No. 21-___

IN THE

Supreme Court of the United States

MARK E. SCHELL,

Petitioner,

v.

THE CHIEF JUSTICE AND JUSTICES OF THE OKLAHOMA SUPREME COURT, ET AL.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

JACOB HUEBERT
TIMOTHY SANDEFUR
SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION AT THE GOLDWATER INSTITUTE
500 E. Coronado Road
Phoenix, AZ 85004

ANTHONY J. DICK
Counsel of Record
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
ajdick@jonesday.com

Counsel for Petitioner

QUESTION PRESENTED

In *Keller v. State Bar of California*, 496 U.S. 1, 13 (1990), this Court held that mandatory bar dues are "subject to the same constitutional rule" as compulsory public-sector union fees. In *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), the Court held that compulsory public-sector union fees are subject to "exacting" First Amendment scrutiny. The question presented is:

Are mandatory bar dues that subsidize the political and ideological speech of bar associations subject to "the same constitutional rule" of exacting First Amendment scrutiny that applies to compulsory union fees under *Janus*?

PARTIES TO THE PROCEEDINGS

Petitioner, who was Plaintiff-Appellant in the court below, is Mark E. Schell.

Respondents, who were Defendants-Appellees in the court below, are the Chief Justice and Justices of the Oklahoma Supreme Court[1]; the members of the Oklahoma Bar Association's Board of Governors[2]; and John M. Williams, Executive Director of the Oklahoma Bar Association.

RELATED PROCEEDINGS

Western District of Oklahoma:

Schell v. Gurich, No. 19-cv-0281 (Sept. 18, 2019).

U.S. Court of Appeals for the Tenth Circuit:

Schell v. Chief Justice & Justices of the Oklahoma Supreme Court, No. 20-6044 (Aug. 25, 2021).

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[1] The Court of Appeals identified the Chief Justice and Justices collectively in this manner in its case caption. The current Chief Justice of the Oklahoma Supreme Court is Richard Darby; the other justices are M. John Kane IV, Dustin P. Rowe, Noma Gurich, Yvonne Kauger, James R. Winchester, Dana L. Kuehn, James E. Edmondson, and Douglas L. Combs.

[2] The Court of Appeals identified the Board of Governors members collectively in this manner in its case caption. The current members are Michael C. Mordy, James R. Hicks, Charles E. Geister III, Susan B. Shields, John M. Williams, Michael R. Vanderburg, Michael J. Davis, David T. McKenzie, Timothy E. DeClerck, Andrew E. Hutter, Richard D. White, Jr., Benjamin R. Hilfiger, Joshua A. Edwards, Robin L. Rochelle, Amber Peckio Garrett, Kara I. Smith, Miles T. Pringle, and April J. Moaning.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

INTRODUCTION

In *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), this Court overturned *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which had applied an anomalous rule of lax First Amendment scrutiny to uphold compulsory subsidies for the political speech of public-sector unions. In the wake of *Janus*, a handful of plaintiffs have filed petitions asking this Court to "overturn" its decision in *Keller v. State Bar of California*, 496 U.S. 1, 13 (1990), which addressed a First Amendment challenge to mandatory bar dues. *See, e.g.*, *Jarchow v. State Bar of Wis.*, 140 S. Ct. 1720, 1720 (2020) (Thomas, J., dissenting from denial of certiorari).

In this case, by contrast, Petitioner recognizes that there is no need to "overturn" *Keller* in order to strike down compulsory subsidies for bar associations' political speech. In fact, *Keller* itself squarely held that compulsory bar dues and union fees must be subject to the "same constitutional rule" of First Amendment scrutiny. 496 U.S. at 13. And under *Janus*, the "constitutional rule" is now exacting scrutiny.

The actual holding of *Keller* did not say that mandatory bar dues are constitutionally permissible. Instead, the Court in *Keller* ruled in favor of the plaintiffs by reversing the decision of the California Supreme Court, which had held that mandatory bar dues are categorically *exempt* from First Amendment scrutiny. Although the Court discussed in dicta how *Abood*'s now-defunct rule of lax scrutiny might apply to mandatory bar dues, that discussion was not necessary to the result and thus was not part of *Keller*'s holding.

In the decision below, the Tenth Circuit upheld Oklahoma's mandatory bar dues by following the dicta of *Keller* instead of its holding. As noted, the actual holding of *Keller* was that mandatory bar dues and compulsory public-sector union fees must be subject to the "same constitutional rule" of First Amendment scrutiny due to the "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." *Id.* at 10–13. But instead of following that holding, the Tenth Circuit held that mandatory bar dues are *not* subject to the same rule of exacting scrutiny that applies to compulsory union fees under *Janus*, due to supposed *differences* between public-sector unions and state bar associations. Based on that reasoning, the court held that mandatory bar dues are—unlike union fees—*per se* permissible under the *Abood* rule, even if they are used to subsidize political and ideological speech, as long as the speech is "germane" to regulating the legal profession or improving the quality of legal services.

This Court should grant certiorari because the Tenth Circuit's decision directly conflicts with the holdings of *Keller* and *Janus*. *Keller* held that bar dues and union fees must be subject to the "same constitutional rule." *Id.* at 13. And *Janus* held that the rule is "exacting scrutiny." 138 S. Ct. at 2465. In light of those holdings, the Tenth Circuit was wrong to follow *Keller*'s dicta about how bar dues might be analyzed under the now-defunct rule of *Abood*. Since *Janus* overturned *Abood*, the only way to be faithful to *Keller*'s core holding is to make clear that both mandatory bar dues and compulsory union fees are subject to the same rule of exacting scrutiny.

