

No. 17-594

**In The
Supreme Court of the United States**

RUSSELL THAW, et al.,

Petitioners,

v.

JEFFERSON B. SESSIONS III,
ATTORNEY GENERAL, et al.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR REHEARING

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I. The Jurisprudential Origin and Unresolved Ripe Conflict in the Question Presented

This case is closely related to *Janus v. American Federation of State, County, and Municipal Employees, Council 31* Supreme Court docket 16-1466 where this Court granted review on September 28, 2017. The *Janus* Question Presented, in part, states: whether “it is constitutional for a government to force its employees to pay agency fees to an exclusive representative for speaking and contracting with the government over policies that affect their profession.” This case raises the same issue: whether “it is constitutional for a government to force *licensed attorneys* to pay agency fees to an exclusive representative for speaking and contracting with the government over policies that affect their profession.” The majority of State Bar associations are mandatory bar organizations that routinely engage in political lobbying on behalf of its members like any other public labor union. All lawyers seeking bar membership in sixty percent of the Federal District Courts are compelled by Local Rules to join these political organizations to practice in the Federal District Court whether they want to or not. The same question is presented in this case with an additional wrinkle stemming from the constitutional right to petition the government for the redress of grievances.

Many have suggested that the Petitioners are deaf and dumb to pursue this *attorney equality* and *compelled association* question because these challenged administratively adopted Local Rules (sic) arise from institutional and tradition bound *Us vs. Them* federal

compelled association that has existed for decades. Others in the know have suggested, additionally, that you did not go to Harvard or Yale Law School, you have not clerked in the Supreme Court, you are not being represented by Thurgood Marshall or Ruth Bader Ginsburg, and Petitioner THAW and his advocates were not even smart enough to entirely escape United States military service.

Petitioner RUSSELL M. THAW is an American citizen. He has been a licensed trial lawyer in good standing for over thirty-three years. Attorney Thaw is an honorably discharged Vietnam Veteran decorated for meritorious service. In wearing the uniform of the U.S. Army and serving with other Americans from all fifty states, Petitioner was fundamentally transformed, not unlike a judge is transformed in wearing a robe, or a law clerk is transformed by serving in the marble palace. Thaw, in representing America 24-7 in armed combat earned his citizenship rights. He stood side by side with other American servicemen from fifty states representing the United States government; some of his brothers were wounded, many suffer post-traumatic stress disorder, and some paid their last full measure. Yet, Attorney Thaw is barred under Local Rules (sic) from representing clients in the Arizona Federal District Court. In order for attorney Thaw to gain admission, he is required to re-enroll in law school, graduate again, and then take and pass the Uniform Bar Exam in Arizona *that does not test Arizona law*. Thaw is not disbarred because of charges of misconduct. He has not been provided an opportunity

to be heard on his qualifications or experience, or a presumption of innocence, or a full and fair hearing by an impartial judge or jury. On the contrary, Thaw is automatically and categorically disbarred by an administratively adopted Local Rule enacted to benefit Us and disable Them. An administratively adopted Local Rule that has national effect; a Local Rule that divests Americans of fundamental citizenship rights. A Local Rule, the Ninth Circuit panel upheld by squarely holding only the Supreme Court possesses *supervisory* review jurisdiction.

Petitioner SHERYL ANN PHIPPS is an attorney in good standing licensed in California. Like THAW, she has a diversified life experience. She earned a M.Ed. in mathematics at the University of Arizona. As an *Arizona* citizen, she taught high school and college mathematics at the University of Arizona for sixteen years. She evolved in her career choice and earned a J.D. and an LL.M. in Taxation at Golden Gate University School of Law. She has taught courses on federal income, estate, and gift taxation as an Adjunct Law Professor at Golden Gate University School of Law. She has served as a Taxation and Accounting Editor for Mathew Bender & Co. (part of Lexis-Nexis). Since 2012, she has been the Attorney-Editor of the California Continuing Education of the Bar (CCE). Attorney Phipps is barred under Local Rules from general admission privileges in the Arizona Federal District Court. In order for Sheryl Ann Phipps to gain admission in the Arizona District Court, she is required to take and pass the Uniform Bar Exam in

Arizona that does not test Arizona law. A test designed to measure entry level practice that has nothing to do with her federal practice field of taxation. The alleged reason for this "reinvent the wheel" requirement is Petitioner has allegedly not proved that she is not incompetent and not a threat to the public.

