No. _____

In The
Supreme Court of the United States

DANIEL Z. CROWE; LAWRENCE K. PETERSON;
and OREGON CIVIL LIBERTIES ATTORNEYS,
an Oregon nonprofit corporation,

Petitioners,

v.

OREGON STATE BAR, a Public Corporation, *et al.*,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has held that "exacting" First Amendment scrutiny applies to laws that force public employees to subsidize the speech and political activities of public sector unions. *Janus v. AFSCME*, 138 S. Ct. 2448, 2477 (2018). The Court has also made clear that attorneys regulated under state law are subject to "the same constitutional rule" that applies to public employees. *Keller v. State Bar of California*, 496 U.S. 1, 13 (1990). Oregon requires attorneys to join and pay dues to the Oregon State Bar as a condition of practicing law. The Oregon State Bar uses members' mandatory dues to fund political and ideological speech regarding issues of law and public policy. Is the statute that compels attorneys to subsidize Oregon State Bar's political and ideological speech subject to "exacting" scrutiny?

PARTIES TO THE PROCEEDINGS

Petitioners, who were Plaintiffs-Appellants in the court below, are Daniel Z. Crowe, Lawrence K. Peterson, and Oregon Civil Liberties Attorneys, an Oregon nonprofit corporation.

Respondents, who were Defendants-Appellees in the court below, are the Oregon State Bar, an Oregon public corporation; the Oregon State Bar Board of Governors; and several Oregon State Bar officials sued in their official capacities: David Wade, President of the Oregon State Bar Board of Governors; Kamron Graham, President-Elect of the Oregon State Bar Board of Governors; Helen Marie Hierschbiel, Chief Executive Officer of the Oregon State Bar; Mike Williams, Director of Finance and Operations of the Oregon State Bar; and Amber Hollister, General Counsel for the Oregon State Bar.[1]

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[1] David Wade, Kamron Graham, and Mike Williams have respectively replaced as parties a previous President of the Oregon State Bar Board of Governors, Vanessa A. Nordyke; a previous President-Elect of the Oregon State Bar Board of Governors, Christine Constantin; and a previous Director of Finance and Operations of the Oregon State Bar, Keith Palevsky. The former officeholders were identified as Defendants-Appellants in the caption of the Ninth Circuit's opinion although their successors were automatically substituted as parties under Federal Rule of Civil Procedure 25(d) and Federal Rule of Appellate Procedure 43(c).

CORPORATE DISCLOSURE STATEMENT

Petitioner Oregon Civil Liberties Attorneys has no parent corporations, and no publicly-held company owns 10 percent or more of its stock.

RELATED CASES

- *Crowe v. Oregon State Bar*, No. 3:18-cv-02139-JR, U.S. District Court for the District of Oregon. Judgment entered May 24, 2019.
- *Crowe v. Oregon State Bar*, No. 19-35463, U.S. Court of Appeals for the Ninth Circuit. Judgment entered February 26, 2021.

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INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

Oregon requires attorneys who practice law in the state to join and pay dues to the Oregon State Bar ("OSB"). The OSB, in turn, uses attorneys' mandatory dues to fund legislative advocacy and other political and ideological speech on matters of public importance. The question presented here is whether Oregon's law that forces attorneys to subsidize political speech should be subject to exacting First Amendment scrutiny.

In *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), this Court held that laws forcing public employees to fund the political speech and lobbying activities of a public sector union were subject to exacting scrutiny, *id.* at 2477, and in *Keller v. State Bar of California*, 496 U.S. 1, 12 (1990), it found that there was "a substantial analogy" between mandatory bar associations and unions when it comes to First Amendment principles. Petitioners challenged the constitutionality of Oregon's compelled subsidies for OSB's political and ideological speech, based on those precedents.

Yet the Ninth Circuit dismissed Petitioners' First Amendment challenge to the compelled subsidies, holding that it is foreclosed by *Keller*, which, the court said, allows bar associations to "use mandatory dues to subsidize activities 'germane to those goals' of 'regulating the legal profession and improving the quality of legal services' without running afoul of its members' First Amendment rights." App. 14. Although it agreed

that *Janus* establishes a different rule, the Ninth Circuit felt itself bound to continue to follow *Keller*'s supposed holding due to the rule that lower courts must adhere to on-point Supreme Court precedent even if it believes that precedent has been abrogated. *See* App. 16 (citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997)). Since *Janus*, many other lower courts have done the same, dismissing challenges to compulsory subsidies for bar association speech on the grounds that *Keller* permits them notwithstanding *Janus*. *See infra* at 16–17. *Keller* should not, however, foreclose Petitioners' free-speech claim. *Keller* held that compelled subsidies for bar association speech are subject to the "same constitutional rule" as compelled subsidies for public-sector unions' speech. 496 U.S. at 13. At that time, the rule for public-sector unions was set by *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which allowed governments to force public-sector employees to pay for union activities germane to collective bargaining. Now that *Janus* has overruled *Abood*, it is clear that such fees are subject to (and fail) exacting scrutiny, under which the government must show that an infringement of First Amendment rights serves a compelling government interest and that there is no other way to serve that interest that would infringe significantly less on First Amendment rights. *Janus*, 138 S. Ct. at 2466, 2478–86. Therefore, subjecting mandatory bar association dues to "the same constitutional rule" as public-sector unions, as *Keller* requires, now means subjecting them to exacting scrutiny—which the lower courts purporting to follow *Keller* have not done.

