No. _____

# Supreme Court of the United States

SCHUYLER FILE,

*Petitioner*,

v.

KATHLEEN BROST, IN HER OFFICIAL CAPACITY AS PRESIDENT OF THE STATE BAR OF WISCONSIN, LARRY MARTIN, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE STATE BAR OF WISCONSIN, AND CHIEF JUSTICE PATIENCE ROGGENSACK AND JUSTICES ANN WALSH BRADLEY, ANNETTE ZIEGLER, REBECCA BRADLEY, REBECCA DALLET, BRIAN HAGEDORN, AND JILL KAROFSKY, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN SUPREME COURT,

*Respondents*.

*On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Seventh Circuit*

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

A "mandatory" or "integrated" bar is "an association of attorneys in which membership and dues are required as a condition of practicing law in a State." *Keller v. State Bar of California*, 496 U.S. 1, 5 (1990). In *Keller*, this Court held that mandatory bar dues could be used to "constitutionally fund activities germane to" the goals of "regulating the legal profession and improving the quality of legal services." *Id.* at 13–14. *Keller* built on this Court's decision in *Lathrop v. Donohue*, 367 U.S. 820 (1961), which held that mandatory bar membership is "no different from" "union-shop agreements." *Id.* at 842 (plurality opinion). *Keller* thus adopted wholesale the "germaneness" test of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which governed "whether, consistent with the First Amendment, agency-shop dues of nonunion public employees could be used to support political and ideological causes of the union." *Keller*, 496 U.S. at 9.

In *Janus v. AFSCME, Council 31*, however, this Court overruled *Abood*, holding that it "was poorly reasoned," had "led to practical problems and abuse," and was "inconsistent with other First Amendment cases." 138 S. Ct. 2448, 2460 (2018). As Chief Judge Sykes recognized below, "[w]ith *Abood* overruled, the foundations of *Keller* have been shaken," and "[t]he tension between *Janus* and *Keller* is hard to miss." App. 11.

The question presented is: Whether membership in a mandatory state bar is subject to heightened scrutiny under the First Amendment.

## LIST OF ALL PROCEEDINGS

United States Court of Appeals for the Seventh Circuit, No. 20-2387, *File v. Brost et al.*, judgment entered April 29, 2022.

United States District Court for the Eastern District of Wisconsin, No. 19-cv-1063, *File v. Kastner et al.*, judgment entered June 29, 2020.

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## DECISIONS BELOW

The Eastern District of Wisconsin's order granting the motion to dismiss is reported at 469 F. Supp. 3d 883 (E.D. Wis. 2020), and reprinted in the Appendix ("App.") at App. 14-28.

The Seventh Circuit's opinion affirming is reported at 33 F.4th 385 (7th Cir. 2022), and reprinted at App. 1-13.

## STATEMENT OF JURISDICTION

Petitioner timely files this petition from the Seventh Circuit's April 29, 2022, decision. This Court has jurisdiction under 28 U.S.C. § 1254(a).

## PERTINENT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The relevant statutory and bar provisions are set out at App. 39-119.

## INTRODUCTION

The question presented by this case is whether the government can force individuals to speak and associate in state-prescribed ways as a condition of living and working in modern society. This Court has already answered that question: "Freedom of association plainly presupposes a freedom not to associate." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2463 (2018) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)) (cleaned up). In *Janus*, this Court freed non-union public employees from state-compelled speech and association. Lawyers, however, can still be subjected to compelled membership in mandatory state bars, which use compelled dues and the strength of their (forced) membership to advance social and political agendas that many members oppose. This case presents the Court with an ideal opportunity to make its First Amendment jurisprudence consistent by imposing heightened scrutiny on these mandatory associations too.

As this Court has explained, "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors." *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001). Yet this is precisely what the respondents do to lawyers in Wisconsin: they force them on pain of fines, suspension, and ultimately the loss of their livelihood, to join and pay money to the State Bar of Wisconsin, which uses their affiliation and dollars to speak on controversial public issues. Petitioner, a lawyer in Wisconsin, does not wish to associate with or subsidize the State Bar of Wisconsin.

But because he cannot practice his profession otherwise, he is forced to pay dues and belong to an organization he does not want to support.

None of this is constitutional, and the Court's recent precedents recognize as much. In *Janus*, this Court overruled *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which had upheld compelled union fees for public employees conditioned only on a malleable and often meaningless requirement that the union's activities be "germane" to its goals. The Court in *Janus* explained that *Abood* "was poorly reasoned," "led to practical problems and abuse," and had "been undermined by more recent decisions." 138 S. Ct. at 2460.

*Abood* was the only basis for this Court's application of the lax "germaneness" standard to mandatory bar membership in *Keller v. State Bar of California*, 496 U.S. 1, 13–14 (1990). *Keller* and its predecessor decision, *Lathrop v. Donohue*, 367 U.S. 820 (1961), refused to apply heightened First Amendment scrutiny to mandatory bar membership as long as compelled dues were used for activities purportedly "germane" to the bar's purposes. In practice, as in the union context, this relaxed standard had little bite. The subject matter of bar associations' activities—the law itself—is substantially related to practically all matters of public concern, and individual lawyers faced high hurdles—and little reward—in challenging the use of their dues. Thus, lawyers in 30-plus states across the country have been forced to associate with private organizations that use millions in mandatory dues to express their own views.

This compelled membership violates the First Amendment. Not only are lawyers like the petitioner forced to associate with organizations whose views they disagree with, those organizations use the strength of their forced membership to add weight to their ideological speech—deepening the First Amendment infringements. A strong argument could be made that *Keller* and *Lathrop* do not give mandatory bars a license to use dues for any political or ideological speech—"germane" or not—particularly after *Janus*, because *Keller* held that bar associations should be subject to "the same constitutional rule with respect to the use of compulsory dues" as the one governing public unions. *Keller*, 496 U.S. at 13. But the courts of appeals have unanimously rejected such arguments. Below, Chief Judge Sykes, speaking for a unanimous Seventh Circuit panel, instructed the petitioner to "seek relief from the Supreme Court" to address the obvious "tension between *Janus* and *Keller*." App. 11, 13.

