No. 21-974

In the Supreme Court of the United States

SYLVIA BORUNDA FIRTH, et al.,
Cross-Petitioners,

v.

TONY K. MCDONALD, et al.,
Cross-Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should overrule *Johanns v. Livestock Marketing Association*, 544 U.S. 550, 561-62 (2005), and *Keller v. State Bar of California*, 496 U.S. 1, 10-12 (1990), and hold that the compelled funding of a mandatory bar association is "government speech" that does not implicate the First Amendment at all.

PARTIES TO THE PROCEEDING

Cross-petitioners, defendants-appellees below, are the voting members of the Board of Directors of the State Bar of Texas, sued only in their official capacities. Under Federal Rule of Civil Procedure 25(d) and Federal Rule of Appellate Procedure 43(c)(2), the successors of individuals who were previously named as defendants but who are no longer members of the Bar's Board of Directors have been automatically substituted as parties. Cross-petitioners are Sylvia Borunda Firth, Laura Gibson, Larry P. McDougal, Santos Vargas, Benny Agosto, Jr., Andrés E. Almanzán, Chad Baruch, Kate Bihm, Rebekah Steely Brooker, David N. Calvillo, Luis M. Cardenas, Luis Cavazos, Jason Charbonnet, Kelly-Ann F. Clarke, Thomas A. Crosley, Christina M. Davis, Steve Fischer, Lucy Forbes, August W. Harris III, Britney E. Harrison, Forrest L. Huddleston, Michael K. Hurst, Lori M. Kern, Bill Kroger, Yolanda Cortés Mares, Dwight McDonald, Carra Miller, Lydia Elizondo Mount, Kimberly M. Naylor, Jeanine Novosad Rispoli, Michael J. Ritter, Adam T. Schramek, Audie Sciumbato, Mary L. Scott, David Sergi, D. Todd Smith, G. David Smith, Jason C. N. Smith, Diane St. Yves, Nitin Sud, Robert L. Tobey, Andrew Tolchin, G. Michael Vasquez, Kimberly Pack Wilson, and Kennon L. Wooten, in their official capacities as members of the Board of Directors of the State Bar of Texas.

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

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INTRODUCTION

In *Keller v. State Bar of California*, this Court unanimously held that a mandatory state bar's activities and advocacy are not government speech but are instead subject to the First Amendment's protections against coerced speech and expression. 496 U.S. 1, 11-14 (1990). The Texas State Bar has filed a conditional cross-petition for a writ of certiorari asking this Court to revisit that aspect of *Keller* and hold that the First Amendment has no application whatsoever in this context.

The fact that even the Bar believes certain aspects of *Keller* are wrong should undermine its arguments in the principal case that *Keller*'s other holdings should be retained under *stare decisis* principles. In all events, Petitioners/Cross-Respondents take no position on whether the conditional cross-petition should be granted if the Court grants certiorari in the principal case. But Petitioners/Cross-Respondents submit this brief to explain why the Bar's government speech arguments are entirely meritless.

Although there have been some developments in "government speech" doctrine since 1990, the cross-petition's suggestion that *Keller*'s holding on government speech has eroded is meritless. The Bar cites only one case—*Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005)—in support of its position that recent precedent suggests the Bar's speech is government speech. But the Bar badly overreads *Johanns*, which explicitly distinguishes *Keller* based on the degree of government control over the activities

in question. The Bar's vast array of politically and ideologically charged activities are not government speech and should remain fully subject to the First Amendment's protections against coerced speech and association.

ARGUMENT

I. This Court correctly held that a mandatory bar association's activities are not government speech, and that holding is fully consistent with subsequent decisions.

A. The Bar argues that "*Keller*'s refusal to treat integrated bars' speech as government speech was central to its analysis and thus should be reconsidered if this Court revisits *Keller*." Cross-Pet. 15. But that holding was correct at the time and remains so today.

As this Court explained in *Keller*, although the California Supreme Court concluded that the bar was a "government agency" "for purposes of state law" and thus "entitled to the treatment accorded a governor, a mayor, or a state tax commission," that determination was "not binding on [the Court] when such a determination [was] essential to the decision of a federal question." *Id.* at 11. The Court offered several reasons why a mandatory state bar "is a good deal different from most other entities that would be regarded in common parlance as 'governmental agencies'":

- "Its principal funding comes, not from appropriations made to it by the legislature,

but from dues levied on its members by the board of governors."

