

No. 19-670

IN THE
Supreme Court of the United States

ARNOLD FLECK,

Petitioner,

v.

JOE WETCH; AUBREY FIEBELKORN-ZUGER;
TONY WEILER; AND PENNY MILLER,

Respondents.

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

**BRIEF OF THE NATIONAL RIGHT TO WORK
LEGAL DEFENSE FOUNDATION, INC. AND
REASON FOUNDATION AS *AMICI CURIAE*
SUPPORTING PETITIONER**

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QUESTIONS PRESENTED

The Petitioner is an attorney who is required by state law to join and to fund a state bar association as a condition of practicing law. He challenged both compulsory membership and the compulsory funding of the association's political activities under the First Amendment. This Court vacated and remanded the previous judgment against him for consideration in light of *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), whereupon the Court of Appeals reaffirmed its prior ruling in all respects, holding that “*Janus* does not alter our prior decision.” *Fleck v. Wetch*, 937 F.3d 1112, 1118 (8th Cir. 2019) (App. 13a). The questions presented are:

1. Are laws mandating membership in a state bar association subject to the same “exacting” First Amendment scrutiny that the Court prescribed for mandatory public-sector union fees in *Janus*?

2. Does it violate the First Amendment to presume that an attorney is willing to pay for a bar association's “non-chargeable” political and ideological speech, unless and until that attorney takes steps to opt out?

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES.....	iii
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
A. <i>Janus</i> requires clear and compelling evidence that individuals have waived their First Amendment rights before payments for speech can be exacted from them	3
B. Many states and local governments are resisting this Court’s holding in <i>Janus</i>	4
CONCLUSION	10

TABLE OF AUTHORITIES

CASES	<u>Page(s)</u>
<i>Belgau v. Inslee</i> , 359 F. Supp. 3d 1000 (W.D. Wash. 2019).....	9
<i>College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.</i> , 527 U.S. 666 (1999).....	4
<i>Curtis Publishing Co. v. Butts</i> , 388 U.S. 130 (1967).....	4
<i>Fleck v. Wetch</i> , 937 F.3d 1112 (8th Cir.2019).....	i
<i>Harris v. Quinn</i> , 573 U.S. 616 (2014).....	1
<i>Janus v. AFSCME.</i> , 138 S. Ct. 2448 (2018).....	passim
<i>Johnson v. Zerbst</i> , 304 U.S. 458 (1938).....	3
<i>Keller v. State Bar of Cal.</i> , 496 U.S. 1 (1990).....	9
<i>Knox v. SEIU Local 100</i> , 567 U.S. 298 (2012)	1, 3
<i>Oliver v. SEIU Local 668</i> , 2019 WL 5964778 (E.D. Pa. Nov. 12, 2019).....	9
<i>Smith v. Bieker</i> , 2019 WL 2476679 (N.D. Cal. June 13, 2019).....	9
<i>Smith v. New Jersey Education Association</i> , 2019 WL 6337991 (D.N.J., Nov. 27, 2019).....	9
 U.S. CONSTITUTION	
U.S. Const. amend. I	passim
 STATUTES	
Cal. Gov. Code §1157.2.....	8
Del. Code Ann. tit. 19 §1304	8
Haw. Rev. Stat. Ann. §89-4(c).....	8
Illinois S.B. 1784 §6.....	8

