No. 11-681

IN THE
Supreme Court of the United States

PAMELA HARRIS *et al.*,

Petitioners,

v.

PAT QUINN, Governor of Illinois, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court of Appeals
for the Seventh Circuit

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

JOHN W. NIELDS, JR.
Counsel of Record
ROBERT D. LENHARD
LEAH E. POGORILER
MATTHEW J. BERNS
Covington & Burling LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
jnields@cov.com
(202) 662-6000

December 2013

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Materials

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 mandatory bars such as the D.C. Bar. *See Keller v. State Bar of California*, 496 U.S. 1, 12 (1990).

Petitioners say that *Abood* is an "errant exception" to this Court's First Amendment jurisprudence: that it is an "anomaly." Petitioner's Brief at 3, 14. But *Abood* is no such thing. *Abood* has for over thirty years stood at the heart of a well-developed, well-reasoned body of law that has been refined and reaffirmed in numerous opinions of this Court, and whose reasoning has been applied by this Court not only to union shops, but to mandatory

---

[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 Jamie S. Gorelick, Shirley Ann Higuchi, George W. Jones, Jr., Kim Michele Keenan, John C. Keeney, Jr., Carolyn B. Lamm, Myles V. Lynk, Andrew H. Marks, Darrell G. Mottley, Stephen J. Pollak, E. Barrett Prettyman, Jr., Daniel A. Rezneck, the Honorable James Robertson (Ret.), Robert J. Spagnoletti, Joan H. Strand, Marna S. Tucker, Mark H. Tuohey, III, Robert L. Weinberg, Robert N. Weiner, Melvin White, and Charles R. Work. *Amici* are acting in their personal capacities and not as representatives of any organizations with which they are affiliated.

bars, agricultural cooperatives, and public universities.

The *Abood*/*Keller* line of cases represents a stable body of law upon which integrated bars, including the D.C. Bar, have relied for many years 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 mandatory bars may properly be required to pay their fair share of the core functions of mandatory bars, 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 a mandatory 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 characterized the principal rationale for this body of law — that individuals who benefit from services may properly be required to pay their *fair share* of the costs — as an "anomaly" that should be declared "invalid." Petitioners' Brief at 14, 34. This "fair share" rationale is no anomaly in the union shop or

mandatory bar contexts. As we show immediately below, this "fair share" rationale has been repeated and reaffirmed in opinion after opinion after opinion issued by this Court over a 50-year period in both the union shop and mandatory bar contexts. It was explained, perhaps most forcefully, in a concurring and dissenting opinion in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991).

> 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.

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

The request by Petitioners that this Court overrule *Abood* should be firmly 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* and its fair share rationale would, at a minimum, create uncertainty and instability injurious to the important work that mandatory bars do both for the legal profession and for the administration of justice.

ARGUMENT

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

A. *Hanson*

The line of precedent at issue in this case begins with *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956). *Hanson* arose out of the Railway Labor Act (RLA), a federal statute that overrode State "right to work" laws and permitted the 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 the mandatory dues requirement violated their First Amendment rights of free association. *See id.* at 236-38. The Court held that Congress' enactment of the RLA constituted government action that implicated the First Amendment's right to free association, but it rejected the First Amendment claim on the merits. *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:

> [T]he requirement for financial support of the collective bargaining agency *by all who receive the benefits of the work* . . . does not violate either the First or Fifth Amendments.

Id. at 238 (emphasis added).[3]

The Court also stated, however, that requiring non-union members to provide financial support to the unions' political activities, not "germane" to collective bargaining, would raise a very different problem not presented on the record in *Hanson*. *Id.* at 235-36.

B. *Street*

Four years later, the Court answered the question not reached in *Hanson*, concluding that non-union employees could not 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 began its opinion by reaffirming *Hanson*. *Id.* at 746-49. As Justice Douglas explained

---

[3] The Court also stated, presaging the parallel development of the Court's First Amendment decisions 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.

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.

Id. at 777.[4]

C. *Abood*

The court first addressed union shops in the context of public employment 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

---

[4] In *Street*, the Court *construed* the Railway Labor Act to prohibit collection of dues from objecting non-members to pay for political or ideological causes unrelated to collective bargaining activities, and it therefore did not reach the question whether the United States *Constitution* would have forbidden the union from doing so. However, the desire to avoid First Amendment issues strongly influenced the Court's construction of the RLA. *Id.* at 749-50.

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, it 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 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 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] unionshop 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 its review and reaffirmation of *Hanson* and *Street* by saying*:*

> As 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 (quoting *Street*, 367 U.S. at 778 (Douglas, J., concurring)) (emphasis added).

Turning to the use of compulsory dues to fund the union's political activities unrelated to collective bargaining, the Court held that 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).

D. *Ellis*

In *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435 (1984), the Court refined the lines drawn in *Abood* and *Street* between costs that are properly included in the fee objecting employees had to pay and those that are not.

The Court began its analysis, once again, by reviewing and reaffirming the "fair share" rationale underlying *Hanson*, *Street* and *Abood*. Specifically, the Court stated:

> We 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).

