No. 21-779

In The
Supreme Court of the United States

MARK E. SCHELL,

Petitioner,

v.

RICHARD DARBY, CHIEF JUSTICE,
SUPREME COURT OF OKLAHOMA, ET AL.,

Respondents.

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

BRIEF *AMICUS CURIAE* OF THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONER

JOHN J. PARK, JR.
Counsel of Record
for Amicus Curiae
P. O. Box 3073
Gainesville, GA 30503
(678) 608-1920
jackparklaw@gmail.com

ROBERT ALT
President and CEO
THE BUCKEYE INSTITUTE
88 East Broad Street
Suite 1300
Columbus, OH 43215
(614) 224-4422

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

In *Keller v. State Bar of California*, 496 U.S. 1, 13 (1990), this Court held mandatory bar dues are "subject to the same constitutional rule" as compulsory pubic-sector union fees. In *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), the Court held that compulsory public-sector union fees are subject to "exacting" First Amendment scrutiny. The question presented is:

Are mandatory bar dues that subsidize the political and ideological speech of bar associations subject to the "same constitutional rule" of exacting First Amendment scrutiny that applies to compulsory union fees under *Janus*?

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INTEREST OF *AMICUS CURIAE*

This *amicus* brief is submitted by The Buckeye Institute.[1] The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market solutions for Ohio's most pressing public policy problems. The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those public policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute is located directly across from the Ohio Statehouse on Capitol Square in Columbus, where it assists executive and legislative branch policymakers by providing ideas, research, and data to enable the lawmakers' effectiveness in advocating free-market public policy solutions. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. § 501(c)(3).

Through its Legal Center, The Buckeye Institute works to protect the First Amendment rights of union

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[1] Pursuant to Rule 37.2, all parties were notified of The Buckeye Institute's intention to file this brief at least 10 days prior to the due date. All parties consented to the filing through blanket consent letters filed with the Clerk of this Court. Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for any 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* or their counsel made a monetary contribution to the brief's preparation or submission.

workers who object to being forced to subsidize union speech with which they disagree. In support of this aspect of its work, Buckeye filed amicus briefs on the merits in support of the petitioners in both *Friedrichs v. California Teachers Association*, Case No. 14-915, in the Supreme Court of the United States, *aff'd by an equally divided court*, 136 S. Ct. 1083 (2016), and in *Janus*. Moreover, since *Janus*, Buckeye has challenged compulsory exclusive representation laws as violative of the First Amendment rights of public-sector employees. See, e.g., *Uradnik v. Inter Faculty Organization*, *et al.*, No. 18-719, *cert. denied*, 139 S.Ct. 1618 (Mem.) (U.S. Apr. 29, 2019).

SUMMARY OF ARGUMENT

In 1994, Professor Bradley Smith, observed, "[I]f ever there were advantages to the unified bar, those advantages no longer exist." Bradley A. Smith, *The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession*, 22 Fla. St. U. L. Rev. 35 (1994). He wrote shortly after this Court purportedly put integrated bar organizations out of the business of using their members' dues for political or ideological purposes. *Keller v. State Bar of California*, 496 U.S. 1 (1990).

Keller has now been in place for 30 years, and First Amendment jurisprudence has been clarified in that time, cutting the jurisprudential and logical foundations from under it. In particular, this Court reversed

Abood v. Detroit Board of Education, 431 U.S. 209 (1977), on which the *Keller* Court relied, in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018). Along the way to *Janus*, the Court made it clear that the standard of review is more rigorous than the test applied in *Keller*, that deterring free ridership is not a compelling interest that will justify the compelled subsidization of speech, and that *Abood* was flawed in other ways. The key precedent relied on in *Keller* has been overruled, and history has further proven that the distinction relied upon by *Keller* between activities germane to improving the quality of legal services and "activities of an ideological nature" is unworkable because speech about improving legal services is inherently political and touches on issues of public concern about which people can and do disagree.

In short, "[n]ow that *Abood* is no longer good law, there is effectively nothing left supporting [the Court's] decision in *Keller*." *Jarchow v. State Bar of Wis.*, 140 S. Ct. 1720, 1720 (2020) (Thomas, J., dissenting from denial of certiorari). *Keller* and *Lathrop* accordingly should be reexamined and overruled. Alternatively, as Petitioner suggests, *Keller* and *Janus* should be reconciled so that "exacting" scrutiny can be applied to Petitioner's claims on remand.

