No. 21-974

In the Supreme Court of the United States

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

v.

TONY K. MCDONALD, ET AL.

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

REPLY BRIEF FOR THE CONDITIONAL CROSS-PETITIONERS

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The plaintiffs do not oppose the Bar defendants' conditional cross-petition. See Pls.' Br. in Opp. ("Pls.' BIO") 1, 9 (plaintiffs "take no position" on conditional cross-petition). Instead, the plaintiffs focus on the merits of the government-speech issue raised in the conditional cross-petition. But if the Court grants review of the plaintiffs' petition, the parties' dispute on the merits of the government-speech issue is no reason for this Court to deny review of that issue. What matters at this stage in the proceedings is that the plaintiffs do not dispute that the Court's "refusal to treat integrated bars' speech as government speech was central to its analysis" in *Keller* v. *State Bar of California*, 496 U.S. 1 (1990). Pls.' BIO 2 (quoting Cross-Pet. 15). Nor do the plaintiffs dispute that their arguments rest entirely on the "analogy" that *Keller* drew between integrated bars and labor unions, *Keller*, 496 U.S. at 12; see also Cross-Pet. 3-4, or that the plaintiffs would have no viable First Amendment claims if the State Bar of Texas's expressive activities instead qualify as government speech, see Cross-Pet. 30-32. Therefore, as the Bar defendants have argued, see *id.* at 3, if the Court is inclined to revisit *Keller*, it should reassess that decision in its entirety—including *Keller*'s holding that integrated-bar speech does not qualify for the protection of the government speech doctrine. See *Keller*, 496 U.S. at 11-13.

Although full merits briefing is properly reserved for the parties' briefs on the merits (if the case proceeds to that stage), the plaintiffs' brief in opposition

provides no persuasive justification for refusing to treat the State Bar of Texas as the governmental "administrative agency" that Texas state law says that it is. Tex. Gov't Code Ann. § 81.011(a). But before turning to the merits, it is important to note that the plaintiffs are wrong in suggesting that the Bar defendants' disagreement with *Keller*'s government-speech analysis "undermine[s] [their] arguments in the principal case that *Keller*'s other holdings should be retained under *stare decisis* principles." Pls.' BIO 1. To be clear, the Bar defendants' request for this Court to reconsider *Keller*'s refusal to treat integrated bars as government agencies for purposes of First Amendment analysis is an argument in the alternative. The Bar defendants recognize that the fact that an argument—even a compelling argument—may be made that a decision of this Court was wrong "cannot by itself justify scrapping settled precedent." *Kimble* v. *Marvel Ent., LLC*, 576 U.S. 446, 455 (2015). That is why the Bar defendants' lead argument is that this Court should deny the plaintiffs' petition asking the Court to revisit *Keller*, and why the Bar defendants' petition is framed as a *conditional* cross-petition. See Cross-Pet. I, 3, 33.

If, however, this Court is inclined to grant the plaintiffs' petition, it should also grant the Bar defendants' conditional cross-petition. Doing so will allow the Court to correct *Keller*'s foundational error of treating integrated bars like labor unions rather than government agencies in the context of the First Amendment.

A. *Keller*'s Government Speech Holding Is A Jurisprudential Anomaly Warranting Reconsideration

"It is an odd feature" of this Court's jurisprudence that *Keller* precludes treating the State Bar of Texas's speech as government speech for purposes of First Amendment analysis, yet there appears to be no dispute that for all other purposes the Texas State Bar qualifies as a government agency. *Janus* v. *Am. Fed'n of State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2484 (2018). Texas's State Bar Act expressly provides that the State Bar of Texas is "an administrative agency of the judicial department of government," subject to the Supreme Court of Texas's "administrative control." Tex. Gov't Code Ann. § 81.011(a), (c); see also, *e.g.*, Tex. Att'y Gen. Amicus Br. at 1, *McDonald* v. *Firth*, No. 21-800 (Jan. 19, 2022) (acknowledging that Texas State Bar is a "governmental entit[y]"). The plaintiffs do not dispute that the Texas Bar is subject to legal requirements and restrictions similar to those governing other state agencies, including sunset reviews and open meetings and records laws, as well as the requirement that Bar officers and directors take the oath of office prescribed for state officials in the Texas Constitution. See Cross-Pet. 8-10, 23-26. Nor do the plaintiffs contest that the Bar lacks full autonomy over its funds or that the Bar's funds are used to support numerous entities not subject to the direct control of the Bar's Board of Directors. See *id.* at 7-8. The plaintiffs also concede that the Texas Bar qualifies as an arm of the state entitled to sovereign immunity. See *id.* at 22-23 (citing Cross-Pet. App. 15a-16a). Therefore, under *Keller*, the State Bar of Texas is a truly rare

