No. 20-1678

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CATO INSTITUTE, AND ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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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 the Oregon State Bar's political and ideological speech subject to "exacting" scrutiny?

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INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind.[1] Among other matters affecting the public interest, PLF has repeatedly litigated in defense of the right of workers not to be compelled to make involuntary payments to support political or expressive activities with which they disagree, including representing the plaintiff attorneys in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990), and *Brosterhous v. State Bar of Cal.*, 12 Cal. 4th 315 (1995). PLF also participated as amicus curiae in cases involving state laws mandating forced association and compelled speech in violation of the First Amendment from *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), through *Janus v. Am. Fed. of State, Cty., and Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018), and supported the petitions for writ of certiorari in *Fleck v. Wetch*, 139 S. Ct. 590 (2018) (petition granted, decision vacated and remanded), 140 S. Ct. 2756 (2020) (second petition after remand denied), and *Jarchow v. State Bar of Wisconsin*, 140 S. Ct. 1720 (2020).

The Cato Institute was established in 1977 as a nonpartisan public policy foundation dedicated to

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and produces the annual *Cato Supreme Court Review*.

Established in 1977, the Atlantic Legal Foundation is a national, nonprofit, public interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, protection of property rights, limited and efficient government, sound science in judicial and regulatory proceedings, and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and scientists who serve on its Board of Directors and Advisory Council, the Foundation pursues its mission by participating as amicus curiae in carefully selected appeals before the Supreme Court of the United States, federal courts of appeals, and state supreme courts.

Amici believe that *Janus*'s statement of First Amendment doctrine was correct and requires this Court's reconsideration of compelled subsidies in the analogous mandatory bar context and urge the Court to grant the petition for writ of certiorari.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

Oregon is one of 30 states that require attorneys to join and pay dues to a state bar association as a condition of practicing law.[2] The Oregon State Bar uses members' mandatory dues not only to regulate the legal profession but also to engage in political and ideological speech in its *Bar Bulletin* magazine as well as legislative and policy advocacy. Petitioners sued to challenge mandatory Oregon State Bar dues after the *Bar Bulletin* published statements calling for limitations on free speech and criticizing 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. 7–11.

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[2] Arkansas, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Tennessee, and Vermont regulate attorneys without compelling bar association membership. Nebraska and California, as of 2013 and 2018, respectively, use a hybrid model that bifurcates bar membership into regulatory and non-regulatory functions. Membership in the latter is separate and purely voluntary. *In re Pet. for a Rule Change to Create a Voluntary State Bar of Neb.*, 841 N.W.2d 167 (Neb. 2013); State of California Senate Bill 36 (Oct. 2, 2017) https://tinyurl.com/3zcdep2m. Whether attorneys reside in states with mandatory bar associations or not, they all may choose to support an array of voluntary bar associations that engage in advocacy, such as the American Bar Association, the Association of Corporate Counsel, the American Association for Justice, and DRI—The Voice of the Defense Bar. Attorneys may also support more general associations to pursue their political ideological goals such as Amici organizations.

In an ideal world, an integrated, mandatory bar association would efficiently, effectively, and non-controversially manage the core functions related to regulation of the legal profession. This Court in *Lathrop v. Donohue*, 367 U.S. 820 (1961), presumed this to be true, and the petitioners in *Keller v. State Bar of California*, 496 U.S. 1 (1990), conceded that *Lathrop* was controlling on the constitutionality of the integrated bar, eliminating any need for the Court to consider that question.

However, the history of mandatory bar associations has not borne out that ideal. State bar associations—Oregon's being no exception—perceive their role as general guardians of the legal system and often extend their reach into political and ideological activities while couching their involvement under innocuous-sounding phrases like pursuing "fairness" or "providing law improvement assistance." App. 123–24. As this Court noted in *Janus*, virtually all matters involving governance and public policy are inherently and "overwhelmingly" political "matters of great public concern" because they involve the allocation of public money and collateral policy matters. *Janus v. AFSCME Council 31*, 138 S. Ct. 2448, 2475–77 (2018). And ideological activities extend even further to social and cultural concerns. Given the sheer breadth of such political and ideological activities, many attorneys have abundant reasons to resent subsidizing and associating with mandatory bar associations, just as public employees may not want to associate with or subsidize public employee unions for a wide range of reasons.

