No. 22-95

Supreme Court of the United States

SCHUYLER FILE,

Petitioner,

v.

MARGARET HICKEY, 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 ANNETTE ZIEGLER AND JUSTICES PATIENCE ROGGENSACK, ANN WALSH BRADLEY, 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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Unlike some state bars, the Wisconsin State Bar does not regulate lawyers. It does not set or enforce rules of professional conduct. It does not administer the bar exam. Instead, it forces individuals to speak and associate in a way that is "no different from" compelled "union-shop agreements." *Lathrop v. Donohue*, 367 U.S. 820, 842 (1961) (plurality opinion). As this Court recently recognized, such compelled association infringes the First Amendment and therefore faces heightened scrutiny. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2464–65 (2018). Because all lower courts have still refused to apply heightened scrutiny to mandatory bar membership, this Court's intervention is necessary.

The State Bar's efforts to evade review are unavailing. First, the State Bar tries to find solace in other denials of certiorari, ignoring that "[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *United States v. Carver*, 260 U.S. 482, 490 (1923). Other cases involved state bars that regulated lawyers, unlike Wisconsin's,[1] or arose on "unpublished summary decision[s]," like *Jarchow*. App. 12. That "[e]very court of appeals to address the issue" "has, as they must, affirmed the ongoing validity of *Keller* and *Lathrop*" (BIO 13) only confirms the need for this Court's review.

Second, though Chief Judge Sykes said below that "[t]he tension between *Janus* and *Keller* is hard to miss" (App. 11), the State Bar does its best, asserting

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[1] *E.g.*, *Crowe v. Oregon State Bar*, 989 F.3d 714, 720 (9th Cir. 2021) (noting the Oregon bar "administers bar exams" and "formulates and enforces rules of professional conduct").

that *Janus* addressed "a wholly different issue." BIO 17. Yet *Keller v. State Bar of California* said that mandatory state bars are "subject to the same constitutional rule" as "labor unions representing public" employees. 496 U.S. 1, 13 (1990). Accordingly, many Justices on this Court have recognized that *Janus* eviscerated *Keller*'s foundation. As Justice Kagan explained, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), was "the way we look at mandatory fee cases," Pet. 23, and *Keller* relied on *Abood*. *Janus* overruled *Abood*. Now "there is effectively nothing left supporting" *Keller*. *Jarchow v. State Bar of Wis.*, 140 S. Ct. 1720, 1720 (2020) (Thomas, J., dissenting from the denial of certiorari). The State Bar cannot explain why lawyers may be compelled to speak and associate against their will, but public employees may not. And its strange suggestion that Petitioner raised no freedom of association claim is belied by the complaint, which leads with a discussion of that freedom and alleges that "[t]he actions of the Defendants constitute a violation of Mr. File's First Amendment rights to free speech and freedom of association to not join or subsidize an organization." App. 37.

Third, the State Bar says that this Court "reaffirmed *Keller*" in *Harris v. Quinn*, 573 U.S. 616 (2014). BIO 18. But *Harris* (in dicta) highlighted the "State's interest in regulating the legal profession," 573 U.S. at 655, and Wisconsin cannot rely on that interest to justify the State Bar's compelled association: its bar does not regulate lawyers. In any event, whether the State might be able to *assert* some interest does not answer whether heightened scrutiny applies. And if *Harris* did not "call into question"

Keller, 573 U.S. at 655, *Janus* did four years later. *See McDonald v. Longley*, 4 F.4th 229, 243 n.14 (5th Cir. 2021) (emphasizing *Lathrop*'s and *Keller*'s "increasingly wobbly, moth-eaten foundations" (cleaned up)).

Fourth, *stare decisis* is not an argument against certiorari, and the State Bar's argument is meritless anyway. *Janus* eliminated *Keller*'s foundation, *Keller* is unworkable for the same reasons *Abood* was, and many States regulate the legal profession without violating the First Amendment. Refusing to apply heightened scrutiny to mandatory bars forces "members of the legal profession—especially those who advocate for religious liberty" and other bar-disfavored rights—"to subsidize briefs [and other speech] that contend against not only their own deeply held views, but also against their litigation positions and the interests of their clients." First Liberty Br. 7; *see* Alliance Defending Freedom Br. 5–13.

