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

This case involves compelled association and compelled speech in ways that are similar to *Janus v. American Fed'n*, 851 F.3d 746 (7th Cir. 2017), *cert. granted*, 138 S. Ct. 54 (U.S. Sept. 28, 2017) (No. 16-1466), but different in an important respect. Unlike *Janus*, this petition addresses both of the legal issues this Court considered in *Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 1083 (2016):

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. Should *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990), and *Lathrop v. Donohue*, 367 U.S. 820 (1961), be overruled insofar as they permit the state to force Petitioner to join a trade association he opposes as a condition of earning a living in his chosen profession?

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.

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The Eighth Circuit order affirming the district court is reproduced in the appendix (App. 1a–11a) as is the district court's order granting summary judgment to Respondents (App. 14a–30a).

JURISDICTION

The Eighth Circuit entered judgment on August 17, 2017. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are reproduced in the Appendix at App. 33a–37a).

STATEMENT OF THE CASE

This case challenges the constitutionality of North Dakota's mandatory bar association laws under the First Amendment.

A. Mandatory Bar Association Membership In North Dakota.

The State Bar Association of North Dakota ("SBAND") is a mandatory bar association. N.D. Cent. Code §§ 27-11-22, 27-12-02. That means North Dakota

compels attorneys to become members and pay association dues as a condition of practicing law in that jurisdiction. *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. 1a–2a. It is unlawful for a person to practice law in North Dakota without being a member of SBAND and financially subsidizing its speech. N.D. Cent. Code §§ 27-11-01, 27-11-22, 27-12-02. Pursuant to N.D. Cent. Code § 27-12-04, SBAND must receive $75 out of each member's mandatory dues for the operation of the lawyer discipline system, and receive 80 percent of the remaining amount of mandatory dues for the purpose of administering and operating SBAND.

Respondent Miller, as Secretary-Treasurer of the State Board of Law Examiners, is charged with collecting mandatory dues from SBAND members and disbursing those dues to SBAND as prescribed by statute. N.D. Cent. Code §§ 27-11-22, 27-11-23, 27-12-04. Respondents Wetch, Fiebelkorn-Zuger, and Weiler, as SBAND officers, enforce laws requiring membership in and funding of SBAND as a prerequisite to practicing law in North Dakota. N.D. Cent. Code §§ 27-11-24, 27-12-02, 27-12-04; *see also* N.D. R. LWYR. DISC. Rule 2.4.[1]

SBAND engages in non-germane activities, App. 16a, that is, activities not related to "elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available

[1] https://www.ndcourts.gov/rules/Discipline/frameset.htm.

to the people of the State." *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961). *See also Keller v. State Bar of Cal.*, 496 U.S. 1, 14 (1990); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986). SBAND conducts a variety of activities that include lobbying on bills pending before the North Dakota Legislature, proposing revisions to existing laws, and supporting or opposing ballot measures. App. 16a–17a. SBAND's activities are largely funded by mandatory member dues. App. 48a.

B. Arnold Fleck And Measure 6.

Petitioner Arnold Fleck is a licensed North Dakota attorney. App. 1a–2a. In addition to maintaining his law license, he is compelled by North Dakota law to join SBAND and to subsidize its speech in order to earn a living practicing law in the State. N.D. Cent. Code §§ 27-11-01, 27-11-22, 27-12-02; App. 1a–2a. Fleck strongly supported Measure 6, which appeared on the North Dakota ballot on November 4, 2014. App. 17a.[2] Fleck not only contributed $1,000 to a ballot measure committee in support of Measure 6, he also participated in the campaign – even appearing on television and radio to debate the measure's merits. *Id*.

A few weeks before the election, Fleck discovered – through a third party – that SBAND was opposing Measure 6 and threw its weight – and members' money

[2] Measure 6 proposed to amend state law "to create a presumption that each parent is a fit parent and entitled to be awarded equal parental rights. . . ." App. 17a.

– behind the opposition. *Id*. SBAND contributed $50,000 in compelled member dues to "Keeping Kids First," a committee that opposed Measure 6. *Id*. Ultimately, Keeping Kids First returned some funds and SBAND's final contribution totaled $46,525.85. *Id*. However, SBAND's support did not end with cash. Respondent Weiler, the Executive Director of SBAND, expended $3,694 worth of his time supporting Keeping Kids First. SBAND also provided Keeping Kids First with support by allowing the ballot committee to use SBAND's email system and establish an email address with SBAND's domain name: keepingkidsfirst@sband.org. App. 17a–18a.

Under SBAND's then-applicable procedures (which were changed as a result of this lawsuit, App. 5a), Fleck received no notice of SBAND's Measure 6 activities. App. 17a. Moreover, SBAND's procedures required Fleck to request a refund directly from the Executive Director of SBAND, Defendant Weiler. App. 5a. At the time, Defendant Weiler was actually serving on the Ballot Measure Committee that received SBAND's contribution. Faced with SBAND's deficient procedures and abuse of member dues for non-germane activities, Fleck filed this suit against SBAND. App. 18a.