If the lower courts are right about *Keller* and *Lathrop*, then those decisions are wrong. Because mandatory bar membership compels speech and association in violation of core First Amendment rights, it is subject to strict scrutiny. *E.g.*, *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018) ("*NIFLA*"). At a minimum, mandatory bar membership must pass the "exacting scrutiny" "applied in other cases involving significant impingements on First Amendment rights." *Janus*, 138 S. Ct. at 2483. "Under 'exacting' scrutiny," a law "must serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 2465 (cleaned up). To

be sure, States have an important interest in ensuring the ethical practice of professions in our society, including the legal profession. *See N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 512–13 (2015). But identifying a legitimate interest is only the first step in heightened scrutiny; it is not a reason to disregard scrutiny entirely. And this case, which arose on a motion to dismiss, does not require the Court to decide whether Wisconsin can satisfy heightened scrutiny. Instead, the Court can simply hold that germaneness is a "deferential standard that finds no support in [this Court's] free speech cases." *Janus*, 138 S. Ct. at 2480. The First Amendment requires the application of, at minimum, exacting scrutiny to mandatory bar membership.

To the extent they hold otherwise, *Keller* and *Lathrop* should be overruled. As lower courts have applied them, they have given the wrong answer to a question of great practical importance: can a mandatory bar condition a person's livelihood on compelled speech and association? Most mandatory bars could not satisfy exacting scrutiny, given that about 20 States have fully regulated the legal profession *without* compelling association in a private organization. Wisconsin's State Bar does not even regulate attorneys; it is a pure trade association. Nor is the germaneness standard workable, as the "line between chargeable and nonchargeable [bar] expenditures has proved to be impossible to draw with precision." *Janus*, 138 S. Ct. at 2481. And reliance interests in *Keller* and *Lathrop* are minimal. Not only have States been on notice for years that mandatory bar membership is likely unconstitutional, several

States have reformed their bar structures accordingly with relative ease.

"At stake here is the interest of the individual lawyers of Wisconsin in having full freedom to think their own thoughts, speak their own minds, support their own causes and wholeheartedly fight whatever they are against, as well as the interest of the people of Wisconsin and, to a lesser extent, the people of the entire country in maintaining the political independence of Wisconsin lawyers." *Lathrop*, 367 U.S. at 874 (Black, J., dissenting). As long as courts continue to apply *Keller*'s germaneness test, this Court's precedents will "sanction a device where men and women in almost any profession or calling can be at least partially regimented behind causes which they oppose" and put "into goose-stepping brigades." *Id.* at 884 (Douglas, J., dissenting). "Those brigades are not compatible with the First Amendment." *Id.* at 885. This Court's review is necessary.

## STATEMENT

### A. Legal framework

The Wisconsin State Bar has a long history before this Court. It was the subject of this Court's first mandatory bar association case, *Lathrop v. Donohue*, 367 U.S. 820 (1961). There, the appellant argued "that he [could not] constitutionally be compelled to join and give support to an organization which has among its functions the expression of opinion on legislative matters and which utilizes its property, funds and employees for the purposes of influencing legislation and public opinion toward legislation." *Id.* at 827 (plurality opinion). A plurality held that the State Bar could "require that the costs of improving the

profession" "should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity." *Id.* at 843. The Court considered this only "a question of compelled financial support of group activities, not with involuntary membership in any other aspect." *Id.* at 828. And it refused to reach the appellant's free speech claim, finding "that on this record [it had] no sound basis for deciding appellant's constitutional claim insofar as it rest[ed] on the assertion that his rights of free speech [we]re violated by the use of his money for causes which he oppose[d]." *Id.* at 845. By declining to decide that question, the Court permitted mandatory bar dues to be spent on a range of political and ideological activities.

Justices Black and Douglas each dissented. Justice Black said that "the same reasons that led me to conclude that it violates the First Amendment for a union to use dues compelled under a union-shop agreement to advocate views contrary to those advocated by the workers paying the dues under protest lead me to the conclusion that an integrated bar cannot take the money of protesting lawyers and use it to support causes they are against." *Id.* at 871 (dissenting opinion). Justice Douglas agreed, emphasizing that "the First Amendment applies strictures designed to keep our society from becoming moulded into patterns of conformity which satisfy the majority." *Id.* at 885.

About fifteen years later, the Court reached the compelled speech question in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), holding that public employees "may constitutionally prevent [a union's]

spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." *Id.* at 234. The Court emphasized that "a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment." *Id.* It made no difference "that the appellants [were] compelled to make, rather than prohibited from making, contributions for political purposes": "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Id.* at 234–35. But the Court held that funding "the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes" was still constitutional if "germane" to the union's "duties as collective-bargaining representative." *Id.* at 235.

Thirty years later, in *Keller v. State Bar of California*, 496 U.S. 1 (1990), the Court applied *Abood* to mandatory state bars, finding "a substantial analogy between the relationship of the State Bar and its members" "and the relationship of employee unions and their members." *Id.* at 12. Thus, the Court applied "the same constitutional rule with respect to the use of compulsory dues": "[t]he State Bar may therefore constitutionally fund activities germane to" its interests "in regulating the legal profession and improving the quality of legal services" "out of the mandatory dues of all members." *Id.* at 13–14. The Court did not reach petitioners' claim "that they [could not] be compelled to associate with an

organization that engages in political or ideological activities beyond those for which mandatory financial support is justified under the principles of *Lathrop* and *Abood*." *Id.* at 17.

*Abood* has now been overruled. This Court questioned the opt-out scheme applicable to mandatory union dues in *Knox v. SEIU, Local 1000*, 567 U.S. 298, 310–14 (2012). Then this Court criticized *Abood* extensively in *Harris v. Quinn*, 573 U.S. 616 (2014), holding that because of its "questionable foundations," *Abood* would be "confine[d]" "to full-fledged state employees." *Id.* at 645, 647. And in *Janus*, the Court overruled *Abood*, explaining that "the compelled subsidization of private speech seriously impinges on First Amendment rights." 138 S. Ct. at 2464; *id.* at 2486. The Court found *Abood* to be "an 'anomaly' in our First Amendment jurisprudence," as it "fail[ed] to perform the 'exacting scrutiny' applied in other cases involving significant impingements on First Amendment rights." *Id.* at 2483. The Court also emphasized that segregating "chargeable and nonchargeable union expenditures" does not work in practice. *Id.* at 2481.

