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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: PETITION TO AMEND RULES 32(c) AND (d), RULES OF THE SUPREME COURT	Supreme Court No. R-19-0005 **REPLY IN SUPPORT OF THE PETITION TO AMEND RULES 32(c) AND (d), RULES OF THE SUPREME COURT**

The State Bar's opposition to the Petition[1] to amend Rule 32 to make the Arizona Bar a voluntary organization and to ensure greater transparency with regard to its spending, is based on unpersuasive arguments and fails to give adequate weight to the significance of the individual rights at stake. The Petition should be granted.

[1] Of the 12 comments received, 11 commenters support the Petition. Only the State Bar opposes it.

DISCUSSION

The State Bar essentially makes two arguments against the Petition: first, it seeks to distinguish *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), on the grounds that the Bar is not a labor union; second, it argues that it provides important services and would be hindered in doing so if membership were made voluntary. Neither argument is persuasive.

I. The principles of the union cases apply

While the Bar is not literally a union, it shares relevant features with the unions involved in such Supreme Court cases as *Janus*, so that the analogy is appropriate. First, it engages in compulsory association. Second, the Bar is in a relevant sense representative (i.e., the Bar is taken, and is intended to be taken, as the presumptive representative of the legal community in the state). Third, attorneys are forced to subsidize it with annual dues. These were the same factors considered relevant in the union cases, and they are why the U.S. Supreme Court endorsed the union analogy in *Keller v. State Bar of California*, 496 U.S. 1, 12 (1990). The Bar here fails to explain why this Court should do the opposite. Just as *Keller* applied the same principles to mandatory bars that the Court previously applied in the union context, so the principles of *Janus* and other cases should apply here. *Id.*

II. Compelling membership is unconstitutional

A. The Bar fails to show that the state interests at stake cannot be accomplished through means significantly less restrictive of associational freedom.

Janus holds that the state may compel membership in an association only if it satisfies "exacting scrutiny," which means that compulsory membership "must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'" 138 S. Ct. at 2465. Forcing attorneys to be members of the Arizona State Bar fails this test.

The state interests the Bar identifies fall into two categories: regulating the practice of law to protect the public, and facilitating improvement of the legal profession (including providing educational programs and "forums for the discussion of subjects pertaining to the practice of law."). Bar's Comment ("Cmt.") at 3.[2] Assuming these are compelling interests, the question is whether

[2] The Bar claims that it is difficult to differentiate regulatory functions from other functions. Cmt. at 7. This is not true; state and federal courts have drawn this distinction many times. *See, e.g.*, *Kahn v. State Bar of Ariz.*, No. 1 CA-CV 07-0154, 2008 WL 4132235, at *6 ¶ 29 (Ariz. Ct. App. Mar. 6, 2008); *Keller v. State Bar of Cal.*, 226 Cal. Rptr. 448, 454 (Cal. App. 1986). (The California Supreme Court reversed that Court of Appeal decision, 47 Cal.3d 1152 (1989), but the U.S. Supreme Court then reversed the California Supreme Court, and recognized the distinction between the bar's regulatory and non-regulatory activities. *Keller*, 496 U.S. at 6–7.) The difference is simple: regulatory activities ensure a practitioner's "fitness or capacity to practice," *Schware v. Bd. of Bar Exam'rs of N.M.*, 353 U.S. 232, 239 (1957), by establishing and enforcing minimum standards of competency and honesty that are "attainable by reasonable study or application" and are

they can be achieved in a way that is significantly less restrictive of associational freedoms than compulsory membership.

To that the answer is an obvious and unqualified *yes*. Some 20 states—including New York and California, which have the largest populations of attorneys in the nation—already have voluntary bar associations, but still manage to serve both categories of interests. There is no reason to believe these states have suffered any diminishment in the quality of legal services as a result. These states regulate the practice of law the same way they regulate the practice of other trades and professions: by specifying minimum acceptable standards and disciplining those who fall below those standards. Arizona can do likewise.

