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 A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

This case raises important questions regarding the conflict between the exacting scrutiny required by *Janus v. AFSCME*, 138 S. Ct. 2448, 2465 (2018), and the rational basis scrutiny used in *Keller v. State Bar*, 496 U.S. 1, 8 (1990), as well as the applicability of *Janus*'s opt-in requirement to bar associations. The case comes to the Court a second time with a record of undisputed facts to aid the Court's deliberations, and with the legal issues sharply drawn.

None of Respondents' arguments against certiorari are persuasive.

First, Respondents' assertion that Petitioner "waived the argument he now presents" is irrelevant and misleading. Br. in Opp'n of Joe Wetch, et al. (Wetch Opp'n) at 15. Petitioner has consistently pressed his claim, at every stage of this case, that compelling him to join a bar association violates his First Amendment rights. He may therefore make any argument in support of that claim. *See Citizens United v. FEC*, 558 U.S. 310, 330 (2010); *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

Even if he could have waived the argument that *Keller* does not say what Respondents think it says, that would have no effect on the first Question Presented, which asks whether Fleck's freedom of association claim is subject to exacting scrutiny under *Janus* or rational basis under *Keller*, and, if the latter, whether *Keller* should be overruled. *See* Pet. at 24–29.

Second, there is no merit in Respondents' contention that the billing procedures the State Bar Association of North Dakota (SBAND) uses are really an opt-in system consistent with *Janus*. Respondents cannot evade *Janus* simply by calling their system opt-in when it is really opt-out. The fact is that SBAND presumes attorneys are willing to subsidize its political activities unless they take steps to negate that presumption. That makes it an *opt-out* system in violation of *Janus*'s rule that "waiver [of First Amendment rights] cannot be presumed." 138 S. Ct. at 2486. Respondents call it an opt-in system because SBAND only receives an attorney's money if the attorney writes out a check and sends it in. Wetch Opp'n at 24. But that plays "word games with the concept of ' . . . burden of [proof],' " *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 518 n.7 (1993)—and this actually demonstrates why certiorari is necessary.

SBAND presumes attorneys are willing to waive their First Amendment rights unless they discharge the burden of opting out (before writing a check). If attorneys' right to "affirmatively consent *before* any money is taken from them," *Janus*, 138 S. Ct. at 2486 (emphasis added), can be evaded simply by requiring them to write checks *after* forcing them to negate the presumption of waiver, then that right will likely prove valueless.

Third, contrary to Respondents' argument, Wetch Opp'n at 27, the record here is sufficient to answer both Questions Presented. This case comes to the Court after one District Court opinion and two Court of

Appeals opinions, and has a record of undisputed facts that illuminates how the abstract legal principles at issue work in practice.

Respondents also argue that there is no circuit split. Br. in Opp'n for Petra Hulm (Hulm Opp'n) at 10. But it's unrealistic to expect one to develop because lower courts are bound by abrogated precedents that they believe "directly apply" under *Agostini v. Felton*, 521 U.S. 203, 237 (1997). That means that, even though *Janus*'s exacting scrutiny requirement is irreconcilable with *Keller*'s rational basis approach, lower courts will continue following *Keller*.

Finally, Respondents' argument that this Court reaffirmed *Keller* in *Harris v. Quinn*, 573 U.S. 616 (2014), is simply incorrect. Hulm Opp'n at 16. The portion of *Keller* that *Harris* reaffirmed is not in dispute here, and *Harris* strongly questioned those portions of *Keller* that are at issue. Moreover, *Harris* was premised on the continuing viability of *Abood v. Detroit Board of Education*, 425 U.S. 949 (1976), which *Janus* overruled.

This Court should grant this Petition to reinforce the principles articulated in *Janus*, which will otherwise continue to be weakened by lower courts' misconstruction. The fact that several states are actively seeking to evade *Janus*'s affirmative-consent principle even in the union context demonstrates the urgency of clarifying and enforcing that rule.

ARGUMENT

I. Petitioner did not waive his challenges to the constitutionality of mandatory membership or to SBAND's billing procedure.

Petitioner has *always* maintained, at *every stage* of this case, that compelling him to join a bar association violates his First Amendment rights. He never waived that claim. He asserted it before the district court. Pet. App. 35a. He asserted it in his first appeal to the Eighth Circuit. *Id*. at 16a. He asserted it in his previous petition. And he asserted it on remand. Pet. App. 5a.

