COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Appeals Court
No. 2017-P-0784

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

CHARGING PARTIES-APPELLANTS,

AND,

DEPARTMENT OF LABOR RELATIONS,
COMMONWEALTH EMPLOYMENT RELATIONS BOARD,

AGENCY-APPELLEE,

ON APPEAL FROM A DECISION OF THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD OF THE DEPARTMENT OF LABOR RELATIONS
(Nos. ASF-14-3744, ASF-14-3919, ASF-14-3920)

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

APPLICATION FOR DIRECT APPELLATE REVIEW

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REQUEST FOR DIRECT APPELLATE REVIEW

Ben Branch, Wm. Curtiss Conner, Deborah Curran and Andre Melcuk ("Educators"), ask the Supreme Judicial Court to grant direct review of a final decision of the Commonwealth Employment Relations Board of the Department of Labor Relations ("Board"). This case presents a First Amendment (speech and association) challenge to compulsory union representation and fees for public employees. It seeks relief that can only be given by this Court or the United States Supreme Court.

In 1982 this Court completely revolutionized the agency fee challenge system for public employees in *School Committee of Greenfield v. Greenfield Education Association*, 385 Mass. 70 (1982). Three decades later (2014), the U.S. Supreme Court announced a second revolution: the highest level of judicial scrutiny must now be applied to the evaluation of compulsory union fees.

The Appeals Court is bound by the precedents of this Court. Therefore, this request for consideration of whether a second revolution in agency fee law is

required due to the new standard of scrutiny should be heard directly by this Court. This request is based not only on the authority of this Court, but on the efficient use of judicial resources.

STATEMENT OF PRIOR PROCEEDINGS

The Educators filed a series of prohibited practice charges with the Board in the summer and fall of 2014 against their employers (the University of Massachusetts and the Hanover School Committee) and their unions (the Massachusetts Teachers Association and its affiliates). The Board held two investigations, and on November 18, 2014, Investigator Susan L. Atwater consolidated the charges and issued a decision dismissing all of the Educators' charges. The Educators filed a timely request for review on November 24, 2014, and the Board upheld the dismissal decision on February 23, 2015. Since the Board is bound by constitutional decisions of this Court and the U.S. Supreme Court, the Educators conceded below that a dismissal was consistent with existing case law.

On February 26, 2015, the Educators filed a timely notice of appeal. The Board notified the Appeals Court on May 31, 2017 that the record was assembled and the Educators received notice on June 5, 2017. This appeal was docketed on June 14, 2017.

FACTS

Educators Ben Branch, Wm. Curtiss Conner and Andre Melcuk are employees of the University of Massachusetts. Dr. Branch is Professor of Finance at the University of Massachusetts in the Isenberg School of Management. Dr. Conner is Professor of Chemical Engineering at the University of Massachusetts. Dr. Melcuk is Director of Departmental Information Technology at the Silvio O. Conte National Center for Polymer Research at the University of Massachusetts. Deborah Curran is a middle school teacher in the Hanover Public Schools.

None of the Educators are union members, but all of them are included in collective bargaining units represented by affiliates of the Massachusetts Teachers Association and the National Education Association (collectively "Union"), which the

Educators are compelled to join or financially support as a condition of employment.

Forced to promote their ideological foe. The Educators submitted their own affidavits to the Board about their desire to stand apart from the Union based on conflicts with the Union's goals and methods that have adversely impacted the Educators. The Educators do not want to be represented by the Union, much less compelled to support the Union financially. Notwithstanding the Educators' decision, state law and Union practice compel them to promote the Union's viewpoint.

The agency fee statute, G.L. c. 150E § 12, requires nonmembers pay an agency fee in the amount of Union dues and seek a rebate for non-chargeable fees. Under current practice, the chargeable fees are "collective bargaining" costs and the non-chargeable fees are "political costs." (The actual description and segregation is much more complex.) The Union imposes a variation on the statute, largely consistent with the gloss imposed by *School Committee of Greenfield*, in which the Educators are required to

take an affirmative action, filing prohibited practice charges with the Board, to receive the lowest fee the Union will accept. (Branch aff'd ¶ 14.) According to scientific evidence presented by the Educators, requiring affirmative action from them to change the status quo favors Union political speech over the Educators' political speech. (Balz aff'd ¶¶ 19–26.)