- "Only 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."

- "[The state bar] undoubtedly performs important and valuable services for the State by way of governance of the profession, but those services are essentially advisory in nature."

- "The State Bar does not admit anyone to the practice of law, it does not finally disbar or suspend anyone, and it does not ultimately establish ethical codes of conduct. All of those functions are reserved by California law to the State Supreme Court."

Id. Those "very specialized characteristics" distinguished the bar "from the role of the typical government official or agency." *Id.* at 12.

The Texas State Bar is indistinguishable in all relevant respects from the California Bar on each of these considerations, and Respondents/Cross-Petitioners do not argue otherwise. The Texas Bar's primary funding comes from member dues and commercial activities (such as conferences and CLE programs); only lawyers admitted to practice in Texas are members of the Texas Bar; and all lawyers

admitted to practice in Texas must join and pay dues. *See* Pet. 7-8; Pet. App. 2-4.

Moreover, like the California Bar, the Texas Bar does not admit, disbar, or suspend members, nor does it adopt ethical rules. That authority ultimately rests with the Texas Supreme Court and the Texas state courts, with the Bar playing at most a preliminary or advisory role. *See* Tex. Gov't Code Ann. § 81.024(b) (Texas Supreme Court shall "adopt rules, including the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure, for the discipline of state bar members"); *id.* § 81.078(a) (any suspension order against an attorney who does not voluntarily accept such sanction must be entered by a "court of competent jurisdiction"); *id.* § 81.077(a) (attorney is entitled to "trial by jury … in the county of the residence of the accused attorney" in any disbarment proceeding); *id.* § 81.061 ("Rules governing the admission to the practice of law are within the exclusive jurisdiction of the supreme court. The officers and directors of the state bar do not have authority to approve or disapprove of any rule governing admissions to the practice of law or to regulate or administer those admissions standards.").

In short, the Texas Bar, like the California Bar, "was created[] not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession." *Keller*, 496 U.S. at 13. And "[i]ts members and officers are such not because they are citizens or voters, but because they are lawyers." *Id.* These differences

"render[ed] unavailing" the California Bar's argument "that it is not subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees." *Id.* And they "render unavailing" the Texas Bar's identical argument now. *Id.*

The Bar's government speech arguments are further undermined by the fact that even states that do not mandate membership in a bar association have active voluntary associations that engage in many of the *exact same activities* as mandatory associations like the Texas Bar. *See* Pet. 6-7. The voluntary New York State Bar Association, for example, promotes legal aid and pro bono work; sponsors numerous diversity, equity, and inclusion initiatives; advocates for "affirmative legislative proposals" supported by its membership; hosts CLE programs and conferences; and has numerous sections and committees based on practice area. *See* www.nysba.org; *see also* Freedom Foundation Amicus Br. 9-12 (discussing numerous voluntary bar associations organized by state, locality, practice area, and other subject areas). The fact that mandatory bars perform many of the same functions as voluntary associations underscores that their activities and advocacy do not merely involve the government speaking on its own behalf.

Indeed, Wisconsin—whose mandatory bar was challenged in *Lathrop*—chose to make membership mandatory because "too many lawyers ha[d] refrained or refused to join, [and] membership in the voluntary association ha[d] become static." *Lathrop v. Donohue*, 367 U.S. 820, 833 (1961) (plurality op.). Thus, from the

start, even the states viewed mandatory bar membership as simply a substitute for what had previously been voluntary association in private organizations. The Bar offers no persuasive reason to question *Keller*'s holding that mandatory bar associations cannot evade First Amendment scrutiny on the ground that their activities and advocacy are merely government speech.

B. The Bar's primary argument to reconsider this aspect of *Keller* is that "post-*Keller* case law supports treating" the Bar's speech "as government speech." Cross-Pet. 20. The Bar identifies *Johanns* as the "most important" post-*Keller* precedent in this area. *Id.* at 20-21. But the Bar reads far too much into *Johanns*, which painstakingly distinguished *Keller* and does not in any way cast doubt on *Keller*'s holding regarding government speech.

