No. 24-1025

In the
Supreme Court of the United States

DANIEL Z. CROWE AND OREGON CIVIL LIBERTIES ATTORNEYS, an Oregon Nonprofit Corporation,

PETITIONERS,

v.

OREGON STATE BAR, a Public Corporation, *ET AL.*,

RESPONDENTS.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC. SUPPORTING THE PETITIONERS

RICHARD M. ESENBERG
Counsel of Record
LUCAS T. VEBBER
SKYLAR CROY

WISCONSIN INSTITUTE FOR LAW & LIBERTY

330 E Kilbourn Ave, #725
Milwaukee, WI 53202
(414) 727-9455
rick@will-law.org

QUESTIONS PRESENTED

1. Whether compelled membership in a bar association that engages in nongermane activities is necessarily unconstitutional, as the Fifth Circuit held and the Ninth Circuit rejected.

2. Whether this Court should reconsider *Keller* in light of *Janus*, and require the activities of a mandatory bar association to satisfy at least exacting scrutiny.

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INTEREST OF *AMICUS CURIAE*[1]

In Wisconsin, over 25,000 attorneys are members of the state's bar association, which engages in ideological and political activities. *See, e.g.*, Jill M. Kastner et al., *Racial Equity of Black Americans: It's Time to Step Up | A Statement*, 12 InsideTrack (June 17, 2020).[2] For example, the Bar has endorsed the Black Lives Matter Movement, which presupposes systemic racism infects the criminal justice system. *Id.* The Bar declared in bold lettering: "**The State Bar of Wisconsin, with more than 25,000 attorneys, must play a stronger role in this national awakening.**" *Id.*; *see also* Richard Moore, *The State Bar of Wisconsin: An Octopus's Garden of Left-Wing Ideology*, MacIver Inst. (Mar. 13, 2025).[3]

Attorneys across Wisconsin object. *E.g.*, *Suhr v. Billings*, No. 23-CV-1697-SCD, 2024 WL 3861143 (E.D. Wis. Aug. 19, 2024). They must be members of the Bar and pay it hundreds of dollars annually; otherwise, they cannot practice law. *State Bar Bylaws*, State Bar Wis. (last visited Feb. 25, 2025);[4] *see also* Wis. Sup. Ct. Rs. 10.03(6), 20:8.4(f).

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[1] As required by Supreme Court Rule 37, the Counsel of Record for all parties received timely notice of intent to file this brief. No party's counsel authored any part of this brief; no person other than *amicus* or its members made a monetary contribution to fund its preparation or submission.

[2] https://tinyurl.com/2rv67wtb.

[3] https://tinyurl.com/4adhhra3.

[4] https://tinyurl.com/3rahrdbn.

Across this nation, attorneys in 30 other states and the District of Columbia must similarly violate their conscience and allow themselves to be used as pawns if they want to practice law. *See* Leslie C. Levin, *The End of Mandatory State Bars?*, 109 Geo. L.J. Online 1, 2 (2020).

The Wisconsin Institute for Law & Liberty, Inc. (WILL) is interested in this action because it presents a good vehicle for this Court to remedy this injustice. WILL is a public interest law and policy center dedicated to, among other things, advancing economic liberty. It files this brief in pursuit of that mission.

SUMMARY OF ARGUMENT

This action concerns the so-called "bar wars." *See Boudreaux v. La. State Bar Ass'n* (*Boudreaux I)*, 3 F.4th 748, 751 (5th Cir. 2021). The Fifth Circuit has held that a mandatory bar cannot engage in activities that are nongermane to improving the quality of legal services or regulating the legal profession. *Boudreaux v. La. State Bar Ass'n* (*Boudreaux II)*, 86 F.4th 620, 632–34 (5th Cir. 2023). In this action, the Ninth Circuit split with the Fifth's reasoning, holding that a bar could engage in many—if not most—nongermane activities so long as it slaps disclaimers on its statements. App. 34a n.10 (citing *Boudreaux II*, 86 F.4th at 632–34). The questions presented will continue to plague the circuits unless this Court acts. An action like this one is proceeding in the Eastern District of Wisconsin, and that court has noted the split and that the Seventh Circuit has yet to weigh in. *Suhr*, 2024 WL 3861143, *6 & n.3.

