No. 21-800

In the Supreme Court of the United States

TONY K. MCDONALD, et al.,
Petitioners,

v.

SYLVIA BORUNDA FIRTH, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

In *Janus v. AFSCME*, this Court held that public employees could not be compelled to financially support organizations that engage in activities with a pervasive "political valence." 138 S. Ct. 2448, 2483 (2018). The Court further held that an amorphous "germaneness" test was inadequate to protect the important First Amendment interests at stake, *id.* at 2481-82, and that public unions had no legitimate reliance interests in receiving coerced dues, *id.* at 2484-86.

Notwithstanding *Janus*, hundreds of thousands of attorneys across the country continue to be coerced into subsidizing the highly ideological and polarizing activities of "mandatory" or "integrated" bar associations. This Court's intervention is needed. It should grant certiorari either to clarify the First Amendment limits on this coercion under existing precedent or to reconsider from first principles whether compelling attorneys to join and fund a mandatory bar association violates their freedom of speech or association.

I. Respondents cannot dispute the importance of the question presented to the hundreds of thousands of attorneys who are compelled to support mandatory bar associations.

This case has profound implications for the hundreds of thousands of attorneys who are compelled

to join and fund mandatory bar associations as a condition of practicing their profession.

Mandatory bar associations use coerced dues to engage in an expansive array of controversial and ideologically charged activities. *See*, *e.g.*, *Jarchow v. State Bar of Wisc.*, 140 S. Ct. 1720, 1720 (2020) (Thomas, J., dissenting) (noting that the Wisconsin Bar "has taken a position on legislation prohibiting health plans from funding abortions, legislation on felon voting rights, and items in the state budget"); Buckeye Institute Br. 10-14 (discussing mandatory bars' advocacy regarding, *inter alia*, taxation, landlord-tenant law, student loan forgiveness, LGBT issues, and other matters); America First Legal Br. 4-9 (discussing mandatory bars' advocacy regarding racial quotas, abortion, judicial selection, campaign finance, gun control, and the use of gender designations on public documents); Liberty Justice Center Br. 10-11 (advocacy on environmental, gender, and religious liberty issues). These activities touch on some of the most sensitive and politically charged issues facing the country, yet attorneys are compelled to fund this advocacy even if they vehemently oppose it.

Indeed, *even while this suit was pending*, the Texas Bar was embroiled in a high-profile public controversy over comments made by its past president that were critical of the Black Lives Matter movement. *See* America First Legal Br. 5. The upshot was that the Bar doubled down on supporting even more "diversity and inclusion" programs, initiatives, and task forces. *Id.* Absent this Court's intervention, these

activities will continue unabated, with bar members forced to subsidize divisive activities that violate their deeply held beliefs.

Worse still, mandatory bar associations typically engage in these controversial and polarizing activities while claiming they are merely promoting "improvement" of the profession or the "administration of justice." Mandatory bars "perceive their role as general guardians of the legal system and often extend their reach into political and ideological activities while couching their involvement under innocuous-sounding phrases" like access to justice, government relations, diversity, or improvement of the profession. Pacific Legal Foundation Br. 5; *see also id.* at 10-12 (explaining how bars engage in controversial and ideological activities under the guise of "social change, good government, and fairness"). Yet most lower courts have refused to apply meaningful First Amendment scrutiny to these activities on the ground that they fall within some amorphous conception of "germaneness" under *Keller v. State Bar of California*, 496 U.S. 1 (1990). *Id.* at 13; *see also* App. 29 (finding that the Texas Bar's diversity initiatives were "highly ideologically charged" but nonetheless satisfied the "germaneness" test).

