No. 20-1678

In the Supreme Court of the United States

DANIEL Z. CROWE, *et al.*

Petitioners,

v.

OREGON STATE BAR, *et al.*

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

BRIEF FOR PROTECT THE 1ST, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTRODUCTION AND INTEREST OF AMICUS[1]

This Court has never recognized professional speech as a separate, less-protected speech category. See, *e.g., NIFLA* v. *Becerra*, 138 S. Ct. 2361, 2371 (2018). Instead, it has recognized that professionals—including lawyers—are protected when they speak or, as here, when they choose not to speak. Consistent with that general rule, and as the petition (at 2) correctly explains, this Court has held that, where attorneys are forced to pay mandatory bar dues, thereby subsidizing the bar's political speech, such a requirement is subject to the "same constitutional rule" that governs mandatory public-sector unions. *Keller* v. *State Bar of Cal.*, 496 U.S. 1, 13 (1990).

Amicus Protect the 1st (PT1) agrees with the petition that, following this Court's decision in *Janus* v. *AFSCME*, mandatory bar dues used to fund speech on contested issues should be subject to "exacting" scrutiny. 138 S. Ct. 2448, 2477 (2018). PT1 is a nonprofit, nonpartisan 501(c)(4) organization that advocates for protecting First Amendment rights in all applicable arenas. PT1 is concerned about all facets of the First Amendment and advocates on behalf of people from across the ideological spectrum, people of all religions and no religion, and people who may not even agree with the organization's views.

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. All parties have consented in writing to the filing of this brief, and all parties were notified of *amicus*'s intent to file this brief more than 10 days before filing.

PT1 agrees with petitioners that the Question Presented is important and deserves this Court's review. It writes separately to highlight (1) the practical and conceptual flaws of *Keller*'s "germaneness" test as applied to collective speech using compelled funds and (2) the many examples of political and ideological advocacy by mandatory bar associations, beyond the two identified in the petition (at 8). Because the germaneness test from *Keller* is deeply flawed, and because state bar associations around the country regularly push political and ideological views with which many of their members disagree, this Court should grant the petition and reverse the decision below.

ADDITIONAL REASONS TO GRANT THE PETITION

I. *Keller*'s Distinction Between "Germane" And Non-"Germane" Bar Association Activities Is Unworkable.

Based on this Court's earlier and since-overruled decision in *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), *Keller* held that mandatory state bars may promote bar association activities that are "germane" to regulating the legal profession or improving the quality of legal services in the jurisdiction. 496 U.S. at 13. This distinction no longer carries the day in the public-sector union context, has proven unworkable generally, and should be overruled to the extent it remains good law at all.

1. In *Abood*, this Court, attempting to limit the First Amendment imposition of compelled contributions to public-sector unions, ruled that such unions could use compelled fees only for their contractual function of collective bargaining and for speech and

activities "germane" to such function. See 431 U.S. at 235-236. In *Keller*, this Court extended that limitation to compelled bar dues.

Properly understood, speech "germane" to the core activities of unions or bars—collective bargaining or regulating the legal profession, respectively—should have been confined to speech *implementing* those functions. Informing the relevant members of a new or proposed contract's terms, or new rules of professional conduct, for example, is certainly speech, but is likewise indispensable (and arguably required by due process) to the performance of the underlying non-speech or speech-act functions.[2] Alas, such sensible clarity was not to be.

Instead, the Court quickly "encountered difficulties in deciding what is germane" to an association "and what is not," even when that associations' functions were "well known and understood by the law and the courts after a long history of government regulation and judicial involvement." *Bd. of Regents of Univ. of Wis. System* v. *Southworth*, 529 U.S. 217, 231-232 (2000). In *Lehnert* v. *Ferris Faculty Association*, for example, four Justices held that a public-sector union's lobbying activities seeking "financial support of the employee's profession or of public employees generally" were not germane to the union's purpose—the "ratification or implementation of a dissenter's collective-bargaining agreement." 500 U.S. 507, 520 (1991) (plurality opinion). Justice Scalia, writing for a different four justices, found the lobbying expenses

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[2] A contract, for example, is entered into by "speech," but it is properly understood as an economic act. It is an operative commitment, not merely informational or persuasive.

"nonchargeable" even though he recognized that they "may certainly affect the outcome of negotiations." *Id.* at 559 (Scalia, J., concurring in the judgment in part and dissenting in part). And Justice Marshall, who considered the principal opinion's germaneness standard "new and unjustifiably restrictive," would have considered the lobbying activities germane to the union's function. *Id.* at 535 (Marshall, J., concurring and dissenting in part).

