No. 20-1678

IN THE
Supreme Court of the United States

DANIEL Z. CROWE; LAWRENCE K. PETERSON; AND OREGON CIVIL LIBERTIES ATTORNEYS, an Oregon non-profit corporation,

Petitioners,

v.

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

Respondents.

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

BRIEF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. AS *AMICUS CURIAE* SUPPORTING THE PETITION

RAYMOND J. LAJEUNESSE, JR.
Counsel of Record
JAMES C. DEVEREAUX
W. JAMES YOUNG
WILLIAM L. MESSENGER
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510
rjl@nrtw.org

Counsel for Amicus

QUESTION PRESENTED

This Court has held that "exacting" First Amendment scrutiny applies to laws the force public employees to subsidize the speech and political activities of public sector unions. *Janus v. AFSCME*, 138 S. Ct. 2448, 2477 (2018). The Court has made clear that attorneys regulated under state law are subject to "the same constitutional rule" that applies to public employees. *Keller v. State Bar of California*, 496 U.S. 1, 13 (1990). Oregon requires attorneys to join and pay dues to the Oregon State Bar as a condition of practicing law. The Oregon State Bar uses members' mandatory dues to fund political and ideological speech regarding issues of law and public policy. Is that statute that compels attorneys to subsidize the Oregon State Bar's political and ideological speech subject to "exacting" scrutiny?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

STATUTES & RULES

INTEREST OF THE *AMICUS CURIAE*[1]

The National Right to Work Legal Defense Foundation is a non-profit, charitable organization formed to provide free legal assistance to individual employees who, as a consequence of their subjection to compulsory unionism, suffer violations of their freedoms of association, speech, petition, and religion; right to procedural due process of law; and other fundamental liberties guaranteed by the Constitution and laws of the United States and of the several States. To this end, the Foundation has recently supported several major cases involving employees' First Amendment rights to refrain from subsidizing unions and their expressive activities. *See Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018); *Harris v. Quinn*, 573 U.S. 616 (2014); *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012). In each case, the Court held that schemes that compel employees to subsidize union speech are subject to at least exacting constitutional scrutiny. *Janus*, 138 S. Ct. at 2477; *Harris,* 573 U.S. at 647; *Knox*, 567 U.S. at 310. The Foundation submits this amicus brief to urge the Court to apply the same level of constitutional scrutiny to schemes that compel attorneys to subsidize the speech of bar associations.

---

[1] Pursuant to Supreme Court Rule 37.2(a), both Petitioners and Respondents submitted letters, filed with the Clerk and noted on the docket, granting blanket consent to file amicus curiae briefs in this case, whether in support of either side or no side. Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than amicus curiae made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The question on which Petitioners seek review is whether "the statute that compels attorneys to subsidize Oregon State Bar's political and ideological speech" is "subject to 'exacting' scrutiny?"' Pet. (i). The Court should grant review and answer that question in the affirmative because the Court held a similar regime of compelled speech subject to such scrutiny in *Janus*, 138 S. Ct. at 2477, *Harris,* 573 U.S. at 647, and *Knox*, 567 U.S. at 310. The Court also should answer that question in the affirmative because, in *Janus*, the Court overruled *Abood v. Detroit Board of Educ.*, 431 U.S. 209 (1977). 138 S. Ct. at 2460, 2486.

Abood inexplicably applied a deferential and ultimately unworkable standard of review to a scheme compelling dissenting public employees to subsidize union speech. 431 U.S. at 222; *see Janus*, 138 S. Ct. at 2479–80 (discussing *Abood*). In *Keller v. State Bar of California*, 496 U.S. 1 (1990), the Court applied *Abood's* standard when analyzing whether dissenting attorneys' compelled dues could subsidize a bar association's political and ideological speech. 496 U.S. at 12-14. *Keller* held that mandatory bar dues are "subject to the same constitutional rule" that applies to compulsory union fees, which at the time was the rule set forth in *Abood*. *Id*. at 13.

Now that *Abood* has been overruled, its deferential standard of review cannot survive as the "constitutional rule" applicable to mandatory bar dues. Indeed, permitting *Abood* to endure through *Keller* would incongruously preserve the deferential standard regarding compelled dues for speech. Rather, the constitutional rule applicable to mandatory bar dues must now be at least the standard the Court adopted in *Janus*, *Harris*, and *Knox*: at least exacting First Amendment scrutiny.

Abood's deferential standard is a constitutional anomaly rightly relegated to oblivion in *Knox*, *Harris*, and *Janus*. That standard should not be allowed to survive in the context this case presents.

Further, the Court should clarify that compelled subsidization of speech is subject to strict scrutiny.

