No. _____

In The

Supreme Court of the United States

DIANE GRUBER and MARK RUNNELS,

Petitioners,

v.

OREGON STATE BAR, a public corporation, CHRISTINE CONSTANTINO, President of the Oregon State Bar, and HELEN HIERSCHBIEL, Chief Executive Officer of the Oregon State Bar,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves compelled speech of attorneys and whether that compelled speech unconstitutionally infringes upon the attorneys' Freedom of Speech:

1. Did *Keller v. State Bar of California*, 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990), actually decide that an integrated bar may use mandatory dues for germane speech or was it dictum and therefore not binding precedent?

2. If *Keller* did actually decide that an integrated bar may use mandatory dues for germane speech, should *Keller* be overruled to be consistent with *Janus v. AFSCME, et al.*, ___ U.S. ___, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018)?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners, who were Plaintiffs-Appellants in the court below, are Diane L. Gruber and Mark Runnels.

Respondents, who were Defendants-Appellees in the court below, are the Oregon State Bar, a public corporation, Christine Constantino, President of the Oregon State Bar, and Helen Hierschbiel, Chief Executive Officer of the Oregon State Bar.

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

RELATED CASES

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JURISDICTION

The Ninth Circuit entered judgment on February 26, 2021. (App. 1) This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are reproduced in the Appendix at App. 81.

STATEMENT OF THE CASE

This case challenges the constitutionality of Oregon's mandatory bar laws as they apply to Freedom of Speech under the First Amendment.

A. Mandatory Bar Membership in Oregon

The Oregon State Bar (OSB) is a public corporation established by Oregon Revised Statute (ORS) 9.010. Membership in the OSB is required for attorneys to

practice law in Oregon. ORS 9.160. Christine Costantino was the President of the Oregon State Bar, Helen Hierschbiel is the Chief Executive Officer of the Oregon State Bar. Each are charged with enforcing the provisions of ORS 9.160.

The OSB engages in various forms of speech, including publishing a monthly magazine and lobbying, all or most of which are paid for from the dues each member is required to pay.

B. Diane L. Gruber and Mark Runnels

Petitioners Gruber and Runnels are attorneys who were required to join the Oregon State Bar and maintain that membership in order to practice law. They have paid their mandatory dues and other assessments and fees which are required of them and object to the Oregon State Bar utilizing their mandatory dues to pay for various types of speech.

C. Proceedings Below

On August 29, 2018, the Petitioners filed their Complaint of Relief, alleging two claims for relief: (1) the unconstitutionality of a mandatory bar membership and use of mandatory dues to fund speech and (2) the use of mandatory dues to fund non-germane speech.

Respondents then filed a motion to dismiss Petitioners' complaint. Petitioners filed a motion for partial summary judgment. On May 24, 2019, the District

Court granted the Respondents' motion to dismiss and denied Petitioners' motion for partial summary judgment.

Petitioners appealed the judgment to the United States Court of Appeals for the Ninth Circuit on May 31, 2019. On February 26, 2021 the Ninth Circuit reversed the dismissal of Petitioners' Freedom of Association claim on the basis that *Keller v. State Bar of California*, 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990) was not binding precedent on that claim and reversed the dismissal of Petitioners' complaint regarding the OSB on the basis that the OSB was not entitled to immunity under the Eleventh Amendment. The Ninth Circuit affirmed the dismissal of Petitioners' Freedom of Speech claim on the basis that *Keller* was binding precedent: "We agree with the district court that precedent forecloses the free speech claim. . . ." (App. 4).

Petitioners now petition this Court for certiorari and request that this Court reverse the Ninth Circuit's decision on the basis that *Keller* did not establish a binding precedent or, in the alternative, overrule *Keller* on the issue of compelled funding of germane speech.

REASONS FOR GRANTING THE PETITION

This Court should grant this Petition because the Ninth Circuit has decided an important question of federal constitutional law that has not been, but

should be, settled by this Court. Specifically, the question is whether an integrated bar may use mandatory fees to support germane speech.

Alternatively, if this Court determines that it has already decided the question in *Keller*, then this Court should grant this Petition due to a conflict between the *Keller* case and this Court's recent decision in *Janus v. AFSCME, et al.*, ___ U.S. ___, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018).

