In the

Supreme Court of Ohio

BARBARA KOLKOWSKI,	:	Case No.
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	On Appeal from the Ashtabula
	:	County Court of Appeals,
ASHTABULA AREA TEACHERS, et al.,	:	Eleventh Appellate District
	:	
	:	Court of Appeals
	:	Case No. 2021-A-0033
Defendants-Appellees.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF PLAINTIFF-APPELLANT BARBARA KOLKOWSKI

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INTRODUCTION

When the United States Supreme Court issued its opinion in *Janus* in 2018, it recognized that public employment does not require that public employees surrender their constitutional rights. *Janus v. Am. Fedn. of State, Cnty., & Mun. Employees, Council 31*, ___U.S.___, 138 S.Ct. 2448, 201 L. Ed. 2d 924 (2018). Likewise, the State of Ohio has long recognized—in its Constitution, through case law and statutorily—that Ohio public employees do not surrender all their rights when they become bound to a public collective bargaining agreement.

Plaintiff-Appellant Barbara Kolkowski sought to adjust, up to and including through arbitration, an employment grievance utilizing the notice procedure required by the governing collective bargaining agreement ("CBA"). When demanding arbitration, Ms. Kolkowski, who is *not* a member of the Defendant Unions, relied on the Eighth District Court of Appeals decision in *Johnson v. Metro Health Medical Centr.*, 8th Dist. Cuyahoga No. 79403, 2001 WL 1685585 (Dec. 20, 2001) and also demanded that, since she had not asked for or accepted the Union's representation, she be allowed to hire her own counsel to represent her in the arbitration. The Defendants refused that request, essentially saying that if Ms. Kolkowksi wanted to arbitrate, she was required to accept the Union's representation—in which the Union may even use a non-lawyer under the CBA. (AmCompl. at ¶ 42-44). The Eleventh District Court of Appeals, in apparent contradiction to *Johnson* and its progeny, held that the terms of a collective bargaining agreement effectively trump those statutory and constitutional guarantees that a public employee has no standing in an arbitration except at the sufferance of the union, and that the conveniences of the collective bargaining system outweighed Ms. Kolkowski's constitutional and statutory rights.

This case presents a question of first impression that implicates both state law and the state and federal constitutional rights to association, expression, and the right to counsel: Does a public

employee involuntarily bound by a collective bargaining agreement have a right to hire her own counsel to represent her in an employment grievance arbitration? The answer to that question has profound implications for Ohioans employed in the public sector and working under collective bargaining agreements and is, therefore, a question of great general interest.

STATEMENT OF THE FACTS AND CASE

Plaintiff-Appellant Barbara Kolkowski is a guidance counselor employed by the Ashtabula Area City School District ("the District"). Like the hundreds of thousands of Ohioans who work for state or local government entities,[1] Ms. Kolkowski's employment is subject to a Collective Bargaining Agreement. By law, she is a member of a collective bargaining unit that is exclusively represented by the Ashtabula Area Teachers' Association (the "AATA" or the "Union"). (Am.Compl. at ¶ 1). She is bound to the bargaining unit and the Union even though she opted-out of Union membership following the U.S. Supreme Court's decision in *Janus*. The CBA to which Ms. Kolkowski is bound contains a multi-level procedure to address employee grievances. (Compl.Ex.A, Art. XVI). And like most CBAs, the CBA to which Ms. Kolkowski is bound requires her to surrender her right to pursue any contractual dispute with her employer in court. Instead, she must follow the grievance procedure set forth in the CBA, which ends with arbitration.

In addition to serving as a guidance counselor for the District, Ms. Kolkowski, like many District employees, entered into certain supplemental contracts for additional services. During the 2019-2020 school year, a dispute arose between Ms. Kolkowski and the District regarding one of those supplemental contracts. On September 16, 2020, Ms. Kolkowski initiated the contractual grievance procedure under the CBA—the only process available to her—relating to a dispute over

[1] *See* Daniel DiSalvo, *By the Numbers: Public Unions' Money and Members Since Janus v. AFSCME* (April 14, 2022), https://www.manhattan-institute.org/disalvo-public-unions-money-members-since-janus-v-afscme (accessed Oct. 20, 2022).

a supplemental contract and the duties assigned to her by filing a "Level One" request for an "adjustment" of her grievance. (Am.Compl. at ¶ 16); *see* R.C. 4117.11. Ms. Kolkowski represented herself in pursuing her grievance adjustment. (Am.Compl. at ¶ 17). On September 25, 2020, the District denied her grievance at Level 1. (*Id*. at ¶ 18).

