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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Since this petition was filed, three Court of Appeals decisions have addressed the question this petition presents: whether a law that forces attorneys to subsidize a bar association's political and ideological speech is subject to "exacting" First Amendment scrutiny. All three concluded—like the Ninth Circuit in this case—that such laws *are not* subject to exacting scrutiny. In these courts' view, *Keller v. State Bar of California*, 496 U.S. 1 (1990), bars the application of such scrutiny, and allows states to compel attorneys to subsidize bar association speech that is germane to regulating the legal profession or improving the quality of legal services, as long as the bar association provides safeguards to (theoretically) ensure that attorneys are not compelled to subsidize "non-germane" speech.

These decisions reinforce the fact that, if attorneys are to have the same protection against compelled subsidies for speech that public-sector employees enjoy under *Janus v. AFSCME*, 138 S. Ct. 2448 (2018)—and to which all Americans are entitled under the First Amendment—this Court must revisit its caselaw on mandatory bar associations. Specifically, the Court should grant certiorari to clarify that *Keller* does *not* prevent courts from subjecting such compulsion to exacting First Amendment scrutiny. *See* Pet. 19–23. Alternatively, if the lower courts have read *Keller* correctly, then the Court must overrule *Keller*. *See id.* at 23–30.

The Fifth Circuit

1. In a case challenging Texas's requirement that attorneys join and pay dues to the State Bar of Texas, the Fifth Circuit concluded that *Keller* "held that state bar associations may constitutionally charge mandatory dues to fund activities germane to . . . regulating the legal profession and improving the quality of legal services." *McDonald v. Longley*, 4 F.4th 229, 244 (5th Cir. 2021) (cleaned up). In the Fifth Circuit's view, *Keller* allows states to force attorneys to pay even for "controversial and ideological" bar association speech—including diversity initiatives the court deemed "highly ideologically charged," "sensitive," "political," and "'undoubtedly a matter of profound value and concern to the public'"—as long as such speech is "germane." *Id.* at 249 (quoting *Janus*, 138 S. Ct. at 2476) (cleaned up).

The Court of Appeals did acknowledge that this "Court's First Amendment caselaw has changed dramatically" since *Keller, id.* at 243 n.14, and that *Keller* "rested almost exclusively on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), . . . which the Court overruled in *Janus*." *Id.* It even recognized that *Keller* therefore has "increasingly wobbly, moth-eaten foundations," *id.* at 253, so that, but for *Keller*, it was "doubt[ful]" that it would be "constitutionally permissible, under *Janus*, to compel [attorneys] to join an association taking the [Texas] Bar's stances on [germane] ideologically charged issues." *Id.* at 250 n.29; *see also* Pet. 17–19 (explaining why compelled subsidies for germane bar association speech could not survive

exacting scrutiny). Yet the court felt obligated by *Keller* to uphold this infringement on attorneys' free-speech rights.

McDonald did deem mandatory Texas State Bar membership and dues unconstitutional, based on the Bar's *non*-germane speech, and its lack of protections against compelled subsidies for such speech.

Like the lower court in this case (App. 20–25), the Fifth Circuit concluded that *Keller* does not foreclose a freedom-of-association challenge to mandatory membership in a bar association that engages in non-germane speech. *McDonald*, 4 F.4th at 244 & n.16. It further concluded that compulsory membership in such a bar association is subject to at least exacting First Amendment scrutiny, "under which mandatory associations are permissible only when they serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 246 (cleaned up, quoting *Knox v. SEIU*, 567 U.S. 298, 310 (2012); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)). And it held that mandatory membership could not survive that scrutiny because states "do not have a compelling interest in having all licensed attorneys engage as a group in . . . non-germane activities," and "there are other 'means significantly less restrictive of associational freedoms' to achieve the state's legitimate interests" related to regulating the legal profession. *Id.* at 246 (citation omitted). The Bar could not "reasonably suggest" that the states where there is no mandatory bar association

that can engage in non-germane activities[1] "are unable to regulate their legal professions adequately." *Id.* at 246–47.

The Fifth Circuit further held that compelling Texas attorneys to pay dues to the State Bar of Texas was unconstitutional because the Bar lacked procedures that *Keller*, 496 U.S. at 17, requires to protect attorneys against being forced to subsidize non-germane speech. Such safeguards, the Fifth Circuit said, must "include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *McDonald*, 4 F.4th at 253 (quoting *Chi. Teachers Union v. Hudson*, 475 U.S. 292, 310 (1986)). In *Keller* itself, this Court said a mandatory bar association could satisfy its obligation to provide such safeguards by adapting the protections that *Hudson* prescribed for public-sector unions, but *Keller* left open the question whether alternative procedures might suffice. 496 U.S. at 17. The Fifth Circuit, however, concluded—in light of this Court's strengthening of First Amendment protections against compelled speech subsidies in *Knox* and *Janus*—that *Hudson*'s procedures are not merely sufficient but necessary.[2] *Id.* at 254. And it concluded that the Texas

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[1] There are 20 such states. *See* Pet. 18.

