**Case No. 19-35463**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

DANIEL Z. CROWE; OREGON CIVIL LIBERTIES ATTORNEYS; and LAWRENCE K. PETERSON,

*Plaintiffs-Appellants,*

v.

STATE BAR OF OREGON,

*Defendant-Appellee.*

On Appeal from the United States District Court for the District of Oregon
Case No. 3:18-cv-02139-JR, Hon. Michael H. Simon, presiding

# BRIEF FOR *AMICUS CURIAE* THE STATE BAR OF CALIFORNIA IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE

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## CERTIFICATION PURSUANT TO RULE 29(a)(4)(E)

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), the State Bar of California certifies: (a) that no party's counsel authored this brief in whole or in part, (b) that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and (c) that no person other than the State Bar of California contributed money that was intended to fund preparing or submitting this brief.

DATED: November 13, 2019

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## I. IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Federal Rule of Appellate Procedure 29(a), and with consent of all parties, the State Bar of California files this *amicus curiae* brief in support of Defendant-Appellee State Bar of Oregon ("OSB").

The State Bar of California is the largest state bar in the country, with approximately 190,000 active licensees. Ass. Jud. Comm. Rep. SB 36 at 6 (Jul. 17, 2017), *available at* https://leginfo.legislature.ca.gov/faces/billAnalysis Client.xhtml?bill_id=201720180SB36# (last visited Nov. 12, 2019).

Until recently, it was an integrated bar that required membership in and payment of dues to an association as a condition of practicing law in California. While an integrated bar, the State Bar of California was the respondent in *Keller v. State Bar of California*, 496 U.S. 1 (1990).

On January 1, 2018, the State Bar of California de-integrated by spinning off its remaining associational and membership components into the California Lawyers Association, and became a solely regulatory agency. *See generally* California Senate Bill No. 36 §§ 21, 24, *available at* https://leginfo.legislature. ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB36 (last visited Nov. 12, 2019).

While *Keller*, by its own terms, applies only to integrated bars—and thus no longer directly applies to the State Bar of California—the State Bar of California

continues to operate under *Keller*'s restrictions on the permissible uses of mandatory fees, and does not spend mandatory fees on political or ideological activities that are not germane to regulating the legal profession or improving the quality of legal services. *See Keller* 496 U.S. at 13-14; The State Bar of California, "Information about your 2019 fees: Statement of Expenditures of Mandatory Fees," *available at* http://www.calbar.ca.gov/Portals/0/documents/members/Updated-2019-Keller-Notice-Statement-of-Expenditures-of-Mandatory-Fees.pdf (last visited Nov. 12, 2019). The State Bar of California therefore has an interest in maintaining clarity of the *Keller* decision, including continued allowance of integrated bars such as OSB. The State Bar of California also has an interest in ensuring that, should this Court determine that states may not compel attorneys to join and/or pay dues to integrated bars, such decision be expressly limited to integrated bars such as OSB and not to purely regulatory agencies such as the State Bar of California.

In addition, because the State Bar of California continues to apply *Keller* in its use of licensees' mandatory fees in furtherance of its statutory regulatory mission, the State Bar of California has an interest in this Court's review of the District Court's determination that the challenged activities of OSB were germane under *Keller*. The State Bar has an interest in ensuring that the concept of "germaneness" is not unreasonably conscribed so as to exclude activities core to its

statutory mission, which includes "support for greater access to, and inclusion in, the legal system." Cal. Bus. & Prof. Code § 6001.1. The State Bar of California's activities are not before this Court for decision but are brought to this Court's attention to avoid this Court's decision having an inadvertent effect on access and inclusion and other core activities of the State Bar of California.

The State Bar of California's filing of this brief was authorized by its Board of Trustees. *See generally* Cal. Bus. & Prof. Code §§ 6010, *et seq*. (setting forth powers and duties of the Board of Trustees).

## II. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs-Appellants[1] argue that *Keller* does not foreclose their claim that mandatory membership in an integrated bar violates their First Amendment association rights, and that *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018) somehow overrules—without so saying—longstanding precedent supporting mandatory membership in and dues to integrated bars.

