No. 22-95

In The Supreme Court of the United States

SCHULYLER 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, REBECCA DALLET, BRIAN HAGEDORN, AND JILL KAROFSKY, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN SUPREME COURT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF GOLDWATER INSTITUTE AS AMICUS CURIAE 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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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Goldwater Institute ("GI") is a non-partisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom, and individual responsibility. GI does this through litigation, research papers, editorials, policy briefings, and forums. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates and occasionally files amicus briefs when it or its clients' objectives are directly implicated.

Among GI's principal goals is defending the right of freedom of association and freedom of speech against compulsory membership in state bar associations. Toward that goal, GI is currently representing the plaintiffs in *Crowe v. Oregon State Bar*, No. 3:18-cv-02139-JR (D. Or., filed Dec. 13, 2018); *Schell v. Darby*, No. 5:19-cv-00281-HE (W.D. Okla., filed Mar. 26, 2019); *Boudreaux v. Louisiana State Bar Ass'n*, No. 2:19-cv-11962 (E.D. La., filed Aug. 1, 2019); and *Pomeroy v. Utah State Bar*, No. 2: 21-cv000219-JNP-DAO (D. Utah., filed Apr. 13, 2021). GI has a strong interest in the outcome in this case and the expertise

[1] Pursuant to Rules 37.3(a) and 37.6, counsel for amicus affirms that all parties received timely notice and consented to the filing of this brief, that no counsel for any party authored it in whole or in part, and that no person or entity, other than amicus, its members, or counsel, made a monetary contribution for its preparation or submission.

and experience to provide the Court with assistance in its consideration of the petition.

SUMMARY OF ARGUMENT

The Seventh Circuit Court of Appeals held that the petitioner's First Amendment claims were "squarely foreclosed" by *Keller v. State Bar of California*, 496 U.S. 1 (1990). This is plainly wrong and at odds with other circuits.

The First Amendment guarantees the right to freely speak and to freely associate. These guarantees necessarily encompass the right to *not* speak and the right to *not* associate. But the Seventh Circuit approved the Wisconsin State Bar's infringement of each of these fundamental First Amendment rights without analyzing the two rights. It did so on the basis of *Keller*—which it said requires the rejection of the petitioner's claim that the bar's use of compelled dues amounts to compelled speech ***and*** the petitioner's claim that Wisconsin's integrated bar results in an unjustified compelled association.

In *Keller*, this Court held that a mandatory integrated bar could use compelled dues to engage in even non-germane activities so long as the bar provided a "sufficient" refund procedure. But that holding was wrong. *Keller* failed to properly value the free speech rights of attorneys, as this Court effectively acknowledged in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018).

Janus held that agency fee agreements violated the First Amendment's free speech guarantees, and in doing so, *explicitly* overruled its 1977 decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which upheld union shop agreements against a First Amendment free speech challenge. The *Janus* Court said *Abood* was "poorly reasoned" and "inconsistent with other First Amendment cases," and had "been undermined by more recent decisions." 138 S. Ct. at 2460.

It was the now-repudiated *Abood* decision on which the *Keller* Court based its decision. *Keller*, 496 U.S. at 12, held that there is a "substantial analogy" between mandatory integrated bars and the union shop agreements at issue in *Abood*. Now that *Abood* is gone, what does that mean for *Keller*?

This petition presents this Court with an occasion to answer that question and re-examine *Keller* in light of *Janus*. Multiple lower courts, two Justices on this Court, and the dissenters in *Janus*[2] have already noted that *Janus* cast doubt on *Keller*'s viability. But only this Court can definitively say what impact *Janus* has on related precedent. It is imperative that this Court answer that question.

Notably, *Keller* expressly declined to answer the question of whether mandatory bar associations violate the freedom of association. 496 U.S. at 17. The

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[2] *Jarchow v. State Bar of Wis.*, 140 S. Ct. 1720 (2020) (Thomas and Gorsuch, JJ., dissenting from denial of cert.); *Janus*, 138 S. Ct. at 2498 (Kagan, J., dissenting); *McDonald*, 4 F.4th at 243; *Crowe*, 989 F.3d at 724–25, 727; *Schell*, 11 F.4th at 1190.

