APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19-4217

JADE THOMPSON,

Plaintiff - Appellant,

v.

MARIETTA EDUCATION ASSOCIATION; MARIETTA CITY SCHOOL DISTRICT BOARD OF EDUCATION

Defendants - Appellees.

Appeal from the U.S. District Court for the for the Southern District of Ohio at Columbus.

No. 2:18-cv-00628—Michael H. Watson, District Judge.

Argued: August 5, 2020

Decided and Filed: August 25, 2020

Before GIBBONS, GRIFFIN, and THAPAR, Circuit Judges.

Counsel

ARGUED: Robert Alt, THE BUCKEYE INSTITUTE, Columbus, Ohio, for Appellant. Scott A. Kronland, ALTSHULER BERZON LLP, San Francisco, California, for Appellee Marietta Education Association. Bryan M. Smeenk, BRICKER & ECKLER LLP, Columbus, Ohio, for Appellee Marietta City School District Board of Education. **ON BRIEF:** Robert Alt, THE BUCKEYE INSTITUTE, Columbus, Ohio, Andrew M. Grossman, Patrick T. Lewis, BAKER-HOSTETLER LLP, Washington, D.C., for Appellant. Scott A. Kronland, P. Casey Pitts, ALTSHULER BERZON LLP, San Francisco, California, Eben O. McNair, IV, Timothy Gallagher, SCHWARZWALD MCNAIR & FUSCO LLP, Cleveland, Ohio, for Appellee Marietta Education Association. Bryan M. Smeenk, Nicole M. Donovsky, BRICKER & ECKLER LLP, Columbus, Ohio, for Appellee Marietta City School District Board of Education.

OPINION

THAPAR, Circuit Judge. By signing on the dotted line, public employees accept the government as their employer. In Ohio, the law requires them to also accept a union as their exclusive bargaining

representative. It's a take-it-or-leave-it system—either agree to exclusive representation, which is codified in state law, or find a different job. This take-it-or-leave-it system is in direct conflict with the principles enunciated in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018). But when the Supreme Court decided *Janus*, it left on the books *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984). And because *Knight* directly controls the outcome of this case, we affirm the district court's decision upholding the challenged Ohio law.

I.

Marietta is a small town in southeast Ohio that sits on the banks of the Ohio and Muskingum Rivers. The Marietta Board of Education governs the town's public schools. And the Marietta Education Association, a teacher's union, serves as the exclusive bargaining representative for the school district's employees.

Jade Thompson is a Spanish teacher at Marietta High School. After the Supreme Court's decision in *Janus*, Thompson sued the Marietta Education Association and the Marietta Board of Education, arguing that Ohio's scheme of exclusive public-sector union representation violates the First Amendment.

Under Ohio law, a union may become the exclusive bargaining representative for all public employees in a bargaining unit. To become an exclusive representative, the union must submit proof that a majority of the bargaining unit's members wish to be represented by the union. Ohio Rev. Code § 4117.05(A)(1). Once a union has done so, public employers are required to collectively bargain with it. *Id.* § 4117.04. And they are prohibited from bargaining with anyone else. *Id.* This includes both individual employees and other labor organizations.

Ohio law sets a broad scope for collective-bargaining negotiations. Public employers *must* bargain over "[a]ll matters pertaining to wages, hours, or terms and other conditions of employment" as well as over any "existing provision of a collective bargaining agreement." *Id.*§ 4117.08(A). And public employers *may* bargain over almost all other topics. *Id.* § 4117.08(C). This latter category includes "the functions and programs of the public employer"; the employer's "overall budget" and "organizational structure"; the methods "by which governmental operations are to be conducted"; and even "the mission of the public employer as a governmental unit." *Id.*

Thompson is not a member of the Marietta Education Association. She objects to its policies and to any association with it. But because the union

has been designated as her bargaining unit's "exclusive representative," the union has a statutory right to represent her "for the purposes of collective bargaining." *Id.* § 4117.05(A). So while Thompson believes layoffs should occur based largely on merit rather than seniority, the union advocates to the contrary. And while Thompson believes teachers' benefits should be cut to save academic programs, the union takes a different view. These are just a few of the many issues on which Thompson and the union disagree. Indeed, when Thompson's late husband—Representative Andy Thompson— ran for the Ohio General Assembly, the union published advertisements and sent emails to teachers at Marietta High School opposing his candidacy.

Two years ago, Thompson filed this lawsuit, arguing that Ohio's system of exclusive public-sector bargaining violates her First Amendment rights. Both parties soon moved for summary judgment. The district court held that Thompson's challenge was foreclosed by *Knight* and thus granted summary judgment to the defendants. This appeal followed.

II.

Thompson raises two challenges to Ohio's system of exclusive representation: (1) that it violates her rights to be free from compelled speech and as-

sociation, and (2) that it violates her right to meaningfully communicate with the government. We agree with the district court that both arguments are foreclosed by Supreme Court precedent.

A.

Thompson's first claim is that Ohio law impermissibly allows the Marietta Education Association to speak on her behalf during collective-bargaining sessions, and that this amounts to compelled speech and association in violation of the First Amendment. *See* Ohio Rev. Code §§ 4117.05(A), 4117.11(B)(6).

The First Amendment protects "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, "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). These rights capture the more basic truth that "[f]orcing free and independent individuals to endorse"—either implicitly or explicitly—"ideas they find objectionable is always demeaning." *Janus*, 138 S. Ct. at 2464. The Supreme Court has thus explained that "designating a union as the exclusive representative of nonmembers substantially restricts the nonmembers' rights." *Id.* at 2469. And the Court has deemed exclusive public- sector bar-

gaining "a significant impingement on associational freedoms that would not be tolerated in other contexts." *Id.* at 2478.

Given the Supreme Court's language, one might think that Thompson should prevail. Yet Supreme Court precedent says otherwise. And lower courts must follow Supreme Court precedent. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997).

The primary precedent blocking Thompson's way is *Knight*. There, a group of non-union community college instructors challenged Minnesota's collective-bargaining statute. They objected to the State's recognition of an exclusive representative to speak for all employees at "meet and confer" sessions. These sessions concerned subjects outside the scope of mandatory collective bargaining. *See* 465 U.S. at 274–78. But the Supreme Court rejected the challenge. It held that Minnesota had "in no way restrained [the instructors'] freedom to speak . . . or their freedom to associate or not to associate with whom they please." *Id.* at 288. To the contrary, the Court held that the instructors' First Amendment rights were not unduly infringed because they remained "free to form whatever advocacy groups they like" and were "not required to become members of [the union]." *Id.* at 289.

Knight controls here. If allowing exclusive representatives to speak for all employees at "meet

and confer" sessions does not violate the First Amendment, we see no basis for concluding that the result should be different where the union engages in more traditional collective- bargaining activities. It appears that every other circuit to address the issue has agreed. *See, e.g.*, *Reisman v. Associated Faculties of Univ. of Maine*, 939 F.3d 409 (1st Cir. 2019); *Mentele v. Inslee*, 916 F.3d 783 (9th Cir. 2019); *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018); *Hill v. Serv. Emps. Int'l Union*, 850 F.3d 861 (7th Cir. 2017); *Jarvis v. Cuomo*, 660 F. App'x 72 (2d Cir. 2016) (summary order).

Thompson responds, arguing that *Knight* did not involve a compelled-representation challenge. But in *Knight*, the Court framed the question presented in broad terms: 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." 465 U.S. at 273. Even assuming plaintiff's compelled-representation theory is technically distinguishable, such a cramped reading of *Knight* would functionally overrule the decision. And that is something lower court judges have no authority to do.

To be sure, *Knight*'s reasoning conflicts with the reasoning in *Janus*. But the Supreme Court did not

overrule *Knight* in *Janus*. And when an earlier Supreme Court decision "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989). We do so here.

B.

Thompson's second claim fares no better. She argues that Ohio's system of exclusive representation unconstitutionally burdens her First Amendment right to engage with the government through speech, association, and petition. Thompson's theory seems to be that by allowing the Marietta Education Association to serve as her exclusive representative, Ohio unconstitutionally tilts the playing field against her speech.

But this argument conflicts with two Supreme Court decisions. First, we consider *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463 (1979) (per curiam). There, the Court held that the First Amendment imposes no "affirmative obligation on the government to listen, to respond[,] or . . . [to] bargain." *Id.* at 465. And since the government has no obligation to bargain with Thompson, it is difficult to see how the government's decision to bargain with someone else violates her rights.

Second, in *Knight*, the Supreme Court recognized that it was "doubtless true that the unique status of the exclusive representative . . . amplifies its voice in the policymaking process." 465 U.S. at 288. But amplification "is inherent in government's freedom to choose its advisers." *Id.* And a "person's right to speak is not infringed when government simply ignores that person while listening to others." *Id.* Thus, *Knight* again forecloses Thompson's claim.*

***

This case presents First Amendment questions of considerable importance. But they are controlled

* The district court also held that Thompson waived this second claim during an earlier stage of the proceedings. But we see things differently. To be sure, Thompson did not press this theory while seeking a preliminary injunction. And some of her arguments during the preliminary injunction hearing implicitly contradict the theory. Yet our review of the record does not reveal an "intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993). To the contrary, Thompson asserted the theory in her complaint, pressed it in her motion for summary judgment, and continues to pursue it on appeal. Likewise, at every stage the defendants have had a full opportunity to respond to this theory and have in fact done so. *See United States v. Dillard*, 438 F.3d 675, 682 n.1 (6th Cir. 2006) (finding no waiver where the opposing party "had a full and fair opportunity to consider and address the issue"). Fortunately, the district court addressed the merits of Thompson's claim in the alternative. And since both parties fully briefed Thompson's theory in the district court and on appeal, there has been no impediment to our consideration of the issue.

by a fair reading of the Supreme Court's precedents. We therefore affirm the district court's order granting summary judgment for the defendants.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19-4217

JADE THOMPSON,

Plaintiff - Appellant,

v.

MARIETTA EDUCATION ASSOCIATION; MARIETTA CITY SCHOOL DISTRICT BOARD OF EDUCATION

Defendants - Appellees.

FILED
August 25, 2020
Deborah S. Hunt, Clerk

Before GIBBONS, GRIFFIN, and THAPAR, Circuit Judges.

Judgment

On Appeal from the U.S. District Court for the for the Southern District of Ohio at Columbus.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Jade Thompson,

Plaintiff

v.

Marietta Education Association, *et al.*,

Defendants

Case No. 2:18-cv-628

Judge Michael H. Watson

Magistrate Judge Vascura

OPINION AND ORDER

Jade Thompson ("Plaintiff") sues the Marietta Education Association ("the Union") and Marietta Board of Education ('1the Board") (collectively, "Defendants") under 42 U.S.C. § 1983. She argues that Ohio Revised Code §§ 4117.04-05 are unconstitutional. The Court denied Plaintiff's motion for a preliminary injunction, Op. and Order, ECF No. 52, and Plaintiff, the Union, and the Board now all move for summary judgment. ECF Nos. 56, 57, 58. For the following reasons, the Court **GRANTS** the Union's and the Board's motions and **DENIES** Plaintiff's motion.

I. FACTS

The pertinent facts of this case were recited in the Court's prior Opinion and Order, ECF No. 52. The Court adds, however, the following relevant facts.

The Collective Bargaining Agreement ("Agreement") that was in effect at the time this lawsuit was filed has been replaced by a successor Collective Bargaining Agreement ("Successor Agreement"). Both the Agreement and the Successor Agreement are governed by the challenged portions of Ohio law. Stipulated Facts ¶ 12, ECF No. 59. No party suggests the Successor Agreement varies from the Agreement in any way material to this lawsuit. See *id.* ¶14.

Although Plaintiff at times asserts that the Board appoints or appointed the Union as Plaintiff's speaker, agent, or representative, *see, e.g.,* Pl. Mot. Summ. J. 2, ECF No. 58-1, that is not accurate. Rather, once an entity has been designated an exclusive representative, pursuant to Ohio Revised Code § 4117.05, Ohio law requires public employers like the Board to "extend to [that] exclusive representative …the right to represent exclusively the employees in the appropriate bargaining unit…." O.R.C. § 4117.04(A). Thus, "[p]ursuant to the provisions of the Act governing the designation of employee representatives, the Board has *recognized* the Union as the majority-designated exclusive representative of a bargaining unit of certain public employees of the Board for the purposes of collective bargaining under the Act," Stipulated Facts ¶ 9, ECF No. 59 (emphasis added), it did not *appoint* the Union as the exclusive representative.

Additionally, Plaintiff's contention that the Union speaks for her is inaccurate. As a matter of law, Ohio

requires the Board to recognize the Union as the bargaining unit's representative for purposes of collective bargaining. O.R.C. § 4117.04(A), (B). The Agreement also states that the Board recognized the Union as the bargaining agent for the members of the bargaining unit. CBA § 1.01, ECF No. 1-1. Thus, the Court concluded in its prior Opinion and Order that "although the Union represents Plaintiff, and in that representation 'speaks for her,' realistically, it is speaking for the bargaining unit members as a collective rather than purporting to espouse specific views for any individual bargaining unit member." Op. and Order 19, ECF No. 52; *cf. Reisman v. Associated Faculties of Univ. of Maine,* 939 F.3d 409, 412–13 (1st Cir. 2019) (concluding same when interpreting similar statute). Plaintiff's argument that Ohio law or the Agreement should be interpreted as meaning that the Union's speech is attributable to each individual bargaining unit member (as opposed to the bargaining unit as a collective), or that they should be interpreted as appointing the Union as Plaintiff's personal agent or representative (as opposed to the bargaining unit's agent or representative), is unpersuasive and does not change the Court's prior legal conclusion. And, as a factual matter, Plaintiff has not offered evidence that anyone perceives the Union's speech as attributable to her as an individual. On the other hand, since the Court issued its Opinion and Order denying Plaintiff's motion for a preliminary injunction, the Board has submitted additional evidence showing that the Superintendent of the Marietta City School District "make[s] no assumption or conclusion that the Union

speaks on behalf of all teachers, or that all teachers agree with the position(s) of the Union." Hampton Decl. ¶11, ECF No. 56-1.

Because the parties dispute only the law or legal significance of certain facts, and there is no genuine dispute of any material fact,[1] this case is prime for resolution via summary judgment.

II. STANDARD OF REVIEW

Summary judgment is appropriate "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." FED. R. CIV. P. 56(a). The movant has the burden of establishing that there are no genuine issues of material fact, which may be accomplished by demonstrating that the nonmoving party lacks evidence to support an essential element of its case. *Celotex Corp. v. Catrett,* 477 U.S. 317; 322–23 (1986); *Barnhart v. Pickrel, Schaeffer* & *Ebeling* Co., 12 F.3d 1382, 1388–89 (6th Cir. 1993). To avoid summary judgment, the nonmovant "must do more than simply show that there is some metaphysical doubt as

[1] The Court's legal conclusion that Plaintiff's claims are precluded by *Knight* renders it unnecessary to resolve the parties' disputes over the accuracy of certain assertions contained in Plaintiff's statement of facts. By way of example and not limitation, the parties dispute the accuracy of Plaintiffs statement that the Union "is entitled to participate in the adjustment process" during the adjustment of a grievance or Plaintiff's explanation of the Union's role in teacher evaluation procedures. *See* Pl. Mot. Summ. J. 3–4 (fact section), ECF No. 58-1; Bd. Resp. 5–7, ECF No. 63; Union Resp. 1–2, ECF No. 64. In any event, they are not material facts.

to the material facts." *Matsushita Elec. Indus.* Co. *v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986); *accord Moore v. Philip Morris Cos.,* 8 F.3d 335, 340 (6th Cir. 1993). "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

In evaluating a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158–59 (1970); *see Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 150 (2000) (stating that the court must draw all reasonable inferences in favor of the nonmoving party and must refrain from making credibility determinations or weighing evidence). Furthermore, the existence of a mere scintilla of evidence in support of the nonmoving party's position will not be sufficient; there must be evidence on which the jury reasonably could find for the nonmoving party. *Anderson,* 477 U.S. at 251; *see Copeland v. Machulis,* 57 F.3d 476, 479 (6th Cir. 1995); *see also Matsushita,* 475 U.S. at 587–88 (finding reliance upon mere allegations, conjecture, or implausible inferences to be insufficient to survive summary judgment).

Here, the parties have filed cross-motions for summary judgment. Each party, as a movant for summary judgment, bears the burden of establishing that no genuine issue of material fact exists and that he or she is entitled to a judgment as a matter of law. The

fact that one party fails to satisfy that burden on his or her own Rule 56 motion does not automatically indicate that the opposing party or parties has satisfied the burden and should be granted summary judgment on the other motion. In reviewing cross-motions for summary judgment, courts should "evaluate each motion on its own merits and view all facts and inferences in the light most favorable to the non-moving party." *Wiley v. United States,* 20 F.3d 222, 224 (6th Cir. 1994). "The filing of cross-motions for summary judgment does not necessarily mean that the parties consent to resolution of the case on the existing record or that the district court is free to treat the case as if it was submitted for final resolution on a stipulated record." *Taft Broad.* Co. *v. United States,* 929 F.2d 240,248 (6th Cir. 1991) (quoting *John v. State of La. (Bd. of Trs. for State Colls.* & *Univs.),* 757 F.2d 698, 705 (5th Cir. 1985)). The standard of review for cross-motions for summary judgment does not differ from the standard applied when a motion is filed by one party to the litigation. *Taft Broad.,* 929 F.2d at 248.

III. ANALYSIS

The Court denied Plaintiff's request for a preliminary injunction primarily because it found that she was unlikely to succeed on the merits of her claim. Op. and Order 6–21, ECF No. 52. Specifically, the Court concluded that Plaintiff's claims were likely foreclosed by the Supreme Court's opinion in *Minnesota Bd. for Community Colleges v. Knight,* 465 U.S. 271 , 283 (1984).

Upon thorough review of the summary judgment briefing, the Court concludes that the parties have not presented any factual issue in need of resolution. Further, nothing in the briefing undermines the Court's prior legal conclusion that Plaintiff's compelled speech and compelled association claims were likely foreclosed by the Supreme Court's decision in *Knight*. Accordingly, the Court affirms the analysis contained in its prior Opinion and Order, ECF No. 52, and now conclusively finds that Plaintiffs claims are precluded by Supreme Court precedent. There is no utility in repeating the Court's entire analysis here and, instead, the Court adopts that analysis herein. Notwithstanding that, the Court offers the following additional observations.

