The unions moved to strike these affidavits and, when this motion was denied, submitted counter-affidavits. The investigator admitted the employees' affidavits and those of two of the experts. She excluded some portions of the unions' affidavits and the employees' other two expert

decision, the investigator concluded that the DLR did not have authority to address the employees' constitutional arguments. Instead, she only considered whether the employers and the unions had violated G. L. c. 150E. She concluded that G. L. c. 150E, § 5, expressly authorized the unions to serve as the employees' exclusive representatives and that they were permitted to enforce membership rules restricting service on negotiating committees to union members. She further concluded that, under controlling precedent of this court and the United States Supreme Court, neither the employers nor the unions engaged in a prohibited practice by requiring nonmember employees to pay agency fees to a public sector union pursuant to G. L. c. 150E, § 12.

The employees sought review of the investigator's dismissal of their charges by the board pursuant to G. L. c. 150E, § 11. They conceded in their briefing that "existing precedent" required the board to uphold the dismissal of the unfair labor practice charges but appealed in order "to exhaust administrative remedies" and preserve their constitutional arguments for appellate review. In February 2015, the board affirmed the dismissal in its entirety for the reasons set forth in the investigator's decision. The employees then appealed from the board's decision to the Appeals Court. That court granted the unions' motion to intervene and stayed the case until

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affidavits on the grounds that they were not relevant to agency fee procedures in Massachusetts. We decline to disturb the investigator's evidentiary ruling with respect to the employees' expert affidavits. See *Maddocks* v. *Contributory Retirement Appeal Bd.*, 369 Mass. 488, 498 (1976) (court will not overturn agency's discretionary exclusion of evidence absent "denial of substantial justice").

the Supreme Court issued *Janus* in June 2018. We then transferred the case to this court on our own motion and ordered supplemental briefing.

2. Mootness. We first address the employees' argument that *Janus* requires us to overturn the board's decision upholding the unions' collection of agency fees pursuant to the agency fee provision, G. L. c. 150E, § 12. The Supreme Court, in *Janus*, 138 S. Ct. at 2486, held that "States and public sector unions may no longer extract agency fees from nonconsenting employees," and the board and the unions accordingly concede that "public employers and public-sector unions can no longer collect agency fees from nonunion employees unless they affirmatively consent." The board argues that both the employers and unions have voluntarily complied with *Janus* by no longer permitting the nonconsensual collection of agency fees from employees who are not in a union, and hence that the portion of its decision dismissing the employees' constitutional challenges to the imposition of agency fees and the manner of their collection should be vacated and dismissed as moot.[11] We agree

[11] The intervener unions argue that we lack jurisdiction to decide the employees' constitutional challenges because the employees brought them before an administrative agency rather than through seeking a declaratory judgment in the Superior Court. We disagree. The instant case did not just raise a direct challenge to the constitutionality of the agency fee provision of G. L. c. 150E, § 12. Instead, it required the Department of Labor Relations (DLR) to apply multiple statutory requirements consistent with its understanding of constitutional law and to draw on its own expert knowledge of labor relations practices and procedures in deciding the questions before it.

As explained by the DLR investigator, while the charges presented facial challenges to the constitutionality of the agency fee and exclusive representation provisions in G. L. c. 150E, they also "raised allegations . . . that the service fees demanded

violate specific provisions of [G. L. c. 150E], i.e. that prohibiting non-members from joining a union negotiating team, while simultaneously requiring service fees, violates [G. L. c. 150E, § 10 (b) (1),] by coercing employees in the exercise of their rights to non-membership; and that the employers' agreement to a contractual service fee provision violated [§ 10 (a) (3)]." In deciding these issues the DLR was required to "apply [§ 12] . . . constitutionally, using decisions of the United States Supreme Court to guide its construction of [G. L. c. 150E]," and to resolve "factual issues that are appropriate for the agency's consideration, i.e. the extent to which the unions allow or prohibit fee payers from participating in the negotiations process."

We conclude that the DLR correctly assumed jurisdiction here for the reasons it stated. In the course of their adjudications, agencies must "decide questions of law, including, at times, questions of constitutional law." *Temple Emanuel of Newton* v. *Massachusetts Comm'n Against Discrimination*, 463 Mass. 472, 483 (2012). "Although an agency cannot decide an ultimate constitutional issue [regarding the legality of its statute], the question remains whether such an issue must nonetheless be brought before it to inform the agency's resolution of the statutory and regulatory questions it must consider and to draw on its specialized expertise for necessary fact finding." *Maher* v. *Justices of the Quincy Div. of the Dist. Court Dep't*, 67 Mass. App. Ct. 612, 619 (2006). With the benefit of an agency's factual determinations, understanding of its regulated industry, and statutory construction, a court can then decide whether the agency's determinations were made in compliance with or "[i]n violation of constitutional provisions." G. L. c. 30A, § 14. See, e.g., *Selectmen of Framingham v. Civil Serv.* Comm'n, 366 Mass. 547, 554 (1974) (emphasizing that Civil Service Commission "will need to take up and consider the factual matters underlying the issue of the constitutional validity of the regulation since these matters are here intrinsic to a decision as to 'just cause'" even though "the ultimately controlling decision of a constitutional issue is for the courts"). Although not directly argued below, the instant case also depends on an interpretation of the duty of fair representation, which involves the special expertise of the DLR. "As a matter of promoting proper relationships between the courts and administrative agencies, strong policies support the primary

with the board, and thus vacate that portion of the board's decision as moot.

It is a "general rule that courts decide only actual controversies . . . and normally do not decide moot cases." *Boston Herald, Inc.* v. *Superior Court Dep't*

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jurisdiction of the [DLR] over cases involving the duty of fair representation." *Leahy v. Local 1526, Am. Fed'n of State, County, & Mun. Employees*, 399 Mass. 341, 349 (1987).

