No. 20-1019

In The Supreme Court of the United States

♦

JADE THOMPSON,

Petitioner,

v.

MARIETTA EDUCATION ASSOCIATION, ET AL.,

Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For the Sixth Circuit

♦

BRIEF IN OPPOSITION FOR RESPONDENT MARIETTA CITY SCHOOL DISTRICT BOARD OF EDUCATION

♦

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QUESTIONS PRESENTED

Petitioner lists the following as the questions presented by this matter:

1. Whether it violates the First Amendment to designate a labor union to represent and speak for public sector employees who object to its advocacy on their behalf.

2. Whether *Knight* should be overruled.

However, Petitioner's above "questions presented" fail to distinguish between a private-sector union governed by Federal law under the National Labor Relations Act (NLRA) and a public sector union governed under applicable state law. Further, by stating that a union speaks "for public sector employees" instead of "on behalf of the bargaining unit," Petitioner's questions presented misconstrue the reach of Ohio's collective bargaining law.

Therefore, the Board believes the proper question presented is:

Whether a public sector labor union's status as the exclusive bargaining representative for a bargaining unit under state law violates the First Amendment rights of non-union members of the bargaining unit who are not required to join the union but who also object to the public sector union's advocacy on behalf of the bargaining unit?

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STATEMENT OF THE CASE

Anticipating the decision in *Janus v. Am. Fed'n of State, Cnty. and Mun. Emps., Council 31*, 138 S.Ct. 2448 (2018), Petitioner Jade Thompson ("Petitioner") filed her Complaint the same day that this Court released its opinion in *Janus*. (Complaint, Pet. App. 73) Petitioner's Complaint set forth three Counts, asserting claims against the union for her bargaining unit, the Marietta Education Association ("Union"), and against the Marietta City School District Board of Education ("Board"). *Id.* In three Counts, Petitioner alleged in the Complaint that: (1) exacting compulsory fees to support collective bargaining violates the First Amendment, (Pet. App. 87); (2) requiring an individual to opt out from exactions to subsidize a labor union's speech and petitioning violates the First Amendment, (Pet. App. 88); and (3) designating a union as employees' "Exclusive Representative" violates the First Amendment, (Pet. App. 89).

Based upon this Court's decision in *Janus*, the parties filed a joint motion to dismiss Counts I and II of Petitioner's Complaint because the parties agreed that those counts were rendered moot under *Janus*. The district court granted that motion. (Order granting Jt. Mot. to Dis., R.30, PAGEID# 342).

Petitioner also sought a preliminary injunction related to what she believed was Ohio's collective bargaining statute's effect on compelling her speech and association. After holding oral argument, the district court denied Petitioner's preliminary-injunction motion, (Pet. App. 43-68). Principally, the district court concluded that Petitioner could not show a likelihood of success on the merits because

Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271 (1984), foreclosed her compelled-association and -speech claims. *Id.*

The parties then stipulated to a set of undisputed facts. (Stip. Facts, Pet. App. 37-42) That stipulation served as the basis of the parties' cross-motions for summary judgment. The district court granted the motions for summary judgment filed by the Union and the Board and denied Petitioner's motion. (Opinion and Order, Pet. App. 14-34) In rendering its decision, the district court found that Petitioner had affirmatively waived her exclusive representation claim. (Pet. App. 20-24) The district court further found that, even had Petitioner not waived her claims, this Court's holding in *Knight* foreclosed them nonetheless. (Pet. App. 24)

Petitioner appealed the district court's decision to the Sixth Circuit Court of Appeals, citing that Ohio's statutory system of exclusive representation: (1) violates her rights to be free from compelled speech and association; and (2) that it violates her right to meaningfully communicate with the government. (Pet. App. 1-11) The Sixth Circuit affirmed the district court's decision, finding that *Knight* foreclosed both of Petitioner's arguments. *Id.* Citing decisions from the First, Seventh, Eighth, and Ninth Circuits, the Sixth Circuit acknowledged that "every other circuit to address the issue has agreed" that *Knight* controls. *Id.*

