No. 20-1621

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SUSAN BENNETT, Plaintiff-Appellant, v. AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, AFL-CIO; AFSCME LOCAL 672; BOARD OF EDUCATION OF MOLINE-COAL VALLEY SCHOOL DISTRICT NO. 40; ATTORNEY GENERAL KWAME RAOUL, in his official capacity; and ANDREA R. WAINTROOB, chair, JUDY BIGGERT, GILBERT O'BRIEN JR., LYNNE SERED, and LARA SHAYNE, members, of the Illinois Educational Labor Relations Board, in their official capacities, Defendants-Appellees.	)	Appeal from the United States District Court for the Central District of Illinois No. 4:19-cv-04087-SLD-JEH The Honorable SARA DARROW, Judge Presiding.

BRIEF OF STATE DEFENDANTS-APPELLEES

KWAME RAOUL
Attorney General
State of Illinois

JANE ELINOR NOTZ
Solicitor General

100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3312

Attorneys for State Defendants-Appellees

FRANK H. BIESZCZAT
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2234
fbieszczat@atg.state.il.us

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JURISDICTIONAL STATEMENT

The jurisdictional statement of Plaintiff-Appellant Susan Bennett is not complete and correct. State Defendants-Appellees Illinois Attorney General Kwame Raoul; Andrea R. Waintroob, chair of the Illinois Educational Labor Relations Board ("Board"); and Board members Judy Biggert, Gilbert O'Brien Jr., Lynne Sered, and Lara Shayne (together, "state defendants") provide this statement as required by 7th Cir. R. 28(b).[1]

Bennett filed a two-count complaint in district court under 42 U.S.C. § 1983 and 28 U.S.C. § 2201(a) against American Federation of State, County, and Municipal Employees ("AFSCME") Council 31, and AFSCME Local 672 (together, "union defendants"); the Board of Education of Moline-Coal Valley School District No. 40 ("District"); and state defendants. Doc. 1.[2] In count one, Bennett alleged that union defendants and the District violated the First and Fourteenth Amendments to the United States Constitution by collecting union dues without her affirmative consent. *Id.* at 7-9. In count two, Bennett alleged that portions of the Illinois Educational Labor Relations Act ("Act"), 115 ILCS 5/1 *et seq.*, violate the First Amendment. *Id.* at 9-10. Bennett sought declaratory and injunctive relief against all defendants, as well as monetary relief from union defendants. *Id.* at 10-12.

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[1] This court should remove Andrea R. Waintroob and Judy Biggert as defendants because they are no longer members of the Board. *See* Fed. R. App. P. 43(c)(2).

[2] The district court's docket is cited as "Doc. __ at __," this court's docket is cited as "7th Cir. Doc. __ at __," Bennett's opening brief is cited as "AT Br. __," and the appendix to the opening brief is cited as "A__."

The District later filed a cross-claim against union defendants under Fed. R. Civ. P. 13(g), alleging that union defendants had a duty under the parties' collective bargaining agreement to indemnify it as to damages and litigation costs if Bennett prevailed on her claim against the District. Doc. 17 at 29-30. The district court had subject matter jurisdiction over Bennett's action under 28 U.S.C. § 1331 because it raised a federal question and had supplemental jurisdiction over the District's state-law cross-claim under 28 U.S.C. § 1367.

State defendants moved to dismiss count two under Fed. R. Civ. P. 12(b)(6). Doc. 14. The other parties filed cross-motions for summary judgment under Fed. R. Civ. P. 56 as to both claims. Doc. 27 (Bennett); Doc. 30 (union defendants); Doc. 32 (District). On March 31, 2020, the district court granted state defendants' motion to dismiss, as well as the other defendants' summary judgment motions, while denying Bennett's motion for summary judgment. Doc. 42 (A1-15). The court stated that the action was dismissed with prejudice, *id.* at 15 (A15), thereby disposing of all claims against all parties, and, on April 2, 2020, a separate judgment order was entered on the district court docket pursuant to Fed. R. Civ. P. 58, Doc. 43 (A16).

