Of Counsel:
DAMON KEY LEONG KUPCHAK HASTERT
Attorneys at Law
A Law Corporation

ROBERT H. THOMAS 4610-0
rht@hawaiilawyer.com
1003 Bishop Street, Suite 1600
Honolulu, Hawaii 96813
www.hawaiilawyer.com
Telephone: (808) 531-8031
Facsimile: (808) 533-2242

BRIAN K. KELSEY (*Pro Hac Vice)*
bkelsey@libertyjusticecenter.org
JEFFREY M. SCHWAB (*Pro Hac Vice)*
jschwab@libertyjusticecenter.org
REILLY STEPHENS (*Pro Hac Vice)*
rstephens@libertyjusticecenter.org
Liberty Justice Center
190 South LaSalle Street, Suite 1500
Chicago, Illinois 60603
Telephone: (312) 263-7668
Facsimile: (312) 263-7702

Attorneys for Plaintiff
PATRICIA GROSSMAN

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

PATRICIA GROSSMAN, Plaintiff, vs. HAWAII GOVERNMENT EMPLOYEES ASSOCIATION / AFSCME LOCAL 152;	Civil No. 18-00493-DKW-RT **PLANTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COUNT II;** ***[Caption continues on next page.]***

DAVID LASSNER, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF HAWAII; AND CLARE E. CONNORS, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF HAWAII, [1] Defendants.	**CERTIFICATE OF SERVICE** Date: 5/15/2015 Time: 9:30 AM Judge: Derrick K. Watson

[1] Pursuant to F.R.C.P. 25(d), Attorney General Clare E. Connors has replaced her predecessor as a Defendant in this case in her official capacity.

Table of Contents

Page

Table of Authorities

Page

Cases

Statutes

PLANTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COUNT II

Patricia Grossman ("Grossman") brings this action to vindicate her right under the First Amendment not to be compelled to join, financially support, or associate with a public sector labor union because she does not agree with its political positions. Defendant Hawaii Government Employees Association ("HGEA"), the union that serves as the exclusive representative of Grossman's bargaining unit, moved to dismiss Count II of the Complaint. Motion to Dismiss at 5 (Dkt. 27) ("MTD").[2] Count II challenges the union's status as Grossman's exclusive representative in negotiations with her employer, the University of Hawaii (the "University"), which is overseen by Defendant David Lassner in his official capacity as President of the University ("President Lassner"). Grossman opposes the Motion.

INTRODUCTION

HGEA misconstrues Count II as asking the Court to overturn the "model used for collective bargaining for public employees of the federal government and about 40 other States." MTD at 10. Count II does no such thing. Grossman acknowledges that if President Lassner wants to bargain with only one union, HGEA, he may do

[2] Attorney General Clare E. Connors ("AG Connors") joined in the Motion on April 23, 2019. Defendant Russell A. Suzuki's Joinder at 2 (Dkt. 38). Defendant David Lassner joined in the Motion on April 24, 2019. Defendant David Lassner's Joinder at 2 (Dkt. 40).

so. Put another way, Grossman does not challenge the portion of Haw. Rev. Stat. § 89-8(a) that states that HGEA shall have the right to "negotiate agreements covering all employees in the unit." Instead, Grossman challenges the portion of the statute that says, in doing so, HGEA "shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership." Haw. Rev. Stat. § 89-8(a). Grossman asks this Court only to recognize and acknowledge that, after the Supreme Court's decision in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), neither the government nor the union can claim the union is representing non-members in its negotiations with the government. To do so would violate Grossman's First Amendment right to freedom of association.

HGEA relies primarily upon a Supreme Court case decided decades before the *Janus* decision, *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984). *Knight* rejected a claim that individual public employees should be entitled to speak during negotiation sessions because of the state government's preference to negotiate with a union without dissenters present. Grossman acknowledges that *Knight* allows President Lassner to ignore her views and not negotiate with her for bargaining purposes. *Knight* is a private forum case, not a freedom of association case. It does not stand for what HGEA would like it to—a blanket license to speak on behalf of employees, irrespective of the wishes of the employees themselves.

