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 FREEDOM FOUNDATON AS *AMICUS CURIAE* 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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INTERESTS OF *AMICUS CURIAE*[1]

Freedom Foundation (the Foundation) is a non-profit, nonpartisan organization advocating for the associational freedom of public employees. As part of this mission, the Foundation has regularly filed *amicus curiae* briefs in cases pending before this Court. *See, e.g.*, *Alaska, et al., v. Alaska Employees Assoc.*, 144 S. Ct. 682 (2024); *Firth, et al.*, *v. McDonald,* 142 S. Ct. 1442 (2022); *Thompson v. Marietta Educ. Ass'n*, 141 S. Ct. 2721 (2021); *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31,* 585 U.S. 878 (2018). The Foundation represents public sector employees who are compelled to support political speech by labor unions in the wake of this Court's decision in *Janus v. AFSCME*, 585 U.S. 878 (2018).

Like the Oregon Bar Association's mandatory membership for anyone seeking to practice law, many public sector employees are compelled to be members of bargaining units represented by labor unions if they want to participate in a government job, such as teaching. Even if the employee opts out of paying dues, the employee is still a member of the bargaining unit and is represented by a private entity. This compelled association is objectionable to many employees, since it associates them with union political speech, even when that speech is antithetical to their beliefs.

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[1] Pursuant to Rule 37.2, all parties received notice of the filing of this brief. Pursuant to Rule 37.6, *Amicus* affirms that no party's counsel authored this brief in whole or in part, and no person or entity, other than *Amicus* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

The Foundation has an interest in the Court accepting review of the instant case and addressing First Amendment prohibitions against compelled expressive association for licensed attorneys forced into bar membership and for public employees forced to be members of a bargaining unit represented by a labor union. The Foundation respectfully urges this Court to accept review of this case.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

Free association injuries under the First Amendment can occur as a matter of offensive speech, or objecting to the association qua association. But the Ninth Circuit has departed from this understanding. Instead, it holds that a person "cannot demonstrate that his freedom of association is infringed merely by pointing to the fact that he is required to interact with an organization in some sense." Pet.App. 25a. According to the Ninth Circuit, he "must show that the required association impairs his expression." *Id.* This is wrong.

Forced association with groups that are expressive *by their very nature*, is injurious to free association rights regardless of an individual's own expression. Also wrong is the Ninth Circuit's conclusion that a simple disclaimer suffices to remedy a potential associational injury. Pet.App. 37a-38a. As discussed below, such a disclaimer is insufficient to remedy association injuries. This is especially true in cases where individuals' freedom of conscience is burdened. As such, Freedom Foundation respectfully urges this Court to grant review in this case for three reasons additional to those presented in the petition.

First, this case presents an excellent vehicle to address and to clarify the scope of the freedom of association, and particularly the impact of compelled association. The damage caused by compelled association is not always as obvious as compelled speech, sometimes consisting of a violation of conscience and the loss of reputation. Second, compelled association alone is sufficient for a free association injury regardless of specific objectionable expression. Prior cases support recognition of a right of free association sounding compelled association with groups or individuals that are themselves inherently expressive. Third, voluntary associations can more effectively represent the interests of the members who get to choose their participation, while legitimate government interests at issue in regulating professions can be better achieved through direct management. Civil society and its myriad voluntary associations provide excellent examples. This is true of licensed attorneys, public sector employees, and everything in between.

The Petition should be granted.

REASONS TO GRANT THE PETITION

I. THIS CASE PRESENTS AN EXCELLENT OPPORUNITY TO ADDRESS THE HARMS CAUSED BY COMPELLED ASSOCIATION

Injuries to associational freedoms can be felt in unique ways, including burdening the freedom of conscience. *See* James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785) ("The Religion then of every man must be left to the conviction and conscience of every man: and it is the right of every man to exercise it as these may dictate."). An example of the seriousness of potential associational injuries is the situation surrounding

Jewish teachers working for the Los Angeles Unified School District.

These Jewish individuals are forced into a representational relationship with a labor union, United Teachers of Los Angeles (UTLA), which has expressed antisemitic viewpoints. *See Krieger, et al., v. Banks, et al.*, No. 2:24-cv-08589 (filed Nov 22, 2024). This includes funding and supporting programs advocating boycott, divestment and sanctions against Israel, supporting candidates for official positions that have made extreme antisemitic statements, pushing classroom curricula that redefines Judaism to exclude the belief in a Jewish homeland which slanders Israel as a genocidal apartheid state, and worst of all, defines for Jews the scope of their own religious beliefs. Nonetheless, under California's collective bargaining laws, these Jewish teachers are forced members of a bargaining unit represented by UTLA. So while the Jewish Teachers may choose not to pay union dues or be members of the union itself, they are nonetheless legally compelled to associate with a group spouting hateful rhetoric about them.