**B. Facts**

The State Bar of Wisconsin is the mandatory professional association for lawyers in Wisconsin. App. 1. Active membership in the State Bar is "a condition precedent to the right to practice law" in the State. Wis. S. Ct. R. 10.01(1); *see also id.* R. 10.03(5) (establishing the dues requirement); *id.* R. 23.02(1) ("No person may engage in the practice of law in Wisconsin" "unless the person is currently licensed to practice law in Wisconsin by the Wisconsin Supreme Court and is an active member of the State Bar of

Wisconsin."). The State Bar provides a narrow and optional dues deduction for "[e]xpenditures that are not necessarily or reasonably related to the purposes of regulating the legal profession or improving the quality of legal services." *Id.* R. 10.03(5)(b).

"Failing to pay bar dues can result in serious consequences." App. 3. "Attorneys who fail to pay dues by the annual due date and remain delinquent after notice and the expiration of a specified grace period are automatically suspended." *Id.* (citing Wis. State Bar By-Laws art. I, § 3(a)). "Suspended lawyers cannot practice law," and "additional sanctions," including "full license suspension," can follow. App. 3. And lawyers who engage in the unauthorized practice of law can be sent to jail and fined. Wis. Stat. § 757.30.

Funded by attorneys' mandatory dues, the State Bar undertakes many activities. It sponsors conferences and continuing education seminars, advocates for the profession, files amicus briefs, and publishes books and a monthly magazine. App. 33-35. It even sponsors cruises. *Travel and Vacation Discounts,* STATE BAR OF WISCONSIN.[1] And it engages in extensive discussion of the law, including advocacy for certain views of the law, advocacy for potential new laws, and advocacy on public issues connected to the law. App. 33-35. Often this advocacy involves controversial issues; the State Bar has published and given an award to a prominent transgender activist, for instance. App. 34. "When the State Bar lobbies on general policy items of importance to the legal

[1] https://www.wisbar.org/aboutus/membership/membershipandbenefits/Pages/Travel-Discounts.aspx (last visited Aug. 27, 2022)

profession, it does so on behalf of the entire membership, purporting to represent the views of all members." App. 33-34 (cleaned up). In a recent legislative session, the State Bar spent over half a million dollars lobbying the Wisconsin legislature. *Id.* Unsurprisingly, "[a] member satisfaction survey conducted for the [Wisconsin] bar in 2008 revealed that a majority of the respondents—57 percent—would vote for a voluntary association if given the opportunity to do so." *In re Petition for a Rule Change to Create a Voluntary State Bar of Nebraska*, 841 N.W.2d 167, 172 (Neb. 2013).

As one example of the State Bar's ideological activities, its leadership recently issued a statement—featured prominently on the Bar's website—stating:

> Black Americans suffer from police brutality and crippling fear caused by systemic racism and implicit bias that is ingrained in our legal system, law enforcement institutions, and countless other facets of American life. This is unacceptable. Black Lives Matter. . . . As members of the legal profession and as citizens striving to create a more just society, we stand with Black Lives Matter protesters demanding change in our justice system and in the other institutions inflicted by systemic racism and implicit bias.[2]

In line with these views, the State Bar plans to engage in advocacy about "legislation related to race equity

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[2] Jill M. Kastner et al., *Racial Equity of Black Americans: It's Time to Step Up*, State Bar of Wisconsin (2020), https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=12&Issue=11&ArticleID=27820.

and justice for the next legislative session" and seek to "require[] Wisconsin lawyers [to] receive elimination of bias/diversity and inclusion training."[3]

What the State Bar does *not* do is act as the formal regulatory authority over Wisconsin lawyers. App. 15. It does not administer the bar exam; the Board of Bar Examiners does that. App. 33 (citing Wis. S. Ct. R. Ch. 40). That Board is also the state agency responsible for ensuring compliance with the Wisconsin Supreme Court's rules for continuing legal education. *See* Wis. S. Ct. R. ch. 31. The Office of Lawyer Regulation is the state agency of the judicial branch responsible for investigating compliance with the Rules of Professional Conduct governing attorneys in Wisconsin. *See* Wis. S. Ct. R. 21.02. And the Wisconsin Supreme Court "is the ultimate enforcement authority for the lawyer regulatory system—including the licensing rules, bar-membership requirement, and the ethics code—and imposes discipline for violations." App. 3-4 (citing Wis. S. Ct. R. 21.09).

Though the State Bar occasionally proposes amendments to the ethical codes governing lawyers, it has no special authority on that front.[4] Other individuals and entities far more often bring petitions to change the rules governing bar admission or ethical practices.[5] Indeed, the last time the Wisconsin

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[3] *Racial Equity: It's Time to Step Up*, State Bar of Wisconsin, https://www.wisbar.org/aboutus/diversity/Pages/Racial-Equity.aspx (last visited July 13, 2022).

[4] *E.g.*, In the Matter of the Petition to Amend Supreme Court Rule Chapter 31 and Chapter 10.03 [15–05].

[5] *E.g.*, In the Matter of Petition to Amend Board of Bar Examiners Rule 6.02 [17–10] (private attorney); In the matter of

Supreme Court ordered a thorough review of the entirety of the professional code, it entrusted the task to a specially created committee of its own choosing rather than to the State Bar.[6]

### C. Proceedings below

Petitioner Schuyler File has been a member of the State Bar of Wisconsin since December 2017, when he moved to Wisconsin for a new career opportunity. App. 31. He previously practiced in Indiana, where he was not forced to join the state bar. App. 31. Because of Wisconsin's rules, he must join the State Bar of Wisconsin and fund its speech or face suspension from the practice of law and sanctions. App. 32. When this suit was filed, his bar dues were $258. *Id.* Faced with the coercive effect of Wisconsin law on his speech, petitioner sought pre-enforcement relief under the First Amendment and 42 U.S.C. § 1983 against the officers of the State Bar and the justices of the Wisconsin Supreme Court. *See* 28 U.S.C. § 1343.

