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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The brief in opposition is heavy on bluster but light on substance. It cannot seriously dispute the limited nature of *Keller*'s holding, so it resorts to bullying by calling the petition "borderline frivolous." But Respondents' reading of *Keller* is wrong, as confirmed by their inability to defend it. The fact is, *Keller* ruled in *favor* of the plaintiffs and held that mandatory bar dues are not exempt from scrutiny, but are instead subject to the "same constitutional rule" as compulsory union fees. 496 U.S. 1, 13 (1990). No party advocated for greater scrutiny, so the Court did not consider it.

Respondents do not even attempt to deny that this Court's review is warranted if Petitioner's account of *Keller*'s holding is correct. Indeed, if *Keller* requires the same constitutional rule for bar dues as it does for union fees, then the decision below conflicts with *Keller* and this Court's other precedent by allowing states to force hundreds of thousands of attorneys all around the country to subsidize political speech without the exacting scrutiny the First Amendment demands. There is no other area where the courts have tolerated such a flagrant and widespread defiance of the First Amendment. And this ongoing affront to free speech presents an issue of exceptional importance—which, again, Respondents do not dispute.

Respondents protest that granting this case would require the Court to consider exacting scrutiny for mandatory bar dues without overruling any of its precedents. But that is a virtue, not a vice. It allows the Court to get the law right by clarifying how the First Amendment applies in this context without worrying about *stare decisis*.

I. Respondents Are Wrong About *Keller*'s Holding.

As the petition explained (at 15–18), *Keller* held that mandatory bar dues and compulsory union fees are subject to the "same constitutional rule." 496 U.S. at 13. By contrast, its discussion of how the then-extant rule of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), would apply to mandatory bar dues was dicta because it was not essential to the result. The California Supreme Court had ruled that mandatory bar dues were completely exempt from First Amendment scrutiny. This Court reversed, holding that mandatory bar dues are *not* exempt. And the essential stated reason for that reversal was clear: "There is . . . a substantial analogy between the relationship of the State Bar and its members" and that of "unions and their members," which requires the "same" rule of constitutional scrutiny for both—not the rule of *no scrutiny* adopted by the California Supreme Court. *Keller*, 496 U.S. at 12–13. That fully explained why reversal was required. There was no need to go any further by addressing whether *Abood* supplied the correct level of scrutiny (no party argued otherwise), or how the *Abood* rule might apply in the context of bar dues. All of that was dicta.

After *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), it is now clear that the proper constitutional rule for compulsory union fees is exacting scrutiny. *Id*. at 2483. Thus, a faithful reading of *Keller*'s holding requires applying that "same" rule to mandatory bar dues. That in turn requires discarding *Keller*'s dicta, which relied on the now-discredited *Abood* rule to suggest that attorneys can be forced to subsidize political speech as long as it is "germane" to the legal profession.

Respondents attempt a variety of arguments to resist the petition's reading of *Keller*, but they all fail.

A. Respondents say that the "result" of *Keller* was not just to reverse the lower court's decision that no scrutiny applied, but also to "reject[] the plaintiffs' claim that any use of mandatory bar dues for speech violates the First Amendment." Opp. 15. But that is clearly wrong. The plaintiffs in *Keller* made no such "claim," and thus this Court did not "reject" it. The plaintiffs argued that the California Supreme Court was wrong to apply *no* First Amendment scrutiny to mandatory bar dues. Thus, the first question presented was whether the First Amendment was "implicated" by mandatory bar dues. And the second was whether attorneys could be forced to pay bar dues to subsidize non-germane "political and ideological activities" on issues such as "handgun control and a nuclear weapons freeze"—which could not pass muster even under the relatively lax rule of scrutiny prescribed by *Abood*. *See* Pet. Br., *Keller*, 496 U.S. 1 (No. 88-1905), 1989 WL 1127359, at *i.

In light of the limited nature of their claim, the *Keller* plaintiffs argued only that the California Supreme Court's no-scrutiny rule should be reversed, and that the "labor union" rule of *Abood* should apply instead. *Id*. at *9–10. This Court did not consider—much less "reject"—any argument that a *more* robust level of First Amendment scrutiny should apply. Beyond the point that bar dues and union fees should be subject to the same scrutiny, the proper *level* of scrutiny was not part of the Court's holding. Indeed, with no party arguing for a higher level of scrutiny than *Abood* required, the Court did not and could not foreclose more exacting scrutiny.

B. Alternatively, Respondents contend that *Keller*'s holding was so "limited" that it did not even include the Court's reasoning that the "same constitutional rule" must apply to bar dues and union fees. After all, Respondents say, it was not "necessary" for the *Keller* Court to draw that equivalency, because it "could" have reversed the lower court's no-scrutiny decision simply by concluding that "state bars and traditional government entities are different," without taking the "additional, discrete[] step" of saying that bar associations and labor unions are the same. Opp. 16.