There are 30 States which utilize an integrated bar approach to regulating the practice of law. Cases are pending in several of those States challenging that practice. Two cases have been presented to this Court for review but this Court has denied certiorari. *Fleck v. Wetch, et al.*, No. 19-670 and *Jarchow v. State Bar of Wisconsin*, No. 19-831 Petitioners' argument in this case differs from *Fleck* and *Jarchow* in that Petitioners in this case have never conceded that *Keller* was precedent on the issue of use of mandatory dues for germane speech. This case offers the opportunity for this Court to address this important constitutional issue which is the subject of multiple other cases and resolve the matter once and for all.

ARGUMENT

I. THIS COURT'S DECISION IN *KELLER* DID NOT DECIDE THE ISSUE OF WHETHER INTEGRATED BARS MAY USE MANDATORY DUES TO FUND GERMANE SPEECH.

The Plaintiffs in the other lower courts which have considered this issue have conceded that *Keller* was binding precedent on this issue. The Petitioners in this case disagree with that concession.

In *Keller*, the

> " . . . Petitioners, 21 members of the State Bar, sued in state court claiming that through these activities respondent expends mandatory dues payments to advance political and ideological causes to which they do not subscribe."

Keller at 9. Footnote 2 sets out the types of activities complained about:

> "Some of the particular activities challenged by petitioners were described in the complaint as follows: (1) Lobbying for or against state legislation prohibiting state and local agency employers from requiring employees to take polygraph tests; prohibiting possession of armor piercing handgun ammunition; creating an unlimited right of action to sue anybody causing air pollution; creating criminal sanctions for violation of laws pertaining to the display for sale of drug paraphernalia to minors; limiting the right to individualized education programs for students in need of

> special education; creating an unlimited exclusion from gift tax for gifts to pay for education tuition and medical care; providing that laws providing for the punishment of life imprisonment without parole shall apply to minors tried as adults and convicted of murder with a special circumstance; deleting the requirement that local government secure approval of the voters prior to constructing low-rent housing projects; requesting Congress to refrain from enacting a guest worker program or from permitting the importation of workers from other countries. (2) Filing amicus curiae briefs in cases involving the constitutionality of a victim's bill of rights; the power of a workers' compensation board to discipline attorneys; a requirement that attorney-public officials disclose names of clients; the disqualification of a law firm. (3) The adoption of resolutions by the Conference of Delegates endorsing a gun control initiative; disapproving the statements of a U.S. senatorial candidate regarding court review of a victim's bill of rights; endorsing a nuclear weapons freeze initiative; opposing federal legislation limiting federal court jurisdiction over abortions, public school prayer, and busing."

Keller at 9.

The *Keller* Court recognized that the issue before it was a challenge to the use of compulsory dues to finance political and ideological activities:

> Indeed, the plurality expressly reserved judgment on *Lathrop's* additional claim that his

> free speech rights were violated by the Wisconsin Bar's use of his mandatory dues to support objectionable political activities, believing that the record was not sufficiently developed to address this particular claim. Petitioners here present this very claim for decision, contending that the use of their compulsory dues to finance political and ideological activities of the State Bar with which they disagree violates their rights of free speech guaranteed by the First Amendment.

Keller at 9.

The *Keller* Court then went on to decide if such expenditures were constitutionally permissible. However, the *Keller* Court stated:

> "***The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members***. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity. The difficult question, of course, is to define the latter class of activities." (Emphasis added.)

Id. at 14.

While it appears that the *Keller* Court decided that germane activities could be funded from mandatory dues, that was not its decision. The issue before the *Keller* Court was whether non-germane activities could be funded from mandatory dues.

There was no challenge to the funding of germane activities, there was no determination that any of the challenged activities were germane and thus, there was no case or controversy regarding that issue as required by Article III Section 2 of the Constitution. The precedential value of *Keller* must therefore be limited to the issues before it and not upon dictum.

In reviewing *Keller*, it is clear that the *Keller* Court did not undertake any form of scrutiny of the integrated bar in making its decision. Instead, it relied upon the minority opinion of the plurality decision in *Lathrop v. Donohue*, 367 U.S. 820, 81 S. Ct. 1826, 6 L. Ed. 2d 1191 (1961) (three Justices) who analyzed the issue using a rational basis test. *Lathrop* at 871 (BLACK, J., Dissenting).

