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 OF *AMICUS CURIAE* AMERICA FIRST LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus America First Legal Foundation is a public interest law firm providing citizens with representation in cases of broad public importance to vindicate Americans' constitutional and common law rights, protect their civil liberties, and advance the rule of law. Compelled speech regimes conducted under the authority of integrated bar associations threaten each of these values.

SUMMARY OF ARGUMENT

As this Court has recognized, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical." *Janus* v. *Am. Fed. of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2464 (2018) (citing A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950)). Yet this takes place every day, as mandatory bar associations use the mandatory fees paid by attorneys across the country to directly finance or otherwise support ideological arguments and activities to which many of its members are opposed.

[1] Rule 37 Statement: No attorney for any party authored any part of this brief, and no one apart from *amicus curiae* and its counsel made any financial contribution toward the preparation or submission of this brief. All parties have consented to the filing of this brief and were given notice of the intent to file this brief.

Importantly, the speech being forcibly subsidized does not merely touch on mundane procedural matters that bar members would simply rather not support. It covers core political issues and touches on "matters of profound 'value and concern to the public,'" thus occupying "'the highest rung of the hierarchy of First Amendment values' and merit[ing] 'special protection.'" *Janus*, 138 S. Ct. at 2476 (quoting *Snyder* v. *Phelps*, 562 U.S. 443, 452–53 (2011)). From advocacy against immigration enforcement to statements in support of abortion rights, the publicized views of state bars (often represented through litigation in the form of *amicus* briefs) speak directly to "controversial subjects" in the public sphere. *Ibid.* And that is why the right *not* to make that speech must be guarded just as much as the right to make it.

Moreover, many bar associations are compounding this injury by using bar fees to advocate for speech codes preventing dissenting views on certain topics such as "sexual orientation and gender identity"—topics specifically outlined by this Court to fall within the realm of public concern. *Id.* at 2476. In those scenarios, members must not only subsidize the bar's speech to which they object, but they are also forced to subsidize the efforts of the bar to outlaw their own speech moving forward. And the bar's attempts to regulate conduct and speech in this manner prevents attorneys from exercising fundamental rights that the rest of society are free to exercise.

Compounding the problem, both the bar speech and the speech codes touch on areas of religious belief.

Far from addressing only legitimate regulatory measures for supervising a state's bar, these are hot-button issues over which people of "good faith" are divided. *Obergefell* v. *Hodges*, 576 U.S. 644, 657 (2015). To press gang dissenting attorneys into paying for such speech offends the First Amendment twice over.

At the same time, as Petitioners have noted, such intrusions into the rights of bar members are wholly unnecessary. Pet. at 31–34. States without mandatory associations have no difficulty in regulating legal practice without compulsory bar membership. Not only do voluntary bar associations thrive without the subsidies of attorneys who disagree with the bar's agenda, the purposes of an integrated bar are all fulfilled in each of the states to have forgone a mandatory bar.

"'[C]ompelled funding of the speech of other private speakers or groups' presents the same dangers as compelled speech." *Harris* v. *Quinn*, 573 U.S. 616, 647 (2014) (quoting *Knox* v. *Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012)). The time has thus come to stop ideologically driven bar associations from using the power of the state to collect funds to advocate for political and legal positions to which their members object.

The petition should be granted.

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ARGUMENT

The freedom of speech "necessarily compris[es] the decision of both what to say and what not to say." *Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988). Consequently, mandatory bar associations should not be allowed to force attorneys to underwrite speech they would not say. Even worse, the bar association speech is often something those same attorneys are contending against in their professional capacity. Making attorneys finance the arguments against them and their clients is anathema not only to the First Amendment but also to the rule of law. This is just one example of the "practical problems and abuse" that compelled speech creates. *Janus*, 138 S. Ct. at 2460. No wonder this Court has recognized that the precedential foundation for mandatory bar associations—*Abood* v. *Detroit Bd. of Ed.*, 431 U.S. 209 (1977)—was "poorly reasoned." *Janus*, 138 S. Ct. at 2460.

I. Mandatory Bar Associations Violate The First Amendment By Compelling Objecting Members To Subsidize (Increasingly) Ideological Causes.