A different question would be presented if this case were only presenting a challenge to the constitutionality of enabling legislation. Cf. *Doe, Sex Offender Registry Bd. No. 10800 v. Sex Offender Registry Bd.*, 459 Mass. 603, 630-631 (2011) (court without jurisdiction to hear constitutional challenge to agency's enabling statute and implementing regulations when first brought on appeal from agency decision rather than in declaratory judgment action in court). If after *Janus* v. *American Fed'n of State, County, & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2486 (2018), had been decided, the employees had simply brought a declaratory judgment action seeking a declaration that G. L. c. 150E, § 12, was unconstitutional, such an action should have been brought in the Superior Court. The multifaceted challenge here is different and requires administrative review in the first instance. See *Gurry* v. *Board of Pub. Accountancy*, 394 Mass. 118, 126 (1985) ("Except for jurisdictional claims based upon constitutional challenges to an agency's enabling legislation, litigants involved in adjudicatory proceedings should raise all claims before the agency, including those which are constitutionally based"). See, e.g., *Seagram Distillers* Co. v. *Alcoholic Beverages Control Comm'n*, 401 Mass. 713, 724 (1988) (facial and as applied constitutional challenges to statute "not raised before the commission and we therefore decline to consider them here for the first time"). See also, e.g., *McCormick* v. *Labor Relations Comm'n*, 412 Mass. 164, 169-170 (1992) (relying on *Seagram Distillers* Co., supra, to conclude that party raising First Amendment challenge to validity of agency fee waived that challenge by not raising it before Labor Relations Commission).

We thus conclude that the DLR correctly determined that it had jurisdiction.

of the Trial Court, 421 Mass. 502, 504 (1995). "[L]itigation is considered moot when the party who claimed to be aggrieved ceases to have a personal stake in its outcome." *Bronstein* v. *Board of Registration in Optometry*, 403 Mass. 621, 627 (1988).[12] A moot case is one where a court can order "no further effective relief." *Lawyers' Comm. for Civ. Rights & Economic Justice* v. *Court Adm'r of the Trial Court*, 478 Mass. 1010, 1011 (2017).

Here, the unions presented affidavits[13] demonstrating that they did not collect any agency fees from the employees while their complaints were pending, stopped collecting agency fees entirely in anticipation of *Janus*, and no longer collected agency fees from nonmembers once *Janus* was issued in order to comply with the decision.[14] Furthermore, both the Attorney

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[12] "The mootness doctrine applies to judicial review of administrative decisions as well as to appellate review of lower court decisions." *International Marathons, Inc.* v. *Attorney Gen.*, 392 Mass. 376, 380 (1984).

[13] To determine whether a case has become moot while it is on appeal, we may consider evidence introduced by the parties in the form of affidavits. *Doe* v. *Superintendent of Sch. of Worcester*, 421 Mass. 117, 123 (1995), citing *Hubrite Informal Frocks, Inc.* v. *Kramer*, 297 Mass. 530, 532–533 (1937) ("Affidavits are the proper way to raise a question of mootness").

[14] To comply with the prohibition on the collection of agency fees announced in *Janus*, 138 S. Ct. at 2486, the general counsel of the MTA sent letters to its local affiliates on April 25 and May 2, 2018, instructing them to stop collecting agency fees preemptively as of June 1, 2018, in the event that "the collection of agency fees is declared unconstitutional." Following the issuance of *Janus* on June 27, 2018, the MTA informed its affiliates that they may "no longer deduct agency fees from a nonmember's wages" and processed a "bulk cancellation" of agency fees. Furthermore, the presidents of the affiliate unions involved in this case (i.e., the MSP, PSU, and HTA) stated that,

General and the DLR issued guidance explaining that *Janus* prohibits public employers and public sector unions from collecting agency fees from members of a bargaining unit who do not belong to the union and do not consent to pay the fees.[15] And, as mentioned, the unions and employers concede that they are bound by *Janus.* In light of these significant steps by the unions and the unequivocal legal guidance issued by the relevant agencies, we are not persuaded by the employees' claim that there is "no reason to expect any change" in the challenged conduct involving agency fees.[16] Nor is this the exceptional case where

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on account of *Janus*, they no longer collect agency fees. Additionally, in November 2018, the MTA executive committee approved the removal of any reference to "agency service fees" from its bylaws.

[15] See Department of Labor Relations, Question and Answer Regarding Impacts of Janus v. American Federation of State, County, and Municipal Employees, Council 31, https://www.mass.gov/service-details/dlr-qa-re-janus-v-american-fed-of-state-cty-muni-employees [https://perma.cc/XG43-Z9DW] ("The Janus decision makes it unlawful for public sector employers or unions to require that an employee who is not a voluntary dues paying union member to pay an agency fee to a union as a condition of obtaining employment or continued employment" and any "agency shop arrangements contained in collective bargaining agreements are invalidated"); Office of the Attorney General, Attorney General Advisory: Affirming Labor Rights and Obligations in Public Workplaces, https://www.mass.gov/files/documents/2018/07/03/Attorney%20General%20Advisory%20-%20Rights%20of%20Public%20Sector%20Employees%20%287-3%29.pdf [https://perma.cc/74LPEVMF] ("Under *Janus,* public employers may not deduct agency fees from a nonmember's wages, nor may a union collect agency fees from a nonmember, without the employee's affirmative consent").

[16] A defendant whose voluntary conduct renders a case moot must satisfy a "heavy burden of showing that there is no reasonable expectation that the wrong will be repeated; and a

we exercise our discretion to decide a moot case.[17] Because no agency fee demands are currently being made on the employees, and because any such

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defendant's mere assurances on this point may well not be sufficient." *Cantell* v. *Commissioner of Correction*, 475 Mass. 745, 753 n.16 (2016), quoting *Wolf* v. *Commissioner of Pub. Welfare*, 367 Mass. 293, 299 (1975). This burden may be met by a policy change by an administrative agency or by other change in conduct to comply with the law. See *Bronstein* v. *Board of Registration in Optometry*, 403 Mass. 621, 626-627 (1988) (case moot where administrative board agreed not to enforce order that was no longer in compliance with amended statute); *Buchannan* v. *Superintendent of Mass. Correctional Inst. at Concord*, 9 Mass. App. Ct. 545, 548-550 (1980) (case moot where bulletin issued by Department of Correction addressed challenged correctional practice and issuance of bulletin suggested defendants did not "cease[] their allegedly wrongful conduct in order to escape review"). See also *Danielson* v. *Inslee*, 345 F. Supp. 3d 1336, 1339 (W.D. Wash. 2018) (post-Janus challenge to mandatory agency fee law moot because it was "improbable that the State will renege on a policy it has justified by legal precedent").

