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 J.B. 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

PETITIONERS' REPLY BRIEF

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ARGUMENT

A. The Seventh Circuit's Objection Requirement Cannot Be Reconciled With *Janus*, *Harris*, and *Knox*.

This case squarely presents the question whether "individuals from whom union fees were seized without their consent have to prove contemporaneous subjective opposition to that union to establish a First Amendment injury and damage?" Pet. i. After this Court vacated its prior opinion, the Seventh Circuit reiterated its previous holding that "'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, but also to what extent the non-supporters were actually injured.'" Pet.App. 8a–9a (quoting *id.* at 28a). The court also found "disharmony within the class" solely based on whether personal assistants supported or opposed SEIU. *Id.* at 9a. The district court, for its part, acknowledged that "subjective support of the union, or lack thereof, for each absent class member is central to this case." *Id.* at 54a.

Respondents' claims that the lower court denied class certification for other reasons are thereby baseless. The Seventh Circuit's decision was predicated on its holding that victims of agency fee seizures must prove they object to supporting a union to prove injury and damages. Pet.App. 8a–9a. If the Court rejects that holding, the Seventh Circuit's class certification decision collapses with it.

SEIU tries to square the Seventh Circuit's objection holding with *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), *Harris v. Quinn*, 573 U.S. 616 (2014)

(Pet.App. 68a), and *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012).[1] SEIU argues (at 13–16) that while those cases hold the collection of union fees without consent violates individuals' First Amendment rights, that does not mean individuals suffer damages as a result of those violations.

That makes no sense. Given unions have no lawful right to take individuals' money without their consent under *Janus*, it necessarily follows that unions injure individuals by taking their money without consent. *See Janus*, 138 S. Ct. at 2462 (recognizing the "petitioner was injured in fact by Illinois' agency-fee scheme"). That especially is true given it "cannot be presumed" that employees want to subsidize union speech. *Id*. at 2486. The damages owed for an unconstitutional fee seizure are simple: it is all monies wrongfully seized. *See* Pet. 9–10.

"A potential plaintiff's support of, indifference to, or hostility toward the union has no bearing on his or her entitlement to a refund of money taken without affirmative consent." Pet.App. 12a (Judge Manion, concurring in judgment). At most, such feelings may affect whether individuals *want* a refund. But it does not affect their *entitlement* to a refund.

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[1] Neither Respondent attempts to reconcile the Seventh Circuit's holding with the Court's pre-*Knox* case law establishing employees do not have to specify why they oppose subsidizing a union to prove damages. *See* Pet. 12–13.

The possibility that some personal assistants in the putative class may not want damages from SEIU is no impediment to class certification. It cannot be presumed that individuals do not want to be made whole for deprivations of their First Amendment rights, for "courts 'do not presume acquiescence in the loss of fundamental rights.'" *Knox*, 567 U.S. at 312 (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999)). The interests of any personal assistant who affirmatively wishes to decline damages to which they are entitled can opt-out of receiving that relief under Federal Rule of Civil Procedure 23(c)(2)(B)(v)'s opt-out procedure.

The Seventh Circuit's holding that a subjective objection to supporting SEIU is necessary to prove personal assistants suffered damages conflicts with *Janus*, as well as *Harris* and *Knox*. The Court already vacated that holding once for reconsideration in light of *Janus*. Pet.App. 14a. The Court should now, if it does not grant full review, summarily reverse the holding as inconsistent with *Janus*.

B. Petitioners Have Article III Standing.

In the district court, "Defendants agree[d] that Plaintiffs have not waived their right to appeal from the denial of their motion for class certification after entry of the proposed final judgment." Dist. Ct. ECF Nos. 186, at 2. The State and SEIU now renege on their agreement and argue Petitioners lack standing to appeal because that court entered final judgment in their favor. SEIU Br. 9–10; State Br. 8–9.

There is no jurisdictional problem. The Court has held that plaintiffs who are awarded final judgment and have an interest in recovering attorney fees can appeal the denial of class certification. *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 336–37, 340 (1980); *see also U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 399–400 (1980) (stating a "proposed class representative who proceeds to a judgment on the merits may appeal denial of class certification"); *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 393 (1977) (finding "the District Court's refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs, as [a respondent] concedes"). Petitioners' entitlement to attorney fees under 42 U.S.C. § 1988 partially depends on whether this appeal succeeds, as the district court's order reflects. *See* Pet.App. 37a (delaying resolution of attorney fees recovery until conclusion of appeal).

