UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LUCILLE S. TAYLOR, Plaintiff, v DENNIS M. BARNES, President of the State Bar of Michigan Board of Commissioners; ROBERT J. BUCHANAN, President-Elect of the State Bar of Michigan Board of Commissioners; DANA M. WARNEZ, Vice President of the State Bar of Michigan Board of Commissioners; JAMES W. HEATH, Secretary of the State Bar of Michigan Board of Commissioners; DANIEL D. QUICK, Treasurer of the State Bar of Michigan Board of Commissioners, Defendants.	Case No.: 1:19-cv-00670 HON. ROBERT J. JONKER **PLAINTIFF'S REPLY BRIEF AND RESPONSE TO DEFENDANTS' MOTION** Oral Argument Requested

PLAINTIFF'S REPLY BRIEF AND RESPONSE TO DEFENDANTS' MOTION

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I. INTRODUCTION

Pursuant to this Court's Second Case Management Order issued on February 26, 2020, Docket No. 13, Plaintiff submitted her initial Rule 56 motion and brief on May 15, 2020, Docket No. 17. Defendants filed their motion and brief for Rule 56 summary judgment on June 15, 2020, Docket Nos. 19 and 20. Now, also pursuant to the Second Case Management Order, Plaintiff submits her Reply Brief and Response to Defendants' Motion.

II. ARGUMENT

A. *Janus* overruled *Keller* and *Lathrop,* and *Agostini* does not control

Defendants have argued that *Janus v. AFSCME,* 138 S. Ct. 2448 (2018) does not directly control, and that *Keller v. State Bar of Cal.,* 496 U.S. 1 (1990) and *Lathrop v. Donahue,* 367 U.S. 820 (1961) remain untouched because *Janus*, although it announced the proper standard which is contrary to *Keller* and *Lathrop*, did not explicitly announce that those two cases where overturned by name. To that end, Defendants cite the Sixth Circuit in *Grutter v. Bollinger*, 288 F.3d 732, 743 (6th Cir. 2002) (en banc), aff'd, 539 U.S. 306 (2003), which in turn quoted *Agostini v. Felton*, 521 U.S. 203, 237 (1997). "[L]ower courts lack authority to determine whether adherence to a judgment of this Court is inequitable. Those courts must 'follow the [Supreme Court] case which directly controls, leaving to this Court the prerogative of overruling its own decisions.' *Agostini*, 521 U.S. at 258.

Such reliance on *Agostini* is misplaced, however, for several reasons. The first reason is that the degree to which *Janus* overturned *Keller* and *Lathrop* through rejection of the rational basis test in First Amendment cases. While the *Janus* court may not have named *Lathrop* and *Keller* in the same manner it named *Abood*, the directness with which it abrogated the use of the rational basis test was more than a mere implication. And even if it were by mere implication,

contrary to Defendants' reading of *Agostini*, this court is not bound to apply an abrogated standard just because another, previous Supreme Court precedent was more on point with the *factual* basis underlying the challenge. It does not matter that *Lathrop* and *Keller* where cases specifically on integrated state bars and the First Amendment while *Janus* was not. The most important factor is the First Amendment legal standard that was announced. This governs over other previous cases that were arguably closer in terms of facts of the case.

Second, *Agostini* has been misapplied and, to that extent, has been an anomaly in our jurisprudence. Lower courts have always been free to apply the Supreme Court's announced standards when appropriate to matters outside of the opinion in which it announces the standard. To do otherwise would create an incredible backlog of cases that could only be dealt with by the Supreme Court itself in the relatively few number of cases it hears each term. Furthermore, because *Agostini* was mere dicta in this regard, and not announcing a new rule of substance, the lower courts remain free to apply appropriate standards.

The oft-quoted *Agostini* opinion dealt with something other than a rule of applying or announcing a new precedent – the decision in question was altering *the law of the case*. The law-of-the-case doctrine holds that the court should not reopen issues decided in earlier stages of the same litigation. But such reopening is what happened in *Agostini*:

> In *Aguilar v. Felton*, 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985), this Court held that the Establishment Clause of the First Amendment barred the city of New York from sending public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to a congressionally mandated program. On remand, the District Court for the Eastern District of New York entered a permanent injunction reflecting our ruling. Twelve years later, [the *Agostini*] petitioners—the parties bound by that injunction—seek relief from its operation. Petitioners maintain that *Aguilar* cannot be squared with our intervening Establishment Clause jurisprudence and ask that we explicitly recognize what our more recent cases already dictate: *Aguilar* is no longer good law. We agree with petitioners that *Aguilar* is not consistent with our subsequent Establishment Clause decisions and further conclude that, on the facts presented here, petitioners are

> entitled under Federal Rule of Civil Procedure 60(b)(5) to relief from the operation of the District Court's prospective injunction.

Agostini, 521 U.S. at 208-209. The *Agostini* petitioners sought to be free from an injunction imposed by the courts when that injunction was based on law that had been overruled. *Agostini*, then, did not deal with a separate case involving a guiding precedent – it involved the same case that had been before the Supreme Court before, and its continuing injunction.

> Most importantly, our decision today is intimately tied to the context in which it arose. This litigation involves a party's request under Rule 60(b)(5) to vacate a continuing injunction entered some years ago in light of a bona fide, significant change in subsequent law. The clause of Rule 60(b)(5) that petitioners invoke applies by its terms only to "judgment[s] hav[ing] prospective application." Intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6), the only remaining avenue for relief on this basis from judgments lacking any prospective component. See, J. Moore et al., Moore's Federal Practice, § 60.48[5][b], p. 60–181 (3d ed.1997) (collecting cases). ***Our decision will have no effect outside the context of ordinary civil litigation where the propriety of continuing prospective relief is at issue.***

Agostini, 521 U.S. at 238-239 (emphasis added).

If *Agostini* did in fact announce a new rule, it did so quietly and in what is arguably dicta. The Court had no reason to correct the lower court when it ruled. It was in no way part of the reasoning of the decision. Remove that commend to follow directly-controlling precedent, and the holding of the opinion as it regarded *Agostini* would remain unchanged. Nor was this command necessary, as the Second Circuit there had in fact held that *Aguilar* had not been overruled yet, as it was in *Agostini*'s Supreme Court holding.

