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 IN OPPOSITION

MICHAEL BURRAGE
WHITTEN BURRAGE
512 N. Broadway
Suite 300
Oklahoma City, OK 73102

Counsel for the Members of the Oklahoma Bar Association Board of Governors and John M. Williams

SETH P. WAXMAN
DANIEL S. VOLCHOK
Counsel of Record
KEVIN M. LAMB
SAMUEL M. STRONGIN
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 663-6000
daniel.volchok@wilmerhale.com

Counsel for all respondents

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

THOMAS G. WOLFE
HEATHER L. HINTZ
PHILLIPS MURRAH P.C.
Corporate Tower
13th Floor
101 N. Robinson Ave.
Oklahoma City, OK 73102

Counsel for the Members of the Oklahoma Bar Association Board of Governors and John M. Williams

KIERAN D. MAYE, JR.
LESLIE M. MAYE
MAYE LAW FIRM
3501 French Park Drive
Suite A
Edmond, OK 73034

Counsel for the Chief Justice and Justices of the Oklahoma Supreme Court

QUESTION PRESENTED

In *Keller* v. *State Bar of California*, 496 U.S. 1 (1990), this Court "held that lawyers admitted to practice in [a State] could be required … to fund activities 'germane' to the association's mission of 'regulating the legal profession and improving the quality of legal services,'" *Board of Regents of University of Wisconsin System* v. *Southworth*, 529 U.S. 217, 231 (2000) (quoting *Keller*, 496 U.S. at 13-14). The question presented is whether the Tenth Circuit correctly understood and applied *Keller*'s holding here.

PARTIES TO THE PROCEEDING

The petition correctly identifies the parties save for its list of members of the Oklahoma Bar Association Board of Governors. Several of the individuals the petition lists—Charles E. Geister III, Susan B. Shields, David T. McKenzie, Timothy E. DeClerck, Andrew E. Hutter, and April J. Moaning—are no longer members. They have been succeeded by Brian T. Hermanson, S. Shea Bracken, Dustin Conner, Allyson E. Dow, Angela Ailles Bahm, and Dylan D. Erwin.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

DOCKETED CASES

RULES

IN THE

Supreme Court of the United States

No. 21-779

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 IN OPPOSITION

INTRODUCTION

Petitioner Mark Schell, an active member of the Oklahoma Bar Association ("OBA"), filed this action alleging that because OBA engages in expressive activity with which he disagrees, the First Amendment bars Oklahoma from requiring him to pay annual dues to OBA in order to practice law in the state. The Tenth Circuit affirmed dismissal of that claim on the ground that *Keller* v. *State Bar of California*, 496 U.S. 1 (1990), held that mandatory bar dues do not contravene the First Amendment so long as they are used to "fund activities germane to th[e] goals" of "regulating the legal profession and improving the quality of legal services,"

id. at 13-14; *see also, e.g.*, *Board of Regents of University of Wisconsin System* v. *Southworth*, 529 U.S. 217, 231 (2000) ("*Keller* … held that lawyers admitted to practice in California could be required to join a state bar association and to fund activities 'germane' to the association's mission of 'regulating the legal profession and improving the quality of legal services.'" (quoting *Keller*, 496 U.S. at 13-14)).

Petitioner's request for certiorari rests entirely on his view that the holding in *Keller* just described was actually dicta. According to petitioner, *Keller*'s actual holding was that the First Amendment standard governing the use of mandatory *bar* dues for expressive activity blindly tracks forever the First Amendment standard governing the use of mandatory *union* dues for expressive activity. That holding, petitioner argues, means that when this Court later changed the First Amendment standard governing (some) mandatory union dues, in *Janus* v. *AFSCME, Council 31*, 138 S.Ct. 2448 (2018), that automatically changed the First Amendment standard governing mandatory bar dues. That reading is borderline frivolous. No court has ever adopted it (although hundreds of cases have cited *Keller*), the rule it would produce is unprecedented and unworkable, and the reading itself runs afoul of this Court's precedent.

There is no reason for this Court to review the Tenth Circuit's rejection of petitioner's reading of *Keller* and its consequent affirmance of the dismissal of his First Amendment challenge to mandatory bar dues. The decision below does not conflict with any decision of this Court or any other. And this Court has recently denied petitions raising the same underlying constitutional question petitioner raises, i.e., whether exacting First Amendment scrutiny applies to mandatory bar

dues. Moreover, even if the Court now wanted to address that question, this case would be a poor vehicle for doing so. That is because petitioner, despite declaring that the question is in dire need of a definitive answer, has expressly disavowed any request to overrule *Keller*, meaning the Court could not reach the underlying question if it rejected petitioner's far-fetched reading of *Keller*. The petition should be denied.

