COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-12603

BEN BRANCH, WM. CURTIS CONNER, DEBORAH CURRAN and ANDRE MELCUK,
Plaintiffs-Appellants,

v.

COMMONWEALTH EMPLOYMENT RELATIONS BOARD,
Defendant-Appellee,

and

MASSACHUSETTS SOCIETY OF PROFESSORS, MTA/NEA, HANOVER TEACHERS ASSOCIATION, MTA/NEA, and PROFESSIONAL STAFF UNION, MTA/NEA,

Intervenors-Appellees.

ON APPEAL FROM A DECISION OF THE
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

BRIEF FOR AMICUS CURIAE PIONEER INSTITUTE, INC. IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, Pioneer Institute, Inc. states that it is a nonprofit corporation organized under the laws of the Commonwealth of Massachusetts. No publicly held corporation owns more than 10% of the stock of Pioneer Institute, Inc.

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Amicus Curiae Pioneer Institute, Inc. respectfully submits this brief pursuant to the Court's solicitation of amicus briefs issued on October 10, 2018.

INTEREST OF AMICUS CURIAE[1]

Pioneer Institute ("Pioneer") is an independent, non-partisan, privately funded research organization that seeks to improve the quality of life in Massachusetts through civic discourse and intellectually rigorous, data-driven public policy solutions.

Pioneer seeks to change policies that negatively affect freedom of association, freedom of speech, economic freedom, and government accountability.

Pioneer believes that the First Amendment protects individuals from being forced to associate with or subsidize political speech with which they disagree. That protection promotes a diverse and robust public discourse in service of the common good, where individuals are free to follow and express their own opinions rather than be involuntarily pressed, as a condition of their right to earn a living, to support causes with which they disagree.

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[1] Pursuant to Aspinall v. Philip Morris Cos., 442 Mass. 381, 480 n.8 (2004), undersigned counsel state that (1) Wilmer Cutler Pickering Hale and Dorr LLP does not represent any of the parties to this case in other litigation presenting the same issues as are presented in this case; and (2) no counsel for a party authored this brief in whole or in part, nor has any party made a monetary contribution intended to fund the preparation or submission of this brief.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the imposition of compulsory agency or service fees, pursuant to G.L. c. 150E, on public employees who choose not to become union members, but who may benefit from collective bargaining, violates the United States Constitution.

2. Whether G.L. c. 150E § 12 impermissibly burdens the constitutional rights of non-union public employees by requiring them to apply for a rebate of certain fees rather than requiring affirmative consent for the payment of fees.

3. Whether, by permitting a union to be the exclusive employee representative with respect to bargaining on the terms and conditions of employment, but failing to require that non-union public employees have a voice and a vote with respect to those terms and conditions, G.L. c. 150E impermissibly coerces non-union public employees to join the union with which the non-union public employees disagree, in order to have a say in the terms of their employment, in violation of the non-union employees' First Amendment rights.

STATEMENT OF THE CASE

Public employee unions appointed the exclusive collective bargaining representative are the sole representatives of an entire unit of public employees, regardless of whether those employees are members of the union. G.L. c. 150E § 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."). Public employee unions are alone empowered to negotiate the terms of employment agreements with state actors, the terms of which the United States Supreme Court has held are indisputably matters of public policy and of the highest public concern. Janus v. American Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2472-2473 (2018); Harris v. Quinn, 134 S. Ct. 2618, 2642-2643 (2014) ("[I]t is impossible to argue that the level of . . . state spending for employee benefits in general . . . is not a matter of great public concern").

Because public employee unions have the exclusive state-endorsed privilege to negotiate on behalf of all public employees in a collective bargaining unit, they are the sole vehicle and arbiter of the means through which public employees may have a say in the terms of their employment. For the same reason, public employee unions are also the sole means by which public employees can meaningfully speak to the government on matters of public policy affecting their employment. See Bivens et al., How Today's Unions Help Working People: Giving Workers The Power To Improve Their Jobs And Unrig The Economy, Economic Policy Institute, 2 (Aug. 24, 2017), available at https://www.epi.org/files/pdf/133275.pdf

("'Collective bargaining' is how working people gain a voice at work . . . . Joining a union simply means that you and your colleagues have a say . . . .").[2]

Laws like G.L. c. 150E require that non-union public employees financially support public sector unions. However, the effect of such laws is to coerce non-union public employees into financially supporting the speech preferred by unions, regardless of whether the non-union employees agree with that speech. See, e.g., Schatzki, Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity be Abolished?, 123 U. Penn. L. Rev. 897, 914 (1975) (noting that "employees are coerced (induced?) into joining their exclusive representative because, once having the union imposed upon them, they might as well join and have some voice in selecting their spokesmen and in determining what policies the union should follow"); Hunter, Exclusive Representation, Mackinac Ctr. for Pub. Policy (May 1, 1997), available at https://www.mackinac.org/1007 (noting that under an exclusive representation scheme, "[when] a union is selected to represent employees in an 'appropriate' unit

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[2] Cf. Mass. Teachers' Ass'n, Good Reasons to Belong to MTA, available at https://massteacher.org/about-the-mta/good-reasons-to-belong-to-mta (explaining that joining a union "[p]rovides legal protection of your First Amendment rights to speak freely"); Mass. Soc'y of Professors, Why Join, available at https://umassmsp.org/join/why-join/ ("When you join the MSP, you have a voice.").

of workers, the union alone has the legal authority to speak for all employees, including those who neither voted for nor joined the labor organization. No other union, individual or representative may negotiate terms and conditions of employment, and the individual employee is effectively deprived of the opportunity to represent his or her own interests.").

