No. _____

In The
Supreme Court of the United States

LUCILLE S. TAYLOR, an individual,

Petitioner,

v.

DENNIS M. BARNES, in his official capacity as President of the State Bar of Michigan Board of Commissioners; ROBERT J. BUCHANAN, in his official capacity as President-Elect of the State Bar of Michigan Board of Commissioners; DANA M. WARNEZ, in her official capacity as Vice President of the State Bar of Michigan Board of Commissioners; JAMES W. HEATH, in his official capacity as Secretary of the State Bar of Michigan Board of Commissioners; DANIEL DIETRICH QUICK, in his official capacity as Treasurer of the State Bar of Michigan Board of Commissioners,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Janus v. AFSCME*, 138 S.Ct. 2448 (2018), this Court held that laws that impinge on public-sector employees' First Amendment rights are subject to "exacting" scrutiny. *Janus* held that forcing public employees to subsidize a union's speech and advocacy of public positions violated those employees' First Amendment rights.

Prior to *Janus*, the Court had developed two lines of case law together, frequently alternating and each building on the other—the aforementioned public-sector employees and whether they could be forced to fund a union—and attorneys and whether they could be forced to join and fund an integrated bar association. After *Janus* held that such compulsion in the union context was impermissible, the question is: Can the State of Michigan compel practicing attorneys to fund an integrated bar association that takes policy positions, or does such a law fail exacting scrutiny and violate the attorneys' First Amendment rights?

PARTIES TO THE PROCEEDINGS

Petitioner, who was the Plaintiff-Appellant in the court below, is Lucille S. Taylor, an individual lawyer practicing in Michigan.

Respondents, who were Defendant-Appellees in the court below, are officers of the State Bar of Michigan ("SBM") acting in their official capacities: Robert J. Buchanan, in his official capacity as President of the State Bar of Michigan Board of Commissioners; Dana M. Warnez, in her official capacity as President-Elect of the State Bar of Michigan Board of Commissioners; James W. Heath, in his official capacity as Vice President of the State Bar of Michigan Board of Commissioners; Daniel Dietrich Quick, in his official capacity as Secretary of the State Bar of Michigan Board of Commissioners; Joseph P. McGill, in his official capacity as Treasurer of the State Bar of Michigan.[1]

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[1] In the District Court below, the State Bar of Michigan had been a named defendant, but was dismissed by stipulation of the parties. Jennifer M. Grieco had been a party in her official capacity as President of the Bar Association, but was removed during the proceeding when she left that position. Daniel D. Quick was added in the District Court when he assumed his position as Treasurer during the proceedings. In the Sixth Circuit below, Dennis Barnes was substituted out after he left his position as President, and Joseph P. McGill was substituted in once he assumed the position of Treasurer.

CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual and is not a subsidiary or affiliate of a publicly owned corporation.

RELATED CASES

Taylor v. Barnes, No. 1:19-cv-670, U.S. District Court for the Western District of Michigan. Judgment entered September 8, 2020.

Taylor v. Buchanan, No. 20-2002, U.S. Court of Appeals for the Sixth Circuit. Judgment entered July 15, 2021.

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PETITION FOR WRIT OF CERTIORARI

Michigan, like many other states, requires practicing attorneys to join and pay dues to a mandatory integrated bar association, the State Bar of Michigan ("SBM"). SBM advocates public policies. A previous decision of this Court, *Keller v. State Bar of California*, 496 U.S. 1 (1990), held that compelled association and mandatory dues used by such an integrated bar did not infringe on First Amendment freedoms as long as the positions the bar took were germane to regulating and improving the legal profession: "Here the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services." *Keller*, 496 U.S. at 13.

Petitioner has not alleged that SBM has exceeded the parameters for germaneness set forth in *Keller*. Rather, Petitioner has alleged that the holding of *Keller* has been superseded by *Janus v. AFSCME*, 138 S.Ct. 2448 (2018). *Janus* involved public employees being forced to subsidize public-sector unions, and therefore the unions' speech, on matters of public importance.

The two lines of First Amendment cases have been intertwined: Public-sector employees' First Amendment rights in relation to unions, and attorneys' First Amendment rights in relation to mandatory integrated bars. These two lines have moved together since these arrangements were first called into question because both concern potentially impermissible compelled speech and association. As a result of these two lines of cases intersecting, *Keller* relied extensively on

a public-sector labor case, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which allowed governments to mandate that public-sector employees pay for union activities that were germane to collective bargaining.

Janus explicitly overruled *Abood*, which had served as a foundation for *Keller*. *Janus* determined that the proper standard for evaluating such First Amendment violations was to subject it to at least "exacting scrutiny"—a higher standard than that applied in *Keller*. For these reasons, Petitioner sought a determination that *Keller* could no longer be considered binding law.

However, the District Court and the Sixth Circuit Court of Appeals disagreed. The courts below held that *Keller*, and an earlier case, *Lathrop v. Donohue*, 367 U.S. 820 (1961), still stood. The Sixth Circuit held:

> Our cases are clear that we may not disregard Supreme Court precedent unless and until it has been overruled by the Court itself. *Thompson v. Marietta Educ. Ass'n*, 972 F.3d 809, 813 (6th Cir. 2020), *cert. denied*, No. 20-1019, 2021 WL 2301972 (U.S. 2021). Even where intervening Supreme Court decisions have undermined the reasoning of an earlier decision, we must continue to follow the earlier case if it 'directly controls' until the Court has overruled it. *Id*. at 812, 814; *Grutter v. Bollinger*, 288 F.3d 732, 743-44 (6th Cir. 2002) (en banc). . . ."[2]

[2] App. 5.

