No. 19-35470

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DIANE GRUBER and MARK RUNNELS,

Plaintiffs-Appellants,

v.

OREGON STATE BAR, a public corporation, CHRISTINE COSTANTINO, President of the Oregon State Bar, HELEN HIERSCHBIEL, Chief Executive Officer of the Oregon State Bar,

Defendants-Appellees.

On Appeal from the United States District Court
For the District of Oregon
No. 3:18-cv-1591-JR
Honorable Michael H. Simon

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INTRODUCTION

The Oregon State Bar ("Bar") regulates the practice of law in Oregon and helps ensure that Oregon attorneys meet the high ethical standards essential to their role "as assistants to the court in search of a just solution to disputes." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978). Appellants Diane Gruber ("Gruber") and Mark Runnels ("Runnels") are two members of the Bar. They sued the Bar, the Bar's president,[1] and the Bar's chief executive officer for requiring Gruber and Runnels to become members of the Bar and pay membership fees as conditions of practicing law in Oregon. They argue that compulsory membership and mandatory membership fees violate their First and Fourteenth Amendment rights. The district court dismissed Gruber and Runnels's claims because (1) the Bar is entitled to Eleventh Amendment immunity; (2) compulsory membership in the Bar and mandatory membership fees are constitutional under

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[1] Appellees note that Gruber and Runnels have misspelled Bar President Christine Costantino's name in their caption and briefing. Appellees use the correct spelling of Ms. Costantino's name.

controlling Supreme Court precedent. This Court should affirm the district court's ruling in all respects.

JURISDICTIONAL STATEMENT

Appellees dispute that the district court or this Court has subject matter jurisdiction over the Bar based on the Eleventh Amendment. The district court entered final judgment on May 24, 2019. ER 8. In all other respects, Appellees agree with Appellants' jurisdictional statement.

COUNTERSTATEMENT OF ISSUES PRESENTED

1. Did the district court correctly rule that the Bar is immune from suit under the Eleventh Amendment based on, among other factors, the central governmental function that the Bar performs?

2. Does controlling Supreme Court authority, including *Keller v. State Bar of California*, foreclose Gruber and Runnels's claims that compulsory membership in the Bar and mandatory membership fees violate their rights to freedom of association and free speech?

STATEMENT OF THE CASE

I. The Bar's Structure and Procedures

The Oregon legislature created the Bar in 1935 as part of the State Bar Act. *See* Or. Rev. Stat. ("ORS") §§ 9.005–9.757 (State Bar Act

in relevant part); *In re Glover*, 68 P.2d 766, 767–68 (Or. 1937) (describing the Bar's origins). The Act makes the Bar "a public corporation and an instrumentality of the Judicial Department of the government of the State of Oregon." ORS § 9.010(2). The "Judicial Department of the government of the State of Oregon" is one of three separate branches that, under the Constitution of the State of Oregon, share the powers that make up the government. Or. Const. Art. III, § 1. Every lawyer in Oregon must join the Bar and pay annual membership fees. ORS §§ 9.160, 9.191, 9.200. Bar organizations, like Oregon's, that require membership and dues as a condition of practicing law in the state are known as "integrated bars." *Keller v. State Bar of Cal.*, 496 U.S. 1, 5 (1990). The Bar's work is primarily funded by membership fees. ORS § 9.191.The Bar's mission "is to serve justice by promoting respect for the rule of law, by improving the quality of legal services, and by increasing access to justice."[2] The Bar, through its Board of

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[2] Oregon State Bar, *Mission Statement*, https://www.osbar.org /docs/resources/OSBMissionStatement.pdf (last visited October 9, 2019). The district court took judicial notice of the Bar's Bylaws, Mission Statement, and other official statements and documents. ER 21. The

Governors ("Board"), also has the statutory responsibility to advance "the science of jurisprudence and the improvement of the administration of justice" in Oregon. ORS § 9.080(1). The Bar carries out these duties in a variety of ways. The Bar recommends rules to the Oregon Supreme Court regarding admission to the practice of law and professional conduct. ORS §§ 9.114, 9.210, 9.490. Subject to the Supreme Court's oversight, the Bar administers the attorney disciplinary system. ORS §§ 9.080, 9.490; Or. State Bar R. Pro. ("B.R.") 2.3–2.4. The Bar also administers programs designed to improve the quality of legal services that Oregon lawyers provide and increase all Oregonians' access to justice.[3]

Bar amended the Mission Statement and Bylaws in the summer of 2019, after the district court's decision, but the Mission Statement and Bylaws have not changed substantively in any way that would affect this case.

[3] Consistent with the Bar's mission, it has established programs that provide the public with information about common legal topics. The Bar also seeks to make pro bono legal services available to impoverished Oregonians, military families, and survivors of domestic violence. *See, e.g.*, Or. State Bar, *Public Information Home*, https://www.osbar.org/public/ (last visited October 31, 2019); Or. State Bar, *Volunteer Opportunities*, https://www.osbar.org/probono

To help keep members apprised of current events and legal trends, the Bar publishes a monthly *Bulletin*.[4] The Bar's Bylaws ("Bylaws") provide that the Bar's statements in the *Bulletin*, as well as all other Bar communications other than permitted advertisements, "should be germane to the law, lawyers, the practice of law, the courts and the judicial system, legal education and the Bar in its role as a mandatory membership organization" and "should advance public understanding of the law, legal ethics and the professionalism and collegiality of the bench and Bar." Bylaws § 11.1.[5] The Bylaws further provide that any "legislative or policy activities" by the Bar "must be reasonably related to" (1) regulating and disciplining lawyers; (2) improving courts' functioning; (3) making legal services available; (4) regulating lawyer

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/VolunteerOpportunities.html (last visited October 9, 2019); Or. State Bar, *Legal Services Program*, https://www.osbar.org/lsp (last visited October 9, 2019).

