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

BRIEF IN OPPOSITION OF RESPONDENT INTER FACULTY ORGANIZATION

SCOTT A. KRONLAND
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151
skronland@altber.com

BRENDAN D. CUMMINS
Counsel of Record
CUMMINS & CUMMINS, LLP
1245 International Centre
920 Second Avenue South
Minneapolis, MN 55402
(612) 465-0108
brendan@cummins-law.com

Counsel for Respondent Inter Faculty Organization

Mosaic - (301) 927-3800 - Cheverly, MD

QUESTION PRESENTED

Whether the State of Minnesota should be preliminarily enjoined from continuing to use the same democratic system of collective bargaining that it has used for more than 45 years to enable public employees to participate in setting their employment terms.

CORPORATE DISCLOSURE STATEMENT

Respondent Inter Faculty Organization is not a corporation. Respondent has no parent corporation, and no corporation or other entity owns any stock in respondent.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases (*continued*)

Statutes

Other Authorities

STATEMENT OF THE CASE

A. Background

1. *Minnesota's democratic system of public employee representation*

Minnesota adopted its Public Employment Labor Relations Act (PELRA) in 1971 to "promote orderly and constructive relationships between all public employers and their employees." Minn. Stat. §179A.01(a). The Legislature found that "granting public employees certain rights to organize and choose freely their representatives" would "best accomplish[]" the State's goals, including "minimizing … and providing for the[] resolution" of "disputes between the public employer and its employees." *Id.* §179A.01(c).

PELRA establishes an exclusive-representative system in which the public employer negotiates with a single representative democratically elected by the majority of the workers in each bargaining unit to fix unit-wide contract terms. *See id.* §§179A.06, subds. 2, 5, 179A.07, subd. 2. The Minnesota Legislature's choice to use this system reflects the essentially universal judgment by Congress and state legislatures about how best to structure collective bargaining systems.[1] The federal government, about 40 states, the District of Columbia, and Puerto Rico all authorize

---

[1] *See, e.g.,* House Rep. No. 1147 (1935), *reprinted in* 2 Leg. Hist. of the National Labor Relations Act 3070 (1935) ("There cannot be two or more basic agreements applicable to workers in a given unit; this is virtually conceded on all sides."); Sen. Report No. 573 (1935), *reprinted in* 2 Leg. Hist. of the NLRA 2313 (1935) ("[T]he making of agreements is impracticable in the absence of majority rule.").

collective bargaining for at least some public employees through an exclusive-representative system based on majority rule. *See* D.Ct. ECF No. 35 at 7. The National Labor Relations Act and Railway Labor Act also adopt exclusive-representative systems. *See* 29 U.S.C. §159; 45 U.S.C. §152, Fourth.

2. *The Inter Faculty Organization*

Faculty members at the seven Minnesota State university campuses have democratically elected an independent union, the Inter Faculty Organization ("IFO"), to serve as the PELRA representative of the nearly 4,000-member faculty bargaining unit. Pet. App. 4; D.Ct. ECF No. 33-1; ECF No. 29 at ¶8. The IFO represents the bargaining unit in negotiations with the Board of Trustees of the Minnesota State Colleges and Universities ("Board"), which administers the seven-university system. D.Ct. ECF No. 29 at ¶10.

3. *The robust rights of individual employees under PELRA*

Faculty members are not required to become members of the IFO. Minn. Stat. §179A.06, subd. 2. Rather, PELRA protects public employees' right not to join any union or to join or support other labor organizations. *Id.* Further, employees are entitled, regardless of union membership status, to the IFO's fair representation. *See Eisen v. State*, 352 N.W.2d 731, 735 (Minn. 1984). After this Court's decision in *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448 (2018), faculty who are not union members need not pay any money to the IFO.

PELRA also protects employees' right to "express or communicate a view, grievance, complaint, or opinion on any matter related to the conditions or

compensation of public employment," so long as the communication does not interfere with employees' performance of their duties or circumvent the PELRA rights of the exclusive representative. Minn. Stat. §179A.06, subds. 1, 2.

For professional employees, such as university faculty, PELRA also creates a process in which the employees' democratically elected representative and their employer "meet and confer" about "policies and other matters" outside the scope of collective bargaining negotiations. *Id.* §§179A.06, subd. 4, 179A.07, subd. 3. University faculty are also free to communicate individually with their employers about the same policies and matters covered in formal meet-and-confer sessions. *Id.* §179A.07, subd. 4.

4. *Petitioner's vigorous exercise of her individual rights under PELRA*

Petitioner Kathleen Uradnik, a tenured professor at St. Cloud State University, has been in the IFO-represented faculty bargaining unit for about 20 years. Pet. App. 3. Petitioner, who has never been an IFO member, has long been a vocal critic of the IFO and attempted to launch a rival organization. D.Ct. ECF No. 31 at ¶¶3, 11; ECF No. 32 at ¶19; ECF No. 29 at ¶44; ECF No. 29-2 at 39-40.