Circuits across the country have seen this question arise and have reached results similar to the Sixth Circuit here.[3] The Fifth Circuit went so far as to describe the situation as: "[D]espite their 'increasingly wobbly, moth-eaten foundations,' *Lathrop* and *Keller* remain binding." *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021) n. 14.

Keller and *Lathrop* should be explicitly overruled. The standard set forth in *Janus* cannot be met. Under exacting scrutiny, it cannot be said that *Keller*'s and *Lathrop*'s infringements on First Amendment rights can stand. There are many less burdensome ways for a state to achieve its goals of regulating and enhancing the legal profession. This can be shown by the fact that, although a majority of states have mandatory integrated bars, a majority of lawyers are not subject to this requirement. This is because many of the most populous states do not have an integrated bar. Therefore, if approximately 20 states[4] containing a

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[3] *Jarchow v. State Bar of Wis.*, 140 S.Ct. 1720 (2020) (Thomas, J., dissenting from denial of certiorari); *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021); *Boudreaux v. La. State Bar Ass'n*, 3 F.4th 748 (5th Cir. 2020); *File v. Kastner*, 469 F. Supp. 3d 883 (E.D. Wis. 2020); *Schell v. Chief Justice and Justices of the Okla. Sup. Ct.*, 2 F.4th 1312 (10th Cir. 2021). Two cases out of the Ninth Circuit, *Crowe v. Oregon State Bar*, combined with *Gruber v. Oregon State Bar*, 989 F.3d 714 (9th Cir. 2021) are currently before this Court pending petitions for writ of certiorari, 20-1520 and 20-1678. A similar case is pending in the District Court for Utah, *Pomeroy v. Utah State Bar*, No. 2:21-cv-00219-JCB.

[4] There may be some disagreement about the number of states that have an integrated bar because Nebraska, while technically having a mandatory bar, has, by order of its supreme

majority of the nation's lawyers can fulfill the state's purpose of regulating the profession without such a requirement, it cannot be said that such an imposition is necessary for those goals.

This case presents an excellent opportunity for this Court to reevaluate *Keller* and *Lathrop* and reconsider the First Amendment rights of lawyers and whether they are any less than public employees. The parties here have developed the factual record in the lower court by submitting a detailed Joint Statement of Material Facts in lieu of discovery.[5] The development

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court, reduced fees from approximately $300 to $100 and ended mandatory funding for certain activities. While it did not abolish the integrated bar, it restricted what mandatory fees can be used for to a greater extent than did *Keller*, and it is more in accord with the practice of voluntary-membership states, where lawyers only pay for licensing, ethics, and disciplinary functions. The Nebraska Supreme Court declined to make their state bar a fully voluntary bar, but held:

> In our view, the best solution is to modify the court's rules creating and establishing the Bar Association (and other related rules) to limit the use of mandatory dues, or assessments, to the regulation of the legal profession. This purpose clearly includes the functions of (1) admitting qualified applicants to membership in the Bar Association, (2) maintaining the records of membership, (3) enforcing the ethical rules governing the Bar Association's members, (4) regulating the mandate of continuing legal education, (5) maintaining records of trust fund requirements for lawyers, and (6) pursuing those who engage in the unauthorized practice of law.

In re Petition for a Rule Change to Create a Voluntary State Bar of Nebraska, 286 Neb. 1018, 1035 (2013).

[5] App. 21 to 118.

of factual matters, or the lack thereof, was raised as a potential concern in the denial of certiorari in *Jarchow*, *supra*: "Respondents argue that our review of this case would be hindered because it was dismissed on the pleadings. But any challenge to our precedents will be dismissed for failure to state a claim, before discovery can take place." *Jarchow*, 140 S.Ct. at 1721 (Thomas, J., dissenting from denial of certiorari).

OPINIONS BELOW

The Sixth Circuit's opinion is reported at *Taylor v. Buchanan*, 4 F.4th 406 (6th Cir. 2021) and provided at App. 1 to 7. The District Court's order, 2020 WL 10050772, is provided at App. 13 to 15.

JURISDICTION

The Sixth Circuit issued its opinion on July 15, 2021. By Order on March 19, 2020, the deadline to file any petition for a writ of certiorari was extended to 150 days from the date of the lower court's judgment. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

The First Amendment and the Fourteenth Amendment to the United States Constitution are reproduced

at App. 17 to 19. The relevant Michigan statute is reproduced at App. 20.

STATEMENT OF THE CASE

1. The Current State of First Amendment Rights and Mandatory Integrated Bar Associations.

This case presents a challenge, based on Petitioner's First Amendment rights, to Michigan's requirement that practicing attorneys must join and pay dues to an integrated bar association. Such membership and subsidization forces them to join in promulgating speech on policy matters with which they do not agree.

