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 Appeals for the Sixth Circuit**

## REPLY BRIEF FOR PETITIONER


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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

CASES

STATUTES

## REPLY BRIEF FOR PETITIONER

Respondents' arguments only confirm the necessity of the Court's review. Ohio's "take-it-or-leave-it system" requires public employees to "either agree to exclusive representation, which is codified in state law, or find a different job." Pet.App.3. As the court below recognized, this arrangement "is in direct conflict with the principles enunciated in *Janus v. AFSCME*," *id.*, which, in turn, acknowledges exclusive-representation requirements to be "a significant impingement on associational freedoms that would not be tolerated in other contexts," *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478 (2018). Tellingly, the Union's principal argument against certiorari is that the Sixth Circuit panel—whose decision the Union defends—was unanimously in error in this determination. Union Br. 18. And the Board has no answer to it at all.

Yet it is the Sixth Circuit's reluctant approval of compelled representation that cries out for this Court's review. The import of its judgment (and Respondents' defense of it) is that compelling public workers to accept an unwanted representative to speak for them does not impinge their speech and associational rights one iota—and hence triggers no constitutional scrutiny at all. Not only does that view conflict with more or less every compelled-speech and compelled-association case this Court has decided over the past 75 years, from *Barnette* through *Janus*, but the court below *recognized* that, under those cases, "Thompson should prevail." Pet.App.7. Yet it considered itself constrained to rule otherwise by *Minnesota State Board for Community Colleges v.*

*Knight*, 465 U.S. 271 (1984). Only this Court can resolve that glaring conflict.

This case is the ideal vehicle for the Court to do so. It squarely challenges the constitutionality of Ohio's compelled-representation scheme in a typical factual scenario involving a state employee who objects to the speech of the union that state law appoints as her representative. That issue is dispositive of the Petitioner's entitlement to relief, and Respondents identify no basis that could prevent the Court from addressing it on the merits and finally resolving the application of standard First Amendment principles to this important and recurring question. The Court should grant the petition and do so.

## I. Review Is Required To Settle an Important Question That This Court Has Never Considered and That Lower Courts Have Decided Contrary to This Court's Free-Speech Precedents

The decisions below conflict with this Court's free-speech jurisprudence while addressing what the Sixth Circuit called "First Amendment questions of considerable importance," Pet.App.10, that this Court has never meaningfully considered. The very fact that Ohio believes the First Amendment has absolutely nothing to say about its appointment of an unwanted representative to speak for public employees like Mrs. Thompson confirms that the Court's guidance is sorely needed.

A. Contrary to the Respondents' argumentation, Ohio's compelled-representation requirement plainly impinges Mrs. Thompson's speech and associational rights.

1. The Union's claim (at 14–15) that it does not speak for Mrs. Thompson is unsupportable. The statute itself makes clear that, when the appointed representative speaks with the state, it is speaking for the employees, because it has "the right to represent exclusively the employees in the appropriate bargaining unit and the right to unchallenged and exclusive representation" of the employees in that unit. Ohio Rev. Code § 4117.04(A), Pet.App.109. Ohio law likewise requires the Board to recognize the Union as Mrs. Thompson's "sole and exclusive bargaining agent," Pet.App.69–70, 135. The Sixth Circuit agreed that the Union is Mrs. Thompson's "exclusive representative." Pet.App.9. In other words, as *Janus* recognized, "when a union negotiates with the employer or represents employees in disciplinary proceedings, the union speaks for the employees." 138 S. Ct. at 2474.

And the Union's claim (at 15) that Mrs. Thompson is not required to recite the Union's words herself ignores that the Court's "compelled-speech cases are not limited to the situation in which an individual must personally speak the government's message." *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 63 (2006) (*FAIR*). No different from compelling a parade organizer to accept an unwanted brigade carrying its own banner, Ohio's compelled-rep-

resentation requirement usurps dissenting employees' "choice…not to propound a particular point of view," a matter "presumed to lie beyond the government's power to control." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 575 (1995).

