No. 20-2002

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.

Appeal from the United States District Court
for the Western District of Michigan
Case No. 1:19-cv-00670
Hon. Robert J. Jonker

APPELLEES' BRIEF

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Dated: December 24, 2020

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sixth Circuit Rule 26.1, Defendants-Appellees Robert J. Buchanan, in his official capacity as President of the State Bar of Michigan Board of Commissioners; Dana M. Warnez, in her official capacity as President-Elect of the State Bar of Michigan Board of Commissioners; James W. Heath, in his official capacity as Vice President of the State Bar of Michigan Board of Commissioners; Daniel D. Quick, in his official capacity as Secretary of the State Bar of Michigan Board of Commissioners; and Joseph P. McGill, in his official capacity as Treasurer of the State Bar of Michigan Board of Commissioners, make the following disclosures:

1. Are said parties subsidiaries or affiliates of a publicly owned corporation?

Answer: No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

Answer: No.

Dated: December 24, 2020 /s/ John J. Bursch
John J. Bursch

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STATEMENT REGARDING ORAL ARGUMENT

Given the uncommonly clear answer to the question before the Court, Appellees do not believe that oral argument would aid this Court's disposition of this appeal. If the Court nonetheless orders argument, Appellees respectfully request the opportunity to participate.

JURISDICTIONAL STATEMENT

Appellees agree that the district court had subject-matter jurisdiction, that this Court has appellate jurisdiction, and that the appeal was timely filed from the district court's final judgment.

STATEMENT OF ISSUES FOR REVIEW

Plaintiff-Appellant Lucille Taylor contends that Michigan's requirement that licensed lawyers belong and pay dues to the State Bar of Michigan violates her First Amendment associational and speech rights. Taylor concedes that her claims are materially indistinguishable from those the Supreme Court rejected in *Lathrop v. Donohue*, 367 U.S. 820 (1961), and *Keller v. State Bar of California*, 496 U.S. 1 (1990). But she contends that a recent case involving labor-union agency fees, *Janus v. American Federation of State, County, & Municipal Employees*, 138 S. Ct. 2448 (2018), implicitly overruled *Lathrop* and *Keller*. This case presents two questions for review:

1. Whether the district court correctly held that, because *Lathrop* and *Keller* are directly controlling precedents, lower courts are bound to apply them until the Supreme Court overrules those decisions.

2. Whether, in any event, Michigan's requirements that licensed lawyers be members of and pay dues to the State Bar of Michigan are constitutional even under *Janus*.

INTRODUCTION

Numerous plaintiffs like Lucille Taylor have filed First Amendment challenges to integrated bars around the country following the Supreme Court's decision in *Janus v. American Federation of State, County, & Municipal Employees*, 138 S. Ct. 2448 (2018). *Janus* limited the circumstances under which a public-sector union may charge mandatory fees to nonmembers for whom the union serves as exclusive representative in bargaining with the government. Though the Supreme Court has twice considered and twice upheld the constitutionality of integrated bars in the face of indistinguishable claims, these plaintiffs invite courts to hold that *Janus* overruled those controlling precedents. In every case, including two circuits, the court rejected that invitation. *Jarchow v. State Bar of Wis.*, No. 19-3444, 2019 WL 8953257, at *1 (7th Cir. Dec. 23, 2019) ("The district court, in its thorough and well-reasoned order, correctly held that the appellants' claims are foreclosed by *Keller*."); *Fleck v. Wetch*, 937 F.3d 1112, 1118 (8th Cir. 2019) ("[A]s *Janus* did not overrule *Keller* . . . *Janus* does not alter our prior decision [affirming dismissal] . . . ."). And the Supreme Court denied petitions for certiorari from both circuit decisions.

The district court here correctly held that it, too, was bound by the Supreme Court's directly controlling precedents and granted summary judgment in favor of Appellees, the officers of the Board of Commissioners of the State Bar of Michigan ("SBM"). Lower courts must always follow the Supreme Court's controlling caselaw, "leaving to th[at] Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). This Court should affirm.

STATEMENT OF THE CASE

Legal background.

This case is part of a recent wave of litigation about mandatory membership in bar associations that have been integrated into state government to play a central role in regulating the legal profession and improving the administration of justice. The Supreme Court has twice considered and upheld the constitutionality of integrated bars.

First, in *Lathrop v. Donohue*, 367 U.S. 820 (1961), the Court rejected the plaintiff-lawyer's claim that Wisconsin's requirement that he become a member of and pay dues to an integrated bar violated his First Amendment right to free association. 367 U.S. at 822. A Court majority agreed that the mandatory membership and dues

requirements did not unconstitutionally impinge on the lawyer's right to free association given Wisconsin's legitimate interest in regulating and improving the quality of legal services. *Id.* at 843 (plurality opinion); *id.* at 849–50 (Harlan, J., concurring); *id.* at 865 (Whittaker, J., concurring).

Then, in *Keller v. State Bar of California*, 496 U.S. 1 (1990), the Supreme Court took up the question of mandatory dues. It unanimously rejected the plaintiffs' claim that the use of their mandatory dues to fund the California bar's political and ideological activities violated their free-speech rights. 496 U.S. at 9. It held that an integrated bar may "constitutionally fund activities germane" to the state's "interest in regulating the legal profession and improving the quality of legal services." *Id.* at 13–14. "[T]he guiding standard," the Court explained, is "whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the state.'" *Id.* at 14 (quoting *Lathrop*, 367 U.S. at 843 (plurality opinion)). Under this standard, a bar could not, for example, use mandatory dues to advocate for gun control, but it could do so to propose new ethics rules. *Id.* at 16.

The Supreme Court has never overruled *Lathrop* or *Keller*. To the contrary, the Court recently reaffirmed *Keller*'s continuing vitality unequivocally in a case that struck down mandatory membership and dues requirements for home healthcare workers, a precursor to *Janus*. *Harris v. Quinn*, 134 S. Ct. 2618, 2643 (2014) ("[O]ur decision in this case is wholly consistent with our holding in *Keller*.").

In *Janus*, the Court overruled *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), a case in which the Court held that a public-sector union may use mandatory agency fees to fund expressive activities germane to the union's purposes. 138 S. Ct. at 2463, 2486. Applying "exacting scrutiny"—under which a compelled subsidy of speech must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms," *id.* at 2465 (cleaned up)—*Janus* held that public-sector union agency fees violate the First Amendment, *id.* at 2486. Public-sector unions are the exclusive mouthpieces for public employees in the collective bargaining process, including nonmembers. After *Janus*, public-sector unions must obtain affirmative consent before exacting an agency fee from a nonmember. *Id.* at 2486.

Post-*Janus*, plaintiffs around the country have filed challenges to integrated bars, contending that *Janus* signaled the Supreme Court's interest in reexamining the constitutionality of integrated bars. Those challenges have universally failed.[1] Indeed, two separate cases have already reached the Supreme Court, where the plaintiff-petitioners asked the Court to overrule *Lathrop* and *Keller*. Petition for a Writ of Certiorari, *Fleck v. Wetch*, 140 S. Ct. 1294 (2020) (No. 19-670), 2019 WL 6341142; Petition for a Writ of Certiorari, *Jarchow v. State Bar of Wis.*, 140 S. Ct. 1720 (2020) (No. 19-831), 2019 WL 7423388. The Supreme Court denied certiorari in both cases. *Fleck v. Wetch*, 140 S. Ct. 1294 (2020) (mem.); *Jarchow v. State Bar of Wis.*, 140 S. Ct. 1720 (2020) (mem.). As Justice Thomas explained in *Jarchow*, the Court's refusal to reexamine *Keller* closes the door in lower courts for plaintiffs like

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[1] *Jarchow v. State Bar of Wis.*, No. 19-3444, 2019 WL 8953257, at *1 (7th Cir. Dec. 23, 2019), *cert. denied*, 140 S. Ct. 1720 (2020); *Fleck v. Wetch*, 937 F.3d 1112, 1114–15, 1118 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 1294 (2020); *File v. Kastner*, 469 F. Supp. 3d 883, 891 (E.D. Wis. 2020); *McDonald v. Sorrels*, No. 19-CV-00219, 2020 WL 3261061, at *4–5 (W.D. Tex. May 29, 2020); *Boudreaux v. La. State Bar Ass'n*, 433 F. Supp. 3d 942, 976–77 (E.D. La. 2020); *Schell v. Gurich*, 409 F. Supp. 3d 1290, 1298 (W.D. Okla. 2019); *Gruber v. Oregon State Bar*, No. 18-CV-1591, 2019 WL 2251826, at *9 (D. Or. Apr. 1, 2019) (deciding companion case, *Crowe v. State Bar of Oregon*, No. 18-CV-2139, in same opinion).

