No.

In the Supreme Court of the United States

SYLVIA BORUNDA FIRTH, ET AL., CROSS-PETITIONERS,

v.

TONY K. MCDONALD, ET AL.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

JOSHUA S. JOHNSON
MORGAN A. KELLEY
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6623

THOMAS S. LEATHERBURY
Counsel of Record
VINSON & ELKINS LLP
2001 Ross Ave., Suite 3900
Dallas, TX 75201
(214) 220-7792
tleatherbury@velaw.com

PATRICK W. MIZELL
VINSON & ELKINS LLP
1001 Fannin St., Suite 2500
Houston, TX 77002
(713) 758-2932

QUESTIONS PRESENTED

The plaintiffs in this case—members of the mandatory State Bar of Texas—have filed a petition for a writ of certiorari, which has been docketed as Case Number 21-800. Although the defendants—the voting members of the Texas State Bar's Board of Directors sued only in their official capacities—believe that the plaintiffs' certiorari petition should be denied, they conditionally cross-petition for this Court's review of the following questions:

1. Whether the State Bar of Texas, which is "a public corporation and an administrative agency of the judicial department of [the Texas] government," Tex. Gov't Code Ann. § 81.011(a), qualifies as a government agency for purposes of the government speech doctrine, such that the State Bar of Texas's speech is "not subject to scrutiny under the [First Amendment's] Free Speech Clause," *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 464 (2009).

2. To the extent that this Court's case law—including *Keller* v. *State Bar of California*, 496 U.S. 1 (1990)—precludes applying the government speech doctrine to the State Bar of Texas's speech, whether that precedent should be overruled.

PARTIES TO THE PROCEEDINGS

Cross-petitioners, defendants-appellees below, are the voting members of the Board of Directors of the State Bar of Texas, sued only in their official capacities. Under Federal Rule of Civil Procedure 25(d) and Federal Rule of Appellate Procedure 43(c)(2), the successors of individuals who were previously named as defendants but who are no longer members of the Bar's Board of Directors have been automatically substituted as parties. Cross-petitioners are Sylvia Borunda Firth, Laura Gibson, Larry P. McDougal, Santos Vargas, Benny Agosto, Jr., Andrés E. Almanzán, Chad Baruch, Kate Bihm, Rebekah Steely Brooker, David N. Calvillo, Luis M. Cardenas, Luis Cavazos, Jason Charbonnet, Kelly-Ann F. Clarke, Thomas A. Crosley, Christina M. Davis, Steve Fischer, Lucy Forbes, August W. Harris III, Britney E. Harrison, Forrest L. Huddleston, Michael K. Hurst, Lori M. Kern, Bill Kroger, Yolanda Cortés Mares, Dwight McDonald, Carra Miller, Lydia Elizondo Mount, Kimberly M. Naylor, Jeanine Novosad Rispoli, Michael J. Ritter, Adam T. Schramek, Audie Sciumbato, Mary L. Scott, David Sergi, D. Todd Smith, G. David Smith, Jason C. N. Smith, Diane St. Yves, Nitin Sud, Robert L. Tobey, Andrew Tolchin, G. Michael Vasquez, Kimberly Pack Wilson, and Kennon L. Wooten, in their official capacities as members of the Board of Directors of the State Bar of Texas.

Cross-respondents, plaintiffs-appellants below, are Tony K. McDonald, Joshua B. Hammer, and Mark S. Pulliam.

RELATED PROCEEDINGS

Supreme Court of the United States:

McDonald et al. v. *Firth et al.*, No. 21-800 (petition for a writ of certiorari docketed on November 30, 2021)

U.S. Court of Appeals for the Fifth Circuit:

McDonald et al. v. *Longley et al.*, No. 20-50448 (July 2, 2021)

U.S. District Court for the Western District of Texas:

McDonald et al. v. *Sorrels et al.*, No. 1:19-cv-219-LY (May 29, 2020) (original judgment); (Dec. 2, 2021) (judgment entered on remand from the Fifth Circuit)

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-petitioners—members of the State Bar of Texas Board of Directors sued only in their official capacities—respectfully submit this conditional cross-petition for a writ of certiorari pursuant to this Court's Rule 12.5 to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1-43,[1] is reported at 4 F.4th 229. The opinion of the district court, Pet. App. 44-65, is not published in the *Federal Supplement* but is available at 2020 WL 3261061.

JURISDICTION

The Fifth Circuit's judgment was entered on July 2, 2021. The petition for a writ of certiorari in Case Number 21-800 to which this conditional cross-petition relates was docketed on November 30, 2021. This conditional cross-petition is timely filed within 30 days of November 30, in accordance with this Court's Rule 12.5. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of

[1] "Pet." refers to the petition for a writ of certiorari in Case Number 21-800. "Pet. App." refers to the appendix to that petition.

the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "No State shall * * * deprive any person of life, liberty, or property, without due process of law."

INTRODUCTION

In *Keller* v. *State Bar of California*, 496 U.S. 1 (1990), this Court reaffirmed its holding in *Lathrop* v. *Donohue*, 367 U.S. 820 (1961), that states may require licensed attorneys "to join and pay dues" to a mandatory state bar (also known as an "integrated bar"). *Keller*, 496 U.S. at 4-5. *Keller*, however, also held that integrated bars must limit their member-funded expressive activities to those germane to the state interests justifying integrated bars' existence—i.e., "regulating the legal profession and improving the quality of legal services." *Id.* at 13-14. *Keller* imposed this limitation based on its conclusion that integrated bars should be treated like labor unions rather than government agencies for purposes of First Amendment analysis. *Id.* at 11-13. That holding prevents integrated bars from benefitting from the government speech doctrine—the principle that government speech is "not subject to scrutiny under the [First Amendment's] Free Speech Clause." *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 464 (2009). If integrated bars were treated as government agencies under the First Amendment, they would be "entitled to say what [they] wish[]," rather than restricting their member-funded speech to issues germane to the

permissible state interests identified in *Keller*. *Id.* at 467 (citation omitted).

