No. 19-4217

IN THE UNITED STATE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Jade Thompson,

Plaintiff–Appellant,

v.

Marietta Education Association and the Marietta Board of Education,

Defendants–Appellees.

On Appeal from the United States District Court
For the Southern District of Ohio, No. 2:18-cv-00628-MHW-CMV
The Honorable Michael H. Watson

Opening Brief of Appellant Jade Thompson

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Statement in Support of Oral Argument

Plaintiff–Appellant Jade Thompson respectfully requests oral argument under Local Rule 28(b)(1)(B) and Fed. R. App. P. 34. This appeal raises important constitutional issues that have been the subject of recent Supreme Court decisions altering the law governing the First Amendment rights of public employees. The specific issues raised, however, have not been authoritatively decided in this Court or in the Supreme Court. Therefore, oral argument would significantly aid in the decisional process.

Jurisdictional Statement

The district court had jurisdiction over this case under 28 U.S.C. § 1331 because Plaintiff–Appellant Jade Thompson's claims arise under the First Amendment. Ms. Thompson timely filed a notice of appeal on December 10, 2019 from the district court's final judgment entered on November 26, 2019. This Court therefore has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

Statement of the Issues

1. Whether the Marietta Board of Education's recognition of a labor union, pursuant to Ohio law, as the "representative" and "agent" of public employees like Plaintiff Jade Thompson, who are not members of the union and who object to its speech and representation, impinges those employees' First Amendment rights to be free from compelled speech and association.

2. Whether the Board's obligation to bargain *exclusively* with that labor union, to the exclusion of public employees like Ms. Thompson, impinges those employees' First Amendment rights.

3. Whether these impingements on First Amendment rights are appropriately tailored to achieve a compelling governmental interest.

4. Whether the district court erred in finding that Ms. Thompson's arguments at the preliminary-injunction stage foreclosed her from raising, at the summary-judgment stage, an additional or alternative argument that was asserted in her complaint.

Statement of the Case

This case challenges the constitutionality of Ohio's compelled exclusive-representation scheme, which designates a labor union as public employees' "representative" and "agent," even if they object to that representation. The Supreme Court has recognized that such "exclusive representation" schemes work "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).

However, the district court here held that Ohio's law recognizing a labor union as the representative of an objecting public employee did not even impinge her First Amendment rights. That was wrong, for two independent reasons. First, the First Amendment does not permit the government to impose an unwanted private-party representative on citizens who object to its speech and representation. Second, the First Amendment does not permit the government to bind itself indefinitely to hear the viewpoint of only one private advocacy organization, to the exclusion of all others. The decision below contravenes these principles, allows an egregious constitutional impingement to escape all constitutional scrutiny, and is untenable. This Court should reverse.

A. Ohio Law Recognizes Labor Unions as Public Employees' "Representative[s]"

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 and object to its speech—in bargaining over a wide variety of matters of public interest. The union 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 Recognizes the Union to Represent Ms. Thompson and Speak for Her

Ms. Thompson is a Spanish teacher at Marietta High School and belongs to the bargaining unit covered by the collective bargaining agreement between the Marietta Board of Education (the "Board") and the Marietta Education Association (the "Union") (collectively, "Defendants"). Statement of Stipulated Undisputed Facts, R.59, Page ID ##653, 655, ¶¶ 1, 15. Ms. Thompson is not a member of the Union. *Id.*, Page ID #655, ¶ 17. She opposes many positions the Union has taken, both in collective bargaining sessions and on policy matters more generally. Declaration of Jade Thompson, R.15-2, Page ID #164–65. ¶¶ 13–19. When Ms. Thompson's husband ran for public office, the Union took out radio and television advertisements against him. *Id.*, Page ID #165, ¶ 19. The Union's president also advocated against him in emails to Ms. Thompson and her colleagues at Marietta High School. *Id.*

Nonetheless, the Board recognizes the Union as Ms. Thompson's "representative" and "agent." 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, Statement of Stipulated Undisputed Facts, R.59, Page ID #655, ¶ 15—and has entered into a series of collective-bargaining agreements with the Union, including the recent "Agreement." Collective Bargaining Agreement, R.1-1, Page ID #24, § 1.01; *see also* Statement of Stipulated Undisputed Facts, R.59, Page ID #654, ¶ 11 (stipulating to authenticity of the Agreement). The bargaining unit includes "all full and reg-

ular part-time certificated personnel employed under contract, including classroom teachers," irrespective of whether they are members of the Union or object to its speech. Collective Bargaining Agreement, R.1-1, Page ID #24, § 1.01.

