

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS

\_\_\_\_\_  
THERESA RIFFEY, et al.,

Plaintiffs,

v.

GOVERNOR BRUCE RAUNER, in his  
official capacity as Governor of the State of  
Illinois; and SEIU HEALTHCARE  
ILLINOIS & INDIANA,

\_\_\_\_\_  
Defendants.

No.: 10-cv-02477

Judge:  
Honorable Manish S. Shah

Magistrate Judge:  
Honorable Michael T. Mason

**DEFENDANT SEIU HCII's MEMORANDUM IN OPPOSITION  
TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

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## INTRODUCTION

Prior to the Supreme Court's decision in *Harris v. Quinn*, Illinois automatically deducted union fair-share fees from the State's payments to homecare workers ("person assistants") who had not become union members. These deductions were authorized by state law and collective bargaining agreements between the State and the union. The same collective bargaining agreements that included the fair-share provision provided for the State to pay wage increases that exceeded the fair-share fees. Plaintiffs are three homecare workers who allege that the fair-share requirement violated their First Amendment rights by compelling them to subsidize union speech and petitioning. Plaintiffs seek to represent a class that comprises the approximately 80,000 homecare workers who paid fair-share fees to pursue monetary damages in excess of \$30 million.

Plaintiffs' class certification motion should be denied because a fundamental conflict of interest precludes Plaintiffs from adequately representing the class. The class would include many homecare workers who support the union and the fair-share requirement, and oppose the relief plaintiffs are seeking. Class certification also should be denied because common issues would not predominate. Homecare workers who had no First Amendment objection to supporting their union representative suffered no First Amendment injury from the former fair-share system. Their fees paid for union representation that they received. The contemporaneous, subjective views of homecare workers could be determined only through individualized proof.

## BACKGROUND

1. Illinois pays personal assistants to deliver home-based care to elderly and disabled individuals to carry out the State's Home Services Program, also known as the Rehabilitation Program. The personal assistants are "public employees" for purposes of Illinois' Public Labor Relations Act ("IPLRA"). 20 ILCS 2405/3(f). In 2003, after the majority of personal assistants

chose representation by SEIU Healthcare Illinois & Indiana (“Union”), the State recognized the Union as the collective bargaining representative of the personal assistant bargaining unit. Kelleher Decl. ¶¶7-8.<sup>1</sup>

Prior to gaining union representation the personal assistants were an essentially invisible workforce in a low-wage, high-turnover, no-training occupation. Kelleher Decl. ¶2. Since 2003, the Union has negotiated collective bargaining agreements (“CBAs”) with the State that raised wages from \$7.00 per hour to \$13.00 per hour and provide health benefits, paid training, a grievance/arbitration procedure, and many other improvements in employment terms. Kelleher Decl. ¶¶11-17.

2. The IPLRA provides that a union acting as an exclusive 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) (emphasis added). To help cover the cost of that representation, the IPLRA provides that the CBA “may include . . . a provision requiring employees covered by the agreement 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 Supreme Court held in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), that such fair-share provisions are consistent with the First Amendment when the union has a legal duty to represent all unit workers, as long as the fee is limited to costs germane to collective bargaining. *Id.* at 225-26.

The CBAs between the State and Union included fair-share provisions. Kelleher Decl. ¶18. The State implemented those provisions by automatically deducting fair-share fees from the

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<sup>1</sup> All cited declarations are filed with this Memorandum.

State's payments to personal assistants who had not become Union members. Kelleher Decl. ¶19. Personal assistants who chose to become Union members paid membership dues, which were higher than fair-share fees because membership dues include payments for union activities not germane to collective bargaining, such as political activities. Kelleher Decl. ¶¶19-20.

3. Plaintiffs filed this lawsuit on April 22, 2010 against the State and Union, alleging the fair-share requirement violated their First Amendment rights. Doc. 1. On November 12, 2010, this Court dismissed the claim, reasoning that the State functions as an employer of the personal assistants and, therefore, the fair-share provision fell within "longstanding Supreme Court precedent." Doc. 56 at 16. The Court agreed with an earlier court decision involving California homecare workers that reached the same conclusion. *Id.* at 15-16. The Seventh Circuit unanimously affirmed. "[B]ecause of the significant control the state exercises over all aspects of the personal assistants' jobs," the panel had "no difficulty concluding that the State employs [the] personal assistants" and, therefore, that the fair-share provision was lawful under *Abood*. *Harris v. Quinn*, 656 F.3d 692, 698-99 (7th Cir. 2011).

The Supreme Court reversed in a 5-4 decision issued on June 30, 2014. *Harris v. Quinn*, 134 S. Ct. 2618 (2014). The dissenters agreed with the Seventh Circuit that the State jointly employs the homecare workers and, therefore, that the case was controlled by *Abood*. *Id.* at 2646-51 (Kagan, J., dissenting). The majority, however, harshly criticized the Supreme Court's own reasoning in *Abood* and decided to "confine *Abood*'s reach to full-fledged state employees." *Id.* at 2638 (majority opinion). The majority held that "[t]he 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." *Id.* at 2644.<sup>2</sup>

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<sup>2</sup> The Supreme Court recently granted review of a case presenting the question whether *Abood* should be overruled. See *Friedrichs v. CTA*, Case No. 14-915.



4. After the Supreme Court's decision in *Harris*, the State and Union agreed that the State should stop deducting fair-share fees. Kelleher Decl. ¶23; Stone Decl. ¶9. The parties also amended their 2012-2015 CBA to eliminate the fair-share provision. Kelleher Decl. ¶24, Ex. E; Stone Decl. ¶10. No fair-share fees have been collected for work performed after June 30, 2014. Kelleher Decl. ¶¶23-24; Stone Decl. ¶9; *see also* Hannah Decl. ¶14. The parties have no intention of including a fair-share provision in future CBAs. Kelleher Decl. ¶25; Stone Decl. ¶¶11-12.

5. On May 20, 2015, after remand of this case, Plaintiffs moved to certify a class pursuant to Rule 23(b)(3) that comprises every personal assistant who had fair-share fees deducted from April 22, 2008 to the end of fair-share deductions and who was not a Union member at the time. Doc. 80 at 1. Plaintiffs seek certification of the class to seek recovery from the Union of all these fair-share fees. Doc. 81 at 1. The putative class would include about 80,000 personal assistants, and the fair-share fees they paid during the six-year class period would total about \$32 million. Kelleher Decl. ¶¶26, 29. By way of comparison, the total membership dues paid by all Union members in 2014 was about \$7.3 million. *Id.* ¶27.

Plaintiffs' class certification motion is not supported by any evidence to show that the putative class members, who all received the benefits of union representation, had any objection at the time to paying their fair share for the costs of that representation. Nor do Plaintiffs present evidence that it is possible to determine, without individualized proof, the contemporaneous, subjective views of individual putative class members about supporting their union representative.

