

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 KAROFKY, 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*

**SUPPLEMENTAL REPLY IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI**

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REASONS FOR GRANTING THE WRIT

After this Court called for a response from the Wisconsin Supreme Court Respondents, they filed a copycat brief in opposition that does not dispute the lead reason this case provides the perfect vehicle to reconsider *Keller v. State Bar of California*, 496 U.S. 1 (1990): the Wisconsin State Bar plays no role in the State’s “lawyer regulation system.” BIO 4; *see* App. 33. Instead, the State assigns lawyer admissions and disciplinary functions to State entities. Pet. 12–13, 29–30; BIO 4. The State Bar, by contrast, is a trade association that sponsors conventions, publishes a magazine, and lobbies the legislature—while compelling speech and association from every Wisconsin lawyer. Pet. 10–12; *see* Wisconsin Institute for Law & Liberty Br. 14–18. Indeed, the only connection described by the Supreme Court Respondents between lawyer regulation and the State Bar is that lawyers will be subject to “disciplinary proceedings in the Wisconsin Supreme Court” if they “fail[] to pay their dues” to the State Bar for its ideological speech. BIO 5.

Such compelled speech and association presumptively violate the First Amendment. *See Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018). The State Bar’s lack of involvement in lawyer regulation sets this case apart and makes it an ideal vehicle to resolve the pure legal question presented: whether membership in a mandatory state bar is subject to heightened scrutiny under the First Amendment. *See* Initial Reply 1 & n.1. This Court should grant certiorari on that question.

The Wisconsin Supreme Court Respondents’ reproduced arguments against certiorari were fully

addressed in Petitioner’s initial reply, which these Respondents do not cite, much less respond to. Rather than belabor these points, Petitioner briefly explains the inconsistencies of the Wisconsin Supreme Court Respondents’ arguments.

First, these Respondents say that “there is no circuit conflict” and that this Court has denied certiorari in other cases. BIO 12. But as just explained, they do not dispute that this case, unlike others, involves a mandatory state bar that does not regulate lawyers. And as they say, there is no conflict among the lower courts because they have all “agree[d] that *Keller* controls and forecloses First Amendment claims like Petitioner’s.” BIO 1. That is a reason for granting certiorari and addressing the inconsistency in this Court’s jurisprudence between *Keller* and *Janus*.¹

Second, on that issue, these Respondents echo the State Bar in claiming that “*Janus* did not undermine *Keller* whatsoever.” BIO 13. No one believes that. The lower courts here did not, as these Respondents concede. *See* BIO 9 (“[t]he tension between *Janus* and *Keller* is hard to miss” (quoting App. 11)); *see* Pet. 24–25 (collecting other courts). Justices on this Court have also recognized the conflict between *Keller* and *Janus*. *See* Pet. 23. That the dissent in *Janus* “noted” that *Janus* did not reach out to decide an unrepresented

¹ The Wisconsin Supreme Court Respondents’ passing reference to the supposed absence of a freedom of association claim here (BIO 12) makes no more sense than the State Bar’s did. *See* Initial Reply 4–5; App. 37 (complaint: “The 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 without his affirmative consent.”).

question and “overrule” *Keller* (BIO 15) only hurts Respondents’ argument: the point of that note was to highlight that *Keller* “relied on” *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). *Janus*, 138 S. Ct. at 2498 (Kagan, J.).

Indeed, *Abood* provided the constitutional foundation for *Keller*, which adopted “the same constitutional rule” as the one governing “labor unions representing public” employees. 496 U.S. at 13–14; cf. *Lathrop v. Donohue*, 367 U.S. 820, 842 (1961) (plurality opinion) (the two situations are “no different”). *Janus* overruled *Abood*. Thus, *Keller* is wrong, or it requires a new foundation. Either way, certiorari is necessary.²

Third, the Wisconsin Supreme Court Respondents echo the State Bar’s meritless vehicle noises. No “developed record” (BIO 17) is necessary to resolve the pure legal question presented, and no such record would ever be developed if *Keller* remains good law. See *id.* (recognizing that “*Keller*[] automatically foreclos[ed] Petitioner’s First Amendment claim”). Though these Respondents allude to “nuances” of Wisconsin’s scheme (*id.*), they neither articulate any such nuances nor explain why they would be relevant to the legal standard that should apply to compelled mandatory bar speech and association. And they do not dispute that they, not the State Bar, oversee lawyer regulation.

Fourth, the Wisconsin Supreme Court Respondents make no effort to defend *Keller*, either on

² The Wisconsin Supreme Court Respondents’ arguments about *Harris v. Quinn*, 573 U.S. 616 (2014) (BIO 16–17) have already been addressed, to no response. See Initial Reply 8–9.

stare decisis grounds or on its own. That the Wisconsin Supreme Court—which regulates lawyers in the State—declines both to defend *Keller* and to articulate any reliance interests that it thinks would be implicated underscores the key fact that would facilitate the Court’s review of the legal question here: the State Bar of Wisconsin does not regulate lawyers. It simply compels speech and association, “[f]orcing free and independent individuals to endorse ideas they find objectionable.” *Janus*, 138 S. Ct. at 2464. That violates the First Amendment. And the violation is even more severe here than in *Janus*, for Petitioner stands to lose his livelihood if he does not submit to the State’s efforts to “mould[] [our society] into patterns of conformity which satisfy the majority.” *Lathrop*, 367 U.S. at 885 (Douglas, J., dissenting). Certiorari is required.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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JANUARY 3, 2023