No. 20-1678

In The

Supreme Court of the United States

DANIEL Z. CROWE; LAWRENCE K. PETERSON;
and OREGON CIVIL LIBERTIES ATTORNEYS,
an Oregon nonprofit corporation,

Petitioners,

v.

OREGON STATE BAR, a Public Corporation, et al.,

Respondents.

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

BRIEF AMICUS CURIAE OF LAWYERS UNITED INC. IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE

Lawyers United Inc. (LU) is a California corporation with diversified membership including lawyers, corporations, and citizens located throughout the United States.[1] LU is dedicated to advancing and petitioning on behalf of lawyers and enforcing their and their clients' First Amendment precious freedoms to speech, association, and to petition the Government for the redress of grievances.

"Assistance of counsel" is "deemed necessary to ensure fundamental human rights of life and liberty" without which justice cannot be done. *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963). "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). This Court has had little trouble concluding that erroneous deprivation of the right to counsel of choice, "with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" *US v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006).

We start with the premise that the rights to assemble peaceably and to petition for a redress of

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief by blanket consent filed. No counsel for a 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 amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected, both in origin and in purpose, with the other First Amendment rights of free speech and free press. All these, though not identical, are inseparable. *Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217, 229 (1967). An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). Litigation "is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local." *NAACP v. Button*, 371 U.S. 415, 429 (1963). It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. *Ibid*. Even the brief loss of First Amendment freedoms constitutes an irreparable injury.

Lawyers United Inc. and its counsel have over thirty years of experience championing and vindicating lawyer constitutional rights in the federal courts. LU has as much first-hand litigation experience in this subject, if not more, than any other individual or association in the United States. LU's attorneys have published articles on lawyers' First Amendment rights in California and national legal journals. LU's attorneys have attended and testified at American Bar

Association hearings. LU has time and again filed amicus and certiorari petitions in this Court.

LU's *viewpoint* as amicus is necessary and proper because this Court has held an attorney's *opportunity* to practice law is a fundamental right that is constitutionally protected because lawyers have a constitutional duty to vindicate federal rights and champion locally unpopular claims. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). This Court has held that *general* bar admission on motion privileges across state lines is constitutionally protected. *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988). Equally important, this Court has held that it has a supervisory responsibility over United States District Court *Local Rules*. *Frazier v. Heebe*, 482 U.S. 641 (1987).

Petitioners in the related cases *Gruber v. Oregon State Bar Association*, 20-1520 and *Crowe v. Oregon State Bar Association*, 20-1678 persuasively argue that this Court should grant review because the respondent is compelling members of its bar to associate and subsidize mandatory state trade union partisan politics. Petitioners urge this compulsion contradicts *Janus* and violates their First Amendment rights to speech and association. Petitioners do not urge this compulsion trespasses their First Amendment right to petition, but that freedom is certainly part of the calculus.

The State Bar of Oregon is a union that serves as an administrative arm of the Oregon Supreme Court while concurrently wearing a second hat as partisan

political advocate and union lobbyist. What is at issue in this petition unquestionably qualifies as structural error. That is, Respondent union seeks an exemption from the First Amendment that applies to everyone else.

The consequences arising from the constitutional question presented extend far beyond the litigants and the thirty states that compel lawyers to choose between forfeiting their license and constitutionally protected opportunity to practice law or their First Amendment freedoms. The consequence of allowing any trade union an exemption from complying with laws, which everyone else must comply, affects every citizen, directly or indirectly. These mandatory trade unions are not composed of angels. They are controlled by attorneys in private practice who have a self-serving vested interest in their financial future. *See North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S. Ct. 1101, 1114 (2015) ("When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest.").

Moreover, the United States District Court for the District of Oregon by Local Rule limits *general* bar admission privileges solely to lawyers admitted to practice in Oregon. Approximately, two-thirds of the 94 Federal District Courts have similar Local Rules that vicariously endorse and ratify the partisan politics of mandatory state trade unions. The majority of these District Courts that practice federal discrimination are

housed in states that are controlled by mandatory trade unions that engage in partisan politics.