The fact that more than a third of the states already successfully follow this voluntary model is dispositive of the question of whether the identified state interests can be achieved in ways that are significantly less restrictive of associational freedoms. *See Janus*, 138 S. Ct. at 2466 (evidence that state and federal public sector unions operated successfully without mandatory fees made it "undeniable" that the state's interests could "readily be achieved 'through means

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properly "relat[ed] to [the] calling or profession." *Dent v. W.Va.*, 129 U.S. 114, 122 (1889). In short, the prevention of force, fraud, and dangerous incompetency are the traditional bases for regulating the practice of law. Services beyond this, such as offering lawyers advice on ethics matters, are "undoubtedly … important and valuable … , but … are essentially advisory in nature," *Keller*, 496 U.S. at 11, and should be provided by voluntary associations.

significantly less restrictive of associational freedoms' than the assessment of agency fees." (citation omitted)).

Note: the question is not whether the transition to a voluntary system would disrupt the compulsory funding that now exists for state bar programs. The question is whether the state's compelling interest in regulating the practice of law can be served in a less burdensome manner than Arizona is currently employing. It can be.

B. *Keller* is not dispositive; indeed, it did not even decide the question.

The Bar claims *Keller* is "controlling precedent establishing the constitutionality of compelled membership in an integrated bar association." Cmt. at 9. This is false. *Keller* "decline[d]" to decide that question. 496 U.S. at 17. Instead, the Court *assumed* the constitutionality of compulsory membership and decided a *different* question. Its statements appearing to approve of compulsory bars were therefore *obiter dicta*. More: *Keller* based those dicta statements on *Lathrop v. Donohue*, 367 U.S. 820 (1961), but *Lathrop* was a plurality opinion that also did *not* decide the question of mandatory membership. Like *Keller*, *Lathrop* assumed that proposition—but actually decided "only … a question of compelled financial support of group activities, *not … involuntary membership in any other aspect*." *Id*. at 828 (emphasis added). What's more, the *Lathrop* plurality based its assumption regarding the validity of compulsory membership on a third case,

Railway Employes' Department v. Hanson, 351 U.S. 225 (1956)—which *also* did not decide that question, but only included a sentence saying that to force railway workers to join a union was "no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar." *Id.* at 238. This statement, too, was *dicta*. In other words, *Keller* did not hold that mandatory bar association membership is constitutional, but assumed it on the basis of nonbinding *dicta* in a plurality opinion (*Lathrop*) that was itself based on a case *(Hanson*) where it was also nonbinding *dicta*. This is hardly decisive precedent.

Nor did *Harris v. Quinn*, 573 U.S. 616 (2014), say otherwise. In fact, *Harris* acknowledged that the cases permitting compulsory membership had been superseded, and criticized *Lathrop* for having "disposed of the critical question in a single, unsupported sentence that its author essentially abandoned a few years later." *Id*. at 635–36. (This was a reference to the fact that "in his *Lathrop* dissent, Justice Douglas, the author of *Hanson*, came to the conclusion that the First Amendment *did not permit* compulsory membership in an integrated bar." *Id*. at 630). When the *Harris* Court said that its holding was "consistent with our holding in *Keller*," *id.* at 656, it characterized *Keller* as holding only that it is constitutional to "allocat[e] to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices," *id.* at 655–56—*not* as

holding that compulsory membership is constitutional. In other words, the portion of *Keller* that *Harris* reaffirmed referred only to the *funding of regulatory oversight*, and *not* to any holding regarding mandatory membership. That only makes sense, given that *Keller* actually never ruled on the constitutionality of mandatory membership in the first place.

III. Compelling membership is wrong

A. Voluntary association is more just and more effective.

The Petition asks the Court to make a prudential and moral as well as a constitutional judgment. The point is simple: even aside from the question of legal precedent, the voluntary route is best. It is both wrong and unwise to force people to join an association against their will.

First, it is wrong because it inflicts an injustice on a person to force her to become a member of an organization that she does not wish to join. Freedom of association is a right distinct and separate from freedom of speech, though often related to it. *See* Patrick Lofton, *Any Club That Would Have Me As A Member: The Historical Basis for A Non-Expressive and Non-Intimate Freedom of Association*, 81 Miss. L.J. 327, 357 (2011) ("there is a historical basis, deeply rooted in the American tradition of civil liberty, for a non-expressive and non-intimate associational right based on privacy."). Freedom of association is "a method of making more effective, of giving greater depth and scope to, the

individual's needs, aspirations and liberties," Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 Yale L.J. 1, 4 (1964), and this is true even where the individual chooses to associate (or not) in pursuit of no expressive or intimate end. Freedom of association is best understood as "associational autonomy," a right that is "neither expressive nor intimate, but one largely of privacy." Lofton, *supra* at 338, 342. People who simply wish to have nothing to do with an association have that right, even aside from concerns about speech.