Nine years later, this court in *Southworth* declined to extend the *Abood* and *Keller* germaneness standard in the context of compelled student activity fees. It did so at least partly because of the sweeping reach of a badly expanded germaneness test that threatened to sweep all speech into its reach and therefore provided no limit at all. 529 U.S. at 231-232. Recognizing the difficulty of "defin[ing] germane speech with ease or precision" even "where a union or bar association is the party," the Court explained that the germaneness standard would be "unmanageable in the public university setting, particularly where the State undertakes to stimulate the whole universe of speech and ideas." *Id.* at 232.

2. Mandatory state bar associations have taken advantage of the Court's difficulty defining what is and is not germane in other areas to expansively define their own roles in a manner more closely resembling that of a university than that of a trade or regulatory group. In the process, they have interpreted everything—including all manner of programming, presentations, award-giving, advocacy, and publications—to be "germane" to the regulation of the legal profession and improving the quality of legal services. *Keller*, 496 U.S. at 13-14.

Moreover, contrary to this Court's traditional understanding of viewpoint neutrality, these activities regularly choose content that advances one viewpoint at the expense of all others. Cf. *Consolidated Edison Co. of N.Y.* v. *Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 537 (1980) ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic."). For these reasons, *Keller*'s distinction between germane and non-germane activities is, in practice, lacking.

3. Meanwhile, in *Janus*, this Court overturned *Abood*, and recognized (and the union conceded) that "much" of the speech supposedly "germane" to the furtherance of some economic activity such as collective bargaining nonetheless advanced viewpoints on matters of public concern. *Id.* at 2473. Because of that, the Court held that forcing public employees to subsidize a union—even when they "strongly object to the positions the union takes in collective bargaining and related activities"—imposed a substantial burden on the free-speech rights of those compelled to fund such speech against their will. *Janus*, 138 S. Ct. at 2460, 2474-2475.

Because "*Abood* provided" *Keller's* legal foundation. *Southworth*, 529 U.S. at 231, its overruling in *Janus* should suffice to undermine—if not fully gut—the reasoning and the authority of *Keller*. Furthermore, just as *Janus* recognized the artificial and undefinable lines drawn in *Abood*, see *Janus*, 138 S. Ct. at 2482, so too this Court should recognize the similarly false dichotomy between speech that is germane to regulating the legal profession and improving the quality of legal services and speech that is not. Here, as in *Janus*, "[t]o

suggest that speech on such matters is not of great public concern—or that it is not directed at the 'public square'—is to deny reality." *Id.* at 2475 (citations omitted).

Given the scope of the legal profession and the many areas of government and public policy involving the law and lawyers, a broad notion of "germaneness" as having anything to do with or touching upon the law, and as including utterly subjective *improvements* in the quality of the legal profession through bar-approved views on controversial legal topics, was doomed to fail as a meaningful limitation on compelled speech. Even a narrow view of germaneness as tightly limited to speech essential to carry out regulatory functions would be difficult to cabin. The current system, however, is hopelessly subjective, unlimited, and oppressive of the right not to support or be compelled to pay for speech on issues of public concern with which people disagree. *Id.* at 2460.

The demise of *Abood* thus necessarily requires the demise of *Keller* and its unworkable and non-limiting germaneness test. As even the dissenting Justices in *Janus* suggested, *Janus* undermined "the constitutionality of compelled speech subsidies in a variety of cases beyond *Abood*, involving a variety of contexts beyond labor relations." 138 S. Ct. at 2495 n.3 (Kagan, J., dissenting). Those Justices rightly included "mandatory fees imposed on state bar members (for professional expression)" on their "list" of cases obsolete and unanchored following *Janus*. *Ibid.* (Kagan, J., dissenting) (citing, among others, *Keller*, 496 U.S. at 14).[3]

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[3] The *Janus* dissenters were in good company, at least as far as their predictions are concerned: Professors William Baude and

The petition should be granted to complete the constitutionally necessary course correction begun in *Janus*.

II. The Court Should Grant Review To Prevent Mandatory Bar Organizations Across The Nation From Compelling Support For Ideological And Political Speech.

While both *Keller* and the decision below are wrong as a constitutional matter, they are also significant because the problem of compelled support for political and ideological speech occurs frequently in the bar context. Indeed, attorneys in 31 States and the District of Columbia are compelled to finance such mandatory bar organizations.[4] This puts attorneys in these states in an impossible dilemma: they must decide between "betraying their convictions" and earning a living by practicing law. *Janus*, 138 S. Ct. at 2464. Such a choice is no choice at all.

One way that mandatory bar associations frequently push political and ideological positions is by appearing as *amici* in court.[5] And while many of the

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Eugene Volokh similarly understood *Janus* to require *Keller's* repudiation. See William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 Harv. L. Rev. 171, 196-198 (2018).