Similarly, G.L. c. 150E, which permits unions to exclude non-union employees from participating in discussions regarding the terms of their employment, coerces non-union public employees into joining the union in order to have a say in the terms and conditions of their employment. That coercion infringes the non-union employees' First Amendment rights not to endorse or subsidize political speech or to associate with groups or opinions with which they disagree.

This case affords the opportunity to rectify these wrongs. Laws like G.L. c. 150E that coerce speech and association, long prohibited in almost every context other than public sector unions, can no longer stand. Cf. Janus, 138 S. Ct. at 2483 (describing the free speech impairment endorsed by Abood as "an 'anomaly' in [the Supreme Court's] First Amendment jurisprudence"); Weinrib, The Right to Work and the Right to Strike, 2017 U. Chi. Legal F. 513, 518-519 (2018) (noting how, in the labor context, statutes and policies that limit First Amendment rights have been tolerated to a much greater

extent than other areas of American life).

The Supreme Court's recent decision in Janus makes clear that laws coercing non-union public employee speech and association are unconstitutional. Accordingly, to the extent G.L. c. 150E §§ 4, 5, and 12 permit exclusive bargaining representatives to impose agency fees upon non-union public employees or exclude non-union public employees from exercising any voice in the collective bargaining process, they violate the First Amendment and cannot stand.

SUMMARY OF ARGUMENT

In the wake of Janus v. American Federation of State, County, & Municipal Employees, Council 31, any mandatory agency or service fee charged to non-union public employees by an exclusive bargaining representative unconstitutionally compels non-union public employees to support union speech. See 138 S. Ct. 2448, 2486 (2018). The mandatory agency fee provision of G.L. c. 150E § 12 is functionally indistinct to Ill. Comp. Stat. ch. 5 § 315/6(a), the Illinois agency fee statute held unconstitutional in Janus. See id.; compare G.L. c. 150E § 12, with Ill. Comp. Stat. ch. 5 § 315/6(a). Therefore, the compulsory agency fee permitted by G.L. c. 150E § 12 is an unconstitutional violation of the First Amendment.

G.L. c. 150E § 12 is not saved by allowing non-union public employees to apply for a rebate to recover

the agency fee paid. Janus unequivocally held that a non-union public employee must freely consent before any agency fee is exacted. See 138 S. Ct. at 2486. Thus, even temporarily exacting a fee without public employee consent does not withstand constitutional scrutiny. Cf. School Comm. of Greenfield v. Greenfield Educ. Ass'n, 385 Mass. 70, 84 (1982).

Finally, G.L. c. 150E is unconstitutional to the extent that it permits an exclusive bargaining representative to deprive non-union public employees of a voice and vote in the collective bargaining process. By enabling an exclusive bargaining representative to deprive non-union public employees of a voice and vote in the collective bargaining process, G.L. c. 150E coerces non-union employee speech and forces non-union employees to surrender their associational rights without any plausible--much less compelling--justification. See Janus, 138 S. Ct. at 2472 n.9. No Supreme Court precedent cite by Appellees authorizes the coercion of public employees' First Amendment rights without a compelling justification. Cf. Elrod v. Burns, 427 U.S. 347, 362 (1976).

ARGUMENT

I. G.L. C. 150E § 12 IS UNCONSTITUTIONAL BECAUSE IT IMPERMISSIBLY COMPELS NON-UNION PUBLIC EMPLOYEES TO SUPPORT UNION SPEECH

The First Amendment to the United States Constitution precludes the government from coercing

speech. Janus v. American Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2463 (2018) ("Compelling individuals to mouth support for views they find objectionable violates [a] cardinal constitutional command, and in most contexts, any such effort would be universally condemned."). Coerced speech is not limited forced speech, but also includes coercing financial support of organizations with whose speech one disagrees. Id. at 2464 ("Compelling a person to subsidize the speech of other private speakers raises similar First Amendment concerns. . . . As Jefferson famously put it, 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.'"). As the Supreme Court recently held in Janus, these principles are no less important in the context of non-union public employees. Id. at 2473.

In Janus, the Court considered a provision in Ill. Comp. Stat. ch. 5 § 315/6(a), requiring that non-union public employees "pay [to their exclusive bargaining representative] a fee which shall be their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment." Ill. Comp. Stat. ch. 5 § 315/6(a). Overruling Abood v. Detroit Board of Education, 431 U.S. 209 (1977), the Supreme Court held that Ill. Comp. Stat. ch. 5 § 315/6(a)

is unconstitutional. Janus, 138 S. Ct. at 2486. The Court unequivocally held that "neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages . . . unless the employee affirmatively consents to pay" that fee. Id. That is because coercing a non-union employee to support financially speech by an exclusive bargaining representative with which a non-union employee disagrees "violates [the] cardinal constitutional command" against compelled speech. Id. at 2463.

G.L. c. 150E § 12 is functionally indistinct--and, in fact, more coercive--than the agency fee imposed by the statute struck down in Janus. Like Ill. Comp. Stat. ch. 5 § 315/6(a), G.L. c. 150E § 12 allows unions to compel non-union public employees to pay an agency fee. Worse, G.L. c. 150E § 12 makes that requirement mandatory: it provides that "the [State] or any other employer ***shall*** require as a condition of employment . . . the payment . . . of a service fee to the employee organization." G.L. c. 150E § 12 (emphasis added); compare Ill. Comp. Stat. ch. 5 § 315/6(a).

