No. 20-50448

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TONY K. MCDONALD; JOSHUA B. HAMMER; MARK S. PULLIAM,

Plaintiffs-Appellants

v.

JOE K. LONGLEY, Immediate Past President of the State Bar of Texas; RANDALL O. SORRELS, President of the State Bar of Texas; LAURA GIBSON, Member of the State Bar Board of Directors and Chair of the Board; JERRY C. ALEXANDER, member of the State Bar Board of Directors; ALISON W. COLVIN, member of the State Bar Board of Directors; ET AL,

Defendants-Appellees

On Appeal from the United States District Court for the Western District of Texas, No. 1:19-cv-00219-LY, Lee Yeakel, District Judge

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

- Tony K. McDonald, Joshua B. Hammer, and Mark S. Pulliam, *Plaintiffs-Appellants*

- Members of the Board of Directors of the State Bar of Texas, sued in their official capacity, *Defendants-Appellees*[1]:

  Randall O. Sorrels, *Immediate-Past President*
  Larry P. McDougal, *President**
  Sylvia Borunda Firth, *President-Elect**
  Jerry C. Alexander, *Immediate Past Chair of the Board*
  John Charles "Charlie" Ginn, *Chair of the Board*
  Britney E. Harrison
  Victor Flores
  Derek Cook
  Robert D. Crain
  Alistair B. Dawson
  Michael Dokupil
  Shari Goldsberry
  Marc E. Gravely
  August W. Harris, III
  Joe "Rice" Horkey, Jr.
  Wendy-Adele Humphrey
  Stephen J. Naylor
  Carmen M. Roe
  Alan E. Sims
  Amy Welborn
  James Wester
  Andres E. Almanzan
  Kate Bihm
  Rebekah Steely Brooker
  Luis M. Cardenas
  Christina Davis

[1] Certain Defendants-Appellees listed here are successors of prior members of the State Bar Board of Directors. Pursuant to Federal Rule of Appellate Procedure 43(c)(2), those individuals have been automatically substituted as parties. Individuals who have been automatically substituted as parties are denoted by an asterisk. The following former members of the State Bar Board were named as Defendants in their official capacity in Plaintiffs-Appellants' complaint, but are no longer Board members and thus are no longer parties to this case: Joe K. Longley, G. Thomas Vick, Jr., Laura Gibson, Christy Amuny, Jeff Chandler, Alison W. Colvin, Leslie W. Dippel, Estrella Escobar, Jarrod T. Foerster, Angelica Hernandez, Sarah Clover Keathley, Neil D. Kelly, David C. Kent, Aldo D. Lopez, Robert E. McKnight, Jr., Rudolph K. Metayer, Christopher Oddo, Amie S. Peace, Sally Pretorius, Curtis Pritchard, Baili B. Rhodes, Lisa S. Richardson, Fidel Rodriguez, Jr., Gregory W. Sampson, Dinesh H. Singhal, K. Nicole Voyles, Bradley C. Weber, and James C. Woo.

Michael K. Hurst
Yolanda Cortes Mares
Adam T. Schramek
David K. Sergi
Jason Smith
Diane St. Yves
Santos Vargas
G. Michael Vasquez
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Steve Fischer*
Lucy Forbes*
Carra Miller*
Lydia Elizondo Mount*
Mary L. Scott*
D. Todd Smith*
Andrew Tolchin*
Kimberly Pack Wilson*
Maria Hernandez Ferrier*

- AIG, *State Bar of Texas Insurer*

- The following attorneys have appeared on behalf of Plaintiffs-Appellants Tony K. McDonald, Joshua B. Hammer, and Mark S. Pulliam either before this Court or in the district court: Jeffrey M. Harris, William S. Consovoy, Cameron T. Norris, and Tiffany H. Bates, all of Consovoy McCarthy PLLC; and Samuel D. Adkisson, formerly of Consovoy McCarthy PLLC.

- The following attorneys have appeared on behalf of Defendants-Appellees, members of the State Bar of Texas Board of Directors sued in their official capacity, either before this Court or in the district court: Thomas S. Leatherbury, Patrick W. Mizell, Joshua S. Johnson, and Morgan A. Kelley, all of Vinson & Elkins LLP; and Deborah Carleton Milner, formerly of Vinson & Elkins LLP.

- The following Defendants were named in Plaintiffs' First Amended Complaint, *see* ROA.2135-2154, but were dismissed without prejudice

pursuant to a stipulation between the parties, *see* ROA.3145-3148: Seana Willing, in her official capacity as Chief Disciplinary Counsel of the State Bar of Texas; and Pablo Javier Almaguer, Noelle M. Reed, John Neal, Bruce Ashworth, Gena Bunn, Magali Suarez Candler, Teresa Acosta, Dave Obergfell, William Skrobarczyk, Vance Goss, Javier S. Vera, and Sheri Roach Brosier, in their official capacities as Members of the Commission for Lawyer Discipline of the State Bar of Texas.

Dated: July 30, 2020

Respectfully submitted,

/s/ Thomas S. Leatherbury

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STATEMENT REGARDING ORAL ARGUMENT

The Court has scheduled this case for oral argument on September 1, 2020.

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STATEMENT OF ISSUES

The Supreme Court has held that "lawyers admitted to practice in [a] State may be required to join and pay dues to [a] State Bar," and that a state bar may use lawyers' mandatory fees "for the purpose of regulating the legal profession or 'improving the quality of . . . legal service[s].'" *Keller v. State Bar of Cal.*, 496 U.S. 1, 4, 14 (1990) (quoting *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961) (plurality op.)). Plaintiffs-Appellants—active or inactive members of the State Bar of Texas—allege that the Texas State Bar Act's requirements that Texas attorneys enroll in, and pay annual membership fees to, the State Bar violate the First Amendment. Defendants-Appellees are members of the Texas State Bar Board of Directors sued only in their official capacities. The issues presented are:

1. Whether the Texas State Bar's mandatory-membership requirement violates Plaintiffs' First Amendment rights.

2. Whether the Texas State Bar's use of Plaintiffs' annual membership fees violates their First Amendment rights.

3. Whether the Texas State Bar's procedure for members to protest actual or proposed expenditures violates First Amendment requirements.

INTRODUCTION

In furtherance of the goals of regulating the practice of law and improving the quality of legal services, Texas—like the overwhelming majority of states—requires

all lawyers licensed to practice in the state to enroll in, and pay annual membership fees to, a statewide bar. *See* Tex. Gov't Code Ann. §§ 81.051, 81.054, 81.102. The State Bar of Texas "is a public corporation and an administrative agency of the judicial department" of the Texas government, and is subject to the Texas Supreme Court's "administrative control." *Id.* § 81.011(a), (c). The Bar engages in a wide variety of regulatory and administrative activities with the principal objectives of "advanc[ing] the quality of legal services," "aid[ing] the courts in carrying on and improving the administration of justice," and "foster[ing] and maintain[ing]" among lawyers "high ideals and integrity, learning, competence in public service, and high standards of conduct." *Id.* § 81.012. But for lawyers uninterested in participating in the Bar's activities and programs, Texas law requires no more than registration with the Bar and annual fee payments. No further association with the Bar, Bar activities, or other Bar members is required.

In performing its regulatory and administrative functions, the Bar necessarily engages in some expressive activities. In Plaintiffs' view, certain of those activities are unduly "political and ideological" in nature. Opening Br. 5. Based on the limited subset of activities to which Plaintiffs object, they contend the First Amendment requires wholesale reconfiguration or invalidation of Texas's legislatively approved mandatory Bar.

Binding Supreme Court precedent forecloses Plaintiffs' claims. In *Lathrop v. Donohue*, 367 U.S. 820 (1961), the Court held that mandatory bar membership does not violate attorneys' First Amendment right to freedom of association. *Id.* at 843 (plurality op.); *accord id.* at 848-51 (Harlan, J., and Frankfurter, J., concurring in judgment); *id.* at 865 (Whittaker, J., concurring in judgment). And in *Keller v. State Bar of California*, 496 U.S. 1 (1990), the Court unanimously held that mandatory bar fees do not violate the First Amendment's free-speech guarantee when they are used for expenditures "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 op.)).

Contrary to Plaintiffs' suggestion, *see* Opening Br. 23-26, 34-36, subsequent Supreme Court precedent—including *Janus v. American Federation of State, County, & Municipal Employees*, 138 S. Ct. 2448 (2018), and *Harris v. Quinn*, 573 U.S. 616 (2014), which addressed the distinct issue of union "agency fees"—has not overruled or modified *Keller* or *Lathrop*. The Court's opinion in *Janus* mentioned neither *Keller* nor *Lathrop*, and the principal dissent cited *Keller* only to emphasize that the majority did "not question" that decision. *Janus*, 138 S. Ct. at 2498 (Kagan, J., dissenting). In *Harris*, Justice Alito—who also authored *Janus*—made clear that *Keller* "is wholly consistent with" and "fits comfortably within the [legal]

framework applied" in *Harris* (and later carried forward in *Janus*). 573 U.S. at 655-56. Even Justices who have expressed interest in reexamining *Keller* acknowledge it remains binding law, mandating lower courts' "dismiss[al]" of any constitutional challenges to bar expenditures satisfying the *Keller* standard. *Jarchow v. State Bar of Wis.*, 140 S. Ct. 1720, 1720-21 (2020) (Thomas, J., and Gorsuch, J., dissenting from denial of certiorari).

Unable to escape *Keller*'s and *Lathrop*'s precedential force, Plaintiffs attempt to recast those decisions as imposing a flat prohibition on mandatory bars' engagement in any activities that some might view as "political or ideological," or that extend "beyond regulatory and disciplinary functions." Opening Br. 30 (citation omitted). But that is not what *Keller* and *Lathrop* held. *Lathrop* held that Wisconsin could require the plaintiff's membership in the Wisconsin Bar "to further the State's legitimate interests in raising the quality of professional services," even though the Bar "participated in political activities." 367 U.S. at 835-43 (plurality op.). Building on *Lathrop*, *Keller* held that a state bar may use "mandatory dues" to "fund activities germane" to the state's interests in "regulating the legal profession *or* improving the quality of . . . legal service[s]." 496 U.S. at 13-14 (emphasis added) (citation omitted). *Keller* does *not* prohibit a bar from engaging in activities merely because some might label them as "political or ideological," and Plaintiffs' effort to limit the

Bar to purely "regulatory and disciplinary" activities ignores half of *Keller*'s disjunctive standard.

Plaintiffs' scattershot, undeveloped challenges to particular Bar programs are meritless. The Bar has adopted robust safeguards to ensure that all of its activities comply with *Keller*. The challenged activities are no exception. Each furthers the state's interests in regulating the legal profession or improving legal-service quality, and many, if not all, advance both interests. *See, e.g.*, Tex. Legal Ethics Counsel's *Amicus* Br. 2-12. Finally, Plaintiffs have conceded that their challenge to the Bar's protest procedure cannot survive if all of the Bar's expenditures comply with the *Keller* standard. ROA.3539:19-24. The district court thus correctly granted summary judgment to Defendants on all of Plaintiffs' claims.[2]

STATEMENT OF THE CASE

A. The State Bar Of Texas

In 1939, the Texas legislature created the State Bar of Texas as "an administrative agency of the Judicial Department of the State." ROA.1527. Today,

[2] The *amicus* brief from "the State of Texas, by and through Attorney General Ken Paxton" ("Att'y Gen. Br."), essentially tracks Plaintiffs' arguments. The Attorney General is charged with "[d]efending the State of Texas and its duly enacted laws." Duties & Responsibilities, Office of Attorney General of Texas, Ken Paxton, http://bit.ly/2PCGPM4 (last visited July 30, 2020). But here, he has chosen to side with private plaintiffs asserting constitutional challenges to a Texas administrative agency. He has done so even though the Texas legislature has vested "administrative control over the state bar" in the Texas Supreme Court, not the Attorney General or any other Executive Department official. Tex. Gov't Code Ann. § 81.011(c); *see also id.* § 81.014 (Bar "may sue and be sued in its own name"); *cf.* Tex. Const. art. II, § 1 ("[N]o person, . . . being of one . . . department[], shall exercise any power properly attached to either of the others . . . ."). The Attorney General's *amicus* brief deserves no weight.

the State Bar Act (Tex. Gov't Code Ann. ch. 81) provides that the State Bar of Texas "is a public corporation and an administrative agency of the [Texas] judicial department," subject to the Texas Supreme Court's "administrative control." Tex. Gov't Code Ann. § 81.011(a), (c). The Bar's legislatively defined "purposes" include "advanc[ing] the quality of legal services," "aid[ing] the courts in carrying on and improving the administration of justice," and "foster[ing] and maintain[ing]" among lawyers "high ideals and integrity, learning, competence in public service, and high standards of conduct." *Id.* § 81.012.