[1] A different group of plaintiffs assert similar claims in another case now pending in the Ninth Circuit, *Gruber, et al. v. Oregon State Bar, et al.*, Case No. 19-35470. The State Bar of California is filing concurrently herewith an *amicus* brief in that case. That *amicus* brief does not contain the discussion of germaneness set forth in Part II.B of this brief, as the *Gruber* plaintiffs do not raise that issue in their appeal. Otherwise, the arguments in that *amicus* brief are substantially identical to the arguments contained herein.

These arguments are without merit. As this Court previously held in *Morrow v. State Bar of California*, 188 F.3d 1174, 1177 (9th Cir. 1999), *Keller* and *Lathrop v. Donohue*, 367 U.S. 820 (1961) together foreclose the very type of freedom of association claim asserted by Plaintiffs-Appellants. Nor does *Janus* overrule *Keller*'s or *Lathrop*'s holdings that states may require membership in and payment of dues to integrated bars as a condition of practicing law. Thus, this Court should not reverse the District Court's determination that compelled membership in and payment of dues (or membership fees) to OSB do not violate the First Amendment.

If, however, this Court finds that *Janus* somehow affects the legality of OSB's compelled membership and membership fees, it should make clear that its decision is limited to integrated bars—i.e., associations of attorneys in which membership is required—and does not apply to attorney regulatory agencies without members or associational aspects, such as the State Bar of California. The legality of such agencies is not before the Court. Further, the First Amendment concerns at issue in *Janus*—compelled association and compelled subsidization of the private, political speech of a union—do not exist for regulatory agencies without members or associational aspects. In fact, Plaintiffs-Appellants' argument against integrated bars depends on the availability and legality of agencies like the State Bar of California as a means of attorney regulation that Plaintiffs-Appellants

contend is "significantly less restrictive of associational freedoms." *Janus*, 138 S. Ct. at 2465.[2] For clarity and to avoid unjustified litigation regarding attorney regulatory agencies that are not integrated bars like OSB, this Court should thus expressly limit any decision to integrated bars.

Second, Plaintiffs-Appellants argue in the alternative that the District Court incorrectly concluded that certain allegedly political speech activities of OSB were germane to the regulation of the legal profession or improving the quality of legal services (and thus permissible uses of mandatory membership fees). The State Bar of California agrees with OSB that the District Court's holding regarding germaneness was correct. However, in the event that this Court modifies the District Court's decision or otherwise provides guidance regarding germaneness, it should not exclude from any definition of germaneness core bar activities that are central to the State Bar of California's statutory public protection mission (such activities are central to the missions of OSB and many integrated bars as well). Such core public protection activities are dissimilar to the OSB statements at issue in this case and are not before this Court in any event.

[2] Mandatory licensing by a regulatory agency like the State Bar of California does not restrict associational freedoms at all; the State Bar of California has *no* associational aspects.

# III. ARGUMENT

## A. The First Amendment Permits Mandatory Membership in Integrated Bars

### 1. Mandatory Membership in Integrated Bars is Permissible Under Supreme Court Precedent that Was Not Disturbed by *Janus*

Plaintiffs-Appellants make two primary arguments with respect to the constitutionality of mandatory membership in integrated bars. Plaintiffs-Appellants argue first that *Keller* does not foreclose their argument that mandatory membership in integrated bar associations violates the First Amendment. (Plaintiffs-Appellants' Opening Brief ("AOB") at 15-16.) Then, relying entirely on *Janus*, Plaintiffs-Appellants argue that *Janus*—a case about public-sector unions—somehow overrules *Keller* and requires that exacting scrutiny be applied to states' requirement of membership in and payment of dues to integrated bars like OSB as a condition of practicing law. AOB at 20-22. Neither of these arguments has merit.

