No. 22-95

IN THE
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 United States Court of Appeals for the Seventh Circuit

AMICUS CURIAE BRIEF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., IN SUPPORT OF PETITIONER

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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.

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INTEREST OF THE AMICUS CURIAE[1]

The National Right to Work Legal Defense Foundation, Inc. is a nonprofit, charitable organization formed to provide free legal assistance to individual employees subject to compulsory unionism. To this end, the Foundation has recently supported several major cases involving employees' First Amendment rights to refrain from subsidizing unions and their expressive activities. They include *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018); *Harris v. Quinn*, 573 U.S. 616 (2014); and *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012). In each case, the Court held schemes that compel employees to subsidize union speech are subject to at least exacting constitutional scrutiny. *Janus*, 138 S. Ct. at 2465; *Harris,* 573 U.S. at 648–49; *Knox*, 567 U.S. at 310. The Foundation submits this amicus brief to urge the Court to apply the same level of constitutional scrutiny to schemes that compel attorneys to subsidize the speech of bar associations.

SUMMARY OF ARGUMENT

The question on which Petitioners seek review is "[w]hether membership in a mandatory state bar is subject to heightened scrutiny under the First Amendment." Pet. (i). The Court should answer that question in the affirmative to resolve the tension between *Keller v. State Bar of California*, 496 U.S. 1 (1990), which

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[1] Pursuant to Supreme Court Rule 37.2, all parties received timely notice of the Foundation's intent to file an amicus curiae brief and consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than amicus curiae made a monetary contribution to its preparation or submission.

principally relied on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and *Janus*, which overruled *Abood*. In *Keller*, the Court held that mandatory bar dues are "subject to the same constitutional rule" that applies to compulsory union fees, namely, the now-overruled deferential standard set forth in *Abood*. 496 U.S. at 13. Given that the Court found *Abood*'s standard unconstitutional in *Janus*, the Court should not allow it to live on in other contexts.

The Court should also grant the petition in order to clarify that compelled subsidization of speech is subject to strict scrutiny.

ARGUMENT

A. The Court Should Resolve the Tension Between *Janus* and *Keller*.

In *Janus*, the Court unequivocally overruled *Abood*, deeming its deferential analysis to be "unworkable." *Janus*, 138 S. Ct. at 2481–82. It would be incongruous for the Court to continue to apply *Abood*'s discarded and unworkable analysis to compelled subsidies for bar associations and their expressive activities.

1. In *Janus*, the Court not only overruled *Abood*, but found its "line between chargeable and nonchargeable union expenditures has proved to be impossible to draw with precision." *Id.* at 2481; *see also Harris*, 134 S. Ct. at 2633 (citing examples); *Bd. of Regents v. Southworth*, 529 U.S. 217, 231–32 (2000) (recognizing the Court "ha[s] encountered difficulties in deciding what is germane and what is not" under *Abood*). Thus, the Court jettisoned *Abood*'s standard in favor of at least an exacting scrutiny analysis. *Janus*, 138 S. Ct. at 2465, 2486.

Absent this Court's review, *Abood*'s unworkable analysis will continue to govern the constitutionality of mandatory bar dues. The Court in *Keller* analogized bar dues to compulsory union dues. 496 U.S. at 13–15. The Court therefore applied *Abood*'s analysis to mandatory dues by finding a distinction between activities germane to "regulating the legal profession" and "improving the quality of legal services"—which lawyers could be forced to subsidize—and activities "having political or ideological coloration which [is] not reasonably related to the advancement of such goals"—which lawyers could not be forced to subsidize. *Id.* at 13–14 (citations omitted).

The analogy between mandatory bar dues and mandatory union dues is just as apt today as it was when *Keller* was decided. The application of *Abood*'s deferential analysis, however, is not. The Court now subjects mandatory union dues to at least exacting constitutional scrutiny. *Janus*, 138 S. Ct. at 2465. Under the logic of *Keller*, the same scrutiny should now be applied to mandatory bar dues.

2. The Seventh Circuit construed *Keller* to require it to apply *Abood* to the instant case. Pet. App. 11–13. The application of *Abood*'s standard through *Keller* is not unique to this case. Lower courts have consistently interpreted *Keller* to implement *Abood*'s standard, notwithstanding *Janus*. *See* Pet. App. 11–13; *Schell v. Chief Just. & Just. of the Okla. Sup. Ct.*, 11 F.4th 1178, 1190–91 (10th Cir. 2021); *Crowe v. Or. State Bar*, 989 F.3d 714, 724–25 (9th Cir. 2021); *Taylor v. Buchanan*, 4 F.4th 406, 408–09 (6th Cir. 2021); *McDonald v. Longley*, 4 F.4th 229, 246 (5th Cir. 2021).