Taylor. *Jarchow*, 140 S. Ct. at 1721 (Thomas, J., dissenting from denial of certiorari) ("[A]ny challenge to our [integrated-bar] precedents will be dismissed for failure to state a claim.").

Factual background.[2]

A. SBM's background and purposes.

The Michigan Legislature established SBM as a public body corporate in 1935. R.16, JSMF ¶¶ 1–2, PageID.84; Mich. Comp. Laws § 600.901. By statute, all persons licensed to practice law in Michigan must be an SBM member. R.16, JSMF ¶ 3, PageID.85; Mich. Comp. Laws § 600.901. The Michigan Supreme Court has plenary authority over the organization, government, members, conduct, and activities of SBM. R.16, JSMF ¶ 11, PageID.85; Mich. Comp. Laws § 600.904. The Supreme Court has exercised this authority by promulgating the Rules Concerning the State Bar of Michigan ("RCSBM")[3] as well as various

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[2] The parties agreed upon and filed a Joint Statement of Material Facts ("JSMF"). R.16, PageID.84–142.

[3] The RCSBM are attached as Exhibit A to the Joint Statement of Material Facts. The parties agree that, at all times relevant to this lawsuit, SBM operated in accordance with the RCSBM and the administrative orders promulgated by the Michigan Supreme Court. R.16, JSMF ¶ 12, PageID.85–86.

administrative orders. Since SBM's inception, the Michigan Supreme Court has declared that SBM's mission is to "aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interests of the legal profession" in Michigan. R.16-1, JSMF Ex. A (RCSBM) at R. 1, PageID.99; *see also* RCSBM § 1 (1935) (substantially identical).

The RCSBM provide that each member must pay dues to fund SBM's operations. R.16-1, JSMF Ex. A (RCSBM) at R. 4(A), PageID.101. The dues consist of three amounts set by the Supreme Court to fund (1) Michigan's Attorney Grievance Commission and Attorney Discipline Board; (2) SBM's Client Protection Fund, which reimburses clients who have been victimized by lawyers; and (3) SBM's other expenses. *Id.* SBM also has established several voluntary subject-matter-specific sections, on whose behalf it collects separate dues from attorneys who voluntarily join them. *Id.* at R. 12(1), PageID.111. Taylor does not challenge the section dues. R.16, JSMF ¶ 26, PageID.88.

B. SBM's activities.

The Michigan Supreme Court has defined SBM's public mission, and SBM engages in a wide array of activities in service of that mission. SBM's primary activities are regulatory and include attorney-licensing-database management, character and fitness recommendations, maintaining the official record of attorneys licensed to practice in Michigan, compliance administration functions, *pro hac vice* admissions administration, and unauthorized-practice-of-law investigation and prosecution. *See id.* ¶¶ 27, 43, PageID.88–89, 92. SBM also performs ancillary services, including the Client Protection Fund, the Lawyers and Judges Assistance Program (focused on mental health and substance-abuse dependency), ethics guidance, pro bono activities coordination, lawyer referral, coordination of legal aid services, and equal access programs. *Id.* ¶ 27, PageID.88–89. Activities in these categories consume well in excess of 90% of SBM's budget. *Id.* ¶ 43, PageID.92.

SBM also engages in certain public policy activities related to the legal profession and the administration of justice, as roughly defined in *Keller* and refined by several Michigan Supreme Court directives. *Id.*

¶¶ 39–40, PageID.91–92. The Michigan Supreme Court has adopted administrative orders that direct whether and how SBM may conduct those activities using mandatory dues. The current order,[4] in effect since 2004, authorizes SBM to use mandatory dues to analyze pending legislation and provide content-neutral technical assistance to legislators on request. R.16-3, JSMF Ex. C (Admin. Order No. 2004-01) at 2, PageID.131. The order also allows SBM to fund activities of an ideological nature if they reasonably relate to:

> (A) the regulation and discipline of attorneys;
>
> (B) the improvement of the functioning of the courts;
>
> (C) the availability of legal services to society;
>
> (D) the regulation of attorney trust accounts; and
>
> (E) the regulation of the legal profession, including the education, the ethics, the competency, and the integrity of the profession.

Id. at 1, PageID.130.

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[4] The current administrative order, Administrative Order No. 2004-01 (Mich. Feb 3, 2004), is attached as Exhibit C to the Joint Statement of Material Facts. The parties agree that, at all times relevant to this lawsuit, SBM operated in accordance with Administrative Order No. 2004-01 and did not exceed the limits on bar speech set in *Keller*. R.16, JSMF ¶¶ 39–40, PageID.91–92.

Before undertaking any of the foregoing activities, the Michigan Supreme Court's order requires SBM to provide all members at least two weeks' notice, via its website, that SBM may consider taking a position on proposed legislation at a public meeting. *Id.* at 2, PageID.131.[5] After the notice period, the issue of whether to support the proposed legislation may be taken up at a public hearing of SBM's 33-member Board of Commissioners or its 150-member Representative Assembly. *Id.* SBM's members may make comments at such hearings. *Id.* The results of all Board and Assembly votes must be posted to SBM's website as soon as possible after the vote and published in the next issue of the *Michigan Bar Journal*. *Id.*

A member who believes that SBM has violated the administrative order may file a written challenge and seek revocation of the offending position and reimbursement of the activity's cost. *Id.* at 3, PageID.132. The challenger may also seek Michigan Supreme Court review. *Id.* Since the current administrative order's adoption in 2004, there has

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[5] SBM discharges this obligation through the Public Policy Resource Center section of its website, which is available at https://www.michbar.org/publicpolicy/Home.

been only one member challenge. R.16, JSMF ¶ 45, PageID.93. As explained in greater detail below, Taylor has never filed a challenge or sought reimbursement.

SBM has operated well within the lines set by the Michigan Supreme Court. *Id.* ¶ 39, PageID.91–92. In the 2019–2020 legislative session, for instance, it has:

- supported legislation extending the sunset of Michigan's e-filing system fee, to ensure that the e-filing system remains adequately funded;
- supported legislation setting out permissible venues for prosecutions for delivery of controlled substances causing death; and
- opposed legislation that exempted a class of people from jury service.

R.16-4, JSMF Ex. D (Summary of Positions During 2017–18 and 2019–20 Legislative Sessions) at 1–2, PageID.136–37.

When SBM engages in ideological activities, its positions are neither promulgated nor published with an indication that they have come from any SBM member or group of members. R.16, JSMF ¶ 41, PageID.92. Instead, SBM's advocacy is always attributed to SBM itself. *Id.* SBM's members are always free to—and often do—speak privately or publicly about any issue on which SBM has deliberated or taken a

position. *Id.* ¶ 46, PageID.93. Likewise, SBM's members are free to join other bar associations and special-interest groups that take positions contrary to those taken by SBM. *Id.* ¶ 48, PageID.93. For all these reasons, SBM is not in any way its members' exclusive representative in the collective-bargaining sense. *Id.* ¶ 47, PageID.93.

Procedural history.

A. Taylor's complaint.

Taylor is a longstanding SBM member. R.1, Compl. ¶ 24, PageID.5. She does not necessarily disagree with SBM's public policy positions. *Id.* ¶ 5, PageID.2. Indeed, aside from SBM's support for its integrated status, Taylor does not identify even a single position with which she disagrees, and she has never challenged a particular SBM position under the administrative order or filed a comment regarding a proposed SBM position. R.16, JSMF ¶¶ 49–50, PageID.93; *see also id.* ¶¶ 51–54, PageID.93–94. Taylor nonetheless alleges that SBM's "uses of mandatory dues to carry out functions that opine on a number of public policy issues related to the legal profession" violates her First Amendment rights to free association and free speech. R.1, Compl. ¶¶ 15–16, PageID.4.