On April 14, 2020, Bennett filed a notice of appeal. Doc. 44. On April 28, 2020, the District filed a timely motion to alter or amend the judgment under Fed. R. Civ. P. 59(e), asking the district court to reopen the case to reconsider its cross-claim or, alternatively, to clarify the reasons for dismissing its cross-claim and whether the dismissal was without prejudice, so the District could refile in the appropriate forum. Doc. 49; *see* Fed. R. Civ. P. 59(e) ("motion to alter or amend a judgment must be filed

no later than 28 days after the entry of the judgment"). On May 29, 2020, this court suspended briefing in this appeal pending further court order. 7th Cir. Doc. 14. On September 16, 2020, the district court entered an order stating that it was declining to exercise supplemental jurisdiction over the District's cross-claim, clarifying that it was dismissing the cross-claim without prejudice, and otherwise denying the motion. Doc. 53. On September 21, 2020, this court ordered that briefing would resume. 7th Cir. Doc. 32. On September 23, 2020, an amended judgment order was entered on the district court docket pursuant to Fed. R. Civ. P. 58, stating that Bennett's action was dismissed and the District's cross-claim was dismissed without prejudice. Doc 54.

Bennett's notice of appeal, filed on April 14, 2020, was timely under Fed. R. App. P. 4(a)(4)(B)(i). Although the district court dismissed the District's cross-claim without prejudice, *see* Doc. 54, and such a dismissal generally does not qualify as an appealable judgment, *see Larkin v. Galloway*, 266 F.3d 718, 721 (7th Cir. 2001), a dismissal for lack of jurisdiction, as occurred here, is final even though it is without prejudice, *see Bovee v. Broom*, 732 F.3d 743, 743-44 (7th Cir. 2013). The notice of appeal was timely under 28 U.S.C. § 2107(a) and Fed. R. App. P. 4(a)(4)(B)(i) because it was filed after the district court entered the April 2 judgment, but before the court disposed of the District's subsequent Rule 59(e) motion, and thus became effective on the date the court disposed of that motion. This court has jurisdiction over Bennett's appeal from a final judgment under 28 U.S.C. § 1291.

ISSUE PRESENTED FOR REVIEW

Whether the Act's system of exclusive representation is constitutional under the Supreme Court's decision in *Minnesota Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), and this court's decision in *Hill v. Service Employees International Union*, 850 F.3d 861 (7th Cir. 2017), both of which held that exclusive representation does not violate the First Amendment.

STATEMENT OF THE CASE

Statutory Background

The Act regulates labor relations between public-sector educational employers and employees in Illinois through a comprehensive system of exclusive representation involving the selection of employee representatives, negotiation of employment conditions, and resolution of disputes pursuant to a collective bargaining agreement. 115 ILCS 5/1. Under the Act, a majority of employees in a bargaining unit may select a labor organization to serve as the unit's exclusive representative. 115 ILCS 5/8. The exclusive representative and the employer share a duty to bargain in good faith over wages, hours, and other terms and conditions of employment and to execute a written contract incorporating the agreement they reach. 115 ILCS 5/10(a).

Prior to June 2018, the exclusive representative could require employees in the bargaining unit who had not joined the union to pay a "fair-share fee" for services rendered. 115 ILCS 5/11. The Supreme Court, however, ended that practice when it decided *Janus v. American Federation of State, County & Municipal Employees*, 138 S. Ct. 2448 (2018), holding that such an arrangement violates the First Amendment and overruling *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

Procedural Background

Bennett is a District employee whose bargaining unit is represented by AFSCME Local 672, an affiliate of AFSCME Council 31. Doc. 1 at 3, 7. She joined the union in 2009 and most recently signed a membership and dues authorization card in August 2017. Doc. 26 at 3-4. In November 2018, after *Janus* was decided, Bennett sent a letter to AFSCME's national office stating that she wanted to resign

her union membership and asking the union to stop collecting dues. Doc. 1-3. She also sent a letter to the District's chief financial officer stating that she was revoking her prior authorization to deduct union dues. Doc. 1-4. AFSCME and the District responded that, pursuant to the authorization card Bennett signed in 2017, her next opportunity to revoke that authorization was during a two-week window from July 17 to August 11, 2019. Docs. 1-5, 1-6. Bennett later revoked her authorization during that window, and the District immediately stopped collecting union dues. Doc. 26 at 8-9.

