No. ______

In the Supreme Court of the United States

TONY K. MCDONALD, ET AL.,
Petitioners,

v.

SYLVIA BORUNDA FIRTH, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Jeffrey M. Harris
Counsel of Record
William S. Consovoy
Cameron T. Norris
Tiffany H. Bates
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
jeff@consovoymccarthy.com

Attorneys for Petitioners

November 24, 2021

QUESTION PRESENTED

Does the First Amendment prohibit a state from compelling attorneys to join and fund a state bar association that engages in extensive political and ideological activities?

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Petitioners—Tony K. McDonald, Joshua B. Hammer, and Mark S. Pulliam—were plaintiffs in the district court and appellants before the U.S. Court of Appeals for the Fifth Circuit.

Respondents—defendants in the district court and appellees in the Fifth Circuit—are the members of the Board of Directors of the State Bar of Texas and are sued in their official capacities. Pursuant to Federal Rule of Civil Procedure 25(d), the successors of individuals who were previously named as defendants but who are no longer members of the Bar's Board of Directors have been automatically substituted as parties. Respondents are: Sylvia Borunda Firth, Laura Gibson, Larry P. McDougal, Santos Vargas, Benny Agosto, Jr., Andres E. Amanzan, Chad Baruch, Kate Bihm, Rebekah Steely Brooker, David N. Calvillo, Luis M. Cardenas, Luis Cavazos, Jason Charbonnet, Kelly-Ann F. Clarke, Thomas A. Crosley, Christina M. Davis, Maria Hernandez Ferrier, Steve Fischer, Lucy Forbes, August W. Harris III, Britney E. Harrison, Forrest L. Huddleston, Michael K. Hurst, Lori M. Kern, Bill Kroger, Yolanda Cortes Mares, Dwight McDonald, Carra Miller, Lydia Elizondo Mount, Kimberly M. Naylor, Jeanine Novosad Rispoli, Michael J. Ritter, Adam T. Schramek, Audie Sciumbato, Mary L. Scott, David Sergi, D. Todd Smith, G. David Smith, Jason C. N. Smith, Diane St. Yves, Nitin Sud, Robert L. Tobey, Andrew Tolchin, G. Michael Vasquez, Kimberly Pack Wilson, and Kennon L. Wooten.

Per Rule 14(b)(iii), Petitioners are not aware of any "directly related" cases in state or federal courts.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS ii

TABLE OF AUTHORITIES vi

INTRODUCTION 1

OPINIONS BELOW 4

JURISDICTION 5

CONSTITUTIONAL PROVISION INVOLVED 5

STATEMENT OF THE CASE 5

- A. Overview of mandatory and voluntary bar associations 5
- B. Texas law requires all attorneys to join and fund the Bar as a condition of practicing their chosen profession 7
- C. The Bar's use of compelled dues for ideological and political activities 9
- D. Proceedings below 14

REASONS FOR GRANTING THE PETITION 17

I. The Court should grant certiorari because the decision below misconstrues *Keller* and *Lathrop* and conflicts with this Court's more recent compelled-membership decisions 17

II. In the alternative, the Court should overrule *Lathrop* and *Keller* 23

A. *Keller* and *Lathrop* are poorly reasoned, inconsistent with the Court's more recent decisions, and have wrought significant negative consequences 24

B. It is inherently unworkable for courts to parse out chargeable and non-chargeable activities based on an amorphous "germaneness" test 28

C. *Keller* and *Lathrop* have generated no legitimate reliance interests 31

CONCLUSION 34

APPENDIX

Appendix A Opinion in the United States Court of Appeals for the Fifth Circuit (July 2, 2021) ....App. 1

Appendix B Order on Cross-Motions for Summary Judgment in the United States District Court for the Western District of Texas Austin Division (May 29, 2020) ....App. 44

Appendix C Judgment in the United States District Court for the Western District of Texas Austin Division (May 29, 2020) ....App. 66

TABLE OF AUTHORITIES

Cases

Abood v. Detroit Board of Education,
431 U.S. 209 (1977) 22, 25, 31

Bridge Aina Le'a LLC v. Hawaii Land Use Comm'n, 141 S. Ct. 731 (2021) 31

Chicago Teachers Union v. Hudson,
475 U.S. 292 (1986) 14, 16

Crowe v. Oregon State Bar,
989 F.3d 714 (9th Cir. 2021), *cert. denied*,
No. 20-1678, 2021 WL 4507678 (Oct. 4, 2021) 4

Elrod v. Burns,
427 U.S. 347 (1976) 3

Fleck v. Wetch,
937 F.3d 1112 (8th Cir. 2019), *cert. denied*,
140 S. Ct. 1294 (2020) 4

Harris v. Quinn,
573 U.S. 616 (2014) .... *passim*

I*n re Petition for a Rule Change to Create a Voluntary State Bar*, 841 N.W.2d 167
(Neb. 2013) 6

Janus v. Am. Fed. of State, Cty., & Mun. Employees, Council 31,
138 S. Ct. 2448 (2018) .... *passim*

Jarchow v. State Bar of Wisconsin,
140 S. Ct. 1720 (2020) 4, 6, 25

Johanns v. Livestock Marketing Ass'n,
544 U.S. 550 (2005) 22

Keller v. State Bar of California,
496 U.S. 1 (1990) .... *passim*

Kisor v. Wilkie,
139 S. Ct. 2400 (2019) 23, 24

Knox v. Service Employees Intern. Union, Local 1000, 567 U.S. 298 (2012) 30, 33

Lathrop v. Donohue,
367 U.S. 820 (1961) .... *passim*

Lehnert v. Ferris Faculty Assn.,
500 U.S. 507 (1991) 31

Railway Employees' Department. v. Hanson,
351 U.S. 225 (1956) 26, 27

Ramos v. Louisiana,
140 S. Ct. 1390 (2020) 24, 27

Roberts v. U.S. Jaycees,
468 U.S. 609 (1984) 18

Constitution and Statutes

U.S. Const. amend. I .... *passim*

28 U.S.C. §1254(1) 5

Tex. Gov't Code § 81.011 7

Tex. Gov't Code § 81.051(b) 7

Tex. Gov't Code § 81.052 8

Tex. Gov't Code § 81.053 8

Tex. Gov't Code § 81.054 8

Tex. Gov't Code § 81.054(c) 12

Tex. Gov't Code § 81.054(j) 8, 12

Tex. Gov't Code § 81.054(k)..8

Rules

Sup. Ct. R. 10(c)..17

Other Authorities

2020 Operating Budget, bit.ly/3l5VyjB 7, 33

About NYSBA, History and Structure of the
Ass'n, archive.nysba.org/history/....................7, 33

Lyle Moran, *California Split: 1 Year After Nation's Largest Bar Became 2 Entities, Observers See Positive Change*, ABA Journal (Feb. 4, 2019), bit.ly/3xuSroN.........33, 34

The Integrated Bar Ass'n,
30 Fordham L. Rev. 477 (1962). 5, 6

INTRODUCTION

The "freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all,'" and compelled subsidization of speech "seriously impinges on First Amendment rights." *Janus v. Am. Fed. of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2463-64 (2018). This Court recently held in *Janus* that the First Amendment fully protects public employees' freedom to decline to associate with or subsidize the activities of a labor union.

This case implicates the same types of First Amendment harms that were at issue in *Janus*. Petitioners are three Texas attorneys who are compelled to join and financially support the State Bar of Texas in order to practice their chosen profession. The Bar uses their coerced funds to support an extensive array of highly ideological and controversial activities, including lobbying for legislation; promoting identity-based programming and affinity groups; and supporting legal aid and pro bono initiatives that often touch on controversial matters such as immigration policy. Petitioners do not support these activities yet are compelled to associate with the Bar and fund its activities if they wish to continuing practicing law in Texas.

In the decision below, the Fifth Circuit correctly held that Petitioners could not be compelled to support the Bar's lobbying and political advocacy regarding matters unrelated to the legal profession. But the court found itself constrained by this Court's precedent to reject Petitioners' First Amendment challenges to all of the other activities at issue. The

Fifth Circuit acknowledged that many of these activities—such as identity-based programming based on race, gender, and sexual orientation—were "highly ideologically charged." App. 29. Yet the Court found Petitioners' First Amendment challenges to these activities to be barred by this Court's precedent because they were "germane" to "regulating the legal profession" or "improving the quality of legal services." *Keller v. State Bar of California*, 496 U.S. 1, 13 (1990).

This Court should grant certiorari and hold that members of a mandatory bar cannot be compelled to finance *any* political or ideological activities, and cannot be compelled to join a bar that engages in such activities. That rule flows directly from this Court's existing precedent, which makes clear that members of a mandatory bar "could not be required to pay the portion of bar dues *used for political or ideological purposes* but that they could be required to pay the portion of the dues used for activities connected with proposing ethical codes and disciplining bar members." *Harris v. Quinn*, 573 U.S. 616, 655 (2014) (emphasis added). Although *Keller* did contemplate a limited role for a mandatory bar whose activities are carefully circumscribed, nothing in *Keller* gives bar associations a blank check to use coerced dues to support highly controversial and ideologically charged activities such as those challenged here.

This Court's intervention is imperative. Mandatory bars across the country have become increasingly embroiled in advocacy and programming on hot-button and politically charged issues such as

immigration, identity-based programming, and legal aid for controversial causes. Yet countless bar members, including Petitioners, do not support those activities and would prefer to support and associate with organizations and causes of *their own* choosing. Given that this case implicates "First Amendment rights of association which must be carefully guarded against infringement," *Elrod v. Burns*, 427 U.S. 347, 373 (1976), certiorari is plainly warranted.

In the alternative, if *Keller* and *Lathrop* actually do authorize the use of coerced dues for the broad array of ideological and controversial activities challenged here, then those decisions should be overruled. *Janus* recognized the hopeless ambiguity of attempting to use a "germaneness" test to determine what types of activities a union member could be compelled to support. And this Court expressly recognized in *Keller* that there is a "substantial analogy" between compelled support for a union and compelled support for a bar association. *Keller*, 496 U.S. at 12. Given that *Keller* relied on the same legal doctrines that this Court since repudiated in *Janus*, it is untenable to give less First Amendment protection to attorneys forced to join a bar association than to government employees forced to support a union. If this Court's precedents authorize the Bar to compel Petitioners to support the highly ideological activities challenged here, then those decisions should be reconsidered and overruled.

The First Amendment question underlying this petition has been raised in a few other recent petitions, one of which garnered two votes for

certiorari. *See Jarchow v. State Bar of Wisconsin*, 140 S. Ct. 1720, 1720-21 (2020) (Thomas, J., joined by Gorsuch, J., dissenting from the denial of certiorari). Unlike those earlier petitions, however, this petition does not argue that the Court *must* overrule prior precedent; Petitioners' primary argument is that this Court's full body of First Amendment precedent *already* bans states from compelling membership in and funding of a bar that engages in political or ideological activities. Unlike the earlier cases, moreover, the decision below actually evaluated whether each of the Bar's activities was germane to the legal profession and found that many were not. This case was also decided at summary judgment where the First Amendment issues were fully litigated based on an extensive record. *Cf. Jarchow*, 140 S. Ct. at 1721 (pleadings stage); *Crowe v. Oregon State Bar*, 989 F.3d 714 (9th Cir. 2021) (pleadings stage and a key First Amendment claim left unresolved), *cert. denied*, No. 20-1678, 2021 WL 4507678 (Oct. 4, 2021); *Fleck v. Wetch*, 937 F.3d 1112, 1115-17 (8th Cir. 2019) (plaintiff forfeited key First Amendment claim), *cert. denied*, 140 S. Ct. 1294 (2020). This case accordingly presents an ideal vehicle for the Court to address the important First Amendment issues arising out of mandatory bar membership.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 4 F.4th 229 and is reproduced at App. 1-43. The district court's order on cross-motions for summary judgment is available at 2020 WL 3261061 and is reproduced at App. 44-65.

JURISDICTION

The Fifth Circuit issued its opinion on July 2, 2021. Because its decision was issued before July 19, 2021, the deadline for filing this petition was automatically extended to 150 days from the date of the lower court's decision, or November 29, 2021. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment, as incorporated against the states by the Fourteenth, provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

A. Overview of mandatory and voluntary bar associations.

An "integrated" bar association (also called a "unified" or "mandatory" bar) is "an official state organization requiring membership and financial support of all attorneys admitted to practice in that jurisdiction." *The Integrated Bar Ass'n*, 30 Fordham L. Rev. 477, 477 (1962). These mandatory associations are described as "integrated" because they both regulate the legal profession and engage in other activities such as lobbying, promoting "access to justice" and pro bono work, organizing conferences and continuing legal education programs, holding

public forums, publishing reports, and promoting diversity initiatives.

