Appeal No. 20-2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LUCILLE S. TAYLOR,

Plaintiff – Appellant,

v.

ROBERT J. BUCHANAN, in his official capacity as President of the State Bar of Michigan Board of Commissioners, *et al*.

Defendants – Appellees.

On Appeal from the United States District Court
For the Western District of Michigan
Case No. 1:19-cv-00670 (Jonker, J.)

REPLY BRIEF OF APPELLANT LUCILLE TAYLOR

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1. Taylor Has Not Waived Her Arguments.

At the outset, the Defendant-Appellee, SBM Officers, allege that Plaintiff-Appellant, Taylor, has not addressed the primary issue before this court – whether the applicable First Amendment standard announced in *Janus v. American Federation*, 138 S. Ct. 2448 (2018) overruled the previous opinions *Lathrop v. Donohue*, 367 U.S. 820 (1961) and *Keller v. State Bar of California*, 496 U.S. 1 (1990). Rather, the SBM Officers turn the question around and phrase it as whether or not a lower court must follow an abrogated case until the Supreme Court says otherwise. Taylor has already briefed this court on why and how, contra the District Court here, *Lathrop* and *Keller* are not directly controlling precedents, because the standards that they used have been abrogated by the more recent controlling opinion in *Janus*. Since a lower court does not need to follow an abrogated or overruled case, the issue has been addressed.

The SBM Officers allege that Taylor cannot address in her Reply Brief the further points on which precedent must be followed by this court. To that end, they cite *Sanborn v. Parker*, 629 F.3d 554, 579 (6th Cir. 2010) which cites *Am. Trim, LLC v. Oracle Corp.*, 383 F.3d 462, 477 (6th Cir. 2004) for the claim that "arguments made to us in the first time in a reply brief are waived." Yet a quick review of those cases shows that these are not applicable here. In *Sanborn*, further issues were waived "for failure to raise *any form* of it in Sanborn's initial brief on appeal."

Sanborn, 629 F.3d at 579 (emphasis added). The issue in *Sanborn* that was not raised until the reply was whether or not there was sufficient evidence for a conviction, whereas in the initial brief the only issue addressed was the admissibility of certain evidence. *Id.* Similarly in *Am. Trim.* the initial brief dealt with the issues of the conduct of the trial and the admissibility of evidence. *Am. Trim*, 383 F. 3d 471-475. It wasn't until the reply brief that the appellant introduced an entirely new claim, that of punitive damages as being unconstitutional. *Am. Trim*, 383 F. 3d 477. In both *Sanborn* and *Am. Trim*, the issue introduced was entirely different from what had been briefed before. The issue in those two cases had not been raised in "any form," as it was phrased in *Sanborn*. And as they involved entirely new issues which the opposing side would have had no ability to respond to, the court did not consider them.

Here, Taylor's initial brief fully addressed which Supreme Court precedent controlled the question at hand, and argued that the District Court was incorrect in holding that *Lathrop* and *Keller* still controlled. But even with the question turned around in the way the SBM Officers prefer to phrase it, the SBM Officers have addressed it in their Appellees' Brief of December 24, 2020 ("SBM Brief," Page ID 27-33), and it cannot be said they have been precluded from addressing the issue.

2. When and to what extent has a precedent been overruled.

The SBM Officers maintain that when our Supreme Court announces a new precedent, older cases following the previous precedent must stand until the Supreme Court explicitly announces that each previous case has been overruled by name. But this is not correct. Taylor certainly agrees with the importance of a vertical form of controlling cases and the importance of stare decisis, but the matter is not as clear as the SBM Officers maintain. There are many instances where the lower courts were upheld when they followed the new precedent and ignored older, on-point cases that applied the old precedent, as Taylor is urging here.

SBM Officers cite the line of cases regarding judicial compensation and the Constitution's Compensation Clause: *Evans v. Gore*, 253 U.S. 245 (1920), *Miles v. Graham*, 268 U.S. 501 (1925), *O'Malley v. Woodrough*, 307 U.S. 277 (1939), and *United States v. Hatter*, 532 U.S. 557 (2001). In *Hatter*, the Supreme Court explicitly overruled *Evans*, even though *Miles* had relied on *Evans*, and *Miles* had been overruled in *O'Malley*. In short, SBM Officers maintain that *Evans* was not overruled until *Hatter*, despite the reasoning it relied upon having been overruled already in *O'Malley*.