## ARGUMENT

### **I. A Class Action May Be Maintained Only If The Plaintiff Demonstrates That All The Rule 23 Requirements Are Satisfied.**

"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*, 131 S. Ct. 2541,

2550 (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 satisfied: numerosity, commonality, typicality, and adequacy of representation. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013); *Harper v. Sheriff of Cook Cnty.*, 581 F.3d 511, 513 (7th Cir. 2009). Plaintiffs here seek to certify a Rule 23(b)(3) class, so they also must demonstrate that common issues predominate and that a class action is the superior means of adjudication. *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012).

“[A] district court has broad discretion to determine whether certification of a class is appropriate.” *Retired Chicago Police Ass’n v. City of Chicago*, 7 F.3d 584, 596 (7th Cir. 1993). The 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*, 131 S. Ct. at 2551. The court’s analysis may “entail some overlap with the merits of plaintiff’s underlying claim” because “the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.” *Id.* at 2551-52 (punctuation and citations omitted).

## **II. The Adequacy Of Representation Requirement Is Not Satisfied.**

### **A. A class action cannot be maintained if there is a fundamental conflict between the plaintiff and a substantial portion of the class.**

Rule 23(a)(4) precludes class certification unless “the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). “The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class . . .” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). “It is axiomatic that a putative representative cannot adequately protect the class if the representative’s interests are antagonistic or in conflict with the objectives of those being represented.” 7A Wright, Miller & Kane, Federal

Practice and Procedure 3d §1768 at 389. Adequacy of representation is not just a requirement of Rule 23: “To satisfy constitutional due process concerns, absent class members must be afforded adequate representation before entry of a judgment which binds them.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). That principle can be traced to *Hansberry v. Lee*, 311 U.S. 32 (1940), which held that property owners who sought to enforce a racially restrictive covenant could not represent a class that included owners who did not want the covenant enforced. *Id.* at 45. The Supreme Court held that “a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires.” *Id.*<sup>3</sup>

Thus, in *Gilpin v. AFSCME*, 875 F.2d 1310 (7th Cir. 1989), the Seventh Circuit held that the “district judge was right not to certify the suit as a class action” when the plaintiffs sought monetary damages against a union “on behalf of . . . 10,000 nonunion members” because “[a] potentially serious conflict of interest within the class precluded the named plaintiffs from representing the entire class adequately.” *Id.* at 1313. The *Gilpin* plaintiffs alleged the union had violated the First Amendment by failing to properly collect agency fees, and they sought a refund of all the agency fees. *Id.* The Seventh Circuit reasoned that this type of essentially “punitive” relief, which might “confer a windfall” on the class members and “embarrass the union financially,” was “consistent with — and only with — the aims of the . . . type of employee” who “is hostile to unions on political or ideological grounds” and wants to “weaken and if possible destroy the union.” *Id.* The plaintiffs’ objective was not consistent with the interests of workers

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<sup>3</sup> See also *Mayfield v. Dalton*, 109 F.3d 1423, 1427 (9th Cir. 1997) (plaintiff military personnel challenging constitutionality of a DNA repository were not adequate representatives of class members who approved of the repository); *Peterson v. Okla. City Hous. Auth.*, 545 F.2d 1270, 1273 (10th Cir. 1976) (plaintiffs challenging security deposit in public housing could not adequately represent class members who thought security deposit beneficial); *Dierks v. Thompson*, 414 F.2d 453, 456 (1st Cir. 1969) (disagreement on appropriate investment strategy for pension plan precluded class certification).

who are not union members but “have no desire to ruin the union or impair its ability to represent them effectively,” so the case could not be a class action. *Id.*<sup>4</sup>

Similarly, *Schlaud v. Snyder (Schlaud I)*, 717 F.3d 451 (6th Cir. 2013), upheld the denial of class certification in another case very similar to this one. The *Schlaud* plaintiffs sought certification of a class of child care providers who had union dues or fees deducted from their subsidy checks. *Id.* at 455. Alternatively, plaintiffs sought certification of a subclass of childcare providers who had dues or fees deducted and who had never signed union authorization cards. *Id.* at 456. As in this case, the *Schlaud* plaintiffs claimed that the deductions violated the First Amendment because the childcare providers were not true public employees. *Id.* at 455. As is also true here, collection of the challenged fees had ended by the time the district court ruled on the class certification motion (indeed, the bargaining unit had been dissolved). *See Schlaud v. Snyder (Schlaud II)*, 785 F.3d 1119, 1122 (6th Cir. 2015).

The Sixth Circuit held that class certification was properly denied because there would have been fundamental conflicts between the named plaintiffs and the class. Many class members would want a system in which all providers must financially support the union, and “the interests of those providers who would financially support the Union are in conflict with the interests of the plaintiffs.” *Schlaud I*, 717 F.3d at 459. Plaintiffs had asked that the “district court certify, in the alternative, any class that it deemed appropriate,” but the Sixth Circuit “agree[d] with the district court’s conclusion” that “no appropriate alternative class could ‘be certified consistent with Rule 23(a)(4).’” *Id.* at 458 n.5. After a remand from the Supreme Court for consideration of *Schlaud I*

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<sup>4</sup> Other circuits have relied on the reasoning of *Gilpin* to deny class certification in cases seeking the refund of union dues or fees. *See, e.g., Weaver v. The Univ. of Cincinnati*, 970 F.2d 1523, 1530-31 (6th Cir. 1992); *Kidwell v. Transp. Comm’n Int’l Union*, 946 F.2d 283, 305 (4th Cir. 1991); *Pilots Against Illegal Dues (PAID) v. Air Line Pilots Ass’n (ALPA)*, 938 F.2d 1123, 1134 (10th Cir. 1991); *see also Cummings v. Connell*, 316 F.3d 886, 895-96 (9th Cir. 2003) (quoting the analysis in *Gilpin* with approval but finding no conflict because the type of monetary relief sought in *Gilpin* was unavailable as a matter of law).

in light of *Harris*, the Sixth Circuit reaffirmed its class certification decision. The Sixth Circuit reiterated that — regardless of the *merits* of plaintiff’s claim about fair-share fees after *Harris* — no class could be certified because there would be a fundamental conflict between the named plaintiff and other providers who wanted union representation and were willing to support the union financially. *Schlaud II*, 785 F.3d at 1126.

A district court recently relied upon *Schlaud* to deny class certification in another lawsuit challenging the deduction of funds for union representation from homecare providers who had not affirmatively consented to the deductions. The court reasoned that “[t]he named Plaintiffs are not adequate representatives of . . . Providers who willingly pay Union dues and believe others should not be permitted to free ride on their contributions,” and that “the Union support issue is not a merely speculative conflict relating to damages, but a concrete disagreement going to the very subject matter of the litigation.” *Centeno v. SEIU 775 Healthcare NW*, Case 2:14-00200, Dkt. 116 (E.D. Wa., June 9, 2015) (*Centeno I*), attached as Kronland Decl., Ex. A. The court also denied plaintiffs’ renewed motion for class certification. *See Centeno*, Dkt. 165 (E.D. Wa., Sept. 11, 2015) (*Centeno II*), attached as Kronland Decl., Ex. B.