The district court granted respondents' motions to dismiss. First, the district court found that petitioner had standing and that the Supreme Court justices did not have immunity. App. 17-22. The district court explained that "there is no dispute that the plaintiff has standing to seek declaratory and injunctive relief against the [State] Bar defendants based on the

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amending Supreme Court Rules pertaining to referees and attorney discipline [19–04] (Office of Lawyer Regulation); In the Matter to Amend SCR 31.02 and 31.05 Relating to Continuing Legal Education Requirements [16–06] (Board of Bar Examiners).

[6] *See* In the Matter of the Petition for Amendment to Supreme Court Chapter 20 – Rules of Professional Conduct for Attorneys [04–07].

likelihood that he would suffer a future injury." App. 18. "If the plaintiff stopped paying his mandatory bar dues, his membership in the State Bar would be automatically suspended," and he "would be forbidden from practicing law." *Id.* Rejecting the Supreme Court respondents' contention that they did not inflict any injury, the court held that it was "substantially likely" that they would "impose discipline" on petitioner if he "stops paying his dues." App. 20. The court held that "a plaintiff does not have to risk arrest or incurring other forms of harm in order to have standing to obtain an injunction to prevent that harm from coming to pass." *Id.* The court also held that the Supreme Court justices do not have immunity from suit. App. 21-22.

On the merits, the district court found that "[t]he relevant facts are undisputed." App. 22. The district court acknowledged that "the [Supreme] Court's reasoning in *Janus* might in some respects support the argument that mandatory bar membership is unconstitutional," but concluded that *Keller* required dismissal because "a lower court is not free to deem Supreme Court precedent defunct even if a later case demolishes the intellectual underpinnings of the earlier case." App. 26

The Seventh Circuit affirmed. First, it agreed that petitioner has standing "based on the threat of injury—suspension of his right to practice law—if he were to refuse to pay bar dues." App. 5. Next, it agreed that the Supreme Court respondents did not have immunity because they "have been sued in their enforcement capacity": "This is a straightforward pre-enforcement suit seeking prospective relief enjoining the justices from enforcing the requirements of State

Bar membership and payment of compulsory dues." App. 8.

On the merits, the Seventh Circuit held that petitioner's "claim is squarely foreclosed by the Supreme Court's decision in *Keller*." App. 10. Yet the court agreed that "[t]he tension between *Janus* and *Keller* is hard to miss." App. 11. "*Keller* rests largely on *Abood v. Detroit Board of Education*, 431 U.S. 209, 235–36 (1977), which rejected a First Amendment challenge to a law requiring public employees to pay mandatory union dues." *Id.* But the Supreme Court "overruled *Abood* in *Janus*, holding that it 'was poorly reasoned,' had 'led to practical problems and abuse,' and was 'inconsistent with other First Amendment cases and ha[d] been undermined by more recent decisions.'" *Id.* (quoting *Janus*, 138 S. Ct. at 2460).

"With *Abood* overruled," the Seventh Circuit said, "the foundations of *Keller* have been shaken," and "*Keller* may be difficult to square with the Supreme Court's more recent First Amendment caselaw." App. 2, 11. But the court said it is "not our role to decide whether [*Keller*] remains good law." App. 11-12 "Only the Supreme Court can answer that question." App. 12. The court told petitioner that he "must seek relief from the Supreme Court." App. 13.

## REASONS FOR GRANTING THE WRIT

### I. This Court's precedents require applying at least exacting scrutiny to mandatory bar membership.

Mandatory bar membership entails a substantial infringement of First Amendment rights. Not only is a lawyer forced to associate with a private organization and contribute money used to fund that

organization's speech—which the lawyer often finds contrary to his own views—but also the bar uses forced membership to give weight and credence to its ideological messages. In this way, the State "use[s]" a dissenter as "an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Knox*, 567 U.S. at 324 (Sotomayor, J., concurring in judgment) (cleaned up). Compelled bar membership thus violates the individual's freedom of speech and association, and distorts society's marketplace of ideas—and its role in advancing truth.

Because compelled bar membership is a significant First Amendment intrusion, heightened scrutiny must apply. *Keller* and *Lathrop* could be read to prescribe heightened scrutiny for compelled support for ideological and political bar speech. Those decisions tie the standard for mandatory bars to public unions—and *Janus* now requires heightened scrutiny for compelled public union subsidies. But lower courts have rejected that reading, holding that *Keller* and *Lathrop*'s lax "germaneness" standard continues to govern. *See* App. 12-13.

If that is correct, *Keller* and *Lathrop* are wrong. Whatever interests mandatory bars purportedly advance, those interests should be adjudicated in the context of heightened scrutiny—not as excuses to decline to apply such scrutiny. The proper level of scrutiny is the one that applies broadly to core First Amendment infringements: strict. But at a minimum, this Court's jurisprudence requires applying exacting scrutiny to mandatory bar rules. This Court's review is urgently needed to vindicate consistent First Amendment analysis.

### A. Compelled integrated bar membership infringes significantly on First Amendment freedoms.

"The First Amendment creates 'an open marketplace' in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference." *Knox*, 567 U.S. at 309. "The government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves." *Id.* Thus, this Court has "held time and again that freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Janus*, 138 S. Ct. at 2463 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). "The right to eschew association for expressive purposes is likewise protected." *Id.*

When a State compels individuals "to voice ideas with which they disagree, it undermines" "our democratic form of government" and "the search for truth." *Id.* at 2464. More, "individuals are coerced into betraying their convictions." *Id.* As this Court has said, "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning." *Id.*

Listeners' rights are harmed too when the marketplace of ideas is distorted by government interference. *See Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("[T]he Constitution protects the right to receive information and ideas."); *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) ("[T]he right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and

political freedom."). When mandatory bars claim to speak for the entire profession, all of whom are members, they mislead listeners into thinking all attorneys agree on often controverted points. f

"[C]ompelled funding of the speech of other private speakers or groups presents the same dangers as compelled speech." *Harris*, 573 U.S. at 647 (cleaned up). A "significant impingement on First Amendment rights occurs when" individuals "are required to provide financial support for" private organizations that may advocate for "many positions . . . that have powerful political and civic consequences." *Janus*, 138 S. Ct. at 2464 (cleaned up). As Thomas Jefferson explained, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical." *Id.* (quoting A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950)).

