No. 20-6044

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARK E. SCHELL,

Plaintiff - Appellant.

v.

THE CHIEF JUSTICE AND JUSTICES OF THE OKLAHOMA SUPREME COURT; THE MEMBERS OF THE OKLAHOMA BAR ASSOCIATION'S BOARD OF GOVERNORS; JOHN M. WILLIAMS, Executive Director, Oklahoma Bar Association, all in their official capacities,

Defendants - Appellees.

APPELLANT'S REPLY BRIEF

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INTRODUCTION

As explained in the opening brief, forcing attorneys to join the Oklahoma Bar Association and subsidize its political speech violates the First Amendment because it is a form of compelled speech and association that triggers exacting scrutiny. This compulsion cannot stand unless it "serve[s] a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Janus v. AFSCME*, 138 S. Ct. 2448, 2465 (2018) (citation omitted). And Defendants cannot carry that burden because Oklahoma has many other ways to regulate the legal profession without compulsory bar membership or dues, as 20 other states already do. *See* Opening Br. at 23-27, 34-36.

In response, Defendants make no attempt to argue that the challenged requirements can survive exacting scrutiny. Nor do they attempt to explain why exacting scrutiny would not apply under the ordinary First Amendment principles that govern compelled associations and compelled subsidies for political and ideological advocacy in every other context. Instead, Defendants fall back on the argument that Mr. Schell's claims are foreclosed by *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *Lathrop v. Donohue*, 367 U.S. 820 (1961) (plurality op.). But despite their strategy of argument-by-assertion, Defendants largely ignore the reasons explained in Mr. Schell's opening brief that *Keller* and *Lathrop* do not control here. *See* Opening Br. at 21-23, 30-34.

As to the first issue, Defendants have no answer to the point that *Keller* expressly reserved the question of whether attorneys can be forced to join a bar association that engages in political and ideological advocacy beyond that which is germane to its regulatory purpose. 496 U.S. at 17. *Lathrop* likewise did not decide that issue, as *Keller* acknowledged. *Id.* Indeed, *Lathrop* could not have decided the issue because it was unclear in that case whether the bar association engaged in non-germane political advocacy. 367 U.S. at 846. Here, by contrast, Mr. Schell alleges that the OBA *does* engage in precisely the type of non-germane political and ideological advocacy that *Lathrop* did not consider. App.028–30 ¶¶ 60, 63, 69; App.037 ¶¶ 113-14. And because that allegation must be taken as true on a motion to dismiss, this appeal presents exactly the issue that both *Lathrop* and *Keller* left unresolved—and that neither the Supreme Court nor this Court has resolved since. Forcing people to join a bar that engages in this type of non-germane political advocacy violates the First Amendment.

As to the second issue, Defendants also have no answer to the point that *Keller*'s holding requires mandatory bar dues to be subject to the "same constitutional rule" as compulsory union dues. 496 U.S. at 13. Everything else in *Keller* was non-binding dicta. At the time of *Keller*, the "same constitutional rule" meant the lax scrutiny of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). But now, *Janus* has made clear that the rule is exacting scrutiny, which

Defendants cannot satisfy. *See* Opening Br. 30-33. Defendants try to take refuge in *Harris v. Quinn*, 573 U.S. 616 (2014), but that case does not help them. *Harris* expressly declined to overrule *Abood*, and thus left in place the *Abood* rule of lax scrutiny that applied to both union dues and bar fees. *Id.* at 646 n.19. That is why *Harris* could say that its decision preserving *Abood* was "wholly consistent" with allowing certain mandatory bar dues to continue under *Keller*. *Id*. at 656. But *Janus* did overrule *Abood* a few years later, and held that mandatory union fees must be subject to the rule of exacting scrutiny. As a result, *Keller* now requires that "same constitutional rule" to apply to bar dues as well. 496 U.S. at 13. Accepting this argument does not require overruling any Supreme Court precedent. It simply requires a faithful application of *Keller*'s holding that the same rule must govern both types of mandatory fees.

Finally, Mr. Schell's claims did not become moot or unripe when the OBA recently changed its procedures for dues objections. As Defendants do not dispute, Oklahoma still requires Mr. Schell to join and pay dues to the OBA as a condition of practicing law. And Mr. Schell's complaint still alleges that the OBA uses his dues for both germane and non-germane political and ideological speech that he opposes without his affirmative consent. Accordingly, Mr. Schell's claims are as live and ripe for decision as they ever have been or ever could be.

