IN THE SUPREME COURT OF FLORIDA
CASE NO. SC20-985

HONORABLE GERALDINE F. THOMPSON,
in her Official Capacity as a
Representative for District 44
in the Florida House of
Representatives, and as an
Individual,
Petitioner,
vs.
HONORABLE RON DESANTIS, in his
Official Capacity of Governor
of Florida,
Respondent.
_____/

ERWIN ROSENBERG'S MOTION TO THE COURT TO CONSIDER WITHDRAWING ITS ORDER GRANTING THE AMENDED PETITION ON THE BASIS THAT THE FLORIDA CONSTITUTION'S 10-YEAR FLORIDA BAR MEMBERSHIP REQUIREMENT FOR THE APPOINTMENT OF A NEW JUDGE TO THIS COURT VIOLATES THE U.S. CONSTITUTION'S FIRST AMENDMENT

Erwin Rosenberg has expressed an interest in this case by having filed a motion for leave to file an amicus brief in support of Respondents which was denied on July 17, 2020. Erwin Rosenberg believes that his expressed interest, his interest as a former member of The Florida Bar who is seeeking to reestablish his right to practice law in Florida, his interest as a resident of Florida and the importance of the U.S. Constitution's First Amendment provide sufficient grouds to render this motion appropriate.

Today this Court granted the amended petition for writ of mandamus The Supremacy Clause of the U.S. Constitution requires this Court to place federal law above Florida State law. See Espinoza v. Montana Dept. of Revenue, 140 S. Ct. 2246, 2262 (2020):

> The Supremacy Clause provides that "the Judges in every State shall be bound" by

> the Federal Constitution, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. "[T]his Clause creates a rule of decision" directing state courts that they "must not give effect to state laws that conflict with federal law[]." *Armstrong v. Exceptional Child Center, Inc*., 575 U.S. 320, 324, 135 S.Ct. 1378, 191 L.Ed.2d 471 (2015).

The U.S. Constitution provides rights for protection of speech, petition and association.

See Janus v. American Federation of State, 138 S. Ct. 2448, 2464 (2018).

> The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgment of the freedom of speech. We have held time and again that freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977); see *Riley v. National Federation of Blind of N. C., Inc*., 487 U.S. 781, 796-797, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988); *Harper & Row, Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539, 559, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-257, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974); accord, *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal*., 475 U.S. 1, 9, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (plurality opinion). The right to eschew association for expressive purposes is likewise protected. *Roberts v. United States Jaycees*, 468 U.S. 609, 623, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate"); see *Pacific Gas & Elec*., supra, at 12, 106 S.Ct. 903 ("[F]orced associations that burden protected speech are impermissible"). As Justice Jackson memorably put it: "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." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (emphasis added).

The Court should consider whether the 10 year The Florida Bar requirement for the appointment of a judge to this Court is an unconstitutional condition on the basis that an integrated bar requirement violates the U.S. Constitution's First Amendment rights to speech, association and petition.

"The Florida Bar was integrated by this Court in Petition of Florida State Bar Association,

40 So.2d 902 (Fla. 1949)." The Florida Bar Re Schwarz, 552 So. 2d 1094, 1095 (Fla. 1989)". "A majority of States, including Wisconsin, have 'integrated bars.' Unlike voluntary bar associations, integrated or mandatory bars require attorneys to join a state bar and pay compulsory dues as a condition of practicing law in the State." *Jarchow v. State Bar of Wisconsin*, No. 19-831., Supreme Court 2020 (Justice THOMAS, with whom JUSTICE GORSUCH joins, dissenting from the denial of certiorari.). Abood v. Detroit Bd. of Ed., 431 US 209 (1977), the case supporting the right to an integrated bar, has been overruled. "Now that we have overruled *Abood*, *Keller* has unavoidably been called into question." *Jarchow v. State Bar of Wisconsin*, No. 19-831., Supreme Court 2020 (Justice THOMAS, with whom JUSTICE GORSUCH joins, dissenting from the denial of certiorari.). See Exhibit "A" (*Jarchow v. State Bar of Wisconsin*, No. 19-831., Supreme Court 2020),

This Court should consider the arguments made in certain amicus briefs from *Jarchow v. State Bar of Wisconsin*. See BRIEF OF STATE PUBLIC POLICY ORGANIZATIONS AS AMICI CURIAE IN SUPPORT OF PETITIONERS, See Exhibit "B", BRIEF AMICUS CURIAE OF THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONERS, See Exhibit "C", BRIEF AMICUS CURIAE OF LAWYERS UNITED INC. IN SUPPORT OF PETITIONERS, See Exhibit "D", and BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CATO INSTITUTE, ATLANTIC LEGAL FOUNDATION, REASON FOUNDATION, AND INDIVIDUAL RIGHTS FOUNDATION IN SUPPORT OF PETITIONERS, See Exhibit "E".

Wherefore Erwin Rosenberg respectfully moves this Court to consider withdrawing its order granting the amended petition on the basis that the Florida Constitution's 10-year Florida Bar membership requirement for the appintment of a new judge to this Court violates the U.S. Constitution's First Amendment.

CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2020 I served a copy hereof via Portal Filing.

Respectfully,

/s./ Erwin Rosenberg
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EXHIBIT "A"

ADAM JARCHOW, ET AL.,

v.

STATE BAR OF WISCONSIN, ET AL.

No. 19-831.

Supreme Court of the United States.

Decided June 1, 2020.

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

The petition for a writ of certiorari is denied.

Justice THOMAS, with whom JUSTICE GORSUCH joins, dissenting from the denial of certiorari.

A majority of States, including Wisconsin, have "integrated bars." Unlike voluntary bar associations, integrated or mandatory bars require attorneys to join a state bar and pay compulsory dues as a condition of practicing law in the State. Petitioners are practicing lawyers in Wisconsin who allege that their Wisconsin State Bar dues are used to fund "advocacy and other speech on matters of intense public interest and concern." App. to Pet. for Cert. 10. Among other things, petitioners allege that the Wisconsin State Bar has taken a position on legislation prohibiting health plans from funding abortions, legislation on felon voting rights, and items in the state budget. Petitioners' First Amendment challenge to Wisconsin's integrated bar arrangement is foreclosed by *Keller* v. *State Bar of Cal.*, 496 U. S. 1 (1990), which this petition asks us to revisit. I would grant certiorari to address this important question.

In *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977), the Court held that a law requiring public employees to pay mandatory union dues did not violate the freedom of speech guaranteed by the First Amendment, *id.,* at 235-236. In *Keller,* the Court extended *Abood* to integrated bar dues based on an "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." 496 U. S., at 12. Applying *Abood,* the Court held that "[t]he State Bar may . . . constitutionally fund activities germane to [its] goals" of "regulating the legal profession and improving the quality of legal services" using "the mandatory dues of all members." 496 U. S., at 13-14.

Two Terms ago, we overruled *Abood* in *Janus* v. *State, County, and Municipal Employees,* 585 U. S. ___ (2018). We observed that "*Abood* was poorly reasoned," that "[i]t has led to practical problems and abuse," and that "[i]t is inconsistent with other First Amendment cases and has been undermined by more recent decisions." *Id.,* at ___ (slip op., at 1). After considering arguments for retaining *Abood* that sounded in both precedent and original meaning, we held that "States and public-sector unions may no longer extract agency fees from nonconsenting employees." 585 U. S., at ___ (slip op., at 48).

Our decision to overrule *Abood* casts significant doubt on *Keller.* 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.* If the rule in *Keller* is to survive, it would have to be on the basis of new reasoning that is consistent with *Janus*.[*]

Respondents argue that our review of this case would be hindered because it was dismissed on the pleadings. But any challenge to our precedents will be dismissed for failure to state a claim, before discovery can take place. And in any event, a record would provide little, if any, benefit to our review of the purely legal question whether *Keller* should be overruled.

Short of a constitutional amendment, only we can rectify our own erroneous constitutional decisions. We have admitted that *Abood* was erroneous, and *Abood* provided the foundation for *Keller.* In light of these developments, we should reexamine whether *Keller* is sound precedent. Accordingly, I respectfully dissent from the denial of certiorari.

[*] Respondents resist this conclusion by citing *Harris* v. *Quinn,* 573 U. S. 616 (2014), which predates *Janus.* But all we said in *Harris* was that "a refusal to extend *Abood*" would not "call into question" *Keller. Harris,* 573 U. S., at 655. Now that we have overruled *Abood, Keller* has unavoidably been called into question.

