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

REPLY BRIEF FOR PETITIONERS

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Respondents' arguments only confirm the necessity of the Court's review. *Lathrop v. Donohue*, 367 U.S. 820 (1961), and *Keller v. State Bar of California*, 496 U.S. 1 (1990), authorized States to compel attorneys to join integrated bar associations and subsidize their speech on matters of public concern, such as the law and operation of government. *Janus v. AFSCME* specifically rejected the legal standard applied in *Keller* as improperly "deferential" and out of step with the Court's "free speech cases." 138 S. Ct. 2448, 2480 (2018). And *Lathrop* was, if anything, more deferential than *Keller*. Respondents do not even attempt to reconcile *Lathrop* and *Keller* with *Janus*'s holding that compelled subsidization of speech on matters of public concern is subject to heightened scrutiny, because that would be an impossible task. Instead, they are left to argue that *Janus*'s articulation of First Amendment law is limited to assessments of agency fees from public employees and that the Court's freedom-of-association cases have nothing to say about State-compelled membership in expressive associations. These unprincipled arguments only confirm that *Lathrop* and *Keller* are indefensible anomalies and require reconsideration by the Court.

Seeking to forestall that necessary reconsideration, Respondents urge the Court to wait for a case where there has been discovery, summary judgment proceedings, or even a "full-blown trial." BIO.31. Yet Respondents recognize that Petitioners' claims were controlled in the lower courts by *Lathrop* and *Keller*, which was the basis on which Respondents sought

and obtained dismissal and on which that dismissal was affirmed. This case presents a pure question of law concerning the First Amendment's application to State-compelled membership in and funding of an advocacy organization, and the Court has often decided similar questions on the basis of pleaded-but-unproven facts, including in *Janus*, *Keller*, and *Lathrop*. Given that *Lathrop* and *Keller* are binding on the lower courts, there is no possibility of further "percolation" on these issues and no other posture in which the question presented here could make its way to this Court.

I. Respondents' Defense of *Lathrop* and *Keller* Fails

A. In conflict with the Court's modern First Amendment jurisprudence, *Lathrop* and *Keller* failed to subject compelled membership in an integrated bar and subsidization of its speech to heightened scrutiny. Respondents' inability to defend those decisions' reasoning demonstrates the need for review.

1. Respondents refuse to confront *Lathrop*'s and *Keller*'s fundamental conflict with the First Amendment principles articulated in *Janus*. Compelled subsidization of speech on matters of public concern, *Janus* held, "seriously impinges on First Amendment rights" and is therefore subject to heightened scrutiny. 138 S. Ct. at 2464–65. *Janus* condemned the inappropriately "deferential standard" of labor-law precedents like *Abood* that *Lathrop* and *Keller* applied to uphold mandatory bar dues. *Id.* at 2479–80. Respondents do not (and cannot) dispute that *Keller*

in particular drew its deferential standard from *Abood*, Pet.12–13, that *Janus* rejected that standard, 138 S. Ct. at 2480, and that Petitioners and other attorneys subject to integrated-bar schemes are compelled to subsidize speech on matters of intense public concern, Pet.11–12, such that the *Janus* standard applies. *Janus* knocked the legs out from under *Lathrop*'s and *Keller*'s unconsidered approval of such schemes, and Respondents' refusal to engage *Janus*'s reasoning only underscores the point.

2. Rather than take *Janus* seriously, Respondents contend that its reasoning is limited to assessments of agency fees from public employees and has no "application in the integrated bar context." BIO.16. But *Janus*, as Respondents acknowledge, "overruled *Abood*," *id.*, and *Abood* is the foundation upon which *Keller*'s approval of compelled dues rests. 496 U.S. at 13–14 (applying *Abood* to hold that bar associations may "constitutionally fund activities germane to [certain purposes] out of the mandatory dues of all members"). And there is no way to reconcile *Janus*'s holding that compelled subsidization of speech on matters of public concern is subject to heightened scrutiny with the decidedly lax standard applied in *Lathrop* and *Keller*—again, Respondents do not even attempt the task. But take *Janus* at its word as to what the First Amendment demands, and it is clear that the rule of *Lathrop* and *Keller* has become a constitutional anomaly requiring reconsideration.