I. Supreme Court precedent expressly allows Mr. Schell's challenge to mandatory OBA membership.

As Mr. Schell explained in his opening brief (at 21-23), the Supreme Court has expressly declined to decide the question presented by his first claim for relief: whether attorneys may "be compelled to associate with an organization that engages in political or ideological activities" that are not "germane" to the bar's regulatory purpose. *Keller*, 496 U.S. at 17. Contrary to Defendants' arguments, *Keller* does not foreclose, but rather *specifically allows*, Mr. Schell's claim that Oklahoma violates the First Amendment by forcing him to join a bar association that engages in this type of non-germane political advocacy. *Keller* also noted that the *Lathrop* Court failed to address this issue. *See Keller*, 496 U.S. at 17. *Lathrop* is the only other Supreme Court decision regarding the constitutionality of compulsory bar membership, but that case addressed only the generic issue of whether attorneys can be forced to join bar associations that engage exclusively in activities that *are* germane to the bar's regulatory purpose. 367 U.S. at 846. It did not consider whether attorneys can be forced to join a bar association like the OBA that engages in *non-germane* political and ideological advocacy.[1]

[1] As noted in his opening brief (at 23. n.2), Mr. Schell also maintains that mandatory membership in *any* bar association violates the First Amendment. App.034-35 ¶¶ 94-104. He acknowledges, however, that *Lathrop* is binding on that separate issue. He raises it here only to preserve it for Supreme Court review.

1. In response, Defendants' primary argument is that the Supreme Court in *Keller* did not truly "reserve" the issue, but only declined to address it because the California courts below had not addressed it. Def. Br. 26. That is incorrect. In fact, *Keller* expressly stated that *Lathrop* did not resolve the issue. It explained that the question of whether attorneys can "be compelled to associate with an organization that engages in [non-germane] political or ideological activities" was not resolved in *Lathrop*, because that question "appears to implicate a much broader freedom of association claim than was at issue in *Lathrop*." 496 U.S. at 17. That is exactly right. Because it was unclear whether the bar association in *Lathrop* engaged in non-germane advocacy (*see* 367 U.S. at 846), the court did not and could not address whether attorneys could be forced to join if it did.

In trying to show otherwise, Defendants quote language from the lower court in *Lathrop* stating that it "promot[es a compelling] … public interest to have public expression of the views of a majority of the lawyers of the state, *with respect to legislation affecting the administration of justice and the practice of law*, the same to be voiced through their own democratically chosen representatives comprising the board of governors of the State Bar." Def. Br. 9 (quoting *Lathrop*, 367 U.S. at 844 (emphasis added)). But the Supreme Court did not endorse that quoted language. And in any event, as the italicized phrase makes clear, this language contemplates only that attorneys may be forced to join a bar association

that engages in public expression "with respect to legislation affecting the administration of justice and the practice of law." *Lathrop*, 367 U.S. at 844. Thus, at most, the Court was talking about mandatory membership in a bar that engages in speech *germane to its regulatory purpose*. It did not address mandatory membership in a bar association like the OBA that engages in *non-germane* political and ideological advocacy. Defendants cryptically suggest that the issue might have been "decided in other cases." Def. Br. 27. But they do not identify any case other than *Keller* or *Lathrop* that could have resolved the issue.

2. Defendants hint that since *Keller* followed the *Abood* rule in suggesting that attorneys could "obtain dues refunds" for "non-germane" advocacy, it must have implicitly endorsed the notion that attorneys could be forced to *join* bar associations that engaged in non-germane advocacy. Def. Br. 28. But that is mistaken. After all, *Abood* itself contemplated that mandatory unions fees would be paid by "*non-members*," because "[n]othing ... required any teacher to join the Union" in that case. 431 U.S. at 211-12. Indeed, just as in *Keller* and *Lathrop*, the Court in *Abood* expressly reserved whether it is "constitutionally permissible" to force employees to "formally *join* the union," even though the Court held that they could be forced to pay mandatory fees. *Id*. at 217 n.10 (emphasis added). Accordingly, *Keller*'s statement that mandatory *fees* would be allowed under the *Abood* rule did not say anything about mandatory *membership*.

3. Defendants are wrong to suggest that only the "'California [state] courts'" on remand, and "not 'all courts,'" were free to address the issue of mandatory membership after *Keller* left it open. Def. Br. 26 (citing *Keller*, 496 U.S. at 17). It should go without saying that since the Supreme Court left the issue open for California courts to decide, it also left the issue open for all other courts to decide. Every court is equally bound (or not bound) by the precedent of the U.S. Supreme Court on federal constitutional issues. Defendants' contrary suggestion makes no sense.

