No. 21-800

In The
Supreme Court of the United States

TONY K. McDONALD, et al.,
Petitioners,

v.

SYLVIA BORUNDA FIRTH, et al.,
Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CATO INSTITUTE, ATLANTIC LEGAL FOUNDATION, AND REASON FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the First Amendment prohibit a state from compelling attorneys to join and fund a state bar association that engages in extensive political and ideological activities?

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INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF) is a nonprofit legal foundation that seeks to protect individual liberty and economic opportunity in the courts.[1] PLF has repeatedly litigated in defense of the right of workers not to be compelled to make involuntary payments to support political or expressive activities with which they disagree, including representing the plaintiff attorneys in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990), and *Brosterhous v. State Bar of Cal.*, 12 Cal. 4th 315 (1995). PLF also participated as amicus curiae in cases involving state laws mandating forced association and compelled speech in violation of the First Amendment from *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), through *Janus v. Am. Fed. of State, Cty., and Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018), and supported the petitions for writ of certiorari in *Schell v. Darby*, docket no. 21-779 (pending); *Crowe v. Oregon State Bar*, 142 S. Ct. 79 (2021); *Fleck v. Wetch*, 139 S. Ct. 590 (2018) (petition granted, decision vacated and remanded), 140 S. Ct. 1294 (2020) (second petition after remand denied); and *Jarchow v. State Bar of Wisconsin*, 140 S. Ct. 1720 (2020).

The Cato Institute is a nonpartisan public policy research foundation established in 1977 and

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[1] Pursuant to this Court's Rule 37.2(a), all parties consent to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*.

Established in 1977, the Atlantic Legal Foundation is a national, nonprofit, public interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, protection of property rights, limited and efficient government, sound science in judicial and regulatory proceedings, and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and scientists who serve on its Board of Directors and Advisory Council, the Foundation pursues its mission by participating as amicus curiae in carefully selected appeals before the Supreme Court of the United States, federal courts of appeals, and state supreme courts.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing Reason magazine, as well as commentary on its websites, and

by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason participates as amicus curiae in cases raising significant constitutional or legal issues, including *Janus*, 138 S. Ct. 2448.

Amici believe that *Janus*'s announcement and application of First Amendment doctrine requires this Court's reconsideration of compelled subsidies in the analogous mandatory bar context and urge the Court to grant the petition for writ of certiorari.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

Petitioners are attorneys licensed to practice in Texas. As required by state law, they are members and pay annual dues and fees to the State Bar of Texas as a condition of practicing law. Tex. Gov't Code § 81.051(b) (membership requirement); *id.* § 81.054 (dues requirement); *id.* § 81.054(j) (legal services fee applicable to some licensed attorneys); App. 4. State law permits the State Bar of Texas to engage in political and ideological speech through lobbying efforts, support of affinity groups such as sections and local bar associations, communicative forums, and publications distributed to the entire membership. App. 3–5, 9. The authorization permits speech related to "the administration of justice," App. 3, or that furthers the "purposes, expressed or implied," of the State Bar Act. App. 6. Paraphrasing the statutory list of authorized activities, the State Bar of Texas defines its mission broadly as

> to support the administration of the legal system, assure all citizens equal access to

> justice, foster high standards of ethical conduct for lawyers, enable its members to better serve their clients and the public, educate the public about the rule of law, and promote diversity in the administration of justice and the practice of law.[2]

This Court has to date assumed that that integrated, mandatory bar associations efficiently, effectively, and (for the most part) non-controversially manage the core functions related to regulation of the legal profession. *See Lathrop v. Donohue*, 367 U.S. 820, 843 (1961); *Keller*, 496 U.S. at 5, 13. This assumption was reasonable in light of the fact that the *Keller* petitioners conceded that *Lathrop* was controlling on the constitutionality of the integrated bar, eliminating any need for the Court to consider that question in 1990.[3] However, the history of mandatory bar associations since *Keller* demonstrates that the assumption now is unwarranted and should be reconsidered in light of *Janus*.

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[2] State Bar of Texas, Mission Statement, https://tinyurl.com/3uyrx97e (visited Dec. 22, 2021).

[3] Counsel for petitioners, Anthony T. Caso, made this point in his opening remarks of the *Keller* oral argument. *Keller v. State Bar of Cal.*, Oyez, https://www.oyez.org/cases/1989/88-1905 (last visited Dec. 22, 2021) ("This case does not challenge the right of California to regulate attorneys through a mandatory bar association. Instead, it asks whether having done so, may it also authorize the bar to, in the words of the [California Supreme Court], comment generally upon matters pending before the legislature."). The *Keller* complaint was filed in 1982, just five years after *Abood*, a case representing a jurisprudence far less protective of individual First Amendment rights. The court below acknowledged that neither *Lathrop* nor *Keller* resolved a freedom of association claim. App. 19.

