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SUPREME COURT OF ARIZONA

IN THE MATTER OF
PETITION TO AMEND
SUPREME COURT RULE
32(A) – (M)

Case No. _____

**PETITIONERS' REPLY TO
COMMENTS RE: PETITION TO
AMEND ARIZ. SUP. CT. R.
32(A) – (M)**

Petitioners, President Warren Petersen and Speaker Ben Toma, hereby respond to the comments made in opposition to their request that this Court eliminate the requirement that attorneys join, and pay dues to, the State Bar Association of Arizona (the "Arizona Bar") as set out in Ariz. Sup. Ct. R. 32(a) – (m).

INTRODUCTION

The Arizona Bar compels lawyers to pay dues that, at times, support political and ideological messages. But the Supreme Court has “held time and again that freedom of speech includes both the right to speak freely and the right to refrain from speaking at all.” *Janus v. AFSCME*, 585 U.S. 878, 892 (2018). Lawyers who object to some of the Bar’s messages therefore have an absolute right to refrain from funding that speech and to “eschew association for expressive purposes,” and lawyers must “clearly and affirmatively consent *before* any money is taken from them.” *Id.* at 892, 930 (emphasis added). The mandatory Arizona Bar does not adhere to those principles, and modified Rule 32(c)(9), allowing for an opt-out, does not rectify its constitutional deficiencies.

Petitioners’ amendments to Ariz. Sup. Ct. R. 32 to make the Bar voluntary would avoid these compelled speech and association problems, and they would better serve the Arizona public and lawyers. For the reasons discussed in the Petition, this Court should adopt those proposed amendments. The comments made in opposition to the Petition (“Petition Opponents”) are not persuasive:

First, the Petition Opponents do not show why it is advisable for this Court to ignore the broad holding of *Janus* and instead abide by the widely criticized and unworkable precedent in *Keller v. State Bar of California*, 496 U.S. 1 (1990) the logic of which was severely undercut in *Janus*. For one, *Keller* is not and never was “controlling” over this Court’s rulemaking, in that *Keller* does not *require* a mandatory bar. Even before *Janus*, Arizona was free to raise speech protections above what *Keller* permitted, as several states have done. That would also be more aligned with the Arizona Constitution’s broad protections for free speech and association. This Court does need not wait for *Keller* to be “explicitly” overruled before it can adhere to *Janus*, as some suggest. In short, there is no constitutional risk under *Keller* by making the bar voluntary, but there is such a risk under *Janus* by keeping it mandatory.

Second, even if *Keller* were “controlling,” the Petition Opponents cannot deny that the Arizona’s mandatory Bar violates *Keller*’s limitation that compelled speech be “germane” to regulating the practice of law. Putting aside that fact that the germaneness standard is unworkable—further weighing in favor of following *Janus*—the Bar at times crosses that line with its trainings on gender and sexuality, DEI task forces, and lobbying

activities. None of the Petition Opponents try to justify the Bar's support and trainings on these political and ideological issues. Nor do they successfully argue that an opt-out system protects against unlawfully compelled speech. Opting out is burdensome, confusing, time-limited, not guaranteed, and lawyers are loath to anger their regulators, all of which makes a successful opt-out program unrealistic. That is why *Janus* requires an *opt-in*—the presumption should be *against* compelled speech, not tilted in its favor.

Third, the Petition Opponents try but fail to show that a voluntary bar would be worse for Arizona and its lawyers. Beyond platitudes and vague phrases, like “access to justice,” the Petition Opponents do not rely on empirical evidence or scholarship. And, fundamentally, they cannot explain why their laudable—albeit vague—goals cannot be equally or better accomplished through voluntary association. By contrast, the Petition Opponents do not dispute that compelling lawyers to pay Bar fees to support certain political and ideological speech is unconstitutional.

When weighing the pros and cons of a voluntary bar, the pros carry the day. The Petition Opponents' failure to establish the legality or benefits of a mandatory bar should inform this Court's decision. Petitioners urge this

Court to follow other states (which regulate over 60% of the lawyers in America) that have successfully protected the First Amendment *and* their states' legal profession with a voluntary bar association.

ARGUMENT

1. The Petition Opponents Do Not Provide A Reason For This Court To Ignore The Principles in *Janus* and Disregard Core First Amendment Protections

a. *Janus* Holds That Compelling The Subsidization of Political Speech Is Unlawful—That Is Precisely What the Arizona Bar Does

As explained in the Petition, *Janus* renders mandatory bars unconstitutional when those bars—like Arizona's—force its members to fund political and ideological speech as a condition of practicing law in the State. In *Janus*, the Supreme Court held that compelling individuals “to subsidize private speech on matters of substantial public concern” is categorically unlawful. *Janus*, 585 U.S. at 886. But the Arizona Bar does, at times, speak on hotly debated political issues. *See* Pet. 6–7 (collecting examples). Nonetheless, as a condition of practicing law, the Bar requires members to pay dues subsidizing that speech, without an opt-in system. *Id.* This is unlawful. *See Janus*, 585 U.S. at 93.

