No. 18-1120

In the
Supreme Court of the United States

THERESA RIFFEY, et al.,
Petitioners,

v.

J.B. PRITZKER, Governor of Illinois, et al.,
Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

DEBORAH J. LA FETRA*
**Counsel of Record*
ERIN E. WILCOX
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Email: DLaFetra@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

QUESTION PRESENTED

Under *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018), and *Harris v. Quinn*, 573 U.S. 616 (2014), do 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 damages?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION 2

REASONS TO GRANT THE PETITION 4

I. THE DECISION BELOW CONFLICTS WITH CASES HOLDING THAT WHERE THE CONSTITUTION DEMANDS AFFIRMATIVE CONSENT, SILENCE MEANS "NO" 4

A. Statutory Requirement of Affirmative Consent 5

B. Bar Association Refund of Insurance Premiums 6

C. Classes To Recover for Deficient *Hudson* Notices 9

II. THE FIRST AMENDMENT PROTECTS THE INDIVIDUAL RIGHT TO REFUSE CONSENT FOR ANY REASON OR NO REASON AT ALL 10

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Abood v. Detroit Bd. of Educ.,
431 U.S. 209 (1977) 1

Anderson v. Smith,
751 F.2d 96 (2d Cir. 1984)..... 13

Berghuis v. Thompkins,
560 U.S. 370 (2010) 13

Bond v. United States,
529 U.S. 334 (2000) 14

Brosterhous v. State Bar of Cal.,
12 Cal. 4th 315 (1995) 1

Brown v. Colegio de Abogados de Puerto Rico,
613 F.3d 44 (1st Cir. 2010),
cert. denied, 562 U.S. 1200 (2011) 6–8

Carnley v. Cochran,
369 U.S. 506 (1962) 13

Chicago Teachers Union v. Hudson,
475 U.S. 292 (1986) 9

Citizens United v. Federal Election Comm'n,
558 U.S. 310 (2010) 10

City of Cleveland v. Cleveland City Ry. Co.,
13 Ohio C.D. 373 (Cir. Ct. 1902)..... 14

Collier v. Dickinson,
477 F.3d 1306 (11th Cir. 2007) 5

Cumero v. Pub. Emp't Relations Bd.,
49 Cal. 3d 575 (1989)..... 1

Damiano v. Matish,
644 F. Supp. 1058 (W.D. Mich. 1986),
rev'd on other grounds,
830 F.2d 1363 (6th Cir. 1987) 9

Davenport v. Washington Education Association,
551 U.S. 177 (2007) 3–4, 10

Friedrichs v. Cal. Teachers Ass'n,
136 S. Ct. 1083 (2016) 1, 8

George v. Baltimore City Public Schools,
117 F.R.D. 368 (D. Md. 1987) 9

Hamidi v. SEIU Local 1000,
2015 WL 2455600
(E.D. Cal. May 22, 2015) 12

Harrington v. City of Albuquerque,
222 F.R.D. 505 (D.N.M. 2004) 11–12

Harris v. Quinn,
573 U.S. 616 (2014) 1–2, 14

Hohe v. Casey,
128 F.R.D. 68 (M.D. Pa. 1989) 9

*Janus v. Am. Fed'n of State, Cty. and
Mun. Emps. Council 31*,
138 S. Ct. 2448 (2018) .....*passim*

Kansas v. Dailey,
209 Kan. 707 (1972) 4

Keller v. State Bar of Cal.,
496 U.S. 1 (1990) 1

Knight v. Kenai Peninsula Borough School Dist.,
131 F.3d 807 (9th Cir. 1997) 10

Knox v. Chiang,
2013 WL 2434606
(E.D. Cal. June 5, 2013) 10

Knox v. Serv. Emps. Int'l Union, Local 1000,
567 U.S. 298 (2012) 1, 4, 8

Lopez v. Stages of Beauty, LLC,
307 F. Supp. 3d 1058 (S.D. Cal. 2018)..... 5

Lowary v. Lexington Local Board of Educ.,
903 F.2d 422 (6th Cir. 1990) 9

Maracich v. Spears,
570 U.S. 48 (2013) 5

Mitchell v. Los Angeles Unified School Dist.,
744 F. Supp. 938 (C.D. Cal. 1990),
rev'd on other grounds,
963 F.2d 258 (9th Cir. 1992) 9

