No. 19-670

In The
Supreme Court of the United States

ARNOLD FLECK,

Petitioner,

v.

JOE WETCH, et al.,

Respondents.

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

BRIEF FOR THE 1889 INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

BENJAMIN M. LEPAK
1889 INSTITUTE
1401 N. Lincoln Blvd., Suite 175
Oklahoma City, Oklahoma 73104
405-646-3272

WARREN V. NORRED
Counsel of Record
NORRED LAW, PLLC
515 East Border Street
Arlington, Texas 76010
817-500-9433
wnorred@norredlaw.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether laws requiring membership in a state bar association are subject to the same "exacting" First Amendment scrutiny described in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018).

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

INTEREST OF THE AMICUS CURIAE[1]

The 1889 Institute advances ideas that promote human flourishing through limited, responsible government, robust civil society, and free enterprise. Located in Oklahoma, it is a nonpartisan, nonprofit think tank that makes public policy proposals to expand opportunity and fight unjust, government-granted privilege.

As part of its mission, the Institute studies occupational licensing schemes and makes proposals designed to unburden practitioners from the more pernicious attributes of such schemes. The Institute has published studies evaluating a wide array of occupational licenses required by Oklahoma law, and has concluded that none are more onerous than that of attorney licensing. This is because Oklahoma, like thirty other states, burdens its attorneys not only with a cumbersome licensing requirement, but with an imposition on their First Amendment freedoms—compulsory membership in the Oklahoma Bar Association.

The Institute believes that attorneys should have their First Amendment rights fully recognized by this

---

[1] Pursuant to Rule 37.2(a), all parties consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of Amicus Curiae's intention to file this brief. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any 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.

Court. Attorneys should be permitted to practice their occupation without being forced to associate with any particular organization, especially not an organization that uses its members' dues to spread political opinions with which the members may disagree. The Institute will be aided in its mission to reduce occupational licensing burdens on Oklahomans by a favorable decision in this case.

For these reasons, Amicus Curiae 1889 Institute is interested in this case.

INTRODUCTION & SUMMARY OF REASONS TO GRANT THE PETITION

Whatever interest a state has in mandating membership in a bar association, it is difficult to imagine that it includes using inaccurate portrayals of the decisions of this Court to disseminate political attacks against the state's most important industry and source of tax revenue. And yet, nakedly political and ideological speech like the following from the then-President of the Oklahoma Bar Association appears regularly in that organization's official publication—funded by compulsory dues—*The Oklahoma Bar Journal*:

> The decisions by the United States Supreme Court in *Citizen's* [*sic*] *United v. Federal Election Commission* and *McCutcheon v. Federal Election Commission* have allowed unlimited campaign contributions by political action committees that do not have to identify contributors. These two cases have changed

> our whole country and have given control of our government to big money. . . .
>
> Oklahoma is in danger. It is time for us as lawyers to stand up for people and stop control of our government by the oil and gas industry. We must take action now![2]

Oklahoma is not alone. Mandatory bar associations across the United States routinely extract money from attorneys to propagate similar political and ideological speech. Much of this speech is made possible by the ambiguous definition of the government's interest found in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990), that of "regulating the legal profession and improving the quality of legal services." *Id.* at 13.

The results are in, and nearly thirty years of the *Keller* regime have demonstrated the same deficiencies that this Court corrected in its line of public-sector union cases culminating in *Janus*. *Keller* remains as much of "an anomaly" in the Court's First Amendment jurisprudence as was *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), and should meet a similar fate. *Janus*, 138 S. Ct. 2448, 2483 (2018).

Keller—ostensibly a decision seeking to shield attorneys from forced subsidization of political speech—has instead fostered a system where mandatory bar associations presume attorneys' waiver of their First

---

[2] Garvin A. Isaacs, "Explorers Attacked by Polar Bear" *The Oklahoma Bar Journal*, Vol. 87, No. 14, p.1012 (May 21, 2016), *available at* https://www.okbar.org/wpcontent/uploads/2018/06/OBJ2016May21-sm.pdf.