No case decided by this Court has ever decided that an integrated bar passes any form of Constitutional scrutiny as the means to achieve the compelling state interest in " . . . regulating the legal profession and improving the quality of legal services." *Keller* at 14. Thus, there is no Supreme Court precedent on this matter and the doctrine of *stare decisis* does not apply.

The *Keller* Court cited the following statement as support for its statement:

> "On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar."

Railway Employees Department v. Hanson, 351 U.S. 225, 238, 76 S. Ct. 714, 100 L. Ed. 1112 (1956).

However, this Court later pointed out the error of this statement:

> "This explanation was remarkable for two reasons. First, the Court had never previously held that compulsory membership in and the payment of dues to an integrated bar was constitutional, and the constitutionality of such a requirement was hardly a foregone conclusion. Indeed, that issue did not reach the Court until five years later, and it produced a plurality opinion and four separate writings. See *Lathrop v. Donohue*, 367 U.S. 820, 81 S. Ct. 1826, 6 L. Ed. 2d 1191 (1961) (plurality opinion).
>
> Second, in his *Lathrop* dissent, Justice Douglas, the author of *Hanson*, came to the conclusion that the First Amendment did not permit compulsory membership in an integrated bar. See 367 U.S., at 878–880, 81 S. Ct. 1826. The analogy drawn in *Hanson*, he wrote, fails. "Once we approve this measure," he warned, "we sanction a device where men and women in almost any profession or calling can be at least partially regimented behind causes which they oppose." 367 U.S., at 884, 81 S. Ct. 1826. He continued:
>
> "I look on the *Hanson* case as a narrow exception to be closely confined. Unless we so treat it, we practically give carte blanche to any legislature to put at least professional people

> into goose-stepping brigades. Those brigades are not compatible with the First Amendment." Id., at 884–885, 81 S. Ct. 1826 (footnote omitted).

Harris v. Quinn, 134 S. Ct. 2618, 2629, 189 L. Ed. 2d 620 (2014).

This shows that the quoted statement in *Hansen* was no more a "decision" than the one sentence in *Keller*.

In its recent case of *Janus, supra*, this Court stated:

> "Picking up that cue, petitioner in the present case contends that the Illinois law at issue should be subjected to "strict scrutiny." Brief for Petitioner 36. The dissent, on the other hand, proposes that we apply what amounts to rational-basis review, that is, that we ask only whether a government employer could reasonably believe that the exaction of agency fees serves its interests. See post, at 2489 (KAGAN, J., dissenting) ("A government entity could reasonably conclude that such a clause was needed"). ***This form of minimal scrutiny is foreign to our free-speech jurisprudence, and we reject it here***." (Emphasis added.)

Id. at 2465.

The issue here is whether *Keller*, *supra*, established a precedent regarding how laws infringing on associational rights protected by the First and

Fourteenth Amendments are reviewed or if the one sentence in *Keller* was *dictum*.

Dictum is defined as:

> "The word is generally used as an abbreviated for of *obiter dictum*, 'a remark by the way,' that is, an observation or remark made by a judge in pronouncing an opinion upon a cause, concerning some rule, principal, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination. . . ."

Black's Law Dictionary.

The one sentence in *Keller*, which had no citation or discussion regarding germane speech, can be given no more authority than, for example, the statement in *Barber v. Barber*, 21 How. 582 (1959) regarding jurisdiction of federal courts over suits for divorce or the allowance of alimony, which was later rejected by this Court:

> "In dicta, however, the *Barber* Court announced – without citation or discussion – that federal courts lack jurisdiction over suits for divorce or the allowance of alimony. . . ."

Marshall v. Marshall, 126 S. Ct. 1735, 164 L. Ed. 2d 480, 547 U.S. 293 (2006).

The one sentence in *Keller* dealing with germane speech clearly fits this definition since deciding whether compelled funds could be used for germane speech was neither involved nor essential to the

determination of whether compelled funds could be used for nongermane speech.

Indeed, this Court has recognized that:

> "The central holding in *Keller*, moreover, was that the objecting members were not required to give speech subsidies for matters not germane to the larger regulatory purpose which justified the required association."

U.S. and Department of Agriculture v. United Foods Inc., 533 U.S. 405, 447, 121 S. Ct. 2334, 150 L. Ed. 2d 438 (2001).