A. Plaintiff Waived her Argument that Ohio Law Restricts her Right to Speak, Associate, and Petition the Government (Compl. ¶ 116, ECF No. 1).

In her motion for summary judgment, Plaintiff argues that Ohio's "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." Pl. Mot. Summ. J. 2, ECF No. 58-1; *see also id.* at 13–17. Plaintiff states that this argument "was not presented at the preliminary injunction stage, [but] it is pleaded in her Complaint and remains part of this case." Pl. Mot. Summ. J. 12, ECF No. 58-1 (record citations omitted).

But Plaintiff did not merely fail to address this argument at the preliminary injunction stage or fail to

support it with sufficient evidence to warrant the grant of a preliminary injunction.[2] Rather, the Court found that Plaintiff affirmatively waived her argument that Ohio Revised Code§ 4117.04(A) violates her right to speak, associate, and petition the government. Op. and Order 5, ECF No. 52; *id.* at n.8. Indeed, the instances of waiver are numerous:

• Mot. Prelim. In. 8, ECF No. 15-1 (conceding that "the government has no obligation to listen to the views of any such person or organization." (citing *Knight,* 465 U.S. at 283));

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[2] Thus, Plaintiff's affirmative waiver of the argument and express advocacy for relief that is entirely inconsistent with the argument she attempts to raise now renders the cases Plaintiff cites inapposite. *See United States v. Certain Land Situated in City of Detroit,* 76 F.3d 380,380 n.1 (6th Cir. Jan. 23, 1996) ("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."); *William G. Wilcox, D.O., P.C. Emp. Defined Ben. Pension Trust v. United States,* 888 F.2d 1111 (6th Cir. 1989) (finding district court erred in granting summary judgment based solely on its conclusion that its earlier denial of motion for preliminary injunction constituted the law of the case vis-a-vis the merits of the lawsuit); *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.,* 511 F.3d 535 (6th Cir. 2007) (finding district court erred in concluding plaintiff was unlikely to have granted a preliminary injunction based on the evidence presented). Although she referred only to her "motion" in several of the quoted examples above, when read in the proper context, it is clear that Plaintiff was arguing that (notwithstanding her Complaint) her position of this *case* was one in which she did not challenge exclusive representation and limited her challenge solely to the designation of that exclusive representative as her "representative" who spoke "for her."

• *Id.* at 11 (representing that Plaintiff's "claim is not that she or an organization with which she chooses to associate has a right to participate in a bargaining session, but that she cannot be compelled to associate with the Union through its advocacy as her representative or agent.");

• Reply to Mot. Prelim. lnj. 1–2, ECF No. 35 *("Knight*…rejected a claim to the right by non-union members to be heard by the government, which is not the right this motion seeks to vindicate.");

• *Id.* at 2 (stating the Union "treats this motion as a request to end collective bargaining or open it up to multiple competing unions, but that is not what [Plaintiff] seeks. She *simply requests* that the Union stop speaking on her behalf as her 'representative.' The Union may continue speaking, and it may continue negotiating terms and conditions of employment and other policy concessions with the board. Likewise, the Board may continue to negotiate with the Union the terms and conditions of employment that it offers to its employees and continue to apply the terms of its collective bargaining agreement to all bargaining-unit members." (emphasis added));

• *Id.* at 11 ("She does not request to be heard or, for that matter, for the Union *not* to be heard.");

• *Id.* at 12 ("[G]ranting the relief here will…*not* prevent the Union from continuing to bargain with the Board or require the Board to bargain with [Plaintiff].");

• *Id.* at 13 ("[Plaintiff] does not challenge the State's policy of negotiating terms of employment and other matters with an organization that has won the majority support of employees-the State, after all, is free to discuss matters of policy with whomever it pleases.");

• *Id.* at 14 ("[Plaintiff] is *not* asking for the end of majority rule in the workplace and a court-imposed system of competing unions or multiple collective-bargaining agreements.");

• *Id.* at 14–15 (A preliminary injunction "would *not* prevent the state from applying a single set of terms to all its employees, or from engaging in collective bargaining with the Union, or from listening to the Union at collective-bargaining sessions. If would not compel the State to listen to [Plaintiff] and other non-members. Under *Knight,* the state has no obligation to give [Plaintiff] an equal say in policy, and nothing prevents the state from applying the terms and conditions of employment it arrives at with the Union to all its employees….");

• *Id.* at 15 ("[T]he Board can recognize the Union as speaking for its own members, even while applying terms arrived at through negotiation with the Union to all public employees within a bargaining unit-just as it does today.");

• *Id.* at 18 ("Such an injunction would not affect wages or benefits under the Agreement, the Union's right to bargain over terms and conditions governing

all bargaining-unit members (including [Plaintiff]), or the Board's right to negotiate with a single union.");

• Tr. Prelim. lnj. Hrg. 4–5, ECF No. 43 ("I'd like to begin by clarifying what it is that we're challenging and what it is that we're not. We **have no objection to Ohio law recognizing a labor union as an exclusive bargaining partner of a school board or school district.** That's fine. We're not claiming that a school board has to negotiate with other labor unions or other organizations. We're not even claiming that [Plaintiff] has a right to be heard by the school board. Maybe it should do that but we recognize that the First Amendment doesn't require that. What we're challenging is the appointment of the union as her representative." (emphasis added));

• *Id.* at 8 ("But again, we're not challenging the exclusive aspect of the union's role here. What we're challenging is its representational role.");

• *Id.* at 16 ("[Plaintiff] is not claiming that she has any right to appear at collective bargaining sessions or that she has a right to participate at every single grievance proceeding. All she's saying is that she doesn't want the board to recognize the union as speaking for her.");

• *Id.* at 33–34 ("We are not seeking to open up any additional avenues for [Plaintiff] to have her say .... She has not claimed the right to be heard. She has not claimed the right to participate in collective bargaining or anything of that sort.");

• *Id.* at 34 ("In our view, the labor union, as well as the board, can largely continue as they've been going.");

• *Id.* at 36–37 **("We're not seeking to disrupt the collective bargaining process....**I haven't understood my friends who identified any particular thing that the union couldn't do other than claiming to speak for her that it is currently doing. In other words, there's this very broad argument on labor peace and disruption and chaos and so on, but the problem is, how do you connect the two?...Sure, if there were multiple unions that might be a problem. If maybe there wasn't a union at all, that perhaps could be a problem. Maybe the state has [a] legitimate interest with respect to those things. But in terms of the union not speaking for [Plaintiff], I haven't heard anything about how the union needs to speak for her." (emphasis added));

• *Id.* at 38 ("She doesn't want those words put in her mouth as opposed to any type of right of access or right for her to participate in some type of proceeding with the school board."); and

• *Id.* ("[T]he injury to the defendants in this instance would be negligible. Again, I haven't heard any of that connection as to how this affects their operations....").

Regardless of how Plaintiff frames the arguments on summary judgment, her contention that the Union's exclusive status burdens her rights to free

speech, free association, and to petition the government is directly at odds with her repeated assertions that her lawsuit does not challenge the Union's right to bargain exclusively with the State in setting the terms of employment for all bargaining-unit members. Plaintiff has repeatedly taken the position that she simply challenges the Union being deemed her "agent" or "representative," and therefore speaking "on her behalf," while it does so. As the Court found earlier, *see, e.g.,* Op. and Order 5, ECF No. 52, her other arguments are therefore waived.

Alternatively, even if Plaintiff had not waived her right to pursue those arguments, they are foreclosed by *Knight. See Knight.* 465 U.S. at 280–90; *see also id.* at 273–75 (despite Plaintiffs attempt to distinguish *Knight,* the Minnesota scheme at issue there also involved a statutory limitation requiring the Board to negotiate or confer only with the exclusive representative (if one was so selected)).[3] Plaintiff asserts

[3] *Knight* and this Court's prior Opinion and Order also explain why Plaintiff's argument that the Union should be deemed to represent only bargaining unit members who are also Union members must fail. If that were the case, Plaintiff and other non-Union bargaining unit members would either be utterly unable to negotiate the terms of their employment (because they were unrepresented during negotiations), or they would have to have the corresponding right to participate in negotiations on their own behalf, which right was found lacking in *Knight.* Permitting the Union to "represent" all bargaining unit members (in the sense that negotiated-for terms and conditions apply even to non-Union members), while preserving bargaining unit members' ability to reject association with the Union (through non-membership), and protecting that right through the requirement of fair representation, passes constitutional scrutiny.

that, to the extent *Knight* precludes her arguments, *Knight* should be overruled. However, she also acknowledges this Court's inability to overrule Supreme Court precedent. For that reason, Plaintiff seeks to preserve for appeal her contention that *Knight* should be overruled if it forecloses her arguments concerning the affirmative rights to speak, associate, and petition the government. Pl. Mot. Summ. J. 16, ECF No. 58-1. Although the Court finds Plaintiff has waived those arguments and finds them precluded by *Knight* only in the alternative, in the event the Sixth Circuit disagrees with this Court's finding on waiver, this Court acknowledges Plaintiffs preservation request.

B. The Court Gave Proper Deference to *Knight.*

The Court disagrees with Plaintiff's contention that the Court's preliminary conclusion reads "a single sentence unnecessary to the decision [in *Knight]* as having done so much work." Pl. Mot. Summ. J. 8, ECF No. 58-1 (quoting *Ark. Game* & *Fish Comm'n v.*

Such a system of exclusive representation is narrowly tailored-Plaintiff's argument would entirely undo exclusive representation or require Plaintiff to give up her job as a requirement of her choice to go unrepresented. To the extent Plaintiff argues that a more narrowly tailored scheme would be a system wherein she remains bound by the terms and conditions bargained-for by the Union while her interests are wholly unrepresented in that bargaining process, the Supreme Court has suggested that such a scheme would raise "serious 'constitutional questions.'" *Janus v. Am. Fed. of State, Cty., and Municipal Emps., Council 31,* 138 S. Ct. 2448, 2469 (2018) (internal citation omitted).

United States, 568 U.S. 23, 35 (2012)). Unlike in the cases Plaintiff cites, this Court did not take a "general expression[]" from *Knight* and "transpose• [it] to other facts." *Armour* & Co. *v. Wantock,* 323 U.S. 126, 133 (1944). Rather, the scheme of exclusive representation at issue in *Knight* is materially indistinguishable from Ohio's scheme. Moreover, this Court concludes that the same reasoning applied by the Supreme Court in *Knight* to decide the claims that were advanced in that case-not merely a single sentence unnecessary to the decision-also compels rejection of the claims Plaintiff raises here. In fact, this Court found that, while the exact claims Plaintiff raises here were not raised in *Knight,* the claims raised in *Knight* and those raised by Plaintiff "are two sides of the same coin." Op. and Order 16, ECF No. 52. That conclusion makes *Knight's* reasoning equally applicable to Plaintiff's claims and keeps this Court's interpretation of *Knight* "within reasonable bounds." *Wantock,* 323 U.S. at 133.

C. Additional Case Law Supports the Court's Conclusion.

The Court previously cited multiple cases that rejected, as foreclosed by *Knight,* the same claims Plaintiff makes here. *See* Op. and Order 8–9, 12–13, 15, 19, ECF No. 52. The Court notes that, as of this time, none of those cases have been reversed.

In fact, the district court opinion in *Reisman v. Associated Faculties of the University of Maine,* 356 F. Supp. 3d 173 (D. Maine 2018), was subsequently affirmed by the United States Court of Appeals for the

First Circuit. *Reisman,* 939 F.3d at 414 (finding *Janus* did not undermine prior circuit precedent holding that *Knight* foreclosed such compelled speech and compelled association claims). Similarly, the district court opinion in *Mentele v. lnslee,* No. C15-5134- RBL, 2016 WL 3017713 (W.D. Wash. May 26, 2016), was affirmed by the United States Court of Appeals for the Ninth Circuit after the issuance of this Court's prior Opinion and Order. *Mentele v. lnslee,* 916 F.3d 783, 789 (9th Cir. 2019) ("[W]e apply *Knight's* more directly applicable precedent, rather than relying on the passage [Plaintiff] cites from *Janus,* and hold that Washington's authorization of an exclusive bargaining representative does not infringe [Plaintiff's] First Amendment rights."). These subsequently issued circuit opinions lend further support to this Court's conclusion.

Moreover, the Supreme Court has recently denied petitions for certiorari in *Bierman,* 139 S. Ct. 2043, and *Mentele,* 2019 WL 4921408, and those circuit decisions are therefore final.

Additionally, several other opinions have since been issued that support this Court's conclusion that *Knight* forecloses Plaintiff's claims. *See O'Callaghan v. Regents of Univ. of Cal.,* No. 2:19-cv-2289-JVS-DFM, Docket No. 69, at 9-10 (C.D. Cal. Sept. 30, 2019); *Sweet v. Cal. Ass'n. of Psychiatric Technicians,* No. 2:19-cv-349-JAM-AC, 2019 WL 4054105 (E.D. Cal. Aug. 28, 2019); *Grossman v. Haw. Gov. Emps. Ass'n/AFSCME Local 152,382* F. Supp. 3d 1088 (D. Haw. 2019); *Babb v. Cal. Teachers Ass'n,* 378 F. Supp.

3d 857 (C.D. Cal. 2019); *Crockett v. NEA-Alaska,* 367 F. Supp. 3d 996, 1009 (D. Alaska 2019) ("Despite the dicta set forth in *Janus* that enticed Plaintiff McCollum to bring such a First Amendment challenge, binding Supreme Court precedent flatly rejects her position."); *Akers v. Md. State Edu. Ass'n,* 376 F. Supp. 3d 563, 573 (D. Md. 2019) ("Plaintiffs have agreed with Defendants that this claim is foreclosed by Supreme Court precedent....").

At the time of this writing, it appears that every court to have considered the issue has found that *Knight* precludes claims that exclusive representation in the public sector, alone, amounts to unconstitutional compelled speech or compelled association.

D. Ohio has a Compelling Interest in Preserving Labor Peace, and its Exclusive Representation Scheme is Narrowly Tailored to Achieve that Interest

In any event, even if Plaintiff's First Amendment claims are not precluded by Supreme Court precedent, they would fail.

Defendants have submitted ample evidence of Ohio's history of labor strife and how the system of exclusive representation has resulted in labor peace. Millstone Decl., ECF No. 28-1; Buettner Decl., ECF No. 28-2; Grodin Decl., ECF No. 28-3. Plaintiff has failed to rebut that evidence. Defendants' evidence shows that Ohio has a compelling interest in preserving labor peace and that exclusive representation is essential to facilitate that interest.

Ohio's system of exclusive representation is narrowly tailored to achieve that end such that it would survive even strict scrutiny. Although the scheme means that the terms of any bargained-for collective bargaining agreement apply to Plaintiff as a member of the bargaining unit, she remains free to *not* join the Union. O.R.C. § 4117.03(A)(1); Stipulated Facts ¶ 16, ECF No. 59. She remains free to "[f]orm, join, assist, or participate in, or refrain from forming, joining, assisting, or participating in…*any* employee organization of [her] own choosing." O.R.C. § 4117.03(A)(1) (emphasis added). Moreover, the Union does not speak for Plaintiff; it speaks for the bargaining unit of which she is a member, *supra,* and she remains free to voice her disagreement with the Union. Hampton Decl. ¶ 5–8 (and exhibits), ECF No. 56-1; Stipulated Facts ¶ 20, ECF No. 59; Pl. Mot. Summ. J. 17, ECF No. 58-1 (conceding Plaintiff has "a near absolute right to speak out [herself] on matters of public concern and to join alternative labor organizations, just like [she] may enter into any number of private associations free from government retaliation." (citing *Heffernan v. City of Paterson, N.J.,* 136 S. Ct. 112, 1416 (2016)); *see also* O.R.C. § 4117.03(A)(5). And the Union must fairly represent even the interests of those bargaining unit members who are not also Union members, such as Plaintiff. O.R.C. § 41 17.11(8)(6).

All of these aspects of Ohio's exclusive representation scheme demonstrate that it is narrowly tailored to achieve the compelling State interest while protecting bargaining unit members' constitutional rights

from undue infringement. Opening the system up to multiple unions (or permitting non-Union members to negotiate on their own behalf) would impair the State's compelling interest, *see* Millstone Decl. ¶¶ 12, 15–16, ECF No. 28-1; Buettner Decl. ¶¶ 13–14, ECF No. 28-2; Grodin Decl. ¶¶ 4–5, 11–13, 15, ECF No. 28-3, and leaving non-Union members' interests entirely unrepresented during bargaining would raise its own constitutional concerns. Ohio's system is sufficiently tailored, and Plaintiff's discontent with the legislature's word choice in using "exclusive representative" instead of a phrase such as "exclusive bargaining partner" does not render the scheme unconstitutional as violative of her First Amendment speech and association rights.

Indeed, to the extent *Knight* does not foreclose Plaintiff's claims, *Janus* strongly suggests that exclusive representation, alone, is narrowly tailored to achieve the compelling State interest of labor peace. *See Janus,* 138 S. Ct. at 2465–66 (assuming labor peace is a compelling state interest and finding that, because exclusive representation and agency fees are not inextricably linked, the *agency fees* are not sufficiently tailored to achieve that state interest but suggesting that exclusive representation, itself, is sufficiently tailored); *see also id.* at 2478 ("It is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees-itself a significant impingement on associational freedoms that would not be tolerated in other contexts. We simply draw the line at allowing the government to go further still and require all employees to support

the union irrespective of whether they share its views."); *id.* at 2466 (discussing federal law, the Postal Service, and state law permitting the appointment of exclusive representatives without any hint of disapproval of the same); *id.* at 2469 (implying that the duty of fair representation ameliorates any infringement on First Amendment rights caused by appointment of exclusive representative); *id.* at 2485 n. 27 ("States can keep their labor-relations systems exactly as they are-only they cannot force nonmembers to subsidize public sector unions. In this way, these States can follow the model of the federal government and 28 other States.").

Thus, this Court agrees with the Ninth Circuit that *"Janus* did not revisit the longstanding conclusion that labor peace is 'a compelling state interest,' and the Court has long recognized that exclusive representation is necessary to facilitate labor peace; without it, employers might face 'inter-union rivalries' fostering 'dissention within the work force,' 'conflicting demands from different unions,' and confusion from multiple agreements or employment conditions." *Mentele,* 916 F.3d at 790 (quoting *Janus,* 138 S. Ct. at 2465). Plaintiff's claims would thus fail even if they were not precluded by binding Supreme Court precedent.

