No. 20-50448

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

v.

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 COLVIN, member of the State Bar Board of Directors; ET AL.,
Defendants-Appellees

On appeal from No. 1:19-cv-219-LY, United States District Court for the Western District of Texas, Austin Division
Hon. Lee Yeakel, Judge Presiding

BRIEF ON BEHALF OF FORMER PRESIDENTS OF THE STATE BAR OF TEXAS, FORMER CHAIRS OF THE TEXAS BAR COLLEGE, AND FORMER CHAIRS OF THE STATE BAR OF TEXAS COUNCIL OF CHAIRS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE

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August 6, 2020

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to FED. R. APP. P. 26.1 and 29(a)(4)(A), as well as 5TH CIR. R. 28.2.1, the undersigned *amici curiae* (collectively, "Bar Leaders") present the following Certificate of Interested Persons:

(1) No. 20-50448, *McDonald v. Sorrels*;

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5TH CIR. R 28.2.1 have an interest in the outcome of this case. Pursuant to FED. R. APP. P. 43(c)(2), certain defendants-appellees listed below have been automatically substituted as parties by virtue of succeeding prior officers of the State Bar of Texas ("Texas Bar") and the Texas Young Lawyers Association ("TYLA"). These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

Plaintiffs/Appellants	**Counsel for Plaintiffs / Appellants**
Tony K. McDonald Joshua B. Hammer Mark S. Pulliam	Jeffrey M. Harris William S. Consovoy Cameron T. Norris Tiffany H. Bates Samuel D. Adkisson

Defendants/Appellees	**Counsel for Defendants / Appellees**
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[1] In his then-capacity of Chair of the Texas Bar College, lead counsel for the Bar Leaders here, Dylan O. Drummond, was a signatory to the Bar College Executive Committee's July 11, 2020 statement joining the Joint Statement by the Texas Bar and TYLA leaders regarding remarks made by the Texas Bar President. Since that time, Mr. Drummond has also publicly

Amici Curiae	**Counsel for *Amici Curiae***
Charles Herring, Jr. James M. McCormack Amon Burton Gaines West Robert P. Schuwerk	Jason M. Panzer Lauren B. Ross

Pursuant to 5TH CIR. R. 29.2, the Bar Leaders certify that no supplemental statement of interested parties is necessary.

called for the resignation of the Texas Bar President and one of the Texas Bar's Directors.

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY

The Texas Bar is the official professional organization of Texas attorneys, and unifies all functions necessary to regulate the profession, ensure access to the legal system, and improve the delivery of legal services to Texans. Originally founded as the

Texas Bar Association nearly 140 years ago in 1882, the modern Bar was established over 80 years ago in 1939.

The following Bar Leaders are former Texas Bar presidents:

David J. Beck	Martha S. Dickie	Allan K. DuBois
Harper Estes	Kelly Frels	Guy N. Harrison
Roland K. Johnson	Lynne Liberato	Richard Pena
Eduardo R. Rodriguez	Frank E. Stevenson II	Terry O. Tottenham
G. Thomas Vick, Jr.		

The Texas Bar College ("Bar College") was chartered by the Supreme Court of Texas in 1981 "for the purpose of recognizing members of the [Texas] Bar who maintain and enhance their professional skills and the quality of their service to the public by significant voluntary participation in Continuing Legal Education." Order of Dec. 14, 1981, Misc. Docket. As its first Chair noted, it "is a College without a campus, but it has the finest student body in the world." Jim Bowmer and J. Chrys Dougherty, *State Bar College: You Can Enroll Now*, 45 TEX. B.J. 321, 321 (Mar. 1982). The following Bar Leaders are former College chairs:

Claude E. Ducloux	John C. Grace	Cori Harbour-Valdez
Veronica F. Jacobs	Steven C. James	David Keltner
Herman H. Segovia		

The Texas Bar's Council of Chairs is a committee comprised

of the chairs of the various bar sections. The following Bar Leaders are former chairs of the Council of Chairs:

Talmage Boston	Patrick J. Maher	Melissa D. Matthews
Robert M. "Randy" Roach, Jr.		

The Bar Leaders' counsel contacted the parties to this matter, and each consents to the filing of the Bar Leaders' *amici curiae* brief. As a result, the Bar Leaders have not filed a motion for leave under FED. R. APP. P. 29(a)(2).

STATEMENT UNDER FED. R. APP. P. 29(a)(4)(E)

Pursuant to FED. R. APP. P. 29(a)(4)(E), the Bar Leaders confirm that no counsel for any party authored this brief in whole or in part, and no person or entity other than the Bar Leaders, its members, or its counsel, made a monetary contribution intended to fund the brief's preparation or submission.

INTRODUCTION

Attorneys serve a unique role in our justice system "as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes," *Cohen v. Hurley*, 366 U.S. 117, 124 (1961). The Bar Leaders draw upon their many years of service to the Texas Bar to explain how the programs challenged by the plaintiffs-appellants ("McDonald Appellants") help Texas attorneys fulfill these roles.

Since its founding, the Texas Bar has been the chief means of regulating the Texas legal profession and served as the primary framework for the administration of justice in Texas. Indeed, the stated purposes of the Texas Bar include:

- "[A]id[ing] the courts in carrying on and improving the administration of justice;"
- "[A]dvanc[ing] the quality of legal services to the public;" and
- "[F]oster[ing] and maintain[ing] 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."

TEX. GOV'T CODE § 81.012(1)–(3).

The Texas Bar assists Texas attorneys in fulfilling their

ethical obligation to improve the practice of law through a variety of processes that enhance—rather than restrict—member speech. The Texas Bar assembles viewpoints from across the spectrum of practices, geography, and political ideology. It carries out systematic outreach to attorneys both to inform them of pending court rule changes and legislation affecting the practice of law, as well as to gather their input on these matters. All of this is permissible under *Keller v. State Bar of California*, 496 U.S. 1, 13–14 (1990). And all of it works, ultimately, to benefit Texans.

Contrary to the claims of the McDonald Appellants, the challenged programs here assist the Texas Bar both in regulating Texas attorneys and in enhancing the quality of legal services available to Texans. (*Contra* App'ts Br., at 5–11). These activities are permitted under the standards enunciated by the Supreme Court.

The Bar Leaders also write to express their acute concern that dismantling the Texas Bar would diminish attorney competence and ethical compliance, thereby undermining the quality of legal services delivered to Texans.

SUMMARY OF THE ARGUMENT

Keller v. State Bar of California, 496 U.S. 1 (1990), governs the permissibility of unified-bar[2] activities. At a minimum, *Keller* authorizes activities germane to regulating attorneys to ensure their ethical compliance and improving the quality of legal services delivered to the public. The programs challenged by the McDonald Appellants fall within these permitted activities. Dismantling these programs would imperil the quality of legal services available in Texas.

ARGUMENT

More than half a century ago in *Railway Employees' Department v. Hanson*, a unanimous Supreme Court held that no infringement or impairment of one's First Amendment rights occurs when an attorney is forced by state law to be a member of an integrated bar. *Ry. Emps.' Dep't v. Hanson*, 351 U.S. 225, 238

[2] A unified bar—sometimes also referred to as a mandatory, universal, or integrated bar—is one "'in which membership and dues are required as a condition of practicing law.'" *Harris v. Quinn*, 573 U.S. 616, 655 (2014) (quoting *Keller v. St. Bar of Cal.*, 496 U.S. 1, 5 (1990)); *see* J. Chrys Dougherty, *Our First Centenary—Pride and Humility*, 45 TEX. B.J. 34, 34 (Jan. 1982) ("universal" bar). A majority of the states (29)—including Texas—currently maintain mandatory bar associations. (ECF No. 35-14, at ¶ 34).

(1956). Five years later, Justices Harlan and Frankfurter confirmed that *Hanson* "surely lays at rest all doubt that a [s]tate may [c]onstitutionally condition the right to practice law upon membership in an integrated bar association." *Lathrop v. Donohue*, 367 U.S. 820, 849 (1961) (Harlan, J., joined by Frankfurter, J., concurring). In the same case examining the propriety of a unified bar association, four other Justices held in a plurality opinion that "no sound basis [exists] for deciding appellant's constitutional claim insofar as it rests on the assertion that his rights of free speech are violated by the use of his money for causes which he opposes" because "both in purport and in practice, the ***bulk of … Bar activities serve the function***, or at least so [the State] ***might reasonably believe***, 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, without any reference to the political process." *Id.* at 843, 845 (emphasis added).

The Supreme Court most recently addressed constitutional issues associated with unified bar associations in *Keller v. State*

Bar of California, 496 U.S. 1 (1990). The McDonald Appellants incorrectly contend the Court impliedly overruled *Keller* in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018). (App'ts Br., at 29). *Janus* involved whether public employees can be forced to subsidize a union—pay "agency fees"—"even if they choose not to join and strongly object to the positions that the union takes in collective bargaining and related activities." *Janus*, 138 S. Ct. at 2459–60.

But *Janus* said nothing about the lawfulness of bar fees. Justice Kagan's dissent in *Janus*—joined by three other Justices—explicitly lists *Keller* as falling into the category of cases that *Janus* "does not question." *Id.* at 2498 (Kagan, J., dissenting).

In *Harris v. Quinn*, the Court struck down an agency-fee scheme but rejected the argument that this would "call into question our decision[] in *Keller* ...." *Harris v. Quinn*, 573 U.S. 616, 655 (2014). The *Janus* majority leaned heavily on *Harris*. *See Janus*, 138 S. Ct. at 2463–66, 2468, 2471–72, 2474, 2477 (citing *Harris*). And the *Janus* majority did not dispute

Justice Kagan's observation that it does not question *Keller*. *See id.* at 2459–86. Therefore, *Keller* remains good law and governs this case.

Under *Keller*, the Texas Bar may use compulsory dues to fund two types of activities "germane to" the goals of: (1) "regulating the legal profession;" and (2) "improving the quality of legal services." *Keller*, 496 U.S. at 13–14. Citing *Harris*, the McDonald Appellants seek to cabin these activities to "proposing ethical codes and disciplining members." (App'ts Br., at 5, 20, 25, 30, 35–36 (citing *Harris*, 573 U.S. at 655)). But in *Harris*, the Court merely recounted its holding from *Keller* identifying one example—and an "extreme end[] of the spectrum"[3] at that—where bar members could permissibly 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); *Keller*, 496 U.S. at 16. And, under *Lathrop*, so long as the Texas Bar

[3] *Keller*, 496 U.S. at 15.

"reasonably believe[s]" that the "bulk of … [its] activities serve the function" of "elevating the educational and ethical standards of the [Texas] Bar to the end of improving the quality of the legal service available to the people of the State," its programs pass constitutional muster. *Lathrop*, 367 U.S. at 843, 845 (plurality op.).

I. The Texas Bar Administers Numerous Programs—Including Those Under Challenge Here—as Part of its Permissible Mission to Regulate Attorneys and Improve the Quality of Legal Services in Texas

A. The Texas Bar's diversity initiatives promote ethical compliance and improve the quality of legal services in Texas

If not for the filing-date header on the McDonald Appellants' brief, it would be difficult to discern that it was filed in 2020 instead of 1920.

Texas's nearly 22,000 minority attorneys now make up some 22% of the Texas Bar membership, an increase of 67% over the past decade. STATE BAR OF TEXAS DEPARTMENT OF RESEARCH & ANALYSIS, 2019 POPULATION TRENDS OF RACIAL/ETHNIC MINORITIES IN THE STATE BAR OF TEXAS, at 1 (2020) [hereinafter 2019 POPULATION TRENDS],

available at https://bit.ly/308BjHY (last visited Aug. 1, 2020). Of these, over 9,800 are Hispanic, nearly 5,700 are African-American, and over 3,700 are Asian. *Id.* at 2. Nearly 39,000—some 37%—of Texas's 100,000 attorneys are female. STATE BAR OF TEXAS DEPARTMENT OF RESEARCH & ANALYSIS, RACIAL/ETHNIC MINORITY ATTORNEYS: ATTORNEY STATISTICAL PROFILE (2019–20), at 1 (2020) [hereinafter 2019–20 STATISTICAL PROFILE], *available at* https://bit.ly/2P1asY9 (last visited Aug. 1, 2020).

In his 2017 State of the Judiciary speech, Texas Supreme Court Chief Justice Nathan L. Hecht reaffirmed the vital importance of providing "equal justice under the law" so that Texans do "not think the Justice system is rigged." Hon. Nathan L. Hecht, Chief Justice, Supreme Court of Texas, State of the Judiciary in Texas (Feb. 1, 2017) [hereinafter 2017 State of the Judiciary], *available at* https://bit.ly/3gb6wQj (last visited Aug. 1, 2020).

Yet here, the McDonald Appellants nevertheless decry the "appropriate[ness]" of the Texas Bar's diversity initiatives being

offered to "individuals of a particular race, gender, or sexual orientation." (App'ts Br., at 8). They label "race- and gender-based initiatives" as "controversial" and denounce the stated mission of the Texas Bar's Office of Minority Affairs to "serve minority, women, and LGBT attorneys and legal organizations in Texas" for the purpose of "enhanc[ing] employment and economic opportunities for minority, women, and LGBT attorneys in the legal profession." (*Id.* at 7, 19).

More broadly, the McDonald Appellants' criticisms of the Texas Bar's diversity initiatives as advancing some political or social viewpoint suffer from a series of misperceptions concerning the operation and the purpose of these programs to promote competence and ethical compliance.

First, the McDonald Appellants ignore the Texas ethical rule prohibiting attorneys in adjudicatory proceedings from manifesting, "by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation towards any person involved in that proceeding in any capacity." Tex. Disciplinary Rules Prof'l Conduct R. 5.08(a).

Second, the McDonald Appellants disregard that the Texas Bar's diversity programs are one of its main conduits to improve the quality of legal services delivered by its ever-increasing number of diverse attorneys to clients. For example, the critical mission of the Texas Minority Counsel Program—founded nearly three decades ago—is to "increase[e] opportunities for minority, women, and LGBT attorneys who provide legal services to corporate and government clients, and to expose those organizations to the legal talent of diverse attorneys in Texas." *Texas Minority Counsel Program (TMCP)*, STATE BAR OF TEXAS, https://bit.ly/2X6ysNQ (last visited Aug. 1, 2020).

Third, the McDonald Appellants apparently operate under the misconception that the Texas Bar's diversity programs are exclusionary. While these programs may be targeted toward certain groups, they are open to everyone.

B. The Texas Bar's access-to-justice initiatives promote ethical compliance and improve both the quality of legal services and the administration of justice in Texas

Texas Chief Justice Nathan L. Hecht noted the critical importance of supporting access to justice for all Texans,

observing that "Justice only for those who can afford it is neither justice ***for all*** nor justice ***at all.***" 2017 State of the Judiciary (emphasis added). "The rule of law," he continued, "has no integrity if its promises and protection extend only to the well-to-do." *Id.* Yet access to justice is not just a struggle for the indigent, but also "for many in the middle class and small businesses who need the legal system but find the costs prohibitive and are forced to represent themselves." Hon. Nathan L. Hecht, Chief Justice, Supreme Court of Texas, State of the Judiciary in Texas (Feb. 18, 2015), *available at* https://bit.ly/3hKgMPZ (last visited Aug. 1, 2020).

More than 5.6 million Texans qualify for legal aid. But inadequate resources mean that only 10% of their legal needs are being met. The Texas Bar helps to fill this justice gap through initiatives that provide legal assistance to veterans, active-duty military and their families, people affected by natural disasters, victims of domestic violence and abuse, and countless other Texans. The Texas Legislature has also recognized this gap, directing the Texas Supreme Court to set an annual $65.00 fee to

be collected from attorneys to support the provision of "basic civil legal services to the indigent" as well as "quality representation to indigent defendants in criminal cases." TEX. GOV'T CODE § 81.054(c), (j).

Access to justice becomes even more crucial when catastrophes strike. Hon. Nathan L. Hecht, Chief Justice, Supreme Court of Texas, State of the Judiciary in Texas (Feb. 6, 2019), *available at* https://bit.ly/2CYqPSO (last visited Aug. 1, 2020). When Hurricane Harvey struck Texas in August 2017, hundreds of legal-aid and volunteer attorneys assisted thousands of impacted families not only with impacts from the storm itself but from its ripple effects as well. *Id.* To support the extraordinary efforts of legal aid attorneys to assist Harvey victims, the Bar College's Endowment Fund donated $10,000.00 to the Houston Volunteer Lawyers Program and another $10,000.00 to Lone Star Legal Aid. *Texas Bar College Endowment Fund Contributes to Hurricane Harvey Recovery*, TEXAS BAR COLLEGE (Sept. 7, 2017), https://bit.ly/3jSqUYU.

The McDonald Appellants bemoan the Texas Bar's access-

to-justice efforts, singling out in particular its support of the "highly political" Texas Access to Justice Commission ("Commission"). (App'ts Br., at 8–9). But the Commission—established nearly two decades ago by the Texas Supreme Court—is not remotely political. Order of Apr. 26, 2001, Misc. Docket No. 9065, *available at* https://bit.ly/312A10i (last visited Aug. 1, 2020). Instead, its charter is to:

- "[I]dentify and assess current and future needs for access to justice in civil matters by low-income Texans;
- [D]evelop and publish a strategic plan for statewide delivery of civil legal services to low-income Texans;
- [F]oster the development of a statewide integrated civil legal-services delivery system;
- [W]ork to increase resources and funding for access to justice in civil matters and to ensure that the resources and funding are applied to the areas of greatest need;
- [W]ork to maximize the wise and efficient use of available resources, including the development of local, regional, and statewide coordination systems and systems that encourage the coordination or sharing of resources or funding;
- [D]evelop and implement initiatives designed to expand civil access to justice;

- [W]ork to reduce barriers to the justice system by addressing existing and proposed court rules, procedures, and policies that negatively affect access to justice for low income Texans; and
- [M]onitor the effectiveness of the statewide system and services provided and periodically evaluate the progress made by the Commission in fulfilling the civil legal needs of low-income Texans."

Id. at 2.

The McDonald Appellants also take issue with the Texas Bar's Lawyer Referral and Information Service ("LRIS"). (App'ts Br., at 9). But the LRIS, which helped nearly 65,000 callers during 2019–20 and made over 71,000 referrals, exists solely to facilitate the delivery of quality legal services to Texans. (*See* STATE BAR OF TEXAS, ANNUAL REPORT 2018–19, at 4 (2020), *available at* https://bit.ly/30aGR4Y (last visited Aug. 1, 2020) [hereinafter 2018–19 ANNUAL REPORT).

The ethical rules governing Texas attorneys require this effort. The rules state that Texas attorneys should "devote professional time and civic influence" on behalf of those too poor to obtain legal representation, and should "aid the legal profession" in doing so as well. Tex. Disciplinary Rules Prof'l

Conduct Preamble ¶ 5.

Moreover, attorneys and judges know that reducing the number of pro-se litigants vastly improves the efficiency of our court system. The presence of counsel on both sides of a dispute promotes settlement and reduces wasted time. When both parties are represented by attorneys, fewer fruitless arguments are raised, less irrelevant evidence is offered, and there are fewer delays.

Finally, the presence of counsel levels the playing field and improves the administration of justice. Indeed, it is difficult to envision what would improve the quality of legal services more than ensuring that litigants are represented by counsel.

C. The Texas Bar provides attorney and client assistance programs that improve and safeguard the quality of legal services in Texas

The Texas Bar sponsors and funds programs for attorneys dealing with mental or physical impairments—impairments that can impede competent representation and put the public at risk. The Texas Bar funds the Texas Lawyers Assistance Program ("TLAP") to help identify and assist impaired attorneys so as to improve the quality of legal services provided to Texans. During

the 2017–18 bar year, TLAP fielded 717 calls and made 115 presentations to more than 11,000 people. STATE BAR OF TEXAS, ANNUAL REPORT 2017–18, at 4 (2019), *available at* https://bit.ly/2P38dUb (last visited Aug. 1, 2020) [hereinafter 2017–18 ANNUAL REPORT].

The Texas Bar also administers the Client Security Fund ("Fund") to protect consumers of legal services by providing financial relief to clients whose attorneys have stolen money intended for the client or failed to refund an unearned fee. During the 2017–18 bar year, the Fund approved 148 eligible applications and disbursed more than $900,000. *Id.* at 5.

Finally, the Client-Attorney Assistance Program ("CAAP") assists clients in resolving issues with their attorneys, and achieved an 87% success rate during 2019–20 bar year in reopening communication between counsel and client in more than 22,000 referrals. 2018–19 ANNUAL REPORT, at 4.

In this way, TLAP and CAAP help attorneys avoid potential ethical pitfalls that could result in discipline. They also enhance the quality of legal representation rendered to Texans. And the

Fund helps compensate victims of ethical lapses by attorneys.

D. The Texas Bar improves the quality of legal services rendered to Texans by offering CLE on issues that may confront Texas attorneys—including contentious ones

The McDonald Appellants attack the Texas Bar's CLE department ("TexasBarCLE") for what they contend are "ideologically-slanted" and "ideologically-driven" programs. (App'ts Br., at 8, 24, 32). But the ethical rules governing Texas attorneys require competence in the practice of law. *See*, *e.g.*, Tex. Disciplinary Rules Prof'l Conduct Preamble ¶ 3, R. 1.01. This means that attorneys must keep abreast of changes in:

- Substantive law;
- Statutes affecting legal practice, and
- Rules governing practice in various Texas courts.

As part of its *Keller*-permitted mission to improve the quality of legal services—and help Texas attorneys avoid violating their ethical duties and entering the disciplinary system—the Texas Bar offers webcasts and live, online, and video CLE courses. These activities relate directly to improving the quality of legal services provided to Texans.

TexasBarCLE leads the nation, annually reaching over 100,000 attorneys. 2018–19 ANNUAL REPORT, at 4 (more than 104,000); 2017–18 ANNUAL REPORT, at 4 (more than 121,000). In the 2018–19 bar year alone, TexasBarCLE offered 101 live courses, 141 webcasts, and 927 online classes. 2018–19 ANNUAL REPORT, at 2. In addition, TexasBarCLE offers more than 2,700 hours of CLE credit online, and makes available to the public more than 27,000 CLE articles, including more than 2,300 pertaining to legal ethics. *Id.*

That some CLE topics address contentious issues simply reflects the unsurprising reality that Texas attorneys often find themselves representing clients embroiled in the hot-button issues of the day. This commitment by American attorneys to represent controversial causes and clients enjoys a majestic tradition predating the American Revolution. *See*, *e.g.*, DAVID MCCULLOUGH, JOHN ADAMS 65–68 (2001) (describing representation by Adams of British soldiers involved in the Boston Massacre, which he later described as "one of the best pieces of service I ever rendered my country").

Just as Texas attorneys ***cannot***—and, if our system of government is to endure, ***must not***—eschew contentious or unpopular clients and cases, so too the Texas Bar must provide CLE on these topics to ensure that when attorneys take such cases—no matter how divisive or controversial—they are armed with the requisite knowledge and expertise to provide competent representation to their clients.

The Texas Supreme Court's creation of the Bar College confirms what should be self-evident—the greater the number of cumulative CLE education obtained by Texas attorneys each year, the greater the improvement to the quality of legal services rendered to Texans. *See* Order of Dec. 14, 1981, Misc. Docket (because "there is a need for lawyers to continue studying throughout their lives to stay well informed and current," the Bar College was established to recognize attorneys "who maintain and enhance their professional skills and the quality of their service to the public by significant voluntary participation in [CLE]").

In recognition of this simple equation—more CLE = better

attorneys—the Texas Bar constantly pursues new and creative means to attract the greatest number of lawyers possible to its CLE offerings. As part of this effort, the Texas Bar seeks to connect with its member lawyers in every way imaginable. It connects by experience,[4] practice area, age,[5] section membership, geographic location, and a host of other factors—even travel interests.[6]

For example, the McDonald Appellants criticize CLE programs offered during the Texas Bar's 2018 annual meeting involving issues facing Hispanics, the impact of openly LGBT judges, implicit bias, and a legislative update on proposed rulemaking under the Trump Administration. (App'ts Br., at 11). But attorneys practicing administrative law need to keep abreast of proposed rulemaking under a current administration. Moreover,

[4] The Texas Bar now offers a highly popular *Handling Your First_____* series targeted·toward inexperienced lawyers.

[5] The Texas Bar offers a CLE course on issues facing aging and retiring lawyers.

[6] For example, the Texas Bar has produced CLE programs associated with various cruises as a means of attracting lawyers who might not otherwise attend such programs.

CLE topics pertaining to potential bias based on race, color, national origin, or sexual orientation promote understanding of, and compliance with, Disciplinary Rule 5.08—and could help Texas lawyers avoid potential discipline. Indeed, Texas attorneys (nearly 10,000 of which are Hispanic themselves) frequently represent Hispanic clients and need to know issues they may face. *See* Tex. Disciplinary Rules Prof'l Conduct R. 5.08(a); 2019–20 STATISTICAL PROFILE, at 1. If openly LGBT judges view certain cases differently than their peers, Texas attorneys need to know it so that they can better communicate with and persuade those judges.

Another example is TexasBarCLE's Bill of Rights CLE course. Do topics in that course concern "ideologically-driven" issues? Of course. Indeed, they necessarily involve the most polemical issues in our society. But the fact that attorneys require continuing education to better represent their clients on difficult issues is completely inapposite to any broad political mischief the McDonald Appellants allege is afoot.

The McDonald Appellants also curiously take issue with

TYLA's longstanding Ten Minute Mentor series that qualifies recipients for self-study CLE credit. During the 2017–18 bar year, the Ten-Minute-Mentor videos were accessed more than 36,000 times. 2017–18 ANNUAL REPORT, at 5. The McDonald Appellants do not explain the nature of their objection to this program. And it's difficult to imagine what it could be. Like the other CLE programs offered the Texas Bar, the Ten-Minute-Mentor program assists Texas attorneys in avoiding ethical lapses and promotes competence by providing information necessary to improve their knowledge and skills.

At bottom, none of the Texas Bar's CLE programs are ***political*** activities. Instead, they are ***educational*** ones concerning legal issues that may intersect with politics. TexasBarCLE's courses assist Texas attorneys in meeting the ethical requirement for competence, and they improve the quality of legal services rendered to Texans.

E. The Texas Bar's sections and the Bar College offer numerous programs designed to promote ethical compliance and improve the quality of legal services in Texas

Most Texas attorneys interact with the Texas Bar principally through involvement in its sections or the Bar College—membership in which are each entirely voluntary. The Texas Bar has 48 sections and 2 divisions. The smallest of these sections has 200 members, and the largest more than 10,000. The Bar College has more than 4,400 members.

Together, the sections offer an astonishing array of programs and resources to promote attorney ethics and competence. Many sections provide CLE programming focused on their members' specific practice areas. Often, these section-produced programs are provided in rural areas and frequently at no charge, or a reduced charge.

Almost all sections maintain websites and produce newsletters directed at their members practice areas. Many sections produce high-quality journals and law reviews dedicated to specific practice areas. The Litigation Section, for example,

produces one of the leading journals on litigation in the country. Some sections also maintain libraries of past articles. The appellate section maintains more than enough free online CLE presentations to satisfy its members' annual requirement. These resources keep section members abreast of changes in the law and often provide in-depth analyses of particular issues confronting practitioners.

Many sections provide their members with regular case updates ensuring that Texas lawyers are aware of the very latest decisions. Some sections maintain a listserv where members can obtain input from the leading lawyers in their practice areas on particularly complex issues.

Similar to the Texas Bar's sections, the Bar College provides a variety of resources for Texas attorneys to maintain competent and ethical practice. The Bar College produces a quarterly newsletter addressing substantive legal developments and ethical issues that may arise in the practice of law. It provides all of its members with free access to the entire library of Texas Bar CLE articles (more than 27,000). *See* 2018–19

ANNUAL REPORT, at 2. It produces a three-day CLE program for general practitioners. And, finally the Bar College promotes attorney competence and ethics by limiting membership to attorneys who agree to obtain double the amount of CLE required to maintain a Texas attorney's bar license. Through these initiatives, the Bar College substantially furthers the cause of improving the quality of legal services in Texas.

F. The *Texas Bar Journal* helps to regulate the profession, improve the quality of legal services delivered to Texans, increase the ethical knowledge of attorneys, and educate lawyers about disciplinary pitfalls

The McDonald Appellants attack the Texas Bar's publication of the *Texas Bar Journal*. (App'ts Br., at 11). But the *Journal* forms a critical component of the Texas Bar's effort to regulate the profession, improve the quality of Texas legal services, increase the ethical knowledge of attorneys, and educate lawyers about disciplinary perils.

Specifically, the *Journal* publishes all proposed procedural and evidentiary rules promulgated by the Texas Supreme Court. In recent months, the *Journal* has printed each of the Texas

Supreme Court's twenty (so far) emergency COVID-19 orders. Each month, the *Journal* also publishes ethics opinions issued by the Texas Bar's Professional Ethics Committee, as well as descriptions of disciplinary actions taken by the Texas Bar's Office of Chief Disciplinary Counsel. In addition, the *Journal* provides topical articles on various practice areas, and publishes an annual update issue discussing significant developments in numerous substantive practice areas.

Although any number of these notices or articles might present contentious issues, Texas attorneys nevertheless need to be knowledgeable about them in order to provide competent representation to Texans.

G. The Texas Bar's nonpartisan legislative program improves the quality of legal services in Texas

Finally, the McDonald Appellants assail the Texas Bar's legislative program. (App'ts Br., at 30–31). The mere fact that the program has the "legislative" moniker, they allege, constitutes sufficient evidence of its ideological bent. In the words of the late Justice Scalia, this argument is "pure applesauce." S*ee King v.*

Burwell, 135 S. Ct. 2480, 2501 (2015) (Scalia, J., joined by Thomas and Alito, J.J., dissenting).

Keller permits expenditures germane to regulating the profession and improving the quality of legal services. *Keller v. St. Bar of Cal.*, 496 U.S. 1, 13–14 (1990). No credible dispute exists that each session, the Legislature considers, debates, and passes numerous statutes affecting the practice of law—statutes that affect both the disciplinary process and the quality of legal services in Texas.

As the McDonald Appellants note, the Texas Bar—principally through its sections—provides recommendations and other feedback on certain proposed legislation. Certain areas of the law—particularly family, consumer, and criminal law—regularly require study and amendment. The Texas Bar is often particularly well-positioned to advise legislators on the potential effects of proposed legislation and how that legislation may best be tailored to serve the public interest.

But in so doing, the Texas Bar goes to great lengths to ensure that all of its interactions with the Legislature comply with

Keller. Before supporting any proposed legislation, the Texas Bar determines that the proposal meets specific criteria designed to ensure compliance with *Keller*. These requirements include verifying that the proposed measure will not be philosophically or emotionally divisive among any substantial segment of the bar, and that it "cannot be construed to advocate political or ideological positions."[7]

⁂

Consequently, there can be no credible doubt that the Texas Bar's programs challenged here comply with the Supreme Court's mandate to promote ethical compliance, regulate the profession, and improve the quality of legal services in Texas. *Harris v. Quinn*, 573 U.S. 616, 655 (2014); *Keller v. St. Bar of Cal.*, 496 U.S. 1, 13–14 (1990).

[7] STATE BAR OF TEXAS, BOARD OF DIRECTORS POLICY MANUAL § 8.01.03 (June 2020), *available at* https://bit.ly/33bTCOn (last visited Aug. 1, 2020).

II. Dismantling the Texas Bar Would Risk the Destruction of All These Activities and Diminish the Quality of Legal Representation in Texas

The McDonald Appellants' blithe assumption that the Texas Bar could be dismantled without serious impact on Texas litigants and legal consumers is fatally incorrect. (*See* App'ts Br., at 26–28). To the contrary, as longtime stewards of the profession, the Bar Leaders fear that dismantling the Texas Bar could have devastating consequences for Texas residents who depend on the competency and professionalism of Texas lawyers.

Every Texas-Bar program discussed in this brief—from diversity to access to justice, LRIS, TLAP, the Fund, CAAP, the nation's leading CLE offerings, to the *Texas Bar Journal*, and legislative efforts—depends on a unified bar. Mindful of what has occurred in other states that have abandoned their unified bars, the Bar Leaders have little doubt that every program described in this brief would be at risk if the Texas Bar were dismantled. And, contrary to both *Keller* and *Harris*, neither the ethical compliance nor the professional competence of Texas attorneys will be maintained at their present levels without these programs. *See*

Harris v. Quinn, 573 U.S. 616, 655 (2014); *Keller v. St. Bar of Cal.*, 496 U.S. 1, 13–14 (1990).

If dismantling the Texas Bar ***imperils*** the continued efficacy of these many initiatives, it virtually ***guarantees*** the destruction of the Texas Bar sections and the Bar College. Setting aside the many other reasons this might be true, the sections and the Bar College would have no means of accessing their membership lists or collecting dues from their members without the Texas Bar. And, with very few exceptions, the sections depend on the Texas Bar for administrative functions. Without a unified bar, the sections and the Bar College either would cease to exist or would become ineffectual shells of their former selves.

III. The McDonald Appellants Seek to Return the Texas Bar to the Very Unregulated and Disorganized State Texas Lawyers Deliberately Rejected More Than Eighty Years Ago

From its very first moments, Texas has been forged and defended by attorneys. Perhaps the earliest Texas bar association was a ragtag band of six lawyers who fought together and perished at the Alamo in March 1836. *See* Dylan O. Drummond, *The Toughest Bar in Texas: A Look at the Lawyers and Future Supreme*

Court Judges Who Fought at the Alamo and San Jacinto, 81 TEX. B.J. 174, 174 (March 2018).

The Texas Bar's formal predecessor, the Texas Bar Association, was a voluntary organization founded in 1882 that possessed no governmental power to regulate the profession of law, much less the conduct of lawyers. *See*, *e.g.*, D.A. Frank, *Administration of the Bar Act*, 2 TEX. B.J. 191, 191 (July 1939) [hereinafter *Bar Act Administration*] ("the Texas Bar Association ha[d] no such powers"); D.A. Simmons, *A Voice for the Bar*, 1 TEX. B.J. 5, 5 (Jan. 1938). Indeed, prior to the establishment of the Texas Bar, "the majority of the lawyers in Texas … [we]re not in any organization at all." *Bar Act Administration*, 2 TEX. B.J. at 192.

Accordingly, the Texas Bar Association sponsored legislative efforts for more than a decade to establish a mandatory bar that could regulate the profession. D.A. Frank, *'Better to Save than Disbar'*, 2 TEX. B.J. 124, 124 (May 1939); *see* J. Chrys Dougherty, *Our First Centenary—Pride and Humility*, 45 TEX. B.J. 34, 34 (Jan. 1982) ("[f]rom 1921 on, there was a

growing realization that ***discipline*** as well as the full power of the [B]ar for ***continuing legal reform*** could never be achieved without universal membership" (emphasis added)). These efforts were driven by the "growing demand upon the part of the public and the lawyers of [Texas] that the Supreme Court be empowered to adopt and promulgate rules and ***regulations governing the legal profession and the professional conduct of attorneys***." State Bar Act, 46th Leg., R.S., ch. 1, § 9, 1939 Tex. Gen. Laws 64, 66 (emphasis added); Hannah Kiddoo & Lindsay Stafford Mader, *Window to the Past: A Look at the Exhibit Chronicling the Life of the State Bar of Texas*, 77 Tex. B.J. 768, 768 (Oct. 2014) ("[t]he unified bar movement in North America began in the early twentieth century in response to what some attorneys considered a ***crisis of declining ethical standards***" (emphasis added)).

Here, although Appellants acknowledge that the Supreme Court has recognized that regulation of the legal profession and improving the quality of legal services are valid state interests, they nevertheless seek to return Texas attorneys to the disorganized and unregulated state they were in prior to 1939.

(App'ts Br., at 25, 27–28, 51). But, after having practiced under such a system for over a half-century, Texas lawyers long ago rejected such an antiquated approach for the very reasons the Supreme Court has confirmed are permissible: (1) "regulating the legal profession;" and (2) "improving the quality of legal services." *Keller*, 496 U.S. 1, 13–14 (1990). Indeed, it was the desire of Texas attorneys, the Legislature, and the Governor—as expressly stated in in the State Bar Act—to address declining ethical standards and professional conduct among lawyers that drove the creation of the Texas Bar in 1939 so that it ***could*** regulate the profession and improve the quality of legal services afforded to Texans. State Bar Act, 46th Leg., R.S., ch. 1, § 9, 1939 Tex. Gen. Laws 64, 66.

The Court should reject the McDonald Appellants attempt to force the Texas Bar to regress back to providing less regulation of the profession and lower quality of legal services available to Texans.

IV. The Court Should Give No Weight to the Texas Attorney General's *Amicus Curiae* Brief that Belittles the Texas Bar's Diversity Initiatives as "Ideologically-Charged" and "Divisive"

By statute, the Texas Attorney General is charged with "[d]efending the State of Texas and its duly enacted laws by providing legal representation to the State, its officials[,] and ***agencies***." ATTORNEY GENERAL OF TEXAS, DUTIES & RESPONSIBILITIES: THE WORK OF THE ATTORNEY GENERAL, https://bit.ly/39zlhtQ (last visited Aug. 1, 2020) (emphasis added); *see* TEX. GOV'T CODE § 402.021. Since its founding some eight decades ago, the Texas Bar has been and continues to be "an administrative ***agency*** of the Judicial Department." *Compare* TEX. GOV'T CODE § 81.011(a) (emphasis added), *with* State Bar Act, 46th Leg., R.S., ch. 1, § 2, 1939 Tex. Gen. Laws 64, 64. As such, administrative control of the Texas Bar is wielded by the Texas Supreme Court—not the Attorney General. TEX. GOV'T CODE § 81.011(c).

But here, the Attorney General has filed an *amicus curiae* brief not in support of an agency of the State, but against one. In so doing, the Attorney General brands the Texas Bar's diversity

initiatives as "***ideologically[-]charged*** activities" and includes them in what it calls a "***divisive ideological agenda.***" (Tex. *Amicus Curiae* Br., at 1–2 (emphasis added)).

That the Attorney General under the imprimatur of the State of Texas would—***in 2020***—attempt to tar programs that seek to increase minority representation, engagement, and involvement in the Texas Bar as being "ideologically charged" or "divisive" incorrectly presupposes that diversity in the profession remains even remotely controversial. *See Sweatt v. Painter*, 339 U.S. 629 (1950) (the last times the State unsuccessfully argued that diversity in the Texas legal profession was a matter of public dispute). Far from being contentious, the Texas Bar's wildly successful diversity programs directly support its mission to "aid the courts in carrying on and improving the administration of justice" and "advanc[ing] the quality of legal services to the public." TEX. GOV'T CODE § 81.012(1)–(2); 2019 POPULATION TRENDS, at 1 (minority-attorney membership in the Texas Bar has increased by two-thirds over the past decade).

Accordingly, the Court should give no weight to the

Attorney General's *amicus curiae* brief. (*See* App'ees' Br. at 18 n.2).

CONCLUSION

For the foregoing reasons, the Bar Leaders support the Texas Bar's request that the Court affirm the district court's decision below (ECF Nos. 98, 99).

Respectfully submitted,

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August 6, 2020

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PROOF OF SERVICE

Pursuant to FED. R. APP. P. 25(b)–(d) and 5TH CIR. R. 25.2.1, the Bar Leaders hereby certify that, on August, 6, 2020, its counsel electronically filed and served on all counsel of record who are registered CM/ECF users the foregoing document using the appellate CM/ECF system.

/s/ Dylan O. Drummond
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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Pursuant to FED. R. APP. P. 32(g) and 5TH CIR. R. 32.3, the Bar Leaders certify that this document complies with the type-volume limit prescribed by FED. R. APP. P. 29(a)(5) and 5TH CIR. R. 29.3 because, excluding the parts of the document exempted by FED. R. APP. P. 32(f) and 5TH CIR. R. 29.3, this brief contains 6,492 words as tabulated by the "Word Count" function of Microsoft Word®.

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