As Petitioners explain, this case involves a mandatory bar association using "coerced funds to support an extensive array of highly ideological and controversial activities." Pet. at 1. But if anything, Petitioners may have understated the ideological actions of the Texas Bar Association.

For example, just this past June, the Bar recommended requiring "Implicit Bias" training for all Texas attorneys. State Bar of Texas, *Task Force on Diversity, Equity, and Inclusion, June 2021 Report*, at 17, https://www.texasbar.com/AM/Template.cfm?Section=Meeting_Agendas_and_Minutes&Template=/CM/ContentDisplay.cfm&ContentID=53666. There has been a focus on such controversial training since the former President of the Texas Bar Association spoke out against the Black Lives Matter organization a few years ago. See Trey Apffel, *Taking Action on Diversity and Inclusion*, Executive Director's Page, Sept. 2020, https://www.texasbar.com/AM/Template.cfm?Section=articles&Template=/CM/HTMLDisplay.cfm&ContentID=51122. As part of the backlash that called for the President's removal, the Bar has made a commitment to even more contentious programing moving forward. Debra Cassens Weiss, *Texas bar president's comments about Black Lives Matter bring calls for resignation*, ABA JOURNAL (July 13, 2020), https://www.abajournal.com/news/article/texas-bar-presidents-comments-about-black-lives-matter-bring-calls-for-resignation. These ideological and controversial initiatives continue within the association even though the Board of Directors recently made changes—because of this case—to stop the Bar's support for outside lobbying or legislative activities. See *The Texas Bar Journal*, January 2022, at 8, https://lsc-pagepro.mydigitalpublication.com/publication/?m=21412&i=732181&p=8&ver=html5.

This situation is hardly limited to Texas, though. Bar associations across the country regularly engage in political speech, the promotion of identity-based

groups, and seeking to move the law (whether though litigation or lobbying) on controversial topics such as immigration and abortion. These advocacy issues are not "germane" to the regulation or improvement of the bar—as they must be under this Court's precedent, *Keller* v. *State Bar of Cal.*, 496 U.S. 1, 13 (1990)—yet they continue.

Abortion rights is among the most contentious topics that can be advocated by a state bar. In Wisconsin, for example, the state bar has fought against "*legislation* prohibiting health plans from funding abortions." See *Jarchow* v. *State Bar of Wisconsin*, 140 S. Ct. 1720, 1720 (2020) (Thomas, J., dissenting from denial of certiorari) (emphasis added). This clearly falls outside of *Keller*'s safe harbor for bar association activity.

Another popular area for bar advocacy is sexual orientation and gender identity issues. The State Bar of Arizona, for instance, has a Sexual Orientation and Gender Identity Council devoted to advocating for LGBT rights. State Bar of Arizona, Advisory Groups, https://www.azbar.org/for-lawyers/communities/advisory-groups/sexual-orientation-and-gender-identity-council/. Relatedly, the most recent issue of the Idaho Bar Association's publication has an article advocating for abolishing gender designations on public identity documents and promoting the use of personal pronouns that do not correspond with a traditional understanding of the English language. Casey Parsons, *Gender Designations on Public Identity Documents: To Amend or Abolish?*, 64 The Advocate 11/12 (Nov/Dec 2021), at 40–42, https://isb.idaho.gov/member-services/communications-public-relations/advocate/. No matter

one's view on those topics, they are matters of public debate on which there are diverse viewpoints. Indeed, this Court specifically recognized "sexual orientation and gender identity" as topics on the "highest rung" of the First Amendment's hierarchy. *Janus*, 138 S. Ct. at 2476. Thus, objecting attorneys have a right not to speak in favor of those topics. *Riley*, 487 U.S. at 796–97.

