No. 19-3749

IN THE UNITED STATE COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Kathleen Uradnik,

Plaintiff–Appellant,

v.

Inter Faculty Organization, et al.,

Defendants–Appellees.

On Appeal from the United States District Court
For the District of Minnesota, No. 0:18-cv-01895-PAM-LIB
The Honorable Paul A. Magnuson

Appellant's Opening Brief

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Summary and Statement on Oral Argument

The Plaintiff, Dr. Kathleen Uradnik, is a professor at St. Cloud State University (the "University") and belongs to a bargaining unit represented by the Inter Faculty Organization (the "IFO"). Dr. Uradnik is not a member of the IFO, disagrees with its positions, and objects to its representation.

She brought two causes of action against the University and the IFO (collectively, "Defendants"). Count I challenged the IFO's status as the "exclusive representative" of bargaining unit members. Count II challenged the University's policy of excluding non-IFO faculty members from University committees that handle an array of University affairs and are, in all relevant aspects, government jobs. On summary judgment, the district court concluded that Count I is foreclosed by this Court's decision in *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018). It declined to reach Count II because it concluded that it was not in Dr. Uradnik's complaint (it was), and then it rejected her request, tendered both before and after judgment, for leave to amend to correct any perceived deficiencies in Count II. The questions in this case include whether excluding Dr. Uradnik from University employment opportunities because of her choice not to join the IFO violates the First Amendment, whether the district court erred in reading Dr. Uradnik's complaint not to assert the matter expressly stated in Count II, and whether it erred in rejecting her requests for leave to amend.

An oral argument of 30 minutes would greatly assist the Court in resolving these First Amendment issues and untangling the procedural web the district court erroneously wove in what should have been a straightforward case.

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Introduction

This case challenges employment discrimination at St. Cloud State University (the "University") in St. Cloud, Minnesota. The plaintiff, Dr. Kathleen Uradnik, is a professor at the University. But she is barred from performing many ordinary employment functions because she has declined to join a labor union, the Inter Faculty Organization ("IFO"), which is the "exclusive representative" of faculty members at the University under Minnesota law.

The University conducts much of its business through a network of committees, and only IFO members may serve on them. These IFO-members-only committees make binding decisions on everything from faculty grants to study-abroad programs to curriculum—and much more. Committee members are often paid for their committee work and receive employment credit for their time. In all but name, these are official University jobs. Most professors at the University serve on them at some point in their careers; many serve on multiple committees at once. Yet Dr. Uradnik is excluded from these jobs solely because of her choice not to associate with the IFO. Dr. Uradnik knows this because she has, many times, applied for empty seats on committees and been denied—and those seats remained empty.

Under the "unconstitutional conditions" doctrine, this case calls for a simple inquiry: if Dr. Uradnik's exclusion from these committees imposes a "material employment disadvantage," the discriminatory condition must satisfy heightened (even strict) scrutiny. *Okruhlik v. Univ. of Ark.*, 395 F.3d 872, 879 (8th Cir. 2005) (quotation marks omitted). And the questions of both (1) whether her

exclusion in fact carries such a disadvantage and (2) whether her exclusion is tailored to achieve a compelling government interest both implicate matters of fact to be resolved *after* discovery, not *before* it.

Yet the district court handled this case in the most convoluted of ways. It ruled on summary judgment before discovery, ignored Dr. Uradnik's extensive factual presentation, and found that she had not presented her discrimination claim in her complaint—when it was there all along in bold letters as "Count II." Then, when Dr. Uradnik offered to correct the perceived complaint defects through an amendment, the first offered in the case, the court deemed it too late—again, *before discovery*—and dismissed her claim with prejudice. With that, it blessed the University's First Amendment discrimination without even addressing the First Amendment issue. That was a plain abuse of discretion.

To be sure, the court also hinted some modicum of support for the position advocated by the University and the IFO (collectively, the "Defendants") that the Supreme Court's decision in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), exempts their discrimination against non-members of the IFO from any scrutiny. If that is the basis of the district court's ruling (which is far from clear), it is legally unfounded. *Knight* did not address or approve of First Amendment discrimination in employment. It held merely that citizens have no right to an audience with the government. Although that principle is broad enough to allow the University to restrict participation in collective bargaining sessions to the IFO alone, while excluding non-members, it does not allow the University to condition compensation, employment opportunity, and

jobs on the basis of protected speech and association. This case involves the latter, not the former, and any reading of *Knight* to approve of the conduct Dr. Uradnik has alleged and shown through sworn testimony would put *Knight* at odds with a long line of precedent generally forbidding government discrimination based on protected speech and association.

For these reasons and those discussed below, the district court's decision should be reversed and the case remanded to allow Dr. Uradnik to proceed on her First Amendment discrimination claim.

Jurisdictional Statement

The district court had jurisdiction under 28 U.S.C. § 1331 because the claims in this case arise under the First Amendment. Dr. Uradnik filed a timely notice of appeal from the district court's final judgment. This Court therefore has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

Statement of the Issues

1. Whether the University's exclusion of Dr. Uradnik from job positions on committees that conduct official University business and award participants a slew of employment advantages impinges her First Amendment rights.

- U.S. Const., amend. I.
- *Bd. of Cty. Comm'rs, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668 (1996).
- *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996).
- *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000).

2. Whether the district court erred by entering summary judgment against Dr. Uradnik without taking any inferences in the factual record (or the pleadings) in her favor or even considering the evidence or arguments she presented.

- Fed. R. Civ. P. 56(a), (c).
- *Perry v. Sindermann*, 408 U.S. 593 (1972).
- *Weitz Co. v. Lloyd's of London*, 574 F.3d 885 (8th Cir. 2009).

3. Whether the district court erred in finding that a cause of action for First Amendment discrimination expressly included in Dr. Uradnik's complaint was not part of her complaint.

- Fed. R. Civ. P. 8(a)(2).

4. Whether the district court erred in denying Dr. Uradnik's request for leave to amend her complaint when (1) the case had not progressed past the pleadings, (2) the court identified no prejudice to the Defendants in an amendment, (3) the court did not find (and could not have found) that amendment would be futile, and (4) the court identified no other factor weighing against granting leave to amend.

- Fed. R. Civ. P. 15.
- *Foman v. Davis*, 371 U.S. 178 (1962).
- *Wilburn v. Pepsi-Cola Bottling Co. of St. Louis*, 492 F.2d 1288 (8th Cir. 1974).

5. Whether *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), permits a public university to grant employment opportunities

and other benefits to only members of a labor union and deny those opportunities and benefits to non-members.

- *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984).

6. Whether Minnesota law's exclusive-representation scheme, which requires governmental entities to recognize a union as the "exclusive representative" of all employees in a bargaining unit, including those who reject the union's speech and representation, violates dissenting employees' First Amendment rights to freedom of speech and freedom of association.

- *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).
- *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018).
- *Harris v. Quinn*, 134 S. Ct. 2618 (2014).
- *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984).

Statement of Facts

A. Minnesota Law Permits Governmental Entities To Recognize a Union as Employees' "Exclusive Representative"

Under the Minnesota Public Employment Labor Relations Act ("PELRA") a public employer must bargain collectively with a union that obtains status as the exclusive representative of some or all its employees. Minn. Stat. §§ 179A.07, subdiv. 2(a), 179A.13, subdiv. 2(5). The scope of those mandatory negotiations includes the "terms and conditions of employment" for employees. *Id.* § 179A.14, subdiv. 1(a).

Additionally, PELRA identifies a class of "professional employees" and affords such employees the right "to meet and confer with a representative or committee of the public employer" regarding "all matters that are not terms and conditions of employment." *Id.* § 179A.08, subdiv. 1. The statute authorizes employees of a public employer to designate a single "representative" to represent all employees of that employer. *Id.* § 179A.08, subdiv. 2.