Knight bases its reasoning upon the Supreme Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which the Court overturned in *Janus*, explaining that "designating a union as the employees' exclusive representative substantially restricts the rights of individual employees." *Janus*, 138 S. Ct. at 2460. HGEA would now deny the substantial restriction that *Janus* recognized, on the basis of a case answering an unrelated question using overruled precedent. Grossman's claim finds support not only in *Janus* but also in a long line of jurisprudence affirming a right under the First Amendment not to be compelled into associations against one's will. This Court should, therefore, conclude that Grossman has met Fed. R. Civ. P. 12(b)(6)'s minimal requirement that she "state a claim on which relief can be granted."

FACTS

Grossman first began work for the University in 1984, and she currently serves as an admissions officer for the University of Hawaii at Hilo. Complaint ¶ 16 (Dkt. 1). HGEA has been certified as the exclusive representative for collective bargaining purposes for University employees like Mrs. Grossman. Comp. ¶ 17. On July 6, 2018, the University sent an email announcement to employees explaining that, due to the Supreme Court's decision in *Janus* on June 27, 2018, the University would cease payroll deductions for nonmember employees. Comp. ¶ 19. On July 7, 2018, Grossman sent an email to HGEA, asking to confirm she was not a union

member. Comp. ¶ 20. On July 8, 2018, Grossman sent an email to the University to confirm she was not a union member. Comp. ¶ 21. On July 9, 2018, the University responded that it deferred to HGEA in this determination, and on the same day HGEA responded that its records indicated she had been a union member since 1995. Comp. ¶ 22-23. On July 10, Grossman sent an email to HGEA expressing her wish to withdraw her union membership. Comp. ¶ 28. HGEA responded that, pursuant to the recently enacted Hawaii Act 007, she could not do so unless she submitted a written notice within thirty days before the anniversary of her union membership on May 23.[3] Comp. ¶ 29.

ARGUMENT

I. Standard of Review

To survive this Motion to Dismiss, Grossman need only state in her First Amended Complaint "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). She should prevail provided her First Amended Complaint demonstrates something "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678.

[3]In its letter, HGEA misstated the withdrawal period, calculating it as thirty days after, instead of thirty days before, Grossman's anniversary date. If she had followed the HGEA instruction, Grossman would have missed the withdrawal deadline.

II. *Knight* is a private-forum case and does not address Grossman's compelled association claim.

HGEA's primary submission is that *Knight* controls as to Count II of the Complaint. MTD at 13-16. But *Knight* is addressed to a different question, and more recent cases more directly on point support Grossman's claim not to be compelled to associate with HGEA.

A. *Knight* does not control.

The *Knight* case holds that employees do not have a right, as members of the public, to a formal audience with the government to air their views. *Knight* does not decide, however, whether such employees can be forced to associate with the union; therefore, the case is inapposite. As the *Knight* court framed the issue, "The question presented . . . is whether this restriction on participation in the nonmandatory-subject exchange process violates the constitutional rights of professional employees." *Knight*, 465 U.S. at 273.

The plaintiffs in *Knight* were community college faculty who dissented from the certified union. *Id.* at 278. The Minnesota statute at issue required that their employer "meet and confer" with the union alone regarding "non-mandatory subjects" of bargaining. The statute explicitly prohibited negotiating separately with dissenting employees. *Id.* at 276. The plaintiffs filed their suit claiming a constitutional right to take part in these negotiations. *Id.* at 282.

The Court explained the issue it was addressing well: "[A]ppellees' principal claim is that they have a right to force officers of the State acting in an official policymaking capacity to listen to them in a particular formal setting." *Id*. Confronted with this claim, the Court held: "Appellees have no constitutional right to force the government to listen to their views. They have no such right as members of the public, as government employees, or as instructors in an institution of higher education." *Id.* at 283.

The First Amendment guarantees citizens a right to speak. It does not deny governments, or anyone else, the right to ignore such speech. Unlike the plaintiffs in *Knight*, Grossman does not claim that her employer—or anyone else—should be compelled to listen to her views. Instead, she asserts a right against the compelled association forced on her by exclusive representation.

