Legal Challenges to Mandatory Bar Associations

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East Valley Bar Association
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Materials

- *Lathrop v. Donohue*, 367 U.S. 820 (1961)
- *Keller v. State Bar of California*, 496 U.S. 1 (1990)
- *Janus v. AFSCME,* 138 S. Ct. 2448 (2018)
- *Jarchow v. State Bar of Wisconsin*, 140 S. Ct. 1720 (2020) (Thomas and Gorsuch, JJ., dissenting from denial of certiorari)
- *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021)
- Petition for Certiorari, *Crowe v. Oregon State Bar*

81 S.Ct. 1826
Supreme Court of the United States

Trayton L. LATHROP, Appellant,
v.
Josephine D. DONOHUE.

No. 200.
|
Argued Jan. 18, 1961.
|
Decided June 19, 1961.
|
Rehearing Denied Oct. 9, 1961.

See 82 S.Ct. 23.

Synopsis

Action to recover dues paid to treasurer of State Bar under alleged unconstitutional compulsion. The Wisconsin Supreme Court, 10 Wis.2d 230, 102 N.W.2d 404, affirmed judgment dismissing complaint, and an appeal was taken. The Supreme Court upheld the decision below.

Affirmed.

Mr. Justice Douglas and Mr. Justice Black dissented.

Attorneys and Law Firms

****1826** ***820** Mr. Trayton L. Lathrop, pro se, and Mr. Leon E. Isaksen, Madison, Wis., for appellant.

Messrs. Gordon Sinykin, Madison, Wis., and John W. Reynolds, Green Bay, Wis., for appellee.

Opinion

***821** Mr. Justice BRENNAN announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, Mr. Justice CLARK and Mr. Justice STEWART join.

The Wisconsin Supreme Court integrated the Wisconsin Bar by an order which created 'The State Bar of Wisconsin' on January 1, 1957, under Rules and Bylaws promulgated by the court. ****1827** In re Integration of the Bar, 273 Wis. 281, 77 N.W.2d 602; id., at page vii. The order originally was effective for a two-year trial period, but ***822** in 1958 was continued indefinitely. In re Integration of the Bar, 5 Wis.2d 618, 93 N.W.2d 601. Alleging that the 'rules and by-laws required the plaintiff to enroll in the State Bar of Wisconsin and to pay dues to the treasurer of the State Bar of Wisconsin on the penalty of being deprived of his livelihood as a practicing lawyer, if he should fail to do so,' the appellant, a Wisconsin lawyer, brought this action in the Circuit Court of Dane County for the refund of $15 annual dues for 1959 paid by him under protest to appellee, the Treasurer of the State Bar. He attached to his complaint a copy of the letter with which he had enclosed his check for the dues. He stated in the letter that he paid under protest because 'i do not like to be coerced to support an organization which is authorized and directed to engage in political and propaganda activities. * * * A major portion of the activities of the State Bar as prescribed by the Supreme Court of Wisconsin are of a political and propaganda nature.' His complaint alleges more specifically that the State Bar promotes 'law reform' and 'makes and opposes proposals for changes in * * * laws and constitutional provisions and argues to legislative bodies and their committees and to the lawyers and to the people with respect to the adoption of changes in * * * codes, laws and constitutional provisions.' He alleges further that in the course of this activity 'the State Bar of Wisconsin has used its employees, property and funds in active, unsolicited opposition to the adoption of legislation by the Legislature of the State of Wisconsin, which was favored by the plaintiff, all contrary to plaintiff's convictions and beliefs.' His complaint concludes: 'The plaintiff bases this action of his claim that the defendant has unjustly received, held, and disposed of funds of the plaintiff in the amount of $15.00, which to the knowledge of the ***823** defendant were paid to the defendant by the plaintiff unwillingly and under coercion, and that such coercion was and is entailed in the rules and by-laws of the State Bar of Wisconsin continued in effect by the aforesaid order of the Supreme Court of the State of Wisconsin * * *; and the said order insofar as it coreces the plaintiff to support the State Bar of Wisconsin, is unconstitutional and in violation of the Fourteenth Amendment of the Constitution of the United States * * *.'

The appellee demurred to the complaint on the ground, among others, [1] that it failed to state a cause of action. The demurrer was sustained and the complaint was dismissed. The Supreme Court of Wisconsin, on appeal, stated that the Circuit Court was without jurisdiction to determine the questions raised by the complaint. However, treating the case as if originally and properly brought in the Supreme Court, the court considered

appellant's constitutional claims, not only on the allegations of the complaint, but also upon the facts, of which it took judicial notice, as to its own actions leading up to the challenged order, and as to all activities, including legislative activities, of the State Bar since its creation.[2] The judgment of the Circuit Court dismissing the complaint was affirmed. 10 Wis.2d 230, 102 N.W.2d 404. The Supreme Court held that the requirement that appellant be an enrolled dues-paying member of the State Bar did not abridge his rights of freedom of association, and also that his rights to free speech were not violated because **1828 the State Bar used his money to support legislation with which he disagreed.

1 He also demurred on grounds that the Circuit Court had no jurisdiction of the subject matter because exclusive jurisdiction was vested in the Supreme Court and that there was a defect of parties because the State Bar was not made a defendant.

2 We also consider the case on this expanded record. Appellant raises no objection, and indeed urges us to do so.

*824 An appeal was brought here by appellant under 28 U.S.C. s 1257(2), 28 U.S.C.A. s 1257(2), which authorizes our review of a final judgment rendered by the highest court of a State 'By appeal, where is drawn in question the validity of a (state) statute * * *.' We postponed to the hearing on the merits the question whether the order continuing the State Bar indefinitely under the Rules and Bylaws is a 'statute' for the purposes of appeal under s 1257(2). 364 U.S. 810, 81 S.Ct. 57, 5 L.Ed.2d 41.

We think that the order is a 'statute' for the purposes of s 1257(2). Under that section, the legislative character of challenged state action, rather than the nature of the agency of the State performing the act, is decisive of the question of jurisdiction. It is not necessary that the state legislature itself should have taken the action drawn in question. In construing the similar jurisdictional provision in the Judiciary Act of 1867, 14 Stat. 385, we said: 'Any enactment, from whatever source originating, to which a State gives the force of law is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of this court.' Williams v. Bruffy, 96 U.S. 176, 183, 24 L.Ed. 716. We likewise said of the provision of the Act of 1925, 43 Stat. 936, which is the present s 1257(2): '* * * the jurisdictional provision uses the words 'a statute of any state' in their larger sense and is not intended to make a distinction between acts of a state legislature and other exertions of the State's law-making power, but rather to include every act legislative in character to which the state gives its sanction.' King Manufacturing Co. v. City Council, 277 U.S. 100, 104—105, 48 S.Ct. 489, 490, 72 L.Ed. 801. Thus this Court has upheld jurisdiction on appeal of challenges to municipal ordinances, e.g., King Manufacturing Co. v. City Council, supra; Jamison v. State of Texas, 318 U.S. 413, 63 S.Ct. 669, 87 L.Ed. 869; certain types of orders of state regulatory commission, e.g., Lake Erie & Western R. Co. v. State Public Utilities Comm., 249 U.S. 422, 39 S.Ct. 345, 63 L.Ed. 684; and some *825 orders of other state agencies, e.g., Hamilton v. Regents, 293 U.S. 245, 257—258, 55 S.Ct. 197, 201, 202, 79 L.Ed. 343. It is true that in these cases the state agency the action of which was called in question was exercising authority delegated to it by the legislature However, this fact was not determinative, but was merely relevant to the character of the State's action. The absence of such a delegation does not preclude consideration of the exercise of authority as a statute.

We are satisfied that this appeal is from an act legislative in nature and within s 1257(2). Integration of the Bar was effected through an interplay of action by the legislature and the court directed to fashioning a policy for the organization of the legal profession. The Wisconsin Legislature initiated the movement for integration of the Bar in 1943 when it passed the statute, chapter 315 of the Wisconsin Laws for that year, now Wis.Rev.Stat. s 256.31, providing:
'(1) There shall be an association to be known as the 'State Bar of Wisconsin' composed of persons licensed to practice law in this state, and membership in such association shall be a condition precedent to the right to practice law in Wisconsin.

'(2) The supreme court by appropriate orders shall provide for the organization and government of the association and shall define the rights, obligations and conditions of membership therein, to the end that such association shall promote the public interest by maintaining high standards of conduct in the legal profession and by aiding in the efficient administration of justice.'

The State Supreme Court held that this statute was not binding upon it because **1829 '(t)he power to integrate the bar is an incident to the exercise of the judicial power * * *.' Integration of Bar Case, 244 Wis. 8, 40, 11 N.W.2d 604, 619, 12 N.W.2d 699, 151 A.L.R. 586. The court twice refused to order *826 integration, 244 Wis. 8, 11 N.W.2d 604, 12 N.W.2d 699, 151 A.L.R. 586; 249 Wis. 523, 25 N.W.2d 500, before taking the actions called in question on this appeal, 273 Wis. 281, 77 N.W.2d 602; 5 Wis.2d 618, 93 N.W.2d

601. Nevertheless, the court in rejecting the first petition, 244 Wis. at pages 51—52, 11 N.W.2d at pages 623—624, recognized that its exercise of the power to order integration of the Bar would not be adjudicatory, but an action in accord with and in implementation of the legislative declaration of public policy.[3] The court said:

3 The court's action was in response to a petition for 'integration * * * in the manner described' in Wis.Rev.Stats. s 256.31. Wis.Bar Bull., Apr. 1956, p. 21. The resolution of the House of Governors of the Wisconsin Bar Association leading to the filing of the petition referred to 'integration * * * pursuant to the provisions of Section 256.31 of the Wisconsin Statutes.' Id., p. 52. In many other States integration was initially accomplished either entirely by the legislature or by a combination of legislative and judicial action. See N.D.Laws 1921, c. 25; Ala.Laws 1923, No. 133; Idaho Laws 1923, c. 211; N.M.Laws 1925, c. 100; Cal.Stat.1927, c. 34; Nev.Stat.1928, c. 13; Okla.Laws 1929, c. 264; Utah Laws 1931, c. 48; S.D.Laws 1931, c. 84; Ariz.Laws 1933, c. 66; Wash.Laws 1933, c. 94; N.C.Laws 1933, c. 210; La.Acts 1934, 2d Extra Sess., No. 10; Ky.Acts 1934, c. 3; Ore.Laws 1935, c. 28; Mich.Acts 1935, No. 58; Va.Acts 1938, c. 410; Tex.Gen.Laws 1939, p. 64; W.Va.Acts 1945, c. 44; Alaska Laws 1955, c. 196.

'It is obvious that whether the general welfare requires that the bar be treated as a corporate body is a matter for the consideration of the legislature. * * * While the legislature has no constitutional power to compel the court to act or, if it acts, to act in a particular way in the discharge of the judicial function, it may nevertheless, with propriety and in the exercise of its power and the discharge of its duty, declare itself upon questions relating to the general welfare which includes the integration of the bar. The court, as has been exemplified during the entire history of the state, will respect such declarations ***827** and, as already indicated, adopt them so far as they do not embarrass the court or impair its constitutional functions.'

Integration of the Bar in Wisconsin bore no resemblance to adjudication. The State Supreme Court's action disposed of no litigation between parties. Rather the court sought to regulate the profession by applying its orders to all present members of the Bar and to all persons coming within the described class in the future. Cf. Hamilton v. Regents, supra, 293 U.S. at page 258, 55 S.Ct. at page 202; King Manufacturing Co. v. City Council, supra, 277 U.S. at page 104, 48 S.Ct. at page 490. As such, the action had the characteristics of legislation. We conclude that the appeal is cognizable under s 1257(2). We therefore proceed to the consideration of the merits.

The core of appellant's argument is that he cannot constitutionally be compelled to join and give support to an organization which has among its functions the expression of opinion on legislative matters and which utilizes its property, funds and employees for the purposes of influencing legislation and public opinion toward legislation.[4] But ****1830** his compulsory enrollment imposes only ***828** the duty to pay dues.[5] The Supreme Court of Wisconsin so interpreted its order and its interpretation is of course binding on us. The court said: 'The rules and by-laws of the State Bar, as approved by this court, do not compel the plaintiff to associate with anyone. He is free to attend or not attend its meetings or vote in its elections as he chooses. The only compulsion to which he has been subjected by the integration of the bar is the payment of the annual dues of $15 per year.' 10 Wis.2d at page 237, 102 N.W.2d at page 408.[6] We therefore are confronted, as we were in Railway Employes' Department v. Hanson, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112, only with a question of compelled financial support of group activities, not with involuntary membership in any other aspect. Cf. International Association of Machinists v. Street, 367 U.S. 740, at pages 748—749, 81 S.Ct. 1784, at pages 1789—1790, 6 L.Ed.2d 1141.

4 Appellant's notice of appeal presents the following question for our review:
'Do the orders and rules of the Supreme Court of the State of Wisconsin * * * and the rules and by-laws which were promulgated thereby deprive the appellant * * * of his rights of freedom of association, assembly, speech, press, conscience and thought, or of his liberty or property without due process of law or deny to him equal protection of the law or otherwise deprive him of rights under the Fourteenth Amendment of the Constitution of the United States by compelling him, as a condition to his right to continue to practice law in the State of Wisconsin, to be a member of and financially support an association of attorneys known as the State Bar of Wisconsin, which association * * * among other things, uses its property, funds and employees for the purpose of influencing a broad range of legislation and public opinion; and, therefore, are said orders, rules and by-laws, insofar

as they coerce the appellant to be a member of and support said association, invalid on the ground that they are repugnant to the Constitution of the United States?'

5 The rules limit the maximum permissible dues to $20 a year.

6 A member suspended for nonpayment of dues may secure automatic reinstatement, so long as his dues are not in arrearage for three or more years, by making full payment of the amount and paying an additional $5 as a penalty. No other condition on acquiring or retaining membership is imposed by the rules or bylaws. Although the State Bar participates in the investigation of complaints of misconduct, see 367 U.S. at pages 829—832, 81 S.Ct. at pages 1830—1832, final power to disbar or otherwise discipline any member resides in the Supreme Court.

The rules also make the canons of ethics of the American Bar Association, as modified or supplemented by the Supreme Court of Wisconsin, 'the standards governing the practice of law in this state.' But appellant makes no claim that the State lacks power to impose on him a duty to abide by these canons.

A review of the activities of the State Bar authorized under the Rules and Bylaws is necessary to decision. The purposes of the organization are stated as follows in Rule 1, s 2: 'to aid the courts in carrying on and improving ***829** the administration of justice; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence and public service and high standards of conduct; to safeguard the proper professional interests of the members of the bar; to encourage the formation and activities of local bar associations; to provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform, and the relations of the bar to the public, and to publish information relating thereto; to the end that the public responsibilities of the legal profession may be more effectively discharged.' To achieve these purposes standing committees and sections are established. [7] ****1831** The Rules also assign the organization ***830** a major role in the State's procedures for the discipline of members of the bar for unethical conduct. A Committee on Grievances is provided for each of the nine districts into which the State is divided. Each ***831** committee receives and investigates complaints of alleged misconduct of lawyers within its district. ****1832** Each committee also investigates and processes petitions for reinstatement of lawyers and petitions for late enrollment in the State Bar of lawyers who fail to enroll within a designated period after becoming eligible to enroll.

7 The committees and their assigned functions are as follows:

'Legal education and bar admissions.—This committee shall make continuing studies of the curricula and teaching methods employed in law schools, and of standards and methods employed in determining the qualifications of applicants for admission to the bar; and whenever requested by the State Bar commissioners shall assist in the investigation of the qualifications of persons seeking admission to the bar.

'Post-graduate education.—This committee shall formulate and promote programs designed to afford to the members of the State Bar suitable opportunities for acquiring additional professional knowledge, training, and skill, through publications, lectures, and discussions at regional meetings of association members and law institutes, and through correspondence course study.

'Administration of justice.—This committee shall study the organization and operation of the Wisconsin judicial system and shall recommend from time to time appropriate changes in practice and procedure for improving the efficiency thereof; and in that connection shall examine all legislative proposals for changes in the judicial system.

'Judicial selection.—This committee shall study and collect information pertaining to judicial selection, tenure, and compensation, including retirement pensions, and shall report from time to time to the association with respect thereto,

'Professional ethics.—This committee shall formulate and recommend standards and methods for the effective enforcement of high standards of ethics and conduct in the practice of law; shall consider the Canons of Ethics of the legal profession and the observance thereof, and shall make recommendations for appropriate amendments thereto. The committee shall have authority to express opinions regarding proper professional conduct, upon written request of any member or officer of the State Bar.

'Public services.—This committee shall prepare and present to the board of governors plans for advancing public acceptance of the objects and purposes of the association; and shall have responsibility for the execution of such plans as are approved by the board of governors. Such plans shall include arrangements for disseminating information of interest to the public in relation to the functions of the departments of government, the judicial system and the bar; and to that end the committee may operate a speakers' bureau and employ the facilities of the public press and other channels of public communications.

'Interprofessional and business relations.—It shall be the duty of this committee to serve as a liaison agency between the legal profession and other professions and groups with whom the bar is in contact in order to interpret to such professions and groups the proper scope of the practice of law.

'Legislation.—This committee shall study all proposals submitted to the Wisconsin legislature or the congress of the United States for changes in the statutes relating to the courts or the practice of law, and shall report thereon to the board of governors; and with the approval of the board of governors may represent the State Bar in supporting or opposing any such proposals.

'Legal aid.—This committee shall promote the establishment and efficient maintenance of legal aid organizations equipped to provide free legal services to those unable to pay for such service; shall study the administration of justice as it affects persons in the low income groups; and shall study and report on methods of making legal service more readily available to persons of moderate means, and shall encourage and assist local bar associations in accomplishing this purpose.

'Unauthorized practice of the law.—This committee shall keep itself and the association informed with respect to the unauthorized practice of law by laymen and by agencies, and the participation of members of the bar in such activities, and concerning methods for the prevention thereof. The committee shall seek the elimination of such unauthorized practice and participation therein on the part of members of the bar, by such action and methods as may be appropriate for that purpose.

'State Bar Bulletin.—This committee shall assist and advise the officers of the association and the board of governors in matters pertaining to the production and publication of the Wisconsin State Bar Bulletin, the Wisbar Letter, the Supreme Court Calendar Service and such other periodical publications of the State Bar as may be authorized by the board of governors from time to time.

'State Grievance Committee.—This committee shall consist of the chairmen of the district grievance committees, who shall meet at least quarterly and whose duties shall be to exchange information as to problems arising under the grievance procedure, to discuss and adopt uniform procedures and standards under Rule 10 (relating to grievances) and to make recommendations to the Board of Governors for improvements in the procedures under Rule 10 and for other matters consistent with their organization.' Article IV, Sections 2—13, 273 Wis. xxxiii—xxxv; Supplement, Wis.Bar Bull., Aug. 1960, pp. 21—23.

Sections have been created in the areas of corporation and business law, family law, role of house counsel, insurance, negligence and workmen's compensation law, labor relations law, military law, real property, probate and trust law, taxation, government law, protection of individual rights against misuse of powers of government, patent, trademark and copyright law, and criminal law.

The State Legislature and the State Supreme Court have informed us of the public interest sought to be served by the integration of the bar. The statute states its desirability 'to the end that such association shall promote the public interest by maintaining high stand ***832** ards of conduct in the legal profession and by aiding in the efficient administration of justice.' This theme is echoed in the several Supreme Court opinions. The first opinion after the passage of the statute noted the 'widespread general recognition of the fact that the conduct of the bar is a matter of general public interest and concern.' 244 Wis. 8, 16, 11 N.W.2d 604, 608, 12 N.W.2d 699, 15 A.L.R. 586. But the court's examination at that time of existing procedures governing admission and discipline of lawyers and the prevention of the unauthorized practice of the law persuaded the court that the public interest was being adequately served without integration. The same conclusion was reached when the matter was reviewed again in 1946.

At that time, in addition to reviewing the desirability of integration in the context of the problems of admission and discipline, the court considered its utility in other fields. The matter of post-law school or post-admission education of lawyers was one of these, The court believed, however, that while an educational program was a proper objective, the one proposed was 'nebulous in outline and probably expensive in execution.' 249 Wis. 523, 530, 25 N.W.2d 500, 503. The Court also observed, 'There are doubtless many other useful activities for which dues might properly be used, but what they are does not occur to us and no particular one seems to press for action.' Id., 249 Wis. 523, 530, 25 N.W.2d 500, 503.

The court concluded in 1956, however, that integration might serve the public interest and should be given a two-year trial.[8] It decided to 'require the bar to act as ***833** a unit to promote high standards of practice and the economical and speedy enforcement of legal rights,' 273 Wis. 281, 283, 77 N.W.2d 602, 603, because it had come to the conclusion that efforts to accomplish these ends in the public interest through voluntary association had not been effective. '(T)oo many lawyers have refrained or refused to join, * * * membership in the voluntary association has become static, and * * * a substantial minority of the lawyers in the state are not associated with the State Bar Association.' Id., 273 Wis. 281, 283, 77 N.W.2d 602, 603. When the order was extended indefinitely in 1958 the action was expressly grounded on the finding that, 'Mem bers ****1833** of the legal profession by their admission to the bar become an important part of (the) process (of administering justice) * * *. An independent, active, and intelligent bar is necessary to the efficient administration of justice by the courts.' 5 Wis.2d 618, 622, 93 N.W.2d 601, 603.

8 The court said: 'We feel * * * that integration of the bar should be tried. The results thereof will be what the bar and the court make of it. If integration does not work, this court can change the rules to meet any situation that arises or it can abandon the plan.' In re Integration of the Bar, 273 Wis. 281, 285, 77 N.W.2d 602, 604. '(The rules and by-laws) cannot be taken as the last word, and * * * experience in operating under them may disclose imperfections and particulars in which they should be changed. The integrated bar itself is an experiment in Wisconsin, and like all new enterprises may be expected to need adaptation to conditions and circumstances not yet clearly foreseen.' 273 Wis. ix.

The appellant attacks the power of the State to achieve these goals through integration on the ground that because of its legislative activities, the State Bar partakes of the character of a political party. But on their face the purposes and the designated activities of the State Bar hardly justify this characterization. The inclusion among its purposes that it be a forum for a 'discussion of * * * law reform' and active in safeguarding the 'proper professional interests of, the members of the bar,' in unspecified ways, does not support it. Only two of the 12 committees, Administration of Justice, and Legislation, are expressly directed to concern themselves in a substantial way with legislation. Authority granted the other committees directs them to deal largely with matters ***834** which appear to be wholly outside the political process and to concern the internal affairs of the profession.

We do not understand the appellant to contend that the State Bar is a sham organization deliberately designed to further a program of political action. Nor would such a contention find support in this record. Legislative activity is carried on under a statement of policy which followed the recommendations of a former president of the voluntary Wisconsin Bar Association, Alfred LaFrance. He recommended that the legislative activity of the State Bar should have two distinct aspects: (1) 'the field of legislative reporting or the dissemination of information concerning legislative proposals. * * * This is a service-information function that is both useful to the general membership and to the local bar associations'; and (2) 'promotional or positive legislative activity.' As to the latter he advised that 'the rule of substantial unanimity should be observed. Unless the lawyers of Wisconsin are substantially for or against a proposal, the State Bar should neither support nor oppose the proposal.' Wis.Bar Bull., Aug. 1957, pp. 41—42. 'We must remember that we are an integrated Bar, that the views of the minority must be given along with the views of the majority where unanimity does not appear. The State Bar represents all of the lawyers of this state and in that capacity we must safeguard the interests of all.' Id., p. 44. The rules of policy and procedure for legislative activity follow these recommendations.[9]

9 The policy provides:
1. 'The State Bar, through action of its Board of Governors, will initiate legislation only on such matters as it believes to be of general professional interest. ,No legislation will be sponsored unless and until the Board is satisfied that the recommendation represents the consensus and the best composite judgment of the legal

profession of this state, and that the proposed legislation is meritorious and in the public interest. The text of all proposed legislation shall be carefully prepared and considered and the counsel of the experts in the field involved will be sought wherever possible.'

2. Power to make the final determination of the policy of the State Bar toward specific legislative proposals is lodged in the Board of Governors.

3. 'Where it is obvious that the membership of the Bar is of a substantially divided opinion, the Board of Governors shall take no definite position'; but in any such case the Board is empowered to report its vote to the Legislature as a reflection of the diverse views of the members.

4. The Board may delegate its power to take a position on legislative matters to the Committee on Leigslation, the president of the State Bar, or the legislative counsel.

5. Between Board meetings, the Executive Committee may exercise all of the Board's powers with respect to legislation.

6. The Board shall designate a legislative counsel, to be registered as a lobbyist in accordance with Wisconsin law. His task is to manage legislative activities, coordinating the work of sections and committees interested in legislative proposals with the activities of the Board, Executive Committee, and Committee on Legislation; he is also directed to screen all legislative proposals and refer those of special interest to the appropriate section or committee for study and recommendation.

7. The Committee on Legislation is empowered to designate persons to appear before legislative committees and arrange for their appearance.

8. When a section or committee sponsors legislation with the approval of the Board, section officers or the committee chairman may appear before the legislature in its name, or request the legislative counsel to appear.

9. 'During the session of the Legislature all sections and committees of the State Bar are expected to stand ready to: (a) Participate in explaining the bills recommended or opposed by the State Bar to the committees of the Legislature to whom they are referred; (b) Prepare explanatory material relative to any bill about which a question has arisen since its introduction; (c) Examine all bills advocated by others that would affect the courts, the judiciary, the legal profession, or the administration of justice in any particular, or that would make any changes in the substantive law, and keep the Board of Governors and the Executive Committee fully informed so that ill-advised bills can be opposed and meritorious bills can be supported. Committees of the Legislature should be encouraged to request the State Bar to study and to report its recommendations concerning all bills of this category.'

10. The State Bar staff is directed to cooperate with all sections, committees, individual members, and local bar associations desiring to have bills drafted for introduction into the legislature.

11. To facilitate widespread study of legislative proposals, the State Bar shall issue a weekly legislative bulletin to officers, members of the Board of Governors and the Executive Committee, section and committee chairmen, presidents and secretaries of all local bar associations, judges, and other persons as directed by the Executive Committee.

12. Local bar associations are encouraged to take such action on legislation as they deem appropriate and forward their recommendations to the State Bar for consideration. Board of Governors Minutes, June 12, 1957.

By resolution in 1959 it was further provided that a committee or section may present its views on legislation without approval of the Board of Governors. But in so doing it must state that the position is that of the group or its officers, not that of the State Bar. Board of Governors Minutes, Feb. 18, 1959.

****1834** ***835** Under its charter of legislative action, the State Bar has participated in political activities in these principal categorites:

(1) its executive director is registered as a lobbyist in accordance with state law. For the legislative ***836** session 1959—1960, the State Bar listed a $1,400 lobbying expense; this was a percentage of the salary of the executive director, based on an estimate of the time he spent in seeking to influence legislation, amounting to 5% of his salary for the two years. The registration statement signed by the then president of the State Bar added the explanatory note: 'His activities as a lobbyist on behalf of the State Bar are incidental to his general work and occupy only a small portion of his time.'

(2) The State Bar, through its Board of Governors or Executive Committee, has taken a formal ***837** position with respect to a number of questions of legislative policy. These have included such subjects as an increase in the salaries of State Supreme Court justices; making attorneys notaries public; amending the Federal Career Compensation Act, 37 U.S.C.A. s 231 et seq., to apply to attorneys employed with the Armed Forces the same provisions for special pay and promotion available to members of other professions; improving pay scales of attorneys in state service; court reorganization; extending personal jurisdiction over nonresidents; allowing the recording of unwitnessed conveyances; use of deceased partners' names in firm names; revi sion ****1835** of the law governing federal tax liens; law clerks for State Supreme Court justices; curtesy and dower; securities transfers by fiduciaries; jurisdiction of county courts over the administration of inter vivos trusts; special appropriations for research for the State Legislative Council.

(3) The standing committees, particularly the Committees on Legislation and Administration of Justice, and the sections have devoted considerable time to the study of legislation, the formulation of recommendations, and the support of various proposals. For example, the president reported in 1960 that the Committee on Legislation 'has been extremely busy, and through its efforts in cooperation with other interested agencies has been instrumental in securing the passage of the Court Reorganization bill, the bill of the Judicial Council expanding personal jurisdiction, and at this recently resumed session a bill providing clerks for our Supreme Court, and other bills of importance to the administration of justice.' Wis.Bar Bull., Aug. 1960, p. 41. See also id., June 1959, pp. 64—65. A new subcommittee, on federal legislation, was set up by this committee following a study which found need for such a group ***838** 'TO DEAL WITH FEDERAL LEGISLATION AFFECTIng the practice of law, or lawyers as a class, or the jurisdiction, procedure and practice of the Federal courts and other Federal tribunals, or creation of new Federal courts or judgeships affecting this state, and comparable subjects * * *.' Board of Governors Minutes, Dec. 11, 1959. Furthermore, legislative recommendations and activities have not been confined to those standing committees with the express function in the bylaws of considering legislative proposals. See, e.g., Report of the Committee on Legal Aid, Wis.Bar Bull., June 1960, p. 61; Report of the Committee on Legal Aid, id., June 1959, pp. 61—62. Many of the positions on legislation taken on behalf of the State Bar by the Board of Governors or the Executive Committee have also followed studies and recommendations by the sections. See, e.g., Report of the Real Property, Probate and Trust Law Section, Wis.Bar Bull., June 1960, p. 51; Report of the Corporation and Business Law Section, id., p. 56.

(4) A number of special committees have been constituted, either ad hoc to consider particular legislative proposals, or to perform continuing functions which may involve the consideration of legislation. Thus special committees have considered such subjects as extension of personal jurisdiction over nonresidents, law clerks for State Supreme Court justices, and revision of the federal tax lien laws. The Special Committee on World Peace through Law, which has encouraged the formation of similar committees on the local level, has sponsored debates on subjects such as the repeal of the Connally reservation, believing that 'the general knowledge of laymen as well as of lawyers concerning the possibility of world peace through law is limited and requires a ***839** constant program of education and discussion.' Wis.Bar Bull., June 1960, p. 54.

(5) The Wisconsin Bar Bulletin, sent to each member, prints articles suggesting changes in state and federal law. And other publications of the State Bar deal with the progress of legislation.

But it seems plain that legislative activity is not the major activity of the State Bar. The activities without apparent political coloration are many. The Supreme Court provided in an ap pendix ****1836** to the opinion below, 'an analysis of (State Bar) * * * activities and the public purpose served thereby.' 10 Wis.2d at page 246, 102 N.W.2d at page 412. The court found that 'The most extensive activities of the State Bar are those directed toward postgraduate education of lawyers,' and that 'Post-graduate education of lawyers is in the public interest because it promotes the competency of lawyers to handle the legal matters entrusted to them by those of the general public who employ them.' 10 Wis.2d at page 246, 102 N.W.2d at pages 412—413.[10] It found that the State Bar's partic ***840** ipation in the handling of grievances improved the efficiency and effectiveness of this work.[11] It found that the public interest was furthered by the Committee on Unauthorized Practice of Law which was carrying on 'a constant program since numerous trades and occupations keep expanding their services and frequently start offering services which constitute the practice of the

law.' 10 Wis.2d at page 248, 102 N.W.2d at page 413. [12] The court ***841** also ****1837** concluded that the Legal Aid Committee had 'done effective and noteworthy work to encourage the local bar associations of the state to set up legal aid systems in their local communities * * *. Such committee has also outlined recommended procedures for establishing and carrying through such systems of providing legal aid.' 10 Wis.2d at page 249, 102 N.W.2d at page 414. [13] In the field of public relations the court found that the 'chief activity' of the State Bar was the 'preparation, publication, and distribution to the general public of pamphlets dealing with various transactions and happenings with which laymen are frequently confronted, which embody legal problems.' 10 Wis.2d at page 247, 102 N.W.2d at page 413. [14] ***842** Moreover, a number of studies have been made of programs, not involving political action, to further the economic well-being of the profession. [15]

10 The statewide and regional meetings, the court found, are largely devoted 'to the delivery of papers on technical legal subjects of an instructive nature.' 10 Wis.2d at page 246, 102 N.W.2d at pages 412—413. The sections are particularly active in this regard. As a former president of the State Bar described their role: 'The sections provide a special place where members with interest in particular fields of law may serve on committees and receive assistance and training in such fields. Moreover, the sections provide their own programs at each Annual and Midwinter meeting largely of a very practical and educational nature.' Wis. Bar Bull., Aug. 1958, p. 71. See, e.g., Report of Corporation and Business Law Section, id., June 1960, p. 56; Report of Labor Law Section, id., p. 60. For example, the Taxation Section has sponsored an annual tax institute for practicing lawyers. See Report of Taxation Section, Wis.Bar.Bull., June 1959, pp. 53—54. Many of the papers delivered at such sessions are later given wider circulation to the Bar by publication in the Bar Bulletin. In addition, the State Bar has undertaken the sponsorship of numerous special seminars and symposia, see, e.g., Wis.Bar Bull., Aug. 1960, p. 41. And it has made funds available to the University of Wisconsin Law School to compensate students for assisting in the preparation of materials for post-graduate programs. See Board of Governors Minutes, Apr. 25, 1958; Wis.Bar Bull., Aug. 1958, pp. 69—70.

11 Prior to integration the Board of State Bar Commissioners conducted and paid for the investigation of grievances. Since then the grievance committees have performed most of that work, with a resulting diminution in the financial needs of the bar commissioners. A former president of the State Bar commented on these committees' performance of their functions: 'The result is that a majority of complaints are adjusted or explained to the satisfaction of the complainant, and the State Bar Commissioners are saved considerable time and effort * * *.' Wis.Bar Bull., Aug. 1958, p. 68. See also id., Aug. 1960, p. 41.

12 Revenues from integration enabled the State Bar to employ a lawyer whose principal task is the investigation of complaints of unauthorized practice and the effort to achieve its discontinuance. A number of legal actions to prevent unauthorized practice have been instituted. See, e.g., Wis.Bar Bull., Aug. 1960, p. 45; id., June 1960, pp. 48—50; id., June 1958, pp. 48—49. The Committee on Unauthorized Practice has also worked with the Committee on Interprofessional and Business Relations in conferring with other professional groups to establish demarcation lines between their activities and those of the bar. Thus an agreement was negotiated with the Association of Certified Public Accountants and a joint committee provided to police it. See Board of Governors Minutes, Dec. 9, 1960. The Committee on Interprofessional and Business Relations has also participated in projects for the formulation of agreements with the Association of Real Estate Brokers and the Association of Collection Agencies, and its program includes conferences with other professional groups. See Executive Committee Minutes, July 22, 1960. Legal ethics is another concern of the State Bar. Its Committee on Professional Ethics has given opinion on a number of questions of ethical practice. See, e.g., Wis.Bar Bull., June 1960, pp. 46—49.

13 The number of lawyers in Wisconsin participating in legal aid has steadily increased. The committee reported in 1960 that it would 'continue to vigorously carry on its program of rendering prompt and efficient legal aid services to all those who require the same; to continue to work

diligently to the realization of the goal that every county bar association within our State have an effective legal aid bureau or legal aid society as soon as possible; to continue our policy of bringing into our open forum meetings on legal aid, the most outstanding authorities on the subject, to the end that we here in the State of Wisconsin will at all times have the fullest, up-to-date information on every phase of legal aid * * *.' Wis.Bar Bull., June 1960, p. 64. See also id., June 1959, p. 63.

14 The State Bar has also prepared articles on legal subjects for distribution to newspapers throughout the State. It has been concerned with the promotion of the annual Law Day. See, e.g., Wis.Bar Bull., Aug. 1958, p. 67. The Bar Bulletin, in addition to publishing articles on legal subjects, has issued special supplements explaining and annotating new laws and has printed checklists for attorneys suggesting how to proceed with various legal problems. Its avowed aim is to make the Bulletin 'a very practical means for all practicing lawyers to keep posted on the ever-changing requirements in the practice. * * * We believe that one of the great justifications for integration is found in the means of publication and communication from the Bar to the member through these vehicles.' Wis.Bar Bull., June 1960, p. 67.

15 The stated functions of the Special Committee on Economics of the Bar are: '(t)he committee will engage itself in the general study of the economics of the Bar to determine a fair fee schedule from time to time; seek its uniform adoption and recognition throughout the state; study the encroachment of lay agencies on the fields of law; make suggestions for proper office management, and make such recommendations from time to time as it considers proper in the general field.' Wis.Bar Bull., June 1959, p. 58. One of the principal products of such activity has been a recommended schedule of minimum fees for Wisconsin lawyers; this schedule was published and distributed at a cost of over $10,000 to the State Bar. See Wis.Bar Bull., Aug. 1960, p. 40; also id., pp. 10—11. Another project authorized by the Board of Governors is a comprehensive statistical study of the economic status of Wisconsin lawyers. See Board of Governors Minutes, Sept. 23, 1960, Dec. 9, 1960. Other special committees have considered such matters as group insurance for State Bar members and creation of a client security plan to insure against attorneys' defalcations. See, e.g., Wis.Bar Bull., Aug. 1960, p. 41; Board of Governors Minutes, Feb. 18, 1959; Executive Committee Minutes, Sept. 23, 1960.

This examination of the purposes and functions of the State Bar shows its multifaceted character, in fact as well as in conception. In our view the case presents a claim of impingement upon freedom of association no different from that which we decided in Railway Employes' Dept. v. Hanson, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112. We there held that s 2, Eleventh of the Railway Labor Act, 45 U.S.C. s 152, 45 U.S.C.A. s 152, subd. 11, Eleventh, did not on its face abridge protected rights of association in authorizing union-shop agreements between interstate railroads and unions of their employees conditioning the employees' continued employment on payment of **1838 union dues, initiation fees and assessments. *843 There too the record indicated that the organizations engaged in some activities similar to the legislative activities of which the appellant complains. See International Association of Machinists v. Street, ante, 367 U.S. at page 748, 81 S.Ct. at page 1789, note 5. In rejecting Hanson's claim of abridgment of his rights of freedom of association, we said, 'On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar.' 351 U.S. at page 238, 76 S.Ct. at page 721. Both in purport and in practice the bulk of State Bar activities serve the function, or at least so Wisconsin might reasonably believe, of 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, without any reference to the political process. It cannot be denied that this is a legitimate end of state policy.[16] We think that the Supreme Court of Wisconsin, in order to further the State's legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity. Given the character of the integrated bar shown on this record, in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, we are unable to find any impingement upon protected rights of association.

16 On the subject of integration of the bar in the United States, see generally Glaser, The Organization of the Integrated Bar, The Debate Over the Integrated Bar, and Bibliography on the Integrated Bar (Columbia University Bureau of Applied Social Research). Comprehensive discussions of integration of the Bar in the various States are contained in briefs amici curiae filed with the Court in this case.

***844** However, appellant would have us go farther and decide whether his constitutional rights of free speech are infringed if his dues money is used to support the political activities of the State Bar. The State Supreme Court treated the case as raising the question whether First Amendment rights were violated 'because part of his dues money is used to support causes to which he is opposed.' 10 Wis.2d at page 238, 102 N.W.2d at page 409. The Court in rejecting appellant's argument reasoned that '(t)he right to practice law is not a right but is a privilege subject to regulation. * * * The only limitation upon the state's power to regulate the privilege of the practice of law is that the regulations adopted do not impose an unconstitutional burden or deny due process.' Id., 10 Wis.2d at pages 237—238, 102 N.W.2d at page 408. The Court found no such burden because '* * * the public welfare will be promoted by securing and publicizing the composite judgment of the members of the bar of the state on measures directly affecting the administration of justice and the practice of law. The general public and the legislature are entitled to know how the profession as a whole stands on such type of proposed legislation. * * * The only challenged interference with his liberty is the exaction of annual dues to the State Bar, in the nature of the imposition of an annual license fee, not unreasonable or unduly burdensome in amount, part of which is used to advocate causes to which he is opposed. However, this court, in which is vested the power of the state to regulate the practice of law, has determined that it promotes the public interest to have public expression of the views of a majority of the lawyers of the state, with respect to legislation affecting the administration ****1839** of justice and the practice of law, the same to be voiced through their own democratically chosen representatives comprising the board of governors of the State Bar. The public interest so promoted far outweighs the slight inconvenience to the plaintiff result ***845** ing from his required payment of the annual dues.' Id., 10 Wis.2d at pages 239, 242, 102 N.W.2d at pages 409, 411. [17]

17 The Wisconsin Supreme Court originally declined to order integration partly because of misgivings whether possible political activities of the integrated Bar would be consistent with the public interest sought to be served. See In re Integration of the Bar, 249 Wis. 523, 25 N.W.2d 500. It indicated that integration would 'require it to censor the budgets and activities of the bar after integration' and said: 'It requires a very short look at some of the possible activities of the bar to make it clear that this court would have to insist upon scrutinizing every activity for which it is proposed to expend funds derived from dues, and that a series of situations would arise that would be embarrassing to the relations of bench and bar.' 249 Wis. at pages 528, 529—530, 25 N.W.2d at pages 502, 503. These reservations were expressly disclaimed when the court continued integration in 1958, 5 Wis.2d 618, 626—627, 93 N.W.2d 601, 605. The court said: 'The integrated State Bar of Wisconsin is independent and free to conduct its activities within the framework of such rules and by-laws.' Id., 5 Wis.2d at page 626, 93 N.W.2d at page 605. The court reiterated this position in the present case: 'In so far as it confines such activities to those authorized by the rules and by-laws, this court will not interfere or in any manner seek to control or censor the action taken, or to substitute its judgment for that of the membership of the State Bar.' 10 Wis.2d at page 240, 102 N.W.2d at page 410.

We are persuaded that on this record we have no sound basis for deciding appellant's constitutional claim insofar as it rests on the assertion that his rights of free speech are violated by the use of his money for causes which he opposes. Even if the demurrer is taken as admitting all the factual allegations of the complaint, even if these allegations are construed most expansively, and even if, like the Wisconsin Supreme Court, we take judicial notice of the political activities of the State Bar, still we think that the issue of impingement upon rights of free speech through the use of exacted dues is no more concretely presented for adjudication than it was in Hanson. Compare International Association of Machinists v. Street, 367 U.S. 740, at pages 747—749, 81 S.Ct. 1784, at pages 1788—1790, 6 L.Ed.2d 1141. Nowhere are we clearly ***846** apprised as to the views of the appellant on any particular legislative issues on which the State Bar has taken a position, or as to the way in which and the degree to which funds compulsorily exacted from its members are used to support the organization's political activities. There is an allegation in the complaint that the State Bar had 'used its employees,

property and funds in active, unsolicited opposition to the adoption of legislation by the Legislature of the State of Wisconsin, which was favored by the plaintiff, all contrary to the plaintiff's convictions and beliefs,' but there is no indication of the nature of this legislation, nor of appellant's views on particular proposals, nor of whether any of his dues were used to support the State Bar's positions. There is an allegation that the State Bar's revenues amount to about $90,000 a year, of which $80,000 is derived from dues, but there is no indication in the record as to how political expenditures are financed and how much has been expended for political causes to which appellant objects. The facts of which the Supreme Court took judicial notice do not enlighten us on these gaps in the record. The minutes of the Board of Governors and Executive Committee of the State Bar show that the organization has taken one position or another on a wide variety of issues, but those minutes give no indication of appellant's views as to any of such issues or of what portions of the expenditure of funds to propagate the State Bar's views may be **1840 properly apportioned to his dues payments. Nor do the other publications of the State Bar. The Supreme Court assumed, as apparently the trial court did in passing on the demurrer, that the appellant was personally opposed to some of the legislation supported by the State Bar. But its opinion still gave no description of any specific measures he opposed, or the extent to which the State Bar actually utilized dues funds for specific purposes to which he had objected. Appellant's phrasing of the question presented on appeal in this *847 Court is not responsive to any of these inquiries as to facts which may be relevant to the determination of constitutional questions surrounding the political expenditures. It merely asks whether a requirement of financial support of an association which, 'among other things, uses its property, funds and employees for the purpose of influencing a broad range of legislation and public opinion' can be constitutionally imposed on him. This statement of the question, just as does his complaint, appears more a claim of the right to be free from compelled financial support of the organization because of its political activities, than a challenge by appellant to the use of his dues money for particular political causes of which he disapproves. Moreover, although the court below purported to decide as against all Fourteenth Amendment claims that the appellant could be compelled to pay his annual dues, even though 'part * * * is used to support causes to which he is opposed,' on oral argument here appellant disclaimed any necessity to show that he had opposed the position of the State Bar on any particular issue and asserted that it was sufficient that he opposed the use of his money for any political purposes at all. In view of the state of the record and this disclaimer, we think that we would not be justified in passing on the constitutional question considered below. '(T)he questions involving the power of * * * (the State) come here not so shaped by the record and by the proceedings below as to bring those powers before this Court as leanly and as sharply as judicial judgment upon an exercise of * * * (state) power requires.' United States v. C.I.O., 335 U.S. 106, 126, 68 S.Ct. 1349, 1359, 92 L.Ed. 1849 (concurring opinion). Cf. United States v. U.A.W.-C.I.O., 352 U.S. 567, 589—592, 77 S.Ct. 529, 540, 541, 1 L.Ed.2d 763.

We, therefore, intimate no view as to the correctness of the conclusion of the Wisconsin Supreme Court that the appellant may constitutionally be compelled to contribute his financial support to political activities which *848 he opposes. That issue is reserved, just as it was in Hanson, see International Association of Machinists v. Street, 367 U.S. 740, at pages 746—749, 81 S.Ct. 1784, at pages 1788—1790, 6 L.Ed.2d 1141. Upon this understanding we four vote to affirm. Since three of our colleagues are of the view that the claim which we do not decide is properly here and has no merit, and on that ground vote to affirm, the judgment of the Wisconsin Supreme Court is affirmed.

Affirmed.

Mr. Justice HARLAN, with whom Mr. Justice FRANKFURTER joins, concurring in the judgment.

I think it most unfortunate that the right of the Wisconsin Integrated Bar to use, in whole or in part, the dues of dissident members to carry on legislative and other programs of law reform—doubtless among the most useful and significant branches of its authorized activities—should be left in such disquieting Constitutional uncertainty. The effect of that uncertainty is compounded by the circumstance that it will doubtless also reach into the Integrated Bars of twenty-five other States. [1]

1 Alabama, Alaska, Arizona, California, Florida, Idaho, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wyoming. See note 14, dissenting opinion of MR. JUSTICE FRANKFURTER in International Association of Machinists v. Street, 367 U.S. 808, 81 S.Ct. 1819, ante. Arkansas has a Bar which is integrated only

with respect to disciplinary matters. 207 Ark. xxxiv —xxxvii.