Meanwhile, on April 26, 2019, Bennett filed a two-count complaint under 42 U.S.C. § 1983 and 28 U.S.C. § 2201(a) in the district court, alleging that all of the defendants violated her rights under the First and Fourteenth Amendments. Doc. 1. In count one, Bennett alleged that union defendants and the District collected union dues without her affirmative consent. *Id.* at 7-9. She asserted that the dues authorizations she had signed, which pre-dated *Janus*, did not reflect valid consent because they were the product of an unconstitutional choice between paying full union dues or a fair-share fee. *Id.* at 8-9. Bennett requested declarations that the dues deductions were unconstitutional, as well as injunctions allowing her to immediately resign her union membership and barring future deductions. *Id.* at 10-11. In addition, Bennett sought damages from union defendants equal to the dues she had paid, both before and after *Janus* was decided. *Id.* at 12.

In count two, Bennett alleged that the Act violates her freedom of association by permitting the union to speak on her behalf as an exclusive representative. *Id.* at

9-10. Specifically, Bennett asserted that the Act compelled her to associate with the union through its representation. *Id.* at 10. Bennett sought a declaration that the Act was unconstitutional and injunctions barring its enforcement. *Id.* at 11-12.

State defendants moved to dismiss count two, arguing that public-sector exclusive representation was constitutional under controlling precedent. Doc. 15. In particular, the Supreme Court upheld the constitutionality of a system of exclusive representation in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), concluding that the government has the discretion to choose the persons and entities that it will consult when making employment decisions. Doc. 15 at 4-5. Then, in *Hill v. Service Employees International Union*, 850 F.3d 861 (7th Cir. 2017), this court, applying *Knight*, rejected a First Amendment challenge by home healthcare and childcare providers, who are partial public employees under *Harris v. Quinn*, 573 U.S. 616 (2014), holding that exclusive representation does not create a mandatory association between the union and dissenting bargaining unit members. Doc. 15 at 5-6. State defendants argued that *Janus* did not undermine either *Knight* or *Hill*, noting that multiple courts had reached the same conclusion before and after *Janus* was decided. *Id.* at 6-7.

Bennett moved for summary judgment, arguing that the Act violates the First Amendment because it authorizes the exclusive representative to speak on behalf of all employees in the bargaining unit, thereby forcing those employees who did not join the union into a compelled association with that organization. Doc. 28 at 7-8. She concluded that exclusive representation was subject to heightened scrutiny and

that it could not satisfy that standard because it did not serve a compelling interest. *Id.* at 8-9. Bennett also argued that she did not affirmatively consent to paying union dues when she signed the authorization cards because she was never given the option to pay nothing to the union. *Id.* at 3-6.

Union defendants and the District filed cross-motions for summary judgment. *See* Docs. 30-33. Union defendants argued that Bennett's constitutional challenge to exclusive representation was foreclosed by *Knight* and *Hill*, pointing out that neither decision was overruled by *Janus*, which instead confirmed that States could keep their labor relations systems exactly as they were except for fair-share fees. Doc. 31 at 21-25. They also argued that exclusive representation would survive heightened scrutiny, if it were appropriate, because that system serves the State's compelling interest in promoting labor peace. *Id.* at 25-26. Union defendants contended that they were entitled to summary judgment on count one because Bennett voluntarily authorized the dues deductions, they were not acting under color of state law when they enforced her membership agreement, and the claims for prospective relief were moot. *Id.* at 10-21. The District adopted union defendants' arguments, while adding that Bennett's alleged injury was not caused by its customs or policies, it was entitled to qualified immunity, and *Janus* should not be given retroactive effect. Doc. 33.

