Case No. 20-6044

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARK E. SCHELL,
Plaintiff-Appellant

v.

THE CHIEF JUSTICE AND JUSTICES OF THE OKLAHOMA SUPREME COURT; THE MEMBERS OF THE OKLAHOMA BAR ASSOCIATION'S BOARD OF GOVERNORS; JOHN M. WILLIAMS, Executive Director, Oklahoma Bar Association, all in their official capacities,
Defendants-Appellees

APPELLEES' JOINT ANSWER BRIEF

Michael Burrage, OBA No. 1350
Whitten Burrage
512 N Broadway, Suite 300
Oklahoma City, OK 73102
Attorneys for Defendants-Appellees the Members of the Oklahoma Bar Association's Board of Governors, other than Timothy E. DeClerck, and John M. Williams, Executive Director of the Oklahoma Bar Association, in their official capacities

Kieran D. Maye, Jr.
Leslie M. Maye
Maye Law Firm
3501 French Park Drive, Suite A
Edmond, OK 73034
Attorneys for Defendants-Appellees, The Chief Justice and Justices of the Oklahoma Supreme Court, in their official capacities

Thomas G. Wolfe, OBA No. 11576
Heather L. Hintz, OBA No. 14253
Phillips Murrah P.C.
Corporate Tower, 13th Floor
101 N Robinson Avenue
Oklahoma City, OK 73102
Attorneys for Defendants-Appellees the Members of the Oklahoma Bar Association's Board of Governors, and John M. Williams, Executive Director of the Oklahoma Bar Association, in their official capacities

ORAL ARGUMENT NOT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Appellees are not required to file a disclosure statement pursuant to 10th CIR. R. 26.1.

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STATEMENT OF RELATED CASES

Pursuant to 10th CIR. R. 28.2(c), Appellees state that there are no prior or related appeals.

STATEMENT REGARDING ORAL ARGUMENT

Appellees believe that oral argument is not necessary, as the issues are determined by well-settled binding Supreme Court precedent that must be applied. Contrary to Appellant Mark E. Schell's contention, the relationship between *Janus v. AFSCME*, 138 S. Ct. 2448 (2018) and *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) is not an issue. However, if the Court were to grant Appellant's request, Appellees' request that the argument be conducted via video conference from the courthouse for the United States District Court for the Western District of Oklahoma in Oklahoma City.

I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Does the First Amendment prohibit the State of Oklahoma from requiring membership in the Oklahoma Bar Association as a condition of licensure to practice law in the State.

B. Does the First Amendment prohibit the State of Oklahoma from requiring the payment of dues to the Oklahoma Bar Association as a condition of licensure to practice law in the State.

II. STATEMENT OF THE CASE

In exercise of its plenary powers over the State's courts, OKLA. CONST. arts. 4, 7, the Oklahoma Supreme Court created the Oklahoma Bar Association ("OBA"), and adopted the Rules Creating and Controlling the Oklahoma Bar Association ("RCAC") to govern the OBA. *See In re Integration of State Bar of Okla.*, 1939 OK 378, ¶¶ 12-14, 95 P.2d 113, 116.[1] The RCAC Preamble states the OBA's broad purpose and function:

> In the public interest, for the advancement of the administration of justice according to law, and to aid the courts in carrying on the administration of justice; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence and public service, and high standards of conduct; to provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence, and law reform; to carry on a

[1] "[T]he power to organize, regulate and control the Bar for the administration of justice is inherently vested in the Supreme Court...." *Archer v. Ogden*, 1979 OK 130, 600 P.2d 1223, 1225 (quoting *Ford v. Bd. of Tax-Roll Corr.*, 1967 OK 90, 431 P.2d 423, 429).

> continuing program of legal research in technical fields of substantive law, practice and procedure, and to make reports and recommendations thereto; to prevent the unauthorized practice of law; to encourage the formation and activities of local bar associations; to encourage practices that will advance and improve the honor and dignity of the legal profession; and to the end that the responsibility of the legal profession and the individual members thereof, may be more effectively and efficiently discharged in the public interest, and acting within the police powers vested in it by the Constitution of this State ….

Aple.App. Vol. 1 at 000069, RCAC, OKLA. STAT. tit. 5, Ch.1, App.1. *et seq.* (2005).[2]

The OBA is an "official arm" of the Oklahoma Supreme Court when the OBA acts for and on its behalf "in the performance of its governmental powers and functions." RCAC, Art. I, § 1. "Attorneys admitted to practice law in Oklahoma are a part of the judicial system of Oklahoma and officers of its courts." *Id.* at Art. I, § 2. The Oklahoma Supreme Court retains "exclusive jurisdiction in all matters

[2] While codified in the Oklahoma statutes, the RCAC are not legislative in origin, but are rules promulgated by the Oklahoma Supreme Court, and published as part of the State's Court Rules. *See In re Integration of State Bar of Okla.*, 1939 OK 378, ¶¶ 12-14. The RCAC may be found on the Oklahoma State Courts Network, www.oscn.net, at the "Legal Research" tab, and are included in Appellees' Appendix ("Aple.App.") (Aple.App. Vol 1 at 000069-83). Appellees respectfully request that the Court take judicial notice of the RCAC and other public records referenced in Appellees' Brief. *See Tal v. Hogan*, 453 F.3d 1244, 1264 n. 24 (10th Cir. 2006) (The court may "take judicial notice of its own files and records, as well as facts which are a matter of public record. However, the documents may only be considered to show their contents, not to prove the truth of matters asserted therein.") (internal quotations, citations and brackets omitted).

involving the licensing and discipline of lawyers in Oklahoma" and has sole control over rules governing admission to practice law in the state. *Doyle v. Okla. Bar Ass'n*, 998 F.2d 1559, 1563 (10th Cir. 1993) (citations omitted); RCAC, Art. XVI.

In exercise of its police powers, the Oklahoma Supreme Court created the OBA as an integrated bar association, such that attorneys licensed to practice in the state are required to be members of the OBA and pay annual dues in an amount set by the Oklahoma Supreme Court. RCAC, Art. II, § 7(a), Art. VIII, § 1.[3] Dues paid by OBA members "are for a public purpose connected with the administration of justice." *Ford*, 431 P.2d at 431. Currently, annual dues for active members who have been admitted to practice more than three years are $275.00. *See In re Rules Creating and Controlling the Okla. Bar Ass'n*, 2011 OK 92; RCAC Art. VIII, § 1.

