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

PETITIONERS' REPLY BRIEF

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1. Respondents do not argue that the question presented is unworthy of review. Nor do they attempt to reconcile the lower courts' holding—that individuals must object to being compelled to subsidize union speech to suffer a First Amendment injury—with *Knox v. SEIU*, Local 1000, 567 U.S. 298 (2012), or *Harris v. Quinn*, 134 S. Ct. 2618 (2014).

Rather, Respondents argue the decisions below are not dependent on that holding, but also rest on independent findings that Petitioners did not satisfy the commonality, adequacy of representation, and Rule 23(b)(3) prerequisites for class certification. To the contrary, the lower courts held Petitioners did not satisfy those three prerequisites only and precisely because the courts incorrectly found an objection to an agency fee seizure to be necessary to establish an injury.

Commonality. SEIU argued below that "plaintiffs' claims are neither typical nor common because many class members *had no objections to financially supporting the union*." Pet.App. 34a (emphasis added). The district court, in response, held it "agreed that whether class members were injured (or what amount of damages would compensate for the injury, discussed below) is an individual question." *Id*. The Seventh Circuit affirmed that conclusion, and rejected Petitioners' position that an objection is unnecessary to establish a First Amendment injury. *Id*. at 5a–7a.

Adequacy of Representation. The district court found a conflict existed between Petitioners and the proposed class because the "subjective support of the union, or lack thereof, for each absent class member is central to this case, and not just a factor in the decision to seek a remedy." *Id*. at 40a. In so doing, the

court rejected Petitioners' positions that "liability turns on the lack of affirmative consent to the fair-share fees," and that "private motives and thoughts on unionization are irrelevant, because they do not affect the merits of the case." *Id*. at 39a. The Seventh Circuit affirmed, holding "differences in opinion regarding the Union and its activities go to the heart of both the question of consent to the fee collection and to the motivation to seek monetary damages against the Union." *Id*. at 11a.

Rule 23(b)(3). The district court found Rule 23(b)(3)'s predominance and superiority prerequisites were not satisfied because establishing damages required individualized proof of objection to the fee seizures. *Id*. at 41a–42a. The court reiterated its "conclusion that subjective beliefs about the fair-share fees are relevant, indeed paramount, to the availability and amount of relief here . . . ." *Id*. at 42a.[1] The Seventh Circuit "agree[d] with the district court that the question whether damages are owed for many, if not most, of the proposed class members can be resolved only after a highly individualized inquiry" that "would require exploration of not only each person's support (or lack thereof) for the Union,

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[1] SEIU misconstrues the district court's phrase "even if injury can be presumed . . ." to mean the court's class certification decision was not predicated on an objection requirement. *See* SEIU Br. 8 (quoting Pet.App. 42a). But, in that sentence, the court further stated: "plaintiffs' pursuit of refunds on behalf of a class requires individualized determinations that predominate over the remaining common questions." Pet.App. 42a–43a. The court believed "individual determinations" are necessary because it improperly held individual objections to the fee seizures are required to show damages. *See id*. at 34a–35a, 41a–42a.

but also to what extent the nonsupporters were actually injured." *Id.*

In short, the lower courts' class certification decisions are predicated wholly on the proposition that an objection to subsidizing SEIU's speech was necessary to establish a First Amendment injury. The district court recognized as much, acknowledging "the heart of the parties' arguments over class certification are the necessary elements of an injury in the context of compelled subsidization of third-party speech." *Id.* at 28a. Judge Manion, in his concurrence, similarly recognized the objection issue's centrality to the district court's holdings. *See id.* at 15a–19a. An objection requirement is the foundation upon which the decisions below were built.

2. Consequently, this case squarely presents the question of "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. Contrary to Respondents' arguments, the Court's answer to this question can both change the outcome of this case and resolve the constitutionality of "opt-out" systems for agency fee exactions.

First, a holding by this Court that forcing individuals to subsidize speech without their consent necessarily inflicts a First Amendment injury will invalidate the predicate of the lower courts' decisions. There will be no need for individualized proof of each class member's objection, nor any conflict relevant to the case's merits, just as Judge Manion recognized. *See* Pet. App. 16a–19a. The Seventh Circuit's decision will have to be reversed.

Second, a holding by this Court that the government inflicts a First Amendment injury when it compels individuals to subsidize speech without their consent will invalidate requirements that individuals opt-out of agency fee seizures. Individuals plainly cannot be required to opt-out of fee seizures that are unconstitutional in the first instance.

That Illinois has an "opt-in" system for agency fee exactions does not change this ramification in the slightest. Nor does it render this case an improper vehicle to decide the question presented. As explained in the Petition at 17–18, a class certification case, such as this one, is an excellent vehicle to resolve the objection issue because nonmembers who have not objected to subsidizing union speech only will be found in a plaintiff class.

3. The Court may resolve the question presented in this case in *Janus v. AFSCME Council 31*, No. 16-1466. If it does, and holds objections to agency fee seizures to be unnecessary, the Court should grant certiorari, vacate the Seventh Circuit's judgment, and remand the case for further consideration in light of *Janus*. Alternatively, if the objection question is not resolved in *Janus*, the writ should be granted so that this important question can be resolved conclusively in this case.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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May 21, 2018