Plaintiffs-Appellants' first argument ignores the fact that the question they claim was reserved by *Keller* was in fact resolved by *Lathrop v. Donohue*, 367 U.S. 820 (1961), in which the Supreme Court upheld mandatory integrated bar membership in the face of the objection that such membership associated bar members with viewpoints they oppose. *Keller*, 496 U.S. at 7. Indeed, this Court has directly addressed the argument raised by Plaintiffs-Appellants, and concluded

that *Keller* and *Lathrop* foreclose the claim that "[integrated bar] membership alone may cause the public to identify Plaintiffs with State Bar positions in violation of plaintiffs' First Amendment rights." *Morrow v. State Bar of California*, 188 F.3d 1174, 1177 (9th Cir. 1999). As this Court explained:

> 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. Here, plaintiffs do not allege that they are compelled to associate in any way with the California State Bar's political activities. They do not allege that the Bar's political involvement is greater and the regulatory function less than it was when the Court decided *Keller* and *Lathrop*. The claim they make is therefore no broader than that in *Lathrop*, where the court held the regulatory function of the bar justified compelled membership. *Lathrop* controls our decision here.

*Id.; see also Eugster v. Washington State Bar Ass'n,* 684 F. Appx. 618, 619 (9th Cir. 2017) (citing *Keller* and *Lathrop*, and affirming dismissal of claims relating to compulsory membership in integrated bar "because an attorney's mandatory membership with a state bar association is constitutional").

Likewise, Plaintiffs-Appellants' freedom of association claim here is based solely on the fact of their membership in OSB; they do not allege that they are "compelled to associate in any way with [OSB's] political activities." Nor do they allege that OSB's "political involvement is greater and the regulatory function less than" that of the California and Wisconsin bars, respectively, when the Court

decided *Keller* and *Lathrop*.[3] *Morrow* thus controls, and precludes Plaintiffs-Appellants' associational claim.

Plaintiffs-Appellants' second argument fails because *Janus* concerned only public sector unions, which raise associational concerns not present for integrated bars. The Court in *Janus* had serious First Amendment concerns with compelled support of public sector unions because their central function—collective bargaining—has "powerful political and civic consequences," the compelled support of which results in "significant impingement on First Amendment rights[.]" *Janus*, 138 S. Ct. at 2464 (internal quotations omitted). Integrated bars like OSB, on the other hand, do not have as their central purpose political or even speech activities; rather, their limited speech activities are incidental to their regulatory purpose. *Cf. Harris v. Quinn*, 573 U.S. 616, 655 (2014) (recognizing the strong state interest "in regulating the legal profession"); *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469-72 (1997) (permitting mandatory funding of advertisement as a valid regulation in the service of a "lawful collective program" regulating California fruit producers that "impose[d] no restraint on the freedom of any producer to communicate any message to any audience" and "d[id]

[3] In fact, the record suggests that OSB's political involvement is *less* than that of the State Bar of California's at the time *Keller* was decided. *Compare* OSB's Answering Brief at 7-10 (discussing OSB's limits on permissible activities), *with Keller*, 496 U.S. at 15 (noting that petitioners alleged the State Bar of California engaged, at that time, in lobbying related to gun control and immigration, among other political issues).

not compel the producers to endorse or to finance any political or ideological views.").

Integrated bars are not even mentioned in the Court's majority opinion in *Janus*, but the fact that they are not impacted by the Court's application of exacting scrutiny in the public sector union context has been recognized both by the Court in an earlier exacting scrutiny case relied on by *Janus*, and by Justice Kagan in her *Janus* dissent. *See Harris*, 573 U.S. at 655 (*Keller* "fits comfortably within the framework applied within the present case"); *Janus*, 138 S. Ct. at 2498 (Kagan, J., dissenting) ("today's decision does not question" *Keller*.)