Given that G.L. c. 150E § 12 is indistinct from the law struck down in Janus, G.L. c. 150E § 12 is unconstitutional.

II. THE MERE FACT THAT A NON-UNION PUBLIC EMPLOYEE MAY APPLY FOR A REBATE TO RECOUP A PORTION OF AGENCY FEES PAID DOES NOT RENDER G.L. C. 150E § 12 CONSTITUTIONAL

Merely because a statutory scheme--like G.L. c. 150E § 12--allows a non-union public employee to apply for a rebate to recoup some (or even all) of the agency fee (or permits the agency fee to be paid into escrow pending a challenge to the fee) does not cure the constitutional deficiency of a mandatory agency fee. Again, Janus is dispositive.

Ill. Comp. Stat. ch. 5 § 315/6(a), (e), the statute at issue in Janus, permitted a public employer to automatically deduct the agency fee from a non-union employee's paycheck. In holding that statute unconstitutional, the Supreme Court explained that no "agency fee nor any other payment to the union may be deducted . . . ***unless the employee affirmatively consents to pay.***" Janus, 138 S. Ct. at 2486 (emphasis added). Indeed, "[u]nless employees clearly and affirmatively consent ***before*** any money is taken from them, this standard cannot be met." Id. (emphasis added). The Supreme Court's categorical rule makes no exceptions for statutory schemes that afford the non-union public employees to recoup some or all of the agency fee paid by applying for a rebate or otherwise. What matters is that they have not affirmatively consented to pay that fee.

The categorical rule espoused in Janus is not only dispositive, but the inevitable result of the application of this Court's decision in School Committee of Greenfield v. Greenfield Education Association, 385 Mass. 70 (1982), uninhibited by the now dispensed-with constraints of Abood.

In School Committee of Greenfield, this Court considered the constitutionality of G.L. c. 150E § 12's requirement that an exclusive bargaining representative imposing an agency fee as a condition of employment establish an internal procedure permitting non-union employees to seek a rebate of that portion of the agency fee that the non-union employee could establish involved political expenditures. 385 Mass. at 77-78. The starting point for this Court's analysis was the premise that even a temporary payment to a union of any money that could be used to pay for political speech is "constitutionally suspect." Id. at 79. Moreover, this Court stated that even "interim payment . . . not only deprives [non-union employees] of the opportunity to engage in expressive activities with those funds but also forces them to subsidize the objectionable activities of the [union]." Id. at 84 (citing Abood, 431 U.S. at 244 (Stevens, J., concurring)). For that reason, this Court acknowledged that G.L. c. 150E § 12 would be unconstitutional to the extent it required the payment of an agency or service fee to support political

speech subject only to an internal union process for obtaining a rebate. Id. at 83-84.

However, this Court also acknowledged that Abood--around which G.L. c. 150E § 12 was drafted--permitted an exclusive bargaining representative to charge an agency fee for costs associated with collective bargaining. Accordingly, the Court was compelled to weigh the "competing interests of [non-union employees] and associations of public sector employees." School Comm. of Greenfield, 385 Mass. at 85. Although an exclusive rebate scheme would be "constitutionally suspect" given that it does nothing to alleviate the temporary deprivation of a constitutional right, this Court ultimately concluded that G.L. c. 150E § 12 could be interpreted to permit a non-union employee to alternatively petition the Labor Relations Commission which would hold the agency fee in escrow pending the outcome of the petition: "The necessity of protecting the rights of dissenters is not a justification for allowing . . . nonaccess [by a union] to that portion of the fee which will be used for collective bargaining, contract administration and grievance adjustment." Id.

This Court is no longer bound by Abood. An exclusive bargaining representative no longer has any legitimate interest in an agency fee; indeed, assessing agency fees without prior consent are per se unconstitutional. See Janus, 138 S. Ct. at 2486. Thus,

there is no longer any justification for weighing the "competing interests of [non-union employees] and associations of public sector employees." School Comm. of Greenfield, 385 Mass. at 85. Uninhibited by Abood, the only protected interest at issue is a non-union employee's constitutional right not to "be forced to subsidize, ***even temporarily***, activities they [find] objectionable." Id. at 84 (emphasis added). Therefore, temporarily appropriating non-union employee funds--whether by payment to a union subject to a rebate or by paying the funds into escrow held by the Labor Relations Commission--no longer has any constitutional justification, and unconstitutionally "deprives [non-union employees] of the opportunity to engage in expressive activities." Id. at 84, citing Abood, 431 U.S. at 244 (Stevens, J., concurring).

After Janus, G.L. c. 150E § 12's compulsory agency or service fee cannot withstand constitutional scrutiny, even if the compulsory surrender of an agency fee is only temporary.

III. G.L. C. 150E IS UNCONSTITUTIONAL TO THE EXTENT THAT IT PERMITS AN EXCLUSIVE BARGAINING REPRESENTATIVE TO DEPRIVE NON-UNION PUBLIC EMPLOYEES OF A VOICE AND VOTE IN THE COLLECTIVE BARGAINING PROCESS

A. G.L. c. 150E's Failure To Preclude Unions From Depriving Non-Member Employees Of A Voice And Vote In The Collective Bargaining Process Is Subject To Constitutional Scrutiny

An infringement of First Amendment freedoms need not be the direct result of state conduct itself. Lugar

v. Edmondson Oil Co., 457 U.S. 922, 937 (1982) (setting out requirements for finding private actions attributable to the state for Constitutional purposes). The deprivation of constitutional rights by private associations pursuant to a delegation of authority by the state is no less a constitutional violation than the express command of state law. Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295-296 (2001) (private "activity may be state action when . . . [the private party] has been delegated a public function by the state").