3. Respondents' claim (at 17) that dicta in *Harris v. Quinn*, 573 U.S. 616 (2014), blunts *Janus*'s application in this context is badly mistaken. *Harris* did not, as Respondents contend (at 12), declare "*Keller*…fully consistent with the First Amendment." *Harris* held that Illinois's claimed interests in promoting "labor peace" and worker "welfare" were insufficient to justify subjecting personal assistants who were not full-fledged public employees to an agency-fee requirement. 573 U.S. at 649–51. That result, the Court explained, did not itself "call into question" *Keller*, because *Keller* was premised on different claimed interests, regulation of the practice of law and improving the quality of legal services. *Id.* at 655–56. *Janus*, however, took the additional step of overruling *Abood* and generally holding compelled subsidization of core speech to be subject to heightened scrutiny—in plain conflict with *Keller*, which had applied *Abood*'s improperly deferential standard. It is a complete *non sequitur* to claim, as Respondents do, that the limited reach of *Harris*'s tailoring analysis somehow cabins *Janus*'s generally applicable legal standard.[1]

Moreover, *Harris*'s discussion of *Keller* takes a strikingly narrow view of that decision as precluding compelled subsidization of the bulk of the State Bar's

[1] Indeed *Harris* itself belies that claim, recognizing that it would be constitutionally problematic for a State to compel "individuals who follow a common calling and benefit from advocacy or lobbying conducted by a group" to "make payments to the group." 573 U.S. at 646.

activities. Whereas *Keller* approved compelled subsidies to fund "regulating the legal profession and improving the quality of legal services," 496 U.S. at 13, *Harris* states that dissenting attorneys may be compelled to pay only "the portion of the dues used for activities connected with proposing ethical codes and disciplining bar members," 573 U.S. at 655. In this respect, *Harris* confirms the necessity of clarifying attorneys' rights under the Court's modern free-speech jurisprudence.

4. As with *Janus*, Respondents refuse to take seriously the reasoning of the Court's freedom-of-association decisions as they apply to State-compelled membership in an expressive association like the State Bar. Those decisions are not, as Respondents claim (at 18), limited to a so-called "freedom to exclude"; instead, they recognize that the First Amendment protects "[t]he right to eschew association for expressive purposes," *Janus*, 138 S. Ct. at 2463 (discussing authorities), and that impingements of that right are subject to heightened scrutiny, *id*. at 2464–65. Respondents, however, do not dispute that *Lathrop* subjected compelled bar membership to no scrutiny at all and that *Keller*, with no reasoning on the point, reaffirmed *Lathrop*. *See* Pet.14–15. That dismissive approach is at odds with the Court's recent, more rigorous jurisprudence.

Rather than defend *Lathrop*'s and *Keller*'s (non-existent) reasoning on this point, Respondents contend (at 19) that forcing attorneys to join the State Bar

works no injury at all because the association is compelled by law and so "does not imply identification with the State Bar's positions." But the same could be said of *any* instance of State-compelled speech or association. The astounding implication of Respondents' claim—that government compulsion to associate with an advocacy organization never violates the First Amendment *because it is compelled*—only confirms the indefensibility of *Lathrop*'s and *Keller*'s unreasoned approval of such arrangements and the need for reconsideration.

5. Finally, Respondents make no attempt to defend the tailoring of Wisconsin's requirements that attorneys join the State Bar and subsidize its advocacy. *See* Pet.17–19. They do not contend that these severe burdens on First Amendment freedoms are important to achieving the State's interests in improving the quality of legal services or regulating the legal profession, or even that those interests are sufficiently compelling to justify impingement of First Amendment rights. This further confirms that *Keller*'s assumption that those interests support compelled membership and funding of an integrated bar was mistaken and requires reconsideration.

