No. 19-670

In the
Supreme Court of the United States

ARNOLD FLECK,

Petitioner,

v.

JOE WETCH, et al.,

Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CATO INSTITUTE AND ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

ILYA SHAPIRO
TREVOR BURRUS
Cato Institute
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

DEBORAH J. LA FETRA
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
(916) 419-7111
DLaFetra@pacificlegal.org

MARTIN S. KAUFMAN
Atlantic Legal Foundation
500 Mamaroneck Ave, #320
Harrison, NY 10528
(914) 834.3322
mskaufman@atlanticlegal.org

Counsel for Amici Curiae

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?

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INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. Among other matters affecting the public interest, PLF has repeatedly litigated in defense of the right of workers not to be compelled to make involuntary payments to support political or expressive activities with which they disagree. To that end, PLF attorneys were counsel of record in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Brosterhous v. State Bar of Cal.*, 12 Cal. 4th 315 (1995); and *Cumero v. Pub. Emp't Relations Bd.*, 49 Cal. 3d 575 (1989), and PLF has participated as amicus curiae in all of the most important cases involving state laws allowing unions to garnish wages and force association in violation of the First Amendment, from *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), to *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298 (2012); *Harris v. Quinn*, 573 U.S. 616 (2014); *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016); and *Janus v. Am. Fed. of State, Cty., and Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018). PLF filed amicus briefs in this case supporting the first petition for writ of certiorari, *Fleck v. Wetch*, 139 S. Ct. 590 (2018), and on the remand proceedings in the Eighth Circuit Court of Appeals.[1]

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[1] Pursuant to this Court's Rule 37.2(a), all parties consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of Amici Curiae's intention to file this brief. Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No

The Cato Institute is a nonpartisan public policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*.

Atlantic Legal Foundation (ALF) is a nonprofit, nonpartisan public interest law firm that provides effective legal advice, without fee, to scientists, parents, educators, and other individuals and trade associations. ALF is guided by a basic but fundamental philosophy: Justice prevails only in the presence of reason and in the absence of prejudice. ALF seeks to promote sound thinking in the resolution of legal disputes and the formulation of public policy. Among other things, ALF's mission is to advance the rule of law in courts and before administrative agencies by advocating limited and efficient government, free enterprise, individual liberty, school choice, and sound science. ALF's leadership includes distinguished legal scholars and practitioners from across the legal community. For the last 25 years, ALF has litigated numerous "compelled speech" and "compelled association" cases in the Second and Third Circuits as "first chair" trial and appellate counsel for students at public universities challenging the use of mandatory student fees to fund political speech of

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person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

organizations with which they disagreed, and as counsel for amici, in cases such as *Janus*, 138 S. Ct. 2448, *Harris*, 573 U.S. 616, and *Friedrichs*, 136 S. Ct. 1083.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

In an ideal world, an integrated, mandatory bar association would efficiently, effectively, and non-controversially manage the core functions related to regulation of the legal profession. This Court in *Lathrop v. Donohue*, 367 U.S. 820 (1961), presumed this to be true, and the petitioners in *Keller*, 496 U.S. 1, conceded that *Lathrop* was controlling on the constitutionality of the integrated bar, eliminating any need for the Court to consider that question.[2] However, the history of mandatory bar associations has not borne out that ideal and this Court's decision in *Janus* undermines the foundations on which *Lathrop* and *Keller* were decided. Among other things, *Janus* acknowledged that the decision in *Abood v. Detroit Board of Education* failed to appreciate the inherently political nature of public sector unions. Similarly, *Lathrop* and *Keller* failed to appreciate the pervasive politicization of state bar associations. The clear parallels between the public sector unions and

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[2] Counsel for petitioners, Anthony T. Caso, made this point in his opening remarks of the *Keller* oral argument. *Keller v. State Bar of Cal.*, Oyez, https://www.oyez.org/cases/1989/88-1905 (last visited Dec. 2, 2019) ("This case does not challenge the right of California to regulate attorneys through a mandatory bar association. Instead, it asks whether having done so, may it also authorize the bar to, in the words of the [California Supreme Court], comment generally upon matters pending before the legislature.").

the state bar associations led this Court to grant the petition for writ of certiorari in this case and remand to the Eighth Circuit "for further consideration in light of *Janus*." *Fleck*, 139 S. Ct. 590.