C. Proceedings Below.

On February 3, 2015, Fleck filed his Complaint for Declaratory and Injunctive Relief, alleging three claims for relief: (1) constitutionally deficient notice

and objection procedures, including violation of the right to receive notice, a reasonably prompt decision by an impartial decision-maker if a member objects to the way his or her mandatory dues are being spent, and an escrow for the amounts reasonably in dispute while such objections are pending; (2) constitutionally deficient consent procedures, which violate the right to affirmatively consent to non-germane expenditures; and (3) the unconstitutionality of a mandatory bar association. App. 18a. On the same day, Fleck filed a Motion for Preliminary Injunction with respect to his first and second claims for relief. *Id*. On May 14, 2015, the District Court ordered the parties to conduct settlement discussions under the supervision of a Magistrate Judge. *Id*.

Pursuant to a Joint Stipulation, SBAND adopted revised policies and procedures, which cured the procedural deficiencies that formed the basis of Fleck's first claim for relief. Fleck accordingly withdrew his Motion for Preliminary Injunction. *Id.*; App. 38a. The District Court adopted the Joint Stipulation, dismissed Fleck's first claim for relief, and found Fleck's Motion for Preliminary Injunction moot.[3] App. 19a.

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[3] Fleck has already had to exercise his ability to object to recent SBAND expenditures as non-germane under these revised procedures. *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 (last accessed December 8, 2017). 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

Fleck then moved for summary judgment on his remaining claims regarding affirmative consent and the constitutionality of mandatory bar membership. App. 14a–15a. Respondent Miller opposed this motion, and Respondents Wetch, Fiebelkorn-Zuger, and Weiler filed a cross-motion for summary judgment. *Id*. On January 28, 2016, the District Court denied Fleck's motion for summary judgment and granted the cross-motion filed by Respondents Wetch, Fiebelkorn-Zuger, and Weiler. *Id.*

Fleck acknowledged that his challenge to mandatory bar membership was foreclosed by binding precedent, and the District Court appropriately denied this claim. App. 22a. But the District Court also erroneously found that Fleck's claim regarding his right to affirmatively consent to non-germane SBAND expenditures was foreclosed by prior precedent, and denied that claim. App. 22a–29a. Accordingly, the District Court dismissed Fleck's remaining claims, App. 29a–30a, and entered judgment in favor of Respondents. *Id*.

Fleck appealed the judgment to the United States Court of Appeals for the Eighth Circuit. On August 17, 2017, the Eighth Circuit affirmed summary judgment on Fleck's affirmative consent claim on the basis that SBAND's dues procedure is carefully tailored to minimize the infringement of First Amendment rights,

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the Task Force had not yet proposed rules or statutory changes. *Id*. But she acknowledged that SBAND failed to meet "its burden to show that all potential activities of the Task Force *will be* germane under *Keller [v. State Bar of California]*." *Id*. at 7 (emphasis added).

even though it requires members to subtract the non-germane portion of their dues in order to calculate the actual amount owed. App. 1a–11a. The panel affirmed the dismissal of Fleck's challenge to mandatory bar membership on the basis of *Keller*, 496 U.S. 1, and *Lathrop*, 367 U.S. 820. App. 1a–11a. Fleck now petitions this Court for certiorari and requests that this Court reverse the Eighth Circuit's decision and overrule *Keller* and *Lathrop*.

REASONS FOR GRANTING THE PETITION

This Court determined that the legal principles at stake here were worthy of its consideration when it granted certiorari on essentially the same questions in *Friedrichs v. California Teacher's Ass'n*, 136 S. Ct. 1083 (2016), and reiterated that determination when it granted the petition in *Janus v. American Fed'n*, 851 F.3d 746 (7th Cir. 2017), *cert. granted*, 138 S. Ct. 54 (U.S. Sept. 28, 2017) (No. 16-1466). The First Amendment rights implicated in these cases are worthy of the Court's consideration in the mandatory bar association context of this case, just as they are worthy of consideration in the mandatory public employee union context of *Friedrichs* and *Janus*.

But *Janus* only asks one of the questions this Court granted in *Friedrichs* – Fleck's petition asks the other. Critically, this petition allows the Court to make clear that its decision in *Knox v. Service Emps. Int'l Union, Local 1000 ("SEIU")*, 132 S. Ct. 2277 (2012),

requires *affirmative* consent for *all* non-germane expenditures. Any reformation of the compelled speech doctrine – including overruling *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) – will have little practical consequence without a clear commandment that consent is constitutionally required.