Bennett responded to defendants' motions to dismiss and for summary judgment by arguing that *Knight* was not controlling because, unlike the plaintiffs in that case, who wanted to bargain directly with their employer, she was not trying to force the District to listen to her views but, rather, to stop the union from bargaining

on her behalf. Doc. 34 at 25-26. Bennett also argued that *Hill* was distinguishable because that decision applied only to partial public employees, whose relationship to the exclusive representative was more attenuated. *Id.* at 26-27. In addition, Bennett maintained that she could not have knowingly waived her right to pay nothing to the union when she signed the dues authorization cards because she was never given that option and the deduction of union dues from her paycheck constituted state action under section 1983. *Id.* at 14-18.

State defendants replied that multiple circuits, including this one, had agreed that exclusive representation is constitutional under *Knight* and that other district courts had rejected attempts to distinguish those decisions based on the differences between full and partial public employees. Doc. 37. Union defendants added that Bennett's attempt to distinguish *Hill* was unsuccessful because the nature of her challenge to exclusive representation applied equally to both full and partial public employees. Doc. 38 at 12-15. They also argued that Bennett voluntarily chose to pay union dues when she signed the authorization cards and that the change in the law caused by *Janus* did not invalidate those contracts. *Id.* at 5-9. The District further argued that Bennett failed to identify a District policy or practice that was causally linked to her purported injury. Doc. 39.

The district court granted state defendants' motion to dismiss, holding that the Act's system of exclusive representation is constitutional. Doc. 42 at 11-15 (A11-15). Specifically, it determined that *Knight* and *Hill* were controlling, and that *Janus* did not undermine either decision. *Id.* The court therefore concluded that the Act

did not create a mandatory association in violation of the First Amendment. *Id.* at 15 (A15). As to count one, the court held that Bennett voluntarily waived her right not to pay union dues when she signed the authorization cards, decided that *Janus* did not invalidate that consent, and granted summary judgment in favor of union defendants and the District. *Id.* at 7-11 (A7-11).

Bennett appealed. Doc. 44.

SUMMARY OF ARGUMENT

Exclusive representation is constitutional under the Supreme Court's decision in *Knight* and this court's decision in *Hill*, as this court reiterated in *Ocol v. Chicago Teachers Union*, No. 20-1668, 2020 WL 7239992 (7th Cir. Dec. 9, 2020). This court should affirm the dismissal of Bennett's First Amendment challenge to exclusive representation pursuant to *Hill* because she brings the same claim and presents the same arguments that this court rejected in that case. Bennett, however, does not even mention *Hill* in her opening brief on appeal, much less explain why it should be overruled, thereby forfeiting any such argument on appeal. Regardless, there is no compelling reason to justify overruling *Hill* because every circuit to have considered the issue has agreed that exclusive representation is constitutional under *Knight*, the Supreme Court did not undermine that conclusion in *Janus*, and no intracircuit conflict exists. Moreover, *Hill* was correctly decided, and, in any event, the Act would satisfy exacting scrutiny if that level of review were appropriate.

ARGUMENT

I. This court reviews the dismissal of a claim *de novo* and may affirm on any basis supported by the record and law.

A district court may grant a Rule 12(b)(6) motion to dismiss if the plaintiff's complaint "fail[s] to state a claim upon which relief may be granted." Fed. R. Civ. P. 12(b)(6). To state a claim on which relief may be granted, the complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell At. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This court reviews the dismissal of a claim *de novo*, construing all well-pleaded facts and any reasonable inferences therefrom in the light most favorable to the plaintiff, as a district court would. *Taha v. Int'l Bhd. of Teamsters*, 947 F.3d 464, 469 (7th Cir. 2020). And on *de novo* review, this court may affirm the district court's judgment on any ground supported by the record and law. *Dix v. Edelman Fin. Servs., LLC*, 978 F.3d 507, 513 (7th Cir. 2020).

II. The district court correctly dismissed count two pursuant to binding precedent holding that exclusive representation does not violate the First Amendment.

