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 FOR THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Amicus curiae is the State of Texas.[1] Texas files this brief to promote its interests and those of its citizens in ensuring that the actions and policies of governmental entities such as respondents comport with the First Amendment. Texas also has a legitimate interest in ensuring that members of the legal profession retain their independence and thus their ability to maintain the high ethical standards required of their profession. Those interests are implicated here.

Petitioners are attorneys required by law to be members of the State Bar of Texas to practice their chosen profession. They argue that respondents, members of the Bar's board, have forced them to associate with and to subsidize political and ideological activities with which they disagree. Thus, petitioners raise important First Amendment questions regarding how a state entity may regulate attorneys within its jurisdiction.

SUMMARY OF ARGUMENT

As the Fifth Ciruit noted, the issues presented here, including whether to overrule *Lathrop v. Donohue*, 367 U.S. 820 (1961), and *Keller v. State Bar of California*, 496 U.S. 1 (1990), are ripe for this Court's review. Decades of this Court's subsequent decisions reveal that *Lathrop* and *Keller* are neither consistent with the First Amendment's prohibitions on compelled speech and association nor tenable given this Court's repudiation of the decisions supporting those cases.

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[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than amicus contributed monetarily to its preparation or submission. On January 6, 2022, counsel for the State of Texas informed counsel of record for petitioners and counsel of record for respondents of its intent to file this brief.

This Court's stare decisis principles support, rather than counsel against, overruling *Lathrop* and *Keller*. Both decisions were poorly reasoned and rely on precedents that have themselves been overturned. Both announced an unworkable standard that lower courts have struggled to apply. Both are inconsistent with comparable First Amendment precedent prohibiting government entities and unions from compelling their members to engage in the type of speech and association the state bar requires here. As several intervening decades have demonstrated, both *Lathrop* and *Keller* are plainly wrong.

This Court should bring those decisions in line with the rest of this Court's First Amendment jurisprudence and hold that only attorneys who "opt-in" need contribute to a state bar's expenditures for causes it deems improve "the quality of legal services," *Keller*, 496 U.S. at 13. Individuals in the legal profession should not be forced to support the political and ideological causes that bar associations so commonly take on themselves.

ARGUMENT

I. The Court Should Grant Certiorari to Overrule *Lathrop* and *Keller*.

Stare decisis "applies with perhaps least force of all to decisions that wrongly denied First Amendment rights." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018). This Court "has not hesitated to overrule decisions offensive to the First Amendment" when "there are strong grounds for doing so," *id.*, as there are here. When this Court overruled *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the key case upon which *Keller* rests, it identified the five "most important" factors it considered when deciding whether to overrule that decision:

(1) "the quality of [the decision's] reasoning," (2) "the workability of the rule it established," (3) "its consistency with other related decisions," (4) "developments since the decision was handed down," and (5) "reliance on the decision." *Janus*, 138 S. Ct. at 2478-79. Applying those factors to *Lathrop* and *Keller* supports abandoning both.

A. *Lathrop* and *Keller* are inconsistent with the First Amendment.

This Court has recognized that compelled subsidies for speech and compelled association violate the First Amendment. The Court should take this opportunity to correct *Lathrop*'s and *Keller*'s archaic holdings to the contrary.

1. "If there is any fixed star in our constitutional constellation, it is that no [government] 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." *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). What's more, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical . . . ." A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950) (emphasis and footnote omitted).

Hence governments cannot ordinarily compel speech or association, nor can they ordinarily compel *subsidization* of speech or of associations. *Harris v. Quinn*, 573 U.S. 616, 647 (2014); *Janus*, 138 S. Ct. 2463-64. Compelling either speech or the subsidization of others' speech directly contravenes the First Amendment as well as the intellectual and expressive freedoms the First Amendment was designed to protect. *Janus*, 138 S. Ct. at 2464. Compelling others to *subsidize* speech with which they

disagree "coerce[s] [them] into betraying their convictions." *Id.* (emphasis added). In such a case, "a law commanding 'involuntary affirmation' of objected-to-beliefs would require 'even more immediate and urgent grounds' than a law demanding silence. *Id.*