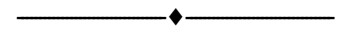
Absent a robust opt-in requirement, mandatory associations will continue to put the onus on objectors to revoke their membership or to claw back the non-germane portion of their dues. Only affirmative consent (opt-in) can "shift the advantage of . . . inertia," *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966), onto members who wish to exercise their First Amendment rights and away from mandatory associations, which have "no constitutional entitlement to the fees" they compel from members. *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 185 (2007).

Fleck's petition also gives this Court a straightforward opportunity to halt the damage done by compulsory bar associations. It is possible to regulate the practice of law and protect the public "through means significantly less restrictive of associational freedoms" than mandatory bar association membership. *Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014) (citations omitted). There was no evidence to the contrary when *Lathrop* and *Keller* were decided, and the record today is clear that the First Amendment and lawyer regulation need not conflict. There are 19 states – Arkansas, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota,

Nebraska[4], New Jersey, New York, Ohio, Pennsylvania, Tennessee, and Vermont – that regulate attorneys without compelling bar association membership. *See In re Petition*, 841 N.W.2d at 170–71.

This Court has reaffirmed the regulatory core of *Keller* and *Lathrop* over the years and that core holding is unaffected by this petition – attorneys can be required to pay for the cost 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," *Lathrop*, 367 U.S. at 843 – but the First Amendment prohibits forcing them to join an association of other attorneys in order to achieve that purpose. And with good reason – *Keller* used broad language to define the purposes germane to bar association membership, and bar associations have not adhered to the procedural protections *Keller* mandated.

The loose application of *Keller*'s permissive language has led to egregious First Amendment violations, including the violations that gave rise to this litigation. This Court's endorsement of mandatory bar membership should be overturned for one simple reason: attorney regulation can be readily achieved without the First Amendment burdens imposed by mandatory bar associations.



[4] Nebraska's is a hybrid model, which bifurcates bar membership into regulatory and non-regulatory functions. Membership in the latter is separate and purely voluntary. *In re Petition*, 841 N.W.2d at 178–79.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT ALLOW MANDATORY ASSOCIATIONS TO PRESUME ACQUIESCENCE IN NON-GERMANE EXPENDITURES.

A. This Court's Reasoning In *Knox* Necessitates Affirmative Consent For All Non-Germane Expenditures.

The First Amendment protects the right not to support causes and activities that conflict with one's beliefs and the right not to be compelled into unwanted associations. *See, e.g.*, *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) ("[T]he [First] Amendment may prevent the government from . . . compelling certain individuals to pay subsidies for speech to which they object." (citations omitted)); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) ("Freedom of association . . . plainly presupposes a freedom not to associate." (citation omitted)).

Indeed, it is a "bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris*, 134 S. Ct. at 2644. That is because " 'compelled funding of the speech of other private speakers or groups' presents the same dangers as compelled speech." *Id.* at 2639 (quoting *Knox*, 132 S. Ct. at 2288); *see also id.* at 2656 (Kagan, J. dissenting) ("[T]he 'difference between compelled speech and compelled silence' is 'without constitutional significance.' " (quoting

Riley v. National Fed'n of Blind of N.C., Inc., 487 U.S. 781, 796 (1988)).

There is inherent tension between compelled associations like mandatory bar associations and the First Amendment, because compelled membership and dues are "a form of compelled speech and association" that burden First Amendment rights. *Knox*, 132 S. Ct. at 2289. Because of this inherent tension, courts "do not presume acquiescence in the loss of fundamental rights." *Id*. at 2290 (quotation marks omitted). To ensure that objectors are only compelled to foot the bill for the narrow subset of expenditures that are germane to a sufficiently compelling interest, safeguards must be "carefully tailored to minimize the infringement" of objectors' First Amendment rights. *Hudson*, 475 U.S. at 303.

Yet, most compelled bar associations employ an opt-out rule, requiring objectors to deduct from their dues the portion allocated to the group's political or otherwise non-germane speech. This wrongly "put[s] the burden on the nonmember" objector, thereby "creat[ing] a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree." *Knox*, 132 S. Ct. at 2290.

Opt-out procedures that shift the burden onto attorneys pose a great risk to First Amendment rights. They "nudge" individuals to acquiesce because "people have a strong tendency to go along with the status quo or default option." RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE 8 (2008). Actually, attorneys are more

than just "nudged" into acquiescence. Given SBAND's power to regulate the practice of law and threaten an attorney's license and livelihood, putting the burden on an attorney to inform the bar that he does not wish to fund its non-germane activities puts that attorney at odds with his regulator.

Knox wisely required opt-in for non-germane special assessments and noted that this issue was previously overlooked due to "historical accident" rather than "careful application of First Amendment principles." 132 S. Ct. at 2290–91 ("By authorizing a union to collect fees from nonmembers and permitting the use of an opt-out system for the collection of fees levied to cover nonchargeable expenses, our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate.").