Seventh Circuit also did not consider and reject the free association claim on the merits, but simply, and wrongly, rejected the claim as categorically foreclosed by precedent. This creates a circuit split, as the other circuits have held that the question remains open. *McDonald v. Longley*, 4 F.4th 229, 244 (5th Cir. 2021); *Crowe v. Or. State Bar*, 989 F.3d 714, 724–25, 727 (9th Cir. 2021); *Schell v. Chief J. & JJ. of the Okla. Sup. Ct.*, 11 F.4th 1178, 1194–95 (10th Cir. 2021). But even in those circuits, the merits of the question have yet to be reached.[3]

This Court now has the chance to reaffirm what it said in *Keller* and provide lower courts with needed guidance on how to address these free association claims. This Court made clear in *Janus*, 138 at 2477–78, that the default rule is that exacting scrutiny applies to free association claims. As this case presents a free association claim, this Court should make clear that exacting scrutiny applies, even if a different level of scrutiny would have applied under *Keller*.

ARGUMENT

I. *Janus* substantially clarifies how *Keller* should be interpreted.

In *Keller*, this Court held that a mandatory bar association could use the compulsory dues to fund

[3] The plaintiffs that GI represents in each of the bar-challenge actions referenced above assert both the compelled speech claim and the freedom of association claim.

non-germane speech—even political or ideological speech—so long as the bar employed adequate procedures to refund the payments to dissenting members, thereby protecting them against the compulsory subsidization of speech with which they disagree. The Court rested this decision on the similarities between mandatory bar associations and mandatory payments to public sector unions as addressed in *Abood*.

Keller explained that mandatory bars are "substantial[ly] analog[ous]" to public sector unions. 496 U.S. at 12. In fact, it went as far as to term a bar's duty to spend compulsory dues on only germane activity as the bars' "*Abood* obligation." *Id.* at 17. This Court then held that a bar could meet that *Abood* obligation in the *same way* that public sector unions could—by adopting refund procedures. *Id*.

That equivalence of public sector unions and mandatory bar associations in now more important after *Janus*, which makes clear that exacting scrutiny is required for all infringements on free association. It logically follows that the same exacting scrutiny should apply to state laws that require attorneys to join and fund state bar associations.

Yet this Court did not mention *Keller* in its *Janus* decision, and lower courts are, of course, bound by *Agostini v. Felton*, 521 U.S. 203, 207 (1997), to continue applying this Court's precedents, even if they have been abrogated, until this Court expressly overrules them. Consequently, lower courts have struggled to

resolve how *Abood*'s overruling affects *Keller*'s applicability. *See*, *e.g.*, App. 11 ("[T]he foundations of *Keller* have been shaken."); *McDonald*, 4 F.4th at 243 n.14 ("*Janus* in particular, cast doubt on *Lathrop* and *Keller*."); *Schell*, 11 F.4th at 1190 ("Although *Janus* suggests *Keller* is vulnerable to reversal by the Supreme Court, at this time *Keller* remains binding precedent on this court.").

This Court has already acknowledged the tension that now exists in its *Keller* jurisprudence. The dissenters in *Janus* mentioned it, 138 S. Ct. at 2498 (Kagan, J., dissenting), and Justices Thomas and Gorsuch did so in dissenting from the denial of certiorari in *Jarchow*, 140 S. Ct. 1720 ("Our decision to overrule *Abood* casts significant doubt on *Keller*. The opinion in *Keller* rests almost entirely on the framework of *Abood*. Now that *Abood* is no longer good law, there is effectively nothing left supporting our decision in *Keller*."). What's more, this Court reversed and remanded in *Fleck v. Wetch*, 139 S. Ct. 590 (2018), instructing the lower court to address just this question.[4] It is imperative that this Court take this opportunity to probe the effect of *Janus* on *Keller*.

[4] On remand, the Eighth Circuit found it could not resolve the question for procedural reasons. 937 F.3d 1112 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 1294 (2020).

