

Case No. 19-35463

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DANIEL Z. CROWE; OREGON CIVIL LIBERTIES ATTORNEYS;
and LAWRENCE K. PETERSON,

Plaintiffs-Appellants,

v.

STATE BAR OF OREGON, *et al.*,

Defendants-Appellees.

APPELLANTS' REPLY BRIEF

Appeal from the United States District Court for the District of Oregon
Case No. 3:18-cv-02139-JR, Hon. Michael H. Simon, presiding

**MILITARY DISABILITY
LAWYER, LLC**

Luke D. Miller
1567 Edgewater St. NW
PMB 43
Salem, OR 97304
(800) 392-5682
luke@militarydisabilitylawyer.com

**Scharf-Norton Center for
Constitutional Litigation at the
GOLDWATER INSTITUTE**

Jacob Huebert
Timothy Sandefur
500 E. Coronado Rd.
Phoenix, Arizona 85004
(602) 462-5000
litigation@goldwaterinstitute.org

Attorneys for Plaintiffs-Appellants

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I. Plaintiffs have appealed the dismissal of their claims against the individual Defendants.

Plaintiffs have appealed dismissal of their claims with respect to all of the individuals who were defendants in the district court: namely, the President and President Elect of the Oregon State Bar (“OSB”) Board of Governors, and the OSB’s Chief Executive Officer, Director of Finance and Operations, and General Counsel. Defendants say “it is not clear” whether Plaintiffs actually did so because those individuals were not listed in the notice of appeal or on the cover of Plaintiffs’ opening brief. Defendants-Appellees’ Answering Br. (“Defs.’ Br.”) at 3-4. In fact, however, Defendants have long been on notice that the Appellees include the individual Defendants. On September 5, 2019, Defendants’ counsel filed an appearance on behalf of all of the Appellees in this Court. Doc. 16, Notice of Appearance. Then, on October 8, 2019, out of an abundance of caution, Plaintiffs’ counsel even sent Defendants’ counsel a letter to reiterate that Plaintiffs did indeed appeal the dismissal of their claims against the individual Defendants.¹

It was not necessary for Plaintiffs to identify all Appellees in their notice of appeal. *Millemann v. Multnomah Educ. Serv. Dist.*, 168 F.3d 500, 1999 WL 50853, *7 (9th Cir. 1999) (table decision) (FRAP 3 did not require appellant to identify

¹ The Federal Rules of Appellate Procedure and Ninth Circuit Rules provide no apparent way for Plaintiffs to present evidence of this letter to the Court. If the Court deems such evidence necessary, Plaintiffs respectfully request leave to file it.

appellees in notice of appeal); *MIF Realty L.P. v. Rochester Assocs.*, 92 F.3d 752, 758 (8th Cir. 1996) (same). And if omission of some appellees from a notice of appeal might create the potential for confusion or prejudice in a particular case, the problem may be cured “by a letter to the appellees’ counsel” identifying the intended appellees. *Chathas v. Smith*, 848 F.2d 93, 94 (7th Cir. 1988). Plaintiffs have therefore done exactly what they must to place the Appellees’ identities beyond doubt.

II. Plaintiffs have stated a viable challenge to mandatory OSB membership.

Plaintiffs have stated a viable First Amendment claim challenging Oregon’s requirement that attorneys join the OSB as a condition of practicing law. *See* Plaintiffs-Appellants’ Opening Br. (“Plfs.’ Br.”) at 14-26. As Plaintiffs explained in their opening brief, this claim is not foreclosed by *Keller v. State Bar of California*, 496 U.S. 1 (1990). Plfs.’ Br. at 15-17. On the contrary, *Keller* expressly declined to resolve whether attorneys may be “compelled to associate with an organization that engages in political or ideological activities beyond those [germane activities] for which mandatory financial support is justified under the principles of *Lathrop* [*v. Donohue*, 367 U.S. 820 (1961)] and *Abood* [*v. Detroit Board of Education*, 431 U.S. 209 (1977)].” 496 U.S. at 17.

