No. 20-1019

IN THE
Supreme Court of the United States

JADE THOMPSON,

Petitioner,

v.

MARIETTA EDUCATION ASSOCIATION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeal for the Sixth Circuit

BRIEF IN OPPOSITION

TIMOTHY GALLAGHER
FUSCO GALLAGHER PORCARO & MONROE LLP
1215 Superior Avenue East, Suite 225
Cleveland, OH 44114
(216) 566-1600

ALICE O'BRIEN
PHILIP HOSTAK
NATIONAL EDUCATION ASSOCIATION
1201 16th Street N.W.
Washington, DC 20036
(202) 822-7035

SCOTT A. KRONLAND
Counsel of Record
P. CASEY PITTS
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151
skronland@altber.com

Counsel for Respondent Marietta Education Association

QUESTION PRESENTED

For nearly a century, American labor law, in both the public and private sectors, has been built on the principle that, if a majority of employees in a bargaining unit democratically elects to be represented by a union, that union bargains on behalf of the entire unit with respect to the terms and conditions of employment, and any agreement the union negotiates with the employer runs to the benefit of all employees in the unit.

The question presented is whether this Court should overrule *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), and hold that the First Amendment prohibits the use of exclusive-representation collective bargaining to set employment terms for public-sector employees.

CORPORATE DISCLOSURE STATEMENT

Respondent Marietta Education Association is not a corporation. Respondent has no parent corporation, and no corporation or other entity owns any stock in respondent.

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INTRODUCTION

For the ninth time in the last five years, this Court is asked to consider holding unconstitutional what has been, for the past century, the fundamental principle of American labor relations in both the public and private sectors: the representation of a bargaining unit, for purposes of negotiating terms and conditions of employment and enforcing the agreed-upon terms, by a labor organization democratically selected by the majority of employees in that unit. This Court appropriately has denied certiorari in each case in which the lower courts have rejected constitutional challenges to exclusive representation, and it should do so here as well.

This Court already recognized more than thirty years ago, in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), that exclusive-representative collective bargaining for public employees, by itself, does not compel speech or association in violation of the First Amendment. *Id.* at 288 (designation of a union as the bargaining representative for a unit of public employees "in no way restrain[s] [the employees'] 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"). *Knight* recognized that rights against compelled speech and association are not violated where individuals (like the petitioner here) are not required to communicate any message, to join or financially support a union, or, indeed, to personally do or say *anything* to associate themselves with a union. In the years since *Knight*, this Court has never recognized a violation of First Amendment rights under such circumstances, and the lower courts

have uniformly rejected constitutional challenges to exclusive-representative bargaining. Petitioner offers no good reason for the Court to revisit *Knight*'s holding.

Petitioner contends here that her First Amendment rights are violated because the union's mere status as her bargaining unit's collective bargaining representative purportedly forces the union's words into her mouth. Pet. at 10. But, as the district court emphasized, that argument is based on a misunderstanding of Ohio law, under which the union "speak[s] for the bargaining unit members *as a collective* rather than purporting to espouse specific views for any individual bargaining unit member." Pet. App. 64 (emphasis added). The undisputed evidence below demonstrated that school officials and reasonable outsiders understand that teachers do not necessarily agree with the union's positions, and that the school district here has adopted policies to encourage petitioner and others to communicate their own views directly to the school board. Pet. App. 16–17; *cf. Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 65 (2006) (finding no compelled speech violation where "[n]othing … suggests that [plaintiffs] agree with any speech by [third parties], and nothing … restricts what [plaintiffs] may say").

Contrary to petitioner's contention, *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), did not question the constitutionality of exclusive-representation bargaining. *Janus* considered only whether public employees could be forced to provide financial support for the union that represents them in collective bargaining. In concluding that the First

Amendment prohibits such compelled financial support, this Court emphasized that States could "keep their labor-relations systems exactly as they are" and that the Court was "not in any way questioning the foundations of modern labor law." *Id.* at 2471 n.7, 2485 n.27. No principle is more central to the foundations of modern labor law than exclusive representation.

STATEMENT OF THE CASE

A. Background

1. In response to years of significant labor strife, Ohio adopted its Public Employees' Collective Bargaining Act ("PECBA") in 1983. *See* Ohio Rev. Code Ch. 4117. Before PECBA, Ohio public employees had no right to engage in collective bargaining through a democratically chosen representative, and they were prohibited from striking; as a result, "frustrations stemming from employee powerlessness frequently erupted into illegal strikes." *City of Rocky River v. State Employment Relations Bd.*, 43 Ohio St.3d 1, 2, 20 (1989); *see also* D. Ct. ECF No. 28-1, at 302.[1]

During the 1970s, Ohio often led the nation in strikes by public safety employees, and in 1980 Ohio "experienced *fifteen* strikes by safety forces, involving 2,300 workers and costing 6,800 lost workdays." *City of Rocky River*, 43 Ohio St.3d at 19 n.16 (emphasis in original). The Ohio Legislature adopted PECBA to

[1] Petitioner did not dispute any of the facts or supporting evidence presented by respondents in support of summary judgment, so the district court correctly treated those facts and evidence as undisputed. *See* Pet. App. 17; Fed. R. Civ. P. 56(e)(2).

