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

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to this Court's Rule 37.2(b), Pacific Legal Foundation (PLF) respectfully requests leave of the Court to file this brief amicus curiae in support of Petitioner Arnold Fleck. PLF timely notified all parties of its intent to file an amicus brief in this matter pursuant to Rule 37.2(a). Petitioner Fleck granted consent, but all Respondents denied consent, necessitating this motion.

PLF was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. Among other matters affecting the public interest, PLF has repeatedly litigated in defense of the right of workers not to be compelled to make involuntary payments to support political or expressive activities with which they disagree. To that end, PLF attorneys were counsel of record in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Brosterhous v. State Bar of Cal.*, 12 Cal. 4th 315 (1995); and *Cumero v. Pub. Emp't Relations Bd.*, 49 Cal. 3d 575 (1989), and PLF has participated as amicus curiae in all of the most important cases involving labor unions compelling workers to support political speech, from *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), to *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298 (2012), *Harris v. Quinn*, 134 S. Ct. 2618 (2014), *Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 1083 (2016), to *Janus v. AFSCME*, Supreme Court docket no. 16-1466. PLF believes that its experience and expertise in the application of the Frist Amendment freedoms of speech and association to matters involving government compulsion will

provide an additional and useful viewpoint in this case.

For all the foregoing reasons, the motion of Pacific Legal Foundation to file a brief amicus curiae should be granted.

DATED: January, 2018.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Does it violate the First Amendment for state law to presume that Petitioner 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 Petitioner must affirmatively consent to subsidizing such speech?

2. May the state force Petitioner 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

Federal Statute

State Statutes

Rules

Miscellaneous

INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. Among other matters affecting the public interest, PLF has repeatedly litigated in defense of the right of workers not to be compelled to make involuntary payments to support political or expressive activities with which they disagree. To that end, PLF attorneys were counsel of record in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Brosterhous v. State Bar of Cal.*, 12 Cal. 4th 315 (1995); and *Cumero v. Pub. Emp't Relations Bd.*, 49 Cal. 3d 575 (1989), and PLF has participated as amicus curiae in all of the most important cases involving labor unions compelling workers to support political speech, from *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), *Harris v. Quinn*, 134 S. Ct. 2618 (2014), *Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 1083 (2016), to *Janus v. AFSCME*, Supreme Court docket no. 16-1466.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

In an ideal world, an integrated bar association would non-controversially manage the core functions related to regulation of the legal profession. This

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[1] PLF timely notified all parties of its intent to file an amicus brief in this matter pursuant to Rule 37.2(a).

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Court in *Lathrop v. Donohue*, 367 U.S. 820 (1961), presumed this ideal, and the petitioners in *Keller v. State Bar of California*, 496 U.S. 1 (1990), conceded that *Lathrop* was controlling on the constitutionality of the integrated bar.[2] The history of mandatory bar associations has not borne out that ideal. Just as the currently pending case of *Janus v. AFSCME* reconsiders the Court's premises underlying *Abood v. Detroit Board of Education* that reflected an unrealistic view of public employee unions, this case demonstrates that *Lathrop* and *Keller* failed to appreciate the increasing and pervasive politicization of state bar associations, and also overestimated the ability of a unified bar to be a careful steward of mandatory dues. Reconsideration of this question presents an important issue of nationwide importance that can only be resolved by this Court. *See* Sup. Ct. R. 10.

