UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JADE THOMPSON, Plaintiff, v. MARIETTA EDUCATION ASSOCIATION, MARIETTA BOARD OF EDUCATION, Defendants.	Civil Case No.: 2:18-cv-00628-MHW-CMV

MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Plaintiff Jade Thompson respectfully moves for summary judgment. As shown in the accompanying memorandum of points and authorities and supporting materials, there is no dispute of material fact, and Ms. Thompson is entitled to judgment as a matter of law. There Court therefore should grant Ms. Thompson's motion, issue judgment in her favor, and enter injunctive relief as set forth in Ms. Thompson's attached proposed order.

March 4, 2019

Respectfully submitted,

/s/Patrick T. Lewis
Patrick T. Lewis
Baker & Hostetler LLP
Key Tower 127 Public Square, Suite 2000
Cleveland, OH 44114
(216) 621-0200 (phone)
(216) 696-0740 (fax)

Andrew M. Grossman*
Mark W. DeLaquil*
Richard B. Raile*
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, DC 20036
(202) 861-1697 (phone)
(202) 861-1783 (fax)
agrossman@bakerlaw.com

Robert Alt
The Buckeye Institute
88 East Broad Street, Suite 1120
Columbus, OH 43215
(614) 224-4422
robert@buckeyeinstitute.org

Counsel for Plaintiff

* Admitted pro hac vice

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2019, the foregoing was filed using the Court's CM/ECF system.

/s/Patrick T. Lewis
Patrick T. Lewis
Baker & Hostetler LLP
Key Tower 127 Public Square, Suite 2000
Cleveland, OH 44114
(216) 621-0200 (phone)
(216) 696-0740 (fax)

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JADE THOMPSON, Plaintiff, v. MARIETTA EDUCATION ASSOCIATION, MARIETTA BOARD OF EDUCATION, Defendants.	Case No. 2:18-cv-00628 Judge Michael H. Watson Mag. Judge Chelsey M. Vascura **ORAL ARGUMENT REQUESTED**

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Robert D. Alt (0091753)
The Buckeye Institute
88 East Broad Street, Suite 1120
Columbus, OH 43215
(614) 224-4422
robert@buckeyeinstitute.org

Patrick T. Lewis (0078314)
Trial Attorney
Email: plewis@bakerlaw.com
BAKER & HOSTETLER LLP
Key Tower
127 Public Square, Suite 2000
Cleveland, OH 44114
(216) 621-0200 / Fax (216) 696-0740

Andrew M. Grossman (*pro hac vice*)
Mark W. DeLaquil (*pro hac vice*)
Richard B. Raile (*pro hac vice*)
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, DC 20036
(202) 861-1697 / Fax (202) 861-1783
agrossman@bakerlaw.com

Counsel for Plaintiff

INTRODUCTION

Pursuant to Ohio law, the Marietta Board of Education (the "Board") has recognized the Marietta Education Association (the "Union") (collectively, "Defendants"), as "the exclusive representative" of "all the public employees" in the Marietta School District. Ohio Rev. Code § 4117.05(A). According to the Supreme Court, this constitutes "a significant impingement on associational freedoms that would not be tolerated in other contexts." *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2478 (2018). Accordingly, the burdens this arrangement imposes trigger enhanced scrutiny.

That is so in two distinct respects. First, Ohio's exclusive-representation arrangement identifies a union to speak for "all the public employees" in a bargaining unit, whether they agree with that speech or not. This constitutes compelled speech and expressive association because the law appoints the Union to represent and speak for all bargaining-unit members. Second, the exclusive-representation scheme burdens the First Amendment rights of the Plaintiff, Jade Thompson, and other non-members by binding the Board indefinitely to negotiate with the Union to the exclusion of non-members. This impinges their associational rights by effectively compelling them to associate with the Union and impinges their right to speak and petition the government by prohibiting the Board from acting on the advice of any speaker but the Union and of prohibiting the Board from even negotiating with anyone else.

The Board has numerous less restrictive means available to work out sound labor policy without binding itself to a favored relationship with one labor union. It can, as the government does in all other affairs, listen and ignore various competing voices as it chooses without fixing into place what amounts to decades-long relationships implementing only the Union's views into government policy. Indeed, many governments employ workers who are not represented by any union at all.

Because the material facts supporting these legal conclusions are undisputed or indisputable, the Court is positioned now to resolve Ms. Thompson's claims on the law. It should do so and enter summary judgment in her favor.

FACTS

A. Ohio Law Requires Governmental Entities To Recognize a Union as Employees' "Exclusive Representative"

Ohio law empowers a union to become the "exclusive representative" for "all the public employees" in a bargaining unit (often a public school district) by submitting proof that a majority of employees in the unit wish to be represented by the union. Ohio Rev. Code § 4117.05(A). A "public employee" is "any person holding a position by appointment or employment in the service of a public employer." *Id.* § 4117.01(C). On this showing, the public employer "shall extend" to the union "the right to represent exclusively the employees in the appropriate bargaining unit and the right to unchallenged and exclusive representation" of the employees in the unit. *Id.* § 4117.04(A). And the public employer "shall bargain" with that union. *Id.* § 4117.04(B).

