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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: **PETITION TO AMEND ARIZ. R. SUP. CT., RULES 32(c) AND (d)**	Supreme Court No. R-17-0022 **Comment to Pending Petition**

In accordance with Rule 28(D) of the Rules of the Arizona Supreme Court, the undersigned submits the following Comment to the above-referenced Petition.

The Petition to Amend Rules 32(c) and (d) governing SBA membership closely approximates legislative attempts in 2016 (HB 2221) and in 2017 (HB 2295) to bifurcate the regulatory and non-regulatory functions of the State Bar of Arizona (SBA). The intent of those legislative reforms was to make paramount core regulatory public protection functions by eliminating the regulator/trade association conflict of interest; respect attorney free speech by limiting forced funding solely to lawyer regulation; increase transparency; and mitigate the second

highest mandatory bar costs to practice in the U.S.[1] Because I strongly supported these bills, I endorse the Petitioner's more nuanced version[2] of that legislation. I urge this honorable court to approve the Petition.

I. A New Reality. Although the above-mentioned legislation has as yet been unsuccessful, heightened lawmaker, lawyer and public awareness point to progress. These efforts are part of a burgeoning trend, a new reality, driven to effectuate structural changes to mandatory bars not only in Arizona but elsewhere, e.g., in Washington State[3] and California.[4] The introduction of the subject Petition is most welcome.

Even more encouraging are anticipated changes affecting compelled-speech jurisprudence at the U.S. Supreme Court. Quoting the introduction to the questions presented in *Friedrichs v. California Teachers Association*, 578 US__ (2016), "Twice in the past three years this Court has recognized that agency shop provisions—which compel public employees to financially subsidize public sector unions' efforts to extract union-preferred policies from local officials—impose a "significant impingement" on employees' First Amendment rights." *Knox v. Serv.*

[1] See *How Does The Cost to Practice In Arizona Compare To Other Mandatory Bar States?*, January 31, 2017, http://workingforabetterbar.org/2017/01/31/state-bar-arizona-cost-practice-comparison/

[2] As a co-author of the subject bar reform legislation, I disagree with the State Bar's suggestion that those bills were calculated to place lawyer regulation with the Arizona Legislature. See SBA, *Bills Regarding the Bar and Pending Rules Petition*, http://www.azbar.org/media/1398723/rulespetitionfactsheet.pdf

[3] SB 5721 requires the Washington State Bar Association to obtain an affirmative membership vote prior to increasing bar dues, http://app.leg.wa.gov/documents/billdocs/2017-18/Htm/Bills/Senate%20Bills/5721.htm

[4] SB 36, https://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=201720180SB36

Emps. Int'l Union, 132 S. Ct. 2277, 2289 (2012) and *Harris v. Quinn*, 134 S. Ct. 2618 (2014).

But for the untimely death of Justice Antonin Scalia it might be three victories for First Amendment rights in the past five years. Justice Scalia had been expected[5] to provide the fifth vote in *Friedrichs v. California Teachers Association.*[6] *Friedrichs* would have overruled *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) thereby restricting the ability of public-sector unions to collect fees from nonunion teachers for collective bargaining and administration costs. The impact on mandatory bars would have been significant. *Abood* provides the regulatory framework adopted in *Keller v. State Bar of California*, 496 U.S. 1 (1990).

Indeed, such was the apprehension of *Friedrichs* that 21 past presidents of one mandatory bar filed a brief with the Ninth Circuit as *Amici Curiae* supporting

[5] Adam Liptak, *Victory for Unions as Supreme Court, Scalia Gone, Ties 4-4*, N.Y. Times, March 29, 2016, https://www.nytimes.com/2016/03/30/us/politics/friedrichs-v-california-teachers-association-union-fees-supreme-court-ruling.html and Charlotte Garden, *What Will Become of Public-Sector Unions Now? With the death of Supreme Court Justice Antonin Scalia, organized labor may be spared—for a little while*, The Atlantic, Feb. 16, 2016, https://www.theatlantic.com/business/archive/2016/02/scalia-friedrichs/462936/