Ms. Kolkowski, again representing herself and without assistance from the Union, sought a "Level Two" review of her grievance on September 28, 2020. (*Id*. at ¶ 19). On October 20, 2020, that was denied. (*Id*.). Ms. Kolkowski then chose to submit her grievance to arbitration. The CBA provides that an aggrieved employee may demand mediation (Level Three) or Arbitration (Level Four) relating to the grievance. (Compl.Ex.A, Art. XVI (C)). The CBA specifically recognizes—consistent with Ohio statute and Kolkowski's Constitutional rights—that a bargaining unit member can pursue a grievance on his or her own behalf. (Am.Compl. at ¶ 20); (Compl.Ex.A, Art. XVI). In other words, the grievance and the rights to adjust it belong to the aggrieved bargaining unit member.

The CBA, which Ms. Kolkowski is bound to follow as a bargaining unit member, requires that an aggrieved employee seeking arbitration of the grievance demand that the Union submit the grievance to arbitration. (Compl.Ex.A, Art. XVI(C)). On November 5, 2020, pursuant to Article XVI (C) of the CBA, Ms. Kolkowski demanded that the Union submit a demand for arbitration on her behalf against the District with the American Arbitration Association. (Am.Compl. at ¶ 21). In her letter demanding arbitration, Ms. Kolkowski was clear that she did not want the Union's representation in the arbitration proceedings and intended to use her own counsel at her own expense. (*Id*. at ¶ 22); (Compl.Ex.B). On November 25, 2020, the Union emailed Ms. Kolkowski's counsel that, while the Union would submit the grievance to arbitration, it would not permit Ms. Kolkowski to be represented by her own counsel. (Am.Compl. at ¶ 24); (Compl.Ex.C). On

December 14, 2020, the AATA submitted the grievance for arbitration to the American Arbitration Association (the "AAA"). (Am.Compl. at ¶ 24).

Concerned that the Union might not adequately represent her interests—and to vindicate her right to retain and associate with a lawyer of her choice in the only forum available to litigate the merits of her grievance—Ms. Kolkowski sued in the Ashtabula County Common Pleas Court to assert her right to choose her own counsel at the arbitration. Indeed, she seeks representation by an Ohio lawyer and not a "union representative" who would likely not even be a lawyer. (*Id.* at ¶ 42-44).

Ms. Kolkowski filed her initial complaint on January 27, 2021, against Defendants AATA and the Ashtabula Area City School District (the "District"). (T.Docket, Compl., Jan. 27, 2021). Following the filing of an Amended Complaint and Motions to Dismiss by both Defendants, on October 5, 2021, the Court granted the Defendants' Motions to Dismiss. (T.Docket, Judgment Entry, Oct. 5, 2021).

The Eleventh District affirmed the trial court's dismissal, holding that Ms. Kolkowski lacked standing to pursue her right to her own representation because she had followed the CBA's required procedure of demanding that the Union submit the grievance to arbitration—even though she had at the same time advised the Union that she wished to choose her own representation. *Kolkowski v. Ashtabula Area Teachers Assn.*, 11th Dist. Ashtabula No. 2021-A-0033, 2022-Ohio-3112, ¶ 4. She respectfully requests that this Court accept jurisdiction and reverse the Eleventh District's decision.

THIS CASE RAISES SUBSTANTIAL CONSTITUTIONAL QUESTIONS AND INVOLVES A QUESTION OF PUBLIC AND GREAT GENERAL INTEREST

This Court should agree to review the First District's Decision for the following reasons.