Consistent with the approach of 29 other states and the District of Columbia, the Texas State Bar is a "mandatory," "integrated," or "unified" bar. ROA.3691-3692. That means attorneys must enroll in the Bar and pay annual membership fees to practice law in Texas. *See* Tex. Gov't Code Ann. §§ 81.051, 81.054, 81.102; ROA.3691-3692. As of May 1, 2019, the Bar had 103,561 active and 17,949 inactive members. ROA.3689; *see also* Tex. Gov't Code Ann. § 81.052 (membership classes).

Mandatory Bar membership ensures that Texas lawyers have an opportunity for input on how the Bar carries out its regulatory and administrative authorities, and on the disciplinary rules governing legal practice. *See, e.g.*, Tex. Gov't Code Ann. §§ 81.019(b), 81.020(b), 81.0878 (providing for election of Bar officers and directors and voting on proposed disciplinary rules). But for lawyers uninterested

in such matters, Texas law requires no more than registration with the Bar and annual fee payments. No Bar member is required to participate in any Bar section, committee, program, or activity, or to endorse any actions or positions of the Bar or anyone else.

The Texas State Bar is entirely self-funded; it does not receive funds from the legislative appropriations process. ROA.3691. Nearly half of the Bar's annual revenue comes from membership fees.[3] ROA.3581, 3691. The annual membership fees are currently $68 for active members licensed less than 3 years; $148 for active members licensed between 3 and 5 years; $235 for active members licensed for at least five years; and $50 for inactive members.[4] ROA.3689; ROA.4075 (State Bar of Texas Board of Directors Policy Manual ("Policy Manual") § 3.01.01). The Bar has not raised annual membership fees since 1991, and its fees are among the lowest in states with integrated bars. ROA.3691-3692.

In 2003, the Texas legislature amended the State Bar Act to require non-exempt Texas lawyers to pay a $65 legal services fee in addition to their membership fees. Tex. Gov't Code Ann. § 81.054(c)-(d), (j)-(k). The Texas State Bar does not receive or control that fee. *Id.* § 81.054(c)-(d). Instead, the Texas Supreme Court distributes it to the Comptroller, who allocates half to the Supreme Court Judicial

[3] The Bar's second largest revenue source is fees from continuing legal education programs. ROA.3581, 3695.

[4] Members 70 years and older are exempt from membership fees. ROA.3689.

Fund for civil legal services for the indigent, and the remainder to the Fair Defense Account of the state's general revenue fund for indigent criminal defense programs. *Id.* § 81.054(c).

Like other state agencies, the Texas State Bar is subject to periodic "sunset" reviews by the legislature to determine "whether a public need exists" for the Bar, including "whether less restrictive or alternative methods of performing any function that the [Bar] performs could adequately protect or provide service to the public." Tex. Gov't Code Ann. §§ 81.003, 325.011. The Bar has undergone sunset review four times, the last in 2017, when the legislature voted to continue the Bar's existence until the next review in 2029. ROA.3688.

B. Texas Law And Bar Policy Ensure All Bar Expenditures Comply With *Keller* And Provide Ample Opportunities For Objecting To Particular Expenditures

Texas law and State Bar policy require that all Bar expenditures further the state's interests in regulating the legal profession and improving legal-service quality, in compliance with *Keller*. The State Bar Act provides that membership fees "may be used only for administering the public purposes" provided for in the Act. Tex. Gov't Code Ann. § 81.054(d). The Act prohibits the Bar from using any funds "for influencing the passage or defeat of any legislative measure unless the measure relates to the regulation of the legal profession, improving the quality of

legal services, or the administration of justice and the amount of the expenditure is reasonable and necessary." *Id.* § 81.034.

Similarly, the State Bar Board's Policy Manual provides that the Bar's "expenditure of funds . . . is limited both as set forth at § 81.034 of the State Bar Act and in *Keller*." ROA.4098 (Policy Manual § 3.14.01). The Policy Manual contains detailed procedures to ensure compliance with this requirement, emphasizing the Bar's obligation to comply with *Keller* no less than seven times. *See* ROA.4098-4099, 4104, 4107-4108, 4111, 4125 (Policy Manual §§ 3.14.01, 3.14.05, 5.01.02(B)(8), 5.01.07(E), 5.01.14, 5.04.05(E), 8.01.03(G)). Those procedures include orientation sessions for incoming section leaders addressing the "restrictions imposed by *Keller*." ROA.4108 (Policy Manual § 5.01.14).

Legislative activities constitute a miniscule portion of the Bar's operations. The Bar's Governmental Relations Department constituted just 0.34% of the Bar's proposed budget. ROA.3698, 3867. Nevertheless, *nine pages* of the Board's 93-page Policy Manual are devoted to detailing the Bar's procedures for determining whether to take a position on legislative proposals, and ensuring that its legislative activities comply with *Keller*. ROA.4125-4133 (Policy Manual § 8.01). Subject to a narrow exception not at issue here,[5] the Policy Manual prohibits the Bar from

[5] ROA.4125 ("Nothing herein shall prohibit the State Bar's support of or opposition to legislation relating to the selection, tenure, compensation, staffing, equipping, and housing of the federal or state judiciary.").

taking a position on a legislative proposal unless it "conforms in all material respects to the following criteria":

> (A) The proposed legislation or legislative action falls within the purposes, expressed or implied, of the State Bar as provided in the State Bar Act.
>
> (B) Adequate notice and opportunity has been afforded for the presentation of opposing opinions and views.
>
> (C) The proposed legislation or legislative action does not carry the potential of deep philosophical or emotional division among a substantial segment of the membership of the bar.
>
> (D) The proposed legislation or legislative action is in the public interest.
>
> (E) The primary purpose of the proposed legislation or legislative action is not to provide economic benefit to the members of the State Bar.
>
> (F) The proposed legislation or legislative action is not designed to promote or impede the political candidacy of any person or party or to promote a partisan political purpose.
>
> (G) The proposed legislation cannot be construed to advocate political or ideological positions. See, e.g. *Keller v. The State Bar of California*, 496 U.S. 1 (1990).

ROA.4125 (Policy Manual § 8.01.03).

Although the Board approved taking a position on certain proposals during the 2019 Texas legislative session, *see* ROA.3755-3757, State Bar employees did not lobby in support of those proposals, ROA.3720-3721. Instead, members of the Bar's *voluntary* subject-matter sections—such as the Family Law Section and the Real Estate, Probate & Trust Law Section—coordinated any lobbying activities. ROA.3720-3721. The Bar did not provide compensation for that work, and the

sections were responsible for any associated expenses. ROA.3720-3721. Consistent with the governmental relations departments of other Texas agencies, *e.g.*, ROA.3717 (discussing Texas Education Agency), a principal focus of the Bar's Governmental Relations Department is responding to requests from legislators for information related to the legal profession, ROA.3716-3717.

Bar members have numerous opportunities to object to the Bar's proposed or actual expenditures. For example, they can object to proposed expenditures at the annual public hearing on the Bar's proposed budget and at the annual Bar Board meeting at which the budget is approved—both of which occur before the June 1 deadline for annual membership fees. *See* Tex. Gov't Code Ann. § 81.022(b)-(c); *see also* ROA.3690, 3693. Members may object to the Bar's proposed legislative positions by filing a written objection or appearing at a Legislative Policy Subcommittee meeting before the Bar Board votes to adopt such a position. *See* ROA.3721-3722. And under the Policy Manual's protest procedure, members may file a written objection to any "proposed or actual expenditure" at any time, and seek a *pro rata* refund of a portion of their membership fees, plus interest, on the ground that the expenditure allegedly violates *Keller*. ROA.4098-4099 (Policy Manual § 3.14). Since the protest procedure's adoption in 2005, only one person, who is not involved in this lawsuit, has invoked it. *See* ROA.3699.

C. The Bar's Activities Advance Professional Regulation And Legal-Service Quality

The Bar engages in an array of activities furthering Texas's interests in professional regulation and improving the quality and availability of legal services. *See Keller*, 496 U.S. at 13-14. For example:

- The Bar serves as a clearinghouse for legal information and resources during natural disasters and other crises. ROA.3587, 3736-3739. After Hurricane Harvey, the Bar's disaster hotline connected survivors with legal-aid programs, and the Bar's Legal Access Division matched more than 2,000 volunteer attorneys with legal-aid programs needing assistance. ROA.3588, 3737-38. The Bar has also led the preparation and updating of a resource manual for attorneys assisting natural-disaster survivors that has been a model for other states. ROA.3738.

- The Bar administers a Client Security Fund "to protect the integrity of the legal profession through discretionary grants to clients who have been harmed by their lawyers' dishonest conduct." ROA.4087.

- The Bar financially supports, and appoints a minority of the members of, the Texas Access to Justice Commission, which the Texas Supreme Court established in 2001 to serve as a statewide umbrella organization for efforts to expand low-income Texans' access to legal services. ROA.3594-3598, 3740-3741. The Commission is subject to the Texas Supreme Court's supervision, and is expressly prohibited from using Bar funds "for influencing the passage or defeat of

any legislative measure unless the measure relates to the regulation of the legal profession, improving the quality of legal services, or the administration of justice and the amount of the expenditure is reasonable and necessary." Tex. Gov't Code Ann. § 81.034; *see also* ROA.3597, 3741.

- The Bar's Legal Access Division complements the Commission's work by "support[ing] the day-to-day needs" of legal-aid and *pro bono* providers, such as Westlaw access, malpractice insurance, and funding for interpreters. ROA.3604-3607; *see also* ROA.3734-3746. It also helps connect attorneys willing to provide *pro bono* services with legal-services organizations needing assistance. As part of that effort, and in response to widespread expressions of interest by Bar members, the Division published on the State Bar website a "list of training, volunteer, and donation opportunities for attorneys who would like to assist with migrant asylum and family separation cases." ROA.3887-3888; *see also* ROA.3738. That is just one example of the numerous resources the Bar provides to Texas attorneys seeking to serve the public. Others include the State Bar's Texas Lawyers for Texas Veterans program, which has helped connect thousands of veterans needing legal assistance with volunteer attorneys, ROA.1744, and the Bar's *Pro Bono Texas* website, which allows attorneys to search hundreds of *pro bono* opportunities in a variety of practice areas, *see* Find Your Pro Bono, Pro Bono Texas, https://www.probonotexas.org/find-your-pro-bono (last visited July 30, 2020).

- In accordance with Chapter 467 of the Texas Health and Safety Code, the Bar administers the Texas Lawyers' Assistance Program to assist lawyers, judges, and law students with mental-health or addiction issues. That program not only helps save lives and careers, but "also protects the public, reduces ethical violations, and promotes the integrity and reputation of the legal profession." ROA.3603.