Prior to *Agostini*, the Supreme Court would simply affirm the lower court when the lower court correctly applied the correct governing standard as announced in more recent cases – even if by implication. One such example of this comes in the area of labor law and First Amendment jurisprudence – similar to our issues here.

In 1968 the Supreme Court decided *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968). In *Logan Valley*, the question arose regarding union picketing at an enclosed, privately owned, shopping center. The Supreme Court of Pennsylvania had ruled that such behavior was trespass, and the Supreme Court heard the matter:

> This case presents the question whether peaceful picketing of a business enterprise located within a shopping center can be enjoined on the ground that it constitutes an unconsented invasion of the property rights of the owners of the land on which the center is situated. We granted certiorari to consider petitioners' contentions that the decisions of the state courts enjoining their picketing as a trespass are violative of their rights under the First and Fourteenth Amendments of the United States Constitution.

Logan Valley, 391 U.S. at 309. The *Logan Valley* court resolved the issue by analogizing the shopping center to a "company town":

> This Court has also held, in *Marsh v. State of Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946), that under some circumstances property that is privately owned may, at least for First Amendment purposes, be treated as though it were publicly held. In *Marsh*, the appellant, a Jehovah's Witness, had undertaken to distribute religious literature on a sidewalk in the business district of Chickasaw, Alabama. Chickasaw, a so-called company town, was wholly owned by the Gulf Shipbuilding Corporation. 'The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated. * * * (T)he residents use the business block as their regular shopping center. To do so, they now, as they have for many years, make use of a company-owned paved street and sidewalk located alongside the store fronts in order to enter and leave the stores and the post office. Intersecting company-owned roads at each end of the business block lead into a four-lane public highway which runs parallel to the business block at a distance of thirty feet. There is nothing to stop highway traffic from coming onto the business block and upon arrival a traveler may make free use of the facilities available there. In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.' 326 U.S., at 502—503, 66 S.Ct. at 277.

Logan Valley, 391 U.S. at 316-317.

> All we decide here is that because the shopping center serves as the community business block 'and is freely accessible and open to the people in the area and those passing through,' *Marsh v. State of Alabama*, 326 U.S., at 508, 66 S.Ct. at 279, the

> State [of Pennsylvania] may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.

Logan Valley, 391 U.S. at 319-320.

Subsequently, in 1972, the question of leaflet distributors operating inside of shopping centers was before the Court. *Lloyd Corporation, LTD v. Tanner*, 407 U.S. 551 (1972). This time it was not labor related but, instead, was anti-draft protestors opposed to the Vietnam War.

> This case presents the question reserved by the Court in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603 (1968), as to the right of a privately owned shopping center to prohibit the distribution of handbills on its property when the handbilling is unrelated to the shopping center's operations. Relying primarily on *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946), and *Logan Valley*, the United States District Court for the District of Oregon sustained an asserted First Amendment right to distribute handbills in petitioner's shopping center, and issued a permanent injunction restraining petitioner from interfering with such right.

Lloyd, 407 U.S. at 552. The *Lloyd* Court drew some distinctions between that situation and *Logan Valley*:

> I think it is fair to say that the basis on which the *Marsh* decision rested was that the property involved encompassed an area that for all practical purposes had been turned into a town; the area had all the attributes of a town and was exactly like any other town in Alabama.' 391 U.S., at 330-331, 88 S.Ct., at 1614.
>
> The holding in *Logan Valley* was not dependent upon the suggestion that the privately owned streets and sidewalks of a business district or a shopping center are the equivalent, for First Amendment purposes, of municipally owned streets and sidewalks. No such expansive reading of the opinion of the Court is necessary or appropriate. The opinion was carefully phrased to limit its holding to the picketing involved, where the picketing was 'directly related in its purpose to the use to which the shopping center property was being put…

Lloyd, 407 U.S. at 563.

In dissent, Justice Marshall was joined by Justices Douglas, Brennan, and Stewart, and disagreed with the Court's decision to not follow the recent labor-based precedent of *Logan Valley*:

> Relying primarily on our very recent decision in *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603 (1968), the United States District Court for the District of Oregon granted the relief requested. 308 F.Supp. 128 (1970). The United States Court of Appeals for the Ninth Circuit affirmed. 446 F.2d 545 (1971). Today, this Court reverses the judgment of the Court of Appeals and attempts to distinguish this case from *Logan Valley*. In my view, the distinction that the Court sees between the cases does not exist. As I read the opinion of the Court, it is an attack not only on the rationale of *Logan Valley*, but also on this Court's longstanding decision in *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946). Accordingly, I dissent.

Lloyd, 407 U.S. at 571-572 (Marshall, J., dissenting).

The matter of shopping center picketing by labor groups returned to the Supreme Court in *Hudgens v. NLRB*, 424 U.S. 507 (1976). *Hudgens* worked its way through the National Labor Relations Board and the lower courts until it was decided by the Fifth Circuit – *Hudgens v. NLRB*, 501 F.2d 161 (1974). Although *Hudgens* was very much like *Logan Valley* on the facts (a labor dispute-related picket at a shopping center), the Fifth Circuit applied the non-labor related *Lloyd* opinion because it had announced the more-recent First Amendment standard:

> On stipulated facts the Board interpreted *Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603 (1968); to hold that a shopping center, during the times that it is open and accessible to the public, is the functional equivalent of the community business block, long associated with the exercise of First Amendment rights, and that the mere fact of ownership was not enough to 'justify restrictions on the place of picketing.' It then found 'that *Logan Valley* establishes the union's right to picket at the location it chose, and that the Respondent's (Hudgens') threats to cause the arrest of the pickets for criminal trespass if they continued to refuse to leave the enclosed mall, unlawfully interfered with protected concerted activities, in violation of section 9(a)(1) of the Act.'
>
> During the pendency here of Hudgens' petition for review of this decision, the Supreme Court decided *Lloyd Corp. v. Tanner*, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131 (1972) and *Central Hardware Co. v. NLRB*, 407 U.S. 539, 92 S.Ct. 2238, 33 L.Ed.2d 122 (1972). In *Lloyd* the Court upheld the right of the corporate owner of a large Portland, Oregon shopping mall to apply its non-discriminatory no solicitation rule to exclude anti-Viet Nam war pamphleteers from the center's interior. Finding that the constitutional inquiry must be broader than a simple in rem determination of whether a particular shopping center is the functional equivalent of a municipal business district, *Lloyd* established the appropriate initial inquiry to be whether the conduct assertedly protected by the First Amendment was

> 'directly related in its purpose to the use to which the shopping center property (is) being put,' 407 U.S. at 563, 92 S.Ct. at 2226, 33 L.Ed.2d at 140. If so, giving explicit recognition to the shopping center owner's constitutionally protected private property rights, the Court held that an accommodation between these rights and the asserted First Amendment rights required those asserting the right to use the property of another to show that reasonable alternative means of conveying their message to its intended audience are unavailable before access for this purpose will be required.