Ignoring the clear import of the remand, the court below found the principles underlying *Janus* to be irrelevant in the mandatory bar context and reaffirmed its decision. App. 13a. In so doing, it relied on a crabbed view of the speech and associational freedoms protected by the First Amendment that is irreconcilable with this Court's recent jurisprudence.

State bar associations in general—the State Bar Association of North Dakota (SBAND) being no exception—pursue political ends and work to ensure that objectors get the smallest possible deduction after jumping through the greatest number of hoops to claim it. North Dakota is not alone in this approach. Government bar associations that perceive their role as general guardians of the legal system often extend their reach into political and ideological activities while couching their involvement under innocuous-sounding phrases like "pursuing the administration of justice." As this Court noted in *Janus*, matters of public policy that involve the allocation of tax dollars are inherently political. And ideological activities extend even further to societal and cultural concerns. Given the sheer breadth of such political and ideological activities, many attorneys have abundant reasons to resent subsidizing and associating with the government's mandatory bar association, just as public employees may not want to associate with or subsidize public employee unions for a wide range of reasons.

Applying the constitutional doctrine set forth most recently in *Janus*, as the court below steadfastly refused to do, this Court should grant certiorari to hold that the Constitution forbids the state from coercing attorneys into association with a government bar and that the government bar may not presume objectors' acquiescence in joining the bar's speech and association.

REASONS TO GRANT THE PETITION

I

MANDATORY GOVERNMENT BAR ASSOCIATIONS ENGAGE IN PERVASIVE, POLITICAL AND IDEOLOGICAL ACTIVITIES, CREATING A SIGNIFICANT INFRINGEMENT ON FIRST AMENDMENT RIGHTS

The question presented by this petition is one of national importance that can be settled only by this Court.[3] While mandatory government bar officials tout their organizations' roles as disciplinarians and evangelists for legal representation and justice, bars

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[3] Cases raising similar issues have been filed across the country. While the specifics of each bar's program differ, the underlying issue—do the principles announced in *Janus* apply to mandatory government bar associations—remain consistent across the litigation. The Texas State Bar has compiled pleadings filed in cases in Texas, Louisiana, Oklahoma, Oregon, Michigan, and Wisconsin, as well as the present case, detailing the specific activities that extend well beyond regulation and discipline of attorneys. *See* State Bar of Texas, *McDonald et al. v. Sorrels et al.*, https://www.texasbar.com/Content/NavigationMenu/McDonald_et_al_v_Longley_et_al1/default.htm (last visited Dec. 2, 2019). Granting this petition, in a case with which the Court already is familiar, will provide much-needed guidance to lower courts and preserve judicial resources.

across the country engage in a wide range of political and ideological activities designed to implement the officials' view of a better society.

Although the court below dismissed its relevance, *Janus* provides greater understanding of the nature of the injury to individuals forced to support activities against their will. *See Keller*, 496 U.S. at 12 ("There is . . . a substantial analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of employee unions and their members, on the other."); *Gardner v. State Bar of Nevada*, 284 F.3d 1040, 1042 (9th Cir. 2002) ("[T]here is some analogy between a bar that, under state law, lawyers must join and a labor union with an agency shop."); *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291, 298 (1st Cir. 2000) ("No reason has been presented to give attorneys who are compelled to belong to an integrated bar less protection than is given employees who are compelled to pay union dues, and *Keller* suggests the two groups are entitled to the same protection."); *Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396, 1404 (7th Cir. 1993) (*Keller* "represented the first definitive legal statement that mandatory bar dues had the same restrictions on their use as compulsory union dues.").