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
N.J. Stat. Ann. §52:14-15.9e	8
 OTHER RULES & AUTHORITIES	
Supreme Ct. Rule 37.3(a)	1
Supreme Ct. Rule 37.6	1
Affirming Labor Rights and Obligations in Public Workplaces, Cal. Att’y Gen. Op. (undated), https://oag.ca.gov/system/files/attach- ments/press_releases/AG%20Becerra%20La- bor%20Rights%20Advisory%20FINAL.pdf	5
Attorney General Advisory: Affirming Labor Rights and Obligations in Public Workplaces, Wash. Att’y Gen. Op. (July 17, 2018), https://www.atg.wa.gov/news/news-releases/at- torney-general-ferguson-issues-advisory-affirm- ing-labor-rights-and-obligations Guidance for Public-Sector Employers and Employees in New York State, N.Y. Dep’t of Labor (undated), https://www.labor.ny.gov/formsdocs/fact- sheets/pdfs/janus-guidance.pdf	6
Attorney General Advisory: Affirming Labor Rights and Obligations in Public Workplaces, Mass. Att’y Gen. Op. (undated), https://www.mass.gov/files/docu- ments/2018/07/03/Attorney%20General%20Advi- sory%20-%20Rights%20of%20Public%20Sec- tor%20Employees%20(7-3).pdf	5, 6
Attorney General Advisory Guidance for Public Sec- tor Employers and Employees after <i>Janus v. AF- SCME Council 31</i> , N.M. Att’y Gen. Op. (un- dated), https://www.nmag.gov/attorney-general- advisory-on-janus-decision.pdf	5

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
Attorney General Advisory: Affirming Labor Rights and Obligations in Public Workplaces, Oregon Att’y Gen. Op. (undated), https://www.doj.state.or.us/wp-content/uploads/2018/07/AG_Advisory_on_Janus_Decision.pdf	5
First Amendment Rights and Union Due Deductions and Fees, Alaska Att’y Gen. Op. (Aug. 27, 2019), 2019 WL 4164739.....	7
General Guidance Regarding the Rights and Duties of Public-Sector Employers and Employees in the State of Connecticut after <i>Janus v. AFSCME Council 31</i> , Conn. Att’y Gen. Op. (undated), https://portal.ct.gov/AG/General/Guidance_on_Janus	5
General Guidance On The Rights And Duties Of Public-Sector Workers And Employers After Janus, Maryland Att’y Gen. Op. (undated), http://www.marylandattorneygeneral.gov/news%20documents/After_Janus.pdf	5
Guidance On The Rights And Responsibilities Of Public Sector Employees And Employers Following The U.S. Supreme Court’s <i>Janus</i> Decision, Pa. Atty. Gen. Op. (undated), https://www.attorneygeneral.gov/wp-content/uploads/2018/08/2018-08-03-AG-Shapiro-Janus-Advisory-FAQ.pdf	5
Guidance Regarding Rights and Duties of Public Employees, Public Employers, and Public Employee Unions After <i>Janus v. AFSCME Council 31</i> , Illinois. Att’y Gen. Op. (July 19, 2018), http://www.illinoisattorneygeneral.gov/rights/Janus_Advisory_72018.pdf	5

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
Vermont Attorney General Advisory: Public Sector Labor Rights and Obligations Following <i>Janus</i> , Vt. Att’y Gen. Op. (undated), https://ago.vermont.gov/wp-content/uploads/2018/08/Janus-Advisory-8.9.2018.pdf	6

INTEREST OF *AMICI CURIAE*¹

The **National Right to Work Legal Defense Foundation, Inc.** has been the nation’s leading litigation advocate for employee free choice concerning unionization since 1968. To advance this mission, Foundation staff attorneys have represented individual employees in many cases before this Court, including *Janus v. AFSCME*, 138 S. Ct. 2448 (2018).²

The Foundation submits this brief because it has an interest in the second question presented. Foundation staff attorneys currently represent hundreds of employees in many states who have not affirmatively consented to having union dues seized from their wages, but yet are still forced to subsidize union speech in violation of their First Amendment rights recognized in *Janus*.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason’s mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, and by issuing

¹ Pursuant to Supreme Court Rule 37.3(a), both parties received timely notice of *amici curiaes*’ intent to file this brief and consented to its filing. Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici curiae* made a monetary contribution to its preparation or submission.

² *E.g.*, *Harris v. Quinn*, 573 U.S. 616 (2014); *Knox v. SEIU Local 1000*, 567 U.S. 298 (2012).

policy research reports. To further Reason’s commitment to “Free Minds and Free Markets,” Reason participates as *amicus curiae* in cases raising significant constitutional or legal issues, including *Janus*.

