No. 22-95

In The
Supreme Court of the United States

SCHUYLER FILE,
Petitioner,
v.
MARGARET HICKEY, IN HER OFFICIAL CAPACITY AS PRESIDENT OF THE STATE BAR OF WISCONSIN, LARRY MARTIN, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE STATE BAR OF WISCONSIN, AND CHIEF JUSTICE ANNETTE ZIEGLER AND JUSTICES PATIENCE ROGGENSACK, ANN WALSH BRADLEY, REBECCA BRADLEY, REBECCA DALLET, BRIAN HAGEDORN, AND JILL KAROFSKY, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN SUPREME COURT,
Respondents.

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

BRIEF OF AMICUS CURIAE WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC. IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS

Amicus Wisconsin Institute for Law & Liberty is a public interest law and policy center dedicated to advancing the public interest in limited government, free markets, individual liberty, and a robust civil society.[1] A significant focus of this mission includes protecting the constitutional right to freedom of speech.

Amicus has extensive experience successfully litigating free speech questions. *See, e.g.*, *Olsen v. Rafn*, 400 F. Supp. 3d 770 (E.D. Wis. 2019) (obtaining ruling that technical college violated student's free speech rights); *Cohoon v. Konrath*, 563 F. Supp. 3d 881 (E.D. Wis. 2021) (obtaining ruling that law enforcement officers violated high school student's free speech rights); *CRG Network v. Barland*, 139 F. Sup. 3d 950 (E.D. Wis. 2015) (obtaining ruling that portion of campaign finance law facially violated the First Amendment); *cf. McAdams v. Marquette University*, 2018 WI 88, 383 Wis. 2d 358, 914 N.W.2d

[1] As required by Supreme Court rules 37.2 and 37.6, Amicus states as follows. No counsel for a party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus, its members, or its counsel made such a monetary contribution. Counsel of record received timely notice of intent to file this brief and consent has been given by all parties to this brief.

708 (2018) (obtaining ruling that university violated contractual guarantee of academic freedom).

Relevant here, Amicus was also co-counsel for the Petitioners in *Jarchow v. State Bar of Wisconsin*, 140 S. Ct. 1720 (2020) (denial of certiorari petition with two justices dissenting).

Amicus respectfully requests that this Court grant the petition for writ of certiorari to resolve the urgent question raised by the Petitioner.

SUMMARY OF ARGUMENT

> *The liberties we enjoy were only acquired after centuries of struggle. The liberal nations of the world are now engaged in a death struggle for their protection. I would be false to my ideals were I to approve of [a bill making bar membership compulsory], with its denials of individual freedom of action.*

– Acting Wisconsin Governor Walter S. Goodland, in 1943 message accompanying his veto of a bill to integrate Wisconsin's bar[2]

* * *

[2] Journal of Proceedings of the Sixty-Sixth Session of the Wisconsin Legislature 700 (1943) [hereinafter "Journal"].

For far too long, this Court's precedents have allowed States to put attorneys to the choice of either losing their ability to earn a living in their profession or associating with and funding opinions with which they disagree. This is a critical First Amendment case. A favorable decision will permit lower courts to engage in the modest step of applying heightened scrutiny to mandatory or integrated bar systems.

The Petitioner and amici have already ably canvassed the many compelling legal arguments supporting a full restoration of First Amendment protections to practicing attorneys. Amicus Wisconsin Institute for Law & Liberty writes this brief for the purpose of providing important additional context for the Petitioner's challenge: a discussion of the history of the State Bar of Wisconsin ("SBW") up to the present day.

This discussion of the SBW's history—its periods of voluntary and involuntary membership, the legislation that finally created an integrated bar and the litigation that followed it—will yield several important conclusions: (1) Wisconsin does not need an integrated bar, that is, its legal profession has thrived and will continue to thrive without one; (2) because of the limited role the SBW plays in the regulation of attorneys, the First Amendment injuries in this case are especially blatant; and (3) this case is the ideal one in which to address the question presented.

