No. 19-831

In the
Supreme Court of the United States

ADAM JARCHOW and MICHAEL D. DEAN,
Petitioners,

v.

STATE BAR OF WISCONSIN, et al.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CATO INSTITUTE, ATLANTIC LEGAL FOUNDATION, REASON FOUNDATION, AND INDIVIDUAL RIGHTS FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), the Court held that state laws compelling public employees to subsidize the speech of labor unions violate the First Amendment, overruling *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). The same improperly "deferential standard" that *Abood* espoused underpins the two decisions of the Court—*Lathrop v. Donohue*, 367 U.S. 820 (1961), and *Keller v. State Bar of California*, 496 U.S. 1 (1990)—permitting states like Wisconsin to compel attorneys to be members of an "integrated bar" and fund its speech and advocacy on matters of substantial public concern. Accordingly, the question presented is:

Whether *Lathrop* and *Keller* should be overruled and "integrated bar" arrangements like Wisconsin's invalidated under the First Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

Rules

INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. Among other matters affecting the public interest, PLF has repeatedly litigated in defense of the right of workers not to be compelled to make involuntary payments to support political or expressive activities with which they disagree. To that end, PLF attorneys were counsel of record in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Brosterhous v. State Bar of Cal.*, 12 Cal. 4th 315 (1995); and *Cumero v. Pub. Emp't Relations Bd.*, 49 Cal. 3d 575 (1989), and PLF has participated as amicus curiae in all of the most important cases involving state laws allowing unions to garnish wages and force association in violation of the First Amendment, from *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), to *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298 (2012); *Harris v. Quinn*, 573 U.S. 616 (2014); *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016); and *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018).[1]

The Cato Institute is a nonpartisan public policy research foundation established in 1977 and dedicated to advancing the principles of individual

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[1] Pursuant to this Court's Rule 37.2(a), all parties consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of Amici Curiae's intention to file this brief. Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*.

Atlantic Legal Foundation (ALF) is a nonprofit, nonpartisan public interest law firm that provides effective legal advice, without fees, to scientists, parents, educators, and other individuals and trade associations. ALF is guided by a basic but fundamental philosophy: Justice prevails only in the presence of reason and in the absence of prejudice. ALF seeks to promote sound thinking in the resolution of legal disputes and the formulation of public policy. Among other things, ALF's mission is to advance the rule of law in courts and before administrative agencies by advocating limited and efficient government, free enterprise, individual liberty, school choice, and sound science. ALF's leadership includes distinguished legal scholars and practitioners from across the legal community. For the last 25 years, ALF has litigated numerous "compelled speech" and "compelled association" cases in the Second and Third Circuits as "first chair" trial and appellate counsel for students at public universities challenging the use of mandatory student fees to fund political speech of organizations with which they disagreed, and as counsel for amici, in cases such as *Janus*, 138 S. Ct. 2448, *Harris*, 573 U.S. 616, and *Friedrichs*, 136 S. Ct. 1083.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason participates as amicus curiae in cases raising significant constitutional or legal issues, including *Janus*, 138 S. Ct. 2448.

The Individual Rights Foundation (IRF) was founded in 1993. It is the legal arm of the David Horowitz Freedom Center (DHFC), a nonprofit 501(c)(3) organization (formerly known as the Center for the Study of Popular Culture). The mission of DHFC is to promote the core principles of free societies—and to defend America's free society—through educating the public to preserve traditional constitutional values of individual freedom, the rule of law, private property, and limited government. In support of this mission, the IRF litigates cases and participates as amicus curiae in appellate cases, such as *Janus*, that raise significant First Amendment speech issues.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

Petitioners Adam Jarchow and Michael D. Dean are Wisconsin attorneys required by state law to join the State Bar of Wisconsin and subsidize its speech on

matters of substantial public concern ranging from the "administration of justice" to a variety of substantive and controversial legislation. Approximately 25,000 attorneys are compelled to join and subsidize the Wisconsin Bar as a precondition to practicing law within the state. Jarchow and Dean disagree with the bar's speech on a variety of political and ideological issues and oppose being compelled to financially support it with their membership dues. For the same reason, they object to being compelled to join the bar as members. They sued the Wisconsin Bar and its officers, seeking declaratory and injunctive relief from the compelled-membership and compelled-dues requirements. The courts below ruled in favor of the Wisconsin Bar because they were bound by this Court's decisions in *Lathrop* and *Keller*.