[6] Friedrichs v. California Teachers Association, 578 US _ (2016). Oyez.org, https://www.oyez.org/cases/2015/14-915. Questions presented: (1) "Whether *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment." (2) "Whether it violates the First Amendment to require that public employees affirmatively object to subsidizing nonchargeable speech by public-sector unions, rather than requiring that employees affirmatively consent to subsidizing such speech." Although the 9th Circuit was affirmed by a deadlocked Supreme Court, with the seating of Justice Gorsuch there is little doubt challenges to *Abood* and the constitutionality of union dues will persist.

the respondents.[7] However, *Friedrichs* is hardly the end.[8] The trend lines are clear. Mandatory bars should continue being concerned.

It's simply a question of time before the next foray[9] on *Abood*. As one commentator opined following *Harris*, "While not quite the stake in the heart that would kill public employee unions altogether, today's decision in *Harris v. Quinn* has at least made *Abood* a ghoul, one of the walking dead."[10]

But rather than prepare for the incoming tides of advancing U.S. Supreme Court compelled-speech jurisprudence heralded by *Knox* and *Harris*, the SBA seems unmindful and unperturbed. It continues vigorously opposing any structural reforms. There's little doubt, then, that the SBA will weigh in against the subject Petition having already doubled down on the status quo per the findings submitted September 1, 2015 by this Court's 16-member *Task Force on the Review of the Role and Governance Structure of the SBA*.

The members of that Task Force ought rightly be recognized for their service. But so, too, should the appearance of partiality inasmuch as the Task Force

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[7] See *Brief of 21 Past Presidents of the D.C. Bar as Amici Curiae,* Scotus Blog, November 12, 2015, http://www.scotusblog.com/case-files/cases/friedrichs-v-california-teachers-association/

[8] Joan C. Rogers and Kimberly Strawbridge Robinson, *SCOTUS Ruling Leaves Keller Alone—for Now*, Bloomberg Law, April 6, 2016, https://www.bna.com/scotus-ruling-leaves-n57982069505/

[9] See *Yohn v. Calif. Teachers Ass'n*, https://www.cir-usa.org/cases/yohn-v-california-teachers-association/ and *Janus v. AFSCME*, http://www.nrtw.org/blog/janus-v-afscme-update11212016/

[10] John Eastman, *Harris v. Quinn Symposium: Abood and the walking dead*, Scotus Blog, June 30, 2014, Professor Eastman goes on to add, "One can almost see the ghoul of *Abood* walking ever more slowly, arms outstretched, as its legs are shot out from under it piece by piece." http://www.scotusblog.com/2014/06/harris-v-quinn-symposium-abood-and-the-walking-dead/

was dominated by interested stakeholders, including the SBA CEO/Executive Director; an SBA lobbyist; and eight past or current SBA governing board members, five of them past SBA Presidents.

Perceiving no "crisis or event" with the current system, the Task Force sang a paean to the existing state of affairs, save for one lonely dissent[11] buried at the end of its report. If only the Task Force had been truly well-balanced among stakeholders, disinterested third parties, and yes, perish the thought even dissidents.[12] And if only it had contemporaneously employed the necessary steps to fully, inclusively and disinterestedly assess the SBA's structure, mission and governance in the face of mounting criticisms, challenges, and complaints from Arizona consumers, SBA members, and state lawmakers.

There are 18 voluntary bar jurisdictions where lawyers are regulated, disciplined, and the public is protected. And because lawyers in those 18 jurisdictions are held to the same high standards of ethical conduct and professionalism as Arizona lawyers, they are no less principled or professional. The SBA, however, promotes the self-interested fiction that a public protection mission cannot otherwise be discharged than by an integrated bar.