Respondents do not deny this. Instead, they say Petitioner waived one *argument* in support of this claim: specifically, that it is unnecessary to overrule *Keller* to find that compulsory membership in a bar that engages in non-germane political speech is unconstitutional. *See* Wetch Opp'n at 15–17. Petitioner made that argument on remand in the alternative to the argument—which he has made consistently throughout this case, with no waiver or concession—that *Keller* should be overruled. The lower court deemed that alternative argument waived.

That was incorrect, since "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee*, 503 U.S. at 534. But it's unnecessary to decide that, since it would have no effect on the Question Presented: namely, whether the law forcing Petitioner to join SBAND is subject to

exacting scrutiny under *Janus* instead of the rational basis standard *Keller* used. It is beyond dispute that that issue has been preserved.

Citizens United rejected a similar waiver argument in almost identical circumstances, because this Court is not "prevent[ed] . . . from reconsidering [existing precedents] or addressing the facial validity of [a statute]," as long as the constitutional claim has been passed upon below. 558 U.S. at 330. Petitioner has consistently argued that it is unconstitutional to force him to join SBAND; that question was passed upon below—and resolving it logically entails the question of whether *Keller* must or should be overruled. Respondents' waiver argument is therefore both meritless and irrelevant.

SBAND also claims Petitioner "conceded" that its billing procedures satisfy the Constitution. Wetch Opp'n at 26–27. That is a misrepresentation. The stipulation in question is in Petitioner's Appendix at 52a–57a. Paragraph 12 (*id*. at 54a) expressly states that Petitioner's claim regarding "violation of the alleged right to affirmatively consent to non-chargeable expenditures" remains *un*resolved. Petitioner did agree that SBAND's adoption of a procedure that *allows opt-out* satisfied *Keller*'s opt-out requirement, but he never conceded that *Keller*'s opt-out requirement is constitutionally adequate. Respondents' waiver arguments are therefore a red herring.

II. SBAND's attempt to characterize its opt-out system as opt-in shows why certiorari is warranted here.

SBAND characterizes its billing procedure as an "opt-in" system, Wetch Opp'n at 24, and the Eighth Circuit called it that, Pet. App. 11a–12a, 24a, on the theory that attorneys must write out checks to SBAND every year. This is wrong, and this confusion indicates why certiorari is so important here.

The difference between opt-in and opt-out is *where the presumption lies*: if a person is presumed willing to participate, or willing to surrender her rights, in the absence of action on her part, then the system in question is opt-*out*. On the other hand, if the system does not presume a willingness to participate, and requires the person to take some affirmative step to indicate consent, then it is opt-*in*. Here, SBAND presumes that attorneys are willing to subsidize its political activities; those who are not must take action to disassociate themselves—to overcome the presumption of acquiescence—in order to preserve their rights. It is therefore an opt-out system of the sort *Janus* held unconstitutional. 138 S. Ct. at 2486. Calling it something else does not change that.

Every year, SBAND sends attorneys a bill—*see* Pet. App. 58a—which states in bold type at the top, **"ANNUAL LICENSE FEE FOR 2018 $380.00."** But $380 is *not* the annual license fee. Instead, that amount includes the nonchargeable political expenditures that SBAND is constitutionally forbidden from mandating.

SBAND's form therefore says, in non-boldfaced type at the bottom right, that if members "want[] to take" the "OPTIONAL" "deduction," they may "deduct $1.45" from that total. That $1.45 represents the *nonchargeable* expenses that are *included* in the $380. In other words, the $380 figure *presumes consent* and requires dissenters to disavow that presumptive consent. This violates *Janus*'s affirmative consent rule.

Respondents call this an opt-in system because attorneys must write out a check for the proper total. Wetch Opp'n at 8. That is an attempt to evade *Janus*'s rule by playing a semantic game. *Janus* makes clear that this dues form amounts to a waiver of First Amendment rights, "and such a waiver cannot be presumed," but instead "must be freely given and shown by 'clear and compelling' evidence." 138 S. Ct. at 2486. That burden cannot be met by a form that presumes consent. Even the court below acknowledged that "a busy or careless lawyer might fill out the fee statement and write a check to SBAND for the full annual dues without noticing the option to take the *Keller* deduction," Pet. App. 12a—which demonstrates that SBAND's practices fail to prove by clear and compelling evidence that waiver is freely given.

