No. 24-1025

IN THE

Supreme Court of the United States

DANIEL Z. CROWE ET AL.,
Petitioners,

v.

OREGON STATE BAR ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether compulsory membership in an integrated bar association is necessarily unconstitutional when the bar association engages in any nongermane activity, regardless of whether the activity has any impact on the expressive rights of the association's members or could be attributed to those members in any way?

2. Whether *Keller v. State Bar of California*, 496 U.S. 1 (1990), upholding the constitutionality of integrated bar associations, remains good law after *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 585 U.S. 878 (2018)?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent-Appellee the Oregon State Bar states that it is a public corporation that does not have a parent corporation and no publicly held corporation holds 10% or more of its stock.

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INTRODUCTION

Petitioners Daniel Z. Crowe and Oregon Civil Liberties Attorneys prevailed below in obtaining an order from the Ninth Circuit Court of Appeals reversing the district court's order granting summary judgment for Respondents.[1] The Ninth Circuit's decision held that Petitioner Crowe's associational rights were violated when the Oregon State Bar ("OSB") published two statements in its monthly magazine that criticized President Trump. The Ninth Circuit applied the exacting scrutiny standard from *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 585 U.S. 878 (2018), and concluded that because the statements could be reasonably attributed to all OSB members and were not solely germane to the OSB's compelling interests, the OSB's publication of those statements was unconstitutional. The Ninth Circuit therefore held that Petitioners established a First Amendment violation and remanded for further proceedings about the appropriate remedy for that violation. Despite receiving the reversal they sought on appeal, Petitioners now ask this Court to review that decision based on an alleged circuit split arising from a footnote and nonbinding guidance in the Ninth Circuit's opinion. The Court should refuse to do so for several independent reasons.

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[1] The Ninth Circuit remanded to the district court to consider, in the first instance, whether Petitioner Oregon Civil Liberties Attorneys had standing to assert a free association claim. Pet. App. 9a n.1. The Ninth Circuit therefore only analyzed Petitioner Crowe's individual claim.

First, no circuit split exists. Petitioners (and *amici*) attempt to create a circuit split because the Ninth Circuit "disagreed" with the Fifth Circuit in a footnote and provided nonbinding guidance to the district court on the prospective remedy on remand. However, neither statement by the Ninth Circuit was central to its holding nor in direct conflict with the Fifth Circuit. There is no actual circuit split.

Second, to the extent the Ninth Circuit split from the Fifth Circuit about the future remedy for a free association violation, the Ninth Circuit did not err. The Ninth Circuit applied well-established precedent from this Court requiring a plaintiff to demonstrate an infringement of their expressive rights to prove a violation of their associational rights. As a result, the Ninth Circuit's suggestion that an integrated bar association *may* be able to prevent an undesired association with some of its activities through a clear disclaimer is consistent with the Court's First Amendment principles.

Third, this case is not a good vehicle to review the issues raised in the petition. Petitioners received the relief they sought in the Ninth Circuit—a reversal of summary judgment in Respondents' favor—and therefore fail to demonstrate a basis for this Court to review that decision. In addition, Petitioners' request for review on the appropriate remedy for the associational violation at issue is premature because it will be the subject of future proceedings. *See Abbott v. Veasey*, 580 U.S. 1104, 1105 (2017) (Roberts, C.J., statement respecting denial of certiorari) (noting that when "the District Court has yet to enter a final

remedial order," the "issues will be better suited for certiorari review" "after entry of final judgment").

Fourth, and finally, Petitioners' and *amici*'s request to overturn and reverse this Court's precedent under *Keller v. State Bar of California*, 496 U.S. 1 (1990), is unwarranted. This Court has already held that *Keller* remains in line with this Court's First Amendment precedents and *Keller* was properly applied by the Ninth Circuit.

Accordingly, for each of these reasons, the Court should deny the petition.

