No. 19-670

In The
Supreme Court of the United States

ARNOLD FLECK,

Petitioner,

v.

JOE WETCH; AUBREY FIEBELKORN-ZUGER; TONY WEILER; and PENNY MILLER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR REHEARING

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Pursuant to Rule 44, Petitioner Arnold Fleck requests rehearing and reconsideration of the Court's March 9, 2020 order denying the Petition for a Writ of Certiorari, on the grounds of substantial intervening circumstances and substantial grounds not previously presented.

After this Petition was filed, another Petition raising substantially the same issue as this Petition's first Question Presented was filed in *Jarchow v. State Bar of Wisconsin*, No. 19-831. That Petition, like this one, asks the Court to overrule *Keller v. California State Bar*, 496 U.S. 1 (1990), and to hold that the First Amendment forbids compulsory bar association membership. The filing of that Petition demonstrates the exceptional nationwide importance of the question presented here. Unlike this case, however, *Jarchow* lacks an evidentiary record, because it was decided entirely on the pleadings. This Court has expressed its reluctance to decide important constitutional cases without a developed record. *See*, *e.g.*, *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 455 (2008); *Gonzales v. Carhart*, 550 U.S. 124, 167 (2007). But the Court could consider the question of *Keller*'s validity with a full evidentiary record either by granting this Petition or by granting both Petitions and consolidating the cases.

The *Jarchow* respondents' opposition brief is due April 3, 2020. Therefore, Petitioner suggests that the Court defer consideration of this Petition for Rehearing until the conference at which it considers the

Jarchow Petition and then decide whether to grant either or both of the Petitions.

BACKGROUND

Petitioner Arnold Fleck is a North Dakota attorney who, pursuant to state law, is forced to join and pay dues to the State Bar Association of North Dakota (SBAND) in order to practice law. He filed this case arguing, among other things, that this compulsory membership violates his First Amendment freedom of association. Freedom of association claims are subject to exacting scrutiny, which requires the state to demonstrate that it cannot accomplish its compelling public interests by a significantly less intrusive means. *Janus v. AFSCME*, 138 S. Ct. 2448, 2465 (2018). North Dakota can accomplish the legitimate interests a mandatory bar association serves—"regulating the legal profession and improving the quality of legal services," *Keller*, 496 U.S. at 13—by means substantially less intrusive on attorneys' First Amendment freedom of association. Therefore, mandatory membership is unconstitutional.

This Court decided *Janus* after the Eighth Circuit had ruled against Fleck, so, after deciding *Janus*, this Court granted Fleck's then-pending Petition for certiorari and remanded the case to the Court of Appeals with instructions to apply *Janus*. *See Fleck v. Wetch*, 139 S. Ct. 590 (2018). That court held that *Janus* made no difference to Fleck's case, however, on the grounds,

inter alia, that this Court approved of mandatory bar association membership in *Keller*. *See Fleck v. Wetch*, 937 F.3d 1112, 1117 (8th Cir. 2019). Fleck petitioned this Court to apply the exacting scrutiny of *Janus* in the context of mandatory membership and, if necessary, to overrule *Keller*.

ARGUMENT

I. This Petition and the *Jarchow* Petition show that whether *Keller* should be overruled is an important question nationwide.

Whether lawyers can be compelled to join a bar association that goes beyond regulation of the legal profession and engages in political and ideological activities and speech is a question of vital importance to the lawyers in the 30 states that force lawyers to join a bar association as a condition of practicing law. As *Keller* recognized, laws compelling bar membership affect attorneys' freedom of speech and association in essentially the same way that laws compelling support for public-sector unions affected government employees' rights and therefore should be treated the same under the First Amendment. 496 U.S. at 12-14.

Yet *Keller*, and the cases on which it relied, are equivocal as to whether compulsory bar association membership is constitutional. *Keller* itself appeared to reserve the question, at least with respect to bar associations that engage in political and ideological speech that is not germane to regulating the practice of law

and improving the quality of legal services (the only government interests *Keller* recognized as legitimate bases for such laws). *See id.* at 17 ("declin[ing]" to decide that question). But it also appeared to answer it in the affirmative. *See id.* at 4 ("lawyers admitted to practice in the State may be required to join."). Likewise, as *Keller* recognized, *Lathrop v. Donohue*, 367 U.S. 820 (1961), also failed to squarely resolve that question. *See Keller*, 496 U.S. at 17.