The Educators also presented evidence to the Board showing the extraordinary cost, in terms of time and money, of challenging the Union's calculation of the amount it claims it spent on politics. (Dixon aff'd ¶ ¶ 3–11.)

One "no" not sufficient. Instead of accepting that once the Educators say "no" to the Union's political point of view, they should be able to continue to pay the lowest agency fee amount automatically, the Educators' "no" gets flipped by the Union to a "yes" for part of the Union's political expenses the next year. (Branch aff'd ¶ 14.)

Muzzled speech the price of political autonomy. The current system requires the Educators (and other nonmembers) to pay for collective bargaining costs,

yet the Union has an official policy barring them from a voice or vote in their workplace conditions. "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 their employment." Joint Exhibit 1, pp. 1-2. The only way to regain their voice is for the Educators to join the Union at the cost of supporting Union political speech.

Science and the Constitution. The Educators presented scientific evidence that the procedural barriers created by the Union based on current law favor Union speech over their own speech. (Balz aff'd ¶ 31.)

Finally, the currently approved practices under G.L.c. 150E § 12 artificially favor certain Union political speech. While Union lobbying for higher taxes is not chargeable to the Educators, Union expenses for collective bargaining resulting in higher taxes is chargeable. The Educators challenge being forced to support any type of Union speech.

LEGAL ISSUES

1. Is the imposition of any agency fee a prohibited practice under G.L.c.150E, §§ 2, 10(a)(1) & (3), 10(b)(1), and 12, because compulsory union fees are unconstitutional under the First and Fourteenth Amendments of the U.S. Constitution?

2. Is G.L.c.150E, § 12 unconstitutional under the First and Fourteenth Amendments of the U.S. Constitution because it structures the default choice of nonmembers to pay for the union's political and ideological costs?

3. Appellant Educators are barred by their union from having a voice and a vote on the terms and conditions of their employment because they refuse to support the union's viewpoint on political activities: is it a violation of the First and Fourteenth Amendments of the U.S. Constitution for the state, pursuant to G.L.c.150E, §§ 2, 4, 5 & 12, to grant exclusive representation to an organization that uses such authority to muzzle the speech of nonmembers?

4. The current process, pursuant to G.L.c.150E, § 12, for separating the agency fee into collective

bargaining and political costs draws the line on how much of the Educators' speech can be forced: is this expensive and complex process a violation of the First and Fourteenth Amendment requirement that burdens on speech be minimized?

5. The government is party to the agreement that imposes compulsory union fees on the Educators: does the government bear responsibility for violation of the Educators' constitutional rights?

6. Should this Court consider the affidavits of Professors Michael Podgursky and George Nerren as evidence to determine the constitutional claims before this Court?

7. Was the decision of the Board on the foregoing issues in error?

All of these issues were raised and preserved before the Board.

ARGUMENT

A. Introduction. More than sixty years ago the Supreme Court embarked on an experiment with compulsory union fees. In *Railway Employes' Department v. Hanson,* 351 U.S. 225 (1956) the Court

acknowledged the controversial nature of this compulsion: "The ingredients of industrial peace" are not only "numerous and complex," but they "may well vary from age to age" with the result that what "would be needful one decade might be anathema the next." *Id.* at 234.

Recently, the U.S. Supreme Court in *Harris v. Quinn*, 134 S.Ct. 2618 (2014) announced that the time had arrived to consider whether compulsory union fees continue to be appropriate for public employees. It described *Hanson's* analysis upholding the constitutionality of compulsory union fees as "a single, unsupported sentence that its author essentially abandoned a few years later." *Id. at* 2632.

The original justification for compulsory fees sat on a very narrow perch: the legislative judgment that the elimination of "free riders" is necessary for "labor peace." *Knox v. Serv. Emps. Int'l Union, Local 1000,* 132 S.Ct 2277, 2290 (2012).