The Supreme Court upheld the constitutionality of exclusive representation in *Knight*, and this court followed that precedent to hold that the Act's parallel statute does not violate the First Amendment in *Hill*. Bennett presents the same arguments that this court rejected in *Hill* but fails to ask this court to overrule that decision or identify a reason for doing so. In any event, *Hill* was correctly decided, and the Act would satisfy exacting scrutiny even if it were appropriate.

A. This court rejected the same challenge to the constitutionality of exclusive representation in *Hill*.

This court held in *Hill* that exclusive representation does not violate the First Amendment, concluding that, under *Knight*, that system of labor relations does not compel a mandatory association that triggers heightened scrutiny. 850 F.3d at 864-65. In *Knight*, the Supreme Court upheld the constitutionality of a law that allowed bargaining units of public employees to choose an exclusive representative to meet, negotiate, and confer with their employers about employment-related matters. 465 U.S. at 282-90. The Court explained that the government could decide to confer only with the exclusive representative because it possessed the constitutional discretion to choose the persons and entities it would consult when making employment decisions. *Id.* at 283-89. The Court also concluded that the law did not infringe on the speech or associational rights of the employees who did not join the exclusive representative because they were free to speak on education-related issues and to associate, or not to associate, with whomever they pleased, noting that they were not required to support the representative except to pay a fair-share fee, which was permissible under *Abood* at that time. *Id.* at 288-90.

In *Hill*, a group of home healthcare and childcare providers brought a First Amendment challenge to the exclusive representation provisions in the Illinois Public Labor Relations Act. 850 F.3d at 862. They claimed that exclusive representation was subject to exacting scrutiny because it forced them into a mandatory association with the union that represented their bargaining unit and that it could not satisfy that standard after *Harris*, 573 U.S. 616, which held that partial public employees,

like them, could not be required to pay a fair-share fee. Appellants' Brief and Short Appendix, *Hill v. Serv. Emps. Int'l Union*, 850 F.3d 861 (7th Cir. 2017) (No. 16-2327), 2016 WL 3854683.

This court held that, "under *Knight*," the exclusive representation statute was "constitutionally firm and not subject to heightened scrutiny" because, as in that case, the plaintiffs in *Hill* were not required to join or support the union and could form their own groups or oppose the union if they chose. *Hill*, 850 F.3d at 864. The court explained that *Harris* did not undermine *Knight* or cast doubt on the validity of exclusive representation because its reach was limited to the issue of fair-share fees. *Id.* at 864-65. The court also rejected the plaintiffs' argument that the law created a mandatory association, noting that exclusive representation did not compel them to express a particular message, accept undesired members into their own associations, or force them to modify their expressive conduct. *Id.* at 865. Accordingly, the court concluded that "the IPLRA's authorization of a majority-elected exclusive bargaining representative does not compel an association that triggers heightened First Amendment scrutiny." *Id.*

Bennett presents the same arguments against exclusive representation that this court rejected in *Hill*. Like the *Hill* plaintiffs, Bennett argues that exclusive representation is subject to exacting scrutiny because it forces her to associate with the union and that it fails to meet that standard because it does not serve the State's compelling interest in labor peace. *Compare* AT Br. 22-27, *with* Appellant's Brief, *Hill*, 2016 WL 38354683, at **12-22, 32-35. Regarding *Knight*, Bennett, again like

the *Hill* plaintiffs, argues that the decision is distinguishable because she seeks to prevent the union from bargaining on her behalf rather than to require the District to negotiate directly with her. *Compare* AT Br. 27-28, *with* Appellant's Brief, *Hill*, 2016 WL 38354683, at **22-27. Bennett is therefore asking this court to decide the same issue that it resolved in *Hill* and presenting the same arguments that it already rejected in that case.

