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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I. THE OPT-OUT PROCESS SBAND USES IS NOT AN OPT-IN PROCESS

The gist of both Oppositions is to contend that SBAND's opt-out rule is really an opt-in rule, since attorneys are given an opportunity to deduct the non-chargeable expenses from the presumptive "annual license fee" that they're presented with—and therefore that this case is not cert-worthy. Miller Opp'n at 8; Wetch Opp'n at 14–15. This argument is both illogical and false. More importantly, it is a crucial argument for this Court to resolve, because if an entity—whether a union or a state bar—can use a system like SBAND's, which in *substance* is an opt-out requirement, but is *labeled* an opt-in requirement, then this Court's rulings in cases such as *Knox v. Service Emps. Int'l Union, Local 1000*, 567 U.S. 298 (2012), and *Harris v. Quinn*, 134 S. Ct. 2618 (2014), will be effectively neutralized.

The definition of an *opt-in* rule is that it presumes people do not consent unless they say they do. But as the Oppositions make clear, SBAND's rule doesn't do that. Instead, SBAND sends members a fee statement like the one attached hereto (*infra* App. 1a; this was sent to Petitioner a few days after the Petition was filed). That statement—in bold print—"informs each member that he must pay annual dues of either $380, $350, or $325"—a figure that, as Respondents state, is "identifie[d] . . . as the 'annual license fee'" Wetch Opp'n at 6—even though that figure *includes* non-chargeable expenses. The member is then required

to *affirmatively opt-out*, by finding the unobtrusively written instructions and then *deducting* the non-chargeable amounts from that "annual license fee." *Id.* at 12–13; Miller Opp'n at 3. None of the *required* portions of the dues statement—all located in the left-hand column—reveal that the so-called "annual license fee" includes non-chargeable expenses.

The Oppositions are right that objecting bar members must do this math themselves and then write a check, instead of having earnings withheld and requesting a refund afterward. But the default is still *presumed acquiescence* in SBAND's political speech. The mechanical act of writing a check in response to a misleading notice is not the kind of affirmative consent that this Court's precedents contemplate when they speak of ensuring that "the default rule comport[s] with the probable preferences of most nonmembers," and creating a system that avoids "[the] risk that the fees . . . will be used to further political and ideological ends with which [payers] do not agree." *Knox*, 567 U.S. at 312.

Respondents dismiss these concerns as "fly-specking." Wetch Opp'n at 14. But cases like *Knox* make clear the importance of preventing even what Respondents might view as trivial intrusions on First Amendment rights. In *Knox*, the union failed to provide nonmembers with a renewed *Hudson* notice before imposing a special assessment, and then required them to pay a small amount (56.35% of the assessment, which itself was 1.25% of monthly salary). 567 U.S. at 303–04. This Court did not view this as trivial; instead, it

"fly-specked" the union's actions by holding that they violated the rights of nonmembers whose decision of whether to subsidize the union's political activities might have been affected by the union's failure to remind them of their right not to pay. *See id.* at 315 ("When a union levies a special assessment or raises dues as a result of unexpected developments, the factors influencing a nonmember's choice may change.").

The *Knox* dissenters even argued that nonmembers had already been informed of their right to object, so that there was no reason to "giv[e] a second objection opportunity to those nonmembers who did not object the first time." *Id*. at 340 (Breyer, J., dissenting). Yet the Court required the union to cross every *t* and dot every *i* because "procedures for collecting fees from nonmembers must be carefully tailored to minimize impingement on First Amendment rights." *Id.* at 316. It would have been easy, the Court noted, for the union to send a second *Hudson* notice. Thus the fact that it failed to do so counted more strongly against the union. It resulted in a risk to the rights of those who "would have opted out if they had been permitted to do so when the special assessment was announced." *Id*.