Any attempt to compel the subsidization of speech must satisfy at least exacting scrutiny. *Id.* at 2464-65, 2480. Exacting scrutiny demands that "a compelled subsidy must serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 2465 (internal citation and quotation marks omitted). But as the Court noted when overruling it, *Abood* failed to apply even exacting scrutiny, let alone strict scrutiny. *Id.* at 2458, 2480, 2483. Rather, the Court had inexplicably deferred to the State's judgment, as it did not when examining claims of compelled speech in other contexts. *Id.* at 2484 ("It is an odd feature of our First Amendment cases that political patronage has been deemed largely unconstitutional, while forced subsidization of union speech (which has no such pedigree) has been largely permitted."). It did so despite the fact the State's justification for the compelled speech relied on an "unsupported empirical assumption" rather than evidence. *Id.*; *see also id.* at 2465.

Even under the lesser standard of exacting scrutiny—or the lack of standard applied in *Abood*—*Lathrop* and *Keller* cannot stand for a similar reason. Neither decision scrutinized the government's stated interests in mandatory bar membership, nor did either inquire whether those interests could be effectively preserved by a substantially less infringing method. *See generally Keller*, 496 U.S. at 10-14; *Lathrop*, 367 U.S. at 827-33, 839-44. As with *Abood*, *Keller* and *Lathrop* are an "anomaly," *Janus*, 139 S. Ct. at 2483, out of line with the more

demanding standard this Court's First Amendment jurisprudence requires.

2. *Lathrop* and *Keller* relied on three interests, none of which justifies the compelled subsidy of ideologically unwanted speech: avoiding "free riders," regulating the legal profession, and improving the quality of legal services.

a. The concept of "free riders" originated from the Court's union cases. *See Keller*, 496 U.S. at 12. In the agency-shop context, free riders are "those who receive the benefit of union negotiation with their employers, but who do not choose to join the union and pay dues" and thereby "avoid[] their fair share of the cost of a process from which they benefit." *Id.* The *Keller* Court found "a substantial analogy between the relationship of the State Bar and its members" and that between unions and employees. *Id.* As a result, it concluded that absent mandatory subsidization, "free riding" lawyers would benefit from organized bars' self-governance—which was thought to be more advantageous to attorneys than "regulation conducted by a government body which has little or no connection with the profession"—without paying part of the cost of that advantage. *Id.*

This Court has since clarified in the union context that "avoiding free riders is not a compelling interest," and "free-rider arguments . . . are generally insufficient to overcome First Amendment objections." *Janus*, 138 S. Ct. at 2466 (internal quotation marks and citations omitted). The concept that public employees should subsidize unions' speech because it benefits them has "startling consequences." *Id.* "Many private groups speak out with the objective of obtaining government action that will have the effect of benefiting nonmembers," but applying *Abood*'s logic "across the board" would allow "all those

who are thought to benefit from such efforts [to] be compelled to subsidize this speech." *Id.* Private speech "often furthers the interests of nonspeakers," but "that does not alone empower the state to compel the speech to be paid for" by them. *Id.* at 2466-67.

b. As a result, even if bar associations use their influence to benefit the legal profession, that does not obligate members to fund those activities. And any benefit from associations' roles establishing rules and regulations for attorneys does not overcome the loss of those individuals' First Amendment rights when mandatory funds are used for other purposes. This is especially so because the Court's trust in bar associations in *Keller* relied heavily on an unsupported assumption—that mandatory bar associations' self-regulatory regime is preferable to state regulation.