bird: It is subject to both the benefits and burdens of being a government agency for seemingly all purposes except one—the ability to freely engage in expressive activities that the government speech doctrine provides. See *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 467-468 (2009).

That peculiar result cannot be justified as a matter of "first principles." Cf. Pls.' Pet. at 34, *McDonald* v. *Firth*, No. 21-800 (Nov. 24, 2021); Pls.' Reply at 1, *McDonald* v. *Firth*, No. 21-800 (Feb. 22, 2022). The plaintiffs do not contest that the theory of democratic accountability underlying the government speech doctrine applies fully to the Texas State Bar. See Cross-Pet. 27-28. If Texas lawyers object to the Bar's speech, they can hold the responsible officials accountable through "the democratic electoral process." *Walker* v. *Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015). Moreover, the plaintiffs ignore that by opening the door to federal courts' second-guessing of whether integrated bars' expressive activities satisfy *Keller*'s germaneness standard, *Keller* invites "permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism." *Garcetti* v. *Ceballos*, 547 U.S. 410, 423 (2006); see also Cross-Pet. 28-29. Therefore, if this Court grants the plaintiffs' request that it revisit *Keller*, the Court should reconsider the jurisprudential anomaly created by *Keller*'s refusal to treat integrated bars as government agencies for purposes of the government speech doctrine.

B. The Plaintiffs Provide No Persuasive Justification For Treating The Texas State Bar Differently Than Other Government Entities For Purposes Of The Government Speech Doctrine

The plaintiffs fail to provide any principled basis for treating the Texas State Bar differently than other government entities for purposes of the government speech doctrine. Instead, the plaintiffs attempt to justify that differential treatment based on language in *Keller* and *Johanns* v. *Livestock Marketing Ass'n*, 544 U.S. 550 (2005). Their arguments, however, are utterly unpersuasive.

To start, the plaintiffs cite *Keller*'s lead rationale for the differential treatment of integrated bars—i.e., that an integrated bar's "principal funding comes, not from appropriations made to it by the legislature, but from dues levied on its members." Pls.' BIO 2-3 (quoting *Keller*, 496 U.S. at 11). But the plaintiffs cannot dispute that this reasoning does not survive *Johanns*, which held that whether expressive activities qualify as government speech is "altogether unaffected by whether the funds for the [activities were] raised by general taxes or through a targeted assessment." 544 U.S. at 562.

Next, the plaintiffs quote *Keller*'s statement that "[o]nly lawyers admitted to practice in the State of California are members of the State Bar, and all 122,000 lawyers admitted to practice in the State must be members." *Keller*, 496 U.S. at 11. The relevance of this fact is not entirely clear. After all, many government entities focus on particular issues or industries. The plaintiffs' point seems to be that integrated bars'

status as government agencies under state law should be ignored because integrated bars allegedly are "a substitute" for voluntary bar associations. Pls.' BIO 5-6. But that cannot be correct. Government entities often serve similar functions as private ones. For example, public universities "engage in many of the *exact same activities*" as private ones, but that does not strip public universities of their status as government entities. *Id.* at 5; see also, *e.g.*, *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (recognizing public university's authority to "determine[] the content of the education it provides"). *Johanns* offers another example: Advertisements obviously can be—and usually are—the product of voluntary efforts in the private sector, yet the Court nevertheless held that the advertisements at issue in *Johanns* qualified as government speech, even though they were funded by industry assessments, were designed by a committee of industry representatives, and did not "identify [the] government as the speaker." *Johanns*, 544 U.S. at 553-555, 560, 562-563, 564 n.7.