For the same reason, it's wrong for Respondents to diminish the significance of SBAND's billing system, which presents members with a bill tailored to cause recipients to think the "annual license fee" is $380, when it is not—and then forces recipients to take affirmative steps to deduct the non-chargeable $10.07. SBAND's default position is to *charge* the nonchargeable

expenses, *unless the member opts out* by affirmatively deducting those expenses prior to payment.

It is a mere game of words to call this an opt-in rule—and that game stacks any risk of error on the backs of dissenting members. SBAND's practice is arguably *more* misleading, and *more* likely to raise the "risk that the fees . . . will be used to further political and ideological ends with which [dissenters] do not agree," *Knox*, 567 U.S. at 312, than was the mere failure to remind nonmembers in *Knox* of their rights.

That is why certiorari is necessary. By labeling SBAND's rule as an opt-in rule, *Fleck v. Wetch*, 868 F.3d 652, 656–57 (8th Cir. 2017), the court below obscured the difference between opt-in and opt-out in a way that—unless this Court acts—threatens to undo this Court's recent cases addressing this question. If states or unions can impose an opt-out requirement by calling it an opt-in requirement—that is, through the simple linguistic trick of sending people a bill designed to mislead them into thinking they must pay the total, and then forcing them to calculate and deduct—then the principle this Court has vindicated in cases such as *Knox* and *Harris* will be transformed into a "stupid staffer" test. *Cf. Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992). It will be a mere matter of semantics.

In fact, this is already beginning to happen. In a brief filed in the Ninth Circuit in November, the Department of Agriculture cited the decision below for the proposition that "in determining whether a compelled subsidy of private speech comports with the

First Amendment, courts *should not focus on the issue of affirmative consent*," but instead on whether dissenters had "a 'fair opportunity' to opt out." Reply Br. of Appellants, *Ranchers-Cattlemen Action Legal Fund v. Perdue*, No. 17-35669, 2017 WL 5127977 at *13 (emphasis added). Categorizing SBAND's rule as an opt-in requirement, as the court below did, the Department argued that all the First Amendment requires is that "attorneys [be given] a reasonable opportunity to avoid subsidizing [the bar's] political activities." *Id.* at *12 n.3.

Fortunately, the Ninth Circuit rejected that effort to water down First Amendment strict scrutiny into a mere "reasonableness" requirement. In April, it affirmed the District Court's finding that the opt-out requirement at issue in that case was unconstitutional. *See Ranchers-Cattlemen Action Legal Fund v. Perdue*, No. CV 16-41-GF-BMM, 2017 WL 2671072, at *3–4 (D. Mont. June 21, 2017), *aff'd*, 718 F. App'x 541 (9th Cir. 2018). That case involved a compulsory subsidy of beef advertising, which cattle-producers could opt out of by checking a box. Like Respondents here, the Department argued that the opportunity to opt out was sufficient, but the District Court ruled that the Department "must secure the citizen's 'affirmative consent' through an opt-in provision." 2017 WL 2671072, at *4. The Court of Appeals called this "[t]he correct legal standard[ ]," and concluded that a system that requires "those who wish to opt out" to "do so every time cattle are sold" violated that standard. 718 F. App'x at 543.

What *Perdue, Knox*, and *Harris* show is that the substantive difference between opt-in and opt-out is not "fly-specking," or a matter of semantics. In fact, the Respondents describe at length the hoops through which dissenting attorneys must jump in order to avoid subsidizing political activities they disagree with: each member must "conduct[ ] his or her own calculation," Miller Opp'n at 7, by consulting "the insert for additional information and explanation," *id.* at 8, and then, taking the steps necessary to *prevent* the default rule from going into place, calculate the correct fee. Attorneys are instructed: "If *you choose* the optional *Keller* deduction, please deduct that amount" (App. 2a, emphasis added)—in other words, the burden is on the objector because under SBAND's rule, the default is that members subsidize SBAND's political activities.

