No. 24-1025

In the Supreme Court of the United States

DANIEL Z. CROWE, ET AL.,
Petitioners,
v.
STATE BAR OF OREGON, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE THE BUCKEYE INSTITUTE AND THE PELICAN INSTITUTE IN SUPPORT OF PETITIONERS

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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 AMICI CURIAE[1]

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute works to restrain governmental overreach at all levels of government. The Buckeye Institute files lawsuits and submits amicus briefs to fulfill its mission. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3).

The Pelican Institute is a nonpartisan research and educational organization—a think tank—and the leading voice for free markets in Louisiana. The Institute's mission is to conduct research and analysis that advances sound policies based on free enterprise, individual liberty, and constitutionally limited government.

Through its Center for Justice, the Pelican Institute represented Randy Boudreaux, a Louisiana lawyer who objected to the Louisiana State Bar Association's (LSBA) use of his dues to speak on issues

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from amici curiae made any monetary contribution toward the preparation or submission of this brief. Counsel timely provided the notice required by Rule 37.2.

like oyster leases, gun control, and civics education—political issues not germane to the practice of law. The LSBA reformed its policies following a Fifth Circuit ruling in *Boudreaux* v. *La. State Bar Ass'n*, 86 F.4th 620 (5th Cir. 2023), which ordered the LSBA to limit its speech to matters germane to law practice.

SUMMARY OF THE ARGUMENT

In 1994, more than 30 years ago, Professor Bradley Smith, observed, "[I]f ever there were advantages to the unified bar, those advantages no longer exist." Bradley A. Smith, *The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession*, 22 Fla. St. U. L. Rev. 35, 37 (1994). He wrote shortly after this Court ruled that integrated bar organizations could not use their members' dues for political or ideological purposes. *Keller* v. *State Bar of California*, 496 U.S. 1 (1990). At least some bar associations did not get the message or could not distinguish between political and ideological speech, and speech germane to lawyers and the legal profession.

Keller has now been in place for 35 years, and First Amendment jurisprudence has been clarified in that time, cutting the jurisprudential and logical foundations from under it. In particular, this Court reversed *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977)— on which the *Keller* Court relied—in *Janus* v. *AFSCME*, 585 U.S. 878 (2018). Along the way to *Janus*, the Court made it clear that the standard of review is more rigorous than the test applied in *Keller*, that deterring free ridership is not a compelling interest that will justify the compelled subsidization of speech, and that *Abood* was flawed in other ways.

The key precedent relied on in *Keller* has been overruled. Moreover, history has further proven that the distinction relied upon by *Keller* between activities germane to improving the quality of legal services and "activities of an ideological nature" is unworkable because speech about improving legal services is inherently political and touches on issues of public concern about which people can and do disagree.

In short, "[n]ow that *Abood* is no longer good law, there is effectively nothing left supporting [the Court's] decision in *Keller*." *Jarchow* v. *State Bar of Wis.*, 140 S. Ct. 1720, 1720 (2020) (Thomas, J., dissenting from denial of certiorari). As the Petitioners argue, *Keller* and *Lathrop* should be reexamined and overruled.

ARGUMENT

I. Introduction

In pertinent part, the First Amendment to the U.S. Constitution provides, "Congress shall make no law … abridging the freedom of speech …." The Court has noted, "An individual's freedom to speak … could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward th[at] end[] were not also guaranteed." *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 622 (1984) (citation omitted). A group that engages in expressive association—like mandatory bar associations—compels support of its message. An individual who has been compelled to join but also objects to that message should have the right to "eschew association for expressive purposes." *Janus*, 585 U.S. at 892. Otherwise, that compelled membership will "infringe[]

on the freedom to associate." *McDonald* v. *Longley*, 4 F.4th 229, 245 (5th Cir. 2021).