Relying on *Janus*, Taylor brings two claims. First, she alleges that the portion of SBM's mandatory dues in excess of the amount that funds the Attorney Grievance Commission and the Attorney Discipline Board is an unconstitutional compelled subsidy of speech, thereby violating her free speech right. *Id.* ¶ 39, PageID.6. Second, she alleges that Michigan's requirement that she be a member of SBM as a condition of practicing law violates her right to free association. *Id.* ¶ 43, PageID.7. Taylor seeks (1) a declaration that compulsory membership and the mandatory payment of SBM dues for non-disciplinary actions violates her First Amendment rights, and (2) a permanent injunction permitting SBM to collect compulsory dues for non-disciplinary actions only if she first voluntarily authorizes that payment. *Id.* at 7–8, PageID.7–8.

B. The district court grants Appellees' motion for summary judgment.

The parties filed cross-motions for summary judgment in the district court. On September 8, 2020, the district court granted Appellees' motion and denied Taylor's motion. R.26, Order at 2, PageID.291 The district court held that, since *Lathrop* and *Keller* decided free-association and free-speech claims on all fours with Taylor's—as Taylor herself admitted—it was bound to apply those

directly controlling precedents. *Id.* at 1–2, PageID.290–91. The district court followed the rule that only the Supreme Court has the power to overrule its own precedents. *Id.* at 2, PageID.291. It recognized that "[e]ven Justices who believe *Lathrop* and *Keller* were wrongly decided recognize that the Supreme Court," not a lower court, "will have to make th[e] call" whether *Janus* abrogated *Lathrop* and *Keller*. *Id.* (citing *Jarchow*, 140 S. Ct. 1720 (Thomas, J., dissenting from denial of certiorari)). Taylor appeals.

SUMMARY OF THE ARGUMENT

This appeal primarily presents a single, narrow question: Did the district court correctly hold that it lacked authority to consider whether *Janus* implicitly overruled *Lathrop* and *Keller* and was bound to follow those directly controlling precedents? Taylor does not address this question at all, so she has waived any arguments she may have on the only issue properly before this Court. Regardless, the district court's holding was correct. Every other court that has considered the question reached the same conclusion, and even the Supreme Court justices who may wish to revisit *Lathrop* and *Keller* recognize that only that Court may do so.

In addition, there are numerous alternative grounds in the record on which to affirm. Taylor's free-association claim challenging the requirement that she belong to SBM is a red herring. Michigan indisputably possesses the power to require lawyers to associate for regulatory and licensing purposes. Likewise, the material differences between public-sector unions and SBM provide ample reason to conclude that *Janus* did not disturb the Supreme Court's precedent concluding that mandatory bar dues do not violate a lawyer's free-speech rights. Michigan's mandatory dues pass constitutional muster because they fund government speech unconstrained by the First Amendment and, in the alternative, because they satisfy the "exacting scrutiny" test applied in *Janus*.

For all these reasons, this Court should affirm the district court's judgment.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo. *Spadafore v. Gardner*, 330 F.3d 849, 851 (6th Cir. 2003).

ARGUMENT

I. The district court correctly held that *Lathrop* and *Keller* control.

Perhaps because its answer is so obvious, Taylor does not attempt to address the primary question that is actually before this Court: Did the district court correctly hold that, because *Lathrop* and *Keller* are directly controlling precedents, it was bound to follow them? Taylor's odd omission means that she has waived any arguments she might have. *E.g.*, *Sanborn v. Parker*, 629 F.3d 554, 579 (6th Cir. 2010) ("We have consistently held . . . that arguments made to us for the first time in a reply brief are waived." (citing *Am. Trim, LLC v. Oracle Corp.*, 383 F.3d 462, 477 (6th Cir. 2004))). This Court should summarily affirm on that basis alone.

Moreover, Taylor does not dispute that her free-association and compelled-speech claims fail as a matter of law under *Lathrop* and *Keller*. That concession is fatal to her case. To succeed, her arguments would necessitate this Court holding that *Janus* implicitly overruled *Lathrop* and *Keller*. "The Supreme Court, however, has explicitly prohibited just such a finding." *Grutter v. Bollinger*, 288 F.3d 732, 743 (6th Cir. 2002) (en banc), *aff'd*, 539 U.S. 306 (2003). Because *Lathrop*

and *Keller* have "direct application" in this case, lower courts must follow them, "leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Id.* at 743–44 (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997)) (cleaned up).

This is so even if *Lathrop* and *Keller* might "appear[] to rest on reasons rejected in some other line of decisions" (i.e., *Janus*), as *Taylor* (erroneously) contends. *Id.* (quoting *Agostini*, 521 U.S. at 484) (internal quotation marks omitted); *accord, e.g.*, *Hohn v. United States*, 524 U.S. 236, 252–53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."). This "vertical" form of "stare decisis is absolute, as it must be in a hierarchical system with 'one supreme Court.' " *Ramos v. Louisiana*, 140 S. Ct. 1390, 1416 n.5 (2020) (Kavanaugh, J., concurring in part) (quoting U. S. Const., Art III, § 1). Applying this rule is particularly appropriate here given that the *Janus* decision "d[id] not question" *Keller*, *Janus*, 138 S. Ct. at 2498 (Kagan, J., dissenting), and *Janus*'s predecessor, *Harris v. Quinn*, acknowledged that it was "wholly consistent" with *Keller*'s holding, 134 S. Ct. at 2643.

Indeed, Justices Thomas and Gorsuch, in *Jarchow*, recognized that lower courts must follow *Keller* in cases like Taylor's:

> Respondents argue that our review of this case would be hindered because it was dismissed on the pleadings. *But any challenge to our precedents will be dismissed for failure to state a claim* . . . . And in any event, a record would provide little, if any, benefit to our review of the purely legal question whether *Keller* should be overruled. *Short of a constitutional amendment, only we can rectify our own erroneous constitutional decisions.*

140 S. Ct. at 1721 (Thomas, J., dissenting from denial of certiorari) (emphasis added). Unsurprisingly, every court considering challenges to integrated bars after *Janus* has declined to hold that *Janus* implicitly overruled *Keller* or *Lathrop*. *Jarchow*, 2019 WL 8953257, at *1 ("The district court, in its thorough and well-reasoned order, correctly held that the appellants' claims are foreclosed by *Keller*."), *cert. denied*, 140 S. Ct. 1720 (2020); *Fleck*, 937 F.3d at 1118 ("[A]s *Janus* did not overrule *Keller* . . . *Janus* does not alter our prior decision [affirming dismissal] . . . ."), *cert. denied*, 140 S. Ct. 1294 (2020); *File v. Kastner*, 469 F. Supp. 3d 883, 891 (E.D. Wis. 2020) ("I conclude that the plaintiff's claim is foreclosed by *Keller*, which only the Supreme Court may overrule."); *McDonald v. Sorrels*, No. 19-CV-00219, 2020 WL 3261061, at *5 (W.D. Tex. May 29, 2020) ("*Janus* did not disturb the binding holdings

of *Lathrop* and *Keller*."); *Boudreaux v. La. State Bar Ass'n*, 433 F. Supp. 3d 942, 977 (E.D. La. 2020) ("The Court must, therefore, apply *Lathrop* and *Keller* . . . ."); *Schell v. Gurich*, 409 F. Supp. 3d 1290, 1298 (W.D. Okla. 2019) (declining "to speculate as to whether the Supreme Court might reach some different result if it were to revisit either *Lathrop* or *Keller*"); *Gruber*, No. 18-CV-1591, 2019 WL 2251826, at *9 (D. Or. Apr. 1, 2019) ("[T]his court . . . must apply *Keller* to the cases at bar.").

Notably, this Court recently rejected a *Janus*-based challenge in an exclusive-bargaining case even though the governing precedent conflicted directly with *Janus*. In *Thompson v. Marietta Education Association*, 972 F.3d 809 (6th Cir. 2020), a public schoolteacher complained that an Ohio law requiring her to accept a union as her exclusive bargaining representative violated her First Amendment rights. 972 F.3d at 811–12. Decades before *Janus*, the Supreme Court upheld a similar law in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984). Although this Court recognized that "*Knight*'s reasoning conflicts with the reasoning in *Janus*," it acknowledged that "lower court judges have no authority" to

"functionally overrule" a Supreme Court decision. 972 F.3d at 814. Accordingly, this Court applied *Knight*, not *Janus*. *Id.*

Insofar as Taylor attempts to raise this issue for the first time in her reply brief, it bears mentioning that the arguments she made in the district court do not hold water. There, she asserted that "[i]t does not matter that *Lathrop* and *Keller* where [sic] cases specifically on integrated bars and the First Amendment while *Janus* was not" because *Janus* announced a new "First Amendment legal standard." R.22, Resp. Br. at 2, PageID.236. This assertion suffers from numerous flaws.