Alternatively, if the lower courts have read *Keller* correctly, then *Keller* should be overruled. To the extent that *Keller* approved of compelled subsidies for bar association speech, it did so based entirely on *Abood*, which *Janus* overruled because it applied a "deferential standard that finds no support in [the Court's] free speech cases" and was otherwise ill-founded, poorly reasoned, and unworkable. *Id.* at 2463–69, 2478–86. "Now that *Abood* is no longer good law, there is effectively nothing left supporting [the Court's] decision in *Keller*." *Jarchow v. State Bar of Wis.*, 140 S. Ct. 1720, 1720 (2020) (Thomas, J., dissenting from denial of certiorari).

The constitutional problems raised by forcing lawyers to subsidize the speech and lobbying of bar associations is a question of immense importance throughout the country. Cases now pending in the Fifth, Sixth, Seventh, and Tenth Circuits, the Utah district court, as well as this Court, now seek to clarify what impact *Janus* has on that question.[1] The Eighth Circuit recently observed that *Janus* applied "a more rigorous exacting scrutiny standard" than *Keller* did, but nonetheless followed what it believed to be the command of *Keller*. *Fleck v. Wetch*, 937 F.3d 1112, 1117

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[1] *Boudreaux v. La. State Bar Ass'n*, No. 20-30086 (5th Cir. Feb. 11, 2020) (challenging Louisiana's mandatory bar); *McDonald v. Longley*, No. 20-50448 (5th Cir. Jun. 4, 2020) (Texas's); *Taylor v. Barnes*, No. 20-2002 (6th Cir. Oct. 13, 2020) (Michigan's); *File v. Kastner*, No. 20-2387 (7th Cir. July 28, 2020) (Wisconsin's); *Schell v. Gurich*, No. 20-6044 (10th Cir. Apr. 2, 2020) (Oklahoma's); *Pomeroy v. Utah State Bar*, No. 2:21-cv-00219-JCB (D. Utah Apr. 13, 2021) (Utah's).

(8th Cir. 2019), *cert. denied*, 140 S. Ct. 1294 (2020). Even the dissenters in *Janus* noted that the opinion was difficult to square with *Keller*, *see* 138 S. Ct. at 2498 (Kagan, Ginsburg, Breyer, Sotomayor, JJ., dissenting)—but the *Janus* majority made no comment on that matter. The question therefore requires resolution by this Court.

The Court should revisit compelled subsidies for bar association speech for the same reason it revisited compelled subsidies for public-sector union speech in *Janus*. Such compulsion is inconsistent with the Court's free speech jurisprudence and is harming thousands of attorneys' First Amendment rights in the 30 states that compel attorneys to join and pay dues to a bar association as a condition of practicing law. With challenges to compelled bar subsidies pending nationwide—and all, so far, failing based on the courts' understanding of *Keller*—the time has come to clarify (and, if necessary, correct) the law on this issue so that attorneys may enjoy the same protection for their fundamental First Amendment rights as government employees and everyone else.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 989 F.3d 714 and reproduced at App. 1–223. The district court's opinion, which adopted a magistrate's findings and recommendation, is reproduced at App. 225–28. The

magistrate's findings and recommendation are reproduced at App. 229–66.

JURISDICTION

The Ninth Circuit issued its opinion on February 26, 2021. On March 19, 2020, this Court extended the deadline to file any petition for writ of certiorari due on or after that date to 150 days after the lower court's decision. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments of the United States Constitution and the relevant statutes are reproduced at App. 293–304.

STATEMENT OF THE CASE

This case presents a First Amendment challenge to Oregon's requirement that attorneys pay dues to the Oregon State Bar ("OSB"), and thus subsidize its political and ideological speech, as a condition of practicing law.

A. The Oregon State Bar's Use of Mandatory Dues for Political and Ideological Speech

Oregon law compels every attorney licensed in Oregon to join the state's integrated bar association, the OSB, in order to practice law. ORS § 9.160; App. 5. State law also authorizes OSB to charge its mandatory members an annual membership fee. ORS § 9.191; App. 303–04. That fee is currently $617.00 for ordinary active members.[2]

The OSB uses mandatory dues for various activities, some of which pertain to regulating the legal profession. Subject to the Oregon Supreme Court's oversight, the OSB administers Oregon's bar examination, investigates bar applicants' character and fitness, formulates rules of professional conduct, and establishes minimum continuing legal education requirements for attorneys. ORS §§ 9.114, 9.210, 9.490; App. 5.

The OSB also uses its mandatory members' mandatory dues to fund political and ideological speech.

One way the OSB uses members' mandatory dues for political and ideological speech is through legislative and policy advocacy. Its Board of Governors may sponsor legislative proposals to the Oregon Legislative Assembly on its own initiative, and the OSB must sponsor legislative proposals approved by the OSB's House of Delegates or approved through a membership

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[2] Oregon State Bar Membership Fee FAQ, https://www.osbar.org/fees/feeFAQ.html.

initiative to the Legislative Assembly. OSB Bylaws §§ 12.200, 12.201; App. 124. The Board and its Public Affairs Committee may propose, or consent to, amendments to legislation, and it may take positions on legislation. OSB Bylaws § 12.3; App. 125. The OSB's committees also may take positions on proposed legislation, rules, and issues of public policy. OSB Bylaws § 12.4; App. 125–26.