The law is crystal clear that a compulsory bar with mandatory dues is entirely constitutional. *Lathrop v. Donohue*, 367 U.S. 820, 842-843 (1961) (plurality) (a state may constitutionally require a lawyer to be a member of a mandatory or unified bar to which compulsory dues are paid) and *Keller v. State Bar of Cal.*, 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

[3] There are exceptions to membership and dues requirements. *See, e.g.*, RCAC Art. II, § 7(b) (providing dues exception for incapacitated persons), Aple.App. Vol. 1 at 000069, 74; Art. VIII, § 1 (providing dues exception for certain active duty deployed military members). Aple.App.Vol. 1 at 000078.

services," and "the State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members").

The Court in *Keller* determined that an integrated bar association satisfies its First Amendment obligations by providing procedures by which members can object to a state bar activity or expenditure and seek a refund of that portion of the member's dues attributable to same (a "*Keller* policy"). In 2005, the OBA adopted a *Keller* policy (the "2005 *Keller* policy"). Aple.App. Vol 1. at 00063-4, 000109-10.

Appellant Mark E. Schell brought suit challenging the constitutionality of the Oklahoma Supreme Court's licensure requirements of bar membership and the payment of dues, and sought an injunction. Appellant's Appendix ("App.") at 021, 040-41.[4] He also alleged that the OBA's 2005 *Keller* policy did not include safeguards sufficient to meet the standards enunciated in *Keller*, thereby depriving him of his constitutionally protected rights and causing him irreparable injury. App.038-40.[5]

[4] Schell's Amended Complaint states he sought "to protect the First and Fourteenth Amendment rights of Oklahoma attorneys who have been forced to join the [OBA] and to subsidize political and ideological speech by the OBA that they do not wish to support." App.021. However, he may only bring the claim on his own behalf, to address his own alleged injury. *See Boudreaux v. La. State Bar Ass'n*, No. 2:19-cv-11962, 433 F. Supp. 3d 942, 2020 WL 137276 (E.D. La. Jan. 13, 2020).

[5] Schell did not avail himself of the OBA's *Keller* policy. Aple.App. Vol. 4 at 000027-29. Accordingly, the challenge below was a facial attack.

Disposition of Schell's First and Second Claims.

On Appellees' motions, the district court dismissed, pursuant to FEDERAL RULES OF CIVIL PROCEDURE 12(b)(6), Schell's first two causes of action contesting the constitutionality of the Oklahoma Supreme Court's requirements of membership and dues as a condition of licensure for failure to state a claim. Determining it was bound by *Lathrop* and *Keller*, the district court rejected Schell's argument that *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), which held that nonmembers of public-sector unions could not be forced to pay union dues, impliedly overruled *Keller* as to the correlative requirements of compulsory membership dues of integrated bar. App.043, 049-51.

Disposition of Schell's Third Claim.

The district court denied Appellees' motions to dismiss Schell's challenge to the sufficiency of the OBA's 2005 Keller policy, ruling Schell stated a facial claim, assuming the truth of his allegations. App.043, 051-2.

Subsequently, the OBA adopted an amended *Keller* policy (the "2020 *Keller* policy") that superseded the 2005 *Keller* policy.[6] Aple.App.000302-303, 306-10. The 2020 *Keller* policy reaffirmed the OBA's commitment to conforming its activities to those articulated by the Oklahoma Supreme Court in the RCAC and the

[6] The Amended Complaint was filed May 15, 2019, App.020; the 2020 *Keller* policy was adopted in March 2020. Aple.App. Vol. 4 at 000076-84. Schell did not seek leave to amend his claims after adoption of the 2020 *Keller* policy. App.017-19.

germaneness parameters set out in *Lathrop* and *Keller*. But the new policy does more than merely incorporate the adequate safeguards set out in *Teachers v. Hudson*, 475 U.S. 292 (1986), as *Keller* requires. Among other things, it also revamps budgeting procedures to strengthen the OBA's ability to identify proposed potentially non-germane activities or expenditures during the budgeting process, and provides for independent review of proposed budgets. It also added a mechanism whereby any OBA expenditures associated with legislative advocacy are tallied annually to produce a figure that OBA members can elect to subtract from their annual dues. The procedure permits members to opt out of paying dues for legislative advocacy even if germane to the OBA's purpose and function. Aple.App. Vol. 4 at 000080-84.

Because the parties agreed that the OBA's adoption of the 2020 *Keller* policy mooted Schell's third cause of action, the district court granted Appellees' Unopposed Motion to Dismiss, and entered judgment. Aple.App. Vol. 4 at 000076-84; App.53-4. Schell did not amend his Amended Complaint to challenge the 2020 *Keller* policy. Thus, whether the 2020 *Keller* policy provides adequate safeguards is not at issue in this appeal. Rather, Schell's only claims on appeal are that the district court erred in dismissing his claims that (1) compelled membership in the OBA and (2) collection and use of mandatory bar dues to subsidize speech which with he disagrees violate his First Amendment rights. App.034, 036.

III. SUMMARY OF THE ARGUMENT

The district court properly dismissed Schell's challenges to the Oklahoma Supreme Court's requirement that attorneys licensed in Oklahoma be members of and pay dues to the OBA for failure to state a claim. Schell failed to plead plausible constitutional claims challenging the Oklahoma Supreme Court's requirements of mandatory membership in and dues to an integrated state bar, as a matter of law. The Supreme Court has conclusively spoken on these issues via *Lathrop* and *Keller*; Schell's challenges fall squarely within these authorities.

The Supreme Court's opinion in *Janus* did not explicitly or implicitly overrule *Lathrop* and *Keller*. In the same vein, *Janus* did not require Appellees to re-establish that the State has a compelling interest to support compulsory membership and annual dues requirements sufficient to meet the requisite level of scrutiny. The Supreme Court, in *Harris v. Quinn*, 573 U.S. 616 (2014), stated that *Keller*'s holding and analysis fit well within the level of scrutiny applied in *Harris*, which Schell seeks to impose here. The district court therefore properly dismissed Schell's challenges.

