No. 21-800

In the Supreme Court of the United States

TONY K. MCDONALD, ET AL., PETITIONERS,

v.

SYLVIA BORUNDA FIRTH, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the First Amendment permits Texas to require lawyers licensed to practice in the state to enroll in the State Bar of Texas and pay annual Bar membership fees, as long as the Bar limits its expressive activities to those germane to regulating the legal profession or improving the quality of legal services.

PARTIES TO THE PROCEEDINGS

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

Respondents, 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. Respondents 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-Brewer, 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.

RELATED PROCEEDINGS

Supreme Court of the United States:

Firth et al. v. *McDonald et al.*, No. 21-974 (conditional cross-petition for a writ of certiorari filed on December 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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INTRODUCTION

In *Keller* v. *State Bar of California*, 496 U.S. 1 (1990), this Court unanimously 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* also articulated the "guiding standard" for ensuring that integrated bars do not infringe their members' First Amendment rights of freedom of association and speech: Member-funded bar expenditures are permissible if they are germane to "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.)). Approximately three-fifths of states nationwide have relied on *Keller* and *Lathrop* in structuring their attorney disciplinary and regulatory systems around integrated bars.

Now, the petitioners—members of the mandatory State Bar of Texas—ask this Court to upend states' reliance on this decades-old settled law by reimagining the guiding standard articulated in *Keller*, or even overruling *Keller* and *Lathrop* entirely. Over the past two years, this Court has rejected four similar requests for it to revisit its integrated-bar precedents. The Court should do the same here.

The petitioners' "primary argument" is both splitless and meritless. Pet. 4. The petitioners contend that *Keller* prohibits an integrated bar from engaging in any activity that might be characterized as "political" or "ideological" in nature. *Id.* at 17-23. Even the Fifth Circuit panel below, which expressly sought to avoid "expanding [*Keller*'s] reach," Pet. App. 17 n.14, recognized that the petitioners' argument is squarely

foreclosed by *Keller*, *id.* at 24-25. The "guiding standard" under *Keller* is whether the member-funded bar expenditure is germane to "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.)); accord *Jarchow* v. *State Bar of Wis.*, 140 S. Ct. 1720, 1720 (2020) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari) (*Keller* "held that '[t]he State Bar may . . . constitutionally fund activities germane to [its] goals' of 'regulating the legal profession and improving the quality of legal services'" (quoting *Keller*, 496 U.S. at 13-14)). As the Fifth Circuit's decision below explained, that standard "contemplates that some political or ideological activities might be germane." Pet. App. 24-25. In so holding, the Fifth Circuit joined every other court of appeals that has addressed the question since *Keller*. The fact that the petitioners' "primary argument" (Pet. 4) rests on an untenable interpretation of *Keller* that no court of appeals has adopted strongly weighs against granting review.

The petitioners' fallback request that this Court overrule *Keller* and *Lathrop* (*id.* at 23-34) also does not warrant this Court's review. The petitioners' argument for disregarding *stare decisis* is weak: The petitioners cite recent developments in this Court's First Amendment case law addressing the distinct issue of union "agency fees," but ignore that the Court has expressly stated that *Keller* "is wholly consistent with" and "fits comfortably within the [legal] framework applied" in those recent decisions. *Harris* v. *Quinn*, 573 U.S. 616, 655-656 (2014). Given that this Court expressly reaffirmed *Keller* in its recent union

decisions, there is no basis for the petitioners' argument that those decisions require overruling either *Keller* or *Lathrop* (on which *Keller* relied). An integrated bar is qualitatively different than a labor union, and the First Amendment rules governing each need not move in lockstep.

The *Keller* standard remains workable, as the Fifth Circuit's application of that standard to the Bar activities challenged in this case demonstrates. Furthermore, the mere requirements that attorneys enroll in and pay annual membership fees to an integrated bar operating under *Keller* do not significantly impose on attorneys' First Amendment interests, especially given that attorneys remain free to express views or join associations that disagree with the bar. On the other hand, overruling *Keller* and *Lathrop* would frustrate the substantial reliance interests of the numerous states with integrated bars, severely disrupting how the legal systems in those states operate and—at least in Texas's case—likely requiring extensive legislative intervention. Therefore, any "weighing of practical effects" decisively favors allowing *Keller* and *Lathrop* to stand. *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J., concurring in part) (citation omitted). The petition should be denied.[1]

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[1] The petitioners' amici add little. Although Texas's Attorney General has filed an amicus brief purportedly on behalf of the "State of Texas," that Executive Department official does not in this suit speak for the Texas State Bar, "an administrative agency of the judicial department" with independent litigating authority. Tex. Gov't Code Ann. §§ 81.011(a), 81.014; see also Tex. Const. art. II, § 1 ("no person, * * * being of one * * * department[], shall

STATEMENT

1. As the petitioners note, an "integrated bar" is "an official state organization requiring membership and financial support of all attorneys admitted to practice in that jurisdiction." Pet. 5 (quoting Comment, *The Integrated Bar Association*, 30 Fordham L. Rev. 477, 477 (1962)); accord *Keller* v. *State Bar of Cal.*, 496 U.S. 1, 4-5 (1990). 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]

This Court has twice considered First Amendment challenges to integrated bars. In *Lathrop* v. *Donohue*, 367 U.S. 820 (1961), a Wisconsin lawyer claimed that the state's integrated bar violated his rights of freedom of association and free speech. *Id.* at 821-823 (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. A four-Justice plurality concluded that Wisconsin's integrated bar did not violate the First Amendment's guarantee of freedom of association. *Id.* at 842-843. The plurality explained that a state may constitutionally require attorneys to pay dues to an integrated bar "in order to further the State's legitimate interests in raising the quality of professional services." *Id.* at 843.

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exercise any power properly attached to either of the others"); *id.* art. IV, § 1 (Attorney General in Executive Department).

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

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 835-839, 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 845-848. Three Justices concurring in the judgment—Justices Harlan, Frankfurter, and Whittaker—would have gone further, concluding that the integrated bar did not violate either the plaintiff's free-association or free-speech rights. *Id.* at 849-850 (Harlan, J., joined by Frankfurter, J., concurring in judgment); *id.* at 865 (Whittaker, J., concurring in result).

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. In a unanimous decision, 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 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.'" *Ibid.* (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.

In *Keller*, the Court drew an "analogy" between integrated bars and labor unions. *Id.* at 12. At the time of *Keller*, this Court's case law in the context of public-sector unions authorized "agency shop" arrangements, under which a government employer required its employees to contribute financially to a union serving as the employees' exclusive collective-bargaining agent. See *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 223-232 (1977). In recent opinions authored by Justice Alito, this Court questioned *Abood*, see *Harris* v. *Quinn*, 573 U.S. 616, 635-638 (2014), and then overruled it, see *Janus* v. *Am. Fed'n of State, Cnty., & Mun.*

Emps., 138 S. Ct. 2448, 2463-2486 (2018). As a result, government employees may no longer be required to pay agency fees to unions. See *Janus*, 138 S. Ct. at 2486. Nevertheless, *Harris* reaffirmed *Keller*, explaining that the "holding in *Keller*" was "wholly consistent with," and "fit[] comfortably within the [exacting-scrutiny] framework applied in," *Harris*. *Harris*, 573 U.S. at 655-656. Similarly, as the dissenters in *Janus* emphasized, the Court's decision in that case "d[id] not question" *Keller*. *Janus*, 138 S. Ct. at 2498 (Kagan, J., dissenting).

