ORIGINAL

22-1009
No. _____

In the
Supreme Court of the United States

BARBARA KOLKOWSKI,
Petitioner,
v.

ASHTABULA AREA TEACHER'S ASSOCIATION, OHIO EDUCATION ASSOCIATION, AND ASHTABULA AREA CITY SCHOOLS,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of Ohio, Eleventh Appellate District, Ashtabula County

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Ohio has a public employee statutory scheme for collective bargaining. In this statutory scheme, the Ohio Legislature took care to create an individual process right for all bargaining unit members, which allows them to "present [their own] grievances". It follows from the statute's language, if they choose to represent themselves, they are allowed to speak freely to present their grievances at any time during the grievance process. It also allows those employees to do so "without the intervention of the bargaining representative". This statutory process right clearly implicates individual freedom of speech and associational rights of those members during the grievance process, and more specifically under R.C. 4117.03(A)(5). It seems clear the Legislature intended this statute to embody an individual "liberty interest" and objective expectancy of due process for those members.

This petition presents two questions, depending on the answer to the first question:

1. Whether a public employee in Ohio under a collective bargaining agreement providing for binding arbitration has the Constitutional right either fundamentally or more specifically under ORC 4117.03(A)(5) to retain counsel to present their grievance under that agreement?

2. If not, whether due process rights of public employees under the Fourteenth Amendment to the Constitution require at a minimum a balancing test to be conducted

under *Mathews v. Eldridge*, 424 U.S. 319 (1976) as to the procedural protections "due" when an objective expectancy of an individual liberty or property interest is identified?

LIST OF PARTIES

Pursuant to Rule 14.1(b), the parties here and in the proceeding in Ohio's 11th District Court of Appeals are listed.

The petitioner here and appellant below is myself, Barbara Kolkowski. I am the real party in interest.

Respondents here and appellees below are:

Ashtabula Area Teacher's Association, Ohio Education Association, and Ashtabula Area City Schools.

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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JURISDICTION

On January 17, 2023 the Ohio Supreme Court declined a timely discretionary appeal in this case. This case arises under the First, Fifth, and Fourteenth Amendments to the United States Constitution and under 42 U.S.C. § 1983. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides, "Congress shall make no law...abridging the freedom of speech [and association]".

The Fifth Amendment to the U.S. Constitution provides, "No person shall...be deprived of life, liberty, or property, without due process of the law".

The Fourteen Amendment to the U.S. Constitution provides, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Ohio Rev. Code § 4117.03(A)(5) provides collective bargaining unit members in Ohio the right to:

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

Ohio Rev. Code § 4117.10(A) and (A)(1) provides:

> (A) ... If the [collective bargaining] agreement provides for a final and

> binding arbitration of grievances, public employers, employees, and employee organizations are subject solely to that grievance procedure....All of the following prevail over conflicting provisions of agreements between employee organizations and public employers: (1) Laws pertaining to any of the following subjects: (a) Civil rights. . . .

STATEMENT OF THE CASE

Ohio has a public employee statutory scheme for collective bargaining. Under this scheme, the Ohio Legislature took care to create an individual process right for all bargaining unit members, which allowed them to "present [their own] grievances". From this statute, it follows that employees who choose to represent themselves are allowed to speak freely to present their grievances throughout the grievance process. It also provides that those employees can do so "without the intervention of the bargaining representative" thereby avoiding association with the union. This statutory process right clearly implicates the free speech and associational rights of the individual bargaining unit members creating an objective expectancy of an individual "liberty interest" under Ohio Rev. Code 4417.03(A)(5). This liberty interest is enforceable as a procedural due process right under the First and Fourteenth Amendments to the U.S. Constitution. *Gitlow v. New York*, 268 U.S. 652, 666 (1925); and *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L. Ed. 2d 570 (1972). Under this Court's recent decision in *Janus v. Am. Fedn. of State, Cnty., & Mun. Employees, Council 31*, ___U.S.___, 138

S.Ct. 2448, 201 L. Ed. 2d 924 (2018) there may exist more fundamental free speech rights that extend beyond this statutory right provided by Ohio.

Three things this Court should keep in mind with respect to R.C. 4117.03(A)(5). First, given the ordinary meaning of the words in the statute the Legislature clearly didn't consider the grievance process in Ohio to be one of the more traditional bargaining activities of a union. Second, if it did - then clearly the Legislature would not have included this particular right. Third, this right isn't arbitrary - the bargaining unit member unequivocally is given this right to present their grievance without intervention by the union.

Under this "liberty" right, individual bargaining unit members have

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

Ohio Rev. Code Section 4117.03(A)(5). The intent obviously was to strike a balance between the individual bargaining unit member, the union, and the public employer, and their respective interests: 1) for a fair adjudication, 2) for ensuring the adjustment isn't inconsistent with terms bargained

for, and 3) so as not to create new administrative burdens on the employer.

Prior to my case, the courts in Ohio interpreted this procedural due process right to exist as long as the grievance was pursued without union representation. *Johnson v. Metro Health Medical Centr.,* 8th Dist. Cuyahoga No 79403, 2001 WL 1685585 (Dec. 20, 2001); *Gaydosh v. Trumbull County,* 2017-Ohio-5859, 94 N.E. 3d 932 (11th Dist.); and *Waiters v. Lavelle,* 8th Dist. Cuyahoga No. 95270, 2011-Ohio 116, ¶ 11. Under Ohio common law, the public employee had standing as the real party in interest until such point where the union's representation was sought by the member needing to be *represented* - then the real party in interest became the union. I properly invoked my rights under R.C. 4117.03(A)(5) carefully ensuring my actions could not be considered a request for union representation.