- Recognizing that historical and continuing discrimination based on race, sex, and sexual orientation can impede the career opportunities of Texas attorneys and their ability to provide quality legal services, the Bar's Office of Minority Affairs implements and carries out initiatives to further the Bar's "commitment toward creating a fair and equal legal profession for minority, women, and LGBT attorneys." ROA.3841; *see also* ROA.3702, 3711. All Texas attorneys may participate in the Office's programs, regardless of their race, sex, or sexual orientation. ROA.3697, 3702. The Office accounted for just 1% of the Bar's 2019-2020 proposed budget. ROA.3697, 3867.

- The Bar publishes the *Texas Bar Journal*, which provides information and articles regarding "legal matters and the affairs of the State Bar and its members." ROA.3623 (State Bar R. art. IX). The Bar is required to publish certain information in the *Journal*, such as notices of disciplinary actions and amendments to evidentiary and procedural rules. *See, e.g.*, Tex. R. Disciplinary P. 6.07; Tex.

Gov't Code Ann. §§ 22.108(c), 22.109(c); *see also* ROA.3696. The *Journal* aims to "report [on] matters objectively" and to feature articles expressing "[v]arious viewpoints," including opinions "differing with the State Bar and/or Bar leaders." ROA.4122 (Policy Manual § 7.05.02). Each *Journal* issue includes a disclaimer that "[p]ublication of any article or statement is not to be deemed an endorsement of the views expressed therein." ROA.3638; *see also* ROA.3696.

- When the Texas legislature is in session, the Bar's "Friday Update" provides objective information on the status of "legislation of interest to the legal profession." ROA.3862; *see also* ROA.3717.

- The Bar and its sections sponsor continuing legal education programs on an array of topics. These programs assist Bar members with satisfying their minimum continuing legal education requirements in furtherance of their professional duty to maintain the requisite knowledge of a competent practitioner. *See* ROA.3630-3631 (State Bar R. art. XII, § 6); Tex. Disciplinary R. Prof'l Conduct 1.01 cmt. 8. Revenue from the programs helps fund the Bar's operations and keep membership fees low. ROA.3695. The Bar regularly publishes disclaimers that the programs' speakers "do not necessarily reflect opinions of the State Bar of Texas, its sections, or committees." ROA.3640; *accord* ROA.3902; *see also* ROA.3695.

D. The District Court Granted Summary Judgment To Defendants

Plaintiffs claim that the requirements that they enroll in, and pay annual membership fees to, the Texas State Bar violate their First Amendment rights to freedom of association and speech. ROA.70-72. They also claim the protest procedure in Policy Manual § 3.14 is inadequate to protect First Amendment rights. ROA.72-73.

Ruling on cross-motions for summary judgment, the district court granted summary judgment to Defendants on all of Plaintiffs' claims.[6] ROA.3435-3452. Agreeing with Defendants' argument that "*Lathrop* and *Keller* foreclose Plaintiffs' claims," ROA.3442, the court concluded that "*Janus* did not disturb [those decisions'] binding holdings," ROA.3442, 3444. Examining each of the categories of Bar activities Plaintiffs challenge individually, the court determined that they all "comply with the *Keller* standard because they further Texas's interest in professional regulation or legal-service quality improvement." ROA.3447. The court also concluded that the $65 legal-services fee, *see* Tex. Gov't Code Ann. § 81.054(j), "is not subject to *Keller* because it is not used to fund any Bar expenditures," and alternatively, that it is permissible because it is germane to the state's legitimate interests under *Keller*. ROA.3450.

[6] Having granted Defendants summary judgment, the district court dismissed Plaintiffs' motion for a preliminary injunction. ROA.3541.

Finally, the court rejected Plaintiffs' challenge to the Bar's protest procedure. ROA.3450-3451. The court emphasized that "the Bar's procedures ensure that all of its expenditures comply with *Keller*," and that the "Bar provides members with advance, detailed notice of its proposed expenditures, along with several opportunities to object to those expenditures before they occur." ROA.3450. The court thus "conclude[d] that the Bar's existing policies and procedures achieve the objective of procedural safeguards in the First Amendment by ensuring that 'the government treads with sensitivity in areas freighted with First Amendment concerns.'" ROA.3450 (quoting *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 303 n.12 (1986)).

SUMMARY OF ARGUMENT

Keller and *Lathrop* foreclose Plaintiffs' challenges to the Texas State Bar Act's mandatory-membership and fee-payment requirements. In those cases, the Supreme Court held that the First Amendment permits states to adopt integrated bars supported by compulsory fees to further their interests in "regulating the legal profession or 'improving the quality of . . . legal service[s].'" *Keller*, 496 U.S. at 14 (quoting *Lathrop*, 367 U.S. at 843 (plurality op.)). Recent decisions addressing the constitutionality of union "agency fees" did not overrule or modify *Keller* and *Lathrop*, which require "dismiss[ing]" Plaintiffs' claims. *Jarchow*, 140 S. Ct. at 1720-21 (Thomas, J., and Gorsuch, J., dissenting from denial of certiorari). To the

contrary, those agency-fee decisions reaffirmed *Keller*, explaining that *Keller* "is wholly consistent with" the exacting-scrutiny framework applied in those decisions. *Harris*, 573 U.S. at 655-56.

Plaintiffs' effort to narrow the *Keller* standard conflicts with that decision's plain language. *Keller*'s disjunctive standard means the Texas State Bar may use mandatory fees for activities "germane to" *either* "regulating the legal profession *or* improving the quality of . . . legal service[s]," 496 U.S. at 14 (emphasis added) (citation omitted)—regardless of whether some may view the activities as having "political" or "ideological" characteristics, or as going beyond "regulatory and disciplinary functions," Opening Br. 30.

Even if Plaintiffs could identify a few instances in which Bar expenditures have infringed their free-speech rights by exceeding *Keller*'s limitations, *Lathrop* would still foreclose their freedom-of-association challenge to the Bar's mandatory-membership requirement. *See Lathrop*, 367 U.S. at 842-48 (rejecting free-association claim because "*the bulk* of State Bar activities" advanced legitimate state interests, while reserving judgment on whether particular expenditures might violate members' free-speech rights (emphasis added)). Plaintiffs' narrower challenge to particular Bar expenditures is also meritless. Every Bar activity Plaintiffs cite satisfies *Keller* because it furthers the state's interests in professional regulation or improving legal-service quality.

Finally, Plaintiffs' challenge to the Bar's protest procedure fails because it rests on the erroneous contention that the Bar has non-chargeable expenditures under *Keller*. Regardless, existing Bar policies and procedures achieve the objective of First Amendment procedural safeguards because the Bar provides detailed notice of proposed expenditures and numerous opportunities to object to those expenditures before they occur.

ARGUMENT

I. Standard Of Review

This Court reviews the district court's grant of summary judgment *de novo*. *See Am. Family Life Assurance Co. of Columbus v. Biles*, 714 F.3d 887, 895 (5th Cir. 2013).

II. Mandatory Membership In, And Financial Support For, The Texas State Bar Is Constitutional Under Binding Supreme Court Precedent

To practice law in Texas, attorneys must enroll in the State Bar and pay annual membership fees. *See* Tex. Gov't Code Ann. §§ 81.051, 81.054, 81.102. In their principal claims, Plaintiffs contend that the mandatory-membership requirement and the fee-payment requirement each violate the First Amendment. *See* Opening Br. 23-41. Plaintiffs rely on two interests this Court has recognized as implicit in the First Amendment's general prohibition against "abridging the freedom of speech," U.S. Const. amend. I: "freedom of association," *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617 (1984), and avoiding compelled subsidization of "private speech

on matters of substantial public concern," *Janus*, 138 S. Ct. at 2460; *see also Knox v. Service Emps. Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012). *See, e.g.*, Opening Br. 23.

Binding Supreme Court precedent forecloses Plaintiffs' claims. *Lathrop* and *Keller* squarely held that the First Amendment permits states to adopt integrated bars supported by compulsory membership fees to further their interests in "regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" *Keller*, 496 U.S. at 14 (quoting *Lathrop*, 367 U.S. at 843 (plurality op.)). The district court correctly held that a straightforward application of *Lathrop* and *Keller* defeats Plaintiffs' challenges to the Bar's mandatory-membership and fee-payment requirements. *See* ROA.3442-3450.

A. *Lathrop* And *Keller* Foreclose Plaintiffs' Claims

In *Lathrop*, the plaintiff claimed that Wisconsin's integrated bar violated his First Amendment rights of freedom of association and free speech. 367 U.S. at 821-23 (plurality op.). The plaintiff contended that he could not "constitutionally be compelled to join and give support to an organization" that expressed "opinion[s] on legislative matters" and "utilize[d] its property, funds and employees for the purposes of influencing legislation and public opinion toward legislation." *Id.* at 827. The four-Justice plurality opinion concluded that Wisconsin's integrated bar did not violate the First Amendment's guarantee of freedom of association. *Id.* at

842-43. The plurality explained that a state may constitutionally require attorneys to pay dues to the state bar "in order to further the State's legitimate interests in raising the quality of professional services." *Id.* at 843. This is true even when an integrated bar "participate[s] in political activities"—including "legislative activit[ies]"—as long as "the bulk of State Bar activities serve the function . . . of elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State." *Id.* at 835-39, 843.

Concluding that the record was insufficiently developed to provide a "sound basis" for deciding whether the integrated bar violated the plaintiff's right to free speech, the *Lathrop* plurality declined to resolve that question. *Id.* at 845-48. Three Justices concurring in the judgment—Justices Harlan, Frankfurter, and Whittaker—would have gone further, concluding that the integrated bar and compulsory membership fees did not violate either the plaintiff's free-association or free-speech rights. *Id.* at 849-50 (Harlan, J., and Frankfurter, J., concurring in judgment); *id.* at 865 (Whittaker, J., concurring in result). Warning against "fall[ing] prey to . . . alluring abstractions on rights of free speech and association" lacking "any solid basis," Justices Harlan and Frankfurter rejected the constitutional arguments asserted against integrated bars as "specious" and "chimerical." *Id.* at 849, 864-65. Justice Whittaker agreed that "the State's requirement that a lawyer pay . . . an annual fee

. . . as a condition of its grant . . . of the special privilege . . . of practicing law . . . does not violate any provision of the United States Constitution." *Id.* at 865.

In its unanimous decision in *Keller*, the Court resolved the free-speech issue left open in *Lathrop*. The *Keller* plaintiffs claimed, among other things, that the integrated California State Bar's "use of their compulsory dues to finance political and ideological activities . . . with which they disagree violates their rights of free speech." 496 U.S. at 9. Addressing that claim, the Court held that lawyers "may be required to join and pay dues to the State Bar," and the Court articulated "the scope of permissible dues-financed activities in which the State Bar may engage." *Id.* at 4. The Court concluded that integrated bars "are justified by the State's interest in regulating the legal profession and improving the quality of legal services." *Id.* at 13. The *Keller* Court held that state bars may use mandatory membership fees to "fund activities germane to those goals," but may not use mandatory fees to "fund activities of an ideological nature which fall outside of those areas of activity." *Id.* at 14.

Therefore, under *Keller*, integrated state bars' use of membership fees complies with the First Amendment if the "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.* (quoting *Lathrop*, 367 U.S. at 843 (plurality op.)). *Keller* acknowledged that determining on

which side of that constitutional line a particular expenditure falls "will not always be easy," but the Court explained that "the extreme ends of the spectrum are clear": While mandatory fees may not be used for advancing "gun control or nuclear weapons freeze" initiatives, they may be used for "activities connected with disciplining members of the Bar or proposing ethical codes for the profession." *Id.* at 15-16.

