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

BRIEF *AMICUS CURIAE* OF FREEDOM FOUNDATION IN SUPPORT OF PETITIONER

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January 17, 2022

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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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INTERESTS OF *AMICUS CURIAE*[1]

Freedom Foundation (the Foundation) is a nonprofit, nonpartisan organization working to protect the First Amendment rights of public employees to make their own decisions about how their lawfully earned wages will be spent. Pursuant to this mission, the Foundation regularly files *amicus curiae* briefs with this Court. *See, e.g.*, *Doughty v. State Employees' Ass'n of New Hampshire, SEIU Loc. 1984*, 141 S. Ct. 2760 (2021); *Thompson v. Marietta Educ. Ass'n*, 141 S. Ct. 2721 (2021); *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31,* 138 S. Ct. 2448 (2018); *Friedrichs v. California Teachers Association*, 136 S. Ct. 1083 (2016).

The Foundation has an interest in the Court accepting review of the instant case and addressing First Amendment prohibitions against compelled speech for licensed attorneys, thereby strengthening this vital protection against coercion for public sector workers and all Americans.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

As this Court stated in *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018), when free and independent individuals are coerced into betraying their convictions it is *always* demeaning. Several conclusions flow from this basic constitutional truth. First, the Court really meant what it said in *Janus*: all public sector workers, even

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[1] Pursuant to Rule 37.2, all parties received notice of the filing of this brief and granted consent to file. Pursuant to Rule 37.6, *Amicus* affirms that no party's counsel authored this brief in whole or in part, and no person or entity, other than *Amicus* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

those who signed boilerplate union agreements, continue to enjoy the full protection and waiver requirements of the First Amendment. *See Yates v. Hillsboro Unified Sch. Dist.,* 2021 WL 4777010, at *1 (9th Cir. Oct. 12, 2021), *petition for cert. filed*, (U.S. Jan. 10, 2022) (No. 21-992). Especially those who signed their agreements before the *Janus* case was decided. *Id.*

Second, and the subject of the instant petition, is the conclusion that the First Amendment protection against compelled speech applies with equal force to every instance where the government compels objectionable speech, in this matter to protect the rights of licensed attorneys. The carve out allowing for the coerced speech of licensed attorneys based upon the distinction originally drawn in *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), and applied to attorneys in *Keller v. State Bar of California*, 496 U.S. 1 (1990), has subsequently been seriously undermined. Even before *Janus*, this Court found *Abood* to be "questionable on several grounds," *Harris v. Quinn*, 573 U.S. 616, 635 (2014), and it's holding allowing for the coerced speech of public sector employees "something of an anomaly," *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 311 (2012). Having ultimately concluded that "*Abood* was wrongly decided and is now overruled," *Janus*, 138 S. Ct. at 2486, this Court should now take the necessary remaining step and address the outstanding First Amendment implications for *Keller*.

The petition should be granted for three reasons additional to those stated in the petition. First, neither the First Amendment nor this Court's precedents interpreting its application to compelled speech regimes broker any flexibility between what is or is not political and ideological speech. Second, taken to its logical extreme, the "germaneness" test is not a serious

or workable standard to regulate which political and ideological issues mandatory bar associations can constitutionally spend their coerced members' lawfully earned wages. Last, when it comes to representation, civil society and its myriad voluntary associations are perfectly capable of representing individuals and protecting their interests. This is true of licensed attorneys, public sector employees, and everything in between.

The petition should be granted.

REASONS TO GRANT THE PETITION

I. POLITICAL AND IDEOLOGICAL ADVOCACY ARE CLEARLY DEFINED UNDER THE FIRST AMENDMENT

The First Amendment clearly defines "political and ideological speech," and to the degree that the "germaneness" test survives constitutional scrutiny at all, the court below unnecessarily blurred the line. Engaging in political and overtly partisan lobbying efforts, "diversity" initiatives targeting individuals of a particular race, gender, or sexual orientation for special benefits, and the promotion of specific ideological viewpoints, like assisting immigrants in the country illegally, all undoubtedly qualify as political and ideological speech.