Respondents misunderstand what a holding is. As this Court has explained, the holding of a case is the actual "rationale upon which the Court based the result[]." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66–67 (1996). In other words, the holding consists of the essential reasons the Court *actually relied upon* to reach the result it did. *Id.* Just because the Court *could have* based the result on a *different* line of reasoning, that does not make the Court's *actual* essential reasoning any less of a holding.

In *Keller*, the Court did not perform a "discrete" two-step analysis. It did not first hold that bar associations are not government agencies for First Amendment purposes, and then go on to say separately in dicta that bar associations are similarly situated to labor unions and so must be subject to the same rule. Rather, the Court's finding of a "substantial analogy" between the two was integral to its essential rationale for *why* bar associations are not exempt from First Amendment scrutiny—which was the operative point that required reversal of the California Supreme Court's contrary ruling. *See Keller*, 496 U.S. at 10–13. That reasoning was thus part of the holding.

C. Next, Respondents argue that the "decisions of this Court" somehow "refute" Petitioner's reading of *Keller*'s holding. Again, that is wrong.

This Court has never considered the argument about *Keller*'s holding pressed by Petitioner here. Respondents cite three pre-*Janus* cases (at 11). But in those cases nobody raised the issue, and the Court referred only in passing to the "holding" of *Keller* as requiring *Abood*-level scrutiny for mandatory bar dues. *See Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 231 (2000); *Harris v. Quinn*, 573 U.S. 616, 655 (2014); *United States v. United Foods, Inc.*, 533 U.S. 405, 418 (2001) (Stevens, J., concurring). At the time, that was a perfectly natural shorthand way of describing *Keller*'s holding: It required the "same" rule for union fees and bar dues, and thus as long as *Abood* governed union fees, it governed bar dues too. After *Janus* overturned *Abood*, however, the situation changed. Now *Keller*'s holding—requiring the "same" rule for bar dues and union fees—requires both to be subject to the "exacting" scrutiny of *Janus*.

The one post-*Janus* case that Respondents cite, *Jarchow v. State Bar of Wisconsin*, 140 S. Ct. 1720 (2020), did not involve a "decision of the Court" at all. It was a dissent from denial, and the two dissenters can hardly be blamed for accepting the parties' mischaracterization of *Keller*'s holding. No party in that case pointed out how limited *Keller*'s holding actually was. Thus, while the two *Jarchow* dissenters apparently favored applying *Janus*-style scrutiny to mandatory bar dues, they should be heartened to learn that doing so does not require overturning *Keller*, *id.* at 1721, but only following its true holding.

D. Respondents bizarrely claim that following *Keller*'s holding would be "unworkable" because the "same constitutional rule" cannot "blindly" apply "for all time" to both compulsory union fees and mandatory bar dues. Opp. 12–13. That is a puzzling assertion because the same principle is at stake in both contexts: When the government forces people to pay money to support an organization's political and ideological speech, that is a compelled speech subsidy that triggers the same exacting First Amendment scrutiny whether the organization is a bar association or a labor union. The Constitution does not care about any of the "legal, policy, [or] other considerations" that Respondents may "deem relevant." *Id*. at 12. There is no great mystery here.

Respondents also claim that Petitioner's approach does not work because *Keller* assumed that the same rule should apply to labor unions for both "public *and private* employees." *Id.* at 13 (emphasis added) (quoting *Keller*, 496 U.S. at 13). But that is no problem at all. The constitutional rule is indeed exactly the same for both public and private union fees: If the fees are *compelled* by state action, exacting scrutiny applies. In the public-sector context, there is no doubt about it because the state prohibits people from public employment unless they pay fees to the union. That is state coercion. In the private sector things are more complicated: A private company might freely agree to hire exclusively from the ranks of dues-paying union workers even *without* state coercion. Federal or state labor law might supply the state-action element by coercing private-sector workers into union-shop arrangements, but this Court has so far avoided that constitutional question. *See Janus*, 138 S. Ct. at 2479.

Regardless of how the compelled-speech analysis might come out for private-sector unions, it is clear that the "same constitutional rule" applies across the board. Whether the organization at issue is a private-sector union, a public-sector union, or a bar association, the constitutional rule is the same: Is the government *coercing* people to pay fees to subsidize the organization's political and ideological speech? If so, then exacting scrutiny applies. There is no doubt about state action when it comes to mandatory bar dues. If attorneys do not pay them, then the state prohibits them from practicing law on pain of legal penalty. Accordingly, if such compulsory dues are used to pay for the bar association's political and ideological speech, then they are clearly a form of "compelled subsidization" of speech, which "seriously impinges on First Amendment rights" and "cannot be casually allowed." *Id.* at 2464. But that type of "casual" violation is exactly what Respondents are getting away with here, by forcing all attorneys in Oklahoma to subsidize the favored political and ideological advocacy of the private lawyers who run the Oklahoma bar association.

