No. 22-95

IN THE

Supreme Court of the United States

SCHUYLER FILE,

Petitioner,

v.

KATHLEEN BROST, ET AL,

Respondents.

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

BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether membership in a mandatory state bar is subject to heightened scrutiny under the First Amendment.

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Under Supreme Court Rule 37.2, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

INTEREST OF AMICUS CURIAE

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Those key ideas include the freedoms and rights protected by the First Amendment to the United States Constitution, including in particular the freedoms of speech and association. As part of its mission, AFPF appears as *amicus curiae* before federal and state courts.

AFPF is committed to defending the constitutional principles of free speech and freedom of association. It believes all Americans should have greater freedom to structure their work relationships as they determine and to have a greater say in choosing those who speak for them and those with whom they wish to associate, issues directly impacted by the instant case.

SUMMARY OF ARGUMENT

It is appropriate for state law to regulate the legal profession. That good, however, need not and must not be accomplished in a manner that abrogates the First

[1] All parties consented to the filing of this brief after receiving timely notice. No counsel for a party authored this brief in whole or in part and no person other than *amicus curiae* or its counsel made any monetary contributions intended to fund the preparation or submission of this brief.

Amendment rights of individual lawyers by compelling them to subsidize and participate in private speech. But that is what the lower court did by ignoring relevant First Amendment jurisprudence and relying solely on *Keller v. State Bar of California*, 496 U.S. 1 (1990) to hold that Wisconsin may condition the practice of law on mandatory membership in and payment of dues to the Wisconsin State Bar.

Keller, the sole basis of the lower court's decision on the merits, must be rejected as binding precedent, as it is no longer tenable in light of *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018). The latter is a robust affirmation of an individual's free speech and free association rights under the First Amendment, and its rationale both destroys *Keller* and applies directly to the instant case—and the many other cases that have been brought[2] and will continue to be brought until this Court grants certiorari and answers the Question Presented.

Indeed, the lower courts are begging this Court to take up this issue, as they feel compelled to apply *Keller* even as they recognize its contradiction to the Court's more recent First amendment jurisprudence. As the lower court here declared, "*Keller* therefore remains binding on us. [Petitioner] must seek relief from the Supreme Court." App. 13.

This Court should grant certiorari to reiterate in the context of mandatory state bars that the First Amendment forbids compelled association with and

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[2] *See* App. 12–13 (lower court collecting other circuit court cases on the issue presented here).

financial subsidy of any group that, by virtue of its purpose, speaks on matters of opinion and conviction.

ARGUMENT

As the Apostle Paul wrote some 2,000 years ago, we must not "do evil that good may come." Romans 3:8 (King James). Yet that is the effect of the lower court's opinion. Only this Court can correct that abhorrent result. Certiorari should be granted.

I. STATE BAR MEMBERS SHOULD NOT LOSE THEIR FIRST AMENDMENT RIGHTS AS A CONDITION OF PRACTICING LAW.

The lower court held that, as currently applied by the federal courts, Supreme Court precedent demands qualified lawyers who wish to practice law in states with an integrated, mandatory bar give up their First Amendment rights to free speech and free association as a condition of employment. That need not and should not be the law.[3]

It is not disputed that the regulation of the legal profession is a good that may be accomplished in and through the general police powers of state law. But that good must not depend upon the evil of abrogating the First Amendment rights of individual lawyers by compelling them to subsidize and participate in private speech on matters of conscience and opinion with which they disagree.

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[3] As the Petition for Certiorari notes, at least 20 states regulate the practice of law without mandating membership in an integrated state bar. Pet. for Cet. 29–30.

> 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. If there are any circumstances which permit an exception, they do not now occur to us.

West Virginia Board of Education v. Barnette, 319 U.S. 624, 642 (1943).[4] Thomas Jefferson, as this Court recognized in its landmark *Janus* decision, put the underlying principle in these words:

> [T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.

A Bill for Establishing Religious Freedom, as quoted in *Janus*, 138 S. Ct. at 2464.

In this Court's words, compelled speech is abhorrent because it undermines a people's search for truth and impedes our representative and democratic form of government. But that is not all:

> When speech is compelled . . . additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse

[4] In applying that principle to the case before it, the Court held: "We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power, and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." 319 U.S. at 642.

> ideas they find objectionable is always demeaning, and for this reason, one of our land-mark free speech cases said that a law commanding "involuntary affirmation" of objected-to beliefs would require "even more immediate and urgent grounds" than a law demanding silence.