"put an end to such chaos." *Id*. at 19–20. As intended, "the number of strikes called by public sector labor unions in Ohio diminished greatly once Ohio passed [PECBA]." D. Ct. ECF 28-2, at 310.

Under PECBA, public employees in a particular bargaining unit may select, by majority support, a single PECBA representative to negotiate unit-wide contract terms with their public employer. Ohio Rev. Code § 4117.03; *id.* §§ 4117.05, 4117.07. PECBA also provides a process for a unit of employees to remove a representative that no longer holds majority support. *Id*. §§ 4117.05(b)(ii), 4117.07(A)(1).

If a unit of employees chooses a PECBA representative, the public employer must "bargain collectively with [the] exclusive representative" to attempt to reach a contract governing certain terms and conditions of employment for the bargaining unit. *Id*. § 4117.04(B). The scope of mandatory bargaining is limited to "matters pertaining to wages, hours, or terms and other conditions of employment" and any "existing provision[s] of a collective bargaining agreement." *Id.* § 4117.08(A). Bargaining over other matters is entirely at the discretion of the public employer. *Id.* § 4117.08(C)(9) (providing that "employer is not required to bargain on subjects reserved to the management and direction of the governmental unit"). If no PECBA representative has been chosen, the employer may dictate unit-wide contract terms unilaterally.

PECBA does not require individual workers to become members of the union that has been designated as their bargaining unit's PECBA representative and does not prohibit those workers from joining other

organizations. Pet. App. 40. To the contrary, PECBA protects individual public employees' right to "[f]orm, join, assist, or participate in, or refrain from forming, joining, assisting, or participating in … any employee organization." Ohio Rev. Code § 4117.03(A)(1). PECBA also prohibits the exclusive representative, when acting in that capacity, from discriminating against employees who choose not to become union members. *Id.* § 4117.11(B)(6). Public employees who choose not be members of the union that represents their bargaining unit are not required to provide any financial support to the union. Pet. App. 40.

PECBA also does not prevent individual employees from criticizing the exclusive representative's positions and further provides that individual public employees may "[p]resent grievances and have them adjusted, without the intervention of the bargaining representative." Ohio Rev. Code §4117.03(A)(5).[2]

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[2] Petitioner misrepresents PECBA and the collective bargaining agreement by suggesting that teachers "ha[ve] no choice but to submit to the Union in resolving disputes with the Board." Pet. at 7. PECBA provides all public employees with the right to "[p]resent 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[.]" Ohio Rev. Code §4117.03(A)(5) (emphasis added); Pet. App. 138 (CBA provision implementing same rule); *see also* 29 U.S.C. §159(a) (similar provision of the National Labor Relations Act). The union representative has the right "to be *present* at [such] adjustment," not to participate over an employee's objection. Ohio Rev. Code §4117.03(A)(5) (emphasis added); Pet. App. 138. Petitioner also misrepresents the collective bargaining agreement in asserting that it allows only the Union to call witnesses at a grievance hearing. Pet. at 7–8. The agreement does not limit which parties can call witnesses, but rather merely provides the Union with a

2. PECBA's exclusive-representative collective bargaining system uses the same democratic model also used for collective bargaining for employees of the federal government; public employees in about 40 other States, the District of Columbia, and Puerto Rico; and private-sector employees covered by the federal National Labor Relations Act and the Railway Labor Act. *See* D. Ct. ECF No. 28-3, at 319–20; 29 U.S.C. §159; 45 U.S.C. §152, Fourth. Exclusive-representative systems presently serve as the basis for collective bargaining agreements that cover more than 1.1 million federal employees and more than 6.7 million state, county, and local employees. News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Union Members—2020 (Jan. 22, 2021), Table 3 (Union Affiliation 2020), https://www.bls.gov/news.release/pdf/union2.pdf. At the local government level, more than 45 percent of all employees—including police officers, firefighters, teachers, bus drivers, and sanitation workers—are covered by collective bargaining agreements with a democratically chosen exclusive representative. *Id.*

The undisputed evidence submitted to the district court demonstrated that these systems reflect the longstanding legislative judgment based on experience that the democratic exclusive-representation model of collective bargaining provides the only practical mechanism for negotiating contract terms for an entire workforce. *See, e.g.*, H.R. Rep. No. 74-1147 (1935), *reprinted in* 2 Leg. Hist. of the National Labor

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contractual right to do so. *See* Pet. App. 140–41. Nor does the agreement preclude employees from obtaining representation in the grievance process; rather, it only limits participation by an employee organization, if any, to the Union. Pet. App. 138–39.

