No. 17-981

IN THE

Supreme Court of the United States

THERESA RIFFEY, SUSAN WATTS, STEPHANIE YENCER-PRICE, AND A PUTATIVE CLASS OF SIMILARLY SITUATED PERSONS,

PETITIONERS,

v.

GOVERNOR BRUCE RAUNER, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF ILLINOIS, AND SERVICE EMPLOYEES INTERNATIONAL UNION HEALTHCARE ILLINOIS, INDIANA, MISSOURI, KANSAS,

RESPONDENTS.

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

BRIEF IN OPPOSITION FOR RESPONDENT GOVERNOR BRUCE RAUNER

LISA MADIGAN
Attorney General
State of Illinois
DAVID L. FRANKLIN*
Solicitor General
BRETT E. LEGNER
Deputy Solicitor General
FRANK H. BIESZCZAT
Assistant Attorney General

100 West Randolph Street
Chicago, Illinois 60601
(312) 814-5376
dfranklin@atg.state.il.us

*Counsel of Record

Attorneys for Respondent Governor Bruce Rauner

QUESTION PRESENTED

Whether the district court abused its discretion by denying a request to certify a class of personal assistants to seek a refund of agency fees collected prior to this Court's decision in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), when many members of the proposed class have since joined or supported the union.

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STATEMENT

Illinois created and operates the Home Services Program, which prevents the unnecessary institutionalization of people in need of long-term care by delivering services to them in their homes. 20 ILCS 2405/3(f); 89 Ill. Admin. Code §§ 676.10(a), 676.30, 676.40(a), 682.100. Some of the program's services are provided by a "personal assistant." 89 Ill. Admin. Code §§ 676.30(p), 686.20. While the State pays the personal assistants, sets the requirements to qualify as a personal assistant, and helps recipients and their guardians use the program's services, *see* 20 ILCS 2405/3(f); 89 Ill. Admin. Code §§ 677.40(d), 684.20, 686.10, 686.30, recipients have been given control over the other aspects of their relationships with the personal assistants, *see* 20 ILCS 2405/3(f); 89 Ill. Admin. Code §§ 676.10(c), 676.30(c)(3), 677.40(d), 684.20(b).

Personal assistants are "public employees" of the State within the meaning of the Illinois Public Labor Relations Act. 5 ILCS 315/3(n–o); 20 ILCS 2405/3(f). The State must therefore bargain with the exclusive representative chosen by the personal assistants over the terms and conditions of their employment that are within the State's control. 5 ILCS 315/7; 20 ILCS 2405/3(f).

The personal assistants chose respondent SEIU as their exclusive representative, Doc. 79 at 5–6, and SEIU entered into a collective bargaining agreement with the State that governed the terms and conditions of employment that were within the State's control, Pet. App. 165a–205a. The agreement contained a clause that required personal assistants who were not

dues-paying SEIU members to instead pay an agency fee equal to their proportionate share of the costs of bargaining and administering the contract, Pet. App. 180a–181a, as was permitted under the Act, *see* 5 ILCS 315/6(e).

A group of personal assistants who were not SEIU members filed suit, asserting that the agency fee requirement violated their First Amendment rights.[1] Doc. 1. In addition to asking for declaratory and injunctive relief, the plaintiffs sought damages from SEIU to recover the fees it had collected. *Id.* at 11–12. The district court dismissed the complaint, Pet. App. 143a–64a, and the Seventh Circuit affirmed, holding that the plaintiffs' claims were foreclosed by this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), *id.* at 126a–42a.

In *Harris v. Quinn*, 134 S. Ct. 2618 (2014), this Court reversed the Seventh Circuit and held that the statutory provisions that permitted the collection of agency fees were unconstitutional as applied to personal assistants. *Id.* at 48a–97a. Reasoning that personal assistants were not full-fledged public employees because the State had relinquished control over various aspects of their job duties to the customers they served, the Court declined to extend *Abood* to reach them. *Id.* at 76a–85a. The Court instead determined that the state interests furthered by agency fees in this context were insufficient to justify the constitutional impingement they caused, and concluded that "[t]he First Amendment prohibits the

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[1] Petitioners Theresa Riffey, Susan Watts, and Stephanie Yencer-Price were among the named plaintiffs. Doc. 1.

collection of an agency fee from personal assistants in the [Home Services] Program who do not want to join or support the union." *Id.* at 85a–97a.