To the extent Schell's claims are tied to the OBA's *Keller* policies, his alleged injuries are hypothetical. The 2007 *Keller* policy is no longer in effect, the claim challenging its adequacy was dismissed as moot. Schell did not challenge the new 2020 *Keller* policy, or allege below that it fails to provide adequate safeguards to

protect against Schell's association with non-germane speech. His claims are, therefore, non-justiciable.

IV. ARGUMENT

A. Standard for Dismissal of a Claim under RULE 12(b)(6).

"To survive a motion to dismiss under RULE 12(b)(6), a plaintiff must plead sufficient factual allegations 'to state a claim to relief that is plausible on its face.'" *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1104 (10th Cir. 2017) (quotation marks and citations omitted). "A claim is facially plausible 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "In ruling on a motion to dismiss for failure to state a claim, all well-pleaded facts...must be taken as true, and the court must liberally construe the pleadings and make all reasonable inferences in favor of the non-moving party. *Id.* at 1105 (alterations and quotation omitted).

Since it is well settled that it is constitutional under the First Amendment to require lawyers seeking a license to practice law to be a member of an integrated bar association and to pay a compulsory annual membership fee, Schell failed to plead plausible claims challenging the Oklahoma Supreme Court's requirements for an

integrated bar and mandatory fees. As a matter of law, the district court properly dismissed Schell's challenge.

B. The Extant Law.

1. Mandatory Bar Membership Comports with Freedom of Association Guarantees.

The Supreme Court determined in 1961 that a state does not violate the First Amendment's guarantee of freedom of association by conditioning law licensure on attorneys joining, and paying dues to, a state bar association that "engages in some legislative activity" or expresses opinions. *Lathrop*, 367 U.S. at 842-843 (plurality). In doing so, *Lathrop* expressly rejected appellant's argument that (1) the integrated Wisconsin Bar unconstitutionally infringed upon his constitutionally protected freedom of association, and (2) that paying dues violated his right of free speech. *Id.* at 843.

The Court explained the states' compelling interest in "promot[ing] the public interest to have public expression of the views of a majority of the lawyers of the state, with respect to legislation affecting the administration of justice and the practice of law, the same to be voiced through their own democratically chosen representatives comprising the board of governors of the State Bar." *Id.* at 844-45. That compelling public interest promoted via the Bar far outweighed any small inconvenience to the appellant resulting from paying annual dues. *Id.* at 845. The plurality determined:

> ....that the Supreme Court of Wisconsin, in order to further the State's legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity. Given the character of the integrated bar shown on this record, in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, we are unable to find any impingement upon protected rights of association.

367 U.S. at 843. Notably, compulsory bar membership posed no burden on attorneys beyond the obligation to pay dues. Thus, the *Lathrop* Court implicitly rejected the argument that mandatory membership, standing alone, caused appellant any First Amendment injury. *Id.*

Lathrop identified the "guiding standard" permitting a bar to expend dues payments on political or ideological speech. If "the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State,'" mandatory dues may be expended without violating members' constitutional rights. *Id.* at 843. While the plurality did not determine whether an integrated bar violated the First Amendment's right to free speech by application of dues to political speech, *id.* at 845,[7] that issue was resolved in favor of state bars in *Keller*, discussed below.

[7] Three Justices concurring in the written opinion determined that the application of mandatory dues complied with the Constitution's free speech guarantees. *Id.* at 850-51 (Harlan, J., concurring in judgment), 864 (Whittaker, J., concurring in result).

2. Application of Mandatory Dues to Germane Political or Ideological Speech and Other Germane Activity is Constitutional.

Both building on and reaffirming its holding in *Lathrop*, the Court in *Keller* examined the constitutionality of an integrated bar's use of "compulsory dues to finance political speech and ideological activities" with which the appellant disagreed. *Keller*, 496 U.S. at 9.

Unlike the plurality in *Lathrop*, the unanimous Court in *Keller* determined that "compelled association and [an] integrated bar are justified by the [s]tate's interest in regulating the legal profession and improving the quality of legal services," and that a state bar may "constitutionally fund activities germane to those goals out of the mandatory dues of all members." *Id.* at 13, 14. The Court also determined that compulsory dues may not be constitutionally applied to fund non-germane activities or speech. *Id.*

The *Keller* Court turned first to the state court's determination that the California Bar's "status as a regulated state agency exempted it from any constitutional constraints on the use of its dues." *Id*. at 6-7, 10.[8] The Supreme Court

[8] Below, Appellees Williams and the Board of Governors argued, in the alternative, that the payment of dues to support the OBA's speech was constitutional because the doctrine of what constitutes government speech has evolved, and OBA activity should be considered government speech. *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559-60 (2005). Aple.App. Vol. 1 at 000064-66, Vol. 2 at 000048-51.

disagreed. For the purpose of the federal question before it, the Court observed that the bar was more like a public sector union than a traditional government agency. So, it cited and analogized to public sector union cases, including *Abood v. Detroit Bd. Of Educ.*, 431 U.S. 209 (1977), in assessing the constitutionality of the policies before it. *Id.* at 11.

Abood addressed the constitutionality of withholding money from non-union members' monthly paychecks to be paid to the union to remedy the "free rider" problem in agency shops (where a non-union member benefits from the union's activities without contributing to the union). *Keller*, 496 U.S. at 12. From *Abood*, the Court adopted the standard of "germaneness" holding:

> 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 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. The difficult question, of course, is to define the latter class of activities.

Id. at 13-14.

The Court recognized that "[p]recisely where the line falls between those State Bar activities...will not always easy to discern." *Id*. at 15. Looking to the principles outlined in its decision in *Ellis v. Ry. Clerks*, 466 U.S. 435, 455-57 (1984), the Court approved a constitutional standard incorporating the concept of reasonableness – "the guiding standard must be whether the challenged expenditures are necessarily

or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" *Id.* at 14 (quoting *Lathrop*, 367 U.S. at 843).

Rebuffing the state court's conclusion that imposing a 'germaneness' requirement on the state bar would be burdensome, because it would require a constant analysis of every activity, the Court said a state bar need not conduct a detailed analysis of 'germaneness' every time it might desire to "'lobby a bill or brief a case'" to avoid litigation over expenditures or speech. *Id.* at 16 (quotation and citation omitted). Rather, a bar that engaged in advocacy or other activities could fulfill its constitutional duty to membership by adopting a "*Keller* policy" – procedures that would allow a member to object to application of his or her dues to an activity to which the member objected or considered not germane – as an adequate safeguard against application of their dues to non-germane political or ideological speech or activity.

