No. 16-1564

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ARNOLD V. 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 OF THE MISSOURI BAR AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE

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April 5, 2019

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* The Missouri Bar 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.

CERTIFICATION PURSUANT TO RULE 29(a)(4)(E)

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), The Missouri Bar certifies that (i) no party's counsel authored the brief in whole or in part; (ii) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and (iii) no person, other than *amicus*, its members, and its counsel, contributed money that was intended to fund preparing or submitting the brief.

/s/ *David C. Frederick*
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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Missouri Bar is an integrated bar created in 1944 by order of the Supreme Court of Missouri and consisting of the tens of thousands of attorneys licensed to practice in the State of Missouri. Its purpose is to improve the legal profession, the administration of justice, and the law on behalf of the public — a mission it furthers by, among other things, enrolling and evaluating Missouri lawyers; administering continuing legal education ("CLE") standards, accrediting CLE providers, and tracking CLE compliance; and protecting consumers of legal services against unethical attorney performance through a Client Security Fund. As the largest integrated bar in the Eighth Circuit, The Missouri Bar has an interest in ensuring its continued ability to operate on behalf of the citizens and attorneys of Missouri under longstanding Supreme Court precedent holding that the collection of mandatory enrollment fees does not violate the First Amendment.

Amicus has conferred with counsel for the parties and is authorized to state that all parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

At the outset of this litigation, appellant Arnold Fleck acknowledged that his claim is governed by *Keller v. State Bar of California*, 496 U.S. 1 (1990). *See Fleck v. Wetch*, 868 F.3d 652, 653 (8th Cir. 2017) ("*Fleck I*"). It is apparent why. In *Keller*, the Supreme Court squarely stated that "[t]he State Bar may . . . constitutionally fund activities germane to" regulating the legal profession and improving the quality of services "out of the mandatory dues of all members." 496 U.S. at 14; *see also Lathrop v. Donohue*, 367 U.S. 820, 849 (1961) (Harlan, J., concurring in the judgment) ("a State may Constitutionally condition the right to practice law upon membership in an integrated bar association"); *United States v. United Foods, Inc.*, 533 U.S. 405, 414 (2001) (under *Keller*, lawyers can "be required to pay moneys in support of activities . . . germane to the reason justifying the compelled association").

Appellant now argues that, following *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), *Keller* no longer controls this appeal. As appellee Penny Miller, Secretary-Treasurer of the State Board of Law Examiners, explains (at 2-11), appellant's earlier concession is a sufficient basis on which to affirm.[1] But whether or not appellant may revise his view as a matter of procedure, his contention that *Keller* does not control here lacks merit as a matter of law.

[1] *Amicus* joins in full the arguments in appellees' briefs.

I. *Janus* did not overrule *Keller*. In *Janus*, the Supreme Court specifically addressed fees paid by employees represented by public-sector unions. Those fees, the Court held, forced government employees to subsidize speech on a range of "controversial subjects" of "profound" public concern and thereby implicated concerns occupying "the highest rung of the hierarchy of First Amendment values." 138 S. Ct. at 2476. The *Janus* Court made no mention of integrated bars. It did, however, rely heavily on its earlier analysis in *Harris v. Quinn*, in which the Court explained that the exacting-scrutiny standard it applied to agency fees "is wholly consistent with [its] holding in *Keller*." 573 U.S. 616, 656 (2014).

Because collective bargaining is effectively "union *speech*," *Janus*, 138 S. Ct. at 2474 (emphasis added), *Janus*'s holding had nothing at all to do with the many *non*-speech functions — such as bar registration, evaluation, and CLE accreditation and compliance tracking — that integrated bars perform. In light of those primary regulatory functions, the limited speech in which integrated bars do engage is just a small and constitutional part of a "broader regulatory scheme," *United Foods*, 533 U.S. at 415, governing attorneys in the pursuit of valid state ends. Moreover, integrated bars' limited speech tends to concern prosaic questions of legal procedure and administration that do not implicate *Janus*'s concern with the hot-button political issues that are the stuff of collective bargaining. In all

events, unlike public employees, attorneys who disagree with the limited speech in which integrated bars do engage are empowered to voice their dissent in any way they like.

