No. 20-50448

In the United States Court of Appeals for the Fifth Circuit

TONY K. MCDONALD; JOSHUA B. HAMMER; MARK S. PULLIAM,
Plaintiffs-Appellants,

v.

JOE K. LONGLEY, IMMEDIATE PAST PRESIDENT OF THE STATE BAR OF TEXAS; RANDALL O. SORRELS, PRESIDENT OF THE STATE BAR OF TEXAS; LAURA GIBSON, MEMBER OF THE STATE BAR BOARD OF DIRECTORS AND CHAIR OF THE BOARD; JERRY C. ALEXANDER, MEMBER OF THE STATE BAR BOARD OF DIRECTORS; ALISON W. COLVIN, MEMBER OF THE STATE BAR BOARD OF DIRECTORS; ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division

BRIEF OF THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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Certificate of Interested Persons

No. 20-50448

Tony K. McDonald; Joshua B. Hammer; Mark S. Pulliam,
Plaintiffs-Appellants,

v.

Joe K. Longley, Immediate Past President of the State Bar of Texas; Randall O. Sorrels, President of the State Bar of Texas; Laura Gibson, Member of the State Bar Board of Directors and Chair of the Board; Jerry C. Alexander, member of the State Bar Board of Directors; Alison W. Colvin, member of the State Bar Board of Directors; et al.,
Defendants-Appellees.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, amicus curiae the State of Texas, as a governmental entity, need not furnish a certificate of interested persons.

/s/ Kyle D. Hawkins
Kyle D. Hawkins
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Identity and Interest of Amicus Curiae

Amicus curiae is the State of Texas, by and through Attorney General Ken Paxton. As the chief legal officer of the State of Texas, Attorney General Paxton carries the solemn responsibility of protecting the constitutional rights of Texans. And the State has an interest in ensuring that the actions and policies of its governmental entities comport with the federal Constitution's requirements. Both of those interests are implicated in this case. Appellants argue that an arm of the State of Texas violates their First Amendment rights by forcing them to subsidize political and ideological activities they do not wish to support. That claim implicates the State's duty to protect its residents' constitutional rights while effectively regulating the legal profession.

No one other than the State's counsel authored this brief. No fee has been or will be paid for its preparation.

Summary of Argument

The State of Texas requires every attorney, as a condition of receiving and maintaining a law license, to join the State Bar of Texas. The Bar, in turn, compels every attorney in Texas to support, though mandatory membership dues, a host of political and ideological activities as to which reasonable minds can and do disagree. That compulsion violates the First Amendment. The Bar has no compelling interest in forcing lawyers to support its divisive ideological agenda. And in any event, the means it has chosen to advance its aims are not narrowly tailored. Over a third of the

States regulate the legal profession without requiring attorneys to financially support political causes they disfavor, and there is no reason Texas cannot do the same.

If the Bar wishes to use member dues to fund political and ideological activities, it first must obtain members' free, clear, and affirmative consent. The current "opt-out" regime is unconstitutional.

ARGUMENT

I. The Activities Appellants Object to are Ideological and Political, and Appellants Cannot Be Forced to Subsidize Them Unless the Bar Overcomes Exacting Scrutiny.

"Compelling individuals to mouth support for views they find objectionable violates [the] cardinal constitutional command" against compelled speech. *Janus v. State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2463 (2018) (noting that, "in most contexts, any such effort would be universally condemned"). Indeed, "except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris v. Quinn*, 573 U.S. 616, 656 (2014).

Yet the State Bar of Texas does just that to Appellants. In order to practice law in Texas, attorneys are required to pay dues to the Bar—and those dues fund a host of political and ideological activities far removed from the prosaic work of regulating and disciplining lawyers. *See* Appellants' Br. 5-11 (describing Bar's "legislative program," "diversity initiatives," and other ideologically charged activities). While there is no doubt that the Bar may extract dues for the narrow and limited purpose of "proposing ethical codes and disciplining bar members," *Harris*, 573 U.S. at 655,

the State Bar of Texas goes much further. *See* ROA.3755-57 (Bar's proposed legislative initiatives). When a state bar lobbies legislators to, for example, amend the state constitution to change the definition of marriage (ROA.3756; ROA.3959), or to create legislative "alternative[s] to marriage" (ROA.3756; ROA.3961-79), or to change how grandparents may override parents' rights to determine access to children (ROA.3755, 3981-83), it steps outside its core functions and becomes a lobbying organization driven by the partisan ideological interests that capture it.