The OSB's Bylaws ostensibly limit the OSB's "legislative or policy activities" to those "reasonably related to any of the following subjects":

> regulating and disciplining lawyers; improving the functioning of the courts including issues of judicial independence, fairness, efficacy and efficiency; making legal services available to society; regulating lawyer trust accounts; the education, ethics, competence, integrity and regulation of the legal profession; providing law improvement assistance to elected and appointed government officials; issues involving the structure and organization of federal, state and local courts in or affecting Oregon; issues involving the rules of practice, procedure and evidence in federal, state or local courts in or affecting Oregon; or issues involving the duties and functions of judges and lawyers in federal, state and local courts in or affecting Oregon.

OSB Bylaws § 12.1; App. 123–24.

In addition, the OSB has used mandatory member fees to publish political and ideological speech in its *Bar Bulletin* magazine. App. 276–78. In the April 2018 *Bar Bulletin*, it published, on opposing pages, two statements on alleged "white nationalism." *See* App. 7–11. One of the statements, attributed to the OSB itself, called for limitations "to address speech that incites violence" notwithstanding the First Amendment. App. 7–9. The other, attributed to several affinity bar associations, criticized President Trump for, among other things, "allowing [the white nationalist movement] to make up the base of his support" and signing an executive order restricting immigration and refugee admissions. App. 9–11.

Petitioners Daniel Crowe and Lawrence Peterson—Oregon attorneys who have been compelled to join and pay dues to the OSB—learned of the OSB's publication of these statements when they received the *Bar Bulletin* in the mail in April 2018. App. 277. Crowe and Peterson disagree with the statements' criticism of President Trump and, if given a choice, would not have voluntarily paid for the statements' publication. *Id.*

Crowe, Peterson, and other OSB members informed the OSB of their objections to the use of their mandatory fees to publish the statements and requested refunds of their annual membership dues. App. 277–78. The objecting members each received a payment of $1.15 from the OSB, which the OSB described as a partial dues refund of $1.12, plus $0.03 of statutory interest, with no further explanation. *Id.*

B. Proceedings Below

Petitioners Crowe and Peterson and the members of Petitioner Oregon Civil Liberties Attorneys (collectively, "Petitioners") are licensed Oregon attorneys who are required to pay annual OSB membership dues.[3] App. 270–71. Petitioners disagree with OSB speech that they are forced to fund, including but not limited to the April 2018 *Bar Bulletin* statements, and do not wish to fund any of the OSB's political or ideological speech, regardless of its viewpoint. App. 278.

Petitioners therefore brought suit against the OSB and several OSB officials in their official capacities, raising three First Amendment claims. In one claim, Petitioners allege that compulsory OSB membership and dues violate attorneys' rights to free speech and association. App. 283–84. In another claim, they allege that the OSB's use of mandatory dues for political and ideological speech without members' affirmative consent violates attorneys' rights to free speech and association. App. 282–83. And in another claim, Petitioners allege, in the alternative, that the OSB violates attorneys' First Amendment rights by failing to provide safeguards, as prescribed by *Keller*, to ensure that member dues are not used for activities that are not germane to regulating the legal profession or improving the quality of legal services in Oregon. App. 279–81.

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[3] In February 2020, more than a year after this lawsuit was filed, Peterson retired from the practice of law and resigned his OSB membership.

Defendants moved to dismiss. A magistrate recommended that the motion be granted, App. 229–66, and the district court adopted the magistrate's recommendation in full, *id.* at 225–27. The district court concluded that *Keller* and *Lathrop v. Donohue*, 367 U.S. 820 (1961), foreclosed any First Amendment challenge to mandatory bar membership or dues. It also found that the OSB's safeguards for attorneys' First Amendment rights sufficed under *Keller*. App. 251–64. The district court further concluded that the *Bar Bulletin* statements to which Petitioners objected were "germane" and thus properly chargeable to all members under *Keller*. *Id.* at 257–58.

On appeal, the Ninth Circuit reversed dismissal of Petitioners' freedom-of-association challenge to mandatory OSB membership, concluding, contrary to the district court, that *Keller* and *Lathrop* did not foreclose it because this Court has never resolved that issue; indeed, *Keller* expressly declined to address it. App. 20–26 (citing *Keller*, 496 U.S. at 17).[4] The Ninth Circuit affirmed the dismissal of Petitioners' challenge to the OSB's lack of *Keller* safeguards, however. App. 16–20. Judge VanDyke dissented from the majority's opinion on (only) that issue. App. 36–38.

The Ninth Circuit also affirmed dismissal of Petitioners' free-speech challenge to compulsory OSB dues, concluding that this Court approved of the collection

[4] That claim was remanded and is now pending before the district court. *See* Scheduling Order, *Crowe v. Or. State Bar*, No. 3:18-cv-02139-JR (D. Or. Apr. 12, 2021).

and use of mandatory bar association dues for "germane" political and ideological speech in *Keller*. App. 14–16. The Ninth Circuit recognized that *Keller* "instruct[ed] that integrated bars adhere to the same constitutional constraints as [public-sector] unions"; that *Keller* "expressly relied on" this Court's decision approving compulsory public-sector union fees in *Abood*; and that the Court had overruled *Abood* in *Janus* and deemed compulsory public-sector union fees subject to (and unconstitutional under) exacting First Amendment scrutiny. App. 14–16. The court also noted that "[g]iven *Keller*'s instruction that integrated bars adhere to the same constitutional constraints as unions," Petitioners' argument that *Keller* does not foreclose their free-speech challenge to mandatory dues "is not without support." App. 15. Nonetheless, the Ninth Circuit concluded that, because *Janus* did not overrule *Keller*, lower courts are still bound to follow *Keller*'s (supposed) holding that the First Amendment allows states to compel attorneys to fund a bar association's germane speech.[5] App. 15–16.