[17] We have discretion to decide a moot case where the issue is one of "significant public importance, and there appears to be some uncertainty about it," or "where the parties have fully briefed and argued the issues of a case, and . . . the issues are capable of repetition, yet evading review" (quotation and citations omitted). *Commonwealth* v. *McCulloch*, 450 Mass. 483, 486 (2008). Here, there is no uncertainty that *Janus* forbids the collection of agency fees from nonconsenting bargaining unit members who are not in a union. See Ladley *vs.* Pennsylvania State Educ. Ass'n, No. CI-14-08552, slip op. at 23 (Pa. Ct. Com. Pl. Oct. 29, 2018) (declining to decide moot post-*Janus* agency fee challenge on public interest grounds because no need for court to create "guideposts for future conduct or action" [citation omitted]). Nor is the issue one that is likely to evade review should it arise again: the challenged issue "is one of law" that would likely receive immediate judicial review and rebuke if a union sought to impose an agency fee despite *Janus*. Ott v. *Boston Edison Co*., 413 Mass. 680, 684 (1992).

demands are not likely to recur, there is no "actual controvers[y]" for the court to decide and no "effective relief" for it to order. *Murphy* v. *National Union Fire Ins. Co.*, 438 Mass. 529, 533 (2003). See *Lawyers' Comm. for Civ. Rights & Economic Justice*, 478 Mass. at 1011. We therefore hold that the unions' cessation of agency fee collection to comply with *Janus* and the issuance by the Attorney General and the DLR of guidance categorically prohibiting their collection has rendered moot the employees' challenge to the agency fee provisions of G. L. c. 150E.[18]

3. Constitutionality of exclusive representation. The employees also challenge the constitutionality of their unions' exclusive representation of their employees in collective bargaining, claiming that exclusive representation compels them to associate with the unions in violation of the First Amendment.[19] We

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[18] This conclusion accords with those of other courts that have dismissed challenges to the constitutionality of State agency fee laws on mootness grounds following the issuance of *Janus* and the corresponding cessation in the collection of agency fees by public sector unions. See *Danielson*, 345 F. Supp. 3d at 1339-1340; *Danielson* v. *American Fed'n of State, County, & Mun. Employees, Council 28, AFL-CIO*, 340 F. Supp. 3d 1083, 1084 (W.D. Wash. 2018); Lamberty *vs.* Connecticut State Police Union, U.S. Dist. Ct., No. 3:15-cv-378 (D. Conn. Oct. 19, 2018); Yohn *vs.* California Teachers' Ass'n, U.S. Dist. Ct., No. SACV 17-202-JLS-DEM (C.D. Cal. Sept. 28, 2018); Ladley, *supra*.

[19] The unions argue that the employees' exclusive representation challenge is not properly before this court because the employees failed to raise it below. Specifically, they point out that the employees' charges were addressed to G. L. c. 150E, § 12, the agency fee provision, and not to the exclusive representation provisions of G. L. c. 150E. Yet the investigator's decision addressed the employees' "challenge [to] the concept of exclusive representation as a burden on their [First] Amendment right of association." The employees then appealed to

conclude that, under controlling Supreme Court precedent, neither the exclusive representation provisions of G. L. c. 150E nor the unions' internal policies and procedures barring nonmembers from various collective bargaining activities violate the First Amendment.

General Laws c. 150E, § 4, provides that "[p]ublic employers may recognize an employee organization designated by the majority of the employees in an appropriate bargaining unit as the exclusive representative of all the employees in such unit for the purpose of collective bargaining." In turn, G. L. c. 150E, § 5, provides that the "exclusive representative shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership." We have explained that the "exclusive representation concept" is "a basic building block of labor law policy under G. L. c. 150E." *Service Employees Int'l Union, AFL-CIO, Local 509* v. *Labor Relations Comm'n*, 431 Mass. 710, 714–715 (2000). The same is true under Federal labor relations law.[20]

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the board from the investigator's conclusion that "[e]xclusive representation, pursuant to G. L. c. 150E §§ 4 [and] 5, is constitutional." We thus conclude that the issue was sufficiently raised below.

[20] The National Labor Relations Act (NLRA) provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. § 159(a). For cases discussing exclusive representation under

Our analysis of exclusive representation is guided by an uninterrupted line of decisions in which the Supreme Court has affirmed its "long and consistent adherence to the principle of exclusive representation tempered by safeguards for the protection of minority interests" provided by the duty of fair representation. *Emporium Capwell Co*. v. *Western Addition Community Org*., 420 U.S. 50, 65 (1975). Exclusive representation, as the Supreme Court has explained, is necessary to effectively and efficiently negotiate collective bargaining agreements and thus promote peaceful and productive labor-management relations. See, e.g., *National Labor Relations Bd.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967) ("National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The

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the NLRA, see, e.g., *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 270–271 (2009), quoting *Emporium Capwell Co*. v. *Western Addition Community Org*., 420 U.S. 50, 62 (1975) ("In establishing a regime of majority rule, Congress sought to secure to all members of the [bargaining] unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority"); *Vaca* v. *Sipes*, 386 U.S. 171, 191 (1967) (discussing importance of exclusive representation in grievance arbitration context); *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192, 200-201 (1944) (describing exclusive representation under NLRA); *J.I. Case Co*. v. *National Labor Relations Bd*., 321 U.S. 332, 338-339 (1944) (under NLRA, employer must bargain with exclusive representative, rather than individually with employees, because "the majority rules" and to allow individual negotiations would "prove . . . disruptive of industrial peace).

policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees"). See also Carlson, The Origin and Future of Exclusive Representation in American Labor Law, 30 Duq. L. Rev. 779, 780 (1992) ("Majority-rule based exclusivity bolsters a union's bargaining position, legitimizes its complete control over employee bargaining within a unit and, even from the employer's perspective, simplifies the bargaining process. Collective bargaining on any other basis faces considerable practical difficulties" [footnote omitted]).[21]

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[21] For discussions of the policy rationales for exclusive representation, see, e.g., *Janus*, 138 S. Ct. at 2465 (discussing how exclusive representation serves "compelling state interest" in "labor peace" [citation omitted]); *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 38-39, 52 (1983) (rejecting First Amendment challenge to term in collective bargaining agreement restricting use of interschool mail system to exclusive representative because "exclusion of the rival union may reasonably be considered a means of insuring labor-peace within the schools"); *Vaca*, 386 U.S. at 191 (explaining that if individual employees could bypass collective bargaining agreement with respect to grievance arbitration "the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation"); *Medo Photo Supply Corp.* v. *National Labor Relations Bd.*, 321 U.S. 678, 685 (1944) ("orderly collective bargaining requires that the employer be not permitted to go behind the designated representatives, in order to bargain with the employees themselves"). See also *Matter of Houde Engineering Corp. & United Auto. Workers Fed. Labor Union No. 18839*, 1 N.L.R.B. 35, 40 (1934) (exclusive representation provision of Federal law designed to stop employers from exploiting "differences within the ranks" of employees); Carlson, The Origin and Future of

In particular, our analysis of the constitutionality of exclusive representation is informed by *Knight* v. *Minnesota Community College Faculty Ass'n*, 460 U.S. 1048 (1983) (*Knight I*); *Minnesota State Board for Community Colleges* v. *Knight*, 465 U.S. 271 (1984) (*Knight II*); and *Janus* itself. In the two *Knight* decisions and *Janus*, the majority and the dissents alike recognized and respected the importance of exclusive representation in the collective bargaining process, at least in the negotiation of the terms and conditions of employment.