The Union's rejoinder (at 15) that its "speech is *not* understood to represent petitioner's own views" draws a distinction recognized nowhere else in First Amendment law. Could Ohio appoint the Republican or Democratic Party the "representative" of Marietta teachers on the theory that no teacher would be understood to consent individually to its speech? Of course not. That Mrs. Thompson must speak out to distance herself from the Union's speech on her behalf intensifies, rather than relieves, her constitutional injury, as the Court has recognized in such cases as *Pacific Gas & Electric Co. v. Public Utility Commission of California*, 475 U.S. 1, 20–21 (1986) (plurality opinion), and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974)*; see also FAIR*, 547 U.S. at 63–64.

2. Likewise, Ohio's compelled-representation requirement clearly impinges Mrs. Thompson's associational rights. Again, the whole point of that requirement is, as the Union concedes (at 4), to facilitate collective bargaining "to reach a contract governing certain terms and conditions of employment," in which the Union advocates on a host of "matters…of great public concern," *Janus*, 138 S. Ct at 2475. That

speech, "far from being ancillary, is the principal object of the regulatory scheme." *United States v. United Foods*, 533 U.S. 405, 412 (2001). The Union's assertion (at 16–17) that its appointment to negotiate and advocate on behalf of employees like Mrs. Thompson is not expressive in nature defies both the Ohio statute and reality, as well as *Janus*'s recognition to the contrary. 138 S. Ct at 2474. *FAIR* is inapposite: while "a law school's decision to allow recruiters on campus is not inherently expressive," 547 U.S. at 64, the Union's advocacy on matters of public concern in the context of collective bargaining surely is, *see Janus*, 138 S. Ct. at 2475–77.

3. Respondents' contention that *Knight* exempted these impingements from First Amendment scrutiny, Union Br. 11–14, Board Br. 5–7, fails to grapple with the fact that *Knight* passed judgment only on a "restriction of participation" that barred the plaintiffs, public college instructors, from participating themselves in "meet and confer" sessions between the union and the college. 465 U.S. at 273. There is a material difference between the government's choosing to listen to only certain speakers—the restriction at issue in *Knight*—and its appointment of an unwanted representative to represent and speak on behalf of objecting public workers.

Conflating the two, Respondents insist that *Knight* additionally upheld compelled union representation against First Amendment challenge, but *Knight* says no such thing. The precise section the Union cites (at 12–13) expressly addresses the instructors' argument

that "restriction of participation in 'meet and confer' sessions to the faculty's exclusive representative" impaired their associational rights by pressuring them to associate with the union. *Knight*, 465 U.S. at 288. Indeed, that same section of *Knight* explains that the Court "summarily approved" in a companion case the district court's rejection of the instructors' challenge to union's "unique status" as exclusive representative. *Id.* at 290. That separate claim actually did challenge compelled union representation, but was premised solely on nondelegation grounds, not any First Amendment right. See *id.* at 279 (discussing that claim); *Knight v. Minn. Cmty. Coll. Fac. Ass'n*, 571 F. Supp. 1, 3–4 (D. Minn. 1982) (same). Respondents (correctly) do not dispute that the compelled-representation challenge rebuffed by the district court and this Court was so limited. In sum, this Court has never addressed whether compelled union representation comports with the First Amendment.

4. The Sixth Circuit's erroneous reading of *Knight*, along the lines Respondents advocate, caused it to find conflict between *Knight* and *Janus*. But, as the Petition explained (at 21–28), this error only confirms the necessity of this Court's review. *Knight* should either be clarified, so as to avoid conflict with *Janus* and the long line of free-speech cases preceding it, or else overruled as erroneous.