Wisconsin's State Bar is a "compelled association" that infringes on First Amendment freedoms in all the above ways. *Keller*, 496 U.S. at 13. Wisconsin compels lawyers to join, associate with, and pay dues to the State Bar, which uses those dues to regularly engage in politically and ideologically controversial speech and activities. It lobbies for legislation, funds racially charged diversity initiatives, sponsors one-sided CLEs and publications, and requires members to fund its magazine, among many other activities. *See supra* at 10-11. In short, the State Bar uses coerced membership to both fund and give weight to its own speech on matters of public concern, even though that membership has no choice in the matter. Because the First Amendment protects "[t]he right to eschew association for expressive purposes," *Janus*, 138 S. Ct.

at 2463, compelled State Bar membership significantly burdens petitioner's rights.

Because this compelled association is more than a mere exaction, dismissing compelled bar membership claims as no different from attacks on use of tax monies misses the mark.[7] First, this Court rejected similar arguments in *Janus*. Second, both the Constitution and this Court's precedents establish a difference between general taxation and other government exactions. *E.g.*, U.S. Const. art. I, § 8, cl. 1; *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 36 (1922). Third, petitioner does not merely write a check to the government taxing authority; he is forced to *join* a *private* entity and associate with it. *See Keller*, 496 U.S. at 12-13. The State Bar then uses both his monies and his forced membership to promote its own agenda. When a mandatory bar speaks, "part of its expressive message is that its members stand behind its expression. The membership is part of the message." *McDonald v. Longley*, 4 F.4th 229, 245–46 (5th Cir. 2021); *see* App. 33-34 ("the State Bar lobbies . . . 'on behalf of the entire membership'"). Fourth, the implications of this revisionist theory are startling. The State, for example, could presumably force every person to join "one of the major political parties" (*Janus*, 138 S. Ct. at 2464) as a condition to being employed, or receiving a tax break, or driving a car. Or the State could force individuals to "volunteer" at

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[7] *See generally* William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 Harv. L. Rev. 171 (2018). To be fair, this article distinguishes between "compelled contributions" and "compelled speech or compelled membership," comparing only *subsidies* to taxation. *Id.* at 176. But mandatory bar dues entail compelled membership and thus compelled speech too.

Planned Parenthood as a condition of living in modern society, for what is time but money—and, on the revisionist theory, taxation? All this shows the infirmity of dismissing compelled membership victims as tax cranks.

Thus, mandatory bar membership implicates core First Amendment rights because it compels speech and association. Except in this area, the Court's precedents suffer only minor confusion as to how such compelled speech and association claims are adjudicated. At a minimum, laws that compel association are subjected to exacting scrutiny: the government must establish "a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Janus*, 138 S. Ct. at 2465 (quoting *Knox*, 567 U.S. at 310). In *Janus*, *Knox*, and *Harris*, the Court characterized this as "exacting scrutiny." *Janus*, 138 S. Ct. at 2477, 2483; *Harris*, 573 U.S. at 651; *Knox*, 567 U.S. at 310.

Yet, at the same time, the Court has "questioned whether that test provides sufficient protection for free speech rights." *Janus*, 138 S. Ct. at 2465; *see Harris*, 573 U.S. at 648 ("it is arguable that [this] standard is too permissive"). Indeed, the more appropriate test is the one that generally applies to compelled speech laws and other infringements of core First Amendment rights: strict scrutiny. *E.g.*, *NIFLA*, 138 S. Ct. at 2371. If anything, strict scrutiny is more appropriate here than in *Janus*, since that case involved public employees, who traditionally have received less First Amendment protection. *See* 138 S. Ct. at 2491–97 (Kagan, J., dissenting).

In any event, the relevant level of scrutiny must be at least "exacting." Under that standard, the government must show that its mandatory state bar requirement "serve[s] a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Janus*, 138 S. Ct. at 2465.

### B. To the extent that *Keller* and *Lathrop* applied a deferential standard to compelled membership claims, they are wrong.

Citing this Court's precedents, the courts below declined to apply exacting scrutiny to the Wisconsin State Bar's mandatory scheme. Those courts refused even to let petitioner's claim out of the gate, reasoning that it was "squarely foreclosed by the Supreme Court's decision in *Keller*," which "held that an integrated state bar" may compel membership and "constitutionally fund activities germane to [the] goals" of "regulating the legal profession and improving the quality of legal services." App. 10. A careful reading of *Keller* suggests that it may not have opened the door for mandatory state bars to use member dues to fund political and ideological activities, no matter if they asserted that those activities were "germane" to the bar's goals. That reading is bolstered by *Keller*'s holding that mandatory bar associations should be subject to "the same constitutional rule" as the one governing public employees and unions. 496 U.S. at 13. The rule for public unions is now (at least) exacting scrutiny. But the lower courts have rejected this reading and refused to apply heightened scrutiny to mandatory bars, even while acknowledging that *Janus*

eviscerates any reasoned foundation for the relaxed germaneness inquiry. If they are right, then *Keller* is wrong. Only this Court can fix the fundamental inconsistency in its First Amendment precedents, which inexplicably offer less protection to private employees who happen to be lawyers than even to regulated public employees.

First, a strong argument could be made that applying exacting scrutiny to mandatory bar compelled speech and association claims does not require overruling *Keller* and *Lathrop*. *Lathrop* declined to "decide whether [a lawyer's] constitutional rights of free speech are infringed if his dues money is used to support the political activities of the State Bar." 367 U.S. at 844 (plurality opinion). And *Keller*, referring to "the State's interest in regulating the legal profession and improving the quality of legal services," held that:

> The 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.