Hudgens, 501 F.2d at 163-164 (footnotes omitted). The Fifth Circuit continued:

> The Court's opinion in *Lloyd* reflects the need to focus on the scope of the invitation extended to the public. See 407 U.S. at 556-566, 92 S.Ct. at 2226-2227, 33 L.Ed.2d at 135. Indeed, the issue in that case distinctly included the extent of dedication to public use and not simply the degree of relationship between the actual operation of the shopping center and the picketing. Neither logic nor precedent requires that picketing be directly related to the actual operation of an individual store in the shopping center as was the case in *Logan Valley*. Although the facts in *Lloyd* were different - the anti-Viet Nam War handbilling here had 'no relation to any purpose for which the center was built and being used,' 407 U.S. at 564, 92 S.Ct. at 2226, 33 L.Ed.2d at 140 - the rationale is fully applicable here.

Hudgens, 501 F.2d at 167 (1974). The Fifth Circuit, relying on *Lloyd*, not *Logan Valley*, and a string of NLRB cases, eventually held that the union had a right to picket that was location dependent. *Hudgens*, 501 F.2d at 169. The Supreme Court reversed the holding of the Fifth Circuit that the union had a right to picket, based on labor law. *Hudgens*, 407 U.S. at 523. Nevertheless, the Supreme Court upheld the use of the more-recent precedent of *Lloyd*, rather than the more-on-point labor-related precedent of *Logan Valley*:

> The Court in its *Lloyd* opinion did not say that it was overruling the *Logan Valley* decision. Indeed a substantial portion of the Court's opinion in *Lloyd* was devoted to pointing out the differences between the two cases, noting particularly that, in contrast to the hand-billing in *Lloyd*, the picketing in *Logan Valley* had been specifically directed to a store in the shopping center and the pickets had had no other reasonable opportunity to reach their intended audience. 407 U.S., at 561-567, 92 S.Ct., at 2225-2228. But the fact is that the reasoning of the Court's opinion in *Lloyd* cannot be squared with the reasoning of the Court's opinion in *Logan Valley*.
>
> It matters not that some Members of the Court may continue to believe that the *Logan Valley* case was rightly decided. Our institutional duty is to follow until changed the law as it now is, not as some Members of the Court might wish it to

> be. And in the performance of that duty ***we make clear now, if it was not clear before***, that the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case. Not only did the *Lloyd* opinion incorporate lengthy excerpts from two of the dissenting opinions in *Logan Valley*, 407 U.S., at 562-563, 565, 92 S.Ct., at 2225-2226, 2227; the ultimate holding in *Lloyd* amounted to a total rejection of the holding in *Logan Valley* :

Hudgens, 424 U.S. at 517-518 (footnotes omitted) (emphasis added).

In short, what occurred in *Hudgens* at the Fifth Circuit and the Supreme Court is what is being urged here. A case was determined on the more recent precedent which had announced a standard for First Amendment cases. The court of appeals correctly applied the more recent standard, even though it was from a case factually distinct from the older case that had been almost factually identical to the labor case at issue.

Here, *Janus* announced the more recent standard for First Amendment cases, just as *Lloyd* had. The Fifth Circuit applied that new *Lloyd* precedent even though *Hudgens* was a labor-related matter and *Lloyd* did not occur in the labor context. And the Supreme Court affirmed this application of the *Lloyd* standard (although it reversed the Fifth Circuit on other labor-related grounds). This is very analogous to our situation where the *Janus* standard was announced in a labor-law context but the older, on-point integrated bar cases of *Keller* and *Lathrop* exist and have not been overturned by name. Nevertheless, the new standard exists and must be applied, even if the facts of the matter are not squarely on point with the case that announced the new standard.

This has long been the method and precedent of our courts. And logic would dictate this result. The Supreme Court can only decide a relatively small number of cases compared to the number heard in the lower courts. It cannot name each and every case that is overruled when it announced a new precedent, as it did in *Janus* and in *Lloyd*. And so it falls to the lower courts to properly apply the new standard, as the Fifth Circuit did in *Hudgens*. If Defendants urge that *Agostini* changed this, then Plaintiff notes again that the action taken in *Agostini* did not merely

involve the application of a new precedent, but the alteration of the law of the case. And to the extent that *Agostini* has been held to mean what Defendants claim – that each case overturned by our Supreme Court must be overturned explicitly by name or it has not been overturned at all - is a reading that has been thoroughly criticized by commentators as unworkable, not in line with our very long-standing precedent, and the mis-adherence to obiter dictum.[1]

B. The obiter dictum of *Harris v. Quinn*

Throughout their brief, Defendants assert that the Supreme Court reaffirmed *Keller* in *Harris v. Quinn*, 134 S. Ct. 2618 (2014). And that because *Harris* predated *Janus*, *Harris* was a "precursor to and foundation for *Janus*." (Defendants' Brief at page 22.) Plaintiff explained in her brief at length the importance of *Harris* in the chain of cases that culminated in *Janus*. (Plaintiff's Brief at pages 17-19.) *Harris* severely critiqued *Hanson*, *Lathrop*, and *Abood*, but did not overturn these as it was able to decide the matter on other grounds. (Plaintiff's Brief at 19.) Rather, it declined to apply *Abood*. "If we allowed *Abood* to be extended to those who are not full-fledged public employees, it would be hard to see just where to draw the line, and we therefore confine *Abood*'s reach to full-fledged state employees." *Harris*, 573 U.S. at 638-639. *Harris*, therefore, was certainly a precursor to *Janus* in that regard. *Harris* did, however, like *Knox v. SEIU*, 567 U.S. 298 (2012), hold that a more strict standard of scrutiny must be applied in free speech cases – exacting scrutiny. To that extent, it is a foundation for *Janus*.