[4] See Leslie C. Levin, *The End of Mandatory State Bars?*, 109 Geo. L. J. Onl. 1, 2 (2020).

[5] Even if such briefs were done without the expenditure of bar time and resources—pro bono, for example, without involvement of bar employees—they still imposed a forced association on bar members with political views they may oppose. *Knox* v. *SEIU, Local 1000*, 567 U.S. 298, 309–311 (2012); *Harris* v. *Quinn*, 573 U.S. 616, 630-631 (2014); *Janus*, 138 S. Ct. at 2465-2466.

issues involved may have some tangential—or even direct—connection with the legal profession, they are nonetheless political or ideological positions of public concern on which bar members can and do disagree and hence should not be compelled to support. For example:

- **D.C. Political and Economic Governance.** The District of Columbia Bar, the "largest unified bar in the United States,"[6] filed a brief in this Court seeking D.C. representation in Congress. That brief expressed contested and contestable views on voting rights, equal protection, the Constitution, and various political events including congressional votes regarding D.C. and an odd attempt to connect the January 6 mayhem at the Capitol to the lack of D.C. statehood.[7] In another case, the D.C. Bar's D.C. Affairs Section opined to this Court on the economic merits of the "federal ban found at [District of Columbia] Code § 1-206.02(a)(5) on the District government's ability to tax the income of those who work in the District but live elsewhere"—a group that includes many members of the D.C. Bar itself.[8] Whatever one thinks of

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[6] DC Bar, *Who We Are*, https://www.dcbar.org/about/who-we-are.

[7] Brief of the District of Columbia Affairs Community of the District of Columbia Bar, and Other Concerned District of Columbia Legal Organizations and Professionals as *Amici Curiae* in Support of Petitioners and Reversal in *Castanon* v. *United States*, 2021 WL 1535853, at *6-*7 (O.T. 2020).

[8] Brief for *Amici Curiae* District of Columbia Chamber of Commerce, Federal City Council, District of Columbia Affairs Section of the District of Columbia Bar, et al., in Support of

the positions taken in those briefs, they addressed contentious policy issues on which many bar members likely disagreed.

- **LGBT Rights**. The mandatory bars of Arizona, Montana, and Oregon joined a brief in *Romer* v. *Evans*, 517 U.S. 620 (1996), arguing that Colorado's Amendment 2, which precluded any governmental body in Colorado from taking any action to protect LGBT Coloradans, was unconstitutional.[9] Whatever one thinks of the merits of the issue in that case, it was plainly a matter of vigorous public debate (on which the Court itself divided), has little or nothing to do with the regulation of the legal profession, and expressed a viewpoint not shared by many attorneys forced to pay dues to those bars.
- **Judicial Conduct and Eligibility.** State bars also have expressed views about the proper qualifications to become a judge. While obviously related to the legal profession in the ordinary sense, such matters are also highly contentious political issues.[10]

Petitioners in *Banner* v. *United States*, 2006 WL 901177, at *3 (O.T. 2005).

[9] See Brief of the Colorado Bar Association, Other State and Local Bar Associations and Various National Organizations as *Amici Curiae* in Support of Respondents in *Romer* v. *Evans*, 1995 WL 17008440 (O.T. 1994).

[10] See Motion of the Missouri Bar for Leave to File Brief of *Amicus Curiae* and Brief of *Amicus Curiae* in Support of Respondent in *Gregory* v. *Ashcroft*, 1990 WL 10013071, at *3 (O.T. 1990) (opinion on the constitutional and federal law permissibility of a mandatory retirement age for state judges); Motion of the Missouri Bar for Leave to File Brief *Amicus Curiae* and Brief *Amicus*

- **Criminal Justice.** There are similarly plentiful examples of mandatory bars wading into contentious criminal-justice issues—where at least prosecutors and defense attorneys are likely to disagree. For example, in a lengthy brief, the State Bar of Michigan, the North Carolina State Bar, and the West Virginia State Bar urged this Court to conclude that "a death sentenced inmate cannot achieve meaningful access to the courts without the assistance of counsel."[11] And the Mississippi Bar once urged this Court to hold that, under the Fifth and Sixth Amendments, "a suspect who has requested counsel may [not] be subjected to renewed (and potentially repeated) interrogation without counsel present, [even if] the suspect has had the opportunity to consult with counsel prior to the renewed interrogation."[12] Here again, whatever one thinks of the positions

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Curiae of the Missouri Bar in Support of the Petition for a Writ of Certiorari in *Dimick* v. *Republican Party of Minn.*, 2006 WL 42106, at *2-*10 (O.T. 2005) (opining on constitutionality of campaign-finance restrictions in judicial elections); Brief of *Amicus Curiae* Kentucky Bar Association in *North* v. *Russell*, 1975 WL 173580, at *4 (O.T. 1975) (self-servingly opining on whether judges must be licensed lawyers).