Lathrop and *Keller* foreclose Plaintiffs' challenge to the Texas State Bar's mandatory-membership and fee-payment requirements. As explained above, *see supra* pp. 21-24, the State Bar Act and the Bar's Policy Manual limit the Bar's expenditures to the objectives authorized in *Keller*—regulating the legal profession and improving the quality of legal services in Texas. *See, e.g.*, Tex. Gov't Code Ann. §§ 81.034, 81.054(d); ROA.4098-4099, 4104, 4107-4108, 4111, 4125 (Policy Manual §§ 3.14.01, 3.14.05, 5.01.02(B)(8), 5.01.07(E), 5.01.14, 5.04.05(E), 8.01.03(G)). The Bar carefully complies with those limitations in practice. *See infra* pp. 52-63. Therefore, the district court correctly concluded that Plaintiffs have not established any First Amendment violation.

B. The Supreme Court Has Not Overruled Or Modified *Lathrop* Or *Keller*

The district court correctly held that subsequent Supreme Court decisions, including *Janus*, have not "disturb[ed] the binding holdings of *Lathrop* and *Keller*." ROA.3444. In *Janus*, the Supreme Court held that a public employer violates the

First Amendment by compelling an employee to contribute financially to a union that acts as the employee's exclusive collective bargaining agent. *See Janus*, 138 S. Ct. at 2459-60. *Janus* overruled *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which had held that such "agency fee" arrangements complied with the First Amendment because they served the state's compelling interests in maintaining labor peace and avoiding free riders. *See Janus*, 138 S. Ct. at 2478; *Abood*, 431 U.S. at 221-22, 242. In overruling *Abood*, *Janus* concluded that those two interests (which are not at issue here) were insufficient to justify an agency-fee arrangement (also not at issue here). *Janus*, 138 S. Ct. at 2465-69. Justice Alito's opinion for the Court in *Janus* did not even mention—much less overrule—*Lathrop* or *Keller*. The only mention of either case in *Janus* appears in the principal dissent, which emphasized that the Court's decision "does not question" *Keller*. *Janus*, 138 S. Ct. at 2498 (Kagan, J. dissenting). This Court remains bound by *Lathrop* and *Keller*. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

Although Plaintiffs contend that *Keller* "relied heavily on *Abood*," Opening Br. 29 n.4, *Keller* did so principally in the context of rejecting the contention that the

California State Bar's "status as a regulated state agency exempted it from any constitutional constraints on the use of its dues"—an argument that, if accepted, would have obviated the plaintiffs' First Amendment challenge.[7] 496 U.S. at 10. *Keller* merely drew an "analogy" between integrated state bars and labor unions. *Id.* at 12. As the district court explained, "*Janus*'s reassessment of the state interests that *Abood* concluded justified agency fee arrangements" (maintaining labor peace and avoiding free riding) in no way "undermine[s] *Keller*'s recognition of the very different state interests in professional regulation and legal-service quality served by integrated bars." ROA.3445 (quoting *Keller*, 496 U.S. at 13-14).

Integrated bars differ from public-sector labor unions in at least three fundamental respects critical to First Amendment analysis. First, lawyers' special role as "officers of the court" allows for greater imposition on their rights than what may be permissible in other contexts. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991) (citation omitted). Bar membership "is a privilege burdened with conditions." *Id.* at 1066 (citation omitted). Licensed attorneys "enjoy[] singular powers that others do not possess." *In re Snyder*, 472 U.S. 634, 644 (1985). They

[7] Although *Keller* binds this Court, Defendants disagree with *Keller*'s refusal to treat the California State Bar as a state agency for purposes of First Amendment analysis. Defendants thus preserve for potential Supreme Court review whether the speech of the Texas State Bar, which is "an administrative agency of the judicial department of government," Tex. Gov't Code Ann. § 81.011(a), should be free of First Amendment Free Speech Clause restrictions under the government speech doctrine. *See, e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) ("The Free Speech Clause . . . does not regulate government speech.").

"share a kind of monopoly" because individuals lacking law licenses cannot "appear in court and try cases" or "counsel clients" on legal matters. *Id.* The principal justification for the restrictions on competition that redound to licensed lawyers' benefit is that licensing improves the quality of legal services for consumers. *See, e.g.*, *Grievance Comm. State Bar of Tex. v. Coryell*, 190 S.W.2d 130, 131 (Tex. App.–Austin 1945, writ ref'd w.o.m.); Tex. Disciplinary R. Prof'l Conduct, preamble ¶ 8. In exchange for the extraordinary benefits a law license offers, attorneys are expected to submit to certain requirements to ensure that the licensing system attains that objective. Accordingly, as *Keller* recognized, "[i]t is entirely appropriate that all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts should be called upon to pay a fair share of the cost" of collective professional efforts to improve legal-service quality. 496 U.S. at 12, 14; *see also* Leo Brewster, *The State Bar*, 22 Tex. B.J. 113, 114 (1959) (while "a bar is state-organized to enable the profession to discharge its duty to the public to maintain the high standards of practice and conduct," the "primary purpose of a labor union is to bargain collectively for its members" regarding "wages, hours and working conditions").

Second, *Janus* noted that collective bargaining by public unions has a special "political valence" the *Abood* Court did not then appreciate. *Janus*, 138 S. Ct. at 2483. According to *Janus*, the "ascendance of public-sector unions has been marked

by a parallel increase in public spending," giving rise to political debate over public spending and debt. *Id.* Indeed, *Janus* emphasized that "[u]nsustainable collective-bargaining agreements have . . . been blamed for multiple municipal bankruptcies." *Id.* Here, by contrast, there can be no serious claim that the member-funded activities of the State Bar burden the public fisc in Texas or have led to the accumulation of significant government debt for which taxpayers would be liable. Mandatory bar fees thus represent much less of a threat to First Amendment interests than the risk that *Janus* perceived and sought to address.

Third, unions "significant[ly] impinge[] on associational freedoms" insofar as they serve as the exclusive representative in employment negotiations for all employees, including those who are not union members. *Id.* at 2478. The State Bar has no similar authority to serve as Texas lawyers' exclusive representative.

The Supreme Court's decision in *Harris* "confirms that *Keller* fits within the 'exacting scrutiny' framework applied in *Janus*." ROA.3445; *cf.* Opening Br. 25-26 (discussing "exacting scrutiny"). *Harris* was decided just four years before *Janus*, and like *Janus*, was written by Justice Alito. *Harris* refused to extend *Abood* to home-care personal assistants after concluding that they were not public employees. 573 U.S. at 645-46. Foreshadowing *Abood*'s demise, *Harris* applied "exacting scrutiny" in holding that states could not constitutionally charge non-public employees agency fees. *See id.* at 648-51. As later explained by *Janus*, which

applied the exacting-scrutiny standard in overruling *Abood*, exacting scrutiny requires that a compelled subsidy "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." 138 S. Ct. at 2465 (quoting *Knox*, 567 U.S. at 310).

The Court in *Harris* explicitly considered whether the exacting-scrutiny framework would disturb its prior holding in *Keller* that states may require lawyers to pay fees to fund bar activities furthering the "State's interest in regulating the legal profession and improving the quality of legal services." *Harris*, 573 U.S. at 655 (quoting *Keller*, 496 U.S. at 14). Answering that question in the negative, the Court stated that *Keller* "fits comfortably within [the exacting-scrutiny] framework" applied in *Harris*, and that its decision in *Harris* was "wholly consistent with [the Court's] holding in *Keller*." *Id.* at 655-56. In reaching that conclusion, the Court emphasized that licensed attorneys are "subject to detailed ethics rules, and the bar rule [at issue in *Keller*] requiring the payment of dues was part of this regulatory scheme." *Id.* at 655; *cf. Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469, 472 (1997) ("mandatory funding of expressive activities" does not violate the First Amendment where the speech is part of a "broader . . . regulatory scheme"). Echoing *Keller*, *see* 496 U.S. at 12, *Harris* also noted that states 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."[8] 573 U.S. at 655-56. Given the Court's express statement in *Harris* that *Keller*'s holding "is wholly consistent" with the exacting-scrutiny framework later applied in *Janus*, *id.* at 656, there is no basis for concluding that *Janus* overruled *Keller*.[9]

Every court to consider the issue after *Janus* has concluded that *Keller* and *Lathrop* remain good law.[10] And the Supreme Court recently denied certiorari petitions asking it to overrule *Keller* in light of *Janus*. *See Jarchow v. State Bar of Wis.*, 140 S. Ct. 1720 (2020) (mem.); *Fleck v. Wetch*, 140 S. Ct. 1294 (2020) (mem.). Even Justices Thomas and Gorsuch, who have expressed interest in reexamining *Keller*, acknowledge that it remains binding on lower courts, requiring "dismiss[al]"

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[8] Although Plaintiffs contend that "lawyers and the legal profession" are "adequately regulated" in the minority of states without integrated bars, Opening Br. 27, the mere fact that an overwhelming majority of states have adopted and maintain integrated bars is strong evidence of their important role in furthering states' interests in regulating attorneys and improving legal-service quality. *See* ROA.3691-3692. Furthermore, in the context of sunset reviews—the last in 2017—the Texas legislature has repeatedly determined that "a public need exists" for the Bar and "less restrictive or alternative methods" would be inadequate. *Supra* p. 21.

[9] Although Plaintiffs briefly suggest the "relevant standard here should be strict scrutiny," Opening Br. 24, even *Knox*, *Harris*, and *Janus*—Plaintiffs' preferred precedents, *e.g.*, *id.* at 26—applied the "less demanding" "exacting scrutiny" standard, *Janus*, 138 S. Ct. at 2464-65. In any event, because *Lathrop* and *Keller* squarely foreclose Plaintiffs' claims, any debate here regarding either the appropriate level of constitutional scrutiny or whether integrated bars satisfy the applicable scrutiny standard is academic. *Cf.* Opening Br. 24-28. Regardless of how this Court might resolve those questions if writing on a blank slate, *Lathrop* and *Keller* control. *See Rodriguez de Quijas*, 490 U.S. at 484.

[10] *See Fleck v. Wetch*, 937 F.3d 1112, 1118 (8th Cir. 2019); *Jarchow v. State Bar of Wis.*, No. 19-3444, 2019 WL 8953257, at *1 (7th Cir. Dec. 23, 2019); *File v. Kastner*, No. 19-C-1063, 2020 WL 3513530, at *5 (E.D. Wis. June 29, 2020); *Boudreaux v. La. State Bar Ass'n*, 433 F. Supp. 3d 942, 975-77 (E.D. La. 2020); *Schell v. Gurich*, 409 F. Supp. 3d 1290, 1298-99 (W.D. Okla. 2019); *Gruber v. Or. State Bar*, 3:18-cv-1591-JR, 2019 WL 2251826, at *8-9 (D. Or. Apr. 1, 2019), *findings & recommendation adopted*, 2019 WL 2251282 (D. Or. May 24, 2019).

of any constitutional challenges to integrated-bar expenditures "germane to [the] goals of regulating the legal profession and improving the quality of legal services." *Jarchow*, 140 S. Ct. at 1720-21 (Thomas, J., dissenting from denial of certiorari) (citation omitted).[11]

C. *Keller* Authorizes State Bar Activities That Some Might View As "Political Or Ideological," As Long As They Are Germane To The State's Interests In Professional Regulation Or Legal-Service Quality

Unable to escape *Keller*, Plaintiffs attempt to recast the decision as prohibiting an integrated bar from engaging in any activities that a bar member might view as "political or ideological" in nature. Opening Br. 30 (citation omitted). But as the district court concluded, the question under *Keller* is *not* "whether the challenged activity is 'political or ideological' in the abstract." ROA.3446. Instead, the "guiding standard" is whether the challenged activity is "germane to" the state interests that justify integrated bars' establishment—"regulating the legal profession and improving the quality of legal services." *Keller*, 496 U.S. at 13-14.