ARGUMENT

I. Introduction

The Schell Petitioners contend that the requirement that they subsidize the Oklahoma Bar's political speech by joining it and paying dues violates the First Amendment. As they argue, *Keller* held that bar associations are "subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions," 496 U.S. at 13, and the Court since made it clear that the constitutional standard to be applied is "exacting scrutiny." Pet. at 2.

In this brief, Buckeye will show that this Court has treated the integrated bar similarly to a union for years, so *Janus* applies to it. Then, Buckeye will show how, notwithstanding *Keller*'s injunction, unified bars are engaged in lobbying and filing amicus briefs on political and ideological issues as to which reasonable people can and do disagree. Those unified bars justify that activity as the pursuit of the anodyne, yet expansive, notion of improving the quality of legal services. The way out of the *Keller* wilderness in which lawyers have wandered for 30 years lies in bifurcating the bar, splitting it into a voluntary association that is not bound by *Keller* and a mandatory regulatory body.

Only lawyers in some, but not all States, must join the state bar association as a condition to their practice of law. Other professions require a license to practice, but nothing requires them to join an association. Professor Bradley Smith explains, "Doctors are not required to join the medical society, nor dentists the

dental association. Certified public accountants, veterinarians, and architects are free to join, or refrain from joining, their respective professional organizations." Smith, *supra* at 36.

Put differently, it is only in some States that lawyers are obligated to join the bar association and have the bar association speak for them, subject to blurry and ill-defined limits. The result is a First Amendment outlier.

This Court, though, has declared, "Freedom of association . . . plainly presupposes a freedom not to associate." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). Likewise, 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.'" *Janus*, 138 S. Ct. at 2643 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). The unified bar takes the freedom not to associate and the freedom not to speak from lawyers in States like Oklahoma, where such membership is required.

II. *Janus* applies to integrated bar organizations like the Oklahoma State Bar.

In *The Limits of Compulsory Professionalism*, Bradley Smith noted that, viewed organizationally, an integrated bar might be a private association, a state agency, or a professional union.[2] This Court's

[2] The private association model doesn't work because the State compels lawyers to join the bar organization in order to practice. The State could simply require a license to practice

jurisprudence and other considerations show that, contrary to the contention of some unified bar associations, an integrated bar operates more like a professional union than the other alternatives.

In *Keller*, the Court unanimously rejected the California State Bar's contention that it was a state agency and was entitled to be treated as such. It noted, "The State Bar of California is a good bit different from most other entities that would be regarded in common parlance as 'government agencies.' " 496 U.S. at 11. The Court explained that its funding came from dues payments, not from appropriations, and its membership was limited. In short, "The State Bar of California was created, not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession." *Id*. at 13.

In contrast, "[t]here 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 12 (emphasis added). By requiring lawyers to join the bar, the organization utilized state enforcement mechanisms to preclude so-called free ridership, just like other unions historically have done. The Court saw nothing wrong with this: "It is entirely appropriate that all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the

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without mandating the tie-in of a mandatory association membership.

courts should be called upon to pay a fair share of the cost of the professional involvement in this effort." *Id*. at 12.

The consequences that followed from characterizing integrated bar organizations as professional unions were familiar ones. First, the Court rejected the California State Bar's argument "that it is not subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees." *Id*. at 13. Instead, consistent with and in reliance on *Abood*, the bar organization was not permitted to spend its members' dues on "activities having political or ideological coloration which are not reasonably related to the advancement" of its legitimate goals. *Id*. at 15. And, where the integrated bar spent dues on nongermane political or ideological activities, the remedy was to be determined using the *Hudson* procedures. See *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986). The Court explained, "We believe an integrated bar could certainly meet its *Abood* obligation by adopting the sort of procedures described in *Hudson*." 496 U.S. at 17.

The application of *Abood* to integrated bar organizations has further consequences given this Court's criticism of and ultimate reversal of *Abood*. Those actions mandate reversing *Lathrop* and *Keller* or reconciling them with *Janus*.

III. Thirty years of experience with *Keller* shows that it is no more deserving of continued respect than *Abood*.

In the 30 years since *Keller*, the integrated bars were supposed to have refrained from spending dues on political or ideological activities and were required to provide rebates to lawyers when they went too far. But this solution has proven to be unworkable in practice. Speech by state bars concerning the improvement of legal services is, like speech in public-sector collective bargaining, inherently political. Even when an integrated bar does not take positions on what may be characterized as hot-button controversies, the positions advocated by integrated bars regarding improving legal services touch on matters of general public concern and involve questions upon which reasonable people may and do disagree. In short, the problem of line-drawing is insoluble, and the *Hudson* remedy is not a constitutionally adequate solution.