Last, complaints about Petitioner not "develop[ing] an adequate record" (BIO 30) disregard that this case arose on a motion to dismiss, thereby presenting the Court with a clean vehicle to resolve the legal question of whether government-compelled speech and association through a mandatory state bar is subject to heightened scrutiny. *Janus* all but answers that question: yes. The Court should grant certiorari.

REASONS FOR GRANTING THE WRIT

I. This Court's precedents require applying heightened scrutiny to mandatory bars.

Mandatory bar membership means that a lawyer is forced to associate with a private organization and contribute money to fund that organization's speech, often on intensely controversial public issues. That compelled association—"[f]orcing free and independent individuals to endorse ideas they find objectionable" and associate in state-prescribed ways—contradicts the First Amendment. *Janus*, 138 S. Ct. at 2464.

The State Bar offers several confused reasons to resist this conclusion. First, it says that "associational rights" did not "arise" in *Janus* and "are not properly before this Court" because "Petitioner has not 'raised a free-standing compelled-association claim distinct from his compelled speech claim challenging the compulsory dues.'" BIO 20 (quoting App. 11 n.1). Nonsense. The cited footnote from the decision below—repeatedly mischaracterized by the State Bar—merely pointed out that Petitioner's claim is not "a *Keller* 'germaneness' challenge," and he has not raised an alternative associational claim about non-germane activities. App. 11 n.1; *compare McDonald*, 4 F.4th at 244. As the courts below recognized, Petitioner "contends that requiring him to join and subsidize the State Bar violates his free-speech and associational rights." App. 1; *see* App. 37; BIO 9.

The State Bar's theory that associational rights were not at stake in *Janus* and are not at issue here is incomprehensible. *See Janus*, 138 S. Ct. at 2463 ("[t]he right to eschew association for expressive

purposes" is protected by the First Amendment). That the plaintiffs in *Janus* "were non-members[] challenging the requirement that they pay dues" (BIO 20) does not help the State Bar. Not only are associational rights at issue in both cases, but this case presents an even more severe infringement: the *Janus* objectors merely had to pay money to avoid compelled association, while Petitioner would lose his livelihood. *See* Americans for Prosperity Br. 6 n.5. If merely subsidizing another entity infringed the First Amendment in *Janus*, being forced to subsidize *and join* a private organization certainly infringes the First Amendment.

The State Bar next argues that there is no "First Amendment injury in being identified as a member of an[] expressive organization." BIO 21–22 (emphasis omitted). The notion that the government could force all citizens to join (and financially support) the ACLU or the Republican Party is incredible. "[U]s[ing]" an objector as "an instrument for fostering public adherence to an ideological point of view he finds unacceptable" works a severe First Amendment injury. *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 324 (2012) (Sotomayor, J., concurring in judgment) (cleaned up). And when a bar association speaks, "[t]he membership is part of the message." *McDonald*, 4 F.4th at 246.

The theory that a State may compel membership "[b]ecause all practicing lawyers in the State must become members of the State Bar" (BIO 21) is circular. A State could not force all dentists to join the Democratic Party and then claim no injury because it has successfully compelled their association. Plus, that most lawyers nationwide are *not* required to join

mandatory bars (Mackinac Br. 9–15) eviscerates the State Bar's argument about the "reasonable implication[s]" that "Wisconsin lawyers" might draw based on an unrelated professional conduct rule (BIO 21); the public reasonably understands that joining a group, including the bar, implies endorsement. *See Janus*, 138 S. Ct. at 2464. And forcing members to *fund* speech contrary to their views works another injury.

That "State Bar members are free to espouse their own views on any issue on which the State Bar speaks, even where the two views are directly contradictory" (BIO 24–25) only highlights that compelling a person to join and financially support a private organization infringes on the person's speech and associational rights. A Democrat compelled to support the Republican Party would hardly consider the injury resolved because he must work twice as hard to spread his real views—while appearing to hypocritically support opposing views.

The State Bar also tries to minimize the associational injuries by comparing compelled membership to a license requirement. BIO 21. But that underscores the problem: the State Bar does *not* license or regulate Wisconsin lawyers. Pet. 12–13, 29–30. Instead, Wisconsin regulates attorneys through other avenues, yet still imposes a requirement to join and support a private organization that takes controversial positions on matters of public importance. There is no daylight between this requirement and forcing individuals to "identif[y] as a member of a political party." BIO 21.