4. Defendants are also wrong to argue that a viable freedom-of-association claim must allege non-germane activities more "extreme" than those involved in *Keller*, and must allege that the bar association "forsakes any appreciable activity that supports the state's interest in regulating the bar." Def. Br. 28. *Keller* said no such thing. The Court simply gave certain "extreme" examples to make clear what types of expenditures were not germane to the bar's regulatory purpose. 496 U.S. at 15-16. But the Court did not otherwise differentiate between different types of non-germane expenditures. Nor could it have, because the First Amendment does not allow any legal differentiation between political advocacy that is "extreme" or "non-extreme." And *Keller* specifically *declined* to decide whether the First Amendment allows mandatory membership in state bars that engage in *any* non-germane advocacy, extreme or not. *Id*. at 17.

5. Defendants invoke (at 27) the Ninth Circuit's decision in *Morrow v. State Bar of California*, 188 F.3d 1174 (9th Cir. 1999), but the reasoning of that decision is unclear and unpersuasive. The court recognized that *Keller* "reserved" a freedom-of-association issue. *Id.* at 1177. It also acknowledged that the plaintiffs raised precisely that issue—i.e., whether the First Amendment allows "compulsory membership in a state bar association that conducts political activities beyond those for which mandatory financial support is justified." *Id.* at 1175. But the court then inexplicably rejected the plaintiffs' freedom-of-association claim because they supposedly had "not allege[d] that they [we]re compelled to associate in any way with the California State Bar's political activities" or "that the Bar's political involvement [was] greater and the regulatory function less than [those of the bar associations] in *Keller* and *Lathrop*." *Id.* at 1177. *Morrow*'s reasoning, to the extent it can be discerned, appears to share the fatal flaw of Defendants' argument here: it assumes that *Keller* somehow answered the freedom-of-association issue that it expressly reserved, and which *Lathrop* also did not address. This Court should not repeat that mistake.

Outside the Ninth Circuit, no Court of Appeals has rejected the argument that Mr. Schell makes on this issue. An Eighth Circuit decision that Defendants have cited (Def. Br. 23) declined to address it because the plaintiff had not preserved it. *Fleck v. Wetch*, 937 F.3d 1112, 1116-17 (8th Cir. 2019). But the

Eighth Circuit stated that "it may well be … that *Keller* and *Lathrop* did not consider, and therefore did not foreclose [this] First Amendment associational claim." *Id.* at 1116. The court added that it "may also be that *Janus* confirms that this issue would now be decided under a more rigorous exacting scrutiny standard than the Court may have applied in *Keller* and *Lathrop*." *Id.* at 1116-17.

A Seventh Circuit decision Defendants have cited (Def. Br. 19) likewise did not consider this issue when it rejected a recent challenge to Wisconsin's mandatory bar. *See Jarchow v. State Bar of Wis.*, No. 19-3444, 2019 WL 8953257, *1 (7th Cir. Dec. 23, 2019). The plaintiffs there did not invoke the issue that *Keller* reserved, but simply assumed that *Keller* controlled their claims and moved for the Seventh Circuit to summarily affirm the claims' dismissal so that they could ask the Supreme Court to overturn *Keller*. *See id*.

6. Because *Keller* and *Lathrop* did not address (much less foreclose) Mr. Schell's freedom-of-association claim, the district court should not have dismissed it on that basis. Instead, it should have applied generally applicable First Amendment principles to determine whether Oklahoma can compel attorneys to join an association that engages in political and ideological advocacy not germane to any regulatory purpose. In his opening brief, Mr. Schell explained why the First Amendment requires exacting scrutiny of this type of compelled association, and why Defendants cannot satisfy that scrutiny. *See* Opening Br. 23-27.

Defendants have no response to either point. First, they do not seriously dispute that exacting scrutiny generally applies when the government compels individuals to join private organizations that engage in controversial political and ideological advocacy that serves no regulatory purpose. *See* Opening Br. 24. Nor do they offer any reason why the rule should be any different here. As alleged in the complaint, the OBA has devoted itself to such efforts as praising Al Gore's environmental advocacy, attacking the state legislature's regulation of the oil-and-gas industry, and criticizing the supposedly sinister influence of "wealthy conservative libertarians [*sic*]." *See, e.g.*, App.028-30, ¶¶ 60, 63, 69. This makes the OBA precisely the type of political and ideological advocacy group that no person can be forced to join without an especially compelling justification.