IV. CONCLUSION

In conclusion, the Court's prior Opinion and Order fully explains why Supreme Court precedent precludes Plaintiff's claims. The fact that exclusive representation "would not be tolerated in other contexts,"

Janus, 138 S. Ct. at 2478, is irrelevant because the Supreme Court has stated that it is tolerated in *this* context. In fact, although Plaintiff repeats that phrase as her mantra throughout her briefing, the full statement by the Supreme Court is, *"It is also not disputed that the State may require that* a *union serve as exclusive bargaining agent for its employees—itself* a significant impingement on associational freedoms that would not be tolerated in other contexts." *Id.* (emphasis added).

Whatever impingement on Plaintiff's First Amendment rights is caused by the exclusive representation scheme, the Supreme Court has found that the impingement passes constitutional muster. Unless and until the Supreme Court overrules binding precedent, her claims are precluded by law. Therefore,

Plaintiff's motion for summary judgment, ECF No. 58, is **DENIED,** and

Defendants' motions for summary judgment, ECF Nos. 56 & 57, are **GRANTED.**

The Clerk shall enter final judgment for Defendants and terminate the case.

IT IS SO ORDERED.

Michael H. Watson

Michael H. Watson, Judge

United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

JUDGMENT IN A CIVIL CASE

Jade Thompson,

Plaintiff

v.

Marietta Education Association, *et al.*,

Defendants

Case No. 2:18-cv-628

Judge Michael H. Watson

[] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

[X] **Decision by Court.** This action was decided by the Court without a trial or hearing.

IT IS ORDERED AND ADJUDGED that pursuant to the November 26, 2019 Opinion and Order, the Court DENIES Plaintiff's Motion for Summary Judgment and GRANTS Defendants' Motions for Summary Judgment.

Date: November 26, 2019

Richard Nagel, Clerk

s/ Jennifer Kacsor

By Jennifer Kacsor/Courtroom Deputy

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

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

STATEMENT OF STIPULATED UNDISPUTED FACTS

For purposes of their cross-motions for summary judgment, the parties stipulate and agree that the following facts are undisputed and accurate. The parties, however, reserve the right to dispute legal materiality of any of these facts. The parties also reserve the right to submit other evidence in support of or in opposition to the cross-motions for summary judgment consistent with the Federal Rules of Civil Procedure.

1. The Plaintiff, Jade Thompson, is a Spanish teacher at Marietta High School in Washington County, Ohio.

2. Defendant Marietta Board of Education (the "Board") manages and controls schools in the Marietta School District, including Marietta High School.

3. The Board is an Ohio political subdivision.

4. The Marietta School District is a public school district, funded with public money.

5. The Board is Ms. Thompson's employer, operating under provisions of Ohio law, including Ohio Revised Code Title 33 and Chapter 4117, and sets policies for students and staff in the Marietta School District.

6. Defendant Marietta Education Association (the "Union") is an "employee organization" as defined in Ohio's Public Employees' Collective Bargaining Act, Ohio Rev. Code Chapter 4117) ("the Act").

7. The Union is affiliated with the Ohio Education Association, an Ohio teachers union, and the National Education Association, a national teachers union.

8. Ms. Thompson, the Marietta Board of Education, and the Marietta Education Association are all residents of Washington County, Ohio.

9. Pursuant to the provisions of the Act governing the designation of employee representatives, the Board has recognized the Union as the majority-designated exclusive representative of a bargaining unit of certain public employees of the Board for the purposes of collective bargaining under the Act. The Union has been the designated exclusive representative of that bargaining unit for several decades.

10. The Board and the Union are parties to a collective bargaining agreement, which sets forth the terms and conditions of employment for the members of the bargaining unit defined in the collective bargaining agreement.

11. A true and correct copy of the collective bargaining agreement in effect from June 30, 2016 through June 29, 2018 (the "Agreement") is attached to Ms. Thompson's Complaint as Exhibit A, ECF No. 1-1. The Board and the Union have completed their negotiations for and reached an agreement regarding a successor collective bargaining agreement ("Successor Agreement").

12. The Agreement was and the Successor Agreement is governed by Ohio law, including by the provisions of the Act.

13. The Agreement and Successor Agreement record the Board's and Union's negotiated points of agreement on matters subject to mandatory and permissive bargaining under the Act.

14. The Agreement identified a bargaining unit of "all full and regular part-time certificated personnel employed under contract, including classroom teachers, special education teachers, psychologists, guidance counselors, librarians, school nurses, head teacher(s), attendance officer, resource teachers, and full-time substitutes employed sixty one (61) or more consecutive days in the same position in a school year." Agreement § 1.01. The Successor Agreement

does not modify the bargaining unit in a manner material to this lawsuit. This is the bargaining unit for which the Union has been recognized as the designated exclusive collective bargaining representative under the Act.

15. Ms. Thompson is a member of the bargaining unit.

16. Ms. Thompson is not legally obligated to become a member of the Union.

17. Ms. Thompson is not a member of the Union.

18. The Union holds all rights and obligations applicable to public-sector labor unions recognized as exclusive representatives of a bargaining unit under the Act.

19. The Board holds all rights and obligations applicable to public-sector employers under the Act.

20. Ms. Thompson holds all rights and obligations applicable to public-sector employees under the Act.

21. Since the Supreme Court's decision in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), Ms. Thompson has not been legally obligated to make any payment of money to the Union and has not, in fact, made any such payment.

22. Since the Supreme Court's *Janus* decision, Ms. Thompson has not been legally obligated to engage in any "opt out" process to avoid making any payment of money to the Union.

March 4, 2019

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Jade Thompson,

Plaintiff

v.

Marietta Education Association, *et al.*,

Defendants

Case No. 2:18-cv-628

Judge Michael H. Watson

Magistrate Judge Vascura

OPINION AND ORDER

Jade Thompson ("Plaintiff") sues the Marietta Education Association ("the Union") and Marietta Board of Education ("the Board") (collectively, "Defendants") under 42 U.S.C. § 1983. She argues that Ohio Revised Code§ 4117.04–05 is unconstitutional and moves for a preliminary injunction prohibiting Defendants from recognizing the Union as Plaintiffs representative. The State filed an amicus curiae brief in support of the statute. For the following reasons, the Court **DENIES** Plaintiff's motion

I. FACTS

The following facts are taken from Plaintiff's Complaint and pertinent exhibits and declarations, and the Court addresses only those facts relevant to Plaintiff's remaining claim.[1]

Plaintiff is a Spanish teacher at Marietta High School in Washington County, Ohio. The Board manages and controls schools within the Marietta School District (including Marietta High School) and employs Plaintiff. The Union is an employee organization that represents employees of the Marietta School District. It is affiliated with the Ohio Education Association and the National Education Association.

The Board and the Union are parties to a collective bargaining agreement ("CBA"). The CBA establishes a bargaining unit of "all full and regular

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[1] Plaintiff originally challenged the collective bargaining agreement's provision requiring the Board to exact a "fair share" fee (in the same amount as union dues) from non-union-member employees' paychecks and remit the same to the Union (Count I). She also challenged the automatic nature of that provision and the accompanying opt-out requirement (Count II). The parties later jointly moved to dismiss those counts as moot after the Board notified Plaintiff that it had stopped deducting a fair share fee from nonmembers following the Supreme Court's decision in *Janus v. Am. Fed'n* of *State, Cty.,* & *Mun. Emps., Council 31,* 138 S. Ct. 2448 (2018) and after the Union recognized that it was not entitled to such fees absent affirmative consent from a nonmember. Joint Mot., ECF No. 29. The Court granted the parties' joint motion and dismissed Counts I and II. Order, ECF No. 30.

part-time certificated personnel employed under contract, including classroom teachers, special education teachers, psychologists, guidance counselors. librarians, school nurses, head teacher(s), attendance officer, resource teachers, and full- time substitutes employed sixty-one (61) or more consecutive days in the same position in a school year." CBA § 1.01, ECF No. 15-2. As such, Plaintiff is a member of the bargaining unit as defined in the CBA. Plaintiff is not, however, a member of the Union. Thompson Decl. ¶ 8, ECF No. 15-2. In fact, Plaintiff disagrees with the Union's position on several issues. *Id.* ¶ 12–17.

Nonetheless, the CBA recognizes the Union as the "sole and exclusive bargaining agent for the members of the bargaining unit."[2] CBA § 1.01, ECF No. 15-2. This provision is legal under Ohio law. Ohio Rev. Code § 4117.04 ("Public employers shall extend to an exclusive representative designated under section 4117.05 of the Revised Code, the right to represent exclusively the employees in the appropriate bargaining unit…."); § 4117.05 (describing how "[a]n employee organization becomes the exclusive representative of all the public employees in an appropriate unit for the purposes of collective bargaining….").

[2] For ease of reference, the Court will sometimes throughout this Opinion and Order refer to any future employee organization duly elected as an exclusive representative of public employees in an appropriate bargaining unit for the purposes of collective bargaining or permissive bargaining as "the Union."

Notwithstanding the designation of the Union as bargaining unit members' exclusive representative, bargaining unit members are neither required to join the Union nor to contribute financially to the Union. Benson Decl. ¶ 10, ECF No. 28- 4; Ohio Rev. Code § 4117.03(A)(3) ("Public employees have the right to: (1) Form, join, assist, or participate in, or refrain from forming, joining, assisting, or participating in, except as otherwise provided in Chapter 4117. of the Revised Code, any employee organization of their own choosing…."). Further, any bargaining unit member (whether a member of the Union or not) is "free to criticize [the Union's] positions or take positions different from those taken by [the Union]." Benson Decl. ¶ 11, ECF No. 28-4. Moreover, the Union recognizes that "there will always be teachers or other employees represented by [the Union] who disagree with its positions." *Id.* ¶ 12.

Plaintiff contends that Ohio law and the CBA have violated Plaintiff's First and Fourteenth Amendment rights to free speech and free association[3] by designating the Union as Plaintiff's exclusive representative. Specifically, she contends that

[3] Plaintiff also alleges that the designation of the Union as her exclusive representative violates her right to petition the Government for redress of grievances, Compl. ¶¶ 7, 116, 117, Prayer for Relief (C), ECF No. 1, but the Court does not address this claim as Plaintiff did not mention it in her motion for a preliminary injunction or during the preliminary injunction hearing.

the designation of the Union as her exclusive representative amounts to compelled speech and compelled association. She seeks a declaration that Ohio Revised Code§§ 4117.04–05 are unconstitutional and a preliminary injunction prohibiting Defendants from recognizing the Union as her representative.

II. STANDARD OF REVIEW

Preliminary injunctions are "extraordinary and drastic remed[ies]…never awarded as of right." *Platt v. Bd. of Comm'rs on Grievances and Discipline of Ohio Supreme Court,* 769 F.3d 447, 453 (6th Cir. 2014) (internal quotation marks and citation omitted). Nonetheless, Federal Rule of Civil Procedure 65 permits the Court to issue preliminary injunctions upon the satisfaction of certain requirements. The Court considers four factors in determining whether to grant injunctive relief: (1) whether the movant has established a substantial probability of success on the merits; (2) whether the movant would suffer irreparable harm in the absence of an injunction; (3) whether an injunction would substantially harm third parties; and (4) whether an injunction would serve the public interest. *Winnett v. Caterpillar, Inc.,* 609 F.3d 404, 408 (6th Cir. 2010). The factors are not prerequisites; rather, they must be balanced in weighing the equities involved. *Capobianco, D.C. v. Summers,* 377 F.3d 559,561 (6th Cir. 2004). The plaintiff bears the burden to justify such drastic relief, even in First Amendment cases, *Platt,* 769 F.3d at

453 (citation omitted), and it should "only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat'l Res. Def. Council, Inc.,* 555 U.S. 7, 22 (2008) (citation omitted).

III. ANALYSIS

A. Likelihood of Success on the Merits

As stated above, Plaintiff contends that the designation of the Union as her exclusive representative amounts to compelled speech and forces her into an expressive association, in violation of the First and Fourteenth Amendments. Before turning to the merits of those arguments, the Court notes that Plaintiff also alleged in her Complaint that the designation of the Union as her exclusive representative impinges her ability to engage in her own free speech or her ability to petition the government, see Compl. ¶117 ("That designation *restricts* the Plaintiffs speech and petitioning.") (emphasis added), but Plaintiff has waived those arguments. Indeed, at oral argument, counsel for Plaintiff repeatedly asserted that Plaintiff is not alleging that the statutes violate a right of Plaintiff to be heard by the Board or to bargain on her own behalf. Tr. 4:17–24, 16:8–10, 33:22–34:12, 36:12–23; 38:3–8, ECF No. 43. With that in mind, the Court considers the merits of only Plaintiff's compelled association and compelled speech arguments.

1. Compelled Association

Plaintiff contends that the designation of the Union as her exclusive representative forces her into an expressive association with the Union. For the reasons that follow, the Court concludes that *Minnesota State Bd. for Community Colleges v. Knight,* 465 U.S. 271 (1984) applies to Plaintiffs forced association claim, and although *Knight* did not itself involve a forced association claim, the broad reasoning in the opinion forecloses such a claim.

The district court in *Knight* distinguished between "meet and negotiate" sessions (collective bargaining) and "meet and confer" sessions. With respect to collective bargaining, the district court rejected various attacks on the union's ability to serve as the exclusive representative under PELRA[4] and con-

[4] The Public Employment Labor Relations Act ("PELRA") was the statute under attack in *Knight.* It permitted the designation of an exclusive representative and, where such an exclusive representative was appropriately designated, required public employers to "meet and negotiate" on matters subject to collective bargaining only with that exclusive representative. *Knight,* 465 U.S. at 274. PELRA also required public employees to designate a representative to "meet and confer" with the public employer on matters related to employment that fell outside the scope of mandatory negotiations, and, if the employees had selected an exclusive representative for collective bargaining purposes, that representative also served as the "meet and confer" representative. *Id.* In short, if an exclusive representative was selected, public employers were not permitted to "meet and negotiate" or "meet and confer" with any bargaining unit member other than through the exclusive representative. *Id.* at 275.

cluded that *"Abood* squarely upholds the constitutionality of exclusive representation bargaining in the public sector." *Knight v. Minn. Cmty. Coll. Faculty Ass'n,* 571 F. Supp. 1, 4 (D. Minn. 1982) (citing *Abood v. Detroit Bd. of Edu.,* 431 U.S. 209 (1977), *overruled by Janus v. Am. Fed. of State, Cty., and Mun. Emps., Council 31,* 138 S. Ct. 2448 (2018)). In rejecting the notions that PELRA impermissibly delegated state sovereignty to the union, impermissibly granted the union the power to make "economic laws," and that the union was, in essence, a political party, the district court held that "Minnesota may provide for exclusive representation by an employee association in the public sector and may require that nonmembers of the association financially support its collective bargaining efforts through a fair share fee." *Id.* at 5. On appeal, the Supreme Court summarily affirmed that holding, rejecting "the constitutional attack on PELRA's restriction to the exclusive representative of participation in the 'meet and negotiate' process." *Knight,* 465 U.S. at 279 (citing 103 S. Ct. 1493 (1983)).

However, the district court in *Knight* also concluded that the "meet and confer" process violated nonmembers' First Amendment speech and associational rights. In a separate opinion, the Supreme Court reversed that portion of the district court's opinion. The Supreme Court's specific holding in *Knight* (as it related to the appellees' freedom of association claim with respect to the "meet and confer" sessions) was that PELRA's *restriction of participa-*

tion in "meet and confer" sessions to the exclusive representative did not violate the nonmembers' associational rights. *Knight,* 465 U.S. at 273. As such, the holding is not directly dispositive of the claim Plaintiff makes here—that the very designation of the Union as Plaintiffs exclusive representative forces an association between Plaintiff and the Union.

In coming to the holding in *Knight,* however, the Supreme Court made broad statements about PELRA and the freedom of association. For instance, the Supreme Court stated that "[t]he state has in no way restrained appellees'…freedom to associate or not to associate with whom they please, including the exclusive representative." *Knight,* 465 U.S. at 288. Similarly, it stated later that the nonmembers' associational freedom was not impaired because the nonmembers were both "free to form whatever advocacy groups they like" and were "not required to become members of' the union. *Id.* at 289. These broad statements at the very least suggest that because joinder in the Union is not required, the First Amendment right to be free from compelled association is still protected. *See Bierman v. Dayton,* 900 F.3d 570,574 (8th Cir. 2018) (rejecting the same argument Plaintiff makes here about the narrowness of *Knight's* holding and reading *Knight* broadly as affirming that exclusive representation, alone, does not amount to compelled association).

PELRA contained a fair share provision, but the nonmembers in *Knight* did not challenge the fair

share provision as a violation of their speech or associational rights. Of course, *Janus* has since established that fair share provisions violate the First Amendment. But because the fair share provision was not at issue in *Knight,* the Supreme Court's association claim analysis in that case rested on the reasoning above-the fact that employees were not forced to join the union meant that their associational rights were not infringed by designating the union as those employees' exclusive representative for purposes of meet and negotiate or meet and confer.

That reasoning is applicable to this case. Indeed, every court that has considered the argument raised by Plaintiff has rejected it as foreclosed by *Knight. Hill v. Serv. Emps. Int'l Union,* 850 F.3d 861, 863 (7th Cir. 2017) (rejecting claim that designation of exclusive representative forced employees into an "agency-like association with the [union]" and finding that, "under *Knight,* the IPLRA's exclusive-bargaining-representative scheme is constitutionally firm and not subject to heightened scrutiny."); *Jarvis v. Cuomo,* 660 F. App'x 72, 74 (2d Cir. 2016) (finding the plaintiff's claim that designation of an exclusive representative amounted to forced association was "foreclosed" by *Knight* where the employees were not required to join the union); *D'Agostino v. Baker,* 812 F.3d 240,244 (1st Cir. 2016) (finding *Knight* contained the implied premise "that exclusive bargaining representation by a democratically selected union does not, without more, violate the right of free association on the part of dissenting nonunion members

of the bargaining unit."); *Reisman v. Associated Faculties of the Univ. of Maine,* No. 1:18-cv-307, 2018 WL 6312996 (D. Maine Dec. 3, 2018) (rejecting the plaintiff's compelled association claim as foreclosed by *Knight); Mentele v. lnslee,* No. C15-5134-RBL, 2016 WL 3017713, at *3 (W.D. Wash. May 26, 2016) (stating that *Knight* "also reasoned that the restriction did not infringe employees' associational freedoms because they did not have to join the representative group" and finding no forced association where employee was not required to join or pay dues to the union).