Unfortunately, the Tenth Circuit is not alone in allowing compelled subsidies for bar associations' political speech to continue after *Janus*. Recent decisions of the Fifth, Sixth, and Ninth Circuits likewise refused to subject mandatory bar dues to exacting scrutiny, instead following *Abood*'s "germaneness" rule, which *Keller* discussed in dicta before *Janus* squarely rejected it. As a result, hundreds of thousands of attorneys in states with mandatory bar dues are suffering significant and irreparable First Amendment harms under the anomalous and constitutionally defective rule of *Abood* that *Janus* overturned. All of these attorneys are being deprived of their fundamental First Amendment right to avoid compulsory subsidies of political and ideological speech that they do not wish to support. And they will continue to suffer that harm unless and until this Court makes clear that lower courts must follow *Keller*'s holding rather than its dicta, and apply the "same constitutional rule" of exacting scrutiny that *Janus* prescribed.

OPINIONS BELOW

The Tenth Circuit's opinion is reported at 11 F.4th 1178 and reproduced at Pet.App.1a–30a. The district court's opinion is reported at 409 F. Supp. 3d 1290 and reproduced at Pet.App.33a–44a.

JURISDICTION

The Tenth Circuit issued its opinion on August 25, 2021. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments of the United States Constitution and the relevant statutes are reproduced at Pet.App.47a–50a.

STATEMENT OF THE CASE

Petitioner Mark E. Schell has been licensed to practice law in Oklahoma since 1984. Pet.App.58a. During that time, he has been a member, and paid annual dues to, the Oklahoma Bar Association ("OBA")—but only because the state requires him, and every other Oklahoma attorney, to do so as a condition of practicing law in the state. Pet.App.58a, 66a–67a.; Okla. Stat. tit. 5, ch. 1, app. 1, art. VIII, §§ 1–4. If he stopped paying dues, the Oklahoma Supreme Court would suspend and ultimately terminate his membership, which would prohibit him from practicing law. Pet.App.58a; Okla. Stat. tit. 5, ch. 1, app. 1, art. VIII, §§ 2, 4, 5. In this case, Mr. Schell challenges the requirement that he pay dues to the OBA to subsidize its political, ideological, and other speech.

A. The Oklahoma Bar Association's Use of Mandatory Dues for Political and Ideological Speech

In his 36 years of practice, Mr. Schell has seen the OBA use his mandatory dues to fund political and ideological advocacy on a wide range of legal and political issues that he strongly opposed. For example, in 2009, the OBA took a controversial stance by publicly opposing a tort-reform bill that many attorneys in the state supported, including Mr. Schell. Pet.App.60a. Likewise, in 2014, the OBA publicly

opposed legislation that would have changed the process of judicial selection in Oklahoma to make it less subject to the control of legal and political elites. *Id*. To oppose that reform, the OBA used its members' mandatory dues to send communications arguing against the measure, and staged a rally against the measure at the State Capitol. *Id.*

The OBA's bylaws authorize it to advocate for and against legislation, and it does so. Pet.App.59a–60a. Specifically, the bylaws authorize the OBA to create a "Legislative Program" to propose legislation "relating to the administration of justice; to court organization, selection, tenure, salary and other incidents of the judicial office; to rules and laws affecting practice and procedure in the courts and in administrative bodies exercising adjudicatory functions; and to the practice of law." Pet.App.59a. The bylaws empower the OBA to "make recommendations upon any proposal pending before [the] Legislature of the State of Oklahoma or any proposal before the Congress of the United States of America, if such proposal relates to the administration of justice, to court organization, selection, tenure, salary or other incidents of the judicial office; to rules and laws affecting practice and procedure in the courts and in administrative bodies exercising adjudicatory functions; and to the practice of law." Pet.App.59a–60a. And the bylaws separately authorize the OBA to endorse "[a]ny proposal for the improvement of the law, procedural or substantive … in principle," with no restriction on subject matter. Pet.App.60a.

In addition to its legislative advocacy, the OBA also uses mandatory dues to publish political and

ideological speech in its *Oklahoma Bar Journal* publication. *Id.* Examples from recent years include:

- A January 2016 article by the OBA's then-president criticizing *Citizens United v. FEC*, 558 U.S. 310 (2010), for supposedly changing the United States "[in]to 'a government of the corporations, by the bureaucrats, for the money,'" Pet.App.60a–61a;
- A February 2016 article by the OBA's then-president criticizing "super PACs" for supposedly "threaten[ing] to corrupt the political process" with "virtually unlimited campaign contributions," Pet.App.61a;
- A March 2016 article by the OBA's then-president criticizing Oklahoma's legislature for not regulating the oil and gas industry to restrict the use of "injection wells" alleged to cause earthquakes, *id.*;
- An April 2016 article by the OBA's Executive Director characterizing proposed legislation that would change Oklahoma's method of judicial selection as one of many alleged legislative "attack[s on] the Oklahoma Bar Association or the courts," *id.*;
- Another April 2016 article entitled "We Don't Want to Be Texas," also criticizing efforts to change Oklahoma's method of judicial selection, *id.*;
- A May 2016 article by the OBA's then-president that: (1) criticized *Citizens United* and *McCutcheon v. FEC*, 572 U.S. 185 (2014), stating (falsely) that they "have allowed unlimited campaign contributions by political action

committees that do not have to identify contributors"; (2) praised Jane Mayer's book *Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right* for its exposition of a supposed "takeover of our government by big money from the oil and gas industry"; (3) praised former Vice President Al Gore for "advocating that our environment and climate suffered from a failure of our government to regulate the fossil fuel industry"; and (4) called on OBA members to "take action now" and "stand up for people and stop control of our government by the oil and gas industry," Pet.App.61a–62a;

- A May 2016 article entitled "State Attorney General Argues Against Tribal and State Interests," criticizing an amicus brief filed by the State of Oklahoma (and other states) in *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016), on the grounds that the state's arguments were (among other things) the "disingenuous" product of "uninformed bias," Pet.App.62a;
- A September 2016 article by the OBA's then-president again praising Mayer's *Dark Money* book, describing it as "a snapshot of history of the United States at a time when money controls our government," and stating that he wanted Mayer to speak at the OBA's annual meeting because "[w]e need to hear … how corrupt our government has become and how big money is turning our government into a government of the corporations, by the bureaucrats, for the money," *id.*;