Amendment rights, fail to provide meaningful procedures for attorneys to remedy the harm, and then are insulated from consequences in any litigation to vindicate those rights. Rather than allowing attorneys to more fully realize their First Amendment rights, *Keller* has served as a cover for mandatory bar associations to carry on with their political activities without fear of any significant loss of revenue.

As a result, attorneys in thirty states are required by law to associate with and fund the speech of bar associations, even when they would rather not lend their reputations to the organizations, disagree with the speech's message, or even—as with the statement of the then-President of the Oklahoma Bar Association—find the bar's legal analysis to be faulty and misleading.[3]

The Petition squarely presents an important and unsettled question of law at the heart of the First Amendment that only this Court can address: whether laws compelling attorneys to join and pay dues to a bar association as a condition of practicing law must stand up to *Janus*'s exacting scrutiny.

The question is important because if the Court's answer is yes, vast numbers of attorneys nationwide

---

[3] It is unclear to Amicus Curiae how *Citizens United* and *McCutcheon* "have allowed unlimited campaign contributions by political action committees that do not have to identify contributors." Isaacs, *supra* note 2. Given this interpretation of the Court's First Amendment jurisprudence, perhaps it is unsurprising that the Oklahoma Bar Association continues to infringe on its members' speech and association rights.

will for the first time in their careers be free to practice law without being forced to fund political speech with which they disagree. In other words, attorneys will no longer have to choose between their vocation and their First Amendment rights.

The question is unsettled because courts—including the court below—continue to apply *Keller* as though *Janus* has no application to mandatory bar laws. Petitioner's claims make clear that *Keller* and *Janus* are at least incompatible, and likely irreconcilable. *Janus* stands for the proposition that compelled funding of an organization's speech as a condition of one's employment is unconstitutional, whether the extracted money funds straightforwardly political speech or some other form of speech, such as collective bargaining. In contrast, *Keller*—like *Abood* before it—employs an unworkable distinction between "germane" and "non-germane" activities and speech, requiring attorneys to fund the former but not the latter.

At bottom, the two decisions operate from different conceptual frameworks. *Janus* acknowledges that compelled association itself is constitutionally suspect, and thus requires at least exacting scrutiny and affirmative consent. *Keller* tolerates constitutionally offensive conduct as a tradeoff for "reasonable" governmental interests; *i.e.*, it employs rational basis scrutiny. *Keller*, 496 U.S. at 8 (discussing what the state "might reasonably believe"). But "ask[ing] only [what a state] . . . could reasonably believe" is a "form of minimal scrutiny [that] is foreign to our free-speech jurisprudence, and we reject it." *Janus*, 138 S. Ct. at 2465.

The need for the Court to take up the issue is urgent because in many states, like Oklahoma, attorneys have no other realistic recourse. Institutional obstacles prevent reform of mandatory bar associations. It is telling that despite decades of rigorous debate over the constitutionality of mandatory bar laws, only two challenges have ever reached this Court. These institutional obstacles, however, should make this Court more, not less, skeptical of mandatory bar laws. After all, "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).

REASONS TO GRANT THE PETITION

I. The Political Activities of the Oklahoma Bar Association are Emblematic of How Mandatory Bar Associations Infringe Attorneys' First Amendment Rights

Mandatory state bar associations engage in pervasive political and ideological speech that is, at best, tenuously related to the government's interest in "regulating the legal profession and improving the quality of legal services." *Keller*, 496 U.S. at 13. The activities of the mandatory Oklahoma Bar Association (OBA), of which Amicus Curiae has particular insight, are representative of the political and ideological activities

undertaken by mandatory bar associations across the nation.