The University administration maintains an "open door" policy, allowing any faculty member to communicate with the administration on any matter. D.Ct. ECF No. 32 at ¶¶12-17; ECF No. 34 at ¶7; ECF No. 29 at ¶49. Petitioner regularly takes advantage of this policy, expressing her views to administrators about teaching loads, enrollment, recruitment, and many other issues. D.Ct. ECF No. 34 at ¶8; ECF No. 31 at ¶¶7-9, 12; ECF No. 32 at ¶18; ECF No. 30 at

¶¶3-7. Petitioner's disagreements with the IFO and its views are well known on campus. Faculty and administrators alike understand that, while the IFO serves as the unit's democratically elected PELRA representative, not all individual faculty members—particularly petitioner—necessarily agree with the IFO's positions. D.Ct. ECF No. 32 at ¶¶20-22; ECF No. 31 at ¶¶10-11; ECF No. 28 at ¶¶9-10.

Petitioner's outspoken criticism of the IFO has not affected her employment conditions. She received tenure and promotions on a typical schedule, chaired her department and served on several committees, directed the University's prelaw program, and regularly received professional development funds. D.Ct. ECF No. 31 at ¶¶4-6, 15; ECF No. 34 at ¶¶4, 6, 11.

B. Proceedings Below

1. *Petitioner's lawsuit and preliminary injunction motion*

Petitioner filed this lawsuit against Minnesota officials and the IFO in July 2018. Pet. App. 16-32. Her complaint alleges that, notwithstanding the absence of any membership or fee requirement, and notwithstanding petitioner's frequent and well-known criticism of the union, the State's recognition of the IFO as the democratically elected PELRA representative for her bargaining unit purportedly compels her to associate with the IFO and compels her to speak (by attributing the union's speech to her) in violation of the First Amendment. Pet. App. 28 (¶¶51-53). Her complaint further alleges that the IFO's role in the meet-and-confer process purportedly results in discrimination against petitioner in violation of the First Amendment. Pet. App. 29 (¶¶61-62).

Petitioner moved for a preliminary injunction based solely on her compelled-association and compelled-speech claims, seeking to enjoin the State from continuing to recognize the IFO "as her representative and allowing it to speak on her behalf." Pet. App. 3. The only evidence petitioner submitted to support her motion was her own short declaration and a copy of the collective bargaining agreement. In her declaration, petitioner listed various IFO positions with which she disagrees and asserted that the IFO's speech "is imputed to [her]" and that she is "restricted from speaking on [her] own behalf or petitioning the government on [her] own behalf by virtue of the Union's designation as [her] exclusive bargaining agent." Pet. App. 35-36 (¶¶10, 22).

In opposition to the preliminary injunction motion, respondents presented evidence that petitioner had never been restricted from speaking and, indeed, had been a vocal critic of the IFO for 20 years. *See supra* pp. 3-4. Respondents also presented evidence that the IFO, University administrators, and the rest of the campus understand that petitioner does not agree with the IFO. *See supra* p. 4. Finally, respondents presented evidence, including expert testimony, that the exclusive-representation model of collective bargaining is the only collective bargaining model that has proven to be successful in the United States and best fosters workplace democracy and harmonious labor relations. D.Ct. ECF No. 35 at ¶¶4-16; *see also* D.Ct. ECF No. 26 at 32-39.

Petitioner offered no evidence in rebuttal and conceded in her reply brief that she is not "restrained from speaking." D.Ct. ECF No. 36 at 7-8.

2. *The district court's denial of a preliminary injunction*

The district court (Hon. Paul A. Magnuson) denied petitioner's motion for a preliminary injunction. Pet. App. 3-13. The district court found that petitioner was "not required to pay fees, attend meetings, endorse the union, or take any other direct actions against her will." Pet. App. 8. The district court further found that petitioner's "lack of [IFO] membership has not harmed her career," and that she has "been able to speak to [University] administrators freely, without having to rely on the IFO to do so for her." Pet. App. 11-12.

The district court concluded that petitioner was not likely to succeed on the merits of her compelled-speech claim because, "[a]lthough the IFO is speaking on behalf of … faculty …. [t]he IFO speaks for the collective, and not for individual members; those individuals may speak their mind freely and speak to their public employer on their behalf." Pet. App. 8. The district court also reasoned that petitioner's argument that she was nonetheless being compelled to speak was inconsistent with the reasoning of *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), and *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018), *petition for cert. filed*, No. 18-766.

The district court further reasoned that *Janus* did not support petitioner's compelled-speech argument because *Janus* addressed only a requirement that nonmembers pay union fees. Pet. App. 7-8. The district court noted this Court's statement that it was "not disputed that the State may require that a union serve as exclusive bargaining agent for its employees" and that the Court "simply [drew] the line at allowing

the government to … require all employees to support the union ….” Pet. App. 7 (quoting *Janus*, 138 S.Ct. at 2478).

