No. 18-1120

In the Supreme Court of the United States

THERESA RIFFEY, SUSAN WATTS, STEPHANIE YENCER-PRICE, AND A PUTATIVE PLAINTIFF CLASS,
PETITIONERS,

v.

GOVERNOR JB PRITZKER, 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 JB PRITZKER

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QUESTION PRESENTED

Whether the district court abused its discretion when it denied a request to certify a class of personal assistants under Rule 23(b)(3) to seek a refund of fair-share fees after this Court had resolved the common constitutional question in *Harris v. Quinn*, 573 U.S. 616 (2014).

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STATEMENT

1. The Home Services Program is a state initiative that prevents the unnecessary institutionalization of people who require long-term care by delivering in-home services. 20 ILCS 2405/3(f); 89 Ill. Admin. Code §§ 676.10(a), 676.30. Some of the program's services are provided by "personal assistants," 89 Ill. Admin. Code §§ 676.30(u), 686.20, who are paid by the State and subject to state-imposed standards but are otherwise employees of the customers whom they serve, *see* 20 ILCS 2405/3(f); 89 Ill. Admin. Code §§ 676.10(c), 686.10. Personal assistants are classified as "public employees" for purposes of the Illinois Public Labor Relations Act ("Act"), 5 ILCS 315/3(n); 20 ILCS 2405/3(f), and may select an exclusive representative to collectively bargain with the State over those terms and conditions of employment that are within its control, *see* 5 ILCS 315/6(a).

The personal assistants chose respondent SEIU as their exclusive representative, Dist. Ct. Doc. 79 at 5–6, and SEIU entered into a collective bargaining agreement with the State, *see* Dist. Ct. Doc. 106-4. That agreement included a "fair share" provision requiring personal assistants who were not dues-paying union members to pay a fee to SEIU equal to their share of the costs of bargaining and administering the contract, *id.* at 12, as was permitted under the Act, *see* 5 ILCS 315/6(e).

2. Petitioners, three personal assistants who were not union members, filed suit, asserting that the fair-share fee requirement violated their First Amendment rights. Dist. Ct. Doc. 1. In addition to asking for declaratory and injunctive relief, the plaintiffs

sought damages from SEIU to recover the fees the union had collected. *Id.* at 17–18. The district court dismissed the complaint, Pet. App. 157a–78a, and the Seventh Circuit affirmed, concluding 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 140a–56a.

In *Harris v. Quinn*, 573 U.S. 616 (2014), this Court reversed the Seventh Circuit and held that the statutory provision permitting the collection of fair-share fees was unconstitutional as applied to personal assistants. Pet. App. 62a–111a. Reasoning that personal assistants were not full-fledged public employees, this Court declined to extend *Abood* to reach them and instead determined that the constitutional impingement caused by fair-share fees was not justified by sufficient state interests in this context. *Id.* at 90a–111a.

3. On remand, petitioners moved to certify a class under Federal Rule of Civil Procedure 23(b)(3) of all personal assistants who paid fair-share fees after April 22, 2008, to pursue the damages claims against SEIU. Dist. Ct. Doc. 81. The district court denied the motion, holding that the proposed class was too broad and that petitioners had failed to demonstrate that it complied with several of Rule 23's requirements. Pet. App. 38a–57a. Specifically, the court concluded that the proposed class did not satisfy the commonality and typicality requirements of Rule 23(a) because the damages claims necessitated individualized inquiries into the extent of the compensable injuries suffered by each member of the proposed class, and also that petitioners were not adequate class representatives under Rule 23(a)(4). *Id.* at 42a–54a. The court also

determined that the proposed class did not meet Rule 23(b)(3)'s predominance threshold because individual questions about the scope of relief were not amenable to class-wide resolution and a class action was not superior to other methods of adjudicating the damages claims. *Id.* at 55a–57a. In conclusion, the court explained that it was dismissing the motion without prejudice to petitioners' ability to revise their class definition or seek certification as to other issues. *Id.* at 57a.

