No. 10-719

IN THE

Supreme Court of the United States

DAVID H. SCHEFFER, MARY C. BERGEVIN, JOSEPH L. STEPHANY AND LAURA J. SWARTZENBERG,
Petitioners,

v.

CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 828; CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME, LOCAL 1000; AND THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,
Respondents.

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

PETITIONERS' REPLY BRIEF

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ARGUMENT

I. THE PETITION PRESENTS A LEGAL, NOT A FACT-BOUND, QUESTION FOR WHICH RESPONDENTS CITE NO AUTHORITY TO SUPPORT THE REJECTION OF CLASS COUNSEL PROVIDED BY A LEGAL AID ORGANIZATION.

Respondents Civil Service Employees Association, Local 828; Civil Service Employees Association,

AFSCME, Local 1000; and American Federation of State, County and Municipal Employees, AFL-CIO (collectively "CSEA") argue that the Petition for Writ of Certiorari only presents a "fact-bound question" of whether the refusal to appoint Plaintiffs' attorneys as class counsel was "well grounded in the record." Brief in Opposition ("Opp.") at 1, 7-11.

The Petition neither asks this Court to review evidence nor to discuss specific facts. The issue presented is not whether the lower court's decision denying the application of class counsel was "well grounded in the record." Instead, the issue is whether Federal Rule of Civil Procedure 23(g) ("Rule 23(g)") or the First Amendment permits the type of "fact-bound" inquiry in which the district court engaged and the Second Circuit affirmed. That is a legal question—indeed, a constitutional one going to the heart of freedom of speech and association for purposes of litigation—which this Court should review.

CSEA does not discuss or respond to the actual question of law the Petition presents. CSEA cites no authority supporting the lower court's decision to consider the ideological views of the public-interest legal aid organization in determining an individual counsel's ability to fairly and adequately represent the class under Rule 23(g).

Neither does CSEA respond to *amici curiae*'s argument that this case raises a critical issue for attorneys employed by, or affiliated with, public-interest or legal services organizations, and that review by this Court is necessary to ensure that federal courts do not engage in an ideological conformity check to determine which political viewpoints are appropriately orthodox in future Rule 23(g) proceedings. *See Brief Amicus Curiae* of Center for Constitutional

Jurisprudence, Atlantic Legal Foundation, and Mackinac Center for Public Policy in Support of Petitioners.

Although the Rule 23(g) determination whether an attorney seeking appointment as class counsel will "'fairly and adequately represent the interests of the class' is a matter within the district court's discretion," Opp. at 8, application of the wrong legal standard is an abuse of discretion. *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990). The Petition asks the Court to determine the proper legal standard. The only issue presented is the legal question whether a district court may refuse to appoint class counsel on the basis of the views of the supporting legal aid organization, rather than on an assessment of the attorneys' actual experience and conduct in litigating the case.[1]

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[1] The only "inappropriate" conduct of Plaintiffs' attorneys the district court suggested was the request for full restitution and punitive damages contained in the original complaint. Pet. App. at 33a, 38a-39a. The Petition explains the legitimate reasons for the initial request for these remedies and their subsequent abandonment prior to the district court's ruling on the application for appointment as class counsel. Pet. at 9. Yet, the district court justified its denial of the application as if those remedies were still in play. Pet. App. at 39a; *accord* Opp. Pet. at 4, 9, 11.

The more limited relief actually sought when the district court denied class counsel status to Plaintiffs' attorneys was something far different from that described by CSEA and the court below. The requested relief was not "diametrically opposed to the economic interests of the members of the class [Plaintiffs] sought to represent." Opp. at 10. Instead, the supplemental pleadings sought only: 1) adequate First Amendment due process notice under *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), which is in all nonmembers' interest; and 2) constitutionally chargeable fees that excluded the nonchargeable organizing costs, which is in the economic interest of the subclass of objectors. CA2 App. at 293-94, 305-07.

