NO. 22-95

IN THE
Supreme Court of the United States

SCHUYLER FILE,
Petitioner,

v.

KATHLEEN BROST, IN HER OFFICIAL CAPACITY AS PRESIDENT OF THE STATE BAR OF WISCONSIN, ET AL.,
Respondents.

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

BRIEF OF ALLIANCE DEFENDING FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

DAVID A. CORTMAN
Counsel of Record
CODY S. BARNETT
ALLIANCE DEFENDING FREEDOM
440 First Street, NW
Suite 600
Washington, DC 20001
(202) 393-8690
dcortman@ADFlegal.org

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

Alliance Defending Freedom (ADF) is a nonprofit, public-interest legal organization that provides strategic planning, training, funding, and litigation services to protect our First Amendment freedoms. ADF regularly defends the free-speech rights of students, adults, and organizations. *E.g.*, *Ams. for Prosperity* v. *Bonta*, 141 S. Ct. 2373 (2021); *Uzuegbunam* v. *Preczewski*, 141 S. Ct. 792 (2021); *Masterpiece Cakeshop, Ltd.* v. *Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719 (2018); *Nat'l Inst. of Fam. & Life Advocs.* v. *Becerra*, 138 S. Ct. 2361 (2018); *Reed* v. *Town of Gilbert*, 576 U.S. 155 (2015). ADF often relies on the First Amendment's Free Speech Clause to protect individuals and organizations whose speech is wrongly restricted or compelled by the government.

ADF has a particular interest in protecting individuals from being compelled to voice, through words or subsidies, views that violate their consciences. See *303 Creative LLC* v. *Elenis*, 142 S. Ct. 1106, 1106 (2022) (granting certiorari to determine "[w]hether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment"). That interest extends to professionals—like attorneys—who do not surrender their First Amendment rights simply by practicing their trade.

---

[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel were timely notified of this brief as required by Supreme Court Rule 37.2, and all parties consented to its filing.

SUMMARY OF THE ARGUMENT

"First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side it favors." *United States* v. *United Foods, Inc.*, 533 U.S. 405, 411 (2001). Yet compelled subsidies are the very evil that this Court's rule in *Keller* v. *State Bar of California*, 496 U.S. 1 (1990), tolerates. There, this Court held that a state bar association could charge its members mandatory dues and then use that money to "constitutionally fund activities germane to" "regulating the legal profession and improving the quality of legal services." *Id.* at 13–14.

But what's germane to the goose is not always germane to the gander. Time and again, state bar associations, under the guise of "germaneness," have advocated "on controversial subjects" and "sensitive political topics." *Janus* v. *Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2476 (2018). And they have done so using money from attorneys who disagree with the associations' stances.

Petitioners have demonstrated the harm that this compelled subsidization does to the First Amendment's free-speech values. It also does violence to religious liberty. Attorneys with religious beliefs—especially on marriage and sexuality—find their money funding not only advocacy for views with which they disagree but, in many instances, outright attacks on their very freedom to believe what they want to believe. Bar associations cannot force attorneys to *voice* objectionable views. Neither should

they compel attorneys to *subsidize* objectionable views. *Harris* v. *Quinn*, 573 U.S. 616, 647 (2014) ("[C]ompelled funding of the speech of other private speakers or groups presents the same dangers as compelled speech." (cleaned up)). To force attorneys to fund attacks on their religious freedom "coerce[s]" them "into betraying their convictions" and "is always demeaning." *Janus*, 138 S. Ct. at 2464.

Just as experience shows that a "standard of germaneness" cannot cure compelled subsidization, so too does it show that a similar standard—that of "viewpoint neutrality"—will not do the trick. Though this Court held that "public universit[ies] [may] charge its students an activity fee used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral," universities continually have flouted the line. *Bd. of Regents of the Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217, 221 (2000). Indeed, the line between "viewpoint neutral" and "viewpoint based" has proven just as "impossible to draw with precision" as the standard of germaneness. *Janus*, 138 S. Ct. at 2481.