Take, for example, the Bar's "Access to Justice Commission." Among that Commission's primary tasks is lobbying legislators. ROA.1619; ROA.3942-45. Its lobbying efforts focus on, among other things, promoting "systemic change." ROA.1619. The Bar allocated to this Commission nearly $1 million in the 2018-19 budgetary year, ROA.3871, thereby compelling Appellants to support, through their mandatory dues, legislative initiatives related to "systemic change." ROA.1619. That is not the regulation of the legal profession; it is political lobbying, *see Janus*, 138 S. Ct. at 2481, and the Bar has coerced unwilling attorneys to support it.

To be sure, the Bar is entitled to speak on and support various political causes—but it cannot make objecting attorneys pay for that support without satisfying "exacting" First Amendment scrutiny. *Janus*, 138 S. Ct. at 2465; *Harris*, 573 U.S. at 648-51. As set out below, the Bar cannot meet that standard.

II. The Bar Cannot Overcome Exacting Scrutiny.

"[E]xacting" First Amendment scrutiny is exceedingly hard to satisfy, *see id.*, and the Bar cannot satisfy it here. The Bar must demonstrate a compelling government interest advanced through the most narrowly tailored means possible. *Janus*,

138 S. Ct. at 2465 (demanding a "a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms"); *see also Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (describing the test). The burden falls on the Bar. *Janus*, 138 S. Ct. at 2465. The Bar's regime of compelled support fails if, among other things, there are alternative approaches to satisfying its interests that are "significantly less restrictive of associational freedoms." *Id.* If such compelled support does not meet exacting scrutiny, it is unconstitutional and may not be collected without members' affirmative consent. *Id.* at 2465, 2478, 2486.

When it comes to the regulation of attorneys through a mandatory bar association, the Supreme Court has recognized two compelling government interests: "proposing ethical codes and disciplining bar members." *Harris*, 573 U.S. at 655. To the extent a mandatory bar association extracts dues to advance those two interests and nothing else, it does not offend the First Amendment. *Keller v. State Bar of Cal.*, 496 U.S. 1, 15-16 (1990). But when a mandatory bar compels the funding of ideological interests outside those two interests, it cannot point to a compelling interest sufficient to justify the impingement on core First Amendment rights. *See id.*

Appellants do not challenge the Bar's ability to force them to pay dues "for carefully limited purposes such as 'proposing ethical codes and disciplining bar members.'" Appellants' Br. 5 (quoting *Harris*, 573 U.S. at 655). They instead object to funding a host of "extensive political and ideological activities that extend far beyond any regulatory functions." *Id.*; *see also id.* at 6-11 (listing the objected-to activities). The burden thus falls on the Bar to show that its legislative and lobbying programs, diversity initiatives, "access to justice" groups, legal services fees, and various other

activities that fall outside the scope of regulating lawyers advance a compelling government interest and are narrowly tailored to serve that interest. The Bar fails both of those prongs.

A. The Bar has no legitimate interest in requiring Texas lawyers to support political and ideological activities they do not wish to support. Take, for example, the Bar's lobbying efforts to change various aspects of Texas family law. It publicly advocates in favor of SJR 9, a measure that would amend the definition of marriage in the Texas Constitution. ROA.3756; ROA.3959. Yet the issue of whether marriage should be redefined is among the most contentious and hotly debated topics in the national discourse today. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (stressing that "those who believe allowing same-sex marriage is proper or indeed essential . . . may engage those who disagree with their view in an open and searching debate" and adding that "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered"); *see also Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018) (noting that "the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression"). Nothing authorizes the Bar to override its members' "protected views," *Masterpiece Cakeshop*, 138 S. Ct. at 1727, by forcing them to contribute financially to a political campaign contrary to their beliefs, *see Keller*, 496 U.S. at 15-16.