[2] **In reaching this conclusion, the Fifth Circuit created a circuit split.** The Fifth Circuit expressly rejected the Ninth Circuit's conclusion in this case that *Hudson* procedures are *not* essential and that less stringent safeguards may suffice.

State Bar failed to provide such protections, because it did "not furnish Texas attorneys with meaningful notice regarding how their dues will be spent" or "any breakdown of where their fees go," but instead "place[d] the onus on objecting attorneys to parse the Bar's proposed budget—which only detail[ed] expenses at the line-item level, often without significant explanation—to determine which activities might be objectionable." *Id.* Further, attorney objections were not resolved by a neutral decisionmaker, as *Hudson* prescribes, but by the Bar itself. *Id.* In the absence of *Hudson*'s protections, compelling the plaintiffs to pay Bar dues violated their First Amendment rights. *Id.*[3]

The Fifth Circuit remanded *McDonald* to the district court to enter a preliminary injunction and "determine the full scope of relief to which plaintiffs are entitled." *Id.* at 255. Shortly afterward, the Bar announced its intention *not* to seek rehearing. It also claimed in a public announcement that the Fifth

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McDonald, 4 F.4th at 254 & n.45 ("[W]e part ways with the Ninth's Circuit's decision in *Crowe,* 989 F.3d at 727 [App. 20], and align ourselves with the dissent, *see id.* at 734 (Van Dyke, J., dissenting) [App. 36–38]."). Granting certiorari and subjecting compulsory subsidies for bar-association speech to exacting scrutiny would render the split moot, as *Hudson*-like procedures would no longer be necessary to protect attorneys' First Amendment rights. This split is therefore another reason why the Court should grant certiorari and clarify the law on mandatory bar-association dues.

[3] As Petitioners have explained, *Hudson*'s safeguards do *not* actually protect attorneys against being compelled to subsidize a bar association's non-germane speech, just as they did not actually protect public-sector employees from being compelled to pay for unions' non-germane speech before *Janus*. *See* Pet. 26–28.

Circuit had "upheld the constitutionality of nearly all of the State Bar of Texas programs and activities challenged by the plaintiffs." Amy Starnes, *State Bar of Texas Will Not Seek Rehearing of 5th Circuit Panel Decision*, Texas Bar Blog (July 19, 2021).[4]

Thus, *McDonald* does not adequately secure the First Amendment rights of Texas attorneys. The Fifth Circuit made clear that the State Bar can remedy the constitutional problems the court identified by refraining from non-germane activities and adopting the safeguards prescribed by *Hudson* and *Keller*. If and when it does so, the Fifth Circuit's interpretation of *Keller* will still allow the state to force all Texas attorneys to pay dues to subsidize the Bar's "germane" speech, no matter how "controversial" or politically sensitive it is. *Id.* at 249.

Therefore, to ensure that attorneys are not unconstitutionally forced to pay against their will for *any* political or ideological speech by bar associations—whether germane or not—this Court must clarify or overrule *Keller*.

The Sixth Circuit

2. The Sixth Circuit affirmed a judgment against a plaintiff challenging Michigan's requirement that attorneys join and pay dues to the State Bar of Michigan in *Taylor v. Buchanan*, 4 F.4th 406, 408 (6th Cir.

[4] https://blog.texasbar.com/2021/07/articles/state-bar/state-bar-of-texas-will-not-seek-rehearing-of-5th-circuit-panel-decision/.

2021). In that case, the plaintiff and the court agreed that *Keller* allows states to compel attorneys to subsidize germane bar association speech, and the plaintiff conceded that the State Bar of Michigan does not engage in non-germane speech.[5] *Id.* at 408. The plaintiff argued that *Janus* had implicitly overruled *Keller* and conceded that, if *Keller* has not been overruled, her claim must fail.[6] *Id.* Thus—because *Janus* did not, in fact, overrule *Keller*—the court readily rejected her claim. *Id.* at 409.

A concurring opinion by Judge Thapar noted that the plaintiff's claim's failure "[lay] not in the First Amendment, but in Supreme Court precedent." *Id.* at 410 (Thapar, J., concurring). Judge Thapar noted that, although the rules for "state bars and public-sector unions seemed to go hand-in-hand" in *Keller*, *Janus* did not overrule *Keller* when it overruled *Abood*. *Id.*

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[5] It is not clear that this concession was warranted. The State Bar of Michigan's website—apparently funded by member dues—publishes policy positions adopted by member interest groups ("Sections") on many non-germane issues. *See* Jacob Huebert & Kileen Lindgren, *Michigan Attorney Sues State Bar to Defend Her First Amendment Rights*, In Defense of Liberty (Oct. 16, 2019), https://bit.ly/3jwEH9t. Thus, Michigan lawyers have been forced to pay to propagate opinions on such issues as what animal the state legislature should select as the official state pet. *See* Animal Law Section Public Policy Position HB 4455, State Bar of Mich. (June 28, 2019), https://bit.ly/3zxfHnZ.

[6] Petitioners here have *not* made that concession. *See* Pet. 19–23.