On remand, petitioners moved to certify a class under Federal Rule of Civil Procedure 23(b)(3) of all personal assistants who paid an agency fee after April 22, 2008, to pursue the damages claim against SEIU. Doc. 81. The district court denied the motion, holding that petitioners had failed to demonstrate that the proposed class complied with several of Rule 23's requirements. Pet. App. 24a–43a. Specifically, the court concluded that the class did not satisfy the commonality and typicality requirements of Rule 23(a) because the damages claims necessitated individualized inquiries to determine the extent of each class member's compensable injury and that petitioners were not adequate representatives of the class under Rule 23(a)(4). *Id.* at 28a–40a. In addition, individual questions about the scope of relief predominated over common issues and a class action was not superior to other methods of adjudicating the damages claims as required by Rule 23(b)(3). *Id.* at 41a–43a.

The court, however, granted judgment in favor of petitioners on the injunction claim after the parties filed a joint motion to that effect. Pet. 23a; Doc. 189. The motion explained that the State and SEIU had stopped collecting agency fees and deleted the agency-fee clause from their collective bargaining agreement following this Court's decision in *Harris*. Doc. 186. The parties also stipulated to a judgment awarding money damages to the named plaintiffs. Pet. 22a.

The Seventh Circuit affirmed the denial of class certification. Pet. App. 1a–21a. It held that the

district court did not abuse its discretion when it determined that petitioners had failed to establish either that they were adequate class representatives under Rule 23(a)(4) or that common questions predominated over individual ones such that a class action was a superior method of adjudication under Rule 23(b)(3). *Id.* at 8a–14a.

Before reaching adequate representation and predominance, the court discussed the nature of the alleged injury. *Id.* at 4a–8a. Starting from *Harris*'s holding that the First Amendment prohibited the collection of agency fees from those personal assistants "who do not want to join or support the union," *id.* at 96a, the court reasoned that only those class members who did not want to pay a fee suffered a compensable injury, even if collecting the fee impinged upon the legal rights of all class members, *id.* at 5a–8a. Although petitioners argued that few class members would have voluntarily paid the fee, the district court reasonably found otherwise based on evidence that 65% of class members who were still personal assistants had joined SEIU and were paying full union dues. *Id.* at 7a–8a. The court also questioned whether a class action was ever an appropriate vehicle for resolving claims that presented this type of injury, but declined to answer that question because Rules 23(a)(4) and 23(b)(3) provided independent bases for denying class certification. *Id.* at 8a.

As to Rule 23(a)(4), the Seventh Circuit held that the district court did not abuse its discretion when it found that petitioners were not adequate class representatives because their interests conflicted with those of most class members, who supported SEIU. *Id.* at 8a–12a. Those conflicts about union represen-

tation and agency fees went to the heart of whether class members would want to seek damages from SEIU. *Id.* at 11a. While a more tailored class may have been permissible, the court noted that petitioners had chosen not to pursue that option. *Id.* at 12a.

Turning to Rule 23(b)(3), the court concluded that common questions did not predominate over individual ones because the only issue that remained after *Harris* was damages, and adjudicating that issue would require a determination of the extent to which each class member's injury was caused by the agency-fee requirement. *Id.* at 12a–14a. As a result, the district court did not abuse its discretion when it found that a class action was not a superior method for adjudicating those claims. *Id.* at 14a.

Judge Manion concurred in the judgment but disagreed with the majority insofar as he concluded that all class members suffered a compensable injury and that petitioners were adequate representatives of the class. *Id.* at 15a–21a. Judge Manion explained that he would nonetheless affirm the district court because it did not abuse its discretion when it found that common issues did not predominate and that a class action was not a superior method of adjudication when the primary, if not the only, issue before it was individual damages. *Id.* at 20a–21a. Class members, he concluded, "have all the incentive in the world to pursue their individual claims and should not have any trouble finding attorneys to help them in a case where the merits have mostly been decided and fees are recoverable." *Id*. at 21a.