**B. There are fundamental conflicts between Plaintiffs and a substantial portion of the class about the central claim and relief sought.**

The conflicts between the named Plaintiffs and putative class here are at least as serious as the conflicts that precluded class certification in *Gilpin* and *Schlaud*.

1. As in *Gilpin*, Plaintiffs want to seek monetary relief for the class that is essentially “punitive” and would “confer a windfall” on fair-share payors and “embarrass the union financially,” *i.e.* damages equal to all the fair-share fees. During the class period, the Union had a legal duty to represent the entire unit; the fair-share fees paid for that representation; and all the personal assistants in the class enjoyed the benefits of that union representation. *See Kelleher*

Decl. ¶¶11-17, 28; *see also infra* at 13-14 & nn. 6-7 (declarations of potential class members). Indeed, the same CBAs that contained the fair-share provisions also included wage increases — as well as paid health benefits and paid training — that far exceeded the amount of the fair-share fees. Moreover, the fair-share clause in the CBA was authorized by Illinois law and, as this Court and the Seventh Circuit agreed, consistent with Supreme Court precedent at the time.

As then-Chief Judge Posner explained in *Gilpin*, seeking this type of essentially “punitive” relief is “consistent with — and only with — the aims of the . . . type of employee” who “is hostile to unions on political or ideological grounds” and wants to “weaken and if possible destroy the union.” *Gilpin*, 875 F.2d at 1313. Such relief is not consistent with the interests of the many employees who may not be union members but “have no desire to ruin the union or impair its ability to represent them effectively.” *Id.*

In this case, of the 16,621 workers who paid fair-share fees during the class period and are still in the bargaining unit, 10,863 (about 65 percent) subsequently joined the Union and are voluntarily paying union dues today, even though they could now be “free riders.” Kelleher Decl. ¶33. If a class were certified, these personal assistants would essentially be suing themselves. Similarly, as *Gilpin* recognized, many workers who choose not to become union members still want strong union representation and would be hurt by a large damages award against their representative. Because of the transient nature of the workforce, moreover, many personal assistants who are no longer in the unit will return to the unit in the future and receive the benefits of CBAs negotiated by the union. *See id.* ¶38. The Union has also submitted declarations from a cross-section of personal assistants who are in the putative class and confirm that they support the Union and oppose the classwide remedy that the named Plaintiffs want to seek. *See infra* at 12-16 & nn. 5-14.

2. There also is a fundamental conflict that precludes class certification because, as in *Schlaud*, many class members would support the Union and the fair-share requirement.

In this regard, it bears emphasis that fair-share payors here did not take *any* affirmative action that would evidence opposition to the Union or fair-share requirement. The State automatically deducted the fair-share fees. The fair-share payors here are simply personal assistants who had not signed union membership cards. *Gilpin* rejects the proposition that non-members do not want union representation and are unwilling to pay their fair-share, and *Gilpin* was correct to reject that proposition: there are many indications that the proposed class here would include substantial numbers of personal assistants who, unlike the named Plaintiffs, want effective Union representation and do not favor a right to “free-ride.”

First, the majority of personal assistants chose union representation in 2003 (Kelleher Decl. ¶¶7-8), which shows there was broad support for the Union. The workers who did not sign cards did not express opposition to union representation; they were largely workers who the Union was unable to contact. Kelleher Decl. ¶7. In 2008 and 2012, personal assistants overwhelmingly voted to ratify the CBAs containing the fair-share provisions (Kelleher Decl. ¶9), which shows there was broad support for the CBAs. Personal assistants who could not be contacted in 2003, or who joined the bargaining unit later, or who did not participate in the vote on the CBAs, would likely share the same preferences. *See Schlaud II*, 785 F.3d at 1128 (reasoning that the “probable preferences” of new providers would be the same as those of providers who voted in the representation election).

Second, more than 10,000 workers who paid fair-share fees during the class period subsequently signed union membership cards. Kelleher Decl. ¶33. “[I]t is likely that many of those individuals were inclined to support the Union prior to signing the cards,” *Centeno I*

(Kronland Decl. Ex. A) at 9, and simply had not received any personal contact from a Union representative earlier. The bargaining unit has very high turnover, with about 811 new personal assistants joining the unit each month. Kelleher Decl. ¶31. The personal assistants work in private homes throughout the State rather than sharing centralized or common worksites where they would meet Union members or representatives. Kelleher Decl. ¶7. When the Union was able to contact personal assistants in person, many fee-payors signed membership cards (Kelleher Decl. ¶¶34-35), which suggests they had no objection to paying fair-share fees and also that other fee-payors would have signed cards if they had received in-person contact from a Union representative. That over 10,000 current personal assistants were previously fair-share fee payors but have since voluntarily joined the Union demonstrates that a significant number of individuals in the putative class do not share Plaintiffs' hostility toward the Union.

Third, bargaining unit workers have a rational economic interest in supporting a fair-share requirement. Because the Union is required by Illinois law to represent all personal assistants, regardless of whether they are members of the Union (5 ILCS 315/6(d), 315/8; *see also* Kelleher Decl. ¶28), the benefits of union representation accrue to members and non-members alike. Absent a fair-share requirement, even union supporters have a financial incentive to free ride, so workers who want effective union representation would rationally support a fair-share requirement. *See* Mancur Olson, Jr., *The Logic of Collective Action* 11, 14-16, 67, 75-76, 85-87 (1965) (seminal economic text explaining why a "public good" like union representation will be underfunded, to the detriment of the rational economic interests of all individuals in the group, in the absence of a fair-share requirement). Some workers may have strong ideological views against unions that would lead to preferences contrary to their economic interests in having a well-funded union



representative to advocate for their interests, but it certainly cannot be assumed that workers would have views contrary to their own economic interests.

Fourth, there are rational reasons why a personal assistant might support strong union representation and a fair-share requirement but not become a union member. The personal assistant may not want to pay for activities not germane to collective bargaining representation, such as political activities, particularly as others could free ride on those payments. Similarly, a personal assistant might choose not to be a Union member now, when free-riding is possible, but have been a supporter of the prior system in which all bargaining unit workers must pay their fair share. Many people want a good public school system and would vote for a school tax to be paid by everyone but would not voluntarily contribute the same amount if their neighbors could free ride. Or the personal assistant may not have been able to afford the greater expense of membership dues. *See* Glassman Decl. ¶10, Ex. D (fair-share fee payor called the Union “with concerns that her fairshare stopped” and “wanted to know what she can do to help although she can not [sic] afford full membership”).