The parties then filed a joint motion for entry of judgment. Dist. Ct. Doc. 186. They asked the court to award the damages sought by petitioners and issue an injunction preventing the collection of fair-share fees, while stating that petitioners were not waiving an appeal from the order denying class certification. *Ibid.* The district court entered judgment, awarding damages to petitioners and granting injunctive relief. Dist. Ct. Doc. 189.

The Seventh Circuit affirmed the denial of class certification. Pet. App. 15a–35a. It held that the district court did not abuse its discretion when it determined that petitioners 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 22a–28a.

Before reaching adequate representation and predominance, however, the Seventh Circuit addressed petitioners' argument that the damages claims did not present individual questions about the scope of relief because all class members suffered the same injury.

Id. at 18a–22a. While recognizing that *Harris* prohibited the collection of fair-share fees, the court reasoned that only those class members who did not want to pay the fee suffered a compensable injury, even if collecting the fee impinged upon the legal rights of all of them. *Id.* at 19a–21a. Citing evidence that 65% of the members of the proposed class who were still personal assistants had since joined SEIU, the Seventh Circuit explained that the district court's finding that many class members would have voluntarily paid a fee was reasonable. *Id.* at 21a–22a. The court declined to discuss the matter further because Rules 23(a)(4) and 23(b)(3) supplied additional, independent reasons for denying class certification. *Id.* at 22a.

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 the many class members who supported SEIU. *Id.* at 22a–26a. The court noted petitioners' proposal that those class members could opt out of the action, but decided that solution was lacking because "a class must meet Rule 23's requirements *before* class members are allowed to opt out of the action." *Id.* at 25a–26a (emphasis in original). And while a more tailored class may have been permissible, the Seventh Circuit noted that petitioners had rejected the district court's invitations to pursue that option. *Id.* at 26a.

Turning to Rule 23(b)(3), the court concluded that common questions did not predominate over individual ones because the primary issue that remained after *Harris* had resolved the class-wide constitutional

question was damages. *Id.* at 26a–27a. Adjudicating that issue required an inquiry into the extent to which each class member was injured by the collection of fees. *Id.* at 27a–28a. As a consequence, the Seventh Circuit held that the district court did not abuse its discretion when it found that the class action as proposed was not a superior method of litigating those individual questions. *Id.* at 28a.

Judge Manion concurred in the judgment but expressed the view that all class members suffered a compensable injury and that petitioners were adequate representatives of the class, disagreeing with the majority on those points. *Id.* at 29a–35a. 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 34a–35a. He thus agreed that the proposed class did not satisfy Rule 23(b)(3)'s requirements and stated that class members "have all the incentive in the world to pursue their individual claims and should not have trouble finding attorneys to help them in a case where the merits have mostly been decided and fees are recoverable." *Ibid.*

Petitioners filed a petition for a writ of certiorari. *See* Petition for Writ of Certiorari, *Riffey v. Rauner*, No. 17-981. This Court granted the petition, vacated the Seventh Circuit's judgment, and remanded for further consideration in light of *Janus v. American Federation of State, County & Municipal Employees*, 138 S. Ct. 2448 (2018). Pet. App. 14a.

4. On remand, the Seventh Circuit again affirmed the district court's denial of class certification, concluding that *Janus* did not require a different result on the narrow question before it, "namely, whether the class-action device is the proper one for the Assistants to use in seeking refunds of fair-share fees." *Id.* at 1a–12a. The court explained that *Janus*'s holding that all public-sector fair-share fee provisions were unconstitutional did not affect the remaining claims held by putative class members because *Harris* had already invalidated the fee requirement as to personal assistants. *Id.* at 6a. Its previous decision, the court explained, followed *Harris* "to the letter" by recognizing that the class-wide constitutional issue had been resolved, leaving individual damages as the only matter in dispute. *Id.* at 6a–7a.

