No. 24-1025

IN THE

Supreme Court of the United States

DANIEL Z. CROWE, *et al.*,

Petitioners,

v.

STATE BAR OF OREGON, *et al.*,

Respondents.

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

REPLY BRIEF

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Constitutional Provisions

The Courts of Appeals are split over whether the First Amendment bars the state from compelling attorneys to join an integrated bar association if that association engages in "nongermane" conduct—that is, conduct not directly related to (1) regulating the practice of law or (2) improving the quality of legal services (which are the only two state interests that can justify compelled membership under *Keller v. State Bar of California*, 496 U.S. 1, 13-14 (1990)).

This split rests on a fundamental disagreement over what constitutes an associational injury.

In *McDonald v. Longley*, 4 F.4th 229, 245-46 (5th Cir. 2021), the Fifth Circuit explained that membership itself is inherently part of the bar's message, and that when a bar association engages in expressive activity, "part of its expressive message is that its members stand behind its expression." Thus, "[c]ompelling membership … compels support of that message" and "[i]f a member disagrees with that [message] then compelling his or her membership infringes on the freedom of association." *Id.* at 246. The Fifth Circuit then held that because the State Bar of Texas engages in some non-germane activity "compelling … plaintiffs to join an association engaging in it violates their freedom of association." *Id.* at 249.

But the Ninth Circuit explicitly disagreed "with the Fifth Circuit's holding that if a state bar engages in nongermane activities, compelled membership is necessarily unconstitutional." App. 34a-35a n.10. Instead, it determined that "membership in a state bar, standing alone, has no expressive meaning, and the public will not associate the bar's members with the bar's activities." *Id.*

In those situations, it said, "the membership requirement does not infringe the freedom of association—even if the bar engages in nongermane activities such as offering dietary advice or promoting a charity drive." *Id.*

Germaneness is central to the rationale of *Keller*, because that case said the state may compel membership to achieve the two legitimate goals of regulating lawyers and improving the practice of law, 496 U.S. at 13-14, but that it violated the First Amendment to require lawyers to "fund activities of an ideological nature which fall outside of those areas of activity." *Id.* at 14. Although *Keller* declined to address the freedom of association claim at issue here, *see id.* at 17, the logical implication is plain: the state may require lawyers to join a regulatory body for a *regulatory* purpose, but not to effectively add themselves to the *political* constituency for which the bar association claims to be speaking or lobbying.

That is why the Fifth Circuit held that it is *necessarily* unconstitutional to force attorneys to join a bar association that engages in *nongermane* activity. *McDonald*, 4 F.4th at 245. Yet the Ninth Circuit held that compelled membership is unconstitutional only if the public would associate a given attorney with the bar's speech on nongermane matters. The consequence of this split is that in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, attorneys can be compelled to join an integrated bar association that engages in nongermane activity—but in Mississippi, Louisiana, and Texas, they cannot. As a result, a lawyer's constitutional rights depend entirely on geography. Only this Court can remedy this situation.

I. There is a clear and explicit circuit split between the Ninth and Fifth Circuits.

Despite the Ninth Circuit's clear acknowledgment of a circuit split, App. 34a-35a n.10, Respondents assert that there is no split, by characterizing the decision below as merely "establish[ing] a First Amendment violation with respect to Crowe's associational rights and remand[ing] for further proceedings on the appropriate remedy." Br. in Opp'n ("BIO") at 10. This, they claim, is just what the Fifth Circuit did in both *McDonald* and *Boudreaux v. Louisiana State Bar Ass'n,* 86 F.4th 620 (5th Cir. 2023).

But that ignores the crucial doctrinal difference between the two holdings. The Fifth Circuit, in deciding that the Louisiana and Texas bars violated their members' First Amendment rights, held that a bar that engages in nongermane conduct *necessarily* violates the rights of those forced to join—and consequently that no bar association that engages in lobbying or advocacy on political or social issues can force lawyers to join. Contrarily, the Ninth Circuit held that a bar association that engages in nongermane conduct does *not* necessarily violate its members' constitutional rights, and that attorneys can still be compelled to join, if the bar issues a boilerplate statement informing the public that not all attorneys agree with everything it says.

A. The circuit split

The Fifth Circuit, employing exacting scrutiny, uses a one-step test to determine whether a mandatory bar association has violated a member's free association rights. A court looks at whether a mandatory bar association

engages in nongermane conduct. *McDonald*, 4 F.4th at 246. If so, the compelled association is unconstitutional. *Id.*; *see also Boudreaux*, 86 F.4th at 640.