**2. In Any Event, Plaintiffs-Appellants' Arguments Do Not Pertain to Non-Integrated Bars Such As The State Bar of California, Which Lack Members or Other Associational Aspects**

The State Bar of California's structure illustrates why precision in the language of any holding by this Court regarding the legality of OSB's mandatory membership and membership fees is important. The State Bar of California is a public corporation, established by California's Legislature, Cal. Bus. & Prof. Code § 6001, and is the "administrative arm of [the Supreme Court of California] for the purpose of assisting in matters of admission and discipline of attorneys." *In re Rose*, 22 Cal. 4th 430, 438 (2000) (quotations omitted). It does not have any trade associational mission. Rather, "[p]rotection of the public, which includes support for greater access to, and inclusion in, the legal system, shall be the highest priority

for the State Bar of California…." Cal. Bus. & Prof. Code § 6001.1. The State Bar of California does not have "members;" it regulates attorney "licensees." *See* Cal. Bus. & Prof. Code § 6002.

Until recently, however, the State Bar of California was an integrated bar—indeed, it was a party in *Keller*. That is, to practice law in California, attorneys were once required to become members of the State Bar of California, which had trade associational components and was run by a Board of Governors that included individuals elected by the membership. In 2017, legislation was enacted to de-integrate the State Bar of California, effective January 1, 2018, including by spinning off the associational components of the State Bar of California—the educational Sections and the California Young Lawyers Association—into a separate, private voluntary non-profit entity called the California Lawyers Association,[4] leaving the State Bar of California a purely regulatory agency.[5]

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[4] According to its website, the California Lawyers Association is "a member-driven, mission-focused organization dedicated to the professional advancement of attorneys practicing in the state of California." "California Lawyers Association – About CLA," *available at* https://calawyers.org/About-CLA (last visited Nov. 12, 2019).

[5] In 2002, the State Bar of California spun off its Conference of Delegates, another associational component. The Conference of Delegates became a separate non-profit entity called the California Conference of Bar Associations. *See generally* California Senate Bill No. 1897, *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=200120020SB1897&search_keywords=%22State+Bar%22 (last visited Nov. 12, 2019); "Conference of California Bar Associations – What We Do," *available at* http://calconference.org/about-2/ (last

California Senate Bill No. 36 §§ 21, 24, *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB36 (last visited Nov. 12, 2019).

The legislation also changed the makeup of the State Bar of California's governing body, the Board of Trustees, transitioning it from a body containing some members elected by attorneys to a body made up solely of individuals appointed by other democratically accountable government officials—the California Supreme Court, the Governor, and the Legislature. *Id.* at §§ 6-16. This separation of the associational aspects of the State Bar of California was enacted in order to "ensure that the State Bar of California will focus on its mission to protect the public …." S. Jud. Comm. Rep. SB 36 at 8 (May 8, 2017), *available at* https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB36# (last visited Nov. 12, 2019). The next year, legislation was enacted to adjust nomenclature to reflect the fact that the State Bar of California no longer has any members—all attorneys licensed by the State Bar of California are "licensees," rather than "members," and they now pay "fees," rather than "dues." California Assembly Bill 3249 §§ 6, 93, *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB3249 (last visited Nov. 12, 2019).

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visited Nov. 12, 2019). The Conference of Delegates had been the body of the State Bar of California that made the non-germane political and ideological statements challenged in *Keller*. *Keller*, 496 U.S. at 15.

Plaintiffs-Appellants admit that the State Bar of California is no longer an integrated bar. AOB at 19 fn5. The fact that the State Bar of California is still known as a state "bar" is irrelevant to the question whether the First Amendment permits requiring attorneys to obtain licenses from it and pay fees to it in order to practice law in California. The State Bar of California's lack of membership or associational characteristics is dispositive on this question. Nonetheless, a decision that *Janus* affects the legality of OSB's mandatory membership and membership fees could lead to confusion and baseless litigation if this Court's decision does not make clear that its holding does not affect non-integrated bars such as the State Bar of California. To avoid this result, and for the reasons discussed below, this Court should make clear that any decision it makes regarding the applicability of *Janus* applies only to integrated bars, as defined by *Keller*: "*association[s]* of attorneys in which *membership* and dues are required as a condition of practicing law in a State[.]" *Keller*, 496 U.S. at 5 (emphasis added).