HGEA's invocation of *Knight* makes two important missteps. First, it asserts that the "the Supreme Court summarily affirmed the lower court's rejection of the Knight plaintiffs' 'attack on the constitutionality of exclusive representation in bargaining over terms and conditions of employment.'" MTD at 13 (quoting *Knight,* 465 U.S. at 278-79). But HGEA does not clarify what was summarily affirmed. What was summarily affirmed was a rejection of the argument that collective bargaining violates the non-delegation doctrine, not that it violates a right of association. The relevant portion of the lower court opinion makes this point clearly.

See Knight v. Minn. Cmty. Coll. Faculty Ass'n., 571 F. Supp. 1, 4 (D. Minn. 1982). That the non-delegation doctrine is at issue is proven when the Supreme Court cites to *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) and *Carter v. Carter Coal Co*., 298 U.S. 238 (1936), neither of which address a right to freedom of association. *Knight*, 465 U.S. at 279. The plaintiffs in *Knight* viewed the granting of negotiating rights to the union as a delegation of legislative power to a private organization, and the district court rejected the claim, explaining simply that the claim "is clearly foreclosed by the Supreme Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 (1977)." *Knight,* 571 F. Supp. at 4. The statutory arrangement did not violate the non-delegation doctrine "merely because the employee association is a private organization." *Id.* at 5. In its own *Knight* decision, the Supreme Court was not affirming a claim of exclusive representation equivalent to Count II of Grossman's Complaint.

HGEA's second misreading of *Knight* severely elevates and misinterprets dicta in the decision. The central issue of the *Knight* decision is whether plaintiffs could compel the government to negotiate with them instead of, or in addition to, the union. That question is fundamentally different from Grossman's claim that the government cannot compel her to associate with the union by making the union bargain on her behalf.

In arguing that these two distinct claims are the same, HGEA points only to dicta towards the end of the *Knight* opinion that suggests the challenged policy "in no way restrained [plaintiffs'] freedom to speak on any education related issue or their freedom to associate or not associate with whom they please." *Knight*, 465 U.S. at 288. Yet HGEA's own quotations from that portion of the opinion reinforce that the Court was still addressing the question of being heard. *See* MTD at 14. The Court explained that the government's right to "choose its advisors" was upheld because a "person's right to speak is not infringed when the government simply ignores that person while listening to others." *Knight,* 465 U.S. at 288. The Court raised the matter of association only to address the objection that exclusive representation "amplifies [the union's] voice in the policymaking process. But that amplification no more impairs individual instructors' constitutional freedoms to speak than the amplification of individual voices" impairs the ability of others to speak, as well. *Id.* This again is another path to the same conclusion: First Amendment "rights do not entail any government obligation to listen." *Id.* at 287.

Knight is, therefore, not responsive to the question Grossman now raises: whether someone else can speak in her name, with her imprimatur granted to them by the government. Grossman does not contest the right of the government to choose whom it meets with, to "choose its advisors," or to amplify HGEA's voice. She does not demand that the government schedule meetings with her, engage in negotiations

with her, or assent to any of the other demands made in *Knight*. She demands only that HGEA not do so in her name.

B. *Janus* presents a new opportunity to consider the question.

As the Supreme Court has recently recognized, "Designating a union as the employees' exclusive representative substantially restricts the rights of individual employees." *Janus*, 138 S. Ct. at 2460. This understanding of the "substantial restriction" that exclusive representation places on Grossman's rights cannot be squared with HGEA's interpretation of the dicta in *Knight*.

Of the eight citations HGEA puts forward for its interpretation of the *Knight* case, only one involves a Court of Appeals opinion written after *Janus*. MTD at 16; *see Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018). The remaining cases either predate *Janus* or are district court decisions, and few provide more than a cursory analysis of the question at issue.