ARGUMENT

I. The history of the SBW is largely one of voluntary association.

The SBW was founded on January 9, 1878 in Madison, Wisconsin, 30 years after statehood. Dianne Molvig, *Coming Together: The State Bar's First 125 Years*, 76 Wis. Law. nos. 4, 6 (2003), https://www.wisbar.org/aboutus/overview/pages/the-state-bar%27s-first-125-years.aspx.[3]

The SBW was a voluntary association for about 79 years, from its establishment in January 1878 to integration in January 1957. *See id.*; *In re Integration of the Bar*, 79 N.W.2d 441, 441 (Wis. 1956) (per curiam). Due to interceding court decisions discussed below, the SBW again became voluntary for about four years, from May 1988 through June 1992. *See Matter of State Bar of Wisconsin: Membership-SCR 10.01(1) & 10.03(4)*, 169 Wis. 2d 21, 22-23, 485 N.W.2d 225 (1992) (per curiam).

At the outset, then, it should be noted that for over half of its existence—approximately 83 out of 145 years—the SBW did not compel membership and coerce dues. As explained below, the transition to a mandatory association, relatively modern in the

[3] For much of its history the SBW was referred to as the State Bar Association, *see* Molvig, *supra*, but for simplicity "SBW" will be used to designate the SBW's predecessor as well.

SBW's history, has produced endless controversy in Wisconsin and has never received full acceptance there.

The Petitioner observes that the SBW "has a long history before this Court," given that it "was the subject of this Court's first mandatory bar association case." Pet. 6 (citing *Lathrop v. Donohue*, 367 U.S. 820 (1961)). Wisconsin's experience with the difficulties of a mandatory bar is unique in another respect: by some accounts, Wisconsin was the first State in the nation to "consider" the "radical" proposal of mandatory association in the first place. Molvig, *supra*; *accord Integration of Bar Case*, 244 Wis. 8, 15, 11 N.W.2d 604 (1943) ("Since discussion of the matter was begun in Wisconsin, the matter of integration has been considered in other states.").

The proposal was made by the SBW's president, Claire Bird, at SBW's 1914 annual meeting. Molvig, *supra.* It did not initially bear fruit. During the Great Depression, however, the SBW's cash resources, "which came almost exclusively from membership dues," plummeted by almost 70%. Theodore J. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 1983 Am. B. Found. Res. J. 1, 12 & n.61 (1983). In the midst of this precipitous decline in assets, a committee to study anew the prospect of forcing Wisconsin's lawyers to fund the SBW met with Bird as chair. *See* Terry Radtke, *The Last Stage in*

Reprofessionalizing the Bar: The Wisconsin Bar Integration Movement, 1934–1956, 81 Marq. L. Rev. 1001, 1006 (1998). Following the formation of this committee, bills to integrate the state bar were repeatedly introduced in the Wisconsin Legislature, in 1935, 1937, 1939, and 1941. But none succeeded. *Id.* at 1008–1012.

In 1943, the Legislature successfully sent an integration bill to the desk of Acting Governor Walter S. Goodland. *See id.* at 1012; Journal, *supra*, at 699–700. Acting Governor Goodland took great exception to the bill, suggesting in a message accompanying his veto that it was "opposed to our conception of democracy and individual initiative" and adding that he "believe[d] thoroughly and wholeheartedly in cooperation, but not in coercion, in conducting human affairs and relations." Journal, *supra*, at 699.

Goodland then eloquently pointed out the irony of the Legislature having passed such a bill in the midst of a World War:

> Wisconsin courts have a high reputation in the administration of justice. The Wisconsin bar ranks among the best in the country.
>
> I cannot see the need nor desirability of this arbitrary measure, particularly in these times of emergency when a great

> number of young lawyers affected thereby are in the armed forces of the United States fighting to preserve the principles of democracy which this bill would restrict . . . .
>
> [The legal profession] is the first line of defense in the guarding and protection of human rights and liberties. Its training in and knowledge of the laws and constitution and the details and operation of government, pre-eminently qualify it as the protector and defender of human rights. It should be constantly on guard to oppose, at its very inception, the slightest attempt to encroach on the fundamental of human rights and liberties. In this instance that duty seems to have been forgotten or ignored,–for what reason, it is not my province to determine.
>
> The liberties we enjoy were only acquired after centuries of struggle. The liberal nations of the world are now engaged in a death struggle for their protection. I would be false to my ideals were I to approve of [this bill], with its denials of individual freedom of action.

Id. at 699–700.

The message fell on deaf ears. The Legislature overrode the acting governor's veto, *id.* at 700–01, and the law was immediately challenged before the Supreme Court of Wisconsin, *see Integration of Bar Case*, 244 Wis. 8.