The result is that the public employer recognizes the union as the representative of all employees in a unit—including those who have declined to join the union—in bargaining over a wide variety of matters of public interest. A union's status as exclusive representative curtails the rights of employees to "express or communicate a view, grievance, complaint, or opinion on any matter related to the conditions or compensation of public employment or their betterment" where that expression of views would "circumvent the rights of the exclusive representative." *Id.* § 179A.06, subdiv. 1.

B. The University Appoints the Union To Speak for Dr. Uradnik

The Plaintiff, Dr. Uradnik, is a tenured faculty member at the University.[1] App19. She is not a member of the IFO and disagrees with the IFO on many issues, including issues related to terms and conditions of employment and issues related to governance of the University. App19.

[1] In this brief, "University" refers also to Defendant-Appellee Board of Trustees of the Minnesota State Colleges and Universities, which is a defendant authorized by Minnesota law to oversee all universities in the System of Minnesota State Colleges and Universities ("System"). *See* App42.

Nonetheless, PELRA permits the University to appoint the IFO as Dr. Uradnik's unwanted representative and agent so that it can speak on her behalf on many issues of substantial public concern. As authorized by PELRA, the University recognizes the IFO as "the exclusive bargaining representative" for "all faculty members" at the University. App38. The Agreement provides, in a section called "Exclusive Right," that "[t]he Employer will not meet and negotiate relative to those terms and conditions of employment subject to negotiations with any employee groups or organizations composed of employees covered by this Agreement except through the Association." App39. The employees covered by the Agreement are all faculty members within the bargaining unit, both union members and non-members.

The Agreement records the University's and IFO's negotiated points of agreement, including those pertaining to wages, benefits, grievances, the school year, workload, coaching assignments, office hours, severance, retirement, leaves of absence, and so on. The Agreement also designates the IFO as the representative to exercise the rights of employees of the University to "meet and confer" about matters that are not terms and conditions of employment. App45. Among other things, this right includes an exclusive right to "confer on the need for faculty to serve on System-level committees, after which the [Union] shall appoint the faculty." *Id.* Additionally, the Agreement affords local affiliates of the IFO (called "Faculty Associations" or "FAs") to establish committees to meet and confer with university officials. *See id.*

Faculty have no choice but to submit to the Union in resolving disputes with the University. Although a faculty member may decline to be represented by the Union, the Agreement's grievance process—which applies "whenever a bargaining unit member has a grievance,"—affords only the "exclusive representative" the right to take any action, such as requesting various meetings and hearings. App116. Thus, the Agreement subjects non-union-members to the grievance process and gives them no rights in that process.

C. Dr. Uradnik Is Excluded from Many University Positions Because of Her Choice Not To Join the IFO

Because Dr. Uradnik has chosen not to join the IFO, she is prohibited from serving in various official positions at the University. Under Article 6 of the Agreement, the IFO and the University have established an extensive set of search, service, and governance committees. App17–18; App266. These committees go far beyond what PELRA envisions. PELRA states that the meet-and-confer process is a forum "for discussions and the mutual exchange of ideas." Minn. Stat. § 179A.08, subdiv. 1. By contrast, Article 6 of the Agreement provides that "[a]dditional committees which deal with meet and confer issues *or which are appointed via the meet and confer process* may be established as mutually agreed to by the Association and the President." App45 (emphasis added). As result, committees labeled "meet and confer" also in fact exercise authority at

the University and carry out University functions. Only IFO members may serve on these university-level committees.[2] App276; *see also* App18.

Dozens of committees operate at any given time. Some are standing committees; some are created for limited purposes. App268, App276. Most committees fit within the following categories: "Faculty Association standing committees," university (or "governance/service") committees, and search committees. App268. These three types of committees operate at both the System and University levels, so that there are union Faculty Association standing committees, university/governance committees, and search committees at both the System and University levels. App269.

Faculty Association ("FA") Standing Committees. FA standing committees are internal IFO committees staffed solely by IFO members. App270. Some FA standing committees operate to address IFO internal matters. *Id.* But many others directly control planning and decision-making at the University, including the following:

- The University Curriculum Committee ("UCC"), one of the most powerful committees, controls curriculum at the University. Every change to curriculum must go through a UCC-developed process that is ultimately controlled by the UCC. This means that every addition or deletion of a course, alteration to a program, or even a minor technical edit to a course description is controlled by this committee.

[2] By contrast, non-members are permitted to serve only on departmental-level committees. App231.

- The Academic Affairs Committee exercises disciplinary power directly over students. Among other roles, it determines whether to readmit students who have been suspended, and it decides certain grade appeals.
- The Faculty Research Grants Committee and the Professional Development Committee exercise power over faculty professional development grants through selecting guidelines for grants and determining which faculty members will, in fact, receive the grants. It also determines the amount of awarded grants. Faculty must work through this process to obtain a grant. Although the administration exercises ultimate decision-making authority on awarding grants, the administration rubber-stamps every recommendation from the IFO-only committee.
- The International Studies Committee/International Advisory Committee accepts, reviews, and makes final decisions on faculty proposals for short-term study-abroad programs and awards funding for those proposals.
- The Graduate Committee is responsible for, among other things, setting graduate policies, procedures and regulations to developing criteria for appointing faculty members to the graduate faculty.

App270–275. Because she will not join the IFO, Dr. Uradnik is excluded from serving in University planning and decision-making regarding an array of matters over which these committees exert control.

Further, the University is likely unique in treating its "Faculty Senate" as an FA standing committee—or, more accurately, the lead FA standing committee. Most colleges and universities have faculty senates, which are representative

bodies of faculty members that wield power within the faculty's hands and advise the administration as to matters not within the faculty's hands. App269. The University, by contrast, allows only IFO members to serve on its Faculty Senate. *Id.* The Faculty Senate, in turn, wields direct power over University affairs in the form of a veto power over "decisions agreed to by any faculty member or faculty committee." *Id.* (quotation marks omitted).

University/Governance Committees. University committees, also called governance committees, are created by the University and are composed of IFO faculty members. There are about twenty-seven University standing committees currently in operation.[3] Examples of university committees are:

- The Academic Calendar Committee develops the University's academic calendar.
- The University International Advisory Council addresses the University's international strategy, initiatives, and activities.
- The Student Success Steering Committee evaluates enrollment management-related goals and develops recruitment and retention strategies.
- The Strategic Planning Committee addresses the University's strategic direction, objectives and goals, new challenges and opportunities, continuing structural and operational re-alignment, and other matters.

[3] Governance committees also exist at the System level. App279–280.

- The Scholarship, Research and Creative Achievement Committee facilitates implementation of the Community of Scholars work plan. It also selects students for research awards.
- The Service-Learning Advisory Committee encourages new service-learning initiatives and supports existing projects.
- The Senior-to-Sophomore Advisory Board provides strategic planning regarding concurrent enrollment issues and recommends proposals for concurrent enrollment. It serves as a coordinating entity between secondary education and post-secondary institutions.
- The Honorary Doctorate Committee reviews nominations for honorary doctorate degrees and provides the names of two or three candidates to the provost or president. The president is required to review the recommendations and only awards honorary doctorate degrees to those nominated.
- The Health and Wellness Committee sponsors workplace wellness initiatives, including designing policies related to health and wellness.
- The Parking Appeals Committee makes final determinations regarding alleged parking violations and fines.

App277–278.

In addition, the University's administration and the IFO frequently create additional committees for specific purposes. To that end, the University's administration informs the IFO at meet-and-confer sessions that it needs a new committee, and the parties agree to the size and composition of the committee.