A. Speech regarding improving the quality of legal services, like collective bargaining, is inherently political.

In *Janus*, this Court explained that the union speech paid for by agency fees addressed both budgetary and other important issues, all of which had political implications. Collective bargaining over the level of employee compensation and benefits took place against a backdrop of serious budgetary problems. "The Governor, on the one side, and public-sector unions on the other, disagree[d] sharply over what to

do" about the problems with underfunded pensions and healthcare benefits for retirees. 138 S. Ct. at 2475. Union speech in collective bargaining also addressed issues like "education, child welfare, healthcare, and minority rights, to name a few." *Id*. Speech regarding education, for example, "touches on fundamental questions of education policy":

> Should teacher pay be based on seniority, the better to retain experienced teachers? Or should schools adopt merit-pay systems to encourage teachers to get the best results out of students? Should districts transfer more experienced teachers to the lower performing schools that may have the greatest need for their skills, or should those teachers be allowed to stay where they have put down roots? Should teachers be given tenure protection and, if so, under what conditions? On what grounds and pursuant to what procedures should teachers be subject to discipline or dismissal? How should teacher performance and student progress be measured—by standardized tests or other means?

Id. at 2476. This Court concluded, "[T]he union speech at issue in this case is overwhelmingly of substantial public concern." *Id*. at 2477.

In the same way, bar lobbying and legislative assistance, even on what *Keller* characterized as core, putatively germane issues for the bar like "improving the quality of the legal services available to the people of the State," *Keller*, 496 U.S. at 14 (quoting *Lathrop*, 367 U.S. at 843 (plurality opinion)) involve matters of

"substantial public concern" and are inherently political. *Janus*, 138 S. Ct. at 2477.

Thus, not in spite of *Keller*, but rather *because of* the error committed by *Abood* and perpetuated in *Keller*, unified bar associations have engaged in speech that is purportedly germane to the improvement of legal services, but like public-sector collective bargaining speech, is inherently political as well. The solution accordingly is not to tinker with the line drawing exercise engaged in by the *Keller* court, but to recognize that the First Amendment requires that any expenditures in support of such speech to be engaged in voluntarily, with prior affirmative consent. *Janus*, 138 S. Ct. at 2486.

There are numerous examples that demonstrate how integrated bar expenditures putatively aimed at improving legal services are inherently political or ideological. As Professor Smith observes, supporting the provision of free legal representation to tenants in eviction fights or other landlord-tenant legal disputes would increase the availability of legal services. Even so, "many bar members may staunchly oppose such a position," and an "ideological debate every bit as real as the bar taking a position on a 'substantive' issue such as rent control itself" could result. Smith, *supra* at 53.

Unified bar associations have engaged in lobbying regarding taxation and the spending of public funds that go to the very heart of the kinds of compulsory political speech rejected in *Janus*. The Labor and

Employment Section of the District of Columbia Bar filed a comment in support of the District of Columbia Civil Rights Tax Fairness Act of 2001, which would have eliminated income taxation of emotional distress damages in discrimination lawsuits. See *Proposed Comments of the Labor and Employment Law Section of the District of Columbia Bar on Support for "D.C. Civil Rights Tax Fairness Act of 2001" (Bill No. 14-321)*, available at https://tinyurl.com/55my7f5a. The Litigation Section of the D.C. Bar publicly opposed the Mayor's recommendation to cut $1 million in civil legal services and loan forgiveness funding, and the Florida Bar supports legislation that would provide student loan assistance for government and legal aid lawyers who have served in that capacity for three years.[3] Florida also supports adequate funding of and opposes cuts to the funding of the Legal Services Corporation and supports "adequate funding for civil legal assistance to indigent persons through the Florida Civil Legal Assistance Act."[4] "To suggest that speech on such matters is not of great public concern—or that it is not

[3] See Summary of Public Statement of the Litigation Section of the District of Columbia Bar Opposing the Mayor's Recommendation to Cut $1 Million in Civil Legal Services and Loan Forgiveness Funding, available at https://tinyurl.com/rupp7yvm (*Summary of Public Statement*); see also The Florida Bar, Board Adopts Legislative Positions (Jan. 10, 2019) (*Master List*), available at https://www.floridabar.org/member/legact/legact003.

