

No. 19-35463

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**United States Court of Appeals  
for the Ninth Circuit**

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DANIEL Z. CROWE, OREGON CIVIL LIBERTIES ATTORNEYS; AND  
LAWRENCE K. PETERSON,

*Plaintiffs-Appellants,*

v.

STATE BAR OF OREGON,

*Defendant-Appellee,*

---

**On Appeal from the United States District Court for the  
District of Oregon, Portland Division  
Case No. 3:18-cv-02139-JR  
Honorable Michael H. Simon**

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**MOTION OF STATE BAR OF ARIZONA FOR LEAVE TO FILE  
AMICUS CURIAE BRIEF SUPPORTING APPELLEE**

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The State Bar of Arizona (“Arizona”) moves for leave to file an amicus brief supporting the State Bar of Oregon in this case. The proposed brief is filed with this motion. The State Bar of Oregon consents to Arizona filing this brief. Appellants oppose the filing of this brief.

Arizona has an interest in the court’s decision in this case because Arizona, like Oregon, has an integrated bar in which membership is required. The amicus brief will provide information on state bars in jurisdictions other than Oregon to provide the Court with a broader perspective on the varied systems for regulating the practice of law. Because of the potentially broad impact of the court’s decision, information on other state bars should be useful to the court.

RESPECTFULLY SUBMITTED this 13th day of November, 2019.

OSBORN MALEDON, P.A.

By s/ Mary R. O’Grady

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**AMICUS CURIAE BRIEF OF THE STATE BAR OF ARIZONA  
SUPPORTING APPELLEE STATE BAR OF OREGON<sup>1</sup>**

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<sup>1</sup> As the cases are not consolidated, the State Bar of Arizona is filing identical briefs in cases 19-35463 and 19-35470.

## **CORPORATE DISCLOSURE STATEMENT**

The State Bar of Arizona, the entity filing this amicus brief, has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

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## **INTEREST OF THE STATE BAR OF ARIZONA IN THIS CASE**

The State Bar of Arizona (“State Bar”) submits this amicus brief because of its interest in defending states’ ability to have integrated bars in which membership is mandatory for attorneys practicing in a jurisdiction. The State Bar has an interest in (1) ensuring that the Court has information about the diversity of integrated bar models when assessing the legal issues in this case; (2) supporting the constitutionality of an integrated bar that complies with the requirements in *Keller v. State Bar of California*, 496 U.S. 1 (1990); and (3) preserving Arizona’s integrated bar. This amicus brief provides the Court with information about the State Bar of Arizona and the bars in other states, so this Court has a broad perspective on the states’ approaches to regulating the practice of law. It also describes the important differences between state bars and public employee labor unions. Because this case has implications well beyond Oregon, perspectives from other state bars should be useful for the Court to consider.

This brief is filed pursuant to Federal Rule of Appellate Procedure 29 and with an accompanying motion for leave to file it. Counsel for the State Bar of Arizona authored this brief. Counsel for a party in this case did not author any portion of this amicus brief; no party contributed money to prepare this brief, and no third person contributed money to fund this brief.

## INTRODUCTION

Plaintiffs' appeal should fail because *Keller v. State Bar of California*, 496 U.S. 1 (1990) remains the controlling precedent. *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), did not overrule *Keller*. Although *Janus* overruled *Abood v. Detroit Board of Education of Teachers*, 431 U.S. 209 (1977), *Keller's* holding still controls the analysis of integrated bars.

*Janus* and *Abood* both addressed labor unions, which are very different organizations from state bars and serve significantly different interests. Unlike unions, integrated bars are generally creations of state governments that perform specific responsibilities assigned by the state legislature or the state supreme court to regulate the practice of law and advance the administration of justice in the jurisdiction. The Court established the requirements for integrated State Bars in *Keller*, and those rules still apply, despite the changes in the law governing public unions. State bars' history, responsibilities and structures vary depending on the jurisdiction, but all serve related and important public interests. Integrated bars have incorporated requirements to comply with *Keller*. Any analysis of an integrated bar should consider the unique structure, responsibilities and relevant procedures of the specific bar at issue in the case and avoid broad generalizations that may not apply to bars in different jurisdictions.

In this case, the State Bar of Oregon complies with *Keller*, and the district court's decision should be affirmed.