First and foremost, because the issue of First Amendment restrictions on non-integrated bars is not before the Court, under principles of judicial restraint this Court should make clear that its decision does not affect non-integrated bars. "We should avoid deciding a constitutional issue unless necessary to resolve a controversy…. 'A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the

necessity of deciding them.'" *American Civil Liberties Union of Nevada v. Masto*, 670 F.3d 1046, 1066 (9th Cir. 2012) (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988)).

Moreover, as discussed above, the State Bar of California agrees with OSB that *Janus* does not overrule *Keller*. Mandatory dues paid to an integrated bar for germane activities—which *Keller* limits to expenses supporting the state's "interest in regulating the legal profession and improving the quality of legal services," *Keller*, 496 U.S. at 13—do not support political activity analogous to collective bargaining, and thus do not result in any "significant impingement of First Amendment rights" of the type at issue in *Janus*. *Janus*, 138 S. Ct. at 2464 (quotations omitted).

The concerns underlying *Janus* have even less—indeed, no—connection to non-integrated bars. Integrated bars such as OSB require membership in an association, which is the Constitutional harm complained of by Plaintiffs-Appellants. Oregon attorneys must ***join*** OSB and pay membership fees as a condition of practicing law. AOB at 3. OSB is managed by a Board of Governors the majority of whom are attorneys elected by OSB's membership. "Oregon State Bar, Membership," *available at* https://www.osbar.org/about.html (last visited Nov. 12, 2019). Non-integrated bars such as the State Bar of California, which are regulatory agencies rather than associations, lack these membership characteristics.

Plaintiffs-Appellants repeatedly make clear that the purported First Amendment harm they are suffering is *mandatory membership* in an *association* and compelled payment of membership fees to that association. *See, e.g.*, AOB at 3, 14, 17. Nowhere do Plaintiffs-Appellants argue that being required to pay licensing fees to a regulatory agency such as the non-integrated State Bar of California would violate their First Amendment rights. In fact, one of Plaintiffs-Appellants' central arguments—that mandatory membership in an integrated bar is subject to exacting scrutiny and fails that test—explicitly depends on the availability of regulatory agencies such as the State Bar of California as an alternative. Plaintiffs-Appellants reference states like California that "regulate the practice of law without requiring membership in a state bar association" as evidence that the state's interest in regulating attorneys can be achieved through means significantly less restrictive of associational freedoms. AOB at 19. The State Bar of California agrees that states with such non-integrated bars do not implicate First Amendment issues.

Further, nothing in *Janus* suggests that requiring attorneys to be licensed by state regulatory bodies with no associational aspects or membership, and to pay for such regulation through fees, raises any First Amendment concerns. *Janus* was concerned with "[c]ompelling a person to *subsidize* the speech of other private speakers" in the context of public sector unions, where the Court noted that a

"significant impingement of First Amendment rights occurs when public employees are required to provide financial support for a union that takes many positions during collective bargaining that have powerful political and civic consequences." *Janus*, 138 S. Ct. at 2464 (emphasis in original). Due to these First Amendment concerns, the Court applied exacting scrutiny, which allows compelled subsidies only if they "serve a compelling state interest that cannot be achieved through means significantly less restrictive of *associational* freedoms." *Id.* at 2465 (emphasis added).

These concerns do not arise for a regulatory body, like the State Bar of California, that is run by state government appointees and lacks members. Indeed, given these characteristics, requiring payment of licensing fees to the State Bar of California for attorney regulation cannot be characterized as compelling subsidization of "private speakers" at all, unlike agency fees paid by non-members to a union run by its members.[6] *Janus*'s reasoning cannot be stretched to suggest that attorney regulatory bodies such as the State Bar of California "seriously impinge[] on First Amendment rights" such that exacting scrutiny should be

[6] The speech of attorney regulatory bodies such as the State Bar of California that are controlled by democratically accountable state officials may in fact be entirely exempt from First Amendment scrutiny as government speech. *See Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 559-61 (2005) (holding that advertising funded by assessment of beef producers was "government speech" and not susceptible to First Amendment compelled-subsidy challenge where the government "effectively controlled" the speech).

applied. And, even if *Janus*'s exacting scrutiny test were applied, non-integrated bars like the State Bar of California would pass that test: Given that such attorney regulatory agencies lack members and associational aspects, the state's interests in "regulating the legal profession and improving the quality of legal services" and "allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices," *Harris*, 573 U.S. at 655-56 (quotations omitted), could not be achieved through means significantly less restrictive of associational freedoms.