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[5] Both the district court and the Ninth Circuit heard and decided Petitioners' case together with another case in which Oregon attorneys challenge mandatory OSB membership and dues for violating their First Amendment rights. *Gruber v. Oregon State Bar*. *See* App. 4 n.1, 12–13, 225, 230–31. The district court dismissed the *Gruber* plaintiffs' free-speech challenge to mandatory dues, and the Ninth Circuit affirmed, together with Petitioners' substantially identical claim. App. 4 & n.1, 230–31. The *Gruber* plaintiffs have filed their own petition for certiorari in case number 20-1520.

Petitioners seek certiorari so this Court can review and reverse the lower court's dismissal of their free-speech challenge to Oregon's requirement that they subsidize the Oregon State Bar's political and ideological speech as a condition of practicing law.

REASONS FOR GRANTING THE PETITION

I. This case presents the vital and unresolved issue of whether states may compel attorneys to subsidize a bar association's political and ideological speech.

This case presents an issue of extraordinary national importance: whether laws that force attorneys to subsidize a bar association's political and ideological speech as a condition of practicing law should be subject to the exacting First Amendment scrutiny of *Janus*, rather than the rational-basis scrutiny that lower courts have given them based on their interpretation of *Keller*.

A. Lower courts have allowed Oregon and other states to compel attorneys to subsidize bar associations' political and ideological speech without applying exacting First Amendment scrutiny.

This Court has recognized that forcing people to subsidize an organization's political and ideological speech inflicts significant First Amendment harm. It has cited with approval Thomas Jefferson's famous

statement that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical." *Janus*, 138 S. Ct. at 2464 (citing A Bill for Establishing Religious Freedom, *in* 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950)). And it has therefore held that laws that mandate subsidization of other people's political and ideological speech must satisfy at least "exacting" scrutiny (under which the government must show that "a compelled subsidy . . . serve[s] a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms"). *Id.* at 2465 (internal marks and citation omitted). In *Janus*, that meant that compulsory public-sector union fees, which were spent on lobbying, were subject to exacting scrutiny. *Id.* at 2466, 2478–86.

Nonetheless, Oregon and most other states require attorneys to join and pay dues to a state bar association as a condition of practicing law—even though many compulsory state bar associations, including the OSB, use attorneys' mandatory dues to engage in core political and ideological speech. App. 5–11; *see also* Leslie C. Levin, *The End of Mandatory State Bars?*, 109 Geo. L.J. Online 1, 7–8, 15–16 (2020).[6] Here, for example, the OSB uses mandatory dues, not only to engage in legislative advocacy on matters it claims to be "germane," but also to publish political and ideological

[6] https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/04/Levin_The-End-of-Mandatory-State-Bars.pdf.

advocacy such as the *Bar Bulletin* statements to which Petitioners objected. App. 7–11.

Other states' compulsory bar associations also use member dues for political and ideological activities. The Oklahoma Bar Association, for example, spends members' compulsory dues to operate a "legislative program," which proposes legislation and lobbies the state legislature, and it has even staged a rally at the state capitol building to oppose legislation its leaders disfavored.[7] The Louisiana State Bar Association uses mandatory dues to take positions on, and lobby for or against, controversial political matters such as public school curricula, the death penalty, and LGBT rights.[8] The Michigan State Bar has used dues to advocate for and against legislation on issues unrelated to the practice of law, such as a bill to change rules regarding expungement for juvenile offenders and a bill about the charging of minors who commit prostitution-related offenses.[9] The Texas Bar spends compulsory dues to engage in political lobbying relating to bills before the state legislature on a wide variety of subjects,

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[7] *See* First Am. Compl. at ¶¶ 47–54, *Schell v. Gurich*, 409 F.Supp.3d 1290 (W.D. Okla. 2019), *appeal docketed*, No. 20-6044 (10th Cir. Apr. 2, 2020).

[8] *See* Compl. at ¶¶ 41, 43–44, *Boudreaux v. La. State Bar Ass'n*, 433 F.Supp.3d 942 (E.D. La. 2020), *appeal docketed*, No. 20-30086 (5th Cir. Feb. 19, 2020).

[9] *See* Jacob Huebert & Kileen Lindgren, *Michigan Attorney Sues State Bar to Defend Her First Amendment Rights*, In Defense of Liberty (Oct. 16, 2019), https://indefenseofliberty.blog/2019/10/16/michigan-attorney-sues-state-bar-to-defend-her-first-amendment-rights/.

including everything from tort reform to contentious anti-discrimination proposals and immigration reform measures.[10] The State Bar of Wisconsin participates in legislative and policy debates on a variety of issues, funding some of that advocacy with members' mandatory dues.[11]

Even when addressing matters related to regulating the legal profession, mandatory bar associations engage in political and ideological advocacy that affects not only lawyers but also the public. Through their role in the rulemaking process, mandatory bar associations "can prevent proposals that benefit the pubic from ever proceeding to the courts for consideration" and "sometimes support proposals that favor lawyers over the public." Levin, *supra*, at 16–17. State bars, in other words, exercise an outsize influence on democracy at the state and federal levels—and in mandatory bar states, they do so with funds taken from lawyers against their will. Quintin Johnstone, *Bar Associations: Policies and Performance*, 15 Yale L. & Pol'y Rev. 193, 228–30 (1996).

