No. 16-1564

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ARNOLD FLECK,

Appellant,

v.

JOE WETCH, President of the
State Bar Association of North Dakota, et al.,

Appellees.

On Remand from the United States Supreme Court

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANT AND REVERSAL

DEBORAH J. LA FETRA
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Fax: (916) 419-7747
Email: DLaFetra@pacificlegal.org
Counsel for Amicus Curiae,
Pacific Legal Foundation

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Pursuant to Federal Rule of Appellate Procedure 26.1, Pacific Legal Foundation states that it has no parent corporation and that there is no publicly held corporation that holds 10% or more of its membership or ownership interests.

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Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), Pacific Legal Foundation certifies (a) that no party's counsel authored the brief in whole or in part, (b) that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and (c) that no person other than amicus, its members, and its counsel, contributed money that was intended to fund preparing or submitting the brief.

s/ Deborah J. La Fetra
DEBORAH J. LA FETRA

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Federal Rule of Appellate Procedure 29(a), and with consent of all parties, Pacific Legal Foundation (PLF) files this amicus curiae brief in support of Arnold Fleck.

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 an amicus brief in this case in the Supreme Court, supporting the petition for writ of certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

In an ideal world, an integrated bar association would efficiently, effectively, and non-controversially manage the core functions related to regulation of the legal profession. The Supreme Court in *Lathrop v. Donohue*, 367 U.S. 820 (1961), presumed this ideal, and the petitioners in *Keller v. State Bar of California*, 496 U.S. 1 (1990), conceded that *Lathrop* was controlling on the constitutionality of the integrated bar, eliminating any need for the Court to consider that question.[1] However, the history of mandatory bar associations has not borne out that ideal and the Supreme 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 increasing and pervasive politicization of state bar associations. The clear parallels between the public sector unions and the state bar associations led the Supreme Court to grant the petition for writ of certiorari in this case and remand to this Court.

[1] 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 Feb. 20, 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.").

State bar associations in general—the North Dakota state bar 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. 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. The constitutional difficulties created by a mandatory bar combining functions of regulation and acting as a trade association has led to the deunification or restructuring of some state bar associations, most notably in California. Applying the constitutional doctrine set forth most recently in *Janus*, this Court should 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.

ARGUMENT

I

MANDATORY STATE BAR MEMBERSHIP GIVES NO ASSURANCE OF COMPETENT REGULATION OF THE LEGAL PROFESSION

Attorneys' First Amendment rights may not be infringed unless the compelled subsidy serves "a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Janus*, 138 S. Ct. at 2465 (citation omitted). Mandatory bar membership fails this "exacting" scrutiny. *Id*.

With regard to the state's asserted interest in regulation, the Supreme Court upheld mandatory bar membership in *Lathrop* primarily on the untested assumption that the government is best positioned to regulate the legal profession when all lawyers are corralled into a single association. *Lathrop*, 367 U.S. at 834 (noting a 1957 policy at the time of integration that required the Wisconsin Bar to represent the views of the minority as well as the majority to "safeguard the interests of all [attorneys]"); *see also Keller*, 496 U.S. at 11 (the State Bar "undoubtedly performs important and valuable services for the State by way of governance of the profession"). Whatever may have been true in 1957, courts must no longer simply assume that a unified bar is necessary for the effective regulation of attorneys. As noted in the Appellant's brief, 19 states ranging from New York (largest economy) to Vermont (smallest) successfully regulate attorneys without mandatory government bar associations.[2] Meanwhile, there are other significantly less restrictive options to regulation that do not impinge on attorneys' First Amendment rights, such as divorcing regulatory functions from the lawyer-centric political functions of a bar-run trade association.

While Amicus cannot speak to the competency and effectiveness of every unified bar, the persistent incompetence of the State Bar of California—documented

[2] From the founding of the State Bar of California in 1927 until 1988, California's attorney disciplinary system also operated primarily with the assistance of volunteers from local bar associations. *Obrien v. Jones*, 23 Cal. 4th 40, 44 (2000).

with depressing regularity by the State Auditor—resulted in a substantial restructuring of the Bar last year.[3] On January 1, 2018, the State Bar of California split into two entities: a regulatory body dealing with attorney admission, ethics, and discipline funded by mandatory dues; and a voluntary trade association—the California Lawyers Association—that provides educational opportunities and lobbies the Legislature on matters of interest to its members.[4] No California attorney is required to join or subsidize the California Lawyers Association.

The restructuring of the California Bar—the nation's largest—followed years of mismanagement and documented harm to the public. The legislative history of SB 36[5] reveals the sordid tale of how the Bar's management utterly failed to protect

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[3] *See* Lyle Moran, *California Split: 1 year after nation's largest bar because 2 entities, observers see positive change*, ABA Journal (Feb. 2019), http://www.abajournal.com/magazine/article/1-year-after-californias-state-bar-became-2-entities-observers-see-positive-changes/. *See also* Bradley A. Smith, *The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession*, 22 Fla. St. U. L. Rev. 35, 58 (1994) (Unified bar supporters argue "that the added resources of coerced dues and membership enable the bar to do more in the way of pro bono programs, legal education, and other programs to benefit lawyers and the public. Actual experience has never supported this argument.").