However, the SBM Officers fail to cite another case that falls in that line, *United States v. Will*, 449 U.S. 200 (1980). *Will* dealt with the same issue of Article III judges and their compensation. And in *Will*, the District Court held that *Evans*

controlled the matter. "Relying on *Evans v. Gore*, the District Court held that such action reduces the amount 'a judge ... has been promised'" *Id*. at 227 (internal citations omitted). But the Supreme Court disagreed, and held that this was the wrong result. Further, it indicated that because *O'Malley* undermined *Miles*, even if by implication, the District Court should not have followed *Miles*. In fact, the Court said that *O'Malley* "must also be read" to undermine *Evans*:

> In *O'Malley*, this Court held that the immunity in the Compensation Clause would not extend to exempting judges from paying taxes, a duty shared by all citizens. … The opinion concluded by saying that to the extent *Miles v. Graham*, was inconsistent, it "cannot survive." Because *Miles* relied on *Evans v. Gore*, *O'Malley* must also be read to undermine the reasoning of *Evans*, on which the District Court relied in reaching its decision.

Will, 449 U.S. 227, n. 31 (internal citations omitted). "Must also be read" is a command that all courts were to follow. Indeed, it is a command that only the lower courts are bound to, as the Supreme Court is not required to apply an old precedent, and can announce a new one. *Hatter* acknowledged that *Will* had already made this determination. *Hatter*, 532 U.S. 571.

How to square that with the language of *Hatter*, where the court said "The Court of Appeals was correct in applying *Evans* to the instant case, …"? *Id*. at 567. The answer lies in this: The fact patterns were different enough that caution by the lower court was warranted. The timing of the judicial appointments and tax enactments were different enough that continued adherence to *Evans* was warranted

by the lower court: "For these reasons, we hold that the Compensation Clause does not forbid Congress to enact a law imposing a nondiscriminatory tax … upon judges, whether those judges *were appointed before or after the tax law in question was enacted or took effect*." *Id*. at 571 (emphasis added).

In our instance, the factual determination is not the triggering factor as it was in cases about whether the timing of the tax creates a constitutional problem. In our case, the acknowledged forcible collection of dues as a condition of practicing law is the pertinent uncontested fact, and that is the same as it was in *Janus*.

SBM Officers cite the Sixth Circuit in *Grutter v. Bollinger*, 288 F.3d 732, 743 (6th Cir. 2002) (en banc), aff'd, 539 U.S. 306 (2003), which in turn quoted *Agostini v. Felton*, 521 U.S. 203, 237 (1997). Such reliance on *Agostini* is misplaced, however, for several reasons. The first reason is that the degree to which *Janus* overturned *Keller* and *Lathrop* by rejecting the rational basis test in First Amendment cases. While the *Janus* court may not have named *Lathrop* and *Keller* in the same manner it named *Abood*, the directness with which it abrogated the use of the rational basis test was more than a mere implication. And even if it were by mere implication, contrary to SBM Officers' reading of *Agostini*, this court is not bound to apply an abrogated standard just because a different Supreme Court precedent was more on point with the *factual* basis underlying the challenge. It does not matter that *Lathrop* and *Keller* were cases specifically on integrated state bars

and the First Amendment while *Janus* was not. The most important factor is the First Amendment legal standard that was announced. This standard governs over other previous cases that were arguably closer in terms of facts of the case.

Second, *Agostini* has been misapplied and, to that extent, has been an anomaly in our jurisprudence. Lower courts have always been free to apply the Supreme Court's announced standards, when appropriate, to matters outside of the opinion which announces the standard. To do otherwise would create an incredible backlog of cases that could only be dealt with by the Supreme Court itself in the relatively few number of cases it hears each term. Furthermore, because *Agostini* was mere dicta in this regard, and not announcing a new rule of substance, the lower courts remain free to apply appropriate standards.

The oft-quoted *Agostini* opinion dealt with something other than a rule of applying or announcing a new precedent: The decision in question was altering *the law of the case*. The law-of-the-case doctrine holds that the court should not reopen issues decided in earlier stages of the same litigation. See *Agostini*, 521 U.S. at 208-209. The *Agostini* petitioners sought to be free from an injunction imposed by the courts where that injunction was based on law that had apparently been overruled. *Agostini*, then, did not deal with a separate case involving a guiding precedent. It involved the same case that had been before the Supreme Court before, and its continuing injunction.