Both the Ashtabula Area Teacher's Association (and their parent the Ohio Education Association) (herein "Union") and the Ashtabula Area City Schools (herein "District" or "School District") denied me the liberty right to represent myself at arbitration, and now both fight to compel my speech through and by association with the Union. I filed suit under 42 U.S.C. § 1983 seeking declaratory and injunctive relief with nominal damages (App. 52). The trial court dismissed my case without a hearing (App. 50). The Eleventh District Court of Appeals in Ohio (herein "Appellate Court") reviewed my appeal as a matter of right (App. 2).

The CBA covering my grievance has certain language that requires a member to be represented by

the union in arbitration. I argued other language in the same CBA grievance procedure could be interpreted as providing individual procedural process rights like those provided under R.C. 4117.03(A)(5). The Appellate Court sided with the Union holding that because the CBA states a member "shall be represented by the association" during arbitration this language by itself stops me from presenting my own grievance. *Kolkowski v. Ashtabula Area Teachers Assn.*, 11th Dist. Ashtabula No. 2021-A-0033, 2022-Ohio-3112, ¶¶31, 38 (App. 14).

The Appellate Court, however, misread R.C. 4117.03(A)(5) in applying it to their ruling in my particular case. They held if I represented myself this itself "would be an adjustment" and that would be "inconsistent with the terms of the collective bargaining agreement". (App. 14) I submit, however, this is not a reasonable interpretation of the statute. Under their interpretation the Appellate Court seems to imply R.C. 4117.03(A)(5) should instead read

> Present grievances and have them adjusted, without the intervention of the bargaining representative, as long as either the act of presenting the grievance or the adjustment is not inconsistent with the terms of the collective bargaining agreement then in effect and as long as the bargaining representative have the opportunity to be present at the adjustment.

It clearly does not. The Appellate Court cannot add language to a statute thereby changing its intent. This is error of law by the Appellate Court,

significantly impacting my case. Unfortunately it is one of many.

More troublesome, the Appellate Court's decision now allows public employers and unions to believe it is their right to negotiate terms in a CBA that conflict with or override an individual bargaining unit member's constitutional rights. This is a particularly dangerous precedent. In making its analysis the Appellate Court did not consider R.C. 4117.10 (A) and (A)(1)(a), another statute under the Ohio's collective bargaining statutory scheme, which states in part:

> (A) ... If the [collective bargaining] agreement provides for a final and binding arbitration of grievances, public employers, employees, and employee organizations are subject solely to that grievance procedure....*All of the following prevail over conflicting provisions of [collective bargaining] agreements between employee organizations and public employers: (1) Laws pertaining to any of the following subjects: (a) Civil rights*;

Emphasis added. Since "civil rights" aren't defined, a general definition of "civil rights" would be appropriate. In Merriam Webster Dictionary civil rights are defined as "the nonpolitical rights of a citizen *especially* the rights of personal liberty guaranteed to U.S. citizens by the 13th and 14th amendments to the Constitution and by acts of Congress". (https://www.merriam-webster.com/dictionary/civil%20rights) Clearly the

Legislature intended any collective bargaining agreement to be subject to an individual's constitutional rights guaranteed by the Fourteenth Amendment of the U.S. Constitution. This is just common sense. This also squarely calls into question this holding.

Both the trial court and the Appellate Court neglected to determine whether R.C. 4117.03(A)(5), by itself, creates the expectancy of a liberty interest, and further whether there is an objective expectancy of due process under the U.S. Constitution by itself. These errors manifested themselves further in the Appellate Court's novel and I submit improper interpretation of the U.S. Supreme Court's ruling in *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 104 S.Ct. 1058, 79 L. Ed. 2d 299 (1984) and a U.S. Sixth Circuit Court of Appeals (herein "6th Circuit") ruling in *Thompson v. Marietta Ed. Assn.*, 972 F.3d (6th Cir. 2020). The Appellate Court held these cases precluded them from finding a more fundamental constitutional violation in my case related to my free speech and associational rights. (App. 27) I will address this error first.

In *Thompson* the plaintiff was attempting to "avoid association" with respect to traditional collective bargaining rights. The 6th Circuit held that *Knight* precluded Thompson from asserting free speech rights related to areas of traditional collective bargaining rights of the union such as a meet and confer session with the government. The 6th Circuit in *Thompson* further pointed out in Ohio the collective bargaining statutory scheme "*is in direct conflict with the principles enunciated* in *Janus v. AFSCME*, 138 S.

Ct. 2448, 201 L. Ed. 2d 924 (2018). *But when the Supreme Court decided Janus, it left on the books Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 104 S. Ct. 1058, 79 L. Ed. 2d 299 (1984)." *Thompson v. Marietta Educ. Ass'n*, 972 F. 3d 809, 811, 812 (6th Cir. 2020), cert. denied, 2021 U.S. LEXIS 2949 (U.S., June 7, 2021). Emphasis added.

