No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Petitioner is an attorney who is required by state law to join and to fund a state bar association as a condition of practicing law. He challenged both compulsory membership and the compulsory funding of the association's political activities under the First Amendment. This Court vacated and remanded the previous judgment against him for consideration in light of *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), whereupon the Court of Appeals reaffirmed its prior ruling in all respects, holding that "*Janus* does not alter our prior decision." *Fleck v. Wetch*, 937 F.3d 1112, 1118 (8th Cir. 2019) (App. 13a). The questions presented are:

1. Are laws mandating membership in a state bar association subject to the same "exacting" First Amendment scrutiny that the Court prescribed for mandatory public-sector union fees in *Janus?*

2. Does it violate the First Amendment to presume that an attorney is willing to pay for a bar association's "non-chargeable" political and ideological speech, unless and until that attorney takes steps to opt out?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner, who was Plaintiff-Appellant in the court below, is Arnold Fleck.

Respondents, who were Defendants-Appellees in the court below, are Joe Wetch, President of the State Bar Association of North Dakota; Aubrey Fiebelkorn-Zuger, Secretary and Treasurer of the State Bar Association of North Dakota; Tony Weiler, Executive Director of the State Bar Association of North Dakota; and Penny Miller, Secretary-Treasurer of the State Board of Law Examiners, in their official capacities.

The only party to the original proceedings below who is not a Petitioner or Respondent is Jack McDonald, former President of the State Bar Association of North Dakota.

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

RELATED CASES

Fleck v. Wetch, No. 1:15-cv-13, U.S. District Court for the District of North Dakota. Judgment entered January 28, 2016.

Fleck v. Wetch, No. 16-1564, U.S. Court of Appeals for the Eighth Circuit. Judgment entered August 17, 2017.

Fleck v. Wetch, No. 17-886, Supreme Court of the United States. Certiorari granted and remanded to U.S. Court of Appeals for the Eighth Circuit December 3, 2018.

Fleck v. Wetch, No. 16-1564, U.S. Court of Appeals for the Eighth Circuit. Judgment entered August 30, 2019.

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The Eighth Circuit order reaffirming its prior decision on remand is available at 937 F.3d 1112 (8th Cir. 2019), and is reproduced in the Appendix (App. 1a–14a), along with the Eighth Circuit's original decision affirming the District Court's order granting summary judgment to Respondents, which is reported at 868 F.3d 652 (8th Cir. 2017) (App. 15a–25a). The District Court's original opinion is available at 2016 WL 9710086 (D.N.D. Jan. 28, 2016), and is reprinted at App. 28a–44a.

JURISDICTION

The Eighth Circuit entered judgment on August 30, 2019. (App. 1a–14a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are reproduced at App. 47a–51a.

STATEMENT OF THE CASE

This case challenges the constitutionality of North Dakota's mandatory bar association laws under the First Amendment. Specifically, it challenges two things: the requirement that attorneys join the State

Bar Association of North Dakota (SBAND), and the billing procedure whereby SBAND presumes that attorneys are willing to subsidize its "non-chargeable" political activities unless they take the affirmative step of disavowing that presumptive consent.

In 2017, the Eighth Circuit ruled against Petitioner on both counts. 868 F.3d 652 (App. 15a–25a). Shortly afterwards, this Court decided *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), which involved substantially similar issues. Most significantly, *Janus* applied "exacting scrutiny" to mandatory association, and held that public sector unions may not presume that workers are willing to subsidize union political activities, but must instead obtain "affirmative consent" from them before making any attempt to obtain fees from them. *Id.* at 2477, 2486.

A petition for certiorari in this case was pending in this Court at that time. The Court granted that petition, vacated the Eighth Circuit's decision, and remanded for reconsideration in light of *Janus*. *See* 139 S. Ct. 590 (2018).

After another round of briefing and argument, the Eighth Circuit reaffirmed its prior opinion in all respects, declaring that "*Janus* does not alter" its analysis. App. 13a. It concluded that (A) forcing attorneys to join a bar association as a condition of practicing law is constitutional, and (B) SBAND's billing procedure—whereby the state presumes attorneys are willing to subsidize SBAND's political activities, unless attorneys take the affirmative step of announcing their

dissent and deducting the amount of that subsidy from the total amount that they are told they must pay—is constitutional.

Petitioners therefore seek certiorari again to determine: first, whether mandatory membership is subject to exacting scrutiny pursuant to *Janus* (and, to the extent that *Keller v. State Bar of California*, 496 U.S. 1 (1990), holds otherwise, whether *Keller* should be overruled), and, second, whether the billing procedure at issue satisfies the "affirmative consent" requirement of *Janus*.

A. Mandatory membership in SBAND

Attorneys in North Dakota must join SBAND. N.D. Cent. Code §§ 27-11-22, 27-12-02. They are therefore required to become members and to pay annual dues as a condition of practicing law there. *See In re Pet. for a Rule Change to Create a Voluntary State Bar of Neb.*, 841 N.W.2d 167, 170–71 (Neb. 2013); App. 2a. It is unlawful to practice law in North Dakota without being a member of SBAND and financially subsidizing it. N.D. Cent. Code §§ 27-11-01, 27-11-22, 27-12-02 (App. 47a–50a).

SBAND engages in non-"germane" activities—i.e., activities not related to "regulating the legal profession and improving the quality of legal services" in the state. *Keller*, 496 U.S. at 13–14. Among other things, it lobbies the state legislature regarding pending bills, proposes revisions to existing laws, and supports and opposes ballot measures that do not relate to the

regulation of the legal profession. App. 31a. Members fund these and other activities through mandatory annual member dues. *Id*.