The Bar makes no mention of this distinct freedom of association; it addresses only free speech concerns. Yet there are many reasons why people might prefer not to be members of an association, even aside from expressive considerations, and to force them to join without sufficient justification commits an injustice against them even if they remain free to voice their disapproval or disagreement. That is why it is irrelevant that, as the Bar says, "[n]o lawyer is [currently] prohibited from speaking against a position the State Bar takes." Cmt at 3. *Even where* a restriction on freedom of association is "unrelated to the suppression of ideas," the state *still* may not impose that restriction if there are "means significantly less restrictive of associational freedoms" available to achieve its compelling interest. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 641 (2000).

What's more, the individual employees in *Janus* were also free to voice their personal disagreements with the union, but that fact simply did not address whether

the state's compelling interest could be attained in a significantly less restrictive way. *Janus*, 138 S. Ct. at 2466. *Cf. Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (fact that dissenters were free to state their disagreement was not sufficient to entitle the state to compel them to express a message).[3]

The reality, however, is that the Arizona State Bar, by its very nature, *necessarily* represents the entire legal profession, even if dissenting lawyers are free to express disagreement. That is the Bar's very purpose. It is the officially established, mandatory institution designated by the state to represent the legal profession. The state and the general public perceive it that way, at least *prima facie*. And that forces dissenters into the position of outliers; they must bear the onus of expressing their disagreement, in the absence of which they are presumed to agree to the Bar's representation of them. Yet for the state to presume that an individual attorney assents to the Bar's purported representation unless and until she openly expresses disagreement is to violate the "presumption against waiver of

[3] For the same reason, the Bar's claim that it follows a "*Keller*-pure rule," Cmt at 11, is simply irrelevant. The question is not just whether the current system forces attorneys to fund political lobbying or political speech by the bar—it is also whether the current system forces them to join a group they would choose not to be associated with. Because freedom of association is itself a fundamental right under the state and federal constitutions, the state cannot override it by compelling membership absent some justification that satisfies exacting scrutiny. Mandatory bar membership fails that test regardless of the degree to which its political activities comply with *Keller*.

fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (citation and quotation marks omitted). This also forces upon dissenters the burden of appearing churlish or antisocial—a charge that is always levied against dissenters. *See, e.g., Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 598 (1940) (describing Jehovah's Witness children who refused to pledge allegiance to the flag as holding "crochety beliefs").

This is why the "opt-out" versus "opt-in" distinction is so critical. The current system forces dissenters to affirmatively prevent what in the event of their inaction would be taken as acquiescence in being represented in their professional capacity by the Arizona State Bar. Such a presumption of acquiescence is contrary to the fundamental principle that people do not waive their rights unless they "clearly and affirmatively consent." *Janus*, 138 S. Ct. at 2486.

Given the ready availability of a voluntary alternative which does not presume acquiescence but allows each attorney to decide for herself—an alternative already practiced in many sister states—the moral choice is obvious.

Second, the voluntary alternative is also more practical. Voluntary bar associations are more effective than mandatory associations in many ways. Bradley A. Smith, *The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession*, 22 Fla. St. U. L. Rev. 35 (1994). They are more responsive to the needs of members, *id.* at 64–65, and to the needs of the public.

Id. at 61–62. For instance, voluntary bars tend to be more active in providing pro bono services. *Id.* at 62. And there is no evidence that the transition from compulsory to voluntary status causes a devastating loss of income to bar associations. *Id.* at 59.

Voluntary associations tend to "achieve higher degrees of solidarity, and to develop a distinctive voice in the public sphere, as well as higher capacities for subsidiarity, resistance, and representation" than mandatory associations. Mark E. Warren, *Democracy and Association* 107 (2001). This is why voluntary bars tend to be more effective at lobbying. They suffer none of the delays and setbacks caused by squabbling among members who would prefer not to have joined in the first place. Smith, *supra,* at 65. They can "concentrate energies on common interests, not disagreements," whereas a mandatory bar "must first trim its remarks to meet the subject matter on which it is authorized to spend mandatory dues, and then hope that its dissidents won't undercut it by demanding rebates." *Id*. at 66. While transition to a voluntary system may lead to new, competing bar associations being formed, diversity is a *feature* of freedom, not a bug.