STATEMENT OF THE CASE

A. Factual Background

Oregon requires attorneys to be licensed members of the state bar to practice law in that State. *See* Or. Rev. Stat. § 9.160(1). To maintain a valid license, OSB members must also pay annual fees to fund the bar's activities. *Id.* §§ 9.191, 9.200. The OSB is thus a "mandatory" or "integrated" bar association.

OSB's statutory functions are to serve the public interest by "[r]egulating the legal profession and improving the quality of legal services," "[s]upporting the judiciary and improving the administration of justice," and "[a]dvancing a fair, inclusive and accessible justice system." *Id.* § 9.080(1)(a)–(c). Subject to the Oregon Supreme Court's review, OSB regulates attorneys in Oregon, including by formulating the Oregon Rules of Professional Conduct, minimum continuing legal education requirements, and the rules of procedure relative to

admission, discipline, resignation, and reinstatement of bar members. *Id.* §§ 9.005(8), 9.112, 9.490. To further its mission, OSB also supports various legislative advocacy efforts and publishes a monthly magazine called the *Bulletin*. *See* Pet. App. 3a (citing OSB Bylaws arts. 10, 11).

OSB policy provides a detailed process by which any member may challenge OSB's use of mandatory fees to "promote[] or oppose[] political or ideological causes." Pet. App. 44a (quoting former OSB Bylaws § 12.600). OSB implemented this challenge process in compliance with *Keller*, where the Court held that integrated bars may not use mandatory fees to support activities that are not "germane" to their regulatory purpose—namely, "regulating the legal profession or 'improving the quality of the legal service available to the people of the State,'" 496 U.S. at 14 (quoting *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961)). *See* Pet. App. 46a (citing former OSB Bylaws § 12.602).

In April 2018, following a widely publicized anti-Muslim hate crime in Portland, Oregon, and concerns about discrimination and safety from some attorneys, the OSB published two adjoining statements condemning white nationalist violence and discrimination in the *Bar Bulletin* (the "Statements"). *See* Pet. App. 3a–8a.

The first statement, entitled "White Nationalism and Normalization of Violence," was signed by six OSB officers (the "OSB Statement"). It confirmed that the OSB was committed to "a justice system that operates without discrimination and is fully accessible

to all Oregonians," condemned "the proliferation of speech that incites [acts of] violence," and reaffirmed that OSB would "continue to focus specifically on those issues that are directly within [its] mission, including the promotion of access to justice, the rule of law, and a healthy and functional judicial system that equitably serves everyone." *Id.* 4a–5a.

On the opposite page was a "Joint Statement of the Oregon Specialty Bar Associations Supporting the Oregon State Bar's Statement on White Nationalism and Normalization of Violence" (the "Affinity Bar Statement"). *Id.* 6a. The Affinity Bar Statement was signed by the presidents of several Oregon voluntary bar associations not formally affiliated with OSB. It echoed the OSB Statement's condemnation of racist violence and support for an equitable justice system. *Id.* 6a–8a. The Affinity Bar Statement additionally criticized President Donald Trump for "cater[ing] to this white nationalist movement." *Id.* 7a.

Petitioner Daniel Crowe, an OSB member, disagreed with the viewpoint in the Statements and demanded a refund of his fees attributed to the Statements. *Id.* 8a–9a. OSB issued Crowe (and other objecting bar members) the requested refund. *Id.* 9a.

B. Procedural History

Unsatisfied with the refund, Petitioners filed this lawsuit in December 2018 in the U.S. District Court for the District of Oregon. They asserted three claims for violations of their First Amendment rights: (1) compelled speech arising from mandatory bar fees; (2) insufficient process for challenging OSB's use of mandatory fees for certain activities; and (3)

compelled membership in the OSB. Pet. App. 9a–10a. Petitioners sought a refund of all the mandatory fees they had ever paid to OSB, with interest, and an injunction prohibiting OSB from enforcing its mandatory membership and fees requirements for Oregon attorneys. Pet. 11.