Some Petition Opponents argue that *Janus* is narrow and inapplicable because it addressed public-sector unions, not state bars. *See* Ariz. Bar Comm. at 3-5 (May 1, 2025) [“Ariz. Bar Comm.”] (“The State Bar is not a labor organization”); Arizona Atty. Gen. Comm. at 3 (Apr. 28, 2025) [AG Comm.] (“*Janus* addressed a different issue . . .”); Community L. Servs. et al. at 4 (May 1, 2025) [“CLS Comm.”]. This argument is not persuasive. *Janus* is clear that the First Amendment principles it delineates are broad and do not turn on the precise function of the government entity that is compelling speech by citizens, but instead on the fact that speech is being compelled at all.

The Supreme Court repeats this point throughout its decision, explaining that “[c]ompelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command” that citizens can refrain from speaking. *Janus*, 585 U.S. at 892. Quoting Thomas Jefferson, the Court warns that “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.” *Id.* at 983 (quoting A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950)). And nothing in *Janus* suggests that *only* public-sector unions can unlawfully

compel speech; indeed, the Court makes clear that its decision is *not* limited to unions, stating that “in *most* contexts, any such effort [to compel speech] would be *universally condemned*.” *Id.* at 882 (emphases added).

In any event, even if the type of entity mattered, as some Petition Opponents suggest, the Supreme Court has recognized that “[t]here is . . . a substantial analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of employee unions and their members, on the other.” *Keller*, 496 U.S. at 12. Thus, the Court held, state bar associations ought to be “subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions[.]” *Id.* at 13. Accordingly, the logic of *Janus* extends to the Arizona Bar under the Court’s own reasoning. The commenters’ efforts to avoid or to substantially narrow *Janus* are unsuccessful.

b. This Court Does Not Need to Wait for The Supreme Court To “Explicitly” Overrule *Keller*

Some Petition Opponents also wrongly suggest that because the Supreme Court has not yet “explicitly” overturned *Keller*, that decision is still “controlling” and this is not the appropriate forum to “litigate opposition to

U.S. Supreme Court precedent.” Ariz. Bar. Comm. at 4-5; AG Comm. at 2-4; CLS Comm. at 4. This argument should be disregarded.

Keller held that using compulsory bar dues for political speech is unconstitutional unless the expenditures 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.” *Keller*, 496 U.S. at 14. But even if *Keller* were viable today, it does not – and never did – *require* integrated state bars; it only *permitted* them with limitations. That is why several states do not have integrated state bars, with some recently moving from mandatory to voluntary. *See* Pet. 17.

Accordingly, *Keller* is not “controlling” in the sense that some commenters try to insinuate—*i.e.*, that *Keller prevents* this Court from adopting Petitioners’ proposals to create a voluntary bar. Not so. Nothing in *Keller* ever stopped this Court from raising First Amendment protections above the floor set in *Keller*. So, whether *Keller* has been “explicitly” overruled by the Supreme Court is irrelevant to this Court’s decision to afford *more* First Amendment protections to its citizens. If anything, following *Janus* would be more in line with Supreme Court precedent *and* would be more faithful to the Arizona Constitution, which affords citizens

broad speech rights than the First Amendment. See *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 281 ¶ 45 (2019).

Several Petition Opponents cite cases like *File v. Martin*, 33 F.4th 385, 387 (7th Cir. 2022), where federal courts recognize that they are still “bound” by *Keller* after *Janus*. See AG Comm. at 4. But those cases are inapposite. In those cases, lawyers try to challenge their state’s mandatory bars as unconstitutional and obtain a judicial remedy. Accordingly, lower federal courts *are* bound by *Keller* for those types of First Amendment claims (until it is explicitly overturned), so they cannot *strike down* mandatory bars. Here, by contrast, this Court has discretion whether to *establish* a mandatory bar at all. It need not do what *Keller* merely permits. It can follow *Janus*. That is not improperly “litigating” *Keller*.