This important principle only makes sense because the state cannot delegate to a private organization the power to effectuate what the Constitution precludes the state itself from doing. Lugar, 457 U.S. at 939 (holding that state action turns in part on "whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority."); see International Ass'n of Machinists v. Street, 367 U.S. 740, 749, 760 (1961) (finding questions are of the "utmost [constitutional] gravity" when "'Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents'"). Irrespective of whether a statute delegating authority to a private association makes express reference to--or expressly approves of--

the discretionary practice engaged in by the private association, what is determinative is whether the power delegated to the private association is used to infringe constitutional rights. Cf. Brentwood Acad., 531 U.S. at 301 (explaining that the repeal of an express grant of authority did not render constitutional a practice that "now [operates] by winks and nods").

Accordingly, it has long been settled that a statutory scheme empowering a union to be an exclusive bargaining representative is subject to constitutional scrutiny to the extent that it enables the union to engage in conduct that, if engaged in by the state itself, would be unconstitutional. See Abood, 431 U.S. at 220-221, 235-236 (holding that an exclusive bargaining representative's effort to force non-union employees to support ideological and political positions against their will violated the First Amendment); Street, 367 U.S. at 749, 760 (finding decisions of an exclusive bargaining representative subject to constitutional scrutiny when that decision-making authority was delegated by the state); Railway Emps. Dep't v. Hanson, 351 U.S. 225, 232 (1956) (similar); see also Janus, 138 S. Ct. at 2464-2465 (effectively holding that a public employee union's use of its exclusive bargaining position to force non-members to support political speech of the union was state action for purposes of constitutional analysis); Knox v. Service

Emps. Int'l Union, 567 U.S. 298, 314-317 (2012) (considering the constitutionality of an opt-out requirement for a union's special assessment fee).

Hanson is illustrative. In Hanson, the Supreme Court considered whether a statute permitting a union to charge agency fees subjected the statutory grant of authority to constitutional challenge. See 351 U.S. at 231-232. The Court held that it did. Id. at 232. Reasoning that "[i]f private rights are being invaded, it is by force of an agreement made pursuant to federal law," the Court thus held that the "federal statute is the source of the power and authority by which any private rights are lost or sacrificed." Id. at 232. Therefore, "[t]he enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction." Id. In other words, where a statute empowers a union to deprive individuals of their constitutional rights, that statute is subject to constitutional challenge to the extent that the union's conduct infringes First Amendment freedoms. See id.

That is precisely the issue here. In this case, G.L. c. 150E empowers a union to negotiate exclusively on behalf of public employees. That exclusive power affords the union substantial discretionary authority to determine the terms and conditions upon which employees

may engage with their state employers regarding the terms and conditions of their employment. To the extent that the union uses that authority to inhibit the free exercise of non-union employees, G.L. c. 150E's empowerment of the union to engage in that practice is subject to constitutional challenge.

Without addressing the theory of state action espoused in Hanson, Abood, Knox, and Janus, both Defendant-Appellee and Intervenor-Appellees assert that an exclusive bargaining representative's decision to deprive a non-union employee of a voice and vote in the collective bargaining process does not constitute state action because internal union rules do not constitute state action. See Brief of Defendant-Appellee at 32-33; Brief of Intervenor-Appellees at 40-44. That reliance is misplaced.

The union conduct at issue here is not an internal union rule. Appellants are not challenging the terms of union membership. Cf. Hovan v. United Bhd. of Carpenters & Joiners of Am., 704 F.2d 641, 642 (1st Cir. 1983) (holding that a union conditioning membership on a renunciation oath was not subject to constitutional challenge); Kidwell v. Transportation Commc'ns Int'l Union, 946 F.2d 283, 297 (4th Cir. 1991) (similar); Hallinan v. Fraternal Order of Police of Chicago Lodge No. 7, 570 F.3d 811, 815-820 (7th Cir. 2009) (expulsion of union members not state action). Nor are Appellants

challenging rules regarding the internal operation of exclusive union business. Cf. United Steelworkers of Am., AFL-CIO-CLC v. Sadlowski, 457 U.S. 102, 121 n.16 (1982) (upholding rule barring outside spending on union leadership elections). Rather, Appellants are challenging the authority granted by the state to an exclusive bargaining representative to preclude non-union employees--employees who expressly do not want to associate with a union--from having any input into the process by which the terms of their employment are negotiated.

Intervenor-Appellees' resort to the Central District of California's non-precedential, and pre-Janus decision, in Bain v. California Teachers Association, 156 F. Supp. 3d 1142 (C.D. Cal. 2015) is equally unavailing. See Brief of Intervenor-Appellees at 42-43. In fact, Bain acknowledges that state action is present where exclusive bargaining representatives "use the force of law to require a [non-union employee] to contribute to political and ideological expenditures" of the union. 156 F. Supp. 3d at 1153. That is precisely what the exclusive bargaining representatives are doing here: using the force of law (i.e., their exclusive authority to negotiate on behalf of non-union members) to coerce non-union members to join and subsidize union speech (i.e., conditioning a voice and vote in the process of collective bargaining on union membership).

Although Bain held that the choice afforded the non-union member plaintiffs by the exclusive bargaining representative was insufficiently coercive, it implicitly acknowledged that certain choices would be sufficiently coercive. See id. (explaining that the "choice enabled by state law [was] not necessarily . . . coercive without more"). The practice of depriving non-union employees of speaking with the state and having a say in the process by which the terms of their employment are determined is such a coercive choice. See infra Section III.B.