**1841 I must say, with all respect, that the reasons stated in the plurality opinion for avoiding decision of this Constitutional issue can hardly be regarded as anything but trivial. For, given the unquestioned fact that the Wisconsin Bar uses or threatens to use, over appellant's protest, some part of its receipts to further or oppose legislation on matters of law reform and the administration of *849 justice, I am at a loss to understand how it can be thought that this record affords 'no sound basis' for adjudicating the issue simply because we are not 'clearly apprised as to the views of the appellant on any particular legislative issues on which the State Bar has taken a position, or as to the way in which and the degree to which funds compulsorily exacted from its members are used to support the organization's political activities' (367 U.S. at pages 845—846, 81 S.Ct. at page 1839). I agree with my Brother BLACK that the Constitutional issue is inescapably before us.

Unless one is ready to fall prey to what are at best but alluring abstractions on rights of free speech and association, I think he will be hard put to it to find any solid basis for the Constitutional qualms which, though unexpressed, so obviously underlie the plurality opinion, or for the views of my two dissenting Brothers, one of whom finds unconstitutional the entire Integrated Bar concept (367 U.S. at pages 877—885, 81 S.Ct. at pages 1856—1860, and the other of whom holds the operations of such a Bar unconstitutional to the extent that they involve taking 'the money of protesting lawyers' and using 'it to support causes they are against' (367 U.S. at page 871, 81 S.Ct. at page 1852).

For me, there is a short and simple answer to all of this. The Hanson case, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112, decided by a unanimous Court, surely lays at rest all doubt that a State may Constitutionally condition the right to practice law upon membership in an integrated bar association, a condition fully as justified by state needs as the union shop is by federal needs. Indeed the conclusion reached in Hanson with respect to compulsory union membership seems to me a fortiori true here, in light of the supervisory powers which the State, through its courts, has traditionally exercised over admission to the practice of law, see Konigsberg v. State Bar of California, 366 U.S. 36, 81 S.Ct. 997, 6 L.Ed.2d 105; In re Anastaplo, 366 U.S. 82, 81 S.Ct. 978, 6 L.Ed.2d 135, and over the conduct of lawyers after admission, see Cohen v. Hurley, 366 U.S. 117, 81 S.Ct. 954, 6 L.Ed.2d 156. The Integrated Bar was in fact treated as such an a fortiori case in the *850 Hanson opinion itself. Supra, 351 U.S. at page 238, 76 S.Ct. at page 721. So much, indeed, is recognized by the plurality opinion which rejects the contention that Wisconsin could not Constitutionally require appellant, a lawyer, to become and remain a dues-paying member of the State Bar.

That being so, I do not understand why it should become unconstitutional for the State Bar to use appellant's dues to fulfill some of the very purposes for which it was established. I am wholly unable to follow the force of reasoning which, on the one hand, denies that compulsory dues-paying membership in an Integrated Bar infringes 'freedom of association,' and, on the other, in effect affirms that such membership, to the extent it entails the use of a dissident member's dues for legitimate Bar purposes, infringes 'freedom of speech.' This is a refinement between two aspects of what, in circumstances like these, is essentially but a single facet of the 'liberty' assured by the Fourteenth Amendment, see **1842 N.A.A.C.P. v. State of Ala bama, 357 U.S. 449, 460, 78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488, that is too subtle for me to grasp.

Nevertheless, since a majority of the Court here, as in the Street case, ante, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 has deemed the 'free speech' issue to be distinct from that of 'free association,' I shall also treat the case on that basis. From a Constitutional standpoint, I think that there can be no doubt about Wisconsin's right to use appellant's dues in furtherance of any of the purposes now drawn in question.[2] Orderly analysis *851 requires that there be considered, first, the respects in which it may be thought that the use of a member's dues for causes he is against impinges on his right of free speech, and second, the nature of the state interest offered to justify such use of the dues exacted from him. I shall also add some further observations as to the over-all Constitutionality of the Integrated Bar concept.

2 Among other things, the Integrated Bar of the State of Wisconsin is authorized by the State Supreme Court, acting under its inherent rule-making powers, to publish information relating to 'the practice of law, the science of jurisprudence and law reform, and the relations of the bar to the public.' Rule 1, 273 Wis. xi. Rule 4, s 4, provides for standing committees including, inter alia, Committees on Administration of Justice and on Legislation. 273 Wis. xvi. The function of the former, as set out in Art. IV, s 4, of the by-laws, 273 Wis. xxxiii, is to 'study the organization and operation of the Wisconsin judicial system and

> * * * recommend from time to time appropriate changes in practice and procedure for improving the efficiency thereof * * *.' The function of the Committee on Legislation is to study and, in certain circumstances, support or oppose 'proposals submitted to the Wisconsin legislature or the congress of the United States for changes in the statutes relating to the courts or the practice of law * * *.' Art. IV, s 9, 273 Wis. xxxiv. The enabling court rules indicate authorization for further study and comment on proposed legislation, for the board of governors is directed to establish sections on corporation and business law; family law; house counsel; insurance, negligence and workmen's compensation law; labor relations law; military law; real property, probate, and trust law; and taxation. 273 Wis. xvii. The plurality opinion of this Court sets out the nature and scope of the activities bearing on prospective legislation actually engaged in by this Integrated Bar. 367 U.S. at pages 835—839, 81 S.Ct. at pages 1834—1835.

I.

To avoid the pitfall of disarming, and usually obscuring, generalization which too often characterizes discussion in this Constitutional field, I see no alternative (even at the risk of being thought to labor the obvious) but to deal in turn with each of the various specific impingements on 'free speech' which have been suggested or intimated to flow from the State Bar's use of an objecting member's dues for the purposes involved in this case. As I understand things, it is said that the operation of the Integrated Bar tends (1) to reduce a dissident member's 'economic capacity' to espouse causes in which he believes; (2) to further governmental 'establishment' of political views; (3) to threaten development of a 'guild ***852** system' of closed, self-regulating professions and businesses; (4) to 'drown out' the voice of dissent by requiring all members of the Bar to lend financial support to the views of the majority; and (5) to interfere with freedom of belief by causing 'compelled affirmation' of majority-held views. With deference, I am bound to say that, in my view, all of these arguments border on the chimerical.

1. Reduction in 'Economic Capacity' to Espouse Views.

This argument which, if indeed suggested at all, is intimated only obliquely, is that the mere exaction of dues money works a Constitutionally cognizable inhibition of speech by reducing the resources otherwise available to a dissident member for the espousal of causes ****1843** in which he believes. The untenability of such a proposition becomes immediately apparent when it is recognized that this rationale would make every governmental exaction the material of a 'free speech' issue. Even the federal income tax would be suspect. And certainly this source of inhibition is as great if the Integrated Bar wastes its dues on dinners as if it spends them on recommendations to the legislature. Yet I suppose that no one would be willing to contend that every waste of money exacted by some form of compulsion is an abridgment of free speech.

2. 'Establishment' of Political Views.

The suggestion that a state-created Integrated Bar amounts to a governmental 'establishment' of political belief is hardly worthy of more serious consideration. Even those who would treat the Fourteenth Amendment as embracing the identical protections afforded by the First would have to recognize the clear distinction in the wording of the First Amendment between the protections of speech and religion, only the latter providing a protection against 'establishment.' And as to the Four ***853** teenth, viewed independently of the First, one can surely agree that a State could not 'create a fund to be used in helping certain political parties or groups favored' by it 'to elect their candidates or promote their controversial causes' (367 U.S. at page 788, 81 S.Ct. at page 1809), any more than could Congress do so, without agreeing that this is in any way analogous to what Wisconsin has done in creating its Integrated Bar, or to what Congress has provided in the Railway Labor Act, considered in the Street case, ante, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141.

In establishing the Integrated Bar Wisconsin has, I assume all would agree, shown no interest at all in favoring particular candidates for judicial or legal office or particular types of legislation. Even if Wisconsin had such an interest, the Integrated Bar does not provide a fixed, predictable conduit for governmental encouragement of particular views, for the Bar makes its own decisions on legislative recommendations and appears to take no action at all with regard to candidates. By the same token the weight lent to one side of a controversial issue by the prestige of government is wholly lacking here.

In short, it seems to me fanciful in the extreme to find in the limited functions of the Wisconsin State Bar those risks of governmental self-perpetuation that might justify the recognition of a Constitutional protection against the

'establishment' of political beliefs. A contrary conclusion would, it seems to me, as well embrace within its rationale the operations of the Judicial Conference of the United States, and the legislative recommendations of independent agencies such as the Interstate Commerce Commission and the Bureau of the Budget.

3. Development of a 'Guild System.'

It is said that the Integrated Bar concept tends towards the development of some sort of a 'guild system.' But there are no requirements of action or inaction connected ***854** with the Wisconsin Integrated Bar, as contrasted with any unintegrated bar, except for the requirement of payment of $15 annual dues. I would agree that the requirement of payment of dues could not be made the basis of limiting the profession of law to the comparatively wealthy. Cf. Griffin v. People of State of Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891. Nor, doubtless, could admission to the profession be restricted to relatives of those already admitted. But there is no such 'guild' threat presented in this situation.

True, the Wisconsin Bar makes recommendations to the State Supreme Court for regulatory canons of legal ethics, and it may be supposed that the Bar is not forbidden to address the State ****1844** Legislature for measures regulating in some respects the conduct of lawyers. But neither activity is the kind of direct self-regulation that was stricken down in Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570. The Wisconsin Supreme Court has retained all of the traditional powers of a court to supervise the activities of practicing lawyers. It has delegated none of these to the Integrated Bar. As put by the State Supreme Court:
'The integrated bar has no power to discipline or to disbar any member. That power has been reserved to and not delegated by this court. The procedure under sec. 256.28, Stats., * * * for filing complaints for discipline or disbarment in this court is unaffected by these rules. Rule 11 and Rule 7 provide an orderly and easy method by which proposals to amend or abrogate the rules of the State Bar may be brought before this court for hearing on petition. Rule 9 provides the rules of professional conduct set forth from time to time in the Canons of the Professional Ethics of the American Bar Association, as supplemented or modified by pronouncement of this court, shall be the standard governing the practice of law in this state. Prior to the adoption of the rules ***855** this court has not expressly adopted such Canons of Professional Ethics in toto.

'The By-laws of the State Bar provide for the internal workings of the organization and by Rule 11, sec. 2, may be amended or abrogated by resolution adopted by a vote of two-thirds of the members of the board of governors or by the members of the association themselves through the referendum procedure. As a further protection to the minority a petition for review of any change in the by-laws made by the board of governors will be entertained by the court if signed by 25 or more active members.

'Independently of the provisions in the rules for invoking our supervisory jurisdiction, this court has inherent power to take remedial action, on a sufficient showing that the activities or policies of the State Bar are not in harmony with the objectives for which integration was ordered or are otherwise contrary to the public interest.' In re Integration of Bar, 5 Wis.2d 618, 624—625, 93 N.W.2d 601, 604.

Moreover, it is by no means clear to me in what part of the Federal Constitution we are to find the prohibition of state-authorized self-regulation of and by an economic group that the Schechter case found in Article I as respects the Federal Government. Is state-authorized self-regulation of lawyers to be the occasion for judicial enforcement of Art. IV, s 4, which provides that 'The United States shall guarantee to every state in this union a Republican form of government * * *'? Cf. Luther v. Borden, 7 How. 1, 12 L.Ed. 581; Pacific States Tel. & Tel. Co. v. State of Oregon, 223 U.S. 118, 32 S.Ct. 224, 56 L.Ed. 377.

4. 'Drowning Out' the Voice of Dissent.

This objection can be stated in either of two ways. First: The requirement of dues payments to be spent to further views to which the payor is opposed tends to ***856** increase the volume of the arguments he opposes and thereby to drown out his own voice in opposition, in violation of his Constitutional right to be heard. Second: The United States Constitution creates a scheme of federal and state governments each of which is to be elected on a one-man-one-vote basis and on a one-man-one-political-voice basis. Of course several persons may voluntarily cumulate their political voices, but no governmental force can require a single individual to contribute money to ****1845** support views to be adopted by a democratically organized group even if the individual is also free to say what he pleases separately.

It seems to me these arguments have little force. In the first place, their supposition is that the voice of a dissenter is

less effective if he speaks it first in an attempt to influence the action of a democratically organized group and then, if necessary, in dissent to the recommendations of that group. This is not at all convincing. The dissenter is not being made to contribute funds to the furtherance of views he opposes but is rather being made to contribute funds to a group expenditure about which he will have something to say. To the extent that his voice of dissent can convince his lawyer associates, it will later be heard by the State Legislature with a magnified voice. In short, I think it begs the question to approach the Constitutional issue with the assumption that the majority of the Bar has a permanently formulated position which the dissenting dues payor is being required to support, thus increasing the difficulty of effective opposition to it.

Moreover, I do not think it can be said with any assurance that being required to contribute to the dispersion of views one opposes has a substantial limiting effect on one's right to speak and be heard. Certainly these rights would be limited if state action substantially reduced one's ability to reach his audience. But are these rights substantially affected by increasing the opposition's ability ***857** to reach the same audience? I can conceive of instances involving limited facilities, such as television time, which may go to the highest bidder, wherein increasing the resources of the opposition may tend to reduce a dissident's access to his audience. But before the Constitution comes into play, there should surely be some showing of a relationship between required financial support of the opposition and reduced ability to communicate, a showing I think hardly possible in the case of the legislative recommendations of the Wisconsin Bar. And, aside from the considerations of freedom from compelled affirmations of belief to be discussed later, I can find little basis for a right not to have one's opposition heard.

Beyond all this, the argument under discussion is contradicted in the everyday operation of our society. Of course it is disagreeable to see a group, to which one has been required to contribute, decide to spend its money for purposes the contributor opposes. But the Constitution does not protect against the mere play of personal emotions. We recognized in Hanson that an employee can be required to contribute to the propagation of personally repugnant views on working conditions or retirement benefits that are expressed on union picket signs or in union handbills. A federal taxpayer obtains no refund if he is offended by what is put out by the United States Information Agency. Such examples could be multiplied.

For me, this 'drowning out' argument falls apart upon analysis.

5. 'Compelled Affirmation' of Belief.

It is argued that the requirement of Bar dues payments which may be spent for legislative recommendations which the payor opposes amounts to a compelled affirmation of belief of the sort this Court struck down in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628. While I agree that the rationale of Barnette is relevant, ***858** I do not think that it is in any sense controlling in the present case.

Mr. Justice Jackson, writing for the Court in Barnette, did not view the issue as turning merely 'on one's possession of particular religious views or the sincerity with which they are held.' 319 U.S. at page 634, 63 S.Ct. at page 1183. The holding of Barnette was that, no matter how strong or weak such beliefs ****1846** might be, the Legislature of West Virginia was not free to require as concrete and intimate an expression of belief in any cause as that involved in a compulsory pledge of allegiance. It is in this light that one must assess the contention that, 'Compelling a man by law to pay his money to elect candidates or advocate laws or doctrines he is against differs only in degree, if at all, from compelling him by law to speak for a candidate, a party, or a cause he is against' (367 U.S. 788, 81 S.Ct. 1809). One could as well say that the same more difference in degree distinguishes the Barnette flag salute situation from a taxpayer's objections to the views a government agency presents, at public expense, to Congress. What seems to me obvious is the large difference in degree between, on the one hand, being compelled to raise one's hand and recite a belief as one's own, and, on the other, being compelled to contribute dues to a bar association fund which is to be used in part to promote the expression of views in the name of the organization (not in the name of the dues payor), which views when adopted may turn out to be contrary to the views of the dues payor. I think this is a situation where the difference in degree is so great as to amount to a difference in substance.

In Barnette there was a governmental purpose of requiring expression of a view in order to encourage adoption of that view, much the same as when a school teacher requires a student to write a message of self-correction on the blackboard one hundred times. In the present case there is no indication of a governmental purpose to fur ***859** ther the expression of any particular view. More than that,

the State Bar's purpose of furthering expression of views is unconnected with any desire to induce belief or conviction by the device of forcing a person to identify himself with the expression of such views. True, purpose may not be controlling when the identification is intimate between the person who wishes to remain silent and the beliefs foisted upon him. But no such situation exists here where the connection between the payment of an individual's dues and the views to which he objects is factually so remote. Surely the Wisconsin Supreme Court is right when it says that petitioner can be expected to realize that 'everyone understands or should understand' that the views expressed are those 'of the State Bar as an entity separate and distinct from each individual.' 5 Wis.2d at page 623, 93 N.W.2d at page 603.

Indeed, I think the extreme difficulty the Court encounters in the Street case (ante, 367 U.S. 740, 81 S.Ct. 1764) in finding a mechanism for reimbursing dissident union members for their share of 'political' expenditures is wholly occasioned by, and is indicative of, the many steps of changed possession, ownership, and control of dues receipts and the multiple stages of decision making which separate the dues payor from the political expenditure of some part of his dues. I think these many steps and stages reflect as well upon whether there is an identification of dues payor and expenditure so intimate as to amount to a 'compelled affirmation.' Surely if this Court in Street can only with great difficulty—if at all-identify the contributions of particular union members with the union's political expenditures, we should pause before assuming that particular Bar members can sensibly hear their own voices when the State Bar speaks as an organization.

Mr. Justice Cardozo, writing for himself, Mr. Justice Brandeis, and Mr. Justice Stone in Hamilton v. Regents, 293 U.S. 245, 265, 55 S.Ct. 197, 205, 79 L.Ed. 343, thought that the remoteness of the ***860** connection between a conscientious objection to war and the study of military science was in itself sufficient to make untenable a claim that requiring this study in state universities amounted to a state establishment of religion. These Justices thought the case even clearer ****1847** when all that was involved was a contribution of money:

'Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war * * * or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government.' Hamilton v. Regents, 293 U.S. 245, 268, 55 S.Ct. 197, 206.

Nor do I now believe that a state taxpayer could object on Fourteenth Amendment grounds to the use of his money for school textbooks or instruction which he finds intellectually repulsive, nor for the mere purchase of a flag for the school. In the present case appellant is simply required to pay dues into the general funds of the State Bar. I do not think a subsequent decision by the representatives of the majority of the bar members to devote some part of the organization's funds to the furtherance of a legislative proposal so identifies the individual payor of dues with the belief expressed that we are in the Barnette realm of 'asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one * * *.' 319 U.S. at page 634, 63 S.Ct. at page 1183.

It seems to me evident that the actual core of appellant's complaint as to 'compelled affirmation' is not the identification with causes to which he objects that might arise from some conceivable tracing of the use of his dues in their support, but is his forced association with the ***861** Integrated Bar. That, however, is a bridge which, beyond all doubt and any protestations now made to the contrary, we crossed in the Hanson case. I can see no way to uncross it without overruling Hanson. Certainly it cannot be done by declaring as a rule of law that lawyers feel more strongly about the identification of their names with proposals for law reform than union members feel about the identification of their names with collective bargaining demands declared on the radio, in picket signs, and on handbills.

II.

While I think that what has been said might well dispose of this case without more, in that Wisconsin lawyers retain 'full freedom to think their own thoughts, speak their own minds, support their own causes and wholeheartedly fight whatever they are against' (367 U.S. 874, 81 S.Ct. 1854), I shall pass on to consider the state interest involved in the establishment of the Integrated Bar, the other ingredient of adjudication which arises whenever incidental impingement upon such freedoms may fairly be said to draw in question governmental action. See, e.g., Barenblatt v. United States, 360 U.S. 109, 79 S.Ct. 1081, 3 L.Ed.2d 1115; Konigsberg v. State Bar of California, supra.

In this instance it can hardly he doubted that it was Constitutionally permissible for Wisconsin to regard the functions of an Integrated Bar as sufficiently important to justify whatever incursions on these individual freedoms may be thought to arise from the operations of the organization. The Wisconsin Supreme Court has described the fields of the State Bar's legislative activities and has asserted its readiness to restrict legislative recommendations to those fields:
'This court takes judicial notice of the activities of the State Bar in the legislative field since its creation by this court in 1956. In every instance the ***862** legislative measures advocated or opposed have dealt with the administration of justice, court reform, and legal prac tice. ****1848** Neither the above-quoted bylaws nor the stated purposes set forth in section 2 of Rule 1 for which the bar was integrated would permit the State Bar to be engaged in legislative activities unrelated to these three subjects. * * * However, as we pointed out in our opinion in the 1958 In re Integration of the Bar Case this court will exercise its inherent power to take remedial action should the State Bar engage in an activity not authorized by the rules and by-laws and not in keeping with the stated objectives for which it was created. If the lawyers of the state wish by group action to engage in legislative activities not so authorized they will have to do so within the framework of some voluntary association, and not the State Bar.' 10 Wis.2d 230, 239—240, 102 N.W.2d 404, 409—410.

Further, the same court has declared its belief that the lawyers of the State possess an expertise useful to the public interest within these fields:
'We are of the opinion that the public welfare will be promoted by securing and publicizing the composite judgment of the members of the bar of the state on measures directly affecting the administration of justice and the practice of law. The general public and the legislature are entitled to know how the profession as a whole stands on such type of proposed legislation. This is a function an integrated bar, which is as democratically governed and administered as the State Bar, can perform such more effectively than can a voluntary bar association.' Ibid.

I do not think that the State Court's view in this respect can be considered in any way unreasonable.

***863** '(T)he composite judgment of the members of the bar of the state on measures directly affecting the administration of justice and the practice of law' may well be as helpful and informative to a state legislature as the work of individual legal scholars and of such organizations as the American Law Institute, for example, is to state and federal courts. State and federal courts are, of course, indifferent to the personal beliefs and predilections of any of such groups. The function such groups serve is a rationalizing one and their power flows from and is limited to their ability to convince by arguments from generally agreed upon premises. They are exercising the techniques and knowledge which lawyers are trained to possess in the task of solving problems with which the legal profession is most familiar. The numberless judicial citations to their work is proof enough of their usefulness in the judicial decision-making process. [3]

3 The nine Restatements of the law alone have been cited well over 27,000 times. 36th Annual Meeting, The American Law Institute, at p. 63.

Legislatures too have found that they can benefit from a legal 'expert's effort to improve the law in technical and non-controversial areas.' Dulles v. Johnson, 2 Cir., 273 F.2d 362, 367. In the words of the Executive Secretary of the New York Law Revision Commission, there are areas in which 'lawyers as lawyers have more to offer, to solve a given question, than other skilled persons or groups.' 40 Cornell L.Q. 641, 644. See also Cardozo, A Ministry of Justice, 35 Harv.L.Rev. 113. The Acts recommended by the Commissioners on Uniform State Laws have been adopted on over 1,300 occasions by the legislatures of the fifty States, Puerto Rico, and the District of Columbia. Handbook of the National Conference of Commissioners on Uniform State Laws (1960), at p. 207. There is no way of counting the number of occasions on which state legislatures have utilized the assistance of ***864** legal advisory groups. Some indication ****1849** may be obtained by noting that thirty-one jurisdictions have permanent legislative service agencies which recommend 'substantive' legislative programs and forty-two jurisdictions utilize such permanent agencies in recommending statutory revision. [4]

4 'Permanent Legislative Service Agencies,' published by the Council of State Governments.

In this light I can only regard as entirely gratuitous a contention that there is anything less than a most substantial state interest in Wisconsin having the views of the members of its Bar 'on measures directly affecting the administration of justice and the practice of law.' Nor can I take seriously a suggestion that the lawyers of Wisconsin are merely being polled on matters of their own personal belief or predilection,

any more than Congress had in mind such a poll when it made it the duty of federal circuit judges summoned to attend the Judicial Conference of the United States 'to advise * * * as to any matters in respect of which the administration of justice in the courts of the United States may be improved.' 42 Stat. 837, 838 (Now 28 U.S.C.A. s 331).

III.

Beyond this conjunction of a highly significant state need and the chimerical nature of the claims of abridgment of individual freedom, there is still a further approach to the entire problem that combines both of these aspects and reinforces my belief in the Constitutionality of the Integrated Bar.

I had supposed it beyond doubt that a state legislature could set up a staff or commission to recommend changes in the more or less technical areas of the law into which no well-advised laymen would venture without the assistance of counsel. A state legislature could certainly appoint a commission to make recommendations to it on the desirability of passing or modifying any of the count ***865** less uniform laws dealing with all kinds of legal subjects, running all the way from the Uniform Commercial Code to the Uniform Simultaneous Death Law.[5] It seems no less clear to me that a reasonable license tax can be imposed on the profession of being a lawyer, doctor, dentist, etc. See Royall v. State of Virginia, 116 U.S. 572, 6 S.Ct. 510, 29 L.Ed. 735. In these circumstances, wherein lies the unconstitutionality of what Wisconsin has done? Does the Constitution forbid the payment of some part of the Constitutional license fee directly to the equally Constitutional state law revision commission? Or is it that such a commission cannot be chosen by a majority vote of all the members of the state bar? Or could it be that the Federal Constitution requires a separation of state powers according to which a state legislature can tax and set up commissions but a state judiciary cannot do these things?

5 In thirty-three States the legislature appoints Commissioners on Uniform State Laws. Handbook of the National Conference of Commissioners on Uniform State Laws (1960), at p. 211.

I end as I began. It is exceedingly regrettable that such specious contentions as appellant makes in this case should have resulted in putting the Integrated Bar under this cloud of partial unconstitutionality.

Mr. Justice WHITTAKER, concurring in result.

Believing that the State's requirement that a lawyer pay to its designee an annual fee of $15 as a condition of its grant, or of continuing its grant, to him of the special privilege (which is what it is) of practicing law in the State—which is really all that is involved here—does not violate any provision of the United States Constitution, I concur in the judgment.

****1850** Mr. Justice BLACK, dissenting.

I do not believe that either the bench, the bar or the litigants will know what has been decided in this case—certainly I do not. Two members of the Court, saying ***866** that 'the Constitutional issue is inescapably before us,' vote to affirm the holding of the Wisconsin Supreme Court that a State can, without violating the Federal Constitution, compel lawyers over their protest to pay dues to be used in part for the support of legislation and causes they detest. Another member, apparently agreeing that the constitutional question is properly here, votes to affirm the holding of the Wisconsin Supreme Court because he believes that a State may constitutionally require a lawyer to pay a fee to its 'designee' as a condition to granting him the 'special privilege' of practicing law, even though that 'designee,' over the lawyer's protest, uses part of the fee to support causes the lawyer detests. Two other members of the Court vote to reverse the judgment of the Wisconsin court on the ground that the constitutional question is properly here and the powers conferred on the Wisconsin State Bar by the laws of that State violate the First and Fourteenth Amendments. Finally, four members of the Court vote to affirm on the ground that the constitutional question is actually not here for decision at all. Thus the only proposition in this case for which there is a majority is that the constitutional question is properly here, and the five members of the Court who make up that majority express their views on this constitutional question. Yet a minority of four refuses to pass on the question and it is therefore left completely up in the air—the Court decides nothing. If ever there were two cases that should be set over for reargument in order for the Court to decide—or at least to make an orderly attempt to decide—the basic constitutional question involved in both of them, it is this case and the companion case of International Association of Machinists v. Street.[1] In this state of affairs, I find it necessary to set out my views on the questions which I think are properly presented and argued by the parties.

1 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141.

***867** In my judgment, this Court cannot properly avoid decision of the single, sharply defined constitutional issue which this case presents. The appellant filed a complaint in a Wisconsin Circuit Court, charging that he is being compelled by the State of Wisconsin, as a prerequisite to maintaining his status as a lawyer in good standing, to be a member of an association known as the State Bar of Wisconsin and to pay dues to that association; that he has paid these dues only under protest; that the State Bar of Wisconsin is using his money along with the moneys it has collected from other Wisconsin lawyers to engage in activities of a political and propagandistic nature in favor of objectives to which he is opposed and against objectives which he favors; and that, as a consequence of this compelled financial support of political views to which he is personally antagonistic, he is being deprived of rights guaranteed to him by the First and Fourteenth Amendments of the Federal Constitution. Upon demurrer to this complaint, the Circuit Court held that it must be dismissed without leave to amend because, in the opinion of that court, 'it would be impossible to frame a complaint so as to state facts sufficient to constitute a cause of action against either the State Bar of Wisconsin or the defendant Donohue.' [2]

2 The Circuit Court also found jurisdictional difficulties with appellant's complaint but it expressly declined to rest its decision upon the jurisdictional defects alone.

On appeal, the Supreme Court of Wisconsin, relying upon its powers of judicial notice, found as a fact that the State Bar does expend some of the moneys ****1851** it collects as dues to further and oppose legislation [3] and that court ***868** also accepted, at its full face value, the allegation of the complaint that many of these expenditures furthered views directly contrary to those held by the appellant. [4] The Wisconsin Supreme Court nevertheless affirmed the judgment of the trial court on the ground that the public interest in having 'public expression of the views of a majority of the lawyers of the state, with respect to legislation affecting the administration of justice and the practice of law * * * far outweighs the slight inconvenience to,' and hence any abridgment of the constitutional rights of, those who disagree with the views advocated by the State Bar. [5]

3 'This court takes judicial notice of the activities of the State Bar in the legislative field since its creation by this court in 1956. In every instance the legislative measures advocated or opposed have dealt with the administration of justice, court reform, and legal practice.' Lathrop v. Donohue, 10 Wis.2d 230, 239, 102 N.W.2d 404, 409. The scope of this finding is shown by the court's further statement in answer to appellant's contention that the State Bar also took positions on strictly substantive legislation: 'We do not deem that the State Bar should be compelled to refrain from taking a stand on a measure which does substantially deal with legal practice and the administration of justice merely because it also makes some changes in substantive law.' Ibid.

4 Thus, the Wisconsin court correctly stated the issue in this case: 'The only challenged interference with his liberty is the exaction of annual dues to the State Bar * * * part of which is used to advocate causes to which he is opposed.' Id., 10 Wis.2d 230, 242, 102 N.W.2d 404, 411.

5 Ibid. The Wisconsin Supreme Court agreed with the Circuit Court that there were jurisdictional difficulties with the suit as it was brought. But the Supreme Court, like the Circuit Court, did not rest its decision on these jurisdictional grounds. Even though it agreed that the Circuit Court did not properly have jurisdiction, it expressly affirmed the judgment of the Circuit Court which, as pointed out above, dismissed the complaint without leave to amend on the ground that no amendment would cure the defects in the merits of appellant's case.

The plurality decision to affirm the judgment of the Wisconsin courts on the ground that the issue in the case is not 'shaped * * * as leanly and as sharply as judicial judgment upon an exercise of * * * (state) power requires' is, in my judgment, wrong on at least two grounds. First of all, it completely denies the appellant an oppor ***869** tunity to amend his complaint so as to 'shape' the issue in a manner that would be acceptable to this Court. Appellant's complaint was dismissed by the Wisconsin courts, without giving him a chance to amend it and before he had an opportunity to bring out the facts in the case, solely because those courts believed that it would be impossible for him to allege any facts sufficient to entitle him to relief. The plurality now suggests, by implication, that the Wisconsin courts were wrong on this point and that appellant could possibly make out a case under his complaint. Why then is the case not remanded

to the Wisconsin courts in order that the appellant will have at least one opportunity to meet this Court's fastidious pleading demands? The opinions of the Wisconsin courts in this case indicate that the laws of that State—as do the laws in most civilized jurisdictions—permit amendments and clarifications of complaints where defects exist in the original complaint which can be cured. And even if Wisconsin law were to the contrary, it is settled by the decisions of this Court that a federal right cannot be defeated merely on the ground that the original complaint contained a curable defect. [6] On this point, the judgment of the Court affirming the dismissal of appellant's suit, insofar as that judgment rests upon the plurality opinion, seems to me to be totally without justification, ****1852** either in reason, in precedent or in justice. [7]

6 See, e.g., Brown v. Western R. of Alabama, 338 U.S. 294, especially at page 296, 70 S.Ct. 105, at page 106, 94 L.Ed. 100.

7 The authorities relied upon by the plurality opinion certainly do not support its position. The concurring opinion in United States v. C.I.O., 335 U.S. 106, 124—129, 68 S.Ct. 1349. 1358—1360, 92 L.Ed. 1849, does not suggest that a litigant who fails properly to 'shape' constitutional issues should be thrown out of court completely for his failure. And the decision of the Court in United States v. International Union, U.A.W.—C.I.O., 352 U.S. 567, 77 S.Ct. 529, 1 L.Ed.2d 763, plainly cannot be taken to justify such a disposition since that case was remanded for further proceedings.

***870** My second ground of disagreement with the plurality opinion is that I think we should consider and decide now the constitutional issue raised in this case. No one has suggested that this is a contrived or hypothetical lawsuit. Indeed, we have it on no less authority than that of the Supreme Court of Wisconsin that the Wisconsin State Bar does in fact use money extracted from this appellant under color of law to engage in activities intended to influence legislation. The appellant has alleged, in a complaint sworn to under oath, that many of these activities are in opposition to the adoption of legislation which he favors. In such a situation, it seems to me to be nothing more than the emptiest formalism to suggest that the case cannot be decided because the appellant failed to alleged, as precisely as four members of this Court think he should, what it is that the Bar does with which he disagrees. And it certainly seems unjust for the appellant to be thrown out of court completely without being given a chance to amend his complaint and for a judgment against him to be affirmed without consideration of the merits of his cause even though that judgment may later be held to constitute a complete bar to assertion of his First Amendment rights. Even if the complaint in this case had been drawn in rigid conformity to the meticulous requirements of the plurality, we would be presented with nothing but the very same question now before us: Can a State, consistently with the First and Fourteenth Amendments, force a person to support financially the activities of an organization in support of view to which he is opposed? Thus, the best, if not the only, reason I can think of for not resolving that question now is that a decision on the constitutional question in this case would make it impossible for the Court to rely upon the doctrine of avoidance with respect to that same constitutional ***871** question to justify its strained interpretation of the Railway Labor Act in the Street case. [8]

8 As I have indicated in my dissenting opinion in that case, I also think the Court went to extravagant lengths to avoid the constitutional issue in that case. Ante, 367 U.S. at pages 784—786, 81 S.Ct. at pages 1807—1808. And I think it clear that the Court would have no choice but to meet and decide the constitutional issue in Street if a decision on that issue were made in this case. See id., 367 U.S. at page 785, 81 S.Ct. at page 1808.

On the merits, the question posed in this case is, in my judgment, identical to that posed to but avoided by the Court in the Street case. Thus, the same reasons that led me to conclude that it violates the First Amendment for a union to use dues compelled under a union-shop agreement to advocate views contrary to those advocated by the workers paying the dues under protest lead me to the conclusion that an integrated bar cannot take the money of protesting lawyers and use it to support causes they are against. What I have said in the Street case would be enough for me to dispose of the issues in this case were it not for the contention which has been urged by the appellee throughout this case that there are distinguishing features that would justify the affirmance of this case even if the statute in the Street case were struck down as unconstitutional.

The appellee's contention in this respect rests upon two different arguments. The first of these is that the use of com pelled ****1853** dues by an integrated bar to further legislative ends contrary to the wishes of some of its members can be upheld under the so-called 'balancing test,' which permits abridgment of First Amendment rights so long as

that abridgment furthers some legitimate purpose of the State.[9] Under this theory, the appellee contends, ***872** abridgments of speech 'incidental' to an integrated bar must be upheld because the integrated bar performs many valuable services for the public. As pointed out above, the Wisconsin Supreme Court embraced this theory in express terms. And the concurring opinion of Mr. Justice HARLAN, though not purporting to distinguish the Street case, also adopts the case-by-case 'balancing' approach under which such a distinction as, indeed, any desired distinction is possible.

9 A complete statement of the arguments underlying the 'balancing test' is set out in American Communications Ass'n v. Douds, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925, in which this Court held that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment are outweighed by the power of Congress to regulate interstate commerce.

The 'balancing' argument here is identical to that which has recently produced a long line of liberty-stifling decisions in the name of 'self-preservation.'[10] The interest of the State in having 'public expression of the views of a majority of the lawyers' by compelling dissenters to pay money against their will to advocate views they detest is magnified to the point where it assumes overpowering proportions and appears to become almost as necessary a part of the fabric of our society as the need for 'self-preservation.' On the other side of the 'scales,' the interest of lawyers in being free from such state compulsion is first fragmentized into abstract, imaginary parts, then minimized part by part almost to the point of extinction, and finally characterized as being of a purely 'chimerical nature.' As is too often the case, when the cherished freedoms of the First Amendment emerge from this process, they are too weightless to have any substantial effect upon the constitutional scales and must therefore be sacrificed in order not to disturb what are conceived to be the more important interests of society.

10 See, e.g., Dennis v. United States, 341 U.S. 494, 509—511, 71 S.Ct. 857, 867—868, 95 L.Ed. 1137; Barenblatt v. United States, 360 U.S. 109, 127—128, 79 S.Ct. 1081, 1093, 3 L.Ed.2d 1115; Wilkinson v. United States, 365 U.S. 399, 411, 81 S.Ct. 567, 574, 5 L.Ed.2d 633.

I cannot agree that a contention arising from the abridgment of First Amendment freedoms which results ***873** from compelled support of detested views can properly be characterized as of a 'chimerical nature' or, in the words of the Wisconsin Supreme Court, as involving nothing more than a 'slight inconvenience.'[11] Quite the contrary, I can think of few plainer, more direct abridgments of the freedoms of the First Amendment than to compel persons to support candidates, parties, ideologies or causes that they are against. And, as stated many times before, I do not subscribe to the theory that abridgments of First Amendment freedoms can ever be permitted on a 'balancing' basis.[12] I reiterate my be lief ****1854** that the unequivocal language of the First Amendment was intended to mean and does mean that the Framers of the Bill of Rights did all of the 'balancing' that was to be done in this area. It is my firm belief that, in the long run, the continued existence of liberty in this country depends upon the abandonment of the constitutional doctrine that permits this Court to reweigh the values weighed by the Framers and thus to weaken the protections of the Bill of Rights. This case reaffirms that belief for it shows that the balancing test cannot be and will not be contained to apply only to those 'hard' cases which at least some members of this Court have regarded as involving the question of the power of this country to ***874** preserve itself. For I assume that no one would argue that the power at stake here is necessary to that end.

11 10 Wis.2d at page 242, 102 N.W.2d at page 411.

12 See, e.g., Scales v. United States, 367 U.S. 203, 259, 81 S.Ct. 1469, 1501, 6 L.Ed.2d 782 (dissenting opinion); Communist Party v. Subversive Activities Control Board, 367 U.S. 1, 137, 81 S.Ct. 1357, 1431, 6 L.Ed.2d 625 (dissenting opinion); In re Anastaplo, 366 U.S. 82, 110—112, 81 S.Ct. 978, 993—994, 6 L.Ed.2d 135 (dissenting opinion); Konigsberg v. State Bar of California, 366 U.S. 36, 62—71, 81 S.Ct. 997, 1013, 1017, 6 L.Ed.2d 105 (dissenting opinion); Braden v. United States, 365 U.S. 431, 441—446, 81 S.Ct. 584, 590—593, 5 L.Ed.2d 653 (dissenting opinion); Wilkinson v. United States, 365 U.S. 399, 422—423, 81 S.Ct. 567, 580, 5 L.Ed.2d 633 (dissenting opinion); Uphaus v. Wyman, 364 U.S. 388, 392—393, 81 S.Ct. 153, 159—160, 5 L.Ed.2d 148 (dissenting opinion); Barenblatt v. United States, 360 U.S. 109, 140—144, 79 S.Ct. 1081, 1100—1102, 3 L.Ed.2d 1115 (dissenting opinion); American Communications Ass'n v. Douds, 339 U.S. 382, 445—453, 70 S.Ct. 674, 707—711, 94 L.Ed. 925 (dissenting opinion).

Moreover, if I felt that I had the power to reweigh the 'competing' values involved, I would have no difficulty reaching the conclusion that the loss inflicted upon our free way of life by invasion of First Amendment freedoms brought about by the powers conferred upon the Wisconsin integrated bar far outweighs any state interest served by the exercise of those powers by that association. At stake here is the interest of the individual lawyers of Wisconsin in having full freedom to think their own thoughts, speak their own minds, support their own causes and wholeheartedly fight whatever they are against, as well as the interest of the people of Wisconsin and, to a lesser extent, the people of the entire country in maintaining the political independence of Wisconsin lawyers. [13] How is it possible that such formidable interests so vital to our free way of life can be said to be outweighed by any interest—much less the wholly imaginary interest urged here by the State which would have us believe that it will never know what its lawyers think about certain political questions if it cannot compel them to pay their money to support views they abhor? Certainly, I feel entirely confident in saying that the Framers of the First Amendment would never have struck the balance against freedom on the basis of such a demonstrably specious expediency.

13 Cf. Cohen v. Hurley, 366 U.S. 117, 138—150, 81 S.Ct. 954, 966—972, 6 L.Ed.2d 156 (dissenting opinion); In re Anastaplo, 366 U.S. 82, 114—116, 81 S.Ct. 978, 995—996, 6 L.Ed.2d 135 (dissenting opinion); Konigsberg v. State Bar of California, 366 U.S. 36, 73—74, 77—80, 81 S.Ct. 997, 1019, 1021—1022, 6 L.Ed.2d 105 (dissenting opinion).

In saying all this, I do not mean to suggest that the Wisconsin State Bar does not provide many useful and entirely lawful services. Quite the contrary, the record indicates that this integrated bar association, like other ***875** bar associations both integrated and voluntary, does provide such services. But I think it clear that these aspects of the Wisconsin State Bar are quite beside the point so far as this case is concerned. For a State can certainly insure that the members of its bar will provide any useful and proper services it desires without creating an association with power to compel members of the bar to pay money to support views to which they are opposed or to fight views they favor. Thus, the power of a bar association to advocate legislation at the expense of those who oppose such legislation is wholly separable from any legitimate function of an involuntary bar association and, therefore, even for those who subscribe to the balancing test, there is nothing to balance against this invasion of constitutionally protected rights.

The second ground upon which the appellee would have us distinguish compelled support of hated views as ****1855** prac ticed by an integrated bar from compelled support of such views as practiced by the unions involved in the Street case is that lawyers are somehow different from other people. This argument, though phrased in various ways, amounts to nothing more than the contention that the practice of law is a high office in our society which is conferred by the State as a privilege and that the State can, in return for this privilege, impose obligations upon lawyers that it could not impose upon those not given 'so high a privilege.' Were it not for this Court's recent decision in Cohen v. Hurley, [14] I would regard this ***876** contention as utterly frivolous. But, it is true that the Court did hold in the Cohen case that lawyers could be treated differently from other people, at least insofar as a constitutional privilege against self-incrimination is concerned. As I pointed out in my dissenting opinion in that case, it is a short step from that position to the position now urged in the concurring opinion of Mr. Justice WHITTAKER—that lawyers must also give up their constitutional rights under the First Amendment in return for the 'privilege' that the State has conferred upon them. [15]

14 366 U.S. 117, 81 S.Ct. 954, 6 L.Ed.2d 156. The decision of the New York Court of Appeals in that case was expressly rested in part upon the notion that the practice of law is a 'special privilege.' See id., 366 U.S. at pages 132—133, 81 S.Ct. at pages 963—964 (dissenting opinion). And I thought then, as I think now, that the decision of this Court upholding the judgment of the New York court placed 'the stamp of approval upon a doctrine that, if permitted to grow, as doctrines have a habit of doing, can go far toward destroying the independence of the legal profession and thus toward rendering that profession largely incapable of performing the very kinds of services for the public that most justify its existence.' Id., 366 U.S. at page 135, 81 S.Ct. at page 965 (dissenting opinion).

15 Id., 366 U.S. at pages 142—143, 81 S.Ct. at page 969 (dissenting opinion).

I do not believe that the practice of law is a 'privilege' which empowers Government to deny lawyers their constitutional rights. The mere fact that a lawyer has important

responsibilities in society does not require or even permit the State to deprive him of those protections of freedom set out in the Bill of Rights for the precise purpose of insuring the independence of the individual against the Government and those acting for the Government. What I said in the Cohen case is, in my judgment, equally applicable here:

'* * * (O)ne of the great purposes underlying the grant of those freedoms was to give independence to those who must discharge important public responsibilities. The legal profession, with responsibilities as great as those placed upon any group in our society, must have that independence. If it is denied them, they are likely to become nothing more than parrots of the views of whatever group weilds governmental power at the moment. Wherever that has happened in the world, the lawyer, as properly so called and respected, has ceased to perform the highest duty of ***877** his calling and has lost the affection and even the respect of the people.' [16]

16 Id., 366 U.S. at pages 138—139, 81 S.Ct. at page 966 (dissenting opinion).

As I see it, the single, sharply defined constitutional issue presented in this case does not raise a difficult problem. This appellant is not denying the power of the State of Wisconsin to provide that its bar shall engage in non-political and non-controversial activities or even the power of the State to provide that all lawyers shall pay a fee to support such activities. What he does argue, and properly I think, is that the State cannot compel him to pay his money to further the views of a majority or any other controlling percentage of the Wisconsin State Bar when that controlling group is trying to pass laws or advance political ****1856** causes that he is against. If the 'privilege' of being a lawyer renders that argument unsound, it is certainly one of the more burdensome privileges Government can confer upon one of its citizens. And lawyers might be well advised to reconsider the wisdom of encouraging the use of a slogan which, though high-sounding and noble in its outward appearance, apparently imposes heavy burdens upon their First Amendment freedoms.

I would reverse this case and direct the Supreme Court of Wisconsin to require refund of the dues exacted under protest from the appellant in order to permit the Wisconsin State Bar to advocate measures he is against and to oppose measures he favors. I think it plain that lawyers have at least as much protection from such compulsion under the Constitution as the Court is holding railroad workers have under the Railway Labor Act.

Mr. Justice DOUGLAS, dissenting.

The question in the present case concerns the power of a State to compel lawyers to belong to a statewide ***878** bar association, the organization commonly referred to in this country as the 'integrated bar.' There can be no doubt that lawyers, like doctors and dentists, can be required to pass examinations that test their character and their fitness to practice the profession. No question of that nature is presented. There is also no doubt that a State for cause shown can deprive a lawyer of his license. No question of that kind is involved in the present case. [1] The sole question is the extent of the power of a State over a lawyer who rebels at becoming a member of the integrated bar and paying dues to support activities that are offensive to him. Thus the First Amendment, made applicable to the States by the Fourteenth, is brought into play. And for the reasons stated by Mr. Justice BLACK, I think all issues in the case are ripe for decision.