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[11] Paul Avelar, *Arizona State Bar Task Force Letter*, June 11, 2015, Institute For Justice, http://ij.org/wp-content/uploads/2015/02/Task-Force-letter1.pdf

[12] Christopher Hitchens, *Letters to a Young Contrarian*, "*. . . in life we make progress by conflict and in mental life by argument and disputation."* (as quoted in The Guardian, November 9, 2001 at https://www.theguardian.com/books/2001/nov/10/books.guardianreview6)

The SBA even conflates lawyer professionalism, civic-mindedness, and aspirational ideals not only with mandatory membership but with compulsory funding of any and all programs and services, including those having nothing to do with public protection. The truth is there is no nexus between public protection and an integrated bar or lawyer professionalism and an integrated bar. Lawyers in all jurisdictions, whether voluntary or mandatory, take similar oaths to uphold the Constitution; to act with professionalism; to abide by ethical principles; to conduct themselves with integrity; and to discharge client obligations to the best of their abilities.

II. Reasons for Supporting the Petition.

A. Right-to-Work. I commend the Petitioner for raising "Right to Work" virtues and especially for aptly describing the "burdensome exception" involved when "everyone seeking to engage in the practice of law in the State of Arizona must become a member of the union or association known as the State Bar."

There is a fundamental principle involved. The spirit if not the letter of that principle is profoundly breached when an individual's ability to work in their chosen occupation is preconditioned on joining and financing a private organization against their will. Considering the line of cases dating back 61 years to *Railway Employees' Dept. v. Hanson,*[13] 351 US 225, 238[14] (1956) to *Lathrop v.*

[13] Peter A. Martin, *A Reassessment of Mandatory State Bar Membership in Light of Levine v. Heffernan*, 73 Marq. L. Rev. 73, 144 (1989) referring to "the analogous relationship between the integrated bar and the union shop" that

Donohue, 367 U.S. 820, 842[15] (1961) to *Abood* and to *Keller*, it is perplexing when mandatory bar proponents sidestep the analog between a mandatory bar and a union shop.

But because of the definitional constraints expressly limiting the reach of Arizona Constitution Article 25 and likewise relevant provisions of the Arizona Revised Statutes to a "labor organization," absent a state constitutional amendment or the U.S. Supreme Court overruling *Lathrop*, the "burdensome exception" will foreseeably continue for Arizona's lawyers.

B. Conflict of Interest. Bifurcating the functions of the State Bar of Arizona into two distinct subsets, a mandatory membership organization ("Mandatory Bar") and a purely voluntary membership organization ("Voluntary Bar") will

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was "first recognized by Justice Douglas." Martin, however, notes that "*Hanson* has been criticized on a number of grounds, not the least of which was the Court's failure to give sufficient weight to the First Amendment concerns in the case."

[14] "On the present record, there is 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." *Hanson*, 351 U.S. at 238. To his great credit, five years later in *Lathrop v. Donohue*, 367 U.S. 820, 884 (1961), Justice Douglas dissenting from forced lawyer funding of an integrated bar wrote:

> "Once we approve this measure, we sanction a device where men and women in almost any profession or calling can be at least partially regimented behind causes which they oppose. I look on the *Hanson* case as a narrow exception to be closely confined. Unless we so treat it, we practically give carte blanche to any legislature to put at least professional people into goose-stepping brigades. Those brigades are not compatible with the First Amendment."

[15] "In our view, the case presents a claim of impingement upon freedom of association no different from that which we decided in *Railway Employees' Dept. v. Hanson*, 351 U.S. 224. We there held that § 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152, subd. 11, Eleventh, did not, on its face, abridge protected rights of association in authorizing union shop agreements between interstate railroads and unions of their employees conditioning the employees' continued employment on payment of union dues, initiation fees and assessments."

eliminate the longstanding conflict of interest that impedes public protection and disservices lawyers.[16]

It will make foremost the core regulatory functions essential to the mission of protecting the public. And by making trade association-like non-regulatory functions voluntary, the resulting voluntary subset of the SBA will be positioned to create value and better serve its members' interests.