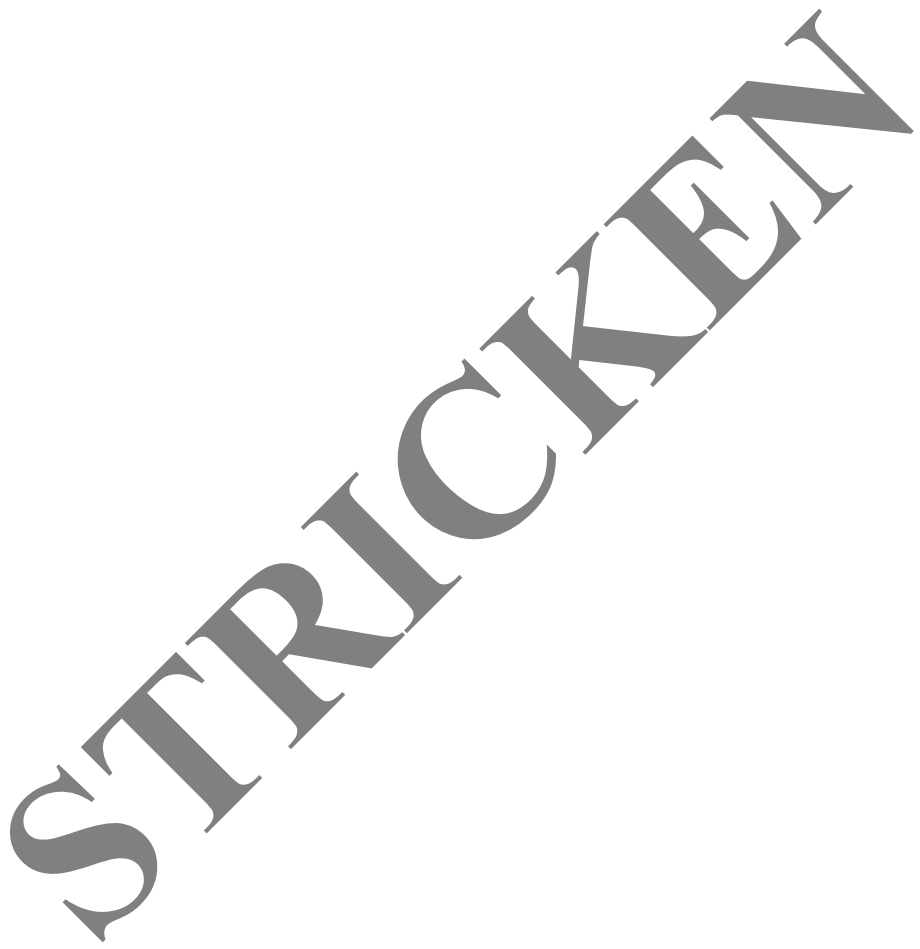

EXHIBIT "B"

No. 19-831

IN THE

Supreme Court of the United States

ADAM JARCHOW, ET AL.,

Petitioners,

v.

STATE BAR OF WISCONSIN, ET AL.,

Respondents.

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

BRIEF OF STATE PUBLIC POLICY ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether *Lathrop v. Donohue*, 367 U.S. 820 (1961), and *Keller v. State Bar of California*, 496 U.S. 1 (1990), should be overruled.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

STATEMENT OF INTEREST[1]

Amici curiae are state-based public policy research organizations. *Amici* closely follow developments in law and politics in their respective states and can thus offer a helpful perspective on the important issues raised by this petition for certiorari. *Amici* are committed to keeping government within its constitutional and statutory constraints and thus have a powerful interest in this case.

The Government Justice Center is an independent, not-for-profit legal center that provides pro bono representation and legal services to protect the rights of New Yorkers in the face of improper action by state or local governments. It believes that government functions best when held to the highest standards of transparency and accountability, and that government should follow the same laws to which private citizens are held. It works to make sure New Yorkers get the transparency and due process from government to which they are entitled.

The Alaska Policy Forum is a nonpartisan, non-profit, tax-exempt organization dedicated to empowering and educating Alaskans and policymakers by promoting policies that grow freedom for all. It believes that labor arrangements such as exclusive representation and mandatory membership in any organization, such as a bar association, are

[1] No counsel for a party authored this brief in whole or in part. No person or entity other than amici, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

prohibitions on First Amendment rights and impinge upon the freedom of Americans.

The James Madison Institute is a Florida-based research and educational organization that advocates for policies consistent with the framework set forth in the U.S. Constitution and such timeless ideals as limited government, economic freedom, federalism, and individual liberty coupled with individual responsibility. The Institute is a non-profit, tax exempt organization based in Tallahassee, Florida.

The John Locke Foundation, a nonprofit organization, is North Carolina's premier free-market public policy think tank. With John Locke's vision as its guide, and the North Carolina Constitution as its foundation, the Foundation joyfully plants the flag for freedom — including workplace freedom — and nurtures its growth in North Carolina. Over three decades, the Foundation has educated policymakers and informed the public debate with reason and research.

The Nevada Policy Research Institute is a nonpartisan education and research organization dedicated to advancing the principles of economic and individual freedom. The Institute's primary areas of focus are education, labor, government transparency and fiscal policy. NPRI is a non-profit, tax exempt organization based in Las Vegas, Nevada.

The Pelican Institute for Public Policy is a non-profit and nonpartisan research and educational organization, and the leading voice for free markets in Louisiana. The Institute's mission is to conduct scholarly research and analysis that advances sound

policies based on free enterprise, individual liberty, and constitutionally limited government. The Institute has an interest in protecting Louisiana citizens' First Amendment rights.

SUMMARY OF ARGUMENT

As Petitioners explain, mandatory bar associations impose severe burdens on protected speech and association. *See* Pet. 13-15. It is a bedrock principle of First Amendment jurisprudence that a restriction on speech or association cannot survive constitutional scrutiny if there are "'means significantly less restrictive of associational freedoms'" through which the government could achieve its asserted interests. *Janus v. Am. Fed. of State, County, and Mun. Employees, Council 31*, 138 S. Ct. 2448, 2466 (2018) (quoting *Harris v. Quinn*, 573 U.S. 616, 648-49 (2014)). Even assuming the government's asserted interests in regulating the legal profession and improving the quality of legal services are valid, mandatory bars fail any level of tailoring analysis.

First, mandatory bars cannot be justified by an interest in regulating the legal profession. Nearly 20 states regulate lawyers directly *without* compelling them to join or financially support a bar association, and there is no suggestion that lawyers are insufficiently regulated in those jurisdictions. And, even in states with integrated bar associations, the regulatory and disciplinary functions are typically handled by the courts rather than the bar association. "Regulating the legal profession" thus provides no

basis for upholding a scheme of coerced speech and association such as Wisconsin's "integrated" bar.

Second, even assuming there is a legitimate interest in amorphously "improving the quality of legal services," mandatory bar membership fails tailoring analysis. Hundreds of thousands of lawyers belong to, and financially support, voluntary bar associations at the local, state, and national level to help improve the legal profession and the quality of legal services. Just as in *Janus*—where this Court found voluntarily supported unions in 28 states and at the federal level to be less-restrictive alternatives to coercive agency fees, *see* 138 S. Ct. at 2466—the proliferation of voluntary bar associations forecloses any suggestion that mandatory membership is needed to "improve the legal profession." The petition for certiorari should be granted, as neither of the claimed interests discussed in *Keller* and *Lathrop* can adequately justify compelled speech and association.

ARGUMENT

I. Mandatory membership in, and funding of, a bar association could be justified only if there is a compelling government interest and no less-restrictive alternatives.

All citizens have the constitutional "freedom not to associate." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). "Compelling individuals to mouth support for views they find objectionable," including by compelled association, "violates that cardinal constitutional command." *Janus*, 138 S. Ct. at 2463. Moreover, "freedom of speech 'includes both the right

to speak freely and the right to refrain from speaking at all,'" and "compelled subsidization of speech seriously impinges on First Amendment rights." *Id.* at 2463-64. This Court has accordingly held in no uncertain terms that "[t]he right to eschew association for expressive purposes" is protected by the First Amendment. *Id.* at 2463.

When considering whether compelled membership in a bar organization violates the First Amendment, "generally applicable First Amendment standards" apply. *Harris*, 573 U.S. at 647. The relevant standard here should be strict scrutiny, which requires narrow tailoring and a compelling government interest. *See Citizens United v. FEC*, 558 U.S. 310, 340 (2010). Strict scrutiny is most consistent with this Court's broader First Amendment jurisprudence, which subjects all government action constraining association "to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958).

But even if this Court applies "exacting scrutiny" instead of strict scrutiny, compulsory association still must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Janus*, 138 S. Ct. at 2465; *Harris*, 573 U.S. at 647-48; *Knox v. Services Emps. Int'l Union, Local 100*, 567 U.S. 298, 310 (2012).

In the context of mandatory bar associations, the only government interests this Court has ever recognized are "regulating the legal profession" and "improving the quality of legal services." *Keller*, 496 U.S. at 13-14. Even assuming those interests are

compelling, however, forcing attorneys to join a bar association as a condition of practicing their profession fails any level of tailoring analysis.

II. Integrated bars are not needed to advance any interest in regulating the legal profession.

As the party seeking to coerce speech and association, it is the Bar's burden to show that its asserted interests could not be achieved through means that are less restrictive of speech. To prevail, the Bar "must demonstrate that [these] alternative measures … would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen v. Coakley*, 573 U.S. 464, 495 (2014). That is, an integrated bar fails constitutional scrutiny if the government could have adopted alternative measures that are "significantly less restrictive of associational freedoms." *Janus*, 138 S. Ct. at 2465.

Nearly twenty states regulate the legal profession without resorting to compulsory bar membership. *See In re Petition for a Rule Change to Create a Voluntary State Bar*, 841 N.W.2d 167, 171 (Neb. 2013). Those states include some of the country's largest legal markets, such as New York, Illinois, Massachusetts, Ohio, and Pennsylvania. In those jurisdictions, the government regulates, licenses, and disciplines lawyers directly, without also requiring them to join, fund, and associate with a bar association.

In New York, for example, the state court system oversees attorney licensing, rules of professional conduct, continuing legal education

requirements, the grievance and disciplinary process, and other regulatory functions.[2] That is, attorneys simply pay a licensing fee and are regulated by the state courts directly without also being compelled to join a bar association.

