No. 17-886

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 a Writer of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF FOR KOUROSH KENNETH HAMIDI ET AL. AND THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

W. James Young
Counsel of Record
Milton L. Chappell
Frank D. Garrison
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road,
Suite 600
Springfield, VA 22160
(703) 321-8510
wjy@nrtw.org

Counsel for Amici

January 22, 2018

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2(b), Kourosh Kenneth Hamidi, Kim McElroy, Dawn P. Ammons, Gary Morrish, Clint Miller, Gary W. Morrish, Olayemi Sarumi, Antonia Toledo, Diane Tutt, and the National Right to Work Legal Defense Foundation, Inc., respectfully move for leave to file the attached brief as *amici curiae* supporting Petitioner. Amici provided all parties with timely notice of their intent to file as required under Rule 37.2(a). Petitioner's counsel consented to this filing. Respondents' counsel withheld consent.

Kourosh Kenneth Hamidi, Kim McElroy, Dawn P. Ammons, Gary Morrish, Clint Miller, Gary W. Morrish, Olayemi Sarumi, Antonia Toledo, and Diane Tutt are employed by the State of California in bargaining units represented by Service Employees International Union, Local 1000 ("SEIU Local 1000"). They are among Plaintiffs-Appellants representing a class of tens of thousands of similarly-situated state employees in a lawsuit currently pending on appeal before the United States Court of Appeals for the Ninth Circuit, *Hamidi et al., v. Service Employees Int'l Union, Local 1000*, No. 17-15434 (filed Mar. 8, 2017).

In their lawsuit, Hamidi et al. challenge the requirement imposed by California law and SEIU Local 1000 that nonmembers must object and annually renew their objection in order to avoid the seizure of full union dues from their wages, notwithstanding that they have: (1) not joined SEIU Local 1000; (2) resigned from union membership; and/or (3) asserted

an objection to the seizure and expenditure of fees exceeding their pro rata share of SEIU Local 1000's costs of collective bargaining, contract administration, and grievance adjustment. Obviously, the outcome of their case may be profoundly affected by the outcome of this case.

The National Right to Work Legal Defense Foundation, Inc. is a nonprofit organization that provides free legal aid to individuals whose rights are infringed upon by compulsory unionism, such as the *Hamidi* plaintiffs. Since its founding in 1968, the Foundation has been the nation's leading litigation advocate against compulsory unionism.

The Foundation's staff attorneys currently represent workers in scores of federal, state, and administrative cases involving forced union association and fee requirements. Foundation attorneys have represented individual workers in almost all of the compulsory union association and fee cases that have come before this Court. Those cases include *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Lehnert v. Ferris Faculty* Ass'n, 500 U.S. 507 (1991); *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177 (2007); *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012); *Harris v. Quinn*, 134 S. Ct. 2618 (2014); and *Janus v. AFSCME*, S. Ct. No. 16-1466 (U.S. pending). This case concerns the Foundation because it implicates freedom of association and First Amendment due process procedures for all workers, not just attorneys.

For the foregoing reasons, the amici respectfully request that they be allowed to file the attached brief in this case.

Respectfully submitted,

W. James Young
Counsel of Record
Milton L. Chappell
Frank D. Garrison
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
wjy@nrtw.org

QUESTIONS PRESENTED

The Petition addresses both of the legal issues this Court considered in *Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 1083 (2016), as applied to regulation of the legal profession:

1. Does it violate the First Amendment for state law to presume that an individual consents to subsidizing non-chargeable speech by the group he is compelled to fund (an "opt-out" rule), as opposed to an "opt-in" rule whereby he must affirmatively consent to subsidizing such speech?

2. Should *Keller v. State Bar*, 496 U.S. 1 (1990), and *Lathrop v. Donohue*, 367 U.S. 820 (1961), be overruled insofar as they permit a state to force an individual attorney to join a trade association he opposes as a condition of earning a living in his chosen profession?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Rules and Other Authorities

INTEREST OF THE AMICI CURIAE[1]

Kourosh Kenneth Hamidi, Kim McElroy, Dawn P. Ammons, Gary Morrish, Clint Miller, Gary W. Morrish, Olayemi Sarumi, Antonia Toledo, and Diane Tutt are employed by the State of California in bargaining units represented by Service Employees International Union, Local 1000 ("SEIU Local 1000"). They are among Plaintiffs-Appellants representing a class of tens of thousands of similarly-situated state employees in a lawsuit currently pending on appeal before the United States Court of Appeals for the Ninth Circuit, *Hamidi v. Service Employees International Union, Local 1000*, No. 17-15434 (filed Mar. 8, 2017).