Even if not “explicitly” overruled, moreover, *Keller* is dead letter and of no value. Its rationale was gutted in *Janus*. Commenters’ efforts to revive it here are not convincing. For example, some try to distance *Keller* from *Abood v. Detroit Board of Education*, 431 U.S. 209, (1977), which the Court overruled in *Janus*. See, e.g., AG Comm. at 3. But *Keller* relied heavily on *Abood*. In *Keller*, the Supreme Court faulted the California Supreme Court for “declining to apply our *Abood* decision,” while noting that several other

courts had at that time applied *Abood* to integrated bars. See *Keller*, 496 U.S. at 16; see generally *id.* (referring to *Abood* thirteen times). As Justice Thomas explains, *Keller* “rests almost entirely on the framework of *Abood*,” and, because *Abood* is overturned, there is “effectively nothing left supporting [the Court’s] decision in *Keller*.” *Jarchow v. State Bar of Wis.*, 140 S. Ct. 1720, 1720 (2020) (Thomas, J., dissenting from denial of certiorari); see also, e.g., *Fleck v. Welch*, 139 S. Ct. 590, 590 (2018) (remanding a state bar association for further consideration in light of *Janus*); *File*, 33 F.4th at 392 (“The tension between *Janus* and *Keller* is hard to miss.”).

The Supreme Court not only overruled *Abood*, it eviscerated it. It held that *Abood* was “poorly reasoned” (*Janus*, 585 U.S. at 886); had “no support in our free speech cases” (*id.* at 919); made a “serious mistake” in its analysis (*id.*); created a standard “impossible to draw with precision” (*id.* at 921); “pinned its result on [an] ‘unsupported empirical assumption’” (*id.* at 924); was “decided against a very different legal and economic backdrop” (*id.*); and was an “anomaly” in the Court’s First Amendment cases (*id.* at 925). The Court’s disapproval of *Abood* counsels heavily in favor of treating *Keller* as dead letter.

Finally, and critically, *Keller* did not address “a broad freedom of association challenge to mandatory bar membership where” —as here— “some of a state bar’s actions might not be germane to regulating the legal profession and improving the quality of legal services in the state.” *Schell v. Chief Just. & Justs. of Oklahoma Supreme Ct.*, 11 F.4th 1178, 1194 (10th Cir. 2021); see also *Crowe v. Oregon State Bar*, 989 F.3d 714, 727–29 (9th Cir. 2021) (where bar engages in non-germane activities, plaintiff has viable free association claim). Accordingly, even if *Keller* were “controlling” (again, it is not), it still would not definitively determine the constitutionality of the mandatory Arizona Bar. This Court must still decide whether the mandatory bar violates lawyers’ free *association* rights—which it does. See *Boudreaux v. Louisiana State Bar Ass’n*, 86 F.4th 620, 625 (5th Cir. 2023) (mandatory bar violated free association rights).

2. Even if *Keller* Were “Controlling,” It Prohibits Mandatory Bar Dues for Funding Ideological Speech Not Germane To Regulating the Legal Profession

Even if *Keller* were “controlling,” the Arizona Bar still cannot require lawyers to pay dues for speech that is not germane to regulating the legal profession. In *Keller*, the Supreme Court held that mandatory bars have only two permissible purposes: “improving the quality of legal services” and

“regulating the legal profession.” 496 U.S. at 13–14. Accordingly, as noted, bars cannot compel a member to fund activities that are not “germane” to those goals, including “political or ideological coloration which are not reasonably related to the advancement of such goals.” *Id.*; see also *Boudreaux*, 86 F.4th at 625 (“[I]f mandatory bar associations are going to compel individuals to associate and speak, they must stay in their constitutionally prescribed lane”). But that is what the Arizona Bar does by, among other things, sponsoring DEI task forces, education related to gender identity and expression, and hosting arts competitions – none of which are “germane” to the practice of law. See Pet. at 6.

None of the Petition Opponents try to address these non-germane political activities. In its opposition, the Arizona State Bar broadly claims that it “does not use membership fees to fund activities of a political or ideological nature that are not reasonably related to lawyer regulation or improving the quality of legal services,” and that it is “an apolitical organization.” Ariz. Bar Comm. at 6. Nevertheless, the Bar does not even *attempt* to address Petitioners’ specific examples of political activities or justify those as “apolitical.” *Id.*

In direct conflict with the Bar’s comment, the Attorney General admits that the Arizona Bar *does* engage in political activities; but, she argues, those topics are “germane” to the legal profession based on the “consistent[]” decisions of several courts. *See* AG Comm. at 8. The Attorney General relies only on one decision, however—*Schell v. Chief Just. & Justs. of Oklahoma Supreme Ct.*, 11 F.4th 1178, 1193 (10th Cir. 2021)—which did *not* address gender and DEI, or anything resembling the Arizona Bar’s activities.