The plaintiffs in this case are members of the mandatory State Bar of Texas, which is "an administrative agency of the judicial department of [the Texas] government," subject to the "administrative control" of the Supreme Court of Texas. Tex. Gov't Code Ann. § 81.011(a), (c). The plaintiffs sued the voting members of the Texas State Bar's Board of Directors in their official capacities, claiming that the requirements that they enroll in, and pay annual membership fees to, the State Bar violate their First Amendment rights to freedom of speech and association. After receiving partial relief in the Fifth Circuit, the plaintiffs have filed a petition for a writ of certiorari asking this Court to revisit *Keller* (and *Lathrop*, on which *Keller* relied) in light of subsequent developments in this Court's First Amendment case law involving labor unions, including *Janus* v. *American Federation of State, County, & Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018). See Pet. 17-34.

This Court should deny the plaintiffs' request for review. But if the Court is inclined to revisit *Keller*, this conditional cross-petition asks that the Court reassess that decision in its entirety—including *Keller*'s holding that integrated bars should be treated like labor unions rather than government agencies, and thus do not qualify for the protection of the government speech doctrine. That holding is the very foundation of the plaintiffs' argument that the evolution of this Court's First Amendment case law in the union context warrants revisiting *Keller*'s approval of integrated bars (subject to limitations on their member-funded

expressive activities). *Keller*'s refusal to apply the government speech doctrine to integrated bars like the Texas State Bar is also suspect in light of subsequent developments in this Court's government speech jurisprudence, including *Johanns* v. *Livestock Marketing Ass'n*, 544 U.S. 550 (2005), which held that a promotional campaign funded by mandatory industry assessments qualified as government speech.

By granting this conditional cross-petition, the Court would ensure that it is equipped to perform the task that the plaintiffs have requested—i.e., reconsidering *Keller* "based on first principles." Pet. 34. This Court cannot sensibly review the issues raised in the plaintiffs' certiorari petition without also considering the antecedent question of whether, for purposes of the government speech doctrine, the Texas State Bar should be treated as the government agency that state law expressly says it is. Tex. Gov't Code Ann. § 81.011(a).

STATEMENT

1. As petitioners note, an "integrated bar"—such as the State Bar of Texas—is "an *official state organization* requiring membership and financial support of all attorneys admitted to practice in that jurisdiction." Pet. 5 (emphasis added) (quoting Comment, *The Integrated Bar Association*, 30 Fordham L. Rev. 477, 477 (1962)); see also *Keller* v. *State Bar of Cal.*, 496 U.S. 1, 4-5 (1990). Accordingly, to practice law in Texas, attorneys must enroll in the Texas State Bar and pay annual membership fees. See Tex. Gov't Code Ann. §§ 81.051, 81.054, 81.102. Like Texas, a substantial majority of states have integrated bars. See Pet. App. 2; see also ROA.3691-3692 (listing "31 states

(including the District of Columbia) [that] have integrated bars").[2]

Texas law makes clear that the State Bar of Texas is a component of the Texas state government. In 1939, the Texas legislature created the State Bar as "an administrative agency of the Judicial Department of the State." State Bar Act § 2, 1939 Tex. Gen. Laws 64. Today, the State Bar Act (Tex. Gov't Code Ann. ch. 81) provides that the Bar "is a public corporation and an administrative agency of the judicial department of [the Texas] government," subject to the Supreme Court of Texas's "administrative control."[3] Tex. Gov't Code Ann. § 81.011(a), (c); see also *id.* § 81.011(b) (State Bar Act "is in aid of the judicial department's powers under the constitution to regulate the practice of law"). 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

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[2] "ROA" refers to the record on appeal before the Fifth Circuit.

[3] Under Texas law, a "public corporation" is a corporation "created for public purposes only." *Miller* v. *Davis*, 150 S.W.2d 973, 978 (Tex. 1941). A "public corporation" is "connected with the administration of the government," and its "interests and franchises * * * are the exclusive property and domain of the government itself." *Ibid.*; cf. *Department of Transp.* v. *Ass'n of Am. R.R.*, 575 U.S. 43, 53-54 (2015) (holding that the National Railroad Passenger Corporation, more often known as Amtrak, is "a governmental entity for purposes of the Constitution's separation of powers provisions"); *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 399 (1995) (holding that Amtrak "is part of the Government for purposes of the First Amendment").

integrity, learning, competence in public service, and high standards of conduct." *Id.* § 81.012.

The Texas Supreme Court has delegated "the responsibility for administering and supervising lawyer discipline and disability"—a "core" government function, *Hoover* v. *Ronwin*, 466 U.S. 558, 569 n.18 (1984) (citation omitted)—"to the Board of Directors of the State Bar of Texas." Tex. R. Disciplinary P., preamble. The State Bar's President appoints the attorney members of the Commission for Lawyer Discipline, which selects Texas's Chief Disciplinary Counsel "with the advice and consent" of the State Bar's Board of Directors. Tex. Gov't Code Ann. § 81.076(b), (g). Bar directors nominate, and the President appoints, the members of local grievance committees, which preside over disciplinary proceedings. Tex. R. Disciplinary P. 2.02, 2.07, 2.11-2.15, 2.17. The President also appoints four of the members of the Committee on Disciplinary Rules and Referenda, which is charged with proposing amendments to Texas's disciplinary rules. Tex. Gov't Code Ann. §§ 81.0872-81.0873, 81.0875. The State Bar's Board of Directors must approve any disciplinary-rule amendments proposed by the Committee before they can take effect. *Id.* §§ 81.0877, 81.08792.

Approximately half of the Texas State Bar's annual revenue comes from membership fees.[4] See Pet. App. 4; 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

[4] The Bar's second largest revenue source is fees from continuing legal education programs. See Pet. App. 4 n.3.

for at least 5 years; and $50 for inactive members.[5] ROA.3689, 4075. Those fees may not be increased without the Texas Supreme Court's approval. See 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 Texas Supreme Court also has ultimate authority over how the Bar's membership fees are spent. Members pay their fees to the Clerk of the Texas Supreme Court, not to the Bar itself. *Id.* § 81.054(c). The Bar's budget must be approved by the Texas Supreme Court. *Id.* § 81.022(d). Moreover, the Texas Supreme Court Clerk will distribute membership fees to cover Bar expenditures only "under the direction of the supreme court." *Id.* § 81.054(c); see also *id.* § 81.0151 (Bar "[p]urchases are subject to the ultimate review of the supreme court").