The recognition that speech and association coerced through compelled monetary contributions is a betrayal of convictions and inherently demeaning, *see Janus*, 138 S. Ct. at 2464, is as old and well-established as the Republic itself. Thomas Jefferson famously wrote that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical." Thomas Jefferson, *A Bill for Establishing Religious Freedom*, Chapter 82 (1779). His colleague James Madison went even

further by describing the absurd result of allowing for such an arrangement. "Who does not see," Madison wrote, "[t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" James Madison, *Memorial and Remonstrance* (1785).

For all the rightful criticism of *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), which upheld compulsory agency fees for public employees before being overruled by this Court in *Janus*, 138 S. Ct. at 2448, even there the distinction between political and ideological speech and all other "germane" activities was clear. While deciding only that the "general allegations in the complaints" in the case established a cause of action under the First Amendment, the Court based this finding on the distinction between "collective bargaining activities, i.e., the negotiation and administration of contracts," which are allowed, and all other activities. *Abood*, 431 U.S. at 213; *See also Chicago Tchrs. Union, Loc. No. 1, v. Hudson*, 475 U.S. 292, 305 (1986) ("For, whatever the amount, the quality of respondents' interest in not being compelled to subsidize the propagation of political or ideological views that they oppose is clear."); *Knox*, 567 U.S. at 310 ("Because a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences, [] the compulsory fees constitute a form of compelled speech [] that imposes a significant impingement on First Amendment rights.").

Thus, the definition of political and ideological speech under the First Amendment was clear and did not lend itself to judicial obfuscation, even when this Court decided *Keller v. State Bar of California*, 496

U.S. 1 (1990), which specifically considered the non-germane political and ideological activities of mandatory bar associations at issue in the instant petition. In fact, *Keller* put an even finer point on the issue. *Id.* at 5 (explaining that lobbying, litigation, conferences, and educational programs qualified as non-germane to the regulation of the legal profession). Thus, in *Keller*, members of the mandatory California bar could be required only to pay directly for activities connected with regulation of the legal profession, such as proposing ethical codes and disciplining members, and nothing else. This understanding was confirmed in *Harris v. Quinn*, which not only recognized that the line existed, but had no trouble in emphasizing its scope. 573 U.S. 616, 655 (2014) (discussing *Keller*, in which the Court "held that members of this bar could not be required to pay the portion of bar dues used for political or ideological purposes.").

Finally, *Janus* left no doubt whatsoever about the definition of what qualifies as political and ideological speech under the First Amendment. Lobbying, social, and recreational activities, advertising, membership meetings and conventions, litigation, and extraneous services for the benefit of members, were all held to be violative of the First Amendment prohibition on compelled speech. *Janus*, 138 S. Ct. at 2461, 2486. Not only did *Janus* remove any doubt about the First Amendment's protection of public employees from coerced speech but cast serious doubt on the "germaneness" test applicable to licensed attorneys laid down in *Keller* and fully reliant on *Abood*. Whether considering the issue in the context of integrated bars or coerced payments to government unions, it is clear that political and ideological activities can *never* be funded without first securing a member's affirmative consent.

II. THE GERMANENESS TEST BLURS THE LINE BETWEEN POLITICAL AND NON-POLITICAL SPEECH

The so-called "germaneness" test previously used to determine the degree to which the First Amendment rights of public employees could be superseded by other countervailing concerns is the quintessential legal test lacking a bright line or even workable standard. Yet, thousands of licensed attorneys required to be members of mandatory bar associations are still subject to the test's vagaries.