Decades of experience have disproven that assumption. In terms of regulating attorneys and providing for legal ethics rules, States have shown that they can accomplish these same ends. And unlike bar associations, States can do so without also using mandatory funds to promote ideological and political positions with which many bar members may disagree. *See, e.g.*, Pet. App. at 6 (Texas Bar advocating for a change to the State's constitutional definition of marriage and for legislation to create civil unions). The benefits of regulating the legal profession can be achieved "through means significantly less restrictive of associational freedoms" than mandatory bar fees, *id.* at 2465, whether that involves allowing States to regulate the legal profession (as they do others) or ensuring attorneys an opportunity to "opt out" of association activities with which they disagree. *See also infra* at 8-9.

c. The current vague waiver of allowing speech compulsion *Keller* and *Harris* provide to bar associations for activities that "improve the quality of legal services" allows bar associations far too much leeway to restrict the First Amendment rights of its members. As noted above, bar associations have repeatedly interpreted that standard to encompass positions they take based on political or ideological positions that "demean" dissenters among their membership. Under any standard of review, therefore, that standard violates the First Amendment.

The government has no compelling interest in forcing members of the bar to support political and ideological activities or causes with which they disagree, such as lobbying programs, diversity initiatives, access to justice campaigns, and other objected-to activities. Those activities are, by respondents' argument, bound up in the idea of "improving the quality of legal services." Indeed, that is how respondents have justified those activities thus far. But that justification is not itself a compelling interest.

Merely identifying some benefit to the public does not make an interest compelling. Rather, respondents must identify a "state interest of the highest order," such as "public perception of judicial integrity," *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 446 (2015), "furthering the legitimate penological objectives of the corrections system," *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 341 (2010), or "ensuring the capacity of the Government to discharge its [military] responsibilities," *id.* They have not done so, and activities that purport to improve legal services under only *some* points of view are not tied to a compelling interest. Moreover, some of the objected-to activities, such as lobbying for substantive changes to the law, are blatantly outside the aegis of

"improving the quality of legal services." A bare desire to support those ideological and political activities does not even provide a *legitimate* government interest for compelling speech, let alone a compelling one.

Even if such a vague standard as "improving the quality of legal services" were a compelling government interest—indeed, even if activities such as lobbying were so—less restrictive means to achieve those ends exist that would not require objecting attorneys to participate, such as voluntary membership. Nineteen states do not have mandatory bars and instead regulate the legal profession directly, leaving other activities to various voluntary-membership associations. Pet. App. at 2, 23-24. Respondents cannot reasonably suggest that those States are less able to provide high-quality legal services in their jurisdictions. Nor have respondents argued as much.

Indeed, the success of voluntary associations underscores the errors of *Lathrop* and *Keller*. These associations win the support of the attorneys in their jurisdictions by persuasion, and they effectively carry out myriad activities to improve the profession and the quality of legal services. The experience of these voluntary bar states, including California, which uses a hybrid model, counters any argument that compulsory funding is necessary to ensure the quality of legal services, and it demonstrates that significantly less restrictive means are available to achieve that end.

And still other means exist. Activities to improve the quality of the legal profession could be funded by legislative apportionment, through voluntary donations given alongside mandatory dues, or, as already takes place across the country, by local organizations, special interest and affinity groups, non-profits, and a plethora of

other sources of funding and programming. At bottom, effectively improving the quality of legal services is not "inextricably linked" to the government's compulsory extraction of funding to achieve that end. *See Harris*, 573 U.S. at 649-50; *Janus*, 138 S. Ct. at 2465-66. Such an interest cannot satisfy exacting scrutiny.

B. Stare decisis does not justify retaining either *Lathrop* or *Keller*.

1. *Lathrop* and *Keller* are poorly reasoned.

a. In *Lathrop*, the Court held that an attorney may constitutionally be required to associate with a mandatory bar, so long as the "major activity of" and the "bulk" of the activities of the bar serve to "elevat[e] the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the" public. 367 U.S. at 839, 843. This was so, the Court said, "even though the organization . . . also engage[d] in some legislative activity." *Id.* at 843. And the Court thought it significant that the membership requirement was limited "to the compulsory payment of reasonable annual dues." *Id.* This reasoning rested on two clear flaws.

