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 OF AMICUS CURIAE FIRST LIBERTY INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

First Liberty Institute is a nonprofit, public interest law firm dedicated to defending religious liberty for all Americans.[1] First Liberty provides *pro bono* legal representation to individuals and institutions of all faiths — Catholic, Islamic, Jewish, Native American, Protestant, the Falun Gong, and others.

First Liberty pays its attorneys' bar dues and has an interest in not being compelled to subsidize the political and ideological activities of the state bar associations to which its attorneys are admitted. State bar associations have advocated for causes that are in tension with First Liberty's mission. For example, in *Fulton v. City of Philadelphia*, First Liberty filed an *amicus curiae* brief supporting the petitioners and their religious-liberty claims, while the New York State Bar Association filed an *amicus curiae* brief supporting the respondents. Even more concerning, state bar associations have used their professional-regulation powers to propose — and in several jurisdictions, to adopt — speech codes that target lawyers' religious viewpoints. These activities directly threaten the ability of religious attorneys to express their views by

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[1] Attorneys from First Liberty Institute authored this brief as counsel for amicus curiae. No attorney for any party authored any part of this brief, and no one apart from First Liberty Institute made any financial contribution toward the preparation or submission of this brief. Petitioners and respondents have filed letters granting blanket consent to amicus curiae briefs pursuant to Supreme Court Rule 37.2(a). Therefore, all parties have consented to the filing of this brief and were given notice of the intent to file this brief.

subjecting them to professional discipline if they dare speak on certain matters of public concern. In view of this concerning trend, First Liberty desires that its attorneys have the freedom to choose whether to pay dues to integrated bar associations.

SUMMARY OF ARGUMENT

This Court should reexamine its holding in *Keller v. State Bar of California* that state bar associations may compel lawyers to subsidize political and ideological activities that are "germane" to regulating the legal profession and improving the quality of legal services. That holding, already an outlier in First Amendment jurisprudence when it was issued, saw its analytical foundation evaporate when this Court overruled *Abood v. Detroit Board of Education*. Only this Court can harmonize *Keller* with this development in its First Amendment jurisprudence. As Justices Thomas and Gorsuch have recognized, it should do so.

The need for this Court's reexamination has only increased as state bar associations have begun using their core professional-regulation powers to advance political and ideological agendas with which many of their dues-paying members disagree. For example, bar associations now use compulsory membership dues to propose and adopt speech codes for lawyers. Modeled after a controversial ABA model rule, these rules of professional discipline target religious viewpoints on matters of significant public concern, even when those viewpoints are expressed during "social activities" that are connected in some tangential way to the practice of law, or not connected at all. Lawyers should not be compelled to subsidize the development, proposal, and

adoption of professional regulations that target their views. This Court should grant certiorari to protect lawyers from this double invasion of their First Amendment rights.

ARGUMENT

I. *Janus* Undermined *Keller*, and Only this Court Can Harmonize *Keller* with *Janus*.

As Justices Thomas and Gorsuch acknowledge, this Court's "decision to overrule *Abood [v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)]" in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), "casts significant doubt on *Keller [v. State Bar of Cal.*, 496 U.S. 1 (1990)]." *Jarchow v. State Bar of Wis.*, 140 S. Ct. 1720, 1720 (2020) (Thomas, J., dissenting from denial of certiorari). "Now that *Abood* is no longer good law, there is effectively nothing left supporting [this Court's] decision in *Keller*." *Id.* This is because "[t]he opinion in *Keller* rests almost entirely on the framework of *Abood*." *Id.* Indeed, *Keller* expressly reasoned that state bar associations ought to be "subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions[.]" 496 U.S. at 13. Now that *Janus* changed that constitutional rule, so too should the constitutional rule applicable to state bar associations change.

But here the Ninth Circuit should not be faulted for declining to take this step. "'[I]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.'"

Agostini v. Felton, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)). As the Ninth Circuit correctly recognized, such is the case here. Even though *Keller*'s central rationale — that state bar associations and labor unions should be governed by the same constitutional standard — dictates a different outcome today in light of *Janus*, *Keller* upheld compulsory bar dues in light of *Abood*. And this Court has yet to overrule *Keller*. *See Janus*, 138 S. Ct. at 2498 (Kagan, J., dissenting).