The "exacting" standard is sometimes found in the analogous campaign finance context. But when examined those cases reveal this Court has applied the more demanding strict scrutiny standard.

ARGUMENT

A. Legal Background

1. This case asks whether *Keller* applied the appropriate standard of scrutiny regarding compelled dues for speech and association purposes. Yet *Keller* itself did not extensively analyze the level of scrutiny required when speech is implicated, but instead relied heavily on *Abood*.

In *Abood* the Court appeared to apply two levels of scrutiny depending on the identified purposes of the compelled dues. Dues expended upon "ideological activities unrelated to collective bargaining" received a heightened level of scrutiny. *See* 431 U.S. at 233-36. However, dues that went toward activities considered germane to collective bargaining failed to receive the typical First Amendment treatment. *See id*. at 220-32. Without directly stating a standard the Court essentially determined forced dues expended upon direct political activity could not be compelled from public employees, but forced dues expended upon "collective bargaining" could.

Concurring, Justice Powell expressed doubts about the standard the *Abood* majority used. 431 U.S. at 259. Justice Powell observed that the Court failed to apply the exacting scrutiny standard typically required in cases addressing forced speech and association, correctly stating that there was no "basis here for distinguishing 'collective-bargaining activities' from 'political activities'" *Id*. at 257, 259.

Janus confirmed that Justice Powell was right: "*Abood* judged the constitutionality of public-sector agency fees under a deferential standard that finds no support in our free speech cases." 138 S. Ct. 2479-80. In other words, *Abood* was a First Amendment jurisprudential anomaly. *Id*. at 2463. Yet, *Abood*'s anomalous—and erroneous—deferential standard of scrutiny persists through *Keller*.

In *Keller*, the Court focused again on the division between types of speech, rather than the root evil: compelled speech and association. The Court there stated, "*Abood* held that a union could not expend a dissenting individual's dues for ideological activities not 'germane' to the purpose for which compelled association was justified: collective bargaining." 496 U.S. at 13. Following that line of reasoning, the Court concluded that "the compelled association and integrated bar is justified by the State's interest in regulating the legal profession and improving the quality of legal services." *Id.* at 13.

Extending *Abood*'s approach, *Keller* applied a highly deferential standard to speech and association termed relevant to regulating the legal profession, lacking the heightened scrutiny typical of the Court's usual First Amendment jurisprudence. Otherwise, the Court would have had to ask if those ends, collective bargaining and the regulation and improvement of legal services, are the type of interests that meet with exacting, intermediate, or strict scrutiny. Like *Abood* before, the *Keller* decision applied the "*Abood* analysis" by drawing an artificial distinction between purely political (and therefore, protected) speech and other types of speech. *see* 496 U.S. at 13-14. Consequently the Court applied virtually no scrutiny to the latter, granting license to State bars to compel lawyers to subsidize the speech. *Id*.

Abood's distinction between speech which can constitutionally be compelled versus what cannot hinged on whether the speech was germane to the union's duties as "collective-bargaining representative." 431 U.S. at 235. This placed the weight of determining constitutional protections on the germaneness of the speech. Landing on one side of the equation or the other determined the result. Efforts at discerning what was germane and what was not eventually evolved into a three-part test. *Lehnert v. Ferris Fac. Ass'n*, 500 U.S. 507, 519-24 (1991). The mere existence of that amorphous test highlighted the unworkability of distinguishing between protected and unprotected speech. *Janus*, 138 S. Ct. at

2481-82 (recognizing that all parties saw *Lehnert* as unworkable).

Keller sought to draw similarly arbitrary lines between different types of speech, the Court stating that speech "germane" to regulating the profession and "improving the quality of legal services" could be charged through compelled dues. 496 U.S. at 13-14. *Keller* relied heavily on *Abood* as it extended the labor organization analogy throughout the Court's opinion and applied the same deferential standard to compelled speech. *Id*. at 12-14.

Alas, determining what is germane under *Keller* in assessing what merits First Amendment protection suffers from the same deficiencies as application of this standard in *Abood* and *Lehnert*. This line-drawing exercise destroys First Amendment protections by classifying types of speech as undeserving of the typical scrutiny. Distinguishing which compelled fees for speech do not merit protection emphasizes artificially contrived and unworkable distinctions. *See Janus*, 138 S. Ct. at 2481-82. It is an exercise in value-laden decision making unworthy of a judiciary purportedly of "a government of laws, and not of men." *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

This Court observed in *Janus* that, despite the best efforts in determining what constituted protected speech the results varied, illustrating the tendency of such an approach to infringe unconstitutionally on speech. 138 S. Ct. at 2481-82. The artificial division of germane versus non-germane speech is unworkable, in part, because all compelled dues for speech to public entities concern matters that are inherently political. *Janus* demands heightened scrutiny for all compelled dues subsidizing speech and removes the artificial divide between germane and non-germane speech. *See id.* at 2482-84.