Specifically, the Court determined a state court could meet its obligations "by adopting the sort of procedures described in" *Teachers v. Hudson*, 475 U.S. 292 (1986), which required providing non-union members compelled to pay a public sector union fee "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such

challenges are pending." *Id.* at 16-17 (quoting *Hudson,* 475 U.S. at 310, citation and quotation marks omitted). In sum, by adopting "the[se] sort of" procedures, a state bar would meet its First Amendment obligations by providing members adequate safeguards against use of dues to fund non-germane speech or activity. *Id.*

The unassailable conclusion is that, together, *Lathrop* and *Keller* permit states to require membership in an integrated bar as a condition of practicing law and require payment of bar dues for expenditures germane to states' interests in regulating the legal profession and improving the quality of legal services in the state. This Court is not free to ignore this governing authority since *Lathrop* and *Keller* "remain binding precedent until [the Supreme Court] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Hohn v. United States*, 524 U.S. 236, 252-53 (1998) (citation omitted).

Schell's claims seeking declaratory and injunctive relief fall squarely within *Lathrop* and *Keller*, controlling authorities the district court and this Court are duty-bound to apply. Consequently, the district court properly dismissed Schell's claims, and this Court must affirm.

C. Schell's Attacks on the Supreme Court's Binding Authority are Unavailing.

Schell's theories and word play do not change the inevitable. Schell argues that the Supreme Court's opinion in *Janus*, 138 S. Ct. at 2486, overturned the

controlling precedent underlying the *Keller* Court's holding, and thus required the district court to re-analyze (1) whether a compelling state interest exists and (2) whether the burdens on Schell's speech are significantly broader than necessary to protect the state's interest. Notwithstanding Schell's arguments to the contrary, both Oklahoma's interest in imposing membership and dues requirements on lawyers and the tailoring it has adopted as dictated by *Keller* – requiring that bar speech and providing a mechanism to seek a refund of dues for any non-germane speech or activities - still meet constitutional muster.[9]

In *Janus*, the Court addressed whether it was constitutional for a public sector employer to deduct wages from a non-union member's pay without the employee's prior consent. 138 S. Ct. at 2459-60. Overruling *Abood*, the Court found the state's interests in 'labor peace' and preventing free riders were not sufficient to justify deducting "agency fees" or other payments from non-union member's wages

[9] In addition to asserting that *Janus* required the district court to abandon *Keller*'s holding and to independently apply an exacting scrutiny analysis to whether the State has sufficient interest to support compulsory membership and dues, Schell argued below that *Janus* requires bar associations to obtain the affirmative consent of members (also called an opt-in policy) prior to engaging in political or ideological speech, and that the OBA's 2005 *Keller* policy, lacking an opt-in component, was constitutionally insufficient. App.038-40. *See Janus*, 138 S. Ct. at 2486 (unions may not deduct agency fees or "any other payment to the union" from the wages of non-member employees unless the employees waive their First Amendment rights by "clearly and affirmatively consent[ing] before any money is taken from them"). That challenge is not at issue on appeal given the district court's dismissal of Schell's challenge to the 2005 *Keller* policy as moot. App.053.

without the employee's affirmative consent, which would demonstrate the employees' waiver of their First Amendment rights. *Id.* at 2486.[10]

Since *Keller* applied *Abood*'s public sector union shop analysis, subsequent to *Janus*, other challengers have seized on *Janus*'s reversal of *Abood* to call into question *Lathrop* and *Keller*. Yet, these attempts to claim *Janus* undermines the decades-long precedent set forth in *Lathrop* and *Keller* have failed every time. Each court that has considered the issue has determined that *Janus*, in overturning *Abood*, did not overrule *Keller* and *Lathrop* or require re-evaluation of the challenged bars' structure under an a different scrutiny standard.

First, these courts have roundly rejected the claim that *Janus* requires reevaluation of whether states have a compelling interest in requiring mandatory membership and payment of dues. For instance, in *Gruber v. Or. State Bar*, the district court addressed whether "mandatory bar membership and compulsory fees fail the exacting scrutiny standard described in *Janus*." No. 3:18-cv-1591-JR, 2019 WL 2251826, at *9 (D. Or. April 1, 2019), report and recommendation adopted in *Gruber v. Or. State Bar*, No. 3:18-cv-1591-JR, 2019 WL 2251282 (D. Or. May 24, 2019) (appeals filed May 2019). The *Gruber* court's ruling that *Janus* did not

[10] Justice Kagan's *Janus* dissent noted that the majority's opinion did not call into question the viability of *Keller*. 138 S. Ct. at 2498 (Kagan, J., dissenting).

abrogate *Keller* was rooted in the Supreme Court's decision in *Harris v. Quinn*, 573 U.S. 616 (2014). *Id*. Thus, an examination of *Harris* is warranted here.

In *Harris*, the Supreme Court reaffirmed *Keller* and its underlying reasoning when considering whether certain home care assistants could be required to pay union fees although the assistants were neither public union members nor state employees. 573 U.S. at 645-47. Petitioner argued that the role of the non-union home care assistants was too far removed from the state to support a compelling state interest necessary to justify extracting union fees from their paychecks. Respondents countered that a refusal to extend *Abood* to the assistants threatened *Keller's* holding that the state had an interest sufficient to support the requirements of mandatory membership in and dues to a state bar.

The Court brushed aside respondents' false equivalence, determining that the analysis of the state's interest in *Keller* "fits comfortably within the framework applied in the present case." *Id.* at 655. Elaborating, the Court explained that the holding in *Keller* establishing the constitutionality of mandatory membership and dues was supported by the "State's interest in regulating the legal profession and improving the quality of legal services." Further differentiating *Keller*, the Court noted that "[s]tates also have a strong interest in allocating to members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices. Thus, our decision [in *Harris*] is wholly consistent with our holding in

Keller." *Id.* at 655-56. Even the *Harris* dissent agreed that *Harris* "reaffirmed [*Keller*] as good law." *Id.* at 670 (Kagan, J., dissenting). In short, *Harris* explicitly found the interests of integrated bars identified in *Keller* were sufficiently compelling to meet the required level of scrutiny, and, importantly here, untethered the analysis in *Keller* from that in *Abood* several years prior to *Janus*.