Keller's invocation of "regulating the legal profession," 496 U.S. at 13, thus cannot justify forcing attorneys to join, fund, and associate with a bar association. The simple fact that nearly half of all states *can* and *do* regulate the legal profession without imposing the significant associational harms of a mandatory bar is fatal to any suggestion that bar membership is needed to advance the states' asserted regulatory interests. *Amici* are unaware of any reason to believe that attorney regulation is less effective in non-integrated states such as New York and Illinois than in integrated states such as Florida and Wisconsin. And, in all events, a state cannot invoke attorney regulation as the justification for mandatory bar membership unless *the state* carries the heavy burden of showing that less-restrictive alternatives would result in worse regulation—a showing that Wisconsin has never even attempted to make here.

Moreover, the most controversial aspects of mandatory bar associations are the activities that go *beyond* regulation of attorneys, such as lobbying and advocacy efforts, diversity initiatives, "access to justice" programs, and amorphous efforts to "improve the profession." Any suggestion that *those* activities

[2] *See* New York State Unified Court System, The Legal Profession, ww2.nycourts.gov/attorneys.

could be justified by a state's interest in regulating attorneys is a non sequitur. And, as Petitioners note, even in states with "integrated" bars, the courts typically retain ultimate authority for licensing and disciplining attorneys. *See* Pet. 19. Any asserted interest in "regulating the legal profession," *Keller*, 496 U.S. at 13, is thus plainly inadequate to justify compelled membership in, and compelled funding of, a state bar association.

III. Voluntary bar associations seek to improve the quality of legal services at the local, state, and national levels even in the absence of government coercion.

A. *Janus* holds that voluntary associations are a less-restrictive alternative to compelled speech and association.

This Court also suggested in *Keller* that there is an interest in "improving the quality of legal services." 496 U.S. at 13. At the outset, many state bars have read this language far too broadly to justify a host of controversial activities never contemplated by this Court. The Court made clear in *Keller* that a mandatory bar may not use coerced dues to fund "activities of an ideological nature," which necessarily "fall outside [the] areas" of permissible activity. 496 U.S. at 14. This Court subsequently emphasized in *Harris* that any state interests in maintaining a mandatory bar are limited to activities such as "proposing ethical codes and disciplining bar members." 573 U.S. at 655.

Yet many state bars have seized on *Keller*'s "improving the quality of legal services" language to justify using coerced dues to fund an array of controversial activities, such as lobbying, politically charged "access to justice" programs, and race- and gender-based initiatives. That expansive interpretation of *Keller* fails on its own terms, as *Harris* makes clear. *See id.*

Moreover, *Janus* squarely holds that coerced speech and association cannot be justified even if the government believes such coercion is limited to "neutral" or "non-ideological" matters. This Court held in *Janus* that, "'[i]n the public sector, core issues such as wages, pensions, and benefits are important political issues,'" 138 S. Ct. at 2480, and that dissenters could not be compelled to subsidize a union's speech on those issues. Here, too, Wisconsin cannot justify its coerced speech and association merely by invoking amorphous concepts such as "administration of justice" or "improvement of the legal profession." Even if couched in neutral terms, those concepts can include hotly contested issues such as how judges should be appointed, how cases should be tried, when arbitration agreements should be enforceable, and how indigent legal services should be funded.

In all events, this Court held in *Janus* that the severe associational harms of coerced union agency fees could not survive tailoring analysis given that unions were capable of effectively representing their members in 28 states (and at the federal level) even in the absence of mandatory agency fees. 138 S. Ct. at 2466. That is, a government attempt to compel speech

or association can never be narrowly tailored when the same interests can be advanced through voluntary speech and association.

Just so here. Even assuming there is a government interest in "improving the quality of legal services," *but see* Pet. 17-18, there are an abundance of privately organized and funded bar associations at the local, state, and national level whose mission is to do just that. Forcing attorneys to join a bar association in order to "improve the quality of legal service" thus fails any level of First Amendment scrutiny.

B. State and local voluntary bar associations seek to improve the legal profession.

State-level voluntary bar associations have been perfectly capable of attracting members and funding—and advancing their goals of improving the legal profession and the administration of justice—even in the absence of government coercion.

Consider New York. Founded in 1876, the New York State Bar Association—which is supported solely by its members and voluntary contributions—has over 70,000 members, more than 125 employees, and more than $20 million in annual revenue.[3] Among its many activities, the NYSBA advocates for legislation "to simplify and update court procedures"; has been "instrumental in raising judicial standards"; has "[e]stablished machinery for maintaining the

[3] *See* About NYSBA, History and Structure of the Ass'n, bit.ly/2sGoDtW; Report to Membership 2017-18, The Year In Review, bit.ly/36aqDbM.

integrity of [t]he profession"; has "[a]dvocated providing enhanced, voluntary pro bono legal services to the poor"; has "[b]een in the vanguard of efforts to elevate the standards of practice"; and has "achieved national recognition for its continuing program of public education." *Id.* The NYSBA also issues advisory ethics opinions to help attorneys comply with all relevant rules of professional conduct.[4]

Indeed, it is striking how much the activities of the voluntary NYSBA overlap with the activities of a coerced bar association such as Wisconsin's.[5] Both seek to advance professionalism and improve the quality of legal services and the administration of justice; both have a network of sections, committees, and divisions that focus on specific practice areas; both seek to advance pro bono and legal services initiatives; both lobby for legislation on matters of interest to the legal profession; both offer conferences, publications, and continuing legal education programs; both offer guidance on ethics issues; both provide practice resources and assistance for lawyers struggling with addiction or mental health issues; and both seek to promote diversity and inclusion in the profession. There is one considerable difference between these groups, however: the NYSBA is funded and supported through the voluntary contributions and efforts of its members, whereas the State Bar of Wisconsin is supported through coerced dues and membership.

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[4] *See* NYSBA, Ethics Opinions, bit.ly/2GEbxRd.

[5] *See* State Bar of Wisconsin, About Us, bit.ly/37sqKRk.

Remarkably, voluntary bar associations have flourished even in states that have integrated bars. For example, the Virginia Bar Association has nearly 5,000 members who participate in 19 sections to promote the values of advocacy, service, professionalism, and collegiality.[6] The members of the VBA engage in, and fund, those programs voluntarily even though they are also compelled to join the integrated Virginia State Bar.

Voluntary bar associations have also proliferated at the local level. The New York City Bar Association has more than 24,000 members who seek "to equip and mobilize the legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world."[7] The NYCBA lobbies on issues of concern to its members; oversees pro bono, legal aid, and lawyer referral programs; promotes diversity and inclusion; offers conferences, meetings, CLE programs, and career development resources; and provides ethics advice through both a hotline and formal advisory opinions. *Id.*

There are also nearly 150 other voluntary bar associations throughout New York that focus on diversity, geographic practice areas, or other matters of interest to the legal community, including the Adirondack Women's Bar Association, Customs and

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[6] *See* About the Virginia Bar Ass'n, bit.ly/2uBSK6j.

[7] New York City Bar, About Us, bit.ly/2TVuYwX.

International Trade Bar Association, South Asian Bar Association of New York, French-American Bar Association, and WNY Trial Lawyers Association.[8] These groups have flourished not because of government coercion and compelled financial support but because they provide valuable services to their members and the legal profession more generally.

C. National-level voluntary bar associations seek to improve the legal profession.

Voluntary groups committed to improving the legal profession are also widespread at the national level. Founded in 1878, the American Bar Association has more than 350,000 members who participate in more than 3,600 committees and member groups.[9] The ABA's mission includes facilitating members' "professional growth and quality of life"; promoting "competence, ethical conduct and professionalism"; advancing "pro bono and public service by the legal profession"; "eliminat[ing] bias in the legal profession[] and the justice system"; increasing "public understanding of and respect for the rule of law, the legal process, and the role of the legal profession at home and throughout the world"; and assuring "meaningful access to justice for all person[s]." *Id.*

Numerous national bar associations also seek to improve professionalism and the quality of legal services within specific areas of practice. The Federal

[8] *See* NYSBA, Bar Ass'ns in New York, bit.ly/37tvki2.

[9] *See* Am. Bar Ass'n, About the ABA, bit.ly/2NYtI8C.

Bar Association has more than 19,000 members and 100 chapters across the country devoted to federal practice.[10] The American Association for Justice seeks to "promote a fair and effective justice system—and to support the work of attorneys in their efforts to ensure that any person who is injured by the misconduct or negligence of others can obtain justice in America's courtrooms,"[11] while DRI—The Voice of the Defense Bar is "the leading organization of [civil] defense attorneys and in-house counsel."[12] Similar national groups also exist for prosecutors,[13] criminal defense attorneys,[14] all areas of family law practice,[15] maritime law,[16] immigration law,[17] intellectual property law,[18] and countless other areas of practice.

A number of national bar associations are also expressly committed to promoting inclusion and diversity in the legal profession. To take just a few examples, the National Conference of Women's Bar Associations is an umbrella organization that

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[10] *See* Fed. Bar Ass'n, Benefits of Membership, bit.ly/36r4aaz.

[11] Am. Ass'n for Justice, Mission and History, bit.ly/2uvAb3W.

[12] DRI—The Voice of the Defense Bar, About Us, bit.ly/2RpRnR7.

[13] *See* Nat'l Dist. Att'ys Ass'n, bit.ly/2Oef515.

[14] *See* Nat'l Ass'n of Crim. Defense Lawyers, nacdl.org.