Likewise, the district court concluded that petitioner was not likely to succeed on her claim that she is being compelled to associate with the IFO because her “compelled-association argument is virtually identical to the arguments *Knight* and *Bierman* rejected.” Pet. App. 11.

The district court also concluded that, even if petitioner could show an infringement of her First Amendment rights, PELRA would satisfy “exacting scrutiny.” Pet. App. 8-9. The district court reasoned that PELRA serves “compelling state interest[s]” and that the exclusive-representative system “is likely the least restrictive means possible” for achieving those interests. Pet. App. 9-10.

Finally, the district court concluded that petitioner had not established the other necessary requirements for a preliminary injunction, *i.e.*, that she would suffer “irreparable harm” before a merits decision and that the “balance of equities and public interest” favored interim relief. Pet. App. 11-12.

3. *The Eighth Circuit’s summary affirmance*

Petitioner appealed the denial of her preliminary injunction motion to the Eighth Circuit. Prior to the submission of merits briefs, however, petitioner asked the court of appeals to summarily affirm the ruling below. Mot. for Summary Affirmance (Oct. 4, 2018). Although petitioner had argued to the district court that her compelled-speech claim was not controlled by *Bierman* because that case addressed only a compelled-association claim, she informed the court of

appeals that *Bierman* had "ruled definitively on the questions she raises." *Id.* at 1, 4 n.2. The Eighth Circuit issued a two-paragraph summary affirmance, "agree[ing] with the district court that [petitioner] cannot show a likelihood of success." Pet. App. 2.

REASONS FOR DENYING THE PETITION

The petition is not worthy of this Court's review. The lower courts are unanimous in rejecting petitioner's argument that exclusive-representative collective bargaining, by itself, compels expressive association or speech in violation of the First Amendment. Those rulings follow from this Court's decision in *Minnesota State Board v. Knight,* which concerned the same statute at issue here. The petition does not ask this Court to overrule *Knight* or contend that there is a special justification for abandoning *stare decisis*. In any event, there is certainly no good reason to grant review of the interlocutory decision below, which concerned only a preliminary injunction motion. The petition also should be denied because petitioner's legal challenge to the state statute is so narrow as to be essentially semantic and because petitioner's arguments find no support in this Court's precedents about compelled expressive association and compelled speech outside the collective bargaining context.

I. This Court and the Lower Courts Have All Rejected Petitioner's Argument

1. *This Court's decision in* Knight *forecloses petitioner's claims*

Petitioner claims that the IFO's status as exclusive representative for her bargaining unit "compels [her] to associate with" the IFO in violation of the First Amendment. Pet. App. 28 (¶¶51-52). But

PELRA does not require petitioner to do anything: she does not have to join or support the IFO or endorse its positions. She may freely express her own views, communicate directly with her employer about employment-related issues, and form or join any group she likes, as she has in fact done. *See supra* pp. 3-4. Petitioner also claims that the State "attributes the [IFO's] speech and petitioning" to her in violation of the First Amendment. Pet. App. 28 (¶¶51, 53). But neither her employer nor reasonable outsiders would believe that all bargaining-unit workers, particularly nonmembers, necessarily agree with a union representative's positions. *See supra* p. 4.

This Court already recognized in *Minnesota State Board v. Knight*, 465 U.S. at 288-90, that PELRA does not infringe the First Amendment rights of individuals in a faculty bargaining unit. In the *Knight* litigation, community college instructors who had opted not to join the faculty union challenged the same provisions of PELRA that petitioner challenges now. A three-judge district court rejected a First Amendment challenge to the use of exclusive representation for the "meet-and-negotiate" process, and this Court summarily affirmed that decision. *Knight v. Minn. Cmty. Coll. Faculty Ass'n*, 571 F. Supp. 1, 5-7 (D. Minn. 1982), *aff'd mem.*, 460 U.S. 1048 (1983). The district court invalidated the use of exclusive representation for the "meet-and-confer" process, and this Court reversed that ruling after plenary review. *Minn. State Bd. v. Knight*, 465 U.S. at 292.

The *Knight* Court began its analysis by recognizing that the meet-and-confer process, like the meet-and-negotiate process, is not a "forum" to which there is any First Amendment right of access, and that the dissenting instructors had no constitutional right "to

force the government to listen to their views." 465 U.S. at 280-83. The government, therefore, was "free to consult or not to consult whomever it pleases." *Id.* at 285; *see also Smith v. Arkansas State Highway Emps.*, 441 U.S. 463, 464-66 (1979) (government did not violate speech or associational rights of union supporters by accepting grievances filed by individual employees while refusing to recognize union's grievances).