II. RESPONDENTS VIRTUALLY CONCEDE A SPLIT AMONG THE CIRCUITS ON WHETHER SPECULATIVE CONFLICTS CAN BE THE BASIS OF RULE 23 DECISIONS.

Although arguing that no constitutional issue or split in appellate authority is presented, Opp. at 11-17, CSEA eventually concedes a split. "Notwithstanding petitioners' attempt to create the appearance of a circuit split, there is in fact no disagreement among the circuits about the holding of *Gilpin* [v. *AFSCME*, 875 F.2d 1310 (7th Cir. 1989)]." Opp. at 13. However, *Gilpin* and the circuits that followed it, including the Second Circuit, did so on the assumption that within every nonmember class there are two conflicting groups: 1) those who are hostile to unions on political and ideological grounds and want to weaken and, if possible, destroy the union; and 2) those who are happy to reap the benefits of union representation but have declined union membership because they do not want to pay any more for that representation than they are forced to. Opp. at 12-13.

Those circuits, including the Ninth Circuit, that refuse to follow *Gilpin* do so because they require empirical evidence of the existence of the two types of nonmembers and a concrete divergence of interests within the class before they will find conflict that will deny class certification or appointment of class counsel. See Pet. at 19-21. As CSEA admits, there is a split among the circuits on whether speculative conflicts can be the basis of Rule 23 decisions or whether empirical evidence of diverging interests within the class is required.

> To the extent there exists any disagreement between [the Ninth Circuit] and the other courts cited, it is at most about whether . . . the existence in a particular bargaining unit of the "free rider" type of nonunion member . . . can properly be assumed, or whether it must be proved up through evidentiary submissions.

Opp. at 14.

That the Ninth Circuit and others, *see* Pet. at 19-21, correctly reject assumptions of class conflict is highlighted by the nature of the speculation the court below accepted. CSEA uses that speculation to justify its opposition to the Petition. In numerous places, both the district court and CSEA accept what they see as "the obvious proposition that public employees—whether union members or not—would be unlikely to find [the Foundation's motives for taxpayers of holding down public employee salaries and benefits] in their interests." Opp. at 17 n.6; *accord id.* at 9, 15; Pet. App. at 36a-39a, 41a.

However, this is not an obvious or self-evident proposition. As both Second Circuit Chief Judge Jacobs, Pet. App. at 27a, and *Harrington v. City of Albuquerque*, 222 F.R.D. 505, 520 (D.N.M. 2004) recognized, public employees are also taxpayers. *See* Pet. at 28 & n.42. This Court has recognized that the "worker and union cannot be said to speak with one voice." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 521 (1991); *accord Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977). Moreover, whatever the indirect benefit for taxpayers might be, counsel's successful goal of reducing the union fees objecting nonmembers must pay will provide an immediate and direct increase in that subclass' take-home pay.

III. COURTS ENJOY MANY WAYS TO PROTECT ABSENT CLASS MEMBERS OTHER THAN BY DISQUALIFYING CLASS COUNSEL FOR IDEOLOGICAL REASONS.

CSEA cites *Hansberry v. Lee*, 311 U.S. 32 (1940), to support the lower courts' rejection of Plaintiffs' attorneys as class counsel. *See* Opp. at 13, 16. *Hansberry* does not forbid class actions. It simply holds that some class actions will not bind a subsequent class where class members have demonstrated direct and diametric opposition to the central goal of the previous lawsuit.[2] As the Fifth Circuit has held, neither does it forbid class actions in every case in which a class member might disagree with the plaintiffs' assertion of rights. In many cases, some class members will wish to assert their rights while others will not, but that does not defeat class certification or the appointment of class counsel. *See Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 486-88 (5th Cir. 1982).

Hansberry mandates concern for adequate protection of absent class members, but that concern does not preclude certification. As a device by which the claims of many individuals can be resolved simultaneously, the class suit both eliminates the possibility of repetitious litigation and, as here, provides individuals with a method of obtaining redress for claims that would otherwise be too small to warrant individual litigation. *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979).