Moreover, *Schell* supports Petitioners insofar as it recognized, for example, which criticizing “big money special interest groups” and prison tort reform are *not* germane. *Id.* Thus, like the Arizona Bar, Attorney General does not even try to explain why DEI initiatives, gender identity education, and art shows are “germane,” when prison tort reform is not. Nor can they. *See Boudreaux*, 86 F.4th at 640 (“We have noted several instances of non-germane speech by the [bar], including, *inter alia*, its promotion of the article about student loan policy and its icon and link celebrating Pride Month.”). If those highly ideological topics are “germane,” then there is no line that could possibly be drawn. Anything political would become legal, swallowing the rule altogether.

Finally, the Attorney General suggests that the opt-out provisions make this non-germane speech acceptable. *See* AG Comm. at 8. No so. So-called “*Keller* dues reductions” are unmanageable, with opaque and labyrinthine procedures. They do not cure First Amendment compelled speech problem because it is too much of a burden for lawyers to challenge violations and bar members are afraid to upset their regulator. *See* Goldwater Inst. Comm. at 5–8 (May 1, 2025) (“The current ‘opt out’ system . . . cannot be said to protect members from having their dues used to fund speech with which they disagree.”); *see also McDonald*, 4 F.4th at 254 (the bar “places the onus on objecting attorneys to parse the Bar’s proposed budget”). Moreover, money is fungible, so an attorney cannot support only *some* of a bar’s activities. An attorney who funds a mandatory bar—for any of its activities—necessarily promotes the bar overall and frees up money for the bar to support political activities. *See Retail Clerks Int’l Ass’n, Local 1625 v. Schermerhorn*, 373 U.S. 746, 753 (1963) (“[O]ur cases have recognized that a union’s money is fungible, so even if the new fee were spent entirely for nonpolitical activities, it would free up funds to be spent for political purposes.”).

3. The Petition Opponents Fail To Show That the Mandatory Bar Is Better For the Arizona Public and Lawyers

Petitioners and supporters persuasively explain why a voluntary bar is better for the Arizona public and its attorneys, including by citing scholarship, empirical evidence, anecdotes, and case studies. *See* Pet. 13–18. Among other reasons, the integrated bars are insufficiently accountable to the public. *See id.* at 13 (citing Theodore Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing From the Wisconsin Case*, Am. B. Found. Res. J. 1, 47, 48, 89 (1983); Patricia Heim, *The Case for a Voluntary Bar*, 64 Wis. Law. 10, 61 (1991); *The End of Mandatory State Bars*, 109 Geo. L.J. Online 1, 18–20 (2020)).

Moreover, case studies show that voluntary bar associations work. For example, California has one of the largest state bars in America. It recently bifurcated its mandatory bar from its voluntary bar association in 2018, and it has thrived for seven years, without decreasing quality or access to legal services. *See* Lyle Moran, *California Split: 1 Year After Nation's Largest Bar Became 2 Entities, Observers See Positive Change*, ABA Journal (Feb. 4, 2019).¹

¹ <https://www.abajournal.com/web/article/california-split-1-year-after-californias-state-bar-became-2-entities-observers-see-positive-changes>.

By contrast, the Petition Opponents objecting to the proposed changes rely on platitudes and vague generalizations about “access to justice.” Past Presidents Comm. (Apr. 21, 2025); *see also* Arizona Lawyers for Equal Justice Comm. (“access to justice”); AG Comm. at 11 (“access to legal assistance”); CLS Comm. (using the phrase “access to justice” ten times). But, as Professor Bradley A. Smith astutely observed, “[t]he advantages of coerced membership in a state bar have always been more rhetorical than real.” Bradley A. Smith, *The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession*, 22 Fla. St. U. L. Rev. 58 (1994). These Petition Opponents prove Professor Smith right, as none even try to explain precisely *how* a mandatory bar promotes “access to justice” any more than a voluntary bar: “who could ever seriously suggest that pro bono legal services for the poor and indigent are more readily available in Michigan, with its mandatory bar, than in Ohio or the other voluntary bar states surrounding Michigan?” *Id.*

CONCLUSION

The Petition Opponents fail to establish the constitutionality of the mandatory Bar, considering the Bar’s subsidization of some political messages and ineffective opt-out system. They also fail to connect the dots

between their laudable policy goals and mandatory state bars. Those failures are telling, if not dispositive, and counsel in favor of Petitioners' proposed amendments. This Court should not sacrifice the fundamental right of citizens to refrain from speech and association, *especially* without any countervailing policy benefits. Petitioners respectfully request that the Court adopt their proposed amendments.

Respectfully submitted this 2nd day of June 2025.

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