No. 18-719

IN THE

Supreme Court of the United States

KATHLEEN URADNIK,

Petitioner,

v.

INTER FACULTY ORGANIZATION, ST. CLOUD STATE UNIVERSITY, and BOARD OF TRUSTEES OF THE MINNESOTA STATE COLLEGES AND UNIVERSITIES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

ROBERT ALT
DANIEL DEW
THE BUCKEYE INSTITUTE
88 East Broad Street
Suite 1120
Columbus, Ohio 43215
(614) 224-4422

ANDREW M. GROSSMAN
Counsel of Record
MARK W. DELAQUIL
RICHARD B. RAILE
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONER

Respondents' arguments only confirm the necessity of the Court's review. Minnesota law appoints a labor union to speak "on behalf" of Petitioner Kathleen Uradnik and to exercise *her* statutory "right…to meet and negotiate" with her state employer on a host of subjects involving the provision of public services, government spending, and other matters of public concern. *Janus v. AFSCME* recognized that arrangement to be "a significant impingement on associational freedoms that would not be tolerated in other contexts." 138 S. Ct. 2448, 2478 (2018). Tellingly, Respondents do not even attempt to explain how it could be tolerated here.

Instead, Respondents' position is that no explanation is required because compelling public workers to accept an unwanted representative that speaks for them does not impinge their speech and associational rights one iota. That view conflicts with more or less every compelled-speech and compelled-association case this Court has decided over the past 75 years, from *Barnette* through *Janus*. Rather than seriously address the Court's free-speech jurisprudence, Respondents pin their hopes on *Minnesota State Board for Community Colleges v. Knight*, which said absolutely nothing about compelled union representation because it addressed only a "restriction on participation" in meetings with a state employer. 465 U.S. 271, 273 (1984). The lower courts' confusion on this point, even following *Janus*'s admonition that "standard First Amendment principles" apply across the board,

demonstrates the need for the Court to clarify the governing legal standard.

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

The Court should grant the petition and do so. At a minimum, if it believes that further lower-court development of these issues is warranted, it should grant, vacate, and remand in light of *Janus*.

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

The decisions below conflict with this Court's free-speech jurisprudence in addressing an indisputably important question of federal law that this Court has never meaningfully considered. The very fact that the State of Minnesota believes that the First Amendment has *absolutely nothing* to say about its appoint-

ment of an unwanted representative to speak for public employees like Dr. Uradnik confirms that the Court's guidance is sorely needed.

1. Contrary to the Union's argumentation, Minnesota's compelled-representation requirement plainly impinges Dr. Uradnik's speech and associational rights.

A. The operation of that requirement compels Dr. Uradnik's speech. The statute itself makes clear that, when the exclusive representative speaks with the state, it is speaking for the employees: "Public employees, *through their certified exclusive representative*, have the right and obligation to meet and negotiate in good faith with their employer regarding grievance procedures and the terms and conditions of employment." Minn. Stat. § 179A.06 (emphasis added). The statute further provides that an "exclusive representative" like the Union speaks "on behalf of" bargaining-unit members like Dr. Uradnik. Minn. Stat. § 179A.03. The State Respondents concede the point on the first page of their brief, which explains (quoting the statute) that Minnesota's Public Employment Labor Relations Act addresses "'negotiations…between public employees and employers.'" State Resp. Br at 1 (quoting Minn. Stat. § 179A.01(b)). In other words, as *Janus* recognized, "when a union negotiates with the employer or represents employees in disciplinary proceedings, the union speaks for the employees." 138 S. Ct. at 2474. The Union's claim otherwise (at 25–26) is unsupportable.

And its claim (at 25) that Dr. Uradnik is not required to recite the Union's words herself ignores that the Court's "compelled-speech cases are not limited to the situation in which an individual must personally speak the government's message." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006). No different than compelling a parade organizer to accept an unwanted brigade carrying its own banner, Minnesota's compelled-representation requirement usurps dissenting employees "choice…not to propound a particular point of view," a matter "presumed to lie beyond the government's power to control." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 575 (1995). That Dr. Uradnik must speak out to distance herself from the Union's speech on her behalf intensifies, rather than ameliorates, her constitutional injury, as the Court has recognized in such cases as *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 20–21 (1986) (plurality opinion), and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974). *See generally FAIR*, 547 U.S. at 63–64.

B. Likewise, Minnesota's compelled-representation requirement clearly impinges Dr. Uradnik's associational rights. Again, the whole point of that requirement is, as the State Respondents concede (at 1), to facilitate "'negotiations…between public employees and employers,'" in which the Union advocates on a host of "matters…of great public concern." *Janus*, 138 S. Ct at 2475. That speech, "far from being ancillary, is the principal object of the regulatory scheme."