The First Amendment protects free speech, the right to refrain from speaking, and the right to be free from compelled speech. It similarly protects a right to free association, and a right to be free from compelled association. The Fourteenth Amendment extends these protections to the states. A majority of states, approximately 30, require that attorneys in their states, as a condition of practicing law, belong to a state bar and pay membership dues to that state bar. These mandatory associations are called "integrated bars." A majority of attorneys in the United States, however, are not subject to a requirement that they be members of an integrated state bar. While a majority of states, including Michigan, require membership and payment to an integrated bar, these mandatory states only include a minority of the nation's lawyers. As of 2021,

approximately 60% of the United States' lawyers are in states that are free from a requirement of mandatory membership in and dues paid to an integrated bar.[6] This is because many of the most populous states do not have mandatory integrated bars. Out of the 1,281,199 lawyers in the 50 states[7] in the ABA's survey, 769,886 practice in a voluntary-bar state—60%.

A previous Supreme Court opinion, *Lathrop v. Donohue*, 367 U.S. 820 (1961), found that integrated bar membership did not violate free association. Similarly, *Keller v. State Bar of California*, 496 U.S. 1 (1990), held that the integrated bars could require

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[6] This data comes from a state-by-state census from the American Bar Association's 2021 National Lawyer Population Survey. https://www.americanbar.org/content/dam/aba/administrative/market_research/2021-national-lawyer-population-survey.pdf Last accessed August 25, 2021.

Petitioner's review of this state-by-state data indicates that 60% of lawyers practice in a state without an integrated bar. These 19 voluntary bar states are: Arkansas, California, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Tennessee, and Vermont. Nebraska might be considered a voluntary bar state. However, as it is still an integrated bar that is essentially constrained to the functions of a voluntary bar, Petitioner has included it with the integrated bar states. The overall percentage of lawyers in voluntary bar states stays essentially unchanged whether or not Nebraska is included as a voluntary state. According to this Survey, this percentage has stayed roughly the same in 2021, 2020, and 2019. This data is reproduced at App. 119 to 121.

[7] The ABA survey also includes lawyers in American Samoa, the District of Columbia, North Mariana Islands, Puerto Rico, and the Virgin Islands. But as we are looking specifically at state bars here, these have been excluded.

membership and payment, but that mandatory membership and fees could only be used for public speech and advocacy for matters which were related to the regulation and disciplining of the profession. In other words, lawyers could be made to support speech and an organization whose advocacy directly affected their own profession and lives but could not be compelled to fund speech for controversial matters that were, perhaps, further afield and not directly related to their profession, such as gun control or nuclear disarmament policies. *Keller* was based on what has now been pronounced to be a faulty standard of review or scrutiny and relied on precedents in other cases that have since been overturned by this Court in *Janus v. AFSCME*, ___ U.S. ___, 138 S.Ct. 2448, 2463 (2018). *Keller* has therefore lost its foundation, and the standard it employed for reviewing free speech and association claims has been overruled. *Keller* should no longer be good or controlling law, and the mandatory integrated bar with its requisite membership and dues cannot stand when the proper level of scrutiny is applied.

Petitioner acknowledges that other judicial districts and courts of appeals have refused to consider *Lathrop* and *Keller* overruled. Further, that this Court refused to grant certiorari to a similar case out of the Seventh Circuit, *Jarchow v. State Bar of Wisconsin*, 140 S.Ct. 1720 (2020). In that denial, Justice Thomas (joined by Justice Gorsuch) dissented and wrote:

> Our decision to overrule *Abood* casts significant doubt on *Keller*. The opinion in *Keller* rests almost entirely on the framework of

> *Abood*. Now that *Abood* is no longer good law, there is effectively nothing left supporting our decision in *Keller*. If the rule in *Keller* is to survive, it would have to be on the basis of new reasoning that is consistent with *Janus*.*
>
> * Respondents resist this conclusion by citing *Harris v. Quinn*, 573 U.S. 616, 134 S.Ct. 2618, 189 L.Ed.2d 620 (2014), which predates *Janus*. But all we said in *Harris* was that "a refusal to extend *Abood*" would not "call into question" *Keller*. *Harris*, 573 U.S. at 655, 134 S.Ct. 2618. Now that we have overruled *Abood*, *Keller* has unavoidably been called into question.

Jarchow, 140 S.Ct. at 1720 (Thomas, J., dissenting).

In the *Jarchow* petition for certiorari, the integrated-bar respondents argued that it could not be effectively adjudicated by this Court because the matter was dismissed on the pleadings, as has occurred here.

> Respondents argue that our review of this case would be hindered because it was dismissed on the pleadings. But any challenge to our precedents will be dismissed for failure to state a claim, before discovery can take place.

Id. at 1721.

However, Petitioner notes that the parties here have, rather than conducting discovery, built an extensive factual basis by agreement, making this appeal more suitable for adjudication by this Court than *Jarchow* was.

2. Relevant Facts

A. SBM Dues and Membership.

Petitioner is challenging the mandatory dues she is required to pay to the State Bar of Michigan for non-disciplinary matters. To this end, Petitioner challenges two-thirds of the accounts which make up the mandatory dues. Petitioner's dues amounts, as well as all members' dues amounts, are set by the Supreme Court of Michigan and are allocated into three separate amounts for: (1) the Attorney Grievance Commission and the Attorney Discipline Board; (2) the Client Protection Fund administered by the SBM; and (3) general membership and SBM expenses.[8] Petitioner is challenging the second and third items, but not the first item for the Attorney Grievance Commission and the Attorney Discipline Board. This is a facial challenge to these requirements based on the state of the law as it stands after *Janus*, *supra*.

The SBM is a public body corporate. MCL 600.901.[9] The State of Michigan requires attorneys to become and stay members of SBM as a condition precedent to being licensed to practice law in Michigan. MCL 600.901.[10] Becoming and staying a member of the Bar requires that lawyers, including Petitioner, pay dues to SBM.[11]

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[8] App. 25 to 26.