Respondents defend an incoherent third option of privileging *Knight* over the Court's free-speech cases like *Janus*, notwithstanding the conflict between them. But even if that was a sound basis for the Sixth

Circuit to render its decision, that course of action does not suit this Court, which has the sole "prerogative of overruling [or clarifying] its own decisions." Pet.App.9 (citation omitted). Undeterred, both the Union (at 19) and the Board (at 8) suggest that *Janus* says nothing about exclusive representation because, in that case, it was "not disputed that the State may require that a union serve as exclusive bargaining agent for its employees." 138 S. Ct. at 2465. One need only read the Sixth Circuit's decision—the decision Respondents defend—to see why those arguments fail. *See* Pet.App.6–7. In particular, *Janus* recognized that "designating a union as the exclusive representative of nonmembers substantially restricts the nonmembers' rights." 138 S. Ct. at 2469. That *Janus* assumed—as to an issue neither raised nor decided—that this *restriction* might be *justified* under First Amendment scrutiny in no way supports Respondents' position that there is no restriction of First Amendment rights at all.

B. *Stare decisis* does not support the judgment below. As the Sixth Circuit recognized, "[t]his case presents First Amendment questions of considerable importance," Pet.App.10, on which Mrs. Thompson "should prevail," Pet.App.7, but for an aggrandized view of *Knight* with no logical underpinnings in widely applicable First Amendment principles or even in the decision itself. Respondents' inability to demonstrate that *Knight* exempted compelled union representation from First Amendment scrutiny renders it all the more troubling that the lower courts have come

to regard *Knight* as controlling on that point. This distortion of *Knight* is an accident of history, and the Court's intervention is required to correct it.

Because *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), upheld compulsory financial support for union collective bargaining, it naturally followed that compelled union representation in bargaining was permissible—indeed, the district court in *Knight* recognized that to be a necessary corollary of *Abood*. 571 F. Supp. at 4. What did not follow, however, was that such compulsion does not even implicate First Amendment rights. Although the lower courts drew that mistaken lesson from *Knight*'s treatment of an adjacent issue—concerning the right to be heard by government—their error made no practical difference until *Janus* jettisoned *Abood*'s holding and its "deferential standard that finds no support in [the Court's] free speech cases." 138 S. Ct. at 2480.

But, by then, the lower courts' reliance on *Knight* as exempting compelled union representation from First Amendment scrutiny had become entrenched, preventing consideration of the issue from first principles. Respondents ignore this history, preferring instead to reel off citations of lower-court decisions applying a distorted reading of *Knight* that they cannot even defend. Yet even those decisions recognize that the prevailing view of the law in this area does not quite add up.

The Eighth Circuit's decision in *Bierman v. Dayton* felt the need to bolster its reliance on *Knight* with discussion of this Court's summary affirmance of "the

constitutionality of exclusive representation for subjects of mandatory bargaining," being apparently unaware that that affirmance concerned only a nondelegation challenge. 900 F.3d 570, 574 (8th Cir. 2018). And the First Circuit's decision in *D'Agostino v. Baker* relies principally on *Abood* to uphold compulsory union representation, reasoning that, if "public employees have no cognizable associational rights objection to a union exclusive bargaining agent's agency shop agreement," then they have no basis to challenge compelled representation. 812 F.3d 240, 243 (1st Cir. 2016). *Knight*, in its view, merely reinforced the point. *Id.*

The Ninth Circuit, in *Mentele v. Inslee*, acknowledged that "*Knight's* recognition that a state cannot be forced to negotiate or meet with individual employees is arguably distinct" from a challenge to compelled representation, but opted to apply *Knight* regardless because it "is a closer fit than *Janus*"—a *non sequitur* response to the point that *Knight* addressed a different issue. 916 F.3d 783, 788 (9th Cir. 2019). Accepting that there is some question over whether *Knight* remains good law, it also, in the alternative, considered the issue from first principles. So proceeding, it recognized that compelled representation appears to impinge First Amendment rights, but held that the state's interest in "labor peace," as recognized by *Abood*, justified the intrusion. *Id.* at 790–91. Thus, one of the only courts ever to attempt meaningful consideration of this issue understood that the prevailing view of *Knight*—compelled representation does not

even impinge First Amendment rights—is untenable under this Court's free-speech cases and could only uphold compelled union representation by relying on an unsound doctrine drawn from an overruled decision. *See* Pet. 16–17 (discussing *Abood*'s "labor peace" doctrine).