The validity of the original legal justification no longer exists because "free rider" arguments are "generally insufficient to overcome First Amendment

objections." *Id.* at 2289. "The mere fact that nonunion members benefit from union speech is not enough to justify an agency fee." *Harris,* 134 S.Ct. at 2636. Even the extent of the benefit, if any, is open to debate. The Educators submitted a twenty year study of public school teachers represented by affiliates of the National Education Association showing they earned less than those who were not union-represented. They also submitted the affidavit of a national expert in the economics of education showing that collective bargaining harms the pay of some categories of teachers.[1]

The level of constitutional scrutiny for compulsory fees has also changed. In *Hanson* the Court applied a rational basis test. 351 U.S. at 234. A later case, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), applied the intermediate scrutiny test. *Id.* at 225. However, *Harris* applied "generally

[1] Nerren aff'd. ¶ ¶ 7-13 and attached study; Podgursky aff'd. ¶¶ 5-7.The Investigator and the Board did not accept either the Nerren or Podgursky affidavits into evidence. The Educators made an offer of proof for both. Whether these affidavits should have been accepted is an issue on appeal.

applicable First Amendment standards," resulting in the application of exacting scrutiny to compulsory union fees. 134 S.Ct. at 2639 ("exacting First Amendment scrutiny," quoting *Knox*, 132 S.Ct. at 2289).

The foundation for compulsory union fees is crumbling; therefore the burdens imposed by the Union on the Educators can no longer stand.

With the U.S. Supreme Court announcing a new level of scrutiny for compulsory union fees, and with the rejection of the "free rider" justification for compulsion, the time has come for the Supreme Judicial Court to decide if these substantial changes require a second revolution in this Court's agency fee jurisprudence.

B. The Government Cannot Create a Default Favoring Union Speech. The First Amendment does not countenance discrimination based on the identity of the speaker, *Citizens United v. FEC,* 558 U.S.310, 341 (2010), or permit limitations based on the identity of the interests represented by the speaker. *Id.* at 347; *Sorrell v. IMS Health Inc.,* 131 S.Ct. 2653, 2664 (2011). Even laws that appear to be neutral as to

content and speaker can burden one side of speech by the procedures employed. *Sorrell*, 131 S.Ct. at 2664.

Calculating the amount of the compulsory union fee draws the line between what speech nonmembers will retain, and what will be forced to be made on behalf of the Union. The current system heavily favors Union speech.

Chapter 150E § 12 equates the nonmember union service fee with union dues. It then provides that if (and only if) an employee demands, the union must provide a rebate of the political portion of the union dues. The Educators provided an affidavit by Dr. John Balz, lead researcher for the New York Times best-selling book, *Nudge*.[2] Balz, an expert in the science of defaults ("choice architecture"), opined what should be obvious – Section 12 creates a default that favors Union speech. If the Educator does nothing, the Union keeps for itself the entire dues amount. (Balz aff'd. ¶¶ 18–19, 25–26.)

In *School Committee of Greenfield* this Court not only added helpful limits on Section 12, it stated

[2] RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2009).

that the Educators' rights in the agency fee are constitutional, while the Union's rights are only statutory and contractual. *Id.* at 84. The result is that Section 12 not only tilts in favor of Union speech, it tilts against the constitutionally protected speech rights of the Educators.

Although affirmative objection has long been required, this constitutional issue is currently in play according to the Supreme Court. *Knox* explained the historic "dissent is not to be presumed" language was only an "offhand remark" which did not "consider the broader constitutional implications of an affirmative opt-out requirement." *Id.* at 2290. The Court went on to write that prior decisions "approach, if they do not cross, the limit of what the First Amendment can tolerate." *Id.* at 2291. As mentioned above, the judicial measuring stick for this issue has changed to require exacting scrutiny.

C. Annual Objection Multiplies the Error in the Default Setting. If government cannot establish a default system which favors union speech at the expense of employee speech, it certainly cannot

repeatedly reset the default to favor union speech. No matter how many times the Educators tell the Union that they don't want to support its political speech, the Union will not allow them to pay the lowest fee it will accept unless they annually file a formal prohibited practice charge. (Branch aff'd ¶ 9.)

In *Shea v. International Association of Machinists,* 154 F.3d 508 (5th Cir. 1998), the court struck down annual union fee objections. "Certainly the procedure that least interferes with an employee's exercise of his First Amendment rights is the procedure by which an employee can object in writing on a continuing basis." *Id.* at 515.