United States v. United Foods, 533 U.S. 405, 411–12 (2001). The Union's assertion (at 23) that its appointment to negotiate and advocate on behalf of employees like Dr. Uradnik is not *expressive* in nature defies both the Minnesota statute and reality, as well as *Janus*'s recognition to the contrary. 138 S. Ct at 2474. *FAIR* is inapposite: while "a law school's decision to allow recruiters on campus is not inherently expressive," 547 U.S. at 64, the Union's advocacy on matters of public concern in the context of collective bargaining surely is, *see Janus*, 138 S. Ct. at 2475–77.

2. As noted, Respondents do not attempt to justify these impingements on Dr. Uradnik's rights, but instead argue that *Knight* exempted them entirely from First Amendment scrutiny. State Resp. Br. at 9–13; Union Br. at 8–12. Neither Respondent brief, however, grapples with the fact that *Knight* passed judgment only on a "restriction on participation" that barred the plaintiffs, public college instructors, from participating themselves in "meet and confer" sessions between the union and the college. 465 U.S. at 273. The Union (at 10–11) even notes in passing this limitation on the instructor's claim, without acknowledging its significance. But there is a material difference between the government's choosing to listen to only certain speakers—the restriction at issue in

Knight—and its appointment of an unwanted representative to speak on behalf of objecting public workers like Dr. Uradnik.[1]

Conflating the two, Respondents insist that *Knight* additionally upheld compelled union representation against First Amendment challenge, but it says no such thing. The precise section they cite expressly addresses the instructor's argument that "restriction of participation in 'meet and confer' sessions to the faculty's exclusive representative" impaired their associational rights by pressuring them to associate with the union. *Id.* at 288. Indeed, that same section of *Knight* explains that the Court "summarily approved" in a companion case the district court's rejection of the instructor's challenge to union's "unique status." *Id.* at 290. As the Petition recounts (at 10–11), that separate claim actually did challenge compelled union representation, but was premised solely on nondelegation grounds, not any First Amendment right. *See id.* at 279 (discussing that claim); *Knight v. Minnesota Community College Faculty Ass'n*, 571 F. Supp. 1, 3–4 (D. Minn. 1982) (same). Respondents correctly do not dispute that the compelled-representation challenge rebuffed by the district court and this Court was so limited. In sum, the Court has never addressed

---

[1] Contrary to the State Respondents' assertion (at 2 n.1), the Union is "state-appointed" as Dr. Uradnik's representative. The faculty did hold a vote—back in 1975, when Dr. Uradnik was a child—but it is the operation of state law that renders the Union her representative in negotiations with her state employer. *See, e.g.*, Minn. Stat. § 179A.07, subd. 2.

whether compelled union representation comports with the First Amendment.

3. Respondents' inability to demonstrate that *Knight* exempted compelled union representation from First Amendment scrutiny renders all the more troubling that the lower courts have come to regard *Knight* as controlling on that point. That is an accident of history, and the Court's intervention is required to correct it.

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

Respondents ignore this history, preferring instead to reel off citations of lower-court decisions applying a

distorted reading of *Knight* that they cannot even defend. Yet even those decisions recognize that the prevailing view of the law in this area does not quite add up. The Eighth Circuit's decision in *Bierman v. Dayton* felt the need to bolster its reliance on *Knight* with discussion of this Court's summary affirmance of "the constitutionality of exclusive representation for subjects of mandatory bargaining," being apparently unaware that that affirmance concerned only a nondelegation challenge. 900 F.3d 570, 574 (8th Cir. 2018). And the First Circuit's decision in *D'Agostino v. Baker* relies principally on *Abood* to uphold compulsory union representation, reasoning that, if "public employees have no cognizable associational rights objection to a union exclusive bargaining agent's agency shop agreement," then they have no basis to challenge compelled representation. 812 F.3d 240, 243 (1st Cir. 2016). *Knight*, in its view, merely reinforced the point. *Id.*

Especially notable is the Ninth Circuit's recent decision in *Mentele v. Inslee*, 916 F.3d 783 (9th Cir. 2019). It acknowledges that "*Knight*'s recognition that a state cannot be forced to negotiate or meet with individual employees is arguably distinct" from a challenge to compelled representation, but opts to apply *Knight* regardless because it "is a closer fit than *Janus*"—a *non sequitur* response to the point that *Knight* addressed a different issue. *Id.* at 788. Accepting that there is some question over whether *Knight* remains good law, it also, in the alternative, considered the issue from first principles. So proceeding, it

recognized that compelled representation appears to impinge First Amendment rights, but held that the state's interest in "labor peace," as recognized by *Abood*, justified the intrusion. *Id.* at 790–91. Thus, the one court ever to attempt meaningful consideration of this issue understood that the prevailing view of *Knight*—compelled representation does not even impinge First Amendment rights—is untenable under this Court's free-speech cases and could only uphold compelled union representation by relying on an unsound doctrine drawn from an overruled decision. *See* Pet. at 17–18 (discussing "labor peace" doctrine).