II. Those critical distinctions demonstrate why the "exacting scrutiny" the Court applied in *Janus* is inappropriate in the context of integrated bars. But even if that standard applied, integrated bars would meet it. The Supreme Court has long recognized, and recently reaffirmed, the States' interest in an effectively regulated bar, *see Harris*, 573 U.S. at 655-56, and state bars pursue that end through narrow and careful means. Appellant's citation to voluntary bar associations compares apples to oranges because those bodies do not perform the regulatory functions of an integrated bar.

ARGUMENT

I. *JANUS* IS CONSISTENT WITH *KELLER* AND *LATHROP*

In three cases over the last seven years, the Supreme Court has clarified the constitutional standard applied to First Amendment challenges to a specific sort of compelled speech: agency fees paid by public-sector employees to the union that represents them.[2] In *Janus*, the Court concluded that such fees can no longer

[2] *See Janus*, 138 S. Ct. at 2459-60, 2474 (addressing requirement that employees "subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining"); *Harris*, 573 U.S. at 620 (question whether "personal care providers" may be compelled "to subsidize speech on matters of public concern by a union that they do not wish to join or

constitutionally be compelled. *See* 138 S. Ct. at 2460. The Court did not there, or in any of its modern agency-fee cases, rule on other fee-payment schemes such as mandatory bar fees. On the contrary, it went out of its way not to because the situations are legally distinct. *Keller* thus controls this appeal and requires affirmance.

A. The Supreme Court's Modern Agency-Fee Jurisprudence Did Not Disturb *Keller*

1. *Janus* considered the question whether "public employees" could be "forced to subsidize a union" — that is, be forced to pay what are known as "agency fees" — "even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities." 138 S. Ct. at 2459-60. The Court concluded that public employees could not be so forced. The Court said nothing whatever about the lawfulness of integrated bar fees — a fact not lost on the *Janus* dissent, which listed *Keller* as one of several cases "today's decision does not question." *Id.* at 2498 (Kagan, J., dissenting).

Justice Kagan's observation is on very firm ground: the Supreme Court's modern agency-fee jurisprudence has gone out of its way *not* to disturb the Court's integrated-bar rulings in *Lathrop* and *Keller*.

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support"); *Knox v. SEIU, Local 1000*, 567 U.S. 298, 302-03 (2012) (constitutionality of "special assessment" increasing dues to cover undisclosed union expenses).

For example, in *Harris v. Quinn*, the Supreme Court invalidated an Illinois agency-fee scheme governing home health aides on the grounds that it (1) compelled those employees "to subsidize speech by a third party that he or she does not wish to support," and (2) could have been done "through means significantly less restrictive of associational freedoms." 573 U.S. at 648-49, 656. In applying that level of "exacting" scrutiny to the agency-fee scheme at issue in *Harris*, the Court expressly rejected the argument that its decision would "call into question our decision[ ] in *Keller*." *Id.* at 655. The Court explained that *Keller* authorized the collection of bar fees (except for the portion "used for political or ideological purposes") and thus "fits comfortably within the framework applied in" *Harris*. *Id.*

In particular, the *Harris* Court observed that bar fees are "part of th[e] regulatory scheme" in which licensed attorneys "are subject to detailed ethics rules." States thus "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." *Id.* at 655-56. *Janus* did not itself reiterate *Harris*'s proviso that *Keller* remains good law; it did not need to. The *Janus* majority relied heavily on the reasoning in *Harris*,[3] and it did not dispute Justice Kagan's observation that,

[3] *See*, *e.g.*, *Janus*, 138 S. Ct. at 2463, 2464, 2465, 2466, 2468, 2471, 2472, 2474, 2477 (citing *Harris*).

like *Harris*, "today's decision does not question" *Keller*. 138 S. Ct. at 2498 (Kagan, J., dissenting).