Murray v. Local 2620, Dist.
Council 57, Am. Fed'n of State, Cty.
and Mun. Emps., AFL-CIO,
192 F.R.D. 629 (N.D. Cal. 2000) 10

New Mexico v. King,
300 P.3d 732 (N.M. 2013)..... 13

People v. Marshall,
41 Cal. App. 3d 129 (1974)..... 13

Porter v. Ascension Parish Sch. Bd.,
393 F.3d 608 (5th Cir. 2004) 12

Probe v. State Teachers' Ret. Sys.,
780 F.2d 776 (9th Cir. 1986) 12–13

Reno v. Condon,
528 U.S. 141 (2000) 5

Romero v. Colegio de Abogados de Puerto Rico,
204 F.3d 291 (1st Cir. 2000)..... 6–7

Ruggles v. WellPoint, Inc.,
272 F.R.D. 320 (N.D.N.Y. 2011) 12–13

Serna v. Transport Workers Union of America, AFL-CIO,
2014 WL 7721824 (N.D. Tex. Dec. 3, 2014).... 10–11

Srail v. Village of Lisle,
249 F.R.D. 544 (N.D. Ill. 2008) 13

United States v. Prescott,
581 F.2d 1343 (9th Cir. 1978) 14

STATUTES

18 U.S.C. § 2721..... 5

42 U.S.C. § 1983..... 5

Pub. L. No. 103–322,
108 Stat. 2099 (1994)..... 5

Pub. L. No. 106–69,
113 Stat. 986 (1999) 5

RULES

Fed. R. Civ. P. 23 3

Sup. Ct. R. 37.2(a)..... 1

Sup. Ct. R. 37.6 1

MISCELLANEOUS

Coenen, Michael,
Constitutional Privileging,
99 Va. L. Rev. 683 (2013) 4

Greenhut, Steven,
Despite Janus Ruling, Some Unions Still Forcing Public Workers to Pay Annual Dues, Reason (Nov. 16, 2018)
https://reason.com/archives/2018/11/16/despite-janus-ruling-some-unions-still-f 6

Selmi, Michael,
Supreme Court Term 2017–18: The Umpires Play Ball,
22 Emp. Rts. & Emp. Pol'y J. 195 (2018) 8

INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind.[1] Among other matters affecting the public interest, PLF has repeatedly litigated in defense of the First Amendment rights of workers. PLF attorneys were counsel of record in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Brosterhous v. State Bar of Cal.*, 12 Cal. 4th 315 (1995); and *Cumero v. Pub. Emp't Relations Bd.*, 49 Cal. 3d 575 (1989). PLF has participated as amicus curiae in all of the most important cases involving the application of the First Amendment freedoms of speech and association to instances of government compulsion, from *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), to *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298 (2012), *Harris v. Quinn*, 573 U.S. 616 (2014), *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016), and *Janus v. Am. Fed'n. of State, Cty. and Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018).

---

[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

In *Harris v. Quinn*, this Court ruled that Illinois laws that deemed more than 80,000 home healthcare workers to be public employees for the sole purpose of being represented by the Service Employees International Union (SEIU)—thus allowing the union to take agency shop fees out of the workers' state Medicaid funding—violated the workers' First Amendment rights. Now the nonunion home healthcare providers seek the return of more than $32 million in union fees unconstitutionally taken from their Medicaid payments by the SEIU.

On remand after *Harris*, the district court denied a motion for class certification and allowed the SEIU to keep the money confiscated from nonunion workers who had not consented. The Seventh Circuit affirmed the denial of class certification and the class sought this Court's review. This Court granted the petition the day after it issued *Janus*, vacated the Seventh Circuit decision, and ordered the lower court to reconsider the case in light of *Janus*. *Janus* expressly held that any union fees taken without a non-member's affirmative consent violates the First Amendment.

However, the Seventh Circuit affirmed its previous ruling, denying class certification on the grounds that each individual homecare provider would have to prove that he or she objected to the taking of the fees when the seizures occurred. The pending petition for certiorari asks this Court to take the case and hold that *Janus* does *not* require a worker to prove his or her subjective opposition to forced union fees but, instead, that the First

Amendment is violated *any time* a state permits a union to seize dues or fees without clear affirmative consent.