First, *Janus* clarified that all actions relating to the allocation of public resources is inherently political, as well as those on matters of "value and concern to the public." *Janus*, 138 S. Ct. at 2474-76 (examples include speech related to collective bargaining, education, child welfare, healthcare and minority rights, climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions). *Janus* is consistent with the

Court's general understanding of the vast range of what constitutes "political" expression. *See, e.g.*, *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1888 (2018) ("political" can be expansively defined to include anything "of or relating to government, a government, or [] governmental affairs" or the "structure of affairs of government, politics, or the state.") (citation omitted); *id.* at 1891 ("All Lives Matter" slogan, National Rifle Association logo, rainbow flag all can be construed as political expression).

Beyond the world of expressive activity that can be described as political, the compelled speech cases also protect individuals from being forced to associate with "ideological" expression, even though what is "ideological" can be tricky to pin down. There is no "bright line between ideological and non-ideological." *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291, 302 (1st Cir. 2000). But, in general, "ideology" encompasses "the body of ideas reflecting the social needs and aspirations of an individual, group, class, or culture." *The American Heritage Dictionary of the English Language* at 654 (Morris ed. 1981). Justice Stewart defined "ideological expression" as follows: "Ideological expression, be it oral, literary, pictorial, or theatrical, is integrally related to the exposition of thought that may shape our concepts of the whole universe of man." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 779 (1976) (Stewart, J., concurring).

Scholars define "ideology" in varying ways, but all stress the social aspect of ideological thought:

• "[A] distinct and broadly coherent structure of values, beliefs, and attitudes with implications for social policy." James Reichley, *Conservatives in an Age of Change: The Nixon and Ford Administrations* at 3 (1982), quoted in Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* at 36 (1987) (Higgs).

• "[A] collection of ideas that makes explicit that nature of the good community . . . [T]he framework by which a community defines and applies values." George C. Lodge, *The New American Ideology* at 7 (1975), cited in Higgs, *supra*, at 36.

• "[A]n economizing device by which individuals come to terms with their environment and are provided with a 'world view' so that the decision-making process is simplified. [It is] ... inextricably interwoven with moral and ethical judgments about the fairness of the world the individual perceives." Douglas C. North, *Structure and Change in Economic History* at 49 (1982), cited in Higgs, *supra*, at 36-37.

At a minimum, therefore, "ideological" activities that cannot be funded with compelled fees include those seeking social change, "good" government, or "fairness" in the way the world operates.[4]

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[4] The present petition also offers the opportunity for this Court to address the conflict among lower courts as to whether compelled membership raises First Amendment issues when the organization's activities are deemed to be non-political or non-ideological. *Compare Kingstad v. State Bar of Wisconsin*, 622 F.3d 708, 718 (7th Cir. 2010) (First Amendment prohibits compulsion of bar dues to fund any non-germane expenditures, regardless of political or ideological content) *and In re Petition for a Rule Change to Create a Voluntary State Bar of Nebraska*,

These goals of social change, good government, and fairness permeate mandatory bars' mission statements and activities. For example, the mission of SBAND is "to serve the lawyers and the people of North Dakota, to improve professional competence, promote the administration of justice, uphold the honor of the profession of law, and encourage cordial relations among members of the State Bar."[5] The Texas State Bar's mission

> is to support the administration of the legal system, assure all citizens equal access to justice, foster high standards of ethical conduct for lawyers, enable its members to better serve their clients and the public, educate the public about the rule of law, and promote diversity in the administration of justice and the practice of law.[6]

Michigan's State Bar's mission is to "aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving

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286 Neb. 1018, 1029 (2013) ("[T]he test to determine what group speech is constitutionally permissible is not whether the speech is political or ideological in nature, but, rather, whether the speech is germane.") *with* App. 30a-31a (attorneys may avoid subsidizing only political or ideological activities that are non-germane) *and Popejoy v. New Mexico Bd. of Bar Comm'rs*, 887 F. Supp. 1422, 1427 (D.N.M. 1995).

[5] State Bar of North Dakota, Board of Governors, https://www.sband.org/page/board_of_governors (visited Dec. 3, 2019).