This approach makes sense, because under exacting scrutiny, a person can be forced to associate with others only when doing so serves a compelling government interest that cannot be achieved through significantly less restrictive means. *Janus v. AFSCME*, 585 U.S. 878, 894 (2018). The two compelling interests that might justify compelled association in this context are regulating the practice of law and improving the quality of legal services. *Keller*, 496 U.S. at 13-14. Thus if a state goes beyond those state interests and does nongermane things as well, the rationale legitimizing the compelled association falls away.

But the Ninth Circuit added another factor to the analysis. Rather than focusing on whether the bar has exceeded the limits of compelling state interests that can justify an infringement on associational freedoms, it also asks whether the general public would *associate* the bar's nongermane activities with the objecting member. App. 37a.

This "imputation" analysis, borrowed from compelled speech jurisprudence, has never before been used in freedom of association jurisprudence. And it has the serious consequence that *admitted violations of freedom of association* can escape constitutional scrutiny through the mere invocation of a boilerplate disclaimer. *See* Pet. at 15. Under this rationale, a person can be forced to join a group that engages in activity that *does not* serve a compelling government interest, as long as that group publicly announces that not every member agrees with what the association is doing or saying. Such a rule

makes a hash of this Court's freedom of association jurisprudence. *Id*. at 18-19.

Thus, notwithstanding the Respondents' effort to downplay the clear and openly acknowledged circuit split, the Fifth and Ninth Circuits are plainly in disagreement about a matter that goes to the heart of associational freedoms. The Court should take the Ninth Circuit at its word that it is disagreeing with the Fifth Circuit and reject Respondents' hand wringing about the irrelevance of footnotes.

B. Under the Ninth Circuit's "well-reasoned dicta rule," the decision below is binding law of the circuit *even if* it were dicta.

Respondents attempt to cast the disagreement between the Ninth and Fifth Circuits as "dicta" (BIO at 22), because the only explicit disagreement between the two circuits comes in footnote 10. Petitioners have explained that the disagreement is more fundamental than this implies.[1] The acknowledged disagreement here concerns a matter that goes to the core of how (and even whether) associational injuries are analyzed and how vital First Amendment rights are protected. But even if the Ninth Circuit's statements *were* properly characterized as dicta, the Ninth Circuit's unusual "well-reasoned dicta rule" gives them gravity that militates in favor of review.

It's true, as Respondents argue, that a holding only includes that which is "necessary to that result."

1. Footnotes are hardly trivial, of course. *See, e.g., United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 67 (1996). The premise that the bar's engagement in nongermane conduct is not itself enough to trigger First Amendment protections here is certainly necessary to the result below, because by adding its newly fashioned "imputation" factor to the analysis, the Ninth Circuit *necessarily* rejected Petitioners' argument that being compelled to associate with a bar association that engages in nongermane conduct violates their rights. And Petitioners will continue to be forced to be members of OSB because, if the Ninth Circuit is right that a simple disclaimer would cure Petitioners' injury, OSB will simply publish a boilerplate statement and continue forcing Petitioners to be members. App. 37a n.12.[2]

But aside from that, the Ninth Circuit follows a rule holding that "[w]ell-reasoned dicta is the law of the circuit." *Li v. Holder*, 738 F.3d 1160, 1164 n.2 (9th Cir. 2013). Under this rule, "[w]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, *regardless of whether doing so is necessary in some strict logical sense*." *United States v. McAdory*, 935 F.3d 838, 843 (9th Cir. 2019) (emphasis added); *see also Stein v. Kaiser Found. Health Plan, Inc.*, 115 F.4th 1244, 1247 (9th Cir. 2024) (Forrest, J., concurring) (discussing and objecting to, the Ninth Circuit's binding-dicta rule).

2. Although the Ninth Circuit remanded the case and left it "to the district court to determine on remand, with further input from the parties, the appropriate forward-looking relief," App. 38a, this suggestion by a superior court to an inferior court is, at the very least, weighty authority. This is especially true in the Ninth Circuit because even dicta is binding if it is "well-reasoned."