> Most importantly, our decision today is intimately tied to the context in which it arose. This litigation involves a party's request under Rule 60(b)(5) to vacate a continuing injunction entered some years ago in light of a bona fide, significant change in subsequent law. … *Our decision will have no effect outside the context of ordinary civil litigation where the propriety of continuing prospective relief is at issue.*

Agostini, 521 U.S. at 238-239 (emphasis added).

If *Agostini* did in fact announce a new rule, it did so quietly and in what is arguably dicta. The *Agostini* Court had no reason to correct the lower court when it ruled. It was in no way part of the reasoning of the decision. Remove that command to follow directly controlling precedent, and the holding of the opinion as it regarded Agostini would remain unchanged. Nor was this command necessary, as the Second Circuit had in fact held that *Aguilar* had not been overruled yet, as it was in *Agostini*'s Supreme Court holding.

Prior to *Agostini*, the Supreme Court would simply affirm the lower court when the lower court correctly applied the correct governing standard as announced in more recent cases, even if by implication. One such example of this comes in the intersection of labor law and First Amendment jurisprudence – similar to our issues here.

In 1968 the Supreme Court decided *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968). In *Logan Valley*, the question arose regarding union picketing at an enclosed, privately owned shopping

center, and whether this prohibition violated the union members' rights. The Supreme Court of Pennsylvania had ruled that such behavior was trespass, and the Supreme Court heard the matter. *Id.*, 391 U.S. at 309. The *Logan Valley* court resolved the issue by analogizing the shopping center to a "company town." See, *Logan Valley*, 391 U.S. at 316-317.

> All we decide here is that because the shopping center serves as the community business block 'and is freely accessible and open to the people in the area and those passing through,' … the State [of Pennsylvania] may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.

Logan Valley, 391 U.S. at 319-320.

Subsequently, in 1972, the question of leaflet distributors operating inside of shopping centers was before the Court. *Lloyd Corporation, LTD v. Tanner*, 407 U.S. 551 (1972). This time, the circulated material was not about labor issues but rather opposition to Vietnam War. See, *Lloyd*, 407 U.S. at 552. The *Lloyd* Court drew some distinctions between that situation and *Logan Valley*:

> The holding in *Logan Valley* was not dependent upon the suggestion that the privately owned streets and sidewalks of a business district or a shopping center are the equivalent, for First Amendment purposes, of municipally owned streets and sidewalks. No such expansive reading of the opinion of the Court is necessary or appropriate. The opinion was carefully phrased to limit its holding to the picketing involved, where the picketing was 'directly related in its purpose to the use to which the shopping center property was being put…

Lloyd, 407 U.S. at 563.

In dissent, Justice Marshall was joined by Justices Douglas, Brennan, and Stewart, and they disagreed with the Court's decision to not follow the recent labor-based precedent of *Logan Valley*:

> Relying primarily on our very recent decision in *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, the … District Court … granted the relief requested. The United States Court of Appeals for the Ninth Circuit affirmed. Today, this Court reverses the judgment of the Court of Appeals and attempts to distinguish this case from *Logan Valley*. In my view, the distinction that the Court sees between the cases does not exist. As I read the opinion of the Court, it is an attack not only on the rationale of *Logan Valley*, but also on this Court's longstanding decision in *Marsh v. Alabama*. Accordingly, I dissent.

Lloyd, 407 U.S. at 571-572 (Marshall, J., dissenting) (internal citations omitted).

The matter of shopping center picketing by labor groups returned to the Supreme Court in *Hudgens v. NLRB*, 424 U.S. 507 (1976). *Hudgens* worked its way through the National Labor Relations Board and the lower courts until it was decided by the Fifth Circuit – in *Hudgens v. NLRB*, 501 F.2d 161 (1974). Although *Hudgens* was very much like *Logan Valley* on the facts (a labor-dispute-related picket at a shopping center), the Fifth Circuit applied the non-labor related *Lloyd* opinion because it had announced the more-recent First Amendment standard:

> On stipulated facts the Board interpreted *Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc.* to hold that a shopping center, during the times that it is open and accessible to the public, is the functional equivalent of the community business block, long associated with the exercise of First Amendment rights, and that the mere fact of ownership was not enough to 'justify restrictions on