REASONS FOR DENYING THE PETITION

The Seventh Circuit held that the district court did not abuse its discretion when it found that petitioners had failed to establish that they were adequate class representatives under Rule 23(a)(4) or that common issues predominated such that a class action was the superior method of adjudication under Rule 23(b)(3). While the majority also suggested that only those class members who did not want to pay the fee suffered a compensable injury, its reasons for affirming the district court's denial of class certification were independent of that suggestion. Indeed, Judge Manion concurred in the judgment even though he concluded that all class members had suffered a compensable injury, because he agreed that the district court did not abuse its discretion when it found that the proposed class did not satisfy Rule 23(b)(3)'s predominance and superiority requirements.

Petitioners ask this Court to decide whether the majority's observations about the nature of the First Amendment injury were correct, and they assert that this case presents the question whether it is constitutional to permit employees to opt out of paying agency fees as opposed to requiring them to opt in. But this case is not an appropriate vehicle for resolving either issue. Even if this Court answered the injury question in the way petitioners would like, class certification would still be denied. And the validity of an opt-out procedure is not presented here, because Illinois is an opt-*in* State. Petitioners' fallback argument—that this Court must resolve the injury question now to avert potential constitutional violations in the future—rests on a misreading of the Seventh Circuit's opinion and flawed predictions that are undermined

by this case's history. Petitioners, moreover, do not assert that there is a conflict among the courts of appeals for this Court to resolve, and there is none. Finally, it is unnecessary to hold this petition pending *Janus v. American Federation of State, County & Municipal Employees, Council 31*, No. 16-1466 (cert. granted, Sept. 28, 2017), because the two cases ask different questions and the outcome in *Janus* will thus not affect this case.[2]

I. This case is a poor vehicle for resolving the question presented by petitioners.

A. The outcome of this case would not change if this Court held that all class members suffered compensable injury.

Resolving the injury issue in the way petitioners prefer would not alter the outcome of this case, because the Seventh Circuit panel unanimously affirmed the district court's denial of class certification for reasons independent of that issue. Neither the conclusion that petitioners did not satisfy Rule 23(a)(4)'s adequacy requirements nor the determina-

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[2] Under the Illinois Constitution and Illinois statutes, the Illinois Attorney General controls the State's representation in court when the State is the real party in interest, including in suits against state officers and employees in their official capacities. Ill. Const. Art. V, § 15; 15 ILCS 205/4; *Fergus v. Russel*, 270 Ill. 304, 342 (1915); *People ex rel. Scott v. Briceland*, 65 Ill. 2d 485, 500 (1976); *Environmental Protection Agency v. Pollution Control Bd.*, 69 Ill. 2d 394, 399–400 (1977). When exercising this authority, the Illinois Attorney General, who is an elected state officer, represents the broader interests of the people of Illinois, not the particular views of any officeholder named in an official capacity. *Id.* at 401–02.

tion that the proposed class did not meet Rule 23(b)(3)'s predominance and superiority standards depended on the absence of a compensable injury.

Adequacy. The majority's adequacy holding was based on a conflict of interest between petitioners and those class members who support the union. That conflict would persist regardless of how the injury issue was resolved. The majority, noting that 65% of class members who were still personal assistants had joined SEIU, reasoned that petitioners' interests in obtaining damages from SEIU conflicted with those of most of the members of the proposed class. Pet. App. 9a–11a. While differences in opinion about union representation will not always preclude class treatment, the majority concluded that those differences went to the heart of class members' decisions about whether to pursue a damages claim here. *Id.* at 11a. The majority's Rule 23(a)(4) analysis thus would not change if this Court held that all personal assistants suffered a compensable injury because the fundamental conflict between petitioners and those class members who support SEIU would exist even if they all suffered the same injury.