2. In 1939, the Texas legislature created the State Bar of Texas 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

[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.*

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

The State Bar of Texas is an integrated bar—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. As of May 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, 81.08792(3) (providing for election of Bar officers and most Bar directors and referendum by Bar members on proposed disciplinary rules). Bar members also may join voluntary subject-matter sections, such as the Bar's Family Law Section. See Pet. App. 5. But for lawyers uninterested in such matters, Texas law requires no more than registration with the Bar and annual fee payments. See Tex. Gov't Code Ann. §§ 81.051, 81.054. 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.

Approximately half of the 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

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

years; $148 for active members licensed between 3 and 5 years; $235 for active members licensed for at least 5 years; and $50 for inactive members. ROA.3689, 4075.

The Texas Supreme Court 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. Tex. Gov't Code Ann. § 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); accord *id.* § 81.0151 (Bar "[p]urchases are subject to the ultimate review of the supreme court"); see also *id.* § 81.054(d) (membership fees "may be used only for administering the public purposes" provided for in State Bar Act).

In addition to Bar membership fees, most active Bar members must pay a $65 annual legal services fee. *Id.* § 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).

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." *Id.* §§ 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. Pet. App. 49.

3. The Texas State Bar engages in an array of activities furthering Texas's interests in professional regulation and improving the quality of legal services. See *Keller*, 496 U.S. at 13-14. To start, the Texas Supreme Court has delegated "the responsibility for administering and supervising lawyer discipline and disability * * * 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. And the Bar must "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.

The Bar also publishes the *Texas Bar Journal*, which provides information and articles regarding "legal matters and the affairs of the State Bar and its members." State Bar R. art. IX (Nov. 2021), https://bit.ly/3I2BsR7. 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 Pet. App. 35; 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. 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.

In addition, the Bar and its sections sponsor continuing legal education programs on an array of topics. See Pet. App. 9; see also Pet. 13 (discussing such programs, including programs at Bar's annual meeting). 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 State Bar R. art. XII, § 6; Tex. Disciplinary R. Pro. 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.

The Bar also engages in "numerous activities aimed at making legal services available to the needy." Pet. App. 8. 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 as a statewide umbrella organization for efforts to expand low-income Texans' access to legal services. ROA.3594-3598, 3740-3741; see also Pet. App. 9. The Bar also maintains its own Legal Access Division, which 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.3733-3740; Pet. App. 8.

The Legal Access Division helps connect attorneys willing to provide *pro bono* services with legal-services organizations that facilitate the provision of legal services to the needy. As part of that effort, and in response to widespread expressions of interest by Bar members, the Division in 2018 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, 3890-3891; Pet. 11-12. That is just one example of the numerous resources the Bar provides to Texas attorneys seeking to serve the public. See Pet. App. 8-9, 33. 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 Feb. 3, 2022).

The Bar's Office of Minority Affairs 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. "[A]ll Texas attorneys are encouraged to participate" in the Office's programs, regardless of their race, sex, or sexual orientation. Pet. App. 8; see also ROA.3697, 3702. The Office accounted for just 1% of the Bar's 2019-2020 proposed budget. ROA.3697, 3866-3867.

Legislative activities similarly account for a miniscule portion of the Texas State Bar's operations. The Bar's Governmental Relations Department constituted just 0.34% of the Bar's 2019-2020 budget. ROA.3698, 3866-3867. 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; see also Pet. App. 7 n.8.

Texas's State Bar Act precludes the Bar from using funds to "infuenc[e] 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." Tex. Gov't Code Ann. § 81.034. The Bar has adopted detailed procedures to ensure that any legislative proposal on which the Bar or any voluntary subject-matter section takes a position has undergone thorough review. See ROA.4125-4133 (September 2018

edition of State Bar of Texas Board of Directors Policy Manual § 8.01 ("Policy Manual")); see also Policy Manual § 8.01 (Sept. 2021), available at https://bit.ly/3gk6hnF (current edition of Policy Manual).

State Bar employees did not lobby in support of any of the legislative proposals in the Bar's 2019 legislative program. ROA.3720-3721. Instead, members of the Bar's voluntary sections coordinated any lobbying activities. *Ibid.*; see also Pet. App. 7. The Bar did not provide compensation for that work, and the sections were responsible for any associated expenses. ROA.3721.

The Bar provides several other important services. For example, the Bar serves as a clearinghouse for legal information and resources during natural disasters and other crises. ROA.3587-3588, 3736-3739. It also administers the Texas Lawyers' Assistance Program, which assists lawyers, judges, and law students with mental-health and addiction issues, ROA.3603, and the Client Security Fund, which provides "discretionary grants to clients who have been harmed by their lawyers' dishonest conduct," ROA.4087.

Bar members have numerous opportunities to object to the Bar's proposed or actual expenditures. See Pet. App. 9-11. 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 of Directors meeting at which the budget is approved—both of which occur before the deadline for annual membership fees. See Tex. Gov't Code Ann. § 81.022(b)-(c); see also ROA.3690, 3693. Members have been afforded

opportunities to object to proposals that the Bar take positions on legislative initiatives. See ROA.3721-3722. The Bar has also adopted a protest procedure that allows members to file a written objection to any "proposed or actual expenditure" and seek a *pro rata* refund of a portion of their membership fees, plus interest, on the ground that the expenditure allegedly violates *Keller*. Policy Manual § 3.14 (Sept. 2021); see also ROA.4098-4099 (version of § 3.14 in effect when petitioners filed their complaint).

4. In March 2019, the petitioners—three Texas State Bar members—filed suit in the U.S. District Court for the Western District of Texas against the respondents, 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.

5. 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.[5] Pet. App. 43.

The Fifth Circuit made clear that it would not "expand[] [*Lathrop*'s and *Keller*'s] reach" by giving integrated bars more flexibility and protection against First Amendment claims than those decisions required. *Id.* at 17 n.14. The court recognized that, under *Lathrop* and *Keller*, 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.'" *Id.* at 18 (quoting *Keller*, 496 U.S. at 13-14). The court, 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 *which fall outside of [the permissible] areas of activity*'" (i.e., "regulating the legal profession" and "improving

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[5] 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.

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 Fifth Circuit determined that nearly all of the Bar's challenged activities were germane—including its annual meeting, continuing legal education programs, publication of the *Texas Bar Journal*, diversity initiatives, and support of *pro bono* and legal-aid efforts.[6] *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.[7] *Id.* at 27-28, 34 & n.36.

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[6] The court stated that the plaintiffs "forfeited any contention related to the [Bar's] advertising expenditures" because their briefs failed to "explain how [those expenditures were] unlawful." Pet. App. 36 n.38; cf. Pet. 13 (passing reference to Bar's advertising expenditures).

