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 the Liberty Justice Center as Amicus Curiae Supporting Petitioners

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Question Presented

The questions presented are:

1. Whether compelled membership in the Oregon State Bar as a condition of practicing law in the State of Oregon violates the First Amendment.

2. Whether the Court should reconsider *Keller v. State Bar of California*, 496 U.S. 1 (1990) in light of *Janus v. AFSCME*, 585 U.S. 878 (2018) and require activities of mandatory bar associations to satisfy exacting scrutiny.

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Interest of the Amicus Curiae[1]

The Liberty Justice Center is a nonprofit, nonpartisan public-interest litigation firm that pursues cutting edge strategic, precedent-setting cases nationwide, focusing on free speech, educational freedom, workers' rights, and government overreach. The Liberty Justice Center is interested in this case because the freedom of association is a core value vital to a free society. The Liberty Justice Center represented Mark Janus in *Janus v. AFSCME Council 31*, 585 U.S. 878 (2018).

Summary of Argument

To practice law in Oregon, an attorney must join the Oregon State Bar and pay bar dues. ORS § 9.160. Petitioners challenged this arrangement as a violation of their First Amendment rights. But the lower court, relying on *Keller v. State Bar of California*, 496 U.S. 1, 13–14 (1990), denied Petitioners' claim. The Court in *Keller* premised its decision on *Abood v. Detroit Board of Education, 431 U.S. 209 (1977). Abood* discussed the permissible use of compulsory fees collected by public sector unions from nonmembers. *Id.* The Court held that compulsory union fees were permissible so long as they were used to fund activities "germane" to the union's duties as employees' exclusive bargaining representative, such

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than Amicus funded its preparation or submission. All parties received timely notice of Amicus's intent to file this brief.

as collective bargaining, contract administration, and grievance adjustment. *Id.* at 225–26, 235. But unions could not use these fees to finance political or ideological activities unrelated to collective bargaining, which would violate the First Amendment. *Id.* at 234–25. *Keller*, adopting this germaneness rule, held that the state bar could constitutionally fund activities germane to its goals of regulating the legal profession and improving the quality of legal services using mandatory dues. 496 U.S. at 13–14.

More recently, this Court explicitly overruled *Abood* in *Janus v. AFSCME Council 31*, 585 U.S. 878, 886 (2018). *Janus* held that *Abood's* germaneness rule—adopted and expanded to the state bar context by *Keller*—was unworkable and compelled subsidization of private speech, infringing on the First Amendment. *Id.* at 922.

Thus, *Keller's* reliance on *Abood's* germaneness rule is unsound. Still, the lower court held that mandatory payment of dues to a bar association as a condition of practicing law did not violate Petitioners' First Amendment rights, explicitly relying on *Keller*. In light of *Janus, Keller* is no longer good law and cannot provide a basis to deny Petitioners' claim. But without an explicit ruling from this Court overturning *Keller*, lower courts will cautiously continue to apply *Keller* in denying First Amendment challenges to forced subsidization of private bar association activities, just as the lower court did in this case. *See Crowe v. Or. State Bar*, 112 F.4th 1218, 1239–40 (9th Cir. 2024).

This Court should grant the petition and make clear that *Keller* is no longer good law because this Court's holding in *Janus* undermines *Keller's* foundation.

Argument

I. This Court's cases addressing mandatory bar dues are inconsistent with its more recent First Amendment jurisprudence.

This Court has considered the constitutional implications of mandatory bar associations several times over the years. The Court heard its first mandatory bar association case in 1961, and the plurality explicitly avoided the First Amendment question of compelled speech. *Lathrop v. Donohue*, 367 U.S. 820, 845 (1961) ("We are persuaded that on this record we have no sound basis for deciding appellant's constitutional claim insofar as it rests on the assertion that his rights of free speech are violated by the use of his money for causes which he opposes."). By declining to decide that question, the Court permitted mandatory bar dues to be spent on a range of political and ideological activities.