1 A self-policing provision whereby lawyers were given the power to investigate and disbar their associates would raise under most, if not all, state constitutions the type of problem presented in Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570. See 1 Davis, Administrative Law Treatise, s 2.14.

If the State can compel all lawyers to join a guild, I see no reason why it cannot make the same requirement of doctors, dentists, and nurses. They too have responsibilities to the public; and they also have interests beyond making a living. The groups whose activities are or may be deemed affected with a public interest are indeed numerous. Teachers are an obvious example. Insurance agents, brokers, and pharmacists have long been under licensing requirements or supervisory regimes. As the interdependency of each person on the other increases with the complexities of modern society, the circle of people performing vital services increases. Precedents once established often gain momentum by the force of their existence. Doctrine has a habit of following the path of inexorable logic.

***879** We established no such precedent in Railway Employes' Dept. v. Hanson, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112. We dealt there only with a problem in collective bargaining, viz., is it beyond legislative competence to require all who benefit from the process of collective bargaining and enjoy its fruits to contribute to its costs? We held that the evil of those who are 'free riders' may be so disruptive

of labor relations and therefore so fraught with danger to the movement of commerce that Congress has the power to permit a union-shop agreement that exacts from each beneficiary his share of the cost of getting increased wages and improved working conditions. The power of a State to manage its internal affairs by requiring a union-shop agreement would seem to be as great.

In the Hanson case we said, to be sure, that if a lawyer could be required to join ****1857** an integrated bar, an employee could be compelled to join a union shop. But on reflection the analogy fails.

Of course any group purports to serve a group cause. A medical association that fights socialized medicine protects the fees of the profession. Yet not even an immediate cause of that character is served by the integrated bar. Its contribution is in policing the members of the legal profession and in promoting what the majority of the Bar thinks is desirable legislation.

The Supreme Court of Wisconsin said that the integrated bar, unlike a voluntary bar association, was confined in its legislative activities. Though the Wisconsin Bar was active in the legislative field, it was restricted to administration of justice, court reform, and legal practice. The court however added:

'The plaintiff complains that certain proposed legislation, upon which the State Bar has taken a stand, embody changes in substantive law, and points to the recently enacted Family Code. Among other things, such measure made many changes in divorce ***880** procedure, and, therefore, legal practice. We do not deem that the State Bar should be compelled to refrain from taking a stand on a measure which does substantially deal with legal practice and the administration of justice merely because it also makes some changes in substantive law.' 10 Wis.2d 230, 239, 102 N.W.2d 404, 409.

It is difficult for me to see how the State can compel even that degree of subservience of the individual to the group.

It is true that one of the purposes of the State Bar Association is 'to safeguard the proper professional interests of the members of the bar.' State Bar of Wisconsin, Rule 1, s 2, W.S.A. ch. 256 Appendix. In this connection, the association has been active in exploiting the monopoly position given by the licensed character of the profession. Thus, the Bar has compiled and published a schedule of recommended minimum fees. See Wis.Bar Bull., Aug. 1960, p. 40. Along the same line, the Committee on Unauthorized Practice of the Law, along with a Committee on Inter-professional and Business Relations, has been set up to police activities by nonprofessionals within 'the proper scope of the practice of law.' State Bar of Wisconsin, By-Laws, Art. IV, ss 8, 11.

Yet this is a far cry from the history which stood behind the decision of Congress to foster the well-established institution of collective bargaining as one of the means of preserving industrial peace. That history is partially crystallized in the language of the Wagner and Taft-Hartley Acts: 'Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce * * * by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and em ***881** ployees.' National Labor Relations Act, as amended by the Taft-Hartley Act, 61 Stat. 136, 137, 29 U.S.C. s 151, 29 U.S.C.A. s 151. It was with this history in mind that we spoke when we said that 'One would have to be blind to history to assert that trade unionism did not enhance and strengthen the right to work.' Railway Employes' Dept. v. Hanson, supra, 351 U.S. at page 235, 76 S.Ct. at page 719.

Nor can the present association be defended on grounds that it renders only public services.

If we had here a law which required lawyers to contribute to a fund out of which clients would be paid in case attorneys turned out to be embezzlers, [2] the ****1858** present objection might not be relevant. in that case, one risk of the profession would be distributed among all members of the group. The fact that a dissident member did not feel he had within him the seeds of an embezzler might not bar a levy on the whole profession for one sad but notorious risk of the profession. We would also have a different case if lawyers were assessed to raise money to finance the defense of indigents. Cf. In re Florida Bar, Fla., 62 So.2d 20, 24. That would be an imposition of a duty on the calling which partook of service to the public. Here the objection strikes deeper. An attorney objects to a forced association with a group that demands his money for the promotion of causes with which he disagrees, from which he obtains no gain, and which is not part and parcel of service owing litigants or courts.

2 See 84 Rep.Am.Bar Assn., pp. 365—367, 513—515, 604—606 (1959); Voorhees, A Progress Report: The Clients' Security Fund Program, 46 Am.Bar Assn.Jour., 496 (1960); Voorhees, Should The Bar Adopt Client Security Funds?, 28 Jour.Bar

Assn.Kan. 5 (1959). As of May 1961, Arizona, Colorado, Connecticut, New Hampshire, New Mexico, Ohio, Pennsylvania, and Washington have such funds.

The right of association is an important incident of First Amendment rights. The right to belong—or not to ***882** belong—is deep in the American tradition. Joining is one method of expression. This freedom of association is not an absolute. For as I have noted in my opinion in International Assn. of Machinists v. Street, ante, 367 U.S. at page 775, 81 S.Ct. at page 1803, decided this day, the necessities of life put us into relations with others that may be undesirable or even abhorrent, if individual standards were to obtain. Yet if this right is to be curtailed by law, if the individual is to be compelled to associate with others in a common cause, then I think exceptional circumstances should be shown. I would treat laws of this character like any that touch on First Amendment rights. Congestion of traffic, street fights, riots and such may justify curtailment of opportunities or occasions to speak freely. Cf. Chaplinsky v. State of New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031. But when those laws are sustained, we require them to be 'narrowly drawn' (Cantwell v. State of Connecticut, 310 U.S. 296, 311, 60 S.Ct. 900, 84 L.Ed. 1213) so as to be confined to the precise evil within the competence of the legislature. See Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231; Louisiana ex rel. Gremillion v. N.A.A.C.P., 366 U.S. 293, 81 S.Ct. 1333, 6 L.Ed.2d 301. There is here no evil shown. It has the mark of 'a lawyer class or caste'—the system of 'a self-governing and self-disciplining bar' such as England has. [3] The pattern of this legislation is regimentation. The inroads of an integrated bar on the liberty and freedom of lawyers to espouse such causes as they choose was emphasized by William D. Guthrie [4] of the New York Bar: [5]

3 Guthrie, The Proposed Compulsory Incorporation of the Bar, 4 N.Y.L.Rev. 223, 231 (1926).

4 See Swaine, The Cravath Firm (1946), Vol. I, pp. 359, 518.

5 Guthrie, supra, note 3, 234—235.

'The idea seems to be, contrary to all human experience, that if power be vested in this at present unknown and untried as well as indifferent outside body, holding themselves aloof from their profession, they will somehow become inspired with a high pro ***883** fessional sentiment or sense of duty and cooperation and will unselfishly exercise their majority power for the good of their profession and the public, that they can be trusted to choose as their officers and leaders lawyers of the type who are now leaders, that the responsibility of power will necessarily sober and elevate their minds, and finally that democracy calls for the rule of the majority.

****1859** 'Thus, the traditions and ethics of our great profession would be left to the mercy of mere numbers officially authorized to speak for us! This would be adopting all the vices of democracy without the reasonable hope in common sense of securing any of its virtues. It would be forcing the democratic dogma of mass or majority rule to a dangerous and pernicious extreme.

'Although in political democrary the rule of the majority is necessary, the American system of democracy is based upon the recognition of the imperative necessity of limitations upon the will of the majority. In the proposed compulsory or involuntary incorporation of the bar, there would be no limitation whatever, and the best sentiments and traditions of the profession, of the public-spirited and highminded lawyers who are now active in the voluntary bar associations of the state, could be wholly and wantonly disregarded and overruled.' [6]

6 Compare with this the language of the court below in this case: '(I)t promotes the public interest to have public expression of the views of a majority of the lawyers of the state, with respect to legislation affecting the administration of justice and the practice of law, the same to be voiced through their own democratically chosen representatives comprising the board of governors of the (Integrated) State Bar.' 10 Wis.2d 230, 242, 102 N.W.2d 404, 411.

This regimentation appears in humble form today. Yet we know that the Bar and Bench do not move to a single ***884** 'nonpartisan' objective. The obvious fact that they are not so motivated is plain from Cohen v. Hurley, 366 U.S. 117, 81 S.Ct. 954, 6 L.Ed.2d 156, which we decided only the other day. Once we approve this measure, we sanction a device where men and women in almost any profession or calling can be at least partially regimented behind causes which they oppose. I look on the Hanson case as a narrow exception to be closely confined. Unless we so treat it, we practically give carte blanche to any legislature to put at least professional people into goose-stepping brigades. [7] ***885** Those brigades are not compatible with the First Amendment.

While the legislature has few limits where strictly social legislation is concerned (Giboney v. Empire Storage Co., 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834; ****1860** Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519), the First Amendment applies strictures designed to keep our society from becoming moulded into patterns of conformity which satisfy the majority.

7 A current observer has commented on the results of the regimented Bar in England:

'Britain is moving towards a dangerous dictatorship not only in journalism, wireless, and television, but in finance and law. The immense groups controlling financial operations are becoming more and more interlocked and have an increasing tendency to cover up each other's errors.

'The great firms of solicitors are less and less inclined to offend the powerful financial houses which place the biggest business; and if dishonesty is alleged they all too often refuse 'to act' if this should involve one of the great interests upon which the big and profitable business of our times depends.

'Slowly, dangerously, and without the public fully realising what is happening, a nation of great power bottled up in a tiny geographical area is being brought within the grip of a minority of extremely powerful men whose genius is to deny the smallest pretension to power, but who, in fact, are wholly ruthless in a persistent search for power.

'In this search, although money is vital, they are ready to be Radical in many ways—particularly in the destruction of all rivalry for influence which might spring from a widespread continuity of wealth in the hands of proprietors of family businesses or land.

'To destroy this movement towards Press monopoly and financial 'cover-up,' it will be necessary for individuals still preserved from 'take-over' to support every form of independent journalism and finance. Unhappily, in the field of journalism the smaller groups are so afraid of worse than already threatens, that the tendency is towards surrender. This must be stopped.' The Weekly Review, Feb. 3, 1961, pp. 1, 2.

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110 S.Ct. 2228
Supreme Court of the United States

Eddie KELLER, et al., Petitioners
v.
STATE BAR OF CALIFORNIA et al.

No. 88–1905.
|
Argued Feb. 27, 1990.
|
Decided June 4, 1990.

Synopsis
Attorneys brought action challenging use of dues of State Bar of California to finance certain ideological or political activities. The Superior Court, Sacramento County, Cecchettini, J., granted summary judgment for Bar, and appeal was taken. The Court of Appeal, 226 Cal.Rptr. 448,reversed. Review was granted, superseding the opinion of the California Court of Appeal. The Supreme Court, 47 Cal.3d 1152, 255 Cal.Rptr. 542, 767 P.2d 1020, reversed and remanded. On certiorari review, the Supreme Court, Chief Justice Rehnquist, held that State Bar's use of compulsory dues to finance political and ideological activities with which members disagreed violated their First Amendment right of free speech when such expenditures were not necessarily or reasonably incurred for purpose of regulating legal profession or improving quality of legal services.

Reversed and remanded.

Procedural Posture(s): Motion for Summary Judgment.

***1 **2229** *Syllabus* *

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Respondent State Bar of California (State Bar) is an "integrated bar"—*i.e.,* an association of attorneys in which membership and dues are required as a condition of practicing law—created under state law to regulate the State's legal profession. In fulfilling its broad statutory mission to "promote the improvement of the administration of justice," the Bar uses its membership dues for self-regulatory functions, such as formulating rules of professional conduct and disciplining members for misconduct. It also uses dues to lobby the legislature and other governmental agencies, file *amicus curiae* briefs in pending cases, hold an annual delegates conference for the debate of current issues and the approval of resolutions, and engage in educational programs. Petitioners, State Bar members, brought suit in state court claiming that through these latter activities the Bar expends mandatory dues payments to advance political and ideological causes to which they do not subscribe, in violation of their First and Fourteenth Amendment rights to freedom of speech and association. They requested, *inter alia,* an injunction restraining the Bar from using mandatory dues or its name to advance political and ideological causes or beliefs. The court granted summary judgment to the Bar on the grounds that it is a governmental agency and therefore permitted under the First Amendment to engage in the challenged activities. The Court of Appeal reversed, holding that, while the Bar's regulatory activities were similar to those of a government agency, its "administration-of-justice" functions were more akin to the activities of a labor union. Relying on the analysis of *Abood v. Detroit Bd. of* ***2** *Education,* 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261—which prohibits the agency-shop dues of dissenting nonunion employees from being used to support political and ideological union causes that are unrelated to collective-bargaining activities—the court held that the Bar's activities could be financed from mandatory dues only if a particular action served a state interest important enough to overcome the interference with dissenters' First Amendment rights. The State Supreme Court reversed, reasoning that the Bar was a "government agency" that could use its dues for any purpose within the scope of its statutory authority, and that subjecting the Bar's activities to First Amendment scrutiny would place an "extraordinary ****2230** burden" on its statutory mission. With the exception of certain election campaigning, the court found that all of the challenged activities fell within the Bar's statutory authority.

Held:

1. The State Bar's use of petitioners' compulsory dues to finance political and ideological activities with which petitioners disagree violates their First Amendment right of free speech when such expenditures are not necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services. Pp. 2233–2238.

(a) The State Supreme Court's determination that the State Bar is a "government agency" for the purposes of state law is not binding on this Court when such a determination is essential to the decision of a federal question. The State Bar is not a typical "government agency." The Bar's principal funding comes from dues levied on its members rather than from appropriations made by the legislature; its membership is composed solely of lawyers admitted to practice in the State; and its services by way of governance of the profession are essentially advisory in nature, since the ultimate responsibility of such governance is reserved by state law to the State Supreme Court. By contrast, there is a substantial analogy between the relationship of the Bar and its members and that of unions and their members. Just as it is appropriate that employees who receive the benefit of union negotiation with their employer pay their fair share of the cost of that process by paying agency-shop dues, it is entirely appropriate that lawyers who derive benefit from the status of being admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort. The State Bar was created, not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession. These differences between the State Bar and traditional government agencies render unavailing respondents' argument that it is not subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions. Pp. 2234–2236.

***3** b) *Abood* cannot be distinguished on the ground that the compelled association in the context of labor unions serves only a private economic interest in collective bargaining while the Bar serves more substantial public interests. In fact, the legislative recognition that the agency-shop arrangements serve vital national interests in preserving industrial peace indicates that they serve a substantial public interest as well. It is not possible to determine that the Bar's interests outweigh these other interests sufficiently to produce a different result here. P. 2236.

(c) The guiding standard for determining permissible Bar expenditures relating to political or ideological activities is whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services. Precisely where the line falls between permissible and impermissible dues-financed activities will not always be easy to discern. But the extreme ends of the spectrum are clear: Compulsory dues may not be used to endorse or advance a gun control or nuclear weapons freeze initiative, but may be spent on activities connected with disciplining Bar members or proposing the profession's ethical codes. Pp. 2236–2237.

(d) Since the Bar is already required to submit detailed budgets to the state legislature before obtaining approval to set annual dues, the State Supreme Court's assumption that complying with *Abood* would create an extraordinary burden for the Bar is unpersuasive. Any burden that might result is insufficient to justify contravention of a constitutional mandate, and unions have operated successfully within the boundaries of *Abood* procedures for over a decade. An integrated bar could meet its *Abood* obligation by adopting the sort of procedures described in ****2231** *Teachers v. Hudson,* 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232. Questions whether alternative procedures would also satisfy the obligation should be left for consideration upon a more fully developed record. Pp. 2237–2238.

2. Petitioners' freedom of association claim based on the State Bar's use of its name to advance political and ideological causes or beliefs will not be addressed by this Court in the first instance. P. 2238.

47 Cal.3d 1152, 255 Cal.Rptr. 542, 767 P.2d 1020 (1989), reversed and remanded.

REHNQUIST, C.J., delivered the opinion for a unanimous Court.

Attorneys and Law Firms

Anthony T. Caso argued the cause for petitioners. With him on the briefs were *Ronald A. Zumbrun* and *John H. Findley.*

Seth M. Hufstedler argued the cause for respondents. With him on the brief were *Robert S. Thompson,* ***4** *Laurie D. Zelon, Judith R. Starr, Herbert M. Rosenthal,* and *Diane Yu.**

* Briefs of *amici curiae* urging reversal were filed for the Ad Hoc Committee Opposing Lobbying and Certain Other Activities of a Mandatory Bar by *James J. Bierbower;* for the American Civil Liberties Union by *Steven R. Shapiro* and *John A. Powell;* for the National Right to Work Legal Defense Foundation by *Edwin Vieira;* for the Washington Legal Foundation et al. by *Daniel J. Popeo, Paul D. Kamenar,*

and *John C. Scully;* for Robert E. Gibson by *Herbert R. Kraft;* for Trayton L. Lathrop, *pro se;* and for Joseph W. Little, *pro se.*

Briefs of *amici curiae* urging affirmance were filed for the American Bar Association by *L. Stanley Chauvin, Jr., Carter G. Phillips,* and *Mark D. Hopson;* for the American Federation of Labor and Congress of Industrial Organizations by *Marsha S. Berzon* and *Laurence Gold;* for the Beverly Hills Bar Association et al. by *Ellis J. Horvitz* and *Peter Abrahams;* for the California Legislature by *Bion M. Gregory;* for the Lawyers' Committee for the Administration of Justice by *James J. Brosnahan;* for the State Bar of Michigan et al. by *Michael Franck* and *Michael J. Karwoski;* and for the State Bar of Wisconsin et al. by *John S. Skilton, Barry S. Richard,* and *Stephen L. Tober.*

Steven Levine, *pro se,* filed a brief of *amicus curiae.*

Opinion

Chief Justice REHNQUIST delivered the opinion of the Court.

Petitioners, members of respondent State Bar of California, sued that body, claiming its use of their membership dues to finance certain ideological or political activities to which they were opposed violated their rights under the First Amendment of the United States Constitution. The Supreme Court of California rejected this challenge on the grounds that the State Bar is a state agency and, as such, may use the dues for any purpose within its broad statutory authority. We agree that lawyers admitted to practice in the State may be required to join and pay dues to the State Bar, but disagree as to the scope of permissible dues-financed activities in which the State Bar may engage.

The State Bar is an organization created under California law to regulate the State's legal profession. [1] It is ***5** an entity commonly referred to as an "integrated bar"—an association of attorneys in which membership and dues are required as a condition of practicing law in a State. Respondent's broad statutory mission is to "promote 'the improvement of the administration of justice.' " 47 Cal.3d 1152, 1156, 255 Cal.Rptr. 542, 543, 767 P.2d 1020, 1021 (1989) (quoting Cal.Bus. & Prof.Code Ann. § 6031(a) (West Supp.1990)). The association performs a variety of functions such as "examining applicants for admission, formulating rules of professional conduct, disciplining members for misconduct, preventing unlawful practice of the law, and engaging in study and recommendation of changes in procedural law and improvement of the administration of justice." 47 Cal.3d, at 1159, 255 Cal.Rptr., at 545–546, 767 P.2d, at 1023–1024 (internal quotation marks omitted). Respondent also engages in a number of other activities which are the subject of the dispute in this case. "[T]he State Bar for many years has lobbied the Legislature and other governmental agencies, filed amicus curiae briefs in pending cases, held an annual conference of delegates at which issues of current interest are debated and resolutions approved, and engaged in a variety of education programs." *Id.,* at 1156, 255 Cal.Rptr., at 543–544, 767 P.2d, at 1021–1022. These activities are financed principally through the use of membership dues.

1 The State Bar's Board of Governors is also a respondent in this action. Accordingly, the terms "respondent" or "State Bar" will refer either to the organization itself, or the organization and its governing board, as the context warrants.

Petitioners, 21 members of the State Bar, sued in state court claiming that through these activities respondent expends mandatory dues payments to advance political and ideological causes to which they do not subscribe. [2] Asserting ***6** that their compelled ****2232** financial support of such activities violates their First and Fourteenth Amendment rights to freedom of speech and association, petitioners requested, *inter alia,* an injunction restraining respondent from using mandatory bar dues or the name of the State Bar to advance political and ideological causes or beliefs. The trial court granted summary judgment to respondent on the grounds that it is a governmental agency and therefore permitted under the First Amendment to engage in the challenged activities. The California Court of Appeal reversed, holding that while respondent's regulatory activities were similar to those of a government agency, its "administration-of-justice" functions were more akin to the activities of a labor union. The court held that under our opinion in *Abood v. Detroit Board of Education,* 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), such activities "could be financed from mandatory dues only if the particular action in question served a state interest important enough to overcome the interference with dissenters' First Amendment rights." 47 Cal.3d, at 1159, 255 Cal.Rptr, at 545, 767 P.2d, at 1023.

2 Some of the particular activities challenged by petitioners were described in the complaint as follows:

(1) Lobbying for or against state legislation prohibiting state and local agency employers from requiring employees to take polygraph tests; prohibiting possession of armor-piercing handgun ammunition; creating an unlimited right of action to sue anybody causing air pollution; creating criminal sanctions for violation of laws pertaining to the display for sale of drug paraphernalia to minors; limiting the right to individualized education programs for students in need of special education; creating an unlimited exclusion from gift tax for gifts to pay for education tuition and medical care; providing that laws providing for the punishment of life imprisonment without parole shall apply to minors tried as adults and convicted of murder with a special circumstance; deleting the requirement that local government secure approval of the voters prior to constructing low-rent housing projects; requesting Congress to refrain from enacting a guest-worker program or from permitting the importation of workers from other countries;

(2) Filing *amicus curiae* briefs in cases involving the constitutionality of a victim's bill of rights; the power of a workers' compensation board to discipline attorneys; a requirement that attorney-public officials disclose names of clients; the disqualification of a law firm; and

(3) The adoption of resolutions by the Conference of Delegates endorsing a gun control initiative; disapproving the statements of a United States senatorial candidate regarding court review of a victim's bill of rights; endorsing a nuclear weapons freeze initiative; opposing federal legislation limiting federal-court jurisdiction over abortions, public school prayer, and busing. App. 9–13.

The Supreme Court of California reversed the Court of Appeal by a divided vote. The court reasoned that respondent's ***7** status as a public corporation, as well as certain of its other characteristics, made it a "government agency." It also expressed its belief that subjecting respondent's activities to First Amendment scrutiny would place an "extraordinary burden" on its mission to promote the administration of justice. *Id.,* at 1161–1166, 255 Cal.Rptr., at 547–550, 767 P.2d, at 1025–1028. The court distinguished other cases subjecting the expenditures of state bar associations to First Amendment scrutiny, see, *e.g., Gibson v. The Florida Bar,* 798 F.2d 1564 (CA11 1986), on the grounds that none of the associations involved in those cases rested "upon a constitutional and statutory structure comparable to that of the California State Bar. None involves an extensive degree of legislative involvement and regulation." 47 Cal.3d, at 1167, 255 Cal.Rptr., at 551, 767 P.2d, at 1029. The court concluded that "the State Bar, considered as a government agency, may use dues for any purpose within the scope of its statutory authority." *Id.,* at 1168, 255 Cal.Rptr., at 552, 767 P.2d, at 1030. With the exception of certain election campaigning conducted by respondent and its president, the court found that all of respondent's challenged activities fell within its statutory authority. *Id.,* at 1168–1173, 255 Cal.Rptr., at 552–555, 767 P.2d, at 1030–1033. We granted certiorari, 493 U.S. 806, 110 S.Ct. 46, 107 L.Ed.2d 15 (1989), to consider petitioners' First Amendment claims. We now reverse and remand for further proceedings.

In *Lathrop v. Donohue,* 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961), a Wisconsin lawyer claimed that he could not constitutionally be compelled to join and financially support a state bar association which expressed opinions on, and attempted to influence, legislation. Six Members of this Court, relying on *Railway Employes v. Hanson,* 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956), rejected this claim.

> ****2233** "In our view the case presents a claim of impingement upon freedom of association no different from that which we decided in [*Hanson*]. We there held that § 2, Eleventh of the Railway Labor Act ... did not on its face ***8** abridge protected rights of association in authorizing union-shop agreements between interstate railroads and unions of their employees conditioning the employees' continued employment on payment of union dues, initiation fees and assessments.... In rejecting Hanson's claim of abridgment of his rights of freedom of association, we said, 'On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar.' 351 U.S., at 238 [76 S.Ct., at 721]. Both in purport and in practice the bulk of State Bar activities serve the function, or at least so Wisconsin might reasonably believe, of 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, without any reference to the political process. It cannot be denied that this is a legitimate end of state policy. We think that the Supreme Court of Wisconsin, in order to further the State's legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving

> the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity. Given the character of the integrated bar shown on this record, in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, we are unable to find any impingement upon protected rights of association." *Lathrop,* 367 U.S., at 842–843, 81 S.Ct., at 1837–1838 (plurality opinion) (footnote omitted).

Justice Harlan, joined by Justice Frankfurter, similarly concluded that "[t]he *Hanson* case ... decided by a unanimous Court, surely lays at rest all doubt that a State may constitutionally condition the right to practice law upon membership in an integrated bar association, a condition fully as justified ***9** by state needs as the union shop is by federal needs." *Id.,* at 849, 81 S.Ct., at 1841 (opinion concurring in judgment).

The *Lathrop* plurality emphasized, however, the limited scope of the question it was deciding: "[Lathrop's] compulsory enrollment imposes only the duty to pay dues.... We therefore are confronted, as we were in [*Hanson*], only with a question of compelled financial support of group activities, not with involuntary membership in any other aspect." *Id.,* at 827–828, 81 S.Ct., at 1830 (footnote omitted). Indeed, the plurality expressly reserved judgment on Lathrop's additional claim that his free speech rights were violated by the Wisconsin Bar's use of his mandatory dues to support objectionable political activities, believing that the record was not sufficiently developed to address this particular claim. [3] Petitioners here present this very claim for decision, contending that the use of their compulsory dues to finance political and ideological activities of the State Bar with which they disagree violates their rights of free speech guaranteed by the First Amendment.

3 Justice Harlan would have reached this claim and decided that it lacked merit. See *Lathrop v. Donohue,* 367 U.S., at 848–865, 81 S.Ct., at 1840–1850.

In *Abood v. Detroit Board of Education,* 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), the Court confronted the issue whether, consistent with the First Amendment, agency-shop dues of nonunion public employees could be used to support political and ideological causes of the union which were unrelated to collective-bargaining activities. We held that while the Constitution did not prohibit a union from spending "funds for the expression of political views ... or toward ****2234** the advancement of other ideological causes not germane to its duties as collective-bargaining representative," the Constitution did require that such expenditures be "financed from charges, dues, or assessments paid by employees who [did] not object to advancing those ideas and who [were] not coerced into doing so against their will by the threat of loss of governmental employment." *Id.,* at 235–236, 97 S.Ct., at 1799–1800. The Court noted that just as ***10** prohibitions on making contributions to organizations for political purposes implicate fundamental First Amendment concerns, see *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), "compelled ... contributions for political purposes works no less an infringement of ... constitutional rights." *Abood, supra,* at 234, 97 S.Ct., at 1799. The Court acknowledged Thomas Jefferson's view that " 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.' " 431 U.S., at 234–235, n. 31, 97 S.Ct., at 1799–1800, n. 31 (quoting I. Brant, James Madison: The Nationalist 354 (1948)). While the decision in *Abood* was also predicated on the grounds that a public employee could not be compelled to relinquish First Amendment rights as a condition of public employment, see 431 U.S., at 234–236, 97 S.Ct., at 1799–1800, in the later case of *Ellis v. Railway Clerks,* 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984), the Court made it clear that the principles of *Abood* apply equally to employees in the private sector. See 466 U.S., at 455–457, 104 S.Ct., at 1895–1897.

Although several federal and state courts have applied the *Abood* analysis in the context of First Amendment challenges to integrated bar associations, see 47 Cal.3d, at 1166, 255 Cal.Rptr., at 550, 767 P.2d, at 1028 (collecting cases), the California Supreme Court in this case held that respondent's status as a regulated state agency exempted it from any constitutional constraints on the use of its dues. "If the bar is considered a governmental agency, then the distinction between revenue derived from mandatory dues and revenue from other sources is immaterial. A governmental agency may use unrestricted revenue, whether derived from taxes, dues, fees, tolls, tuition, donation, or other sources, for any purposes within its authority." *Id.,* at 1167, 255 Cal.Rptr., at 551, 767 P.2d, at 1029. Respondent also urges this position, invoking the so-called "government speech" doctrine: "The government must take substantive positions and decide disputed issues to govern.... So long as it bases its actions on legitimate goals, government may speak despite citizen disagreement with the content of its message,

for government is not required to be content-neutral." Brief for ***11** Respondents 16. See also *Abood, supra,* 431 U.S., at 259, n. 13, 97 S.Ct., at 1811, n. 13 (Powell, J., concurring in judgment) ("[T]he reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people").

Of course the Supreme Court of California is the final authority on the "governmental" status of the State Bar of California for purposes of state law. But its determination that respondent is a "government agency," and therefore entitled to the treatment accorded a governor, a mayor, or a state tax commission, for instance, is not binding on us when such a determination is essential to the decision of a federal question. The State Bar of California is a good deal different from most other entities that would be regarded in common parlance as "governmental agencies." Its principal funding comes, not from appropriations made to it by the legislature, but from dues levied on its members by the board of governors.[4] Only lawyers ****2235** admitted to practice in the State of California are members of the State Bar, and all 122,000 lawyers admitted to practice in the State must be members. Respondent undoubtedly performs important and valuable services for the State by way of governance of the profession, but those services are essentially advisory in nature. The State Bar does not admit anyone to the practice of law, it does not finally disbar or suspend anyone, and it does not ultimately establish ethical codes of conduct. All of those functions are reserved by California law to the State Supreme Court. See Cal.Bus. & Prof.Code Ann. § 6064 (West 1974) (admissions); § 6076 (rules of professional conduct); Cal.Bus. ***12** & Prof.Code Ann. § 6100 (West Supp.1990) (disbarment or suspension).

4 In 1982, the year the complaint in this action was filed, approximately 85% of the State Bar's general funding came from membership dues with the balance made up of fees charged for various bar activities. The State Bar's general funds support the bulk of its activities with the exception of the State Bar's applicant admission functions and other miscellaneous activity. The State Bar's admission functions are not funded from general revenues but rather from fees charged to applicants taking the bar examination. App. 76–77.

There is, by contrast, 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. The reason behind the legislative enactment of "agency-shop" laws is to prevent "free riders"—those who receive the benefit of union negotiation with their employers, but who do not choose to join the union and pay dues—from avoiding their fair share of the cost of a process from which they benefit. The members of the State Bar concededly do not benefit as directly from its activities as do employees from union negotiations with management, but the position of the organized bars has generally been that they prefer a large measure of self-regulation to regulation conducted by a government body which has little or no connection with the profession. The plan established by California for the regulation of the profession is for recommendations as to admission to practice, the disciplining of lawyers, codes of conduct, and the like to be made to the courts or the legislature by the organized bar. It is entirely appropriate that all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort.

But the very specialized characteristics of the State Bar of California discussed above served to distinguish it from the role of the typical government official or agency. Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making governmental decisions were not free to speak for themselves in the process. If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over ***13** issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed. Cf. *United States v. Lee,* 455 U.S. 252, 260, 102 S.Ct. 1051, 1056, 71 L.Ed.2d 127 (1982) ("The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief").

The State Bar of California was created, not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession. Its members and officers are such not because they are citizens or voters, but because they are lawyers. We think that these differences between the State Bar, on the one hand, and traditional government agencies and officials, on the other hand, render unavailing respondent's

argument that it is not subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees.

****2236** Respondent would further distinguish the two situations on the grounds that the compelled association in the context of labor unions serves only a private economic interest in collective bargaining, while the State Bar serves more substantial public interests. But legislative recognition that the agency-shop arrangements serve vital national interests in preserving industrial peace, see *Ellis,* 466 U.S., at 455–456, 104 S.Ct., at 1895–1896, indicates that such arrangements serve substantial public interests as well. We are not possessed of any scales which would enable us to determine that the one outweighs the other sufficiently to produce a different result here.

Abood held that a union could not expend a dissenting individual's dues for ideological activities not "germane" to the purpose for which compelled association was justified: collective bargaining. Here the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services. ***14** The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity. The difficult question, of course, is to define the latter class of activities.

Construing the Railway Labor Act in *Ellis, supra,* we held:

> "[W]hen employees such as petitioners object to being burdened with particular union expenditures, the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit." *Id.,* at 448, 104 S.Ct., at 1892.

We think these principles are useful guidelines for determining permissible expenditures in the present context as well. Thus, the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or "improving the quality of the legal service available to the people of the State." *Lathrop,* 367 U.S., at 843, 81 S.Ct., at 1838 (plurality opinion).

The Supreme Court of California decided that most of the activities complained of by petitioners were within the scope of the State Bar's statutory authority and were therefore not only permissible but could be supported by the compulsory dues of objecting members. The Supreme Court of California quoted the language of the relevant statute to the effect ***15** that the State Bar was authorized to " 'aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice.' " 47 Cal.3d, at 1169, 255 Cal.Rptr., at 552, 767 P.2d, at 1030. Simply putting this language alongside our previous discussion of the extent to which the activities of the State Bar may be financed from compulsory dues might suggest that there is little difference between the two. But there is a difference, and that difference is illustrated by the allegations in petitioners' complaint as to the kinds of State Bar activities which the Supreme Court of California has now decided may be funded with compulsory dues.

Petitioners assert that the State Bar has engaged in, *inter alia,* lobbying for or against state legislation (1) prohibiting state and local agency employers from requiring employees to take polygraph tests; (2) prohibiting possession of armor-piercing handgun ammunition; (3) creating an unlimited right of action to sue anybody causing ****2237** air pollution; and (4) requesting Congress to refrain from enacting a guest-worker program or from permitting the importation of workers from other countries. Petitioners' complaint also alleges that the conference of delegates funded and sponsored by the State Bar endorsed a gun control initiative, disapproved statements of a United States senatorial candidate regarding court review of a victim's bill of rights, endorsed a nuclear weapons freeze initiative, and opposed federal legislation limiting federal-court jurisdiction over abortions, public school prayer, and busing. See n. 2, *supra.*

Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisers to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be

easy to discern. But the extreme ends of the spectrum are clear: ***16** Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession.

In declining to apply our *Abood* decision to the activities of the State Bar, the Supreme Court of California noted that it would entail "an extraordinary burden.... The bar has neither time nor money to undertake a bill-by-bill, case-by-case *Ellis* analysis, nor can it accept the risk of litigation every time it decides to lobby a bill or brief a case." 47 Cal.3d, at 1165–1166, 255 Cal.Rptr., at 550, 767 P.2d, at 1028. In this respect we agree with the assessment of Justice Kaufman in his concurring and dissenting opinions in that court:

> "[C]ontrary to the majority's assumption, the State Bar would not have to perform the three-step *Ellis* analysis prior to each instance in which it seeks to advise the Legislature or the courts of its views on a matter. Instead, according to [*Teachers* v.] *Hudson,* [475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986)] 'the constitutional requirements for the [association's] collection of ... fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.' (*Id.,* at 310 [106 S.Ct., at 1077]). Since the bar already is statutorily required to submit detailed budgets to the Legislature prior to obtaining approval for setting members' annual dues (Bus. and Prof. Code § 6140.1), the argument that the constitutionally mandated procedure would create 'an extraordinary burden' for the bar is unpersuasive.
>
> "While such a procedure would likely result in some additional administrative burden to the bar and perhaps prove at times to be somewhat inconvenient, such additional burden or inconvenience is hardly sufficient to justifycontravention ***17** of the constitutional mandate. It is noteworthy that unions representing government employees have developed, and have operated successfully within the parameters of *Abood* procedures for over a decade." *Id.,* at 1192, 255 Cal.Rptr., at 568, 767 P.2d, at 1046 (citations and footnote omitted).

In *Teachers v. Hudson,* 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), where we outlined a minimum set of procedures by which a union in an agency-shop relationship could meet its requirement under *Abood,* we had a developed record regarding different methods fashioned by unions to deal with the "free rider" problem in the organized labor setting. We do not have any similar record here. We believe an integrated bar could certainly meet its *Abood* obligation by adopting the sort of procedures described in *Hudson.* Questions whether one or more alternative ****2238** procedures would likewise satisfy that obligation are better left for consideration upon a more fully developed record.

In addition to their claim for relief based on respondent's use of their mandatory dues, petitioners' complaint also requested an injunction prohibiting the State Bar from using its name to advance political and ideological causes or beliefs. See *supra,* at 2232. This request for relief appears to implicate a much broader freedom of association claim than was at issue in *Lathrop.* Petitioners challenge not only their "compelled financial support of group activities," see *supra,* at 2233, but urge that they cannot be compelled to associate with an organization that engages in political or ideological activities beyond those for which mandatory financial support is justified under the principles of *Lathrop* and *Abood.* The California courts did not address this claim, and we decline to do so in the first instance. The state courts remain free, of course, to consider this issue on remand.

The judgment of the Supreme Court of California is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

All Citations

496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1, 58 USLW 4661

138 S.Ct. 2448
Supreme Court of the United States

Mark JANUS, Petitioner
v.
AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, et al.

No. 16–1466.
|
Argued Feb. 26, 2018.
|
Decided June 27, 2018.

Synopsis

Background: Governor of Illinois brought action seeking declaration that Illinois statute authorizing public-sector unions to assess "agency fees," that is, a charge for the proportionate share of union dues attributable to activities germane to the union's duties as collective-bargaining representative, from non-member public employees on whose behalf the union negotiated, violated the First Amendment. The United States District Court for the Northern District of Illinois, No. 15 C 1235, Robert W. Gettleman, J., dismissed the Governor as a plaintiff while simultaneously granting public employee's motion to file his own complaint, and subsequently dismissed the action. Employee appealed. The United States Court of Appeals for the Seventh Circuit, Posner, Circuit Judge, 851 F.3d 746, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Justice Alito, held that:

Illinois' agency-fee scheme violated the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern;

employee had Article III standing;

rational-basis review did not apply to employee's First Amendment challenge to Illinois' agency-fee scheme;

State's interest in labor peace did not justify Illinois' agency-fee scheme;

Illinois' agency-fee scheme could not be justified on ground it was needed to prevent nonmembers from being free riders;

Pickering framework for determining whether public employee speech was protected by First Amendment did not apply to analysis of employee's challenge to Illinois' agency-fee scheme;

public-sector agency-shop arrangements violate the First Amendment, overruling *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261; and

stare decisis did not counsel against overruling *Abood*.

Reversed and remanded.

Justice Sotomayor filed a dissenting opinion.

Justice Kagan filed a dissenting opinion, in which Justice Ginsburg, Justice Breyer, and Justice Sotomayor joined.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Codenotes

Held Unconstitutional
S.H.A. 5 ILCS 315/3(g), 315/6(e)

***2455** *Syllabus* *

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Illinois law permits public employees to unionize. If a majority of the employees in a bargaining unit vote to be represented by a union, that union is designated as the exclusive representative of all the employees, even those who do not join. Only the union may engage in collective ***2456** bargaining; individual employees may not be represented by another agent or negotiate directly with their employer. Nonmembers are required to pay what is generally called an "agency fee," *i.e.,* a percentage of the full union dues. Under *Abood v. Detroit Bd. of Ed.,* 431 U.S. 209, 235–236, 97 S.Ct. 1782, 52 L.Ed.2d 261, this fee may cover union expenditures attributable to those activities "germane" to the union's collective-bargaining activities (chargeable

expenditures), but may not cover the union's political and ideological projects (nonchargeable expenditures). The union sets the agency fee annually and then sends nonmembers a notice explaining the basis for the fee and the breakdown of expenditures. Here it was 78.06% of full union dues.

Petitioner Mark Janus is a state employee whose unit is represented by a public-sector union (Union), one of the respondents. He refused to join the Union because he opposes many of its positions, including those taken in collective bargaining. Illinois' Governor, similarly opposed to many of these positions, filed suit challenging the constitutionality of the state law authorizing agency fees. The state attorney general, another respondent, intervened to defend the law, while Janus moved to intervene on the Governor's side. The District Court dismissed the Governor's challenge for lack of standing, but it simultaneously allowed Janus to file his own complaint challenging the constitutionality of agency fees. The District Court granted respondents' motion to dismiss on the ground that the claim was foreclosed by *Abood*. The Seventh Circuit affirmed.

Held :

1. The District Court had jurisdiction over petitioner's suit. Petitioner was undisputedly injured in fact by Illinois' agency-fee scheme and his injuries can be redressed by a favorable court decision. For jurisdictional purposes, the court permissibly treated his amended complaint in intervention as the operative complaint in a new lawsuit. *United States ex rel. Texas Portland Cement Co. v. McCord,* 233 U.S. 157, 34 S.Ct. 550, 58 L.Ed. 893, distinguished. Pp. 2462 – 2463.

2. The State's extraction of agency fees from nonconsenting public-sector employees violates the First Amendment. *Abood* erred in concluding otherwise, and *stare decisis* cannot support it. *Abood* is therefore overruled. Pp. 2463 – 2486.

(a) *Abood* 's holding is inconsistent with standard First Amendment principles. Pp. 2463 – 2469.

(1) Forcing free and independent individuals to endorse ideas they find objectionable raises serious First Amendment concerns. *E.g., West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 633, 63 S.Ct. 1178, 87 L.Ed. 1628. That includes compelling a person to subsidize the speech of other private speakers. *E.g., Knox v. Service Employees,* 567 U.S. 298, 309, 132 S.Ct. 2277, 183 L.Ed.2d 281. In *Knox* and *Harris v. Quinn,* 573 U.S. ——, 134 S.Ct. 2618, 189 L.Ed.2d 620, the Court applied an "exacting" scrutiny standard in judging the constitutionality of agency fees rather than the more traditional strict scrutiny. Even under the more permissive standard, Illinois' scheme cannot survive. Pp. 2463 – 2466.

(2) Neither of *Abood* 's two justifications for agency fees passes muster under this standard. First, agency fees cannot be upheld on the ground that they promote an interest in "labor peace." The *Abood* Court's fears of conflict and disruption if employees were represented by more than one union have proved to be unfounded: Exclusive representation of all the employees in a unit and the exaction of agency fees are not inextricably linked. To the ***2457** contrary, in the Federal Government and the 28 States with laws prohibiting agency fees, millions of public employees are represented by unions that effectively serve as the exclusive representatives of all the employees. Whatever may have been the case 41 years ago when *Abood* was decided, it is thus now undeniable that "labor peace" can readily be achieved through less restrictive means than the assessment of agency fees.

Second, avoiding "the risk of 'free riders,' " *Abood, supra,* at 224, 97 S.Ct. 1782, is not a compelling state interest. Free-rider "arguments ... are generally insufficient to overcome First Amendment objections," *Knox, supra,* at 311, 132 S.Ct. 2277, and the statutory requirement that unions represent members and nonmembers alike does not justify different treatment. As is evident in non-agency-fee jurisdictions, unions are quite willing to represent nonmembers in the absence of agency fees. And their duty of fair representation is a necessary concomitant of the authority that a union seeks when it chooses to be the exclusive representative. In any event, States can avoid free riders through less restrictive means than the imposition of agency fees. Pp. 2466 – 2469.

(b) Respondents' alternative justifications for *Abood* are similarly unavailing. Pp. 2469 – 2474.

(1) The Union claims that *Abood* is supported by the First Amendment's original meaning. But neither founding-era evidence nor dictum in *Connick v. Myers,* 461 U.S. 138, 143, 103 S.Ct. 1684, 75 L.Ed.2d 708, supports the view that the First Amendment was originally understood to allow States to force public employees to subsidize a private third party. If anything, the opposite is true. Pp. 2469 – 2472.

(2) Nor does *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.,* 391 U.S. 563, 88 S.Ct. 1731,

20 L.Ed.2d 811, provide a basis for *Abood*. *Abood* was not based on *Pickering,* and for good reasons. First, *Pickering* 's framework was developed for use in cases involving "one employee's speech and its impact on that employee's public responsibilities," *United States v. Treasury Employees,* 513 U.S. 454, 467, 115 S.Ct. 1003, 130 L.Ed.2d 964, while *Abood* and other agency-fee cases involve a blanket requirement that all employees subsidize private speech with which they may not agree. Second, *Pickering* 's framework was designed to determine whether a public employee's speech interferes with the effective operation of a government office, not what happens when the government compels speech or speech subsidies in support of third parties. Third, the categorization schemes of *Pickering* and *Abood* do not line up. For example, under *Abood,* nonmembers cannot be charged for speech that concerns political or ideological issues; but under *Pickering,* an employee's free speech interests on such issues could be overcome if outweighed by the employer's interests. Pp. 2472 – 2474.

(c) Even under some form of *Pickering,* Illinois' agency-fee arrangement would not survive. Pp. 2473 – 2478.

(1) Respondents compare union speech in collective bargaining and grievance proceedings to speech "pursuant to [an employee's] official duties," *Garcetti v. Ceballos,* 547 U.S. 410, 421, 126 S.Ct. 1951, 164 L.Ed.2d 689, which the State may require of its employees. But in those situations, the employee's words are really the words of the employer, whereas here the union is speaking on behalf of the employees. *Garcetti* therefore does not apply. Pp. 2473 – 2474.

(2) Nor does the union speech at issue cover only matters of private concern, which the State may also generally regulate ***2458** under *Pickering*. To the contrary, union speech covers critically important and public matters such as the State's budget crisis, taxes, and collective bargaining issues related to education, child welfare, healthcare, and minority rights. Pp. 2474 – 2477.