> the place of picketing.' It then found 'that *Logan Valley* establishes the union's right to picket …
> During the pendency here of Hudgens' petition for review of this decision, the Supreme Court decided *Lloyd Corp. v. Tanner* and *Central Hardware Co. v. NLRB.* … *Lloyd* established the appropriate initial inquiry to be whether the conduct assertedly protected by the First Amendment was 'directly related in its purpose to the use to which the shopping center property (is) being put,' …

Hudgens, 501 F.2d at 163-164 (footnotes and internal citations omitted). The Fifth Circuit continued:

> The Court's opinion in *Lloyd* reflects the need to focus on the scope of the invitation extended to the public. … Neither logic nor precedent requires that picketing be directly related to the actual operation of an individual store in the shopping center as was the case in *Logan Valley*. Although the facts in *Lloyd* were different - the anti-Viet Nam War handbilling here had 'no relation to any purpose for which the center was built and being used,' - the rationale is fully applicable here.

Hudgens, 501 F.2d at 167 (1974) (internal citations omitted). The Fifth Circuit, relying on *Lloyd* and a string of NLRB cases, instead of *Logan Valley*, eventually held that the union had a right to picket that was location-dependent. *Hudgens*, 501 F.2d at 169. The Supreme Court reversed the holding of the Fifth Circuit that the union had a right to picket, basing this on labor law. *Hudgens*, 407 U.S. at 523. Nevertheless, the Supreme Court upheld the use of the more recent precedent of *Lloyd*, rather than the more-on-point labor-related precedent of *Logan Valley*:

> The Court in its *Lloyd* opinion did not say that it was overruling the *Logan Valley* decision. Indeed a substantial portion of the Court's opinion in *Lloyd* was devoted to pointing out the differences between the two cases, noting particularly that, in contrast to the hand-billing in *Lloyd*, the picketing in *Logan Valley* had been specifically directed to a

> store in the shopping center and the pickets had had no other reasonable opportunity to reach their intended audience. But the fact is that the reasoning of the Court's opinion in *Lloyd* cannot be squared with the reasoning of the Court's opinion in *Logan Valley*.
>
> It matters not that some Members of the Court may continue to believe that the *Logan Valley* case was rightly decided. Our institutional duty is to follow until changed the law as it now is, not as some Members of the Court might wish it to be. And in the performance of that duty *we make clear now, if it was not clear before*, that the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case. Not only did the *Lloyd* opinion incorporate lengthy excerpts from two of the dissenting opinions in *Logan Valley*, the ultimate holding in *Lloyd* amounted to a total rejection of the holding in *Logan Valley*:

Hudgens, 424 U.S. at 517-518 (footnotes and internal citations omitted) (emphasis added).

In short, what occurred in *Hudgens* at the Fifth Circuit and the Supreme Court is what is being urged here. A case was determined on the more recent precedent which had announced a standard for First Amendment cases. The court of appeals correctly applied the more recent standard, even though that recent standard was from a case factually distinct from the older case that had been almost factually identical to the labor case at issue.

Here, *Janus* announced the more recent standard for First Amendment cases, just as *Lloyd* had. The Fifth Circuit applied that new *Lloyd* precedent even though *Hudgens* was a labor matter while *Lloyd* did not occur in a labor context. And the Supreme Court affirmed this application of the *Lloyd* standard (although it reversed the Fifth Circuit on other labor-related grounds). This is very analogous to our

situation where the *Janus* standard was announced in a labor context but the older, on-point integrated-bar cases of *Keller* and *Lathrop* exist and have not been overturned by name. Nevertheless, the new standard exists and must be applied, even if the facts of the matter are not squarely on point with the case that announced the new standard.

3. The Integrated Bar and Government Speech.

SBM Officers attempt to distinguish the operation of an integrated bar from other violations of First Amendment free speech guarantees by shoehorning the SBM into an exception created for "government speech." (SBM Brief, PageID ## 56-63.) SBM Officers acknowledge that *Keller* held that an integrated bar's speech is private speech, not government speech. (SBM Brief, PageID # 56.) Yet they argue that subsequent Supreme Court opinions have implicitly transformed integrated bar speech into government speech. (SBM Brief, PageID ## 59-62.)

The government-speech exception to the prohibition on compelled speech holds that if the speech can be attributed to the government, the person who pays for that speech loses the ability to object - just as the taxpayer does not get to object to his taxes being spent promoting positions he does not agree with. The doctrine was developed primarily in a string of cases concerned with agricultural-promotion programs. In his concurring opinion in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), Justice Stevens, joined by Justice Ginsburg, called it a "recently minted

doctrine." *Pleasant Grove City*, 555 U.S. at 481 (Stevens, J., concurring). Justice Souter, in a separate concurrence, also agreed as to the "recently minted" categorization. *Pleasant Grove City*, 555 U.S. at 485 (Souter, J., concurring).[1] The doctrine certainly appears to postdate *Keller* and *Lathrop*.