With respect to Petitioner's second argument on appeal to the Sixth Circuit – namely, that Ohio's statutory system of exclusive representation violates her right to meaningfully communicate with the government - the Sixth Circuit glossed over the district court's finding that Petitioner had waived this part of her claim. The Sixth

Circuit relegated the district court's finding to a footnote. *Id*. Nonetheless, the Sixth Circuit concluded that *Knight,* in tandem with another decision of this Court, *Smith v. Arkansas State Highway Employees, Local 1315*, 442 U.S. 463 (1979), foreclosed this claim. *Id*. Specifically, the Sixth Circuit stated that, under *Smith* there is no "affirmative obligation on the government to listen, to respond[,] or . . . [to] bargain." *Id, citing Smith at* 465. The Sixth Circuit concluded that, "since the government has no obligation to bargain with [Petitioner], it is difficult to see how the government's decision to bargain with someone else violates her rights." *Id*.

As has been the case in the district court and Sixth Circuit, the Board takes no substantive position on whether Ohio's statutory scheme for public employee collective bargaining violates First Amendment principles made applicable to the states by the Fourteenth Amendment. Instead, for its part, the Board has simply complied with Ohio's collective bargaining law. Through this brief, the Board will provide clarification of the facts, a review of the case proceedings below and an overview of the relevant law. Ultimately, the Board does not believe this petition should be granted for the reasons set forth herein.

REASONS FOR DENYING THE PETITION

A writ of certiorari is granted "only for compelling reasons." *See* Sup. Ct. R. 10. Rule 10 further sets forth what this Court considers when determining whether to grant such a writ. As applied to this petition, those considerations include when a U.S. court of appeals: (a) has entered a decision in conflict with the decision of another U.S. court of appeals on the same important matter; (b) has decided an important

question of federal law that has not been, but should be, settled by this Court; or (c) has decided an important federal question in a way that conflicts with relevant decisions of this Court. *Id.*

As set forth below, this petition should be denied because the Petitioner has not set forth a compelling reason to grant certiorari as specified by Rule 10 and also because this case is a poor vehicle to decide such an issue.

I. The Sixth Circuit's Decision Does Not Conflict with a Decision of Any Other Circuit.

As the Sixth Circuit acknowledged in its decision, "every other circuit to address the issue has agreed" that *Knight* controls this matter. (Pet. App. 1-11) Specifically, the First, Second, Seventh, Eighth, and Ninth Circuits have all concluded, consistent with *Knight*, that exclusive representation does not violate the First Amendment rights of non-union members. *D'Agostino v. Baker*, 812 F.3d 240 (1st Cir. 2016), *cert. denied*, 136 S. Ct. 2473 (2016); *Jarvis v. Cuomo*, 660 F. App'x 72 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1204 (2017); *Hill v. Serv. Emps. Int'l Union*, 850 F.3d 861 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 446 (2017); *Uradnik v. Inter Faculty Org. Association et al.*, Civ. No. 18-1895 (8th Cir. 2018), *cert denied*, 139 S.Ct. 1618 (2019); *Mentele v. Inslee*, 916 F.3d 783 (9th Cir. 2019). Further, this Court has already considered and denied petitions for certiorari in *D'Agostino*, *Jarvis*, *Hill*, and *Uradnik,* which were all similar to this petition. *Id.*

While Petitioner claims that this Court's decision in *Janus* changed the landscape in this area, several of the above decisions were decided after *Janus* and expressly reject Petitioner's position. *Mentele*, 916 F.3d at 789 (stating that *Janus*

does not "revise the analytical underpinnings of *Knight* or otherwise reset the longstanding rules governing the permissibility of mandatory exclusive representation."); *See also Uradnik, Supra.*

Because all other Circuits have rejected Petitioner's arguments, there is no conflict between the Circuits for this Court to resolve. *See* Sup. Ct. R. 10(a).