If this Court discards *Keller* (as it should), it should resist the temptation to apply anything less than the First Amendment's original meaning. There is no evidence showing that the First Amendment has ever tolerated compelled speech. If anything, the evidence shows the opposite: government-compelled speech has always been anathema to our constitutional tradition.

In *Janus*, this Court overruled *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), a decision that over the years had warped and woofed First Amendment principles, *Janus*, 138 S. Ct. at 2486. But *Abood*'s progeny remain. Cf. *Kennedy* v. *Bremerton Sch. Dist.*, 4 F.4th 910, 952 (9th Cir. 2021) (R. Nelson, J., dissenting) ("It makes little sense to kill *Lemon* but keep its progeny."). Like *Abood*, they are "poorly reasoned," have "led to practical problems and abuse," and are "inconsistent with other First Amendment cases" more recently decided. *Janus*, 138 S. Ct. at 2460. Multiple jurists—including Justices Thomas and Gorsuch—have noted that, without *Abood*, "there is effectively nothing left supporting [this Court's] decision in *Keller*." *Jarchow* v. *State Bar of Wis.*, 140 S. Ct. 1720, 1720 (2020) (Thomas, J., dissenting from the denial of certiorari); accord *McDonald* v. *Longley*, 4 F.4th 229, 253 (5th Cir. 2021) (noting that *Keller*'s "foundations" are "increasingly wobbly" and "moth-eaten"); Pet.App.11 ("With *Abood* overruled, the foundations of *Keller* have been shaken.").

But "it is this Court's prerogative alone to overrule one of its precedents." *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997). This case presents the Court with the perfect opportunity to do so with at least one of *Abood*'s offspring—one that stands at odds with both free speech and religious liberty.

ARGUMENT

I. State bar associations use mandatory bar dues to advocate against religious liberty.

State bar associations are not neutral actors. Like the public unions in *Janus*, state bar associations speak on "fundamental questions of policy, and more broadly [on] powerful political and civic" questions. William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 196 (2018) (cleaned up) (quoting *Janus*, 138 S. Ct. at 2464, 2476). Confronted with "controversial public issues," bar associations pick sides. *Janus*, 138 S. Ct. at 2464. As Petitioners have demonstrated, this advocacy is funded directly from attorneys' pockets—attorneys who not only disagree with the bar associations' positions, but whose religious liberty may be jeopardized by them.

A. Some state bar associations advocate a discredited interpretation of the Establishment Clause that harms religious liberty.

Start with how some state bar associations view the Establishment Clause. At least two bar associations teach that the Establishment Clause builds a "wall of separation between church and state" that stops the government from enacting *any* law that "advance[s]" religion. Okla. Bar Ass'n, *Lesson Five: Establishment Clause* (2019)[2]; see also State Bar of Tex., *Teacher Notes:* Engel v. Vitale (1962).[3] But for

[2] https://perma.cc/JTA9-5HKP
[3] https://perma.cc/NB4E-PLAN

decades now, this Court has rejected this interpretation as inconsistent with the Constitution's original meaning. *Carson ex rel. O.C.* v. *Makin*, 142 S. Ct. 1987, 1998 (2022) ("A State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise."); *Espinoza* v. *Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2254 (2020) ("We have repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs."); *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2021–24 (2017); *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 649–53 (2002).

And for good reason: this reading of the Establishment Clause, grounded in "separationist" and "anti-religious" reasoning, harms religious liberty. *Kennedy*, 4 F.4th at 952 (R. Nelson, J., dissenting). It treats religious people and organizations as second-class citizens who must choose between their religious identity or the public square. That is a form of discrimination "odious to our Constitution." *Carson*, 142 S. Ct. at 1996 (cleaned up).

Worse, "[t]he 'wall of separation between church and State' is a metaphor based on bad history." *Wallace* v. *Jaffree*, 472 U.S. 38, 107 (1985) (Rehnquist J., dissenting). History shows that the Establishment Clause is actually "complementary" with the Free Exercise Clause and works in tandem to protect, not hinder, religious liberty. *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2426 (2022).