Reflecting the Bar's status as a state "agency," *id.* § 81.011(a), the Texas legislature has imposed additional restrictions on the Bar's use of Bar funds. The Bar's Board must "adopt guidelines and procedures for purchasing that are consistent with the guidelines and procedures" applicable to other state agencies. *Id.*

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[5] In addition to Bar membership fees, most active Bar members must pay a $65 annual legal services fee. Tex. Gov't Code Ann. § 81.054(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 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).

§ 81.0151. The Bar may not use membership fees to purchase alcohol. *Id.* § 81.0221. The Bar also may not use its funds to influence "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." *Id.* § 81.034. In addition, the Bar must maintain reports regarding its purchases and "make those reports available for review by the state auditor." *Id.* § 81.0151; see also *id.* § 81.023 (State Bar is "subject to audit by the state auditor" and must file its annual financial reports "with the supreme court, the governor, and the presiding officer of each house of the legislature").

The Bar's budget is also used to fund entities not subject to the Bar Board's direct control, including the Commission for Lawyer Discipline, the Office of Chief Disciplinary Counsel, the Board of Disciplinary Appeals, the Ombudsman for the Attorney Discipline System, the Committee on Professional Ethics, the Unauthorized Practice of Law Committee, and the Texas Access to Justice Commission. See *id.* §§ 81.076(f), 81.0882(a), 81.095, 81.103(f); Tex. R. Disciplinary P. 4.08, 5.01; Order Establishing Texas Access to Justice Commission § 12, Misc. Docket No. 01-9065 (Tex. Apr. 26, 2001), ROA.3597. More generally, the Bar is required to "allocate funds to pay all * * * reasonable and necessary expenses to administer the disciplinary and disability system effectively and efficiently." Tex. R. Disciplinary P. 4.08.

Further confirming its status as a state agency, the Bar is subject to numerous other legislatively imposed restrictions and requirements. Like other state

agencies in Texas, the Bar is subject to periodic "sunset" reviews by the legislature to determine "whether a public need exists" for the Bar's continued existence.[6] Tex. Gov't Code Ann. §§ 81.003, 325.011. It is also subject to the same open meetings and records laws as other state agencies. See *id.* §§ 81.021, 81.033. The State Bar Act reserves a role for both the Texas governor and the Texas Senate in appointing the Bar Board's non-attorney members. See *id.* § 81.020(b)(4) (Board's six non-attorney members are "appointed by the supreme court and confirmed by the senate"); *id.* § 81.020(c) ("The supreme court shall annually appoint two nonattorney members, with at least one of the two from a list of at least five names submitted by the governor."). The Act also contains numerous provisions governing the selection and ethical obligations of the Bar's officers, directors, Executive Director, and General Counsel. See *id.* §§ 81.019-81.020, 81.0241, 81.025, 81.027-81.031. The Act further requires Bar Board members to complete a training program covering eight specific topics. *Id.* § 81.0201. In addition, the Bar must develop a long-range strategic plan and report its performance measures to the Texas Supreme Court and in the *Texas Bar Journal*. *Id.* § 81.0215. Other legislatively imposed requirements include that the Bar establish a standard fee dispute resolution procedure, *id.* § 81.112; provide a course on guardianship, *id.* § 81.114; create and maintain online attorney profiles, *id.* § 81.115; and refrain from creating new

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[6] 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. Pet. App. 49.

standing or special committees of the Bar unless certain conditions are satisfied, *id.* § 81.123.

The Bar is also subject to rules promulgated by the Texas Supreme Court. See *id.* § 81.024. Those rules impose detailed requirements regarding numerous aspects of the Bar's activities, from the location of the Bar's principal office to procedures for Bar meetings and the election of Bar directors and officers. See State Bar R. art. II, §§ 5, 14 (Nov. 2021), https://bit.ly/3I2BsR7; *id.* art. IV, §§ 6-7, 11. The rules require all State Bar officers and directors to take the oath of office required for state officials under the Texas Constitution. See *id.* art. II, § 9 (citing Tex. Const. art. 16, § 1).

2. In March 2019, the cross-respondents—three Texas State Bar members—filed suit in the U.S. District Court for the Western District of Texas against the cross-petitioners, the voting members of the Bar's Board of Directors sued only in their official capacities. The plaintiffs asserted claims under 42 U.S.C. § 1983. In Counts I and II of their complaint, the plaintiffs claimed that the requirements that they enroll in, and pay annual membership fees to, the Bar violated their First Amendment rights to freedom of association and speech. See ROA.2148-2150. In Count III, the plaintiffs claimed that the "Bar's procedures are inadequate to ensure that members are not coerced into funding" expenditures that are not germane to the permissible purposes of a mandatory bar under *Keller*. ROA.2151. The plaintiffs sought declaratory and injunctive relief. ROA.2152. In May 2020, the district court granted summary judgment to the Bar defendants on all of the

plaintiffs' claims and dismissed the plaintiffs' motion for a preliminary injunction. Pet. App. 44-65.

3. On appeal, the Fifth Circuit vacated the grant of summary judgment to the Bar defendants, rendered partial summary judgment for the plaintiffs on liability, rendered a "preliminary injunction preventing the Bar from requiring the plaintiffs to join or pay dues pending completion of the remedies phase" before the district court, and remanded to the district court for further proceedings on remedies.[7] Pet. App. 43.

The Fifth Circuit recognized that, under this Court's decisions in *Keller* and *Lathrop* v. *Donohue*, 367 U.S. 820 (1961), integrated bars "may constitutionally charge mandatory dues to 'fund activities germane' to 'the purpose[s] for which compelled association [is] justified,' i.e., 'regulating the legal profession and improving the quality of legal services.'" Pet. App. 18 (quoting *Keller*, 496 U.S. at 13-14). The Fifth Circuit, however, held that "[c]ompelled membership in a bar association that engages in non-germane activities" violates objecting members' right to freedom of association, and compelling objecting members "to subsidize * * * non-germane activities violates their freedom of speech." *Id.* at 23, 36.