The court below seems to be improperly balancing individual constitutional rights against the union's previously authorized statutory privilege of collecting compelled dues. This Court should take this important post-*Janus* case to ensure that individual constitutional rights prevail. *Cf. Davenport v. Washington Education Association*, 551 U.S. 177, 187 (2007) ("For purposes of the First Amendment, it is entirely immaterial that [a law] restricts a union's use of funds only after those funds are already within the union's lawful possession . . . . What matters is . . . the union's extraordinary state entitlement to acquire and spend *other people's money*.") (emphasis added). *Janus* firmly held that public employee unions may not take money from non-members without those non-members' *affirmative* consent. *Janus*, 138 S. Ct. at 2486. As in other contexts that require affirmative consent to demonstrate waiver of a constitutional right, silence will not suffice and subjective motivations for remaining silent are irrelevant. Moreover, the class action procedures provided in Rule 23 of the Federal Rules of Civil Procedure permitting individuals to opt-out provides an established method to accommodate those non-members who prefer to support the union.

The petition should be granted.

REASONS TO GRANT THE PETITION

I

THE DECISION BELOW CONFLICTS WITH CASES HOLDING THAT WHERE THE CONSTITUTION DEMANDS AFFIRMATIVE CONSENT, SILENCE MEANS "NO"

If a state authorizes unions to garnish nonunion public employee paychecks, it first must secure each worker's affirmative consent. *See Knox*, 567 U.S. at 322; *Janus*, 138 S. Ct. at 2486. There is no dispute that the home healthcare workers represented by Theresa Riffey and the other named plaintiffs did not provide such affirmative consent. In this respect, each member of the class is in the same legal posture—all had a constitutional right to grant or withhold consent to subsidizing union activities; all were deprived by the state of the ability to exercise that right. *See Kansas v. Dailey*, 209 Kan. 707, 721 (1972) (Affirmative consent is distinguished from acquiescence or cooperative submission.).

The workers' constitutional rights outweigh the union's improper statutory entitlement to take the money without permission. *Davenport*, 551 U.S. at 185 ("[U]nions have no constitutional entitlement to the fees of nonmember-employees."). Because of this, the union must bear any financial risks connected to the garnishment of nonunion worker wages. *Knox*, 567 U.S. at 321. *See also* Michael Coenen, *Constitutional Privileging*, 99 Va. L. Rev. 683, 684 (2013) ("Constitutional law trumps nonconstituitonal law, and not the other way around.").

As shown below, plaintiffs joining as a class in light of a state's failure to obtain affirmative consent

is neither novel nor an improper basis for obtaining relief.

A. Statutory Requirement of Affirmative Consent

The Driver's Privacy Protection Act of 1994 (DPPA) provides an example of a law changing from an opt-out to an opt-in approach to be more effective in protecting privacy. 18 U.S.C. § 2721. Under the original DPPA, states were not permitted to release a driver's personal information without consent, but consent was presumed unless the driver opted-out. Driver's Privacy Protection Act of 1994, Pub. L. No. 103–322, § 300002, 108 Stat. 2099 (1994). In 1999, Congress amended the DPPA by requiring a state to receive a driver's express consent before it could release the driver's information. Department of Transportation and Related Agencies Appropriation Act of 2000, Pub. L. No. 106–69, § 350(c)-(e), 113 Stat. 986, 1025 (1999). *See also Maracich v. Spears*, 570 U.S. 48, 67 (2013). Following the amendment of the statute, states could no longer infer consent by a driver's failure to opt-out of disclosure. *Reno v. Condon*, 528 U.S. 141, 144–45 (2000). When a state releases private information in violation of the statute, therefore, aggrieved drivers may sue under 42 U.S.C. § 1983, *Collier v. Dickinson*, 477 F.3d 1306, 1310 (11th Cir. 2007), including as a class. *Cf. Maracich*, 570 U.S. at 75 (noting that the complaint in that case sought damages for over 30,000 drivers whose information was disclosed without their consent).[2]

---

[2] *See also Lopez v. Stages of Beauty, LLC*, 307 F. Supp. 3d 1058 (S.D. Cal. 2018) (A product delivered to a consumer without

B. Bar Association Refund of Insurance Premiums

The long-running challenge to Puerto Rico's mandatory bar association provides another example. In *Brown v. Colegio de Abogados de Puerto Rico*, 613 F.3d 44, 47–48 (1st Cir. 2010), *cert. denied*, 562 U.S. 1200 (2011), the First Circuit recounted the litigation brought by Colegio members who challenged the requirement that they participate in the Colegio's life insurance program. In 2006, they filed a class action seeking declaratory and injunctive relief, and later amended their complaint to seek "damages reflecting forced participation in the program" from the time the First Circuit had declared the plan unconstitutional in *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291 (1st Cir. 2000), until the Colegio finally cancelled the program four years later.