WILL respectfully urges this Court to grant the petition. The Ninth Circuit erred. To quote this Court, an individual has "the right to eschew association for expressive purposes." *Janus v. AFSCME*, 585 U.S. 878, 892 (2018) (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)). A state cannot abridge this right unless it can overcome exacting scrutiny (maybe even strict scrutiny), and as the Fifth Circuit has said, "[c]ompelled membership in a bar … that engages in non-germane activities … fails exacting scrutiny." *McDonald v. Longley*, 4 F.4th 229, 246 (5th Cir. 2021) (citing *Knox v. Serv. Emps. Int'l Union,* 567 U.S. 298, 310 (2012)). A disclaimer, at most, goes to the tailoring-prong of an exacting scrutiny analysis, but the Ninth Circuit acted like a disclaimer negates any abridgment altogether. *See* App. 37a n.12. Not so.

ARGUMENT

This brief proceeds in three steps. First, it explains how this Court's precedents have, unfortunately, failed to protect attorneys. It also provides background on what the freedom of association—and the freedom not to associate—are. In Part II, it explains the doctrinal framework for deciding said claims. Within this framework, the Ninth Circuit's error becomes clear: a disclaimer is, at most, a tailoring-prong issue. Lastly, it explains why a disclaimer requirement is unworkable.

I. In *Keller v. State Bar of California*, this Court held that mandatory bar dues could not be used to subsidize nongermane activities to which a member objects; however, that victory for attorneys has proved hollow.

As a preliminary matter, this Court has not entered the bar war zone since 1990, when it decided *Keller v. State Bar of California*, 496 U.S. 1 (1990). It explained that mandatory bars have only two constitutionally permissible purposes: "improving the quality of legal services" and "regulating the legal profession." *Id.* at 13–14. It then held that a bar cannot compel an objecting member to subsidize activities that are not "germane" to either of these purposes. *Id.* It viewed itself as resolving a compelled speech claim. *Id.* This Court analogized heavily to its precedents about mandatory public-sector union fees. *Id.* at 9–14. Notably, this Court left open whether a bar can even engage in "political and ideological" activities at all, which it characterized as a free association question. *Id.* at 17.

A. Mandatory bars post-*Keller* have offered so-called "*Keller* dues reductions," which they claim resolve any First Amendment claims, but said reductions do not account for money's fungibility.

This Court did not say in *Keller* that mandatory bars can engage in nongermane activities without abridging free association interests; however, because the question was left open, most do. Bars have generally chosen to offer so-called "*Keller* dues reductions" instead of abstaining from nongermane

activities. They classify their own activities as either chargeable or nonchargeable to a mandatory portion of dues, often through an opaque procedure. *See Suhr*, 2024 WL 3861143, at *5 (noting Wisconsin's *Keller* dues reduction notice "describes only those activities that the Bar determined are nonchargeable" even though the Bar was required to provide "notice of chargeable activities as well"); *see also McDonald,* 4 F.4th at 254 ("The Bar does not furnish Texas attorneys with meaningful notice regarding how their dues will be spent. Nor does it provide them with any breakdown of where their fees go. Instead, it places the onus on objecting attorneys to parse the Bar's proposed budget ...."). These procedures were taken wholesale from the union context. *See Keller*, 496 U.S. at 1, 9–14.

Keller dues reductions do little to nothing to address the First Amendment claims at issue. Given money's fungibility, an attorney cannot really support only some of a mandatory bar's activities even if he or she is so inclined, regardless of whether the bar meticulously calculates the reduction amount. *See Southworth v. Grebe*, 151 F.3d 717, 732 (7th Cir. 1998), *rev'd sub nom. on other grounds*, *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000).

Holder v. Humanitarian Law Project is illustrative. 561 U.S. 1 (2010). Several nonprofits sought to have "material support" for terrorists statutes declared unconstitutional. *Id.* at 1. They wanted to provide only peaceful, non-military support, e.g., "training … for tsunami-related aid" and "legal expertise in negotiating peace agreements." *Id.* at 15. *Holder* is a rare precedent in which this Court upheld a restriction on First Amendment interests, noting

"money is fungible." *Id.* at 31. Accordingly, Congress could enact statutes that prohibit "aiding a foreign terrorist organization's lawful activity" because said aid necessarily "promotes the terrorist organization as a whole." *Id.*

As in *Holder*, an attorney who provides aid to a mandatory bar—for any of its activities—necessarily promotes the bar as a whole. For example, a mandatory bar can use the dues from objecting members to pay a legal ethics expert's salary (something a bar probably needs to do), freeing up dues paid by non-objecting members that can be used to support an illegal affirmative action program (something a bar need not—and should not—do). Even if a *Keller* dues reduction in some sense stops an attorney from being forced to support particular activities, it does not stop that attorney from being forced to support a bar that engages in those activities—which is just as bad. Whether viewed through the lens of free speech or free association, a reduction leaves much to be desired. Creative accounting did little for the nonprofits in *Holder*, and it should do equally little for bars.