The reasoning in *Bierman* is not persuasive because the Eighth Circuit was addressing the same Minnesota statute that had been upheld in *Knight*. Understandably, the court felt bound by the *Knight* holding, despite differences in the claims being made by plaintiffs in the two cases. *Bierman*, 900 F. 3d. at 574. Had it considered the different reasoning of the two cases, as this Court is doing, the Eighth Circuit should have reached a different result. Instead, the court in *Bierman*

repeated the holding of *Knight* in a few perfunctory paragraphs and did not consider or make mention of any potential reasons why *Knight* should be distinguished. *Id.*

The remaining circuit decisions cited by HGEA predate *Janus*, and their reasoning cannot survive it. The First Circuit upheld exclusive representation by explaining that "the starting point for purposes of this case is [*Abood*]" before going on to address *Abood*'s extension in *Knight*. *D'Agostino v. Baker*, 812 F.3d 240, 242 (1st Cir. 2016). The Second Circuit's approached was even more perfunctory than others, citing *Abood* and then *D'Agostino* in a brief unpublished opinion that considered none of the arguments Grossman presents here. *Jarvis v. Cuomo*, 660 F. App'x 72, 74 (2d Cir. 2016). The Seventh Circuit likewise followed *D'Agostino* in holding correctly at the time, but now incorrectly, that *Abood,* and therefore *Knight,* remained good law. *Hill v. SEIU*, 850 F.3d 861, 864 (7th Cir. 2017).

HGEA's remaining citations are district court opinions at various, often preliminary, stages of litigation and cannot control the outcome here. Nor do they stand for as much as HGEA would like. The opinion HGEA attaches as Exhibit 1 to its Motion actually explains that "the holding [of *Knight*] is not directly dispositive of the claim" that exclusive representation is corrective association, before going on to over-broadly read the dicta this Opposition addressed above. *Thompson v. Marietta Education Ass'n*, No. 2:18-cv-00628-MHW-CMV, ECF Dkt. 52 at *7 (S.D. Ohio Jan. 14, 2019). *Uradnik* represents nothing more than a district court

properly following circuit precedent, since the "Eighth Circuit specifically found that *Knight* foreclosed a similar compelled association argument" in *Bierman*, discussed above. *Uradnik v. Inter Faculty Org*., No. 18-1895 (PAM/LIB), 2018 U.S. Dist. LEXIS 165951, at *10 (D. Minn. Sep. 27, 2018). *Reisman* is likewise a district court case following binding (but erroneous) circuit precedent, in this instance the *D'Agostino* case from the First Circuit. *Reisman v. Associated Faculties of the Univ. of Me.*, No. 1:18-cv-00307-JDL, 2018 U.S. Dist. LEXIS 203843, at *11 (D. Me. Dec. 3, 2018). And *Mentele v. Inslee*, 2016 WL 3017713 (W.D. Wash. May 26, 2016) has been superseded by a later Ninth Circuit decision in that case which will be discussed below.

HGEA makes much of the fact that *Janus* did not "hold" exclusive representation unconstitutional, quoting *Bierman* to the effect that "*Janus* 'never mentioned *Knight*, and the constitutionality of exclusive representation standing alone was not at issue.'" MTD at 17 (quoting *Bierman,* 900 F. 3d. at 574). Therefore, in the view of HGEA, "both *Knight* and *Janus* require rejection of plaintiffs' claim." MTD at 18. To the contrary, if the *Janus* court had relied on *Knight* for its reasoning and had rejected an exclusive representation claim, it would have mentioned *Knight* explicitly. The *Janus* court did not mention *Knight* only because the issue of exclusive representation had not been disputed by the plaintiff. *Janus*, 138 S. Ct. 2478.

Instead, the *Janus* court eroded the foundations of *Knight*, which was "relying chiefly on [*Abood*]." *Knight*, 465 U.S. at 278. In *Janus* the Supreme Court "cataloged *Abood*'s many weaknesses." *Janus*, 138 S. Ct. at 2484. The Court rejected both rationales that *Knight* had borrowed from *Abood* to support its claim that unions may serve as the exclusive representative of a dissenting member: "labor peace" and "free riders." *Janus*, 138 S. Ct. at 2486. The Court determined that both governmental interests were not compelling enough to override the First Amendment rights to free speech and freedom of association. *Id*. Its foundations now swept from underneath it, *Knight* should be regarded as the impotent decision that it is.