None of this inspires confidence in the lower courts' treatment of this issue. Instead, it confirms the confusion that remains in the absence of meaningful guidance by this Court. There is no dispute that the question presented is important and recurring; given the weight of the rights at stake and number of public employees at issue, there could be no dispute. Review is necessary to settle the matter and correct a serious departure from the Court's free-speech jurisprudence.

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

This case presents an ideal vehicle for the Court to finally resolve an issue of overriding importance. Respondents do not identify any justiciability concern or factual dispute that could prevent the Court from addressing the merits.

1. The Petition squarely presents the issue of whether the First Amendment permits a state to appoint and recognize a labor union as the exclusive representative of public workers who have declined to join the union and object to its speech on their behalf. And it presents that issue in the most typical factual scenario, involving a state employee. In this respect, the Petition is complementary to the one in *Bierman v. Walz*, No. 18-766 (filed Dec. 13, 2018), which challenges the same statutory requirement as applied to home-care workers.

2. Respondents argue that the interlocutory posture of this appeal weighs against certiorari without identifying any particular reason why that would be. State Resp. Br. at 15–16; Union Br. at 16–17. But the question presented is purely one of law, concerning the constitutionality of Minnesota's compelled union-representation requirement, and the Court regularly grants certiorari in interlocutory appeals where such an "important and clear-cut issue of law" is presented. Eugene Gressman, et al., Supreme Court Practice § 4.18 (9th ed. 2007).[2] That question was addressed at length by the district court and in a summary affirmance, premised on an intervening decision upholding the same statutory requirement, by the appeals court. Pet.App.1–2, 3–13. There is no question as to

[2] *See, e.g.*, *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2365 (2018); *Am. Broad. Companies, Inc. v. Aereo*, Inc., 573 U.S. 431 (2014).

the Petitioner's standing to bring this challenge, its ripeness, or the ongoing nature of her asserted injury.

Respondents identify no factual disputes that might impede review, and it is obvious that there are none, given that the material facts are that Dr. Uradnik is a public employee, is subject to Minnesota's compelled union-representation requirement, and objects to it. The substance of the Union's bargaining activity is a matter of public record, based on the statute, *see* Minn. Stat. § 179A.03, subd. 19 (identifying mandatory topics of bargaining), and collective bargaining agreement, Pet.App.71 *et seq*.

In these circumstances, delaying review would only increase the duration of Dr. Uradnik's injury, without serving any legitimate purpose.[3]

3. The Union's claim that Dr. Uradnik waived her compelled-speech claim is wrong. As the Union recounts (at 18), Dr. Uradnik's complaint alleged both compelled-speech and compelled-association violations, and she moved for relief on both claims. After she did so, the Eight Circuit decided *Bierman*, relying on *Knight* to uphold Minnesota's compelled union-

[3] Whether Dr. Uradnik is ultimately entitled to preliminary relief is a question to be answered by the court below or district court in the first instance and does not affect this Court's consideration of her likelihood of success on the merits. Under Eighth Circuit law, a showing of likelihood of success on a First Amendment claim typically supports preliminary relief. *See Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 870 (8th Cir. 2012).

representation requirement, 900 F.3d at 572, and the district court found *Bierman* controlling in denying her relief, Pet.App.7, 11. On appeal, Dr. Uradnik sought summary affirmance, specifically reciting both her compelled-speech and compelled-association arguments and asking the Eighth Circuit to confirm that both of her claims were foreclosed by *Bierman*'s reasoning.[4] It did so, expressly holding that "Uradnik cannot show a likelihood of success on the merits of her compelled speech argument." Pet. App. 2. There was no waiver.

4. The State Respondents' apparent confusion over the relief sought by Dr. Uradnik—confusion not shared by the Union—has nothing to do with the legal question presented here. *See* State Resp. Br. at 17–18. Should Dr. Uradnik prevail on that legal question, the courts below will decide in the first instance the extent of her entitlement to relief—a question that went unaddressed because of their determination that her claims were foreclosed by *Knight*.

5. At a minimum, if the Court believes that further lower-court consideration of the legal question presented by this case is warranted, then the proper course would be for it to grant, vacate, and remand in light of *Janus* so that Dr. Uradnik's compelled-speech and compelled-association claims can be considered under standard First Amendment principles. *See Order, Fleck v. Wetch*, No. 17-886 (filed Dec. 3, 2018)

---

[4] Appellant's Mot. for Summary Affirmance, *Uradnik v. Inter Faculty Org.*, No. 18-3086 (8th Cir. filed Oct. 4, 2019).

(granting, vacating, and remanding petition challenging mandatory bar dues-payments and membership in light of *Janus*). Absent such relief, the determination of the court below that *Knight* exempts such claims from any constitutional scrutiny will stand.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

ANDREW M. GROSSMAN
Counsel of Record
MARK W. DELAQUIL
RICHARD B. RAILE
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

ROBERT ALT
DANIEL DEW
THE BUCKEYE INSTITUTE
88 East Broad Street
Suite 1120
Columbus, Ohio 43215
(614) 224-4422

Counsel for Petitioner

APRIL 2019