Largely because of money's fungibility, this Court has narrowed and overruled much of its precedents on union dues, upon which *Keller* is based. *See, e.g.*, *Knox*, 567 U.S. at 317 n.6 (citing *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 373 U.S. 746, 753 (1963)) ("[O]ur cases have recognized that a union's money is fungible, so even if the new fee were spent entirely for nonpolitical activities, it would free up funds to be spent for political purposes."). As this Court has explained, how money is "earmark[ed]," at least in this context, is more a matter of "bookkeeping" than "real substance." *Id.*

(quoting *Retail Clerks*, 373 U.S. at 753); *see also Janus*, 585 U.S. 878 (holding a nonmember cannot be forced to pay any portion of a union's dues even if he or she receives some benefit from the union's existence).

Several circuit courts have noted that *Keller*'s continued validity is in serious doubt, at least insofar as it suggests a dues reduction is all that a mandatory bar need do to negate First Amendment interests; however, these courts have largely felt bound by *Keller*. *E.g.*, *File v. Martin*, 33 F.4th 385, 392 (7th Cir. 2022) ("[T]he foundations of *Keller* have been shaken. But it's not our role to decide whether it remains good law.").

Accordingly, one reason to grant the petition is to address money's fungibility and how it relates to *Keller*. Even if the Oregon State Bar offers a *Keller* dues reduction and even if a disclaimer is added to its statements, objecting members are still being forced to financially prop up an association that engages in activities they find morally repugnant. Notably, at least one district court has mistakenly suggested that the very existence of *Keller* dues reductions negates any free association interests, simply demonstrating why this Court should step in. *Pomeroy v. Utah State Bar*, No. 2:21-cv-00219-TC-JCB, 2024 WL 1810229, at *6 (D. Utah Apr. 25, 2024), *appeal filed*.

B. Money aside, an attorney's free association interests include not being used as a pawn for ideological and political activities.

Even if attorneys were not required to pay any dues, they would still have a free association interest in not allowing themselves to be used to amplify messages with which they disagree.

The freedom of association extends from the freedom of speech because "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958); *see also Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 618 (2021) (explaining the freedom of association protects, among other things, the "ability to join with others to further shared goals").

For example, the American Bar Association (ABA) grades federal judicial nominees. *Ratings of Article III and Article IV Judicial Nominees*, ABA (last visited Mar. 26, 2025).[5] Few people care about what any particular randomly chosen attorney thinks about said nominees, but many care deeply about what the ABA thinks. Its size, "more than 400,000 members," allows it to amplify the collective message of those members in a way that an individual or a smaller association could not. *Consumer FAQs*, ABA (last visited Mar. 26, 2025).[6]

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[5] https://tinyurl.com/3h9berfs.

[6] https://tinyurl.com/38pyxja7.

Associations generally cannot engage in effective advocacy unless they have at least some authority to control and restrict their membership. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655–56 (2000). This Court has explained that "[f]reedom of association … plainly presupposes a freedom not to associate." *Janus*, 585 U.S. at 892 (quoting *Roberts*, 468 U.S. at 623). To quote the Fifth Circuit, "groups that engage in expressive association" have "a right to restrict their membership[ ] because the membership is the message." *McDonald*, 4 F.4th at 245.

For example, a bar claims credibility to lobby on law-related issues precisely because its members are attorneys. A bar that anyone could join would not be, well, a bar.

Against this backdrop, the freedom not to associate encompasses the freedom to "eschew association for expressive purposes." *Janus*, 585 U.S. at 892. Just like a voluntary bar can engage in diversity initiatives, an attorney should be able to refuse to join a purportedly mandatory bar engaged in the same initiatives. *See Saadeh v. N.J. State Bar Ass'n*, Unpublished Slip Op., No. A-2201-22, 2024 WL 5182533, *13 (N.J. Ct. App. Dec. 20, 2024) ("[T]he Bar Association has a First Amendment right of expressive association that permits it to select the membership of its governing bodies through intentional inclusion of specified underrepresented groups, in furtherance of the ideological position it expresses.").

In summary, an attorney who objects to the activities of a mandatory bar has a free association interest in ensuring his forced association is not used to amplify messaging with which he or she disagrees. The problem is not so much whether he or she is associated with said speech (although that is a problem). The problem is that his or her membership itself allows the bar to more effectively promote its messaging.