- A September 2016 advertisement for the OBA's Annual Meeting—held less than one week before the 2016 general election, with Mayer as keynote speaker—quoting Mayer as stating: "money is becoming a growing factor in judicial races. … I see the money as a real threat to judicial integrity and independence…. The courts are very much part of their plan, and they[]"—meaning "wealthy conservative libertarians [*sic*]"—"[have] gone about swaying [courts] by changing the way the law is taught in law schools, paying for judicial junkets in which they push their viewpoint on the judges and by trying to use dark money to win judicial elections," Pet.App.63a;
- A November 2016 article by the OBA's then-president urging readers to contact legislators to advocate for increased funding of the judicial branch, particularly greater funding to pay bailiffs and court reporters, *id.*;
- An April 2017 article by the OBA's Executive Director criticizing legislative proposals to change Oklahoma's method of judicial selection, suggesting that, if they passed, "big money and special interest groups [would] elect judges and justices and campaign contributions [would] buy court opinions," *id.*;
- A May 2018 article by the OBA's Executive Director criticizing "attacks" on Oklahoma's system of "merit selection" of judges, Pet.App.64a;
- A November 2018 article entitled "Tort Litigation for the Rising Prison Population,"

arguing that Oklahoma's prison system was underfunded and advocating that the legislature eliminate prisons' and jails' exemption from tort liability, *id.*;

- A March 2019 "Legislative News" column stating that "MORE LAWYERS ARE NEEDED" as members of the state legislature. *Id.*

B. The OBA's Procedures for Members' Objections to Its Uses of Mandatory Dues

In 1990, this Court stated that a mandatory bar association such as the OBA may not use mandatory dues for activities that are not "germane" to "regulating the legal profession [or] improving the quality of legal services." *Keller*, 396 U.S. at 13–14. To use mandatory dues for "activities of an ideological nature which fall outside of those areas of activity" violates members' First Amendment rights to freedom of speech and association. *Id.* at 14.[3]

Under *Keller*, a bar association can meet its constitutional obligation to ensure that members are not forced to pay for such non-germane activities by

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[3] As discussed in detail below, when *Keller* deemed compelled subsidies for non-germane bar association speech unconstitutional, it did *not* hold that subsidies for germane speech *are* constitutional. Rather, the Court held that compelled subsidies for bar association speech must be subject to the "same constitutional rule" as compelled subsidies for union speech. 496 U.S. at 12–13. At that time, the rule for union speech was that established in *Abood*, 431 U.S. at 235–36, which held that public-sector unions could use compulsory speech for activities germane to collective bargaining. *Janus* has since overruled *Abood* and held that compulsory subsidies for union speech, *whether germane or not*, are subject to exacting First Amendment scrutiny. 138 S. Ct. at 2466, 2478–86.

providing: (1) "an adequate explanation of the basis for the [mandatory bar association fee]"; (2) "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker"; and (3) "an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* at 16. This is the same "minimum set of procedures" the Court mandated for public-sector unions—to ensure that non-members' mandatory union fees were not used for political or ideological activity not germane to the union's representation activities—in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986).

When Mr. Schell filed his lawsuit, however—some 29 years after *Keller*—the OBA did not explain the basis of members' dues, provide any opportunity for members to have their objections heard by an impartial decisionmaker, or place an objecting member's dues in escrow. Pet.App.64a–66a. Although the OBA annually published a proposed budget in its *Bar Journal*, that budget did not identify any specific expenditures that the OBA had made or proposed to make; it only identified general categories of expenditures. Pet.App.64a–65a. And its budgets did not state whether any past or proposed expenditures of member dues were germane to either regulating the legal profession or improving the quality of legal services. *Id.* The OBA therefore did not provide members with sufficient information to determine whether any past or proposed expenditure of member dues was germane to those purposes. *Id.*

The OBA did have a "Notice and Objection Procedure" that allowed members to object to certain OBA expenditures—if members were aware of them. Pet.App.65a–66a. But that procedure did not provide

for a neutral third party to resolve member objections. *Id.* Instead, the OBA's Executive Director was to review any objection and then either issue a partial dues refund to the objecting member or refer the objection to an "OBA Budget Review Panel" consisting of three members of the OBA's Budget Committee selected by the OBA's President Elect. Pet.App.66a. The member could appeal the OBA Budget Review Panel's ruling to the OBA Board of Governors, whose decision would be final. *Id.* While a member's objection was pending, the OBA did not require any portion of the member's dues to be placed in escrow. Pet.App.72a.

After Mr. Schell filed this lawsuit, the OBA's Board of Governors adopted a new "*Keller* Policy," with new notice and objection procedures. *See* OBA, OBA *Keller* Policy (adopted Mar. 2 & 9, 2020), https://www.okbar.org/wp-content/uploads/2020/03/OBA_KellerPolicy.pdf. As a result, members now may at least request specific details of the OBA's expenditures. *Id.* ¶ 5(a)(iii). The new policy also provides that members may choose to opt out of funding the OBA's "legislative advocacy" by subtracting a specified pro rata amount from the total amount stated on their annual dues notices. *Id.* ¶ 7. And if a member objects to the OBA's use of mandatory dues for a particular activity and the Executive Director does not grant a refund, the member may appeal to a neutral mediator selected by the Oklahoma Attorney General, with the member's dues placed in a separate fund while the dispute is pending. *Id.* ¶ 3; *id.* app. ¶ 1.