[6] State Bar of Texas, Mission Statement, https://www.texasbar.com/AM/Template.cfm?Section=Our_Mission&Template=/CM/HTMLDisplay.cfm&ContentID=41823 (visited Dec. 3, 2019).

relations between the legal profession and the public, and in promoting the interest of the legal profession in this State."[7] The Louisiana State Bar Association exists to

> assist and serve its members in the practice of law, assure access to and aid in the administration of justice, assist the Supreme Court in the regulation of the practice of law, uphold the honor of the courts and the profession, promote the professional competence of attorneys, increase public understanding of and respect for the law, and encourage collegiality among its members.[8]

Others are much the same.[9] The common theme and language across all the mandatory bars is dedication to "administration of justice." Yet this is precisely the phrase in the California Bar's statutory authorization that this Court held in *Keller* to permit too broad an infringement on individual bar members'

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[7] State Bar of Michigan, Mission Statement, https://www.michbar.org/file/generalinfo/pdfs/missionstatement.pdf (visited Dec. 3, 2019).

[8] Louisiana State Bar Association, The Mission of the Louisiana State Bar Association, https://www.lsba.org/BarGovernance/LSBAMission.aspx (visited Dec. 3, 2019).

[9] *See, e.g.*, State Bar of Arizona, *Mission, Vision, and Core Values*, https://www.azbar.org/aboutus/mission-vision-andcorevalues/ (visited Dec. 4, 2019); Hawaii State Bar Association, Mission, https://hsba.org/HSBA/ABOUT_US/Governance/HSBA/About_Us/Governance.aspx?hkey=61f455cd-e768-470c-8750-4243223f861d (visited Dec. 4, 2019); Idaho State Bar, Mission Statement, https://isb.idaho.gov/about-us/ (visited Dec. 4, 2019); The Mississippi Bar, Mission, https://www.msbar.org/inside-the-bar/governance/mission/ (visited Dec. 4, 2019).

First Amendment rights. *Keller*, 496 U.S. at 14-15. Specifically, the Court noted that the California Bar's pursuit of "administration of justice" led it to lobby against polygraph tests for state and local agency employees, possession of armor-piercing handgun ammunition, and a federal guest-worker program. *Id.* at 15. It lobbied in favor of an unlimited right of action to sue anyone causing air pollution. *Id.* The bar's policy-making branch, the Conference of Delegates, justified proposing legislation regarding gun control, a victim's bill of rights, abortion, public school prayer, and busing as under the "administration of justice" umbrella. *Id.* Regardless of whether these activities could be considered valid pursuits toward the "administration of justice," compelled funding of these programs violated objectors' First Amendment rights.

Notwithstanding the *Keller* decision, mandatory government bars, including SBAND, continue to justify a wide range of activities as related to the "administration of justice." And federal courts continue to grant government bars expansive power to demand money to fund these activities. *See Kingstad v. State Bar of Wisconsin*, 622 F.3d at 721 (Seventh Circuit rejected the First Amendment claim of an attorney forced to make unwilling subsidies to the mandatory bar's public relations campaign); *Gardner*, 284 F.3d at 1043 (Ninth Circuit held that attorneys can be forced to support government bar's public relations campaign to improve public perceptions of lawyers); *Liberty Counsel v. Florida Bar Bd. of Governors*, 12 So. 3d 183, 189 (Fla. 2009) (approving bar's authorization for a section to file an amicus brief related to a law prohibiting homosexuals from adopting children); *Popejoy*, 887 F. Supp. at 1430-31 (approving mandatory funding for the bar's lobbying

for higher salaries for government lawyers and staff, court-appointed representation in child abuse and neglect cases, a task force to assist military personnel and families, and the bar's own litigation expenses).