## ARGUMENT

### I. Integrated Bars Vary in Different Jurisdictions.

More than half the states in the country have integrated bars. *See In re Petition for a Rule Change to Create a Voluntary State Bar of Neb.*, 286 Neb. 1018, 1022, 841 N.W.2d 167, 171 (2013) (“Thirty-two states and the District of Columbia require attorneys to become members of a bar and to pay dues as a condition of practicing law in that jurisdiction.”). Integrated bars have made changes to comply with *Keller*'s requirements. Some are “*Keller*-pure” and prohibit lobbying-expenditures outside the subjects *Keller* authorized that are germane to the Bar's purpose. Others engage in lobbying expenditures that are not within the confines of *Keller*-permissible lobbying, but have reimbursement processes for non-consenting members. Others, like Arizona, have both spending restrictions and a reimbursement process in case there are complaints. Aside from the differences in the approach to *Keller* compliance, the bars also have different structures and responsibilities. All have a strong connection with state government. They are created by the Legislature or the Supreme Court, and their overall mission and responsibilities may be defined by statute or court rule. Although their rules and procedures vary, the bars in these states share the common purpose of advancing the

legal profession and administration of justice through rules of discipline, provision of ethics guidance, maintenance of continuing legal education programs, and administration of client protection funds, among other functions. A survey of some jurisdictions is below.

**Arizona.** As is true in other jurisdictions, Arizona’s state bar is a creation of State government. Arizona’s first state bar organization was established by statute in 1933. 1933 Ariz. Laws Ch. 66. It was later reconstituted in court rules as a corporate organization subject to the Arizona Supreme Court’s direction and control. Ariz. R. Sup. Ct. 32(a); *see also* 1982 Ariz. Sess. Laws, Ch. 202, § 17 (repeals statutes governing the state bar). The Arizona Supreme Court has “exclusive authority over the regulation of attorneys” in Arizona. *Scheehle v. Justices of the Sup. Ct. of the State of Ariz.*, 120 P.3d 1092, 1099 ¶22 (2005). The State Bar plays a critical part in the Supreme Court’s system for regulating attorneys and has also been assigned a number of related responsibilities through the Arizona Supreme Court rules.

Any person “licensed by [the Arizona Supreme] Court to engage in the practice of law” in Arizona must be a member. Ariz. R. Sup. Ct. 32(a)(1). “The State Bar . . . exists to serve and protect the public with respect to the provision of legal services and access to justice.” *Id.* at 32(a)(2). Consistent with this mission established by Supreme Court rule, the State Bar’s work includes a range of

responsibilities including aiding the courts in the administration of justice, *id.* at 32(a)(2)(C), “[p]romot[ing] access to justice” in Arizona, *id.* at 32(a)(2)(B), assisting with the regulation and discipline of attorneys, *id.* at 32(a)(2)(D), conducting educational programs, *id.* at 32(a)(2)(E) and “serv[ing] the professional needs of its members,” *id.* at 32(a)(2)(D). The Arizona Supreme Court has also assigned the State Bar specific tasks, that include, for example, performing the investigative and prosecutorial functions in attorney discipline, *id.* at 46-49, administering the Board of Legal Specialization, *id.* at 44, overseeing the mandatory continuing legal education program, *id.* at 45, implementing a conservatorship program that protects client interests, *id.* at 66-69, and serving investigatory and prosecutorial functions regarding the unauthorized practice of law, *id.* at 75-79.

By statute, the State Bar also acts as an advisory board to the Arizona Supreme Court, advising the Court on the promulgation of rules relating to pleading, practice, and procedure in state courts. A.R.S. § 12-110(A). The focus of all of this work fulfills the Supreme Court’s responsibilities to regulate the practice of law and, more broadly, to oversee the administration of justice in Arizona.

The State Bar is governed by a geographically diverse board that includes members elected by Bar-members and others appointed by the Supreme Court, including some non-lawyers. Ariz. R. Sup. Ct. at 32(e). It is also required to conduct its business in public meetings and to maintain records subject to the Court’s

public access policies. *Id.* at 32(m); *see also* Ariz. Sup. Ct. Admin. Order 2017-34 (requiring opportunities for public comment at governing board meetings and written minutes of all meetings). Any changes to the court rules that govern the State Bar require the Arizona Supreme Court's approval after public notice and comment.

All lawyers practicing law in Arizona are required to pay an annual fee to the State Bar. Ariz. R. Sup. Ct. at 32(c)(7). The fee is calculated based on the amount needed for the operation of the State Bar and an amount for funding the Client Protection Fund, and must be approved by the Arizona Supreme Court. *Id.* at 32(c)(7)-(8), (d)(1). Any lobbying activities by the State Bar must comply with the requirements of *Keller v. State Bar of California*, 496 U.S. 1 (1990). *Id.* at 32(c)(8). The State Bar is “*Keller*-pure” in that it will not take positions or engage in activities that are not germane to its responsibilities based on the United States Supreme Court decision explained in *Keller*. Even though the State Bar attempts to avoid any expenditure that would not be germane to the State Bar's role, as described in *Keller*, any person objecting to a particular lobbying activity may request a refund of a portion of the annual fee. *Id.*; *see also* State Bar of Arizona, *State Bar's Role in Lobbying*, (Nov. 6, 2019), <https://www.azbar.org/aboutus/governmentrelations/lobbyingexpenserefund/>. For additional transparency relating to its *Keller* responsibilities, the State Bar's by-laws

require the organization to produce a report summarizing any positions taken by the organization on pending legislation, and that report is posted on the Bar's website. Ariz. State Bar Bylaws, art. X.