Having determined that *Janus* did not speak to the limited class-action issue presented here, the Seventh Circuit found it unnecessary to reach the Rule 23(a) factors because the district court did not abuse its discretion when it decided that the proposed class did not satisfy Rule 23(b)(3)'s predominance requirement. *Id.* at 7a–10a. That decision, the court explained, was sensible in light of the individualized inquiry required to resolve the damages claims and the manageability concerns posed by litigating those questions as a class. *Id.* at 8a–9a. Disharmony within the proposed class also counseled against certification. *Id.* at 9a. The Seventh Circuit, noting that petitioners had "spurned the opportunity to suggest a narrower class," thus concluded that the district court "acted well within its authority" when it decided under Rule 23(b)(3) that petitioners had failed to establish that a class action

was the superior method of adjudicating their claims. *Id.* at 10a.

Judge Manion again concurred in the judgment but wrote separately to emphasize his conclusion that all class members had suffered a First Amendment injury. *Id.* at 11a. Although Judge Manion disagreed with some of the district court's reasons for denying class certification, he agreed with the majority that petitioners had failed to show that common issues predominated over individual ones and that *Janus* did not alter the outcome on that issue. *Id.* at 11a–12a.

REASONS FOR DENYING THE PETITION

The Seventh Circuit decided a narrow question as to the appropriateness of a class action under the unique facts of this case when it held that the district court did not abuse its discretion by finding that the proposed class failed to satisfy the requirements of Rule 23(b)(3). Recognizing that *Harris* already resolved the constitutional issue common to the class, the court focused on whether a class action was the best method for adjudicating the remaining claims for individual damages. As to that limited question, the majority held that the district court sensibly decided that common questions did not predominate and the proposed class would be difficult to manage, both because the extent of each person's damages depended on various individual factors and because conflicts of interest divided the class. Judge Manion, in fact, concurred in the judgment despite agreeing with petitioners' injury analysis, stating that the district court's findings on predominance and superiority under Rule 23(b)(3) should be upheld.

Petitioners ask this Court to review the denial of class certification, arguing that the Seventh Circuit ignored *Harris* and *Janus* and claiming that this case carries national importance. But neither assertion is accurate, and both overlook that answering the question presented in the way petitioners suggest would not change the result of even this case. In fact, this case is a poor vehicle for deciding the question presented by petitioners not only because class certification would be denied no matter how petitioners' question were decided, but also because it is unclear if petitioners have Article III standing to litigate the matter after they voluntarily settled their damages claims. In any event, the Seventh Circuit faithfully followed this Court's precedents, and petitioners cannot identify a conflict among the courts of appeals for this Court to resolve because there is none. Finally, petitioners' prediction that the Seventh Circuit's decision will have a widespread impact lacks support and rests on erroneous assumptions about the decision's effect. For these reasons, the petition for certiorari should be denied.

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

This case is not a suitable vehicle for answering the question presented for at least two reasons. First, as detailed in SEIU's brief, *see* SEIU Brief at 9–10, it is unclear whether petitioners have the personal stake in certifying the class needed to satisfy Article III given that they agreed to a judgment that fully resolved their damages claims following the denial of class certification. *See* Dist. Ct. Docs. 186, 189; *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 336 (1980) (holding that a party whose

individual claims were resolved over its objection may appeal the denial of class certification when the facts show that it retained a personal stake in obtaining class certification); *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 n.10 (1980) ("We intimate no view as to whether a named plaintiff who settles the individual claim after denial of class certification may, consistent with Art. III, appeal from an adverse ruling on class certification."); *see also Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 78 (2013) ("*Roper*'s holding turned on a specific factual finding that the plaintiffs[] possessed a continuing personal economic stake in the litigation[.]"). Thus, even if the question presented did warrant review, this Court should wait until it is presented in a case that is not beset by such jurisdictional uncertainty.

Second, the outcome of this case would not change if this Court were to agree with petitioners on their question presented and hold that all members of the proposed class suffered "a First Amendment injury and damages." To justify a departure from the usual rule "that litigation is conducted by and on behalf of the individual named parties only," a litigant seeking to initiate a class action must demonstrate that the putative class meets each applicable requirement of Rule 23. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348–49 (2011) (internal quotations omitted). A party bringing a class action under Rule 23(b)(3) must establish that the proposed class satisfies all requirements of Rule 23(a), as well as that common questions predominate over individual ones and that "a class action is superior to other available methods for fairly and efficiently adjudicating the controver-

sy." Fed. R. Civ. P. 23(b)(3); *see Wal-Mart*, 564 U.S. at 345. A district court's decision on class certification will not be disturbed absent an abuse of discretion. *See Califano v. Yamasaki*, 442 U.S. 682, 703 (1979).