SUMMARY OF ARGUMENT

The second question on which Petitioner seeks review is “[d]oes it violate the First Amendment to presume that an attorney is willing to pay for a bar association’s ‘non-chargeable’ political and ideological speech, unless and until that attorney takes steps to opt out?” Pet. (i). As Petitioner argues, Pet. 29–33, this question should be controlled by the Court’s holding in *Janus* that the government cannot seize payments for union speech from individuals unless it has clear and compelling evidence those individuals have knowingly waived their First Amendment right to refrain from subsidizing that speech. 138 S. Ct. at 2486.

The second question presented warrants this Court’s review because many state and local governments are refusing to comply with *Janus*’ waiver requirement. At least a dozen states’ attorneys general have claimed that states do *not* need proof that employees waived their First Amendment rights to take union membership dues from employees’ wages. Worse, several of those states have enacted legislation that prohibits employees from stopping the seizure of union dues from their wages for most of the year or precludes state and local governments from evaluating whether employees consented to union dues deductions. Unfortunately, some lower courts have upheld these state and union tactics that undermine *Janus*.

It is important that the Court take the second question presented to clarify that the Court meant

what it held in *Janus*: that it is unconstitutional for states to seize payments for speech from individuals unless the state has clear and compelling evidence that those individuals have knowingly waived their First Amendment right to refrain from subsidizing that speech.

ARGUMENT

A. *Janus* requires clear and compelling evidence that individuals have waived their First Amendment rights before payments for speech can be exacted from them.

Janus concerned an Illinois statute under which that state deducted union fees from employees' wages without proof of consent. 138 S. Ct. at 2486. The Court held that the First Amendment guarantees public employees a right to refrain from subsidizing union speech and that Illinois' fee deductions violated that right. *Id.* The Court established the following rule to govern deductions of payments for union speech from public employees' wages:

Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); see also *Knox [v. SEIU Local 100]*, 567 U.S. 298, 312–313 (2012)]. Rather, to be effective, the waiver must be freely given and shown

by “clear and compelling” evidence. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion); see also *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 680–682 (1999). Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

Id. In sum, to deduct payments for union speech from employees’ wages, states need proof the employees waived their First Amendment right to refrain from subsidizing union speech.

This waiver requirement makes sense. If individuals have a First Amendment right to refrain from subsidizing certain speech, it follows that they must waive that right for the government to constitutionally take their money for that speech. This reasoning applies just as forcefully to payments for a state bar association’s nonchargeable political and ideological speech as it does to payments for union speech, all of which is nonchargeable under the First Amendment.

B. Many states and local governments are resisting this Court’s holding in *Janus*.

Despite this Court’s holding in *Janus*, former compulsory fee states continue to deduct union dues from employees’ wages without proof the employees waived their First Amendment rights.

1. Shortly after the Court’s ruling in *Janus*, several state attorneys general (and one state agency) issued similar guidance about how to comply with *Janus*. This includes Illinois’ Attorney General (who represented Illinois in *Janus*) and the attorneys general of California, Connecticut, Maryland, Massachusetts,

New Mexico, Oregon, Pennsylvania, Vermont, and Washington (who filed an amicus brief supporting the respondents in *Janus*).³ Each of those attorneys general summarily declared *Janus* inapplicable to government deductions of union membership dues.⁴ The

³ See Brief for the State of New York *et al.*, No. 16-1466 (Jan. 19, 2018); Brief for the State of Cal. Supporting Affirmance, No. 16-1466 (Jan. 19, 2018).