**Alaska.** The powers, duties, responsibilities, and organization of the Alaska Bar Association ("Alaska Bar") are established by the Alaska Integrated Bar Act and the Alaska Bar Rules, as set forth in the Alaska Bar's Bylaws. AK R BAR BYLAWS art. I. The purposes of the Alaska Bar are to regulate the practice of law, promote reform in the law and in judicial procedure, facilitate the administration of justice, encourage continuing legal education, and increase the public service and efficiency of the Alaska Bar. *Id.*

Admission in the Alaska Bar is mandatory. AK R BAR Rules 1, 5, 9. The Alaska Bar sets forth requirements for admission (*Id.* at Rules 2-8), and provides Rules of Disciplinary Enforcement that govern supervision of attorney conduct (*Id.* at Rules 10-29). The Alaska Bar employs a Bar Counsel, who is authorized to provide informal and confidential ethics guidance to all bar members. *Id.* at Rule 11. The Alaska Bar provides a process for disputes regarding attorney fees, including through arbitration (*Id.* at Rules 34-42), and operates a client-protection fund partially funded by dues from members. *Id.* at Rules 45-60.

The Alaska Bar is governed by a Board of Governors, consisting of nine active members of the Alaska Bar and three persons appointed by the governor who are not

attorneys. Alaska Stat. Ann. § 08.08.030-040; AK R BAR BYLAWS art. IV, V. Through the Board, the Bar is responsible for approving and recommending rules concerning admission, discipline, licensing, and continuing legal education to the state supreme court. Alaska Stat. Ann. § 08.08.080; AK R BAR Rule 62.

Members of the Alaska Bar are required to pay an annual membership fee. AK R BAR Rule 61. The Board is empowered to disburse membership fees, consistent with the Alaska Bar Rules. Alaska Stat. Ann. § 08.08.080. The Alaska Bar's Bylaws prohibit the Alaska Bar from making expenditures relating to political or ideological activities "unless reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services available to the people of the state." AK R BAR BYLAWS art. X, § 3. "It is the general policy of the Board to restrict the disbursement of dues to expenditures necessarily or reasonably incurred for the purpose of regulating the legal profession in Alaska or improving the quality of legal services available to the people of Alaska. These expenditures are considered "chargeable" within the meaning of *Keller v. State Bar of California*, 496 U.S. 1, 110 L.Ed.2d 1, 110 S.Ct. 2228 (1990)." *Id.* art. III, §5. Any member may object to the disbursement of funds that the member believes to be "nonchargeable" by following procedures set forth in the bylaws. *See id.* § 5(d) and (e).

**Hawaii.** State statute gives the Hawaii Supreme Court the “ultimate authority . . . to oversee and control the privilege of the practice of law” in the state. Haw. R. Sup. Ct. 1.1. Pursuant to this power, “all persons admitted to the practice of law in [Hawaii] are hereby unified into an organization to be known as the Hawai’i’ State Bar” (“Hawaii Bar”) which “shall be and remain an independent, member-governed organization.” *Id.* at Rule 17(a). The Hawaii Bar’s purpose is to “aid the courts in regulating, maintaining and improving the legal profession, administration of justice and advancements in jurisprudence, in improving relations between the legal profession, the public and the various branches and instrumentalities of government in this State, and in promoting the interests of the profession in this State.” *Id.* at 17(b). The Hawaii Bar is responsible for administering the state statutes and rules of the Supreme Court relating to governance of the legal profession, including through assisting the Supreme Court with carrying out functions related to the unauthorized practice of law (HRS § 605-14); admission to the bar (Haw. R. Sup. Ct. 1); discipline (Haw. R. Sup. Ct. 2); and the state’s client protection fund (Haw. R. Sup. Ct. 10). The Hawaii Bar has the “primary responsibility for the other rules of the court and programs relating to the profession, its governance and improvement, including Rule 6 [Professional Corporations], Rule 11 [IOLTA], and Rule 16 [Substance Abuse].” Haw. R. Sup. Ct. 17(b). Hawaii mandates continuing

legal education for attorneys licensed in the state, which is administered by the Hawaii Bar. *Id.* at Rule 22.

The powers of the Hawaii Bar are exercised by an elected Board of Directors comprised of at least eleven geographically diverse members and four officers. *Id.* at Rule 17(c). The Board has the authority to adopt, amend or repeal bylaws that are not inconsistent with state statute or the rules of the Supreme Court. *Id.* at Rule 17(h). *See generally* HI R. BAR CONST AND BYLAWS arts. I-XIV. The Board has the authority to “[m]ake appropriations and authorize disbursements from the funds of the State Bar Association in payment of the expenses of the Bar Association, its officers, agents, employees, and committees.” *Id.* at art. V, §§ 2, 3.