D. Exclusive Representation Is Unconstitutional If It Is Used to Coerce Speech. The government cannot require public employees to support a specific political party either to retain their jobs (*Branti v. Finkel,* 445 U.S. 507 (1980)), or to avoid employment discrimination. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 69, 74 (1990). The reason is that political beliefs go to the core of those activities protected by the First Amendment. *Id.* at 69.

The Union requires the Educators to become actual members, and thus support all of its political, religious and ideological positions, as the price of having a voice and a vote in the Educators' working conditions. The government "*may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech*." *Id.* at 72 (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). Barring the Educators from a voice and a vote in their working conditions is the most extreme form of discrimination – and it arises from one thing only – the Educators' refusal to join the Union and thus be saddled with supporting its controversial views. While this kind of political blackmail might pass under the lower level of scrutiny applied in prior union fee cases, it cannot survive exacting scrutiny.

E. The Existing System for Allocating Speech Is Too Burdensome. "The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content

based bans." *United States v. Playboy Entertainment Grp.,Inc.,* 529 U.S. 803, 812 (2000). Several times this Court expressed concern in *School Committee of Greenfield* about limiting the procedural burden on nonmembers forced to pay compulsory fees. 385 Mass. at 76, n. 3, 78, n. 4, & 82.

In *Citizens United v. FEC,* 558 U.S.310 (2010) the Court rejected the idea that a statute which limited speech could be saved through an interpretation "that force[s] speakers to retain a campaign finance attorney" to understand "an amorphous regulatory interpretation." *Id.* at 324. "Prolix laws chill speech for the same reason that vague laws chill speech." *Id.* If protecting speech against a statute requires "substantial litigation over an extended time ... [t]he interpretive process itself would create an inevitable, pervasive, and serious risk of chilling protected speech." *Id.* at 326–27.

The Educators submitted evidence to the Board on the expenses for some of the most prominent union fee challenges. These included U.S. Supreme Court cases and *Belhumeur v. Springfield Education Assn*, 432 Mass.

458 (2000) which utilized the specific procedure suggested by this Court in *School Committee of Greenfield.* It was filed in 1988 and settled in 2004. It consumed 8,058.40 attorney hours, 7,177 support staff hours, $161,680.80 in court costs, expert fees and travel expenses, and 5,019.44 hours of Westlaw research. The transcript costs in *Belhumeur* were nearly $27,000 for the determination of a $300 union fee defining the free speech rights of the objecting teachers. Dixon aff'd ¶¶ 3–11.

The attorneys' fee award in the previously mentioned *Knox* decision was over a million dollars! *Knox v. Chiang*, No. 2:05–cv– 021980 MCE – CKD, 2013 WL 2434606 (E.D. Cal. June 5, 2013).

In *Citizens United,* the court held that when a citizen is required to engage in complex and prolix litigation to vindicate speech, the statute creating such a burden cannot stand. 558 U.S. at 324–27. The experiment requiring employees to object and challenge the union's fee calculations to protect their political autonomy cannot withstand exacting scrutiny.

REASONS WHY DIRECT APPELLATE REVIEW IS APPROPRIATE

The U.S. Supreme Court has determined that the highest level of constitutional scrutiny applies to compulsory union fees and fee procedures. However, it has not had before it a case in which the new level of scrutiny could be applied to the challenges presented in this appeal. Neither the Board nor the Court of Appeals has authority to ignore *Abood* and the old standard in light of *School Committee of Greenfield*. This appeal involves novel First Amendment questions which, as a practical matter, can only be resolved by this Court or the U.S. Supreme Court.

This Court ignited the first revolution in agency fee law in 1982, and it is this Court which has the authority today to determine whether the new standard of scrutiny demands a second revolution. Of the tens of thousands of public employees in the Commonwealth, many have a direct interest in the outcome of this case. Therefore, direct appellate review should be granted.

Respectfully submitted,

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DATED: June 23, 2017

Certificate of Service

I, Bruce N. Cameron, attorney for the Charging Parties-Appellants, hereby certify that on June 23, 2017, a copy of the foregoing Application for Direct Appellate Review was sent by first class pre-paid mail to: Jane Gabriel, Chief Counsel, Commonwealth Employment Relations Board, Department of Labor Relations, Charles F. Hurley Building, 19 Staniford Street, 1st Floor, Boston, MA 02114.

/s/ Bruce N. Cameron
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