[4] *See* Oregon State Bar, *OSB Bulletin Archives*, https://www.osbar.org /publications /bulletin/archive.html (last visited October 9, 2018), for examples of the Bar's *Bulletin*.

[5] The Bar's Bylaws are available at https://www.osbar.org/_docs /rulesregs/bylaws.pdf.

trust accounts; (5) assuring the legal profession's education, ethics, competence, integrity, and regulation; (6) providing law improvement assistance to government officials; (7) advising on issues involving the structure and organization of courts; (8) expounding on issues involving court rules of practice, procedure, and evidence; and (9) addressing issues involving the duties and functions of judges and lawyers. *See id.* § 12.1.

If a member opposes any action taken by the Bar—in its publication of the *Bulletin* or otherwise—on the ground that the action impermissibly promotes or opposes political or ideological causes, the Bylaws provide procedures for objecting. *Id.* § 12.600. The member may object in writing, and the Board will review the objection. *Id.* If the Board agrees with the objection, the Board will issue a full refund of "the portion of the member's dues that are attributable to the activity, with interest paid on that sum of money from the date that the member's fees were received to the date of the Bar's refund." *Id.* § 12.601. If the Board disagrees with the objection, the member may pursue binding arbitration. *Id.* §§ 12.601–12.602. If the arbitrator agrees with the objection, the Bar immediately refunds the portion of

the member's dues that are reasonably attributable to the activity, with interest; if the arbitrator agrees with the Bar, the member's objection is denied and the file in the matter is closed. *Id.* § 12.602.

II. Gruber and Runnels's Complaint

Gruber and Runnels filed a lawsuit against the Bar and its officers under 42 U.S.C. § 1983, alleging violation of their rights to freedom of association and free speech. First Amended Compl., ER 41–47. They challenge the statutes that require them, as practicing Oregon attorneys, to join the Bar and pay membership fees. *Id.* In their complaint, they asserted both a facial and an as-applied challenge to these statutes. ER 45 ¶ 18. Their as-applied challenge rested on (1) their disagreement with a statement that the Bar published in the April 2018 edition of the *Bulletin* and (2) the Bar's procedures for objecting and obtaining a refund when a member disagrees with how the Bar has spent compulsory fees. ER 43 ¶ 6, 46 ¶ 19. However, in their appeal, Gruber and Runnels appear to abandon their as-applied challenge. Not once do they refer to the *Bulletin* or the Bar's arbitration and refund procedures. On the merits of their claims, they argue only that the Bar's requirements are unconstitutional after the Supreme

Court's decision in *Janus v. American Federation of State, County & Municipal. Employees*, —U.S.—, 138 S. Ct. 2448 (2018).

III. The District Court's Decision

The Bar filed a motion to dismiss the complaint, and Gruber and Runnels filed a motion for partial summary judgment.[6] *See* ER 5–7 (docket entries). After hearing argument on those motions, Magistrate Judge Russo recommended dismissal of Gruber and Runnels's claims on two bases: first, the Bar is immune from suit under the Eleventh

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[6] The original complaint named only the Bar as a defendant. After briefing on the motion to dismiss and motion for partial summary judgment was complete, Gruber and Runnels requested and received leave to file an amended complaint, naming officers of the Bar as defendants. *See* ER 7 (docket entries for ECF 38–40). The Bar filed a motion to dismiss the first amended complaint, but Gruber and Runnels never responded to the Bar's second motion or refiled their motion for partial summary judgment. *See* ER 7–8 (docket entries for ECF 41–44). The Bar brought this procedural irregularity to Magistrate Judge Russo's attention during oral argument, citing *Ramirez v. City of San Bernardino*, 806 F.3d 1002, 1008 (9th Cir. 2015), for the principle that the second complaint superseded the original complaint and the Bar's second motion was therefore technically unopposed. SER 1–5 (Transcript of Proceedings at 37–38). In her Findings and Recommendation, Magistrate Judge Russo acknowledged that the Bar's second motion to dismiss was technically unopposed but ruled on it and the motion for partial summary judgment "for purposes of judicial economy." ER 20 n.1, 38.