II. This Court Has Already Settled the Question Presented.

As all other Circuits have consistently found, in *Knight*, this Court already determined that exclusive representation does not violate the First Amendment rights of non-union members. *See Knight, Supra.*

In *Knight*, this Court explained that exclusive representation does not infringe upon speech and associational rights because "[t]he state has in no way restrained [the dissenters'] freedom to speak on any education-related issue or their freedom to associate or not to associate with whom they please, including the exclusive representative." *Id.* at 288. This Court emphasized that non-members were "free to form whatever advocacy groups they like," and they "are not required to become members of [the union]." *Id.* at 289.

The same analysis applies here. As in *Knight*, Petitioner's freedom *not* to associate is unaffected. Petitioner is not required to join a union under Ohio law and is free to associate with any group or represent herself in advocating any education-related position. *See* O.R.C. 4117.03(A)(1) (stating public employees have the right to "refrain from forming joining, assisting, or participating in" a union); *Knight*, 465 U.S. at 289 ("Appellees are free to form whatever advocacy groups they like.").

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Petitioner remains free to speak to relevant decision-makers of the Board on any subject and the Board has instituted several policies to ensure that employees and members of the public maintain that right. For example, the Board's "Community Involvement in Decision Making" policy specifies that "all citizens may express ideas, concerns and judgments about the schools to the administration, to the staff, to any appointed advisory bodies and ultimately to the Board." (Hampton Declr. ¶5, Exh. A, R.56-1, PAGEID# 587, 590). Another Board policy addressed "Staff Involvement in Decision Making." That policy says that "[m]orale is enhanced when employees are assured that their voices are heard by those in positions of administrative authority. All employees have the opportunity to bring their ideas and/or concerns to the Board . . ." (Hampton Declr. ¶6, Exh. C R.56-1, PAGEID# 587, 592 (formatting altered)). In addition, the Board's "Public Participation at Board Meetings" policy ensures that "[a]ll meetings of the Board and Board-appointed committees are open to the public…Each person addressing the Board may have up to three minutes to speak. Persons desiring more time should follow the procedure of the Board to be placed on the regular agenda." (Hampton Declr. ¶7, Exh. C, R.56-1, PAGEID# 587, 594). Lastly, the Board has a policy addressing "Board-Staff Communications." That policy says that "Staff members should utilize the Superintendent to communicate with the Board or its subcommittees." (Hampton Declr. ¶8, Exh. D, R.56-1, PAGEID# 587, 596).

Furthermore, as in *Knight*, the Board fully understands that the Union's positions do not represent Petitioner's personal views, but rather the collective

viewpoint of the bargaining unit as a whole. (Hampton Declr. ¶11, Exh. D, R.56-1, PAGEID# 586); *Knight*, 465 U.S. at 276 (noting that the State considered the views presented by the union to be the official collective position and recognized that not every instructor agrees with the official faculty view on every policy question); *see also D'Agostino*, 812 F.3d at 244 ("[W]hen 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. . . .").

Accordingly, certiorari is unwarranted here because this Court already settled whether exclusive representation violates the First Amendment rights of non-members. *See* Sup. Ct. R. 10(c).

III. The Sixth Circuit's Decision Does Not Conflict with Any Decisions of This Court.

Contrary to Petitioner's assertion, the lower court's conclusion that *Knight* controls this case does not conflict with *Janus* or any other decision of this Court. *Janus* dealt with whether a state may compel non-union members to pay a fair-share fee to a union. *Janus* simply did not deal with the issue presented and decided in *Knight*. *See Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018). ("[T]he constitutionality of exclusive representation standing alone was not at issue" in *Janus*); *See also Mentele*, 916 F.3d at 789 (constitutionality of exclusive

representation "was not presented or argued" in *Janus*). Further, the *Janus* opinion does not even mention *Knight*.