To start, the Supreme Court has already recognized that *Keller* "fits comfortably within the [exacting scrutiny] framework" that the Court applied in *Janus* and its precursors. *Harris*, 134 S. Ct. at 2643–44. The Court's application of exacting scrutiny did *not* "call [*Keller*] into question." *Id.* at 2643.

What's more, the Supreme Court has already rejected Taylor's "new announcement" standard. Consider *United States v. Hatter*, 532 U.S. 557 (2001), in which the Court overruled *Evans v. Gore*, 253 U.S. 245 (1920). *Evans* held that the Constitution's Compensation Clause barred the application to a federal Article III judge of an income tax

enacted after the judge's appointment. 253 U.S. at 264. Five years later, in *Miles v. Graham*, 268 U.S. 501 (1925), the Supreme Court extended *Evans* to taxes enacted before a judge was appointed. 268 U.S. at 509. A short time after that, the Court explicitly overruled *Miles*. *O'Malley v. Woodrough*, 307 U.S. 277, 282–83 (1939). Although that decision's reinterpretation of the Compensation Clause's requirements implicitly "repudiated *Evans*' reasoning," *Hatter*, 532 U.S. at 570, the Court did not *explicitly* overrule *Evans*.

Decades later, in *Hatter*, several federal judges sued the government, alleging that the extension of Social Security and Medicare taxes to federal employees *after* the judges took the bench violated the Compensation Clause. *Id.* at 560–61. So, the judges' claims were governed by *Evans*, insofar as it remained good law, and the court of appeals applied it. *Id.* at 567. Notwithstanding its ultimate decision to overrule *Evans*, the Supreme Court observed that "[t]he Court of Appeals was *correct* in applying *Evans* . . . , given that 'it is this Court's prerogative alone to overrule one of its precedents.'" *Id.* (emphasis added) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)).

In sum, the district court correctly held that it was bound by *Lathrop* and *Keller*. This Court should affirm.

II. The record contains numerous alternative grounds on which to affirm.

This Court may affirm a district court's judgment "on any grounds supported by the record even if different from the reasons of the district court." *Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc.*, 280 F.3d 619, 629 (6th Cir. 2002) (collecting cases). This record contains numerous alternative grounds on which to affirm.

A. *Janus* did not abrogate *Lathrop* with respect to free association.

To begin, even if this Court were inclined to ignore the Supreme Court's instruction and recognize overrulings by implication, it would be inappropriate to do so here. *Janus* overruled *Abood*, but *Lathrop* long predated *Abood*. Moreover, *Janus* focused on compelled speech, not free association. That focus makes sense because the right to free association protects the right to associate (or not) only for purposes of engaging in activities otherwise protected by the First Amendment. Unions, whose raison d'être is to speak on behalf of employees, implicate this right. By contrast, integrated bars like SBM do not exist primarily to engage in expressive activities; rather, SBM's chief focus is

regulating and improving the legal profession for the benefit of Michigan's citizens. It is beyond dispute that Michigan constitutionally may require lawyers to associate for such purposes.

As a threshold matter, *Janus* is a compelled-speech case. *E.g.*, 138 S. Ct. at 2460 ("We conclude that this arrangement violates the *free speech rights* of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." (emphasis added)). It did not prohibit mandatory associations. Indeed, it did not even purport to prohibit burdens on public employees' freedom to associate. To the contrary, the Court explicitly recognized that its holding did not undermine state requirements "that a union serve as exclusive bargaining agent for its employees," which themselves work a "significant impingement on associational freedoms." *Id.* at 2478.

In addition, the material differences between public-sector labor unions and integrated bar associations like SBM preclude the application of that holding here. Unlike a labor union, SBM is "not in any way [Taylor's] exclusive representative in the collective-bargaining sense." R.16, JSMF ¶ 47, PageID.93. In contrast to union members,

Taylor and SBM's other members are always free to speak and join other associations that disagree with SBM. *Id.* ¶¶ 46–48, PageID.93.

Moreover, the First Amendment does not protect the right to associate for any purpose; rather, it protects the "right to associate *for the purpose of engaging in those activities protected by the First Amendment*—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) (emphasis added); *see also Janus*, 138 S. Ct. at 2463 ("The right to eschew association *for expressive purposes* is likewise protected." (emphasis added) (collecting cases)). Associations that engage in activities not otherwise protected by the First Amendment do not fall within the right's scope. *E.g.*, *City of Dall. v. Stanglin*, 490 U.S. 19, 25 (1989) ("We think the activity of these dance-hall patrons—coming together to engage in recreational dancing—is not protected by the First Amendment. Thus this activity qualifies neither as a form of 'intimate association' nor as a form of 'expressive association' . . . ."); *Watson v. Fraternal Order of Eagles*, 915 F.2d 235, 244 (6th Cir. 1990) ("[The Eagles] seems to be simply a drinking club. As such, the application of § 1981 to its conduct does not violate the freedom to associate.").

Labor unions implicate this right: speech on behalf of members is all but their exclusive activity and their reason for being. *Janus*, 138 S. Ct. at 2474 ("[W]hen a union negotiates with the employer or represents employees in disciplinary proceedings, the union *speaks* . . . ." (emphasis added)). By contrast, as *Lathrop* recognized, 367 U.S. at 839–43 (plurality opinion), and as is clearly the case here, integrated bars principally engage in *nonexpressive* activities. For instance, SBM engages in the following nonexpressive activities, among others:

a. Collects license fees and administers licensing requirements.

b. Investigates the character and fitness of candidates for admission to the Michigan bar.

c. Maintains the official record of attorneys licensed to practice in Michigan.

d. Operates and supports its governance mechanisms, including the Board of Commissioners and the Representative Assembly.

e. Investigates and prosecutes the unauthorized practice of law.

f. Administers IOLTA financial institution registrations.

g. Issues ethics opinions interpreting the Michigan Rules of Professional Conduct and the Michigan Code of Judicial Conduct.

h. Provides ethics counseling to lawyers and judges through its Ethics Helpline.

i. Administers the Client Protection Fund to reimburse clients whose attorneys misappropriate funds.

j. Administers the Lawyers and Judges Assistance Program, which assists attorneys and judges with substance abuse, mental health, and general wellness issues.

k. Coordinates *pro bono*, legal aid, and access to justice initiatives.

l. Provides the Practice Management Resource Center, a broad-based information clearinghouse and resource center for Michigan lawyers for services and goods necessary to successfully manage a legal practice.

m. Provides finance, administration, and human resources department support to the Attorney Grievance Commission and the Attorney Discipline Board.

R.16, JSMF ¶¶ 27, 66, PageID.88–89, 96.

Aside from the Client Protection Fund, Taylor ignores these nonexpressive SBM activities. Br. at 37–44. Although Taylor asserts that the existence of the Client Protection Fund somehow violates her First Amendment rights, Br. at 43, she nowhere explains how the Client Protection Fund constitutes an expressive activity that implicates the First Amendment. It does not. The Client Protection Fund is straightforward: it reimburses clients for reimbursable losses caused by attorney misconduct within the scope of the fund's rules, and it uses money paid by attorneys to do so. R.16, JSMF ¶¶ 28, 33,

PageID.90–91. Similar programs exist in all 50 states and the District of Columbia, and in all but two states—including states that do not have integrated bars—the programs are funded with mandatory fees exacted on licensed attorneys. *Id.* ¶ 29, PageID.90. It is impossible to discern how the Client Protection Fund and its counterparts in the remaining states and District of Columbia have anything to do with the First Amendment.

In sum, the Client Protection Fund and SBM's other nonexpressive activities—to which the vast majority of a member's dues are allocated, *id.* ¶ 43, PageID.92—do not implicate the First Amendment. *See United States v. United Foods*, 533 U.S. 405, 414 (2001) ("[In *Keller*, t]hose 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*." (emphasis added)); *Falk v. State Bar of Mich.*, 342 N.W.2d 504, 512 (Mich. 1983) (opinion of Boyle, J.) ("In connection with plaintiff's challenges to non-political activities of the bar, we find that plaintiff has not met his

burden of proof in showing an injury to a protected First Amendment interest."); *see also United States v. Frame*, 885 F.2d 1119, 1131 (3d Cir. 1989) ("[W]e find that the aspect of the Beef Promotion Act which imposes the assessments for research purposes qualifies as neither 'expressive' nor 'intimate' association, and therefore does not implicate Frame's first amendment rights."), *abrogated on other grounds by Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005). Although Taylor "may feel that [her] money is not being well-spent," that "does not mean that [she] ha[s] a First Amendment complaint." *Ellis v. Bhd. of Ry. Emps.*, 466 U.S. 435, 456 (1984).