The *Knight* Court went on to consider whether PELRA violated those First Amendment rights that the instructors *could* properly assert—namely, the right to speak and the right to "associate or not to associate." 465 U.S. at 288. The Court concluded that PELRA's use of exclusive representation for the meet-and-confer process did not infringe on the dissenting instructors' speech rights because, while the exclusive representative's status "amplifie[d] its voice in the policymaking process," that amplification was "inherent in government's freedom to choose its advisers" and did not "impair[] individual instructors' constitutional freedom to speak." *Id.*[2]

Contrary to petitioner's assertion that *Knight* gave "zero consideration" to compelled association, Pet. 10-13, this Court did consider that issue. The district court had ruled that restricting participation in meet-

---

[2] Justice Stevens' dissent in *Knight* expressed concern with a PELRA provision that appeared to allow instructors to communicate individually with their employers only if the communication was "part of the employee's work assignment." 465 U.S. at 302 (Stevens, J., dissenting). After *Knight*, PELRA was amended to provide that it does not restrict postsecondary employees and employers from communicating about "policies and matters" that are subject to the meet-and-confer process. Minn. Stat. §179A.07, subd. 4.

and-confer sessions to the exclusive representative "inherently creates a chilling effect on the associational … interests of faculty members" by pressuring them to join and thereby associate with the union. 571 F. Supp. at 10. The dissenting instructors quoted that compelled-association holding twice in their principal brief to this Court, and they also responded at length to an amicus brief that dealt exclusively with that holding. Brief for Appellees, *Minn. State Bd. v. Knight*, No. 82-898 (filed Aug. 16, 1983), at 12-13, 23-24, 34-39; Brief for the AFL-CIO as Amicus Curiae in Support of Appellants, *Minn. State Bd. v. Knight*, Nos. 82-898, 82-977 (filed June 22, 1983), at 2-4. This Court expressly considered the dissenting instructors' First Amendment rights "both to speak and to associate" and, after addressing the right to speak, separately held that "appellees' associational freedom has not been impaired." 465 U.S. at 288-89.

This Court reasoned that the government's decision to consult with an exclusive representative "in no way restrained [the instructors'] freedom … to associate or *not to associate* with whom they please, including the exclusive representative," because instructors were "free to form whatever advocacy groups they like" and were "not required to become members" of the organization acting as the exclusive representative. 465 U.S. at 288-89 (emphasis supplied). This Court rejected the district court's compelled-association theory based on an analogy to our democratic system of government, reasoning that even if dissenting instructors felt some "pressure to join the exclusive representative," that pressure "is no different from the pressure to join a majority party that persons in the minority always feel. Such pressure is inherent in our system of government; it does

not create an unconstitutional inhibition on associational freedom." 465 U.S. at 289-90.

Knight thus rejects petitioner's theory here—that the mere existence of a democratically elected exclusive representative compels nonmembers to enter into an expressive association with the representative. This Court squarely held that the instructors had the "freedom … *not* to associate with … the exclusive representative" and that the instructors were "[u]nable to demonstrate an infringement of any First Amendment right." 465 U.S. at 288, 291 (emphasis supplied).

2. *The lower courts have unanimously held that* Knight *precludes petitioner's claims*

Not surprisingly, every court to consider the issue has concluded that *Knight* forecloses petitioner's claim here that democratic systems of exclusive-representative collective bargaining violate the First Amendment.

The First, Second, Seventh, Eighth, and Ninth Circuits have all rejected petitioner's argument. *Mentele v. Inslee*, 916 F.3d 783 (9th Cir. 2019); *Bierman*, 900 F.3d 570; *Hill v. Service Emps. Int'l Union*, 850 F.3d 861 (7th Cir. 2017), *cert. denied*, 138 S.Ct. 446 (2017); *Jarvis v. Cuomo*, 660 F. App'x 72 (2d Cir. 2016), *cert. denied*, 137 S.Ct. 1204 (2017); *D'Agostino v. Baker*, 812 F.3d 240 (1st Cir. 2016), *cert. denied*, 136 S.Ct. 2473 (2016).

As Justice Souter, sitting by designation for the First Circuit, explained: *Knight* held that "non-union professionals … could claim no violation of associational rights by an exclusive bargaining agent

speaking for their entire bargaining unit when dealing with the state." *D'Agostino*, 812 F.3d at 243. In doing so, *Knight* applied and extended the premise that "exclusive bargaining representation by a democratically selected union does not, without more, violate the right of free association on the part of dissenting non-union members of the bargaining unit." *Id.* at 244.