> [In *Knox*] Under "exacting" scrutiny, we noted, a compelled subsidy must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms. *Ibid*. (internal quotation marks and alterations omitted).

[1] See, for example, Bradley Scott Shannon, *Overruled by Implication*, 33 Seattle U. L. Rev. 151 (2009), or Ashutosh Bhagwat, *Separate but Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power*," 80 B.U. L. Rev. 967 (2000).

> In *Harris*, the second of these cases, we again found that an agency-fee requirement failed "exacting scrutiny."

Janus, 138 S. Ct. at 2465.

Yet in *Harris*, the line about *Keller* is clearly obiter dictum. What *Harris* actually held was that refusing to extend *Abood* to the quasi-public employees at issue in *Harris* did not call into question the holding of *Keller*:

> Respondents contend, finally, that a refusal to extend *Abood* to cover the situation presented in this case will call into question our decisions in *Keller v. State Bar of Cal.*, 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990), and *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000). Respondents are mistaken.
>
> In *Keller*, we considered the constitutionality of a rule applicable to all members of an "integrated" bar, i.e., "an association of attorneys in which membership and dues are required as a condition of practicing law." 496 U.S., at 5, 110 S.Ct. 2228. We held that members of this bar could not be required to pay the portion of bar dues used for political or ideological purposes but that they could be required to pay the portion of the dues used for activities connected with proposing ethical codes and disciplining bar members. Id., at 14, 110 S.Ct. 2228.
>
> This decision fits comfortably within the framework applied in the present case. Licensed attorneys are subject to detailed ethics rules, and the bar rule requiring the payment of dues was part of this regulatory scheme. The portion of the rule that we upheld served the "State's interest in regulating the legal profession and improving the quality of legal services." *Ibid*. States also have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices. Thus, our decision in this case is wholly consistent with our holding in *Keller*.

Harris, 134 S. Ct. at 655-656.

The *Harris* holding did not call into question the *Keller* holding because the *Harris* court was able to hold as it did on other grounds. They refused to extend *Abood* to these quasi-public employees. But to the extent that attorneys subject to integrated bars were more akin to full-fledged public employees, *Keller* still stood. It would wait until *Janus* for the higher level of scrutiny to be applied to free speech matters.

The *Harris* discussion of *Keller* works against the Defendants' claims, as it directly connects attorneys subject to integrated bars to the public employees who would get their rights upheld in *Janus*, as opposed to the quasi-public employees who were at issue in *Harris*. *Harris* did not contradict *Keller* because the type of employees at issue in *Harris* were not analogous to attorneys subject to integrated bars in *Keller*.

And as to the *Harris* language relied upon be Defendants, this was the Court's recitation from *Keller*, and mere obiter dictum as to the actual holding of *Harris*: "The portion of the rule that we upheld served the 'State's interest in regulating the legal profession and improving the quality of legal services.' … States also have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices." *Harris* supra. *Harris* could not decide that a state's interest regarding integrated bars was such that it could compel dues for that purpose. *Harris* did not have a record before it as to the necessity of such dues to fulfill an integrated bar's goal. Unlike the matter here, there was no development of facts, as Plaintiff has cited in her brief, such as that that the majority of attorneys nationwide in 19 states are not subject to such a requirement. And therefore *Harris* had no discussion as to whether a less onerous method existed for the state to meet this interest. And so, to that extent, the *Keller* discussion in *Harris* was mere obiter dictum.

The *Keller* subject is more akin to the interest in *Janus*. Contrary to Defendants' assertion that the Supreme Court gave "explicit recognition of *Keller*'s continuing vitality," (Defendants' Brief at 22) the *Harris* Court noted that it left *Keller* untouched because the nature of quasi-public employee at issue. It was untouched, not because *Keller* could still stand when exacting scrutiny was applied to attorneys subject to integrated bars, but because these attorneys are not sufficiently similar to quasi-public employees. Attorneys are more like the union members in *Janus*.

C. The Integrated Bar and Government Speech

Defendants attempt 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" and claiming that this doctrine entitles them to summary judgment on Plaintiff's speech claim. (Defendants' Brief at 31-43.) Defendants acknowledge that *Keller* held that an integrated bar's speech is private speech, not government speech. (Defendants' Brief at 31.) Yet Defendants argue that subsequent Supreme Court opinions have transformed integrated bar speech into government speech by implication. (Defendants' Brief at 31 to 37.)

The government-speech exception to the prohibition on compelled speech holds that if the speech 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 object to his taxes being spent promoting ideas he does not agree with. The doctrine was developed primarily in a string of cases concerned with agricultural promotion programs. Justice Stevens, joined by Justice Ginsburg, in a concurring opinion in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) has called it a "recently minted" doctrine:

> To date, our decisions relying on the recently minted government speech doctrine to uphold government action have been few and, in my view, of doubtful merit. See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006); *Johanns v. Livestock Marketing Assn.*, 544 U.S. 550, 125 S.Ct. 2055, 161 L.Ed.2d 896 (2005); *Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991).

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:

> Because the government speech doctrine, as Justice STEVENS notes, ante, at 1139 (concurring opinion), is "recently minted," it would do well for us to go slow in setting its bounds, which will affect existing doctrine in ways not yet explored.

Pleasant Grove City, 555 U.S. at 485 (Souter, J., concurring).[2] The doctrine certainly appears to post-date *Keller* and *Lathrop*.

