No. 21-800

In the Supreme Court of the United States

TONY K. MCDONALD, ET AL., *Petitioners*

v.

SYLVIA BORUNDA FIRTH, ET AL.

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

BRIEF OF PROTECT THE FIRST FOUNDATION AS *AMICUS CURIAE* SUPPORTING PETITIONERS

GENE C. SCHAERR
Counsel of Record
ERIK S. JAFFE
JOSHUA J. PRINCE
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerrjaffe.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION AND INTEREST OF *AMICUS*[1]

This case is the latest in a long line of cases where the lower courts have felt compelled to turn a blind eye to significant First Amendment harms that follow from compelled speech and association. It thus presents this Court with an opportunity to remove an unnecessary obstacle to the proper application of the First Amendment to schemes that compel support for ideological speech and to clarify (again) that, among other things, professional speech is not a separate, less-protected speech category. See, *e.g., NIFLA* v. *Becerra*, 138 S. Ct. 2361, 2371 (2018).

Full protection of commercial speech is a subject of particular concern for *amicus* Protect the First Foundation (PT1), a nonprofit, nonpartisan organization that advocates for First Amendment rights in all applicable arenas. PT1 is concerned about all facets of the First Amendment and advocates on behalf of people from across the ideological spectrum, people of all religions and no religion, and people who may not even agree with the organization's views.

PT1 agrees with the Petitioners (at 2) that professionals—including lawyers—are protected when they speak or, as here, when they choose not to speak. Attorneys forced to pay mandatory bar dues, thereby subsidizing the bar's political speech that they may disagree with, are protected by the "same

---

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. All parties have been notified of and consented in writing to the filing of this brief more than 10 days before its filing.

constitutional rule" that governs mandatory public-sector union fees. *Keller* v. *State Bar of Cal.*, 496 U.S. 1, 13 (1990). Following this Court's landmark decisions in *Harris* v. *Quinn*, 573 U.S. 616 (2014) and *Janus* v. *AFSCME*, 138 S. Ct. 2448 (2018), that rule is clear: Members of a mandatory bar can neither be compelled to finance political or ideological activities, nor to associate with a bar that engages in such activities

PT1 also agrees with Petitioners that the Question Presented is important and deserves this Court's immediate review. PT1 writes separately to highlight two key points. *First*, *Keller*'s "germaneness" test—as applied to collective speech using compelled funds—has many practical and conceptual flaws that this Court should now correct. *Second*, the activities of the Texas bar identified in the petition (at 9-13) are not unique to the Lone Star State. Because *Keller*'s germaneness test is deeply flawed, and because it allows state bar associations around the country to push with impunity political and ideological views with which many of their members disagree, this Court should grant the petition. And if, upon review of the merits the Court finds, as it should, that *Keller* cannot be reconciled with its more recent decisions, the Court should overrule it.

STATEMENT

Many States require "attorneys [to] join and pay compulsory dues" to a state bar before practicing law. App. 2. This case is a challenge brought by three Texas attorneys challenging their inability to practice law in Texas without joining the State Bar of Texas. App. 2.

Those attorneys allege that forcing them to join a "Bar * * * engaged in political and ideological activities" with which they disagree violates their First Amendment rights. App. 2. Among those activities was the use of mandatory dues to lobby for legislation, App. 7, to create diversity initiatives, App. 8, and to maintain access to justice programs, App. 8-9. The Bar recognizes that "some members * * * object to various of its myriad initiatives" and accordingly provides ways for dissenters to voice their disagreements. App. 9. To Petitioners, however, those procedures, including the separation of chargeable and non-chargeable expenses through a "*pro rata* refund of their membership fee," fail to protect their rights against forced speech. App. 10-11.

Their claims were rejected in the district court as the court considered each of the challenged activities "germane" to "Texas's interest in professional regulation or legal-service quality improvement," App. 59-63, On appeal, the Fifth Circuit found that *some* of the challenged activities were non-germane to the Bar's legitimate purposes and that the forced funding of "non-germane" activities "fails exacting scrutiny." App. 21-23. Petitioners now seek this Court's review on the ground that forcing them to fund political or ideological activities violates the First Amendment even if those activities are germane to regulating the legal profession or improving the quality of legal services.

ADDITIONAL REASONS TO GRANT THE PETITION

I. *Keller*'s Distinction Between "Germane" and Non-"Germane" Bar Association Activities Is Unworkable.

Keller, citing this Court's earlier and since-overruled decision in *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), held that mandatory state bars may promote bar association activities that are "germane" to regulating the legal profession or improving the quality of legal services in the jurisdiction. 496 U.S. at 13. The Court further recognized that forced funding of non-germane activities—such as those that "fund activities of an ideological nature which fall outside of those areas"—would do violence to the First Amendment. *Id.* at 14. Whatever the validity of that distinction when *Keller* was decided, the distinction is no longer relevant, has proven unworkable, and should be overruled to the extent it remains good law at all.