The Appellate Court when ruling in *Kolkowski* instead of trying to understand how this conflict might affect the outcome in *Kolkowski* - went ahead and *impermissibly* extended *Knight's* holding past what this Court may have intended in *Knight*. The Appellate Court *held* that the traditional bargaining activities identified in *Knight* are now *extended to included grievance arbitration. Kolkowski v. Ashtabula Area Teachers Assn.*, 11th Dist. Ashtabula No. 2021-A-0033, 2022-Ohio-3112, ¶ 59. (App. 25) What is even more perplexing is they did so knowing that by creating R.C. 4117.03(A)(5) the Ohio Legislature could not have considered binding arbitration to be a traditional bargaining activity! This Appellate Court may be the first court in the United States to make such a holding. What makes this holding so troubling, however, is its direct conflict with both the explicit process and implicit free speech and associational rights the Legislature in Ohio clearly intended for bargaining unit members under R.C. 4117.03(A)(5). **As it stands, the Appellate Court, with its ruling, effectively removed R.C. 4117.03(A)(5) from the Ohio collective bargaining scheme by "judicial fiat" thereby impermissibly eliminating these individual**

constitutional freedoms of bargaining unit members.

I also believe this is the first case seeking this Court's review to address whether the speech and associational rights of individuals recognized in *Janus* fundamentally extend to grievance arbitrations. Unlike the plaintiff in *Thompson*, I am not seeking to interfere with the traditional bargaining activities of the unions in Ohio, but rather merely seek to represent myself in a grievance arbitration. This case involves a second grievance (herein known as the "grievance") I filed against the District without assistance of the Union (as opposed to my prior grievance I describe below where the Union represented me) for purposes of nomenclature I call my first grievance (the "prior grievance").

So this Court might better understand why I don't want or trust the Union to speak for me in arguing my grievance arbitration, I am providing background about my prior grievance. I am not raising or arguing new issues of fact, but simply pointing out my motivation for pursuing my individual due process rights at this time. I ask this Court to indulge me because the relevance should be readily apparent.

I am a 17 year employee of the District with great reviews during my tenure. In April 2020, I was reassigned to a new job against my wishes during a reduction in force ("RIF") back to the position of special education teacher - an area I had not worked in nor kept up with the law and regulations for almost 8 years in 2020. (App. 78) This reassignment made no sense, particularly for our students.

I asked for meetings with the Union and the District's superintendent to understand how this decision was made. The District's superintendent admitted my reassignment did not look right to him. (App.83) The Union, on the other hand, was defensive - blaming me for being too qualified and pointing out my reassignment was to save the job of a non-tenured counselor. (App. 84) The counselor replacing me had no experience performing the various functions of the position I was being moved out of. I knew if I didn't fight this reassignment - the following year I'd also be pressured into helping this inexperienced guidance counselor do my old job as well. The end result would be that students affected by either of our jobs would lose.

The District, in hind sight, apparently had difficulty attracting highly skilled special education teachers due to their low pay scale. My reassignment solved a couple of problems for the District and Union even though it breached the CBA. Regardless, the District went along with the Union's shenanigans because I am generally quiet and cooperative, and rarely complained.

The CBA's reassignment provisions provided procedural protections for teachers being assigned to a new position against their will. In order to be reassigned the Superintendent, himself as required by the CBA, needed to make a fairly detailed, objective assessment of qualifications of the affected teachers involved in this shift of personnel to ensure this made sense from an educational perspective. (App. 84-85) This assessment wasn't performed clearly because the Superintendent admitted they only followed the RIF

provisions of the CBA. (App. 84) My attorneys also looked at the personnel records of the affected teachers and felt this decision could not be made objectively and in good faith - even if the District's Superintendent had tried. (App. 88)

Both the District and Union took the position during a RIF that only the RIF provisions of the CBA applied (App. 83-85), but later after I filed an unfair labor practice charge against the Union with Ohio's State Employment Relations Board ("SERB") for violation of their duty of fair representation, the Union's attorney argued just the opposite claiming with mere argument and no evidence that the reassignment provisions of the CBA were followed. Fortunately two audio recordings existed of statements made by the Union's representatives that show they knew and previously admitted the reassignment provisions of the CBA were not followed. These recordings along with my affidavits summarizing those conversations with the Union were submitted to SERB. (App. 92-105)

During this prior grievance the Union's behavior was so bad, in one meeting, the Union's labor consultant who supposedly represented me stated that even though he had not read nor investigated my grievance if I brought up the CBA's procedural protection rights on reassignments during the Level Two meeting he was going to argue against me saying those procedural protections were not required. (App. 93-95) In another instance an email was sent by the District's attorney that joked and questioned why I was caucusing with the Union's representatives at mediation given he understood the Union was on the

District's side. (App. 90-91) In still another instance, the Union's attorney handling the SERB complaint stated that in the future the Union would take these same inappropriate actions to reassign me if they needed to save another job in the future. Given this experience, I lost all trust for the Union's leadership.