III. *Mentele v. Inslee* controls only "partial" state employees with limited representation by the union; in contrast, Grossman is a full-fledged public employee, and HGEA claims full representation of her.

A. *Mentele* does not control.

In its Reply to this Memorandum, HGEA doubtless will point to the recent decision of *Mentele v. Inslee*, No. 16-35939, 2019 U.S. App. LEXIS 5613 (9th Cir. Feb. 26, 2019). As stated above, *Mentele* recognizes that the question presented in *Knight* can be distinguished from the current question of whether a union can act as exclusive representative of non-members. *Id.* at *12 (the two questions are "arguably distinct"). Nonetheless, *Mentele* goes on to state that *Knight* continues to apply to "partial" state employees with limited representation by the union.

Mentele should be distinguished on this point. The plaintiffs in *Mentele* are not government workers but private employees. Under the childcare system of the State of Washington, "families choose independent childcare providers and pay them on a scale commensurate with the families' income levels. The State covers the remaining cost." *Id.* at *3. Washington only considers the plaintiffs in *Mentele* to be "'public employees' for purposes of the State's collective bargaining legislation." *Id.* at *3-4. As such, the exclusive representation provided these employees by their union is limited: "[T]hey are considered 'partial' state employees, rather than full-fledged state employees, and Washington law limits the scope of their collective bargaining agent's representation." *Id.* at *4. The exclusive representative cannot organize a strike, negotiate over retirement benefits, or even govern the hiring or firing of employees because they are private employees hired by the families in need of their services. *Id*. The harm of being forced to associate with such an exclusive representative is, thus, minimal.

By contrast, Grossman is a public employee in every aspect of the phrase. She is a public university employee, is hired and fired by the government, and is being forced to associate with a government union that has different views from her own on important policy issues.

The *Janus* case clearly recognized the difference between government employees like Grossman and privately hired employees like those in *Mentele* when

it ended the collection of agency fees from non-members of the union for government workers only and not for private employees. 138 S. Ct. at 2486.

Likewise, in *Harris v. Quinn*, the Supreme Court distinguished between "full-fledged public employees" like Grossman and partial state employees. 573 U.S. 616, 639 (2014). In fact, the plaintiffs in *Harris* were almost identical in nature to the plaintiffs in *Mentele*, and the Supreme Court in *Harris* limited its holding to partial state employees because of the differences between such employees and full-fledged public employees. *Id*. at 647. The plaintiffs in *Harris* were personal assistants hired solely by families to provide homecare services for Medicaid recipients. *Id*. at 621. Like the plaintiffs in *Mentele*, they were considered partial state employees because they were paid by the state and subject to limited collective bargaining and exclusive representation by state statute. *Id*. at 621-623. Just as the Court in *Harris* limited its holding to employees who were public only for collective bargaining purposes, so should the *Mentele* holding be limited to partial state employees and not extended to full-fledged public employees like Grossman.

B. In the alternative, *Knight* and *Mentele* should be overruled to the extent they hold that exclusive representation does not violate Grossman's right of association.

In the alternative, Grossman asserts that both *Knight* and *Mentele* should be overruled. *Knight* asserted that exclusive representation "in no way restrained [plaintiff's]…freedom to associate," *Knight*, 465 U.S. at 288; *Mentele* asserted that

"it is difficult to imagine an alternative that is '*significantly* less restrictive' than" exclusive representation, *Mentele*, 2019 U.S. App. LEXIS 5613, at *19 (quoting *Janus*); however, *Janus* stated that exclusive representation "substantially restricts the rights of individual employees," *Janus*, 138 S. Ct. at 2460. *Knight* and *Mentele* were, therefore, in error on this point and should be overruled to bring greater clarity to the doctrine.

IV. Grossman states a cognizable claim of compelled association under the First Amendment that should be heard on the merits.

As the Supreme Court has recently recognized, "Designating a union as the employees' exclusive representative substantially restricts the rights of individual employees." *Janus*, 138 S. Ct. at 2460. The First Amendment should not require such compelled association. "[M]andatory associations are permissible only when they serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 310 (2012) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)) (internal quotation marks omitted). Because forced union representation does not further a compelling state interest, Grossman has stated a claim on which relief could be granted and should be allowed to proceed to the merits.