Moreover, *Janus* undermines the foundations on which *Lathrop* and *Keller* were decided. This Court's

decisions rely on established clear parallels between the public sector unions and state bar associations. *See Keller*, 496 U.S. at 13 (holding that attorneys regulated under state law are subject to "the same constitutional rule" that applies to public employees). *Janus* acknowledged that the decision in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), failed to appreciate the inherently political nature of public sector unions. Similarly, *Lathrop* and *Keller* failed to appreciate the pervasive politicization of state bar associations. *Janus* overruled *Abood*, holding that laws requiring non-union members to pay public-sector union fees are subject at least to "exacting scrutiny." Therefore, subjecting mandatory bar associations to "the same constitutional rule" as public-sector unions now means subjecting them to exacting scrutiny that reveals unjustifiable violations of attorneys' First Amendment rights. This Court should grant the petition and overrule *Keller* to the extent necessary to direct federal courts to review compelled subsidies for bar association speech under exacting scrutiny.

REASONS TO GRANT THE PETITION

I

MANDATORY STATE BAR ASSOCIATIONS, LIKE PUBLIC EMPLOYEE UNIONS, ENGAGE IN PERVASIVE POLITICAL AND IDEOLOGICAL ACTIVITIES

This case asks the Court to harmonize First Amendment doctrine across the parallel and analogous contexts of public employee union dues and mandatory state bar dues. The question presented by this petition is one of national importance that can be

settled only by this Court.[3] State bars' mission statements and bar officials' statements focus on their organizations' roles as disciplinarians and evangelists for legal representation and justice. In truth, however, bars across the country continually engage in a wide range of political and ideological activities designed to implement the officials' view of a better society, just as public employee unions engage in a wide array of political activity to achieve workplace goals and their view of a better society.

The *Janus* majority was silent as to that ruling's impact on mandatory bars, but the primary dissent acknowledged that the decision weaves together policies that underlie both agency fee and state bar cases. *Janus*, 138 S. Ct. at 2498 (Kagan, J., dissenting). In both contexts, *Janus* provides a greater understanding of the nature of the injury to individuals forced to support expressive activities against their will. *See Keller*, 496 U.S. at 12 ("There is . . . 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."); *Gardner v. State Bar of Nev.*, 284 F.3d 1040, 1042 (9th Cir. 2002) ("[T]here is some analogy between a bar that, under state law, lawyers

[3] Cases raising similar issues have been filed across the country. While the specifics of each bar's program differ, the underlying issue—whether the principles announced in *Janus* apply to mandatory bar associations—remain consistent across the litigation. The Texas State Bar has compiled pleadings filed in cases in Texas, Louisiana, Oklahoma, Michigan, South Dakota, Utah, and Wisconsin, as well as the present case, detailing specific bar activities that extend well beyond attorney regulation and discipline. *See* State Bar of Texas, *McDonald v. Sorrels*, https://tinyurl.com/e9d943ra (last visited June 11, 2021).

must join and a labor union with an agency shop."); *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291, 298 (1st Cir. 2000) ("No reason has been presented to give attorneys who are compelled to belong to an integrated bar less protection than is given employees who are compelled to pay union dues, and *Keller* suggests the two groups are entitled to the same protection."); *Crosetto v. State Bar of Wis.*, 12 F.3d 1396, 1404 (7th Cir. 1993) ("[*Keller*] represented the first definitive legal statement that mandatory bar dues had the same restrictions on their use as compulsory union dues.").

Despite the clear analogy, some lower courts are unconvinced. In fact, one district court held that *Janus* has no bearing on *Keller* on the theory that mandatory state bar associations are more akin to private-sector unions than public-sector unions and therefore lack the politicization that *Janus* acknowledged pervades collective bargaining in the public sector. *McDonald v. Sorrels*, No. 19-219, 2020 WL 3261061 (W.D. Tex. May 29, 2020). *See also Zuckerman v. Bevin*, 565 S.W.3d 580, 611 n.53 (Ky. 2018) (Keller, J., dissenting, joined by Cunningham and Wright, JJ.) (opining that the rule of law announced in *Janus* was narrowly "specific to public sector employees").