Finally, the Union has submitted 57 non-boilerplate declarations from a diverse group of personal assistants who paid fair-share fees at some point during the class period and are therefore within the proposed class. Glassman Decl. ¶12. These personal assistants are from a broad cross-section of the unit, including urban and rural, older and younger, female and male, and related and unrelated to their care recipients. Despite these differences, they all supported the Union and had no objection to paying fair-share fees.<sup>5</sup> They all understood that fair-share fees support the Union’s

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<sup>5</sup> Bandy Decl. ¶3 (“[O]nce I learned what the fair [share] fee was, I had no objection because I come from a union family.”); Brown Decl. ¶3 (“I had no objection to providing financial support for the Union because I understood that the Union was responsible for getting the raises in wages I also saw in my paycheck.”); Burton Decl. ¶3 (“I knew the fees were ultimately going to support home care workers like myself.”); Corzine Decl. ¶3 (“I understood that this money was going to the Union and I had no objection to providing financial support for the Union.”); Grant Decl. ¶3 (“I knew how fair-share fees worked because some of

activities and they all believed those activities benefitted them.<sup>6</sup> Many declarants echo the sentiment of declarant Marlene Burton that “a strong union representative is necessary if home care workers are to be treated with the dignity and respect [they] deserve” and that “all home care

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my family members have been in unions. I had no objection to providing financial support for the Union.”); Strickland Decl. ¶3 (“I had no objection to providing financial support for the Union. At the time, I was already a member of the Union through my work at St. Bernard Hospital, so I knew that the fees were going to be spent well.”); Tatum Decl. ¶3 (“I am fine with them taking a little change out of my paycheck for them to do the footwork that makes things happen for us.”); *see also* Anderson Decl. ¶3; Ashford Decl. ¶3; Benjamin Decl. ¶3; Brock Decl. ¶3; Coleman Decl. ¶3; Collins Decl. ¶3; Coney Decl. ¶3; J. Davis Decl. ¶3; Davis-Greene Decl. ¶3; DeMary Decl. ¶3; Dixon Decl. ¶3; Gillespie Decl. ¶3; Gray Decl. ¶3; Green Decl. ¶3; Harris Decl. ¶3; Hatchett Decl. ¶3; Henry Decl. ¶3; L. Jones Decl. ¶2; S. Jones Decl. ¶3; Leach Decl. ¶3; Lofton Decl. ¶3; Luna Decl. ¶3; McGee Decl. ¶3; Moffett Decl. ¶3; Moore Decl. ¶3; Nelson Decl. ¶3; Newman Decl. ¶3; Paschel Decl. ¶3; Pearson Decl. ¶3; Piggee Decl. ¶3; Roberts Decl. ¶3; H. Scott Decl. ¶3; R. Scott Decl. ¶3; Sherrod Decl. ¶3; K. Smith Decl. ¶3; Stanback Decl. ¶3; Stepp Decl. ¶3; Stewart Decl. ¶3; Stowell Decl. ¶3; A. Sykes Decl. ¶3; R. Sykes Decl. ¶3; Talkington Decl. ¶3; Taylor Decl. ¶3; Townsend Decl. ¶3; Warren Decl. ¶3; Williams Decl. ¶3.

<sup>6</sup> Benjamin Decl. ¶3 (“The wages I was paid then and the benefits I received were all the result of work by the Union.”); Brown Decl. ¶3, ¶5 (“I realized that all of the raises I had seen came from the work of the Union and that the Union had stopped cuts from the Home Services Program.”); Coleman Decl. ¶3 (“I wanted to pay, because I knew that the Union fought for me.”); Coney Decl. ¶3 (“Since I benefit from the increased wages and the training classes, even if I can’t participate and advocate myself, I believe it is only fair that I financially support the efforts of the Union.”); B. Davis Decl. ¶3 (“I had no objection to providing financial support for the Union, especially since I knew that the Union was fighting for me behind the scenes.”); J. Davis Decl. ¶3 (“The wages I was paid then and the benefits I received were all the result of work by the Union.”); Grant Decl. ¶3 (“I did not mind that fees were being taken out of my check because I knew they were going to support the work of the Union that ultimately benefits me.”); Horaney Decl. ¶3 (“So instead I chose to pay fair share fees, because I received the benefits of the Union and wanted to contribute.”); S. Jones Decl. ¶3 (“When I learned what the fees were for, I felt they were beneficial to me.”); Leach Decl. ¶3 (“I believe all home care workers should pay their fair share to support the Union because all home care workers benefit from the Union’s activities and none of us should benefit for free.”); Lofton Decl. ¶3 (“I believe the Union works for home care workers by advocating on our behalf during collective bargaining.”); Piggee Decl. ¶3 (“I had no objection to providing financial support for the Union. My mother was in the same Union, and I knew all about the good work the Union does from when I was a child.”); K. Smith Decl. ¶3 (“I am glad to have paid the fees, because I can see how much I have benefitted from the Union.”); R. Smith Decl. ¶4 (“I knew that the fees I paid went to help the Union operate more effectively, including fighting for me when my voice alone was not enough to make a difference.”); *see also* Anderson Decl. ¶3; Burton Decl. ¶3; Collins Decl. ¶3; Corzine Decl. ¶3; B. Davis Decl. ¶3; Davis-Greene Decl. ¶3; Green Decl. ¶3; Harris Decl. ¶3; Hatchett Decl. ¶3; Henry Decl. ¶3; Lightsey Decl. ¶3; Luna Decl. ¶3; McGee Decl. ¶3; Moffett Decl. ¶3; Paschel Decl. ¶3; Pearson Decl. ¶3; Sherrod Decl. ¶3; Stanback Decl. ¶3; Stepp Decl. ¶3; Stewart Decl. ¶3; Stowell Decl. ¶3; A. Sykes Decl. ¶3; Talkington Decl. ¶3; Tatum Decl. ¶3; Townsend Decl. ¶3; Warren Decl. ¶3.

workers should pay their fair share to support the Union because all home care workers benefit from the Union's activities."<sup>7</sup>

Most of these personal assistants later become members of the Union because they came to understand the importance of the Union's activities.<sup>8</sup> Some thought they were members of the

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<sup>7</sup> Burton Decl. ¶3; Bandy Decl. ¶3 ("I believe the Union is like an umbrella, with the Union, I always know that I have some protection for me and my fellow home care workers."); Green Decl. ¶3 ("I'm all for the Union, I believe the Union is helpful because we cannot fight by ourselves."); Lightsey Decl. ¶5 ("I was really happy that my home care jobs had a Union. I have also worked at a non-union assisted living home, where we were not treated well, and I believe that a strong union representative is necessary if home care workers are to be treated with dignity and respect that we deserve."); Nelson Decl. ¶3 ("I support our Union, and I believe that home care workers need a strong Union."); Paschel Decl. ¶3 ("I believe there is strength in numbers, and that home care workers can achieve more when we fight together."); Roberts Decl. ¶3 ("I believe that home care workers need the Union, and that the Union helps advocate for home care workers and other low-wage workers in the State of Illinois."); Tatum Decl. ¶3 ("I see the Union rallying and representing workers like me. I want to do anything I can to help the Union. I believe that all home care workers should pay their fair share to support the Union because all home care workers benefit from the Union's activities."); Williams Decl. ¶3 ("Through the Union, home care workers' voices are heard, and without the Union it would be much harder for home care workers to win wage increases and benefits."); *see also* Anderson Decl. ¶3; Ashford Decl. ¶3; Benjamin Decl. ¶3; Brock Decl. ¶3; Bandy Decl. ¶3; Brown Decl. ¶3; Coleman Decl. ¶3; Collins Decl. ¶3; Coney Decl. ¶3; Corzine Decl. ¶3; Grant Decl. ¶3; Taylor Decl. ¶3; Davis-Green Decl. ¶3; Anderson Decl. ¶3; B. Davis Decl. ¶3; J. Davis Decl. ¶3; DeMary Decl. ¶3; Dixon Decl. ¶3; Gillespie Decl. ¶3; Gray Decl. ¶3; Harris Decl. ¶3; Hatchett Decl. ¶3; Henry Decl. ¶3; Horaney Decl. ¶3; S. Jones Decl. ¶3; Leach Decl. ¶3; Lofton Decl. ¶3; Luna Decl. ¶3; McGee Decl. ¶3; Moffett Decl. ¶3; Newman Decl. ¶3; Pearson Decl. ¶3; Sherrod Decl. ¶3; Stepp Decl. ¶3; Stewart Decl. ¶3; Stowell Decl. ¶3; Talkington Decl. ¶3; Townsend Decl. ¶3.