In arguing the contrary, the Bar and the district court below prove too much. Suppose a State were to make driver's licenses available only to those who contribute at least $10 to the Republican Party. On its face, that condition would be invalid. *Cf. Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (concluding that a State may not compel drivers to "participate in the dissemination of an ideological message"); *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988) ("[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say."). It would not matter if the State could show that the Republican Party's platform is "germane" to driving-related interests, such as support for better roads and harsher penalties for drunk driving. The same is true here. As a condition of practicing law in Texas, the Bar requires attorneys to contribute financial support to political campaigns aimed, among other things, at changing the state constitution's definition of marriage. It should not matter whether that ideological activity has some attenuated connection to the practice of law. As with a law conditioning a driver's license on support for the Republican Party or requiring public-sector employees to fund a labor union they do not wish to support, the Bar's behavior should "be universally condemned." *Janus*, 138 S. Ct. at 2463.

Indeed, the Supreme Court recently "reject[ed] . . . out of hand" the notion that "lobbying" expenses are chargeable to unwilling members of a public-sector union. *Id.* at 2481. Even if lobbying activities might be "germane" to some legitimate interest, "political or ideological" activities remain categorically nonchargeable to objectors. *Harris*, 573 U.S. at 655 (*Keller* "held that members of this bar could not be required to pay the portion of bar dues used for political or ideological purposes"). The

analysis is the same for unwilling members of a mandatory bar. *Id.*; *Keller*, 496 U.S. at 15-16. And that rule means that the Bar fails at step one: It lacks a compelling interest in charging unwilling members for lobbying programs, diversity initiatives, "access to justice" campaigns, legal services fees, and the other activities Appellants object to.

B. The Bar fails twice over to satisfy "exacting" scrutiny because its means are not narrowly tailored to advance its interests. Indeed, the experience of other States demonstrates that there are many alternatives available to the mandatory integrated Bar that are "significantly less restrictive of associational freedoms." *Janus*, 138 S. Ct. at 2465.

One in particular bears emphasis here. Over a third of the States allow their attorneys to forego membership in mandatory bars. *In re Petition for a Rule Change to Create a Voluntary State Bar of Nebraska*, 841 N.W.2d 167, 171 (Neb. 2013) (per curiam). Those States regulate lawyers directly. They extract from attorneys the minimal dues necessary to fund core regulatory functions, *cf. Harris*, 573 U.S. at 655 (describing those functions), then allow them to join voluntary bar associations and engage in political and ideological activities as they see fit. There is no evidence that these States regulate the legal profession less effectively than do others. And as far as amicus can tell, the Bar at no point has claimed otherwise.

The experience of one-third of the Nation is enough to conclude that the Bar fails the narrow-tailoring component of exacting scrutiny. *See Janus*, 138 S. Ct. at 2465. If the Bar wishes to extract financial support for its ideological and political activities, it must win that support by persuading attorneys to contribute voluntarily.

Cf. id. at 2485-86 (acknowledging, but dismissing, the concern that "the loss of payments from nonmembers may cause unions to experience unpleasant transition costs in the short term, and may require unions to make adjustments in order to attract and retain members").

III. The Bar May Exact Funds for Its Ideological and Political Activities Only After Obtaining Free, Clear, and Affirmative Consent.

Because the Bar's compelled financial support for ideological and political activities cannot survive exacting scrutiny, it is unconstitutional. The Bar may continue to extract financial support only with affirmative, voluntary opt-in. *Janus*, 138 S. Ct. at 2465, 2478, 2486. "[W]aiver cannot be presumed" when it comes to the relinquishment of First Amendment rights. *Id.* at 2486. The Bar must instead make sure that it has obtained "clear[]," "free[]," and "affirmative[]" consent to use dues to fund political and ideological activities. *Id.*

The Bar's current practices flout that rule. The Bar admits that is "has had an 'opt out' refund procedure for decades." ROA.3950. Indeed, attorneys can demand a refund only after paying their dues in full. ROA.3749, 3957, 4098-99. To do so, they must avail themselves of an administrative process that Appellants find "opaque" and "convoluted." Appellants' Br. 42, 43. The First Amendment does not permit the Bar to grant refunds only on the back end, and only to those who first jump through a series of bureaucratic hoops. *See Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 312 (2012); *see also Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 444 (1984) (rejecting regime requiring full payment up front with the possibility of a refund "months later").

If the Bar wishes to continue to fund its ideological and political activities with attorney dues, it must collect those dues only after obtaining the clear, free, and affirmative consent the First Amendment requires. *Janus*, 138 S. Ct. at 2486.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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Certificate of Service

On July 7, 2020, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Kyle D. Hawkins
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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 2,261 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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