The Court then articulated the First Amendment "test" to be applied in drawing the line between union expenditures chargeable to objecting employees, and those that are not chargeable:

> [T]he 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 (emphasis added). Applying this test, the Court held three of the categories of activities to be properly chargeable to dissenting employees: national conventions, social activities, and certain publications. Three others — litigation unconnected to collective bargaining, general organizing efforts, and certain other publications — were held not chargeable. *Id.* at 448-57.

E. *Hudson*

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.

Before addressing the procedures of the defendant union, the Court reaffirmed the fair share principles of its prior cases, stating that, in *Abood*,

> We . . . 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).

The Court then turned to the procedures in place at the defendant union, finding them inadequate in three respects, and ordered the inadequacies to be corrected. *Id.* at 304-11.

F. *Lehnert*

The Court reaffirmed the core holding of the *Abood* line of cases in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). While the Court split regarding the precise test for identifying chargeable expenses, all nine justices agreed that the *Abood* doctrine is sound.

Once again, the Court began by reaffirming *Hanson*, *Street, Ellis*, and *Abood*. As to the RLA cases, the court stated that "those cases make clear that expenses that are relevant or 'germane' to the collective bargaining functions of the union generally will be constitutionally chargeable to dissenting employees." *Id.* at 516.

As to *Abood*, the Court said that compulsory financial support of the collective-bargaining-related services of a public-employment union does not, without more, violate the First Amendment:

> [A]n employee's free speech rights are not unconstitutionally burdened because the employee opposes positions taken by a union in its capacity as collective-bargaining representative.

Id. at 517.

The Court then held that, in order to be chargeable to dissenting public employees, the expenditures must be 1) germane to collective bargaining activity; 2) justified by the government's interest in labor peace and avoiding "free riders"; and 3) not significantly adding to the burdening of free speech inherent in a union shop. *Id.* at 519.[5]

Although the portion of the Court's opinion described above received only five votes, the concurring and dissenting opinion of Justice Scalia (joined in by Justices O'Connor, Souter and, as to the portion quoted below, Justice Kennedy) gave emphatic support to the proposition 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, the concurring opinion, hewing closely to the language and holdings in *Abood* and *Ellis*, 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

[5] The challenged expenditures included lobbying and publicity not involving ratification of the collective bargaining agreement, attending conventions, a union newsletter, collective bargaining training and other services of the national union, and preparations for a strike, that if carried out, would have been illegal. Applying this standard, the Court upheld some of the challenged expenditures and ruled that others violated the First Amendment.

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. The "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; private speech often furthers the interests of nonspeakers, and that does not alone empower the state to compel the speech to be paid for. What is distinctive, however, about the "free riders" who are nonunion members of the union's own bargaining unit is that in some respects *they* are free riders 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. In the context of bargaining, 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. Thus, the free ridership (if it were left to be that) would be not incidental but calculated, not imposed by circumstances but mandated by government decree.

> Once it is understood that the source of the state's power, despite the First Amendment, to compel nonmembers to support the union financially, is elimination of the inequity that would otherwise arise from mandated free-ridership, the constitutional limits on that power naturally follow. It does not go beyond the expenses incurred in discharge of the union's "great responsibilities" in "negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances," *Abood*, 431 U.S., at 221; the cost of performing the union's "statutory functions," *Ellis*, 466 U.S., at 447; the expenses "necessary to 'performing the duties of an exclusive representative.'" [*Communications Workers of Am. v. Beck,* 487 U.S. 735, 762 (1988).]

Id. at 556-57 (Scalia, J., concurring in the judgment in part and dissenting in part).

Consequently, all nine Justices in *Lehnert* endorsed the Court's fair share rationale in upholding union shop provisions for public employees.

G. *Locke*

In *Locke v. Karass*, 555 U.S. 207 (2009), the Court addressed whether a local union's *pro rata* share of litigation expenses incurred by the national

union was properly chargeable to the local's dissenting non-members. The expenses were incurred in connection with collective-bargaining-related litigation involving a different local. The Court held the expenses were properly chargeable because — as the parties had conceded — other locals had a reciprocal obligation to contribute their *pro rata* share of similar litigation expenses involving the objecting non-members' local. *Id*. at 219-21.

The opinion of the Court, joined in by all of its nine members, reaffirmed *Hanson, Street, Abood, Ellis*, and *Lehnert* and specifically endorsed the Court's prevention-of-free-riding rationale. *Id*. at 213.[6]

* * * * *

The above decisions constitute an unbroken line of holdings by this Court that non-union employees may — consistent with First Amendment principles — be required to pay service fees to the union for costs of collective-bargaining-related services. And each decision rests on the common-sense proposition that those who benefit from

---

[6] There is language in the Court's opinion in *Knox v. Service Employees International Union, Local 100*, 132 S. Ct. 2277 (2012), to the effect that prevention of free riding is not generally sufficient to overcome First Amendment objections, citing examples *unrelated* to union shops or mandatory bars. *Id*. at 2290. *Knox* itself involved union expenditures *unrelated* to collective bargaining that were treated procedurally by the union in a way that failed to comply with *Hudson*, *supra*. *Knox* did not overturn any of the union shop First Amendment law discussed above.