C. Mr. Schell's Ongoing Injuries

Despite the recent changes in the OBA's procedures, Oklahoma's requirements that attorneys join and pay dues to the OBA continue to injure Mr. Schell. He does not want to have to "opt out" annually to avoid subsidizing its legislative activity, as the new rules require. *See* Pet.App.66a–67a; OBA *Keller* Policy ¶ 7. Nor does he wish to pay for the OBA's non-"legislative" political and ideological speech, which he cannot opt out of, such as its publication of the *Bar Journal*. Pet.App.66a–67a. The state's objection procedures that allow him to opt out and challenge "non-germane" uses of his dues money are inadequate because he does not wish to fund *any* of the OBA's speech, regardless of whether it is "germane" to regulating the legal profession or improving the quality of legal services. *Id.*

D. Proceedings Below

Mr. Schell disagrees with the OBA speech that he is forced to fund, including but not limited to the examples noted above, and he does not wish to fund any of the OBA's speech regardless of its viewpoint. *Id.* He therefore brought suit against the individuals responsible for enforcing Oklahoma's requirements that he join and pay dues to the OBA—the justices of the Oklahoma Supreme Court, the members of the OBA's Board of Governors, and the OBA's executive director—raising three First Amendment claims. *See* Pet.App.51a–75a.

His first claim alleges that forcing him to join the OBA violates his rights to free speech and association. Pet.App.67a–68a. His second claim alleges that the OBA's collection and use of dues to subsidize its speech

without his affirmative consent violate his rights to free speech and association. Pet.App.69a–71a. His third claim alleges, in the alternative, that the OBA violates attorneys' First Amendment rights by failing to provide safeguards, as described in *Keller*, to ensure that member dues are not used for activities that are not germane to regulating the legal profession or improving the quality of legal services in Oklahoma. Pet.App.71a–73a.

Respondents moved to dismiss. The district court dismissed Mr. Schell's first and second claims (challenging mandatory membership and dues, respectively), concluding that this Court's precedents foreclosed them. Pet.App.40a–44a. The court denied the motions with respect to his third claim, however, concluding that its "allegations potentially support[ed] a successful claim under the standards set out in *Keller*." Pet.App.43a. After the OBA adopted its new "*Keller* Policy" in March 2020, the Defendants filed an unopposed motion to dismiss his third claim as moot, which the court summarily granted. Pet.App.2a–3a, 11a, 32a.

On appeal, the Tenth Circuit reversed the dismissal of Schell's first claim challenging mandatory OBA membership. The court concluded that *Keller* and *Lathrop v. Donohue*, 367 U.S. 820 (1961), do not foreclose that claim, because this Court has never resolved whether an attorney can be compelled to join a bar association that engages in speech that is not germane to regulating the legal profession or improving the quality of legal services; indeed *Keller* expressly reserved that question. Pet.App.28a–29a (citing *Keller*, 496 U.S. at 17). On remand, the district court has stayed proceedings on that claim until this

Court resolves this Petition. *See* Order, *Schell v. Gurich*, 409 F. Supp. 3d 1290 (W.D. Okla. 2021) (No. 19-cv-00281), ECF No. 100.

As to the second claim, the Tenth Circuit affirmed the district court's dismissal of Mr. Schell's challenge to mandatory OBA dues, concluding that *Keller* upheld mandatory bar dues for all speech, even political and ideological speech, as long as it is "germane[]" to the broad purposes of regulating the legal profession or improving the quality of legal services. Pet.App.19a–22a. The court rejected Petitioner's argument that *Keller* requires courts to apply the "same constitutional rule" of exacting First Amendment scrutiny to both bar dues and union fees. Pet.App.19a–20a. Instead, the court concluded that *Keller* established a rule that compulsory bar dues that fund "germane[]" political or ideological speech are *per se* constitutional. Pet.App.20a–22a.

Mr. Schell now seeks certiorari on that issue: whether the First Amendment requires exacting judicial scrutiny for the state's requirement that he pay compulsory dues to support the OBA's political and ideological speech.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts With This Court's Decisions in *Keller* and *Janus*.

The Court should grant certiorari because the decision below directly conflicts with this Court's decisions in *Keller* and *Janus*. In *Keller*, this Court held that mandatory bar dues are subject to the "same constitutional rule" that applies to compulsory public-sector union fees. 496 U.S. at 13. In *Janus*, this Court held that the constitutional rule for compulsory public-

sector union fees is (at the very least) "exacting" First Amendment scrutiny. 138 S. Ct. at 2465. Accordingly, because the decision below failed to apply exacting scrutiny to Oklahoma's mandatory bar dues, it directly conflicts with this Court's precedents.

A. *Keller* held that mandatory bar dues and compulsory union fees are subject to the "same constitutional rule" of First Amendment scrutiny.

To understand this Court's decision in *Keller*, it is necessary to separate its holding from its dicta. The result in *Keller* was to rule in favor of the plaintiffs by reversing the California Supreme Court, which had held that mandatory bar dues were subject to no First Amendment scrutiny whatsoever. This Court's reasoning was simple: because public-sector unions and bar associations are analogous in the relevant respects, the same rule of constitutional scrutiny must apply to both. *Keller*, 496 U.S. at 12–14. That reasoning was necessary to the result because it supplied the rationale for reversing the no-scrutiny rule that the California Supreme Court had adopted.

By contrast, *Keller*'s unnecessary discussion of how *Abood*'s then-regnant rule of lax First Amendment scrutiny for union fees might apply to mandatory union dues was pure dicta. That issue was not presented in the case because it was not necessary to reverse the California Supreme Court's decision that *no* scrutiny applied. No party in *Keller* argued that "exacting" First Amendment scrutiny should apply,

and thus the Court did not consider it and could not have issued any holding on that question.

1. The plaintiffs in *Keller* were attorneys who argued that the California State Bar's use of their mandatory dues for "political and ideological" causes violated the First Amendment. *Id.* at 6. The California Supreme Court rejected their claim, holding that the State Bar was a "state agency" and therefore "exempted … from any constitutional constraints on the use of its dues." *Id.* at 10. For that reason, the California court determined that no First Amendment scrutiny applied to mandatory bar association dues. *Id*.