All members of the Hawaii Bar are required to pay annual dues. *Id.* at art. VI, § 1. “Neither the Hawai‘i State Bar Association nor any of its committees or sections may engage in political or ideological activities involving the expenditure of compulsory membership dues unless it is determined by the Board of Directors or the Executive Committee that the activity is related to the purposes of the Hawai‘i State Bar as set forth in Rule 17 and Article II.” *Id.* at art. VI, § 2(a). The Hawaii Bar must publish an annual report of expenditures, and any member of the bar may, within 45 days of the publication of the report, file written objections to any expenditure. The Hawaii Bar’s bylaws set forth a procedure for adjudicating objections to expenditures, which includes arbitration and placement of the pro-rata

amount of the objecting member's dues into escrow pending determination of the merits. *Id.* at art. VI § 2(c).

**Idaho.** Idaho has statutorily provided for its Board of Commissioners of the Idaho State Bar (“Idaho Bar”) to govern the practice of law in the state. Idaho Code Ann. § 3-401. The statute is animated by a goal to “properly protect[]” the public from “unprofessional, improper and unauthorized practice of law and unprofessional conduct of members of the bar.” *Id.* The Board in Idaho consists of five members, all members of the Idaho Bar and all elected pursuant to the Idaho Bar's procedures. *Id.* § 3-402. The Board promulgates rules governing attorney admission and discipline, subject to the approval of the Idaho Supreme Court. *Id.* §§ 3-408, 3-412, 3-413; *see also* ID R. BAR COMM. 101-1309.

Rule 304 provides for annual license fees to maintain membership in the Idaho Bar. ID R. BAR COMM. 304. Fees are used “for the purpose of administering the Idaho state bar, encouraging local bar associations, promoting legal education seminars, fostering relations between the public and the bar and for the purpose of establishing and maintaining a clients' assistance fund.” Idaho Code Ann. § 3-409. All moneys received and expended are audited annually. *Id.*

Under its Rules, the Idaho Bar “is an integrated bar, and as such is limited in its ability to engage in legislative and political activity.” ID R. BAR COMM. 1106. Any practice section of the Idaho Bar that seeks to promote legislation or any other

political position must comply with rules regarding resolutions of the Idaho Bar. *See id.*; *see also* Rule 906 (resolution process). The Rules also set forth a process for members to apply for a refund if license funds are expended “to advocate political or ideological positions that are not reasonably related to the [Idaho] Bar’s enumerated purposes.” *Id.* at Rule 307. However, this Rule does not “create an affirmative obligation on the Bar to advocate or refrain from advocating any political or ideological positions.” *Id.* If the Idaho Bar expends funds for advocacy activities, it is required to publish the amount of funds for member scrutiny. *Id.*

**Montana.** Montana’s Constitution empowers the Supreme Court of Montana to make rules governing “admission to the bar and the conduct of its members,” subject to the legislature’s power to disapprove such rules. Mont. Const. art. VII, § 2. In 1974, the Montana Supreme Court invoked this power and created the “Unified Bar of Montana” (“Montana Bar”) with required membership and dues. *In re President of the Mont. Bar Ass’n*, 163 Mont. 523, 526, 518 P.2d 32, 34 (1974). The Montana Bar was created for the purpose of “aiding the Court in maintaining and improving the administration of justice; maintaining high standards of integrity, conduct, competence and public service on the part of practicing attorneys; providing a forum for the discussion of subjects pertaining to the practice of law; and insuring that the responsibilities of the legal profession to the public are more effectively discharged.” *In re State Bar of Mont. for a Dues Increase*, 305 Mont.

279, 53 P.3d 854, 856–57 ¶ 16 (2001). In 2001, the Court reaffirmed its order requiring mandatory membership in the Montana Bar and payment of membership dues, noting: “There is little question but that our concerns with ethical conduct, continuing legal education and availability of legal services to all are even more compelling now than they were 27 years ago.” *Id.* 53 P.3d at 857-58 ¶¶ 20, 25.