In short, mandatory bar associations engage in core political and ideological speech on matters of great public concern—just like the public-sector unions

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[10] *See* First Am. Compl. at ¶¶ 39–40, *McDonald v. Sorrels*, No. 1:19-CV-219-LY, 2020 WL 3261061 (W.D. Tex. May 29, 2020), *appeal docketed sub nom. McDonald v. Longley*, No. 20-50448 (5th Cir. Jun. 4, 2020).

[11] *See* Compl. ¶¶ 31–39, *Jarchow v. State Bar of Wis.*, No. 19-cv-266-bbc, 2019 WL 6728258 (W.D. Wis. Dec. 11, 2019), *aff'd*, No. 19-3444, 2019 WL 8953257 (7th Cir. Dec. 23, 2019).

whose compelled subsidies were struck down in *Janus*, 138 S. Ct. at 2475–76 (recognizing that subjects of collective bargaining, including wages and employee benefits, and other union speech constituted core political speech). Just as union speech on matters germane to collective bargaining, such as government employees' wages and benefits, implicated matters of great public concern, so does bar association advocacy, even on matters germane to regulating lawyers, which can have significant consequences for both lawyers and the general public. *See* Levin, *supra*, at 15–16.

Despite this "substantial analogy between . . . State Bar [associations] . . . on the one hand, and the relationship of employee unions and their members, on the other," *Keller*, 496 U.S. at 12, lower courts, including the Ninth Circuit in this case, continue to uphold compelled subsidies for bar association speech without applying the exacting First Amendment scrutiny that *Janus* calls for—or *any* meaningful scrutiny, for that matter. They do so based on their view that *Keller*, 496 U.S. at 13–14, categorically approved of the collection and use of mandatory bar dues for political and ideological speech that is "germane" to "regulating the legal profession and improving the quality of legal services." App. 14–15; *see*, *e.g.*, *Jarchow v. State Bar of Wis.*, No. 19-3444, 2019 WL 8953257 (7th Cir. Dec. 23, 2019); *Taylor v. Barnes*, No. 1:19-CV-670, slip op. at 1–2 (W.D. Mich. Sept. 8, 2020),[12] *appeal docketed sub nom.*

[12] https://www.mackinac.org/archives/2020/2020%2009%2008%20Order%20Dismissing%20the%20Case%20on%20Summary%20Motion.pdf.

Taylor v. Buchanan, No. 20-2002 (6th Cir. Oct. 13, 2020); *McDonald v. Sorrels*, No. 1:19-CV-219-LY, 2020 WL 3261061, *5–6 (W.D. Tex. May 29, 2020), *appeal docketed sub nom. McDonald v. Longley*, No. 20-50448 (5th Cir. Jun. 4, 2020); *Schell v. Gurich*, 409 F.Supp.3d 1290, 1298 (W.D. Okla. 2019), *appeal docketed*, No. 20-6044 (10th Cir. Apr. 2, 2020).

If courts were to subject mandatory subsidies for bar association speech to exacting scrutiny, they would not survive it. *Keller* recognized two governmental interests that mandatory bar association dues could serve: "regulating the legal profession and improving the quality of legal services." 496 U.S. at 13. The Court has also recognized that states "have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices." *Harris v. Quinn*, 573 U.S. 616, 655–56 (2014); *see also Lathrop*, 367 U.S. at 843 (plurality opinion) (holding that a state "may constitutionally require that the costs of improving the [legal] profession . . . be shared by the subjects and beneficiaries of the regulatory program, the lawyers").[13] But

[13] *Lathrop* upheld Wisconsin's requirement that attorneys join and pay dues to the State Bar of Wisconsin so that attorneys would pay for their own regulation, but the plurality opinion expressed "no view" on the plaintiff's claim that "his rights of free speech [were] violated by the use of [bar dues] for causes which he opposes." 367 U.S. at 845–47. This petition therefore does not call for the Court to overrule *Lathrop* as a case challenging mandatory *membership* itself would have to. *Cf.* Petition for Writ of Certiorari, *Jarchow*, 140 S. Ct. 1720 (asking the Court to overrule both *Lathrop* and *Keller* to declare both mandatory bar

there is no doubt that states can accomplish these interests in a manner that is significantly less restrictive of associational freedoms than by forcing attorneys to finance a bar association's political and ideological speech. We know that because today 20 states—Arkansas, California, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New York, Ohio, Pennsylvania, Tennessee, and Vermont[14]—regulate attorneys, and require them to pay for the costs of their own regulation, without compelling membership in a bar association that may engage in political or ideological speech. *See* Levin, *supra*, at 15, 17–19 ("Even if these state interests are found to be 'compelling,' those interests can almost certainly 'be achieved through means significantly less restrictive of associational freedoms,'" as "evidenced by looking at the jurisdictions

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membership and compelled subsidies for bar association speech unconstitutional).

