No. 18-1120

IN THE
Supreme Court of the United States

THERESA RIFFEY, *et al.*,

Petitioners,

v.

GOVERNOR J.B. PRITZKER, *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

ROBERT E. BLOCH
DOWD, BLOCH, BENNETT, CERVONE, AUERBACH & YOKICH
8 South Michigan Avenue
19th Floor
Chicago, IL 60603
(312) 372-1361
rebloch@laboradvocates.com

SCOTT A. KRONLAND
Counsel of Record
ALTSHULER BERZON LLP
177 Post Street
Suite 300
San Francisco, CA 94108
(415) 421-7151
skronland@altber.com

Counsel for Respondent SEIU Healthcare Illinois, Indiana, Missouri, Kansas

Mosaic - (301) 927-3800 - Cheverly, MD

QUESTION PRESENTED

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

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

A. Background

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. These personal assistants are "public employees" for purposes of Illinois' Public Labor Relations Act ("PLRA"). 20 ILCS 2405/3(f). In 2003, the majority of personal assistants chose collective bargaining representation. Pet. App. 45a.

Under the PLRA, 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 PLRA provided 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 included such "fair-share" or "agency fee" provisions.

Petitioners are three personal assistants who did not wish to support the union financially. They filed this lawsuit 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,* 573 U.S. 616 (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." *Id.* at 656. This Court remanded the case for further proceedings.

B. Proceedings after *Harris*

1. After *Harris*, the State and union immediately ended all fair-share fee deductions. 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 to seek compensatory damages under 42 U.S.C. §1983 for pre-*Harris* fee deductions. Petitioners' proposed damages class would have included every personal assistant who paid fair-share fees after April 22, 2008.

In opposing class certification, the union presented evidence that the proposed class included, *inter alia*, personal assistants who joined the union sometime after commencing employment but continued to have fair-share fees deducted by the State for a period of time after the assistants signed individual membership cards and asked to have union dues deducted. Dist. Ct. ECF No. 106 ¶21. Because there was often a lag of weeks or even months before the State processed membership cards, this kind of error was not uncommon.

The proposed class also included assistants who received financial benefits from union representation. For example, 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 No. 106 ¶¶14-15, 17.

In addition, the union presented evidence that many 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 or because they did not have contact with a union representative until after starting work in the unit. *See, e.g.*, Dist. Ct. ECF No. 106 ¶¶30, 33-36; ECF No. 111 ¶7; ECF No. 112 ¶3; ECF No. 113 ¶¶3-5; ECF No. 119 ¶7; ECF No. 122 ¶5; ECF No. 128 ¶5; ECF No. 137 ¶7. These personal assistants *did* subsequently sign membership cards that authorize dues deductions, and the district court found that "65% of the proposed class members who are still personal assistants have since joined the union." Pet. App. 22a.

The district court denied petitioners' motion for class certification on several independent grounds. Pet. App. 38a-57a. While petitioners take issue with one of those grounds—namely, the district court's reasoning 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"—the district court provided additional reasons for denying class certification, explaining that 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. 44a, 46a.

The district court found that petitioners failed to demonstrate that common issues would "predominate over any questions affecting only individual members," as required by FRCP 23(b)(3). Pet. App. 55a-56a. The district court reasoned that *Harris* already

had resolved "the central First Amendment question—whether fair-share fees can be deducted without consent." Pet. App. 56a. Thus, if a class were certified, damages determinations "for 80,000 potential class members would predominate." Pet. App. 55a-56a.

The district court also observed that, "even if injury can be assumed, the extent of the injury—the amount of damages beyond nominal damages" could require individualized inquiries. Pet. App. 49a. For example, if "the compelled payment resulted in some tangible benefit to the nonmember from the union, the deduction may not be an accurate measure of loss." Pet. App. 50a. Or, "[i]f the nonmember would have willingly paid a fair-share fee," the amount of the fair-share fee may not "be a measure of the interference in [his or her] First Amendment rights." Pet. App. 49a. Petitioners' proposal for class certification to resolve all damages issues therefore could present "significant manageability issues," yet petitioners "propose[d] no plan" to address them. Pet. App. 56a.

The district court also found that 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. 55a. The district court explained 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. 56a.