Each year, attorneys receive a bill, or "fee statement," a copy of which is reproduced at App. 58a. Pursuant to N.D. Cent. Code § 27-12-04, SBAND receives $75 from each member's mandatory dues for the operation of the lawyer discipline system, and 80 percent of the remaining amount of mandatory dues for the purpose of administering and operating SBAND.

An attorney's annual bill states in boldface, "**ANNUAL LICENSE FEE FOR [YEAR]**" and specifies an amount (**$380.00**). App. 58a. This amount, however, *includes* the amount for non-germane or non-chargeable fees. In other words, the bill is written to presume that the attorney is willing to pay the non-chargeable portion.

In small print at the bottom of the form, the bill tells attorneys that they may, if they wish, "take this deduction"—i.e., reduce the presumptive total of $380 by subtracting the non-chargeable portion. To do so, they must take the affirmative step of "deduct[ing] [the appropriate] amount from the [presumptive] total," *id.* at 59a, and then make the appropriate payment. The form does not state that by failing to make this deduction, the attorney is agreeing to allow SBAND to lobby regarding non-germane matters or is waiving First Amendment rights.

B. Arnold Fleck

Petitioner Arnold Fleck is a licensed North Dakota attorney who is compelled, as a condition of practicing law, to join SBAND and to subsidize its speech. N.D. Cent. Code §§ 27-11-01, 27-11-22, 27-12-02. In 2014, Fleck—who practices family law—supported a ballot measure called Measure 6, which would have changed the state law governing custody disputes. App. 31a. He contributed $1,000 to the committee supporting Measure 6, and participated in the campaign, even appearing on television and radio to advocate for the measure. *Id*.

Shortly before the election, Fleck learned through a third party that SBAND was officially against Measure 6 and was spending money to oppose it. In fact, SBAND gave $50,000—money made up of compelled member dues—to a committee that opposed Measure 6, which was defeated. *Id*.[1] Respondent Weiler, SBAND's Executive Director, spent $3,694 worth of his time supporting that opposition committee, and even allowed it to use SBAND's email system and to establish an email with SBAND's domain name: keepingkidsfirst@sband.org. *Id*. 31a–32a.

Under SBAND's procedures at that time (which were changed later, as a result of this lawsuit, *see id.* 32a–33a), Fleck received no notice of these political activities. SBAND's procedures at that time required Fleck to request a refund directly from Mr. Weiler. *Id*.

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[1] That committee later returned some funds, so that SBAND's final contribution totaled $46,525.85. *Id*.

At that time, Mr. Weiler was actually serving on the same ballot measure committee that received SBAND's contribution. Believing that both SBAND's procedures and the compulsory membership requirement were unconstitutional, Fleck filed this case.

C. Proceedings Below

Fleck's complaint alleged three claims: (1) that the notice and objection procedures relating to the political expenditure of SBAND dues were constitutionally deficient under *Keller, supra*; (2) that the billing procedure whereby attorneys receive a bill that presumes their willingness to fund non-germane expenditures unless they take steps to prevent that from occurring, were unconstitutional; and (3) that mandatory membership violated Fleck's right of freedom of association. App. 32a. After the District Court ordered the parties to conduct settlement discussions, SBAND adopted new policies and procedures that cured the deficiencies that formed the basis of Fleck's first claim. The District Court adopted the parties' joint stipulation to that effect, and dismissed that claim.[2] *Id.* at 32a–33a.

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[2] Almost immediately afterwards, Fleck was required to exercise his new ability to object to SBAND's non-germane expenditures. *See In re Objection of Arnold Fleck to SBAND Family Law Task Force*, http://workingforabetterbar.org/wp-content/uploads/2016/04/1-27-16-Klein-Fleck-SBAND-decision.pdf. Fleck objected to a Family Law Task Force charged with proposing changes to North Dakota rules and statutes. *Id.* at 1. SBAND's designated mediator, Chief Magistrate Judge Karen Klein (ret.), found the objection premature because the Task Force had not yet proposed rules or statutory changes, *id.*, but acknowledged that SBAND

Fleck then sought summary judgment on his other two claims: that mandatory membership violates his First Amendment freedom of association, and that SBAND's presumption that attorneys are willing to subsidize its non-germane activities violates the First Amendment freedom of speech. The District Court granted summary judgment against him and in favor of SBAND on the grounds that mandatory membership had been held constitutional in *Keller*, App. 35a–36a, and that Fleck's claim regarding his right to affirmatively consent to non-germane SBAND expenditures was also foreclosed by existing precedent. *Id.* at 42a.

Fleck appealed to the Eighth Circuit, which affirmed on August 17, 2017. It concluded, first, that Fleck's mandatory association claim was foreclosed by *Keller*, App. 16a, and, second, that SBAND's billing procedure actually *is* an affirmative consent procedure, even though it forces members to dissociate themselves from presumptive acquiescence in SBAND's non-germane activities, and to subtract the non-germane portion of their dues from the $380 presumptive total in order to exercise their First Amendment rights. *Id*. at 24a.

On December 15, 2017, Fleck petitioned for certiorari. This Court granted certiorari on December 3, 2018 (139 S. Ct. 590), and ordered the Eighth Circuit to reconsider in light of the newly-decided *Janus* case.

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had failed to meet "its burden to show that all potential activities of the Task Force *will be* germane under *Keller*." *Id*. at 7 (emphasis added).

The Court of Appeals therefore ordered supplemental briefing and oral argument.

On remand, Fleck argued two points:

A. With regard to his freedom of association claim, Fleck argued that *Janus* makes clear that mandatory association is subject to "exacting scrutiny," 138 S. Ct. at 2477, instead of the rational basis scrutiny *Keller* used, and that although *Keller* did declare that "lawyers admitted to practice in the State may be required to join . . . the State Bar," 496 U.S. at 4, it also "decline[d]" to resolve the freedom of association questions that compulsory membership raises. *Id.* at 17. Fleck therefore argued in the alternative that either (1) *Keller* did not actually foreclose a freedom of association challenge to mandatory membership, and lower courts were therefore bound to apply *Janus*'s "exacting scrutiny" requirement to that question, or, (2) if *Keller* did control, the Eighth Circuit was bound to reaffirm its previous rejection of Fleck's compelled association claim, and preserve the issue for this Court.