Relations Act 3070 (1985) ("There cannot be two or more basic agreements applicable to workers in a given unit; this is virtually conceded on all sides."); S. Rep. No. 74-573 (1935), *reprinted in* 2 Leg. Hist. of the National Labor Relations Act 2313 (1985) ("[T]he making of agreements is impracticable in the absence of majority rule."); *see also* D. Ct. ECF No. 28-1, at 303; D. Ct. ECF No. 28-3, at 320–22; D. Ct. ECF No. 28-2, at 311. Decades ago, some states experimented with collective bargaining systems that did not follow the exclusive-representative model, but those alternative systems proved to be unmanageable for employers, and they were abandoned as failures. D. Ct. ECF No. 28-3, at 319.

3. Respondent Marietta Education Association ("MEA" or "Union") is the majority-designated exclusive representative for a bargaining unit of about 179 teachers and other certificated employees of Respondent Marietta City School District Board of Education ("Board"). Pet. App. 38; D. Ct. ECF No. 28-4, at 325. Petitioner is a teacher in the Marietta City School District ("District"); she has been a member of the bargaining unit for about 17 years. Pet. App. 37; D. Ct. ECF No. 28-4, at 328. During petitioner's tenure as an employee, MEA and the Board have entered into a series of collective bargaining agreements setting the terms and conditions of employment for the bargaining unit and establishing a grievance procedure. Pet. App. 39; D. Ct. ECF No. 28-4, at 325–26.

Petitioner is not a member of the Union, and she is not required to provide any financial support to the Union. Pet. App. 40; D. Ct. ECF No. 28-4, at 328; D. Ct. ECF No. 28-5, at 336. The Union and the Board understand that, as in any democratic system,

individual members of the bargaining unit, including petitioner, may not agree with the Union's views or positions, and the Union does not speak for petitioner personally. D. Ct. ECF No. 28-4, at 327; D. Ct. ECF No. 56-1, at 587. The Board has adopted policies that invite petitioner and other bargaining unit members to express their views, arguments, positions, and beliefs to the Board and the school administration. D. Ct. ECF No. 56-1, at 587–96.

B. Proceedings Below

On June 27, 2018, petitioner sued MEA and the Board, asserting that the Board's recognition of MEA as the exclusive representative of her bargaining unit violates her First Amendment rights. Pet. App. ii, 94. Petitioner sought a preliminary injunction prohibiting the Board from recognizing the Union as the bargaining representative of the entire unit. *See* Pet. App. 43. In her supporting papers and at oral argument, petitioner disavowed any claim that MEA's exclusive role in the collective bargaining process—as opposed to its designation as her unit's "representative"—burdened her First Amendment rights. *See* Pet. App. 21–25 (collecting quotations).

The district court denied petitioner's preliminary injunction motion, concluding that petitioner could not demonstrate a likelihood of success on the merits because her claim was barred by this Court's decision in *Knight*. Pet. App. 49, 51–52, 57. The district court explained that *Knight*'s "broad statements" upholding Minnesota's democratic exclusive-representation system against First Amendment speech and expressive association challenges foreclosed petitioner's claims, and that petitioner's attempts to distinguish *Knight*

were unavailing because "her position and the position of the plaintiffs in *Knight* are two sides of the same coin." *Id.* at 51, 59.

Following the denial of the preliminary injunction motion, the parties stipulated to certain undisputed facts and filed cross-motions for summary judgment. *See* Pet. App. 37–42. The district court granted the motions for summary judgment of MEA and the Board. Pet App. 14–34. The district court held that *Knight* foreclosed petitioner's compelled speech and association claims because "the scheme of exclusive representation at issue in *Knight* is materially indistinguishable from Ohio's scheme." Pet. App. 28. The district court held that petitioner had waived any other First Amendment theories, *see* Pet. App. 21 ("[T]he instances of waiver are numerous[.]"), and that, even if she had not, those theories had been rejected by *Knight*, *see* Pet. App. 26.

Finally, the district court held that, even if *Knight* did *not* foreclose petitioner's First Amendment claims, those claims still would fail because "Defendants' evidence shows that Ohio has a compelling interest in preserving labor peace and that exclusive representation is essential to facilitate that interest" and Thompson "failed to rebut that evidence." Pet. App. 30–31. As such, Ohio's system would "survive even strict scrutiny." Pet. App. 31.

The Sixth Circuit affirmed the district court's decision. Pet. App. 1–11. The Sixth Circuit reasoned that "*Knight* directly controls the outcome of this case," and observed that its decision agreed with "every other circuit to address the issue." Pet. App. 3, 8.

