No. 20-50448

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

v.

JOE K. LONGLEY, IMMEDIATE PAST PRESIDENT OF THE STATE BAR OF TEXAS; RANDALL O. SORRELS, PRESIDENT OF THE STATE BAR OF TEXAS; LAURA GIBSON, MEMBER OF THE STATE BAR BOARD OF DIRECTORS AND CHAIR OF THE BOARD; JERRY C. ALEXANDER, MEMBER OF THE STATE BAR BOARD OF DIRECTORS; ALISON W. COLVIN, MEMBER OF THE STATE BAR BOARD OF DIRECTORS
Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Texas, No. 1:19-cv-219 (Yeakel, J.)

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August 14, 2020

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CERTIFICATE OF INTERESTED PERSONS

(1) No. 20-50448, *McDonald v. Sorrels*;

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

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INTRODUCTION

The Bar asserts that *every last one of its activities*—including those involving some of the most hotly contested issues of the day, such as illegal immigration, race- and gender-based programs, legislation on LGBT and family-law issues, and lobbying to increase government spending—can be funded through coerced dues. The Bar then doubles down, claiming it has no obligation to provide *Hudson* notices or to adopt opt-in rather than opt-out policies because every dollar it spends comports with First Amendment limits on the use of coerced dues.

The Bar thinks all of this is permitted by *Keller v. State Bar of California*, 496 U.S. 1 (1990). According to the Bar, it is free to use coerced dues on any activities of its choosing, no matter how controversial, political, or ideological, as long as there is some attenuated connection to legal services. But, in its most recent discussion of *Keller*, the Supreme Court summarized its holding as follows: members of an integrated bar "could be required to pay the portion of the dues used for activities connected with proposing ethical codes and disciplining bar members" but "could not be required to pay the portion of bar dues used for political or ideological purposes." *Harris v. Quinn*, 573 U.S. 616, 655

(2014). This Court should reject the Bar's invitation to ignore the Supreme Court's authoritative interpretation of its own precedents.

Because the Bar views political and ideological activities such as lobbying, access to justice programs, and diversity initiatives as its very *raison d'etre*, Appellants cannot constitutionally be compelled to join and associate with it. At a minimum, however, the Bar flouts Supreme Court precedent by failing to adopt constitutionally adequate procedures to ensure that the Bar does not use coerced dues for political and ideological activities without members' clear and affirmative consent. This Court should reverse the judgment below and instruct the district court to grant preliminary injunctive relief pending further proceedings on remedies.

ARGUMENT

I. The Bar engages in numerous activities with political or ideological coloration that cannot be funded through coerced dues absent members' affirmative consent.

A. The Bar advances an interpretation of *Keller* that would effectively eliminate any meaningful First Amendment checks on its use of coerced dues. According to the Bar (at 43-47), any expenditure is permissible—no matter how political, ideological, or controversial—as long as the Bar can articulate some tenuous connection to "regulating the legal profession and improving the quality of legal services." That

interpretation of *Keller* is untenable on its own terms, as the Supreme Court has repeatedly made clear that "political" or "ideological" activities cannot be funded through coerced dues without a member's affirmative consent.

In *Keller* itself, the Court distinguished between "activities germane to" the state's interests in regulating the legal profession and improving the quality of legal services and "activities of an ideological nature which fall outside those areas of activity." 496 U.S. at 14. Later in the opinion, the Court further distinguished between "activities in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with regulation of the legal profession, on the one hand, *and those activities having political or ideological coloration* which are not reasonably related to the advancement of such goals, on the other." *Id.* at 15 (emphasis added).

Despite *Keller*'s express warnings about activities with "political or ideological coloration," the Bar argues that all of this is irrelevant. According to the Bar (at 44-45), *Keller* allows it to use coerced dues for all activities that are "germane," regardless of whether they are controversial or ideological. The Bar reasons (at 45) that if all ideological

activities were categorically off-limits, then the Supreme Court would have simply said that "integrated bars may not 'fund activities of an ideological nature'—full stop." But the same critique can be made of the Bar's interpretation of *Keller*.[1] Under the Bar's view, there is a simple dichotomy between germane (chargeable) and non-germane (non-chargeable) activities. If that were actually the law, however, there would have been no need for the Supreme Court to discuss activities with "political or ideological coloration" *at all*, since the political or ideological character of the activity would have been irrelevant to the analysis.