Unlike bar associations that stick to their regulatory purpose, those like the OBA that engage in non-germane ideological advocacy impose the additional First Amendment harm of forcing their non-consenting members to associate with non-germane political viewpoints that they strongly oppose. This associational harm exists regardless of whether the members are also forced to subsidize the group's advocacy. For example, forcing attorneys to join the Republican Party as a condition of practicing law would impinge on the First Amendment rights of dissenters even if they did not have to make any monetary contributions. *Cf. Rutan v. Republican Party of Ill.*, 497 U.S. 62, 68 (1990). Simply branding them as

"members" against their will would be intolerable. And the same is true of the OBA, which likewise operates as a partisan advocacy group that is equally offensive to those who do not share its political and ideological beliefs.

To address the associational harm of compelled membership in this type of advocacy organization, the ordinary First Amendment rule of exacting scrutiny must apply: Such "mandatory associations are permissible only when they serve a 'compelling state interest … that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Knox v. SEIU*, 567 U.S. 298, 310 (2012) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)).

Second, Defendants also do not make any attempt to explain how compulsory OBA membership could survive exacting scrutiny. That is, they do not deny that Oklahoma has several "less restrictive" alternatives that would allow it to regulate the practice of law without forcing attorneys to join a bar association that engages in non-germane political advocacy. *See* Opening Br. 26-27. This is a telling concession. By making it, Defendants concede that Oklahoma law is subjecting attorneys like Mr. Schell to a serious First Amendment injury that is entirely unnecessary. This is exactly the type of gratuitous injury that exacting scrutiny is designed to prevent. As a rule, the First Amendment dictates that membership in political advocacy groups should be voluntary, and the government must have a strong justification to depart from that rule. Here it has none.

II. The Court must subject mandatory OBA dues to exacting First Amendment scrutiny, which they cannot survive.

In his opening brief (at 28-33), Mr. Schell explained that *Keller* requires mandatory union fees and bar dues to be subject to "the same constitutional rule." 496 U.S. at 13. The actual holding of *Keller* consisted of (1) the result, and (2) the reasoning necessary to that result. The result was to reverse the California court's ruling that mandatory bar dues were subject to *no* constitutional scrutiny. The reasoning was that because unions and bar associations are analogous, i*d.* at 12, the *same rule* of constitutional scrutiny must apply to both types of mandatory fees. *Id.* at 14. That reasoning was necessary to the result because it supplied the rationale for reversing the no-scrutiny rule that the California court had adopted. Both elements of that holding are binding here. *See* Opening Br. 30-32. By contrast, the other aspects of *Keller* (including its discussion of how the then-extant *Abood* rule should apply) were nothing more than dicta. *See* Opening Br. 32-33.

This Court is bound to apply the actual holding of *Keller*, not its dicta. This means that the OBA's mandatory bar dues must be subject to the "same constitutional rule" that applies to mandatory union fees. 496 U.S. at 13. And after *Janus*, that rule is (at the very least) "exacting scrutiny." 138 S. Ct. at 2465. Defendants cannot satisfy that standard because Oklahoma has many ways to regulate the legal profession without compelling attorneys to pay mandatory bar dues to subsidize political advocacy.

In response, Defendants do not make any serious attempt to dispute Mr. Schell's explanation of what the actual holding of *Keller* was, as opposed to its dicta. Nor do they attempt to explain how *Keller*'s holding could possibly allow anything other than the "same constitutional rule" of exacting scrutiny to apply both to mandatory union fees and mandatory bar dues after *Janus*. Nor do they attempt to explain how they could satisfy exacting scrutiny.

1. Faced with *Keller*'s square holding that union fees and bar dues must be governed by the same constitutional rule, Defendants argue that *Harris v. Quinn* somehow changed the law by "untether[ing] the analysis in *Keller* from that in *Abood*." Def. Br. 18. That is clearly wrong. Because *Harris* explicitly declined to overrule *Abood*, and left *Keller* in place, it did not disturb *Keller*'s holding that bar dues and union fees must be subject to the "same constitutional rule." Under the *Abood* rule, both types of mandatory fees were permissible, and that remained true until *Janus* overturned *Abood*.

In *Harris*, the Supreme Court considered whether to "extend" the holding of *Abood* to the "new situation" of home healthcare workers who received Medicaid subsidies but were not "full-fledged public employees." *Harris*, 573 U.S. at 645-46. Because the Court determined that *Abood* should not be extended to this "new situation," it explained that it was "unnecessary … to reach [the] argument that *Abood* should be overruled." *Id*. at 646 n.19. Accordingly, it left the lax First

Amendment rule of *Abood* in place, unchanged from the time when *Keller* was decided. *Abood* thus continued to govern both mandatory union and bar fees.

