No. 14-915

IN THE
Supreme Court of the United States

REBECCA FRIEDRICHS, *et al.*,

Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, *et al.*,

Respondents.

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

BRIEF OF 21 PAST PRESIDENTS OF THE D.C. BAR AS *AMICI CURIAE* SUPPORTING RESPONDENTS

JOHN W. NIELDS, JR.
Counsel of Record
PHILIP J. LEVITZ
Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
jnields@cov.com
(202) 662-6000

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are 21 former Presidents of the District of Columbia Bar.[2] We submit this brief because Petitioners have asked the Court to overrule *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), a case that provides support for integrated bars such as the D.C. Bar. *See Keller v. State Bar of California*, 496 U.S. 1, 12 (1990).

Petitioners premise their argument for overruling *Abood* on the assumption that *Abood* is a "jurisprudential outlier." Petitioner's Brief at 2, 14. But *Abood* is not an outlier. For nearly four decades, *Abood* has stood at the heart of a well-developed body of law rooted in a simple proposition: where a state establishes a legal entitlement to a benefit, it

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[1] Pursuant to this Court's Rule 37.6, *amici curiae* affirm that no counsel for any party authored this brief in whole or in part, that no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of *amicus curiae* briefs are on file with the Clerk.

[2] The signatories to this brief are Andrea C. Ferster, Jamie S. Gorelick, Shirley Ann Higuchi, George W. Jones, Jr., Kim Michelle Keenan, John C. Keeney, Jr., Philip A. Lacovara, Carolyn B. Lamm, Myles V. Link, Andrew H. Marks, Darrell G. Motley, Stephen J. Pollak, Daniel A. Rezneck, Robert J. Spagnoletti, Joan H. Strand, Marna S. Tucker, Robert L. Weinberg, Robert N. Weiner, Melvin White, Thomas S. Williamson, Jr, and Charles R. Work. *Amici* are acting in their personal capacities and not as representatives of any organizations with which they are affiliated. *Amici* former D.C. Bar Presidents also filed a brief in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), when this Court was first asked to overrule *Abood*, and the Court declined to do so.

may compel those receiving the benefit to pay their fair share of the cost. *Abood*'s reasoning has been applied by this Court not only to union shops, but also to integrated bars, agricultural cooperatives, and public universities.

The *Abood*/*Keller* line of cases represents a firmly rooted body of law upon which not only states and unions but also integrated bars, including the D.C. Bar, have long relied in structuring their activities. Overruling *Abood* would have a profoundly destabilizing impact on bars all over the country. We ask this Court to leave *Abood* undisturbed.

SUMMARY OF ARGUMENT

The body of law at issue in this case holds that dissenting members of a collective bargaining unit may properly be required to pay their fair share of the costs of the union's core collective-bargaining-related services, but not of the union's unrelated political or ideological activities. Similarly, this body of law holds that members of "integrated" or "mandatory" bars may properly be required to pay their fair share of the core functions of the bar, but not of the bar's unrelated political activities or policy initiatives. The Court has reasoned that where an entity such as a union or an integrated bar has a statutory duty to perform services for the benefit of a defined group of people, members of that group may properly be required to pay for the costs of those services. *Abood*, 431 U.S. at 221-22; *Keller*, 496 U.S. at 12.

The Petitioners have attacked *Abood* and its principal rationale — that individuals who benefit from services may properly be required to pay their *fair share* of the costs — as a "jurisprudential outlier" that "[t]he Court should now discard." Petitioner's Brief at 2. But, as explained in further detail below, the "fair share" rationale is no outlier; it has been applied and refined in numerous opinions of this Court in the union, integrated bar, and other contexts for over half a century.

In explaining *Abood*'s fair-share rationale, Justice Scalia elaborated:

> Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them; or, looked at from the other end, where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost. . . . In the context of bargaining, a union *must* seek to further the interests of non-members; it cannot, for example, negotiate particularly high wage increases for its members in exchange for accepting no increases for others.

Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 556 (1991) (Scalia, J. concurring in part and dissenting in part).

Petitioners' request that this Court overrule *Abood* should be firmly rejected, just as petitioners' invitation to overrule *Abood* two years ago in *Harris v. Quinn*, 134 S. Ct. 2618, 2656 (2014) was rejected. *Abood* is part of a soundly reasoned and stable body of law to which bars throughout the country have conformed their behavior. A decision overruling *Abood* would, at a minimum, create substantial uncertainty and instability injurious to integrated bars.