As Plaintiff points out, all but one of those cases was decided before the Supreme Court's decision in *Janus. Janus* overruled prior Supreme Court precedent, *Abood v. Detroit Bd. of Edu.,* regarding the constitutionality of fair share fees paid by nonmembers to a union. *Janus* does not change the above analysis, though.

In overruling *Abood, Janus* held that forcing nonmembers to pay fair share fees to the exclusive representative union amounts to compelled subsidization of private speech, which violates the nonmembers' First Amendment free speech and association rights. *Janus,* 138 S. Ct. at 2459–60. There is some dicta in *Janus* stating that the appointment of an exclusive representative itself infringes on nonmember employees' associational rights. Nonetheless, to the extent such dicta is at odds with *Knight's* reasoning that exclusive representation does not infringe asso-

ciational rights, *Janus's* discussion in no way questions whether any resulting infringement of First Amendment associational rights in the labor context satisfies exacting scrutiny. *See, e.g., id.* at 2478 ("It is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees-itself a significant impingement on associational freedoms that would not be tolerated in other contexts. We simply draw the line at allowing the government to go further still and require all employees to support the union irrespective of whether they share its views."); *id.* at 2466 (discussing federal law, the Postal Service, and state law permitting the appointment of exclusive representatives without any hint of disapproval of the same); *id.* at 2469 (implying that the duty of fair representation ameliorates any infringement on First Amendment rights caused by appointment of exclusive representative); *id.* at 2485 n. 27 ("States can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions. In this way, these States can follow the model of the federal government and 28 other States.").

At bottom, although *Janus* overrules *Abood* with respect to the issue of fair share fees, it does not directly question *Abood's* foundational premise that "[t]he principle of exclusive union representation…is a central element in the congressional structuring of industrial relations" because it "avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and con-

ditions of employment[;]…prevents inter-union rivalries from creating dissention within the work force and eliminating the advantages to the employee of collectivization[;]…frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations." *Abood v. Detroit Bd. of Edu.,* 431 U.S. 209, 220–21 (1977).[5]

Indeed, even after the Supreme Court issued *Janus,* the United States Court of Appeals for the Eighth Circuit concluded that a compelled association argument identical to that made by Plaintiff in this case was "foreclosed by *Knight*" because there was "no meaningful distinction between [that plaintiff's] case and *Knight." Bierman v. Dayton,* 900 F.3d 570,574 (8th Cir. 2018).[6] The Eighth Circuit concluded that *Janus* did not supersede *Knight* because "the constitutionality of exclusive representation standing alone was not at issue" in *Janus,* and *Janus* did not even mention *Knight. Id.*

This Court agrees. Plaintiff argues that *Janus* changes the landscape on her compelled speech and compelled association claims, but plaintiffs in prior

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[5] The Union has presented evidence in this case that Ohio also has an interest in labor peace and that exclusive representation furthers that interest. *See, e.g.,* Millstone Decl. ¶¶ 8, 12, 15, 16; Buettner Decl. ¶¶ 7, 11, 13, 14, ECF No. 28-2.

[6] In *Bierman,* as here, the employees were not forced to join the union and were not prevented from joining their own advocacy groups. *Bierman,* 900 F.3d at 574.

cases made the same argument about *Harris v. Quinn,* 134 S. Ct. 2618 (2014). In rejecting compelled speech and compelled association claims as foreclosed by *Knight,* those *pre-Janus* courts concluded that *Harris* "did not speak to the constitutionality of the exclusive-bargaining-representative provisions" of the statutes at issue and, therefore, "did not limit *Knight's* approval of exclusive bargaining representatives." *Hill,* 850 F.3d at 564 (citing *Jarvis,* 660 F. App'x at 74–75; *D'Agostino,* 812 F.3d at 244); see *also Mentele,* 2016 WL 3017713, at *3. Analogously, this Court finds that *Janus* also failed to consider the constitutionality of the mere designation of exclusive representatives and, therefore, likewise does not limit *Knight's* applicability.

In sum, even after *Janus,* it remains the case that "[t]he Supreme Court has not…revisited Knight or otherwise overturned legislative authorizations of collective and exclusive bargaining." *Clark v. City of Seattle,* No. C17-382RSL, 2017 WL 3641908, at *3 (W.D. Wash. Aug. 24, 2017). It may be that the Supreme Court extends *Janus* in the future and declares that the appointment of exclusive representatives itself amounts to compelled association in violation of the First Amendment, but, for now, *Knight* seems to foreclose such an argument. *See Rodriguez de Quijas v. Shearson/Am. Exp., Inc.,* 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly con-

trols, leaving to this Court the prerogative of overruling its own decisions."). Because *Knight* likely forecloses Plaintiff's compelled association claim, Plaintiffs are not likely to succeed on the merits of that claim.

2. Compelled Speech

Plaintiff argues that Knight is not controlling on Plaintiff's compelled speech claim because no compelled speech claim was brought in Knight.

Plaintiff is correct insofar as she argues that Knight did not explicitly consider a compelled speech claim. However, in reviewing the constitutionality of PELRA's restriction of participation in "meet and confer" sessions to the exclusive representative, the Supreme Court broadly proclaimed that nonmembers' "speech and associational rights…have not been infringed…."[7] *Knight*, 465 U.S. 288. With respect to freedom of speech, the Supreme Court in Knight reasoned that "[t]he state has in no way restrained appellees' freedom to speak on any education-related issue…." *Id.* It noted that "the unique status of the exclusive representative in the 'meet and confer' process amplifies its voice in the policymaking process" but found that such amplification of the union's voice

[7] And, in summarizing the First Amendment claim, the Supreme Court broadly stated that the plaintiffs were "[u]nable to demonstrate any infringement of *any* First Amendment right…."*Id.* at 291 (emphasis added); *see also id.* at 290 n.12 ("appellees…speech and associational rights have been wholly unimpaired.").

over the nonmembers' voices did not impair nonmembers' constitutional freedom to speak. *Id.* It also concluded that the union's voice was no more amplified in "meet and confer" sessions than it was in "meet and negotiate" sessions, and the Court had summarily upheld the constitutionality of exclusive representation in collective bargaining, suggesting that exclusive representation was also constitutional in the "meet and confer" context. *Id.* Finally, the Supreme Court concluded that the union's ability to retaliate against bargaining unit members who spoke out against the union by refusing to appoint those bargaining unit members to "meet and confer" committees did not unconstitutionally chill First Amendment speech. *Id.* at 289. Thus, Knight concluded that the statutory scheme prohibiting the plaintiffs from participating on their own behalf in "meet and confer" sessions (because the union served as the exclusive representative) did not unconstitutionally infringe their free speech rights.

Although *Knight* did not involve a compelled speech claim, several of the same cases addressed above have rejected compelled speech claims, along with compelled association claims, based on the broad reasoning in *Knight*. See *D'Agostino*, 812 F.3d at 244 ("Nor does the fiduciary characterization support any claim of compelled speech on the theory that a 'fiduciary' union's position is the more plausibly imputable to a non-union dissenter."); see also *Reisman*, 2018 WL 6312996; *Hill*, 850 F.3d at 865 n.4 ("Because we hold that the IPLRA does not give rise to a mandatory association, we decline to address appellants'

argument that the IPLRA gives Illinois 'untrammeled authority…to designate mandatory agents to speak and contract for citizens in their relations with government.'"); *Uradnik v. Inter Faculty Org.*, No. 18-1895(PAM/LIB), 2018 WL 4654751 (D. Minn. Sept. 27, 2018) (rejecting compelled speech claim as foreclosed by *Knight* and stating, "The IFO speaks for the collective, and not for individual members; those individuals may speak their mind freely and speak to their public employer on their own behalf.").

Plaintiff argues that *Knight* is inapplicable to her compelled speech claim because the plaintiffs in Knight sought the right to represent themselves at "meet and confer" sessions whereas Plaintiff does not seek the right to represent herself (or to be represented by a different organization) in either "meet and negotiate" or "meet and confer" sessions. Because she asks only that the Union not be deemed her representative or deemed to speak for her, she argues, her case is unlike *Knight*.

This Court agrees with the above cases that *Knight* forecloses Plaintiff's compelled speech claim even though Knight did not involve a compelled speech claim. Plaintiff's argument is unpersuasive as her position and the position of the plaintiffs in Knight are two sides of the same coin. That is, if the Court grants Plaintiff her requested relief-prohibiting the Union from holding itself out as representing Plaintiff or the Board from recognizing the Union as representing her, then Plaintiff (and any future em-

ployees who choose not to be represented by the Union) must either: (1) be given some right to bargain (on their own behalf or by joining competing unions that have the right to bargain on their behalf); or (2) be entirely deprived of representation at the bargaining table. The former scenario would necessarily destroy the Union's status as the sole negotiator, which Plaintiff argued at oral argument she does not seek to do.[8] E.g., Tr. 4:17-24, ECF No. 43. Moreover, the right to bargain on their own behalf was exactly the

[8] Plaintiff contends her requested relief would not "end collective bargaining or open it up to multiple competing unions" and argues that her requested relief would still permit the Union to "continue speaking,…continue negotiating terms and conditions of employment and other policy concessions with the Board…and continue to apply the terms of its collective-bargaining agreement to all bargaining-unit members" Reply 2, ECF No. 35. It is not clear to the Court, though, exactly how it could grant Plaintiff her requested relief while permitting the Union to be the sole negotiator with the Board because it is the very act of representing Plaintiff in negotiating terms and conditions of employment and other policy concessions that Plaintiff alleges violates her First Amendment rights. At bottom, the Court cannot square Plaintiff's contentions that "the labor union, as well as the board, can largely continue as they've been going," Tr.34:13-14, with her legal arguments and requested relief. If, however, Plaintiff is seeking nothing more than to maintain the status quo with the addition of a statement from both the Union and the Board that both entities recognize that the Union's views are not to be presumed to be Plaintiff's views, then the Court believes the parties may be able to resolve this lawsuit and recommends the parties engage in good faith settlement discussions.

right the plaintiffs sought-and which was found nonexistent in *Knight*. *Knight*, 465 U.S. at 283.

Only under the latter of the above scenarios would Plaintiff's requested relief not disrupt the Union's right to be the exclusive negotiator. But a system in which the Union is the sole negotiator on matters of collective or permissible bargaining, and yet some public employees are not represented by the Union, is arguably unconstitutional as itself violating the First Amendment. See *Janus*, 138 S. Ct. at 2469 ("[D]esignating a union as the exclusive representative of nonmembers substantially restricts the nonmembers' rights. Protection of their interests is placed in the hands of the union, and if the union were free to disregard or even work against those interests, these employees would be wholly unprotected. That is why we said many years ago that serious constitutional questions would arise if the union were not subject to the duty to represent all employees fairly." (internal quotation marks and citations omitted)). Just as constitutional issues would arise were unions appointed exclusive representatives of nonmembers but had no duty to fairly represent those nonmembers, even more serious issues would arise if a union was the sole entity allowed to bargain with the State but did not represent nonmembers (who were prevented from being represented by any other entity or by themselves). In both situations, nonmembers would be "wholly unprotected."

In sum, Plaintiff's requested relief would leave nonmembers completely unrepresented at the bargaining table unless they were given the concomitant right to represent themselves or be represented by another group of their choosing. The Supreme Court found no such concomitant right existed in *Knight*.

Thus, although Plaintiff asks for relief different than what the plaintiffs sought in *Knight*, the holding in *Knight* nonetheless forecloses Plaintiff's claim.

Further, *D'Agostino* explained that:

> [n]o matter what adjective is used to characterize it, the relationship [between the nonmember and the union] is one that is clearly imposed by law, not by any choice on a dissenter's part, and when an exclusive bargaining agent is selected by majority choice, it is readily understood that employees in the minority, union or not, will probably disagree with some positions taken by the agent answerable to the majority. And the freedom of the dissenting appellants to speak out publicly on any union position further counters the claim that there is an unacceptable risk the union speech will be attributed to them contrary to their own views; they may choose to be heard distinctly as dissenters if they so wish….

812 F.3d at 244 (citing *Knight,* 465 U.S. at 288). Indeed, *Knight* itself recognized that the respondent in the case "consider[ed] the views expressed

by the state- wide faculty 'meet and confer' committees to be the faculty's official collective position. It recognizes, however, that not every instructor agrees with the official faculty view on every policy question." *Knight,* 465 U.S. at 277.

Here, Defendants did not offer any declarations from Board members that the Board does not assume the Union's speech reflects the views of every bargaining unit member. Still, David Millstone, who negotiated hundreds of collective bargaining agreements while representing public and private employers, declared that:

> public employers were certainly aware that not all employees represented by the union shared the same views as the union. Public employers were aware that the union was supported by a majority of the employees in the bargaining unit, but did not necessarily have the support of all employees in that unit, and that some represented employees disagreed with the union's positions and views.

Millstone Decl. ¶ 14, ECF No. 28-1. Indeed, this sentiment is practically a matter of common sense. *See D'Agostino, supra; Clark v. City of Seattle)* No. C17-0382RSL, 2017 WL 3641908, at *3 (W.D. Wash. Aug. 24, 2017) ("The selection of an [exclusive driver representative] by majority vote—as specified in the Ordinance—would make unreasonable any assumption that all members of the bargaining unit support the representative, much

less every one of its policy positions." (citation omitted)). Thus, although the Union represents Plaintiff, and in that representation "speaks for her," realistically, it is speaking for the bargaining unit members as a collective rather than purporting to espouse specific views for any individual bargaining unit member.

Finally, just as *Janus* does not undermine *Knight* as it relates to Plaintiff's compelled association claim, neither does it undermine *Knight* with respect to her compelled speech claim. *Janus* held that fair share fees amount to unconstitutional compelled subsidization of private speech. *Janus,* 138 S. Ct. at 2460. *Janus* does not dictate success on Plaintiff's compelled speech claim, however.

As noted above, *Janus* does not challenge *Abood's* determination that exclusive representation furthers the compelling State interest of labor peace and even suggests that exclusive representation is the only appropriately tailored way of furthering that interest. *Id.* at 2466.

Indeed, the *Janus* Court dispelled the notion that a "State has a compelling interest in requiring the payment of agency fees because (1) unions would otherwise be unwilling to represent nonmembers…." *Id.* at 2467. In finding that unions would continue to represent nonmembers even without agency fees, the Court discussed the benefits of exclusive representation, including that, as an exclusive representative, "the union [is] given the exclusive right to speak for all the employees

in collective bargaining, [and] the employer is required by state law to listen to and to bargain in good faith with only that union." *Id.* at 2467 (citation omitted). Thus, even in explicitly recognizing that an exclusive representative union speaks for all employees in a bargaining unit, the *Janus* Court offered no hint that such a scheme, in and of itself, amounted to compelled speech that violated bargaining unit members' First Amendment rights.

Similarly, in addressing the respondent's originalism argument, the *Janus* Court concluded that public employees did not historically lack free speech protections. *Id.* at 2469–72. But even in stating that public-sector unionization "would astound those who framed and ratified the Bill of Rights," the Court explicitly said that it was "not in any way questioning the foundations of modem labor law." *Id.* at 2471 n.7. Thus, *Janus* does not undermine *Knight* or support Plaintiffs compelled speech claim, and Plaintiff is unlikely to prevail on that claim.

In conclusion, Plaintiff is not likely to succeed on the merits of either her compelled speech or compelled association claim, and this factor weighs against granting a preliminary injunction.

B. Irreparable Harm

The Court next considers whether Plaintiff would suffer irreparable harm without the requested injunction. When determining this factor,

"[s]uch harm must be 'likely,' not just possible." *Tri-Cty. Wholesale Distributors, Inc. v. Wine Grp.,* Inc., No. 10-4202, 565 F. App'x 477, at *482 (6th Cir. June 29, 2012) (quoting *Winter,* 555 U.S. at 22). "A plaintiff's harm from the denial of a preliminary injunction is irreparable if it is not fully compensable by monetary damages." *Id.* (citations and internal quotation marks omitted).

Plaintiff's purported irreparable harm is the deprivation of her First Amendment rights to free speech and free association. Any such harm would be irreparable, but, because the Court has concluded that Plaintiff is unlikely to prevail on her First Amendment claims, the Court also finds that Plaintiff will not likely suffer irreparable harm absent an injunction. This factor therefore weighs against granting a preliminary injunction.

C. Harm to Third Parties

The Union and the Board are currently negotiating a successor CBA, and a preliminary injunction could substantially harm the Union, the Board, and other bargaining unit members. If the Court granted Plaintiff's requested injunction, it would be utterly unclear to both the Union and the Board how to proceed with negotiations as they related to the terms and conditions of Plaintiff's employment. Plaintiff is not seeking the right to negotiate her contract herself or through another entity, and if the Union did not represent her in negotiations, the Board would be unable to negotiate

her contract. Further, Plaintiff's proposed injunction prohibits the Board from recognizing the Union as the representative of *any* bargaining unit members who are not members of the Union, *see* ECF No. 15-3, leaving each of those third parties likewise unrepresented in negotiations. Such relief would harm those third parties, and the Court finds this factor weighs against granting Plaintiff's requested relief.

D. Public Interest

The public has an interest in protecting the freedom of speech, and "it is always in the public interest to prevent the violation of a party's constitutional rights." G&*V Lounge, Inc. v. Mich. Liquor Control Comm'n,* 23 F.3d 1071, 1079 (6th Cir. 1994) (quoting *Gannett* Co., *Inv. v. DePasqule,* 443 U.S. 368, 383 (1979)). The Court has concluded, though, that Ohio's exclusive representative system does not likely violate Plaintiff's free speech or association rights, and the public interest also lies in avoiding the type of labor strife that predated passage of Ohio's collective bargaining law. Accordingly, this factor weighs against granting Plaintiffs requested preliminary injunction.

IV. CONCLUSION

For the above reasons, Plaintiffs motion for a preliminary injunction, ECF No. 15, is **DENIED.** The Clerk shall terminate ECF No. 15 from the pending motions list.

IT IS SO ORDERED.