Thirty years later, in *Keller*, the Court narrowed the *Lathrop* ruling by explicitly holding that dues could not be used for "activities having political or ideological coloration." *Keller v. State Bar of Cal.*, 496 U.S. 1, 15 (1990). To prevent such illicit diversion, the Court said a mandatory bar could follow the same procedures governing agency fees endorsed in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475

U.S. 292 (1986). *Keller*, 496 U.S. at 15–17. In *Hudson*, the Court held that a union procedure separating political or ideological activities from germane activities must "be carefully tailored to minimize the infringement" of First Amendment rights. 937 F.3d at 303. *Hudson* required that this procedure include an explanation of the basis for the fee, an opportunity to challenge the fee amount before a third party, and escrow for the amounts in dispute during pending challenges. *Id.* at 310.

In addressing the First Amendment implications of mandatory dues, *Keller* relied heavily on the Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). In *Abood*, the Court held that public employees could be required to pay union fees to support collective bargaining so long as the employees were not compelled to fund the union's political or ideological activities. *Abood*, 431 U.S. at 235–37. *Keller* adopted and expanded this framework, stating that "the principles of *Abood* apply equally to employees in the private sector." *Keller*, 496 U.S. at 10. *Keller* analogized the relationship between the state bar and its members to that of a labor union and its members, finding that *Abood's* germaneness rule—allowing compulsory fees to be used for activities "germane" to the union's duties—should also apply to state bars. *Id.* at 12–13. With this in mind, *Keller* determined that the state bar could constitutionally fund activities germane to its goals of regulating the legal profession and improving the quality of legal services using mandatory dues. *Id.* at 14. The Court echoed *Abood*'s concerns

about compelled speech and association, stating that the Bar could not use those dues for political or ideological activities unrelated to the Bar's regulatory mission. *Id.* at 13–14.

But in 2018, this Court overruled *Abood*—the legs on which *Keller* stood—in *Janus v. AFSCME Council 31*, 585 U.S. 878, 886 (2018). *Janus* held that compelling public-sector employees to pay union fees violated the First Amendment unless those employees affirmatively consented to the dues, confirming that compelled financial support for speech is unconstitutional. *Id.* at 894, 930. *Janus* reasoned that "*Abood's* line between chargeable and nonchargeable union expenditures has proved to be impossible to draw with precision." *Id.* at 921. This Court explicitly overruled *Abood*, finding that *Abood's* practice of forcing individuals to endorse and finance ideas they found objectionable violated the First Amendment. *Id.* at 893, 930.

II. The Court should clarify that *Janus* overrules *Keller* to prevent confusion in the lower courts.

Janus held that the government violates the First Amendment when it forces someone to pay money to a private organization that takes positions on "controversial public issues." 585 U.S. at 892. *Janus* identified various topics on which unions speak: "controversial subjects such as climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions." *Id.* at 913–14. These are sensitive political topics, and they are "un-

doubtedly matters of profound value and concern to the public." *Id.* at 914 (internal quotations omitted). "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." *Id.* at 912 (internal quotation omitted). Both unions and state bars advocate public policy positions on the dime of people who do not consent to pay or agree with such positions but are forced to pay for these organization's messaging just to maintain their job.

Similarly, the Oregon State Bar uses mandatory bar dues paid by all licensed attorneys in Oregon to subsidize a magazine called the *Bulletin*. *Crowe*, 112 F.4th at 1225. The Oregon State Bar uses this magazine to speak on matters of great public concern that are often directed at the public square. The magazine published two politically charged statements on "White Nationalism and [the] Normalization of Violence," which included the Oregon State Bar's logo. *Id.* The piece claimed that the country's President fostered a white nationalist movement. The dues of all practicing lawyers in Oregon are required to subsidize this speech without prior consent.

This is not an isolated scenario—courts have continually been asked to determine the validity of mandatory state bar fees, and in doing so, exemplify the conflicting standards of *Keller* and *Janus*. In *McDonald v. Longley,* 4 F.4th 229 (5th Cir. 2021), the State Bar of Texas required attorneys to join and pay compulsory dues as a condition of practicing law. *Id.* at 237. Texas law dictated that these dues could only

be spent on administering the public purposes outlined via statute.[2] *Id.* at 237–38. The Bar spent considerable funds on highly ideological diversity initiatives, including efforts of the Office of Minority Affairs, whose goals prioritize service for minority, women, and LGBT attorneys and legal organizations and "Minority Initiatives" dedicated to furthering diversity. *Id.* at 249. The Fifth Circuit determined that such identity-based programs "have spawned sharply divided public debate[.]" *Id.* at 249. At the same time, these diversity initiatives were "aimed at 'creating a fair and equal legal profession for minority, women, and LGBT attorneys,' which the Court considered a form of regulating the legal profession. *Id.* The Fifth Circuit recognized that the Bar's diversity initiatives were simultaneously sensitive political issues of profound value and concern to the public—speech that *Janus* prohibited forced payment to subsidize—*and*