To say that the germaneness standard has been and continues to be abused to this day by both unions and mandatory bars, would be a gross understatement. The decades before the *Janus* case was decided provide ample evidence of the political and ideological activities that government unions considered "germane" to the wages, hours, and working conditions of public employees under the former *Abood* standard. Simply put, anything that the Union could justify under the barest rationale as "germane" to collective bargaining activities was considered to be a chargeable expense that a public employee would be required to pay for under the collective bargaining agreement. *Janus*, 138 S. Ct. at 2460-61. As discussed by this Court in *Janus*, some of the activities which public sector unions held strong beliefs in, and used money from public employees to speak on, included "climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions." *Id.* at 2476. Admittedly, these are all topics of immense value and concern to the public and therefore any speech on those topics is highly protected First Amendment speech. *Id.* Yet, under the germane test first described in *Abood*, it was completely appropriate for the union

to use public employees' money to speak on these topics, even without their consent and over their express objections. It is now, still, completely permissible for mandatory state bars to do the same things.

Even though in the years leading up to *Janus*, and ultimately in *Janus*, this Court recognized that "the First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay," *id.* at 2467, the abuse continues. While the germaneness test is no longer applicable in the context of public sector employees and their unions because it does not allow for appropriate protection of public employees' First Amendment rights, *see id.*, its use continues in the context of mandatory bars, even after the legal basis for distinguishing between germane "chargeable" and political and ideological "non-chargeable" dues originating in the *Abood* case has been subsequently decimated. There is no distinction between public sector employees and licensed attorneys subject to mandatory bar associations. Consider the specific allegations of the instant petition.

Here, the applicable mandatory bar used members' dues money to finance a legislative program including proposed legislation on family law affecting the definition of marriage, LGBT law, and poverty law, amongst others. The money is also being used to fund the "Office of Minority Affairs," which engages in "Minority Initiatives," dedicated to diversity efforts, such as the Texas Minority Counsel Program, and the Texas Minority Attorney Program. The Bar even hosts an annual convention at which panel topics have previously included "Diversity and Inclusion: The Important Role of Allies"; "Current Issues Affecting

the Hispanic Community"; "LGBT Pathways to the Judiciary: Impact of Openly LGBT Judges in Texas"; "Implicit Bias"; and "Texas Transgender Attorneys: A View from the Bar." If an attorney forced to contribute money to one or any of these of these initiatives has a political or moral objection, their hands are tied. To oppose such coerced speech is not to diminish the importance of the concerns expressed or views represented, but to recognize the vital importance of individual autonomy and free thought in a democracy. Currently, however, even overtly political and ideological activities are "germane" to regulating the legal profession, and member money may be spent on those activities, so long as a given mandatory bar says they are "germane." Such rampant manipulation of language and doublespeak would surprise even George Orwell.

In the very same way government unions violated the First Amendment rights of public employees, mandatory state bars currently violate the First Amendment rights of the attorneys they claim to represent by requiring the payment of dues and fees simply for practicing law, all while utilizing that money to fund political and ideological speech without the forced contributors having any say or control in the matter. The use of the germane test has resulted, and in the case of attorneys under mandatory bar schemes still results, in over-broad and abusive uses of mandatorily paid money. When there is no bright line for the use of state mandated money paid by the citizens of that state, then the abuses are nearly limitless. Any topic can be tied to the mission of a private organization if one tries hard enough.

III. VOLUNTARY ASSOCIATIONS EFFECTIVELY REPRESENT MEMBER INTERESTS

Finally, as noted by the famed political philosopher Alexis de Tocqueville close to two hundred years ago, the United States is noteworthy for its robust civil society and abundance of voluntary associations. *See generally* Jeffrey C. Alexander, *Tocqueville's Two Forms of Association: Interpreting Tocqueville and Debates Over Civil Society Today*, The Tocqueville Review (2006). Despite decades of government efforts to subvert this system of spontaneous order, Tocqueville's observation is just as true now as it was in the nineteenth century. Government coercion is neither a sufficient nor necessary condition for effectively representing the interests of individuals, whether licensed attorneys, public sector employees, or other voluntary professional associations.