A mandatory bar association differs from a voluntary bar association in that it is an "official organization by authority of the state" and has "compulsory membership." *Id.*; *see also Jarchow*, 140 S. Ct. at 1720 (Thomas, J., dissenting from denial of cert.) ("Unlike voluntary bar associations, integrated or mandatory bars require attorneys to join a state bar and pay compulsory dues as a condition of practicing law in the State."). As this Court has recognized, mandatory bars can burden the First Amendment rights of those who are compelled to join in a manner "substantial[ly] analog[ous]" to the way that mandatory "agency shop" arrangements can burden the rights of union members. *Keller*, 496 U.S. at 12.

Although a majority of states currently have mandatory bar associations, they are by no means necessary to ensure adequate regulation and supervision of the legal profession. Nearly twenty states—including large legal markets such as New York, Illinois, Massachusetts, Ohio, and Pennsylvania—regulate the legal profession directly without compulsory bar membership. *See In re Petition for a Rule Change to Create a Voluntary State Bar*, 841 N.W.2d 167, 171 (Neb. 2013).

Voluntary bar associations devoted to improvement of the law and the legal profession have continued to flourish in those jurisdictions even in the absence of government coercion. For example, the New York State Bar Association—which is supported

solely by voluntary membership and contributions—has over 70,000 members, more than 125 employees, and more than $20 million in annual revenue. *See* About NYSBA, History and Structure of the Ass'n, archive.nysba.org/history/; 2020 Operating Budget, bit.ly/3l5VyjB.

Voluntary bar associations such as the NYSBA typically conduct the same types of activities that members of mandatory bars are coerced to support, *e.g.*, lobbying, legal advocacy, diversity programs, legal aid projects, conferences, CLE programs and other similar initiatives. Because they are private, voluntary organizations supported solely by their members, these groups are free to support or oppose any causes of their choosing without limitation.

B. Texas law requires all attorneys to join and fund the Bar as a condition of practicing their chosen profession.

The State Bar of Texas is a mandatory bar association. The Bar is a public corporation and an administrative agency of the judicial department, operating under the administrative control of the Supreme Court of Texas. *See* Tex. Gov't Code § 81.011. Individuals who wish to practice law in Texas are compelled to join the Bar in order to engage in their profession. *See* Tex. Gov't Code § 81.051(b) ("Each person licensed to practice law in this state shall, not later than the 10th day after the person's admission to practice, enroll in the state bar by registering with the clerk of the supreme court.").

Failure to join the Bar makes an individual ineligible to practice law in Texas. An attorney who is eligible to practice law in Texas but is not currently practicing may move to "inactive" status. *See* Tex. Gov't Code §§ 81.052, 81.053. Inactive members must remain members of the Bar, and continue to pay dues, in order to preserve their eligibility to return to active status in the future.

All attorneys licensed to practice law in Texas must pay dues to the Bar. *See* Tex. Gov't Code § 81.054. Those dues are currently $68 for attorneys licensed 0 to 3 years, $148 for attorneys licensed 4 to 5 years, and $235 for attorneys licensed more than 5 years. ROA.3749.[1] Dues for inactive members are currently $50 per year. ROA.3761. In the year ending on May 31, 2017, the Bar collected more than $22 million in mandatory dues, plus another $25 million in revenue from its other activities. ROA.3775.

Texas law also imposes an additional $65 "legal services fee" on certain attorneys as a condition of their practicing law. Tex. Gov't Code § 81.054(j). This fee is imposed only on certain attorneys in active private practice in Texas. It is not imposed on attorneys over 70 years old or on inactive status; those who work in state, federal, or local government; those who work for certain non-profit organizations; or those who reside out of state and do not practice law in Texas. *Id.* § 81.054(k).

---

[1] "ROA" refers to the Record on Appeal before the Fifth Circuit.

C. The Bar's use of compelled dues for ideological and political activities.

Under this Court's precedent, compelled bar dues may be used only for carefully limited purposes such as "proposing ethical codes and disciplining bar members." *Harris*, 573 U.S. at 655. But the Bar does not limit its spending to this narrow category. Instead, it uses coerced dues for extensive political and ideological activities that extend far beyond regulatory and disciplinary functions.

Legislative Program. It is difficult to imagine a more quintessentially "political" activity than advocating for the passage of legislation. Yet the Bar uses compelled dues to do just that. The Bar maintains a Governmental Relations department that "serves as the State Bar's liaison to the Texas Legislature and other state and federal governmental entities." ROA.3752. This department "reviews thousands of bills each legislative session for their potential impact on the State Bar and the legal profession," and "manages and coordinates" the Bar's legislative advocacy for certain bills. *Id.* The Bar's 2019 legislative program included proposed legislation on wide-ranging matters including construction law, family law, LGBT law, poverty law, real estate law, trust law, and probate law. ROA.3755-57.

At the time this suit was filed, the Bar was actively advocating for the passage of forty-seven proposed bills in these areas. *Id.* One of these bills (SJR 9) would amend the definition of marriage in the Texas Constitution. ROA.3756, 3959. Another (HB

978) would amend the Texas Code to create civil unions, "intended as an alternative to marriage" for both sexes. ROA.3756, 3961-79. Other bills would modify the procedures used by grandparents to gain access to grandchildren over parental objections (HB 575), ROA.3755, 3981-83; would substantively amend Texas trust law (HB 2782), ROA.3756, 3985-4017; and would impose notification requirements on parents wishing to take summer weekend possession of a child under a court order (HB 553), ROA.3755, 4019.

Diversity Initiatives. The Bar also has an "Office of Minority Affairs." The goals of this office include "serv[ing] minority, women, and LGBT attorneys and legal organizations in Texas" and "enhanc[ing] employment and economic opportunities for minority, women, and LGBT attorneys in the legal profession." ROA.3841. The Office of Minority Affairs engages in "Minority Initiatives," which are "ongoing forums, projects, programs, and publications dedicated to [their] diversity efforts." *Id.* These initiatives include the Texas Minority Counsel Program, Texas Minority Attorney Program, Minority Attorneys at the Podium Project, Diversity Forum, Diversity Summit, LeadershipSBOT, Pipeline Program, Texas Spectrum (a diversity newsletter), and the Ten Minute Mentor Program. ROA.3841-42.

All of the Bar's "diversity" initiatives are premised on the assumption that is appropriate to offer certain services targeted at individuals of a particular race, gender, or sexual orientation. The Texas Minority Counsel Program, for example, is a "client development, networking, and CLE event for diverse

attorneys in Texas," which are defined as "minority, women, and LGBT attorneys." ROA.3845. This annual program allows "diverse lawyers" to "meet one-on-one to discuss potential outside counsel opportunities" and offers "incomparable networking events." ROA.3853. The Bar also operates a host of diversity committees and sections. ROA.3849-50.

Access to Justice Division and Programs. The Bar maintains a "Legal Access Division" that "offers support, training, publications, resource materials, and more to legal services programs and pro bono volunteers." ROA.3874. During the 2018-2019 budgetary year, the Bar spent over $1 million on Legal Access Division programs. ROA.3871. In 2019-2020, the Bar budgeted over $1.5 million for these activities. ROA.3867.

The Bar spent an additional $827,000 in 2018-2019 funding an "Access to Justice Commission," and it intended to spend a similar amount during the 2019-2020 fiscal year. *See* ROA.3871, 3867. The Access to Justice Commission engages in a variety of highly political and ideological activities, including lobbying. *See* ROA.3942-45. The Commission's lobbying is aimed at "increas[ing] resources and funding for access to justice," ROA.1607, and promoting "systemic change," ROA.1619. Simply put, bar members' coerced dues are used to finance an organization that lobbies to increase government spending on its preferred programs and policies.

In connection with its pro bono and "access to justice efforts," ROA.3607, the Bar maintains a

directory of "volunteer and resource opportunities." ROA.3887-88. That directory "provides a comprehensive list of training, volunteer, and donation opportunities for attorneys who would like to assist with migrant asylum and family separation cases." *Id.* At the time this suit was filed, every one of the relevant entries promoted a group that seeks to help undocumented immigrants remain in the United States. *Id.* Moreover, the directory links to a 2018 article published by Joe K. Longley, the then-President of the Bar. In that article, Longley says he "traveled to the border to learn how we can promote access to justice and the rule of law related to the separation of immigrant families" and decided to create the volunteer opportunities webpage as a result. ROA.3890-91. Even though Longley was expressly encouraging Bar members to oppose immigration policies being implemented by the federal government, Longley claimed that "[t]his is not about politics. It's about access to justice." *Id.*

Legal Services Fee. As noted above, Texas law requires certain attorneys to pay a $65 legal services fee. Tex. Gov't Code § 81.054(j). This fee is imposed only on a subset of attorneys in active private practice in Texas. The $65 legal services fee has nothing to do with regulating the profession or ensuring ethical conduct by attorneys. Its *sole* purpose is to fund legal services for certain groups. Half of the fees are allocated to the Supreme Court Judicial Fund, which provides civil legal services to the poor, and the other half goes to the Fair Defense Account of the State's general reserve fund for indigent criminal defense. *See id.* § 81.054(c). This fee is effectively a compelled

charitable contribution that is imposed on certain Texas attorneys as a condition of practicing their chosen profession.

Other Non-Chargeable Activities. The Bar spends attorneys' compelled dues on countless other activities that extend far beyond the regulation of attorneys. The Bar hosts an annual convention at which political and ideological activities are rampant. During the 2018 convention, for example, topics included "Diversity and Inclusion: The Important Role of Allies"; "Current Issues Affecting the Hispanic Community"; "LGBT Pathways to the Judiciary: Impact of Openly LGBT Judges in Texas"; "Implicit Bias"; "Texas Transgender Attorneys: A View from the Bar"; and a "Legislative Update [on] Proposed Rulemaking Under the Trump Administration." ROA.3904-28.

The Bar also funds ideologically charged continuing legal education programs. *See, e.g.*, ROA.3879-82 ("The Paradox of Bodily Autonomy: Sex Confirming Surgeries and Circumcision"; "Intersectionality: The New Legal Imperative"). It spends nearly $800,000 on advertising each year. *See* ROA.3870. It publishes and exercises editorial control over its "official publication," the *Texas Bar Journal*, on which it spends over $1.5 million each year. ROA.3947; ROA.3871. And to support these activities, the Bar spends millions on administrative staff, technology, and facilities. *See* ROA.3866-72.

D. Proceedings below.

1. On March 6, 2019, Petitioners—three Texas attorneys—brought suit against the Bar's officers and directors, alleging that: (1) the First Amendment barred the state from compelling Petitioners to join a bar association that engages in political and ideological activities; (2) even if Petitioners could be compelled to join the Bar, they could not be compelled to fund its political and ideological activities; and (3) the Bar's procedures for allowing members to opt-out of paying for its political and ideological activities were constitutionally inadequate. App. 11, 49-50.[2] Shortly thereafter, Petitioners filed a motion for preliminary injunction and motion for partial summary judgment on liability. The Bar cross-moved for summary judgment.

On May 29, 2020, the district court denied Petitioners' motions and granted the Bar's cross-motion for summary judgment. First, the district court concluded that "*Keller* and *Lathrop* directly control under the facts of this case," and thus foreclose Petitioners' claim that compelling them to join the Bar violates the First Amendment. App. 57. Second, the district court found that *every single one* of the challenged activities was "germane" to "Texas's interest in professional regulation or legal-service

---

[2] At the time this suit was filed, the Bar failed to provide members a *Hudson* notice, a description of which portions of members' dues are paying for regulatory functions and which portions are paying for non-chargeable political and ideological activities. *See Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). This put the entire burden of identifying non-chargeable expenses on potential objectors.

quality improvement." App. 59-63. Finally, the district court summarily rejected Petitioners' challenge to the Bar's procedures for objecting to impermissible expenditures. App. 63-64. Because the court concluded that all of the challenged activities were "germane" it further held that Petitioners' "claim that the Bar unconstitutionally coerces them into funding allegedly non-chargeable activities without a meaningful opportunity to object necessarily fails as a matter of law." App. 64 And the court found that the Bar's opt-out procedures were "adequate" to "protect against compelled speech." App. 64.

2. Petitioners appealed. On July 2, 2021, the Fifth Circuit vacated the summary judgment for the Bar, rendered partial summary judgment for Petitioners, and remanded for the district court to determine the scope of relief to which plaintiffs are entitled. App. 43. The court concluded that *Keller* left open the question of whether attorneys can be compelled to join a bar association that engages in "non-germane" activities. App. 16-17 n.14, 40. The Fifth Circuit then answered that question by holding that "compelling a lawyer to join a bar association engaged in non-germane activities burdens his or her First Amendment right to freedom of association," App. 21, and that "[c]ompelled membership in a bar association that engages in non-germane activities ... fails exacting scrutiny." App. 23.

The court then analyzed each of the challenged activities at issue here to determine whether they were germane to regulating or improving the legal profession. App. 25-36. It held that "some" of the Bar's

"lobbying was germane, but most was not." App. 27. The court held that "advocating changes to a state's substantive law is non-germane to the purposes identified in *Keller*," but that "[l]obbying for legislation regarding the functioning of the state's courts or legal system writ large … is germane." App. 26.