<sup>8</sup> Benjamin Decl. ¶5 ("I wanted to know more about where my fee payments were going. [One of the Union's organizers] explained to me what the Union is, what it does and how the Union fights for me and other home care workers like me....After this conversation I thought, they are doing this for me when I am not even a member. I need to do my part."); Brown Decl. ¶5 ("When the organizer came out I fully understood the impact the Union has had. I realized that all of the raises I had seen came from the work of the Union and that the Union had stopped cuts from the Home Services Program. Since then I have remained a proud member and have occasionally worked to recruit other members."); Collins Decl. ¶¶6-7 ("I didn't know what was going on in politics...with the Union, now I know how to be more active and participate in the democratic process for myself, other home care workers and my community...I attended a Union meeting ... and I was sold."); Corzine Decl. ¶5 ("Sometime in 2013 I received a Union membership card in a packet of information from the Home Services Program. I signed the card and returned it to the Union then because I wanted to become a part of something that actually mattered."); Gillespie Decl. ¶5 ("Due to my family history, I already had a passion for home care work and healthcare, so I was excited to join the Union to further the cause to protect home care workers and promote workers' rights and opportunities."); Sherrod Decl. ¶ ("I wanted to be a member because the State kept cutting the hours my son could receive. I felt that I needed someone to help me in my interaction with the State. Since then I have remained a proud Union member and have occasionally worked to recruit other members."); *see also* Anderson Decl. ¶6; Ashford Decl. ¶7; Burton Decl. ¶7; Coney Decl. ¶7; Davis-Greene Decl. ¶7; B. Davis Decl. ¶7; J. Davis Decl. ¶5; DeMary Decl. ¶6; Grant Decl. ¶6; Harris Decl. ¶5; Hatchett Decl. ¶7; Henry Decl. ¶5; S. Jones

Union while they were paying fair-share fees.<sup>9</sup> Those who have not become members do not oppose the Union; their reasons for not joining are not based on animus toward the Union or the Union's actions. Declarant Earline Taylor, who is not currently a Union member, explains "[t]his is not because I oppose the Union, rather, I simply keep forgetting to sign up." Taylor Decl. ¶ 4.

These providers are concerned about a large damages award against their Union.<sup>10</sup> They do not seek a refund of fair-share fees they had no objection to paying.<sup>11</sup> They do not understand Plaintiffs' demand for damages because they believe Plaintiffs, like all home care workers, benefitted from the work of the Union, work funded in part by the fair-share fees.<sup>12</sup> In sum, these

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Decl. ¶7; Leach Decl. ¶5; Lofton Decl. ¶7; Luna Decl. ¶6; McGee Decl. ¶6; Moffett Decl. ¶5; Pearson Decl. ¶6; Stepp Decl. ¶ 6; Stewart Decl. ¶6; Stowell Decl. ¶¶5-6; Talkington Decl. ¶7; Townsend Decl. ¶5.

<sup>9</sup> J. Davis Decl. ¶5; S. Jones Decl. ¶7; Paschel Decl. ¶3; Roberts Decl. ¶3; Talkington Decl. ¶7.

<sup>10</sup> Brown Decl. ¶4 ("I do not believe that home care workers would have achieved this without a strong Union or that we will be able to continue to improve the status of home care workers without a strong Union."); Burton Decl. ¶9 ("I believe it is unfair that [the named plaintiffs] are trying to weaken the Union that represents, and fights to improve the conditions for all home care workers."); Smith Decl. ¶7 ("I am worried that if the named plaintiffs succeed in weakening the Union, I stand to lose out on all the gains we've made as workers."); A. Sykes Decl. ¶9 ("I don't want to see my Union weakened. I would not want any fees I've paid back from the Union because I believe it's important to invest in and support the Union."); Nelson Decl. ¶8 ("I believe this lawsuit is just about weakening our Union, and I believe that weakening our Union is bad for consumers."); *see also* Anderson Decl. ¶¶4, 7; Benjamin Decl. ¶6; Hatchett Decl. ¶8; Newman Decl. ¶8; Townsend Decl. ¶4; Warren Decl. ¶6.

<sup>11</sup> Ashford Decl. ¶8 ("I would rather the money stay with the Union, because it is spent wisely and it's for a good cause. I believe the fees I've paid and the Union dues I pay now are an investment in home care workers."); Brown Decl. ¶6 ("I don't believe the Union should have to pay return fees to anyone; I do not want fees I paid returned to me. I know that the Union used the money I paid to benefit all home care workers in Illinois."); Corzine Decl. ¶6 ("I do not want the fair share fees I paid returned to me. I feel that the Union used the money I paid to provide benefits like health insurance, dental insurance and everything that we are fighting for."); Green Decl. ¶8 ("I would not want the fair share fees I paid back, because I believe my money went to good use and I want the Union to have it."); Paschel Decl. ¶6 ("I could use the money, but I don't want the Union to have to pay back the fees, because I believe my fees and my Union dues are well spent in the Union."); *see also* Henry Decl. ¶6; L. Jones Decl. ¶6; S. Jones Decl. ¶8; Sherrod Decl. ¶6; Coney Decl. ¶8; K. Smith Decl. ¶7; Stanback Decl. ¶6; Strickland Decl. ¶6; Williams Decl. ¶8

<sup>12</sup> Anderson Decl. ¶7 ("They seem to want to get all of the benefits of the contract without contributing anything, but I believe you need to give in order to get."); Benjamin Decl. ¶6 ("I don't feel that the named plaintiffs in this case speak for me. I don't agree that they should be able to enjoy the benefits of the Union's work and our collective bargaining agreement without contributing anything."); B. Davis Decl. ¶8 ("I

class members want a strong union representative and favor a system in which all home care workers must pay their fair share.<sup>13</sup> Unlike Plaintiffs, they do not support a right to “free ride.”<sup>14</sup>

3. Plaintiffs bear the burden of proving that no conflicts of interest would preclude adequate representation. Not only have Plaintiffs failed to carry that burden but the record shows the opposite. Moreover, as in *Schlaud*, no alternative class “could be certified consistent with Rule