In their lawsuit, Hamidi et al. challenge the requirement imposed by California law and SEIU Local 1000 that nonmembers must object and annually renew their objection in order to avoid the seizure of full union dues from their wages, notwithstanding that they have: (1) not joined SEIU Local 1000; (2) resigned from union membership; and/or (3) asserted an objection to the seizure and expenditure of fees exceeding their pro rata share of SEIU Local 1000's costs of collective bargaining, contract administration, and grievance adjustment. Obviously, the outcome of their case may be profoundly affected by the outcome of this case.

---

[1] Rule 37 statement: All parties received timely notice of intent to file this brief. Petitioner's consent letter has been lodged with the Clerk. Respondents withheld consent, so a motion for leave to file is attached. No party's counsel authored any part of the brief and no one other than amicus Foundation funded its preparation or filing.

The National Right to Work Legal Defense Foundation, Inc., is a nonprofit organization that provides free legal aid to workers, including the *Hamidi* Plaintiffs, whose rights are infringed upon by compulsory unionism. Since its founding in 1968, the Foundation has been the nation's leading litigation advocate against compulsory union fee requirements.

Currently, Foundation staff attorneys represent workers in scores of federal, state, and administrative cases involving forced union fee requirements. Foundation attorneys have represented individual workers in almost all of the compulsory union association and fee cases that have come before this Court.[2] Those cases include *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Lehnert v. Ferris Faculty* Ass'n, 500 U.S. 507 (1991); *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177 (2007); *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012); *Harris v. Quinn*, 134 S. Ct. 2618 (2014), and *Janus v. AFSCME*, No. 16-1466 (U.S. pending).

The amici submit this brief to urge the Court to protect the First Amendment due process rights of all workers, including attorneys, who are subject to a presumption of waiver of their fundamental rights, and to apply the proper level of First Amendment scrutiny to government compelled associations.

INTRODUCTION AND SUMMARY OF ARGUMENT

The First and Fourteenth Amendments prohibit government from forcing Americans into unwanted associations. This Court has carved out limited excep-

---

[2] *See* http://www.nrtw.org/en/foundation-cases.htm (last visited Jan. 11, 2018).

tions to that constitutional rule when a state's interest meets heightened constitutional scrutiny. But the Court has also made it clear that these associations must protect the First Amendment rights of dissenters through procedural safeguards, because the funding of an unwanted expressive association creates the risk of compelled political speech.

Petitioner Arnold Fleck is an attorney forced by North Dakota into that state's bar association as a condition of practicing law. He must pay annual dues to this organization, and he must object every year ("opt-out") if he wants to exercise his constitutional right not to pay for the bar association's political activities. Therefore, the default procedure in North Dakota is that Fleck is presumed to waive his constitutional rights.

This presumption is not, however, unique to North Dakota's compelled bar association. In many other states with "integrated bars," the default rule is that forced members must opt-out to exercise their constitutional right to be free from compelled speech. Moreover, the opt-out procedure is not unique to mandatory bar associations. Millions of other workers are subject to a presumption that they want an organization—one they have been forced to subsidize—to spend their hard-earned money on political ideas with which they might not agree.

Thus, this case presents the Court with the opportunity to address two overlapping First Amendment issues with national implications for millions of working Americans. First, whether the First Amendment prohibits an opt-out scheme that presumes individuals acquiesce in having their exacted fees spent on ideas with which they might disagree. Second,

whether a state must overcome strict First Amendment scrutiny before it can force an attorney into a mandatory bar association.