Harris eliminates any doubt that the Bar's position is untenable. The Court's description of its holding in *Keller* is clear and unequivocal: "We held that members of this bar *could not be required to pay the portion of bar dues used for political or ideological purposes* but that they could be required to pay the portion of the dues used for activities connected with proposing ethical codes and disciplining bar members." *Harris*, 573 U.S. at 655 (emphasis added).

[1] The Bar's argument on this point shows the perils of parsing judicial opinions as if they were "a comprehensive code" rather than "just an explanation for the Court's disposition." *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010). As Judge Easterbrook has explained, "[j]udicial opinions must not be confused with statutes, and general expressions must be read in light of the subject under consideration." *Id.*

The Bar advances a heads-I-win-tails-you-lose interpretation of *Harris*. The Bar (at 40-42) embraces *Harris* for the proposition that *Keller* was not "disturb[ed]" by subsequent decisions in the union context. But then, four pages later (at 46), the Bar brushes aside as "dicta" *Harris*'s discussion of *Keller*'s holding regarding the non-chargeability of expenditures on political and ideological activities. The Bar cannot have it both ways. *Harris* remains the Supreme Court's last word on the proper interpretation of *Keller*, and this Court is bound to follow and apply the Supreme Court's authoritative interpretation of its own precedents.

The Bar further contends (at 46) that *Harris* "did not purport to modify the standard set forth in" *Keller*. Appellants agree. *Harris* merely confirmed what *Keller* already made clear: that *Keller* authorized using coerced dues for, at most, activities like "proposing ethical codes and disciplining bar members," and that members of an integrated bar "could not be required to pay the portion of bar dues used for political or ideological purposes." *Harris*, 573 U.S. at 655; *see also Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557-58 (2005) (explaining that *Keller* "invalidated the use of the compulsory fees to fund speech on political matters" because such speech "was not germane to the regulatory

interests that justified compelled membership"). Indeed, the Supreme Court has made clear that even under *Abood*—the key precedent the Court interpreted and applied in *Keller*—an organization that receives coerced dues is "flatly prohibited" from using such fees for speech that "concerns political or ideological issues." *Janus v. AFSCME*, 138 S. Ct. 2448, 2473 (2018).[2]

B. For all these reasons, the best interpretation of *Keller* is that it flatly prohibits an integrated bar from using coerced dues for activities with political or ideological coloration in the absence of its members' affirmative consent. *See also* State of Texas Amicus Br. 5 ("The Bar has no legitimate interest in requiring Texas lawyers to support political and ideological activities they do not wish to support."). But even if there were some ambiguity about *Keller*'s holding, that hardly means the Bar gets a free pass in treating 100% of its expenditures as "germane."

[2] The Bar (at 45 n.12) cites various out-of-circuit decisions for the proposition that the chargeability of a bar's expenditures does not turn on "whether they might be characterized as 'political' or ideological.'" Those decisions rest on an erroneous interpretation of *Keller* and should not be followed. For example, in *Schneider v. Colegio de Abogados de P.R.*, 917 F.2d 620 (1st Cir. 1990), the First Circuit drew an utterly unworkable line between lobbying on what it called "technical, non-ideological aspects of substantive law" as opposed to "controversial" or "partisan political" issues. *Id.* at 632-33. The court failed to appreciate that *any* lobbying to make changes to "substantive law" is necessarily "political" and cannot be funded through coerced dues absent members' affirmative consent.

Critically, neither the Supreme Court nor this Court has ever applied *Keller*'s standard to determine the constitutionality of a *specific* expenditure. The only expenditures the Supreme Court has even suggested might satisfy the "germaneness" test are matters such as "activities connected with disciplining members of the Bar or proposing ethical codes for the profession." *Keller*, 496 U.S. at 16; *see also Harris*, 573 U.S. at 655 (Bar could use coerced dues only for activities such as "proposing ethical codes and disciplining bar members"). In the absence of further guidance from the Supreme Court about how to apply *Keller*'s "germaneness" test, this Court should be guided by several broader principles of First Amendment jurisprudence. *See Harris*, 573 U.S. at 647 (considering "generally applicable First Amendment standards" in the absence of "controlling" precedent on the specific question at issue).

First, since the Founding, it has been well settled that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical." *Janus*, 138 S. Ct. at 2448 (quoting Thomas Jefferson, A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950)). The Supreme Court has recognized the "extraordinary" power that is

conferred on an entity when it can compel individuals "to pay for services that they may not want and in any event have not agreed to fund." *Knox v. SEIU*, 567 U.S. 298, 321 (2012).