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believe it is ridiculous that the named plaintiffs want to get their fees back while they reap the benefits of the Union’s work.”); Davis-Greene Decl. ¶8 (“I do not understand why the named plaintiffs would not want to support the very Union that supports home care workers.”); Grant Decl. ¶7 (“I do not think the named plaintiffs understand what the Union does and the difference having the Union makes.”); Harris Decl. ¶6 (“I am flabbergasted that the named plaintiffs are asking for their fees to be returned after we have all benefitted from the work of the Union. I don’t think it’s right because everyone has seen their wages increase, and the change to be a better caregiver to our consumers.”); Lofton Decl. ¶8 (“I believe the Union supports all home care workers, and that it is unfair for the named plaintiffs to reap the benefits of the Union while wanting to make it harder for the Union to do its work.”); Stepp Decl. ¶7 (“I do not understand and cannot relate to the named plaintiffs and their views on the Union and the fair share fees. I believe that the fair-share fees I paid to the Union were well worth it, and contributed to the Union’s fight for wage increases and training for all home care workers.”); *see also* Ashford Decl. ¶8; Coney Decl. ¶8; Coleman Decl. ¶8; Green Decl. ¶8; Hatchett Decl. ¶8; Horaney Decl. ¶9; L. Jones Decl. ¶6; Luna Decl. ¶7; McGee Decl. ¶7; Moffett Decl. ¶6; Newman Decl. ¶8; Pearson Decl. ¶7; Piggee Decl. ¶7; K. Smith Decl. ¶7; Stewart Decl. ¶7; Taylor Decl. ¶7.

<sup>13</sup> Anderson Decl. ¶3; Ashford Decl. ¶3; Bandy Decl. ¶3; Brock Decl. ¶3; Benjamin Decl. ¶3; Brown Decl. ¶3; Coleman Decl. ¶3; Collins Decl. ¶3; Coney Decl. ¶3; Corzine Decl. ¶3; DeMary Decl. ¶3; Dixon Decl. ¶3; Gillespie Decl. ¶3; Gray Decl. ¶3; Green Decl. ¶3; Grant Decl. ¶3; Davis-Greene Decl. ¶3; J. Davis Decl. ¶3; Harris Decl. ¶3; Hatchett Decl. ¶3; Henry Decl. ¶3; Horaney Decl. ¶3; Jones Decl. ¶3; Leach Decl. ¶3; Lightsey Decl. ¶3; Lofton Decl. ¶3; Luna Decl. ¶3; McGee Decl. ¶3; Moffett Decl. ¶3; Moore Decl. ¶3; Nelson Decl. ¶3; Newman Decl. ¶3; Paschel Decl. ¶3; Pearson Decl. ¶3; Piggee Decl. ¶3; Roberts Decl. ¶3; H. Scott Decl. ¶3; R. Scott Decl. ¶3; Sherrod Decl. ¶3; K. Smith Decl. ¶3; Stanback Decl. ¶3; Stepp Decl. ¶3; Stewart Decl. ¶¶3-4; Stowell Decl. ¶3; Strickland Decl. ¶3; A. Sykes Decl. ¶3; R. Sykes Decl. ¶3; Talkington Decl. ¶3; Tatum Decl. ¶3; Taylor Decl. ¶4; Townsend Decl. ¶3; Warren Decl. ¶3; Williams Decl. ¶3.

<sup>14</sup> Corzine Decl. ¶6 (“Those that want to reap the benefits that the Union provides without paying anything for it are freeloading on the hard work that I and others have done through the Union.”); B. Davis Decl. ¶8 (“It’s heartbreaking that the named plaintiffs don’t want to stand in solidarity and support other home care workers.”); Talkington Decl. ¶8 (“The named plaintiffs seem to want something for nothing, even though they benefit from the wage increases and the health insurance won through the Union’s negotiations with the State. . . . It’s only fair for everybody to contribute to something we all benefit from, I believe it’s the right thing to do.”).

23(a)(4),” *Schlaud I*, 717 F.3d at 458 n.5, because a class cannot be defined based on the subjective views of individual class members.

**C. These Plaintiffs cannot adequately represent a class that includes Union members and supporters.**

For the reasons stated above, no class can be certified here because the fair-share payors have conflicting interests. We point out for completeness that these three named Plaintiffs cannot be adequate class representatives for a class that includes Union supporters and members because of the Plaintiffs’ strong ideological opposition to Union representation.

Plaintiffs oppose the Union,<sup>15</sup> think that the Union is too powerful,<sup>16</sup> and believe that the Union should not represent personal assistants.<sup>17</sup> Notwithstanding the improvements achieved in the CBAs, Plaintiffs do not believe they received any benefit from union representation.<sup>18</sup> Plaintiffs testified that they would seek damages even if the relief would impede the Union’s ability to represent personal assistants<sup>19</sup> or result in the dissolution of the Union.<sup>20</sup> One of the Plaintiffs even received a national award from the Right to Work Foundation “acknowledging an individual who contributes to the principles of right to work.”<sup>21</sup> These views present a clear conflict with the interests of the many members of the putative class who support the Union, believe they have benefitted from the Union’s representation of personal assistants, and want strong union representation in the future. Moreover, Plaintiffs’ deposition testimony shows that they do not realize, or do not care, that many proposed class members do not share their anti-union views.<sup>22</sup>

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<sup>15</sup> Riffey Dep. (Kronland Decl. Ex. C) 24:4-7; Yencer-Price Dep. (Kronland Decl. Ex. E) 23:5-7.

<sup>16</sup> Riffey Dep. 23:22-24; Yencer-Price Dep. 23:8-10.

<sup>17</sup> Riffey Dep. 24:4-7; Yencer-Price Dep. 23:16-19.

<sup>18</sup> Riffey Dep. 23:16-25:22; Watts Dep. (Kronland Decl. Ex. D) 42:8-10, 44:11-45:8; Yencer-Price Dep. 24:6-9.

<sup>19</sup> Riffey Dep. 28:8-11; Watts Dep. 51:19-22; Yencer-Price Dep. 28:11-14.

<sup>20</sup> Riffey Dep. 28:4-7; Watts Dep. 51:15-18; Yencer-Price Dep. 28:7-10.

<sup>21</sup> Watts Dep. 46:18-47:19.

<sup>22</sup> Riffey Dep. 28:12-29:12; Watts Dep. 51:23-52:19; Yencer-Price Dep. 28:15-29:5.

Plaintiffs are entitled to pursue relief on their own behalf. But they cannot adequately represent the interests of, and make decisions about litigation strategy and settlement for, personal assistants, including at least 10,000 current Union members, who do not share Plaintiffs' anti-union objectives.