Justice Souter also pointed out that challenges to exclusive-representative bargaining find no support in other precedents about compelled expressive association and speech because bargaining-unit workers "are not compelled to act as public bearers of an ideological message they disagree with," nor "are they under any compulsion … to modify the expressive message of any public conduct they may choose to engage in." *Id.* at 244. Moreover, the union's message would not be attributed in the public eye to individual employees because "it is readily understood that employees in the minority, union or not, will probably disagree with some positions taken by the agent answerable to the majority." *Id.*

3. Janus *did not overrule* Knight

Petitioner relies on *Janus*, but *Janus* held only that public employees who are not union members cannot be required to pay "fair-share" or "agency" fees to an exclusive representative for collective bargaining representation. 138 S.Ct. at 2460. The Court stated that it was "not disputed that the State may require that a union serve as exclusive bargaining agent for its employees," and the Court recognized that "designation of a union as the exclusive representative of all the employees in a unit and the exaction of agency fees" are not "inextricably linked."

Id. at 2465, 2478. Additionally, the Court explained that while the States may no longer require public employees to pay agency fees, "we are not in any way questioning the foundations of modern labor law," and the States can otherwise "keep their labor-relations systems exactly as they are." *Id.* at 2471 n.7, 2485 n.27; *see also id.* at 2466, 2485 n.27 (States may "follow the model of the federal government," in which "a union chosen by majority vote is designated as the exclusive representative of all the employees").

The Eighth Circuit was the first court of appeals to consider a challenge to exclusive representation after *Janus*, and the court unanimously rejected the arguments made here. In *Bierman*, the Eighth Circuit held that the plaintiffs' compelled-association argument was foreclosed by *Knight* because plaintiffs were allowed to form their own advocacy groups and were not required to join the union. 900 F.3d at 574. The Eighth Circuit concluded that *Janus* did not overrule *Knight* because *Janus* never mentioned *Knight* and, in *Janus*, the "constitutionality of exclusive representation standing alone was not at issue." *Id.*

In this case, petitioner asked the Eighth Circuit to summarily affirm the district court's ruling on her compelled-speech and compelled-association claims because *Bierman* had "ruled definitively on the questions she raises." Mot. for Summary Affirmance (Oct. 4, 2018), at 1, 4 n.2. The Eighth Circuit obliged. Pet. App. 2.

The Ninth Circuit also unanimously held that *Knight* is the controlling precedent regarding exclusive representation and has not been overruled by *Janus*. *Mentele*, 916 F.3d at 788-89.

Several district courts have also rejected the argument that *Janus* overruled *Knight*. *See Thompson v. Marietta Educ. Ass'n*, No. 2:18-cv-00628-MHW-CMV, ECF No. 52 (S.D. Ohio Jan. 14, 2019); *Reisman v. Associated Faculties*, 356 F. Supp. 3d 173 (D. Me. 2018), *appeal pending*, No. 18-2201 (1st Cir.).

4. *There is no conflict in the case law, and the question presented is still percolating in multiple jurisdictions*

Petitioner does not ask this Court to overrule *Knight*, nor does she offer any "special justification" for overruling settled precedent and invalidating the collective bargaining systems that have been used for many decades by the federal government and about 40 states. *Cf. Janus*, 138 S.Ct. at 2486. Instead, she disagrees with how the lower courts have interpreted this Court's precedents. Pet. 12-13. Absent any conflict in the lower courts, however, that provides no reason for this Court to grant review.

Moreover, the question petitioner seeks to present has not finished percolating through the lower courts. After *Janus*, the same advocacy group that filed this case also filed two similar cases in district courts within the First and Sixth Circuits. In *Reisman v. Associated Faculties*, No. 18-2201 (1st Cir.), the court of appeals entered an order on February 6, 2019, that denied the appellant's motion for summary affirmance and stated that the court would consider her claims in light of *Janus*. In the other case, *Thompson v. Marietta Education Assn.*, No. 18-628 (S.D. Ohio), cross-motions for summary judgment will be presented to the district court. Another advocacy group filed similar post-*Janus* challenges to exclusive representation in district courts within the Third and

Tenth Circuits. *Oliver v. Serv. Emps. Int'l Union Local 668*, No. 2:19-cv-00891-GAM (E.D. Pa.); *Hendrickson v. AFSCME Council 18*, No. 1:18-cv-01119-JHR-LF (D. New Mexico). Given that the lower court decisions thus far are unanimous and only two courts of appeals have ruled on petitioner's argument after *Janus*, there is no good reason to preempt further percolation of this issue.

II. The Decision Below Is Just an Interlocutory Ruling

The petition should also be denied because it does not, as petitioner claims, "present[] an ideal vehicle." Pet. at 20. Rather, the decision below involved the denial of a preliminary injunction motion. There are many reasons why that interlocutory ruling is not worthy of this Court's review.