Attorneys with Amicus Pacific Legal Foundation represented the petitioners in the eight-year battle culminating in the Court's *Keller* opinion and continued suing the Bar on behalf of objecting members for another decade to enforce this Court's decision. After eighteen years total litigation, the situation for California attorneys is little better than before *Keller*. The State Bar continues to pursue

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[2] Counsel for petitioners, Anthony T. Caso, made this point in his opening remarks of the *Keller* oral argument. *Keller v. State Bar of Cal.*, Oral Argument (Feb. 27, 1990), https://www.oyez.org/cases/1989/88-1905 ("This case does not challenge the right of California to regulate attorneys through a mandatory bar association. Instead, it asks whether having done so, may it also authorize the bar to, in the words of the [California Supreme Court], comment generally upon matters pending before the legislature.").

political ends, works to ensure that objectors get the smallest possible deduction after jumping through the greatest number of hoops to claim it, and engages in financial shenanigans that constantly draw the attention—and ire—of the state auditor. Many attorneys have abundant reasons to resent subsidizing and associating with the government's mandatory bar association. This Court should grant the petition in this case to revisit whether the Constitution allows the state to coerce attorneys into association with a government bar and, if so, whether the government bar may (unlike any other constitutional infringement) presume objectors' acquiescence until they complain.

The petition for a writ of certiorari should be granted.

REASONS FOR GRANTING THE PETITION

I

MANDATORY STATE BAR MEMBERSHIP GIVES NO ASSURANCE OF COMPETENT REGULATION OF THE LEGAL PROFESSION

The rationale for mandatory state bar membership rests primarily on the idea that the government is best positioned to regulate the legal profession when all lawyers are corralled into a single association. *Lathrop*, 367 U.S. at 834 (noting a 1957 policy at the time of integration that required the Wisconsin bar to represent the views of the minority as well as the majority to "safeguard the interests of all [attorneys]"). Yet as noted in the Petition for Writ of Certiorari, nineteen states ranging from New York

(largest economy) to Vermont (smallest) successfully regulate attorneys with voluntary bar associations. Pet. at 26. On the flip side, the State Bar of California stands as an example of a unified bar noted primarily for its incompetence in performing its core functions as well as its intransigence in complying with *Keller*.

A. Bar Unification Cannot Guarantee Competent Regulation

Both *Lathrop* and *Keller* were decided under the assumption that, at a minimum, state regulators of attorneys were competent in that role. *Lathrop*, 367 U.S. at 843 ("Both in purport and in practice the bulk of State Bar activities serve the function, or at least so Wisconsin might reasonably believe, of elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State, without any reference to the political process."); *Keller*, 496 U.S. at 11 (The State Bar "undoubtedly performs important and valuable services for the State by way of governance of the profession"). While Amicus cannot speak to the competency and effectiveness of every unified bar, the persistent incompetence and tribulations of the State Bar of California has been documented with depressing regularity by the State Auditor.[3]

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[3] *See also* Bradley A. Smith, *The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession*, 22 Fla. St. U. L. Rev. 35, 58 (1994) (Unified bar supporters argue "that the added resources of coerced dues and membership enable the bar to do more in the way of pro bono programs, legal education, and other programs to benefit lawyers and the public. Actual experience has never supported this argument.").

Perhaps the most important role exercised by the State Bar of California is disciplining attorneys who fail to meet their professional responsibilities. It is worth noting at the outset that from the Bar's founding in 1927 "[u]ntil 1988, the State Bar's attorney disciplinary system was operated primarily with the assistance of volunteers from local bar associations." *Obrien v. Jones*, 23 Cal. 4th 40, 44 (2000). Professionalization of the disciplinary apparatus within the mandatory bar did not improve its effectiveness or efficiency. The California State Auditor, mandated by statute[4] to report on the Bar's finances and programs, bluntly reported in 2015 that "the State Bar has not consistently fulfilled its mission to protect the public from errant attorneys." California State Auditor, *State Bar of California: It Has Not Consistently Protected the Public Through Its Attorney Discipline Process and Lacks Accountability*, Report 2015-030 (June 18, 2015).[5]

The details are sobering. The auditor determines the effectiveness of the Bar's discipline system in part by counting the number of complaints it fails to resolve within six months of receipt (denominated "the backlog"). In 2010, the backlog reached 5,174 cases. Under pressure to reduce that number, the Bar compromised the severity of the discipline imposed on attorneys in favor of speedier types of resolutions. This succeeded in resolving two-thirds of the backlogged cases, but the auditor found that the State Bar was inexcusably lenient in many of its settlements.[6] For example, the California Supreme

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[4] Cal. Bus. & Prof. Code § 6145.