Michigan has the power to require professionals to "associate" for purposes of licensing and regulation. *E.g.*, *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." (collecting cases)). "States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health,

safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975). Michigan's interest is "especially great" in the context of lawyers "since lawyers are essential to the primary governmental function of administering justice, and have historically been officers of the courts." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978) (quoting *Goldfarb*, 421 U.S. at 792) (cleaned up). SBM is the means through which the Michigan Legislature and the Michigan Supreme Court have rationally decided to serve this interest for more than 80 years. Mich. Comp. Laws § 600.901; Mich. Comp. Laws § 600.904.

Michigan's and other states' long history of reliance on the integrated bar model provides further support for concluding that *Janus* did not abrogate *Lathrop*. *See, e.g.*, *Hilton v. S.C. Pub. Railways Comm'n*, 502 U.S. 197, 202 (1991) ("*Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response."). SBM has been an

essential component of Michigan's regulation of lawyers and the administration of justice for nearly a century—predating even *Lathrop*. Undoing that integration would force the Michigan Legislature and Supreme Court to resolve thorny logistical and legal questions. Would a yet-to-be-created state agency assume SBM's functions? Would SBM continue to exist as a voluntary bar association, or would it be entirely subsumed into this new entity? How would the new agency be funded? How would it be governed? *Janus* offers no reason to force Michigan, its courts, its lawyers, and its citizens to bear the significant costs associated with resolving these and other questions.

For all these reasons, there is no basis to conclude that Michigan's mandatory-SBM-membership rule violates Taylor's right to free association. *Lathrop* held that mandatory membership rules for attorneys are constitutional and compels judgment for Defendants on Taylor's free-association claim.

B. On the merits, Taylor's compelled-speech claim fails.

Taylor's claim that, under *Janus*, Michigan's mandatory dues facially violate her right to free speech because SBM applies a portion of those dues "to speech and positions with which the members may not

agree," R.1, Compl. ¶¶ 5, 39, PageID.2, 6, also fails on the merits.[6] *Keller* still stands. Further, Michigan's mandatory dues requirement survives First Amendment scrutiny because the dues fund government speech that is unfettered by the First Amendment and, in the alternative, because the requirement serves compelling state interests that cannot be served by another means that is significantly less restrictive of First Amendment rights.

1. Janus *did not abrogate* Keller.

The Supreme Court has foreclosed lower courts from considering whether *Janus* implicitly abrogated *Keller*. In any event, it would be wrong to conclude that was *Janus*'s effect. In *Harris*, the precursor to and foundation for *Janus*, the Supreme Court reaffirmed *Keller*'s holding. Because *Janus*'s reasons for discounting the state interests justifying agency fees are not applicable to the distinct interests justifying SBM's mandatory dues, the Supreme Court's recognition of

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[6] Taylor implicitly contends that all dues other than those for the Attorney Grievance Commission and the Attorney Discipline Board fund speech. That is untrue, as discussed herein. But SBM admits it allocates a small portion of each member's mandatory dues to advocating public policy matters germane to the legal profession.

Keller's continuing vitality is unsurprising. Finally, the material differences between unions and SBM means that analogizing SBM to a labor union is inappropriate.

a. The Supreme Court recognized *Keller*'s continuing vitality in *Janus*'s precursor.

Concluding that *Janus* implicitly overruled *Keller* makes little sense given the Supreme Court's *explicit* recognition of *Keller*'s continuing vitality in *Janus*'s precursor. *Janus* was the last in a trilogy of cases—all with majority opinions authored by Justice Alito—that led to the overruling of *Abood v. Detroit Board of Education*, 431 U.S. 209.[7] In the second of those cases, *Harris v. Quinn*, the Court harshly criticized *Abood*'s rationale, 134 S. Ct. at 2632–34, and applied the "exacting scrutiny" test later employed in *Janus* to strike down a state law authorizing public-sector unions to charge agency fees to certain nonmembers, *id.* at 2639, 2644.

Despite its criticism of *Abood* and its application of exacting scrutiny, the Court made clear that its decision did not "call [*Keller*] into

[7] The trilogy began with *Knox v. Service Employees International Union*, 567 U.S. 298 (2012).

question." *Id.* at 2643. To the contrary, the Court observed that *Keller* "fits comfortably within the [exacting scrutiny] framework applied in" *Harris*:

> 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 2643–44 (emphasis added) (quoting *Keller*, 496 U.S. at 14) (citation omitted).

Taylor strains to distinguish *Harris*, asserting that the Court recognized *Keller*'s continuing vitality because the Court viewed attorneys as indistinguishable from "full-fledged public employees" and because "[i]t would not be until *Janus* that the higher level of scrutiny was applied to these First Amendment matters." Br. at 30–33. But *Janus* applied the same level of scrutiny as *Harris*. 138 S. Ct. at 2465. Moreover, *Harris* is devoid of anything connecting attorneys to public employees. Quite the opposite, the *Harris* Court explained why, given the unique state interests justifying the integrated bar *in contrast to*

those justifying agency fees, its decision did not "call [*Keller*] into question." 134 S. Ct. at 2643–44.

In short, given *Janus*'s relationship to *Harris,* in both rationale and authorship, the Court's recognition that *Keller* fits within the exacting scrutiny framework applied in *Harris* is a strong indicator that *Keller* survived *Janus*.

b. *Janus*'s criticism of *Abood* does not carry over to *Keller*.

Janus's reasons for rejecting *Abood* also do not carry over to *Keller*. *Janus* considered whether the state interests identified in *Abood*—the interests in labor peace and eliminating free riders—could justify agency fees under exacting scrutiny. 138 S. Ct. at 2465–66. *Janus* held that *Abood*'s assumption that agency fees were necessary to promote labor peace was empirically wrong, *id.* at 2465, and that the interest in avoiding union free riders could not overcome a First Amendment objection given the significant benefits that unions derive from being designated as the exclusive representatives of employees, *id.* at 2466–69.

By contrast, *Keller* did not turn on the state's interests in promoting labor peace and eliminating free riders. To be sure, to

support its conclusion that the California bar was not a government agency for First Amendment purposes, the Court recognized "a substantial analogy between the relationship of the State Bar and its members . . . and the relationship of employee unions and their members" in that bar members are called upon to pay their fair share of the bar's costs. 496 U.S. at 12. But what justified the integrated bar was the state's interest "in regulating the legal profession and improving the quality of legal services." *Id.* at 12–13; *accord Harris*, 134 S. Ct. at 2643–44 (recognizing as well the state's "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"). *Janus*'s rejection of states' interests in labor peace and eliminating free riders of labor unions does not undermine the states' legitimate and strong interests in regulating lawyers and improving the quality of legal services. *McDonald*, 2020 WL 3261061, at *3 ("*Janus*'s reassessment of the state interests that *Abood* concluded justified agency fee arrangements did not undermine *Keller*'s recognition of the very different state interests in professional regulation and legal-service quality served by integrated bars.").

Janus also criticized *Abood* for drawing an impossible line between union expenditures that constitutionally may be charged to nonmembers and those that may not. 138 S. Ct. at 2481. Despite twice revisiting the issue, the Court observed, "States and unions have continued to 'give it a try'" in litigation. *Id.* The same is not true for the line drawn in *Keller*, especially in SBM's experience. The Supreme Court has not once sought to clarify *Keller*'s line; to the contrary, it has now denied certiorari twice in cases seeking to revisit *Keller*. Moreover, since *Keller* was decided, no party has filed a lawsuit challenging SBM's compliance with *Keller*, and SBM has received only a single member challenge since 2004. R.16, JSMF ¶¶ 44–45, PageID.92–93. Taylor herself does not even challenge SBM's compliance with *Keller*. Unlike *Abood*, *Keller* has proven eminently workable.

c. SBM is materially different from a labor union.

SBM stands in stark contrast to a public-sector union in terms of its purpose, functions, speech, composition, and enhancement of member speech.

(1) SBM has a public purpose; unions advance private interests.