1. *The decision was not on the merits and, in any event, the interim relief requested by petitioner makes no practical sense*

A preliminary injunction is an "extraordinary remedy," *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008), and "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held," not to adjudicate the merits, *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). If the Court granted review, the question before the Court would be whether the district court should have entered a preliminary injunction. Petitioner had been in the faculty bargaining unit for 19 years before she moved for a preliminary injunction, which by itself provides a sufficient basis for denying interim relief. *Cf. Benisek v. Lamone*, 138 S.Ct. 1942, 1944 (2018).

The interim relief petitioner sought also made no practical sense. Petitioner did not "seek to compel the Board to listen to her views." D. Ct. ECF No. 36, at 3. Nor did she seek to prevent the Board from "continu[ing] to negotiate with the Union the terms and conditions of employment that it offers to its employees and continu[ing] to apply the terms of its collective-bargaining agreement to *all* bargaining-unit members." *Id.* at 2-3 (emphasis supplied). Instead, she asked the district court "to enjoin the Union from *holding itself out* as [her] representative and speaking for her, and the Board … from *regarding* its speech as hers." *Id.* at 3 (emphasis supplied). Petitioner did not need that interim relief under the undisputed evidence in the record.

Respondents presented evidence that the IFO does *not* "hold[] itself out as" her representative, but as the representative of the unit as a whole, and that the Board does *not* "regard[]" the IFO's speech as "hers," but fully understands that petitioner is not an IFO member and that petitioner does not agree with the IFO's speech. *See, e.g.*, D.Ct. ECF No. 28 at ¶¶9-10; ECF No. 31 at ¶¶10-11; ECF No. 32 at ¶¶20-22. Petitioner did not present any evidence to the contrary. Nor did she explain what—as a concrete and practical matter—she wanted the district court to preliminarily enjoin respondents from doing. The interlocutory decision below can be affirmed on that basis as well.

2. *Petitioner waived her compelled-speech claim for purposes of her preliminary injunction motion*

Petitioner also abandoned her compelled-speech claim, at least for purposes of the preliminary injunction motion, by failing to present that as a separate

claim to the Eighth Circuit. Petitioner included both compelled-association and compelled-speech claims in her complaint. Pet. App. 28 (¶¶52-53). Petitioner moved for a preliminary injunction based on both her compelled-association and compelled-speech claims, and she briefed both claims in support of her motion. D.Ct. ECF No. 18; D.Ct. ECF No. 19 at 6-11.

The Eighth Circuit decided *Bierman* before petitioner filed her reply brief in support of her preliminary injunction motion. *Bierman* rejected a claim by state-compensated homecare providers that PELRA compelled them to associate with the democratically elected exclusive representative for their bargaining unit in violation of their First Amendment rights. 900 F.3d at 574. The *Bierman* plaintiffs did not allege a compelled-speech claim, and the Eighth Circuit did not mention the words "speech" or "speak" in its opinion. *See generally id.* at 570-74. In her reply brief in support of her motion for a preliminary injunction, petitioner argued to the district court that "*Bierman* … did not address a compelled-speech claim and therefore is not controlling on that question." D.Ct. ECF No. 36 at 4.

After the district court denied petitioner's preliminary injunction motion, however, petitioner asked the Eighth Circuit to summarily affirm the district court's ruling without any briefing because *Bierman* had "ruled definitively on the questions she raises." Mot. for Summary Affirmance (Oct. 4, 2018), at 1. As a result, petitioner waived her previous argument that her compelled-speech claim differs from the compelled-association claim rejected in *Bierman*. That waiver makes this petition the wrong vehicle for addressing the compelled-speech part of the question petitioner seeks to present.

3. *Petitioner has not yet presented arguments to the district court that may be relevant to her First Amendment claims*

Petitioner alleged that the democratic system of workplace representation purportedly results in discrimination against her and other nonmembers of the IFO in violation of the First Amendment. Pet. App. 27-30. But petitioner did not raise this claim in her preliminary injunction motion. Likewise, petitioner's complaint contains many allegations that are specific to the PELRA meet-and-confer process for professional employees. *E.g.*, Pet. App. 21 (¶17), 22-26 (¶¶26-38), 27 (¶48). But petitioner did not develop an argument specific to the meet-and-confer process in her preliminary injunction motion. She also informed the Eighth Circuit that her preliminary injunction motion was controlled by *Bierman*, which involved only the meet-and-negotiate process. *See supra* pp. 14, 18. This Court should not devote its limited resources to reviewing an interlocutory ruling in a case in which the evidence and arguments have not yet been fully developed below.

4. *The decision denying the preliminary injunction motion was well supported by the evidence in the record*

Based on a careful review of record evidence, the district court concluded that PELRA would survive exacting scrutiny even if, as petitioner claimed, PELRA infringed on her First Amendment rights. Pet. App. 8-11. The conclusion was supported by the evidence respondents submitted in opposition to the preliminary injunction motion that the exclusive-representation model of collective bargaining is the only

collective bargaining model that has proven to be successful in the United States and that it serves compelling interests. *See supra* p. 5. Respondents demonstrated, among other things, that PELRA benefits the university system by creating an efficient and effective process for the faculty to participate in university governance through a democratically elected representative, without diminishing the ability of individual faculty members to express their own views to the campus administration. *E.g.*, D.Ct. ECF No. 28 at ¶¶4-5; ECF No. 33 at ¶¶10, 15-17; ECF No. 29 at ¶35; ECF No. 32 at ¶¶2, 12-17.