Michael H. Watson

Michael H. Watson, Judge

United States District Court

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

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

DECLARATION OF JADE THOMPSON

Pursuant to 28 U.S.C. § 1746, I, Jade Thompson, declare and state as follows:

1. I am over the age of 18 years and am competent to make this declaration. I have personal knowledge of the facts stated herein, and if called as a witness, I could and would competently testify thereto.

2. I am a Spanish teacher at Marietta High School in Washington County, Ohio.

3. I am an employee of the Marietta School Board (the "Board"), which employs teachers in Marietta public schools.

4. The Marietta Education Association (the "Union") has been designated as the exclusive bargaining agent for employees of the Board.

5. The Board has entered into a series of collective bargaining agreements with the Union, including the latest "Agreement." A true and correct copy of the Agreement is attached as Exhibit A.

6. Under that Agreement, the bargaining unit includes "all full and regular parttime certificated personnel employed under contract, including classroom teachers, special education teachers, psychologists, guidance counselors, librarians, school nurses, head teacher(s), attendance officer, resource teachers, and full-time substitutes employed sixty one (61) or more consecutive days in the same position in a school year." Ex. A,§ 1.01.

7. I belong to the bargaining unit covered by the Agreement.

8. I am not a member of the Union.

9. Under Ohio law and the Agreement, and without my affirmative consent, the Union acts as my exclusive representative and agent to the Board when collectively bargaining, in grievance proceedings, in other contacts with the Board and its agents and employees, and when engaging in other public and governmental advocacy.

10. The Union speaks on my behalf. The Union's speech to and petitioning of the government in its representative capacity is imputed to me because of the Union's status under Ohio law and the Agreement as my agent and representative, despite that I do not authorize the Union to advocate or otherwise speak on my behalf.

11. My unwanted association with the Union is forced upon me by Ohio law and government officials, despite my actual refusal to associate with the Union.

12. I oppose many of the positions the Union has taken, including on political and policy matters.

13. I oppose numerous of the positions that the Union has taken on my behalf relating to, among other things, wages, hours, and conditions of employment. Indeed, the Union has taken positions as my exclusive representative that are contrary to my conscience and beliefs

14. Specifically, I oppose the Union's position requiring seniority to be the sole substantive criteria in layoff decisions to the exclusion of any merit factors. And I oppose the Union's position, included the Agreement, that dictates that layoffs will be "determined by a toss of the coin" in cases of equal seniority, even if such a tie exists between the teacher of the year and a poor-performing teacher. Agreement § 25.031.

15 . I oppose positions advocated by the Union that favored or resulted in the cutting of academic programs rather than allowing a reduction in fringe benefits for teachers.

16. I oppose positions advocated by the Union that exclude teachers who are not Union members from participation in the Evaluation Committee. Agreement§ 14.061.

17. I oppose positions promoted by the union that exclude teachers who are not Union members from

participation in the Student Growth Measures Committee. Agreement§ 14.071.

18. I have no control over the Union's choices of positions to advocate, despite that the Union advocates those positions on my behalf.

19. The Union took out radio and television advertisements opposing my husband, Andy Thompson, a member of the Ohio General Assembly, when he ran for office. The Union's president also advocated against him in emails to my colleagues and me at Marietta High School.

20. I am restricted from speaking on my own behalf or petitioning the government on my own behalf by virtue of the Union's designation as my exclusive bargaining agent.

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 21, 2018.

Jade Thompson

Jade Thompson

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

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

COMPLAINT

Jade Thompson, for her Complaint against the Marietta Education Association and the Marietta Board of Education (collectively, "Defendants"), alleges as follows:

NATURE OF THE ACTION

1. This action challenges the Defendants' unlawful scheme of withholding money from the paychecks of public employees to fund the speech and petitioning of a labor union without their affirmative consent.

2. The First Amendment protects the individual rights of free speech and association, including the rights *not* to speak and *not* to associate. Accordingly, public employees who do not belong to a labor union "should not be required to fund a union's political and

ideological projects unless they choose to do so." *Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 315 (2012). Furthermore, "[b]ecause a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences, the compulsory fees constitute a form of compelled speech and association that imposes a significant impingement on First Amendment rights." *Id.* at 311–12 (quotations and citations omitted). As the Supreme Court has now made clear in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, No. 16-1466, Slip Op. (June 2018), that burden is impermissible.

3. In violation of these principles, Ohio law authorizes local governments and labor unions to require public employees who are not union members to fund union activities. And it authorizes them to deduct fees to fund those activities from public employees' paychecks, absent those employees' affirmative consent.

4. That arrangement is unlawful for at least three independent reasons.

5. First, union activities "germane" to collective bargaining are expressive and associational activities that public employees have a First Amendment right not to subsidize. *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, No. 16-1466, Slip Op. 7–18 (June 2018). Thus, a union has no right to the money of any public employee who does not consent to funding it. The government

may not require its employees to subsidize a labor union's speech and petitioning of government.

6. Second, the First Amendment requires that the government obtain the affirmative consent of a person before directing her money to subsidize a private organization's speech, petitioning of government, and other political and ideological activities. But, as *Janus* now holds, a waiver of First Amendment rights "cannot be presumed"; rather, agency fees cannot be collected from non-union members "[u]nless employees clearly and affirmatively consent." *Janus*, Slip Op. at 48. Just like any other organization—a church, a charity, an activist group—a labor union has no inherent right to any individual's money, and the government therefore may not simply deduct union fees of any kind from a public employee's paycheck absent that employee's affirmative consent. Requiring public employees to periodically navigate an arduous "opt-out" scheme to avoid subsidizing speech with which they disagree—and taking their money if they are unable to navigate that regime perfectly every time—is not sufficiently tailored to protect their First Amendment rights.

7. Third, "[d]esignating a union as the employees' exclusive representative substantially restricts the rights of individual employees. Among other things, this designation means that individual employees may not be represented by any agent other than the designated union; nor may individual employees negotiate directly with their employer." *Janus*, Slip Op. 2. For that reason, and because the union's advocacy

is attributed to employees, that designation violates employees' speech and petitioning rights, as well as their associational rights, in contravention of the First Amendment.

8. For these reasons, the agency-fee, "opt-out," and exclusive representation schemes employed by Ohio public employers and unions are unconstitutional. The Plaintiff is entitled to a declaration to that effect and to an injunction prohibiting the Defendants from continuing to burden the Plaintiff's First Amendment rights through operation of their unconstitutional fee-deduction scheme.

PARTIES

9. The Plaintiff, Jade Thompson, is a Spanish teacher at Marietta High School in Washington County, Ohio.

10. Defendant Marietta Board of Education (the "Board") manages and controls schools in the Marietta School District, including Marietta High School. Ohio Rev. Code § 3313.47. The Board is an Ohio political subdivision, *see* Ohio Rev. Code § 2743.01(B), and a corporate body capable of being sued, Ohio Rev. Code § 3313.17. The Board employs teachers in Marietta public schools, including Ms. Thompson. Ohio Rev. Code § 3319.07(A).

11. Defendant Marietta Education Association (the "Union") is an "employee organization" as defined in the Ohio public-employees labor-relations code, Ohio Rev. Code § 4117.01(D), and represents employees of the Marietta School District. The Union

is affiliated with the Ohio Education Association, an Ohio teachers union, and the National Education Association, a national teachers union.

JURISDICTION AND VENUE

12. This case raises claims under the First and Fourteenth Amendments of the federal Constitution and 42 U.S.C. § 1983. Jurisdiction is proper under 28 U.S.C. § 1331.

13. Ms. Thompson, the Marietta Board of Education, and the Marietta Education Association are all residents of Washington County, Ohio. Venue is proper in this District under 28 U.S.C. § 1391(b).

FACTUAL ALLEGATIONS

A. Ohio Law Permits Governmental Entities To Exact "Agency Fees" from Public Employees to Fund Union Speech Without Employees' Affirmative Consent

14. Under Ohio law, a union may become the exclusive bargaining represented for public employees in a bargaining unit, such as a public school district, by submitting proof that a majority of the bargaining-unit employees wish to be represented exclusively by the union. Ohio Rev. Code § 4117.05; *see also* Ohio Rev. Code § 4117.04 (providing that public employers shall recognize and bargain with a designated "exclusive representative).

15. A public employer must bargain collectively with that union. Ohio Rev. Code Ann. § 4117.04(B).

16. Ohio law sets a broad scope to negotiations, including "[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." Ohio Rev. Code § 4117.08(A).

17. Permissive subjects of bargaining include: "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." Ohio Rev. Code § 4117.08(C).

18. An agreement between a public employer and union on any of these topics must be reduced to writing and executed.

19. Ohio law permits such an agreement to contain a provision requiring the public employer to collect a "fair share" fee from employees. Ohio Rev. Code § 4117.09(C). Although the statute does not empower public employers to require union membership as a condition of employment, it does empower them to deduct fees in the same amount as union dues from non-member employees' paychecks and remit those to the relevant unions. *Id.*

20. The fee is deducted from non-members' paychecks automatically "and does not require the

written authorization of the employee." Ohio Rev. Code § 4117.09(C).

21. Ohio law requires that, if a collective-bargaining agreement provides for a fair-share arrangement, the union establish an internal procedure for issuing rebates to employees who are entitled to withhold all or a portion of the fair-share agreement. Ohio Rev. Code § 4117.09(C).

22. A rebate is only required for "expenditures in support of partisan politics or ideological causes not germaine [sic] to the work of employee organizations in the realm of collective bargaining." Ohio Rev. Code § 4117.09(C). The Ohio Administrative Code confirms the limited scope of fees subject to rebate. Ohio Admin. Code § 4117-11-01(A) ("The internal rebate procedure shall provide for a rebate of expenditures in support of partisan politics or ideological causes not germane to the work of employee organizations in the realm of collective bargaining. Any employee who has paid to the employee organization a fair share fee may apply to the employee organization for a rebate for such expenditures.")

23. By statute, a rebate may be conditioned on the employee's making "a timely demand on the employee organization." Ohio Rev. Code § 4117.09(C).

24. By statute, the union may determine whether the employee is entitled to a rebate, and that determination is subject to review only for "arbitrary and

capricious action" in an appeal before the Ohio Employment Relations Board. Ohio Rev. Code § 4117.09(C).

25. An appeal must be filed within 30 days of the determination, and the appeal must specify "the arbitrary or capricious nature of the determination." Ohio Rev. Code § 4117.09(C). A petition must identify the amount of the employee's fair share fee, include a copy of the rebate determination, state the reasons "why the rebate determination was arbitrary and capricious," and contain proof of service on the union. Ohio Admin. Code § 4117-11.01(B). The union may respond to the petition, and it may be subject to a hearing by the Employment Relations Board. Ohio Admin. Code § 4117-11.01(C).

B. The Board Agrees To Exact Agency Fees from Its Employees' Paychecks To Fund the Union's Speech Without Employees' Affirmative Consent

26. The Board and the Union are parties to a collective bargaining agreement with a term from June 30, 2016, through June 29, 2018. *See* Exhibit A (the "Agreement").

27. The Agreement establishes a bargaining unit of "all full and regular part-time certificated personnel employed under contract, including classroom teachers, special education teachers, psychologists, guidance counselors, librarians, school nurses, head teacher(s), attendance officer, resource teachers, and full-time substitutes employed sixty one (61) or more

consecutive days in the same position in a school year." Agreement § 1.01.

28. The Agreement recognizes the Union as the "sole and exclusive bargaining agent for the members of the bargaining unit." Agreement § 1.01.

29. The Agreement records the Board's and Union's negotiated points of agreement, including those pertaining to wages, benefits, grievances, teacher planning time, professional meetings, the school day, the school year, student discipline, school activities, class size, transfer, leaves of absence, vacancies, teacher lounges, performance appraisals, and so forth.

30. The Agreement also includes an Article titled "Association Rights."

31. Among its provisions is one requiring that "[a]ll bargaining unit members who are not members of the Association shall pay a monthly agency fee equivalent to the monthly dues uniformly required of such members." Agreement § 27.018.

32. It provides that the agency fee amount "be automatically deducted commencing the first paycheck on or after January 15th of each year and continue to be deducted throughout the remaining paychecks."

33. It also provides that the payment "shall be subject to a rebate procedure provided by the Association meeting all requirements of applicable state and federal law." Agreement § 27.018.

34. Pursuant to this provision, the Union has adopted an opt-out procedure.

35. Under that procedure, the agency fee amount is deducted from the paychecks of bargaining unit members to fund the Union's activities without their affirmative consent.

36. That procedure presumes that the Board's non-union employees wish to have an agency fee equivalent in amount to union dues deducted each month from their paychecks and that such employees wish to fund the Union's political activities to the same extent as a Union member. An employee who does not indicate otherwise through the optout procedure will have that amount automatically deducted each month, and a portion of that fee will be used to fund the Union's political activities.

37. Employees who oppose funding the Union's political activities must follow the opt-out procedure to avoid doing so each year. Among other things, the employee must send the opt-out notice via mail or deliver it in person to a Union representative.

38. The employee may only opt out between specific dates in mid-December and mid-January of each year (typically December 15 through January 15).

39. To qualify, the employee's objection must be received or post-marked by the January deadline.

40. If the employee does not comply with the procedure to register an objection, the employee's rights are waived, and the Union proceed to collect the full agency fee for the entire year.

41. If the employee does successfully register an objection, the Union affords a fee reduction for that single year.

42. To assess whether the Union's calculation of the fee reduction is correct, the employee must examine a notice the Union provides, called a *Hudson* notice, outlining the Union's political spending.

43. Disputes over the calculation are submitted to arbitration.

44. If the employee wishes to challenge the arbitration decision, the employee must file a petition with the Ohio Employment Relations Board within 30 days of the determination. As described above, the determination is subject to an arbitrary-and-capricious standard of review.

45. The Agreement does not permit an employee to opt-out from paying the remainder of the agency fee that is (according to the Union's calculation) "germane" to collective bargaining and not attributable to partisan politics or ideological causes.

46. Even if the Agreement did permit an employee to opt-out from paying agency fees altogether, such a scheme would presume that employees wish to have an agency fee deducted each month from their paychecks to fund the Union's activities, including collective bargaining.

C. The Board Infringes Ms. Thompson's First Amendment Rights by Withholding Funds from Her Paycheck To Fund the Union's Speech Without Her Affirmative Consent

47. The Union transfers percentages of dues and of agency fee payments to its affiliates, the National Education Association and the Ohio Education Association.

48. The Union and its affiliates advocate on a wide range of issues.

49. The National Education Association, for example, has published a 150-page handbook of its currently in-force resolutions. These include resolutions on matters ranging from education policy, school financing, charter schools, and early childhood learning to "social and economic justice," the constitutional convention process of Article V, voting rights, historic preservation, covert operations and counterintelligence activities, and the "self-determination of indigenous people," racial preferences, sex education, the metric system, D.C. statehood, U.S. participation in the International Court of Justice and criminal court, and gun control.

50. The National Education Association generally adopts such measures at its annual "Representative Assembly." The National Education Association treats its Representative Assembly as fully chargeable to non-members. It therefore funds these advocacy efforts, in part, through agency fees collected from non-members.

51. The Ohio Education Association also advocates on political issues and has adopted a handbook of legislative policies on a swath of issues, including legislative redistricting, voter identification laws, minimum wage, asbestos, nuclear waste storage and dumping, public-employee retirement.

52. The Ohio Education Association adopted these and other measures at its representative assembly, which it treats as fully chargeable to non-members. It therefore funds these advocacy efforts, in part, through agency fees collected from non-members.

53. Both the National Education Association and Ohio Education Association encourage members to engage in political advocacy and providing training for that purpose.

54. The Ohio Education Association and National Education Association obtain funding for their activities through the dues of members of affiliated local unions, such as the Marietta Education Association, and through agency-fee payments made to such local unions.

55. Both the National Education Association and Ohio Education Association undertake political and ideological activities that they do not regard as "germane" to collective bargaining. These political and ideological activities are funded through dues of members of affiliated local unions, such as the Marietta Education Association, and through agency-fee payments made to such local unions.

56. The Union's collective bargaining activities and other activities that it regarded as "germane" to collective bargaining are funded through dues of members and through agency-fee payments by non-members.

57. Ms. Thompson is a member of the bargaining unit identified in Article 1.01 of the Agreement.

58. Ms. Thompson is not a member of the Union.

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

60. These disagreements came to a head in 2010, when Ms. Thompson's husband, Andy Thompson, ran for the Ohio House of Representatives.

61. The Ohio Education Association launched an attack campaign against Mr. Thompson, through mailers and radio and television advertisements.

62. The president of the Marietta Education Association emailed every teacher at Marietta High School, urging them to vote and advocate against Mr. Thompson.

63. Ms. Thompson's agency fees fund the activities of the Union, the National Education Association, and the Ohio Education Association.

64. To avoid funding union the political and ideological activities that unions have identified as not being "germane" to collective bargaining, Ms. Thomp-

son must take steps every year to opt out of the portion of the agency fee that Ohio law and the Agreement allow her not to pay.

65. These steps take time.

66. These steps cost money.

67. Ms. Thompson must prepare a written notice to the Union.

68. She must research what to say in the notice.

69. She must research how to send the notice.

70. She must research where and when to send the notice.

71. She must prepare the mailing.

72. She must pay the postage.

73. She must travel to a post office to send the notice via certified mail.

74. On receiving the Union's response, she must independently verify the amount the Union calculates as being reimbursable. This requires examination of a detailed *Hudson* notice.

75. Assessing her rights, including under changes in the legal regime, may require consultation with an attorney or accountant, and failure to undertake such consultation may prevent her from identifying and remediating any infringement of her rights.

76. If Ms. Thompson fails to undertake any step of this process for any reason or fails to navigate the process accurately, the Union collects the full agency

fee and uses it to subsidize political and ideological causes she opposes.

77. Even if she successfully completes this opt-out procedure, Ms. Thompson is still compelled to subsidize activities the Union and its affiliates have identified as "germane" to collective bargaining, despite the fact that she opposes positions that the Union takes in collective bargaining and other activities and speech that the Union and its affiliates regard as "germane" to collective bargaining.