[5] https://www.bsa.ca.gov/pdfs/reports/2015-030.pdf.

[6] *Id*. at 20, 23-24.

Court—the ultimate arbiter of attorney discipline in the state—returned 27 case files to the Bar due to the appearance of insufficient levels of discipline.[7] The Bar, upon reconsideration, imposed greater discipline in 21 of those cases, including 5 disbarments. The Auditor commented, "Thus, in its efforts to reduce its backlog, the State Bar may have been too lenient on attorneys deserving of greater discipline, or even disbarment, potentially at significant risk to the public."[8] Finally, the Auditor concluded that the State Bar lacked goals and metrics that would measure the effectiveness of its enforcement efforts.[9]

The same report chastised the Bar for failing to allocate more of its resources to improving the discipline system or ensuring it has sufficient staffing to handle complaints. Instead, the Bar spent $76.6 million to purchase and renovate a building in Los Angeles in 2012, a purchase accomplished only through improper shuffling of funds and a lack of transparency to the Legislature.[10] This financial mismanagement of members' mandatory dues was not an isolated incident. It exemplifies perpetual problems with the State Bar that continue to this day. *See* California State Auditor, *The State Bar of California: It Needs Additional Revisions to Its Expense Policies to Ensure That It Uses Funds Prudently*, Report 2017-030 (June 27, 2017);[11] California State Auditor, *The State Bar of California: Its Lack of Transparency Has Undermined Its*

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[7] *Id.* at 23.
[8] *Id.* at 20.
[9] *Id.* at 41-42.
[10] *Id.* at 43-48.
[11] https://www.bsa.ca.gov/pdfs/reports/2017-030.pdf.

Communications with Decision Makers and Stakeholders, Report 2015-047 (May 12, 2016).[12] Among other findings, the State Auditor's reports highlight the following instances of financial misfeasance:

- As of April, 2017, 80% of the State Bar's full-time employees worked only 36.25 hours per week while receiving base salaries that averaged 10% above the market median for comparable agencies;[13]
- Nearly 38% of bar employees have state credit cards with monthly credit limits up to $75,000, even while the Bar lacks any process to demonstrate that these cards are issued to appropriate staff or that it documents changes to employees' credit limits;[14]
- The State Bar falsely reported the balance in two of its funds as unrestricted;[15]
- The Bar has not clearly reported its budget assumptions to the Legislature despite the fact that the Legislature relies on that budget to

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[12] https://www.bsa.ca.gov/pdfs/reports/2015-047.pdf. *See also* Matt Hamilton, *Audit rips California's state bar for shady finances and bloated salaries*, Los Angeles Times (May 13, 2016) http://www.latimes.com/local/lanow/la-me-ln-state-bar-audit-20160513-snap-story.html ("The organization has long been bedeviled by conflict and controversy, with lawmakers publicly excoriating the agency for being inefficient and overly political. In recent years, internal strife has grabbed headlines beyond legal trade papers.").

[13] Report 2017-030 at 15.

[14] *Id*. at 20.

[15] Report 2015-047 at 23.

ensure the reasonableness of the State Bar's fees;[16]

- The Bar created and used a nonprofit foundation without sufficient oversight of its Board of Trustees and used almost $15,000 to pay the foundation's debts out of the general fund (mandatory dues);[17] and
- To finance its purchase of the Los Angeles building, the cost of which it underestimated by $50 million, the Bar "secured a $25.5 million loan, sold a parking lot in Los Angeles for $29 million, and transferred $12 million between its various funds, some of which the State Bar's Board of Trustees (board) had set aside for other purposes."[18]

These are just a sampling of the State Auditor's revelations about the State Bar's continuous mismanagement and inability to perform its most basic functions in an efficient or transparent way.[19]

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[16] *Id*. at 37-38.