Amendment, and second, binding Supreme Court precedent establishes that compulsory bar membership and mandatory fees are constitutional. ER 23, 33–38. Gruber and Runnels did not object to the recommendation. [7] *See* ER 8 (docket entries). District Judge Simon

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[7] There is an unresolved intra-circuit split on whether failure to object to a magistrate's conclusions of law operates as a waiver of the right to appellate review. In *Greenhow v. Secretary of Health & Human Services*, 863 F.2d 633, 636 (9th Cir. 1988), this Court noted a conflict between *McCall v. Andrus*, 628 F.2d 1185, 1187 (9th Cir. 1980), and *Britt v. Simi Valley Unified School District*, 708 F.2d 452, 454 (9th Cir. 1983), regarding whether failure to object to conclusions of law waives the right to appeal. *Greenhow* was later overruled on other grounds by *United States v. Hardesty*, 977 F.2d 1347 (9th Cir. 1992), which held that the appropriate mechanism for resolving irreconcilable conflict between panel opinions is an *en banc* decision. Panels of this Court have attempted to resolve the conflict short of calling for *en banc* review. *See United States v. Willis*, 431 F.3d 709, 713 n.4 (9th Cir. 2005) ("Although *Britt* and *McCall* are to some degree in tension, *Britt*'s core holding—that a prevailing party need not object to a magistrate judge's conclusions of law in order to preserve those grounds for appeal—remains good law, at least where the objections are raised on appeal in either the prevailing party's opening or answer brief."); *Martinez v. Ylst*, 951 F.2d 1153, 1156 (9th Cir. 1991) ("[F]ailure to object would not, standing alone, ordinarily constitute a waiver of the issue. However, such a failure is a factor to be weighed in considering the propriety of finding waiver of an issue on appeal." (citation omitted)). Other circuits have held that failure to object to a magistrate's conclusions of law always "waives the right to appeal all issues, both factual and legal." *Video Views, Inc. v. Studio 21, Ltd.*, 797 F.2d 538, 539 (7th Cir. 1986) (collecting cases). Without further clarity

adopted the recommendation in full. ER 10–12.

SUMMARY OF THE ARGUMENT

As a threshold matter, the district court correctly determined that it did not have subject matter jurisdiction over the claims against the Bar. The Eleventh Amendment prevents suit against the Bar because the Bar functions as an arm of the state under the factors set forth in *Mitchell v. Los Angeles Community College District*, 861 F.2d 198 (9th Cir. 1988). These factors are (1) whether a money judgment would be satisfied out of state funds, (2) whether the entity performs central governmental functions, (3) whether the entity may sue or be sued, (4) whether the entity has the power to take property in its own name or only the name of the state, and (5) the corporate status of the entity. The totality of the *Mitchell* factors, viewed in light of the purpose of state sovereign immunity, weighs in favor of finding that the Bar is an arm of the state. Moreover, both before and after *Mitchell*, the Ninth

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from the Ninth Circuit on the effect of Gruber and Runnels's lack of objection, Appellees treat the legal issues addressed in Gruber and Runnels's opening brief as preserved for appellate review.

Circuit has consistently held that bar organizations are entitled to Eleventh Amendment immunity.

The district court also reached the correct result on the merits of Gruber and Runnels's claims. In *Lathrop v. Donohue*, 367 U.S. 820 (1961), and *Keller v. State Bar of California*, 496 U.S. 1, 4 (1990), the Supreme Court held that a state may require membership in a state bar and that the bar may use members' mandatory fees to fund speech germane to improving legal services and promoting access to justice. Under *Lathrop* and *Keller*, the First Amendment permits both compulsory bar membership and mandatory membership fees.

As noted, Gruber and Runnels rely on *Janus v. American Federation of State, County & Municipal. Employees*, —U.S.—, 138 S. Ct. 2448 (2018), for a contrary proposition. That reliance is misplaced. The Supreme Court's decision in *Janus* does not overrule *Keller*'s holding on bar membership or membership fees. *Janus* addressed whether public-sector labor unions may charge nonmembers fees for activities related to collective bargaining. Applying "exacting scrutiny," the Supreme Court overruled its precedent in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and held that mandatory union fees

violate the First Amendment. Gruber and Runnels argue that *Keller*, which discussed *Abood*, cannot be squared with *Janus*'s reasoning, but they are wrong for two reasons.

First, Gruber and Runnels incorrectly apply a strict scrutiny standard to argue that the Bar must use the least restrictive means possible for regulating attorneys. *Janus* does not require this level of scrutiny; nor does it mandate that the Bar adopt Gruber and Runnels's preferred regulatory scheme. Second, *Keller* did not apply *Abood*'s lenient standard of scrutiny; rather, *Keller* analyzed the propriety of California's integrated bar in a way that is consistent with *Janus*. The Supreme Court has expressly stated on two different occasions that *Keller* is consistent with exacting scrutiny analysis. *Harris v. Quinn*, 573 U.S. 616, 655–56 (2014); *United States v. United Foods, Inc.*, 533 U.S. 405, 410–15 (2001). Accordingly, this Court is bound to follow *Keller* unless and until the Supreme Court overrules *Keller*. *See Agostini v. Felton*, 521 U.S. 203, 207 (1997) ("[L]ower courts should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." (citing *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989)).

ARGUMENT

I. The Bar is Immune from Suit as an Arm of the State

Under the Eleventh Amendment, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. It is well established that the Eleventh Amendment also prevents a state and its related agencies from being sued by the state's own citizens in federal court. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). However, for immunity to attach to an agency or entity like the Bar, it must serve as "an arm of the state." *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1040 (9th Cir. 2003).