[4] See *Master List*, *supra* n 3.

directed at the public square—is to deny reality." *Janus*, 138 S. Ct. at 2475 (internal citation omitted).[5]

The D.C. Bar, the Florida Bar's Business Law Section, the Family Law Section of the Nevada Bar, the Missouri Bar, and the Arizona Bar have all filed amicus briefs on issues of public concern, including nonresident taxation, LGBTQ rights, and other topics as

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[5] In many states, the sections of the state bar are opt-in. That allows subsets of the bar to take controversial positions which the Bar may or may not stand behind. When, for example, the Litigation Section of the District of Columbia Bar issued a public statement opposing the Mayor's proposal to cut $1 million in funding for civil legal services and loan forgiveness, the D.C. Bar stated that the Section's action did not reflect the views "of the D.C. Bar or of its Board of Governors." See *Summary of Public Statement*.

For its part, the Florida Bar Board of Governors initially opposed some lobbying efforts proposed by the Family Law Section "because it would cause deep philosophical and emotional divisions among a significant portion of the Bar's membership." See The Florida Bar, "Family Law Section to File Gay Adoption Case Amicus" (February 15, 2009), available at https://tinyurl.com/23c84vep. In 2009, the Supreme Court of Florida held that the Florida Bar's "actions in permitting the Family Law Section to file an amicus brief do not violate the First Amendment rights of the petitioners because membership in the Family Law Section is voluntary and any such advocacy by a section is not funded with compulsory dues." *Liberty Counsel v. Florida Bar Bd. of Governors*, 12 So.3d 183, 185 (Fla.2009). In dissent, Justice Polston, joined by Justice Canady, observed that the Bar did not follow its policies in allowing the amicus brief to be filed.

Allowing optional sections of the bar to take ideological positions that the bar cannot transparently end-runs *Keller*. Only truly voluntary groups of lawyers, not subsets of unified bars, should be permitted to stake out such positions.

to which people can and do disagree.[6] Cf. *Keller*, 496 U.S. at 5 & n.2 (noting that *Keller* Petitioners complained that "[f]iling *amicus curiae* briefs in cases involving the constitutionality of a victim's bill of rights; the power of a workers' compensation board to discipline attorneys; a requirement that attorney-public officials disclose names of clients; [and] the disqualification of a law firm" were among the bar activities that advanced "political and ideological causes"). More particularly, the Missouri and Arizona Bars have filed amicus briefs in support of unified bar associations against attacks like those of the Schell Petitioners.[7] In each case, there are lawyers who disagree

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[6] See Summary of *Amicus Curiae* Brief by the D.C. Affairs Section in Banner, et al. v. U.S., Before the Supreme Court of the United States, available at https://tinyurl.com/4cfj27dx; Raychel Lean, *Florida Bar's Business Law Section Urges High Court to Ease Summary Judgment Standard*, Law.com (Dec. 31, 2019), available at https://tinyurl.com/8pb6zh9d; and Brief of *Amicus Curiae* Family Law Section of Nevada State Bar, *Hedlund v. Hedlund*, 281 P.3d 1180 (Nev. 2009) (No. 48944), available through http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=16714 (06-32943).

[7] See Brief of the Missouri Bar as *Amicus Curiae* in Support of Appellees and Affirmance, *Fleck v. Wetch*, 937 F.3d 1112 (8th Cir. 2019) (No. 16-1564), available at https://goldwaterinstitute.org/wp-content/uploads/2019/04/Fleck-Missouri-Bar-AC.pdf.

The State Bar of Arizona filed the amicus brief in support of the State Bar of Oregon in *Crowe v. State Bar of Oregon*, No. 19-35463, in the United State Court of Appeals for the Ninth Circuit (DktEntry 30-1). No announcement of the filing appears on the Arizona Bar's website (azbar.org), or on the website of the law firm that filed the brief (omlaw.com).

with the positions taken by the unified bars in their states.

Attempts to solve the constitutional infringement by restricting the range of lobbying activities are inadequate. Professor Bradley Smith has explained how, even when the range of bar lobbying is limited, "the problems inherent in the unified bar concept" remain. Smith, *supra* at 52. For example, the Michigan Bar limited its legislative activity to five general areas, including "increasing the availability of legal services to society," and providing "content-neutral advice to legislators." See *id* at 53. But, "none of th[o]se terms is self-defining." *Id*. He notes that such a limitation "shifts, but does not eliminate, the locus of questions concerning the political activities of the bar and the rights of dissenting members." *Id*. at 52-53.