II. At most, a disclaimer goes to the tailoring-prong of an exacting scrutiny analysis, but the Ninth Circuit held that a disclaimer could actually negate any abridgment altogether.

In this action, Oregon has required attorneys to join the State Bar of Oregon, and that Bar engages in expressive activities. These activities are offensive to many across the nation. For example, The Bar lambasted President Donald Trump. App. 36a–37a.

The freedom not to associate is triggered; accordingly, the proper doctrinal framework is to analyze whether Oregon's "compelling interest" could be achieved "through means significantly less restrictive of associational freedoms," i.e., exacting scrutiny or potentially strict scrutiny. *Janus*, 585 U.S. at 894.

States have a compelling interest in improving the quality of legal services and regulating the legal profession. *See Keller*, 496 U.S. at 13–14; *see also Harris v. Quinn*, 573 U.S. 616, 655–56 (2014) ("States also have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices.").

States though can achieve these interests in several ways. Notably, 19 states do not even have a mandatory bar, and they seem to be doing just fine. Levin, *The End of Mandatory State Bars?*, *supra* at 2; *see also* Rebecca Rusiecki, Note, *Something to Crowe About: Crowe v. Oregon State Bar and the Constitutionality of Integrated Bar Associations*, 56 UIC L. Rev. 383, 408–09 (2023). Even in states that do, how or why their bars need to engage in nongermane activities at all to achieve said interests is difficult to comprehend. States accordingly have at least one means by which they can achieve these interests that is much less cumbersome on the freedom of association—have their bars stop engaging in nongermane activities.

A "disclaimer" requirement, like the one adopted by the Ninth Circuit, at most fits within the tailoring-prong, but, as just explained, it is insufficient because states have substantially less restrictive means to achieve their compelling interests. For example, if Nazi Germany had something like the freedom of association, does anyone think that compelled membership in the Nazi Party would not have abridged free association interests if the Nazis just said, "some Germans may disagree"? *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

WILL is unaware of any precedents from this Court that would permit a disclaimer to be used in any way other than in a tailoring-prong analysis. In fact, several precedents do not make sense if a disclaimer can just negate the entire First Amendment issue. *See, e.g.*, *Janus*, 585 U.S. 878.

The Ninth Circuit relied heavily on *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006). This Court held that a law school did not have a free association interest in preventing military recruiters from coming onto campus. *Id.* at 69.

The facts of *Rumsfeld* are distinguishable. *Rumsfeld* did not deal with a situation like the one present in this action, in which someone is forced to join an association and pay its dues even though that association does many activities he or she thinks are immoral.

Even in *Rumsfeld*, this Court explained that no one was forcing the school to accept employees or "members" that it did not want. *Id.* It emphasized that "nothing about the statute affects the composition of the group by making group membership less desirable." *Id.* at 70. It also distinguished the facts from *Boy Scouts of America v. Dale*, 530 U.S. at 648. In *Boy Scouts*, an association successfully argued that it did not have to accept gay members. *Id.*

III. A "disclaimer" requirement is unworkable.

Lastly, how this "disclaimer" requirement will work in a way that purportedly cures all associational injuries is unclear, demonstrating that it is unworkable. An association like the State Bar of Oregon necessarily speaks for its members. The

members elect their leaders, etc. *OSB Board of Governors*, Or. State Bar (last visited March 26, 2025).[7] An association does not really have speech of its "own" in a meaningful sense. An association cannot effectively disassociate itself from its members, no matter how hard it tries, which is exactly why those members need their own freedom not to associate.

What is a disclaimer going to say? "Daniel Z. Crowe and members of the Oregon Civil Liberties Attorneys do not agree with this message"? Saying just "some members may disagree" is not especially helpful.

Where does such a "disclaimer" need to be placed? On the inside cover of a bar journal? Does anyone actually read those? At the top of an article or statement? On some webpage that few may ever visit?

At bottom, this Court has long favored clarity in the rules it announces, and a disclaimer theory is anything but. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989).

CONCLUSION

WILL respectfully urges this Court to grant the petition.

[7] https://tinyurl.com/yzkks75d.

Dated: April 23, 2025.

Respectfully submitted,

RICHARD M. ESENBERG
Counsel of Record
LUCAS T. VEBBER
SKYLAR CROY

WISCONSIN INSTITUTE
FOR LAW & LIBERTY

330 E Kilbourn Ave, #725
Milwaukee, WI 53202
(414) 727-9455

Rick@will-law.org