The Fifth Circuit found most of the remaining activities to be germane under *Keller*: the Bar's diversity initiatives, "though highly ideologically charged," were germane to improving the legal profession, App. 29; "[m]ost, but not quite all," of the Bar's Access to Justice initiatives were germane; and "all" of the "miscellaneous activities—hosting an annual convention, running CLE programs, and publishing the Texas Bar Journal—" were germane. App. 31-36. The court found these activities to be "germane to the purposes identified by *Keller*" notwithstanding their "controversial and ideological nature." App. 29-30.

Finally, the court held that the Bar's procedures were "constitutionally wanting" but that "at least under current law, opt-in procedures are [not] required." App. 39. It concluded that the Bar "may use opt-out procedures," as long as it employs the notice procedures outlined in *Hudson*, which are "*both* necessary and sufficient." App. 39-40. The court concluded that the Bar's current procedures were "inadequate" under that framework. App. 41.

Petitioners do not challenge the Fifth Circuit's holdings that some of the Bar's lobbying was non-

germane; that they cannot be compelled to join the Bar while it engages in non-germane activities; and that the Bar's procedures for disclosing its activities were inadequate. But Petitioners now seek this Court's review of the lower courts' grant of summary judgment to the Bar on Petitioners' challenge to the remaining expenditures and activities that were found to be "germane."

REASONS FOR GRANTING THE PETITION

The First Amendment does not allow states to force an individual to join and fund an organization that engages in political and ideological activities. By concluding otherwise, the Fifth Circuit "decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10(c). This Court's precedents do not require that conclusion; if they did, those precedents should be overruled.

I. The Court should grant certiorari because the decision below misconstrues *Keller* and *Lathrop* and conflicts with this Court's more recent compelled-membership decisions.

Texas law requires all attorneys to join and associate with the Bar as a condition of practicing their chosen profession even though the Bar engages in extensive political and ideological activities. This scheme is unconstitutional even under current law, and the Fifth Circuit erred to the extent it held otherwise. *Keller* prohibits compelled membership in a bar association that engages in political and ideological activities, and subsequent decisions such as *Harris* and *Janus* confirm this understanding. At a

minimum, this Court's precedents prohibit Texas from compelling support for bar activities that extend beyond regulatory and disciplinary functions.

All citizens have the constitutional "freedom not to associate." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). "Compelling individuals to mouth support for views they find objectionable," including by compelled association, "violates that cardinal constitutional command." *Janus*, 138 S. Ct. at 2463. Moreover, "freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all,'" and compelled subsidization of someone else's speech "seriously impinges on First Amendment rights." *Id.* at 2463-64.

Here, Texas law compels attorneys to join, associate with, and fund the Bar even though that organization engages in extensive political and ideological activities to which many of its members object. The Bar lobbies for the passage of legislation; funds numerous diversity initiatives targeted at individuals of a certain race, gender, or sexual orientation; sponsors ideologically charged CLEs and panels; compels charitable contributions to pay for legal services, pro bono, and access to justice initiatives; requires members to fund its magazine; and much more. *See supra* 9-13. Since the First Amendment always protects "[t]he right to eschew association for expressive purposes," there is no question that compelled membership in the Bar *burdens* Petitioners' constitutional rights. *Janus*, 138 S. Ct. at 2463.

To reduce the burden on constitutional rights resulting from compelled bar membership, this Court has held that bar members may be compelled to support only those activities that are "germane" to regulating attorneys or improving the legal profession. *See Keller*, 496 U.S. at 13-14. This Court has never addressed whether any specific expenditures are "germane." But this Court's precedents in both the bar and the union context are clear that politically and ideologically charged activities can *never* be funded through compelled dues without members' consent.

The Fifth Circuit correctly held that lobbying for changes to substantive law unrelated to the legal profession was non-germane under *Keller* and that Petitioners could not be required to associate with and financially support the Bar so long as it engaged in those activities. App. 25-29. But the court nonetheless held that the other challenged activities were nearly all germane despite their "controversial and ideological nature." App. 29-36. That holding rests on a misinterpretation of *Keller* and *Lathrop*. Those decisions—especially when read in light of subsequent decisions like *Harris* and *Janus*—make clear that compelling Petitioners to join and associate with the Bar notwithstanding its significant political and ideological activities exceeds bedrock First Amendment limitations.

The Fifth Circuit reasoned that, in *Keller*, this Court "held that state bar associations may constitutionally charge mandatory dues to 'fund activities germane' to 'the purpose[s] for which

compelled association was justified,' i.e., 'regulating the legal profession and improving the quality of legal services.'" App. 18. Acknowledging that "*Keller* did not lay down a test to determine when lobbying is germane and when it is not," the Fifth Circuit addressed that issue as a matter of first impression. App. 26. Among other things, the court stated that "advocating changes to a state's substantive law is non-germane." App. 26. But it concluded that "[l]obbying for legislation regarding the functioning of the state's courts or legal system writ large, on the other hand, is germane. So too is advocating for laws governing the activities of lawyers *qua* lawyers." App. 26.

The Fifth Circuit reached a similar conclusion with respect to the other challenged activities, such as the Bar's identity-based "diversity" initiatives; its advocacy on immigration issues; and its legal aid programs. App. 29-36. Despite acknowledging that these activities could be seen as "controversial and ideological," App. 30, the court concluded that (with limited exceptions) they were sufficiently "germane" to regulating and improving the legal profession to pass muster under *Keller*.

Properly construed, however, nothing in *Keller* grants state bar associations plenary power to spend coerced dues *on political or ideological activities* so long as they satisfy an amorphous germaneness test. To the contrary, *Keller* expressly identified "activities of an ideological nature" as an example of *non-germane* activities. As the Court explained:

> 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.

Keller, 496 U.S. at 14.

The best reading of this language is that "activities of an ideological nature" necessarily "fall outside those areas" of permissible activity. *Id.* Indeed, if a bar association had blanket authority to force its members to associate with and fund ideologically charged activities merely because they could be deemed "germane," then *Keller* would provide little meaningful protection at all.

But even if *Keller* were open to multiple interpretations on this point, the Fifth Circuit's approach is contrary to this Court's more recent precedents regarding coerced association. In *Harris*, decided in 2014, the Court explained that *Keller* "held that members of this bar *could not be required to pay the portion of bar dues used for political or ideological purposes* but that they could be required to pay the portion of the dues used for activities connected with proposing ethical codes and disciplining bar members." *Harris*, 573 U.S. at 655 (emphasis added). *Harris* eliminates any doubt that, even under *Keller*'s "germaneness" framework, objectors cannot be compelled to support activities of a "political or

ideological" nature. They are non-germane as a matter of law, full stop.

This conclusion is reflected in this Court's decision in *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005). There, the Court explained that *Keller* had "invalidated the use of the compulsory fees to fund speech on political matters" and held that "Bar or union speech with such content ... was not germane to the regulatory interests that justified compelled membership." *Id.* at 557-58. *Keller* also held, according to *Johanns*, that "making those who disagreed with [that speech] pay for it violated the First Amendment." *Id.* at 558. Thus, even if there were some ambiguity about the scope of *Keller*, later decisions such as *Harris* and *Johanns* resolve it decisively in Petitioners' favor.

Petitioners' interpretation is further buttressed by this Court's recent decision in *Janus*. There, the Court similarly distinguished between speech that is "germane to collective bargaining" and speech that "instead concerns political or ideological issues." *Janus*, 138 S. Ct. at 2473. The Court never suggested that there was a third category of speech that concerned political or ideological issues but *was* germane to collective bargaining. And the Court further emphasized that even "[u]nder *Abood*"—the principal case upon which *Keller* relied—and other pre-*Janus* precedents, compulsory organizations are "flatly prohibited from permitting nonmembers to be charged" for speech that "*concerns political or ideological issues*." *Id.* (emphasis added).

* * *

At bottom, the Fifth Circuit correctly recognized that bar members could not be compelled to support lobbying activity unrelated to the legal profession. But the Fifth Circuit's interpretation of *Keller* gives mandatory bars sweeping power to compel their members to support even highly controversial political and ideological activities so long as those activities bear some connection to legal services or the legal profession. That holding is contrary to both *Keller* and later decisions of this Court that recognize citizens' paramount First Amendment right to decline to associate with or fund ideological activities with which they disagree. Certiorari is warranted to review and reverse this decision on an important question of federal law that deprives hundreds of thousands of attorneys of bedrock First Amendment protections.

II. In the alternative, the Court should overrule *Lathrop* and *Keller*.

For the reasons set forth above, Petitioners should prevail on their First Amendment challenge to the Bar's use of coerced funds for all the political and ideological activities challenged here. But, in the alternative, if the Fifth Circuit was right that *Keller* and *Lathrop* actually permit the Bar to force Petitioners to associate with and fund these activities, then those decisions should be overruled.

Stare decisis ensures that decisions to overrule precedent are not taken "lightly." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2445 (2019) (Gorsuch, J., concurring in the judgment). "At the same time, everyone agrees

that *stare decisis* is not an inexorable command." *Id.* (cleaned up). For this reason, almost "every current Member of this Court has voted to overrule multiple constitutional precedents" in "just the last few Terms." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring in part). Moreover, this Court has recognized that *stare decisis* "'is at its weakest when [the Court] interpret[s] the Constitution.'" *Janus*, 138 S. Ct. at 2478. And it applies with the "least force of all to decisions that wrongly den[y] First Amendment rights." *Id.*

When deciding whether to overrule precedent, this Court considers several "factors": "the quality of [the case's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *Id.* at 2478-79. Analyzing these factors makes it clear that if *Keller* and *Lathrop* really do authorize coerced support for nearly all of the highly political and ideological activities challenged here, then those decisions should be overruled.

A. *Keller* and *Lathrop* are poorly reasoned, inconsistent with the Court's more recent decisions, and have wrought significant negative consequences.

As the Fifth Circuit recognized, this Court's broader First Amendment jurisprudence has "changed dramatically" "[s]ince *Lathrop* and *Keller* were decided." App. 16 n.14. Indeed, these cases are now "First Amendment 'anomal[ies].'" *Janus*, 138 S. Ct. at 2484.

This Court has already rejected *Keller*'s legal foundation. In *Janus*, the Court overruled *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), as poorly reasoned and inconsistent with broader First Amendment jurisprudence. 138 S. Ct. at 2460. The Court held that "States and public-sector unions may no longer extract agency fees from nonconsenting employees." *Id.* at 2486. That decision explicitly overturned *Abood*. *See id.* ("*Abood* was wrongly decided and is now overruled."). As the Court explained, *Abood* threatened "[f]undamental free speech rights" and "perpetuat[ed] … free speech violations" without adequate justification, especially given the existence of other "'means significantly less restrictive of associational freedoms.'" *Id.* at 2460, 2466.

Keller's holding, as construed by the Fifth Circuit, is untenable for the same reasons. As the Fifth Circuit recognized, *Keller* "rested almost exclusively on *Abood*." App. 16 n.14. *Keller* simply extended *Abood*'s reasoning to mandatory bars given the "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." *Keller*, 496 U.S. at 12. Now that *Abood* "is no longer good law," however, "there is effectively nothing left supporting [the Court's] decision in *Keller*." *Jarchow*, 140 S. Ct. at 1720 (Thomas, J., dissenting from the denial of cert.). Having a different constitutional rule for government unions and bar associations would be untenable given that *this Court itself* has recognized the close similarities between the two situations.

Lathrop also failed to give "careful consideration" to the First Amendment. *Janus*, 138 S. Ct. at 2479. Indeed, the term "First Amendment" appears only twice in the plurality's 28-page opinion. The *Lathrop* plurality relied heavily on *Railway Employees' Department. v. Hanson*, 351 U.S. 225 (1956), to conclude that compelled membership in a state bar is permissible. *See Lathrop v. Donohue*, 367 U.S. 820, 842-43 (1961) (plurality op.). But such reliance was "unwarranted." *Janus*, 138 S. Ct. at 2479. *Hanson* involved the "'bare authorization'" of private union-shop contracts, not government compulsion. *Id.* And, as this Court has already explained, *Hanson*'s First Amendment analysis was "thin," and its holding was "quite narrow." *Harris*, 573 U.S. at 631, 636. Additionally, *Hanson* primarily dealt with the Commerce Clause and substantive due process. *See Janus*, 138 S. Ct. at 2479. The First Amendment issue was "disposed of … in a single, unsupported sentence." *Harris*, 573 U.S. at 635.