To determine whether any entity acts as an arm of the state, this Court looks to the five factors articulated in *Mitchell*. 861 F.2d at 201. The Court evaluates each factor in turn. *Sato v. Orange Cty. Dep't of Educ.*, 861 F.3d 923, 929–34 (9th Cir. 2017). In its analysis, the Court must keep in mind the overarching purpose of state sovereign immunity, which "is to accord States the dignity that is

consistent with their status as sovereign entities." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002).

A. The *Mitchell* Factors Weigh in Favor of Immunity

The totality of the *Mitchell* factors, viewed in light of the purpose of state sovereign immunity, weighs in favor of finding that the Bar is immune as an arm of the state.

The first factor—whether a money judgment would be satisfied out of state funds— weighs against immunity at first blush. *See* ORS § 9.010(6) (establishing that a money judgment against the Bar cannot be satisfied out of state funds). However, the Court also may consider whether a judgment likely will have an "impact on [the state's] treasury because of the state's strong interest in keeping [the Bar] operationally and fiscally sound." *See Alaska Cargo Transp., Inc. v. Alaska R.R. Corp.*, 5 F.3d 378, 382 (9th Cir. 1993) (holding that the Alaska Railroad Corporation was entitled to Eleventh Amendment immunity). Additionally, the Court "cannot divorce" the first *Mitchell* factor from the second where the entity in question performs an important state function. *Id.* at 380; *see also Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 58 (1996) (explaining that Eleventh Amendment immunity "does not exist solely in order to preven[t] federal-court judgments that must be

paid out of a State's treasury" (internal quotation marks omitted)). Accordingly, the first factor should not be dispositive.

The second factor—whether the entity performs central state government functions—weighs strongly in favor of immunity. In Oregon, "[n]o area of judicial power is more clearly marked off and identified than the courts' power to regulate the conduct of the attorneys who serve under it." *Ramstead v. Morgan*, 347 P.2d 594, 601 (Or. 1959). This power comes from both "the necessity for the courts' control over an essential part of the judicial machinery with which it is entrusted by the [Oregon] constitution," as well as from the "long and jealously guarded tradition vested in the judiciary" of controlling members of bar organizations. *Id.* It is well settled that regulating attorneys is an essential state government function in Oregon.

The Oregon Supreme Court has delegated some of its regulatory authority to the Bar. The Bar regulates admission to the practice of law in Oregon and the conduct of practicing attorneys. ORS §§ 9.080, 9.114, 9.210, 9.490; B.R. 2.3. The Oregon Supreme Court nonetheless closely oversees the Bar's regulatory activities, retaining original jurisdiction to make decisions concerning admissions, reinstatement, and attorney

discipline. ORS §§ 9.005(7), 9.536; Oregon Rule of Appellate Procedure ("ORAP") 11.25. The Chief Justice reviews annual statements of the Bar's financial condition, ORS § 9.100, and the Supreme Court approves several items of the Bar's budget, Bylaws § 7.202. The Oregon Supreme Court appoints members of the Bar's boards and committees including the Board of Bar Examiners, Disciplinary Board, State Professional Responsibility Board, and Unlawful Practice of Law Committee, as well as lawyer mentors who serve in the New Lawyer Mentoring Program. ORS §§ 9.210, 9.532; B.R. 1.1, 2.3, 2.4, 12.1; Bylaws § 28.1; New Lawyer Mentoring Program R. 4. Further, the Oregon Supreme Court promulgates Rules for Admission, Bar Rules of Procedure, Rules of Professional Conduct, and Minimum Continuing Legal Education Rules that govern the Bar's regulatory function. ORS §§ 9.005(7), 9.112, 9.490, 9.542. The Oregon Supreme Court supervises the Bar as the Bar carries out the central state governmental function of regulating attorneys. *See also Ohralik*, 436 U.S. at 460 (1978) (describing States' interests in regulating lawyers in light of the role lawyers play in "the primary governmental function of administering justice"). The Bar's role in regulating the profession satisfies the second *Mitchell* factor, to

which this Court affords substantial weight. *See, e.g.*, *Rounds v. Or. State Bd. of Higher Educ.*, 166 F.3d 1032, 1035 (9th Cir. 1999) (emphasizing that a state university was an arm of the state based on its performance of "the central governmental function of providing opportunities for 'deserving and qualified citizens to realize their aspirations for higher education'").

The third factor—whether the entity may sue or be sued—is neutral. Oregon law states that the Bar "may sue and be sued." ORS § 9.010(5). However, the State Bar Act limits the Bar's susceptibility to lawsuits in certain respects. *See* ORS § 9.010(b) (applying the Oregon Tort Claims Act to the Bar), § 9.537(2) (providing the Bar absolute immunity from civil liability in the performance of their duties relative to proposed or pending admission, professional licensing requirements, reinstatement, or disciplinary proceedings), § 9.657(2) (providing the Bar and its participating members immunity from civil liability for the performance of duties relative to proposed or pending client security fund claims). Moreover, and regardless of which way the third factor points, the Ninth Circuit assigns it less importance than the first two *Mitchell* factors. *Sato*, 861 F.3d at 934.