In considering the constitutional implications of a law that involved matters arguably committed to the judiciary, the Court construed the law as a non-mandatory "declaration that the integration of the Bar will promote the general welfare" and decided to postpone action in light of the fact that "a large number of the lawyers are in the military and naval service of the United States" and "[m]any other members of the Bar are giving a large part of their time and energy to matters directly connected with the prosecution of the war." *Id.* at 50–54. The state bar remained a voluntary association.

The Supreme Court of Wisconsin did not have to wait long. In 1946, less than one year after the end of World War II, the President of the SBW moved the Court to proceed with the matter of integration. Radtke, *supra*, at 1016; *In re Integration of the Bar*, 249 Wis. 523, 25 N.W.2d 500 (1946) (per curiam), *overruled by In re Integration of the Bar*, 5 Wis. 2d 618, 93 N.W.2d 601 (1958) (per curiam).

The Court did so—and rejected the request to integrate the bar. It explained that acceptance of the

proposal "would destroy some of the virtues of a voluntary association and would impose upon the court embarrassing duties of censorship and audit which might lead to unfortunate misunderstandings between the bench and the bar." *In re Integration of the Bar*, 249 Wis. at 531. "A free and voluntary bar," declared the Court, "even though embarrassed by lack of funds, is to be preferred to one that is or feels itself to be dominated by the court unless some exigency tips the scales in favor of the latter." *Id.* at 530. With respect to this last point, the Court flatly concluded that there was "no crisis in any important matter" and that the "highly desirable results" sought by proponents of an integrated bar "would result from an adequately supported voluntary association." *Id.* at 530–31.

The SBW was certainly "adequately supported" as of the mid-1950s, where *voluntary* membership reached levels of nearly 70%. *See* Radtke, *supra*, at 1024. Despite the SBW's apparent successes, however, it was at that time, following the replacement of every member of the Supreme Court of Wisconsin but one and "a rather extended series of discussions between the bar leadership and members of the Supreme Court," that that the newly-constituted Court reversed course and ordered integration of the bar in 1956 (effective January 1957). Radtke, *supra*, at 1022–1025; *see In re Integration of the Bar*, 273 Wis. 281, 77 N.W.2d 602 (1956) (per curiam); *In re Integration of the Bar*, 79

N.W.2d at 441. The Court rested its decision on the "report[]" that "too many lawyers have refrained or refused to join" SBW voluntarily, on the fact that integration would allow the Court to obtain a full registration list of all attorneys in the state, and on its observation that of the 24 states which had integrated their bars, all "ha[d] continued their practice." *In re Integration of the Bar*, 273 Wis. at 283–85.

Although the 1956 integration order was only for a "two year trial period," *In re Integration of the Bar*, 79 N.W.2d at 441, in December of 1958 the Supreme Court of Wisconsin made the change permanent. *In re Integration of the Bar*, 5 Wis. 2d at 627. In bolstering its reasoning for making membership compulsory, the Court explicitly repudiated the concerns it had raised in its 1946 decision, stating that although it had earlier "assumed it would be required to censor the budget and activities of the Bar after integration," it "now believe[d] that such detailed supervision is not desirable or essential to the existence of the integrated Bar." *Id.* at 626.

Thus, after nearly eight decades of voluntary association by Wisconsin lawyers, membership, on pain of loss of livelihood, was finally imposed on the minority who declined to associate with the SBW.

It was these actions of the Wisconsin Supreme Court that led to this Court's landmark decision in *Lathrop v. Donohue* in 1961, when a Wisconsin lawyer challenged the constitutionality of the mandatory state bar. 367 U.S. 820. The parties to this case have already discussed *Lathrop* in detail and Amicus will not repeat that discussion. Amicus notes only that the decision in *Lathrop* obviously did not end the controversy over the constitutional injuries that mandatory bar membership was producing in Wisconsin. *See, e.g.*, Schneyer, *supra*, at 5 n.27 ("Since the mid-1970s, continuation of the unified bar has regularly been an issue, both within the state bar and before the state supreme court." (citations omitted)). To take one of many examples, in 1980 the Supreme Court of Wisconsin received and dismissed a petition to discontinue the integrated bar. *Matter of Discontinuation of State Bar of Wisconsin*, 93 Wis. 2d 385, 286 N.W.2d 601 (1980) (per curiam). The petitioners in that case cited a poll they had taken—after the SBW "refused to hold a petitioned-for referendum relating to unification"—showing that 60% of those approximately 5,000 lawyers voting preferred a voluntary bar. *See Matter of State Bar of Wisconsin*, 169 Wis. 2d at 38 n.11 (Abrahamson, J., dissenting); *see also Matter of Discontinuation of State Bar of Wisconsin*, 93 Wis. 2d at 386.