In *Knight I*, 460 U.S. at 1048, a case involving faculty at State community colleges, the Supreme Court summarily affirmed the portion of the lower court's decision concluding that it was constitutional to limit collective bargaining sessions (known as "meet and negotiate" sessions) regarding the terms and conditions of employment to the faculty's exclusive representative. See *Knight II*, 465 U.S. at 279 ("The Court's summary affirmance . . . rejected the constitutional attack on [the State statute's] restriction to the exclusive representative of participation in the 'meet and negotiate' process"). In summarily affirming the lower court, it thus appeared noncontroversial to the Court to limit collective bargaining regarding the terms and conditions of employment to the exclusive representative and to recognize the "constitutionality of exclusive representation bargaining in the public sector." *Knight* v. *Minnesota Community College Faculty Ass'n*, 571 F. Supp. 1, 4 (D. Minn. 1982), aff'd in part, 460 U.S. 1048 (1983). This decision is in line with earlier Supreme Court

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Exclusive Representation in American Labor Law, 30 Duq. L. Rev. 779, 814 (1992) ("Without exclusivity, employee factions would inevitably make conflicting proposals and demands").

decisions that recognize and respect the need for an exclusive bargaining representative. See *Emporium Capwell Co*., 420 U.S. at 65. See also notes 20 and 21, *supra* (citing cases).

In *Knight II*, 465 U.S. at 292, the Court extended the right of exclusive representation to "meet and confer" sessions with the employer regarding university governance and academic matters outside the scope of the mandatory bargaining that took place in the "meet and negotiate" sessions deemed constitutional in *Knight I.* Although *Knight II, supra* at 288, presented a more difficult question than exclusive representation in the collective bargaining context, and one that divided the Court, the majority held that the nonmembers' "speech and associational rights . . . [had] not been infringed" even by this type of government-imposed exclusive representation. Specifically, the Court observed that exclusive representation was constitutional because the First Amendment creates no "government obligation to listen" to particular voices on policy questions, and the State's right to designate the faculty union as the exclusive representative for the "meet and confer" sessions (as well as the "meet and negotiate" sessions) was within its inherent right to "choose its advisers." *Id*. at 288 & n. 10.

The Court further explained that such exclusive representation did not impair the nonmember employees' associational freedoms, as the nonmembers were "not required to become members of the [union]." *Id.* at 289. Although the nonmembers "[might] well [have felt] some pressure to join the exclusive representative" to gain a "voice" in the "meet and confer" sessions, such pressure was "no different from the pressure to join a majority party

that persons in the minority always feel." *Id.* at 289-290. This sort of pressure, the Court explained, is inherent both in majority rule, which is a guiding principle of "our system of government," and in the collective bargaining process; as such, "it does not create an unconstitutional inhibition on associational freedom." *Id.* at 290.

Janus, a challenge to the agency fee provision of a State collective bargaining law, did not in any way question the centrality of exclusive representation, at least in the collective bargaining process. There, the Court "noted" that exclusive representation provided the union with the "exclusive right to speak for all the employees in collective bargaining" and that the employer was "required by state law to listen to and bargain in good faith with only that union." *Janus*, 138 S. Ct. at 2467. Indeed, the Court expressly observed that it is "not disputed that the State may require that a union serve as exclusive bargaining agent for its employees," and that, with the exception of laws permitting mandatory agency fees, "States can keep their labor-relations systems exactly as they are." *Id*. at 2478, 2485 n.27. See *id.* at 2489 (Kagan, J., dissenting) ("The majority does not take issue with the [concept of exclusive representation]"). And the Court assumed that "labor peace," defined as the avoidance of "the conflict and disruption" that would occur if employees were "represented by more than one union," was a "compelling state interest," but that mandatory agency fees were not "inextricably linked" to such peace (citation omitted). *Id*. at 2465. It was this "compelling state interest" that apparently justified the "significant impingement on asso-

ciational freedoms that would not be tolerated in other contexts." *Id*. at 2478.[22]

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[22] This conclusion accords with those of other courts that have rejected First Amendment challenges to the constitutionality of exclusive representation provisions of State public sector collective bargaining laws, including a previous challenge to G. L. c. 150E. See *D'Agostino* v. *Baker*, 812 F.3d 240, 243 (1st Cir.), *cert. denied*, 136 S. Ct. 2473 (2016) (Justice Souter, writing for court and rejecting First Amendment challenge to G. L. c. 150E on basis of *Minnesota State Board for Community Colleges* v. *Knight*, 465 U.S. 271 [1984] [*Knight II*], reasoned, "Since nonunion professionals, college teachers, could claim no violation of associational rights by an exclusive bargaining agent speaking for their entire bargaining unit when dealing with the state even outside collective bargaining, the same understanding of the First Amendment should govern the position taken by the [appellants] here, whose objection goes only to bargaining representation"). See also *Mentele* v. *Inslee*, 916 F.3d 783, 789 (9th Cir. 2019) (holding, on basis of *Knight II*, that State's "authorization of an exclusive bargaining representative does not infringe" on First Amendment rights of nonunion members); *Bierman* v. *Dayton*, 900 F.3d 570, 574 (8th Cir. 2018) (home care providers' argument that their First Amendment rights were violated by compelled association with their exclusive representative "foreclosed by [*Knight II*]"); *Hill* v. *Service Employees Int'l Union*, 850 F.3d 861, 864 (7th Cir.), *cert. denied*, 138 S. Ct. 446 (2017) (*Knight II* "forecloses . . . argument" of home health care and child care providers that exclusive representation creates "mandatory association" subject to heightened First Amendment scrutiny); *Jarvis* v. *Cuomo*, 660 Fed. Appx. 72, 74 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1204 (2017) (child care providers' argument that their First Amendment rights were violated by compelled association with their exclusive representative "foreclosed" by *Knight II*); Thompson vs. Marietta Education Ass'n, U.S. Dist. Ct., No. 2:18-cv-628 (S.D. Ohio Jan. 14, 2019) (*Knight II* "forecloses" high school Spanish teacher's First Amendment challenge to exclusive representation provision of State statute); Reisman vs. Associated Faculties of the Univ. of Me., U.S. Dist. Ct., No. 1:18-cv-00307-JDL (D. Me. Dec. 3, 2018) ("binding precedent" of *Knight*