First, *Lathrop* rested in large part on dicta from an even earlier case: *Railway Employees' Department v. Hanson*, 351 U.S. 225, 238 (1956). *Hanson* addressed a federal statute that permitted "union-shop" agreements between rail companies and unions. *Harris*, 573 U.S. at 629. Some employees argued that they were being forced into an ideological and political association in violation of the First Amendment. *Id.* But, because there was no record evidence that the union in *Hanson* engaged in political or ideological activities, the Court dismissed their claim out of hand, saying: "[o]n 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." *Id.* at 629-30 (quoting *Hanson*, 351 U.S. at 238).

As this Court later recognized, there was little justification for this dictum:

> 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.

Id. at 630.

That later case was *Lathrop*. And *Lathrop* rested on *Hanson* and its dictum—in other words, the rule of *Lathrop* rested on close to nothing. Moreover, *Hanson*'s author himself dissented in *Lathrop*, explaining that the First Amendment should *not* permit compulsory bar membership and that the *Hanson* case was "to be closely confined." *Lathrop*, 367 U.S. at 884-85 (Douglas, J.). Indeed, this Court has looked back on *Hanson* as "thin" on First Amendment analysis and "narrow" in scope. *Harris*, 573 U.S. at 631. So *Lathrop*'s precedential and analytical bases were shaky from the outset.

Second, *Lathrop* is unrecognizable from the perspective of this Court's more recent freedom-of-association jurisprudence. On one hand, the Court no longer accepts mandatory membership in a group just because the "bulk" of its activities are not ideological. The Court is accordingly far less tolerant of ideologically or politically charged compelled speech subsidies, let alone those arising from mandatory membership organizations. *See, e.g.*,

Janus, 138 S. Ct. at 2464-65 (explaining that, at minimum, exacting scrutiny applies to these claims).

And on the other, the Court now recognizes that mere membership in a group and payment of dues are themselves expressive acts reflecting association with the group, its ideals, and its politics. *Janus*, 138 S. Ct. at 2464 ("Compelling a person to *subsidize* the speech of other private speakers raises [] First Amendment concerns."); *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings v. Martinez*, 561 U.S. 661, 680 (2010) ("speech and expressive-association rights are closely linked"). A mandatory organization is not required to compel speech subsidies to implicate First Amendment concerns; compelled association and compelled payments alone implicate core First Amendment concerns.

b. *Keller*, relying in part on *Lathrop*, fares little better. *Keller* addressed a question that *Lathrop*, a freedom of *association* case, left open—whether it violated free *speech* rights for a mandatory bar to fund activities of an ideological nature over a member's objections. *Keller* recognized only narrow speech rights for objectors, entitling mandatory bar associations to extract speech subsidies for ideological activities, so long as those activities were "germane" to regulating the legal industry or improving the quality of legal services. 496 U.S. at 14.

This familiar (and since rejected) distinction lay in *Abood* alone. There, the Court held that an "agency-shop" union[2] could spend funds for the expression or advancement of political or ideological causes not germane to its collective bargaining purpose, so long as those

[2] Like a "union shop" union in the private sector, an "agency shop" union takes mandatory dues from all employees of a governmental agency and represents them as their sole representative in collective bargaining.

expenditures were "financed from charges, dues, or assessments paid by employees who [did] not object to advancing those ideas and who [were] not coerced into doing so against their will by the threat of loss of governmental employment." *Abood*, 431 U.S. at 235-36.

The *Keller* Court reasoned that in the agency-shop context, all employees derive a benefit from the union's collective bargaining activities, and agency-shop agreements preserved the government's interest in "industrial peace," justifying a shared cost for union activities. 496 U.S. at 12-13. And agency-shop agreements preserved the government's interest in "industrial peace." *Id.* Similarly, the Court held, attorneys benefit greatly from "a large measure of self-regulation." *Id.* at 12. Mandatory bar associations, the Court said, "are justified by the State's interest in regulating the legal profession and improving the quality of legal services." *Id.* at 13.

So, articulating a rule strikingly similar to *Abood*'s, the Court held that "[t]he State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity." *Id.* at 14. But these government interests—preventing free riders, regulating the profession, and improving legal services—need reexamining.