Nonetheless, bar associations continue to teach and advocate for an interpretation of the Establishment Clause that is "ahistorical, atextual[,]" and a threat to religious liberty. See *id.* at 2421. Attorneys who disagree with this interpretation—and whose religious liberties are threatened by it—should not have to subsidize their state bars' advocacy.

B. Some state bar associations are openly hostile to religious views on marriage, sexuality, and gender.

Also consider how state bar associations have expressed open hostility toward religious viewpoints on sexual orientation and gender identity. On these "hotly contested matter[s] of public concern," several bar associations have advocated for one side (and only one side) of the debate. *Meriwether* v. *Hartop*, 992 F.3d 492, 506 (6th Cir. 2021) (citing *Janus*, 138 S. Ct. at 2476). Like millions of Americans, however, many lawyers disagree with the bar associations' stances. And many do so "based on decent and honorable religious or philosophical premises." *Obergefell* v. *Hodges*, 576 U.S. 644, 672 (2015).

These bar associations have not treated their views as "decent and honorable." See *ibid.* In some instances the disparagement has come subtly. With advocacy veiled behind innocuous-sounding phrases like "fairness" and "equality," bar associations have published articles and sponsored programming that has derided traditional Judeo-Christian teachings on marriage and sexuality. For instance, in a review of this Court's decision in *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Commission*, 138 S. Ct. 1719

(2018), the Oklahoma Bar Association published an article comparing Jack Phillips's views to those of segregationists, Michael Salem, *The Cake and the Constitution*, OKLA. BAR J. (May 2020).[4] To date, the Oklahoma Bar has not published an article advocating for the "sincere religious beliefs and convictions" that motivated Phillips—convictions this Court described, contrary to segregationists' invidious discrimination, as "protected" under our Constitution. *Masterpiece Cakeshop*, 138 S. Ct. at 1723, 1727.

Some state bar associations have not been content to confine their advocacy to publications and lectures. For instance, in 2003, several bar associations lobbied the California Supreme Court to adopt a rule that would have required judges who volunteered with the Boy Scouts of America to recuse in several cases—all because of the Boy Scouts' views on sexuality. Daniel R. Suhr, *The Religious Liberty of Judges*, 20 WM. & MARY BILL OF RTS. J. 179, 209–10 (2011); Johnathan A. Mondel, *Mentally Awake, Morally Straight, and Unfit to Sit?: Judicial Ethics, The First Amendment, and the Boy Scouts of America*, 68 STAN. L. REV. 865 (2016). If "mere membership in the Boy Scouts may force judges to recuse themselves from a wide range of cases," then state bar associations may also target judges and lawyers based on their membership in religious organizations that shared the Boy Scouts' moral stance. Suhr, *The Religious Liberty of Judges* at 210.

[4] https://perma.cc/ZZ4A-NJL7

Moreover, some state bar associations have sought to regulate more than judges and lawyers and have expanded their public advocacy beyond the legal realm. For instance, the Louisiana State Bar Association adopted a "policy position" that would have prohibited elementary and secondary schools from receiving state funds if they "discriminated" based on sexual orientation or gender identity. Amicus Curiae Br. of Pelican Inst. For Pub. Pol'y at 9, *Crowe* v. *Or. State Bar*, 142 S. Ct. 79 (2021) (No. 20-1678). The Louisiana State Bar Association did so despite having a bylaw that banned the support or opposition of legislation that is political, ideological, or divisive in nature. *Ibid.*

Some bar associations also have, as amici curiae, adopted positions in litigation that conflict with attorneys' religious beliefs. For instance, the Florida State Bar Association received approval to advocate as an amicus curiae on same-sex adoption, despite religious objections from some dues-paying attorneys. *Liberty Counsel* v. *Fla. Bar Bd. of Governors*, 12 So.3d 183, 189 (Fla. 2009) (approving state bar association's request to advocate against, as amicus curiae, a law prohibiting same-sex couples from adopting children).