Lower courts have been equally inconsistent in applying the line between what constitutes political speech and what is properly chargeable or germane. In *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), this Court held, among other things, that a union's public relations campaign aimed at burnishing the standing of teachers "entailed speech of a political nature in a public forum" and was not properly chargeable. *Id*. at 528-29. The Ninth Circuit, later followed by the Seventh Circuit, declined to follow *Lehnert* in cases involving similar bar campaigns.

In *Gardner v. State Bar of Nevada*, 284 F.3d 1040, 1043 (9th Cir. 2002), the Ninth Circuit deemed a bar's public relations campaign to be "highly germane to the

purposes for which the State Bar exists." It did so after acknowledging, "Undoubtedly every effort to persuade public opinion is political in the broad sense of the word." *Id*. at 1042-43. The court explained that the campaign helped to "dispel the notion that lawyers are cheats or are merely dedicated to their own self-advancement or profit." *Id*. at 1043. The campaign served vague State bar interests: "to advance understanding of the law, the system of justice, and the role of lawyers, as opposed to nonlawyers, to make the law work for everyone." *Id*.

The Seventh Circuit followed the Ninth Circuit in disregarding one of *Lehnert*'s holdings. The court concluded, "It is no infringement of a lawyer's First Amendment freedoms to be forced to contribute to the advancement of the public understanding of the law." *Kingstad v. State Bar of Wisconsin*, 622 F. 3d 708, 720 (7th Cir. 2010) (quoting *Gardner*, 284 F. 3d at 1043); see also *id*. at 721 ("T]he State Bar's public relations campaign was germane to the Bar's constitutionally legitimate purpose of improving the quality of legal services available to the Wisconsin public."). In contrast to the "exacting" scrutiny mandated by *Janus*, the court's review was "deferential": it found no need for a trial "that would scrutinize either the subjective motives of bar leaders or the actual effectiveness of the public image campaign"; and the test was not necessity, but rather reasonableness. *Id*. at 718-19.

The First Circuit found a unified bar association requirement that all bar members purchase life insurance from the association's program not to be

germane to the bar association's purposes. *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291 (1st Cir. 2000). The court observed, "The costs of that insurance are far from negligible; in some years the life insurance premium has constituted 72% of the dues." *Id*. at 293.

Gardner, *Kingstad*, and *Romero* come from the days when the courts looked at germaneness. Now, to be consistent with this Court's First Amendment jurisprudence, the courts should employ exacting scrutiny. Each case, though, illustrates how the unified bars thought they should—or at least could—spend their members' dues.

B. The *Hudson* remedy is inadequate.

As noted above, remanding objecting lawyers to a *Hudson*-like process of claiming a refund puts the burden on the objectors and fails to examine the legal basis for the bar's claim. The results are also hardly worth the effort.

In *Crowe v. Oregon State Bar*, the Petitioners note that, after they complained about the Oregon Bar's advocacy, the Bar gave them "a partial dues refund of $1.12, plus $0.03 of statutory interest, with no further explanation." Petition for Writ of Certiorari at 8, *Crowe v. Oregon State Bar*, *cert. denied*, 595 U.S. ___ (U.S. Oct. 4, 2021) (No. 20-1678); cf. *Janus*, 138 S. Ct. at 2482 ("[T]he *Hudson* notice in the present case and in others that have come before us do not permit a nonmember to make that determination," i.e.,

whether to challenge the Bar's chargeability allocation.).

Professor Bradley Smith further explains, after the Florida Supreme Court trimmed the Florida Bar's sails by limiting its lobbying activities to five subject areas, the number of objectors was "relatively small." Smith, *supra* at 51 & 54. Among the reasons for that paucity of objections was "the rather paltry size of the rebate," which was $8.52 plus interest in 1993. *Id*. at 54 and n.113; see also Petitioner's Appx. at 10a, *Fleck v. Wetch*, 140 S. Ct. 1294 (2020) (No. 19-670) ("OPTIONAL: Keller deduction relating to non-chargeable activities. Members wanting to take this deduction may deduct $10.07 if paying $380; $8.99 if paying $350; and $7.90 if paying $325."). Those *Fleck* numbers reflect a return of some 2-3% of the annual dues.

Recall that in *Lathrop* in 1961, Mr. Lathrop was objecting to a $15 annual assessment. See *Lathrop*, 367 U.S. at 822. Now, even after deductions allowed in some jurisdictions, much more money goes to the unified bar in the form of member dues. Even if the transition to a bifurcated bar led to a decrease in bar membership, the resulting decrease might be offset by reductions in administrative costs, ending services to the lawyers who opted out, and saving the cost of *Keller*-driven fights and rebates. Smith, *supra* at 60.