Also, *Janus* itself distinguished exclusive representation from the issue of fair-share fees. *Janus*, 138 S. Ct. at 2465 (it is "simply not true" that "designation of a union as the exclusive representative of all the employees in a unit and the exaction of agency fees are inextricably linked"). With respect to exclusive representation, this Court stated in *Janus* that, "[i]t is . . . not disputed that the State may require that a union serve as exclusive bargaining agent for its employees" and "States can keep their labor-relations systems exactly as they are" with the exception of fair-share fees. *Janus*, 138 S. Ct. at 2478, 2485 n.27; *see also id.* at 2471 n.7 ("[W]e are not in any way questioning the foundations of modern labor law.").

As outlined above, the *Janus* opinion is wholly consistent with *Knight*. *See also Mentele*, 916 F.3d at 789 (*Janus* "expressly affirm[ed] the propriety of mandatory union representation"); *Janus*, 138 S. Ct. at 2478 (stating that impingement caused by exclusive representation "would not be tolerated in *other* contexts" (emphasis added)). States simply cannot "go further still and require" non-members to pay fair-share fees. *Janus*, 138 S. Ct. at 2478. Such fees cross the line drawn by this Court, whereas exclusive representation does not. *Id.*

Because the Sixth Circuit's decision in this case is consistent with this Court's precedent, including *Janus*, there is no conflict with a decision of this Court to resolve. *See* Sup. Ct. R. 10(c).

IV. This Case Is a Poor Vehicle to Consider This Issue.

This appeal is not, as Petitioner contends, an "ideal vehicle" for this Court to decide the constitutionality of exclusive representation.

a. The Sixth Circuit's Decision Did Not Rely Solely on *Knight*.

First, contrary to Petitioner's allegation, the Sixth Circuit did not make its decision based solely on *Knight*. The Sixth Circuit also hinged its decision on a second decision of this Court – *Smith v. Arkansas State Highway Employees, Local 1315*, 442 U.S. 463 (1979). (Pet. App. 1-11) The Sixth Circuit stated that both *Knight* and *Smith* foreclosed Petitioner's First Amendment claim. *Id*. Specifically, the Sixth Circuit stated that, under *Smith* there is no "affirmative obligation on the government to listen, to respond[,] or . . . [to] bargain." *Id, citing Smith at* 465. The Sixth Circuit concluded that, "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." *Id*.

As such, overturning *Knight* as requested by Petitioner would not change the Sixth Circuit's opinion on this particular matter since it also relied on *Smith*, a case that Petitioner does not seek to overturn through this Petition.

b. This Case Calls Into Question Whether Petitioner Waived All or Part of Her Claim.

The Sixth Circuit relegated to a footnote the district court's conclusion that Petitioner's conduct during the district court proceedings amounted to a waiver of her claim. This defensive argument was fully briefed by the Board in the district court and the district court spent time analyzing this evidence before concluding that

Petitioner had, in fact, waived the exclusive representation aspect of her case. (Pet. App. 14-34)

"[W]aiver is the intentional relinquishment or abandonment of a known right." *Wheatt v. City of East Cleveland*, 741 Fed.App'x 302, 306 (6th Cir. 2018) (internal citation omitted). Reviewing what Petitioner's Complaint set forth as her claim and what she affirmatively disclaimed at the district court level shows that waiver has occurred, as recognized by the district court.

In Count III of her Complaint (the only part of her Complaint left after voluntarily dismissing Counts I and II as moot), Petitioner inextricably bound every part of her First Amendment claim with the Union's designated role under Ohio's statutes as the bargaining unit's exclusive representative. She further asserted that this designation compels her "to associate with the Union," attributes to her the Union's "speech and petitioning," and restricts her "speech and petitioning." Complaint, App. 73. She prayed that the district court declare that "Ohio's exclusive-representation law," specifically, Ohio Rev. Code § 4117.04–05, impermissibly abridges her "First Amendment speech, petitioning, and associational rights by designating the Union" as her exclusive representative. *Id.* Indeed, she asked that the district court "[e]nter an injunction barring defendants from recognizing the Union as [her] exclusive representative or representative." *Id.* It is hard to deny that, from the start, Petitioner sought injunctive relief from the Union's exclusive representative status.