The district court also found that petitioners failed to demonstrate they would "fairly and adequately protect the interests of the class." FRCP 23(a)(4); *see* Pet. App. 50a-54a. Petitioners opposed union representation and would pursue relief even if doing so

"hampered or destroyed the union." Pet. App. 52a. By contrast, petitioners' proposed class definition would include many current union members who want effective union representation and were always willing to provide financial support for their union. Pet. App. 52a-54a.

The district court denied petitioners' class certification motion "without prejudice to [petitioners] revising their proposed class definition or seeking class certification on non-damages issues." Pet. App. 57a. 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. 49a.

Petitioners declined the district court's invitation to submit a revised class certification motion. 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. 36a-37a. Petitioners then appealed the denial of their class certification motion.

2. The Seventh Circuit affirmed the judgment. Pet. App. 15a-28a. Chief Judge Wood, writing for the majority, held that the district court "did not abuse its discretion in finding that the proposed class representatives failed the adequacy requirement" and that, even if 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."

Pet. App. 26a. The court of appeal agreed with the district court that assessing compensatory damages would involve an "individualized inquiry" into the extent of each person's actual injury, and thus the "district court was well within the bounds of its discretion to reject class treatment on these bases as well." Pet. App. 28a.

Judge Manion wrote separately to concur in the judgment. Pet. App. 29a-35a. In Judge Manion's view, every proposed class member suffered a "compensable injury" from the fair-share requirement and "may recover their money irrespective of their feelings towards the union." Pet. App. 29a, 32a. 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 wouldn't predominate over individual issues" and that "a class action wouldn't be superior in this case." Pet. App. 34a-35a. Judge Manion observed that while some prospective class members "might prefer a class action, … they 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. 35a.

3. Petitioners sought review in this Court. Their petition for writ of certiorari set forth a single 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. i, *Riffey v. Rauner*, No. 17-981, 2018 WL 367513 (Jan. 8, 2018). While the petition was pending, this Court decided *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018). In that

case, the Court overruled prior precedent and held that the First Amendment prohibits public employers from deducting union fair-share fees from payments to full-fledged public employees without their affirmative consent. *Id.* at 2486. The Court vacated the Seventh Circuit's judgment in this case and remanded for further consideration in light of *Janus*. Pet. App. 14a.

4. On remand, the Seventh Circuit again affirmed the district court's judgment. Pet. App. 1a-12a. The Seventh Circuit concluded that "*Janus* does not require a different result on the narrow question presented in our appeal, namely, whether the class-action device is the proper one for the Assistants to use in seeking refunds of fair-share fees." Pet. App. 2a. The court explained that *Janus* did not change the law with respect to petitioners, who "had *already* persuaded the Court to outlaw their agency fees." Pet. App. 6a (emphasis in original). The Seventh Circuit quoted from its previous decision on remand from *Harris*, which recognized that "the Supreme Court has resolved the overarching common issue in this case: whether the First Amendment prohibits the fair-share fee deductions in the absence of affirmative consent (yes)." *Id.*

Accordingly, the Seventh Circuit again upheld the district court's order denying petitioners' motion for class certification. Pet. App. 10a. The court saw "nothing approaching an abuse of discretion in the district court's decisions here that whatever common questions remain among the proposed class members do not predominate, and that 'a class action is [not] superior.'" Pet. App. 8a (quoting FRCP 23(b)(3)). The court also observed that the district court had denied petitioners' motion "without prejudice to a revised

class definition" but that petitioners had "spurned the opportunity to suggest a narrower class in favor of a 'go-for-broke' strategy." Pet. App. 9a-10a.

Judge Manion again wrote separately to concur in the judgment. Pet. App. 11a-12a. He reiterated his view that a First Amendment "injury is suffered regardless of whether the non-member employee opposed supporting the union through fair-share fees." *Id.* He continued to concur in the judgment because *Janus* did "not affect" his conclusion that it was not an abuse of discretion for the district court to hold that petitioners "failed to show common issues would predominate over individual questions, or that a class action would be superior to individual litigation." Pet. App. 11a.