The parameters of what qualifies speech for the government speech exception is not always well defined. One of the earliest cases dealt with the compelled advertising made on behalf of California tree fruit growers, processors, and handlers. *Glickman v. Wileman Brothers & Elliot, Inc.*, 521 U.S. 457 (1997). Defendants' cite *Glickman* for the proposition that compelled speech subsidies are allowable when they are part of a broader regulatory scheme, as an integrated bar is. (Defendants' Brief at 26.) However, *Glickman*'s regulatory scheme was substantially different than an integrated bar like the SBM, and that difference is crucial. *Glickman*'s regulatory scheme was economic. Specifically, the fruit program was part of a scheme that was exempt from anti-trust law, and prohibited the participants from acting economically on their own:

> Marketing orders promulgated pursuant to the AMAA are a species of economic regulation that has displaced competition in a number of discrete markets; they are expressly exempted from the antitrust laws. § 608b. Collective action, rather than the aggregate consequences of independent competitive choices, characterizes these regulated markets. In order "to avoid unreasonable fluctuations in supplies and prices," § 602(4), these orders may include mechanisms that provide a uniform price to all producers in a particular market, that limit the quality and the quantity of the commodity that may be marketed, §§ 608c(6)(A),(7), that determine the grade and size of the commodity, § 608c(6)(A), and that make an orderly disposition of any surplus that might depress market prices, *ibid*. Pursuant to the policy of collective, rather than competitive, marketing, the orders also authorize joint research and development projects, inspection procedures that ensure uniform quality, and even certain standardized packaging requirements. §§ 608c(6)(D),(H), (I). The expenses of administering such orders, including specific projects undertaken to serve the economic interests of the cooperating producers, are "paid from funds collected pursuant to the marketing order."

[2] See also Justice Souter: "The government-speech doctrine is relatively new, and correspondingly imprecise." *Johanns*, 544 U.S. at 574 (Souter, J., dissenting).

Glickman, 521 U.S. at 461 (footnote omitted).

> 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.
>
> 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 compelled speech was acceptable. This was discussed at length in *Glickman*, 521 U.S. at 474-477, with the final conclusion being:

> In sum, what we are reviewing is a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress. The mere fact that one or more producers "do not wish to foster" generic advertising of their product is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial.

Glickman, 521 U.S. at 477.

Assuming *Glickman*'s rationale survived *Janus*, it does not support Defendants' position. It is believed to be undisputed that the SBM does not promote the financial interests of the legal profession. (See JSMF paragraphs 39 through 43 and 55 through 60, detailing what the SBM advocates and regulates.) The SBM does not place artificial constraints on attorney's economic activities, nor does it directly promote the economic well-being of lawyers. Indeed, both Defendants and *Keller* maintain that, unlike public-employee unions, integrated bars do not serve private economic interests. "Respondent would further distinguish the two situations on the

grounds that the compelled association in the context of labor unions serves only a private economic interest in collective bargaining, while the State Bar serves more substantial public interests." *Keller*, 110 U.S. at 2236. (See also Defendants' Brief at pages 25-26.) For that reason, the central criteria for *Glickman*'s exception to free-speech prohibitions does not apply.

After *Glickman* came *United States v. United Foods, Inc*., 533 U.S. 405 (2001), a case which came up through the Sixth Circuit, and dealt with the marketing of mushrooms. At the outset, *United Foods* confirmed the centrality of *economic* regulation to *Glickman*:

> The opinion and the analysis of the [*Glickman*] Court proceeded upon the premise that the producers were bound together and required by the statute to market their products according to cooperative rules. To that extent, their 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 cannot be applied to the non-economic regulation of the SBM here.

Here, Defendants contend that because *Keller* forbade them from funding speech on topics that were seemingly more far afield and more controversial, it is therefore not a free-speech or association violation to compel speech and association because the remaining issues are less controversial to the general public. (Although these issues may be of much greater significance and more controversial to those within the profession.) 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 as it is for other discrete, little noticed groups in a society which values the freedom resulting from speech in all its diverse parts. First Amendment concerns apply here because of the requirement that producers subsidize speech with which they disagree.
> ***
> Here the disagreement could be seen as minor: Respondent wants to convey the message that its brand of mushrooms is superior to those grown by other producers.

> It objects to being charged for a message which seems to be favored by a majority of producers. The message is that mushrooms are worth consuming whether or not they are branded. 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. As a consequence, the compelled funding for the advertising must pass First Amendment scrutiny.

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 government there would have had a difficult time getting the benefit of the government-speech exception:

> The Government argues the advertising here is government speech, and so immune from the scrutiny we would otherwise apply. As the Government admits in a forthright manner, however, this argument was "not raised or addressed" in the Court of Appeals.
> ***
> The Government's failure to raise its argument in the Court of Appeals deprived respondent of the ability to address significant matters that might have been difficult points for the Government. 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.

Those parting words in *United Foods* regarding the criteria for determining government speech would wait four more years until *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005) for the Court to flesh out this "newly minted" exception. Like *United Foods*, Defendants use *Johanns* to support their claims. However, as with *United Foods*, it is actually the Plaintiff whose argument is buttressed by *Johanns*.

As noted by Defendants, *Johanns* involved the promotion behind the well-known "Beef. It's what's for dinner." advertising campaign, among other activities:

> For the third time in eight years, we consider whether a federal program that finances generic advertising to promote an agricultural product violates the First Amendment. In these cases, unlike the previous two, the dispositive question is whether the generic advertising at issue is the Government's own speech and therefore is exempt from First Amendment scrutiny.

Johanns, 544 U.S. at 553.

> 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*, *supra*, at 11, 15–16, 110 S.Ct. 2228; *Abood*, *supra*, at 212–213, 97 S.Ct. 1782; *United Foods*, *supra*, at 416–417, 121 S.Ct. 2334…" *Johanns*, 544 U.S. at 559.

Johanns, therefore, went on to describe the criteria to determine whether the speaker was private or the government. (And recall that *Keller* had already determined the integrated bar's message to be private speech.) These criteria focus on whether or not a government official who was part of the electorally-answerable branch of government authored the message and the degree to which that message was controlled by an official who was accountable to the voters directly or indirectly. 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 has directed the implementation of a "coordinated program" of promotion, "including paid advertising, to advance the image and desirability of beef and beef products." 7 U.S.C. §§ 2901(b), 2902(13). Congress and the Secretary have also specified, in general terms, what the promotional campaigns shall contain, see, e.g., § 2904(4)(B)(i) (campaigns "shall ... take into account" different types of beef products), and what they shall not, see, e.g., 7 CFR § 1260.169(d) (2004) (campaigns shall not, without prior

> approval, refer "to a brand or trade name of any beef product"). 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. All proposed promotional messages are reviewed by Department officials both for substance and for wording, and some proposals are rejected or rewritten by the Department. App. 114, 118–121, 274–275. Nor is the Secretary's role limited to final approval or rejection: Officials of the Department also attend and participate in the open meetings at which proposals are developed. Id., at 111–112.
>
> ***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.*** See 496 U.S., at 5, and n. 2, 110 S.Ct. 2228. When, as here, 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.