During the preliminary injunction process, however, Petitioner considerably narrowed the scope of her sole remaining claim. Petitioner's motion for preliminary injunction echoes her averments in the Complaint related to the Union's appointment as her *exclusive representative*. (Pl. Mot. for Prelim. Inj., R.15, PAGEID# 145). Then, in her motion, Petitioner conceded that, "the government has no obligation to listen to the views of any such person or organization." (Pl. Mot. for Prelim. Inj., R.15-1, PAGEID# 156). Next, she disclaimed any right she or any organization has to participate in bargaining but asserted that she "cannot be compelled to associate with the Union through its advocacy as her representative or agent." (*Id*. at PAGEID# 159).

Petitioner's real winnowing began in her reply in support of her preliminary-injunction motion. Specifically, Petitioner asserted:

> [Petitioner] 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. [Petitioner]'s *claim* does not seek to compel the Board to listen to her views. *Instead, she asks that it simply must stop regarding the Union's speech as [Petitioner]'s.*

(Pl. Reply in Support of Mot. for Prelim. Inj., R.35, PAGEID# 369) (emphasis added).

Even at the preliminary-injunction hearing itself, Petitioner's counsel stated:

> 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 [Petitioner] 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.

(Prelim. Inj. Hearing Trans., R.43, PAGEID# 424) (emphasis added).

"But again, we're not challenging the exclusive aspect of the union's role here. What we're challenging is its representational role." (Prelim. Inj. Hearing Trans., R.43, PAGEID# 428). "All she seeks is that the state not recognize the union as speaking for her and that the union not speak for her; that she not be forced into that compelled speech as well as that compelled association. That's it." (Prelim. Inj. Hearing Trans., R.43, PAGEID# 454). There are even more examples of waiver at every turn and the district court's opinion catalogued them effectively. (Opinion and Order, App. 43-68).

Petitioner tried to revive her exclusive representative argument at the summary judgment stage. But, Petitioner's summary judgment motion made no real distinction on these issues. For example, Petitioner contended that even if she can "approach the Board with ideas, the Board is bound by statute and contract not to adopt anything she proposes, at least if it falls within the enormously broad scope of the Union's representation." (Pl. Mot. for Summ. J., R.58-1, PAGEID# 639). Yet, she has disclaimed any desire to negotiate for herself or to have the Board negotiate with other labor organizations. (Prelim. Inj. Hearing Trans., R.43, PAGEID# 454, and at PAGEID# 424).

Further, Petitioner's summary judgment motion contended that formal recognition of the Union compels her association with the Union "so that she may not speak to and petition the Board…because the Board is bound to listen only to the

Union, cutting off any other speaker or petitioner's ability to influence governmental policy." (Pl. Mot. for Summ. J., R.58-1, PAGEID# 641). She waived that argument, however, because her arguments at the preliminary-injunction stage conceded that she was fine with the Board "continu[ing] to negotiate with the Union the terms and conditions of employment that it offers…to all bargaining-unit members." (Pl. Reply in Support of Mot. for Prelim. Inj., R.35, PAGEID# 369). And she disclaimed any desire to negotiate for herself or to have the Board negotiate with other labor organizations. (Prelim. Inj. Hearing Trans., R.43, PAGEID# at 454 and 424).