SBM is a public body corporate that exists primarily to serve the public interest. Mich. Comp. Laws § 600.901; R.16-1, JSMF Ex. A (RCSBM) at R. 1, PageID.99 ("[SBM] shall . . . aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interests of the legal profession in this state."). When SBM speaks, it speaks to advance that interest and not to represent the private interests of any individual lawyer. By contrast, public-sector unions exist to represent their employees at the bargaining table. Unlike a union, the benefits SBM provides to its members are incidental to its operations for the public's benefit.

(2) SBM's primary activities are regulatory and nonexpressive; unions' primary activities are expressive.

As discussed in detail above, SBM's primary activities are non-expressive and relate to regulating the legal profession in Michigan and improving the quality of legal services. *See supra* Section II.A. By contrast, unions exist primarily, if not exclusively, to speak on behalf of their members. *Janus*, 138 S. Ct. at 2474; *see also supra* Section II.A.

The fact that SBM's speech is "a necessary incident of a" larger, and otherwise proper, regulatory program materially distinguishes it from speech by a mandatory association, like a union, whose "principal object is speech itself." *United States v. United Foods*, 533 U.S. 405, 414–15 (2001); *accord Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469 (1997) (in upholding compelled speech subsidy, emphasizing that "[t]he business entities that are compelled to fund the generic advertising at issue in this litigation do so as part of a" broader regulatory program).

(3) SBM speaks on issues related to the legal profession and the administration of justice; unions speak on controversial political issues.

Public-sector labor unions' collective bargaining activities have a unique "political valence" given the mushrooming burden of public employee wages and benefits. *Janus*, 138 S. Ct. at 2483; *see also Harris*, 134 S. Ct. at 2632 ("In the public sector, core issues such as wages, pensions, and benefits are important political issues . . . ."). And as part of their core collective bargaining activities, public-sector unions speak out on contentious topics "such as climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority

religions." *Janus*, 138 S. Ct. at 2476 (footnotes omitted). Speech on such "sensitive political topics" understandably "occupies the highest rung of the hierarchy of First Amendment values and merits special protection." *Id.* (quoting *Snyder v. Phelps*, 562 U.S. 443, 452 (2011)) (internal quotation marks omitted).

By contrast, SBM's speech, though on the subject of an essential government function, is far more apolitical and benign. By order of the Michigan Supreme Court, SBM may fund activities of an ideological nature only if they reasonably relate to:

> (A) the regulation and discipline of attorneys;
>
> (B) the improvement of the functioning of the courts;
>
> (C) the availability of legal services to society;
>
> (D) the regulation of attorney trust accounts; and
>
> (E) the regulation of the legal profession, including the education, the ethics, the competency, and the integrity of the profession.

R.16-3, JSMF Ex. C (Admin. Order No. 2004-01) at 1, PageID.130. These topics do not have the same "political valence," *Janus*, 138 S. Ct. at 2483, as issues like climate change, the Confederacy, or sexual orientation and gender identity. The fact that Taylor herself fails to identify even a single SBM position with which she disagrees—aside

from the existence of the integrated bar—proves the point. As a result, SBM's activities do not raise the same level of First Amendment concern as the speech at issue in the public labor union cases.

(4) SBM's members are officers of the court with special obligations.

SBM comprises all lawyers licensed to practice law in Michigan, not state employees with a variety of duties. As lawyers, all SBM members have a foundational ethical obligation to "seek improvement of the law, the administration of justice[,] and the quality of service rendered by the legal profession." *See* R.16, JSMF ¶ 60, PageID.94–95; MRPC 1.0 cmt. They should "aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest." R.16, JSMF ¶ 60, PageID.94–95; MRPC 1.0 cmt. In other words, "[w]hile lawyers act in part as 'self-employed businessmen,' they also act 'as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes.'" *Ohralik*, 436 U.S. at 460 (quoting *Cohen v. Hurley*, 366 U.S. 117, 124 (1961)). Indeed, "lawyers are essential to the primary governmental function of administering justice." *Goldfarb*, 421 U.S. at 792 (collecting cases).

SBM provides a crucial platform for *all* Michigan lawyers to meet these obligations. It assembles lawyer viewpoints from across the spectrum of practices, geography, and ideology to produce valuable, broad-based input on issues related to the regulation and discipline of attorneys, the functional improvement of the Michigan court system, the availability of legal services to the public, the regulation of attorney trust accounts, and the regulation of the legal profession. *See* R.16-3, JSMF Ex. C (Admin. Order No. 2004-01) at 1–2, PageID.130–31. A voluntary bar, by definition, does not create the same opportunities for all lawyers in a state or the same benefits to the public. *See* R.16, JSMF ¶ 62, PageID.95.

Moreover, unlike unions that deduct agency fees from employees' pay, SBM collects dues from licensed attorneys—a group that is "trained to understand and appreciate legal communications." *Fleck*, 937 F.3d at 1117. SBM members must affirmatively act to renew their membership each year. "Though membership is mandatory, it still involves a relatively comfortable relationship in which the member is encouraged to raise issues or seek information from" SBM. *Id.* at 1118.

(5) SBM's members retain their ability to speak out.

Unions and SBM also sharply contrast in their restrictions on member speech. Unions exist to speak at the bargaining table *for* the employees they represent. Those employees may not bargain directly with their employers, nor may they choose another agent to represent them. *E.g.*, *Janus*, 138 S. Ct. at 2460 (describing Illinois's system). In other words, unions are the mouthpiece through which public employees speak.

In sharp contrast, SBM members are free to advocate within the bar and publicly on any issue SBM addresses and even those it does not. R.16, JSMF ¶¶ 46–47, PageID.93. Members can even join voluntary bars and special-interest groups that take positions contrary to SBM's. *Id.* at ¶ 48, PageID.93. These features diminish any First Amendment concerns raised by SBM's expressive activities. *Cf. Glickman*, 521 U.S. at 469 (agricultural cooperative's speech differed from other cases because "the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience").

Against all this, Taylor contends that "[t]he very fact the Bar can be said to speak for all lawyers amplifies its voice, and therefore drowns

out individual lawyers who object." Br. at 40. But SBM's expressive activities are structured to enhance, not restrict, member speech. Under the Michigan Supreme Court's administrative order governing SBM's ideological activities, SBM must provide members at least two weeks' notice, via its website, that SBM may consider taking a position on proposed legislation at an upcoming meeting. R.16-3, JSMF Ex. C (Admin. Order No. 2004-01) at 2, PageID.131. That notice must "include a brief summary of the legislation, a link to the text and status of the pending legislation on the Michigan Legislature website, and a statement that members may express their opinion to [SBM] at the meeting, electronically, or by written or telephonic communication." *Id.* The same website must provide an opportunity for SBM members to respond electronically and publish the comments of members who wish to make their positions public. *Id.*

After the notice period, whether to support the legislation may be taken up at a public meeting of SBM's Board of Commissioners or Representative Assembly. *Id.* SBM members may make comments at such meetings. *Id.* The results of all Board and Assembly votes must be

posted to SBM's website as soon as possible after the vote and published in the next issue of the *Michigan Bar Journal*. *Id.*

These procedures all support SBM members' speech on topics of interest to the legal profession. It stands to reason that some SBM members learn of legislation only because of the bar's pre- and post-position notification procedures. And if a member desires to make a public comment about pending legislation, SBM provides that member a platform to do so.

* * *

In short, the analogy of SBM to public labor unions doesn't work. SBM exists to serve the public, and it does so through activities that are primarily nonexpressive in nature. SBM's limited speech concerns the regulation of lawyers and the administration of justice, not the hot-button political issues of our time. SBM's structure enables Michigan attorneys to meet their ethical obligations to improve the law and aid in the administration of justice. And in all cases, SBM encourages its members to speak out on the issues on which it takes positions.

2. *SBM's expressive activities are constitutional, even under* Janus.

Even under *Janus*, Michigan's requirement that attorneys pay dues to fund SBM's operations passes muster. First, under post-*Keller* caselaw, SBM's speech qualifies as government, rather than private, speech, placing Michigan's mandatory dues requirement outside the First Amendment's scope. Second, even if SBM's speech is private speech, Michigan's mandatory dues requirement passes *Janus* exacting scrutiny.

a. SBM's speech is government speech and therefore not subject to the First Amendment.