IV. Neither *Keller* nor *Lathrop* are essential to the unified state bars' performance of their core functions.

In 1994, Bradley Smith observed, "The advantages of coerced membership in a state bar have always been more rhetorical than real." *Id.* at 58. He goes on to examine the claims that unified bars have more resources and provide greater benefits to the public and members, finding the arguments lacking.

Smith notes that voluntary bar associations have developed other sources of revenue and have generally retained more than 70% of the State's lawyers. *Id*. at 59. Smith explains, "Where dues are mandatory, lawyers may view the bar as a taxing authority, to which the less paid the better." *Id*. at 60.

In the same way, claims that the unified bar provides "better consumer protection and regulatory innovation, improved delivery of legal services, including pro bono work, and better lawyer discipline" are without merit. *Id*. at 61. Voluntary bar associations first adopted client security funds and continuing legal education programs. *Id*. Moreover, "who could ever seriously suggest that pro bono legal services for the poor and indigent are more readily available in Michigan, with its mandatory bar, than in Ohio or the other voluntary bar states surrounding Michigan?" *Id*. Furthermore, the state can effectively take responsibility for attorney discipline from the otherwise autonomous trade association, and "there are public policy reasons to prefer that it do so." *Id*. at 62. The

state is less likely to apply discipline for "anti-competitive or other illegitimate reasons" or "unreasonably seek to protect members from punishment or exposure." *Id*. at 63. In short, the unified bar has been a "disappointment" when it comes to providing better public benefits. *Id*. at 61.

The solution is to apply *Janus*'s requirement that no funds be extracted by bars in support of inherently political speech without clear and affirmative consent. *Janus*, 138 S. Ct. at 2486. This can be (and has been) accomplished by breaking the unified bar into two parts: a voluntary bar that can act without regard to *Keller*'s limitations and a mandatory association to perform core regulatory functions.

In 2013, the Supreme Court of Nebraska limited the use of mandatory dues to the regulation of the legal profession, identifying six functions of that regulation, and called for "the remaining activities of the Bar Association [to] be financed solely by revenues other than mandatory assessments." *In re Petition for a Rule Change to Create a Voluntary State Bar of Nebraska*, 841 N.W. 2d 167, 179 (Neb. 2019). The California Bar split into two entities in 2018, when the bar's sections and other trade association-like activities were spun off into a voluntary entity. That voluntary association is free to advocate for and against state legislation without being limited by *Keller*. See Lyle Moran, *California Split: 1 Year After Nation's Largest Bar Became 2 Entities, Observers See Positive Change*, ABA Journal, Feb. 2019.

As Bradley Smith notes, "to the extent that efficient bar association administration and a strong legislative program are beneficial to the private bar, unification is a handicap, not a strength." Smith, *supra* at 64. He explains, "In a voluntary bar state, . . . the state can directly assume its proper regulatory functions aimed at protecting the public interest. Voluntary bar associations are then free to tend to the broader issues of improving professional standards, and to promoting voluntary pro bono, educational, and other programs." *Id*. at 63.

Getting to a bifurcated bar requires reversing both *Keller* and *Lathrop*, or, alternatively, reconciling *Keller* and *Janus* so that "exacting scrutiny" is genuinely applied. Reversing *Keller* would be just *Abood*'s second shoe dropping; *Keller* relied on it and, in application, suffers from the same defects. *Lathrop* is the source of the mischief in that it authorizes the state to compel lawyers to become members of the unified bar. It thereby infringes lawyers' First Amendment right to refrain from associating. If this Court does not reverse both *Keller* and *Lathrop*, then it must reconcile *Keller* with *Janus*, given this Court's rejection of *Abood*.

Professor Smith concludes that "a return to a voluntary bar is in the best interests of both lawyers and the public." *Id.* at 73. This case offers the Court an opportunity to eliminate a First Amendment outlier.

CONCLUSION

For the reasons stated in the Petition and this *amicus* brief, this Court should grant the writ of certiorari and, on review, reverse the decision of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

JOHN J. PARK, JR.
Counsel of Record
for Amicus Curiae
P. O. Box 3073
Gainesville, GA 30503
(678) 608-1920
jackparklaw@gmail.com

ROBERT ALT
President and CEO
THE BUCKEYE INSTITUTE
88 East Broad Street
Suite 1300
Columbus, OH 43215
(614) 224-4422