Lathrop also rests on reasoning that would be unrecognizable today. There, the Wisconsin Bar adopted a mandatory membership policy because "too many lawyers have refrained or refused to join, … membership in the voluntary association has become static, and … a substantial minority of the lawyers in the state are not associated with the State Bar Association." 367 U.S. at 833 (cleaned up). Simply put, because the bar was not attracting enough voluntary membership, the state decided to coerce it. That reasoning is wholly foreign to modern First Amendment jurisprudence, which ensures robust protection for individuals who choose not to associate

with or support causes or groups with which they disagree. *See*, *e.g.*, *Janus*, 138 S. Ct. at 2466 (noting voluntary union membership in 28 states and at the federal level as a less restrictive alternative to mandatory membership).

Lathrop thus cannot be sustained under the Court's earlier reasoning. By the time *Lathrop* was decided, even Justice Douglas—*Hanson*'s author—had recognized the First Amendment dangers resulting from coerced membership and "conclu[ded] that the First Amendment *did not* permit compulsory membership in an integrated bar." *Harris,* 573 U.S. at 630; *see also Lathrop*, 573 U.S. at 885 (Douglas, J., dissenting) (noting that compulsory membership in a mandatory bar is "not compatible with the First Amendment").

Equally important, *Keller* and *Lathrop* have inflicted significant "real-world" damage on Petitioners and countless other bar members across the country. *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part). The First Amendment is "essential to our democratic form of government." *Janus*, 138 S. Ct. at 2464. This Court has accordingly worked to fulfill the First Amendment's foundational promise that individuals may not be "coerced into betraying their convictions." *Id.* Yet for more than 60 years, *Lathrop*'s indifference to the First Amendment has allowed "men and women in [the legal] profession" to be "regimented behind causes which they oppose." *Lathrop*, 367 U.S. at 884 (Douglas, J., dissenting). "Surely a First Amendment issue of this importance deserve[s] better treatment." *Harris*, 573 U.S. at 636.

In the end, "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning." *Janus*, 138 U.S. at 2464. And "lawyers have at least as much protection from such compulsion under the Constitution as [anyone else]." *Lathrop*, 367 U.S. at 877 (Black, J., dissenting). If *Keller* and *Lathrop* really permit the Bar to compel support for the highly controversial and ideological activities challenged in this case, then those decisions should be overruled to stop the associational harms the Bar has inflicted on Petitioners and to bring "greater coherence to our First Amendment law." *Janus*, 138 S. Ct. at 2484.

B. It is inherently unworkable for courts to parse out chargeable and non-chargeable activities based on an amorphous "germaneness" test.

The decision below confirms that *Keller* and *Lathrop* have "proved unworkable." *Id.* at 2486. "*Lathrop* held that lawyers may constitutionally be mandated to join a bar association that solely regulates the legal profession and improves the quality of legal services." App. 19. And "*Keller* identified that *Lathrop* did not decide whether lawyers may be constitutionally mandated to join a bar association that engages in other, nongermane activities." App. 19. But *Keller* didn't "resolve that question" either. App. 19. Instead, both *Keller* and *Lathrop* left that "'difficult question'" to the lower courts. App. 25. In remanding that issue while providing little guidance to the lower courts, this Court admitted that "[p]recisely where the line falls" between professional regulation and ideological

imposition "will not always be easy to discern." *Keller,* 496 U.S. at 15. That was an understatement.

The Fifth Circuit's opinion illustrates as much. "For activities to be germane," the court explained, "they must be 'necessarily or reasonably incurred for' th[e] purposes" of "'regulating the legal profession and improving the quality of legal services.'" App. 24. The Fifth Circuit's application of the germaneness test underscores that there is no clear and consistent way to segregate germane and non-germane expenditures in a manner that gives adequate breathing room to the important First Amendment interests at stake.

Take lobbying. The Bar's lobbying, the Fifth Circuit held, can be germane or non-germane depending on the circumstances. *See* App. 25 (the Bar's lobbying "is neither entirely germane nor wholly non-germane"). For example, lobbying to make substantive changes to Texas family law is "obviously" non-germane. App. 27. Lobbying to create "'exemption[s] regarding the appointment of *pro bono* volunteers'" is clearly germane. App. 28. And lobbying for changes to Texas trust law is germane "to the extent the changes affect lawyer's duties when serving as trustees," and non-germane "to the extent the changes do not." App. 28.

From the perspective of the First Amendment interests at stake, these distinctions are untenable. A dissenting bar member who does want to support the Bar's political agenda suffers the same burden on his or her First Amendment rights regardless of whether the legislation at issue is deemed "germane." Indeed,

in the context of public employee unions, this Court has made clear that lobbying is a paradigmatic example of a political activity that can *never* be funded through coerced dues or fees. *See Janus*, 138 S. Ct. at 2481 ("reject[ing] ... out of hand" the argument that "costs of lobbying" are chargeable); *Keller*, 496 U.S. at 15-16 (finding it "clear" that "[c]ompulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative"); *Knox v. Service Employees Intern. Union, Local 1000*, 567 U.S. 298, 323 (2012) (Sotomayor, J., concurring in the judgment) ("When a public-sector union imposes a special assessment intended to fund solely political lobbying efforts, the First Amendment requires that the union provide nonmembers an opportunity to opt out of the contribution of funds."). Yet the Fifth Circuit's interpretation of the "germaneness" test allows objectors to be forced to support significant portions of the Bar's *inherently* political lobbying activities.

The other activities challenged here further illustrate the flaws of the germaneness test. Few questions have been more divisive across the country than identity-based programs targeted at individuals of a certain race, gender, or sexual orientation. *See* App. 29 (noting that such programs "have spawned sharply divided public debate and widespread, contentious litigation"). The Bar has an abundance of such programs. *See supra* 10-13. Yet the Fifth Circuit allowed these admittedly "highly ideologically charged programs" to be funded through coerced dues because the Bar claimed they were germane to improving the quality of legal services. App. 29.

Similarly, although immigration policy remains a hotly contested topic of national debate, the Fifth Circuit allowed the Bar to use coerced dues to fund its immigration advocacy because these activities were "germane" to improving legal services for low-income individuals. App. 31-34. If the "germaneness" test is so capacious as to allow coerced dues to be used for these highly charged activities, then it provides little meaningful protection at all for the paramount First Amendment interests at stake.

At bottom, the ongoing validity of a "germaneness" First Amendment standard for bar members was always on uneasy constitutional footing but is entirely untenable in light of *Janus*. *Janus* explained that "*Abood*'s line between chargeable and nonchargeable union expenditures has prove[n] to be impossible to draw with precision." 138 S. Ct. at 2481. And subsequent efforts by this Court to clarify the line in the union context, including a test focusing on germaneness, *see Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507, 519 (1991), were unworkable and led to persistent "'give it a try'" litigation. *Janus*, 138 S. Ct. at 2481. In the end, this Court's precedents "have still not provided [lower] courts with a 'workable standard.'" *Bridge Aina Le'a LLC v. Hawaii Land Use Comm'n*, 141 S. Ct. 731, 731 (2021) (Thomas, J., dissenting from the denial of cert.).

C. *Keller* and *Lathrop* have generated no legitimate reliance interests.

Overruling *Keller* and *Lathrop* would not unduly upset any legitimate reliance interests. Nearly half of states do not have mandatory bars at all, and those

that do can easily transition to other, alternative arrangements that are "'less restrictive of associational freedoms.'" App. 23. Moreover, any potential inconvenience to the states is rendered trivial when compared to the "windfall" gained from decades of unconstitutional mandatory memberships and dues. *Janus*, 138 S. Ct. at 2486.

States certainly have an interest in regulating the legal profession, but compelled bar association membership is not necessary to advance that interest. Today, nearly twenty states regulate the legal profession directly without resort to mandatory bars. App. 23-24. Those states include some of the largest legal markets, such as New York, Illinois, Massachusetts, and Pennsylvania. *See id.* In those jurisdictions, the government regulates, licenses, and disciplines lawyers directly, without also requiring them to join, fund, or associate with an 'integrated' bar association. There is no "reasonab[e] [argument] that those states are unable to regulate their legal professions adequately." *Id.*

Nor does the absence of compulsory membership sound the death knell for bar associations. Quite the opposite. Even without *Lathrop* and *Keller*, bar associations will continue to have carte blanche to engage in any advocacy efforts of their choosing—no matter how political or ideological—so long as they can obtain voluntary support from their members for those activities. The New York State Bar Association, for example, is supported solely by voluntary memberships and contributions. Today, it boasts over 70,000 members, more than 125 employees, and more

than $20 million in annual revenue. *See* About NYSBA, History and Structure of the Ass'n, archive.nysba.org/history/; 2020 Operating Budget, bit.ly/3l5VyjB.

Furthermore, a transition away from mandatory bars is neither impossible nor overly burdensome. States can and have successfully transitioned to "'less restrictive'" alternatives. *Knox*, 567 U.S. at 310. In 2018, the largest bar in the United States, the State Bar of California, underwent such a transition. *See* Lyle Moran, *California Split: 1 Year After Nation's Largest Bar Became 2 Entities, Observers See Positive Change*, ABA Journal (Feb. 4, 2019), bit.ly/3xuSroN. After years of complaints, California split off its Bar's educational, networking, and advocacy programs into a separate, voluntary association. *See id.* The Bar, in turn, refocused on lawyer admissions and discipline. *See id.* The transition to a less-restrictive alternative has been a boon to both organizations, which can now fully pursue their distinct missions while lessening the First Amendment injury to attorneys who did not support it. *See id.*

Finally, state bars "have been on notice for years" about the First Amendment issues posed by mandatory and integrated state bars. *Janus*, 138 U.S. at 2484. Overruling *Keller* and *Lathrop* would not come as a surprise. Two years ago, the former CEO of the Arizona Bar explained that "conversations [about restructuring mandatory bars] [had been] happening across the country." Moran, *supra*. Given the rising tide of legislation and legal challenges to mandatory bars, the former CEO added that "we [in Arizona] are

doing some contingency planning and asking ourselves what we would need to do if we had to change our current model." *Id.* The National Association of Bar Executives has likewise "hosted discussions at its meetings about the changing landscape facing mandatory bars." *Id.*

In sum, mandatory state bars can and must transition to less-restrictive alternatives that prevent attorneys from being coopted into supporting causes and activities with which they disagree. Such transitions "may cause [these organizations] to experience unpleasant transition costs in the short term" and "may require [them] to make adjustments in order to attract and retain members." *Janus*, 138 S. Ct. at 2485-86. But those costs must be weighed "against the considerable windfall" that state bars have received for decades. *Id.* at 2486. In fact, under *Keller* and *Lathrop* "[i]t is hard to [even] estimate how many billions of dollars have been taken … in violation of the First Amendment." *Id.* Regardless, these "unconstitutional exactions cannot be allowed to continue indefinitely." *Id.* If *Keller* and *Lathrop* actually allow Texas to force Petitioners to associate with and fund the litany of political and ideological activities challenged here, then those decisions should be reconsidered based on first principles.

CONCLUSION

This Court should grant the petition and reverse the decision below in part.

Jeffrey M. Harris
Counsel of Record
William S. Consovoy
Cameron T. Norris
Tiffany H. Bates
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
jeff@consovoymccarthy.com

November 24, 2021

Attorneys for Petitioners

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A Opinion in the United States Court of Appeals for the Fifth Circuit (July 2, 2021). . . . . App. 1

Appendix B Order on Cross-Motions for Summary Judgment in the United States District Court for the Western District of Texas Austin Division (May 29, 2020). . . . . App. 44

Appendix C Judgment in the United States District Court for the Western District of Texas Austin Division (May 29, 2020). . . . . App. 66

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 20-50448

[Filed: July 2, 2021]

TONY K. MCDONALD; JOSHUA B. HAMMER; MARK S. PULLIAM,

Plaintiffs—Appellants,

versus

JOE K. LONGLEY, *Immediate Past President of the State Bar of Texas*; RANDALL O. SORRELS, *President of the State Bar of Texas*; LAURA GIBSON, *Member of the State Bar Board of Directors and Chair of the Board*; JERRY C. ALEXANDER, *Member of the State Bar Board of Directors*; ALISON W. COLVIN, *Member of the State Bar Board of Directors*,

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Texas
No. 1:19-CV-219

REVISED

Before SMITH, WILLETT, and DUNCAN, *Circuit Judges*.

JERRY E. SMITH, *Circuit Judge*:

Three Texas attorneys sued officers and directors of the State Bar of Texas under 42 U.S.C. § 1983. They allege that the Bar is engaged in political and ideological activities that are not germane to its interests in regulating the legal profession and improving the quality of legal services and that therefore, compelling them to join the Bar and subsidize those activities violates their First Amendment rights. We vacate in part, render in part, and remand.

I.

A.

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

---

[1] *See* Ralph H. Brock, *"An Aliquot Portion of Their Dues:" A Survey of Unified Bar Compliance with* Hudson *and* Keller, 1 TEX. TECH J. TEX. ADMIN. L. 23, 24 (2000); Leslie C. Levin, *The End of*

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

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

---

Mandatory State Bars, 109 GEO. L.J. ONLINE 1, 2 (2020). Most states have either a mandatory or voluntary bar, but California has switched to a hybrid model in which core functions are performed by a mandatory state bar, while other functions previously performed by its "sections" are now done by a separate voluntary bar association. CAL. BUS. & PRO. CODE §§ 6001, 6031.5(a), 6056.

science of jurisprudence and law reform, and the relationship of the state bar to the public; and

(7) to publish information relating to the subjects listed in Subdivision (6).