B. G.L. c. 150E Unconstitutionally Coerces Non-Union Employee Speech By Permitting Public Sector Unions To Exclude Non-Union Employees From A Voice And Vote In The Collective Bargaining Process

It is well settled that state actors may not, "without sufficient justification, . . . pressur[e] employees to discontinue the free exercise of their First Amendment rights." Rutan v. Republican Party of Ill., 497 U.S. 62, 79 (1990). Such pressure need not be direct to be unconstitutional: "In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of [the Supreme Court] recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action." NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 461, 463 (1958) (forced disclosure of membership violated right to association

because it "may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure"); see Elrod v. Burns, 427 U.S. 347, 362 (1976) (patronage dismissals held unconstitutional, noting that "[i]t is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny. This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct.") (internal citations omitted); Healy v. James, 408 U.S. 169, 183 (1972) (placing the burden on a college administration to justify rejecting official recognition of student groups, noting that "[f]reedom[s] such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." (quoting Bates v. City of Little Rock, 361 U.S. 516, 523 (1960)).

When, in the context of public employment, First Amendment rights are infringed, that infringement can only stand if it survives exacting scrutiny. Janus, 138 S. Ct. at 2472 n.9 ("[I]n public employment, a significant impairment of First Amendment rights must survive exacting scrutiny."); Elrod, 427 U.S. at 362.

Thus, absent a compelling state interest justifying the impairment of a First Amendment freedom and a finding

that the interest cannot be achieved through less-restrictive means, the impairment of the First Amendment freedom cannot stand. See Janus, 138 S. Ct. at 2472 n.9; see also Boy Scouts of Am. v. Dale, 530 U.S. 630, 648 (2000) (discussing the balancing test required under exacting scrutiny).

Here, by permitting public employee unions to exclude non-union employees from a voice and vote in the collective bargaining process, G.L. c. 150E indirectly--and impermissibly--coerces public employees to join the union in order to express their views about the terms of their employment. Such expression is, the Court in Janus found, of significant public interest. See Janus, 138 S. Ct. at 2474-2476. Compelled association with a union forces an employee who do not wish to join a union to forgo his or her constitutional right to the freedoms of association and speech. That coercion is unconstitutional and cannot stand.[3]

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[3] Pioneer is not asserting, and does not understand Plaintiff-Appellants to be asserting, that collective bargaining or exclusive representation in collective bargaining is itself unconstitutional. Pioneer recognizes the Supreme Court's holding in Abood that exclusive representation serves the state's compelling interest. See 431 U.S. at 220-221, overruled on other grounds by Janus, 138 S. Ct. at 2465. Much of Defendant-Appellee's and Intervenor-Appellees' argument is therefore misplaced. Instead, Pioneer asserts that, even "assum[ing] that 'labor peace' . . . is a compelling state interest" that may justify exclusive bargaining, depriving non-union employees of a voice and vote in the collective bargaining process is a distinct constitutional violation that does not serve the

1. G.L. c. 150E'S grant of authority to exclusive bargaining representatives to exclude non-union employees from a voice and vote impermissibly coerces them to surrender their first amendment rights

G.L. c. 150E on its face is silent regarding the restrictions that a public sector union may impose on the participation of non-union employees in voting on the terms and conditions of employment. See G.L. c. 150E §§ 4-5. However, that very silence permits public sector unions--including the Massachusetts Society of Professors, Hanover Teachers Association, Massachusetts Teachers Association, and Professional Staff Union--to exclude non-union public employees from participating in deliberations regarding the terms and conditions of their employment. See, e.g., R.A. II, 6 ("WARNING: IF YOU ELECT [NOT] TO . . . BECOME A MEMBER . . . YOU WILL NOT BE ENTITLED TO THE FOLLOWING SERVICES[:] . . . [the] ability to . . . vote on . . . contract proposals or bargaining strategy.").

Such a scheme coerces employees to relinquish at least two bedrock First Amendment rights: the right to freedom of association, see Knox, 132 S. Ct. at 2288, and the right to freedom of speech, see Janus, 138 S. Ct. at 2474-2476. Non-union employees--like Appellants--have no interest in associating with a union, nor any interest in subsidizing union speech. See R.A. I, 103-

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interest served by exclusive bargaining. Janus, 138 S. Ct. at 2465.

104 at ¶ 8 (Dr. Melcuk explaining that he has "philosophical, political, emotional, ethical, and psychological objections" to unions); R.A. III, 73-75 at ¶¶ 1, 6-7, 9 (Dr. Branch noting his aversion to the union because it keeps unqualified teachers in their jobs at the expense of more experienced teachers and students); R.A. III, 82-83 at ¶ 15 (Dr. Connor explaining that union membership is not in his best interest and that he opposes the union's political and ideological views). Nevertheless, G.L. c. 150E authorizes exclusive bargaining representatives and leaves those exclusive bargaining representatives completely free to deprive non-union employees of a voice and vote in collective bargaining matters. Thus, choosing not to associate with the union substantially limits--indeed, precludes--the ability of non-union employees to participate in the negotiation of the terms of their employment.[4]

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[4] See Hunter, Exclusive Representation, Mackinac Ctr. For Pub. Policy (May 1, 1997), available at https://www.mackinac.org/1007 (noting that under an exclusive representation scheme, "[when] a union is selected to represent employees in an 'appropriate' unit of workers, the union alone has the legal authority to speak for all employees, including those who neither voted for nor joined the labor organization. No other union, individual or representative may negotiate terms and conditions of employment, and the individual employee is effectively deprived of the opportunity to represent his or her own interests. . . . [L]abor laws are usually portrayed as benefiting employees, but the laws take away legally and practically an individual's right to price his or her own labor and to work under conditions which are personally agreeable"); Alt &

