UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

KATHLEEN URADNIK, Plaintiff–Appellant, v. INTER FACULTY ORGANIZATION, ST. CLOUD STATE UNIVERSITY, BOARD OF TRUSTEES OF THE MINNSOTA STATE COLLEGES AND UNIVERSITIES, Defendants–Appellees.	Case No. 18-3086

MOTION FOR SUMMARY AFFIRMANCE

This Court's decision in *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018), controls the issues presented by this appeal and therefore requires affirmance of the district court's denial of the preliminary injunction sought by the Plaintiff–Appellant, Dr. Kathleen Uradnik. Dr. Uradnik has filed this appeal in hopes of persuading the Supreme Court to overturn that binding precedent, but she acknowledges that this Court has ruled definitively on the questions she raises. The most sensible step now is therefore to summarily affirm the district court. Accordingly, she hereby moves this Court, pursuant to FRAP 27 and Circuit Rule 47A, to confirm that its precedent forecloses Dr. Uradnik's appeal and to affirm the decision of the district court.

Background

Dr. Uradnik is a tenured political-science professor at St. Cloud State University (the "University") in St. Cloud, Minnesota. Pursuant to Minnesota's Public Employment Labor Relations Act ("PELRA"), Minn. Stat. ch. 179A, Dr. Uradnik belongs to a bargaining unit of University employees for purposes of collective bargaining. Also pursuant to PELRA, the Inter Faculty Organization (the "Union"), which won majority support of the bargaining unit in an election in 1975, represents all members of the bargaining unit in collective bargaining. Its representation extends to non-members, including Dr. Uradnik.

PELRA requires the University and the Board of Trustees of the Minnesota State Colleges and Universities (the "Board"), which oversees the University, to "meet and negotiate" with the Union over terms and conditions of employment for unit members like Dr. Uradnik. *See* Minn. Stat. §§ 179A.06, subd. 5; 179A.07, subd. 2. PELRA also grants the Union the right to "meet and confer" with the Board and University on matters outside the scope of negotiations. *See* Minn. Stat. §§ 179A.07, subd. 3; 179A.08, subd. 2. In both meet-and-negotiate and meet-and-confer sessions, the Union speaks "on behalf of all" professors of at the University, whether or not they are members of the Union or have otherwise consented to its speech on their behalf. Minn. Stat § 179A.03, subd. 8.

Dr. Uradnik is not a member of the Union and does not consent to its speech on her "behalf." She filed this action on July 6, 2018, contending that

this statutory scheme violates her rights under the First and Fourteenth Amendments because it compels speech and compels expressive association and is not appropriately tailored to achieve any compelling state interest. Dr. Uradnik then moved for a preliminary injunction prohibiting the Union from holding itself out as, or the Board or University from recognizing the Union as, the representative of non-members like herself and speaking for non-members.[1]

Dr. Uradnik argued that the Supreme Court's decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), which invalidated statutory requirements that non-union members contribute financially to labor unions through so-called "agency fees," clarifies how First Amendment principles apply in the collective-bargaining context. In particular, it held that speech in public-sector collective-bargaining sections is expressive activity meriting the highest level of First Amendment protection. Accordingly, Dr. Uradnik asserted that a legal regime expressly providing in unmistakable statutory language that the Union represents and speaks for non-consenting non-members triggers strict scrutiny and cannot be justified because less burdensome avenues are available to effectuate collective bargaining.

However, after Dr. Uradnik filed her complaint and preliminary-injunction motion, this Court issued its decision in *Bierman v. Dayton*, 900 F.3d

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[1] Dr. Uradnik's complaint includes a separate claim alleging that the University unlawfully discriminates based in whole or in part on Union membership, but she did not move for a preliminary injunction on that claim, and it is not part of this appeal.

570 (8th Cir. 2018), which considered the same PELRA provisions Dr. Uradnik challenges and rejected the positions Dr. Uradnik advances. *Bierman* concluded that these issues are covered by the Supreme Court's decision in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), which upheld the PELRA exclusive-representation provisions challenged here and in *Bierman*. *Bierman* concluded that *Knight* foreclosed a First Amendment expressive association challenge, even though *Knight* case addressed a different argument: that non-union members are entitled to participate in collective-bargaining meetings as part of their right to petition the government. As Dr. Uradnik argued below and the *Bierman* plaintiff argued, *Knight* did not address an argument that exclusive representation amounts to compelled speech or compelled association in violation of the First Amendment. *Bierman*, however, disagreed, concluding that *Knight* controls these issues.[2] Moreover, *Bierman* concluded that the Supreme Court's *Janus* decision does not supersede *Knight* as the Court construed it. 900 F.3d at 574.