Admittedly, the SBA's mission was recently clarified by this Court. But without bifurcation the conflict of interest will continue particularly when some SBA governing board members view the mandatory bar as a regulatory agency while other board members see its purpose as promoting the profession.[17]

The regulator/trade-association conflict of interest is hardly unique to Arizona. The problem and its solution have, for example, been the subject of ongoing debate in California.[18] In fact, matters have so accelerated there that deunification of the California State Bar may be completed as soon as this year.[19]

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[16] Ironically, the regulatory/trade association conflict of interest was extensively explained to the Mission & Governance Task Force by Member Paul Avelar's dissent, supra note 8. Parenthetically, I know SBA members who hate paying compulsory membership dues to finance bar activities. But having resigned themselves to it, they counterintuitively expect more trade association services. It's reminiscent of the line from Woody Allen's *Annie Hall*, "There's an old joke - um... two elderly women are at a Catskill mountain resort, and one of 'em says, "Boy, the food at this place is really terrible." The other one says, "Yeah, I know; and such small portions."

[17] For recent confusion about this conflicted mission, go no further than the 2017 BOG candidates' campaign statements where candidates ask either for *"the opportunity to serve my fellow lawyers"* or to be *"a voice for solo and young lawyers"* so that *"the needs of our members are voiced and heard"* or who pledge to *"make sure the Bar is here to help attorneys, not hurt them."* And also see vague variations on the tried-and-tested trade association theme of running *"to ensure the Bar is working for its members"* or that it *"performs more services for the membership." News For Members, Board of Governors Candidates*, Arizona Attorney, May 2017, pp.72 - 76.

[18] See Dan Walters, *State Bar gets the message, begins to split its functions*, Sacramento Bee, January 8, 2017, http://www.sacbee.com/news/politics-government/politics-columns-blogs/dan-walters/article125360534.html

To be sure, when the Nebraska Supreme Court ordered bifurcation of the Nebraska Bar Association on December 6, 2013, *In re Petition for a Rule Change to Create a Voluntary State Bar of Nebraska*, 286 Neb. 1018, 841 N.W.2d 167 (2013), it was not to expressly resolve a conflicted mission but to "ensure that the Bar Association remains well within the limits of the compelled-speech jurisprudence of the U.S. Supreme Court and avoid embroiling this court and the legal profession in unending quarrels and litigation over the germaneness of an activity in whole or in part, the constitutional adequacy of a particular opt-in or opt-out system, or the appropriateness of a given grievance procedure." 841 N.W.2d 179 -180. The same policy and Constitutional concerns resonate in Arizona along with the aforementioned intractable conflict of interest.

C. Free Speech Rights. And speaking of First Amendment concerns, the proposed Rule amendment better respects attorney free speech rights by limiting SBA forced funding only to regulatory functions consistent with constitutionally permissible activities "germane" to allowable purposes. *Keller*, 496 U.S. 1, 14. The allowable purposes are regulating the legal profession to improve the quality of

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and Lorelei Laird, *California legislature may split state bar into two separate entities*, ABA Journal, January 1, 2017, http://www.abajournal.com/magazine/article/california_bar_dues_legislation/ Additional policy insights for bifurcation are found in Bridget F. Gramme's *Testimony of the Center for Public Interest Law regarding Organizational Structure of the Bar to Enhance Protection of the People of California*, February 9, 2017, http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000017003.pdf and especially, the *Governance in the Public Interest Task Force Report* at http://www.calbar.ca.gov/Portals/0/documents/reports/2016_Governance_in_the_Public_Interest_Task_Final_Task_Force_&_Minority_Report.pdf and the extensively documented in-depth 258-page Task Force "White Paper" at http://www.calbar.ca.gov/portals/0/documents/2016%20Governance%20in%20the%20Public%20Interest%20Task%20Force%20Appendices_A-O_080816.pdf

[19] See SB36, supra note 4

legal services or as the nation's highest court recently expounded, "activities connected with proposing ethical codes and disciplining bar members," *Harris*, 134 S. Ct. 2618, 2643 (citing *Keller*, 496 U.S. at 14) Under *Knox*, 132 S. Ct. 2277, 2285, mandatory dues cannot be "used for political, ideological, and other purposes not germane" to the organization's mandatory purpose. In permitting the use of mandatory dues for non-germane activities that are not political or ideological, the SBA not only ignores the "germaneness" requirement in *Keller* but as a consequence continues to infringe on the First Amendment rights of members.