B. With regard to SBAND's billing rules—i.e., its presumption that attorneys are willing to fund SBAND's political activities unless they take steps to opt out of funding those activities—Fleck argued that SBAND's actions violate *Janus*'s affirmative consent requirement. Each year, SBAND sends a bill that specifies a presumptive total the attorney must pay (*see* App. 58a). That presumptive total is calculated by *including* the non-chargeable expenses. The recipient is then required to *deduct* those in order to avoid

subsidizing SBAND's political activities. This, Fleck argued, contradicts *Janus*'s holding that the state may not make "any . . . attempt . . . to collect" such payments unless a person "clearly and affirmatively consent[s] before[hand]," 138 S. Ct. at 2486. The Eighth Circuit's previous conclusion that SBAND's practice is already equivalent to the constitutionally required "opt-in" rule (*see* App. 24a) is untenable, Fleck argued, because SBAND's bill presumes his agreement unless and until he acts to *dis*associate himself from that presumption.

The Court of Appeals reaffirmed its prior decision in all respects. It (A) declined to question whether *Keller* expressly resolved the constitutionality of mandatory bar membership, App. 4a, and reaffirmed its prior decision that *Keller* forecloses Fleck's freedom of association challenge to compulsory association. In the process, the court declined to apply *Janus*'s exacting scrutiny requirement. *Id*. at 9a.[3] And (B) it rejected the argument that SBAND's billing practices constitute an

[3] Oddly, the Court of Appeals concluded that Fleck had "forfeit[ed] the issue" of whether exacting scrutiny applies, *id.*, which he could not have done, since all proceedings in the lower courts occurred before the *Janus* decision, which applied exacting scrutiny, was announced. Be that as it may, it need not detain this Court. Fleck's freedom of association claim was properly presented and passed on below, and he may therefore make any argument in support of that claim before this Court. *See Citizens United v. FEC*, 558 U.S. 310, 330 (2010). Further, the questions here—whether compulsory bar association membership is constitutional, and, to the extent that *Keller* said that it is, whether that case should be overruled—are questions of pure law that need no factual development.

unconstitutional "opt-out" procedure, because the fee statement "give[s] SBAND members adequate notice of their constitutional right to take the *Keller* deduction." App. 12a.

REASONS FOR GRANTING THE PETITION

The decision below fails to give effect to, and in some ways drastically undermines, this Court's decision in *Janus*. First, it exacerbates the prevailing confusion over a question of major significance: whether states may force attorneys to join bar associations as a condition of practicing law. That question has important consequences not just for Arnold Fleck's First Amendment rights, but for those of attorneys across the United States. Second, the decision below creates a loophole in *Janus*'s affirmative consent requirement which, if left undisturbed, would transform that requirement into a semantic game. The decision below would allow states to presume acquiescence in the waiver of First Amendment rights by interpreting a person's failure to assert an objection as proof of consent. This would elevate form over substance and violate *Janus*'s rule that "waiver cannot be presumed." 138 S. Ct. at 2486.

Certiorari should be granted to address: A) attorneys can also be forced to join a trade association as a condition of employment—as opposed to being regulated under legally enforceable standards of practice as other professions are—and B) whether *Janus*'s

affirmative consent requirement is satisfied by a rule that presumes the person is willing to subsidize an organization's political activities unless the person takes steps to expressly disavow that presumption.

A. The question of compulsory association.

Janus held not only that government employees cannot be forced to join a public sector union as a condition of employment, 138 S. Ct. at 2463, but also that the state may not require them to subsidize the political speech and political activism of public sector unions. Rather, the state must first obtain the employees' clear and affirmative consent. *Id.* at 2486.

But mandatory bar associations—which are analogous to public sector unions in constitutionally relevant respects, as this Court recognized in *Keller*, 496 U.S. at 12—do just what *Janus* forbids. Attorneys are forced to join them and pay them annual dues—dues which, unless the attorney takes steps to prevent it, will be spent on non-germane political activities and speech that the attorney may disagree with. The constitutionality of laws compelling attorneys to join and pay a bar association is now the subject of lawsuits in at least Louisiana,[4]

[4] *Boudreaux v. La. State Bar Ass'n*, No. 2:19-cv-11962 (E.D. La., filed Aug. 1, 2019).

Oklahoma,[5] Texas,[6] Wisconsin,[7] Oregon,[8] and Michigan.[9]

Essential to resolving those cases is the question of what standard of review applies: the rational basis standard that *Keller* used, 496 U.S. at 8, or the exacting scrutiny required by *Janus*, 138 S. Ct. at 2464–65. Certiorari is warranted because, although *Janus* appears to have abrogated *Keller* in this respect, the *Janus* decision did not expressly refer to *Keller*, leaving lower courts unable to apply *Janus*'s exacting scrutiny standard consistently. Instead, they are required by the rule of *Agostini v. Felton*, 521 U.S. 203, 237 (1997), to keep applying *Keller* despite its conflict with *Janus*.

In addition, *Keller*'s own inconsistencies have caused confusion. That case said on one hand that "lawyers admitted to practice in the State may be required to join" a state bar association. 496 U.S. at 4. But, on the other hand, it also "decline[d]" to address the "broader freedom of association" concerns raised by compulsory membership in a bar association that engages in non-germane activities and violates freedom of association. *Id*. at 17. This leaves lower courts in

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[5] *Schell v. Gurich*, No. 5:19-cv-00281-HE (D. Okla., filed Mar. 26, 2019).