States do have a legitimate regulatory role with regard to attorneys and the practice of law. Over 20 states have a state regulatory body—sometimes, as in California, called a "state bar"—that exists solely to regulate admission, discipline, and aspects of legal practice such as continuing education and client trust accounts. An "integrated" bar, like the State Bar of Wisconsin, combines legitimate regulatory functions with actions more befitting a private trade association and it is this latter function that infringes upon nonconsenting members' First Amendment rights.

This Court's plurality decision in *Lathrop* accepted that integrated bar associations were the ideal way to efficiently, effectively, and non-controversially manage the core regulatory functions of state bars. 367 U.S. at 839-42. Subsequently, *Keller* conceded that *Lathrop* controlled on the issue of whether an integrated bar was constitutional,

496 U.S. at 7-8, and the *Keller* Court did not consider that question beyond noting its reliance on *Lathrop*[2] before moving on to decide the question reserved in the earlier case. *Id.* at 9, 14. Thirty years later, this Court's decision in *Janus* undermines the foundations on which *Lathrop* and *Keller* were decided. Among other things, *Janus* acknowledged that the decision in *Abood v. Detroit Board of Education* failed to appreciate the inherently political nature of public sector unions. Similarly, *Lathrop* and *Keller* failed to appreciate the pervasive politicization of state bar associations.

The combined—integrated—regulatory bodies and trade associations pursue political ends and work to ensure that objectors get the smallest possible deduction for "nonchargeable" activities after jumping through the greatest number of hoops to claim it. The Wisconsin Bar perceives its role as a general guardian of the legal system and claims to justify its reach into political and ideological activities by couching its involvement under innocuous sounding phrases like "pursuing the administration of justice." As *Janus* noted, matters of public policy that involve the allocation of tax dollars—a factor in most legislation—

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[2] Counsel for Petitioners, Anthony T. Caso, made this point in his opening remarks of the *Keller* oral argument. *Keller v. State Bar of Cal.*, Oyez, https://www.oyez.org/cases/1989/88-1905 (last visited Dec. 2, 2019) ("This case does not challenge the right of California to regulate attorneys through a mandatory bar association. Instead, it asks whether having done so, may it also authorize the bar to, in the words of the [California Supreme Court], comment generally upon matters pending before the legislature."). It is also worth noting that the *Keller* complaint was filed in 1982, just five years after *Abood*, a case representing a jurisprudence far less protective of individual First Amendment rights.

are inherently political. And ideological activities extend even further to societal and cultural concerns. Given the sheer breadth of such political and ideological activities, many attorneys have abundant reasons to resent subsidizing and associating with the government's mandatory bar association, just as public employees may not want to associate with or subsidize public employee unions for a wide range of reasons.

Applying the constitutional doctrine set forth most recently in *Janus*, this Court should grant certiorari to hold that the Constitution forbids the state from coercing attorneys into association with an integrated bar.