[15] *See, e.g.*, Nat'l Ass'n of Counsel for Children, naccchildlaw.org/; Nat'l Ass'n of Estate Planners and Counsels, naepc.org/; Am. Academy of Matrimonial Lawyers, aaml.org/.

[16] *See* Maritime Law Ass'n of the United States, mlaus.org/.

[17] *See* Am. Immigration Lawyers Ass'n, aila.org/.

[18] *See* Am. Intellectual Prop. Law Ass'n, aipla.org/.

represents more than 35,000 lawyers and "advocates for the equality of women in the legal profession and in society by mobilizing and uniting women's bar associations to effect change in gender-based processes and laws."[19] The Minority Corporate Counsel Association is "committed to advancing the hiring, retention and promotion of diverse lawyers in law departments and law firms by providing research, best practices, professional development and training; and through pipeline initiatives."[20] And the National LGBTBar Association "promotes justice in and through the legal profession for the LGBTQ+ community in all its diversity."[21]

Finally, the last few decades have seen the development and expansion of the American Inns of Court movement, whose vision is "[a] legal profession … dedicated to professionalism, ethics, civility, and excellence."[22] The Inns' mission is to "inspire the legal community to advance the rule of law by achieving the highest level of professionalism through example, education and mentoring." *Id.* Today, there are more than 30,000 active members participating in nearly 400 chartered Inns, which bring together judges, junior and senior practicing

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[19] Nat'l Conf. of Women's Bar Ass'ns, Mission, Vision, and Objectives, bit.ly/36tv9ly.

[20] Minority Corp. Counsel Ass'n, mcca.com/.

[21] Nat'l LGBTBar Ass'n and Found., Mission Statement, bit.ly/2Rs4gKC.

[22] Am. Inns of Court, home.innsofcourt.org/.

attorneys, and law students to promote non-partisan values of excellence, civility, and professionalism.[23]

* * *

In sum, given the sheer number and diversity of voluntary bar associations across every geographic area, practice area, and issue of concern to the legal profession, it strains credulity to suggest that the government's only option to "improve the quality of legal services" is to coerce lawyers to join, fund, and associate with a state bar association. There simply is no market failure here that could justify such an extraordinary burden on core speech and associational rights.

[23] *See* The History of the Am. Inns of Court, bit.ly/2Gp3kjM.

CONCLUSION

The Court should grant the petition for certiorari.

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EXHIBIT "C"

No. 19-831

In the Supreme Court of the United States

ADAM JARCHOW AND MICHAEL D. DEAN,
Petitioners,

v.

STATE BAR OF WISCONSIN ET AL.,
Respondents.

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

BRIEF AMICUS CURIAE OF THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), the Court held that State laws compelling public employees to subsidize the speech of labor unions violate the First Amendment, overruling *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). The same improperly "deferential standard" that *Abood* espoused underpins the two decisions of the Court—*Lathrop v. Donohue*, 367 U.S. 820 (1961), and *Keller v. State Bar of California*, 496 U.S. 1 (1990)—permitting States like Wisconsin to compel attorneys to be members of an "integrated bar" and fund its speech and advocacy on matters of substantial public concern. Accordingly, the question presented is:

Whether *Lathrop* and *Keller* should be overruled and "integrated bar" arrangements like Wisconsin's invalidated under the First Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

INTEREST OF *AMICUS CURIAE*

This *amicus* brief is submitted by The Buckeye Institute (the "Buckeye Institute").[1] The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market solutions for Ohio's most pressing public policy problems. The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those public policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute is located directly across from the Ohio Statehouse on Capitol Square in Columbus, where it assists executive and legislative branch policymakers by providing ideas, research, and data to enable the lawmakers' effectiveness in advocating free-market public policy solutions. The Buckeye Institute is a non-partisan, nonprofit, tax-exempt organization, as defined by I.R.C. § 501(c)(3).

Through its Legal Center, the Buckeye Institute works to protect the First Amendment

[1] Pursuant to Rule 37.2, all parties were notified of the Buckeye Institute's intention to file this brief at least 10 days prior to its filing. All parties consented to the filing. Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae* or their counsel made a monetary contribution to the brief's preparation or submission.

rights of union workers who object to being forced to subsidize union speech with which they disagree. In support of this aspect of its work, Buckeye filed amicus briefs on the merits in support of the petitioners in both *Friedrichs v. California Teachers Association*, Case No. 14-915, in the Supreme Court of the United States, *aff'd by an equally divided court*, 136 S. Ct. 1083 (2016), and in *Janus*. Moreover, since *Janus,* Buckeye has challenged compulsory representation laws as violative of the First Amendment rights of public-sector employees. See, e.g., *Uradnik v. Inter Faculty Organization, et al.*, No. 18-719, in the Supreme Court of the United States, *cert. denied* (Apr. 29, 2019).

SUMMARY OF ARGUMENT

In 1994, 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. L. Rev. 35, 37 (1994) ("*The Limits of Compulsory Professionalism*"). He wrote shortly after this Court purportedly put integrated bar organizations out of the business of using their members' dues for political or ideological purposes. *Keller v. State Bar of California,* 496 U.S. 1 (1990).

Keller has now been in place for 30 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, 138 S. Ct. 2448 (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, and 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. *Keller* and *Lathrop* should accordingly be re-examined and overruled.

ARGUMENT

I. Introduction

The Jarchow Petitioners contend that both the requirements that they join the Wisconsin Bar and that they subsidize its political speech violate the First Amendment. In this brief, Buckeye will show that this Court has treated the integrated bar similarly to a union for years, so *Janus* applies to it. Then, Buckeye will show how, 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 way out of the *Keller* wilderness in which lawyers

have wandered for 30 years lies in bifurcating the bar, splitting it into a voluntary association that is not bound by *Keller* and a mandatory regulatory body.

Only 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. Professor Bradley Smith explains, "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." *The Limits of Compulsory Professionalism* 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 v. United States Jaycees*,468 U.S. 609, 623 (1984). 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*, 138 S. Ct. at 2643 (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 Wisconsin, where such membership is required.

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

In *The Limits of Compulsory Professionalism*, Bradley 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 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.'" 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, "[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."

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[2] The private association model doesn't work because the State compels lawyers to join the bar organization in order to practice. The State could simply require a license to practice without mandating the tie-in of a mandatory association membership.

Id. at 12 (emphasis added). By requiring lawyers to join the bar, the organization precluded free ridership, just like other unions do. 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 (1986). The 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.

The application of *Abood* to integrated bar organizations has further consequences given this Court's criticism of and ultimate reversal of *Abood*.

Those actions mandate the reversal of *Lathrop* and *Keller*.

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

In the 30 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 go 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 upon which reasonable people may and do disagree. In short, the problem of line-drawing is insoluble, and the *Hudson* remedy is not a 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. 138 S. Ct. at 2475. 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 2476. This Court concluded, "[T]he union speech at issue in this case is overwhelmingly of substantial public concern." *Id.* at 2477.

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" and are inherently political. *Janus*, 138 S. Ct. at 2477.

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 to be engaged in voluntarily, with prior affirmative consent. *Janus*, 138 S. Ct. at 2486.

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. *The Limits of Compulsory Professionalism* 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 *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)*, available at https://www.dcbar.org/communities/labor-and-employment-law/upload/2001-Civil-Rights-Fairness-Act-of-2001.pdf. 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, and the Florida Bar supports legislation that would provide student loan assistance for government and legal aid lawyers who have served in that capacity for three years.[3] Florida also supports 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."[4] "To suggest that speech on such matters is not of great public concern—or that it is not

[3] See 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, available at https://www.dcbar.org/communities/public-statements.cfm (*Summary of Public Statement*); see also Florida Bar Master List of Legislative Positions 2018-2020 (*Master List*), available at https://floridabar.org/member/legact/legactoo3/#blse.

[4] See *Master List*.

directed at the public square—is to deny reality." *Janus*, 138 S. Ct. at 2475 (internal citation omitted).[5]

In other case, integrated bars have engaged in speech that historically has been considered more political, even under the terms outlined in *Keller*. The Louisiana Bar has advocated for a state employment non-discrimination act and for requiring public-sector

[5] In many states, the sections of the state bar are opt-in. That allows subsets of the bar to take controversial positions which the Bar may or may not stand behind. When, for example, the Litigation Section of the District of Columbia Bar issued a 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 did not reflect the views "of the D,C. Bar or of its Board of Governors." See *Summary of Public Statement.*

For its part, the Florida Bar 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." Court Asked to Stop Family Law Section's Gay Adoption Amicus (Mar. 15, 2019), available at https://floridabar.org/the-florida-bar-news/court-asked-to-stop-family-law-sctions-gay-adoption-amicus. Outside counsel for the Florida Bar said the Board of Governors did not have to approve the filing and did not endorse the Section's position. He stated, "The Florida Supreme Court has recognized in the past that sections can engage in political ideology that the Bar cannot." *Id.*

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.

contractors to comply with the Louisiana Equal Pay for Women Act.[6]

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 public issues on such subjects as non-resident taxation, LGBTQ rights, and other issues as to which people can and do disagree.[7] Cf. *Keller*, 496 U.S. at 5 and n. 2 (identifies "[filing *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" as a bar activity "to advance political and ideological causes" as one of the *Keller* Petitioners' complaints). More particularly, the Missouri and Arizona Bars have filed amicus briefs in support of unified bar associations against attacks like those of

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[6] See lsba.org/Legislation/.