The fourth factor— whether the entity has the power to take property in its own name or only in the name of the state—is likewise neutral. The same statute that gives the Bar the ability to sue and be sued in some cases also provides that the Bar may "acquire, hold, own, . . . and dispose of real and personal property." ORS § 9.010(5). Still, other statutes limit the Bar's ability to hold and dispose of certain property. For example, although the Uniform Disposition of Unclaimed Property Act provides that the Bar may take possession of abandoned client funds held in lawyers' trust accounts, ORS § 98.386(2), the state controls how the Bar uses those funds, ORS § 98.304. Similarly, although the Legal Services Program receives millions of dollars to fund legal aid, the state controls the purposes for which those funds may be used. ORS §§ 98.386(2), 9.572(1). On the whole, this factor is entitled to little weight. *See Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 254 (9th Cir. 1992) (concluding that the fact that school districts, although holding property in their own name, also held public schools for the benefit of the state meant that the fourth *Mitchell* factor was too close to call).

Finally, the fifth factor—concerning the Bar's corporate status—weighs in favor of immunity. By statute, the Bar has the corporate status of a state agent. It is "a public corporation and an instrumentality of the Judicial Department of the government of the State of Oregon." ORS § 9.010(2); *see State ex rel. Frohnmayer v. Or. State Bar*, 767 P.2d 893, 895 (Or. 1989) (discussing the corporate status of the Bar).

In sum, the *Mitchell* factors, particularly the second, tip toward concluding that the Bar is an arm of the state dedicated to the essential governmental function of regulating the practice of law under the direction and supervision of the Oregon Supreme Court and Oregon Judicial Department. The Bar is entitled to immunity from suit to give Oregon "the dignity that is consistent with [its] status as [a] sovereign entit[y]." *Fed. Mar. Comm'n*, 535 U.S. at 760.

B. Ninth Circuit Precedent Confirms that the Bar Is Immune

This is not the first time this Court has been called upon to decide whether a bar organization within the Ninth Circuit is an arm of the state. The question has arisen on numerous occasions, both before and after the 1988 *Mitchell* decision, and the Court has repeatedly answered

in the affirmative. For example, in *O'Connor v. State of Nevada*, the Court concluded "that the state bar is the investigative arm of the Supreme Court of Nevada, charged with investigating and disciplining the legal profession of the state, and as such an agency, it . . . is immune from suit in federal court under the [E]leventh [A]mendment." 686 F.2d 749, 750 (9th Cir. 1982) (per curiam).

Seven years after *Mitchell* was decided, the Court similarly concluded that the California State Bar was immune. *Hirsch v. Justices of Supreme Court of Cal.*, 67 F.3d 708, 715 (9th Cir. 1995); *see also Lupert v. Cal. State Bar*, 761 F.2d 1325, 1327 (9th Cir. 1985) (recognizing the immunity of the California State Bar). Additionally, in several, albeit unpublished, decisions, this Court has recognized that Oregon's and Washington's bar organizations are immune under the Eleventh Amendment. *See, e.g.*, *Eardley v. Garst*, 232 F.3d 894 (9th Cir. 2000) (appearing in Table of Decisions Without Reported Opinions) (applying *O'Connor v. State of Nevada* to conclude that the Bar qualifies for immunity); *Block v. Wash. State Bar Ass'n*, 761 F. App'x 729, 731 (9th Cir. 2019); *Grundstein v. Wash. State Bar Ass'n*, 576 F. App'x 708 (9th Cir. 2014). Oregon's district courts also have recognized the Bar's

immunity. *See, e.g.*, *Erwin v. Or. ex rel. Kitzhaber*, 231 F. Supp. 2d 1003, 1007 (D. Or. 2001), *aff'd sub nom. Erwin v. Oregon*, 43 F. App'x 122 (9th Cir. 2002) (affirming on the basis of res judicata and lack of a justiciable controversy). Gruber and Runnels offer no reason to distinguish these cases, and the Court should reach the same result here.

II. Supreme Court Precedent Establishes that the Bar Has Not Violated Gruber and Runnels's Rights to Freedom of Association and Free Speech

A. *Lathrop* and *Keller* Squarely Address Compulsory Bar Membership and Mandatory Membership Fees

The Supreme Court squarely addressed the issue of compulsory bar membership in *Lathrop* and *Keller*—both times concluding that compulsory membership does not violate the First Amendment right to freedom of association. *Keller* similarly held that mandatory membership fees do not violate the right to free speech where fees are used for activities germane to regulating the legal profession and improving the quality of legal services. This Supreme Court precedent "has direct application" here and binds this Court. *See Agostini*, 521 U.S. at 237 (stating that the Court of Appeals must apply Supreme Court precedent until the Supreme Court overrules itself).

In *Lathrop*, the Supreme Court addressed whether the state of Wisconsin could compel attorneys "to join and give support to [the State Bar of Wisconsin]." 367 U.S. at 827. The case "present[ed] a claim of impingement upon freedom of association." *Id.* at 842. The four-judge plurality concluded that compelled bar membership does not violate the Constitution:

> We think 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.*

Id. at 843 (emphasis added).