State bar associations—Texas's being no exception—perceive their role as general guardians of the legal system and often extend their reach into political and ideological activities while couching their involvement under innocuous-sounding phrases. App. 3–4. Yet virtually all matters involving the legal system, occupational governance and public policy are inherently and "overwhelmingly" political "matters of great public concern" because they involve the allocation of public money and collateral policy matters. *See Janus*, 138 S. Ct. at 2475–77, 2480. Ideological activities extend even further to social and cultural concerns. Given the sheer breadth of such political and ideological activities, many attorneys have abundant reasons to resent subsidizing mandatory bar associations, just as public employees may not want to subsidize public employee unions.

Overruling *Abood*, *Janus* held that laws requiring non-union members to pay public-sector union fees are subject at least to "exacting scrutiny." 138 S. Ct. at 2465. *Keller* relied on established clear parallels between public sector unions and state bar associations when it held that attorneys regulated under state law are subject to "the same constitutional rule" that applies to public employees. 496 U.S. at 13. Therefore, subjecting mandatory bar associations to "the same constitutional rule" as public sector unions now means subjecting them to exacting scrutiny that reveals unjustifiable violations of attorneys' First Amendment rights. This Court should grant the petition and direct federal courts to review compelled subsidies for bar association speech under exacting scrutiny regardless of germaneness.

REASONS TO GRANT THE PETITION

I

MANDATORY STATE BAR ASSOCIATIONS, LIKE PUBLIC EMPLOYEE UNIONS, ENGAGE IN PERVASIVE POLITICAL AND IDEOLOGICAL ACTIVITIES

This case asks the Court to harmonize First Amendment doctrine across the parallel and analogous contexts of public employee union dues and mandatory state bar dues, a question of national importance that can be settled only by this Court. State bars' mission statements and bar officials' statements focus on their organizations' roles as disciplinarians and evangelists for legal representation and justice. In truth, however, bars across the country continually engage in a wide range of political and ideological activities designed to implement the officials' view of a better society, just as public employee unions engage in a wide array of political activity to achieve workplace goals and their view of a better society.

The *Janus* majority was silent as to that ruling's impact on mandatory bars, but the primary dissent acknowledged that, like *Keller*, the decision weaves together policies that underlie both agency fee and state bar cases. *Janus*, 138 S. Ct. at 2498 (Kagan, J., dissenting). In both contexts, *Janus* provides a greater understanding of the nature of the injury to individuals forced to support expressive activities against their will. *See Keller*, 496 U.S. at 12 ("There is . . . a substantial analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of employee unions and their

members, on the other."); *Gardner v. State Bar of Nevada*, 284 F.3d 1040, 1042 (9th Cir. 2002) ("[T]here is some analogy between a bar that, under state law, lawyers must join and a labor union with an agency shop."); *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291, 298 (1st Cir. 2000) ("No reason has been presented to give attorneys who are compelled to belong to an integrated bar less protection than is given employees who are compelled to pay union dues, and *Keller* suggests the two groups are entitled to the same protection."); *Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396, 1404 (7th Cir. 1993) ("[*Keller*] represented the first definitive legal statement that mandatory bar dues had the same restrictions on their use as compulsory union dues.").

Despite the clear analogy, and *Keller*'s instruction that mandatory bar dues are analyzed under the "same constitutional rule" as public employee union agency fee cases, the lower courts are unwilling to apply *Janus*'s exacting scrutiny. *See* App. 12 (district court in this case held that Petitioners' challenge to mandatory bar dues is entirely foreclosed by *Keller* and *Lathrop*).[4] The Fifth Circuit below acknowledged that "[s]ince *Lathrop* and *Keller* were decided, [this] Court's First Amendment caselaw has changed dramatically," and that *Janus*, "in particular, cast[s] doubt" on the cases. App. 16 n.14. Even so, the court

[4] This Court's previous unwillingness to grapple with the implications of *Janus* on *Keller* is even leading some judges to question whether the "same constitutional rule" holding remains good law. *See, e.g.*, *Zuckerman v. Bevin*, 565 S.W.3d 580, 611 n.53 (Ky. 2018) (Keller, J., dissenting, joined by Cunningham and Wright, JJ.) (opining that the rule of law announced in *Janus* was narrowly "specific to public sector employees").

considered itself bound by *Lathrop* and *Keller* in light of this Court's silence on the matter. App. 16–17.