The Court treated *Abood* as "questionable" for some time before finally overruling it. *Harris* contained a lengthy explanation of the cases that led to *Abood*, 573 U.S. at 628-33, and discussed *Abood*'s then-obvious weaknesses, *id.* at 633-38. Ultimately, the *Harris* Court did not overrule *Abood*, but confined *Abood*'s application and cast doubt on its going-forward vitality. *Id.* at 635-38, 646-67. That prediction, of course, proved true in

Janus, where the Court formally overruled *Abood*. 138 S. Ct. at 2479-81.

Rather than belabor the Court's own twice-recited criticism of *Abood*, it should suffice to say that *Janus* resoundingly rejected *Abood* and expressly overruled it. *Id.* at 2486. However, *Keller* itself suffers from several of the same flaws *Abood* did before its demise, and thus merits the same fate.

First and foremost, *Abood* treated two prior cases as dispositive when they were not—one was not a constitutional decision at all, and one answered a different, narrow question with little First Amendment analysis to support its holding. *Harris*, 573 U.S. at 363-37; *Janus*, 138 S. Ct. at 2479. Likewise, *Keller* rests on *Abood* itself. And though *Abood* may have appeared to be good law at the time, it is no longer. Thus, in the way *Abood* treated inapposite cases as dispositive, *Keller* treated as dispositive a case we now know to be bad law.

A few of the other flaws in *Abood*'s reasoning are applicable to *Keller*: (1) *Abood* failed to appreciate important differences between the public and private sectors, and thus did not anticipate the unworkability of its test, *see infra* at I.B.2; (2) relatedly, *Abood* failed to appreciate the difficulty that would face objectors, *see infra* at II; and (3) an assumed government interest underlying *Abood* proved not to justify its rule, *see supra* at I.A.4. For these reasons, *Keller* was poorly reasoned, even if largely as a retrospective matter.

2. *Keller*'s rule is as unworkable as *Abood*'s.

Abood did not set a workable standard, and neither did *Keller*. *Abood* failed to appreciate the difference between the private sector and the public sector. *Harris*, 573 U.S. at 636-67; *Janus*, 138 S. Ct. at 2480. In the private sector, collective bargaining targets employers and

political advocacy targets the government. *Harris*, 573 U.S. at 636-37. But "[i]n the public sector, core issues such as wages, pensions, and benefits are important political issues." *Id.* at 636. So, in the public sector, it is much harder to distinguish between "expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends." *Id.*

As expected, there are "practical administrative problems" with such a rule. *Id.* at 637. After *Abood*, the Court articulated a three-prong test: an acceptable expenditure is one that (1) is "germane to collective-bargaining activity," (2) is justified by the interest in "labor peace and avoiding 'free riders,'" and (3) does not "significantly add to the burdening of free speech" inherent in allowing the members to function as a unit. *Id.* (citing *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507, 519 (1991)). But this helped the *Abood* standard little, as all of these prongs "involve[d] a substantial judgment call." *Id.* (quoting *Lehnert*, 500 U.S. at 551 (Scalia, J., dissenting)). Even members of this Court could not agree how to apply them. *Janus*, 138 S. Ct. at 2481.

Though the public-private distinction is not directly applicable to *Keller* (there are no private-sector mandatory bars), the overarching point rings true. It is very difficult to determine the line between "provid[ing] specialized professional advice to those with the ultimate responsibility of governing the legal profession" and "the advancement of other ideological causes." *Keller*, 496 U.S. at 9, 13 (internal citations omitted). As a result, *Keller*'s test remains as nebulous as *Abood*'s. And it does not benefit from application-clarifying progeny cases from this Court. *Keller* deemed political and ideological activities acceptable, so long as they are "germane" to, and "justified" by, the State's interests in the regulation of

the legal profession and the improvement of legal services. 496 U.S. at 13-14. The latter category, especially, has unacceptably indiscernible contours. *See* Pet. at 28-31. At bottom, this standard sounds strikingly like *Abood*'s, which the Court recently called "altogether malleable" and "not principled." *Janus*, 138 S. Ct. at 2481 (internal quotation marks omitted).