In fact, this Court had no occasion to address opt-in versus opt-out prior to *Knox*. The majority in *Abood* expressly declined to reach the issue. 431 U.S. at 242 n.45 ("We express no view as to the constitutional sufficiency of the [union's] internal remedy" described by the Court in footnote 41 of the majority opinion as an opt-out system). And *Hudson* dealt with what happens when there is a dispute between nonmembers and a union within an opt-in system – the procedures this Court approved in *Hudson* protected teachers who had not opted-in to joining the union. 475 U.S. at 295. *Knox* was this Court's first opportunity to decide whether opt-in is constitutionally required.

Just like the union in *Knox*, Respondents here did not and cannot identify a state interest – let alone a compelling one – in "shift[ing] the advantage of . . . inertia," *Katzenbach*, 383 U.S. at 328, away from members who wish to exercise their First Amendment rights, and onto SBAND, which has "no constitutional entitlement to the fees" it forces members to pay. *Davenport*, 551 U.S. at 185.

B. SBAND's Procedures Do Not Seek Affirmative Consent.

By approving a dues procedure that requires objectors to subtract non-germane spending from total dues owed, the decision below drains *Knox* of all meaning and leaves the "advantage of inertia" firmly on the side of SBAND. The procedure works this way: Each year, SBAND sends attorneys a Statement of License Fees Due, informing the attorney that, unless exempt, he or she must pay annual dues of either $380, $350, or $325, depending on years of practice. App. 5a, 44a–53a. SBAND describes this amount as the "annual license fee" but – as we shall soon see – it really isn't. *Id.*

Starting from the "annual license fee," SBAND then allows attorneys to opt-*in* to various charges for specialized sections, the bar foundation, and the pro bono fund. *Id*. These optional additional charges are then followed by a "*Keller* deduction," which allows an attorney to opt-*out* of paying SBAND's non-germane expenditures by subtracting an amount based on last year's non-germane spending. App. 5a–6a, 44a–50a.

On its face, the *Keller* deduction is not opt-in; if an objector pays the default "annual license fee" he pays for non-germane spending. He must take an affirmative step of subtracting the "*Keller* deduction" in order to preserve his First Amendment rights.

Calling the initial amount the "annual license fee" but then allowing the savvy objector to subtract the non-germane portion – which is *not* part of the "annual license fee" – is designed only to deceive, and unconstitutionally stacks any advantage of error on the side of SBAND. Likewise the erratic approach to calculating the actual annual license fee – add some optional expenses, but subtract this one – can only serve the purpose of capitalizing on individual fallibility to subsidize SBAND at the expense of objectors' constitutional rights. Any private business that manipulated customers that way – posting an "amount due" at the top of a bill but then hiding additional charges in the form of deductions – would find itself at the sharp end of a law-enforcement investigation.

The Eighth Circuit's own description of SBAND's procedure reveals that the dues form is tailored to put the burden on the objector, who must take back what SBAND has no entitlement to in the first place:

> Before submitting an annual license fee payment, each member calculates the amount owing on the revised Statement. If he *selects* the *Keller deduction*, he writes a check for the lower amount that *excludes* a payment for SBAND's non-germane expenditures. 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.

App. 10a (emphases added). To emphasize: if the objector fails to choose the deduction, even through inadvertence, he is said to "opt-in" because he writes a check for the amount SBAND states at the top of the dues form is the "annual license fee."

That is the opposite of what this Court called for in *Knox*, because it puts the burden on the innocent objector who simply pays the "annual license fee" without scouring the form for hidden deductions. *Knox*, however, stands for the rule that the default choice must benefit the objector, not SBAND. In the same way that SBAND allows the genuine choice to opt-in to specialty sections, the bar foundation, and the pro bono fund, it must allow opt-in for *all* non-germane spending.

C. The Lack Of An Affirmative Consent Requirement Invites Unconstitutional Mischief.

The "opt-in if you do not opt-out" model endorsed by the decision below would work the same constitutional violation if it were adopted by a public employee union, which could send a dues notice to all employees, indicating that the agency fee or special assessment is a given amount (although the portion germane to collective bargaining is really only some percentage of that amount, or none at all) and then bury the

non-chargeable *deduction* in a long list of *additional* charges. If the employee does not choose the non-chargeable deduction, he "opts-in" to subsidizing non-germane expenses by the affirmative act of writing a check (or allowing a paycheck deduction) for the greater amount.

The danger would be the same if *Abood* were overturned and public employee unions were prohibited from collecting an agency fee from non-members. All employees could be presumed to be members, and if an employee does not choose to disassociate, he "opts-in" to joining the union by the affirmative act of unwittingly paying dues he is not required to pay.

The factual differences between this case and *Knox* show that SBAND members actually suffer *greater* injury to their associational rights than do public sector employees, who can at least choose not to be members of the union that they are forced to fund. Fleck is given no similar choice: he is *required* to join as a condition of practicing law. In *Knox*, this Court found that forcing public employees to opt-out of subsidizing non-chargeable activities "creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree." 132 S. Ct. at 2290. That risk is greater here, given that Fleck is not even free to refuse to join the association.