[6] *McDonald v. Longley*, No. 1:19-cv-00219-LY (W.D. Tex., filed Mar. 6, 2019).

[7] *Jarchow v. State Bar of Wis.*, No. 19-CV-266 (W.D. Wis., filed Apr. 8, 2019).

[8] *Crowe v. Or. State Bar*, No. 19-35463 (9th Cir., pending).

[9] *Taylor v. State Bar of Mich.*, No. 1:19-cv-00670-RJJ-PJG (W.D. Mich., filed Aug. 22, 2019).

need of guidance as to the constitutionality of mandatory bar associations. Some have held that *Keller* entirely forecloses a freedom of association challenge to mandatory bar association membership. *See*, *e.g.*, *Kingstad v. State Bar of Wis.*, 622 F.3d 708, 713 (7th Cir. 2010); *Romero v. Colegio De Abogados De Puerto Rico*, 204 F.3d 291, 296–97 (1st Cir. 2000). The Ninth Circuit, by contrast, has acknowledged *Keller*'s internal inconsistency in respect to this question. *Morrow v. State Bar of Cal.*, 188 F.3d 1174, 1175 (9th Cir. 1999). And others have commented on the tension between *Keller* and *Janus* in this respect. *See*, *e.g.*, *Rodriguez Casillas v. Colegio de Tecnicos y Mecanicos Automotrices de Puerto Rico*, No. AC-2017-76, 2019 WL 2147491 at **13–14 (P.R. May 8, 2019).

B. Opt-in versus opt-out.

In addition, although *Keller*, 496 U.S. at 15–16, forbade the use of mandatory dues for political activities absent the consent of members, SBAND, like many state bar associations, bills attorneys in a way that *presumes* that they *consent* to contributing money to the association's political activities—and forces attorneys to bear the burden of *disavowing* that presumption if they wish to opt out. This contradicts *Janus*'s affirmative consent requirement, which requires the state to obtain evidence of a clear and knowing waiver of constitutional rights.

Yet the Eighth Circuit characterized SBAND's billing practice as an "opt-in" rule, on the theory that

"[i]f [an attorney] does not choose the *Keller* deduction, he 'opts in,'" App. 24a—even though it also admitted the contradictory point that "a busy or careless lawyer might fill out the fee statement and write a check to SBAND for the full annual dues without noticing the option to take the *Keller* deduction." *Id.* at 12a. Obviously any process that is likely to lead to such an accidental waiver fails the "clear and compelling" evidence requirement of *Janus*'s affirmative consent rule. 138 S. Ct. at 2486.

The decision below therefore essentially inverts *Janus*'s affirmative consent test, and if left undisturbed, will create an easy mechanism whereby that requirement will be transformed into an ineffectual semantic game. Despite the fact that *Janus* forbids mandatory associations from presuming consent and/or putting the onus on objectors to proactively demand refunds, the court below characterized SBAND's presumption-of-consent as being *Janus*-compliant—on the theory that attorneys must write out a check and send it to SBAND. App. 10a, 24a. In other words, the Court of Appeals ignored the fact that SBAND presumes acquiescence in the waiver of constitutional rights—even while the court admitted that "a busy or careless lawyer" could easily be misled—and it therefore characterized SBAND's opt-out requirement as an opt-in rule.

If government can obtain "affirmative consent" in this way—by presuming citizens' willingness to "waive their First Amendment rights," *Janus*, 138 S. Ct. at 2486, unless they take steps to negate that

presumption, and characterizing any failure to negate that presumption as "opting in"—then the affirmative consent requirement will be reduced to mere semantics. States could easily fashion means whereby people are presumed to consent to the waiver of their constitutional rights, by characterizing their failure to object as an "affirmative choice" of approval. But the Constitution "'deals with substance, not shadows,'" *Salazar v. Buono*, 559 U.S. 700, 723 (2010) (Roberts, C.J., concurring) (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1866)), and such a formalistic approach is inappropriate with regard to waivers of fundamental First Amendment rights.

The mechanical act of writing a check in response to a misleading notice is simply not the kind of affirmative consent *Janus* contemplated. This Court should take this case to reiterate that *Janus* forbids states from presuming a willingness to waive constitutional rights, and requires clear and affirmative consents to such a waiver, instead.

ARGUMENT

I. Certiorari is necessary to examine mandatory bar association membership.

Since its decision in *Keller* almost 30 years ago, this Court has clarified the constitutional standards relating to freedom of association in the context of public sector unions. In a series of cases climaxing in *Janus*, the Court explained that the state may not

force employees to join such unions, or to subsidize their political activities or speech, unless the state can meet the high burden of "exacting scrutiny." 138 S. Ct. at 2477. Yet although the Court recognized in *Keller* that mandatory bar associations, or "integrated bars," are analogous to unions as far as the First Amendment is concerned, 496 U.S. at 12, it has not so far expressly applied the reasoning of these union cases in the bar context.

That is overdue. As the Court noted in *Harris v. Quinn*, 573 U.S. 616 (2014), the law relating to compulsory membership has a complex history, which has resulted in "anomal[ies]." *Id*. at 628–34. The Court appears never to have produced a definitive opinion with regard to the constitutionality of mandatory bar associations. As a consequence, attorneys in 30 states are now forced to join these associations—private trade organizations that engage in a wide variety of activities, including political lobbying and speech—as a condition of practicing their profession.[10] This is true of no other profession in the United States.