1. This is a case of first impression that significantly affects the constitutional rights—which are also expressly preserved by Ohio statute--of public employees throughout Ohio. "'[A] civil litigant's right to retain counsel is rooted in fifth amendment notions of due process * * * .'" *Anderson v. Sheppard,* 856 F.2d 741, 748 (6th Cir. 1988), quoting *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1118 (5th Cir.1980). "The right to counsel, safeguarded by the constitutional guarantee of due process of law, includes the right to choose the lawyer who will provide that representation." *McCuin v. Texas Power & Light Co*., 714 F.2d 1255, 1257 (5th Cir.1983). Ohio courts also recognize "a party's right to representation by counsel of his or her choice * * * ." *A.B.B. Sanitec W., Inc. v. Jeffrey J. Weinsten*, 8th Dist. Cuyahoga No. 88258, 2007-Ohio-2116, ¶ 25. The Ohio Legislature explicitly preserved this right when creating the collective bargaining scheme, explaining that unless and until a public employee requests "union representation," the employee has the right to representation by counsel of his or her choice. R.C. 4117.03(A)(5). *Johnson* recognized this right in reaching its result. *Johnson,* 2001 WL 1685585. While the court cited the statute, there is no question that this right originates with the U.S. and Ohio Constitutions and not the Ohio Revised Code. *Johnson* explained—consistent with the Fifth Amendment, *Anderson*, *McCuin*, *A.B.B. Sanitec W*., and the Ohio Revised Code—that such right exists until "the employee invokes union representation." *Johnson* at *2. But the Eleventh District's decision in *Kolkowski* below disregarded this right—which would allow the Union to have a non-lawyer represent Ms. Kolkowksi's interests at the arbitration.[2] Moreover, in *Kolkowski* below, the

[2] A non-lawyer union employee is permitted to represent a "labor organization" "during a grievance labor arbitration." Board on the Unauthorized Practice of Law of the Supreme Court

Eleventh District elevated the terms of a CBA—an agreement to which a non-union member is legally bound but about which the employee has no say—over constitutional and statutory authority. The Court should accept review to confirm the validity of this right and that it controls over any conflicting terms of a CBA.

2. This is also the first case to reach this Court to address whether the speech and associational rights recognized in *Janus* and litigated in *Thompson v. Marietta*, 972 F.3d 809 (6th Cir.2020), extend to grievance arbitration. This implicates the constitutional rights of tens of thousands of Ohio public employees. This Court should accept jurisdiction to clarify whether grievance arbitration is one of "the more traditional bargaining activities" where the government can legitimately curtail speech and associational rights protected in the Ohio and U.S. Constitutions.

ARGUMENT

Appellant's First Proposition of Law: *A Public Employee Has The Right To Retain Counsel In An Arbitration Under A Collective Bargaining Agreement Unless The Employee Has Explicitly Requested Union Representation In The Arbitration.*

A. The Eleventh District's Decision Conflicts With *Johnson* And Violates The Federal And State Constitutional Rights Manifest In Case Law And Statute.

1. The Eleventh District's decision conflicts with the Eighth District's decision in *Johnson* and, indeed, its own decision in *Gaydosh v. Trumbull County*, 2017-Ohio-5859, 94 N.E. 3d 932 (11th Dist.), which adopted *Johnson*. The rule advanced in *Johnson* is that under a CBA, employees like Ms. Kolkowski have the right to choose their own counsel in a grievance arbitration so long as they have not already accepted Union representation. *Johnson* at *2. In other words, the

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of Ohio, Adv. Op. No. UPL 2008-1, 5. However, a non-lawyer should not be allowed to represent Ms. Kolkowski's interest—especially without her consent. The opinion did not address this issue.

grievance belongs to the employee unless and until she accepts the Union's assistance in adjusting it.

Although the *Johnson* court did not frame the right in constitutional terms, it clearly sounds constitutional overtones, speaking to both the U.S. Constitution's First and Fifth Amendment rights to speak and associate with counsel of one's choice and the right of representation in an adversarial proceeding, as well as the right to speak freely guaranteed by Article I, Section 11 of the Ohio Constitution. Specifically, the constitutional right to retain one's own counsel in a civil proceeding arises out of the Fifth Amendment's Due Process Clause and is well established in both federal and Ohio law. *Anderson*, 856 F.2d at 748; *A.B.B. Sanitec,* 2007-Ohio-2116, at ¶ 25; *see also* Ohio Constitution, Article I, Section 1; Section 16. The First Amendment rights asserted in the Amended Complaint and related to the right to speak through one's own counsel—the rights to speak freely, to avoid compelled speech, and to choose not to associate with a particular group—are likewise well-established. *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984).