⁴ See Affirming Labor Rights and Obligations in Public Workplaces, Cal. Att’y Gen. Op. (undated), https://oag.ca.gov/system/files/attachments/press_releases/AG%20Becerra%20Labor%20Rights%20Advisory%20FINAL.pdf; Guidance Regarding Rights and Duties of Public Employees, Public Employers, and Public Employee Unions After *Janus v. AFSCME Council 31*, Illinois. Att’y Gen. Op. (July 19, 2018), http://www.illinoisattorneygeneral.gov/rights/Janus_Advisory_72018.pdf; General Guidance Regarding the Rights and Duties of Public-Sector Employers and Employees in the State of Connecticut after *Janus v. AFSCME Council 31*, Conn. Att’y Gen. Op. (undated), https://portal.ct.gov/AG/General/Guidance_on_Janus; General Guidance On the Rights and Duties of Public-Sector Workers And Employers After *Janus*, Maryland Att’y Gen. Op. (undated), http://www.marylandattorneygeneral.gov/news%20documents/After_Janus.pdf; Attorney General Advisory: Affirming Labor Rights and Obligations in Public Workplaces, Mass. Att’y Gen. Op. (undated), [https://www.mass.gov/files/documents/2018/07/03/Attorney%20General%20Advisory%20-%20Rights%20of%20Public%20Sector%20Employees%20\(7-3\).pdf](https://www.mass.gov/files/documents/2018/07/03/Attorney%20General%20Advisory%20-%20Rights%20of%20Public%20Sector%20Employees%20(7-3).pdf); Attorney General Advisory Guidance for Public Sector Employers and Employees after *Janus v. AFSCME Council 31*, N.M. Att’y Gen. Op. (undated), <https://www.nmag.gov/attorney-general-advisory-on-janus-decision.pdf>; Attorney General Advisory: Affirming Labor Rights and Obligations in Public Workplaces, Oregon Att’y Gen. Op. (undated), https://www.doj.state.or.us/wp-content/uploads/2018/07/AG_Advisory_on_Janus_Decision.pdf; Guidance on the Rights And Responsibilities of Public Sector Employees And Employers Following the U.S. Supreme Court’s *Janus* Decision, Pa. Att’y. Gen. Op. (undated), <https://www.attorneygeneral.gov/wp-content/uploads/2018/08/2018-08-03-AG-Shapiro-Janus-Advisory-FAQ.pdf>;

advisory opinion issued by the Attorney General of Massachusetts is typical. It declares that:

The *Janus* decision does not impact any agreements between a union and its members to pay union dues, and existing membership cards or other agreements by union members to pay dues should continue to be honored. The opinion only impacts the payment of an agency service fee by individuals who decline union membership.

Attorney General Advisory: Affirming Labor Rights and Obligations in Public Workplaces, Mass. Att’y Gen. Op. (undated), [https://www.mass.gov/files/documents/2018/07/03/Attorney%20General%20Advisory%20-%20Rights%20of%20Public%20Sector%20Employees%20\(7-3\).pdf](https://www.mass.gov/files/documents/2018/07/03/Attorney%20General%20Advisory%20-%20Rights%20of%20Public%20Sector%20Employees%20(7-3).pdf)

The state attorneys general have thus effectively declared that the government does *not* need proof of a constitutional waiver to deduct payments for union speech from public employees’ wages if the employee joins the union, even if he or she did so without knowledge of his or her *Janus* rights (knowledge which would have been impossible before *Janus*). This

Vermont Attorney General Advisory: Public Sector Labor Rights and Obligations Following *Janus*, Vt. Att’y Gen. Op. (undated), <https://ago.vermont.gov/wp-content/uploads/2018/08/Janus-Advisory-8.9.2018.pdf>; Attorney General Advisory: Affirming Labor Rights and Obligations in Public Workplaces, Wash. Att’y Gen. Op. (July 17, 2018), <https://www.atg.wa.gov/news/news-releases/attorney-general-ferguson-issues-advisory-affirming-labor-rights-and-obligations>; *see also* Guidance for Public-Sector Employers and Employees in New York State, N.Y. Dep’t of Labor (undated), <https://www.labor.ny.gov/formsdocs/factsheets/pdfs/janus-guidance.pdf>.

misinterpretation of *Janus* renders its waiver requirement effectively meaningless, because the requirement can be ignored by simply including a union membership authorization on the same form that authorizes government dues deduction. That is the usual state of affairs: membership and dues deductions authorizations are almost always coupled together on one document.