The Petitioners contend that the requirement that they join the Oregon Bar, even though it engages in nongermane speech, which *Keller* prohibits, violates their rights of free speech and free association. As they noted, the Ninth Circuit disagrees with the Fifth Circuit's two holdings that attorneys compelled to join a bar association that engages in nongermane activities are entitled to relief. In *McDonald*, the Fifth Circuit concluded,

> In sum, the Bar is engaged in non-germane activities, so compelling the plaintiffs to join it violates the First Amendment. There are multiple constitutional options: The Bar can cease engaging in non-germane activities; Texas can directly regulate the legal profession and create a voluntary bar association, like New York's; or Texas can adopt a hybrid system. But it cannot continue mandating membership in the Bar as currently structured or engaging in its current activities.

Id. at 252.

Janus's rejection of *Abood* applies in this case because the Court has treated the integrated bar similarly to a union for years. Much like unions, and notwithstanding *Keller*'s injunction, unified bars are engaged in lobbying and filing amicus briefs on political and ideological issues as to which reasonable people can and do disagree. Those unified bars justify

that activity as the pursuit of the anodyne, yet expansive, notion of improving the quality of legal services.

The Fifth Circuit has also explained the constitutional difference between germane and nongermane bar activities. "Compelled membership in a bar that is engaged in only germane activities survives [exacting] scrutiny." *Id.* at 246. In contrast, "[c]ompelled membership in a bar association that engages in non-germane activities … fails exacting scrutiny." *Id.*; see also *Boudreaux*, 86 F.4th at 625 ("[I]f mandatory bar associations are going to compel individuals to associate and speak, they must stay in their constitutionally prescribed lane.").

The way out of the *Keller* wilderness in which lawyers have wandered for 35 years lies in bifurcating the bar, splitting it into a voluntary association that is not bound by *Keller* and a mandatory regulatory body. The alternative to vindicating the associational rights of dissenting attorneys is to require those attorneys to police bar activities for nongermane uses of their compelled funding support and hope for a puny refund.

Lawyers in some, but not all, states must join the state bar association as a condition to their practice of law. Other professions require a license to practice, but nothing requires them to join an association. As Professor Smith explained, "Doctors are not required to join the medical society, nor dentists the dental association. Certified public accountants, veterinarians, and architects are free to join, or refrain from joining, their respective professional organizations." Smith, *supra*, at 36.

Put differently, it is only in some states that lawyers are obligated to join the bar association and have the bar association speak for them, subject to blurry and ill-defined limits. The result is a First Amendment outlier.

This Court, though, has declared, "Freedom of association … plainly presupposes a freedom not to associate." *Roberts*, 468 U.S. at 623. Likewise, this Court has "held time and again that freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Janus*, 585 U.S. at 892 (quoting *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977)). The unified bar takes the freedom not to associate and the freedom not to speak from lawyers in states like Oregon, where such membership is required.

II. *Janus* applies to integrated bar organizations like the Oregon State Bar.

In *The Limits of Compulsory Professionalism*, Professor Smith noted that viewed organizationally, an integrated bar might be a private association, a state agency, or a professional union.[2] This Court's jurisprudence and other considerations show that, contrary to the contention of some unified bar associations, an integrated bar operates more like a professional union than the other alternatives.

In *Keller*, the Court unanimously rejected the California State Bar's contention that it was a state

[2] The private association model does not work because the state compels lawyers to join the bar organization to practice. The state could simply require a license to practice without mandating the tie-in of a mandatory association membership.

agency and was entitled to be treated as such. It noted, "The State Bar of California is a good bit different from most other entities that would be regarded in common parlance as 'government agencies.'" *Keller*, 496 U.S. at 11. The Court explained that its funding came from dues payments, not from appropriations, and its membership was limited. In short, "The State Bar of California was created, not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession." *Id.* at 13.

In contrast, the Court found, "[t]here is … *a substantial analogy* between the relationship of the State Bar and its members, on the one hand, and the relationship of employee unions and their members, on the other." *Id.* at 12 (emphasis added). By requiring lawyers to join the bar, the organization utilized state enforcement mechanisms to preclude so-called free ridership, just like other unions historically have done. The Court saw nothing wrong with this: "It is entirely appropriate that all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort." *Id.* at 12.