Defendants lack any basis for their assertion that “*Keller* reserved a claim of violation of associational rights only for instances in which an integrated bar

engages in non-germane speech *and* lacks procedures for challenging its use of membership fees.” Defs.’ Br. at 22. That simply is not what *Keller* said. Its “central holding” was that compelling attorneys to fund non-germane bar association speech violates their First Amendment rights. *United States v. United Foods, Inc.*, 533 U.S. 405, 414 (2001). *Keller* did not consider whether requiring attorneys to join a bar association that engages in non-germane political and ideological speech violates their First Amendment right to freedom of association, even if (per *Keller*’s holding) they are not compelled to fund that speech. *That* is the issue that *Keller* said lower courts “remain free ... to consider,” 496 U.S. at 17, and neither the Supreme Court nor this Court has resolved it to date. Because Plaintiffs’ Third Claim for Relief presents that issue,² the district court erred in concluding that *Keller* required its dismissal.

Further, contrary to Defendants’ assertions, the Supreme Court did not “effectively recognize[],” or even suggest, that mandatory bar association membership would survive exacting First Amendment scrutiny in *Harris v. Quinn*, 573 U.S. 616 (2014). *See* Defs.’ Br. at 28. True, *Harris* did identify government interests that mandatory bar dues serve when used for germane purposes: “regulating the legal profession,” “improving the quality of legal services,” and

² If the Court were to conclude otherwise, Plaintiffs would respectfully request leave to amend their claim on remand.

“allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices.” 573 U.S. at 655-56. But *Harris* did not address the key question that exacting scrutiny asks: whether the government could serve its interests “through means significantly less restrictive of associational freedoms.” *Id.* at 648-49.

Nothing in *Harris*—or any other case—suggests that the Supreme Court would answer that question in the negative with respect to mandatory bar membership. And it is beyond doubt that governments can (and, in many states, do) serve all of those interests without compelling attorneys to join (or pay) a bar association, let alone a bar association that engages in non-germane political and ideological speech. *See* Plfs.’ Br. at 18-19; Br. of *Amicus Curiae* State Bar of Cal. at 9-16.

The State of Oregon, as *Amicus Curiae*, argues that a mandatory bar association serves additional interests that a state licensing agency could not serve, or would not serve as well: (1) “attracting members” to join the bar association, which supposedly will prompt “more lawyers [to] contribute their voice to solving difficult legal-services problems”; (2) “rais[ing] the same amount of money” to fund certain services; and (3) the “intrinsic value” of bringing lawyers together. Br. of *Amicus Curiae* State of Or. at 10-11. As an initial matter, that argument must fail because it would have to be substantiated by extrinsic evidence, which is not

before the Court and could not support dismissal under Rule 12(b)(6). *See Lee v. City of L.A.*, 250 F.3d 668, 688 (9th Cir. 2001) (reversing dismissal based on evidence outside pleadings).

Moreover, the State’s argument fails on its merits. The first and third purported interests are illegitimate because the First Amendment does not allow the government to compel speech and association simply because it believes that the resulting speech and association will be socially beneficial. “The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it.” *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 790-91 (1988). And the government can serve the second interest—funding services—by means that do not infringe First Amendment rights at all, such as payment from the state treasury.

Because precedent does not foreclose Plaintiffs’ challenge to mandatory OSB membership, and Defendants have not shown that mandatory membership satisfies exacting First Amendment scrutiny, this Court should reverse the dismissal of Plaintiffs’ Third Claim for Relief.

III. Plaintiffs have stated a viable challenge to OSB’s use of dues for political speech without their affirmative consent.

Plaintiffs have also stated a viable First Amendment claim challenging the OSB’s use of members’ mandatory dues for political speech without their affirmative consent. *See* Plfs.’ Br. at 20-22. *Keller* held that mandatory state bar

associations should be “subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees.” 496 U.S. at 13. At the time, that meant that mandatory bar associations were constrained in their use of mandatory dues in the same way that unions were constrained in their use of mandatory fees under *Abood*. *Id.* Today, with *Abood* overruled, it means that a bar association’s use of mandatory dues for political speech is subject to exacting scrutiny, just as mandatory union fees are, under *Janus v. AFSCME*, 138 S. Ct. 2448, 2477 (2018).