This Court should take this case to hold explicitly that the First Amendment doctrine announced in *Janus* applies to mandatory bar associations which would follow naturally from this Court's precedent. First, *Janus* clarified that all advocacy relating to the allocation of public resources is inherently political, as well as speech on matters of "value and concern to the public." *Janus*, 138 S. Ct. at 2474–76 (listing examples

including speech related to collective bargaining, education, child welfare, healthcare and minority rights, climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions). This is consistent with the Court's general understanding of the vast range of what constitutes "political" expression. *See, e.g.*, *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1888 (2018) ("political" can be expansively defined to include anything "of or relating to government, a government, or [] governmental affairs" or the "structure of affairs of government, politics, or the state.") (citation omitted); *id.* at 1891 ("All Lives Matter" slogan, National Rifle Association logo, rainbow flag all can be construed as political expression).

Beyond the world of expressive activity that can be described as political, the compelled speech cases also protect individuals from being forced to associate with "ideological" expression, even though what is "ideological" can be tricky to pin down. *See Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291, 302 (1st Cir. 2000) (finding no "bright line between ideological and non-ideological" bar association speech). But, in general, "ideology" encompasses "the body of ideas reflecting the social needs and aspirations of an individual, group, class, or culture." *Am. Heritage Dictionary of the English Language* at 654 (Morris ed. 1981). Justice Stewart defined "ideological expression" as follows: "Ideological expression, be it oral, literary, pictorial, or theatrical, is integrally related to the exposition of thought that may shape our concepts of the whole universe of man." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer*

Council, Inc., 425 U.S. 748, 779 (1976) (Stewart, J., concurring).

Scholars define "ideology" in varying ways, but all stress the social aspect of ideological thought:

- "[A] distinct and broadly coherent structure of values, beliefs, and attitudes with implications for social policy." James Reichley, *Conservatives in an Age of Change: The Nixon and Ford Administrations* at 3 (1982), quoted in Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* at 36 (1987) (Higgs).
- "[A] collection of ideas that makes explicit that nature of the good community . . . [T]he framework by which a community defines and applies values." George C. Lodge, *The New American Ideology* at 7 (1975), cited in Higgs, *supra*, at 36.
- "[A]n economizing device by which individuals come to terms with their environment and are provided with a 'world view' so that the decision-making process is simplified. [It is] . . . inextricably interwoven with moral and ethical judgments about the fairness of the world the individual perceives." Douglas C. North, *Structure and Change in Economic History* at 49 (1982), cited in Higgs, *supra*, at 36–37.

At a minimum, therefore, "ideological" activities that cannot be funded with compelled fees include those seeking social change, "good" government, or, as the Oregon State Bar phrases it, "fairness" in the way the world operates.

These goals of social change, good government, and fairness permeate mandatory bars' mission statements and activities. Here, the Oregon State Bar's communications cover a gamut of topics "germane to the law, lawyers, the practice of law, the courts, and the judicial system, legal education, and the Bar [itself]." App. 5–6. The Bar's legislative and public policy activities reflect a similarly broad scope, encompassing issues of "fairness, efficacy and efficiency; making legal services available to society; . . . providing law improvement assistance to elected and appointed government officials;" and more. App. 6.

The Oregon State Bar is not unique in this regard; all mandatory state bar associations assert a broad mandate to mold the laws and legal system to fit their political and ideological views. For example, the mission of the State Bar of North Dakota is "to serve the lawyers and the people of North Dakota, to improve professional competence, promote the administration of justice, uphold the honor of the profession of law, and encourage cordial relations among members of the State Bar."[4] The Texas State Bar's mission

> is to support the administration of the legal system, assure all citizens equal access to justice, foster high standards of ethical conduct for lawyers, enable its members to better serve their clients and the public, educate the public about the rule of law, and promote diversity in the

[4] State Bar of North Dakota, Board of Governors, https://tinyurl.com/67z8s7w (visited June 14, 2021).

> administration of justice and the practice of law.[5]

The Michigan State Bar's mission is to "aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interest of the legal profession in this State."[6] The Louisiana State Bar Association exists to

> assist and serve its members in the practice of law, assure access to and aid in the administration of justice, assist the Supreme Court in the regulation of the practice of law, uphold the honor of the courts and the profession, promote the professional competence of attorneys, increase public understanding of and respect for the law, and encourage collegiality among its members.[7]

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[5] State Bar of Texas, Mission Statement, https://tinyurl.com/cz2fks4k (visited June 14, 2021).