This is not the time or place to address the merits,[1] but this look at SBAND's effort to minimize the scale

[1] Respondents object that Petitioner has not yet addressed the merits question of *stare decisis*. *See* Wetch Opp'n at 22. Petitioner is prepared to argue at the proper time that *stare decisis* does not justify retaining *Keller* for the same reasons that *Janus*, 138 S. Ct. at 2479–86 & n.27, gave for overruling *Abood*.

of its constitutional violation shows why certiorari is necessary. If an opt-out system like this can be called *Janus*-compliant simply because the individual writes out a check *after being forced to take steps to negate the presumption of acquiescence*—then *Janus*'s safeguards will likely be rendered impotent in other contexts.

III. This case is an ideal opportunity to address the questions presented.

The Court should grant this petition because this case has a sufficiently developed record of undisputed facts, presents clearly drawn legal issues, and raises questions of pressing national significance.

A. This case is an ideal opportunity to address whether *Janus*'s exacting scrutiny applies to mandatory bar associations.

The first Question Presented—whether compulsory membership in a bar association is subject to exacting scrutiny—is a clear question of law. While an evidentiary record is not necessary to resolve it, the record here will aid the Court's deliberations. The District Court made findings about SBAND's structure, its organizational objectives, its billing practices and amounts, the "political or ideological activities" in which it engages, Pet. App. 30a, its past activities of spending dues on initiative campaigns, *id.* at 31a–32a, and the *Keller*-style opt-out procedures it adopted during this lawsuit. *Id.* at 33a.

Other cases raising the constitutionality of mandatory bar associations are unlikely to present a similarly robust record. Based on their assumption that *Keller* controls, lower courts are likely to dismiss such claims under Rule 12(b)(6) without developing any record. Several have done this in recent months. *See Boudreaux v. La. State Bar Ass'n*, No. CV 19-11962, 2020 WL 137276, *23–24 (E.D. La. Jan. 13, 2020); *Jarchow v. State Bar of Wis.*, No. 19-CV-266-BBC, 2019 WL 6728258, at *1 (W.D. Wis. Dec. 11, 2019), *aff'd*, No. 19-3444 (7th Cir. Dec. 23, 2019), *cert. petition pending*, No. 19-831; *Gruber v. Or. State Bar*, No. 3:18-CV-1591-JR, 2019 WL 2251826, at *7 (D. Or. Apr. 1, 2019); *Schell v. Gurich*, 409 F. Supp. 3d 1290, 1298 (W.D. Okla. 2019). This case presents the fullest evidentiary record that the Court is likely to get.

B. This case is an ideal opportunity to address whether SBAND's opt-out procedure is constitutional after *Janus*.

The record here is also helpful in addressing the second Question Presented: whether SBAND's opt-out procedure violates the Constitution. The entire text of SBAND's opt-out policy is quoted in the District Court opinion, Pet. App. 38a–41a, which also includes extensive findings regarding SBAND's nonchargeable expenditures. *Id.* at 30a–31a. The record also includes a copy of SBAND's billing statement, *id*. at 58a, which illustrates how SBAND presumes consent and requires dissenters to disavow that consent to preserve their constitutional rights.

IV. Whether the *Janus* affirmative-consent principle applies to state bars is a matter of vital importance.

All sides recognized *Janus*'s significance, not only for the rights of government employees, but for the democratic process. Compulsory (or presumptive) subsidization of public employee unions' political activities was "especially" "importan[t]" because it affected debate on matters of "great public concern." 138 S. Ct. at 2475–76. It was therefore critical to adhere to the rule against presuming acquiescence in the loss of fundamental rights in order to protect dissenters who, given the choice, would not subsidize the opposite side in political debates. The same applies here.