[7] For example, the Fifth Circuit held non-germane the Bar's support for conforming Texas law to *Obergefell* v. *Hodges*, 576 U.S. 644 (2015), as well as the final judgment in *De Leon* v. *Perry*, No.

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. 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, explained 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.

6. 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

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SA-13-CA-00982-OLG (W.D. Tex. July 7, 2015) (ROA.3644), by repealing the provision of Texas's Constitution denying same-sex couples the right to marry. See Pet. App. 27; see also ROA.3756, 3959. To take another example that the plaintiffs highlight, see Pet. 9-10, the court also held non-germane the Bar's support of a bill addressing "civil union[s] * * * *entered into in another state*" in the context of the Family Code subchapter on interspousal claims for reimbursement. ROA.3756, 3965-3966 (emphasis added); see also Pet. App. 27. Contra Pet. 9-10 (suggesting that bill would have "create[d] civil unions").

(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. *Id.* at 4a; see also 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 DENYING THE PETITION

I. The Court Should Follow Its Recent, Repeated Practice Of Denying Review Of Challenges To Integrated Bars

This Court has recently, and repeatedly, denied certiorari petitions raising similar First Amendment arguments against integrated bars as the plaintiffs assert here. See *Crowe* v. *Or. State Bar*, 142 S. Ct. 79 (2021) (No. 20-1678); *Gruber* v. *Or. State Bar*, 142 S. Ct. 78 (2021) (No. 20-1520); *Jarchow* v. *State Bar of Wis.*, 140 S. Ct. 1720 (2020) (No. 19-831); *Fleck* v. *Wetch*, 140 S. Ct. 1294 (2020) (No. 19-670). The Court should follow the same approach in this case.

The plaintiffs' arguments for distinguishing their case from the other integrated-bar cases in which this Court has denied review are unavailing. Contrary to

the plaintiffs' suggestion, their petition is hardly the first to argue that this Court could rule in favor of integrated-bar opponents without "overrul[ing] prior precedent." Pet. 4; cf. Petition for Writ of Certiorari at 19-23, *Crowe* v. *Or. State Bar*, 142 S. Ct. 79 (2021) (No. 20-1678) (arguing that Ninth Circuit erred in holding that "*Keller* categorically approved of compelled subsidies for bar associations' germane political and ideological speech"); Petition for a Writ of Certiorari at i, 5-17, *Gruber* v. *Or. State Bar*, 142 S. Ct. 78 (2021) (No. 20-1520) (arguing that *Keller* did not "actually decide that an integrated bar may use mandatory dues for germane speech"); Petition for a Writ of Certiorari at 24, *Fleck* v. *Wetch*, 140 S. Ct. 1294 (2020) (No. 19-670) (arguing that "*Keller*'s holding is ambiguous" and "*Lathrop* * * * did not squarely uphold the constitutionality of mandatory bar associations"). The plaintiffs also do not explain why it should matter for purposes of the legal issues raised in their petition that this case was "decided at summary judgment" rather than at the "pleadings stage." Pet. 4; cf. *Jarchow*, 140 S. Ct. at 1721 (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari) (asserting that "a record would provide little, if any, benefit to our review of the purely legal question whether *Keller* should be overruled"). In any event, the Court denied review in *Fleck* even though it too was decided at summary judgment. See *Fleck* v. *Wetch*, 937 F.3d 1112, 1113-1114 (8th Cir. 2019).

Finally, the fact that the decision below held that certain legislative activities of the Texas State Bar and Access to Justice Commission were not germane under *Keller* does not militate in favor of this Court's review.

Contra Pet. 4. Through the district court's final judgment, the plaintiffs have already received declaratory and injunctive relief with respect to the activities that the Fifth Circuit determined to be non-germane. See App., *infra*, 15a-16a. Furthermore, the Texas State Bar's policies and rules have been amended to comply with the Fifth Circuit's decision. See pp. 18-19, *supra*. No basis exists for the plaintiffs to seek this Court's review of issues on which they have already prevailed. See *Camreta* v. *Greene*, 563 U.S. 692, 703-704 (2011) (Court "generally decline[s] to consider cases at the request of a prevailing party").

II. The Plaintiffs' Primary Argument—That The Fifth Circuit Misconstrued *Keller* And *Lathrop*—Is Splitless And Meritless

The plaintiffs' "primary argument" is that the Fifth Circuit misconstrued *Keller* and *Lathrop* in holding that integrated bars may fund activities that some members might view as "political or ideological" in nature, as long as the activities are germane to integrated bars' permissible objectives of professional regulation or improving legal-service quality. Pet. 4, 17-23; see also Pet. App. 24-25. That argument is both splitless and meritless. It thus does not warrant this Court's review.

The plaintiffs do not allege a split on whether integrated bars are prohibited from funding any activities that might be characterized as "political or ideological." Nor could they. Like the Fifth Circuit below, the other federal courts of appeals that have addressed the issue since *Keller* have all held that "[p]olitical 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." *Schneider* v. *Colegio de Abogados de Puerto Rico*, 917 F.2d 620, 632 (1st Cir. 1990); see also *Crowe* v. *Or. State Bar*, 989 F.3d 714, 724-725 (9th Cir. 2021) (per curiam) (concluding that "*Keller* * * * permitted" certain "political and ideological activities"), cert. denied, 142 S. Ct. 79, and 142 S. Ct. 78 (2021); *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)). The absence of a split alone demonstrates that the plaintiffs' "primary argument" (Pet. 4) does not warrant this Court's review.

In any event, the plaintiffs' argument is meritless. Even the Fifth Circuit panel below—which expressly sought to avoid "expanding [*Keller*'s] reach," Pet. App. 17 n.14—recognized that "*Keller*'s standard * * * contemplates that some political or ideological activities might be germane," and this Court has never "purported to alter" that standard, *id.* at 24-25.[8]

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[8] The plaintiffs' own amicus similarly acknowledges that "*Keller* deemed political and ideological activities acceptable, so long as they are 'germane.'" Tex. Att'y Gen. Amicus Br. 14-15.

The plaintiffs' contrary position is irreconcilable with *Keller*. *Keller* expressly stated that "the guiding standard" in assessing the constitutionality of integrated-bar expenditures funded by mandatory fees is whether the challenged expenditures are germane to "regulating the legal profession or 'improving the quality of the legal service available to the people of the State'"—in other words, whether the expenditures are germane to either of the state interests that justify integrated bars' establishment.[9] *Keller*, 496 U.S. at 13-14 (quoting *Lathrop*, 367 U.S. at 843 (plurality op.)). As long as a member-funded expenditure satisfies that standard, it is "permissible," *id.* at 14, even if some might characterize the expenditure as "political" or "ideological" in nature. See *Lathrop*, 367 U.S. at 835-839, 843 (plurality op.) (holding that integrated bar did not violate attorney's right to freedom of association, even though it "participated in political activities"); accord *Keller*, 496 U.S. at 7 (recognizing that *Lathrop* "rejected" the plaintiff's claim that "he could not constitutionally be compelled to join and financially

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[9] To the extent that the plaintiffs attempt to limit integrated bars to purely "regulatory and disciplinary" activities, Pet. 17-18, they ignore half of *Keller*'s disjunctive 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.

support a state bar association which expressed opinions on, and attempted to influence, legislation").