App277. They virtually always agree that only IFO members may serve. *Id.* For example, when the University undergoes reaccreditation each decade, it creates a number of committees to execute that process. *Id.*

Dr. Uradnik and other non-union faculty are excluded from positions on any of these committees, even when committee seats are vacant for lack of enough faculty participants. App287–288. Union-faculty serve on one or, in many cases, more committees at once. App281. Students are even invited to serve on these committees. *Id.*

Search Committees. Search committees manage the efforts to hire new University and System administrators, including presidents, provosts, vice-presidents, deans, and other such administrators. App282. Search committees review applications and winnow down candidates, select finalists for site visits, review the finalists, and make recommendations for hiring. *Id.* Although the University makes the final choice, it generally adopts the search committee's recommendation and excludes from consideration candidates rejected by the committee. *Id.* Non-union faculty are entirely excluded from the process because the search committee's work is done in secret.

All of these committees are created out of the meet-and-confer process. *Id.* The administration informs the FA during meet and confer that a search has been approved. *Id.* It may or may not negotiate with the FA about the size and makeup of the committee. *Id.* Only IFO members sit on search committees, and many IFO members have sat on multiple search committees. App282–283.

D. IFO Members Are Compensated for Work on IFO Committees

Faculty members are generally compensated by the University for their work on the above-described committees. App284. Some faculty members are assigned committee work as part of their regular workload for an academic year. *Id.* Others are "reassigned" time for committee work, which is a method of real-locating faculty workload on a short-term basis. App285. Because she is not an IFO member, Dr. Uradnik is ineligible for this compensation. App286.

Faculty members also receive credit for their committee-work that is used to satisfy mandatory professional-development criteria. Pursuant to Article 22 of the Agreement, there are five requirements for professional development. Satisfying these criteria is necessary for obtaining and maintaining promotion and tenure. App95–96; App286–287. Committee-work is the most common method for satisfying the mandatory requirement to provide "Service to University and Community." App287. Non-union members cannot satisfy this criterion through committee-work.

E. Dr. Uradnik Overcame the Tilted Playing Field To Achieve Tenure, Despite Repeated Rejection from Committee Service Jobs

During Dr. Uradnik's 20 years at the University, the IFO has repeatedly represented during meet-and-confer sessions that it has difficulty identifying enough faculty members to staff the numerous committees. App288. In the meantime, Dr. Uradnik has repeatedly applied to work on various committees at the University and in the System. App288–289. In every instance, Dr.

Uradnik's choice not to join the IFO was the dispositive factor barring her service. App289.

Thus, Dr. Uradnik had to pioneer an atypical—and especially difficult—trail to achieve tenure, and she must continue to do so to keep her position, which is contingent on her meeting the requirements of Article 22. App290–297. Because Dr. Uradnik has a law degree, worked once as a litigator at a prominent Minneapolis law firm, and taught legal writing at Berkley, she successfully served as the University's pre-law advisor for about 20 years. App290–292. In that role she created a pre-law program for the University; prepared a pre-law curriculum, which has been circulated around the nation and used in many pre-law programs; and gained a reputation for excellence in pre-law advising. App291–293. She also published two books and contributed to a third. App294.

Her work as the pre-law advisor was particularly time-consuming, because she is the University's only pre-law advisor, and isolating, because she could not work alongside other faculty members or administrators. App293–294. This job also forced her to work during summers, sabbaticals, and holidays, unlike for committee positions. App293. This idiosyncratic set of circumstances—and plenty of hard work—has allowed Dr. Uradnik to overcome the barriers resulting from her status as a non-IFO faculty member. *Id.* Dr. Uradnik, however, has resigned her position as the pre-law advisor, and her path to continued satisfaction of the Article 22 requirements is less certain. Her colleagues are able to easily satisfy the service requirement through committee work—an option not available to her as a non-union member. App271.

F. Proceedings Below

1. Dr. Uradnik's Claims

On July 7, 2018, Dr. Uradnik filed her complaint, alleging two causes of action—Count I and Count II. App11.

Count I asserts that the IFO's recognition by the government as Dr. Uradnik's representative to speak on her behalf violates her First Amendment right to be free from compelled speech and association. App21–22.

Count II asserts that excluding IFO non-members from committees that conduct official University affairs—as opposed to those where the University is merely soliciting views, such as in collective bargaining—is discriminatory in violation of the First Amendment. App22–23. Dr. Uradnik contends that positions on the University committees described above (among others) are in fact government jobs; they do not merely provide the IFO a forum to express views to the University administration. Dr. Uradnik does not assert any right to participate in collective-bargaining or meet-and-confer sessions where the IFO simply expresses views to the University's administration; but she *does* assert the right to an equal opportunity to government employment, which the committees at issue provide, free from the unconstitutional condition of IFO membership.

2. Dr. Uradnik's Preliminary Injunction Motion on Count I—But Not Count II

On July 31, 2018, Dr. Uradnik moved for a preliminary injunction exclusively on Count I (compelled representation). Her motion expressly stated that

she "does not seek a preliminary injunction on Count II." App181 (emphasis added).

After she filed her motion, this Court issued its decision in *Bierman v. Dayton*, 900 F.3d 570, 572 (8th Cir. 2018), holding that the Supreme Court's decision in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), sanctioned PERLA's compelled-representation regime. The district court concluded that, in light of *Bierman*, Dr. Uradnik had "no likelihood of success" and denied her motion. App198. The court did not address Count II.

Dr. Uradnik appealed that order, but moved this Court to summarily affirm it so that she could petition the Supreme Court to review Count I. This Court granted that motion. App202. Dr. Uradnik petitioned the Supreme Court for certiorari. The Supreme Court denied it. App7.

3. The Case on Remand

During the appeal on the preliminary injunction decision on Count I, Dr. Uradnik agreed to several stays of discovery on Count II. *See* App6–7. Thus, even though both sets of Defendants answered the complaint, the case did not proceed to discovery.

On remand, the parties sought to reach a factual stipulation so as to avoid the need for discovery. App204–210. After those efforts proved unsuccessful, counsel conducted a Rule 26(f) conference. At that conference, Defendants' counsel announced for the first time that they intended to move for judgment on the pleadings and for summary judgment. They filed these motions in September 2019. App212–214.

At the magistrate judge's recommendation, Dr. Uradnik agreed to yet another stay of discovery. App8. But, in response to Defendants' dispositive motions, Dr. Uradnik provided a lengthy declaration attesting to the University's use of committees to conduct official business, the compensation available to faculty for service in committee positions, and her exclusion from those positions based on her refusal to associate with the IFO as a member. *See* App264. She contended in her response to Defendants' motions that the district court must consider this factual showing because (1) a summary-judgment motion was presented and (2) they would show what types of facts could be included if an amendment to the complaint was required to provide further allegations in support of Count II. App249–250. Meanwhile, Dr. Uradnik conceded that Count I was foreclosed by *Bierman*. App253.

4. The District Court's Rulings

On December 5, 2019, the district court issued a 5-page order, granting summary judgment to the Defendants on both Counts I and II. App298. As to Count I, it observed that Dr. Uradnik "concedes that this is not the correct forum to obtain relief on this claim, and merely restates it to preserve it for appeal." App300 (cleaned up).

As for Count II, the Court called it a "Compulsory Association" claim and identified it as the same argument it "previously found" at the preliminary-injunction stage to have "no likelihood of success." App301. It then found that Dr. Uradnik "now argues that not participating in SCSU's 'meet and confer' committees has prevented her from obtaining government benefits" but found

that "her Complaint is silent about this alleged deprivation." App300–301. It declined to consider "the merits of that argument" and stated that Dr. Uradnik "must filed an amended complaint." App301. It then went on to state that, "[e]ven so, *Knight* and *Bierman* foreclose Plaintiff's claims." App302.

On December 10, Dr. Uradnik moved the court under Rule 59(e) to vacate the judgment and permit her to amend her complaint on Count II. App304. She pointed out that the court appeared to conflate Count II with Count I, and thus should reconsider Count II, and that, if the court were to find that Count II did not adequately present Dr. Uradnik's contentions, she should be allowed to present an amended complaint containing allegations based on the additional factual detail presented in her declaration. *See* App308. On December 17, the district court denied her Rule 59(e) motion, finding that it had "already considered and rejected" Dr. Uradnik's arguments and that Dr. Uradnik "presents no valid reason why the Court should allow her to change her pleadings at this late stage of the proceeding." App375.