Plaintiffs' argument conflicts with *Keller*'s plain language and ignores *Keller*'s roots in *Lathrop*. *Lathrop* held that the integrated bar there did not violate attorneys' right to freedom of association, even though it "participated in political activities." *Lathrop*, 367 U.S. at 835-39, 843 (plurality op.). *Keller* reaffirmed that

[11] Justice Alito, *Janus*'s author, did not join Justice Thomas's *Jarchow* certiorari-denial dissent.

holding, expressly recognizing that *Lathrop* "rejected" the plaintiff's claim that "he could not constitutionally be compelled to join and financially support a state bar association which expressed opinions on, and attempted to influence, legislation." *Keller*, 496 U.S. at 7.

Building on *Lathrop*, *Keller* held that lawyers can "be required to pay moneys in support of activities . . . germane to the reason justifying the compelled association." *United States v. United Foods, Inc.*, 533 U.S. 405, 414 (2001) (discussing *Keller*). *Keller* concluded that integrated bars "are justified by the State's interest in regulating the legal profession and improving the quality of legal services." 496 U.S. at 13. It thus held that integrated bars may "constitutionally fund activities *germane to those goals* out of . . . mandatory dues." *Id.* at 14 (emphasis added). Therefore, even if a State Bar expenditure has some political or ideological features, it is constitutional as long as it is germane to a permissible *Keller* purpose.

Demonstrating the extent of the conflict between Plaintiffs' argument and *Keller*, the language in *Keller* on which Plaintiffs primarily rely to support their argument actually defeats it. Plaintiffs quote *Keller*'s statement that integrated bars may not use mandatory fees to "fund activities of an ideological nature which fall outside of those areas of activity" authorized by *Keller*'s guiding standard. Opening Br. 34 (quoting *Keller*, 496 U.S. at 14). Plaintiffs implausibly assert that "[t]he best

reading of this language is that 'activities of an ideological nature' necessarily 'fall outside those areas' of permissible activity." *Id.* Nonsense. The only reasonable reading of the sentence on which Plaintiffs rely is that it identifies a subset of "activities of an ideological nature" that cannot be funded with mandatory fees—i.e., those "which fall outside" the permissible objectives of professional regulation and improving legal-service quality. *Keller*, 496 U.S. at 14. The cited sentence sets forth the corollary rule to the immediately preceding sentence's statement that integrated bars may "constitutionally fund activities germane to th[e] goals" of professional regulation and improving legal-service quality. *Id.* If *Keller* had intended to adopt Plaintiffs' rule, it would have said that integrated bars may not "fund activities of an ideological nature"—full stop. *Id.* It would not have added the restrictive qualifier "which fall outside of th[e] areas of [permissible] activity."[12] *Id.*; *see also id.* at 15 ("activities having political or ideological coloration *which are not reasonably related to the advancement of such goals*" (emphasis added)).

[12] Courts of appeals have repeatedly rejected the notion that the constitutionality of integrated-bar expenditures turns solely on whether they might be characterized as "political" or "ideological." *See, e.g.*, *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620, 632 (1st Cir. 1990) ("Political activities, including lobbying, may be funded from compulsory dues so long as the target issues are narrowly limited to regulating the legal profession or improving the quality of legal service . . . ."); *see also Kingstad v. State Bar of Wis.*, 622 F.3d 708, 718 (7th Cir. 2010) (integrated bar may use mandatory fees "to fund only those activities that are reasonably related to the [s]tate [b]ar's dual purposes . . . , *whether or not those same expenditures are also non-ideological and non-political*" (emphasis added)); *Gardner v. State Bar of Nev.*, 284 F.3d 1040, 1043 (9th Cir. 2002) ("[W]hat *Keller* found objectionable was not political activity but partisan political activity as well as ideological campaigns *unrelated to the bar's purpose*." (emphasis added)).

Lacking support for their proposed standard in *Keller*, Plaintiffs erroneously suggest that *Harris* limits integrated bars to "us[ing] coerced dues only to fund activities 'connected with proposing ethical codes and disciplining bar members,' not for 'political or ideological purposes.'" Opening Br. 30 (quoting *Harris*, 573 U.S. at 655); *accord id.* at 34-35. As explained above, *Harris* focused on the constitutionality of union agency fees for home-care personal assistants, not on integrated bars' constitutionality. *See supra* pp. 40-42. In its dicta regarding *Keller*, *Harris* did not purport to modify the standard set forth in that case. *See File v. Kastner*, No. 19-C-1063, 2020 WL 3513530, at *4 (E.D. Wis. June 29, 2020). To the contrary, *Harris* reaffirmed both prongs of the *Keller* standard. It expressly noted *Keller*'s holding that mandatory bar fees are justified by the "State's interest in regulating the legal profession *and improving the quality of legal services*." 573 U.S. at 655 (emphasis added) (quoting *Keller*, 496 U.S. at 14). And the Court confirmed that *Keller* was "wholly consistent" with *Harris* and "fit[] comfortably within the [exacting-scrutiny] framework applied in" that case. *Id.* at 655-56.[13]

Contrary to Plaintiffs' suggestion, "strictly limiting bar expenditures . . . to attorney disciplinary and regulatory functions" would *not* be "grounded in Supreme

[13] Similar to *Harris*, neither *Janus* nor the pre-*Harris* decision *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 557-58 (2005), purports to modify *Keller*. *Contra* Opening Br. 35-36. Indeed, the Court's opinion in *Janus* does not even mention *Keller*. *See Janus*, 138 S. Ct. at 2498 (Kagan, J., dissenting) (emphasizing majority "does not question" *Keller*).

Court precedent." Opening Br. 40. It would ignore half of *Keller*'s "guiding standard," which authorizes integrated bars to use mandatory fees "for the purpose of regulating the legal profession *or* improving the quality of . . . legal service[s]." 496 U.S. at 14 (emphasis added) (citation omitted); *see also United States v. Woods*, 571 U.S. 31, 45-46 (2013) (under "ordinary us[age]," "or" indicates phrases have "separate meanings" (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979))). *Keller* envisioned a "spectrum" of permissible Bar activities beyond the "extreme end[]" of "activities connected with disciplining members . . . or proposing ethical codes." 496 U.S. at 15-16. Although Plaintiffs may wish that the Supreme Court had "draw[n] a [more] precise line" by "limiting bar expenditures . . . to attorney disciplinary and regulatory functions," Opening Br. 40, the unanimous *Keller* Court expressly declined to do so, *see* 496 U.S. at 15-16, and that decision binds this Court.

D. Plaintiffs' Free-Association Challenge To The State Bar's Mandatory-Membership Requirement Is Meritless

Plaintiffs claim that the State Bar's mandatory-membership requirement violates their First Amendment right to freedom of association. They argue that "the First Amendment prohibits a state from compelling individuals to join and associate with a bar association that engages in political and ideological activities to which those individuals object." Opening Br. 29. And they contend that *Keller* "declined to decide" whether such a free-association claim is viable. *Id.* Plaintiffs, however, misread *Keller*, and *Lathrop* squarely forecloses their free-association claim.

Because the lower court in *Keller* had applied the wrong legal standard, the Supreme Court remanded for further proceedings. In doing so, the Court recognized that "[i]n addition to their claim for relief based on [the California State Bar's] use of their mandatory dues," the plaintiffs also appeared to assert a "broader freedom of association claim." 496 U.S. at 17. Accordingly, the Court noted that the lower courts "remain[ed] free . . . to consider" whether the plaintiffs could "be compelled to associate with an organization that engages in political or ideological activities *beyond those for which mandatory financial support is justified under the principles of Lathrop and Abood*."[14] *Id.* (emphasis added). The italicized language makes clear that the free-association claim that *Keller* "declined" to address in the first instance (Opening Br. 28-29) was limited to state bar political or ideological activities unrelated to the state's legitimate interests in professional regulation or legal-service quality. *Cf.* Petitioners' Reply Brief at 12, *Keller*, 496 U.S. 1 (1990) (No. 88-1905), 1990 WL 505849 ("[I]t is the Bar's political and ideological advocacy *unrelated to the regulation of the practice of law or improvement of the judicial system that is challenged*." (emphasis added)). Plaintiffs can assert no such free-association claim here because the Texas State Bar, as a matter of both policy and practice, limits its

[14] It appears that post-*Keller* amendments to the California State Bar's rules obviated the need for further proceedings on remand. *See Brosterhous v. State Bar*, 906 P.2d 1242, 1244-45 (Cal. 1995).

activities to the *Keller*-authorized purposes of professional regulation and improving legal-service quality. *See infra* pp. 52-63.

But even if Plaintiffs managed to identify a few instances in which the Texas State Bar has transgressed *Keller*'s limitations, *Lathrop* makes clear that those improper expenditures would not support Plaintiffs' free-association claim. Any alleged impingement on Plaintiffs' associational rights from their "compelled membership," Opening Br. 24, in the Bar is permitted under *Lathrop*. "Member of the Bar" is an historical term of art that merely refers to lawyers licensed to practice in a particular jurisdiction. *See* Tex. Gov't Code Ann. § 81.051(a) ("Bar members" are those "licensed to practice law in th[e] state."); *cf.* Fed. R. App. P. 46(a)(1)-(2) (addressing "membership" in "bar of a court of appeals"). Here, as in *Lathrop*, Plaintiffs' "compulsory enrollment [in the Bar] imposes only the duty to pay" fees. 367 U.S. at 827-28 (plurality op.). Like the *Lathrop* plaintiffs, Plaintiffs here are not required to associate with other Bar members in any way, such as by attending meetings or voting in elections. *Id.* at 828. Under those circumstances, *Lathrop* rejected the plaintiff's free-association claim because "*the bulk* of State Bar activities" there advanced legitimate state interests, even though a plurality of Justices reserved judgment on whether *particular* expenditures might violate members' free-speech rights. *Id.* at 842-48 (emphasis added). Therefore, under *Lathrop*, the possibility that an occasional member-funded expenditure might

impinge on members' free-speech rights does not give rise to a viable free-association claim.[15]

Keller did not purport to overrule that aspect of *Lathrop*. *See Keller*, 496 U.S. at 17 (addressing a "request for relief [that] appear[ed] to implicate *a much broader freedom of association claim than was at issue in Lathrop*" (emphasis added)). *Lathrop* also accords with subsequent free-association case law. That case law explains that the "constitutionally protected 'freedom of association'" has two components. *Roberts*, 468 U.S. at 617-18. Plaintiffs do not (and cannot) argue that mandatory Bar membership infringes their freedom of "intimate association." *Id.* at 618-20 ("[f]amily relationships" "exemplify" protected intimate associations).

Plaintiffs' free-association claim thus must rely on the "freedom of expressive association," an "instrumental" right securing the freedom "to associate for the purpose of engaging in . . . activities" directly "protected by the First Amendment," such as "speech" and "assembly." *Id.* at 618; *see also* Opening Br. 24 (claiming "right to eschew association *for expressive purposes*" (emphasis added) (quoting *Janus*, 138 S. Ct. at 2463)). But where, as here, "compulsory enrollment [in the Bar]

[15] *Lathrop*'s description of the free-association claim rejected there closely resembles Plaintiffs' description of their free-association claim here. *Compare Lathrop*, 367 U.S. at 827 (plurality op.) (plaintiff alleged he could not "constitutionally be compelled to join and give support to an organization" that expresses "opinion[s] on legislative matters"), *with* Opening Br. 24, 29 (objecting to "compell[ed]" association with bar "engag[ing] in political and ideological activities," including "legislation"-related activities).

imposes only the duty to pay" fees, no meaningful impingement of the freedom of expressive association occurs. *Lathrop*, 367 U.S. at 827-28 (plurality op.). Beyond the minimal requirements of registration and paying annual fees, Plaintiffs are free to associate or "not to associate," Opening Br. 23 (citation omitted), with the State Bar and other Bar members as they see fit. Plaintiffs have not shown that they are likely to "be identified" in any meaningful sense with any views Bar representatives may express, and Plaintiffs "remain[] free to disassociate [themselves] from those views." *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 65 (2006); *see also Lathrop*, 367 U.S. at 859 (Harlan, J., concurring in judgment) ("everyone understands or should understand" that integrated bar's statements do not necessarily represent individual members' views (citation omitted)); *cf. Janus*, 138 S. Ct. at 2460, 2478 (discussing unions' role as employees' "exclusive bargaining agent"). Plaintiffs' claimed associational injury is illusory; it has no grounding in how the Texas State Bar operates in practice. *Cf. Roberts*, 468 U.S. at 627 (effect on expressive-association interests of requiring organization to admit female voting members was "attenuated at best").