(3) The government's proffered interests must therefore justify the heavy burden of agency fees on nonmembers' First Amendment interests. They do not. The state interests asserted in *Abood*—promoting "labor peace" and avoiding free riders—clearly do not, as explained earlier. And the new interests asserted in *Harris* and here—bargaining with an adequately funded agent and improving the efficiency of the work force—do not suffice either. Experience shows that unions can be effective even without agency fees. Pp. 2476 – 2478.

(d) *Stare decisis* does not require retention of *Abood*. An analysis of several important factors that should be taken into account in deciding whether to overrule a past decision supports this conclusion. Pp. 2477 – 2486.

(1) *Abood* was poorly reasoned, and those arguing for retaining it have recast its reasoning, which further undermines its *stare decisis* effect, *e.g., Citizens United v. Federal Election Comm'n,* 558 U.S. 310, 363, 130 S.Ct. 876, 175 L.Ed.2d 753. *Abood* relied on *Railway Employes v. Hanson,* 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112, and *Machinists v. Street,* 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141, both of which involved private-sector collective-bargaining agreements where the government merely authorized agency fees. *Abood* did not appreciate the very different First Amendment question that arises when a State *requires* its employees to pay agency fees. *Abood* also judged the constitutionality of public-sector agency fees using *Hanson* 's deferential standard, which is inappropriate in deciding free speech issues. Nor did *Abood* take into account the difference between the effects of agency fees in public- and private-sector collective bargaining, anticipate administrative problems with classifying union expenses as chargeable or nonchargeable, foresee practical problems faced by nonmembers wishing to challenge those decisions, or understand the inherently political nature of public-sector bargaining. Pp. 2479 – 2481.

(2) *Abood* 's lack of workability also weighs against it. Its line between chargeable and nonchargeable expenditures has proved to be impossible to draw with precision, as even respondents recognize. See, *e.g., Lehnert v. Ferris Faculty Assn.,* 500 U.S. 507, 519, 111 S.Ct. 1950, 114 L.Ed.2d 572. What is more, a nonmember objecting to union chargeability determinations will have much trouble determining the accuracy of the union's reported expenditures, which are often expressed in extremely broad and vague terms. Pp. 2480 – 2482.

(3) Developments since *Abood,* both factual and legal, have "eroded" the decision's "underpinnings" and left it an outlier among the Court's First Amendment cases. *United States v. Gaudin,* 515 U.S. 506, 521, 115 S.Ct. 2310, 132 L.Ed.2d 444. *Abood* relied on an assumption that "the principle of exclusive representation in the public sector is dependent on a union or agency shop," *Harris,* 573 U.S., at —— –

——, 134 S.Ct., at 2634, but experience has shown otherwise. It was also decided when public-sector unionism was a relatively new phenomenon. Today, however, public-sector union membership has surpassed that in the private sector, and that ascendency corresponds with a parallel increase in public spending. *Abood* is also an anomaly in the Court's First Amendment jurisprudence, where exacting scrutiny, ***2459** if not a more demanding standard, generally applies. Overruling *Abood* will also end the oddity of allowing public employers to compel union support (which is not supported by any tradition) but not to compel party support (which is supported by tradition), see, *e.g., Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547. Pp. 2482 – 2484.

(4) Reliance on *Abood* does not carry decisive weight. The uncertain status of *Abood,* known to unions for years; the lack of clarity it provides; the short-term nature of collective-bargaining agreements; and the ability of unions to protect themselves if an agency-fee provision was crucial to its bargain undermine the force of reliance. Pp. 2484 – 2486.

3. For these reasons, States and public-sector unions may no longer extract agency fees from nonconsenting employees. The First Amendment is violated when money is taken from nonconsenting employees for a public-sector union; employees must choose to support the union before anything is taken from them. Accordingly, neither an agency fee nor any other form of payment to a public-sector union may be deducted from an employee, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. Pp. 2486.

851 F.3d 746, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, THOMAS, and, GORSUCH, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion. KAGAN, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined.

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Opinion

Justice ALITO delivered the opinion of the Court.

Under Illinois law, public employees are forced to subsidize a union, even if ***2460** they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities. We conclude that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.

We upheld a similar law in *Abood v. Detroit Bd. of Ed.,* 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), and we recognize the importance of following precedent unless there are strong reasons for not doing so. But there are very strong reasons in this case. Fundamental free speech rights are at stake. *Abood* was poorly reasoned. It has led to practical problems and abuse. It is inconsistent with other First Amendment cases and has been undermined by more recent decisions. Developments since *Abood* was handed down have shed new light on the issue of agency fees,

and no reliance interests on the part of public-sector unions are sufficient to justify the perpetuation of the free speech violations that *Abood* has countenanced for the past 41 years. *Abood* is therefore overruled.

I

A

Under the Illinois Public Labor Relations Act (IPLRA), employees of the State and its political subdivisions are permitted to unionize. See Ill. Comp. Stat., ch. 5, § 315/6(a) (West 2016). If a majority of the employees in a bargaining unit vote to be represented by a union, that union is designated as the exclusive representative of all the employees. §§ 315/3(s)(1), 315/6(c), 315/9. Employees in the unit are not obligated to join the union selected by their co-workers, but whether they join or not, that union is deemed to be their sole permitted representative. See §§ 315/6(a), (c).

Once a union is so designated, it is vested with broad authority. Only the union may negotiate with the employer on matters relating to "pay, wages, hours [,] and other conditions of employment." § 315/6(c). And this authority extends to the negotiation of what the IPLRA calls "policy matters," such as merit pay, the size of the work force, layoffs, privatization, promotion methods, and non-discrimination policies. § 315/4; see § 315/6(c); see generally, *e.g., Illinois Dept. of Central Management Servs. v. AFSCME, Council 31,* No. S–CB–16–17 etc., 33 PERI ¶ 67 (ILRB Dec. 13, 2016) (Board Decision).

Designating a union as the employees' exclusive representative substantially restricts the rights of individual employees. Among other things, this designation means that individual employees may not be represented by any agent other than the designated union; nor may individual employees negotiate directly with their employer. §§ 315/6(c)-(d), 315/10(a)(4); see *Matthews v. Chicago Transit Authority,* 2016 IL 117638, 402 Ill.Dec. 1, 51 N.E.3d 753, 782; accord, *Medo Photo Supply Corp. v. NLRB,* 321 U.S. 678, 683–684, 64 S.Ct. 830, 88 L.Ed. 1007 (1944). Protection of the employees' interests is placed in the hands of the union, and therefore the union is required by law to provide fair representation for all employees in the unit, members and nonmembers alike. § 315/6(d).

Employees who decline to join the union are not assessed full union dues but must instead pay what is generally called an "agency fee," which amounts to a percentage of the union dues. Under *Abood,* nonmembers may be charged for the portion of union dues attributable to activities that are "germane to [the union's] duties as collective-bargaining representative," but nonmembers may not be required to fund ***2461** the union's political and ideological projects. 431 U.S., at 235, 97 S.Ct. 1782; see *id.,* at 235–236, 97 S.Ct. 1782. In labor-law parlance, the outlays in the first category are known as "chargeable" expenditures, while those in the latter are labeled "nonchargeable."

Illinois law does not specify in detail which expenditures are chargeable and which are not. The IPLRA provides that an agency fee may compensate a union for the costs incurred in "the collective bargaining process, contract administration[,] and pursuing matters affecting wages, hours [,] and conditions of employment." § 315/6(e); see also § 315/3(g). Excluded from the agency-fee calculation are union expenditures "related to the election or support of any candidate for political office." § 315/3(g); see § 315/6(e).

Applying this standard, a union categorizes its expenditures as chargeable or nonchargeable and thus determines a nonmember's "proportionate share," § 315/6(e); this determination is then audited; the amount of the "proportionate share" is certified to the employer; and the employer automatically deducts that amount from the nonmembers' wages. See *ibid.*; App. to Pet. for Cert. 37a; see also *Harris v. Quinn,* 573 U.S. ——, —— – ——, 134 S.Ct. 2618, 2633–2634, 189 L.Ed.2d 620 (2014) (describing this process). Nonmembers need not be asked, and they are not required to consent before the fees are deducted.

After the amount of the agency fee is fixed each year, the union must send nonmembers what is known as a *Hudson* notice. See *Teachers v. Hudson,* 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). This notice is supposed to provide nonmembers with "an adequate explanation of the basis for the [agency] fee." *Id.,* at 310, 106 S.Ct. 1066. If nonmembers "suspect that a union has improperly put certain expenses in the [chargeable] category," they may challenge that determination. *Harris, supra,* at ——, 134 S.Ct., at 2633.

As illustrated by the record in this case, unions charge nonmembers, not just for the cost of collective bargaining *per se,* but also for many other supposedly connected activities. See App. to Pet. for Cert. 28a–39a. Here, the nonmembers were told that they had to pay for "[l]obbying," "[s]ocial and recreational activities," "advertising," "[m]embership

meetings and conventions," and "litigation," as well as other unspecified "[s]ervices" that "may ultimately inure to the benefit of the members of the local bargaining unit." *Id.,* at 28a–32a. The total chargeable amount for nonmembers was 78.06% of full union dues. *Id.,* at 34a.

B

Petitioner Mark Janus is employed by the Illinois Department of Healthcare and Family Services as a child support specialist. *Id.,* at 10a. The employees in his unit are among the 35,000 public employees in Illinois who are represented by respondent American Federation of State, County, and Municipal Employees, Council 31 (Union). *Ibid.* Janus refused to join the Union because he opposes "many of the public policy positions that [it] advocates," including the positions it takes in collective bargaining. *Id.,* at 10a, 18a. Janus believes that the Union's "behavior in bargaining does not appreciate the current fiscal crises in Illinois and does not reflect his best interests or the interests of Illinois citizens." *Id.,* at 18a. Therefore, if he had the choice, he "would not pay any fees or otherwise subsidize [the Union]." *Ibid.* Under his unit's collective-bargaining agreement, however, he was required to pay an agency fee of $44.58 per month, *id.,* at 14a —which would amount to about $535 per year.

***2462** Janus's concern about Illinois' current financial situation is shared by the Governor of the State, and it was the Governor who initially challenged the statute authorizing the imposition of agency fees. The Governor commenced an action in federal court, asking that the law be declared unconstitutional, and the Illinois attorney general (a respondent here) intervened to defend the law. App. 41. Janus and two other state employees also moved to intervene—but on the Governor's side. *Id.,* at 60.

Respondents moved to dismiss the Governor's challenge for lack of standing, contending that the agency fees did not cause him any personal injury. *E.g., id.,* at 48–49. The District Court agreed that the Governor could not maintain the lawsuit, but it held that petitioner and the other individuals who had moved to intervene had standing because the agency fees unquestionably injured them. Accordingly, "in the interest of judicial economy," the court dismissed the Governor as a plaintiff, while simultaneously allowing petitioner and the other employees to file their own complaint. *Id.,* at 112. They did so, and the case proceeded on the basis of this new complaint.

The amended complaint claims that all "nonmember fee deductions are coerced political speech" and that "the First Amendment forbids coercing any money from the nonmembers." App. to Pet. for Cert. 23a. Respondents moved to dismiss the amended complaint, correctly recognizing that the claim it asserted was foreclosed by *Abood*. The District Court granted the motion, *id.,* at 7a, and the Court of Appeals for the Seventh Circuit affirmed, 851 F.3d 746 (2017).

Janus then sought review in this Court, asking us to overrule *Abood* and hold that public-sector agency-fee arrangements are unconstitutional. We granted certiorari to consider this important question. 582 U.S. ——, 138 S.Ct. 54, 198 L.Ed.2d 780 (2017).

II

Before reaching this question, however, we must consider a threshold issue. Respondents contend that the District Court lacked jurisdiction under Article III of the Constitution because petitioner "moved to intervene in [the Governor's] jurisdictionally defective lawsuit." Union Brief in Opposition 11; see also *id.,* at 13–17; State Brief in Opposition 6; Brief for Union Respondent i, 16–17; Brief for State Respondents 14, n. 1. This argument is clearly wrong.

It rests on the faulty premise that petitioner intervened in the action brought by the Governor, but that is not what happened. The District Court did not grant petitioner's motion to intervene in that lawsuit. Instead, the court essentially treated petitioner's amended complaint as the operative complaint in a new lawsuit. App. 110–112. And when the case is viewed in that way, any Article III issue vanishes. As the District Court recognized—and as respondents concede—petitioner was injured in fact by Illinois' agency-fee scheme, and his injuries can be redressed by a favorable court decision. *Ibid.*; see Record 2312–2313, 2322–2323. Therefore, he clearly has Article III standing. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). It is true that the District Court docketed petitioner's complaint under the number originally assigned to the Governor's complaint, instead of giving it a new number of its own. But Article III jurisdiction does not turn on such trivialities.

The sole decision on which respondents rely, *United States ex rel. Texas Portland Cement Co. v. McCord,* 233 U.S. 157, 34 S.Ct. 550, 58 L.Ed. 893 (1914), actually ***2463**

works against them. That case concerned a statute permitting creditors of a government contractor to bring suit on a bond between 6 and 12 months after the completion of the work. *Id.,* at 162, 34 S.Ct. 550. One creditor filed suit before the 6–month starting date, but another intervened within the 6–to–12–month window. The Court held that the "[t]he intervention [did] not cure th[e] vice in the original [prematurely filed] suit," but the Court also contemplated treating "intervention ... as an original suit" in a case in which the intervenor met the requirements that a plaintiff must satisfy—*e.g.,* filing a separate complaint and properly serving the defendants. *Id.,* at 163–164, 34 S.Ct. 550. Because that is what petitioner did here, we may reach the merits of the question presented.

III

In *Abood,* the Court upheld the constitutionality of an agency-shop arrangement like the one now before us, 431 U.S., at 232, 97 S.Ct. 1782, but in more recent cases we have recognized that this holding is "something of an anomaly," *Knox v. Service Employees,* 567 U.S. 298, 311, 132 S.Ct. 2277, 183 L.Ed.2d 281 (2012), and that *Abood* 's "analysis is questionable on several grounds," *Harris,* 573 U.S., at ——, 134 S.Ct., at 2632; see *id.,* at —— – ——, 134 S.Ct., at 2632–2634 (discussing flaws in *Abood* 's reasoning). We have therefore refused to extend *Abood* to situations where it does not squarely control, see *Harris, supra,* at —— – ——, 134 S.Ct., at 2638–2639, while leaving for another day the question whether *Abood* should be overruled, *Harris, supra,* at ——, n. 19, 134 S.Ct., at 2638, n. 19; see *Knox, supra,* at 310–311, 132 S.Ct. 2277.

We now address that question. We first consider whether *Abood* 's holding is consistent with standard First Amendment principles.

A

The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgment of the freedom of speech. We have held time and again that freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard,* 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977); see *Riley v. National Federation of Blind of N. C., Inc.,* 487 U.S. 781, 796–797, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988); *Harper & Row, Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539, 559, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985); *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 256–257, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974); accord, *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.,* 475 U.S. 1, 9, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (plurality opinion). The right to eschew association for expressive purposes is likewise protected. *Roberts v. United States Jaycees,* 468 U.S. 609, 623, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) ("Freedom of association ... plainly presupposes a freedom not to associate"); see *Pacific Gas & Elec., supra,* at 12, 106 S.Ct. 903 ("[F]orced associations that burden protected speech are impermissible"). As Justice Jackson memorably put it: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess by word or act their faith therein*." *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (emphasis added).

Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned. Suppose, for example, ***2464** that the State of Illinois required all residents to sign a document expressing support for a particular set of positions on controversial public issues—say, the platform of one of the major political parties. No one, we trust, would seriously argue that the First Amendment permits this.

Perhaps because such compulsion so plainly violates the Constitution, most of our free speech cases have involved restrictions on what can be said, rather than laws compelling speech. But measures compelling speech are at least as threatening.

Free speech serves many ends. It is essential to our democratic form of government, see, *e.g., Garrison v. Louisiana,* 379 U.S. 64, 74–75, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964), and it furthers the search for truth, see, *e.g., Thornhill v. Alabama,* 310 U.S. 88, 95, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). Whenever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends.

When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to

endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding "involuntary affirmation" of objected-to beliefs would require "even more immediate and urgent grounds" than a law demanding silence. *Barnette, supra,* at 633, 63 S.Ct. 1178; see also *Riley, supra,* at 796–797, 108 S.Ct. 2667 (rejecting "deferential test" for compelled speech claims).

Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns. *Knox, supra,* at 309, 132 S.Ct. 2277; *United States v. United Foods, Inc.,* 533 U.S. 405, 410, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001); *Abood, supra,* at 222, 234–235, 97 S.Ct. 1782. As Jefferson famously put it, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical." A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950) (emphasis deleted and footnote omitted); see also *Hudson,* 475 U.S., at 305, n. 15, 106 S.Ct. 1066. We have therefore recognized that a " 'significant impingement on First Amendment rights' " occurs when public employees are required to provide financial support for a union that "takes many positions during collective bargaining that have powerful political and civic consequences." *Knox, supra,* at 310–311, 132 S.Ct. 2277 (quoting *Ellis v. Railway Clerks,* 466 U.S. 435, 455, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984)).

Because the compelled subsidization of private speech seriously impinges on First Amendment rights, it cannot be casually allowed. Our free speech cases have identified "levels of scrutiny" to be applied in different contexts, and in three recent cases, we have considered the standard that should be used in judging the constitutionality of agency fees. See *Knox, supra* ; *Harris, supra* ; *Friedrichs v. California Teachers Assn.,* 578 U.S. ——, 136 S.Ct. 1083, 194 L.Ed.2d 255 (2016) (*per curiam*) (affirming decision below by equally divided Court).

In *Knox,* the first of these cases, we found it sufficient to hold that the conduct in question was unconstitutional under even the test used for the compulsory subsidization of commercial speech. 567 U.S., at 309–310, 321–322, 132 S.Ct. 2277. Even though commercial speech has ***2465** been thought to enjoy a lesser degree of protection, see, *e.g., Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.,* 447 U.S. 557, 562–563, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), prior precedent in that area, specifically *United Foods, supra,* had applied what we characterized as "exacting" scrutiny, *Knox,* 567 U.S., at 310, 132 S.Ct. 2277, a less demanding test than the "strict" scrutiny that might be thought to apply outside the commercial sphere. Under "exacting" scrutiny, we noted, a compelled subsidy must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Ibid.* (internal quotation marks and alterations omitted).

In *Harris*, the second of these cases, we again found that an agency-fee requirement failed "exacting scrutiny." 573 U.S., at ——, 134 S.Ct., at 2641. But we questioned whether that test provides sufficient protection for free speech rights, since "it is apparent that the speech compelled" in agency-fee cases "is not commercial speech." *Id.,* at ——, 134 S.Ct., at 2639.

Picking up that cue, petitioner in the present case contends that the Illinois law at issue should be subjected to "strict scrutiny." Brief for Petitioner 36. The dissent, on the other hand, proposes that we apply what amounts to rational-basis review, that is, that we ask only whether a government employer could reasonably believe that the exaction of agency fees serves its interests. See *post,* at 2489 (KAGAN, J., dissenting) ("A government entity could reasonably conclude that such a clause was needed"). This form of minimal scrutiny is foreign to our free-speech jurisprudence, and we reject it here. At the same time, we again find it unnecessary to decide the issue of strict scrutiny because the Illinois scheme cannot survive under even the more permissive standard applied in *Knox* and *Harris*.

In the remainder of this part of our opinion (Parts III–B and III–C), we will apply this standard to the justifications for agency fees adopted by the Court in *Abood*. Then, in Parts IV and V, we will turn to alternative rationales proffered by respondents and their *amici*.

B

In *Abood,* the main defense of the agency-fee arrangement was that it served the State's interest in "labor peace," 431 U.S., at 224, 97 S.Ct. 1782. By "labor peace," the *Abood* Court meant avoidance of the conflict and disruption that it envisioned would occur if the employees in a unit were represented by more than one union. In such a situation, the Court predicted, "inter-union rivalries" would foster "dissension within the work force," and the employer could face "conflicting demands from different unions." *Id.,* at

220–221, 97 S.Ct. 1782. Confusion would ensue if the employer entered into and attempted to "enforce two or more agreements specifying different terms and conditions of employment." *Id.,* at 220, 97 S.Ct. 1782. And a settlement with one union would be "subject to attack from [a] rival labor organizatio [n]." *Id.,* at 221, 97 S.Ct. 1782.

We assume that "labor peace," in this sense of the term, is a compelling state interest, but *Abood* cited no evidence that the pandemonium it imagined would result if agency fees were not allowed, and it is now clear that *Abood* 's fears were unfounded. The *Abood* Court assumed that designation of a union as the exclusive representative of all the employees in a unit and the exaction of agency fees are inextricably linked, but that is simply not true. *Harris, supra,* at ——, 134 S.Ct., at 2640.

***2466** The federal employment experience is illustrative. Under federal law, a union chosen by majority vote is designated as the exclusive representative of all the employees, but federal law does not permit agency fees. See 5 U.S.C. §§ 7102, 7111(a), 7114(a). Nevertheless, nearly a million federal employees—about 27% of the federal work force—are union members. [1] The situation in the Postal Service is similar. Although permitted to choose an exclusive representative, Postal Service employees are not required to pay an agency fee, 39 U.S.C. §§ 1203(a), 1209(c), and about 400,000 are union members. [2] Likewise, millions of public employees in the 28 States that have laws generally prohibiting agency fees are represented by unions that serve as the exclusive representatives of all the employees. [3] Whatever may have been the case 41 years ago when *Abood* was handed down, it is now undeniable that "labor peace" can readily be achieved "through means significantly less restrictive of associational freedoms" than the assessment of agency fees. *Harris, supra,* at ——, 134 S.Ct., at 2639 (internal quotation marks omitted).

1 See Bureau of Labor Statistics (BLS), Labor Force Statistics From the Current Population Survey (Table 42) (2017), https://www.bls.gov/cps/tables.htm (all Internet materials as visited June 26, 2018).

2 See Union Membership and Coverage Database From the Current Population Survey (Jan. 21, 2018), unionstats.com.

3 See National Conference of State Legislatures, Right–to–Work States (2018), http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx# chart; see also, *e.g.,* Brief for Mackinac Center for Public Policy as *Amicus Curiae* 27–28, 34–36.

C

In addition to the promotion of "labor peace," *Abood* cited "the risk of 'free riders' " as justification for agency fees, 431 U.S., at 224, 97 S.Ct. 1782. Respondents and some of their *amici* endorse this reasoning, contending that agency fees are needed to prevent nonmembers from enjoying the benefits of union representation without shouldering the costs. Brief for Union Respondent 34–36; Brief for State Respondents 41–45; see, *e.g.,* Brief for International Brotherhood of Teamsters as *Amicus Curiae* 3–5.

Petitioner strenuously objects to this free-rider label. He argues that he is not a free rider on a bus headed for a destination that he wishes to reach but is more like a person shanghaied for an unwanted voyage.

Whichever description fits the majority of public employees who would not subsidize a union if given the option, avoiding free riders is not a compelling interest. As we have noted, "free-rider arguments ... are generally insufficient to overcome First Amendment objections." *Knox,* 567 U.S., at 311, 132 S.Ct. 2277. To hold otherwise across the board would have startling consequences. Many private groups speak out with the objective of obtaining government action that will have the effect of benefiting nonmembers. May all those who are thought to benefit from such efforts be compelled to subsidize this speech?

Suppose that a particular group lobbies or speaks out on behalf of what it thinks are the needs of senior citizens or veterans or physicians, to take just a few examples. Could the government require that all seniors, veterans, or doctors pay for that service even if they object? It has never been thought that this is permissible. "[P]rivate speech often furthers the interests of nonspeakers," but "that does not alone empower the state to compel the ***2467** speech to be paid for." *Lehnert v. Ferris Faculty Assn.,* 500 U.S. 507, 556, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991) (Scalia, J., concurring in judgment in part and dissenting in part). In simple terms, the First Amendment does not permit the government to compel a

person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay. [4]

4 The collective-action problem cited by the dissent, *post,* at 2489 – 2490, is not specific to the agency-fee context. And contrary to the dissent's suggestion, it is often not practical for an entity that lobbies or advocates on behalf of the members of a group to tailor its message so that only its members benefit from its efforts. Consider how effective it would be for a group that advocates on behalf of, say, seniors, to argue that a new measure should apply only to its dues-paying members.

Those supporting agency fees contend that the situation here is different because unions are statutorily required to "represen[t] the interests of all public employees in the unit," whether or not they are union members. § 315/6(d); see, *e.g.,* Brief for State Respondents 40–41, 45; *post,* at 2490 (KAGAN, J., dissenting). Why might this matter?

We can think of two possible arguments. It might be argued that a State has a compelling interest in requiring the payment of agency fees because (1) unions would otherwise be unwilling to represent nonmembers or (2) it would be fundamentally unfair to require unions to provide fair representation for nonmembers if nonmembers were not required to pay. Neither of these arguments is sound.

First, it is simply not true that unions will refuse to serve as the exclusive representative of all employees in the unit if they are not given agency fees. As noted, unions represent millions of public employees in jurisdictions that do not permit agency fees. No union is ever compelled to seek that designation. On the contrary, designation as exclusive representative is avidly sought. [5] Why is this so?

5 In order to obtain that status, a union must petition to be recognized and campaign to win majority approval. Ill. Comp. Stat., ch. 5, § 315/9(a) (2016); see, *e.g., County of Du Page v. Illinois Labor Relations Bd.,* 231 Ill.2d 593, 597–600, 326 Ill.Dec. 848, 900 N.E.2d 1095, 1098–1099 (2008). And unions eagerly seek this support. See, *e.g.,* Brief for Employees of the State of Minnesota Court System as *Amici Curiae* 9–17.

Even without agency fees, designation as the exclusive representative confers many benefits. As noted, that status gives the union a privileged place in negotiations over wages, benefits, and working conditions. See § 315/6(c). Not only is the union given the exclusive right to speak for all the employees in collective bargaining, but the employer is required by state law to listen to and to bargain in good faith with only that union. § 315/7. Designation as exclusive representative thus "results in a tremendous increase in the power" of the union. *American Communications Assn. v. Douds,* 339 U.S. 382, 401, 70 S.Ct. 674, 94 L.Ed. 925 (1950).

In addition, a union designated as exclusive representative is often granted special privileges, such as obtaining information about employees, see § 315/6(c), and having dues and fees deducted directly from employee wages, §§ 315/6(e)-(f). The collective-bargaining agreement in this case guarantees a long list of additional privileges. See App. 138–143.

These benefits greatly outweigh any extra burden imposed by the duty of providing fair representation for nonmembers. What this duty entails, in simple terms, is an obligation not to "act solely in the interests of [the union's] own members." ***2468** Brief for State Respondents 41; see *Cintron v. AFSCME, Council 31,* No. S–CB–16–032, p. 1, 34 PERI ¶ 105 (ILRB Dec. 13, 2017) (union may not intentionally direct "animosity" toward nonmembers based on their "dissident union practices"); accord, *14 Penn Plaza LLC v. Pyett,* 556 U.S. 247, 271, 129 S.Ct. 1456, 173 L.Ed.2d 398 (2009); *Vaca v. Sipes,* 386 U.S. 171, 177, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

What does this mean when it comes to the negotiation of a contract? The union may not negotiate a collective-bargaining agreement that discriminates against nonmembers, see *Steele v. Louisville & Nashville R. Co.,* 323 U.S. 192, 202–203, 65 S.Ct. 226, 89 L.Ed. 173 (1944), but the union's bargaining latitude would be little different if state law simply prohibited public employers from entering into agreements that discriminate in that way. And for that matter, it is questionable whether the Constitution would permit a public-sector employer to adopt a collective-bargaining agreement that discriminates against nonmembers. See *id.,* at 198–199, 202, 65 S.Ct. 226 (analogizing a private-sector union's fair-representation duty to the duty "the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates"); cf. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,* 547 U.S. 47, 69,

126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (recognizing that government may not "impose penalties or withhold benefits based on membership in a disfavored group" where doing so "ma [kes] group membership less attractive"). To the extent that an employer would be barred from acceding to a discriminatory agreement anyway, the union's duty not to ask for one is superfluous. It is noteworthy that neither respondents nor any of the 39 *amicus* briefs supporting them—nor the dissent—has explained why the duty of fair representation causes public-sector unions to incur significantly greater expenses than they would otherwise bear in negotiating collective-bargaining agreements.

What about the representation of nonmembers in grievance proceedings? Unions do not undertake this activity solely for the benefit of nonmembers—which is why Illinois law gives a public-sector union the right to send a representative to such proceedings even if the employee declines union representation. § 315/6(b). Representation of nonmembers furthers the union's interest in keeping control of the administration of the collective-bargaining agreement, since the resolution of one employee's grievance can affect others. And when a union controls the grievance process, it may, as a practical matter, effectively subordinate "the interests of [an] individual employee ... to the collective interests of all employees in the bargaining unit." *Alexander v. Gardner–Denver Co.,* 415 U.S. 36, 58, n. 19, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974); see *Stahulak v. Chicago,* 184 Ill.2d 176, 180–181, 234 Ill.Dec. 432, 703 N.E.2d 44, 46–47 (1998); *Mahoney v. Chicago,* 293 Ill.App.3d 69, 73–74, 227 Ill.Dec. 209, 687 N.E.2d 132, 135–137 (1997) (union has " 'discretion to refuse to process' " a grievance, provided it does not act "arbitrar[ily]" or "in bad faith" (emphasis deleted)).

In any event, whatever unwanted burden is imposed by the representation of nonmembers in disciplinary matters can be eliminated "through means significantly less restrictive of associational freedoms" than the imposition of agency fees. *Harris,* 573 U.S., at ——, 134 S.Ct., at 2639 (internal quotation marks omitted). Individual nonmembers could be required to pay for that service or could be denied ***2469** union representation altogether.[6] Thus, agency fees cannot be sustained on the ground that unions would otherwise be unwilling to represent nonmembers.

6 There is precedent for such arrangements. Some States have laws providing that, if an employee with a religious objection to paying an agency fee "requests the [union] to use the grievance procedure or arbitration procedure on the employee's behalf, the [union] is authorized to charge the employee for the reasonable cost of using such procedure." *E.g.,* Cal. Govt.Code Ann. § 3546.3 (West 2010); cf. Ill. Comp. Stat., ch. 5, § 315/6(g) (2016). This more tailored alternative, if applied to other objectors, would prevent free ridership while imposing a lesser burden on First Amendment rights.

Nor can such fees be justified on the ground that it would otherwise be unfair to require a union to bear the duty of fair representation. That duty is a necessary concomitant of the authority that a union seeks when it chooses to serve as the exclusive representative of all the employees in a unit. As explained, designating a union as the exclusive representative of nonmembers substantially restricts the nonmembers' rights. *Supra,* at 2460 – 2461. Protection of their interests is placed in the hands of the union, and if the union were free to disregard or even work against those interests, these employees would be wholly unprotected. That is why we said many years ago that serious "constitutional questions [would] arise" if the union were *not* subject to the duty to represent all employees fairly. *Steele, supra,* at 198, 65 S.Ct. 226.

In sum, we do not see any reason to treat the free-rider interest any differently in the agency-fee context than in any other First Amendment context. See *Knox,* 567 U.S., at 311, 321, 132 S.Ct. 2277. We therefore hold that agency fees cannot be upheld on free-rider grounds.

IV

Implicitly acknowledging the weakness of *Abood* 's own reasoning, proponents of agency fees have come forward with alternative justifications for the decision, and we now address these arguments.

A

The most surprising of these new arguments is the Union respondent's originalist defense of *Abood*. According to this argument, *Abood* was correctly decided because the First Amendment was not originally understood to provide *any* protection for the free speech rights of public employees. Brief for Union Respondent 2–3, 17–20.

As an initial matter, we doubt that the Union—or its members—actually want us to hold that public employees have "*no* [free speech] rights." *Id.,* at 1. Cf., *e.g.,* Brief for National Treasury Employees Union as *Amicus Curiae* in *Garcetti v. Ceballos,* O.T. 2005, No. 04–473, p. 7 (arguing for "broa[d]" public-employee First Amendment rights); Brief for AFL–CIO as *Amicus Curiae* in No. 04–473 (similar).

It is particularly discordant to find this argument in a brief that trumpets the importance of *stare decisis*. See Brief for Union Respondent 47–57. Taking away free speech protection for public employees would mean overturning decades of landmark precedent. Under the Union's theory, *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), and its progeny would fall. Yet *Pickering,* as we will discuss, is now the foundation for respondents' chief defense of *Abood*. And indeed, *Abood* itself would have to go if public employees have no free speech rights, since *Abood* holds that the First Amendment prohibits the exaction of agency fees for political or ideological purposes. ***2470** 431 U.S., at 234–235, 97 S.Ct. 1782 (finding it "clear" that "a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment"). Our political patronage cases would be doomed. See, *e.g., Rutan v. Republican Party of Ill.,* 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990); *Branti v. Finkel,* 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); *Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Also imperiled would be older precedents like *Wieman v. Updegraff,* 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952) (loyalty oaths), *Shelton v. Tucker,* 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960) (disclosure of memberships and contributions), and *Keyishian v. Board of Regents of Univ. of State of N. Y.,* 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967) (subversive speech). Respondents presumably want none of this, desiring instead that we apply the Constitution's supposed original meaning only when it suits them—to retain the part of *Abood* that they like. See Tr. of Oral Arg. 56–57. We will not engage in this halfway originalism.

Nor, in any event, does the First Amendment's original meaning support the Union's claim. The Union offers no persuasive founding-era evidence that public employees were understood to lack free speech protections. While it observes that restrictions on federal employees' activities have existed since the First Congress, most of its historical examples involved limitations on public officials' outside business dealings, not on their speech. See *Ex parte Curtis,* 106 U.S. 371, 372–373, 1 S.Ct. 381, 27 L.Ed. 232 (1882). The only early *speech* restrictions the Union identifies are an 1806 statute prohibiting military personnel from using " 'contemptuous or disrespectful words against the President' " and other officials, and an 1801 directive limiting electioneering by top government employees. Brief for Union Respondent 3. But those examples at most show that the government was understood to have power to limit employee speech that threatened important governmental interests (such as maintaining military discipline and preventing corruption)—not that public employees' speech was entirely unprotected. Indeed, more recently this Court has upheld similar restrictions even while recognizing that government employees possess First Amendment rights. See, *e.g., Brown v. Glines,* 444 U.S. 348, 353, 100 S.Ct. 594, 62 L.Ed.2d 540 (1980) (upholding military restriction on speech that threatened troop readiness); *Civil Service Comm'n v. Letter Carriers,* 413 U.S. 548, 556–557, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973) (upholding limits on public employees' political activities).

Ultimately, the Union relies, not on founding-era evidence, but on dictum from a 1983 opinion of this Court stating that, "[f]or most of th[e 20th] century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Connick v. Myers,* 461 U.S. 138, 143, 103 S.Ct. 1684, 75 L.Ed.2d 708; see Brief for Union Respondent 2, 17. Even on its own terms, this dictum about 20th-century views does not purport to describe how the First Amendment was understood in 1791. And a careful examination of the decisions by this Court that *Connick* cited to support its dictum, see 461 U.S., at 144, 103 S.Ct. 1684, reveals that none of them rested on the facile premise that public employees are unprotected by the First Amendment. Instead, they considered (much as we do today) whether particular speech restrictions were "necessary to protect" fundamental government interests. *Curtis, supra,* at 374, 1 S.Ct. 381.

***2471** The Union has also failed to show that, even if public employees enjoyed free speech rights, the First Amendment was nonetheless originally understood to allow forced subsidies like those at issue here. We can safely say that, at the time of the adoption of the First Amendment, no one gave any thought to whether public-sector unions could charge nonmembers agency fees. Entities resembling labor unions did not exist at the founding, and public-sector unions did not emerge until the mid–20th century. The idea

of public-sector unionization and agency fees would astound those who framed and ratified the Bill of Rights.[7] Thus, the Union cannot point to any accepted founding-era practice that even remotely resembles the compulsory assessment of agency fees from public-sector employees. We do know, however, that prominent members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed. As noted, Jefferson denounced compelled support for such beliefs as " 'sinful and tyrannical,' " *supra,* at 2464, and others expressed similar views.[8]

7 Indeed, under common law, "collective bargaining was unlawful," *Teamsters v. Terry,* 494 U.S. 558, 565–566, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990) (plurality opinion); see N. Citrine, Trade Union Law 4–7, 9–10 (2d ed. 1960); Notes, Legality of Trade Unions at Common Law, 25 Harv. L. Rev. 465, 466 (1912), and into the 20th century, every individual employee had the "liberty of contract" to "sell his labor upon such terms as he deem[ed] proper," *Adair v. United States,* 208 U.S. 161, 174–175, 28 S.Ct. 277, 52 L.Ed. 436 (1908); see R. Morris, Government and Labor in Early America 208, 529 (1946). So even the concept of a private third-party entity with the power to bind employees on the terms of their employment likely would have been foreign to the Founders. We note this only to show the problems inherent in the Union respondent's argument; we are not in any way questioning the foundations of modern labor law.

8 See, *e.g.,* Ellsworth, The Landholder, VII (1787), in Essays on the Constitution of the United States 167–171 (P. Ford ed. 1892); Webster, On Test Laws, Oaths of Allegiance and Abjuration, and Partial Exclusions from Office, in A Collection of Essays and Fugitiv[e] Writings 151–153 (1790).

In short, the Union has offered no basis for concluding that *Abood* is supported by the original understanding of the First Amendment.

B

The principal defense of *Abood* advanced by respondents and the dissent is based on our decision in *Pickering,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811, which held that a school district violated the First Amendment by firing a teacher for writing a letter critical of the school administration. Under *Pickering* and later cases in the same line, employee speech is largely unprotected if it is part of what the employee is paid to do, see *Garcetti v. Ceballos,* 547 U.S. 410, 421–422, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006), or if it involved a matter of only private concern, see *Connick, supra,* at 146–149, 103 S.Ct. 1684. On the other hand, when a public employee speaks as a citizen on a matter of public concern, the employee's speech is protected unless " 'the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees' outweighs 'the interests of the [employee], as a citizen, in commenting upon matters of public concern.' " *Harris,* 573 U.S., at ——, 134 S.Ct., at 2642 (quoting *Pickering, supra,* at 568, 88 S.Ct. 1731). *Pickering* was the centerpiece of the defense of *Abood* in *Harris*, see 573 U.S., at —— – ——, 134 S.Ct., at 2653–2656 (KAGAN, J., dissenting), and we found the argument unpersuasive, see ***2472** *id.,* at —— – ——, 134 S.Ct., at 2641–2643. The intervening years have not improved its appeal.

1

As we pointed out in *Harris*, *Abood* was not based on *Pickering*. 573 U.S., at ——, and n. 26, 134 S.Ct., at 2641, and n. 26. The *Abood* majority cited the case exactly once—in a footnote—and then merely to acknowledge that "there may be limits on the extent to which an employee in a sensitive or policymaking position may freely criticize his superiors and the policies they espouse." 431 U.S., at 230, n. 27, 97 S.Ct. 1782. That aside has no bearing on the agency-fee issue here.[9]

9 Justice Powell's separate opinion did invoke *Pickering* in a relevant sense, but he did so only to acknowledge the State's relatively greater interest in regulating speech when it acts as employer than when it acts as sovereign. *Abood v. Detroit Bd. of Ed.,* 431 U.S. 209, 259, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) (concurring in judgment). In the very next sentence, he explained that "even in public employment, a significant impairment of First Amendment rights must survive exacting scrutiny." *Ibid.* (internal quotation marks omitted). That is the test we apply today.

Respondents' reliance on *Pickering* is thus "an effort to find a new justification for the decision in *Abood*." *Harris, supra,* at ——, 134 S.Ct., at 2641. And we have previously taken a dim view of similar attempts to recast problematic First Amendment decisions. See, *e.g., Citizens United v. Federal Election Comm'n,* 558 U.S. 310, 348–349, 363, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010) (rejecting efforts to recast *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990)); see also *Citizens United, supra,* at 382–385, 130 S.Ct. 876 (ROBERTS, C.J., concurring). We see no good reason, at this late date, to try to shoehorn *Abood* into the *Pickering* framework.

2

Even if that were attempted, the shoe would be a painful fit for at least three reasons.

First, the *Pickering* framework was developed for use in a very different context—in cases that involve "one employee's speech and its impact on that employee's public responsibilities." *United States v. Treasury Employees,* 513 U.S. 454, 467, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995). This case, by contrast, involves a blanket requirement that all employees subsidize speech with which they may not agree. While we have sometimes looked to *Pickering* in considering general rules that affect broad categories of employees, we have acknowledged that the standard *Pickering* analysis requires modification in that situation. See 513 U.S., at 466–468, and n. 11, 115 S.Ct. 1003. A speech-restrictive law with "widespread impact," we have said, "gives rise to far more serious concerns than could any single supervisory decision." *Id.,* at 468, 115 S.Ct. 1003. Therefore, when such a law is at issue, the government must shoulder a correspondingly "heav[ier]" burden, *id.,* at 466, 115 S.Ct. 1003, and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights, see *id.,* at 475–476, n. 21, 115 S.Ct. 1003; accord, *id.,* at 482–483, 115 S.Ct. 1003 (O'Connor, J., concurring in judgment in part and dissenting in part). The end product of those adjustments is a test that more closely resembles exacting scrutiny than the traditional *Pickering* analysis.

The core collective-bargaining issue of wages and benefits illustrates this point. Suppose that a single employee complains that he or she should have received a 5% raise. This individual complaint would ***2473** likely constitute a matter of only private concern and would therefore be unprotected under *Pickering*. But a public-sector union's demand for a 5% raise for the many thousands of employees it represents would be another matter entirely. Granting such a raise could have a serious impact on the budget of the government unit in question, and by the same token, denying a raise might have a significant effect on the performance of government services. When a large number of employees speak through their union, the category of speech that is of public concern is greatly enlarged, and the category of speech that is of only private concern is substantially shrunk. By disputing this, *post,* at 2493 – 2494, the dissent denies the obvious.

Second, the *Pickering* framework fits much less well where the government compels speech or speech subsidies in support of third parties. *Pickering* is based on the insight that the speech of a public-sector employee may interfere with the effective operation of a government office. When a public employer does not simply restrict potentially disruptive speech but commands that its employees mouth a message on its own behalf, the calculus is very different. Of course, if the speech in question is part of an employee's official duties, the employer may insist that the employee deliver any lawful message. See *Garcetti,* 547 U.S., at 421–422, 425–426, 126 S.Ct. 1951. Otherwise, however, it is not easy to imagine a situation in which a public employer has a legitimate need to demand that its employees recite words with which they disagree. And we have never applied *Pickering* in such a case.

Consider our decision in *Connick*. In that case, we held that an assistant district attorney's complaints about the supervisors in her office were, for the most part, matters of only private concern. 461 U.S., at 148, 103 S.Ct. 1684. As a result, we held, the district attorney could fire her for making those comments. *Id.,* at 154, 103 S.Ct. 1684. Now, suppose that the assistant had not made any critical comments about the supervisors but that the district attorney, out of the blue, demanded that she circulate a memo praising the supervisors. Would her refusal to go along still be a matter of purely private concern? And if not, would the order be justified on the ground that the effective operation of the office demanded that the assistant voice complimentary sentiments with which she disagreed? If *Pickering* applies at all to compelled speech —a question that we do not decide—it would certainly require adjustment in that context.

Third, although both *Pickering* and *Abood* divided speech into two categories, the cases' categorization schemes do not line

up. Superimposing the *Pickering* scheme on *Abood* would significantly change the *Abood* regime.

Let us first look at speech that is not germane to collective bargaining but instead concerns political or ideological issues. Under *Abood,* a public employer is flatly prohibited from permitting nonmembers to be charged for this speech, but under *Pickering,* the employees' free speech interests could be overcome if a court found that the employer's interests outweighed the employees'.

A similar problem arises with respect to speech that *is* germane to collective bargaining. The parties dispute how much of this speech is of public concern, but respondents concede that much of it falls squarely into that category. See Tr. of Oral Arg. 47, 65. Under *Abood,* nonmembers may be required to pay for all this speech, but *Pickering* would permit that practice only if the employer's interests outweighed those of the employees. Thus, recasting *Abood* as an application of *Pickering* ***2474** would substantially alter the *Abood* scheme.

For all these reasons, *Pickering* is a poor fit indeed.

V

Even if we were to apply some form of *Pickering,* Illinois' agency-fee arrangement would not survive.

A

Respondents begin by suggesting that union speech in collective-bargaining and grievance proceedings should be treated like the employee speech in *Garcetti, i.e.,* as speech "pursuant to [an employee's] official duties," 547 U.S., at 421, 126 S.Ct. 1951. Many employees, in both the public and private sectors, are paid to write or speak for the purpose of furthering the interests of their employers. There are laws that protect public employees from being compelled to say things that they reasonably believe to be untrue or improper, see *id.,* at 425–426, 126 S.Ct. 1951, but in general when public employees are performing their job duties, their speech may be controlled by their employer. Trying to fit union speech into this framework, respondents now suggest that the union speech funded by agency fees forms part of the official duties of the union officers who engage in the speech. Brief for Union Respondent 22–23; see Brief for State Respondents 23–24.

This argument distorts collective bargaining and grievance adjustment beyond recognition. When an employee engages in speech that is part of the employee's job duties, the employee's words are really the words of the employer. The employee is effectively the employer's spokesperson. But when a union negotiates with the employer or represents employees in disciplinary proceedings, the union speaks for the *employees,* not the employer. Otherwise, the employer would be negotiating with itself and disputing its own actions. That is not what anybody understands to be happening.

What is more, if the union's speech is really the employer's speech, then the employer could dictate what the union says. Unions, we trust, would be appalled by such a suggestion. For these reasons, *Garcetti* is totally inapposite here.

B

Since the union speech paid for by agency fees is not controlled by *Garcetti,* we move on to the next step of the *Pickering* framework and ask whether the speech is on a matter of public or only private concern. In *Harris*, the dissent's central argument in defense of *Abood* was that union speech in collective bargaining, including speech about wages and benefits, is basically a matter of only private interest. See 573 U.S., at ——– – ———, 134 S.Ct., at 2654–2655 (KAGAN, J., dissenting). We squarely rejected that argument, see *id.,* at ——– – ———, 134 S.Ct., at 2642–2643, and the facts of the present case substantiate what we said at that time: "[I]t is impossible to argue that the level of ... state spending for employee benefits ... is not a matter of great public concern," *id.,* at ——– – ———, 134 S.Ct., at 2642–2643.