Dr. Uradnik timely appealed. App377.

Summary of Argument

I. The Supreme Court has "long since rejected Justice Holmes' famous dictum, that a policeman 'may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.'" *Bd. of Cty. Comm'rs, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668, 674 (1996) (quoting *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517 (1892)). The law is clear that the government "may not deny a benefit to a person on a basis that infringes his constitutionally

protected interests—especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

Here, the facts that must be taken as true at this stage demonstrate that the Defendants have violated Dr. Uradnik's First Amendment rights. Defendants have reserved an extensive set of employment opportunities and benefits—even money compensation—for only IFO members. They are therefore unavailable to Dr. Uradnik solely on the basis of her First Amendment-protected choice not to join the IFO. Accordingly, the district court should have shifted the burden to Defendants to establish a compelling justification that outweighs Dr. Uradnik's speech and associational rights. It failed to do so, and that was legal error. In any event, no justification for these burdens can be identified. Dr. Uradnik's First Amendment claim should therefore be allowed to proceed.

II. The district court's treatment of Dr. Uradnik's First Amendment discrimination claim was inconsistent with the Rule 56 summary judgment standard and disregarded the procedural rights of a civil-rights plaintiff challenging discrimination in good faith.

A. The district court inaccurately asserted that Dr. Uradnik's complaint was "silent" about First Amendment discrimination. Quite the opposite, Count II alleged this deprivation, and at least 20 paragraphs of the complaint supported Count II. Defendants did not challenge the plausibility of Count II, and Dr. Uradnik was not limited to her complaint's allegations at the summary-judgment stage. Her introduction of evidence was appropriate and expressly authorized by Rule 56.

B. That aside, any infirmity in her pleading of Count II should not have resulted in dismissal. Rule 15 provides a liberal standard to replead, and Dr. Uradnik requested leave to replead both before and after final judgment. It is "entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of…mere technicalities," *Foman v. Davis*, 371 U.S. 178, 181 (1962), but that is the result of the district court's ruling. It identified no prejudice to affording her the right to replead, and the pleadings stage is the paradigmatic stage at which no prejudice can result. The district court therefore abused its discretion in denying Dr. Uradnik's multiple requests for leave to file an amended complaint.

C. The district court also suggested—quite cryptically—that *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), forecloses Count II, but any reliance on *Knight* was legal error. *Knight* does not authorize discrimination. It does not permit the government to deny material employment advantages or other government benefits based on First Amendment-protected speech or association. *Knight* tendered the quite different holding that citizens have no right to an audience with the government. That holding is not relevant here. Dr. Uradnik asserts the University's committees exercise employment functions at the University, wield decision-making authority, interface with the University community and the general public on the University's behalf, and otherwise operate as government programs. They do not exist merely as viewpoint-sharing forums. *Knight* does not justify this scheme, and, if it did, it would contravene intervening Supreme Court precedent and merit abrogation.

III. Also before the district court was Count I of Dr. Uradnik's complaint, which challenges the IFO's status as "exclusive representative" for all faculty members at the University, even members who reject its representation. The district court correctly dismissed Count I, not because it lacks merit, but because this Court's intervening decision in *Bierman*, foreclosed the district court from providing relief. Dr. Uradnik preserved her challenge to this precedent below and states her arguments here again to preserve the challenge for further review. Dr. Uradnik, however, does not dispute that a panel of this Court is unable to rule in her favor on Count I. The panel here should affirm on Count I to allow Dr. Uradnik to seek further review of these issues.

Standard of Review

The standard of review on a motion for summary judgment is *de novo*. *Cuffley*, 208 F.3d at 705. "The party seeking summary judgment must establish the absence of a genuine issue of material fact and his entitlement to judgment as a matter of law." *Artis v. Francis Howell N. Band Booster Ass'n*, 161 F.3d 1178, 1180 (8th Cir. 1998) (citation omitted). "The court views the evidence and the inferences which may be reasonably drawn from the evidence in the light most favorable to the nonmoving party." *Enter. Bank v. Magna Bank of Mo.*, 92 F.3d 743, 747 (8th Cir. 1996). "Summary judgment of course is inappropriate where a dispute exists as to a material fact." *Johnson v. Grim-Smith Hosp.*, 453 F.2d 1253, 1253 (8th Cir. 1972).

The Court's decision on whether to grant leave to amend is reviewed "for an abuse of discretion, but the legal conclusions underlying a determination of

futility are reviewed *de novo*." *In re Medtronic, Inc., Sprint Fidelis Leads Prod. Liab. Litig.*, 623 F.3d 1200, 1208 (8th Cir. 2010).

Argument

I. Defendants Discriminate Against Dr. Uradnik by Denying Her Material Employment Advantages on the Basis of Her Protected Speech and Association

Defendants have unlawfully conditioned Dr. Uradnik's eligibility for government employment, employment advantages, and compensation based on her First Amendment-protected decision not to associate with an advocacy organization, the IFO.[4] They prohibit non-IFO faculty members from filling positions on University committees, which are government jobs in all but name. There is, at a minimum, a material dispute of fact as to how these committees function and whether service on them involves employment opportunities and benefits, and so the district court should have required justification from Defendants under heightened scrutiny. No such justification could possibly be provided, because there is no compelling government interest (or even a legitimate interest) in denying employment opportunities on the basis of union membership.

[4] There can be no doubt that Dr. Uradnik's choice not to join the IFO is protected by the First Amendment. *See Int'l Ass'n of Firefighters, Local No. 3808 v. City of Kansas City*, 220 F.3d 969, 974–75 (8th Cir. 2000). Nor can there be any doubt that Dr. Uradnik's speech and associational choices touch on matters of public concern and thereby draw the highest level of First Amendment protection. *See Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2476–77 (2018).

A. Denying Dr. Uradnik Compensation and Committee Positions Based on Union Membership Is an Unconstitutional Condition

As applied in the government-employment setting, the unconstitutional-conditions doctrine holds that "[a] State may not condition public employment on an employee's exercise of his or her First Amendment rights." *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 717 (1996). "If the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited," and the government could thereby "produce a result which it could not command directly." *Id*. (cleaned up).

It is therefore beyond dispute that Defendants could not, consistent with the First Amendment, fire Dr. Uradnik for her refusal to join the IFO. Neither Defendants nor the district court suggested otherwise. But it is equally clear that "material employment disadvantages" short of termination also burden First Amendment rights. *Okruhlik v. Univ. of Ark.*, 395 F.3d 872, 879 (8th Cir. 2005) (cleaned up). Any "gratuitous benefit or privilege" the government "bestows upon the sacrifice of a constitutional right" qualifies, *Blackburn v. Snow*, 771 F.2d 556, 568 (1st Cir. 1985), and the term "benefit," as this Circuit has explained, "is not limited to valuable government benefits or even benefits at all." *Cuffley*, 208 F.3d at 707 n.5. Even "the opportunity to serve as a volunteer constitutes the type of governmental benefit or privilege the deprivation of which can trigger First Amendment scrutiny." *Hyland v. Wonder*, 972 F.2d 1129, 1135 (9th Cir. 1992); *see also Andersen v. McCotter*, 100 F.3d 723, 727 (10th Cir. 1996) (same).

Here, whether the opportunities denied to Dr. Uradnik constitute government benefits is a question of fact, and all facts and inferences should have been taken in Dr. Uradnik's favor. At the summary-judgment stage, Dr. Uradnik identified numerous material employment disadvantages denied to her solely on the basis of her First Amendment-protected choices, and these denials establish a First Amendment deprivation.