The consequences that followed from characterizing integrated bar organizations as professional unions were familiar ones. First, the Court rejected the California State Bar's argument "that it is not subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees."

Id. at 13. Instead, consistent with and in reliance on *Abood*, the bar organization was not permitted to spend its members' dues on "activities having political or ideological coloration which are not reasonably related to the advancement" of its legitimate goals. *Id.* at 15. And, where the integrated bar spent dues on nongermane political or ideological activities, the remedy was to be determined using the *Hudson* procedures. See *Chicago Teachers Union, Local No. 1* v. *Hudson*, 475 U.S. 292, 310 (1986) ("[T]he constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending."). The *Keller* Court explained, "We believe an integrated bar could certainly meet its *Abood* obligation by adopting the sort of procedures described in *Hudson*." 496 U.S. at 17.

In its decision, the Ninth Circuit held that the Oregon Bar was a state agency, Pet. App. 14a–21a, justifying its ruling by pointing to changes in its legal standard for identifying state agencies. Even so, it drew its test for evaluating the merits of Crowe's freedom of association claim from *Knox* v. *SEIU*, 567 U.S. 293, 310 (2012). Pet. App. 23a. *Knox*, which mandates exacting scrutiny, involved the remedy scheme for union spending on a "Political Fight-Back Fund." The *Knox* Court held that non-members should have been notified of their rights and offered the opportunity to opt out of the union's political and ideological campaign.

The continued application of *Abood*, *Hudson*, and other union cases to integrated bar organizations reinforces the "substantial analogy" that the *Keller* Court saw between mandatory bar associations and labor unions. It has further consequences given this Court's criticism of and ultimate reversal of *Abood*. Those actions mandate the revising and reversal of *Lathrop* v. *Donohue*, 367 U.S. 820 (1961), and *Keller*.

III. Thirty-five years of experience with *Keller* shows that it is no more deserving of continued respect than *Abood*.

In the 35 years since *Keller*, the integrated bars were supposed to have refrained from spending dues on political or ideological activities and were required to provide rebates to lawyers when they went too far. But this solution has proven to be unworkable in practice. Speech by state bars concerning the improvement of legal services is, like speech in public-sector collective bargaining, inherently political. Even when an integrated bar does not take positions on what may be characterized as hot-button controversies, the positions advocated by integrated bars regarding improving legal services touch on matters of general public concern and involve questions on which reasonable people may and do disagree. In short, the problem of line drawing is insoluble, and the *Hudson* remedy is not a constitutionally adequate solution.

A. Speech regarding improving the quality of legal services, like collective bargaining, is inherently political.

In *Janus*, this Court explained that the union speech paid for by agency fees addressed both budgetary and other important issues, all of which had political implications. Collective bargaining over the level of employee compensation and benefits took place against a backdrop of serious budgetary problems. "The Governor, on the one side, and public-sector unions on the other, disagree[d] sharply over what to do" about the problems with underfunded pensions and healthcare benefits for retirees. *Janus*, 585 U.S. at 911. Union speech in collective bargaining also addressed issues like "education, child welfare, healthcare, and minority rights, to name a few." *Id.* Speech regarding education, for example, "touches on fundamental questions of education policy":

> Should teacher pay be based on seniority, the better to retain experienced teachers? Or should schools adopt merit-pay systems to encourage teachers to get the best results out of students? Should districts transfer more experienced teachers to the lower performing schools that may have the greatest need for their skills, or should those teachers be allowed to stay where they have put down roots? Should teachers be given tenure protection and, if so, under what conditions? On what grounds and pursuant to what procedures should teachers be subject to discipline or

> dismissal? How should teacher performance and student progress be measured—by standardized tests or other means?

Id. at 913. This Court concluded that the union speech at issue in *Janus* was "overwhelmingly of substantial public concern." *Id.* at 914.

In the same way, bar lobbying and legislative assistance, even on what *Keller* characterized as core, putatively germane issues for the bar like "improving the quality of the legal services available to the people of the State," *Keller*, 496 U.S. at 14 (quoting *Lathrop*, 367 U.S. at 843 (plurality opinion)), involve matters of "substantial public concern," *Janus*, 585 U.S. at 914, and are inherently political.