Keller declared that state bars may not force lawyers to subsidize "political or ideological" activates, 496 U.S. at 15, but many do so, in part because they use the opt-out presumption of acquiescence that *Keller* allowed but which *Janus* found unconstitutional, and partly as a consequence of *Keller*'s inherent weaknesses. Like *Abood*, it "failed to appreciate" the "conceptual difficulty" or the "magnitude of the practical administrative problems" involved in letting states force people to subsidize some speech but not other speech, *Harris*, 573 U.S. at 636–37, and provided no sufficient justification for compelling attorneys to subsidize *germane* speech by bars. *See* Smith, *The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession*, 22 Fla. St. U. L. Rev. 35, 56 (1994) ("[I]t is hard to see why the law should compel a person to fund an association's propagation of

views with which she or he disagrees, merely because these views relate in some way to the quality of justice and the person happens to be a lawyer.").

As this Court has recognized, the freedom from compelled association is important not only for preserving the democratic process, but also because freedom of association is an essential personal liberty. *City of Dallas v. Stanglin*, 490 U.S. 19, 24 (1989). *Keller* quoted precedent that applied rational basis review to that fundamental right, 496 U.S. at 8, but *Janus* held that the proper standard is exacting scrutiny. 138 S. Ct. at 2477. The court below held that exacting scrutiny does not apply because *Janus* involved unions that employees are not required to join, whereas this case involves mandatory association. Pet. App. 13a. This Court alone can determine whether that distinction—which has no basis in the Court's jurisprudence apart from *Janus*'s lack of any reference to *Keller*—is valid, and provide lower courts with the guidance they need.

If the decision below is left undisturbed, so that *Janus*'s affirmative consent rule can be evaded simply by requiring the employee to write a check for a total that includes a presumptive waiver—and then calling that a *Janus*-compliant opt-in system—then *Janus* will be transformed into a mere "jurisprudence of labels." *Pleasant Grove City v. Summum*, 555 U.S. 460, 484 (2009) (Breyer, J., concurring).

V. Respondents' remaining arguments against certiorari are meritless.

Respondents observe that there is no circuit split. Wetch Opp'n 23. And it is true that, so far, lower courts have agreed that compulsory bars are constitutional under *Keller*, notwithstanding *Janus*. *See Boudreaux*, 2020 WL 137276, at *23–24; *Jarchow*, 2019 WL 6728258, at *1; *Gruber*, 2019 WL 2251826, at *7; *Schell*, 409 F. Supp. 3d at 1298.

But contrary to the Respondents' argument, the uniformity of these decisions is why the Court should *grant* certiorari: Given the rule that lower courts must keep applying precedent they believe to be on-point even after it has been abrogated, *Agostini*, 521 U.S. at 237, lower courts will continue applying *Keller*-style rational basis to the question of mandatory bar membership notwithstanding *Janus*. They will continue dismissing such challenges prior to fact-finding, and no circuit split is likely to develop—nor is there reason to wait for one. *Only* this Court can address the clash between *Keller* and *Janus*.

Respondents claim certiorari should be denied because *Harris* "signal[ed] strong support for *Keller*'s continued vitality." Hulm Opp'n at 16. But the portion of *Keller* that *Harris* reaffirmed was unrelated to either Question Presented here. What *Harris* strongly supported was *Keller*'s holding that bar members "could not be required to pay the portion of bar dues used for political or ideological purposes," and that attorneys can be required to bear the expenses of attorney

regulation. *Harris*, 573 U.S. at 655–56. Petitioners do not dispute this.

What Petitioners dipute is the constitutionality of compulsory membership and the opt-out rule SBAND uses (and calls opt-in). *Harris* said little about compulsory membership, except to express doubts about its constitutionality, and to observe that precedents apparently upholding it did so on the basis of "thin" constitutional analysis. *See id.* at 630–31. And *Harris* expressed strong *dis*approval of opt-out—based on the same arguments Petitioner makes here: presuming consent is "an anomaly" in the First Amendment context, and the opt-out requirement creates "practical problems" by imposing a "heavy burden" on objectors. *Id.* at 627, 637.

Harris said nothing about whether mandatory bar membership would survive the exacting scrutiny that *Janus* now requires. Thus, far from being a reason to deny certiorari, *Harris* shows why it should be granted: while a part of *Keller* that Petitioners to not dispute remains good law, the questions raised here remain unresolved and will remain so until this Court acts.

CONCLUSION

The petition should be *granted*.

Respectfully submitted,

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