### B. Germaneness Should Not Be Defined to Exclude Core Bar Activities Not Before the Court

In the alternative to their challenge to the constitutionality of mandatory membership in and payment of dues to integrated bar associations, Plaintiffs-Appellants argue that particular speech of OSB—a statement by OSB in an OSB publication condemning white nationalism as well as a similar statement by specialty bars printed in the same publication explicitly criticizing President Trump—was not germane to regulation of the legal profession or improving the quality of legal services, the test set forth in *Keller* for determining whether mandatory dues may be spent on integrated bars' speech activities.

The District Court held that the challenged activities were germane because the OSB's statement was "made within the specific context of promotion of access to justice, the rule of law, and a healthy and functional judicial system that equally

serves everyone." The court further held that the specialty bars' statement was germane because it was printed as part of the OSB's practice of "routinely publish[ing] statements from a variety of authors with differing political viewpoints and creat[ing] a forum for the exchange of ideas pertaining to the practice of law." Findings & Recommendation at 21-22. The District Court also held that, even if the specialty bars' statements were not germane and attributable to the OSB, they did not form a basis for a First Amendment claim against OSB because OSB provided adequate procedures for Plaintiffs-Appellants to obtain a refund, such that they were not compelled to subsidize that speech. *Id.* at 22-26. These decisions should be affirmed.

In the event, however, that this Court modifies the District Court's holding regarding OSB's challenged statements or otherwise provides guidance on what constitutes germaneness in the context of expenditures of mandatory bar dues, the Court should not exclude from any definition of germaneness core bar activities that are not at issue in this case.

### 1. The State Bar of California's Statutory Regulatory Mission Encompasses a Variety of Core Activities

The State Bar of California's regulatory mission is mandated by statute:

> Protection of the public, which includes support for greater access to, and inclusion in, the legal system, shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions. Whenever the

> protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.

Cal. Bus. & Prof. Code § 6001.1.

As part of this public protection mission, the State Bar of California engages in licensing, regulation, and discipline, including related activities such as inclusion initiatives and administering California's IOLTA program and the Lawyer Assistance Program for attorneys with substance abuse issues affecting competence. *See, e.g.*, Cal. Bus. & Prof. Code §§ 6001.3(b) (directing the State Bar of California to "continue to increase diversity and inclusion in the legal profession" and to report to the Legislature on its inclusion activities)[7], 6060 – 6069.5 (admissions/licensing), 6075 – 6088 (discipline), 6076 (establishing ethics rules), 6210 – 6228 (IOLTA program providing access to legal services for the indigent), 6230 – 6238 (Lawyer Assistance Program). OSB, likewise, generally focuses on similar public protection activities. *See* Defendant-Appellee's Answering Brief at 6-7.

While a wide variety of activities fall within the State Bar of California's public protection mission, the State Bar of California—in its new form as a non-

[7] Information about the State Bar of California's inclusion activities can be found in its required biannual report to the Legislature on such activities. The State Bar of California, "Diversity & Inclusion Plan: 2019 – 2020 Biennial Report to the Legislature" (Mar. 15, 2019), *available at* http://www.calbar.ca.gov/Portals/0/documents/reports/Diversity-Inclusion-Plan-Report.pdf (last visited Nov. 12, 2019).

integrated bar—no longer engages in associational activities.

### 2. The Challenged Statements of OSB are Not Like Core Regulatory Activities, Which Are Not Before the Court

*Keller* sets forth a simple rule for determining which activities are germane to the interests justifying the integrated bar and thus may be funded by mandatory fees to integrated bars: "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." *Keller*, 496 U.S. at 13. *Keller*, however, does not define the exact boundary between germane and non-germane bar activities, but only the "extreme ends of the spectrum":

> Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession.