[17] *Id*. at 41-42 ("Without increased oversight, there is a risk that the State Bar could create similar nonprofits in the future and use their funds for questionable purposes.").

[18] Report 2015-030 at 3; *see also id.* at 45, 48.

[19] The Bar's failures resulted in California governors twice vetoing the legislature that authorized collection of bar dues, in 2007 and 2009. *See* Kathleen O. Beitiks, *Wilson vetoes fee bill; bar moves to secure funding*, California Bar J. (Nov. 1997) http://archive.calbar.ca.gov/archive/calbar/2cbj/97nov/caljnl.htm. Governor Pete Wilson's veto message noted the "chronic disharmony" that exists when the Bar attempts to function "both a regulatory and disciplinary agency as well as a trade organization designed to promote the legal profession and collegial discourse among its members." Gov. Pete Wilson, Veto message accompanying veto of SB 1145 (Oct. 11, 2007), http://archive.calbar.ca.gov/archive/calbar/2cbj/97nov/97nov-16.htm.

Additional reports, dating from 1996 and all on the same themes, are available on the Auditor's website.[20]

B. The State Bar of California Has Engaged in Calculated, Long-term Defiance of *Keller*

When this Court ruled in *Keller* that the State Bar of California could no longer demand that California attorneys subsidize its political and ideological agenda, the conclusion of that eight-year litigation did not resolve the underlying problem. Taking a cue from Paul Harvey, here is the rest of the story of the

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Governor Arnold Schwarzenegger's 2009 veto message lamented, "As the organization charged with regulating the professional conduct of its members, the conduct of the State Bar itself must be beyond reproach. Regrettably, it is not." Even the then-State Bar President Howard Miller acknowledged that the Governor's criticisms were "justified." Cheryl Miller, *Legal Pad: Governor Vetoes State Bar Dues Bill*, The Recorder (Oct. 11, 2009) http://legalpad.typepad.com/my_weblog/2009/10/governor-vetoes-state-bar-dues-bill.html.

[20] California State Auditor, *Reports Related to "Bar of California, State"* (last visited, Jan. 12, 2018), https://www.bsa.ca.gov/reports/agency/8. The titles of previous reports demonstrate the consistency of these problems, all of which involve the expenditure and reporting of mandatory dues. California State Auditor, *State Bar of California: It Can Do More to Manage Its Disciplinary System and Probation Processes Effectively and to Control Costs*, Report 2009-030 (July 21, 2009), https://www.bsa.ca.gov/pdfs/reports/2009-030.pdf; California State Auditor, *State Bar of California: With Strategic Planning Not Yet Completed, It Projects General Fund Deficits and Needs Continued Improvement in Program Administration*, Report 2007-030 (Apr. 26, 2007), https://www.bsa.ca.gov/pdfs/reports/2007-030.pdf; California State Auditor, *State Bar of California: Opportunities Exist to Reduce Fees, Better Control Administration and Planning, and Strengthen an Improved Discipline Process*, Report 96021 (May 21, 1996).

California attorney fee objectors' fight to free themselves from the State Bar's politicking.

1. *Brosterhous v. State Bar of California*

After *Keller*, the Bar enacted regulations purporting to implement the constitutional requirements mandated by the decision. The regulations required the Bar to provide an advance reduction of the amount of dues it determined to be nongermane, or nonchargeable. *Brosterhous v. State Bar of California*, 12 Cal. 4th at 320 (describing provisions of State Bar Rules and Regulations Article 1A). Then, attorneys could object to the amount as determined by the Bar. The Bar could choose either to rebate the amount as determined by the objector (this has never happened), or submit the matter to arbitration. *Id.*

In 1991, 179 objectors found their objections submitted to arbitration as provided by the regulation, without their consent. They had no voice in the selection of the arbitrator, had to travel to the Bar's headquarters in San Francisco for the 14-day arbitration, and were not permitted the benefit of discovery or other pre-hearing procedural niceties. Nevertheless, the objectors participated in the Bar's arbitration. The arbitrator found that the Bar's original deduction amount of $3.00—out of $478—was short by $4.36 and ordered a rebate. The Bar cut checks to the objectors for $4.36 plus interest and then spent the rest of their dues, which had, until this point, been kept in an escrow account. *Id.* at 321.