On Respondents' motion, the district court dismissed Petitioners' complaint entirely, concluding that the *Bar Bulletin* Statements were germane to the practice of law in Oregon under *Keller*, and that, even if they were nongermane, OSB's partial refund of Crowe's bar fees cured any constitutional injury. Pet. App. 97a.

Petitioners appealed. In February 2021, the U.S. Court of Appeals for the Ninth Circuit affirmed in part and reversed in part. The Ninth Circuit agreed with the district court's dismissal of Petitioners' first two claims, holding that under *Keller* the OSB's process for challenging and refunding any bar fees used for nongermane activities was sufficient to safeguard Petitioners' free speech rights. Pet. App. 104a. The Ninth Circuit also rejected Petitioners' argument that *Keller* was no longer good law following *Janus*. Pet. App. 100a. The Ninth Circuit held, however, that *Keller* did not clearly preclude Petitioners' free association claim and remanded for the district court to reconsider the contours of the compelled association claim "*independent* of compelled financial support." *Id.* 109a (emphasis added). Petitioners sought a writ of certiorari, which this Court denied. *Crowe v. Oregon State Bar*, 142 S. Ct. 79 (2021).

On remand, the parties completed fact discovery and cross-moved for summary judgment. Petitioners argued that neither the *Bar Bulletin* Statements nor various OSB legislative advocacy efforts were germane to the practice of law, and that these OSB activities violated their right to free association. Pet. App. 75a. The district court disagreed and granted summary judgment to OSB on Petitioners' remaining association claim. *Id.* 83a. As a result, the district court did not address the scope of Petitioners' requested injunctive relief. *Cf. id.* 83a.

Petitioners again appealed, and this second appeal was now limited to the free association claim. The Ninth Circuit agreed with both parties that the Court's exacting scrutiny standard applied to Petitioners' free association claim, and further that *Keller*'s germaneness inquiry "fits comfortably" within the exacting scrutiny framework, as this Court recognized in *Harris v. Quinn*, 573 U.S. 616, 655–56 (2014).[2]

The applicable inquiry, as the Ninth Circuit framed it, proceeds in two parts: First, the court assesses whether the compelled association burdened any of the plaintiff's expressive rights, which is the core concern in the free association context. Pet. App. 24a–27a (citing *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47 (2006); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984)). Second,

[2] The Ninth Circuit also held that the OSB was an arm of the state of Oregon and thus entitled to sovereign immunity. Pet. App. 21a. Petitioners do not challenge or seek review of that aspect of the Ninth Circuit's decision.

applying exacting scrutiny, the court inquires whether the compelled association is nonetheless constitutionally permissible, *i.e.*, it relates to the compelling state interest in regulating and improving the quality of legal services under *Keller*. Pet. App. 33a–37a.

Applying this framework, the Ninth Circuit first held that the *Bar Bulletin* Statements could be reasonably read to suggest that all OSB members agreed with the Statements, when in fact Crowe did not, and therefore burdened Crowe's expressive rights. Pet. App. 30a–33a. Second, the Ninth Circuit held that the Affinity Bar Statement's criticism of the President did not relate to the justice system and the condemnation of violence and racism had too tenuous a connection to improving the legal system to be germane. Pet. App. 36a. As a result, the Ninth Circuit held that the OSB's adoption of the Affinity Bar Statement did not survive exacting scrutiny and was unconstitutional. *Id*. at 36a–37a. The Ninth Circuit did not assess whether the OSB's lobbying activities were germane, instead expressly leaving that issue to the district court on remand. Pet. App. 37a. The Ninth Circuit therefore reversed the summary judgment decision and remanded for the district court to determine "the appropriate forward-looking relief" to remedy the violation. Pet. App. 38a. In doing so, the Ninth Circuit noted that the remedy "need not be drastic," but expressly did not make any decisions on the injunctive relief sought by Petitioners. Pet. App. 37a–38a. Petitioners sought en banc review, which was denied. Pet. App. 85a.