The Fifth Circuit rejected the plaintiffs' contention that "all 'activities of a "political or ideological" nature' necessarily are non-germane." *Id.* at 24. *Keller*, the Fifth Circuit observed, "said mandatory dues cannot be used to 'fund activities of an ideological nature

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[7] The Fifth Circuit also concluded that the Tax Injunction Act, 28 U.S.C. § 1341, did not bar the plaintiffs' suit. See Pet. App. 13-16.

which fall outside of [the permissible] areas of activity'" (i.e., "regulating the legal profession" and "improving the quality of legal services"). *Ibid.* (quoting *Keller*, 496 U.S. at 13-14). Therefore, the Fifth Circuit explained, *Keller* "contemplates that some political or ideological activities might be germane." *Id.* at 24-25. The Fifth Circuit concluded that nothing in this Court's "later decisions * * * purported to alter *Keller*'s standard." *Ibid.*

The court concluded that nearly all of the Bar's challenged activities were germane—including its support of *pro bono* and legal-aid efforts, annual meeting, continuing legal education programs, publication of the *Texas Bar Journal*, and diversity initiatives. *Id.* at 29-36. The court also recognized that *Lathrop* and *Keller* foreclosed the plaintiffs' proposed "bright line rule that *any* legislative lobbying is non-germane." *Id.* at 25. The court explained that lobbying on legislation regarding the "functioning of the state's courts," the "legal system writ large," or the "laws governing the activities of lawyers *qua* lawyers" was germane. *Id.* at 26. The court, however, held that certain components of "the Bar's 2019 legislative program," as well as certain prior legislative activities of the Bar-funded Access to Justice Commission, exceeded those bounds and were thus non-germane. *Id.* at 27-28, 34 & n.36.

Based on those non-germane legislative activities, the court held that requiring the plaintiffs to enroll in the Bar violated their right to freedom of association, and the Bar's use of the plaintiffs' mandatory membership fees to fund non-germane activities violated their right to free speech. *Id.* at 36-37. In addition, on the plaintiffs' Count III claim, the court held that "the

Bar's procedures for separating chargeable from non-chargeable expenses" were "constitutionally inadequate." *Id.* at 37-42.

The Fifth Circuit, however, noted that the Bar could remedy the constitutional violations by not "engaging in non-germane activities," and by amending its procedures to ensure that Bar members receive adequate notice of, and opportunity to object to, potentially non-germane expenditures. *Id.* at 36, 40-42. Because the plaintiffs had only sought "partial summary judgment on liability," the Fifth Circuit remanded for further proceedings in the district court on remedies. *Id.* at 11, 43.

In their district court and Fifth Circuit briefing, the Bar defendants noted that they "disagree[d] with *Keller*'s refusal to treat the California State Bar as a state agency for purposes of First Amendment analysis." Bar Defs. C.A. Br. 38 n.7; accord Bar Defs. Cross-Mot. for Summ. J. 18 n.10 (May 13, 2019), ECF No. 35. The Bar defendants recognized that "*Keller* binds" lower courts. Bar Defs. C.A. Br. 38 n.7; accord Bar Defs. Cross-Mot. for Summ. J. 18 n.10. But they "preserve[d] 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." Bar Defs. C.A. Br. 38 n.7 (citing *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 467 (2009)); accord Bar Defs. Cross-Mot. for Summ. J. 18 n.10.

4. At its September 24, 2021 meeting, the Bar's Board of Directors approved amendments to the

Board's Policy Manual to ensure compliance with the Fifth Circuit's decision. See App., *infra*, 1a-12a (district court filing summarizing amendments). Acting on a petition from the Bar, the Texas Supreme Court also amended the Texas State Bar Rules in response to the Fifth Circuit's decision. See *id.* at 4a; Order Amending Articles I and II of the State Bar Rules, Misc. Docket No. 21-9122 (Tex. Oct. 12, 2021), https://www.txcourts.gov/media/1452997/219122.pdf. Among other things, those amendments made clear that a Bar representative may not "purport to speak on behalf of all State Bar members or to represent that all State Bar members support the message that the representative is conveying." State Bar R. art. II, § 13.

On remand from the Fifth Circuit, the parties in this case agreed to a proposed final judgment, which the district court entered on December 2, 2021. See App., *infra*, 13a-17a.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

The plaintiffs have filed a petition for a writ of certiorari asking this Court to revisit the portion of *Keller* holding that lawyers "may be required to join and pay dues" to a state bar, and that a mandatory bar may use members' dues on 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.'" *Keller*, 496 U.S. at 4, 14 (quoting *Lathrop*, 367 U.S. at 843 (plurality op.)); see also Pet. 17-34.[8] The Court should deny the

[8] The plaintiffs also ask the Court to revisit *Lathrop*, on which *Keller* relied. Because this conditional cross-petition presents the

plaintiffs' petition. But if the Court grants that petition, it should also grant this conditional cross-petition, which asks the Court to reconsider *Keller*'s refusal to treat an integrated bar as a state government agency for purposes of the First Amendment government speech doctrine, even if the integrated bar is a government agency as a matter of state law. See *Keller*, 496 U.S. at 10-13. This Court's subsequent case law demonstrates that the State Bar of Texas's speech is government speech, so "the Free Speech Clause has no application" to the Bar's expressive activities—wholly undermining the basis for the plaintiffs' First Amendment claims. *Pleasant Grove*, 555 U.S. at 467. *Keller* foreclosed this government-speech argument below, but the Bar defendants preserved the argument for this Court's review. See Bar Defs. C.A. Br. 38 n.7; Bar Defs. Cross-Mot. for Summ. J. 18 n.10. If the Court accepts the plaintiffs' invitation to revisit *Keller*, it should reassess that decision in full, including *Keller*'s erroneous treatment of a state agency's expressive activities as non-governmental speech.

