No. 19-831

IN THE

Supreme Court of the United States

ADAM JARCHOW, ET AL.,

Petitioners,

v.

STATE BAR OF WISCONSIN, ET AL.,

Respondents.

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

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

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QUESTION PRESENTED

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

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STATEMENT OF INTEREST[1]

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

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

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

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

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

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

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

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

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

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

SUMMARY OF ARGUMENT

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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