Forty-six objectors were not satisfied by this outcome. Believing that about $85 of their mandatory dues had been improperly spent, they brought a civil

rights action under 42 U.S.C. § 1983 in Sacramento Superior Court, alleging violations of their First and Fourteenth Amendment rights. The lead plaintiff, Raymond L. Brosterhous II, a prosecutor in the state Attorney General's office, had been the second named plaintiff in the *Keller* lawsuit. *Id.* at 321-22.

The Bar, however, was determined not to allow the judiciary to have another crack at its mandatory dues. The Bar demurred to the complaint, asserting that the objectors were bound by the arbitrator's decision and could only move to correct or vacate that decision on the grounds of corruption or fraud. The Superior Court agreed, ordering the case dismissed with prejudice. *Id.* at 322. In its ruling, the court suggested that the objectors—by definition representing *minority* views—could work to elect members to the Bar's Board of Governors who were sympathetic to their point of view, or lobby the Legislature to force changes in the Bar's procedures or programs.[21]

Both the Bar and the Superior Court had overlooked one critical legal doctrine: arbitration can be binding only with the agreement of the parties. What is more, this Court had already specifically stated that arbitration in the mandatory dues context does not preclude a subsequent Section 1983 action. On these grounds, the California Court of Appeal unanimously reversed the Superior Court and reinstated the lawsuit. *Brosterhous v. State Bar of*

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[21] *Brosterhous v. State Bar of California*, Sacramento Super. Ct. case no. CV527974, Notice of Ruling re Demurrer (filed Jan. 29, 1993).

California, 29 Cal. App. 4th 963, 35 Cal. Rptr. 2d 86, 92-93 (1994).

The Bar was not content. Facing the realization that the "binding arbitration" argument was going nowhere, the Bar filed a Petition for Rehearing, arguing for the first time that the arbitration decision should be reviewed under administrative mandamus. The Court of Appeal denied the petition and the Bar reiterated its latest position in its Petition for Review to the California Supreme Court. Perhaps realizing that this important issue was not going away, the California Supreme Court granted review and then unanimously rejected every one of the Bar's arguments.

First, the court held that arbitration cannot be binding without the consent of all parties. *Brosterhous*, 12 Cal. 4th at 326. Second, it held that Congress specifically intended for civil rights actions to be heard in a court of law, even if the litigation was brought subsequent to an arbitration proceeding. *Id.* at 326-27. Third, it held that the objectors had no obligation to participate in the arbitration at all because a state cannot require exhaustion of administrative or judicial remedies as a prerequisite to a civil rights action. *Id.* at 336. Finally, the court held that administrative mandamus does not apply to arbitration, summarily rejecting the Bar's last ditch effort in a footnote. *Id.* at 336 n.8.

On remand from the California Supreme Court, the case spent several years on procedural battles, pre-trial legal issues, cross-motions for summary judgment, and discovery, and eventually went to the first phase of a bifurcated trial to determine liability for seven days in May, 1999. *Brosterhous v. State Bar*

of California, Sacramento Super. Ct. No. 95AS03901. When the trial court ruled largely in favor of the objectors, the State Bar petitioned the California Court of Appeal for a writ of mandate reversing the interim judgment.[22] Opposed by the objectors, the appellate court denied the writ. The objectors and the Bar then avoided a trial on damages by stipulating to the amount owed to the objectors. The trial court entered final judgment for the objectors on July 11, 2000—just over a decade since *Keller* was decided.[23]