This Court should grant certiorari to hold explicitly that *Keller*'s germaneness test as applied by the Fifth Circuit fails the First Amendment doctrine announced in *Janus*. Applying *Janus*'s articulation of First Amendment doctrine to mandatory bar associations naturally follows from the Court's precedent. First, *Janus* clarified that all advocacy relating to the allocation of public resources is inherently political, as well as speech on matters of "value and concern to the public." *Janus*, 138 S. Ct. at 2474–76 (listing examples including speech related to collective bargaining, education, child welfare, healthcare and minority rights, climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions). This is consistent with the Court's general understanding of the vast range of what constitutes "political" expression. *See, e.g.*, *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1888 (2018) ("political" can be expansively defined to include anything "of or relating to government, a government, or [] governmental affairs" or the "structure of affairs of government, politics, or the state.") (citation omitted); *id.* at 1891 ("All Lives Matter" slogan, National Rifle Association logo, rainbow flag all can be construed as political expression).

Beyond the world of expressive activity that can be described as political, the compelled speech cases also protect individuals from being forced to associate with "ideological" expression, even though what is "ideological" can be tricky to pin down. *See Romero*, 204 F.3d at 302 (finding no "bright line between

ideological and non-ideological" bar association speech). But, in general, "ideology" encompasses "the body of ideas reflecting the social needs and aspirations of an individual, group, class, or culture." *Am. Heritage Dictionary of the English Language* at 654 (Morris ed. 1981). Justice Stewart defined "ideological expression" as follows: "Ideological expression, be it oral, literary, pictorial, or theatrical, is integrally related to the exposition of thought that may shape our concepts of the whole universe of man." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 779 (1976) (Stewart, J., concurring).

Scholars define "ideology" in varying ways, but all stress the social aspect of ideological thought:

- "[A] distinct and broadly coherent structure of values, beliefs, and attitudes with implications for social policy." James Reichley, *Conservatives in an Age of Change: The Nixon and Ford Administrations* 3 (1982), quoted in Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* 36 (1987) (Higgs).

- "[A] collection of ideas that makes explicit that nature of the good community . . . [T]he framework by which a community defines and applies values." George C. Lodge, *The New American Ideology* 7 (1975), cited in Higgs, *supra*, at 36.

- "[A]n economizing device by which individuals come to terms with their environment and are provided with a 'world view' so that the decision-making process is simplified. [It is]

> . . . inextricably interwoven with moral and ethical judgments about the fairness of the world the individual perceives." Douglas C. North, *Structure and Change in Economic History* 49 (1982), cited in Higgs, *supra*, 36–37.

At a minimum, therefore, "ideological" activities that cannot be funded with compelled fees include those seeking social change or "good" government. *See Crowe v. Oregon State Bar*, 989 F.3d 714, 721 (9th Cir. 2021) (Oregon State Bar seeks "fairness" in the way the world operates); Mark R. Herring, Va. Atty. Gen. Op., 2015 WL 9701653 (Oct. 2, 2015) (statute authorizes use of mandatory bar dues to fund a "Diversity Conference" without any opt-out procedure). These goals of social change, good government, and fairness permeate mandatory bars' mission statements and activities.[5]

Like the State Bar of Texas, other mandatory state bar associations assert a broad mandate to mold the laws and legal system to fit their political and ideological views. For example, the mission of the State Bar of North Dakota is "to serve the lawyers and the people of North Dakota, to improve professional competence, promote the administration of justice, uphold the honor of the profession of law, and

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[5] Lawyers have ample alternative professional voluntary outlets to collectively express political or ideological views including national organizations such as the American Bar Association, DRI (civil defense attorneys), American Association for Justice (trial lawyers), and voluntary bars such as the Bar Association of the District of Columbia, California Young Lawyers Association, as well as dozens of national and regional women's and minority bar associations.

encourage cordial relations among members of the State Bar."[6]

The Oklahoma Bar Association lacks an official mission statement, but its statutory authorization and bylaws encompass issues related to "the administration of justice," "administrative bodies exercising adjudicatory functions," and "any proposal for the improvement of the law, procedural or substantive in principle." *Schell v. Darby*, docket no. 21-779, at 5a (filed Nov. 22, 2021) (cleaned up). Consequently, its communications cover a gamut of topics including corporate speech, limitations on campaign spending, oil and gas regulation, and so forth. *Id.* at 6a–7a. The Bar's legislative and public policy activities reflect a similarly broad scope,

The Michigan State Bar's mission is to "aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interest of the legal profession in this State."[7] The Louisiana State Bar Association exists to

> assist and serve its members in the practice of law, assure access to and aid in the administration of justice, assist the Supreme Court in the regulation of the practice of law, uphold the honor of the courts and the profession, promote

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[6] State Bar of North Dakota, Board of Governors, https://tinyurl.com/2p97dz9s (visited Dec. 22, 2021).