II. The Seventh Circuit's decision holding that *Keller* foreclosed a free association claim creates a circuit split.

Keller was concerned with the constitutionality of mandatory bar dues being spent on non-germane activities. It said that if a compulsory bar uses dues for non-germane activity, the First Amendment requires the bar to employ "the sort of procedures described in [*Chicago Teachers Union v.*] *Hudson*[, 475 U.S. 292 (1986)]"—procedures that protect dissenting members from being forced to fund political speech they disagree with. *Keller*, 496 U.S. at 17. But the Court *did not* decide in *Keller* whether being forced to join a state bar association that engages in non-germane activities violates the freedom of association.[5] In fact, *Keller*'s closing paragraph made quite clear that the Court was *not* deciding whether laws forcing attorneys to join a so-called integrated bar are constitutional. *See id*. at 17 ("[W]e decline" to decide whether attorneys can be "compelled to associate with an organization that engages in political or ideological activities.").

The Seventh Circuit, however, said *Keller* forecloses both a claim based on dues paying *and* a claim based of forced association. App. at 10. Quoting *Keller*, it explained that "the compelled association required by an integrated bar is 'justified by the State's interest in regulating the legal profession and improving the quality of legal services.'" *Id*. But looking to *Keller*, the

[5] Forced association, of course, cannot be cured with a refund.

quoted language is part of a larger discussion about dues paying and the use of mandatory dues, not the question of compelled association. *See Keller*, 496 U.S. at 13–14. The Seventh Circuit rested its decision that *Keller* disposed of the association issue solely on this out-of-context language. And it did not address *Keller*'s specific statement that the associational claim was *not* decided and left open for future consideration. *Id*. at 17.

To be fair, *Keller* is ambiguous. Although its closing paragraph explicitly declares that it is *not* deciding whether mandatory membership is constitutional, its *opening* paragraph says "[w]e agree that lawyers admitted to practice in the State may be required to join and pay dues to the State Bar." *Id.* at 4. Thus, *Keller* simultaneously says, and denies, that compulsory membership is constitutional. Still, as that question was not before the Court, it formed no part of the holding.

A similar inconsistency afflicts *Lathrop v. Donohue*, 367 U.S. 820 (1961), which the court below also cited as affirming the constitutionality of mandatory membership. *See* App. at 15. In reality, *Lathrop* did *not* decide that question. *Lathrop* was a plurality decision that addressed "only . . . [the] question of compelled financial support of group activities, *not . . . involuntary membership in any other aspect*," 367 U.S. at 828 (emphasis added). Because *Lathrop* focused only on the constitutionality of mandatory funding, its statements regarding compulsory membership were *dicta.* What's more, the precise holding of *Lathrop* is

so elusive that Justices Harlan and Frankfurter complained of its "disquieting Constitutional uncertainty," *id.* at 848 (Harlan & Frankfurter, JJ., concurring), and Justice Black remarked, "I do not believe that either the bench, the bar or the litigants will know what has been decided in this case—certainly I do not." *Id*. at 865 (Black, J., dissenting). The single paragraph in *Lathrop* which addressed the "impingement upon freedom of association" caused by mandatory membership, *id*. at 842, sought to resolve it by quoting from *Railway Employes' Dept. v. Hanson*, 351 U.S. 225, 238 (1956). But *Hanson*—"a case in which the First Amendment was barely mentioned," *Harris v. Quinn*, 573 U.S. 616, 628 (2014)—was a union case, not a mandatory bar case, and its reference to mandatory bars consisted of only a single sentence, which was *also* dicta. *See id.* at 238. Finally, as *Janus* noted, *Hanson* employed a rational basis scrutiny that is "inappropriate" in deciding First Amendment issues. 138 S. Ct. at 2480.

The decision below not only read *Keller* and *Lathrop* for propositions those cases do not actually support, but it also directly conflicts with decisions of the Fifth, Sixth, Ninth, and Tenth Circuits, each of which has recognized that *Keller* explicitly leaves open an associational claim.

In *Crowe*, the Ninth Circuit addressed both a free speech claim and a free association claim against the Oregon State Bar. It held that *Keller* foreclosed the free speech claim, but acknowledged that *Keller* "expressly declined to address the 'freedom of association claim' that attorneys 'cannot 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*.'" 989 F.3d at 724–25, 728. Moreover, the Ninth Circuit explained that this Court "has never resolved this broader free association claim based on compelled bar membership." *Id*. Overturning the district court, the Ninth Circuit held that the free association claim was viable and remanded it for further evaluation. *Id*. at 729.