Likewise, in *McDonald v. Sorrels*, the district court recently granted summary judgment to the State Bar of Texas on plaintiffs' claims that "the mandatory requirement that attorneys in Texas must join, associate with, and pay dues to the Bar violates their First Amendment right to freedom of speech and association." *McDonald*, No. 19-CV-219-LY, 2020 WL 3261061, *3 (W.D. Tex. May 29, 2020) (appeal filed June 2, 2020). Applying *Keller* and *Lathrop*, the court determined "mandatory Bar membership and compulsory fees do not otherwise violate the First Amendment." *Id.* at *8. The court rejected that plaintiffs could avoid *Keller* and *Lathrop* because *Janus* requires a re-analysis of the state's interests in mandatory bar membership and dues, concluding that "*Janus*'s reassessment of the state interests that *Abood* concluded justified agency fee arrangements did not undermine *Keller*. *Id.* at *5. Instead, the state's "interests in professional regulation and legal service quality served by integrated bars," are "very different" from the public sector union interests *Abood* found compelling and *Janus* concluded were not. *Id.*

Further, "the majority opinion in *Janus* did not address *Keller* or respond to the dissent's assertion that *Keller* was a 'case involving compelled speech subsidies outside the labor sphere [that] today's decision does not question.'" *Id.* (quoting *Harris*, 138 S. Ct. at 2498 (Kagan, J., dissenting). Finally, the court determined that *Harris* "confirms that *Keller* fits within the 'exacting scrutiny' framework applied in *Janus*." *Id.* (quoting *Harris*, 573 U.S. at 648-51). *See also Boudreaux v. La. State Bar Ass'n*, No. 2:19-cv-11962, 433 F. Supp. 3d 942, 2020 WL 137276, at *24 (E.D. La. Jan. 13, 2020) ("This case is distinguishable from *Janus*....[which] did not discuss *Keller* or respond to the dissent's assertion" that *Janus* did not impact *Keller*).

Similarly, the district court in *Jarchow v. State Bar of Wis.*, No. 19-cv-266, 2019 WL 6728258 (W.D. Wis. Dec. 11, 2019), rejected a claim that being compelled to join the Wisconsin state bar and pay dues violated state bar members' First Amendment rights of speech and association. *Id*. at *1. There, plaintiff bar members alleged that mandatory bar membership and dues requirements violated their First Amendment rights, relying on the argument that *Janus* "undermined the reasoning and holding of *Keller*." *Id.* Determining *Janus* did not overrule *Keller*, the court determined it was bound by *Keller* to dismiss the challenge. *Id*. at **1-2. The Seventh Circuit affirmed, holding that "the district court, in its thorough and well-reasoned order, correctly held that appellants' claims are foreclosed by *Keller*."

Jarchow v. State Bar of Wis., No. 19-3444, 2019 WL 8953257 (7th Cir. Dec. 23, 2019) (ruling made on the appellant's motion for summary affirmance, filed in the apparent desire to have a petition for certiorari pending at the same time as that in *Fleck v. Wetch*, *see* 140 S. Ct. 1294 (Mar. 9, 2020)). The Supreme Court denied certiorari earlier this month. *See Jarchow v. State Bar of Wis.*, –S. Ct.–, 2020 WL 2814314 (Mem.) (June 1, 2020).[11]

Second, Schell attempts to avoid application of *Lathrop* and *Keller* by positing that the constitutionality of mandatory dues must be governed by the "same constitutional rule" as that applied in the public sector union cases such as *Janus*. He implies this "*Janus* rule" allows him to skirt the binding rulings of *Lathrop* and *Keller* that the compelling interest of integrated bars allows them to constitutionally fund germane activities. The Court must reject this unsound argument.

The Supreme Court in *Bd. of Regents of Univ. of Wis. Sys. v. Southworth* expressly identified the applicable constitutional standard as "germaneness." 529 U.S. 217, 231-32 (2000) ("In *Abood* and *Keller*, the *constitutional rule* took the form of limiting the required subsidy to speech germane to the purposes of the union or bar association.") (emphasis added). As previously noted, in integrated bar cases, the applicable "constitutional rule" is that a "State Bar may...constitutionally fund

[11] Justices Thomas and Gorsuch dissented arguing that given the overruling of *Abood*, it would be wise to "reexamine" *Keller*. *See* 2020 WL 2814314 (Thomas, J., dissenting). The majority clearly disagreed.

activities germane to [the State's interest in regulating the legal profession and improving the quality of legal services] out of the mandatory dues of all members." *Keller*, 496 U.S. at 13-14. As a number of courts have universally determined, *Janus* decidedly does not create a new "constitutional rule" to apply to integrated bars that requires casting aside *Lathrop* and *Keller*.

Third, courts have likewise declined to accept Schell's claims that the tailoring approved by *Keller* does not meet the required scrutiny, and his contention that integrated bars must provide affirmative consent to application of their dues to political or ideological activity, via some sort of opt-in provision. Aplt.Brf. at 43.[12]

Again, *Keller* held that mandatory membership and the application of dues to political and ideological activity or speech was constitutional so long as the activity or speech was germane to the interests of the bar recognized in *Lathrop*, and the bar adopted a policy incorporating procedures "of the sort" approved in *Hudson*, 475 U.S. 292 (1986), that would allow members to seek to opt-out of having their dues applied to fund non-germane speech or activity. *Keller*, 496 U.S. at 13-14, 16. While the *Keller* Court did not use the word 'tailoring,' it is plain that by limiting dues-supportable bar speech or activity to that *germane* to a bar's interests, and providing a mechanism for members to opt-out of application of their dues to items determined

[12] When citing to Appellant's Opening Brief ("Aplt.Brf."), Appellees refer to the page number included in the ECF filing stamp at the top of the document.

to be non-germane, the Court approved a standard that if complied with, satisfied the bar's obligation to members: not to burden their speech significantly more than necessary to protect the State's compelling interests. *Id.* Indeed, the *Harris* Court expressly confirmed this when it determined that *Keller* fit within the exacting scrutiny standard it applied in that case. 573 U.S. at 655-56. In this regard, the *Gruber* court stated:

> plaintiffs assert … [that] because the Bar does not obtain members' affirmative consent before using their fees for political or ideological speech, the compulsory nature of the Bar's membership and fees further violates their First Amendment rights. However, because *Keller* has not been abrogated, this court is bound to follow its dictates as it is directly applicable to the case at bar….Applying *Keller* demonstrates that plaintiffs' claims fail as a matter of law and should be dismissed.