[9] App. 20.

[10] App. 22.

[11] App. 22.

Petitioner is a member of SBM, and her dues have been paid through 2021.[12] Petitioner has paid her dues since becoming a practicing attorney in Michigan and is not in arrears.[13] The Respondents are controlling officers of SBM, acting solely in their official capacities and acting under the color of state law to enforce laws requiring membership in and paying dues to the Bar.[14]

B. SBM's Public Speech and Advocacy.

SBM advocates positions on legislation, policies, or initiatives that regulate or directly affect the regulation of the legal profession.[15] Petitioner does not challenge that, at all times relevant to this lawsuit, SBM has constrained itself to public advocacy that was previously held to be allowable under *Keller*.[16] This previously allowable advocacy has been described by the Michigan Supreme Court as:

> I. IDEOLOGICAL ACTIVITIES GENERALLY.
>
> The State Bar of Michigan shall not, except as provided in this order, use the dues of its members to fund activities of an ideological nature that are not reasonably related to:

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[12] App. 22.

[13] App. 22.

[14] App. 22 to 23.

[15] App. 112 to 118.

[16] App. 32.

(A) the regulation and discipline of attorneys;

(B) the improvement of the functioning of the courts;

(C) the availability of legal services to society;

(D) the regulation of attorney trust accounts; and

(E) the regulation of the legal profession, including the education, the ethics, the competency, and the integrity of the profession.

* * *

II. ACTIVITIES INTENDED TO INFLUENCE LEGISLATION.

(A) The State Bar of Michigan may use the mandatory dues of all members to review and analyze pending legislation.

(B) The State Bar of Michigan may use the mandatory dues of all members to provide content-neutral technical assistance to legislators . . . ;

(C) No other activities intended to influence legislation may be funded with members' mandatory dues, unless the legislation in question is limited to matters within the scope of the ideological-activities requirements in Section I.

Michigan Supreme Court Administrative Order No. 2004-01.[17] Petitioner has not alleged that SBM has exceeded these parameters.

The advocacy of SBM is not promulgated nor published with an indication that it has come from the Michigan Supreme Court, the state judiciary, the governor, or the legislature. It is always attributed to SBM.[18]

Petitioner's dues are paid into the SBM treasury and spent as authorized by the Board of Commissioners: "All dues are paid into the State Bar treasury and maintained in segregated accounts to pay State Bar expenses authorized by the Board of Commissioners and the expenses of the attorney discipline system within the budget approved by the Supreme Court, respectively."[19]

C. The Attorney Grievance Commission and Attorney Discipline Board.

The Attorney Grievance Commission and the Attorney Discipline Board are distinct entities (not a party to this action) which are governed separately and are not funded out of SBM's membership fees. Rather, SBM collects and forwards a specific fee to those two entities for their specific functions. All fees are collected and paid into the SBM treasury and are

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[17] App. 39 to 40.

[18] App. 32.

[19] App. 26.

maintained in segregated accounts to pay SBM expenses authorized by the Board of Commissioners and the expenses of the attorney discipline system. [20] Petitioner has not challenged fees related to these two attorney-discipline entities.

The Attorney Grievance Commission is the prosecution arm of the Michigan Supreme Court. These commissioners are appointed solely by the Supreme Court. The Supreme Court chooses a chairperson and a vice-chairperson. Other officers are chosen by the commissioners appointed by the Supreme Court.[21]

The Attorney Discipline Board is the adjudicative arm of the Michigan Supreme Court for discharge of its exclusive constitutional responsibility to supervise and discipline Michigan attorneys and those temporarily admitted to practice under Michigan Court Rule 8.126 or otherwise subject to the disciplinary authority of the Supreme Court.[22] The board consists of 6 attorneys and 3 laypersons appointed solely by the Supreme Court. The Michigan Supreme Court designates from among the members of the board a chairperson and a vice-chairperson. Other officers are chosen by the board from among its Michigan Supreme Court-appointed members.[23]

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[20] App. 37.

[21] App. 37 to 38.

[22] App. 38.

[23] App. 38.

D. The Client Protection Fund.

The State Bar of Michigan Client Protection Fund reimburses certain clients who have been victimized by lawyers who violate the profession's ethical standards and misappropriate funds entrusted to them.[24] The Client Protection Fund does not reimburse all such victimized clients nor, when it does reimburse clients, does it always fully reimburse those clients. It awards partial reimbursements, and sometimes no reimbursements.[25] Any reimbursement is at the discretion of the Board of Commissioners of the Bar.[26] The purpose of the Client Protection Fund "is to promote public confidence in the administration of justice and integrity of the legal profession by reimbursing losses caused by the dishonest conduct of lawyers admitted and licensed to practice law in Michigan. Reimbursable losses must have occurred in the course of the lawyer-client or other fiduciary relationship between the lawyer and claimant."[27] The Client Protection Fund does not operate as an insurance policy, and no client who submits a request for reimbursement has a right to such reimbursement.[28] The Client Protection Fund's rules state: "Reimbursement from fund is a matter of grace" and, "No person shall have the legal right to

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[24] App. 29.

[25] App. 30.

[26] App. 30.

[27] App. 29.