REASONS FOR DENYING THE PETITION

The petition is not worthy of this Court's review. The Sixth Circuit's decision is consistent with the decisions of every other court to consider the same issue, which unanimously hold that exclusive-representative bargaining systems for public employees do not, by themselves, compel speech or association in violation of the First Amendment.[3] This Court has declined to review the question presented by this petition eight times in the previous five years (including in two other cases brought by petitioner's counsel). There is no reason for a different outcome in this case.

Petitioner does not establish any good reason for this Court to reconsider its decision in *Minnesota State Board v. Knight*, which rejected a First Amendment challenge to a collective bargaining system that

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[3] *See Hendrickson v. ASFCME Council 18*, 992 F.3d 950, 968–70 (10th Cir. 2021); *Bennett v. AFSCME Council 31*, 991 F.3d 724, 732–35 (7th Cir. 2021); *Akers v. Maryland State Educ. Ass'n*, 990 F.3d 375, 382 n.3 (4th Cir. 2021); *Oliver v. SEIU Local 668*, 830 F. App'x 76, 80–81 (3d. Cir. 2020); *Reisman v. Associated Faculties of Univ. of Maine*, 939 F.3d 409 (1st Cir. 2019), *cert. denied*, 141 S. Ct. 445 (2020); *Branch v. Commonwealth Emp't Relations Bd.*, 120 N.E.3d 1163 (Mass. 2019), *cert. denied sub nom. Branch v. Mass. Dep't of Labor Relations*, 140 S. Ct. 858 (2020); *Mentele v. Inslee*, 916 F.3d 783 (9th Cir.), *cert. denied sub nom. Miller v. Inslee*, 140 S. Ct. 114 (2019); *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018), *cert. denied sub nom. Bierman v. Walz*, 139 S. Ct. 2043 (2019); *Hill v. SEIU*, 850 F.3d 861 (7th Cir.), *cert. denied*, 138 S. Ct. 446 (2017); *Jarvis v. Cuomo*, 660 F. App'x 72 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1204 (2017); *D'Agostino v. Baker*, 812 F.3d 240 (1st Cir.), *cert. denied*, 136 S. Ct. 2473 (2016); *see also Uradnik v. Inter Faculty Org.*, 2018 WL 4654751 (D. Minn. Sept. 27, 2018) (preliminary-injunction denial), *aff'd*, 2018 WL 11301550, No. 18-3086 (8th Cir. Dec. 3, 2018), *cert. denied*, 139 S. Ct. 1618 (2019).

is indistinguishable from the system here. *Knight* undergirds the labor relations systems for millions of public employees throughout the country, including federal, state, and local employees. No subsequent decisions have undermined *Knight*'s precedential force. Contrary to petitioner's contention, *Janus* did not question the constitutionality of exclusive-representative bargaining. Rather, *Janus* emphasized that, beyond eliminating agency fees, public employers could "keep their labor-relations systems exactly as they are." 138 S. Ct. at 2485 n.27. *Janus* explained that, while the government has greater authority under the First Amendment when it acts as an employer rather than a sovereign, the Court was "draw[ing] the line at" agency fee requirements. *Id.* at 2478.

This case also would be poor vehicle for considering the question presented because the district court held that, even if the petitioner's First Amendment claims were *not* foreclosed by *Knight,* the unrebutted record evidence established that the challenged Ohio law would "survive even strict scrutiny." *Supra* at 9.

I. As the lower courts have unanimously recognized, *Knight* forecloses petitioner's challenge to exclusive representation.

The question presented in this petition is not new. This Court concluded more than thirty years ago in *Knight* that exclusive-representative collective bargaining, by itself, does not violate the First Amendment rights of public employees who are not members of their bargaining unit's chosen representative. Every lower court to consider this issue has recognized that *Knight* forecloses First Amendment challenges to exclusive-representative bargaining.

In *Knight*, this Court addressed a First Amendment challenge by college instructors to a Minnesota statute that (like the Ohio statute here) "establishe[d] a procedure, based on majority support within a unit, for the designation of an exclusive bargaining agent for that unit." 465 U.S. at 274. The Minnesota statute required public employers 1) to negotiate with such an exclusive representative over terms and conditions of employment (known as a "meet and negotiate" requirement), and also (2) to confer with the exclusive representative about subjects outside the scope of mandatory negotiations (known as a "meet and confer" requirement). *Id.* Under the statute, "the employer [could] neither 'meet and negotiate' nor 'meet and confer' with any members of that bargaining unit except through their exclusive representative." *Id.* at 275.

The statute did not prevent members of the bargaining unit from submitting advice to their employer or from speaking publicly on matters related to their employment. *Id.* Although the state university board "consider[ed] the [union's] views ... to be the faculty's official collective position," the board also recognized "that not every instructor agrees with the official faculty view on every policy question." *Id.* at 276.

