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

BRIEF IN OPPOSITION FOR PENNY MILLER

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QUESTIONS PRESENTED

1. Whether the process by which the State Bar Association of North Dakota enables bar members to choose whether to pay for non-chargeable expenditures is consistent with the First Amendment.

2. Whether this Court should overrule *Keller v. State Bar of California*, 496 U.S. 1 (1990), even though it recently reaffirmed that decision in *Harris v. Quinn*, 134 S.Ct. 2618 (2014).

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STATEMENT OF THE CASE

On February 3, 2015, Arnold Fleck (the "Petitioner"), filed a complaint against certain officers and employees of the State Bar Association of North Dakota (the "State Bar") and Penny Miller, secretary-treasurer of the state board of law examiners (the "State Board"), all in their official capacities. Pet. App. 18a. Petitioner sought declaratory and injunctive relief based upon three claims: (1) State Bar procedures for allowing members to object to non-germane expenditures lack the safeguards required under *Keller v. State Bar of California*, 496 U.S. 1 (1990); (2) the State Bar's "opt-out" procedure violates his right to affirmatively consent to non-germane or non-chargeable expenditures; and (3) North Dakota's integrated or mandatory bar association violates Petitioner's freedoms not to associate and to avoid subsidizing speech with which he disagrees. Pet. App. 2a, 18a.

The Respondents, the State Board and the State Bar, have complementing duties and functions relating to the annual license fee payment process and the administration of the fees collected. Respondent Penny Miller, the clerk of the North Dakota Supreme Court, is the ex officio secretary-treasurer of the State Board, which administers the admissions process, and annually issues licenses upon payment of the mandatory fee established by the State Bar. N.D. Cent. Code §§ 27-11-02, 27-11-09, 27-11-17, 27-11-19, 27-11-22, 27-11-23; Pet. App. 33a, 35a. The annual license fees collected are deposited in the state

bar fund. N.D. Cent. Code § 27-11-23; Pet. App. 34a-35a.

Under N.D. Cent. Code §§ 27-11-24 and 27-12-04, the State Bar is paid out of the state bar fund $75 of each license fee for operation of the lawyer discipline system, and 80 percent of the remaining amount of each license payment is paid to the State Bar to pay the costs of administering and operating the association. *See* N.D. Cent. Code §§ 27-11-22, 27-12-02; Pet. App. 6a, 15a, 16a. "SBAND [the State Bar] investigates complaints against attorneys and facilitates attorney discipline, promotes law-related education and ethics, facilitates and administers a volunteer lawyers program and lawyer assistance program, administers a client protection fund, provides advisory services to government officials on various legal subjects, monitors and keeps members of the bar updated on the status of various legislative measures, and provides information to the legislature on matters affecting regulation of the legal profession and matters affecting the quality of legal services available to the people of the State. . . ." Pet. App. 16a. A small portion of the State Bar's activities may be "non-chargeable" political or ideological activities, or activities other than those related to its compelling government interest in improving the practice of law through the regulation of attorneys. Pet. App. 16a.

Prior to Petitioner's lawsuit, the State Bar's Legislative Policy provided that an association member who dissented from the State Bar's position on any legislative or ballot matter could receive a refund of that

portion of his or her dues which would otherwise have been used in that activity. Pet. App. 5a. "The Policy did not advise if members could opt out of paying for non-germane expenses . . . or allow members to challenge [the State Bar's] calculation of germane expenses before an impartial decisionmaker." *Id.*

After the district court ordered the parties into an early settlement conference, the parties entered into a joint stipulation that resolved Petitioner's first claim for relief. *Id*.; Pet. App. 38a-43a. Pursuant to the stipulation, the State Bar agreed to new procedures that allow members to deduct a pro-rata share of non-chargeable expenditures estimated for the upcoming fiscal year, based on the prior years' audited financial statements. Pet. App. 5a-7a, 19a, 45a-53a. Now, when North Dakota attorneys receive their annual Statement of License Fees Due ("Fee Statement"), each attorney has the option of writing a check or making payment for an amount that reflects just his or her annual license fee to practice law. Pet. App. 5a, 38a-43a, 44a.