Some have argued that compulsory association can be a "'school[] of democracy'" because members are forced to "deal with internal conflict." Warren, *supra*, at 108. But the reality is that members of compulsory associations are often deadlocked by internal dissension, and in any event are always distracted by it.

Forced association is an especially poor way to develop and foster professionalism, which "does not come from being conscripted into an organization a lawyer would prefer not to join. Resentment of the profession's norms, as determined by the unified bar, seems the more probable result. The unified bar cannot force enthusiastic participation, and more likely invites only sullen, involuntary association." Smith, *supra*, at 66.

Arizona already regulates the profession of medicine in the way Petitioners propose. Physicians must be licensed by a state agency, but are not required to join the Arizona Medical Association or any other organization to practice medicine. Architects are required to be licensed by the state, but are not required to join the American Institute of Architects. Psychologists are required to be licensed, but are not required to join the Arizona Psychological Association. Not only does this method of regulation protect the public and serve the needs of practitioners, while respecting individual freedom, but the voluntary quality of membership makes these associations both more effective and prestigious. Membership in them is an important signal of quality and professionalism to consumers, precisely because they are voluntary—whereas no such symbolic force attaches to State Bar membership, since every lawyer is required to be a member anyway. That is why many Arizona attorneys advertise their reliance on sources of ethical or professional guidance *other than* the Arizona State Bar. For example, many

attorneys refer to their Better Business Bureau ratings, or use the Christian *ichthys* (fish) symbol in their advertisements—but virtually never promote the fact that they are members of the Arizona State Bar.

To emphasize: this Petition presents a question of policy aside from constitutionalism. *Cf. In re Petition for a Rule Change to Create a Voluntary State Bar of Neb.*, 841 N.W.2d 167, 177–78 (Neb. 2013) ("The nature of the proceeding before this court, i.e., a petition for a rule change … , does not require us to resolve a case or controversy," but "to assess the future and the structure of the mandatory bar."). And the best policy here is to avoid intruding on the rights of attorneys where such intrusion is not necessary, and where an alternative policy is preferable. A voluntary bar would avoid compelling association, would not deprive the state of its ability to regulate or provide services—and would likely improve the quality of the bar itself.

B. Pandemonium won't result.

The fact that the Arizona State Bar currently funds non-regulatory functions (such as "the Find A Lawyer program," or "law office management programs," Cmt at 4–5) through compulsory dues is insufficient to overcome the constitutional rights that are being sacrificed under the current system. To put it another way, the question is not whether the status quo would be disrupted if individual rights were better protected, because that is *always* true, no matter how unjustifiable the status

quo might be. Rather, the question is whether the state's compelling interest in regulating the profession can be served in a substantially less restrictive manner than it now is. The answer is yes.

Fortunately, just as *Janus* found no reason to think "pandemonium" would result from eliminating compulsory subsidy of public sector unions, 138 S. Ct. at 2465, so there's no reason to think the voluntary alternative would deprive the public or the profession of the services the Bar refers to. When Nebraska eliminated mandatory funding for anything other than lawyer regulation, it noted that the "many laudable and worthwhile programs" overseen by that state's bar—including lawyer referral and continuing education—"can continue to thrive with the aid of voluntary dues, grants, and gifts." *In re Petition*, 841 N.W.2d at 179. That has indeed proven the case; Nebraska attorneys and consumers still enjoy plentiful services of that sort.[4] California, New York, and Massachusetts, also have voluntary bar associations—and all of those provide lawyer referral services,[5]

[4] https://www.nefindalawyer.com/; https://www.nefindalawyer.com/

[5] https://www.massbar.org/public/lawyer-referral-service; http://www.nysba.org/lawyerreferral/; http://www.calbar.ca.gov/Public/Need-Legal-Help/Lawyer-Referral-Service.

continuing education programs,[6] and help with the improvement of court facilities,[7] just to name a few. Even if this were not already true, the "less restrictive means" inquiry must include consideration of the possibility of alternatives *other than* those available through state coercion. *United States v. Playboy Entm't Grp., Inc*., 529 U.S. 803, 823–24 (2000). It is obvious that private entities *could* provide services such as continuing legal education programs, even if they were not already doing so.

