No. 21-357

In The
Supreme Court of the United States

LUCILLE S. TAYLOR,

Petitioner,

v.

DANA M. WARNEZ, in her official capacity as President of the State Bar of Michigan Board of Commissioners; et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Petitioner makes the following arguments in reply to the Respondents' Brief in Opposition.

ARGUMENT

1. The integrated bar's speech is not government speech.

SBM attempts to distinguish the operation of an integrated bar from other violations of First Amendment free speech guarantees by shoehorning the SBM into an exception created for "government speech." BIO 26-29. SBM acknowledges that *Keller v. State Bar of California*, 496 U.S. 1 (1990) held that an integrated bar's speech is private speech, not government speech. BIO 26. Yet it argues that subsequent opinions of this Court have implicitly transformed integrated bar speech into government speech. BIO 26-29.

The government-speech exception to the prohibition on compelled speech holds that if the message can be attributed to the government, the person who pays for that speech loses the ability to object – just as the taxpayer does not get to prevent his taxes being spent promoting positions he does not agree with. The doctrine was developed primarily in a string of cases concerned with agricultural-promotion programs. In his concurring opinion in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), Justice Stevens, joined by Justice Ginsburg, called it a "recently minted doctrine." *Pleasant Grove City*, 555 U.S. at 481 (Stevens, J.,

concurring). Justice Souter, in a separate concurrence, also agreed as to the "recently minted" categorization. *Pleasant Grove City*, 555 U.S. at 485 (Souter, J., concurring). The doctrine certainly appears to postdate *Keller* and *Lathrop v. Donohue*, 367 U.S. 820 (1961).

One of the earliest cases involving compelled speech and agricultural programs dealt with speech made on behalf of fruit growers, processors, and handlers. *Glickman v. Wileman Brothers & Elliot, Inc.*, 521 U.S. 457 (1997). SBM cites *Glickman* for the proposition that compelled speech subsidies are allowable when they are part of a broader regulatory scheme, such as an integrated bar. BIO 21. But *Glickman*'s regulatory scheme was substantially different than that of an integrated bar, and that difference is crucial. *Glickman*'s regulatory scheme was economic. Specifically, the fruit program was part of a scheme that was exempt from antitrust law, and prohibited the participants from acting economically on their own:

> The legal question that we address is whether being compelled to fund this advertising raises a First Amendment issue for us to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve.
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> In answering that question we stress the importance of the statutory context in which it arises. California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize

> other portions of the economy in which competition is fully protected by the antitrust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme.

Glickman, 521 U.S. at 468-469. The economic component of the regulation and the restriction on individual actions was emphasized throughout *Glickman* and was central to its holding that this type of compelled speech was acceptable. *Glickman*, 521 U.S. at 474-477.

Assuming *Glickman*'s rationale survived *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), it does not support SBM's position. It is uncontested that SBM does not promote the financial interests of the legal profession. BIO 20. SBM does not place artificial constraints on attorneys' economic activities, nor does it directly promote the economic well-being of lawyers. Indeed, *Keller* held that integrated bars do not serve private economic interests. *Keller*, 110 U.S. at 2236. For that reason, the government speech rationale *Glickman* provided for allowing compelled speech does not fit here.

After *Glickman* came *United States v. United Foods, Inc*., 533 U.S. 405 (2001), which dealt with the marketing of mushrooms. At the outset, *United Foods* confirmed the centrality of *economic* regulation to *Glickman*: "[T]heir mandated participation in an advertising program with a particular message was the logical concomitant of a valid scheme of economic

regulation." *United Foods*, 533 U.S. at 412. So, again, it is not applicable to the non-economic regulation of the SBM.

SBM contends that because *Keller* forbade them from compelling speech on topics that were seemingly further afield and more controversial, it is therefore not a free speech violation to compel such speech because the germane issues are less controversial to the general public. The *United Foods* Court held that opinions on less controversial matters are still entitled to First Amendment protection:

> The subject matter of the speech may be of interest to but a small segment of the population; yet those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them. . . .
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> * * *
>
> Here the disagreement could be seen as minor: . . . It objects to being charged for a message which seems to be favored by a majority of producers. . . . First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors; and there is no apparent principle which distinguishes out of hand minor debates about whether a branded mushroom is better than just any mushroom.

United Foods, 533 U.S. at 410-411. *United Foods* struck down the compelled-speech subsidy and declined to

consider it government speech. However, the issue of government speech was not properly raised prior to the Supreme Court, and was therefore not given a full analysis. Nevertheless, the Court indicated that the food marketers there would have had a difficult time getting the benefit of the government-speech exception:

> For example, although the Government asserts that advertising is subject to approval by the Secretary of Agriculture, respondent claims the approval is *pro forma*. This and other difficult issues would have to be addressed were the program to be labeled, and sustained, as government speech.

United Foods, 533 U.S. at 416-417.