Any court that disregards the Supreme Court's instruction and says that *Janus* abrogated *Keller* would also have to revisit *Keller*'s holding that speech by an integrated bar like SBM is private, rather than government, speech. *Keller*, 496 U.S. at 13. "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) (collecting cases). For that reason, the Supreme Court's compelled subsidy cases have "consistently respected the principle that '[c]ompelled support of a private association is fundamentally different from compelled support of government.'" *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005) (quoting

Abood v. Detroit Bd. of Educ., 431 U.S. 209, 259 n.13 (1977) (Powell, J., concurring in the judgment)). As both Taylor and her attorneys have admitted, SBM is a state agency, and SBM's activities are at all times subject to the Michigan Supreme Court's complete control.[8] Accordingly, Michigan's rule compelling attorneys to support SBM's expressive activities is not subject to the First Amendment.

To begin, *Keller* observed that the bar was funded by assessments on lawyers rather than legislative appropriations. 496 U.S. at 11. But subsequent cases hold that "[t]he compelled-subsidy analysis is altogether unaffected by whether the funds . . . are raised by general taxes or through a targeted assessment." *Johanns*, 544 U.S. at 562.

Next, *Keller* noted that the bar comprised only lawyers. 496 U.S. at 11. But the Supreme Court has held that a group composed solely of

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[8] In their press release regarding the filing of this case, the Mackinac Center for Public Policy described SBM as "a *state agency*," and Taylor stated, "Thanks to the Janus decision, *public agencies* can no longer require a captive membership." Press Release, Mackinac Center for Public Policy, Mackinac Center Sues the State Bar of Michigan for First Amendment Violation (Aug. 22, 2019) (emphasis added), *available at* https://www.mackinac.org/mackinac-center-sues-the-state-bar-of-michigan-for-first-amendment-violation.

beef industry members nonetheless engaged in government speech. *Johanns*, 544 U.S. at 553–54, 567.

Finally, *Keller* found it important that the California bar did not have final authority to regulate the legal profession and, as a result, provided essentially advisory services to the California Supreme Court. 496 U.S. at 11. But the Supreme Court has since held that an essentially advisory industry group *was* the government for First Amendment purposes. *Johanns*, 544 U.S. at 554 (explaining that the challenged law's assessment "is to be used to fund beef-related projects, including promotional campaigns, *designed by the Operating Committee and approved by the Secretary*" (emphasis added)).

Moreover, the long history of advisory commissions at the federal and state levels—which undoubtedly are part of government—casts significant doubt on the proposition that an entity must have final regulatory authority to engage in government speech. *E.g.*, William T. Egar, Cong. Research Serv., R45328, Designing Congressional Commissions: Background and Considerations for Congress 1–2 (2018) (reporting that 110 congressional advisory commissions were established by statute between the 101st Congress (1989–90) and the

115th Congress (2017–18)); Mich. Comp. Laws § 4.1301 (Michigan Commission on Uniform State Laws); Mich. Comp. Laws § 4.1401 (Michigan Law Revision Commission). Such commissions exist to make recommendations to the legislature regarding legislation that the legislature could enact. *E.g.*, Mich. Comp. Laws § 4.1403 (duties of Michigan Law Reform Commission). If an entity must possess final regulatory authority to engage in government speech, then all advisory commissions necessarily engage in private speech. That is a nonsensical result.

Two post-*Keller* Supreme Court decisions further cement the conclusion that SBM's speech is government speech. In the first, *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), the Court considered whether Amtrak, which nominally is a private corporation, is the government for First Amendment speech purposes. 513 U.S. at 376–78. The Court held that, when "the Government creates a corporation by special law, for furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." *Id.* at 400.

If Amtrak is the government for purposes of the First Amendment, then certainly SBM is. And indeed, each of *Lebron*'s criteria is met here: SBM was created by a special statute, Mich. Comp. Laws § 600.901, in furtherance of the important governmental objectives of regulating the legal profession, "promoting improvements in the administration of justice and advancements in jurisprudence," and "improving relations between the legal profession and the public," among others, *id.* § 600.904; R.16-1, JSMF Ex. A (RCSBM) at R. 1, PageID.99. Further, although the Michigan Supreme Court appoints a minority of the members of SBM's Board of Commissioners, *id.* at R. 5(2)(2), PageID.104, the Court at all times has *plenary authority* over SBM's organization, government, conduct, and activities, Mich. Comp. Laws § 600.904.

The second case, *Johanns v. Livestock Marketing Association*, 544 U.S. 550, squarely addressed compelled subsidies, albeit where the subsidized entities' governmental status was in question. There, several parties in the beef industry challenged the constitutionality of the federal program responsible for the "Beef. It's What's For Dinner." advertising campaign, among other promotional activities. 544 U.S. at

553–55. The program called for the Secretary of Agriculture to appoint a board (the "Beef Board") composed of industry members, which in turn would convene an Operating Committee. *Id.* at 553–54. The Operating Committee designed certain beef-related projects, including the promotional activities, subject to the Secretary's approval. *Id.* at 554. The Beef Board's and the Operating Committee's activities were funded by a mandatory assessment on the sale and importation of cattle and beef products. *Id.*

Recognizing that the First Amendment does not limit compelled support for government speech, the Supreme Court upheld the program. The Court explained that, regardless of whether the Beef Board or the Operating Committee were state actors, the government maintained effective control over the promotional campaigns' message. *Id.* at 560. Congress and the Secretary "set out the overarching message and some of its elements," and they "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)." *Id.* at 561. Further, the evidence showed that the Secretary exercised final authority over the content of each promotional message. *Id.*

Because "the government set[] the overall message to be communicated and approve[d] every word that [was] disseminated, it [was] not precluded from relying on the government-speech doctrine merely because it solicit[ed] assistance from nongovernmental sources in developing specific messages." *Id.* at 562. Accordingly, "*Johanns* stands for the proposition that when the government determines an overarching message and retains power to approve every word disseminated at its behest, the message must be attributed to the government for First Amendment purposes." *Am. Civil Liberties Union of Tenn. v. Bredesen*, 441 F.3d 370, 375 (6th Cir. 2006).

SBM's speech satisfies these conditions. *Cf. id.* at 386 (Martin, J., concurring in part and dissenting in part) (recognizing that, under the majority's test, the speech at issue in *Keller* could be considered government speech). Although the Michigan Supreme Court does not approve every SBM position before it is issued, the Supreme Court retains plenary authority over SBM's activities, including by dictating the boundaries of SBM's speech (to ensure SBM acts in accord with *Keller*), R.16-3, JSMF Ex. C (Admin. Order No. 2004-01) at 1, PageID.130, defining the objectives that SBM must consider when

developing its positions, R.16-1, JSMF Ex. A (RCSBM) at R. 1, PageID.99, and receiving SBM's audited financial statements each year, *id.* at R. 9, PageID.110.[9] Nothing more is required. *Cf. Delano Farms Co. v. Cal. Table Grape Comm'n*, 586 F.3d 1219, 1228–29 (9th Cir. 2009) (industry group engaged in government speech even though the government did not approve the messages promulgated by the group).

In short, whether viewing the question as (i) whether SBM is a government entity, or (ii) whether the government exercises sufficient control over SBM's messages regardless of its public or private status, SBM engages in government speech for purposes of the First Amendment. That reality is fatal to Taylor's compelled-speech claim.

b. SBM's mandatory dues pass exacting scrutiny.

What's more, Michigan's requirement that attorneys pay the portion of their dues that supports SBM's expressive activities passes the "exacting scrutiny" test the Court applied in *Janus*. Under exacting

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[9] These facts distinguish SBM's advocacy from that at issue in *Keller*, where "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." *Johanns*, 544 U.S. at 562.

scrutiny, "a compelled subsidy must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Janus*, 138 S. Ct. at 2465 (quoting *Knox v. Serv. Emps. Int'l Union*, 567 U.S. 298, 310 (2012)). Michigan's mandatory dues requirement meets this standard.

To start, as discussed above, SBM allocates the vast majority of its members' dues to *nonexpressive* activities that have nothing to do with the First Amendment. *See supra* Section II.A. Because those dues do not "*subsidize the speech of other private speakers*," their exaction does not impinge on First Amendment rights. *Janus*, 138 S. Ct. at 2464 (emphasis added). Again, Taylor "may feel that [her] money is not being well-spent," but that "does not mean that [she] ha[s] a First Amendment complaint." *Ellis*, 466 U.S. at 456.