In 2008, the court certified a damages class consisting of all attorneys who were members of the Colegio between 2002 and 2006. *Brown*, 613 F.3d at 48. Like the public employee union practices of trying to prevent workers from exercising their First Amendment rights,[3] the Colegio "did not fully advise its members that they no longer had to buy insurance, threw obstacles in front of those trying to opt out, and

---

consent, in violation of state law, is considered a gift and the consumer is injured when money is taken to "pay for" that gift.).

[3] *See* Steven Greenhut, *Despite Janus Ruling, Some Unions Still Forcing Public Workers to Pay Annual Dues*, Reason (Nov. 16, 2018), https://reason.com/archives/2018/11/16/despite-janus-ruling-some-unions-still-f (noting various strategies used by California public employee unions to "trap" employees into signing away post-*Janus* rights and concluding, "[m]any public-sector unions are making it inordinately difficult for people to opt out of dues-paying.").

delayed refunds." *Id.* at 49. As in this case, the government challenged the plaintiffs' class certification, arguing that the class representatives did not adequately represent the interests of all class members. The Colegio's position was that "it owed nothing because the class members had not objected to paying for insurance and had benefitted from coverage." *Id.* at 52. The court rejected the "assumption, even more clearly flawed, [] that the insurance was in fact desired by the class members on whom it was inflicted." *Id.* The court acknowledged the possibility that some members of the class may have wanted the insurance and might have purchased it. However, this was outweighed by the fact that members may have failed to object for any number of reasons:

> some class members may have been unaware of the *Romero* decision; others may have accepted Colegio's remarkable claim that only Romero himself could benefit from the decision; and still others may have learned enough of how Colegio treated objectors . . . to stay silent because of the threatening obstruction and penalties.

Id. at 52–53.

The First Circuit rejected the idea that class members could not recover their premiums because they "benefited" from coverage they did not want. *Id.* at 52 (noting that this is consistent with tort law generally, as damages typically are not reduced because someone received an undesired benefit). Moreover, the court approved the district court's remedy of requiring the Colegio to disgorge the

improperly taken premiums in their entirety, to the whole membership, because the Colegio "knowingly inflicted all of the insurance on willing and unwilling members alike in the teeth of a ruling that it was not entitled to do so." *Id.* at 54.[4]

As for those class members who truly desired the insurance and were willing to pay for it, they were entitled to notice of their right to opt-out of the class and be excluded from the judgment awarding damages. "If Colegio is right about the degree of its support among the membership, this opt-out group may well include most or all those who were happy to have the insurance at the price charged, thereby significantly reducing the ultimate judgment." *Id.* In contrast to the court below, the First Circuit in *Brown* used the existing procedural mechanisms to accommodate class members who supported the government's action and sought no redress.[5]

---

[4] While the *Janus* decision itself came down last year, the unions were well aware, since *Knox* at the earliest, and the deadlocked decision in *Friedrichs*, 136 S. Ct. at 1083, at the latest, that their ability to garnish wages for agency shop fees was about to end. *Janus*, 138 S. Ct. at 2485 ("During this period of time [since *Knox*], any public-sector union seeking an agency-fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was uncertain."). As pro-union author Michael Selmi acknowledged about *Janus*, "If ever there was a case where the outcome was not in doubt, this is the one." Michael Selmi, *Supreme Court Term 2017–18: The Umpires Play Ball*, 22 Emp. Rts. & Emp. Pol'y J. 195, 199 (2018).

[5] One cannot escape noticing the irony of the state and union in this case arguing that an opt-out solution cannot protect their interests. *Cf. Knox*, 567 U.S. at 314 (noting "indefensible" and "aggressive use of power" by union to collect fees from non-members).