Most egregiously, some bar associations have done more than just pick a side; they have taken active measures to *silence* the opposing viewpoint. In August 2016, the American Bar Association approved, and a number of state bar associations have adopted, a model rule of professional conduct that prohibits certain speech that allegedly "manifests bias or prejudice toward others." ABA Code of Professional Responsibility Model Rule 8.4(g). This

model rule encompasses all "conduct related to the practice of law," including "interacti[ons] with" a broad range of people and even "participati[on] in" certain "social activities." *Ibid.* Lawyers who debate the merits of same-sex marriage at continuing legal education seminars would find themselves under threat of discipline under this broadly worded "speech code."

Numerous legal commentators have noted that Model Rule 8.4(g) blatantly violates lawyers' Free Speech and Free Exercise rights. Bruce A. Green & Rebecca Roiphe, *ABA Model Rule 8.4(g), Discriminatory Speech, and the First Amendment*, 50 HOFSTRA L. REV. 543 (2022); Lindsey Keiser, *Lawyers Lack Liberty: State Codifications of Comment 3 of Rule 8.4 Impinge on Lawyers' First Amendment Rights*, 28 GEO. J. LEGAL ETHICS 629 (2015); Eugene Volokh, *A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' Including in Law-Related Social Activities*, WASH. POST (Aug. 10, 2016)[5]; Ronald Rotunda, *The ABA Decision to Control What Lawyers Say,* HERITAGE FOUND. (Oct. 6, 2016)[6]; Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 241 (2017); George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political* (2017). At least three state attorneys general and one state solicitor general have agreed. Tex. Att'y Gen. Op. KP-0123 (Dec. 20, 2016); Letter from Robert Cook, S.C. Solicitor General, to State Rep. John R. McCravy III (May 1, 2017); La. Att'y Gen. Op. 17-0114

[5] https://perma.cc/KH96-TDGS
[6] https://perma.cc/U4XD-6FXJ

(Sep. 8, 2017); Tenn. Att'y Gen. Op. 18-11 (March 16, 2018). So has at least one federal district court—twice. *Greenberg* v. *Goodrich*, 2022 WL 874953 (E.D. Pa. March 24, 2022); *Greenberg* v. *Haggerty*, 491 F. Supp. 3d 12, 32 (E.D. Pa. 2020) ("[T]he government has created a rule that promotes a government-favored, viewpoint monologue and creates a pathway for its handpicked arbiters to determine, without any concrete standards, who and what offends.").

That has not stopped state bar associations from expending tremendous resources in advocating for, adopting, and defending this rule in court. At the behest of state bar associations, eight states—Colorado, Connecticut, Maine, New Hampshire, New Mexico, New York, Pennsylvania, and Vermont—have adopted some version of this rule. See generally *A Misguided Proposed Ethics Rule Change: ABA Model Rule 8.4(g) and the States*, CHRISTIAN LEGAL SOC'Y.[7] State bar associations in Idaho, Nevada, New Jersey, North Carolina, Oregon, South Dakota, Tennessee, Texas, and Wisconsin have also advocated that their states adopt this rule. *Ibid.* Eight of these state bar associations require mandatory dues, so any resources they expended came unwillingly from the pockets of lawyers who object to how this rule erodes their religious liberty. See Laurel S. Terry, *The Power of Lawyer Regulators to Increase Client & Public Protection Through Adoption of a Proactive Regulation System*, 20 LEWIS & CLARK L. SCH. 717, 798–801 (2016) (listing mandatory bar associations). And "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and

[7] https://perma.cc/4387-QV7R

abhor[s] is sinful and tyrannical." A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950) (cleaned up).

C. The Wisconsin State Bar specifically uses mandatory bar dues in ways that harm its attorneys' religious liberty.

The Wisconsin State Bar, respondent in this case, has engaged on a variety of social issues, and it has done so in a way that threatens the religious liberties of its attorneys. It supports insurance coverage for abortions in policies sold on a State-operated exchange, Pet. for Writ of Cert. at 5, *Jarchow* v. *State Bar of Wis.*, 140 S. Ct. 1720 (2020) (No. 19-831), despite religious objections to funding abortion coverage, see, e.g., *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 700–02 (2014). The State Bar also advocates for incorporating "sexual orientation" and "gender identity" into anti-discrimination laws without any accompanying exemptions for those with sincere religious objections. Pet. for Writ of Cert. at 5, *Jarchow* v. *State Bar of Wis.*, 140 S. Ct. 1720 (2020) (No. 19-831).