So too is the ability to enforce these rights in Ohio's courts. Ohio Constitution Article I, Section 16; *Franklin Cty. Law Enf't Ass'n v. Fraternal Order of Police, Capital City Lodge No. 9*, 59 Ohio St.3d 167, 171, 572 N.E.2d 87 (1991). While Ohio law grants the State Employment Relations Board ("SERB") exclusive jurisdiction in disputes relating to the "new rights and remedies" created by R.C. Chapter 4117, "if a party asserts rights that are independent of R.C. Chapter 4117, then the party's complaint may properly be heard in common pleas court." *Franklin Cty. Law Enf't Ass'n.* at 171. Thus, the Ohio Supreme explained, "[b]ecause constitutional rights exist independently of R.C. Chapter 4117, such claims may be raised in common pleas court even though they may touch on the collective bargaining relationships between employer, employee,

and union." *Id.* at 172; *see also Weinfurtner v. Nelsonville-York School Dist. Bd. of Edn.*, 77 Ohio App.3d 348, 356, 602 N.E.2d 318 (4th Dist.1991) (stating that "since federal civil rights claims exist independently of R.C. Chapter 4117," common pleas courts have jurisdiction over claims brought under 42 U.S.C. § 1983).

2. In *Johnson,* the Eighth District Court of Appeals recognized that public employees have the right to counsel (and not just a non-lawyer union representative) when seeking an adjustment of a grievance unless the employee has "invoke[ed] union representation," *Johnson*, 2001 WL 168558 at *2, as established in the Constitution and recognized in R.C. 4117.03(A)(5). While *Johnson* did not explicitly reference the Constitution, that is the source of the rights codified in R.C. 4117.03. *Johnson* recognized that if the grievant submits his or her claim to the union and accepts its representation pursuant to R.C. 4117.03(A)(5), then—and only then—the union essentially steps into the grievant's shoes and becomes the real party in interest. *Id*. As with a subrogation claim, the grievant's standing to pursue the claim is thus extinguished. *Johnson* correctly concluded that once the employee invokes union representation, that employee lacks standing on all matters, including an appeal. *Id.*

The Plaintiff in *Johnson* undisputedly invoked union representation, and the union represented Ms. Johnson at every step of the grievance proceedings, including arbitration. *Id.* at *1. But unlike the plaintiff in *Johnson*, Ms. Kolkowski did not "choose" union representation; rather, she explicitly rejected Union representation at every step. (Am.Compl. at ¶ 17, 19, 22, 26, 30).

When Ms. Kolkowski demanded arbitration, she "wanted to use (and pay for) her own counsel to represent her throughout the arbitration process." (Compl. at ¶ 2). She neither requested nor received representation or any other assistance from the Union during the first two stages of

the grievance process. (*Id.* at ¶ 16) ("Ms. Kolkowski initiated the contractual grievance process"); (*Id.* at ¶ 17) ("Ms. Kolkowski has thus far represented herself in pursuing her grievance"). Indeed, Ms. Kolkowski filed her pre-arbitration action to avoid surrendering her grievance to the Union by proceeding to arbitration with Union representation. Ms. Kolkowski intentionally took every step available to her to preserve her right to choose her own counsel under *Johnson*.

