No. 17-981

IN THE

Supreme Court of the United States

THERESA RIFFEY, *et al.*,
Petitioners,

v.

GOVERNOR BRUCE RAUNER, *et al.*,
Respondents.

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

BRIEF IN OPPOSITION OF RESPONDENT SEIU HEALTHCARE ILLINOIS, INDIANA, MISSOURI, KANSAS

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QUESTION PRESENTED

Whether the district court abused its discretion by denying, without prejudice, petitioners' motion for class certification because petitioners' motion failed to establish all the necessary requirements for certification of a Rule 23(b)(3) class.

CORPORATE DISCLOSURE STATEMENT

Respondent SEIU Healthcare Illinois, Indiana, Missouri, Kansas is not a corporation. Respondent has no parent corporation, and no corporation or other entity owns any stock in respondent.

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STATEMENT OF THE CASE

The petition concerns the denial of petitioners' motion for class certification. Petitioners ask the Court to grant review to decide whether, as the district court concluded, not all members of their proposed class suffered a "First Amendment injury." Pet. at i. But the answer to petitioners' question presented cannot change the judgment below. The district court also concluded that, "even if injury can be presumed," Pet. App. 42a, "class certification … [was] nevertheless inappropriate" because petitioners failed to show they were "adequate representatives" of their proposed class and did "not me[et] their burden to demonstrate predominance and superiority for their proposed class." Pet. App. 32a, 40a, 42a. The Seventh Circuit affirmed the judgment based on the district court's "independent reasons for declining to certify the class," *i.e.* that "intra-class conflicts of interest rendered the named plaintiffs inadequate" and "common questions did not predominate, so as to make a class action superior to individual adjudication." Pet. App. 8a. This being so, petitioner's case is not an appropriate vehicle for considering the question presented by the petition.

For the same reason, there is no good reason to hold the petition pending a decision in *Janus v. AFSCME Council 31*, No. 16-1466, nor to vacate the judgment and remand the case for reconsideration after a *Janus* decision.

A. Background

1. The State of Illinois pays personal assistants to deliver home-based care to elderly and disabled individuals to carry out the State's Home Services Program. The personal assistants are "public employees"

for purposes of Illinois' Public Labor Relations Act ("IPLRA"). 20 ILCS 2405/3(f). In 2003, the majority of personal assistants chose collective bargaining representation by the union now known as SEIU Healthcare Illinois, Indiana, Missouri, Kansas. Pet. App. 31a.

Under the IPLRA, the collective bargaining representative is "responsible for representing the interests of all public employees in the unit," regardless of whether they choose to be union members. 5 ILCS 315/6(d). To cover the cost of that representation, the IPLRA provides that a collective bargaining agreement "may include … a provision requiring employees … who are not members of the organization to pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment." 5 ILCS 315/6(e). The collective bargaining agreements covering personal assistants here included such "fair-share" or "agency fee" provisions.

The State implemented those provisions by automatically deducting fair-share fees from its payments to personal assistants who had not signed union membership cards. Because the personal assistants lacked a common worksite, most of them had no contact with a union representative when they first entered the unit. Many personal assistants subsequently signed membership cards, at which point the State began deducting dues rather than fair-share fees. Dist. Ct. ECF 106 ¶¶7, 21-22, 33.

2. Petitioners are three personal assistants who did not wish to support the union financially. They filed this lawsuit on April 22, 2010 against the State and union, alleging the fair-share requirement violated their First Amendment rights. The lower courts

rejected their claim as contrary to controlling precedent. This Court granted review and reversed in *Harris v. Quinn,* 134 S. Ct. 2618 (2014). In *Harris*, this Court held that the personal assistants are not "full-fledged" public employees and, therefore, "[t]he First Amendment prohibits the collection of an agency fee from personal assistants … who do not want to join or support the union." *Id.* at 2644. This Court remanded the case for further proceedings.