Oliver Wendell Holmes, Jr., a man familiar with the foibles of human nature, having been wounded three times in the Civil War is quoted to the effect, that if you really get a person to understand your reasoning and that reasoning is valid, they will eventually agree with you. Life and people evolve. There are many examples where people wake up and wonder how their predecessors could have been so ignorant. For 1500 years people swore the sun revolved around the earth. It was held as a matter of law women do not have a constitutional right to practice law. *Bradwell v. State*, 83 U.S. 130 (1873); *In re Lockwood*, 154 U.S. 116 (1894); African-Americans were not injured by separate but equal government policies. *Plessy v. Ferguson*, 163 U.S. 537 (1896); Japanese-Americans could not be trusted. *Korematsu v. United States*, 323 U.S. 214 (1944).

This case presents a pure question of law that only this Honorable Court has the jurisdiction and supervisory duty to decide that raises the same Us/Them equality and dignity issued raised in *Bradwell*, *Lockwood*, *Plessy*, and *Korematsu*. The question presented is whether "Local Rules" in 60% of the 94 Federal District Courts that invidiously and categorically disqualify otherwise competent and licensed out of state

attorneys from 49 States and the District of Columbia for *general* bar admission are lawful, and subject to rubber stamp rational basis review based on any conceivable justification in the record or not. The remaining 40% of 94 Federal District Courts provide *general* bar admission to all licensed sister-state attorneys and do not provide a monopoly and uneven playing field for forum state lawyers.

The Declaration of Independence was founded on the principle that all men are created equal. Local Rules enacted once upon a time hold that while all men are created equal, only forum state lawyers are created equal.

Similarly, our Constitution was formed to provide a more perfect Union and to ensure justice and the blessings of liberty to ourselves and posterity. The Bill of Rights provides that Congress shall pass no law that abridges the People's freedoms to speech, assembly, and to petition the government for the redress of grievances. Yet, the Local Rules in 60% of Federal District Courts hold – that while Congress may not abridge the constitutional freedoms to speech, expressive association, counsel, and to petition the United States judiciary – we can until the United States Supreme Court exercises its supervisory power and tells us we cannot.

In *Frazier v. Heebe*, 482 U.S. 641 (1987) this Honorable Court exercised its *supervisory* power and abrogated a Louisiana Federal District Court local rule that disqualified out-of-state attorneys for *general* bar admission privileges applying a heightened “rational

and necessary” standard of review. Under the standard set forth in *Frazier v. Heebe*, it is obviously not necessary for Local Rules to categorically deny all sister-state attorneys *general* admission privileges as 40% of the Federal District Courts do not discriminate in favor or against any state’s lawyers. It is also obviously not rational for federal courts to arbitrarily and invidiously discriminate against any group of citizens.

This case presents a perfect opportunity to decide this important Us/Them question that is capable of repetition like the METOO cases; but has time after time escaped certiorari review by this Honorable Court. See Supreme Court docket *NAAMJP v. Howell*, 17-409, *Alfriend v. United States District Court for the Northern District of California* 16-310, *NAAMJP v. Lynch* 16-404, and *NAAMJP v. Lynch* 160525. Amicus briefs supporting certiorari grant were filed by the *Association of Professional Responsibility Lawyers* and others.

In each of these cases, the lower Courts followed each other and upheld Local Rules categorically barring non-forum state lawyers holding: (a) that no substantive or constitutional rights were implicated by the Local Rules; (b) that the Congressionally imposed rule-making standards set forth by 28 U.S.C. §§ 2071-72 were not applicable to District Courts; (c) that the Local Rules were subject to rubber stamp rational basis review; and (d) that these Court’s did not possess this Honorable Court’s supervisory power that was employed by this Court in *Frazier v. Heebe* to invalidate discriminatory bar admission Local Rules.