496 U.S. at 13–14. And *Keller* carried over "the same constitutional rule" as the one applied in the union context. 496 U.S. at 13. Particularly reading *Keller* in light of *Harris* and *Janus*, "activities of an ideological nature" "fall outside" *Keller*'s areas of permissible activity. *Id.* at 14. In line with this reading, the Court in *Harris* described *Keller* as holding "that members of th[e] bar could not be required to pay the portion of bar dues used for political or ideological purposes." 573 U.S. at 655; *accord Johanns v. Livestock*

*Marketing Ass'n*, 544 U.S. 550, 558 (2005) (explaining that *Keller* "invalidated the use of the compulsory fees to fund speech on political matters").

Despite the plausibility of this understanding, Justices of this Court have understood *Keller* to "h[o]ld" that "the State Bar may constitutionally fund activities germane to its goals" even if those activities are political or ideological. *Jarchow v. State Bar of Wisconsin*, 140 S. Ct. 1720, 1720 (2020) (Thomas, J., dissenting from the denial of certiorari). Accordingly, they have understood that *Janus* contradicts *Keller*. For instance, at oral argument in *Janus*, Justice Sotomayor emphasized that a mandatory bar was "no different" than a union agency fee, as both "forc[e] the subsidization of private interests for a government purpose." Transcript of Oral Argument at 7, *Janus*, 138 S. Ct. 2448 (2018) (No. 16-1466). In an earlier case, Justice Breyer said that overruling *Abood* "would require overruling a host of other cases": "[i]t would certainly affect the integrated bar." Transcript of Oral Argument at 28, *Friedrichs v. Cal. Teachers Ass'n*, 578 U.S. 1 (2016) (No. 14-915). Justice Ginsburg reiterated the question, wondering "if *Abood* falls, then so do[es] our decision[] in *Keller* on mandatory bar association." *Id.* at 35. When one counsel suggested *Keller* was distinguishable, Justice Kagan disagreed, saying that *Abood* "is the way we look at mandatory fee cases": "Those cases start with *Abood*," they "say *Abood* is the framework," and they "decide the questions that they decided specifically within that framework." *Id.* "Now that *Abood* is no longer good law, there is effectively nothing left supporting our decision in *Keller*." *Jarchow*, 140 S. Ct. at 1720 (Thomas, J., dissenting from the denial of certiorari).

The lower courts too have universally read *Keller* and *Lathrop* as following *Abood* and providing a deferential standard for reviewing mandatory bar membership. The courts of appeal have spoken in one voice in asserting that only this Court can fix the mismatch between *Keller*/*Lathrop* and current First Amendment jurisprudence:

- "With *Abood* overruled, the foundations of *Keller* have been shaken. But it's not our role to decide whether it remains good law." App. 11-12 (Sykes, C.J.).
- "*Keller* established a germaneness test for the constitutionality of mandatory bar dues. *Janus* did not replace that longstanding test with exacting scrutiny, and the Supreme Court has yet to announce the impact of that decision on its holdings in *Keller* and *Lathrop*." *Schell v. Chief Just. & Justs. of Oklahoma Supreme Ct.*, 11 F.4th 1178, 1191 (10th Cir. 2021).
- "Although *Abood*'s rationale that *Keller* expressly relied on has been clearly rejected," "[w]e are a lower court, and we would be scorning [the Supreme Court's] clear directive if we concluded that *Keller* now prohibits the very thing it permitted when decided." *Crowe v. Oregon State Bar*, 989 F.3d 714, 725 (9th Cir. 2021) (cleaned up).
- "*Janus* did not overrule *Keller*'s bar mandate," "[a]nd only the Supreme Court can overrule its previous decisions. Until it does, we must follow *Keller*." *Taylor v.*

*Buchanan*, 4 F.4th 406, 410 (6th Cir. 2021) (Thapar, J., concurring).

- "[D]espite their increasingly wobbly, moth-eaten foundations, *Lathrop* and *Keller* remain binding." *McDonald v. Longley*, 4 F.4th 229, 243 n.14 (5th Cir. 2021) (Smith, J.) (cleaned up).

On these understandings, this Court must reconsider *Keller* and *Lathrop*. If those decisions require a deferential standard for claims challenging mandatory state bar membership and dues, they are wrong. *Keller* identified two "legitimate interests" supposedly justifying a bar's mandatory nature: "regulating the legal profession and improving the quality of legal services." 496 U.S. at 13. But identifying asserted interests—even legitimate ones—is not enough to satisfy exacting scrutiny. Instead, the government must show that a rule compelling membership "serve[s] a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Janus*, 138 S. Ct. at 2465 (cleaned up). And "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021) ("*AFPF*") (plurality opinion). "[E]ven a 'legitimate and substantial' governmental interest cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id.* at 2384 (majority opinion) (cleaned up). And "speech by the state bar is as likely as speech by unions to 'touch fundamental questions of . . . policy,' and more broadly to 'have powerful political and civic

consequences.'" Baude & Volokh, *supra*, at 196 (quoting *Janus*, 138 S. Ct. at 2464, 2476).

Yet rather than apply exacting scrutiny, *Keller* and *Lathrop* applied "a deferential standard that finds no support in [this Court's] free speech cases." *Janus*, 138 S. Ct. at 2480. Defenses of *Keller* that focus on the supposed interests advanced by mandatory bar membership miss the point. Those defenses skip the most significant parts of exacting scrutiny: is the asserted interest sufficiently important given the burdens on First Amendment rights, and are the government's means "narrowly tailored to th[at] interest"? *AFPF*, 141 S. Ct. at 2384. As shown below, the question presented has sustained importance in part because mandatory bars are unlikely to satisfy exacting scrutiny. But this case, which arose at the motion to dismiss stage, does not require the Court to resolve that question. *See, e.g.*, *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 800 (2017) ("[I]t is proper for the District Court to determine in the first instance whether strict scrutiny is satisfied.").

Instead, this case merely asks the Court to set the proper standard, the one that is mandated by its First Amendment precedents, which adequately protects core rights of free expression, and which equally vindicates workers' rights. The Court should grant certiorari and hold that compelled integrated bar membership is subject to, at minimum, exacting scrutiny.