I believe my concerns about the Union violating their duty of fair representation were well grounded. A labor union's duty of fair representation is a judicially created doctrine grounded in the union's statutory position as exclusive representative of the members of its bargaining unit. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 198-203 (1944), National Labor Relations Act §159(a) (1976). The doctrine requires that the union represent all members of the bargaining unit "without hostile discrimination, fairly, impartially, and in good faith." Id at 204. Courts apply this standard to intentional union action that deprives an employee of fair representation. Several courts extended the duty to unintentional action, holding that gross or ordinary negligence by union officials may constitute a breach of their duty. The Sixth Circuit adopted such a view, ruling that negligent grievance processing constitutes a breach of the union's duty. *Rizicka v. General Motor Corp.*, 523 F.2d 306 (6th Cir. 1975). The duty to advocate [by the Union] includes the responsibility to investigate the grievance and to present the grievant's case fully and fairly. The National Labor Relations Board has held that an outright statement contrary to the employee's interest constituted a breach of the duty of fair representation. *Truck Drivers Local 705 (Associated Transp., Inc.),* 209 N.L.R.B. 292, 86 L.R.R.M. 1119 (1974) (duty to advocate breached when union

representative told grievance board that grievance lacked merit) *petition for review denied,* 532 F.2d 1169 (7th Cir. 1976). To me the Union's violation of their duty of fair representation seemed obvious.

A couple of weeks after filing the SERB complaint, with little explanation, the District simply notified me I was being assigned back to my old job. I felt relieved, and hoped to focus on taking care of the students for which I was responsible. I did, however, quit my membership in the Union under this Court's *Janus* decision. I could not in good conscience associate with an organization to whom I paid dues for 15 years that would not fairly represent myself and others under the rules they negotiated and that we as members relied on. Subsequently, the Union convinced SERB to dismiss my unfair labor practice complaint claiming it became moot once the District moved me back into my old job.

I was shocked after returning to my old job when I quickly received what in prior years used to be a standard supplemental contract for extra duty days required of guidance counselors. (App. 74-75) What bothered me was the new contract contained a brand new clause requiring *a waiver of any claim that I was entitled to a continuing contract,* a clause never required over my previous seven years. (App. 75)

The waiver stated more specifically that "Employee... HEREBY WAIVES ANY CLAIM THAT HE/SHE IS ENTITLED TO PRIOR NOTICE OF CONTRACT NON-RENEWAL OR TO A CONTINUING CONTRACT." (App. 75) My attorneys felt by my signing this contract it was possible I might be waiving my right to claim tenure protections in the

future, effectively terminating my continuing contract. Out of an abundance of caution, I asked my attorney to see if the District would amend the contract to make it clear the waiver only applied to the supplemental contract - the District would not.

Due to both this unwillingness by the District and my previous experience with the Union, I decided to represent myself given my expectation of a liberty right under R.C. 4117.03(A)(5) and its subsequent common law interpretation. I filed my grievance being careful not to ask for Union representation. (App. 68-75)

I represented myself through Level Two of the grievance procedure. At each step the District listened to my argument and issued a general denial without providing any details why they were denying the grievance. (App. 66-67 and 69) Clearly neither of first two levels constituted a fair and impartial hearing.

In November 2020, I decided against mediation and requested the Union submit a demand for arbitration as required under their grievance procedure, however, I invoked my right to continue to represent myself rather than relying on the Union's labor relations consultant who during my prior grievance was unwilling to read, investigate and fairly represent my grievance. The Union agreed to arbitrate but denied my right to represent myself.

Given what I believed to be both my rights codified by the Ohio legislature in RC 4117.03(A)(5) and under the U.S. Constitution, in January 2021, I filed suit seeking declaratory and injunctive relief against the Union's stated intentions to represent me.

(App. 52-65) In this suit I was represented by The Buckeye Institute, an Ohio-based, free market, non-profit, policy institute, who earlier argued the *Thompson* case at the 6th Circuit. (App. 65) I thank them. The trial court dismissed my case without conducting a hearing to determine what process rights were due (App. 28-51), the Appellate Court affirmed this dismissal (App. 2-27), and the Ohio Supreme Court denied a discretionary appeal (App. 1) (although 2 justices voted to review) leaving the U.S. Supreme Court as my last hope. I will attempt to explain through this Writ in my own words why the Union's refusal to allow me to present my grievance not only violates my free speech rights, but more importantly why this review is of great public importance to the hundreds of thousands of public employee bargaining unit members in Ohio and potentially millions across the United States.

REASONS FOR GRANTING THIS PETITION

This is a case of first impression that significantly affects individual constitutional rights—which are also expressly preserved by Ohio statute--of public employees throughout Ohio. "'[A] civil litigant's right to retain counsel is rooted in fifth amendment notions of due process * * * .'" *Anderson v. Sheppard,* 856 F.2d 741, 748 (6th Cir. 1988), quoting *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1118 (5th Cir.1980). "The right to counsel, safeguarded by the constitutional guarantee of due process of law, includes the right to choose the lawyer who will provide that representation." *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1257 (5th Cir.1983). Ohio courts also recognize "a party's right to representation

by counsel of his or her choice * * * ." *A.B.B. Sanitec W., Inc. v. Jeffrey J. Weinsten*, 8th Dist. Cuyahoga No. 88258, 2007-Ohio-2116, ¶ 25. The Ohio Legislature explicitly preserved this right when creating the collective bargaining scheme, explaining that unless and until a public employee requests "union representation," the employee has the right to representation by counsel of his or her choice. R.C. 4117.03(A)(5) *Johnson* recognized this right in reaching its result. *Johnson,* 2001 WL 1685585.