The situation facing attorneys in Oklahoma would look familiar to the Petitioner in this case, as well as the plaintiffs in Texas,[4] Louisiana,[5] Oregon,[6] Michigan,[7] and Wisconsin[8] who have brought similar claims. Unfortunately—and instructively—these attorneys' situation is virtually unchanged from that of the California attorneys who complained in *Keller*.

Though the Oklahoma Bar Association plays a role in "ensuring that attorneys adhere to ethical practices," *Harris*, 573 U.S. 616, 655–56 (2014), it also wades into the political fray. The OBA routinely engages in political and ideological speech, including direct advocacy on important, disputed public policy issues.

A. The OBA Fights to Preserve the Privileged Position it Worked to Codify in State Law

Little rouses the OBA to full-throated political speech the way efforts to modify the state's method of

---

[4] *McDonald v. Longley*, No. 1:19-cv-00219-LY (W.D. Tex., filed Mar. 6, 2019).

[5] *Boudreaux v. La. State Bar Ass'n*, No. 2:19-cv-11962 (E.D. La., filed Aug. 1, 2019).

[6] *Crowe v. Or. State Bar*, No. 19-35463 (9th Cir., pending); *Gruber v. Or. State Bar*, No. 3:18-cv-1591-JR. 2019 WL 2251826 *1 (D. Or. Apr. 1, 2019).

[7] *Taylor v. State Bar of Mich.*, No. 1:19-cv-00670-RJJ-PJG (W.D. Mich., filed Aug. 22, 2019).

[8] *Jarchow v. State Bar of Wis.*, No. 19-CV-266 (W.D. Wis., filed Apr. 8, 2019).

judicial selection do, largely because the OBA plays such a highly influential role within Oklahoma's selection process. *See* Benjamin M. Lepak, *The Oklahoma Supreme Court's Unchecked Abuse of Power in Attorney Regulation*, 1889 INSTITUTE POLICY ANALYSIS (February 2019) at p.7–11, n.115, *available at* https://img1.wsimg.com/blobby/go/8a89c4f1-3714-49e5-866b-3f6930172647/downloads/1d31jh6d1_297471.pdf (describing the OBA's outsized role in judicial selection and noting "[n]othing mobilizes the Oklahoma Bar Association more quickly or to greater hysteria than a proposal to alter the method of selecting judges"). The OBA was the leading advocate in the 1960s for establishing Oklahoma's Judicial Nominating Commission, a scheme of judicial appointment within which the OBA has a legally mandated and disproportionate role. *See id.* at 10, n.115–116 (noting that OBA members amount to approximately one–third of one percent of Oklahoma's population, yet the OBA selects approximately forty percent of commission members); Jack N. Hays, *Oklahoma Moves Forward in Judicial Selection*, 6 TULSA L. J. 85 (1970) (describing the OBA-led campaign to establish nominating commission system via amendment of the Oklahoma Constitution). It has continued that advocacy for over fifty years. Recent years have seen multiple proposals to alter Oklahoma's method of judicial selection, with each attempt at reform generating substantial, heated public debate.

To protect its powerful position within the Commission, the OBA carries out a full-fledged public relations campaign funded by compulsory dues. The

OBA maintains a website dedicated to promoting the Commission system, featuring a one-sided version of the facts and history of the issue. Oklahoma Bar Association, COURTFACTS.ORG, *Judicial Nominating Commission*, *available at* https://courtfacts.org/jnc/ (last visited December 23, 2019). The OBA goes so far as to suggest that dissenters will introduce bribery and corruption into the judiciary. John M. Williams, "JNC Filing Period, Legislation and Déjà vu All Over Again," *The Oklahoma Bar Journal*, Vol. 88, No. 11, p.768–69 (April 15, 2017).

To defeat judicial selection reform measures it opposes, the OBA has, among other activity, mobilized a petition drive, organized a rally at the state capitol building timed to occur as the legislature voted on the measures, and encouraged its members to lobby legislators. The overall effect of this activity provides a false impression to the public and policymakers that the OBA speaks for "the bar," not just the Bar Association.