[14] *See* Ralph H. Brock, "*An Aliquot Portion of Their Dues": A Survey of Unified Bar Compliance with* Hudson *and* Keller, 1 Tex. Tech. J. Tex. Admin. L. 23, 24 n.1 (2000). This article identifies 32 states with a mandatory bar association. After its publication, however, California adopted a bifurcated system under which lawyers pay only for purely regulatory activities and are not forced to fund the bar association's political or ideological speech, eliminating most if not all of the First Amendment problems. *See* Levin, *supra*, at 17–18. Nebraska also adopted a bifurcated system in 2013 and then made its bar association fully voluntary. *See In re Petition for a Rule Change to Create a Voluntary State Bar of Neb.*, 841 N.W.2d 167, 173 (Neb. 2013); Neb. S. Ct. Rule 3-100(B) (amended effective February 12, 2020 to require payment of an annual assessment to the Nebraska Supreme Court rather than the Nebraska State Bar Association).

with voluntary state bars."). There is no evidence that compulsory bar associations help produce better laws governing lawyers, or that they are better than voluntary bars at improving the quality of legal services. *See id.* at 18–19. And there is certainly no reason to believe that compelled support for bar associations' *political and ideological speech*—in addition to their purely regulatory activities—produces lawyers who are more ethical or provide better services.

Thus, the Ninth Circuit's (and other lower courts') failure to subject compelled bar subsidies to exacting First Amendment scrutiny is causing significant unjustified First Amendment harm to the many thousands of attorneys in Oregon and other states who, as a condition of practicing their profession, are forced to pay money to a bar association that spends money on political or ideological speech and activities.

B. The Court should grant certiorari to clarify that *Keller* does not require courts to uphold compelled subsidies for bar association speech.

The lower court said that *Keller* categorically approved of compelled subsidies for bar associations' germane political and ideological speech. App. 14–16. But in fact, *Keller* only held that mandatory bar dues are "subject to the same constitutional rule" that applies to compulsory public-sector union fees. 496 U.S. at 13. And given the rule in *Janus* that the latter are subject

to exacting scrutiny, *Keller* therefore necessarily imposes the same scrutiny on the latter.

The plaintiffs in *Keller* were attorneys who argued that the California State Bar's use of their mandatory dues for "political and ideological causes" violated the First Amendment. *Id.* at 6. The California Supreme Court rejected their claim, holding that the State Bar was a "state agency" and therefore "exempted . . . from any constitutional constraints on the use of its dues." *Id.* at 10. Reviewing that issue, this Court reversed and ruled in favor of the plaintiffs. *Id.* at 17. It held that bar associations are not like "traditional government agencies" funded by tax dollars, but are instead akin to labor unions funded by individual member dues. *Id.* at 10–13. For that reason, the Court concluded, bar associations are not exempt from First Amendment scrutiny, but must be "subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions." *Id.* at 13.

When the Court decided *Keller*, the "constitutional rule" for compulsory union fees had been established by *Abood*, 431 U.S. at 235, which held that the First Amendment did not forbid governments from compelling public-sector employees to subsidize a union's political and ideological speech that was germane to collective bargaining on their behalf. In reaching that conclusion, *Abood* did not apply exacting First Amendment review, but used rational-basis review. *See Janus*, 138 S. Ct. at 2479–80 (citing *Abood*, 431 U.S. at 222). Now that *Janus* has overruled *Abood*, that "deferential standard"—which has "no support in [the Court's] free

speech cases"—no longer applies to compelled support for public-sector union fees. 138 S. Ct. at 2479–80. Under *Janus*, forcing people to pay union fees triggers exacting First Amendment scrutiny. *Id.* at 2483. Therefore, because *Keller* requires "the same constitutional rule" to apply to both union fees and bar dues, 496 U.S. at 13, the same exacting scrutiny must apply to both. This means that the many lower courts that have upheld compelled support for bar association speech without applying exacting scrutiny have *not* followed *Keller*, as they claim, but have *failed* to follow it.

To be clear, *Keller* did not hold that states may compel attorneys to subsidize a bar association's political and ideological speech. It reviewed a lower court decision that deemed mandatory bar dues categorically exempt from First Amendment scrutiny. 496 U.S. at 6–7. The plaintiffs sought to overturn that holding by arguing that bar dues should be subject to the same standard as union fees. *Id.* at 5–6. Nobody in the case argued that exacting scrutiny should apply, and the Court did not consider that question. There was no need to: it was not necessary to decide *what level* of scrutiny applied in order to reverse the lower court's holding that *no* scrutiny applied.

Thus, any statements in *Keller* about whether or how the *Abood* standard should apply to mandatory bar dues were dicta. That case took it for granted that *Abood* supplied the proper level of scrutiny. *See*, *e.g.*, *id.* at 13 ("*Abood* held that a union could not expend a dissenting individual's dues for ideological activities not 'germane' to . . . collective bargaining."). Based on that

premise, the *Keller* Court said: "We think . . . the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" *Id.* at 14 (citation omitted). That tentative dicta about the Court's "think[ing]" was not part of *Keller*'s holding.

Further, even apart from *Keller* and *Janus*, other precedents of this Court also require compelled subsidies for bar association speech to be subject to exacting scrutiny. "[G]enerally applicable First Amendment standards" require "exacting scrutiny" for any "compelled funding of the speech of other private speakers or groups." *Harris*, 573 U.S. at 647; *see also Knox v. SEIU*, 567 U.S. 298, 310 (2012) (noting that "compulsory subsidies for private speech are subject to exacting First Amendment scrutiny"); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (noting that compelled association for expressive purposes is only permissible "to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms"). Accordingly, the rule of "exacting scrutiny" trumps any dicta in *Keller* about how the now-defunct *Abood* standard should or should not apply to bar dues.