2. The Supreme Court's explicit reaffirmation of *Keller* is a sufficient basis to affirm here, especially in light of appellant's repeated concession that *Keller* governs this lawsuit. *See Fleck I*, 868 F.3d at 653. In addition, the Supreme Court's statements in *Harris* strengthen *Keller*'s force as a matter of *stare decisis*. *See Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2410 (2015) ("considerations favoring *stare decisis* are at their acme" in situations where a precedent "has actually generated reliance"). In *Janus*, the Court observed that the unions' claims of decades of "reliance" on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), were weakened by the fact that "public-sector unions ha[d] been on notice for years regarding th[e] Court's misgivings about *Abood*." 138 S. Ct. at 2484 (citing *Knox* and *Harris*). *Janus* foretells no such "misgivings" about *Keller*. Quite the contrary, *Harris* reaffirmed *Keller*, and *Janus* relied on *Harris* and said nothing more about *Keller*. *Keller* is good law.

B. Agency Fees Receive Heightened First Amendment Protection Because Collective Bargaining Raises Specific Concerns Not Present Here

The agency-fee requirement at issue in *Janus* raised several concerns that do not arise in the context of integrated bars. For that reason as well, *Keller*, not *Janus*, remains the governing precedent.

1. The agency-fee scheme at issue in *Janus* was characterized chiefly, if not exclusively, by the union's speech activities. *See* 138 S. Ct. at 2460 (referring to "collective bargaining and related activities"); *id.* at 2468 (describing the associational harms of "the representation of nonmembers in grievance proceedings"). That speech implicated core First Amendment concerns. A union's entitlement to bargain on behalf of a "bargaining unit" — a designated group of public employees — confers upon the union the "broad authority" to "speak[] for the employees" on massively consequential public-policy issues ranging from the size of the government's budget to gay marriage to climate change. *Id.* at 2460, 2474 (emphasis omitted).

As the Court explained, "a public-sector union's demand for," say, "a 5% raise for" the bargaining unit "could have a serious impact on the budget of the government unit in question, and by the same token, denying a raise might have a significant effect on the performance of government services." *Id.* at 2473; *see also Harris*, 573 U.S. at 654 ("[I]t is impossible to argue that the level of . . . state spending for employee benefits . . . is not a matter of great public concern."). Moreover, the "ascendance of public-sector unions has been marked by a parallel increase in public spending," which has led to state and local government funding crises. *Janus*, 138 S. Ct. at 2483. That more recent development — and the active

policy debate about how to address those fiscal concerns — has distinguished collective-bargaining issues by giving them a specific "political valence." *Id.*

"In addition to affecting how public money is spent, . . . unions express views on a wide range of subjects — education, child welfare, healthcare, and minority rights, to name a few." *Id.* at 2475.

> Unions can also speak out in collective bargaining on 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 (footnotes omitted) (quoting *Snyder v. Phelps*, 562 U.S. 443, 453 (2011)). Given the hot-button and fiscally consequential issues on which public-sector unions weigh in, the Court compared mandatory support of union speech to mandatory support of a political party, *see id.* at 2484 — speech at the very core of the First Amendment's purpose. *See Buckley v. Valeo*, 424 U.S. 1, 45 (1976).

In addition, the Court observed that dissenting members of a bargaining unit were prohibited in certain cases from engaging in their own counter-speech — *i.e.*, were not permitted to "negotiate directly with their employer." 138 S. Ct. at 2460.

2. All of those features of public-sector-union speech render *Janus* a poor fit in the integrated-bar context.

a. As an initial matter, the activities in which integrated bars engage is primarily *not* speech but regulation and administration of the legal profession. *See*

Lathrop, 367 U.S. at 833-34 (plurality) (bar activities "deal largely with matters which appear to be wholly outside the political process and to concern the internal affairs of the profession"). In Missouri, for example, pursuant to rules promulgated by the state supreme court, enrollment fees fund the following regulatory functions:

- The Missouri Bar administers CLE requirements to which all Missouri attorneys must adhere, *see* Mo. Sup. Ct. R. 15.03(e) (enrollment fees must "[f]und the administration of this Rule 15" governing CLE), including "[a]ccredit[ing] programs and activities and sponsors that satisfy" Missouri CLE requirements, *id.* R. 15.03(b), and ensuring and reporting attorney compliance with those requirements, *see id.* R. 15.03(d); *id.* R. 15.06(f);
- The Missouri Bar administers a Client Security Fund, which it created in consultation with the Supreme Court of Missouri, that protects consumers of legal services by compensating clients for fees paid to attorneys that fail to uphold minimum ethical standards, *see* The Missouri Bar, *Client Security Fund*, http://missourilawyershelp.org/ethics/client-security-fund/ (last visited Apr. 3, 2019) ("The Fund is maintained by appropriations from the annual enrollment fees paid by each member of The Missouri Bar."); The Missouri Bar Bd. of Governors, Resolution Pertaining to Client Security Fund 1 (as amended Nov. 20, 2009), http://missourilawyershelp.org/wp-

content/uploads/2019/03/CSF-Rules-Regs-approved-11-15-2018.pdf (fund established after "me[e]t[ing] and conferr[ing] with the Supreme Court concerning the establishment of the fund");

- In circumstances provided by rule of the Supreme Court of Missouri, The Missouri Bar assists in the evaluation of the character and fitness of applicants to The Missouri Bar, *see* Mo. Sup. Ct. R. 8.11(g); *id.* R. 16.02(8);
- The Missouri Bar assists in attorney discipline by administering an informal "Complaint Resolution Program" under guidelines established by the Supreme Court of Missouri, *see id.* R. 5.10, as well as by handling disciplinary referrals and making disciplinary recommendations in certain circumstances provided by rule, *see id.* R. 16.04; *id.* R. 16.05(b);
- The Missouri Bar maintains the official roll of Missouri attorneys and funds annual tracking of, among other things, attorneys' affirmation of their oath of admission, *see generally id.* R. 8.15, and their ethical obligation to maintain "IOLTA" (interest-bearing trust accounts for client property) accounts.[4]

[4] The precise functions performed by the nation's various integrated bars vary considerably, as does the organizational structure and rules or legislation enabling the operations of these bars. *See* Br. of *Amici Curiae* Integrated State Bars.

The Missouri Bar's (and other bars') critical *non*-speech functions distinguish the collective-bargaining apparatus at issue in *Janus*. While *Janus* concerned an arrangement primarily devoted to speech, the limited speech state bars undertake exists within a much larger regulatory scheme that operates for the benefit of all lawyers and the citizens they serve as officers of the court. *Cf. Harris*, 573 U.S. at 655 (affirming the Supreme Court's recognition of the strong state interest "in regulating the legal profession"); *Keller*, 496 U.S. at 11 ("Respondent undoubtedly performs important and valuable services for the State by way of governance of the profession . . . ."). [5] The existence of that broader "regulatory scheme," *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469 (1997), hobbles appellant's constitutional claim under settled Supreme Court precedent.

In *Glickman*, the Supreme Court made clear that "mandatory funding of expressive activities" does not "constitute[] compelled speech in violation of the First Amendment" where the speech is merely a portion of a "broader collective

[5] The *Keller* Court observed that the State Bar of California is "essentially advisory in nature," thus weakening its claim to being a regulatory agency. 496 U.S. at 11. The Court found that bar's collection of mandatory fees to be constitutional. Missouri's claim is only stronger by virtue of the actual authority it has been granted by the Supreme Court of Missouri to regulate and monitor attorneys in areas such as the formal accreditation of CLE providers and the tracking and reporting of compliance with CLE requirements. *See supra* p. 10.

enterprise in which the[ ] freedom to act independently is already constrained by the regulatory scheme." *Id.* at 469, 472. *Glickman* concerned a regulatory scheme applicable to California fruit producers. In order to improve sales for all producers, federal rules adopted by the Secretary of Agriculture imposed a number of restrictions affecting pricing, sales territories, the disposition of surplus fruit to avoid depressed prices, and inspection procedures to ensure uniform quality. *See id.* at 461. As part of that "collective enterprise" of regulations created to govern the generic fruit, producers were also obligated to contribute funds toward promoting their common output through advertising designed to benefit all producers equally. *See id.* at 463. The Court rejected one producer's claim that the required advertising contribution violated the First Amendment.