Ordinarily this Court awaits a direct and entrenched split between the federal courts of appeals or state courts of last resort before granting certiorari. *See* Sup. Ct. R. 10 (a), (b). But that will not happen here, *see Agostini*, 521 U.S. at 237, at least not absent some unusual circumstance, *see, e.g.*, *Obergefell v. Hodges*, 576 U.S. 644, 663, 681–85 (2015) (citing with approval scores of lower-court decisions that disregarded this Court's decision in *Baker v. Nelson*, 409 U.S. 810 (1972)); *id.* at 675 (acknowledging that *Baker* controlled the lower courts by declaring that "*Baker v. Nelson* must be and now is overruled"). "Short of a constitutional amendment, only [this Court] can rectify [its] own erroneous constitutional decisions." *Jarchow*, 140 S. Ct. at 1720 (Thomas, J., dissenting from denial of certiorari).

Now is the time for the Court to reexamine *Keller*. The Court "admit[s] that *Abood* was erroneous, and *Abood* provided the foundation for *Keller*." *Id.* "In light of these developments, [the Court] should reexamine whether *Keller* is sound precedent." *Id.*

II. Politics and Ideology Infect Bar Associations' Professional Regulations, Making Unworkable *Keller*'s Distinction Between Germane and Nongermane Activities.

As the petitioners ably explain, *stare decisis* considerations weigh even less in favor of sustaining *Keller* than they did in favor of sustaining *Abood*. Pet. 25–30. Rather than repeat the persuasive reasons the petitioners give, amicus simply will provide one more: since *Keller*, state bar associations have begun wielding their core professional-regulation powers as a tool to advance politics and ideology on lightning-rod social issues, including speech codes for lawyers, thereby flouting *Keller*'s distinction between "germane" and "nongermane" bar activities.

Of course, it has long been the case that state bar associations have lobbied legislatures and governmental agencies. *See Keller*, 496 U.S. at 5. It also has long been the case that state bar associations have filed amicus briefs on controversial legal questions. *See id.* And these trends continue today. As petitioners point out, state bar associations spend compulsory dues on legislative lobbying programs and on advocacy for and against legislation on issues such as curriculum in public schools, capital punishment, sexual orientation and gender identity policies, juvenile delinquency policy, tort reform, and immigration reform. Pet. 14–15. In addition, state bar associations continue to file amicus briefs in cases that stray far afield from regulation of the legal profession. To take a fresh example, the New York State Bar Association filed an amicus brief opposing the religious-liberty claims that

this Court unanimously vindicated less than two weeks ago in *Fulton v. City of Philadelphia*, No. 19-123, 2021 WL 2459253 (U.S. June 17, 2021).

For all of the reasons that *Janus* identified, regardless whether they could fairly be categorized in some way as "germane" to regulation of the legal profession, when integrated bars engage in these activities, they pose a threat to vital First Amendment freedoms by compelling attorneys to subsidize private speech with which they may ardently disagree. *See* 138 S. Ct. at 2463–64. Indeed, with respect to amicus briefs, attorneys have been compelled to subsidize briefs dealing with highly contested social issues. *See, e.g.*, Brief of the Colorado Bar Ass'n, *et al.*, in *Romer v. Evans*, No. 94-1039, 1995 WL 17008440 (U.S. June 19, 1995) (amicus brief of numerous state bar associations, including the State Bar of Arizona and the Oregon State Bar — both unified state bar associations — in support of the respondents). This raises the very real prospect that members of the legal profession — especially those who advocate for religious liberty — will be compelled to subsidize briefs that contend against not only their own deeply held views, but also against their litigation positions and the interests of their clients. Moreover, while the *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), framework may offer a theoretical *post hoc* opportunity to reclaim a proportion of the bar dues that subsidize these briefs, as *Janus* explained, that opportunity has proven illusory. 138 S. Ct. at 2482.