1. In *Abood*, this Court, attempting to limit the First Amendment imposition of compelled contributions to public-sector unions, ruled that such unions could use compelled fees only for their contractual function of collective bargaining and for speech and activities "germane" to such function. See 431 U.S. at 235-236. In *Keller*, this Court extended that limitation to compelled bar dues, citing what it deemed a "substantial analogy between the relationship of the State Bar and its members * * * and the relationship of employee unions and their members. 496 U.S. at 12. Given that "analogy," *Keller* held that integrated bars were "subject to the same constitutional rule with

respect to the use of compulsory dues as are labor unions." *Id.* at 13. *Keller*, accordingly, was nothing more than *Abood* applied in a different context.

Properly understood, speech "germane" to the core activities of unions or integrated bars—collective bargaining or regulating the legal profession, respectively—should have been confined to speech *implementing* those functions. Informing the relevant members of a new or proposed contract's terms, or new rules of professional conduct, for example, is certainly speech, but is necessary (and arguably required by due process) to the performance of the underlying non-speech or speech-act functions.[2] Unfortunately, however, neither *Keller* nor *Abood* provided such clarity.

As a result, the Court quickly "encountered difficulties in deciding what is germane" to an association "and what is not," even when that association's functions were "well known and understood by the law and the courts after a long history of government regulation and judicial involvement." *Bd. of Regents of Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217, 231-232 (2000). In *Lehnert* v. *Ferris Faculty Association*, for example, four Justices held that a public-sector union's lobbying activities seeking "financial support of the employee's profession or of public employees generally" were not germane to the union's purpose—the "ratification or implementation of a dissenter's collective-bargaining agreement." 500 U.S. 507, 520 (1991) (plurality opinion). Justice Scalia, writing for a different four justices, found the lobbying expenses

---

[2] A contract, for example, is entered into by "speech," but it is properly understood as an economic act. It is an operative commitment, not merely informational or persuasive.

"nonchargeable" even though he recognized that they "may certainly affect the outcome of negotiations." *Id.* at 559 (Scalia, J., concurring in the judgment in part and dissenting in part). And Justice Marshall, who considered the principal opinion's germaneness standard "new and unjustifiably restrictive," would have considered the lobbying activities germane to the union's function. *Id.* at 535 (Marshall, J., concurring and dissenting in part).

Nine years later, this Court in *Southworth* declined to extend the *Abood* and *Keller* germaneness standard to compelled student activity fees. It did so at least partly because of the breadth of a badly expanded germaneness test that threatened to sweep all speech into its reach and therefore provided no limit at all. *Southworth*, 529 U.S. at 231-232. Recognizing the difficulty of "defin[ing] germane speech with ease or precision" even "where a union or bar association is the party," the Court explained that the germaneness standard would be "unmanageable in the public university setting, particularly where the State undertakes to stimulate the whole universe of speech and ideas." *Id.* at 232.

2. Predictably, mandatory state bar associations have taken advantage of the Court's difficulty cabining germaneness in other areas to expansively define their own roles in a manner more closely resembling that of a university than that of a trade or regulatory group. Rather than carefully deciding whether activities are actually germane to their core purpose of regulating the legal profession or even an overly expansive claimed purpose of improving the quality of legal services, such associations read the word "germane" so broadly that everything—including all manner of

programming, presentations, award-giving, advocacy, and publications—falls into those two purportedly narrow categories. *Keller*, 496 U.S. at 13-14.

Moreover, contrary to this Court's traditional understanding of viewpoint neutrality, these activities regularly choose content that advances one viewpoint at the expense of others. Cf. *Consol. Edison Co. of N.Y.* v. *Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 537 (1980) ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic."). For these reasons, *Keller*'s distinction between germane and non-germane activities has proven illusory.

3. As *Abood*'s myriad problems became more apparent, this Court began questioning *Abood*'s reasoning. *Knox* v. *Serv. Emps.*, 567 U.S. 298, 311 (2012); *Harris*, 573 U.S. at 655. Ultimately, in *Janus*, this Court overturned *Abood* after determining that it was "poorly reasoned," led to "practical problems," allowed "free speech violations," was "inconsistent with other First Amendment cases," and was "undermined by more recent decisions." *Janus*, 138 S. Ct. at 2460. These problems flowed directly from the Court's recognition that "much" of the speech supposedly "germane" to the furtherance of some economic activity such as collective bargaining nonetheless advanced viewpoints on matters of public concern. *Id.* at 2473. Because of that, the Court held that forcing public employees to subsidize a union—even when they "strongly object to the positions the union takes in collective bargaining and related activities"—imposed a substantial burden on the free-speech rights of those

compelled to fund such speech against their will. *Id.* at 2460, 2474-2475.