While the court cited the statute, there is no question that this right originates with the U.S Constitution and not the Ohio Revised Code. *Johnson* explained—consistent with the Fifth Amendment, *Anderson*, *McCuin*, *A.B.B. Sanitec W.*, and the Ohio Revised Code—that such right exists until "the employee invokes union representation." *Johnson* at *2. But the Appellate Court's decision in *Kolkowski* below disregarded this right—which would allow the Union to have a non-lawyer represent my interests at the arbitration.[1] Moreover, in *Kolkowski* below, the

[1] A non-lawyer union employee is permitted to represent a "labor organization" "during a grievance labor arbitration." Board on the Unauthorized Practice of Law of the Supreme Court of Ohio, Adv. Op. No. UPL 2008-1, 5. However, this same advisory opinion made it clear that "[a] nonlawyer labor consultant, employed by a union, may represent a local bargaining unit in an arbitration process...*as long as he/she do not engage in those activities that equate to the practice of law*." Emphasis added. This opinion also makes clear "[t]he practice of law encompasses many activities that may be necessary in an arbitration setting, depending on the complexity of the issues presented and the requisite burden of proof. It is theoretically possible for a nonlawyer, representing another person or entity in a labor grievance arbitration, to impermissibly engage in the practice of

Appellate Court elevated the terms of a CBA—an agreement to which a non-union member is legally bound but about which the employee has no say—over the bargaining unit member's constitutional rights (including their procedural process rights "due" to them, which have been statutorily defined by the Ohio Legislature). The Court should accept review to confirm the validity of these constitutional rights and that these individual rights control over any conflicting terms of a CBA.

This is also the first case to reach this Court to address whether the speech and associational rights recognized in *Janus* and litigated in *Thompson v. Marietta*, 972 F.3d 809 (6th Cir. 2020), extend to

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law if they give legal advice to the organization or its members [or particularly nonmembers] about their respective legal rights and duties, engage in legal argument, or engage in the direct or cross-examination of witnesses. *Dayton Supply & Tool Co., Inc. v. Montgomery Cty. Bd. of Revision,* 111 Ohio St.3d 367, 2006-Ohio-5852 at ¶32; *CompManagement* at ¶63-68...Nonlawyers, when actually engaging in these activities, whether in an arbitration, administrative or other quasi-judicial setting, are engaged in the unauthorized practice of law in Ohio." Emphasis added. It follows from this and from my prior grievance that the Union's labor relations consultant engaged in the unauthorized practice of law, while purporting to represent me in my prior grievance, and given the complexity of the current grievance as well as the need to establish a factual foundation for the time I worked outside the mandated work day/year as proof of my right to recovery of the "equal pay" - such a foundation can only be established through the questioning of my witnesses and the cross-examination of government witnesses. Therefore the use of a labor relations consultant with a duty to fairly represent me in my grievance arbitration would clearly lead to a violation of public policy in Ohio - because he/she would be forced to practice law without a license to meet their duty in this case.

grievance arbitration. This implicates the constitutional rights of over two hundred and forty thousand public employees in Ohio.[2] This Court should accept jurisdiction to clarify whether grievance arbitration is one of "the more traditional bargaining activities" where the government can legitimately curtail speech and associational rights protected under the U.S. Constitution.

I. A Public Employee Under Ohio's Collective Bargaining Framework Has The Right To Retain Counsel To Present Their Grievance In An Arbitration Under A Collective Bargaining Agreement

A. The Appellate Court's decision conflicts with the Ohio's Eighth District Court of Appeal's decision in *Johnson* and, indeed, its own decision in *Gaydosh v. Trumbull County*, 2017-Ohio-5859, 94 N.E. 3d 932 (11th Dist.), which adopted *Johnson*. The rule advanced in *Johnson* is that under a CBA, employees like myself have the right to choose their own counsel in a grievance arbitration so long as they have not already accepted union representation.

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[2] In Ohio there are over 750,000 public employees and statistics nationwide show that 33.1 percent of public employees belong to unions see https://247wallst.com/state/this-is-how-many-people-work-for-the-government-in-ohio/ and https://www.bls.gov/news.release/pdf/union2.pdf. This means that if Ohio mirrors these nationwide statistics over 240,000 Ohio public employees would be affected by this Court's decision should it decide to take this case. If this case is decided on a more fundamental basis under *Janus* there are over 20,000,000 public employees nationwide, and therefore statistically over 7,000,000 public employee union members who could be affected, see https://link.springer.com/chapter/10.1057/9781403920171_5.

Johnson at *2. In other words, the grievance belongs to the employee unless and until he/she accepts the union's assistance in adjusting it.