One of the earliest cases involving compelled speech and agricultural programs dealt with speech made on behalf of California fruit growers, processors, and handlers. *Glickman v. Wileman Brothers & Elliot, Inc.*, 521 U.S. 457 (1997). SBM Officers cite *Glickman* for the proposition that compelled speech subsidies are allowable when they are part of a broader regulatory scheme, as an integrated bar is. But, *Glickman*'s regulatory scheme was substantially different than that of an integrated bar, and that difference is crucial. *Glickman*'s regulatory scheme was economic. Specifically, the fruit program was part of a scheme that was exempt from anti-trust law, and prohibited the participants from acting economically on their own:

> The legal question that we address is whether being compelled to fund this advertising raises a First Amendment issue for us to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve.
>
> In answering that question we stress the importance of the statutory context in which it arises. California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced

[1] See also Justice Souter: "The government-speech doctrine is relatively new, and correspondingly imprecise." *Johanns v. Livestock Marketing Association*, 544 U.S. at 574 (Souter, J., dissenting).

> many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme.

Glickman, 521 U.S. at 468-469. The economic component of the regulation and the restriction on individual actions was emphasized throughout *Glickman* and was central to its holding that this type of compelled speech was acceptable. This was discussed at length in *Glickman*, 521 U.S. at 474-477.

Assuming *Glickman*'s rationale survived *Janus*, it does not support SBM Officers' position. It is believed to be undisputed that the SBM does not promote the financial interests of the legal profession. The SBM does not place artificial constraints on attorney's economic activities, nor does it directly promote the economic well-being of lawyers. Indeed, *Keller* held that integrated bars do not serve private economic interests. *Keller*, 110 U.S. at 2236. For that reason, the rationale *Glickman* provided for allowing compelled speech does not fit here.

After *Glickman* came *United States v. United Foods, Inc*., 533 U.S. 405 (2001), a case which came up through the Sixth Circuit, and dealt with the marketing of mushrooms. At the outset, *United Foods* confirmed the centrality of *economic* regulation to *Glickman*: "[T]heir mandated participation in an advertising program with a particular message was the logical concomitant of a valid scheme of economic

regulation." *United Foods*, 533 U.S. at 412. So, again, it is not applicable to the non-economic regulation of the SBM.

Here, SBM Officers contend that because *Keller* forbade them from compelling speech on topics that were seemingly further afield and more controversial, it is therefore not a free speech or association violation to compel speech and association because the remaining issues are less controversial to the general public. (Even though these issues may be of much greater significance and more controversial to those within the profession.) The *United Foods* Court held that opinions on less controversial matters are still entitled to First Amendment protection:

> The subject matter of the speech may be of interest to but a small segment of the population; yet those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups in a society which values the freedom resulting from speech in all its diverse parts.
>
> ***
>
> Here the disagreement could be seen as minor: … It objects to being charged for a message which seems to be favored by a majority of producers. … First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors; and there is no apparent principle which distinguishes out of hand minor debates about whether a branded mushroom is better than just any mushroom. As a consequence, the compelled funding for the advertising must pass First Amendment scrutiny.

United Foods, 533 U.S. at 410-411. *United Foods* struck down the compelled-speech subsidy and declined to consider it government speech. However, the issue of government speech was not properly raised prior to the Supreme Court, and was therefore not given a full analysis. Nevertheless, the Court indicated that the food marketers there would have had a difficult time getting the benefit of the government-speech exception:

> For example, although the Government asserts that advertising is subject to approval by the Secretary of Agriculture, respondent claims the approval is *pro forma*. This and other difficult issues would have to be addressed were the program to be labeled, and sustained, as government speech.

United Foods, 533 U.S. at 416-417.

The developments anticipated in those parting words in *United Foods* regarding the criteria for determining government speech would wait another four years until *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005) for the Court to flesh out this "newly minted" exception. As they do with *United Foods*, SBM Officers use *Johanns* to support their claims. But again, as with *United Foods*, it is actually Taylor's argument that is buttressed by *Johanns*.