Because "*Abood* provided" *Keller's* legal foundation, *Southworth*, 529 U.S. at 231, *Abood*'s overruling in *Janus* should suffice to undermine—if not fully gut—the reasoning and the authority of *Keller*. If *Abood* was "poorly reasoned," so too was *Keller*—for it expressly adopted *Abood*'s reasoning. Moreover, *Janus* rejected even the interest recognized as motivating the mandatory fees in both *Keller* and *Abood*—to prevent free riders. 138 S. Ct. at 2466 ("[A]voiding free riders is not a compelling interest[.]"). And since *Keller* applied the same germaneness test, it, no less than *Abood*, is inconsistent with the First Amendment and leads to the same constitutional violation: compelling individuals "to mouth support for views they find objectionable." *Janus*, 138 S. Ct. at 2463. Furthermore, just as *Janus* recognized the artificial and undefinable lines drawn in *Abood*, see *Janus*, 138 S. Ct. at 2482, this Court should again recognize the similarly false dichotomy between speech that is germane to regulating the legal profession and improving the quality of legal services and speech that is not. Here, as in *Janus*, "[t]o suggest that speech on such matters is not of great public concern—or that it is not directed at the 'public square'—is to deny reality." *Id.* at 2475 (citations omitted).

Given the legal profession's scope and the many areas of government and public policy involving the law and lawyers, a broad notion of "germaneness" was doomed to fail as a meaningful limitation on compelled speech. Even a narrow view of germaneness as tightly limited to speech essential to carry out regulatory functions would be difficult to cabin. The current system, however, is hopelessly subjective, unlimited, and

oppressive of the right not to support or be compelled to pay for speech on issues of public concern with which people disagree. *Id.* at 2460.

The demise of *Abood* thus necessarily requires the demise of *Keller* and its unworkable and non-limiting germaneness test. As even the dissenting Justices in *Janus* recognized, *Janus* undermined "the constitutionality of compelled speech subsidies in a variety of cases beyond *Abood*, involving a variety of contexts beyond labor relations." 138 S. Ct. at 2495 n.3 (Kagan, J., dissenting). Those Justices rightly included "mandatory fees imposed on state bar members (for professional expression)" in their "list" of cases that are now obsolete and unanchored following *Janus*. *Ibid.* (Kagan, J., dissenting) (citing, among others, *Keller*, 496 U.S. at 14).[3]

The petition should be granted to complete the constitutionally necessary course correction that *Janus* started.

---

[3] Professors William Baude and Eugene Volokh similarly understood *Janus* to be *Keller's* death knell. See William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 Harv. L. Rev. 171, 196-198 (2018).

II. This Court Should Grant Review to Determine Whether the First Amendment Prevents Mandatory Bar Organizations Across the Nation from Compelling Support for Ideological and Political Speech.

In addition to both *Keller* and the decision below being wrong as a constitutional matter, they are also significant because the problem of compelled support for political and ideological speech occurs frequently in the bar context. Indeed, attorneys in 31 States and the District of Columbia are compelled to finance such mandatory bar organizations.[4] This puts attorneys in these states in an impossible dilemma: they must decide between "betraying their convictions" and earning a living by practicing law. *Janus*, 138 S. Ct. at 2464. As this Court has held in other contexts, such a choice is no choice at all. See, *e.g.*, *Fulton* v. *Philadelphia*, 141 S. Ct. 1868, 1876 (2021).

Petitioners cite (at 9-13) multiple examples of how their bar association has harmed them. *Amicus* here provides additional examples of how state bars across the country are imposing the same burdens on dissident attorneys forced to pay them dues. One such example is that mandatory state bars frequently push political and ideological positions in court.[5] And while

---

[4] See Leslie C. Levin, *The End of Mandatory State Bars?*, 109 Geo. L.J. Online 1, 2 (2020).