These cases directly conflict with the Court's decisions in *Janus, Harris*, *Knox*, and other cases that ap-

plied exacting or greater scrutiny to instances of compelled speech and association. The lower courts' interpretation of *Keller* makes this case just as much an "'anomaly' in [the Court's] First Amendment jurisprudence," as was *Abood*. *Janus*, 138 S. Ct. at 2483 (citing *Harris*, 573 U.S. at 627; *Knox*, 567 U.S. at 311). To restore the consistency of its jurisprudence, the Court should overrule *Keller* and require that mandatory bar dues be subject to at least exacting scrutiny.

3. *Abood*'s analysis is just as unworkable in the mandatory bar dues context as it is applied to compulsory union fees. Almost any bar association activity could arguably relate to "improving the quality of legal services." *Keller*, 496 U.S. at 13. That vague standard gives bar associations great leeway to charge dissenting attorneys for political and ideological activities, as the examples the Petition lists illustrate. *See* Pet. 10–13.

The State Bar of Wisconsin does not even have a formal role in regulating the legal profession, and yet attorneys are forced to subsidize this expressive association. Pet. 12–13. The Court should grant review to reverse the Seventh Circuit's decision to apply *Abood*'s defunct analysis and require the courts to apply at least exacting First Amendment scrutiny to compelled subsidies for a bar association and its speech

In *Janus*, the Court noted that by "overruling *Abood*, we end the oddity of privileging compelled union support over compelled party support and bring a measure of greater coherence to our First Amendment law." 138 S. Ct. at 2484. However, if *Janus* is limited to union-dues cases, rather than all compelled association cases, *Abood*'s "oddity" will live on through *Keller*.

4. The Court overturns a constitutional decision if it is badly reasoned and wrongly decided, conflicts with other precedents, has proven unworkable, and is not supported by valid reliance interests. *See Janus*, 138 S. Ct. at 2478–79; *Citizens United v. FEC*, 558 U.S. 310, 362–63 (2010); *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009).

Janus outlined why *Abood* met this standard. The Court should grant the petition to apply its reasons for overruling *Abood* to overrule *Keller*. First, the Court recognized that *Abood* was poorly reasoned. Specifically, *Abood* failed to consider the employees' First Amendment rights with respect to compulsory "agency fees," incorrectly relying on the Court's decisions in *Railway Employees v. Hanson*, 351 U.S. 225 (1956), and *Machinists v. Street*, 367 U.S. 740 (1961), which upheld private-sector "agency fee" schemes. *Janus*, 138 S. Ct. at 2479. Second, as discussed, *infra*, *Abood*'s deferential standard is not supported by the Court's other compelled speech cases. *Id.* at 2480, 2483–84. Third, *Abood*'s standard is unworkable in practice. *Id.* at 2482–83. Even the respondents in *Janus* "agree[d] that *Abood*'s chargeable-nonchargeable line suffers from 'a vagueness problem,' that it sometimes 'allows what it shouldn't allow,' and that 'a firm[er] line c[ould] be drawn.'" *Id.* at 2481 (quoting Tr. of Oral Arg. 47–48). Finally, the Court recognized any reliance interests were misplaced, in part, because *Abood*'s standard was not "clear or easily applicable" and unions had been on notice regarding the Court's "misgivings about *Abood*." *Id.* at 2484. The Court's decision in *Janus* further bolsters this latter point with respect to *Keller*.

For all of these reasons, the Court should take this opportunity to bring consistency to its compelled

speech precedents and explicitly overrule *Abood* in all contexts.

B. The Court Should Apply Strict Scrutiny to This and All Compelled Speech Cases.

The Court also should grant review to resolve what standard of scrutiny applies to compelled subsidies for speech. In prior cases, the Court found it unnecessary to resolve whether exacting scrutiny or strict scrutiny should apply. *See Janus*, 138 S. Ct. at 2465; *Harris*, 573 U.S. at 648. However, in both *Janus* and *Harris*, the Court recognized that strict scrutiny may be required. The Court in *Janus* recognized that "cases involving compelled speech and association have . . . employed exacting scrutiny, *if not a more demanding standard*." *Id.* at 2483 (emphasis added). In *Harris,* the Court recognized that exacting scrutiny may be "too permissive" a standard for evaluating compelled subsidies for union speech. 573 U.S. at 648.

Given the lack of a clear standard with respect to compelled subsidies, the Court should take this opportunity to explicitly pronounce a strict scrutiny standard for all First Amendment compelled subsidy cases.

Strict scrutiny requires "the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United*, 558 U.S. at 340 (quoting *FEC v. Wisc. Right to Life*, 551 U.S. 449, 464 (2007) (Roberts, C.J., joined by Alito, J.)). When speech and associational rights are implicated, the Court often applies strict scrutiny.