This Court summarily affirmed the district court's dismissal of the instructors' constitutional challenge to the "meet and negotiate" requirement. *See Knight*, 465 U.S. at 279 (citing *Knight v. Minnesota Cmty. Coll. Faculty Ass'n*, 460 U.S. 1048 (1983)). The Court then gave plenary consideration to the instructors' challenge to the "meet and confer" requirement, concluding that exclusive representation was constitutional in that context as well. *Id.* at 288.

In Part II.A of its opinion, the *Knight* Court first considered and rejected the instructors' claim that their right to free speech was impaired because, unlike the exclusive representative, they had no "government audience for their views." *Id.* at 280–88.

The Court then turned, in Part II.B of its opinion, to the broader issues of speech and association, concluding that "[t]he State ha[d] *in no way* restrained [the instructors'] freedom to speak … or their freedom to associate or not to associate with whom they please, including the exclusive representative." *Id.* at 288 (emphasis added). The Court pointed out that the instructors were "not required to become members" of the union and were "free to form whatever advocacy groups they like." *Id.* at 289. The instructors' "associational freedom ha[d] not been impaired" because "the pressure [they may have felt to join the exclusive representative was] no different from the pressure to join a majority party that persons in the minority always feel." *Id.* at 289–90.

Like every other court to consider the issue, the Sixth Circuit recognized here that *Knight*'s holding is not limited, as petitioner contends, to the narrow question whether public employees have "a right to be heard by the state in certain 'meet and confer' sessions." Pet. at 3. To the contrary, *Knight* "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.'" Pet. App. 8 (quoting *Knight*, 465 U.S. at 273). Petitioner's "cramped reading of *Knight* would

functionally overrule the decision." Pet. App. 8; *see also Bierman*, 900 F.3d at 574 (rejecting argument that *Knight* considered only public employees' right to be heard because "a fair reading of *Knight* is not so narrow"); *Bennett*, 991 F.3d at 734 (rejecting argument that *Knight* "addressed only whether the plaintiffs could force the government to listen to their views"); *Hendrickson*, 992 F.3d at 969 (recognizing that *Knight* "found exclusive representation constitutionally permissible" and forecloses the "claim that exclusive representation imposes compulsion in violation of the First Amendment").

The lower courts are in complete agreement that, under *Knight*, exclusive representation does not violate the First Amendment rights of bargaining-unit members who do not agree with positions taken by the union. In the absence of any conflict regarding the proper interpretation of *Knight*, this Court should deny certiorari. The Court did that on each of the eight previous occasions when it was asked to revisit *Knight*, including earlier this term (*Reisman*, 141 S. Ct. 445), and nothing justifies a different outcome here.

II. *Knight* is consistent with this Court's broader First Amendment jurisprudence, including *Janus*.

The lower courts' unanimity on the question presented is sufficient reason to deny the petition. But *Knight* is also entirely consistent with this Court's subsequent First Amendment decisions.

1. Petitioner's contention that exclusive representation collective bargaining violates her First

Amendment rights is premised on her contention that the Union's status as her bargaining unit's representative forces the Union's words into her mouth and compels her to associate with the Union. *See, e.g.*, Pet. at 10. But her repeated assertions do not make it so.

As the district court recognized, petitioner's argument is premised on a misunderstanding of Ohio law, under which the Union "realistically … is speaking for the bargaining unit members as a collective rather than purporting to espouse specific views for any individual bargaining unit member." Pet. App. 64. The undisputed record establishes that the Union's speech is *not* understood to represent petitioner's own views. *See* Pet. App. 16–17; *see also, e.g.*, *D'Agostino*, 812 F.3d at 244 (Souter, J.) ("[I]t 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.").[4] It is also undisputed that petitioner is not compelled to join the Union as a member or to provide any financial support for the Union's activities. Pet. App. 40.

Petitioner's compulsion arguments find no support in this Court's First Amendment decisions. This Court has *never* recognized a compelled speech or association violation where (1) the plaintiff is not required to say or do anything, (2) no third-party message is

[4] *Cf., e.g.*, *Lathrop v. Donohue*, 367 U.S. 820, 859 (1961) (Harlan, J., concurring) ("[E]veryone understands or should understand that the views expressed are those of the State Bar as an entity separate and distinct from each individual.") (internal quotation marks omitted); *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990) (even high school students understand that their school does not endorse the speech of school-recognized student groups).

personally attributed to the plaintiff, and (3) the plaintiff is not required to join a group, accept an unwanted member, or provide financial support for a third party's speech. As Justice Souter, sitting for the First Circuit, explained, compelled speech challenges to exclusive-representative collective bargaining fail because bargaining-unit workers "are not compelled to act as public bearers of an ideological message they disagree with," nor "are they under any compulsion … to modify the expressive message of any public conduct they may choose to engage in." *D'Agostino*, 812 F.3d at 244.

None of the compelled speech cases petitioner cites offer any support for her theory. In those cases, the plaintiff was required *personally* to communicate an unwanted message. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 581 (1995) (parade organizers were required "to alter the[ir] message"); *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795 (1988) (fundraisers were required to make specific disclosures to potential donors); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 627 (1943) (students were required to salute the flag).