## II. *Keller* and *Lathrop* should be overruled.

Because at least exacting scrutiny should be applied to mandatory integrated bar membership, *Keller* and *Lathrop* were demonstrably erroneous to

the extent they held otherwise. Thus, the decision below relying on those decisions must be reversed, unless stare decisis requires this Court to continue permitting States to exact millions of dollars each year in compelled membership dues. It does not.

"[S]tare decisis is not an inexorable command" and is "at its weakest when [the Court] interpret[s] the Constitution." *Janus*, 138 S. Ct. at 2478 (cleaned up). Indeed, it "applies with perhaps least force of all to decisions that wrongly denied First Amendment rights." *Id.* This Court has identified several factors relevant to stare decisis, including the quality of the prior decision's reasoning, "its consistency with other related decisions," "developments since the decision was handed down," the decision's ongoing importance, "the workability of the rule it established," and "reliance on the decision." *Id.* at 2478–79.

As shown above, if *Keller* and *Lathrop* declined to apply exacting scrutiny to mandatory bar membership, their reasoning is wrong and has no foundation without *Abood*. Their rule is also inconsistent with subsequent jurisprudence, particularly *Janus*, which explained that a "deferential" germaneness standard "finds no support in [the Court's] free speech cases." 138 S. Ct. at 2480. As shown next, failing to apply exacting scrutiny here also has significant negative outcomes, is not workable, and does not implicate cognizable reliance interests. *Keller* and *Lathrop* are now "First Amendment 'anomal[ies]'" and should be overruled. *Id.* at 2484.

### A. *Keller* and *Lathrop* give the wrong answer to a recurring question of great importance.

First, *Keller*'s and *Lathrop*'s error matters in the "real-world" because it leads to wrong results—and massive infringements of First Amendment rights. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J., concurring in part). As this case shows, keeping those decisions on the books closes the courthouse doors to hundreds of thousands of lawyers who find their ability to earn a livelihood conditioned on supporting causes they fundamentally disagree with. Millions (if not billions) of dollars in compelled membership dues are coerced and spent. If heightened scrutiny applied, many mandatory bars would likely have to end their compelled speech and association practices.

It is "exceedingly rare" for a mandatory association to pass exacting scrutiny. *Knox*, 567 U.S. at 310. As discussed, the State would have to show that its interest is not just legitimate but "compelling" given the burdens imposed on speech. *Id.* And it would have to show that its interest "cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* Most mandatory bars like Wisconsin's will be unable to make those demanding showings.

As noted, *Keller* asserted two interests: "regulating the legal profession and improving the quality of legal services." 496 U.S. at 13. The relationship between mandatory bars and these interests is dubious to start: "The idea seems to be, contrary to all human experience, that if power be vested in this" "outside body, holding themselves aloof from their profession, they will somehow become inspired with a high

professional sentiment or sense of duty and cooperation and will unselfishly exercise their majority power for the good of their profession and the public." *Lathrop*, 367 U.S. at 882–83 (Douglas, J., dissenting) (cleaned up).

In any event, the State Bar of Wisconsin does not provide the formal ethics regulatory system for the State. At most, the State Bar sometimes offers amendments to the ethical code, but it is one of many organizations and parties that do so. *See supra* at 12. The State Bar plays no role in disciplining bar members. Those responsibilities lie with the Board of Bar Examiners (admissions; continuing legal education) and Office of Lawyer Regulation (misconduct and grievances). *See supra* at 11-12. These alternative regulatory agencies reflect a conscious choice by the Wisconsin Supreme Court to "assure the public that lawyer discipline, bar admission, and regulating competence through continuing legal education would be conducted for the benefit of the public, independent of elected bar officials." *In re State Bar of Wis.*, 169 Wis. 2d 21, 35–36 (1992) (Abrahamson, J., dissenting). Thus, it is doubtful that *Keller*'s asserted interests apply at all to integrated bars like Wisconsin's. Indeed, when the Wisconsin Supreme Court initially refused to force lawyers to join a mandatory bar, it explained that "[t]here is no crisis in any important matter." *In re Integration of the Bar*, 25 N.W.2d 500, 503 (Wis. 1946).

It is even more doubtful that compelling membership in the Wisconsin State Bar is narrowly tailored to any interest in the legal profession. Wisconsin itself assigns most legal profession regulation to actual state entities. About 20 States do

not have a mandatory bar, App. 33, and there is no evidence that the legal profession in nearly half the country is subpar. *See* Leslie C. Levin, *The End of Mandatory State Bars?*, 109 Geo. L.J. Online 1, 18–19 (2020). "That so many other" jurisdictions regulate the legal profession without compelling association "suggests that the [State] could satisfy its [purported] concerns through a means less restrictive" of expressive activity. *Holt v. Hobbs*, 574 U.S. 352, 368–69 (2015); *accord Janus*, 138 S. Ct. at 2466 (noting voluntary union membership in 28 states as a less restrictive alternative). These less restrictive means avoid the problem of forcing lawyers to associate with ideologically and politically controversial speech. Further, even if the State Bar regulated lawyers, a less restrictive means of fulfilling its goals would be to allow lawyers to opt-in to paying dues for any political or ideological speech.

Thus, the error of *Keller* and *Lathrop* matters because it forces lawyers en masse to support "hated views." *Lathrop*, 367 U.S. at 875 (Black, J., dissenting). As Justice Black explained, "[t]he mere fact that a lawyer has important responsibilities in society does not require or even permit the State to deprive him of those protections of freedom set out in the Bill of Rights for the precise purpose of insuring the independence of the individual against the Government." *Id.* at 876. And as long as *Keller* and *Lathrop* remain good law, they remain dangerous to "men and women in almost any profession or calling," who "can be at least partially regimented behind causes which they oppose." *Id.* at 884 (Douglas, J., dissenting). *Keller* and *Lathrop* should be overruled.