Compensation. Dr. Uradnik's choice not to join the IFO bars her from receiving money. App284–286. Positions on IFO-members-only committees often come with employment compensation. The allocation of money on the basis of First Amendment-protected rights is paradigmatic First Amendment discrimination. *See Speiser v. Randall*, 357 U.S. 513, 518–19 (1958) (striking down tax exemption conditioned on First Amendment-protected speech).

Employment Opportunity. The denial of employment opportunities is another burden on First Amendment rights. Service on a committee is a government job. IFO-members-only committees exercise direct control over numerous aspects of academic, student, and faculty life at the University. App268–284. They decide what curriculum will be used, select which faculty members will receive grants, award teaching and research grant funding, approve sabbaticals, decide appeals from grade disputes, award honorary doctorates, choose which short-term study-abroad programs will be implemented, choose finalists for high-level administrative and leadership positions, and even decide campus parking-infraction appeals.

These committee positions are government jobs. But they are foreclosed to Dr. Uradnik on the basis of her exercise of First Amendment rights. That committees conducting official University business are open only to some employees on the basis of political affiliation is a violation of the First Amendment. *See, e.g.*, *Holloway v. Clackamas River Water*, 739 F. App'x 868, 870 (9th Cir. 2018) (holding that plaintiff stated a First Amendment claim based on her exclusion from executive sessions); *Allen v. Napolitano*, 774 F. Supp. 2d 186, 199–200 (D.D.C. 2011) (holding that plaintiff stated a First Amendment claim based on being excluded from meetings relevant to her work); *Hoffman v. Dewitt Cty.*, 176 F. Supp. 3d 795, 807 (C.D. Ill. 2016) (holding that a plaintiff stated a First Amendment claim based on his exclusion from board meetings after he engaged in protected speech). If participation in an Adopt-A-Highway program cannot be denied to Ku Klux Klan members on the basis of their (entirely objectionable) speech and association, *Cuffley v. Mickes*, 208 F.3d 702, 709 (8th Cir. 2000), the University cannot exclude Dr. Uradnik from its programs and opportunities on the basis of her equally protected speech and association.

Employment Credit. Committee participants receive employment credit for committee service, a credit no different from the credit faculty members receive for teaching courses. App284–285. A faculty member who serves on an IFO-members-only committee is credited with work time, and the faculty member's schedule is adjusted accordingly. This is not an extra-curricular activity; it is part and parcel of employment work, no different from teaching or

researching. Denying that valuable credit on the basis of union membership contravenes the First Amendment.

Professional-Development Credit. IFO-members-only committee participants also receive professional-development credit. App286–290. Non-IFO members like Dr. Uradnik must acquire this credit in atypical and more onerous ways in order to ensure tenure, promotion, and the very continuation of their employment. App290–297. An IFO-members-only committee provides a straightforward path to promotion and continued achievement of professional-responsibility obligations. App297. Denying that path on the basis of union membership contravenes the First Amendment.

Although those faculty members barred from committees may still advance, their path is more difficult because the playing field is not level. Dr. Uradnik was able to meet the professional-development requirements because of her unique background with a law degree and litigation experience, her successful curriculum drafting and pre-law program building, her authorship of books, and her success in the classroom. App290–297. The fact that she achieved tenure does not prove that the playing field is even. A runner can win a race even with a disadvantage of starting five feet back from where the competitors start; the fact that the runner must work that much harder and be that much better only proves the disadvantage.

Valuable Experience and Expertise. Service on IFO-members-only committees affords a faculty member valuable employment experience. This allows committee-members a substantial leg up in competition for other faculty and

administrative positions. App286. As noted, IFO-members-only committees run many aspects of the University, and, as a result, those participants gain significant experience in university administration. This disadvantages Dr. Uradnik in the competition to move up into higher-education administration, whether at the University or elsewhere. That is especially true since other universities do not close administrative functions to non-union faculty members. For example, it is, to Dr. Uradnik's knowledge, extremely unusual for the University's Faculty Senate to be closed to non-union faculty members. App269. Faculty senate experience is something available to all faculty at other schools. That experience and committee service are important qualifications to have for someone looking to advance in university administration.

Participation in University Life. Service on IFO-members-only committees carries an inherent value of participating in the faculty life of the University, and Dr. Uradnik is disadvantaged by being denied that benefit. App290. In other words, another benefit unavailable to Dr. Uradnik is the valuable experience of interacting with her colleagues and supervisors and in developing opportunities for networking that service on IFO-members-only committees provide.

The fact that Dr. Uradnik can meet mandatory professional-responsibility criteria by working as the University's pre-law advisor is no substitute for committee work. The role is isolating, and the pre-law program has not drawn interest from other University faculty members. App292–294. The fact that University administrators and faculty members have identified disfavored roles for a few non-IFO faculty members and, at the same time, excluded them from the

favored roles only confirms that Defendants have chosen to dole out employment advantages and disadvantages on the basis of protected speech and association.[5] *See Rutan v. Republican Party of Illinois*, 497 U.S. 62, 73 (1990) ("Employees who find themselves in dead-end positions due to their political backgrounds are adversely affected. They will feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold, in order to progress up the career ladder.").

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These facts establish that committee positions constitute government jobs, or at a minimum government programs, and that committee service affords multiple material employment advantages. It was premature to rule against Dr. Uradnik on the factual merit of these contentions: she has had no *discovery*, let alone a trial. The district court therefore should have found that Dr. Uradnik is being denied a material employment advantage and permitted Count II to proceed. Its failure to do so at this stage was legal error.

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[5] The employment disadvantage is sufficiently severe to satisfy the standards of First Amendment retaliation. Nevertheless, because the standard for establishing an unconstitutional condition (which is sufficient for injunctive relief here) is lower than that for establishing retaliation, the Court need not address this issue. *See Wishnatsky v. Rovner*, 433 F.3d 608, 612 n.2 (8th Cir. 2006) ("While a requirement of a 'chilling effect' would be part of the analysis if Wishnatsky had alleged only that the government took retaliatory action against him because of his speech, such a showing is not necessary to state a claim that the Clinic discriminated against Wishnatsky by denying access to the program on account of his viewpoint." (citation omitted)).

B. There Is No Justification for Burdening Dr. Uradnik's First Amendment Rights

Because Defendants have burdened Dr. Uradnik's First Amendment rights, they bear the burden of justifying those burdens under the appropriate level of First Amendment scrutiny. Conditions on free speech and association ordinarily trigger strict scrutiny. *See Rutan*, 497 U.S. at 70 n.4. Possibly, if the University seeks to place its "role as an employer" into its defense strategy, then either a "narrow-justification test," *Thompson v. Shock*, 852 F.3d 786, 791 (8th Cir. 2017), or else the *Connick-Pickering* framework might apply, *see Int'l Ass'n of Firefighters, Local No. 3808*, 220 F.3d at 973. But the distinction is irrelevant because reversal is required under any standard.

To begin, the district court erred in failing to require justification. Nor did Defendants offer any, and so any contention on this element is forfeited at this stage.[6] Nor would that inquiry be appropriate before discovery, since any justification put forward would need vetting in the ordinary adversarial process. Because it is established that Dr. Uradnik's rights are burdened, *supra* § I.A, the only permissible outcome was the denial of Defendants' dispositive motions in favor of discovery. The Court may summarily dispose of this issue on that basis.

In any instance, no justification is even imaginable. The *Connick-Pickering* framework allows the government some leeway to restrict the impact of an employee's speech "'on that employee's public responsibilities.'" *Janus*, 138 S. Ct.

[6] The University's opening brief below did not mention heightened scrutiny, and the IFO mentioned it only in conjunction with Count I, not Count II.

at 2472 (quoting *United States v. Treasury Employees*, 513 U.S. 454, 467 (1995)).[7] Yet there is no conceivable reason why the duties on committees approving curriculum or research grants or adjudicating grade disputes or parking appeals require participants to belong to a union. These things—and the many other topics addressed by IFO-members-only committees—are entirely unrelated to union membership.