Id. § 81.012.

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

Texas law does not give the Bar carte blanche to spend the membership fees however it pleases. The dues may "be used only for administering the public purposes" outlined above. *Id.* § 81.054(d). The State Bar Act forbids the Bar from using funds to "influenc[e] the passage or defeat of any legislative measure unless the measure relates to the regulation of the legal profession, improving the quality of legal services, or the administration of justice." *Id.* § 81.034. And the Bar's Policy Manual recognizes that "[t]he expenditure

---

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

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

of funds by the State Bar of Texas is limited . . . as set forth . . . in *Keller*,"[4] a case that we discuss at length *infra*.

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

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

---

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

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

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

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

They are allocated to pay for legal services for the indigent—half for civil services and half for criminal defense. *Id.*

B.

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

1.

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

In 2019, the Bar lobbied for forty-seven bills, on subjects ranging from LGBT rights to trusts and estates, that it supposedly determined to have met those criteria. Those measures included efforts to, among other things, (1) amend the Texas Constitution's definition of marriage (SJR 9); (2) create civil unions

"as an alternative to marriage" (HB 978); (3) alter the procedures grandparents must use to obtain access to their grandchildren over parental objections (HB 575); (4) substantively amend Texas trust law (HB 2782); and (5) impose new notification requirements on parents who wish to take summer weekend possession of a child under a court order (HB 553).

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

2.

The record reflects that the Bar houses an Office of Minority Affairs ("OMA"), whose goals include "serv[ing] minority, women, and LGBT attorneys and legal organizations in Texas" and "enhanc[ing] employment and economic opportunities . . . in the

---

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

legal profession" for members of those groups. OMA sponsors "ongoing forums, projects, programs, and publications"—called "Minority Initiatives"—"dedicated to [its] diversity efforts." Though the programming is focused on furthering diversity relative to certain groups, all Texas attorneys are encouraged to participate. All told, the Bar spends about $500,000 per year on minority affairs.

3.

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

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

---

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

2019, it directed lawyers to organizations representing asylum-seekers and illegal aliens.

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

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

4.

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

C.

Recognizing that some members might object to various of its myriad initiatives, the Bar provides ways for dissenting members to make their disagreements known. Before the expenditure is approved, members can lodge their objections to either the Bar's Board of

Directors or the appropriate committee or section. *See, e.g.*, *Policy Manual* §§ 8.01.03(B), 8.01.06(B), 8.01.08(B), 8.01.09(D). Members may also express disapproval at the Bar's annual public hearing on its proposed budget. TEX. GOV'T CODE § 81.022(b)–(c). The ballot box provides another incidental check: Members vote for the Bar's officers and directors. *See generally Policy Manual* §§ 1.03, 2.01.

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

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

D.

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

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

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

The district court denied the plaintiffs' motions and granted summary judgment to the Bar. The court held that *Lathrop* and *Keller* remain binding in spite of *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), and that *Lathrop* and *Keller* foreclose the plaintiffs' contention that being forced to join the bar violates the First Amendment. The court further determined that all of the challenged Bar expenses passed constitutional muster under *Keller*, "because they further[ed] Texas's interest in professional regulation or legal-service quality improvement." Finally, the court rejected the plaintiffs' challenge to

---

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

the refund procedures, concluding that they are constitutionally adequate. The court entered a "take nothing" judgment, and the plaintiffs appeal.

II.

Because "[t]his court has a continuing obligation to assure itself of its own jurisdiction"[12] before addressing the merits, we must determine whether the Tax Injunction Act ("TIA") stripped the district court of jurisdiction. Our review is *de novo*. *Washington v. Linebarger, Goggan, Blair, Pena & Sampson, LLP*, 338 F.3d 442, 444 (5th Cir. 2003).

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

---

[12] *United States v. Pedroza-Rocha*, 933 F.3d 490, 493 (5th Cir. 2019) (per curiam), *cert. denied,* 140 S. Ct. 2769 (2020).

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

services fee are taxes or, instead, whether they are fees.

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

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

The membership fees are "classic fees." First, they are linked to the regulation of the legal profession, not

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

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

with id. § 81.054(j). But that does not outweigh the other factors.

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

III.

We first analyze the plaintiffs' claim that compelling them to join the Bar violates the First Amendment. The Supreme Court has twice opined on whether mandatory bars violate the First Amendment. We discuss those cases, *Lathrop v. Donohue*, 367 U.S. 820 (1961) (plurality), and *Keller v. State Bar of California*, 496 U.S. 1 (1990), to determine whether the plaintiffs' claim survives.[14]

---

[14] Since *Lathrop* and *Keller* were decided, the Supreme Court's First Amendment caselaw has changed dramatically. Both cases drew from the then-existing jurisprudence on the First Amendment implications of mandatory union dues, but that jurisprudence has evolved. *Keller*, in particular, rested almost exclusively on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which the Court overruled in *Janus*, 138 S. Ct. at 2486. Those changes, and *Janus* in particular, cast doubt on *Lathrop* and *Keller*. *See Jarchow*, 140 S. Ct. at 1720 (Thomas, J., dissenting from denial of certiorari). *Contra Janus*, 138 S. Ct. at 2498 (Kagan, J., dissenting) (contending that *Janus* did not call *Keller* into question).

But "the Supreme Court abrogates its cases with a bang, not a whimper, and it has never revisited" either *Lathrop* or *Keller*. *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 405 (5th Cir. 2020). So, despite their "increasingly wobbly, moth-eaten foundations," *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (cleaned up), *Lathrop* and *Keller* remain binding. Because they have "direct application

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

The Court rejected the plaintiff's claim for two reasons. First, it noted that the plaintiff's "compulsory enrollment imposes only the duty to pay dues"; his involuntary membership did not require any other participation. *Id.* at 827–28. Second, the Court found that the bar's activities at issue were almost entirely limited to "elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State" *Id.* at 843. Though that bar was engaged in legislative activity, that activity was "not the major activity of the State Bar," *id.* at 839, and, furthermore, it was limited to bills pertinent to the legal profession for which there was "substantial unanimity," *id.* at 834–38.

After deciding that compelling the plaintiff to pay dues to such a bar association did not violate the

---

in [this] case," we apply them, "leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989). With that said, *Lathrop*'s and *Keller*'s weakened foundations counsel against expanding their reach as we consider questions they left open.

freedom of *association*, the *Lathrop* Court, noting the paucity of the record, declined to decide whether "the use of his money for causes which he opposes" violated his right to *free speech*. *Id.* at 845. Three decades later, *Keller* reached that issue.

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

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

---

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

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

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

A.

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

---

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

1.

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

For groups that engage in expressive association, the "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Roberts*, 468 U.S. at 623. Those groups have a right to restrict their membership, because the membership is the message.[19] Individuals

---

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

[18] *Roberts*, 468 U.S. at 622; *see also NAACP v. Alabama* ex rel. *Patterson*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . .").

[19] *See Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 680 (2010) ("Who speaks . . . colors what concept is conveyed.").

have an analogous right to "eschew association for expressive purposes." *Janus*, 138 S. Ct. at 2463. That right is part and parcel of the "cardinal constitutional command" that the government may not compel "individuals to mouth support for views they find objectionable." *Id.*[20]

Based on that, compelling a lawyer to join a bar association engaged in non-germane activities burdens his or her First Amendment right to freedom of association. Such a bar association would invariably be engaged in expressive activities. Even bar associations that engage in only germane activities undertake some expressive activities; for example, proposing an ethical rule expresses a view that the rule is a good one, and commenting on potential changes to the state's court system, as the bar in *Lathrop* did, expresses a view that such a reform is a good or bad idea.

Bar associations that also engage in non-germane activities will almost certainly be engaging in additional expressive activities that "support . . . a particular conception of the good life or controversial ideology of the good society." *Id.* And, when a bar association does so, part of its expressive message is that its members stand behind its expression. The membership is part of the message. Compelling

---

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

membership, therefore, compels support of that message. If a member disagrees with that "conception of the good life or controversial ideology," then compelling his or her membership infringes on the freedom of association. *Id.*

2.

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

Compelled membership in a bar association that is engaged in only germane activities survives that scrutiny. We know that both because *Lathrop* held that compelled membership in such a bar did not violate freedom of association and because of the more recent statement in *Harris v. Quinn*, 573 U.S. 616, 655–56 (2014): States "have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices" as well as of regulating the legal protection and improving the quality of legal services. *Id.* And, for that reason, *Keller*, which allowed

compelled subsidization[21] of germane activities, "fits comfortably within the [exacting scrutiny] framework." *Id.* at 655.

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

Moreover, there are other "means significantly less restrictive of associational freedoms" to achieve the state's legitimate interests. *Knox*, 567 U.S. at 310. Almost twenty states—including some of the largest legal markets, such as New York, Illinois, and Pennsylvania—directly regulate the licensing and

---

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

disciplining of attorneys. *See* Brock, *supra*, at 24 n.1 (not listing those states as having mandatory bars).

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

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

B.

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

Keller said mandatory dues cannot be used to "fund activities of an ideological nature *which fall outside of those areas of activity*." *Id.* (emphasis added). Though later decisions have framed *Keller* somewhat as these plaintiffs do,[22] none of them purported to alter *Keller*'s

---

[22] *See*, *e.g.*, *Harris*, 573 U.S. at 655 (describing *Keller* as holding "that members of this bar could not be required to pay the portion of bar dues used for political or ideological purposes but that they could be required to pay the portion of the dues used for activities connected with proposing ethical codes and disciplining bar members"); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 558

standard, which contemplates that some political or ideological activities might be germane. With that in mind, we turn to "[t]he difficult question" of determining whether each respective challenged activity is germane. *Id.*

1.

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

(2005) ("[W]e have invalidated the use of the compulsory fees to fund speech on political matters." (citing *Keller*)); *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 231 (2000) ("[L]awyers could not, however, be required to fund the bar association's own political expression." (citing *Keller*, 496 U.S. at 16)).

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

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

---

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

> The State Bar, through its Board of Governors or Executive Committee, has taken a formal position with respect to a number of questions of legislative policy. These have included such subjects as an increase in the salaries of State Supreme Court justices; making attorneys notaries public; amending the Federal Career Compensation Act to apply to attorneys employed with the Armed Forces the same provisions for special pay and promotion available to members of other professions; improving pay scales of attorneys in state service; court

Applied to the Bar's 2019 legislative program, for example, that means that some lobbying was germane, but most was not. Many of the bills the Bar supported relate to substantive Texas law and are wholly disconnected from the Texas court system or the law governing lawyers' activities. For example, the Bar's lobbying to amend the Texas Constitution's definition of marriage and create civil unions is obviously non-germane.[24] The Bar's presumably less-controversial

---

> reorganization; extending personal jurisdiction over nonresidents; allowing the recording of unwitnessed conveyances; use of deceased partners' names in firm names; revision of the law governing federal tax liens; law clerks for State Supreme Court justices; curtesy and dower; securities transfers by fiduciaries; jurisdiction of county courts over the administration of inter vivos trusts; special appropriations for research for the State Legislative Council.

Lathrop, 367 U.S. at 836–37 (citations omitted). Those positions, with the possible exceptions of "curtesy and dower," "extending personal jurisdiction over nonresidents," and "federal tax liens," all relate to the state's court system or the activities of lawyers. That type of lobbying is germane.

In addition to its formally taken positions, the Wisconsin bar set up a group to address federal legislation affecting "the practice of law, or lawyers as a class, or the jurisdiction, procedure and practice of the Federal courts and other Federal tribunals, or creation of new Federal courts or judgeships affecting this state, and comparable subjects." *Id.* at 838. Announcing positions on those topics would also pass the germaneness test.

[24] The Bar contends that its lobbying was germane because "seeking to amend or repeal unconstitutional laws benefits the legal profession and improves the quality of legal services because it reduces the risk that lawyers, their clients, members of the public, or government officials will rely on laws that judicial

proposed substantive changes to Texas family law are equally non-germane. The Bar's lobbying for the "creation of an exemption regarding the appointment of *pro bono* volunteers," on the other hand, is germane, because it relates to the law governing lawyers. Its lobbying for changes to Texas trust law is germane to the extent the changes affect lawyers' duties when serving as trustees, and non-germane to the extent the changes do not.

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

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

---

decisions have rendered invalid." But *Keller* does not afford the Bar a roving commission to advocate for legislation to "amend or repeal unconstitutional laws" or "clean up legal texts."

association engaging in it violates their freedom of association.

2.