Indeed, much of the State Bar's argument depends on distorting its role. It contends that it "fill[s] quasi-

governmental roles" and undertakes "numerous functions in support of the state's attorney regulatory system." BIO 23, 5. But it cannot say that it *is* the state's regulatory system, because it is not. It does not administer the bar exam or attorney discipline procedures. As the State Bar admits, all it does is "collect the assessments that support" the state entities that regulate the legal profession (BIO 28)—and take money from individuals like Petitioner to fund speech that they disagree with. And States with a majority of the nation's lawyers have found no need to compel association with a private organization to adequately regulate the legal profession. Mackinac Br. 9–15; *see* Pet. 29–30.

In all events, as the State Bar concedes, even *Keller* did not consider "speech by a state-created integrated bar" to be "government speech." BIO 24. *Keller* rejected a similar argument and held that an "integrated bar" amounted to a "compelled association" that infringes on First Amendment rights, no matter if "the State Bar serves" "substantial public interests." 496 U.S. at 13. *Keller* found that those infringements "are justified by the State's interest in regulating the legal profession." *Id.* Petitioner's point is that *Keller* erred by *assuming* that justification rather than requiring heightened scrutiny of this compelled association.

As explained, "a strong argument could be made that applying [heightened] scrutiny to mandatory bar compelled speech and association claims does not require overruling *Keller* and *Lathrop*" because *Keller* adopted "the same constitutional rule" as the one governing public employees and unions. Pet. 22; 496 U.S. at 13. The State Bar oddly treats that statement

as a "conce[ssion]" that "*Lathrop* and *Keller* remain fully in line with this Court's First Amendment precedents." BIO 16. If the State Bar believes that *Lathrop* and *Keller* require heightened scrutiny here, that is all the more reason to grant certiorari, for the court below—like all other courts—viewed those decisions as *precluding* heightened scrutiny.

Regardless, after *Janus*, heightened scrutiny must apply. 138 S. Ct. at 2480 (overruling the "deferential" germaneness standard). The State Bar's claim that "*Janus* addressed a wholly different issue" (BIO 17) lacks seriousness. *Lathrop* said the two issues were "no different." 367 U.S. at 842. *Keller* said they are governed by the "same constitutional rule." 496 U.S. at 13. Judges up and down the federal courts have recognized the obvious reality that *Janus* knocked out *Keller*'s jurisprudential foundation, *Abood*. Pet. 24–25. That leaves "effectively nothing left supporting [this Court's] decision in *Keller*." *Jarchow*, 140 S. Ct. at 1720 (Thomas, J.); Goldwater Institute Br. 4–6; Americans for Prosperity Br. 9–12.

Trying to resuscitate *Keller*, the State Bar insists that this Court in *Harris* "reaffirmed [it] and its underlying reasoning." BIO 18. Of course, *Harris* did not consider an integrated bar, so its discussion of *Keller* was dicta. And "all [this Court] said in *Harris* was that 'a refusal to extend *Abood*' would not 'call into question' *Keller*"; "[n]ow that [the Court] ha[s] overruled *Abood*, *Keller* has unavoidably been called into question." *Jarchow*, 140 S. Ct. at 1720 n.* (Thomas, J.).

Harris would not help the State Bar anyway. This Court in *Harris* said that *Keller* "fits comfortably within the framework applied in the present case"

(573 U.S. at 655)—which was *not* the framework originally "underlying" *Keller* (BIO 18). *See Harris*, 573 U.S. at 645 (emphasizing "*Abood*'s questionable foundations" and refusing to apply it). The reason this Court gave for *Keller* fitting within *Harris* was that "[t]he portion of the rule that we upheld served the State's interest in regulating the legal profession." 573 U.S. at 655. But as just explained, the State Bar does not regulate lawyers in Wisconsin, so those interests are irrelevant here. And *whatever* interests mandatory bars purportedly advance, they should be adjudicated in the context of heightened scrutiny, not used as excuses to skip scrutiny altogether.