REASONS FOR DENYING THE PETITION

Petitioners fail to demonstrate any compelling reasons for granting a writ of certiorari and the petition should be denied. Petitioners' raise two arguments for seeking review in this Court: (1) the Ninth Circuit's decision that a bar association "that goes beyond the *Keller* limitations may still mandate membership, as long as it issues a disclaimer to dispel the public impression that member attorneys endorse the nongermane statement(s)" created a direct circuit split with the Fifth Circuit; and (2) this case presents a good vehicle to consider whether *Keller* remains good law after *Janus*. Pet. 14–30. Petitioners are wrong.

Contrary to Petitioners' argument, the Ninth Circuit's decision did not create or "acknowledge[]" an "explicit conflict" with the Fifth Circuit about the constitutionality of compulsory membership in an integrated bar association. *See* Pet. 3, 15 (citing Pet. App. 34a–35a n.10). The Ninth Circuit's decision applied the same exacting scrutiny standard established by this Court and applied by the Fifth Circuit. Petitioners' arguments about an alleged conflict are entirely based on dicta and footnotes in the Ninth Circuit's decision about prospective remedies for the constitutional violation that the Ninth Circuit expressly reserved for the district court and will be the subject of future proceedings.

In addition, because Petitioners prevailed in establishing a First Amendment violation at the Ninth Circuit, for which only prospective injunctive relief is available, this case does not present a proper vehicle to consider whether *Keller* should be

overturned. Both *Keller* and *Janus* involved broad free speech and free association claims, whereas only the limited free association claim remains at issue here. And because further proceedings will decide the appropriate remedy for the free association violation at issue, it is premature and unnecessary for this Court to review the Ninth Circuit's decision. The Court should therefore deny the petition.

I. There is no circuit split on the standard for analyzing a free association claim in the context of integrated bar associations.

This Court typically grants certiorari to resolve conflicts between federal appellate courts only when those decisions are directly in conflict on the same important matter. *See* S. Ct. R. 10(a). A "genuine conflict" meriting this Court's review exists when "two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts." Stephen M. Shapiro et al., *Supreme Court Practice* § 4.3, at 4–11 (11th ed. 2019). Petitioners do not establish any such conflict between the decision below and the decisions from the Fifth Circuit in *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021), and *Boudreaux v. Louisiana State Bar Association*, 86 F.4th 620 (5th Cir. 2023), to justify review.

As set forth above, the Ninth Circuit held that Petitioners established a First Amendment violation with respect to Crowe's associational rights and remanded for further proceedings on the appropriate remedy for that violation. Pet. App. 36a–37a. The Fifth Circuit applied the exact same framework.

In *McDonald*, three Texas attorneys sued the State Bar of Texas asserting free speech and free association claims arising from their compulsory membership and forced subsidization of the bar association's political and ideological activities. 4 F.4th at 241. In analyzing those claims, the Fifth Circuit began, like the Ninth Circuit did, in assessing whether the bar association engages in expressive association such that membership is an implicit endorsement of that expressive message. *Id.* at 245. The Fifth Circuit then concluded, again like the Ninth Circuit, that compelled membership in such a bar association is constitutional unless it fails exacting scrutiny. *Id.* at 245–46. To satisfy exacting scrutiny, the Fifth Circuit held that the bar association must engage in germane activities, *i.e.*, activities related to regulating the legal profession and improving the quality of legal services within the state. *Id.* at 246. Because the Fifth Circuit found that the Texas bar association engaged in some nongermane activities, it held, similar to the Ninth Circuit, that the bar had violated the attorneys' First Amendment rights. *Id.* at 252. The Fifth Circuit remanded to the district court to enter a preliminary injunction preventing the bar from requiring the attorneys to join the bar or pay dues pending completion of the remedies phase, where the district court would determine the full scope of relief. *Id.* at 255.