REASONS FOR DENYING THE PETITION

This case is not a suitable vehicle for considering the question presented. As a threshold matter, there is a jurisdictional question as to whether petitioners retain a personal stake sufficient to satisfy Article III. If the question presented here is likely to recur, as petitioners contend, the Court should wait for a vehicle without jurisdictional problems. Additionally, both the district court and Seventh Circuit offered several grounds for rejecting class certification that are not encompassed within the question presented, such that a ruling on that question would not change the judgment below.

This case is also unworthy of review because the Seventh Circuit's decision does not, as petitioners claim, conflict with *Janus*, *Harris*, or *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012). Petitioners incorrectly elide the distinction between whether a constitutional violation occurred and whether and to

what extent a plaintiff is entitled to compensatory (as opposed to nominal) damages. The latter issue was not addressed by *Janus*, *Harris*, or *Knox*. The Seventh Circuit's opinion also responds to the particular facts of this case, and it is not clear that the issues addressed by the court of appeal will arise in other cases.

I. This Case Would Not Be a Suitable Vehicle for Review of the Question Presented

1. There is a threshold jurisdictional issue that could prevent the Court from reaching the question presented because petitioners may not retain a "personal stake" in the controversy sufficient to satisfy Article III. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016). Petitioners agreed to a judgment that granted them all the individual relief they sought and preserved their right to seek attorney's fees under 42 U.S.C. §1988. Pet. App. 36a-37a. The parties' joint motion for entry of judgment provided that petitioners did not waive their right to appeal the denial of their class certification motion, Dist. Ct. ECF No. 186, at 2, but litigants cannot stipulate to create Article III jurisdiction.

This Court held in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), that plaintiffs whose individual claims were involuntarily mooted had standing to appeal the denial of class certification, but the Court did so on the basis of a "specific factual finding" that "the named plaintiffs possessed an ongoing, personal economic stake in the substantive controversy—namely, to shift a portion of attorney's fees and expenses to successful class litigants." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 78 (2013). Here there was no such "finding," and the judgment preserves petitioners' ability to recover

attorney's fees from respondents pursuant to 42 U.S.C. §1988.

Additionally, in *Roper* the plaintiffs' claims were involuntarily mooted. It is not clear that the rationale of *Roper* extends further to cover situations, like this one, in which plaintiffs voluntarily settle their individual claims after the denial of class certification. *See Ruppert v. Principal Life Ins. Co.*, 705 F.3d 839, 844 (8th Cir. 2013) (holding that "when a putative class plaintiff voluntarily dismisses the individual claims underlying a request for class certification … there is no longer a self-interested party advocating for class treatment in the manner necessary to satisfy Article III standing requirements"); *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 100 (4th Cir. 2011) (same); *see also Pettrey v. Enter. Title Agency, Inc.*, 584 F.3d 701, 705 (6th Cir. 2009) (observing that "it is doubtful that there is a live controversy here because the named plaintiffs' claims were voluntarily relinquished").

Petitioners contend that the question presented here will arise in future cases. Pet. 13. The Court should therefore wait for a vehicle without a potential jurisdictional problem.

2. This case would not be a suitable vehicle for addressing the question presented for two additional reasons.

First, even an answer to that question in petitioners' favor would not change the judgment below. Although the Seventh Circuit judges had differing opinions about whether a nonmember's desire to support the union would be relevant to his or her claim for compensatory damages, all three judges agreed that class certification was properly

denied for reasons *independent* of that issue. Pet. App. 8a, 11a. Second, the question petitioners have articulated is not in fact presented by the decision below. The Seventh Circuit never held that a personal assistant would have to prove a "contemporaneous subjective opposition" to the union to recover damages.

"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*, 569 U.S. 27, 33 (2013). A plaintiff seeking to certify a Rule 23(b)(3) compensatory damages class must also 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, "presum[ing]" petitioners suffered a First Amendment injury, they still had not met their burden of establishing adequacy of representation under Rule 23(a)(4) or predominance and superiority under Rule 23(b)(3). Pet. App. 54a, 56a. The Seventh Circuit concluded

that there was "nothing approaching an abuse of discretion" in the district court's determination. Pet. App. 8a.