Any system that places the burden on the individual objector to vigilantly safeguard his choice not to speak puts the accountability on the wrong party.

Burdening the individual objector leads to unjust and needless encroachment upon First Amendment rights, which *Hudson*'s insistence on "carefully tailored" safeguards was supposed to prevent. 475 U.S. at 303. There is no compelling government interest that can justify the inherent First Amendment injury of collecting compelled dues for non-germane expenditures; only funds that are given voluntarily may be spent for such expenditures.

Under the Constitution, the default option cannot be presumed consent. Only a genuine opt-in system ensures that consent is really by choice, and creates a functional barrier between compelled dues and voluntary funds. Compelled associations cannot escape *Knox*'s bottom line: presuming acquiescence wrongly presumes against fundamental rights. 132 S. Ct. at 2290. SBAND must afford its compelled membership "carefully tailored" safeguards for their free speech rights. *Hudson*, 475 U.S. at 303. After *Knox*, that tailoring must include an opt-in requirement for all non-germane spending. 132 S. Ct. at 2295. The Eighth Circuit's endorsement of the functional opposite of opt-in should be reversed.

II. MANDATORY BAR MEMBERSHIP, LIKE PUBLIC UNION AGENCY FEES, IS UNWORKABLE AND UNNECESSARY.

A. *Keller*, Consistent With *Abood*, Engages In Arbitrary Line Drawing Between Germane And Non-Germane Political And Ideological Activities.

Abood drew an indefensible line in finding that public-sector employees could be forced to fund political and ideological speech related to collective bargaining, but not any other political and ideological speech because the First Amendment prohibits requiring an individual "to contribute to the support of an ideological cause he may oppose." 431 U.S. at 235. This imaginary line between different kinds of political speech should prove fatal to *Abood* and this Court should overrule it.

Keller also engages in *Abood*'s arbitrary and impermissible line-drawing by allowing mandatory bars to compel dues for "regulating the legal profession" or "'improving the quality of the legal service available to the people of the State.'" 496 U.S. at 14 (quoting *Lathrop*, 367 U.S. at 843). If *Keller* only applied to "payment of dues [ ]as part of [a] regulatory scheme," as this Court's subsequent decisions suggest, *see*, *e.g.*, *Harris*, 134 S. Ct. at 2643, then *Keller* could be distinguished from *Abood* on these grounds. Its deficiencies would then be limited to the fact that it fails to apply any constitutional scrutiny to the supposition that mandatory bar associations are necessary to regulate attorneys. *See* Part B., *infra*. But *Keller* is not so limited.

Consequently, mandatory bar associations have capitalized on *Keller*'s "improving the quality of the legal service" language to fund activities that go far beyond "regulating the legal profession." *See, e.g.*, *Gardner v. State Bar of Nev.*, 284 F.3d 1040, 1042 (9th Cir. 2002); *Kingstad v. State Bar of Wis.*, 622 F.3d 708, 718–21, 723–25 (7th Cir. 2010). Like *Abood*, *Keller* "failed to appreciate the conceptual difficulty of distinguishing" between germane and non-germane expenditures. *Harris*, 134 S. Ct. at 2632.

Because *Keller* has been read to permit mandatory bars to compel dues for two broad and distinct purposes, mandatory bars routinely spend coerced dues on a broad range of political and ideological activities. As a result, members' First Amendment rights have been harmed and *Keller* has been placed in the same dangerous territory as *Abood*. Reading *Keller* as permitting the expenditure of mandatory dues to improve the quality of legal services – even if the expenditure is unrelated to regulating attorneys – is an inevitably vague and subjective standard. Each expense must be justified as germane to improving the quality of legal services, without significantly adding to the burden on free speech. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991). But that determination "'involves a substantial judgment call (What is 'germane'? What is 'justified'? What is a 'significant' additional burden?).'" *Harris*, 134 S. Ct. at 2633 (quoting *Lehnert*, 500 U.S. at 551 (Scalia, J., concurring in part & dissenting in part)). This inevitably (even innocently) leads mandatory bars into mischief as they find the elasticity of

"improving the quality of legal service" to greenlight an array of activities that attorneys can be forced to fund. It also drags courts into the political arena, requiring them to differentiate between "controversial bills" and "technical, non-ideological aspects of substantive law" – if that distinction even exists. *Schneider v. Colegio de Abogados de P.R.*, 917 F.2d 620, 633 (1st Cir. 1990). *Keller* has therefore placed mandatory bars – and the members compelled to foot the bill – in a fog of uncertainty as to what is permissible and what is not, leading to needless rights violations and litigation.

