No. 21-779

IN THE
Supreme Court of the United States

MARK E. SCHELL,

Petitioner,

v.

THE CHIEF JUSTICE AND JUSTICES OF THE OKLAHOMA SUPREME COURT, ET AL.,

Respondents.

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

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

RAYMOND J. LAJEUNESSE, JR.
Counsel of Record
JAMES C. DEVEREAUX
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

In *Keller v. State Bar of California*, 496 U.S. 1, 13 (1990), this Court held that mandatory bar dues are "subject to the same constitutional rule" as compulsory public-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*?

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 nonprofit, charitable organization formed to provide free legal assistance to individual employees subject to compulsory unionism. These employees suffer violations or threats to their 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 "mandatory bar dues that subsidize the political and ideological speech of bar associations [are] subject to 'the same constitutional rule' of exacting First Amendment scrutiny that applies to compulsory union fees under *Janus*?" 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 Bd. of Educ.*, 431 U.S. 209 (1977). *Abood* inexplicably applied a deferential and ultimately unworkable standard of review to a scheme of dues compelled from 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 held that mandatory bar dues are "subject to the same constitutional rule" that applies to compulsory union fees, which at the time was the deferential standard set forth in *Abood*. *Id*. at 13. Given that the Court relegated *Abood's* standard to oblivion in *Janus*, the Court should not allow it to live on in the similar context this case presents.

Indeed, the Court should clarify that compelled subsidization of speech is subject to strict scrutiny. A standard described as "exacting" is sometimes found in the campaign finance context, but when examined

closely those cases reveal this Court has applied the more demanding strict scrutiny standard.

ARGUMENT

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

1. In *Knox*, the Court recognized that "exacting scrutiny" is the minimum standard required when a scheme compels funding of speech and association. 567 U.S. at 309-10; *see also 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* invalidated a union's "Emergency Temporary Assessment to Build a Political Fight-Back Fund" imposed on nonmembers without proper notice. The Court pointed out that in *United Foods* it had "made it clear that compulsory subsidies for private speech are subject to exacting First Amendment scrutiny." 567 U.S. at 310. In striking down that union scheme, *Knox* applied a two part test that "there must be a comprehensive regulatory scheme" which "serve[s] a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms," and the compulsory fees must be "a 'necessary incident' of the larger regulatory purpose . . . ." *Id.* (quoting *Roberts*, 468 U.S. at 623, and *United Foods*, 533 U.S. at 414).

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, "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 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*, where the Court again held that agency-fee requirements are subject to at least exacting scrutiny "[b]ecause the compelled subsidization of private speech seriously impinges on First Amendment rights." 138 S. Ct. at 2464-65. The Court held agency fee requirement do not survive that scrutiny. *Id.* at 2465-78.

2. In *Keller*, the Court held that the constitutional scrutiny applicable to compelled support for unions applies to compelled support for bar associations. 496 U.S. at 12-14. The Court found "[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. The Court in *Keller* also relied heavily on cases that concerned compelled support for a union.[2]

A faithful application of *Keller* requires applying to mandatory bar dues the level of scrutiny now applicable to mandatory union fees under *Knox*, *Harris*, and *Janus*: which is at least exacting constitutional scrutiny. Indeed, as discussed below, *Janus* suggests that an even higher standard—strict scrutiny—may apply. 138 S. Ct. at 2464-65.

B. *Abood's* Discredited Analysis Should Not Live on Through *Keller*.

The alternative to applying exacting scrutiny to mandatory bar dues is for courts to apply the now-defunct rule of *Abood* to these compelled subsidies for speech, as the Tenth Circuit did below. Pet. App. 20a-22a. The Court should grant review and reject that alternative for several reasons.

First, and most obviously, *Abood* is no longer good law, the Court having overruled it in *Janus*. The Court in *Janus* found specific fault in *Abood's* failure to apply exacting scrutiny to compelled subsidies for union speech. 138 S. Ct. at 2483. The Court recognized that "*Abood* judged the constitutionality of public-sector agency fees under a deferential standard that

---

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

finds no support in our free speech cases." *Id*. at 2479-80. This made "*Abood* . . . an 'anomaly' in [the Court's] First Amendment jurisprudence" that was inconsistent both with prior cases and with "later cases involving compelled speech and association . . . [that] also employed exacting scrutiny, if not a more demanding standard." *Id* at 2483. (quoting *Harris*, 573 U.S. at 658). It would be incongruous for *Abood*'s discredited analysis to continue to control the constitutionality of compelled subsidies for bar associations and their expressive activities.