2019 WL 2251826, at *9.

The Eighth Circuit issued an instructive set of opinions examining the challenge raised by an attorney to North Dakota's membership and dues requirements. In the first opinion, the court affirmed the district court's determination on summary judgment that, when he opposed application of his dues to expenditures he claimed were non-germane, the North Dakota Bar's *Keller* policy adequately safeguarded attorney's First Amendment rights. *Fleck v. Wetch*, 868 F.3d 652, 655-57 (8th Cir. 2017). The attorney contended that the Supreme Court's decision in the union case of *Knox v. Serv. Employees Int'l Union Local 1000*, 567 U.S. 298 (2012), imposed an affirmative 'opt-in' requirement on his bar dues

statement, not the 'opt-out' feature whereby North Dakota allowed dues payers to subtract from their annual dues a sum based on the bar's prior year's expenditure on non-germane activities. *Id.* a 654-55. Disposing of the challenge, the Eighth Circuit differentiated between *Knox* (where the employer deducted money from public-sector employees' wages and transferred it to the union) and the North Dakota Bar's licensing procedure (pursuant to which the bar members themselves "pay the license fees"). *Id.* at 656-57.

The Supreme Court granted attorney's petition for certiorari, vacated the Eighth Circuit's opinion, and remanded the case "for further consideration in light of *Janus*." *Fleck v. Wetch*, 139 S. Ct. 590 (2018). On remand, the Eighth Circuit affirmed the district court again focusing on the same distinction in how the offending payment made its way to the organization. *Fleck v. Wetch*, 937 F.3d 1112, 1117-18 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 1294 (Mar. 9, 2020). Finally, "as *Janus* did not overrule *Keller* and did not question the use of the *Hudson* procedures when it is appropriate to do so," the court "conclude[ed] that *Janus* [did] not alter its prior decision explaining" its 2017 opinion. *Id.* 1118. The Supreme Court recently denied attorney's petition for certiorari. *See Fleck v. Wetch*, 140 S. Ct. 1294 (Mar. 9. 2020), *reh'g denied*, 2020 WL 2105677, –S.Ct.– (May 4, 2020).

Fourth, no doubt aware that there is no weight to his argument that the constitutionality of mandatory bar dues must be reexamined in light of *Janus*, Schell

categorizes *Keller*'s holding – that a state can meet its constitutional requirements by "adopting the sort of procedures described in *Hudson,*" *Keller*, 496 U.S. at 17 – as *dicta* that "no longer carries any force." Aplt.Brf. at 42. This argument is nonsensical for several reasons.

Not only does any reasoned reading of *Keller* belie Schell's interpretation, that numerous courts have applied *Keller* to analyze challenges to the constitutional sufficiency of various bars' *Keller* policies fatally undermines Schell's argument. Additionally, Schell himself does not read *Keller* the way he urges the Court to read it. He has always framed his injury as deprivation of a constitutional right due to the OBA's alleged adoption of a policy that did not meet the *requirements* of *Keller*. App.038-39, at ¶121 ("To protect the rights of OBA members and ensure that mandatory member fees are only used for chargeable expenditures, *Keller* requires the OBA to institute safeguards that provide, at a minimum [the *Hudson* policy elements]") (emphasis supplied); App.039, at ¶126 (by failing to maintain a *Keller* policy that mirrored *Hudson* exactly, the OBA "deprive[d] Plaintiff Mark E. Schell of his First and Fourteenth Amendment rights."). Schell's concession below that *Keller*'s requirement that bars adopt *Hudson*-like procedures provides members with

constitutional protection against use of their dues to support non-germane speech forecloses his new 'dicta' argument. *Id*.[13]

Fifth, the Court must reject Schell's position that his associational challenge is not governed by, or was undecided in *Keller*. Schell essentially argues that *Lathrop* or *Keller* did not decide whether he can be compelled to associate with the OBA because it engages in both germane and, in his view, non-germane speech.[14] Schell's argument fails for the same reasons his other arguments do.

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[13] Moreover, as noted in fn.9, *supra*, Schell's argument concerning the propriety of an opt-in versus opt-out *Keller* policy oversteps the bounds of the issues before this Court on appeal, and may not be considered. *See, e.g.,* Aplt.Brf. at 42. Of the three claims brought below, only two were dismissed over Schell's objection and are now before this Court. The third claim – whether the 2005 *Keller* policy aligned with "the sort of procedures described in *Hudson*" – was mooted and thus dismissed by the district court, with Schell's consent. Aple.App. Vol. 4 at 000076-84; App.053. Schell has not preserved an issue for review as to whether either the 2005 or the 2020 *Keller* policies comply with governing law, and he cannot challenge them here. The Court must disregard any OBA *Keller* policy arguments, whether to the current or former policy. *See, e.g.*, Aplt.Brf. at 43-44 (alleging the 2020 *Keller* policy is unduly burdensome and otherwise deficient).

[14] Relatedly, the Amended Complaint highlights a collection of items, and articles from the Oklahoma Bar Journal ("OBJ"), some occurring as early as 2009, which Schell cherry-picked for no other purpose than because he believes they support his allegation that the OBA engaged in non-germane speech. App.027-031. These are wholly irrelevant to this appeal for a number of reasons. **First,** all but six of the allegations occurred or were published outside of the two year limitation period applicable to Schell's 42 U.S.C. § 1983 claims. *Garcia v. Wilson*, 731 F.2d 640, 651 (10th Cir. 1984); OKLA. STAT. tit. 12, § 95(2). App.027-31. **Second**, the articles are not the OBA's speech but that of their authors. The OBJ publishes the articles in accord with one of the purposes for which the OBA was created - "provid[ing] a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence, and law reform." *See* RCAC, Preamble. Aple.App. Vol. 1 at 000069.