The result is that the public employer recognizes the union as the representative of *all* employees in a unit—including those who have declined to join the union—in bargaining over a wide variety of matters of public interest. The union then represents employees, and the public employer recognizes the union as representing employees, in bargaining over "[a]ll matters pertaining to wages, hours, or terms and other conditions of employment" as well as over "the continuation, modification, or deletion of any existing provision of a collective bargaining agreement." *Id.* § 4117.08(A). Additionally, public employers and unions may bargain over matters of "inherent managerial policy," such as "the functions and programs of the public employer"; "standards of services"; the employer's "overall budget"; its "organizational structure"; hiring, discipline, and supervision of employees; methods "by which governmental operations are to be conducted"; and other matters related to "the mission of the public employer as a governmental unit." *Id.* § 4117.08(C).

B. The Board Appoints the Union To Speak for Ms. Thompson

The material facts of this case are not in dispute, and the parties have stipulated to most of them. *See* Statement of Stipulated Undisputed Facts ("Undisputed Facts"); *see also* Exhibit A, Plaintiff's Proposed Additional Undisputed Facts.

The Plaintiff, Ms. Thompson, is a Spanish teacher at Marietta High School and belongs to the bargaining unit covered by the collective bargaining agreement between the Union and the Board. Undisputed Facts ¶¶ 1, 15. Ms. Thompson is not a member of the Union. *Id.* ¶ 17. She opposes many positions the Union has taken, both in collective bargaining sessions and on policy matters more generally. Declaration of Jade Thompson, ECF No. 15-2, ¶¶ 13–19.[1] In fact, Ms. Thompson's husband, Andy Thompson, is a member of the Ohio General Assembly, and when he ran for office, the Union took out radio and television advertisements against him. *Id.* ¶ 19. The Union's president also advocated against him in emails to Ms. Thompson and her colleagues at Marietta High School. *Id.*

Nonetheless, Ohio law permits the Board to appoint the Union as Ms. Thompson's unwanted representative and agent so that it can speak on her behalf on many issues of substantial public concern. As authorized by Ohio law, the Board recognizes the Union as "the sole and exclusive bargaining agent" for certain employees of the Marietta School Board—including Ms. Thompson, Undisputed Facts ¶ 15—and has entered into a series of collective-bargaining agreements with the Union, including a recent "Agreement." Collective Bargaining Agreement, ECF No. 1-1 § 1.01; *see also* Undisputed Facts ¶ 11 (stipulating to authenticity of the Agreement).[2] The bargaining unit includes "all full and regular part-time certificated personnel employed under contract, including classroom teachers…." Agreement § 1.01.

That Agreement thereby appoints the Union to speak for all teachers, including those like Ms. Thompson who are not Union members. For example, the Union represents Ms. Thompson when it speaks with the Board regarding "wages, hours, terms and conditions and employment" and all the other matters that are addressed in the 72-page Agreement struck by the Board and

[1] Although Plaintiffs have declined to stipulate that Ms. Thompson has disagreements with the Union's positions or that the disagreements stated in her prior declaration, ECF No. ECF No. 15-2, ¶¶ 13–19, are sincere, Ms. Thompson respectfully submits that there is no good-faith basis to dispute these facts. *See* Plaintiff's Additional Undisputed Facts ¶¶ 1–3.

[2] Defendants have entered a new collective bargaining agreement (the "Successor Agreement"), Undisputed Facts ¶ 11, but the Successor Agreement is materially identical to the Agreement.

the Union. Agreement § 2.05. Likewise, the Union represents Ms. Thompson when it speaks with the Board regarding "all elements of the teacher evaluation procedure" or layoffs. Agreement §§ 14.062, 25.02. And it speaks for Ms. Thompson when it adopts positions regarding grievances concerning the interpretation and application of the Agreement. Agreement § 5. The Union and the Board also jointly appoint the membership of various committees, including the Sabbatical Committee, the Student Growth Measures Committee, the Teacher Evaluation Handbook Committee, and the Evaluation Committee, which participates in making retention and promotion decisions and in removing teachers. Agreement §§ 12.01, 14. Indeed, under a provision bargained for by the Union, teacher membership on the Evaluation Committee is limited to Union members, as is teacher membership on the Student Growth Measures Committee. Agreement §§ 14.061, 14.071.

Teachers also have no choice but to submit to the Union in resolving disputes with the Board. Although a teacher may decline to be represented by the Union in the adjustment of a grievance, the Union is entitled to participate in the adjustment process, the teacher may not obtain representation from another employee organization, and there is no provision for her to obtain witness testimony for a hearing without the Union's assistance. Agreement § 5. Similarly, a teacher may only be accompanied and represented by a Union-approved representative at a reprimand meeting. Agreement § 23.02. Accordingly, to obtain the benefit of representation in disputes with the Board, teachers must associate with the Union.