In each of these cases, the lower courts covered-up, as with a date-rape drug, the evidence Petitioners submitted: including multiple American Bar Association reports recommending reciprocal licensing; the fact that 28 states have adopted the Uniform Bar Exam where state law is not even tested and reciprocity is provided to novice attorneys; and scientific evidence proving that increased diversity improves fitness, innovation, and decision-making.

In each of these cases, where certiorari was denied in the last two years, no substantive evidence was submitted justifying this federal discrimination.

Oliver Wendell Holmes, Jr. also famously said even a dog can distinguish between when he is kicked intentionally and tripped over. Petitioners here are being intentionally kicked. Petitioners, under Local Rule, are afforded the same civil rights as Homer Plessy, Myra Bradwell, Belva Lockwood, and Korematsu.

The decisions below squarely hold only the Supreme Court has *supervisory* review. As the drumbeat of METOO cases against Bill Cosby, Alex Kozinski, and other public officials demonstrate numeracy counts. There is a big difference between one person making an abuse of power claim and 49 people echoing the same thing.

In *Chico and the Man*, the famous television show in the 70s, Chico's famous line was "that's not my job." This is what the lower courts have held about

supervisory review: That's not my job. In other words, the lower courts are examining the question presented in the narrowest context possible and not considering the global impact of this federal discrimination that nullifies the Constitution. This Honorable Court cannot allow this "Us vs. Them" federal discrimination to escape *supervisory* review without staining its own reputation for integrity and undermining the rule of law because more METOO cases will follow where the justices of this Honorable Court will be named as *supervisory* defendants.

II. The Sociological and Biological Origin and Unresolved Conflict in the Question Presented

Professor Robert M. Sapolsky is a professor of biology, neurology, and neurological sciences at Stanford University. He is a MacArthur Genius award winner. Professor Sapolsky in his magisterial book *Behave: The Biology of Humans at Our Best and Worst* (2017 Penguin Publishing Group, Kindle Edition) sets forth two reasons why this Honorable Court should exercise its *supervisory* jurisdiction and grant review in this case that is capable of repetition, and in light of 21st Century technological advances cannot evade review.

First, the petitioners are not being treated fairly by this federal discrimination. Professor Sapolsky cites a scientific paper on fairness called "Monkeys Reject Unequal Pay." See YouTube Video <https://www.youtube.com/watch?v=lKhAd0Tyny0>, demonstrating this remarkable study on fairness. Professor Sapolsky writes:

Now there are two capuchins, side by side. Each gets a pebble. Each gives it to the human. Each gets a grape, very rewarding. Now change things. Both monkeys pay their pebble. Monkey 1 gets a grape. But monkey 2 gets some cucumber, which blows compared with grapes – capuchins prefer grapes to cucumber 90 percent of the time. Monkey 2 was shortchanged. And monkey 2 would then typically fling the cucumber at the human or bash around in frustration. Most consistently, they wouldn't give the pebble the next time. *Id.* 484-485.

This response has since been demonstrated in various macaque monkey species, crows, ravens, and dogs.

What's key – that the other guy is still getting grapes . . . It's about the work – give one monkey a free grape, the other free cucumber, and the latter doesn't get pissed. The closer in proximity the two animals are, the more likely the one getting cucumber is to go on strike.

Instead it's self-interest – "This isn't fair; I'm getting screwed." *Id.* at 486.

Given the relatively limited reasoning capacities of monkeys, these findings support the importance of social intuitionism. De Waal perceives even deeper implications – the roots of human morality are older than our cultural institutions, than our laws and sermons. Rather than human morality being spiritually transcendent (enter deities, stage right), it transcends our species boundaries. *Id.* at 487.

Petitioner THAW is an honorably discharged Veteran. He did the work, and he is getting short changed by Local Rules. The same holds true for petitioner PHIPPS, who is being treated in this 21st Century the same way this Supreme Court treated attorneys Belva Lockwood and Myra Bradwell in the 19th Century. It is not fair.

Second, Professor Sapolsky in Chapter 11 “Us vs. Them,” explores our tendency to form Us/Them dichotomies and to favor the former and treat them unfairly.