The Bar's various diversity initiatives through OMA, though highly ideologically charged, are germane to the purposes identified in *Keller*. The plaintiffs contend that OMA's diversity initiatives are "highly ideological," because they support the approach of "having programs targeted at certain individuals based on their race, gender, or sexual orientation" and "people of good faith . . . disagree sharply about the merits of such programs." The plaintiffs are certainly right on that point—affirmative action and other identity-based programs, in contexts ranging from contract bidding to higher education, have spawned sharply divided public debate and widespread, contentious litigation.[25] Legislation has been introduced in Congress to address a number of race-based issues,[26] and litigation remains pending

[25] *See, e.g.*, *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 572 U.S. 291 (2014); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

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

challenging several diversity-justified initiatives.[27] In other words, that issue is a "sensitive political topic[ ]" that is "undoubtedly [a] matter[] of profound value and concern to the public." *Janus*, 138 S. Ct. at 2476 (cleaned up).

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

The germaneness test does not require that there be unanimity on the Bar's position on what best regulates the legal profession—that is typically for the Bar to decide.[28] To take a non-controversial example, the Bar's

---

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

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

advocating a particular ethical rule is germane no matter how strenuously an attorney might disagree with its propriety. The same principle applies here. In sum, the diversity initiatives are "activities of an ideological nature which fall [in]side" the areas identified by *Keller*, 496 U.S. at 14. Given that those activities are germane under *Keller*, they are not a basis for granting summary judgment for the plaintiffs.[29]

3.

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

Such initiatives also aid Texas courts, because decreasing the number of *pro se* litigants reduces the administrative burdens those litigants place on Texas courts. Moreover, legal aid and *pro bono* efforts help lawyers to "fulfill [their] ethical responsibility to

---

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

provide public interest legal service."[30] The Supreme Court has suggested that funding legal aid and encouraging *pro bono* service are permissible ends for a mandatory bar to pursue,[31] and our sister circuits appear to agree.[32]

The plaintiffs' main complaint with those programs seems to be that they disagree with the Bar's choice of legal aid organizations to support, particularly in the context of immigration. Specifically, they contend that facilitating representation of aliens "is *itself* a highly 'substantive' and 'ideological activity'" that "squarely aligns the Bar with one view of a politically charged

---

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

[31] *See Lathrop*, 367 U.S. at 840–43 (observing most of the Wisconsin Bar's political activities, which included support for legal aid, "serve the function . . . of elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State").

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

national debate." But a "lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities."[33] It follows that there is no reason to believe that facilitating lawyers' representation of aliens in navigating immigration laws constitutes an endorsement of any particular viewpoint about those statutes. And structurally, in cases where the federal government is a party, it is unsurprising that only one side of that "v" needs *pro bono* assistance.

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

AJC is more complicated, because unlike LAD, the resources page, and the legal services fee, AJC's activities are not *entirely* cabined to making legal representation more available to low-income Texans.

---

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

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

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

4.

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

The Bar's annual convention and CLE offerings help regulate the legal profession and improve the quality of legal services. Both programs assist attorneys in

---

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

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

fulfilling requirements designed to ensure that they maintain the requisite knowledge to be competent practitioners. *See, e.g.*, TEX. DISCIPLINARY R. PRO. CONDUCT 1.01 cmt. 8. The plaintiffs' complaint is that some of the convention panels and CLE courses are ideologically charged. Probably so. But that is not the test under *Keller*. And moreover, any objectionable CLE and annual convention offerings are only one part of a large, varied catalogue, and the Bar includes disclaimers indicating that it is not endorsing any of the views expressed. That is enough to satisfy *Keller*.[37]

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

---

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

expressed therein. That structure suffices under *Keller*.[38]

* * * * *

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

IV.

Assuming, *arguendo*, that the plaintiffs *can* be required to join the Bar, compelling them to subsidize the Bar's non-germane activities violates their freedom of speech.[39] Given that the Bar is engaged in non-

---

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

[39] "This alternative holding is not dicta. In this circuit, 'alternative holdings are binding precedent and not *obiter dicta*.'" *Ramos-*

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

V.

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

Portillo v. Barr, 919 F.3d 955, 962 n.5 (5th Cir. 2019) (quoting *Whitaker v. Collier*, 862 F.3d 490, 496 n.14 (5th Cir. 2017)).

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

[41] Even if the plaintiffs cannot be compelled to join the Bar because that violates their freedom of association, the adequacy of the Bar's procedures is still relevant. As we clarify today in No. 20-30086, *Boudreaux v. Louisiana State Bar Association*, the inability to identify non-germane expenses is itself a constitutional injury, entitling the plaintiffs to relief. Moreover, because the plaintiffs *can* be compelled to join the Bar if it ceases its non-germane activities, per *Lathrop*, ensuring the Bar has adequate procedures to notify the plaintiffs, and others, that some activities might be non-germane is important.

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

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

---

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

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

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

But, though the Bar may use opt-out procedures, its current procedures are constitutionally inadequate. The Bar asserts that *Keller* did not hold that *Hudson*'s

---

[43] *State Oil*, 522 U.S. at 20 (quotation marks omitted).

procedures are constitutionally necessary. That is correct as far as it goes: *Keller* left open whether "one or more alternative procedures would likewise satisfy" the Bar's obligation. *Keller*, 496 U.S. at 17. But *Janus* and *Knox* have subsequently made clear that procedures even more protective than those described in *Hudson* (i.e., opt-in procedures) are necessary in the closely related union context.[44] In the absence of *Keller*'s holding that *Hudson*'s procedures are sufficient, we would be bound to follow the Supreme Court's directive in those cases and require opt-in procedures. But of course, *Keller*'s indication that *Hudson*'s procedures are sufficient remains binding. Therefore, given that *Keller* indicated that *Hudson*'s procedures are sufficient, and *Janus* held even more protective procedures are necessary, *Hudson*'s procedures are *both* necessary and sufficient.[45]

---

[44] "Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, *unless the employee affirmatively consents to pay*." *Janus*, 138 S. Ct. at 2486 (emphasis added); *see also Knox*, 567 U.S. at 312–13 (explaining that the cases approving opt-out procedures were more "historical accident" than "careful application of First Amendment principles"); *id.* at 314 ("By authorizing a union to collect fees from nonmembers and permitting the use of an opt-out system for the collection of fees levied to cover nonchargeable expenses, our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate.").

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

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

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

---

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

denied, the objecting attorney is out of luck. *Hudson* requires more than that.

VI.

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

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

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

The plaintiffs have plainly satisfied the first factor. They are not just likely to succeed on the merits; they have succeeded on the merits already. The remaining factors also support granting the preliminary injunction. First, "[t]he loss of First Amendment freedoms, for even minimal periods of time unquestionably constitutes irreparable injury." *Elrod*

v. Burns, 427 U.S. 347, 373 (1976) (plurality). Next, "injunctions protecting First Amendment freedoms are always in the public interest." *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013) (quotation marks omitted). Finally, the balance of equities weighs heavily in plaintiffs' favor because the only harm to the Bar is the inability to extract mandatory dues from the plaintiffs in violation of the First Amendment, which is really "no harm at all." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006).

* * *

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

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

CAUSE NO. 1:19-CV-219-LY

[Filed: May 29, 2020]

TONY K. MCDONALD, JOSHUA B.)
HAMMER, AND MARK S. PULLIAM,)
)
PLAINTIFFS,)
)
V.)
)
RANDALL O. SORRELS, LARRY P.)
MCDOUGAL, JOE K. LONGLEY,)
LAURA GIBSON, BRITNEY E. HARRISON,)
ANDRES E. ALMANZAN, JERRY C.)
ALEXANDER, KATE BIHM,)
REBEKAH STEELY BROOKER,)
LUIS M. CARDENAS, ALISON W. COLVIN,)
DEREK COOK, ROBERT D. CRAIN,)
CHRISTINA DAVIS, ALISTAIR B.)
DAWSON, LESLIE DIPPEL, MICHAEL)
DOKUPIL, VICTOR FLORES,)
JARROD T. FOERSTER, LAURA GIBSON,)
JOHN CHARLES GINN, SHARI)
GOLDSBERRY, MARC E. GRAVELY,)
AUGUST W. HARRIS III, JOE “RICE”)
HORKEY, JR., WENDY-ADELE)

HUMPHREY, MICHAEL K. HURST, NEIL D.)
KELLY, DAVID C. KENT, ALDO D.)
LOPEZ, YOLANDA CORTES MARES,)
ROBERT E. MCKNIGHT, JR., STEPHEN J.)
NAYLOR, AMIE S. PEACE, SALLY)
PRETORIUS, CARMEN M. ROE,)
ADAM T. SCHRAMEK, DAVID K SERGI,)
ALAN E. SIMS, DINESH H. SINGHAL,)
JASON SMITH, SANTOS VARGAS, G.)
MICHAEL VASQUEZ, K. NICOLE VOYLES,)
AMY WELBORN, JAMES WESTER, JAMES)
C. WOO, AND DIANE ST. YVES,)
IN THEIR OFFICIAL CAPACITIES AS)
MEMBERS OF THE BOARD OF)
DIRECTORS OF THE STATE BAR OF)
TEXAS,)
)
DEFENDANTS.)
)

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Before the court in the above-styled cause are the parties' cross-motions for summary judgment, responses, replies, *amicus* briefs, and exhibits.[1] On

[1] Plaintiffs' Motion for Partial Summary Judgment on Liability filed March 25, 2019 (Doc. #6); Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment on Liability filed May 13, 2019 (Doc. #33); Plaintiffs' Reply in Support of Motion for Partial Summary Judgment on Liability filed May 31, 2019 (Doc. #63); Defendants' Cross-Motion for Summary Judgment filed May 13, 2019 (Doc. #35); Plaintiffs' Response in Opposition to Defendants' Cross-Motion for Summary Judgment filed May 31, 2019 (Doc.

August 1, 2019, the court held a hearing on the motions at which all parties were represented by counsel. Having considered the motions, responses, replies, *amicus* briefs, the parties' summary-judgment proof, argument of counsel, post-hearing submissions, case file, and applicable law, the court renders the following order.

Jurisdiction and venue

Federal courts have original jurisdiction over "all civil actions arising under the Constitution, laws or treaties of the United States." 28 U.S.C. § 1331. This action arises under the First and Fourteenth Amendments to the United States Constitution and is brought pursuant Section 1983 of Title 42 of the United States Code. This court has subject-matter jurisdiction under Sections 1331 and 1343 of Title 28 of the United States Code, and venue is proper in this district because at least one of the defendants resides in this district and all defendants reside in the State of Texas. *See* 28 U.S.C. § 1391(b)(l).

#65); Defendants' Reply in Support of Cross-Motion for Summary Judgment filed June 18, 2019 (Doc. #75); Brief *Amicus Curiae* of Goldwater Institute in Support of Plaintiffs' Motion for Preliminary Injunction (Doc. #39); Brief *Amicus Curiae* Texas Attorney General Ken Paxton in Support of Plaintiffs' Motion for Partial Summary Judgment on Liability filed May 14, 2019 (Doc. #40); Texas Legal Ethics Counsel's *Amicus Curiae* Brief filed May 17, 2019 (Doc. #49); Brief *Amicus Curiae* of Former Presidents of the State Bar of Texas, Forms Chairs of the Texas Bar College, and Former Chairs of the State Bar of Texas Council of Chairs filed May 20, 2019 (Doc. #53); Brief of *amicus Curiae* Texas Access to Justice Commission filed May 20, 2019 (Doc. #54); and Brief *Amici Curiae* of Concerned Lawyers of Color (Doc. #84).

Factual background

Texas requires all lawyers licensed to practice in the state to enroll in, and pay annual membership fees to, a statewide bar. *See* Tex. Gov't Code §§ 81.051, 81.054, 81.102. The Texas Legislature established the State Bar of Texas (the "Bar") in 1939 as "an administrative agency of the Judicial Department of the State." State Bar Act § 2, *reprinted in* 2 Tex. B.J. 128, 128 (1939). The operations and responsibilities of the Bar are governed by statute, along with the Bar's internal rules and policies. The State Bar Act (the "Act") mandates that all attorneys licensed to practice law in Texas be members of the Bar. The Bar "is a public corporation and an administrative agency of the judicial department" of Texas government and is subject to "administrative control" by the Texas Supreme Court. *See* Tex. Gov't Code § 81.011(a), (c).

The Act specifies the Bar's purposes as follows:

(1) to aid the courts in carrying on and improving the administration of justice;

(2) to advance the quality of legal services to the public and to foster the role of the legal profession in serving the public;

(3) to foster and maintain on the part of those engaged in the practice of law high ideals and integrity, learning, competence in public service, and high standards of conduct;

(4) to provide proper professional services to the members of the state bar;

(5) to encourage the formation of and activities of local bar associations;

(6) to provide forums for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform, and the relationship of the state bar to the public; and

(7) to publish information relating to the subjects listed in Subdivision (6).

Id. at § 81.012.