B. Bennett has not asked this court to overrule *Hill* or provided any basis for departing from its holding.

Principles of *stare decisis* require adherence to precedent unless intervening developments warrant its reconsideration. *Wilson v. Cook Cnty.*, 937 F.3d 1028, 1035 (7th Cir. 2019). This court therefore requires a compelling reason to overrule circuit precedent. *Int'l Union of Operating Eng'rs Local 139 v. Schimel*, 863 F.3d 674, 677 (7th Cir. 2017). Overruling precedent is appropriate only when this court's position remains a minority among other circuits, the Supreme Court has issued a decision on an analogous issue that compels reconsideration of that position, or an intracircuit conflict exists. *Campbell v. Kallas*, 936 F.3d 536, 544 (7th Cir. 2019).

Bennett does not ask this court to overrule *Hill* or identify a compelling reason for reconsidering that precedent and, in fact, entirely fails to mention or discuss *Hill* in her opening brief even though the district court explicitly based its dismissal of her claim on that decision. *See* Doc. 42 at 13-15 (A13-15). She has thus forfeited any argument that *Hill* is distinguishable or that it should be reconsidered or overruled. *See Lipsey v. United States*, 879 F.3d 249, 257 (7th Cir. 2018) ("By failing to attack the basis of the district court's grant of summary judgment, the plaintiff has waived

such argument on appeal."). Consequently, this court may affirm the district court's dismissal of count two for that reason alone.

Regardless, none of the bases for overruling precedent apply to *Hill*. First, this court's position is not a minority among other circuits. To the contrary, every circuit that has considered the issue, both before and after *Janus*, has held that exclusive representation is constitutional under *Knight*. *See Reisman v. Associated Facs. of Univ. of Me.*, 939 F.3d 409, 414 (1st Cir. 2019), *cert. denied*, 2020 WL 5883778 (Oct. 5, 2020); *Jarvis v. Cuomo*, 660 F. App'x 72, 74-75 (2d Cir. 2016); *Oliver v. Serv. Emps. Int'l Union Local 668*, 830 F. App'x 76, 80-81 (3d Cir. 2020); *Thompson v. Marietta Educ. Ass'n*, 972 F.3d 809, 813-14 (6th Cir. 2020); *Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018), *cert denied sub nom.*, *Bierman v. Waltz*, 139 S. Ct. 2043 (2019); *Mentele v. Inslee*, 916 F.3d 783, 786-89 (9th Cir.), *cert denied sub nom.*, *Miller v. Inslee*, 140 S. Ct. 114 (2019).

Second, the Supreme Court has not issued a decision on an analogous matter that compels reconsideration of *Hill*. To the extent Bennett suggests that *Hill* must be reexamined after *Janus*, *see* AT Br. 22-27, the Supreme Court did not mention *Knight* or indicate that exclusive representation was invalid in that decision. The Court instead stated that it was undisputed that a "State may require that a union serve as exclusive bargaining agent for its employees," *Janus*, 138 S. Ct. at 2478, emphasizing that "States can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions," *id*. at 2485 n.27. Far from undermining *Hill*, *Janus* confirmed the constitutionality of exclusive

representation. *See Int'l Union of Operating Eng'rs, Local 139 v. Daley*, Nos. 20-1672 & 20-1724, 2020 WL 7396048, at *7 (7th Cir. Dec. 17, 2020) ("*Knight* remain[s] good law" after *Janus*); *Ocol*, 2020 WL 7239992 at *2 ("the Court gave no indication that its ruling on fair-share fees necessarily undermined the system of exclusive representation"). In addition, in *Hill* this court considered the effect of the invalidation of fair-share fees on the constitutionality of exclusive representation when it rejected the argument that *Harris*, which struck down those fees as to partial public employees, required a departure from *Knight*. *See Hill*, 850 F.3d at 864-65.

Third, there is no intracircuit conflict on this issue. This court, in fact, just affirmed the dismissal of a First Amendment challenge to the Act, stating "*Knight* and its progeny firmly establish the constitutionality of exclusive representation." *Ocol*, 2020 WL 7239992, at *2. Thus, none of the compelling reasons for overruling circuit precedent are present here.