[7] See 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, available at https://ww.dcbar.org /communities/district-of-columbia- affairs/upload/2006- Amicus-Curiae.pdf; Rachel Lean, *Florida Bar's Business Law Section Urges High Court to Ease Summary Judgment Standard*, Law.Com (Dec. 31, 2019), available at https://law.com /daily/businessreview2019/12/31/florida-bars-business- law-section-urges-high-court-to ease-summary-judgment-standard/; and Brief Amicus Curiae Family Law Section of Nevada State Bar. Case No. 48944, in the Supreme Court of the State of Nevada, available at https://willicklawgroup. com/wp=content/uploads/2010/04/Hedland-Amicus-Brief.pdf

Petitioners.[8] In each case, there are lawyers and citizens who disagree with the positions taken by the unified bars in their states.

Attempts to solve the constitutional infringement by restricting the range of lobbying activities are inadequate. Professor Bradley Smith has explained how, even when the range of bar lobbying is limited, "the problems inherent in the unified bar concept" remain. *The Limits of Compulsory Professionalism* at 52. For example, the Michigan Bar's legislative activity was limited to five general areas, including "increasing the availability of legal services to society," and providing "content-neutral advice to legislators." See *The Limits of Compulsory Professionalism* 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.

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[8] See Brief of the Missouri Bar as *Amicus Curiae* in Support of Appellees and Affirmance, *Fleck v. Wetch*, Case No. 16-1564, in the Eighth Circuit Court of Appeals, available at https://goldwaterinstitute.org/wp-content/uploads/2019/04/Fleck-Missouri-Bar-AC.pdf;

The State Bar of Arizona filed the amicus brief in support of the State Bar of Oregon in *Crowe v. State Bar of Oregon*, No. 19-35463, in the United State Court of Appeals for the Ninth Circuit (DktEntry 30-1). No announcement of the filing appears on the Arizona Bar's website (azbar.org), or on the website of the law firm that filed the brief (omlaw.com). An electronic copy is in the possession of counsel of record.

Lower courts have been 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 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*, 622 F. 3d at 720 (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:" it 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;" and the test was not necessity, but rather reasonableness. *Id*. at 718-19.

The First Circuit found a unified bar association requirement that all bar members purchase life insurance from the association's program was not 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, *Lambert*, and *Romero* come from the days when the courts looked at germaneness. Now, the courts should employ exacting scrutiny. Each though, illustrates how the unified bars thought they should spend their members' dues.

B. The *Hudson* remedy is inadequate.

As noted above, 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.

As Professor Bradley Smith explains, 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." *The Limits of Compulsory Professionalism* 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 and n. 113; see also Appendix, *Fleck v. Wetch*, No.19-670, in the Supreme Court of the United States, at 10a ("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 was objecting to a $15 annual assessment. See 367 U.S. at 822. Now, even after deductions 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. *The Limits of Compulsory Professionalism* at 60.

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

In 1994, Bradley Smith observed, "The advantages of coerced membership in a state bar have always been more rhetorical than real." *The Limits of Compulsory Professionalism* 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.

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. Smith 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.

The 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*, 138 S. Ct. at 2486. 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.

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. 2019.

As Bradley Smith notes, "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." *The Limits of Compulsory Professionalism* 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.

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 compelling lawyers to become members of the unified bar. It thereby takes away from them their First Amendment right to refrain from associating.

Smith concludes that "a return to a voluntary bar is in the best interests of both lawyers and the public." *The Limits of Compulsory Professionalism* at 73. This case offers the Court an opportunity to eliminate a First Amendment outlier.

CONCLUSION

For the reasons stated in the Petition and this *amicus* brief, this Court should grant the writ of certiorari and, on review, reverse the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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EXHIBIT "D"

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BRIEF *AMICUS CURIAE* OF LAWYERS UNITED INC. IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

INTEREST OF THE *AMICUS CURIAE*[1]

Lawyers United Inc. is a California corporation, with dues paying members located all over the United States, dedicated to advancing and petitioning on behalf of lawyers and their clients' First Amendment rights to speech, assembly, and to petition the Government for the redress of grievances. Lawyers are the principal voice of justice. By invoking the judicial power to protect life, liberty, and property, lawyers enable the judiciary to interpret the law and define the contours of constitutional and other legal rights, as in *Janus v. AFSCME*, 138 S.Ct. 2448 (2018), where the union member who successfully checked governmental overreaching under color of state law was represented at every phase of his petition for the redress of grievances by a lawyer.

Lawyers United Inc. is particularly interested in this case because of its direct impact on the First Amendment petition, associational, and free speech rights of the lawyer community. *Amicus* agrees with petitioners that being compelled to join and pay the equivalent of union dues to a mandatory "integrated" state bar association that routinely advocates political

[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

and ideological positions before the state legislature, Congress, and various rule-making positions with which the petitioners either vigorously disagree or on which petitioners choose to maintain intentional neutrality—is tyrannical and violative of basic First Amendment rights enjoyed by non-lawyers.

Lawyers United Inc. has its own special First Amendment interests in supporting certiorari review. *Lawyers United Inc. v. Roberts*, United States District Court for the District of Columbia docket No. 19-3222—aside from presenting legal questions concerning balkanized and disparate Federal District Court Local Rule lawyer admission standards virtually identical with the 17th century practice of licensing printing presses based on content—directly challenges the compelled association and compelled dues payments in the federal context that the petitioners in *Jarchow* avow represents a First Amendment violation in the state context.

This Hobson's choice that lawyers in thirty states confront—either forfeit your law license and constitutionally protected privilege to practice law, or submit to joining a bar association and subsidizing speech you disagree with—is magnified and multiplied in the state and federal context. In the state context, out-of-state licensed attorneys are often compelled to join two, three, or more additional integrated state bar associations and subsidize their political and ideological speech they disagree with, or would prefer to remain silent, in order to practice in the state court. In the federal context, fifty-six of the ninety-four Federal District

Courts, by Local Rule, require all non-forum state admitted attorneys seeking *general* admission privileges in the Federal District Courts, to join the forum state bar association and pay annual union dues as a condition precedent to obtain general bar admission privileges in that Federal District Court. Hence, the state compelled association and dues payments are shoehorned into federal practice. The remaining United States District Courts by Local Rules grant *general* bar admission privileges to all licensed attorneys in good standing, regardless of forum state law, without imposing additional obligations to become a member of the forum state bar's political network and fund its ideological agenda. This Wisconsin State Bar Association compelled association and compelled funding does not magically cease at the state boundary line. The effects of this trade union trespass is nationwide and it is baked into a majority of the Federal District Courts.

Within the various compulsory state bars, lobbying positions and activity are driven by active market participants in private practice with a vested political and financial interest in the market being "regulated." The resultant skewing of the free market competitive forces threatens core Congressional policies. *See North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S.Ct. 1101, 1114 (2015) ("When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest.")

There is little or no state or federal judiciary supervision of the political and ideological causes

advanced by "integrated" state bar associations. That is the reason they are "integrated;" wearing two hats while juggling and performing judicial and trade union functions. This is a glaring conflict of interest.

SUMMARY OF THE ARGUMENT

The First Amendment enumerates a panoply of rights protected against abridgment—freedom of religion, speech, press, assembly, and petition. This Court has called these "the great, the indispensable democratic freedoms secured by the First Amendment." *Thomas v. Collins*, 323 U.S. 516, 530 (1945). *Amicus* submits there is no valid or constitutionally justifiable reason why lawyers, whether as a class or individually, should enjoy lesser First Amendment rights than the public employee union members in *Janus* in advocating (or choosing not to advocate) for or against political matters of public concern. *See Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 281 (1985) (holding an attorney's opportunity to practice law is a fundamental right because lawyers have a "constitutional duty to vindicate federal rights and champion locally unpopular claims.")

It is well settled that "in cases raising First Amendment issues . . . an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of*

United States, Inc., 466 U.S. 485, 499 (1984). In the case at bar, both lower courts were prevented from exercising independent review because their hands were tied by *Agostini v. Felton*, 521 U.S. 203, 237 (1997), which holds only the Supreme Court can reverse its precedents, even when those precedents have been implicitly eviscerated by a subsequent decision such as *Janus*.

Janus clarified that all actions relating to the allocation of public resources is inherently political, as are activities on matters of "value and concern to the public." *Janus*, 585 U.S. ___, 138 S.Ct. at 2474-76.

This Court should thus grant review in light of its non-delegable constitutional duty to make an independent *de novo* review of the facts and law in this First Amendment case. Review is further necessary and proper because *Keller* and its predecessor, *Lathrop v. Donohue*, 367 U.S. 820 (1961), stopped short of resolving the constitutional implications of the compelled association and dues paying issues presented there. Significantly, *Keller* and *Lathrop* were decided utilizing rational basis review, flatly rejected by *Janus* in favor of "exacting scrutiny." The enormous difference in these constitutional standards of review and their impact on the burdens of proof is another compelling reason why review is necessary in the present case.

The Wisconsin State Bar's compelled association and use of mandatory dues for political and ideological activity are an even plainer affront to the First Amendment than the compelled payments to public-employee

labor unions struck down by *Janus v. AFSCME*. Such First Amendment compulsion in the context of lawyer speech, association, and petition has never been subject to First Amendment scrutiny and never will be absent the Court's intervention.

Twenty state bar associations do not mandate what shall be the orthodox viewpoint of their lawyers and citizens. If these groups can so easily comply with the First Amendment, so can Respondents.

