No. 19-831

In The
Supreme Court of the United States

ADAM JARCHOW, et al.,

Petitioners,

v.

STATE BAR OF WISCONSIN, et al.

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

INTEREST OF THE *AMICUS CURIAE*[1]

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

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

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

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

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

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

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

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

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

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

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

SUMMARY OF THE ARGUMENT

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

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

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

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

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

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

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

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

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

ARGUMENT

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

A. Standard of Review

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

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

B. Argument

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[3] *Ibid.*

[4] *Ibid*.

liberties established and ordained by the Constitution.").

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

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

CONCLUSION

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

Respectfully submitted,

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