Reminiscent of Petitioner's claims, several of the legislators carrying such reform measures in recent years were, themselves, dues-paying members of the OBA. The proposals were uniformly opposed by the OBA, creating the spectacle of attorney-legislators being required to fund the opposition to their own legislation.

The OBA evidently considers this type of advocacy germane to the Bar's purpose, as it has adopted a policy in its by-laws creating a "Legislative Program" as a priority of the Bar's activities. *Bylaws of the*

Oklahoma Bar Association, OKLA. STAT. Tit. 5, Ch. 1, App. 2, Art. VIII, § 1, *et seq*. The policy permits the OBA to advocate for and against 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." *Id.* at Art. VIII, §§ 2–3. It also empowers the OBA to make affirmative proposals to the legislature and other policymakers. *Id.* at Art. VIII, §§ 1–9.

Meanwhile, Oklahoma attorneys who support efforts to dislodge the OBA from its privileged position in the selection of the state judiciary are left swimming against the tide, much like the Petitioner in this case. The OBA extracts from these attorneys' compulsory dues, then uses the dues to advocate the opposite position. Their personal resources, time, and public profiles are no match for those of the OBA. It shows. Virtually every proposal to alter Oklahoma's judicial selection method has failed.

B. The OBA Regularly Broadcasts Political and Ideological Speech in *The Oklahoma Bar Journal*

The OBA also uses mandatory dues to promote political and ideological content in *The Oklahoma Bar Journal*, the official publication of the organization. Particularly fitting given the First Amendment issues presented by this Petition is the OBA's

crusade—launched during the 2016 presidential campaign—to decry this Court's recent First Amendment jurisprudence for its supposedly deleterious impact on politics in the state. The following sampling of recent content from *The Oklahoma Bar Journal* is representative of the nakedly political and ideological speech the OBA uses its members' compulsory dues to promote.[9]

- The January 2016 issue featured an article by the OBA's then-President criticizing this Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), for supposedly changing the United States "to a government of the corporations, by the bureaucrats, for the money." Garvin A. Isaacs, "Will We Let History Repeat Itself?" *The Oklahoma Bar Journal*, Vol. 87, No. 2, p.28 (January 16, 2016).
- A February 2016 article by the same OBA President criticized "super PACs" for supposedly "threaten[ing] to corrupt the political process" with "virtually unlimited campaign contributions." Garvin A. Isaacs, "Upcoming Events Deserve Your Attention" *The Oklahoma Bar Journal*, Vol. 87, No. 5, p.244 (January 13, 2016).
- A March 2016 article criticized Oklahoma's legislature for not regulating the oil and gas industry to restrict the use of "injection wells" alleged to cause earthquakes. Garvin A. Isaacs, "The Jesse Owens Rule: Never Be

[9] All *The Oklahoma Bar Journal* content cited herein is *available at* https://www.okbar.org/barjournal/archive.

Intimidated" *The Oklahoma Bar Journal*, Vol. 87, No. 8, p.460 (March 12, 2016).

- The April 2016 issue of *The Oklahoma Bar Journal*, under the banner of celebrating the OBA's "Law Day" event, was crowded with political commentary. That issue featured: (1) cover artwork with illustrations and phrases depicting a variety of political causes, including "Same Sex Marriage" and a rainbow flag; "Hands Up, Don't Shoot" and "#Black Lives Matter" alongside an illustration of handcuffs, a police car, and a man surrendering to police; and an illustration of a woman wearing a head-covering and addressing a jury, referencing *Equal Emp't Opportunity Comm'n v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015) (cover art *available at* https://www.okbar.org/wp-content/uploads/2018/06/OBJ2016April16-sm.pdf); (2) an article criticizing 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," Garvin A. Isaacs, "On Law Day Let Us Celebrate Trial by Jury" *The Oklahoma Bar Journal*, Vol. 87, No. 11, p.764 (April 16, 2016); (3) an article entitled "We Don't Want to Be Texas," also criticizing efforts to change Oklahoma's method of judicial selection, Michael J. Blaschke, *id.* at p.848.