Thus, not in spite of *Keller*, but rather because of the error committed by *Abood* and perpetuated in *Keller*, unified bar associations have engaged in speech that is purportedly germane to the improvement of legal services, but like public-sector collective bargaining speech, is inherently political as well. The solution accordingly is not to tinker with the line-drawing exercise engaged in by the *Keller* Court, but to recognize that the First Amendment requires that any expenditures in support of such speech must have been obtained voluntarily, with prior affirmative consent. *Janus*, 585 U.S. at 929.

There are numerous examples that demonstrate how integrated bar expenditures putatively aimed at improving legal services are inherently political or ideological. As Professor Smith observes, supporting the provision of free legal representation to tenants in

eviction fights or other landlord-tenant legal disputes would increase the availability of legal services. Even so, "many bar members may staunchly oppose such a position," and an "ideological debate every bit as real as the bar taking a position on a 'substantive' issue such as rent control itself" could result. Smith, *supra*, at 53.

Unified bar associations have engaged in lobbying regarding taxation and the spending of public funds that go to the very heart of the kinds of compulsory political speech rejected in *Janus*. The Labor and Employment Section of the District of Columbia Bar filed a comment in support of the District of Columbia Civil Rights Tax Fairness Act of 2001, which would have eliminated income taxation of emotional distress damages in discrimination lawsuits. See Labor and Employment Section of the D.C. Bar, *Proposed Comments of the Labor and Employment Law Section of the District of Columbia Bar on Support for "D.C. Civil Rights Tax Fairness Act of 2001" (Bill No. 14-321)*.[3] The Litigation Section of the D.C. Bar publicly opposed the Mayor's recommendation to cut $1 million in civil legal services and loan forgiveness funding, see Litigation Section of the D.C. Bar, *Summary of Public Statement of the Litigation Section of the District of Columbia Bar Opposing the Mayor's Recommendation to Cut $1 Million in Civil Legal Services and Loan Forgiveness Funding*,[4] and the Florida Bar supported

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[3] https://tinyurl.com/55my7f5a (last visited Apr. 16, 2025).

[4] https://tinyurl.com/rupp7yvm (last visited Apr. 16, 2025). When, the Litigation Section issued its public statement opposing the Mayor's proposal to cut $1 million in funding for civil legal services and loan forgiveness, the D.C. Bar stated that the Section's action

legislation to provide student loan assistance for government and legal aid lawyers who have served in that capacity for three years, The Florida Bar, *Board Adopts Legislative Positions* (Jan. 10, 2019).[5] Florida also supported adequate funding of and opposes cuts to the funding of the Legal Services Corporation and supports "adequate funding for civil legal assistance to indigent persons through the Florida Civil Legal Assistance Act." See The Florida Bar, *supra*. "To suggest that speech on such matters is not of great public concern—or that it is not directed at the public square—is to deny reality." *Janus*, 585 U.S. 878 at 912 (internal citation omitted).

The D.C. Bar, the Florida Bar's Business Law Section, the Family Law Section of the Nevada Bar, the Missouri Bar, and the Arizona Bar have all filed amicus briefs on issues of public concern, including nonresident taxation, LGBTQ rights, and other topics as to which people can and do disagree. See D.C. Bar, *Summary of Amicus Curiae Brief by the D.C. Affairs Section in* Banner, et al. v. U.S., *Before the Supreme Court of the United States*[6]; Raychel Lean, *Florida Bar's Business Law Section Urges High Court to Ease Summary Judgment Standard*, Law.com (Dec. 31, 2019)[7]; Brief of Amicus Curiae Family Law Section of Nevada State Bar, *Hedlund* v. *Hedlund*, 125 Nev. 1043

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did not reflect the views "of the D.C. Bar or of its Board of Governors."

[5] https://www.floridabar.org/member/legact/legact003.

[6] https://tinyurl.com/47mu8xc3.