The Tenth Circuit

3. The Tenth Circuit affirmed dismissal of a First Amendment challenge to Oklahoma's requirement that attorneys pay dues to the Oklahoma Bar Association in *Schell v. Chief Justice and Justices of the Oklahoma Supreme Court*, No. 20-6044, 2021 WL 3877404 (10th Cir. Aug. 25, 2021).[7]

Like Petitioners, the *Schell* plaintiff argued that *Keller* only held that "mandatory bar dues are subject to the same constitutional rule that applies to mandatory union fees"—*not* that the First Amendment allows states to compel attorneys to subsidize a bar association's "germane" political and ideological speech. *Compare id.* at *8 *with* Pet. 19–23. The plaintiff argued that *Keller*'s discussion of *Abood*'s germaneness test was dicta, not part of the case's holding, and that compelled subsidies for bar association speech therefore should be subject to the "same constitutional rule" to which public-sector union fees are now subject under *Janus*: exacting scrutiny. 2021 WL 3877404, at *7–8.

The Tenth Circuit rejected that argument, concluding that *Keller*'s discussion of "germaneness" was part of its holding, not dicta. *Id*. at *8. The Tenth Circuit's basis for that conclusion is unclear. It said that "*Keller*'s holding is meaningfully distinct from *Abood*'s

[7] Like the Ninth Circuit in this case (App. 20–26), the Tenth Circuit reversed dismissal of the plaintiff's freedom-of-association challenge to mandatory bar association membership, based on its non-germane speech, because the district court incorrectly concluded that *Keller* and *Lathrop v. Donohue*, 367 U.S. 820 (1961), foreclosed it. 2021 WL 3877404, at *9–11.

holding for the same reason that bar associations are meaningfully distinct from unions, despite the 'substantial analogy' between the two types of entities." *Id*. "Specifically," the court continued, "the analysis conducted in *Janus*, which drew into question the furtherance of the state's interest in 'labor peace' through 'agency shop' agreements, is not directly in play[,] for 'regulating the legal profession' and 'improving the quality of the legal service available' were the interests identified in *Keller* in support of mandatory dues." *Id.* That, the court concluded, meant that "*Janus* did not overrule *Keller*'s discussion of *Abood*, or its related discussion of germaneness, as the test for the constitutionality of mandatory dues and expenditures." *Id.* (footnote omitted).

That analysis makes little sense. After *Janus*, these two propositions cannot both be true: (1) that the same constitutional rule applies to both public-sector unions and bar associations (as *Keller* said, 496 U.S. at 13), and (2) that compelled support for germane bar association speech is *per se* constitutional (as the Tenth Circuit said, 2021 WL 3877404, at *6–7). These propositions are mutually exclusive. If compelled subsidies for bar fees are subject to the same constitutional scrutiny as compelled support for public-sector union fees, then they must receive exacting scrutiny, which is what *Janus*, 138 S. Ct. at 2483, requires in the case of public-sector unions. And if exacting scrutiny applies, then a court cannot simply deem compelled subsidies for germane bar-association speech *per se* constitutional. Therefore, a court considering a First

Amendment challenge to mandatory bar dues *must* reject one of those two propositions. The Tenth Circuit gave no sufficient reason for rejecting *Keller*'s "same constitutional rule" holding in favor of its "germaneness" discussion.

Although the Tenth Circuit's reasoning is unclear, one thing is absolutely clear, as the Tenth Circuit itself said: if attorneys are to have any First Amendment protection against being forced to pay for bar associations' "germane" political and ideological speech, then this Court must "reexamine its precedent on mandatory bar dues." *Schell*, 2021 WL 3877404, at *8.

CONCLUSION

These Court of Appeals decisions make clear that this Court should review the question this petition presents. Lower courts are consistently interpreting *Keller* in a manner that makes that decision out of step with *Janus* and this Court's First Amendment jurisprudence—giving attorneys less protection against compelled subsidies for political and ideological speech than public-sector employees and all other Americans enjoy. Lower courts have also consistently recognized that, if this anomalous situation is to change, this Court must clarify or overrule *Keller*. The time for the Court to do so is now, as these cases are all still pending, and more challenges to compelled subsidies for bar

association speech continue to be litigated across the country.[8]

The Court therefore should grant the petition for certiorari.

Respectfully submitted,

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[8] *See*, *e.g.*, *Boudreaux v. La. State Bar Ass'n*, 3 F.4th 748 (5th Cir. 2021) (reversing dismissal of challenge to mandatory Louisiana State Bar Association membership and dues); *File v. Kastner*, No. 20-2387 (7th Cir. July 28, 2020) (appealing dismissed challenge to mandatory Wisconsin State Bar membership and dues); *Bennett v. State Bar of Tex.*, No. 4:21-cv-2829 (S.D. Tex. Aug. 30, 2021) (class action seeking relief for all Texas attorneys based on *McDonald*); *Pomeroy v. Utah State Bar*, No 2:21-cv-00219-JCB (D. Utah Apr. 13, 2021) (challenging mandatory Utah State Bar membership and dues).