Reviewing that issue, this Court disagreed and ruled in favor of the plaintiffs. *Id.* at 17. It concluded that bar associations are not like "traditional government agencies" funded by tax dollars, but are instead akin to labor unions funded by individual member dues. *Id.* at 12–13. For that reason, *Keller* concluded that state bar associations must be "subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions." *Id.* at 13. That was *Keller*'s essential rule of decision: It required the reversal of the lower court's ruling that bar associations are "state agenc[ies]" whose mandatory dues are "exempted" from First Amendment scrutiny. *Id*. at 10.

The binding "holding" of a case consists of nothing more than the actual disposition of the case and the reasoning that was "necessary to th[e] result." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996). *Keller*'s holding thus consists of two parts: First, the California Supreme Court had to be reversed

because it erred in holding that a mandatory bar dues are completely exempt from First Amendment scrutiny. And second, the reason that the California Supreme Court erred is that mandatory bar dues are substantially analogous to compulsory public-sector union fees, and therefore must be subject to the "same constitutional rule" of First Amendment scrutiny. 496 U.S. at 13.

2. Beyond those two limited points, *Keller* did not and could not issue any holding as to what level of First Amendment scrutiny should apply to mandatory bar dues. Addressing that question was not in any way "necessary" to decide whether the California Supreme Court erred in categorically *exempting* mandatory bar dues from First Amendment scrutiny. And this Court's statements are "unquestionably dict[a]" when they are "not essential to [the] disposition of any of the issues contested" in the case. *Cent. Green Co. v. United States*, 531 U.S. 425, 431 (2001).

To be sure, at the time *Keller* was decided, public-sector union fees were accorded lax First Amendment scrutiny under the rule of *Abood*. And the *Keller* opinion did contain some extraneous discussion about how the Court thought the *Abood* rule might be applied to mandatory bar dues. In particular, the court suggested that if *Abood* were applied to bar dues, then "[w]e think … the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" 496 U.S. at 14 (citation omitted). But that tentative dicta about the Court's "think[ing]" was not part of *Keller*'s holding. It was not in any way "essential" to overturn

the California Supreme Court's holding that *no First Amendment scrutiny at all* should apply. *Cent. Green Co.*, 531 U.S. at 431.

Indeed, because the plaintiffs in *Keller* were focused on overturning the lower court's decision that no First Amendment scrutiny applied, they did not argue for anything more stringent than the *Abood* standard. As a result, the Court had no reason to address that question at all, much less issue a holding on it. *See Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.") (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399–400 (1821)).

B. *Janus* held that the "constitutional rule" for compulsory dues is exacting First Amendment scrutiny.

In *Janus*, this Court overturned the "anomal[ous]" rule of *Abood* and held that compulsory public-sector union fees are subject to (at the very least) "exacting" First Amendment scrutiny. 138 S. Ct. at 2465, 2483. This brought the treatment of such compulsory fees into harmony with general First Amendment principles, which prohibit compulsory speech subsidies unless they "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 2465, 2483–84; *see also Harris v. Quinn*, 573 U.S. 616, 627–38 (2014) (explaining *Abood*'s inconsistency with ordinary First Amendment principles); *Knox v. SEIU, Loc. 1000*, 567 U.S. 298, 310, 312 (2012) (*Abood* "appears to have come about

more as a historical accident than through the careful application of First Amendment principles").

Accordingly, just as *Keller* made clear that bar dues and union fees must be subject to the "same constitutional rule," 496 U.S. at 13, *Janus* makes clear that the rule is (at the very least) "exacting scrutiny." 138 S. Ct. at 2465, 2483. This is the "same constitutional rule" that should apply to compulsory bar dues as well. *Keller*, 496 U.S. at 13.

C. The decision below conflicts with *Keller* and *Janus* by refusing to apply the "same constitutional rule" of exacting scrutiny.

The decision below directly conflicts with *Keller* and *Janus* because the Tenth Circuit held that compulsory bar dues are *not* subject to the same constitutional rule of exacting scrutiny that applies to compulsory public-sector union fees. Instead, the court adhered to the now-defunct rule of *Abood* and held that compelled subsidies for bar association speech are permissible as long as they fund speech that is "germane" to regulating the legal profession or improving the quality of legal services. Pet.App.17a–18a, 19a–22a. That wrongly elevates *Keller*'s dicta about *Abood*'s germaneness rule over its core *holding* that mandatory bar dues and compulsory union fees are subject to the "same constitutional rule." *Keller*, 496 U.S. at 13.

The Tenth Circuit's decision contradicts not only *Keller*'s holding but also its reasoning. In particular, the reason that *Keller* held that bar dues and union fees must be subject to the "same constitutional rule" is that the two types of entities are *similar* in relevant ways—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." *Id.* at 12–13. The Tenth Circuit held, by contrast, that bar associations and unions should be subject to *different* constitutional rules based on *differences* between them. It said that "bar associations are meaningfully distinct from unions," pointing to the different interests governments have cited to justify mandatory union fees on the one hand (primarily "labor peace") and bar dues on the other ("regulating the legal profession" and "improving the quality of the legal service available"). Pet.App.20a–21a. That line of reasoning is directly at odds with the essential rationale of *Keller*.

After *Janus*, *Keller*'s "same constitutional rule" holding and its "germaneness" discussion cannot both be binding precedent. These two propositions cannot both be true: (1) that the "same constitutional rule" applies to both public-sector unions and bar associations (as *Keller* said, 496 U.S. at 13), and (2) that compelled support for "germane" bar association speech is *per se* constitutional while compelled labor union speech is subject to heightened scrutiny (as the Tenth Circuit said, Pet.App.17a–18a, 19a–22a). These propositions are mutually exclusive. If compelled subsidies for bar fees are subject to the same constitutional scrutiny as compelled support for public-sector union fees, then they must receive exacting scrutiny as *Janus* prescribes. 138 S. Ct. at 2483. And if exacting scrutiny applies, then a court cannot simply deem compelled subsidies for a bar association's "germane" speech to be *per se* constitutional.