In the course of its analysis, the Court explained that its "refusal to extend *Abood*" to a novel context did not "call into question" its earlier decision in *Keller* regarding mandatory bar dues. *Id*. at 655. That made perfect sense: *Keller* had simply required bar dues to be subject to the "same constitutional rule" as union fees. 496 U.S. at 13. And because *Harris* left *Abood* in place to govern union fees, the "constitutional rule" remained unchanged. The *Harris* Court then explained why mandatory bar dues would continue to survive under the lax scrutiny that *Abood* allowed: Forcing attorneys to pay mandatory bar dues certainly advances the state's interests in "regulating the legal profession, and improving the quality of legal services," and 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. Notably, however, the Court did not address whether the same interests would be enough to satisfy "exacting scrutiny," or whether the state could serve those interests through less restrictive means. The Court had no need to address that issue, because it had applied a framework in which *Abood*'s deferential scrutiny continued to govern bar dues and union fees alike.[2]

[2] *Harris* did not address bar membership at all, except to note that *Lathrop* produced no majority opinion on the issue. 573 U.S. at 630. And *Harris* certainly did not resolve the mandatory-membership issue that *Lathrop* and *Keller* left open.

Contrary to Defendants' argument, *Harris* did not in any way "untether" *Keller* from *Abood*. Rather, the Court simply said that *Keller* "fit[] comfortably" in the "framework" applied in *Harris*. *Id.* at 655-56. That was a "framework" in which *Abood remained good law*. *Id.* at 646 n.19. Thus, *Harris*'s discussion of *Keller* simply confirmed that, even after *Harris*, compulsory bar dues would remain subject to the "same constitutional rule" as compulsory union fees under *Abood*.

Harris also did not suggest, much less hold, that mandatory bar dues could survive exacting scrutiny. The Court had no reason to consider that issue because, again, it declined to abrogate *Abood*, under which mandatory union fees and bar dues were *not* subject to exacting scrutiny. *See id.* at 646 n.19, 655-56. While *Harris* noted that mandatory bar dues served legitimate interests, it did not consider the two further questions that exacting scrutiny would require: whether those interests are truly "compelling," and whether the government could serve the same interests "through means significantly less restrictive of associational freedoms." *Id.* at 648-49, 655-56. By declining to address those questions, *Harris* was confining its analysis to the constitutionality of mandatory bar dues under the

deferential standard of *Abood*. It therefore said nothing about whether they could survive exacting scrutiny if that more demanding standard were to apply.[3]

2. Now that *Janus* has overturned *Abood*, the defunct rule of *Abood* cannot govern mandatory bar dues any longer. Exacting scrutiny must apply. And Mr. Schell has shown—and Defendants do not dispute—that exacting scrutiny is fatal here because Oklahoma has many ways to regulate the legal profession without requiring mandatory bar dues. *See* Opening Br. 23-27, 34-36.

In particular, both of the state interests identified in *Harris* can be served by means far less restrictive of First Amendment freedoms. First, with regard to "regulating the legal profession, and improving the quality of legal services," *Harris*, 573 U.S. at 655-56, over twenty other states already serve those interests without mandatory bar dues. Opening Br. 26-27. They simply regulate the legal profession like every other profession, without forcing members of the profession to join or pay fees to support the political advocacy of any group they oppose. As a result, it is impossible to maintain that Oklahoma cannot take the same approach.

Second, there are also many less restrictive means of "allocating to the members of the bar, rather than the general public, the expense of ensuring that

[3] Defendants also invoke *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 231-32 (2000) (Def. Br. 20), but that case simply assumed that *Abood* governed bar dues and union fees, in keeping with *Keller*'s holding that the same rule applies to both.

attorneys adhere to ethical practices." *Harris*, 573 U.S. at 655-56. At the outset, this is not a truly "compelling" interest as required by exacting scrutiny (*id*. at 648), as Oklahoma regulates most *other* professions without requiring their members to bear the cost.

But even if it were a compelling interest, there are many ways to make attorneys bear ethics-related costs without making them pay dues to finance political advocacy. For example, Oklahoma could limit the OBA's activities to "ensuring that attorneys adhere to ethical practices." *Id*. at 656. It could also limit dues to cover only ethics-related expenses, not political advocacy. It could charge direct fees to attorneys involved in ethics proceedings and training programs. Or it could increase attorneys' court-filing fees to cover ethics costs.