Surprisingly, the SBW again became a voluntary association in 1988, when a federal district court ruled that "the requirement that plaintiff belong

to the State Bar of Wisconsin as a condition of practicing law in Wisconsin abridges his rights of free speech and free association under the First Amendment to the United States Constitution and is not justified by a compelling state interest." *Levine v. Supreme Ct. of Wisconsin*, 679 F. Supp. 1478, 1480 (W.D. Wis. 1988). Although this decision was reversed by the Seventh Circuit later in the year, *see Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988), in the interim the Supreme Court of Wisconsin "suspended enforcement of its mandatory State Bar membership rules." *Matter of State Bar of Wisconsin*, 169 Wis. 2d at 22. It would not order the state bar re-integrated until four years later in 1992, following this Court's decision—also fully discussed by the parties to this case—in *Keller v. State Bar of California*, 496 U.S. 1 (1990).

The 1992 decision of the Supreme Court of Wisconsin re-integrating the bar was not unanimous. In dissent, Justice Shirley Abrahamson observed that the two activities identified by this Court as permissible justifications for an integrated bar supported by coerced dues, namely "regulating the legal profession" and "improving the quality of legal services," were "performed primarily by the Wisconsin supreme court, not the State Bar of Wisconsin." *Matter of State Bar of Wisconsin*, 169 Wis. 2d at 34–35 (Abrahamson, J., dissenting) (quoting *Keller*, 496 U.S. at 14). And the assessments

funding these activities were separate from the membership dues paid to the SBW. *Id.*

Justice Abrahamson likewise noted, conversely, that the SBW was not unique in respect to the functions it actually carried out, pointing to "public interest law firms, legal service associations, and other organizations of lawyers, representing the diverse views of lawyers." *Id.* at 37. She rejected as unsupported the notion that an integrated bar was "better equipped" than these other organizations to "speak for the profession with respect to important regulatory and other issues and to make appropriate recommendations to this court." *Id.* at 37–38. Similarly unsupported was any suggestion that an integrated bar "ha[d] a better record for service to its members or to the public than a voluntary bar." *Id.* at 38.

Finally, and highly relevant here, Justice Abrahamson noted that the SBW had "operated well during the four fiscal years since the court made membership voluntary in May 1988," with voluntary membership levels reaching over 80% of licensed attorneys (and 90% when out-of-state practitioners were omitted from the calculation). *Id.* at 38. In her view, reverting to voluntary status had "resulted . . . in the Bar's greater responsiveness to the needs and wishes of the members in efforts to attract members and keep them enrolled." *Id.* at 38–39.

The Supreme Court of Wisconsin's re-integration of the bar hardly put an end to disagreement and litigation about the SBW's mandatory nature. *See, e.g.*, *Kingstad v. State Bar of Wis.*, 622 F.3d 708, 709 (7th Cir. 2010) ("For more than fifty years, this system has been generating First Amendment litigation, and this case is the latest installment."). Indeed, in 2006, the SBW's *own president* argued in favor of making the organization voluntary again. Steve Levine, *President's Message: Why a Voluntary Bar*, 79 Wis. Law. no. 10 (2006), https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=79&Issue=10&ArticleID=1147. And, of course, this Court's opinion in *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018), spawned new litigation against the SBW, which brings this history to the present day.

II. Today the State Bar of Wisconsin is essentially a trade association, not a regulatory entity.

In its response, the SBW paints itself as "central to Wisconsin's framework for regulating the practice of law." SBW Resp. 1. This is a highly misleading portrayal.

Whatever the SBW's past activities may have been, or the motivations for its initial creation, many decades ago the Supreme Court of Wisconsin determined that "lawyer discipline, bar admission,

and regulating competence through continuing legal education would be conducted for the benefit of the public, *independent of elected bar officials*." *Matter of State Bar of Wisconsin*, 169 Wis. 2d at 35 (Abrahamson, J., dissenting). [4]

This is illustrated well by the mandatory payments collected from Wisconsin attorneys each year. *See, e.g.*, *Update: Annual Court Assessments and Dues Statements*, 14 Wis. Law. no. 10 (2022), https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=14&Issue=10&ArticleID=29144. Annually the Supreme Court of Wisconsin imposes assessments to fund the Board of Bar Examiners ("BBE") and the Office of Lawyer Regulation ("OLR"). *These entities are distinct from the SBW and the assessments that fund them are distinct from SBW membership dues*. *See id.*