[7] https://tinyurl.com/8pb6zh9d.

(No. 48944).[8] Cf. *Keller*, 496 U.S. at 5 & n.2 (noting that the *Keller* petitioners complained that "[f]iling amicus curiae briefs in cases involving the constitutionality of a victim's bill of rights; the power of a workers' compensation board to discipline attorneys; a requirement that attorney public officials disclose names of clients; [and] the disqualification of a law firm" were among the bar activities that advanced "political and ideological causes"). More particularly, the Missouri and Arizona Bars have filed amicus briefs in support of unified bar associations against attacks like those of Petitioners. See Brief of the Missouri Bar as Amicus Curiae in Support of Appellees and Affirmance, *Fleck* v. *Wetch*, 937 F.3d 1112 (8th Cir. 2019) (No. 16-1564). The State Bar of Arizona filed the amicus brief in support of the State Bar of Oregon in the case below. In each case, there are lawyers who disagree with the positions taken by the unified bars in their states.

The Texas and Louisiana Bars are no exception to mandatory bar associations that engage in nongermane activity. The Texas Bar engaged in legislative lobbying that was "neither entirely germane nor wholly non-germane," with its support for "changes to a state's substantive law" being almost completely nongermane. *McDonald*, 4 F.4th at 247–48. Additionally, its funding of the Access to Justice Commission was not germane insofar as some of that funding went to "lobbying for changes to Texas substantive law designed to benefit low-income Texans." *Id.* at 251. For its part, the mandatory

[8] https://tinyurl.com/9jtcxyty.

Louisiana Bar engaged in nongermane spending through several "Wellness Wednesday" and technology and safety tweets, and its promotion of the annual Red Mass, Halloween, and Christmas holiday charity drives. *Boudreaux*, 86 F.4th at 632–34. None of those Bar activities were "germane to the regulation of the legal profession or the improvement in quality of legal services." *Id.* at 634.

In much the same way, the Oregon Bar engaged in nongermane conduct when it published two interrelated statements on "White Nationalism and Normalization of Violence" in its Bar *Bulletin*. See, *e.g.,* Pet. App. 6a–9a. The Bar leadership's statement was paired with one on behalf of Specialty Bar groups, including the Oregon Asian Pacific Bar Association, the Oregon Women Lawyers, and other affiliated groups. The Ninth Circuit noted, "[A] reasonable observer would attribute meaning to [Crowe's] membership in [the Oregon Bar] because of the Bulletin statements. [The Oregon Bar] endorsed the Specialty Bars' statement criticizing then-President Trump and suggested that all members agreed with it." Pet. App. 29a–30a. "Because the Specialty Bars' statement was not germane, [the Oregon Bar's] adoption of the Specialty Bars' statement was not germane either." Pet. App. 36a.

Attempts to solve the constitutional infringement by restricting the range of lobbying activities are inadequate. Professor Smith has explained how, even when the range of bar lobbying is limited, "the problems inherent in the unified bar concept" remain. Smith, *supra*, at 52. For example, the Michigan Bar limited its legislative activity to five general areas,

including "increasing the availability of legal services to society," and providing "content-neutral advice to legislators." See *id.* at 53. But, "none of th[o]se terms is self-defining." *Id.* He notes that such a limitation "shifts, but does not eliminate, the locus of questions concerning the political activities of the bar and the rights of dissenting members." *Id.* at 52–53.

Lower courts have been equally inconsistent in applying the line between what constitutes political speech and what is properly chargeable or germane. In *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507 (1991), this Court held, among other things, that a union's public relations campaign aimed at burnishing the standing of teachers "entailed speech of a political nature in a public forum" and was not properly chargeable. *Id.* at 528–29. The Ninth Circuit, later followed by the Seventh Circuit, declined to follow *Lehnert* in cases involving similar bar campaigns.