The three concurring judges in *Lathrop* agreed that compelled bar membership does not violate the Constitution. *See id.* at 849 (Harlan, J., joined by Frankfurter, J., concurring) (stating that a previous case "surely lays at rest all doubt that a State may Constitutionally condition the right to practice law upon membership in an integrated bar association"); *id.* at 865 (Whittaker, J., concurring) (stating that his

concurrence rests on his belief "that the State's requirement that a lawyer pay to its designee an annual fee of $15 as a condition of its grant, or of continuing its grant, to him of the special privilege . . . of practicing law in the State . . . does not violate any provision of the United States Constitution").

In *Keller*, a unanimous Supreme Court reaffirmed that compulsory bar membership does not violate the Constitution. 496 U.S. at 4, 14. The Court also addressed whether California attorneys could be compelled to pay dues to the State Bar of California, which used "membership dues to finance certain ideological or political activities to which they were opposed." *Id.* at 4. The Supreme Court determined that an integrated bar did not transgress the right to free speech because "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." *Id.* at 13–14. The State Bar could not, however, "fund activities of an ideological nature which fall outside of those areas of activity." *Id.* at 14. In reaching this holding, the Court repeated that

"lawyers . . . may be required to *join* and pay dues to the State Bar." *Id.* (emphasis added).

Keller reserved a broader claim of violation of associational rights where an integrated bar engages in significant political or ideological activities. *See id.* at 17 ("Petitioners . . . urge that they cannot be compelled to associate with an organization that engages in political or ideological activities beyond those for which mandatory financial support is justified . . . . The California courts did not address this claim, and we decline to do so in the first instance."); *see also Morrow v. State Bar of Cal.*, 188 F.3d 1174, 1177 (9th Cir. 1999) ("The claim reserved in *Keller* was a broader claim of violation of associational rights than was at issue in either *Lathrop* or in this case."). On appeal, however, Gruber and Runnels do not argue that the Bar's speech is non-germane or that the Bar engages in impermissible political or ideological activities. Gruber and Runnels's claims are governed in whole by *Lathrop* and *Keller*.

Further, this Court treats the issues of compulsory bar membership and mandatory membership fees as settled law under *Lathrop* and *Keller*. For example, in *Gardner v. State Bar of Nevada*,

this Court held that an integrated bar did not violate its members' freedom of association or freedom of speech by engaging in a public information campaign. 284 F.3d 1040 (9th Cir. 2002). The Court relied on both *Lathrop* and *Keller*. *Id.* at 1042. The Court likewise relied heavily on *Lathrop* and *Keller* in *Morrow* when it rejected a freedom of association challenge to membership in California's bar organization. 188 F.3d 1174. The Court also has summarily disposed of similar arguments in unpublished decisions. *See, e.g.*, *Caruso v. Wash. State Bar Ass'n*, 716 F. App'x 650, 651 (9th Cir. 2018) (citing *Lathrop* and *Keller* in support of the conclusion that plaintiff failed to state a plausible claim); *Eugster v. Wash. State Bar Ass'n*, 684 F. App'x 618, 619 (9th Cir. 2017) (stating that the district court properly dismissed claims relating to compulsory membership in the WSBA and mandatory membership fees).

Binding Supreme Court precedent, consistently applied by the Ninth Circuit, compels this Court to affirm dismissal of Gruber and Runnels's freedom of association and free speech claims. *Agostini*, 521 U.S. at 237. The Supreme Court's more recent decision in *Janus* does not permit or require a different result.

B. *Janus* Does Not Overrule *Keller*'s Holding that Bar Organizations May Charge Mandatory Membership Fees for Germane Activities

The Supreme Court's decision in *Janus* does not overrule *Keller*. *Janus* concerned an Illinois statute that required public employees to subsidize a union's collective-bargaining activities where the employees chose not to join the union and objected to the union's position. 138 S. Ct. at 2460–61. In a previous case, *Abood*, 431 U.S. 209, the Supreme Court had upheld these so-called "agency fees" against a First Amendment challenge. *See Janus*, 138 S. Ct. at 2463 (summarizing *Abood*'s holding). But, in *Janus*, the Supreme Court reversed course. It decided that "*Abood* judged the constitutionality of public-sector agency fees under a deferential standard that finds no support in [the Supreme Court's] free speech cases." *Id.* at 2479–80.

Applying "exacting scrutiny," the Supreme Court examined whether agency fees were justified by a compelling state interest that could not be achieved through means significantly less restrictive of associational freedoms. *Id.* at 2465–69. The union offered two primary justifications: maintaining "labor peace" and "avoiding free riders." *See id.* The Supreme Court rejected both. First, the Supreme Court cited overwhelming evidence that employers could avoid inter-union rivalries

and conflicting demands from different unions without agency fees. *Id.* at 2465–66. Second, the Supreme Court rejected the free-rider justification as "generally insufficient to overcome First Amendment objections," particularly in light of the fact that a union's "designation as the exclusive representative confers many benefits," such as obtaining information about employees. *Id.* at 2467–69. Without these justifications, the Supreme Court concluded that agency fees could not meet the exacting scrutiny standard. Therefore, the Court held that the First Amendment prevents public-sector unions from charging agency fees without the nonmembers' affirmative consent. *Id.* at 2486. The Court's holding reached only the free speech rights implicated by a compelled subsidy and not any associational concerns.