Nonetheless, lower courts continue to assume that *Keller* simply created a *per se* rule upholding compelled subsidies for bar associations' "germane" speech. These courts have accordingly failed to subject laws that

compel attorneys to pay bar associations to exacting scrutiny or *any* meaningful scrutiny. *See supra* at 16–17.

Thus, the Court should grant certiorari to clarify that *Keller* did not categorically approve compelled support for bar association speech, whether germane or non-germane—and that mandatory bar association dues are now subject to the same *exacting scrutiny* as laws that compel government employees to pay union fees, or other laws that compel support for an organization's political or ideological speech.

C. Alternatively, the Court should grant certiorari to overrule *Keller* because it conflicts with *Janus* and allows unjustifiable violations of attorneys' First Amendment rights.

In the alternative, if *Keller* is properly read as approving compelled support for bar associations' germane political and ideological speech, then the Court should overrule *Keller* because it conflicts with *Janus* and has allowed widespread unjustifiable violations of attorneys' fundamental First Amendment right not to subsidize an organization's political or ideological speech.

Keller's (supposed) approval of compelled subsidies for bar association speech directly conflicts with the Court's reasoning in *Janus*. To the extent that *Keller* approved of compulsory bar association dues, it did so based on *Abood*, which *Janus* overruled. With *Abood* overruled, there is no ground for permitting

states to force attorneys to subsidize bar association speech, unless exacting scrutiny is satisfied. *See Jarchow*, 140 S. Ct. at 1720 (Thomas, J., dissenting from denial of certiorari) ("Now that *Abood* is no longer good law, there is effectively nothing left supporting our decision in *Keller*.").

If compelled subsidies for speech by public-sector unions and other organizations warrant exacting First Amendment scrutiny, there is no reason why compelled subsidies for bar associations' speech should not be subject to that same scrutiny. As discussed above, OSB and other compulsory state bar associations engage in speech on controversial matters of substantial public concern, just as public-sector unions do. But even if a bar association only engages in advocacy on matters that are germane to regulating the legal profession, as the OSB purports to, App. 7, compelled subsidies still violate the First Amendment because—just as in *Janus*—the regulation of lawyers and the administration of justice are matters of great public concern. *See* Levin, *supra*, at 15–17 (explaining how bar associations support rules that favor lawyers, sometimes over the public); Bradley A. Smith, *The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession*, 22 Fla. St. U. L. Rev. 35, 55–58 (1994) (explaining how "[a]pparently benign" or "technical" matters on which bar associations lobby "often involve significant philosophical disputes over the role of states in our federal system of government, differing attitudes toward various types of business activity, or divergent beliefs about the economic effects and social

wisdom of encouraging or discouraging different types of legal claims"); *cf. Janus*, 138 S. Ct. at 2475. Moreover, bar associations and courts tend to take an expansive view of germaneness, as seen in the district court's conclusion here that Petitioners could rightly be made to pay for the OSB's criticism of President Trump regarding matters having nothing to do with the practice of law. App. 257–58.

Thus, to the extent *Keller* allows states to compel support for bar association speech without having to overcome exacting First Amendment scrutiny, it stands as an unjustifiable anomaly in the Court's First Amendment jurisprudence. *Cf. Janus*, 138 S. Ct. at 2483 (noting that *Abood* was "an 'anomaly' in [the Court's] First Amendment jurisprudence" because "later cases involving compelled speech and association have . . . employed exacting scrutiny, if not a more demanding standard").

Stare decisis should not prevent the Court from overruling *Keller*. "*Stare decisis* is not an inexorable command" and is "at its weakest when [the Court] interpet[s] the Constitution." *Id.* at 2478 (quotations and citation omitted). Indeed, it "applies with perhaps least force of all to decisions that wrongly denied First Amendment rights." *Id.* The Court should find *stare decisis* an insufficient basis to adhere to *Keller* for the same reasons it was insufficient reason to uphold *Abood* in *Janus*. *See id.* at 2479–86.

Janus identified five factors important in deciding whether to overrule *Abood*: "the quality of [the earlier

decision's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *Id.* at 2478–79. These factors favor overruling *Keller* at least as much as they favored overruling *Abood*.

First, *Keller*'s reasoning is weaker than *Abood*'s. *Keller* simply accepted *Abood* as settled law and extended its holding to the mandatory-bar setting without questioning its soundness. 496 U.S. at 9–14. *Keller* therefore simply built without analysis on *Abood*'s errors, including its "deferential standard that finds no support in [the Court's] free speech cases." *Janus*, 138 S. Ct. at 2480.

Further, although one could perhaps have argued that *Abood*'s holding was justified under the Court's framework allowing government employees to be subject to greater restraints on First Amendment rights than other individuals, *see id.* at 2471–78 (rejecting that argument), no similar argument is even available that would justify forcing *private citizens* such as attorneys to subsidize an organization's political or ideological speech just to be allowed to practice their profession—which the Court has never approved in any other context. This factor therefore favors overruling *Keller*. *See id.* at 2479–81.