2. In *Knox*, the Court clarified that exacting scrutiny is the minimum standard required when speech and association rights are implicated in a scheme of compelled speech and association. 567 U.S. 310; *see United States v. United Foods, Inc.*, 533 U.S. 405, 414 (2001); *Boy Scouts of Am. v. Dale*, 530 U.S. 640,

648 (2000); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). *Knox* addressed an "Emergency Temporary Assessment to Build a Political Fight-Back Fund" imposed without proper notice. The Court "made it clear that compulsory subsidies for private speech are subject to exacting First Amendment scrutiny." 567 U.S. at 304. That is particularly true when "compelled speech and compelled association" are tied to "compelled funding of the speech… of private speakers or groups." *Id.* at 309. *Knox* provided a course correction on compulsory subsidies for private speech by subjecting them to exacting First Amendment scrutiny. *Knox* did not entirely dissolve the division between types of speech, however: "compulsory fees can be levied only insofar as they are a 'necessary incident' of the 'larger regulatory purpose which justified the required association.'" *Id.* at 3010 (citations omitted).

Harris picked up where *Knox* left off. Asking whether agency fees to support a union could constitutionally be extracted from in-home care workers, this Court stated that "we explained in *Knox* that an agency-fee provision imposes 'a "significant impingement on First Amendment rights,"' and this cannot be tolerated unless it passes 'exacting First Amendment scrutiny.'" 573 U.S. at 647-48. *Harris* did not decide whether a more exacting level of scrutiny was appropriate, but held that "no fine parsing of levels of First Amendment scrutiny is needed because the agency-fee provision here cannot satisfy even the test used in *Knox*." *Id.* at 648. The provision in question did "not serve a '"compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms."'" *Id.* at 648-49. (alteration in original) (citations omitted).

This Court reaffirmed *Knox* and *Harris* in *Janus*, explicitly applying exacting scrutiny and rejecting rational-basis review, "[b]ecause the compelled subsidization of private speech seriously impinges on First Amendment rights." 138 S. Ct. at 2464-65. *Janus* addressed an Illinois statute under which the state deducted fees from employees' wages for union participation, regardless of union membership. The

Court held such fees to be compelled speech that failed to pass muster under exacting scrutiny. *Id.* at 2465-78.

Moreover, *Janus* not only applied exacting scrutiny where compelled speech is imposed on public employees, it explicitly overruled *Abood*. *Id*. at 2486. Thus, through *Knox*, *Harris*, and *Janus*, the Court corrected *Abood*'s anomalous application of extreme deference—rational review—where First Amendment rights were implicated, applying at least exacting scrutiny to the forced collection of fees used for speech and association.

B. Mandatory Bar Dues Should Be Subject to at Least the Same Scrutiny As Mandatory Union Fees: Exacting Scrutiny.

With *Abood*'s anomalous standard overruled and corrected by *Harris, Knox,* and *Janus*, *Keller* stands alone in its application of *Abood*'s lesser, deferential level of protection for First Amendment rights. But as is clear now, exacting scrutiny is the minimum level required when determining whether compelled fees in derogation of First Amendment rights of free speech and association are justifiable. Indeed, *Janus* suggests that even a higher standard—strict scrutiny—may apply. 138 S. Ct. at 2464-65.

Keller determined that the same rules should apply to bar associations and labor organizations collecting compulsory fees. 496 U.S. at 12-14. *Keller* was right in this regard, which now requires application here of the exacting scrutiny *Knox*, *Harris*, and *Janus* applied to compulsory union fees.

State bars, like public sector labor unions pre-*Janus,* are granted special statutory authority to compel dues. Without that authorization state bars cannot compel dues from attorneys. Previous decisions have upheld the ability of state bars to compel dues and use them for speech germane to the practice of law. *Keller*; *Lathrop v. Donohue*, 367 U.S. 820 (1961). *Keller* formulaically applied the unstated level of scrutiny used in *Abood*, now overruled. *Compare* 496 U.S. at 12-14 *with* 431 U.S. at 220-32. Cases involving compelled speech and association, such as *Keller*,

which applied *Abood*'s lesser form of scrutiny, require a fresh look and harmonization with *Knox*, *Harris*, and *Janus*. The alternative is to allow courts to approach situations of government-compelled speech and association with a deferential and erroneous standard of scrutiny resting on the shoulders of an overturned case. *Keller* then would be a Trojan horse, sneaking rational basis into the Troy of free speech case law.