Specifically, the BBE is an "an 11-member board appointed by the Supreme Court" which "evaluates the skills, character, and fitness of lawyers," "writes and grades the Wisconsin Bar Examination," and "monitor[s] lawyers' compliance with rules for continuing legal education." Wisconsin Court System, *Board of Bar Examiners*, https://www.wicourts.gov/courts/offices/bbe.htm; *see*

[4] In 1914, for example, SBW President Bird had, in calling for an integrated bar, "reserved his sharpest criticisms for Wisconsin's primitive disciplinary process." Schneyer, *supra*, at 16. As explained, the SBW does not discipline attorneys.

also generally Wisconsin Supreme Court Rules ("SCR") chs. 30, 31, 40.

The OLR, on the other hand, is the "agency of the Wisconsin Supreme Court that receives grievances relating to lawyer misconduct, conducts investigations, and prosecutes violations of lawyer ethics rules." Wisconsin Court System, *Office of Lawyer Regulation*, https://www.wicourts.gov/courts/offices/olr.htm; *see also generally* Wisconsin SCR chs. 21–22. It is one component of a complex regulatory structure that includes district committees, special investigators, referees, the preliminary review committee, the board of administrative oversight, and of course the Supreme Court of Wisconsin itself. SCR 21.01.

None of the functions just discussed are managed by the SBW. The SBW's involvement in these activities consists largely of the fact that the Supreme Court "utilize[s] the mailing and billing machinery of the State Bar to collect [its] assessment from the lawyers." *Matter of Discontinuation of State Bar of Wisconsin*, 93 Wis. 2d at 389–90 (Day, J., dissenting). Thus, the SBW is "central to Wisconsin's framework for regulating the practice of law," SBW Resp. 1, only in the same sense as the mailman who delivers an assessment letter to a lawyer's house is central to that framework. Because of its relative *lack* of a role in serving the interests identified in *Keller*, the SBW today in its

speech and advocacy activities much more closely resembles a trade association.

In sum, regardless of whether membership in the SBW is mandatory or voluntary, "all lawyers licensed to practice in Wisconsin pay the court-mandated annual assessments to support the court-created and court-supervised boards primarily responsible for regulating the legal profession and improving the quality of legal service available to the people of the state. There are no 'free riders.'" *Matter of State Bar of Wisconsin*, 169 Wis. 2d at 36 (Abrahamson, J., dissenting). None of the potential outcomes of this case will alter this fact.

III. The history and current function of the State Bar of Wisconsin show why this is an ideal case in which to resolve the critical First Amendment question presented.

The history and current status of the SBW provide several additional reasons why this is the ideal case in which to confirm what should be an "unremarkable" rule "in light of [this Court's] prior decisions," *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017): forcing attorneys to join and fund an organization that engages in "private speech on matters of substantial public concern," *Janus*, 138 S. Ct. at 2460, triggers heightened scrutiny under the First Amendment.

First, the history of the SBW demonstrates that catastrophe will not befall Wisconsin if the SBW is unable to meet the strictures imposed by the First Amendment. Not only has the SBW been a voluntary association for over half of its existence, but Wisconsin has already once transitioned from integration to voluntary association, in the late 1980s. The sky did not fall.

Second, the fact that the SBW today does not regulate, discipline, or monitor the competency or character of attorneys only intensifies the constitutional injuries mandatory membership is producing in Wisconsin. Especially in light of the SBW's non-regulatory role, it is difficult to characterize compelled association with and funding of the SBW by objecting attorneys as anything other than "forcing free and independent individuals to endorse ideas they find objectionable" and to "betray[] their convictions." *Id.* at 2464.

Third, there is something fitting about ending this saga where it began. It was Wisconsin that first seriously considered bar integration in the early 20th century; it was Wisconsin that produced the *Lathrop* precedent which in turn provided the foundation for *Keller*; and when this Court finally declares that lawyers are *not* specially exempted from the protections of the First Amendment, it should likewise be in Wisconsin.

This Court should grant the petition for writ of certiorari.

CONCLUSION

For the foregoing reasons Amicus respectfully requests that this Court grant the petition for writ of certiorari to resolve the urgent question raised by the Petitioner.

Respectfully submitted,

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