D. Transparency. Bifurcation will also promote transparency insofar as the Petition proposes amending Rule 32 so that on payment of the annual regulation fee each member will "also receive an independently audited list of expenditures that verifies mandatory assessments were spent in the preceding year only on regulatory functions or for the funding of the client protection fund."

Currently, the SBA asserts its standing as a 501(c) (6) as grounds for non-compliance with A.R.S. 39-121. It then acts as its own arbiter of the breadth of its transparency. Selective transparency is unacceptable. The Petition therefore augurs a welcome change and an overdue departure from the current situation.

The SBA calls itself *Keller*-pure. But inconsistently, it believes it can fund *any* activity or expenditure, including those not germane to the regulation of the legal profession. Because of its organizational opacity, members have little inkling

of the extent of these expenditures. For these reasons, on February 1, 2017 eleven SBA members, including the undersigned, filed a 9-page *Mandatory Dues Challenge Regarding State Bar Activities*.[20] The signatories demanded:

1. A complete accounting of the State Bar's expenditures;
2. That the State Bar immediately refund our 2016 pro rata share of mandatory dues expended on all the activities listed in section VI below or otherwise justify the constitutionality of those expenditures and activities;
3. That the State Bar immediately cease collecting any mandatory dues for these activities now and in the future;
4. That the State Bar revise its bylaws to comply with the First Amendment.

On February 24, 2017, the SBA mailed a 1½ page non-responsive answer to the challengers. It disregarded the aforementioned demands, including the asked-for complete accounting of SBA expenditures. In a letter dated April 28, 2017, the SBA finally notified dues challengers that its governing board had approved an uncorroborated pro rata lobbying expense refund of $4.29 to each. The refund barely covers the cost of a Unicorn Frappuccino. Without reforms, one thing is certain. The amount of sunshine the SBA is willing to tolerate remains solely its own discretion.

III. The Nebraska Model. The SBA lobbies lawmakers each session to vote against bar bifurcation legislation, including in 2017 via an *HB2295 Fact Sheet* it produced. The SBA's Fact Sheet called the bifurcated bar in Nebraska an "untested

[20] A copy of the *Mandatory Dues Challenge* is posted by one of the signatories at http://www.reformthebar.com/

concept" and claimed it "has proven problematic." The sheet asked, "Why switch to an untested concept that could harm consumers?"

These statements were made without evidence undoubtedly influenced by the less than neutral anecdotal aggrievements of the Nebraska Bar's Executive Director.[21] Furthermore, the suggestion of consumer harm ignores reality. Public protection in Nebraska is not predicated on an integrated bar. The Attorney Services Division[22] of the Nebraska Supreme Court protects Nebraskans by overseeing licensure, registration and discipline. The Division houses the Office of Counsel for Discipline which investigates complaints against attorneys and the Commission on Unauthorized Practice of Law which protects the public against persons practicing law without a license.

Additionally, my conversations with Nebraska attorneys the past two years reveal a more member focused Nebraska Bar Association since deunification. My sample is admittedly small. Nonetheless, the feedback is positive, especially concerning lower mandatory fees. I am even told the inexplicable post deunification cuts to the pro bono Volunteer Lawyer Program (VLP) have been restored -- although the Nebraska Bar continues spending more on lobbying than on VLP. Significantly, the attorneys also describe a Nebraska Bar with a decided

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[21] Dan Kittay, *Deunification challenge in Michigan, big changes in Nebraska: Part of a trend?*, Bar Leader, May-June 2014, http://www.americanbar.org/publications/bar_leader/2013-14/may_june/deunification_challenge_michigan_big_changes_nebraska_part_trend.html

[22] Attorney Services Division of the Nebraska Supreme Court, https://supremecourt.nebraska.gov/13448/attorney-services-division-nebraska-supreme-court

member retention focus; an enhanced customer service orientation; a new-found dedication to fiscal discipline; and an improved attention to value creation.[23]

IV. Goldwater Institute Concerns. I would be remiss not to mention that on its website[24] and in its *HB2295 Fact Sheet*, the SBA makes much of an out-of-context statement in the Petition, i.e., "Removing any part of lawyer regulation from the Supreme Court and placing it with the Legislature is, for many reasons, not a good idea." The SBA characterizes this as a Goldwater Institute "concern."