Thus, 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 between the Board and the Union. Collective Bargaining Agreement, R.1-1, Page ID #25, § 2.05. Likewise, the Union represents Ms. Thompson when it speaks with the Board regarding "all elements of the teacher evaluation procedure" or layoffs. *Id.* at Page ID ##51–52, 72, §§ 14.062, 25.02. And it speaks for Ms. Thompson when it adopts positions regarding grievances concerning the interpretation and application of the Agreement. *Id.* at Page ID ##27–31, § 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. *Id.* at Page ID ##44, 50–62, §§ 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. *Id.* at Page ID ##51–52, §§ 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 still entitled to participate

in the adjustment process, the teacher may not obtain representation from another employee organization, and only the Union may obtain witness testimony in her support at a hearing. *Id.* at Page ID ##27–31, § 5. Similarly, a teacher may be accompanied and represented only by a Union-approved representative at a reprimand meeting. *Id.* at Page ID#71, § 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 in bargaining sessions. 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. *Id.* at Page ID ##76–77, § 27.01. These activities, too, are undertaken in the Union's role as the representative and agent of teachers like Ms. Thompson.

C. Proceedings Below

Ms. Thompson filed her complaint in June 2018 challenging Ohio's compelled-representation scheme as violating her First and Fourteenth Amendment rights to be free from compelled speech and association. Complaint, R.1, Page ID ##15–18. Ms. Thompson moved for a preliminary injunction. Motion for Preliminary Injunction, R.15, Page ID #145. At that stage, she contended only that Ohio's law unconstitutionally imposed on her an unwanted representative, the Union, and thereby forced her into an expressive association and compelled her speech. Memorandum in Support of Motion for Preliminary Injunction,

R.15-1, Page ID ##154–59. The district court denied Ms. Thompson's motion for preliminary injunction, reasoning that *Minnesota Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984), foreclosed her likelihood of success on the merits. Order Denying Preliminary Injunction, R.52, Page ID #533.

The parties agreed to submit the case on stipulated facts and file cross motions for summary judgment. In her motion, Ms. Thompson both renewed her compelled-representation argument and additionally argued that the Union's exclusive status also burdened her First Amendment rights. Memorandum in Support of Plaintiff's Motion for Summary Judgment, R.58-1, Page ID #627. This latter contention, although not raised at the preliminary-injunction stage, was alleged in her complaint. Complaint, R.1, Page ID #18, ¶¶ 115, 117. The district court granted the Defendants' motion for summary judgment and denied Ms. Thompson's, incorporating its ruling denying Ms. Thompson's Motion for a Preliminary Injunction and ruling once again that *Knight* precluded Ms. Thompson's arguments. Further, the district court ruled that, during the preliminary injunction proceedings, Ms. Thompson had "affirmatively waived" her challenge to the Union's exclusivity. Opinion and Order, R.69, Page ID ##1260–61. The district court entered its final judgment on November 26, 2019, and Ms. Thompson timely appealed.

Summary of the Argument

Pursuant to Ohio law, the Board has recognized the Union 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, that is "a

significant impingement on associational freedoms that would not be tolerated in other contexts." *Janus* 138 S. Ct. at 2478. The district court's view that compelled representation *does not even impinge* the First Amendment rights of objecting public employees is at odds with *Janus* and finds no support in *Knight*.

Ohio's law impinges objecting employees' rights in two separate respects. First, Ohio law compels public employees who object to a union's speech to submit to representation by the union, a private advocacy organization, and suffer it to speak for them. That impinges their First Amendment rights to be free from compelled association and compelled speech. Second, Ohio law impinges objecting employees' First Amendment rights through its exclusivity requirement, which here binds the Board indefinitely to negotiate only with the Union to the exclusion of non-union-member employees on a host of important matters of public concern. That impinges those employees' speech, petitioning, and associational rights.

Because these requirements impinge the First Amendment rights of objecting public employees like Ms. Thompson, they are subject to First Amendment scrutiny, which they cannot survive. The only state interest the Defendants assert is "labor peace," a rationale rooted in rational-basis review wholly inadequate to justify compelled speech and association. And even if "labor peace" were a compelling interest, forcing unwanted representation on objecting employees is not tailored to achieve that interest, because public employers could continue to bargain with unions just as they do today, without subjecting objecting employees to an unwanted "representative" and "agent." And, while ending

unions' exclusive status could alter the bargaining process, it would simply leave public employers like the Board in the same position as most public and private employers in the Nation's economy—a viable alternative that demonstrates that there are effective ways to achieve "labor peace" without burdening First Amendment rights.

Standard of Review

This Court reviews denials of motions for summary judgment *de novo*. *Ondo v. City of Cleveland*, 795 F.3d 597, 603 (6th Cir. 2015). This Court also reviews *de novo* "whether a given set of facts constitutes waiver." *Stoudemire v. Mich. Dep't of Corr.*, 705 F.3d 560, 569 (6th Cir. 2013).