Second, *Keller*'s scheme for protecting attorneys' First Amendment rights is no more workable than *Abood*'s identical scheme for protecting public-sector employees' rights. *See Janus*, 138 S. Ct. at 2481. As

with union expenditures, the line between germane and nongermane bar association expenditures "has proved to be impossible to draw with precision." *Id.*; *see also* Smith, *supra*, at 56 (arguing that this line-drawing problem is even more difficult in the bar-association context because "[l]egal reform issues simply do not break down as neatly as the collective bargaining issues at stake in the *Abood* line of cases"). The attorneys who run state bar associations will *always* be able to argue that a bar association's advocacy on issues of law or public policy relates in some way to "improving the quality of legal services"—as in this case, in which the OSB argued, and the district court agreed, that the OSB's criticism of President Trump was germane and chargeable to all members. App. 257–58. And dissenting attorneys can virtually always argue that a seemingly "narrow, technical" issues related to regulating the legal profession has broader political implications. Smith, *supra*, at 55–56.

Further, just as *Janus*, 138 S. Ct. at 2482, found *Abood* unreasonable for requiring public-sector employees to undertake the "daunting," "expensive," "laborious and difficult task" of challenging improper union expenditures, so *Keller* is also unreasonable in its assumption that attorneys can adequately protect their First Amendment rights by monitoring all of a bar association's activities (including each item in the bar association's publications) for inappropriate uses of dues and challenging each one that is objectionable. 496 U.S. at 16–17. Like the public sector workers whose rights were at stake in *Janus*, OSB members

and other attorneys in states with integrated bars typically receive only general information about the bar's expenditures of mandatory fees. *See Janus*, 138 S. Ct. at 2482; App. 280; Oregon State Bar, *Distribution of Active Member Fees*.[15] That makes it impossible for them to know what their money is being used for without filing a challenge. *See Janus*, 138 S. Ct. at 2482. And it is especially unreasonable to expect lawyers to challenge an entity that is partially responsible for regulating them, especially when the amount of money at stake for any individual is low.

Third, *Keller* is inconsistent with related decisions of this Court. Its tolerance of compelled subsidies for bar association speech was founded on *Abood*, the reasoning of which this Court has rejected. *See Janus*, 138 S. Ct. at 2479–81 (explaining why "*Abood* was not well reasoned"); *Keller*, 496 U.S. at 9–14 (adopting *Abood*'s "principles" for mandatory bar associations). Given that *Janus* "seemingly upended the reasoning underlying *Keller*," Levin, *supra*, at 13, there appears to be little reason to retain it. And there is no other First Amendment case of any kind in which the Court has treated compelled subsidies for political or ideological speech so leniently.

Fourth, for the same reasons, developments in the Court's First Amendment jurisprudence have "eroded" *Keller*'s "underpinnings," making it—like *Abood*—an

[15] https://www.osbar.org/fees/feedistribution.html.

"outlier among [the Court's] First Amendment cases." *Janus*, 138 S. Ct. at 2482–83.

Fifth, no reliance interest justifies maintaining *Keller* despite its outlier status and direct conflict with *Janus*. If *Keller* is overruled, states with integrated bars can revise their means of regulating the legal profession to avoid compelled support for political speech. They will not have to abolish their bar associations. Rather, they can simply constrain these associations' ability to engage in political speech, and thus "allocat[e] to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices," *Harris*, 573 U.S. at 655–56, without forcing attorneys to subsidize political speech.

California and Nebraska provide examples of how states can do that. In 2017, the California legislature voted to limit the State Bar of California's mission to regulating the legal profession, funded by attorneys' licensing fees. A new voluntary bar association, the California Lawyers' Association, performs other functions formerly performed by the State Bar, such as hosting state bar sections and offering continuing legal education and other benefits. *See* Levin, *supra*, at 17–18. In 2013, Nebraska similarly split its bar association into a mandatory component limited to regulatory activities and a voluntary component that performs other functions previously performed by the state's mandatory bar. *See In re Petition for a Rule Change*, 841 N.W.2d 167; Neb. S. Ct. Rule 3-100(B) (amended effective February 12, 2020 to require payment of an

annual assessment to the Nebraska Supreme Court rather than the Nebraska State Bar Association).

Thus, if *Keller* stands in the way of courts subjecting compelled subsidies for bar association speech to exacting First Amendment scrutiny, *stare decisis* should not prevent the Court from overruling *Keller*.

II. This case is a suitable vehicle for the Court to consider the constitutionality of compelled subsidies for bar association speech.

This case is an excellent vehicle for the Court to consider the question it presents. The OSB does not and cannot deny that it engages in political and ideological speech, but maintains that it only engages in speech that is germane under *Keller*. App. 7. Thus, this case squarely presents the question whether courts should apply exacting First Amendment scrutiny in a challenge to compelled subsidies for a bar association's political and ideological speech, regardless of whether that speech is germane.

This case's procedural posture makes it an appropriate a vehicle for reviewing this issue. Like *Janus*, this case is an appeal of a lower court decision affirming dismissal of a First Amendment claim. *See* App. 4; *Janus*, 138 S. Ct. at 2462. In *Janus*, the district court dismissed the plaintiff's First Amendment challenge to mandatory union fees, and the Court of Appeals affirmed, because *Abood* foreclosed it. *Id*. Here, similarly, the district court dismissed the plaintiff's challenge to compelled subsidies for bar association speech, and the

Court of Appeals affirmed, because they concluded that *Keller* foreclosed it. App. 14–16, 251–64. Indeed, as discussed above, *supra* at 16–17, *all* of the courts that have considered challenges to other states' mandatory bar associations since *Janus* have reached the same conclusion—which makes it likely that any case presenting this issue will have a similar procedural posture. And because this case, like *Janus*, presents a pure question of law, the lack of a trial record will not affect the Court's ability to decide the issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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