Given the close parallels between *Lathrop* and this case, *Lathrop* defeats Plaintiffs' free-association claim, even if the Court were to conclude that certain Bar expenditures infringe Plaintiffs' free-speech rights by violating the *Keller* standard. *See Morrow v. State Bar of Cal.*, 188 F.3d 1174, 1177 (9th Cir. 1999) (*Lathrop*

foreclosed plaintiffs' claim that they could not be forced to associate with integrated bar that engaged in political activities); *see also Palmer v. Jackson*, 617 F.2d 424, 430 n.10 (5th Cir. 1980) ("*Lathrop* held that . . . requir[ing] lawyers . . . to become members of the integrated state bar and to pay reasonable annual dues[] d[id] not violate the fourteenth amendment."). Isolated misjudgments regarding particular expenditures' compliance with *Keller* would not compel the strong medicine associated with Plaintiffs' free-association claim—i.e., wholesale reconfiguration or invalidation of the integrated Bar.[16] *Cf.* Opening Br. 26-28.

E. The State Bar Expenditures Plaintiffs Challenge Satisfy *Keller*

In addition to challenging the Bar's mandatory-membership requirement, Plaintiffs challenge the Bar's use of membership fees to fund particular activities that they allege are "political and ideological" in nature and fall outside of the Bar's "regulatory and disciplinary functions." Opening Br. 30. As explained above, however, *Keller* does not preclude the Bar from engaging in an activity merely because some members may view it as "political or ideological" or as unconnected with "regulatory and disciplinary functions." *See supra* pp. 43-47. Instead, *Keller*'s disjunctive "guiding standard" authorizes integrated bars to use mandatory fees "for

[16] If Plaintiffs were able to show that particular Bar expenditures violated the *Keller* standard and thus infringed Plaintiffs' *free-speech* rights, *but see infra* pp. 52-63, they would at most be entitled to narrow relief tailored to those particular violations. *See, e.g., Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707, 715 (5th Cir. 1984).

the purpose of regulating the legal profession *or* improving the quality of . . . legal service[s]." 496 U.S. at 14 (emphasis added) (citation omitted). As the district court concluded, under the standard *actually* articulated in *Keller*, Plaintiffs' scattershot, factually undeveloped challenges to particular Bar expenditures fail. *See* ROA.3447-3450.

Governmental Relations. Plaintiffs assert that "lobbying is the paradigmatic example of what mandatory bar associations *cannot* do." Opening Br. 31. *Keller*, however, only precludes using mandatory bar fees for lobbying that does *not* further the state's legitimate interests in professional regulation or improving legal-service quality—e.g., endorsing "a gun control or nuclear weapons freeze initiative." 496 U.S. at 15-16. *Keller* authorizes lobbying that advances those legitimate state interests, such as supporting "propos[ed] ethical codes." *Id.* Prohibiting the Bar from engaging in *any* legislative activities would be absurd, as it would preclude the Bar even from advocating for its continued existence during the sunset-review process. *See* Tex. Gov't Code Ann. § 81.003; *see also id.* § 81.034. It would also hamstring the legislative process. The legislature benefits from the Bar's response to information requests related to the regulation of attorneys and legal-service availability, *see* ROA.3716-3717, as well as the Bar's facilitation of attorney involvement in technical legislative matters that can benefit from specialized legal

expertise, *cf.* Tex. Disciplinary R. Prof'l Conduct, preamble ¶ 5 (lawyers "should seek improvement of the law" and "employ [their] knowledge in reform of the law").

Plaintiffs cannot establish any First Amendment harm with respect to the particular legislative proposals they cite that were part of the Bar's "2019 Legislative Program." *See* Opening Br. 6-7; *see also* ROA.3755-3757. Although the State Bar Board approved that legislative program, *see* Opening Br. 38, State Bar employees did not lobby on behalf of *any* proposal included in the program. ROA.3720-3721. Instead, "[m]embers of the Bar's voluntary, subject-matter sections coordinate[d] all lobbying activities" for the proposals, "without compensation from the Bar for their efforts." ROA.3447; *see also* ROA.3720-3721. Because the voluntary sections were responsible for any expenses associated with their lobbying activities, ROA.3720-3721, those activities do not "raise[] the First Amendment concerns set forth in *Keller*." *Liberty Counsel v. Fla. Bar Bd. of Governors*, 12 So. 3d 183, 185, 188 & n.11 (Fla. 2009) (so concluding regarding voluntary bar section's *amicus* brief, even though Florida Bar Board of Governors approved filing).

In any event, the State Bar Board approves a legislative program only after conducting a detailed, multi-step deliberative process to ensure that the Bar's legislative activities comply with the requirements of the State Bar Act and *Keller*. *See* ROA.4125-4133 (Policy Manual § 8.01). The Bar subjected the legislative proposals Plaintiffs cite to that rigorous scrutiny, and the Bar's expression of support

for each satisfies *Keller*. For example, the Bar's 2019 Legislative Program supported amending Texas law to conform to *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and *Lawrence v. Texas*, 539 U.S. 558 (2003), as well as the final judgment in *De Leon v. Perry*, No. SA-13-CA-00982-OLG (W.D. Tex. July 7, 2015) (ROA.3644), which declared unconstitutional and enjoined enforcement of "[a]ny Texas law denying same-sex couples the right to marry, including Article I, §32 of the Texas Constitution" and "any related provisions in the Texas Family Code."[17] *See* ROA.3959 (S.J.R. No. 9); *see also* ROA.3756. As the district court rightly concluded, "participating in legislative activities such as seeking to amend or repeal unconstitutional laws benefits the legal profession and improves the quality of legal services because it reduces the risk that lawyers, their clients, members of the public, or government officials will rely on laws that judicial decisions have rendered invalid."[18] ROA.3447; *cf. De Leon v. City of El Paso*, 353 S.W.3d 285, 288-89 (Tex. App.–El Paso 2011, no pet.) (seeking injunction against threatened enforcement of

[17] Plaintiffs err in suggesting that the Bar has supported "creat[ing] civil unions . . . as an alternative to marriage." Opening Br. 6 (citation omitted). On its face, the bill Plaintiffs cite, H.B. No. 978, would not have authorized the formation of civil unions in Texas. Instead, it addresses "civil union[s] . . . *entered into in another state*," within the context of the Family Code subchapter addressing interspousal claims for reimbursement. ROA.3965-3966 (emphasis added).

[18] Contrary to Plaintiffs' suggestion, the district court's decision does not empower the Bar Board to use mandatory fees to lobby for the repeal of any law that its members merely "*believe[]* to be unconstitutional" based on their "own reading of[] Supreme Court precedent." Opening Br. 37 (emphasis added). Instead, the district court's decision recognizes that *Keller* authorizes the Board to support efforts to clean up legal texts by amending or repealing provisions that "judicial decisions" have *actually* "rendered invalid." ROA.3447.

Tex. Penal Code Ann. § 21.06, which *Lawrence* invalidated). The remaining legislative proposals Plaintiffs cite in passing, *see* Opening Br. 6-7, address evidentiary and notice requirements in family-law cases and technical changes to the Estates Code. *See* ROA.3981-4019. Plaintiffs develop no meaningful argument those proposals fail the standard *actually* articulated in *Keller*. *See* 496 U.S. at 13-14; *see also GIC Servs., L.L.C. v. Freightplus USA, Inc.*, 866 F.3d 649, 667 n.23 (5th Cir. 2017).

Access to Justice. Plaintiffs do not dispute that the Bar's support of legal-aid organizations, *pro bono* efforts, and the Texas Access to Justice Commission improves the quality of legal services in Texas. Indeed, even with these initiatives, many Texans lack access to vital legal services. *See* ROA.3642 (Texas Judicial Council explaining that "more than 5.6 million Texans qualify for civil legal aid," but there is only "approximately one legal aid lawyer for every 8,000 Texans who qualify"); *accord* ROA.3732-3733. The lack of access to lawyers not only harms individuals; it also places serious burdens on courts overseeing litigation by *pro se* parties.

The Bar's Legal Access Division attempts to reduce the justice gap by providing critical assistance to attorneys and legal-aid organizations handling cases *pro bono*. *See* ROA.3604-3606, 3734-3736. It also helps connect *pro bono* volunteers with legal-services organizations needing assistance. *See* ROA.3736.

Although these efforts occasionally touch on headline-grabbing topics, such as immigration, *see* Opening Br. 9-10, the initiatives' purpose is not to "advance substantive ideological goals," *id.* at 40; it is to help ensure that individuals receive "access to justice" and "due process." ROA.3891; *see also* ROA.3737 (Bar seeks to provide assistance "regardless of . . . policy issues"). Just as a "lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities," Tex. Disciplinary R. Prof'l Conduct 6.01 cmt. 4, the Bar's facilitation of private attorneys' representation of low-income individuals needing legal assistance does *not* constitute an endorsement of particular viewpoints.

The Texas Supreme Court established the Texas Access to Justice Commission in 2001 in response to findings by a statewide planning group that "many poor people in Texas are underrepresented" and "many gaps exist in developing a comprehensive, integrated statewide civil legal-services delivery system in Texas." ROA.3594, 3597-3598; *see also* ROA.3447. Subject to the Texas Supreme Court's supervision, the Commission "develop[s] and implement[s] policy initiatives designed to expand access to and enhance the quality of justice in civil legal matters for low-income Texas residents." ROA.3595.

Although Plaintiffs assert that the Commission "engages in a variety of highly political and ideological activities, including lobbying," Opening Br. 9, the only

specific Commission lobbying activities about which Plaintiffs complain involve the Commission's fulfillment of its Court-assigned duty of "work[ing] to increase resources and funding for access to justice in civil matters," ROA.1607; *accord* ROA.3942 (noting Commission's "Support [for] the *Texas Supreme Court's* Legislative Appropriations Request for Basic Civil Legal Services" (emphasis added)); ROA.3742 (similar). *See* Opening Br. 9, 31, 38. Like the Legal Access Division's support of *pro bono* organizations, those efforts improve the quality of legal services available to low-income Texans and reduce the burdens on courts associated with *pro se* litigants. *See Keller*, 469 U.S. at 13-14. Plaintiffs also ignore that the Texas Supreme Court's order creating the Commission prohibits it from using Bar funds "for influencing the passage or defeat of any legislative measure unless the measure relates to the regulation of the legal profession, improving the quality of legal services, or the administration of justice and the amount of the expenditure is reasonable and necessary." Tex. Gov't Code Ann. § 81.034; *see also* ROA.3597 ("Commission is subject to section[] . . . 81.034"). Plaintiffs come nowhere close to establishing that the Commission's legislative activities—such as working with Texas legislators to "amend the current rotation process . . . for appointing *pro bono ad litem* attorneys" and endorsing a State Bar Act amendment authorizing "the Texas Supreme Court to promulgate rules permitting inactive

members to [provide] pro bono legal services"—violate *Keller*. ROA.3742-3743, 3944.