Rounding out the plaintiffs' reliance on *Keller*, the plaintiffs argue that the government speech doctrine should not apply to the Texas State Bar because its activities "are essentially advisory in nature." Pls.' BIO 3-4 (quoting *Keller*, 496 U.S. at 11). The Texas State Bar, however, is not limited to playing an exclusively advisory role. The Texas Supreme Court has delegated "the responsibility for administering and supervising lawyer discipline and disability"—a "core" government function, *Hoover* v. *Ronwin*, 466 U.S. 558, 569 n.18 (1984) (citation omitted)—to the Texas State Bar's Board of Directors. Tex. R. Disciplinary P.,

preamble; see also Cross-Pet. 6. Furthermore, the Bar's Board of Directors can veto proposed disciplinary rules. See Tex. Gov't Code Ann. §§ 81.0877, 81.08792. And even if the Texas State Bar's activities were exclusively or primarily advisory in nature, that would not distinguish the Bar from numerous other government entities—e.g., the U.S. Sentencing Commission, which prepares the advisory federal sentencing guidelines, see *United States* v. *Booker*, 543 U.S. 220, 245 (2005), or the Congressional Research Service, see 2 U.S.C. § 166.

As for the plaintiffs' reliance on the *Johanns* dicta that distinguished *Keller*, see Pls.' BIO 6-9, the plaintiffs' argument is circular. Like *Johanns*, the plaintiffs effectively assume the conclusion that integrated-bar speech is not government speech. See *Johanns*, 544 U.S. at 559 (noting that in prior "cases invalidating exactions to subsidize speech," including *Keller*, "the speech was, or was presumed to be, that of an entity other than the government itself"). The plaintiffs assert that "no government official" exercises a sufficient "degree of governmental control" over the State Bar's speech for it to qualify as government speech. Pls.' BIO 7-9 (quoting *Johanns*, 544 U.S. at 561). But that argument rests on the assumption that it is appropriate to ignore the State Bar of Texas's status as "an administrative agency of the judicial department of government," Tex. Gov't Code Ann. § 81.011(a), for purposes of the government speech doctrine. The argument thus assumes the answer to the question presented here.

In any event, if the exercise of control over the Texas State Bar by other government actors were required,

it exists here. As the Bar defendants have explained, all three branches of the Texas government can—and do—exercise substantial control over the Bar's activities. See Cross-Pet. 25-26; cf. *Department of Transp.* v. *Ass'n of Am. R.R.*, 575 U.S. 43, 55 (2015) ("practical reality of federal control and supervision" supported treating Amtrak as government entity). Particularly relevant here, the Texas State Bar Act expressly provides that the Texas Supreme Court "shall exercise administrative control over the state bar." Tex. Gov't Code Ann. § 81.011(c). The Texas Supreme Court must approve the Bar's annual budget, any increases of Bar membership fees, and any distributions of those fees to cover Bar expenditures. See *id.* §§ 81.022(d), 81.054(a), (c). Furthermore, Bar "[p]urchases are subject to the ultimate review of the supreme court." *Id.* § 81.0151. The Texas Supreme Court has also promulgated detailed rules governing the Bar's "operation, maintenance and conduct," including on such fundamental issues as the procedures for electing Bar directors and officers. State Bar R. art. II, § 3; *id.* art. IV, §§ 6-7, 11; see also Tex. Gov't Code Ann. § 81.024.

It is simply extraordinary that an entity subject to such a high degree of control by a state's supreme court and other government officials does not itself qualify as a government agency for purposes of the government speech doctrine under current precedent. If this Court is inclined to revisit *Keller*, it should include within the scope of its review *Keller*'s erroneous refusal to treat integrated-bar speech as government speech.

CONCLUSION

The petition for a writ of certiorari in Case Number 21-800 should be denied. If that petition is

granted, however, then the Bar defendants' conditional cross-petition for a writ of certiorari should also be granted.

Respectfully submitted.

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