Initially, it is far from clear that the *Keller* Court "reserved" a claim from consideration. Readily apparent is that the *Keller* petitioners failed to preserve for appeal their argument that their associational rights were violated because they did not agree with the bar's non-germane speech, or that they were entitled to an injunction against the bar's use of its name to promote political speech. *Keller*, 496 U.S. at 17. Because the California state courts did not address this claim below, the *Keller* Court did not decide it either. The *Keller* Court stated the "California [state] courts" (not "all courts" as Schell claims) could address it on remand, if they wished.

Every issue of the OBJ states expressly that "Statements or opinions expressed herein are those of the authors and do not necessarily reflect those of the [OBA], its officers, Board of Governors, Board of editors or staff." *See, e.g., The Oklahoma Bar Journal*, Vol. 91, No. 1, p. 5 (Jan. 2020), found at https://www.okbar.org/wp-content/uploads/2020/01/OBJ2020January.pdf. **Third**, even if the articles are the OBA's speech, on their face, the six articles published within the limitations period fit easily within the constitutional standard of germaneness approved in *Keller*. App.029-30 (respectively, the articles discuss protecting the fair and impartial administration of justice, ¶ 71; relate concerns over attacks on an impartial judiciary, ¶¶ 72-73; discuss Oklahoma's high incarceration rate, ¶ 74; note that the Oklahoma legislature is well-served by elected lawyer-legislators, and encourage lawyer participation in the legislative process, ¶ 75; and announce the non-advocacy Legislative Reading Day, and describe new bills introduced, ¶ 76). **Fourth**, as Appellees establish elsewhere, not one of the articles was published *after* adoption of the enhanced safeguards incorporated into the 2020 *Keller* policy, so, although Appellees deny that any of the articles are OBA speech or in any sense allegations that would support a claim, each one is fatally tied to the mooted and dismissed claim challenging the 2005 *Keller* policy, and cannot be considered. **Fifth**, Schell did not allege below, and cannot argue now, that the 2020 *Keller* policy is not constitutionally adequate to prevent his dues from being applied to non-germane speech or activity. His challenge is not ripe but hypothetical, and the district court's dismissal can be independently affirmed on that basis. *Morgan v. McCotter*, 365 F.3d 882, 890-91 (10th Cir. 2004).

496 U.S. at 17. The Supreme Court's refusal to decide the issue in that case signals only that appellate courts do not address issues for the first time on appeal, not that the issue has not been decided in other cases. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (citation omitted).

That aside, the analysis in *Morrow v. State Bar of Cal.*, 188 F.3d 1174 (9th Cir. 1999) is edifying. There, members of the bar sought to enjoin alleged political activities of the bar that plaintiffs claimed were not germane to the approved regulatory functions. *Morrow*, 188 F.3d at 1175. The district court dismissed the complaint applying *Lathrop*'s ruling on a similar challenge. *Id.* The court characterized appellants' claims as a freedom of association challenge – they asserted they were being forced to associate with an organization that publicly espoused views with which they disagreed. Although not required to fund non-germane speech, appellants nonetheless sought to enjoin it. The court rejected appellants' argument that their claim fell within a free association claim allegedly 'reserved' by *Keller*, holding that they, in fact, asserted the same claim determined in *Keller* and *Lathrop*. *Id.* at 1177. *Accord Eugster v. Wash. State Bar Ass'n*, No. C15-0375JLR, 2015 WL 5175722, at *6 (W.D. Wash. Sept. 3, 2015), *aff'd*, 684 F. App'x 618 (9th Cir. 2017) ("absent a state bar that differs appreciably from those at issue in *Lathrop* and *Keller*, compelled membership in a state bar association is constitutional"); *Boudreaux*, 2020 WL 137276 at **23-24 ("the Court is not

persuaded that the United States Supreme Court left open the mandatory membership question in *Keller* or *Lathrop*. The Court is similarly not persuaded that *Janus* overruled one or both decisions.").

Like appellants in *Morrow*, *Eugster* and *Boudreaux*, Schell does not allege that the OBA's interests, activities or composition differ in any material way from the state bars at issue in *Lathrop* and *Keller*. The *Keller* Court expressly determined that integrated bars can constitutionally engage in germane political and ideological speech, so long as they adopt adequate *Keller* policies to allow members to obtain dues refunds for any activity they reasonably contend is non-germane. *Keller*, 496 U.S. at 13-14. *Keller* identified that some activities or speech would be unquestionably germane, and some unquestionably not. *Id.* at 15-16. For Schell to state a freedom of association claim outside the zone of constitutionality established by *Keller* and *Lathrop*, he would have to allege that the OBA "lends its name" to political activity or speech at the "extreme end" of the non-germane spectrum, and forsakes any appreciable activity that supports the state's interest in regulating the bar. *See, e.g., id.* at 15, 17. This he cannot do. Instead, Schell's allegations fall squarely within the associational analysis of *Lathrop* and *Keller*, and the district court properly dismissed his claims.

Sixth, contrary to Schell's argument, despite the fact that its compliance with governing law is not challenged here, the OBA's adoption of the 2020 *Keller* policy

does impact Schell's remaining challenges. Aplt.Brf. at 42-44. The 2020 *Keller* policy comprehensively changes the safeguards provided to members with regard to application of their dues to what they contend is non-germane speech (including calculating all identifiable budgeted expenditures associated with legislative advocacy activity and allowing members to subtract that sum from their annual dues when paid). Moreover, it significantly strengthens the OBA's practice of identifying and avoiding non-germane speech by, among other things, incorporating heightened budget procedures to eliminate non-germane speech and activity, and providing members expanded notice of budgeted items – including those flagged as potentially non-germane – and places the burden on the OBA to provide membership detailed financial information and to justify expenditures if their propriety is challenged.[15] Aple.App. Vol. 4 at 000080-84.[16]

Schell has not challenged the 2020 *Keller* policy's compliance with the "adequate safeguards" requirement of *Keller*, and he has not alleged that any political or ideological speech (whether or not germane) has occurred while that

[15] Additionally, the Oklahoma Supreme Court reviews and holds approval power over every proposed OBA budget, and determines "if the proposed items of expenditure are within the Court's police powers *and necessary in the administration of justice*," which findings are a condition of budget approval. RCAC, Art. VII, § 1 (emphasis added). Aple.App. Vol. 1 at 000077.