Petitioner's only evidence in support of a preliminary injunction was her own declaration, which did not address these issues. As a result, there would be no basis for concluding that the district court abused its discretion in denying the preliminary injunction motion, regardless of how the Court might resolve the other legal issues petitioner raises. That also makes this case a poor vehicle for considering the question presented.

III. Petitioner's Challenge to Exclusive Representation Is Essentially Semantic

The petition should also be denied because petitioner's narrow challenge to exclusive-representative bargaining by a democratically elected representative is ultimately about semantics and, therefore, not worthy of this Court's consideration.

Petitioner argues that she is compelled to associate with the IFO and speak the IFO's message in violation of her First Amendment rights because PELRA provides that the IFO is "certified … to meet and negotiate with the public employer *on behalf of* all employees in the [bargaining] unit." Minn. Stat.

§179A.03, subd. 8 (emphasis supplied); *see* Pet. 1, 4-7, 14-15. But petitioner does "not challenge the State's policy of negotiating terms of employment and other matters with an organization that has won the majority support of employees," nor does she object to the State's "applying a single set of terms to all its employees." D.Ct. ECF No. 36 at 14, 16. She herself "does not seek an audience with the government, the same opportunity as the [IFO] to influence policy, or recognition of a right to be heard." 8th Cir. Mot. for Summary Affirmance (Oct. 4, 2018), at 5. Thus, it would be fine with petitioner if the State continued to negotiate only with the IFO, "declin[ed] to bargain with rival unions," and continued to apply the terms of its agreements with the IFO to petitioner. Pet. 18; D.Ct. ECF No. 36 at 2-3.

All petitioner seems to want is for the State and the IFO to recognize that when the IFO speaks, it is not expressing petitioner's views. D.Ct. ECF No. 36 at 15-17. Respondents have already recognized this. *See supra* p. 17. Petitioner's inability to identify any concrete harm to support a preliminary injunction—instead relying solely on the argument that she was harmed as a "matter of law," D.Ct. ECF No. 19 at 12; ECF No. 36 at 19-20—makes clear that her case is merely about labels.

Not only is an argument that reduces to semantics unworthy of this Court's review, but this Court already recognized in *Knight* that what PELRA means by the phrasing that the exclusive representative negotiates "on behalf of all employees in the [bargaining] unit," Minn. Stat. §179A.03, subd. 8, is that the chosen union represents the unit as a whole in presenting "an official collective faculty position," not that the State believes that "every instructor

agrees with the official faculty view." *Knight*, 465 U.S. at 276 & n.3. And this Court already held that, under the same PELRA statute, faculty bargaining-unit members have the "freedom … not to associate with … the exclusive representative," *id.* at 288, which forecloses petitioner's theory of inherent expressive association based on the bare language of the statute.

Equally to the point, petitioner apparently seeks a collective bargaining system in which the majority-chosen union continues to negotiate a unit-wide contract but no longer represents nonmembers—necessarily meaning that the union also would owe no duty of fair representation to nonmembers. This Court recognized in *Janus* that "serious 'constitutional questions [would] arise'" if the union negotiating a unit-wide contract "were not subject to the duty to represent all employees fairly." *Janus*, 138 S.Ct. at 2469 (quoting *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 198 (1944)) (emphasis omitted).

IV. Petitioner's Arguments Run Counter to this Court's Precedents About Compelled Association and Compelled Speech

Finally, the petition should be denied because, contrary to petitioner's contention, her arguments find no support in this Court's precedents about compelled expressive association and compelled speech outside the collective bargaining context.

1. *Petitioner's relationship with the IFO is not an expressive association*

Petitioner contends that she necessarily is forced into an expressive association with the IFO by virtue of the IFO's representation of the bargaining unit to which she belongs. Pet. 4, 15. She wrongly assumes

that any "association" between two people or groups rises to the level of an expressive association warranting First Amendment protection. The case she relies upon, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), held only that an organization that engaged in expressive activity could not be required to accept an unwanted member when doing so would force the organization to send a message it did not want to send. *Id.* at 659. This case is nothing like *Dale* because petitioner is not required to become an IFO member or to include the IFO as a member of groups she may form or join.

Rather, as in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47 (2006), the "association" here is much more limited. In that case, law schools were required to "'associate' with military recruiters in the sense that they interact with them," but there was no compelled *expressive* association because the recruiters came onto campus for a "limited purpose," and "not to become members of the school's expressive association." *Id.* at 69.