The Union, as Ms. Thompson's representative, does more than just speak on her behalf with the Board. It is also authorized to hold meetings using school facilities, to use the intra-school mail system to distribute "bulletins, newsletters or other communications," and to communicate through notices on a bulletin board. Agreement § 27.01. These activities, too, are undertaken in the Union's role as the representative and agent of teachers like Ms. Thompson. Indeed, as noted above, the Union, in the course of speaking for Ms. Thompson and other teachers, denounced her husband by sending an email to the faculty list-serve using a school email account and school computer during school working hours.

LEGAL STANDARD

Summary judgment is mandatory "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Maben v. Thelen*, 887 F.3d 252, 263 (6th Cir. 2018), *reh'g denied* (Apr. 19, 2018) (quoting Fed. R. Civ. P. 56(a)). Summary judgment is an appropriate vehicle to resolve "purely legal issues." *Eisenmann Corp. v. Sheet Metal Workers Int'l Ass'n Local No. 24, AFL-CIO*, 323 F.3d 375, 380 (6th Cir. 2003)).

ARGUMENT

This case is ripe for resolution on the merits. It is undisputed that Ms. Thompson belongs to a bargaining unit and that her government employer, the Board, has recognized the Union as the exclusive representative of "all the public employees" in the school district. Ohio Rev. Code § 4117.05(A). Although Ms. Thompson is not required to join the Union and is no longer required fund the Union through dues or agency fees, Undisputed Facts ¶¶ 16, 21, the government-authorized and imposed exclusive-representation arrangement nevertheless constitutes "a significant impingement on associational freedoms." *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2478 (2018). That is so because (1) it appoints the union to represent and speak for "all the public employees" in the unit (including those, like Ms. Thompson, who disagree with its speech and representation) and creates an agency relationship against Ms. Thompson's will and (2) it compels Ms. Thompson's association with the Union and restricts Ms. Thompson's ability to petition the government by prohibiting the Board from acting on the advice of any speaker but the Union and of prohibiting the Board from even negotiating with anyone else. That both of these burdens trigger enhanced scrutiny is clear because, "in other contexts," this type of government-created representational scheme would be summarily rejected. *Id.* Accordingly, strict or exacting scrutiny must be applied, and Ohio's exclusive-representational scheme cannot pass either test.

I. The Government's Appointment of a Speaker and Agent for Ms. Thompson Burdens her Free-Speech and Expressive-Association Rights.

The State and Defendants have imposed on Ms. Thompson a government-appointed lobbyist who attempts to influence government on her behalf and in her name, as her agent and representative, even though she disagrees with the positions it attributes to her. But the First Amendment protects the individual rights of free speech and free association. Freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). "The right to eschew association for expressive purposes is likewise protected." *Janus*, 138 S. Ct. at 2463; *see also Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association…plainly presupposes a freedom not to associate"). Ohio's exclusive-representation scheme violates both rights, because it compels public employees to speak by appointing a union that speaks for them and because it forces them into an expressive association with that union.

A. Ohio Law Compels Ms. Thompson's Speech on Matters of Substantial Public Concern

Under Ohio law and the Agreement, the government has appointed the Union as Ms. Thompson's representative and agent. Ohio Rev. Code § 4117.05(A); Agreement § 1.01. In that role, it speaks for her on matters that the Supreme Court has recognized to be "overwhelmingly of substantial public concern." *Janus*, 138 S. Ct. at 2477. But the First Amendment prohibits the government from compelling Ms. Thompson's speech.

That the Defendants compel Ms. Thompson's speech is indisputable. The Union has been appointed, per Ohio law, as her "representative," Ohio Rev. Code § 4117.05(A), and under the Agreement it is named her "agent" in interactions with the Board, Agreement § 1.01. Having sought and obtained exclusive-representative status, the Union's duty under Ohio law is to "represent all public employees in a bargaining unit," including Ms. Thompson. Ohio Rev. Code § 4117.11(B)(6). It carries out that duty through, among other things "speech in collective bargaining." *Janus*, 138 S. Ct. at 2475. In so doing, "the union speaks for the *employees*." *Id*. at 2474 (emphasis in original). In other words, it speaks on their behalf, as their official

representative and agent. Its speech is attributable to them and therefore constitutes compelled speech. *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 564–65, 566 n.11 (2005).

But, as Justice Jackson put it, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). Instead, "[t]he First Amendment mandates that [courts] presume that speakers, not the government, know best both what they want to say and how to say it." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 790–91 (1988). "[T]he government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers…; free and robust debate cannot thrive if directed by the government." *Id.* at 791. For that reason, government-compelled speech is subject to strict scrutiny. *Id.* at 789–90, 800–01 (1988).

The arguments Defendants have asserted to date do not show why enhanced scrutiny should not apply. First, it is not relevant whether Defendants subjectively know that Ms. Thompson and other non-members disagree with the Union's speech; the statute, the Agreement, and the very nature of the bargaining arrangement appoint the Union to speak for "*all* public employees in a bargaining unit." Ohio Rev. Code § 4117.011(B)(6); *see also id.* § 4117.04. If that appointment is, as Defendants suggest, superfluous—because Defendants subjectively attribute no meaning to it—that counsels *against* the exclusive-representation arrangement, not *for* it.