Similarly, choosing not to associate with a union effectively precludes meaningful speech to the state about the matters of "great public concern" recognized by Janus: the terms and conditions of state employment. See 138 S. Ct. at 2474. The nature of an exclusive collective bargaining arrangement is such that a public sector employee's speech is silenced unless made through a union which is granted the exclusive right to bargain. G.L. c. 150E, § 4 ("Public employers may recognize an employee organization . . . as the *exclusive* representative of all the employees in such unit for the purpose of collective bargaining.") (emphasis added). Because the public employer--i.e., the state--is required to reach an agreement with the collective bargaining representative, the state cannot (even if it wanted to) take into account the concerns of non-union employees related to the terms of their public employment. Cf. Janus, 138 S. Ct. at 2469 ("[D]esignating a union as the exclusive representative of nonmembers substantially restricts the nonmembers' rights.").

By permitting the exclusive bargaining

Grossman, Opinion, It's Time to Stop Forcing Work Labor Under Exclusive Representation, The Hill (Aug. 30, 2018, 8:00 AM), https://thehill.com/opinion/civil-rights/404246-its-time-to-stop-forcing-workers-to-labor-under-exclusive-representation (noting that "for workers who have not voluntarily joined a union, the government is literally appointing someone to speak for them, in their name and on their behalf").

representative to preclude non-union employees from effectively communicating with their employer on matters of ***personal*** concern and to the government about matters of ***public*** concern, it is more than "likely" that non-union employees are pressured to forego their First Amendment rights not to associate with, and subsidize the speech of, those with whom they disagree. Simply as a matter of self-preservation in their effort to earn a living, they must join the union to preserve their voice on important matters of public and private concern. See Patterson, 357 U.S. at 462-463 (explaining that laws impair First Amendment rights when they "entail[] the ***likelihood*** of a substantial restraint upon the exercise . . . of [the] right to freedom of association," are "***likely*** to affect adversely the ability of [individuals] to pursue their collective effort to foster beliefs which they admittedly have the right to advocate," or "***may*** induce members" to forgo First Amendment freedoms) (emphases added); see also Healy, 408 U.S. at 183 (explaining that courts "are not free to disregard the practical realities" that may indirectly impair First Amendment rights).

This is no idle threat. Unions--including the Appellees here--openly acknowledge that exclusive bargaining rights provide the vehicle that preserves an employee's voice regarding the terms of his or her employment. See, e.g., Mass. Society of Professors, Why

Join ("When you join the MSP, you have a voice."); Mass. Teachers' Ass'n, Good Reasons to Belong to MTA (explaining that joining a union "[p]rovides legal protection of your First Amendment rights to speak freely"); Nat'l Educ. Ass'n, NEA Collective Bargaining and Member Advocacy, https://www.nea.org/assets/docs/120701-BargainBenefitsEveryoneEducation.pdf ("Bargaining gives the education professional a genuine voice.").[5]

Thus, it is no surprise that union members cite their desire to be heard regarding the terms and conditions of their employment as the reason for their continued union membership, even when they disagree with union policy positions. See e.g., Holst, It's Time to Opt In, Ill. Times (July 5, 2018, 12:20 AM), https://illinoistimes.com/article-20175-it%E2%80%99s-time-to-opt-in.html (explaining that although she was formerly a nonmember, she would join the union after Janus "despite its flaws" because without the union, her "lone voice and interests would be ignored. By teaming up with tens of thousands of other working people, however, our collective voice gives us power in negotiations."); Keller, The Pros and Cons of Joining a Labor Union, Fox

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[5] See also Bivens et al., How Today's Unions Help Working People: Giving Workers The Power To Improve Their Jobs And Unrig The Economy 1 (Aug. 24, 2017) ("'Collective bargaining' is how working people gain a voice at work . . . . Joining a union simply means that you and your colleagues have a say . . . .").

Business (Apr. 10, 2012), https://www.foxbusiness.com/features/the-pros-and-cons-of-joining-a-labor-union (noting that joining a union preserves one's voice on issues of employment); Schatzki, Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity be Abolished?, 123 U. Penn. L. Rev. 897, 914 (1975) (noting that "the fact that [employees who unwilling join unions] receive some 'quid pro quo' for joining hardly changes the fact that they might prefer another (or no) union").[6]

This demonstrable coercion impermissibly forces non-union employees to forgo their First Amendment freedoms. Such coercion cannot stand absent a compelling government interest served through the least restrictive means. See Janus, 138 S. Ct. at 2472 n.9.

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[6] Cf. Dey, Legal Fight Over Janus Decision Drenched In Ruthless Politics, News Gazette (July 19, 2018), available at http://www.news-gazette.com/opinion/columns/2018-07-19/jim-dey-legal-fight-over-janus-decision-drenched-ruthless-politics.html ("Union spokesman Anders Lindall stated that 'just a handful' of members have decided to drop out [of the union following *Janus*]. But he did say 'hundreds of former fee-payers'--non-union members required to pay agency fees to the union--'have joined the union as new members.' He said the ratio of those joining to those leaving is 'more than 10 to 1.'").