In *Keller* this Court went to great lengths to analogize state bars to labor unions.[2] If labor organizations and state bars are similar, as *Keller* insisted, then either new analysis is required differentiating the two, or *Janus* scrutiny must now be applied.

In any event, it appears they are similar in all important ways, especially as to the public sector. As Petitioner notes, "mandatory bar associations engage in core political and ideological speech on matters of great public concern," are similar in their relationship between the members and the organization, and do not rely on tax dollars but on dues to achieve their ends. *See* Pet. (15-16).

The similarity of the relationship between a public-sector labor organization and its members and a mandatory state bar and its members are more than sufficient to apply the same standard of constitutional scrutiny. Accordingly, at least *Janus* exacting scrutiny should apply in this case.

C. Strict Scrutiny should be required to avoid confusion in the application of First Amendment rights.

Though there are various forms of heightened scrutiny, at the least exacting scrutiny is required by *Janus*. 138 S. Ct. at 2483. A more demanding

---

[2] *See*, *e.g.*, 496 U.S. at 7-12 (discussing at length *Railway Employes v. Hanson*, 351 U.S. 225 (1956), a case under the Railway Labor Act, and *Abood*); *id.* 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."); *id.* at 14 (discussing *Ellis v. Railway Clerks,* 466 U.S. 435 (1984), another Railway Labor Act case); *id.* at 16-17 (relying on *Teachers v. Hudson*, 475 U.S. 292 (1986), a union-fee case, to propose procedures for the California Bar that would "meet its *Abood* obligation.").

standard should more appropriate when dues are compelled,[3] but whether this is true remains unresolved by this Court. *Id*. *Janus*' speculation on this subject should now be addressed by the Court to give guidance to the lower courts.

When speech and associational rights are implicated strict scrutiny is often applied. Campaign finance cases have held that "[l]aws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (quoting *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 464 (2007) (Roberts, C.J., joined by Alito, J.)). Other campaign finance cases have often called strict scrutiny, "exacting scrutiny," saying "exacting scrutiny" when describing and employing strict scrutiny. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995).[4]

In *Austin v. Michigan Chamber of Commerce*, the trend of employing strict scrutiny continued as this Court required a "compelling state interest," though it expanded what counts as such an interest. 494 U.S. 652, 658 (1990). *Citizens United* applied strict scrutiny: "laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United*, 558 U.S. at 340 (citations

---

[3] *Janus* recognized this possibility: "later cases involving compelled speech and association have also employed exacting scrutiny, if not a more demanding standard." 138 S. Ct. at 2483 (*citing Roberts*; 468 U.S. at 623, and *United Foods*, 533 U.S. at 414).

[4] The Court there said that "this case 'involves a limitation on political expression subject to exacting scrutiny.' *Meyer v. Grant*, 486 U.S. 414, 420 (1988)." But in the footnote to that sentence, the Court called the test applied in *Meyer* "strict scrutiny." 514 U.S. at 346 n.10. Later the Court defined the exacting scrutiny test the same as the test for strict scrutiny: "When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *Id*. at 347.

omitted). Moreover, *Citizens United* narrowed what constitutes a compelling interest to the previous anti-corruption standard defined in *Buckley v. Valeo*. 424 U.S. 1, 26 (1976).

That the campaign finance cases often use the term "exacting scrutiny" as a virtual synonym for strict scrutiny suggests that the exacting standard used in *Janus* may be insufficient when compelled dues are at issue in contexts other than that of forced union dues, and instead strict scrutiny is appropriate. At a minimum, maintenance of an potential semantic distinction without a difference provides a fertile playground for litigants in the lower federal and state courts in an area where uniformity in decision making—and therefore in the protection of First Amendment rights of speech and association—is vital to the sound administration of justice.

In *Janus*, the Court noted that by "overruling *Abood*, we end the oddity of privileging compelled union support over compelled party support and bring a measure of greater coherence to our First Amendment law." 138 S. Ct. at 2484. In this case, the Court has an opportunity similarly to bring greater coherence to First Amendment law by clarifying that strict scrutiny applies to all forced political speech and association.

CONCLUSION

For the reasons stated above, and those stated by Petitioners, the petition should be granted, and the case set for plenary briefing and argument on the important question presented.

Respectfully submitted,

RAYMOND J. LAJEUNESSE, JR.
Counsel of Record
JAMES C. DEVEREAUX
W. JAMES YOUNG
WILLIAM L. MESSENGER
c/o NATIONAL RIGHT TO WORK
LEGAL DEFENSE FOUNDATION
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510

rjl@nrtw.org

Counsel for the National Right to Work Legal Defense Foundation

July 1, 2021