The Court reasoned that the context of the advertising requirement was "a broader collective enterprise" created by federal law in which each producer's competitive "freedom to act independently [wa]s already constrained by the regulatory scheme." *Id.* at 469. In that context, the "mandatory funding of expressive activities" was not a First Amendment violation but rather a valid regulation in the service of the "lawful collective program." *Id.* at 472.[6] That

[6] The Court further observed that, as here, the required advertising contributions "impose[d] no restraint on the freedom of any producer to communicate any message to any audience" and "d[id] not compel the producers to endorse or to finance any political or ideological views." 521 U.S. at 469-70.

reasoning applies with full force here. The Supreme Court of Missouri established The Missouri Bar as part of a "collective program" that regulates the registration, education, and conduct of the State's attorneys. The very limited speech aspects of that collective program do not render the entire regulatory enterprise subject to a First Amendment challenge.

Four Terms after *Glickman*, in *United States v. United Foods*, the Supreme Court specifically analogized the regulatory scheme in *Glickman* to the activities of integrated bars. In *United Foods*, the Court invalidated a fee imposed on mushroom producers to support a collective advertising effort where, unlike in *Glickman*, the "principal object" of the regulatory scheme was "speech itself." 533 U.S. at 415. In invalidating the contribution, the Court distinguished the mandatory payment upheld in *Keller* as supporting a broader regulatory enterprise (just like the fruit regulation in *Glickman*). "Lawyers c[an] be required to pay moneys in support of activities that [a]re germane to the reason justifying the compelled association in the first place, for example, expenditures (including expenditures for speech) that relate[ ] to" the regulatory conduct of an integrated bar. *Id.* at 414.

b. Integrated bars are distinct from the public-sector unions at issue in *Janus* for the additional reason that the limited speech they *do* undertake is of a far more prosaic, far less political, nature.

For example, The Missouri Bar's Board of Governors has long operated under policies limiting the Bar's "legislative" activities to subject matter affecting "the administration of justice, the integrity of the judiciary, improvement of the law, or the dignity of the profession of law."[7] Consistent with that limitation, The Missouri Bar weighs in on legislation that would affect the everyday practice of law, such as jury duty and real estate conveyances. *See*, *e.g.*, Memorandum from Missouri Bar Bd. of Governors Exec. Comm. to Rep. Bill White (Apr. 3, 2018), https://members.mobar.org/uploadedfiles/legis/2018/MoBarPositionHB2063.pdf (commenting on HB 2063, which would have allowed individuals age 75 or older to be excused from jury duty without cause and favoring current statutory hardship procedures, on the basis of feedback from a state judge that individuals of that age "are often willing" to serve and that it is "hard enough to get people to serve now"); Memorandum from Missouri Bar Bd. of Governors Exec. Comm. to Rep. Bart Korman (Feb. 16, 2018), https://members.mobar.org/uploadedfiles/legis/2018/

[7] The Missouri Bar Bd. of Governors, Restatement of the By-Laws, as Amended, of The Missouri Bar, art. XV, § 3 (rev. Nov. 17, 2017), http://www.mobar.org/uploadedFiles/Home/About_Us/Governance/Bylaws/MoBarBylaws.pdf; *see also* The Missouri Bar Bd. of Governors, Policy Statement Regarding Legislative Procedures (rev. Feb. 24, 2012) ("Policy Statement"), http://www.mobar.org/legislative/policy.htm (last visited Apr. 3, 2019). Additional speech-protective standards include taking no position when issues may be "factional, partisan, [or] narrow in interest or [where] . . . substantial constituencies of the bar may in good faith differ." Policy Statement.

MoBarPositionHB1632.pdf (opposing HB 1632, which would have required that deeds conveying real estate include certain additional data; contending that the new required information "has never previously been deemed necessary" and questioning "the legal effect" of including it).