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[10] Ralph H. Brock, "*An Aliquot Portion of their Dues": A Survey of Unified Bar Compliance with Hudson and Keller*, 1 Tex. Tech. J. Tex. Admin. L. 23, 24 n.1 (2000), identified 32 states with mandatory bar associations. After its publication, California and Nebraska adopted bifurcated systems under which lawyers only pay for purely regulatory activities and are not forced to fund a bar association's political or ideological speech, thereby eliminating most if not all of the First Amendment problems caused by mandatory bars. *See In re Petition for a Rule Change to Create a Voluntary State Bar of Neb.*, 841 N.W.2d 167, 173 (Neb. 2013); Marilyn Cavicchia, *Newly Formed California Lawyers*

Moreover, the only cases in which this Court *has* considered the question used rational basis scrutiny, which this Court has since repudiated. *Compare Keller*, 496 U.S. at 8 (discussing what state "might reasonably believe") *with Janus*, 138 S. Ct. at 2465 ("[A]sk[ing] only [what a state] . . . could reasonably believe" is a "form of minimal scrutiny is foreign to our free-speech jurisprudence, and we reject it."). In other words, to the extent that this Court may have sanctioned mandatory bar association membership in *Keller*, later cases have abrogated those decisions. Yet pursuant to *Agostini*, 521 U.S. at 237–38, lower courts must continue applying those earlier decisions until this Court addresses the matter directly. Certiorari is therefore necessary to resolve the present legal paradox.

A. The question of mandatory bar association membership is one of nationwide importance.

Some 30 states currently require attorneys to join a bar association as a condition of practicing law. These range in size from Florida and Texas to Rhode Island and Wyoming. These associations engage in a wide variety of practices over and above regulating the practice of law—including taking positions on political

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Association Excited to Step Forward, ABA Journal (Apr. 30, 2018), https://www.americanbar.org/groups/bar_services/publications/bar_leader/2017-18/may-june/born-by-legislative-decision-california-lawyers-association-excited-to-step-forward/.

debates and contributing money to political campaigns.

This case is typical of the problems that result, and demonstrates the need for this Court's guidance. North Dakota law requires attorneys to become members of SBAND to practice their profession, and to pay it annual dues. N.D. Cent. Code §§ 27-11-22, 27-12-02. Arnold Fleck is therefore forced to join and to fund SBAND, even though he disagrees with many of the political positions it takes. In 2014, he supported a ballot initiative called Measure 6, which related to family law (his own area of practice)—and even contributed $1,000 of his own money to the Yes on Measure 6 campaign. App. 31a. Only later did he discover that SBAND had given $50,000, made up of bar dues—including his own—to the No on Measure 6 campaign. *Id*.

Other states' bar associations likewise use mandatory dues for political activities. The Texas Bar, for instance, spends annual dues to engage in political lobbying relating to bills before the state legislature on a wide variety of subjects, including everything from tort reform to contentious anti-discrimination proposals and immigration reform measures.[11] The Louisiana Bar engages in legislative advocacy with mandatory dues, lobbying on controversial political matters such as the death penalty, high school

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[11] *See* First Am. Compl., *McDonald v. Longley*, No. 1:19-cv-00219-LY (W.D. Tex., filed May 31, 2019) at ¶¶ 39–40.

curricula, and LGBT rights.[12] The Oregon bar recently published a statement in its monthly *Bar Bulletin* characterizing President Trump and his supporters as "white nationalists"—again, with funds taken from mandatory dues.[13] The Oklahoma Bar Association spends member dues to operate a "legislative program" which proposes legislation, lobbies the state legislature, and stages rallies at the state capitol building.[14] There are many other examples.

Several state bars have adopted procedural safeguards whereby, *in theory*, attorney members may refuse to contribute to political and ideological activities, but many of these are constitutionally inadequate, as explained below, in Part II. And the question presented here is broader, anyway. It is the question that *Keller* itself "decline[d]" to address, namely: whether it is constitutional for the state to "compel[ ] [attorneys] to associate with an organization that engages in [non-germane] political or ideological activities," even aside from compulsory funding. 496 U.S. at 17.

Such compulsory membership intrudes on Fleck's freedom of association, and should be subjected to "exacting scrutiny," which requires that the state demonstrate that it cannot achieve its compelling interests in a way that is "'significantly less restrictive of

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[12] *See* Compl., *Boudreaux v. La. State Bar*, No. 2:19-cv-11962 (E.D. La., filed Aug. 1, 2019) ¶¶ 41, 43–44.

[13] *Gruber v. Or. State Bar*, No. 3:18-cv-1591-JR, 2019 WL 2251826 *1 (D. Or. Apr. 1, 2019).

[14] *See* First Am. Compl., *Schell v. Gurich*, No. 5:19-cv-00281-HE (D. Okla. filed May 15, 2019) ¶¶ 47–54.

associational freedoms.'" *Janus*, 138 S. Ct. at 2465 (citation omitted). But no case has yet said so, and both *Keller* and the case on which it relied, *Lathrop*, applied rational basis scrutiny to that question, instead. *See Keller*, 496 U.S. at 8 (referring to what legislatures "might reasonably believe" (quoting *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961))).

Because both *Keller* and *Lathrop* used rational basis, neither case asked the question that subsequent cases have required courts to ask: whether it is possible to achieve the state's important interests "through means significantly less restrictive of associational freedoms" than mandatory bar association membership. *Harris*, 573 U.S. at 618–19 (citation omitted). And although there was little evidence available to resolve that question back when *Keller* and *Lathrop* were decided, the record is clear today: states *can* accomplish their interests in "regulating the legal profession and improving the quality of legal services," *Keller*, 496 U.S. at 13, in a manner that is significantly less restrictive of associational freedoms. We know this because today, 20 states—Arkansas, California, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New York, Ohio, Pennsylvania, Tennessee, and Vermont—all regulate attorneys without compelling bar association membership.[15]

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[15] As noted above, note 10, Nebraska and California use a hybrid model, which bifurcates bar membership into regulatory and non-regulatory functions. Membership in the latter is purely voluntary.