*Id.* at 15.

The Ninth Circuit has provided some additional guidance in holding that certain bar activities, such as public education, are germane in so far as they "make the law work for everyone":

> [I]n our real world, lawyers are not merely a necessity but a blessing. If the public doesn't understand that—and the State Bar had reason to think many members of the

> public did not—the justice system itself will wither. The work of the State Bar to foster public understanding of the adversary nature of law is vital to the bar's function. It is no infringement of a lawyer's First Amendment freedoms to be forced to contribute to the advancement of the public understanding of law.

*Gardner v. State Bar of Nevada*, 284 F.3d 1040, 1043 (9th Cir. 2002) (upholding integrated bar's public relations activities as germane under *Keller*).

If this Court reaches the question whether the statements in the OSB publication are germane under this framework or otherwise provides guidance on the boundaries of germaneness, it should take care not to exclude from germaneness any of the types of core bar activities that the State Bar of California pursues as part of its statutory mandate (just as OSB and other integrated bars focus on such core activities). As a matter of judicial restraint, the Court should not even entertain holding such activities not germane on the current record[8]—indeed, Plaintiffs-Appellants do not seek such a ruling.

Moreover, while the State Bar of California agrees with the District Court's decisions regarding the challenged OSB statements, these statements are unlike the activities the State Bar of California undertakes as part of its statutorily mandated public protection mission (they are unlike the core activities of OSB and other integrated bars as well). On the spectrum discussed by *Keller*, the State Bar of California's statutorily mandated public protection activities all are either

[8] *See* discussion of judicial restraint and applicable authority *supra* pp. 12-13.

"activities connected with disciplining members of the Bar or proposing ethical codes for the profession," to which there can be no valid germaneness objection, or are near those activities on the spectrum. *Keller*, 496 U.S. at 13. Activities promoting access to legal services[9] and inclusion in the profession,[10] for example,

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[9] As a matter of plain language and logic, increasing the availability of legal services affords professional representation to people who may otherwise turn to self-help and thus "improve[s] the quality of the legal service available to the people of the State," plainly meeting *Keller*'s germaneness test. Promoting access to justice is also germane to regulation of the profession. Access to justice has historically and traditionally been seen as central to the legal profession since well before the time *Keller* was decided. *See* James L. Baillie & Judith Bernstein-Baker, *In the Spirt of Public Service: Model Rule 6.1, The Profession and Legal Education*, 13 Law & Inequ. 51, 52-57 (Univ. of Minn. Libs. Pub. 1995) (discussing how pro bono service has been central to legal ethics since the profession's roots in ancient Greece and continuing through its development in colonial and 19th-century America); *see also* "ABA, Rule 6.1: Voluntary Pro Bono Publico Service," *available at* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_6_1_voluntary_pro_bono_publico_service/ (last visited Nov. 12, 2019) ("Every lawyer has a professional responsibility to provide legal services to those unable to pay."). In California, the ethical duty to represent the unserved is codified in the State Bar Act. *See* Cal. Bus. & Prof. Code § 6068(h). California courts have applied this duty to attorneys since at least the 1950s. *See People v. Massey*, 137 Cal. App. 2d 623, 626 (1955) (admonishing attorney for abandoning client "for considerations personal to himself"); *see also* Cal. Bus. & Prof. Code § 6073 ("It has been the tradition of those learned in the law and licensed to practice law in this state to provide voluntary pro bono legal services to those who cannot afford the help of a lawyer. Every lawyer authorized and privileged to practice law in California is expected to make a contribution.").