78. She must navigate this opt-out procedure anew each year.

79. Ms. Thompson has in previous years opted out of paying non-chargeable fees.

80. Ms. Thompson opted out of paying non-chargeable fees in January 2018

81. Ms. Thompson has, nevertheless, been required to pay chargeable fees.

D. Ohio's Opt-Out Scheme Violates the First Amendment

82. Agency-shop arrangements, such as Ohio's fair-share law, impose a "significant impingement on First Amendment rights" because "[t]he dissenting employee is forced to support financially an organization with whose principles and demands he may disagree." *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 455 (1984)). This "impingement" is quite severe because "public-sector union[s] take[] many po-

sitions during collective bargaining that have powerful political and civic consequences." *Knox*, 132 S. Ct. at 2289.

83. Moreover, "any procedure for exacting [union] fees from unwilling contributors must be carefully tailored to minimize the infringement of free speech rights." *Id.* at 2291 (citation omitted). By contrast, "unions have no constitutional entitlement to the fees of nonmember-employees." *Id.* (citation omitted). Rather, their "collection of fees from nonmembers is authorized by an act of legislative grace." *Id.* (citation omitted).

84. The Agreement's agency-fee provision and the provisions of Ohio law that enable it are unconstitutional for two independent reasons.

85. First, Ohio law permits Ohio governmental entities to require employees who are not members of a union to fund activities identified by the union as "germane" to collective bargaining, including speech on matters of public concerning and petitioning of government on matters of public concern.

86. As the Supreme Court held in its recent decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, No. 16-1466, Slip Op. (June 2018), this is unconstitutional.

87. Second, Ohio law's opt-out procedure is unconstitutional.

88. Requiring public employees to affirmatively opt out to obtain a rebate is an unacceptable burden on speech.

89. No compelling government interest supports requiring public employees to affirmatively opt out.

90. As the Supreme Court held in its recent decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, No. 16-1466, Slip Op. (June 2018), it is unconstitutional to collect agency fees from employees who do not "affirmatively consent" as shown "by clear and compelling evidence." *Janus*, Slip Op. at 48 (quotations omitted).

91. Even if there were a compelling government interest, requiring public employees to affirmatively opt out to obtain a rebate is not narrowly tailored.

92. The process to affirmatively opt out is arduous.

93. A public employee must attempt to opt out every year.

94. If a union denies the rebate, the employee must then prosecute an arduous administrative appeal with an unfavorable standard of review.

95. There is a more narrowly tailored alternative to all of these onerous procedures: requiring that, before the government withholds funds from a public employee's paycheck to fund a labor union's activities, the employee affirmative consent to the with-

holding. This would remove the burden from those individuals electing not to fund union speech and allow those individuals interested in supporting such speech to do so.

COUNT I

Exacting Compulsory Fees to Support Collective Bargaining Violates the First Amendment

96. The Plaintiff incorporates and re-alleges each and every allegation in the foregoing paragraphs as though fully set forth herein.

97. The First Amendment to the United States Constitution provides: "Congress shall make no law… abridging the freedom of speech."

98. The Fourteenth Amendment to the United States Constitution incorporates the protection of the First Amendment against the States, providing: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

99. By requiring the Plaintiff to make any financial contributions in support of any union, Ohio's fair-share arrangement violates the Plaintiff's rights under the First and Fourteenth Amendments to the United States Constitution.

100. The Plaintiff has no adequate remedy at law.

101. The controversy between Defendants and the Plaintiff is a definite and concrete dispute concerning the legal relations of parties with adverse legal interests.

102. The dispute is real and substantial, as the Union is continuing to collect fees each month from the Plaintiff's paycheck.

103. The declaratory relief sought is not based on a hypothetical state of facts, nor would it amount to a mere advisory opinion, as the parties dispute the legality of ongoing seizure of a portion of the Plaintiff's paycheck.

104. As a result of the foregoing, an actual and justiciable controversy exists between the Plaintiff and the Union regarding their respective legal rights, and the matter is ripe for review.

COUNT II

Requiring an Individual To Opt Out from Exactions To Subsidize a Labor Union's Speech and Petitioning Violates the First Amendment

105. The Plaintiff incorporates and re-alleges each and every allegation contained in the foregoing paragraphs of this Complaint, as though fully set forth herein.

106. By requiring the Plaintiff to opt-out from funding union speech and petitioning activities with which she disagrees, Ohio's agency-fee arrangement violates the Plaintiff's rights under the First and

Fourteenth Amendments to the United States Constitution.

107. The Supreme Court has now made clear: "Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." *Janus*, Slip Op. at 48.

108. The Plaintiff has no adequate remedy at law.

109. The controversy between Defendants and the Plaintiff is a definite and concrete dispute concerning the legal relations of parties with adverse legal interests.

110. The dispute is real and substantial, as the Union is continuing to collect fees each month from the Plaintiff's paycheck and will continue to do so in coming months and years.

111. The declaratory relief sought is not based on a hypothetical state of facts, nor would it amount to a mere advisory opinion, as the parties dispute the legality of ongoing seizure of a portion of the Plaintiff's paycheck.

112. As a result of the foregoing, an actual and justiciable controversy exists between the Plaintiff and the Union regarding their respective legal rights, and the matter is ripe for review.

COUNT III

Designating a Union as Employees' "Exclusive Representative" Violates the First Amendment

113. The Plaintiff incorporates and re-alleges each and every allegation contained in the foregoing paragraphs of this Complaint, as though fully set forth herein.

114. By designating the Union as the Plaintiff's exclusive representative, Ohio law and the Agreement violate the Plaintiff's rights under the First and Fourteenth Amendments to the United States Constitution

115. That designation compels the Plaintiff to associate with the Union.

116. That designation attributes the Union's speech and petitioning to the Plaintiff.

117. That designation restricts the Plaintiff's speech and petitioning.

118. The Plaintiff has no adequate remedy at law.

119. The controversy between Defendants and the Plaintiff is a definite and concrete dispute concerning the legal relations of parties with adverse legal interests.

120. The dispute is real and substantial, as the Union continues to hold itself out as the Plaintiff's exclusive representative and its designation as such restricts the Plaintiff's rights.

121. The declaratory relief sought is not based on a hypothetical state of facts, nor would it amount to a mere advisory opinion, as the parties dispute the legality of the Union's designation as the Plaintiff's exclusive representative.

122. As a result of the foregoing, an actual and justiciable controversy exists between the Plaintiff and the Union regarding their respective legal rights, and the matter is ripe for review.

COSTS AND ATTORNEY FEES

123. Pursuant to 42 U.S.C § 1988, the Plaintiff seeks an award of costs and attorney fees incurred in the litigation of this case.

PRAYER FOR RELIEF

For these reasons, Ms. Thompson requests that the Court:

(A) Enter a judgment declaring that Ohio's fair-share law, codified in Ohio Rev. Code § 4117.09(C) and Ohio Admin. Code § 4117-11-01(A), and the Agreement impermissibly abridge Ms. Thompson's First Amendment free- speech rights by requiring payment of fees to a union as a condition of public employment;

(B) Enter a judgment declaring that Ohio's fair-share law, codified in Ohio Rev. Code § 4117.09(C) and Ohio Admin. Code § 4117-11-01(A), and the Agreement impermissibly abridge Ms. Thompson's First Amendment free speech rights by requiring Ms.

Thompson to opt out of the fair-share process to seek reimbursement of fees through a rebate scheme.

(C) Enter a judgment declaring that Ohio's exclusive-representation law, codified in Ohio Rev. Code § 4117.04–05, and the Agreement impermissibly abridge

Ms. Thompson's First Amendment speech, petitioning, and associational rights by designating the Union as Ms. Thompson's exclusive representative;

(D) Enter an injunction barring Defendants from seeking to require payment of agency fees from any employee who has not affirmatively consented to financially support the Union;

(E) Enter an injunction barring Defendants from recognizing the Union as Ms. Thompson's exclusive representative or representative;

(F) An award of costs, including reasonable attorney fees, pursuant to 28 U.S.C. § 1988(b); and

(G) Grant to Ms. Thompson such additional or different relief as the Court deems just and proper.

Respectfully submitted,
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** Applications for admission forthcoming

Ohio Statutes (2018)

4117.01 Public employees' collective bargaining definitions.

As used in this chapter:

(A) "Person," in addition to those included in division (C) of section 1.59 of the Revised Code, includes employee organizations, public employees, and public employers.

(B) "Public employer" means the state or any political subdivision of the state located entirely within the state, including, without limitation, any municipal corporation with a population of at least five thousand according to the most recent federal decennial census; county; township with a population of at least five thousand in the unincorporated area of the township according to the most recent federal decennial census; school district; governing authority of a community school established under Chapter 3314. of the Revised Code; college preparatory boarding school established under Chapter 3328. of the Revised Code or its operator; state institution of higher learning; public or special district; state agency, authority, commission, or board; or other branch of public employment. "Public employer" does not include the nonprofit corporation formed under section 187.01 of the Revised Code.

(C) "Public employee" means any person holding a position by appointment or employment in the ser-

vice of a public employer, including any person working pursuant to a contract between a public employer and a private employer and over whom the national labor relations board has declined jurisdiction on the basis that the involved employees are employees of a public employer, except:

(1) Persons holding elective office;

(2) Employees of the general assembly and employees of any other legislative body of the public employer whose principal duties are directly related to the legislative functions of the body;

(3) Employees on the staff of the governor or the chief executive of the public employer whose principal duties are directly related to the performance of the executive functions of the governor or the chief executive;

(4) Persons who are members of the Ohio organized militia, while training or performing duty under section 5919.29 or 5923.12 of the Revised Code;

(5) Employees of the state employment relations board, including those employees of the state employment relations board utilized by the state personnel board of review in the exercise of the powers and the performance of the duties and functions of the state personnel board of review;

(6) Confidential employees;

(7) Management level employees;

(8) Employees and officers of the courts, assistants to the attorney general, assistant prosecuting

attorneys, and employees of the clerks of courts who perform a judicial function;

(9) Employees of a public official who act in a fiduciary capacity, appointed pursuant to section 124.11 of the Revised Code;

(10) Supervisors;

(11) Students whose primary purpose is educational training, including graduate assistants or associates, residents, interns, or other students working as part-time public employees less than fifty per cent of the normal year in the employee's bargaining unit;

(12) Employees of county boards of election;

(13) Seasonal and casual employees as determined by the state employment relations board;

(14) Part-time faculty members of an institution of higher education;

(15) Participants in a work activity, developmental activity, or alternative work activity under sections 5107.40 to 5107.69 of the Revised Code who perform a service for a public employer that the public employer needs but is not performed by an employee of the public employer if the participant is not engaged in paid employment or subsidized employment pursuant to the activity;

(16) Employees included in the career professional service of the department of transportation under section 5501.20 of the Revised Code;

(17) Employees of community-based correctional facilities and district community-based correctional facilities created under sections 2301.51 to 2301.58 of the Revised Code.

(D) "Employee organization" means any labor or bona fide organization in which public employees participate and that exists for the purpose, in whole or in part, of dealing with public employers concerning grievances, labor disputes, wages, hours, terms, and other conditions of employment.

(E) "Exclusive representative" means the employee organization certified or recognized as an exclusive representative under section 4117.05 of the Revised Code.

(F) "Supervisor" means any individual who has authority, in the interest of the public employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other public employees; to responsibly direct them; to adjust their grievances; or to effectively recommend such action, if the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment, provided that:

(1) Employees of school districts who are department chairpersons or consulting teachers shall not be deemed supervisors.

(2) With respect to members of a police or fire department, no person shall be deemed a supervisor except the chief of the department or those individuals

who, in the absence of the chief, are authorized to exercise the authority and perform the duties of the chief of the department. Where prior to June 1, 1982, a public employer pursuant to a judicial decision, rendered in litigation to which the public employer was a party, has declined to engage in collective bargaining with members of a police or fire department on the basis that those members are supervisors, those members of a police or fire department do not have the rights specified in this chapter for the purposes of future collective bargaining. The state employment relations board shall decide all disputes concerning the application of division (F)(2) of this section.

(3) With respect to faculty members of a state institution of higher education, heads of departments or divisions are supervisors; however, no other faculty member or group of faculty members is a supervisor solely because the faculty member or group of faculty members participate in decisions with respect to courses, curriculum, personnel, or other matters of academic policy.

(4) No teacher as defined in section 3319.09 of the Revised Code shall be designated as a supervisor or a management level employee unless the teacher is employed under a contract governed by section 3319.01, 3319.011, or 3319.02 of the Revised Code and is assigned to a position for which a license deemed to be for administrators under state board rules is required pursuant to section 3319.22 of the Revised Code.

(G) "To bargain collectively" means to perform the mutual obligation of the public employer, by its representatives, and the representatives of its employees to negotiate in good faith at reasonable times and places with respect to wages, hours, terms, and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement, with the intention of reaching an agreement, or to resolve questions arising under the agreement. "To bargain collectively" includes executing a written contract incorporating the terms of any agreement reached. The obligation to bargain collectively does not mean that either party is compelled to agree to a proposal nor does it require the making of a concession.

(H) "Strike" means continuous concerted action in failing to report to duty; willful absence from one's position; or stoppage of work in whole from the full, faithful, and proper performance of the duties of employment, for the purpose of inducing, influencing, or coercing a change in wages, hours, terms, and other conditions of employment. "Strike" does not include a stoppage of work by employees in good faith because of dangerous or unhealthful working conditions at the place of employment that are abnormal to the place of employment.

(I) "Unauthorized strike" includes, but is not limited to, concerted action during the term or extended term of a collective bargaining agreement or during the pendency of the settlement procedures set forth

in section 4117.14 of the Revised Code in failing to report to duty; willful absence from one's position; stoppage of work; slowdown, or abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment for the purpose of inducing, influencing, or coercing a change in wages, hours, terms, and other conditions of employment. "Unauthorized strike" includes any such action, absence, stoppage, slowdown, or abstinence when done partially or intermittently, whether during or after the expiration of the term or extended term of a collective bargaining agreement or during or after the pendency of the settlement procedures set forth in section 4117.14 of the Revised Code.

(J) "Professional employee" means any employee engaged in work that is predominantly intellectual, involving the consistent exercise of discretion and judgment in its performance and requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship; or an employee who has completed the courses of specialized intellectual instruction and is performing related work under the supervision of a professional person to become qualified as a professional employee.

(K) "Confidential employee" means any employee who works in the personnel offices of a public employer and deals with information to be used by the

public employer in collective bargaining; or any employee who works in a close continuing relationship with public officers or representatives directly participating in collective bargaining on behalf of the employer.

(L) "Management level employee" means an individual who formulates policy on behalf of the public employer, who responsibly directs the implementation of policy, or who may reasonably be required on behalf of the public employer to assist in the preparation for the conduct of collective negotiations, administer collectively negotiated agreements, or have a major role in personnel administration. Assistant superintendents, principals, and assistant principals whose employment is governed by section 3319.02 of the Revised Code are management level employees. With respect to members of a faculty of a state institution of higher education, no person is a management level employee because of the person's involvement in the formulation or implementation of academic or institution policy.

(M) "Wages" means hourly rates of pay, salaries, or other forms of compensation for services rendered.

(N) "Member of a police department" means a person who is in the employ of a police department of a municipal corporation as a full-time regular police officer as the result of an appointment from a duly established civil service eligibility list or under section 737.15 or 737.16 of the Revised Code, a full-time deputy sheriff appointed under section 311.04 of the Revised Code, a township constable appointed under

section 509.01 of the Revised Code, or a member of a township or joint police district police department appointed under section 505.49 of the Revised Code.

(O) "Members of the state highway patrol" means highway patrol troopers and radio operators appointed under section 5503.01 of the Revised Code.

(P) "Member of a fire department" means a person who is in the employ of a fire department of a municipal corporation or a township as a fire cadet, full-time regular firefighter, or promoted rank as the result of an appointment from a duly established civil service eligibility list or under section 505.38, 709.012, or 737.22 of the Revised Code.

(Q) "Day" means calendar day.

4117.03 Rights of public employees

(A) Public employees have the right to:

(1) Form, join, assist, or participate in, or refrain from forming, joining, assisting, or participating in, except as otherwise provided in Chapter 4117. of the Revised Code, any employee organization of their own choosing;

(2) Engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection;

(3) Representation by an employee organization;

(4) Bargain collectively with their public employers to determine wages, hours, terms and

other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement, and enter into collective bargaining agreements;

(5) Present grievances and have them adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of the collective bargaining agreement then in effect and as long as the bargaining representatives have the opportunity to be present at the adjustment.

(B) Persons on active duty or acting in any capacity as members of the organized militia do not have collective bargaining rights.

(C) Except as provided in division (D) of this section, nothing in Chapter 4117. of the Revised Code prohibits public employers from electing to engage in collective bargaining, to meet and confer, to hold discussions, or to engage in any other form of collective negotiations with public employees who are not subject to Chapter 4117. of the Revised Code pursuant to division (C) of section 4117.01of the Revised Code.

(D) A public employer shall not engage in collective bargaining or other forms of collective negotiations with the employees of county boards of elections referred to in division (C)(12) of section 4117.01 of the Revised Code.

(E) Employees of public schools may bargain collectively for health care benefits.

4117.04 Public employers exclusive representative

(A) Public employers shall extend to an exclusive representative designated under section 4117.05 of the Revised Code, the right to represent exclusively the employees in the appropriate bargaining unit and the right to unchallenged and exclusive representation for a period of not less than twelve months following the date of certification and thereafter, if the public employer and the employee organization enter into an agreement, for a period of not more than three years from the date of signing the agreement. For the purposes of this section, extensions of agreements shall not be construed to affect the expiration date of the original agreement.

(B) A public employer shall bargain collectively with an exclusive representative designated under section 4117.05 of the Revised Code for purposes of Chapter 4117. of the Revised Code.

When the state employment relations board notifies a public employer that it has certified an employee organization as exclusive representative for a unit of its employees, the public employer shall designate an employer representative and promptly notify the board and the employee organization of his identity and address. On certification, the employee organization shall designate an employee representative and promptly notify the board and the public employer of his identity and address. The board or any party shall address to the appropriate designated representative all communications concerned with

collective relationships under Chapter 4117. of the Revised Code. In the case of municipal corporations, counties, school districts, educational service centers, villages, and townships, the designation of the employer representative is as provided in division (C) of section 4117.10 of the Revised Code. The designated representative of a party may sign agreements resulting from collective bargaining on behalf of his designator; but the agreements are subject to the procedures set forth in Chapter 4117. of the Revised Code.