Demonstrating the extent of the conflict between the plaintiffs' argument and *Keller*, the language in *Keller* on which the plaintiffs primarily rely to support their argument that integrated bars cannot engage in any purportedly "political" or "ideological" activities actually defeats that argument. The 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. Pet. 20-21 (emphasis added) (quoting *Keller*, 496 U.S. at 14). The plaintiffs implausibly assert that the "best reading of this language is that 'activities of an ideological nature' necessarily 'fall outside those areas' of permissible activity." *Id.* at 21.

Nonsense. As the Fifth Circuit recognized, see Pet. App. 24-25, the only reasonable reading of the sentence on which the 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 articulates 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. *Ibid.* If *Keller* had intended to adopt the plaintiffs' rule, it would have said that integrated bars may not "fund activities of an ideological nature"—full stop. *Ibid.* It would not have added the restrictive qualifier "which

fall outside of th[e] areas of [permissible] activity." *Ibid.*

Lacking support for their proposed standard in *Keller*, the plaintiffs turn to this Court's subsequent decisions, especially *Harris*, which addressed the constitutionality of mandatory union agency fees for home-care personal assistants. See Pet. 21-22. *Harris*, however, expressly acknowledged that *Keller* held 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 (quoting *Keller*, 496 U.S. at 14). And far from altering the *Keller* standard, the Court confirmed that *Keller* was "wholly consistent" with the Court's decision in *Harris* and "fit[] comfortably within the [exacting-scrutiny] framework applied in" that case. *Id.* at 655-656.

Similarly, as the Fifth Circuit recognized, neither *Janus* nor the Court's pre-*Harris* decision in *Johanns* v. *Livestock Marketing Ass'n*, 544 U.S. 550, 557-558 (2005), "purported to alter *Keller*'s standard." Pet. App. 24-25. 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*).

Further undermining the plaintiffs' arguments, even the two Justices who recently expressed interest in revisiting *Keller* recognized that *Keller* "held that '[t]he State Bar may . . . constitutionally fund activities germane to [its] goals' of 'regulating the legal profession and improving the quality of legal services.'" *Jarchow*, 140 S. Ct. at 1720 (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari) (quoting

Keller, 496 U.S. at 13-14). They did not suggest that *Keller* categorically prohibited integrated bars from engaging in any activities that might be characterized as "political" or "ideological." The "primary argument" in the plaintiffs' certiorari petition is thus based on an untenable interpretation of *Keller*. Pet. 4. It does not warrant this Court's review.

III. This Court Should Not Reconsider *Lathrop* And *Keller*

As an alternative argument, the plaintiffs ask this Court to overrule *Lathrop* and *Keller*. See Pet. 23-34. Four times over the past two years, this Court has denied certiorari petitions asking that one or both of those decisions be overruled. See p. 19, *supra* (citing *Crowe*, *Gruber*, *Jarchow*, and *Fleck*). No reason exists for the Court to take a different approach in this case. This Court "will not overturn a past decision unless there are strong grounds for doing so." *Janus*, 138 S. Ct. at 2478; accord *Allen* v. *Cooper*, 140 S. Ct. 994, 1003 (2020) ("To reverse a decision, we demand a special justification, over and above the belief that the precedent was wrongly decided." (citation omitted)). The plaintiffs have come nowhere close to establishing that such grounds exist here.

A. Developments In Case Law Regarding Unions Do Not Support Reconsidering *Lathrop* And *Keller*

The plaintiffs principally argue that *Janus*'s overruling of *Abood*, which upheld compulsory agency fees for public-sector unions, demands that *Lathrop* and *Keller* also be overruled. See Pet. 24-28. But integrated bars are not labor unions, and the

constitutional rules applicable to integrated bars and labor unions need not move in tandem. Indeed, *Keller* itself recognized that the "analogy" that it drew between integrated bars and 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." *Keller*, 496 U.S. at 12. *Keller* also held out the possibility that integrated bars might not be required to adopt the same procedural safeguards that *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292 (1986), required of public-sector unions. *Keller*, 496 U.S. at 17. Therefore, nothing in *Keller* (or *Lathrop*, on which *Keller* relied, and which was decided before *Abood*) mandates that the constitutional requirements applicable to integrated bars move in lockstep with the requirements applicable to labor unions.

Integrated bars like the State Bar of Texas differ from public-sector unions in at least five fundamental respects critical to First Amendment analysis. First, as the Bar defendants argue in their conditional cross-petition for a writ of certiorari in Case Number 21-974, the State Bar of Texas's expressive activities should be treated as government speech "not subject to scrutiny under the Free Speech Clause." *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 464 (2009); see also Tex. Gov't Code Ann. § 81.011(a), (c) (Texas State Bar is "an administrative agency of the judicial department of government," subject to the Supreme Court of Texas's "administrative control"); Tex. Att'y Gen. Amicus Br. 1 (recognizing that Texas Bar is a "governmental entit[y]").

Second, even if the Bar's speech does not qualify as government speech, the Bar's speech is nonetheless part of a "broader * * * regulatory scheme," such that the use of Bar fees to fund that speech does not violate the First Amendment. *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469, 472-473 (1997) (holding that compelled funding of advertising as part of broader regulatory scheme did not violate First Amendment); see also *United States* v. *United Foods, Inc.*, 533 U.S. 405, 414 (2001) (noting that, in *Keller*, "[t]hose who were required to pay a subsidy * * * already were required to associate for other purposes"). 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, 1074-1075 (1991). Licensed attorneys "enjoy[] singular powers that others do not possess." *In re Snyder*, 472 U.S. 634, 644 (1985). They "share a kind of monopoly" because individuals lacking law licenses cannot "appear in court and try cases" or "counsel clients" on legal matters. *Ibid.* 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. 1945); Tex. Disciplinary R. Pro. 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—including the requirements imposed by the disciplinary system that the Texas State Bar's Board of Directors is charged with "administering and supervising." Tex. R. Disciplinary P., preamble. By

contrast, labor unions have no such regulatory responsibilities. See Leo Brewster, *The State Bar*, 22 Tex. B.J. 113, 114 (1959) (while the Texas Bar has "regulatory police powers" and was established "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").

Third, as the district court here explained, the state interests purportedly served by union agency-shop arrangements—maintaining labor peace and avoiding free riders, *Janus*, 138 S. Ct. at 2465-2469—are "very different" from the "state interests in professional regulation and legal-service quality served by integrated bars." Pet. App. 57; accord *Kingstad*, 622 F.3d at 719. *Janus*'s reassessment of the former does not undermine *Keller*'s treatment of the latter. See *Schell* v. *Chief Justice & Justices of Okla. Sup. Ct.*, 11 F.4th 1178, 1190-1191 (10th Cir. 2021), petition for cert. pending, No. 21-779 (filed Nov. 22, 2021).