3. Defendants occasionally suggest that *Lathrop* itself upheld the type of mandatory bar dues challenged here, such that accepting Mr. Schell's argument would require "overturning" *Lathrop*. *See, e.g.*, Def. Br. 7, 9, 16. That is incorrect. In fact, *Lathrop* expressly reserved the question whether an attorney can be forced to pay mandatory bar dues to support political advocacy he opposes. *Keller* is thus the only Supreme Court precedent that has ever addressed this issue. And in any event, since *Keller* came after *Lathrop* and generally held that bar dues are subject to the same constitutional rule as union dues, *that* holding is the one that governs here.

In *Lathrop*, there was no majority of the Supreme Court that joined any single opinion, and even the plurality opinion explicitly stated that it was expressing "no view as to [whether] the appellant may constitutionally be compelled to contribute his financial support to political activities which he opposes." 367 U.S. at 847-48. The Court did not and could not address that issue, because it was unclear whether the bar association there actually used mandatory bar dues for political advocacy that the plaintiff opposed. *Id*. at 845-46.

Defendants' contrary suggestion rests on a glaring citation error, which mistakenly attributes a quote to *Lathrop* that actually comes from *Keller*. On page 10 of their brief, Defendants quote the Supreme Court as saying that "expenditures" are permissible as long as they are "necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" Def. Br. 10. Defendants attribute this quote to page "843" of the *Lathrop* decision (*id*.), but in fact it comes from the dicta of *Keller*, 496 U.S. at 14. The Court in *Lathrop* did not say that mandatory bar dues are permissible as long as they are "necessarily or reasonably incurred" for improving the quality of legal services. Instead, the *Lathrop* plurality reserved the question whether a compulsory subsidy for such germane expenditures might violate the First Amendment if they were political in nature and an attorney objected to them. 367 U.S. at 847-48.

If there were any doubt on this score, the Supreme Court's unanimous opinion in *Keller* made clear that the issue was not decided in *Lathrop*. As *Keller* explained, "the [*Lathrop*] plurality expressly reserved judgment on Lathrop's additional claim that his free speech rights were violated by the … use of his mandatory dues to support objectionable political activities, believing that the record was not sufficiently developed to address this particular claim." 496 U.S. at 9. *Keller* then announced its holding that "compulsory dues" for bar associations are "subject to the same constitutional rule" as mandatory union fees. *Id*. at 13. That holding is the one that governs here.

4. Defendants cite a handful of out-of-circuit cases decided after *Janus* to support their position, Def. Br. 16-20, but those cases did not grapple with the argument Mr. Schell is making here. In particular, none of those cases even quoted *Keller*'s holding that bar dues and union fees must be subject to "the same constitutional rule." 496 U.S. at 13. Much less did they rebut the argument outlined above for why that holding requires exacting scrutiny for mandatory bar dues in the wake of *Janus.*

In two of the cases, the plaintiffs pitched their claims as seeking to *overturn* the holding of *Keller*, so the courts did not consider how *Keller*'s holding applies after *Janus*. *See Fleck*, 937 F.3d at 1116 (plaintiff argued that "*Keller* and *Lathrop* should be overruled"); *Jarchow*, 2019 WL 6728258, at *1 ("The parties in this case

agree" that *Keller* forecloses their claims). In *Boudreaux v. Louisiana State Bar Ass'n*, 433 F. Supp. 3d 942 (E.D. La. 2020), the court did not even reach the merits of the plaintiff's challenge to the "collection of mandatory bar association dues." *Id*. at 959. And the other two cases wrongly determined that *Harris* said mandatory bar dues could survive "exacting scrutiny." *See McDonald v. Sorrels*, 2020 WL 3261061, *6 (W.D. Tex. May 29, 2020); *Gruber v. Or. State Bar*, 2019 WL 2251826, at *9 (D. Or. April 1, 2019) (same). That is mistaken for the reasons explained above, which neither *Gruber* nor *McDonald* addressed. *Supra* pp. 16-18. Accordingly, all of the out-of-circuit cases relied on by Defendants are either inapposite, unpersuasive, or both. This Court should not follow them.

5. Defendants claim that the denial of certiorari in *Jarchow* somehow shows that a "majority" of the Supreme Court "clearly disagreed" with the need to reexamine mandatory bar dues in light of *Janus*. Def. Br. 20 n.11. This argument is wrong for two reasons. First, the *Jarchow* plaintiffs asked the Supreme Court to *overturn* the decision in *Keller*, but they did not make the argument that Mr. Schell presses here—i.e., that *Keller* is consistent with (and indeed requires) striking down mandatory bar fees because it mandates "the same constitutional rule" as *Janus*. Accordingly, the denial of certiorari in *Jarchow* cannot reasonably be construed as saying anything about Mr. Schell's argument here.