Argument

I. Forcing Ms. Thompson To Accept an Unwanted "Representative" Impinges Her First Amendment Rights To Be Free from Compelled Speech and Association

The State of Ohio has imposed on Ms. Thompson a government-appointed lobbyist who works on her behalf and in her name, as her "agent" and "representative," even though she disagrees with the positions it attributes to her. That impinges her First Amendment rights. The First Amendment right of 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). Likewise, the First Amendment right of "[f]reedom of association…plainly presupposes a freedom not to associate" *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). Ohio's compelled representation scheme impinges 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, Impinging Her First Amendment Rights

Under Ohio Law and the Agreement, the government has appointed the Union as Ms. Thompson's "exclusive representative" and agent. Ohio Rev. Code § 4117.05(A); Collective Bargaining Agreement, R.1-1, Page ID #24, § 1.01. In that role, it speaks to the school board on matters such as collective bargaining and handling of grievances, Collective Bargaining Agreement, R.1-1, Page ID ##25, 27–31, § 2.05, 5, that *Janus* held to be "overwhelmingly matters of public concern." *Janus*, 138 S. Ct. at 2477. That is an impingement of Ms. Thompson's right to be free from compelled speech. Ohio law unequivocally mandates that the Union speak for Ms. Thompson. It appoints the Union, by operation of law, as her "representative" in dealings with a government body, the Board. Ohio Rev. Code § 4117.05(A). Carrying out that statutory mandate, the Agreement recognizes the Union her "agent" in all interactions with the Board, Collective Bargaining Agreement, R.1-1, Page ID #24, § 1.01. The Union is thereby recognized by Ohio law to "represent all public employees in the bargaining unit," including Ms. Thompson. Ohio Rev. Code § 4117.11(B)(6). And it does so, through (among other things) its speech in collective bargaining. Ohio Rev. Code § 4117.08(A).

When carrying out this representational role, "the union speaks for the *employees*," *Janus*, 138 S. Ct. at 2475, and that includes Ms. Thompson. Despite

Ms. Thompson's desire to completely separate herself from the Union's advocacy, speech, and ideas, the Union's speech is attributable to Ms. Thompson, because it is her official "representative" and "agent." Ohio law does not permit Ms. Thompson to reject this unwanted representative and its speech on her behalf. Short of resigning her public employment, she has no ability to curtail the Union's speech on her behalf. Ms. Thompson is thereby compelled to speak through the agent the State has imposed on her, the Union, because its speech is attributable to her. *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 564–65, 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." *W. Va 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.

The district court's reasons for concluding that imposing an unwanted representative on public employees *does not even impinge* their speech rights are mistaken. First, it is not relevant whether the Union or government may "not assume the Union's speech reflects the views of every bargaining unit member." Decision Denying Preliminary Injunction, R.52, Page ID #543. *Barnette* rejected that line of argument, holding that even the rote recitation of the pledge of allegiance where students "assent by words without belief" and their actions were "barren of meaning" is still an impingement of their First Amendment rights. 319 U.S. at 633. Here, Ohio law and Agreement are clear that the Union speaks for "*all* public employees in a bargaining unit," Ohio Rev. Code § 4117.011(B)(6) (emphasis added), and it is undisputed that the Union does in fact carry out that duty by speaking on a wide variety of topics of public interest and concern. Ohio law forces that speech on Ms. Thompson by making the Union's speech her own, and it is no defense to argue that, *because the speech is compelled*, it is somehow not meaningfully hers.

Second, Ms. Thompson's ability to speak out in disagreement with the Union's positions does not extenuate the First Amendment injury. The compelled necessity to affirmatively disclaim agreement with another's speech is itself a burden on speech. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256–57 (1974). The plaintiffs in many compelled speech cases were able to speak in opposition to the messages they were compelled to co-sign, and yet the Supreme Court has rejected that as a mitigating factor in determining whether their free speech rights were impinged. *See, e.g.*, *Miami Herald,* 418 U.S. at 256–57

(rejecting argument that a newspaper could publish its own response to columns it was compelled to publish by state laws). That is because 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." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 11 (1986) (plurality opinion) (rejecting the argument that utility could send its own responses to advocacy articles state law compelled it to include with mailings to customers). In other words, the burden to affirmatively *disagree* with speech that has been compelled infringes on the right to say nothing whatever on the topic. *See Hurley v. Irish Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) ("Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.").

Third, it is for the same reasons not relevant that the Union is (in the district court's words) "speaking for the bargaining unit members as a collective rather than purporting to espouse specific views for any individual bargaining member." Decision Denying Preliminary Injunction, R.52, Page ID #543. That distinction enjoys no support in any First Amendment precedent, and it contravenes this Nation's most fundamental principle of *individual* rights. *See, e.g.*, *Wooley*, 430 U.S. at 715. Ohio law could not appoint the Republican Party as the official representative of "Ohio as a collective" any more than it could appoint a representative for "all individual Ohioans." Because the burden to leave the collective—moving out of Ohio—is severe, there is no difference between

the collective comprising all citizens and all citizens constituting the collective. This is semantic trickery masquerading as constitutional doctrine, and it is unprecedented. Here, Ms. Thompson is part of the collective so long as she maintains her employment, she has a right to maintain that employment free of unconstitutional conditions, and the imposition of a speaker for the collective is therefore an imposition of a speaker for her. And that is, in fact, exactly what Ohio law provides: the Union represents "all the public employees" of the unit. Ohio Rev. Code § 4117.05(A).