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

While Ohio law grants the State Employment Relations Board ("SERB") exclusive jurisdiction in disputes relating to the "new rights and remedies" created by R.C. Chapter 4117, "if a party asserts rights that are independent of R.C. Chapter 4117, then the party's complaint may properly be heard in common pleas court." *Franklin Cty. Law Enf't Ass'n.* at 171. Thus, the Ohio Supreme explained, "[b]ecause constitutional rights exist independently of R.C. Chapter 4117, such claims may be raised in common pleas court even though they may touch on the

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

The Appellate Court's opinion was "sloppy" in *Kolkowski* using the case law of *State ex rel. Cleveland v. Sutula*, 127 Ohio St. 3d 131, 2010-Ohio-5039 to hold the trial court lacked subject matter jurisdiction quoting from *Sutula* that "SERB has exclusive jurisdiction over matters within R.C. Chapter 4117 in its entirety, not simply over unfair labor practice claims" thereby using an improper basis for denying certain claims in my case under Ohio Civ.R 12(B)(1). (App. 11)

Performing a simple search, I found this expanded view of SERB's jurisdiction in *Sutula* used by the Appellate Court was corrected six years later by the Ohio Supreme Court in *Ohio Civ. Serv. Emps. Assn.*, 146 Ohio St. 3d 315, 2016-Ohio-478, 56 N.E,.3d 913, at ¶ 57. The Ohio Supreme Court later addressed this very issue in *State ex rel. City of Cleveland v. Russo*, 156 Ohio St.3d 449. The *Russo* Court held "[s]ubsequently, we clarified that our decision in *Sutula* did not expand the scope of **SERB**'s jurisdiction under R.C. Chapter 4117,", further pointing out "[w]hen a party has asserted claims that are independent of R.C. Chapter 4117, we have recognized that jurisdiction lies with a common pleas court, not SERB. See, e.g., *State ex rel. Rootstown*

School Dist. Bd. of Edn. v. Portage Cty. Court of Common Pleas, 78 Ohio St.3d 489, 493-494, 678 N.E.2d 1365 (1997) (contract claim); see also *Franklin Cty. Law Enforcement Assn.*, 59 Ohio St.3d at 172, 572 N.E.2d 87 (constitutional claims)." Clearly, the Appellate Court's holding on subject matter jurisdiction was wrong. The trial court therefore had jurisdiction under R.C. Chapter 4117 to hear my constitutional "liberty" and due process claims with respect to R.C. 4117.03(A)(5), and under the U.S. Constitution itself.

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

The Plaintiff in *Johnson* undisputedly invoked union representation, and the union represented Ms. Johnson at every step of the grievance proceedings,

including arbitration. *Id.* at *1. But unlike the plaintiff in *Johnson*, I did not "choose" union representation; rather, I explicitly rejected Union representation at every step. (App. 52-65; Am.Compl. at ¶ 17, 19, 22, 26, 30).

When I demanded arbitration, I made clear I "wanted to use (and pay for) her [my] own counsel to represent her [me] throughout the arbitration process." (App. 53; Compl. at ¶ 2). I neither requested nor received representation or any other assistance from the Union during the first two stages of the grievance process. (*Id.* at ¶ 16) ("[I] initiated the contractual grievance process"); (*Id.* at ¶ 17) ("[I have] thus far represented herself [myself] in pursuing her [my] grievance"). Indeed, I filed my pre-arbitration action to avoid surrendering my grievance to the Union by proceeding to arbitration with Union representation. I intentionally took every step available to me to preserve my right to choose my own counsel under *Johnson*.

In stark contrast to *Johnson*, the Appellate Court asserted that I have no right to demand arbitration and that only the Union could make that decision. *Kolkowski*, 2022-Ohio-311, at ¶ 38 (App. 17). The Appellate Court held that by merely requesting that the Union submit the grievance to arbitration—as the CBA required—I ceded my standing to adjust the grievance. *Id.* This conflicts with *Johnson's* holding and allows unions and employers to bargain away the statutory and constitutional rights of public employees. If—by agreement between the Union and the District—a CBA contains language that requires a public employee to demand that the Union submit

the arbitration request on her behalf, then that employee has no "right to adjust [her] grievance, without union interference" as provided by R.C. 4117.03(A)(5). This renders illusory the public employee's protections codified in R.C. Chapter 4117. More troubling, the employee is prevented from speaking for herself, choosing her own legal strategy, or presenting evidence of her choice, but is compelled to speak through a union representative. A right that others can bargain away is no right at all.

Gaydosh also supports my legal position. *Gaydosh*, 2017-Ohio-5859, 94 N.E.3d 932. The court held—relying on *Johnson*—that "once an employee subject to a collective bargaining agreement authorizes his or her union to pursue a grievance, the cause of action belongs to the union, and the employee lacks standing to prosecute the case." *Id.* at ¶ 23. The unescapable conclusion, again, is that the grievance belongs to the employee until he or she transfers it to the union. *Id.*; *see also Waiters v. Lavelle*, 8th Dist. Cuyahoga No. 95270, 2011-Ohio-116, ¶ 11. Here, my amended complaint unequivocally stated that I did not seek or accept the Union's assistance. (App. 52-65; Am.Compl. at ¶ 16, 17, 19, 21, 22). Indeed, I filed this pre-arbitration cause of action in reliance on the *Johnson/Gaydosh* rule and to avoid any claim that I had released the claim to the Union. (*Id.* at ¶ 38, 39). *Johnson* and *Gaydosh* premise the loss of standing on the employee's *decision* to seek Union representation.