The Fifth Circuit issued a similar decision in *Boudreaux* in reviewing the Louisiana bar association's mandatory membership. There, the Fifth Circuit confirmed that lawyers "do not have a categorical First Amendment right to disassociate from their state bar," and instead compulsory bar

membership is analyzed under exacting scrutiny, as set forth in *Keller*, based on whether the bar association engages in nongermane activities. *Boudreaux*, 86 F.4th at 624. After analyzing the specific challenged conduct at issue, the Fifth Circuit again held that some of the bar's activities were nongermane and therefore were unconstitutional. *Id.* at 637–38. The Fifth Circuit again remanded to the district court for further proceedings on remedy and enjoined the bar from requiring the plaintiff to join or pay dues to the bar pending completion of the remedies phase. *Id.* at 640.

The Fifth Circuit's decisions in both *McDonald* and *Boudreaux* are therefore consistent with the Ninth Circuit's decision below. In each case, the appellate court applied exacting scrutiny, held that the bar association violated its members' associational rights, and remanded to the district court to determine the appropriate remedy. The only place where the Ninth Circuit differed with the Fifth Circuit was in a footnote, which was not part of the holding of its decision, in which the Ninth Circuit stated it "disagree[s] with the Fifth Circuit's holding that if a state bar engages in nongermane activities, compelled membership is necessarily unconstitutional." Pet. App. 34a n.10. The Ninth Circuit went on:

> As we have explained, in many circumstances, 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. In those circumstances, 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.

Pet. App. 34a–35a n.10. The Ninth Circuit hypothesized that under some *other* circumstances nongermane activity *might* be permissible if it has no expressive meaning and cannot be attributed to the bar member in any event. That footnote was not "necessary" to the Ninth Circuit's decision and cannot be deemed a "holding" in conflict with the Fifth Circuit. *See Tyler v. Cain*, 533 U.S. 656, 663 n.4 (2001) (describing a "holding[]" as "the final disposition of a case as well as the preceding determinations '*necessary* to that result'" (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996))).

Petitioners are also wrong that the Ninth Circuit's suggestion about the use of a disclaimer to prevent bar members from being associated with the OSB's expressive conduct created a conflict with the Fifth Circuit. Petitioners argue that the Ninth Circuit split from the Fifth Circuit because it "held that nongermane activity does *not* make compelled membership unconstitutional . . . a mere disclaimer by the organization can suffice." Pet. 15 (citing Pet. App. 37a n.12). However, that is not an accurate description of the Ninth Circuit's decision.

As set forth above, the Ninth Circuit followed this Court's well-established First Amendment precedent by first analyzing whether the compelled association infringed Petitioners' own expression before applying the exacting scrutiny analysis. Pet. App. 23a–24a. The Ninth Circuit ultimately held, based on the text and context of the challenged Statements, that they impaired Petitioners' expressive rights. Pet. App.

28a–33a. The Ninth Circuit explained that had OSB "made clear that its own statement reflected the views of OSB's leadership—and not its members—then there would be no infringement." Pet. App. 31a. The Ninth Circuit then suggested, as part of its remand instructions to the district court to determine the appropriate remedy, that a disclaimer may be appropriate to prevent the OSB's future statements from being attributed to all of its members. Pet. App. 37a. In doing so, the Ninth Circuit confirmed that "First Amendment violations are not always cured by a disclaimer," particularly where the speech is compelled. *Id.* n.12.[3] The Ninth Circuit, however, clarified that because Petitioners' sole basis for asserting a violation of their free association rights was the implication that Crowe shared the OSB's views in the Statements, a clear disclaimer "would have prevented that infringement from occurring in the first place." *Id.*

In contrast, the Fifth Circuit never analyzed whether the Texas or Louisiana bar associations' conduct impaired the attorney members' expressive