- A May 2016 article by the OBA's then-president that: (1) criticized this Court's decisions in *Citizens United* and *McCutcheon*, stating (inaccurately) 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." Garvin A. Isaacs, "Explorers Attacked by Polar Bear" *The Oklahoma Bar Journal*, Vol. 87, No. 14, p.1012 (May 21, 2016).

- A May 2016 article entitled "State Attorney General Argues Against Tribal and State Interests," criticized an amicus brief filed by the State of Oklahoma (together with other states) in *Dollar General Corporation v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016), alleging that the state's arguments were (among other things) "disingenuous" and the product of "uninformed bias." William R. Norman & Randi D. Hardin, *The Oklahoma Bar Journal*, Vol. 87, No. 14, p.1015–21 (May 21, 2016).

- A September 2016 article again praised 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 the OBA President wanted

Mayer to speak at the OBA's annual meeting because "[w]e need to hear what she says about dark money and the future of American democracy," including "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." Garvin A. Isaacs, "Safeguarding Our Freedoms" *The Oklahoma Bar Journal*, Vol. 87, No. 24, p.1668, 1684 (September 10, 2016).

- In the same issue, an advertisement for the OBA's Annual Meeting—held less than one week before the 2016 general election, with Mayer as keynote speaker—quoted Mayer as stating: "I will talk about the way money is becoming a growing factor in judicial races and what the consequences are. . . . 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 them by changing the way the law is taught in 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." *Id.*

- A November 2016 article by the OBA's then-President urged readers to contact legislators to advocate for increased funding of the judicial branch, particularly greater funding to pay bailiffs and court reporters.

- An April 2017 article by the OBA's Executive Director criticized 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." John M. Williams, "JNC Filing Period, Legislation and Déjà vu All Over Again," *The Oklahoma Bar Journal*, Vol. 88, No. 11, p.768–69 (April 15, 2017).

- A May 2017 article by the OBA's then-president implored attorneys to "warn [the public] of the potential ill effects of reintroducing politics into our judicial selection process." Linda S. Thomas, "14th Amendment Guarantees Are Vital," *The Oklahoma Bar Journal*, Vol. 88, No. 14, p.932 (May 20, 2017).
- The May 2018 issue detailed legislation tracked by the OBA's Legislative Monitoring Committee and included comments by the OBA's Executive Director criticizing "attacks" on Oklahoma's system of "merit selection" of judges. *The Oklahoma Bar Journal*, Vol. 89, No. 13, pp.52–55 (May 2018).
- A March 2019 "Legislative News" column reviewed pending legislation and declared "MORE LAWYERS ARE NEEDED" as members of the state legislature. Angela A. Bahm, "Reading Day Recap. Day at the Capitol March 12," *The Oklahoma Bar Journal*, Vol. 90, No. 3, pp.44–47 (March 2019).

Forcing attorneys to associate with such political and ideological speech seriously burdens their First

Amendment rights. Indeed, "[c]ompelling individuals to mouth support for views they find objectionable violates [a] cardinal constitutional command, and in most contexts, any such effort would be universally condemned." *Janus*, 138 S. Ct. 2448, 2463 (2018).

II. Sustained Infringement of Attorneys' First Amendment Rights Since *Keller* Reveals the Decision's Inadequacies and the Need for this Court to Revisit It

That mandatory bar associations have continued to infringe attorneys' First Amendment rights in the years since this Court decided *Keller* demonstrates that *Keller*'s framework is seriously flawed. Moreover, courts' expansive application of *Keller* and apparent confusion over whether *Janus* abrogates *Keller* necessitates this Court's intervention.

A. *Keller*'s Framework is Flawed

The *Keller* framework has failed to protect attorneys' First Amendment rights because (1) it defines the state's interest in compulsory bar membership too amorphously, and (2) it relies on the same unworkable distinction between "germane" and "non-germane" activities as did the Court's *Abood*-line of public-sector union decisions.