Amici urge the Court to take this case and answer yes to both questions. First, like labor unions, mandatory bar associations must provide procedures that ensure First Amendment due process for dissenters. This requires the use of means that are least restrictive of the dissenters' First Amendment association and speech rights. In *Knox v. SEIU*, 567 U.S. 298, 313-14 (2012), this Court held that an opt-out procedure for a union's special assessment was unconstitutional because it did not meet this test. *Knox*'s rationale applies to all opt-out schemes. An opt-out procedure presumes that dissenting individuals waive their fundamental right to be free from compelled speech, and is not narrowly tailored to protect their First Amendment association and speech rights. In short, it presumes *consent* to political speech where none has been given.

Second, the right to associate—and the right not to associate—are deeply-rooted fundamental rights protected by the First Amendment. This Court has repeatedly held that state regulation infringing on fundamental rights is subject to strict scrutiny. Thus, it is important that the Court take this case and make it clear that states must have a narrowly-tailored compelling interest when mandating compulsory financial support of any private association.

ARGUMENT FOR GRANTING THE WRIT

I. Opt-out regimes violate the First Amendment because they presume waiver of fundamental rights, and are not narrowly tailored procedural safeguards as the First Amendment requires.

A. This Court has never squarely held opt-out schemes are constitutional.

When allowed, forced associations like the North Dakota Bar abridge a fundamental right: freedom of speech and association. This is because when government forces dissenters to join associations, dues are also mandated. In turn, those associations will spend money to further causes with which the dissenters disagree—thus compelling individuals to subsidize speech. *See Harris*, 134 S. Ct. at 2644.

Because of the risk of compelled speech, the Court has limited the subjects on which a mandated association can spend the money of those forced to subsidize it. *See, e.g.*, *Keller v. State Bar,* 496 U.S. 1, 14 (1990); *Ellis v. Ry. Clerks*, 466 U.S. 435, 446-48 (1984); *Abood*, 431 U.S. at 235. The Court, moreover, requires that the association establish procedures to ensure First Amendment due process for potential dissenters. *See Teachers Local No. 1 v. Hudson*, 475 U.S. 292 (1986). These procedures are not subject to a balancing test—they must meet strict scrutiny to overcome the First Amendment injuries that compelled speech causes. *Knox*, 567 U.S. at 314.

This Court has never squarely held that opt-out regimes meet this strict scrutiny standard. Indeed, the Court's reasoning in *Knox* suggests the opposite conclusion: opt-out schemes are always unconstitu-

tional. In striking down the opt-out scheme in *Knox*, a majority of this Court found that prior judicial "acceptance of the opt-out approach" based on *Machinists v. Street,* 367 U.S. 740, 796 (1961), was a "historical accident" and not a "careful application of First Amendment principles." *Knox*, 567 U.S. at 312. Moreover, as far as *Street* itself was concerned, its "offhand remark" that led to that later acceptance was mere "dicta," and not binding on this Court. *See id.* at 312-13. Thus, whether opt-out procedures in general are unconstitutional is a question demanding this Court's attention.

B. This Court does not presume waiver of fundamental rights.

As noted, *Knox* held that an opt-out procedure for a union's special assessment was unconstitutional. This is for a good reason: opt-out schemes presume that individuals acquiesce in the loss of their fundamental right to be free from compelled speech—and thus do not meet the strict scrutiny *Hudson* requires. *See id.* at 312. ("Courts 'do not presume acquiescence in the loss of fundamental rights.'") (citing *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666, 682 (1999)). As this Court asked in *Knox*: "[W]hat is the justification for putting the burden on the nonmember to opt out of making such a payment? Shouldn't the default rule comport with the probable preferences of most nonmembers?" 567 U.S. at 312.

This reasoning applies just as forcefully to forced bar dues. Opt-out schemes like the North Dakota Bar Association's put the burden on the individual to object to the use of his or her forced bar dues for the

bar's constitutionally nonchargeable activities. *See* Pet. Brief at 13-15 (describing North Dakota's opt-out procedure). This Court should take this case and hold that any Americans subjected to forced-association schemes—including attorneys like Mr. Fleck—do not waive their fundamental rights by mere silence.

C. Opt-out regimes do not meet *Hudson*'s "less restrictive means" procedures for collecting dues and, thus, are unconstitutional.