Illinois, like some other States and a number of counties and cities around the country, suffers from severe budget problems. [10] As of 2013, Illinois had nearly ***2475** $160 billion in unfunded pension and retiree healthcare liabilities. [11] By 2017, that number had only grown, and the State was grappling with $15 billion in unpaid bills. [12] We are told that a "quarter of the budget is now devoted to paying down" those liabilities. [13] These problems and others led Moody's and S & P to downgrade Illinois' credit rating to "one step above junk"—the "lowest ranking on record for a U.S. state." [14]

10 See Brief for State of Michigan et al. as *Amici Curiae* 9–24. Nationwide, the cost of state and local employees' wages and benefits, for example, is nearly $1.5 trillion—more than half of those jurisdictions' total expenditures. See Dept. of Commerce, Bureau of Economic Analysis, National Data, GDP & Personal Income, Table 6.2D, line 92 (Aug. 3, 2017), and Table 3.3, line 37 (May 30, 2018), https://www.bea.gov/iTable/iTable.cfm?reqid=19&step=2#reqid=19&step=2&isuri=1&1921 =survey. And many States and cities struggle with unfunded pension and retiree healthcare liabilities and other budget issues.

11 PEW Charitable Trusts, Fiscal 50: State Trends and Analysis (updated May 17, 2016), http://www.pewtrusts.org/en/research-and-analysis/data-visualizations/2014/fiscal-50# ind4.

12 See Brief for Jason R. Barclay et al. as *Amici Curiae* 9; M. Egan, How Illinois Became America's Most Messed–Up State, CNN Money (July 1, 2017), https://cnnmon.ie/2tp9NX5.

13 Brief for Jason R. Barclay et al. as *Amici Curiae* 9.

14 E. Campbell, S & P, Moody's Downgrade Illinois to Near Junk, Lowest Ever for a U.S. State, Bloomberg (June 1, 2017), https://bloom.bg/2roEJUc.

The Governor, on one side, and public-sector unions, on the other, disagree sharply about what to do about these problems. The State claims that its employment-related debt is " 'squeezing core programs in education, public safety, and human services, in addition to limiting [the State's] ability to pay [its] bills.' " Securities Act of 1933 Release No. 9389, 105 S.E.C. Docket 3381 (2013). It therefore "told the Union that it would attempt to address th[e financial] crisis, at least in part, through collective bargaining." Board Decision 12–13. And "the State's desire for savings" in fact "dr[o]ve [its] bargaining" positions on matters such as health-insurance benefits and holiday, overtime, and promotion policies. *Id.,* at 13; *Illinois Dept. of Central Management Servs. v. AFSCME, Council 31,* No. S–CB–16–17 etc., 33 PERI ¶ 67 (ILRB Dec. 13, 2016) (ALJ Decision), pp. 26–28, 63–66, 224. But when the State offered cost-saving proposals on these issues, the Union countered with very different suggestions. Among other things, it advocated wage and tax increases, cutting spending "to Wall Street financial institutions," and reforms to Illinois' pension and tax systems (such as closing "corporate tax loopholes," "[e]xpanding the base of the state sales tax," and "allowing an income tax that is adjusted in accordance with ability to pay"). *Id.,* at 27–28. To suggest that speech on such matters is not of great public concern—or that it is not directed at the "public square," *post,* at 2495 (KAGAN, J., dissenting)—is to deny reality.

In addition to affecting how public money is spent, union speech in collective bargaining addresses many other important matters. As the examples offered by respondents' own *amici* show, unions express views on a wide range of subjects—education, child welfare, healthcare, and minority rights, to name a few. See, *e.g.,* Brief for American Federation of Teachers as *Amicus Curiae* 15–27; Brief for Child Protective Service Workers et al. as *Amici Curiae* 5–13; Brief for Human Rights Campaign et al. as *Amici Curiae* 10–17; Brief for National Women's Law Center et al. as *Amici Curiae* 14–30. What unions have to say on these matters in the context of collective bargaining is of great public importance.

Take the example of education, which was the focus of briefing and argument in ***2476** *Friedrichs*. The public importance of subsidized union speech is especially apparent in this field, since educators make up by far the largest category of state and local government employees, and education is typically the largest component of state and local government expenditures. [15]

15 See National Association of State Budget Officers, Summary: Spring 2018 Fiscal Survey of States 2 (June 14, 2018), http://www.nasbo.org; ProQuest Statistical Abstract of the United States: 2018, pp. 306, Table 476, 321, Table 489.

Speech in this area also touches on fundamental questions of education policy. Should teacher pay be based on seniority, the better to retain experienced teachers? Or should schools adopt merit-pay systems to encourage teachers to get the best results out of their students? [16] Should districts transfer more experienced teachers to the lower performing schools that may have the greatest need for their skills, or should those teachers be allowed to stay where they have put down roots? [17] Should teachers be given tenure protection and, if so, under what conditions? On what grounds and pursuant to what procedures should teachers be subject to discipline or dismissal? How should teacher performance and student progress be measured—by standardized tests or other means?

16 See Rogers, School Districts 'Race to the Top' Despite Teacher Dispute, Marin Independent J., June 19, 2010.

17 See Sawchuk, Transferring Top Teachers Has Benefits: Study Probes Moving Talent to Low–Performing Schools, Education Week, Nov. 13, 2013, pp. 1, 13.

Unions can also speak out in collective bargaining on controversial subjects such as climate change,[18] the Confederacy,[19] sexual orientation and gender identity,[20] evolution,[21] and minority religions.[22] These are sensitive political topics, and they are undoubtedly matters of profound " 'value and concern to the public.' " *Snyder v. Phelps,* 562 U.S. 443, 453, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011). We have often recognized that such speech " 'occupies the highest rung of the hierarchy of First Amendment values' " and merits " 'special protection.' " *Id.,* at 452, 131 S.Ct. 1207.

18 See Tucker, Textbooks Equivocate on Global Warming: Stanford Study Finds Portrayal 'Dishonest,' San Francisco Chronicle, Nov. 24, 2015, p. C1.

19 See Reagan, Anti–Confederacy Movement Rekindles Texas Textbook Controversy, San Antonio Current, Aug. 4, 2015.

20 See Watanabe, How To Teach Gay Issues in 1st Grade? A New Law Requiring California Schools To Have Lessons About LGBT Americans Raises Tough Questions, L.A. Times, Oct. 16, 2011, p. A1.

21 See Goodstein, A Web of Faith, Law and Science in Evolution Suit, N.Y. Times, Sept. 26, 2005, p. A1.

22 See Golden, Defending the Faith: New Battleground in Textbook Wars: Religion in History, Wall St. J., Jan. 25, 2006, p. A1.

What does the dissent say about the prevalence of such issues? The most that it is willing to admit is that "some" issues that arise in collective bargaining "raise important non-budgetary disputes." *Post,* at 2496. Here again, the dissent refuses to recognize what actually occurs in public-sector collective bargaining.

Even union speech in the handling of grievances may be of substantial public importance and may be directed at the "public square." *Post,* at 2495. For instance, the Union respondent in this case recently filed a grievance seeking to compel Illinois to appropriate $75 million to fund a 2% wage increase. *State v.* ***2477** *AFSCME Council 31,* 2016 IL 118422, 401 Ill.Dec. 907, 51 N.E.3d 738, 740–742, and n. 4. In short, the union speech at issue in this case is overwhelmingly of substantial public concern.

C

The only remaining question under *Pickering* is whether the State's proffered interests justify the heavy burden that agency fees inflict on nonmembers' First Amendment interests. We have already addressed the state interests asserted in *Abood*—promoting "labor peace" and avoiding free riders, see *supra,* at 2465 – 2469—and we will not repeat that analysis.

In *Harris* and this case, defenders of *Abood* have asserted a different state interest—in the words of the *Harris* dissent, the State's "interest in bargaining with an adequately funded exclusive bargaining agent." 573 U.S., at ——, 134 S.Ct., at 2648 (KAGAN, J., dissenting); see also *post,* at 2489 – 2490 (KAGAN, J., dissenting). This was not "the interest *Abood* recognized and protected," *Harris, supra,* at ——, 134 S.Ct., at 2648 (KAGAN, J., dissenting), and, in any event, it is insufficient.

Although the dissent would accept without any serious independent evaluation the State's assertion that the absence of agency fees would cripple public-sector unions and thus impair the efficiency of government operations, see *post,* at 2490 – 2491, 2492 - 2493, ample experience, as we have noted, *supra,* at 2465 - 2466, shows that this is questionable.

Especially in light of the more rigorous form of *Pickering* analysis that would apply in this context, see *supra,* at 2472 – 2473, the balance tips decisively in favor of the employees' free speech rights.[23]

23 Claiming that our decision will hobble government operations, the dissent asserts that it would prevent a government employer from taking action against disruptive non-unionized employees in two carefully constructed hypothetical situations. See *post,* at 2495 – 2497. Both hypotheticals are

short on potentially important details, but in any event, neither would be affected by our decision in this case. Rather, both would simply call for the application of the standard *Pickering* test.

In one of the hypotheticals, teachers "protest merit pay in the school cafeteria." *Post,* at 2496. If such a case actually arose, it would be important to know, among other things, whether the teachers involved were supposed to be teaching in their classrooms at the time in question and whether the protest occurred in the presence of students during the student lunch period. If both those conditions were met, the teachers would presumably be violating content-neutral rules regarding their duty to teach at specified times and places, and their conduct might well have a disruptive effect on the educational process. Thus, in the dissent's hypothetical, the school's interests might well outweigh those of the teachers, but in this hypothetical case, as in all *Pickering* cases, the particular facts would be very important.

In the other hypothetical, employees agitate for a better health plan "at various inopportune times and places." *Post,* at 2496. Here, the lack of factual detail makes it impossible to evaluate how the *Pickering* balance would come out. The term "agitat[ion]" can encompass a wide range of conduct, as well as speech. *Post,* at 2496. And the time and place of the agitation would also be important.

We readily acknowledge, as *Pickering* did, that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." 391 U.S., at 568, 88 S.Ct. 1731. Our analysis is consistent with that principle. The exacting scrutiny standard we apply in this case was developed in the context of commercial speech, another area where the government has traditionally enjoyed greater-than-usual power to regulate speech. See ***2478** *supra,* at 2464 –2465. It is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees—itself a significant impingement on associational freedoms that would not be tolerated in other contexts. We simply draw the line at allowing the government to go further still and require all employees to support the union irrespective of whether they share its views. Nothing in the *Pickering* line of cases requires us to uphold every speech restriction the government imposes as an employer. See *Pickering, supra,* at 564–566, 88 S.Ct. 1731 (holding teacher's dismissal for criticizing school board unconstitutional); *Rankin v. McPherson,* 483 U.S. 378, 392, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) (holding clerical employee's dismissal for supporting assassination attempt on President unconstitutional); *Treasury Employees,* 513 U.S., at 477, 115 S.Ct. 1003 (holding federal-employee honoraria ban unconstitutional).

VI

For the reasons given above, we conclude that public-sector agency-shop arrangements violate the First Amendment, and *Abood* erred in concluding otherwise. There remains the question whether *stare decisis* nonetheless counsels against overruling *Abood*. It does not.

"*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee,* 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). We will not overturn a past decision unless there are strong grounds for doing so. *United States v. International Business Machines Corp.,* 517 U.S. 843, 855–856, 116 S.Ct. 1793, 135 L.Ed.2d 124 (1996); *Citizens United,* 558 U.S., at 377, 130 S.Ct. 876 (ROBERTS, C.J., concurring). But as we have often recognized, *stare decisis* is " 'not an inexorable command.' " *Pearson v. Callahan,* 555 U.S. 223, 233, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009); see also *Lawrence v. Texas,* 539 U.S. 558, 577, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003); *State Oil Co. v. Khan,* 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997); *Agostini v. Felton,* 521 U.S. 203, 235, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997); *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 63, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996); *Payne, supra,* at 828, 111 S.Ct. 2597.

The doctrine "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini, supra,* at 235, 117 S.Ct. 1997. And *stare decisis* applies with perhaps least force of all to decisions that wrongly denied First Amendment rights: "This Court has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one)." *Federal Election Comm'n v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, 500, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (Scalia, J., concurring in part and

concurring in judgment) (internal quotation marks omitted); see also *Citizens United, supra,* at 362–365, 130 S.Ct. 876 (overruling *Austin,* 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652); *Barnette,* 319 U.S., at 642, 63 S.Ct. 1178 (overruling *Minersville School Dist. v. Gobitis,* 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375 (1940)).

Our cases identify factors that should be taken into account in deciding whether to overrule a past decision. Five of these are most important here: the quality of *Abood* 's reasoning, the workability of the rule it established, its consistency with other related decisions, developments ***2479** since the decision was handed down, and reliance on the decision. After analyzing these factors, we conclude that *stare decisis* does not require us to retain *Abood*.

A

An important factor in determining whether a precedent should be overruled is the quality of its reasoning, see *Citizens United,* 558 U.S., at 363–364, 130 S.Ct. 876; *id.,* at 382–385, 130 S.Ct. 876 (ROBERTS, C.J., concurring); *Lawrence,* 539 U.S., at 577–578, 123 S.Ct. 2472, and as we explained in *Harris*, *Abood* was poorly reasoned, see 573 U.S., at —— – ——, 134 S.Ct., at 2632–2634. We will summarize, but not repeat, *Harris* 's lengthy discussion of the issue.

Abood went wrong at the start when it concluded that two prior decisions, *Railway Employes v. Hanson,* 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956), and *Machinists v. Street,* 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961), "appear[ed] to require validation of the agency-shop agreement before [the Court]." 431 U.S., at 226, 97 S.Ct. 1782. Properly understood, those decisions did no such thing. Both cases involved Congress's "*bare authorization* " of *private-sector* union shops under the Railway Labor Act. *Street, supra,* at 749, 81 S.Ct. 1784 (emphasis added). [24] *Abood* failed to appreciate that a very different First Amendment question arises when a State *requires* its employees to pay agency fees. See *Harris, supra,* at ——, 134 S.Ct., at 2632.

24 No First Amendment issue could have properly arisen in those cases unless Congress's enactment of a provision allowing, but not requiring, private parties to enter into union-shop arrangements was sufficient to establish governmental action. That proposition was debatable when *Abood* was decided, and is even more questionable today. See *American Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 53, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999); *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 357, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974). Compare, *e.g., White v. Communications Workers of Am., AFL–CIO, Local 1300,* 370 F.3d 346, 350 (C.A.3 2004) (no state action), and *Kolinske v. Lubbers,* 712 F.2d 471, 477–478 (C.A.D.C.1983) (same), with *Beck v. Communications Workers of Am.,* 776 F.2d 1187, 1207 (C.A.4 1985) (state action), and *Linscott v. Millers Falls Co.,* 440 F.2d 14, 16, and n. 2 (C.A.1 1971) (same). We reserved decision on this question in *Communications Workers v. Beck,* 487 U.S. 735, 761, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988), and do not resolve it here.

Moreover, neither *Hanson* nor *Street* gave careful consideration to the First Amendment. In *Hanson,* the primary questions were whether Congress exceeded its power under the Commerce Clause or violated substantive due process by authorizing private union-shop arrangements under the Commerce and Due Process Clauses. 351 U.S., at 233–235, 76 S.Ct. 714. After deciding those questions, the Court summarily dismissed what was essentially a facial First Amendment challenge, noting that the record did not substantiate the challengers' claim. *Id.,* at 238, 76 S.Ct. 714; see *Harris, supra,* at ——, 134 S.Ct., at 2632. For its part, *Street* was decided as a matter of statutory construction, and so did not reach any constitutional issue. 367 U.S., at 749–750, 768–769, 81 S.Ct. 1784. *Abood* nevertheless took the view that *Hanson* and *Street* "all but decided" the important free speech issue that was before the Court. *Harris,* 573 U.S., at ——, 134 S.Ct., at 2632. As we said in *Harris,* "[s]urely a First Amendment issue of this importance deserved better treatment." *Ibid.*

Abood 's unwarranted reliance on *Hanson* and *Street* appears to have contributed to another mistake: *Abood* judged the constitutionality of public-sector agency ***2480** fees under a deferential standard that finds no support in our free speech cases. (As noted, *supra,* at 2464 – 2465, today's dissent makes the same fundamental mistake.) *Abood* did not independently evaluate the strength of the government interests that were said to support the challenged agency-fee provision; nor did it ask how well that provision actually promoted those interests or whether they could have been adequately served without impinging so heavily on the free speech rights of nonmembers. Rather, *Abood* followed *Hanson* and *Street,*

which it interpreted as having deferred to "*the legislative assessment* of the important contribution of the union shop to the system of labor relations established by Congress." 431 U.S., at 222, 97 S.Ct. 1782 (emphasis added). But *Hanson* deferred to that judgment in deciding the Commerce Clause and substantive due process questions that were the focus of the case. Such deference to legislative judgments is inappropriate in deciding free speech issues.

If *Abood* had considered whether agency fees were actually needed to serve the asserted state interests, it might not have made the serious mistake of assuming that one of those interests—"labor peace"—demanded, not only that a single union be designated as the exclusive representative of all the employees in the relevant unit, but also that nonmembers be required to pay agency fees. Deferring to a perceived legislative judgment, *Abood* failed to see that the designation of a union as exclusive representative and the imposition of agency fees are not inextricably linked. See *supra,* at 2465 – 2466; *Harris, supra,* at 2465 – 2466, 134 S.Ct., at 2640.

Abood also did not sufficiently take into account the difference between the effects of agency fees in public- and private-sector collective bargaining. The challengers in *Abood* argued that collective bargaining with a government employer, unlike collective bargaining in the private sector, involves "inherently 'political' " speech. 431 U.S., at 226, 97 S.Ct. 1782. The Court did not dispute that characterization, and in fact conceded that "decisionmaking by a public employer is above all a political process" driven more by policy concerns than economic ones. *Id.,* at 228, 97 S.Ct. 1782; see *id.,* at 228–231, 97 S.Ct. 1782. But (again invoking *Hanson*), the *Abood* Court asserted that public employees do not have "weightier First Amendment interest[s]" against compelled speech than do private employees. *Id.,* at 229, 97 S.Ct. 1782. That missed the point. Assuming for the sake of argument that the First Amendment applies at all to private-sector agency-shop arrangements, the individual interests at stake still differ. "In the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector." *Harris,* 573 U.S., at ——, 134 S.Ct., at 2632.

Overlooking the importance of this distinction, "*Abood* failed to appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends." *Id.,* at ——, 134 S.Ct., at 2632. Likewise, "*Abood* does not seem to have anticipated the magnitude of the practical administrative problems that would result in attempting to classify public-sector union expenditures as either 'chargeable' ... or nonchargeable." *Ibid.* Nor did *Abood* "foresee the practical problems that would face objecting nonmembers." *Id.,* at ——, 134 S.Ct., at 2633.

In sum, as detailed in *Harris,* ***2481** *Abood* was not well reasoned. [25]

25 Contrary to the dissent's claim, see *post,* at 2497, and n. 4, the fact that "[t]he rationale of [*Abood*] does not withstand careful analysis" *is* a reason to overrule it, *e.g., Lawrence v. Texas,* 539 U.S. 558, 577, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). And that is even truer when, as here, the defenders of the precedent do not attempt to "defend [its actual] reasoning." *Citizens United v. Federal Election Comm'n,* 558 U.S. 310, 363, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010); *id.,* at 382–385, 130 S.Ct. 876 (ROBERTS, C.J., concurring).

B

Another relevant consideration in the *stare decisis* calculus is the workability of the precedent in question, *Montejo v. Louisiana,* 556 U.S. 778, 792, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009), and that factor also weighs against *Abood*.

1

Abood 's line between chargeable and nonchargeable union expenditures has proved to be impossible to draw with precision. We tried to give the line some definition in *Lehnert*. There, a majority of the Court adopted a three-part test requiring that chargeable expenses (1) be " 'germane' " to collective bargaining, (2) be "justified" by the government's labor-peace and free-rider interests, and (3) not add "significantly" to the burden on free speech, 500 U.S., at 519, 111 S.Ct. 1950, but the Court splintered over the application of this test, see *id.,* at 519–522, 111 S.Ct. 1950 (plurality opinion); *id.,* at 533–534, 111 S.Ct. 1950 (Marshall, J., concurring in part and dissenting in part). That division was not surprising. As the *Lehnert* dissenters aptly observed, each part of the majority's test "involves a substantial judgment call," *id.,* at 551, 111 S.Ct. 1950 (opinion of Scalia, J.), rendering the test "altogether malleable" and

"no[t] principled," *id.,* at 563, 111 S.Ct. 1950 (KENNEDY, J., concurring in judgment in part and dissenting in part).

Justice Scalia presciently warned that *Lehnert* 's amorphous standard would invite "perpetua[l] give-it-a-try litigation," *id.,* at 551, 111 S.Ct. 1950, and the Court's experience with union lobbying expenses illustrates the point. The *Lehnert* plurality held that money spent on lobbying for increased education funding was not chargeable. *Id.,* at 519–522, 111 S.Ct. 1950. But Justice Marshall—applying the same three-prong test—reached precisely the opposite conclusion. *Id.,* at 533–542, 111 S.Ct. 1950. And *Lehnert* failed to settle the matter; States and unions have continued to "give it a try" ever since.

In *Knox,* for example, we confronted a union's claim that the costs of lobbying the legislature and the electorate about a ballot measure were chargeable expenses under *Lehnert*. See Brief for Respondent in *Knox v. Service Employees,* O.T. 2011, No. 10–1121, pp. 48–53. The Court rejected this claim out of hand, 567 U.S., at 320–321, 132 S.Ct. 2277, but the dissent refused to do so, *id.,* at 336, 132 S.Ct. 2277 (opinion of BREYER, J.). And in the present case, nonmembers are required to pay for unspecified "[l]obbying" expenses and for "[s]ervices" that "may ultimately inure to the benefit of the members of the local bargaining unit." App. to Pet. for Cert. 31a–32a. That formulation is broad enough to encompass just about anything that the union might choose to do.

Respondents agree that *Abood* 's chargeable-nonchargeable line suffers from "a vagueness problem," that it sometimes "allows what it shouldn't allow," and that "a firm[er] line c[ould] be drawn." Tr. of Oral Arg. 47–48. They therefore argue that we should "consider revisiting" this part of *Abood*. Tr. of Oral Arg. 66; see Brief for Union Respondent 46–47; Brief for State Respondents 30. This concession ***2482** only underscores the reality that *Abood* has proved unworkable: Not even the parties defending agency fees support the line that it has taken this Court over 40 years to draw.

2

Objecting employees also face a daunting and expensive task if they wish to challenge union chargeability determinations. While *Hudson* requires a union to provide nonmembers with "sufficient information to gauge the propriety of the union's fee," 475 U.S., at 306, 106 S.Ct. 1066, the *Hudson* notice in the present case and in others that have come before us do not begin to permit a nonmember to make such a determination.

In this case, the notice lists categories of expenses and sets out the amount in each category that is said to be attributable to chargeable and nonchargeable expenses. Here are some examples regarding the Union respondent's expenditures:

Category	Total Expense	Chargeable Expense
Salary and Benefits	$14,718,708	$11,830,230
Office Printing, Supplies, and Advertising	$148,272	$127,959
Postage and Freight	$373,509	$268,107
Telephone	$214,820	$192,721
Convention Expense	$268,855	$268,855

See App. to Pet. for Cert. 35a–36a.

How could any nonmember determine whether these numbers are even close to the mark without launching a legal challenge and retaining the services of attorneys and accountants? Indeed, even with such services, it would be a laborious and difficult task to check these figures. [26]

26 For this reason, it is hardly surprising that chargeability issues have not arisen in many Court of Appeals cases. See *post,* at 2498 - 2499 (KAGAN, J., dissenting).

The Union respondent argues that challenging its chargeability determinations is not burdensome because the Union pays for the costs of arbitration, see Brief for Union Respondent 10–11, but objectors must still pay for the attorneys and experts needed to mount a serious challenge. And the attorney's fees incurred in such a proceeding can be substantial. See, *e.g., Knox v. Chiang,* 2013 WL 2434606, *15 (E.D.Cal., June 5, 2013) (attorney's fees in *Knox* exceeded $1 million). The Union respondent's suggestion that an objector could obtain adequate review without even showing up at an arbitration, see App. to Pet. for Cert. 40a–41a, is therefore farfetched.

C

Developments since *Abood,* both factual and legal, have also "eroded" the decision's "underpinnings" and left it an outlier among our First Amendment cases. *United* ***2483** *States v. Gaudin,* 515 U.S. 506, 521, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).

1

Abood pinned its result on the "unsupported empirical assumption" that "the principle of exclusive representation in the public sector is dependent on a union or agency shop." *Harris,* 573 U.S., at ——, 134 S.Ct., at 2634; *Abood,* 431 U.S., at 220–222, 97 S.Ct. 1782. But, as already noted, experience has shown otherwise. See *supra,* at 2465 – 2466.

It is also significant that the Court decided *Abood* against a very different legal and economic backdrop. Public-sector unionism was a relatively new phenomenon in 1977. The first State to permit collective bargaining by government employees was Wisconsin in 1959, R. Kearney & P. Mareschal, Labor Relations in the Public Sector 64 (5th ed. 2014), and public-sector union membership remained relatively low until a "spurt" in the late 1960's and early 1970's, shortly before *Abood* was decided, Freeman, Unionism Comes to the Public Sector, 24 J. Econ. Lit. 41, 45 (1986). Since then, public-sector union membership has come to surpass private-sector union membership, even though there are nearly four times as many total private-sector employees as public-sector employees. B. Hirsch & D. Macpherson, Union Membership and Earnings Data Book 9–10, 12, 16 (2013 ed.).

This ascendance of public-sector unions has been marked by a parallel increase in public spending. In 1970, total state and local government expenditures amounted to $646 per capita in nominal terms, or about $4,000 per capita in 2014 dollars. See Dept. of Commerce, Statistical Abstract of the United States: 1972, p. 419; CPI Inflation Calculator, BLS, http://data.bls.gov/cgi-bin/cpicalc.pl. By 2014, that figure had ballooned to approximately $10,238 per capita. ProQuest, Statistical Abstract of the United States: 2018, pp. 17, Table 14, 300, Table 469. Not all that increase can be attributed to public-sector unions, of course, but the mounting costs of public-employee wages, benefits, and pensions undoubtedly played a substantial role. We are told, for example, that Illinois' pension funds are underfunded by $129 billion as a result of generous public-employee retirement packages. Brief for Jason R. Barclay et al. as *Amici Curiae* 9, 14. Unsustainable collective-bargaining agreements have also been blamed for multiple municipal bankruptcies. See Brief for State of Michigan et al. as *Amici Curiae* 10–19. These developments, and the political debate over public spending and debt they have spurred, have given collective-bargaining issues a political valence that *Abood* did not fully appreciate.

2

Abood is also an "anomaly" in our First Amendment jurisprudence, as we recognized in *Harris* and *Knox*. *Harris, supra,* at ——, 134 S.Ct., at 2627; *Knox,* 567 U.S., at 311, 132 S.Ct. 2277. This is not an altogether new observation. In *Abood* itself, Justice Powell faulted the Court for failing to perform the " 'exacting scrutiny' " applied in other cases involving significant impingements on First Amendment rights. 431 U.S., at 259, 97 S.Ct. 1782; see *id.,* at 259–260, and n. 14, 97 S.Ct. 1782. Our later cases involving compelled speech and association have also employed exacting scrutiny, if not a more demanding standard. See, *e.g., Roberts,* 468 U.S., at 623, 104 S.Ct. 3244; *United Foods,* 533 U.S., at 414, 121 S.Ct. 2334. And we have more recently refused, even in agency-fee cases, to extend *Abood* beyond circumstances where it directly controls. See *Knox, supra,* at 314, 132 S.Ct. 2277; *Harris, supra,* at —— – ——, 134 S.Ct., at 2639.

***2484** *Abood* particularly sticks out when viewed against our cases holding that public employees generally may not be required to support a political party. See *Elrod,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547; *Branti,* 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574; *Rutan,* 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52; *O'Hare Truck Service, Inc. v. City of Northlake,* 518 U.S. 712, 116 S.Ct. 2353, 135 L.Ed.2d 874 (1996). The Court reached that conclusion despite a "long tradition" of political patronage in government. *Rutan, supra,* at 95, 110 S.Ct. 2729 (Scalia, J., dissenting); see also *Elrod,* 427 U.S., at 353, 96 S.Ct. 2673 (plurality opinion); *id.,* at 377–378, 96 S.Ct. 2673 (Powell, J., dissenting). It is an odd feature of our First Amendment cases that political patronage has been deemed largely unconstitutional, while forced subsidization of union speech (which has no such pedigree) has been largely permitted. As Justice Powell observed: "I am at a loss to understand why the State's decision to adopt the agency shop in the public sector should be worthy of *greater* deference, when challenged on First Amendment grounds, than its decision to adhere to the *tradition* of political patronage." *Abood, supra,* at 260, n. 14, 97 S.Ct. 1782 (opinion concurring in judgment) (citing

Elrod, supra, at 376–380, 382–387, 96 S.Ct. 2673 (Powell, J., dissenting); emphasis added). We have no occasion here to reconsider our political patronage decisions, but Justice Powell's observation is sound as far as it goes. By overruling *Abood,* we end the oddity of privileging compelled union support over compelled party support and bring a measure of greater coherence to our First Amendment law.

D

In some cases, reliance provides a strong reason for adhering to established law, see, *e.g., Hilton v. South Carolina Public Railways Comm'n,* 502 U.S. 197, 202–203, 112 S.Ct. 560, 116 L.Ed.2d 560 (1991), and this is the factor that is stressed most strongly by respondents, their *amici,* and the dissent. They contend that collective-bargaining agreements now in effect were negotiated with agency fees in mind and that unions may have given up other benefits in exchange for provisions granting them such fees. Tr. of Oral Arg. 67–68; see Brief for State Respondents 54; Brief for Union Respondent 50; *post,* at 2498 – 2501 (KAGAN, J., dissenting). In this case, however, reliance does not carry decisive weight.

For one thing, it would be unconscionable to permit free speech rights to be abridged in perpetuity in order to preserve contract provisions that will expire on their own in a few years' time. "The fact that [public-sector unions] may view [agency fees] as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that [nonmembers] share in having their constitutional rights fully protected." *Arizona v. Gant,* 556 U.S. 332, 349, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).

For another, *Abood* does not provide "a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced." *South Dakota v. Wayfair, Inc., ante,* at 20, —— U.S. ——, 138 S.Ct. 2080, —— L.Ed.2d ——, 2018 WL 3058015 (2018); see *supra,* at 2480 – 2482.

This is especially so because public-sector unions have been on notice for years regarding this Court's misgivings about *Abood*. In *Knox,* decided in 2012, we described *Abood* as a First Amendment "anomaly." 567 U.S., at 311, 132 S.Ct. 2277. Two years later in *Harris*, we were asked to overrule *Abood,* and while we found it unnecessary to take that step, we cataloged *Abood* 's many weaknesses. In ***2485** 2015, we granted a petition for certiorari asking us to review a decision that sustained an agency-fee arrangement under *Abood*. *Friedrichs v. California Teachers Assn.,* 576 U.S. ——, 136 S.Ct. 2545, 195 L.Ed.2d 880 (2016). After exhaustive briefing and argument on the question whether *Abood* should be overruled, we affirmed the decision below by an equally divided vote. 578 U.S. ——, 136 S.Ct. 1083, 194 L.Ed.2d 255 (2016) (*per curiam*). During this period of time, any public-sector union seeking an agency-fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was uncertain.

That is certainly true with respect to the collective-bargaining agreement in the present case. That agreement initially ran from July 1, 2012, until June 30, 2015. App. 331. Since then, the agreement has been extended pursuant to a provision providing for automatic renewal for an additional year unless either party gives timely notice that it desires to amend or terminate the contract. *Ibid*. Thus, for the past three years, the Union could not have been confident about the continuation of the agency-fee arrangement for more than a year at a time.

Because public-sector collective-bargaining agreements are generally of rather short duration, a great many of those now in effect probably began or were renewed since *Knox* (2012) or *Harris* (2014). But even if an agreement antedates those decisions, the union was able to protect itself if an agency-fee provision was essential to the overall bargain. A union's attorneys undoubtedly understand that if one provision of a collective-bargaining agreement is found to be unlawful, the remaining provisions are likely to remain in effect. See *NLRB v. Rockaway News Supply Co.,* 345 U.S. 71, 76–79, 73 S.Ct. 519, 97 L.Ed. 832 (1953); see also 8 R. Lord, Williston on Contracts § 19:70 (4th ed. 2010). Any union believing that an agency-fee provision was essential to its bargain could have insisted on a provision giving it greater protection. The agreement in the present case, by contrast, provides expressly that the invalidation of any part of the agreement "shall not invalidate the remaining portions," which "shall remain in full force and effect." App. 328. Such severability clauses ensure that "entire contracts" are not "br[ought] down" by today's ruling. *Post,* at 2499, n. 5 (KAGAN, J., dissenting).

In short, the uncertain status of *Abood,* the lack of clarity it provides, the short-term nature of collective-bargaining agreements, and the ability of unions to protect themselves if an agency-fee provision was crucial to its bargain all work to undermine the force of reliance as a factor supporting *Abood*.[27]

27 The dissent emphasizes another type of reliance, namely, that "[o]ver 20 States have by now enacted statutes authorizing [agency-fee] provisions." *Post,* at 2499. But as we explained in *Citizens United,* "[t]his is not a compelling interest for *stare decisis*. If it were, legislative acts could prevent us from overruling our own precedents, thereby interfering with our duty 'to say what the law is.' " 558 U.S., at 365, 130 S.Ct. 876 (quoting *Marbury v. Madison,* 1 Cranch 137, 177, 2 L.Ed. 60 (1803)). Nor does our decision " 'require an extensive legislative response.' " *Post,* at 2499. States can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions. In this way, these States can follow the model of the federal government and 28 other States.

* * *

We recognize that the loss of payments from nonmembers may cause unions to experience unpleasant transition costs in the short term, and may require unions to make adjustments in order to attract and ***2486** retain members. But we must weigh these disadvantages against the considerable windfall that unions have received under *Abood* for the past 41 years. It is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment. Those unconstitutional exactions cannot be allowed to continue indefinitely.

All these reasons—that *Abood* 's proponents have abandoned its reasoning, that the precedent has proved unworkable, that it conflicts with other First Amendment decisions, and that subsequent developments have eroded its underpinnings—provide the " 'special justification[s]' " for overruling *Abood*. *Post,* at 2497 (KAGAN, J., dissenting) (quoting *Kimble v. Marvel Entertainment, LLC,* 576 U.S. ——, ——, 135 S.Ct. 2401, 2409, 192 L.Ed.2d 463 (2015)). [28]

28 Unfortunately, the dissent sees the need to resort to accusations that we are acting like "black-robed rulers" who have shut down an "energetic policy debate." *Post,* at 2501 – 2502. We certainly agree that judges should not "overrid[e] citizens' choices" or "pick the winning side," *ibid.*—unless the Constitution commands that they do so. But when a federal or state law violates the Constitution, the American doctrine of judicial review requires us to enforce the Constitution. Here, States with agency-fee laws have abridged fundamental free speech rights. In holding that these laws violate the Constitution, we are simply enforcing the First Amendment as properly understood, "[t]he very purpose of [which] was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 638, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).

VII

For these reasons, States and public-sector unions may no longer extract agency fees from nonconsenting employees. Under Illinois law, if a public-sector collective-bargaining agreement includes an agency-fee provision and the union certifies to the employer the amount of the fee, that amount is automatically deducted from the nonmember's wages. § 315/6(e). No form of employee consent is required.

This procedure violates the First Amendment and cannot continue. Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); see also *Knox,* 567 U.S., at 312–313, 132 S.Ct. 2277. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 145, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) (plurality opinion); see also *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.,* 527 U.S. 666, 680–682, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999). Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

* * *

Abood was wrongly decided and is now overruled. The judgment of the United States Court of Appeals for the Seventh Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

***2487** Justice SOTOMAYOR, dissenting.

I join Justice Kagan's dissent in full. Although I joined the majority in *Sorrell v. IMS Health Inc.,* 564 U.S. 552, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011), I disagree with the way that this Court has since interpreted and applied that opinion. See, *e.g., National Institute of Family and Life Advocates v. Becerra, ante,* p. ——, —— U.S. ——, 138 S.Ct. 2361, ——L.Ed.2d ——, 2018 WL 3116336 (2018). Having seen the troubling development in First Amendment jurisprudence over the years, both in this Court and in lower courts, I agree fully with Justice KAGAN that *Sorrell*—in the way it has been read by this Court—has allowed courts to "wiel[d] the First Amendment in ... an aggressive way" just as the majority does today. *Post,* at 2501.

Justice KAGAN, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join, dissenting.

For over 40 years, *Abood v. Detroit Bd. of Ed.,* 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), struck a stable balance between public employees' First Amendment rights and government entities' interests in running their workforces as they thought proper. Under that decision, a government entity could require public employees to pay a fair share of the cost that a union incurs when negotiating on their behalf over terms of employment. But no part of that fair-share payment could go to any of the union's political or ideological activities.

That holding fit comfortably with this Court's general framework for evaluating claims that a condition of public employment violates the First Amendment. The Court's decisions have long made plain that government entities have substantial latitude to regulate their employees' speech—especially about terms of employment—in the interest of operating their workplaces effectively. *Abood* allowed governments to do just that. While protecting public employees' expression about non-workplace matters, the decision enabled a government to advance important managerial interests—by ensuring the presence of an exclusive employee representative to bargain with. Far from an "anomaly," *ante,* at 2463, the *Abood* regime was a paradigmatic example of how the government can regulate speech in its capacity as an employer.

Not any longer. Today, the Court succeeds in its 6–year campaign to reverse *Abood*. See *Friedrichs v. California Teachers Assn.,* 578 U.S. ——, 136 S.Ct. 1083, 194 L.Ed.2d 255 (2016) (*per curiam*); *Harris v. Quinn,* 573 U.S. ——, 134 S.Ct. 2618, 189 L.Ed.2d 620 (2014); *Knox v. Service Employees,* 567 U.S. 298, 132 S.Ct. 2277, 183 L.Ed.2d 281 (2012). Its decision will have large-scale consequences. Public employee unions will lose a secure source of financial support. State and local governments that thought fair-share provisions furthered their interests will need to find new ways of managing their workforces. Across the country, the relationships of public employees and employers will alter in both predictable and wholly unexpected ways.

Rarely if ever has the Court overruled a decision—let alone one of this import—with so little regard for the usual principles of *stare decisis*. There are no special justifications for reversing *Abood.* It has proved workable. No recent developments have eroded its underpinnings. And it is deeply entrenched, in both the law and the real world. More than 20 States have statutory schemes built on the decision. Those laws underpin thousands of ongoing contracts involving millions of employees. Reliance interests do not come any stronger than those surrounding ***2488** *Abood*. And likewise, judicial disruption does not get any greater than what the Court does today. I respectfully dissent.

I

I begin with *Abood,* the 41–year–old precedent the majority overrules. That case involved a union that had been certified as the exclusive representative of Detroit's public school teachers. The union's collective-bargaining agreement with the city included an "agency shop" clause, which required teachers who had not joined the union to pay it "a service charge equal to the regular dues required of [u]nion members." *Abood,* 431 U.S., at 212, 97 S.Ct. 1782. A group of non-union members sued over that clause, arguing that it violated the First Amendment.

In considering their challenge, the Court canvassed the purposes of the "agency shop" clause. It was rooted, the Court understood, in the "principle of exclusive union representation"—a "central element" in "industrial relations" since the New Deal. *Id.,* at 220, 97 S.Ct. 1782. Significant benefits, the Court explained, could derive from the "designation of a single [union] representative" for all similarly situated employees in a workplace. *Ibid.* In particular, such arrangements: "avoid[ ] the confusion that would result from attempting to enforce two or more

agreements specifying different terms and conditions of employment"; "prevent[ ] inter-union rivalries from creating dissension within the work force"; "free[ ] the employer from the possibility of facing conflicting demands from different unions"; and "permit [ ] the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations." *Id.,* at 220–221, 97 S.Ct. 1782. As proof, the Court pointed to the example of exclusive-representation arrangements in the private-employment sphere: There, Congress had long thought that such schemes would promote "peaceful labor relations" and "labor stability." *Id.,* at 219, 229, 97 S.Ct. 1782. A public employer like Detroit, the Court believed, could reasonably make the same calculation.

But for an exclusive-bargaining arrangement to work, such an employer often thought, the union needed adequate funding. Because the "designation of a union as exclusive representative carries with it great responsibilities," the Court reasoned, it inevitably also entails substantial costs. *Id.,* at 221, 97 S.Ct. 1782. "The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones." *Ibid.* Those activities, the Court noted, require the "expenditure of much time and money"—for example, payment for the "services of lawyers, expert negotiators, economists, and a research staff." *Ibid.* And there is no way to confine the union's services to union members alone (and thus to trim costs) because unions must by law fairly represent all employees in a given bargaining unit—union members and non-members alike. See *ibid.*

With all that in mind, the Court recognized why both a government entity and its union bargaining partner would gravitate toward an agency-fee clause. Those fees, the Court reasoned, "distribute fairly the cost" of collective bargaining "among those who benefit"—that is, *all* employees in the work unit. *Id.,* at 222, 97 S.Ct. 1782. And they "counteract[ ] the incentive that employees might otherwise have to become 'free riders.' " *Ibid.* In other words, an agency-fee provision prevents employees from reaping all the "benefits of union representation"—higher pay, a better retirement plan, and so forth—while ***2489** leaving it to others to bear the costs. *Ibid.* To the Court, the upshot was clear: A government entity could reasonably conclude that such a clause was needed to maintain the kind of exclusive bargaining arrangement that would facilitate peaceful and stable labor relations.

But the Court acknowledged as well the "First Amendment interests" of dissenting employees. *Ibid.* It recognized that some workers might oppose positions the union takes in collective bargaining, or even "unionism itself." *Ibid.* And still more, it understood that unions often advance "political and ideological" views outside the collective-bargaining context—as when they "contribute to political candidates." *Id.,* at 232, 234, 97 S.Ct. 1782. Employees might well object to the use of their money to support such "ideological causes." *Id.,* at 235, 97 S.Ct. 1782.

So the Court struck a balance, which has governed this area ever since. On the one hand, employees could be required to pay fees to support the union in "collective bargaining, contract administration, and grievance adjustment." *Id.,* at 225–226, 97 S.Ct. 1782. There, the Court held, the "important government interests" in having a stably funded bargaining partner justify "the impingement upon" public employees' expression. *Id.,* at 225, 97 S.Ct. 1782. But on the other hand, employees could not be compelled to fund the union's political and ideological activities. Outside the collective-bargaining sphere, the Court determined, an employee's First Amendment rights defeated any conflicting government interest. See *id.,* at 234–235, 97 S.Ct. 1782.

II

Unlike the majority, I see nothing "questionable" about *Abood* 's analysis. *Ante,* at 2463 (quoting *Harris,* 573 U.S., at ——, 134 S.Ct., at 2632). The decision's account of why some government entities have a strong interest in agency fees (now often called fair-share fees) is fundamentally sound. And the balance *Abood* struck between public employers' interests and public employees' expression is right at home in First Amendment doctrine.

A

Abood 's reasoning about governmental interests has three connected parts. First, exclusive representation arrangements benefit some government entities because they can facilitate stable labor relations. In particular, such arrangements eliminate the potential for inter-union conflict and streamline the process of negotiating terms of employment. See 431 U.S., at 220–221, 97 S.Ct. 1782. Second, the government may be unable to avail itself of those benefits unless the single union has a secure source of funding. The various

tasks involved in representing employees cost money; if the union doesn't have enough, it can't be an effective employee representative and bargaining partner. See *id.,* at 221, 97 S.Ct. 1782. And third, agency fees are often needed to ensure such stable funding. That is because without those fees, employees have every incentive to free ride on the union dues paid by others. See *id.,* at 222, 97 S.Ct. 1782.

The majority does not take issue with the first point. See *ante,* at 2478 (It is "not disputed that the State may require that a union serve as exclusive bargaining agent for its employees" in order to advance the State's "interests as an employer"). The majority claims that the second point never appears in *Abood,* but is willing to assume it for the sake of argument. See *ante,* at 2476 – 2477; but see *Abood,* 431 U.S., at 221, 97 S.Ct. 1782 (The tasks of an exclusive representative "often entail expenditure of much time and money"). So the majority stakes everything on the ***2490** third point—the conclusion that maintaining an effective system of exclusive representation often entails agency fees. *Ante,* at 2477 – 2478 (It "is simply not true" that exclusive representation and agency fees are "inextricably linked"); see *ante,* at 2467.

But basic economic theory shows why a government would think that agency fees are necessary for exclusive representation to work. What ties the two together, as *Abood* recognized, is the likelihood of free-riding when fees are absent. Remember that once a union achieves exclusive-representation status, the law compels it to fairly represent all workers in the bargaining unit, whether or not they join or contribute to the union. See *supra,* at 2488 – 2489. Because of that legal duty, the union cannot give special advantages to its own members. And that in turn creates a collective action problem of nightmarish proportions. Everyone—not just those who oppose the union, but also those who back it—has an economic incentive to withhold dues; only altruism or loyalty—as *against* financial self-interest—can explain why an employee would pay the union for its services. And so emerged *Abood* 's rule allowing fair-share agreements: That rule ensured that a union would receive sufficient funds, despite its legally imposed disability, to effectively carry out its duties as exclusive representative of the government's employees.