[7] State Bar of Michigan, Mission Statement, https://tinyurl.com/2p8sm6yw (visited Dec. 22, 2021).

> the professional competence of attorneys, increase public understanding of and respect for the law, and encourage collegiality among its members.[8]

The common theme and language across all mandatory bars reflect dedication to general improvement of courts, laws, and lawyers—frequently denominated as the "administration of justice." Yet, in *Keller*, this Court held that a state bar's statutory mandate phrased in expansive platitudes such as "administration of justice" permits too broad an infringement on individual bar members' First Amendment rights because it allows the bar to speak on such wide-ranging and controversial issues as polygraph tests for state and local agency employees, possession of armor-piercing handgun ammunition and other gun control measures, a federal guest-worker program, a victim's bill of rights, abortion, public school prayer, and busing. *Keller*, 496 U.S. at 14–15. Regardless of whether these activities were legitimately described as pursuing the

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[8] Louisiana State Bar Association, The Mission of the Louisiana State Bar Association, https://tinyurl.com/2uapdkey (visited Dec. 22, 2021). *See also* State Bar of Arizona, *Mission, Vision, and Core Values*, https://tinyurl.com/2p8n87km (visited Dec. 22, 2021); Hawaii State Bar Association, Mission, https://tinyurl.com/4xux8ub2 (visited Dec. 22, 2021) ("The Mission of the Hawaii State Bar Association is to unite and inspire Hawaii's lawyers to promote justice, serve the public and improve the legal profession."); Idaho State Bar, Mission Statement, https://tinyurl.com/2yjj8dp5 (visited Dec. 22, 2021) (mission is "to aid in the advancement of the administration of justice"); The Mississippi Bar, Mission, https://tinyurl.com/4tn82a5a (visited Dec. 22, 2021). Almost all these state bar associations are the subject of First Amendment challenges by individual bar members.

"administration of justice," the state's compulsory funding of these programs violated objectors' First Amendment rights. *Id.* at 15–16.

Although *Keller* should have acted as a brake on political and ideological mandatory bar activities, many mandatory state bars, including the State Bar of Texas, continue to justify a wide range of activities focused on a general desire for improving the "administration of justice." App. 3–4. Lower courts continue to grant mandatory bars extensive power to demand money from unwilling contributors to fund these activities. *See also Kingstad v. State Bar of Wisconsin*, 622 F.3d 708, 721 (7th Cir. 2010) (rejecting the First Amendment claim of an attorney forced to make unwilling subsidies to the mandatory bar's public relations campaign); *Gardner*, 284 F.3d at 1043 (holding that attorneys can be forced to support mandatory bar's public relations campaign to improve public perceptions of lawyers); *Liberty Counsel v. Fla. Bar Bd. of Governors*, 12 So.3d 183, 189 (Fla. 2009) (approving bar's authorization for a section to file an amicus brief related to a law prohibiting homosexuals from adopting children); *Popejoy v. N.M. Bd. of Bar Comm'rs*, 887 F. Supp. 1422, 1430–31 (D.N.M. 1995) (approving mandatory funding for the bar's lobbying for higher salaries for government lawyers and staff, court-appointed representation in child abuse and neglect cases, a task force to assist military personnel and families, and the bar's own litigation expenses). This continued widespread infringement on attorneys' individual First Amendment rights presents an issue of national scope that this Court should resolve.

II

COMPULSORY BAR DUES REQUIRE EXACTING SCRUTINY

Janus held that a state law compelling non-union members to subsidize a public sector union's speech impinged on First Amendment rights to such an extent that courts must apply "exacting scrutiny" to determine whether the government can justify it. 138 S. Ct. at 2464–65. *Janus* defined exacting scrutiny in the compelled subsidy context as requiring that the state's mandate must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Id*. This case presents an opportunity both to require courts to apply exacting scrutiny to mandatory subsidization of state bar associations and also to better define the scope and application of exacting scrutiny.