Second, it is for a similar reason not relevant that Ms. Thompson may speak out in disagreement with the Union's positions. The compelled necessity to affirmatively disclaim agreement with another's speech is itself a burden on speech. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573–74 (1995). The First Amendment protects more than citizens' rights to vocally oppose and support positions; it also protects the right to silence, to decide "what to leave unsaid." *Id.* at 573 (quoting *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 11 (1986) (plurality opinion)).

Third, it is not relevant that Ms. Thompson need not join or financially support the Union. The statute, the Agreement, and the very nature of the bargaining arrangement treat the Union's speech as being made on behalf of the unit members, not the Union's members. Ms. Thompson has no way to dissociate herself from the unit, short of resigning her employment.

Fourth, it is not relevant that the Union was (decades ago) designated the excusive representative by a popular vote. The First Amendment protects *individual* rights *against* the majority. In any popular vote, a majority might appoint one party to speak for them, but that in no way alters the First Amendment prerogatives of all other persons (including those of the majority who subsequently change their views). It would never pass muster for the majority of some jurisdiction to appoint the Republican Party as the representative of all its residents; so too here.

Fifth, as Ms. Thompson has explained at length in prior briefing, *Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 273 (1984), does not resolve or even touch on these questions. Although the Court provisionally disagreed with Ms. Thompson in addressing her motion for a preliminary injunction, Ms. Thompson respectfully submits that the Court's provisional conclusion is incorrect. The Court agreed that "Plaintiff is correct insofar as she argues that *Knight* did not explicitly consider a compelled speech claim." Order Denying Motion for Preliminary Injunction, ECF No. 52 at 14; *see also id.* at 15 ("*Knight* did not involve a compelled speech claim."). The Court's provisional conclusion that *Knight* nonetheless controls is founded on language in *Knight* that "[t]he state has in no way restrained appellees' freedom to speak on any education-related issue…." *Id.* at 14 (quoting *Knight*, 465 U.S. at 288). But it is unpersuasive to read "a single sentence unnecessary to the decision as having done so much work." *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 35 (2012). "[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Id.* (quoting *Cohens v. Virginia*, 19 U.S (6 Wheat.) 264, 399 (1821)); *see also Armour & Co. v. Wantock*, 323 U.S. 126, 132–33 (1944) ("It is timely again to remind

counsel that words of our opinions are to be read in the light of the facts of the case under discussion.").

As the Court's provisional ruling explains, the asserted "freedom to speak" *Knight* addressed was a challenge to Minnesota law's "*restriction of participation in 'meet and confer' sessions to the exclusive representative*." Order Denying Motion for Preliminary Injunction, ECF No. 52 at 7 (emphasis in original). That is the context in which the "general expressions" *Knight* rendered must be understood. *Ark. Game*, 568 U.S. at 35. In fact, the sentence proceeding *Knight*'s use of the phrase "freedom to speak" clarifies what asserted freedom it was addressing by explaining "[t]here is no constitutional right to participate in academic governance." *Id.* at 288. It did not address Ms. Thompson's asserted right to be free from compelled representation.

Finally, the Court's provisional conclusion that Ms. Thompson's view of the First Amendment cannot be correct because it would deprive Ms. Thompson and non-members of "representation at the bargaining table," Order Denying Motion for Preliminary Injunction, ECF No. 52 at 16, merits a second look. The choice against representation of any kind is as valid as (and, indeed, simply another form of) the choice not to speak at all. *See Hurley*, 515 U.S. at 573–74. As Defendants are quick to point out, anyone in the unit can freely choose to *join* the Union and thereby obtain representation at the bargaining sessions. If they choose against that, the law should respect their choice.

It is anomalous for the government to reject that choice by appointing a speaker for persons who chose against representation. If government officials meet with representatives of the Republican and Democratic Parties, no one would seriously argue that independent voters, who have declined to join those parties, should be deemed represented by one party or some other speaker in those discussions. The very nature of meeting with representatives of some societal constituencies is that persons who have rejected membership in those constituencies go *un*represented. The Constitution protects that freedom, so it hardly makes sense that declining to appoint a representative for persons who make that choice "is arguably unconstitutional as itself

violating the First Amendment." Order Denying Motion for Preliminary Injunction, ECF No. 52 at 17.

In this respect, Defendants' position cuts *against* the *Knight*'s core reasoning. Its central premise is not that the government may appoint speakers on behalf of its citizens, but that the government can choose "whose voices must be heard" and that there is no "constitutional constraint requiring them to afford every interested member of the public an opportunity to present testimony before any policy is adopted." *Knight*, 465 U.S. at 284. *Knight* treats the government-employer–union relationship as another one of these "policymaking" relationships as to which "the state must be free to consult or not to consult whomever it pleases." *Id.* at 285. It is therefore the norm, not an anomaly, that persons not belonging to the groups the government has chosen to consult will "be entirely deprived of representation at the bargaining table." Order Denying Motion for Preliminary Injunction, ECF No. 52 at 16. What *is* unusual here is that the government, rather than acknowledge this fact, has deemed the person it chose to consult (i.e., the relevant union) the exclusive representative of all other persons in a unit.