[3] Contrary to Petitioners' argument, the Ninth Circuit's discussion of disclaimers is therefore entirely consistent with the Third Circuit's holding in *Circle School v. Pappert*, 381 F.3d 172, 182 (3d Cir. 2004). *See* Pet. 20. In *Circle School*, the Third Circuit held that a disclaimer as part of the mandated recitation of the Pledge of Allegiance was insufficient to prevent a First Amendment violation because "the schools are still *compelled* to speak the Commonwealth's message." 381 F.3d at 182 (emphasis added). Notably, like the Ninth Circuit here, the Third Circuit analyzed the First Amendment claim by first considering whether the challenged conduct infringed the plaintiffs' associational rights, and after concluding it did, proceeded with analyzing whether it survived the appropriate level of scrutiny. *Id.*

rights; the Fifth Circuit simply assumed it did. *See McDonald*, 4 F.4th at 246. Thus, even if the Ninth Circuit's statement about a future disclaimer were part of its holding—it is not—it is not in direct conflict with the Fifth Circuit in any event because the Fifth Circuit never held (or even considered) whether the entirety of the bar associations' conduct infringed their members' expressive rights. Petitioners are therefore wrong in arguing that attorneys in "Texas, Louisiana, or Mississippi *cannot* be forced to join a bar association that engages in nongermane conduct, whereas attorneys in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, or Washington can . . . as long as the bars publish disclaimers." *See* Pet. 18. Neither the Ninth Circuit nor the Fifth Circuit decided that specific issue, and it is not properly before this Court.

The Ninth Circuit also did not hold that the OSB may "speak officially on any number of controversial and nongermane political issues, with money taken from Petitioner against his will[.]" *See id.* 24. The Ninth Circuit had already resolved and dismissed Petitioners' free speech claim relating to payment of compulsory membership fees and the adequacy of the OSB's refund procedures as part of the first appeal. Pet. App. 10a. This Court denied review of that prior appeal, and those issues were no longer part of the Ninth Circuit's decision at issue. *See Crowe v. Oregon State Bar*, 142 S. Ct. 79 (2021).

Instead, the sole legal issue remaining before the court was "whether the First Amendment tolerates mandatory membership itself—independent of compelled financial support—in [a state bar] that

engages in nongermane political activities." Pet. App. 13a. The Ninth Circuit's decision addressed that narrow free association issue and never held that the OSB (or any integrated bar association) may use compelled membership fees for nongermane purposes.[4]

Petitioners have failed to demonstrate any genuine conflict between the Fifth and Ninth Circuit's decisions to warrant review in this Court. Accordingly, the Court should deny the petition.

II. The Ninth Circuit's decision on the challenged issues was correct.

Even if a conflict exists between the Ninth and Fifth Circuits on the standards for analyzing free association claims with respect to mandatory bar membership, the Ninth Circuit correctly followed this Court's precedent by first analyzing whether the forced association placed a burden on Petitioners' expressive rights in any meaningful way. Pet. App. 22a–27a. The Ninth Circuit relied on decades of established precedent from this Court confirming that only "expressive" association is protected under the First Amendment, and therefore the threshold question is whether the challenged conduct infringes on the member's expressive rights. *Id.* (citing

[4] Because the Ninth Circuit held that the OSB was entitled to sovereign immunity, an issue on which Petitioners are not seeking review in this Court, Petitioners may not seek any retrospective relief from the OSB or its officers. *See* Pet. App. 22a. Thus, unlike in *McDonald* or *Boudreaux*, Petitioners could not seek a refund of past fees or a declaration that their past membership in the OSB was unconstitutional based on the nongermane conduct in any event.

Rumsfeld, 547 U.S. at 70 (holding that requirement to provide access to military recruiters on law school campus only "incidentally affects expression" and therefore did not impair free association rights); *Boy Scouts of Am.*, 530 U.S. at 653 (considering whether the scoutmaster's presence would significantly burden the Boy Scouts' expressive rights and noting an expressive association cannot establish that burden "simply by asserting" that mere acceptance of a member would impair its message); *City of Dallas v. Stanglin*, 490 U.S. 19, 24 (1989) (noting certain opportunities could "be described as 'associational' in common parlance, but they simply do not involve the sort of expressive association that the First Amendment has been held to protect"); *Roberts*, 468 U.S. at 626 (concluding act did not impose "any serious burdens on the male members' freedom of expressive association" to violate the First Amendment)). This was the proper framework for analyzing Petitioners' free association claim here.