Respondents (at 30) invoke this Court's bar membership requirements for the proposition that merely paying a fee as a condition of practicing law does not "meaningfully impinge on attorneys' associational freedom." But the Supreme Court Bar in no way resembles Texas' scheme. To practice law before this Court, an attorney completes an application, pays a

fee, and then subjects herself to this Court's ongoing oversight and disciplinary authority. *See* S. Ct. Rules 5, 8. That's it. Supreme Court Bar members have no obligation to fund lobbying, legal aid, diversity initiatives or other amorphous "improvement of the profession" activities. Attorneys who wish to "improve" practice before this Court may lobby for legislation affecting the Court or support legal aid for parties before this Court. And they may do so through countless *voluntary* associations such as Inns of Court, appellate sections of voluntary bar associations, or the Supreme Court Historical Society. Practice before this Court thus closely resembles that of a *non-integrated* state that licenses and regulates lawyers directly without also requiring them to join a bar association.

All of this underscores that mandatory bar associations impose significant burdens on attorneys' First Amendment rights—and that voluntary association is always a less restrictive alternative to coerced association. "Activities to improve the quality of the legal profession could be funded by legislative apportionment, through voluntary donations given alongside mandatory dues, or, as already takes place across the country, by local organizations, special interest and affinity groups, non-profits, and a plethora of other sources of funding and programming." Texas Br. 8-9; *see also* Freedom Foundation Br. 9-12 (discussing numerous voluntary bar associations organized by state, locality, practice area, and other subject areas).

Respondents repeatedly argue (at 1, 21-22) that there is no circuit split on the question presented. But

this Court has not hesitated to grant certiorari even in the absence of a square split when a case implicates the core First Amendment rights of large numbers of citizens. After all, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). No circuit split was alleged in the certiorari petitions in either *Harris* or *Janus*; instead, those petitioners argued that the Court's intervention was needed to clarify the law and ensure that many workers across the country were not deprived of their First Amendment rights. *See* Petition for Certiorari at 7-8, *Harris v. Quinn*, No. 11-681 (filed Nov. 29, 2011) (certiorari warranted because forcing home health aides to accept exclusive state-designated representation is "grievously offensive to the First Amendment" and is especially important because "similar schemes have been imposed on care providers in at least a dozen states"); Petition for Certiorari at 9, *Janus v. AFSCME*, No. 16-1466 (filed June 6, 2017) (certiorari warranted because "agency fee requirements are widespread and egregiously infringe on First Amendment rights").

Contrary to Respondents' suggestion, moreover, *see* BIO 19-20, this case is different from those in which the Court has recently denied certiorari. This case was decided on a full summary-judgment record; Petitioners argue both that they should prevail within the four corners of *Keller* and that, in the alternative, *Keller* should be overruled; and this case includes a court of appeals decision that actually *applies* the "germaneness" standard to numerous activities that

are typical of mandatory bar associations. This case—unlike the prior petitions—thus cleanly presents on a full record *both* the question of what *Keller* actually requires *and* the broader question of whether the *Keller* framework is workable and consistent with this Court's subsequent precedents. And Respondents identify no other impediment to this Court's review.

In short, this petition presents the best vehicle to date for the Court to address these important issues. It is an ideal case to provide much-needed guidance to attorneys and states about the extent to which the First Amendment protects attorneys from being compelled to support ideological activities and causes that they strongly oppose.

II. The decision below misconstrues *Keller* and conflicts with this Court's more recent compelled-membership decisions.

Respondents advance an interpretation of *Keller* that would effectively eliminate any meaningful First Amendment checks on their use of coerced dues. According to Respondents (at 21-26), any expenditure is permissible—no matter how political, ideological, or controversial—so long as the Bar can articulate some tenuous connection to "professional regulation or improving legal-service quality." That interpretation of *Keller* is untenable on its own terms: This Court has made clear that political or ideological activities cannot be funded through coerced dues without a member's affirmative consent.

In *Keller* itself, this Court distinguished between "activities germane to" the state's interests in regulating the legal profession and improving the quality of legal services, which may be funded through compelled dues, and "activities of an ideological nature which fall outside those areas of activity," which may not. 496 U.S. at 14. Later in the opinion, this Court further distinguished between "activities in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with regulation of the legal profession, on the one hand, *and those activities having political or ideological coloration* which are not reasonably related to the advancement of such goals, on the other." *Id.* at 15 (emphasis added).