[5] Even if such briefs were done without the expenditure of bar time and resources—pro bono, for example, without involvement of bar employees—they still imposed a forced association on bar members with political views they may oppose. *Knox*, 567 U.S. at 309-311; *Harris*, 573 U.S. at 630-631; *Janus*, 138 S. Ct. at 2463-2464.

many of the issues involved may have some tangential—or even direct—connection with the legal profession, they are nonetheless political or ideological positions of public concern on which bar members can and do disagree and hence should not be compelled to support. For example:

- **D.C. Political and Economic Governance.** The District of Columbia Bar, the "largest unified bar in the United States,"[6] filed a brief in this Court seeking D.C. representation in Congress. That brief expressed contested and contestable views on voting rights, equal protection, the Constitution, and various political events including congressional votes regarding D.C. and an odd attempt to connect the January 6, 2021 mayhem at the Capitol to the lack of D.C. statehood.[7] In another case, the D.C. Bar's D.C. Affairs Section opined to this Court on the economic merits of the "federal ban found at [District of Columbia] Code § 1-206.02(a)(5) on the District government's ability to tax the income of those who work in the District but live elsewhere"—a group that includes many members of the D.C. Bar itself.[8] Whatever one thinks

---

[6] DC Bar, *Who We Are*, https://www.dcbar.org/about/who-we-are (last visited Jan. 18, 2022).

[7] Brief of the District of Columbia Affairs Community of the District of Columbia Bar et al. as *Amici Curiae* in Support of Petitioners and Reversal at 6-7, *Castanon* v. *United States*, 142 S. Ct. 56 (2021) (No. 20-1279), 2021 WL 1535853, at *6-7.

[8] Brief for *Amici Curiae* District of Columbia Chamber of Commerce, Federal City Council, District of Columbia Affairs Section of the District of Columbia Bar et al. in Support of Petitioners, *Banner* v. *United States*, 547 U.S. 1143 (2006) (No. 05-970), 2006 WL 901177, at *3.

of the positions taken in those briefs, they addressed contentious policy issues on which many bar members likely disagreed.

- **LGBT Rights**. The mandatory bars of Arizona, Montana, and Oregon joined a brief in *Romer* v. *Evans*, 517 U.S. 620 (1996), arguing that Colorado's Amendment 2, which precluded any governmental body in Colorado from taking any action to protect LGBT Coloradans, was unconstitutional.[9] Whatever one thinks of the merits of the issue in that case, it was plainly a matter of vigorous public debate (on which the Court itself divided), has little or nothing to do with the regulation of the legal profession, and expressed a viewpoint not shared by many attorneys forced to pay dues to those bars.
- **Judicial Conduct and Eligibility.** State bars also have expressed views about the proper qualifications to become a judge. While obviously related to the legal profession in the ordinary sense, such matters are also highly contentious political issues.[10]

---

[9] See Brief of the Colorado Bar Association, Other State and Local Bar Associations and Various National Organizations as *Amici Curiae* in Support of Respondents, *Romer* v. *Evans*, 517 U.S. 620 (1996) (No. 94-1039), 1995 WL 17008440.

[10] See Motion of the Missouri Bar for Leave to File Brief of *Amicus Curiae* and Brief of *Amicus Curiae* in Support of Respondent, *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991) (No. 90-50), 1990 WL 10013071, at *3 (opinion on the constitutional and federal law permissibility of a mandatory retirement age for state judges); Motion of the Missouri Bar for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* of the Missouri Bar in Support of the Petition for a Writ of Certiorari, *Dimick* v. *Republ. Party of Minn.*, 546 U.S. 1157 (2006) (No. 05-566), 2006 WL 42106, at *2-10

- **Criminal Justice.** There are similarly plentiful examples of mandatory bars wading into contentious criminal-justice issues—where at least prosecutors and defense attorneys are likely to disagree. For example, in a lengthy brief, the State Bar of Michigan, the North Carolina State Bar, and the West Virginia State Bar urged this Court to conclude that "a death sentenced inmate cannot achieve meaningful access to the courts without the assistance of counsel."[11] And the Mississippi Bar once urged this Court to hold that, under the Fifth and Sixth Amendments, "a suspect who has requested counsel may [not] be subjected to renewed (and potentially repeated) interrogation without counsel present, [even if] the suspect has had the opportunity to consult with counsel prior to the renewed interrogation."[12] Here again, whatever one thinks of the positions taken in those briefs, they addressed contentious policy issues on which many bar members likely disagreed.

(opining on constitutionality of campaign-finance restrictions in judicial elections); Brief of *Amicus Curiae* Kentucky Bar Association, *North* v. *Russell*, 427 U.S. 328 (1976) (No. 74-1409), 1975 WL 173580, at *4 (self-servingly opining on whether judges must be licensed lawyers).