The Ninth Circuit's statement in footnote 10 obviously qualifies for this rule; the opinion below is published, and the principle that imputation is necessary to find a violation of association rights was adopted after reasoned consideration. It is therefore "the general law of the Ninth Circuit," *Li v. Holder*, 738 F.3d at 1164, not a mere non-binding "remark by the way." *Stein*, 115 F.4th at 1248 (Forrest, J., concurring).

C. Respondents admit the existence of a circuit split.

Despite their repeated assertions to the contrary, Respondents actually acknowledge the circuit split. They argue that the Ninth Circuit was right to analyze whether "the forced association placed a burden on Petitioners' expressive rights in any meaningful way," BIO at 16, because—they claim—*only* expressive association is protected by the First Amendment. They then take the Fifth Circuit to task for failing to follow that line, and argue that the Fifth Circuit made an "unsupported analytical leap" in *McDonald* "that any bar association engaged in nongermane activities necessarily burdens the lawyer-member's First Amendment rights." BIO at 17. They even assert that the Fifth Circuit "skipped over" the required analysis and "failed to cite any legal authority for its omission of that step," *id.* at 17-18, and conclude by arguing that "[t]he Ninth Circuit therefore did not err by *rejecting the Fifth Circuit's decision* to skip the infringement step of the free association analysis." *Id.* at 18 (emphasis added). In other words, Respondents acknowledge the disagreement between the circuits and argue that the Ninth Circuit got it right. That's a circuit split.

II. This Court needs to address the variability of *Keller* in a post-*Janus* world.

Respondents argue that the continued viability of *Keller*, after this Court's decision in *Janus*, has effectively been confirmed because this Court has denied certiorari in several cases involving this question. BIO at 19-20. Respondents also argue that *Harris v. Quinn*, 573 U.S. 616 (2014), which was decided a few terms before *Janus*, somehow proves there's no conflict between *Janus*—which overruled *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977)— and *Keller*—which largely and expressly rested on *Abood*. BIO at 20-21.

Of course, the fact that this Court has denied certiorari in other cases involving this question doesn't mean it's not a question worth answering. "[A] denial of certiorari normally carries no implication or inference." *United States v. Kras*, 409 U.S. 434, 443 (1973). There are many reasons why this Court may not grant a specific petition that have nothing to do with the importance of the questions. For example, this Court rejected many cases asking whether *Lemon v. Kurtzman*, 403 U.S. 602 (1971), remained good law, before taking up the issue in *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022).

This case is a far superior vehicle than were the previous cases raising the questions involved here. Four of those[3] were appeals from motions to dismiss, and therefore

3. *File v. Martin*, 33 F.4th 385 (7th Cir. 2022), *cert. denied*, 143 S. Ct. 745 (2023); *Schell v. Chief J. & JJ. of Okla. Sup. Ct.*, 11 F.4th 1178 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 1440 (2022); *Jarchow v. State Bar of Wis.*, No. 19-3444, 2019 WL 8953257 (7th Cir. Dec. 23, 2019), *cert. denied*, 140 S. Ct. 1720 (2020); *Crowe v. Or. State Bar*, 989 F.3d 714 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 78 (2021).

lacked a complete trial record. The Court typically prefers to address constitutional questions with a complete record. *See, e.g., Gonzales v. Carhart*, 550 U.S. 124, 167-68 (2007); *Johnson v. Bd. of Educ. of Chi.*, 457 U.S. 52, 53-54 (1982). This case comes to the Court with a completed record.

In other instances, this Court has preferred to allow a question to "percolate" in the lower courts before taking up an issue. *See, e.g., Calvert v. Texas*, 141 S. Ct. 1605, 1606 (2021) (Sotomayor, J., respecting denial of cert.). But the very fact that the Fifth,[4] Sixth,[5] Seventh,[6] Eighth,[7] and Ninth[8] Circuits have now pronounced on these issues, with another case now pending in the Tenth Circuit,[9] shows that the question has percolated sufficiently—especially given the admitted circuit split here.

Further, Justices of this Court and judges of the lower courts have all acknowledged the importance of this Court addressing *Keller*'s continued viability in the wake of *Janus.* In *Janus* itself, the dissent remarked on this, *see* 585 U.S. at 950 (Kagan, J., dissenting), and in *Jarchow,* two Justices urged the Court to take up the

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4. *McDonald, supra; Boudreaux, supra.*

5. *Taylor v. Buchanan*, 4 F.4th 406 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 1441 (2022).