B. Proceedings after Remand

1. After *Harris*, the State and union ended the fair-share fee deductions and renegotiated the collective bargaining agreement to eliminate the fair-share provision. When the case returned to the district court, and the case caption changed to *Riffey v. Rauner*, petitioners filed a motion to certify a class pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure to seek pre-*Harris* compensatory damages under 42 U.S.C. §1983. Petitioners' proposed damages class would have included every personal assistant who paid fair-share fees after April 22, 2008, regardless of whether the personal assistant subsequently signed a union membership card. Pet. App. 3a, 8a.

In opposing petitioners' motion, the union presented evidence that many, if not most, of the personal assistants falling within petitioners' proposed class definition always wanted to join and provide financial support for their union and had not signed membership cards immediately only because they thought they already were members, because they did not have contact with a union representative until after starting work in the unit, or for some other reason having nothing to do with opposition to the union or to fees/dues payments. *See, e.g.*, Dist. Ct. ECF 106

¶¶30, 33-36; 111 ¶7; 112 ¶3; 113 ¶¶3-5; 119 ¶7; 128 ¶5. The district court found that "there are many such people within the proposed class." Pet. App. 35a n.5. The district court also found that "65% of the proposed class members who are still in the bargaining unit have since joined the union." Pet. App. 8a.

2. The district court denied petitioners' motion for Rule 23(b)(3) class certification without prejudice. Pet. App. 25a-43a. The district court found that the union had presented "compelling evidence" that many proposed class members wanted to support the union financially and that petitioners "d[id] not rebut this evidence." Pet. App. 31a. The district court reasoned that "if a personal assistant wants to support the union, collecting a fair-share fee from her would not result in a First Amendment injury," so "the proposed class includes too many people who could not have been injured." Pet. App. 31a.

The district court also reasoned that, "alternatively," even "if [the union] committed a complete First Amendment tort by taking fees without consent (whether or not the nonmember wanted to support the union) … class certification – as currently proposed by [petitioners] – is nevertheless inappropriate under Rule 23." Pet. App. 32a.

First, petitioners failed to demonstrate they would "fairly and adequately protect the interests of the class." FRCP 23(a)(4); *see* Pet. App. 36a-40a. Petitioners opposed union representation and would pursue relief even if doing so "hampered or destroyed the union." Pet. App. 38a. By contrast, petitioners' proposed class definition would include tens of thousands of personal assistants, including many *current* union members, who want effective union representation,

are willing to provide financial support for their union, and "would not want to associate with" petitioners. Pet. App. 39a-40a.

Second, petitioners failed to demonstrate that common issues would "predominate over any questions affecting only individual members." FRCP 23(b)(3); Pet. App. 41a-42a. The district court reasoned that "*Harris* already resolved the central First Amendment question – whether fair-share fees can be deducted without consent" and that, if a class were certified, "damages questions for the 80,000 potential class members would predominate over other questions." Pet. App. 41a-42a.

The district court observed that, "even if injury can be assumed, the extent of the injury – the amount of the damages" would present individual questions. Pet. App. 35a. For example, if the nonmember received a "tangible benefit" from the union, "the deduction may not be an accurate measure of the loss." Pet. App. 36a.[1] Moreover, "if the nonmember would have willingly paid a fair-share fee if given a choice, then the deduction did not cause a monetary loss to that nonmember." Pet. App. 35a. Petitioners' proposal for class certification to resolve all damages issues therefore presented "significant manageability issues," yet petitioners "propose[d] no plan" to address them. Pet. App. 35a. The district court suggested that "narrower, issue-based class certification" to resolve common issues could address its concerns. Pet. App. 35a, 41a.

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[1] Many proposed class members had enrolled in the health insurance plan administered by the union or participated in training programs offered by the union. And about 29 percent of the grievances filed by the union were filed on behalf of personal assistants who were not union members. Dist. Ct. ECF 106 ¶¶14, 15, 17.