The Montana Supreme Court possesses original and exclusive jurisdiction to enforce the professional ethics and conduct of members of the Montana Bar. *Id.* at 53 P.3d at 858 ¶ 26. Although power is vested with the Montana Supreme Court, its programs and initiatives are carried out by the Montana Bar and its members. The Court has established an Office of Disciplinary Counsel and Commission on Practice, comprised of members of the Montana Bar, which investigates complaints against lawyers. *See* M. R. Disciplinary Enforcement 1-35. The Court has also promulgated rules governing the arbitration of fee disputes in a program administered by the Montana Bar (*see* M. R. Fee Arb. 1-11) and governing mandatory continuing legal education (*see* M. R. CLE 1-15) in a program that is administered by the Montana Bar. Admission to the Montana Bar is governed by the Montana Supreme Court Commission on Character and Fitness and the Montana Supreme Court Board of Bar Examiners; both commissions are administered by the Montana Bar. *See* M. R. Admission § 1. The Montana Bar has also established an Ethics Committee charged with recommending changes to the Rules of Professional

Conduct and providing formal and informal advisory ethics opinions to members of the Montana Bar. *See* M. Ethics Comm. Operating Rules I-III.

A Board of Trustees, elected from among the membership, manages the Montana Bar. *See* M. State Bar Bylaws arts. II-IV. The Board is authorized to make appropriations and disbursements from the funds of the Montana Bar “in payment of the necessary expenses of the association, its officers and committees,” and is required to annually report on the bar’s financial status to the Montana Supreme Court. *Id.* art. III § 4(a)(iii) and (viii). The Board is responsible for the establishment and administration of the state’s Lawyers’ Fund for Client Protection. *Id.* art. XI.

**Nevada.** Nevada’s State Bar (“Nevada Bar”) is a public corporation created by statute and under the exclusive jurisdiction and control of the Nevada Supreme Court. Nev. Rev. Stat. § 7.275; *see also* Nev. Sup. Ct. R. 76. Membership in the Nevada Bar is mandatory. Nev. Sup. Ct. R. 77. The Nevada Bar’s rules are made by the Nevada Supreme Court pursuant to Nev. Rev. Stat. § 2.120. The rules provide admission requirements, membership classes, and mandatory fees. Nev. Sup. Ct. R. 49 (board of bar examiners), R. 98 (membership classes and fee structure). The Nevada Bar’s rules also govern attorney discipline, *id.* R. 99-116, and mandatory continuing legal education, *id.* R. 210.

The Nevada Bar is governed by a Board of Governors, comprised of fifteen elected members of the Nevada Bar. *Id.* R. 80-84. The rules require the Board to

annually prepare “a statement showing the total amount of receipts and expenditures of the state bar.” *Id.* R. 85. Rule 86 sets forth the Board’s power to make appropriations and disbursements from funds of the Nevada Bar. The Board is authorized to expend funds in furtherance of actions that “promote reform in the law and in judicial procedure,” “uphold and elevate the standard of honor, of integrity and of courtesy in the legal profession,” and “encourage higher and better education for membership in the profession,” among others. *Id.* R. 86. The Board is also permitted to establish a client security fund maintained from dues paid by members of the state bar, among other sources. *Id.* R. 86.5. The Nevada Bar may make legislative recommendations regarding matters “pertaining to the science of jurisprudence or the improvement in the administration of justice or with matters of legislation into session,” if approved by the Board. *Id.* R. 88.

**Washington.** The Washington Supreme Court has “inherent and plenary authority” to regulate the practice of law in Washington, which it accomplishes through adoption of rules governing the practice of law and through its authorization and supervision of the Washington State Bar Association (“Washington Bar”). Wash. R. Gen. Application 12 and 12.2. All persons admitted to practice in the state must become members of the Washington Bar. Wash. Rev. Code. Ann. § 2.48.021. The Washington Bar is governed by a board of governors consisting of fifteen elected members. *Id.* §§ 2.48.030-040. The board has the power to adopt rules

concerning admission, membership, annual and special meetings, and the collection and disbursement of membership and admission fees, among other topics. *Id.* §§ 2.48.050-60.

The Washington Supreme Court has enumerated the purposes of the Washington Bar, which are familiar: promotion of an effective legal system; fostering and maintaining high standards of competence, professionalism, and ethics among its members; administering legal education programs; and administering the admission, regulation, and discipline of its members in a manner that protects the public. Wash. R. Gen. Application 12.2. In furtherance of these purposes, the Washington Bar is authorized to administer a discipline system; maintain a program requiring members to submit fee disputes to arbitration; maintain a program for mediation of disputes between members and others; maintain a program for legal professional practice assistance; sponsor, conduct, and assist in producing programs of continuing legal education; and maintain a client protection fund. *Id.*

The Washington Bar is also directed to serve as a “statewide voice to the public and to the branches of government on matters relating to these purposes and the activities of the association and the legal profession.” *Id.* To that end, the Washington Bar is authorized to “disseminate information about the organization’s activities, interests, and positions”; “monitor, report on, and advise public officials about matters of interest to the organization and the legal profession”; and “maintain

a legislative presence to inform members of new and proposed laws and to inform public officials about the organization's positions and concerns." *Id.* The association is expressly not permitted to "take positions on issues concerning the politics or social positions of foreign nations"; "take positions on political or social issues which do not relate to or affect the practice of law or the administration of justice"; or "support or oppose, in an election, candidates for public office." *Id.*

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The state bars' connection with state government and responsibilities to the general public with regard to attorney conduct and the administration of justice distinguish them from the labor unions discussed in *Abood* and *Janus*. Because of the variations between jurisdictions, any First Amendment analysis of an integrated bar should focus on the requirements applicable to the bar at issue to avoid unnecessarily impacting bars in different jurisdictions.