The majority's initial response to this reasoning is simply to dismiss it. "[F]ree rider arguments," the majority pronounces, "are generally insufficient to overcome First Amendment objections." *Ante,* at 2466 (quoting *Knox,* 567 U.S., at 311, 132 S.Ct. 2277). "To hold otherwise," it continues, "would have startling consequences" because "[m]any private groups speak out" in ways that will "benefit[ ] nonmembers." *Ante,* at 2466 – 2467. But that disregards the defining characteristic of *this* free-rider argument—that unions, unlike those many other private groups, must serve members and non-members alike. Groups advocating for "senior citizens or veterans" (to use the majority's examples) have no legal duty to provide benefits to all those individuals: They can spur people to pay dues by conferring all kinds of special advantages on their dues-paying members. Unions are—by law—in a different position, as this Court has long recognized. See, *e.g., Machinists v. Street,* 367 U.S. 740, 762, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961). Justice Scalia, responding to the same argument as the majority's, may have put the point best. In a way that is true of no other private group, the "law *requires* the union to carry" non-members—"indeed, requires the union to *go out of its way* to benefit [them], even at the expense of its other interests." *Lehnert v. Ferris Faculty Assn.,* 500 U.S. 507, 556, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991) (opinion concurring in part and dissenting in part). That special feature was what justified *Abood* : "Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them." 500 U.S., at 556, 111 S.Ct. 1950.

The majority's fallback argument purports to respond to the distinctive position of unions, but still misses *Abood* 's economic insight. Here, the majority delivers a four-page exegesis on why unions will seek to serve as an exclusive bargaining representative even "if they are not given agency fees." *Ante,* at 2467; see *ante,* at 2467 – 2469. The gist of the account is that "designation as the exclusive representative confers many benefits," which outweigh the costs of providing services to non-members. *Ante,* at 2467. But that response avoids the key question, which is whether unions without agency fees will be *able to* (not whether they will *want to*) carry on as an effective exclusive representative. ***2491** And as to that question, the majority again fails to reckon with how economically rational actors behave—in public as well as private workplaces. Without a fair-share agreement, the class of union non-members spirals upward. Employees (including those who love the union) realize that they can get the same benefits even if they let their memberships expire. And as more and more stop paying dues, those left must take up the financial slack (and anyway, begin to feel like suckers)—so they too quit the union. See Ichniowski & Zax, Right–to–Work Laws, Free Riders, and Unionization in the Local Public Sector, 9 J. Labor Economics 255, 257 (1991). [1] And when the vicious cycle finally ends,

chances are that the union will lack the resources to effectively perform the responsibilities of an exclusive representative—or, in the worst case, to perform them at all. The result is to frustrate the interests of every government entity that thinks a strong exclusive-representation scheme will promote stable labor relations.

1 The majority relies on statistics from the federal workforce (where agency fees are unlawful) to suggest that public employees do not act in accord with economic logic. See *ante,* at 2465. But first, many fewer federal employees pay dues than have voted for a union to represent them, indicating that free-riding in fact pervades the federal sector. See, *e.g.,* R. Kearney & P. Mareschal, Labor Relations in the Public Sector 26 (5th ed. 2014). And second, that sector is not typical of other public workforces. Bargaining in the federal sphere is limited; most notably, it does not extend to wages and benefits. See *Fort Stewart Schools v. FLRA,* 495 U.S. 641, 649, 110 S.Ct. 2043, 109 L.Ed.2d 659 (1990). That means union operating expenses are lower than they are elsewhere. And the gap further widens because the federal sector uses large, often national, bargaining units that provide unions with economies of scale. See Brief for International Brotherhood of Teamsters as *Amicus Curiae* 7. For those reasons, the federal workforce is the wrong place to look for meaningful empirical evidence on the issues here.

Of course, not all public employers will share that view. Some would rather not bargain with an exclusive representative. Others would prefer that representative to be poorly funded—to serve more as a front than an effectual bargaining partner. But as reflected in the number of fair-share statutes and contracts across the Nation, see *supra,* at 2487 – 2488, many government entities think that effective exclusive representation makes for good labor relations—and recognize, just as *Abood* did, that representation of that kind often depends on agency fees. See, *e.g., Harris,* 573 U.S., at ——, 134 S.Ct., at 2656–2658 (Kagan, J., dissenting) (describing why Illinois thought that bargaining with an adequately funded exclusive representative of in-home caregivers would enable the State to better serve its disabled citizens). *Abood* respected that state interest; today's majority fails even to understand it. Little wonder that the majority's First Amendment analysis, which involves assessing the government's reasons for imposing agency fees, also comes up short.

B

1

In many cases over many decades, this Court has addressed how the First Amendment applies when the government, acting not as sovereign but as employer, limits its workers' speech. Those decisions have granted substantial latitude to the government, in recognition of its significant interests in managing its workforce so as to best serve the public. *Abood* fit neatly with that caselaw, in both reasoning and result. Indeed, its reversal today creates a significant anomaly—an exception, applying to union fees alone, from the usual rules governing public employees' speech.

***2492** "Time and again our cases have recognized that the Government has a much freer hand" in dealing with its employees than with "citizens at large." *NASA v. Nelson,* 562 U.S. 134, 148, 131 S.Ct. 746, 178 L.Ed.2d 667 (2011) (internal quotation marks omitted). The government, we have stated, needs to run "as effectively and efficiently as possible." *Engquist v. Oregon Dept. of Agriculture,* 553 U.S. 591, 598, 128 S.Ct. 2146, 170 L.Ed.2d 975 (2008) (internal quotation marks omitted). That means it must be able, much as a private employer is, to manage its workforce as it thinks fit. A public employee thus must submit to "certain limitations on his or her freedom." *Garcetti v. Ceballos,* 547 U.S. 410, 418, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006). Government workers, of course, do not wholly "lose their constitutional rights when they accept their positions." *Engquist,* 553 U.S., at 600, 128 S.Ct. 2146. But under our precedent, their rights often yield when weighed "against the realities of the employment context." *Ibid.* If it were otherwise—if every employment decision were to "bec[o]me a constitutional matter"—"the Government could not function." *NASA,* 562 U.S., at 149, 131 S.Ct. 746 (internal quotation marks omitted).

Those principles apply with full force when public employees' expressive rights are at issue. As we have explained: "Government employers, like private employers, need a significant degree of control over their employees' words" in order to "efficient[ly] provi[de] public services." *Garcetti,* 547 U.S., at 418, 126 S.Ct. 1951. Again, significant control does not mean absolute authority. In particular, the Court has guarded against government efforts to "leverage the employment relationship" to shut down its employees' speech as private citizens. *Id.,* at 419, 126 S.Ct. 1951. But when the

government imposes speech restrictions relating to workplace operations, of the kind a private employer also would, the Court reliably upholds them. See, *e.g., id.,* at 426, 126 S.Ct. 1951; *Connick v. Myers,* 461 U.S. 138, 154, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

In striking the proper balance between employee speech rights and managerial interests, the Court has long applied a test originating in *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). That case arose out of an individual employment action: the firing of a public school teacher. As we later described the *Pickering* inquiry, the Court first asks whether the employee "spoke as a citizen on a matter of public concern." *Garcetti,* 547 U.S., at 418, 126 S.Ct. 1951. If she did not—but rather spoke as an employee on a workplace matter—she has no "possibility of a First Amendment claim": A public employer can curtail her speech just as a private one could. *Ibid.* But if she did speak as a citizen on a public matter, the public employer must demonstrate "an adequate justification for treating the employee differently from any other member of the general public." *Ibid.* The government, that is, needs to show that legitimate workplace interests lay behind the speech regulation.

Abood coheres with that framework. The point here is not, as the majority suggests, that *Abood* is an overt, one-to-one "application of *Pickering*." *Ante,* at 2473 – 2474. It is not. *Abood* related to a municipality's labor policy, and so the Court looked to prior cases about unions, not to *Pickering* 's analysis of an employee's dismissal. (And truth be told, *Pickering* was not at that time much to look at: What the Court now thinks of as the two-step *Pickering* test, as the majority's own citations show, really emerged from *Garcetti* and *Connick*—two cases post-dating ***2493** *Abood*. See *ante,* at 2471 – 2472.)[2] But *Abood* and *Pickering* raised variants of the same basic issue: the extent of the government's authority to make employment decisions affecting expression. And in both, the Court struck the same basic balance, enabling the government to curb speech when—but only when—the regulation was designed to protect its managerial interests. Consider the parallels:

2 For those reasons, it is not surprising that the "categorization schemes" in *Abood* and *Pickering* are not precisely coterminous. *Ante,* at 2473. The two cases are fraternal rather than identical twins—both standing for the proposition that the government receives great deference when it regulates speech as an employer rather than as a sovereign. See *infra* this page and 2493 – 2494.

Like *Pickering, Abood* drew the constitutional line by analyzing the connection between the government's managerial interests and different kinds of expression. The Court first discussed the use of agency fees to subsidize the speech involved in "collective bargaining, contract administration, and grievance adjustment." 431 U.S., at 225–226, 97 S.Ct. 1782. It understood that expression (really, who would not?) as intimately tied to the workplace and employment relationship. The speech was about "working conditions, pay, discipline, promotions, leave, vacations, and terminations," *Borough of Duryea v. Guarnieri,* 564 U.S. 379, 391, 131 S.Ct. 2488, 180 L.Ed.2d 408 (2011); the speech occurred (almost always) in the workplace; and the speech was directed (at least mainly) to the employer. As noted earlier, *Abood* described the managerial interests of employers in channeling all that speech through a single union. See 431 U.S., at 220–222, 224–226, 97 S.Ct. 1782; *supra,* at 2460. And so *Abood* allowed the government to mandate fees for collective bargaining—just as *Pickering* permits the government to regulate employees' speech on similar workplace matters. But still, *Abood* realized that compulsion could go too far. The Court barred the use of fees for union speech supporting political candidates or "ideological causes." 431 U.S., at 235, 97 S.Ct. 1782. That speech, it understood, was "unrelated to [the union's] duties as exclusive bargaining representative," but instead was directed at the broader public sphere. *Id.,* at 234, 97 S.Ct. 1782. And for that reason, the Court saw no legitimate managerial interests in compelling its subsidization. The employees' First Amendment claims would thus prevail—as, again, they would have under *Pickering*.

*Abood*thus dovetailed with the Court's usual attitude in First Amendment cases toward the regulation of public employees' speech. That attitude is one of respect—even solicitude—for the government's prerogatives as an employer. So long as the government is acting as an employer—rather than exploiting the employment relationship for other ends—it has a wide berth, comparable to that of a private employer. And when the regulated expression concerns the terms and conditions of employment—the very stuff of the employment relationship—the government really cannot lose. There, managerial interests are obvious and strong. And so government employees are ... just employees, even though they work for the government. Except that today the government does lose, in a first for the law. Now, the government can constitutionally adopt all policies regulating

core workplace speech in pursuit of managerial goals—save this single one.

2

The majority claims it is not making a special and unjustified exception. It offers two main reasons for declining to apply ***2494** here our usual deferential approach, as exemplified in *Pickering,* to the regulation of public employee speech. First, the majority says, this case involves a "blanket" policy rather than an individualized employment decision, so *Pickering* is a "painful fit." *Ante,* at 2472. Second, the majority asserts, the regulation here involves compelling rather than restricting speech, so the pain gets sharper still. See *ante,* at 2472 – 2473. And finally, the majority claims that even under the solicitous *Pickering* standard, the government should lose, because the speech here involves a matter of public concern and the government's managerial interests do not justify its regulation. See *ante,* at 2474 – 2477. The majority goes wrong at every turn.

First, this Court has applied the same basic approach whether a public employee challenges a general policy or an individualized decision. Even the majority must concede that "we have sometimes looked to *Pickering* in considering general rules that affect broad categories of employees." *Ante,* at 2472. In fact, the majority cannot come up with any case in which we have *not* done so. All it can muster is one case in which *while* applying the *Pickering* test to a broad rule—barring any federal employee from accepting any payment for any speech or article on any topic—the Court noted that the policy's breadth would count against the government at the test's second step. See *United States v. Treasury Employees,* 513 U.S. 454, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995). Which is completely predictable. The inquiry at that stage, after all, is whether the government has an employment-related interest in going however far it has gone—and in *Treasury Employees,* the government had indeed gone far. (The Court ultimately struck down the rule because it applied to speech in which the government had no identifiable managerial interest. See *id.,* at 470, 477, 115 S.Ct. 1003.) Nothing in *Treasury Employees* suggests that the Court defers only to ad hoc actions, and not to general rules, about public employee speech. That would be a perverse regime, given the greater regularity of rulemaking and the lesser danger of its abuse. So I would wager a small fortune that the next time a general rule governing public employee speech comes before us, we will dust off *Pickering*.

Second, the majority's distinction between compelling and restricting speech also lacks force. The majority posits that compelling speech always works a greater injury, and so always requires a greater justification. See *ante,* at 2463 – 2464. But the only case the majority cites for that reading of our precedent is possibly (thankfully) the most exceptional in our First Amendment annals: It involved the state forcing children to swear an oath contrary to their religious beliefs. See *ibid.* (quoting *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943)). Regulations challenged as compelling expression do not usually look anything like that—and for that reason, the standard First Amendment rule is that the "difference between compelled speech and compelled silence" is "without constitutional significance." *Riley v. National Federation of Blind of N. C., Inc.,* 487 U.S. 781, 796, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988); see *Wooley v. Maynard,* 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (referring to "[t]he right to speak and the right to refrain from speaking" as "complementary components" of the First Amendment). And if anything, the First Amendment scales tip the opposite way when (as here) the government is not compelling actual speech, but instead compelling a subsidy that others will use for expression. See Brief for Eugene Volokh et al. as *Amici Curiae* 4–5 (offering many examples to show that the ***2495** First Amendment "simply do[es] not guarantee that one's hard-earned dollars will never be spent on speech one disapproves of"). [3] So when a government mandates a speech subsidy from a public employee—here, we might think of it as levying a tax to support collective bargaining—it should get at least as much deference as when it restricts the employee's speech. As this case shows, the former may advance a managerial interest as well as the latter—in which case the government's "freer hand" in dealing with its employees should apply with equal (if not greater) force. *NASA,* 562 U.S., at 148, 131 S.Ct. 746.

3 That's why this Court has blessed the constitutionality of compelled speech subsidies in a variety of cases beyond *Abood,* involving a variety of contexts beyond labor relations. The list includes mandatory fees imposed on state bar members (for professional expression); university students (for campus events); and fruit processors (for generic advertising). See *Keller v. State Bar of Cal.,* 496 U.S. 1, 14, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990); *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217, 233, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000); *Glickman v. Wileman Brothers & Elliott, Inc.,* 521 U.S. 457, 474, 117

S.Ct. 2130, 138 L.Ed.2d 585 (1997); see also *infra,* at 2497 – 2498.

Third and finally, the majority errs in thinking that under the usual deferential approach, the government should lose this case. The majority mainly argues here that, at *Pickering* 's first step, "union speech in collective bargaining" is a "matter of great public concern" because it "affect [s] how public money is spent" and addresses "other important matters" like teacher merit pay or tenure. *Ante,* at 2474, 2476 (internal quotation marks omitted). But to start, the majority misunderstands the threshold inquiry set out in *Pickering* and later cases. The question is not, as the majority seems to think, whether the public is, or should be, interested in a government employee's speech. Instead, the question is whether that speech is about and directed to the workplace—as contrasted with the broader public square. *Treasury Employees* offers the Court's fullest explanation. The Court held there that the government's policy prevented employees from speaking as "citizen[s]" on "matters of public concern." 513 U.S., at 466, 115 S.Ct. 1003 (quoting *Pickering,* 391 U.S., at 568, 88 S.Ct. 1731). Why? Because the speeches and articles "were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their Government employment." 513 U.S., at 466, 115 S.Ct. 1003; see *id.,* at 465, 470, 115 S.Ct. 1003 (repeating that analysis twice more). The Court could not have cared less whether the speech at issue was "important." *Ante,* at 2475 – 2476. It instead asked whether the speech was truly *of* the workplace—addressed *to* it, made *in* it, and (most of all) *about* it.

Consistent with that focus, speech about the terms and conditions of employment—the essential stuff of collective bargaining—has never survived *Pickering* 's first step. This Court has rejected all attempts by employees to make a "federal constitutional issue" out of basic "employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations." *Guarnieri,* 564 U.S., at 391, 131 S.Ct. 2488; see *Board of Comm'rs, Wabaunsee Cty. v. Umbehr,* 518 U.S. 668, 675, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996) (stating that public employees' "speech on merely private employment matters is unprotected"). For that reason, even the Justices who originally objected to *Abood* conceded that the use of agency fees for bargaining on "economic issues" like "salaries and pension benefits" would not raise significant First Amendment questions. 431 U.S., at 263, n. 16, 97 S.Ct. 1782 (Powell, J., concurring in judgment). ***2496** Of course, most of those issues have budgetary consequences: They "affect[ ] how public money is spent." *Ante,* at 2475. And some raise important non-budgetary disputes; teacher merit pay is a good example, see *ante,* at 2476. But arguing about the terms of employment is still arguing about the terms of employment: The workplace remains both the context and the subject matter of the expression. If all that speech really counted as "of public concern," as the majority suggests, the mass of public employees' complaints (about pay and benefits and workplace policy and such) *would* become "federal constitutional issue[s]." *Guarnieri,* 564 U.S., at 391, 131 S.Ct. 2488. And contrary to decades' worth of precedent, government employers would then have far less control over their workforces than private employers do. See *supra,* at 2491 – 2493.

Consider an analogy, not involving union fees: Suppose a government entity disciplines a group of (non-unionized) employees for agitating for a better health plan at various inopportune times and places. The better health plan will of course drive up public spending; so according to the majority's analysis, the employees' speech satisfies *Pickering* 's "public concern" test. Or similarly, suppose a public employer penalizes a group of (non-unionized) teachers who protest merit pay in the school cafeteria. Once again, the majority's logic runs, the speech is of "public concern," so the employees have a plausible First Amendment claim. (And indeed, the majority appears to concede as much, by asserting that the results in these hypotheticals should turn on various "factual detail[s]" relevant to the interest balancing that occurs at the *Pickering* test's *second* step. *Ante,* at 2477, n. 23.) But in fact, this Court has always understood such cases to end at *Pickering* 's *first* step: If an employee's speech is about, in, and directed to the workplace, she has no "possibility of a First Amendment claim." *Garcetti,* 547 U.S., at 418, 126 S.Ct. 1951; see *supra,* at 2492. So take your pick. Either the majority is exposing government entities across the country to increased First Amendment litigation and liability—and thus preventing them from regulating their workforces as private employers could. Or else, when actual cases of this kind come around, we will discover that today's majority has crafted a "unions only" carve-out to our employee-speech law.

What's more, the government should prevail even if the speech involved in collective bargaining satisfies *Pickering* 's first part. Recall that the next question is whether the government has shown "an adequate justification for treating the employee differently from any other member of the general public." *Garcetti,* 547 U.S., at 418, 126 S.Ct. 1951; *supra,* at 2492. That inquiry is itself famously respectful of government interests. This Court has reversed

the government only when it has tried to "leverage the employment relationship" to achieve an outcome unrelated to the workplace's "effective functioning." *Garcetti,* 547 U.S., at 419, 126 S.Ct. 1951; *Rankin v. McPherson,* 483 U.S. 378, 388, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987). Nothing like that is true here. As *Abood* described, many government entities have found agency fees the best way to ensure a stable and productive relationship with an exclusive bargaining agent. See 431 U.S., at 220–221, 224–226, 97 S.Ct. 1782; *supra,* at 2488 – 2489. And here, Illinois and many governmental *amici* have explained again how agency fees advance their workplace goals. See Brief for State Respondents 12, 36; Brief for Governor Tom Wolf et al. as *Amici Curiae* 21–33. In no other employee-speech case has this Court dismissed such work-related interests, as the majority does here. See ***2497** *supra,* at 2489 – 2491 (discussing the majority's refusal to engage with the logic of the State's position). Time and again, the Court has instead respected and acceded to those interests —just as *Abood* did.

The key point about *Abood* is that it fit naturally with this Court's consistent teaching about the permissibility of regulating public employees' speech. The Court allows a government entity to regulate that expression in aid of managing its workforce to effectively provide public services. That is just what a government aims to do when it enforces a fair-share agreement. And so, the key point about today's decision is that it creates an unjustified hole in the law, applicable to union fees alone. This case is *sui generis* among those addressing public employee speech—and will almost surely remain so.

III

But the worse part of today's opinion is where the majority subverts all known principles of *stare decisis*. The majority makes plain, in the first 33 pages of its decision, that it believes *Abood* was wrong.[4] But even if that were true (which it is not), it is not enough. "Respecting *stare decisis* means sticking to some wrong decisions." *Kimble v. Marvel Entertainment, LLC,* 576 U.S. ——, ——, 135 S.Ct. 2401, 2409, 192 L.Ed.2d 463 (2015). Any departure from settled precedent (so the Court has often stated) demands a "special justification—over and above the belief that the precedent was wrongly decided." *Id.,* at ——, 135 S.Ct., at 2409 (internal quotation marks omitted); see, *e.g., Arizona v. Rumsey,* 467 U.S. 203, 212, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984). And the majority does not have anything close. To the contrary: all that is "special" in this case—especially the massive reliance interests at stake—demands retaining *Abood,* beyond even the normal precedent.

4 And then, after ostensibly turning to *stare decisis,* the majority spends another four pages insisting that *Abood* was "not well reasoned," which is just more of the same. *Ante,* at 2480 – 2481; see *ante,* at 2479 – 2481.

Consider first why these principles about precedent are so important. *Stare decisis*—"the idea that today's Court should stand by yesterday's decisions"—is "a foundation stone of the rule of law." *Kimble,* 576 U.S., at ——, 135 S.Ct., at 2409 (quoting *Michigan v. Bay Mills Indian Community,* 572 U.S. ——, ——, 134 S.Ct. 2024, 2036, 188 L.Ed.2d 1071 (2014)). It "promotes the evenhanded, predictable, and consistent development" of legal doctrine. *Payne v. Tennessee,* 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). It fosters respect for and reliance on judicial decisions. See *ibid.* And it "contributes to the actual and perceived integrity of the judicial process," *ibid.,* by ensuring that decisions are "founded in the law rather than in the proclivities of individuals," *Vasquez v. Hillery,* 474 U.S. 254, 265, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986).

And *Abood* is not just any precedent: It is embedded in the law (not to mention, as I'll later address, in the world) in a way not many decisions are. Over four decades, this Court has cited *Abood* favorably many times, and has affirmed and applied its central distinction between the costs of collective bargaining (which the government can charge to all employees) and those of political activities (which it cannot). See, *e.g., Locke v. Karass,* 555 U.S. 207, 213–214, 129 S.Ct. 798, 172 L.Ed.2d 552 (2009); *Lehnert,* 500 U.S., at 519, 111 S.Ct. 1950; *Teachers v. Hudson,* 475 U.S. 292, 301–302, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986); ***2498** *Ellis v. Railway Clerks,* 466 U.S. 435, 455–457, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984). Reviewing those decisions not a decade ago, this Court—unanimously—called the *Abood* rule "a general First Amendment principle." *Locke,* 555 U.S., at 213, 129 S.Ct. 798. And indeed, the Court has relied on that rule when deciding cases involving compelled speech subsidies outside the labor sphere—cases today's decision does not question. See, *e.g., Keller v. State Bar of Cal.,* 496 U.S. 1, 9–17, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990) (state bar fees); *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217, 230–232, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000) (public university student fees); *Glickman v. Wileman Brothers & Elliott, Inc.,* 521 U.S. 457, 471–473, 117 S.Ct. 2130, 138

L.Ed.2d 585 (1997) (commercial advertising assessments); see also n. 3, *supra*.

Ignoring our repeated validation of *Abood,* the majority claims it has become "an outlier among our First Amendment cases." *Ante,* at 2482. That claim fails most spectacularly for reasons already discussed: *Abood* coheres with the *Pickering* approach to reviewing regulation of public employees' speech. See *supra,* at 2492 – 2494. Needing to stretch further, the majority suggests that *Abood* conflicts with "our political patronage decisions." *Ante,* at 2484. But in fact those decisions strike a balance much like *Abood* 's. On the one hand, the Court has enabled governments to compel policymakers to support a political party, because that requirement (like fees for collective bargaining) can reasonably be thought to advance the interest in workplace effectiveness. See *Elrod v. Burns,* 427 U.S. 347, 366–367, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *Branti v. Finkel,* 445 U.S. 507, 517, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). On the other hand, the Court has barred governments from extending that rule to non-policymaking employees because that application (like fees for political campaigns) can't be thought to promote that interest, see *Elrod,* 427 U.S., at 366, 96 S.Ct. 2673; the government is instead trying to "leverage the employment relationship" to achieve other goals, *Garcetti,* 547 U.S., at 419, 126 S.Ct. 1951. So all that the majority has left is *Knox* and *Harris*. See *ante,* at 2483 – 2484. Dicta in those recent decisions indeed began the assault on *Abood* that has culminated today. But neither actually addressed the extent to which a public employer may regulate its own employees' speech. Relying on them is bootstrapping—and mocking *stare decisis*. Don't like a decision? Just throw some gratuitous criticisms into a couple of opinions and a few years later point to them as "special justifications."

The majority is likewise wrong to invoke "workability" as a reason for overruling *Abood*. *Ante,* at 2480 – 2481. Does *Abood* require drawing a line? Yes, between a union's collective-bargaining activities and its political activities. Is that line perfectly and pristinely "precis[e]," as the majority demands? *Ante,* at 2480 – 2481. Well, not quite that—but as exercises of constitutional linedrawing go, *Abood* stands well above average. In the 40 years since *Abood,* this Court has had to resolve only a handful of cases raising questions about the distinction. To my knowledge, the circuit courts are not divided on any classification issue; neither are they issuing distress signals of the kind that sometimes prompt the Court to reverse a decision. See, *e.g., Johnson v. United States,* 576 U.S. ——, ——S.Ct. ——, —— L.Ed.2d —— (2015) (overruling precedent because of frequent splits and mass confusion). And that tranquility is unsurprising: There may be some gray areas (there always are), but in the mine run of cases, everyone knows the difference between politicking and collective bargaining. The majority cites some disagreement in two of the classification cases this Court decided ***2499** —as if non-unanimity among Justices were something startling. And it notes that a dissenter in one of those cases called the Court's approach "malleable" and "not principled," *ante,* at 2481—as though those weren't stock terms in dissenting vocabulary. See, *e.g., Murr v. Wisconsin,* 582 U.S. ——, ——, 137 S.Ct. 1933, 1950–1951, 198 L.Ed.2d 497 (2017) (ROBERTS, C.J., dissenting); *Dietz v. Bouldin,* 579 U.S. ——, ——, 136 S.Ct. 1885, 1897, 195 L.Ed.2d 161 (2016) (THOMAS, J., dissenting); *Alabama Legislative Black Caucus v. Alabama,* 575 U.S. ——, ——, 135 S.Ct. 1257, 1281, 191 L.Ed.2d 314 (2015) (Scalia, J., dissenting). As I wrote in *Harris* a few Terms ago: "If the kind of hand-wringing about blurry lines that the majority offers were enough to justify breaking with precedent, we might have to discard whole volumes of the U.S. Reports." 573 U.S., at ——, 134 S.Ct., at 2652.

And in any event, one *stare decisis* factor—reliance—dominates all others here and demands keeping *Abood*. *Stare decisis,* this Court has held, "has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision." *Hilton v. South Carolina Public Railways Comm'n,* 502 U.S. 197, 202, 112 S.Ct. 560, 116 L.Ed.2d 560 (1991). That is because overruling a decision would then "require an extensive legislative response" or "dislodge settled rights and expectations." *Ibid.* Both will happen here: The Court today wreaks havoc on entrenched legislative and contractual arrangements.

Over 20 States have by now enacted statutes authorizing fair-share provisions. To be precise, 22 States, the District of Columbia, and Puerto Rico—plus another two States for police and firefighter unions. Many of those States have multiple statutory provisions, with variations for different categories of public employees. See, *e.g.,* Brief for State of California as *Amicus Curiae* 24–25. Every one of them will now need to come up with new ways—elaborated in new statutes—to structure relations between government employers and their workers. The majority responds, in a footnote no less, that this is of no proper concern to the Court. See *ante,* at 2485, n. 27. But in fact, we have weighed heavily against "abandon[ing] our settled jurisprudence" that

"[s]tate legislatures have relied upon" it and would have to "reexamine [and amend] their statutes" if it were overruled. *Allied–Signal, Inc. v. Director, Div. of Taxation,* 504 U.S. 768, 785, 112 S.Ct. 2251, 119 L.Ed.2d 533 (1992); *Hilton,* 502 U.S., at 203, 112 S.Ct. 560.

Still more, thousands of current contracts covering millions of workers provide for agency fees. Usually, this Court recognizes that "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights." *Payne,* 501 U.S., at 828, 111 S.Ct. 2597. Not today. The majority undoes bargains reached all over the country. [5] It prevents the parties from fulfilling other commitments they have made based on those agreements. It forces the parties —immediately—to renegotiate once-settled terms and create new tradeoffs. It does so knowing that many of the parties will have to revise (or redo) multiple contracts simultaneously. (New York City, for example, has agreed to agency fees in 144 contracts with 97 public-sector unions. See Brief for New York City Municipal Labor Committee as *Amicus Curiae* 4.) It does ***2500** so knowing that those renegotiations will occur in an environment of legal uncertainty, as state governments scramble to enact new labor legislation. See *supra,* at 2472. It does so with no real clue of what will happen next—of how its action will alter public-sector labor relations. It does so even though the government services affected —policing, firefighting, teaching, transportation, sanitation (and more)—affect the quality of life of tens of millions of Americans.

5 Indeed, some agency-fee provisions, if canceled, could bring down entire contracts because they lack severability clauses. See *ante,* at 2485 (noting that unions could have negotiated for that result); Brief for Governor Tom Wolf et al. as *Amici Curiae* 11.

The majority asserts that no one should care much because the canceled agreements are "of rather short duration" and would "expire on their own in a few years' time." *Ante,* at 2484, 2485. But to begin with, that response ignores the substantial time and effort that state legislatures will have to devote to revamping their statutory schemes. See *supra,* at 2472. And anyway, it misunderstands the nature of contract negotiations when the parties have a continuing relationship. The parties, in renewing an old collective-bargaining agreement, don't start on an empty page. Instead, various "long-settled" terms —like fair-share provisions—are taken as a given. Brief for Governor Tom Wolf et al. 11; see Brief for New York City Sergeants Benevolent Assn. as *Amicus Curiae* 18. So the majority's ruling does more than advance by a few years a future renegotiation (though even that would be significant). In most cases, it commands new bargaining over how to replace a term that the parties never expected to change. And not just new bargaining; given the interests at stake, complicated and possibly contentious bargaining as well. See Brief for Governor Tom Wolf et al. 11. [6]

6 In a single, cryptic sentence, the majority also claims that arguments about reliance "based on [*Abood* 's] clarity are misplaced" because *Abood* did not provide a "clear or easily applicable standard" to separate fees for collective bargaining from those for political activities. *Ante,* at 2484 - 2485. But to begin, the standard for separating those activities was clear and workable, as I have already shown. See *supra,* at 2498 – 2499. And in any event, the reliance *Abood* engendered was based not on the clarity of that line, but on the clarity of its holding that governments and unions could generally agree to fair-share arrangements.

The majority, though, offers another reason for not worrying about reliance: The parties, it says, "have been on notice for years regarding this Court's misgivings about *Abood.*" *Ante,* at 2484. Here, the majority proudly lays claim to its 6–year crusade to ban agency fees. In *Knox,* the majority relates, it described *Abood* as an "anomaly." *Ante,* at 2484 (quoting 567 U.S., at 311, 132 S.Ct. 2277). Then, in *Harris,* it "cataloged *Abood* 's many weaknesses." *Ante,* at 2484. Finally, in *Friedrichs,* "we granted a petition for certiorari asking us to" reverse *Abood,* but found ourselves equally divided. *Ante,* at 2485. "During this period of time," the majority concludes, public-sector unions "must have understood that the constitutionality of [an agency-fee] provision was uncertain." *Ibid*. And so, says the majority, they should have structured their affairs accordingly.

But that argument reflects a radically wrong understanding of how *stare decisis* operates. Justice Scalia once confronted a similar argument for "disregard[ing] reliance interests" and showed how antithetical it was to rule-of-law principles. *Quill Corp. v. North Dakota,* 504 U.S. 298, 320, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992) (concurring opinion). He noted first what we always tell lower courts: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [they] should follow the case which directly ***2501** controls, leaving to this Court the prerogative of overruling its own decisions."

Id., at 321, 112 S.Ct. 1904 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989); some alterations omitted). That instruction, Justice Scalia explained, was "incompatible" with an expectation that "private parties anticipate our overrulings." 504 U.S., at 320, 112 S.Ct. 1904. He concluded: "[R]eliance upon a square, unabandoned holding of the Supreme Court is *always* justifiable reliance." *Ibid. Abood* 's holding was square. It was unabandoned before today. It was, in other words, the law—however much some were working overtime to make it not. Parties, both unions and governments, were thus justified in relying on it. And they did rely, to an extent rare among our decisions. To dismiss the overthrowing of their settled expectations as entailing no more than some "adjustments" and "unpleasant transition costs," *ante,* at 2485, is to trivialize *stare decisis*.

IV

There is no sugarcoating today's opinion. The majority overthrows a decision entrenched in this Nation's law—and in its economic life—for over 40 years. As a result, it prevents the American people, acting through their state and local officials, from making important choices about workplace governance. And it does so by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.

Departures from *stare decisis* are supposed to be "exceptional action[s]" demanding "special justification," *Rumsey,* 467 U.S., at 212, 104 S.Ct. 2305—but the majority offers nothing like that here. In contrast to the vigor of its attack on *Abood,* the majority's discussion of *stare decisis* barely limps to the finish line. And no wonder: The standard factors this Court considers when deciding to overrule a decision all cut one way. *Abood* 's legal underpinnings have not eroded over time: *Abood* is now, as it was when issued, consistent with this Court's First Amendment law. *Abood* provided a workable standard for courts to apply. And *Abood* has generated enormous reliance interests. The majority has overruled *Abood* for no exceptional or special reason, but because it never liked the decision. It has overruled *Abood* because it wanted to.

Because, that is, it wanted to pick the winning side in what should be—and until now, has been—an energetic policy debate. Some state and local governments (and the constituents they serve) think that stable unions promote healthy labor relations and thereby improve the provision of services to the public. Other state and local governments (and their constituents) think, to the contrary, that strong unions impose excessive costs and impair those services. Americans have debated the pros and cons for many decades—in large part, by deciding whether to use fair-share arrangements. Yesterday, 22 States were on one side, 28 on the other (ignoring a couple of in-betweeners). Today, that healthy—that democratic—debate ends. The majority has adjudged who should prevail. Indeed, the majority is bursting with pride over what it has accomplished: Now those 22 States, it crows, "can follow the model of the federal government and 28 other States." *Ante,* at 2485, n. 27.

And maybe most alarming, the majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy. Today is not the first time the Court has wielded the First Amendment in such an aggressive way. See, *e.g., National Institute of Family and Life Advocates* ***2502** *v. Becerra, ante,* p. ——, —— U.S. ——, 138 S.Ct. 2361, 138 L.Ed.2d 2361, 2018 WL 3116336 (2018) (invalidating a law requiring medical and counseling facilities to provide relevant information to users); *Sorrell v. IMS Health Inc.,* 564 U.S. 552, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011) (striking down a law that restricted pharmacies from selling various data). And it threatens not to be the last. Speech is everywhere—a part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech. So the majority's road runs long. And at every stop are black-robed rulers overriding citizens' choices. The First Amendment was meant for better things. It was meant not to undermine but to protect democratic governance—including over the role of public-sector unions.

All Citations

138 S.Ct. 2448, 201 L.Ed.2d 924, 211 L.R.R.M. (BNA) 3201, 86 USLW 4663, 168 Lab.Cas. P 61,878, 18 Cal. Daily Op. Serv. 6405, 2018 Daily Journal D.A.R. 6308, 27 Fla. L. Weekly Fed. S 554

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140 S.Ct. 1720
Supreme Court of the United States.

Adam JARCHOW, et al.
v.
STATE BAR OF WISCONSIN, et al.

No. 19-831
|
Decided June 1, 2020

Opinion

The petition for a writ of certiorari is denied.

Justice THOMAS, with whom Justice GORSUCH joins, dissenting from the denial of certiorari.

A majority of States, including Wisconsin, have "integrated bars." Unlike voluntary bar associations, integrated or mandatory bars require attorneys to join a state bar and pay compulsory dues as a condition of practicing law in the State. Petitioners are practicing lawyers in Wisconsin who allege that their Wisconsin State Bar dues are used to fund "advocacy and other speech on matters of intense public interest and concern." App. to Pet. for Cert. 10. Among other things, petitioners allege that the Wisconsin State Bar has taken a position on legislation prohibiting health plans from funding abortions, legislation on felon voting rights, and items in the state budget. Petitioners' First Amendment challenge to Wisconsin's integrated bar arrangement is foreclosed by *Keller v. State Bar of Cal.*, 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990), which this petition asks us to revisit. I would grant certiorari to address this important question.

In *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), the Court held that a law requiring public employees to pay mandatory union dues did not violate the freedom of speech guaranteed by the First Amendment, *id.*, at 235–236, 97 S.Ct. 1782. In *Keller*, the Court extended *Abood* to integrated bar dues based on an "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." 496 U.S. at 12, 110 S.Ct. 2228. Applying *Abood*, the Court held that "[t]he State Bar may ... constitutionally fund activities germane to [its] goals" of "regulating the legal profession and improving the quality of legal services" using "the mandatory dues of all members." 496 U.S. at 13–14, 110 S.Ct. 2228.

Two Terms ago, we overruled *Abood* in *Janus* v. *State, County, and Municipal Employees*, 585 U. S. ——, 138 S.Ct. 2448, 201 L.Ed.2d 924 (2018). We observed that "*Abood* was poorly reasoned," that "[i]t has led to practical problems and abuse," and that "[i]t is inconsistent with other First Amendment cases and has been undermined by more recent decisions." *Id.*, at ——, 138 S.Ct., at 2460. After considering arguments for retaining *Abood* that sounded in both precedent and original meaning, we held that "States and public-sector unions may no longer extract agency fees from nonconsenting employees." 585 U. S., at ——, 138 S.Ct., at 2486.

Our decision to overrule *Abood* casts significant doubt on *Keller*. The opinion in *Keller* rests almost entirely on the framework of *Abood*. Now that *Abood* is no longer good law, there is effectively nothing left supporting our decision in *Keller*. If the rule in *Keller* is to survive, it would have to be on the basis of new reasoning that is consistent with *Janus*. *

* Respondents resist this conclusion by citing *Harris v. Quinn*, 573 U.S. 616, 134 S.Ct. 2618, 189 L.Ed.2d 620 (2014), which predates *Janus*. But all we said in *Harris* was that "a refusal to extend *Abood*" would not "call into question" *Keller*. *Harris*, 573 U.S. at 655, 134 S.Ct. 2618. Now that we have overruled *Abood*, *Keller* has unavoidably been called into question.

***1721** Respondents argue that our review of this case would be hindered because it was dismissed on the pleadings. But any challenge to our precedents will be dismissed for failure to state a claim, before discovery can take place. And in any event, a record would provide little, if any, benefit to our review of the purely legal question whether *Keller* should be overruled.

Short of a constitutional amendment, only we can rectify our own erroneous constitutional decisions. We have admitted that *Abood* was erroneous, and *Abood* provided the foundation for *Keller*. In light of these developments, we should reexamine whether *Keller* is sound precedent. Accordingly, I respectfully dissent from the denial of certiorari.

All Citations

140 S.Ct. 1720 (Mem), 207 L.Ed.2d 166, 20 Cal. Daily Op. Serv. 4779, 2020 Daily Journal D.A.R. 5221, 28 Fla. L. Weekly Fed. S 276

4 F.4th 229
United States Court of Appeals, Fifth Circuit.

Tony K. MCDONALD; Joshua B. Hammer; Mark S. Pulliam, Plaintiffs—Appellants,
v.
Joe K. LONGLEY, Immediate Past President of the State Bar of Texas; Randall O. Sorrels, President of the State Bar of Texas; Laura Gibson, Member of the State Bar Board of Directors and Chair of the Board; Jerry C. Alexander, Member of the State Bar Board of Directors; Alison W. Colvin, Member of the State Bar Board of Directors, Defendants—Appellees.

No. 20-50448
|
FILED July 2, 2021

Synopsis

Background: Texas attorneys filed suit, under § 1983 and § 1988, against officers and directors of State Bar of Texas, claiming violation of First Amendment rights to free speech and association based on Bar compelling attorneys to join Bar and subsidize its political and ideological activities that were not germane to Bar's interests in regulating legal profession and improving quality of legal services. The United States District Court for the Western District of Texas, Lee Yeakel, J., 2020 WL 3261061, granted Bar summary judgment and denied attorneys' request for preliminary injunction. Attorneys appealed.

Holdings: The Court of Appeals, Smith, Circuit Judge, held that:

Tax Injunction Act (TIA) did not bar exercise of jurisdiction;

compelling attorneys to join Bar violated their freedom of association;

compelling attorneys to subsidize Bar's non-germane activities violated their freedom of speech;

Bar's procedures for separating chargeable from non-chargeable expenses violated attorneys' freedom of speech; and

preliminary injunctive relief was warranted.

Vacated in part, rendered in part, and remanded.

Procedural Posture(s): On Appeal; Motion for Summary Judgment; Motion for Preliminary Injunction.

***236** Appeal from the United States District Court for the Western District of Texas, No. 1:19-CV-219, Lee Yeakel, U.S. District Judge

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Before Smith, Willett, and Duncan, Circuit Judges.

Opinion

Jerry E. Smith, Circuit Judge:

***237** Three Texas attorneys sued officers and directors of the State Bar of Texas under 42 U.S.C. § 1983. They allege

that the Bar is engaged in political and ideological activities that are not germane to its interests in regulating the legal profession and improving the quality of legal services and that therefore, compelling them to join the Bar and subsidize those activities violates their First Amendment rights. We vacate in part, render in part, and remand.

I.

A.

State bar associations are of two types: (1) "mandatory" and (2) "voluntary." Mandatory bars, also known as "integrated" bars, require that attorneys join and pay compulsory dues "as a condition of practicing law in a State." *Keller v. State Bar of Cal.*, 496 U.S. 1, 5, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990). Voluntary bars do not. *See Jarchow v. State Bar of Wis.*, —— U.S. ——, 140 S. Ct. 1720, 1720, 207 L.Ed.2d 166 (2020) (Thomas, J., dissenting from denial of certiorari). Thirty-one states and the District of Columbia have mandatory bars, while most of the others have voluntary bars. [1]

1 *See* Ralph H. Brock, *"An Aliquot Portion of Their Dues:" A Survey of Unified Bar Compliance with* Hudson *and* Keller, 1 TEX. TECH J. TEX. ADMIN. L. 23, 24 (2000); Leslie C. Levin, *The End of Mandatory State Bars*, 109 GEO. L.J. ONLINE 1, 2 (2020). Most states have either a mandatory or voluntary bar, but California has switched to a hybrid model in which core functions are performed by a mandatory state bar, while other functions previously performed by its "sections" are now done by a separate voluntary bar association. CAL. BUS. & PRO. CODE §§ 6001, 6031.5(a), 6056.

The State Bar of Texas is mandatory. *See* TEX. GOV'T CODE § 81.051(b). All licensed Texas attorneys, more than 120,000 as of May 2019, must join the Bar, which "is a public corporation and an administrative agency" controlled by the Supreme Court of Texas. *Id.* § 81.011(a), (c). The Bar serves the following statutorily enumerated purposes:

> (1) to aid the courts in carrying on and improving the administration of justice;
>
> (2) to advance the quality of legal services to the public and to foster the role of the legal profession in serving the public;
>
> (3) to foster and maintain on the part of those engaged in the practice of law high ideals and integrity, learning, competence in public service, and high standards of conduct;
>
> (4) to provide proper professional services to the members of the state bar;
>
> (5) to encourage the formation of and activities of local bar associations;
>
> (6) to provide forums for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform, and the relationship of the state bar to the public; and
>
> (7) to publish information relating to the subjects listed in Subdivision (6).

Id. § 81.012.

In addition to being required to join the Bar, Texas attorneys are mandated to pay membership fees. [2] The Bar, which is entirely self-funded, relies on membership ***238** fees for nearly half of its budget. [3] The Supreme Court of Texas, in collaboration with the Bar, sets the membership fee schedule. *See id*. § 81.054(a). The current annual dues for active attorneys range from $68 to $235, depending on how many years the attorney has been licensed. Those on inactive status pay $50.

2 Except for emeritus members. *Id.* § 81.054(b)

3 For the fiscal year ending in May 2018, those fees generated $23 million out of the Bar's approximately $51 million in revenue. The second most significant source of revenue is from sales of continuing legal education ("CLE") programs.

Texas law does not give the Bar carte blanche to spend the membership fees however it pleases. The dues may "be used only for administering the public purposes" outlined above. *Id*. § 81.054(d). The State Bar Act forbids the Bar from using funds to "influenc[e] the passage or defeat of any legislative measure unless the measure relates to the regulation of the legal profession, improving the quality of legal services, or

the administration of justice." *Id*. § 81.034. And the Bar's Policy Manual recognizes that "[t]he expenditure of funds by the State Bar of Texas is limited ... as set forth ... in *Keller*," [4] a case that we discuss at length *infra*.

4 *State Bar of Texas Board of Directors Policy Manual*, STATE BAR OF TEXAS § 3.14.01 (2018), https://www.texasbar.com/AM/Template.cfm?Section=Governing_Documents1 & Template=/CM/ContentDisplay.cfm & ContentID=42429 [hereinafter *Policy Manual*].

In addition to their required membership in the general Bar Association, Texas attorneys have the option to join a number of subject-matter "sections" that the Bar maintains. Those sections are funded in part by dues paid by attorneys who voluntarily join them [5] and in part by money allocated from the Bar's general fund. [6]

5 *See Sections*, STATE BAR OF TEXAS (last visited Apr. 21, 2021), https://www.texasbar.com/Content/NavigationMenu/AboutUs/SectionsandDivisions/SectionsandDivisions1/

6 *See* STATE BAR OF TEXAS, *2019-2020 Proposed Combined Budget* 2, https://www.texasbar.com/AM/Template.cfm?Section=Meeting_Agendas_and_Minutes & Template=/CM/ContentDisplay.cfm & ContentID=43829 (allocating funds from the general fund to sections and volunteer committees).