The Bar's members elect the Bar's officers and the majority of the members of the Bar's Board of Directors. *Id.* at §§ 81.019(b), 81.020(b). Almost half of the Bar's annual revenue comes from membership fees, and the Texas Supreme Court and the Bar's Board of Directors share responsibility for setting the fee amount. *See id.* at §§ 81.022, 81.054(a). The Board may increase fees by up to 10% once every six years. *Id.* at § 81.022(a-4). All other fee increases are subject to a referendum vote by the Bar's members. *Id.* at § 81.022(a-3). The annual membership fees are currently $68 for active members licensed less than three years; $148 for active members licensed between three and five years; $235 for active members licensed for at least five years; and $50 for inactive members. Members 70 years of age and older are exempt from paying membership fees. The Bar has not raised annual membership fees since 1991, and remains the lowest among the states with integrated bars.[2]

[2] An integrated bar is defined as an official state organization requiring membership and financial support of all attorneys

In 2003, the Texas Legislature amended the Act to require non-exempt Texas lawyers to pay a $65 legal-services fee in addition to the membership fee. *Id* at. § 81.054(c)-(d), (j)-(k). The Bar does not receive or control that fee. *Id.* at § 81.054(c)-(d). The Texas Supreme Court distributes the legal-services fees to the Texas Comptroller, who allocates half to the Supreme Court Judicial Fund to fund civil legal services for the indigent and the other half to the Fair Defense Account of the state's general-revenue fund for indigent-criminal-defense programs. *Id.* at § 81.054(c).

The Texas Legislature periodically conducts "sunset" reviews of the Bar to determine "whether a public need exists" for the Bar's continued existence, including "whether less restrictive or alternative methods of performing any function that the agency performs could adequately protect or provide service to the public." Tex. Gov't Code § 325.011. The Bar has undergone sunset review four times, the last in 2017, when the Texas Legislature voted to continue the Bar's existence until the next sunset review in 2029. *See* S.B. No. 302 (2017).

Plaintiffs Tony K. McDonald and Joshua B. Hammer are attorneys licensed to practice law in Texas and active members of the Bar. Plaintiff Mark S. Pulliam is an inactive member of the Bar. Plaintiffs filed suit against Defendants, all of whom are members

---

admitted to practice in that jurisdiction. It has two facets which set it apart from a voluntary bar association-official organization by authority of the state and compulsory membership. *See* Tex. Gov't Code § 81.102.

of the State Bar of Texas Board of Directors, in their official capacities only, seeking declaratory and injunctive relief to remedy alleged unconstitutional coerced speech and association in violation of the First and Fourteenth Amendments of the United States Constitution. Plaintiffs assert that the mandatory requirement that attorneys in Texas must join, associate with, and pay dues to the Bar violates their First Amendment right to freedom of speech and association. *See* 42 U.S.C. § 1983. Plaintiffs seek a declaratory judgment that Texas law compelling them to join, associate with, and financially support the Bar violates the First and Fourteenth Amendments. *See* 28 U.S.C. § 2201. Plaintiffs further seek attorney's fees and costs. *See* 42 U.S.C. § 1988.

Plaintiffs' motion for partial summary judgment on liability asserts that the current structure of the Bar violates their First Amendment rights in three ways: (1) by compelling membership in, and financial support for, the Bar in violation of Plaintiffs' First Amendment right to freedom of speech and association; (2) by compelling Plaintiffs to support the Bar's activities beyond attorney regulation in violation the First Amendment; and (3) and by implementing procedures for identifying non-chargeable expenses in violation the First Amendment. Defendants' cross-motion for summary judgment on all of Plaintiffs' claims asserts that Plaintiffs have failed to raise any plausible constitutional violations.

Arguments

Plaintiffs argue that under *Janus v. American Federation of State, County, & Municipal Employees,*

138 S. Ct. 2448 (2018), an organization that collects compelled dues must adopt procedures under which members opt in to supporting political and ideological causes, rather than charging everyone the fee by default and expecting objectors to opt out. Defendants argue that *Lathrop v. Donohue,* 367 U.S. 820 (1961) and *Keller v. State Bar of California,* 496 U.S. 1 (1990), control, holding that mandatory bar membership and mandatory bar fees do not violate the First Amendment. Defendants further assert that Plaintiffs' reliance on *Janus* is misplaced, because *Janus's* reassessment of whether a state's interests in maintaining labor peace and avoiding nonmember free riding on unions' collective-bargaining efforts justify compelled payments from nonmembers does not undermine the United States Supreme Court's endorsement of the state interests in professional regulation and legal-service quality served by integrated bars.

Summary-judgment review

"Summary judgment is required when 'the movant shows that there is no dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Trent v. Wade,* 776 F.3d 368, 376 (5th Cir. 2015) (quoting FED. R. CIV. P. 56(a)). "A genuine dispute of material fact exists when the 'evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Nola Spice Designs, LLC v. Haydel Enters., Inc.,* 783 F.3d 527, 536 (5th Cir. 2015) (quoting *Anderson v. Liberty Lobby,* 477 U.S. 242, 248 (1986)). "The moving party 'bears the initial responsibility of informing the district court of the basis for its motion,

and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.'" *Id.* (quoting *EEOC v. LHC Grp., Inc.,* 773 F.3d 688, 694 (5th Cir. 2014)). A fact is material if "its resolution could affect the outcome of the action." *Aly v. City of Lake Jackson,* 605 Fed. App'x 260, 262 (5th Cir. 2015). "If the moving party fails to meet [its] initial burden, the motion [for summary judgment] must be denied, regardless of the nonmovant's response." *Pioneer Exploration, LLC v. Steadfast Ins. Co.,* 767 F.3d 503 (5th Cir. 2014).

"When the moving party has met its Rule 56(c) burden, the nonmoving party cannot survive a summary judgment motion by resting on the mere allegations of its pleadings." *Duffie v. United States*, 600 F.3d 362, 371 (5th Cir. 2010). The nonmovant must identify specific evidence in the record and articulate how that evidence supports that party's claim. *Willis v. Cleco Corp.*, 749 F.3d 314, 317 (5th Cir. 2014). "This burden will not be satisfied by 'some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence.'" *Boudreaux v. Swift Transp. Co., Inc.*, 402 F.3d 536, 540 (5th Cir. 2005). In deciding a summary-judgment motion, the court draws all reasonable inferences in the light most favorable to the nonmoving party. *Darden v. City of Fort Worth*, 866 F.3d 698, 702 (5th Cir. 2017).

On cross motions for summary judgment, the court reviews each party's motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party, and determining for each side

whether judgment may be rendered in accordance with the Rule 56 standard. *Amerisure Ins. Co. v. Navigators Ins. Co.,* 611 F.3d 299, 304 (5th Cir. 2010) (internal citation and quotation omitted); *Shaw Constr. v. ICF Kaiser Engrs., Inc.,* 395 F.3d 533 fn. 8 & 9 (5th Cir. 2004).

Analysis

Counts One and Two

In Counts One and Two of Plaintiffs' First Amended Complaint, Plaintiffs assert that compelling membership in and financial support for the Bar and compelling Plaintiffs to support the Bar's activities beyond attorney regulation violates Plaintiffs' First Amendment right to freedom of speech and association. *See Janus,* 138 S. Ct. at 2463-64. Plaintiffs acknowledge that the United States Supreme Court upheld compulsory state bars in *Keller,* but they argue that the Court did so only by relying heavily on *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), which Plaintiffs argue the Court explicitly overruled in *Janus. See* 138 S. Ct. at 2478-79. Plaintiffs argue in the alternative that even if *Keller* remains good law, nothing in *Keller* authorizes a state to compel bar membership when the bar engages in political or ideological activities.

Defendants argue that *Lathrop* and *Keller* foreclose Plaintiffs' claims by squarely holding that the First Amendment permits states to adopt integrated bars supported by compulsory membership fees to further the state's interests in "regulating the legal profession or 'improving the quality of the legal service available

to the people of the State.'" *Keller,* 496 U.S. at 14 (quoting *Lathrop,* 367 U.S. at 843). Defendants further argue that contrary to Plaintiffs' contentions, *Janus* did not overrule *Keller,* and integrated bars may engage in activities that some members may view as "political or ideological" in nature so long as they advance the legitimate state interests recognized in *Keller*.

In *Lathrop,* the plaintiff claimed that Wisconsin's establishment of an integrated bar with compulsory membership fees violated his First Amendment rights of freedom of association and free speech. 367 U.S. at 821-23. The Supreme Court concluded that Wisconsin's integrated bar did not violate the First Amendment's guarantee of freedom of association, reasoning that a state may constitutionally require attorneys to pay dues to a state bar "in order to further the State's legitimate interests in raising the quality of professional services," even when an integrated bar "engages in some legislative activity," as long as "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." *Id.* at 843. Concluding that the record was insufficiently developed to provide a "sound basis" for deciding whether the integrated bar violated the plaintiffs right to free speech, the *Lathrop* Court declined to resolve that issue. *Id.* at 845-48.

However, *Keller* did resolve the free-speech issue left open by *Lathrop*. The *Keller* plaintiffs claimed that the integrated California State Bar's "use of their compulsory dues to finance political and ideological

activities . . . with which they disagree violate[d] their rights of free speech." 496 U.S. at 9. The Court held that lawyers "may be required to join and pay dues to the State Bar," and articulated "the scope of permissible dues-financed activities in which the State Bar may engage." *Id.* at 4. The Court concluded that integrated bars "are justified by the State's interest in regulating the legal profession and improving the quality of legal services." *Id.* at 13. *Keller* held that state bars may use mandatory membership fees to "fund activities germane to those goals," but may not use mandatory fees to "fund activities of an ideological nature which fall outside of those areas of activity." *Id.* at 14. Therefore, under *Keller,* integrated state bars' use of membership fees complies with the First Amendment if the "expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" *Id.* (quoting *Lathrop,* 367 U.S. at 843). *Keller* acknowledges that determining on which side of that constitutional line a particular expenditure falls "will not always be easy," but the Court explained that "the extreme ends of the spectrum are clear": although mandatory fees may not be used for advancing "gun control or nuclear weapons freeze" initiatives, they may be used for "activities connected with disciplining members of the Bar or proposing ethical codes for the profession." *Id.* at 15-16.

Janus did not disturb the binding holdings of *Lathrop* and *Keller*.[3] *Janus* addressed First Amendment issues applicable only to public-sector employees. 38 S. Ct. at 2478. The Court held that arrangements whereby a governmental entity and a labor organization agree to require government employees to pay fees that are used by the union to negotiate how governmental funds are spent, and in what amounts, implicate the First Amendment in ways distinct from agency fees in the private sector. Public-sector fees involve "the government . . . compel[ling] a person to pay for another party's speech," on matters involving "the budget of government" and "the performance of government services." *Id.* at 2467, 2473. The Court also indicated that public unions raise particular First Amendment concerns that are not raised by integrated state bars, noting that collective bargaining by public unions has a special "political valence" that the Court in *Abood* did not appreciate at the time. *Janus,* 13 8 S. Ct. at 2483. Private-sector agency fees raise no such issues. Like *Keller* and *Lathrop,* this case involves mandatory membership in a bar association, not a public-sector union.

Although Plaintiffs contend that *Keller* relies heavily on *Abood,* the Supreme Court decided *Keller* principally in the context of rejecting the contention

---

[3] The United States District Court for the Eastern District of Louisiana also has concluded that *Janus* did not overrule *Lathrop* and *Keller*. *See Boudreaux v. La. State Bar Ass'n,* No. 2:19-cv-11962, slip op. at 55-56 (E.D. La. Jan. 13, 2020), *appeal docketed.* No. 20-30086 (5th Cir. Feb. 10, 2020). *See also Fleck v. Wetch,* 937 F.3d 1112, 1118 (8th Cir. 2019), *cert. denied,* 140 S. Ct. 1294 (Mar. 9, 2020).

that the California State Bar's "status as a regulated state agency exempted it from any constitutional constraints on the use of its dues." 496 U.S. at 10. *Keller* merely drew an "analogy" between integrated state bars and labor unions. *Id* at 12. *Janus's* reassessment of the state interests that *Abood* concluded justified agency fee arrangements did not undermine *Keller's* recognition of the very different state interests in professional regulation and legal-service quality served by integrated bars. *See id.* at 13-14.