What's more, the inadequacies of the *Keller* safeguards that state bars use today reveals why a stronger First Amendment line is warranted. *Keller* used broad language to define the purposes "germane" to bar association membership, with the consequence that state bars today often engage in activities only tenuously related to legitimate state interests of protecting clients and the legal profession.

For example, the Oregon district court recently held that it was "germane" for the Oregon State Bar to publish an article condemning President Trump's political statements because such condemnation helps promote "a healthy and functional judicial system that equitably serves everyone." *Gruber v. Or. State Bar*, No. 3:18-cv-1591-JR, 2019 WL 2251826, at *10 (D. Or. Apr. 1, 2019). The Louisiana State Bar Association has used its dues to lobby the legislature to eliminate a component from high school education curricula relating to free enterprise.[16] And the Michigan State Bar has used dues to advocate for and against legislation on a variety of issues unrelated to the practice of law, such as a bill to change rules regarding expungement for juvenile offenders and a bill about the charging of minors who commit prostitution-related offenses.[17] Bar associations also frequently use their

[16] La. State Bar Ass'n, LSBA HOD Policy Positions (Through June 2019) 9 (2019), available at https://www.lsba.org/documents/Legislation/LSBAHODPoliciesThruJune2019.pdf.

[17] *See* Jacob Huebert & Kileen Lindgren, *Michigan Attorney Sues State Bar to Defend Her First Amendment Rights*, In Defense of Liberty (Oct. 16, 2019), https://indefenseofliberty.blog/2019/10/16/michigan-attorney-sues-state-bar-to-defend-her-first-amendment-rights/.

websites, funded by mandatory dues, to publish statements supporting or opposing legislation. The Michigan State Bar even published one such statement supporting a 2018 bill to designate an official state pet.[18]

The vagueness of the concept of "germaneness," plus the failure of bar associations to adhere to the procedural protections *Keller* mandated, have contributed to egregious First Amendment violations, including those that gave rise to this litigation. For example, at an early stage of this case SBAND conceded that, a quarter of a century after *Keller* was decided, it *still* had no *Keller* procedures in place. App. 32a–33a.

Similar reasons recently counseled this Court to reconsider the protections for public sector union members established in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Like *Keller*, *Abood* required procedural safeguards to prevent public sector unions from forcing dissenting workers to subsidize expenses that were not germane to the limited purpose for which compulsory funding was supposedly justified (in that case, collective bargaining on workers' behalf). But 37 years later, in *Harris*, this Court found that these procedural safeguards had proven inadequate. The Court said that *Abood* had "not . . . anticipated the magnitude of the practical administrative problems that would result" from that requirement, which the Court "struggled repeatedly with" in the years following the

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[18] https://www.michbar.org/publicpolicy/ppolicyDB_Detail/PublicPolicyID=1458.

decision. *Harris*, 573 U.S. at 637. *Abood* had "not foresee[n] the practical problems that would face objecting nonmembers"—especially the fact that objectors would bear "'the onus'" of "'com[ing] up with the resources to mount the legal challenge in a timely fashion.'" *Id*. (quoting *Knox v. SEIU*, 567 U.S. 298, 319 (2012)).

Precisely the same is true of *Keller*'s safeguard requirement. The *Keller* Court appears not to have anticipated the practical problems that result from its requirement to separate chargeable and non-chargeable expenses, especially in light of the vagueness of those categories—vagueness that enables bar associations to classify expenditures as chargeable on the flimsiest grounds. And, in practice, the *Keller* safeguards have placed the onus on objecting attorneys—not only to find the resources to challenge the unjustifiable expenditure of funds, but even to learn of such expenditures in the first place, as in this case. In fact, some state bars have openly retaliated against dissenting attorneys. For example, in Louisiana, after attorney Dane Ciolino filed a lawsuit on behalf of a client who challenged that state's mandatory bar association on freedom of association grounds, the Association immediately cancelled ethics presentations Ciolino was scheduled to teach and refused to reappoint him to an ethics code committee on which he had served for 20 years.[19]

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[19] Dane S. Ciolino, *On Being Forced Into and Excluded From the Bar Association*, Louisiana Legal Ethics (Oct. 30, 2019), https://lalegalethics.org/on-being-forced-to-join-and-banned-from-the-bar-association/.

B. This Court should grant certiorari to reconcile *Janus*'s exacting scrutiny requirement with *Keller*'s application of rational basis scrutiny, or to consider overruling *Keller*.

Keller is the leading case on the constitutionality of mandatory bar association membership, but *Keller*'s holding is ambiguous. Although its opening paragraph said that the Court "agree[d] that lawyers admitted to practice in the State *may be required* to join and pay dues to the State Bar," 496 U.S. at 4 (emphasis added), its closing paragraph expressly "decline[d]" to address the "broader freedom of association claim" of whether attorneys may be "compelled to associate with an organization that engages in political or ideological activities beyond those for which mandatory financial support is justified"—that is, beyond the compulsory funding of regulatory activities. *Id*. at 17. The *Keller* Court focused its attention on the question of mandatory subsidies for the California Bar's political activities, so it did not discuss compulsory membership itself in any detail.

The same ambiguity is found in the cases on which *Keller* relied. *Keller*'s only discussion of the question of compulsory membership consisted of a long quotation from *Lathrop*—but *Lathrop* itself was a plurality decision which did not squarely uphold the constitutionality of mandatory bar associations. Instead, the *Lathrop* plurality resolved "only . . . a question of compelled financial support of group activities, *not . . . involuntary membership in any other aspect*," 367 U.S. at 828

(emphasis added). Because *Lathrop*, like *Keller*, was focused on the constitutionality of mandatory funding, its statements regarding compulsory membership were therefore actually *obiter dictum*.