The developments anticipated in those parting words in *United Foods* regarding the criteria for determining government speech would wait another four years until *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005) for the Court to flesh out this "newly minted" exception. As it did with *United Foods*, SBM uses *Johanns* to support its claims. But again, as with *United Foods*, it is actually Petitioner's argument that is buttressed by *Johanns*.

Johanns involved the promotion of a well-known beef advertising campaign, among other activities:

> We have sustained First Amendment challenges to allegedly compelled expression in two categories of cases: true "compelled-speech" cases, in which an individual is obliged personally to

> express a message he disagrees with, imposed by the government; and "compelled-subsidy" cases, in which an individual is required by the government to subsidize a message he disagrees with, expressed by a private entity. We have not heretofore considered the First Amendment consequences of government-compelled subsidy of the government's own speech.

Johanns, 544 U.S. at 557.

"In all of the cases invalidating exactions to subsidize speech, the speech was, or was presumed to be, that of an entity other than the government itself. See *Keller*, . . . *Abood*, . . . *United Foods*, ..." *Johanns*, 544 U.S. at 559 (internal citations omitted).

Johanns described the criteria to determine whether the speaker was a private entity or the government. (And recall that *Keller* had already established that the integrated bar's message was private speech.) These criteria focus on whether or not a government official who was part of an electorally accountable branch of government authored the message and the degree to which that message was controlled by an official who was accountable to the voters. In *Johanns*, the Court found that the speech was the government's message:

> The message set out in the beef promotions is from beginning to end the message established by the Federal Government. . . . Congress and the Secretary have also specified, in general terms, what the promotional campaigns

> shall contain . . . , and what they shall not. . . . Thus, Congress and the Secretary have set out the overarching message and some of its elements, and they have left the development of the remaining details to an entity whose members are answerable to the Secretary (and in some cases appointed by him as well).
>
> Moreover, the record demonstrates that the Secretary exercises final approval authority over every word used in every promotional campaign.
>
> * * *
>
> *This degree of governmental control over the message funded by the checkoff distinguishes these cases from Keller. There 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*.

Johanns, 544 U.S. at 560-562 (footnote and internal citations omitted, emphasis added).

> Here, the beef advertisements are subject to political safeguards more than adequate to set them apart from private messages. . . . The Secretary of Agriculture, a politically accountable official, oversees the program, appoints and dismisses the key personnel, and retains absolute veto power over the advertisements' content, right down to the wording. And

> Congress, of course, retains oversight authority, not to mention the ability to reform the program at any time. No more is required.

Johanns, 544 U.S. at 563-564 (footnote omitted). Therefore, it was *Johanns* that has set the criteria for determining government speech and the extent to which it requires electoral control over the government office controlling the speech.

In response to *Keller* and the government-speech exception, SBM argues that *Keller* has been implicitly overruled by *Johanns* in regard to an integrated bar's message being private speech. BIO 27. But even if SBM is correct that *Johanns* superseded *Keller*, *Johanns* provides additional criteria which still shows that the SBM's message is private speech. *Johanns* requires the government speech to be controlled by government officials who are held accountable by the electorate.

In *Johanns*, the Court found that Congress and the Secretary of Agriculture set the message and its elements, and that the remaining elements were authored by those who were answerable to the Secretary. *Johanns*, 544 U.S. at 560-561. SBM asserts that this condition is met by the Michigan Supreme Court's "complete control." BIO 27. This falls short of the *Johanns* criteria where the oversight was over "every word" and "all proposed" messages. *Johanns*, 544 U.S. at 561. While the Michigan Supreme Court has the power to provide for the broad organizational structure of SBM, it does not provide all control. It does not

provide the management of the structure it provides. It does not engage in a mandatory exercise of power – it need not act unless it desires to. It does not engage in the day-to-day operations, nor dictate what messages SBM promulgates. Rather, the SBM Representative Assembly "is the final policy-making body of the State Bar of Michigan." Pet.App. 54. Contrast this with *Johanns*, where "as here, the government sets the overall message to be communicated and approves every word that is disseminated." *Johanns*, 544 U.S. at 562. Further, "[Congress and the Secretary of Agriculture] have left the development of the remaining details to an entity whose members are answerable to the Secretary." *Johanns*, 544 U.S. at 561. Of SBM's Board, at no time are more than 5 members of the 150 representatives to the Representative Assembly (3.333% of the total) appointed by the Supreme Court. And no one holding a judicial office can serve as an officer on the Representative Assembly. Pet.App. 24. The extent of the management by Michigan Supreme Court, or any other judge or public official, is slight.