The district court, informed by the *Bierman* decision, denied Dr. Uradnik's preliminary-injunction motion.[3] Following *Bierman*, it concluded that *Knight* governs her claims and forecloses them and that *Janus* does not apply in a case like this. Dr. Uradnik filed a timely notice of appeal, and this Court has jurisdiction under 28 U.S.C. § 1292(a).

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[2] Dr. Uradnik argued below that *Bierman* addressed only compelled association, not speech, but the district court read the case to reach compelled speech claims.

[3] The lower court's order is filed with this motion as Attachment A.

<u>Argument</u>

This case concerns a rapidly changing area of law. Dr. Uradnik seeks to apply the holding in *Janus* that speech by public-sector labor unions involves matters of intense public interest and concern, and therefore governmental attempts to compel that speech—in this case through exclusive-representation schemes—are subject to the First Amendment's strongest protections. But this Court is not the proper forum for that argument. Its *Bierman* decision accords the Supreme Court's *Knight* decision a broad reach, virtually immunizing exclusive-representation schemes from constitutional challenge, and reduces the *Janus* decision to a very narrow reach—one having virtually no effect outside the narrow context of compelled agency fees. Dr. Uradnik concedes that she is not currently being required to pay agency fees and challenges only the exclusive-representation regime. As the Defendants argued below, *Bierman* therefore forecloses those claims.

To be clear, Dr. Uradnik does not concede that *Knight*, properly understood, controls her compelled speech and compelled association claims. *Knight* considered only whether non-union public employees "have a right to force officers of the State acting in an official policymaking capacity to listen to them in a particular formal setting." 465 U.S. at 282. But Dr. Uradnik does not seek an audience with the government, the same opportunity as the Union to influence policy, or recognition of a right to be heard. She simply asks that the University and State of Minnesota not appoint the Union to speak for her and not force her into an expressive association with it. That arrangement amounts

to compelled speech under cases like *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974), *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1 (1986), and *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995), and compelled expressive association under cases like *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000), and *United States v. United Foods, Inc.*, 533 U.S. 405 (2001). Moreover, to the extent the Supreme Court believes *Knight* reaches these issues, Dr. Uradnik believes it should be overruled in light of *Janus* and generally applicable First Amendment principles.

This Court, however, is not the proper forum for those arguments because *Bierman*—issued in August 2018, after *Janus* was decided—states this Circuit's position on these issues. One panel of this Circuit may not overrule another. *Jackson v. Ault*, 452 F.3d 734, 736 (8th Cir. 2006). Nor does this case implicate a lack of "uniformity of the court's decisions" such that it is a likely candidate for *en banc* review. FRAP 35(a)(2). And the best forum for adjudicating the respective reach of two Supreme Court precedents that may be in tension with each other is the Supreme Court itself.

Accordingly, Dr. Uradnik respectfully submits that this case and the issues it raises, as far as this Circuit's precedent is concerned, "do not require further consideration," Circuit Rule 47A, because *Bierman* forecloses them. Only by obtaining Supreme Court review can Dr. Uradnik obtain the relief she seeks. The Court should summarily affirm the denial of Dr. Uradnik's motion

for a preliminary injunction so that she may pursue her rights in the proper forum.

Conclusion

The Court should grant Dr. Uradnik's motion and summarily affirm the district court's denial of her preliminary injunction.

October 4, 2018

Respectfully submitted,

/s/ Andrew M. Grossman

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2018, a true and correct copy of the foregoing was filed via the Court's CM/ECF system and served via electronic filing upon all counsel of record in this case.

/s/ Andrew M. Grossman

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the length limitations of Rule 27(d)(2) because it is 1,406 words. It complies with the typeface and type-style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it is printed in 14-point Calisto MT font, a proportionally spaced face with serifs.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1(b), the undersigned counsel for Dr. Kathleen Uradnik certifies that she has no information to report regarding corporate ownership as required by that rule.

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