In fact, the precise holding of *Lathrop*'s plurality decision is so elusive that Justices Harlan and Frankfurter complained of its "disquieting Constitutional uncertainty," *id.* at 848 (Harlan & Frankfurter, JJ., concurring), and Justice Black remarked, "I do not believe that either the bench, the bar or the litigants will know what has been decided in this case—certainly I do not." *Id*. at 865 (Black, J., dissenting).

The sole paragraph in *Lathrop* that did address the "impingement upon freedom of association" caused by mandatory membership, *id*. at 842, sought to resolve it by quoting from *Railway Employes' Department v. Hanson*, 351 U.S. 225, 238 (1956). But *Hanson*—"a case in which the First Amendment was barely mentioned," *Harris*, 573 U.S. at 628—was a union case, not a mandatory bar case, and its reference to mandatory bars consisted of only a single sentence, which was also *dictum*. *See Hanson*, 351 U.S. at 238.[20] Finally, as *Janus* noted, *Hanson* (like *Lathrop* and *Keller*) employed a rational basis scrutiny that is

[20] In addition, as *Harris* noted, *Hanson*'s author, Justice Douglas, dissented in *Lathrop* because he believed compulsory bar association membership was *not* constitutional. *See Harris*, 573 U.S. at 630–31. *Harris* itself characterized the sentence in *Hanson* on which *Lathrop* relied as *dictum*. *See id.* at 630.

"inappropriate in deciding free speech issues." *Janus*, 138 S. Ct. at 2480.

In other words, *Keller*'s ambiguous reference to the constitutionality of compulsory bar association membership was based on a fractured plurality decision (*Lathrop*) in which that proposition was *dictum*, and which was based on another decision (*Hanson*) in which it was, again, *dictum*—and all of it based on a now-repudiated rational basis analysis.

Despite this legal disarray, several lower courts have simply asserted that the constitutionality of mandatory bar association membership has been definitively resolved. *See*, *e.g.*, *Kingstad*, 622 F.3d at 713; *Romero*, 204 F.3d at 296–97; *Gruber*, 2019 WL 2251826, at *7; *Eugster v. Wash. State Bar Ass'n*, No. C15-0375JLR, 2015 WL 5175722, at *5 (W.D. Wash. Sept. 3, 2015), *aff'd*, 684 F. App'x 618 (9th Cir. 2017).

And they have continued to apply the rational basis test that *Keller* used. *See*, *e.g.*, *Brown v. Fla. Bar*, No. 2:08-cv-308-FTM-29SPC, 2010 WL 1049381, at **5–6 (M.D. Fla. Mar. 22, 2010), *aff'd*, 406 F. App'x 434 (11th Cir. 2010); *Crosetto v. Heffernan*, 810 F. Supp. 966, 970–71 (N.D. Ill. 1992), *aff'd sub nom. Crosetto v. State Bar of Wis.*, 12 F.3d 1396 (7th Cir. 1993). In *Gruber*, for example, the plaintiffs argued that *Keller*'s rational basis scrutiny was inappropriate and that *Janus*'s exacting scrutiny applies to the question of whether compulsory bar membership is constitutional. But the District Court declared that it "decline[d] to apply *Janus* and must apply *Keller*." 2019 WL 2251826,

at *9. It therefore dismissed a challenge to the constitutionality of mandatory membership without asking—as *Janus* requires—whether that membership mandate satisfies exacting scrutiny.

Likewise in *Schell*, the Oklahoma District Court rejected a freedom of association challenge to mandatory bar association membership "[i]n light of the Supreme Court's decisions in *Lathrop* and *Keller*," because there was "no suggestion in *Janus* that either *Lathrop* or *Keller* were overruled." *See Schell v. Gurich*, No. 5:19-cv-00281-HE, 2019 WL 5413896, *4 (W.D. Okla. Sept. 18, 2019).

Other courts have struggled with the ambiguity of *Keller*. For example, in *Morrow*, 188 F.3d at 1177, the Ninth Circuit acknowledged that *Keller* "reserved" the "broader claim of violation of associational rights" with regard to mandatory bar association membership—but it also ruled that "the Court decided [in] *Keller* . . . that 'lawyers admitted to practice in the State may be required to join' " an association. *Id*. at 1176.

This Court should therefore grant certiorari to clarify the impact *Janus* has had in this area, and specifically to make clear that its exacting scrutiny requirement controls, instead of the rational basis analysis *Keller* and *Lathrop* employed.

This question was argued below on remand, but the Eighth Circuit "decline[d] to consider" it, on the theory that resolving it requires "an evidentiary record," and, given Fleck's pre-*Janus* concession that *Keller* was binding precedent, SBAND "did not place in the

summary judgment record the types of detailed information discussed by the Supreme Court in *Lathrop* concerning the legislative decision to adopt an integrated bar." App. 8a–9a. This is illogical, however. It was, of course, impossible for Fleck to have forfeited these issues, given that all proceedings below occurred before *Janus* was decided, and thus before the exacting scrutiny requirement was made clear. Moreover, the Court of Appeals was only asked to determine what level of *scrutiny* applies to Fleck's freedom of association challenge—a legal question, not a factual one—and then to remand to the District Court for whatever fact-finding might be necessary when applying the appropriate scrutiny.

In any event, as *Citizens United* explains, 558 U.S. at 329–31, nothing prevents this Court from reviewing this issue. Fleck's freedom of association claim was preserved throughout the litigation, and the Court of Appeals on remand simply reaffirmed its prior opinion, which upheld mandatory membership pursuant to *Keller*. Fleck's argument that *Keller* either does not govern or should be overruled "is 'not a new claim,'" but "is—at most—'a new argument to support what has been [a] consistent claim'"—namely, that compulsory bar association membership violates the First Amendment. *Id.* at 331 (citations omitted).