Specifically, the State Bar's revised Fee Statement contains a new section near the end of the Statement:

> OPTIONAL: Keller deduction relating to nonchargeable activities. Members wanting to take this deduction may deduct $10.07 if paying $380; $8.99 if paying $350; and $7.90 if paying $325.

Pet. App. 6a, 44a. Each attorney, if he or she chooses, may choose to deduct the Keller deduction from the

license fee or voluntarily opt in to support the State Bar's non-germane expenditures by writing a check or making payment for an amount that includes the non-germane expenses disclosed on the annual Fee Statement. Pet. App. 6a, 10a, 44a. The State Bar also now provides a notice within its Fee Statement that includes its Keller Policy, which is also on its website. Pet. App. 6a, 7a, 23a-27a, 44a, 46a-53a.

Petitioner continued to press his other claims before the district court. He still insisted that North Dakota's integrated bar association inherently violates his freedoms not to associate and to avoid subsidizing speech with which he disagrees. But he conceded that this Court's decisions in *Keller* and *Lathrop v. Donohue*, 367 U.S. 820 (1961) foreclosed his claim. Pet. App. 21a. The district court agreed that *Keller* and *Lathrop* established that integrated bar associations, such as the State Bar, "are justified by a state's interest 'in regulating the legal profession and improving the quality of legal services.'" *Id.* (quoting *Keller*, 496 U.S. at 13). North Dakota could therefore "constitutionally condition the right of its attorneys to practice law upon the payment of membership dues to an integrated bar." Pet. App. 21a-22a.

The district court next rejected Petitioner's challenge to the State Bar's Keller Policy as an unlawful "opt-out" policy. The court held that the claim was similarly foreclosed because this Court specifically held, in the context of an integrated bar in *Keller*, that "the 'opt-out' procedures established under *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986)

satisfied constitutional requirements." Pet. App. 22a-27a. "The new procedures employed by [the State Bar] are based on the policies and procedures for labor unions that the Supreme Court approved in *Hudson*." Pet. App. 23a. The district court disagreed with Petitioner that *Knox v. Serv. Emps. Int'l Union*, 567 U.S. 298 (2012), overturned those rulings, finding that it required an "opt-in" procedure only for mid-year special assessments and dues increases. Pet. App. 27a-28a.

On appeal, Petitioner conceded that the Eighth Circuit was bound by *Keller*, and the court therefore did not consider his argument that an integrated bar violates the First Amendment. Pet. App. 2a. The sole issue considered by the Eighth Circuit was "whether SBAND [the State Bar] has implemented constitutionally adequate procedures to protect the First Amendment rights of North Dakota attorneys who oppose a non-germane expenditure." Pet. App. 4a-5a. Petitioner again argued, relying upon *Knox*, that the "revised license fees Statement violates the First Amendment because it requires him to opt out of subsidizing non-germane expenses, and [the State Bar] may only finance non-germane activities with compulsory fees paid by affirmatively consenting members." Pet. App. 7a. The Eighth Circuit agreed with the district court that, although the majority in *Knox* raised questions about opt-out procedures, *Knox* left in place the annual procedures established in *Hudson* and referenced in *Keller*, which included the opt-out feature. Pet. App. 9a.

Consistent with *Hudson*, the Eighth Circuit considered the State Bar's annual procedures to make

sure they were " 'carefully tailored to minimize the infringement' of a non-member's First Amendment rights." Pet. App. 9a (citing *Hudson*, 475 U.S. at 303). The Eighth Circuit concluded there was an obvious answer to the Petitioner's challenge: "the opt-out issue debated by the Court in *Knox* is simply not implicated by [the State Bar's] revised license fee Statement." Pet. App. 10a. That is because, whereas the union fees cases involved paycheck deductions under which the employer transfers money straight to the union, "North Dakota attorneys pay the annual license fee themselves." *Id*. Each bar "member calculates the amount owing on the revised Statement. . . . If he does not choose the Keller deduction, he 'opts in' to subsidizing non-germane expenses by the affirmative act of writing a check for the greater amount." *Id.*