This Court's precedents also do not support petitioner's contention that Ohio law compels her to "associate" with the Union even though she need not join the Union or provide financial support. This Court has never validated a claim of compelled expressive association where, as here, the complaining party is not personally required to do *anything* and there is no public perception of an expressive association. *Cf. Rumsfeld*, 547 U.S. at 65, 69 (*FAIR*) (no compelled expressive association where law schools had to "associate" with military recruiters by allowing on-

campus recruiting, but recruiters did not "become members of the school's expressive association," and "[n]othing about recruiting suggests that law schools agree with any speech by recruiters"). Public perception plays a crucial role in delimiting the scope of First Amendment compelled association claims, which might otherwise extend to the merest of metaphysical connections. This Court's decisions establish that, if outsiders would not reasonably perceive one group's speech as reflecting the views or endorsement of another person, then that person has not been forced to associate with the group in a manner that implicates the First Amendment.[5]

Petitioner contends that her First Amendment rights are infringed because the Union has the "formal, indefinite" right to engage in collective bargaining with the Board "at the expense of all other persons" who might wish to participate in that process. Pet. at 13. Petitioner, however, waived that argument in the proceedings below by disclaiming it on multiple occasions, as the district court recognized.

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[5] *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 460 (2008) (Roberts, C.J., concurring) ("Voter perceptions matter, and if voters do not actually believe the parties and the candidates are tied together, it is hard to see how the parties' associational rights are adversely implicated."); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980) (finding no First Amendment violation where views of individuals granted right to gather signatures and distribute pamphlets in a privately owned shopping center "[would] not likely be identified with those of the owner").

See Pet. App. 20–26 (collecting "numerous" "instances of waiver").[6]

In any event, this Court has repeatedly rejected petitioner's theory, holding that public employers have no First Amendment obligation "to listen, to respond or … to recognize … and bargain with" individual public employees or their representatives, *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 465 (1979); and that affording democratically-selected employee representatives the exclusive right to participate in collective bargaining is consistent with the First Amendment because any pressure employees feel to join the representative "is no different from the pressure to join a majority party that persons in the minority always feel," *Knight*, 465 U.S. at 290.

Petitioner contends that *Healy v. James*, 408 U.S. 169 (1972), supports her theory. Pet. at 13–14. As *Knight* explained in expressly distinguishing *Healy*, however, that case involved "a [student] group's claim of access to a forum to use in communicating among themselves and with other potentially willing

[6] The Sixth Circuit acknowledged that petitioner's "arguments during the preliminary injunction hearing implicitly contradict[ed]" this argument, but nonetheless stated that the argument had not been waived. Pet. App. 10. Petitioner did far more, however, than "implicitly contradict[]" her theory—she expressly disavowed it, repeatedly. *See, e.g.*, Pet. App. 23 (quoting petitioner's statement that she "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"); Pet. App. 24 (quoting counsel's statement that "we have no objection to Ohio law recognizing a labor union as an exclusive bargaining partner of a school board or school district"). The district court was therefore correct to find that petitioner waived the argument.

listeners." *Knight*, 465 U.S. at 288 n.10. This case, like *Knight,* "involve[d] no such claim to a forum" to reach willing listeners, but instead a demand that the government listen to the petitioner's views. *Id*. As such, *Healy* is entirely inapposite.

2. *Janus* did not modify these First Amendment principles. *Janus* held that public employees who are not union members cannot be required to pay fees to an exclusive representative for collective bargaining representation, because "compelled subsidization of private speech seriously impinges on First Amendment rights." *Janus*, 138 S.Ct. at 2464. In so holding, the Court emphasized that it was "not disputed that the State may require that a union serve as exclusive bargaining agent for its employees" and explained that "designation of a union as the exclusive representative of all the employees in a unit and the exaction of agency fees" are *not* "inextricably linked." *Id*. at 2465, 2478.[7]

The *Janus* majority expressly stated that it was "not in any way questioning the foundations of modern labor law"—none of which is more fundamental than exclusive representation—but was instead "simply draw[ing] the line at allowing the government to … require all employees to support the union irrespective of whether they share its views." 138 S.Ct. at 2471 n.7, 2478. The Court explained that its decision would not require an "extensive legislative response," and that the States could "keep their labor-relations systems exactly as they are—only they cannot force

[7] The Court drew the same distinction between exclusive-representative bargaining and the exaction of agency fees in *Harris v. Quinn*, 573 U.S. 616, 649 (2014).

nonmembers to subsidize public-sector unions." *Id.* at 2485 n.27. *See also id.* at 2466, 2485 n.27 (States may "follow the model of the federal government," in which "a union chosen by majority vote is designated as the exclusive representative of all the employees" but there are no agency fees).