Finally, it is not relevant that Ms. Thompson need not join or financially support the Union. Ohio law and the Agreement regard the Union's speech as being on behalf of the unit members, irrespective of their membership in or financial support of a union. That Ms. Thompson need not fund the speech makes it no less her own.

B. Ohio Law Compels Ms. Thompson To Enter into an Expressive Association with the Union, Impinging Her First Amendment Rights

In addition to compelling her speech, Ohio law forces Ms. Thompson into an expressive association with the Union, thereby impinging her First Amendment rights.

At issue here is an "expressive association." An association is subject to "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 represent and speak for public employees who are members of the bargaining unit. Because that speech "is the principal object of the regulatory scheme," the resulting association is an "expressive" one, subject to the First Amendment. *United States v. United Foods*, 533 U.S. 405, 411–12 (2001).

Compelling objecting employees like Ms. Thompson to associate with a labor union impinges their associational rights. "Freedom of association…plainly presupposes a freedom not to associate." *Roberts*, 468 U.S. at 623; *see also Pac. Gas & Elec. Co.*, 475 U.S. at 12 (plurality opinion) ("[F]orced associations that burden protected speech are impermissible."). Ohio law impinges that freedom by denying objecting employees like Ms. Thompson the right not to associate with a labor union and is therefore subject to First Amendment scrutiny.

C. *Knight* Does Not Exempt These Impingements from First Amendment Scrutiny

The district court incorrectly viewed *Knight*, 465 U.S. at 271, as exempting compelled representation from First Amendment scrutiny altogether, such that forcing an unwanted representative on an objecting public employee does not even impinge her First Amendment rights, *see* Order Denying Preliminary Injunction, R52, Page ID ##530–33. Yet, as the district court itself recognized, "*Knight* did not explicitly consider a compelled speech claim," and "*Knight* did not itself involve a forced associational claim." *Id.* at Page ID ##538, 530. That is why the Supreme Court in *Janus* had no trouble recognizing what should be

obvious: that compelling a public employee to accept an unwanted representative so that it can speak on her behalf is "a significant impingement" on her First Amendment freedoms. 138 S. Ct. at 2478.

Knight gave zero consideration to the issue of *compelled* representation. The single claim that *Knight* addressed on the merits was whether a state statute restricting college instructors from participating themselves in "meet and confer" sessions passed First Amendment muster. The Court phrased the question presented as whether the "restriction on participation in the nonmandatory-subject exchange process violates the constitutional rights of professional employees within the bargaining unit who are not members of the exclusive representative and who may disagree with its views." *Knight*, 465 U.S. at 273.

In answering that question, the Court relied on the longstanding principle that there is no constitutional right to a personal audience with the state. *Id.* at 283, 288. Applying that principle, it held that restricting non-members from participation in collective-bargaining sessions did not violate their First Amendment rights to free speech and free association. *Id*. at 280. The majority decision does not discuss the issues of *compelled* speech or *compelled* association or the Court's precedents in those areas. That is because neither issue was raised. The instructors' principal brief recognized that the "constitutionality of exclusive representation" was undecided, but expressly "pretermit[ed]" any discussion of it. Brief for Appellees, *Minnesota State Board for Community Colleges v. Knight*, No. 82-898 (filed Aug. 16, 1983), at 46–47, *available at* 1983 U.S. S. Ct. Briefs LEXIS

130. A separate brief filed by the instructors[1] did challenge exclusive representation, but only on nondelegation grounds. Brief for Appellees, *Minnesota State Board for Community Colleges v. Knight*, No. 82-898 (filed Aug. 16, 1983), *available at* 1983 U.S. S. Ct. Briefs LEXIS 126.

No First Amendment challenge to compelled representation having been raised in *Knight*, the Court had no reason to address the matter. *Janus* confirms as much. It recognized that compelled exclusive representation is "a significant impingement on associational freedoms that would not be tolerated in other contexts," 138 S. Ct. at 2478. The Supreme Court's position, as stated in *Janus*, is that *Knight* did not settle the matter.

What is a matter of settled law, however, is that compelled speech and compelled association implicate the First Amendment and trigger First Amendment scrutiny, a fundamental principle established through a long-line of precedent including *Janus*, *Knox*, *Hurley*, *Dale*, *Miami Herald*, *Pacific Gas*, *Johanns*, and *Roberts*. To read *Knight* as foreclosing Ms. Thompson's argument here would conflict with that precedent and would be, as a matter of first principles, unsupportable.