It has long been the position of this Court that statements that are not necessary for a holding are *dictum*:

> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Cohens v. Virginia, 19 U.S. 264, 399, 5 L. Ed. 257, 6 Wheat. 264 (1821).

> "With venue established under the new and broader approach, the *Eastman* case presented no problem regarding the service of process, except possibly for the ruling that process might run to another district than the one in which suit was brought. 273 U.S. at page 374, 47 S. Ct. at page 403. For by whatever test, whether of the old § 7 or the new § 12, the service was good as we have noted, the process had been directed to and served in the district where the Eastman Company was an 'inhabitant.' ***There was therefore no necessity for ruling upon the meaning of 'found' as relating to any other district. Any such ruling necessarily could be no more than dictum, since no such issue was presented by the facts.***" (Emphasis added.)

United States v. Scophony Corporation of America, 333 U.S. 795, 68 S. Ct. 855, 92 L. Ed. 91 (1948).

> "In neither of these cases was this court called upon to decide the question which has been certified, and the expression of opinion in *Peck v. Collins*, relied upon by the defendants, must be considered merely a dictum, and lacking the force of a judicial determination."

McCormick Harvesting Mach. Co. Aultman Co., 169 U.S. 606, 611, 18 S. Ct. 443, 42 L. Ed. 875 (1898).

> "The broad language in *Counselman* relied upon by petitioners was unnecessary to the

> Court's decision, and cannot be considered binding authority."

Kastigar v. United States, 406 U.S. 441, 454, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972).

> It has been said:
>
> "The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are:
>
> 1. The Court will not pass upon the constitutionality of legislation in a friendly, nonadversary, proceeding, declining because to decide such questions 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.' *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345, 12 S. Ct. 400, 402, 36 L. Ed. 176. *Compare Lord v. Veazie*, 8 How. 251, 12 L. Ed. 1067; *Atherton Mills v. Johnston*, 259 U.S. 13, 15, 42 S. Ct. 422, 66 L. Ed. 814.
>
> 2. The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' *Liverpool, N.Y. & Phila. Steamship Co. v. Emigration Commissioners*, 113 U.S. 33, 39, 5 S. Ct. 352, 355, 28 L. Ed. 899;

> *Abrams v. Van Schaick*, 293 U.S. 188, 55 S. Ct. 135, 79 L. Ed. 278; *Wilshire Oil Co. v. United States*, 295 U.S. 100, 55 S. Ct. 673, 79 L. Ed. 1329. 'It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.' *Burton v. United States*, 196 U.S. 283, 295, 25 S. Ct. 243, 245, 49 L. Ed. 482.
>
> 3. The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' *Liverpool, N.Y. & Phila. Steamship Co. v. Emigration Commissioners, supra. Compare Hammond v. Schappi Bus Line, Inc.*, 275 U.S. 164, 169 – 172, 48 S. Ct. 66, 72 L. Ed. 218. . . ."

Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-347, 56 S. Ct. 466, 80 L. Ed. 688 (1936).

The quoted sentence from *Keller*, if an actual decision, would certainly be anticipating a constitutional question in advance of necessity of deciding it or formulating a rule of constitutional law broader than was required by the facts to which it was applied.

As Justice Holmes stated in his dissent:

> "The dictum in that case gains no new force from the repetition by text writers. It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis."

Frederick Hyde v. United States, 225 U.S. 347, 391, 32 S. Ct. 793, 56 L. Ed. 1114 (1911).

In order to infringe on associational rights of individuals that are protected by the First and Fourteenth Amendments, a State must have a "compelling state interest". *Id*. Once a "compelling state interest" is established, then the Court determines whether the means the State has chosen to meet that "compelling state interest" meets the required scrutiny.

> "Contrary to the view of the Ninth Circuit panel majority, we did not call for a balancing of the "right" of the union to collect an agency fee against the First Amendment rights of nonmembers. 628 F.3d, at 1119-1120. As we noted in *Davenport*, "unions have no constitutional entitlement to the fees of nonmember-employees." 551 U.S., at 185, 127 S. Ct. 2372. A union's "collection of fees from nonmembers is authorized by an act of legislative grace," 628 F.3d, at 1126 (Wallace, J., dissenting)-one that we have termed "unusual" and "extraordinary," *Davenport*, supra, at 184, 187, 127 S. Ct. 2372. Far from calling for a balancing of rights or interests, *Hudson* made it clear that any procedure for exacting fees from unwilling contributors must be "carefully tailored to minimize the infringement" of free speech rights. 475 U.S., at 303, 106 S. Ct. 1066. And to underscore the meaning of this careful tailoring, we followed that statement with a citation to cases holding that measures burdening the freedom of speech or association must serve a "compelling interest" and must not be significantly broader than necessary to serve that interest."