Second, the Supreme Court has made quite clear that its discretionary denial of certiorari should not be taken as any "expression of opinion upon the merits of the case." *Teague v. Lane*, 489 U.S. 288, 296 (1989). That rule is especially important because the Supreme Court often denies certiorari to allow issues to percolate in the lower courts. Effective percolation requires each circuit to apply its own independent judgment. Interpreting denials of certiorari as rejecting claims on the merits would frustrate that purpose.

6. Finally, contrary to Defendants claim (at 24-25), Mr. Schell has not conceded that *Keller*'s statements regarding mandatory dues for germane expenses are binding rather than dicta. Defendants quote a paragraph from the Amended Complaint stating that "*Keller* requires the OBA to institute safeguards" to ensure dues are used for "chargeable expenditures," Def. Br. 24 (citing App.038-039 ¶ 121). But that statement appears in Mr. Schell's voluntarily dismissed third claim—which was pled *in the alternative* to his other claims and assumed, *contrary to his first two claims*, that mandatory bar membership and dues are constitutional. App. 038 ¶ 120; App.041 ¶ D. Of course, a party may plead inconsistent alternative claims without "conceding" either alternative. *See* Fed. R. Civ. P. 8(d)(2), (3); *see also, e.g., U.S. Energy Corp. v. Nukem, Inc.*, 400 F.3d 822, 833 n.4 (10th Cir. 2005) ("[I]nconsistent statements made in the alternative … could [not] reasonably be construed as judicial admissions."); *Henry v. Daytop*

Village, Inc., 42 F.3d 89, 95 (2d Cir. 1994) (court could not construe plaintiff's "first claim as an admission against another alternative or inconsistent claim"); *Schott Motorcycle Supply, Inc. v. Am. Honda Motor Co.*, 976 F.2d 58, 61 (1st Cir. 1992) ("[A] pleading should not be construed as a judicial admission against an alternative or hypothetical pleading in the same case.").

III. The OBA's revised notice-and-objection procedures do not render Mr. Schell's claims moot or unripe.

Contrary to Defendants' arguments, OBA's adoption of a new "*Keller* Policy" does not somehow moot Mr. Schell's First Amendment claims or render them "unripe." Def. Br. 28-30. Mr. Schell's Amended Complaint contains three claims, the first two of which remain live. The first claim is that "[c]ompelled membership in the OBA" violates his First Amendment rights. App.034-36, ¶¶ 94-104. The second is that forcing him to pay "mandatory bar dues to subsidize the OBA's speech," "including its political and ideological speech," without his "affirmative consent," violates his First Amendment rights. App.036-38, ¶¶ 105-18. The third claim (which no longer remains in the case) asserted that the OBA's old policy violated Mr. Schell's First Amendment rights even under the lax standard allowed by *Keller* while *Abood* was still in effect. App.038-40, ¶¶ 119-28.

After Mr. Schell filed this lawsuit, the OBA adopted a new policy with new procedures to comply with the lax *Keller-Abood* standard. As a result, Mr. Schell voluntarily dismissed his third claim as moot. *See* App.053. But that does not

affect the viability of his first or second claims, because the new policy does not eliminate the constitutional defects that either of those claims allege. Under the new policy, as Defendants do not dispute, Mr. Schell is still required to join the OBA. And he is still required to pay dues to subsidize the OBA's speech—including its political and ideological speech—without his affirmative consent.

Defendants are wrong to suggest that Mr. Schell was required to amend his complaint to allege that the OBA continues to engage in non-germane political and ideological speech after adopting its new policy. *See* Def. Br. 29-30. Mr. Schell's Amended Complaint already alleges everything it must to state viable constitutional claims. Specifically, he alleges that the state compels attorneys to join and pay dues to the OBA, and that the OBA uses his dues to engage in speech, including political and ideological speech that is not germane to its regulatory purpose, without his affirmative consent. App.027 ¶ 48; App.037 ¶ 113. He has supported those allegations by citing provisions of the OBA's Bylaws—still in effect[4]—that authorize that speech, and by alleging numerous examples of the OBA engaging in germane and non-germane political and ideological speech in the decade before he filed his complaint. App.027-031 ¶¶ 49-76.

In considering a motion to dismiss under Rule 12(b)(6), the Court must accept all of those allegations as true and construe them in the light most favorable

[4] https://www.okbar.org/bylaws/.

to Mr. Schell. *Porter v. Ford Motor Co.*, 917 F.3d 1246, 1248 (10th Cir. 2019). The OBA's adoption of a new policy does not, and by itself cannot, disprove any of Mr. Schell's allegations. If the OBA believes that it can show that Mr. Schell's allegations are now false, it can and must do so with evidence presented with a motion for summary judgment or at trial.