Moreover, the majority opinion in *Janus* did not address *Keller* or respond to the dissent's assertion that *Keller* was a "case . . . involving compelled speech subsidies outside the labor sphere [that] today's decision does not question." 138 S. Ct. at 2498 (Kagan, J., dissenting). *Keller* and *Lathrop* directly control under the facts of this case, and therefore bind this court. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.,* 490 U.S. 477,484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

Additionally, the Supreme Court's decision in *Harris v. Quinn,* 573 U.S. 616 (2014), confirms that *Keller* fits within the "exacting scrutiny" framework applied in *Janus*. *Harris* applied "exacting scrutiny" in holding that states could not constitutionally charge non-public employees agency fees. *See id.* at 648-51. As later explained by *Janus,* exacting scrutiny requires

that a compelled subsidy "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Janus*, 138 S. Ct. at 2465 (quoting *Knox v. Serv. Emps. Int'l Union*, 567 U.S. 298, 310 (2012)). *Harris* explicitly considered whether the exacting-scrutiny framework would disturb its prior holding in *Keller* that states may require lawyers to pay fees to fund bar activities furthering the "State's interest in regulating the legal profession and improving the quality of legal services." *Harris*, 573 U.S. at 655 (quoting *Keller*, 496 U.S. at 14). The Court answered no, holding that *Keller* "fits comfortably within [the exacting-scrutiny] framework" applied in *Harris* and that its decision in *Harris* was "wholly consistent with [the Court's] holding in *Keller*." *Id.* at 656. Thus, the court finds no basis for holding that *Janus* overrules *Keller*.

Having determined that *Keller* applies, the court will next address whether the Bar's challenged activities meet the *Keller* standard. *Keller* held that integrated bars "are justified by the State's interest in regulating the legal profession and improving the quality of legal services available to the people of the State," *id.* at 13; thus, state bars may use mandatory membership fees to "fund activities germane to those goals," so long as they do not "fund activities of an ideological nature which fall outside of those areas of activity." *Id.* at 14. The question is not whether the challenged activity is "political or ideological" in the abstract, but whether the challenged activity is "germane to" the state interests that justify integrated bars' establishment of "regulating the legal profession and improving the quality of legal services." *Id.* at 13;

see also United States v. United Foods, Inc., 533 U.S. 405, 414 (2001) (under *Keller*, lawyers can "be required to pay moneys in support of activities . . . germane to the reason justifying the compelled association"); *Kingstad v. State Bar of Wis.*, 622 F .3d 708, 716 (7th Cir. 2010) (question is "whether challenged expenditures . . . are reasonably related to the constitutionally relevant purposes of [the mandatory] association").

"The purpose of the State Bar of Texas is to engage in those activities enumerated at [Section] 81.012 of the State Bar Act. The expenditure of funds by the State Bar of Texas is limited both as set forth at [Section] 81.034 of the State Bar Act and in *Keller*." Board Policy Manual § 3.14.01 ("Policy Manual"). The court finds that the following Bar activities Plaintiffs challenge comply with the *Keller* standard because they further Texas's interest in professional regulation or legal-service quality improvement.

Lobbying. Members of the Bar's voluntary, subject-matter sections coordinate all lobbying activities without compensation from the Bar for their efforts. The Bar follows a detailed, multi-step process to ensure that its legislative activities comply with the requirements of the State Bar Act and *Keller*. In addition, the Bar maintains a policy against engaging in legislative activities that "carry the potential of deep philosophical or emotional division among a substantial segment of the membership of the bar." Policy Manual § 8.01.03(c). Participating in legislative activities such as seeking to amend or repeal unconstitutional laws benefits the legal profession and improves the quality

of legal services because it reduces the risk that lawyers, their clients, members of the public, or government officials will rely on laws that judicial decisions have rendered invalid. To date no person–Plaintiffs included–have raised an objection under the Bar's protest procedure from the time of its adoption in 2005 until the filing of Plaintiffs' suit.

Access to Justice Programs. The Texas Supreme Court established the Texas Access to Justice Commission in 2001 in response to findings by a statewide planning group that many poverty-stricken people in Texas are underrepresented, and that gaps exist in developing a comprehensive, integrated statewide civil-legal-services-delivery system in Texas. The Texas Supreme Court's order creating the Commission expressly provides that it is prohibited from using Bar funds "for influencing the passage or defeat of any legislative measure unless the measure relates to the regulation of the legal profession, improving the quality of legal services, or the administration of justice and the amount of the expenditure is reasonable and necessary." Tex. Gov't Code § 81.034.

In addition, the preamble to the Texas Disciplinary Rules of Professional Conduct urges attorneys to be "mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance." Tex. Disciplinary R. Prof'l Conduct preamble 15, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2013). The Bar advances Texas' interest in professional regulation by taking steps to

assist lawyers in fulfilling their "ethical responsibility to provide public interest legal service." Tex. Disciplinary R. Prof'l Conduct 6.01 cmt. 5.

Diversity Initiatives. Texas has a long history of discrimination in the legal profession and legal education. *See, e.g., League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F .2d 831, 866 (5th Cir. 1993) (en banc) (noting "Texas' long history of discrimination against its black and Hispanic citizens in all areas of public life"). The Bar's diversity-related initiatives seek to reduce those barriers and promote a fairness and equity among lawyers help to build and maintain the public's trust in the legal profession and the judicial process as a whole, advancing Texas's interests in professional regulation and improving the quality of legal services.

Continuing Legal Education. The Bar's Continuing Education programs assist Bar members in satisfying minimum continuing legal education requirement in furtherance of the members' professional duty to maintain the requisite knowledge of a competent practitioner. *See* Tex. State Bar R. art. XII, § 6, *reprinted in* Tex. Gov't Code Ann., tit. 2. subtit. G, app. A (West 2013); Tex. Disciplinary R. Prof'l Conduct 1.01 cmt. 8. The programs' fees aid in funding the Bar's operations, without which the Bar would likely increase its membership fees. The Bar regularly publishes disclaimers stating that the opinions expressed by speakers in continuing legal education programs "do not necessarily reflect opinions of the State Bar of Texas, its sections, or committees."

Bar Journal. The Bar publishes the *Texas Bar Journal*, providing articles regarding "legal matters and the affairs of the [] Bar and its members." State Bar R. art. IX. The Bar is required to publish information of interest to the legal profession, including notices of disciplinary actions and amendments to evidentiary and procedural rules. *See*, *e.g.*, Tex. R. Disciplinary P. 6.07; Tex. Gov't Code §§ 22.108(c), 22.109(c). The *Texas Bar Journal* aims to "report [on] matters objectively" and to feature articles expressing" [v]arious viewpoints," including the "opinions of people differing with the State Bar and/or Bar leaders." Policy Manual § 7.05.02. Each issue includes a disclaimer making clear that publication of any article or statement is not to be deemed an endorsement of the views expressed therein. Like the continuing legal education programs, the *Texas Bar Journal* advances the interest of professional regulation and improving legal-service quality by keeping Bar members up-to-date on developments in the law and the legal profession. *Cf. Lehnert v. Ferris Faculty Ass'n*, 500U.S. 507,529 (1991) (rejecting First Amendment challenge to expenditures on union's statewide journal).

Advertising. *Keller* authorizes expenditures to inform lawyers and the public regarding the Bar's programs and the Bar's role in regulating the legal profession and advancing the quality of legal services. *See Kingstad*, 622 F.3d at 718-19 (upholding state bar public image campaign). *See also Gardner v. State Bar of Nev.*, 284 F.3d at 1043 (9th Cir. 2002). Indeed, the Bar's advertising activities are "highly germane to the purposes for which the State Bar exists," *Gardner*, 284 F.3d at 1043, because they inform lawyers and the

public about the Bar's programs and the Bar's role in furthering those interests.

The court concludes that the $65 legal-services fee added by the Texas Legislature in 2003 is not subject to *Keller* because it is not used to fund any Bar expenditures, but rather is used by the Texas Supreme Court and the Texas Indigent Defense Commission to promote legal services for the indigent. *See* Tex. Gov't Code § 81.0549(c)-(d). Even if *Keller* applies, the fee satisfies *Keller* because–like the Bar's access-to-justice programs–promoting legal services for the indigent is "germane to" the state's interests in regulating the legal profession and improving the quality of legal services. *Keller*, 496 U.S. at 13-14.

Count Three

In Count Three, Plaintiffs assert that the Bar's implementation of procedures for identifying non-chargeable expenses violate the First Amendment because the Bar has failed to adopt the precise procedures established by the Supreme Court in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). The court notes, however, that *Keller* did not address the question of whether integrated bars can adopt "alternative procedures" to prevent bar members from being compelled to fund nonchargeable expenses. *See Keller*, 496 U.S. at 17. Having previously concluded that the Bar's procedures ensure that all of its expenditures comply with *Keller*, the court further concludes that the Bar's existing policies and procedures achieve the objective of procedural safeguards in the First Amendment by ensuring that "the government treads with sensitivity in areas

freighted with First Amendment concerns." *Hudson,* 475 U.S. at 303 n.12.

The Bar provides members with advance, detailed notice of its proposed expenditures, along with several opportunities to object to those expenditures before they occur. Bar members have multiple opportunities to object to proposed expenditures before they occur–none of which Plaintiffs have undertaken–including, but not limited to, (1) at the annual public budget hearing required under Tex. Gov't Code § 81.022(b), (2) at the annual Bar Board meeting at which the budget is approved under Policy Manual § 3.02.03, and (3) under the Policy Manual's protest procedure, which allows members to "object to a proposed or actual expenditure," Policy Manual § 3.14.02. In addition, members can object to proposed legislative activities and participate in the Legislative Policy Subcommittee meeting on the Bar's proposed legislative program. Because the Bar has adequate procedural safeguards in place to protect against compelled speech and because mandatory Bar membership and compulsory fees do not otherwise violate the First Amendment, Plaintiffs' claim that the Bar unconstitutionally coerces them into funding allegedly non-chargeable activities without a meaningful opportunity to object necessarily fails as a matter of law.

Conclusion

IT IS ORDERED that Plaintiffs' Motion for Partial Summary Judgment on Liability filed March 25, 2019 (Doc. #6) is **DENIED.**

IT IS FURTHER ORDERED that Defendants' Cross-Motion for Summary Judgment filed May 13, 2019 (Doc. #35) is **GRANTED.**[4]

A Final Judgment shall be rendered subsequently in this cause.

SIGNED this 29th, day of May, 2020.

/s/Lee Yeakel
LEE YEAKEL
UNITED STATES DISTRICT JUDGE

---

[4] Having granted summary judgment in favor of Defendants, the court need not address Plaintiffs' Motion for Preliminary Injunction filed March 25, 2019 (Doc. #5). Accordingly, it is **ORDERED** that Plaintiffs' Motion for Preliminary Injunction filed March 25, 2019 (Doc. #5) is **DISMISSED.**

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

CAUSE NO. 1:19-CV-219-LY

[Filed: May 29, 2020]

TONY K. MCDONALD, JOSHUA B.	)
HAMMER, AND MARK S. PULLIAM,	)
	)
PLAINTIFFS,	)
	)
V.	)
	)
RANDALL O. SORRELS, LARRY P.	)
MCDOUGAL, JOE K. LONGLEY,	)
LAURA GIBSON, BRITNEY E. HARRISON,	)
ANDRES E. ALMANZAN, JERRY C.	)
ALEXANDER, KATE BIHM,	)
REBEKAH STEELY BROOKER,	)
LUIS M. CARDENAS, ALISON W. COLVIN,	)
DEREK COOK, ROBERT D. CRAIN,	)
CHRISTINA DAVIS, ALISTAIR B.	)
DAWSON, LESLIE DIPPEL, MICHAEL	)
DOKUPIL, VICTOR FLORES,	)
JARROD T. FOERSTER, LAURA GIBSON,	)
JOHN CHARLES GINN, SHARI	)
GOLDSBERRY, MARC E. GRAVELY,	)
AUGUST W. HARRIS III, JOE “RICE”	)

HORKEY, JR., WENDY-ADELE	)
HUMPHREY, MICHAEL K. HURST, NEIL D.	)
KELLY, DAVID C. KENT, ALDO D.	)
LOPEZ, YOLANDA CORTES MARES,	)
ROBERT E. MCKNIGHT, JR., STEPHEN J.	)
NAYLOR, AMIE S. PEACE, SALLY	)
PRETORIUS, CARMEN M. ROE,	)
ADAM T. SCHRAMEK, DAVID K SERGI,	)
ALAN E. SIMS, DINESH H. SINGHAL,	)
JASON SMITH, SANTOS VARGAS, G.	)
MICHAEL VASQUEZ, K. NICOLE VOYLES,	)
AMY WELBORN, JAMES WESTER, JAMES	)
C. WOO, AND DIANE ST. YVES,	)
IN THEIR OFFICIAL CAPACITIES AS	)
MEMBERS OF THE BOARD OF	)
DIRECTORS OF THE STATE BAR OF	)
TEXAS,	)
	)
DEFENDANTS.	)
	)

FINAL JUDGMENT

Before the court is the above entitled cause of action. On this date, the court rendered an order granting Defendants summary judgment. Accordingly, the court renders the following Final Judgment pursuant to Federal Rule of Civil Procedure 58.

IT IS ORDERED that Plaintiffs **TAKE NOTHING** by their suit against Defendants.

IT IS FURTHER ORDERED that Defendants are awarded costs.

IT IS FINALLY ORDERED the case is **CLOSED.**

SIGNED this 29th day of May, 2020.

/s/Lee Yeakel
LEE YEAKEL
UNITED STATES DISTRICT JUDGE