With respect to the nominal dues used to fund expression, courts have long recognized the legitimate interests that states like Michigan have in regulating the legal profession, elevating the ethical and educational standards of the bar, improving the quality of legal services, receiving input from the bar on legislation, and allocating to lawyers rather than taxpayers the cost of such activities. *E.g.*, *Harris*,

134 S. Ct. at 2643–44 (recognizing the "State's interest in regulating the legal profession and improving the quality of legal services," as well as its "strong interest in allocating to members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices"); *Keller*, 496 U.S. at 13–14 (interest in regulating lawyers and improving the quality of legal services); *Ohralik*, 436 U.S. at 460 (state has an "especially great" interest in regulating lawyers because they are "essential to the primary governmental function of administering justice"); *Lathrop*, 367 U.S. at 843 (plurality opinion) (interest in raising the quality of legal services); *Falk*, 342 N.W.2d at 514 (opinion of Boyle, J.) ("There can be little doubt that the government has an interest in receiving the input of the State Bar into the legislative process.").

Janus did not delegitimize these interests. *See supra* Section II.B.1.b. And even Taylor admits Michigan's wide-ranging interests in relation to the legal profession.[10] Given that "lawyers are essential to

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[10] R.16, JSMF ¶¶ 56–60, PageID.94 (acknowledging Michigan's interests in "the practice of law within the state," "elevating the ethical and educational standards of the bar," "enhancing the quality of legal services," "improving relations between the legal profession and the public," "protecting the public from unethical attorneys," and "receiving systematized input from licensed attorneys on legislation concerning

the primary government function of administering justice," *Goldfarb*, 421 U.S. at 792, these interests are compelling.

There is no alternative to SBM's integrated model that serves these interests as well while simultaneously imposing a *significantly* lesser restriction on associational freedoms. Exacting scrutiny is not strict scrutiny, and SBM's integrated model need not be the least restrictive means of serving the state's interests. *Cf. Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). Here, the seemingly obvious alternative to mandatory membership—a voluntary bar—is no alternative at all. To serve Michigan's interests, SBM necessarily must include *all* lawyers licensed to practice in Michigan. An association comprising only a subset of licensed attorneys cannot act on the whole profession. R.16, JSMF ¶ 62, PageID.95.

SBM also must necessarily engage in speech. Just like the "government has to say something" to govern, *Summum*, 555 U.S. at 468 (quoting *Johanns*, 544 U.S. at 574 (Souter, J., dissenting)), SBM

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the administration of justice, the functioning of the court system, and the legal profession," as well as Michigan's "broad power to protect public health, safety, and other valid interests by establishing standards for licensing attorneys and regulating the practice of law").

cannot serve Michigan's interests and fulfill its mission and purposes without speaking. SBM could not, for instance, "aid in promoting improvements in the administration of justice and advancements in jurisprudence," R.16-1, JSMF Ex. A (RCSBM) at R. 1, PageID.99, without sharing its views. It also would be impossible for SBM to fulfill even its core regulatory functions, such as prosecuting the unauthorized practice of law, if it could not speak. *Cf. Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001) ("There can be little doubt that the LSC Act [providing for legal assistance in noncriminal proceedings] funds constitutionally protected expression . . . .").

A voluntary bar association would be a poor substitute on this score, too. Although Michigan has an array of local and special-interest voluntary associations for lawyers and judges, none of them has the uniquely public, nonparochial character that SBM has as an arm of the Michigan Supreme Court. Nor do those voluntary associations have the duty, much less the capacity, to consider the entirety of the legal profession in Michigan when formulating their positions on matters that concern the regulation of lawyers and the administration of justice. *See* R.16, JSMF ¶ 62, PageID.95.

Taylor's contrary arguments do not withstand scrutiny. Taylor says that the fact that a minority of states (comprising, she asserts, a majority of the nation's lawyers[11]) have voluntary bars conclusively proves that Michigan has a less restrictive means to achieve its interests. Br. at 40–41. Not so. Those states may well have weighed their interests differently than Michigan or decided not to serve them at all. That hardly proves that voluntary-bar states have identified a means significantly less restrictive of associational freedoms to achieve the interests that Michigan has elected to serve. It shows only that some states choose to respond *reactively* to bad lawyering while others—including Michigan—choose to act *proactively* to improve the bar and the delivery of legal services.

Taylor next contends that other professionals, like doctors, are not subject to the same requirements as lawyers. Br. at 41. But lawyers are different from other professionals: they "are essential to the primary

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[11] Even if Taylor's assertion were accurate, it does not prove that a majority of lawyers are not members of integrated bars. The number of lawyers that are licensed in more than one jurisdiction is not tabulated, and it stands to reason that many lawyers who are licensed in voluntary-bar states also are licensed in integrated-bar states.

governmental function of administering justice and have historically been 'officers of the courts.'" *Goldfarb*, 421 U.S. at 792. "While lawyers act in part as 'self-employed businessmen,' they also act 'as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes.'" *Ohralik*, 436 U.S. at 460. Lawyers also have a foundational ethical obligation to improve the law, the administration of justice, and the quality of legal services. *See supra* Part II.B.1.c(4).

Other licensed professionals do not occupy a similar role. Doctors are not sworn in as public-health officers, nor are they obligated to offer the state advice on how to carry out its public-health functions. Engineers and plumbers are not obligated to advise on the state's infrastructure. Lawyers alone have ethical obligations for an essential government function: the finding of truth in both civil and criminal matters. That difference underlies why Michigan—and most other states—have integrated their bars.

Taylor also argues that Michigan's interest in "monitoring and policing lawyers" can be served by the Attorney Discipline Board and the Attorney Grievance Commission alone. Br. at 41–42. Even if Michigan's interests were so narrow, Taylor ignores SBM's primary role

in collecting license fees and administering licensing requirements, investigating the character and fitness of candidates for admission to the bar, maintaining the official record of attorneys licensed to practice in Michigan, and prosecuting the unauthorized practice of law, among other monitoring and policing activities. R.16, JSMF ¶ 27(a)–(c), (e), PageID.88–89. Regardless, as discussed above, Michigan's interests are not so narrow. And given that the Attorney Discipline Board's and the Attorney Grievance Commission's exclusive functions are the prosecution and adjudication of attorney ethical violations, *id.* ¶¶ 67, 69, PageID.96, those entities necessarily cannot serve Michigan's interests that extend beyond monitoring and policing, such as promoting improvements in the administration of justice and advancements in jurisprudence and prospectively enhancing the quality of legal services.

Next, Taylor contends that Michigan's mandatory dues requirement does not survive exacting scrutiny because SBM's expressive activities could be funded by legislative appropriation or even voluntary dues. Br. at 42. But "[t]he compelled-subsidy analysis is altogether unaffected by whether the funds . . . are raised by general taxes or through a targeted assessment." *Johanns*, 544 U.S. at 562.

Reverting to a legislative appropriation would not resolve Taylor's First Amendment objection. Voluntary dues are also no substitute given Michigan's "strong interest in allocating to the members of the bar" the expenses associated with the privilege of being a lawyer. *See Harris*, 134 S. Ct. at 2644.

Taylor last argues that the Client Protection Fund does not survive exacting scrutiny. Br. at 43. But as noted in Section II.A, the Client Protection Fund is not an expressive activity and has nothing to do with the First Amendment. Taylor may feel that the Client Protection Fund is unwise or poorly administered. Even if that were true, she has no *First Amendment* complaint regarding the program.

In short, each state weighs its interests differently and opts for different methods for administering its justice system, including the regulation of lawyers. Here, given the choices that the Michigan Legislature and Supreme Court have made and the absence of equally effective alternatives that impinge significantly less on lawyers' associational rights, Taylor's own policy preferences cannot trump the judgment of two branches of Michigan's state government. She must

take her complaints to the Michigan Legislature or Michigan Supreme Court, not the federal courts.

CONCLUSION AND REQUESTED RELIEF

For the foregoing reasons, Appellees respectfully request that this Court affirm the district court's judgment.

Dated: December 24, 2020

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation pursuant to Fed. R. App. P. 32(a)(7)(B). The foregoing brief contains 11,895 words of Century Schoolbook 14-point proportional type. The word processing software used to prepare this brief was Microsoft Word 2016.

Dated: December 24, 2020

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CERTIFICATE OF SERVICE

This certifies that Defendants-Appellee's brief was served on December 24, 2020, by electronic mail on all counsel of record using the Sixth Circuit's Electronic Case Filing system.

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DESIGNATION OF RECORD

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