[28] App. 30.

reimbursement from the Fund whether as a claimant, third party beneficiary or otherwise."[29]

REASONS FOR GRANTING THE PETITION

This Court has addressed the questions related to compelled speech in a line of opinions weaving together threads from both public-sector union membership and lawyers who are members of integrated bars. The Court previously applied what appears to be a rational-basis test to a question of whether or not such compelled speech and association was constitutional. The Court found that mandatory dues to integrated bars did not violate the members' First Amendment rights.

More recently, the Court has revisited the related cases involving public-sector employees who are represented by unions and found that the past line of cases had applied an incorrect standard. Furthermore, the standard to be used in First Amendment compelled speech cases is, at the very least, the more stringent exacting scrutiny—and possibly strict scrutiny, not rational basis. In doing so, the Court explicitly overruled its past decision in its primary public-sector labor union compelled fee case, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). *Abood* had been a precedent explicitly relied upon by *Keller*. With *Keller*'s precedential foundation knocked away, and with the Court stating that the proper standard is exacting

[29] App. 29.

scrutiny or strict scrutiny, the two cases allowing mandatory membership and dues, *Lathrop* and *Keller*, should also be overruled.

1. How a combination of labor union and integrated bar cases misapplied the First Amendment, culminating in *Keller v. State Bar of California*.

The first opinion that mentioned state bars and whether the First Amendment was violated involved compelled association. *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956), compared railway employees who were compelled to pay dues or fees to attorneys who were required to join a bar. In an off-hand way, *Hanson* just assumed that there was no First Amendment violation in requiring lawyers to join an integrated bar.

Lathrop, *supra*, in 1961, summarized *Hanson*'s holding in this way:

> In our view the case presents a claim of impingement upon freedom of association no different from that which we decided in [*Hanson*]. We there held that . . . the Railway Labor Act . . . did not on its face abridge protected rights of association in authorizing union-shop agreements between interstate railroads and unions of their employees conditioning the employees' continued employment on payment of union dues, initiation fees and assessments. . . . In rejecting Hanson's claim of abridgment of his rights of freedom of association, we said, '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.'

Lathrop, 367 U.S. at 842-843 (plurality opinion).

After *Lathrop*'s holding on bar membership, the matter of compelled financial support returned to the courts again, this time concerning public-sector employees and labor unions in *Abood*, *supra*. *Abood* employed a deferential standard which looked to whether or not the state legislature had a basis for requiring mandatory nonmember payments to the union: "such interference [with First Amendment rights] as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Abood*, 431 U.S. at 222.

Twenty-three years later, *Keller*, *supra*, would again consider integrated bars. This time, the question was whether lawyers' First Amendment rights were violated when they were required to fund advocacy, through mandatory dues, on public-policy issues with which they disagreed. In evaluating the California bar's functioning, the *Keller* court compared the bar's status to that of a labor union, rather than that of a state agency. *Keller* explicitly drew upon *Abood* and analogized the attorneys in *Keller* to the public employees in *Abood*. Mandatory dues for lawyers were allowable without violating the First Amendment as

long as its use was germane to the function which supported the government's interest:

> *Abood* held that a union could not expend a dissenting individual's dues for ideological activities not 'germane' to the purpose for which compelled association was justified: collective bargaining. Here the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services.

Keller, 496 U.S. at 13.

2. The Court overruled the Previous First Amendment cases involving mandatory dues and public-sector labor unions and set the correct standard.

The Court began to question what had gone before in *Hanson*, *Street*, *Lathrop*, and *Abood*. The first case to call into question this previous line of cases was *Knox v. Service Employees International Union, Local 1000*, 567 U.S. 298 (2012). *Knox* involved California non-union-member public employees who objected to mid-year fees they were charged by the union, which represented them for the union's political activities.[30]

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[30] In *Knox*, the matter involved a procedure whereby employees could object to portions of their dues which were spent on political activities and seek a refund. This was called a "Hudson notice" after *Teachers v. Hudson*, 475 U.S. 292 (1986). Other than setting the stage for *Knox*, *Hudson* has no relevancy here since Petitioner is not challenging whether a particular charge is miscategorized as germane when it should be political, but rather is challenging any compelled financial support for either the client

The *Knox* Court called into question the previous line of cases, but did not need to revisit or resolve the First Amendment free speech issue, as it could be resolved on the more narrow issue of whether an employee who objected to such mandatory fees had to opt in or opt out to refuse to pay for non-germane speech and activities:

> Although the difference between opt-out and opt-in schemes is important, our prior cases have given surprisingly little attention to this distinction. Indeed, acceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment principles.
>
> The trail begins with dicta in *Street*, where we considered whether a federal collective-bargaining statute authorized a union to impose compulsory fees for political activities. 367 U.S., at 774, 81 S.Ct. 1784. The plaintiffs were employees who had affirmatively objected to the way their fees were being used, and so we took that feature of the case for granted. We held that the statute did not authorize the use of the objecting employees' fees for ideological purposes, and we stated in passing that "dissent is not to be presumed—it must affirmatively be made known to the union by the

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protection fund or general membership. SBM has a similar process for challenging the use of dues if a lawyer believes this to be outside of the *Keller* parameters. (App. 34.) Because Petitioner does not challenge SBM for exceeding these parameters, and makes a facial challenge that any such compelled speech violates the First Amendment, the requirements for getting refunds before or after the fact of the speech and association are irrelevant.