Knox at 2291.

The decision in *Keller* only goes to the first part of this test. In *Keller* the Supreme Court clearly determined that the State of California did not have a compelling state interest which would justify any infringement on the associational rights of the Appellants if the speech was not germane to the compelling state interest.

Whether a compelling state interest justified infringement for germane speech was not an issue and could not have been decided. Also, no scrutiny of the means of achieving the compelling state interest, an integrated bar, was conducted or even discussed. The *Keller* Court did not even apply the now rejected rational basis test!

Further support for the position that the quoted sentence was only dictum is found in Article III Section 2 of the United States Constitution:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States. . . ."

Since the question of whether compelled payment of dues to an integrated bar for use in supporting germane speech was not raised in *Keller*, it was not a case where that question arose and therefore the *Keller* Court would have no jurisdiction to decide an issue not before it.

II. IF IT IS DETERMINED THAT THE *KELLER* COURT ACTUALLY DECIDED THE ISSUE OF USE OF COMPELLED FUNDING FOR GERMANE SPEECH, THIS COURT SHOULD OVERRULE THAT DECISION.

If, for some reason, the Court should determine that the *Keller* Court actually decided the issue of the use of compelled funding for germane speech, then this Court should overrule that decision since it is not consistent with other cases decided by this Court in the 21st Century.

A. The *Keller* Court did not fully evaluate the issue of germane speech.

The one sentence in *Keller* regarding germane speech is:

> "The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members."

Keller at 14.

These twenty (20) words are the only words in the entire *Keller* decision relating to germane speech. While it was true, and remains true, that a State may infringe upon an individual's Freedom of Speech if there is a compelling State interest and if the speech involved is germane to that compelling State interest, the infringement must also meet an appropriate constitutional scrutiny, which is the issue in this appeal.

No decision of this Court has ever determined the appropriate level of scrutiny for an integrated bar. There is absolutely no discussion of any level of scrutiny in *Keller*. The only other case that has been decided by this Court regarding an integrated bar is *Lathrop v. Donohue*, 367 U.S. 820, 81 S. Ct. 1826, 6 L. Ed. 2d 1191 (1961).

Lathrop, however, was a plurality decision. In that case, four (4) Justices of the Supreme Court joined in an Opinion declining to decide the constitutional issue raised by Mr. Lathrop; but, because three (3) other Justices decided against Mr. Lathrop on constitutional grounds, the lower court decision was affirmed:

> "We, therefore, intimate no view as to the correctness of the conclusion of the Wisconsin Supreme Court that the appellant may constitutionally be compelled to contribute his financial support to political activities which he opposes. That issue is reserved, just as it was in *Hanson*, see *International Association of Machinists v. Street*, 367 U.S. 740, at pages 746-749, 81 S. Ct. 1784, at pages 1788-1790, 6 L. Ed. 2d 1141. Upon this understanding we four vote to affirm. Since three of our colleagues are of the view that the claim which we do not decide is properly here and has no merit, and on that ground vote to affirm, the judgment of the Wisconsin Supreme Court is affirmed."

Lathrop at 847.

Thus, the *Lathrop* decision was a "plurality" decision and does not establish any precedent which is binding on this Court.

> "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . .' *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15, 96 S. Ct. 2909, 2923, 49 L. Ed. 2d 859 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)."

Marks v. United States, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977).

In *Lathrop*, the narrowest grounds – that of four (4) Justices – was:

> "In view of the state of the record and this disclaimer, we think that we would not be justified in passing on the constitutional question considered below."

Id. at 847. Since there was no majority Opinion on the constitutional question presented (only three (3) Justices agreed on this), *Lathrop* does not mandate any specific resolution as it did not set out a " . . . single rational explaining the result [which enjoyed] the assent of five Justices." *Gregg*, 428 at 169 n. 15.

Since this Court has never ruled on whether an integrated bar passes any form of scrutiny, this Court should overrule any "decision" in *Keller* holding that an

integrated bar may infringe on germane speech of its members.