Accordingly, a court considering a First Amendment challenge to mandatory bar dues *must* reject one of those two propositions. And it makes no sense to reject *Keller*'s "same constitutional rule" holding in favor of its "germaneness" discussion. Again, *Keller*'s core *holding*—the part of the decision *essential* to the result—was that both types of entity should be subject to the same constitutional rule. Indeed, *Keller*'s discussion of the germaneness test depends on the "same constitutional rule" holding; without that holding, the Court would have had no reason to discuss the germaneness test. And the Tenth Circuit's decision illustrates that one cannot reject the "same constitutional rule" holding in favor of the germaneness test without rejecting the reason the *Keller* Court thought that any First Amendment scrutiny should apply to mandatory bar dues in the first place: the "substantial analogy" between compulsory subsidies for state bar associations and public-sector unions. *Keller*, 496 U.S. at 12.

Accordingly, the decision below conflicts with both the reasoning and holdings of *Keller* and *Janus*, and this Court should grant certiorari for that reason.

II. This Case Presents an Exceptionally Important Constitutional Question.

This Court should also grant certiorari because this case presents an exceptionally important constitutional issue. In conjunction with similar decisions from other lower courts, the Tenth Circuit's failure to apply exacting scrutiny as required by *Keller* and *Janus* is inflicting significant and irreparable First Amendment harm on hundreds of thousands of attorneys in states around the country. Unless this

Court intervenes, all of these attorneys will continue to be forced to subsidize the political and ideological speech of bar associations on a wide variety of controversial causes that they do not wish to support.

A. If courts faithfully apply the rule of exacting scrutiny as required by *Keller* and *Janus*, then mandatory subsidies for bar-association speech cannot survive. Under exacting scrutiny, a law must serve a "compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Janus*, 138 S. Ct. at 2465. And while bar associations surely serve some important purposes, there is no serious argument that they need to force attorneys to subsidize their political and ideological speech. Indeed, there are at least 20 states that adequately regulate the legal profession without forcing attorneys to pay dues to subsidize speech on controversial political issues. This includes states with large populations of lawyers (New York, California) and small ones (Vermont, Delaware).[4]

The example of these other states shows that there are "significantly less restrictive" means available for regulating the legal profession without forcing lawyers to pay mandatory dues to subsidize political and ideological speech. Most obviously, states could simply regulate the legal profession through a state agency without requiring the payment of mandatory dues to a private association that engages in controversial political advocacy. That is how states regulate virtually every other profession. Or, if states insist on

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[4] *See* Ralph H. Brock, *"An Aliquot Portion of Their Dues:" A Survey of Unified Bar Compliance with* Hudson *and* Keller, 1 Tex. Tech J. Tex. Admin. L. 23, 24 n.1 (2000).

having private bar associations, they could create a bifurcated system as some states have, which ensure that no mandatory dues go toward political and ideological speech. *See, e.g.*, *In re Petition for a Rule Change to Create a Voluntary State Bar of Neb.*, 841 N.W.2d 167, 173 (Neb. 2013).

Under either solution, private bar associations that wish to engage in controversial political advocacy could then do what every other private advocacy group does: raise voluntary contributions without coercing dissenters to provide financial support. These alternatives would be significantly less restrictive of First Amendment rights because attorneys then would not be forced to support bar associations' political and ideological expression unless they "affirmatively consent." *Janus*, 138 S. Ct. at 2486. Accordingly, the question of whether "exacting scrutiny" applies to mandatory bar dues is exceedingly important because it determines whether such dues are permissible.

B. The answer to the question presented also has widespread significance because it affects dozens of states. The Tenth Circuit is not the only one to hold that compulsory subsidies for "germane" bar association speech are *per se* constitutional and exempt from exacting scrutiny. The Fifth, Sixth, and Ninth Circuits recently reached the same conclusion. *See McDonald v. Longley*, 4 F.4th 229, 244 (5th Cir. 2021); *Taylor v. Buchanan*, 4 F.4th 406, 408 (6th Cir. 2021) *petition for cert. filed*, No. 21-357 (U.S. Sept. 1, 2021); *Crowe v. Or. State Bar*, 989 F.3d 714, 724–25 (9th Cir. 2021). It is likely that the same result will recur in other pending challenges to mandatory bar

dues, most of which are in jurisdictions where these Court of Appeals decisions are controlling.[5]

C. As the facts of this case demonstrate, the "germaneness" rule that lower courts are applying instead of exacting scrutiny does not suffice to protect attorneys' First Amendment rights. Even if mandatory bar associations strictly limit their dues-funded advocacy to matters "germane" to the legal profession, lawyers can still be forced to subsidize political and ideological speech. In this case, for example, the Tenth Circuit deemed the OBA's persistent, outspoken opposition to proposed changes to Oklahoma's method of judicial selection, and its advocacy for more attorneys to be elected to the state legislature, to be "germane" and therefore chargeable to all members, despite the controversial political nature of that speech. Pet.App.25a–26a. Likewise, the Fifth Circuit recently noted that "germane" activities can include such "controversial and ideological" activities as the Texas State Bar's diversity initiatives, which the court found to be "highly ideologically charged," "'sensitive,'" "'political,'" and "'undoubtedly a matter of profound value and concern to the public.'"

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[5] *See Boudreaux v. La. State Bar Ass'n*, 3 F.4th 748 (5th Cir. 2021) (reversing dismissal of, inter alia, challenge to mandatory Louisiana State Bar Association dues on Tax Injunction Act grounds); *File v. Kastner*, No. 20-2387 (7th Cir. July 28, 2020) (appealing dismissed challenge to mandatory Wisconsin State Bar membership and dues); *Bennett v. State Bar of Tex.*, No. 21-cv-2829 (S.D. Tex. Aug. 30, 2021) (class action seeking relief for all Texas attorneys based on *McDonald*); *Pomeroy v. Utah State Bar*, No. 21-cv-00219 (D. Utah Apr. 13, 2021) (challenging mandatory Utah State Bar membership and dues).