Petitioner's relationship to the IFO is similarly limited because: (1) petitioner does not have to join the IFO or pay any money to it; (2) the IFO negotiates with the Board a contract that applies unit-wide, not simply to petitioner; and (3) the IFO has a duty to represent *all* unit employees' interests fairly in negotiating that contract. Petitioner herself does not have to do anything. Petitioner does not object to the contract terms negotiated by the IFO being applied to her. D.Ct. ECF No. 36 at 2-3, 14, 16. She apparently does not object to what she terms the IFO's "duty of fairness to all employees," Pet. 16, and it would be odd if she did, since she indicates that she is content to be subject to the collective bargaining agreement.

As stated above, petitioner's only objection seems to be to the phrase "on behalf of" in the statute providing that the elected representative "meet[s] and negotiate[s] with the public employer *on behalf of* all employees in the [bargaining] unit." Minn. Stat. §179A.03, subd. 8 (emphasis supplied). *See supra* pp. 17, 20-21. In other words, she objects not to the practical ramifications of the IFO's role, but to a phrase that signifies democratic representation of the bargaining unit in negotiations. Pet. 4-7, 15. Democratic representation of the employees in a bargaining unit under PELRA in no way compels dissenting employees to associate with the majority representative for expressive purposes. Instead, dissenters such as petitioner can and do exercise their rights under PELRA to speak out against the position of the democratically elected representative when they see fit. *See supra* pp. 2-4.

The phrase "on behalf of" cannot produce a compelled expressive association unless it somehow creates the public *perception* of an expressive association. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 460 (2008) (Roberts, C.J., concurring) ("Voter perceptions matter, and if voters do not actually believe the parties and the candidates are tied together, it is hard to see how the parties' associational rights are adversely implicated."). Here, petitioner's employer does not believe that the IFO acts or speaks "on behalf of" individual unit employees in the sense that individual unit employees necessarily agree with the IFO's positions; rather, petitioner is known on campus for her *disagreements* with the IFO. *See supra* pp. 3-4. Nor would reasonable outsiders believe that every bargaining

unit employee necessarily agrees with the IFO's positions. *Cf. Board of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990) (even high school students understand that school does not endorse speech of school-recognized student groups). As a result, there is no compelled expressive association between petitioner and the IFO.

2. *Petitioner has no compelled-speech claim*

Petitioner forfeited any argument that her compelled-speech claim is distinct from her compelled-association claim. *See supra* pp. 17-18. In any event, petitioner's entire argument about compelled speech is that "when the [IFO] speaks, it is speaking for the Petitioner, putting words in her mouth." Pet. 14. But petitioner is not literally being required to speak any words, as in the case she relies upon, *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), which held that the state cannot require schoolchildren to recite the Pledge of Allegiance. Nor is petitioner forced to host or accommodate the IFO's message. *Cf. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 566 (1995) (State cannot require parade to include group whose message parade organizer does not want to send).

Instead, petitioner's claim is that she is metaphorically required to speak the words spoken by the IFO because they would purportedly be attributed to her. This Court has rejected that type of compelled-speech claim where, as here, reasonable outsiders would not believe that the complainant personally agrees with the message. *See FAIR*, 547 U.S. at 65 ("Nothing about recruiting suggests that law schools agree with

any speech by recruiters ….”); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (rejecting shopping center owner’s claim that law requiring him to allow expressive activity on his property compelled his speech because “[t]he views expressed by members of the public in passing out pamphlets … will not likely be identified with those of the owner”).

Faculty and administrators understand that, while the IFO serves as the unit’s democratically elected PELRA representative, not all individual faculty members—particularly petitioner—agree with the IFO’s positions. *See supra* p. 4. This is true of all democratic systems in which a representative chosen by the majority speaks for a group—whether the representative is a congresswoman speaking for her constituents or a parent-teacher association speaking for parents. *See, e.g.*, *Lathrop v. Donohue*, 367 U.S. 820, 859 (1961) (Harlan, J., concurring) (“[E]veryone understands or should understand that the views expressed are those of the State Bar as an entity separate and distinct from each individual.” (internal quotation marks omitted)). Because the IFO’s speech cannot reasonably be attributed to petitioner in any sense that matters for First Amendment purposes, her compelled-speech claim lacks merit.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

SCOTT A. KRONLAND
ALTSHULER BERZON LLP
177 Post Street
Suite 300
San Francisco, CA 94108
(415) 421-7151
skronland@altber.com

BRENDAN D. CUMMINS
CUMMINS & CUMMINS, LLP
Counsel of Record
1245 International Centre
920 Second Avenue South
Minneapolis, MN 55402
(612) 465-0108
brendan@cummins-law.com

Counsel for Respondent
Inter Faculty Organization

March 27, 2019