B. *Keller* should be overruled to have consistency in Freedom of Speech jurisprudence.

This Court has recently established a specific rule regarding what scrutiny cannot be used in Freedom of Speech jurisprudence:

> "Picking up that cue, petitioner in the present case contends that the Illinois law at issue should be subjected to "strict scrutiny." Brief for Petitioner 36. The dissent, on the other hand, proposes that we apply what amounts to rational-basis review, that is, that we ask only whether a government employer could reasonably believe that the exaction of agency fees serves its interests. See post, at 2489 (KAGAN, J., dissenting) ("A government entity could reasonably conclude that such a clause was needed"). ***This form of minimal scrutiny is foreign to our free-speech jurisprudence, and we reject it here.***" (Emphasis added.)

Janus at 2465.

As discussed above, *Keller* did not use any form of scrutiny of the California laws regarding its integrated bar. *Lathrop* wasn't decided upon any form of scrutiny since only three (3) Justices decided the case on Constitutional grounds. While their opinion was not

clear, it appears that they utilized a "rational basis" level of scrutiny.

Justice Black, in his dissenting opinion in *Lathrop, supra*, stated:

> "The first of these is that the use of compelled dues by an integrated bar to further legislative ends contrary to the wishes of some of its members can be upheld under the so-called 'balancing test,' which permits abridgment of First Amendment rights so long as that abridgment furthers some legitimate purpose of the State. Under this theory, the appellee contends, abridgments of speech 'incidental' to an integrated bar must be upheld because the integrated bar performs many valuable services for the public. As pointed out above, the Wisconsin Supreme Court embraced this theory in express terms. And the concurring opinion of Mr. Justice HARLAN, though not purporting to distinguish the Street case, also adopts the case-by-case 'balancing' approach under which such a distinction as, indeed, any desired distinction is possible."

Lathrop at 871.

Thus, to the extent that it may be inferred that the *Keller* Court decided that germane speech could be infringed, the Court should overrule that to maintain consistency with its disapproval of the use of a rational basis analysis in free-speech jurisprudence.

This Court's recent ruling in *Ramos v. Louisiana*, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020) should provide guidance on this case:

> "Start with the quality of the reasoning. Whether we look to the plurality opinion or Justice Powell's separate concurrence, *Apodaca* was gravely mistaken; again, no Member of the Court today defends either as rightly decided."

Ramos at 1405.

The Court than went on to consider the consistency of *Apodaca v. Oregon*, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1971) with other decisions and recent legal developments:

> "Looking to *Apodaca*'s consistency with related decisions and recent legal developments compounds the reasons for concern. *Apodaca* sits uneasily with 120 years of preceding case law. Given how unmoored it was from the start, it might seem unlikely that later developments could have done more to undermine the decision. Yet they have. While Justice Powell's dual-track theory of incorporation was already foreclosed in 1972, some at that time still argued that it might have a role to play outside the realm of criminal procedure. Since then, the Court has held otherwise. Until recently, dual-track incorporation attracted at least a measure of support in dissent. But this Court has now roundly rejected it. Nor has the plurality's rejection of the Sixth Amendment's historical unanimity

> requirement aged more gracefully. As we've seen, in the years since *Apodaca*, this Court has spoken inconsistently about its meaning – but nonetheless referred to the traditional unanimity requirement on at least eight occasions. In light of all this, calling *Apodaca* an outlier would be perhaps too suggestive of the possibility of company.

Ramos at 1406.

Thirdly, this Court considers the reliance interest on those States which have followed the decision in question. While those States are still using integrated bars, the recent actions of California in 2018 modifying its laws to make the State Bar an actual State Agency which regulates the practice of law through licensing and discipline and creating a voluntary non-profit State Bar Association to handle non-regulatory activities shows that any such worries are outstripped by reality. There certainly is less reliance that those affected by the *Janus* decision.

As stated in *Ramos*:

> "In the final accounting, the dissent's *stare decisis* arguments round to zero. We have an admittedly mistaken decision, on a constitutional issue, an outlier on the day it was decided, one that's become lonelier with time. In arguing otherwise, the dissent must elide the reliance the American people place in their constitutionally protected liberties, overplay the competing interests of two States, count some of those interests twice, and make

> no small amount of new precedent all its own."

Ramos at 1408.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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