Independent *de novo* review is warranted to preserve the petitioners' precious First Amendment freedoms.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO RECOGNIZE EXPLICITLY THAT *JANUS* HAS EFFECTIVELY OVERRULED *KELLER* AND *LATHROP*.

A. Standard of Review

It is well settled law that "in cases raising First Amendment issues . . . an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964)). For the rule of independent review assigns to

judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge. *Bose*, 466 U.S. at 501. "The constitutional values protected by the rule make it imperative that judges—and in some cases judges of this Court—make sure that it is correctly applied." *Id*. at 502. *This rule of independent de novo review of the facts and law "reflects a deeply held conviction that judges—and particularly Members of this [Supreme] Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution.*" *Id*. at 510-11. (Emphasis added.)

B. Argument

In *Janus v. AFSCME*, 585 U.S. ___, 138 S.Ct. 2448 (2018), this Court held that State laws which compel public employees to join and subsidize the political activity of labor unions violate the First Amendment, squarely overruling *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) and additionally, rejecting *Abood*'s use of rational basis review:

> The dissent, on the other hand, proposes that we apply what amounts to rational-basis review, that is, that we ask only whether a government employer could reasonably believe that the exaction of agency fees serves its interests. See *post*, at 2489 (KAGAN, J., dissenting) ("A government entity could reasonably conclude that such a clause was needed"). This

> form of minimal scrutiny is foreign to our free-speech jurisprudence, and we reject it here. *Id*. at 2465.

Janus held not only that government employees cannot be forced to join a public sector union as a condition of employment, 138 S.Ct. at 2463, but also that the state may not require them to subsidize the political speech and political activism of public sector unions. Rather, the state must first obtain the employees' clear and affirmative consent. *Id*. at 2486. *Janus* clarified that all actions relating to the allocation of public resources are inherently political, as are activities addressed to matters of "value and concern to the public." *Janus*, 138 S.Ct. at 2474-76.

In *Jarchow*, petitioners squarely argue that *Keller v. State Bar of California*, 496 U.S. 1 (1990), which relied on *Abood* in significant part—citing it thirteen times with approval—should be overruled in light of the fact *Abood* was squarely overruled in *Janus*. *Keller* analogized the trade unions in *Abood* to mandatory bar associations. In *Jarchow*, the Seventh Circuit could not and did not exercise independent *de novo* review because its hands were tied by *Keller* per *Agostini v. Felton*, 521 U.S. 203 (1997), which directs that, "if a precedent of this Court has direct application in a case [here, *Keller*], yet appears to rest on reasons rejected in some other line of decisions [here, *Janus*, overruling *Abood*], the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id*. at 237.

A necessary corollary of *Agostini* and *Bose* is that this Court must favor plenary review on certiorari when the lower courts have been prevented from applying this Court's most recent precedents to a case before them, resulting in a legal anomaly for the actual parties, one of whom has been subjected to a legal principle that would not apply to most other similar parties.

Keller applied rational basis review per *Abood*, but under rational basis review the sky is the limit as to the political positions that can be (and have been) espoused by "integrated" bar associations. *Keller*'s constitutional foundation has been gutted by *Janus*. The same logic that led the Court in *Janus* to revisit and overrule *Abood* applies with even more force here because of a lawyer's constitutional duty to vindicate federal rights and champion locally unpopular claims, such as checking the overreaching of government power.

Review is also necessary and proper because the two decisions of the Court directly addressing compelled association and subsidization of political speech in the context of lawyers and "integrated" bar associations—*Lathrop v. Donohue*, 367 U.S. 820 (1961), and *Keller v. State Bar of California*, 496 U.S. 1 (1990)—never actually resolved the First Amendment issues.

In *Lathrop*, the Wisconsin Supreme Court held that the requirement that appellant be an enrolled dues-paying member of the [integrated] State Bar did not abridge his rights of freedom of association. *Id*. at

823. This Court's plurality opinion affirmed, announcing only that "on this record we have no sound basis for deciding appellant's constitutional claim." *Id*. at 845.

Twenty-nine years later, the California Supreme Court in *Keller v. State Bar*, 47 Cal.3d 1152 (1989) declared "the bar is not subject to First Amendment constraints." *Id*. at 1173, This Court directly rejected that holding in light of *Abood*, but "decline[d] to resolve the freedom of association questions that compulsory membership raises." *Keller*, 496 U.S. at 17.

Thus, neither *Keller* nor *Lathrop* decided the First Amendment compelled speech and association issues presented herein. *Jarchow* is both the proper vehicle to finally address those constitutional questions, which—by historical accident—have been side-stepped for 59 years, and an opportunity to restore the First Amendment's uniform application to all citizens.

Janus, like the Court's predecessor decisions in *Harris v. Quinn*, 573 U.S. 616 (2014) and *Knox v. SEIU*, 567 U.S. 298 (2012), applied the "bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris*, 573 U.S. at 656; *see* also *Knox*, 567 U.S. at 310-11 "[C]ompulsory fees constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.'" *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435, 455 (1984). The First Amendment does not permit government, "even with the purest of

motives," to "substitute its judgment as to how best to speak for that of speakers and listeners," *Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 791 (1988), or to "sacrifice speech for efficiency." *Id.* at 795.

Respondents and their *amici* will argue that certiorari is not warranted because there is a fundamental difference between the compelled association and compelled payment of union dues in *Janus* and the compelled association and compelled payment of bar dues in *Jarchow.* But First Amendment rights for lawyers are just as important for them as it is for others. Moreover, lawyers have a constitutional duty to vindicate federal rights and champion locally unpopular claims, *Supreme Court of New Hampshire v. Piper*, 470 U.S. at 281, including checking government overreaching, so, if they are to be treated differently than the populace at large, lawyers require *greater* First Amendment freedoms, not a watered-down version.

The notion that lawyers, individually or a class, are exempt from First Amendment coverage is nonsense. Any such concept offends the central purpose of the First Amendment under which: "The people, not the government, possess the absolute sovereignty." *New York Times v. Sullivan*, 376 U.S. 254, 274 (1964).

Respondents' underlying hypothesis is that "integrated" state bar associations are always managed by trustworthy angels, who would never in a million years act in any self-serving interest to establish themselves

in power, or enhance their active market participant financial interests, or drive a competitor out of the market, or injure a fly, let alone deprive an American lawyer or citizen of any worthy constitutional rights. But experience has shown beyond peradventure that "integrated" mandatory bar associations, like flag-waving politicians of every stripe throughout history, always seem to make a colorable argument that their advocacy has some link to improving justice, or the delivery of legal services, or protecting the public.

And when push comes to shove, the "integrated" bars always skate by whatever half-hearted judicial scrutiny comes their way. A prime exemplar is the State Bar of Michigan, which had its activities reviewed by a "blue ribbon panel" consisting of nearly a dozen past presidents of the State Bar and three appellate judges, all appointed by the Michigan Supreme Court. Not surprisingly, having stacked the deck, the outcome was a foregone conclusion, with five minutes given to the Michigan bar's primary opponent followed by a parade of bar activists singing hosannas.

Similarly, after the Court's decision in *Keller v. State Bar of California*, Governor Pete Wilson shut down and refused to fund the California State Bar Association, laying off over five hundred workers for six months for engaging in divisive political partisan lobbying on such subjects as abortion.[2] Governor Wilson concluded the California State Bar Association was bloated, unresponsive to the *Keller* decision, and

[2] https://en.wikipedia.org/wiki/State_Bar_of_California.

inefficient.[3] The California State Bar had the highest annual dues of $478 of any state-level bar association in our nation.[4] The State Bar of California has in the past paid its lobbyists over $500,000 a year. Its annual budget is over a hundred million dollars a year, a sum which can buy an enormous amount of political influence on matters of public concern.

Amicus submits the doctrine of *stare decisis* is wholly inapplicable in *Jarchow* because the Court in *Keller* and *Lathrop* for various reasons did not decide the First Amendment compelled speech and association issues presented. Assuming that constitutional rights are not implicated based on an incomplete record, as in *Keller* and *Lathrop*, is a far different legal question than adjudicating the constitutional question that is squarely presented in this case.

This legal issue presented constitutes a pure question of law that only this Court can decide. Moreover, even assuming the warrant of *stare decisis*, this Court has already concluded *Abood* was wrongly decided in *Janus*. *Keller* cites *Abood* with approval thirteen times. *Keller* therefore requires reconsideration in light of this Court's independent duty of review in First Amendment cases. *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. at 510-11 ("This rule of independent de novo review of the facts and law reflects a deeply held conviction that judges—and particularly Members of this [Supreme] Court—must exercise such review in order to preserve the precious

[3] *Ibid.*

[4] *Ibid*.

liberties established and ordained by the Constitution.").

As Jefferson famously put it, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical." *Janus*, 138 S.Ct. at 2464. "Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

The First Amendment questions presented in this case have been futilely banging on the doors of this Court for six decades, and begs for this Court's plenary review. Twenty state bar associations do not mandate what shall be the orthodox viewpoint of their lawyers and citizens. If these groups can so easily comply with the First Amendment, so can Respondents.

CONCLUSION

The Court should grant certiorari and overrule *Keller* and *Lathrop* by applying *Janus* to lawyers and "integrated" state bar associations.

Respectfully submitted,

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EXHIBIT "E"

No. 19-831

In the
Supreme Court of the United States

ADAM JARCHOW and MICHAEL D. DEAN,
Petitioners,

v.