3. There are no legitimate reliance interests in forcing subsidization of future speech.

Finally, there are no reliance interests that justify retaining *Lathrop* and *Keller*. First and foremost, state bar associations have no legitimate interest in compelling ideological speech or association, and they cannot rely on their desire to do so or on a pattern of past infringements of First Amendment rights to justify continuing *Keller*'s rule. *See Janus*, 138 S. Ct. at 2484 ("The fact that [bar associations] may view [mandatory dues] as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that [objecting attorneys] share in having their constitutional rights fully protected." (quoting *Arizona v. Gant*, 556 U.S. 332, 349 (2009))).

Second, just as with *Abood*, reliance arguments based on the clarity of *Keller*'s standard are severely misplaced. As this case and others like it demonstrate, *Keller*'s standard is nearly impossible to apply in a way that effectively protects the First Amendment rights of objecting attorneys or in a way that comports with essential principles of First Amendment law.

Third, mandatory bar associations cannot realistically argue that *Keller*'s rule is necessary to their viability or continued effectiveness in meeting both their ideological and non-ideological goals. Many States have voluntary bar associations that survive on the funds they

persuade members to donate. Nor should any perceived difficulty in changing the model from mandatory to voluntary persuade the Court otherwise; indeed, California, one of the largest jurisdictions in the country, recently transitioned to a hybrid bar association model. Other States may do the same—and that less-restrictive possibility is damning.

Finally, the Court's compelled speech and compelled association cases of late have sought to undo the First Amendment infringements blessed by older cases such as *Abood*. Thus, respondents and mandatory bar associations across the country should have been aware that *Lathrop* and *Keller* might soon meet the same fate. The Court should cast mandatory bar associations into the testing fire of exacting scrutiny, as it has done to mandatory union fees.

C. As the Fifth Circuit expressly acknowledged, this Court's intervention is urgently needed.

As the Fifth Circuit put it, *Lathrop* and *Keller* rely on "wobbly, moth-eaten foundations," and the Court's "First Amendment caselaw has changed dramatically" since both. Pet App. at 16-17 n.14, 39. The Fifth Circuit acknowledged its duty to "leav[e] to [the Supreme] Court the prerogative of overruling its own decisions," *id.* at 17 n.14 (second alteration in original) (quoting *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989)), but concluded that those "weakened foundations counsel[ed]" that court "against expanding [*Lathrop*'s and *Keller*'s] reach" further, *id.* at 16-17 n.14.

This case presents a clean vehicle for this Court to revisit *Lathrop* and *Keller*. The Fifth Circuit expressed the two cases' inconsistency with this Court's modern First Amendment jurisprudence:

> Since *Lathrop* and *Keller* were decided, the Supreme Court's First Amendment caselaw has changed dramatically. Both cases drew from the then-existing jurisprudence on the First Amendment implications of mandatory union dues, but that jurisprudence has evolved. . . . *Lathrop*'s and *Keller*'s weakened foundations counsel against expanding their reach as we consider questions they left open.

Pet. App. at 16-17 n.14.

Likewise, the Fifth Circuit pointed out that more recent precedents suggest that *Hudson*'s "opt-out" notice procedures should no longer be considered adequate to protect members of a mandatory bar from impermissible expenditures. Pet. App. at 39. The Fifth Circuit again reiterated *Keller*'s "increasingly wobbly, moth-eaten foundations" but nevertheless applied *Keller* and its adoption of the *Hudson* standard as the most applicable precedent, rather than applying more recent but contextually different precedents. *Id.*

No issues lurk in this case. Jurisdiction and the justiciability of the issues are clearly established, and this case is not simply about correcting the misapplication of a correctly stated rule. There are no issues of fact that would prevent this Court from reaching the First Amendment issues presented, and those issues are not bound up in the specific facts of the case. In addition, the Court would not benefit from further development of these issues in the lower courts—decisions from those courts and this one have drawn *Lathrop* and *Keller* into question and demonstrate that they are ripe for reconsideration.