These teachers share a devout commitment to their traditional religious heritage, which includes support for the State of Israel as an integral part of their sincerely held religious belief and practices. In the teachers' view, UTLA has become an association of political activists committed to destroying their religion, culture, and values. Nevertheless, through the compelled association enabled by state law, these Jewish teachers are complicit in violating their own conscience and their deeply held religious tenets. The teachers object not only to the forced association with speech with which they disagree, but also with forced association with an organization with views

repugnant to the requirements of the practice of their religious faith. That is to say, even if the public did not know of UTLA's alleged antisemitism, the Jewish teachers *themselves* would know. That knowledge when combined with the compelled association, *is* a First Amendment injury.

This associational injury is compounded by knowledge of the association amongst one's intimate community. Here, the Jewish teachers' forced association with UTLA harms their reputation among their family members and their community, who know that the Jewish teachers are associated with an entity espousing antisemitic rhetoric. *Meese v. Keene*, 481 U.S. 465, 475 (1987) (recognizing reputational injury in the First Amendment context). The mere fact that others in the Jewish teachers' religious and ethnic community will know that the Jewish teachers are associated with UTLA creates a "public formation of an association" between the Jewish teachers and UTLA's antisemitic views. And while the Jewish teachers may explain to those they encounter that they have no choice but to be associated with UTLA, and do not support UTLA's antisemitism, this explanation "would be ineffective among those citizens" to whom they have no chance to explain. *Keene*, 481 U.S. at 476.

Krieger exemplifies the stakes for associational freedoms raised by this Petition. While the compelled bar members are not necessarily being forced to betray their consciences, they are raising what should be actionable First Amendment claims. For Jewish teachers forced to be in bargaining units represented by labor unions that publicly denigrate their faith, "guilt by association" cannot easily be overcome. It is unrealistic in the extreme to presume that a mere

disclaimer, such as the Ninth Circuit contemplated in *Crowe*, can adequately repair the associational injuries suffered by the Jewish teachers caused by their compelled association with UTLA. The same is true of the Petitioners.

The Petition should be granted.

II. OBJECTIONABLE ASSOCIATION ALONE IS A SUFFICIENT INJURY UNDER THE FIRST AMENDMENT

As the Fifth Circuit recognized in *McDonald v. Longley*, when it comes to expressive associations, "the membership is the message." 4 F.4th 229, 245 (5th Cir. 2021). Thus, declining association, or *disassociating*, can itself be a form of expression. *Janus*, 585 U.S. at 892. *Boudreaux v. Louisiana State Bar Ass'n*, 86 F.4th 620, 632 (5th Cir. 2023) (if mandatory associations "may opine…on anything…there is no limiting principle."). This is true even if the group's activities appear harmless, because "[t]here is no de minimis exception" to the First Amendment. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001). The very act of forcing someone to associate with a group they otherwise would disdain causes a First Amendment injury *by its very nature*. *See* Patrick Lofton, *Any Club That Would Have Me as A Member: The Historical Basis for A Non-Expressive and Non-Intimate Freedom of Association*, 81 Miss. L.J. 327, 337 (2011).

This Court has recognized that the "freedom of association" protects not only public participation, but the choice of whether to "enter into and maintain certain intimate human relationships." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617 (1984). This freedom of choice necessarily includes the ability to choose

not to form a relationship. *Id.* at 623; *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. Of the L. v. Martinez*, 561 U.S. 661, 680 (2010) ("Who speaks…colors what concept is conveyed."). Forced association with groups or entities that are expressive *by their very nature*, is injurious to free association rights regardless of an individual's own expression. The converse is also true in that groups cannot be forced to associate with individuals, even if the groups' own expression is unaffected.

For example, where political parties have been forced as a matter of law to associate with non-partisan voters in so-called "open" primaries in which those voters can nominate party representatives, this Court has found a violation of the parties' free association rights. *E.g.*, *California Democratic Party v. Jones*, 530 U.S. 567, 577 (2000). In those cases, it was not so much that the parties took issue with the voters' speech in any specific election, but that the voters role in the process was inherently expressive in such a way that they were seen as speaking *for* the party itself. *Id.* ("Proposition 198 [allows speech by] those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival."). The same is true here, as the compelled affiliation with the bar means that the bar is perceived as speaking *for* an individual, regardless of the content of the speech.

The Ninth Circuit's holding that something *more* than mere membership in an inherently expressive group is necessary to show an associational injury is at odds with this Court's precedents. Contrary to those cases, the Ninth Circuit reasons that a person "cannot demonstrate that his freedom of association is infringed merely by pointing to the fact that he is required to interact with an organization in some

sense." Pet.App. 25a. The Ninth Circuit's "disclaimer" rule thus opens the door to allow inherently expressive associations to avoid constitutional scrutiny for their actions merely by stating they do not speak for all those associated with the group. But this misses the point, because when it comes to expressive groups, again, "the membership is the message." *McDonald*, 4 F.4th at 245.

Compulsory association is inherently distasteful in a free society, and, perhaps for that reason, is blessedly rare. But compulsory bar associations for attorneys, and compulsory union representation for teachers, remain two glaring examples of compulsory association. For individuals practicing law or teaching in states with this type of mandatory association, the burden is not just being identified with specific messages with which one disagrees, it is also the *association itself*.