REASONS FOR DENYING THE PETITION

This Court has longstanding precedent supporting the constitutionality of integrated state bar associations. In *Lathrop*, this Court held that "the Supreme Court of Wisconsin, in order to further the State's legitimate interests in raising the quality of professional services, may constitutionally require that [lawyers share] the costs of improving the profession . . . even though the [Wisconsin Bar] also engages in some legislative activity." 367 U.S. at 842-843. In *Keller*, the Court held that "the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality

of legal services." *Keller*, 496 U.S. at 13-14; *see also Harris v. Quinn*, 134 S.Ct. 2618, 2643-2644 (2014). The *Keller* Court further recognized and suggested guidelines for integrated state bars to follow to make sure their expenditures and procedures are constitutionally compliant. *Keller*, 496 U.S. at 14-15.

Petitioner asks this Court to review two questions. The first is whether the State Bar's revised license fee procedures violates the First Amendment because it supposedly is an opt-out policy. That question does not warrant review because, among other reasons, the State Bar actually employs an opt-in process. Pet. 7-8. Petitioner also asks this Court to overrule *Keller*, just as this Court is considering overruling *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). Pet. 9. *See Janus v. American Fed'n of State, County, and Municipal Employees*, No. 16-1466 (U.S.). But *Harris v. Quinn* reaffirmed *Keller* and made clear that reconsideration of *Abood* does not imply the need to reconsider *Keller*.

I. Certiorari is not warranted on the question whether the State Bar's procedure for enabling bar members to choose whether to pay for non-chargeable expenditures violates the First Amendment.

Petitioner suggests this case involves a compulsory fee which he must affirmatively opt out of paying; he is incorrect. Members of the State Bar control the payment of their license fee. Pet. App. 10a. Each member conducts his or her own calculation and writes a

check for the appropriate amount. *Id.*; Pet. App. 44a. The deduction is clearly located in the Fee Statement directly above the total dues calculation. Pet. App. 44a. A State Bar member must consider this calculation before tabulating his or her final fee. "If [members including Petitioner do] not choose the Keller deduction, [they] 'opt[ ] in' to subsidizing non-germane expenses by the affirmative act of writing a check for the greater amount." Pet. App. 10a. State Bar members are free to write a check that includes the deduction, or to write a check that reflects only the amount of his or her annual license to practice law.

In addition, the Keller deduction line item refers members to the insert for additional information and explanation. Pet. App. 6a. The Fee Statement insert contains instructions for the Keller deduction (Pet. App. 45a), a notice explaining its purpose (Pet. App. 46a-50a), and the State Bar's Keller Policy (Pet. App. 51a-53a). The State Bar's notice provides a substantive background explanation of the Keller deduction, an overview of *Keller*, an explanation regarding how the State Bar's Executive Committee develops its chargeable vs. non-chargeable fees calculation, and a process for objecting to the State Bar's chargeability determinations. Pet. App. 46a-51a. The notice also contains an explanation of the State Bar's Keller Policy (Pet. App. 51a), which explains the activities that can be supported by compulsory dues (chargeable) and activities that cannot (non-chargeable), information regarding how the State Bar will manage expenditures that deviate from its pre-collection notice and how members

will be informed of the State Bar's policy positions, and the specifics regarding how a member can object to their dues calculation and the availability of binding dispute resolution. Pet. App. 51a-53a. The Fee Statement and its associated documents unmistakably comply with *Keller*, *Abood*, and *Hudson*.

The Petitioner does not cite to a conflict amongst the circuits or rely upon any authority to support his argument relative to the State Bar's specific procedures. Rather he relies on the twice-rejected argument that *Knox* requires affirmative consent for all non-germane expenditures. Pet. at 10. The Eighth Circuit correctly rejected that argument because the "opt-out issue debated by the Court in *Knox* is simply not implicated [by the State Bar's] revised license fee Statement." Pet. App. 10a. *Knox* expressed the concern that an opt-out process creates a "default rule" that does not "comport with the probable preferences of most nonmembers." 567 U.S. at 328. But the State Bar does not impose a "default rule" for payment of its dues. As the Eighth Circuit found, North Dakota attorneys simply choose which of two dollar amounts to pay, depending on whether or not they wish to subsidize non-germane activities. That fully respects "the probable preference" of all North Dakota attorneys. This is a far different situation than in public sector union cases, where the union gets to use the compulsory payment on non-germane expenditures the employee opposes until the employee successfully objects and obtains a rebate. Pet. App. 10a.