STATEMENT

A. The Oklahoma Bar Association

OBA comprises all individuals licensed to practice law in Oklahoma. Pet. App. 4a. With exceptions not relevant here, Oklahoma law requires every lawyer, as a condition of practicing law in the state, to join OBA and pay annual dues to support its operations. Pet. App. 33a. The mandatory dues are imposed "for a public purpose connected with the administration of justice." *Ford* v. *Board of Tax-Roll Corrections of Oklahoma County*, 431 P.2d 423, 431 (Okla. 1967).

OBA's bylaws authorize the association to spend money on three types of "legislative activity." Pet. App. 5a. The first is "propos[ing] legislation 'relating to the administration of justice; to court organization; selection, tenure, salary and other incidents of the judicial office; to rules and laws affecting practice and procedures in the courts and in administrative bodies exercising adjudicatory functions; and to the practice of law.'" Pet. App. 59a (quoting OBA's bylaws). The second is "mak[ing] recommendations upon any proposal pending before" Congress or the Oklahoma Legislature, so long as the proposal concerns a topic on which OBA is authorized to suggest legislation. Pet. App. 59a-60a (quoting OBA's bylaws). The third is "en-

dors[ing] '[a]ny proposal for the improvement of law, procedural or substantive … in principle.'" Pet. App. 60a (quoting OBA's bylaws) (second alteration in original).[1]

OBA also publishes the *Oklahoma Bar Journal*, which contains articles by a variety of authors on a variety of topics. Pet. App. 5a-7a, 60a-64a. OBA publishes the *Oklahoma Bar Journal* to further the association's purpose of "provid[ing] a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence, and law reform," Dkt. 45-1, at 1, *Schell* v. *Williams*, No. 5:19-cv-00281 (W.D. Okla. June 21, 2019).

B. *Keller* And *Janus*

1. In *Keller*, this Court upheld California's requirement that attorneys pay membership dues to an integrated bar association as a condition for practicing law in the state, stating that "[t]he State Bar may … constitutionally fund activities germane to [its] goals out of the mandatory dues of all members." 496 U.S. at 14; *accord id.* at 4 ("We agree that lawyers admitted to practice in the State may be required to … pay dues to the State Bar[.]"). As the Court explained, in an earlier case, *Lathrop* v. *Donohue*, 367 U.S. 820 (1961), a plurality had reserved decision on whether mandatory bar dues could be used to finance ideological activities over a member's objection. *See Keller*, 496 U.S. at 7-9. *Keller* resolved that question, holding that in light of states' valid "interest in regulating the legal profession and improving the quality of legal services," a state bar can use compulsory dues to fund "activities germane to

[1] Procedures that OBA adopted in 2020 allow members to opt out of having any of their dues applied to OBA legislative advocacy. Pet. App. 11a-12a.

those goals," but cannot use such dues for "activities of an ideological nature" that are not "germane." *Id.* at 13-14.

In reaching this holding, the Court rejected the California bar's threshold argument (which the California Supreme Court had accepted) that a state bar's speech is "government speech" and thus entirely exempt from First Amendment scrutiny. 496 U.S. at 10-12. This Court held that the state bar was not a government agency for First Amendment purposes because its primary funding came from membership dues rather than legislative appropriations, and because it provided "essentially advisory" services to the state's supreme court, which had ultimate authority to regulate the legal profession. *Id.* at 11.

Keller then addressed the level of First Amendment scrutiny that applies to mandatory bar dues. Perceiving "a substantial analogy" between "the relationship of employee unions [with] their members" and the relationship of state bars with their members, 496 U.S. at 12, the Court looked to *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977). At the time of *Keller*, both public and private employees could be required under *Abood* to pay union dues to support activities germane to their union's collective-bargaining efforts, but could not be required to pay dues to fund activities unrelated to those efforts. *See id.* at 225, 234-235. *Keller* concluded that while members of the state bar "do not benefit as directly from its activities as do employees from union negotiations with management," they derive benefit from being admitted to practice in the state's courts and can accordingly likewise be made to pay their "fair share of the cost" of the bar's work in proposing both rules and disciplinary actions to state bodies with ultimate regulatory authority. 496 U.S. at