II. The Union's *Exclusive* Status Impinges Ms. Thompson's First Amendment Rights

Ohio law also impinges Ms. Thompson's rights by conferring on the Union the *exclusive* right—indefinitely—to negotiate with the Board on topics of collective bargaining. This too merits heightened First Amendment scrutiny.

[1] In their cross-appeal regarding a dismissed claim.

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 solely with it over terms and conditions of employment. Ohio Rev. Code § 4117.08(A) ("All matters pertaining to wages, hours, or terms and other conditions of employment…are subject to collective bargaining between the public employer and the exclusive representative."); *see also* Collective Bargaining Agreement, R.1-1, Page ID ##51–53, 72 §§ 14.062, 25.02 (requiring Union representation on all discussions regarding teacher evaluation procedures or layoffs). "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 rights and privileges granted to the Union box out non-Union members like Ms. Thompson from any possibility of meaningful communication to the Board and compel them to associate with the Union. That state of affairs "would not be tolerated in other contexts." *Janus* 138 S. Ct. at 2478. Whether or not it can be tolerated in this context, *see infra* § III.C, it is at a minimum an impingement of Ms. Thompson's First Amendment rights.

A. The Union's Indefinite Exclusivity Impinges Ms. Thompson's First Amendment Rights

As the Supreme Court has consistently held, "expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982). Therefore petitioning the government seeking "to advance political, social, or other ideas of

interest to the community as a whole" always "assume[s] an added [constitutional] dimension." *Bourough of Duryea v. Guarnieri,* 564 U.S. 379, 395 (2011). 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. 463, 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 public affairs as they please. The Constitution's right to speech and petitioning 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 are several indirect restraints here that, cumulatively, burden Ms. Thompson's First Amendment rights. Taken together, these actions grant formal, codified, exclusive status to the Union.

In particular, Ohio law bars the Board on an indefinite basis from allowing parties other than the Union from participating in negotiations on topics subject to bargaining with the Union. *See* Ohio Rev. Cod. § 4117.08(A); Collective Bargaining Agreement, R.1-1, Page ID #26, §3.01. That is altogether different from the *ad hoc* decision to hear or ignore various competing speakers in a given session or meeting. 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 465, is entirely beside the point, because the state law has removed any discretion from the Board on whom it may "choose to hear." *Knight*, 465 U.S. at 284.

That is a constitutionally significant difference. It is, for example, indisputable that Congress has the right, in day-to-day decision-making, to give groups and individuals aligned with its members greater opportunity for influence and access, even to the exclusion of opposing groups. But, if Congress passed a law restricting all lobbying only to a certain organization, or required that any idea brought by an unapproved party must be endorsed by that favored organization, no one could seriously argue that the law imposed no burden on First Amendment associational and petitioning rights. Nor could there be any serious defense of a law binding Congress to bargain in good faith with only a specific special-interest group, such that taking positions and adopting policies proposed by others would be deemed a statutory violation. The "practical effect," *Healy*, 408 U.S. at 181, of these two distinct concepts—deciding which speakers to listen to on a day-to-day discretionary basis versus formally recognizing one favored speaker as the exclusive speaker in all circumstances going forward—is completely different.

Here, the Board is bound by statute and contract to ignore Ms. Thompson's proposals if any of them run afoul of the Union's positions on any topic within the enormously broad scope of the Union's representation. The Board is

permanently obligated to bargain with the Union so long as it avoids decertification and permanently obligated *not* to bargain with Ms. Thompson. This neuters her rights: only one private party, the Union, is allowed into the room where decisions are made, and Ms. Thompson has no hope of influencing those decisions unless she formally associates with the Union.

Because of the way the specific and narrow claim before it was presented, *Knight* does not provide much guidance on these core points. *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 seek "a government audience for [her] views." *Id.* at 282. She claims instead that the government's decision to bind itself on a perpetual basis to listen to and bargain with only one speaker, to the exclusion of her and all others, impermissibly burdens her rights.

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 has, as *Knight* recognized, discretion to invite and allow various speakers into the back-room policymaking process. But it is untenable that it may, consistent with the First Amendment, define by statute which speakers will indefinitely be excluded from that process.