Similarly, the IFO's argument below that compelled representation finds justification in the "[t]he concept of 'labor peace'" and the need for "majority rule" holds no application in the employment-discrimination context. Defendants' burden is to show that political affiliation "is an appropriate requirement for the job." *DePriest v. Milligan*, 823 F.3d 1179, 1184–85 (8th Cir. 2016). The response that collective bargaining by an exclusive representative furthers the purpose of labor peace is a non-sequitur, so far as First Amendment discrimination is concerned.

Even if Minnesota has a compelling interest in forcing the IFO's representation on an entire bargaining unit, that does not justify barring non-IFO faculty members from employment roles, compensation, and other benefits. By the same token, Minnesota can continue to administer PELRA in full—including both the meet-and-confer and meet-and-negotiate systems—without prohibiting non-IFO faculty from serving on committees that exercise government authority

[7] Although Dr. Uradnik believes strict scrutiny should apply, she assumes application of the more lenient *Connick-Pickering* framework here to illustrate how weak any proposed justification would be.

and award its members with government benefits. The discrimination alleged here is unrelated to any government interest in public-sector collective bargaining.

II. The District Court Erred in Its Treatment of Dr. Uradnik's Count II

The district court failed to consider or credit any of the Count II-related assertions in Dr. Uradnik's complaint or declaration. This failure to "view the evidence and all reasonable inferences in the light most favorable to the nonmoving party," *Weitz Co. v. Lloyd's of London*, 574 F.3d 885, 892 (8th Cir. 2009), is a paradigmatic legal error, and it demands correction. Dr. Uradnik's civil-rights complaint should not have been dismissed on "mere technicalities"—if they even existed. *Foman*, 371 U.S. at 182; *see also Perry*, 408 U.S. at 598 ("[W]e hold that the grant of summary judgment against the respondent, without full exploration of this issue, was improper.").

A. Count II Was Part of Dr. Uradnik's Complaint All Along

The district court erred in finding that Dr. Uradnik's complaint "is silent about" her Count II deprivation. App302. In fact, Dr. Uradnik's complaint devoted at least 20 paragraphs to supporting Count II. *See* App12, App16–19, App20–21, App22–23. Those paragraphs asserted that Defendants maintain "an extensive set of search, service, and governance committees" that exercise "significant influence over affairs at the University" and that "[t]his system unlawfully allocates state-granted benefits and state-imposed burdens on the basis of political association" by excluding non-union faculty from committee positions and the benefits associated with those positions. App12–13, App17. The Prayer

for Relief sought a declaration "that Defendants' discrimination against non-members of the Union impermissibly abridges the Plaintiff's First Amendment speech, petitioning, and associational rights" and "an injunction barring Defendants from discriminating against nonmembers of the Union." App23. These remedies are distinct from those associated with Count I.

The district court simply misunderstood the nature of the claims before it, which apparently explains its incorrect treatment of Count II. It misidentified Count II as the same count the district court "previously" addressed at the preliminary-injunction stage. App301. But it was not: Dr. Uradnik only presented Count I in her preliminary-injunction motion and expressly informed the district court that "Dr. Uradnik does not seek a preliminary injunction on Count II at this time." App181. The district court seems to have conflated Count II with Dr. Uradnik's "associational" claim, which falls under the umbrella of Count I. *Compare* App301 (calling Count II an "associational" claim), *with* App187 (raising an associational challenge as part of Count I at preliminary-injunction stage) *and* App258 (same at summary-judgment stage). The district court misunderstood the counts before it. And, unfortunately, when Dr. Uradnik afforded it the opportunity to revisit this error under Rule 59(e), the court found again that it "previously considered and rejected the arguments." App375. That left Dr. Uradnik no choice but to seek correction on appeal.

The district court may also have been confused by the fact that Dr. Uradnik's declaration—and her arguments in response to Defendants' dispositive motions—were more extensive than her complaint in detailing the factual

basis of her claim to First Amendment harm. But Dr. Uradnik was not limited to her complaint in opposing the IFO's motion for summary judgment—nor would she even have been justified in relying on her complaint's allegations, *see* Fed. R. Civ. P. 56(c)(1)(A). It was entirely appropriate to respond with a detailed declaration attesting to the facts underpinning Count II.[8] If the IFO or the University believed Count II did not satisfy the Rule 8 "requirement of plausibility," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 560 (2007), they could have challenged the sufficiency of the allegations in a Rule 12 motion, but they did not. In the posture the district court chose (at Defendants' urging) to resolve this case, there was no procedural bar to Dr. Uradnik's submission of evidence. And Dr. Uradnik expressly invoked Rule 56(d) to identify facts that she believes she can obtain through discovery.

B. The District Court Should Have Granted Dr. Uradnik Leave to Amend

Even if Dr. Uradnik inadequately alleged her discrimination claim, the district court should have granted her leave to replead. *See Foman v. Davis*, 371 U.S. at 181. Dr. Uradnik requested leave to amend both before and after judgment, and the district court should, at a minimum, have permitted her to do so.

[8] The district court's reliance on *Morgan Distrib. Co. v. Unidynamic Corp.*, 868 F.2d 992, 995 (8th Cir. 1989), was misplaced. This statute-of-limitations case inquired into when a claim was raised and held that a claim first raised in a brief, not in the pleadings, does not toll the limitations period. *Id.* at 994–95. There is no limitations problem here, and Dr. Uradnik did not raise Count II for the first time in her brief. Meanwhile, *Morgan Distributing Co.* did not hold that a party who raises a claim in a pleading cannot present a more detailed basis for the claim at the summary-judgment stage.

"Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded." *Id.* at 182. "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Id.* To deny that opportunity, a district court must first find some "apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment." *Id.*

The district court's sole basis for denying leave was that it found the proceedings to be "at [a] late stage." App375. This was an abuse of discretion. "Ordinarily, delay alone is an insufficient basis for denying leave to amend. Prejudice must be shown." *Hanson v. Hunt Oil Co.*, 398 F.2d 578, 582 (8th Cir. 1968). The district court found none, and Defendants have not even alleged it. And no such allegation would hold water. The proposed amendment was the first in the case, no discovery had taken place, and the case had not progressed past the pleadings. Denial of leave under these circumstances is an abuse of discretion. *See, e.g.*, *McLain v. Meier*, 851 F.2d 1045, 1051 (8th Cir. 1988); *Wilburn v. Pepsi-Cola Bottling Co. of St. Louis*, 492 F.2d 1288, 1290 (8th Cir. 1974); *Word v. Mo. Dep't of Corr.*, 542 F. App'x 540, 541 (8th Cir. 2013).

The district court cited *Humphreys v. Roche Biomedical Labs., Inc.*, 990 F.2d 1078, 1082 (8th Cir. 1993), for the proposition that "a district court does not abuse its discretion" in denying amendment where "the amendment is offered

after summary judgment" and "no valid reason is shown for the failure to present the new theory at an earlier time." App375 (citation omitted). Its reliance on this test is misguided.

First, its citation of *the court of appeals'* inquiry into whether a district court "abuse[s] its discretion" erroneously sidestepped its *own* obligation to review the case under the *Foman* factors. Its reasoning was circular: the court denied leave because it believed it had discretion to deny leave. But *Foman* directs the district court to specific inquiries that should have been addressed head on. Just as "outright refusal to grant the leave without any justifying reason…is not an exercise of discretion," but "merely abuse of that discretion," *Foman*, 371 U.S. at 182, citing the mere existence of discretion as the basis for denying leave is also merely an abuse of that discretion.