Opt-out schemes fail to meet First Amendment due process requirements for another reason: they do not follow *Hudson*'s mandates. In *Hudson*, this Court held that "carefully tailored" procedures are necessary to protect dissenters because First Amendment rights are at stake. 475 U.S. at 302-03. As authority for that holding, the Court quoted *Roberts v. U.S. Jaycees*' statement of the least-restrictive-means test. *Id.* at 303 n.11 (quoting 468 U.S. 609, 623 (1984)). *Knox* later relied on the same holding of *Roberts* for the proposition that "mandatory associations are permissible *only* when they serve a 'compelling state interest . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Knox*, 567 U.S. at 310 (emphasis added) (quoting *Roberts*, 468 U.S. at 623).

Surely any scheme that allows an involuntary association to extract more than can constitutionally be required (i.e., for political purposes the individual has a constitutional right not to subsidize) is not "narrowly tailored" to avoid First Amendment harms. Narrow tailoring requires that it be presumed that an individual required to pay does not want to pay any more than can legally be required.

Of course, an individual can voluntarily opt-in to support financially the association's political views by affirmatively consenting to pay those costs. However, even if this were a balancing test—explicitly rejected in *Knox*, 567 U.S. at 313—the balance favors the individuals whose fundamental rights are at stake, not the mere pecuniary interests of government-favored and enabled private associations. As this Court noted in *Davenport*, state-imposed associations have "no constitutional entitlement to the fees" they compel from individuals. *See Davenport v. Wash. Educ. Ass'n*, 551 U.S. at 185. The North Dakota Bar possesses no claim to Fleck's dues when they are spent for political purposes, i.e., purposes that serve no compelling governmental interest. Thus, a presumption that he would want to pay for the political causes the Bar supports should not be allowed from his mere silence.

Knox noted that "[b]y authorizing a union to collect fees from nonmembers and permitting the use of an opt-out system for the collection of fees levied to cover non-chargeable expenses, our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate." 567 U.S. at 314. *Knox* then held that the line was crossed and "affirmative consent" was required for "a special assessment or dues increase." *Id.* at 321-22. The Court should take this case to squarely hold that opt-out requirements always exceed First Amendment limits.

II. Forced associations, like the North Dakota Integrated Bar, implicate the First Amendment rights of millions of workers across the nation and, thus, raise a question of national importance.

The First and Fourteenth Amendments' protection of the freedom of association are fundamental to ordered liberty. Indeed, the freedom to associate is "implicit in the right to engage in activities protected by the First Amendment[.]" *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000) (citing *Roberts*, 468 U.S. at 622). Individuals use this freedom to associate "with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Id.* The Framers knew this when they enshrined these freedoms in the First Amendment. Indeed, the ability to assemble and associate were crucial to America's founding—and without them, the Revolution might not have taken place.

Prior to the War for Independence, for example, the British government did not allow individuals to assemble and associate without its authorization. *See* Michael McConnell, *Freedom by Association: Neglect of the Full Scope of the First Amendment Diminishes our Rights*, First Things, Aug., 2012, https://www.firstthings.com/article/2012/08/freedom-by-association. But when the colonial governors tried to enforce these bans, courageous associations—including the Sons of Liberty—defied the crown, and their meetings became a seedbed for independence. *See id*; *see also*, *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 167-68 (1961) (C.J. Warren, dissenting) ("public opinion by groups, organizations, societies, clubs, and parties, has been and is a necessary part of our democratic society . . .

[G]roups, like the Sons of Liberty and the American Corresponding Societies, played a large part in creating sentiment in this country that led the people of the Colonies to want a nation of their own.").

In post-revolutionary America, associations would continue to play an essential role in the progression of freedom. This was recognized by Alexis de Tocqueville on his tour of America: "Americans of all ages, all stations in life . . . are forever forming associations . . . Nothing, in my view, more deserves attention than the intellectual and moral associations in America." Alexis de Tocqueville, II *Democracy in America* 938 (1938) (Eduardo Nolla ed., Liberty Fund 2010). de Tocqueville noted, moreover, associations are essential for the pursuit of equality. *See id.* ("Among the laws that rule human societies there is one that seems more precise and clearer than all the others. In order that men remain civilized or become so, the art of associating must be developed and perfected among them in the same ratio as equality of conditions increases.").

de Tocqueville's observations have proven prescient. We are a society with a long tradition of coming together as individuals not only to share interests in social activities—bowling leagues, rotary clubs, Civil War roundtables—but also to accomplish important societal goals such as securing other fundamental rights. Before the Civil War, for example, abolitionist associations sparked much of the unrest that would free millions of enslaved men, women, and children. *See*, John D. Inazu, *The Forgotten Freedom of Assembly*, 84 Tul. L. Rev. 565, 581-88 (2010). Likewise, the suffrage and civil rights movements depended on

the freedom of association to secure hard-fought victories for their causes. *See id.* at 591-93.