Third, petitioners failed to demonstrate that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FRCP 23(b)(3); Pet. App. 42a. The district court reasoned that, "armed with *Harris*" and "the potential benefit of 42 U.S.C. §1988 fee-shifting," personal assistants could pursue individual damages suits. Pet. App. 42a.

Thus, the district court ruled that, "*even if injury can be presumed*," Pet. App. 42a (emphasis supplied), petitioners' motion failed to satisfy the Rule 23(b)(3) requirements for class certification. The district court denied petitioners' class certification motion "without prejudice to [petitioners] revising their class definition or seeking class certification on non-damages issues." Pet. App. 43a. The district court suggested that a renewed motion for class certification might be granted, but added that "without additional briefing" the court was not prepared "at this time" to certify an "alternative class." Pet. App. 35a.

Petitioners declined the district court's invitation to submit a new class certification motion. Instead, they stipulated to a final judgment that granted them all the individual monetary relief they sought and permanently enjoined the State and union from applying any fair-share requirement to personal assistants. Pet. App. 22a. Petitioners then appealed the denial of their class certification motion.

2. The Seventh Circuit affirmed the judgment. Pet. App. 1a-14a. Chief Judge Wood, writing for the majority, observed that the question whether proposed class members "who would have happily paid the fair-share fee" suffered any First Amendment injury was "interesting," and may have "interesting implications in the class action context," but that "[w]e

need not pursue this possibility further … because the district court offered additional, independent reasons for declining to certify the class." Pet. App. 5a, 8a.

The court of appeal had "no trouble finding that the district court did not abuse its discretion in finding that the proposed class representatives failed the adequacy requirement of Rule 23(a)(4)." Pet. App. 12a. Moreover, "even if the [petitioners] had not run into problems with adequacy of representation … they would still not clear the class certification hurdles" because petitioners failed to demonstrate that common issues would "predominate" and that a class action was "superior," and "the district court was well within the bounds of its discretion to reject class treatment on these bases as well." Pet. App. 12a-14a.

Judge Manion wrote separately to concur in the judgment. Pet. App. 15a. In Judge Manion's view, every proposed class member suffered an "injury" from the fair-share requirement. Nevertheless, Judge Manion "agree[d] that we should affirm the denial of certification" because the district court did not abuse its discretion by concluding that "issues common to the class would not predominate over individual issues" and that "a class action wouldn't be superior in this case." Pet. App. 20a-21a.

REASONS FOR DENYING THE PETITION

Petitioners ask the Court to grant review to answer the question "whether the government inflicts a First Amendment injury when it compels individuals to subsidize speech without their prior consent, or is an objection required?" Pet. at i. But the answer to that question about "First Amendment injury" could not change the judgment below. The district court de-

nied petitioners' class certification motion on independent grounds that petitioners do not challenge, and the court of appeal affirmed the judgment on those independent grounds. Further review is therefore not warranted.

1. "The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (citation, internal quotation marks omitted). A plaintiff seeking to come within that exception must "affirmatively demonstrate" with "evidentiary proof" that the requirements of Rule 23(a) are met: numerosity, commonality, typicality, and adequacy of representation. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). A plaintiff seeking to certify a Rule 23(b)(3) compensatory damages class also must demonstrate that common issues predominate and that a class action is the superior means of adjudication. A district court may grant class certification only if it is "satisfied, after a rigorous analysis," that the plaintiff has proven *all* the Rule 23 requirements. *Wal-Mart*, 564 U.S. at 350-51. A district court's class certification decisions are reviewed only for abuse of discretion. *See Califano v. Yamasaki*, 442 U.S. 682, 703 (1979).

The district court here ruled that, "*even if injury can be presumed*," Pet. App. 42a (emphasis supplied), petitioners had not met their burden of establishing adequacy of representation, predominance, and superiority, which are necessary requirements for a Rule 23(b)(3) class. *See supra* at 4-6. The Seventh Circuit held that the district court's ruling on these "independent" class certification factors was not an abuse of discretion. *Id.* at 6-7. The petition does not seek review of these case-specific issues.