> dissenting employee." *Ibid*. In making that offhand remark, we did not pause to consider the broader constitutional implications of an affirmative opt-out requirement. *Nor did we explore the extent of First Amendment protection for employees who might not qualify as active "dissenters" but who would nonetheless prefer to keep their own money rather than subsidizing by default the political agenda of a state-favored union.*
>
> In later cases such as *Abood* and *Hudson*, we assumed without any focused analysis that the dicta from *Street* had authorized the opt-out requirement as a constitutional matter.

Knox, 567 U.S. at 312-314 (emphasis added, footnote omitted).

Because *Knox* noted the problems with the previous line of cases but did not need to resolve these problems to adjudicate the matter at hand, the matter subsequently came up again in *Harris v. Quinn*, 573 U.S. 616 (2014). *Harris* dealt with home-care workers—personal assistants for medical care and hygiene—who were legislatively deemed to be public employees for the sole purpose of collective bargaining with the state. In all other aspects, these workers were in the private employment of the person who received that care, although they received compensation from publicly funded programs. In *Harris*, the Supreme Court described the previous line of cases and the insufficiency of those cases' First Amendment analysis:

> The *Hanson* Court dismissed the objecting employees' First Amendment argument with a single sentence. The Court wrote: "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."
>
> 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. 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.

Harris, 573 U.S. at 630-631 (internal citations omitted). *Harris* would go on at length to thoroughly criticize *Abood* in its context regarding labor unions:

> The *Abood* Court's analysis is questionable. . . . The *Abood* Court seriously erred in treating *Hanson* and *Street* as having all but decided the constitutionality of compulsory payments to a public sector union. . . . The *Abood* Court fundamentally misunderstood the holding in *Hanson*, . . . *Abood* failed to appreciate the difference between the core union speech involuntarily subsidized by dissenting

> public-sector employees and the core union speech involuntarily funded by their counterparts in the private sector. . . . *Abood* failed to appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective bargaining purposes and those that are made to achieve political ends. . . . *Abood* does not seem to have anticipated the magnitude of the practical administrative problems that would result in attempting to classify public-sector expenditures . . .

Harris, 573 U.S. at 635-637.

Despite *Harris*'s extensive critique of *Abood*, the issue was resolved without overturning or altering *Abood*. Rather, as the *Harris* issue involved the distinction between public- and private-sector employees, the *Harris* Court found that the personal assistants in question were not public employees—or, at least, not "full-fledged" public employees—and therefore, *Abood* did not apply to them, and the First Amendment question was avoided. "If we allowed *Abood* to be extended to those who are not full-fledged public employees, it would be hard to see just where to draw the line, and we therefore confine *Abood*'s reach to full-fledged state employees." *Harris*, 573 U.S. at 638-639.

The constitutional question of compelled fees and speech for public employees in the union context would wait until *Janus v. AFSCME*, ___ U.S. ___, 138 S.Ct. 2448 (2018) to be taken up again. *Janus* explicitly overruled *Abood*.

> *Abood* was poorly reasoned. It has led to practical problems and abuse. It is inconsistent with other First Amendment cases and has been undermined by more recent decisions. Developments since *Abood* was handed down have shed new light on the issue of agency fees, and no reliance interests on the part of public-sector unions are sufficient to justify the perpetuation of the free speech violations that *Abood* has countenanced for the past 41 years. *Abood* is therefore overruled.

Janus, 138 S.Ct. at 2460. *Janus* provided a thorough discussion of First Amendment rights and their application to compelled speech.

The Court explained that freedom from compelled speech receives constitutional protections:

> We have held time and again that freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." The right to eschew association for expressive purposes is likewise protected. As Justice Jackson memorably put it: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess by word or act their faith therein*." Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts,

> any such effort would be universally condemned.

Id. at 2463 (cleaned up and internal citations omitted).

The Court explained why, although the harms may be different, compelling speech harms nevertheless, and may even be a more serious infraction than prohibiting certain speech:

> When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding "involuntary affirmation" of objected-to beliefs would require "even more immediate and urgent grounds" than a law demanding silence.

Id. at 2464 (internal citations omitted).

Compelled subsidization of speech through forced payments is likewise impermissible, just as other forms of compulsion would be:

> Compelling a person to subsidize the speech of other private speakers raises similar First Amendment concerns. As Jefferson famously put it, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical." We have therefore recognized that a "significant impingement on First Amendment rights" occurs when public employees

> are required to provide financial support for a union that "takes many positions during collective bargaining that have powerful political and civic consequences."

Id. at 2464 (internal citations omitted).

Because of the seriousness of the harm, a higher level of scrutiny is applied, rather than a mere rational basis review. At the very least, exacting scrutiny is applied, as it was in *Harris*, *supra*, and *Knox*, *supra*:

> Because the compelled subsidization of private speech seriously impinges on First Amendment rights, it cannot be casually allowed. Our free speech cases have identified "levels of scrutiny" to be applied in different contexts, and in three recent cases, we have considered the standard that should be used in judging the constitutionality of agency fees.
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> In *Knox*, the first of these cases, we found it sufficient to hold that the conduct in question was unconstitutional under even the test used for the compulsory subsidization of commercial speech. Even though commercial speech has been thought to enjoy a lesser degree of protection, prior precedent in that area, specifically *United Foods*, had applied what we characterized as "exacting" scrutiny, a less demanding test than the "strict" scrutiny that might be thought to apply outside the commercial sphere. Under "exacting" scrutiny, we noted, a compelled subsidy must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of

> associational freedoms." *Ibid*. (internal quotation marks and alterations omitted).
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> * * *
>
> [W]e again find it unnecessary to decide the issue of strict scrutiny [versus exacting scrutiny] because the Illinois scheme cannot survive under even the more permissive standard applied in *Knox* and *Harris*.