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-two States and the District of Columbia have created what are known as "integrated 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 union shops. 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 addressed the subject of mandatory bar dues directly in *Lathrop v. Donahue*, 367 U.S. 820 (1961).[7] 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. The integrated State Bar was created to "elevat[e] 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.

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 which he opposed. Because there was no factual basis for the claim that the Bar

---

[7] 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.

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, stating:

> In our view, the case presents a claim of impingement upon freedom of association no different from that which we decided in *Railway Employees' Dep't v. Hanson*, 351 U.S. 225.

Id. at 842.

The plurality explained that "the bulk of State Bar's 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," and 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. at 843 (emphasis added).

In an opinion authored by Justice Harlan and joined in by Justice Frankfurter, these two additional justices concurred, stating:

> The *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 v. State Bar of California*, 496 U.S. 1 (1990). 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 or political 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 political or ideological 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 the law; and to engage in the study of and recommend changes in procedural law and improvement of the administration of justice. *Id.* 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 legislature by the organized bar." *Id.* at 12 (emphasis added). The Court pointed out further that this regime benefitted lawyers generally, because they "prefer a large measure of self-regulation to regulation conducted by a government body which has little or no connection with the profession." *Id.*

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 then turned to its union shop jurisprudence and the "fair share" rationale that underlies it:

> 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). Then, after noting that members of state *bars* generally benefit from participating in their own regulation, the Court stated:

> 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.

Id. (emphasis added).

The Court then 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, and said:

> *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 further emphasized, however, that:

> [P]etitioners 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 16.

Thus, while there are differences between bars and unions and the relevant state interests may vary, they are 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 would create uncertainty for and cause harm to both.

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

This Court has also repeatedly looked to *Abood* and *Keller* to guide its First Amendment analysis in compulsory-funding cases outside the union and bar-association context.[8] The Court has

---

[8] Many federal and state courts have come to view *Abood* and *Keller* as representing closely related lines of authority. *See, e.g., Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 230 (2000) ("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.* (continued…)

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 the 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.

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

---

Tenn. Regulatory Auth., 79 S.W.3d 506, 518 (Tenn. 2002) (discussing "the *Abood-Keller* standards").

procedural requirements of *Keller*.[9] The overruling of *Abood* would inevitably inject significant uncertainty and instability into a body of law that has been stable for over fifty years.

This risk is by no means only a theoretical one. Earlier this month, the Nebraska Supreme Court made substantial changes to the rules governing its Bar. It did so because language in *Knox*, *supra*, created "doubt" about the constitutionality of opt-out systems for dissenting members.[10] *Knox* was a case involving only *unions*, yet it had immediate repercussions for bars, prompting the Nebraska Supreme Court to rewrite its rules, greatly restricting the activities of the bar that may be funded by mandatory dues.[11] The Nebraska court narrowed the approved scope of its Bar's activities not because it found that the First Amendment required it, but out of an abundance of caution because of uncertainty and in order to avoid the risk of disputes over the Bar's activities.[12] The overruling of *Abood* could be expected to inject into

---

[9] *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).

[10] *Petition for a Rule Change to Create a Voluntary State Bar of Nebraska*, No. S-36-120001, 286 Neb. R. 1018, 1031-32, 1034-37, -- N.W.2d --, Neb. Advance Sheets (Dec. 6, 2013) (per curiam).

[11] *Id.* at 1035.

[12] *Id.* at 1035-37.

the law governing bars much more uncertainty than *Knox* already has.

This is precisely the kind of uncertainty that *stare decisis* principles are meant to prevent. Petitioners nonetheless ask the Court to "overrule *Abood*," with no mention of principles of *stare decisis* and no effort to explain why circumstances here would justify a departure from those principles. The request is made in spite of the fact that Petitioners did not challenge the continued validity of *Abood* in the courts below; the Court of Appeals has had no opportunity to consider or address such a challenge; and the continued validity of *Abood* is not an issue raised or suggested by either of the questions presented. Petitioners point to no changes in factual circumstances that have rendered existing law unworkable. *See Planned Parenthood v. Casey*, 505 U.S. 833, 854-55 (1992). They point to no change in the law that might leave the *Abood*/*Keller* body of law "no more than a remnant of abandoned doctrine." *Id.* And they say nothing about the disruptive effect that the overruling of *Abood* would have on institutions that have conformed their practices to comply with longstanding doctrine.

Amici submit that the body of law represented by *Abood* and *Keller* is sound and well-reasoned, and that its overruling would have disruptive effects on bars across the country. We urge the Court to reject Petitioners' invitation to overrule it.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JOHN W. NIELDS, JR.
Counsel of Record
ROBERT D. LENHARD
LEAH E. POGORILER
MATTHEW J. BERNS
Covington & Burling LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
jnields@cov.com
(202) 662-6000

December 2013