To be sure, Ms. Thompson's separate argument, addressed below, that the *exclusive* nature of this representation scheme also inhibits her associational rights and speech and right to petition the government identifies further anomalies of exclusive representation, including that it is highly unusual for the government to tie its own hands in advance and commit to listen only to certain groups (a facet of exclusive representation *Knight* also ignored). If Ms. Thompson is correct on this, however, that only underscores the dignitary harm of forced speech and association. The harm of the government's raising one speaker to an exulted status cannot be undone by pretending that speaker is everyone's representative against the plain fact that this is not true and the individual right not to speak or associate. Thus, if the Court is right that persons other than union members must have an opportunity at "representation at the bargaining table," the remedy would be to allow them to have real representation, not to give them false representation by a union they reject.

B. Ohio Law Compels Ms. Thompson To Associate With the Union

In addition to compelling her speech, Ohio law forces Ms. Thompson into an expressive association with the Union, also in violation of her First Amendment rights.

At issue here is an "expressive association." An association "is protected by the First Amendment's expressive associational right" if the parties come together to "engage in some form of expression, whether it be public or private." *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000). That is, of course, the entire purpose of the Union's appointment as Ms. Thompson's exclusive representative—to rely on her status as an employee of the Board to advocate on behalf of her and the other employees. *Compare United States v. United Foods*, 533 U.S. 405, 411–12 (2001) (looking at the whole regulatory scheme to determine that challenged "advertising itself, far from being ancillary, is the principal object of the regulatory scheme").

"Freedom of association…plainly presupposes a freedom not to associate." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *see also Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 12 (1986) (plurality opinion) ("[F]orced associations that burden protected speech are impermissible."). Compelled association is therefore subject to "exacting scrutiny" and therefore must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Knox v. Service Employees*, 567 U.S. 298, 310 (2012) (cleaned up); *see also Boy Scouts*, 530 U.S. at 648 (same).

Defendants' arguments to date largely mirror the arguments lodged against Mr. Thompson's compelled-speech claims, addressed above. Their emphasis on the rights Ms. Thompson does have (e.g., the right not to join the Union as a formal member or fund it) do not justify or ameliorate the burden Ohio's exclusive-representation scheme imposes. It does not matter that Ms. Thompsons does not have to sign a card asserting her membership with the Union when Ohio law and the Agreement regards the Union as her "agent," Agreement § 1.01, and she cannot escape that relationship. Furthermore, the Court "must also give deference" to Ms. Thompson's "view of what would impair [her] expression," *Boy Scouts*, 530 U.S. at 653, and that view is surely reasonable when it is codified in Ohio law and the Agreement.

Nor, again, does *Knight* foreclose Ms. Thompson's claim. The Court's provisional ruling agrees that "*Knight* did not itself involve a forced associational claim" but found it forecloses Ms. Thompson's forced associational claim because "The Supreme Court made broad statements about PERLA and the freedom to associate." Order Denying Motion for Preliminary Injunction, ECF No. 52 at 6, 8. As discussed above, this takes language out of the context of what issues *Knight* presented and addressed.

II. Ohio Law's Conferral of *Exclusive* Status on the Union Burdens Ms. Thompson's Associational Rights and Right To Speak and Petition the Government

A second, independent burden on Ms. Thompson's constitutional rights is that the exclusive aspect of Ohio law's representation scheme restricts her associational rights and speech and petitioning. Compl., ECF No. 1, ¶¶ 115, 117. While this argument was not presented at the preliminary injunction stage, ECF No. 52 at 5, it is pleaded in her Complaint, Compl. ¶¶ 115, 117, and remains part of this case.

Under color of Ohio law, the Board has afforded formal recognition to one private organization, granted it an assortment of privileges, and bound itself to bargain in good faith solely with that organization and apply the terms and conditions of employment reached in that bargaining to all employees. "There can be no doubt that" granting formal recognition to the Union and "denying it to" anyone else "burdens or abridges" associational and free-speech rights. *Healy v. James*, 408 U.S. 169, 181 (1972). The various rights and privileges granted to the Union create an uneven playing field that effectively shut other voices out of a public forum.

To be sure, "[t]he First Amendment right to associate and advocate provides no guarantee that a speech will persuade or that advocacy will be effective." *Smith v. Ark. State Highway Employees, Local 1315*, 441 U.S. 456, 464–65 (1979) (per curiam). And, for that reason, there is no First Amendment right of any public employee to participate in any specific discussions a state actor conducts with private persons, including labor negotiations. *See Knight*, 465 U.S. at 285. But it does not follow that government bodies are free to tilt the playing field of potential speakers and petitioners as they please. The Constitution's right to speech and petition prohibit

"indirect" as well as direct infringements on these liberties. *Healy*, 408 U.S. at 183; *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967) (stating that the right to petition the government would be "a hollow promise" if it tolerated "indirect restraints"). There several indirect infringements here, which independently and cumulatively burden First Amendment rights.