The notion that *Janus* has no application to government deductions of union membership dues is untenable. The First Amendment protects all public employees, both union members and nonmembers alike, from having monies for union speech taken from them without their affirmative consent. Under *Janus*, affirmative consent requires clear and compelling evidence that the employee knowingly waived their First Amendment rights. 138 S. Ct. at 2486. The waiver standard applies to all public employees.

One state attorney general, Alaska's, has recognized as much in a formal opinion. *See* First Amendment Rights and Union Due Deductions and Fees, Alaska Att'y Gen. Op. (Aug. 27, 2019), 2019 WL 4164739. He properly concluded that, under *Janus*, the state could not lawfully deduct union dues from its employees' wages without proof the employees knowingly waived their First Amendment rights. *Id.* At present, his (correct) position is in the minority among states that collect payments for unions from their employees.

2. Besides flouting *Janus*' waiver requirement, several states responded to the decision (in some cases preemptively) by passing laws that severely restrict when employees can stop subsidizing union speech. Delaware permits employees to stop the deduction of

union dues from their wages only during a 15-day annual escape period or the period set on the authorization. Del. Code Ann. tit. 19, § 1304. Hawaii allows only a 30-day annual escape period. Haw. Rev. Stat. Ann. § 89-4(c). New Jersey permits employees to stop government dues deduction during only 10 days per year. N.J. Stat. Ann. §52:14-15.9e. A bill that recently passed Illinois' legislature authorizes a limited 10-day escape period. Illinois S.B. 1784 § 6. These states are, in effect, prohibiting employees from exercising their First Amendment rights under *Janus* for 335 to 355 days of the year.

Equally pernicious are state laws that seek to undermine *Janus* by granting unions control over government deductions of union dues from employees. California Government Code § 1157.12 requires public employers to blindly rely on union claims that employees authorized dues deductions and not demand proof the employees actually did so. That law further requires that public employers direct to unions all employee requests to stop dues deductions and prohibits stopping deductions except upon a union's order. *Id.* Rather than comply with *Janus* by ensuring that employees truly consented to union dues deductions, California has done the opposite and mandated that public employers turn a blind eye to whether a dues deduction violates employees' First Amendment rights.

3. State and union resistance to *Janus* has spawned much litigation by employees who seek to freely exercise their First Amendment rights. *Amici* know of eighty-six (86) currently active cases concern-

ing *Janus*-related issues, forty-five (45) of which concern government seizures of union dues from the wages of nonconsenting employees.

Unfortunately, several district courts in those cases have approved of government and union resistance to this Court's holding that governmental deductions of payments for union speech require proof of a constitutional waiver. Some courts, with little or no analysis, simply declared that *Janus* does not apply to union members. See, e.g., *Smith v. New Jersey Education Association*, 2019 WL 6337991, at *6 (D.N.J., Nov. 27, 2019); *Smith v. Bieker*, 2019 WL 2476679, at *2 (N.D. Cal. June 13, 2019). Two district courts have reached the same result a different way by declaring that state deductions of union membership dues do not involve state action, and are thus not subject to First Amendment scrutiny. See *Belgau v. Inslee*, 359 F. Supp. 3d 1000, 1016 (W.D. Wash. 2019), on appeal 19-35137 (9th Cir.); *Oliver v. SEIU Local 668*, 2019 WL 5964778, at *6 (E.D. Pa. Nov. 12, 2019).

4. The widespread refusal by state and local governments to comply with *Janus*' waiver requirement would likely come to a swift end if the Court clarified that it meant what it said in *Janus*: that affirmative consent to paying for another party's speech requires clear and compelling evidence that the individual knowingly waived his or her First Amendment right to refrain from subsidizing that speech. This case presents a suitable vehicle for the Court to (again) reach this important issue, because the procedural protections of the right to refrain from subsidizing others' speech should be the same whether or not public employees or lawyers are involved. See *Keller v. State Bar of Cal.*, 496 U.S. 1, 16-17 (1990).

CONCLUSION

For all these reasons, and those which Petitioners stated, the Court should grant the petition.

Respectfully submitted,

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