**D. Plaintiffs' counsel cannot adequately represent a class that includes Union members and supporters.**

As with the named Plaintiffs themselves, Plaintiffs' counsel cannot adequately represent a class that would include Union supporters and members. In *Gilpin*, the Seventh Circuit specifically held that the National Right to Work Legal Defense Foundation's attempt to seek essentially punitive financial relief on behalf of the class showed that the Foundation was "not an adequate litigation representative" for class members who do not seek to "weaken and if possible destroy the union." 875 F.2d at 1313. That holding applies fully here because Plaintiffs' counsel are seeking the same type of relief, and the class would include at least 10,000 current Union members as well as non-members who are "happy to be represented by a union." *Id.*

Plaintiffs' counsel's strategic choices in this litigation also show that they cannot adequately represent Union supporters. When this case was before the Supreme Court, they purposefully phrased the "Question Presented" broadly to encompass the issue whether merely including homecare workers within a system of exclusive representative collective bargaining violated the First Amendment and sought to have the Supreme Court issue a broad ruling that exclusive representative collective bargaining, even without fair-share fees, impairs First Amendment rights. *See Kronland Decl., Exs. F, G (Brief for Pet'rs, Harris, 134 S. Ct. 2618 (2014), at 16-34; Reply Brief for Pet'rs, Harris, 134 S. Ct. 2618 (2014), at 11-19).* If the Supreme Court had accepted that argument, the Illinois statutes that permit personal assistants to democratically choose a bargaining representative would have been invalidated. Foundation attorneys are now pursuing that legal



theory in five cases around the country that seek to strike down statutes that allow homecare or childcare workers to democratically choose union representation. Kronland Decl. ¶7.

The Foundation, moreover, solicits contributions from donors by promising to use litigation to further the interests of the taxpayers by weakening public sector unions because “[n]o force is inflicting more damage on our economy, citizenry, and cherished democracy than the union bosses.” Kronland Decl., Ex. H. The Foundation proclaims that unions “support far-left, Big Government candidates who can be counted on to bow to union boss demands” and have an “economy-wrecking agenda” that leads to “unproductive work rules, higher taxes, and wasteful government spending.” *Id.* The Foundation’s website proclaims that its aim is to “break the back of union control in the public sector and dramatically reduce the financial resources union officials use to manipulate public policy.” *Id.*, Ex. I. The Foundation’s objective is political, as the Foundation’s former president acknowledged in an internal memorandum:

I realize that, as a charitable entity, we are constrained to activities which can be defended as charitable. However, I believe our real aim is to change public policy through the direction of our charitable activity.

Kronland Decl., Ex. J at 47 (John West Decl. from *Schlaud v. Snyder*, Ex. F, at 1). The Foundation’s literature makes abundantly clear that its objective in pursuing class action lawsuits against public-sector unions like this one is to make it more difficult for unions to protect the wages and benefits of the workers they represent. *See* Kronland Decl. ¶¶8-11, Exs. H-K.

In *Scheffer v. Civil Serv. Employees Ass’n*, No. 05-6700, 2006 WL 7066914 (W.D.N.Y. Oct. 24, 2006), the district court concluded that Foundation attorneys could not adequately represent a class of public employees because the Foundation’s goal is to use class action litigation to weaken public employee unions. Foundation attorneys therefore could not have “undivided loyalty” to a proposed class of union-represented public employees. *Id.* at \*6. The Second Circuit



affirmed that ruling as “well grounded in the record.” *Scheffer v. Civil Serv. Employees Ass’n*, 610 F.3d 782, 786 n.3 (2d Cir. 2010).

Plaintiffs here are within their rights to hire attorneys employed by an organization that views improved wages and benefits for public sector workers as “wasteful government spending,” castigates democratically elected union leaders as “union bosses,” and seeks to reduce union power in society. But such attorneys cannot adequately represent a class of union supporters. There is too great a risk that Plaintiffs’ counsel would try to use the class action device to further anti-union goals at the expense of class members’ own interests.

### **III. The Predominance and Superiority Requirements Are Not Satisfied Because Individualized Proof Of State Of Mind Would Be Required.**

Plaintiffs seek to certify a class under Rule 23(b)(3) so they must also prove that questions of law or fact common to class members predominate over any questions affecting only individual members and that a class action is the superior means of adjudication. The court must therefore determine whether it would be necessary to examine facts regarding individual plaintiffs to resolve the claim for which class certification is sought. *See Messner*, 669 F.3d at 815; *see also Lady Di’s, Inc. v. Enhanced Servs. Billing, Inc.*, 654 F.3d 728, 738 (7th Cir. 2011). “If the class certification only serves to give rise to hundreds or thousands of individual proceedings . . . it is hard to see how common issues predominate or how a class action would be the superior means to adjudicate the claims.” *Andrews v. Chevy Chase Bank*, 545 F.3d 570, 577 (7th Cir. 2008); *see also Pastor v. State Farm Mut. Auto. Ins. Co.*, 487 F.3d 1042, 1047 (7th Cir. 2007) (“[W]hen a separate evidentiary hearing is required for each class member’s claim, the aggregate expense may, if each claim is very small, swamp the benefits of class-action treatment.”).

The inquiry “begins . . . with the elements of the underlying cause of action.” *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011). Here, the collection of fair-

share fees ended more than a year ago and personal assistants do not face a realistic prospect of being subject to a future fair-share requirement. The purpose of class certification would be for Plaintiffs to pursue a claim for monetary relief against the Union on the theory that personal assistants who paid fair-share fees were injured by a violation of their First Amendment rights and thereby suffered damages for which the Union is liable under 42 U.S.C. §1983. Plaintiffs' claim would necessarily require individualized proof because individual personal assistants suffered no First Amendment injury from having paid fair-share fees unless the personal assistant had some First Amendment objection to supporting the union or its activities at the time.

The Supreme Court held in *Harris* that the fair-share requirement implicated the First Amendment rights of personal assistants who are “compel[ed] . . . to subsidize speech on matters of public concern by a union that *they do not wish to join or support.*” 134 S. Ct. at 2623 (emphasis added); *see also id.* at 2644 (individual suffers First Amendment injury when required to “subsidize speech by a third party *that he or she does not wish to support*” (emphasis added)). Whether a personal assistant “[did] not wish to support” the Union’s activities turns on the individual personal assistant’s contemporaneous state of mind.

The Supreme Court’s cases concerning the collection of union fees make clear that class certification is not appropriate for claims seeking retroactive monetary relief on the theory that workers were compelled to support union activities when support should have been optional. Class certification is not appropriate because there is no presumption that individual bargaining unit workers did not *want* to support their union representative. *See Bhd. of Ry. & S.S. Clerks v. Allen*, 373 U.S. 113, 119 (1963) (because it cannot be shown that the class as a whole opposed paying for the union’s political activities, “[t]his is not and cannot be a class action”); *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 774 (1961) (“[T]he present action is not a true class action, for

there is no attempt to prove the existence of a class of workers who had specifically objected to the exaction of dues for political purposes.” (citing *Hansberry*, 311 U.S. at 44)).