12. The Court thus deemed "unavailing" the 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.

Finally, *Keller* explained that a germaneness requirement for the use of mandatory bar dues would not unduly burden state bars by requiring them to conduct a case-by-case analysis of their activities. *See Keller*, 496 U.S. at 16. Rather, *Keller* held (*see id.* at 17) that a bar could adopt procedures like those approved in *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292 (1986). As *Keller* explained, *Hudson* held that a union could satisfy its obligation to limit the use of mandatory dues to germane activities by (1) providing both "an adequate explanation of the basis for [its] fee" and "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker," and (2) placing disputed amounts in escrow pending resolution of challenges, *Keller*, 496 U.S. at 16.

2. In *Janus*, this Court overruled *Abood*, holding that mandatory union dues for public-sector employees violate the First Amendment. *See* 138 S.Ct. at 2486. That was because, the Court held, such arrangements are subject to (and cannot withstand) "exacting scrutiny" under the First Amendment. *Id.* at 2465. At the same time, *Janus* expressly distinguished mandatory union dues for *private* employees, explaining that *Abood* "failed to appreciate that a very different First Amendment question arises when a State requires its employees to pay agency fees," and "did not sufficiently take into account the difference between the effects of agency fees in public- and private-sector collective bargaining." *Id.* at 2479-2480 (emphasis omitted).

The dissent in *Janus* noted that the Court's decision "does not question" *Keller* or other cases, 138 S.Ct. at 2497-2498 (opinion of Kagan, J.). Neither the Court nor any individual Justice disputed that statement.

C. Proceedings Below

1. Following *Janus*, petitioner brought this action in the Western District of Oklahoma, alleging three First Amendment violations. Pet. App. 7a-8a. Count I of the amended complaint challenges the Oklahoma-law requirement that attorneys join OBA in order to practice law in the state. Pet. App. 67a-68a. Count II challenges the mandatory-dues requirement. Pet. App. 69a-71a. And count III challenges the adequacy of OBA's *Hudson* procedures, i.e., procedures to ensure compliance with the germaneness requirement. Pet. App. 71a-73a. Underlying all three claims is petitioner's assertion that "OBA uses members' mandatory dues to engage in speech, including political and ideological speech," with which he disagrees. Pet. App. 59a. As examples of this purportedly improper speech, the complaint cites legislative advocacy and *Oklahoma Bar Journal* articles on various topics, including "the influence of monetary contributions on the judicial selection process" in Oklahoma (where many state judges stand for election). Pet. App. 6a; *see also* Pet. App. 60a-64a (operative complaint discussing articles).

The district court granted in part and denied in part defendants' motion to dismiss the amended complaint. Pet. App. 8a-10a. The court dismissed petitioner's challenges to the dues and membership requirements, reasoning that those challenges were foreclosed by, respectively, *Keller* and *Lathrop*. *See* Pet. App. 10a, 41a-42a. The court was also "unpersuaded" by petitioner's argument that *Janus* "requires a different

result." Pet. App. 42a. In the court's view, nothing in *Janus* "suggest[ed] … that either *Lathrop* or *Keller* w[as] overruled or otherwise called into question." Pet. App. 43a.

The district court held, however, that petitioner had adequately alleged that OBA's *Hudson* procedures failed to "appropriately protect the rights of members who do not wish to subsidize activities beyond those germane to improving legal services and regulating the profession." Pet. App. 43a. OBA subsequently adopted new procedures "that enshrined the spending safeguards … Schell had alleged were compelled by the First Amendment." Pet. App. 11a. After adoption of the revised procedures, the court dismissed count III as moot, without opposition from petitioner. *Id.*

2. On appeal, the Tenth Circuit unanimously affirmed the dismissal of petitioner's mandatory-dues claim (the claim at issue here) but reversed the dismissal of his mandatory-membership claim, remanding it for further proceedings. Pet. App. 30a.

With respect to mandatory bar dues, the court held that "*Keller* remains binding precedent," and that under *Keller*, "Schell's Amended Complaint failed to state a plausible claim that the OBA's mandatory dues are unconstitutional." Pet. App. 20a. The court rejected as "unconvincing" petitioner's argument that *Keller* "held that mandatory bar dues are subject to the same constitutional rule that applies to mandatory union fees." *Id.* In reality, the court concluded, "*Keller* established a germaneness test for the constitutionality of mandatory bar dues," a test that "*Janus* did not replace … with exacting scrutiny." Pet. App. 22a.