For example, SBAND attempted to defend itself in this lawsuit in part by arguing that Measure 6 – dealing with presumptions about child custody – was a proper compelled expenditure because the measure theoretically could have placed a greater burden on the judicial system and threatened the "perception" of the quality of legal services in North Dakota. Defendants Jack McDonald, Aubrey Fiebelkorn-Zuger, and Tony Weiler's Memorandum of Law in Opposition to Plaintiff's Motion for Preliminary Injunction at 7–9, *Fleck v. McDonald, et al.*, 1:15-cv-00013-DLH-ARS (D.N.D. filed March 20, 2015) (ECF #25). By expending mandatory dues to advocate against the passage of Measure 6, SBAND was purportedly "improving the quality of legal services." *Id*. at 6.

That logic would allow mandatory bars limitless authority. There is scarcely a law that does not burden the judicial system, including laws this Court called non-chargeable, such as gun control. *Keller*, 496 U.S. at

3 ("Compulsory dues may not be used to endorse or advance [] gun control . . . but may be spent on activities connected with disciplining Bar members or proposing the profession's ethical codes."). Yet *Keller*'s "improving the quality of legal services" standard invites a broad understanding of chargeability, making SBAND's arguments not the exception but the rule among mandatory bar associations.[5]

Kingstad, 622 F.3d at 718–21, and *Gardner*, 284 F.3d 1040, illustrate this issue well. The Ninth Circuit and a divided panel of the Seventh Circuit allowed

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[5] *See, e.g.*, Idaho Bar Commission Rules, Idaho State Bar, at Rule 906, Rule 1106 (*available at* https://isb.idaho.gov/pdf/rules/ibcr.pdf) (last accessed on Dec. 12, 2017) (Permitting the State Bar to engage in legislative and political activity on, inter alia, "[a]ll matters relating to or affecting the statutes or laws of the State of Idaho. . . ."); The Political Process: Roles and Responsibilities, Oregon State Bar (*available at* http://osbpublicaffairs.homestead.com/files/Political_Process.pdf) (last accessed on Dec. 12, 2017) (Stating that *Keller* "did not establish a particularly clear standard on what constitutes permissible or impermissible dues-financed activities. . . . We believe the broad middle area of law improvement is appropriate if it is germane to the bar's role in improving the quality of legal services to the people of the State of Oregon or relates to the regulation of the legal profession."); V.T.C.A., Government Code § 81.034 (Texas) (Permitting the Texas Bar to influence the passage or defeat of any legislative measure that relates "to the regulation of the legal profession, improving the quality of legal services, or the administration of justice and the amount of the expenditure is reasonable and necessary."); An Executive Summary of *Keller* and Related Case Law, the State Bar of Arizona (*available at* http://www.azbar.org/edia/159949/kellerexecsummary.pdf) (last accessed on Dec. 12, 2017); The Political Process: Roles and Responsibilities, Oregon State Bar (*available at* http://osbpublicaffairs.homestead.com/files/Political_Process.pdf) (last accessed on Dec. 12, 2017).

mandatory bar associations to force attorneys to contribute to advertising campaigns designed to bolster the image of attorneys, holding that this was germane to "improving the quality of legal services" under *Keller*. In *Kingstad*, the Seventh Circuit correctly held that the *Keller* limitations applied to all uses of compelled dues and not just those related to political or ideological activities. 622 F. 3d at 714–18. But the majority then followed the Ninth Circuit's decision in *Gardner* and employed such a broad interpretation of "improving the quality of legal services" that it rendered the correct portion of its ruling "meaningless." *Id*. at 725 (Sykes, J., dissenting).

Employing a deferential standard for reviewing a mandatory bar association's use of compelled dues, the majority found that the advertising campaign was reasonably related to "improving the quality of legal services" in part because it might hypothetically encourage clients to trust lawyers, making a client follow legal advice and, "[w]hen people follow competent legal advice, the system itself is improved." *Id*. at 719.

Judge Sykes dissented, arguing that "[t]o be germane to improving the quality of legal services, an expenditure of compulsory bar dues should as a factual matter have at least *some* connection to the law, legal advising, legal education, legal ethics, or the practice of law." *Id*. at 723 (Sykes, J., dissenting) (emphasis in the original; quotations omitted). The result of *Kingstad* and *Gardner* is that attorneys compelled to fund bar associations in the Seventh and Ninth Circuits have been left with such a broad interpretation of

what expenditures are germane to "improving the quality of legal services" that it is unclear if there is *any* expenditure that they cannot be compelled to fund. Mandatory bar associations are further emboldened to tread in the murky waters of political and ideological activities allowed under *Abood* and *Keller*.