Second, courts construing *Keller* to *not* require application of exacting scrutiny, but rather *Abood*'s deferential standard, will bring *Keller* into conflict with *Knox*, *Harris*, *Janus* and other cases that applied exacting or greater scrutiny to instances of compelled speech and association. This interpretation of *Keller* would make the case just as much an "'anomaly' in [the Court's] First Amendment jurisprudence," *Janus*, 138 S. Ct. at 2483 (quoting *Harris*, 573 U.S. at 658), as was *Abood*. To maintain the internal consistency of its jurisprudence, the Court should interpret *Keller* to require that mandatory bar dues be subject to at least exacting scrutiny.

Finally, the Court should not construe *Keller* to require *Abood*'s analysis because the Court found that analysis to be unworkable in *Janus*, 138 S. Ct. at 2481-2482. "Under *Abood*, nonmembers may be charged for the portion of union dues attributable to activities that are 'germane to [the union's] duties as collective-bargaining representative,' but nonmembers may not be required to fund the union's political

and ideological projects." *Id*. at 2460-61 (quoting *Abood*, 431 U.S. at 235). The Court found "*Abood*'s line between chargeable and nonchargeable union expenditures has proved to be impossible to draw with precision." *Id*. at 2481. Even the respondents in *Janus* "agree[d] that *Abood*'s chargeable-nonchargeable line suffers from 'a vagueness problem,' that it sometimes 'allows what it shouldn't allow,' and that 'a firm[er] line c[ould] be drawn.'" *Id*. at 2481 (quoting Tr. of Oral Arg. 47–48).

Absent this Court's review, *Abood*'s unworkable analysis will continue to govern the constitutionality of mandatory bar dues. In dicta, the Court in *Keller* discussed how application of *Abood*'s analysis would result in distinguishing between activities germane to "regulating the legal profession" and "improving the quality of legal services"—which lawyers could be forced to subsidize—and activities "having political or ideological coloration which [is] not reasonably related to the advancement of such goals." *Keller*, 496 U.S. at 14-15. The Tenth Circuit construed *Keller* to require the court to apply this test. Pet. App. 20-21a.

But this test is just as amorphous as *Abood's* test, if not more so. Just about any bar association activity could arguably relate to "improving the quality of legal services." This vague standard, in turn, gives bar associations great leeway to charge dissenting attorneys for political and ideological activities, as illustrated by the examples the Petition lists. *See* Pet. 6-9.

Abood's analysis is just as unworkable as applied to mandatory bar dues as it was when applied to agency fees. The Court should grant review to reverse

the Tenth Circuit's decision to apply this defunct analysis and to require the courts to apply at least exacting First Amendment scrutiny to compelled subsidies for a bar association and its speech.

C. Strict Scrutiny Should Be Required to Avoid Confusion in the Application of First Amendment Rights.

The Court stated in *Harris* that exacting scrutiny may be "too permissive" a standard for evaluating compelled subsidies for union speech, but found that "[f]or present purposes . . . 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*." 573 U.S. at 648. The Court in *Janus* similarly recognized that "cases involving compelled speech and association have . . . employed exacting scrutiny, *if not a more demanding standard*." *Id.* at 2483 (emphasis added). The Court should grant review to resolve precisely what standard of scrutiny applies to compelled subsidies for speech, and hold that strict scrutiny applies.

When speech and associational rights are implicated, the Court often applies strict scrutiny. 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).[3]

Another notable campaign finance case employed strict scrutiny rather than exacting scrutiny when evaluating whether a law prohibiting use of corporate treasury funds for independent expenditures violated the First Amendment. In *Austin v. Michigan Chamber of Commerce*, the Court required the government show a "compelling state interest." There, the Court expanded what counts as such an interest. 494 U.S. 652, 658 (1990). Yet it still relied on a strict scrutiny standard.

Continuing this trend, *Citizens United* explicitly applied strict scrutiny. *Citizens United*, 558 U.S. at 340. 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).

---

[3] The Court there said, "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.

The campaign finance cases often use the term "exacting scrutiny" as a virtual synonym for strict scrutiny, which suggests that the exacting standard used in *Janus* may fail to protect First Amendment rights when compelled dues are at issue, that strict scrutiny is necessary. First Amendment rights may also be unprotected in contexts other than those concerning forced union dues, such as this case. Strict scrutiny is the appropriate level of heightened scrutiny. At a minimum, maintenance of any 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 Court should grant the petition.

Respectfully submitted,

RAYMOND J. LAJEUNESSE, JR.
Counsel of Record
JAMES C. DEVEREAUX
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