[16] Compare the 2005 *Keller* policy, Aple.App. Vol. 1 at 000109-110, with the 2020 *Keller* policy. Aple.App. Vol. 4 at 000080-84.

policy has been in force. Accordingly, while the OBA's adoption of, and Schell's failure to challenge, the 2020 *Keller* policy may not *moot* his claims, it nevertheless renders his claims challenging the constitutionality of mandatory membership and dues hypothetical, unripe for adjudication and thus a non-justiciable controversy. *See Morgan*, 365 F.3d at 890-91 (citing *Keyes v. Sch. Dist. No. 1*, 119 F.3d 1437 (10th 1997).

In *Keyes*, in addressing the School District's claim that judicial oversight of its desegregation efforts should cease, the district court, in *dicta*, opined that a clause of the Colorado Constitution, which prohibited busing to achieve racial balance, was constitutional. Despite the lack of evidence, the parties had agreed that the busing clause would conflict with the District's and individual school's desegregation plans. Appellants appealed, not the district court's order canceling judicial oversight, but its determination that the busing clause was constitutional. 119 F.3d at 1442-43.

Determining the constitutional claim was speculative and not ripe, depriving the court of a justiciable Article III case or controversy, the court explained that "Appellants did not challenge an extant School District Policy, nor did they claim the Busing Clause caused the School District to refrain from adopting a specific policy. Rather, they requested the district court to render an opinion in a vacuum." *Id.* at 1444-45. The parties' agreement that future desegregation plans would conflict with the constitution in the future did not present a present case or controversy.

The same analysis applies here with the same result. Schell's allegations regarding the OBA's supposed ideological and political speech and activity, occurred while the 2005 *Keller* policy was in place.[17] The 2020 *Keller* policy imposes new burdens on the OBA to identify and to attempt to root out non-germane activity. Theorizing that non-germane speech will occur in the future under the new policy is pure speculation that fails to present a justiciable Article III controversy.

V. CONCLUSION

Because the district court was required to dismiss Schell's claims for failure to state a claim under binding Supreme Court precedent, this Court must affirm. Not only is the Supreme Court the only court empowered to overturn its own decisions, Schell has offered no credible argument to suggest that the binding authority is in any danger of reversal. Oklahoma's requirements of mandatory bar membership and payment of annual dues are constitutional.

[17] Schell's allegation that the OBA Bylaws allow the OBA to engage in legislative activity, App.027, is insufficient to state a claim. The *Keller* Court expressly recognized that integrated bars may constitutionally lobby bills or propose legislation. 496 U.S. at 16. Schell's bare allegation that the power to lobby bills or propose legislative activity exists does not present a concrete claim ripe for review. Schell asks the court to examine "in a vacuum" that the OBA will exercise its power unconstitutionally. *Keyes*, 119 F.3d at 1444-45. Further underscoring Schell's failure to state a claim, the 2020 *Keller* policy, which was not at issue below, incorporated a *new* OBA policy that allows members to subtract from their dues their pro rata portion of the funds that be will be applied to legislative advocacy in the dues year. Aple.App. Vol. 4 at 000080-84. Finally, that some OBA members could state a claim does not give Schell standing in this case. *See Boudreaux*, 2020 WL 137276, at *15.

RESPECTFULLY SUBMITTED this 18th day of June, 2020, by:

/s/ *Michael Burrage*
Michael Burrage, OBA No. 1350
WHITTEN BURRAGE
512 N Broadway, Suite 300
Oklahoma City, OK 73102
Telephone: (405) 516-7800
Facsimile: (405) 516-7859
mburrage@whittenburragelaw.com

Attorneys for Defendants-Appellees the Members of the Oklahoma Bar Association Board of Governors, other than Timothy E. DeClerck, and John M. Williams, Executive Director of the Oklahoma Bar Association, in their official capacities

/s/ *Heather L. Hintz*
Thomas G. Wolfe, OBA No. 11576
Heather L. Hintz, OBA No. 14253
PHILLIPS MURRAH P.C.
Corporate Tower, Thirteenth Floor
101 N Robinson Avenue
Oklahoma City, OK 73102
tgwolfe@phillipsmurrah.com
hlhintz@phillipsmurrah.com

Attorneys for Defendants-Appellees the Members of the Oklahoma Bar Association Board of Governors, and John M. Williams, Executive Director of the Oklahoma Bar Association, in their official capacities

/s/ *Kieran D. Maye, Jr.*
Kieran D. Maye, Jr.
Leslie M. Maye
MAYE LAW FIRM
3501 French Park Drive, Suite A
Edmond, OK 73034
405-990-2415 (telephone)
866-818-0482 (fax)
kdmaye@mayelawfirm.com
lmmaye@mayelawfirm.com

Attorneys for Defendants-Appellees the Chief Justice and Justices of the Oklahoma Supreme Court, in their official capacities

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Because this Brief contains 8,064 words, it complies with the applicable type-volume limitations of FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(B) and (g). This certification was prepared in reliance on the word count of the word-processing system (Microsoft Word 2016) used to prepare the Brief.

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I certify that a virus check was performed on the PDF version of this Brief using Security Manager AV Defendant version 6.6.10.148, and that no virus was indicated on June 18, 2020.

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I certify that this Brief meets the requirements of FEDERAL RULE OF APPELLATE PROCEDURE 25(a)(5) and 10th CIR. R. 25.5 concerning privacy and redactions of sensitive personal data.

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As of the date of filing of this brief, the requirement that hard copies of briefs be submitted to the Court is suspended pursuant to the Court's March 16, 2020 General Order. Pursuant to the Court's June 12, 2020 General Order, the requirement for parties to submit paper copies of briefs will be reinstated effective July 1, 2020, unless a separate order issued in an individual case requires paper filing of briefs filed from March 17, 2020 through June 30, 2020. No separate order has been issued in this case requiring paper copies of briefs. Should the parties be required to submit paper copies of the briefs at a later time, I certify that the hard copies to be submitted will be exact copies of the versions submitted electronically.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June, 2020, the foregoing Appellees' Joint Answer Brief was filed and served on all counsel of record via the ECF system.

/s/ Heather L. Hintz
Heather L. Hintz