Janus, 138 S. Ct. at 2464 (citing *Barnette*, 319 U.S. at 633); *see also Healy v. James*, 408 U.S. 169, 181 (1972) ("Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs." A formal recognition of some groups while denying it to others "burdens or abridges that associational right.").

Association with a mandatory state bar is an act of expression. State bars by their nature formulate and publish positions on policy, contemplated legislation, judicial candidates, and a myriad of social issues. They speak to matters of controversy and public debate. Even in their core competency—regulating and policing the practice of law—they express opinions about which not all members of the bar or the wider public agree. And they do all of this with funds coerced from all members of the bar, including those most at odds with the bar's expressive activities. Here, the lower court directly acknowledged these facts as applied in Wisconsin:

> [The Wisconsin] State Bar hosts seminars, sponsors amicus briefs, publishes a magazine, proposes legal-ethics rules, and lobbies the government. Some of these activities venture into political and socially sensitive subjects.

App. 3.

By definition, a mandatory state bar constitutes a forced association. For the state bar, that forced association brings with it the power to extract money from the pockets of the members and the right to speak in an official capacity on behalf of those members, including those who disagree with and oppose that speech. In the present case, as in all states with a mandatory bar, the forced association at issue is a product of statutory law. As a matter of that law, as long as the Bar can argue its expressive activities are "germane" to the practice of law, no lawyer who disagrees with its official statements or the manner in which it uses members' dues can opt out, except by giving up the practice of law altogether.[5]

The First Amendment is designed to protect against this exact type of government coercion. 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 (1977); *see Janus*, 138 S. Ct. at 2463 (collecting cases). Similarly, "[f]reedom of association . . . presupposes a freedom not to associate." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *see Pacific Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1 (1986) (plurality opinion) (recognizing right to be free from forced association with views with which one disagrees).

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[5] As the lower court explained, "Failing to pay bar dues can result in serious consequences. Attorneys who fail to pay dues by the annual due date and remain delinquent after notice and the expiration of a specified grace period are automatically suspended.... Suspended lawyers cannot practice law." App. 3. These consequences are even more severe than those at issue in *Janus* because they exclude the lawyer not from employment by a particular employer but from an entire profession.

In its 2018 *Janus* opinion, this Court explained that "[c]ompelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command." 138 S. Ct at 2463. It provided a hypothetical to drive its point home:

> Suppose, for example, that [a State] required all residents to sign a document expressing support for a particular set of positions on controversial public issues—say, the platform of one of the major political parties. No one, we trust, would seriously argue that the First Amendment permits this.

Id. at 2463–64.

But that is exactly what a state law requiring lawyers to join and pay dues to a state bar does. If the First Amendment fails to protect individuals from this type of coercive government action, it has failed to serve one of its core functions.

Although *Janus* concerned public employees who wished to opt out of forced payments to unions rather than members of a state bar, the reasoning of the case applies directly to the facts at issue here. This Court held individuals could not be forced to pay dues to a private entity as a condition of their employment. The forced payments at issue were "agency fees," so called because they were designed to cover those activities of the union, such as collective bargaining, that, at least facially, were directed to the benefit of all employees, even non-union members. This Court concluded non-union members could not be required to pay such fees because any such requirement "violates the free speech rights of nonmembers by compelling them to

subsidize private speech on matters of substantial public concern." *Id.* at 2460.

Importantly, the Court found the forced payment of agency fees by non-union members, even if they covered only the union's collective bargaining activities—and thus presumptively benefited the non-union members—constituted compelled speech and that no compelling government interest justified that infringement of an individual's First Amendment rights. *Id.* at 2466–78.

Janus is thus a robust affirmation of an individual's free speech and free association rights under the First Amendment. It upholds an individual's political autonomy and teaches that, even if there might be a benefit conferred by virtue of a forced association with a particular group, the First Amendment forbids that compelled association against the individual's wishes. Any state law that compels an individual to associate with and pay money to a group that, by virtue of its purpose, speaks on political or social issues, indeed on any matter of conscience or opinion, is therefore constitutionally infirm.

Here, the lower court recognized the tension between the principles articulated in *Janus* and the forced association with a mandatory state bar that Petitioner challenges. Nevertheless, it deemed itself bound by *Keller v. State Bar of California*, 496 U.S. 1, 13–14 (1990) and therefore held forced association with a state bar was acceptable to the extent the bar's activities were germane to regulating or improving the legal profession.