Similarly, the Bar has published a book—with an accompanying video series—advocating for the Bar's views on sexual orientation and gender identity. SEXUAL ORIENTATION, GENDER IDENTITY, AND THE LAW (Pinnacle 2018). And the Bar even hosted "the 'grandmother' of the transgender civil rights movement" to deliver a keynote address. Joe Forward, *Phyllis Frye: The Grandmother of the Transgender Rights Movement*, INSIDETRACK (July 17, 2019).[8]

[8] https://perma.cc/UFK2-94D4

This advocacy has come at the expense—and to the detriment—of attorneys who, in accordance with their religious beliefs, take a different view. "At stake here is the interest of the individual lawyers of Wisconsin in having full freedom to think their own thoughts, speak their own minds, support their own causes and wholeheartedly fight whatever they are against, as well as the interest of the people of Wisconsin and, to a lesser extent, the people of the entire country in maintaining the political independence of Wisconsin lawyers." *Lathrop* v. *Donohue*, 367 U.S. 820, 874 (1961) (Black, J., dissenting).

Because *Keller* allows the government unconstitutionally to compel the subsidization of speech and because that speech often infringes the religious liberty of state bar association members, this Court should jettison *Keller*'s unworkable standard.

II. Experience shows that organizations cannot compel subsidies and then disburse funds in a viewpoint-neutral manner.

As this Court demonstrated in *Janus*, the best way for courts to evaluate the intersection between mandatory dues and First Amendment rights is to consult the First Amendment's "text, as informed by history." *N.Y. State Rifle & Pistol Ass'n* v. *Bruen*, 142 S. Ct. 2111, 2127 (2022); *Janus*, 138 S. Ct. at 2469–71 (examining "the First Amendment's original meaning"). Experience has proven that *Keller*'s "standard of germaneness" does not find shelter in the First Amendment's original meaning. This Court should therefore discard it.

But this Court should also resist the temptation to replace one "poorly reasoned," court-created standard with another. *Janus*, 138 S. Ct. at 2460, 2479. In *Southworth*, this Court confronted "constitutional questions arising from a program designed to facilitate extracurricular student speech at a public university." 529 U.S. at 220–21. The Court refused to extend *Keller*'s "standard of germane speech" to university student group funding because that standard was "unworkable" given the "vast, unexplored bounds" of speech that universities generally subsidize. *Id.* at 231–32 ("If it is difficult to define germane speech with ease or precision where a union or bar association is the party, the standard becomes all the more unmanageable in the public university setting, particularly where the State undertakes to stimulate the whole universe of speech and ideas."). Rather than apply the First Amendment's original meaning to the students' challenge, however, the Court held that mandatory student fees were permissible so long as universities were "viewpoint neutral[ ] in the allocation of funding." *Id.* at 233.

Not only is that standard as detached from the First Amendment's original meaning as "germaneness," but it is also just as "unmanageable." In the twenty-two years since *Southworth* imposed "viewpoint neutrality" on universities, they have continued to "give[] insufficient protection … to the objecting students." *Id.* at 231.

A. The University of Lincoln-Nebraska explicitly considers speakers' viewpoints when deciding whether to use mandatory student activities funds.

Consider an example from the University of Nebraska-Lincoln. Each year the University collects from students more than $28 million—roughly $600 per student—in mandatory student activity fees. Compl. ¶¶ 3, 106, *Ratio Christi at the University of Nebraska-Lincoln* v. *Clare*, No. 4:21-cv-3301 (D. Neb. Oct. 27, 2021). The University apportions these fees into two funds: Fund A, used primarily for programs and activities managed by student groups, and Fund B, which funds, among other things, student unions and centers. *Id.* ¶ 4. Student Government distributes some of the monies from Fund A to a University Program Council that approves student organizations' events. *Id.* ¶ 127. Student Government also recommends to the University's Board of Regents how they should allocate Fund B monies not dedicated to bond debt. *Id.* ¶ 133.