Finally, on top of the membership fees, Texas imposes a $65 "legal services fee" on certain attorneys. [7] Those funds are collected by the Supreme Court of Texas and remitted to the Comptroller. *Id.* § 81.054(c). They are allocated to pay for legal services for the indigent—half for civil services and half for criminal defense. *Id.*

7 TEX. GOV'T CODE § 81.054(j). Exempt from the legal services fee are (1) inactive and nonpracticing attorneys, (2) attorneys over seventy years old, (3) those who work for the federal, state, or local governments, (4) § 501(c)(3) employees, and (5) out-of-state lawyers who do not practice in Texas. *Id*. § 81.054(k).

B.

In carrying out its statutorily enumerated purposes, the Bar undertakes a plethora of initiatives. The plaintiffs object to a number of them, alleging that they are "political and ideological activities that extend far beyond any regulatory functions." We outline the objected-to activities here.

1.

The Bar has a legislative program, through which it lobbies for "bills drafted by sections of the State Bar." The Bar's Policy Manual forbids the Bar from taking a position on proposed legislation unless strict criteria are met. *See Policy Manual* § 8.01.03. Among those criteria are that the proposed legislation (1) "falls within ***239** the purposes, expressed or implied, of the State Bar as provided in the State Bar Act," (2) "does not carry the potential of deep philosophical or emotional division among a substantial segment of the membership of the bar," (3) "is in the public interest," and (4) "cannot be construed to advocate political or ideological positions." *Policy Manual* § 8.01.03(A), (C)–(D), (G).

In 2019, the Bar lobbied for forty-seven bills, on subjects ranging from LGBT rights to trusts and estates, that it supposedly determined to have met those criteria. Those measures included efforts to, among other things, (1) amend the Texas Constitution's definition of marriage (SJR 9); (2) create civil unions "as an alternative to marriage" (HB 978); (3) alter the procedures grandparents must use to obtain access to their grandchildren over parental objections (HB 575); (4) substantively amend Texas trust law (HB 2782); and (5) impose new notification requirements on parents who wish to take summer weekend possession of a child under a court order (HB 553).

The voluntary sections, as distinguished from the Bar as a whole, write and lobby for the bills included in the legislative program. But the Bar, using mandatory dues, supports those efforts in a number of ways. First, the legislative program must be approved by the Bar's board, placing the entire Bar's imprimatur on it. Second, the voluntary sections are funded in part by the Bar's general fund. And third, the Bar funds a Government Relations Department ("GRD"), which "manages and coordinates the State Bar's legislative program." [8]

8 *Governmental Relations*, STATE BAR OF TEXAS (Apr. 21, 2021), https://www.texasbar.com/Content/NavigationMenu/AboutUs/GovernmentalRelations/default.htm. The GRD also "serves as the State Bar's liaison to the Texas Legislature and other state and federal governmental entities." *Id.* In that capacity, it responds to requests for information and assistance by the Texas Legislature and other entities, and reviews thousands of bills each legislative session.

2.

The record reflects that the Bar houses an Office of Minority Affairs ("OMA"), whose goals include "serv[ing] minority, women, and LGBT attorneys and legal organizations in Texas" and "enhanc[ing] employment and economic opportunities ... in the legal profession" for members of those groups. OMA sponsors "ongoing forums, projects, programs, and publications"—called "Minority Initiatives"—"dedicated to [its] diversity efforts." Though the programming is focused on furthering diversity relative to certain groups, all Texas attorneys are encouraged to participate. All told, the Bar spends about $500,000 per year on minority affairs.

3.

The Bar engages in, or financially supports, numerous activities aimed at making legal services available to the needy. First, it spends more than $1 million annually to support its Legal Access Division ("LAD"), which facilitates *pro bono* efforts in a wide variety of activities in the legal arena, including immigration, veterans' affairs, and landlord-tenant disputes. It "offers support, training, publications, resource materials, and more to legal services programs and *pro bono* volunteers."

Second, in support of its *pro bono* efforts, the Bar maintains a directory of "volunteer and resource opportunities."[9] ***240** The webpage appears to direct lawyers to various resources depending on the Bar's perceived needs of the time. For example, as of April 2021, it directed lawyers to volunteering for legal needs related to the COVID-19 pandemic (e.g. evictions, unemployment, and domestic problems). For a time in 2019, it directed lawyers to organizations representing asylum-seekers and illegal aliens.

9 *Volunteer and Resource Opportunities*, STATE BAR OF TEXAS, https://www.texasbar.com/Content/NavigationMenu/LawyersGivingBack/Volunteer/default.htm.

Third, the Bar funds the Texas Supreme Court's Access to Justice Commission ("AJC"), which "focuses on cutting-edge initiatives and pilot projects that promote access to justice in Texas." Among other things, it aims to "increase resources and funding for access to justice," "develop and implement initiatives designed to expand civil access to justice," and promote "systemic change." One of its mechanisms for achieving those aims is lobbying for "both funding and non-funding legislation."

Finally, as mentioned above, the legal services fee, by statute, is used to fund legal services for the indigent.

4.

The Bar also undertakes a number of miscellaneous activities to which the plaintiffs object. It hosts an annual convention, which sponsors panels, some of which the plaintiffs contend are ideologically charged. The Bar funds continuing legal education ("CLE") programs, some of which the plaintiffs aver are similarly charged. And the Bar funds the *Texas Bar Journal*.

C.

Recognizing that some members might object to various of its myriad initiatives, the Bar provides ways for dissenting members to make their disagreements known. Before the expenditure is approved, members can lodge their objections to either the Bar's Board of Directors or the appropriate committee or section. *See, e.g.*, *Policy Manual* §§ 8.01.03(B), 8.01.06(B), 8.01.08(B), 8.01.09(D). Members may also express disapproval at the Bar's annual public hearing on its proposed budget. TEX. GOV'T CODE § 81.022(b)–(c). The ballot box provides another incidental check: Members vote for the Bar's officers and directors. *See generally Policy Manual* §§ 1.03, 2.01.

The Bar also provides a mechanism for objecting members to obtain a *pro rata* refund of their membership fee. Specifically, members may file a written objection "to a proposed or actual

expenditure ... as not within the purposes or limitations" set forth by the State Bar Act or by Supreme Court precedent. *Policy Manual* §§ 3.14.01, 3.14.02. The protesting member may "seek refund of a *pro rata* portion of his or her dues expended, plus interest," on the objectionable activity. *Id.* § 3.14.02. The Bar does not proactively furnish members with a breakdown of their respective *pro rata* shares of funding the Bar's chosen pursuits. Objections are reviewed by the Executive Director, who "in consultation with the President, shall have the discretion to resolve" it. *Id.* § 3.14.03. A refund is the *only* available remedy—an objector cannot prevent the Bar from otherwise pursuing the objected-to activity. If a refund is issued, it is done so only "for the convenience of the Bar": It does not constitute an admission that the expense was improper. *Id.* § 3.14.04. If a refund is denied, the objector has no further administrative recourse.

The Bar requires notice of those procedures to be "published in conjunction with any publication or description of the State Bar's budget, legislative program, performance measures, amicus briefs, and any other similar policy positions adopted by the State Bar." *Id.* § 3.14.05. Nevertheless, ***241** the Bar has record of only one member—who is not among the plaintiffs and who lodged the objection after the plaintiffs filed this lawsuit—using the procedure since its adoption in 2005.

D.

The plaintiffs sued under 42 U.S.C. §§ 1983 and 1988 on three theories: (1) Compelling the plaintiffs "to join, associate with, and financially support the State Bar as a precondition to engaging in their chosen profession" violates their "rights to free speech and association"; (2) in the alternative, if they can be compelled to join, requiring them to "subsidize political and ideological activities that extend beyond the Bar's core regulatory functions" violates their right to free speech; and (3) related to both of those, "[t]he Bar's procedures for separating chargeable and non-chargeable expenses are inadequate to protect" their First Amendment rights. The plaintiffs moved for a preliminary injunction and partial summary judgment on liability. [10]

10 The plaintiffs moved only for partial summary judgment because the scope of relief they planned to seek differed based on the district court's holding on liability. We address both the summary judgment on liability and the scope of the relief plaintiffs are entitled to through a preliminary injunction; we do not have occasion to opine on the full scope of relief to which they may be entitled.

The Bar cross-moved for summary judgment. [11] It countered with three principal points. First, it contended that Supreme Court precedent—specifically *Keller* and *Lathrop v. Donohue*, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961) (plurality)—forecloses the plaintiffs' claim that being compelled to join the bar violates the First Amendment. Second, the Bar asserted that the challenged expenditures are constitutionally permissible as "necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of ... legal service[s]." And third, the Bar maintained that its refund procedures are constitutionally adequate.

11 The Bar also filed a motion to dismiss, asserting that the original named defendants did not enforce the mandatory bar membership and legal services fee. In response, the plaintiffs filed an amended complaint adding additional defendants to address those concerns. The district court dismissed the Bar's motion without prejudice, and the Bar does not challenge the propriety of that dismissal on appeal.

The district court denied the plaintiffs' motions and granted summary judgment to the Bar. The court held that *Lathrop* and *Keller* remain binding in spite of *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, —— U.S. ——, 138 S. Ct. 2448, 201 L.Ed.2d 924 (2018), and that *Lathrop* and *Keller* foreclose the plaintiffs' contention that being forced to join the bar violates the First Amendment. The court further determined that all of the challenged Bar expenses passed constitutional muster under *Keller*, "because they further[ed] Texas's interest in professional regulation or legal-service quality improvement." Finally, the court rejected the plaintiffs' challenge to the refund procedures, concluding that they are constitutionally adequate. The court entered a "take nothing" judgment, and the plaintiffs appeal.

II.

Because "[t]his court has a continuing obligation to assure itself of its own jurisdiction" [12] before addressing the merits,

we must determine whether the Tax ***242** Injunction Act ("TIA") stripped the district court of jurisdiction. Our review is *de novo*. *Washington v. Linebarger, Goggan, Blair, Pena & Sampson, LLP*, 338 F.3d 442, 444 (5th Cir. 2003).

12 *United States v. Pedroza-Rocha*, 933 F.3d 490, 493 (5th Cir. 2019) (per curiam), *cert. denied,* —— U.S. ——, 140 S. Ct. 2769, 206 L.Ed.2d 940 (2020).

The TIA provides that "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341.[13] In other words, "the [TIA] is a broad jurisdictional impediment to federal court interference with the administration of state tax systems." *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998) (quotation marks omitted). The TIA does not, however, impede federal courts' review of regulatory fees. *See id.* Therefore, to determine our jurisdiction, we must decide whether the membership fee and the legal services fee are taxes or, instead, whether they are fees.

13 Similarly, "[t]he Anti-Injunction Act, 26 U.S.C. § 7421(a), bars any 'suit for the purposes of restraining the assessment or collection of any tax.' " *CIC Servs., LLC, v. IRS*, —— U.S. ——, 141 S. Ct. 1582, 1586, —— L.Ed.2d —— (2021).

"Whether a charge is a fee or a tax is a question of federal law." *Neinast v. Texas*, 217 F.3d 275, 278 (5th Cir. 2000). Although the label given to a particular outlay "has no bearing on the resolution of the question," *Home Builders*, 143 F.3d at 1010 n.10, we may take notice of how an expense is treated by the state's courts, *see Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 269 F.3d 494, 500 n.13 (5th Cir. 2001). Generally, "a broad construction of 'tax' is necessary to honor Congress's goals in promulgating the TIA." *Henderson v. Stalder*, 407 F.3d 351, 356 (5th Cir. 2005).

"[T]he line between a 'tax' and a 'fee' can be a blurry one." *Home Builders*, 143 F.3d at 1011 (quotation marks omitted). Indeed, "the distinction between a tax and a fee is a spectrum with the paradigmatic fee at one end and the paradigmatic tax at the other." *Washington*, 338 F.3d at 444 (quotation marks omitted). But we have enunciated some workable distinctions. First, "the classic tax sustains the essential flow of revenue to the government, while the classic fee is linked to some regulatory scheme." *Home Builders*, 143 F.3d at 1011. Second, "[t]he classic tax is imposed by a state or municipal legislature, while the classic fee is imposed by an agency upon those it regulates." *Id.* And third, "[t]he classic tax is designed to provide a benefit for the entire community, while the classic fee is designed to raise money to help defray an agency's regulatory expenses." *Id.*

The membership fees are "classic fees." First, they are linked to the regulation of the legal profession, not to generating revenue for the government. Texas law requires that Bar funds "be used only for administering the public purposes provided by" the State Bar Act. TEX. GOV'T CODE § 81.054(d). In fact, the Supreme Court of Texas must distribute the fees to the Bar *only* for funding expenditures to pursue those ends. *See id*. § 81.054(c). Second, the membership fees are imposed neither by a legislature nor on the entire community. Although a statute authorizes charging the fees, the process of setting and collecting those fees is left to the Texas Supreme Court and the Bar. *See id.* §§ 81.022, 81.054(a), (c). Furthermore, the dues are paid only by those regulated by the Bar—licensed Texas attorneys—"not the public at large," indicating they are a fee. *Neinast*, 217 F.3d at 278. Third and finally, the membership fees defray the Bar's costs. The Bar is entirely self-funded, and the ***243** mandatory dues amount to nearly half of its annual revenue.

The legal services fee is also a fee, albeit a less paradigmatic one. Like the membership fee, the legal services fee is imposed only on the legal profession, "not the public at large." *Id.* And the fee is linked to the regulation of the legal profession, given that its purpose is to ensure adequate funding of "basic civil legal services to the indigent and legal representation and other defense services to indigent defendants in criminal cases." TEX. GOV'T CODE § 81.054(d). In other words, its purpose is not to raise revenue but to ensure that members of the legal profession are able to provide a particular legal service. On the other hand, unlike the membership fee, the legal services fee is imposed directly by the legislature. *Compare id.* § 81.054(a), *with id.* § 81.054(j). But that does not outweigh the other factors.

Since neither the membership fee nor the legal services fee is a tax, the TIA does not deprive the federal courts of jurisdiction. We therefore turn to the merits.

III.

We first analyze the plaintiffs' claim that compelling them to join the Bar violates the First Amendment. The Supreme

Court has twice opined on whether mandatory bars violate the First Amendment. We discuss those cases, *Lathrop v. Donohue*, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961) (plurality), and *Keller v. State Bar of California*, 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990), to determine whether the plaintiffs' claim survives. [14]

14 Since *Lathrop* and *Keller* were decided, the Supreme Court's First Amendment caselaw has changed dramatically. Both cases drew from the then-existing jurisprudence on the First Amendment implications of mandatory union dues, but that jurisprudence has evolved. *Keller*, in particular, rested almost exclusively on *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), which the Court overruled in *Janus*, 138 S. Ct. at 2486. Those changes, and *Janus* in particular, cast doubt on *Lathrop* and *Keller*. *See Jarchow*, 140 S. Ct. at 1720 (Thomas, J., dissenting from denial of certiorari). *Contra Janus*, 138 S. Ct. at 2498 (Kagan, J., dissenting) (contending that *Janus* did not call *Keller* into question).
But "the Supreme Court abrogates its cases with a bang, not a whimper, and it has never revisited" either *Lathrop* or *Keller*. *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 405 (5th Cir. 2020). So, despite their "increasingly wobbly, moth-eaten foundations," *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997) (cleaned up), *Lathrop* and *Keller* remain binding. Because they have "direct application in [this] case," we apply them, "leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). With that said, *Lathrop*'s and *Keller*'s weakened foundations counsel against expanding their reach as we consider questions they left open.

In *Lathrop*, 367 U.S. at 827–28, 81 S.Ct. 1826, the Court considered whether mandatory bar membership necessarily violates the right to freedom of association. The Wisconsin Bar, the *Lathrop* plaintiff alleged, "express[es] ... opinion[s] on legislative matters" and "utilizes its property, funds and employees for the purposes of influencing legislation and public opinion toward legislation." *Id.* at 827, 81 S.Ct. 1826. Therefore, he contended "that he [could not] constitutionally be compelled to join and give support to" the Bar. *Id.*

The Court rejected the plaintiff's claim for two reasons. First, it noted that the plaintiff's "compulsory enrollment imposes only the duty to pay dues"; his involuntary membership did not require any other participation. *Id.* at 827–28, 81 S.Ct. 1826. Second, the Court found that the bar's activities at issue were almost entirely limited ***244** to "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, 81 S.Ct. 1826. Though that bar was engaged in legislative activity, that activity was "not the major activity of the State Bar," *id.* at 839, and, furthermore, it was limited to bills pertinent to the legal profession for which there was "substantial unanimity," *id.* at 834–38, 81 S.Ct. 1826.

After deciding that compelling the plaintiff to pay dues to such a bar association did not violate the freedom of *association*, the *Lathrop* Court, noting the paucity of the record, declined to decide whether "the use of his money for causes which he opposes" violated his right to *free speech*. *Id.* at 845, 81 S.Ct. 1826. Three decades later, *Keller* reached that issue.

Like the *Lathrop* plaintiff, the *Keller* plaintiffs claimed that compelling their financial support of political activities violated their rights to freedom of speech and freedom of association. *Keller*, 496 U.S. at 5–6, 110 S.Ct. 2228. The Court held that state bar associations may constitutionally charge mandatory dues to "fund activities germane" to "the purpose[s] for which compelled association was justified," i.e., "regulating the legal profession and improving the quality of legal services." *Id.* at 13–14, 110 S.Ct. 2228. But state bar associations cannot constitutionally use mandatory dues to "fund activities of an ideological nature which fall outside of those areas of activity." *Id.* at 14, 110 S.Ct. 2228. Although it held that at least some complained-of activities were germane, the Court remanded for the lower courts to determine exactly which of the challenged activities were non-germane. [15]

15 *See Keller*, 496 U.S. at 15–16, 110 S.Ct. 2228 (noting that "[c]ompulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative," both of which the plaintiffs asserted the state bar did).

After deciding the free speech issue, the Court turned briefly to freedom of association. The *Keller* plaintiffs contended that "they cannot be compelled to associate with an organization that engages in political or ideological activities beyond those

for which mandatory financial support is justified under the principles of *Lathrop* and *Abood* [*v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977)].” *Id.* Despite noting that the plaintiffs’ claim “appears to implicate a much broader freedom of association claim than was at issue in *Lathrop*,” *id.* at 17, 110 S.Ct. 2228, the Court did not resolve that broader claim, *see id.*

So where do *Lathrop* and *Keller* leave us? *Lathrop* held that lawyers may constitutionally be mandated to join a bar association that solely regulates the legal profession and improves the quality of legal services. *Keller* identified that *Lathrop* did not decide whether lawyers may be constitutionally mandated to join a bar association that engages in other, non-germane activities. Nor did *Keller* resolve that question. [16] Therefore, we must both decide that issue and determine whether the Texas Bar is engaged in non-germane activities.

16 We join the Ninth and Tenth Circuits in reading *Lathrop* and *Keller* as leaving that question unresolved. *See Schell v. The Chief Justice & Justices of the Oklahoma Supreme Court*, No. 20-6044, 2021 WL 2657106, at *11 (10th Cir. June 29, 2021); *Crowe v. Or. State Bar*, 989 F.3d 714, 727–29 (9th Cir. 2021), *petition for cert. filed* (May 27, 2021) (No. 20-1678).”

A.

To determine whether compelling the plaintiffs to join a bar that engages in non-germane ***245** activities violates their freedom of association, we must decide (1) whether compelling the plaintiffs to join burdens their rights and, (2) if so, whether it is nevertheless justified by a sufficient state interest.

1.

“[F]reedom of association is never mentioned in the United States Constitution.” [17] Instead, it is implicit in the other rights listed in the First Amendment. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 618, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). As relevant here, “[a]n individual's freedom to speak ... could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.” [18] Because the right to freedom of association is part of the freedom of speech, “[t]o determine whether a group is protected by the First Amendment's expressive associational right, we must determine whether the group engages in ‘expressive association.’ ” *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000).

17 Amy Gutmann, *Freedom of Association: An Introductory Essay*, *in* FREEDOM OF ASS’N 3, 9 (Amy Gutmann ed. 1998); *see* U.S. Const. amend. I.

18 *Roberts*, 468 U.S. at 622, 104 S.Ct. 3244; *see also NAACP v. Alabama* ex rel. *Patterson*, 357 U.S. 449, 460, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958) (“Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association ....”).

For groups that engage in expressive association, the “[f]reedom of association ... plainly presupposes a freedom not to associate.” *Roberts*, 468 U.S. at 623, 104 S.Ct. 3244. Those groups have a right to restrict their membership, because the membership is the message. [19] Individuals have an analogous right to “eschew association for expressive purposes.” *Janus*, 138 S. Ct. at 2463. That right is part and parcel of the “cardinal constitutional command” that the government may not compel “individuals to mouth support for views they find objectionable.” *Id.* [20]

19 *See Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 680, 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010) (“Who speaks ... colors what concept is conveyed.”).

20 “When membership of an association requires the individual to give support to a particular conception of the good life or controversial ideology of the good society, the freedom to refuse association is clearly fundamental to the individual's freedom to live authentically in accordance with his/her own ethical and political beliefs.” Stuart White, *Trade Unionism in a Liberal State*, *in* FREEDOM OF ASS’N, *supra*, at 330, 345.

Based on that, compelling a lawyer to join a bar association engaged in non-germane activities burdens his or her First Amendment right to freedom of association. Such a bar

association would invariably be engaged in expressive activities. Even bar associations that engage in only germane activities undertake some expressive activities; for example, proposing an ethical rule expresses a view that the rule is a good one, and commenting on potential changes to the state's court system, as the bar in *Lathrop* did, expresses a view that such a reform is a good or bad idea.

Bar associations that also engage in non-germane activities will almost certainly be engaging in additional expressive activities that "support ... a particular conception of the good life or controversial ideology of the good society." *Id.* And, when a bar association does so, part of its expressive message is that its members ***246** stand behind its expression. The membership is part of the message. Compelling membership, therefore, compels support of that message. If a member disagrees with that "conception of the good life or controversial ideology," then compelling his or her membership infringes on the freedom of association. *Id.*

2.

But that does not necessarily mean the plaintiffs are entitled to relief. "The right to associate for expressive purposes is not ... absolute." *Roberts*, 468 U.S. at 623, 104 S.Ct. 3244. In its freedom-of-association cases, the Court has generally applied "exacting ... scrutiny," under which "mandatory associations are permissible only when they serve a 'compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.' " *Knox v. Serv. Emps. Intl Union, Loc. 1000*, 567 U.S. 298, 310, 132 S.Ct. 2277, 183 L.Ed.2d 281 (2012) (quoting *Roberts*, 468 U.S. at 623, 104 S.Ct. 3244).

Compelled membership in a bar association that is engaged in only germane activities survives that scrutiny. We know that both because *Lathrop* held that compelled membership in such a bar did not violate freedom of association and because of the more recent statement in *Harris v. Quinn*, 573 U.S. 616, 655–56, 134 S.Ct. 2618, 189 L.Ed.2d 620 (2014): 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" as well as of regulating the legal profession and improving the quality of legal services. *Id.* And, for that reason, *Keller*, which allowed compelled subsidization[21] of germane activities, "fits comfortably within the [exacting scrutiny] framework." *Id.* at 655, 134 S.Ct. 2618.

21 Exacting scrutiny is applied to both freedom-of-association and compelled-subsidy claims. *See, e.g.*, *Janus*, 138 S. Ct. at 2465 (compelled subsidy); *Dale*, 530 U.S. at 648, 120 S.Ct. 2446 (freedom of association).

Compelled membership in a bar association that engages in non-germane activities, on the other hand, fails exacting scrutiny. *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 310, 132 S.Ct. 2277, 183 L.Ed.2d 281 (2012) (quoting *Roberts*, 468 U.S. at 623, 104 S.Ct. 3244). Plaintiffs suggest that, instead of exacting scrutiny, strict scrutiny should apply. Under that standard, the government must show that its action is "narrowly tailored" to "further compelling governmental interests." *Johnson v. California*, 543 U.S. 499, 505, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005) (cleaned up). Because the bar's mandatory membership "cannot survive under even the more permissive standard," we do not decide whether strict scrutiny is necessary. *See Janus*, 138 S. Ct. at 2465. Although states have interests in allocating the expenses of regulating the legal profession and improving the quality of legal services to licensed attorneys, they do not have a compelling interest in having all licensed attorneys engage as a group in other, non-germane activities.

Moreover, there are other "means significantly less restrictive of associational freedoms" to achieve the state's legitimate interests. *Knox*, 567 U.S. at 310, 132 S.Ct. 2277. Almost twenty states—including some of the largest legal markets, such as New York, Illinois, and Pennsylvania—directly regulate the licensing and disciplining of attorneys. *See* Brock, *supra*, at 24 n.1 (not listing those states as having mandatory bars).

The Bar cannot reasonably suggest that those states are unable to regulate their ***247** legal professions adequately. Nor does the Bar have to cede its ability to engage in non-germane activities entirely—as California has shown, a hybrid model is possible.

Therefore, the plaintiffs are entitled to summary judgment on their freedom-of-association claim if the Bar is in fact engaged in non-germane activities.

B.

The purposes justifying compelled association in a bar association are "regulating the legal profession" and "improving the quality of legal services." *Keller*, 496 U.S. at 13, 110 S.Ct. 2228. For activities to be germane, they must be "necessarily or reasonably incurred for" those purposes. *Id.* at 14, 110 S.Ct. 2228. The plaintiffs contend that all "activities of a 'political or ideological' nature" necessarily are non-germane. That misses the mark.

Keller said mandatory dues cannot be used to "fund activities of an ideological nature *which fall outside of those areas of activity*." *Id.* (emphasis added). Though later decisions have framed *Keller* somewhat as these plaintiffs do,[22] none of them purported to alter *Keller*'s standard, which contemplates that some political or ideological activities might be germane. With that in mind, we turn to "[t]he difficult question" of determining whether each respective challenged activity is germane. *Id.*

22 *See, e.g.*, *Harris*, 573 U.S. at 655, 134 S.Ct. 2618 (describing *Keller* as holding "that members of this bar could not be required to pay the portion of bar dues used for political or ideological purposes but that they could be required to pay the portion of the dues used for activities connected with proposing ethical codes and disciplining bar members"); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 558, 125 S.Ct. 2055, 161 L.Ed.2d 896 (2005) ("[W]e have invalidated the use of the compulsory fees to fund speech on political matters." (citing *Keller*)); *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 231, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000) ("[L]awyers could not, however, be required to fund the bar association's own political expression." (citing *Keller*, 496 U.S. at 16, 110 S.Ct. 2228)).

1.

The Bar's legislative program is neither entirely germane nor wholly non-germane. The plaintiffs advocate a bright line rule that *any* legislative lobbying is non-germane. But such a rule is foreclosed by *Lathrop* and *Keller.* In *Lathrop*, 367 U.S. at 836–37, 81 S.Ct. 1826, the Court identified no First Amendment violation despite the Wisconsin bar's lobbying for various pieces of legislation regarding the state court system, attorney compensation, and other matters related to the legal profession. And *Keller*, 496 U.S. at 15, 110 S.Ct. 2228, highlighted that lobbying is germane where "officials and members of the Bar are acting essentially as professional advisers to those ultimately charged with the regulation of the legal profession." At the same time, the scope of the Bar's legislative program belies its contention that every single bill it has lobbied for is germane to regulating the legal profession or improving the quality of legal services.

Keller did not lay down a test to determine when lobbying is germane and when it is not, acknowledging that the dividing line would "not always be easy to discern." *Id.* at 16, 110 S.Ct. 2228. Instead, it identified "advanc[ing] a gun control or nuclear weapons freeze initiative" and "proposing ethical codes" as the bookends of the spectrum and left it to lower courts to work out intermediate cases. We must do so now.

Except as stated below, advocating changes to a state's substantive law is non-germane to the purposes identified in *Keller*. Such lobbying has nothing to do with ***248** regulating the legal profession or improving the quality of legal services. Instead, those efforts are directed entirely at changing the law *governing* cases, disputes, or transactions *in which attorneys might be involved*. Lobbying for legislation regarding the functioning of the state's courts or legal system writ large, on the other hand, is germane. So too is advocating for laws governing the activities of lawyers *qua* lawyers.[23]

23 *Lathrop*'s description of the topics on which the Wisconsin Bar took positions is illustrative of the type of lobbying that is germane:

> The State Bar, through its Board of Governors or Executive Committee, has taken a formal position with respect to a number of questions of legislative policy. These have included such subjects as an increase in the salaries of State Supreme Court justices; making attorneys notaries public; amending the Federal Career Compensation Act to apply to attorneys employed with the Armed Forces the same provisions for special pay and promotion available to members of other professions; improving pay scales of attorneys in state service; court reorganization; extending personal jurisdiction over nonresidents; allowing the recording of unwitnessed conveyances; use of deceased partners' names in firm names; revision of the law governing federal tax liens; law clerks for State Supreme Court justices; curtesy and dower; securities transfers

> by fiduciaries; jurisdiction of county courts over the administration of inter vivos trusts; special appropriations for research for the State Legislative Council.
>
> *Lathrop*, 367 U.S. at 836–37, 81 S.Ct. 1826 (citations omitted). Those positions, with the possible exceptions of "curtesy and dower," "extending personal jurisdiction over nonresidents," and "federal tax liens," all relate to the state's court system or the activities of lawyers. That type of lobbying is germane.
>
> In addition to its formally taken positions, the Wisconsin bar set up a group to address federal legislation affecting "the practice of law, or lawyers as a class, or the jurisdiction, procedure and practice of the Federal courts and other Federal tribunals, or creation of new Federal courts or judgeships affecting this state, and comparable subjects." *Id.* at 838, 81 S.Ct. 1826. Announcing positions on those topics would also pass the germaneness test.

Applied to the Bar's 2019 legislative program, for example, that means that some lobbying was germane, but most was not. Many of the bills the Bar supported relate to substantive Texas law and are wholly disconnected from the Texas court system or the law governing lawyers' activities. For example, the Bar's lobbying to amend the Texas Constitution's definition of marriage and create civil unions is obviously non-germane.[24] The Bar's presumably less-controversial proposed substantive changes to Texas family law are equally non-germane. The Bar's lobbying for the "creation of an exemption regarding the appointment of *pro bono* volunteers," on the other hand, is germane, because it relates to the law governing lawyers. Its lobbying for changes to Texas trust law is germane to the extent the changes affect lawyers' duties when serving as trustees, and non-germane to the extent the changes do not.

24 The Bar contends that its lobbying was germane because "seeking to amend or repeal unconstitutional laws benefits the legal profession and improves the quality of legal services because it reduces the risk that lawyers, their clients, members of the public, or government officials will rely on laws that judicial decisions have rendered invalid." But *Keller* does not afford the Bar a roving commission to advocate for legislation to "amend or repeal unconstitutional laws" or "clean up legal texts."

What is important, however, is that *some* of the legislative program is non-germane. The Bar attempts to salvage the program by maintaining that only its voluntary sections engage in lobbying and that therefore plaintiffs are not compelled to associate with those initiatives. But, by the Bar's own admission, "[n]o voluntary ***249** section may assert a position regarding legislative, judicial, or executive action unless it has first obtained permission" from the Bar's Board of Directors. *See Policy Manual* § 8.01.06. Those positions have the imprimatur of the entire Bar.

Moreover, even if the subject-matter sections undertake the direct-lobbying expenses, the Bar still uses mandatory dues to fund those sections directly and to pay for the GRD, which reviews the sections' proposals. That too ties the entire Bar to the program. In sum, some of the legislative program is non-germane, so compelling the plaintiffs to join an association engaging in it violates their freedom of association.

2.

The Bar's various diversity initiatives through OMA, though highly ideologically charged, are germane to the purposes identified in *Keller*. The plaintiffs contend that OMA's diversity initiatives are "highly ideological," because they support the approach of "having programs targeted at certain individuals based on their race, gender, or sexual orientation" and "people of good faith ... disagree sharply about the merits of such programs." The plaintiffs are certainly right on that point—affirmative action and other identity-based programs, in contexts ranging from contract bidding to higher education, have spawned sharply divided public debate and widespread, contentious litigation.[25] Legislation has been introduced in Congress to address a number of race-based issues,[26] and litigation remains pending challenging several diversity-justified initiatives.[27] In other words, that issue is a "sensitive political topic[ ]" that is "undoubtedly [a] matter[ ] of profound value and concern to the public." *Janus*, 138 S. Ct. at 2476 (cleaned up).

25 *See, e.g., Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 572 U.S. 291, 134 S.Ct. 1623, 188 L.Ed.2d 613 (2014); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*

No. 1, 551 U.S. 701, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007); *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995).

26 *See, e.g.*, Commission to Study and Develop Reparation Proposals for African-Americans Act, H.R. 40, 116th Cong. (2019); Commission to Study and Develop Reparation Proposals for African-Americans Act, S. 1083, 116th Cong. (2019); George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020).

27 *See, e.g., Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020), *petition for cert. filed* (Feb. 25, 2021) (No. 20-1199).

But, despite the controversial and ideological nature of those diversity initiatives, they are germane to the purposes identified by *Keller*. They are aimed at "creating a fair and equal legal profession for minority, women, and LGBT attorneys," which is a form of regulating the legal profession. And the Bar contends that those initiatives "help to build and maintain the public's trust in the legal profession and the judicial process as a whole," which is an improvement in the quality of legal services.

The germaneness test does not require that there be unanimity on the Bar's position on what best regulates the legal profession—that is typically for the Bar to decide. [28] To take a non-controversial ***250** example, the Bar's advocating a particular ethical rule is germane no matter how strenuously an attorney might disagree with its propriety. The same principle applies here. In sum, the diversity initiatives are "activities of an ideological nature which fall [in]side" the areas identified by *Keller*, 496 U.S. at 14, 110 S.Ct. 2228. Given that those activities are germane under *Keller*, they are not a basis for granting summary judgment for the plaintiffs. [29]

28 But there are limits. Certain ideologically charged activities might be so tenuously related to the legal profession that any argument they are germane would be pre-textual. In holding that the diversity initiatives are germane, we do not give the Bar *carte blanche* to engage in any ideological activities so long as they have some sophistic argument the activities are germane. We just identify that the diversity initiatives are not so tenuously connected to the purposes identified in *Keller*, and that therefore their ideologically charged nature does not defeat their germaneness.

29 We doubt it would be constitutionally permissible, under *Janus*, to compel the plaintiffs to join an association taking the Bar's stances on those ideologically charged issues. But *Keller* binds us as the caselaw that is most directly applicable.

3.

Most, but not quite all, of the Bar's activities aimed at aiding the needy are germane. Specifically, (1) the LAD, (2) the Bar's directory of volunteer and resource opportunities, and (3) the legal services fee solely support *pro bono* work. That is germane to both regulating the legal profession and improving the quality of legal services. Legal aid and *pro bono* programs focus on providing legal counsel to millions of Texans who cannot afford it and would otherwise be forced to proceed *pro se*. This improves the quality of legal services available to low-income Texans, given that they would otherwise have no legal services at all.

Such initiatives also aid Texas courts, because decreasing the number of *pro se* litigants reduces the administrative burdens those litigants place on Texas courts. Moreover, legal aid and *pro bono* efforts help lawyers to "fulfill [their] ethical responsibility to provide public interest legal service." [30] The Supreme Court has suggested that funding legal aid and encouraging *pro bono* service are permissible ends for a mandatory bar to pursue, [31] and our sister circuits appear to agree. [32]

30 TEX. DISCIPLINARY R. PRO. CONDUCT 6.01 cmt. 5; *see also id*. preamble ¶ 6 ("A lawyer should render public interest legal service. ... The provision of free legal services to those unable to pay reasonable fees is a moral obligation of each lawyer ...."); TEX. STATE BAR BD. OF DIRS., PRO BONO RESOLUTION (2000) ("[E]ach Texas attorney should aspire to render at least 50 hours of legal services to the poor each year ....").

31 *See Lathrop*, 367 U.S. at 840–43, 81 S.Ct. 1826 (observing most of the Wisconsin Bar's political activities, which included support for legal aid, "serve the function ... of 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").

32 *See, e.g.*, *Schneider v. Colegio de Abogados de P.R.*, 917 F.2d 620, 626, 631 (1st Cir. 1990) (endorsing mandatory dues to support "legal aid services"); *Levine v. Heffernan*, 864 F.2d 457, 462 & n.4 (7th Cir. 1988) (noting that *Lathrop* indicated that "helping [to] establish legal aid systems" was an "important activit[y] that the bar engaged in"); *Gibson v. Fla. Bar (Gibson I)*, 798 F.2d 1564, 1569 n.4 (11th Cir. 1986) ("Acceptable areas for Bar lobbying would include ... budget appropriations for the judiciary and legal aid ....").

The plaintiffs' main complaint with those programs seems to be that they disagree with the Bar's choice of legal aid organizations to support, particularly in the context of immigration. Specifically, they contend that facilitating representation of aliens "is *itself* a highly 'substantive' and 'ideological activity' " that "squarely aligns the Bar with one view of a politically charged national debate." But a "lawyer's representation ***251** of a client ... does not constitute an endorsement of the client's political, economic, social or moral views or activities." [33] It follows that there is no reason to believe that facilitating lawyers' representation of aliens in navigating immigration laws constitutes an endorsement of any particular viewpoint about those statutes. And structurally, in cases where the federal government is a party, it is unsurprising that only one side of that "v" needs *pro bono* assistance.

33 TEX. DISCIPLINARY R. PRO. CONDUCT 6.01 cmt.4. If it did, no attorney would want to represent an accused murderer or child molester.

In any event, LAD's directory merely provides information for attorneys interested in such matters to connect with related organizations, and LAD provides *pro bono* support for groups touching on a wide array of legal disciplines. [34] The plaintiffs do not allege, and the record does not support, that LAD reserves those resources only for low-income Texans with certain political views or those who are pursuing certain ideological causes.

34 For example, LAD also provides resources for *pro bono* organizations seeking to assist Texas veterans, help with tax issues, support criminal defense, or address improper conduct by attorneys.

AJC is more complicated, because unlike LAD, the resources page, and the legal services fee, AJC's activities are not *entirely* cabined to making legal representation more available to low-income Texans. To be sure, most of its activities are so directed, [35] and to the extent the Bar is supporting AJC activities limited to helping low-income Texans access legal services, it is germane. But some of AJC's activities include lobbying for changes to Texas substantive law designed to benefit low-income Texans. [36] Those may be salutary activities. But they are aimed at making substantive Texas law more favorable to low-income Texans, not at "regulating the legal profession" or "improving the quality of legal services," so they are non-germane under *Keller*. Therefore, the Bar's funding of the AJC is non-germane.

35 For example, the AJC lobbying for funding for civil legal services, creating *pro bono* opportunities for law students, and providing training for attorneys are all merely supporting *pro bono* work. And its efforts to help the Supreme Court of Texas make Texas courts more assessable and navigable to low-income Texans, and creating "pro se forms and toolkits" improve the quality of legal services.

36 For example, AJC "supported two enacted bills that made it easier for people to pass their money and their home outside probate," supported amending the Texas Property Code to "limit dissemination of eviction information," and supported regulations of "wrap-around loans."

4.

The miscellaneous activities—hosting an annual convention, running CLE programs, and publishing the *Texas Bar Journal*—are all germane. We explain why.

The Bar's annual convention and CLE offerings help regulate the legal profession and improve the quality of legal services. Both programs assist attorneys in fulfilling requirements designed to ensure that they maintain the requisite knowledge to be competent practitioners. *See, e.g.*, TEX. DISCIPLINARY R. PRO. CONDUCT 1.01 cmt. 8. The

plaintiffs' complaint is that some of the convention panels and CLE courses are ideologically charged. Probably so. But that is not the test under *Keller*. And moreover, any objectionable CLE and annual convention offerings are only one part of a large, varied catalogue, and the Bar includes disclaimers indicating that it is ***252** not endorsing any of the views expressed. That is enough to satisfy *Keller*. [37]

37 *See, e.g.*, *Schneider*, 917 F.2d at 626, 631 (endorsing "continuing legal education programs" as a permissible activity to fund with mandatory bar dues).

The *Texas Bar Journal* publishes information related to regulating the profession and improving legal services. Such information includes, among other things, (1) notices regarding disciplinary proceedings against Bar members, *see* TEX. R. DISCIPLINARY P. 6.07; (2) announcements of amendments to evidentiary and procedural rules, *see* TEX. GOV'T CODE § 22.108(c); *id*. § 22.109(c); (3) "public statements, sanctions, and orders" issued by the State Commission on Judicial Conduct, *see id*. § 33.005(e); and (4) articles "devoted to legal matters and the affairs of the [Texas] Bar and its members," TEX. STATE BAR R. art. IX. Moreover, the *Journal* purports to feature articles advancing various viewpoints, and, in any event, includes a disclaimer clarifying that the Bar does not endorse any views expressed therein. That structure suffices under *Keller*. [38]

38 The plaintiffs also reference, in a single sentence, the Bar's spending on advertising. Beyond that, however, they do not explain how it is unlawful, under *Keller*, to compel them to support those efforts. "It is not enough to merely mention or allude to a legal theory": "[A] party must 'press' its claims," which means, at a minimum, "clearly identifying a theory as a proposed basis for deciding the case." *United States v. Scroggins*, 599 F.3d 433, 446–47 (5th Cir. 2010). Because the plaintiffs have not met that threshold, they have forfeited any contention related to the advertising expenditures.

* * * * *

In sum, the Bar is engaged in non-germane activities, so compelling the plaintiffs to join it violates their First Amendment rights. There are multiple other constitutional options: The Bar can cease engaging in non-germane activities; Texas can directly regulate the legal profession and create a voluntary bar association, like New York's; or Texas can adopt a hybrid system, like California's. But it may not continue mandating membership in the Bar as currently structured or engaging in its current activities.

IV.

Assuming, *arguendo*, that the plaintiffs *can* be required to join the Bar, compelling them to subsidize the Bar's non-germane activities violates their freedom of speech. [39] Given that the Bar is engaged in non-germane activities and that its interests fail exacting scrutiny, [40] that is a straightforward application of *Keller*. The Bar may "constitutionally fund activities germane to [regulating the legal profession or improving the quality of legal services] out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity." *Keller*, 496 U.S. at 14, 110 S.Ct. 2228. As explained above, parts of the legislative program and the support for AJC are non-germane, so compelling plaintiffs to fund them violates their freedom of speech. They are entitled to summary judgment on their second claim.

39 "This alternative holding is not dicta. In this circuit, 'alternative holdings are binding precedent and not *obiter dicta*.' " *Ramos-Portillo v. Barr*, 919 F.3d 955, 962 n.5 (5th Cir. 2019) (quoting *Whitaker v. Collier*, 862 F.3d 490, 496 n.14 (5th Cir. 2017)).

40 *See* Part III.C, *supra*.

V.

The plaintiffs maintain that the Bar's procedures for separating chargeable from non-chargeable expenses is constitutionally ***253** inadequate. [41] They are, but not for the primary reason the plaintiffs offer.

41 Even if the plaintiffs cannot be compelled to join the Bar because that violates their freedom of association, the adequacy of the Bar's procedures is still relevant. As we clarify today in No. 20-30086, *Boudreaux v. Louisiana State Bar Association*, the inability to identify non-germane expenses is itself a constitutional injury, entitling the plaintiffs to

relief. Moreover, because the plaintiffs *can* be compelled to join the Bar if it ceases its non-germane activities, per *Lathrop*, ensuring the Bar has adequate procedures to notify the plaintiffs, and others, that some activities might be non-germane is important.

The plaintiffs contend the Bar's procedures, outlined in Part I.C, *supra*, are constitutionally inadequate in light of recent precedent requiring clear, free, and affirmative consent—i.e., an opt-in system [42]—"before an association can use an individual's coerced fees or dues to support its political and ideological activities." The plaintiffs assert in the alternative that, even if the Bar may use an opt-out refund procedure, its current procedures are still inadequate because the Bar (1) requires members to pay dues before seeking any refund, (2) does not provide adequate notice of its spending as required by *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), and (3) makes refunds available only at the Bar's discretion.

42 *See Janus*, 138 S. Ct. at 2486; *Knox*, 567 U.S. at 322, 132 S.Ct. 2277.

The Bar counters that "nothing in *Keller* mandates that integrated bars adopt the exact procedures *Hudson* outlined," let alone that mandatory bars use an opt-in system. The Bar avers that its current procedures are constitutional under *Keller* because "the Bar provides members with advance, detailed notice of its proposed expenditures, along with several opportunities to object to those expenditures before they occur." Specifically, the Bar points to (1) the publication of its proposed budget, which itemizes expenditures for particular categories, in the *Texas Bar Journal*; (2) opportunities to object at the budget hearing and the annual Bar Board meeting related to the budget; and (3) the protest procedure, which allows members to object to both proposed and actual expenditures and obtain a refund.

Each side is half right. The plaintiffs are correct that the Bar's procedures are constitutionally wanting, but they are incorrect that, at least under current law, opt-in procedures are required. Though *Janus* and *Knox* indicate that may be the case, *Keller*, despite "its increasingly wobbly, moth-eaten foundations," [43] remains binding on this court. And *Keller* noted that "an integrated bar could certainly meet its *Abood* obligation by adopting the sort of procedures described in *Hudson*." *Keller*, 496 U.S. at 17, 110 S.Ct. 2228.

43 *State Oil*, 522 U.S. at 20, 118 S.Ct. 275 (quotation marks omitted).

Hudson requires that a public organization collecting mandatory dues and engaging in non-germane conduct have procedures that "include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Hudson*, 475 U.S. at 310, 106 S.Ct. 1066. The explanation of the basis of the fee must include "sufficient information to gauge the propriety of the union's fee." *Id.* at 306. *Hudson*'s procedures contemplate an opt-out rule. And *Keller* indicated that *Hudson*'s procedures are sufficient to satisfy a Bar's obligations. Therefore, assuming that plaintiffs can be compelled to join the Bar at all, the Bar ***254** may constitutionally use some sort of opt-out procedure for giving pro-rata refunds.