In *Gardner* v. *State Bar of Nevada*, 284 F.3d 1040, 1043 (9th Cir. 2002), the Ninth Circuit deemed a bar's public relations campaign to be "highly germane to the purposes for which the State Bar exists." It did so after acknowledging, "Undoubtedly every effort to persuade public opinion is political in the broad sense of the word." *Id.* at 1042–43. The court explained that the campaign helped to "dispel the notion that lawyers are cheats or are merely dedicated to their own self-advancement or profit." *Id.* at 1043. The campaign served vague state bar interests "to advance understanding of the law, the system of justice, and the role of lawyers, as opposed to nonlawyers, to make the law work for everyone." *Id.*

The Seventh Circuit followed the Ninth Circuit in disregarding one of *Lehnert*'s holdings. The court concluded, "It is no infringement of a lawyer's First Amendment freedoms to be forced to contribute to the advancement of the public understanding of the law." *Kingstad* v. *State Bar of Wisconsin*, 622 F.3d 708, 720 (7th Cir. 2010) (quoting *Gardner*, 284 F.3d at 1043); see also *id.* at 721 ("[T]he State Bar's public relations campaign was germane to the Bar's constitutionally legitimate purpose of improving the quality of legal services available to the Wisconsin public."). In contrast to the "exacting" scrutiny mandated by *Janus*, the court's review was "deferential." The Seventh Circuit found no need for a trial "that would scrutinize either the subjective motives of bar leaders or the actual effectiveness of the public image campaign." *Id.* at 718–19. The court's test was not necessity, but rather reasonableness.

The First Circuit found a unified bar association requirement that all bar members purchase life insurance from the association's program not to be germane to the bar association's purposes. *Romero* v. *Colegio de Abogados de Puerto Rico*, 204 F.3d 291 (1st Cir. 2000). The court observed, "The costs of that insurance are far from negligible; in some years the life insurance premium has constituted 72% of the dues." *Id.* at 293.

Gardner, *Kingstad*, and *Romero* come from the days when the courts looked at germaneness. Now, to be consistent with this Court's First Amendment jurisprudence, the courts should employ exacting scrutiny. Each case, though, illustrates how the

unified bars thought they should—or at least could—spend their members' dues.

B. The *Hudson* remedy is inadequate.

Remanding objecting lawyers to a *Hudson*-like process of claiming a refund puts the burden on the objectors and fails to examine the legal basis for the bar's claim. The results are also hardly worth the effort.

When the Petitioners were before this Court unsuccessfully in 2021, they noted that, after they complained about the Oregon Bar's advocacy, the Bar gave them "a partial dues refund of $1.12, plus $0.03 of statutory interest, with no further explanation." Pet. at 8, *Crowe* v. *Oregon State Bar*, No. 20-1678 (U.S. May 27, 2021); cf. *Janus*, 585 U.S. at 922 ("[T]he *Hudson* notice in the present case and in others that have come before us do not permit a nonmember to make that determination," i.e., whether to challenge the Bar's chargeability allocation.).

Professor Smith further explains that after the Florida Supreme Court trimmed the Florida Bar's sails by limiting its lobbying activities to five subject areas, the number of objectors was "relatively small." Smith, *supra*, at 51 & 54. Among the reasons for that paucity of objections was "the rather paltry size of the rebate," which was $8.52 plus interest in 1993. *Id.* at 54, n.113; see also Pet. App. at 10a, *Fleck* v. *Wetch*, 140 S. Ct. 1294 (2020) (No. 19-670) ("OPTIONAL: *Keller* deduction relating to non-chargeable activities. Members wanting to take this deduction may deduct $10.07 if paying $380; $8.99 if paying $350; and $7.90

if paying $325."). Those *Fleck* numbers reflect a return of some 2–3% of the annual dues.

Recall that in *Lathrop* in 1961, Mr. Lathrop objected to a $15 annual assessment. See *Lathrop*, 367 U.S. at 822. Now, even after deductions are allowed in some jurisdictions, much more money goes to the unified bar in the form of member dues. Even if the transition to a bifurcated bar led to a decrease in bar membership, the resulting decrease might be offset by reductions in administrative costs, ending services to the lawyers who opted out, and saving the cost of *Keller*-driven fights and rebates. Smith, *supra*, at 60.