The majority in *Janus* did not discuss *Keller* or respond to the dissent's statement that "today's decision does not question" other cases, such as *Keller*, "involving compelled speech subsidies outside the labor sphere." *Id.* at 2498 (Kagan, J., dissenting). Because *Keller* discussed *Abood*, however, Gruber and Runnels follow the example of members of integrated bars in other states and argue that *Janus* overrules *Keller*. *See, e.g.*, *Fleck v. Wetch*, 937 F.3d 1112, 1118 (8th Cir.

2019) (considering and rejecting the argument that North Dakota's procedures for charging membership fees violates the First Amendment after *Janus*). Gruber and Runnels are wrong.

First, *Janus* applied exacting scrutiny rather than strict scrutiny. Only the latter standard would require the Bar to use the least restrictive means possible for regulating attorneys. When Gruber and Runnels argue that the state must use a licensing system rather than an integrated bar, they erroneously rely on an inapplicable strict scrutiny standard.

Second, in *Harris* and *United Foods*, the Supreme Court concluded that *Keller* fits comfortably within the exacting scrutiny standard it has applied in other compelled subsidy challenges.[8] This Court is not free to disregard this binding Supreme Court precedent. *See Agostini*, 521 U.S. at 237 (stating that an appellate court lacks authority to conclude that the Supreme Court has overruled itself by implication).

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[8] In fact, although the Court has concluded that *Keller* is consistent with its exacting scrutiny framework, the Court has not expressly held that integrated bars, given their core regulatory functions, are even subject to as demanding a standard as exacting scrutiny. That the Bar can satisfy exacting scrutiny does not mean that it must.

1. *Janus* Does Not Adopt a Strict Scrutiny Standard that Would Require the Bar to Use the Least Restrictive Means Possible to Regulate Attorneys

Janus expressly declined to adopt a strict scrutiny standard when analyzing the compelled subsidy at issue. *Janus*, 138 S. Ct. at 2465 ("At the same time, we again find it unnecessary to decide the issue of strict scrutiny because the Illinois scheme cannot survive under even the more permissive standard applied in *Knox* and *Harris*."). Strict scrutiny asks whether a law is "*the least restrictive means* of achieving a compelling state interest." *McCullen v. Coakley*, 573 U.S. 464, 478 (2014) (emphasis added). Exacting scrutiny, on the other hand, asks only whether the state can achieve its compelling interest through a "*significantly* less restrictive" means. *Janus*, 138 S. Ct. at 2465 (emphasis added).

Here, Gruber and Runnels argue at some points that the Court should apply "strict constitutional scrutiny." Opening Br. at 3, 12. In doing so, however, they offer no explanation for why this Court should adopt a stricter standard than *Janus*. Then, later, they claim to request only that the Court apply "the lesser 'exacting scrutiny' test," but they also argue that the Bar must accomplish "the compelling State interest of regulating the legal profession and improving the quality of legal

services . . . through a licensing system." Opening Br. at 9–11. In light of different methods used by other states to regulate attorneys, they ask, "[H]ow can Oregon's system of requiring membership in the Oregon State Bar, coupled with compulsory subsidies, be the only means to accomplish the State's interest?" *Id.* But that is the wrong question: Under exacting scrutiny, the fact that a less restrictive means exists does not establish that the Bar must adopt it.

Nothing in *Janus* suggests that there are "*significantly* less restrictive" means to regulate lawyers than the Bar's current regulatory scheme. Under Bylaws §12.1, the Bar does not fund any activities that are non-germane to regulating the practice of law and improving the quality of legal services. If a member believes that the Bar nonetheless has funded political or ideological activities that do not sufficiently relate to a permissible purpose and with which the member disagrees, the Bylaws include a refund process. Bylaws § 12.6 outlines the process. The objecting member may pursue binding arbitration. Bylaws § 12.602. If the arbitrator agrees with the member's objection, the Bar immediately refunds the portion of the member's dues that are reasonably attributable to the impermissible activity, with interest. *Id.*

These procedures ensure that the Bar's members are not required to bear any cost beyond their share of regulating attorneys and improving the quality of legal services in Oregon. *See also Chicago Teachers Union v. Hudson*, 475 U.S. 292, 303–10 (1986) (outlining procedures that a union may use to minimize infringements on nonmembers' First Amendment rights).

The Bar's procedural safeguards are distinguishable from those that the Supreme Court found insufficient in *Janus*. There, the union funded both germane and non-germane activities, though it charged nonmembers only their "proportionate share" for activities related to collective bargaining. *Janus*, 138 S. Ct. at 2461. The union then sent members a notice explaining the basis for the agency fee. *Id.* Employers automatically deducted the fee from nonmembers' paychecks, and nonmembers were not asked nor required to consent before the fees were deducted. *Id.* The Supreme Court concluded that this process did not adequately protect nonmembers' First Amendment rights:

> Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay,

> nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed.

Id. at 2486. The Bar, consistent with its own bylaws, only seeks to fund activities that are germane to its function and for which all members may be charged, consistent with *Keller*. There simply is no process by which the Bar could set aside a portion of its fees for non-germane activities, because, by definition, that amount would be zero. The Bar's procedures thus do not replicate the union's errors and the Bar here should not be required to adopt Gruber and Runnels's preferred regulatory scheme. *See also Fleck*, 937 F.3d at 1118 ("*Janus* did not overrule *Keller* and did not question use of the *Hudson* procedures *when it is appropriate to do so*." (emphasis in original)).