STATE BAR OF WISCONSIN, et al.,
Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CATO INSTITUTE, ATLANTIC LEGAL FOUNDATION, REASON FOUNDATION, AND INDIVIDUAL RIGHTS FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), the Court held that state laws compelling public employees to subsidize the speech of labor unions violate the First Amendment, overruling *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). The same improperly "deferential standard" that *Abood* espoused underpins the two decisions of the Court—*Lathrop v. Donohue*, 367 U.S. 820 (1961), and *Keller v. State Bar of California*, 496 U.S. 1 (1990)—permitting states like Wisconsin to compel attorneys to be members of an "integrated bar" and fund its speech and advocacy on matters of substantial public concern. Accordingly, the question presented is:

Whether *Lathrop* and *Keller* should be overruled and "integrated bar" arrangements like Wisconsin's invalidated under the First Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

Rules

INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. Among other matters affecting the public interest, PLF has repeatedly litigated in defense of the right of workers not to be compelled to make involuntary payments to support political or expressive activities with which they disagree. To that end, PLF attorneys were counsel of record in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Brosterhous v. State Bar of Cal.*, 12 Cal. 4th 315 (1995); and *Cumero v. Pub. Emp't Relations Bd.*, 49 Cal. 3d 575 (1989), and PLF has participated as amicus curiae in all of the most important cases involving state laws allowing unions to garnish wages and force association in violation of the First Amendment, from *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), to *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298 (2012); *Harris v. Quinn*, 573 U.S. 616 (2014); *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016); and *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018).[1]

The Cato Institute is a nonpartisan public policy research foundation established in 1977 and dedicated to advancing the principles of individual

[1] Pursuant to this Court's Rule 37.2(a), all parties consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of Amici Curiae's intention to file this brief. Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*.

Atlantic Legal Foundation (ALF) is a nonprofit, nonpartisan public interest law firm that provides effective legal advice, without fees, to scientists, parents, educators, and other individuals and trade associations. ALF is guided by a basic but fundamental philosophy: Justice prevails only in the presence of reason and in the absence of prejudice. ALF seeks to promote sound thinking in the resolution of legal disputes and the formulation of public policy. Among other things, ALF's mission is to advance the rule of law in courts and before administrative agencies by advocating limited and efficient government, free enterprise, individual liberty, school choice, and sound science. ALF's leadership includes distinguished legal scholars and practitioners from across the legal community. For the last 25 years, ALF has litigated numerous "compelled speech" and "compelled association" cases in the Second and Third Circuits as "first chair" trial and appellate counsel for students at public universities challenging the use of mandatory student fees to fund political speech of organizations with which they disagreed, and as counsel for amici, in cases such as *Janus*, 138 S. Ct. 2448, *Harris*, 573 U.S. 616, and *Friedrichs*, 136 S. Ct. 1083.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason participates as amicus curiae in cases raising significant constitutional or legal issues, including *Janus*, 138 S. Ct. 2448.

The Individual Rights Foundation (IRF) was founded in 1993. It is the legal arm of the David Horowitz Freedom Center (DHFC), a nonprofit 501(c)(3) organization (formerly known as the Center for the Study of Popular Culture). The mission of DHFC is to promote the core principles of free societies—and to defend America's free society—through educating the public to preserve traditional constitutional values of individual freedom, the rule of law, private property, and limited government. In support of this mission, the IRF litigates cases and participates as amicus curiae in appellate cases, such as *Janus*, that raise significant First Amendment speech issues.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

Petitioners Adam Jarchow and Michael D. Dean are Wisconsin attorneys required by state law to join the State Bar of Wisconsin and subsidize its speech on

matters of substantial public concern ranging from the "administration of justice" to a variety of substantive and controversial legislation. Approximately 25,000 attorneys are compelled to join and subsidize the Wisconsin Bar as a precondition to practicing law within the state. Jarchow and Dean disagree with the bar's speech on a variety of political and ideological issues and oppose being compelled to financially support it with their membership dues. For the same reason, they object to being compelled to join the bar as members. They sued the Wisconsin Bar and its officers, seeking declaratory and injunctive relief from the compelled-membership and compelled-dues requirements. The courts below ruled in favor of the Wisconsin Bar because they were bound by this Court's decisions in *Lathrop* and *Keller*.

States do have a legitimate regulatory role with regard to attorneys and the practice of law. Over 20 states have a state regulatory body—sometimes, as in California, called a "state bar"—that exists solely to regulate admission, discipline, and aspects of legal practice such as continuing education and client trust accounts. An "integrated" bar, like the State Bar of Wisconsin, combines legitimate regulatory functions with actions more befitting a private trade association and it is this latter function that infringes upon nonconsenting members' First Amendment rights.

This Court's plurality decision in *Lathrop* accepted that integrated bar associations were the ideal way to efficiently, effectively, and non-controversially manage the core regulatory functions of state bars. 367 U.S. at 839-42. Subsequently, *Keller* conceded that *Lathrop* controlled on the issue of whether an integrated bar was constitutional,

496 U.S. at 7-8, and the *Keller* Court did not consider that question beyond noting its reliance on *Lathrop*[2] before moving on to decide the question reserved in the earlier case. *Id.* at 9, 14. Thirty years later, this Court's decision in *Janus* undermines the foundations on which *Lathrop* and *Keller* were decided. Among other things, *Janus* acknowledged that the decision in *Abood v. Detroit Board of Education* failed to appreciate the inherently political nature of public sector unions. Similarly, *Lathrop* and *Keller* failed to appreciate the pervasive politicization of state bar associations.

The combined—integrated—regulatory bodies and trade associations pursue political ends and work to ensure that objectors get the smallest possible deduction for "nonchargeable" activities after jumping through the greatest number of hoops to claim it. The Wisconsin Bar perceives its role as a general guardian of the legal system and claims to justify its reach into political and ideological activities by couching its involvement under innocuous sounding phrases like "pursuing the administration of justice." As *Janus* noted, matters of public policy that involve the allocation of tax dollars—a factor in most legislation—

[2] Counsel for Petitioners, Anthony T. Caso, made this point in his opening remarks of the *Keller* oral argument. *Keller v. State Bar of Cal.*, Oyez, https://www.oyez.org/cases/1989/88-1905 (last visited Dec. 2, 2019) ("This case does not challenge the right of California to regulate attorneys through a mandatory bar association. Instead, it asks whether having done so, may it also authorize the bar to, in the words of the [California Supreme Court], comment generally upon matters pending before the legislature."). It is also worth noting that the *Keller* complaint was filed in 1982, just five years after *Abood*, a case representing a jurisprudence far less protective of individual First Amendment rights.

are inherently political. And ideological activities extend even further to societal and cultural concerns. Given the sheer breadth of such political and ideological activities, many attorneys have abundant reasons to resent subsidizing and associating with the government's mandatory bar association, just as public employees may not want to associate with or subsidize public employee unions for a wide range of reasons.

Applying the constitutional doctrine set forth most recently in *Janus*, this Court should grant certiorari to hold that the Constitution forbids the state from coercing attorneys into association with an integrated bar.

REASONS TO GRANT THE PETITION

I

INTEGRATED BAR ASSOCIATIONS ENGAGE IN PERVASIVE POLITICAL AND IDEOLOGICAL ACTIVITIES, CREATING A SIGNIFICANT INFRINGEMENT ON FIRST AMENDMENT RIGHTS

The question presented by this petition is one of national importance that can be settled only by this Court.[3] While mandatory government bar officials

[3] The question presented in this case also is raised in *Fleck v. Wetch*, docket no. 19-670, arising out of the Eighth Circuit. Other cases raising similar issues have been filed across the country. While the specifics of each bar's program differ, the underlying issue—do the principles announced in *Janus* apply to mandatory integrated government bar associations—remains consistent across the litigation. The Texas State Bar has compiled pleadings filed in cases in Texas, Louisiana, Oklahoma, Oregon, North Dakota, and Michigan, as well as the present case, detailing the specific activities that extend well beyond regulation and

tout their organizations' roles as disciplinarians and evangelists for legal representation and justice, bars across the country engage in a wide range of political and ideological activities designed to implement the officials' view of a better society.

While *Janus* acknowledged that the principles announced in the decision applied in "other contexts," it did not elaborate, with the consequence that lower courts, including the court below, reject attempts to apply it in cases involving integrated mandatory bar associations.[4] The Court should grant certiorari in this case to make explicit what was earlier implied: that *Janus* provides greater understanding of the nature of the injury to individuals forced to support activities against their will. *See Keller*, 496 U.S. at 12 ("There 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."); *Gardner v. State Bar of Nevada*, 284 F.3d 1040, 1042 (9th Cir. 2002) ("[T]here is some analogy between a bar that, under state law, lawyers must join and a labor union with an agency shop."); *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291, 298 (1st Cir. 2000) ("No reason has been presented to give attorneys who are compelled to belong to an integrated bar less

discipline of attorneys. *See* State Bar of Texas, *McDonald et al. v. Sorrels et al.*, https://www.texasbar.com/Content/NavigationMenu/McDonald_et_al_v_Longley_et_al1/default.htm (last visited Jan. 7, 2020).

[4] This Court suggested that the principles announced in *Janus* do have a bearing on the bar cases when it granted the petition for writ of certiorari in *Fleck v. Wetch*, 193 S. Ct. 590 (2018), and remanded it to the Eighth Circuit "for further consideration in light of *Janus*."

protection than is given employees who are compelled to pay union dues, and *Keller* suggests the two groups are entitled to the same protection."); *Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396, 1404 (7th Cir. 1993) (*Keller* "represented the first definitive legal statement that mandatory bar dues had the same restrictions on their use as compulsory union dues.").