B. Respondents do not take issue with the point that their claim for adherence to *stare decisis* here is far weaker than the one the Court rejected in *Janus*. *See* Pet.21–25. Although denying that *Keller* and *Lathrop* were poorly reasoned, BIO.25, Respondents do not dispute that those decisions were the product of the same "historical accident" of conflating State-

compelled association with private-sector labor relations that *Janus* corrected by overruling *Abood*. *See* Pet.21–23. Although contending that the *Keller* procedure for opting out from subsidizing "ideological" advocacy is workable, BIO.25–26, Respondents do not dispute that it is *identical* to the *Hudson* procedure for refund of agency fees that *Janus* found to be "unworkable" because it was incapable of consistent application and subjected the vindication of First Amendment rights to an impermissibly "daunting and expensive" barrier. Pet.23–24; 138 S. Ct. at 2481–82. Of a piece with their refusal to engage the reasoning of *Janus* and the Court's freedom-of-association cases, Respondents decline to address the erosion of *Lathrop*'s and *Keller*'s jurisprudential underpinning and do not dispute that, *Abood* having been overruled, those decisions are now "outlier[s] among [the Court's] First Amendment cases." 138 S. Ct. at 2482. Indeed, Respondents identify no other instance in which government compels individuals engaged in a common calling to join and fund an advocacy organization, let alone a court decision upholding such compulsion against First Amendment challenge. *See Harris*, 573 U.S. at 646 (rejecting the very suggestion).

And although Respondents assert "a strong reliance interest in upholding *Keller* and *Lathrop*," BIO.27, they do not dispute that the reliance interest asserted and ultimately rejected in *Janus* was far weightier than here. In fact, Respondents concede (at 28) that States do have the authority and ability to license and regulate attorneys just as they do other professionals

without compelling them to join and subsidize the speech of an advocacy organization—an arrangement significantly less restrictive of First Amendment freedoms that already prevails in over a third of the States. *See* Pet.25.

Finally, Respondents' silence on the importance of the question presented here speaks volumes. *See* Pet.25–26. Today, under the authority of *Lathrop* and *Keller*, States compel hundreds of thousands of attorneys to join integrated bars and fund their advocacy, irrespective of their own views and beliefs. No less than in *Janus*, allowing that wholesale deprivation of First Amendment rights to persist indefinitely "would be unconscionable." 138 S. Ct. at 2484.

II. This Case Is an Ideal Vehicle for Considering the Question Presented

Having sought and obtained dismissal based on the application of *Lathrop* and *Keller*, Respondents now argue that this Court should wait for a case with a more developed factual record to reconsider those precedents. That makes no sense. Petitioners' argument is that the First Amendment categorically prohibits Respondents from imposing bar dues on dissenting attorneys to fund the State Bar's advocacy and from requiring dissenting attorneys to maintain membership in what is an advocacy organization. Under *Lathrop* and *Keller*, however, Respondents are entitled to impose those obligations on Petitioners. That is what the Respondents argued below in seeking dis-

missal, what the district court held required dismissal, Pet.App.6a–8a, and what the court below held required it to affirm that decision, Pet.App.2a.

The record here is more than sufficient for the Court to review the decision below and reconsider *Lathrop* and *Keller*. Petitioners object generally to being compelled by Wisconsin law to join the State Bar and fund its advocacy on subjects that Respondents do not dispute are matters of public concern. Pet.App.11a, 40a.[2] Not only does the complaint state that general objection, but it also contains detailed allegations of the State Bar's advocacy activities, Pet.App.22–39, and Petitioners' specific objections to them, Pet.App.40a–41a. Moreover, Respondents specifically identified (in an exhibit to their motion to dismiss) which of those activities are "chargeable" even to dissenting attorneys. Defendants' Motion to Dismiss, Ex. B, *Jarchow v. State Bar of Wisconsin*, No. 19-cv-266, (W.D. Wis. May 21, 2019), ECF No. 16-2. Among them are advocacy on legislation, *id*. at 4, 9, advocacy on Second Amendment rights, *id*. at 7, advocacy on federal nominations, *id*., advocacy for "campaign reform," *id*. at 9, and advocacy for government programs and spending, *id*. This is the same sort of advocacy that *Janus* holds to "occup[y] the highest rung of the hierarchy of First Amendment values and merit[] special protection." 138 S. Ct. at 2475 (quotation marks omitted). Contrary to Respondents' claim (at 31), this case provides