Even if the Michigan Supreme Court did exercise day-to-day control and absolute plenary powers over everything put forth by SBM, that would still not be enough to satisfy *Johanns*' criteria for government-controlled speech. This is because the cornerstone of *Johanns* is that the government control must be exercised by elected officials, or by those who are accountable to elected officials, so that they in turn are democratically accountable. *Johanns*, 544 U.S. at 563-564. See also *Southworth v. Board of Regents of the*

University of Wisconsin System, 529 U.S. 217 (2000): "When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Supra*, at 235.

While the Michigan Supreme Court may provide oversight, and Michigan justices are both appointed and popularly elected,[1] still, "The judicial branch, ultimately, is 'the least politically accountable branch of government.' " *Lansing Schools Educ. Ass'n v. Lansing Bd. of Educ.*, 487 Mich. 349, 438, 792 N.W.2d 686, 735 (2010).

Lastly, another factor raised by *Johanns*, but not decided because there was not a record developed on it, was the possibility that it could not be government speech if the speech was attributable to someone other than the government.[2] "SBM speech is not promulgated or published with an indication that it has come from the Michigan Supreme Court, the state judiciary, the governor, the legislature, ... It is always attributed to the State Bar of Michigan." Pet.App. 32. This should

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[1] See generally Michigan Constitution of 1963, Article VI, Sections 2, 8, 9, and 12.

[2] SBM argues that Petitioner has referred to SBM as a "state agency" in a press release, and that this binds her and she cannot deny that the SBM's message is government speech. BIO 27. But such a position was not stipulated to by Petitioner, and even if it were, the parties' agreement could not bind the Court as that is a question of law.

weigh against SBM's claim that its message is government speech.

2. The comparison between unions and integrated bars supports the contention that *Janus* controls.

Perhaps because the ties between *Keller* and *Janus* are so strong, SBM attempts to distinguish labor unions in *Janus* and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) and the integrated bar here and *Keller*.[3] BIO 20-24. SBM argues that labor unions serve private interests, while the SBM serves a public interest. BIO 20. This contention that the speech of unions covers only private interests and not the public interest, was thoroughly rejected by this Court:

> [W]e . . . ask whether the speech is on a matter of public or only private concern. In *Harris*, the dissent's central argument in defense of *Abood* was that union speech in collective bargaining, including speech about wages and benefits, is basically a matter of only

[3] The genesis of the entire First Amendment doctrine at issue here builds upon both labor and integrated bar cases, each coming together to reinforce the other like the teeth of a zipper. A reader of *United Foods*, *supra*, for example, might be forgiven for thinking that there was a case called "*Abood* and *Keller*," as the two case names joined together like that are used no less than three times in the syllabus, twice in the majority opinion, and twice in the dissent. *Johanns*, *supra*, similarly uses the "*Abood* and *Keller*" naming three times in its majority opinion.

> private interest. We squarely rejected that argument. . . .

Janus, 128 S.Ct. at 2474 (internal citations omitted).

SBM then attempts to distinguish public-sector labor unions and integrated bars by claiming that "SBM's primary activities are non-expressive and . . . by contrast, unions exist primarily, if not exclusively, to speak on behalf of their members." BIO 21. It is an odd claim that an organization by and for lawyers is considered non-expressive. Indeed, in the very next paragraph, SBM admits that it "speaks on issues related to the legal profession and the administration of justice." BIO 21. That would seem to be an excellent definition of "expressive" speech – speaking on issues related to the legal profession and the administration of justice.

3. The record contains the number of lawyers practicing in integrated bar states.

SBM asserts that Petitioner relies on facts outside of the record regarding the percentage of attorneys who practice in a state which does not have a mandatory integrated bar. BIO 35. However, which states have a voluntary bar and which have a mandatory integrated bar are facts that SBM has conceded. Pet.App. 36. The number of lawyers in each of these voluntary or mandatory states comes from a survey of lawyers from the American Bar Association. The federal courts may take judicial notice of such reliable numbers collected and produced by an impartial organization.

> (b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:
>
> > (1) is generally known within the trial court's territorial jurisdiction; or
> >
> > (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

Fed.R.Evid. 201. Petitioner would assert that the ABA is a source whose accuracy cannot be reasonably questioned in this regard.

Even if this court does not take judicial notice of the impartial data collected by the ABA, essentially the same result can be reached by using United States Census Bureau data for the various states.[4] "The courts may take judicial notice of census figures, absent a showing that they are unreliable for some reason." *Mitchell v. Rose*, 570 F.2d 129, 132 n. 2 (6th Cir. 1978), *cert. granted*, 439 U.S. 816 (1978), *rev'd on other grounds*, 443 U.S. 545 (1979). Using Census data for the population of the states that SBM acknowledges as not requiring an integrated bar shows that a majority, 54%, of the population lives in states where it does not require mandatory integrated bar membership.

[4] This data is the most recent estimate for 2020, and can be accessed here: https://www.census.gov/programs-surveys/popest/technical-documentation/research/evaluation-estimates/2020-evaluation-estimates/2010s-state-total.html Last accessed December 7, 2021.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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