2. *County of Ventura v. State Bar of California*

While *Brosterhous* was underway, the California Attorney General issued an opinion at the request of Kern County District Attorney Edward R. Jagels (a *Brosterhous* plaintiff) to answer the question of whether government agencies could lawfully pay the

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[22] After the trial court ruling, the California Legislature spun off the State Bar Conference of Delegates, a politically active group comprised of representatives from local and specialty volunteer bar associations, so that it would no longer be funded with mandatory dues. The State Bar continues to provide administrative and support services subject to reimbursement. Cal. Bus. & Prof. Code § 6031.5 (effective Jan. 1, 2000). *See also* 1999 Cal. Legis. Serv. Ch. 342 (S.B. 144) (filed with the Secretary of State Sept. 7, 1999). On January 1, 2018, the State Bar similarly spun off the "Sections"—subject-matter interest groups and the California Young Lawyers' Association—to the voluntary California Lawyers Association. State Bar of Cal., Sections, http://www.calbar.ca.gov/Attorneys/Sections (last visited Jan. 11, 2018). Although one might think this would result in a State Bar dues reduction, it does not. Cal. Lawyers Ass'n, *FAQ*, http://cla.legal/Sections-FAQ (last visited Jan. 11, 2018).

[23] The State Bar filed a notice of appeal but later abandoned it. The case finally concluded with a settlement for attorneys' fees in August, 2001.

amount of their attorney-employees' bar dues designated as the "nonchargeable" *Hudson* fee. The Attorney General opined that a government agency may properly pay *Hudson* fees only if the agency is bound by a contractual obligation to make such payment as part of the attorneys' compensation. Without such an obligation, the payment would be a waste of public funds subject to a taxpayer's suit pursuant to California Code of Civil Procedure section 526a. Office of the Attorney General, *Opinion of Daniel E. Lungren, No. 92-202*, 92 Ops. Cal. Att'y. Gen. 202 (Sept. 3, 1992).[24]

The State Bar rejected this analysis. In 1993, the State Bar determined the *Hudson* fee reduction to be $5, with total dues ranging from $379 to $478. Ventura County District Attorney Michael Bradbury withheld $5 from each payment of his 82 attorney employees' 1993 bar dues, and further sought to challenge the amount of the $5 calculation on behalf of himself and his employees, who did not join in that challenge. The State Bar adhered to its requirement of individual challenges and refused to allow Bradbury to object on his employees' behalf. The County of Ventura and Bradbury sued the Bar on the grounds that his payment of the nonchargeable portion of bar dues wasted taxpayer funds, for which he could be sued under state law. *County of Ventura v. State Bar of California*, 35 Cal. App. 4th 1055, 1057 (1995), *rev. denied* (Sept. 14, 1995). The Court of Appeal held that "a public agency's payment of the voluntary portion of its employees' State Bar dues would be a waste of public funds because it would constitute a wholly inappropriate encroachment by

[24] https://oag.ca.gov/system/files/opinions/pdfs/92-202.pdf.

government into the realm of financial contribution toward political or ideological causes." *Id.* The court continued, noting that payment of a public attorney's *Hudson* fees "would be no different than a direct contribution by the agency, on its employee's behalf, to a political party or candidate or an ideological organization." *Id.* at 1060. This kind of "payment would be worse than totally unnecessary or useless or without public benefit—it would be a wholly inappropriate encroachment by government into the political arena, and thus a waste of public funds." *Id.* Moreover, if, as alleged by the objectors, the Bar lowballed the nonchargeable amount, public agencies could be liable for a waste of public funds for any amount of dues ultimately found to be nonchargeable and thus, voluntary. *Id.*

In 2018, as in the past several years, the State Bar has offered attorneys a flat $10 deduction that allegedly covers all manner of nonchargeable political and ideological expenditures. As in other states, the Bar lays traps for the unwary by absorbing the nonchargeable fees into the amount described as "member dues" and then requiring objecting attorneys to subtract the nonchargeable portion in a drop-down menu, so that the subtraction is even less obvious. *See* Pet. at 13-14. Given the length of previous litigation and the tremendous resources required to pursue it, objectors have been reluctant to undertake further action.