I. *Keller*'s Refusal To Treat Integrated Bars' Speech As Government Speech Was Central To Its Analysis And Thus Should Be Reconsidered If This Court Revisits *Keller*

The government-speech issue was central in *Keller*. Like the plaintiffs here, the *Keller* plaintiffs claimed that the mandatory State Bar of California's "use of their membership dues to finance certain ideological

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question of whether an integrated bar's speech qualifies as government speech, an issue squarely addressed only in *Keller*, see *Keller*, 496 U.S. at 10-13, the cross-petition focuses primarily on *Keller*.

or political activities to which they were opposed violated" their First Amendment rights. *Keller*, 496 U.S. at 4. Rejecting the plaintiffs' claims, the California Supreme Court held that the California Bar qualified as a "government agency," so its expressive activities were not "subject[] * * * to First Amendment scrutiny." *Id.* at 6-7, 10; see also *Keller* v. *State Bar of Cal.*, 767 P.2d 1020, 1030 (Cal. 1989) ("We conclude that the State Bar, considered as a government agency, may use dues for any purpose within the scope of its statutory authority."); *Keller* v. *State Bar of Cal.*, 226 Cal. Rptr. 448, 457, 472 (Cal. Ct. App. 1986) (describing the question of whether "the State Bar is a governmental agency" "entitled to speak politically and ideologically" as "the lynchpin upon which this case hangs or falls"). Accordingly, the first question presented in *Keller* was whether "the First Amendment" was even "implicated" by the California State Bar's activities. Petition for Writ of Certiorari, *Keller* v. *State Bar of Cal.*, 496 U.S. 1 (1990) (No. 88-1905), 1989 U.S. S. Ct. Briefs LEXIS 1563, at *1.

This Court answered that question in the affirmative, and in doing so drew the "analogy" between integrated bars and labor unions that serves as the entire foundation for the plaintiffs' certiorari petition.[9] *Keller*, 496 U.S. at 12. In its decision, the Court noted that the California State Bar "invok[ed] the so-called 'government speech' doctrine." *Id.* at 10. The

[9] The plurality in *Lathrop* similarly analogized between labor unions and integrated bars in holding that the mandatory State Bar of Wisconsin did not violate bar members' First Amendment right to freedom of association. See *Lathrop*, 367 U.S. at 842-843 (plurality op.).

California Bar argued that because the "government must take substantive positions and decide disputed issues to govern," it "may speak despite citizen disagreement with the content of its message" as "long as it bases its actions on legitimate goals." *Ibid.* (quoting Brief for Respondents 16).

In response, this Court acknowledged that "the process of government as we know it" would be "radically transformed" if "every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed." *Id.* at 12-13. The Court also recognized that the California Supreme Court "is the final authority on the 'governmental' status of the State Bar of California for purposes of state law." *Id.* at 11. The Court, however, stated that the California Supreme Court's determination that the California Bar was a "government agency" was "not binding" on this Court where the determination was "essential to the decision of a federal question." *Ibid.*

The Court thus engaged in its own inquiry into whether the California Bar qualified as a government agency for purposes of the First Amendment, such that Bar members had no constitutional entitlement to object to Bar expressive activities with which they disagreed. In concluding that the California Bar did not qualify as a government agency for purposes of the government speech doctrine, the Court cited three factors: (1) the Bar was primarily funded with "dues levied on its members by the [Bar's] board of governors," rather than by legislative appropriations; (2) the Bar's membership was comprised exclusively of lawyers licensed to practice in California, all of whom were required to be Bar members; and (3) rather than

directly engaging in regulation, the Bar was largely limited to the role of an advisor to the California Supreme Court and legislature, which bore "the ultimate responsibility of governing the legal profession." *Id.* at 11-13.

By contrast, the Court concluded that "[t]here is * * * a substantial analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of employee unions and their members, on the other." *Id.* at 12. The Court recognized that the analogy to labor unions was imperfect because members of an integrated bar "do not benefit as directly from its activities as do employees from union negotiations with management." *Ibid.* Nevertheless, the Court concluded that integrated bars should be "subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees." *Id.* at 13.

Much of *Keller*'s remaining analysis—and, in turn, the Fifth Circuit's analysis below—flowed from the "analogy" *Keller* drew between labor unions and integrated bars. *Id.* at 12; see also Pet. App. 16 n.14 (noting that *Keller* "drew from the then-existing jurisprudence on the First Amendment implications of mandatory union dues"). The Court noted that, under *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), "a union could not expend a dissenting individual's dues for ideological activities not 'germane' to the purpose for which compelled association was justified: collective bargaining." *Keller*, 496 U.S. at 13. Similarly, the Court held that integrated bars could only spend mandatory member dues on activities germane to the state interests justifying integrated bars—i.e.,

"regulating the legal profession and improving the quality of legal services." *Id.* at 13-14. Citing *Ellis* v. *Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435 (1984)—another union case—the Court held that "the guiding standard" for integrated bars "must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of the legal service available to the people of the State." *Keller*, 496 U.S. at 14 (citation omitted).

In sum, in deciding the First Amendment challenge to the California State Bar's expressive activities, the *Keller* Court considered two alternative legal frameworks—the government speech doctrine, under which Bar members would enjoy no constitutional entitlement to object to the Bar's speech, and the labor-union framework, under which the Bar would need to limit its use of mandatory dues to the state interests justifying the Bar's existence. *Keller* based its analysis on an "analogy" to the union framework. *Id.* at 12. The plaintiffs in this case now argue that subsequent developments in this Court's case law regarding unions warrant revisiting the constitutionality of integrated bars. See Pet. 3, 24-27. The plaintiffs are incorrect: The legal framework articulated in *Keller* remains workable and has engendered substantial reliance by states with integrated bars; it does not warrant reconsideration. But if the Court chooses to revisit *Keller*, it should revisit that decision in its entirety, including its critical threshold holding that integrated bars like the California Bar do not qualify as "government agencies" for purposes of the government speech doctrine. *Keller*, 496 U.S. at 10-13.

II. Post-*Keller* Case Law Supports Treating The Texas State Bar's Speech As Government Speech

This Court's review of the government-speech issue is particularly appropriate because the Court's case law on the government speech doctrine has developed significantly since *Keller*. As evidenced by the fact that *Keller* referred to the "*so-called* 'government speech' doctrine," 496 U.S. at 10 (emphasis added), the doctrine was not well developed as of 1990, when *Keller* was decided. See Petitioners' Opening Brief, *Keller*, 1989 WL 429014, at *21 (asserting that "[t]he existence of the doctrine [was] hinted at * * * in various concurring and dissenting opinions"); see also *Keller*, 496 U.S. at 10-11 (quoting Justice Powell's concurrence in the judgment in *Abood* in describing doctrine); cf. *Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) ("[t]he government-speech doctrine is relatively new").