Second, although it is sometimes complicated to separate chargeable and non-chargeable expenditures, the First Amendment requires courts to place the risk of any uncertainty on "the side whose constitutional rights are not at stake." *Id.* If Appellants and other bar members are forced to pay for political and ideological expenditures to which they object, "their First Amendment rights are infringed." *Id.* On the other hand, the Bar "has no constitutional right to receive any payment from" these individuals. *Id.* Courts must accordingly err on the side of protecting free speech and association rights if the question is close.

Third, the Supreme Court has recognized "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." *Keller*, 496 U.S. at 12. The Bar disagrees with the Supreme Court on this point, arguing (at 37-40) that unions "differ" from bar associations in "fundamental respects." Those arguments are irrelevant, as *Keller*—

which the Bar cites more than 150 times in its brief—has *already* held that there is a "substantial analogy" between the mandatory-bar context and the mandatory-union context. 496 U.S. at 12. The Supreme Court's precedents in the mandatory-union context are thus highly pertinent in answering any questions *Keller* left open in the mandatory-bar context.

C. Each category of activities challenged by Appellants extends far beyond matters such as "disciplining members of the Bar or proposing ethical codes for the profession," *Keller*, 496 U.S. at 16, and unquestionably involves using Appellants' coerced dues for "political or ideological purposes," *Harris*, 573 U.S. at 655, without their affirmative consent.

Lobbying: Lobbying for or against legislation is the paradigmatic example of a non-chargeable political activity. As Justice Sotomayor explained in the first sentence of her concurring opinion in *Knox*, "[w]hen a public-sector union imposes a special assessment intended to fund *solely political lobbying efforts*, the First Amendment requires that the union provide nonmembers an opportunity to opt out of the contribution of funds." *Knox*, 567 U.S. at 323 (Sotomayor, J., concurring in the judgment) (emphasis added); *see also Janus*, 138 S. Ct. at 2481

("reject[ing] ... out of hand" the argument that "costs of lobbying" are chargeable); *Keller*, 496 U.S. at 15-16 (finding it "clear" that "[c]ompulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative"). Lobbying activities squarely implicate First Amendment rights because "lobbying and electoral speech are likely to concern topics about which individuals hold strong personal views." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 521 (1991).

The Bar uses coerced dues for lobbying activities that closely resemble those the Supreme Court has found non-chargeable. Most notably, the Access to Justice Commission—which is funded by the Bar using coerced dues—lobbies for more government spending on its preferred programs. *See* Appellees' Br. 57-58 (Commission "'work[s] to increase resources and funding for access to justice'"); ROA.1415-33, 1607, 1619. In *Janus*, the Supreme Court found that collective bargaining by public employees was an inherently political activity in light of the implications of such bargaining for state budgets. *Janus*, 138 S. Ct. at 2483. This case involves activities that are even more directly political, as the Access to Justice Commission *directly lobbies legislators* for

increased government spending. *See* Access to Justice Comm'n Amicus Br. 11 (acknowledging that Commission "seeks funding for legal aid organizations").

Lehnert is also instructive, as the Court held there that a teachers' union's lobbying campaign "designed to secure funds for public education in Michigan" could not "be supported through the funds of objecting employees." *Lehnert*, 500 U.S. at 527. Whatever *Keller* means, it surely does not authorize the Bar to spend coerced dues on lobbying to increase the size of government programs.

Even if *some* lobbying were permissible under a "germaneness" standard—which it is not—the Bar's activities still go too far. *Keller* mentioned an interest in "improving the quality of legal services." 496 U.S. at 13. But much of the Bar's lobbying (for more than 20 separate bills) has nothing to do with *legal services*; it has to do with *substantive changes to the law* in matters such as marriage, family law, trust law, "poverty law," and many other areas. For example, at the time this suit was filed, the Bar was lobbying for bills regarding "summer weekend possession of a child," ROA.4019, and the procedures for "possession of or access to a child by a grandparent," ROA.3981-83. This lobbying may

broadly pertain to "the law" writ large but has nothing to do with regulating or overseeing the legal profession.[3]

The Bar's defense of its lobbying activities is notable for its complete lack of a limiting principle. According to the Bar (at 54-55 & n.18), it may lobby on even hotly contested matters—such as the State's definition of marriage—in order to "'amend or repeal unconstitutional laws'" or "clean up legal texts." But, once again, nothing in *Keller* grants bar associations roving authority to "clean up" the law using coerced dues. Any connection between those activities and the interests discussed in *Keller*—which focus on regulation and improvement of the *legal profession*—would stretch the notion of "germaneness" beyond its breaking point. *See Harris*, 573 U.S. at 655 (chargeable expenditures limited to activities such as "proposing ethical codes and disciplining bar members").