Janus and the other Supreme Court cases have thus not questioned the constitutionality of exclusive representation. The Court has, however, inextricably coupled exclusive representation with a union's duty of fair representation. See, e.g., *Janus*, 138 S. Ct. at 2469 (duty of fair representation "is a necessary concomitant of the authority that a union seeks when it chooses to serve as the exclusive representative of all the employees in a unit"). As the exclusive representative of both members and nonmembers, the union has a duty "fairly to represent all [employees in the bargaining unit], both in its collective bargaining with [the employer] . . . and in its enforcement of the resulting collective bargaining agreement." *Vaca* v. *Sipes*, 386 U.S. 171, 177 (1967).[23]

The focus of this duty in the negotiating context has not been on input but on output, i.e., on the results of the collective bargaining process. Most significantly, the "union may not negotiate a

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II "forecloses" faculty member's First Amendment challenge to exclusive representation provision of State collective bargaining law); Uradnik *vs*. Inter Faculty Org., U.S. Dist. Ct., No. 18-1895 (PAM/LIB) (D. Minn. Sept. 27, 2018), aff'd, U.S. Ct. App., No. 18-3086 (8th Cir. Dec. 3, 2018) (*Knight II* "foreclose[s]" faculty member's First Amendment challenge to exclusive representation provision of State collective bargaining law).

[23] The Supreme Court has stated that "constitutional questions [would] arise" regarding the legitimacy of exclusive representation in the absence of the duty of fair representation. *Steele*, 323 U.S. at 198. In Massachusetts, that duty is codified by statute. See G. L. c. 150E, § 5 (exclusive representative required to "represent[] the interests of all . . . employees without discrimination and without regard to employee organization membership"). See also *Leahy*, 399 Mass. at 348 ("even if the Massachusetts statute did not provide for the duty of fair representation, the courts would infer it as a constitutional requirement").

collective-bargaining agreement that discriminates against nonmembers." Janus, 138 S. Ct. at 2468. Cf. *Ford Motor Co*. v. *Huffman*, 345 U.S. 330, 338 (1953) ("mere existence of . . . differences" in way that "negotiated agreement affect[s] individual employees and classes of employees" will not violate duty of fair representation so long as differences are reasonable and negotiated in good faith). By contrast, the duty of fair representation has not been found to apply to how the union selects its negotiators and develops its proposals. See *National Labor Relations Bd*. v. *Financial Inst. Employees of Am., Local 1182, Chartered by United Food & Commercial Workers Int'l Union, AFL-CIO*, 475 U.S. 192, 205 (1986) (*Financial Inst. Employees*), quoting *Allis-Chalmers Mfg. Co*., 388 U.S. at 191 (explaining that union may "select union officers and bargaining representatives" without input of nonmembers because "[n]on-union employees have no voice in the affairs of the union"); *Standard Fittings Co*. v. *National Labor Relations Bd*., 845 F.2d 1311, 1319 (5th Cir. 1988), citing *Financial Inst. Employees, supra* (duty of fair representation does not give nonmembers right to "ratify a collective-bargaining agreement or select union officers and bargaining representatives"); *Branch 6000, Nat'l Ass'n of Letter Carriers* v. *National Labor Relations Bd*., 595 F.2d 808, 811 (D.C. Cir. 1979) ("non-union employees properly may be excluded" from processes of formulating union's negotiating position without violating duty of fair representation). See also *Southern Worcester County Reg'l Vocational Sch. Dist*. v. *Labor Relations Comm'n*, 377 Mass. 897, 904 (1979) ("selection of the union negotiating team [is] an internal union matter"); *George* v. *Local Union No. 639, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO*, 100 F.3d

1008, 1010–1011, 1014 (D.C. Cir. 1996) (union did not violate duty of fair representation by not permitting member from serving on negotiating committee or attending negotiating meetings); *Sears* v. *Automobile Carriers, Inc*., 711 F.2d 1059 (6th Cir. 1983) (unpublished) (union did not commit breach of duty of fair representation by removing member from negotiating committee); *Bass* v. *International Bhd. of Boilermakers*, 630 F.2d 1058, 1063 (5th Cir. 1980) ("internal union decisions" are "not circumscribed by the constraints of the [duty of fair representation]"); *Matter of Phalen* v. *Theatrical Protective Union No. 1, Int'l Alliance of Theatrical & Stage Employees*, A.F.L.-C.I.O., 22 N.Y.2d 34, 44, *cert. denied*, 393 U.S. 1000 (1968) ("an action for breach of the duty of fair representation by one who has been discriminated against, although it may afford him an important remedy, is no substitute for democratic participation in the affairs of the union. Unless an individual is a member of the union, he can have no voice in the selection of its officers who are his representatives in the collective bargaining process"). Cf. *Anderson* v. *Commonwealth Employment Relations Bd*., 73 Mass. App. Ct. 908, 909 n.5 (2009) (union rule that retired members could not vote on collective bargaining agreements did not "violate[] the duty of fair representation" because "the plaintiffs' voting claim" was "a purely internal matter").

We now address the employees' contention that they are not challenging exclusive representation "in the abstract," but only insofar as the unions use exclusive representation to deprive them of "a voice and a vote in their workplace conditions" with respect to bargaining representatives, contract proposals, and bargaining strategy unless they join the unions

and support their politics. We conclude that this argument is likewise without merit.