Id. at 2464-2465 (cleaned up and internal citations omitted).

3. The Court should grant certiorari to reconsider *Keller* and *Lathrop*.

In *Janus*, the Supreme Court overruled *Abood* and explicitly required that compelled-speech cases be evaluated under, at a minimum, exacting scrutiny. The *Janus* Court explicitly overruled the case whose precedent was the foundation for *Keller*, as well as use of the rational-basis review employed in *Keller*. For these reasons, *Keller* should no longer be considered good law and must be explicitly overruled. This is true whether or not we follow exacting scrutiny or strict scrutiny.

Assuming that the mission of SBM, like the California state bar in *Keller*, rises to the level of an important state interest as in *Lathrop*, *Keller* and *Abood*, it would still not justify such a First Amendment violation. "*Abood* held that a union could not expend a dissenting individual's dues for ideological activities not 'germane' to the purpose for which compelled association was justified: collective bargaining. Here the

compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services." *Keller*, 496 U.S. at 13. From *Janus*, we get the exacting standard it must meet:

> [P]rior precedent in that area, specifically [*United States v. United Foods*, 533 U.S. 405 (2001)], had applied what we characterized as "exacting" scrutiny, *Knox*, 567 U.S., at 310, 132 S.Ct. 2277, a less demanding test than the "strict" scrutiny that might be thought to apply outside the commercial sphere. Under "exacting" scrutiny, we noted, a compelled subsidy must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.' *Ibid.*

Janus, 138 S.Ct. at 2635.

The violation of Petitioner's First Amendment free speech rights is a very real concern. SBM, even under the *Keller* constraints, advocates and promotes positions related to the legal profession that are not universally held. These go beyond actions specifically labeled as legislative position-taking. Although this is a facial challenge, a few examples may be useful to consider. In October 2013, the SBM "sent a letter to Michigan Secretary of State Ruth Johnson requesting that she issue a declaratory ruling to create greater transparency for the sources of funding for judicial campaign advertisements." The letter was reproduced in full in the SBM's publication sent to all attorneys, the

Michigan Bar Journal.[31] Neither the goal nor how such goals are pursued can be presumed to have universal concurrence. "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned." *Janus*, 138 S.Ct. at 2463.

The very fact that the SBM has advocated for a mandatory integrated bar[32] shows that it requires its members to put forth speech and advocacy with which they do not necessarily agree—as Petitioner does not agree. "Suppose that a particular group lobbies or speaks out on behalf of what it thinks are the needs of senior citizens or veterans or physicians, to take just a few examples. Could the government require that all seniors, veterans, or doctors pay for that service even if they object? It has never been thought that this is permissible." *Janus*, 138 S.Ct. at 2466.

Keller's claim, that there can be compelled speech as long as it is germane to the public interest it serves, cannot stand after *Janus*. Even germane speech can be a public concern, and individuals cannot be compelled to support it. "A similar problem arises with respect to speech that is germane to collective bargaining. The parties dispute how much of this speech is of public

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[31] https://www.michbar.org/file/barjournal/article/documents/pdf4article2280.pdf Last accessed August 25, 2021.

[32] http://www.michbar.org/file/barjournal/article/documents/pdf4article3621.pdf Last Accessed August 25, 2021.

concern, but respondents concede that much of it falls squarely into that category." *Janus*, 138 S.Ct. at 2473.

While it may be true that lawyers who disagree with SBM positions can voice their opinions separately, this does not overcome their right to be free from compulsion. And since SBM can be said to speak for all lawyers in Michigan, this amplifies its voice, and therefore drowns out individual objecting lawyers.

It should be obvious that the state could achieve its interests through a less restrictive method than mandating support for the SBM, as shown by the fact that the majority of lawyers in the United States are not subject to a mandatory integrated bar. By the count of the American Bar Association, approximately 60% of lawyers are not required to join an integrated state bar. Without such a requirement, there does not appear to be much evidence that restricting associational freedoms is the only way such goals can be achieved. Indeed, with California recently adopting a voluntary bar association, and Nebraska similarly adopting what more closely resembles a voluntary bar, it would appear that the movement is away from the integrated-bar model. With these other states operating under such a voluntary model, this is conclusive evidence that it is possible, and there is no reason that Michigan could not operate in that manner as well.

Further, in Michigan, other professions are not subject to this mandatory requirement. Other professionals in Michigan, including physicians, are licensed, but are not compelled to join or support a professional

organization as a requirement for that license.[33] If the state interest in making sure that physicians are competent does not require that they join and fund a membership organization, then it is not necessary for attorneys.