Not surprisingly, the limited debate on these sorts of technical legal issues tends to *lack* the "political valence" (*Janus*, 138 S. Ct. at 2483) that the Supreme Court found renders collective-bargaining speech of "profound" public importance. And not only do such issues fall well beyond the range of hot-button issues that arise in collective bargaining, but the limited positions advocated by integrated bars tend not to influence the public fisc — a factor the *Harris* and *Janus* Courts weighed heavily. *See Janus*, 138 S. Ct. at 2483 (noting the "mounting costs of public-employee wages, benefits, and pensions"); *Harris*, 573 U.S. at 653 n.28 ("[P]ayments made to public-sector bargaining units may have massive implications for government spending."); Miller Br. 13-14. That distinction further justifies the level of First Amendment scrutiny that *Keller* held was appropriate in the context of integrated bars, *see* 496 U.S. at 16-17, and that *Harris* and *Janus* did not disturb.

c. The privileged position that public-sector unions enjoy as the *exclusive* representative of the views of its members also finds no analogue in the integrated-bar context. Lawyers who disagree with a particular policy position are

entitled to voice their dissent to the bar in the first instance and, if their opinion does not carry the day, to the legislature. There is no equivalent to the rule, noted by the *Janus* Court, that dissenting members of a bargaining unit may not "negotiate directly with their employer." 138 S. Ct. at 2460. This, too, distinguishes attorney members of an integrated bar and justifies distinct treatment under the First Amendment.

II. EVEN IF *JANUS*'S EXACTING-SCRUTINY STANDARD APPLIED TO INTEGRATED BARS, WHICH IT DOES NOT, MANDATORY BAR FEES WOULD MEET THAT STANDARD

The features of integrated bars described above — their primarily non-speech conduct, the broader regulatory schemes of which they are a part, the non-controversial issues their limited speech concerns, and the lack of any restrictions on dissenting attorneys — render the exacting scrutiny applied in *Janus* inappropriate in this context. Still, even if exacting scrutiny were to apply, mandatory fee payments to integrated bars should be upheld because they "serve a 'compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Harris*, 573 U.S. at 648-49 (quoting *Knox*, 567 U.S. at 310) (brackets and ellipsis in *Harris* omitted).

A. The state interest in a well-regulated bar is well recognized (and not disputed). *See id.* at 655-56 (acknowledging the "State's interest in regulating the legal profession[,] improving the quality of legal services," and "allocating to the

members of the bar, rather than the general public, the expense of" that regulation); *Keller*, 496 U.S. at 13-14 (same).[8] As detailed above (*supra* pp. 10-11), The Missouri Bar assures that Missouri lawyers provide high-quality legal services by engaging in a range of regulatory efforts, such as formally accrediting CLE offerings, ensuring compliance with CLE obligations, assisting in the enforcement of ethical standards through informal dispute-resolution procedures and the Client Security Fund, and, in some circumstances, assisting in character-and-fitness evaluations as well as evaluation and monitoring in attorney discipline matters. "It cannot be denied" — nor has it been — "that this is a legitimate end of state policy." *Lathrop*, 367 U.S. at 843 (plurality).

B. Integrated bars pursue those recognized state interests through narrow means.

First, integrated bars specifically "allocat[e] to the members of the bar, rather than the general public," the costs of furthering these critical and protective state interests. *Harris*, 573 U.S. at 655-56. That allocation is precisely tailored: "It is entirely appropriate that all of the lawyers who derive benefit from the unique

[8] The *Keller* Court approved of those interests even in the case of an integrated bar that was "essentially advisory" in nature. *See supra* note 5. Because enrollment fees fund formal regulatory functions in which The Missouri Bar is obligated to engage by rules of the Supreme Court of Missouri, The Missouri Bar's claims to these well-recognized state interests are significantly stronger than the interests that *Keller* recognized and *Harris* reaffirmed.

status of being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort." *Keller*, 496 U.S. at 12.

Second, the structure of integrated bars carefully limits the degree to which mandatory fees actually fund speech activities. The *Janus* Court relied on the fact that the core activity engaged in by public-sector unions — collective bargaining "about wages and benefits" and even "the handling of grievances," 138 S. Ct. at 2474, 2476 — is protectable *speech* of profound public importance. *See also id.* at 2473 ("When a large number of employees speak through their union, the category of speech that is of public concern is greatly enlarged, and the category of speech that is of only private concern is substantially shrunk."). By contrast, most integrated-bar activity is *not* speech: "[T]he bulk of State Bar activities serve the function . . . of 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, *without any reference to the political process*." *Lathrop*, 367 U.S. at 843 (plurality) (emphasis added).