Second, Dr. Uradnik did not offer to amend only "after summary judgment." Her summary-judgment opposition offered to provide an amended complaint to address any deficiencies the district court may have perceived in the pleadings. *See, e.g.*, App250–251 ("If the Court concludes that…the current complaint is insufficiently specific, it should grant leave to amend under the generous standards of Rule 15."); App251 ("If the Court would prefer, Dr. Uradnik can amend at this time."); App233 (identifying what Dr. Uradnik "could allege in an amended complaint"); App230 (same). This was not a case where Dr. Uradnik dreamed up a new theory only after losing a final judgment on the prior theory. Nor does the standard change after judgment; *Foman* itself was a post-

judgment denial of leave to amend under Rule 59(e). *See* 371 U.S. at 181. So was this Court's decision in *Wilburn v. Pepsi-Cola Bottling*. *See* 492 F.2d at 1289–90.

Third, there was clearly a "valid reason" for Dr. Uradnik's supposed failure to present Count II "at an earlier time": it *was* presented. She had a good faith belief that Count II was sufficient to provide "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), and provided her a path to discovery, unless challenged for failure to state a plausible claim (which Defendants did not do). There was no reason to offer to amend the complaint earlier than she did—her first filing after Defendants challenged Count II. Even if she is ultimately deemed to have not adequately preserved the issue, there is at least a "valid reason" for not acting sooner to amend.

It is "entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of…mere technicalities." *Foman*, 371 U.S. at 181. But that is what happened here. A civil-rights claim was rejected, not on its merits, but on, at most, a minor procedural technicality. Above all else, the Federal Rules favor a "just" determination of every action *on the merits*. Fed. R. Civ. P. 1. Dr. Uradnik was denied that.

C. The District Court's Apparent Reliance on *Knight* Was Legally Erroneous

The district court hinted cryptically that *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), forecloses Count II. This, again, appears to have been predicated on an erroneous understanding of Count II, which

the district court wrongly identified as an "associational" claim.[9] App301. In any event, *Knight* is irrelevant to Count II.

1. *Knight* Does Not Reach the Issues in This Case

Knight does not hold that public universities may condition employment benefits or advantages on the basis of union membership or non-membership. It says absolutely nothing on this subject. It does not address government jobs, compensation, or an effort to tilt the playing field of promotion and tenure against faculty members who decline union membership. In short, it does not contravene the unconstitutional-conditions doctrine or preempt the reach of that doctrine in the context of public-university affairs.

Instead, *Knight* holds merely that citizens, including public-university faculty members, have "have no constitutional right to force the government to listen to their views." *Id.* at 283. The plaintiffs in *Knight* challenged PELRA's establishment of "meet-and-confer" sessions where university administrators host union representatives—but not *non*-union representatives—for an "*official exchange of views*." *Id.* at 273 (emphasis added). In every instance, *Knight* emphasized that the meet-and-confer process it upheld was one of union-member-only discussions. It described meet-and-confer sessions as "occasions for public employers…to receive policy advice from their professional employees." *Id.* at 282. It described PELRA's meet-and-confer regime as providing "the right to 'meet

[9] The district court's citation of *Bierman*, underscores its confusion. *Bierman* simply holds that the *Knight* decision "affirmed the constitutionality of exclusive representation," *id.* at 574, but nothing like Dr. Uradnik's Count II was raised in *Bierman*. *Bierman* is only relevant to Count I, *infra* § III.

and confer' with their employers on matters related to employment that are outside the scope of mandatory negotiations" and emphasized that "[t]here is no statutory provision concerning the 'meet and confer' process, however, that requires good faith efforts to reach agreement." *Id.* at 274.

Knight therefore holds only that, in providing a non-public forum for citizens to approach government officials with their speech and petitioning, the government may listen to some speakers and exclude others. For example, Environmental Protection Agency officials may choose to listen to representatives of the Natural Resources Defense Council and decline to listen to representatives of the American Coalition for Clean Coal Electricity (or vice versa). But *Knight* does not hold that the EPA can condition eligibility for jobs or material employment advantages on the basis of applicants' or employees' membership in these associations. As dozens if not hundreds of cases hold, the government is forbidden from choosing employees, contractors, or benefit recipients on the basis of First Amendment-protected freedoms. *Knight* does not contradict that authority.

Knight has nothing to do with Dr. Uradnik's Count II. The "meet and confer" processes considered by *Knight* bear no resemblance to the committees challenged here—at the very least, the nature and functions of those committees raises questions of fact that must be resolved on the merits, after discovery.

Defendants are wrong to contend that, simply because these committees come with the "meet and confer" title, *anything* that happens under their aegis is approved by *Knight*. To state that argument is to refute it. Treating *Knight* as a green light for employment discrimination would eviscerate the

unconstitutional-conditions doctrine. It would allow state universities to deny employment or benefits to union members, non-union employees, Republicans, Democrats, Catholics, Protestants, and Rotary Club members, or members of any other expressive group simply by applying the label "meet and confer."

Knight holds no such thing and should not be read into conflict with the long line of precedent rejecting Defendants' position. No discrimination claim resembling Dr. Uradnik's was raised in *Knight*, and nothing like the allegations that Dr. Uradnik presents was presented there. The Supreme Court has warned against precisely the types of inferences the IFO would have the Court draw from out-of-context quotations. *See Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 35 (2012) ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." (quoting *Cohens v. Virginia*, 6 Wheat. 264, 399 (1821)); *Armour & Co. v. Wantock*, 323 U.S. 126, 132–33 (1944) ("It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion.").

2. *Knight*, if Read To Allow Employment Discrimination, Would Require Abrogation or Reversal

If, however, *Knight* were to be read to allow the IFO and the University to make extensive employment benefits and opportunities available solely on the basis of union membership, Dr. Uradnik would have no choice but to contend that *Knight* was wrongly decided. Although this Court is unable to overrule *Knight*, Dr. Uradnik hereby preserves this argument for appeal.

Since *Knight* was decided, the Supreme Court has further tightened the unconstitutional-conditions doctrine and emphasized that the government's ability to change labels does not excuse it from administering benefits, including employment benefits, without discriminating on the basis of First Amendment protected rights. *See, e.g.*, *O'Hare Truck Serv.*, 518 U.S. at 721–22; *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1416 (2016) ("The First Amendment generally prohibits government officials from dismissing or demoting an employee because of the employee's engagement in constitutionally protected political activity."). If *Knight* held that public universities can grant or withhold benefits by slapping the label "meet and confer" on them, then it has been entirely undermined by the Supreme Court's subsequent precedents. *Knight* (as Defendants interpret it) cannot continue to be good law in light of this precedent and bedrock First Amendment principles.

III. Minnesota's Compelled Representation Scheme Impinges Dr. Uradnik's First Amendment Rights Without Any Justification

Dr. Uradnik's Count I challenges the IFO's status as the exclusive representative of all faculty at the University, including persons who reject its representation. As discussed below, she contends that the *Knight* decision does not foreclose this claim. But, after she filed her complaint, this Court issued *Bierman*, which rejects her position. Dr. Uradnik conceded below that the district court could not overrule *Bierman*, and she concedes here that a panel of this Court also

cannot overrule *Bierman*. She therefore presents her arguments to preserve them for further review but asks this panel to affirm the district court on Count I.[10]

A. Minnesota Law Compels Dr. Uradnik's Speech on Matters of Substantial Public Concern

Under Minnesota law and the Agreement, the government has appointed the Union as Dr. Uradnik's representative and agent. Minn. Stat. § 179A.07, subdiv. 2(a); *id*. § 179A.13, subdiv. 2(5); *id*. § 179A.08; *id*. § 179A.06, subdiv.1; App39. In that role, it speaks for her on matters that the Supreme Court has recognized to be "overwhelmingly of substantial public concern." *Janus*, 138 S. Ct. at 2477. But the First Amendment prohibits the government from compelling Dr. Uradnik's speech.