As an initial matter, we address the employees' claim that the unions are involved in "State action" for purposes of a First Amendment challenge to their internal rules restricting the participation of non-members in certain meetings or strategy sessions. As then Circuit Judge Breyer, writing for the United States Court of Appeals for the First Circuit, explained, the "link between the union's [government-created] bargaining power and its membership requirements is too distant to impose constitutional restrictions." *Hovan* v. *United Bhd. of Carpenters & Joiners of Am*., 704 F.2d 641, 645 (1st Cir. 1983). He further concluded that, while exclusive representation is a creature of statute, internal union rules not dictated by statute do not constitute State action, and holding otherwise "would radically change not only the legal, but the practical, nature of the union enterprise." *Id.* at 642-643. Accord *United Steelworkers of Am., AFL-CIO-CLC* v. *Sadlowski*, 457 U.S. 102, 104, 121 n.16 (1982) (union's adoption of "outsider rule" prohibiting nonmembers from contributing to union elections did not violate "nonmembers' constitutional rights of free speech and free association" because "the union's decision to adopt an outsider rule does not involve state action"); *Kidwell* v. *Transportation Communications Int'l Union*, 946 F.2d 283, 299 (4th Cir. 1991), *cert. denied*, 503 U.S. 1005 (1992) (for purposes of First Amendment challenge, "the internal membership and procedural decisions of a union . . . , although having an impact on those who may participate in the union's duties in carrying out its role as collective bargaining representative, do[] not constitute state action"); *Turner* v. *Air Transport Lodge 1984 of Int'l Ass'n of Machinists & Aerospace*

Workers, AFL-CIO, 590 F.2d 409, 413 n.1 (2d Cir. 1978), *cert. denied*, 442 U.S. 919 (1979) (per curiam) (Mulligan, J., concurring) ("since union constitutions and rules are formulated and enforced by the union, a private entity, no federal constitutional right of free speech is . . . involved"). While these cases involved private sector unions, State action has been found lacking in the public sector union context as well. See, e.g., *Hallinan* v. *Fraternal Order of Police of Chicago Lodge No. 7*, 570 F.3d 811, 817 (7th Cir.), *cert. denied*, 558 U.S. 1049 (2009) ("Here, it was the Union, rather than the employer, that barred the plaintiffs from membership. And union actions taken pursuant to the organization's own internal governing rules and regulations are not state actions"); *Harmon* v. *Matarazzo*, 162 F.3d 1147 (2d Cir.) (unpublished), *cert. denied*, 525 U.S. 1042 (1998) (police officer's Federal civil rights claim against police union "not actionable" because union "is not a state actor"); *Messman* v. *Helmke*, 133 F.3d 1042, 1044 (7th Cir. 1998) ("a union's internal governing rules usually are not subject to First Amendment prohibitions"); *Jackson* v. *Temple Univ. of the Commonwealth Sys. of Higher Educ.*, 721 F.2d 931, 933 (3d Cir. 1983) (public employee's Federal civil rights claim against union not actionable where plaintiff failed "to set forth any facts suggesting that the state was responsible for the Union or that the Union was acting under color of state law in deciding not to bring [his] grievance to arbitration"). We conclude that here the link between exclusive representation and the unions' membership requirements are likewise too attenuated to constitute State action.

Moreover, even if we were to assume that the link between statutorily required exclusive representation and union membership requirements might be

sufficient in certain circumstances to satisfy the State action requirement, we would still discern no constitutional problems. Employees in the bargaining unit received a vote on whether to form their unions; those opposed to having a union lost that vote. The "majority-rule concept is . . . unquestionably at the center of our federal labor policy," and hence the "complete satisfaction of all who are represented is hardly to be expected" (citations omitted). *Allis-Chalmers Mfg. Co.*, 388 U.S. at 180. See *Emporium Capwell Co.*, 420 U.S. at 62 ("majority rule" is "[c]entral to the policy of fostering collective bargaining"). Indeed, as the Court in *Knight II*, 465 U.S. at 290, observed, majority rule is a fundamental aspect of American democratic government. Those who lose elections often do not have representatives speaking in favor of their personal policy preferences, at least until the next election. Like these members of the electorate, the employees have another chance to vote: they can vote to decertify the union after a certain period of time. See G. L. c. 150E, § 4. See also *Watertown* v. *Watertown Mun. Employees Ass'n*, 63 Mass. App. Ct. 285, 291-292 (2005) (describing "the employees' right to select new union representation" as "a collective bargaining right that is beyond the arbitrator's powers" to penalize).

In the meantime, their inability to select bargaining representatives or participate in bargaining sessions is a consequence of losing the election regarding union representation and choosing not to join the union after having lost. This is an intended and expected feature of exclusive representation. See *Emporium Capwell Co.*, 420 U.S. at 62 (in creating exclusive representation, Congress intended "regime of majority rule" in which interests of some

employees "might be subordinated to the interest of the majority"). Hence, "exclusive bargaining representation by a democratically selected union does not, without more, violate the right of free association on the part of dissenting non-union members of the bargaining unit." *D'Agostino* v. *Baker*, 812 F.3d 240, 244 (1st Cir.), *cert. denied*, 136 S. Ct. 2473 (2016).

Moreover, as discussed, conflicting representatives in collective bargaining is not practicable: to have the employee representatives speak with one voice at the bargaining table is critical to the efficient resolution of labor-management disputes and protects the bargaining unit employees from divide-and-conquer tactics by employers. See note 21, *supra* (citing cases). Thus, as the Court in *Knight II*, 465 U.S. at 291, concluded, "The state has a legitimate interest in ensuring that its public employers hear one, and only one, voice presenting the majority view of its professional employees on employment-related policy questions," and exclusive representation is a "rational means of serving that interest."

Finally, the nonunion employees, even if they do not have input into bargaining committees or bargaining proposals, remain protected by the duty of fair representation. As mentioned, that duty ensures that the unions may not negotiate a collective bargaining agreement that discriminates against nonmembers in the terms and conditions of employment. See *Janus*, 138 S. Ct. at 2468; *Emporium Capwell Co.*, 420 U.S. at 64 ("by the very nature of the exclusive bargaining representative's status as representative of all unit employees, Congress implicitly imposed upon it a duty fairly and in good faith to represent the interests of minorities within the unit"). Here, the employees have not plausibly alleged that

the unions committed a breach of the duty of fair representation for the reasons discussed *supra*. Thus, we conclude, it is not a breach of the duty of fair representation to prevent nonmembers from participating in the selection of bargaining committees or the development of bargaining proposals. The Supreme Court has deemed such exclusive representation to be constitutional.

4. Conclusion. For the foregoing reasons, we vacate as moot the board's decision with respect to the agency fee provisions of G. L. c. 150E, § 12, and we affirm the board's decision with respect to the exclusive representation provisions of G. L. c. 150E, §§ 2, 4, 5, and 12.

