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 U.S. Court of Appeals for the Eighth Circuit

BRIEF OF THE LIBERTY JUSTICE CENTER AND THE MACKINAC CENTER FOR PUBLIC POLICY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a state has any compelling interest in a mandatory bar beyond the formal regulation of attorneys' professional conduct.

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INTERESTS OF THE *AMICUS CURIAE*[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights.

The Liberty Justice Center (LJC) is particularly interested in this case because of its respect for the freedoms of speech and association. LJC represented Mark Janus in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), which provides the framework for many of the arguments in this case. LJC also represents the plaintiff in a challenge to Wisconsin's mandatory bar currently pending in federal district court. *File v. Kastner, et al.*, No. 2:19-cv-01063-LA (E.D.Wis.).

The Mackinac Center for Public Policy is a Michigan-based, nonpartisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1987. The Mackinac Center has played a prominent role in studying and litigating issues related to a mandatory bar and is representing a client that has filed a challenge to Michigan's mandatory bar.

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than amici funded its preparation or submission. Counsel timely provided notice to all parties of their intention to file this brief and counsel for each party consented; Petitioner Fleck also provided blanket consent.

SUMMARY OF ARGUMENT AND INTRODUCTION

The First Amendment includes both the freedom to associate and the freedom not to associate. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). A state-imposed mandate requiring an individual to associate with a private organization must pass exacting scrutiny, *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2483 (2018), which requires a compelling state interest and narrow tailoring. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1664 (2015).

The Court in *Keller v. State Bar of California* did not clearly identify a standard of review, but referred to the state's two interests in a mandatory bar: "regulating the legal profession and improving the quality of legal services." 496 U.S. 1, 13 (1990). In doing so, it drew on the Court's previous plurality opinion in *Lathrop v. Donohue*, which identified as the state's "legitimate interests" in a mandatory bar "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." 367 U.S. 820, 843 (1961).

The Supreme Court should take this case to clarify that the only state interest sufficiently compelling to justify a mandatory bar association is the formal regulation of lawyers' professional conduct.

ARGUMENT

I. States have a compelling interest in the formal regulation of professional legal ethics.

States have a compelling interest in ensuring the ethical practice of important professions in our society. *See N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 512-13 (2015). This is as true for lawyers as it is for dentists, accountants, and other professionals.

Lathrop was the Court's first case on mandatory bar association, and it gave a broad conception of the bar's legitimate role. It considered the bar's role in the formal regulation of lawyers' professional conduct and in combatting the unauthorized practice of law. 367 U.S. at 840-41. In the same breath, it also classified as acceptable the bar's continuing legal education activities, legal aid committee, and public outreach. *Id.* It characterized all of these undertakings as "activities without apparent political coloration." *Id*. at 839.

Keller formalized the *Lathrop* plurality's longwinded discussion of state interests down to a simple sentence identifying two interests: "regulating the legal profession and improving the quality of legal services." 496 U.S. at 13. *Keller* later put greater flesh on the first interest by describing it as "activities connected with disciplining members of the bar or proposing ethical codes for the profession." *Id*. at 26-27.

The Court's discussion of *Keller* in *Harris v. Quinn* put the emphasis squarely on the bar's role in ethical regulation as the justification for its interest. 573 U.S.

616, 655 (2014). There, the Court's majority explained why its holding limiting the application of *Abood v. Detroit Board of Education*, 431 U. S. 209 (1977), was distinguished from its prior holding in *Keller*. The Court described *Keller's* holding: "We held that members of this bar could not be required to pay the portion of bar dues used for political or ideological purposes but that they could be required to pay the portion of the dues used for activities connected with proposing ethical codes and disciplining bar members." *Harris*, 573 U.S. at 655. The Court continued:

> Licensed attorneys are subject to detailed ethics rules, and the bar rule requiring the payment of dues was part of this regulatory scheme. The portion of the rule that we upheld served the "State's interest in regulating the legal profession and improving the quality of legal services." *Ibid.* States also have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices.

Harris, 573 U.S. at 655-56.

Harris' emphasis on the "detailed ethics rules" and "regulatory scheme" charts the path for this Court in this case. Some states may choose to characterize the regulatory authority which enforces these rules as a mandatory bar. *See, e.g.*, "About the Bar," Virginia State Bar, https://www.vsb.org/site/about. As long as it limits its activities to the formal regulation of legal ethics, such an approach is narrowly tailored to meet

a compelling state interest, and there is no need to overrule this holding of *Keller*.[2]

II. The Court should clarify that states do not have a compelling interest in a mandatory bar to propose ethical codes for the profession.

When discussing the mandatory's bar role in maintaining professional standards, *Keller* permitted "activities connected with disciplining members of the bar or proposing ethical codes for the profession." 496 U.S. at 26-27. "Proposing ethical codes for the profession" is a different function from enforcing those codes, and one much more fraught with problematic politics.