Thus SBAND "'presume[s] 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. Public Utils. Comm'n of Ohio*, 301 U.S. 292, 307 (1937)). That is the *only* plausible reason for SBAND to have designed its bill as it did, with the "optional" *Keller* deduction language tucked away on the right, beneath a section of various options, and making members *add* those other options, but *subtract* the *Keller* option—all in hopes that recipients won't go through the tedium of figuring out how to avoid being forced to subsidize SBAND's non-chargeable activities.

The form is designed to exploit "the advantage of . . . inertia," *South Carolina v. Katzenbach*, 383 U.S.

301, 328 (1966), in a manner that *maximizes* the "risk that the fees . . . will be used to further political and ideological ends with which they do not agree." *Knox*, 567 U.S. at 312.

Finally, the Oppositions see a difference between this case, in which bar members must write out checks from their own funds and send those in, and cases involving public employee unions in which money is taken directly from workers' paychecks. Miller Opp'n at 9; Wetch Opp'n at 13. That is a distinction without a difference. The question is not whether money is taken before or after it is received by the person—rather, it's whether the person is forced to subsidize an institution with which he or she disagrees, unless he or she takes steps to prevent it. In both the union cases and this case, the individual must make the payment of his or her own funds. And in both the union cases and this case, the individual is presumed to acquiesce in the subsidization of speech he or she may disagree with, unless he or she takes affirmative steps to block that from happening. In other words, the cases are alike in the relevant respect: both involve *opt-out* requirements, and the question is whether that is constitutional.

The answer should be clear. This Court has long held that "[t]o preserve the protection of the Bill of Rights . . . we indulge every reasonable presumption against the waiver of fundamental Rights," *Glasser v. United States*, 315 U.S. 60, 70 (1942), and that acquiescence in the loss of fundamental rights such as free speech must not be presumed. *Coll. Sav. Bank*, 527 U.S. at 682. One reason is that forcing dissenters to opt out

puts the burden on the person wishing to exercise his or her free speech rights, not on the government that seeks to limit those rights—which contradicts the longstanding rule that in free speech cases, the burden must be on the government to justify burdens on speech, rather than on the speaker. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973).

Another reason is that an opt-out requirement creates a danger that citizens, accidentally or as a consequence of subtle pressure, may waive vital constitutional liberties. *Glasser*, 315 U.S. at 70. As the Court observed in *Knox*, "requiring objecting nonmembers to opt out" gives unions—or in this case, the bar—"a remarkable boon," because it "creates a risk" that those who would prefer not to subsidize non-germane activities will, through intimidation, confusion, delay, or other causes, nevertheless be forced to do so. 567 U.S. at 312.

One District Court put the point well when it described opt-out requirements 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." *Lutz v. Int'l Ass'n of Machinists & Aerospace Workers*, 121 F. Supp. 2d 498, 507 (E.D. Va. 2000). We do not presume a vote is cast when a voter submits a blank ballot, and SBAND may not presume that Petitioner supports its non-chargeable expenditures if he fails to calculate the *Keller* deduction.

In short, "the thumb of the Court [must] be on the speech side of the scales." Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1, 28. But SBAND places its thumb on the wrong side.

II. THIS CASE IS AN IDEAL VEHICLE FOR ADDRESSING THE CONSTITUTIONALITY OF MANDATORY BAR ASSOCIATION MEMBERSHIP

States certainly can regulate the practice of law by requiring attorneys to pass a bar exam, abide by specified standards, and pay for the cost of regulating the profession. But forcing them to join an association, too—one that takes public positions on ideological and political issues of public debate—intrudes on the essential freedom of association. Unfortunately, dicta in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990), asserted without considered explanation that states could force attorneys to join bar associations as a condition of practicing law, and subsequent cases have implied that the matter is settled. It is not, however. And, as detailed in the Petition, this case frames this question well for thorough consideration.