I never sought Union representation. But if the Appellate Court's decision stands and the mere request for arbitration, as required by a CBA, amounts to union "representation," then the guarantees

provided by *Johnson* and *Gaydosh*--codified in R.C. Chapter 4117 and protected by the U.S. Constitution—are illusory. Public employees like myself will have no choice over whether to choose the union's representation. If the CBA allows a grievant to access its grievance procedures only through the Union's intervention, then there is no set of circumstances where R.C. 4117.03(A)(5), *Johnson*, or the constitutional rights that they affirm can apply.

II. Arbitration of A Personal Grievance Is Not "One Of The More Traditional Collective Bargaining Activities" Which Would Allow A Union To Assume A Bargaining Unit Member's Arbitration Rights Over Their Objection

Although the *Janus* decision provided a definitive answer to one component of public employee rights in a collective bargaining context, it left other questions unanswered regarding the associational rights of public employees that are of great public interest. In *Thompson,* 972 F. 3d 809, a teacher who had opted out of union membership under *Janus* brought suit in federal court seeking a declaration that Ohio's exclusive representation requirement violated her associational rights. The Sixth Circuit recognized that Mrs. Thompson's case presented a tension between the expression and associational rights recognized in *Janus* and the U.S. Supreme Court's holding in *Minnesota State Bd. For Community Colleges v. Knight*, 465 U.S. 271 (1984). *Thompson* at 811-812.

Knight involved bargaining unit members' ability to participate in "meet and confer" sessions

with management, during which administration officials met with union representatives to "obtain faculty advice on policy questions." *Knight* at 280. Those were occasions for "public employers, acting solely as instrumentalities of the state, to receive policy advice from their professional employees." *Id.* at 282. The CBA in *Knight* limited participation in the meet and confer sessions to representatives of the union. *Id.* at 278. The public employee plaintiffs in that case, however, challenged the CBA's requirement as violative of their First Amendment rights. *Id.*

In dismissing Mrs. Thompson's case, the Sixth Circuit held that because *Janus* had not explicitly overruled *Knight* and because *Knight*'s decision allowing the state to exclude individual bargaining unit members from meet and confer extended to "more traditional collective bargaining activities," the State was within its rights to compel her to associate with the Union regarding those activities. *Thompson* at. 814.

Arbitration of a grievance is not just a right to speak, and it has nothing to do with "policy views." *Knight* at 286. It includes, by definition, a right to be heard. *Seldner Corp. v. W.R. Grace & Co.*, 22 F.Supp. 388, 392 (D.Md.1938) ("[I]t is a universally recognized rule that the parties to an arbitration proceeding have an absolute right to be heard and to present evidence before the arbitrators."). It is a substitute for litigation where both parties present evidence and legal (not policy) arguments to an independent third-party decision maker.

The Appellate Court missed this point and, looking to *Thompson* and *Knight,* asked only whether

the arbitration of my personal grievance was one of those "more traditional collective bargaining activities" where the rights of public employees gave way to the government's need administration efficiency. *Kolkowski*, 2022-Ohio-3112, at ¶ 53 (App. 25). The Appellate Court held that through a CBA, the Union and the District can force bargaining unit members such as myself to give up their rights to arbitrate their grievance. *Id.* at ¶ 59. More importantly, the Appellate Court ignored the Ohio' collective bargaining scheme, particularly R.C. 4117.03(A)(5) that made it clear that the Legislature didn't consider the grievance process to be a traditional collective bargaining activity to which only the union could be involved.

Significantly, the Appellate Court is the first court in Ohio—or anywhere else—to hold that grievance arbitration is a core collective bargaining activity and that the CBA, therefore, trumps a public employee's competing constitutional and statutory rights. That decision is itself a case of first impression with significant consequences for every public employee under a CBA in Ohio.

The right to choose one's counsel in an arbitration is a fundamentally different situation than "traditional collective bargaining activities" like the meet and confer sessions in *Knight* or the associational rights raised in *Thompson*. An arbitration, like a trial, is an individualized adjudicatory proceeding. *Greenwald v. Shayne*, 10th Dist. Franklin No. 09AP-599, 2010-Ohio-413, ¶ 9 (recognizing "the adjudicatory purpose of arbitration"). Further, the policy rationale enunciated in *Knight* of preserving state resources

and allowing exclusive representation in the context of negotiating a CBA do not exist in the context of resolving or "adjusting" individual disputes or grievances.

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

The arbitrator is no more burdened by hearing a case presented by my lawyer than by hearing from a non-lawyer union representative. Allowing me to be represented by my own lawyer likewise does not burden the government. Unlike the meet and confer demand in *Knight*, I am not demanding a hearing on my public policy views. Rather, I am asking that the arbitrator—the person that the District and the Union designate to resolve employee grievances—listen to my legal and factual arguments presented by a lawyer of my choosing rather than a non-lawyer union representative who, in arbitrating the grievance, may be forced to engage in the unauthorized practice of law both in violation of Ohio's public policy and to my detriment.

III. Due Process Rights Under The Fourteenth Amendment To The U.S. Constitution Require At A Minimum Conducting A Balancing Test Under Matthews As To The Procedural Protections That Are "Due" When A Liberty Interest Is Identified

In *Gitlow v. New York*, 268 U.S. 652, 666 (1925), the U.S. Supreme Court for the first time held that freedom of speech is among the "liberties" protected from state impairment by the due process clause of the Fourteenth amendment. In my case if my freedom of speech and freedom of association rights *do not* flow from R.C. 4117.03(A)(5), as I believe the Appellate Court erred in holding, then the trial court should have at a minimum conducted a hearing to determine that there exists "no set of facts [that can be proven] in support of the claim" as to whether a liberty or property interest was involved.