The promotion of race or gender quotas within bar programming is common as well. For example, the "Business Law Section of The Florida Bar recently adopted a policy regulating the composition of faculty at section-sponsored continuing legal education programs. Subject to certain exceptions, the policy impose[d] quotas requiring a minimum number of 'diverse' faculty * * * *" *In re: Amendment to Rule Regulating Florida Bar 6-10.3*, 315 So. 3d 637, 637 (Fla. 2021). Because the policy defined diversity along the lines of "race, ethnicity, gender, sexual orientation, gender identity, disability, and multiculturalism," the Florida Supreme Court *sua sponte* intervened to prohibit such policies. *Ibid.*

And there are also *mere* political viewpoints espoused by mandatory bar associations concerning topics such as judicial selection or campaign finance reform. In Oklahoma, for example, the bar has advocated for overturning this Court's decision in *Citizens United* v. *FEC*, 558 U.S. 310 (2010). See Pet. for Certiorari, No. 21-779, *Schell* v. *Chief Justice & Justices of the Okla. Sup. Ct.* (U.S. 2021), at 6. Setting aside the merits of *Citizens United*, it is an issue that deeply divides the ideological landscape. Indeed, it is so

politically charged that multiple individuals were willing to accept the consequences of protesting inside this Court at oral argument. While individuals are free to disagree with this Court's ruling(s), a great number of bar members agree with *Citizens United*. And those attorneys cannot be forced to subsidize the chorus of protests coming from a bar association to which they are forced to belong.[2]

The same may be said of bar association efforts to regulate firearms more heavily. See, e.g., Daniel Rivero, *Florida Bar Committee Issues New Recommendations For Gun Control Laws*, WLRN (May 17, 2018), https://www.wlrn.org/news/2018-05-17/florida-bar-committee-issues-new-recommendations-for-gun-control-laws. Or to enforce immigration laws less. See, e.g., *Governor Signs Undocumented Attorney Bill*, The Florida Bar (June 1, 2014) (noting the Florida Bar's decision to waive its policy that an individual show proof of citizenship or immigration status to sit for the bar examination), https://www.floridabar.org/the-florida-bar-news/governor-signs-undocumented-attorney-bill/. To be sure, many attorneys support these efforts (or at least do not mind if their money funds them). But many attorneys take the opposite view and object to subsidizing the advancement of these increasingly ideological topics.

Compounding the problem, the ideological speech from bar associations—whether in the form of bar

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[2] The Wisconsin State Bar Association has advanced related arguments regarding judicial campaign reform.

publications, *amicus* briefs, or policy programming from the organization—is often antithetical to the religious beliefs of members press ganged into supporting it with their dues. This only reinforces the point that ideological speech by state bar associations, paid for by the dues of objecting attorneys, is contrary to the First Amendment and dangerous to the rule of law.

II. Mandatory Bar Associations Further Transgress The First Amendment By Limiting Free Speech Under The Guise Of Attorney Regulation.

Unfortunately, bar associations have not stopped with promoting certain lightning-rod social issues—they are now seeking to incorporate them into their attorney regulating role. The bar's concerns for issues of sexual orientation and gender identity are now animating calls for restricting attorney speech regarding such topics under the banner of preventing discrimination. State bar associations are thus not only compelling speech, they are also preventing it as well.

This is most clearly seen in the American Bar Association's Model Rule 8.4(g). In theory, the model rule prohibits harassment or discrimination based on protected classes; in practice, it is specifically designed to prohibit "verbal conduct * * * that manifests bias or prejudice toward others." Comment, Rule 8.4(g), ABA Model Rules of Professional Conduct. In other words, the rule is meant to stop any speech that could be construed as merely disapproving of other individuals.

This may include speech challenging same-sex marriage, sex reassignment surgeries, or even immigration reform—after all, any such speech would be against the interests of individuals falling within those topics. The rule also extends to any "conduct related to the practice of law" which can even include "social activities" such as attorney happy hours or debate society events.

As many have pointed out, this rule violates the First Amendment's Free Speech Clause and Free Exercise Clause because it discriminates against conservative and religious viewpoints on these issues of public concern (such as marriage and gender identity). See, e.g., Josh Blackman, *ABA Model Rule 8.4(g) in the States*, 68 CATH. U. L. REV. 629, 630 (2019); Eugene Volokh, *A Nationwide Speech Code for Lawyers?*, YouTube.com (May 2, 2017), https://www.youtube.com/watch?v=AfpdWmlOXbA. In essence, it creates a speech code that directly chills the viewpoints of dissenting voices in the bar. And these speech codes short-circuit debate on matters of conscience and public importance.