From the outset, this allocation shows how the viewpoint-neutrality rule has not created a functioning system. Of the $28 million the University collects each year, mere thousands trickle down to student groups. The other millions fund the University's own prerogatives—like maintaining the LGBTQA+ Center, which engages in speech and expressive activities dedicated to "transforming campus climate … by developing and supporting a more inclusive understanding of gender and sexuality." *Id.* ¶ 139. And the LGBTQA+ Center uses Fund B monies for "extracurricular speaking events." *Id.* ¶ 142.

Even more blatantly, the University distributes Fund A monies based on viewpoint. The University promises to "make every attempt to remain neutral and fair in the selection of speakers on subjects of politics, government, and ideologies," but in practice it has proven anything but viewpoint neutral. *Id.* ¶ 146c. Though the University Program Council—who controls how Fund A monies are distributed—has a policy prohibiting financing of "speakers of a political and ideological nature," it does not define those terms. *Id.* ¶ 151. Instead, the Council retains what this Court has called "unbridled discretion" to determine who qualifies as a "political" or "ideological" speaker. See *Southworth* v. *Bd. of Regents of Univ. of Wis. Sys.*, 307 F.3d 566, 575–79 (7th Cir. 2002) (examining on remand this Court's precedents and determining that "the unbridled discretion standard is part of the constitutional requirement of viewpoint neutrality").

And the Council has used that discretion to deny financing to religious organizations. The Christian organization Ratio Christi—a group devoted not to politics but instead to Christian apologetics—wanted to host Dr. Robert Audi, a Christian philosopher, to discuss popular arguments against belief in God. Compl. ¶¶ 166–68, *Ratio Christi at the University of Nebraska-Lincoln* v. *Clare*, No. 4:21-cv-3301 (D. Neb. Oct. 27, 2021). When they applied for Fund A money to help finance the event, however, the Council immediately expressed "concern[ ] about the nature of this event." *Id.* ¶ 169. The Council demanded that Ratio Christi "provide another spokesperson with a different ideological perspective" before it would provide financing. *Id.* ¶ 171. When Ratio Christi

politely refused, explaining that, like all philosophers, Dr. Audi wanted to "make a philosophical case for a certain position," the Council denied Ratio Christi's request. *Id.* ¶ 174, 176. The Council explicitly said that its denial was because of the event's "Christian ideological nature." *Id.* ¶ 176. "[I]t is our job," the Council explained, "to make sure all the ideological perspectives and beliefs are being considered, not just Christianity." *Id.* ¶ 178.

The University of Nebraska-Lincoln Program Council's denial was explicitly viewpoint based. "When a government does not speak for itself, it may not exclude speech based on religious viewpoint; doing so constitutes impermissible viewpoint discrimination." *Shurtleff* v. *City of Boston*, 142 S. Ct. 1583, 1593 (2022) (cleaned up). And there is a "long line of" cases where this Court has rebuffed "governmental efforts to discriminate against disfavored religious speakers." *Id.* at 1609 (Gorsuch, J., concurring in the judgment); see *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98 (2001) (school's denial of after-school meeting space to club that wanted to discuss permissible topics, like child rearing, from a religious perspective was not viewpoint neutral); *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 837 (1995) (university's refusal to pay printing fees for student newspaper publishing on permissible topics from a religious perspective was viewpoint discriminatory); *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (school's denial of after-school meeting space to church to screen films with religious views on permissible topics, like family values, violated viewpoint neutrality).