The related compelled speech and association at issue in *Gruber* and *Crowe* is also front and center in the federal context in *Lawyers United v. United States*, DC Circuit 20-5269, decided May 5, 2021. A petition for certiorari will be timely filed that raises many identical issues. There, LU challenges Local Rules in several circuits and District Courts including the Ninth Circuit that limit *general* bar admission privileges to forum state admitted lawyers. Approximately one-third of the 94 Federal District Courts do not discriminate in favor or against any class of lawyers in *general* bar admission licenses. The United States Supreme Court (Rule 5) and all United States Courts of Appeals (FRAP 46) do not discriminate for or against any class of licensed lawyers in federal bar admission. Under the challenged Local Rules every lawyer is compelled to associate and compelled to pay dues to a state-sponsored trade union, often to a second, third, and fourth trade union, in order to exercise their constitutional rights to associate with their clients and petition the government for the redress of grievances. Year in and year out sixteen thousand lawyers are provided general admission reciprocal licensing privileges in states that are categorically denied them by many Local Rules.

LU alleges this federal discrimination trespasses the *Rules Enabling Act* (28 U.S.C. § 332(d)(4), 28 U.S.C. § 2071-72), the separation of powers doctrine, and a plethora of First Amendment orthodoxy. It was stipulated that LU had established standing and there

was no dispute as to any material fact. Despite squarely citing *Janus*, the Senior District Judge refused to address *Janus*, this Court's explicit rejection of the "professional speech" doctrine in *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018), or any of the plethora of other First Amendment cases cited. The District Judge held his hands were tied and only the Court of Appeals or Supreme Court can decide this issue. The United States District Court for the District of Columbia affirmed in a one-paragraph decision. In other words, the United States Court of Appeals for the District of Columbia was presented with the identical compelled speech and association issue presented in *Gruber* and *Crowe* and it refused to address the issue.

LU also an interest in fixing a broken legal system stuck in the typewriter and carbon paper era. It is a well-known fact that the vast majority of Americans cannot afford access to the courts. LU submits the legal system is broken as a direct result of the self-serving monopoly protecting and partisan political lobbying of mandatory bar associations.

SUMMARY OF ARGUMENT

In *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), this Court held State laws compelling public employees to join and subsidize the speech of labor unions violate the First Amendment, squarely overruling *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). *Janus* rejected *Abood's* use of rational basis review. The

central holding of *Janus* is that "States and public-sector unions may no longer extract agency fees from nonconsenting employees." *Id.* at 2486. Respondent Oregon State Bar Association does what *Janus* squarely holds it may not do: Oregon State law and a public-sector union extract agency fees from the non-consenting Petitioners.

Respondents asks this Court for an exemption from the First Amendment—to deny review and side-step *Janus* so that it can continue to maintain a policy that *Janus* squarely holds is unlawful.

The Oregon State Bar's compelled association and use of mandatory dues for political and ideological activity are an even plainer affront to the First Amendment than the compelled payments to public-employee labor unions struck down by *Janus* because lawyers have a constitutional duty to vindicate federal rights. Respondent argues that *Janus* does not apply because a union of lawyers are different from a union of other citizens. However, lawyers advocate not only for themselves, but also for their clients. It makes no sense to single out and compel lawyers to subsidize union partisan politics and *viewpoints* that they and their clients find objectionable and may have a professional responsibility to oppose.

The Ninth Circuit correctly held that this Court did not decide the compelled association issue presented in *Gruber* and *Crowe*. But it concluded its hands were tied by this Court's decision in *Keller*. Review is necessary and proper, however, because *Keller* and its

predecessor, *Lathrop v. Donohue*, 267 U.S. 820 (1961), did not present or decide the compelled association issue. *Abood* also provides a slim reed as it stopped short of deciding the compelled association issue. Moreover, it was overruled as an outlier and poorly reasoned.

As stated by Justices THOMAS AND GORSUCH in *Jarchow v. State Bar of Wisconsin*, 140 S. Ct. 1720, 1721 (2020):

> Our decision to overrule *Abood* casts significant doubt on *Keller*. The opinion in *Keller* rests almost entirely on the framework of *Abood*. Now that *Abood* is no longer good law, there is effectively nothing left supporting our decision in *Keller*. If the rule in *Keller* is to survive, it would have to be on the basis of new reasoning that is consistent with *Janus*.
>
> We have admitted that *Abood* was erroneous, and *Abood* provided the foundation for *Keller*. In light of these developments, we should reexamine whether *Keller* is sound precedent.

Janus decided that issue. *Janus* holds "exacting scrutiny" is necessary. Respondent cannot meet the exacting scrutiny standard because twenty state bar associations do not mandate what shall be the orthodox viewpoint of their lawyers. If these bar associations function in compliance with our constitutional fixed star and without compelling orthodoxy to partisan viewpoints, so can Respondents.