Defendants’ assertion that *Keller* only compared mandatory bar associations to unions “in passing” and “did not command that integrated bars be treated like labor unions for purposes of First Amendment analysis” is false. Defs.’ Br. at 24-25. To the contrary, *Keller*’s entire analysis depended on that “substantial analogy.” *See Keller*, 496 U.S. at 12-17. The Court rejected the State Bar of California’s argument “that it is not subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions” and concluded that the same rule should apply to both. *Id.* at 13-14. *Keller* reversed the California Supreme Court’s decision because the lower court had erroneously “declin[ed] to apply [the] *Abood* decision to the activities of the State Bar.” *Id.* at 16. And it held that the same procedures the Court had prescribed to protect workers against misuse of their union fees were appropriate to protect attorneys against misuse of

their bar dues. *Id.* at 16-17 (citing *Chi. Teachers Union v. Hudson*, 475 U.S. 292 (1986)).

To treat mandatory bar associations like unions, as *Keller* requires, this Court must subject the OSB's use of mandatory dues for political speech to exacting First Amendment scrutiny. Again, the OSB has not satisfied that standard. This Court should therefore reverse the district court's dismissal of Plaintiffs' Second Claim for Relief.

IV. Plaintiffs have stated a viable challenge to OSB's lack of safeguards to protect First Amendment rights.

As an alternative to their other two claims, Plaintiffs have stated a viable claim that the OSB fails to provide the safeguards that *Keller* requires to ensure that attorneys' mandatory dues are not used for non-germane political and ideological speech and other non-germane activities. Specifically, Plaintiffs have alleged that the OSB does not provide a sufficient explanation of members' dues and does not place disputed fee amounts in escrow. *See* Plfs.' Br. at 22-26.

A. Defendants have not justified their failure to provide members with details about the OSB's expenditures.

Defendants argue that the OSB has no obligation to explain the basis of members' dues amount because the OSB's Bylaws (supposedly) require the OSB's speech activities to be germane. Defs.' Br. at 30-32. In Defendants' view, the very existence of these Bylaws informs OSB members that all of the OSB's activities

are germane and therefore chargeable to them. Defendants say Plaintiffs' argument "impermissibly presumes that the Bar will intentionally violate its Bylaws by engaging in non-germane speech." Defs.' Br. at 33.

That is exactly backward. *Keller*'s safeguards (taken from *Hudson*) exist precisely because lawyers should not have to take their bar association's word for it that the association is using their money appropriately. The first *Keller/Hudson* safeguard—under which a bar association must explain the basis of attorneys' mandatory dues—is necessary because "[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake, ... dictate that ... potential objectors be given sufficient information to gauge the propriety of the [mandatory] fee." *Hudson*, 475 U.S. at 306. "Leaving [potential objectors] in the dark about the source of the figure for the ... fee—and requiring them to object in order to receive information—does not adequately protect" them against being forced to subsidize non-germane political and ideological speech in violation of their First Amendment rights. *Id.* Denying dues-paying members information about expenditures prevents them from evaluating whether the OSB's 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 (quoting *Lathrop*, 367 U.S. at 843).

Moreover, Plaintiffs' argument does *not* depend on a presumption that the OSB will "intentionally violate its Bylaws." Defs.' Br. at 33. Even if OSB officials *intend* to follow the Bylaws and *believe* they only use mandatory dues for germane activities, they could be *mistaken* about the propriety of a given activity. *Keller's* safeguards exist to give attorneys an opportunity to challenge their bar association's judgments about germaneness before a neutral decision-maker. Attorneys cannot have that opportunity without information about how the bar association is using their dues. The first *Keller* safeguard's purpose is to ensure that attorneys receive that information—and the OSB's failure to provide that safeguard is a sufficient basis for Plaintiffs' First Claim for Relief.

B. Defendants have not justified their failure to put disputed dues amounts in escrow.

Defendants also fail to justify the OSB's failure to place disputed funds in escrow, arguing that "escrow may be one way to protect an objecting member from involuntarily subsidizing non-germane speech[, b]ut nothing in existing precedents suggests that escrow is the only way" Defs.' Br. at 33.

To the contrary, *Hudson* makes clear that escrow is essential. As Plaintiffs explained in their opening brief, *Hudson* stated that (before *Janus*), if a union chose to escrow only a portion of an objecting individual's annual fee, then it had to "carefully justify the limited escrow on the basis of [an] independent audit, and the escrow figure must itself be independently verified." 475 U.S. at 310 n.23. If

placing only *part*, rather than all, of an objecting individual’s fee in escrow must be “carefully justif[ied]” based on an independent audit, then of course failing to place *any* amount in escrow is not an option.