To begin, a holding that all members of the putative class suffered a compensable injury would not change the result of the Rule 23(b)(3) predominance and superiority inquiry in this case. The district court made that clear when it stated that a class action was inappropriate "even if injury can be presumed." Pet. App. 56a–57a. The panel majority agreed, noting the deference given to the district court's findings on predominance and manageability. *Id.* at 8a–10a. And despite his disagreement with the district court's conclusion that not every putative class member suffered a compensable injury (the issue on which petitioners seek certiorari), Judge Manion agreed with the majority's conclusion that the class should not be certified. *See id.* at 11a–12a. As Judge Manion explained, petitioners did not meet their burden to establish that a class action was the superior method of adjudicating individual damages claims after *Harris* "where the merits have mostly been decided and fees are recoverable." *Id.* at 35a. Although petitioners argue that the lower courts' decisions were based on the conclusion that many class members did not suffer a compensable injury, *see* Pet. 16–17, that claim is at odds with the courts' statements to the contrary and the logic underpinning their decisions.

In addition, the injury issue has no bearing on petitioners' inadequacy as class representatives under Rule 23(a)(4). While the majority found it unneces-

sary to reach the Rule 23(a) factors on remand, it again noted the disharmony within the proposed class over whether to seek damages, given that most of the class members who were still personal assistants had joined SEIU. Pet. App. 7a, 9a. That conflict of interest would persist, and impede class certification, regardless of how the question presented were resolved. *See Wal-Mart*, 564 U.S. at 345 (stating that class must satisfy all prerequisites of Rule 23(a) in addition to one requirement of 23(b)). Consequently, this case is a poor vehicle for deciding the question presented by petitioners because resolving it in their favor would not change the Seventh Circuit's conclusion about the appropriateness of the proposed class.

II. 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 because no such conflict exists. Instead, they maintain that the appellate court misapplied this Court's precedents while deciding the class certification issue. *See* Pet. 8–13. But even if there were merit to petitioners' argument, this Court should follow its usual practice of allowing the issue to percolate among the lower courts before weighing in. More important, the Seventh Circuit never deviated from the constitutional principle that fair-share fees may not be collected absent affirmative consent when it considered the separate issue of whether a class action was the appropriate method for resolving individual claims for compensatory damages.

This Court has held that a union may not collect fees or dues from a nonmember's wages "unless the employee affirmatively consents to pay." *Janus*, 138 S. Ct. at 2486; *see also Harris*, 573 U.S. at 656 ("The First Amendment prohibits the collection of an agency fee from personal assistants in the Rehabilitation Program who do not want to join or support the union."); *Knox v. Serv. Emps. Int'l Union*, 567 U.S. 298, 322 (2012) (holding public-sector union "may not exact any funds from nonmembers without their affirmative consent"). Rather than ignore these decisions, as petitioners suggest, the Seventh Circuit began its analysis by recognizing that those precedents had already resolved the threshold constitutional question common to the class. *See* Pet. App. 6a ("'States and public-sector unions may no longer extract agency fees from nonconsenting employees.'") (quoting *Janus*, 138 S. Ct. at 2486), ("the Supreme Court has resolved the overarching common issues in this case: whether the First Amendment prohibits the fair-share fee deductions in the absence of affirmative consent (yes)") (internal quotations omitted). The court then turned to the remaining issue of whether the proposed class was a superior method for adjudicating claims for individual damages. *See id.* at 7a ("only one further point needed to be resolved on the *Harris* remand: whether the remaining issues concerning refunds of agency fees that were paid by nonconsenting employees could be resolved in a class action").