ARGUMENT

I. THIS COURT HAS NEVER DECIDED AND SHOULD DECIDE THE ISSUE OF WHETHER STATES MAY COMPEL LAWYERS TO JOIN A UNION THAT SUBSIDIZES BAR ASSOCIATION POLITICAL AND IDEOLOGICAL SPEECH

In *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), this Court held that State laws compelling public employees to join and subsidize the speech of labor unions violate the First Amendment, squarely overruling *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). *Janus* rejected *Abood's* use of rational basis review. The central holding of *Janus* is that "States and public-sector unions may no longer extract agency fees from nonconsenting employees." *Id.* at 2486. Respondent Oregon State Bar Association does what *Janus* squarely holds it may not do: Oregon State law and a public-sector union extract agency fees from the nonconsenting Petitioners.

Respondent asks this Court to deny review and sidestep *Janus* so that it can continue to maintain a policy that *Janus* squarely holds is unlawful. Respondent does not ask this Court to grant review and decide the pure question of law presented by members of the bar in good standing who have a bona fide objection to supporting causes they find personally objectionable. Instead, Respondent asks this Court to close its eyes, apply a rational basis review, and not decide a First Amendment issue that arises in thirty states, and in a

large number of United States District Courts over which this Court has a supervisory duty.

The Oregon State Bar's compelled association and use of mandatory dues for political and ideological activity are an even plainer affront to the First Amendment than the compelled payments to public-employee labor unions struck down by *Janus* because lawyers have a constitutional duty to vindicate federal rights. Respondent argues that *Janus* does not apply because a union of lawyers is different from a union of other citizens. However, lawyers advocate not only for themselves, but also for their clients. It makes no sense to single out and compel lawyers to subsidize union partisan politics and *viewpoints* that they and their clients find objectionable and may have a professional responsibility to oppose.

This Court has held time and again that freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." *See Janus*, at 2363 for numerous cases cited. The right to eschew association for expressive purposes is likewise protected. *Roberts v. United States Jaycees*, 468 U.S. 609, 623, 104 S. Ct. 3244, 82 L.Ed.2d 462 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate.") As Justice Jackson memorably put it: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess by word or act their faith therein.*" *West Virginia Bd. of Ed.*

v. Barnette, 319 U.S. 624, 642, 63 S. Ct. 1178, 87 L.Ed. 1628 (1943) (emphasis added).

Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned. *Janus*, at 2463. Suppose, for example, that the State of Illinois required all residents to sign a document expressing support for a particular set of positions on controversial public issues—say, the platform of one of the major political parties. No one, we trust, would seriously argue that the First Amendment permits this. *Id*. at 2464.

Moreover, this compelled speech and association, that no one would seriously argue the First Amendment permits, is baked into and vicariously adopted by a vast array of United States District Court Local Rules. The *Code of Conduct for United States Judges*, Canon 2 provides,

> "A Judge Should Avoid Impropriety and the Appearance of Impropriety in all Activities"
>
> "(B) Outside Influence. A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge."

The Local Rules on their face stem from a social, political, and financial relationship with a forum trade union that regularly engages in lobbying and litigation stemming from political matters of public concern in the forum state. The *Code of Conduct for United States Judges* prohibits this incestuous relationship with a political trade union. This federal favoritism also flies in the teeth of *Federalist Paper* 10, which holds a core benefit of our Union is to dissolve local faction.

There can be no doubt Petitioners *Gruber* and *Crowe* have presented an important constitutional question that implicates the central components of the First Amendment speech, assembly, and to petition the government for the redress of grievances.

There also can be no doubt that this Court has never decided this pure question of law presented in *Gruber* and *Crowe*. Writing for a unanimous Court in *Keller v. State Bar of California*, 496 U.S. 1 (1990), Chief Justice Rehnquist acknowledged that the *Lathrop* decision did not confront the issue of involuntary membership. Likewise, *Keller* acknowledged:

> Petitioners challenge not only their "compelled financial support of group activities," . . . but urge that they cannot be compelled to associate with an organization that engages in political or ideological activities beyond those for which mandatory financial support is justified under the principles of *Lathrop* and *Abood*. The California courts did not address this claim, and we decline to do so in the first instance. *See Keller*, 491 U.S. at 17.