A. There is no state interest that can sustain this compelled association.

Unions and state governments have proffered various claimed interests for compelling the association of employees. One interest often proffered is "labor peace," meaning the "avoidance of the conflict and disruption that it envisioned would occur if the employees in a unit were represented by more than one union" because "inter-union rivalries would foster dissension within the work force, and the employer could face 'conflicting demands from different unions.'" *Janus*, 138 S. Ct. at 2465. Other interests typically asserted in support of exclusive representation status amount to much the same claim: that it is in the state's interest to have a "comprehensive system" that bundles all employees into a single bargaining representative with which the state can negotiate. *See, e.g.,* Brief for Respondents Lisa Madigan and Michael Hoffman at 4, *Janus v. AFSCME*, 138 S. Ct. 2448 (2018) (No. 16-1466).

This justification does not apply to Grossman because she does not seek to introduce a competing union into the bargaining mix, but only to ensure that HGEA does not speak on her behalf. Furthermore, in *Janus* the Supreme Court assumed, without deciding, that labor peace might be a compelling state interest but rejected it as a justification for agency fees. *Janus*, 138 S. Ct. at 2465. The interest should, likewise, be rejected as a justification for exclusive representation. The Supreme

Court recognized that "it is now clear" that the fear of "pandemonium" if the union couldn't charge agency fees was "unfounded." *Id.* To the extent individual bargaining is claimed to raise the same concerns of pandemonium, this too, remains insufficient. The Supreme Court rejected the invocation of this rationale due to the absence of evidence of actual harm. *Id*. It may be that the state finds it convenient to negotiate with a single agent, but that, in and of itself, is not enough to overcome First Amendment rights. The rights to speech and association cannot be limited by appeal to administrative convenience. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 102 n.9 (1972) (in free speech cases, a "small administrative convenience" is not a compelling interest); *see also Tashjian v. Republican Party*, 479 U.S. 208, 218 (1986) (holding that a state could "no more restrain the Republican Party's freedom of association for reasons of its own administrative convenience than it could on the same ground limit the ballot access of a new major party").

While it may be quicker or more efficient for the state to negotiate only with the union, "the Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois,* 405 U.S. 645, 656 (1972). Even if the state could claim that it saves monetary resources by negotiating only with the union, the preservation of government resources is not an interest that can justify First Amendment violations. In other contexts where the state's burden was only rational basis review, the Supreme Court has rejected such justifications. *See, e.g., Romer v. Evans*, 517 U.S.

620, 635 (1996) (rejecting the "interest in conserving public resources" in a case applying only heightened rational basis review); *see also Plyler v. Doe*, 457 U.S. 202, 227 (1982) ("a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources"). Such claimed interests are not enough to leave Grossman "shanghaied for an unwanted voyage." *Janus*, 138 S. Ct. at 2466.

B. Exclusive representation forces Grossman to associate with the views of the union.

Under Haw. Rev. Stat. § 89-3, as a condition of her employment, Grossman must allow the union to speak on her behalf on "wages [and] hours," matters that *Janus* recognizes to be of inherently public concern. *Janus*, 138 S. Ct. at 2473. This compelled association raises serious First Amendment concerns. *Id*. at 2464 (whenever "a State . . . compels [individuals] to voice ideas with which they disagree, it undermines" First Amendment values). Hawaii law goes further, granting the union prerogatives to speak on Grossman's behalf on all manner of contentious matters. For example, the union is entitled to speak on Grossman's behalf regarding the grievance procedure Grossman would have to go through to settle disputes with her employer. Haw. Rev. Stat. § 89-8(b). It may even take a position directly contrary to Grossman's best interest in negotiating her salary or other terms of her employment. Haw. Rev. Stat. § 89-9. These are precisely the sort

of policy decisions that *Janus* recognized are necessarily matters of public concern. *Janus*, 138 S. Ct. 2467.