The 'fact' sheet is replete with misdescriptions such as the SBA already being subject to open records or that a mandatory bar that is part of the judicial branch handling all regulatory activities and a voluntary bar handling everything else is "untested." Operationally, Nebraska's Bar is no different than 18 voluntary jurisdictions. But perhaps the sheet's most significant factual failing is omitting the Goldwater Institute's full support of HB2221[25] and HB2295.[26] Also unmentioned

[23] Also see public testimony of Nebraska Bar Executive Director Liz Neeley, "In making cuts, voluntary bar associations will look at all they currently do and ask themselves which of these provides value to our membership? How can we strengthen our value proposition?", Task Force "White Paper," p.98, supra note18

[24] *Bills regarding the Bar and Pending Rules Petition*, Government Relations, State Bar of Arizona, February 2, 2017, http://www.azbar.org/aboutus/governmentrelations/billsregardingthebarandpendingrulespetition/

[25] *HB2221 Bullet Points* at http://workingforabetterbar.org/wp-content/uploads/2016/03/Goldwater-Institute-HB-2221-Bullet-Points.pdf and see Jim Manley, *Arizona Lawyers Shouldn't Be Misled: They Have Constitutional Rights, Too*, March 18, 2016, The Goldwater Institute, http://goldwaterinstitute.org/en/work/topics/constitutional-rights/government-preferences/arizona-lawyers-shouldnt-be-misled-they-have-const/ and see Mark Brodie, *Attorney: Make Arizona State Bar Membership Voluntary*, The Show, KJZZ 91.5, October 15, 2015, http://theshow.kjzz.org/content/206464/attorney-make-arizona-state-bar-membership-voluntary

[26] See *Goldwater Institute HB 2295 Bullet Points* at http://workingforabetterbar.org/wp-content/uploads/2017/03/Goldwater-Institute-HB-2295-Bullet-Points.pdf

is the Institute's consistent[27] stance for ending compulsory membership and forced funding as a precondition to practice law in Arizona.[28]

V. Conclusion. Petition R-17-0022 is not only good public policy but it positions the SBA ahead of emerging U.S. Supreme Court compelled-speech jurisprudence. In the words of the Nebraska Supreme Court, "By drawing the line for use of mandatory bar assessments well within the bounds of the compelled-speech jurisprudence, we ensure that the assessments—which will be administered by the Supreme Court—will be used only for activities that are clearly germane . . . And by drawing the line in this way, we will clearly avoid the morass of continuing litigation experienced in other jurisdictions."[29]

The Arizona Supreme Court should do likewise. Limit the expenditure of compulsory bar dues to those specific activities germane to regulation of the legal profession and deem dues for all other bar activities voluntary.

Respectfully submitted this 3rd day of May 2017

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[27] On April 4, 2017, oral argument was heard in the Goldwater Institute suit brought on behalf of North Dakota Attorney Arnold Fleck against the North Dakota Bar at the 8th Circuit. See *Fleck v. Wetch*, Goldwater Institute, Feb. 13, 2015, http://www.goldwaterinstitute.org/en/work/topics/constitutional-rights/free-speech/case/fleck-v-mcdonald/

[28] *Related Reforms*, The Goldwater Institute, January 10, 2017 http://www.goldwaterinstitute.org/en/work/topics/constitutional-rights/related-reforms/case/petition-to-amend-arizona-supreme-court-rule-32/

[29] *In re Nebraska State Bar Ass'n*, 286 Neb. 1018