The Bar contends (at 54-55, 58) that its "legislative program" follows a "detailed, multi-step deliberative process" to ensure it complies with *Keller*. But courts have repeatedly found that it is the challenged

[3] Appellants do not challenge the Bar's ability to respond to the Legislature's "information requests related to the regulation of attorneys and legal-service availability." Appellees' Br. 53. But Appellants emphatically challenge the Bar's ability to use their dues to advance an affirmative "legislative program" that seeks substantive changes to Texas law and more government spending.

action that matters, not the defendant's self-interested disclaimer that its policies comport with the First Amendment. *See*, *e.g.*, *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1183 (6th Cir. 1995) (language in University's harassment policy stating that it would not "interfere impermissibly with individuals['] right to free speech" insufficient to defeat First Amendment claim); *FCC v. Fox Television Stations*, 567 U.S. 239, 255 (2012) (FCC's "assurance" that it would not consider prior broadcasts in a future licensing proceeding was "insufficient to remedy the constitutional violation"); *United States v. Stevens*, 559 U.S. 460, 480 (2010) (court may not "uphold an unconstitutional [policy] merely because the Government promised to use it responsibly"). This Court must accordingly focus on the specific challenged expenditures, giving no weight or deference to the Bar's assurances that it would never violate the First Amendment.

Finally, the Bar (at 54) seeks to distance itself from lobbying activities by claiming that this work is mostly performed by its "voluntary sections." But the Bar does not dispute that the Access to Justice Commission directly lobbies state and federal officials for more government spending on legal aid. Nor does the Bar dispute that the items in its "legislative program" are vetted, approved, and endorsed by

the Bar's Board of Governors and thus bear the imprimatur of being supported by the Bar. *See also* ROA.3752 (noting that Bar's Governmental Relations department "manages and coordinates the State Bar's legislative program").

Diversity initiatives: The Bar unabashedly engages in the "sordid business … [of] divvying us up by race," *LULAC v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, J., concurring in part and dissenting in part), as well as gender, sexual orientation, and other categories. The Bar uses coerced dues to fund numerous "forums, projects, programs, and publications" that are premised on the assumption that is appropriate to offer certain services targeted at individuals of a particular race, gender, or sexual orientation. ROA.3841-42. There is no question that such programs have significant "political or ideological coloration." *Keller*, 496 U.S. at 15.[4]

[4] Since the district court's decision, the Bar has continued to advance a highly ideological and polarizing agenda on racial issues. Spurred by years-old comments from the Bar's President that were deemed insensitive, the Board of Governors held a 12-hour "special meeting" on July 27, 2020, in which it, *inter alia*: (1) created yet another "Task Force" on "diversity, equity, and inclusion"; (2) created a "working group" to "consider numerous diversity and inclusion suggestions"; (3) mandated that the Bar's Board "complete implicit bias training" and "consider making implicit bias training an MCLE requirement for Texas attorneys"; and (4) study whether Texas should adopt the controversial ABA Model Rule 8.4(g), which has been broadly criticized as an unconstitutional restriction on speech. *See* Amy Starnes, State Bar Board of Directors takes action at Special meeting, Texas Bar Blog (July 28, 2020), https://bit.ly/30jl1w0. Absent this Court's intervention, the Bar will surely continue

The Bar (at 60-61) cites *Grutter v. Bollinger*, 539 U.S. 306 (2003), for the proposition that "fostering diversity in the legal profession" is a valid goal. But the Supreme Court expressly limited its decision to "the university environment," as "universities occupy a special niche in our constitutional tradition." *Id.* at 329. The Supreme Court has never discussed or applied a "diversity" rationale outside the university context. And, in all events, even if the Bar may choose to pursue "diversity" initiatives, it does not follow that the costs of such programs can be charged to objectors who believe that people should be treated as individuals rather than members of a particular race, gender, or orientation.