An organization known as the Goldwater Institute is already pressing a lawsuit on behalf of a dissident member of the North Dakota Bar based on the hope that this Court will overrule *Abood*. The Goldwater Institute has filed an *amicus curiae* brief before this Court, in this case, urging that the Court overrule *Abood*. The brief suggests that the Court *could* "overturn *Abood* without necessarily overturning *Keller*." Goldwater Brief at 3. But in the next breath it urges the Court to narrow *Keller* in this case, and then "one day strike it down." *Id.*

If this Court were to overrule *Abood*, it would very likely spawn additional time-consuming and expensive lawsuits by bar members who do not want to pay their mandatory bar dues. Such lawsuits would severely distract this country's thirty-two integrated bars from their critical work "serv[ing] the 'State's interest in regulating the legal profession and improving the quality of legal services.'" *Harris*, 134 S. Ct. at 2644 (quoting *Keller*, 496 U.S. at 14).

ARGUMENT

I. ABOOD IS AT THE HEART OF A WELL-DEVELOPED BODY OF LAW AND SHOULD NOT BE OVERRULED.

A. *Abood's Predecessors*

The line of precedent at issue in this case begins with the Court's unanimous decision in

Railway Employees' Department v. Hanson, 351 U.S. 225 (1956). *Hanson* arose out of the Railway Labor Act (RLA), a federal statute that permitted railroads and unions to enter into collective bargaining agreements that provided for "union shops." *See id.* at 231-32. Under such agreements, employees in a collective bargaining unit who do not wish to join the union are nonetheless required to pay their fair share of the costs of the unions' collective bargaining services. *See id.* at 236-38. In *Hanson*, several employees claimed that this mandatory dues requirement violated their First Amendment rights of free association. *See id.* at 236-38.

The *Hanson* Court rejected the employees' First Amendment claim. *Id.* at 238. The Court took note of the concern that motivated Congress in enacting the RLA: "while non-union members got the benefits of the collective bargaining of the unions, they bore 'no share of the cost of obtaining such benefits.'" *Id.* at 231 (quoting H.R. Rep. No. 81-2811, at 4 (1950)). The Court then *held* that "the requirement for financial support of the collective bargaining agency *by all who receive the benefits of its work* . . . does not violate either the First or Fifth Amendments." *Id.* at 238 (emphasis added).[3]

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[3] The Court also stated, on the subject of mandatory bar dues:

> 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.

Id. at 238. The Court addressed directly, and reaffirmed, the constitutionality of bar dues under the First Amendment soon (continued…)

Five years later, the Court answered a question not reached in *Hanson*: whether non-union employees could lawfully be required to fund political activities unrelated to collective bargaining. *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 768-69 (1961). The Court concluded that non-union members could not be required to fund such activities.

In so doing, the Court also reaffirmed its opinion in *Hanson*. *Id.* at 746-49. As Justice Douglas explained further in his concurring opinion, "all the members of the laboring force" are beneficiaries of the union's collective bargaining services, and it is "permissible for the legislature to require *all who gain from collective bargaining to contribute to its cost*." *Id.* at 776 (Douglas, J., concurring) (emphasis added).

The concurring opinion elaborated:

> The collection of dues for paying the costs of collective bargaining of which each member is a beneficiary is one thing. If, however, dues are used . . . to promote [a variety of unrelated political or ideological causes] then the group compels an individual to support with his money causes beyond what gave rise to the need for group action.

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after in *Lathrop v. Donohue*, 367 U.S. 820 (1961). *See infra* Part II.A.

Id. at 777.[4]

B. *Abood*

The court addressed union shops in the context of public employment for the first time in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Declining to distinguish between the public employees in *Abood* and the private employees in *Hanson* and *Street*, *id.* at 226, 229, the Court stated that "[t]he plaintiffs' claims in *Hanson* failed, not because there was no governmental action, but because there was no *First Amendment* violation." *Id.* at 226 (emphasis added). Accordingly, the Court held that all public employees in the bargaining unit could constitutionally be required to pay their fair share of the union's services related to "collective bargaining, contract administration and grievance adjustment," but that objecting non-members could *not* constitutionally be required to contribute funds for the unions' unrelated political activities. *Id.* at 225-26, 232, 234.