## **II. *Keller* Governs the Integrated Bar Associations' First Amendment Responsibilities.**

*Keller's* framework, which has been in place for close to thirty years, governs the First Amendment analysis of integrated bars' spending of member dues, and the district court correctly dismissed the Plaintiffs' case based on *Keller*. In *Keller*, the Supreme Court recognized California's interest in "regulating the legal profession and improving the quality of legal services." *Keller*, 496 U.S. at 13-14. It then held that the California state bar "may therefore constitutionally fund activities germane

to those goals out of the mandatory dues of all members.” *Id.* The Court, however, concluded that the State Bar could not use its mandatory dues to “fund activities of an ideological nature which fall outside of those areas of activity.” *Id.* It approved of adequate notice procedures developed in the caselaw governing unions in *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986) to satisfy its First Amendment responsibilities. *Id.* at 17.

Although *Keller* remains the controlling precedent for First Amendment issues concerning integrated bars’ spending of member dues, First Amendment law concerning member dues by public sector unions has changed significantly. In *Janus*, the Supreme Court overruled *Abood*, which had governed the ability of public sector unions to require that non-member employees pay union fees. In *Janus*, the Court held that an Illinois law permitting a union to automatically deduct union fees from a non-union members’ wages violated the First Amendment. 138 S. Ct. at 2487. It held that “[n]either an agency fee nor any other payment to the union may be deducted from a nonmember’s wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay.” *Id.* at 2486. *Janus* addressed only public sector unions and did not address integrated bars or the *Keller* decision. As a result, *Keller* remains the law governing integrated bars.

### **III. State Bars Differ Significantly from Public Sector Unions Addressed in *Janus*.**

State bars are generally organizations created at the direction of the state legislature or a state supreme court to assist in the regulation of attorneys and the advancement of work related to the administration of justice. *See, e.g.,* Ariz. R. Sup. Ct. 32 (establishing the Arizona state bar); Mont. Const. art. VII, § 2 (empowering the Supreme Court of Montana to make rules governing “admission to the bar and the conduct of its members,” subject to the legislature’s power to disapprove such rules). Their role in the regulation of attorneys serves a traditional state function similar to the State’s role in the regulation of a variety of professions, in some respects. *See, e.g.,* A.R.S., Title 32 (regulating “Professions and Occupations,” including architects, engineers, barbers, cosmetologists, accountants, collection agencies, dentists, health professionals, and realtors, among others). However, unlike professions regulated by the executive, lawyers are regulated by the judicial arm of state government because “lawyers are essential to the primary governmental function of administering justice, and have historically been ‘officers of the courts.’” *Bates v. State Bar of Ariz.*, 433 U.S. 350, 401 (1977) (quoting *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975)). In this role, state supreme courts are “the ultimate body wielding the State’s power over the practice of law,” and state bar associations are instrumentalities of the state, acting “as the agent of the court under its continuous supervision.” *Id.* at 360-61 (holding that state bar was immune from

Sherman Act liability because its enforcement of disciplinary rules was state action). State bar associations' broader roles beyond attorney regulation relate to a fundamental governmental responsibility to serve and protect the public by "improving the quality of the legal service available to the people of the State." *Keller*, 496 U.S. at 14 (quoting *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961) (plurality opinion); see also *Bates*, 433 U.S. at 361 ("[T]he regulation of the activities of the bar is at the core of the State's power to protect the public.")).

Public sector unions do not serve the governmental purposes that State bars serve. They serve no regulatory function related to any profession and do not have responsibilities to the broader public that relate to the administration of justice. The union analyzed in *Janus* was the exclusive representative of employees in negotiations with a government employer relating to pay, wages, hours and other conditions related to employment. *Janus*, 138 S.Ct. at 2461.

In *Janus* once a union is designated as the employees' exclusive representative, individual employees may not be represented by any other agent and may not negotiate directly with their employer. *Id.* This is not true of lawyers who are members of an integrated bar. Although all lawyers must be members of an integrated bar, the bars impose no restrictions on any lawyers' right to say anything to anyone, within the bounds of the ethical rules that govern all lawyers.

