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TO: MTA - All

FROM: Ira Fader, MTA General Counsel

DATE: July 10, 2019

RE: Branch v. Comm. Employment Relations Board

As you know, three months ago the Supreme Judicial Court ("SJC") issued a strong pro-labor decision in Branch v. CERB, a case brought against MTA affiliates by the National Right to Work Legal Foundation ("NRTW"). Our victory at the SJC had no strings attached – it was a win on all counts. But the case now lives on. This week, the NRTW filed what is called a "petition for certiorari" asking the U.S. Supreme Court to overturn our top court's carefully reasoned decision.

In Branch, the NRTW argued that a union cannot exclude non-members from participating in internal union matters, including identifying bargaining proposals and voting to ratify a contract. Depriving non-members of a "voice and vote" in union matters is, according to the NRTW, an even worse violation of the 1st Amendment to the U.S. Constitution than the collection of "compelled" agency fees, which of course the U.S. Supreme Court struck down in the Janus decision.

The SJC unequivocally rejected all of the NRTW's arguments. The SJC rejected the idea that our state law allowing a member-based union to serve as the "exclusive representative" of all bargaining unit employees, members and non-members alike, violates the U.S. Constitution. It observed that all bargaining unit employees receive a vote on whether to form a union in the first place, and "those opposed to having a union lost that vote." Majority rule, the Court said, "is a fundamental aspect of American democratic government." And it is no less "central," the Court held, to the state's chosen policy of fostering collective bargaining in the Commonwealth's public sector.

But in pursuit of its ideological goal of cutting off funds to unions, the NRTW has a bottomless litigation bankroll. With the two new Trump appointees on the Supreme Court, it is emboldened in its explicit aim of weakening and, if possible, destroying public sector unionism. Accordingly, the NRTW has asked the Janus court to reject the reasoning and decision-making of our own highest state court.

This is not unexpected. It was clear from the outset of this case – which MTA has been litigating for 5 years – that the NRTW had its eyes on the Supreme Court.

But in my view, and in the view of many, the arguments in this case are a bridge too far for our judicial system. The federal courts thus far are all in line with the SJC in declining to adopt the NRTW's arguments. And the Supreme Court itself has previously ruled that "exclusive representation" is a bedrock principle of labor relations that state governments can adopt without transgressing the 1st Amendment. Once again, the Supreme Court would have to overturn its own prior decisions and issue a command to all state legislatures outlawing "exclusive representation" as it is currently applied. Whether the Court will take an interest in NRTW's narrower "voice and vote" argument in Branch remains to be seen.

The Supreme Court risks further delegitimizing itself as a neutral, non-political arbiter of our Constitution. And the Court will have to decide whether a court whose majority has decried excessive judicial activism wants to interfere with how the states regulate their own public sector labor relations. And it will have to grapple with the 1st Amendment rights of unions and their members and whether to compel union members to directly associate with the non-members who have exercised their right not to associate.

The next step will occur on October 1, 2019, when the justices will decide whether or not to grant the NRTW's petition and hear the case. Before then, allies and foes alike will be preparing *amicus* briefs on whether or not the Court should hear the case.

Meanwhile, the SJC's Branch decision is the law of the state. If the Legislature adopts the labor bill that we are all waiting for, that too will be the law of the state. **Local leaders should continue to draw the familiar lines between members and non-members. That is, all locals should assist non-members in matters arising under the bargaining agreement, because the duty of fair representation requires it. But locals may exclude non-members from participation on union committees, from union office, from union elections, and from contract ratification votes. The MTA will not provide legal representation to non-members for any workplace legal disputes outside the bargaining agreement (e.g., statutory dismissal, licensure disputes, retirement disputes, retirement consultation, unemployment, discrimination, whistleblower claims, and so on). MTA Benefits will not open its programs and benefits to non-members.**

The only grounds on which the Supreme Court can overturn the decisions of our top court and our elected legislators is the U.S. Constitution. Whether the Court wants to intrude into state affairs, constitutionalize union affairs, and "weaponize" the 1st Amendment in radical new ways seems doubtful.

But Janus once seemed doubtful, too.