20-961

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOHN HENRY RYSKAMP,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Writ of Certiorari
To the Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERITORARI

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QUESTIONS PRESENTED FOR REVIEW

Introductory Statement

In *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), Justice Kagan correctly noted in her dissent that the "fee" is a tax on free speech. *Janus* is a tax case, because the "fee" is a tax according to criteria established by this Court, as Justice Kagan well understood. Applying *Janus*, the issue in this case is whether the U.S. tax system is, for Constitutional purposes, identical to the tax system described by this Court in *Janus*. If it is, then it contains the same prohibited individually enforceable protected speech component which caused this Court to strike down the *Janus* "fee." In which case, three questions arise for this Court:

The Questions

1. Under *Janus v. AFSCME*, does the U.S. tax system violate U.S. Const. amend I because it contains a prohibited individually enforceable protected speech component?

2. Under *Janus v. AFSCME*, does the U.S. tax system violate Article I, Section 8, Clause 1 because it legislates for the general welfare?

3. Under *Janus v. AFSCME*, does taxation enjoy a higher level of scrutiny than minimum scrutiny?

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PETITION FOR WRIT OF CERTIORARI

John Ryskamp petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Order of the United States Circuit Court of Appeals for the Ninth Circuit denying the petition for rehearing *en banc* (App. A, 1a), the Memorandum of the United States Court of Appeals for the Ninth Circuit (App. B, 2a-3a), and the Tax Court's Order and Order of Dismissal for Lack of Jurisdiction (App. C, 4a-8a), are unreported.

JURISDICTION

The order denying petition for rehearing *en banc* was entered on November 9, 2020. App. B, 2a-3a. This petition is filed within 90 days of that date. Rule 13.3. This Court's jurisdiction rests on 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

The Commissioner issued a standard letter to Petitioner—an enforcement action in the form of Notice LT16—in enforcement of alleged income tax due. Petitioner asserted in the Tax Court that enforcement was unconstitutional because the United States tax system was, for Constitutional purposes, identical to the *Janus* "fee" scheme, suffered the same protected speech disability and so was unconstitutional, and, in addition, constituted legislating for the general welfare in violated of the "tax and spend" provision of Article I, Section 8, Clause 1. For these reasons, the letter constituted, for purposes of the Tax Court's jurisdiction, a Section 6330 notice of determination. The Commissioner asserted that the Constitutional issues could not be addressed because the Tax Court lacked jurisdiction, in that the Notice was not one of the notices providing the Tax Court with jurisdiction.

The Tax Court upheld the Commissioner. On appeal, Petitioner reasserted the arguments made in the Tax Court. The Ninth Circuit refused to reach the Constitutional issues presented, and simply rested its decision on the same basis as the Tax Court, that the Notice was not a notice of deficiency or a notice of determination.

REASONS FOR GRANTING THE PETITION

I. The U.S. tax system violates U.S. Const. amend I.

In a petition to the Tax Court alleging a protected speech violation in the tax system, a letter constituting an action in enforcement of a tax, suffices to satisfy the Section 6330 requirement of a Notice of Determination. *Janus* is without precedent in finding an individually protected speech component in the "fee" scheme of that case. Previously, no tax had been found to contain such a speech component, which necessarily made taxation an individually enforceable right. The function of the present petition is to require the Commissioner to promulgate a tax system which does not contain the *Janus* prohibited individually enforceable protected speech component.

In *Janus*, this Court went out of its way to show that the *Janus* "fee" was not simply part of a system which included **advocacy**. This Court made it clear that the Janus "fee" system effected **results**—that is, the system was government, and not simply an effort to influence what government does.

Now the question inevitably arises—whatever status such a system enjoys under the Illinois Constitution—whether the U.S. tax system is Constitutionally identical to the Illinois system, and therefore unconstitutional? This is the question Justice Kagan dreaded in her dissent, because it is inevitable that, under the brief and uncomplicated facts and holding of *Janus*, the U.S. tax system would be implicated by the *Janus* case. This has now occurred.

Almost needless to say, there is no principled way of distinguishing the U.S. tax system from the *Janus* "fee" system. The "fee"—which is a tax, and which contains the offending protected speech component—goes to government and then is handed out by government to a system which effects general welfare results. The free speech violation highjacks the entire government, as this Court pointed out. That is exactly the U.S. tax system. There is no difference, nor has any commentary, inside or outside of the *Janus* case, indicated any difference.

II. The U.S. tax system violates Article I, Section 8, Clause 1 because it legislates for the general welfare.

Under *Janus*, whatever the United States enacts or enforces, pursuant to its Clause 1 tax and spend power, treads on the individually enforceable protected speech component. This is also what Justice Kagan foresaw. However, she did not point out the conclusion, which is that under *Janus*, the United States unconstitutionally legislates for the general welfare. Need one even rehearse the detailed analysis she provided showing exactly why this is so? And she knew well that there is "no sugarcoating" the implications of *Janus*—its implications are vast and profound. Again, the processes and procedures by which the State of Illinois effects general welfare results, do not differ substantially from those of the United States.

The difference is that under the U.S. Constitution, the United States is prohibited from legislating for the general welfare. This is the second reason the U.S. tax system is unconstitutional.

Section 6330, providing jurisdiction in the tax court, did not contemplate that the U.S. tax system itself would be found to have an unconstitutional individually enforceable protected speech component. First Amendment and Fifth Amendment Due Process considerations rule here to enable a petitioner a taxpayer to get redress in the tax court where there an enforcement action taken, no matter of what kind, which violates the First Amendment.