Contrary to Defendants’ suggestion, this Court and the Eleventh Circuit did not approve a lack of escrow in *Morrow v. State Bar of California*, 188 F.3d 1174 (9th Cir. 1999) and *Gibson v. The Florida Bar*, 906 F.2d 624 (11th Cir. 1990). *See* Defs.’ Br. at 31. *Morrow* only stated—as a background fact—that the State Bar of California “[i]n compliance with ... *Keller*, ... allow[ed] members to seek a refund of the proportion of their dues that the State Bar has spent on political activities unrelated to its regulatory function.” 188 F.3d at 1175. *Morrow* did not suggest that a refund is *all* that *Keller* requires. In fact, a refund was not all that the State Bar of California provided: before the state adopted its current system for regulating attorneys,³ the State Bar of California *did* place an objecting attorney’s dues in escrow—and if it escrowed less than 100 percent of a member’s dues, it based the amount escrowed on an independent audit as *Hudson* and *Keller* prescribe.⁴ As for *Gibson*, the safeguards it upheld likewise *included escrow*. 906 F.2d at 628-29.

³ *See* Br. of *Amicus Curiae* State Bar of Cal. 10-11.

⁴ State Bar of California, Challenge to Mandatory Membership Fees Instructions and Procedures, <https://web.archive.org/web/20090501122827/http://calbar.ca.gov/calbar/pdfs/members/Keller-Challenge-Form.pdf>.

The OSB's failure to place disputed funds in escrow thus provides a second sufficient basis for Plaintiffs' First Claim for Relief, and the district court's dismissal of that claim therefore should be reversed.

V. If the Court reverses dismissal of any of Plaintiffs' claims, it should consider whether the *Bar Bulletin* statements to which Plaintiffs objected were a proper use of mandatory dues.

Finally, if the Court reverses the dismissal of any of Plaintiffs' claims, it should also address whether the OSB's publication of the *Bar Bulletin* statements to which Plaintiffs have objected was an impermissible use of members' mandatory dues. Defendants argue that the Court should not consider this question because the district court's answer to it "had no bearing on its dismissal of plaintiffs' claims." Defs.' Br. at 35. But that misses the point: although the statements' germaneness might not have been a basis of the district court's dismissal, their germaneness will be relevant to the district court's consideration of any claims that this Court remands.

The *Bar Bulletin* statements are relevant to Plaintiffs' Third Claim for Relief, which alleges that compelling Plaintiffs to join a bar association that engages in non-germane speech violates their First Amendment rights even if they are not forced to fund that speech. *See supra* at 2–5. Evidence about whether the OSB does, in fact, engage in non-germane speech is obviously relevant to that claim—which means that the germaneness of the *Bar Bulletin* statements is

relevant. Therefore, if the Court reverses dismissal of Plaintiffs' claim, it should also consider whether the district court's conclusion about the statements' germaneness was in error.

The *Bar Bulletin* statements' germaneness is also relevant to Plaintiffs' Second Claim for Relief, which alleges that using Plaintiffs' mandatory dues for political and ideological speech—or at least non-germane political and ideological speech—without their affirmative consent violates their First Amendment rights. ER.080-081 ¶ 76. Again, evidence of a specific use of mandatory dues for non-germane speech is obviously relevant to Plaintiffs' claim.

The *Bar Bulletin* statements also are relevant to Plaintiffs' First Claim for Relief, which challenges the OSB's lack of *Keller* safeguards. Defendants argue, in part, that their safeguards are adequate because the OSB supposedly never intentionally engages in non-germane speech. Defs.' Br. at 30-33. Evidence that the OSB has, in fact, done so—or that its judgments about the propriety of its expenditures have sometimes been wrong—are relevant to that argument.

Therefore, if the Court reverses the dismissal of any of Plaintiffs' claims, it should also review the district court's conclusions about whether publishing the *Bar Bulletin* statements was an unconstitutional use of members' mandatory dues.

Date: November 26, 2019

/s/ Jacob Huebert

Jacob Huebert

Timothy Sandefur

**Scharf-Norton Center for
Constitutional Litigation**

at the GOLDWATER INSTITUTE

Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,835 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionately spaced typeface using Microsoft Word 2016 Times New Roman 14-point font.

Date: November 26, 2019

/s/ Jacob Huebert

Jacob Huebert

Timothy Sandefur

Scharf-Norton Center for

Constitutional Litigation

at the GOLDWATER INSTITUTE

Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Jacob Huebert
Jacob Huebert