With respect to petitioner's challenge to the membership requirement, the court of appeals reversed,

holding that *Lathrop* and *Keller* did not foreclose "a broad freedom of association challenge to mandatory bar membership where at least some of a state bar's actions might not be germane to regulating the legal profession and improving the quality of legal services in the state." Pet. App. 28a-29a. The court remanded the mandatory-membership claim for further proceedings, including on whether the operative complaint plausibly alleges non-germane political or ideological speech within the applicable statute of limitations. Pet. App. 29a.

The Tenth Circuit denied petitioner's request for rehearing en banc. Pet. App. 46a.[2]

REASONS FOR DENYING THE PETITION

I. PETITIONER'S READING OF *KELLER*—WHICH IS THE ENTIRE BASIS FOR HIS CLAIM THAT THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT—IS MANIFESTLY WRONG

As explained, the Tenth Circuit held here that *Keller* forecloses petitioner's First Amendment challenge to Oklahoma's bar-dues requirement. Pet. App. 20a-22a. Petitioner argues that this holding conflicts with both *Keller* itself and *Janus*. Pet. 14-21. The essential premise of that argument is petitioner's claim about what exactly *Keller* held. According to petitioner, "the actual holding of *Keller*" was simply that the "same constitutional rule" applies to mandatory bar dues and mandatory union fees. Pet. 2 (quoting *Keller*, 496 U.S. at 13). In other words, petitioner says that *Keller* held

---

[2] Petitioner also sought panel rehearing, which the panel granted "for the limited purpose of addressing" the scope of the remand proceedings on petitioner's mandatory-membership claim. Pet. App. 29a n.10.

only that the First Amendment standard for mandatory bar dues forever tracks the First Amendment standard for mandatory union dues. Everything *Keller* then said about why bar dues passed muster under the First Amendment, petitioner insists, was simply dicta. *E.g.*, Pet. 3.

This reading of *Keller*—on which, again, petitioner's request for certiorari depends entirely—borders on frivolous. It finds no support in any judicial decision, is inconsistent with this Court's repeated descriptions of *Keller*'s holding, and would create an unworkable rule for which petitioner cites no precedent in American jurisprudence.

A. No Case Has Adopted Petitioner's Reading Of *Keller*, And Decisions Of This Court Refute It

Petitioner's reading of *Keller* has no precedential support whatsoever. According to Westlaw and LEXIS, *Keller* has been cited in roughly 250 cases. Yet petitioner points to *no* case adopting his reading of the decision—or even to a concurrence, dissent, or other separate opinion doing so. Nor does he cite any case that struck down the use of mandatory bar dues for germane expression. The absence of any such case (on either point) of course means there is no conflict among the lower courts. And that alone goes far to establish that certiorari is unwarranted. But the complete lack of case support for petitioner's reading of *Keller* also illustrates how far-fetched that reading is.

So does the fact that decisions of this Court refute that reading, recognizing that part of *Keller*'s actual holding was that the use of mandatory bar dues for germane expression is constitutional. For example, in *Board of Regents of University of Wisconsin System* v.

Southworth, this Court stated unambiguously that "*Keller* … *held* that lawyers admitted to practice in California could be required to join a state bar association and to fund activities 'germane' to the association's mission of 'regulating the legal profession and improving the quality of legal services,'" 529 U.S. at 231 (emphasis added) (quoting *Keller*, 496 U.S. at 13-14). Petitioner does not so much as cite *Southworth*, even though respondents quoted this exact language below.

Likewise fatal to petitioner's reading is *Harris* v. *Quinn*, 573 U.S. 616 (2014), one of this Court's most recent decisions describing *Keller*'s holding. Echoing *Southworth*, *Harris* stated that "[i]n *Keller*, we … *held* that members of [a state] bar … could be required to pay … dues used for activities connected with proposing ethical codes and disciplining bar members," *id.* at 655 (emphasis added). Again, petitioner (though citing *Harris*) does not try to reconcile *Harris*'s reading of *Keller* with his.