Despite *Keller*'s express warnings about activities with "political or ideological coloration," Respondents argue that all of this is irrelevant. According to Respondents (at 22-25), *Keller* allows the Bar to use coerced dues for all activities that are "germane," regardless whether they are controversial or ideological. Respondents reason (at 24-25) that if all ideological activities were categorically off-limits, then this Court would have simply said that "integrated bars may not 'fund activities of an ideological nature'—full stop." But the same critique can be made of Respondents' interpretation of *Keller*. Under their view, there is a simple dichotomy between germane (chargeable) and non-germane (non-chargeable) activities. If that were actually the law, however, there would have been no need for this Court to discuss activities with "political or ideological coloration" *at*

all, since the political or ideological character of the activity would have been irrelevant to the analysis.[1]

Harris eliminates any doubt that Respondents' position is untenable. This Court's later description of what *Keller* held is clear and unequivocal: "We held that members of this bar *could not be required to pay the portion of bar dues used for political or ideological purposes* but that they could be required to pay the portion of the dues used for activities connected with proposing ethical codes and disciplining bar members." *Harris v. Quinn*, 573 U.S. 616, 655 (2014) (emphasis added).

Respondents advance an opportunistic and selective interpretation of *Harris*. They embrace *Harris* (at 7, 31, 33 n.10) for the proposition that it purportedly "reaffirmed" *Keller*. But Respondents have no response to *Harris*'s discussion of *Keller*'s holding regarding the non-chargeability of expenditures on political and ideological activities. Respondents cannot have it both ways. If—as Respondents assert—*Harris* is this Court's authoritative and final word about the scope of *Keller*, then *Harris* is crystal clear that attorneys cannot "be required to pay the portion of bar

[1] The Bar's argument on this point shows the perils of parsing judicial opinions as if they were "a comprehensive code" rather than "just an explanation for the Court's disposition." *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010). As the Seventh Circuit explained in an opinion by Judge Easterbrook, "[j]udicial opinions must not be confused with statutes, and general expressions must be read in light of the subject under consideration." *Id.*

dues used for political or ideological purposes." *Harris*, 573 U.S. at 655.

Respondents further contend (at 25) that *Harris* did not "alter[] the *Keller* standard" about what types of expenditures may be charged to those who object to a bar's activities. Petitioners agree. *Harris* merely confirmed what *Keller* already made clear: that *Keller* authorized using coerced dues for, at most, activities like "proposing ethical codes and disciplining bar members," and that members of an integrated bar "could not be required to pay the portion of bar dues used for political or ideological purposes." *Harris*, 573 U.S. at 655; *see also Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557-58 (2005) (explaining that *Keller* "invalidated the use of the compulsory fees to fund speech on political matters" because such speech "was not germane to the regulatory interests that justified compelled membership"). Indeed, this Court has made clear that even under *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977)—the key precedent that was interpreted and applied in *Keller*—an organization that receives coerced dues is "flatly prohibited" from using such fees for speech that "concerns political or ideological issues." *Janus*, 138 S. Ct. at 2473.

III. In the alternative, the Court should overrule *Lathrop* and *Keller*.

For the reasons set forth above, Petitioners should prevail on their First Amendment challenge to the Bar's use of coerced funds for each of the activities challenged here. But in the alternative, if the Fifth

Circuit is right that *Keller* and *Lathrop v. Donohue*, 367 U.S. 820 (1961), actually permit the Bar to force Petitioners to associate with and fund these activities, then those decisions should be overruled.

Respondents do not—and cannot—dispute that *Janus* overruled *Abood*, which *Keller* incorporated as the governing legal standard. Basic principles of *stare decisis* counsel in favor of this Court reconsidering *Keller* given "developments since the decision was handed down" and *Keller*'s "[in]consistency with other related decisions." *Janus*, 138 S. Ct. at 2478-79; *see also* App. 16 n.14 (Fifth Circuit recognizing that this Court's First Amendment jurisprudence has "changed dramatically" "[s]ince *Lathrop* and *Keller* were decided"). Nor do Respondents dispute that *stare decisis* "'is at its weakest when [the Court] interpret[s] the Constitution,'" or that it applies with the "least force of all to decisions that wrongly den[y] First Amendment rights." *Id.* at 2478.