Janus counsels against forcing someone to associate with an organization that takes positions on "controversial public issues." 138 S. Ct. at 2464. Bar associations frequently take controversial positions by seeking to incorporate politically correct social expectations into professional conduct codes.

Consider, for instance, the move by many bar associations to adopt the amended ABA Model Rule 8.4(g), which would prohibit lawyers from "engag[ing] in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law." ABA Code of Professional Responsibility

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[2] A state bar that regulates ethics but also engages in trade association-type activities likely is not narrowly tailored to such an interest.

Model Rule 8.4(g). Numerous scholars have raised concerns about the model rule's constitutionality and effect on lawyers' religious liberty and free-speech rights. *See, e.g.,* Lindsey Ker, *Lawyers Lack Liberty: State Codifications of Comment 3 of Rule 8.4 Impinge on Lawyers' First Amendment Rights*, 28 GEO. J. LEGAL ETHICS 629 (2015); Eugene Volokh, "A speech code for lawyers, banning viewpoints that express 'bias,' including in law-related social activities," The Volokh Conspiracy (Aug. 10, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/; Ronald Rotunda, "The ABA Decision to Control What Lawyers Say," Heritage Foundation (Oct. 6, 2016), https://www.heritage.org/report/the-aba-decision-control-what-lawyers-say-supporting-diversity-not-diversity-thought; Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS x (2017); George W. Dent, Jr., "Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political" *Faculty Publications* 2012 (2017). https://scholarlycommons.law.case.edu/faculty_publications/2012.

No fewer than five state attorneys general have opined that the proposed rule suffers severe constitutional defects. Texas Atty. Gen. Op. KP-0123 (Dec. 20, 2016); Letter from Robert Cook, S.C. Solicitor Gen., to State Rep. John R. McCravy, III (May 1, 2017); La. Atty. Gen. Op. 17-0114 (Sep. 8, 2017); Tenn. Atty. Gen. Op. 18-11 (March 16, 2018); Letter from Kevin Clarkson, Alaska Atty. Gen., to Alaska Bar Asso. (Aug. 9, 2019).

The same concerns can arise regarding amendments to a code of judicial ethics. In 2003, several bar associations successfully petitioned the California Supreme Court to adopt a comment to a canon on judicial disqualification that would have prompted recusal by judges who were volunteer leaders in the Boy Scouts of America, given the BSA's then-policy on sexuality. Daniel R. Suhr, *The Religious Liberty of Judges*, 20 WM. & MARY BILL OF RTS. J. 179, 209-10 (2011). Twelve years later, the California Supreme Court formally adopted an amendment to the code itself barring membership in youth organizations that discriminate, and sent a letter to all judges that they must cease affiliation with the Boy Scouts as of January 1, 2016. Raymond J. McCoski, JUDGES IN STREET CLOTHES: ACTING ETHICALLY OFF-THE-BENCH 101-03 (Fairleigh Dickinson U. Press 2017). The rules change sparked substantial controversy among judges and the media. Johnathan A. Mondel, Note, *Mentally Awake, Morally Straight, and Unfit to Sit?: Judicial Ethics, the First Amendment, and the Boy Scouts of America*, 68 STAN. L. REV. 865, 871-72 (2016). Though the initial change was sought by voluntary local bar associations, it illustrates that even rules petitions can get caught up in controversial social issues.

Many other rules petitions that do not touch on culture war issues may never the less provoke substantial controversy within the bar. Rules petitions may favor one type of practice over another, such as a rule expanding license flexibility for out-of-state lawyers working as in-house counsel. *See* "Responses to State Bar of New Mexico Multijurisdictional Practice Survey," State Bar of N.M. (Oct. 2001). They may suggest changes to standards for attorney-client sexual relationships,

which some lawyers may perceive as an invasion of privacy. Neil J. Wertlieb, "The disruptive and controversial new rules," (Calif.) Daily J. (Oct. 17, 2018), https://www.dailyjournal.com/articles/347613-the-disruptive-and-controversial-new-rules. They may pit graduates of in-state law schools against those who went to law schools in other states. "State Bar Board of Governors opposes petition to amend or repeal diploma privilege, among other actions," State Bar of Wis. (Sept. 27, 2010), https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=0&Issue=0&ArticleID=6161. In any of a number of scenarios, proposing amendments to a state's ethical code may put a state bar on one side of a controversial or sensitive issue within the profession or the culture.