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[2] These purposes include: (1) to aid the courts in carrying on and improving the administration of justice; (2) to advance the quality of legal services to the public and to foster the role of the legal profession in serving the public; (3) to foster and maintain on the part of those engaged in the practice of law high ideals and integrity, learning, competence in public service, and high standards of conduct; (4) to provide proper professional services to the members of the state bar; (5) to encourage the formation of and activities of local bar associations; (6) to provide forums for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform, and the relationship of the state bar to the public; and (7) to publish information relating to the subjects listed in Subdivision (6).

germane to the purposes identified in *Keller*. *Id.* at 249.

The Fifth Circuit considered the procedures that *Keller* and *Janus* used when deciding whether an organization could constitutionally mandate specific fees. But the standards set forth in Janus and *Keller* conflict and cannot be reconciled. *Keller* held that mandatory union dues satisfied the First Amendment so long as the union provided notice, an explanation of, and an opportunity to challenge the fee. *Keller*, 496 U.S. at 16 (referencing *Hudson*, 472 U.S. at 310). But *Janus* held that government employees could not be required to pay money to a union unless they provided affirmative consent to pay the union. *Janus*, 585 U.S. at 930. Trying to reconcile these conflicting standards, the Fifth Circuit found that *Keller's* less demanding standard remained binding, and therefore ignored the higher standard specified in *Janus*. *McDonald*, 4 F.4th at 254. This regime, as *Janus* pointed out, is simply unworkable because highly polarizing activities are also categorized as germane. *Janus*, 585 U.S. at 881.

This Court in *Keller* recognized that the line between political and nonpolitical activities "will not always be easy to discern." *Keller*, 496 U.S. at 15. Yet *Keller* held that a state bar could straddle this fine line and "meet its *Abood* obligation by adopting the sort of procedures described in *Hudson*." *Id.* at 17.

But in *Janus*, this Court held that *Abood's* framework of trying to discern between political and nonpolitical activities was unworkable in practice and

that the "line between chargeable and nonchargeable expenditures [set forth in *Abood*] has proved to be impossible to draw with precision." *Janus*, 585 U.S. at 881.

There is no reason to believe that what this Court held is unworkable in the context of public-sector labor unions is workable in the context of mandatory state bar dues. In adopting mandatory state bar dues as a condition of practicing law, states often lean on the notion that particular political or ideological initiatives are simply part of "regulating" the legal profession. *McDonald*, 4 F.4th at 249. By claiming that these political or ideological activities are germane to the purpose or goal of the bar, attorneys are forced to pay for political and ideological speech against their will.

Compelling subsidization of state bars raises the same First Amendment concerns as compelled subsidization of public-sector unions. *See Janus*, 585 U.S. at 893. As lower courts continue to apply *Keller*, they are "[f]orcing free and independent individuals to endorse ideas they find objectionable" which "is always demeaning[.]" *Id.* at 893. Indeed, "[A] law commanding involuntary affirmation of objected-to beliefs would require even more immediate and urgent grounds than a law demanding silence." *Id.* at 893 (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 633 (1943) (internal quotation marks omitted)).

As Justice Thomas has observed, "The opinion in *Keller* rests almost entirely on the framework of

Abood. Now that Abood is no longer good law, there is effectively nothing left supporting our decision in *Keller*." *Jarchow v. State Bar of Wis.*, 140 S. Ct. 1720, 1720 (2020) (Thomas, J., dissenting from denial of certiorari). Even though this Court has "admitted that *Abood* was erroneous, and *Abood* provided the foundation for *Keller*[,]" lower courts are still hesitant to apply *Janus* freely, and will continue to apply *Keller* until it is explicitly overruled. *Id.* at 1721.

Conclusion

Because of the confusion in the lower courts, this Court should grant the petition to hold that *Keller* is no longer good law after *Janus*.

Respectfully submitted,

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