McDonald, 4 F.4th at 249 (cleaned up) (quoting *Janus*, 138 S. Ct. at 2476).

In another recent decision, a district court found an Oregon State Bar statement advocating for limitations to address "speech that incites violence" to be germane. *Gruber v. Or. State Bar*, Nos. 18-cv-1591-JR, 18-cv-2139-JR, 2019 WL 2251826, at *10 (D. Or. Apr. 1, 2019) (magistrate report and recommendation), *adopted in full*, 2019 WL 2251282 (D. Or. May 24, 2019), *aff'd in part sub nom. Crowe*, 989 F.3d 714. Also germane, in that court's view, was the Bar's publication of a statement by several affinity bar associations criticizing President Trump for, among other things, "allowing [the white nationalist movement] to make up the base of his support" and signing an executive order restricting immigration and refugee admissions. *Crowe*, 989 F.3d at 722.

Simply put, lower courts have interpreted "germaneness" so broadly as to "effectively eviscerate the limitation on the use of compulsory fees to support [bar associations'] controversial political activities." *Knox*, 567 U.S. at 320. This is likely inevitable, as the legal profession is so intimately connected to public-policy issues in so many areas of practice that virtually *any* controversial political stance can plausibly be described as "germane" to the practice of law.

Through their role in the process for making rules related to the legal profession, bar associations affect public policy; they "can prevent proposals that benefit the public from ever proceeding to the courts for consideration" and "sometimes support proposals that favor lawyers over the public." Leslie C. Levin, *The End of Mandatory State Bars?*, 109 Geo. L.J. Online 1,

16–17 (2020). And bar associations' lobbying on "[a]pparently benign" or "technical" matters "often involve[s] significant philosophical disputes over the role of states in our federal system of government, differing attitudes towards various types of business activity, or divergent beliefs about the economic effects and social wisdom of encouraging or discouraging different types of legal claims." Bradley A. Smith, *The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession*, 22 Fla. St. U. L. Rev. 35, 55–58 (1994). State bars thus exercise an outsize influence on democracy—and in mandatory bar states, they do so with funds taken from lawyers against their will. Quintin Johnstone, *Bar Associations: Policies and Performance*, 15 Yale L. & Pol'y Rev. 193, 228–30 (1996).

In short, mandatory bar associations engage in core political and ideological speech on matters of great public concern—just like the public-sector unions whose compelled subsidies were struck down in *Janus*, 138 S. Ct. 2475–76 (recognizing that subjects of collective bargaining, including wage and employee benefits, and other union speech constituted core political speech).

This reinforces the "substantial analogy" between bar associations and public-sector unions. *Keller*, 496 U.S. at 12. In *Janus*, this Court recognized that "collective bargaining with a government employer . . . involves inherently political speech," 138 S. Ct. at 2480, because matters such as government employees' wages and benefits implicated matters of great "public concern," *id.* at 2475. The same is true for bar-association advocacy, even on matters germane to

regulating lawyers, which can have significant consequences for both lawyers and the general public.

D. The Tenth Circuit's "germaneness" rule does not even effectively protect attorneys from paying for a bar association's *non*-germane speech, just as *Abood*'s germaneness rule did not effectively protect government employees from subsidizing unions' non-germane speech. As with union expenditures, the line between germane and non-germane expenditures for bar associations "has proved to be impossible to draw with precision." *Id.* at 2481; *see also* Smith, *supra*, at 56 (arguing that this line-drawing problem is even more difficult in the bar-association context because "[l]egal reform issues simply do not break down as neatly as the collective bargaining issues at stake in the *Abood* line of cases"). The attorneys who run state bar associations will *always* be able to argue that their associations' advocacy on issues of law or public policy relates somehow to "improving the quality of legal services." And dissenting attorneys can virtually always argue that a seemingly "narrow, technical" issue related to regulating the legal profession has broader political implications. Smith, *supra*, at 55–56.

Further, just as *Janus* found *Abood* intolerable for forcing public-sector employees to undertake the "daunting," "expensive," "laborious and difficult task[s]" of challenging improper union expenditures, 138 S. Ct. at 2482, so the lower court's interpretation of *Keller* is unreasonable in assuming that attorneys can adequately protect their First Amendment rights by monitoring all of a bar association's activities (including each item in the association's publications) for inappropriate uses of dues and challenging each one that is objectionable.

Like the public-sector workers whose rights were at stake in *Janus*, OBA members and attorneys in other states with integrated bars typically receive only general information about the bar's expenditures of mandatory fees. Pet.App.64a–65a; *see Janus*, 138 S. Ct. at 2482. That makes it impossible for attorneys to know what their money is being used for without filing a challenge. *See Janus*, 138 S. Ct. at 2482. And it is especially unreasonable to expect lawyers to challenge an entity that is partially responsible for regulating them, especially when the amount of money at stake for any individual with respect to any given bar-association expenditure is low.

E. Finally, there is no evidence that the use of compulsory subsidies for bar-association speech helps produce better regulation of the legal profession or a higher quality of legal services. *See* Levin, *supra*, at 18–19. And there is certainly no reason to believe that compelled support for bar associations' *political and ideological speech*—in addition to their purely regulatory activities—produces lawyers who are more ethical or provide better services.

For all of these reasons, the Tenth Circuit's (and other lower courts') failure to subject compelled bar subsidies to exacting First Amendment scrutiny is causing significant unjustified harm to the many thousands of attorneys in Oklahoma and other states who, as a condition of practicing their profession, are forced to pay money to support controversial political and ideological advocacy without any good reason.