Plaintiffs are also wrong in suggesting that "pro bono efforts . . . have nothing to do with the *regulation* of attorneys or legal services." Opening Br. 32. As the district court explained, the Bar's access-to-justice programs "advance[] Texas' interest in professional regulation by . . . assist[ing] lawyers in fulfilling their 'ethical responsibility to provide public interest legal service.'" ROA.3448 (quoting Tex. Disciplinary R. Prof'l Conduct 6.01 cmt. 5); *accord* Am. Bar Ass'n, Model R. Prof'l Conduct 6.1; Tex. Disciplinary R. Prof'l Conduct, preamble ¶ 6; *see also Mallard v. U.S. Dist. Ct. for S. Dist. of Iowa*, 490 U.S. 296, 310 (1989) ("[L]awyers' ethical obligation to volunteer their time and skills *pro bono publico* is manifest.").

The district court also correctly rejected Plaintiffs' challenge to the $65 legal services fee imposed under Tex. Gov't Code Ann. § 81.054(j). *See* Opening Br. 10, 32, 40. Plaintiffs do not even attempt to contest the district court's conclusion that the legal services fee "is not subject to *Keller* because it is not used to fund any Bar expenditures, but rather is used by the Texas Supreme Court and the Texas Indigent Defense Commission to promote legal services for the indigent." ROA.3450 (citing Tex. Gov't Code Ann. § 81.054(c)-(d)). Plaintiffs' challenge to the fee fails for that reason alone. *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005) ("The government, as a general rule, may support valid programs and policies by taxes or

other exactions binding on protesting parties." (citation omitted)). But even if *Keller* applied, the legal services fee would satisfy *Keller* "because—like the Bar's access-to-justice programs—promoting legal services for the indigent is 'germane to' the state's interests in regulating the legal profession and improving the quality of legal services." ROA.3450 (quoting *Keller*, 496 U.S. at 13-14).

Diversity-Related Initiatives. As the district court found, "Texas has a long history of discrimination in the legal profession and legal education." ROA.3448; *see also, e.g.*, *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 866 (5th Cir. 1993) (en banc) (noting "Texas' long history of discrimination against its black and Hispanic citizens in all areas of public life"). The lingering effects of that history, as well as continuing, present-day discrimination, can impede the career opportunities of Texas attorneys and their ability to provide quality legal services to clients. The diversity-related initiatives that Plaintiffs challenge (Opening Br. 7-8, 31-32, 39) seek to reduce those barriers and promote "a fair and equal legal profession for minority, women, and LGBT attorneys." ROA.3841. In turn, those initiatives "help to build and maintain the public's trust in the legal profession and the judicial process as a whole." ROA.3448. And fostering diversity in the legal profession helps lawyers and courts bring a wide range of viewpoints and life experiences to bear on the legal problems faced by Texas's diverse population. *Cf. Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)

("[T]he skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."). The district court thus correctly concluded that the Bar's diversity-related initiatives, which accounted for just 1% of the Bar's 2019-2020 budget, *see* ROA.3697, 3867, advance the state's "interests in professional regulation and improving the quality of legal services." ROA.3448; *see also* ROA.3703-3704, 3711-3712.

Continuing Legal Education and Annual Meeting. Plaintiffs challenge the Bar's sponsorship of allegedly "ideologically charged Continuing Legal Education programs," including at its Annual Meeting. Opening Br. 10-11, 32. As the district court held, however, these programs satisfy *Keller* because they "assist Bar members in satisfying minimum continuing legal education requirement[s] in furtherance of the members' professional duty to maintain the requisite knowledge of a competent practitioner." ROA.3448 (citing State Bar R. art. XII, § 6; Disciplinary R. Prof'l Conduct 1.01 cmt. 8). Continuing legal education programs are thus central to the state's interests in professional regulation and improving legal-service quality, even if Plaintiffs may view some of them as "ideological" in nature. *See Lathrop*, 367 U.S. at 843 (plurality op.) ("cannot be denied" that "elevating the [bar's] educational and ethical standards" is "a legitimate end of state policy"). The programs' fees also "aid in funding the Bar's operations," helping the Bar keep membership fees low.

ROA.3449; *see also* ROA.3581, 3695. And the Bar reduces any risk of First Amendment harm—and, in fact, advances the free-speech values Plaintiffs purport to espouse—by sponsoring programs reflecting a wide variety of subject matters and viewpoints, while also making clear that the programs' speakers "do not necessarily reflect opinions of the State Bar." ROA.3640; *accord* ROA.3899; *see also* ROA.3449, 3694-3695.

Texas Bar Journal. Plaintiffs' challenge to the *Texas Bar Journal*, *see* Opening Br. 11, 33, is similarly meritless. As the district court explained, the *Journal* regularly publishes information directly related to the regulation of the legal profession, "including notices of disciplinary actions and amendments to evidentiary and procedural rules." ROA.3449 (citing Tex. R. Disciplinary P. 6.07; Tex. Gov't Code Ann. §§ 22.108(c), 22.109(c)); *see also* ROA.3696. The *Journal*'s articles also help Bar members stay "up-to-date on developments in the law and the legal profession." ROA.3449; *cf. Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 529 (1991) (rejecting First Amendment challenge to expenditures on union's journal); *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 456-57 (1984) (similar). And the *Journal* advances First Amendment values by featuring articles expressing "[v]arious viewpoints," including opinions "differing with the State Bar and/or Bar leaders," ROA.4122 (Policy Manual § 7.05.02), while making clear that the Bar does

not necessarily "endorse[] . . . the views expressed" in all *Journal* articles, ROA.3638; *see also* ROA.3449, 3696.[19]

III. Plaintiffs' Challenge To The Bar's Protest Procedure Fails

Plaintiffs also claim that the Bar's protest procedure in Policy Manual § 3.14 violates the First Amendment because it allegedly does not comport with pre-*Janus* precedent regarding the procedures that public unions had to implement to prevent compelled funding of activities unrelated to collective bargaining. *See* Opening Br. 41-49. Like their first two claims, however, Plaintiffs' challenge to the protest procedure is predicated on their erroneous contention that the Bar has "non-chargeable" expenditures (*id.*)—i.e., expenditures that were not "necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of . . . legal service[s]," *Keller*, 496 U.S. at 14 (citation omitted). While organizations that indisputably engage in both chargeable and non-chargeable activities may be required to adopt enhanced procedural safeguards to prevent the risk that they will improperly use objectors' funds to subsidize their non-chargeable activities, *see Hudson*, 475 U.S. at 302-03, organizations like the Bar that strictly limit themselves to chargeable activities do not present comparable First

[19] Plaintiffs' one-sentence reference to the Bar's advertising expenditures, *see* Opening Br. 11, is inadequate to present any challenge to them. *See GIC Servs.*, 866 F.3d at 667 n.23. Regardless, the district court correctly held that "*Keller* authorizes expenditures to inform lawyers and the public regarding the Bar's programs and the Bar's role in regulating the legal profession and advancing the quality of legal services," ROA.3449; *see also Kingstad*, 622 F.3d at 718-19 (upholding state bar public image campaign); *Gardner*, 284 F.3d at 1043 (similar).

Amendment concerns. Indeed, the purpose of a "*Hudson* notice"—to inform individuals of the "allocation of funds for chargeable and *nonchargeable purposes*," *Knox*, 567 U.S. at 318 (2012) (emphasis added); *accord* Opening Br. 46—is inapplicable where an integrated bar does not have any non-chargeable expenditures to report.

Plaintiffs have conceded that their protest-policy claim "only comes in if the Bar is doing . . . some nonchargeable things"; if "everything [the Bar] do[es] is . . . completely chargeable, then there's nothing to" Plaintiffs' protest-policy challenge. ROA.3539:19-24; *see also* Opening Br. 49 (arguing Bar's procedures are insufficient "[t]o the extent this Court concludes that the Bar has engaged in non-chargeable . . . activities"). *Contra* Opening Br. 41 (suggesting Plaintiffs' protest-policy challenge is "independent" argument). Plaintiffs' challenge to the Bar's protest procedure thus fails because, as explained above, *supra* pp. 52-63, the Bar only engages in activities that are "chargeable" to its members—i.e., activities furthering the state's interests in professional regulation and legal-service quality improvement. As Plaintiffs have not identified a single Bar expenditure that violates the *Keller* standard, there is—to use Plaintiffs' phrase—"nothing to" their challenge to the Bar's protest procedure, ROA.3539:19-23. *See* ROA.3450 ("[T]he Bar's procedures ensure that all of its expenditures comply with *Keller* . . . .").

In any event, Plaintiffs are wrong in arguing that the First Amendment requires the Bar to implement a protest procedure with more rigorous procedural protections than the one that the Bar in its discretion has chosen to adopt to informally settle claims by members who—perhaps erroneously—"*feel[]* that any actual or proposed expenditure is not within [the] purposes of, or limitations on, the State Bar." ROA.4098 (emphasis added) (Policy Manual § 3.14.01). Plaintiffs contend that the Bar has violated the First Amendment by declining to adopt the precise procedures described in *Hudson*, *see* Opening Br. 45-46, 48, but, as they admit, *Keller* "reserved for the future," *id.* at 46, the "question of whether integrated bars can adopt 'alternative procedures' to prevent bar members from being compelled to fund non-chargeable expenses," ROA.3450 (citing *Keller*, 496 U.S. at 17). Thus, nothing in *Keller* mandates that integrated bars adopt the exact procedures *Hudson* outlined.

As the district court correctly concluded, the Bar's "existing policies and procedures achieve the objective of procedural safeguards in the First Amendment by ensuring that 'the government treads with sensitivity in areas freighted with First Amendment concerns.'" ROA.3450 (quoting *Hudson*, 475 U.S. at 303 n.12). In addition to its blanket prohibition on expenditures that violate *Keller*, the Bar "provides members with advance, detailed notice of its proposed expenditures, along

with several opportunities to object to those expenditures before they occur." ROA.3450.

The Bar publishes its proposed annual budget and notice of a public hearing on the budget in the *Texas Bar Journal*, well in advance of the Bar Board's adoption of the budget and the June 1 deadline for annual membership fees. *See* ROA.3690, 3693 (2019-2020 proposed budget published in March *Texas Bar Journal*). The Bar's annual proposed budgets itemize particular categories of forecasted revenues and proposed expenditures, including for programs such as "Government Relations," "Minority Affairs," and the "Bar Journal." ROA.3866-3868. The Bar's website also publishes the Bar's recent annual financial statements and independent auditor's reports, which provide a detailed accounting of the Bar's finances and expenditures. *See* Our Finances, https://bit.ly/2JTy8Np (last visited July 30, 2020). Together, these disclosures more than satisfy any constitutional notice requirements that might apply to the Bar's expenditures. *See, e.g.*, *Hudson*, 475 U.S. at 307 n.18 (noting "adequate disclosure . . . would include the major categories of expenses").

Additionally, Bar members have numerous opportunities to object to proposed expenditures before they occur. *Contra* Att'y Gen. Br. 8 (suggesting attorneys may only object to expenditures by seeking "refunds . . . on the back end"); Opening Br. 43-44 (similar). Bar members may object "(1) at the annual public [budget] hearing required under Tex. Gov't Code § 81.022(b), (2) at the annual Bar

Board meeting at which the budget is approved under Policy Manual § 3.02.03, and (3) under the Policy Manual's protest procedure, which allows members to 'object to a *proposed* or actual expenditure,'" at any time. ROA.3451 (quoting Policy Manual § 3.14.02 (emphasis added)); *see also supra* p. 24. Bar members can also object to "proposed legislative activities and participate in the Legislative Policy Subcommittee meeting on the Bar's proposed legislative program" before its approval by the Bar Board. ROA.3451; *see also supra* p. 24. As the district court concluded, these procedural safeguards—which Plaintiffs have never utilized—more than satisfy any First Amendment requirements. *See* ROA.3450-51, 3699, 3721-3723.