Formal Recognition and Exclusion. The Board here has bound itself on an indefinite basis not to listen to Ms. Thompson's speech and petitioning, and that is altogether different from *ad hoc* choices to hear and ignore various competing speakers. Even if Ms. Thompson ostensibly may approach the Board with ideas, the Board is bound by statute and contract not to adopt anything she proposes, at least if it falls within the enormously broad scope of the Union's representation. The Board is obligated to bargain with the Union, and it is obligated *not* to bargain with Ms. Thompson. This neuters her rights to speak and petition because the Board is legally forbidden from acting on her views, and both parties know that in advance.

The Board's right not "to listen, to respond or, in this context, to recognize" Ms. Thompson or her preferred labor organization, *Smith*, 441 U.S. at 485, is entirely beside this point. The Board (per Ohio law) has no such right *not* to listen to or respond to or recognize the Union, and it lacks even the *choice* to listen to or respond to or recognize Ms. Thompson. So the law gives all the benefit of the Board's discretion on whom it "choose[s] to hear," *Knight*, 465 U.S. at 284, to one speaker. That is a constitutionally significant difference. It is, for example, undoubtedly true that a Republican presidential administration has the right, in day-to-day decision-making, to give groups and individuals aligned with Republican and conservative causes greater opportunity for influence and access, even to the exclusion of Democratic Party groups. But, if Congress passed a law limiting all future presidential administrations to listen only to Republican Party or conservative groups or only to groups affiliated with the presidential administration's own party or even only to a group certified by a popular vote as the representative of the populace, no one would seriously argue that the law imposed no burden on the rights to speak or petition. The "practical effect," *Healy*, 408 U.S. at 181, of these two

distinct concepts—listing to and ignoring competing speakers on a day-to-day discretionary basis, on the one hand, and formally recognizing one favored speaker for indefinite and mandatory preferential treatment in all circumstances, on the other—is completely different.

Knight does not address these core points. Because of the way the specific and narrow claim before it was presented, *Knight* viewed meet-and-confer sessions between a union and employer as "a *nonpublic* forum" and viewed the challengers' exclusion from that forum as no different from the exclusion of any citizen from a government decision-making session. *Knight*, 465 U.S. at 280–85. But, here, Ms. Thompson does not "claim an entitled to a government audience for [her] views" or to "participate directly in government policymaking." *Id.* at 282, 284. She claims that the government's decision to bind itself on a perpetual basis to solely listen to and bargain with one speaker and exclude all others impermissibly burdens her rights, not that she may (as in *Knight*) attend meet-and-confer sessions between the union and the employer.

Not only was that position not before the Court in *Knight*, but its line of reasoning supports Ms. Thompson's position. *Knight* treats a labor union as no different from any other party that petitions the government. *Id.* at 286–87. Under that logic, the government's right to bargain with the union and ignore other competing persons only extends as far as its right to ignore the union and bargain with other competing person—or, for that matter, to ignore one political party or group and bargain with others. Although the government has, as *Knight* recognized, broad discretion to invite and allow various speakers into the back-room policymaking process, it is untenable that it may, consistent with the First Amendment, define by statute those included or excluded speakers on a formal and indefinite basis.

Union Preferences in the Workplace. Ohio law and the Agreement exacerbate the exclusive-representation problem further by affording the Union a series of practical benefits, such as access to meeting space, equipment, campus mail, and rights to notice and participation in various school governance matters—including the right to participate at grievance proceedings of non-members. *See, e.g.*, Agreement §§ 2.05, 5, 12.01, 14, 14.061, 14.062, 14.071, 23.02, 25.02, 27.01. Affording one speaker and petitioner all these formal luxuries and denying them to

all other speakers and petitioners is no different from a public university's granting to some groups, and denying to others, the formal recognition necessary to be "viable" in speaking in a campus forum. *Healy*, 408 U.S. at 181. In giving the Union a voice in the workplace and unique channels of speaking and obtaining information, the Board has created a public or limited public forum and given access to one speaker on an impermissible basis. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800–02 (1985). And, indeed, the government's *de jure* choice to resolve all matters governing terms and conditions of employment with only one group and afford *no* public forum to resolve them fails even the free-speech test applicable to non-public forums, because the distinctions are neither reasonable in light of the purpose served by the forum nor viewpoint neutral. *See id.* at 800.

Compelled Association. Because of the Union's exclusive status and special privileges, as detailed in the preceding paragraphs, Ms. Thompson has no choice but to enter into an expressive association with it so that she may speak to and petition the Board. This amounts to compelled association because the Board is bound to listen only to the Union, cutting off any other speaker or petitioner's ability to influence governmental policy. The only meaningful path to influencing the policies governing the workplace is through the Union, which gives Ms. Thompson the choice of foregoing speech and petition that may conceivably have an impact or forgoing her right not to join the Union. This is different from the "pressure" persons may ordinarily feel to belong to a group that, as a practical matter, wields influence with a government body. *Knight*, 465 U.S. at 289–90. Here, the Board is legally obligated to listen to the Union and legally obligated not to consider or implement Ms. Thompson's positions. That is more than "pressure"; it is a stark choice between one form of First Amendment activity (speaking to or petitioning the Board) and another (forgoing membership with the Union).