The *Abood* Court began by reaffirming *Hanson* and *Street* and elaborating on the Court's fair share rationale. The Court explained that having a single exclusive union representative for a given category of employees was a central principle of congressional

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[4] In *Street*, the Court construed the Railway Labor Act to forbid a requirement that non-union members fund the union's political and ideological causes, and it therefore did not reach the question of whether its holding would have been the same under the United States Constitution. However, the desire to avoid First Amendment issues strongly influenced the Court's construction of the RLA. 367 U.S. at 749-50.

labor policy. Multiple unions — each one negotiating a different contract, with different terms, for different employees — would create massive confusion and undermine the advantages of collective bargaining. This congressional policy thus *necessarily brings a group of employees together* for the purpose of negotiating a single collective bargaining agreement covering all employees in the group. *See id.* at 220-21.

The Court then explained that a union elected to be the single exclusive representative of a group of employees had "great" and "continuing" responsibilities under the law that included the legal duty "'fairly and equitably to represent *all* employees . . . *union and non-union*' within the relevant unit." *Id.* at 221 (citation omitted) (emphasis added). As a result, the Court explained:

> A union-shop arrangement has been thought to *distribute fairly the cost* of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become "free riders" to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.

Id. at 221-22 (emphasis added).

The Court concluded that "[a]s long as [the union] act[s] to promote the cause which justified *bringing the group together*, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy." *Id.* at 223 (emphasis added) (quoting *Street*, 367 U.S. at 778

(Douglas, J., concurring)). However, a union may not "spend[] a part of [objecting employees'] required service fees to contribute to political candidates and to express political views *unrelated to its duties as exclusive bargaining representative*." *Id.* at 234 (emphasis added).

C. *Abood Refined and Reaffirmed*

In a series of cases following *Abood*, the Court repeatedly reaffirmed its precedent and the fair-share rationale underlying it, while refining the lines drawn in *Abood* and *Street* between costs that are properly included in the fee that objecting employees have to pay and those that are not.

In *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435 (1984), the Court explained, "[w]e remain convinced that Congress' essential justification for authorizing the union shop was the desire to eliminate free riders — employees in the bargaining unit *on whose behalf the union was obliged to perform its statutory functions, but who refused to contribute to the cost thereof*." *Id.* at 447 (emphasis added). Applying the *Abood*/*Street* test, the Court concluded that certain of the challenged activities were chargeable and that others were not. *Id.* at 448-57.

In *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), the Court addressed the internal *procedures* that must be developed by unions to prevent the improper charging to objecting employees of non-chargeable expenditures. The Court found certain procedures in place at the defendant union inadequate under *Abood*, *id.* at 304-11, while reiterating that, in *Abood*, "[w]e . . .

rejected the claim that it was unconstitutional . . . to require nonunion employees, as a condition of employment, to pay *a fair share of the union's cost* of negotiating and administering a collective-bargaining agreement," *id.* at 301-02 (emphasis added).

In *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), the majority held that, in order to be chargeable to dissenting employees, the expenditures must 1) be germane to collective bargaining activity; 2) be justified by the government's interest in labor peace and avoiding "free riders"; and 3) not add significantly to the burdening of free speech inherent in a union shop. *Id.* at 519.

Although the concurring and dissenting opinion of Justice Scalia (joined by Justices O'Connor, Souter and, as to the portion quoted below, Kennedy) offered a somewhat different test for identifying chargeable expenses, the opinion gave emphatic support to the principle that objecting members of a bargaining group may be required to pay their fair share of the cost of the union's core collective bargaining services. Thus, Justice Scalia, hewing closely to the language and holdings in the *Abood* line, stated:

> Our First Amendment jurisprudence . . . recognizes a correlation between the rights and the duties of the union, on the one hand, and the nonunion members of the bargaining unit, on the other. Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them; or, looked at

> from the other end, where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost.

Id. at 556 (Scalia, J., concurring in the judgment in part and dissenting in part).

Justice Scalia emphasized the point that "nonunion members of the union's own bargaining unit" are people "whom the law *requires* the union to carry — indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests." *Id.* "In the context of bargaining," Justice Scalia explained, "a union *must* seek to further the interests of its nonmembers; it cannot, for example, negotiate particularly high wage increases for its members in exchange for accepting no increases for others." *Id.*

Thus, while "private speech often furthers the interests of nonspeakers, and that does not alone empower the state to compel the speech to be paid for," "[t]he '*compelling state interest*' that justifies this constitutional rule is not simply elimination of the inequity arising from the fact that some union activity redounds to the benefit of 'free-riding' nonmembers," but rather that such benefits are *required by law*. *Id.* (emphasis added). "[T]he free ridership (if it were left to be that) would be not incidental but calculated, not imposed by circumstances but mandated by government decree." *Id.*

In *Locke v. Karass*, 555 U.S. 207 (2009), the Court again unanimously reaffirmed *Abood* and its fair-share/prevention-of-free-riding rationale, in holding that a local union's *pro rata* share of core litigation expenses incurred by the national union was properly chargeable to the local's dissenting non-members. *Id.* at 213.