6. *File, supra*; *Jarchow, supra.*

7. *Fleck, supra.*

8. *Crowe, supra; Gruber v. Or. State Bar*, No. 23-35144, 2024 WL 3963834 (9th Cir. Aug. 28, 2024), *cert. denied*, 142 S. Ct. 78 (2021).

9. *Pomeroy v. Utah State Bar*, No. 24-4054 (pending).

issue, observing that "[o]ur decision to overrule *Abood* casts significant doubt on *Keller*." 140 S. Ct. 1720, 1720 (2020) (Thomas and Gorsuch, JJ., dissenting from denial of cert.). The Seventh Circuit said in *File*, 33 F.4th at 392, that "[t]he tension between *Janus* and *Keller* is hard to miss." The Fifth Circuit said in *McDonald*, 4 F.4th at 243 n.14, that *Janus* "cast doubt on *Lathrop* and *Keller*," and in *Schell*, 11 F.4th at 1190, the Tenth Circuit said "*Janus* suggests *Keller* is vulnerable to reversal." This Court should take this petition's opportunity to address this tension. Until it does so, lower courts must adhere to *Keller* despite the fact that *Janus* has now made it an outlier, hard to reconcile with current First Amendment jurisprudence.

The contention that *Harris, supra*, somehow "recognized" that "*Keller*'s germaneness framework 'fits comfortably' within the exacting scrutiny standard from *Janus*," BIO at 7, 20, is strange. *Keller* never purported to apply exacting scrutiny, which was not recognized as the applicable standard of scrutiny until *Janus* was decided in 2018. *Harris* was decided four years before that, so it did not (and could not) address whether *Keller* can be reconciled with the exacting scrutiny that *Janus* mandates. Actually, read in context, *Harris* said essentially the opposite: it said *Keller*'s holding "that members of this bar could *not* be required to pay the portion of bar dues used for political or ideological purposes" was "wholly consistent" with *Harris*'s holding that "[t]he First Amendment *prohibits* the collection of an agency fee from [workers] … who do not want to join or support the union." 573 U.S. at 655-56 (emphasis added). In other words, what "fits comfortably" is the rule that Petitioners argue for here—that lawyers cannot be forced to join or support a group that engages in lobbying, political speech, or social activism.

III. No vehicle issues exist in this important case.

Respondents contend that certiorari would be premature because "further proceedings are necessary," since the Ninth Circuit remanded for a remedy determination. BIO at 21. But the Ninth Circuit's remand order already bars Petitioners from the remedy they seek: a declaration that compelled membership in OSB is necessarily unconstitutional. The decision also offers OSB a roadmap for continuing to violate Petitioners' rights with impunity: publish a rote disclaimer, and continue forcing people to join while engaging in lobbying, political speech, and social activism. App. 37a. Thus the decision below is, in substance, the lower court's final answer.

In other words, although the remedy phase is technically open, the remedy Petitioners have sought—*the remedy they would receive if they were litigating in the Fifth Circuit*—is already closed. There's no sense in requiring Petitioners to go through a pointless "remedy" phase that will only ensure that their freedom of association rights are still violated. No meaningful change can occur on remand, because Petitioners cannot receive the remedy they seek, and "[t]he law does not require the doing of a futile act." *Ohio v. Roberts*, 448 U.S. 56, 74 (1980).

CONCLUSION

The petition for certiorari should be *granted*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 2,908 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 6th day of June, 2025.

Ann Tosel

Ann Tosel

Sworn to and subscribed before me
on this 6th day of June, 2025.

Mariana Braylovskiy

MARIANA BRAYLOVSKIY
Notary Public State of New York
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Qualified in Richmond County
Commission Expires March 30, 2026

AFFIDAVIT OF SERVICE

SUPREME COURT OF THE UNITED STATES

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STATE OF NEW YORK)

COUNTY OF NEW YORK)

I, Ann Tosel, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by Counsel of Record for *Petitioners.*

That on the 6th day of June, 2025, I served the within *Reply Brief* in the above-captioned matter upon:

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by sending three copies of same, addressed to each individual respectively, through Priority Mail. An electronic version was also served by email to each individual.

That on the same date as above, I sent to this Court forty copies of the within *Reply Brief* through the Overnight Next Day Federal Express, postage prepaid. In addition, the brief has been submitted through the Court's electronic filing system.

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 6th day of June, 2025.

Ann Tosel

Sworn to and subscribed before me
this 6th day of June, 2025.

MARIANA BRAYLOVSKIY
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