Moreover, Ohio law and the Agreement exacerbate the problem by affording the Union a long list of special preferences. That includes access to meeting

space, equipment, campus mail, and notice and participation in various school governance matters—including the right to participate at grievance proceedings of non-members. *See, e.g.*, Collective Bargaining Agreement, R.1-1, Page ID ##25, 27–31, 44, 50–62, 71, 72, 76–77, §§ 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 stating that only the College Republicans, and not any other party, may ever receive the formal recognition necessary to be "viable" in speaking on a campus. *Healy*, 408 U.S. at 181. The government's *de jure* choice to resolve all matters governing terms and conditions of employment with only one group flunks even the most forgiving of First Amendment standards, because the distinctions are neither reasonable in light of the purpose served by the school's various practical benefits nor viewpoint neutral. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

Because of the Union's exclusive status and special privileges, the only way Ms. Thompson has even a possibility of the Board considering her speech is to join the Union as a member, a compulsion that even the *Janus* dissenters recognized to violate the First Amendment. *Janus*, 138 S. Ct. at 2489 (noting that "dissenting employees" have "First Amendment interests" and may oppose "unionism itself") (Kagan, J., dissenting). It would be futile for Ms. Thompson to exercise her voting, petitioning, and speech rights to influence the Board or elect members favorable to her views; even if Ms. Thompson's preferred candidates were elected, they too would be bound to listen to the Union and ignore

Ms. Thompson. This illustrates the difference between giving the political "victor" the "spoils" of *ad hoc* decision-making, *see Rutan v. Republican Party of Illinois*, 497 U.S. 62, 64 (1990), versus binding all future administrations to favor one lobbyist over all others.

The problem with the latter is not merely that persons may feel the "pressure" to belong to a group that, as a practical matter, wields influence with a government body. *Knight*, 465 U.S. at 289–90. Affording the Union exclusive status and special privileges goes far beyond mere "pressure" to associate with a popular group so as to obtain a greater voice; it is Ms. Thompson's only course to meaningfully exercise her petitioning right in the face of the State's decision to lock out all parties but for the exclusive representative.

To the extent this Court reads *Knight* to preclude this argument, *Knight* should be overruled by the court with the power to do so, and Ms. Thompson preserves her right to seek that relief, if necessary. *Knight* did not consider the distinction between, on the one hand, the government's choice to admit and exclude speakers and petitioners on a discretionary basis and, on the other, a law by which the government binds itself indefinitely to listen to only a particular party, to the permanent exclusion of all other parties and all speech not endorsed by that party.

B. Ms. Thompson Properly Preserved Her Challenge to the Union's Exclusive Status

The district court erred when it found that Ms. Thompson had waived her challenge to the Union's exclusive status because it differs from the sole argument Ms. Thompson advanced at the preliminary-injunction stage. Ms. Thompson's challenge to the Union's exclusive status was presented in her complaint and fully briefed at the first possible opportunity during the merits stage of this litigation.

This case presents two separate arguments that challenge different aspects of Ohio law. The first, briefed in § I above, challenges compelled union representation and was the sole ground advanced in Ms. Thompson's preliminary injunction papers. The second, briefed in this section and not raised at the preliminary-injunction stage, challenges the exclusive status that Ohio law confers on public-sector unions, to the permanent exclusion of other speakers and speech. The district court found the second argument waived because Ms. Thompson stated, at the preliminary injunction stage, that she was not challenging the Union's exclusive status. Opinion and Order, R.69, Page ID ##1260–61. At that stage, she was not, but she did brief the second argument, challenging the Union's exclusive status, in her summary-judgment motion.

That was sufficient. It is well-settled that plaintiffs may raise the arguments necessary to "sustain recovery under some viable legal theory," as long as their complaints include "all the materials necessary" for such arguments. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007). Further, the waiver doctrine exists to both ensure that a party "unequivocally put[s] its position before the

trial court at a point and in a manner that permits the courts to consider its merits," *Shell Petroleum, Inc. v. United States*, 182 F.3d 212, 218 (3d Cir. 1999), and that an opposing party has notice and an opportunity to respond to the argument, *Portis v. First National Bank*, 34 F.3d 325, 331 (5th Cir. 1994). Ms. Thompson raised this argument in her complaint, Complaint, R.1, Page ID #18, ¶¶115, 117, and the district court did not require her to amend her complaint to raise it. Further, because Ms. Thompson raised this argument in her first substantive motion on the merits, Memorandum in Support of Plaintiff's Motion for Summary Judgment, R.58-1, Page ID ##638–42, both defendants were able to fully respond to the argument, Marietta Education Association Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, R.63, Page ID ##703–08, Board of Education Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, R.64, Page ID ##691–92, and the district court had ample opportunity to consider it on the merits, which it did, Opinion and Order, R.69, Page ID ##1265–68.