The Sixth Circuit decision below suggests that exclusive representation, while constitutional under *Knight*, is in tension with "the principles enunciated in *Janus*." Pet. App. 3, 6–7. The Sixth Circuit decision points to a passage in *Janus* describing exclusive-representative bargaining as "a significant impingement on associational freedoms that would not be tolerated in *other* contexts." 138 S.Ct. at 2478 (emphasis added).[8] But the quoted passage from *Janus* is taken from a paragraph in which the Court explained that exclusive representation in public employment (unlike compulsory agency fees) *survives* constitutional scrutiny under the line of cases pertaining to the government's greater leeway under the First Amendment when it acts as employer. *See id.* at 2477–78 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 564–68 (1968)).

Janus also explained that the "necessary concomitant" of exclusive-representative status is a requirement that the union fairly represent the entire unit, and that it is only *in the absence of* that requirement that "serious constitutional questions would

[8] The Sixth Circuit did not explain how Ohio's system of exclusive representation collective bargaining might conflict with this Court's compelled speech and association cases even though petitioner is not required to say or do anything or to join or support the Union and neither her employer nor the public attribute the Union's speech to her.

arise." *Janus*, 138 S.Ct. at 2469 (citation, internal quotation marks omitted). Ohio's public sector collective bargaining law includes that "necessary concomitant" duty of fair representation. *See supra* at 5. *Janus*'s passing discussion of exclusive representation thus neither overruled *Knight* nor announced any new First Amendment principle that would justify revisiting *Knight*—which remains fully consistent with this Court's broader compelled speech and association jurisprudence.

III. There is no good reason to revisit *Knight*'s holding.

Stare decisis is "a 'foundation stone of the rule of law.'" *Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020) (quoting Mi*chigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014)). This Court seldom overturns its precedents. In deciding whether to do so, this Court considers several factors, including "the quality of [the decision's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *Janus*, 138 S. Ct. at 2478–79. None of these factors favors revisiting—let alone overturning—*Knight*.

Knight was well-reasoned and consistent with this Court's other First Amendment precedents. Justice O'Connor's majority opinion carefully considered the First Amendment interests potentially implicated by exclusive representation—including individual public employees' right to communicate to their employer, freedom to speak about topics of public concern, and freedom to associate or not associate with third parties, including unions—and concluded that exclusive

representation does not impermissibly infringe upon any of those interests. The Court's holding built upon this Court's prior decisions, including *Smith v. Arkansas State Highway Employees Local 1315*, 441 U.S. 463 (1979), and is entirely consistent with the Court's subsequent compelled speech and association cases, for the reasons set forth above.

Notably, the dissenters in *Knight agreed* that exclusive representation is constitutional for collective bargaining about employment terms. The dissenters took issue only with the exclusion of individual instructors from a "meet and confer" process about policy issues, which is not at issue here. *See* 465 U.S. at 299 (Brennan, J., dissenting) ("[T]he use of an exclusive union representative is permissible in the collective-bargaining context[.]"); *id.* at 301–02, 316 (Stevens, J., dissenting) ("[T]here is no dispute that Minnesota may limit the process of negotiation on the terms and conditions of public employment to the union that represents the employees in a given collective bargaining unit.").

Knight's holding that the First Amendment permits exclusive-representation collective bargaining in public employment also has proven to be workable. Indeed, the reliance interests here are overwhelming because the federal government and state and local governments in about 40 states have chosen to use exclusive-representation systems to set employment terms for millions of public employees. *See supra* at 6. Those employees are covered by binding contracts that are premised on the exclusive-representative system. The expert testimony below was undisputed that no other collective bargaining structure has proven to be successful in the United States and that

experiments with alternative systems were abandoned as failures. *Id*. at 7–8.

Petitioner's arguments for revisiting *Knight* are unpersuasive. Petitioner claims that the *Knight* majority failed to consider "the fact" that exclusive representation "compels association with the representative, by assigning its speech to all members of the bargaining unit." Pet. at 23. As explained already, however, this Court has never concluded that the kind of metaphysical association petitioner describes—in which petitioner is not required to say or do anything and the Union's speech is not reasonably attributed to her—constitutes impermissible compelled speech or association for First Amendment purposes. *Knight* can hardly be faulted for failing to expressly discuss an argument lacking any basis in this Court's prior or subsequent decisions.[9]

Petitioner also claims that *Knight* is unworkable because it purportedly inflicts "severe First Amendment injury" while providing "no benefit." Pet. at 27. As stated already, however, any injury to petitioner is self-imposed. She is not required to say or do *anything*; neither the Board nor reasonable outsiders attribute the Union's words to her; and she is free to express her own views. Moreover, petitioner ignores the undisputed record evidence demonstrating the "benefit' of

[9] Contrary to petitioner's claim, *see* Pet. at 24, the Ninth Circuit's opinion in *Mentele v. Inslee* does not support her position. *Mentele* concluded not only that *Knight* foreclosed the plaintiff's claim but also that, in any event, the state interests served by exclusive representation are more than sufficient to justify any "minimal" impingement on First Amendment rights. 916 F.3d at 790–91.

exclusive-representation bargaining in reducing labor strife in Ohio and the essentially universal adoption of that collective bargaining structure in other jurisdictions because it has proven to be effective. *See, e.g.*, D. Ct. ECF 28-2, at 310 (passage of PECBA reduced frequency of public sector labor strikes); D. Ct. ECF No. 28-3, at 319–21 (describing adoption of exclusive-representation collective bargaining in the public sector).