REASONS TO GRANT THE PETITION

I

INTEGRATED BAR ASSOCIATIONS ENGAGE IN PERVASIVE POLITICAL AND IDEOLOGICAL ACTIVITIES, CREATING A SIGNIFICANT INFRINGEMENT ON FIRST AMENDMENT RIGHTS

The question presented by this petition is one of national importance that can be settled only by this Court.[3] While mandatory government bar officials

[3] The question presented in this case also is raised in *Fleck v. Wetch*, docket no. 19-670, arising out of the Eighth Circuit. Other cases raising similar issues have been filed across the country. While the specifics of each bar's program differ, the underlying issue—do the principles announced in *Janus* apply to mandatory integrated government bar associations—remains consistent across the litigation. The Texas State Bar has compiled pleadings filed in cases in Texas, Louisiana, Oklahoma, Oregon, North Dakota, and Michigan, as well as the present case, detailing the specific activities that extend well beyond regulation and

tout their organizations' roles as disciplinarians and evangelists for legal representation and justice, bars across the country engage in a wide range of political and ideological activities designed to implement the officials' view of a better society.

While *Janus* acknowledged that the principles announced in the decision applied in "other contexts," it did not elaborate, with the consequence that lower courts, including the court below, reject attempts to apply it in cases involving integrated mandatory bar associations.[4] The Court should grant certiorari in this case to make explicit what was earlier implied: that *Janus* provides greater understanding of the nature of the injury to individuals forced to support activities against their will. *See Keller*, 496 U.S. at 12 ("There is . . . a substantial analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of employee unions and their members, on the other."); *Gardner v. State Bar of Nevada*, 284 F.3d 1040, 1042 (9th Cir. 2002) ("[T]here is some analogy between a bar that, under state law, lawyers must join and a labor union with an agency shop."); *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291, 298 (1st Cir. 2000) ("No reason has been presented to give attorneys who are compelled to belong to an integrated bar less

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discipline of attorneys. *See* State Bar of Texas, *McDonald et al. v. Sorrels et al.*, https://www.texasbar.com/Content/NavigationMenu/McDonald_et_al_v_Longley_et_al1/default.htm (last visited Jan. 7, 2020).

[4] This Court suggested that the principles announced in *Janus* do have a bearing on the bar cases when it granted the petition for writ of certiorari in *Fleck v. Wetch*, 193 S. Ct. 590 (2018), and remanded it to the Eighth Circuit "for further consideration in light of *Janus*."

protection than is given employees who are compelled to pay union dues, and *Keller* suggests the two groups are entitled to the same protection."); *Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396, 1404 (7th Cir. 1993) (*Keller* "represented the first definitive legal statement that mandatory bar dues had the same restrictions on their use as compulsory union dues.").

First, *Janus* clarified that all actions relating to the allocation of public resources are inherently political, as well as those on matters of "value and concern to the public." *Janus*, 138 S. Ct. at 2474-76 (examples include speech related to collective bargaining, education, child welfare, healthcare and minority rights, climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions). *Janus* is consistent with the Court's general understanding of the vast range of what constitutes "political" expression. *See, e.g.*, *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1888 (2018) ("[P]olitical" can be expansively defined to include anything "of or relating to government, a government, or [] governmental affairs" or the "structure or affairs of government, politics, or the state.") (citation omitted); *id.* at 1891 ("All Lives Matter" slogan, National Rifle Association logo, rainbow flag all can be construed as political expression).

Beyond the world of expressive activity that can be described as political, the compelled speech cases also protect individuals from being forced to associate with "ideological" expression, even though what is "ideological" can be tricky to pin down. There is no "bright line between ideological and non-ideological." *Romero v. Colegio de Abogados de Puerto Rico*, 204

F.3d at 302. But, in general, "ideology" encompasses "the body of ideas reflecting the social needs and aspirations of an individual, group, class, or culture." *The American Heritage Dictionary of the English Language* at 654 (Morris ed. 1981). Justice Stewart defined "ideological expression" as follows: "Ideological expression, be it oral, literary, pictorial, or theatrical, is integrally related to the exposition of thought that may shape our concepts of the whole universe of man." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 779 (1976) (Stewart, J., concurring).