It is imperative to the protection of the First Amendment rights of attorneys in Texas and in all States with

mandatory bars that the Court intervene to clarify the First Amendment's application to mandatory bar schemes. In doing so, the Court should bring that area of constitutional jurisprudence into agreement with other, closely related areas on which the Court has more recently spoken. As the Fifth Circuit recognized, this case is an ideal means by which to do so.

II. The Court Should Require Mandatory Bar Associations to Implement an "Opt-In" Rule for Speech Subsidies.

Keller was wrongly decided in another way—it adopted a procedure from *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986), as the way a mandatory bar association could protect the rights of objecting attorneys. 496 U.S. at 16-17. Under *Hudson*, a union collecting compulsory fees from nonmembers had to provide "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." 475 U.S. at 310. But *Hudson*'s "opt-out" scheme has since been rejected.

"Courts do not presume acquiescence in the loss of fundamental rights." *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 312 (2012) (internal citation and quotation marks omitted). So *Hudson* required that unions adopt procedures to minimize the risk of a First Amendment infringement. *Id.* But, as this Court later recognized, *Hudson*'s opt-out system created a risk that the fees collected from objecting nonmembers would be used to further political and ideological ends. *Id.* The procedures *Hudson* blessed came "about more as a historical accident than through the careful application of

First Amendment principles," *id.*, and were not "carefully tailored to minimize the infringement of free speech rights," *id.* at 313 (internal citation and quotation marks omitted). After all, "a refund provided after the union's objectives had already been achieved would be cold comfort." *Id.* at 317.

Knox's discussion made clear that *Hudson*'s rule was rapidly falling out of favor with the Court. *See id.* at 314 ("our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate"); *see also* 321 ("our cases have substantially impinged upon the First Amendment rights of nonmembers"). And *Knox* narrowed *Hudson* and held that "when a public-sector union imposes a special assessment or dues increase, the union must provide a fresh *Hudson* notice and may not exact any funds from nonmembers without their affirmative consent." *Id.* at 322.

In overruling *Abood*, this Court expressed further concerns about opt-out schemes. Employees who suspect that a union has made a non-germane expenditure from mandatory dues bear a heavy burden. *Harris*, 573 U.S. at 637. Mustering "the resources to mount the legal challenge in a timely fashion" is an expensive proposition for objectors. *Id.* And, often, the *Hudson* procedures do not provide "sufficient information to gauge the propriety of the union's fee." *Janus*, 138 S. Ct. at 2482. So, even with help from attorneys and accountants, successfully objecting and obtaining a refund is "a laborious and difficult task." *Id.*

This Court took those concerns seriously, explaining that

> [n]either an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to

> collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. Rather, to be effective, the waiver must be freely given and shown by clear and compelling evidence. Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

Id. at 2486 (internal citations and quotation marks omitted).

Because opt-out procedures no longer satisfy the First Amendment, the Court should hold that a mandatory bar may extract funds from members for activities that do not pass exacting scrutiny only upon the clear, affirmative consent of those members sufficient to waive First Amendment rights. If lawyers can be compelled to associate with a bar that engages in such activities at all, this hybrid model is the minimum necessary protection of their speech rights.

* * *

The Court should grant a writ of certiorari. Stare decisis is no bar to reconsidering *Lathrop* and *Keller*. Both cases were poorly reasoned, announced an unworkable standard, and are inconsistent with later developments in compelled subsidization jurisprudence. No reliance interests justify retaining either case. This case is a clean vehicle to revisit *Lathrop* and *Keller*—and if it does so, the Court should only permit compelled subsidization of activities that pass *at least* exacting scrutiny, and expressly reject the improvement of legal services as an interest sufficient to justify compelled speech subsidization. Finally, consistent with its precedents, the Court

should apply an opt-in rule for the expenditure of funds on activities that fail at least exacting scrutiny.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2022