In stark contrast to *Johnson*, the Eleventh District asserted that Kolkowski has no right to demand arbitration and that only the Union could make that decision. *Kolkowski*, 2022-Ohio-311, at ¶ 38. The Court of Appeals held that by merely requesting that the Union submit the grievance to arbitration—as the CBA required—Ms. Kolkowski ceded her standing to adjust the grievance. *Id.* This conflicts with *Johnson's* holding and allows unions and employers to bargain away the statutory and constitutional rights of public employees. If—by agreement between the Union and the District—a CBA contains language that requires a public employee to demand that the Union submit the arbitration request on her behalf, then that employee has no "right to adjust [her] grievance, without union interference" as provided by R.C. 4117.03(A)(5). This renders illusory the public employee's protections codified in R.C. Chapter 4117. More troubling, the employee is prevented from speaking for herself, choosing her own legal strategy, or presenting evidence of her choice, but is compelled to speak through a union representative. A right that others can bargain away is no right at all.

Gaydosh also supports Ms. Kolkowski's legal position. *Gaydosh*, 2017-Ohio-5859, 94 N.E.3d 932. In *Gaydosh*, the plaintiff signed a document specifically authorizing the union to represent him in the grievance proceedings. *Id.* at ¶ 3-4. The union represented the plaintiff at the initial grievance phase and prepared the arbitration package. *Id.* The union in *Gaydosh* then withdrew its arbitration demand, at which point the plaintiff hired his own counsel and sought to

pursue the arbitration on his own. *Id.* at ¶ 24. The court held—relying on *Johnson*—that that "once an employee subject to a collective bargaining agreement authorizes his or her union to pursue a grievance, the cause of action belongs to the union, and the employee lacks standing to prosecute the case." *Id*. at ¶ 23. The unescapable conclusion, again, is that the grievance belongs to the employee until he or she transfers it to the union. *Id.*; *see also Waiters v. Lavelle*, 8th Dist. Cuyahoga No. 95270, 2011-Ohio-116, ¶ 11 ("Our interpretation [is] that the statute requires the employee to invoke the provisions of R.C. 4117.03(A)(5) in lieu of union representation at the outset of presenting the grievance."). Here, Ms. Kolkowski's amended complaint unequivocally stated that she did not seek or accept the Union's assistance. (Am.Compl. at ¶ 16, 17, 19, 21, 22). Indeed, she filed this pre-arbitration cause of action in reliance on the *Johnson/Gaydosh* rule and to avoid any claim that she had released the claim to the Union. (*Id.* at ¶ 38, 39).

Johnson and *Gaydosh* premise the loss of standing on the employee's *decision* to seek Union representation. *Gaydosh* at ¶ 23 ("Mr. Gaydosh authorized the Union to represent him in the grievance process"); *Johnson,* 2001 WL 1685585 at *2 ("[P]ublic employees have a statutory right under R.C. 4117.03(A)(5) to 'present grievances and have them adjusted, without intervention of the bargaining representative' " until the employee invokes union representation).

Ms. Kolkowski never sought Union representation. But if the Eleventh District's decision stands and the mere request for arbitration, as required by a CBA, amounts to union "representation," then the guarantees provided by *Johnson* and *Gaydosh*--codified in R.C. Chapter 4117 and protected by the U.S. and Ohio Constitutions—are illusory. Public employees like Ms. Kolkowski will have no choice over whether to choose the union's representation. If the CBA allows a grievant to access its grievance procedures only through the Union's intervention, then there is no set of circumstances where R.C. 4117.03, *Johnson*, or the constitutional rights that they

affirm can apply. The employee does not have an opportunity to choose or decline union representation in the grievance process. The choice has already been made for them by the bargaining unit and the employer. If an employee wants to file a grievance, she must turn over her claim to the union. This is a particularly bitter pill for employees like Ms. Kolkowski, who have exercised their constitutional right under *Janus* to opt-out of union membership.

B. Whether the Terms of Collective Bargaining Agreement Can Supersede Ohio Law Presents a Question of Great General Interest

The Eleventh District based its decision, in part, on particular terms of Ms. Kolkowski's CBA that gave the Union the sole discretion to arbitrate. *Kolkowski*, 2022-Ohio-3112, at ¶ 38. Ms. Kolkowski pointed to contradictory terms in the CBA, which recognized her as the "grievant" and that she was the master of her own case. (Am.Compl. at ¶ 28-30); *see Kolkowski* at ¶ 40. While a determination regarding a narrow, personal issue would not raise a question of great general interest, the language and structure of the CBA issue is common to public employers and unions throughout the state. These agreements—and their ability to deprive hundreds of thousands of public employees throughout the State of Ohio of constitutional and statutory rights—thus raises significant constitutional concerns and presents a question of great general interest.