This Court's recent decision in *Shurtleff* is instructive. There, the City of Boston allowed "groups to hold flag-raising ceremonies" outside city hall. 142 S. Ct. at 1588. But when someone wanted to raise the "Christian flag," the City denied the request because it would have "promoted a specific religion." *Id.* at 1588, 1593. This Court concluded that the City engaged in viewpoint discrimination. In its analysis, the Court explicitly compared the flag-raising case to student-funding cases—for there, applying the rule that governments may not "exclude speech based on religious viewpoint," *id.* at 1593 (cleaned up), this Court held "that a public university may not bar student-activity funds from reimbursing only religious groups," *id.* (citing *Rosenberger*, 515 U.S. at 830–34). So when the Council denied funding Ratio Christi's event because of Dr. Audi's "Christian" perspective, it engaged in viewpoint discrimination.

Compounding this problem, the Council has not applied the same "ideological" rigidity to other student organizations. Viewpoint neutrality also requires that the government refrain from "favor[ing] some viewpoints or ideas at the expense of others." *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). Yet the Council has had no issue paying for speakers who promoted political and ideological viewpoints on sexual orientation, gender identity, reproductive justice, social justice, police reform, and political activism. For instance, the Council approved funding for student organizations to host Jim Obergefell, the petitioner in this Court's case of *Obergefell* v. *Hodges*, 576 U.S. 644 (2015). Compl. ¶ 193i, *Ratio Christi at the University of Nebraska-Lincoln* v. *Clare*, No. 4:21-cv-3301 (D. Neb.

Oct. 27, 2021). It also disbursed funds to host Mwende Katwiwa, a self-described "writer, storyteller and social justice advocate" who is "heavily involved in social justice movements, including Black Lives Matter, reproductive justice, and LGBTQ+ advocacy." *Id.* ¶ 193e. Most recently, the Council allocated funds to host Laverne Cox, a transgender actor, who gave a presentation titled, "Ain't I A Woman." *Id.* ¶ 193k.

If the Council truly distributed student funds in a viewpoint-neutral way, it would have subjected these speakers to the same standard that it subjected Dr. Audi and required the student organizations to "provide another spokesperson with a different ideological perspective" on same-sex marriage, social justice movements, abortion, and sexual orientation and gender identity before funding their events. Or it would have denied funding based on the "ideological perspective" of the speaker. Instead, the Council applied that standard only to deny Dr. Audi based on his Christianity. That was viewpoint discrimination.

B. California State University-San Marcos lopsidedly funded favored viewpoints while denying funding to disfavored ones.

Other universities have exhibited similar problems. Like the University of Nebraska-Lincoln, California State University-San Marcos collected mandatory fees from students and used that money to fund various student-sponsored events.[9] Also like

[9] California State University is the "largest comprehensive higher education system in the nation, with 23 unique campuses." About the California State University System, https://perma.cc/Z8ND-8NDK. It has collected over $574 million

Nebraska-Lincoln, CSU-SM collected millions and disbursed only pittances back to student groups. And the lion's share that the University retained funded its favored speakers, which almost exclusively came from one viewpoint.

What little money does trickle down to student groups does so based on viewpoint. The University allocated funds to host everything from its LGBTQA Pride Center's "discussion of BDSM and Kink" to the Gender Equity Center's pro-abortion lectures. Compl. ¶¶ 96, 113, *Nathan Apodaca* v. *Silas Abrego*, No. 17-cv-1014L (S.D. Cal. May 17, 2017).[10] But when Students for Life—a nonprofit student group focused on advocating the "view that all human life from the point of conception until natural death is sacred and has inherent dignity," *id.* ¶ 153—applied for a $500 grant to host a speech entitled "Abortion and Human Equality: A Scientific and Philosophical Defense of the Pro-Life View," the University denied the request. *Id.* ¶¶ 160, 164, 168. The only explanation the University provided was that "grants [were] not available for speaker fees and travel expenses," *id.* ¶ 166—

---

campuswide in mandatory student activity fees each year, and is projected to exact over $1 billion by 2024. California State Auditor Report 2019-114 at 1 (May 2020). As a result of the *Apodaca* litigation, all 23 campuses have changed how they distribute student activity funds.