But it is this compelled association with and subsidization of an agent who then speaks on the principal's behalf against his will and convictions that is

anathema to the Constitution, as set forth above and reaffirmed in *Janus*. Certiorari should be granted to prevent this "tyrannical and sinful" result, both here and in the numerous other cases where individual lawyers find themselves in identical circumstances.

II. THE FOUNDATIONS OF *KELLER* HAVE BEEN DESTROYED, BUT ONLY THIS COURT CAN DIRECT THE LOWER COURTS TO RECOGNIZE THE IMPLICATIONS OF THAT DEVELOPMENT.

The lower court's decision depends on *Keller* and its articulation that laws requiring mandatory state bar membership meet constitutional scrutiny as long as member dues go toward activities that are germane to regulating the legal profession or improving the quality of legal services.

But such a result cannot stand. The reasoning and rationale of *Keller* are based on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which has since been overturned. The *Keller* Court equated mandatory state bars with labor unions, stating they were "subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees. *Keller*, 496 U.S. at 2. It then developed its "germane-to-the-practice-of-law" test by reference to *Abood*.

> *Abood* held that a union could not expend a dissenting individual's dues for ideological activities not "germane" to the purpose for which compelled association was justified: collective bargaining. Here the compelled association and integrated bar is justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State

> Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members.

Id. at 13–14.

Without *Abood,* the *Keller* decision has nothing to stand on. And because of *Janus*, *Abood* is no longer good law.

> Fundamental free speech rights are at stake. *Abood* was poorly reasoned. It has led to practical problems and abuse. It is inconsistent with other First Amendment cases and has been undermined by more recent decisions. Developments since *Abood* was handed down have shed new light on the issue of agency fees, and no reliance interests on the part of public-sector unions are sufficient to justify the perpetuation of the free speech violations that *Abood* has countenanced for the past 41 years. *Abood* is therefore overruled.

Janus, 138 S. Ct. at 2460.

Janus analyzed why *Abood* should be and was overruled. That detailed analysis need not be repeated here. But a key point of the analysis that must be emphasized is that *Janus* directly addressed and rejected the "free rider" rationale the *Keller* Court considered so important.

In *Keller*, the Court noted the "substantial analogy between the relationship of the State Bar and its members, on the one hand, and the relation of the employee unions and their members, on the other." *Id.* at 12. It then explained that the primary reason for

the existence of agency fees was to avoid the so-called free rider problem:

> [Agency fees exist] to prevent "free riders"—those who receive the benefit of union negotiation with their employers, but who do not choose to join the union and pay dues—from avoiding their fair share of the cost of a process from which they benefit. . . . 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.

Janus thoroughly and unequivocally rejected that rationale.[6] It found there is no compelling state interest at play with respect to such "free riders" that override the First Amendment Rights at issue.

> [A]voiding free riders is not a compelling interest. . . . In simple terms, the First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay.

Janus, 138 S. Ct. at 2467; *see also id.* at 2467–69 (rejecting any argument that agency fees are justified on

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[6] It also rejected the other key rationale for agency fees, namely, the promotion of labor peace. *Janus*, 138 S. Ct. at 2466 ("[I]t is now undeniable that 'labor peace' can readily be achieved 'through means significantly less restrictive of associational freedoms' than the assessment of agency fees.").

the grounds that "(1) unions would otherwise be unwilling to represent nonmembers or (2) it would be fundamentally unfair to require unions to provide fair representation for nonmembers if non-members were not required to pay").

As goes *Abood*, so must *Keller*. But because *Keller* is a Supreme Court case, lower courts feel bound to continue applying it. As the lower court here explained:

> *Keller* may be difficult to square with the Supreme Court's more recent First Amendment caselaw, but on multiple occasions and in no uncertain terms, the Court has instructed lower courts to resist invitations to find its decisions overruled by implication. *Keller* is binding.
>
> . . . .
>
> With *Abood* overruled, the foundations of *Keller* have been shaken. But it's not our role to decide whether it remains good law. Only the Supreme Court can answer that question.

App. 2; 11–12. The district court similarly found that Petitioner's claim was "foreclosed by *Keller*, which only the Supreme Court may overrule." App. 28.

The only way to remedy these incoherent results is for this Court to take up the case. Certiorari is therefore necessary.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

Respectfully submitted,

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