Since *Keller*, the Court has issued several decisions that have more clearly defined the contours of the government speech doctrine.[10] For purposes of this case,

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[10] See, *e.g.*, *Matal* v. *Tam*, 137 S. Ct. 1744, 1757 (2017) ("The First Amendment prohibits Congress and other government entities and actors from 'abridging the freedom of speech'; the First Amendment does not say that Congress and other government entities must abridge their own ability to speak freely."); *Walker* v. *Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 219-220 (2015) (specialty license plates were government speech); *Pleasant Grove*, 555 U.S. at 464 (display of donated monuments in public park was government speech); *Board of Regents of Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217, 229 (2000) ("The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties."); *Rust*

the most important of those decisions is *Johanns* v. *Livestock Marketing Ass'n*, 544 U.S. 550 (2005). In *Johanns*, this Court held that advertisements for beef and beef products that were funded by an assessment on beef producers and importers and were designed by a committee of industry representatives, subject to the Secretary of Agriculture's approval, were government speech, and thus were "exempt from First Amendment scrutiny." *Id.* at 553-555, 560-567. *Johanns* emphasized that the Court had not previously "considered the First Amendment consequences of government-compelled subsidy of the government's own speech." *Id.* at 557. The Court explained that in all of its prior First Amendment cases addressing compelled subsidies of speech—including *Keller*—"the speech was, or was presumed to be, that of an entity other than the government itself." *Id.* at 559. By contrast, *Johanns* held that "compelled funding of government speech" is "perfectly constitutional" and does not "raise First Amendment concerns." *Ibid.* As *Johanns* explained, citizens "have no First Amendment right not to fund government speech." *Id.* at 562.

In holding that the advertisements were government speech, *Johanns* engaged in a straightforward analysis: Because the "message of the promotional campaigns [was] effectively controlled" by government officials, the advertisements qualified as government speech. *Id.* at 560. It did not matter that the

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v. *Sullivan*, 500 U.S. 173, 193 (1991) ("The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.").

advertisements were designed by a committee of beef-industry representatives, only half of whom were appointed by the Agriculture Secretary. *Ibid.* Nor did it matter that the advertisements were "funded by a targeted assessment on beef producers, rather than by general revenues." *Id.* at 562. Nor did it even matter "whether * * * the reasonable viewer would identify the speech as the government's." *Id.* at 564 n.7. It was sufficient that Congress and the Agriculture Secretary provided "general," "overarching" guidance regarding the advertisements' content, and the Agriculture Secretary had "final approval authority" over the advertisements. *Id.* at 561; see also *id.* at 563-564. Neither the "assistance from nongovernmental sources" nor the "funding mechanism" removed the advertisements from the ambit of the government speech doctrine. *Id.* at 562.

Under that analysis, the conclusion that the Texas State Bar's expressive activities qualify as government speech, and thus do not "raise First Amendment concerns," *id.* at 559, should follow *a fortiori*. In *Johanns*, the advertisements at issue were designed by a committee of industry representatives. *Id.* at 553-554, 560. Here, by contrast, Texas law expressly identifies the speaker—the Texas State Bar—as "an administrative agency of the judicial department of government." Tex. Gov't Code Ann. § 81.011(a); see also, *e.g.*, *Bishop* v. *State Bar of Tex.*, 791 F.2d 435, 438 (5th Cir. 1986) ("[T]he State Bar of Texas is a state agency such that an action for damages is barred by the eleventh amendment."); App., *infra*, 15a-16a (judgment entered "upon the agreement of the parties" in this action recognized that "sovereign immunity" shielded the Bar

defendants from an award of monetary restitution).[11] Under the Court's reasoning in *Johanns*, that alone should suffice to render the Texas State Bar's speech "exempt from First Amendment scrutiny." *Johanns*, 544 U.S. at 553.

But if more is needed, ample additional grounds exist for treating the Texas State Bar's speech as government speech. The Bar acts as a statewide regulatory agency: The Texas Supreme Court has delegated to the Bar Board "the responsibility for administering and supervising lawyer discipline and disability." Tex. R. Disciplinary P., preamble; see also p. 6, *supra*. As this Court has recognized, regulating the practice of law is a "core" government function. *Hoover*, 466 U.S. at 569 n.18 (citation omitted). The fact that the Bar is required to serve this and other legislatively prescribed "public objectives" weighs decisively in favor of treating the Bar as a government entity. *Department of Transp.* v. *Ass'n of Am. R.R.*, 575 U.S. 43, 53 (2015); see also Tex. Gov't Code Ann. § 81.012. Moreover, in carrying out its statutorily defined functions, the Texas State Bar is subject to the "administrative control" of the Texas Supreme Court. Tex. Gov't Code Ann. § 81.011(c). And all State Bar officers and directors must take the oath of office required for state officials under the Texas Constitution.

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[11] Texas case law also treats the Bar as an arm of the state, recognizing that the Bar "is a governmental agency that is entitled to the protection afforded by sovereign immunity" under Texas state law. *State Bar of Tex.* v. *Wilson*, No. 03-18-00649-CV, 2019 WL 1272616, at *2 (Tex. App. Mar. 20, 2019), cert. denied, 140 S. Ct. 848 (2020).

See State Bar R. art. II, § 9 (citing Tex. Const. art. 16, § 1).

Significantly, *Johanns* directly contradicts a key rationale on which *Keller* relied in refusing to treat the California State Bar as a government agency for purposes of the government speech doctrine. *Keller* asserted that the California State Bar was "a good deal different from most" government agencies because its principal funding came from targeted assessments (i.e., member dues) rather than legislative appropriations. 496 U.S. at 11. That reasoning does not survive *Johanns*. Under *Johanns*, whether expressive activities qualify as government speech is "altogether unaffected by whether the funds for the [activities were] raised by general taxes or through a targeted assessment." 544 U.S. at 562. Citizens "have no First Amendment right not to fund government speech," and "that is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object." *Ibid.*

To be sure, in *dicta*, *Johanns* purported to distinguish *Keller* on a different basis—that the "degree of governmental control over the message" was greater in *Johanns* than in *Keller*. *Id.* at 561. *Johanns* asserted that "the state bar's communicative activities to which the [*Keller*] plaintiffs objected were not prescribed by law in their general outline and not developed under official government supervision," and they included "lobbying the state legislature on various issues." *Id.* at 562.