While Bennett fails to discuss *Hill* in her opening brief, she argued in the district court that *Hill* is distinguishable because those plaintiffs were partial public employees. *See* Doc. 34 at 26-27. But even if Bennett had not forfeited this point, it is unavailing because *Hill*'s reasoning applies equally to both full and partial public employees. To begin, *Hill* cannot be limited to partial public employees because this court based its decision on *Knight*, which considered the exclusive representation of full public employees. *See Knight*, 465 U.S. at 278 (identifying plaintiffs as "college faculty instructors"); *see also O'Callaghan v. Regents of Univ. of Calif.*, No. CV 19-2289 JVS (DFMx), 2019 WL 6330686, at *6 (C.D. Cal. 2019) (rejecting attempt to

limit *Mentele*, 916 F.3d 783, to partial public employees because "*Mentele*'s primary reasoning is based on *Knight*'s analysis of full public employees"). And nothing in *Hill*'s analysis is specific to partial public employees; on the contrary, this court's reasoning is equally applicable here because, Bennett, like the *Hill* plaintiffs, is not required to join or support the union and is free to associate, or not to associate, with whomever she chooses. *See Hill*, 850 F.3d at 864-65. In any event, *Ocol* concerned full public employees. *See* 2020 WL 7239992, at *1.

In sum, this court upheld the constitutionality of exclusive representation in *Hill*, and Bennett has not asked this court to overrule that decision or provided any basis for departing from its holding.

C. *Hill* was correctly decided.

Even if it were appropriate to reconsider *Hill*, this court should still affirm because that decision properly applied *Knight*'s holding, and it accords with broader First Amendment principles. As explained, *Knight* upheld the constitutionality of a system of public-sector exclusive representation because governments maintain the discretion to choose the entities they will consult when making employment decisions and the law at issue neither required employees to join the exclusive representative nor prevented them from associating with other groups. *See* 465 U.S. at 282-90. In *Hill*, this court correctly recognized that *Knight* was controlling because, as in that case, the challenged law did not require the plaintiffs to join the union or support it in any way, or prevent them from forming their own groups or opposing the union if

they chose. 850 F.3d at 864. *Hill* therefore constitutes a straightforward application of *Knight*.

Bennett argues that *Knight* applies only when an employee seeks to bargain directly with her employer and not when, as here (and in *Hill*), she attempts to stop the exclusive representative from bargaining on her behalf. AT Br. 27-28. But the constitutionality of exclusive representation does not turn on a given plaintiff's purported motivation for her challenge. Under *Knight*, exclusive representation is permissible so long as the law does not force employees to join or support the union or impair their freedom to form or join other groups. 465 U.S. at 282-90. That legal principle regarding the scope of the government's authority holds true regardless of an employee's stated reasons for bringing a lawsuit. *See Bierman*, 900 F.3d at 574 (rejecting argument "that *Knight* addressed only whether it was constitutional for a public employer to exclude employees from union meetings," concluding "a fair reading of *Knight* is not so narrow").

Hill also comports with general First Amendment principles regarding the freedom of association. The First Amendment guarantees individuals the freedom to associate with others to collectively exercise their right to free speech, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984), as well as the freedom not to associate, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). The government infringes on the freedom not to associate if it forces someone to subsidize the speech of another, *see Knox v. Serv. Emps. Int'l Union*, 567 U.S. 298, 309-10 (2012), or to accommodate another speaker's message such that their own message is affected by the speech that they

must accommodate, *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006). In *Hill*, this court correctly decided that exclusive representation does not infringe on associational freedoms because, absent fair-share fees, employees are not required to subsidize the union's speech or to accommodate the union's speech in a way that affects their own. *See* 850 F.3d at 865.

Although Bennett, citing *Janus*, argues that exclusive representation compels her to endorse the union's message, *see* AT Br. 22-23, it is undisputed that she is not required to contribute to the union's speech or subsidize its activities in any way, *see* Doc. 42 at 4 (A4). And Bennett's conclusory statement that she is forced to associate with the union "simply by the fact of her employment in this particular bargaining unit," AT Br. 23-24, is unsupported by any explanation of how she has been required to accommodate the union's speech, much less in a way that affects her own.