First, *Janus* clarified that all actions relating to the allocation of public resources are inherently political, as well as those on matters of "value and concern to the public." *Janus*, 138 S. Ct. at 2474-76 (examples include speech related to collective bargaining, education, child welfare, healthcare and minority rights, climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions). *Janus* is consistent with the Court's general understanding of the vast range of what constitutes "political" expression. *See, e.g.*, *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1888 (2018) ("[P]olitical" can be expansively defined to include anything "of or relating to government, a government, or [] governmental affairs" or the "structure or affairs of government, politics, or the state.") (citation omitted); *id.* at 1891 ("All Lives Matter" slogan, National Rifle Association logo, rainbow flag all can be construed as political expression).

Beyond the world of expressive activity that can be described as political, the compelled speech cases also protect individuals from being forced to associate with "ideological" expression, even though what is "ideological" can be tricky to pin down. There is no "bright line between ideological and non-ideological." *Romero v. Colegio de Abogados de Puerto Rico*, 204

F.3d at 302. But, in general, "ideology" encompasses "the body of ideas reflecting the social needs and aspirations of an individual, group, class, or culture." *The American Heritage Dictionary of the English Language* at 654 (Morris ed. 1981). Justice Stewart defined "ideological expression" as follows: "Ideological expression, be it oral, literary, pictorial, or theatrical, is integrally related to the exposition of thought that may shape our concepts of the whole universe of man." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 779 (1976) (Stewart, J., concurring).

Scholars define "ideology" in varying ways, but all stress the social aspect of ideological thought:

- "[A] distinct and broadly coherent structure of values, beliefs, and attitudes with implications for social policy." James Reichley, *Conservatives in an Age of Change: The Nixon and Ford Administrations* at 3 (1982), *quoted in* Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* at 36 (1987) (Higgs).
- "[A] collection of ideas that makes explicit that nature of the good community . . . . [T]he framework by which a community defines and applies values." George C. Lodge, *The New American Ideology* at 7 (1975), *cited in* Higgs, *supra*, at 36.
- "[A]n economizing device by which individuals come to terms with their environment and are provided with a 'world view' so that the decision-making process is simplified. [It is] . . . inextricably interwoven with moral and ethical

> judgments about the fairness of the world the individual perceives." Douglas C. North, *Structure and Change in Economic History* at 49 (1982), *cited in* Higgs, *supra*, at 36-37.

At a minimum, therefore, "ideological" activities that cannot be funded with compelled fees include those seeking social change, "good" government, or "fairness" in the way the world operates.

II

LOWER COURTS TURN A BLIND EYE TO INTEGRATED BARS' POLITICAL AND IDEOLOGICAL ACTIVITIES WHEN THEY ARE DESCRIBED IN GENERAL LANGUAGE OF JUSTICE

These goals of social change, good government, and fairness permeate mandatory bars' mission statements and activities. The Wisconsin Bar's "strategic priorities" are

> increasing access to justice, promoting a high-functioning justice system, ensuring a commitment to diversity and inclusion, and driving competitive advantage for our members and the organization. . . . [T]he State Bar aids the courts in improving the administration of justice, provides continuing legal education and other services for its members, supports the education of law students, and educates the public about the legal system.[5]

[5] State Bar of Wisconsin, *About Us*, https://www.wisbar.org/aboutUs/Overview/Pages/overview.aspx (last visited Jan. 9,

This is similar to the missions of most integrated bars. For example, the State Bar of North Dakota, at issue in *Fleck*, exists "to serve the lawyers and the people of North Dakota, to improve professional competence, promote the administration of justice, uphold the honor of the profession of law, and encourage cordial relations among members of the State Bar."[6] The Texas State Bar's mission

> is to support the administration of the legal system, assure all citizens equal access to justice, foster high standards of ethical conduct for lawyers, enable its members to better serve their clients and the public, educate the public about the rule of law, and promote diversity in the administration of justice and the practice of law.[7]

Michigan's State Bar's mission is to "aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interest of the legal profession

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2020). The Bar's website emphasizes that it is a "private association" that "does not license or discipline attorneys." *Id.*

[6] State Bar Association of North Dakota, Board of Governors, https://www.sband.org/page/board_of_governors (last visited Jan. 7, 2020).

[7] State Bar of Texas, Mission Statement, https://www.texasbar.com/AM/Template.cfm?Section=Our_Mission&Template=/CM/HTMLDisplay.cfm&ContentID=41823 (last visited Jan. 7, 2020).

in this State."[8] The Louisiana State Bar Association exists to

> assist and serve its members in the practice of law, assure access to and aid in the administration of justice, assist the Supreme Court in the regulation of the practice of law, uphold the honor of the courts and the profession, promote the professional competence of attorneys, increase public understanding of and respect for the law, and encourage collegiality among its members.[9]

Others are much the same.[10] The common theme and language across all the mandatory bars is dedication to "administration of justice." Yet this is precisely the phrase in the California Bar's statutory authorization that this Court held in *Keller* to permit too broad an infringement on individual bar members' First Amendment rights. *Keller*, 496 U.S. at 14-15. Specifically, the Court noted that the California Bar's

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[8] State Bar of Michigan, Mission Statement, https://www.michbar.org/file/generalinfo/pdfs/missionstatement.pdf (last visited Jan. 7, 2020).

[9] Louisiana State Bar Association, The Mission of the Louisiana State Bar Association, https://www.lsba.org/BarGovernance/LSBAMission.aspx (last visited Jan. 7, 2020).

[10] *See, e.g.*, State Bar of Arizona, Mission, Vision, and Core Values, https://www.azbar.org/aboutus/mission-vision-andcore values/ (last visited Jan. 7, 2020); Hawaii State Bar Association, Mission, https://hsba.org/HSBA/ABOUT_US/Governance/HSBA/About_Us/Governance.aspx?hkey=61f455cd-e768-470c-8750-4243223f861d (last visited Jan. 7, 2020); Idaho State Bar, Mission Statement, https://isb.idaho.gov/about-us/ (last visited Jan. 7, 2020); The Mississippi Bar, Mission, https://www.msbar.org/inside-the-bar/governance/mission/ (last visited Jan. 7, 2020).

pursuit of "administration of justice" led it to lobby against polygraph tests for state and local agency employees, possession of armor-piercing handgun ammunition, and a federal guest-worker program. *Id*. at 15. It lobbied in favor of an unlimited right of action to sue anyone causing air pollution. *Id*. The bar's policy-making branch, the Conference of Delegates, justified proposing legislation regarding gun control, a victim's bill of rights, abortion, public school prayer, and busing as under the "administration of justice" umbrella. *Id*. Regardless of whether these activities could be considered valid pursuits toward the "administration of justice," compelled funding of these political and ideological programs violated objectors' First Amendment rights.

Notwithstanding the *Keller* decision, mandatory integrated government bars, including the State Bar of Wisconsin, continue to justify a wide range of activities as related to the "administration of justice." And federal courts continue to grant integrated bars expansive power to demand money to fund these activities. *See Kingstad v. State Bar of Wisconsin*, 622 F.3d 708, 721 (7th Cir. 2010) (Seventh Circuit rejected the First Amendment claim of an attorney forced to make unwilling subsidies to the mandatory bar's public relations campaign); *Gardner*, 284 F.3d at 1043 (Ninth Circuit held that attorneys can be forced to support government bar's public relations campaign to improve public perceptions of lawyers); *Liberty Counsel v. Florida Bar Bd. of Governors*, 12 So. 3d 183, 189 (Fla. 2009) (approving bar's authorization for a section to file an amicus brief related to a law prohibiting homosexuals from adopting children); *Popejoy v. New Mexico Bd. of Bar Commissioners*, 887 F. Supp. 1422, 1430-31 (D.N.M.

1995) (approving mandatory funding for the bar's lobbying for higher salaries for government lawyers and staff, court-appointed representation in child abuse and neglect cases, a task force to assist military personnel and families, and the bar's own litigation expenses).

Lower courts remain obligated to follow *Lathrop* and *Keller* because neither has been overruled, *Agostini v. Felton*, 521 U.S. 203, 237 (1997), even as their legal foundation has been significantly eroded by the evolution in First Amendment compelled speech cases, culminating in *Janus*. Without this Court's overruling of *Lathrop* and *Keller* (to the extent it relies on *Lathrop*), lower courts cannot consider individual attorneys' freedom of association claims—that they object to being forced to associate with a hybrid licensing organization and trade association. *See Morrow v. State Bar of California*, 188 F.3d 1174, 1175 (9th Cir. 1999) (rejecting attorneys' "complain[t] that by virtue of their mandatory State Bar membership, they are associated in the public eye with viewpoints they do not in fact hold"); *Kaimowitz v. Florida Bar*, 996 F.2d 1151, 1154 (11th Cir. 1993); *Schell v. Gurich*, 409 F. Supp. 3d 1290, 1298 (W.D. Okla. 2019); *Gruber v. Oregon State Bar*, Nos. 3:18-cv-1591-JR, 3:18-cv-2139-JR, 2019 WL 2251826 at *9 (D. Or. Apr. 1, 2019). Only this Court can resolve the question.

CONCLUSION

To harmonize First Amendment jurisprudence across analogous union and bar compelled dues contexts, and to protect individual rights of free speech and association, the petition for writ of certiorari should be granted.

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Respectfully submitted,

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