[11] Brief of the Maryland State Bar Association, State Bar of Michigan, North Carolina State Bar, South Carolina Bar Association, West Virginia State Bar as *Amici Curiae* in Support of Respondents in *Murray* v. *Giarratano*, 1989 WL 1127813, at *38 (O.T. 1988).

[12] Motion for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* of the Mississippi State Bar in Support of Petitioner in *Minnick* v. *Mississippi*, 1989 WL 1127192, at *7 (O.T. 1989).

taken in those briefs, they addressed contentious policy issues on which many bar members likely disagreed.

- **Access To Justice.** Even legal-services-related issues raise can involve debatable views that should not be advanced through compelled funding. Mandatory bars, for example, regularly file briefs in access-to-justice cases involving fee shifting and other financial incentives to bring certain types of cases.[13] While access-to-justice issues are obviously *related* to the practice of law, they nonetheless remain controversial and have little to do with regulating the legal profession—in contrast, perhaps, to advocating for more pay for certain lawyers, not unlike the situation in *Lehnert*. Here again, whatever one thinks of these issues, there is no doubt that many bar members would disagree with the positions their mandatory bar dues are being used to support.
- **State Bars' Self-Serving Prerogatives.** Numerous mandatory bars organizations have weighed in against their own members in defending their self-serving prerogatives or

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[13] See Brief for the Washington Council of Lawyers et al. as *Amici Curiae* Supporting Respondents in *City of Riverside, Cal.* v. *Rivera*, 1985 WL 669357, at *1-*6 (O.T. 1985) (amici, a "collection of mandatory and voluntary bar associations," arguing about the proper scope of the fee-shifting provisions of 42 U.S.C. § 1988); Brief for State Bar of California as *Amicus Curiae* in *Mallard* v. *U.S. District Court for the Southern District of Iowa*, 1988 WL 1025774, at *4 (O.T. 1988) (arguing that the appointment of involuntary counsel for the indigent under the then-current version of 28 U.S.C. § 1915(d) leads to poor representation).

restraints on trade.[14] The heightened absurdity of bar members having to contribute money to arguments raised against their own interest epitomizes the problem of compelled support for speech.

- **Other Issues.** Mandatory bars have also taken definitive positions on other, less prominent issues that nonetheless involve highly contentious questions within their own realms. For instance, various bars have taken positions on the substantive scope of the Lanham Act, issue preclusion in certain trademark cases, and even the proper scope of the marital privilege.[15] Lawyers on either side of such issues should not be required to subsidize their opponents through mandatory bar dues.

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[14] See Brief for *Amicus Curiae* the State Bar of California in *Bates* v. *State Bar of Ariz.*, 1976 WL 178674, at *19-*20 (O.T. 1976) (arguing against antitrust liability for state bars); Brief of the North Carolina State Bar, the North Carolina Board of Law Examiners, the West Virginia State Bar, the Nevada State Bar and the Florida Bar, as *Amici Curiae* in Support of Petitioner in *N.C. State Bd. of Dental Exam'rs* v. *Federal Trade Comm'n*, 2014 WL 2465962, at *3-5, *27-*28 (O.T. 2013) (same).

[15] Brief on Behalf of the American Intellectual Property Law Association and the Patent, Trademark and Copyright Section of the State Bar of California as *Amici Curiae* in Support of Petitioner, *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 1984 WL 565855, at *3 (O.T. 1984); Brief *Amicus Curiae* of the Intellectual Property Law Section of the State Bar of Texas in Support of Respondent in *B&B Hardware, Inc.* v. *Hargis Industries, Inc.*, 2014 WL 5760361, at *3-*4 (O.T. 2014); Brief for *Amicus Curiae* the Missouri Bar in *Trammel* v. *United States*, 1979 WL 199802, at *3 (O.T. 1978).

In short, by filing briefs in disputed cases, bar associations push ideas with which some and often many of their members may not agree. Bar associations, of course, have the same First Amendment rights as all other associations to express their own views. But when, as these examples demonstrate, they express views on controversial issues, and in the name of attorneys who have no choice but to be members, they cannot—consistent with the First Amendment—push those ideas with the help of mandatory dues provided by attorneys who disagree with them.

CONCLUSION

The Court should grant certiorari and hold that state laws compelling attorneys to join mandatory bars and pay dues that are used for political and ideological speech are subject to "exacting" scrutiny and violate the First Amendment. The Ninth Circuit's judgment should be reversed.

Respectfully submitted.

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