2. The Supreme Court Has Concluded that *Keller* Is Consistent with Exacting Scrutiny

Even if Gruber and Runnels relied on the actual level of scrutiny used in *Janus*, their claim that *Janus* overrules *Keller* by implication would be untenable. The Supreme Court already has concluded that *Keller* is consistent with the exacting scrutiny standard that it applied in other First Amendment cases. It reached this conclusion in *Harris v. Quinn* and *United States v. United Foods*.

a. Despite Criticizing *Abood*, *Harris* Essentially Reaffirmed *Keller* as Good Law

Similar to *Janus*, *Harris* concerned whether a state could require non-union home healthcare assistants to pay agency fees. 573 U.S. 616. In its analysis, the Supreme Court applied "exacting First Amendment scrutiny" and determined that the agency fees violated the Constitution. *Id.* at 648–49. The Supreme Court criticized *Abood*'s "questionable foundations" but declined to overrule *Abood* based on the distinguishable facts in the case (in contrast to *Abood*, *Harris* involved "quasi-public employees"). *Id.* at 645–46.

After applying the lesser, exacting level of scrutiny to determine that the agency-fee scheme at issue there violated the First Amendment, the *Harris* Court addressed the reach of its ruling. In particular, it addressed the implications for *Keller*'s holding that states could require bar members to pay for activities germane to regulating the legal profession and improving the quality of legal services. *Id.* at 655. Justice Alito, writing for the majority as he did in *Janus*, wrote that *Keller* "fits comfortably within the framework applied in the present case," *i.e.*, exacting scrutiny. *Id.*

> Licensed attorneys are subject to detailed ethics rules, and the bar rule requiring the payment of dues was part of this

> regulatory scheme. The portion of the rule that we upheld served the "State's interest in regulating the legal profession and improving the quality of legal services." States also have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices. Thus, our decision in this case is wholly consistent with our holding in *Keller*.

Id. at 655–56 (quoting *Keller*, 496 U.S. at 14). The Supreme Court did not state that *Keller* was consistent only with the compelling interest prong of exacting scrutiny, but rather that *Keller* was "*wholly* consistent" with the *Harris* analysis. *Id.* at 656 (emphasis added). The dissent in *Harris* similarly emphasized that "today's majority reaffirms [*Keller*] as good law." *Id.* at 670 (Kagan, J., dissenting).

b. In Striking Down a Mandatory Subsidy, *United Foods* Distinguished *Keller*

An earlier Supreme Court decision, cited favorably in *Janus*, also concluded that *Keller* correctly applied exacting scrutiny. In *United Foods*, the federal Mushroom Promotion, Research, and Consumer Information Act imposed mandatory assessments upon handlers of fresh mushrooms to pay for advertising about mushrooms. 533 U.S. 405. A mushroom seller refused to pay the assessment, arguing that the law compelled it to fund speech with which it disagreed (*i.e.*, that all mushrooms are equal) and violated the First Amendment. The

Supreme Court agreed. *Id.* at 409. Applying "First Amendment scrutiny," it held that the Constitution did not permit the government to compel speech that was not "ancillary to a more comprehensive program restricting marketing autonomy." *Id.* at 411; *see also Janus*, 138 S. Ct. at 2465 (stating that *United Foods* "applied what we characterized as 'exacting' scrutiny").

United Foods distinguished the result in *Keller* based on the comprehensive regulatory scheme governing lawyers. The Supreme Court emphasized that, unlike the mushroom handlers, bar members "who were required to pay a subsidy for the speech of the association already were required to associate for other purposes, making the compelled contribution of moneys to pay for expressive activities a necessary incident of a larger expenditure for an otherwise proper goal requiring the cooperative activity." *United Foods*, 533 U.S. at 414. Accordingly, "[l]awyers could be required to pay moneys in support of activities that were germane to the reason justifying the compelled association in the first place, for example, expenditures (including expenditures for speech) that related to 'activities connected with disciplining members of the Bar or proposing ethical codes for the

profession." *Id.* (quoting *Keller*, 496 U.S. at 16). On the other hand, "objecting members were not required to give speech subsidies for matters not germane to the larger regulatory purpose which justified the required association." *Id.* Having concluded that *Keller* correctly applied "First Amendment principles," *United Foods* did not affect the standards applicable to bar organizations. *Id.* at 413.

Harris and *United Foods* teach that *Keller* satisfies the exacting scrutiny framework later applied in *Janus*. *Janus* therefore does not require or permit this Court to deviate from *Keller*, which Gruber and Runnels admit otherwise controls their free speech and association claims. Open Br. at 4; *Agostini*, 521 U.S. at 237; *see Retail Digital Network, LLC v. Prieto*, 861 F.3d 839, 849 (9th Cir. 2017) (en banc) (declining to create an exception to the Supreme Court's heightened scrutiny standard for commercial speech in the absence of a case directly overruling past precedent).

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CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

STATEMENT OF RELATED CASE

Other than the related case identified by Appellants, Appellees are not aware of any related cases.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,464 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Century Schoolbook 14-point font.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on November 6, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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