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

> Here, the beef advertisements are subject to political safeguards more than adequate to set them apart from private messages. The program is authorized and the basic message prescribed by federal statute, and specific requirements for the promotions' content are imposed by federal regulations promulgated after notice and comment. 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. And integrated-bar speech in *Keller* did not qualify for this exception to the First Amendment.

In response to *Keller* and the government-speech exception, Defendants make the following arguments in support of their contention that *Keller* has been implicitly overruled by *Johanns* in regards to an integrated bar's message being private speech[3]: (1) The integrated bar's funding by assessments on lawyers rather than general taxes, as had been held in *Keller*, was inconsequential; (2) The integrated bar in *Keller* was comprised of only lawyers, and this was a factor in holding it to be private speech; and, (3) *Keller* had held that the California integrated bar did not have final authority to regulate the legal profession, providing essentially advisory services. (See Defendants' Brief at 38-39.)

Even if Defendants are correct that *Johanns* overruled *Keller* on those three criteria, *Johanns* provides additional criteria which still show that integrated bar speech, at least here with the SBM, is private speech. The extensive citation above from *Johanns* shows the importance of government speech being controlled by government officials who are in some way held accountable by the electorate. Defendants respond that the SBM is actively controlled by the government. But these arguments are not persuasive.

In *Johanns*, the Court found that Congress and the Secretary of Agriculture "set out the overarching message and some of its elements," and that the remaining elements were authored by those who were answerable to the Secretary. *Johanns*, 544 U.S. at 560-561. Defendants assert that this condition is met by the Michigan Supreme Court's oversight. (Defendants' Brief at 36.) In response, Plaintiff notes that even Defendants acknowledge that the Michigan Supreme Court "does not approve every SBM position before it is issued." *Id*. This falls far short of the *Johanns*

[3] *Johanns* never explicitly stated that it was overruling *Keller* by name. And note that *Agostini* was decided in 1997, and *Johanns* in 2005. Therefore, if *Agostini* did announce a new Supreme Court rule of precedence that all abrogation must be explicit and not by implication in the manner Defendants argue, then *Keller* still controls on these criteria.

criteria: "[T]he record demonstrates that the Secretary exercises final approval authority over every word used in every promotional campaign. All proposed promotional messages are reviewed by Department officials both for substance and for wording, and some proposals are rejected or rewritten by the Department." In *Johanns*, the oversight over "every word" and "all proposed" messages was the criteria. *Johanns*, 544 U.S. at 561.

Defendants find recourse in the assertion that "the Supreme Court retains plenary authority over SBM's activities." (Defendants' Brief at 36.) Generally, "plenary" means authority that is "Full; complete; entire." Black's Law Dictionary, Abridged Ninth Edition. Without delving too much into semantics, the Michigan Supreme Court's authority is described in MCL 600.904, and reproduced in the JSMF at paragraph 11:

> The supreme court has the power to provide for the organization, government, and membership of the state bar of Michigan, and to adopt rules and regulations concerning the conduct and activities of the state bar of Michigan and its members, the schedule of membership dues therein, the discipline, suspension, and disbarment of its members for misconduct, and the investigation and examination of applicants for admission to the bar.

MCL 600.904.

While the Michigan Supreme Court has the power to provide for the broad organizational structure of the SBM, it does not provide all control. It does not provide the management of the structure it provides. It is not 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 the SBM puts forth. The SBM Representative Assembly "is the final policy-making body of the State Bar of Michigan." (JSMF paragraph 13.) Contrast this with the *Johanns* finding "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. Contrast that with the SBM. As we already saw, the Representative Assembly is "the final policy-making body" of the SBM. Of this Representative Assembly, 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." (JSMF paragraph 15.) No one holding a judicial office can serve as an officer on the Representative Assembly. (JSMF paragraph 16.) The extent of the management by Michigan Supreme Court, or any other judge or public official, is slight.

But even if the Michigan Supreme Court did exercise day-to-day control and absolute plenary powers over everything put forth by the SBM, that would not be enough to satisfy *Johanns*' criteria to make it 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.

> Some of our cases have justified compelled funding of government speech by pointing out that government speech is subject to democratic accountability. See, e.g., *Abood*, 431 U.S., at 259, n. 13, 97 S.Ct. 1782 (Powell, J., concurring in judgment); *Southworth*, 529 U.S., at 235, 120 S.Ct. 1346. But our references to "traditional political controls," *id*., at 229, 120 S.Ct. 1346, do not signify that the First Amendment duplicates the Appropriations Clause, U.S. Const., Art. I, § 9, cl. 7, or that every instance of government speech must be funded by a line item in an appropriations bill. Here, the beef advertisements are subject to political safeguards more than adequate to set them apart from private messages. The program is authorized and the basic message prescribed by federal statute, and specific requirements for the promotions' content are imposed by federal regulations promulgated after notice and comment. 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 (footnotes omitted). And see the above-cited *Southworth v Board of Regents of the University of Wisconsin System*, 529 U.S. 217, 235 (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.

Southworth, 529 U.S. at 235.

While the Michigan Supreme Court may provide oversight and (unlike federal judges and justices) Michigan judges and justices are both appointed and popularly elected[4], 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).

Even if the Michigan Supreme Court did exercise complete plenary authority, the degree to which the political branch exercises its authority may also a factor. The *United Foods* court indicated that where the exercise of such authority was more *pro forma*, or rubber stamping, it might not suffice – but it did not decide the issue. *United Foods*, 533 U.S. at 417.

Lastly, another factor raised by *Johanns*, but not decided because there was not a record developed on it there, was the potential issue that it could not be government speech if the speech was attributable to someone other than the government.[5]

> They contend that crediting the advertising to "America's Beef Producers" impermissibly uses not only their money but also their seeming endorsement to promote a message with which they do not agree. Communications cannot be "government speech," they argue, if they are attributed to someone other than the government; and the person to whom they are attributed, when he is, by compulsory funding, made the unwilling instrument of communication, may raise a First Amendment objection.
> We need not determine the validity of this argument - which relates to compelled speech rather than compelled subsidy - with regard to respondents' facial challenge.