Separate opinions from individual Justices have read *Keller* the same way *Southworth* and *Harris* did. Justice Stevens, for example, stated that *Keller* "*held* … a compelled subsidy is permissible when it is ancillary, or 'germane,' to a valid cooperative endeavor." *United States* v. *United Foods, Inc.*, 533 U.S. 405, 418 (2001) (concurring opinion) (emphasis added). More recently, in this Court's sole post-*Janus* opinion of any kind addressing *Keller*, Justice Thomas, joined by Justice Gorsuch, observed that in *Keller*, "the Court *held* that '[t]he State Bar may … constitutionally fund activities germane to [its] goals' of 'regulating the legal profession and improving the quality of legal services' using 'the mandatory dues of all members.'" *Jarchow* v. *State Bar of Wisconsin*, 140 S.Ct. 1720, 1720 (2020) (mem.) (dissenting from denial of certiorari) (altera-

tions and omission in *Jarchow*) (emphasis added) (quoting *Keller*, 496 U.S. at 13-14). And again, although petitioner otherwise discusses *Jarchow*, he simply ignores that the dissent from the denial of certiorari there described *Keller*'s holding in a way irreconcilable with his reading.

In short, not a single case has read *Keller* as petitioner does (or held the use of mandatory bar dues for germane expression unconstitutional), and the opinions of this Court (and of individual Justices) uniformly reject that reading.

B. Petitioner's Position Would Mean *Keller* Adopted An Unprecedented And Unworkable Rule

The holding petitioner ascribes to *Keller* is exceedingly odd. As discussed, petitioner argues that *Keller* did not adopt a specific First Amendment standard for mandatory bars dues, but instead held only that the First Amendment standard for those dues forever follows the First Amendment standard for mandatory union dues. That is simply not how courts decide cases. Courts, when presented with a particular scenario or set of circumstances, adopt a specific rule or standard for that scenario, based on whatever legal, policy, and other considerations they deem relevant. While courts frequently analogize to other scenarios, they do not hold that the applicable rule or standard for the scenario before them blindly tracks, for all time, the rule or standard for some *other* scenario. Petitioner cites no other case, from all of American jurisprudence, adopting such a holding.

Indeed, such a holding is unworkable—as is starkly illustrated by the very sentence in *Keller* from which

petitioner draws his "same constitutional rule" mantra. Although petitioner never goes beyond that snippet, the full sentence reads:

> We think that these differences between the State Bar, on the one hand, and traditional government agencies and officials, on the other hand, render unavailing respondent'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*.

Keller, 496 U.S. at 13 (emphasis added). Petitioner's position, therefore, is that *Keller* held that the First Amendment standard for mandatory bar dues permanently tracks the First Amendment standard for mandatory dues by "unions representing public *and* private employees," *id.* (emphasis added). That, of course, is inherently problematic, because the First Amendment standard for mandatory dues by public-sector unions could diverge from the First Amendment standard for mandatory dues by private-sectors unions. In that event, there is no way that *Keller*'s holding could be followed, because the bar-dues standard could not track the standard for both public-sector union dues and private-sector union dues.

This is obviously not a hypothetical concern; such divergence has occurred. *Janus* changed the First Amendment standard for mandatory public-union dues but not for mandatory private-union dues. As *Keller* itself explained, *see* 496 U.S. at 10, the First Amendment standard for mandatory private-union dues was originally established not by *Abood* (which concerned only public-sector union dues), but by *Ellis* v. *Brotherhood of Railway, Airline & Steamship Clerks, Freight*

Handlers, Express & Station Employees, 466 U.S. 435 (1984). And *Janus* made clear that in overruling *Abood*, it was not changing the First Amendment standard for mandatory private-union dues. In fact, *Janus* explicitly said that "a *very different* First Amendment question arises" with public-union dues and private-union dues. 138 S.Ct. at 2479. Under petitioner's reading of *Keller*, therefore, the use of mandatory bar dues for expressive activity is today "subject to the same constitutional rule [as] … compulsory dues [for] labor unions representing public and private employees," 496 U.S. at 13—which is impossible because "labor unions representing public and private employees" are subject to two different constitutional rules for this purpose. The fact that petitioner's reading ascribes such an unworkable holding to *Keller* further confirms that that reading is wrong.

Petitioner tries to avoid this fatal flaw (which respondents described below) by rewriting *Keller*. He asserts, time and again, that *Keller* said mandatory bar dues are subject to the "same constitutional rule" as *only* public-sector unions. Indeed, petitioner offers this misdescription of *Keller* in the very first sentence of his question presented. *See* Pet. i ("In *Keller*…, this Court held that mandatory bar dues are 'subject to the same constitutional rule' as compulsory public-sector union fees."). And he repeats it again and again. *See* Pet. 2, 14, 15, 17, 19, 20, 21. He even presents this misdescription in various ways. For example, he states that *Keller* saw a "'substantial analogy' between bar associations and *public-sector* unions," Pet. 26 (emphasis added) (quoting *Keller*, 496 U.S. at 12), when in actuality, *Keller* said "[t]here is … a substantial analogy between the relationship of the State Bar and its members [and that of] unions and their members," 496 U.S. at 12.