The Seventh Circuit offered several reasons for upholding the district court's exercise of discretion, one of which was that the court of appeal agreed with the district court's reasoning that a personal assistant's "support (or lack thereof) for the Union" would be relevant to claims for compensatory damages, so such claims would present individualized issues. Pet. App. 8a-9a. But the Seventh Circuit explained that the district court's reasoning that damages claims would present individualized issues was "not all that supports the district court's determination." Pet. App. 9a. For example, the "Union presented evidence of disharmony within the class." *Id.* Under Rule 23(b)(3), district courts must consider, in weighing whether a class action is "superior" to other methods of adjudication, "the class members' interests in individually controlling the prosecution … of separate actions." Pet. App. 7a (quoting FRCP 23(b)(3)(A)). The question presented does not encompass such issues.

Judge Manion concurred in the judgment. Although he apparently agreed with petitioners that nonmembers' feelings about the union would not be relevant to compensatory damages claims, Pet. App. 11a, 32a, he nonetheless concluded that the district court did not abuse its discretion in holding that "plaintiffs failed to show common issues would predominate over individual questions" at the damages stage, "or that a class action would be superior to individual litigation." Pet. App. 11a; *see also* Pet. App. 34a-35a. The answer to the question presented would not change that conclusion.

In addition, and contrary to what petitioners' question presented implies, the Seventh Circuit did not "hold[] that an objection to an agency fee seizure is required to establish injury and damages." Pet. 8. The court of appeal also said nothing about requiring an "objection" to paying fees. Pet. 8. Nor did the court of appeal specify the necessary elements of a claim for damages, as opposed to the elements of "individual defenses" that the "Union would be entitled to litigate … against each member." Pet. App. 9a. Nor did the court of appeal address the burden of proof on any issues. Petitioners' question presented is therefore premised on a mischaracterization of the ruling below.

In sum, the answer to the question whether an "objection to subsidizing union speech is required to prove … injury and damages," Pet. 16, would not change the judgment below, and that question is not actually presented by the Seventh Circuit's decision.

II. The Decision Below Is Not Worthy of this Court's Review

1. Petitioners' primary argument for review is that the Seventh Circuit's decision conflicts with this Court's decisions in *Janus*, *Harris*, and *Knox*. There is no such conflict, and therefore no such reason exists for review. Petitioners' theory that a conflict with those cases exists depends on a sleight of hand: petitioners elide the distinction between a constitutional *violation* and entitlement to compensatory damages for that violation. This Court has long recognized the distinction, and only the former issue was addressed in *Janus*, *Harris*, and *Knox*.

This Court made clear the distinction between a constitutional violation and entitlement to compensatory damages in *Carey v. Piphus,* 435 U.S. 247 (1978), which held that students whose due process rights had been violated were entitled to nominal damages, but a student "could recover compensatory damages only if he proved actual injury caused by the denial of his constitutional rights." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307, 308 n.11 (1986). Thus, a student who would have been suspended anyway, even after a proper hearing, might not have any compensatory damages to recover. *Carey*, 435 U.S. at 260. The same principle applies in First Amendment cases. *Memphis*, 477 U.S. at 309 ("whatever the constitutional basis for §1983 liability, such damages must always be designed to *compensate injuries* caused by the [constitutional] deprivation" (internal quotation marks omitted; emphasis and alteration in original)).

Janus, *Harris*, and *Knox* held that the collection of fees in those cases was not consistent with the Constitution. Petitioners contend that it "inexorably flows from [the] holdings" of *Janus* and *Harris* that individuals whose rights are violated also "suffer First Amendment injury and damages." Pet. 7. But no such conclusion flows inexorably from the finding of a constitutional violation, as this Court made clear in *Carey* and *Memphis*. A personal assistant who testifies that she believed she was a union member, wanted to financially support the union, and would have signed a membership card earlier had she realized the need to do so, *see, e.g.*, Dist. Ct. ECF No. 137 ¶7, has not necessarily suffered a monetary loss. And

Janus, *Harris*, and *Knox* simply did not address the issue of injury or compensatory damages.[1]

The Seventh Circuit's opinion is entirely consistent with the actual holdings of *Janus*, *Harris*, and *Knox*. *Knox* held that "when a public-sector union imposes a special assessment or dues increase, the union … may not exact any funds from nonmembers without their affirmative consent." 567 U.S. at 322. *Harris* held that 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." 573 U.S. at 656. And *Janus* held that, with respect to public employees, "[n]either an agency fee nor any other payment to the union may be deducted from a nonmember's wages … unless the employee affirmatively consents to pay." 138 S. Ct. at 2486.