III. This Case is the Perfect Vehicle for the Court to Consider Whether Exacting Scrutiny Applies to Mandatory Bar Dues.

This case is an ideal vehicle for the Court to consider the question presented. First, granting review here will not require the Court to consider overruling any of its own precedents. Unlike other petitions that this Court has recently denied, Petitioner here argues exclusively that this Court should *apply* the holding of *Keller*, not overrule it. And second, the facts about the nature of political and ideological speech that attorneys in Oklahoma are forced to subsidize—which must be taken as true at this stage of the litigation—provide vivid context for deciding whether exacting scrutiny should apply.

A. This case does not call for the Court to consider overruling any precedent.

Unlike other petitions that this Court has recently denied raising the question of whether mandatory bar dues violate the First Amendment, petitioner here does not ask the Court to overrule *Keller* or any other precedent. Instead, petitioner's sole argument is that a faithful application of *Keller* itself requires exacting scrutiny for mandatory bar dues in the wake of *Janus*. Thus, if the Court grants review in this case, it will not have to confront any *stare decisis* problem, as Petitioner will not submit any briefing on that issue.

This Court recently denied two other petitions arguing *Keller* should be overturned. In *Jarchow v. State Bar of Wisconsin*, the petitioners argued that "*Keller* should . . . be revisited and overruled." *See* Pet. for Cert. at 20, *Jarchow*, 140 S. Ct. 1720 (No. 19-831). The petition focused heavily on the *stare decisis* factors

and argued at length that *Keller* should no longer be considered good law in the wake of *Janus*. *Id.* at 20–26. The petitioners in that case did not recognize the point pressed here—i.e., that *Keller* does not need to be overruled because its actual holding (as opposed to its dicta) already requires mandatory bar dues to be subject to the "same constitutional rule" as mandatory public-sector union dues. *See supra* pp. 15–18.

Likewise in *Crowe v. Oregon State Bar*, the petition argued that "the Court should overrule *Keller* because it conflicts with *Janus* and has allowed widespread unjustifiable violations of attorneys' fundamental First Amendment right not to subsidize an organization's political or ideological speech." Pet. for Cert. at 23, *Crowe*, No. 20-1678 (U.S. May 27, 2021). The petition also included a lengthy argument as to why the *stare decisis* factors supported overturning *Keller* in the wake of *Janus*. *Id.* at 23–30. To be sure, the petition did argue in the alternative that *Keller* is not "properly read as approving compelled support for bar associations' germane political and ideological speech," and thus did not rest its argument exclusively on overturning *Keller*. *Id.* But nevertheless, if the Court had granted certiorari in that case, it would have had to confront the argument that *Keller* should be overruled. That is not true in the present case, because Petitioner here is arguing *exclusively* that a faithful application of *Keller*'s holding requires exacting scrutiny for mandatory bar dues. Indeed, granting review here will not even require this Court to decide whether mandatory bar dues are actually permissible—only what level of scrutiny should apply.

The same issue distinguishes the present case from another petition that is currently pending out of the

Sixth Circuit in *Taylor v. Buchanan*. In that case, the petitioners argue that "*Keller* should no longer be considered good law and must be explicitly overruled." Pet. for Cert. at 27, *Taylor*, No. 21-357 (U.S. Sept. 1, 2021). Thus, again, the present case is a better vehicle because it will not require the Court to consider overruling any of its precedents.

B. The facts here provide vivid context for assessing the level of First Amendment scrutiny that should apply.

This case also presents an excellent vehicle because it provides vivid facts that illustrate the First Amendment stakes. By contrast, the relevant facts about the nature of the subsidized speech in the other petitions that this Court recently denied were far less detailed.

Here, because this case is at the motion-to-dismiss stage, all of the allegations in the complaint must be taken as true. The procedural posture is thus the same as it was in *Janus*, which also involved an appeal of a dismissal of a First Amendment claim on the pleadings. *See* Pet.App.2a–3a; *Janus*, 138 S. Ct. at 2462.

In particular, Mr. Schell alleges that the OBA forces him to subsidize political and ideological advocacy on both "germane" and "non-germane" topics, including tort reform, the state judicial-selection process, and campaign-finance reform. Pet.App.59a–64a; *see also supra* pp. 4–9. On each of these topics, there has been a long-running controversy within Oklahoma about the proper policy that the State should adopt. And on each of these topics, the OBA has consistently used Mr. Schell's mandatory dues to advance its reliably

left-wing political agenda, which is squarely at odds with Mr. Schell's own political beliefs. It is hard to imagine a more vivid illustration of how compulsory subsidies for political and ideological speech can impinge on attorney's First Amendment rights.

By contrast, the other petitions that this Court recently denied did not involve such clear facts on such ordinary political controversies that that were clearly opposed by the people who were forced to pay for them. In *Jarchow*, for example, the speech that the plaintiffs were forced to subsidize included only less controversial topics such as the "regulation of the practice of law," "increased funding for prosecutors;" and "access to justice." Pet. for Cert., *Jarchow*, *supra*, at 7. While the petitioners averred broadly that they "disagree[d]" with the bar association's speech on many topics, they did not specifically identify any particular mandatory-subsidy topic on which they disagreed. *Id*. And in *Crowe*, the petitioners cited only one example of bar-association speech (a single publication) that they found objectionable. Pet. for Cert., *Crowe*, *supra*, at 8.

In short, the petition here presents a stark instance of an attorney being forced to pay for political and ideological advocacy that he directly opposes on many specific germane and non-germane topics. It thus squarely presents the question of whether the First Amendment allows such mandatory subsidies without even requiring the government to satisfy exacting scrutiny.

CONCLUSION

The petition for a writ of certiorari should be granted.

November 22, 2021

Respectfully submitted,

JACOB HUEBERT
TIMOTHY SANDEFUR
SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION AT THE GOLDWATER INSTITUTE
500 E. Coronado Road
Phoenix, AZ 85004

ANTHONY J. DICK
Counsel of Record
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
ajdick@jonesday.com

Counsel for Petitioner