Finally, the Court of Appeals declared that the inquiry as to the constitutionality of mandatory bar membership would be "highly fact-intensive," and cited a concurring opinion in *Lathrop* for that proposition. App. 7a. Yet *Janus* makes clear that the inquiry is

simply whether or not it is *possible* for the state to achieve its significant objections in a manner that is significantly less restrictive of constitutional freedoms—and that can be resolved by looking at what states, in practice, do today. *See Janus*, 138 S. Ct. at 2465–66 (finding, without an evidentiary record, that because several states achieve labor peace without mandatory agency fees, it is "undeniable" that such fees fail exacting scrutiny). It is undisputed that 20 states today regulate the practice of law without compulsory bar membership. The record before this Court is therefore fully adequate to resolve the questions presented.

II. This Court should grant certiorari to explain the meaning of *Janus*'s affirmative consent requirement.

A. Lower courts need guidance on opt-in versus opt-out in the wake of *Janus*.

Janus was decided after a line of cases that expressed concern about the way public sector unions were using procedures that obstructed the right of employees to decide whether or not to subsidize union political activities and political speech.

First, in *Davenport v. Washington Education Association*, 551 U.S. 177 (2007), the Court expressed concern with the consequences of *Abood*'s statement that, in the agency fee context, "dissent is not to be presumed," and that the employee bears the burden of objecting to being forced to subsidize union political

activities. *Id.* at 185 (quoting *Abood*, 431 U.S. at 238). *Abood*'s presumption against dissent meant that the onus was put on individual workers to prevent the waiver of First Amendment rights that would otherwise occur without any action on their part.

Then, in *Knox*, the Court emphasized that this ran contrary to the principle that "[c]ourts 'do not presume acquiescence in the loss of fundamental rights.'" 567 U.S. at 312 (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999)). Setting "the default rule" in this way "creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree." *Id*.

Again in *Harris*, 573 U.S. at 627, the Court referred to *Abood* as an "anomaly," and criticized the idea of presuming against dissent because doing so ignored "the practical problems that would face objecting nonmembers." *Id*. at 637.

Finally, in *Janus*, the Court definitively held that it is unconstitutional for states to impose this kind of "opt-out" burden on employees, whereby they are presumed to agree to subsidizing union speech; instead, the burden must be placed on the state to provide clear and convincing evidence that an employee has affirmatively consented to having her money taken to fund union speech. "Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met." 138 S. Ct. at 2486.

Janus, however, made no direct reference to *Keller*. Lower courts therefore continue to apply, not *Janus*'s affirmative consent rule, but the more lenient *Keller* standard, in cases where attorneys object to having their annual dues spent on political speech or lobbying activities. For instance, in *Gruber, supra*, the District Court "decline[d] to apply *Janus* and . . . appl[ied] *Keller*" instead, 2019 WL 2251826, at *9, concluding that affirmative consent is not required for the expenditure of bar dues on political speech—all that is necessary is that the Oregon Bar "provide a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker." *Id.* at *11. And in *Schell*, the District Court held that because there was "no suggestion in *Janus* that either *Lathrop* or *Keller* were overruled," mandatory bar membership was constitutional. *Schell*, 2019 WL 5413896, at *4.

B. The Court should take this case to make clear that a presumption of acquiescence is impermissible under *Janus*.

Worse still, in this case, the Eighth Circuit held that SBAND's billing procedure is *Janus*-compliant notwithstanding the fact that attorneys receive a bill that *presumes acquiescence* and then forces the recipient to take action to *dis*associate himself by *revoking* that presumptive agreement. Each year, SBAND sends attorneys a bill that states, in boldfaced capital letters "**ANNUAL LICENSE FEE**" and states a "total" of **$380.00**—a total that *includes* the non-chargeable fees for political activity. The *actual* mandatory amount

(according to SBAND) is $378.55. Only in small print at the bottom of the form is the recipient told that members "may deduct $1.45" before making payment. App. 58a. The form therefore presumes a total that includes non-chargeable expenses and puts the onus on the attorney to opt-out by deducting the $1.45—without providing any explanation of the attorney's First Amendment rights under *Keller*.

Yet the Court of Appeals nevertheless declared that because an attorney who receives this bill "must determine how much he or she owes in annual dues and then write a check to SBAND," the billing practice qualifies as a constitutionally adequate "opt-in" procedure. App. 12a.

If left undisturbed, this logic will create a loophole in *Janus*'s affirmative consent requirement. That case declared that a worker's agreement to fund union political activity is tantamount to a waiver of First Amendment rights, "and such a waiver cannot be presumed. . . . Rather, to be effective, the waiver must be freely given and shown by 'clear and compelling' evidence." 138 S. Ct. at 2486. But the theory of the decision below is that since an attorney must choose to make the payment, SBAND's presumption of acquiescence nevertheless satisfies First Amendment standards. Such an approach would have the effect of obliterating the affirmative consent requirement in practice, by transforming it into a mere semantic game whereby government agencies could presume waiver, and infer consent from such actions as paying a

licensing or permit fee, using government property, or accepting government benefits.

CONCLUSION

The application of *Janus*'s exacting scrutiny requirement, and its affirmative consent rule, to mandatory bar associations, is a question of significance nationwide, and is already subject to litigation in multiple district courts at present. Those cases all involve the same questions raised here: (1) whether the government can force attorneys to join a bar association as a condition of practicing law; and (2) whether it may presume their willingness to fund non-germane functions, thereby placing the onus of objecting on the attorney, rather than giving attorneys a genuine opportunity to knowingly and freely agree to fund bar political activities prior to payment. This case is the ideal vehicle for addressing such matters. The facts are undisputed, this Court is already familiar with the case, and the questions have been fully briefed and addressed by the lower courts.

The petition for certiorari should be *granted*.

Respectfully submitted,

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