That reasoning, however, provides no basis for carving the Texas State Bar's speech out from the

government speech doctrine. The Texas State Bar *itself* is a component of the Texas government: It is "an administrative agency of the judicial department of government." Tex. Gov't Code Ann. § 81.011(a). This case thus presents no question of the "degree of governmental control over the message[s]" being communicated. *Johanns*, 544 U.S. at 561. When the Texas State Bar speaks, an agency of the Texas government itself is speaking.

In any event, consistent with the Bar's status as an administrative agency, all three branches of the Texas government have mechanisms for exercising control over the Bar. As previously explained, the State Bar Act expressly provides for the Texas Supreme Court's "administrative control" of the Bar. Tex. Gov't Code Ann. § 81.011(c). The Texas Supreme Court must approve the Bar's annual budget. *Id.* § 81.022(d). The court also controls the Bar's membership fees: The fees may not be increased without the Texas Supreme Court's approval, and the Clerk of the Texas Supreme Court collects the fees and will distribute them to cover Bar expenditures only "under the direction of the supreme court." *Id.* § 81.054(a), (c); see also *id.* § 81.0151 (Bar "[p]urchases are subject to the ultimate review of the supreme court"). In addition, the Bar is subject to detailed rules imposed by the Texas Supreme Court regarding its "operation, maintenance and conduct." State Bar R. art. II, § 3; see also p. 10, *supra*. In short, the Texas State Bar conducts its expressive activities "under [the] official government supervision" of the Texas Supreme Court. *Johanns*, 544 U.S. at 562.

The Texas legislature and governor also exercise control over the State Bar through legislation.[12] Much as in *Johanns*, the "general outline" of the activities in which the Bar may engage is "prescribed by law." *Ibid.* The State Bar Act enumerates the specific "purposes" of the State Bar, Tex. Gov't Code Ann. § 81.012, and expressly provides that the State Bar may not use its 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," *id.* § 81.034. Like other state agencies, the Bar is subject to periodic legislative "sunset" reviews of whether the Bar should be "continued in existence." *Id.* § 81.003. Also like other state agencies, the Bar is further subject to open meetings and records laws, state audits, reporting requirements, ethics mandates, and other legislatively imposed requirements and restrictions regarding its internal organization, operations, and use of funds. See *id.* §§ 81.0151, 81.019-81.0215, 81.0221-81.023, 81.0241, 81.025, 81.027-81.031, 81.033, 81.112, 81.114-81.115, 81.123; see also pp. 7-10, *supra*.; cf. *Ass'n of Am. R.R.*, 575 U.S. at 55 ("practical reality of federal control and supervision" supported treating Amtrak as government entity).

The only remaining basis provided in *Johanns* for distinguishing that case from the integrated-bar context is that integrated bars may "lobby[] the state legislature." *Johanns*, 544 U.S. at 562. But

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[12] Texas's governor and Senate also play a role in the appointment of the Bar Board's non-attorney members. See Tex. Gov't Code Ann. § 81.020(b)(4), (c).

government agencies routinely lobby for or against legislative proposals and for funding. See, *e.g.*, U.S. Department of Justice, Office of Legislative Affairs, https://www.justice.gov/ola (last visited Dec. 28, 2021); U.S. Environmental Protection Agency, Office of Congressional and Intergovernmental Relations, https://bit.ly/3nHtQtW (last visited Dec. 28, 2021). Therefore, the Texas State Bar's legislative activities provide no reason for refusing to treat it as a government agency for purposes of the government speech doctrine.

Treating the Texas State Bar's speech as government speech also accords with the theory of democratic accountability underlying the government speech doctrine. The government's freedom to "determin[e] the content of what it says" reflects the understanding that "the democratic electoral process" serves as the most appropriate "check on government speech." *Walker* v. *Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015). Government officials are "accountable to the electorate and the political process for [the government's] advocacy." *Board of Regents of Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217, 235 (2000). "If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Ibid.*

That rationale applies fully to the Texas State Bar. The vast majority of the defendants in this action—the voting members of the State Bar's Board of Directors—are elected by fellow Bar members. See Tex. Gov't Code Ann. §§ 81.019(a), 81.020(b) (elected officers of the Bar and the Texas Young Lawyers Association and directors elected from districts constitute 36 of the

Board's 46 voting members); see also State Bar R. art. IV, §§ 6, 11; Bylaws of the Texas Young Lawyers Ass'n art. IV, https://www.texasbar.com/tylabylaws.[13] Of the remaining defendants, the four at-large directors are appointed by the elected President of the Bar, Tex. Gov't Code Ann. § 81.020(b)(5), (d), and the six non-attorney directors are appointed by the Texas Supreme Court (the Justices of which are elected), with an opportunity for input from Texas's governor and subject to confirmation by Texas's Senate, *id.* § 81.020(b)(4), (c); see also Tex. Const. art. 5, § 2(c). Given the democratic accountability of the Bar's Board of Directors, the Bar's speech should not "trigger * * * First Amendment rules" that would allow a small minority to silence the Bar, preventing the Bar's Board from carrying out "its electoral mandate." *Walker*, 576 U.S. at 207; see also *Pleasant Grove*, 555 U.S. at 468 ("a First Amendment heckler's veto of any forced contribution" to government speech is "out of the question" (quoting *Johanns*, 544 U.S. at 574 (Souter, J., dissenting))).

Finally, this Court's subsequent case law demonstrates that *Keller*'s refusal to treat integrated-bar speech as government speech conflicts with basic principles of federalism. In *Garcetti* v. *Ceballos*, 547 U.S. 410, 421 (2006), this Court held that the First Amendment does not protect public employees from discipline for statements made "pursuant to their official duties." "To hold otherwise," the Court recognized, "would be to demand permanent judicial intervention in the conduct of governmental operations to a degree

[13] When the seat of a Board member elected from a district becomes vacant, the Bar's President—an elected official—appoints a Bar member to fill the vacancy. See State Bar R. art. IV, § 8.

inconsistent with sound principles of federalism and the separation of powers." *Id.* at 423. The same is true of the *Keller* standard: It invites federal judges' second-guessing of whether each individual expressive activity of mandatory state bars is germane to professional regulation or improving the quality of legal services. *Keller*, 496 U.S. at 13-14. It would be far more in keeping with federalism principles for federal courts to respect Texas state law's designation of the Texas State Bar as a government agency, see Tex. Gov't Code Ann. § 81.011(a), and accordingly treat the Bar's expressive activities as government speech for purposes of the government speech doctrine.