2. Requiring an exclusive bargaining representative to give non-union members a voice and vote in collective bargaining does not violate the associational rights of the union

In a vain effort to invert the constitutional burden at issue, both Defendant-Appellee and Intervenor-Appellees argue that requiring an exclusive bargaining representative to give non-members a voice and vote in the collective bargaining process would violate a union's First Amendment rights of expressive association by forcing a union to accept members with which it would rather not associate. Brief of Defendant-Appellee at 34-35; Brief of Intervenor-Appellees at 44-46. That argument strains credulity. As noted above, Appellants are not seeking union membership. Just the opposite.

Nor would allowing non-members a voice and vote "impair the ability of the original members to express only those views that brought them together." Brief of Intervenor-Appellees at 46. Whether or not non-union employees are afforded a voice and vote, the union and its members remain free to speak and associate as they choose. But when speaking as the exclusive bargaining representative--a state-sanctioned position of privilege--a union is required to speak for the entire unit on whose behalf they are bargaining, both union members and non-members. That is not a constitutional deprivation. Indeed, as Intervenor-Appellees elsewhere acknowledge, their state-sanction position of privilege

requires that they provide "fair representation for all employees in the [collective bargaining] unit 'without discrimination and without regard to employee organization membership.'" Brief of Intervenor-Appellees at 4 (citing G.L. c. 150E § 5). If a union does not wish to serve both its members and non-members, it is free to not seek the status of exclusive bargaining representative and continue to speak exclusively for its membership regarding the "views that brought them together."

3. Coercing the surrender of constitutional liberties by excluding public sector non-union employees from a voice in collective bargaining serves no compelling interest

No compelling interests justify a statutory regime that permits excluding public sector non-union employees from a voice and vote in the collective bargaining process.

First, whatever the merit or justification of exclusive collective bargaining, that justification does not extend to depriving non-union employees from having a voice and vote in the collective bargaining process. For example, Intervenor-Appellees have argued that exclusive representation is justified by the government's need for efficiency in reaching an enforceable agreement. See Appeals Court Brief of Intervenor-Appellees at 41-42 (citing Abood, 431 U.S. at 220-221 (1977); Minnesota State Bd. for Cmty. Colls. v.

Knight, 465 U.S. 271, 291 (1984)). However, that efficiency inheres in having an exclusive representative. It does not justify depriving non-union employees of a voice and vote on the strategy for negotiation, or the terms to be negotiated, by the exclusive bargaining representative. See Janus, 138 S. Ct. at 2466-2469 (disaggregating the questions of whether exclusive representation served a compelling interest from whether the exclusive representative charging agency fees similarly served that interest, concluding the latter did not); Harris v. Quinn, 134 S. Ct. 2618, 2640 (2014) ("A union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked.").

Second, permitting non-union employees a voice and vote on the strategy for negotiation, or the terms to be negotiated, will not eradicate unions or undermine the various governmental interests in exclusive bargaining. Employees join unions "to more effectively pursue their shared interests--such as improved compensation and better working conditions." Malkus, The Janus Case and the Future of Teachers Unions, Am. Enterprise Inst., http://www.aei.org/spotlight/the-janus-case/. Unions will continue to serve that fundamental purpose even if non-union employees are afforded a voice and vote in the collective bargaining process. See Awaiting Janus v. AFSCME Decision, Teachers Weigh in on Unions, Educators

For Excellence (May 23, 2018), https://e4e.org/blog-news/press-release/awaiting-janus-v-afscme-decision-teachers-weigh-unions (discussing a recent study showing that "teachers largely regard their unions as essential," and that of those teachers, the majority believe it is "critically important" for unions to "prioritize wages, benefits and job protections over politics"); Malkus, supra (noting that employees join unions "to more effectively pursue their shared interests--such as improved compensation and better working conditions."). Further, public employees will retain the right to band together to pursue more effectively their shared interests by electing an exclusive bargaining representative, regardless of whether non-union employees are ***also*** afforded a voice and vote in the collective bargaining process.

Indeed, there is ***no*** public interest served by excluding non-union employees from a voice and vote in the collective bargaining process. Instead, depriving non-union public sector employees of a voice regarding their working conditions undermines the very purpose that collective bargaining is intended fulfill and that unions claim to serve. See, e.g., Bivens et al., supra n.5, at 1 ("'Collective bargaining' is how working people gain a voice at work . . . .").

C. Minnesota State Board For Community Colleges v. Knight Does Not Permit Depriving Non-Union Employees Of A Voice And A Vote

In an effort to justify depriving non-union employees of any voice or vote on the terms of their employment and matters of grave public interest, Intervenor-Appellees have sought to wrap themselves in the mantle of Minnesota State Board for Community Colleges v. Knight, 465 U.S. 271 (1984). That refuge is misplaced.

In Knight, the Supreme Court considered whether a union's prohibition on non-union employees joining committees that met with the employer and school board impermissibly restrained the employees' rights to speech and association by "pressuring" those nonmembers to forgo their First Amendment rights. 465 U.S. at 273. These committees met with public employers to discuss matters of general policy ***outside*** the scope of collective bargaining for which the union was the exclusive bargaining agent, and were merely sessions of dialogue that amplified the voice of the union among the array of public voices speaking on similar policy concerns. Knight, 465. U.S. at 274-275. Thus, the "meet and confer" committees considered in Knight did not relate to collective bargaining or the terms of employment. Id. Indeed, the "meet and confer" committees were not even the exclusive vehicle through which the policy issues raised during the "meet and

confer" sessions could be resolved. Id. at 288.

The Supreme Court reasoned that non-union employees retained the right to speak on any of the matters of public concern addressed by the "meet and confer" committees. The fact that the voice of the union members was "amplified" by the presence of the union at the "meet and confer" session was irrelevant: "Amplification of the sort claimed is inherent in government's freedom to choose its advisers." Knight, 465. U.S. at 288.