Predominance and superiority. Likewise, the denial of class certification on the ground that the proposed class did not meet Rule 23(b)(3)'s predominance and superiority standards would stand regardless of how the First Amendment injury issue was resolved. Indeed, Judge Manion concurred on this basis despite his conclusion that all class members had suffered a compensable injury. Pet. App. 18a–21a. Once this Court resolved the merits of the constitutional issue in *Harris*, the primary—if not the only—remaining issue was calculating individualized damages. *Id.* at

20a–21a. As Judge Manion pointed out, there is no reason why class treatment should be preferred to individual litigation on that issue, especially given the availability of attorneys' fees for prevailing parties. *Id*. at 21a.

Petitioners do not take issue with—indeed, they do not even discuss—the Seventh Circuit's analysis or holdings as to these dispositive Rule 23 issues. Instead, they invite this Court to reach substantive First Amendment issues that the case does not present. The Court should decline the invitation.

B. The constitutionality of opt-out procedures is not at issue in this case.

As discussed, the Seventh Circuit held that the district court did not abuse its discretion when it denied petitioners' motion to certify a class of personal assistants to pursue damages claims against SEIU, on the grounds that the proposed class did not meet Rule 23's requirements. Despite petitioners' suggestions to the contrary, *see* Pet. 16–18, the court did not address the constitutionality of procedures that allow a union to collect dues from an employee unless the employee affirmatively opts out of paying them. It is no surprise that the Seventh Circuit did not address this issue, because Illinois is an opt-*in* jurisdiction in which an employee must submit written authorization before a union may collect dues. 5 ILCS 315/6(f). If this Court wishes to address the constitutional validity of the opt-out framework, it should do so in a

case arising in a State that actually uses such a framework.[3]

II. The Seventh Circuit's decision does not have broad implications.

The Seventh Circuit's decision means that personal assistants in Illinois who want to pursue a damages claim against SEIU will have to use an alternative to the class action petitioners had proposed: perhaps a more narrowly tailored class, as the district court and the panel majority suggested, Pet. App. 12a, or individual lawsuits, as discussed by Judge Manion, *id.* at 21a. This case-specific question of litigation strategy does not present an important federal issue.

Petitioners maintain that the Seventh Circuit imposed an objection requirement on employees who do not want to pay a fee, *see* Pet. 14–17, but that is not true. The majority did not hold that unions could collect a fee without consent—to the contrary, it assumed that unions *could not* do so. Pet. App. 13a. The majority merely suggested that, even though all class members had been improperly required to pay a fee, only those who would not have voluntarily paid the fee suffered a compensable injury. *Id.* at 6a–7a. It then went on to affirm the district court's denial of

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[3] The petition itself identifies pending cases in which the opt-out issue is presented. *See* Pet. 16 (citing *Hoffman v. Inslee*, 2016 WL 6126016 (W.D. Wash. Oct. 20, 2016) (upholding opt-out procedure), *appeal docketed*, No. 16-35749 (9th Cir. Sept. 16, 2016); *Hamidi v. SEIU Local 1000*, 231 F. Supp. 3d 624 (E.D. Cal. 2017) (same), *appeal docketed*, No. 17-15434 (9th Cir. Mar. 3, 2017).

class certification on Rule 23 grounds independent of the injury issue. *See supra* 7–9.

In addition, petitioners are wrong to conclude that, as a result of the Seventh Circuit's decision, unions will have an incentive to collect fees even where they are prohibited. *See* Pet. 14–15. That prediction is undermined by the history of this case. The State and SEIU acknowledged that they were bound by *Harris* and thus stopped collecting agency fees and deleted the agency-fee clause from their collective bargaining agreement after *Harris* was decided. Doc. 186. The district court also issued an injunction that prohibited the State and SEIU from entering into agency fee agreements for personal assistants in the future. Pet. App. 23a; Doc. 189. Contrary to petitioners' speculation, there is no basis for assuming that unions will assess, or that States will participate in collecting, agency fees in defiance of this Court's precedent.