II

THE FIRST AMENDMENT REQUIRES "OPT-IN" TO PROTECT THE FREEDOM OF SPEECH AND ASSOCIATION

This Court recognized the national importance of "opt-in" versus "opt-out" in *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 317 (2012). As the Court noted, it is "cold comfort" to objectors to have their money refunded only after it has been spent to achieve political objectives that they oppose. *Id.* The *Janus* case, currently pending, seeks to expand the *Knox* holding regarding special assessment to regular, annual fees. This case presents the "opt-in" issue outside of the labor law context, giving this Court the opportunity to harmonize compelled speech doctrines under the First Amendment.

The *Keller* Court's suggestion that the State Bar of California adopt the *Hudson* procedures to minimize the infringement on objectors' First Amendment rights led to the Bar's usage of "opt-out" as the means for objectors to refrain from subsidizing the Bar's politicking. The opt-out procedure, however, presumes that attorneys wish to conform to the Bar's priorities and political ideals, in violation of the long-standing rule that courts "'do not presume acquiescence in the loss of fundamental rights.'" *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (quoting *Ohio Bell Tel. Co. v. Pub. Utils. Comm'n of Ohio*, 301 U.S. 292, 307 (1937)). This Court has repeatedly held that "[t]o preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights." *Glasser v. United States*, 315 U.S. 60, 70

(1942) (citations omitted). Among other reasons for presuming against such a waiver are that doing so would too easily blind courts to subtle coercion, or too easily allow dissenters, accidentally or through ignorance, to waive vital constitutional liberties.

The rule of strict scrutiny, which presumes that laws infringing on free speech are invalid, is based on the extreme importance of free speech in a system of participatory democracy. *See Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996) (plurality opinion) ("[T]he First Amendment embodies an overarching commitment to protect speech from government regulation through close judicial scrutiny, thereby enforcing the Constitution's constraints, but without imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems."). Requiring objectors to affirmatively make known their dissent from their own regulatory authority's political activities presumes that the objectors intend to waive that fundamental right, unless the contrary is proven. This inconsistency should not stand, especially given the importance of protecting the right to dissent. *See* Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1, 128 (1965) ("[T]he thumb of the Court [must] be on the speech side of the scales.").

The text of the Constitution warrants a general presumption that individuals may act freely unless and until those seeking to limit their freedom provide convincing justification for doing so. *See generally* Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2004); *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) ("[T]he Constitution

recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."). Thus, to have a right means to be free to act or refrain from acting, without being required to give a reason. *See Lutz v. Int'l Ass'n of Machinists and Aerospace Workers*, 121 F. Supp. 2d 498, 507 (E.D. Va. 2000) (Describing the annual objection procedure as "analogous to a governmental pronouncement that a citizen who fails to cast a ballot on election day will be considered to have voted for a previously designated 'default' candidate. The law does not permit such an imposition of an unconstitutional default.").

The *Hudson* Court apparently hoped to minimize the inconsistency between strict scrutiny and the presumption of conformity when it remarked that the burden on a worker is "simply" to make his or her objection known. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 306 n.16 (1986). But this burden is indefensible, given this Court's refusal to presume in other contexts that a person may be presumed to waive constitutional rights. Objectors who do not wish to support the Bar's political speech should not be forced to state their objections before exercising their right not to speak or associate. Such a requirement forces dissidents to mark themselves for potential harassment and retaliation in a way that an "opt-in" requirement would not. Although objectors who choose not to "opt-in" would not remain anonymous, the ability to make their decisions in

private and register those decisions before a political campaign begins would protect them from the individual exposure and peer pressure that the current presumption of conformity enshrines. The current presumption stifles dissent and this Court should grant the petition to overrule it.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: January, 2018.

Respectfully submitted,

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