The Bar's comment quotes out of context from a magazine article about Nebraska's recent transition to a voluntary system to make it seem that the change has been detrimental. In fact, the same article quotes the same state official as recognizing that "[m]andatory bars aren't as concerned with marketing the value of bar membership to bar members [as voluntary bars]." Dan Kittay, *Deunification Challenge in Michigan, Big Changes in Nebraska: Part of a Trend?*, ABA Bar Leader, May–June 2014.[8] For the Nebraska Bar to make an effort to prove their

[6] https://calawyers.org/cla/about-cla/; https://www.massbar.org/education; http://www.nysba.org/CLE/.
[7] https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26865; https://www.massbar.org/docs/default-source/mba-reports/ecochallenge2009.pdf?sfvrsn=6.
[8] https://www.americanbar.org/groups/bar_services/publications/bar_leader/2013-14/may_june/deunification_challenge_michigan_big_changes_nebraska_part_trend/

value to their members has "been a philosophical switch for us," the official noted. *Id.* Yet such a switch is certainly an improvement.

A more recent article in the *ABA Journal* makes a similar point: the transition to a voluntary system in Nebraska and California has forced those bar associations to be more responsive to the needs of attorneys—which is a good thing—and that transition has been largely successful. *See* Lyle Moran, *California Split: 1 Year After Nation's Largest Bar Became 2 Entities, Observers See Positive Change*, ABA Journal, Feb. 4, 2019.[9]

IV. Actual transparency—including independent auditing—should be the rule.

The Bar says it complies with the *Keller* rule against spending dues on political activities, but without an independently audited report, members are forced to take the Bar's word for it. That is not good enough, because it gives members insufficient information to know whether to challenge the Bar's expenditures.

The "substantial analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of employee unions and their

[9] http://www.abajournal.com/web/article/california-split-1-year-after-californias-state-bar-became-2-entities-observers-see-positive-changes

members, on the other," *Keller*, 496 U.S. at 12, is also relevant to the transparency requirement that the Petitioners propose.

When a union collects an agency fee from a nonmember, it must provide that nonmember with a report of how her fees are spent so as to assure her that her fees are not being unlawfully spent on political activities—and that this report must be independently audited, not just a self-generated report. *Chi. Teachers Union v. Hudson*, 475 U.S. 292 (1986). And that report must include "a detailed breakdown of expenses by category," and be independently audited; otherwise it would "'convey[] minimal, if any, assistance to nonmembers attempting to decide whether to challenge the Union's [expenditures].'" *Cummings v. Connell*, 316 F.3d 886, 890–91 (9th Cir. 2003) (citation omitted). The *Connell* court also noted that "'the union must provide this information to *each employee, without formal request*.'" *Id.* at 891 (citation omitted; emphasis added). The same principles apply here.

Keller observed that an audited report, as "described in *Hudson*," would "certainly meet" the Bar's constitutional obligation. 496 U.S. at 17.[10] The Petition seeks to impose just that requirement—by ensuring that the Bar's expense reports

[10] Because it was outside the question presented, however, the Court added that "whether one or more alternative procedures would likewise satisfy that obligation" would be decided at a later date. *Id.*

are independently audited and are provided not only to the Chief Justice, but also to all members "without formal request." *Connell*, 316 F.3d at 891. Other than its claim that it is not a union, the Bar makes no serious argument against this proposal.

Even aside from whether such genuine transparency is required by the Constitution, it is the best *policy* choice for this Court to make. If, indeed, the Bar is as concerned with ensuring transparency, it can have no serious objection to the proposed independent auditing and reporting requirement. If, indeed, it already provides fully transparent information, it can have no serious objection to placing that requirement in the language of Rule 32. If, indeed, it fully complies with *Keller*, it can have no serious objection to doing what *Keller* said would "certainly meet" the constitutional obligation: providing all members the kind of regular, audited report "described in *Hudson*." 496 U.S. at 17.

CONCLUSION

The Petition should be granted.

Respectfully submitted May 30, 2019 by:

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