Indeed, the *Janus* tax is enforced in exactly the same manner as the U.S. tax system, with the same element of coercion and the same effect of generating government. To the point, the "complaint" procedure of *Janus* is identical to the Collection Due Process procedure set out in 26 USC 6330. Indeed, the Janus procedure seems to have been modeled on Section 6330, so completely do the two procedures align. There can be no doubt that the Courts had jurisdiction to hear Janus' First Amendment violation complaint, and no doubt that the tax court had jurisdiction to hear the implications of *Janus* for the U.S. tax system.

The overarching consideration is that the Illinois "fee" is a system which is government itself—from the assessment of the fee, through collection of it, through the protest process against it. Janus was not denied access to the Courts because he alleged a First Amendment violation—which is Petitioner's case. This Court goes to great lengths to show that everything about the Illinois "fee" is part of a scheme which effects general welfare results. Why does the Court do this? In order to show that *Janus* himself is unconstitutionally excluded from government. The Court concluded that that exclusion, including jurisdiction in the Courts, is simply impossible

under the Constitution. Here are those compelling facts, as laid out by the Court in *Janus*:

> "In addition **to affecting how public money is spent**, union speech in collective bargaining addresses many other important matters. As the examples offered by **respondents' own *amici*** show, unions express views on a wide range of subjects—education, child welfare, healthcare, and minority rights, to name a few. See, *e.g.*, Brief for American Federation of Teachers as *Amicus Curiae* 15–27; Brief for Child Protective Service Workers et al. as *Amici Curiae* 5–13; Brief for Human Rights Campaign et al. as *Amici Curiae* 10–17; Brief for National Women's Law Center et al. as *Amici Curiae* 14–30. What unions have to say on these matters in the context of collective bargaining is of great public importance.
>
> Take the example of education, which was the focus of briefing and argument in *Friedrichs*. The public importance of subsidized union speech is especially apparent in this field, since educators make up by far the largest category of state and local government employees, and education is typically the largest component of state and local government expenditures. Speech in this area also touches on fundamental questions of education policy. Should teacher pay be based on seniority, the better to retain experienced teachers? Or should schools adopt merit pay systems to encourage teachers to get the best results out of their students? Should districts transfer

> more experienced teachers to the lower performing schools that may have the greatest need for their skills, or should those teachers be allowed to stay where they have put down roots? Should teachers be given tenure protection and, if so, under what conditions? On what grounds and pursuant to what procedures should teachers be subject to discipline or dismissal? How should teacher performance and student progress be measured—by standardized tests or other means?
>
> Unions can also speak out in collective bargaining on controversial subjects such as climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions. These are sensitive political topics, and they are undoubtedly matters of profound "'value and concern to the public.'" *Snyder* v. *Phelps*, 562 U. S. 443, 453 (2011). We have often recognized that such speech "'occupies the highest rung of the hierarchy of First Amendment values'" and merits "'special protection.'" *Id.*, at 452."

Slip op. at 29-31. Emphases added.

Under Janus, Section 6330 jurisdictional considerations are simply an attempt to preserve an unconstitutional tax system. Indeed, Section 6330 is part of the entire governmental system which *Janus* condemns in such loving detail. The Court makes it clear that the *Janus* tax legislates, from start to finish, for the general welfare not because the matters it affects are important public matters, but because it effects **results** with respect

to those matters. Janus is excluded from government, and, of course, that is also what Justice Kagan says—only she says that, under the scrutiny regime, he *should* be excluded from government and *should* be made to abide by minimum scrutiny for taxation. But the scrutiny regime is problematic under *Janus*. This Court should note that the Janus Court raises the level of scrutiny for taxation ABOVE minimum scrutiny. Janus makes taxation an individually enforceable right. This is what so alarms Justice Kagan.

The Court makes it clear that the Janus tax is not advocacy or support of advocacy—the tax plays a vital role in the process of bringing general welfare results into effect. The *Janus* scheme is government, pure and simple. The Court is emphatic on this point. That the *Janus* tax is government, **and** that *Janus* is excluded from government, is the reason the Court finds an individually enforceable protected speech component in taxation.

III. Taxation enjoys a higher level of scrutiny than minimum scrutiny.

Justice Kagan—a firm scrutiny regime supporter—is highly alarmed that the Court finds an individually enforceable protected speech component in taxation. Why? Because under the scrutiny regime, taxation enjoys only minimum scrutiny. Indeed, the Court has never previously found a tax which contained an individually enforceable protected speech component.

If a tax contains an individually enforceable protected speech component, then the tax enjoys a level of scrutiny higher than minimum scrutiny. And the scrutiny regime? What then happens to

that? Well, it's in big trouble, because, as Justice Kagan correctly points out, speech is everywhere. It's a part of every fact held at minimum scrutiny by the scrutiny regime. And since the U.S. tax system is government and legislates for the general welfare, the protected speech component is a part of every scrutiny regime fact, raising the level of Constitutional scrutiny for every fact now held at minimum scrutiny. There is nothing in *Janus* limiting its applicability, and petitions are now before the Court extending *Janus*—contending that the "fee" extracted by violating protected speech, cannot be retained by the violators (and they are right). Taxation is now an individually enforceable right, enjoying a higher level of scrutiny than minimum scrutiny.

CONCLUSION

The Court should grant the petition for certiorari, and after review, remand the case to the Tax Court, instructing the Tax Court to require the Commissioner to present to the Tax Court as taxation scheme for the United States which does not legislate for the general welfare, does not contain an individually enforceable protected speech component, and enforces taxation at a higher level of scrutiny than minimum scrutiny.

Respectfully submitted,
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