[6] State Bar of Michigan, Mission Statement, https://tinyurl.com/vxbwt23y (visited June 14, 2021).

[7] Louisiana State Bar Association, The Mission of the Louisiana State Bar Association, https://tinyurl.com/yvhxffx6 (visited June 14, 2021). *See also* State Bar of Arizona, *Mission, Vision, and Core Values*, https://tinyurl.com/hjc5axmf (visited June 14, 2021); Hawaii State Bar Association, Mission, https://tinyurl.com/ykebxsv3 (visited June 14, 2021) ("The Mission of the Hawaii State Bar Association is to unite and inspire Hawaii's lawyers to promote justice, serve the public and improve the legal profession."); Idaho State Bar, Mission Statement, https://isb.idaho.gov/about-us/ (visited June 14, 2021)

The common theme and language across all mandatory bars reflect dedication to general improvement of courts, laws, and lawyers—frequently denominated as the "administration of justice." Yet, in *Keller*, this Court held that a state bar's statutory mandate phrased in broad platitudes such as "administration of justice" permits too broad an infringement on individual bar members' First Amendment rights because it allows the bar to speak on such wide-ranging and controversial issues as polygraph tests for state and local agency employees, possession of armor-piercing handgun ammunition and other gun control measures, a federal guest-worker program, a victim's bill of rights, abortion, public school prayer, and busing. *Keller*, 496 U.S. at 14–15. Regardless of whether these activities were legitimately described as pursuing the "administration of justice," this Court held that the state's compulsory funding of these programs violated objectors' First Amendment rights. *Id*. at 15–16.

Although *Keller* should have acted as a brake on mandatory bar activities, many mandatory state bars, including the Oregon State Bar, continue to justify a wide range of activities focused on a general desire to "improve the law," *see* App. at 5–6, a phrasing akin to devotion to "administration of justice." Lower courts continue to grant mandatory bars expansive power to demand money from unwilling contributors to fund

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(mission is "to aid in the advancement of the administration of justice"); The Mississippi Bar, Mission, https://tinyurl.com/3w6x2vf8 (visited June 14, 2021). As noted in the Petition, almost all these state bar associations are the subject of First Amendment challenges by individual bar members.

these activities. *See Kingstad v. State Bar of Wis.*, 622 F.3d 708, 721 (7th Cir. 2010) (rejecting the First Amendment claim of an attorney forced to make unwilling subsidies to the mandatory bar's public relations campaign); *Gardner*, 284 F.3d at 1043 (holding that attorneys can be forced to support mandatory bar's public relations campaign to improve public perceptions of lawyers); *Liberty Counsel v. Fla. Bar Bd. of Governors*, 12 So.3d 183, 189 (Fla. 2009) (approving bar's authorization for a section to file an amicus brief related to a law prohibiting homosexuals from adopting children); *Popejoy v. N.M. Bd. of Bar Comm'rs*, 887 F. Supp. 1422, 1430–31 (D.N.M. 1995) (approving mandatory funding for the bar's lobbying for higher salaries for government lawyers and staff, court-appointed representation in child abuse and neglect cases, a task force to assist military personnel and families, and the bar's own litigation expenses). This continued widespread infringement on attorneys' individual First Amendment rights presents an issue of national scope that this Court should resolve.

II

COMPULSORY BAR DUES GREATLY INFRINGE ON MEMBERS' FIRST AMENDMENT RIGHTS AND REQUIRE EXACTING SCRUTINY

Janus held that a state law compelling non-union members to subsidize a public sector union's speech impinged on First Amendment rights to such an extent that courts must apply "exacting scrutiny" to determine whether the government can justify it. 138 S. Ct. at 2464–65. *Janus* defined exacting scrutiny in the compelled subsidy context as requiring that the state's mandate must "serve a compelling state

interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.*[8]