As noted by SBM Officers, *Johanns* involved the promotion behind a well-known beef advertising campaign, among other activities:

> We have sustained First Amendment challenges to allegedly compelled expression in two categories of cases: true "compelled-speech" cases, in which an individual is obliged personally to express a message he disagrees with, imposed by the government; and "compelled-subsidy"

> cases, in which an individual is required by the government to subsidize a message he disagrees with, expressed by a private entity. We have not heretofore considered the First Amendment consequences of government-compelled subsidy of the government's own speech.

Johanns, 544 U.S. at 557.

"In all of the cases invalidating exactions to subsidize speech, the speech was, or was presumed to be, that of an entity other than the government itself. See *Keller*, … *Abood*, … *United Foods*, …" *Johanns*, 544 U.S. at 559 (internal citations omitted).

Johanns, therefore, went on to describe the criteria to determine whether the speaker was a private one or the government. (And recall that *Keller* had already established the integrated bar's message to be private speech.) These criteria focus on whether or not a government official who was part of an electorally accountable branch of government authored the message and the degree to which that message was controlled by an official who was accountable to the voters directly or indirectly. In *Johanns*, the Court found that the speech was the government's message:

> The message set out in the beef promotions is from beginning to end the message established by the Federal Government. … Congress and the Secretary have also specified, in general terms, what the promotional campaigns shall contain, …, and what they shall not, … . Thus, Congress and the Secretary have set out the overarching message and some of its elements, and they have left the development of the remaining details to an entity whose members are answerable to the Secretary (and in some cases appointed by him as well).
>
> Moreover, the record demonstrates that the Secretary exercises final approval authority over every word used in every promotional

> campaign. All proposed promotional messages are reviewed by Department officials both for substance and for wording, and some proposals are rejected or rewritten by the Department. Nor is the Secretary's role limited to final approval or rejection: Officials of the Department also attend and participate in the open meetings at which proposals are developed.
>
> *This degree of governmental control over the message funded by the checkoff distinguishes these cases from Keller. There the state bar's communicative activities to which the plaintiffs objected were not prescribed by law in their general outline and not developed under official government supervision. Indeed, many of them consisted of lobbying the state legislature on various issues*.

Johanns, 544 U.S. at 560-562 (footnote and internal citations omitted, emphasis added).

> Here, the beef advertisements are subject to political safeguards more than adequate to set them apart from private messages. … The Secretary of Agriculture, a politically accountable official, oversees the program, appoints and dismisses the key personnel, and retains absolute veto power over the advertisements' content, right down to the wording. And Congress, of course, retains oversight authority, not to mention the ability to reform the program at any time. No more is required.

Johanns, 544 U.S. at 563-564 (footnote omitted). Therefore, it was *Johanns* that has set the criteria for determining government speech and the extent to which it requires electoral control over the government office controlling the speech.

In response to *Keller* and the government-speech exception, SBM Officers argue that *Keller* has been implicitly overruled by *Johanns* in regards to an integrated

bar's message being private speech[2]: But even if SBM Officers are correct that *Johanns* overruled *Keller* as they allege that it does, *Johanns* provides additional criteria which still shows that integrated bar speech, at least here with the SBM, is private speech. *Johanns* shows the importance of government speech being controlled by government officials who are held accountable by the electorate.

In *Johanns*, the Court found that Congress and the Secretary of Agriculture set the message and its elements, and that the remaining elements were authored by those who were answerable to the Secretary. *Johanns*, 544 U.S. at 560-561. SBM Officers assert that this condition is met by the Michigan Supreme Court's oversight. But they do acknowledge that the Court "does not approve every SBM position before it is issued." (SBM Brief, Page ID 62.) This falls far short of the *Johanns* criteria where their oversight was over "every word" and "all proposed" messages. *Johanns*, 544 U.S. at 561.