Treating Ms. Thompson's preliminary-injunction arguments as waiving her merits arguments makes no sense. The preliminary-injunction posture renders it essential for litigants to tailor their positions, and the relief they seek, differently from how they tailor them at the final-judgment stage. Here, Ms. Thompson had good reason to assure the district court at the preliminary-injunction stage that she was not seeking to disrupt the existing bargaining process, because disruption would cut against her entitlement to provisional relief. She

therefore informed the court that she was not seeking to end the Union's exclusive status, such that her requested relief would entail no meaningful departure from the *status quo*. In fact, the district court, in denying her motion, raised the concern that even her challenge to forced representation may not preserve the *status quo*, and it all but held that enjoining the Union's exclusive rights was impossible at the provisional stage. *See* Decision Denying Preliminary Injunction, R.52, Page ID ##540–41, n.8. It would be odd, if not outright bizarre, to expect that plaintiffs will demand *all their relief* at the provisional stage and to regard every disclaimer of relief at that stage as a once-and-for-all waiver at the merits stage, where the standard for relief is different.

This is why courts have consistently held that motions for preliminary injunction do not dictate courts' decisions on the merits of the case. *See United States v. Certain Land Situated in City of Detroit*, 76 F.3d 380, 380 n. 1 (6th Cir. 1996) (unpublished) ("Failure to present…evidence in support of…request for a preliminary injunction does not amount to a waiver of…argument at a later stage in the litigation."); *see also William G. Wilcox, D.C., P.C. Emp. Defined Ben. Pension Trust v. United States*, 888 F.2d 1111 (6th Cir. 1989) (preliminary injunction decisions are not the "law of the case"). Courts regularly review and discuss new arguments, factually grounded in the plaintiff's complaint, after deciding a preliminary injunction motion. *See, e.g.*, *CTIA-The Wireless Assoc. v. City of Berkeley*, 158 F. Supp. 3d 897, 900 (N.D. Cal. 2016) ("[the Court] will focus on the arguments…that are different from…those made as part of the briefing on the

preliminary injunction motion."). The Court should follow this settled law and reject the district court's unjustified and incorrect finding of waiver.

And there is yet another reason why parties should be permitted to restructure their arguments at a later stage: once a court has ruled that a party is not "likely to succeed on the merits," Order Denying Preliminary Injunction, R.52, Page ID #545, a party has good reason to revise its arguments—especially where they are already in the complaint—to address the court's concerns. In the analogous setting of judicial estoppel, the Supreme Court has recognized precisely that prerogative, holding that, "absent success in a prior proceeding," a party is not bound to its prior arguments because a "later inconsistent position introduces no risk of inconsistent court determinations." *New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001). Here, Ms. Thompson had every right to make arguments in tension (even contradiction) to her prior arguments, because the district court rejected those prior arguments. It would be inequitable to bind Ms. Thompson in perpetuity to a preliminary-relief-stage argument that did not persuade the district court at that stage.

III. Ohio Law Does Not Withstand First Amendment Scrutiny

Because, as discussed above, Ohio law impinges Ms. Thompson's First Amendment rights, the Board and the Union have the burden to prove that the challenged regulation is narrowly tailored to effectuate a compelling state interest. *Riley,* 487 U.S. at 790–91; *Boos v. Barry*, 485 U.S. 312, 312 (1988).[2]

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

A. "Labor Peace" Is Not a Compelling Interest that Justifies Overriding Citizens' First Amendment Rights

The tailoring inquiry can be cut short in this instance because the only state interest advanced by Defendants, "labor peace," is not compelling.

"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)). Echoing *Abood*, *Janus* "assume[d]," without deciding, that a state might have a compelling interest in avoiding "interunion rivalries" and "conflicting demands from different unions" sufficient to overcome First Amendment objections. 138 S. Ct. at 2465–66 (quoting *Abood*, 431 U.S. at 220–21).

But, like the rest of *Abood*, the "labor peace" concept was borrowed from another area of the Supreme Court's jurisprudence—concerning Congress's Commerce Clause power to regulate economic affairs, *e.g., NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41–42 (1937)—and, without any consideration, given a second life as a First Amendment doctrine. 431 U.S. at 220–21. That the promotion of labor peace might justify congressional regulation of economic affairs, subject only to rational-basis review, says nothing about whether labor-peace interests suffice to clear the higher bar of First Amendment scrutiny.

Knox v. Service Emps., 567 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.

They do not. *Abood*'s unconsidered (and now overruled) acceptance of "labor peace" as a compelling interest was the very sort of "deference to legislative judgments" that "is inappropriate in deciding free speech issues." *Janus*, 138 S. Ct. at 2480. What applies instead is the categorical rule that government may not "substitute its judgment as to how best to speak for that of speakers and listeners" or to "sacrifice speech for efficiency." *Riley*, 487 U.S. at 791, 795. Yet that is the logic of "labor peace": that imposing a representative on objecting public employees furthers their interests, no matter their protestations to the contrary, and permits the government to manage its workplace more efficiently. Those things cannot suffice to render "labor peace" sufficiently compelling to justify impingement of First Amendment rights. After all, the general rule is that "[t]he First Amendment's guarantee of free speech does *not* extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits." *United States v. Stevens*, 559 U.S. 460, 470 (2010). No exception rooted in history having been recognized for restrictions on speech and association that may limit inter-union rivalries, the general rule applies.