4117.05 Employee organization to become exclusive representative - procedure

(A) An employee organization becomes the exclusive representative of all the public employees in an appropriate unit for the purposes of collective bargaining by either:

(1) Being certified by the state employment relations board when a majority of the voting employees in the unit select the employee organization as their representative in a board-conducted election under section 4117.07 of the Revised Code;

(2) Filing a request with a public employer with a copy to the state employment relations board for recognition as an exclusive representative. In the request for recognition, the employee organization shall describe the bargaining unit, shall allege that a majority of the employees in the

bargaining unit wish to be represented by the employee organization, and shall support the request with substantial evidence based on, and in accordance with, rules prescribed by the board demonstrating that a majority of the employees in the bargaining unit wish to be represented by the employee organization. Immediately upon receipt of a request, the public employer shall either request an election under division (A)(2) of section 4117.07 of the Revised Code, or take the following action:

(a) Post notice in each facility at which employees in the proposed unit are employed, setting forth the description of the bargaining unit, the name of the employee organization requesting recognition, and the date of the request for recognition, and advising employees that objections to certification must be filed with the state employment relations board not later than the twenty-first day following the date of the request for recognition;

(b) Immediately notify the state employment relations board of the request for recognition.

The state employment relations board shall certify the employee organization filing the request for recognition on the twenty-second day following the filing of the request for recognition, unless by the twenty-first day following the filing of the request for recognition it receives:

(i) A petition for an election from the public employer pursuant to division (A)(2) of section 4117.07 of the Revised Code;

(ii) Substantial evidence based on, and in accordance with, rules prescribed by the board demonstrating that a majority of the employees in the described bargaining unit do not wish to be represented by the employee organization filing the request for recognition;

(iii) Substantial evidence based on, and in accordance with, rules prescribed by the board from another employee organization demonstrating that at least ten percent of the employees in the described bargaining unit wish to be represented by such other employee organization; or

(iv) Substantial evidence based on, and in accordance with, rules prescribed by the board indicating that the proposed unit is not an appropriate unit pursuant to section 4117.06 of the Revised Code.

(B) Nothing in this section shall be construed to permit a public employer to recognize, or the state employment relations board to certify, an employee organization as an exclusive representative under Chapter 4117. of the Revised Code if there is in effect

a lawful written agreement, contract, or memorandum of understanding between the public employer and another employee organization which, on the effective date of this section, has been recognized by a public employer as the exclusive representative of the employees in a unit or which by tradition, custom, practice, election, or negotiation has been the only employee organization representing all employees in the unit; this restriction does not apply to that period of time covered by any agreement which exceeds three years. For the purposes of this section, extensions of agreement do not affect the expiration of the original agreement.

4117.07 Procedure upon filing petition for election

(A) When a petition is filed, in accordance with rules prescribed by the state employment relations board:

(1) By any employee or group of employees, or any individual or employee organization acting in their behalf, alleging that at least thirty per cent of the employees in an appropriate unit wish to be represented for collective bargaining by an exclusive representative, or asserting that the designated exclusive representative is no longer the representative of the majority of employees in the unit, the board shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, provide for an appropriate hearing upon due notice to the parties;

(2) By the employer alleging that one or more employee organizations has presented to it a claim to be recognized as the exclusive representative in an appropriate unit, the board shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, provide for an appropriate hearing upon due notice to the parties.

If the board finds upon the record of a hearing that a question of representation exists, it shall direct an election and certify the results thereof. No one may vote in an election by proxy. The board may also certify an employee organization as an exclusive representative if it determines that a free and untrammelled election cannot be conducted because of the employer's unfair labor practices and that at one time the employee organization had the support of the majority of the employees in the unit.

(B) Only the names of those employee organizations designated by more than ten per cent of the employees in the unit found to be appropriate may be placed on the ballot. Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation, in conformity with the rules of the board, for the purpose of a consent election.

(C) The board shall conduct representation elections by secret ballot cast, at the board's discretion, by mail or electronically or in person, and at times and places selected by the board subject to the following:

(1) The board shall give no less than ten days' notice of the time and place of an election;

(2) The board shall establish rules concerning the conduct of any election including, but not limited to, rules to guarantee the secrecy of the ballot;

(3) The board may not certify a representative unless the representative receives a majority of the valid ballots cast;

(4) Except as provided in this section, the board shall include on the ballot a choice of "no representative";

(5) In an election where none of the choices on the ballot receives a majority, the board shall conduct a runoff election. In that case, the ballot shall provide for a selection between the two choices or parties receiving the highest and the second highest number of ballots cast in the election.

(6) The board may not conduct an election under this section in any appropriate bargaining unit within which a board-conducted election was held in the preceding twelve-month period, nor during the term of any lawful collective bargaining agreement between a public employer and an exclusive representative.

Petitions for elections may be filed with the board no sooner than one hundred twenty days or later than ninety days before the expiration date of any collective bargaining agreement, or after the expiration date, until the public employer and

exclusive representative enter into a new written agreement.

For the purposes of this section, extensions of agreements do not affect the expiration date of the original agreement.

4117.08 Matters subject to collective bargaining

(A) All matters pertaining to wages, hours, or terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement are subject to collective bargaining between the public employer and the exclusive representative, except as otherwise specified in this section and division (E) of section 4117.03 of the Revised Code.

(B) The conduct and grading of civil service examinations, the rating of candidates, the establishment of eligible lists from the examinations, and the original appointments from the eligible lists are not appropriate subjects for collective bargaining.

(C) Unless a public employer agrees otherwise in a collective bargaining agreement, nothing in Chapter 4117. of the Revised Code impairs the right and responsibility of each public employer to:

(1) Determine matters of inherent managerial policy which include, but are not limited to areas of discretion or policy such as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, and organizational structure;

(2) Direct, supervise, evaluate, or hire employees;

(3) Maintain and improve the efficiency and effectiveness of governmental operations;

(4) Determine the overall methods, process, means, or personnel by which governmental operations are to be conducted;

(5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees;

(6) Determine the adequacy of the work force;

(7) Determine the overall mission of the employer as a unit of government;

(8) Effectively manage the work force;

(9) Take actions to carry out the mission of the public employer as a governmental unit.

The employer is not required to bargain on subjects reserved to the management and direction of the governmental unit except as affect wages, hours, terms and conditions of employment, and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement. A public employee or exclusive representative may raise a legitimate complaint or file a grievance based on the collective bargaining agreement.

4117.11 Unfair labor practice

(A) It is an unfair labor practice for a public employer, its agents, or representatives to:

(1) Interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Chapter 4117. of the Revised Code or an employee organization in the selection of its representative for the purposes of collective bargaining or the adjustment of grievances;

(2) Initiate, create, dominate, or interfere with the formation or administration of any employee organization, or contribute financial or other support to it; except that a public employer may permit employees to confer with it during working hours without loss of time or pay, permit the exclusive representative to use the facilities of the public employer for membership or other meetings, or permit the exclusive representative to use the internal mail system or other internal communications system;

(3) Discriminate in regard to hire or tenure of employment or any term or condition of employment on the basis of the exercise of rights guaranteed by Chapter 4117. of the Revised Code. Nothing precludes any employer from making and enforcing an agreement pursuant to division (C) of section 4117.09 of the Revised Code.

(4) Discharge or otherwise discriminate against an employee because he has filed charges

or given testimony under Chapter 4117. of the Revised Code;

(5) Refuse to bargain collectively with the representative of his employees recognized as the exclusive representative or certified pursuant to Chapter 4117. of the Revised Code;

(6) Establish a pattern or practice of repeated failures to timely process grievances and requests for arbitration of grievances;

(7) Lock out or otherwise prevent employees from performing their regularly assigned duties where an object thereof is to bring pressure on the employees or an employee organization to compromise or capitulate to the employer's terms regarding a labor relations dispute;

(8) Cause or attempt to cause an employee organization, its agents, or representatives to violate division (B) of this section.

(B) It is an unfair labor practice for an employee organization, its agents, or representatives, or public employees to:

(1) Restrain or coerce employees in the exercise of the rights guaranteed in Chapter 4117. of the Revised Code. This division does not impair the right of an employee organization to prescribe its own rules with respect to the acquisition or retention of membership therein, or an employer in the selection of his representative for the purpose of collective bargaining or the adjustment of grievances.

(2) Cause or attempt to cause an employer to violate division (A) of this section;

(3) Refuse to bargain collectively with a public employer if the employee organization is recognized as the exclusive representative or certified as the exclusive representative of public employees in a bargaining unit;

(4) Call, institute, maintain, or conduct a boycott against any public employer, or picket any place of business of a public employer, on account of any jurisdictional work dispute;

(5) Induce or encourage any individual employed by any person to engage in a strike in violation of Chapter 4117. of the Revised Code or refusal to handle goods or perform services; or threaten, coerce, or restrain any person where an object thereof is to force or require any public employee to cease dealing or doing business with any other person, or force or require a public employer to recognize for representation purposes an employee organization not certified by the state employment relations board;

(6) Fail to fairly represent all public employees in a bargaining unit;

(7) Induce or encourage any individual in connection with a labor relations dispute to picket the residence or any place of private employment of any public official or representative of the public employer;

(8) Engage in any picketing, striking, or other concerted refusal to work without giving written notice to the public employer and to the state employment relations board not less than ten days prior to the action. The notice shall state the date and time that the action will commence and, once the notice is given, the parties may extend it by the written agreement of both.

(C) The determination by the board or any court that a public officer or employee has committed any of the acts prohibited by divisions (A) and (B) of this section shall not be made the basis of any charge for the removal from office or recall of the public officer or the suspension from or termination of employment of or disciplinary acts against an employee, nor shall the officer or employee be found subject to any suit for damages based on such a determination; however nothing in this division prevents any party to a collective bargaining agreement from seeking enforcement or damages for a violation thereof against the other party to the agreement.

(D) As to jurisdictional work disputes, the board shall hear and determine the dispute unless, within ten days after notice to the board by a party to the dispute that a dispute exists, the parties to the dispute submit to the board satisfactory evidence that they have adjusted, or agreed upon the method for the voluntary adjustment of, the dispute.

4117.14 Settlement of dispute between exclusive representative and public employer - procedures

(A) The procedures contained in this section govern the settlement of disputes between an exclusive representative and a public employer concerning the termination or modification of an existing collective bargaining agreement or negotiation of a successor agreement, or the negotiation of an initial collective bargaining agreement.

(B)

(1) In those cases where there exists a collective bargaining agreement, any public employer or exclusive representative desiring to terminate, modify, or negotiate a successor collective bargaining agreement shall:

(a) Serve written notice upon the other party of the proposed termination, modification, or successor agreement. The party must serve the notice not less than sixty days prior to the expiration date of the existing agreement or, in the event the existing collective bargaining agreement does not contain an expiration date, not less than sixty days prior to the time it is proposed to make the termination or modifications or to make effective a successor agreement.

(b) Offer to bargain collectively with the other party for the purpose of modifying or terminating any existing agreement or negotiating a successor agreement;

(c) Notify the state employment relations board of the offer by serving upon the board a copy of the written notice to the other party and a copy of the existing collective bargaining agreement.

(2) In the case of initial negotiations between a public employer and an exclusive representative, where a collective bargaining agreement has not been in effect between the parties, any party may serve notice upon the board and the other party setting forth the names and addresses of the parties and offering to meet, for a period of ninety days, with the other party for the purpose of negotiating a collective bargaining agreement.

If the settlement procedures specified in divisions (B), (C), and (D) of this section govern the parties, where those procedures refer to the expiration of a collective bargaining agreement, it means the expiration of the sixty-day period to negotiate a collective bargaining agreement referred to in this subdivision, or in the case of initial negotiations, it means the ninety-day period referred to in this subdivision.

(3) The parties shall continue in full force and effect all the terms and conditions of any existing collective bargaining agreement, without resort to

strike or lock-out, for a period of sixty days after the party gives notice or until the expiration date of the collective bargaining agreement, whichever occurs later, or for a period of ninety days where applicable.

(4) Upon receipt of the notice, the parties shall enter into collective bargaining.

(C) In the event the parties are unable to reach an agreement, they may submit, at any time prior to forty-five days before the expiration date of the collective bargaining agreement, the issues in dispute to any mutually agreed upon dispute settlement procedure which supersedes the procedures contained in this section.

(1) The procedures may include:

(a) Conventional arbitration of all unsettled issues;

(b) Arbitration confined to a choice between the last offer of each party to the agreement as a single package;

(c) Arbitration confined to a choice of the last offer of each party to the agreement on each issue submitted;

(d) The procedures described in division (C)(1)(a), (b), or (c) of this section and including among the choices for the arbitrator, the recommendations of the fact finder, if there are recommendations, either as a single package or on each issue submitted;

(e) Settlement by a citizens' conciliation council composed of three residents within the jurisdiction of the public employer. The public employer shall select one member and the exclusive representative shall select one member. The two members selected shall select the third member who shall chair the council. If the two members cannot agree upon a third member within five days after their appointments, the board shall appoint the third member. Once appointed, the council shall make a final settlement of the issues submitted to it pursuant to division (G) of this section.

(f) Any other dispute settlement procedure mutually agreed to by the parties.

(2) If, fifty days before the expiration date of the collective bargaining agreement, the parties are unable to reach an agreement, any party may request the state employment relations board to intervene. The request shall set forth the names and addresses of the parties, the issues involved, and, if applicable, the expiration date of any agreement.

The board shall intervene and investigate the dispute to determine whether the parties have engaged in collective bargaining.

If an impasse exists or forty-five days before the expiration date of the collective bargaining agreement if one exists, the board shall appoint a

mediator to assist the parties in the collective bargaining process.

(3) Any time after the appointment of a mediator, either party may request the appointment of a fact-finding panel. Within fifteen days after receipt of a request for a fact-finding panel, the board shall appoint a fact-finding panel of not more than three members who have been selected by the parties in accordance with rules established by the board, from a list of qualified persons maintained by the board.

(a) The fact-finding panel shall, in accordance with rules and procedures established by the board that include the regulation of costs and expenses of fact-finding, gather facts and make recommendations for the resolution of the matter. The board shall by its rules require each party to specify in writing the unresolved issues and its position on each issue to the fact-finding panel. The fact-finding panel shall make final recommendations as to all the unresolved issues.

(b) The board may continue mediation, order the parties to engage in collective bargaining until the expiration date of the agreement, or both.

(4) The following guidelines apply to fact-finding:

(a) The fact-finding panel may establish times and place of hearings which shall be, where feasible, in the jurisdiction of the state.

(b) The fact-finding panel shall conduct the hearing pursuant to rules established by the board.

(c) Upon request of the fact-finding panel, the board shall issue subpoenas for hearings conducted by the panel.

(d) The fact-finding panel may administer oaths.

(e) The board shall prescribe guidelines for the fact-finding panel to follow in making findings. In making its recommendations, the fact-finding panel shall take into consideration the factors listed in divisions (G)(7)(a) to (f) of this section.

(f) The fact-finding panel may attempt mediation at any time during the fact-finding process. From the time of appointment until the fact-finding panel makes a final recommendation, it shall not discuss the recommendations for settlement of the dispute with parties other than the direct parties to the dispute.

(5) The fact-finding panel, acting by a majority of its members, shall transmit its findings of fact and recommendations on the unresolved issues to the public employer and employee organization involved and to the board no later than fourteen days after the

appointment of the fact-finding panel, unless the parties mutually agree to an extension. The parties shall share the cost of the fact-finding panel in a manner agreed to by the parties.

(6)

(a) Not later than seven days after the findings and recommendations are sent, the legislative body, by a three-fifths vote of its total membership, and in the case of the public employee organization, the membership, by a three-fifths vote of the total membership, may reject the recommendations; if neither rejects the recommendations, the recommendations shall be deemed agreed upon as the final resolution of the issues submitted and a collective bargaining agreement shall be executed between the parties, including the fact-finding panel's recommendations, except as otherwise modified by the parties by mutual agreement. If either the legislative body or the public employee organization rejects the recommendations, the board shall publicize the findings of fact and recommendations of the fact-finding panel. The board shall adopt rules governing the procedures and methods for public employees to vote on the recommendations of the fact-finding panel.

(b) As used in division (C)(6)(a) of this section, "legislative body" means the controlling board when the state or any of its agencies, authorities, commissions, boards, or other

branch of public employment is party to the fact-finding process.

(D) If the parties are unable to reach agreement within seven days after the publication of findings and recommendations from the fact-finding panel or the collective bargaining agreement, if one exists, has expired, then the:

(1) Public employees, who are members of a police or fire department, members of the state highway patrol, deputy sheriffs, dispatchers employed by a police, fire, or sheriff's department or the state highway patrol or civilian dispatchers employed by a public employer other than a police, fire, or sheriff's department to dispatch police, fire, sheriff's department, or emergency medical or rescue personnel and units, an exclusive nurse's unit, employees of the state school for the deaf or the state school for the blind, employees of any public employee retirement system, corrections officers, guards at penal or mental institutions, special police officers appointed in accordance with sections 5119.08 and 5123.13 of the Revised Code, psychiatric attendants employed at mental health forensic facilities, youth leaders employed at juvenile correctional facilities, or members of a law enforcement security force that is established and maintained exclusively by a board of county commissioners and whose members are employed by that board, shall submit the matter to a final offer settlement procedure pur-

suant to a board order issued forthwith to the parties to settle by a conciliator selected by the parties. The parties shall request from the board a list of five qualified conciliators and the parties shall select a single conciliator from the list by alternate striking of names. If the parties cannot agree upon a conciliator within five days after the board order, the board shall on the sixth day after its order appoint a conciliator from a list of qualified persons maintained by the board or shall request a list of qualified conciliators from the American arbitration association and appoint therefrom.

(2) Public employees other than those listed in division (D)(1) of this section have the right to strike under Chapter 4117. of the Revised Code provided that the employee organization representing the employees has given a ten-day prior written notice of an intent to strike to the public employer and to the board, and further provided that the strike is for full, consecutive work days and the beginning date of the strike is at least ten work days after the ending date of the most recent prior strike involving the same bargaining unit; however, the board, at its discretion, may attempt mediation at any time.

(E) Nothing in this section shall be construed to prohibit the parties, at any time, from voluntarily agreeing to submit any or all of the issues in dispute to any other alternative dispute settlement proce-

dure. An agreement or statutory requirement to arbitrate or to settle a dispute pursuant to a final offer settlement procedure and the award issued in accordance with the agreement or statutory requirement is enforceable in the same manner as specified in division (B) of section 4117.09 of the Revised Code.