There is no more prominent example of this than the NAACP. In the early part of the last century, individuals from all walks of life banded together in that legal association to fight injustice and ensure equal treatment under the law for all individuals in our society. And indeed, a few decades later, a young lawyer working for the NAACP—a former member of this Court—argued a case that would secure equal rights in education for millions of school children. *See Brown v. Bd. of Educ.,* 347 U.S. 483, (1954), supplemented 349 U.S. 294 (1955).

But government does not always respect associational freedoms, so courts must step in and protect these rights through judicial review. After that same association opened a regional office in Alabama in 1951, for example, the state attorney general sought to enjoin it from conducting activities in the state and demanded that it turn over a list of its members. When the NAACP resisted, an Alabama court charged the organization with contempt. In reversing that decision, this Court recognized that "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment[.]" *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958) (citations omitted). The Court, moreover, noted that government action denying the freedom of association is "subject to the closest scrutiny." *Id.* at 461.

The other side of the right to associate—and of no less importance—is, of course, the right *not* to associ-

ate. *See Roberts*, 468 U.S. at 623 ("Freedom of association therefore plainly presupposes a freedom not to associate") (citation omitted); *Elrod v. Burns*, 427 U.S. 347, 359-60 (1976). This includes not only the right of an association not to be forced to include someone that does not share its mission, s*ee e.g.*, *Dale*, 530 U.S. at 661, but also the right of the individual not to be forced into an association with which he or she disagrees. *See e.g., Elrod*, 427 U.S. at 372-73.

When government abridges these fundamental rights, courts must step in and protect associations through strict judicial review. And this Court has done that by continuing to hold that forced associations must meet exacting First Amendment scrutiny. *Knox*, 567 U.S. at 309-10; *Roberts*, 468 U.S. at 623; *NAACP*, 357 U.S. at 461. Under that scrutiny, the government must prove that there is a "compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms" in order to overcome the presumption of unconstitutionality of forced associations. *See Knox*, 567 U.S. at 310. In particular, the Court has recognized that compelled financial support of an expressive entity is subject to at least that type of scrutiny. *See Harris*, 134 S. Ct. at 2639 (agency fee); *Rutan v. Republican Party*, 497 U.S. 62, 74 (1990) (requirement that employee contribute money to, or otherwise associate with, a political party); *Branti v. Finkel*, 445 U.S. 507, 515-16 (1980) (same); *Elrod*, 427 U.S. at 362-63 (same).

Requirements that attorneys, like Arnold Fleck, subsidize a state bar are subject to the same heightened scrutiny as other compulsory fee schemes for

expressive purposes. The Court, therefore, should take and analyze the second question presented under the proper level of scrutiny, i.e., strict First Amendment scrutiny. All workers subjected to forced associations –including attorneys– deserve to have the correct level of judicial review applied to their circumstances.[3]

CONCLUSION

Compelled associations are an exception to the First Amendment and are subject to heightened judicial review. When a state government forces Americans into these associations, this Court should assure it puts narrowly-drawn procedures in place that protect the fundamental rights of the dissenters. Thus, the petition for writ of certiorari should be granted.

Respectfully submitted,

W. James Young
Counsel of Record
Milton L. Chappell
Frank D. Garrison
c/o NATIONAL RIGHT TO WORK
LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510
wjy@nrtw.org

January 22, 2018

[3] Amici take no position as to whether the State's interest in regulating the legal profession through an integrated bar is a compelling governmental interest. Nor do we take a view as to whether forcing attorneys into the mandatory association at issue here is narrowly tailored to accomplish that state goal.