Fourth, *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. *Ibid.* Indeed, *Janus* emphasized that "[u]nsustainable collective-bargaining agreements have * * * been blamed for multiple municipal bankruptcies." *Ibid.* 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.

Fifth, 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. To the contrary, after the Fifth Circuit's decision below, the Texas State Bar Rules were amended to make clear that no State Bar representative may "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. Especially in light of that amendment, it is difficult to understand how the mere requirements that licensed Texas attorneys enroll in the State Bar and pay annual membership fees meaningfully impinge on attorneys' associational freedom. See Tex. Gov't Code Ann. §§ 81.051, 81.054, 81.102. Requirements that attorneys become "members of the Bar" and pay fees to practice in a particular jurisdiction are commonplace; in fact, they appear in this Court's own rules. *E.g.*, S. Ct. R. 5.5, 28.8 (providing that "[o]ral arguments may be presented only by members of the Bar of this Court," and setting admission fee). Texas State Bar members are as free as any other citizens to express views or join associations that disagree with the Bar.

Given the substantial, qualitative differences between integrated bars and labor unions, *Abood*'s demise does not affect the constitutionality of integrated bars. Indeed, this Court said as much in *Harris*, the *Janus* precursor also authored by Justice Alito. Again, the Court explained that *Keller* was "wholly consistent with," and "fit[] comfortably within the [exacting-scrutiny] framework applied in," *Harris*. *Harris*, 573 U.S. at 655-656. There is simply no basis for arguing that *Harris* and *Janus* require overruling *Keller* when *Harris* said the exact opposite.

In sum, *Lathrop*'s and *Keller*'s recognition of the constitutionality of integrated bars was hardly "wrong," much less "grievously or egregiously wrong," and those decisions need not fall with *Abood*, especially given the significant differences between labor unions and integrated bars. *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part); see also *Kimble* v. *Marvel Ent., LLC*, 576 U.S. 446, 455 (2015) ("[A]n argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent."). Therefore, there is no reason to reconsider *Lathrop* and *Keller*.

B. *Lathrop* And *Keller* Have Caused No Significant Negative Consequences, And Overruling Them Would Upend State Reliance Interests

Contrary to the plaintiffs' contentions, *Lathrop* and *Keller* have not caused any "significant negative jurisprudential or real-world consequences." *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part). *Keller*'s requirement that member-funded bar

expenditures be germane to professional regulation or improving legal-service quality, see *Keller*, 496 U.S. at 13-14, is workable. Unlike the *Abood* standard, which this Court struggled in future cases to refine and clarify, see *Janus*, 138 S. Ct. at 2481-2482, this Court has seen no need to provide additional guidance regarding the permissible activities of integrated bars since its unanimous decision in *Keller* over three decades ago. The *Keller* standard's workability is demonstrated by the fact that the plaintiffs do not challenge the Fifth Circuit's determination that the vast majority of Bar activities at issue were germane to professional regulation or improving legal-service quality (instead, the plaintiffs simply argue that the Fifth Circuit should have used a different legal test focused on whether the activities were "political" or "ideological" in nature, see Pet. 17-23, 29-31). The plaintiffs cannot credibly argue that the *Keller* standard is unworkable when they do not even challenge how the lower court applied it to the case at hand.

The plaintiffs also exaggerate *Lathrop*'s and *Keller*'s "real-world effects" on attorneys. *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part); see also Pet. 27-28. Texas attorneys are merely required to enroll in the Texas State Bar and pay annual fees. See p. 8, *supra*. The Bar in no way requires members "to endorse ideas they find objectionable." Pet. 28 (quoting *Janus*, 138 S. Ct. at 2464). Again, Bar representatives may not "purport to speak on behalf of all State Bar members." State Bar R. art. II, § 13; 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)). The plaintiffs also "remain[] free to disassociate" themselves from the Bar's speech through their own speech. *Rumsfeld* v. *Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 65 (2006). Moreover, even in states without integrated bars, attorneys must still pay licensing or similar fees to practice law, and may still be referred to as "members of the bar." See American Bar Association, *2021 State & Local Bar Benchmarks Survey: Membership, Administration and Finance* 11, 82-85 (2021); see also, *e.g.*, Ind. R. for Admission to the Bar & the Discipline of Attorneys 2(b); Pa. Bar Admission R. 232(a).

While any imposition of *Lathrop* and *Keller* on attorneys' First Amendment interests (and pocketbooks) is minimal, overruling *Lathrop* and *Keller* would upend the "legitimate expectations" of states that "have reasonably relied" on those decisions in structuring their attorney disciplinary and regulatory systems around integrated bars.[10] *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part); see also *Hilton* v. *S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (explaining that "[*s*]*tare decisis* has added force when the legislature * * * ha[s] acted in reliance on a previous decision"). Texas is a perfect example. Among the numerous functions that the State Bar of Texas serves, it plays a central role in administering, supervising, and funding Texas's attorney disciplinary system. See

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[10] The plaintiffs' suggestion that integrated bars "have been on notice for years" that this Court might overrule *Keller* and *Lathrop*, Pet. 33 (quoting *Janus*, 138 S. Ct. at 2484), ignores this Court's recent reaffirmation of *Keller* in *Harris*, see *Harris*, 573 U.S. at 655-656.

p. 10, *supra*. Demonstrating how integral the Bar is to Texas's legal system, the Texas legislature has repeatedly determined in the context of sunset reviews that "a public need exists" for the Bar and that "less restrictive or alternative methods of performing [the Bar's] function[s]" would not "adequately protect or provide service to the public." Tex. Gov't Code Ann. § 325.011; see also pp. 9-10, *supra*.

Dismantling the mandatory Texas State Bar after its over eight decades of service to the people of Texas would thus be a wrenching change that would jeopardize the smooth functioning of Texas's legal system and likely "require an extensive legislative response." *Hilton*, 502 U.S. at 202. Contra Pet. 31-32 (suggesting that integrated bars "can easily transition to other, alternative arrangements"). Overruling *Lathrop* and *Keller* would wreak similar disruption in each of the majority of states nationwide with integrated bars.[11]

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[11] While the plaintiffs cite the California State Bar in arguing that "a transition away from mandatory bars is neither impossible nor overly burdensome," Pet. 33, the plaintiffs ignore that the California Bar's annual fees have increased dramatically since the Bar's bifurcation, due at least in part to "the financial hit [the Bar] took from the loss of the [Bar's] sections." Lyle Moran, *California Split: 1 Year After Nation's Largest Bar Became 2 Entities, Observers See Positive Change*, ABA J., Feb. 4, 2019, bit.ly/3xuSroN; see also Joyce E. Cutler, *California Lawyers to Pay $544 for Year's License*, Bloomberg Law, Oct. 10, 2019, https://bit.ly/3JjRJ4J. The plaintiffs also ignore that voluntary bars tend to be "member-centric" while integrated bars generally have broader objectives of serving "the court[s] and * * * the public." Moran, *California Split* (quoting Nebraska State Bar Association's executive director); see also Tex. Gov't Code Ann. § 81.012. Indeed, the mere fact that an overwhelming majority of states have adopted and maintain integrated bars is strong

See Pet. App. 2; ROA.3691-3692. Therefore, any "weighing of practical effects" tilts decisively against reconsidering those decisions. *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part) (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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evidence of their important role in furthering states' interests in regulating attorneys and improving legal-service quality.