In *Keller*, this Court emphasized that the same constitutional rule should apply to mandatory bar associations and public-employee unions given the "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." *Keller*, 496 U.S. at 12. The Bar disagrees, arguing at length (at 27-31) that mandatory bars are different from unions. But those arguments are better raised at the merits stage of the case—they are not a reason to forgo plenary review of an important constitutional doctrine that now rests on "'wobbly, moth-eaten foundations.'" App. 16-17 n.14.

Respondents' invocation of *stare decisis* in defense of *Keller* is "particularly discordant." *Janus*, 138 S. Ct. at 2469. Respondents (at 1) characterize *Keller*'s germaneness test as reflecting "decades-old settled law." But Respondents (at 27) simultaneously attack and disavow *Keller*'s holding that a mandatory bar's activities are not "government speech." And Respondents (at 27-31) further attack *Keller*'s finding of a "substantial analogy" between mandatory bars and public employee unions. Respondents cite no principle of law that would support this heads-I-win-tails-you-lose approach to the *stare decisis* effects of *Keller*.

In all events, Respondents' defense of (certain aspects of) *Keller* is unpersuasive. Respondents suggest (at 28-29) that attorneys should receive less First Amendment protection than other citizens because they act in a "'special role'" as officers of the court that "allows for greater imposition on their rights than what may be permissible in other contexts." Respondents are correct that attorneys—like individuals in countless other professions—can be subject to licensing, oversight, and disciplinary requirements to protect the public. But it does not follow that attorneys can be compelled to subsidize speech, expression, and advocacy that violates their deeply held beliefs. Respondents' proposed carve-out from the First Amendment is just another version of the "professional speech" theory that this Court rejected in *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018). Although states can "regulate professional *conduct*," this Court's precedents "have long protected the First Amendment

rights of professionals" to speak and associate freely. *Id.* at 2372-74 (emphasis added).

Respondents further assert (at 29) that bar associations' activities lack the "political valence" of collective bargaining by public unions. Nonsense. As the eight amicus briefs painstakingly document, and as discussed above, *see supra* Part I, bar associations engage in speech and advocacy on many of the most hotly disputed and politically charged issues facing the country, including immigration, criminal justice, race, sexual orientation and gender identity, abortion, climate change, campaign finance, judicial selection, and countless others. To the extent *Keller* or *Lathrop* viewed mandatory bar associations as apolitical bodies that merely seek to "improve" the law in some technical, neutral way, those decisions "did not fully appreciate" the full sweep of what those organizations do using coerced dues. *Janus*, 138 S. Ct. at 2483.

Finally, Respondents' suggestion (at 33-35) that they have some reliance interest in coerced dues was squarely rejected in *Janus*. "The fact that [bar associations] may view [mandatory dues] as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that [objecting attorneys] share in having their constitutional rights fully protected." *Janus*, 138 S. Ct. at 2484; *see also Knox v. SEIU*, 567 U.S. 298, 321 (2012) (organization "has no constitutional right to receive any payment from" those who object to its activities).

If this Court holds that attorneys cannot be compelled to join and financially support a bar association, its decision would hardly be the death knell for such organizations. Bar associations are perfectly capable of supporting themselves through voluntary contributions by those who support their missions—just like bar associations in nearly 20 "non-integrated" states, and just like professional associations in countless other fields (such as medicine) that do not coerce membership at all. *See* Pet. 32-34.

Certiorari is long overdue to ensure that "men and women in [the legal] profession" are not "regimented behind causes which they oppose." *Lathrop*, 367 U.S. at 884 (Douglas, J., dissenting). "Surely a First Amendment issue of this importance deserve[s] better treatment." *Harris*, 573 U.S. at 636.

CONCLUSION

This Court should grant the petition and reverse the decision below in part.

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