In addition, integrated bars, such as Arizona's, that are "*Keller* pure" have careful reviews to make sure spending is germane to the Bar's purpose. In Arizona, specific procedural requirements ensure that the State Bar can be a helpful source of information for policy makers, when appropriate, but that the Bar does not engage in advocacy that would violate its "*Keller* pure" policy. The State Bar may provide neutral assistance to a legislator, but only if: (1) a legislator requests the assistance; and (2) the governing board or its designee approves the request for assistance in a letter to the legislator that specifically states that "providing technical assistance does not imply either support for or opposition to the legislation." Ariz. State Bar Bylaws, art. X (B). This type of neutral, technical assistance at a legislator's request is not lobbying under Arizona law. A.R.S. §§ 41-1231(11)(a) (defining lobbying); -1232.04(4) (exempting person providing technical assistance to legislator at legislator's request from lobbyist registration requirements). *Keller* was not concerned about neutral, technical advice provided at a legislator's request. It was concerned about advocacy efforts for or against legislation that has nothing to do with the Bar's mission. *Keller*, 496 U.S. at 16 (holding that integrated Bar could not spend compulsory dues to advance gun control or a nuclear weapons freeze but permitting expenditures for member discipline or proposing ethical codes for the legal profession).

To the extent the Arizona State Bar engages in lobbying, legislation must fall within the parameters described in *Keller*, which means the legislation must concern “regulating the legal profession or ‘improving the quality of the legal service available to the people of the State.’” *Keller*, 496 U.S. at 14 (quoting *Lathrop*, 367 U.S. at 843 (plurality opinion)). If the legislation is not germane under *Keller*, the State Bar will not take a position on the measure.

Although *Keller* accepted the analogy to unions when analyzing the First Amendment’s application to the California bar, there are significant differences between bars and unions that warrant maintaining *Keller*’s approach for integrated bars, despite changes in the law governing unions.

#### **IV. The Rationales Supporting *Janus* Do Not Apply to Integrated Bars.**

Although this Court need not reach this issue because *Keller* remains the controlling law, the Supreme Court’s concerns about union agency fees described in *Janus* do not inform the analysis of integrated bars. First, the main purpose for the union agency-fee was to “serve[] the State’s interest in ‘labor peace.’” *Janus*, 138 S. Ct. at 2465 (quoting *Abood*, 431 U.S. at 224). Labor peace meant “avoidance of the conflict and disruption that [the *Abood* Court] envisioned would occur if the employees in a unit were represented by more than one union.” *Id.* The Court concluded in *Janus* that “labor peace” does not justify requiring non-union members

to pay an agency fee because that interest can be advanced in less restrictive ways. *Id.* at 2466.

The second purpose justifying the agency fees was avoiding the risk of “free riders.” *Id.* The concern was that non-union members would benefit from the union’s exclusive representation but would have none of the costs without agency fees. *Id.* The *Janus* Court acknowledged that “free rider” concerns are generally not enough to “overcome First Amendment objections.” *Id.* (quoting *Knox v. Serv. Emps. Int’l Union, Local 1000*, 567 U.S. 298, 311 (2012)). As a result, some additional interest beyond the interest in avoiding “free riders” is required to justify the fee required of non-members. Since the Court rejected the “labor peace” rationale, the “free rider” concern – even if legitimate – would not be sufficient. The Court rejected the “free rider” justification because “the First Amendment does not permit the government to compel a person to pay for another party’s speech just because the government thinks that the speech furthers the interests of the person who does not want to pay.” *Id.* at 2467.

Neither interest analyzed in *Janus* applies to state bars. An integrated bar does not purport to advance an interest in “labor peace.” It provides a system for regulating the legal profession and generally advances the administration of justice. It is also generally a creation of a state government, often, as in Arizona, subject to the oversight of the state supreme court. Nothing in *Janus* undermines these

substantial state interests served by the state's bar or addresses an organization with the bar's unique relationship with state government.

The free-rider analysis also does not apply to state bars. State bars have significant responsibilities for attorney discipline, professional conduct, and continuing education that aid state supreme courts and are aimed at benefiting the public by improving the quality of legal service available, and attorneys wishing to practice law must pay fees to the organization to fund these and related responsibilities. A fee assessed by a state bar to a practicing attorney in a jurisdiction is nothing like a fee assessed to a non-union member. 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 v. Quinn*, 134 S. Ct. 2618, 2643-44 (2014). Indeed, people engaged in a trade or occupation that is regulated by a state typically have to pay a fee to a regulatory agency so that the licensees bear the costs of regulation. *See, e.g.*, A.R.S. §§ 32-1436 (fees for doctors); -1643 (fees for nurses); -2132 (fees for real estate brokers and sales people); -2219 (fees for veterinarians). The free-rider analysis doesn't apply to an organization with the bar's responsibilities.