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TONY K. MCDONALD, JOSHUA B. HAMMER, and MARK S. PULLIAM, Plaintiffs, v. RANDALL O. SORRELS, et al., Defendants.	Civil Action No. 1:19-cv-00219-LY

STATEMENT OF AMENDMENTS TO STATE BAR RULES AND STATE BAR OF TEXAS BOARD OF DIRECTORS POLICY MANUAL APPROVED AT THE SEPTEMBER 24 STATE BAR OF TEXAS BOARD OF DIRECTORS MEETING

Pursuant to the Court's directive at the August 30, 2021 status conference, Defendants file this statement summarizing the State Bar of Texas Board of Directors' September 24, 2021 action regarding amendments to the Bar's rules and policies in response to the U.S. Court of Appeals for the Fifth Circuit's decision:

I. Background

1. The Fifth Circuit vacated the grant of summary judgment to Defendants, rendered partial summary judgment for 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 this Court, and remanded to this Court for further proceedings on remedies. *McDonald v. Longley*, 4 F.4th 229, 255 (5th Cir. 2021).

2. The Fifth Circuit stated that the Bar could remedy any violations of Plaintiffs' First Amendment rights by not "engaging in non-germane activities," in accordance with the guidance provided in the Fifth Circuit's decision, 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 252-54.

3. On August 27, 2021, the Supreme Court of Texas entered an order extending the deadline for Texas lawyers to pay their 2021 membership fees to October 31, 2021. *See* Forty-First Emergency Order Regarding the COVID-19 State of Disaster, Misc. Docket No. 21-9096 (Tex. Aug. 27, 2021), https://bit.ly/3u7TXNw.

4. On August 30, 2021, this Court directed Defendants to file by September 30 a statement summarizing the action taken at the September 24 Bar Board meeting.

5. At its September 24 meeting, the State Bar Board approved amendments to the State Bar of Texas Board of Directors Policy Manual ("Policy

Manual") in response to the Fifth Circuit's decision. *See* Video of September 24, 2021 Board of Directors Meeting at 4:23:00-:45, YouTube (Sept. 24, 2021), https://www.youtube.com/watch?v=lzVBsNXTZ8w. The Bar Board also approved proposed amendments to the Texas State Bar Rules in response to the decision.* *Id.* The Bar is petitioning the Texas Supreme Court to adopt those amendments to the Rules. (Unlike the Policy Manual, which the Bar Board can amend directly, *see* Policy Manual §§ 1.22.01-.02, the State Bar Rules can only be amended by the Texas Supreme Court, *see* Tex. Gov't Code Ann. § 81.024; State Bar R. art. VI.)

6. A copy of the amendments to the relevant State Bar Rules and Policy Manual provisions approved at the September 24 Bar Board meeting is attached as Exhibit A. A clean copy of the Policy Manual that includes the amendments approved at the September 24 Bar Board meeting is attached as Exhibit B. A copy of the current State Bar Rules, which were last amended in March 2020, is attached as Exhibit C and is also available at https://bit.ly/3nRm2aQ.

7. The Bar is in the process of publicizing the Board's action at the September 24 meeting via an email to Bar members and through the State Bar's website, on which a copy of this filing will be posted.

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* One member of the Board of Directors, Steve Fischer, voted against the proposed amendments to the Policy Manual and State Bar Rules.

II. Proposed Amendments to the State Bar Rules – Count I of Plaintiffs' Complaint

8. The Fifth Circuit concluded that mandating Plaintiffs' membership in the State Bar "burdens [their] First Amendment right to freedom of association" because "part of [the Bar's] expressive message is that its members stand behind its expression." *McDonald*, 4 F.4th at 245-46. According to the Fifth Circuit, "[c]ompelling membership . . . compels support of [the Bar's] message." *Id.* at 246.

9. To address that issue, the State Bar Board approved three proposed amendments to the State Bar Rules, and the Bar is petitioning the Texas Supreme Court to adopt those amendments. One amendment would provide: "In no event shall a public representative of the State Bar or its sections or committees 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." Ex. A at 1 (proposed State Bar R. art. II, § 13). The other two amendments would clarify that, in accordance with Tex. Gov't Code Ann. § 81.051, the term "member" of the Bar is a term of art meaning "a person licensed to practice law in Texas," and the term "enrollment" in the Bar is a term of art referring to "the act of registering with the [Texas Supreme Court] Clerk as a person licensed to practice law in Texas." *Id.* (proposed State Bar R. art. I, §§ 13-14).

10. Consistent with those proposed changes to the State Bar Rules, the State Bar will post prominently on the "About Texas Bar" page of its website language conveying the following points: (1) the State Bar of Texas is a public corporation and an administrative

agency of the judicial department of the Texas government; (2) the phrase "member of the Bar" means a person licensed to practice law in Texas; and (3) the State Bar does not purport to speak on behalf of all persons licensed to practice law in Texas. *See id.* at 5-6.

III. Amendments to Policy Manual §§ 3.02.04(D), 3.14.01, 3.14.05, 4.04.15, 5.01.03(B)(8), 5.01.04(B)(4), 5.01.06, 5.04.05(E) – Counts I and II of Plaintiffs' Complaint

11. The Fifth Circuit held that "[c]ompelled membership in a bar association that is engaged in only germane activities survives [exacting] scrutiny." *McDonald*, 4 F.4th at 246. The court explained that, under the Supreme Court's decision in *Keller v. State Bar of California*, 496 U.S. 1 (1990), "[f]or activities to be germane, they must be 'necessarily or reasonably incurred for' " the purpose of "regulating the legal profession" or "improving the quality of legal services." *Id.* at 247 (quoting *Keller*, 496 U.S. at 13-14). The court's decision provides additional guidance regarding the proper application of that standard by applying it to the Bar activities Plaintiffs have challenged in this case. *See id.* at 247-52.

12. To ensure that the State Bar "engage[s] in only germane activities" moving forward, *id.* at 246, the Bar Board approved an amendment specifically requiring the State Bar Board Budget Committee to review the items in the Bar's proposed annual budget "to identify any expenditures that may be non-chargeable to members" under *Keller* and *McDonald*, and to "remove [non-chargeable] expenditure[s] from

the proposed budget." Ex. A at 2 (Policy Manual § 3.02.04(D)). To make clear that the Bar's future activities must comply with the Fifth Circuit's guidance on the *Keller* standard in *McDonald*, the Board also approved amendments to the Policy Manual that add references to the Fifth Circuit's *McDonald* decision where there were already references to *Keller*. *See id.* at 2-5 (Policy Manual §§ 3.14.01, 3.14.05, 4.04.15, 5.01.03(B)(8), 5.01.04(B)(4), 5.01.06, 5.04.05(E)).