This Court is the only court that can harmonize *Knight* with its broader First Amendment jurisprudence, either by clarifying *Knight*'s reach or overruling it altogether. Review is necessary to settle the matter and correct a serious departure from the Court's free-speech precedents.

## II. This Case Is an Ideal Vehicle To Address the Questions Presented

As the Petition explains (at 30–32), this case presents an ideal vehicle to resolve these important First Amendment questions, because it has no justiciability defects and presents the questions in the typical factual scenario in which this issue arises: a state employee compelled by state law to associate with a labor union and suffer it to speak for her. Respondents provide no basis to disagree, and their miscellaneous vehicle contentions fall flat.

A. The Union's assertion (at 26) that "alternative grounds" support the judgment below cites nothing but the Union's position, endorsed by the district court (but not the Sixth Circuit), that exclusive representation satisfies First Amendment scrutiny. But that merely describes one facet of the question presented in the Petition—which contends that exclusive

representation does not satisfy First Amendment scrutiny (at 16–18)—not an "alternative ground" for the judgment independent of the question presented.

This Court routinely conducts all steps of a constitutional inquiry in resolving questions such as those presented here. *See, e.g.*, *Reed v. Town of Gilbert*, 576 U.S. 155, 163–73 (2015); *Janus*, 138 S. Ct. at 2463–65 (determining appropriate standard of scrutiny); *id.* at 2465–69 (applying it). In fact, *Janus* analyzed the case under alternative standards of scrutiny. *See, e.g.*, *id.* at 2472–78 (conducting *Connick-Pickering* analysis). Even where the Court has chosen to bifurcate the question of the applicable standard of scrutiny from its application, and to remand the latter, *see, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 238 (1995); *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 314 (2013), that has not prevented it from deciding the legal standard applicable on remand.

The Union's effort (at 26) to transform First Amendment scrutiny into a fact question by citing "unrebutted record evidence below" ignores that this case was decided on summary judgment, review of which is a question of law, *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466 n.10 (1992), and that application of First Amendment scrutiny is also a question of law, *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 508 n.27 (1984). Nothing prevents this Court from resolving either the governing legal standard or the merits, as it so often has done in

this precise area of the law. *See also* Pet. 16–18 (arguing that any state interest in "labor peace" is insufficient to satisfy strict scrutiny).

B. The Board argues (at 9–14), with half-hearted concurrence from the Union (at 17–18), that Mrs. Thompson waived portions of her First Amendment argument separate from her core compelled speech and association arguments at the preliminary-injunction stage. But the Sixth Circuit found these contentions *not* waived. Pet.App.10. As the case comes packaged to this Court, there is no waiver. In any event, this Court has seen no obstacle to taking cases raising claims "passed upon" below. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *United States v. Williams*, 504 U.S. 36, 41 (1992). Here, all claims were both raised in and decided by both lower courts.

C. The Board also contends (at 14) that Mrs. Thompson "has already been provided" her remedy because the Board insists that it "does not attribute the Union's bargaining positions to her." But the announcement of a local school board that it does not subjectively accord Mrs. Thompson the representation state law imposes on her does not moot Mrs. Thompson's challenge to that state law. *Cf. Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000); *see also R.I. Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 35 (1st Cir. 1999) (rejecting state attorney general's representation that plaintiff did not fall within challenged statute because the "statute is unambiguous and, therefore, not readily susceptible to a narrowing construction"). The

Sixth Circuit had no trouble concluding that Ohio law imposes "a take-it-or-leave-it system—either agree to exclusive representation, which is codified in state law, or find a different job." Pet.App.3. The Board's assertion that Mrs. Thompson has already obtained the relief the Sixth Circuit suggested she *should obtain* under the sound legal standard that she advocates (but Respondents oppose) is nothing short of baffling.

## CONCLUSION

The Court should grant the petition.

Respectfully Submitted,

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