### B. *Keller* and *Lathrop* are not workable.

Second, *Keller* and *Lathrop*'s scheme for protecting attorneys' First Amendment rights is no more workable than *Abood*'s identical scheme for protecting public-sector employees' rights. *See Janus*, 138 S. Ct. at 2481. As with union expenditures, the line between germane and nongermane bar association expenditures "has proved to be impossible to draw with precision." *Id.*

As noted, the State Bar does not regulate lawyers, Instead, virtually everything it does takes a position on the law and therefore on matters of public concern. The recipients of its awards, the topics and authors it selects for books and articles, the topics and speakers it selects for continuing legal education seminars and conferences—everything about the State Bar requires it to take positions as it speaks and publishes about the law. *See supra* 10-11. And because the legal profession is connected to so many public policy issues, nearly all political and ideological speech can plausibly be described as "germane" to the practice of law.

Thus, in practice, the germaneness inquiry has become "not merely generous," but "meaningless." *Kingstad v. State Bar of Wis.*, 622 F.3d 708, 725 (7th Cir. 2010) (Sykes, J., dissenting from denial of rehearing en banc); *id.* at 719 (majority opinion) (comparing inquiry to rational basis review). To the extent that abandoning judicial review might be "workable" in some sense, it also "effectively eviscerate[s] [any] limitation on the use of compulsory fees to support [bar associations'] controversial political activities." *Knox*, 567 U.S. at 320.

Moreover, forcing individual attorneys to challenge the germaneness line-drawing does not workably protect for the First Amendment values at stake. In *Janus*, this Court recognized that "[o]bjecting employees" "face a daunting and expensive task if they wish to challenge" "chargeability determinations." 138 S. Ct. at 2482. In most cases, an attorney wishing to protect his First Amendment rights would need to "launch[] a legal challenge and retain[] the services of attorneys and accountants" to "determine whether these numbers are even close to the mark"—all to save a few dollars on mandatory bar dues. *Id.* *Janus* held that this scheme—the cornerstone of *Keller*'s dues deduction process, 496 U.S. at 15–17—was unworkable. 138 S. Ct. at 2482. It is as unworkable here as it was there. Indeed, the entire framework for an opt-out system of dues deductions is dubious after *Janus*. *See id.* at 2486 (requiring that "employees clearly and affirmatively consent before any money is taken from them").

Thus, *Keller* and *Lathrop* do not workably adjudicate First Amendment claims.

### C. *Keller* and *Lathrop* do not implicate cognizable reliance interests.

Finally, no reliance interest justifies maintaining *Keller* and *Lathrop* despite their outlier status and direct conflict with *Janus*. First, that "over 20 States have by now enacted statutes authorizing [mandatory bar] provisions" "is not a compelling interest for stare decisis": "If it were, legislative acts could prevent [the Court] from overruling [its] own precedents." *Janus*, 138 S. Ct. at 2485 n.27 (cleaned up). Second, that mandatory bars "may view [annual dues] as an entitlement does not establish the sort of reliance

interest that could outweigh the countervailing interest that [attorneys] share in having their constitutional rights fully protected." *Id.* at 2484 (cleaned up). Third, as discussed, *Keller* "does not provide "a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced." *Id.* (cleaned up).

In any event, no serious reliance interests are at stake. If this Court overrules *Keller* and *Lathrop*, "States can keep their [bar] systems exactly as they are—only they cannot" force attorneys to engage in compelled speech and association. *Janus*, 138 S. Ct. at 2485 n.27. "In this way, these States can follow the model of" many other States, noted above. *Id.*

Some mandatory-bar States have already transitioned to a more constitutional framework. California, for instance, limited its State Bar's mission to regulating the legal profession and created a new voluntary association for other activities.[8] California's voluntary association has 100,000 members, even more than New York's voluntary bar membership of 70,000.[9] And Nebraska too has split its bar association into a mandatory component limited to regulatory activities and a voluntary component that performs other functions. Its Supreme Court held that "this separation between mandatory and voluntary dues can be readily accomplished." *See In re Petition for a Rule Change*, 841 N.W.2d at 179; *see id.*

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[8] Lyle Moran, *California Split: 1 year after nation's largest bar became 2 entities, observers see positive change*, ABA Journal (Feb. 4, 2019), https://bit.ly/3cszMFa; *see id.* (noting that *Janus* "has played a key role in sparking more urgent nationwide discussions about the long-term future of mandatory state bars").
[9] *See id.*

at 178–79 ("By limiting the use of mandatory assessments to the arena of regulation of the legal profession, we ensure that the Bar Association remains well within the limits of the compelled-speech jurisprudence of the U.S. Supreme Court").

Thus, notwithstanding the possibility of some "transition costs in the short term," any reliance interests in *Keller* and *Lathrop* cannot save them. *Janus*, 138 S. Ct. at 2485. These temporary "disadvantages" cannot compare to "the considerable windfall that [mandatory bars] have received" for decades. *Id.* at 2486. As in *Janus*, "[i]t is hard to estimate how many billions of dollars have been . . . transferred to [mandatory bars] in violation of the First Amendment." *Id.* "Those unconstitutional exactions cannot be allowed to continue indefinitely." *Id. Keller* and *Lathrop* should be overruled. Review is necessary.

## III. This case is an ideal vehicle.

This case presents an ideal vehicle to resolve the pure legal question about the level of scrutiny applicable to mandatory state bar membership. Like *Janus*, this case is an appeal of a lower court decision affirming dismissal of a First Amendment claim. The Court of Appeals rested its decision on this Court's failure to reconsider *Keller* after *Janus*. No factual dispute matters. As Justice Thomas has explained, "any challenge to our precedents will be dismissed for failure to state a claim, before discovery can take place," and a record would provide no "benefit to our review of the purely legal question whether *Keller* should be overruled." *Jarchow*, 140 S. Ct. at 1721 (dissenting from the denial of certiorari). More, Wisconsin's State Bar started this line of cases in

*Lathrop* after it chose to make its bar mandatory, so compelled membership in that bar squarely raises the ongoing validity of this Court's precedents. Finally, even if the State wanted to try to satisfy exacting scrutiny, that argument could be resolved on remand. Only this Court can clarify the appropriate standard of review. This Court's intervention is necessary to ensure that neutral, consistent principles of law govern First Amendment jurisprudence.

## CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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