C. Classes To Recover for Deficient *Hudson* Notices

Prior to *Knox/Harris/Janus*, the main source of nonunion member class actions were those seeking refunds in light of unions' failure to provide constitutionally-required notices pursuant to *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 310 (1986). *See, e.g.*, *Lowary v. Lexington Local Board of Educ.*, 903 F.2d 422, 430 (6th Cir. 1990) (where notice procedures and fee information were inadequate, the court will not find waiver of rights based on failure to object to defective notice); *Mitchell v. Los Angeles Unified School Dist.*, 744 F. Supp. 938 (C.D. Cal. 1990) (certifying class of nonunion employees who had fees deducted and who alleged *Hudson* constitutional violations for judgment on relief issues), *rev'd on other grounds*, 963 F.2d 258 (9th Cir. 1992); *Hohe v. Casey*, 128 F.R.D. 68 (M.D. Pa. 1989) (certifying class of nonunion employees subject to wage deduction, whether or not they objected to the deductions, and who alleged *Hudson* constitutional violations); *George v. Baltimore City Public Schools*, 117 F.R.D. 368 (D. Md. 1987) (certifying class of nonunion employees who had fees deducted and who alleged *Hudson* constitutional violations); *Damiano v. Matish*, 644 F. Supp. 1058 (W.D. Mich. 1986) (certifying class of nonunion workers subject to agency fees or termination and who alleged *Hudson* constitutional violations), *rev'd on other grounds*, 830 F.2d 1363 (6th Cir. 1987).

After finding that the unions failed to meet their obligations under *Hudson*, many courts held that the appropriate remedy was to refund the entire agency fee to all non-members, regardless of whether

they filed individual objections. *See Knight v. Kenai Peninsula Borough School Dist.*, 131 F.3d 807, 812 (9th Cir. 1997); *Murray v. Local 2620, Dist. Council 57, Am. Fed'n of State, Cty. and Mun. Emps., AFL-CIO*, 192 F.R.D. 629, 634 (N.D. Cal. 2000) (awarding damages, including restitution, across the entire class, including those who did not object); *Knox v. Chiang*, 2013 WL 2434606, at *3 (E.D. Cal. June 5, 2013) (upon remand from this Court's decision in *Knox*, district court ordered refund to all 28,000 class members of all dues deducted without affirmative consent).

II

THE FIRST AMENDMENT PROTECTS THE INDIVIDUAL RIGHT TO REFUSE CONSENT FOR ANY REASON OR NO REASON AT ALL

Constitutional freedoms protect all Americans, regardless of their reason for invoking them, and regardless of whether other people approve of those reasons. *Cf. Davenport*, 551 U.S. at 314–15 (noting various "factors" that may influence a person's choice and that non-members, "for one reason or another," may or may not choose to support the union); *see also Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 327 (2010) (First Amendment standards "must give the benefit of any doubt to protecting rather than stifling speech.") (citation omitted); *Murray*, 192 F.R.D. at 633 ("[N]o inference can properly be drawn from the failure to object [to calculation of an agency fee] by the majority of the class."). In *Serna v. Transport Workers Union of America, AFL-CIO*, 2014 WL 7721824, at *1 (N.D. Tex. Dec. 3, 2014), the court granted class certification of all former, current, and future non-member employees represented by the

union who were compelled to pay compulsory union fees as a condition of employment. Although the union "presented evidence that non-members have chosen not to join the union for a variety of reasons," *id.* at *5, the court held that "this does not necessarily mean that they oppose the claims and relief sought in the matter," *id.*, and anyone who actually did oppose the claims could opt-out of the class. *Id.* at *7.

Similarly, in *Harrington v. City of Albuquerque*, 222 F.R.D. 505, 507–08 (D.N.M. 2004), non-members of the local AFSCME union sought damages for violation of their constitutional rights on a classwide basis. The court certified the class, rejecting the union's contention that the named plaintiffs—explicit objectors—did not adequately represent the largely silent class:

> The Defendants would have the Court believe that the absent class members, who chose not to join the union as was their right, would also choose not to recover such damages as a jury would find appropriate should the Plaintiffs prove that the Defendants intentionally violated the class members' constitutional rights. This is simply conjecture, not to mention illogical, and is insufficient to preclude class certification.