Consistent with those holdings, the Seventh Circuit recognized that "the First Amendment prohibits … fair-share fee deductions in the absence of affirmative consent." Pet. App. 6a.

But the Seventh Circuit then went on to consider whether the district court had abused its discretion in concluding that, even if all proposed class members suffered a violation of their First Amendment rights, the resolution of claims for compensatory damages for the particular proposed class in this particular case would require an "individualized inquiry." Pet. App. 8a-9a. Because that issue was not addressed at all in

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[1] In *Janus*, the Court addressed "injury" only in the distinct context of Article III standing. 138 S. Ct. at 2462.

Knox, *Harris*, or *Janus*, there is no conflict that justifies review. Nor is there any basis for "summary reversal." Pet. 17.

2. Review is also unwarranted because it is not clear that the issues addressed by the Seventh Circuit will arise in other cases. Additionally, the Seventh Circuit's opinion addresses facts specific to this case that may not be present in cases with different records.

Petitioners urge that review is important because of pending lawsuits in which workers seek recovery of union fees they paid prior to this Court's ruling in *Janus*. Pet. 13-14 & n.2. But every district court to consider such a case has dismissed it on the merits because the unions were acting in good faith.[2] If the issues addressed by the Seventh Circuit ever do come up again, this Court will have the opportunity to address them at that point, in cases that squarely present damages issues on the merits (rather than in the context of class certification) and after they have percolated in the lower courts.

There is also no basis for petitioners' wild speculation that the Seventh Circuit's ruling will lead unions "to seize monies unlawfully from employees." Pet. 16. Unions that received fair-share fees before *Janus* were following this Court's precedents, not defying them, and the Seventh Circuit decision repeats the holding of *Janus* that "the First Amendment prohibits

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[2] *See, e.g.*, *Babb v. California Teachers Ass'n*, No. 8:18-cv-00994, 2019 WL 2022222, at *5-9 (C.D. Cal. May 8, 2019) (citing cases); *Mooney v. Illinois Educ. Ass'n*, No. 1:18-cv-1439, 2019 WL 1575186, at *2-11 (C.D. Ill. Apr. 11, 2019), *appeal filed*, No. 19-1774 (7th Cir.) (same).

the fair-share fee deductions in the absence of affirmative consent." Pet. App. 6a. Petitioner provides no evidence that public employers or unions are not following that holding. The district courts have uniformly concluded that public employers and unions are complying with *Janus*. *See, e.g., Babb*, 2019 WL 2022222, at *4.

This case also arose on a specific factual record that raised issues that may not be presented in future cases. Here, the union presented overwhelming evidence that many 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 or because they did not have contact with a union representative until after starting work in the unit. *See supra* at 2-3. These personal assistants *did* subsequently sign membership cards. Indeed, "65% of the proposed class members who are still personal assistants ha[d] since joined the union." Pet. App. 22a. Additionally, because of the lag between when a personal assistant signed a membership card and when the State began deducting dues instead of fair-share fees, it was common for personal assistants to pay fair-share fees *after* they had signed cards. *See supra* at 2.

The Seventh Circuit reasonably deferred to the district court's conclusion that, given these facts, the resolution of claims for compensatory damages for petitioners' proposed class (which included thousands of current union members) would require individualized determinations that would predominate over common issues. Pet. App. 8a-9a. That reasoning may not apply to other cases with different records.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

ROBERT E. BLOCH
DOWD, BLOCH, BENNETT, CERVONE, AUERBACH & YOKICH
8 South Michigan Avenue
19th Floor
Chicago, IL 60603
(312) 372-1361
rebloch@laboradvocates.com

SCOTT A. KRONLAND
Counsel of Record
ALTSHULER BERZON LLP
177 Post Street
Suite 300
San Francisco, CA 94108
(415) 421-7151
skronland@altber.com

Counsel for Respondent SEIU Healthcare Illinois, Indiana, Missouri, Kansas

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