Besides, the OBA's new policy provides no reason to believe—much less conclude at the pleading stage—that the OBA has ceased or will cease using mandatory dues to engage in both germane and non-germane political and ideological speech. On the contrary, the new procedures expressly *allow* the OBA to keep making non-germane expenditures. *See* OBA Keller Policy (adopted Mar. 2 and 9, 2020) Appendix 1, ¶ 2(a).[5] And the OBA has not suggested, let alone proven, that it will cease its lobbying and other legislative activity. As Mr. Schell has explained, attorneys' putative opportunity to opt out of paying for that activity does not eliminate his injury. *See* Opening Br 37-38. The OBA also continues to publish the *Oklahoma Bar Journal*, in which it has published many instances of germane and non-germane political and ideological speech over the past decade.[6] *See* App.028-31 ¶¶ 57-76. The OBA has not alleged, let alone proven, that the *Journal* has changed its editorial policies to prevent the publication of such

[5] https://www.okbar.org/wp-content/uploads/2020/03/OBA_KellerPolicy.pdf.
[6] https://www.okbar.org/barjournal/.

material. On the contrary, the OBA continues to defend the publication of such speech as a permissible use of mandatory dues.[7] *See* Def. Br. 25 n.14.

Even if the OBA had ceased all political and ideological activity after adopting its new policy, that still would not moot this case or render it unripe. "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. If it did, the courts would be compelled to leave the defendant free to return to his old ways." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (internal marks and citations omitted). A defendant can moot a case through voluntary conduct only "if subsequent events [have] made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* Here, however, the Defendants have not even claimed that the OBA will cease all germane and non-germane political and ideological activity.

Contrary to Defendants' argument, this case bears no resemblance to *Keyes v. School District No. 1*, 119 F.3d 1437 (10th Cir. 1997). *See* Def. Br. 30-31. In that case, the Court held that there was no ripe challenge to a state constitutional

[7] Defendants suggest that the political and ideological views expressed in the *Journal* are not the OBA's speech, but the articles' authors' speech. Def. Br. 25 n.14. But most of the articles were written by the OBA's own President or Executive Director in their official capacities. App.028 ¶¶ 58-61; App.029 ¶¶ 63, 65; App.030 ¶¶ 66, 70, 71; App. 031 ¶¶ 72, 73, 75. And in any event, Mr. Schell's injury is the same because he is forced to pay for "the propagation of opinions which he disbelieves." *Janus*, 138 S. Ct. at 2464.

provision that prohibited busing to achieve racial balance in schools. Because there was no evidence that the Busing Clause had deterred any school from implementing voluntary integration plans, the Clause had not yet affected the plaintiffs' rights and their claims were unripe. Here, by contrast, Mr. Schell alleges that the continuing requirements to join and pay dues to the OBA have injured him in the past *and continue to do so now*. *See* App.025-026 ¶¶ 40-44; App.027 ¶ ¶ 48-51; App.033-034 ¶¶ 90-92; App.035 ¶ 102-03; App.037-038 ¶¶ 111-17.

Finally, there is no merit in Defendants' argument that Mr. Schell may not present arguments regarding "the propriety of an opt-in versus opt-out" regime with respect to funding the OBA's political and ideological activities because he supposedly did not challenge the "opt out" feature of the OBA's new *Keller* policy below. *See* Def. Br. 15 n.9, 25 n.13. Mr. Schell's second claim for relief—which Defendants admit he preserved, Def. Br. 6—challenges the OBA's use of his dues for political and ideological speech without his "affirmative consent." App.036-38 ¶¶ 105-18. Specifically, Mr. Schell's second claim alleges that "the OBA must create an 'opt-in' system for attorneys to subsidize its speech and non-germane activities; it cannot require attorneys to opt out." App.037 ¶ 114. Therefore, in addressing the "opt out" issue, Mr. Schell is not raising a new issue; he is presenting precisely the issue raised in his second claim for relief, which the OBA's new *Keller* policy did not moot or negate.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

RESPECTFULLY SUBMITTED this 10th day of July 2020 by:

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1) and Fed. R. App. P. 29(a)(5), I certify that this Brief:

(a) was prepared using 14-point Times New Roman Font;

(b) is proportionately spaced; and

(c) contains 6,449 words.

Submitted this 10th day of July 2020,

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hardcopies, that the ECF submission is an exact copy of those documents;

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of July 2020, the foregoing Brief was filed and served on all counsel of record via the ECF system.

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