1. The State's Interest in Mandating Bar Association Membership Needs to be More Clearly, and Narrowly Defined

Keller broadly defined the state's interest in compulsory bar membership as "regulating the legal profession and improving the quality of legal services." 496 U.S. 1, 13 (1990). To craft this definition, the Court examined the plurality opinion in *Lathrop v. Donohue*, 367 U.S. 820 (1961), which referred to the state's interest in a mandatory bar as "elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State." *Id.* at 843 (1961).

While the Court's description of the state's interest was broad, it was not designed to be limitless. Acknowledging that "[p]recisely where the line falls between those State Bar activities [relating to] the regulation of the legal profession, on the one hand, and those [unrelated] activities having political or ideological coloration . . . on the other, will not always be easy to discern," the Court did identify the extreme ends of the spectrum. *Keller*, 496 U.S. at 15–16 ("[C]ompulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative.").

Like *Abood*'s concept of "labor peace," *Keller*'s "formulation [of the state interest] is broad enough to encompass just about anything that the [bar] might choose to do." *Janus*, 138 S. Ct. at 2481. Indeed, mandatory bar associations have justified any number of far-flung, politically-tinged activities in the name of

"regulating the legal profession and improving the quality of legal services."

In 2017, for example, the Oklahoma Bar Association sponsored a cruise to communist Cuba, for which attendees received six hours of continuing legal education (CLE) credit. *The Oklahoma Bar Journal*, Vol. 88, No. 14, at p.931, *available at* https://www.okbar.org/wp-content/uploads/2018/08/OBJ2017May20s.pdf (April 15, 2017). That the category of "improving the quality of legal services"—the rationale for mandatory CLE—is large enough to encompass a bar association-facilitated trip that arguably subsidized the repressive Castro regime should indicate a need to revisit the definition of the government's interest in mandating bar membership.

2. *Keller*'s Germaneness Distinction is as Unworkable as was *Abood*'s

Keller borrowed directly from *Abood*'s germaneness framework, finding "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." *Keller*, 496 U.S. at 12.

Perhaps unwittingly, mandatory bar associations have demonstrated the validity of the Court's analogy by exploiting this framework in much the same manner public-sector unions exploited *Abood*. As noted, mandatory bar associations often justify their political speech as *germane* to the bar's purpose, not as peripheral activities that may entitle members to a

refund of dues. *See Bylaws of the Oklahoma Bar Association*, OKLA. STAT. tit. 5, ch. 1, app. 2, art. VIII, § 1, *et seq*. (creating the OBA's Legislative Program and providing rationale). Under the banner of broad, malleable concepts like regulation of the legal profession and improvement in the quality of legal services, such justification is not difficult.

Likewise, courts have applied *Keller* expansively, permitting mandatory dues to fund virtually limitless political activity and other extracurricular pursuits on the part of bar associations. *See Kingstad v. State Bar of Wisconsin*, 622 F.3d 708, 721 (7th Cir. 2010) (rejecting First Amendment claim of an attorney forced to make subsidies to the mandatory bar's public relations campaign); *Liberty Counsel v. Florida Bar Bd. of Governors*, 12 So. 3d 183, 189 (Fla. 2009) (approving bar's authorization for a section to file an amicus brief related to a law prohibiting same sex couples from adopting children); *Gardner v. State Bar of Nevada*, 284 F.3d 1040, 1043 (9th Cir. 2002) (holding attorneys can be forced to support government bar's public relations campaign to improve public perceptions of lawyers); *Popejoy v. New Mexico Bd. of Bar Comm'rs*, 887 F. Supp. 1422, 1430–31 (D.N.M. 1995) (approving mandatory funding of bar's lobbying for higher salaries for government lawyers and staff, court-appointed representation in child abuse and neglect cases, a task force to assist military personnel and families, and the bar's own litigation expenses). This expansive application of *Keller* has effectively invited mandatory bar associations to overreach.