Concerning US, Professor Sapolsky writes:

Our brains form Us/Them dichotomies (henceforth, “Us/Them-ing,” for brevity) with stunning speed. . . . fifty-millisecond exposure to the face of someone of another race activates the amygdala, while failing to activate the fusiform face area as much as same-race faces do – all within a few hundred milliseconds.

Minimal group studies show our propensity for generating biased Us/Thems from arbitrary differences. What we then do is link arbitrary markers to meaningful differences in values and beliefs. *Id.* at 391.

Merely grouping people activates parochial biases, no matter how tenuous the basis of the grouping. In general, minimal group paradigms enhance our opinion of Us rather than lessening our opinion of Them. *Id.* at 390.

So in-group parochialism is often more concerned about Us beating Them than with Us simply doing well. This is the essence of tolerating inequality in the name of loyalty. *Id.* at 395.

Concerning THEM, Professor Sapolsky writes:

In economic games people implicitly treat members of other races as less trustworthy or reciprocating. *Id.* at 398.

But Thems do not solely evoke a sense of menace; sometimes it's disgust. The role of disgust in Them-ing explains some individual differences in its magnitude. *Id.* at 399.

Thems are also frequently viewed as simpler and more homogeneous than Us, with simpler emotions and less sensitivity to pain. *Id.* at 399.

Essentialism is all about viewing Them as homogeneous and interchangeable, the idea that while we are individuals, they have a monolithic, immutable, icky essence. . . . Thus, Thems come in different flavors – threatening and angry, disgusting and repellent, primitive and undifferentiated. *Id.* at 399.

Professor Sapolsky in recognizing the arbitrary nature of Us/Theming emphasizes:

Thus Us/Them dichotomies can wither away into being historical trivia questions . . . and can have their boundaries shifted at the whims of a census. Most important, . . . ones that seem inevitable and crucial can, under

the right circumstances, have their importance evaporate in an instant. *Id.* at 410.

The Arizona District Court Local Rules are the product of a quintessential and arbitrary Us/Them bias. All Arizona lawyers are presumed angels. All lawyers licensed in 49 States and the District of Columbia are presumed threatening, angry, repellant, primitive, and undifferentiated.

The question presented in this petition, similar to *Janus* Supreme Docket 16-1466, is whether citizens from 49 states (THEM) should be thrown under the bus, and all citizens be compelled to salute the Arizona state flag, so that a political union, i.e. the Arizona Bar Association (US), can be provided a monopoly on access to the United States Courthouse?

III. This Court Should Grant Rehearing and Supervisory Review to Preserve Its Reputation for Integrity and Equal Justice Under Law: The Buck Stops Here

The American Bar Association has repeatedly concluded that women and minorities are disproportionately disabled by the failure of Courts to have reciprocity provisions.

This Honorable Court has a reputation as a beacon of justice above reproach. Accordingly, the Courts below uniformly refuse to exercise this Court's *supervisory* responsibility. However, refusing to exercise *supervisory* power can be the same as encouraging civil rights violation as the recent METOO cases illustrate.

Refusing to exercise *supervisory* responsibility and not having it are different.

If this Court denies rehearing in light of the same *compelled association* issue presented in *Janus*, Petitioners are going to be compelled to repackage these claims that disable hundreds of attorneys and their clients, and are capable of repletion but evading review, and name the Justices of this Honorable Court as a named party to avoid this "no *supervisory* jurisdiction" subterfuge. Petitioners expect that the Washington Post and every newspaper in America will broadcast this Honorable Court's deliberate indifference to the plight of American veterans and refusal to exercise its supervisory review.

The greater good, the core principles our more perfect Union and Bill of Rights was founded upon, will be preserved by this Court granting review and they will be perverted by not granting review.

Respectfully submitted,

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CERTIFICATION OF COUNSEL

I hereby certify that this petition for rehearing is presented based on good cause based on *Janus v. American Federation of State, County* Supreme Court docket 16-1466 and other recent METOO cases demonstrating public official misconduct including Judge Alex Kozinski's resignation; and the December 20, 2017 letter signed by 850 former law clerks and law professors sent to the Supreme Court asking it to address the system of investigating harassment and other misconduct complaints within the federal judiciary.

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