Petitioner urges that public employee relations statutes should refer to majority-chosen unions as exclusive "bargaining agents" rather than as "representatives." Pet. at 26–28. But her preference regarding word choice is a matter of semantics, and would not justify overruling settled precedent and striking down essentially every public sector collective bargaining law in the United States. The statutory word "representative" does not result in compelled speech or association for purposes of the First Amendment because reasonable people understand that unions are democratically selected and that, as in every democratic system, not every bargaining unit worker necessarily agrees with a union representative's positions.

Petitioner also suggests the States should use a form of "members only" collective bargaining. Pet. at 28. But petitioner makes no effort to delineate how her proposed alternative system would work, including whether the employer could continue to apply terms and conditions agreed upon with the majority-chosen union to all bargaining unit members; whether dispute resolution mechanisms in the union's contract would protect non-members; and whether the chosen union would have any duty to protect non-members

within the bargaining unit. Petitioner also fails to recognize that prior experiments with "members-only" collective bargaining in the context of public employment were tried and abandoned as a failure. D. Ct. ECF No. 28-3, at 319.

This Court pointed out in *Janus* that the federal government and about half the states had successful collective bargaining systems without agency fees, and that a decision that required other states to cease requiring agency fees would not disrupt labor relations or require an "extensive legislative response." 138 S. Ct. at 2466, 2485 n.27. The opposite is true here.[10]

In short, none of the *stare decisis* factors justify reconsidering *Knight*, a decision that the federal government, the vast majority of States, the District of Columbia, and Puerto Rico have relied upon to create well-functioning public sector labor relations systems.

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[10] Petitioner points out that a small minority of states do not permit their public employees to collectively bargain at all. *See* Pet. at 18. But different jurisdictions have different labor histories. In states like Ohio, prohibitions on public employee collective bargaining resulted in substantial and frequent labor disruptions. *See, e.g.*, *City of Rocky River*, 43 Ohio St.3d at 19–20. Moreover, recent strikes by public school teachers in states that prohibit their public employees from striking show the labor strife that can result in the absence of an adequate system for channeling employment disputes into collective bargaining. *See, e.g.*, Brief of Goldwater Institute as *Amicus Curiae* Supporting Petitioner at 20 (describing recent job action by Arizona teachers).

IV. The district court's judgment rests on alternative grounds.

Finally, this case would not be an appropriate vehicle for review of the question presented because the district court also held, based on the unrebutted record evidence, that Ohio's collective bargaining law would "survive [] strict scrutiny" under the First Amendment even if petitioner's claims were *not* foreclosed by controlling precedent. Pet. App. 31. The district court concluded that "Defendants' evidence shows that Ohio has a compelling interest in preserving labor peace and that exclusive representation is essential to facilitate that interest." Pet. App. 30. The district court also concluded that petitioner "ha[d] failed to rebut that evidence." *Id.*

The petition asserts that "any state interest in 'labor peace,' [] is neither compelling nor served in any tailored fashion by" exclusive representation; that "there is no foundation to the contention that labor peace requires collective bargaining"; and that labor peace interests "are not addressed in any way by exclusive[]representation requirements." Pet. at 16–18. But those assertions are directly contrary to the unrebutted record evidence below, including extensive expert testimony, *see, e.g.,* D. Ct. ECF No. 28-3, that fully supports the district court's alternative holding. That being so, this case would not be an appropriate vehicle for review.

As petitioner herself points out, additional challenges to public sector exclusive representation are pending in the lower courts. Pet. at 29–30. The Court would have the opportunity to review the question presented by this petition should one of those lawsuits

produce a conflict. There is no good reason to grant review here.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

TIMOTHY GALLAGHER
FUSCO GALLAGHER
PORCARO & MONROE LLP
1215 Superior Avenue
East, Suite 225
Cleveland, OH 44114
(216) 566-1600

ALICE O'BRIEN
PHILIP HOSTAK
NATIONAL EDUCATION
ASSOCIATION
1201 16th Street N.W.
Washington, DC 20036
(202) 822-7035

SCOTT A. KRONLAND
Counsel of Record
P. CASEY PITTS
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151
skronland@altber.com

Counsel for Respondent
Marietta Education Association

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