IV. Neither *Keller* nor *Lathrop* are essential to the unified state bars' performance of their core functions.

Professor Smith has observed, "The advantages of coerced membership in a state bar have always been more rhetorical than real." *Id.* at 58. He goes on to examine the claims that unified bars have more resources and provide greater benefits to the public and members, finding the arguments lacking.

Professor Smith notes that voluntary bar associations have developed other sources of revenue and have generally retained more than 70% of the State's lawyers. *Id.* at 59. He explains, "Where dues are mandatory, lawyers may view the bar as a taxing authority, to which the less paid the better." *Id.* at 60.

In the same way, claims that the unified bar provides "better consumer protection and regulatory innovation, improved delivery of legal services, including pro bono work, and better lawyer discipline" are without merit. *Id.* at 61. Voluntary bar

associations first adopted client security funds and continuing legal education programs. *Id.* Moreover, "who could ever seriously suggest that pro bono legal services for the poor and indigent are more readily available in Michigan, with its mandatory bar, than in Ohio or the other voluntary bar states surrounding Michigan?" *Id.* Furthermore, the state can effectively take responsibility for attorney discipline from the otherwise autonomous trade association, and "there are public policy reasons to prefer that it do so." *Id.* at 62. The state is less likely to apply discipline for "anti-competitive or other illegitimate reasons" or "unreasonably seek to protect members from punishment or exposure." *Id.* at 63. In short, the unified bar has been a "disappointment" when it comes to providing better public benefits. *Id.* at 61.

One solution is to apply *Janus*'s requirement that no funds be extracted by bars in support of inherently political speech without clear and affirmative consent. *Janus*, 585 U.S. at 929. This can be (and has been) accomplished by breaking the unified bar into two parts: a voluntary bar that can act without regard to *Keller*'s limitations and a mandatory association to perform core regulatory functions. Several integrated bar association states have made that split, while 37 jurisdictions, including 32 states, have not. See Ralph H. Brock, "*An Aliquot Portion of Their Dues*:" *A Survey of Unified Bar Compliance with* Hudson *and* Keller, 1 Tex. Tech J. Tex. Admin. L. 23, 24 (2000).

In 2013, the Supreme Court of Nebraska limited the use of mandatory dues to the regulation of the legal profession, identifying six functions of that regulation, and called for "the remaining activities of

the Bar Association [to] be financed solely by revenues other than mandatory assessments." *In re Petition for a Rule Change to Create a Voluntary State Bar of Nebraska*, 841 N.W.2d 167, 179 (Neb. 2019). The California Bar split into two entities in 2018 when the bar's sections and other trade association-like activities were spun off into a voluntary entity. That voluntary association is free to advocate for and against state legislation without being limited by *Keller*. See Lyle Moran, *California Split: 1 Year After Nation's Largest Bar Became 2 Entities, Observers See Positive Change*, ABA Journal (Feb. 4, 2019).[9]

As Professor Smith noted, "to the extent that efficient bar association administration and a strong legislative program are beneficial to the private bar, unification is a handicap, not a strength." Smith, *supra*, at 64. He explains, "In a voluntary bar state, … the state can directly assume its proper regulatory functions aimed at protecting the public interest. Voluntary bar associations are then free to tend to the broader issues of improving professional standards, and to promoting voluntary pro bono, educational, and other programs." *Id.* at 63. Finally, voluntary bar associations are free to declare their views in ways that mandatory bar associations should not be.

For its part, the Florida Bar Board of Governors initially opposed some lobbying efforts proposed by the Family Law Section "because it would cause deep philosophical and emotional divisions among a significant portion of the Bar's membership." See The

[9] https://tinyurl.com/2k5zhxk2.