While the Michigan Supreme Court has the power to provide for the broad organizational structure of the SBM, it does not provide all control. It does not provide the management of the structure it provides. It does not engage in a mandatory exercise of power - it need not act unless it desires to. It does not engage

[2] *Johanns* never explicitly stated that it was overruling *Keller* by name. And note that *Agostini* was decided in 1997, and *Johanns* in 2005. Therefore, if *Agostini* did announce a new Supreme Court rule of precedence that all abrogation must be explicit and not by implication in the manner SBM Officers argue, then *Keller* still controls on these criteria.

in the day-to-day operations, nor dictate what messages the SBM puts forth. Rather, the SBM Representative Assembly "is the final policy-making body of the State Bar of Michigan." (JSMF, RE 16, ¶13, PageID # 86.) Contrast this with *Johanns*, where "as here, the government sets the overall message to be communicated and approves every word that is disseminated." *Johanns*, 544 U.S. at 562. Further, "[Congress and the Secretary of Agriculture] have left the development of the remaining details to an entity whose members are answerable to the Secretary." *Johanns*, 544 U.S. at 561. Of the SBM's Representative Assembly, at no time are "more than 5 members of the 150 representatives to the Representative Assembly (3.333% of the total) … appointed by the Supreme Court." And no one holding a judicial office can serve as an officer on the Representative Assembly. (JSMF, RE 16, ¶¶15-16, PageID # 86.) The extent of the management by Michigan Supreme Court, or any other judge or public official, is slight.

Even if the Michigan Supreme Court did exercise day-to-day control and absolute plenary powers over everything put forth by the SBM, that would still not be enough to satisfy *Johanns*' criteria for government-controlled speech. This is because the cornerstone of *Johanns* is that the government control must be exercised by elected officials, or by those who are accountable to elected officials, so that they in turn are democratically accountable. See, *Johanns*, 544 U.S. at 563-564. See also *Southworth v. Board of Regents of the University of Wisconsin System*, 529 U.S. 217,

235 (2000): "When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position."

While the Michigan Supreme Court may provide oversight and Michigan justices are both appointed and popularly elected,[3] still, "The judicial branch, ultimately, is 'the least politically accountable branch of government.'" *Lansing Schools Educ. Ass'n v. Lansing Bd. of Educ.*, 487 Mich. 349, 438; 792 N.W.2d 686, 735 (2010).

Lastly, another factor raised by *Johanns*, but not decided because there was not a record developed on it, was the possibility that it could not be government speech if the speech was attributable to someone other than the government.[4] "SBM speech is not promulgated or published with an indication that it has come from the Michigan Supreme Court, the state judiciary, the governor, the legislature, … It is always attributed to the State Bar of Michigan." (JSMF, RE 16, ¶41, PageID # 92.)

[3] See, generally, Michigan Constitution of 1963, Article VI, Sections 2, 8, 9, and 12.

[4] SBM Officers argue that Taylor has referred to the SBM as a "state agency" in communications with the public and news agencies, and that this binds Taylor and she cannot deny that the SBM's message is government speech. (SBM Brief, Page ID 68, footnote 11.) But such a position is not agreed upon in the JSMF, and even if it were, the parties' agreement could not bind the court as that is a question of law.

This should weigh against SBM Officers' claim that the SBM's message is government speech.

4. The comparison between unions and integrated bars supports the contention that *Janus* controls.

Perhaps because the ties between *Keller* and *Janus* are so strong, SBM Officials draw some distinctions between labor unions in *Janus* and *Abood* and the integrated bar here and *Keller*.[5] At the outset, SBM officers argues that labor unions serve private interests, while the SBM serves a public interest. (SBM Brief, Page ID 38-51.) This contention that the speech of unions covers only private interests and not the public interest, was thoroughly rejected by the Supreme Court:

> [W]e move on to the next step of the *Pickering* framework and ask whether the speech is on a matter of public or only private concern. In *Harris*, the dissent's central argument in defense of *Abood* was that union speech in collective bargaining, including speech about wages and benefits, is basically a matter of only private interest. We squarely rejected that argument, and the facts of the present case substantiate what we said at that time: "[I]t is impossible to argue that the level of ... state spending for employee benefits ... is not a matter of great public concern."

[5] As Taylor detailed in her initial Brief, the genesis of the entire First Amendment doctrine at issue here builds upon both labor and integrated bar cases, each coming together to reinforce the other like the teeth of a zipper. A reader of *United Foods*, for example, might be forgiven for thinking that there was a case called "*Abood* and *Keller*," as the two case names joined together like that are used no less than three times in the syllabus, twice in the majority opinion, and twice in the dissent. *Johanns* similarly uses the "*Abood* and *Keller*" naming three times in its majority opinion.

Janus, 128 S.Ct., at 2474 (internal citations omitted). Likewise, any discussion about the content or administration of the law is a public concern.