The non-compulsory, voluntary opt-in facts of this case simply do not implicate this Court's compulsory opt-out jurisprudence. The Petition should be denied.

II. Certiorari is not warranted on the question whether *Keller* should be overruled.

Petitioner also contends the Court should use this Petition as a vehicle to overrule its decision in *Keller*. In doing so, Petitioner notes this Court recently granted a petition in *Janus* to consider whether to overrule *Abood*, implicitly suggesting that overturning *Abood* may undermine *Keller*. *See* Pet. i, 7-8 (No. 17-886). Petitioner argues that *Keller* engages in *Abood*'s arbitrary and impermissible line-drawing and the Court failed to " 'appreciate the conceptual difficulty of distinguishing' between germane and non-germane expenditures." Pet. at 18-19; (quoting *Harris*, 134 S.Ct. at 2632). Without any additional factual support besides the record in this case, Petitioner makes the sweeping assertion that "mandatory bars routinely spend coerced dues on a broad range of political and ideological activities" resulting in harm to members' First Amendment rights. Pet. at 19. Petitioner suggests that because a state bar might occasionally engage in study and recommendation of changes in procedural law and improvement of the administration of justice in a way that shades into the political and ideological, this Court should overturn *Keller*.

As mentioned above, however, this Court recently reaffirmed *Keller*'s continuing vitality independent of

what the Court described as *Abood*'s "questionable foundations." *Harris*, 134 S. Ct. at 2638. In *Harris*, this Court rejected an argument that its refusal to extend *Abood* to the "quasi-public" employees involved therein would "call into question our decision[] in *Keller*" stating instead that *Keller*:

> fits comfortably within the framework applied in the present case. Licensed attorneys are subject to detailed ethics rules, and the bar rule requiring the payment of dues was part of this regulatory scheme. The portion of the rule that we upheld served the State's interest in regulating the legal profession and improving the quality of legal services. States also have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices. Thus, our decision in this case is wholly consistent with our holding in *Keller*.

Id. at 2643-2644 (internal quotation marks omitted).

Indeed, the *Janus* petitioner argued that *Harris* correctly rejected any argument that overturning *Abood* would impact *Keller*'s continued vitality. *See* Reply Br. at 16, *Janus v. American Fed'n* (No. 16-1466) ("Nor will overruling *Abood* undermine other lines of precedent. The Court recognized that *Keller*[] can stand on its own two feet in *Harris*, 134 S.Ct. at 2643-2644."). In the case preceding *Janus* that raised the identical question about whether *Abood* should be overruled, the petitioners similarly argued that

overturning *Abood* would have no impact on this Court's precedents involving fees attorneys pay into an integrated bar for the purpose of regulating the legal profession and improving the quality of legal services. *See* Reply Br. at 24, *Friedrichs v. California Teachers Ass'n* (No. 14-915) ("[T]he Government claims overturning *Abood* would undermine *Keller* . . . [b]ut this Court correctly rejected those arguments in *Harris*, 134 S.Ct. at 2643-2644.").

We recognize that the Court may decide *Janus* before it acts on Petitioner's Petition, and that the *Janus* opinion might discuss *Keller.* If *Janus* reaffirms *Harris*' conclusion that *Keller* remains good law, whether or not *Abood* does, the Court should deny the Petition. If however, *Janus* expressly calls *Keller*'s continuing vitality into question the Court should grant the instant Petition, vacate the Eighth Circuit's decision, and remand for reconsideration in light of *Janus.* Plenary review by this court would be inappropriate because lower courts should be given the first opportunity to assess the impact of *Janus* on *Keller. See Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.").

CONCLUSION

The Petition for a Writ of Certiorari should be denied. If, however, *Janus* calls *Keller* into question, the Court should grant this Petition, vacate the Eighth Circuit's decision, and remand for reconsideration in light of *Janus*.

Respectfully submitted,

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