Such blatant rewriting of *Keller* is impermissible; petitioner must deal with *Keller* as this Court actually wrote it. That he feels compelled to re-write *Keller*, in fact, confirms that the holding he ascribes to the case makes no sense because it requires the First Amendment standard for mandatory bar dues to forever track the First Amendment standard for two different types of mandatory union dues—which after *Janus* is impossible.

C. Petitioner's Argument About What Constitutes *Keller*'s Holding Would Be Wrong Even If His Description Of The Result In *Keller* Were Right

If more were needed, petitioner's reading of *Keller* fails even on its own terms.

Petitioner recognizes (Pet. 16) that the holding of a decision of this Court includes "not only the result but also those portions of the opinion necessary to that result," *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 67 (1996). Petitioner argues that "[t]he result in *Keller*" was merely "reversing the California Supreme Court, which had held that mandatory bar dues were subject to no First Amendment scrutiny whatsoever." Pet. 15. As a threshold matter, that is wrong; the result also included rejecting the plaintiffs' claim that any use of mandatory bar dues for speech violates the First Amendment. That is why the Court stated (in the first paragraph of the opinion, where one would expect to see a summary of the holding), that "lawyers admitted to practice in the State may be required to … pay dues to the State Bar," *Keller*, 496 U.S. at 4; *accord id.* at 14, *quoted supra* p.4.

In any event, even if the result in *Keller* were as limited as petitioner claims, that would not help him. If the result were simply reversing the California Supreme Court's ruling that bar speech is government speech, then this Court's holding was (again as petitioner agrees) only that result plus the reasoning "necessary" to it, *Seminole*, 517 U.S. at 67. But to reach that result, it was not necessary for this Court to make the "same constitutional rule" observation that petitioner repeats 27 times in a 32-page petition. The Court could certainly conclude that bar speech is not government speech for First Amendment purposes without also concluding that mandatory bar dues are forever treated for First Amendment purposes like mandatory union dues. Those two conclusions are separate. Put another way, the Court did not need to say exactly what level of First Amendment scrutiny applies to the use of mandatory bar dues for expressive activity in order to say that *some* such scrutiny applied. The latter conclusion requires explaining only how state bars and traditional government entities are different. The former involves the additional, discrete, step of identifying the non-governmental entities to which bars are similar. Because this Court could say that state bars are *not* like government entities for First Amendment purposes without saying that they *are* like unions, the "same constitutional rule" language in *Keller* was not necessary to the result as petitioner describes it, and therefore was dicta rather than part of the holding.[3]

---

[3] Petitioner insinuates that one reason *Keller*'s holding was actually dicta is that at one point the Court, in laying out that holding, stated "[w]e think," 496 U.S. at 14, *quoted in* Pet. 17. Petitioner will assuredly disavow any such insinuation in his reply, because the lone sentence in the opinion from which he draws his

* * *

Petitioner asks this Court to grant review based on a reading of *Keller* that no court has adopted, that decisions of this Court belie, that produces an unworkable (and unprecedented) rule, and that is wrong even on its own terms. That request should be rejected.

II. THE DECISION BELOW DOES NOT CONFLICT WITH *KELLER* (PROPERLY READ), *JANUS*, OR ANY OTHER DECISION

Once *Keller*'s actual holding is recognized, there is no doubt that the Tenth Circuit's decision here does not conflict with *Keller*, *Janus*, or any other case.

As an initial matter, the decision below obviously does not conflict with *Keller*. To the contrary, the court of appeals embraced (as one would expect) the exact holding *Keller* did. *Keller* held that so long as adequate *Hudson* procedures are in place, a "State Bar may … constitutionally fund activities germane to [its] goals out of the mandatory dues of all members." 496 U.S. at 14; *accord id.* at 4, *quoted supra* p.4. The Tenth Circuit likewise held that "the First Amendment permits mandatory bar dues." Pet. App. 19a (capitalization altered). As discussed, petitioner can posit a conflict only because of his untenable reading of *Keller*.