The Petition should be granted.

III. VOLUNTARY ASSOCIATIONS EFFECTIVELY REPRESENT MEMBERS' INTERESTS AND GOVERNMENT INTERESTS CAN BE ACHIEVED BY DIRECT OVERSIGHT

In 1835, Alexis de Tocqueville wrote of the robust civil society and system of spontaneous order that existed in the United States. Jeffrey C. Alexander, *Tocqueville's Two Forms of Association: Interpreting Tocqueville and Debates Over Civil Society Today*, The Tocqueville Review (2006). Despite efforts at circumvention, this system of spontaneous order survives. The experience of the legal profession in many states demonstrates that government-compelled association is not a necessary condition for effectively

representing the interests of members of the legal profession, or any other profession for that matter.

A sizeable number of states *already* allow attorneys the freedom to make their own decision regarding bar association membership. Leslie C. Levin, *The End of Mandatory State Bars?*, Georgetown Law Journal, Vol. 109, 1 (2020). *Voluntary* bar associations effectively operate on behalf of their voluntary members at both the state,[2] and local levels.[3] The attorneys practicing in those jurisdictions are not bereft of professional representation or without recourse for enforcing standards of professional conduct. This system is possible because voluntary bar associations attract sufficient members and dues without the necessity of government involvement, and because rulemaking and enforcement is carried out directly by those states' supreme courts. *See*, *e.g.*, *Rules of Professional Conduct*, New York State Unified Court System.[4]

For example, the voluntary New York State Bar Association has over seventy thousand members and collects tens of millions in voluntary dues every year. *About NYSBA*, New York State Bar Association.[5] The New York State Bar Association performs all the functions of a mandatory bar by advancing profes-

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[2] *See, e.g.*, *About the Virginia Bar Association*, The Virginia Bar Association, https://www.vba.org/page/about_us (last visited April 22, 2025).

[3] *See, e.g.*, *About Us*, New York City Bar, https://www.nycbar.org/about-us/ (last visited April 22, 2025).

[4] (April 1, 2009), https://www.nycourts.gov/legacypdfs/rules/jointappellate/NY%20Rules%20of%20Prof%20Conduct.pdf (last visited April 22, 2025).

[5] https://nysba.org/about/ (last visited April 22, 2025).

sionalism, regulating behavior, and improving the quality of legal services and the access to justice; all without the need for government coercion. There are even hundreds of voluntary bars representing sub-populations of attorneys with specific interests. Again using New York as an example, this includes the Adirondack Women's Bar Association, Customs and International Trade Bar Association, South Asian Bar Association of New York, French-American Bar Association, and WNY Trial Lawyers Association.

The same proliferation of effective voluntary associations is available to public sector employees, and other professions generally, no matter geography or specific skill set. *List of Professional Associations & Organizations by Industry*, JobStars.[6] This is true of administration professionals, *see* American Society of Administrative Professionals,[7] animal caretakers; *see* American Association of Feline Practitioners,[8] chaplains; *see* Association of Professional Chaplains,[9] dentists; *see* American Dental Association,[10] engineers; *see* American Society of Civil Engineers,[11] fashion designers; *see* Council of Fashion Designers of America,[12] landscapers; National Association of

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[6] https://jobstars.com/professional-associations-organizations/ (last visited April 22, 2025).

[7] https://www.asaporg.com/ (last visited April 22, 2025).

[8] https://catvets.com/ (last visited April 22, 2025).

[9] https://www.professionalchaplains.org/ (last visited April 22, 2025).

[10] https://www.ada.org/ (last visited April 22, 2025).

[11] https://www.asce.org/ (last visited April 22, 2025).

[12] https://cfda.com/ (last visited April 22, 2025).

Landscape Professionals,[13] plumbers; *see* American Society of Plumbing Engineers,[14] pilots; *see* Aircraft Owners and Pilots Association,[15] real estate professionals; *see* The American Guild of Appraisers,[16] professional sports coaches; *see* American Football Coaches Association,[17] and of course teachers; *see* American Association of Physics Teachers.[18]

It is perhaps unsurprising that the list of effective voluntary professional associations is so large in the United States, where free association rights are generally protected, and potential associations are as diverse as the population itself. Of course, the difference between the organizations noted above and mandatory bar associations and government unions is that whereas the former relies on the cooperation of free individuals, the latter forces compliance through coercive power. But there is no need for this rigid system. Like *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), before it, the weaknesses of *Keller v. State Bar of California,* 496 U.S. 1 (1990), have now been laid bare, and this Court should exercise review of the instant Petition and resolve the controversy.

The Petition should be granted.

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[13] https://www.landscapeprofessionals.org/ (last visited April 22, 2025).

[14] https://www.aspe.org/ (last visited April 22, 2025).

[15] https://www.aopa.org/ (last visited April 22, 2025).

[16] https://www.appraisersguild.org/ (last visited April 22, 2025).

[17] https://www.afca.com/ (last visited April 22, 2025).

[18] https://www.aapt.org/ (last visited April 22, 2025).

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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