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

[5] Defendants argue that Plaintiff has referred to the SBM as a "state agency" in communications with the public and news agencies, and that this binds Plaintiff and she cannot deny that the SBM's message is government speech. See Defendants' Brief at page 32, footnote 10. But such a position is not agreed upon in the JSMF, and even if it were, the parties' agreement could not bind the court as that is a question of law.

> Since neither the Beef Act nor the Beef Order requires attribution, neither can be the cause of any possible First Amendment harm.
> ***
> On some set of facts, this second theory might (again, we express no view on the point) form the basis for an as-applied challenge - if it were established, that is, that individual beef advertisements were attributed to respondents. The record, however, includes only a stipulated sampling of these promotional materials, see App. 47, and none of the exemplars provides any support for this attribution theory except for the tagline identifying the funding. Respondents apparently presented no other evidence of attribution at trial, and the District Court made no factual findings on the point. Indeed, in the only trial testimony on the subject that any party has identified, an employee of one of the respondent associations said he did not think the beef promotions would be attributed to his group.

Johanns, 544 U.S. at 563-567 (footnotes omitted).

Here, by contrast, a record has been developed and the parties agree that "The advocacy of the State Bar of Michigan is not promulgated or published with an indication that it has come from the Michigan Supreme Court, the state judiciary, the governor, the legislature, or any State Bar of Michigan member or group of members. It is always attributed to the State Bar of Michigan." (JSMF at paragraph 41.) This should weigh against Defendants' claim that the SBM's message is government speech.

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

Perhaps because the ties between *Keller* and *Janus* are so strong, Defendants draw some distinctions between labor unions in *Janus* and *Abood* and the integrated bar here and in *Keller*.[6] At the outset, Defendants' Brief at pages 25-26, argues that labor unions serve private interests,

[6] As Plaintiff detailed in her Brief at pages 8-28, 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*, 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* similarly uses the "*Abood* and *Keller*" naming three times in its majority opinion.

while the SBM serves a public interest. This contention that the speech of unions covers only private interests and not public interest, was thoroughly rejected by the Supreme Court:

> [W]e move on to the next step of the *Pickering* framework and 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 private interest. See 573 U.S., at ——— – ———, 134 S.Ct., at 2654–2655 (KAGAN, J., dissenting). We squarely rejected that argument, see *id*., at ——— – ———, 134 S.Ct., at 2642–2643, and the facts of the present case substantiate what we said at that time: "[I]t is impossible to argue that the level of ... state spending for employee benefits ... is not a matter of great public concern," id., at ——— – ———, 134 S.Ct., at 2642–2643.

Janus, 128 S.Ct., at 2474.

Defendants then go on to distinguish public-sector labor unions and integrated bars by claiming that "SBM's primary activities are nonexpressive and…by contrast, unions exist primarily, if not exclusively, to speak on behalf of their members." It would seem odd that an organization by and for lawyers is considered nonexpressive when it is a profession that operates almost entirely by using language to advocate positions and/or otherwise explain the law. Furthermore, in *Janus*, it was recognized that unions affected public policy even if they were seemingly speaking to matters seemingly further removed from public policy:

> In addition to affecting how public money is spent, union speech in collective bargaining addresses many other important matters. As the examples offered by respondents' own amici show, unions express views on a wide range of subjects—education, child welfare, healthcare, and minority rights, to name a few. See, e.g., Brief for American Federation of Teachers as *Amicus Curiae* 15–27; Brief for Child Protective Service Workers et al. as *Amici Curiae* 5–13; Brief for Human Rights Campaign et al. as Amici Curiae 10–17; Brief for National Women's Law Center et al. as *Amici Curiae* 14–30. What unions have to say on these matters in the context of collective bargaining is of great public importance.
>
> ***
>
> Even union speech in the handling of grievances may be of substantial public importance and may be directed at the "public square."

Janus, 128 S.Ct., at 2475-2476.

Defendants follow this up by noting that unions speak out on a range of "controversial political issues." (Defendants' Brief at 26-27.) As noted in the *Janus* quote above, the Supreme Court considered "education, child welfare, healthcare, and minority rights" to be less controversial political issues. Yet anyone familiar with public debates should know how quickly even minor differences of opinion can quickly become controversial. So to, it is with the bar speech allowed by *Keller*. What *Keller* considered germane and non-controversial may in fact arouse dramatically different opinions. The availability of legal services to society, for instance. Some might call for publicly-funded attorneys for civil matters. Some might argue for fee limitations. Some might argue, on the basis of access, for significant changes in bar admission to increase racial representation. Any of these could easily become very contentious and draw a number of opinions. Regardless of the process the SBM has adopted (described at length in Defendants' Brief 30-31), the SBM does arrive at a position. SBM members who do not agree with this position are forced to subsidize its voicing. This position is then perceived by the public as that of Michigan's lawyers. JSMF at paragraph 42 and attached Exhibit D provides a summary of positions taken by SBM. None of these can be presumed to have unanimous consent, no matter how non-ideological they might seem at first glance. Indeed, Exhibit D makes this explicit where it describes the position and whether or not the SBM supported or opposed. It even sometimes notes why: E.g., "Oppose because it creates an additional exemption to jury service; courts already have the ability to excuse these individuals from jury service." *Id*, at page 2. Unanimous support cannot be presumed.

Janus did describe some subjects as controversial subjects such as "climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions. These are

sensitive political topics, and they are undoubtedly matters of profound 'value and concern to the public.' *Snyder v. Phelps*, 562 U.S. 443, 453, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011)." *Janus*, 128 S.Ct., at 2475. Defendants then say that the SBM does not address these. "By contrast, SBM's speech, though on the subject of an essential government function, is far more apolitical and benign." (Defendants' Brief at 27.) Plaintiff has made this as a facial challenge, and therefore does not need to cite examples with which she might disagree. (Plaintiff's Brief at 3, 16, and 23.) Nevertheless, the SBM has addressed at least one of the aforementioned "controversial political issues" – and not only in the voluntary bar sections which are not being challenged here. See, for instance, the recent December 2019 issue of the Michigan Bar Journal, Volume 98, number 12, devoted substantially to "LGBTQA Law" with articles by advocates such as a staff attorney of the ACLU's LGBT Project titled "Denied: Access to Essential Transgender Healthcare." It doesn't matter whether such articles are informational in nature, or even if alternate viewpoints are presented. "Sexual orientation and gender identity" was described by the Supreme Court and Defendants as being "contentious" and as having "political valence" and the SBM *has* spoken, and all members were compelled to pay and have that speech made on their behalf. And so Defendants are wrong to say that members' fees are not used to speak on such "controversial" issues. Again, it doesn't matter what the specific issues are, forced concurrence and funding is not allowed, and it cannot be presumed for any issue.