D. Exclusive representation would satisfy exacting scrutiny even if it were appropriate.

The Act would satisfy exacting scrutiny even if this court departed from *Hill* and instead reviewed exclusive representation under the same heightened standard that the Supreme Court applied to fair-share fees in *Janus*. A law satisfies exacting scrutiny when it serves a compelling state interest that cannot be achieved through significantly less restrictive means. *Knox*, 567 U.S. at 310. In *Janus*, the Supreme Court accepted that States have a compelling interest in maintaining labor peace by avoiding the conflict and disruption that would occur if the employees in a bargaining unit were represented by multiple unions, before concluding that fair-share fees were unnecessary to achieve that objective. 138 S. Ct. at 2465-66. Specifically, the Court

determined that States could obtain the benefits of exclusive representation without requiring fair-share fees, noting that numerous States and the federal government had successfully operated such systems without fees. *Id.* at 2466.

The Act necessarily satisfies exacting scrutiny under *Janus* because, like the State systems the Court identified, it provides for exclusive representation without requiring fees. Indeed, exclusive representation must be permissible because the State's compelling interest in labor peace consists of avoiding the disruptions that would occur if the employees in a bargaining unit were not represented by a single entity. *See id.* at 2465. In other words, there is no less restrictive way to obtain the benefits of exclusive representation than by designating a single representative for the entire bargaining unit. *See Janus v. Am. Fed'n of State, Cnty. & Mun. Emps.*, 942 F.3d 352, 354 (7th Cir. 2019), *petition for cert. filed*, No. 19-1104 (Mar. 9, 2019) (stating "[t]he principle of exclusive union representation lies at the heart of our system of industrial relations").

Bennett argues that the State's compelling interest in labor peace does not apply to her because she does not want to be represented by a competing union. AT Br. 24. But that proposed distinction is immaterial because the State's interest in avoiding conflicting demands by multiple employees, *see Janus*, 138 S. Ct. at 2465, would be frustrated even if those demands were made by the employees themselves, rather than by competing unions. Finally, Bennett's claim that the Court implicitly rejected the labor peace rationale for exclusive representation in *Janus*, *see* AT Br. 24-25, is at odds with the Court's reasoning in that decision. As explained, the Court

concluded that fair-share fees were not justified by the State's compelling interest in labor peace because States had proved capable of operating exclusive representation systems without them. *See Janus*, 138 S. Ct. at 2465-66. The Court's conclusion was therefore based on the premise that exclusive representation, by itself, is permissible, which the Court recognized elsewhere in its opinion. *See id.* at 2478 ("[i]t is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees"). Exclusive representation therefore satisfies exacting scrutiny as that standard was applied in *Janus*.

CONCLUSION

For the foregoing reasons, State Defendants-Appellees ask this court to affirm the district court's judgment.

Respectfully submitted,

KWAME RAOUL
Attorney General
State of Illinois

JANE ELINOR NOTZ
Solicitor General

100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3312

Attorneys for State Defendants-Appellees

/s/ Frank H. Bieszczat
FRANK H. BIESZCZAT
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2234
fbieszczat@atg.state.il.us

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CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I hereby certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32 and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2013, in 12-point Century Schoolbook BT font, and complies with Federal Rule of Appellate Procedure 32(a)(7)(A) in that the brief is 23 pages.

/s/ Frank H. Bieszczat
FRANK H. BIESZCZAT
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2234
fbieszczat@atg.state.il.us

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on December 21, 2020, I electronically filed the foregoing Brief of State Defendants-Appellees with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

I further certify that the participants in this appeal are CM/ECF users and will be served by the CM/ECF system.

Jeffrey M. Schwab
jschwab@libertyjusticecenter.org

James J. McQuaid
jmcquaid@libertyjusticecenter.org

Jacob Karabell
jkarabell@bredhoff.com

April Pullium
apullium@bredhoff.com

Jason T. Manning
jmanning@hlerk.com

William L. Messenger
wlm@nrtw.org

/s/ Frank H. Bieszczat
FRANK H. BIESZCZAT
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2234
fbieszczat@atg.state.il.us