Given this history, *Keller* "does not seem to have anticipated the magnitude of the practical administrative problems that would result in attempting to classify [bar] expenditures as either 'chargeable' . . . or nonchargeable." *Harris*, 573 U.S. at 637. Indeed, "each element of [*Keller*'s] test involves a substantial judgment call (What is 'germane'? What is 'justified'? What is a 'significant' additional burden?)." *Id.* (quoting *Lehnert v. Ferris Faculty Assn*, 500 U.S. 507, 551 (1991) (Scalia, J., concurring in judgment)).

B. Despite this Court's Indication that *Janus* Modifies *Keller*, Lower Courts Continue to Apply *Keller* as though *Janus* Has No Impact

Perhaps recognizing *Keller*'s inadequacies, this Court vacated and remanded the previous judgment against Petitioner for reconsideration in light of *Janus*, but the Court of Appeals was unmoved. The court below reaffirmed its prior ruling in all respects, holding that "*Janus* does not alter our prior decision." *Fleck v. Wetch*, 937 F.3d 1112, 1118 (8th Cir. 2019) (App. 13a).

The Court of Appeals is not alone. Finding themselves constrained by the rule of *Agostini v. Felton*, 521 U.S. 203, 237 (1997), lower courts have refused to consider First Amendment claims virtually identical to Petitioner's. *Schell v. Gurich*, ___ F. Supp. 3d ___, 2019 WL 541896 (W.D. Okla. Sept. 18, 2019) (dismissing First Amendment claims on grounds that *Agostini* forecloses claims based on *Janus*); *Gruber v. Oregon*

State Bar, Nos. 3:18-cv-1591-JR, 3:18-cv-2139-JR, 2019 WL 2251826, *9 (D. Or. Apr. 1, 2019). ("[Under *Agostini*, the court] should decline to apply *Janus* and must apply *Keller*.")

Abood and *Keller* share the same fundamental flaws, and should meet the same fate. Each poorly defines the government's interest in compulsory membership and dues requirements, and then presumes that the constitutional harm inflicted by forced association can be neatly quantified and hermetically sealed from activities germane to that ambiguous government interest. The *Abood-Keller* framework asks government employees and attorneys to forfeit their speech and associational freedoms in whole, and then wait for a conflicted union or bar association to distribute it back to them pro rata. Such an approach is inconsistent—perhaps irreconcilable—with this Court's recent First Amendment cases, and the lower courts' continued application of that flawed approach necessitates this Court's intercession.

CONCLUSION

Attorneys are unlikely to reclaim their First Amendment rights unless this Court acts. Mandatory bar associations occupy a peculiar, and formidable, position in the governmental process. They are hybrid regulators and private trade associations, but are also "created . . . to provide specialized professional advice to those with the ultimate responsibility of governing

the legal profession[.]" In other words, mandatory bars act as advisors to policymakers in the formulation of laws and to courts in their interpretation. These are steep institutional barriers for would-be reformers to overcome.

The institutional obstacles that make reform of mandatory bar associations difficult are a key to their durability. It is telling that despite decades of rigorous debate over the constitutionality of mandatory bar laws, only two challenges have ever reached this Court. These institutional obstacles, however, should make this Court more, not less, skeptical of mandatory bar laws. After all, "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).

This Court can, and should, end attorneys' long wait for full First Amendment rights. The 1889 Institute respectfully urges the Court to grant the Petition for Certiorari.

Respectfully submitted,

BENJAMIN M. LEPAK
1889 INSTITUTE
1401 N. Lincoln Blvd., Suite 175
Oklahoma City, Oklahoma 73104
405-646-3272

WARREN V. NORRED
Counsel of Record
NORRED LAW, PLLC
515 East Border Street
Arlington, Texas 76010
817-500-9433