Simply stated, this Court has never decided on the merits the pure question of law presented in *Gruber* and *Crowe*: Whether attorneys can be involuntarily compelled to associate with a union that engages in political and ideological activities.

Moreover, *Abood*—notwithstanding that it was poorly reasoned, an outlier, did not apply exacting scrutiny, and has been overruled—also skips over the freedom of association issue this Court tackled in *Janus* and is presented in *Gruber* and *Crowe*. The *Abood* majority holds: "All that we decide is that the general allegations in the complaints, if proved, establish a cause of action under the First and Fourteenth Amendments." *Abood*, 431 U.S. at 237. The *Abood* Court remanded to provide a remedy.

The *Abood* concurring opinions also support this Court granting review. First, C.J. Rehnquist concurring raises the relevant question:

> I am unable to see a constitutional distinction between a governmentally imposed requirement that a public employee be a Democrat or Republican or else lose his job, and a similar requirement that a public employee contribute to the collective-bargaining expenses of a labor union.

Abood, at 243-44. Second, Justice Powell, concurring joined by the Chief and Justice Blackmun writes:

> I am at a loss to understand why the State's decision to adopt the agency shop in the public sector should be worthy of *greater* deference,

> when challenged on First Amendment grounds, than its decision to adhere to the *tradition* of political patronage.

Id. at 260.

Simply stated, *Gruber* and *Crowe* present an important issue that has evaded decision by this Court since *Lathrop* (1961).

As Justices THOMAS and GORSUCH stated in their dissent from granting certiorari in *Jarchow v. State Bar of Wisconsin*, 140 S. Ct. 1720, 1721 (2020):

> Our decision to overrule *Abood* casts significant doubt on *Keller*. The opinion in *Keller* rests almost entirely on the framework of *Abood*. Now that *Abood* is no longer good law, there is effectively nothing left supporting our decision in *Keller*. If the rule in *Keller* is to survive, it would have to be on the basis of new reasoning that is consistent with *Janus*.
>
> We have admitted that *Abood* was erroneous, and *Abood* provided the foundation for *Keller*. In light of these developments, we should reexamine whether *Keller* is sound precedent.

In sum, *Keller* not only did not address the involuntary union compulsion issue raised in *Gruber* and *Crowe*, but as Justices THOMAS and GORSUCH emphasize, *Keller* almost entirely rests on the discarded *Abood* and should be re-examined.

II. IN LIGHT OF *JANUS*, THE PROHIBITION AGAINST *VIEWPOINT* DISCRIMINATION, AND *NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS*, THE DOCTRINE OF *STARE DECISIS* WARRANTS THIS COURT GRANT REVIEW AND REVERSE

The Oregon State Bar does not admit anyone to the practice of law, it does not finally disbar or suspend anyone, and it does not ultimately establish ethical codes of conduct. It wears two hats. It functions as an administrative arm of the Oregon Supreme Court. It also functions as a political and ideological advocacy union. Oregon law compels all lawyers to become members of the Oregon Bar Association. Petitioners, as in *Janus*, object to being compelled to subsize the speech of a union that engages in political and partisan advocacy. The State of Oregon cannot establish a compelling state interest for all lawyers to fund one political point *viewpoint* over another. To do so, violates our constitutional fixed star.

Moreover, the State of Oregon does not have a legitimate government interest in compelling all lawyers to join a union in advocating one *viewpoint*. A subject that is first defined by content and then regulated or censored by mandating only one sort of comment is not viewpoint neutral. To prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so. *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017). "A law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at

its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official." *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 763 (1988). The State of Oregon can no more compel its lawyers to join a political union and advocate one viewpoint any more than it can compel its citizens to become Democrat or Republican, or salute the flag, or pay political patronage as a condition of employment.

As Jefferson famously put it, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical." *Janus*, 138 S. Ct. at 2464. "Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

The holding in *Janus* is that "States and public sector unions may no longer extract agency fees from nonconsenting employees." *Janus*, 138 S. Ct. at 2486. *Janus* implies members can voluntarily consent to join public sector unions if they choose. However, *Janus* squarely holds that States and public sector unions may no longer extract union dues from nonconsenting members. This is the law of our land. The doctrine of *stare decisis* warrants this Court granting review because the Oregon State Bar Association extracts union dues from nonconsenting members.