Keller's expansive language notwithstanding, this Court has been otherwise consistent in requiring that chargeable expenditures be related to attorney regulation. Overruling *Keller* as suggested herein would do no violence to that core holding: requiring attorneys to pay the cost of their regulation does not justify forcing them to join an association that takes positions with which they disagree. This regulatory focus began in *Lathrop*, 367 U.S. at 843, where this Court failed to apply the scrutiny it now requires of compelled associations, but noted the narrow purpose that the state "might reasonably believe" a mandatory bar served: "elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available." Each time this Court has referenced *Keller* it has described its holding in much more narrow terms than *Keller* used or than the mandatory bars and lower courts have recognized. In *Harris* this Court described *Keller* as narrowly focused on requiring attorneys "to pay the portion of bar dues used for . . . activities connected with proposing ethical codes and disciplining bar members." 134 S. Ct. at 2643 (citing *Keller*, 496 U.S. at 14); *see also United Foods*, 533 U.S. at 414 ("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."). That regulatory interest can be achieved without complicated questions about chargeability and without compelled association.

B. Compelled Speech And Association Are Not Necessary Incidents Of Regulating The Practice Of Law.

There is no question SBAND's mandatory dues are "a form of compelled speech and association" that burden First Amendment rights. *Knox*, 132 S. Ct. at 2289. Compulsory subsidies such as mandatory bar association dues "cannot be sustained unless two criteria are met." *Id*. First, all coerced association must be justified by a "compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Id*. (internal citations and grammar omitted). Second, even in the "rare case" where coerced association is found to be justified, compulsory fees "can be levied only insofar as they are a 'necessary incident' of the 'larger regulatory purpose which justified the required association.'" *Id*. (quoting *United Foods*, 533 U.S. at 414).

Starting with *Lathrop* and continuing with *Keller*, mandatory bar associations have never been measured under the focused analysis required by this Court's later First Amendment free association cases. Instead, it has approved mandatory bar associations on the basis of what a state "might reasonably believe." *Lathrop*,

367 U.S. at 843. It is, in fact, *un*reasonable to tolerate compulsory bar membership because it does not serve a "'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Knox*, 132 S. Ct. at 2289 (citations omitted). The compelling interest SBAND is intended to serve is regulating the practice of law (and the attendant interest of requiring attorneys to pay the cost of that regulation). *Harris*, 134 S. Ct. at 2643–44; *Keller*, 496 U.S. at 14; *Lathrop*, 367 U.S. at 843. Charging attorneys for the cost of regulating the practice of law *can* be achieved by means that are less restrictive of First Amendment freedoms than mandatory bar association membership: 19 states already do it without compelling membership at all.[6]

The regulatory arrangements of these voluntary bar states respect the wisdom that "[t]he mere fact that a lawyer has important responsibilities in society does not require or even permit the State to deprive him of those protections of freedom set out in the Bill of Rights." *Lathrop*, 367 U.S. at 876 (Black, J., dissenting). Yet they have not led to any lapse in the regulation of attorneys or failed to achieve high standards of legal practice or thrust the cost of attorney regulation onto the general public. These states are not unique in some way that enables them to regulate the practice of law in a manner that is beyond the reach of states that now

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[6] *See In re Petition*, 841 N.W.2d at 170–71; 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).

mandate bar association membership. For instance, both New York (one of the largest economies in the world[7]) and Vermont (the smallest economy in the United States[8]) are both voluntary bar states. While these shifts of scale may necessitate differing fees to cover regulatory costs, they do not necessitate mandatory membership in, and funding of, a bar association.

Like attorneys in mandatory bar association states, attorneys in voluntary states still have to be licensed, still must adhere to ethical standards, and still must pay for the cost of attorney regulation. If they

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[7] The State of New York has a GDP of $1,463,175,000 – the third largest in the United States. U.S. Department of Commerce Bureau of Economic Analysis, Gross Domestic Product by State, http://www.bea.gov/iTable/drilldown.cfm?reqid=70&stepnum=11&AreaTypeKeyGdp=5&GeoFipsGdp=XX&ClassKeyGdp=NAICS&ComponentKey=200&IndustryKey=1&YearGdp=2015Q2&YearGdpBegin=-1&YearGdpEnd=-1&UnitOfMeasureKeyGdp=Levels&RankKeyGdp=1&Drill=1&nRange=5 (last accessed Dec. 12, 2017). Moreover, New York is the 16th largest economy in the world. *See* H. Joseph Drapalski III, *The Viability of Interstate Collaboration in the Absence of Federal Climate Change Legislation*, 21 DUKE ENVTL. L. & POL'Y F. 469, 479 n.46 (2011).

[8] The State of Vermont has a GDP of $30,185,000. U.S. Department of Commerce Bureau of Economic Analysis, Gross Domestic Product by State, http://www.bea.gov/iTable/drilldown.cfm?reqid=70&stepnum=11&AreaTypeKeyGdp=5&GeoFipsGdp=XX&ClassKeyGdp=NAICS&ComponentKey=200&IndustryKey=1&YearGdp=2015Q2&YearGdpBegin=-1&YearGdpEnd=-1&UnitOfMeasureKeyGdp=Levels&RankKeyGdp=1&Drill=1&nRange=5 (last accessed Dec. 12, 2017). As a comparison, North Dakota's approaches twice that: $58,819,000. *Id*.

wish to join a bar association, they may.[9] But if their views diverge from the bar association's, they are free to leave and disassociate themselves from the bar association's speech, while still practicing law. Were *Keller* overturned, the 31 states with mandatory bar associations would merely join these 19 states in regulating attorneys without violating their First Amendment rights.