Nor is there any conflict with *Janus*; petitioner's contrary claim, again, depends on his infirm reading of *Keller*. Once that reading is set aside, it is clear that nothing in *Janus* is inconsistent with the Tenth Circuit's First Amendment holding regarding mandatory bar dues. *Janus* was about mandatory public-union

---

entire argument—the "same constitutional rule" sentence—likewise begins "[w]e think," 496 U.S. at 13, *quoted supra* p.13.

dues; the Court never mentioned bar dues, or even state bars. Nor did the Court ever cite *Keller*. The *dissent* cited *Keller*—to assert that "today's decision does not question [*Keller*]," *Janus*, 138 S.Ct. at 2498 (opinion of Kagan, J.). And the Court nowhere disputed that assertion. Given all this, there is no credible argument that the Tenth Circuit's decision conflicts with *Janus* because *Janus* silently abrogated *Keller*. Indeed, even petitioner makes no such argument.

Finally, there is no conflict between the decision below and any decision of another lower court; every other circuit that has considered the constitutionality of using mandatory bar dues to fund germane expression has upheld such use. *See McDonald* v. *Longley*, 4 F.4th 229 (5th Cir. 2021), *petitions for cert. filed*, No. 21-800 (Nov. 24, 2021) and No. 21-974 (Dec. 30, 2021); *Taylor* v. *Buchanan*, 4 F.4th 406 (6th Cir. 2021), *petition for cert. filed*, No. 21-357 (Sept. 1, 2021); *Crowe* v. *Oregon State Bar*, 989 F.3d 714, 724-725 (9th Cir. 2021) (per curiam), *cert. denied by* 142 S.Ct. 79 (2021) *and by Gruber* v. *Oregon State Bar*, 142 S.Ct. 78 (2021); *Jarchow* v. *State Bar of Wisconsin*, 2019 WL 8953257 (7th Cir. Dec. 23, 2019), *cert. denied*, 140 S.Ct. 1720 (2020). Again, petitioner does not contend otherwise.

III. This Case Is A Poor Vehicle For Addressing Whether Mandatory Bar Dues Are Subject To, Or Would Survive, Exacting Scrutiny

The substantive First Amendment question the petition actually presents (*see* Pet. i) is whether the use of mandatory bar dues for germane expression is subject to the "exacting scrutiny" *Janus* held applies to the use of mandatory public-sector union dues for such expression, 138 S.Ct. at 2469. As petitioner acknowledges (Pet. 29), this Court has recently denied other petitions

(*Crowe* v. *Oregon State Bar* and *Jarchow* v. *State Bar of Wisconsin*) presenting that question. *See Crowe*, 142 S.Ct. 79; *Jarchow*, 140 S.Ct. 1720. And even if the Court were now interested in considering that question, this would be a poor vehicle for doing so. The reason is that "petitioner here does not ask the Court to overrule *Keller* or any other precedent." Pet. 29. Indeed, petitioner goes so far as to declare that if review is granted here, he will not brief that issue. *Id.* Petitioner claims that his express disavowal makes this a better vehicle than *Jarchow* and *Crowe*, because "the Court … w[ould] not have to confront any *stare decisis* problem." *Id.* That is quite a curious claim.

Petitioner's disavowal means the Court could not answer the underlying substantive question petitioner presents—whether mandatory bar dues are subject to exacting scrutiny—*unless* it agrees with his reading of *Keller*. Put differently, there are two overarching paths the Court could take to a holding that the use of mandatory bar dues for expressive activity is subject to exacting scrutiny. The first is that petitioner's reading of *Keller* is correct, i.e., the First Amendment standard for such use forever tracks the First Amendment standard for the use of mandatory union dues for expressive activity, and *Janus* applied exacting scrutiny to mandatory union dues (albeit only for public-sector unions, one of the many fatal flaws, as explained, in petitioner's reading of *Keller*). The second path is to conclude instead that this Court's and every other court's reading of *Keller*'s holding is correct, but that that holding is wrong and should be overruled. Because this Court "consistently declin[es] to consider issues not raised in the petition for a writ of certiorari," *Caspari* v. *Bohlen*, 510 U.S. 383, 388 (1994), this second path is not available to the Court here; petitioner has affirma-

tively taken it away. That admittedly makes this petition *different* from *Jarchow* and *Crowe* (which of course is what motivated petitioner's disavowal), but it does not make it a better vehicle. Quite the opposite. If the Court wants to address whether exacting scrutiny applies to the use of mandatory bar dues for expressive activity, it should do so in a case in which the petitioner has not intentionally deprived the Court of one principal avenue for resolving that issue in a particular way.