Keller expressly "decline[d]" to address the question of whether attorneys can constitutionally be forced to join an association that engages in political or ideological activities. *Id*. at 17. That case assumed the validity of the membership requirement and addressed instead the question of whether, given that

such a requirement was in place, members could also be required to subsidize political activities by the bar association. Because it gave a negative answer to that question, it chose not to address the membership requirement itself. *Id.*

Respondents assert that *Harris* made reference to *Keller*'s statement that states may force attorneys to join an association—and sacrifice their associational rights—in order to "ensur[e] that attorneys adhere to ethical practices." Miller Opp'n at 11 (quoting *Harris*, 134 S. Ct. at 2644). But *Harris* did not do that; it was referring to "[*t*]*he portion of* the rule that [the Court] upheld" in *Keller*—meaning *Keller*'s rejection of compulsory subsidization of political activities and the requirement that attorneys pay the cost of regulation, *not* to the freedom of association claim *Keller* declined to address. *Harris*, 134 S. Ct. at 2643–44 (emphasis added).

When *Harris* referred to *Keller* "fit[ting] comfortably within the framework" of today's First Amendment law, *id.* at 2643, it was referring to the question of "allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices," *not* to the question of compulsory association that *Keller* did not resolve. On the contrary, every time this Court has fit *Keller* into its compelled speech and association case law, it has emphasized *that* regulatory core, *not* the compulsory association question. *See, e.g.*, *United States v. United Foods, Inc.*, 533 U.S. 405, 414 (2001) ("The central holding in *Keller*, moreover, was that the objecting

members were not required to give speech subsidies for matters not germane to the larger regulatory purpose which justified the required association.").

True, in *Lathrop v. Donohue*, 367 U.S. 820 (1961)—a quarter century before *Hudson*, 50 years before *Knox*—a plurality of this Court ruled that states can force attorneys to join bar associations, on the grounds that states "might reasonably believe" that this would "elevat[e] the educational and ethical standards of the Bar," *id*. at 843, and *Keller* assumed the validity of that conclusion. Petitioner here does not challenge *Keller* or *Lathrop*'s regulatory core—that attorneys can be required to fund the cost of attorney regulation—but urges the Court to reconsider *Lathrop*'s assertion that attorneys can be forced to join a bar association to achieve that purpose, given that there are less–restrictive means available, and that the plurality's "reasonableness" standard is incompatible with First Amendment jurisprudence and with subsequent legal developments protecting free association.

Yet even in *Lathrop*, the plurality emphasized that it based its decision on the need for attorney regulation, given the evidence "shown on this record." *Id*. That record was essentially nonexistent, since *Lathrop* was a facial challenge without the evidentiary record that exists here.[1] Given this Court's preference for cases that have sufficient factual and evidentiary

[1] The petitioner in *Lathrop* paid dues under protest, then sought a refund on the grounds that compulsory membership was unconstitutional, and when his case was dismissed, appealed to this Court. 367 U.S. at 821–24.

development to ensure an accurate understanding of how a statute is applied in practice, *see, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 167–68 (2007), this case presents an excellent opportunity to address this question. Unlike in *Lathrop*, it's clear here how SBAND operates under the rule. We also have nearly 30 years of evidence that mandatory bars have failed to protect dissenting members' constitutional rights. Pet. at 27–28. Given this ample record, and lack of factual disputes, this case is ideal to resolve the pure questions presented.[2]

[2] For the same reason, Respondents are wrong to suggest that "if *Janus* [*v. Am. Fed'n of State, Cnty., & Mun. Emps, Council 31* (No. 16-1466)] reaffirms *Harris'* conclusion that *Keller* remains good law . . . the Court should deny the Petition." Miller Opp'n at 12. *Harris* did not conclude that *Keller* remains good law *in the aspect relevant to this petition*, because neither *Keller* nor *Harris* addressed the constitutionality of compulsory bar association membership.

CONCLUSION

The petition should be *granted*.

Respectfully submitted,

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