For these reasons, Respondents are just wrong to say that consistently applying the same constitutional rule to bar dues and union fees somehow requires "rewriting" *Keller*. Opp. 14. The rule is always the "same," just as *Keller* said: The government cannot compel subsidies for private speech unless it can satisfy (at least) exacting scrutiny. For present purposes, it is simply irrelevant whether private-sector union fees involve state coercion and thus trigger exacting scrutiny. Mandatory bar dues (like public-sector union fees) clearly do.

II. Respondents Do Not Deny the Exceptional Importance of the Issue.

As the petition explained (at 21–28), the question presented is exceptionally important because the lower courts' misreading of *Keller* is allowing the flagrant, ongoing violation of the First Amendment rights of hundreds of thousands of attorneys in a way that squarely conflicts with this Court's compelled-speech precedents. In their opposition brief, Respondents do not even try to deny the exceptional importance of this issue. They thus tacitly concede that this Court's review is appropriate under Rule 10(c) if Petitioner's understanding of *Keller*'s holding is correct.

Respondents point out (at 21 n.4) that this Court denied review on two prior petitions that made the same exceptional-importance arguments about the First Amendment stakes of mandatory bar dues. But as Respondents say (at 20), those petitions were "admittedly" quite "different" from this one, because they argued for *overturning Keller*. The denial of those petitions can be explained on *stare decisis* grounds. Accordingly, those denials do not remotely suggest that the issue here is anything less than exceptionally important. It obviously is. And this case presents an opportunity for the Court to resolve the issue solely within the four corners of its existing precedent—without getting bogged down in the complicated *stare decisis* considerations that would otherwise distract from the merits.

III. This Case Is the Ideal Vehicle.

Respondents advance three reasons that this case is supposedly not a suitable vehicle to consider the question presented. None is persuasive.

First, they say that this case is a poor vehicle because Petitioner does not raise an alternative argument that *Keller* should be overruled. According to Respondents, that is bad because it "deprive[s]" the Court of the opportunity to overturn *Keller*. Opp. 20. But there are other petitions asking to overturn *Keller*, and if the Court wants to consider going that route it should grant one or both of those petitions alongside this one and set all of the cases for consolidated argument. *See McDonald v. Firth*, No. 21-800 (U.S.); *Firth v. McDonald*, No. 21-974 (U.S.). This case by itself, however, presents a superior vehicle because there is no need to overturn *Keller* once its holding is properly understood. And by granting review where overturning is not on the table, the Court can spare itself and the parties all the time and energy that would otherwise go into briefing and considering a series of *stare decisis* questions that are entirely gratuitous. This is the only case in which the Court can get the First Amendment issue right without having to think about overturning any precedent. That is why this case is a better vehicle than *Crowe* was (Opp. 20).

Second, Respondents say that this case is not an ideal vehicle because the question presented is only whether exacting scrutiny applies, not whether mandatory bar dues can actually "survive[]" such scrutiny. *Id.* at 20–21. But again, that is a virtue not a vice. This is a "court of review, not of first view." *Cutter*

v. Wilkinson, 544 U.S. 709, 719 n.7 (2005). Accordingly, it is entirely commonplace for this Court to decide what level of scrutiny applies, and leave it to the lower courts to apply that scrutiny. *See, e.g.*, *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 800 (2017) ("[I]t is proper for the District Court to determine in the first instance whether strict scrutiny is satisfied."). Here, it would be all but a foregone conclusion that exacting scrutiny does not allow forcing attorneys to fund the political advocacy of private bar associations. But this Court need not address that issue, since the far more important and consequential issue is what level of scrutiny applies.

Finally, Respondents say that review should be denied because it would be interlocutory. But they admit that "this Court has the power to hear interlocutory appeals" from a federal circuit court. Opp. 21. Indeed, Congress granted this Court the power to grant certiorari "before or after rendition of judgment or decree." 28 U.S.C. § 1254(1). And this is exactly the type of case where doing so is appropriate: For all intents and purposes, the question presented has been fully and finally resolved by the Tenth Circuit. Nothing that occurs on remand will address what level of scrutiny applies to the compelled speech subsidy that Petitioner must pay. It would thus be entirely pointless to require Petitioner to "return to the Tenth Circuit and then to this Court to renew his arguments." Opp. 21. The issue is fully ripe for this Court's review—as ripe as it will ever get—and there will never be a better time than now to grant certiorari.

March 9, 2022

Respectfully submitted,

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