Notably, even the cases cited by the Bar have rejected the expenditure of coerced dues on amorphous "diversity" programs. In *Schneider*, the First Circuit affirmed a district court decision rejecting the Bar's invocation of "promot[ing] the creation of a strongly pluralistic society" as an interest that could be advanced through coerced dues. *Schneider*, 917 F.2d at 631. As the court explained, "even if it

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to use coerced dues to support those highly controversial and politically charged activities.

persuasively could be argued that lawyers in Puerto Rico play a distinctive role in creating a pluralistic society, and that collective political action by lawyers is therefore uniquely central to the mission of the Puerto Rico Bar, compulsory funding of non-legal ideological activities would impose too great a burden on the First Amendment rights of individual members to be constitutionally acceptable." *Id.* After all, "[l]awyers who wish collectively to advocate certain political views can band together in a voluntary association, without coercing those with different views to join their ranks." *Id.*

Access to Justice Division and Programs: As noted, the Bar uses coerced dues to fund the Access to Justice Commission, which then uses that money to lobby for more government spending on its preferred programs. Those costs should be non-chargeable for all the reasons discussed above.

The rest of the Bar's access to justice programs and spending, including the $65 legal services fee, are effectively compelled charitable contributions imposed on attorneys alone as a condition of practicing their profession. The Bar concedes (at 56-57) that "these efforts occasionally touch on headline-grabbing topics, such as immigration," but

asserts that they are merely about "access to justice" or "due process" rather than "substantive ideological goals." But that is no distinction at all. Most notably, when the Bar facilitates legal representation for undocumented immigrants who seek to remain in the United States, that is *itself* a highly "substantive" and "ideological" activity. *See* Appellants' Br. 8-10, 32-33, 39-40. It puts the Bar in the position of opposing the federal government's immigration policies and squarely aligns the Bar with one view of a politically charged national debate.

The Bar's "access to justice" activities are also far removed from the interests that could potentially justify mandatory bar membership or funding. The Supreme Court has explained that states "have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that *attorneys adhere to ethical practices*." *Harris*, 573 U.S. at 655-56 (emphasis added). It makes sense that lawyers, as members of a regulated and licensed profession, should bear the costs associated with that regulatory regime. But that is a far cry from requiring lawyers to fund the Bar's hand-picked charitable causes involving "access to justice" or indigent defense. As to those activities, there is no government interest in having those costs uniquely imposed

on lawyers rather than funded through voluntary contributions or the state's general fund.

The Bar asserts (at 59-60) that the $65 legal services fee is not subject to *Keller* at all because it "is not used to fund any Bar expenditures." *See also* ROA.3450. But the district court cited no authority for that proposition. If Texas required all attorneys to contribute $65 to an abortion-access fund or an anti-death-penalty group as a condition of practicing their profession, it surely would not be a defense to a First Amendment claim that the money did not go directly to the Bar. *See also* State of Texas Amicus Br. 6 (First Amendment would prohibit a state from "mak[ing] driver's licenses available only to those who contribute at least $10 to the Republican party"). At bottom, Appellants are being compelled to subsidize charitable causes of the State's own choosing—rather than of their own choosing—which is a classic form of unconstitutional coerced association. Like the rest of the Bar's access-to-justice spending, the $65 legal services fee cannot be funded through coerced dues absent members' affirmative consent.

II. Because the Bar engages in pervasive political and ideological activities, Appellants cannot be required to join and associate with it.

Because the Bar engages in extensive political and ideological activities, Appellants cannot be compelled to join and associate with it. *See* Opening Br. 23-29. Like the district court, the Bar asserts (at 33-36) that this claim is "foreclose[d]" by *Keller* and *Lathrop v. Donohue*, 367 U.S. 820 (1961). To the contrary, Appellants should prevail on this claim even if *Keller* and *Lathrop* remain good law.

Appellants do not want to join or associate with an organization that lobbies to increase government spending and change the state's definition of marriage, that engages in race- and gender-based programs, and that seeks to assist undocumented immigrants entering the United States. Nothing in either *Keller* or *Lathrop* holds that a state can compel bar membership *when a bar engages in political and ideological activities*. Indeed, the Supreme Court reserved that very question in *Keller*, declining to address "in the first instance" whether an individual can "be compelled to associate with an organization that engages in political or ideological activities beyond those for which mandatory financial support is justified under the principles of *Lathrop* and *Abood*." *Keller*, 496 U.S. at 17.