[4] *See* California Lawyers Association, About CLA ("Through premier educational and networking opportunities, our members can maintain expertise in their fields, build contacts, and uphold the legal profession and system. As an independent entity, we can now provide greater value to our members, including direct communication with the California Legislature and the ability to be more responsive to each member's needs."), https://calawyers.org/About-CLA (visited Feb. 13, 2019).

[5] California Senate Bill No. 36, https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB36 (visited Feb. 14, 2019). All legislative

the public, while spending lavishly on themselves. The Assembly Committee on the Judiciary report acknowledges the necessity for drastic reform because the Bar "fail[ed] to effectively prioritize its public protection functions [of] its lawyer trade association functions." Mark Stone, Assembly Committee on Judiciary, Report on SB 36 (Jackson) at 2 (July 18, 2017). The new law "represents significant structural change that allows the Bar to put a renewed focus on its regulatory and public protection obligations, after years of troubling focus on other issues." *Id.*

Most significantly, the Bar had utterly failed in its primary function of protecting the public from harm. The committee report, echoing devastating analysis by the State Auditor,[6] grimly noted that "[a]lthough public protection is the Bar's highest statutory priority, the Bar had allowed hundreds of complaints alleging the unauthorized practice of law to sit idle for months or even years without taking action." *Id.* at 7. Compounding the Bar's failure to perform its most critical function was its improper focus on its own perks, such as spending $76.6 million to purchase

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history documents quoted and cited in this brief are available in pdf format at this link.

[6] California State Auditor, *State Bar of California: It Has Not Consistently Protected the Public Through Its Attorney Discipline Process and Lacks Accountability*, Report 2015-030 (June 18, 2015), https://www.bsa.ca.gov/pdfs/reports/2015-030.pdf. Among other things, the auditor noted that in 2010, the complaint backlog (on all types of complaints from members of the public) reached 5,174 cases. Under pressure to reduce that number, the Bar compromised the severity of the discipline imposed on attorneys in favor of speedier types of resolutions. This succeeded in resolving two-thirds of the backlogged cases, but the auditor found that the State Bar was inexcusably lenient in many of its settlements. *Id.* at 20, 23-24.

and renovate a building in Los Angeles in 2012, a purchase accomplished only through improper shuffling of funds and a lack of transparency to the Legislature.[7] The Judiciary Committee also noted that it has "long raised concerns about the Bar's excessive expenses for travel, business expenses and other special allowances, when limited dues funds are required by law to first and foremost support public protection and the discipline system." Assembly Judiciary Report at 10. It seemed particularly aggravated by the Bar's excessive spending on alcohol and use of outside venues for events. *Id.* But worst of all, the Bar's long history of failing to effectively regulate the legal profession destroyed any expectation that, absent radical changes, it would do so in the future: "However," advised the committee, "just because the revised law specifically directs the Bar to [comply with certain fingerprinting requirements for security checks], it is possible that the Bar will not fully comply since it has not been complying with existing law." *Id.* at 11. Clearly, California legislators had enough. The law to split the Bar and grant to it only those powers necessary to regulate the legal profession passed in both houses without a single "no" vote.[8]

The travails of the California Bar probably are not replicated in every state that maintains a unified bar. But the breadth and depth of the problems with that bar

[7] *Id.* at 43-48.

[8] California Legislative Information, SB-36, Votes, https://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=201720180SB36 (visited Feb. 14, 2019). Governor Jerry Brown signed it into law on October 2, 2017.

association gives this Court a reason to doubt the premises of *Lathrop* and *Keller*—that only government-run bar associations can effectively regulate lawyers and protect the public. No evidence on that point was presented in those cases, and this Court need not turn a blind eye to subsequent events.[9] *See Janus*, 138 S. Ct. at 2483 (finding it "significant" that the Supreme Court decided *Abood* "against a very different legal and economic backdrop"). A state may well have a compelling interest in regulating the legal profession to protect the public from incompetence and malpractice, but there is no justification for requiring that regulation be implemented via a mandatory government-run bar association. And a bar association that supplements its regulatory function with activities more befitting a trade organization cannot be narrowly tailored to protect objectors' First Amendment right to avoid joining or subsidizing an organization against their will.

[9] This Court may take judicial notice of legislative history. *Dolloff v. United States*, 121 F.2d 157, 159 (8th Cir. 1941). *See also United States v. Progressive Farmers Marketing Agency*, 788 F.2d 1327, 1331 (8th Cir. 1986) (identifying state and federal legislative changes as establishing public policy).

II

THE FIRST AMENDMENT REQUIRES "OPT-IN" TO PROTECT THE FREEDOM OF SPEECH AND ASSOCIATION

The Supreme 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 petition for writ of certiorari was granted in this case and the matter remanded to this Court to reconsider in light of *Janus* speaks to the expansive nature of the *Janus* holdings—and the failure of the panel opinion to apply the proper opt-in test as outlined in *Janus*.

This 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 ("[T]he thumb of the Court [must] be on the speech side of the scales.").

Objectors 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 dissidents 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 and register those decisions before a political campaign begins would protect them from the individual exposure and peer pressure that the current presumption of conformity enshrines.

CONCLUSION

The decision below should be reversed.

DATED: February 22, 2019.

Respectfully submitted,

s/ Deborah J. La Fetra
DEBORAH J. LA FETRA
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Fax: (916) 419-7747
Email: DLaFetra@pacificlegal.org
Counsel for Amicus Curiae, Pacific Legal Foundation

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I hereby certify that on February 22, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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