"Exacting scrutiny" lacks a precise definition and appears to be a type of balancing test that sometimes, but not always, falls short of strict scrutiny. As a result, lower courts conflict as to its elements and application. *See* R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 U.M.K.C. L. Rev. 207, 208, 211–13 (2016) (noting the standard's "almost limitless flexibility" as courts choose among multiple factors to emphasize in a balancing framework, sometimes resembling strict scrutiny). For example, in *Washington Post v. McManus*, 944 F.3d 506, 520 (4th Cir. 2019), the court noted in a First Amendment speech case that "exacting scrutiny" is "more forgiving" than "strict scrutiny" in that "strict scrutiny, in practice, is virtually impossible to satisfy, while exacting scrutiny is merely difficult." It defined

the test as requiring an "important" interest, *id.*, and "not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *Id.* at 521 (citations omitted). The court later described the "touchstone for exacting scrutiny" as "whether there is a fit that is not necessarily perfect, but reasonable." *Id.* at 523 (cleaned up).

The Ninth Circuit defines "exacting scrutiny" as "somewhat less rigorous judicial review . . . which requires the government to show that the challenged [speech restrictions] are substantially related to a sufficiently important government interest." *Nat'l Ass'n for Gun Rights, Inc. v. Mangan*, 933 F.3d 1102, 1112 (9th Cir. 2019). That court also has described "exacting scrutiny" as a "balancing test" where "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Mentele v. Inslee*, 916 F.3d 783, 790 (9th Cir. 2019). The Eighth Circuit says that exacting scrutiny requires a "substantial relationship to a sufficiently important governmental interest" where "the strength of the asserted governmental interest reflects the seriousness of the actual burden" on First Amendment rights. *Calzone v. Summers*, 942 F.3d 415, 423 (8th Cir. 2019) (en banc) (cleaned up). Much as the *Keller* decision downplayed the infringement caused by a politicized bar, the Second and Ninth Circuits have enabled speech restrictions to survive under "exacting scrutiny" by downplaying the burden of speech restrictions and thus requiring a lesser state interest to outweigh that burden. *See* Bailie Mittman, *First Amendment Freedoms Diluted: The Impact of Disclosure Requirements on Nonprofit Charities*, 96 Ind. L.J. Supp. 102, 120 (2021).

To date, no lower court has applied exacting scrutiny to compulsory payment of bar dues, instead using some version of the "germaneness" test described in *Keller*. And as even the courts most sympathetic to First Amendment claims have noted, they are obligated to follow *Keller* and *Lathrop* despite the evolution in the underpinning agency fee cases culminating in *Janus*. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997); *see also Jarchow*, 140 S. Ct. at 1720 & n.* (Thomas & Gorsuch, JJ., dissenting to denial of certiorari) (urging the Court to address the "purely legal question whether *Keller* should be overruled" because the overruling of *Abood* "unavoidably" calls into question the continued validity of *Keller*).[9]

In *Janus*, this Court forcefully rejected earlier cases that elevated collective speech over individual expression. Understandably, the Court did not explore every possible application of the announced doctrine in other contexts. But the law now is in disarray. Public employees enjoy greater First Amendment protection for their right to speak than others, such as attorneys, who remain compelled to subsidize the

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[9] *See also Taylor v. Buchanan*, 4 F.4th 406, 408–09 (6th Cir. 2021) (noting that "*Lathrop* and *Keller* are an insurmountable hurdle if they remain good law" and "doom" an attorney challenger's First Amendment claims), *pet. for writ of cert. pending* docket no. 21-357 (filed Sept. 1, 2021); *File v. Kastner*, 469 F. Supp. 3d 883, 889–91 (E.D. Wis. 2020), *appeal pending*, docket no. 20-2387 (7th Cir. 2020) (rejecting facial challenge to mandatory bar membership and dues requirement because a "lower court may not overrule a Supreme Court case even if later cases have deeply shaken the earlier case's foundation") (cleaned up). *Cf. Boudreaux v. Louisiana State Bar Ass'n*, 3 F.4th 748, 755 (5th Cir. 2021) (*Lathrop* and *Keller* "remain controlling law" although the court "recognize[s] their weakened foundations, which counsels against expanding their application.").

speech of others, even when they disagree. Only this Court can ensure consistent First Amendment jurisprudence, in which "exacting scrutiny" warrants a searching inquiry akin to strict scrutiny, across all compelled dues contexts.

CONCLUSION

The petition should be granted.

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Respectfully submitted,

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