IV. Amendments to Policy Manual §§ 7.02.04, 8.01.03(G), 8.01.06(C)(6), 8.01.11, 8.02.02(A)(5), 8.02.02(C) – Counts I and II of Plaintiffs' Complaint

13. The Fifth Circuit held that certain components of the Bar's 2019 legislative program, as well as the Bar's funding of certain prior legislative activities of the Texas Access to Justice Commission ("AJC"), were non-germane. *McDonald*, 4 F.4th at 247-49, 251. The Fifth Circuit, however, explained that the Bar and AJC *may* take positions on legislative proposals that relate to "regulating the legal profession or improving the quality of legal services"—including proposals that relate to "the functioning of the state's courts," "the jurisdiction, procedure and practice of the Federal courts and other Federal tribunals," "the functioning of the . . . legal system writ large," and "laws governing the activities of lawyers *qua* lawyers." *Id.* at 247-48 & n.23 (citation omitted); *see also id.* at 251 n.35 (upholding as germane the Bar's financial support of the AJC's "lobbying for funding for civil legal services, creating *pro bono* opportunities for law students, and providing training for

attorneys," as well as the AJC's "efforts to help the Supreme Court of Texas make Texas courts more [accessible] and navigable to low-income Texans" and to "creat[e] 'pro se forms and toolkits' ").

14. Accordingly, the Bar Board approved amendments to the Policy Manual that strictly limit the types of legislation on which the Bar may take a position and the matters in which the Bar may file amicus briefs. The amendments limit such Bar legislative and amicus activities to those that "address[] the State Bar, the regulation of lawyers, the functioning of state or federal courts, or the functioning of the legal system." Ex. A at 5 (Policy Manual §§ 8.01.03(G), 8.01.06(C)(6), 8.02.02(A)(5)); *see also id.* (amending Policy Manual § 8.01.11 to remove language purporting to authorize "[a] section" to advocate positions to its membership or its council members "without complying with ... the provisions of this policy"); *id.* (deleting Policy Manual § 8.02.02(C) in light of the more specific mandate now contained in the new § 8.02.02(A)(5)). The Bar Board also approved an amendment to the Policy Manual expressly providing that the AJC's legislative activities shall be subject to the State Bar's review for compliance with *Keller* and *McDonald*. *See id.* (Policy Manual § 7.02.04).

15. Finally, Defendants have submitted as Exhibit D a Statement of Intent by the AJC. The AJC states that "all of the Commission's work, including its legislative program, will fully comply with the standards announced in *Keller* and *McDonald*." Ex. D. The AJC further states that in deciding whether to take a position on proposed legislation or initiate

any legislative action, the AJC will apply a standard "consistent with that set forth" in the newly amended Policy Manual section 8.01.03(G)—i.e., the proposed legislation must "address[] the State Bar, the regulation of lawyers, the functioning of state or federal courts, or the functioning of the legal system." *Id.* The AJC also acknowledges that its "legislative activities shall be subject to the State Bar's review for compliance" with *Keller* and *McDonald*. *Id.*

V. Amendments to Policy Manual §§ 3.02.01-3.02.02 – Count III of Plaintiffs' Complaint

16. Regarding Plaintiffs' Count III claim challenging the Bar's notice and objection procedures, the Fifth Circuit concluded that the Bar failed to provide "an adequate explanation of the basis for the [Bar membership] fee" in accordance with *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 310 (1986), because the Bar failed to "furnish Texas attorneys with meaningful notice regarding how their dues will be spent" and a "breakdown of where their fees go." *McDonald*, 4 F.4th at 253-54.

17. To address that issue, the Bar Board approved amendments to the Policy Manual that require the Bar Board to approve and publish on the State Bar's website, in conjunction with the proposed annual budget: (1) "a notice containing a breakdown of expenditures presented by major expense category," and (2) "a notice estimating the amount of membership dues to be devoted to each major category of expenses." Ex. A at 1 (Policy Manual §§ 3.02.01-.02). An example showing the format that the Bar currently plans to use to satisfy both of those requirements is attached as Exhibit E. For

illustration purposes, the example uses figures from the Bar's 2021-2022 budget because the 2022-2023 budget has not yet been prepared. The example shows the amount of membership dues allocated to each major expense category. Going forward, the State Bar will have its independent financial auditor review the membership dues allocation notice each year before its publication on the State Bar's website.

18. The Policy Manual amendments approved by the Bar Board also call for "[a]dditional budget category detail [to] be posted on the State Bar website." Ex. A at 1 (Policy Manual § 3.02.01). For illustration purposes, an example of the format in which "additional budget category detail" may be provided—here, for the major expense category of "Chief Disciplinary Counsel" (*see* Ex. E at 2)—is attached as Exhibit F.

19. The amendments further require the Bar to provide notice to Bar members that the proposed budget, expenditure breakdown, and dues allocation are available on the State Bar's website by publishing such notice in the *Texas Bar Journal*, and by providing such notice to members in conjunction with the State Bar's annual membership dues notice. *See* Ex. A at 1 (Policy Manual § 3.02.02).

VI. Amendments to Policy Manual §§ 3.14.01-3.14.05 – Count III of Plaintiffs' Complaint

20. The Fifth Circuit held that the Bar's procedures for members to object to potentially non-germane Bar expenditures and receive a *pro rata* refund of Bar dues were "constitutionally inadequate" because the decision whether to furnish a refund was

"left to the sole discretion of the Bar's Executive Director." *McDonald*, 4 F.4th at 254; *see also id.* at 253 (noting that *Hudson* requires "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker" (quoting 475 U.S. at 310)). The Fifth Circuit also held that the Bar had to comply with *Hudson's* requirement that it provide "an escrow for the amounts reasonably in dispute" while a member's objection is pending. *Id.* at 253 (quoting 475 U.S. at 310).

21. In response, the State Bar Board approved amendments to the Policy Manual that provide for an impartial decisionmaker to decide the member's objection and require the Executive Director to place the amount of funds reasonably at issue in an escrow account pending the resolution of the member's objection by the impartial decisionmaker. *See* Ex. A at 2-4 (Policy Manual §§ 3.14.01-.05).

22. Specifically, the amendments provide that if a Bar member has a "reasonable belief that any actual or proposed expenditure" is non-chargeable to members, the member may "fil[e] a written objection with the Executive Director" using a form available on the State Bar's website. Ex. A at 2 (Policy Manual §§ 3.14.01-.02). A copy of the "State Bar Fees Objection Form" to be used by members to file objections is attached as Exhibit G.