(F) Nothing in this section shall be construed to prohibit a party from seeking enforcement of a collective bargaining agreement or a conciliator's award as specified in division (B) of section 4117.09 of the Revised Code.

(G) The following guidelines apply to final offer settlement proceedings under division (D)(1) of this section:

(1) The parties shall submit to final offer settlement those issues that are subject to collective bargaining as provided by section 4117.08 of the Revised Code and upon which the parties have not reached agreement and other matters mutually agreed to by the public employer and the exclusive representative; except that the conciliator may attempt mediation at any time.

(2) The conciliator shall hold a hearing within thirty days of the board's order to submit to a final offer settlement procedure, or as soon thereafter as is practicable.

(3) The conciliator shall conduct the hearing pursuant to rules developed by the board. The conciliator shall establish the hearing time and place, but it shall be, where feasible, within the

jurisdiction of the state. Not later than five calendar days before the hearing, each of the parties shall submit to the conciliator, to the opposing party, and to the board, a written report summarizing the unresolved issues, the party's final offer as to the issues, and the rationale for that position.

(4) Upon the request by the conciliator, the board shall issue subpoenas for the hearing.

(5) The conciliator may administer oaths.

(6) The conciliator shall hear testimony from the parties and provide for a written record to be made of all statements at the hearing. The board shall submit for inclusion in the record and for consideration by the conciliator the written report and recommendation of the fact-finders.

(7) After hearing, the conciliator shall resolve the dispute between the parties by selecting, on an issue-by-issue basis, from between each of the party's final settlement offers, taking into consideration the following:

(a) Past collectively bargained agreements, if any, between the parties;

(b) Comparison of the issues submitted to final offer settlement relative to the employees in the bargaining unit involved with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;

(c) The interests and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service;

(d) The lawful authority of the public employer;

(e) The stipulations of the parties;

(f) Such other factors, not confined to those listed in this section, which are normally or traditionally taken into consideration in the determination of the issues submitted to final offer settlement through voluntary collective bargaining, mediation, fact-finding, or other impasse resolution procedures in the public service or in private employment.

(8) Final offer settlement awards made under Chapter 4117. of the Revised Code are subject to Chapter 2711. of the Revised Code.

(9) If more than one conciliator is used, the determination must be by majority vote.

(10) The conciliator shall make written findings of fact and promulgate a written opinion and order upon the issues presented to the conciliator, and upon the record made before the conciliator and shall mail or otherwise deliver a true copy thereof to the parties and the board.

(11) Increases in rates of compensation and other matters with cost implications awarded by

the conciliator may be effective only at the start of the fiscal year next commencing after the date of the final offer settlement award; provided that if a new fiscal year has commenced since the issuance of the board order to submit to a final offer settlement procedure, the awarded increases may be retroactive to the commencement of the new fiscal year. The parties may, at any time, amend or modify a conciliator's award or order by mutual agreement.

(12) The parties shall bear equally the cost of the final offer settlement procedure.

(13) Conciliators appointed pursuant to this section shall be residents of the state.

(H) All final offer settlement awards and orders of the conciliator made pursuant to Chapter 4117. of the Revised Code are subject to review by the court of common pleas having jurisdiction over the public employer as provided in Chapter 2711. of the Revised Code. If the public employer is located in more than one court of common pleas district, the court of common pleas in which the principal office of the chief executive is located has jurisdiction.

(I) The issuance of a final offer settlement award constitutes a binding mandate to the public employer and the exclusive representative to take whatever actions are necessary to implement the award.

Agreement Between The Marietta Board of Education and the Marietta Education Association (2018) [Excerpts]

Section 1.01

The Marietta Board of Education, hereinafter referred to as the "Board," recognizes Marietta Education Association, OEA/NEA, hereinafter referred to as the "Association," as the sole and exclusive bargaining agent for the members of the bargaining unit. The bargaining unit shall consist of all full and regular part-time certificated personnel employed under contract, including classroom teachers, special education teachers, psychologists, guidance counselors, librarians, school nurses, head teacher(s), attendance officer, resource teachers, and full-time substitutes employed sixty-one (61) or more consecutive days in the same position in a school year. The Superintendent, principals, assistant principals, other administrators employed under Section 3319.02 of the Ohio Revised Code who spend more than 50% of their time in that capacity, athletic director, casual substitutes, tutors, interns, treasurer, non-certificated personnel and any other confidential, supervisory and management-level employees as defined in Section 4117.01 of the Ohio Revised Code are excluded from the bargaining unit.

Section 2.05

The Board and Association agree to negotiate concerning wages, hours, terms and conditions of employment and the continuation, modification, or deletion of an existing provision of this Agreement.

Section 3.01

Except as expressly agreed otherwise in this collective bargaining agreement, the Board hereby retains and reserves all rights and responsibilities conferred upon and invested in it and/or the Superintendent by the laws and Constitution of the State of Ohio, and of the United States to: determine matters of inherent managerial policy which include, but are not limited to areas of discretion or policy as the functions and programs of the Board, standards of services, its overall budget, utilization of technology and organization structure; direct, supervise evaluate or hire employees; maintain and improve the efficiency and effectiveness of school operations; determine the overall methods, process, means or personnel by which school operations are to be conducted; suspend, discipline, demote or discharge for just cause or lay off, transfer, assign, schedule, promote or retain employees; determine the adequacy of the work force; determine the overall mission of the school district as an educational unit; effectively manage the work force; take actions to carry out the overall mission of the school district. However, all matters pertaining to wages, hours, terms and conditions of employment, and the continuation, modification or deletion of an existing provision of this Agreement are subject to

collective bargaining between the Board and Association.

Article V—Grievance Procedure

Section 5.01 Definitions

5.011 "Administrator" shall mean a person employed by the Board under Section 3319.02 of the Ohio Revised Code who is excluded from the bargaining unit as identified in Article I.

5.012 "Days" shall mean scheduled bargaining unit member work days exclusive of Saturdays, Sundays, vacation periods and holidays during the regular school year. During a summer recess, "days" shall mean weekdays exclusive of Saturdays, Sundays and holidays.

5.013 "Grievance" shall mean a claim that there has been a violation, misinterpretation or misapplication of this Agreement.

5.014 "Grievant" shall mean member(s) of the bargaining unit initiating a grievance. The Association may process grievances signed by more than one bargaining unit member as group grievances. Final disposition of such group grievances shall apply to all bargaining unit members similarly affected, even if such persons did not sign the grievances.

5.015 "Immediate Supervisor" shall mean that administrator having immediate supervisory responsibility over the grievant. In the case of a traveling teacher, immediate supervisor shall mean

the principal of the building in which the grievance arose.

5.016 "Appropriate Supervisor" will be the lowest level supervisor with the authority to resolve the grievance.

5.02 Rights of the Grievant and the Association

5.021 The Board shall provide due process to all bargaining unit members in accordance with the Grievance Procedure of this Agreement

5.022 A grievant may at his/her sole discretion be represented by the Association at each step of the grievance procedure.

5.023 The purpose of these procedures is to secure, at the lowest level administrator having authority to resolve the grievance, equitable solutions to grievances.

5.024 Grievances shall be processed in accordance with the time lines set forth.

5.025 A bargaining unit member may have grievances adjusted without intervention of the Association, as long as the adjustment is consistent with the terms of this Agreement. The Association shall be permitted to have a representative present at the adjustment of a grievance and shall receive a written copy of the decision whenever Association representation was not required.

5.026 No bargaining unit member can be represented by any employee organization other than

the Association in any grievance initiated under this contract.

5.027 The grievant may withdraw his/her grievance at any level, but that grievance may not be refiled thereafter.

5.028 No records, documents or communications concerning a grievance shall be provided to the public without written notice to the grievant of the requesting person's name, if known, documents provided and the date of the request. All parties agree that grievances will be kept confidential to the extent permitted by state law.

5.029 Any hearing required by this procedure may be waived as to a specific grievance by mutual written agreement of the parties. The grievant shall be given twenty-four (24) hours notice of hearings.

5.030 The Board and Association agree that the grievance procedure shall be the sole and exclusive remedy for the Association and bargaining unit members concerning any alleged violation of any provision of this Agreement, including non-renewal of probationary and auxiliary service contracts.

5.03 Time Limits

5.031 All grievances shall be submitted on authorized grievance forms only. Such forms for processing grievances shall be made available through the administrative offices in each building, the central administration office, and designated officials of the Association including Building

Representatives and members of the Association Grievance Committee.

5.032 The number of days indicated at each step in the procedure shall be the maximum unless mutually extended in writing by the parties.

5.033 If the grievant does not present a grievance at step one within fifteen (15) days of the act or condition on which the grievance is based or does not advance the grievance to the next step of the procedure within the specified time limit, the grievance shall be considered waived.

5.034 An administrator's failure at any step of this procedure to communicate his/her written decision on a grievance within the specified time limit entitles the grievant to appeal to the next level.

5.035 All notices of hearings, dispositions of grievances, written grievances and appeals shall be in writing and hand delivered or mailed by certified mail, return receipt requested.

5.036 Grievance hearings at all levels shall be at a time and place which will afford a reasonable opportunity for all persons involved to attend, but not during regularly scheduled school hours whenever possible. If a grievance is processed during the grievant's summer recess, the hearing shall take place between 9:00 a.m. and 4:00 p.m.

5.037 When a Step III hearing cannot be scheduled outside the regular work day, adequate released time with full pay and a substitute shall be provided for the grievant, the Association

representative chosen by the grievant to represent him/her in the hearings, and a maximum of two (2) witnesses who must be present to give testimony. Other bargaining unit witnesses shall be permitted to be released without pay for the time needed to testify. The Association shall give the Board at least five (5) days advance notice of those bargaining unit members who are requesting to be released. Witnesses shall only be released if qualified substitutes are available.

5.04 Grievance Procedure

5.041 Informal Procedure: A member of the bargaining unit with a grievance shall first discuss the grievance with his/her immediate supervisor to attempt to resolve the matter informally.

5.042 Formal Procedure:

Step I. If the grievance is not resolved within five (5) days of the informal step, it may be pursued further by submitting a completed Grievance Report Form, Step I, in triplicate. Copies of this form shall be submitted by the grievant to the appropriate supervisor.

Within five (5) days of the receipt of the Grievance Report Form, the appropriate supervisor shall meet with the grievant. The appropriate supervisor shall write a disposition of the grievance within five (5) days after such meeting by completing Step I of the grievance Report Form and returning a copy to the grievant and the Superintendent.

Step II. If the grievant is not satisfied with the disposition of the grievance in Step I, the grievant shall, within five (5) days of such disposition, complete Grievance Report Form, Step II, and submit same to the Superintendent or his/her designee, who shall within five (5) days meet with the grievant. In the event that the appropriate supervisor in Step I is the Superintendent, and the grievant is not satisfied with the disposition of the grievance in Step I, the grievance shall proceed to Step III. Within five (5) days of this meeting, the Superintendent or his/her designee shall write his/her disposition of the grievance, by completing his/her portion of the form, forwarding a copy to the grievant, the Association and the immediate supervisor.

Step III. If both the Association and grievant are not satisfied with the disposition of the grievance at Step II, the grievant may request a hearing before an arbitrator by completing Grievance Report Form, Step III. The grievant's request for arbitration shall be made within five (5) days to AAA following either the receipt of the disposition of grievance or the lapse of twenty (20) days following the grievant's submission of the Grievance Report Form to the Superintendent under Step II, whichever occurs first. The grievant's request for arbitration shall be sent by certified mail with return receipt requested to the Superintendent. The grievant or his/her designated representative shall petition the American Arbitration Association (AAA) to provide both parties with a list of nine (9) names from which an arbitrator will be selected in accordance with the rules of the

AAA. If an arbitrator is not selected from the first list, the parties will obtain additional lists from the AAA until an arbitrator is selected.

Once the arbitrator has been selected, he/she shall conduct a hearing on the grievance in accordance with the rules and regulations of the AAA. The arbitrator shall hold the necessary hearing promptly and issue the decision within such time as may be agreed upon. The decision shall be in writing and a copy sent to all parties present at the hearing. The decision of the arbitrator shall be final and binding on the Board, the Association and the grievant.

The arbitrator shall not have the authority to add to, subtract from, modify, change or alter any of the provisions of this collective bargaining contract, nor add to, detract from or modify the language therein in arriving at his/her decision concerning any issue presented that is proper within the limitations expressed herein. The arbitrator shall confine himself/herself to the issue(s) submitted for arbitration and shall have no authority to decide any other issue(s) not so submitted to him/her or to submit observations or declarations are not directly essential in reaching his/her decision.

The arbitrator shall in no way interfere with applicable law, and rules and regulations having the force and effect of law, nor render a decision which conflicts with Federal or State law.

The costs of the arbitrator shall be borne equally. The arbitrator's decision, if within the limitations of

his/her authority, may only be appealed in accordance with Chapter 2711 of the Ohio Revised Code.

Section 12.01

The following committees shall be appointed by the Association and the

Superintendent as needed:

12.011: Sabbatical Committee

12.012: Student Growth Measures Committee

12.013: Calendar Committee

12.014: Student Learning Objectives (SLO) Review Team

12.015: Teacher Evaluation Handbook Committee

12.016: Other Committees shall be appointed in the same manner as needed.

Section 14.01

The Board is required by law to adopt and implement a standards-based teacher evaluation policy which conforms to the framework for the evaluation of teachers developed by the State Board of Education. The evaluation of teachers is governed by this board policy. Ohio law states that these legal requirements are not subject to collective bargaining; however, the Board must consult with teachers prior to adopting this policy. (Ohio Revised Code Section 3319.111.)

The provisions of this Agreement relating to bargaining unit member evaluation shall be subject to the grievance procedure, except the content of the evaluation. Members of the bargaining unit to whom ORC 3319.111 applies shall be evaluated in compliance with the laws and the standards-based Board policy for teacher evaluation, which shall be based upon the Ohio Department of Education's Ohio Teacher Evaluation System (OTES), including the prescribed forms, as may be amended from time to time in consultation with the OTES Task Force. Procedures, policies and forms included in the Teacher Evaluation Handbook are an extension of this contract and are to be followed accordingly.

Section 14.061

l. The committee shall be comprised of 5 association members appointed by the association president, and 5 administrators representing all levels, appointed by the superintendent, and the superintendent or his/her designee.

2. Committee members shall be representative of elementary, middle school, secondary, and specialty areas (e.g., music, art, special education) and programs (e.g., career tech) within the district.

Section 14.062

1. The committee shall be responsible for jointly developing, reviewing, and recommending the policy, procedures, and processes, including the evaluation instrument, for teacher evaluation.

2. The board and the association shall bargain during regular contract negotiations all elements of the teacher evaluation procedure that are not expressly prohibited subjects of bargaining, and these negotiations shall be satisfactorily completed prior to the implementation of the evaluation procedure or prior to any modification or amendment of same. Any agreement that is achieved through said negotiations shall be subject to ratification by both parties. This provision shall not prohibit the Board from implementing any aspect of the evaluation procedure required by law.

3. If either party wishes to consider any change or revision to the evaluation procedure or process, including the evaluation instrument, during the term of this agreement, it shall discuss the matter with the committee. If the discussion results in a recommendation by the committee to change or revise the evaluation procedure or process, including the evaluation instrument or Evaluation Handbook, during the term of the agreement, then said recommendation shall be subject to ratification by the board and the association. The current version of the Evaluation Handbook will be implemented and modified as needed each year.

4. In the event of legislative action by the Ohio General Assembly that impacts in any way on this topic, the parties to this agreement shall discuss this topic to determine whether adjustments are appropriate during the term of this agreement. The impli-

cations of changes made to the Ohio Revised Code regarding evaluation may be bargained without opening the entire negotiated agreement.

Section 14.071

Committee Composition

1. The committee shall be comprised of 5 association members appointed by the association president, and 5 administrators representing all levels, appointed by the superintendent, and the superintendent or his/her designee.

2. The members of the committee shall be representative of the elementary school, the middle school, the secondary school, and specialty areas within the district.

The terms of association members on the committee shall be for a period of no less than two (2) years unless a member leaves the district, retires, requests that the association removes him/her from the committee, is no longer able to serve due to unforeseen circumstances, or is removed by action of the association.

Section 23.02

The Board agrees and understands that each member of the bargaining unit shall have the opportunity to be accompanied and/or represented by an association-approved representative of his/her choice at any reprimand meeting. The bargaining unit member shall be granted two (2) workdays to secure the representative of his/her choice.

Section 25.02

Association Notification

25.021 When the Superintendent intends to recommend a reduction in force to the Board of Education, he/she shall notify the Association thirty (30) days in advance of the Board meeting at which such recommendation is made.

The notification shall include the reasons(s) for the RIF; the number of position(s) within the area(s) of certification affected; the individuals affected, if known; the date of the Board's meeting at which the RIF will be considered, and the effective date of the RIF.

25.022 Superintendent and/or designee shall meet and review the reasons for the proposed RIF and its impact if requested by the Association within ten (10) days of the receipt of the notification. Within five (5) days of the request by the Association, a meeting shall be set between the Board's representatives and the Association's representatives, unless such a date is mutually extended.

25.023 If a bargaining unit member is threatened by layoff due to a RIF, and if said bargaining unit member does hold another area of certification, that bargaining unit member may elect to displace a member holding the lowest position on the district seniority list for which the bargaining unit member is certificated provided the employees have comparable evaluations.

Section 27.01

There will be no reprisals taken against any bargaining unit member by reason of his/her membership or non-membership in the Association. Furthermore, the Board authorizes the Marietta Education Association:

27.011 To use the facilities of any building for meetings and Association business, without fee, upon notification to the administrator in charge of such building. Permission to use facilities shall be given as long as it does not interfere with any previously authorized activity in said building.

27.012 To use the inter-school mail system to distribute Association bulletins, newsletters or other communications of a general nature.

27.013 To use a designated bulletin board in each building for dissemination of information to members.

27.014 To allow representatives to call meetings of Association members within the building so long as they do not conflict with previously scheduled staff responsibilities.

27.015 Representatives and officers of the Association shall be permitted to transact Association business on school property in non-teaching areas at non-teaching times.

27.016 None of the rights set forth above shall be exercised in a way as to interfere with teaching duties.

27.017 Each building will have a faculty workroom/lounge exclusive of students/children. Bargaining unit members shall have the authority to see that this clause is followed.