Scholars define "ideology" in varying ways, but all stress the social aspect of ideological thought:

- "[A] distinct and broadly coherent structure of values, beliefs, and attitudes with implications for social policy." James Reichley, *Conservatives in an Age of Change: The Nixon and Ford Administrations* at 3 (1982), *quoted in* Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* at 36 (1987) (Higgs).
- "[A] collection of ideas that makes explicit that nature of the good community . . . . [T]he framework by which a community defines and applies values." George C. Lodge, *The New American Ideology* at 7 (1975), *cited in* Higgs, *supra*, at 36.
- "[A]n economizing device by which individuals come to terms with their environment and are provided with a 'world view' so that the decision-making process is simplified. [It is] . . . inextricably interwoven with moral and ethical

> judgments about the fairness of the world the individual perceives." Douglas C. North, *Structure and Change in Economic History* at 49 (1982), *cited in* Higgs, *supra*, at 36-37.

At a minimum, therefore, "ideological" activities that cannot be funded with compelled fees include those seeking social change, "good" government, or "fairness" in the way the world operates.

II

LOWER COURTS TURN A BLIND EYE TO INTEGRATED BARS' POLITICAL AND IDEOLOGICAL ACTIVITIES WHEN THEY ARE DESCRIBED IN GENERAL LANGUAGE OF JUSTICE

These goals of social change, good government, and fairness permeate mandatory bars' mission statements and activities. The Wisconsin Bar's "strategic priorities" are

> increasing access to justice, promoting a high-functioning justice system, ensuring a commitment to diversity and inclusion, and driving competitive advantage for our members and the organization. . . . [T]he State Bar aids the courts in improving the administration of justice, provides continuing legal education and other services for its members, supports the education of law students, and educates the public about the legal system.[5]

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[5] State Bar of Wisconsin, *About Us*, https://www.wisbar.org/aboutUs/Overview/Pages/overview.aspx (last visited Jan. 9,

This is similar to the missions of most integrated bars. For example, the State Bar of North Dakota, at issue in *Fleck*, exists "to serve the lawyers and the people of North Dakota, to improve professional competence, promote the administration of justice, uphold the honor of the profession of law, and encourage cordial relations among members of the State Bar."[6] The Texas State Bar's mission

> is to support the administration of the legal system, assure all citizens equal access to justice, foster high standards of ethical conduct for lawyers, enable its members to better serve their clients and the public, educate the public about the rule of law, and promote diversity in the administration of justice and the practice of law.[7]

Michigan's State Bar's mission is to "aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interest of the legal profession

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2020). The Bar's website emphasizes that it is a "private association" that "does not license or discipline attorneys." *Id.*

[6] State Bar Association of North Dakota, Board of Governors, https://www.sband.org/page/board_of_governors (last visited Jan. 7, 2020).

[7] State Bar of Texas, Mission Statement, https://www.texasbar.com/AM/Template.cfm?Section=Our_Mission&Template=/CM/HTMLDisplay.cfm&ContentID=41823 (last visited Jan. 7, 2020).

in this State."[8] The Louisiana State Bar Association exists to

> assist and serve its members in the practice of law, assure access to and aid in the administration of justice, assist the Supreme Court in the regulation of the practice of law, uphold the honor of the courts and the profession, promote the professional competence of attorneys, increase public understanding of and respect for the law, and encourage collegiality among its members.[9]

Others are much the same.[10] The common theme and language across all the mandatory bars is dedication to "administration of justice." Yet this is precisely the phrase in the California Bar's statutory authorization that this Court held in *Keller* to permit too broad an infringement on individual bar members' First Amendment rights. *Keller*, 496 U.S. at 14-15. Specifically, the Court noted that the California Bar's

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[8] State Bar of Michigan, Mission Statement, https://www.michbar.org/file/generalinfo/pdfs/missionstatement.pdf (last visited Jan. 7, 2020).

[9] Louisiana State Bar Association, The Mission of the Louisiana State Bar Association, https://www.lsba.org/BarGovernance/LSBAMission.aspx (last visited Jan. 7, 2020).