That Defendants compel Dr. Uradnik's speech is indisputable. The Union has been appointed, per Minnesota law, as her "representative," Minn. Stat. § 179A.14, subdiv. 1(a), and under the Agreement it is named her "exclusive bargaining representative" in interactions with the University. App38. Having sought and obtained exclusive-representative status, the Union's duty under Minnesota law is to represent all public employees in a bargaining unit, including Dr. Uradnik. Minn. Stat. § 179A.12, subdiv. 10 (discussing elected

[10] Dr. Uradnik successfully persuaded this Court to summarily affirm this Court's preliminary-injunction ruling to allow her to petition the Supreme Court for a writ of certiorari. Notably, however, the University and the IFO opposed the petition, in part, by asserting that the preliminary stage counseled for denial of the petition. Opp'n Br. at 8, 16–20, *Uradnik v. Inter Faculty Organization*, No. 18-719 (U.S. Mar. 27, 2019). Dr. Uradnik intends to seek further review on Count I at the appropriate time.

representative the "exclusive representative of all employees"); *see id.* § 179A.13, subdiv. 3(3); *id*. § 179A.12, subdiv. 8; *id.* § 179A.13, subdiv. 2(5). It carries out that duty through, among other things "speech in collective bargaining." *Janus*, 138 S. Ct. at 2475. In so doing, "the union speaks for the *employees*." *Id*. at 2474 (emphasis in original). In other words, it speaks on their behalf, as their official representative and agent. Its speech is attributable to them and therefore constitutes compelled speech. *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 564–65, 566 n.11 (2005).

But, as Justice Jackson put it, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). Instead, "[t]he First Amendment mandates that [courts] presume that speakers, not the government, know best both what they want to say and how to say it." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 790–91 (1988). "[T]he government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers…; free and robust debate cannot thrive if directed by the government." *Id*. at 791. For that reason, government-compelled speech is subject to strict scrutiny. *Id.* at 789–90, 800–01.[11]

[11] The Supreme Court has assumed, without answering the question, that compelled subsidization of speech is subject to exacting scrutiny under which a compelled subsidy must "'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Janus*,

B. Minnesota Law Compels Dr. Uradnik To Associate with the Union

In addition to compelling her speech, Minnesota law forces Dr. Uradnik to join into an expressive association with the Union, also in violation of her First Amendment rights.

At issue here is an "expressive association." An association "is protected by the First Amendment's expressive associational right" if the parties come together to "engage in some form of expression, whether it be public or private." *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000). That is, of course, the entire purpose of the Union's appointment as Dr. Uradnik's exclusive representative—to rely on her status as an employee of the University to advocate on behalf of her and the other employees. *Cf. United States v. United Foods*, 533 U.S. 405, 411–12 (2001) (looking at the whole regulatory scheme to determine that challenged "advertising itself, far from being ancillary, is the principal object of the regulatory scheme").

"Freedom of association…plainly presupposes a freedom not to associate." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *see also Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.,* 475 U.S. 1, 12 (1986) (plurality opinion)

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138 S. Ct. at 2465 (quoting *Knox v. SEIU, Local 1000*, 567 U.S. 298, 310 (2012)). Strict scrutiny, however, is applicable to compelled speech because "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning," to the point that the Court's "landmark" decision in *Barnette* recognized "that a law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence." *Id*. at 2464 (quoting *Barnette*, 319 U.S. at 633). The compelled-speech regulation at issue here fails under either standard.

("[F]orced associations that burden protected speech are impermissible"). Compelled association is therefore subject to at least "exacting scrutiny" and therefore must, at a minimum, "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Knox*, 567 U.S. at 310 (cleaned up); *see also Boy Scouts of America*, 530 U.S. at 648.

Exacting scrutiny is to some extent a balancing test: "the associational interest in freedom of expression has been set on one side of the scale, and the State's interest on the other." *Boy Scouts of America*, 530 U.S. at 658–59. Even facially compelling state interests—eradicating discrimination, assuring equal access to places of public accommodation—have been found to be outweighed by the burden of government intrusion on associations that are, themselves, expressive. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 574–75 (1995); *Boy Scouts of America*, 530 U.S. at 559. Compared to those cases, the assumed governmental interest here is far more speculative and far more attenuated from the policy at issue—there is, by contrast, a direct connection between anti-discrimination law and discrimination—while the expressive injury is equally severe.

C. Minnesota's Scheme Is Not Narrowly Tailored

Defendants' burden is therefore to show that the challenged statute is necessary to serve a compelling state interest and is narrowly tailored to achieve that end. *Riley*, 487 U.S. at 800–01; *see also Boos v. Barry*, 485 U.S. 312, 312 (1988). The government's putative interest in "labor peace," which has typically been advanced to defend public-sector union arrangements, is not sufficient.

"Labor peace" refers to the potential for "conflict and disruption" that might arise "if the employees in a unit were represented by more than one union." *Janus*, 138 S. Ct. at 2465 (discussing *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 220–21 (1977)). In *Janus*, the Supreme Court rejected out of hand the argument that "labor peace" justified compelled subsidization of union speech, recognizing that "it is now undeniable that 'labor peace' can readily be achieved 'through means significantly less restrictive of associational freedoms.'" *Id.* at 2466 (citing *Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014)).

"Labor peace" is no more compelling a government interest when it comes to justifying compelled speech or association, as opposed to compelled subsidization of speech as in *Harris* and *Janus*. After all, the First Amendment already affords public workers a near-absolute right to speak out themselves on matters of public concern and to join alternative labor organizations, just like they may enter into any number of private associations free from government retaliation. *Heffernan*, 136 S. Ct. at 1416 ("The First Amendment generally prohibits government officials from dismissing or demoting an employee because of the employee's engagement in constitutionally protected political activity.").

Compelling Dr. Uradnik's speech through the Union does nothing to relieve any "conflict and disruption" that could arise from her own voluntary speech and associations. Moreover, such voluntary speech and associations are unlikely to lead to disruption or conflict because the government has no obligation to listen to the views of any such person or organization. *Knight*, 465 U.S. at 283 ("The Constitution does not grant to members of the public generally a

right to be heard by public bodies making decisions of policy."). The government may avoid any potential conflict simply by declining to bargain with rival unions—a means far more tailored than compelling its employees' speech. Indeed, *doing nothing* is likely sufficient to maintain "labor peace," as demonstrated by the experience of Tennessee, which abolished exclusive representation for teachers in 2011. *See* Tenn. Code Ann. § 49-5-603.

In any instance, "labor peace" is not a compelling interest that supports overriding public workers' First Amendment rights. Although the Supreme Court found that "labor peace" (when combined with the interest in avoiding free-riders) supported compelled subsidization of speech in *Abood*, it borrowed the "labor peace" concept from Commerce Clause precedents without any consideration of its proper place in the First Amendment architecture. *See Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 220, 224 (1977), *overruled by Janus*, 138 S. Ct. 2448 (2018). As the Supreme Court has recognized, "*Abood* was poorly reasoned" and specifically failed to "independently evaluate the strength of the government interests that were said to support the challenged" policies. *Janus*, 138 S. Ct. at 2479–80. Notably, *Abood* did not involve a challenge to exclusive representation, only to the payment of agency fees, and so is not binding on the issues presented here. More importantly, for the reasons identified by the Supreme Court in *Janus* and *Harris*, *Abood*'s musings on First Amendment values are ill-considered and unpersuasive and should not be extended.

Finally, Defendants' actions here are not supported by *Knight*, which upheld a "restriction on participation" in certain bargaining activities that limited

participation to an exclusive representative. 465 U.S. at 273. There was no issue of compelled speech. *Id.* at 291 n.13 ("Of course, this case involves no claim that anyone is being compelled to support [union] activities."). Dr. Uradnik's claim is not that she or an organization with which she chooses to associate has a right to participate in a bargaining session, but that she cannot be compelled to associate with the Union through its advocacy as her representative or agent.

Conclusion

For these reasons, this Court should reverse the district court's decision on summary judgment and remand for further proceedings.

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Respectfully submitted,

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Certificate of Compliance

I hereby certify that the foregoing brief complies with the following requirements:

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Dated: February 18, 2020

/s/ Andrew M. Grossman
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I hereby certify that I electronically filed the foregoing Appellant's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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