Furthermore, the dissent in *Janus* rests on the distinction between the government regulating speech in

its capacity as a sovereign which is subject to full First Amendment scrutiny on the one hand, and in its capacity as an employer in light of the case law holding that government can regulate its employees' speech. *See Janus*, 138 S. Ct. at 2493 ("So long as the government is acting as an employer—rather than exploiting the employment relationship for other ends—it has a wide berth, comparable to that of a private employer.").

Petitioners *Gruber* and *Crowe* are not employees. They are advocates. Forcing lawyers to subsidize speech they disbelieve is tyranny.

Janus, like the Court's predecessor *Harris v. Quinn*, 573 U.S. 616 (2014) and *Knox v. SEIU*, 567 U.S. 298 (2012) decisions, applied the "bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris*, 573 U.S. at 656; *see also Knox*, 567 U.S. at 310–11 ("[C]ompulsory fees constitute a form of compelled speech and association that imposes a significant impingement on First Amendment rights.") The First Amendment does not permit government to "substitute its judgment as to how best to speak for that of speakers and listeners" or to "sacrifice speech for efficiency." *Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 791, 795 (1988).

Here, however, the Oregon State Bar is neither functioning as an employer nor is it functioning as a sovereign. Thus, our constitutional fixed star that prohibits government-imposed viewpoint orthodoxy is

the standard. Thirty integrated state bar associations function as both a trade union and a market regulator with virtually no effective state supreme court supervision. A large majority of these regulators are active market participants in private practice with a vested political and financial interest in the market they regulate. *See North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S. Ct. 1101, 1114 (2015) ("When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest.").

Here, however there is not a shred of supervision because State Supreme Court Judges, much like United States Judges, are prohibited from engaging in political and ideological advocacy.

III. REVIEW IS WARRANTED BECAUSE THE THIRTY MONOPOLY-PROTECTING INTEGRATED BAR ASSOCIATIONS ARE A SUBSTANTIAL FACTOR IN THE EXPANDING JUSTICE GAP

This Court is the *Supreme Court of the United States*. It is the Supreme Court of all of the States and all of the People.

Law forms the basic operating system, the transactional platform of all economic and social activity. Clifford Winston, et al., *Trouble at the Bar*, p. 2 (Brookings Institution Press. Kindle Edition 2020). The legal profession has been able to create a powerful self-aggrandizing position in the United States. *Ibid*. The

legal profession has, in particular, been able to preserve certain anticompetitive features, such as compelled mandatory trade unions that engage in partisan politics and political lobbying.

The evidence shows the legal system is broken. It has been estimated the law profession's monopoly fails to serve 80 percent of the known market and it continues to build barriers for people to access legal services. *Ibid*.

Additionally, twenty-seven percent of all civil cases filed in the United States District Court had at least one *pro se* plaintiff.[2] The following chart depicts the numbers of total appeals and *pro se* appeals of all US Circuit Courts of Appeals.[3]

Fiscal year	**Total Appeals**	***Pro se* appeals**	**Percentage *pro se***
2020	48,190	23,546	48.9%
2019	48,486	23,728	48.9%
2018	49,276	24,680	50.1%
2017	50,506	25,366	50.2%
2016	60,357	31,609	52.4%
2015	52,698	26,883	51.0%
2010	55,991	27,208	48.6%
2005	68,469	28,555	41.7%
2000	54,694	24,935	45.6%
1995	50,072	19,973	39.8%

[2] Just the Facts: Trends in *Pro Se* Civil Litigation from 2000 to 2019 | United States Courts (uscourts.gov)

[3] https://www.uscourts.gov/sites/default/files/data_tables/jff_2.4_0930.2020.pdf

These statistics shock the conscience.

A substantial factor in causing the legal system to be broken arises from the thirty mandatory public trade unions that by custom and habit engage in partisan politics and have a glaring monopoly protecting conflict of interest. As stated by Justice Powell, "I am unable to see a constitutional distinction between a governmentally imposed requirement that a public employee be a Democrat or Republican or else lose his job, and a similar requirement that a public employee contribute to the collective-bargaining expenses of a labor union." *Abood*, at 243-44.

CONCLUSION

The Court should grant certiorari and then upon review hold *Janus* provides the rule of law, apply the exacting scrutiny standard of review, and hold *Keller* and *Lathrop* are distinguishable and inapplicable. This Court should reverse and enter judgment for Petitioners.

Respectfully submitted,

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