Unions in other states agree with Grossman on this point. In Illinois, the International Union of Operating Engineers, Local 150, AFL-CIO brought a lawsuit against the State of Illinois precisely because they did not want to speak as the exclusive representative of non-union members: "[P]laintiffs assert that they, and therefore their membership, will be compelled to speak on behalf of non-members, infringing on their First Amendment rights." *Sweeney v. Madigan*, No. 18-cv-1362, 2019 U.S. Dist. LEXIS 19389, at *6 (N.D. Ill. Feb. 6, 2019).

Legally compelling Grossman to associate with HGEA demeans her First Amendment rights. Indeed, "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning. . . . [A] law commanding involuntary affirmation of objected-to beliefs would require even more immediate and urgent grounds than a law demanding silence." *Janus*, 138 S. Ct. at 2464 (2018) (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 633 (1943) (internal quotation marks omitted)). Hawaii's laws command Grossman's involuntary affirmation of objected-to beliefs. The fact that she retains the right to speak for herself does not resolve the fact that HGEA organizes and negotiates as her representative in her employment relations.

C. HGEA's contention that exclusive representation does not compel association does not survive examination.

Finally, HGEA asserts that their representation does not abridge Grossman's rights because it says she is not required to "do or say anything" and because "reasonable people" would not attribute HGEA's actions to Grossman. MTD at 18.

In the first instance, HGEA is right that Grossman "does not allege that she is required to personally do or say anything to join or endorse HGEA." MTD at 18. This is in fact precisely her objection: she has no agency in the matter, her autonomy having been assigned to HGEA as her agent despite her objections, and she cannot withdraw that endorsement under Hawaii law.

HGEA asserts that in this case HGEA's speech is not "attributed to plaintiff" on the premise that "reasonable people would not believe that all bargaining unit workers necessarily agree with the exclusive representative or its positions." MTD at 18. For this proposition, HGEA relies on *Rumsfeld v. FAIR*, 547 U.S. 47, 69 (2006), in which law schools could be pressured to "'associate' with military recruiters in the sense that they interact[ed] with them." Grossman does not claim a right to never interact with a representative of HGEA. Indeed, she expects she will cross paths with them in her employment from time to time and expects the interactions to be cordial. The problem is that the union negotiates on Grossman's behalf without her consent. No law student or faculty member was required to follow

the military's "Don't Ask, Don't Tell" policy, which was the basis of the law school's objection. HGEA also incorrectly cites *FAIR* by analogy, because even "high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy." *FAIR*, 547 U.S. at 65 (citing *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)). But Grossman does not object to HGEA's speech; she objects to HGEA representing her in her employment relations, so *FAIR* is inapposite.

Another analogy offered by HGEA for the proposition that compelled association is constitutional has been specifically addressed by the Supreme Court in light of *Janus*. HGEA cites a concurrence in *Lathrop v. Donohue*, 367 U.S. 820, 859 (1961) for the proposition that individuals can be compelled to associate with the views of a state bar association. MTD at 20. However, the Supreme Court recently addressed this very issue when it vacated an 8th Circuit decision upholding forced membership in the bar and remanded it for further consideration in light of *Janus*. *See Fleck v. Wetch*, 139 S. Ct. 590 (2018). Likewise, this Court should also consider *Janus* when reviewing cases that rely on *Abood*.

The premise that Grossman is not burdened by compelled association because she can speak her own mind is not consistent with other Supreme Court rulings on the issue. An individual's ability to speak in public disagreement with a group is not

an excuse for continuing to compel association with the group. In New Hampshire, for example, motorists could not be compelled to associate with the state motto by bearing it on their license plates even though they were given the outlet to publicly speak against it. *Wooley v. Maynard*, 430 U.S. 705 (1977). The Boy Scouts could not be compelled to associate with members who engaged in activism with which the Boy Scouts disagreed even when they were given the outlet to express such disagreement publicly. *Boy Scouts of America et al. v. Dale*, 530 U.S. 640 (2000). Florida newspapers could not be compelled to print editorials from the state even when they were given the freedom to print their disagreement with such editorials. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256–57 (1974). Each of these instances of compelled association or speech was held unconstitutional. Grossman's ability to express a message different from that of HGEA does not make it constitutional for Hawaii to forcibly associate Grossman with HGEA and its views.