As petitioner admits, moreover (Pet. 30), one of the other two petitions the Court recently denied on this issue (*Crowe*) made the same argument he advances here. Petitioner tries to minimize this fact, but neither of his arguments has merit. First, petitioner says (*id.*) that the *Crowe* petition advanced his argument (about how to read *Keller*) only "in the alternative." That is flatly false; the argument petitioner makes here was the *Crowe* petition's *principal* merits argument. *See* Pet. 19-23, *Crowe*, No. 20-1678 (U.S. May 27, 2021). Overruling *Keller* was its avowedly "alternative" argument. *Id.* at 23. Second, petitioner asserts (Pet. 30) that "if the Court had granted certiorari in that case, it would have had to confront the argument that *Keller* should be overruled." That is likewise simply untrue, not only because the Court could of course have limited the grant of review so as to exclude whether to overrule *Keller*, but also because the Court would not need "to confront the argument that *Keller* should be overruled," *id.*, unless it first rejected the argument petitioner advances here.

Further belying petitioner's claim (Pet. 29) that this case is the "[p]erfect" and "ideal vehicle" is the fact that petitioner's question presented does not "fairly include[]" (S.Ct. R. 14.1(a)) whether the use of mandatory bar dues for expressive activity *survives* exacting scru-

tiny, only whether such scrutiny applies. *See* Pet. i ("Are mandatory bar dues … *subject to* … exacting … scrutiny…?"). Indeed, petitioner expressly confirms this, stating that "granting review here will … require this Court to decide … *only* what level of scrutiny should apply." Pet. 30 (emphasis added). To the extent the Court would want to address both issues at the same time—as it did in *Janus*—that omission makes this case an even worse vehicle.[4]

Finally, this case is in an interlocutory posture, given the Tenth Circuit's remand for further proceedings on petitioner's separate challenge to Oklahoma's bar-membership requirement. Pet. App. 30a. While this Court has the power to hear interlocutory appeals, it has long taken the view that "except in extraordinary cases, the writ is not issued until final decree," *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916); *accord*, *e.g.*, *The Conqueror*, 166 U.S. 110, 113 (1897); *Abbott* v. *Veasey*, 137 S.Ct. 612, 613 (2017) (mem.) (Roberts, C.J., respecting the denial of certiorari). Once the remand proceedings are resolved, petitioner will be able to return to the Tenth Circuit and then to this Court to renew his arguments. Denying review at this interlocutory stage would thus not "preclude [petitioner] from raising the same issues in a later petition, after final judgment has been rendered," *Virginia Military Institute* v. *United States*, 508 U.S. 946 (1993) (mem.) (Scalia, J., concurring in the denial of

[4] Both the *Crowe* and *Jarchow* petitions also made the same arguments petitioner advances (Pet. 21-28) about the supposed importance of the question presented, including claims of widespread irreparable harm. *See, e.g.*, *Crowe* Pet. 19 (alleging "significant unjustified First Amendment harm to … many thousands of attorneys"). Those arguments did not persuade the Court to grant review in either case, and petitioner offers nothing new here.

certiorari). During the remand proceedings, moreover, other lower courts might address the issues petitioner raises, allowing this Court to benefit from their analysis. *See, e.g.*, *Box* v. *Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S.Ct. 1780, 1784 (2019) (Thomas, J., concurring in the denial of certiorari). All this militates in favor of the Court not rushing to grant review now.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

MICHAEL BURRAGE
WHITTEN BURRAGE
512 N. Broadway
Suite 300
Oklahoma City, OK 73102

THOMAS G. WOLFE
HEATHER L. HINTZ
PHILLIPS MURRAH P.C.
Corporate Tower
13th Floor
101 N. Robinson Ave.
Oklahoma City, OK 73102

Counsel for the Members of the Oklahoma Bar Association Board of Governors and John M. Williams

SETH P. WAXMAN
DANIEL S. VOLCHOK
Counsel of Record
KEVIN M. LAMB
SAMUEL M. STRONGIN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 663-6000
daniel.volchok@wilmerhale.com

Counsel for all respondents

KIERAN D. MAYE, JR.
LESLIE M. MAYE
MAYE LAW FIRM
3501 French Park Drive
Suite A
Edmond, OK 73034

Counsel for the Chief Justice and Justices of the Oklahoma Supreme Court

FEBRUARY 2022