Similarly, *Ellis v. Bhd. of Ry. Employees*, 466 U.S. 435 (1984), confirms that a worker suffers no constitutional injury from merely providing financial support to a union in the absence of some First Amendment objection. The *Ellis* plaintiffs challenged a requirement that they pay money to a union for a death benefits system. “[T]he union [was] no longer the exclusive bargaining agent and petitioners [were] no longer involved in the death benefits system, [so] the only issue [was] whether petitioners [were] entitled to a refund of their past contributions.” *Id.* at 454. The Supreme Court held that “they are not so entitled [to a refund], even if they had the right to an injunction to prevent future collections from them for death benefits. . . . [T]hey remained entitled to the benefits of the plan as long as they paid their dues; they thus enjoyed a form of insurance for which the union collected a premium. We doubt that the equities call for a refund of those payments.” *Id.* at 454-55. The same situation applies here: the fair-share payors had money deducted to pay for union representation, and they received that union representation. Unless the worker had a First Amendment objection to supporting the union’s speech or petitioning, the worker suffered no First Amendment injury from having paid for services that the worker received.

Chief Judge Marsha J. Pechman recently reached the same conclusion in denying class certification in *Centeno II* (Kronland Decl., Ex. B). Judge Pechman reasoned that, even if the First Amendment precludes the deduction of union dues or fees from a homecare provider in the absence of the provider’s affirmative consent,

this premise does not necessarily lead to the conclusion that any provider who had dues deducted without this safeguard suffered a First Amendment injury. The First Amendment frequently mandates overinclusive, prophylactic rules that extend further than the core speech sought to be protected . . . . Here, the Constitution might require an opt-in regime to protect the speech of providers who subjectively

“do not wish to join or support” the union, *see Harris*, 134 S. Ct. at 2644, while incidentally guarding the wallets of those who harbor no such reservations.

*Centeno II* (Kronland Decl., Ex. B), at 5. In other words, individuals who had money automatically deducted and transmitted to a union did not suffer a First Amendment injury, even if the automatic deduction system should not have been used, unless the individual actually opposed supporting the union.

Judge Pechman further explained that the fact of non-membership in the union could not by itself establish that proposed class members held a First Amendment objection to supporting the union:

Although the Court is satisfied that the named Plaintiffs “do not wish to join or support” the Union and thus have a colorable claim for a First Amendment injury when their agency fees were deducted and sent to the Union, Plaintiffs have not met their burden to show that the remainder of the class similarly “d[id] not wish to join or support” the Union during the class period.

*Id.* at 7. As a result, the court concluded that individualized inquiries regarding the subjective beliefs of fair-share fee payors would predominate over any common issues:

[A] class member suffered a First Amendment injury only if he or she did not wish to “join or support” the Union at the time his or her dues were directed to the Union . . . . Determining whether an Individual Provider had a subjective stance of not wishing to join or support the Union at the time of a deduction is not conclusively determined by asking whether the Individual Provider had signed a union card prior to the deduction . . . . Even if the First Amendment requires the imposition of an opt-in system for dues deduction, . . . determining whether any class member suffered a First Amendment injury under the current or prior system of dues deductions . . . would require individualized hearings. For this reason, the common questions do not predominate over individual issues.

*Id.* at 12.

The reasoning of *Centeno II* applies fully here. Indeed, the evidence includes declarations from class members who not only had no First Amendment objection to paying for union activities but wanted to make those payments. *See supra* at 12-14 & n.5-7. Some fair-share payors thought

they were Union members and wanted to be members. *Id.* at 14-15 & n.9. These class members suffered no First Amendment injury from providing support they wanted to provide.<sup>23</sup>

Determining the contemporaneous, subjective views of individual workers about supporting the Union would be particularly complicated here. No records were kept on this issue (Kelleher Decl. ¶22; Hannah Decl. ¶15; Stone Decl. ¶13), and individuals' views can change over time. For example, a fair-share fee payor who called the Union to ask "why she has to pay to the union if she doesn't want to be in the union," subsequently became a member of the Union. Glassman Decl. ¶8. Other non-member personal assistants who called the Union inquiring about fair-share fees appear to have been satisfied by the explanation and later became members. *Id.* ¶¶6-8. There also would be personal assistants who had purely financial reasons, as opposed to First Amendment reasons, for not wanting to support the Union. They suffered no First Amendment injury. *Cf. Ellis*, 466 U.S. at 456 ("Petitioners may feel that their money is not being well-spent, but that does not mean they have a First Amendment complaint.").

Plaintiffs have not shown that the contemporaneous, subjective views of individual personal assistants can be determined based on common proof. As such, they have not shown that common issues would predominate. *Cf. Amgen Inc. v. Conn. Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1193 (2013) (even when the defendant's conduct toward the putative class is the same, when a plaintiff must establish the subjective element of reliance as part of the claim, class certification is "ordinarily preclude[d] ... because individual reliance issues would overwhelm

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<sup>23</sup> In *Centeno II*, the proposed class was limited to homecare workers who had money automatically deducted from their paychecks and transmitted to the union and who subsequently affirmatively opted out of union membership, at which point deductions stopped. The Court reasoned that a later decision to opt out of union membership did not prove that the worker objected to supporting the union in the past. Here, the fair-share payor class would consist of personal assistants who either never took any action at all or who paid fair-share fees and subsequently joined the union, so the inference that class members had a contemporaneous objection to supporting the Union would be even less justified here than in *Centeno II*.

questions common to the class.”). Because of the need for individualized proof, the class action mechanism also is not the superior means of adjudication. Even if individual claims are relatively small, Congress provided for attorney fees in 42 U.S.C §1988.

#### **IV. The Commonality and Typicality Requirements Are Not Satisfied.**

The above discussion regarding Rule 23(b)(3) predominance/superiority can also be analyzed as a failure to satisfy Rule 23(a) commonality/typicality because Plaintiffs are not similarly situated to the many class members who had no First Amendment objection to supporting the Union. *See Centeno II* at 6-9 (Kronland Decl., Ex. B) (examining typicality).

“Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury,” *Wal-Mart*, 131 S. Ct. at 2551 (internal citations and quotations omitted), and, in this respect, “[t]he commonality and typicality requirements of Rule 23(a) tend to merge.” *Id.* at 2551 n.5. Here, the named Plaintiffs contend they suffered a First Amendment injury when their funds were used to support Union speech and petitioning that they did not wish to subsidize. By contrast, class members who had no First Amendment objection to providing financial support to the Union suffered no violation of their First Amendment rights when the State transmitted funds to the Union. Plaintiffs have not shown that the class members shared their opposition to supporting the Union, so they have not shown commonality or that their claims are typical.<sup>24</sup>

#### **CONCLUSION**

For all these reasons, the Court should deny Plaintiffs’ motion for class certification.

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<sup>24</sup> Plaintiff Yencer-Price also does not meet the typicality requirement for a different reason: she is not within the class. *See Harriston v. Chicago Tribune Co.*, 992 F.2d 697, 703-04 (7th Cir. 1993). During the entire time Yencer-Price was in the bargaining unit, she paid membership dues, not fair-share fees, because the Union’s records show that she signed a membership card in 2003. Kelleher Decl. ¶¶41-42. Yencer-Price apparently claims that a clerical error was made, but that individualized claim has nothing to do with the fair-share requirement because she never paid fair-share fees. Moreover, Yencer-Price’s claim that she was required to pay money to the Union without her consent would be subject to the unique defense that, according to the Union’s business records, she *did* consent by signing a membership card.

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Respectfully submitted,

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