Indeed, the Court of Appeals relied on a similar case, *Staple v. Ravenna*, 11th Dist. Portage No. 2021-P-0070, 2022-Ohio-261, to hold that CBAs effectively trump employee rights recognized in *Johnson* and R.C. 4117.03. *Kolkowski* at ¶ 32-41. In *Staple*, the appellant bargaining unit member sought to retain private counsel for arbitration. *Staple* at ¶ 28. The *Staple* Court held that because "the CBA does not expressly grant Mr. Staple the right to arbitrate his grievance[,] if Mr. Staple wished to pursue arbitration, he had no choice but to * * * turn the grievance over to the Union." *Id*. The Eleventh District reasoned as such because "[a]ll parties agreed that under the

applicable CBA, only the union, and not Staple individually, had the right to initiate arbitration." *Id.* at ¶ 3.

The *Johnson* Court struck a reasonable balance that recognized the rights of public employees but held that those rights could be waived by accepting the benefit of union representation. This Court should accept jurisdiction and hold that unions and employers cannot bargain away certain core rights of public employees.

Appellant's Second Proposition of Law: *Arbitration of A Personal Grievance Is Not "One Of The More Traditional Collective Bargaining Activities" Which Would Allow A Union To Assume The Union Member's Arbitration Rights Over The Union Member's Objection.*

Although the *Janus* decision provided a definitive answer to one component of public employee rights in a collective bargaining context, it left other questions regarding the associational rights of public employees—questions that raise significant constitutional issues and are of great public interest—unanswered. In *Thompson,* 972 F. 3d 809, an Ohio school teacher who had opted out of union membership under *Janus* brought suit in federal court seeking a declaration that Ohio's exclusive representation requirement violated her associational rights. Although Mrs. Thompson had left the union and was no longer required to pay dues or fair share fees, Ohio law still required her to associate with an organization—the union—with which she did not wish to associate for any collective bargaining purposes. *Id.* at 812. The Sixth Circuit recognized that Mrs. Thompson's case presented a tension between the expression and associational rights recognized in *Janus* and the U.S. Supreme Court's holding in *Minnesota State Bd. For Community Colleges v. Knight*, 465 U.S. 271 (1984). *Thompson* at 811-812.

Knight involved bargaining unit members' ability to participate in "meet and confer" sessions with management, during which administration officials met with union representatives to "obtain faculty advice on policy questions." *Knight* at 280. Those were occasions for "public

employers, acting solely as instrumentalities of the state, to receive policy advice from their professional employees." *Id.* at 282. The CBA in *Knight* limited participation in the meet and confer sessions to representatives of the union. *Id.* at 278. The public employee plaintiffs in that case, however, challenged the CBA's requirement as violative of their First Amendment rights. *Id.*

Knight upheld the limitation as to meet and confer sessions, reasoning that while the *Knight* plaintiffs generally had the right to speak on any topic, they "have no constitutional right * * * to a government audience [i.e. the State of Minnesota] for their policy views." *Id.* at 286. And they had no constitutional right "to force the government to listen to their views." *Id.* at 283. In dismissing Mrs. Thompson's case, the Sixth Circuit held that because *Janus* had not explicitly overruled *Knigh*t and because *Knight*'s decision allowing the state to exclude individual bargaining unit members from meet and confer extended to "more traditional collective bargaining activities," the State was within its rights to compel her to associate with the Union regarding those activities. *Thompson* at. 814. But arbitration of a grievance is not just a right to speak, and it has nothing to do with "policy views." *Knight* at 286. It includes, by definition, a right to be heard. *Seldner Corp. v. W.R. Grace & Co*., 22 F.Supp. 388, 392 (D.Md.1938) ("[I]t is a universally recognized rule that the parties to an arbitration proceeding have an absolute right to be heard and to present evidence before the arbitrators."). It is a substitute for litigation where both parties present evidence and legal (not policy) arguments to an independent third-party decision maker.

