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

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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.

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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).

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[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.

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