In *McDonald*, the Fifth Circuit held that certain non-germane activity undertaken by the Texas' integrated bar violated the plaintiffs' free association rights. 4 F.4th at 243–44. The court noted that while *Keller* mandated a dismissal of the free speech issue, it left open the free association claim. The Fifth Circuit explained that neither *Lathrop* nor *Keller* decided whether "lawyers may be constitutionally mandated to join a bar association that engages in . . . non-germane activities." *Id*. at 244.

In *Schell*, the Tenth Circuit was confronted with both a free speech claim and a free association claim alleging that Oklahoma's integrated bar was unconstitutional. 11 F.4th 1178. It recognized that *Keller* foreclosed any compelled speech claim based on mandatory dues. *Id*. at 1190 (explaining, that wile *Janus* cast doubt on *Keller*, it was still binding precedent and mandated the defeat of the mandatory dues claim). But it also recognized that neither *Keller* nor *Lathrop* foreclosed a freedom of association claim. *Id*. at 1194. The Court held that the district court was wrong to

hold otherwise and remanded the case for discovery. *Id*. at 1195.

In direct conflict with those holdings, the Sixth Circuit held in *Taylor v. Buchanan* that *Keller* and *Lathrop* foreclosed both an attorney's association challenge and a compulsory dues challenge. 4 F.4th 406, 407–08 (6th Cir. 2021). The plaintiff there conceded that all activities of Michigan's integrated bar were germane, and that *Keller* and *Lathrop* foreclosed their claims. But Judge Thapar, concurring in the judgment, made clear that this was incorrect, and explained that if an integrated bar engaged in non-germane activity not related to regulating the legal profession, a free association claim is still available. *Id*. at 410 (Thapar, J., concurring). Further, he explained that under *Keller*, a free association claim is viable "even if the bar association allowed lawyers to opt out of funding ideological activity." *Id*.

And, of course, the Seventh Circuit here said—again in direct conflict with *Crowe, McDonald*, and *Schell*—that the freedom of association claim was "squarely foreclosed" by *Keller*. App. at 10.

Thus, there is a direct conflict on whether *Keller* and *Lathrop* upheld the constitutionality of laws that force attorneys against their will to join a bar association that engages in non-germane activity.[6] In addition

[6] Conduct need not be strictly ideological or political to be "non-germane." Any conduct not strictly related to the regulation of lawyers as lawyers and the improvement of the legal system should be considered "non-germane activit[y]," regardless of any

to the confusion surrounding the consequences of *Janus* on *Keller*, the Seventh Circuit has added to a growing circuit split about the constitutionality of forced bar associations—the question *Keller* explicitly left open. This Court should grant this case to clarify both issues.

III. Reconciling *Janus* and *Keller* would allow this Court to live up to the promises of *Keller* without substantially affecting other areas of its jurisprudence.

This Court's First Amendment jurisprudence has afforded clearer and stronger protections for freedoms of speech and association in the three decades since *Keller*. It is past due for this Court to revisit its decisions on mandatory bar associations. Doing so would not require this Court to encroach on unanticipated areas of law, or even to overrule *Keller* or *Lathrop*. Instead, this Court can simply follow the path those cases left open and apply the constitutionally required exacting scrutiny instead of the rational basis scrutiny that *Lathrop* employed.

In *Keller*, this Court left open a free association claim for the lower courts to consider. Neither lower courts, nor this Court have addressed the free association claim other than to note its continued viability. Petitioner here presents just such a claim and it is ripe for this Court's review. This Court's decision in *Janus*

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ideological/political tinge. *Romero v. Colegio De Abogados De Puerto Rico*, 204 F.3d 291, 297–98 (1st Cir. 2000).

makes clear that exacting scrutiny is the standard and that standard can be directly applied to the path *Keller* left open.

This Court should grant this petition and use this opportunity to bring its mandatory bar association jurisprudence in line with its broader free association jurisprudence by making clear bar associations are subject to *at least* exacting scrutiny.

CONCLUSION

For the reasons stated above, this Court should *grant* the petition for certiorari.

Respectfully submitted,

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