[10] *See, e.g.*, State Bar of Arizona, Mission, Vision, and Core Values, https://www.azbar.org/aboutus/mission-vision-andcore values/ (last visited Jan. 7, 2020); Hawaii State Bar Association, Mission, https://hsba.org/HSBA/ABOUT_US/Governance/HSBA/About_Us/Governance.aspx?hkey=61f455cd-e768-470c-8750-4243223f861d (last visited Jan. 7, 2020); Idaho State Bar, Mission Statement, https://isb.idaho.gov/about-us/ (last visited Jan. 7, 2020); The Mississippi Bar, Mission, https://www.msbar.org/inside-the-bar/governance/mission/ (last visited Jan. 7, 2020).

pursuit of "administration of justice" led it to lobby against polygraph tests for state and local agency employees, possession of armor-piercing handgun ammunition, and a federal guest-worker program. *Id*. at 15. It lobbied in favor of an unlimited right of action to sue anyone causing air pollution. *Id*. The bar's policy-making branch, the Conference of Delegates, justified proposing legislation regarding gun control, a victim's bill of rights, abortion, public school prayer, and busing as under the "administration of justice" umbrella. *Id*. Regardless of whether these activities could be considered valid pursuits toward the "administration of justice," compelled funding of these political and ideological programs violated objectors' First Amendment rights.

Notwithstanding the *Keller* decision, mandatory integrated government bars, including the State Bar of Wisconsin, continue to justify a wide range of activities as related to the "administration of justice." And federal courts continue to grant integrated bars expansive power to demand money to fund these activities. *See Kingstad v. State Bar of Wisconsin*, 622 F.3d 708, 721 (7th Cir. 2010) (Seventh Circuit rejected the First Amendment claim of an attorney forced to make unwilling subsidies to the mandatory bar's public relations campaign); *Gardner*, 284 F.3d at 1043 (Ninth Circuit held that attorneys can be forced to support government bar's public relations campaign to improve public perceptions of lawyers); *Liberty Counsel v. Florida Bar Bd. of Governors*, 12 So. 3d 183, 189 (Fla. 2009) (approving bar's authorization for a section to file an amicus brief related to a law prohibiting homosexuals from adopting children); *Popejoy v. New Mexico Bd. of Bar Commissioners*, 887 F. Supp. 1422, 1430-31 (D.N.M.

1995) (approving mandatory funding for the bar's lobbying for higher salaries for government lawyers and staff, court-appointed representation in child abuse and neglect cases, a task force to assist military personnel and families, and the bar's own litigation expenses).

Lower courts remain obligated to follow *Lathrop* and *Keller* because neither has been overruled, *Agostini v. Felton*, 521 U.S. 203, 237 (1997), even as their legal foundation has been significantly eroded by the evolution in First Amendment compelled speech cases, culminating in *Janus*. Without this Court's overruling of *Lathrop* and *Keller* (to the extent it relies on *Lathrop*), lower courts cannot consider individual attorneys' freedom of association claims—that they object to being forced to associate with a hybrid licensing organization and trade association. *See Morrow v. State Bar of California*, 188 F.3d 1174, 1175 (9th Cir. 1999) (rejecting attorneys' "complain[t] that by virtue of their mandatory State Bar membership, they are associated in the public eye with viewpoints they do not in fact hold"); *Kaimowitz v. Florida Bar*, 996 F.2d 1151, 1154 (11th Cir. 1993); *Schell v. Gurich*, 409 F. Supp. 3d 1290, 1298 (W.D. Okla. 2019); *Gruber v. Oregon State Bar*, Nos. 3:18-cv-1591-JR, 3:18-cv-2139-JR, 2019 WL 2251826 at *9 (D. Or. Apr. 1, 2019). Only this Court can resolve the question.

CONCLUSION

To harmonize First Amendment jurisprudence across analogous union and bar compelled dues contexts, and to protect individual rights of free speech and association, the petition for writ of certiorari should be granted.

DATED: January 2020.

Respectfully submitted,

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