In sum, the development of this Court's government speech jurisprudence since *Keller*—and especially this Court's decision in *Johanns*—casts serious doubt on *Keller*'s holding that integrated-bar speech is not government speech exempt from First Amendment scrutiny. Therefore, if the Court grants the plaintiffs' certiorari petition, it should also grant review of whether the Texas State Bar qualifies as a government agency for purposes of the government speech doctrine.

III. This Case Provides A Suitable Vehicle For Addressing The Government-Speech Issue, And That Issue Could Dispose Of The Plaintiffs' Claims

This case provides a suitable vehicle for reconsidering *Keller*'s refusal to apply the government speech doctrine to integrated bars. Although *Keller* foreclosed the courts below from holding that the Texas State Bar's speech qualifies as government speech, the Bar defendants nonetheless preserved the issue. See Bar

Defs. C.A. Br. 38 n.7; Bar Defs. Cross-Mot. for Summ. J. 18 n.10. Moreover, whether the Texas State Bar's expressive activities qualify as government speech is a legal question that this Court may decide without any additional factual development.

Further favoring this Court's review, treating the Texas State Bar's speech as government speech would likely dispose of the plaintiffs' claims in their entirety. As the Fifth Circuit's repeated reliance on this Court's case law involving unions and other non-governmental entities demonstrates,[14] all of the plaintiffs' claims rest on analogizing the Texas State Bar to a non-governmental association, rather than treating it as the government agency that it is. See Pet. 3, 24-27. If the Texas State Bar qualifies as a government agency for purposes of the government speech doctrine, then the plaintiffs have no more basis for objecting to their compelled enrollment in, and fee payments to, the Bar than municipal residents do of their city government's taxpayer-funded speech. See, *e.g.*, *Avocados Plus Inc.* v. *Johanns*, 421 F. Supp. 2d 45, 54-55 (D.D.C. 2006) (rejecting freedom-of-association challenge to program involving compelled subsidization of government speech, and explaining that "[i]t is well-settled that the First Amendment offers no protection against compelled association with government actors or the

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[14] See, *e.g.*, Pet. App. 19-24, 37-42 (citing, *inter alia*, *Janus* v. *Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018); *Harris* v. *Quinn*, 573 U.S. 616 (2014); *Knox* v. *Serv. Emps. Int'l Union*, 567 U.S. 298 (2012); *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640 (2000); *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292 (1986); *Roberts* v. *U.S. Jaycees*, 468 U.S. 609 (1984); and *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977)).

government itself"); cf. *Janus* v. *Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018) ("compelled subsidization of *private* speech seriously impinges on First Amendment rights" (emphasis added)).

To be sure, the plaintiffs might have a viable *compelled-speech* claim if they could show that the Bar's speech "were attributed to" them. *Johanns*, 544 U.S. at 565; see also *id.* at 557-558 (distinguishing between "compelled-speech" and "compelled-subsidy" claims, and categorizing challenges to integrated bars as compelled-subsidy claims). Such a compelled-speech claim, however, would be different from the claims the plaintiffs have asserted in this case. It would require evidence that the Bar's speech has actually been attributed to the plaintiffs, and the plaintiffs have not even attempted to make that showing.[15] See *id.* at

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[15] The Fifth Circuit stated generally that "when a bar association [engages in expressive activities], part of its expressive message is that its members stand behind its expression," so "[c]ompelling membership * * * compels support of that message." Pet. App. 21-22. But the Fifth Circuit did not find that any Bar expressive activities have been specifically attributed to the individual plaintiffs in this case, nor would the record support such a finding. And this Court's decision in *Johanns* makes "clear that government speech generically attributed to a large group * * * does not constitute compelled speech with regard to individual members of the group." *Dixon* v. *Johanns*, No. CV-05-03740-PHX-NVW, 2006 WL 3390311, at *12 (D. Ariz. Nov. 21, 2006); accord *Avocados Plus*, 421 F. Supp. 2d at 57 (*Johanns* "makes clear that a generic tagline, like those used in Avocado Act promotions, without more, is insufficient to raise the possibility of attribution"); see also *Johanns*, 544 U.S. at 566 (attribution of advertisements to "America's Beef Producers" was not "sufficiently

565-567 (holding that record did not support compelled-speech claim where plaintiffs presented no "evidence of attribution" of government speech to them). Furthermore, the risk of such erroneous attribution going forward is minimal because, after the Fifth Circuit's decision in this case, the Texas Supreme Court amended the State Bar Rules to clarify that Bar representatives may not "purport to speak on behalf of all State Bar members or to represent that all State Bar members support the message that the representative is conveying." State Bar R. art. II, § 13; see also p. 14, *supra*. Because the plaintiffs' complaint seeks only prospective declaratory and injunctive relief, see ROA.2152, no basis exists for them to pursue a compelled-speech claim. Cf. *New York State Rifle & Pistol Ass'n* v. *City of New York*, 140 S. Ct. 1525, 1526 (2020) (per curiam) (amendment of challenged law mooted claims for declaratory and injunctive relief). Therefore, treating the Texas State Bar's speech as government speech should fully dispose of the plaintiffs' claims.

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specific" to establish viable compelled-speech claim by beef producers).

CONCLUSION

The petition for a writ of certiorari in Case Number 21-800 should be denied. If that petition is granted, however, then this conditional cross-petition for a writ of certiorari should also be granted.

Respectfully submitted.

JOSHUA S. JOHNSON
MORGAN A. KELLEY
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6623

THOMAS S. LEATHERBURY
Counsel of Record
VINSON & ELKINS LLP
2001 Ross Ave., Suite 3900
Dallas, TX 75201
(214) 220-7792
tleatherbury@velaw.com

PATRICK W. MIZELL
VINSON & ELKINS LLP
1001 Fannin St., Suite 2500
Houston, TX 77002
(713) 758-2932

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