But, though the Bar may use opt-out procedures, its current procedures are constitutionally inadequate. The Bar asserts that *Keller* did not hold that *Hudson*'s procedures are constitutionally necessary. That is correct as far as it goes: *Keller* left open whether "one or more alternative procedures would likewise satisfy" the Bar's obligation. *Keller*, 496 U.S. at 17, 110 S.Ct. 2228. But *Janus* and *Knox* have subsequently made clear that procedures even more protective than those described in *Hudson* (i.e., opt-in procedures) are necessary in the closely related union context. [44] In the absence of *Keller*'s holding that *Hudson*'s procedures are sufficient, we would be bound to follow the Supreme Court's directive in those cases and require opt-in procedures. But of course, *Keller*'s indication that *Hudson*'s procedures are sufficient remains binding. Therefore, given that *Keller* indicated that *Hudson*'s procedures are sufficient, and *Janus* held even more protective procedures are necessary, *Hudson*'s procedures are *both* necessary and sufficient. [45]

44 "Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, *unless the employee affirmatively consents to pay*." *Janus*, 138 S. Ct. at 2486 (emphasis added); *see also Knox*, 567 U.S. at 312–13, 132 S.Ct. 2277 (explaining that the cases approving opt-out procedures were more "historical accident" than "careful application of First Amendment principles"); *id.* at 314, 132 S.Ct. 2277 ("By authorizing a union to collect fees from

nonmembers and permitting the use of an opt-out system for the collection of fees levied to cover nonchargeable expenses, our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate.").

45 In so holding, we part ways with the Ninth Circuit's decision in *Crowe*, 989 F.3d at 727, and align ourselves instead with the dissent, *see id.* at 734 (Van Dyke, J., dissenting).

The Bar's procedures are inadequate under *Hudson*. The Bar does not furnish Texas attorneys with meaningful notice regarding how their dues will be spent. Nor does it provide them with any breakdown of where their fees go. Instead, it places the onus on objecting attorneys to parse the Bar's proposed budget—which only details expenses at the line-item level, often without significant explanation—to determine which activities might be objectionable. That is a far cry from a *Hudson* notice, which estimates the breakdown between chargeable and non-chargeable activities and explains how those amounts were determined. *See Hudson*, 475 U.S. at 307 & n.18, 106 S.Ct. 1066.

The Bar then leaves the objecting attorney with precious few worth-while options to express his or her disapproval. Though attorneys may register their complaints with committees and sections or lodge an objection at the Bar's annual hearing on its proposed budget, those processes give cold comfort: Any objector's opposition can be summarily overruled, leaving that lawyer on the hook to fund ideological activities that he or she does not support. To obtain a refund, the Bar requires that attorneys object to a *specific* activity.[46] Moreover, whether a refund is available is left to the sole discretion of the Bar's Executive Director, and refunds are issued only "for the convenience of the Bar." In the event a refund is denied, the objecting attorney is out of luck. *Hudson* requires more than that.

46 *See Schneider*, 917 F.2d at 634–35 (holding that the system for processing objections was constitutionally insufficient under *Keller* where, most relevantly, objecting attorneys had to lodge objections to specific activities in order to receive a refund).

***255** VI.

Having held that the plaintiffs are entitled to partial summary judgment, we turn to whether they warrant a preliminary injunction pending the remedies stage. They do.

"We review a ... denial of a preliminary injunction for an abuse of discretion," *Moore v. Brown*, 868 F.3d 398, 402 (5th Cir. 2017), "but we review a decision grounded in erroneous legal principles *de novo*," *City of Dall. v. Delta Air Lines, Inc.*, 847 F.3d 279, 286 (5th Cir. 2017) (quotation marks omitted). As discussed at length, *supra*, the denial of the preliminary injunction was based on an erroneous holding that the Bar was not engaged in any non-germane activities, so our review is *de novo*.

To obtain a preliminary injunction, the plaintiffs must establish that (1) they are "likely to succeed on the merits," (2) they are "likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tips in [their] favor," and (4) "an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008).

The plaintiffs have plainly satisfied the first factor. They are not just likely to succeed on the merits; they have succeeded on the merits already. The remaining factors also support granting the preliminary injunction. First, "[t]he loss of First Amendment freedoms, for even minimal periods of time unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality). Next, "injunctions protecting First Amendment freedoms are always in the public interest." *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013) (quotation marks omitted). Finally, the balance of equities weighs heavily in plaintiffs' favor because the only harm to the Bar is the inability to extract mandatory dues from the plaintiffs in violation of the First Amendment, which is really "no harm at all." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006).

* * *

The district court erred in its reading of *Lathrop* and *Keller* and in its application of *Keller*'s germaneness test to the Bar's activities. We therefore VACATE the summary judgment, RENDER partial summary judgment in favor of the plaintiffs, and REMAND for the court to determine the full scope of relief to which plaintiffs are entitled. We additionally REVERSE the denial of plaintiffs' motion for a preliminary injunction and RENDER a preliminary injunction preventing

the Bar from requiring the plaintiffs to join or pay dues pending completion of the remedies phase.

All Citations

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No. _____

In The
Supreme Court of the United States

DANIEL Z. CROWE; LAWRENCE K. PETERSON;
and OREGON CIVIL LIBERTIES ATTORNEYS,
an Oregon nonprofit corporation,

Petitioners,

v.

OREGON STATE BAR, a Public Corporation, *et al.*,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has held that "exacting" First Amendment scrutiny applies to laws that force public employees to subsidize the speech and political activities of public sector unions. *Janus v. AFSCME*, 138 S. Ct. 2448, 2477 (2018). The Court has also made clear that attorneys regulated under state law are subject to "the same constitutional rule" that applies to public employees. *Keller v. State Bar of California*, 496 U.S. 1, 13 (1990). Oregon requires attorneys to join and pay dues to the Oregon State Bar as a condition of practicing law. The Oregon State Bar uses members' mandatory dues to fund political and ideological speech regarding issues of law and public policy. Is the statute that compels attorneys to subsidize Oregon State Bar's political and ideological speech subject to "exacting" scrutiny?

PARTIES TO THE PROCEEDINGS

Petitioners, who were Plaintiffs-Appellants in the court below, are Daniel Z. Crowe, Lawrence K. Peterson, and Oregon Civil Liberties Attorneys, an Oregon nonprofit corporation.

Respondents, who were Defendants-Appellees in the court below, are the Oregon State Bar, an Oregon public corporation; the Oregon State Bar Board of Governors; and several Oregon State Bar officials sued in their official capacities: David Wade, President of the Oregon State Bar Board of Governors; Kamron Graham, President-Elect of the Oregon State Bar Board of Governors; Helen Marie Hierschbiel, Chief Executive Officer of the Oregon State Bar; Mike Williams, Director of Finance and Operations of the Oregon State Bar; and Amber Hollister, General Counsel for the Oregon State Bar.[1]

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[1] David Wade, Kamron Graham, and Mike Williams have respectively replaced as parties a previous President of the Oregon State Bar Board of Governors, Vanessa A. Nordyke; a previous President-Elect of the Oregon State Bar Board of Governors, Christine Constantin; and a previous Director of Finance and Operations of the Oregon State Bar, Keith Palevsky. The former officeholders were identified as Defendants-Appellants in the caption of the Ninth Circuit's opinion although their successors were automatically substituted as parties under Federal Rule of Civil Procedure 25(d) and Federal Rule of Appellate Procedure 43(c).

CORPORATE DISCLOSURE STATEMENT

Petitioner Oregon Civil Liberties Attorneys has no parent corporations, and no publicly-held company owns 10 percent or more of its stock.

RELATED CASES

- *Crowe v. Oregon State Bar*, No. 3:18-cv-02139-JR, U.S. District Court for the District of Oregon. Judgment entered May 24, 2019.
- *Crowe v. Oregon State Bar*, No. 19-35463, U.S. Court of Appeals for the Ninth Circuit. Judgment entered February 26, 2021.

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INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

Oregon requires attorneys who practice law in the state to join and pay dues to the Oregon State Bar ("OSB"). The OSB, in turn, uses attorneys' mandatory dues to fund legislative advocacy and other political and ideological speech on matters of public importance. The question presented here is whether Oregon's law that forces attorneys to subsidize political speech should be subject to exacting First Amendment scrutiny.

In *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), this Court held that laws forcing public employees to fund the political speech and lobbying activities of a public sector union were subject to exacting scrutiny, *id.* at 2477, and in *Keller v. State Bar of California*, 496 U.S. 1, 12 (1990), it found that there was "a substantial analogy" between mandatory bar associations and unions when it comes to First Amendment principles. Petitioners challenged the constitutionality of Oregon's compelled subsidies for OSB's political and ideological speech, based on those precedents.

Yet the Ninth Circuit dismissed Petitioners' First Amendment challenge to the compelled subsidies, holding that it is foreclosed by *Keller*, which, the court said, allows bar associations to "use mandatory dues to subsidize activities 'germane to those goals' of 'regulating the legal profession and improving the quality of legal services' without running afoul of its members' First Amendment rights." App. 14. Although it agreed

that *Janus* establishes a different rule, the Ninth Circuit felt itself bound to continue to follow *Keller*'s supposed holding due to the rule that lower courts must adhere to on-point Supreme Court precedent even if it believes that precedent has been abrogated. *See* App. 16 (citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997)). Since *Janus*, many other lower courts have done the same, dismissing challenges to compulsory subsidies for bar association speech on the grounds that *Keller* permits them notwithstanding *Janus*. *See infra* at 16–17. *Keller* should not, however, foreclose Petitioners' free-speech claim. *Keller* held that compelled subsidies for bar association speech are subject to the "same constitutional rule" as compelled subsidies for public-sector unions' speech. 496 U.S. at 13. At that time, the rule for public-sector unions was set by *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which allowed governments to force public-sector employees to pay for union activities germane to collective bargaining. Now that *Janus* has overruled *Abood*, it is clear that such fees are subject to (and fail) exacting scrutiny, under which the government must show that an infringement of First Amendment rights serves a compelling government interest and that there is no other way to serve that interest that would infringe significantly less on First Amendment rights. *Janus*, 138 S. Ct. at 2466, 2478–86. Therefore, subjecting mandatory bar association dues to "the same constitutional rule" as public-sector unions, as *Keller* requires, now means subjecting them to exacting scrutiny—which the lower courts purporting to follow *Keller* have not done.

Alternatively, if the lower courts have read *Keller* correctly, then *Keller* should be overruled. To the extent that *Keller* approved of compelled subsidies for bar association speech, it did so based entirely on *Abood*, which *Janus* overruled because it applied a "deferential standard that finds no support in [the Court's] free speech cases" and was otherwise ill-founded, poorly reasoned, and unworkable. *Id.* at 2463–69, 2478–86. "Now that *Abood* is no longer good law, there is effectively nothing left supporting [the Court's] decision in *Keller*." *Jarchow v. State Bar of Wis.*, 140 S. Ct. 1720, 1720 (2020) (Thomas, J., dissenting from denial of certiorari).

The constitutional problems raised by forcing lawyers to subsidize the speech and lobbying of bar associations is a question of immense importance throughout the country. Cases now pending in the Fifth, Sixth, Seventh, and Tenth Circuits, the Utah district court, as well as this Court, now seek to clarify what impact *Janus* has on that question.[1] The Eighth Circuit recently observed that *Janus* applied "a more rigorous exacting scrutiny standard" than *Keller* did, but nonetheless followed what it believed to be the command of *Keller*. *Fleck v. Wetch*, 937 F.3d 1112, 1117

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[1] *Boudreaux v. La. State Bar Ass'n*, No. 20-30086 (5th Cir. Feb. 11, 2020) (challenging Louisiana's mandatory bar); *McDonald v. Longley*, No. 20-50448 (5th Cir. Jun. 4, 2020) (Texas's); *Taylor v. Barnes*, No. 20-2002 (6th Cir. Oct. 13, 2020) (Michigan's); *File v. Kastner*, No. 20-2387 (7th Cir. July 28, 2020) (Wisconsin's); *Schell v. Gurich*, No. 20-6044 (10th Cir. Apr. 2, 2020) (Oklahoma's); *Pomeroy v. Utah State Bar*, No. 2:21-cv-00219-JCB (D. Utah Apr. 13, 2021) (Utah's).

(8th Cir. 2019), *cert. denied*, 140 S. Ct. 1294 (2020). Even the dissenters in *Janus* noted that the opinion was difficult to square with *Keller*, *see* 138 S. Ct. at 2498 (Kagan, Ginsburg, Breyer, Sotomayor, JJ., dissenting)—but the *Janus* majority made no comment on that matter. The question therefore requires resolution by this Court.

The Court should revisit compelled subsidies for bar association speech for the same reason it revisited compelled subsidies for public-sector union speech in *Janus*. Such compulsion is inconsistent with the Court's free speech jurisprudence and is harming thousands of attorneys' First Amendment rights in the 30 states that compel attorneys to join and pay dues to a bar association as a condition of practicing law. With challenges to compelled bar subsidies pending nationwide—and all, so far, failing based on the courts' understanding of *Keller*—the time has come to clarify (and, if necessary, correct) the law on this issue so that attorneys may enjoy the same protection for their fundamental First Amendment rights as government employees and everyone else.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 989 F.3d 714 and reproduced at App. 1–223. The district court's opinion, which adopted a magistrate's findings and recommendation, is reproduced at App. 225–28. The

magistrate's findings and recommendation are reproduced at App. 229–66.

JURISDICTION

The Ninth Circuit issued its opinion on February 26, 2021. On March 19, 2020, this Court extended the deadline to file any petition for writ of certiorari due on or after that date to 150 days after the lower court's decision. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments of the United States Constitution and the relevant statutes are reproduced at App. 293–304.

STATEMENT OF THE CASE

This case presents a First Amendment challenge to Oregon's requirement that attorneys pay dues to the Oregon State Bar ("OSB"), and thus subsidize its political and ideological speech, as a condition of practicing law.

A. The Oregon State Bar's Use of Mandatory Dues for Political and Ideological Speech

Oregon law compels every attorney licensed in Oregon to join the state's integrated bar association, the OSB, in order to practice law. ORS § 9.160; App. 5. State law also authorizes OSB to charge its mandatory members an annual membership fee. ORS § 9.191; App. 303–04. That fee is currently $617.00 for ordinary active members.[2]

The OSB uses mandatory dues for various activities, some of which pertain to regulating the legal profession. Subject to the Oregon Supreme Court's oversight, the OSB administers Oregon's bar examination, investigates bar applicants' character and fitness, formulates rules of professional conduct, and establishes minimum continuing legal education requirements for attorneys. ORS §§ 9.114, 9.210, 9.490; App. 5.

The OSB also uses its mandatory members' mandatory dues to fund political and ideological speech.

One way the OSB uses members' mandatory dues for political and ideological speech is through legislative and policy advocacy. Its Board of Governors may sponsor legislative proposals to the Oregon Legislative Assembly on its own initiative, and the OSB must sponsor legislative proposals approved by the OSB's House of Delegates or approved through a membership

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[2] Oregon State Bar Membership Fee FAQ, https://www.osbar.org/fees/feeFAQ.html.

initiative to the Legislative Assembly. OSB Bylaws §§ 12.200, 12.201; App. 124. The Board and its Public Affairs Committee may propose, or consent to, amendments to legislation, and it may take positions on legislation. OSB Bylaws § 12.3; App. 125. The OSB's committees also may take positions on proposed legislation, rules, and issues of public policy. OSB Bylaws § 12.4; App. 125–26.

The OSB's Bylaws ostensibly limit the OSB's "legislative or policy activities" to those "reasonably related to any of the following subjects":

> regulating and disciplining lawyers; improving the functioning of the courts including issues of judicial independence, fairness, efficacy and efficiency; making legal services available to society; regulating lawyer trust accounts; the education, ethics, competence, integrity and regulation of the legal profession; providing law improvement assistance to elected and appointed government officials; issues involving the structure and organization of federal, state and local courts in or affecting Oregon; issues involving the rules of practice, procedure and evidence in federal, state or local courts in or affecting Oregon; or issues involving the duties and functions of judges and lawyers in federal, state and local courts in or affecting Oregon.

OSB Bylaws § 12.1; App. 123–24.

In addition, the OSB has used mandatory member fees to publish political and ideological speech in its *Bar Bulletin* magazine. App. 276–78. In the April 2018 *Bar Bulletin*, it published, on opposing pages, two statements on alleged "white nationalism." *See* App. 7–11. One of the statements, attributed to the OSB itself, called for limitations "to address speech that incites violence" notwithstanding the First Amendment. App. 7–9. The other, attributed to several affinity bar associations, criticized President Trump for, among other things, "allowing [the white nationalist movement] to make up the base of his support" and signing an executive order restricting immigration and refugee admissions. App. 9–11.

Petitioners Daniel Crowe and Lawrence Peterson—Oregon attorneys who have been compelled to join and pay dues to the OSB—learned of the OSB's publication of these statements when they received the *Bar Bulletin* in the mail in April 2018. App. 277. Crowe and Peterson disagree with the statements' criticism of President Trump and, if given a choice, would not have voluntarily paid for the statements' publication. *Id.*

Crowe, Peterson, and other OSB members informed the OSB of their objections to the use of their mandatory fees to publish the statements and requested refunds of their annual membership dues. App. 277–78. The objecting members each received a payment of $1.15 from the OSB, which the OSB described as a partial dues refund of $1.12, plus $0.03 of statutory interest, with no further explanation. *Id.*

B. Proceedings Below

Petitioners Crowe and Peterson and the members of Petitioner Oregon Civil Liberties Attorneys (collectively, "Petitioners") are licensed Oregon attorneys who are required to pay annual OSB membership dues.[3] App. 270–71. Petitioners disagree with OSB speech that they are forced to fund, including but not limited to the April 2018 *Bar Bulletin* statements, and do not wish to fund any of the OSB's political or ideological speech, regardless of its viewpoint. App. 278.

Petitioners therefore brought suit against the OSB and several OSB officials in their official capacities, raising three First Amendment claims. In one claim, Petitioners allege that compulsory OSB membership and dues violate attorneys' rights to free speech and association. App. 283–84. In another claim, they allege that the OSB's use of mandatory dues for political and ideological speech without members' affirmative consent violates attorneys' rights to free speech and association. App. 282–83. And in another claim, Petitioners allege, in the alternative, that the OSB violates attorneys' First Amendment rights by failing to provide safeguards, as prescribed by *Keller*, to ensure that member dues are not used for activities that are not germane to regulating the legal profession or improving the quality of legal services in Oregon. App. 279–81.

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[3] In February 2020, more than a year after this lawsuit was filed, Peterson retired from the practice of law and resigned his OSB membership.

Defendants moved to dismiss. A magistrate recommended that the motion be granted, App. 229–66, and the district court adopted the magistrate's recommendation in full, *id.* at 225–27. The district court concluded that *Keller* and *Lathrop v. Donohue*, 367 U.S. 820 (1961), foreclosed any First Amendment challenge to mandatory bar membership or dues. It also found that the OSB's safeguards for attorneys' First Amendment rights sufficed under *Keller*. App. 251–64. The district court further concluded that the *Bar Bulletin* statements to which Petitioners objected were "germane" and thus properly chargeable to all members under *Keller*. *Id.* at 257–58.

On appeal, the Ninth Circuit reversed dismissal of Petitioners' freedom-of-association challenge to mandatory OSB membership, concluding, contrary to the district court, that *Keller* and *Lathrop* did not foreclose it because this Court has never resolved that issue; indeed, *Keller* expressly declined to address it. App. 20–26 (citing *Keller*, 496 U.S. at 17).[4] The Ninth Circuit affirmed the dismissal of Petitioners' challenge to the OSB's lack of *Keller* safeguards, however. App. 16–20. Judge VanDyke dissented from the majority's opinion on (only) that issue. App. 36–38.

The Ninth Circuit also affirmed dismissal of Petitioners' free-speech challenge to compulsory OSB dues, concluding that this Court approved of the collection

[4] That claim was remanded and is now pending before the district court. *See* Scheduling Order, *Crowe v. Or. State Bar*, No. 3:18-cv-02139-JR (D. Or. Apr. 12, 2021).

and use of mandatory bar association dues for "germane" political and ideological speech in *Keller*. App. 14–16. The Ninth Circuit recognized that *Keller* "instruct[ed] that integrated bars adhere to the same constitutional constraints as [public-sector] unions"; that *Keller* "expressly relied on" this Court's decision approving compulsory public-sector union fees in *Abood*; and that the Court had overruled *Abood* in *Janus* and deemed compulsory public-sector union fees subject to (and unconstitutional under) exacting First Amendment scrutiny. App. 14–16. The court also noted that "[g]iven *Keller*'s instruction that integrated bars adhere to the same constitutional constraints as unions," Petitioners' argument that *Keller* does not foreclose their free-speech challenge to mandatory dues "is not without support." App. 15. Nonetheless, the Ninth Circuit concluded that, because *Janus* did not overrule *Keller*, lower courts are still bound to follow *Keller*'s (supposed) holding that the First Amendment allows states to compel attorneys to fund a bar association's germane speech.[5] App. 15–16.

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[5] Both the district court and the Ninth Circuit heard and decided Petitioners' case together with another case in which Oregon attorneys challenge mandatory OSB membership and dues for violating their First Amendment rights. *Gruber v. Oregon State Bar*. *See* App. 4 n.1, 12–13, 225, 230–31. The district court dismissed the *Gruber* plaintiffs' free-speech challenge to mandatory dues, and the Ninth Circuit affirmed, together with Petitioners' substantially identical claim. App. 4 & n.1, 230–31. The *Gruber* plaintiffs have filed their own petition for certiorari in case number 20-1520.

Petitioners seek certiorari so this Court can review and reverse the lower court's dismissal of their free-speech challenge to Oregon's requirement that they subsidize the Oregon State Bar's political and ideological speech as a condition of practicing law.

REASONS FOR GRANTING THE PETITION

I. This case presents the vital and unresolved issue of whether states may compel attorneys to subsidize a bar association's political and ideological speech.

This case presents an issue of extraordinary national importance: whether laws that force attorneys to subsidize a bar association's political and ideological speech as a condition of practicing law should be subject to the exacting First Amendment scrutiny of *Janus*, rather than the rational-basis scrutiny that lower courts have given them based on their interpretation of *Keller*.

A. Lower courts have allowed Oregon and other states to compel attorneys to subsidize bar associations' political and ideological speech without applying exacting First Amendment scrutiny.

This Court has recognized that forcing people to subsidize an organization's political and ideological speech inflicts significant First Amendment harm. It has cited with approval Thomas Jefferson's famous

statement that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical." *Janus*, 138 S. Ct. at 2464 (citing A Bill for Establishing Religious Freedom, *in* 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950)). And it has therefore held that laws that mandate subsidization of other people's political and ideological speech must satisfy at least "exacting" scrutiny (under which the government must show that "a compelled subsidy . . . serve[s] a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms"). *Id.* at 2465 (internal marks and citation omitted). In *Janus*, that meant that compulsory public-sector union fees, which were spent on lobbying, were subject to exacting scrutiny. *Id.* at 2466, 2478–86.

Nonetheless, Oregon and most other states require attorneys to join and pay dues to a state bar association as a condition of practicing law—even though many compulsory state bar associations, including the OSB, use attorneys' mandatory dues to engage in core political and ideological speech. App. 5–11; *see also* Leslie C. Levin, *The End of Mandatory State Bars?*, 109 Geo. L.J. Online 1, 7–8, 15–16 (2020).[6] Here, for example, the OSB uses mandatory dues, not only to engage in legislative advocacy on matters it claims to be "germane," but also to publish political and ideological

[6] https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/04/Levin_The-End-of-Mandatory-State-Bars.pdf.

advocacy such as the *Bar Bulletin* statements to which Petitioners objected. App. 7–11.

Other states' compulsory bar associations also use member dues for political and ideological activities. The Oklahoma Bar Association, for example, spends members' compulsory dues to operate a "legislative program," which proposes legislation and lobbies the state legislature, and it has even staged a rally at the state capitol building to oppose legislation its leaders disfavored.[7] The Louisiana State Bar Association uses mandatory dues to take positions on, and lobby for or against, controversial political matters such as public school curricula, the death penalty, and LGBT rights.[8] The Michigan State Bar has used dues to advocate for and against legislation on issues unrelated to the practice of law, such as a bill to change rules regarding expungement for juvenile offenders and a bill about the charging of minors who commit prostitution-related offenses.[9] The Texas Bar spends compulsory dues to engage in political lobbying relating to bills before the state legislature on a wide variety of subjects,

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[7] *See* First Am. Compl. at ¶¶ 47–54, *Schell v. Gurich*, 409 F.Supp.3d 1290 (W.D. Okla. 2019), *appeal docketed*, No. 20-6044 (10th Cir. Apr. 2, 2020).

[8] *See* Compl. at ¶¶ 41, 43–44, *Boudreaux v. La. State Bar Ass'n*, 433 F.Supp.3d 942 (E.D. La. 2020), *appeal docketed*, No. 20-30086 (5th Cir. Feb. 19, 2020).

[9] *See* Jacob Huebert & Kileen Lindgren, *Michigan Attorney Sues State Bar to Defend Her First Amendment Rights*, In Defense of Liberty (Oct. 16, 2019), https://indefenseofliberty.blog/2019/10/16/michigan-attorney-sues-state-bar-to-defend-her-first-amendment-rights/.

including everything from tort reform to contentious anti-discrimination proposals and immigration reform measures.[10] The State Bar of Wisconsin participates in legislative and policy debates on a variety of issues, funding some of that advocacy with members' mandatory dues.[11]

Even when addressing matters related to regulating the legal profession, mandatory bar associations engage in political and ideological advocacy that affects not only lawyers but also the public. Through their role in the rulemaking process, mandatory bar associations "can prevent proposals that benefit the pubic from ever proceeding to the courts for consideration" and "sometimes support proposals that favor lawyers over the public." Levin, *supra*, at 16–17. State bars, in other words, exercise an outsize influence on democracy at the state and federal levels—and in mandatory bar states, they do so with funds taken from lawyers against their will. Quintin Johnstone, *Bar Associations: Policies and Performance*, 15 Yale L. & Pol'y Rev. 193, 228–30 (1996).

In short, mandatory bar associations engage in core political and ideological speech on matters of great public concern—just like the public-sector unions

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[10] *See* First Am. Compl. at ¶¶ 39–40, *McDonald v. Sorrels*, No. 1:19-CV-219-LY, 2020 WL 3261061 (W.D. Tex. May 29, 2020), *appeal docketed sub nom. McDonald v. Longley*, No. 20-50448 (5th Cir. Jun. 4, 2020).

[11] *See* Compl. ¶¶ 31–39, *Jarchow v. State Bar of Wis.*, No. 19-cv-266-bbc, 2019 WL 6728258 (W.D. Wis. Dec. 11, 2019), *aff'd*, No. 19-3444, 2019 WL 8953257 (7th Cir. Dec. 23, 2019).

whose compelled subsidies were struck down in *Janus*, 138 S. Ct. at 2475–76 (recognizing that subjects of collective bargaining, including wages and employee benefits, and other union speech constituted core political speech). Just as union speech on matters germane to collective bargaining, such as government employees' wages and benefits, implicated matters of great public concern, so does bar association advocacy, even on matters germane to regulating lawyers, which can have significant consequences for both lawyers and the general public. *See* Levin, *supra*, at 15–16.

Despite this "substantial analogy between . . . State Bar [associations] . . . on the one hand, and the relationship of employee unions and their members, on the other," *Keller*, 496 U.S. at 12, lower courts, including the Ninth Circuit in this case, continue to uphold compelled subsidies for bar association speech without applying the exacting First Amendment scrutiny that *Janus* calls for—or *any* meaningful scrutiny, for that matter. They do so based on their view that *Keller*, 496 U.S. at 13–14, categorically approved of the collection and use of mandatory bar dues for political and ideological speech that is "germane" to "regulating the legal profession and improving the quality of legal services." App. 14–15; *see*, *e.g.*, *Jarchow v. State Bar of Wis.*, No. 19-3444, 2019 WL 8953257 (7th Cir. Dec. 23, 2019); *Taylor v. Barnes*, No. 1:19-CV-670, slip op. at 1–2 (W.D. Mich. Sept. 8, 2020),[12] *appeal docketed sub nom.*

[12] https://www.mackinac.org/archives/2020/2020%2009%2008%20Order%20Dismissing%20the%20Case%20on%20Summary%20Motion.pdf.

Taylor v. Buchanan, No. 20-2002 (6th Cir. Oct. 13, 2020); *McDonald v. Sorrels*, No. 1:19-CV-219-LY, 2020 WL 3261061, *5–6 (W.D. Tex. May 29, 2020), *appeal docketed sub nom. McDonald v. Longley*, No. 20-50448 (5th Cir. Jun. 4, 2020); *Schell v. Gurich*, 409 F.Supp.3d 1290, 1298 (W.D. Okla. 2019), *appeal docketed*, No. 20-6044 (10th Cir. Apr. 2, 2020).

If courts were to subject mandatory subsidies for bar association speech to exacting scrutiny, they would not survive it. *Keller* recognized two governmental interests that mandatory bar association dues could serve: "regulating the legal profession and improving the quality of legal services." 496 U.S. at 13. The Court has also recognized that 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." *Harris v. Quinn*, 573 U.S. 616, 655–56 (2014); *see also Lathrop*, 367 U.S. at 843 (plurality opinion) (holding that a state "may constitutionally require that the costs of improving the [legal] profession . . . be shared by the subjects and beneficiaries of the regulatory program, the lawyers").[13] But

[13] *Lathrop* upheld Wisconsin's requirement that attorneys join and pay dues to the State Bar of Wisconsin so that attorneys would pay for their own regulation, but the plurality opinion expressed "no view" on the plaintiff's claim that "his rights of free speech [were] violated by the use of [bar dues] for causes which he opposes." 367 U.S. at 845–47. This petition therefore does not call for the Court to overrule *Lathrop* as a case challenging mandatory *membership* itself would have to. *Cf.* Petition for Writ of Certiorari, *Jarchow*, 140 S. Ct. 1720 (asking the Court to overrule both *Lathrop* and *Keller* to declare both mandatory bar

there is no doubt that states can accomplish these interests in a manner that is significantly less restrictive of associational freedoms than by forcing attorneys to finance a bar association's political and ideological speech. We know that because today 20 states—Arkansas, California, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New York, Ohio, Pennsylvania, Tennessee, and Vermont[14]—regulate attorneys, and require them to pay for the costs of their own regulation, without compelling membership in a bar association that may engage in political or ideological speech. *See* Levin, *supra*, at 15, 17–19 ("Even if these state interests are found to be 'compelling,' those interests can almost certainly 'be achieved through means significantly less restrictive of associational freedoms,'" as "evidenced by looking at the jurisdictions

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membership and compelled subsidies for bar association speech unconstitutional).

[14] *See* Ralph H. Brock, "*An Aliquot Portion of Their Dues": A Survey of Unified Bar Compliance with* Hudson *and* Keller, 1 Tex. Tech. J. Tex. Admin. L. 23, 24 n.1 (2000). This article identifies 32 states with a mandatory bar association. After its publication, however, California adopted a bifurcated system under which lawyers pay only for purely regulatory activities and are not forced to fund the bar association's political or ideological speech, eliminating most if not all of the First Amendment problems. *See* Levin, *supra*, at 17–18. Nebraska also adopted a bifurcated system in 2013 and then made its bar association fully voluntary. *See In re Petition for a Rule Change to Create a Voluntary State Bar of Neb.*, 841 N.W.2d 167, 173 (Neb. 2013); Neb. S. Ct. Rule 3-100(B) (amended effective February 12, 2020 to require payment of an annual assessment to the Nebraska Supreme Court rather than the Nebraska State Bar Association).

with voluntary state bars."). There is no evidence that compulsory bar associations help produce better laws governing lawyers, or that they are better than voluntary bars at improving the quality of legal services. *See id.* at 18–19. And there is certainly no reason to believe that compelled support for bar associations' *political and ideological speech*—in addition to their purely regulatory activities—produces lawyers who are more ethical or provide better services.

Thus, the Ninth Circuit's (and other lower courts') failure to subject compelled bar subsidies to exacting First Amendment scrutiny is causing significant unjustified First Amendment harm to the many thousands of attorneys in Oregon and other states who, as a condition of practicing their profession, are forced to pay money to a bar association that spends money on political or ideological speech and activities.

B. The Court should grant certiorari to clarify that *Keller* does not require courts to uphold compelled subsidies for bar association speech.

The lower court said that *Keller* categorically approved of compelled subsidies for bar associations' germane political and ideological speech. App. 14–16. But in fact, *Keller* only held that mandatory bar dues are "subject to the same constitutional rule" that applies to compulsory public-sector union fees. 496 U.S. at 13. And given the rule in *Janus* that the latter are subject

to exacting scrutiny, *Keller* therefore necessarily imposes the same scrutiny on the latter.

The plaintiffs in *Keller* were attorneys who argued that the California State Bar's use of their mandatory dues for "political and ideological causes" violated the First Amendment. *Id.* at 6. The California Supreme Court rejected their claim, holding that the State Bar was a "state agency" and therefore "exempted . . . from any constitutional constraints on the use of its dues." *Id.* at 10. Reviewing that issue, this Court reversed and ruled in favor of the plaintiffs. *Id.* at 17. It held that bar associations are not like "traditional government agencies" funded by tax dollars, but are instead akin to labor unions funded by individual member dues. *Id.* at 10–13. For that reason, the Court concluded, bar associations are not exempt from First Amendment scrutiny, but must be "subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions." *Id.* at 13.

When the Court decided *Keller*, the "constitutional rule" for compulsory union fees had been established by *Abood*, 431 U.S. at 235, which held that the First Amendment did not forbid governments from compelling public-sector employees to subsidize a union's political and ideological speech that was germane to collective bargaining on their behalf. In reaching that conclusion, *Abood* did not apply exacting First Amendment review, but used rational-basis review. *See Janus*, 138 S. Ct. at 2479–80 (citing *Abood*, 431 U.S. at 222). Now that *Janus* has overruled *Abood*, that "deferential standard"—which has "no support in [the Court's] free

speech cases"—no longer applies to compelled support for public-sector union fees. 138 S. Ct. at 2479–80. Under *Janus*, forcing people to pay union fees triggers exacting First Amendment scrutiny. *Id.* at 2483. Therefore, because *Keller* requires "the same constitutional rule" to apply to both union fees and bar dues, 496 U.S. at 13, the same exacting scrutiny must apply to both. This means that the many lower courts that have upheld compelled support for bar association speech without applying exacting scrutiny have *not* followed *Keller*, as they claim, but have *failed* to follow it.

To be clear, *Keller* did not hold that states may compel attorneys to subsidize a bar association's political and ideological speech. It reviewed a lower court decision that deemed mandatory bar dues categorically exempt from First Amendment scrutiny. 496 U.S. at 6–7. The plaintiffs sought to overturn that holding by arguing that bar dues should be subject to the same standard as union fees. *Id.* at 5–6. Nobody in the case argued that exacting scrutiny should apply, and the Court did not consider that question. There was no need to: it was not necessary to decide *what level* of scrutiny applied in order to reverse the lower court's holding that *no* scrutiny applied.

Thus, any statements in *Keller* about whether or how the *Abood* standard should apply to mandatory bar dues were dicta. That case took it for granted that *Abood* supplied the proper level of scrutiny. *See*, *e.g.*, *id.* at 13 ("*Abood* held that a union could not expend a dissenting individual's dues for ideological activities not 'germane' to . . . collective bargaining."). Based on that

premise, the *Keller* Court said: "We think . . . the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" *Id.* at 14 (citation omitted). That tentative dicta about the Court's "think[ing]" was not part of *Keller*'s holding.

Further, even apart from *Keller* and *Janus*, other precedents of this Court also require compelled subsidies for bar association speech to be subject to exacting scrutiny. "[G]enerally applicable First Amendment standards" require "exacting scrutiny" for any "compelled funding of the speech of other private speakers or groups." *Harris*, 573 U.S. at 647; *see also Knox v. SEIU*, 567 U.S. 298, 310 (2012) (noting that "compulsory subsidies for private speech are subject to exacting First Amendment scrutiny"); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (noting that compelled association for expressive purposes is only permissible "to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms"). Accordingly, the rule of "exacting scrutiny" trumps any dicta in *Keller* about how the now-defunct *Abood* standard should or should not apply to bar dues.

Nonetheless, lower courts continue to assume that *Keller* simply created a *per se* rule upholding compelled subsidies for bar associations' "germane" speech. These courts have accordingly failed to subject laws that

compel attorneys to pay bar associations to exacting scrutiny or *any* meaningful scrutiny. *See supra* at 16–17.

Thus, the Court should grant certiorari to clarify that *Keller* did not categorically approve compelled support for bar association speech, whether germane or non-germane—and that mandatory bar association dues are now subject to the same *exacting scrutiny* as laws that compel government employees to pay union fees, or other laws that compel support for an organization's political or ideological speech.

C. Alternatively, the Court should grant certiorari to overrule *Keller* because it conflicts with *Janus* and allows unjustifiable violations of attorneys' First Amendment rights.

In the alternative, if *Keller* is properly read as approving compelled support for bar associations' germane political and ideological speech, then the Court should overrule *Keller* because it conflicts with *Janus* and has allowed widespread unjustifiable violations of attorneys' fundamental First Amendment right not to subsidize an organization's political or ideological speech.

Keller's (supposed) approval of compelled subsidies for bar association speech directly conflicts with the Court's reasoning in *Janus*. To the extent that *Keller* approved of compulsory bar association dues, it did so based on *Abood*, which *Janus* overruled. With *Abood* overruled, there is no ground for permitting

states to force attorneys to subsidize bar association speech, unless exacting scrutiny is satisfied. *See Jarchow*, 140 S. Ct. at 1720 (Thomas, J., dissenting from denial of certiorari) ("Now that *Abood* is no longer good law, there is effectively nothing left supporting our decision in *Keller*.").

If compelled subsidies for speech by public-sector unions and other organizations warrant exacting First Amendment scrutiny, there is no reason why compelled subsidies for bar associations' speech should not be subject to that same scrutiny. As discussed above, OSB and other compulsory state bar associations engage in speech on controversial matters of substantial public concern, just as public-sector unions do. But even if a bar association only engages in advocacy on matters that are germane to regulating the legal profession, as the OSB purports to, App. 7, compelled subsidies still violate the First Amendment because—just as in *Janus*—the regulation of lawyers and the administration of justice are matters of great public concern. *See* Levin, *supra*, at 15–17 (explaining how bar associations support rules that favor lawyers, sometimes over the public); Bradley A. Smith, *The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession*, 22 Fla. St. U. L. Rev. 35, 55–58 (1994) (explaining how "[a]pparently benign" or "technical" matters on which bar associations lobby "often involve significant philosophical disputes over the role of states in our federal system of government, differing attitudes toward various types of business activity, or divergent beliefs about the economic effects and social

wisdom of encouraging or discouraging different types of legal claims"); *cf. Janus*, 138 S. Ct. at 2475. Moreover, bar associations and courts tend to take an expansive view of germaneness, as seen in the district court's conclusion here that Petitioners could rightly be made to pay for the OSB's criticism of President Trump regarding matters having nothing to do with the practice of law. App. 257–58.

Thus, to the extent *Keller* allows states to compel support for bar association speech without having to overcome exacting First Amendment scrutiny, it stands as an unjustifiable anomaly in the Court's First Amendment jurisprudence. *Cf. Janus*, 138 S. Ct. at 2483 (noting that *Abood* was "an 'anomaly' in [the Court's] First Amendment jurisprudence" because "later cases involving compelled speech and association have . . . employed exacting scrutiny, if not a more demanding standard").

Stare decisis should not prevent the Court from overruling *Keller*. "*Stare decisis* is not an inexorable command" and is "at its weakest when [the Court] interpet[s] the Constitution." *Id.* at 2478 (quotations and citation omitted). Indeed, it "applies with perhaps least force of all to decisions that wrongly denied First Amendment rights." *Id.* The Court should find *stare decisis* an insufficient basis to adhere to *Keller* for the same reasons it was insufficient reason to uphold *Abood* in *Janus*. *See id.* at 2479–86.

Janus identified five factors important in deciding whether to overrule *Abood*: "the quality of [the earlier

decision's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *Id.* at 2478–79. These factors favor overruling *Keller* at least as much as they favored overruling *Abood*.

First, *Keller*'s reasoning is weaker than *Abood*'s. *Keller* simply accepted *Abood* as settled law and extended its holding to the mandatory-bar setting without questioning its soundness. 496 U.S. at 9–14. *Keller* therefore simply built without analysis on *Abood*'s errors, including its "deferential standard that finds no support in [the Court's] free speech cases." *Janus*, 138 S. Ct. at 2480.

Further, although one could perhaps have argued that *Abood*'s holding was justified under the Court's framework allowing government employees to be subject to greater restraints on First Amendment rights than other individuals, *see id.* at 2471–78 (rejecting that argument), no similar argument is even available that would justify forcing *private citizens* such as attorneys to subsidize an organization's political or ideological speech just to be allowed to practice their profession—which the Court has never approved in any other context. This factor therefore favors overruling *Keller*. *See id.* at 2479–81.

Second, *Keller*'s scheme for protecting attorneys' First Amendment rights is no more workable than *Abood*'s identical scheme for protecting public-sector employees' rights. *See Janus*, 138 S. Ct. at 2481. As

with union expenditures, the line between germane and nongermane bar association expenditures "has proved to be impossible to draw with precision." *Id.*; *see also* Smith, *supra*, at 56 (arguing that this line-drawing problem is even more difficult in the bar-association context because "[l]egal reform issues simply do not break down as neatly as the collective bargaining issues at stake in the *Abood* line of cases"). The attorneys who run state bar associations will *always* be able to argue that a bar association's advocacy on issues of law or public policy relates in some way to "improving the quality of legal services"—as in this case, in which the OSB argued, and the district court agreed, that the OSB's criticism of President Trump was germane and chargeable to all members. App. 257–58. And dissenting attorneys can virtually always argue that a seemingly "narrow, technical" issues related to regulating the legal profession has broader political implications. Smith, *supra*, at 55–56.

Further, just as *Janus*, 138 S. Ct. at 2482, found *Abood* unreasonable for requiring public-sector employees to undertake the "daunting," "expensive," "laborious and difficult task" of challenging improper union expenditures, so *Keller* is also unreasonable in its assumption that attorneys can adequately protect their First Amendment rights by monitoring all of a bar association's activities (including each item in the bar association's publications) for inappropriate uses of dues and challenging each one that is objectionable. 496 U.S. at 16–17. Like the public sector workers whose rights were at stake in *Janus*, OSB members

and other attorneys in states with integrated bars typically receive only general information about the bar's expenditures of mandatory fees. *See Janus*, 138 S. Ct. at 2482; App. 280; Oregon State Bar, *Distribution of Active Member Fees*.[15] That makes it impossible for them to know what their money is being used for without filing a challenge. *See Janus*, 138 S. Ct. at 2482. And it is especially unreasonable to expect lawyers to challenge an entity that is partially responsible for regulating them, especially when the amount of money at stake for any individual is low.

Third, *Keller* is inconsistent with related decisions of this Court. Its tolerance of compelled subsidies for bar association speech was founded on *Abood*, the reasoning of which this Court has rejected. *See Janus*, 138 S. Ct. at 2479–81 (explaining why "*Abood* was not well reasoned"); *Keller*, 496 U.S. at 9–14 (adopting *Abood*'s "principles" for mandatory bar associations). Given that *Janus* "seemingly upended the reasoning underlying *Keller*," Levin, *supra*, at 13, there appears to be little reason to retain it. And there is no other First Amendment case of any kind in which the Court has treated compelled subsidies for political or ideological speech so leniently.

Fourth, for the same reasons, developments in the Court's First Amendment jurisprudence have "eroded" *Keller*'s "underpinnings," making it—like *Abood*—an

[15] https://www.osbar.org/fees/feedistribution.html.

"outlier among [the Court's] First Amendment cases." *Janus*, 138 S. Ct. at 2482–83.

Fifth, no reliance interest justifies maintaining *Keller* despite its outlier status and direct conflict with *Janus*. If *Keller* is overruled, states with integrated bars can revise their means of regulating the legal profession to avoid compelled support for political speech. They will not have to abolish their bar associations. Rather, they can simply constrain these associations' ability to engage in political speech, and thus "allocat[e] to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices," *Harris*, 573 U.S. at 655–56, without forcing attorneys to subsidize political speech.

California and Nebraska provide examples of how states can do that. In 2017, the California legislature voted to limit the State Bar of California's mission to regulating the legal profession, funded by attorneys' licensing fees. A new voluntary bar association, the California Lawyers' Association, performs other functions formerly performed by the State Bar, such as hosting state bar sections and offering continuing legal education and other benefits. *See* Levin, *supra*, at 17–18. In 2013, Nebraska similarly split its bar association into a mandatory component limited to regulatory activities and a voluntary component that performs other functions previously performed by the state's mandatory bar. *See In re Petition for a Rule Change*, 841 N.W.2d 167; Neb. S. Ct. Rule 3-100(B) (amended effective February 12, 2020 to require payment of an

annual assessment to the Nebraska Supreme Court rather than the Nebraska State Bar Association).

Thus, if *Keller* stands in the way of courts subjecting compelled subsidies for bar association speech to exacting First Amendment scrutiny, *stare decisis* should not prevent the Court from overruling *Keller*.

II. This case is a suitable vehicle for the Court to consider the constitutionality of compelled subsidies for bar association speech.

This case is an excellent vehicle for the Court to consider the question it presents. The OSB does not and cannot deny that it engages in political and ideological speech, but maintains that it only engages in speech that is germane under *Keller*. App. 7. Thus, this case squarely presents the question whether courts should apply exacting First Amendment scrutiny in a challenge to compelled subsidies for a bar association's political and ideological speech, regardless of whether that speech is germane.

This case's procedural posture makes it an appropriate a vehicle for reviewing this issue. Like *Janus*, this case is an appeal of a lower court decision affirming dismissal of a First Amendment claim. *See* App. 4; *Janus*, 138 S. Ct. at 2462. In *Janus*, the district court dismissed the plaintiff's First Amendment challenge to mandatory union fees, and the Court of Appeals affirmed, because *Abood* foreclosed it. *Id*. Here, similarly, the district court dismissed the plaintiff's challenge to compelled subsidies for bar association speech, and the

Court of Appeals affirmed, because they concluded that *Keller* foreclosed it. App. 14–16, 251–64. Indeed, as discussed above, *supra* at 16–17, *all* of the courts that have considered challenges to other states' mandatory bar associations since *Janus* have reached the same conclusion—which makes it likely that any case presenting this issue will have a similar procedural posture. And because this case, like *Janus*, presents a pure question of law, the lack of a trial record will not affect the Court's ability to decide the issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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