To the extent the Fifth Circuit concluded (or merely assumed) that *any* compelled association necessarily burdens expressive rights, this reasoning cannot be squared with this Court's precedent. In *McDonald*, the Fifth Circuit recognized that *Roberts* sets the appropriate standard for analyzing free association claims, but made the unsupported analytical leap that any bar association engaged in nongermane activities necessarily burdens the lawyer-member's First Amendment rights. 4 F.4th at 245. In doing so, the *McDonald* court skipped over the necessary analysis of whether the challenged conduct impaired the member's expressive rights in the first instance. The Fifth Circuit also failed to cite any legal

authority for its omission of that step, relying solely on an academic paper concerning trade unions, not bar associations. *See id.* n.20 (citing Stuart White, *Trade Unionism in a Liberal State*, in *Freedom of Ass'n*, 330, 345 (Amy Gutmann ed. 1998)).

The Ninth Circuit therefore did not err by rejecting the Fifth Circuit's decision to skip the infringement step of the free association analysis. Instead, the Ninth Circuit correctly applied this Court's established precedent and this Court has no need to review that decision.

III. This case is a poor vehicle for review of the First Amendment issues raised in the petition.

Even if Petitioners had met their burden to demonstrate a genuine conflict, this case is not the proper vehicle for resolving that conflict for at least three reasons.

First, Petitioners prevailed in the Ninth Circuit by establishing a violation of their First Amendment rights, and therefore may not obtain review simply because they disagree with some of the Ninth Circuit's statements in the decision. *See, e.g.*, *Mathias v. WorldCom Techs., Inc.*, 535 U.S. 682, 684 (2002) (dismissing writ as improvidently granted, noting that "[a]fter full briefing and oral argument, it is now clear that petitioners were the prevailing parties below, and seek review of uncongenial findings not essential to the judgment and not binding upon them in future litigation. As a general rule, a party may not appeal from a favorable judgment simply to obtain review of findings it deems erroneous."). This is

because, even if the prevailing party maintains a "personal stake" in the appeal to satisfy Article III, judicial policy and prudence counsels against spending resources to review "statements in opinions" for the benefit of the party receiving the favorable judgment. *Camreta v. Greene*, 563 U.S. 692, 702–04 (2011). In the few occasions where the Court has reviewed a decision at the request of the prevailing party, the Court has relied on a "policy reason . . . of sufficient importance to allow an appeal by the winner below," such as in the qualified immunity context. *Id.* at 704 (cleaned up).

Petitioners do not even attempt to demonstrate such important policy reasons to justify this rare exception here. The Ninth Circuit's decision did not issue an adverse ruling under the First Amendment that binds Petitioners going forward.[5] It concluded that the OSB violated Crowe's constitutional rights and remanded for the district court to determine the proper remedy. The Ninth Circuit did not require Petitioners to modify their own conduct or expose them to potential liability in the future. Petitioners therefore fall far short of establishing the special circumstances for this Court to expend limited judicial resources reviewing a decision in their favor.

Second, Petitioners are also wrong that this case presents a good vehicle to resolve the "vital and unresolved issue" about whether *Keller* remains good law after *Janus*. Pet. 25. This Court has denied review of this question at least seven times since *Janus* was

[5] The only arguably adverse holding below is the Ninth Circuit's conclusion that the OSB is entitled to Eleventh Amendment immunity, but Petitioners do not seek review of that issue.