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[8] "Exacting scrutiny" lacks a precise definition and appears to be a type of balancing test that sometimes, but not always, falls short of strict scrutiny. Lower courts conflict as to its elements or application. *See* R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 U.M.K.C. L. Rev. 207, 208, 211–13 (2016) (noting the standard's "almost unlimited flexibility" as courts choose among multiple factors to emphasize in a balancing framework, sometimes resembling strict scrutiny). For example, in *Washington Post v. McManus*, 944 F.3d 506, 520 (4th Cir. 2019), the court noted in a First Amendment speech case that "exacting scrutiny" is "more forgiving" than "strict scrutiny" in that "strict scrutiny, in practice, is virtually impossible to satisfy, while exacting scrutiny is merely difficult." It further defined the test as requiring an "important" interest, *id.*, and "not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *Id.* at 521 (citations omitted). The court later described the "touchstone for exacting scrutiny" as "whether there is a fit that is not necessarily perfect, but reasonable." *Id.* at 523 (cleaned up). The Ninth Circuit defines "exacting scrutiny" as "somewhat less rigorous judicial review . . . which requires the government to show that the challenged [speech restrictions] are substantially related to a sufficiently important government interest." *Nat'l Ass'n for Gun Rights, Inc. v. Mangan*, 933 F.3d 1102, 1112 (9th Cir. 2019). That court also has described "exacting scrutiny" as a "balancing test" where "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Mentele v. Inslee*, 916 F.3d 783, 790 (9th Cir. 2019). The Eighth Circuit says that exacting scrutiny requires a "substantial relationship to a sufficiently important governmental interest" where "the strength of the asserted governmental interest reflects the seriousness of the actual burden" on First Amendment rights." *Calzone v. Summers*, 942 F.3d 415, 423 (8th Cir. 2019) (en banc) (cleaned up). Just as the *Keller* decision downplayed the infringement caused by a politicized bar, the

To date, no lower court has applied exacting scrutiny to compulsory payment of bar dues. Lower courts remain obligated to follow *Lathrop* and *Keller* because neither has been overruled, *Agostini v. Felton*, 521 U.S. 203, 237 (1997), even as their legal foundation has been entirely eroded by the evolution in agency fee cases, culminating in *Janus*. *See, e.g.*, *Jarchow v. State Bar of Wisconsin*, 140 S. Ct. 1720, 1720 and n.* (June 1, 2020) (mem.) (Thomas & Gorsuch, JJ., dissenting from denial of certiorari in an integrated bar case) (urging the Court to address the "purely legal question whether *Keller* should be overruled" because the overruling of *Abood* "unavoidably" calls into question the continued validity of *Keller*). This was precisely the concern of the court below. App. 16.

This issue cannot percolate below because lower courts will not even "wade into the issues" precluded by *Lathrop* and *Keller*. *Taylor v. Barnes*, No. 19-670, 2020 WL 10050772 (W.D. Mich. Sept. 8, 2020) (district court has "no power" to revisit *Lathrop* and *Keller*); *File v. Kastner*, 469 F. Supp. 3d 883, 889–91 (E.D. Wis. 2020), *appeal pending*, docket no. 20-2387 (7th Cir. 2020) (rejecting facial challenge to mandatory bar membership and dues requirement because a "lower court may not overrule a Supreme Court case even if later cases have deeply shaken the earlier case's foundation") (cleaned up); *Boudreaux v. Louisiana*

Second and Ninth Circuits have enabled speech restrictions to survive under "exacting scrutiny" by downplaying the burden of speech restrictions and thus requiring a lesser state interest to outweigh that burden. *See* Bailie Mittman, *First Amendment Freedoms Diluted: The Impact of Disclosure Requirements on Nonprofit Charities*, 96 Ind. L.J. Supp. 102, 120 (2021).

State Bar Ass'n, 433 F. Supp. 3d 942, 977 (E.D. La. 2020) (forced membership and dues claim is foreclosed by *Lathrop* and *Keller*); *Schell v. Gurich*, 409 F. Supp. 3d 1290, 1298 (W.D. Okla. 2019) (court "declines to speculate" as to whether this Court "might reach some different result if it were to revisit either *Lathrop* or *Keller*").

In *Janus*, this Court forcefully rejected earlier cases that elevated collective speech over individual expression. Understandably, the Court did not explore every possible application of the announced doctrine in other contexts. But the law now is in disarray. Public employees enjoy greater First Amendment protection for their right to speak than others, such as attorneys, who remain compelled to subsidize the speech of others, even when they disagree. Only this Court can ensure consistent First Amendment jurisprudence across all compelled dues contexts.

CONCLUSION

The petition should be granted.

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Respectfully submitted,

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