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[2] In fact, Rule 23 makes no mention of conflicts. The rule's requirement is that the class be "fairly and adequately" represented. Thus, Rule 23(g)(4) states: "Class counsel must fairly and adequately represent the interests of the class."

Courts enjoy many ways to protect absent class members other than by disqualifying class counsel for ideological reasons that are not legally valid. For example, under the notice and opt-out procedures of Rule 23(b)(3) and 23(c)(2), an absent class member may evaluate his position in the class and decide whether to avail himself of the representation offered by class counsel. Moreover, the district judge can assure fairness of representation through his ability to decertify or create subclasses.

IV. EVEN AFTER THE MERITS DECISION, THERE IS A SIZABLE SUBCLASS ENTITLED TO DAMAGES ON THE SUCCESSFUL CHARGEABILITY CLAIM.

CSEA misleads the Court with the suggestion that the Second Circuit's merits determinations[3] make class certification moot, thereby diminishing the importance of this case. Opp. at 17-18. This is simply untrue.

Hundreds, if not thousands, of public employees were denied the benefit of class relief solely because the district court made a political and philosophical judgment about the supporting public-interest organ-

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[3] The Second Circuit affirmed the district court's judgment in favor of CSEA with respect to CSEA's use of the local union presumption in its *Hudson* notice sent to all nonmembers, Pet. App. at 17a-22a, but reversed on the chargeability of organizing expenses to objecting nonmembers on the grounds that Plaintiff probation officers "derive little meaningful benefit" from CSEA's efforts to organize private-sector workplaces in the developmental disability, food service, and courier industries. *Id.* at 14a-17a.

ization.[4] Even after the merits decision, there is a sizable subclass entitled to damages on the successful chargeability claim. That subclass consists of all objecting nonmember probation officers statewide and other objecting nonmembers not in the developmental disability, food service, and courier occupations on which the constitutionally nonchargeable organizing activities were targeted. Although on remand the subclass of objectors will have to be narrowed to eliminate objectors in those three occupations, the restructured subclass will still have a common claim on which its members will be entitled to a refund of that portion of their forced fees CSEA used for organizing since November 2002.[5]

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[4] Plaintiffs requested a class of all public-sector employees represented by CSEA who were not union members for the *Hudson* notice claim, and a subclass of nonmembers who had specifically objected to the union's use of their money for nonbargaining activities for the "nonchargeability of organizing" claim. Pet. at 9. The request for a subclass of objectors is faithful to this Court's decision in *Machinists v. Street*, 367 U.S. 740, 774 (1961), which relied on *Hansberry* in limiting relief for the exaction of nonchargeable funds to those who specifically object to the exaction.

[5] Resolution of the question the Petition presents would change the result reached below in another way. Like the subclass of objectors, there remain a large number of nonmembers not employed in the developmental disability, food service, and courier occupations. Although on remand a subclass of the nonmembers not in those three occupations will have to be created, this subclass will still have a common claim. Its members will be entitled to a new *Hudson* notice with correct information that organizing is not a chargeable expenditure, a recalculation of the chargeable and nonchargeable amounts, and a renewed opportunity to object and receive the nonchargeable portion back with interest. *Cummings v. Connell*, 316 F.3d 886, 895 (9th Cir. 2003). Certification of the full class will also benefit CSEA

V. THE LOWER COURT'S ANALYSIS OF THE POLITICAL POSITIONS OF THE PUBLIC-INTEREST ORGANIZATION PAYING FOR THE LEGAL REPRESENTATION IS QUINTESSENTIAL VIEWPOINT DISCRIMINATION

CSEA contends that the district court's refusal to appoint Plaintiffs' attorneys as class counsel raises no "First Amendment issue of any kind." Opp. at 15. It further claims that Petitioners' suggestion that the district court engaged in "impermissible 'viewpoint discrimination' . . . borders on the frivolous." *Id.* at 16-17. However, the district court analyzed the political positions of the public-interest organization paying for the representation and then determined that those positions are not in the best interests of members of the proposed class. Pet. App. at 35a-37a, 39a. That is quintessential viewpoint discrimination. As *amici* explain, "[i]nterpreting Rule 23 to permit such an analysis will necessarily require federal district courts to disrupt relationships that this Court has determined are protected by the First Amendment and will further require those courts to determine what political viewpoints are appropriately orthodox in particular class action litigation." *Amicus* at 9-10, *see id.* at 9-12; Pet. at 29-34.