issued. *See, e.g.*, *File v. Hickey*, 143 S. Ct. 745 (2023); *McDonald v. Firth*, 142 S. Ct. 1442 (2022); *Taylor v. Heath*, 142 S. Ct. 1441 (2022); *Schell v. Darby*, 142 S. Ct. 1440 (2022); *Crowe v. Oregon State Bar*, 142 S. Ct. 79 (2021); *Fleck v. Wetch*, 140 S. Ct. 1294 (2020); *Jarchow v. State Bar of Wisconsin*, 140 S. Ct. 1720 (2020). Those denials were proper and nothing in the Ninth Circuit's decision below should change the Court's decision here. Instead, the Ninth Circuit's decision agreed with this Court that *Keller*'s germaneness framework "fits comfortably" within the exacting scrutiny standard from *Janus* in the state bar association context "because states have a strong interest in 'regulating the legal profession and improving the quality of legal services,' as well as in 'allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices." Pet. App. 34a (quoting *Harris*, 573 U.S. at 655–56). The Ninth Circuit then applied that framework and concluded that the OSB's publication of the Statements did not satisfy exacting scrutiny. Thus, review in this case likely would not even result in a different outcome.

Petitioners' and *amici*'s core argument is that *Keller* and *Lathrop*—which both approved the longstanding practice of state regulation of the legal profession through integrated bar associations—were tacitly overruled by *Janus*—or at least left *Keller* "in a precarious position"—because *Janus* overruled *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), upon which *Keller* heavily relied. *See* Pet. 27–28. That argument is meritless. *Janus* never referenced *Lathrop* or *Keller* in its decision overturning *Abood*. Instead, the Court affirmed in 2014, only a few years before *Janus* was decided, that

Keller's germaneness framework "fits comfortably" within exacting scrutiny. *Harris*, 573 U.S. at 655–56. In doing so, the Court expressly rejected the argument that the Court's refusal to extend *Abood* to allow a state to compel personal care providers to subsidize speech they do not support would call into question the holding in *Keller*. *Id.* This Court explained that licensed attorneys are subject to detailed ethical rules and the compelled payment of fees is part of that regulatory scheme. *Id.* States "have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices," which aligned *Keller* within the exacting scrutiny framework. *Id.*; *see also id.* at 670 (Kagan, J., dissenting) (referring to *Keller* as "good law"). Accordingly, Petitioners have not demonstrated any compelling reasons to review the principles in *Keller* or presented sufficient justification to overturn it. *See Kisor v. Wilkie*, 588 U.S. 558, 587 (2019) (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)) (noting "any departure from the doctrine [of *stare decisis*] demands 'special justification'—something more than 'an argument that the precedent was wrongly decided'").

Finally, this case is not a good vehicle to review *Keller* and *Lathrop*, or the potential remedy for a violation of free association rights even if *Keller* and *Lathrop* do not apply, because further proceedings are necessary. The Ninth Circuit expressly left to the district court the task of determining the appropriate remedy for the constitutional violation at issue. *See* Pet. App. 38a.

Nevertheless, Petitioners' and *amici*'s primary concerns with the Ninth Circuit's decision are the Ninth Circuit's dicta statements that the remedy for the constitutional violation here "need not be drastic" and that future violations may be prevented if the OSB uses a disclaimer "that makes clear that it does not speak on behalf of all those members." *See* Pet. App. 37a. Although Petitioners and *amici* disagree that a disclaimer could sufficiently remedy a free association violation in other circumstances, that issue was not decided by the Ninth Circuit. Instead, the Ninth Circuit directed the district court to engage in further proceedings to determine the appropriate remedy "with further input from the parties." Pet. App. 38a. Those further proceedings have not yet occurred, and therefore review of prospective remedy issues is premature. *See, e.g.*, *Byrd v. United States*, 584 U.S. 395, 404 (2018) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)) (stating as "a court of review, not of first view," this Court finds it "generally unwise to consider arguments in the first instance" that the lower courts "did not have occasion to address"); *Abbott v. Veasey*, 580 U.S. 1104, 1105 (2017) (Roberts, C.J., statement respecting denial of certiorari) (noting that the claim at issue was "remanded for further consideration" and the "issues will be better suited for certiorari review" after "entry of final judgment"). Prudence therefore dictates awaiting review until the remedy issues at the heart of Petitioners' argument are fully litigated below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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