The Bar erroneously contends (at 33-35) that *Lathrop* already resolved this question. It did not. The *Lathrop* plurality simply held that "[g]iven the character of the integrated bar" at issue—which was evaluated through the lens of pre-*Keller* First Amendment doctrine—the Court was "unable to find any impingement upon protected rights of association." *Lathrop*, 367 U.S. at 843. *Lathrop* expressly declined to answer additional questions about association with and funding of integrated bars that engage in "political activities which [the plaintiff] opposes." *Id.* at 847-48. As the Supreme Court later explained in *Abood*, *Lathrop* was a splintered decision that "does not provide a clear holding" on the "constitutional questions" regarding integrated bars that engage in political activities. *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 233 n.29 (1977). *Lathrop* cannot bear the weight the Bar places on it.

The Bar next asserts (at 35-36) that *Keller* "resolved the free-speech issue left open in *Lathrop*." But *Keller* did no such thing. *Keller* rejected the California Bar's assertion that its activities fell entirely outside the First Amendment. 496 U.S. at 11-13. The Court then provided high-level guidance about what activities may or may not be chargeable, without opining on any specific bar expenditures. *Id.* at 13-16. And the Court

concluded by emphasizing that it declined to address "in the first instance" the plaintiffs' claim "that they cannot be compelled to associate with an organization that engages in political or ideological activities beyond those for which mandatory financial support is justified under the principles of *Lathrop* and *Abood*." *Id.* at 17. It strains credulity for the Bar to assert (at 36) that *Keller* "foreclose[s]" Appellants' arguments on a point *Keller* expressly left open.[5]

Without *Lathrop* and *Keller*, the Bar's defense to Appellants' claim that they cannot be compelled to associate with an organization that engages in pervasive political and ideological activities boils down to an assertion that the Bar does not engage in *any* non-chargeable activities. *See* Appellees' Br. 36 (arguing that the Bar "carefully complies" with *Keller*); *id.* at 48-49 (arguing that claim fails because the Bar "as a matter of both policy and practice, limits its activities to [] *Keller*-authorized purposes"). That is wrong for all the reasons set forth above. And,

[5] The Bar attacks a strawman when it spends several pages arguing (at 36-43) that *Janus* "has not overruled" *Keller* or *Lathrop*. From the start of this case, Appellants have argued that they can and should win even if *Keller* remains good law (while reserving the right to seek further review of that question if necessary). In all events, *Janus* is certainly *relevant* in answering the questions left open in *Keller* given that *Keller* itself found a "substantial analogy" between the union context and the mandatory-bar context. 496 U.S. at 12.

especially given the abundance of alternatives to coerced membership in a highly political bar organization, *see* Opening Br. 25-28, the Bar cannot come close to showing that this arrangement is narrowly tailored to achieving its proffered interests. The Bar has entirely failed to "demonstrate that [these] alternative measures … would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen v. Coakley*, 573 U.S. 464, 495 (2014).

III. The Bar's procedures fail to ensure that members have given affirmative consent to use their coerced dues for political and ideological activities.

Even if Appellants can be compelled to join and associate with the Bar notwithstanding its pervasive political and ideological activities, its objection procedures violate the teachings of *Keller*, *Janus*, *Harris*, and *Knox*. *See* Opening Br. 41-49. Supreme Court precedent requires the Bar to provide a detailed breakdown of its expenditures, an appeal of all chargeability determinations to a neutral decision maker, an option to put funds into escrow pending resolution of objections, and opt-in rather than opt-out procedures for funds that will be spent on political and ideological activities. *See Keller*, 496 U.S. at 16-17; *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 310 (1986). Flatly ignoring these requirements, the Bar fails to publish a sufficient breakdown of its

expenditures; does not provide for the placement of funds into escrow or offer an appeal to an impartial decision maker; and admits to having used "an 'opt out' refund procedure for decades," ROA.3950.

The Bar's primary defense of its procedures (at 63-64) is that it has no obligation to provide a *Hudson* notice or any other similar policies because 100% of its expenditures comply with *Keller*. That argument fails for all the reasons set forth above, as the Bar unquestionably engages in activities that cannot be charged to objectors without their consent.