Florida Bar, *Family Law Section to File Gay Adoption Case Amicus* (Feb. 15, 2009).[10] In 2009, the Supreme Court of Florida held that the Florida Bar's "actions in permitting the Family Law Section to file an amicus brief do not violate the First Amendment rights of the petitioners because membership in the Family Law Section is voluntary and any such advocacy by a section is not funded with compulsory dues." *Liberty Counsel* v. *Florida Bar Bd. of Governors*, 12 So.3d 183, 185 (Fla. 2009). In dissent, Justice Polston, joined by Justice Canady, observed that the Bar did not follow its policies in allowing the amicus brief to be filed. Allowing optional sections of the bar to take ideological positions that the Bar cannot transparently end-runs *Keller*. Only truly voluntary groups of lawyers, not subsets of unified bars, should be permitted to stake out such positions.

Separate and apart from voluntary state bar associations like those in California, New York, and Ohio, there are other alternatives. They include the American Bar Association, the Federalist Society, the American Association of Justice, and the Defense Lawyers Institute. Those organizations offer continuing legal education programs for their members and affiliates as well as varying degrees of political activity. If the mandatory bar associations were bifurcated, lawyers could join one of these or other such associations instead of the voluntary state bar associations.

The Ninth Circuit's remedy fails for that reason. It stated that "even if [the Oregon Bar] does engage in

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[10] https://tinyurl.com/23c84vep.

non-germane activities, in situations in which those activities might be attributed to members, it could include a disclaimer that it does not speak on behalf of all those members." Pet. App. 37a. That simply licenses the mandatory Oregon Bar to engage in non-germane activities, requiring lawyers like Crowe to police the nongermane activity.

The Fifth Circuit's remedy is better but still has its limits. In *McDonald*, the Fifth Circuit first rejected the contention that opt-in, rather than opt out is required. The court noted, "Though *Janus* and *Keller* indicate that [opt-in] may be the case, *Keller* despite 'its increasingly wobbly, moth-eaten foundations,' remains binding." *McDonald*, 4 F.4th at 253. The court then concluded that Texas's implementation of the *Hudson* remedy was "inadequate." *Id*. at 254. Finally, the court entered a preliminary injunction in favor of McDonald, "preventing the Bar from requiring plaintiffs to join or pay dues pending completion of the remedies phase." *Id*. at 255; see also *Boudreaux*, 86 F. 4th at 638 (granting the same injunction in favor of Boudreaux).

The Fifth Circuit's disposition of *McDonald* and *Boudreaux* is good as far as it goes. The problem is that the mandatory bar associations will, inevitably, return to nongermane activity, leaving it for objecting members to police, and federal courts to consider. Cf. Rudyard Kipling, *The Gods of the Copybook Headings* (1919) ([T]he Dog returns to its Vomit and the Sow returns to her mire/ And the burnt Fool's bandaged finger goes wabbling back to the Fire."). Far better to jettison *Keller* and *Lathrop* and relieve the members and federal courts of those burdens.

Getting to a bifurcated bar requires reversing both *Keller* and *Lathrop*. Reversing *Keller* would be just *Abood*'s second shoe dropping; *Keller* relied on it and, in application, suffers from the same defects. *Lathrop* is the source of the mischief in that it authorizes the state to compel lawyers to become members of the unified bar. It thereby infringes lawyers' First Amendment right to refrain from associating.

V. This case provides an effective vehicle to liberate lawyers from forced association.

The right to associate and not to associate is fundamental. Organizations purporting to represent lawyers—governed by more lawyers—should be more protective of these rights than any other organization. Yet hundreds of thousands of lawyers are forced to associate with organizations that do not represent their views—and pay for the privilege. That is wrong. This case is a clean, timely vehicle to address this issue. It has been seven years since *Janus*, wherein the Court addressed forced association in the context of public union fair share fees. Lawyers subject to unified mandatory bars should be free to disassociate from an organization taking their money and purporting to represent all lawyers forced into that organization.

Indeed, "the very nature of the unified bar is inconsistent with the role of lawyers as the champions of individual rights. Both lawyers, and the public at large, would benefit from the abolition of the unified bar concept in favor of voluntary bar associations." Smith, *supra*, at 37. And the First Amendment requires no less.

CONCLUSION

For the reasons stated above, the Court should grant the Petition and, on review, reverse the Ninth Circuit's decision.

Respectfully submitted,

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