In determining whether process was due - the trial court should have looked to *Mathews v. Eldridge*, 424 U.S. 319, 96 S.C. 893, 47 L. E. 2d 18 (1976) (for its balancing test) and *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L. Ed. 2d 570 (1972) (for how to determine whether there is an expectancy of due process) for guidance. *Mathews* defines a method by which due process questions can be successfully presented by lawyers and answered by the courts. The approach defined in *Mathews* appears to be this Court's preferred method for resolving questions over what process is due. In *Mathews* there are three factors to be analyzed. First, what is the private interest that will be affected by the official action? Second, what is the risk of an erroneous deprivation of

such interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards? Third, what is the public employer's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail, if any?

In my case, I am being denied my liberty interest and possibly a property interest (due to a waiver of my rights to claim a continuing contract I have held now for 14 years). During the meetings at the first two levels of the CBA's grievance process prior to asking for binding arbitration, the District's administration were the only ones determining whether the steps they themselves took were improper. (App. 68-75 and 66-67) With little or no discussion and debate - their practice was to summarily deny any issues raised. No reasonable person would consider these steps to be fair and impartial.

The only change I asked for in the grievance process was to substitute my own counsel paid at my own expense in place of the Union's labor consultant - nothing more.

In my case if the trial court conducted a hearing and performed the proper balancing test required by *Mathews*, I could have presented risks of the deprivation of my liberty and my property interests using known evidence on the record. The District, likewise, could have presented their evidence of fiscal and administrative burdens to the District by having to substitute my attorney for the Union's labor relations consultant.

The District throughout the extensive record in this case has not once mentioned any fiscal or administrative burden they foresaw by my attorney presenting my grievance under the very rules they negotiated - I suspect there are none. If the District's intent is to rely on their past "cozy" and at times "improper" relationship with the Union's labor relations consultant then I can understand why they might view the use of my own counsel as an administrative burden.

If this Court does not find for my free speech rights under Ohio's collective bargaining scheme and in particular R.C. 4117.03(A)(5), then I believe this Court's holdings in *Gitlow, Perry, Matthews, and Janus* would require there to be a hearing, at a minimum in a case such as mine, at the trial court level where additional facts could be presented by the District, the Union and myself as to what reasonable liberty and property due process rights I am entitled to, if any, using the *Matthews* balancing test - particularly since this grievance also implicates termination by contractual waiver of my ability to claim continuing contract rights (tenure) as well.

CONCLUSION

Bargaining unit members whose union does not fairly represent them have a difficult time in Ohio due to the apparent lack of skilled staff to handle unfair labor practice charges once a valid charge has been made using the administrative process at SERB. R.C. 4117.03(A)(5) provides an objective liberty interest independent of SERB that balances the equities for individual bargaining unit members.

The State of Ohio has provided bargaining unit members with certain free speech and associational process rights under R.C. 4117.03(A)(5). Without this liberty interest and "due process" rights provided by R.C. 4117.03(A)(5) and the U.S. Constitution bargaining unit members are stuck with the union's representative - even when their union puts its own needs above those of its members and non-members *both individually and collectively*. This may become even more evident now in Ohio under this Appellate Court's ruling in *Kolkowski*.

It's clear the Appellate Court doesn't recognize these rights and their decision allows the unions to believe that bargaining unit members only have those rights the union negotiates for them even if those rights are limited to the self-interest of the union rather than its members, and even when those negotiated rights violate the member's individual constitutional rights.

Bargaining unit members should be able to have faith in and understand that the collective bargaining system is fair and impartial for everyone and the rights you are entitled to are reasonably related to those rights you receive. If those rights are viewed as too extensive or burdensome then it is up to the public employer and the respective union to reduce their scope through the bargaining process they exclusively control - not to *arbitrarily ignore some of those rights for some of the bargaining unit members.*

Perhaps Justice Harlan said it best, when writing

> American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, *not on custom or the will of strategically placed individuals, but on the common law model*...Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this system. *Without this guarantee that one may not be deprived of his [her] rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things.*

Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L. Ed. 2d 113 (1971). Emphasis added.

Through my over 17 years in the District this is not an isolated incident where the District and Union both willingly took actions with respect to District employees that when viewed in the very best light for the Union clearly ignored their duty of fair representation owed to those individual bargaining unit members. I have heard many similar stories from employees of other school districts as well.

I ask this Court to consider taking up this case so when a union decides it is somehow permissible to make arbitrary decisions that materially affect a bargaining unit member's job (and in some cases their

life's work) that those bargaining unit members have some measure of individual liberty protection either under an interpretation of R.C. 4117.03(A)(5) as a liberty interest in Ohio, or more fundamentally under the U.S. Constitution. At least to an extent that allows those employees to meaningfully protect themselves in the binding arbitration process when the union is not willing to or simply cannot ensure they will be fairly represented. As Justice Harlan wisely went on to say " [o]nly by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has, through years of adjudication, put flesh upon the due process principle." Id.

Thank you for taking the time to read and consider taking up my case.

Respectfully submitted,

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