In the alternative, the Bar argues (at 65-67) that its existing procedures satisfy *Keller*. *Keller* held that "an integrated bar could certainly meet its [procedural] obligation by adopting the sort of procedures described in *Hudson*." *Keller*, 496 U.S. at 17. It left open the question "whether one or more alternative procedures would likewise satisfy that obligation." *Id.* The Bar does not—and cannot—argue that its procedures meet the requirements of *Hudson*. Instead, the Bar asks this Court to conclude that a compulsory bar association can satisfy its procedural obligations using looser, alternative procedures. The Bar does not explain what alternative standard the Court should adopt, but

asserts (at 67) that its current procedures "more than satisfy any First Amendment requirements."

This Court should not adopt a looser standard than the one countenanced by the Supreme Court in *Keller* and *Hudson*. In the decades since *Keller* was decided, the Supreme Court has significantly tightened the requirements in this area to ensure robust protection of First Amendment associational rights. *See, e.g.*, *Knox*, 567 U.S. at 314-15; *Harris*, 573 U.S. at 638-646; *Janus*, 138 S. Ct. at 2460-63. Adopting a looser standard would thus run directly counter to the Supreme Court's recent jurisprudence in the substantially analogous context of mandatory union fees.

The Bar contends (at 65-67) that it publishes details of its activities and that "Bar members have numerous opportunities to object to proposed expenditures before they occur." But the Bar does not dispute that it continues to employ an opt-out system under which the burden is on the *member* to comb through the Bar's books and identify activities to which he or she objects. That contravenes the Supreme Court's holding that "clear[]," "free[]," and "affirmative[]" consent is needed before an organization can use coerced dues to fund political or ideological

activities. *Janus*, 138 S. Ct. at 2486. The Bar's opt-out system "creates a risk that the fees paid by [those who object to certain activities] will be used to further political and ideological ends with which they do not agree." *Knox*, 567 U.S. at 312.

For the same reasons, the Bar underscores its misunderstanding of Supreme Court precedent when it suggests that Appellants must offer a detailed explanation as to why they object to every one of the bills on which the Bar is lobbying. *See* Appellees' Br. at 56 (faulting Appellants for not discussing every single bill in the Bar's lobbying program). That gets things exactly backwards. The First Amendment requires the Bar to proactively seek Appellants' affirmative, upfront consent for *all* of its lobbying, political and ideological activities; it is not Appellants' burden to explain why they do not want to fund these activities. The Bar "may not exact any funds" for such activities absent "affirmative consent," *Knox*, 567 U.S. at 322, which it is undisputed the Bar neither sought nor received here.

Finally, the Bar suggests (at 67) that the fact Appellants "have never utilized" the procedures in question somehow cuts against them. But the Bar does not dispute that there is no exhaustion requirement

under §1983. *See* Opening Br. 47-48. Appellants are under no obligation to follow the Bar's burdensome and inadequate opt-out procedures in order to challenge this regime as unconstitutional under the First Amendment.

IV. This Court should reverse and remand with instructions to grant Appellants a preliminary injunction pending further proceedings.

The Bar briefly asserts (at 67-68) that any injunctive relief should be left to the district court in the first instance. But since this suit was filed in March 2019, Appellants have already paid two cycles of Bar dues that are being used for political and ideological purposes without their consent. A preliminary injunction is needed to ensure that Appellants are not forced to subsidize these activities for another year.

Knox is clear that the First Amendment requires courts to place the risk of any uncertainty on "the side whose constitutional rights are not at stake," 567 U.S. at 321, namely the Bar. And the First Amendment does not permit an organization that collects coerced dues to compel objectors to lend it money to be used for political and ideological activities. *Id.* at 302-03. The Bar does not dispute that appellate courts routinely remand with instructions to enter a preliminary injunction when First Amendment rights are at stake. *See* Opening Br. 49-50

(collecting cases). If this Court finds that the Bar is using Appellants' coerced dues for non-chargeable expenses without their consent, it should accordingly enjoin the Bar from seeking to collect additional dues until a final order is in place to remedy the Bar's unconstitutional conduct.

CONCLUSION

This Court should reverse the district court's decision granting summary judgment to Appellees, grant summary judgment to Appellants on liability, and remand with instructions to grant Appellants a preliminary injunction pending further proceedings on remedies.

Respectfully submitted,

/s/ Jeffrey M. Harris

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CERTIFICATE OF SERVICE

I filed a true and correct copy of this brief with the Clerk of this Court via the CM/ECF system, which will notify all counsel.

/s/ Jeffrey M. Harris
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Dated: August 14, 2020

CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7)(B) because it contains 5,577 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it has been prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Century Schoolbook font.

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Dated: August 14, 2020