Moreover, a mandatory bar is not a narrowly tailored solution to the need for occasional updates to the rules of professional conduct. The ABA, which is often the progenitor of changes to state codes based on changes to its model code, is a voluntary bar, after all. And many other actors also bring rules petitions, including state agencies, public-interest groups, specialty bar associations, and individual attorneys, or state high courts may act on their own volition, either directly or by the creation of study committees. Thus, there is no unique need for a mandatory bar to ensure that a state's professional code is kept current. All the better, then, to clarify that proposing ethical codes is a different task entirely than enforcing ethical codes, and that the state only has a compelling interest in the latter.

III. The Court should clarify that "improving the quality of legal services" is not a compelling state interest that can be narrowly tailored to justify a mandatory bar.

The other interest identified in *Keller*, "improving the quality of legal services," suffers from the same fundamental defect that the majority critiqued in *Janus*: "That formulation is broad enough to encompass just about anything that the [bar] might choose to do." 138 S. Ct. at 2481. The "quality of legal services" is a loophole so large that mandatory bars drive truckloads of politically charged ideology right through it.

The *Lathrop* plurality identifies the bar's "many . . . activities without apparent political coloration"—continuing legal education, the promotion of pro bono legal aid work, and the preparation and distribution of pamphlets that assist the general public with basic legal questions. 367 U.S. at 839-41.

In reality, though, each of these three activities, and many others besides that may qualify as "improving the quality of legal services," is a platform for State Bar insiders to use mandatory dues dollars to promote their political agenda. A continuing legal education panel may focus on criticizing lawful terrorist detention policies at Guantanamo Bay. *See, e.g.,* Richard Kammen, "Spotlight CLE: Nine Years in the Guantanamo Goo," Kentucky Bar Asso. Annual Conv. (June 13, 2018), https://cdn.ymaws.com/www.kybar.org/resource/resmgr/2018_convention/materials/guantanamo.pdf. A pro bono program may facilitate funneling lawyers into social causes, such as the fight against

climate change. *See, e.g.,* "Green Pro Bono – Helping Provide Solutions to Climate Change," Oregon State Bar, https://sustainablefuture.osbar.org/section-newsletter/20114winter2reiner/. *See generally* Hon. Dennis Jacobs, "Pro Bono for Fun and Profit," Speech to the Rochester Lawyers Chapter of the Federalist Society (Oct. 6, 2008), https://fedsoc.org/commentary/publications/speech-by-judge-dennis-g-jacobs ("Whether a goal is pro bono publico or anti, is often a policy and political judgment. No public good is good for everybody. Much public interest litigation, often accurately classified as impact litigation, is purely political, and transcends the interest of the named plaintiffs, who are not clients in any ordinary sense."). A pamphlet for the general public on ordinary legal issues like divorce, landlord-tenant law, or bankruptcy may pass off as "the law" propositions that may lawyers would find contestable or problematic.

Consider the list of topics about which unions speak identified in *Janus*: "controversial subjects such as climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions. These are sensitive political topics, and they are undoubtedly matters of profound value and concern to the public." *Id.* at 2476. Ticking down the list, one can easily find examples of almost every single topic where mandatory bars are using dues to pay for speech on these same issues.

Climate change: The Arizona State Bar's monthly magazine has an "Earthwise Lawyering" regular feature that "examines innovative trends in environmentally friendly law policy and practice." Tim Eigo, "Climate Change One Focus in New Arizona Attorney

Magazine," Arizona State Bar (Oct 13, 2010), https://www.azbar.org/newsevents/news-releases/2010/10/climatechangeonefocusinnewarizonaattorneymagazine/. The inaugural edition of the feature "published two articles on the effect of climate change on policy and law practice." *Id.* The State Bar of Wisconsin's website offers a "Climate Change Resources" page that includes links to numerous advocacy organizations with specific viewpoints on climate change. "Climate Change Resources," State Bar of Wis., https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/article.aspx?Volume=82&Issue=3&ArticleID=1688. And as noted above, the Oregon State Bar funnels its members into "Green Pro Bono" fighting climate change. "Green Pro Bono – Helping Provide Solutions to Climate Change," Oregon State Bar, https://sustainablefuture.osbar.org/section-newsletter/20114winter2reiner/.

Sexual orientation and gender identity: The State Bar of Wisconsin recently published a book, "Sexual Orientation, Gender Identity, and the Law" (PINNACLE 2018). "Issues Facing Transgender Clients: Lawyers, Book Authors Provide Insight," State Bar of Wis. (Sep. 5, 2018), https://www.wisbar.org/NewsPublications/InsideTrack/Pages/article.aspx?Volume=10&Issue=15&ArticleID=26546. The State Bar described the coauthors as "[Abby] Churchill, an attorney and longtime LGBTQ community advocate, and Nick Fairweather, a labor and employment attorney who works on transgender issues." *Id.* The State Bar also produced a video series to accompany the book featuring the two attorneys. *Id.* Later that same year, the State Bar gave Churchill its Legal Innovators Award for founding TransLaw Help Wisconsin. Ed Finkel, "6 Big

Ideas: 2018 Wisconsin Legal Innovators," Wis. Law. (Nov. 7, 2018), https://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?volume=91&issue=10&articleid=26663. More recently, in June of this year, the State Bar invited "the 'grandmother' of the transgender civil rights movement" to deliver a keynote address that "sheds light on the decades-long struggle" before a State Bar conference. Joe Forward, "Phyllis Frye: The Grandmother of the Transgender Rights Movement," State Bar of Wis. (July 17, 2019), https://www.wisbar.org/NewsPublications/Pages/General-Article.aspx?ArticleID=27122.