D. *Harris*

This Court addressed *Abood* most recently in *Harris v. Quinn*, 134 S. Ct. 2618 (2014). *Harris* involved home healthcare workers who were paid by the State of Illinois, but who were in many respects employees of the persons in whose homes they worked. They were, under state law, members of a collective bargaining unit represented by a union and they were required to pay a fee to the union for its collective bargaining services.

A group of home healthcare workers objected to the fee on First Amendment grounds. They argued first that *Abood* should be overruled, and second that *Abood* did not apply to them because they were not truly employees of the State of Illinois. The Court did not accept the first argument and did not overrule *Abood*. It did accept the second argument and stated that it declined "to approve a very substantial expansion of *Abood*'s reach." *Id.* at 2634.

The Court in *Harris* termed some points of the *Abood* Court's analysis "questionable." *Id.* at 2632. However, the Court did not question *Abood*'s fair-share rationale: namely that, where a state creates in the non-members a legal entitlement from the union, it may compel them to pay their fair share of the cost.

Instead, the Court reaffirmed that the fair-share/free-rider rationale for *Abood* "is the fact that the State compels the union to promote and protect the interests of nonmembers," "[s]pecifically, the union must not discriminate between members and nonmembers" in representing their interests. *Id.* at 2636 (quoting *Lehnert*, 500 U.S. at 556 (Scalia, J., concurring in the judgment in part and dissenting in part)). The Court then said that this fair-share rationale did not apply in the unique circumstances of home healthcare workers. *Id.* at 2637. *Abood*'s fair-share/free-rider rationale remains undisturbed by *Harris*.

Finally, the *Harris* Court also reaffirmed *Keller* and its fair-share rationale for integrated bars, particularly given states' "strong interest in allocating to the members of the bar, rather than the general public, the expenses of ensuring that attorneys adhere to ethical practices." *Id.* at 2644.

* * * * *

The above decisions constitute a long line of holdings that non-union employees may — in line with First Amendment principles — be required to pay their fair share of fees to the union for costs of collective-bargaining-related services benefiting them. These decisions rest on the common-sense proposition that those who benefit from services required by law to be performed for them may properly be required to pay their fair share of the costs.

II. A CLOSELY RELATED BODY OF CASE LAW SUPPORTS THE CONSTITUTIONALITY OF MANDATORY BAR DUES.

This Court's decisions supporting the constitutionality of compulsory "fair share" fees for a union's collective-bargaining-related services have developed hand-in-hand with its decisions upholding the constitutionality of the common state-law requirement that all attorneys licensed to practice law in a state must pay dues representing their "fair share" of the cost of an integrated bar's services.

Some thirty-one states and the District of Columbia have opted to create what are known as "integrated" or "mandatory" bars. An integrated bar is "an association of attorneys in which membership and dues are required as a condition of practicing law in a State." *Keller*, 496 U.S. at 5. In general, integrated bars are charged by the courts or the legislatures with responsibilities for regulating lawyers licensed to practice in particular states and improving the administration of justice.

This Court has twice been presented with challenges — on First Amendment freedom of association grounds — to a bar's mandatory dues requirement. Each case was brought by bar members who objected to the use of their dues for what they claimed to be political or ideological activities with which they disagreed. Each time, this Court drew on its union-shop decisions and applied a rule for bars analogous to the one adopted for unions. And each time, the Court relied heavily on its "fair share" rationale repeated so often in the union-shop cases.

Thus, these decisions establish that objecting bar members may constitutionally be required to pay dues representing their fair share of the cost of a bar's services in regulating the profession and improving the administration of justice, but not to fund unrelated political activities.

A. *Lathrop*

This Court first addressed the subject of mandatory bar dues in *Lathrop v. Donahue*, 367 U.S. 820 (1961).[5] The Supreme Court of Wisconsin, exercising authority provided by the Wisconsin legislature, had created an integrated bar: *i.e.*, it had required everyone licensed to practice law in Wisconsin to join the State Bar and to pay prescribed annual dues to it.

A member of the State Bar objected to the mandatory dues requirement, on freedom of association grounds, claiming that the Bar engaged in political activities that he opposed. Because there was no factual basis for the claim that the Bar had used the challenger's funds for political activities, this Court treated the case as a facial challenge to the requirement that all licensed lawyers pay mandatory dues. *Id*. at 847-48.