Every published decision that has considered the issue has concluded that support for access to justice is a permissible use of mandatory dues by an integrated bar. *See generally Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620, 627-27, 631 (1st Cir. 1990) (affirming district court's conclusion that compulsory bar dues can be spent on "increasing the availability of legal services"); *Popejoy v. New Mexico Bd. of Bar Comm'rs*, 887 F. Supp. 1422, 1430–

are logically tied to increasing the quality of legal services. Thus, even in the event this Court were to conclude that OSB's challenged statements are not germane, it

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31 (D.N.M. 1995) ("A state bar may spend compulsory dues on pro bono activities in pursuing the goal of improving the delivery of legal services."); *The Fla. Bar Re Frankel*, 581 So. 2d 1294, 1296 (Fla. 1991) (lobbying by Florida's bar regarding "increasing the availability of legal services to society" is consistent with *Keller*); *cf. Superior Court v. County of Mendocino*, 13 Cal. 4th 45, 67 (1996) ("The judiciary, of course, has a keen and overriding interest in assuring that the public enjoys the broadest possible access to justice through the judicial system.").

[10] The California Legislature has concluded that "a diverse legal profession" is needed "to provide quality and culturally sensitive services to an ever-increasing diverse population" and that "[d]iversity increases public trust and confidence and the appearance of fairness in the justice system and therefore increases access to justice." This conclusion is supported by empirical evidence and scholarly analysis. For instance, a recent survey of managing partners of the country's 100 largest law firms and the general counsel of Fortune 100 corporations indicated that "diversity was central to providing quality service to clients…." *See* Deborah L. Rhode and Lucy Buford Ricca, *Diversity in the Legal Profession: Perspectives from Managing Partners and General Counsel*, 83 Fordham L. Rev. 2483, 2886 (2015). Further, recent studies indicate generally that businesses with greater diversity are more successful. *See, e.g.*, Vivian Hunt, Dennis Layton, and Sara Prince, *Why Diversity Matters* (McKinsey & Co. Jan. 2015), *available at* https://www.mckinsey.com/~/media/McKinsey/Business%20Functions/Organization/Our%20Insights/Why%20diversity%20matters/Why%20diversity%20matters.ashx (last visited Nov. 12, 2019); *Why It Pays to Invest in Gender Diversity* (Morgan Stanley May 11, 2016), *available at* https://www.morganstanley.com/ideas/gender-diversity-investment-framework.html (last visited Nov. 12, 2019); *see also* Sungjoo Choi and Hal G. Rainey, *Managing Diversity in U.S. Federal Agencies: Effects of Diversity and Diversity Management on Employee Perceptions of Organizational Performance*, Public Administration Review 109 (Dec. 2009), *available at* https://www.researchgate.net/publication/227700249_Managing_Diversity_in_US_Federal_Agencies_Effects_of_Diversity_and_Diversity_Management_on_Employee_Perceptions_of_Organizational_Performance (last visited Nov. 12, 2019) (concluding that racial diversity benefits performance "when leaders work well with employees of diverse backgrounds, show a commitment to a workforce that is representative of all society, and establish policies and procedures that promote diversity").

should avoid comments in its decision that could be taken as bearing on core bar activities such as those of the State Bar of California discussed above.

## IV. CONCLUSION

For the reasons discussed above and as set forth by OSB, Plaintiffs-Appellants' arguments are not well taken, and no aspect of the District Court's decision should be reversed. In the event this Court nonetheless decides *Janus* requires reversing or modifying the District Court's decision with respect to compelled membership in and dues to integrated bars, however, to avoid confusion and unjustified impact on state bar attorney regulatory bodies not implicated by *Janus*, it should expressly limit its revised decision to integrated bars, as that term is defined by *Keller*.

Further, this Court should affirm the District Court's decision regarding the germaneness of OSB's challenged activities. If, however, the Court modifies the District Court's decision or otherwise provides guidance on the meaning of germaneness under *Keller*, it should take care not to exclude core bar activities from the definition of germaneness. Such activities are not before the Court.

DATED: November 13, 2019

Respectfully submitted,
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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(a)(5) because this brief is proportionally spaced, has a typeface of 14 points, and contains 5,699 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

DATED: November 13, 2019

*/s/ BRADY R. DEWAR*

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the Brief for Amicus Curiae The State Bar of California in Support of Appellees with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on November 13, 2019.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California this 13th day of November, 2019.

*/s/ Joan Randolph*
Joan Randolph

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

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