The Eleventh District missed this point and, looking to *Thompson* and *Knight,* asked only whether Ms. Kolkowski's arbitration of her personal grievance was one of those "more traditional collective bargaining activities" where the rights of public employees gave way to the government's need to administer a collective bargaining system efficiently. *Kolkowski*, 2022-

Ohio-3112, at ¶ 53. The Eleventh District held that through a CBA, the Union and the District can force Ms. Kolkowski to give up her rights to arbitrate her grievance. *Id.* at ¶ 59.

Significantly, the Eleventh District is the first court in Ohio—or anywhere else—to hold that grievance arbitration is a core collective bargaining activity and that the CBA, therefore, trumps a public employee's competing constitutional and statutory rights. That decision—itself a case of first impression—implicates both State and Federal constitutional rights and has consequences for every public employee in Ohio working under a CBA.

The right to choose one's counsel in an arbitration is a fundamentally different situation than "traditional collective bargaining activities" like the meet and confer sessions in *Knight* or the associational rights raised in *Thompson*. An arbitration, like a trial, is an individualized adjudicatory proceeding. *Greenwald v. Shayne*, 10th Dist. Franklin No. 09AP-599, 2010-Ohio-413, ¶ 9 (recognizing "the adjudicatory purpose of arbitration"). Further, the policy rationale enunciated in *Knight* of preserving state resources and allowing exclusive representation in the context of negotiating a collective bargaining agreement do not exist in the context of resolving or "adjusting" individual disputes or grievances.

Apart from slightly relaxed formalities, most arbitrations are procedurally indistinguishable from bench trials. Because of its presumptive finality—and because it is the only step in the grievance process where the grievant can be heard before a neutral third party—"the guiding hand of counsel," *Relizon Co. v. Shelly J. Corp.*, 6th Dist. Lucas No. L-02-1377, 2004-Ohio-6884, ¶ 49, in preparing and presenting a case is all the more important. Unlike the general First Amendment rights at issue in *Knight* and *Thompson*, Ms. Kolkowski's right to retain counsel in civil matters arises from the Due Process protections of the Fifth Amendment and Article I, Section 16 of the Ohio Constitution and is, by definition, participatory. *See Anderson* 856 F.2d at

748 ("[T]he right to counsel is one of constitutional dimensions and should thus be freely exercised without impingement."). Indeed, while the Eleventh District Court's decision focused solely on federal constitutional rights, the state constitutional rights pled and argued below are drafted in terms that are broader than their federal counterparts and arguably provide greater protections. *See Eastwood Mall, Inc. v. Slanco*, 68 Ohio St. 3d 221, 225, 26 N.E.2d 59 (1994) (Wright, J., dissenting).

Moreover, the First Amendment rights that Ms. Kolkowski asserts are fundamentally different than those in *Knight* and *Thompson*. The First Amendment rights she asserts are tied to and inseparable from her Fifth Amendment right to have her own lawyer at her own expense. Ms. Kolkowski is not merely seeking to "speak" (as in *Knight*) or "avoid association" (as in *Thompson*), but rather she is seeking to litigate her rights in the only forum allowed to her by speaking through her own attorney. And unlike Mrs. *Thompson*, whose association with that union was largely symbolic, Ms. Kolkowski is being forced to associate with the Union as her legal representative.

The arbitrator is no more burdened by hearing a case presented by Ms. Kolkowski's counsel of choice than by hearing from a non-lawyer union representative. Allowing Ms. Kolkowski to be represented by her own lawyer likewise does not burden the government. Unlike the meet and confer demand in *Knight*, Ms. Kolkowski is not demanding a hearing on her public policy views. Rather, she is demanding that the arbitrator—the person that the District and the Union designated to resolve employee grievances—listen to her legal and factual arguments presented by the lawyer of her choosing rather than a non-lawyer union representative.

Accordingly, the Court should accept jurisdiction and reverse the judgment below.

Respectfully submitted,

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The undersigned hereby certifies that a copy of the foregoing Memorandum In Support of Jurisdiction of Plaintiff-Appellant Barbara Kolkowski was served by e-mail this 21st day of October 2022, upon the following counsel:

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