[11] Brief of the Maryland State Bar Association, State Bar of Michigan, North Carolina State Bar, South Carolina Bar Association, West Virginia State Bar as *Amici Curiae* in Support of Respondents, *Murray* v. *Giarratano*, 492 U.S. 1 (1989) (No. 88-411), 1989 WL 1127813, at *38.

[12] Motion for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* of the Mississippi State Bar in Support of Petitioner, *Minnick* v. *Mississippi*, 498 U.S. 146 (1990) (No. 89-6332), 1989 WL 1127192, at *7.

- **Access To Justice.** Even legal-services-related issues can involve debatable views that should not be advanced through compelled funding. Mandatory bars, for example, regularly file briefs in access-to-justice cases involving fee shifting and other financial incentives to bring certain types of cases.[13] While access-to-justice issues are obviously *related* to the practice of law, they nonetheless remain controversial and have little to do with regulating the legal profession—similar perhaps to advocating for more pay for certain lawyers, not unlike the situation in *Lehnert*. Here again, whatever one thinks of these issues, there is no doubt that many bar members would disagree with the positions their mandatory bar dues are being used to support.
- **State Bars' Self-Serving Prerogatives.** Numerous mandatory bars organizations have weighed in against their own members in defending their self-serving prerogatives or restraints on trade.[14] The

---

[13] See Brief for the Washington Council of Lawyers et al. as *Amici Curiae* Supporting Respondents, *City of Riverside* v. *Rivera*, 477 U.S. 561 (1986) (No. 85-224), 1985 WL 669357, at *1-6 (amici, a "collection of mandatory and voluntary bar associations," arguing about the proper scope of the fee-shifting provisions of 42 U.S.C. § 1988); Brief for State Bar of California as *Amicus Curiae*, *Mallard* v. *U.S. Dist. Ct. for the S. Dist. of Iowa*, 490 U.S. 296 (1989) (No. 87-1490), 1988 WL 1025774, at *4 (arguing that the appointment of involuntary counsel for the indigent under the then-current version of 28 U.S.C. § 1915(d) leads to poor representation).

[14] See Brief for *Amicus Curiae* the State Bar of California, *Bates* v. *State Bar of Ariz.*, 433 U.S. 350 (1977) (No. 76-316), 1976 WL 178674, at *19-20 (arguing against antitrust liability for state bars); Brief of the North Carolina State Bar, the North Carolina Board of Law Examiners, the West Virginia State Bar, the Nevada State Bar and the Florida Bar as *Amici Curiae* in Support

absurdity of bar members having to contribute money to arguments raised against their own interest epitomizes the problem of compelled support for speech.

- **Other Issues.** Mandatory bars have also taken definitive positions on other, less prominent issues that nonetheless involve highly contentious questions within their own realms. For instance, various bars have taken positions on the substantive scope of the Lanham Act, issue preclusion in certain trademark cases, and even the proper scope of the marital privilege.[15] Lawyers on either side of such issues should not be required to subsidize their opponents through mandatory bar dues.

In short, by filing briefs in disputed cases, bar associations push ideas with which some and often many of their members may not agree. Bar associations, of course, have the same First Amendment rights as all other associations to express their own views. But when, as these examples demonstrate, they express views on controversial issues, and in the name of

---

of Petitioner, *N.C. State Bd. of Dental Exam'rs* v. *Federal Trade Comm'n*, 574 U.S. 494 (2015) (No. 13-534), 2014 WL 2465962, at *3-5, *27-28.

[15] Brief on Behalf of the American Intellectual Property Law Association and the Patent, Trademark and Copyright Section of the State Bar of California as *Amici Curiae* in Support of Petitioner, *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U.S. 189 (1985) (No. 83-1132), 1984 WL 565855, at *3; Brief *Amicus Curiae* of the Intellectual Property Law Section of the State Bar of Texas in Support of Respondent, *B&B Hardware, Inc.* v. *Hargis Indus., Inc.*, 575 U.S. 138 (2015) (No. 13-352), 2014 WL 5760361, at *3-4; Brief for *Amicus Curiae* the Missouri Bar, *Trammel* v. *United States*, 445 U.S. 40 (1980) (No. 78-5705), 1979 WL 199802, at *3.

attorneys who have no choice but to be members, they cannot—consistent with the First Amendment—push those ideas with the help of mandatory dues provided by attorneys who disagree with them.

CONCLUSION

The Court should grant certiorari to determine whether the First Amendment prohibits mandatory bar organizations across the nation from compelling support for ideological and political speech with which some of their members disagree.

Respectfully submitted,

GENE C. SCHAERR
Counsel of Record
ERIK S. JAFFE
JOSHUA J. PRINCE
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerrjaffe.com
Counsel for Amicus Curiae

JANUARY 19, 2022