Petitioners did not, as SEIU asserts (at 10), "voluntarily settle their individual claims after the denial of class certification." Petitioners moved the district court for a final judgment in their favor, which the court granted. Dist. Ct. ECF No. 186; Pet.App. 36a. That SEIU chose to join the motion, rather than oppose it (which would have been futile given *Harris*), does not transform a favorable court judgment into a settlement. And as noted, winning a court judgment does not preclude a plaintiff from appealing a denial of class certification.

Indeed, a contrary result would be absurd: only plaintiffs with claims held *not* to be meritorious could

appeal denials of class certification, while plaintiffs whose claims are held meritorious (like Petitioners) could not. That is not, and cannot be, the law.

C. The Case Is Worthy of the Court's Review.

To recover damages for their injuries, the Seventh Circuit's decision requires victims of union fee seizures to endure "'a highly individualized inquiry'" and "exploration" into "each person's support (or lack thereof) for the Union." Pet.App. 8a–9a (quoting *id.* at 28a). The Court should repudiate this requirement because it needlessly impedes victims' ability to obtain relief both individually and on a class wide basis. *See* Pet. 13–16. Here alone, the requirement is permitting SEIU to retain $32 million it illegally seized from more than 80,000 personal assistants in violation of their First Amendment rights. *Id.* at 16.

The State asserts (at 14-15) "[t]he Seventh Circuit's decision imposes no barriers on anyone's ability to pursue individual relief." State Br. 14–15. To the contrary, a plaintiff having to suffer an interrogation over his or her personal beliefs about a union is a significant barrier and deterrent to pursuing relief. The Court recognized this in *Abood v. Detroit Board of Education* when it found that to require employees to specify why they oppose supporting a union "would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure." 431 U.S. 209, 241 (1977), *overruled by Janus*, 138 S.

Ct. 2448. The Court rejected the proposition that "as a prerequisite to any relief each [plaintiff] must indicate to the Union the specific expenditures to which he objects." *Id.* The Seventh Circuit has resurrected that prerequisite.

SEIU argues (at 16–17) this issue is not important because states and unions stopped seizing agency fees from public employees after *Janus*. SEIU, however, omits that states and unions continue to seize monies from nonconsenting individuals through other compulsory means. This includes through escape-period requirements under which the government deducts union dues from individuals' wages, over their express opposition, unless they opt-out during annual escape periods that are usually of 10 to 30-day duration. *See, e.g.*, *Fisk v. Inslee*, 759 Fed. Appx. 632, 633 (9th Cir. Jan. 9, 2019); *Belgau v. Inslee*, No. 18-5620, 2018 WL 4931602, at *1 (W.D. Wash. Oct. 11, 2018), *on appeal* 19-35137 (9th Cir.). Several states have passed laws that mandate or enforce escape-periods for stopping union dues deductions. *See, e.g.*, N.J. Stat. Ann. § 52:14-15.9e (as amended by N.J. P.L. 2018, c.15, § 6, eff. May, 18, 2018); Del. Code Ann. tit. 19, § 1304(c)(2) (as amended by 81 Laws 2018, ch. 240, § 1, eff. May 9, 2018). Under the Seventh Circuit's opinion, individuals who challenge these nonconsensual dues seizures may have to suffer explorations into their personal reasons for not wanting to subsidize the union's speech.

The Seventh Circuit's opinion also is a formidable obstacle to dozens of cases that seek damages for

agency fees seized before *Janus*. *See* Pet. 13–15. SEIU does not dispute that point. It instead argues that district courts have dismissed several of those cases on other grounds—that a good-faith defense shields unions from liability for their unconstitutional conduct. SEIU Br. 16. But the point remains that an objection requirement is a barrier to hundreds of thousands of agency-fee-seizure victims receiving some relief for longstanding violations of their constitutional rights. The Court should remove that barrier.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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