Moreover, lower courts remain obligated to follow *Lathrop* and *Keller* because neither has been overruled, *Agostini v. Felton*, 521 U.S. 203, 237 (1997), even as their legal foundation has been significantly eroded by the evolution in agency fee cases, culminating in *Janus*. Without this Court's approval, lower courts cannot consider individual attorneys' freedom of association claims—that they object to being forced to associate with a hybrid licensing organization and trade association. *See Morrow v. State Bar of California*, 188 F.3d 1174, 1175 (9th Cir. 1999) (rejecting attorneys' "complain[t] that by virtue of their mandatory State Bar membership, they are associated in the public eye with viewpoints they do not in fact hold."); *Kaimowitz v. The Florida Bar*, 996 F.2d 1151, 1154 (11th Cir. 1993); *Schell v. Gurich*, __ F. Supp. 3d __, 2019 WL 541896 (W.D. Okla. Sept. 18, 2019); *Gruber v. Oregon State Bar*, Nos. 3:18-cv-1591-JR, 3:18-cv-2139-JR, 2019 WL 2251826 *9 (D. Or. Apr. 1, 2019).

II

THE LOWER COURT'S EVISCERATION OF THE OPT-IN REQUIREMENT IS A MATTER OF NATIONAL IMPORTANCE THAT REQUIRES RESOLUTION BY THIS COURT

This Court recognized the national importance of "opt-in" versus "opt-out" for mandatory associations in *Knox*, 567 U.S. at 317. As the Court noted, it is "cold comfort" to objectors to have their money refunded

only after it has been spent to achieve political objectives that they oppose. *Id*. *Janus* made "opt-in" a requirement of constitutional stature, 138 S. Ct. at 2486, which means that it applies to compelled speech and association beyond the limited context of public employee unions. The very fact that the first petition for writ of certiorari in this case was granted and the matter remanded to the Eighth Circuit to reconsider in light of *Janus* speaks to the expansive nature of the *Janus* holdings—and the failure of the court below to apply the proper opt-in test as outlined in that case.

This "waiver" aspect of *Janus* relied on the long-standing rule that courts will not presume acquiescence in the loss of First Amendment rights. *Id*. To be effective, the waiver of speech and associational rights "must be freely given and shown by 'clear and compelling' evidence." *Id*. (citations omitted). Among other reasons for presuming against a waiver of constitutional rights are that doing so would too easily blind courts to subtle coercion, or too easily allow dissenters, accidentally or through ignorance, to waive vital constitutional liberties. *Cf. id*. at 2464 ("When speech is compelled, . . . individuals are coerced into betraying their convictions."). Given the importance of protecting the right to dissent, the Constitution demands affirmative consent to waive First Amendment rights. *See* Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1, 28 (1965) ("[T]he thumb of the Court [must] be on the speech side of the scales.").

Yet the default for the SBAND dues bill is payment that includes payment for non-germane activities. App. 58a. To change the default, attorneys must take affirmative steps. If they do nothing, they

pay. The Eighth Circuit's assertion that this default is somehow an "opt-in" begs credulity. Attorneys who do not wish to support the Bar's political speech should not be forced to state their objections—even by so subtle a statement as marking the *Keller* deduction on SBAND's dues form—before exercising their right not to speak or associate. Such a requirement forces individuals to mark themselves for potential harassment and retaliation in a way that an "opt-in" requirement does not. Although objectors who choose not to "opt-in" would not remain anonymous, the ability to make their decisions in private would protect them from the individual exposure and peer pressure that the current presumption of conformity enshrines.

CONCLUSION

Although the Court's action in granting the first petition in this case, vacating, and remanding for further consideration in light of *Janus* implied that the principles announced in that case had some bearing on a challenge to a mandatory bar association, this Court did not explain in *Janus* exactly how the announced principles in that case affected future reliance on *Keller* or *Lathrop*.

To harmonize First Amendment jurisprudence across analogous union and bar compelled dues contexts, and to protect individual rights of free speech and association, the petition for writ of certiorari should be granted.

DATED: December, 2019.

Respectfully submitted,

ILYA SHAPIRO
TREVOR BURRUS
Cato Institute
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

DEBORAH J. LA FETRA
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
(916) 419-7111
DLaFetra@pacificlegal.org

MARTIN S. KAUFMAN
Atlantic Legal Foundation
500 Mamaroneck Ave, #320
Harrison, NY 10528
(914) 834.3322
mskaufman@atlanticlegal.org

Counsel for Amici Curiae