Nevertheless, petitioners contend that "this case is a suitable vehicle to resolve whether an objection to subsidizing speech is required" for a First Amendment injury because "the Seventh Circuit's holding hinges on the notion that such an objection is necessary to establish a First Amendment injury." Pet. at 17. To the contrary, the Seventh Circuit's "holding" was that the district court did not abuse its discretion by denying, without prejudice, petitioners' class certification motion for the "independent … reasons" that petitioners failed to establish "adequacy of representation," "that the common questions predominate," and "that a class action is a superior method to adjudicate the controversy." Pet. App. 8a, 12a. Thus, the answer to the question whether "an objection is necessary to establish a First Amendment injury," Pet. at 17, could not change the judgment below.[2]

2. In addition to petitioners' error in describing the Seventh Circuit's holding, petitioners also mischaracterize the factual record here. The proposed class members here did not all "rebuff[] … solicitations … and choose *not* to join the union and pay union dues," and the district court did not ignore "their actual choice" and instead "speculate[]" that they desired to support the union, even though this is "impossible to believe." Pet. App. 13a (emphasis in original).

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[2] The lower courts were correct that, even if all proposed class members suffered a First Amendment injury, a personal assistant who "would have happily paid the fair-share fee" may not be entitled to §1983 compensatory damages. *See* Pet. App. 6a, 14a; *cf. Carey v. Piphus*, 435 U.S. 247, 260 (1978). In any event, petitioners have not sought review to address any questions concerning the proper measure of §1983 compensatory damages.

On the contrary, the record contains statistical and direct evidence, including more than 50 declarations from proposed class members, showing that many personal assistants within petitioners' proposed class would have joined the union earlier if they had understood they were not union members and understood how to join, *did* sign membership cards when they were contacted, and currently are union members who pay dues, even though they could resign from membership and pay nothing. *See* Dist. Ct. ECF 105, 106, 111-66. The district court found, and petitioners do not dispute, that "65% of the proposed class members who are still in the bargaining unit have since joined the union." Pet. App. 8a.

The district court was right to credit this evidence about the proposed class, which petitioners "d[id] not rebut" with their own evidence. Pet. App. 31a. Nor did petitioners accept "the district court['s] repeated[] invit[ations] … to suggest a more tailored class." Pet App. 12a. In any event, petitioners have not sought review of the case-specific issue whether the district court's factual findings were clearly erroneous on the record before that court.

3. This case would not, as petitioners claim, "present the Court with an opportunity to resolve the question that evaded it in *Friedrichs [v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016)]." Pet. at 8. The *Friedrichs* question to which petitioners refer was whether California could use an annual opt-out system to collect certain optional union fees. Illinois has never used an opt-out procedure for collecting union fees, so this case certainly could not be the vehicle for reviewing such a procedure.

Moreover, the Seventh Circuit's class certification analysis expressly assumed that "the First Amendment prohibits … fair-share fee deductions [for personal assistants] in the absence of affirmative consent." Pet. App. 13a. Thus, a ruling by this Court that "unions cannot seize nonchargeable fees without individuals' prior consent," Pet. at 16, could not change the judgment below.

4. Finally, petitioners urge that the petition should be held pending this Court's decision in *Janus v. AFSCME Council 31*, No. 16-1466, because "*Janus* may address the question presented here." Pet. at 18. For the reasons explained above, however, the answer to petitioners' "question presented here" about "First Amendment injury" could not change the judgment below because the judgment below rests on independent grounds.

The issue in *Janus,* moreover, is whether all "public sector agency fee arrangements [should be] declared unconstitutional." *Janus* Pet. i. This Court already declared such arrangements unconstitutional for the personal assistants here in *Harris*, and the lower courts' analysis of petitioners' class certification motion began from the premise that the prior fair-share arrangement was unconstitutional. Pet. App. 13a, 25a. Thus, there is no good reason to hold the petition pending a *Janus* decision nor to vacate the judgment below for reconsideration after a *Janus* decision.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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