The Supreme Court also reasoned that although "[the non-union employees] may well feel some pressure to join the exclusive representative in order to give them the opportunity to serve on the 'meet and confer' committees or to give them a voice in the representative's adoption of positions on particular issues[,] . . . the pressure is no different from the pressure to join a majority party that persons in the minority always feel. Such pressure is inherent in our system of government; it does not create an unconstitutional inhibition on associational freedom." Knight, 465. U.S. at 289-290; see also Hill v. Service Emps. Int'l Union, 850 F.3d 861, 864 (7th Cir. 2017) ("Noting that the plaintiffs were free to form advocacy groups and were not required to join the union, the Court reasoned that any 'pressure to join the exclusive representative ... [was] no different from the pressure to join a majority party that persons in the minority always feel ... [and did]

not create an unconstitutional inhibition on associational freedom.'").

Nothing in the reasoning of Knight suggests--much less compels--the result sought by Intervenor-Appellees. Knight did not consider pressure to forgo First Amendment rights induced by a rule prohibiting non-union employees from having a voice or vote on matters germane to the collective bargaining process. Nor did Knight consider pressure to forgo First Amendment rights induced by a rule that prohibits non-union employees from having a voice or vote on matters for which the union is the exclusive means through which a particular state policy can be resolved. These differences render the "pressure" deemed constitutional in Knight of an entirely different order than that at issue here.

Indeed, central to the Supreme Court's holding in Knight was that being deprived of a privileged voice is not sufficient coercion, ***so long as employees continue to have a voice***; not all voices need to be equally heard. Hill, 850 F.3d at 864; D'Agostino v. Baker, 812 F.3d 240, 243 (1st Cir. 2016). The non-union employees in Knight remained free to petition the state (or public employers) independently on the issues discussed in the "meet and confer" sessions. Moreover, because the meet and confer committees were not the exclusive vehicles through which policy discussed during those sessions would be resolved, non-union employees could

independently petition the state on those issues and maintain their voice, even if it was diminished by the government's decision to consult exclusively with the union.

The statutory scheme at issue here goes far beyond merely diminishing the voices of non-union employees. Here, G.L. c. 150E completely precludes non-union employees from ***any*** input in the strategy for negotiating the terms of their employment. The statute does this by designating unions (to which they are not members) to be the ***sole*** vehicle by which the terms of their public employment may be negotiated. Non-union employees are not merely at risk of being drowned out or ignored, ***they are deprived of any voice at all.*** Cf. Knight, 465 U.S. at 313 (Stevens, J. dissenting) (explaining that a deprivation of the right to freedom of speech inheres in the government being "statutorily prohibited from listening").

In sum, G.L. c. 150E permits conditioning the exercise of freedom of association and speech on relinquishing ***any*** voice with respect to the strategy for negotiating and the terms of personal employment and issues of significant public concern. The statute thus enables a union to compel non-union employees to relinquish their First Amendment rights to have such a voice. This coercion deprives non-union employees of the free exercise of their rights to speech and

association. And this deprivation is not supported by any compelling governmental interest that cannot be achieved through a less restrictive means. As such, G.L. c. 150E cannot withstand constitutional scrutiny to the extent it authorizes a public employee union to deprive non-members of a voice and vote in the collective bargaining process.

CONCLUSION

For the foregoing reasons, this Court should hold that: (1) G.L. c. 150E § 12 unconstitutionally coerces non-union public employees to subsidize speech by compelling the payment of an agency or service fee; (2) the availability of a rebate to recover any or all of the agency or service does not save G.L. c. 150E § 12 from constitutional condemnation because even a rebate scheme temporarily deprives non-union employees of their First Amendment rights; and (3) permitting an exclusive bargaining representative the right to exclude non-union public employees from a voice and vote in the collective bargaining process unconstitutionally coerces non-union employees to forgo their First Amendment rights to freedom of speech and association, without adequate justification and without using the least restrictive means to achieve any underlying compelling state interest.

December 21, 2018 Respectfully submitted,

/s/ [signature]/eks

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CERTIFICATE OF SERVICE

I, Robert Kingsley Smith, hereby certify, under the penalties of perjury that on December 21, 2018, I caused the foregoing to be filed in the office of the clerk of the Supreme Judicial Court by Federal Express service and I caused two true and accurate copies of the foregoing to be served upon the following counsel by electronic and overnight mail:

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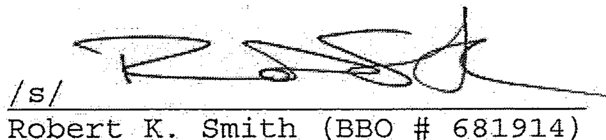

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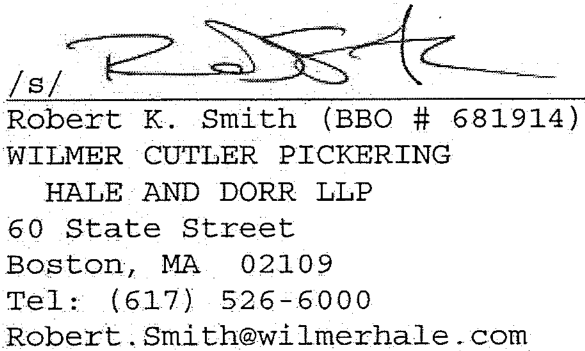
MASSACHUSETTS RULE OF APPELLATE PROCEDURE 16(K)
CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs.



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