Finally, the bar's relationship with state government is fundamentally different than the union's. The state bar as an entity is created at the direction of the state and its mission and responsibilities are assigned by the state, typically by court

rule or statute. *See e.g.*, Ariz. R. Sup. Ct. 32; Idaho Code Ann. § 3-401-413. In Arizona, the State Bar is considered an extension of the Arizona Supreme Court with respect to its responsibilities assigned by the Court. *See Bates*, 433 U.S. at 361. It serves a regulatory role that, for other professions and occupations, may be played by a traditional state agency. And beyond its regulatory work, it has a role (in Arizona, under the direction of the Arizona Supreme Court) in improving the quality of legal services available in a State.

The Court in *Keller* considered whether the restrictions in *Abood* should apply to the California State Bar, or whether it should be treated as a government agency that is not subject to those restrictions. *Keller*, 496 U.S. at 13. That choice is significant because the First Amendment “restricts government regulation of private speech; it does not regulate government speech.” *Pleasant Grove City, Utah v. Sumnum*, 555 U.S. 460, 467 (2009). *Keller* concluded that the *Abood* framework was more appropriate for its analysis of the issues presented by the California State Bar’s activities in that case. However, integrated bars are mindful of their public role and responsibilities when engaging in speech, and a fact-specific analysis of a particular bar’s authority, responsibilities, and activities could support treating its speech as government speech, if the Supreme Court revisits *Keller* in a specific case. *See Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 562 (2005) (analyzing whether marketing campaign for beef was government speech); *cf. Keller*, 496 U.S. at 11

(reviewing the specific activities of the California Bar and concluding that the *Abood* framework should apply to the California Bar because its activities were “essentially advisory in nature”).

Additionally, if the Supreme Court revisits *Keller*, any First Amendment associational challenge to mandatory bar membership would require a fact-specific inquiry into the specific bar’s history, structure, and responsibilities in order to balance the associational burden, if any, with the state’s compelling public interest in regulating the legal profession. *Cf. Lathrop*, 367 U.S. at 827-48 (Harlan, J., concurring) (performing fact-intensive inquiry into constitutionality of membership dues).

The Eighth Circuit’s holding in *Fleck v. Wetch*, 937 F.3d 1112 (8th Cir. 2019), is instructive. In *Fleck*, a lawyer challenged the State Bar Association of North Dakota’s use of his annual dues to oppose a state ballot measure he supported. The lawyer conceded in the district court that *Keller* foreclosed a challenge to the bar’s mandatory membership and dues requirement, and instead challenged the bar’s procedures for compliance with *Keller*. *Id.* at 1115-16. The Eighth Circuit affirmed the district court decision in favor of the defendants, and the plaintiff filed a petition for certiorari with the Supreme Court. The Court decided *Janus* in the interim, and remanded *Fleck* to the Eighth Circuit in light of *Janus*. *Id.* at 1114. On remand, the plaintiff attempted to resurrect his claim that mandatory bars are unconstitutional,

arguing that *Janus* has overruled *Keller*. The Eighth Circuit held that it could not address the issue because plaintiff had waived it by not arguing it in the district court. *Id.* at 1116.

In making its ruling, the court noted that although it had discretion to consider an issue for the first time on appeal if it involved a “purely legal issue,” that exception did not apply because even if *Keller* was abrogated by *Janus*, the associational claim would present a fact-intensive inquiry to be addressed in district court in the first instance. *Id.* The court explained that the district court would need to consider “the types of detailed information discussed by the Supreme Court in *Lathrop* concerning the legislative decision to adopt an integrated bar in North Dakota, the extent to which this method of licensing and regulating the profession burdens associational rights of North Dakota lawyers, and whether, if exacting scrutiny is the governing standard, North Dakota can serve its ‘compelling state interests . . . through means [that are] significantly less restrictive of associational freedoms.’” *Id.* (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 680 (2000)). Because state bars’ powers and responsibilities vary by jurisdiction, this fact-specific inquiry could only be performed on a state-by-state basis.

*Keller* effectively forced integrated bars to scrutinize expenditures so they did not stray into topics unrelated to their publicly-assigned responsibilities. Even if the Supreme Court at some point reconsiders its holding in *Keller*, the outcome of that

case is not dictated by *Janus* because *Janus* did not address the principles and interests relevant to the analysis of state bars.<sup>2</sup> But that is an issue for another day because *Keller* remains binding precedent.

### CONCLUSION

Amicus Curiae State Bar of Arizona asks this Court to affirm the district court's decision.

RESPECTFULLY SUBMITTED this 13th day of November, 2019.

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<sup>2</sup> As *Fleck* noted, “[t]he majority in *Janus* did not discuss *Keller* nor respond to the dissent’s assertion that *Keller* was a ‘case[] involving compelled speech subsidies outside the labor sphere [that] today’s decision does not question.’” 937 F.3d at 1114-15, quoting *Janus*, 138 S.Ct. at 2498 (Kagan, J., dissenting)

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