Nevertheless, state bar associations across the country have been quick to advocate for this rule. Indeed, many (including the Texas Bar) have expended significant resources in considering whether to adopt the rule, with several states already concluding that they should do so in at least some form. See Blackman, *ABA Model Rule 8.4(g) in the States*, 68 CATH. U. L. REV. at 630 (noting approval by Maine, New Mexico, Pennsylvania, and Vermont); Committee Report, *COSAC Proposal to Amend Rule 8.4(g) of the New York*

Rules of Professional Conduct, New York City Bar (June 4, 2021), https://nysba.org/app/uploads/2021/03/COSAC-Report-on-Rule-8.4g-FINAL-Approved-by-HOD-June-12-2021.pdf; David Lee, *Texas State Bar Defies Attorney General on Anti-Bias Rule*, Courthouse News Service (Sept. 10, 2020), https://www.courthousenews.com/texas-state-bar-defies-attorney-general-on-anti-bias-rule/ (noting the continued study by the Bar of ABA Model Rule 8.4(g)).

The promotion of such speech codes by bar associations—which were traditionally committed to the freedom of speech—is surprising when done by voluntary associations. Allowing mandatory bars to do the same is astonishing. But it is doubly problematic when much of the targeted subject of the speech codes deals with topics such as same-sex marriage and gender identity issues. These are matters of public importance that attorneys regularly fight against in court, especially because of religious convictions held by either the attorneys or their clients. That means the forced subsidies imposed by mandatory bar associations are not just violating the freedom of speech but also the freedom of religion.

As this Court has held, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas* v. *Johnson*, 491 U.S. 397, 414 (1989). That is especially critical when the topic at issue is a view that "long has been held—and continues to be held—in good faith by reasonable and sincere

people here and throughout the world." *Obergefell*, 576 U.S. at 657. Indeed, *Obergefell* explicitly mentioned that the First Amendment rights of individuals who disagree with same-sex marriage must be "given proper protection" by government. *Id.* at 679. But government involvement through mandatory bar associations that support only one side of the debate fails to provide the protection this Court promised.

III. The First Amendment Violations By Mandatory Bar Associations Are Wholly Unnecessary.

Finally, although states certainly have an interest in the regulation of attorneys in their jurisdiction, that end may "be achieved through means significantly less restrictive of associational freedoms." *Janus*, 138 S. Ct. at 2465 (citation omitted). Indeed, as states with voluntary bar associations demonstrate, the legitimate goals of a state may be accomplished without requiring objecting attorneys to pay fees to organizations promoting political agendas with which the attorneys disagree. In other words, there is simply no need to violate both the free speech and free exercise rights of the attorneys who dissent from the bar's viewpoint.

There are currently 20 states—Arkansas, California, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New York, Ohio, Pennsylvania, Tennessee, and Vermont—that regulate

attorneys, and require them to pay for the costs of their own regulation, without compelling membership in a bar association that may engage in political or ideological speech. And in those states, the bar association numbers are extremely high anyway. In Delaware, for instance, approximately 90% of the attorneys are members of the state bar.

At the same time, there is no evidence that the use of forced subsidies from members of the bar for the speech made by those organizations produces better regulation of the legal profession or higher quality legal services. See Leslie C. Levin, *The End of Mandatory State Bars?*, 109 GEO. L. J. ONLINE 1, 18 (2020) ("[T]here is no reason to think that states with mandatory state bars are better at administering lawyer regulation than states with voluntary bars."); *ibid.* ("Mandatory state bars are also unlikely to demonstrate that bar dues payments should be compelled because these organizations help produce *better* laws governing lawyers * * * * [T]here is little evidence that mandatory bars are significantly more likely than voluntary state bars to propose lawyer regulation that benefits the public.").

In short, there is no doubt that states can accomplish their legitimate regulatory interests in a manner that is significantly less restrictive of associational freedoms than by forcing attorneys to finance a bar association's political and ideological speech.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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