The opinion for a four-member plurality rejected the constitutional claim, explaining "[i]n our view the case presents a claim of impingement upon freedom of association no different from that which

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[5] As noted above, the Court had assumed in *Hanson* that mandatory bar dues, generally, were consistent with the requirements of the First Amendment. *See supra* n.3.

we decided in *Railway Employees' Dep't v. Hanson*." *Id.* at 842. The plurality noted that "the bulk of State Bar activities 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," which, "[i]t cannot be denied . . . is a legitimate end of state policy." *Id.* at 843.

The plurality concluded that the Supreme Court of Wisconsin "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." *Id.* (emphasis added).

In an opinion authored by Justice Harlan and joined in by Justice Frankfurter, these two additional justices concurred, explaining that "[t]he *Hanson* case . . . 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." *Id.* at 849 (Harlan, J., concurring in the judgment).

B. *Keller*

The Court addressed mandatory bar dues again in *Keller*. In *Keller*, members of the California integrated bar challenged the State Bar's use of their dues on freedom of association grounds, claiming that the bar had used those dues to finance certain ideological activities to which they were opposed. A unanimous Court, drawing heavily on its opinion in

Abood, held that the members' dues could be used over their objection in furtherance of the bar's core purposes, but that they could not be used for unrelated ideological or political activities.

The Court found that the Bar had been given the responsibility by the state to examine applicants for admission to the bar; to formulate rules of professional conduct; to discipline bar members for misconduct; to prevent the unlawful practice of law; and to engage in the study of and recommend improvements in procedural law and the administration of justice. 496 U.S. at 5. The Court pointed out that the California Legislature wanted recommendations concerning "admissions," "discipline," "codes of conduct and the like," "*to be made to the courts or the legislature by the organized bar*." *Id.* at 12 (emphasis added).

Turning to the constitutional issue, the Court reiterated a theme it had sounded since *Hanson*: "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." *Id.* The Court explained:

> 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.

Id. (emphasis added).

The Court noted that attorneys, like union members, benefit from participating in integrated bars, particularly because they generally "prefer a large measure of self-regulation to regulation conducted by a government body which has little or no connection with the profession." *Id.* The Court then explained that "[i]t 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." *Id.* (emphasis added).

The Court next turned to the claim that the State Bar had expended dues-paid funds on a variety of political activities unrelated to the Bar's core functions. The Court explained that

> *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. 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.

Id. at 13-14.

The Court added that, although "[p]recisely where the line falls . . . will not always be easy to discern," "the extreme ends of the spectrum are clear":

> 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.

Id. at 15-16.

While there are differences between bars and unions and the relevant state interests may vary, the bottom line is that each is part and parcel of the same body of First Amendment law, and each is governed by the same sound fair-share principles, the overruling of which in the union context would create uncertainty for and cause harm to both.

III. OTHER APPLICATIONS OF THE ABOOD AND KELLER BODY OF CASE LAW

This Court also has repeatedly looked to *Abood* and *Keller* to guide its First Amendment analysis in compulsory-funding cases outside the union and bar-association contexts. The Court has relied in part on *Abood* and *Keller* to hold that a public university may "require[] its students to pay fees to support the extracurricular speech of other students," *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 233 (2000), even though "[i]t is all but inevitable that the fees will result in subsidies to speech which some students find objectionable and offensive to their personal beliefs," *id.* at 232; *see also id.* at 230-34. And the Court has applied *Abood* and *Keller* to delineate the circumstances in which the First Amendment permits the government to require participants in an industry to contribute financially to advertising that supports the industry as a whole. *See United States v. United Foods, Inc.*, 533 U.S. 405 (2001); *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997). A decision overruling *Abood* would thus disturb the settled doctrine on which a wide variety of social and economic arrangements depend.[6]

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[6] Notably, many federal and state courts also have come to view *Abood* and *Keller* as representing closely related lines of authority and have applied them in a variety of contexts. *See, e.g.*, *Southworth*, 529 U.S. at 230 ("The *Abood* and *Keller* cases, then, provide the beginning point for our analysis."); *Acevedo-Delgado v. Rivera*, 292 F.3d 37, 42 (1st Cir. 2002) (referring to "the *Abood/Keller* line of cases"); *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 917 (9th Cir. 2005) (discussing "the rationale of the *Abood* and *Keller* line of cases"); *Gerawan Farming, Inc. v. Kawamura*, 90 P.3d 1179, 1185 (Cal. 2004) ("*Abood* and *Keller* are the cornerstones of United States Supreme Court jurisprudence regarding government-compelled funding of private speech."); *BellSouth Adver. & Publ'g Corp. v. Tenn. Regulatory Auth.*, 79 S.W.3d 506, 518 (Tenn. 2002) (discussing "the *Abood-Keller* standards").