[10] In fact, in the 2016–17 academic year, these two student organizations raked in more than 53% of the mandatory activity fees allocated to student advocacy. Compl. ¶ 144, *Nathan Apodaca* v. *Silas Abrego*, No. 17-cv-1014L (S.D. Cal. May 17, 2017).

despite evidence that the University did pay such expenses for other advocacy groups.

These two cases are not outliers. They represent how most university systems in the country operate. See generally Compl., *Queens Coll. Students for Life* v. *Members of the City Univ. of N.Y. Bd. of Trs.*, No. 1:17-cv-402 (E.D.N.Y. Jan. 25, 2017) (denying funding to pro-life student group); Compl., *Students for Life at Ball State Univ.* v. *Hall*, No. 1:18-cv-1799 (S.D. Ind. June 13, 2018) (funding organizations dedicated to atheism but not pro-life organizations); Compl., *Students for Life at Colo. State Univ.* v. *Mosher*, No. 1:17-cv-139 (D. Colo. Jan. 17, 2017) (denying pro-life group event funding because some listeners might find the group's views offensive); Compl., *Young Ams. for Freedom of Kennesaw State Univ.* v. *Harmon*, No. 18-cv-00956 (N.D. Ga. March 5, 2018) (requiring only conservative student groups to pay "security fees"); Compl., *Young Ams. for Freedom at Univ. of Fla.* v. *Univ. of Fla. Bd. of Trs.*, No. 1:18-cv-00250 (N.D. Fla. Dec. 21, 2018) (denying official recognition—and thereby funding—to conservative student organization); Compl., *Students for Life at Ga. Tech* v. *Regents of the Univ. Sys. of Ga.*, No. 1:20-cv-1422 (N.D. Ga. Apr. 1, 2020) (denying pro-life group funding because of its "inherently religious" message). Viewpoint neutrality has not worked.

"If an employee cannot be forced to financially support the activities of labor unions with which he disagrees, then it is difficult to see how a student can be forced to financially support the activities of a student organization with which he disagrees." William E. Thro, *Embracing Constitutionalism: The Court and the Future of Higher Education Law*, 44

UNIV. OF DAYTON L. REV. 147, 154–55 & n.65, 171 (2019). Just as much as *Keller*, "*Janus* appears to contradict *Southworth*." *Id.* at 171.

This Court should therefore resist the temptation to retreat from *Keller*'s standard of germaneness and settle for something akin to *Southworth*'s viewpoint neutrality standard. Experience has proven that neither court-created test sufficiently protects the individual liberties enshrined in the First Amendment. Moreover, this Court created the viewpoint-neutrality test particularly for the university setting, where universities are supposed to "foster vibrant campus debate." *Southworth*, 529 U.S. at 234. If universities cannot live up to this standard, then bar associations—with even more self-interested viewpoints than universities—cannot be trusted to.

III. There is no historical evidence showing that the First Amendment has ever tolerated compelled subsidization of objectionable speech.

Whenever the Government "restricts speech, the Government bears the burden of proving the constitutionality of its actions." *Bruen*, 142 S. Ct. at 2130. "And to carry that burden, the government must generally point to *historical* evidence about the reach of the First Amendment's protections." *Ibid.* And as this Court recently noted, no one has produced any evidence showing that the First Amendment was "originally understood to allow forced subsidies like those at issue here." *Janus*, 138 S. Ct. at 2471.

Neither the Founders nor the framers of the Fourteenth Amendment envisioned a world where

speech could be compelled if it was somehow "germane" to the legal profession. Nor did they imagine that the government could compel speech so long as it was "viewpoint neutral." Rather, "prominent members of the founding generation condemned laws" that required someone to "affirm or support beliefs with which they disagreed." *Id.* at 2471 & n.8. That was true of "public employees." *Ibid.* But it was also true for attorneys. This Court should align its free-speech jurisprudence with this original meaning and discard *Keller*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID A. CORTMAN
Counsel of Record
CODY S. BARNETT
ALLIANCE DEFENDING FREEDOM
440 First Street, NW
Suite 600
Washington, DC 20001
(202) 393-8690
dcortman@ADFlegal.org

AUGUST 2022