SBM Officers then attempt to distinguish public-sector labor unions and integrated bars by claiming that "SBM's primary activities are nonexpressive and…by contrast, unions exist primarily, if not exclusively, to speak on behalf of their members." It would seem odd that an organization by and for lawyers is considered nonexpressive when it is a profession known almost entirely for its expression to advocate positions. Furthermore, in *Janus*, it was recognized that unions affected public policy even if they were speaking to matters seemingly far from it:

> In addition to affecting how public money is spent, union speech in collective bargaining addresses many other important matters. As the examples offered by respondents' own amici show, unions express views on a wide range of subjects—education, child welfare, healthcare, and minority rights, to name a few. … What unions have to say on these matters in the context of collective bargaining is of great public importance.
>
> ***
>
> Even union speech in the handling of grievances may be of substantial public importance and may be directed at the "public square."

Janus, 128 S.Ct., at 2475-2476.

SBM Officials follow this up by noting that unions speak out on a range of "controversial political issues." As noted in the *Janus* quotation above, the Supreme Court considered "education, child welfare, healthcare, and minority rights" to be

political issues. Anyone familiar with public debates should know how quickly even minor differences of opinion can quickly become controversial. This is also true of the compelled speech allowed by *Keller*. What *Keller* considered germane and non-controversial may in fact arouse dramatically different opinions - the availability of legal services, for instance. Some might call for publicly-funded attorneys for civil matters. Some might argue for fee limitations. Some might argue, on the basis of access, for significant changes in bar admission practices as a way to increase representation. Any of these could easily become very contentious and draw a number of opinions. Regardless of the process the SBM has adopted, it does arrive at a position. SBM members who do not agree with this position are forced to subsidize its voicing. This position is then perceived by the public as that of Michigan's lawyers. The JSMF (RE 16, ¶42, PageID # 92 and JSMF Exhibit D, RE 16-4, PageID ## 135-142) provides a summary of positions taken by SBM. None of these can be presumed to have unanimous consent, no matter how non-ideological they might seem at first glance. Indeed, JSMF Exhibit D makes this explicit where it describes each position and if the SBM supported or opposed it. It even sometimes notes why there was opposition. Unanimous support cannot be presumed.

Janus did describe some subjects as being more controversial topics, such as "climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions. These are sensitive political topics, and they are undoubtedly

matters of profound 'value and concern to the public.'" *Janus*, 128 S.Ct., at 2475. SBM Officials then say that the SBM does not address these. "By contrast, SBM's speech, though on the subject of an essential government function, is far more apolitical and benign." (SBM Brief, PageID # 50.) Taylor has brought this as a facial challenge, and therefore does not need to cite examples with which she might disagree. Nevertheless, the SBM has recently addressed at least one of the aforementioned "controversial political issues," and not only in the voluntary bar sections which are not being challenged here. See, for instance, the December 2019 issue of the Michigan Bar Journal, Volume 98, number 12, devoted substantially to "LGBTQA Law" with articles by advocates such as a staff attorney of the ACLU's LGBT Project titled "Denied: Access to Essential Transgender Healthcare."[6] It doesn't matter whether such articles are informational in nature, or even if alternate viewpoints are presented. "Sexual orientation and gender identity" was described by the Supreme Court as being "contentious" and as having "political valence" and the SBM *has* spoken, and all members were compelled to pay and have that speech made on their behalf. And so SBM Officers are wrong to say that members' fees are not used to speak on such "controversial" issues. Again, it doesn't matter what

[6] http://www.michbar.org/file/barjournal/article/documents/pdf4article3827.pdf, last accessed February 2, 2021.

the specific issues are, forced concurrence and funding is not allowed, and it cannot be presumed for any issue.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

RE 16: Joint Statement of Material Facts, ¶¶ 13, 15, 16, 41, 42, Page ID 86, 92 (entered May 15, 2019)

RE 16-4: Joins Statement of Material Facts, RE 16-4, PageID ## 135-142 (entered May 15, 2019)

RE 20: Defendants' Brief in Support of Motion for Summary Judgment, Page ID 181-230 (entered June 15, 2019)

RE 22: Plaintiff's Response to Defendants' Motion for Summary Judgment, Page ID 232-265 (entered July 13, 2020)

CERTIFICATE OF COMPLIANCE

This reply brief complies with the type-volume limitation in the Second Case Management Order (Docket No. 13) because it contains 6,440 words, excluding parts of the brief exempted by LCivR 7.2(b)(i), as counted by Microsoft Word 2013.

Dated: February 4, 2021

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