As *amici* also recognize, this case raises a critical issue for attorneys employed by or affiliated with public-interest legal organizations. *Amicus* at 3.

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by binding all nonmembers to the ruling upholding CSEA's use of the "local presumption" in its *Hudson* notice.

Because this Court recognizes that civil rights claimants benefit from the class action device,[6] addressing constitutional injustices through public-interest class actions is an important engine of accountability in American public life.[7] In general, civil rights litigation has been unattractive to the private bar. Consequently, civil rights laws historically have been enforced by groups from the NAACP Legal Defense Fund to the ACLU, to the National Right to Work Legal Defense Foundation, along with other public-interest legal aid organizations.[8] As Justice Marshall noted: "[T]he phrase 'public interest law' . . . refer[s] to the diffuse efforts aimed at providing legal resources for the unrepresented. . . . [P]ublic interest law is necessary to create a balance in the legal system, to assure that all interests get a fair chance to be heard with the help of a lawyer."[9] Thus, public-interest legal organizations have become an estab-

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[6] *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977); *see also* Meghan E. Changelo, *Reconciling Class Action Certification with the Civil Rights Act of 1991*, 36 Colum. J.L. & Soc. Probs. 133, 135 (2003).

[7] Peter Margulies, *The New Class Action Jurisprudence and Public Interest Law*, 25 N.Y.U. Rev L. & Soc. Change 487, 499 (1999); *cf.* William H. Simon, *The Practice of Justice: a Theory of Lawyers' Ethics* 128 (Harv. Univ. Press 1998) (tracing public-interest law back to Justice Brandeis and noting that Brandeis' work was "designed to level the playing field by providing representation to underorganized interests"); *id.* at n.55.

[8] Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 Vand. L. Rev. 905, 951 (1978).

[9] Justice Thurgood Marshall, Financing Public Interest Law: The Role of the Organized Bar, Speech before the Amer. Bar Ass'n Activities Section Award of Merit Luncheon (Aug. 10, 1975), *in "Public Interest" Litigation* 415, 416 (Practicing L. Inst. 1975).

lished social movement that plays a distinctive role in the American legal system.[10]

As a general matter, to allow federal district courts to determine whether the viewpoints of public-interest legal organizations providing attorneys to plaintiffs and class members are consonant with the presumed and speculative viewpoints of class members is to invite suppression of those individuals' rights. It will also diminish the presence of those organizations that use litigation as a means of political expression in the American legal system, a type of political expression which this Court has protected since at least *NAACP v. Button*, 371 U.S. 415 (1962). In this case, the rulings of the courts below on this issue also are an assault on the fundamental First Amendment rights of employees to vindicate their rights through litigation.

CONCLUSION

The Petition raises an important question of law affecting the whole public-interest legal aid community: whether a district court can consider the ideological views of the legal aid organization that is providing the attorneys for a class action in deciding whether those individual attorneys can fairly and adequately represent the class. Review by this Court is necessary to ensure that federal courts do not conduct unbounded inquiries into the political and ideological viewpoints of such legal organizations in making decisions about class counsel under Rule 23.

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[10] Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Practice: 1975-2004*, 84 N.C. L. Rev. 1591, 1592 (2006).

For the foregoing reasons, Petitioners urge the Court to grant their petition, issue a writ of certiorari to the United States Court of Appeals for the Second Circuit, and set the case for plenary briefing and argument on the important questions presented.

Respectfully submitted,

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