Under the First Amendment, Wisconsin must show that its mandatory bar requirement (at least) "serve[s] a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Janus*, 138 S. Ct. at 2465; *cf.* National Right to Work Br. 6–7 (explaining that strict scrutiny should apply). The decision below—and every similar decision—has declined to apply heightened scrutiny to this compelled speech and association. The Court's intervention is necessary.

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

Because refusing to apply heightened scrutiny to mandatory bars is no longer based on a valid precedent, and this Court is the only one that can fix that problem, certiorari is warranted even if the State Bar's *stare decisis* arguments had force. They do not.

As shown, *Janus* requires applying heightened scrutiny to mandatory bars, and *Lathrop* and *Keller* are wrong if they hold otherwise. They are also now outliers. Though the State Bar suggests that being

"wrongly decided" is not enough, BIO 25, egregiously wrong decisions may be overruled—especially when overruling is necessary to "protect[] individual rights with a strong basis in the Constitution's most fundamental commitments." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2342 (2022) (joint dissenting opinion of Breyer, Sotomayor, and Kagan, JJ.); *see id.* at 2265 (majority opinion); *Janus*, 138 S. Ct. at 2478.

Keller's wrong standard hurts hundreds of thousands of lawyers and the marketplace of ideas. Mandatory bars spend fees on all types of controversial policy advocacy, including much with only a tenuous connection with the legal profession. Pelican Institute Br. 2–12; Pet. 10–12. Especially harmed are lawyers who dare to deviate from the elite positions typically parroted by state bars on issues like religious liberty and equality. First Liberty Br. 5–10; Alliance Defending Freedom Br. 5–13.

The State Bar has no response, other than to insist that *Lathrop* and *Keller* are "workable" because it always manages to force lawyers "to fund activities that are . . . chargeable under *Keller*." BIO 26–27. Putting aside the difficulties associated with chargeability claims, Pet. 32, the State Bar's circular explanation misses the point. As the State Bar does not dispute, "because the legal profession is connected to so many public policy issues, nearly all political and ideological speech can plausibly be described as 'germane'" and thus chargeable. Pet. 31. The State Bar's statement that it "does not attempt to draw the line between germane and non-germane expenditures 'with precision'" (BIO 27) does nothing to *help* its argument. A self-interested body's practically

unreviewable guessing then "round[ing] up" (*id.*) does not workably account for the relevant First Amendment interests. *See Janus*, 138 S. Ct. at 2481–82 (noting that a chargeable line that "is broad enough to encompass just about anything" is "unworkable").

Finally, the State Bar's reliance claims are unavailing. *Janus* rejected identical claims. 138 S. Ct. at 2484–86. Most lawyers in America are *not* compelled to join mandatory bars, and the State Bar does not suggest a widespread failure of legal regulation. Nor does the State Bar have any response to Petitioner's showing that other states have managed to untangle with ease supposedly "inextricably intertwined" mandatory bars. BIO 28; *see* Pet. 33–34. That a state legislature might have to fix its own unconstitutional rule (BIO 29) is hardly a tragedy of reliance. *See Janus*, 138 S. Ct. at 2485 n.27.

Stare decisis does not justify denying certiorari. Instead, all factors point to overruling *Lathrop* and *Keller*, confirming the need for this Court's intervention.

III. This case is an ideal vehicle.

The State Bar does not dispute that this case presents a pure legal question about the level of scrutiny applicable to mandatory bar membership. BIO i. Instead, it phones in the usual vehicle objections to cases that arose on a motion to dismiss, making obligatory noises about record development, claims that it believes Petitioner could have brought, and percolation. BIO 30. None of that changes that this case is an ideal vehicle to answer the question that the Seventh Circuit and many other lower courts have left to this Court. *See* App. 13 (Petitioner "must

seek relief from the Supreme Court."); Pet. 24–25. Nothing will change in the lower courts. A record will never be developed in this case or similar ones; they will be dismissed. And a record would provide no "benefit to [this Court's] review of the purely legal question whether *Keller* should be overruled." *Jarchow*, 140 S. Ct. at 1721 (Thomas, J.).

CONCLUSION

Wisconsin has ample ways to "insure that the members of its bar will provide any useful and proper services it desires without creating an association with power to compel members of the bar to pay money to support views to which they are opposed or to fight views they favor." *Lathrop*, 367 U.S. at 875 (Black, J., dissenting). The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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