For example, the Court subjects government-compelled speech to strict scrutiny. *See, e.g.*, *Riley v. Nat'l Fed'n of the Blind of N.C. Inc.*, 487 U.S. 781, 789 (1988) (requiring a restriction to be "narrowly tailored"). In campaign finance cases which concerned

laws regulating political expenditures and contributions, the Court held that "[l]aws that burden political speech are 'subject to strict scrutiny.'" *Citizens United*, 558 U.S. at 340 (quoting *Wisc. Right to Life*, 551 U.S. at 464).

Similarly, the Court applies strict scrutiny when the government restricts expenditures for "issue advocacy," which is speech concerning public issues that does not mention a political candidate. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) (citations omitted) (requiring the government interest to be "compelling" and any abridgment of rights "closely drawn"); *Buckley v. Valeo*, 424 U.S. 1, 44–45 (1976) (applying the same scrutiny "applicable to limitations on core First Amendment rights of political expression").

Logically, the Court should apply the same strict scrutiny to situations where, as here, the government compels individuals to pay for issue advocacy and other speech on matters of public concern.

C. In the Alternative, the Court Should Subject All Compelled Subsidies for Speech to At Least Exacting Scrutiny.

1. At the very least, a law compelling individuals to subsidize a bar association's speech should be subject to exacting constitutional scrutiny.

In *Knox*, the Court recognized that "exacting scrutiny" is the minimum standard required when a scheme compels funding of speech and association. 567 U.S. at 309–10; *see also United States v. United Foods, Inc.*, 533 U.S. 405, 409–10 (2001); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). *Knox* invalidated a union's "Emergency Temporary Assessment

to Build a Political Fight-Back Fund" imposed on non-members without proper notice. 567 U.S. at 304–05. The Court pointed out that in *United Foods* it had "made it clear that compulsory subsidies for private speech are subject to exacting First Amendment scrutiny." *Id.* at 310. In striking down that union scheme, *Knox* applied a two part test that "there must be a comprehensive regulatory scheme" which "serve[s] a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms," and the compulsory fees must be "a 'necessary incident' of the larger regulatory purpose . . . ." *Id.* (quoting *Roberts*, 468 U.S. at 623; *United Foods*, 533 U.S. at 414).

Harris picked up where *Knox* left off. Asking whether agency fees to support a union could constitutionally be extracted from in-home care workers, this Court stated, "we explained in *Knox* that an agency-fee provision imposes 'a significant impingement on First Amendment rights,' and this cannot be tolerated unless it passes 'exacting First Amendment scrutiny.'" 573 U.S. at 647–48 (citing *Knox*, 567 U.S. at 310). *Harris* did not decide whether a more than exacting level of scrutiny was appropriate, but held that "no fine parsing of levels of First Amendment scrutiny is needed because the agency-fee provision here cannot satisfy even the test used in *Knox*." *Id.* at 648. The provision did "not serve a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Id.* at 648–49. (alteration in original) (citations omitted).

In *Janus*, this Court reaffirmed and expanded its analysis in *Knox* and *Harris*. In *Janus* the Court again held that agency fee requirements are subject to at

least exacting scrutiny "[b]ecause the compelled subsidization of private speech seriously impinges on First Amendment rights." 138 S. Ct. at 2464–65. The Court held agency fee requirements do not survive that scrutiny. *Id.* at 2465–78.

Given that the Court recognized in *Keller* that mandatory bar dues implicate similar concerns as union compulsory fees, the Court should apply the same scrutiny to this case as it did in *Janus*, *Harris*, and *Knox*.

2. In certain contexts, it is unclear whether exacting and strict scrutiny are distinct tiers. In some cases, the Court has used "strict scrutiny," and "exacting scrutiny," interchangeably, using the term "exacting scrutiny" when describing and employing strict scrutiny.

For example, in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), the Court noted the case involved a restriction on political expression, subject to the "exacting scrutiny" test used in *Meyer v. Grant*, 486 U.S. 414, 420 (1988). 514 U.S. at 346. But, in a footnote, the Court called the test applied in *Meyer* "strict scrutiny." *Id.* at 346 n.10. Later the Court defined the exacting scrutiny test the same as the test for strict scrutiny: "When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *Id.* at 347; *see also, e.g.*, *First Nat'l Bank of Boston*, 435 U.S. at 786; *Buckley*, 431 U.S. at 44–45.

This confusion provides a fertile playground for litigants in the lower federal and state courts in an area where uniformity in decision making—and therefore in the protection of First Amendment rights of speech

and association—is vital to the sound administration of justice.

At minimum, the Court should grant the petition in order to clarify and apply its exacting scrutiny standard to ensure its standards are uniformly and correctly applied in the lower courts.

CONCLUSION

For the reasons stated above, and those stated by Petitioner, the Court should grant the petition.

Respectfully submitted,

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