For attorneys, a sizeable number of states already do not require membership in a mandatory bar association as a condition of practicing law in a given jurisdiction. Leslie C. Levin, *The End of Mandatory State Bars?*, Georgetown Law Journal, Vol. 109, 1 (2020). Yet, the attorneys practicing in those jurisdictions are not bereft of professional representation or without recourse for enforcing standards of professional conduct. This system is possible because voluntary bar associations attract sufficient members and dues without the necessity of government coercion. Voluntary bar associations effectively operate on behalf of their voluntary members at both the state, *see, e.g.*, *About the Virginia Bar Association*, The Virginia Bar

Association,[2] and local levels, *see, e.g.*, *About Us*, New York City Bar.[3]

For example, the voluntary New York State Bar Association has over seventy thousand members and collects tens of millions in voluntary dues every year. *About NYSBA*, New York State Bar Association.[4] The New York State Bar Association performs all the functions of a mandatory bar by advancing professionalism, regulating behavior, and improving the quality of legal services and the access to justice; all without the need for government coercion. There are even hundreds of voluntary bars representing sub-populations of attorneys with specific interests. Again using New York as an example, this includes the Adirondack Women's Bar Association, Customs and International Trade Bar Association, South Asian Bar Association of New York, French-American Bar Association, and WNY Trial Lawyers Association.

The same proliferation of effective voluntary associations is available to public sector employees, and other professions generally, no matter geography or specific skill set. *List of Professional Associations & Organizations by Industry*, JobStars.[5] This is true of administration professionals, *see* American Society of Administrative Professionals,[6] animal caretakers, *see* American Association of Feline Practitioners,[7]

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[2] https://www.vba.org/page/about_us

[3] https://www.nycbar.org/about

[4] https://nysba.org/about/

[5] https://jobstars.com/professional-associations-organizations/

[6] https://www.asaporg.com/

[7] https://catvets.com/

chaplains, *see* Association of Professional Chaplains,[8] dentists, *see* American Dental Association,[9] engineers, *see* American Society of Civil Engineers,[10] fashion designers, *see* Council of Fashion Designers of America,[11] landscapers, National Association of Landscape Professionals,[12] plumbers, *see* American Society of Plumbing Engineers,[13] pilots, *see* Aircraft Owners and Pilots Association,[14] real estate professionals, *see* The American Guild of Appraisers,[15] professional sports coaches, *see* American Football Coaches Association,[16] and of course teachers, *see* American Association of Physics Teachers.[17]

It is perhaps unsurprising that the list of effective voluntary professional associations is so large in the United States, where free association rights are generally protected, and potential associations are as diverse as the population itself. Of course, the difference between the organizations noted above and mandatory bar associations and government unions is that whereas the former relies on the cooperation of free individuals, the latter forces compliance through the coercive power of state law. But there is no need for this rigid system. Like *Abood* before it, the

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[8] https://www.professionalchaplains.org/

[9] https://www.ada.org/

[10] https://www.asce.org/

[11] https://cfda.com/

[12] https://www.landscapeprofessionals.org/

[13] https://www.aspe.org/

[14] https://www.aopa.org/

[15] https://www.appraisersguild.org/

[16] https://www.afca.com/

[17] https://www.aapt.org/

weaknesses of *Keller* have now been laid bare, and this Court should exercise review and settle the controversy for millions of Americans.

CONCLUSION

On paper, the First Amendment creates an open marketplace of ideas in which differing views about political, economic, and social issues can compete freely for public acceptance without improper government interference. *Knox*, 567 U.S. at 309. But the reality is often much different.

Mandatory bar associations like the one at issue in this petition turn this bedrock constitutional principle on its head. Through the coercive force of state law, mandatory bars continue to take individual attorneys' lawfully earned wages and spend the money on political and ideological speech without their consent, even after this Court squarely held in *Janus* that such scheme violates the First Amendment. The petition should be granted.

Respectfully submitted,

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