Any claim that this petition presents an important federal question is further undermined by the procedural posture of this case. The Seventh Circuit affirmed the denial of petitioners' motion for class certification. Even if this Court were to reverse the Seventh Circuit on that procedural issue—and, as explained, petitioners' broad question presented provides no basis to do so, given that the decision below rested on independent and narrower grounds—SEIU's affirmative defenses to petitioners' claims would remain. *See* Doc. 90 (asserting multiple affirmative defenses, including that SEIU acted in good faith based on the law as it stood before *Harris* was decided).

III. The Seventh Circuit's decision does not conflict with any other circuit's decisions or this Court's precedent.

Petitioners do not argue that the Seventh Circuit's decision conflicts with that of any other circuit, and indeed no such conflict exists. To the extent the proper treatment of class certification for damages claims in the agency-fee context presents an important federal issue, this Court should follow its usual practice of allowing the issue to percolate before it weighs in. Nor do petitioners even contend that the interpretation of Rule 23(a)(4) and Rule 23(b)(3) on which the court of appeals' judgment rests is an error in need of correction. Instead, their reasons for granting the petition amount to a claim that the Seventh Circuit erred when it suggested that only those personal assistants who did not want to pay an agency fee suffered a compensable injury. *See* Pet. 9–14.

That suggestion, however, was not only unnecessary to the court of appeals' holding; it was faithful to this Court's First Amendment jurisprudence. The starting point for the Seventh Circuit's injury analysis was this Court's holding in *Harris* that the First Amendment prohibits the collection of agency fees from personal assistants who do not want to join or support the union. Pet. App. 5a. The court of appeals never deviated from that principle, and in fact stated that the Constitution prohibits the collection of fees absent affirmative consent. *Id.* at 13a. And while the majority suggested that only those personal assistants who would not have voluntarily paid the fee suffered a compensable injury, it recognized that agency fees impinged a legal right held by all personal assistants.

Id. at 6a–7a. There is no need for this Court to grant certiorari to reaffirm that settled principle.

IV. There is no need to hold this petition for *Janus*.

In the alternative, petitioners ask this Court to hold this petition pending the disposition of *Janus*. Pet. 18–19. That is not necessary, because the two cases present different issues. The petitioner in *Janus* asks this Court to decide whether full-fledged public employees may constitutionally be required to pay agency fees. Petitioners here are personal assistants as to whom the Court has already held (in *Harris*) that agency fees are unconstitutional. *See* Pet. App. 48a–97a. The propriety of class certification at issue here turns on the separate issue of how best to litigate damages, which is not presented in *Janus*.

To the extent petitioners suggest that this petition should be held pending a decision on the constitutionality of opt-out procedures in *Janus*, that suggestion misses the mark. As discussed *supra* pp. 9–10, the validity of opt-out procedures is not at issue here: Illinois is an opt-in jurisdiction, and the Seventh Circuit did not impose an objection requirement on employees who do not wish to pay a fee. For similar reasons, it is unlikely that this Court will reach the constitutionality of opt-out procedures in *Janus*, as Illinois does not use an opt-out framework and consequently that issue is not included in the question presented in *Janus*.[4]

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[4] This Court's treatment of the petitions in *Schlaud v. Snyder*, 717 F.3d 451, 455 (6th Cir. 2013), *vacated*, 134 S. Ct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

LISA MADIGAN
Attorney General
State of Illinois
DAVID L. FRANKLIN*
Solicitor General
BRETT E. LEGNER
Deputy Solicitor General
FRANK H. BIESZCZAT
Assistant Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-5376

* *Counsel of Record*

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2899 (2014), *on remand,* 785 F.3d 1119 (6th Cir. 2015), is not instructive here. The first *Schlaud* petition, No. 13-240, was held for *Harris* because the two cases presented the same First Amendment issue on the merits. The second petition, No. 15-166, was held for *Friedrichs v. California Teachers Association*, 135 S. Ct. 2933 (2015), presumably because Michigan, like California, is an opt-out jurisdiction, and *Friedrichs*—unlike *Janus*—presented the opt-out issue. *See* Pet. Br. at i, *Friedrichs v. California Teachers Association*, 2015 WL 5261564 (Sep. 4, 2015); Pet. for Cert. at 3–4, *Schlaud v. International Union, UAW*, 2015 WL 4651688 (Aug. 4, 2015).