So ordered.

APPENDIX D

Part I	ADMINISTRATION OF THE GOVERNMENT
Title XXI	LABOR AND INDUSTRIES
Chapter 150E	LABOR RELATIONS: PUBLIC EMPLOYEES
Section 4	EXCLUSIVE REPRESENTATIVE; HEARING; ELECTION; STIPULATION; CERTIFICATION; REVIEW; VERIFICATION OF EVIDENCE OF WRITTEN MAJORITY AUTHORIZATION

Section 4. Public employers may recognize an employee organization designated by the majority of the employees in an appropriate bargaining unit as the exclusive representative of all the employees in such unit for the purpose of collective bargaining. All notices relative to a representation petition and all elections shall be posted at the request of the commission ten days prior to a hearing in a conspicuous place where the affected employees are employed.

The commission, upon receipt of an employer's petition alleging that one or more employee organizations claims to represent a substantial number of the employees in a bargaining unit, or upon receipt of an employee organization's petition that a substantial number of the employees in a bargaining unit wish to be represented by the petitioner, or upon receipt of a petition filed by or on behalf of a substantial number of the employees in a unit alleging that the exclusive representative therefor no longer represents a majority of the employees therein, shall investigate, and if it has reasonable cause to believe that a substantial

question of representation exists, shall provide for an appropriate hearing upon due notice. If, after hearing, the commission finds that there is a controversy concerning the representation of employees, it shall direct an election by secret ballot or shall use any other suitable method to determine whether, or by which employee organization the employees in an appropriate unit desire to be represented, and shall certify any employee organization which received a majority of the votes in such election as the exclusive representative of such employees.

Except for good cause no election shall be directed by the commission in an appropriate bargaining unit within which a valid election has been held in the preceding twelve months, or a valid collective bargaining agreement is in effect. The commission shall by its rules provide an appropriate period prior to the expiration of such agreements when certification or decertification petitions may be filed.

Nothing in this section shall be construed to prohibit a stipulation, in accordance with regulations of the commission, by an employer and an employee organization for the waiving of hearing and the conducting of a consent election by the commission for the purpose of determining a controversy concerning the representation of employees.

Any hearing under this section may be, when so determined by the commission, conducted by a member or agent of the commission. The decisions and determinations of such member or agent shall be final and binding unless, within ten days after notice thereof, any party requests a review by the full commission. If a review is requested, the member or agent shall file with the commission and with the parties a written statement of the case. In addition

any party may, within ten days from the receipt of such statement, file a supplementary statement with the commission. A review by the commission shall be made upon such statement of the case by the member or agent and upon such supplementary statements filed by the parties, if any, together with such other evidence as the commission may require.

Notwithstanding any other provision of this section, the commission shall certify and the public employer shall recognize as the exclusive representative for the purpose of collective bargaining of all the employees in the bargaining unit an employee organization which has received a written majority authorization, but this shall apply only when no other employee organization has been and currently is lawfully recognized as the exclusive representative of the employees in the appropriate bargaining unit. Whenever an employee organization proffers evidence that it has received a written majority authorization, the employee organization and the public employer shall agree upon a neutral to conduct a confidential inspection of the evidence of a written majority authorization. If within 10 days the employee organization and the public employer do not agree upon a neutral, the commission shall act as the neutral. The neutral shall verify the employee organization's majority support within the appropriate bargaining unit and report the results of its inspection in writing to the parties and, if the verification was conducted by an agreed neutral, to the commission, which shall in turn certify the results to the parties in writing. The commission shall establish rules and procedures for the prompt verification of evidence of a written majority authorization, which rules shall include safeguards to protect the privacy of individual employee choice, and which shall further provide

that, absent exceptional cause, the verification procedure shall not last longer than 30 days after the appointment of the neutral or after the assumption by the commission of the duties of the neutral.

Part I ADMINISTRATION OF THE GOVERNMENT

Title XXI LABOR AND INDUSTRIES

Chapter 150E LABOR RELATIONS: PUBLIC EMPLOYEES

Section 5 EXCLUSIVE REPRESENTATIVE; POWERS AND DUTIES; GRIEVANCES

Section 5. The exclusive representative shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership.

An employee may present a grievance to his employer and have such grievance heard without intervention by the exclusive representative of the employee organization representing said employee, provided that the exclusive representative is afforded the opportunity to be present at such conferences and that any adjustment made shall not be inconsistent with the terms of an agreement then in effect between the employer and the exclusive representative.

Part I ADMINISTRATION OF THE GOVERNMENT

Title XXI LABOR AND INDUSTRIES

Chapter150E LABOR RELATIONS: PUBLIC EMPLOYEES

Section 6 NEGOTIATIONS; MEETINGS

Section 6. The employer and the exclusive representative shall meet at reasonable times, including meetings in advance of the employer's budget-making process and shall negotiate in good faith with respect to wages, hours, standards or productivity and performance, and any other terms and conditions of employment, including without limitation, in the case of teaching personnel employed by a school committee, class size and workload, but such obligation shall not compel either party to agree to a proposal or make a concession; provided, however, that in no event shall the right of any employee to run as a candidate for or to hold elective office be deemed to be within the scope of negotiation.

Part I	ADMINISTRATION OF THE GOVERNMENT
Title XXI	LABOR AND INDUSTRIES
Chapter150E	LABOR RELATIONS: PUBLIC EMPLOYEES
Section 12	SERVICE FEE; IMPOSITION; AMOUNT; DISCRIMINATION

Section 12. The commonwealth or any other employer shall require as a condition of employment during the life of a collective bargaining agreement so providing, the payment on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later, of a service fee to the employee organization which in accordance with the provisions of this chapter, is duly recognized by the employer or designated by the commission as the exclusive bargaining agent for the unit in which such employee is employed; provided, however, that such service fee shall not be imposed unless the collective bargaining agreement requiring its payment as a condition of employment has been formally executed, pursuant to a vote of a majority of all employees in such bargaining unit present and voting.