Id. at 514. The court emphasized that both the named plaintiffs, and the absent class members "chose, for whatever reason, not to join the union," and could have done so at any time. *Id.* It repeated: "The class members may have any number of reasons for not joining the union, any of which may override their

desire to support their collective bargaining representative." *Id.* Rejecting the union's "backward logic" and "unclean hands" in failing to provide constitutionally-required notice, the court held that calculation of damages would be elementary and of such an amount on an individual basis to make the class action the superior method of litigation. *Id.* at 515.

In short, there is no "state of mind" requirement to permit courts to inquire into the subjective motivations of those who choose to exercise their First Amendment rights.[6] *Janus* made it clear that the Constitution requires explicit, affirmative consent, and therefore any dues deductions taken from anyone who had not as of that time given such actual consent is entitled to a refund. This is true even if members of the class generally *support* the union. *See Hamidi v. SEIU Local 1000*, 2015 WL 2455600, at *6 (E.D. Cal. May 22, 2015) ("Support for a strong union [or] approval of the union's political activities . . . does not necessarily conflict with plaintiffs' goal in this lawsuit. For example, an individual may favor both a strong union and an opt in procedure for contributing to political activities—the two views are not mutually exclusive.").[7] *Cf. Probe v. State Teachers*'

---

[6] This carries over to other First Amendment contexts as well. *See, e.g.*, *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004) ("The protected status of the threatening speech is not determined by whether the speaker had the subjective intent to carry out the threat; rather, to lose the protection of the First Amendment and be lawfully punished, the threat must be intentionally or knowingly *communicated* to either the object of the threat or a third person.") (citations omitted).

[7] Class members have no cognizable interest in seeing unlawful conduct go unremedied. *Ruggles v. WellPoint, Inc.*, 272 F.R.D.

Ret. Sys., 780 F.2d 776, 779–81 (9th Cir. 1986) ("[I]f the state plan is found to violate Title VII, it will be invalidated notwithstanding the fact that there may be some who would prefer that it remain in operation.").

In the context of constitutional protection for criminal defendants, this Court demands affirmative, explicit waivers. When considering whether a criminal defendant has invoked *Miranda* rights, the defendant must do so unambiguously, *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010), but need not offer a reason for invoking that right. *New Mexico v. King*, 300 P.3d 732, 736 (N.M. 2013). *See also Anderson v. Smith*, 751 F.2d 96, 105 (2d Cir. 1984) (police officers have no legitimate need or reason to inquire into the reasons why a suspect wishes to remain silent); *People v. Marshall*, 41 Cal. App. 3d 129, 135 (1974) (defendant's reason for asserting his right to remain silent is immaterial). Also, courts may not presume a defendant's waiver of constitutional rights from a silent record and failure to request counsel. *Carnley v. Cochran*, 369 U.S. 506, 515–16 (1962).

Relatedly, a person denying consent to an agent of the state to enter property without a warrant is under no compunction to explain the reason for that denial. For example, a landowner has a constitutional right to refuse warrantless entry even if he is being

---

320, 338 (N.D.N.Y. 2011) ("Adequacy is not undermined where the opposed class members' position requires continuation of an allegedly unlawful practice."); *Srail v. Village of Lisle*, 249 F.R.D. 544, 552 (N.D. Ill. 2008) ("[A] judge may not refuse to certify a class simply because some class members may prefer to leave the violation of their rights unremedied.").

paid by a third party to assert that right. *See City of Cleveland v. Cleveland City Ry. Co.*, 13 Ohio C.D. 373 (Cir. Ct. 1902). Or a person may withhold consent to a warrantless search for the purpose of concealing wrongdoing. *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978). The *Prescott* court explained that the reason for ignoring the person's motivation is that to do so is necessary "to protect the exercise of a constitutional right." *Id. See also Bond v. United States*, 529 U.S. 334, 338 n.2 (2000) ("The parties properly agree that the subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment . . . ; the issue is not his state of mind, but the objective effect of his actions.").

CONCLUSION

At the behest of the SEIU, Illinois deemed home healthcare workers to be public employees solely to permit the union to dun the workers' Medicaid payments to support the union's activities. *Harris*, 573 U.S. at 624–25, 641. The union did so, violating the Constitution, and must now return the money to all non-members who never affirmatively granted the union permission to take the funds.

The petition for writ of certiorari should be granted.

DATED: March, 2019.

DEBORAH J. LA FETRA*
**Counsel of Record*
ERIN E. WILCOX
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Email: DLaFetra@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation