No. 20-50448

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TONY K. MCDONALD, JOSHUA B. HAMMER, and MARK S. PULLIAM,
Plaintiffs-Appellants
v.
JOE K. LONGLEY, et al.,
Defendants-Appellees

On Appeal From the United States District Court
For the Western District of Texas, Austin Division

TEXAS LEGAL ETHICS COUNSEL'S AMICUS CURIAE BRIEF SUPPORTING APPELLEES AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that–in addition to the persons and entities listed in the appellees Certificate of Interested Persons–the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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I. IDENTITY & INTEREST OF AMICI CURIAE

Amici curiae are Texas lawyers who practice "the law of lawyering," including advising lawyers on legal ethics issues, and representing lawyers in disciplinary and professional-liability matters.[1] We respectfully offer this amicus brief to provide our legal-ethics perspective concerning the scope of some activities that mandatory bar associations may permissibly fund with compulsory dues.[2]

II. SUMMARY OF ARGUMENT

Keller v. State Bar of California recognized that an "integrated" or "mandatory" state bar association may use compulsory bar dues to "constitutionally fund activities *germane to* [the] goals" of (1) "regulating the legal profession," and (2) "improving the quality of legal services." 496 U.S. 1, 13-14 (1990) ("The compelled association and integrated bar are justified by the State's interest in *regulating the legal profession* and *improving the quality of legal services*. The State Bar may therefore constitutionally fund activities *germane to* those goals out of the mandatory dues of all members.") (emphasis added).

[1] Amici are Charles Herring, Jr., James M. McCormack, Amon Burton, Gaines West, and Robert P. Schuwerk. Amici are acting in their personal capacities and not as representatives of any organizations with which they are affiliated.

[2] This brief is submitted under Federal Rule of Appellate Procedure 29(a) with the consent of all parties. Undersigned counsel certify that this brief was not authored in whole or part by counsel for any of the parties; no party or party's counsel contributed money for the brief; and no one other than amici and their counsel have contributed money for this brief.

However, *Keller* acknowledged that determining which activities are "germane" to those permissible goals and which activities may have an impermissible "political or ideological coloration" can be difficult. As the district court recognized, *Janus* did not overrule *Keller*, and this Court should affirm the district court's grant of summary judgment in favor of the Appellees—particularly in light of the unique ethical rules and professional responsibilities of the legal profession.

The State Bar of Texas ("SBOT") is the largest mandatory bar association in the nation, with over 100,000 members. But the rulings in the present case will potentially affect all mandatory state bar associations nationwide.[3]

In sum, we submit the following specific examples of broad categories of bar-funded activities that are germane to the permissible goals of "regulating the profession" and "improving the quality of legal services":

1. Educating bar members through Continuing Legal Education (CLE) programs, bar journals, and other publications.
2. Providing counseling and support programs for lawyers with chemical-dependency or psychological conditions that can impair their ability to represent clients.

[3] For example, another case currently pending before this Court implicates similar issues regarding the constitutionality of integrated state bar associations. *See Boudreaux v. Louisiana State Bar Ass'n*, No. 20-30086.

3. Providing legal services to assist those who cannot afford legal representation.
4. Engaging in administrative and legislative advocacy.

We focus our discussion on the relevant legal-ethics rules of Texas—the Texas Disciplinary Rules of Professional Conduct ("the Texas Rules")—and the ABA—the Model Rules of Professional Conduct ("the Model Rules").[4]

Finally, we note that while Appellants argue that *Keller* is impractical in light of the logistical burdens that it raises, Texas has had a detailed administrative *Keller* procedure to allow bar members to object to particular SBOT expenditures and obtain proportionate refunds for almost 15 years. Yet with apparently only one recent exception, no lawyer has ever attempted to file a *Keller* objection to any SBOT expenditures. Whether or not that constitutes a waiver in this case, the complete absence of complaints demonstrates that Texas lawyers have not viewed SBOT expenditures as a significant problem.

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[4] Federal courts in Texas consider both the Texas Rules and the Model Rules when deciding certain legal-ethics issues. *See, e.g., In re American Airlines Inc.*, 972 F.2d 605 (5th Cir. 1992); *In re Proeducation Intl., Inc.*, 587 F.3d 296, 299 (5th Cir. 2009) (following *American Airlines* in noting that a reviewing court should consider a motion to disqualify to be governed by "the ethical rules announced by the national profession in light of the public interest and the litigants' rights," and should also consider the Model Rules).

III. ARGUMENT

Educational and Preventative Programs

Opponents of compulsory dues charged by state bar associations sometimes narrowly define permissible bar expenditures as being limited to "proposing ethical codes and disciplining bar members." *See, e.g.*, Appellants' Opening Br., at 20. That is too restrictive. It is also fundamentally inconsistent with the *Keller* standard's authorization of expenditures for activities that are "germane" to regulating the profession.

For example, Model Rule 1.1,[5] entitled "Competence," sets out a basic ethical standard for all lawyers:

> A lawyer shall provide *competent representation* to a client. Competent representation requires the *legal knowledge*, skill, thoroughness and preparation reasonably necessary for the representation.

(Emphasis added.) Competence requires legal knowledge—which in turn requires education and study. As Comment 8 to Model Rule 1.1 provides,

> To maintain the requisite knowledge and skill, *a lawyer should keep abreast of changes in the law and its practice*, including the benefits and risks associated with relevant technology, *engage in continuing study and education and comply with all continuing legal education requirement*s to which the lawyer is subject.

(Emphasis added.)

[5] *Cf.* Texas Rule 1.01 ("Competent and Diligent Representation").

Thus, to comply with the ethical rule, lawyers must engage in "continuing study" and fulfill all CLE requirements. Many bar associations offer CLE courses, webcasts, online libraries, bar journals, practice guides, ethics help lines, pattern jury charges, and similar materials to assist lawyers to meet those competence requirements.[6] Those activities, and the associated expenditures, are germane to regulating the legal profession and improving the quality of legal services. Those activities also directly serve the same vital interests: to assist lawyers to comply with their ethical obligations set out in the disciplinary rules and therefore to help protect clients and the public.

Assistance For Impaired Lawyers

A lawyer's mental or physical impairment also can prevent competent representation, and therefore put at risk clients, the public, and other lawyers. Thus, Model Rule 1.16(a)(2) generally requires that a lawyer "shall withdraw from the representation of a client if . . . the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client . . . ." *See also* Texas Rule 1.15(a)(2) (requiring withdrawal when the lawyer's "physical, mental or psychological condition materially impairs the lawyer's fitness to represent the client"). Recognizing the unfortunate prevalence of mental illness and chemical

[6] *See* http://www.texasbarcle.com/CLE/Home.asp.

dependency, bar associations often operate and fund counseling and peer-assistance programs to assist lawyers.

For instance, the SBOT sponsors and funds the Texas Lawyers' Assistance Program to provide exactly that type of assistance.[7] Similarly, Texas allows lawyers who become aware of another lawyer's serious misconduct and who suspect that the other lawyer is "impaired by chemical dependency on alcohol or drugs or by mental illness," to report the lawyer to an "approved peer assistance program," instead of to disciplinary authorities. *See* Texas Rules 8.03(a), (c). Again, while that type of bar expenditure is not "discipline" per se, it clearly serves important professional and public interests to improve lawyer competence and protect clients and the public.

<u>Legal Services</u>

Appellants have also attacked access-to-justice and legal-services funding designed to assist persons who cannot pay for legal representation. But as the district court recognized,[8] those expenditures are well-grounded in the ethical standards and traditions of the legal profession.

The legal profession has a long, rich tradition of providing and advocating such services, tracing back to ancient Rome. *See, e.g.*, Roscoe Pound, *The Lawyer*

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[7] *See* https://www.tlaphelps.org.
[8] *See* ROA.3447-3448.

From Antiquity to Modern Times 51-52 (1953) (noting that in ancient Rome, "when regular advocacy arose the assistance rendered to suitors in the forum was gratuitous," and the *Lex Cincia* statute in 204 B.C. "forbade anyone from accepting money or a gift on account of pleading a case"); William G. Ross, *The Honest Hour* 9-10 (1996); Judith L. Maute, *Changing Conceptions of Lawyers' Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations*, 77 Tul. L. Rev. 91, 97 (2002) (noting that patrician jurisconsults provided legal advice to clients who were often poor, dependent household members, and that Roman rules limited payment to nominal compensation).

In the first formal legal Code of Ethics adopted in the United States, in 1887 the Alabama State Bar recognized the profession's commitment to pro bono service by providing that a client's inability to pay for legal services "may require a less charge in many circumstances, and sometimes none at all." Judith L. Maute, *Changing Conceptions of Lawyers' Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations*, 77 Tul. L. Rev. 91, 108-109 (2002).

Bringing that tradition forward, Model Rule 6.1 provides that "[e]very lawyer has a professional responsibility to provide legal services to those unable to pay" and each lawyer should aspire to rendering at least 50 hours per year of pro bono legal services. *See also Mallard v. United States Dist. Ct.*, 490 U.S. 296, 310 (1989) ("We do not mean to question, let alone denigrate, lawyers' ethical

obligation to assist those who are too poor to afford counsel . . . . On the contrary, in a time when the need for legal services among the poor is growing and public funding for such services has not kept pace, *lawyers' ethical obligation to volunteer their time and skills pro bono publico is manifest*.") (emphasis added).

Moreover, that ethical obligation includes using the profession's influence to ensure equal access to justice:

> A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, *all lawyers should* devote professional time and resources and *use civic influence to ensure equal access to our system of justice* for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Model Rules: Preamble ¶ 6 (emphasis added); *see also* Texas Rules: Preamble ¶¶ 5-6.

Accordingly, SBOT expenditures to promote and assist in fulfilling these ethical standards are necessarily germane to both regulating the profession and improving the quality of legal services.

<u>Administrative and Legislative Advocacy</u>

As the Model Rules Preamble quote indicates, the profession's ethical standards and traditions can require more than simply providing legal representation to individual clients. Paragraph 6 in the ABA Preamble recognizes

that "[a]s a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients [and] employ that knowledge *in reform of the law* . . . ."

However, opponents of bar expenditures often make overbroad statements like this: "It is difficult to imagine a more quintessentially 'political' activity than advocating for the passage of legislation."[9] That argument has two flaws.

First, the *Keller* standards allow expenditures germane to regulating the profession and improving the quality of legal services. Statutes can address those same issues, and thus can directly affect lawyer discipline and the quality of legal services. Two examples:

- The Texas Rules prohibit "barratry," but do not define barratry. *See* Texas Rules 8.04(a)(9). Instead, Texas criminal law provides the functional definitions of barratry, and civil statutes create private remedies against barratrous misconduct. *See* Tex. Penal Code § 38.12; Tex. Gov't Code §§ 82.065-.651. The SBOT has a direct interest in monitoring proposed changes to those statutes and their potential effects on discipline, and providing appropriate information and "influence" on the legislature to protect against possible adverse effects of proposed changes in the law.

[9] Appellants' Opening Br., at 3.

- Model Rule 8.4(g) and Texas Rule 5.08 prohibit lawyers from engaging in various types of discriminatory activities. Texas Rule 5.08(a) generally prohibits a lawyer 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" an adjudicatory proceeding. Many Texas statutes address and define those closely related terms, and thus changes to those statutes may affect, for better or worse, discipline under the relevant ethics rules. To protect both lawyers and the public, bar associations therefore have a strong interest to actively monitor and potentially attempt to influence that legislation.

Second, the Model Rule 8.4(g)-Texas Rule 5.08 example above illustrates another oversimplification in Appellants' argument. Do rules and statutes that address "sexual orientation" have "political" or "ideological" content? Of course they do. But does that mean that a bar association must completely ignore potential legislative activity that would affect disciplinary rules predicated on that content? Of course not.

Reform and improvement of the law is a broad mandate that certainly does not require any ideological or political motivation. Legal reforms often develop because existing law has failed to meet its objectives. Further, the legal profession's first-hand experience with the operation of certain laws and rules may

indicate that refinement of a statutory scheme or a different legal codification would better serve intended goals.

For example, family law and criminal statutes regularly require clarification and correction, particularly in response to new court decisions. A mandatory bar association may be particularly well-positioned to organize study groups and fund legislative advocacy in these areas to educate the legislature concerning the need—or lack of need—for particular legal reforms. Thus, legislative "advocacy" is sometimes simply serving as a learned resource to advise legislators on legal history, new obstacles to achieving the law's intended objectives, and how to improve the law to better serve the public's interests.

The SBOT has carefully-designed, detailed procedures and requirements that must be met before the Bar can support any proposed legislation.[10] For example, the Bar must determine in advance that the legislative proposal meets seven specific criteria designed to ensure compliance with *Keller*, including that the proposal "falls within the purposes" prescribed in the State Bar Act; "does not carry the potential of deep philosophical or emotional division among a substantial segment of" the Bar; is "in the public interest"; and does not advocate "political or

[10] *See* SBOT Board of Directors Policy Manual § 8.01, available at: https://www.texasbar.com/AM/Template.cfm?Section=Governing_Documents1&Template=/CM/ContentDisplay.cfm&ContentID=42429.

ideological positions."[11]

Note also that while Texas has had a detailed *Keller* procedure since 2005 to allow bar members to object to particular SBOT expenditures and obtain proportionate refunds,[12] not a single Bar member had ever lodged an objection until this lawsuit was filed.[13] Opponents of bar expenditures, at best, vastly exaggerate the seriousness and prevalence of the supposed logistical burdens under the existing *Keller* procedures.

At what point would a bar association's activities become impermissible "political" or "ideological" activity? We do not presume to propose a comprehensive answer to that question. We merely submit that as the Supreme Court wisely recognized in *Keller*, the answer should depend upon the particular facts, including the concepts and issues involved and the potential effects on lawyer discipline and the quality of legal services.

Appellants' position, if adopted, would destroy or at least fundamentally transform the nature and operations of a valued and highly successful model for the legal profession's self-governance—and do so without any demonstration of constitutional requirement or practical necessity. We submit that the Constitution does not require that radical, disruptive, and counterproductive result.

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[11] *Id.* § 8.01.03.
[12] *Id.* § 3.14.
[13] Apparently a single Bar member not involved in this lawsuit filed a protest in 2019 and 2020.

CONCLUSION

We submit that legal-ethics rules and traditional lawyer-regulation standards are a necessary and appropriate part of applying *Keller* to evaluate the propriety of expenditures of compulsory dues by a mandatory bar association.

Respectfully submitted,

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I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 2,597 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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