And while voluntary bar states continue to adequately regulate their attorneys without violating their First Amendment rights, states with mandatory bars have struggled to own up to the responsibilities that accompany the privilege of receiving coerced dues.

Despite the paramount importance of implementing safeguards to limit the infringement of members' First Amendment rights, ten years after *Keller* was decided, a staggering 26 of the 32 states with mandatory bar associations had failed to institute safeguards that met the constitutional minimum. Brock, *supra* note 6, at 53–85.[10] Now, 27 years later, many mandatory bars admit that they *still* lack these constitutionally

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[9] Every voluntary state still has an active state bar association, *see* ABA Division for Bar Services, *2011 State and Local Bar Membership, Administration and Finance Survey* (2012).

[10] Professor Brock identified the mandatory state bar associations of Alabama, Alaska, Arizona, Florida, Georgia, Hawaii, Idaho, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nevada, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, and Wyoming as having either deficient *Keller/Hudson* safeguards or no *Keller/Hudson* safeguards at all. Brock, *supra*, at 53–85.

obligatory safeguards.[11] Unsurprisingly, this has led to a flood of litigation. *See, e.g.*, *Lautenbaugh v. Nebraska State Bar Ass'n*, 2012 WL 6086913 (D. Neb. Dec. 6, 2012); *Kingstad v. State Bar of Wis.*, 622 F.3d 708 (7th Cir. 2010); *Romero v. Colegio de Abogados de P.R.*, 204 F.3d 291 (1st Cir. 2000); *Popejoy v. New Mexico Bd. of Bar Comm'rs*, 887 F. Supp. 1422 (D.N.M. 1995); *Schneider*, 917 F.2d 620. Meanwhile, no such flood has ensued in voluntary bar states. Violation of First Amendment rights is inevitable in compelled association schemes and litigation will continue so long as such schemes are tolerated. Overturning *Keller* and *Lathrop* in this regard would not open the floodgates to a mass of litigation – rather it would end the current flood.

The regulatory core of *Keller* and *Lathrop* would be unaffected by granting the relief this petition seeks. Attorneys can be required to pay for the cost 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," *Lathrop*, 367 U.S. at 843 – but because means less restrictive of associational freedoms are plainly available to achieve that purpose, there is no longer any excuse for North Dakota and 30 other states to continue violating attorneys' First Amendment rights. Mandating membership in bar associations "cross[es] the limit of what the

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[11] American Bar Association, Unified Bar Association Fact Sheet, https://www.americanbar.org/content/dam/aba/administrative/barservices/resourcepages/unifiedbars_factsheet.authcheckdam.pdf (last accessed Dec. 12, 2017).

First Amendment can tolerate." *Knox*, 132 S. Ct. at 2291.

III. THIS CASE IS AN EXCELLENT VEHICLE FOR ADDRESSING THE QUESTIONS PRESENTED.

As to the first question, this Court's decision in *Knox* sets an important free speech and association precedent, but it only set half the precedent. The question of whether the Constitution *always* requires affirmative consent before compelled associations can extract political contributions must be answered. Time and fate denied this Court of the opportunity to settle this issue in *Friedrichs*, but this petition allows the question to be answered once and for all, for all compelled associations. Plus, the Eighth Circuit's endorsement of SBAND's "opt-in if you do not opt-out" model provides this Court with an opportunity to clarify the substance of *Knox*'s opt-in requirement and ensure that consent cannot be manufactured through sleight of hand in dues procedures.

As to the second, SBAND's own actions make the case against bar associations' continued entitlement to the "remarkable boon" of compelled association. *Knox*, 132 S. Ct. at 2290–93. Like most mandatory bars, SBAND failed to comply with even the most basic safeguards designed to protect attorneys from being unwittingly conscripted into SBAND's political programs. And even after being forced by litigation to comply with *Hudson*, SBAND has rigged the game to avoid giving members a genuine choice about funding

non-germane expenditures. SBAND's spending practices also show the disconnect between mandatory bar associations and attorney regulation, with a paltry $75 out of the more than $300 in annual dues that SBAND collects from each member dedicated to attorney discipline. App. 16a, 49a. The rest funds political speech and *Keller*'s amorphous "improving the quality of legal services." 496 U.S. 13–14. The latter category is so slippery that SBAND saw no problem with wedging a ballot measure involving child custody into it. SBAND's actions show why the 19 states that regulate attorneys without compelling bar association membership have it right – both practically and constitutionally.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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