Indefinite Incumbency. Another infringement on First Amendment liberties is Ohio law's burdensome decertification process. By law, a union that wins a certification election obtains not only "exclusive" but also "unchallenged" representation for one year after original certification and for three years after each new agreement. Code §4117.04(A). Even in those rare

moments when the union is vulnerable to a challenge to its status, the union remains presumptively the exclusive representative until a competing union enters the scene and obtains certification or a decertification campaign succeeds. *State Emp. Relations Bd. v. Miami Univ.*, 643 N.E.2d 1113, 1116 (Ohio 1994). Under that regime, the Union has been the exclusive representative "for several decades." Undisputed Facts ¶ 9. No political party has held Congress or the presidency for several decades. The Union's indefinite incumbency shows that the exclusive-representation scheme is not responsive to the will of employees.

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To the extent that *Knight* is read to preclude this line of argumentation, even though it was neither presented or resolved in that case, Ms. Thompson respectfully submits that the decision should be overruled. Although this Court is not in a position to do so, Ms. Thompson raises the argument to preserve it for possible appellate review. Assuming *Knight* controls this issue, it erroneously did not consider the distinction between the government's choice to admit and exclude speakers and petitioners on a discretionary basis, on the one hand, and to bind itself indefinitely to admit only one speaker or petitioner or class of speakers or petitioners and bargain solely with them. It, for example, found no difference between meet-and-confer bargaining sessions between a government employer and union and a taxpayer's one-time exclusion from a closed meeting of a tax commission addressed in *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 444 (1915). *See Knight*, 465 U.S. at 283–84. But *Bi-Metallic Investment* did not involve a formally recognized speaker designated by statute as authorized to participate in the meeting to the exclusion of all other persons. Nor did *Bi-Metallic Investment* involve the formal benefits the Board has given to the Union outside the bargaining room.

III. The Exclusive-Representation Scheme Is Not Narrowly Tailored

Defendants' burden is to show that the challenged regulation is necessary to serve a compelling state interest and is narrowly tailored to achieve that end.[3] *Riley v. Nat'l Fed'n of the*

[3] The Supreme Court has assumed, without deciding, that compelled subsidization of speech is subject to exacting scrutiny *Janus*, 138 S. Ct. at 2465 (quoting *Knox v. Service Employees*, 567

Blind, 487 U.S. 781, 790–91 (1988); *Boos v. Barry*, 485 U.S. 312, 312 (1988). That standard is insurmountable.

The government's putative interest in "labor peace," which has typically been advanced to defend public-sector union arrangements, is not sufficient. "Labor peace" refers to the potential for "conflict and disruption" that might arise "if the employees in a unit were represented by more than one union." *Janus*, 138 S. Ct. at 2465 (discussing *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 220–21 (1977)). In *Janus*, the Supreme Court rejected out of hand the argument that "labor peace" justified compelled subsidization of union speech, recognizing that "it is now undeniable that 'labor peace' can readily be achieved 'through means significantly less restrictive of associational freedoms.'" 138 S. Ct. at 2466 (quotation marks omitted); *see also Harris v. Quinn*, 134 S. Ct. 2618, 2640 (2014) (rejecting similar argument).

"Labor peace" is no more compelling a government interest when it comes to justifying compelled speech, as opposed to compelled subsidization of speech as in *Harris* and *Janus*. After all, the First Amendment already affords public workers a near-absolute right to speak out themselves on matters of public concern and to join alternative labor organizations, just like they may enter into any number of private associations free from government retaliation. *Heffernan v. City of Paterson, N.J.*, 136 S. Ct. 1412, 1416 (2016) ("The First Amendment generally prohibits government officials from dismissing or demoting an employee because of the employee's engagement in constitutionally protected political activity."). Compelling Ms. Thompson's speech through the Union does nothing to relieve any "conflict and disruption" that could arise from her own voluntary speech and associations. Moreover, such voluntary speech and associations are unlikely to lead to disruption or conflict because the government has no obligation to listen to the views of any such person or organization. *Knight*, 465 U.S. at 283

U.S. 298, 310 (2012)). Strict scrutiny, however, is applicable to compelled speech because "a law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence." *Id.* (quoting *Barnette*, 319 U.S. at 633). The compelled-speech regulation at issue here fails under either standard.

("The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy.").

This is true most obviously as to the dignitary burden imposed by the exclusive-representation scheme's compelled speech and association: Defendants themselves assert that they do not view the Union as representing Ms. Thompson, so appointing it the "representative" of bargaining-unit employees is superfluous. It is also clear that there are more narrowly tailored options available other than appointing a union the "exclusive" speaker in collective bargaining. The government may avoid any potential conflict simply by declining to bargain with rival unions—a means far more tailored than binding itself statutorily to listen to and ignore specific speakers on an indefinite basis. Indeed, *doing nothing* is likely sufficient to maintain "labor peace," as demonstrated by the experience of Tennessee, which abolished exclusive representation for teachers in 2011. *See* Tenn. Code. Ann. § 49-5-603. Likewise, numerous government workplaces employ workers who are not represented by a union at all, and many others curtail the scope of collective bargaining or the right to strike, all without substantial conflict and disruption. Milla Sanes and John Schmitt, Regulation of Public Sector Collective Bargaining in the States, 5–8, 12–68, Center for Economic and Policy Research (March 2014).[4] In sum, it is not necessary that the government bind itself in a statute or agreement to bargain with only one representative to avoid excessive "conflict and disruption." *Janus*, 138 S. Ct. at 2465 (discussing *Abood*, 431 U.S. at 220–21).