IV. The Court Should Reject Plaintiffs' Request For Preliminary-Injunctive Relief

Because Plaintiffs' claims are meritless, Plaintiffs are not entitled to any relief. But even if the Court were to reverse on the issue of liability, it should nonetheless deny Plaintiffs' request that it "remand with instructions" for the district court to enter "a preliminary injunction pending further proceedings on remedies." Opening Br. 51. Especially considering that the scope of appropriate remedies may depend on which of their legal theories Plaintiffs prevail, *see supra* note 16, the Court should allow the district court in the first instance to determine the scope of any preliminary-injunctive relief, and whether to tailor any such relief to minimize interference with

the Bar's ability to achieve its important public purposes. *See* Tex. Gov't Code Ann. § 81.012.

CONCLUSION

The district court's judgment should be affirmed.

Dated: July 30, 2020

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CERTIFICATE OF SERVICE

The undersigned certifies that on July 30, 2020, I electronically filed the foregoing Brief of Defendants-Appellees with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

All counsel of record in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: July 30, 2020

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 12,994 words, excluding those sections exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 ProPlus in 14-point Times New Roman. Footnotes are in 12-point Times New Roman in compliance with Fifth Circuit Rule 32.1.

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STATUTORY ADDENDUM

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Tex. Gov't Code Ann. § 81.003

The state bar is subject to Chapter 325 (Texas Sunset Act). Unless continued in existence as provided by that chapter, this chapter expires September 1, 2029.

Tex. Gov't Code Ann. § 81.011

(a) The state bar is a public corporation and an administrative agency of the judicial department of government.

(b) This chapter is in aid of the judicial department's powers under the constitution to regulate the practice of law, and not to the exclusion of those powers.

(c) The Supreme Court of Texas, on behalf of the judicial department, shall exercise administrative control over the state bar under this chapter.

Tex. Gov't Code Ann. § 81.012

In order that the public responsibilities of the legal profession may be more effectively discharged, the state bar has the following purposes:

(1) to aid the courts in carrying on and improving the administration of justice;

(2) to advance the quality of legal services to the public and to foster the role of the legal profession in serving the public;

(3) to foster and maintain on the part of those engaged in the practice of law high ideals and integrity, learning, competence in public service, and high standards of conduct;

(4) to provide proper professional services to the members of the state bar;

(5) to encourage the formation of and activities of local bar associations;

(6) to provide forums for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform, and the relationship of the state bar to the public; and

(7) to publish information relating to the subjects listed in Subdivision (6).

Tex. Gov't Code Ann. § 81.022

(a) The executive director of the state bar shall confer with the clerk of the supreme court and shall supervise the administrative staff of the state bar in preparation of the annual budget.

(a-1) In developing and approving the annual budget, the state bar and supreme court shall:

(1) consider the goals and performance measures identified in the strategic plan developed under Section 81.0215; and

(2) identify additional goals and performance measures as necessary.

(a-2) Any change in a membership fee or other fee for state bar members must be:

(1) clearly described and included in the proposed budget; and

(2) considered by the supreme court in the state bar budget deliberations.

(a-3) Except as provided by Subsection (a-4), an increase in a membership fee or other fee for state bar members may not take effect until the supreme court:

(1) distributes the proposed fee change in ballot form to each member of the state bar and orders a vote;

(2) counts the returned ballots following the 30th day after the date the ballots are distributed; and

(3) promulgates the proposed fee, effective immediately, only on approval of the fee increase by a majority of the state bar members who voted on the increase.

(a-4) An increase in the fee for membership in the state bar may be made by the board of directors, without a vote of the members of the state bar, provided that not more than one increase may be made by the board of directors in a six-year period and such increase shall not exceed 10 percent.

(b) The proposed budget shall be presented annually at a public hearing. Not later than the 30th day before the day the hearing is held, the proposed budget and notice of the time and place of the budget hearing shall be disseminated to the membership of the state bar and to the public.

(c) The executive director shall preside at the budget hearing or, if the executive director is unable to preside, may authorize any employee of the administrative staff or any officer or director of the state bar to preside. Any member of the public may participate in the discussion of any item proposed to be included in the budget.

(d) After the public hearing, the proposed budget shall be submitted to the board of directors for its consideration. The budget adopted by the board of directors shall be submitted to the supreme court for final review and approval. The board of directors, at a regular or special meeting, may amend the budget subject to approval by the supreme court.

(e) After implementing a budget approved by the supreme court, the state bar shall report to the court regarding the state bar's performance on the goals and performance measures identified in the strategic plan developed under Section 81.0215. The state bar shall:

(1) revise the goals and performance measures as necessary; and

(2) notify the supreme court of the revisions.

Tex. Gov't Code Ann. § 81.034

Fees collected under this chapter and other funds received by the state bar may not be used for influencing the passage or defeat of any legislative measure unless the measure relates to the regulation of the legal profession, improving the quality of legal services, or the administration of justice and the amount of the expenditure is reasonable and necessary. This subsection does not prohibit a member of the board of directors or an officer or employee of the state bar from furnishing information in the person's possession that is not confidential information to a member or committee of the legislature on request of the member or committee.

Tex. Gov't Code Ann. § 81.051

(a) The state bar is composed of those persons licensed to practice law in this state. Bar members are subject to this chapter and to the rules adopted by the supreme court.

(b) Each person licensed to practice law in this state shall, not later than the 10th day after the person's admission to practice, enroll in the state bar by registering with the clerk of the supreme court.

Tex. Gov't Code Ann. § 81.052

(a) A bar membership is one of four classes: active, inactive, emeritus, or associate.

(b) Each licensed member of the state bar is an active member until the person requests to be enrolled as an inactive member.

(c) An inactive member is a person who:

(1) is eligible for active membership but not engaged in the practice of law in this state; and

(2) has filed with the executive director and the clerk of the supreme court written notice requesting enrollment as an inactive member.

(d) An inactive member at his request may become an active member on application and payment of required fees.

(e) An emeritus member is a person who:

(1) is either an active or inactive member in good standing who is at least 70 years old; and

(2) has filed a written notice requesting enrollment as an emeritus member.

(f) A person enrolled in law school in this state may be enrolled as an associate member.

Tex. Gov't Code Ann. § 81.054

(a) The supreme court shall set membership fees and other fees for members of the state bar during the court's annual budget process under Section 81.022. The fees, except as provided by Subsection (j) and those set for associate members, must be set in accordance with this section and Section 81.022.

(b) An emeritus member is not required to pay a membership fee for the year in which the member reaches the age of 70 or any year following that year.

(c) Fees shall be paid to the clerk of the supreme court. The clerk shall retain the fees, other than fees collected under Subsection (j), until distributed to the state bar for expenditure under the direction of the supreme court to administer this chapter. The clerk shall retain the fees collected under Subsection (j) until distribution is approved by an order of the supreme court. In ordering that distribution, the supreme court shall order that the fees collected under Subsection (j) be remitted to the comptroller at least as frequently as quarterly. The comptroller shall credit 50 percent of the remitted fees to the credit of the judicial fund for programs approved by the supreme court that provide basic civil legal services to the indigent and shall credit the remaining 50 percent of the remitted fees to the fair defense account in the general revenue fund which is established under Section 79.031, to be used, subject to all requirements of Section 79.037, for demonstration or pilot projects that develop and promote best practices for the efficient delivery of quality representation to indigent defendants in criminal cases at trial, on appeal, and in postconviction proceedings.

(d) Fees collected under Subsection (j) may be used only to provide basic civil legal services to the indigent and legal representation and other defense services to

indigent defendants in criminal cases as provided by Subsection (c). Other fees collected under this chapter may be used only for administering the public purposes provided by this chapter.

(e) The state bar by rule may adopt a system under which membership fees are due on various dates during the year. For the year in which a due date is changed, the annual fee shall be prorated on a monthly basis so that the member pays only that portion of the fee that is allocable to the number of months remaining before the new expiration date. An increase in fees applies only to fees that are payable on or after the effective date of the increase.

(f) A person who is otherwise eligible to renew the person's membership may renew the membership by paying the required membership fees to the state bar on or before the due date.

(g) A person whose membership has been expired for 90 days or less may renew the membership by paying to the state bar membership fees equal to 1-½ times the normally required membership fees.

(h) A person whose membership has been expired for more than 90 days but less than one year may renew the membership by paying to the state bar membership fees equal to two times the normally required membership fees.

(i) Not later than the 30th day before the date a person's membership is scheduled to expire, the state bar shall send written notice of the impending expiration to the person at the person's last known address according to the records of the state bar.

(j) The supreme court shall set an additional legal services fee in an amount of $65 to be paid annually by each active member of the state bar except as provided by Subsection (k). Section 81.024 does not apply to a fee set under this subsection.

(k) The legal services fee shall not be assessed on any Texas attorney who:

(1) is 70 years of age or older;

(2) has assumed inactive status under the rules governing the State Bar of Texas;

(3) is a sitting judge;

(4) is an employee of the state or federal government;

(5) is employed by a city, county, or district attorney's office and who does not have a private practice that accounts for more than 50 percent of the attorney's time;

(6) is employed by a 501(c)(3) nonprofit corporation and is prohibited from the outside practice of law;

(7) is exempt from MCLE requirements because of nonpracticing status; or

(8) resides out of state and does not practice law in Texas.

(l) In this section, "indigent" has the meaning assigned by Section 51.941.

Tex. Gov't Code Ann. § 81.102

(a) Except as provided by Subsection (b), a person may not practice law in this state unless the person is a member of the state bar.

(b) The supreme court may promulgate rules prescribing the procedure for limited practice of law by:

(1) attorneys licensed in another jurisdiction;

(2) bona fide law students; and

(3) unlicensed graduate students who are attending or have attended a law school approved by the supreme court.

Tex. Gov't Code Ann. § 325.011

The commission and its staff shall consider the following criteria in determining whether a public need exists for the continuation of a state agency or its advisory committees or for the performance of the functions of the agency or its advisory committees:

(1) the efficiency and effectiveness with which the agency or the advisory committee operates;

(2)(A) an identification of the mission, goals, and objectives intended for the agency or advisory committee and of the problem or need that the agency or advisory committee was intended to address; and

(B) the extent to which the mission, goals, and objectives have been achieved and the problem or need has been addressed;

(3)(A) an identification of any activities of the agency in addition to those granted by statute and of the authority for those activities; and

(B) the extent to which those activities are needed;

(4) an assessment of authority of the agency relating to fees, inspections, enforcement, and penalties;

(5) whether less restrictive or alternative methods of performing any function that the agency performs could adequately protect or provide service to the public;

(6) the extent to which the jurisdiction of the agency and the programs administered by the agency overlap or duplicate those of other agencies, the extent to which the agency coordinates with those agencies, and the extent to which the programs administered by the agency can be consolidated with the programs of other state agencies;

(7) the promptness and effectiveness with which the agency addresses complaints concerning entities or other persons affected by the agency, including an assessment of the agency's administrative hearings process;

(8) an assessment of the agency's rulemaking process and the extent to which the agency has encouraged participation by the public in making its rules and decisions and the extent to which the public participation has resulted in rules that benefit the public;

(9) the extent to which the agency has complied with:

(A) federal and state laws and applicable rules regarding equality of employment opportunity and the rights and privacy of individuals; and

(B) state law and applicable rules of any state agency regarding purchasing guidelines and programs for historically underutilized businesses;

(10) the extent to which the agency issues and enforces rules relating to potential conflicts of interest of its employees;

(11) the extent to which the agency complies with Chapters 551 and 552 and follows records management practices that enable the agency to respond efficiently to requests for public information;

(12) the effect of federal intervention or loss of federal funds if the agency is abolished;

(13) the extent to which the purpose and effectiveness of reporting requirements imposed on the agency justifies the continuation of the requirement; and

(14) an assessment of the agency's cybersecurity practices using confidential information available from the Department of Information Resources or any other appropriate state agency.