In sum, Petitioner has admitted that she does not want to negotiate for herself, does not want another union to represent her, does not claim any right to speak to the Board, does not want to otherwise interfere with labor negotiations, does not want to disrupt the collective bargaining process, and does not object to Ohio law recognizing a labor union as an exclusive bargaining partner of a school board or school district. In fact, "[a]ll she seeks is that the state not recognize the union as speaking for her and that the union not speak for her; that she not be forced into that compelled speech as well as that compelled association. *That's it*." (Prelim. Inj. Hearing Trans., R.43, PAGEID# 454) (emphasis added).

Petitioner affirmatively abandoned her objection to the Union's status as her bargaining unit's exclusive representative. The individual points she waived are everything that supported her exclusive representative argument. Disclaiming the parts disclaimed the whole. That makes this case an inappropriate vehicle for this issue.

c. There Is No Real Controversy - Petitioner Already Has Her Requested Remedy.

Petitioner's requested remedy "*that the state not recognize the union as speaking for her and that the union not speak for her*," has already been provided to her by the Board and through Ohio statute. As a result, there is no actual dispute for this Court to remedy in this case. *See Richardson v. Ramirez*, 418 U.S. 24, 36 (1974) (stating federal courts "are limited by the case-or-controversy requirement of Art. III to adjudication of actual disputes between adverse parties")

As an undisputed factual matter, the Board does not attribute the Union's bargaining positions to her (or any other Union member, for that matter). For starters, the Board is fully aware that Petitioner is not a Union member. (Pl. Mot. for Prelim. Inj., R.15-2, PAGEID# 164). Further, the Board's Superintendent does not interpret the Union's various bargaining positions or other speech as reflecting any individual bargaining unit member's positions, much less Petitioner's position. (Hampton Declr. ¶11, R.56-1, PAGEID# 586). Nor is there any evidence supporting the inference that Petitioner agrees with the Union's positions. Quite the opposite, it is known that the Union helped wage what Petitioner characterized as an "attack campaign" against her husband, a then-candidate for the Ohio House of Representatives. Complaint ¶¶47, 60–62, Pet. App. 73. Petitioner failed to produce any evidence that *anyone* construes the Union's bargaining positions as those of Petitioner.

The law gives the above factual distinctions meaning. For example, in *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), the respondents challenged speech

as compelled because they thought it could be attributed to them. *Id.* at 565. Yet they failed to produce any evidence that they "would be tarred with the content" of, in that case, ads about beef. *Id.* at 565–66. Therefore, they were not entitled to relief. *Id.* at 566. Petitioner has placed herself in the same situation.

Neither does Ohio law support Petitioner's claim that the Union is seen as "speaking for her" by the State. In fact, once certified by Ohio's State Employment Relations Board—not the local board of education—a union "becomes the exclusive representative of all the public employees in an appropriate unit for the purposes of collective bargaining." Ohio Rev. Code § 4117.05(A). That certification gives a union "the right to represent exclusively the employees in the *appropriate bargaining unit*[.]" Ohio Rev. Code § 4117.04(A). Recognizing that no bargaining-unit member is required to be a union member, Ohio law protects nonmembers by requiring unions "to fairly represent all public employees in a bargaining unit." Ohio Rev. Code § 4117.11(B)(6). As a result, the Union cannot treat Petitioner differently from its members.

Under Ohio law, the Union represents Petitioner's bargaining unit as a whole and only for the purposes of collective bargaining, nothing more. Ohio Rev. Code § 4117.05(A); 4117.08(A) (providing the subjects for bargaining). Therefore, Ohio's collective bargaining scheme is less onerous to nonmembers than the scheme approved in *Knight*, which involved both collective bargaining on terms and conditions of employment and meet-and-confer sessions on terms beyond employment conditions. 465 U.S. at 288.

Based upon the above, neither the factual evidence nor the law attributes the Union's speech to Petitioner. As such, Petitioner already has what she is seeking and there is no actual dispute for this Court to decide, thereby making this case an inappropriate vehicle.

Due to the above justiciability issues, this case is not an ideal vehicle for this Court to consider this issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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