For example, The Missouri Bar's latest finance report demonstrates that "Government Relations Activities" — the category that consists primarily of the Bar's work to inform members about current legislative or administrative actions that may impact the legal profession or courts, as well as limited efforts to

influence lawmaking concerning "the administration of justice, the integrity of the judiciary, improvement of the law, or the dignity of the profession of law," *supra* p. 15 — constituted just 3.5% of the Bar's disbursements in 2018. *See* The Missouri Bar, *Annual Report, 2018-2019 – 2018 Finance Report*, http://www.mobar.org/uploadedFiles/Home/Publications/Annual_Report/2018-2019/finance-report.pdf. In comparison, the two categories of expenditures devoted to the aspects of the regulatory scheme that accredits, tracks, and provides CLE constituted more than 25% of the year's total outlays. *See id.* Moreover, and as explained above, the very limited aspects of integrated-bar conduct that do constitute speech are sharply curtailed by topic, in order to avoid the sorts of hot-button issues that proved concerning in *Janus*.

Third, in the public-sector-union context, selection of a union "as the exclusive representative of nonmembers substantially restricts the nonmembers' rights." *Janus*, 138 S. Ct. at 2469; *see id.* at 2460 (individual employees may not "negotiate directly with their employer" under state law). The treatment of individual attorneys in the integrated-bar context lacks any parallel restriction. Even in the limited cases in which integrated bars engage in speech, dissenting attorneys are at liberty to register their disagreement however they wish, including before the legislature. Any minimal impingement on those dissenters' First Amendment rights is thus as tailored as possible.

C. Appellant cites (Br. on Remand 8-9) some of the nation's *voluntary* bar associations as organizations that impose a less significant First Amendment burden on their members. But voluntary bar associations are unlike, and do not further the same state ends as, integrated bars. Integrated bars are created by government statute or rule to fulfill the *public* objective of regulating the legal profession. *See*, *e.g.*, Mo. Sup. Ct. R. 7 pmbl. (promulgating rules governing The Missouri Bar in light of the "public obligation owed by the legal profession" and to aid attorneys "in the discharge of their recognized public duty"); *see also Harris*, 573 U.S. at 655 (state interest in "improving the quality of legal services"). Integrated bars further that public purpose in view of the perspectives and experiences of the bar as a whole. It is thus entirely appropriate that all members of the bar share the cost of ensuring that the practice of law is properly regulated. *See Harris*, 573 U.S. at 655-56.

Voluntary bar associations, by contrast, are necessarily internally, not publicly, focused; they serve the subset of lawyers they represent. As a result, they cannot further the same public objectives that integrated bars are required to further by statute or rule. Indeed, appellant offers no evidence at all that *any* voluntary bar association engages in the sort of "regulation of the legal profession" (*Keller*, 496 U.S. at 15) that integrated bars have conducted successfully for decades. Thus, whatever restrictions voluntary bar associations impose on their

members' speech, the comparison is apples to oranges. The Supreme Court has long recognized the specific state interests that integrated bars support. *See Harris*, 573 U.S. at 655-56. A less restrictive process that furthers *distinct* interests is not evidence that the interests integrated bars serve can be achieved through "less restrictive" means. *Id.* at 648-49.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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April 5, 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that the foregoing brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(a)(5) and the typeface and type-style requirements Federal Rule of Appellate Procedure 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013, 14-point, Times New Roman font, and contains 4,890 words.

Pursuant to 8th Circuit Rule 28A(h)(2), I certify that the electronic brief has been scanned for viruses with Cylance Protect (version 2.0.1520.3, updated on March 27, 2019) and, according to the program, is free of viruses.

/s/ *David C. Frederick*
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April 5, 2019

CERTIFICATE OF FILING AND SERVICE

Pursuant to Federal Rule of Appellate Procedure 25 and 8th Circuit Rule 25A, I hereby certify that, on this 5th day of April 2019, I caused the foregoing brief to be submitted electronically with the Clerk of the Court through the Court's CM/ECF system and that a copy of the same was served upon all counsel of record through the Court's CM/ECF system.

/s/ *David C. Frederick*
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