In *Johanns*, this Court upheld a federal statutory requirement that beef producers be required to pay into a fund for generic beef advertisements—designed by a committee of industry representatives in coordination with the Secretary of Agriculture—as permissible funding of government speech. 544 U.S. 550. The Court held that because the "message set out in the beef promotions" was "from beginning to end the message established by the Federal Government," it was government speech. *Id.* at 560. Not only did the Secretary "exercise[] final approval authority over every word used in every promotional campaign," but "[a]ll proposed promotional messages [were] reviewed by Department officials both for substance and for wording, and some proposals [we]re rejected or

rewritten by the Department." *Id.* at 561. On top of that, "[o]fficials of the Department also attend[ed] and participate[d] in the open meetings at which proposals [we]re developed." *Id.* The Secretary's role was thus not "limited to final approval or rejection." *Id.*

The Bar badly overreads *Johanns*. It asserts (at 24-25) that "*Johanns* directly contradicts a key rationale on which *Keller* relied in refusing to treat the California State Bar as a government agency for purposes of the government speech doctrine." But *Johanns* explicitly distinguished *Keller* due to the "degree of governmental control over the message." *Johanns,* 544 U.S. at 561-62. In *Keller*, the Court explained, "the state bar's communicative activities to which the plaintiffs objected were not prescribed by law in their general outline and not developed under official government supervision. Indeed, many of them consisted of lobbying the state legislature on various issues." *Id.* at 562. "When, as here," the Court continued, "the government sets the overall message to be communicated and *approves every word* that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages." *Id.* (emphasis added).

The Bar dismisses all of this as "dicta." Cross-Pet. 24. And it argues that this case "presents no question of the 'degree of governmental control over the message[s]' being communicated" because the Bar is an "administrative agency" under state law. *Id.* at 25. Accordingly, the Bar argues, "[w]hen the Texas State

Bar speaks, an agency of the Texas government itself is speaking." *Id.* Moreover, it argues, "all three branches of the Texas government have mechanisms for exercising control over the Bar," such as approving its budget. *Id.* at 25-26.

But the exact same facts the Court discussed in *Johanns* in distinguishing *Keller* are present here: the Texas Bar has an extensive legislative program that coordinates lobbying on certain matters, and the state government regulates the Bar generally but does not directly control or endorse its specific messages, activities, or programs. As the Court recognized in *Keller* (as summarized in *Johanns*), the California "bar's communicative activities to which the plaintiffs objected were not prescribed by law in their general outline and not developed under official government supervision." 544 U.S. at 562.

So too here. The Texas State Bar Act identifies seven amorphous "purposes" that the Bar is tasked with advancing—such as improving the quality of legal services, encouraging the formation of local bar associations, and providing forums for "the discussion of subjects pertaining to the practice of law." Tex. Gov't Code Ann. § 81.012. But neither the Act nor the Texas Supreme Court *requires* the Bar to engage in the ideologically charged activities that are challenged here. Nothing in state law and no government official dictates the bills on which the Bar will lobby. Nothing in state law and no government official directs the Bar to engage in rampant "diversity and inclusion" initiatives based on race, gender, and sexual orientation. And nothing in state law and no

government official directs what causes the Bar will seek to support through its pro bono and legal aid initiatives.

The Bar notes (at 26) that Texas law "expressly provides that the State Bar may not use its funds 'for influencing the passage or defeat of any legislative measure unless the measure relates to the regulation of the legal profession, improving the quality of legal services, or the administration of justice'" and that the "Bar is subject to periodic legislative 'sunset' reviews." But those high-level supervision mechanisms are a far cry from the state government "*approv[ing] every word* that is disseminated" by the Bar. *Johanns*, 544 U.S. at 562 (emphasis added). Compelling Petitioners/Cross-Respondents to subsidize the Bar's pervasive political and ideological activities violates bedrock principles of the First Amendment and cannot be brushed aside on the ground that this merely entails government speech.

CONCLUSION

Keller's holding that the activities of a mandatory bar are not government speech and remain subject to the First Amendment was correct at the time and has not been eroded by any subsequent developments. Petitioners/Cross-Respondents take no position on whether the Court should grant this cross-petition if the Court grants certiorari in the principal case.

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