E. Lawyers as Officers of the Court

Defendants maintain that lawyers are officers of the court, and therefore have an obligation to be members of the SBM. (Defendants' Brief at 28-29.) The evidence for this is that lawyers have a duty to aspire to "seek improvements of the law" and "the administration of justice." JSMF

paragraph 60, citing the Model Rules of Professional Conduct, Preamble Comment to Rule 1.0. However, the Defendants do not state how the aspirational language contained in the model rule require attorneys to join and pay for speech with which they might not support. The comment states:

> ***As a public citizen***, a lawyer ***should*** seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer ***should*** cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer ***should*** be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer ***should*** aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

MRPC, Preamble Comment to Rule 1.0 (emphasis added). Note the emphasized words are all aspirational. A lawyer "should" do these things. And he or she should do these not only as a lawyer, but as "a public citizen" - not because they are required to join and fund an integrated bar. None of these support the contention that a lawyer *must* join and pay an integrated bar. In fact, the inference that should be drawn is the opposite. It should be voluntary. Statutes and rules are quite clear that when something is to be mandatory, the language uses "shall" or "must." The Model Rules of Professional Conduct are not a statute or court rule, but they should be read in that same way for this purpose.

Nor does improving the legal profession require joining or paying the SBM or another integrated bar. As shown in Plaintiff's Brief at page 25, many states and likely the majority of lawyers are not subject to such mandatory requirements. Nor are all lawyers in Michigan subject to the SBM's mandatory dues. These dues are waived for lawyers with more than fifty years of membership. (See JSMF paragraph 25.) But even if it could be shown that states with a mandatory integrated bar have better legal systems than those with voluntary bars, that improvement is not

the test of whether or not it can be mandated. *Janus* accepted that the states had an interest in creating an exclusive labor representative to bargain with collectively. But the issue of adequacy-of-funding for that state interest was raised in the *Janus* dissent and rejected by the majority. The *Janus* dissent by Justice Kagan claimed that mandating the payment of fees was necessary to strengthen the public-sector union for this bargaining purpose.

> But for an exclusive-bargaining arrangement to work, such an employer often thought, the union needed adequate funding. Because the "designation of a union as exclusive representative carries with it great responsibilities," the Court reasoned, it inevitably also entails substantial costs. "The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones." Those activities, the Court noted, require the "expenditure of much time and money"—for example, payment for the "services of lawyers, expert negotiators, economists, and a research staff."

Janus, 138 S.Ct., at 2488 (Kagan, J., dissenting) (internal citations removed). However, the majority rejected that reasoning:

> In *Harris* and this case, defenders of *Abood* have asserted a different state interest—in the words of the *Harris* dissent, the State's "interest in bargaining with an adequately funded exclusive bargaining agent." 573 U.S., at ——, 134 S.Ct., at 2648 (KAGAN, J., dissenting); see also post, at 2489 – 2490 (KAGAN, J., dissenting). This was not "the interest *Abood* recognized and protected," *Harris*, supra, at ——, 134 S.Ct., at 2648 (KAGAN, J., dissenting), and, in any event, it is insufficient.
>
> Although the dissent would accept without any serious independent evaluation the State's assertion that the absence of agency fees would cripple public-sector unions and thus impair the efficiency of government operations, see post, at 2490 – 2491, 2492 - 2493, ample experience, as we have noted, supra, at 2465 - 2466, shows that this is questionable.

Janus, 138 S.Ct., at 2477. In fact, in *Janus*, it was held that states without such mandatory dues or fees for labor unions (usually referred to as "right-to-work states") were still able to provide those states with adequate bargaining partners:

> Likewise, millions of public employees in the 28 States that have laws generally prohibiting agency fees are represented by unions that serve as the exclusive

> representatives of all the employees.[3] Whatever may have been the case 41 years ago when *Abood* was handed down, it is now undeniable that "labor peace" can readily be achieved "through means significantly less restrictive of associational freedoms" than the assessment of agency fees. *Harris*, supra, at ——, 134 S.Ct., at 2639 (internal quotation marks omitted).
>
> [3] See National Conference of State Legislatures, Right–to–Work States (2018), http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx# chart; see also, *e.g.*, Brief for Mackinac Center for Public Policy as *Amicus Curiae* 27–28, 34–36.

Janus, 138 S.Ct., at 2456-2457. Similarly, states without integrated bars still fulfill their states' interests in regulating the profession through disciplinary measures.

F. It does not matter to the analysis that individual members of the SBM can speak out on their own

Defendants claim that integrated bar members are different than union members in that "SBM members are free to advocate within the bar and publicly." And that "They can join voluntary bars and special-interest groups that take positions contrary to SBM's." (Defendants' Brief at 29.)

Yet these claimed distinctions are exactly the same as union members. Union members have a voice internally in their unions. Union members can voluntarily join outside groups that take positions contrary to their unions' stated positions. And union members can speak out individually contrary to their union. No one disputes, for example, that prior to *Janus*, a public school teacher who was represented by a union that advocated for gun control could not also join the National Rifle Association. Yet none of these negate the fact that they are compelled to associate with and fund opinions that are not their own. It is not an inadequate salve that one can pay twice for speech on the same topic – pay once against your will for a position you oppose, and then pay a second time to more quietly try and negate the previous position that you were compelled to voice.

III. CONCLUSION

For the reasons set forth in Plaintiff's Brief and this Reply, Plaintiff's motion for Summary Judgment should be granted, and Defendant's Motion for Summary Judgment should be denied.

Dated: July 13, 2020

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in the Second Case Management Order (Docket No. 13) because it contains 10,956 words, excluding parts of the brief exempted by LCivR 7.2(b)(i), as counted by Microsoft Word 2013.

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