Prior to the vote, the exclusive bargaining agent shall make reasonable efforts to notify all employees in the unit of the time and place of the meeting at which the ratification vote is to be held, or any other method which will be used to conduct the ratification vote. The amount of such service fee shall be equal to the amount required to become a member and remain a member in good standing of the exclusive bargaining agent and its affiliates to or from which membership dues or per capita fees are paid or

received. No employee organization shall receive a service fee as provided herein unless it has established a procedure by which any employee so demanding may obtain a rebate of that part of said employee's service payment, if any, that represents a pro rata share of expenditures by the organization or its affiliates for:

(1) contributions to political candidates or political committees formed for a candidate or political party;

(2) publicizing of an organizational preference for a candidate for political office;

(3) efforts to enact, defeat, repeal or amend legislation unrelated to the wages, hours, standards of productivity and performance, and other terms and conditions of employment, and the welfare or the working environment of employees represented by the exclusive bargaining agent or its affiliates;

(4) contributions to charitable, religious or ideological causes not germane to its duties as the exclusive bargaining agent;

(5) benefits which are not germane to the governance or duties as bargaining agent, of the exclusive bargaining agent or its affiliates and available only to the members of the employee organization.

It shall be a prohibited labor practice for an employee organization or its affiliates to discriminate against an employee on the basis of the employee's membership, nonmembership or agency fee status in the employee organization or its affiliates.

APPENDIX E

MASSACHUSETTS TEACHERS ASSOCIATION
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January 10, 2014

MEMORANDUM

TO: 2013-2014 Nonmembers

FROM: Susan Lee Weissinger,
MTA General Counsel

SUBJECT: **SERVICES NOT PROVIDED TO AGENCY FEE PAYERS**

This document contains an explanation of the MTA and NEA portion of the agency fee that the local association which represents you in collective bargaining is charging nonmembers for 2013-2014. The type of services and activities for which a union can charge nonmembers is governed by the Massachu-

setts public sector collective bargaining law, GI. c. 150E, regulations and decisions of the Massachusetts Department of Labor Relations interpreting that law, and court decisions interpreting the constitutional rights of nonmembers asked to pay an agency fee.

WARNING: IF YOU ELECT TO PAY AN AGENCY FEE RATHER THAN BECOME A MEMBER OF YOUR LOCAL ASSOCIATION, MTA AND NEA, YOU WILL NOT BE ENTITLED TO THE FOLLOWING SERVICES AND BENEFITS WHICH ARE AVAILABLE ONLY TO MTA/NEA MEMBERS AND FOR WHICH AGENCY FEE PAYERS ARE NOT CHARGED.

As MTA's General Counsel, I urge you to consider joining your local/MTA and NEA. If you elect not to do so, be advised that there are numerous valuable rights, protections and benefits that you are not entitled to receive as a nonmember.

1. Ability to participate in affiliate decision-making. Under the law, nonmembers are entitled to attend ratification meetings and vote on collective bargaining agreements that contain an agency service fee provisions, but they are not entitled to attend any other association meetings or be involved in any other union activities (vote on election of officers, bylaw modifications, contract proposals or bargaining strategy). Therefore, apart from the ratification of the contract, nonmembers do not participate in the collective activities and decision-making of the association that influences the terms and conditions of employment.

2. Legal services are provided at *no* cost to members in need of advice and legal representation in the following areas, but as an agency fee payer, you would not be entitled to free legal representation for:

- Defending against your dismissal or suspension under the Education Reform Act of 1993
- Defending against child abuse charges filed with the Department of Children and Families
- Assisting you in bringing criminal charges if you are assaulted at work
- Any employment discrimination claim (age, sex, race, religion, sexual preference, national origin, handicap, etc.)
- Your right to unemployment benefits
- Retirement benefits, including challenges to decisions of retirement boards regarding your creditable service, and representing you in applying for an ordinary or accidental disability retirement allowance
- License suspension or revocation invoked by the Department of Secondary and Elementary Education
- Violation of your civil rights as an employee
- Workers' compensation
- Open meeting law violations adversely affecting you
- Violations of your right to privacy

3. MTA/NEA members are also covered by an insurance policy which provides $1,000,000 in coverage to protect you in the event you are sued in

connection with your employment under terms specified in the Educators Employment Liability Policy. Agency fee payers are excluded from coverage under this policy.

4. MTA/NEA members charged with crimes alleged to have occurred in the course of their employment, are entitled to assistance from MTA in defraying the legal costs they incur in defending against those charges. Members acquitted of criminal charges are reimbursed for up to $35,000 in criminal defense fees. Agency fee payers receive no MTA assistance when facing criminal charges. You would need to retain private counsel.

5. MTA provides members access to reduced-fee legal services for non-employment legal problems. Under its Attorney Referral Program, MTA provides members with up to three free half-hour consultations for general legal advice and up to 30% fee reduction in legal matters including real estate, domestic relations, wills and estates, consumer protection and motor vehicle violations. Agency fee payers may not participate in the Attorney Referral Program.

6. MTA members have the benefit of discount group purchasing of auto and homeowners insurance, life and dental insurance, health and wellness discounts, travel, mortgage refinancing, financial programs, wireless services, identity theft protection, disability, tax-sheltered annuities and many other services through MTA Benefits, Here's how much one MTA member might save.

• Long-Term Care Insurance	$ 800
• Disability Insurance*	$ 1,887
• Dental Insurance	$ 152
• Free prescription drug card	$ 361
(Savings on prescriptions not covered by insurance.)	
• Home Heating Oil	$ 300
• Propane Program	$ 400
• Berkshire Bank Checking Account	$ 765
(New bank customers who open an Elite Relationship Checking Account)	
• Purchasing Program	$ 90
(Select from more than 2,500 brand-name items to purchase interest-free and pay over a 12-month period.)	
• MTA Discount Directory program savings	$ 600
(Reduced admission to more than 1,000 museums, theaters, concerts, retail stores, parking, ski areas and more.)	
• Discounts through Access	$ 1,300
(Nationwide savings at more than 300,000 locations.)	
• Auto Insurance	$ 125
• Car Rental (up to 20% discount	$ 50
(Up to 20% discount on a one week rental.)	
• Hotel Discounts	$ 150
• MTA Travel Programs	$ 400
(TNT Travel, Orlando Vacations and CruisesOnly)	
• Home Mortgage Program	$ 1,000
(2013 average savings on legal fees.**)	
• Wireless Services	$ 75
TOTAL SAMPLE SAVINGS	$ 8,455

The MTA agency fee amount for 2013-2014 is $325.84 and the NEA agency fee amount is $64.76. The 2013-2014 dues of MTA and NEA are $486.00 and $182.00.

I hope you will give serious consideration to this information as you make your decision whether to join your local/MTA/NEA or pay an agency fee.

* Long-term disability sample savings for a 45 year old member with a salary of $60,000

** Based on a purchase of $285,000