HGEA finally argues that the union is not Grossman's agent since any "democratic" system sometimes requires dissenters to be bound by the majority. MTD at 20-21. But HGEA does not administer a democratic system as regards to Grossman. She has no vote for the union's leadership, for whether to accept or reject a contract, or for whether or not to strike. This "democratic" system is reserved for union members. *Janus* rectified the deficits in this "democracy" by eliminating the

union's system of taxation without representation. Grossman asks the Court only to clarify that she is not being represented.

CONCLUSION

For the forgoing reasons, HGEA's Motion to Dismiss Count II of the First Amended Complaint should be denied.

DATED: Honolulu, Hawaii, April 24, 2019.

Respectfully submitted,

DAMON KEY LEONG KUPCHAK HASTERT

/s/ Robert H. Thomas
ROBERT H. THOMAS

LIBERTY JUSTICE CENTER

BRIAN K. KELSEY (*Pro Hac Vice*)
JEFFREY M. SCHWAB (*Pro Hac Vice*)
REILLY STEPHENS (*Pro Hac Vice)*

Attorneys for Plaintiff,
PATRICIA GROSSMAN

Of Counsel:
DAMON KEY LEONG KUPCHAK HASTERT
Attorneys at Law
A Law Corporation

ROBERT H. THOMAS 4610-0
rht@hawaiilawyer.com
1003 Bishop Street, Suite 1600
Honolulu, Hawaii 96813
www.hawaiilawyer.com
Telephone: (808) 531-8031
Facsimile: (808) 533-2242

BRIAN K. KELSEY (*Pro Hac Vice)*
bkelsey@libertyjusticecenter.org
JEFFREY M. SCHWAB (*Pro Hac Vice)*
jschwab@libertyjusticecenter.org
REILLY STEPHENS (*Pro Hac Vice)*
rstephens@libertyjusticecenter.org
Liberty Justice Center
190 South LaSalle Street, Suite 1500
Chicago, Illinois 60603
Telephone: (312) 263-7668
Facsimile: (312) 263-7702

Attorneys for Plaintiff
PATRICIA GROSSMAN

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

PATRICIA GROSSMAN, Plaintiff, vs. HAWAII GOVERNMENT EMPLOYEES ASSOCIATION / AFSCME LOCAL 152;	Civil No. 18-00493-DKW-RT **CERTIFICATE OF SERVICE** ***[Caption continues on next page.]***

DAVID LASSNER, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF HAWAII; AND CLARE E. CONNORS, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF HAWAII, Defendants.	Date: 5/15/2015 Time: 9:30 AM Judge: Derrick K. Watson

I hereby certify that on this date, a copy of Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss Count II was duly served electronically through CM/ECF upon the following:

Derek T. Mayeshiro, Esq.
Elisabeth A.K. Contrades, Esq.
derekmay@hawaii.edu

Attorney for Defendants
David Lassner, in his official capacity of President of the University of Hawaii

James E.T. Koshiba, Esq.
Jonathan Spiker, Esq.
jkoshiba@koshibalaw.com
jspiker@koshibalaw.com

Attorney for Union
Hawaii Government Employees Association, AFSCME, Local 152

Clare E. Connors
Attorney General of Hawaii
James E. Halvorson
Richard H. Thomason
james.e.halvorson@hawaii.gov
richard.h.thomason@hawaii.gov

Attorneys for Defendant
Russell A. Suzuki, in his official capacity of Attorney General of Hawaii

DATED: Honolulu, Hawaii, April 24, 2019.

DAMON KEY LEONG KUPCHAK HASTERT

/s/ Robert H. Thomas
ROBERT H. THOMAS

LIBERTY JUSTICE CENTER

BRIAN K. KELSEY (*Pro Hac Vice*)
JEFFREY M. SCHWAB (*Pro Hac Vice*)
REILLY STEPHENS (*Pro Hac Vice)*

Attorneys for Plaintiff,
PATRICIA GROSSMAN