B. Compelled Union Representation Furthers No Interest Identified by Defendants

Even assuming *arguendo* that labor peace is a compelling interest in the abstract, it provides no specific justification for compelled union representation. What furthers Defendants' stated interest in avoiding inter-union rivalries is the Union's exclusive status, not forcing the Union on objecting employees as their unwanted representative. That interest can be readily achieved by declining to

listen to other unions—that is, by maintaining the Union's current exclusive status—without compelling objecting employees like Ms. Thompson to submit to the Union's representation and suffer it to speak for her. The two things—compelled representation and exclusive status—are not intertwined, and compelled representation carries no weight in Defendants' "labor peace" argument.

That is confirmed by ample experience. Not all states require public employees to accept unwanted representation. For example, Tennessee abolished compelled 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, *see infra* § III.C, and many others curtail the scope of collective bargaining or the right to strike, all without substantial conflict and disruption. *See* 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).[3] In sum, it is not necessary to force an unwanted representative on public employees to so as to avoid inter-union rivalries. No different than with the compelled union payments rejected by *Janus*, "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).

That experience reflects broader legal principles. Compelled representation is orthogonal to the Defendants' stated interest in avoiding inter-union rivalries. The First Amendment affords public workers a near-absolute right to speak out themselves on matters of public concern and to join alternative labor

[3] *Available at* https://cepr.net/documents/state-public-cb-2014-03.pdf.

organizations, just like they may enter into any number of private associations free from government retaliation. *See, e.g.*, *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1416 (2016). Even when some other group has been recognized as the exclusive representative, such organizations can still make demands on public employers, spark rivalries, and even foster dissention within the workforce—those potential ills are a consequence of public workers' well-recognized First Amendment rights and are not addressed in any way by compelled representation requirements. In this respect, there is a fundamental disconnect between compelling unwilling public workers to accept a labor union as their representative and any claimed interest in "labor peace."

C. Any State Interest in "Labor Peace" Does Not Suffice To Support the Union's Exclusive Status

"Labor peace" also fails to support the Union's exclusive status. While restricting bargaining to a single counterparty may be convenient for the government or ease its labor-management burden, government efficiency is insufficient to justify the impingement of the right of non-members. *See Riley*, 487 U.S. at 798. Many public and private workplaces forgo collective bargaining (and hence union exclusivity) entirely. *See, e.g.*, N.C. Gen. Stat. § 95-98 (1959) (barring collective bargaining by North Carolina government employers); *Branch v. City of Myrtle Beach*, 532 S.E.2d 289, 292–93 (S.C. 2000) (barring collective bargaining by South Carolina government employers); Tex. Govt. Code § 617.002 (generally barring collective bargaining by Texas government employers); Va. Code. § 40.1-57.2 (barring collective bargaining by Virginia government employers);

see generally Bureau of Labor Statistics, Union Members—2019, Jan. 22, 2020[4] (reporting that about a third of public workers, and about 6 percent of private-sector workers, are union members). Nonetheless, those government employers are able to carry out their functions despite the possibility of facing conflicting demands from employees and others.

But that discrepancy is more the result of happenstance than deliberate application of First Amendment principle. *See generally Harris v. Quinn*, 573 U.S. 616 (2014) (recounting how *Abood* carelessly borrowed deferential doctrines like "labor peace" from the court's Commerce Clause precedents). Cases like *Abood*, the Supreme Court explained in *Janus*, "did not independently evaluate the strength of the government interests" in this field, but simply accepted them with the kind of "deference to legislative judgments [that] is inappropriate in deciding free speech issues." 138 S. Ct. at 2480.

The decision below perpetuated that error, notwithstanding *Janus*'s admonition, by accepting as sufficient Defendants' view that curtailing the normal give-and-take of open debate and free association is necessary to achieve the State's interest in "labor peace." Opinion and Order, R.69, Page ID ##1268–71. Yet the fact is that the vast majority of the economy manages to function without union exclusivity, *see* Bureau of Labor Statistics, Union Members, *supra*, and that is more than sufficient to demonstrate that the impingement of First Amendment rights is unnecessary to maintain successful workplaces.

[4] *Available at* https://www.bls.gov/news.release/pdf/union2.pdf

Conclusion

For the foregoing reasons, the decision of the district court should be reversed.

February 18, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the length limitations of Fed. R. App. P. 32(a)(7) because it is 8,304 words. It complies with the typeface and type-style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it is printed in 14-point Calisto MT font, a proportionally spaced face with serifs.

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I hereby certify that on February 18, 2020, a true and correct copy of the foregoing was filed via the Court's CM/ECF system and served via electronic filing upon all counsel of record in this case.

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DESIGNATION OF RELEVANT DOCUMENTS

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