As to the separate issues of compensatory damages and the composition of the proposed class, the court reasoned that many class members may not be entitled to full refunds and held that the district

court did not abuse its discretion by finding that Rule 23(b)(3)'s requirements were not satisfied. *Id.* at 8a–10a. Contrary to petitioners' assertion that the court required a nonmember's subjective objection to find a constitutional violation, *see* Pet. 8–9, the court directly stated that the First Amendment prohibited the collection of a fee absent affirmative consent, Pet. App. 2a, 6a. Although petitioners fault the court for conducting a separate injury analysis, they overlook the basic distinction between a constitutional violation and a compensable injury. *See Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306–07 (1986) (stating that plaintiff must establish compensable injury in addition to constitutional violation to obtain damages under § 1983); *Carey v. Piphus*, 435 U.S. 247, 255 (1978) (holding that damages are available under § 1983 only for actions that violated constitutional rights and caused compensable injury). *Janus*, *Harris*, and *Knox* resolved the constitutional issue but did not discuss compensatory damages. Nothing in the Seventh Circuit's decision conflicts with this Court's precedents.

Similarly, petitioners' claim that the court resurrected an objection requirement is unfounded. *See* Pet. 10–13. The Seventh Circuit squarely held, consistent with *Harris* and *Janus*, that a union cannot collect fees absent affirmative consent. *See* Pet. App. 2a (stating that after *Harris* "no one could be compelled to pay fair-share fees"). SEIU, moreover, stopped collecting fees after *Harris* was decided, Dist. Ct. Doc. 186 at 2, and the district court entered an agreed judgment granting injunctive relief to that effect, Dist. Ct. Doc. 189. Petitioners' assertion that the Seventh Circuit's decision conflicts with this

Court's precedents thus conflates the separate issues of a constitutional violation and a compensable injury while ignoring the decision's direct compliance with *Harris* and *Janus*.

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

The Seventh Circuit's decision as to the narrow question of whether a class action was the superior method for adjudicating individual damages in this case is unlikely to have a widespread impact. Although numerous litigants have commenced class actions to recover fair-share fees following *Janus*, *see* Pet. 13–14, every court that has thus far confronted the issue has held that the union is entitled to a good-faith defense from liability, *see, e.g.*, *Babb v. Cal. Teachers Ass'n*, No. 8:18-cv-00994, 2019 WL 2022222, at *5 (C.D. Cal. May 8, 2019) (listing cases), thus rendering irrelevant any questions about the suitability of the proposed class. The Seventh Circuit's decision as to class certification is therefore unlikely to have any effect on these post-*Janus* proceedings. And even if this issue were to arise in other post-*Janus* cases, this Court would be able to address it then with the benefit of additional lower courts' views and in a case that is not burdened by the jurisdictional and other vehicle problems present here.

In addition, the Seventh Circuit's decision does not prevent anyone from seeking damages on an individual basis. Petitioners' claim that "the vast majority" of people who want a refund will be unable to obtain one outside of a class action is simply incorrect. *See* Pet. 15. The Seventh Circuit's decision imposes no

barriers on anyone's ability to pursue individual relief. As Judge Manion explained, those litigants "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." Pet. App. 35. Petitioners' concern that those individuals will be subject to interrogation into their personal beliefs is unfounded because any inquiry would be limited to their consent to paying a fee. *See* Pet. 15–16. In any event, the district court did not foreclose the possibility of class litigation when it denied certification without prejudice to revising the proposed class. *See* Pet. App. 57a.

Finally, petitioners' speculation that the Seventh Circuit's decision will give unions an incentive to collect fees even when they are prohibited is without support and undermined by the history of this case. *See* Pet. 16. The State and SEIU stopped deducting fees from personal assistants' paychecks after *Harris* was decided, Dist. Ct. Doc. 186 at 2, and the district court issued an injunction barring such agreements in the future, Dist. Ct. Doc. 189. Petitioners provide no basis for believing that unions will assess, or that States will participate in collecting, fees in defiance of this Court's precedent. Certiorari is unnecessary to protect against this unlikely scenario.

CONCLUSION

The petition for a writ of certiorari should be denied.

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