[2] Because Respondents prevailed below, "the complaint's factual allegations are taken as true." *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 715 (1996).

a firm factual basis to assess the constitutionality of Wisconsin law's requirements that Petitioners join the State Bar and fund its advocacy.

Respondents nonetheless contend (at 31) that the Court should defer consideration until presented with a case that has completed "summary judgment proceedings" or even "a full blown trial." But that is no different from arguing that the Court should never reconsider *Lathrop* or *Keller*, because any claim challenging those precedents will necessarily be dismissed. Lower courts are bound by the decisions of this Court "which directly control[]," *Agostini v. Felton*, 521 U.S. 203, 207 (1997), and no district court could allow to proceed a claim that is squarely foreclosed by binding Supreme Court precedent—as Respondents recognize Petitioners' claims here to be. BIO.11. Although Respondents suggest (at 29) that further "percolation" on the issues presented here would be desirable, none is possible in the face of controlling precedent. Instead, the only way to revisit that precedent is through a case that has been dismissed as a matter of law, as here. Should the Court grant the petition and craft a rule that aligns attorney's First Amendment rights with those of public employees, the parties will litigate on remand the facts relevant under that rule.

To that end, this Court regularly resolves similar First Amendment questions on the pleadings. That includes, most notably, *Janus*, in which the Court rejected an identical "insufficient record" argument

against certiorari. *See* Brief in Opposition for Respondents Lisa Madigan & Michael Hoffman, *Janus v. AFSCME*, No. 16-1466, at 7–10 (Aug. 10, 2017).[3] It also includes *Harris*, which assessed the constitutionality of an agency-fee law as applied to personal assistants, 573 U.S. at 626, and *Abood*, 431 U.S. at 213 n.4. Indeed, *Lathrop* was decided on the pleadings, 367 U.S. at 823, and *Keller* drew its facts exclusively from the complaint, 496 U.S. at 5, 15. No more is required to reconsider those precedents.

Finally, Respondents' focus on "the State Bar's *Keller* Dues Reduction Process" is entirely misplaced because Petitioners do not challenge it. *See* BIO.32–34. Petitioners' objection is not to funding the State Bar's acknowledged "political" activities—which are subject to that process, Pet.App.18a, 39a–40a—but to compelled subsidization of its wide-ranging advocacy on other matters of public concern, which *Keller* wrongly approved "under a deferential standard that finds no support in [the Court's] free speech cases." *Janus*, 138 S. Ct. at 2480. Consistent with *Keller*, Wisconsin law does not permit Petitioners to escape from subsidizing that advocacy, no matter its conflict with their own views and deeply held beliefs, or even to avoid membership in an organization whose advocacy (political and otherwise) they reject. Pet.App.40a.

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[3] That objection was also raised, and rejected, in *Friedrichs v. Cal. Teachers Ass'n*, No. 14-915 (Jan. 26, 2015), which presented essentially the same question as *Janus*. *See* Brief of Respondents Cal. Teachers Ass'n et al. in Opposition, *Friedrichs v. Cal. Teachers Ass'n*, No. 14-915, at 22–27 (Apr. 1, 2015).

In sum, Respondents' vehicle arguments can be understood only as an attempt to forestall the reconsideration of *Lathrop* and *Keller*. Delaying review will deprive Petitioners and the hundreds of thousands of attorneys who are compelled by State law to join and subsidize the speech of integrated bars of their most fundamental First Amendment rights. If *Lathrop* and *Keller* were wrongly decided—a conclusion that *Janus* all but dictates—the Court should not delay in overruling them.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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