IV. PRINCIPLES OF STARE DECISIS COUNSEL AGAINST OVERRULING ABOOD.

One of the advantages of stability in the law is that it provides people and institutions with the opportunity to conform their behavior to the law's requirements. Bars across the country have taken steps over the past two-plus decades to bring their practices into compliance with the substantive and procedural requirements of *Keller*.[7] The overruling of *Abood* would inevitably inject significant uncertainty and instability into a body of law that has been stable for over fifty years.

The Goldwater Institute's *amicus curiae* brief proves the point. Goldwater explains that it is already pursuing a lawsuit on behalf of a member of the North Dakota Bar, contending that, because he is "similarly situated to Petitioners here," he should not be required to pay his mandatory bar dues. Goldwater Brief at 1. The Goldwater brief suggests that the Court could "overturn *Abood* without necessarily overturning *Keller*." *Id.* at 3. Yet, in the same breath, Goldwater asks the Court to use this

[7] *See, e.g.*, *Kingstad v. State Bar of Wis.*, 622 F.3d 708, 709 (7th Cir. 2010); *Gardner v. State Bar of Nev.*, 284 F.3d 1040, 1043 (9th Cir. 2002); *Morrow v. State Bar of Cal.*, 188 F.3d 1174, 1175 (9th Cir. 1999); *Petition of the R.I. Bar Ass'n*, 650 A.2d 1235, 1237 (R.I. 1994) (per curiam). It is these efforts to bring bars' practices into compliance with *Lathrop* and *Keller* that explain the handful of cases the Goldwater Institute mischaracterizes in its *amicus* brief as a "continuing flood of lawsuits *Keller* has caused." Goldwater Brief at 16-17.

case to narrow *Keller*,[8] toward its ultimate goal of "one day strik[ing] [*Keller*] down." *Id.* at 3-4.

Overruling *Abood* would inevitably fuel more organizations and more dissenting bar members to challenge *Keller*. This would lead to the very "groundswell of litigation" Goldwater denies. *Id.* at 16. Indeed, even while *Abood* remains intact, Goldwater is not alone in initiating such litigation. For instance, a district court in September 2015 rejected a challenge from a dissident member of the Washington Bar who relied heavily (though mistakenly) on *Harris* to argue that mandatory membership in that Bar "constitutes compelled speech and association." *See Eugster v. Wash. State Bar Ass'n*, No. C15-0375JLR, 2015 WL 5175722, at *5-*6 (W.D. Wash. Sept. 3, 2015).

This is just the kind of disruption and instability that *stare decisis* principles are intended to prevent. Petitioners concede that *stare decisis* "matters" "because it promotes the evenhanded, predictable, and consistent development of legal principles." Petitioners' Brief at 51 (quoting *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015)). But they say nothing about the disruptive effect that the

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[8] Specifically, Goldwater asks this Court to decide "that *Keller* only permits mandatory bar associations to compel dues for the regulation of attorneys." Goldwater Brief at 8. But *Keller* said no such thing. The *Keller* Court explained that "the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of [1] regulating the legal profession *or [2] 'improving the quality of the legal service available to the people of the State*.'" 496 U.S. at 14 (emphasis added) (quoting *Lathrop*, 367 U.S. at 843).

overruling of *Abood* would have on institutions that have conformed their practices to longstanding doctrine.

In short, overruling *Abood* would put a stable body of law rooted in the common-sense notion that a state should not be subjected to "mandated free-ridership" on a slippery slope. *Lehnert*, 500 U.S. at 556 (Scalia, J., concurring in the judgment in part and dissenting in part). First union shops would fall; then integrated bars and other institutions across the country that have long relied on the sound principles of *Abood* would be under attack.

We urge the Court to reject Petitioners' invitation to permit such disturbance of bars' vital work "'regulating the legal profession and improving the quality of legal services.'" *Harris*, 134 S. Ct. at 2644 (quoting *Keller*, 496 U.S. at 14).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JOHN W. NIELDS, JR.
Counsel of Record
PHILIP J. LEVITZ
Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
jnields@cov.com
(202) 662-6000

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