If the state has an interest in monitoring and policing lawyers, can that interest be met with a less restrictive method? Again, the experience of other states shows that it can. Here, in Michigan, the two attorney discipline bodies operate independently of the Bar. The Bar collects the portion of the dues destined for the Attorney Grievance Commission and the Attorney Discipline Board, but that is the extent of their collaboration.[34] Both the Attorney Grievance Commission and the Attorney Discipline Board are controlled by the Michigan Supreme Court, and not the Bar.[35] Even if these two separate entities cooperate with the Bar such that the Bar assists in ministerial functions with the two bodies, and then these two reimburse the Bar, these functions are such that they could be performed in-house by the two disciplinary bodies. The mere usefulness, or even efficiency, of sharing ministerial tasks does not rise to a level that can overcome exacting scrutiny. "To meet the requirement of narrow tailoring, the government must demonstrate that alternative

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[33] The conditions for licensing medical doctors in Michigan can be found here: https://www.michigan.gov/documents/lara/MD_Licensing_Guide_654158_7.pdf Membership in a professional organization is not a requirement. Last accessed August 25, 2021.

[34] App. 37.

[35] App. 37 to 38.

measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen v. Coakley*, 573 U.S. 464, 495 (2014).

Even when acknowledging that the government has an interest in regulating the legal profession, there are numerous less restrictive ways that it could do this without injuring Petitioner's and other attorneys' free speech and associational rights. SBM or an equivalent could be funded through the legislative appropriations process. It could be funded strictly by voluntary contributions, as in other states. Nor can the SBM claim that without mandatory membership and dues, it would be unfair for lawyers to benefit from its advocacy and functions. The "free rider" argument was dealt with in *Knox* and *Janus* and rejected. "As we have noted, 'free-rider arguments . . . are generally insufficient to overcome First Amendment objections.' *Knox*, 567 U.S. at 311, 132 S.Ct. 2277." *Janus*, 138 S.Ct. at 2466. Many less restrictive funding options are available that would comply with the exacting scrutiny standard. Again, one is not entitled to the benefit of an option that is more onerous to the protected right, just because "the chosen route is easier." *McCullen*, *supra*.

The actions SBM takes through the Client Protection Fund cannot be said to be an interest so compelling that it requires mandatory membership and support. Such programs exist in all 50 states. Yet not all of these require mandatory membership.[36] It is not

[36] App. 29.

akin to any kind of government program for the reason that it is a discretionary program which confers no legal rights on any clients.[37] It is not an insurance program nor an entitlement such as these are conceived of and administered by government agencies. Its sole purpose is to "promote public confidence in the administration of justice and integrity of the legal profession."[38] In that role it is more akin to a promotional activity to encourage confidence in the legal system. Such a goal may be laudatory or not, but it is not one that attorneys should be required to support. Many lawyers might think that confidence in the legal system is *not* warranted. Given the high hurdle that compelling speech and association must reach to overcome First Amendment objections, there are surely less intrusive ways to meet this goal. Requiring bonds or malpractice insurance as a condition of licensing, for instance, are alternate ways to meet this goal.

The entire concept of the integrated bar cannot be said to be in accordance with the First Amendment as it was originally understood. As in *Janus*:

> [The defendant union] cannot point to any accepted founding-era practice that even remotely resembles the compulsory assessment of agency fees from public-sector employees. We do know, however, that prominent members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed. As

[37] App. 30.

[38] App. 29.

> noted, Jefferson denounced compelled support for such beliefs as "'sinful and tyrannical,'" . . . and others expressed similar views.[8]
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> FN8 See, *e.g.*, Ellsworth, The Landholder, VII (1787), in Essays on the Constitution of the United States 167–171 (P. Ford ed. 1892); Webster, On Test Laws, Oaths of Allegiance and Abjuration, and Partial Exclusions from Office, in A Collection of Essays and Fugitiv[e] Writings 151–153 (1790).

Janus, 138 S.Ct. at 2466. Attorneys, just like public employees, should not be required to affirm or support such positions.

4. This case is a suitable vehicle for the Court to reconsider *Keller* and *Lathrop*.

This case is an excellent vehicle for the Court to apply the standard set in *Janus* to the matter of attorneys and their First Amendment rights. Because this is a facial challenge, there is no need to determine whether or not Respondents' activities have exceeded the parameters set by *Keller*. A record has been developed in the lower courts on the functioning and activities of the Respondents. On undisputed facts, the Court could determine whether or not mandated speech and association violates the First Amendment, regardless of whether or not such speech is germane to the legal profession.

CONCLUSION

The voluntary nature of professional associations had been presumed to be their strength. The prominent 19th century observer of the United States, Alexis de Tocqueville, in his famous book Democracy in America, noted that Americans had a tendency to form voluntary associations to provide social coordination and resolve the problems in society. And that this method of civic engagement was superior to the mandated associations of old Europe:

> Americans of all ages, all conditions, all minds constantly unite. Not only do they have commercial and industrial associations in which all take part, but they also have a thousand other kinds: religious, moral, grave, futile, very general and very particular, immense and very small; Americans use associations to give fêtes, to found seminaries, to build inns, to raise churches, to distribute books, to send missionaries to the antipodes. . . . Finally, if it is a question of bringing to light a truth or developing a sentiment with the support of a great example, they associate. Everywhere that, at the head of a new undertaking, you see the government in France and a great lord in England, count on it that you will perceive an association in the United States.
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> * * *
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> There is nothing, according to me, that deserves more to attract our regard than the intellectual and moral associations of America. We easily perceive the political and industrial

> associations of the Americans, but the others escape us; and if we discover them, we understand them badly because we have almost never seen anything analogous. One ought however to recognize that they are as necessary as the first to the American people, and perhaps more so.[39]

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[39] Excerpt from online publication of A. de Tocqueville, Democracy in America: https://press.uchicago.edu/Misc/Chicago/805328.html Last accessed August 12, 2021.