In any instance, "labor peace" is not a compelling interest that supports overriding public workers' First Amendment rights. Although the Supreme Court found that "labor peace" (when combined with the interest in avoiding free-riders) supported compelled subsidization of speech in *Abood*, it borrowed the "labor peace" concept from Commerce Clause precedents without any consideration of its proper place in the First Amendment architecture. *See Abood*, 431 U.S. at 220, *overruled by Janus*, 138 S. Ct. 2448 (2018). As the Supreme Court has recognized, "*Abood*

[4] Available at http://cepr.net/documents/state-public-cb-2014-03.pdf.

was poorly reasoned" and specifically failed to "independently evaluate the strength of the government interests that were said to support the challenged" policies. *Janus*, 138 S. Ct. at 2479–80. Notably, *Abood* did not involve a challenge to exclusive representation, only to the payment of agency fees, and so is not binding on the issues presented here. More importantly, for the reasons identified by the Supreme Court in *Janus* and *Harris v. Quinn*, 134 S. Ct. 2618, 2632–34 (2014), *Abood's* musings on First Amendment values are ill-considered and unpersuasive and should not be extended.

CONCLUSION

The Court should grant summary judgment for the Plaintiff and enjoin the Union from holding itself out as and the Board from receiving the Union as the exclusive representative of non-members.

Dated: March 4, 2019

Respectfully submitted,

/s/Patrick T. Lewis

Patrick T. Lewis (0078314)
Trial Attorney
Email: plewis@bakerlaw.com
BAKER & HOSTETLER LLP
Key Tower
127 Public Square, Suite 2000
Cleveland, OH 44114
(216) 621-0200 / Fax (216) 696-0740

Andrew M. Grossman (*pro hac vice*)
Mark W. DeLaquil (*pro hac vice*)
Richard B. Raile (*pro hac vice*)
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, DC 20036
(202) 861-1697 / Fax (202) 861-1783
agrossman@bakerlaw.com

Robert D. Alt (0091753)
The Buckeye Institute
88 East Broad Street, Suite 1120
Columbus, OH 43215
(614) 224-4422
robert@buckeyeinstitute.org

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2019, the foregoing was filed using the Court's CM/ECF system, which automatically served a true and correct copy of the foregoing on all counsel of record.

/s/Patrick T. Lewis
Patrick T. Lewis (0078314)
Counsel for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JADE THOMPSON, Plaintiff, v. MARIETTA EDUCATION ASSOCIATION, MARIETTA BOARD OF EDUCATION, Defendants.	Civil Case No.: 2:18-cv-00628-MHW-CMV

PLAINTIFF'S STATEMENT OF ADDITIONAL UNDISPUTED FACTS

In addition to the undisputed facts stipulated by the parties, Plaintiff proposes that the following facts are also undisputed for purposes of summary judgment:

1. Ms. Thompson disagrees with the Union's stances on many issues, including issues on which the Union and its representatives have taken positions in the course of collective bargaining.

2. Among those issues on which Ms. Thompson disagrees with the Union's stances (or what she perceives to be its stances) are those stated in paragraphs 14–17 and 19 of her declaration, ECF No. 15-2.

3. The statements made by Ms. Thompson in paragraphs 14–17 and 19 of her declaration, ECF NO. 15-2, reflect her sincerely held beliefs.

4. The "Successor Agreement" identified in paragraph 11 of the parties' Statement of Stipulated Undisputed Facts is not materially different as to any provisions relevant to this case, including those cited in Ms. Thompson's summary-judgment motion and supporting materials, from the Agreement in effect from June 30, 2016 through June 29, 2018.

March 4, 2019

Respectfully submitted,

/s/Patrick T. Lewis
Patrick T. Lewis
Baker & Hostetler LLP
Key Tower 127 Public Square, Suite 2000
Cleveland, OH 44114
(216) 621-0200 (phone)
(216) 696-0740 (fax)

Andrew M. Grossman*
Mark W. DeLaquil*
Richard B. Raile*
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, DC 20036
(202) 861-1697 (phone)
(202) 861-1783 (fax)
agrossman@bakerlaw.com

Robert Alt
The Buckeye Institute
88 East Broad Street, Suite 1120
Columbus, OH 43215
(614) 224-4422
robert@buckeyeinstitute.org

Counsel for Plaintiff

* Admitted pro hac vice

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2019, the foregoing was filed using the Court's CM/ECF system.

/s/Patrick T. Lewis
Patrick T. Lewis
Baker & Hostetler LLP
Key Tower 127 Public Square, Suite 2000
Cleveland, OH 44114
(216) 621-0200 (phone)
(216) 696-0740 (fax)