But perhaps most concerning of all, in recent years, state bar associations allowed politics and ideology to

invade not only their more peripheral activities like lobbying and filing amicus briefs, but also their core professional-regulation functions. In August 2016, the American Bar Association approved a model rule of professional conduct that prohibits certain "verbal . . . conduct" — in other words, certain speech — "that manifests bias or prejudice toward others." Comment, Rule 8.4(g), ABA Model Rules of Professional Conduct. The model rule extends to all "conduct related to the practice of law," including "interacti[ons] with" a broad range of persons and even "participati[on] in" certain "social activities." *Id.* As several attorneys general and commentators have recognized, this model rule, if adopted, likely violates the First Amendment's free speech and free exercise clauses as impermissible discrimination against conservative and religious viewpoints on issues of public concern, such as marriage and gender identity. *See, e.g.*, Tex Att'y Gen. Op. KP-0123 (Dec. 20, 2016); Josh Blackman, *ABA Model Rule 8.4(g) in the States*, 68 Cath. U. L. Rev. 629, 630 (2019) (noting that "[f]our state attorneys general have concluded that Model Rule 8.4(g) is unconstitutional"); Eugene Volokh, *A Nationwide Speech Code for Lawyers?*, YouTube.com (May 2, 2017), https://www.youtube.com/watch?v=AfpdWmlOXbA.

Despite these observations, many state bar associations remain undeterred from expending significant resources to propose the adoption of the model rule in formal notice-and-comment proceedings. Indeed, many jurisdictions have proposed adopting the rule in some form, with Maine, New Mexico, Pennsylvania, and Vermont approving its adoption. *See* Blackman, *ABA Model Rule 8.4(g) in the States*, 68

Cath. U. L. Rev. 629 (2019); Committee Report, *Proposed Amendment to New York Rule of Professional Conduct 8.4(g) Intended to More Effectively Guard Against Harassment & Discrimination in the Legal Profession*, New York City Bar (Oct. 27, 2020), https://bit.ly/3qtxQPN; Josh Blackman, *Pennsylvania Adopts Variant of ABA Model Rule 8.4(g)*, The Volokh Conspiracy (June 11, 2020), https://bit.ly/3jmcLFF. Thus, unless this Court intervenes, lawyers will remain compelled to subsidize rulemaking activities that appear to target their viewpoints, their constitutionally protected speech, and their religious exercise.

This new trend of wielding state bar associations' core professional-regulation powers for transparently political and ideological ends has not stopped at the suppression of conservative and religious viewpoints; it also has carried over into the fraught exercise of dictating the race and gender composition of CLE panels. "The Business Law Section of [t]he Florida Bar recently adopted a policy regulating the composition of faculty at section-sponsored continuing legal education programs. Subject to certain exceptions, the policy imposes quotas requiring a minimum number of 'diverse' faculty[.]" *In re: Amendment to Rule Regulating the Florida Bar 6-10.3*, 315 So. 3d 637, 637 (Fla. 2021). Noting that the policy defined diversity along the lines of "race, ethnicity, gender, sexual orientation, gender identity, disability, and multiculturalism," the Florida Supreme Court *sua sponte* amended the Florida Bar rule governing CLE standards to prohibit such policies. *Id.* The court concluded that "[q]uotas based on characteristics like the ones in this policy are antithetical to basic

American principles of nondiscrimination," and that "[i]t is essential that [t]he Florida Bar withhold its approval from continuing legal education programs that are tainted by such discrimination." *Id.* (citing *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978)). Until the Florida Supreme Court intervened, many Florida lawyers were subsidizing a bar CLE policy that discriminated against them and their colleagues.

As the foregoing examples demonstrate, state bar associations increasingly use their professional-regulation functions as a barely-disguised vehicle to advance politics and ideology on matters of intense public concern, including matters that are important to people of faith. Indeed, absent this Court's intervention, there is an unavoidable prospect that lawyers will be forced to continue subsidizing the very same politicized professional regulations against which they will contend in constitutional litigation. Surely such a result is incompatible with Thomas Jefferson's and this Court's view that "'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.'" *Keller*, 496 U.S. at 10 (quoting I. Brant, James Madison: The Nationalist 354 (1948)). But at the very least, such a result demonstrates how, whatever its merits in 1990, *Keller*'s holding that lawyers may be compelled to subsidize "germane" bar activities has become unworkable and should be reexamined.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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