23. Under the amendments, the Executive Director has a limited, 60-day period to review the objection. Ex. A at 2 (Policy Manual § 3.14.03(A)). During that period, the Executive Director may attempt to resolve the objection by refunding a *pro rata* portion of the member's dues, plus interest. *Id.*

Alternatively, the Executive Director may reject the objection. *Id.*

24. The amendments further provide that an objecting member may contest the Executive Director's determination of the objection and have the objection heard by an impartial decisionmaker who is not affiliated with, or selected by, the Bar. Ex. A at 2-3 (Policy Manual § 3.14.03(B)-(E)). Specifically, if the objecting member provides notification within 30 calendar days that the objecting member contests the Executive Director's determination, then the Executive Director shall "submit the member's objection to the Presiding Judge of the administrative judicial region covering Travis County, who shall appoint a retired, senior, or former judge as the impartial decisionmaker to decide the objection, unless the Executive Director and the member agree to a different procedure for selecting the impartial decisionmaker." Ex. A at 2-3 (Policy Manual § 3.14.03(B)-(C)). The impartial decisionmaker must then "promptly and efficiently decide the matter," applying the standards set forth in *Keller* and *McDonald*. *Id.* at 3 (Policy Manual § 3.14.03(D)). If the impartial decisionmaker "determines that the objecting member is entitled to a refund, the State Bar shall promptly refund the *pro rata* portion of the member's dues that is attributable to the expenditure, plus interest, to the objecting member." *Id.*

25. Finally, the amendments provide that if the objecting member timely contests the Executive Director's determination of the objection, the Executive Director shall "determine the *pro rata* amount of the objecting member's dues reasonably at

issue," and place that amount "in an escrow account . . . pending the resolution of the member's objection by the impartial decisionmaker." *Id.* (Policy Manual § 3.14.03(C)).

* * *

The Bar recognizes that, as it implements the amendments discussed above, further changes to its rules and policies might prove to be warranted. Defendants thus respectfully request that the Court provide in any final order in this matter that further amendments to the Policy Manual or the State Bar Rules may be made in accordance with the then-existing provisions governing such amendments, provided that the amendments are not inconsistent with the State Bar's obligations under *Keller v. State Bar of California*, 496 U.S. 1 (1990), and its progeny, including *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021).

Pursuant to the Court's directions at the August 30 status conference, Defendants will confer with Plaintiffs on whether the parties can reach an agreement to resolve this case in light of the Board's action. If the parties cannot reach an agreement, they will contact the Court's clerk to schedule a telephone conference with the Court.

Dated: September 30, 2021 [Signature block omitted]

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

TONY K. MCDONALD, JOSHUA B. HAMMER, AND MARK S. PULLIAM, PLAINTIFFS,	§	
V.	§	CAUSE NO. 1:19-CV-219-LY
RANDALL O. SORRELS, LARRY P. MCDOUGAL, JOE K. LONGLEY, LAURA GIBSON, BRITNEY E. HARRISON, ANDRES E. ALMANZAN, JERRY C. ALEXANDER, KATE BIHM, REBEKAH STEELY BROOKER, LUIS M. CARDENAS, ALISON W. COLVIN, DEREK COOK, ROBERT D. CRAIN, CHRISTINA DAVIS, ALISTAIR B. DAWSON, LESLIE DIPPEL, MICHAEL DOKUPIL, VICTORIA FLORES, JARROD T. FOERSTER, LAURA GIBSON, JOHN CHARLES GINN, SHARI	§	

GOLDSBERRY, MARC E.	§
GRAVELY, AUGUST W.	§
HARRIS III, JOE "RICE"	§
HORKEY, JR.,	§
WENDY-ADELE	§
HUMPHREY, MICHAEL	§
K. HURST, NEIL D.	§
KELLY, DAVID C. KENT,	§
ALDO D. LOPEZ,	§
YOLANDA CORTES	§
MARES, ROBERT E.	§
MCKNIGHT, JR.,	§
STEPHEN J. NAYLOR,	§
AMIE S. PEACE, SALLY	§
PRETORIUS, CARMEN	§
M. ROE, ADAM T.	§
SCHRAMEK, DAVID K.	§
SERGI, ALAN E. SIMS,	§
DINESH H. SINGHAL,	§
JASON SMITH, SANTOS	§
VARGAS, G. MICHAEL	§
VASQUEZ, K. NICOLE	§
VOYLES, AMY	§
WELBORN, JAMES	§
WESTER, JAMES C.	§
WOO, AND DIANE	§
ST. YVES, IN THEIR	§
OFFICIAL CAPACITIES	§
AS MEMBERS OF THE	§
BOARD OF DIRECTORS	§
OF THE STATE BAR OF	§

TEXAS,[1] §
DEFENDANTS. §

FINAL JUDGMENT

This matter is now before the court on remand from the Fifth Circuit, following that court's decision in *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021). In light of that decision, and upon the agreement of the parties:

IT IS ORDERED, ADJUDGED, and DECREED that:

1. Judgment is **RENDERED** in Plaintiffs' favor as specified in *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021).

2. The court hereby **DECLARES** that Defendants violated Plaintiffs' First Amendment rights by compelling them to join the State Bar of Texas while the Bar was engaged in non-germane activities under *Keller v. State Bar of California*, 496 U.S. 1 (1990).

3. The court further **DECLARES** that lobbying and legislative activities seeking substantive changes to the law unrelated to regulating the legal profession or improving the quality of legal services are non-germane activities under *Keller*.

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[1] Defendants were sued in their official capacities as members of the Board of Directors of the State Bar of Texas. Pursuant to Federal Rule of Civil Procedure 25(d), the successors of individuals who were previously named as Defendants in this action but who are no longer members of the Bar's Board of Directors have been automatically substituted as parties.

4. So long as Plaintiffs are members of the State Bar of Texas, Defendants are permanently **ENJOINED** from using Plaintiffs' mandatory dues to support lobbying or legislative activities (including such activities by the Texas Access to Justice Commission) seeking substantive changes to Texas law unrelated to regulating the legal profession or improving the quality of legal services. Plaintiffs and Defendants shall confer in good faith to attempt to resolve any alleged violations of this paragraph before Plaintiffs may seek any judicial remedies that might be available for the alleged violations. Defendants reserve all defenses to any effort to enforce this paragraph, including defenses based on sovereign immunity.

5. Plaintiffs have requested restitution for the dues they paid under protest in 2019, 2020, and 2021 while this action was pending. In response, Defendants have invoked sovereign immunity. *See*, *e.g.*, *Liedtke v. State Bar of Texas*, 18 F.3d 315, 318 n.12 (5th Cir. 1994). Plaintiffs' request for restitution of their dues is therefore **DENIED**.

6. Except as specified above, and in accordance with *McDonald*, final judgment is **RENDERED** for Defendants on all other claims and requests for relief in Plaintiffs' complaint.

7. On November 24, 2021, Plaintiffs filed a petition for writ of certiorari in the United States Supreme Court on the issues on which they did not prevail in the Fifth Circuit. The disposition of that petition could affect Plaintiffs' entitlement to attorney's fees and costs. It is accordingly hereby **ORDERED** that Plaintiffs shall have until 60 days

after the final disposition of the Supreme Court case to file any motion for attorney's fees and costs pursuant to 42 U.S.C. §1988, 28 U.S.C. §1920, and Fed. R. Civ. P. 54(d).

SIGNED this 2nd day of December, 2021.

[Signature omitted]

LEE YEAKEL

UNITED STATES DISTRICT JUDGE