Nevertheless, lower courts have uniformly interpreted *Keller* as allowing states to force lawyers to join bar associations, even when those associations engage in political speech and political activities that are not directly related to regulating the legal profession or improving the quality of legal services. Today, 30 states impose such requirements, and 20 do not, which proves that the state can achieve its compelling interests in less intrusive ways. *Cf. Janus*, 138 S. Ct. at 2465–66 (states operating without compulsory agency fees showed such fees were not necessary to accomplish state's objectives).

There are now—in addition to this case and *Jarchow*—at least five cases pending in federal district courts and courts of appeals on the question whether the First Amendment can be reconciled with mandatory bar associations. *See Boudreaux v. La. State Bar Ass'n*, No. 20-30086 (5th Cir., pending); *Crowe v. Or. State Bar*, No. 19-35463 (9th Cir., pending); *Schell v. Gurich*, No. 5:19-cv-00281 (W.D. Okla., pending); *McDonald v. Longley*, No. 1:19-cv-00219-LY (W.D. Tex., pending); *Taylor v. State Bar of Mich.*, No. 1:19-cv-00670-RJJ-PJG

(W.D. Mich., pending). The validity of *Keller* and the constitutionality of mandatory bar association membership are central in all of these cases. Resolving that question in this case would be the most efficient manner of addressing this dispute.

II. If the Court determines that *Jarchow* presents an issue that warrants review, this case's evidentiary record will assist the Court in determining the constitutionality of mandatory bar association membership.

Both this case and *Jarchow* present the question whether *Keller* should be overruled. Only this case, however, has a fully developed record, including a detailed decision by the district court that explains how SBAND operates and how it has spent money on political and ideological causes from which Mr. Fleck and other bar members dissent. *Jarchow*, by contrast, was dismissed by the district court without any fact-finding, and the Seventh Circuit summarily affirmed that dismissal at the plaintiff's request, without opinion.

This Court has often expressed reluctance to decide cases in the absence of an evidentiary record that would help demonstrate how the laws or principles being discussed actually work in practice. For example, in *Washington State Grange, supra*, the Court considered a facial challenge to certain election laws that the plaintiff claimed would lead to voter confusion. Given the absence of an "evidentiary record against which to assess [the challengers'] assertions" and the "risk of

'premature interpretation of statutes on the basis of factually barebones records,'" the Court concluded that the plaintiff's arguments had to "await an as-applied challenge" with a developed record. 552 U.S. at 450, 455, 458.

Unlike that case, and unlike *Jarchow*, this case includes an as-applied challenge and an evidentiary record. SBAND has "had [an] opportunity to implement" the challenged laws, and lower courts have "had [an] occasion to construe the law in the context of actual disputes." *Id*. at 450.

Therefore, if, upon considering the *Jarchow* Petition, this Court determines that the constitutionality of mandatory bar associations warrants review, it would be helpful for the Court to have before it the evidentiary record of a live case that presents that question.[1]

This Court granted an extension of time to the respondents in *Jarchow*, so that their opposition is due April 3, 2020. Therefore, Petitioners respectfully recommend that the Court consider the two Petitions

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[1] Contrary to an opinion expressed in an unusual *Wall Street Journal* editorial, Fleck's second Question Presented, regarding SBAND's procedures for opting out of its political spending, makes this case no less "clean" a vehicle than *Jarchow* to consider the first Question Presented, which only concerns mandatory membership. *See* Editorial, *Free Speech for Lawyers*, Wall St. J., Mar. 5, 2020, https://www.wsj.com/articles/free-speech-for-lawyersfree-speech-for-lawyers-11583451282. The only important difference between the two cases' presentations of the issue is that Fleck's is supported by an evidentiary record.

together and either grant the Petition in this case or grant both Petitions and consolidate the two cases pursuant to Rule 27.3.

CONCLUSION

The Court should grant the Petition for Rehearing, consider this Petition together with the *Jarchow* Petition, and grant certiorari in this case or both cases to determine the constitutionality of mandatory bar association membership and whether *Keller* should be overruled.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Pursuant to Rule 44.2, Counsel certifies that the Petition is restricted to the grounds specified in the Rule with substantial grounds not previously presented. Counsel certifies that this Petition is presented in good faith and not for delay.

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[Name of Counsel or Party]