Religion: The Oklahoma Bar Association and Texas State Bar both offer educational curricula for teachers to use concerning, among other topics, the First Amendment's religion clauses. "Lesson 5: Establishment Clause," Okla. Bar Asso., https://nie.newsok.com/wp-content/uploads/Law-Day-Lesson-5-1.pdf; "Viewing Guide for Engel v. Vitale (1962) Teacher Notes," Texas State Bar, https://www.texasbar.com/civics/viewing-guides/High%20School/Engel-v-Vitale/Teacher-Notes.pdf. Both bars' curricula emphasize the "wall of separation" metaphor that has been criticized by members of this Court. *Compare id.* with *Ill. ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 247 (1948) (Reed, J., dissenting) ("[T]he 'wall of separation between church and State' that Mr. Jefferson built at the University which he founded did not exclude religious education from that school. . . . A rule of law should not be drawn from a figure of speech."); *Engel v. Vitale*, 370 U.S. 421, 445-46 (1962) (Stewart, J., dissenting) ("[T]he Court's task, in this as in all areas of constitutional adjudication, is not responsibly aided by the uncritical invocation of metaphors like

the 'wall of separation,' a phrase nowhere to be found in the Constitution."); *Wallace v. Jaffree*, 472 U.S. 38, 107 (1985) (Rehnquist J., dissenting) ("The 'wall of separation between church and State' is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.").

In all these instances—climate change, sexual orientation and gender identity, and the religion clauses—by the articles and books they publish, the speakers they highlight, the awardees they honor, these mandatory bars speak on controversial subjects. The speech of the presenters, writers, honorees, and curricula may be right or wrong on any of those issues, but it is speech all the same. "To suggest that speech on such matters is not of great public concern—or that it is not directed at the 'public square'—is to deny reality." *Janus*, 138 S. Ct. at 2475 (internal quotation omitted).

The bar associations may object that they are not "speaking" when they publish an article or host a presentation, that they are merely a neutral forum for the discussion of ideas, a nonpartisan facilitator of legal discourse. This conception of their activities fails on three counts. First, these mandatory bars' educational activities hardly meet the standard of "viewpoint neutrality" set for the use of mandatory fees in *Board of Regents v. Southworth*, 529 U.S. 217, 230 (2000). There is no "Climate Change Skeptics Resources" page on the State Bar of Wisconsin's website, no award or keynote invitation or magazine spread for the lawyers who successfully defended Governor Scott Walker's Act 10 collective-bargaining reforms against every single legal challenge they faced.

Second, when a bar association presents awards, it is definitely speaking—it is lifting up certain individuals or causes as worthy of emulation, honor, and praise.

Third, when a bar association hosts CLE presentations or sponsors books, it confers its powerful imprimatur onto them, especially when the bar positions a presentation or book as a definitive, authoritative statement of the law, much like a restatement. It beggars belief to think that you are going to get the exact same restatement on the law of sexual orientation and gender identity if it is written by the founder of TransLaw rather than the lawyer for the Family Council.

In short, mandatory bars do speak, regularly, institutionally, about controversial subjects and issues of public concern. It is impossible to neatly segregate advocacy on the one side and everything else on the other, and provide a *Keller* deduction just for the lobbying. A state bar's educational activities, its events, its awards, its magazine, virtually everything it does talking about the law addresses issues of substantial public concern. This will continue so long as individual lawyers bring their professional experiences, personal backgrounds, and ideological and jurisprudential beliefs to their view of the law.

This is not a compelling state interest, nor is it narrowly tailored. There are innumerable speakers out in the world about "the law" in all its facets. There are thousands of sponsors for continuing legal education, from for-profit companies to law schools, law firms, and voluntary bar associations. There are numerous organizations dedicated to promoting pro bono work and civic education. These endeavors can all continue

in their good works without the need for the government to coerce attorneys into belonging to a mandatory bar association.

CONCLUSION

The Court should grant certiorari to clarify these important points for the good of the profession and the First Amendment. The Supreme Court should specify that only the formal regulation of lawyers' professional conduct constitutes a state interest sufficiently compelling to justify a mandatory bar association.

Respectfully submitted,

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