No. 24-

IN THE

Supreme Court of the United States

DANIEL Z. CROWE AND OREGON CIVIL LIBERTIES ATTORNEYS, AN OREGON NONPROFIT CORPORATION,

Petitioners,

v.

OREGON STATE BAR, A PUBLIC CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

LUKE D. MILLER
MILITARY DISABILITY LAWYER, LLC
1567 Edgewater Street NW
PMB 43
Salem, OR 97304

SCOTT DAY FREEMAN
Counsel of Record
TIMOTHY SANDEFUR
ADAM SHELTON
SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION AT THE GOLDWATER INSTITUTE
500 East Coronado Road
Phoenix, AZ 85004
(602) 462-5000
sfreeman@goldwaterinstitute.org

Counsel for Petitioners

120309

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

In *Keller v. State Bar of California*, 496 U.S. 1, 13-14 (1990), this Court held that it is constitutional for states to require attorneys to join and pay annual dues to bar associations if the bar engages only in conduct germane to regulation of lawyers or improving the quality of legal services. In doing so, it relied on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). But in *Janus v. AFSCME*, 585 U.S. 878, 886 (2018), this Court overruled *Abood*. Now, there is an avowed circuit split between the Fifth and Ninth Circuits over whether forcing attorneys to join bar associations that engage in nongermane conduct necessarily violates the attorneys' free association rights.

The questions presented are:

1. Whether compelled membership in a bar association that engages in nongermane activities is necessarily unconstitutional, as the Fifth Circuit held and the Ninth Circuit rejected.

2. Whether this Court should reconsider *Keller* in light of *Janus*, and require the activities of a mandatory bar association to satisfy at least exacting scrutiny.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners, who were Plaintiffs-Appellants in the court below, are Daniel Z. Crowe and Oregon Civil Liberties Attorneys, an Oregon nonprofit corporation.

Respondents, who were Defendants-Appellees in the court below, are the Oregon State Bar Board of Governors and several Oregon State Bar officials sued in their official capacities: Vanessa A. Nordyke, President of the Oregon State Bar Board of Governors; Christine Constantino, President-elect of the Oregon State Bar Board of Governors; Helen Marie Hierschbiel, Chief Executive Officer of the Oregon State Bar; Keith Palevsky, Director of Finance and Operations of the Oregon State Bar; Amber Hollister, General Counsel for the Oregon State Bar.

Petitioner Oregon Civil Liberties Attorneys has no parent corporations, and no publicly held company owns 10 percent or more of its stock.

RELATED PROCEEDINGS

This case arises from the following proceedings:

Crowe v. Oregon State Bar, No. 23-35193, Court of Appeals for the Ninth Circuit. Denying *En Banc* Review on October 22, 2024.

Crowe v. Oregon State Bar, No. 23-35193, Court of Appeals for the Ninth Circuit. Opinion filed on August 28, 2024.

Crowe v. Oregon State Bar, No. 3:18-cv-2139-JR., U.S. District Court for the District of Oregon. Judgment filed on February 14, 2023.

Crowe v. Oregon State Bar, No. 20-1678, Supreme Court of the United States. Petition denied on October 4, 2021.

Crowe v. Oregon State Bar, No. 19-35463, U.S. Court of Appeals for the Ninth Circuit. Opinion filed on February 26, 2021.

Crowe v. Oregon State Bar, No. 3:18-cv-02139-JR, U.S. District Court for the District of Oregon. Judgment entered on May 24, 2019.

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OPINIONS BELOW

This action has generated two appellate opinions. The Ninth Circuit's most recent opinion is reported at 112 F.4th 1218, and is reproduced at App. 1a-38a. The district court's decision before that opinion was unreported; it largely adopted a magistrate's findings and recommendations, and is reproduced at App. 70a-83a, and the magistrate's findings and recommendations is reproduced at App. 39a-69a. The Ninth Circuit's first opinion is reported at 989 F.3d 714, and is reproduced at App. 86a-122a.

JURISDICTION

The Ninth Circuit filed its opinion on August 28, 2024, and denied *en banc* review on October 22, 2024. This Court extended the January 17, 2025, deadline for filing a petition for certiorari to March 21, 2025. The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. The Supreme Court may exercise jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Reproduced at App. 123a.

United States Constitution, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Reproduced at App. 124a.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

This case concerns an acknowledged circuit split over the free speech and free association rights of attorneys who are forced to join a state bar association as a condition of practicing law. Petitioners are Oregon attorneys who brought a free speech and association challenge to Oregon's requirement that lawyers join, and pay annual dues to, the Oregon State Bar ("OSB"), arguing that the bar violated their speech and association rights by publishing nongermane "political or ideological" matters in its publication (the *Bulletin*) and by lobbying for and against bills in the state legislature. *See Keller v. State Bar of Cal.*, 496 U.S. 1, 15 (1990).

In its first opinion, *Crowe v. Oregon State Bar*, 989 F.3d 714, 724-29 (9th Cir. 2021) ("*Crowe I*"), the Ninth Circuit held that *Keller* foreclosed Petitioners' argument

that OSB violates the First Amendment by extracting annual dues from them without their prior affirmative consent. App. 105a-109a. But it remanded for further proceedings on Petitioners' argument that being forced to join OSB in the first place violates their freedom of association. App. 109a-110a.

In its second opinion, *Crowe v. Oregon State Bar*, 112 F.4th 1218, 1239 (9th Cir. 2024) ("*Crowe II*"), the Ninth Circuit applied *Keller*'s germaneness test to Petitioners' compelled association claim, and concluded that OSB did indeed engage in conduct not germane to the regulation of lawyers or the improvement of the quality of legal services—the two categories of expression which *Keller* said state bars may legitimately spend dues on. App. 36a. Yet in explicit conflict with the Fifth Circuit, it concluded that nongermane conduct does *not* necessarily render compelled membership unconstitutional. App. 34a-35a n.10.

The Fifth Circuit held in *Boudreaux v. Louisiana State Bar Association*, 86 F.4th 620 (5th Cir. 2023), and *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021), that attorneys cannot be forced to associate with a bar that engages in nongermane speech. But the Ninth Circuit, in "disagree[ment] with the Fifth Circuit's holding," App. 34a n.10, said that "[t]he remedy for this violation need not be [so] drastic" as declaring compelled association with OSB unconstitutional. App. 37a. Instead, it held that a simple disclaimer by OSB would suffice to remedy Petitioners' constitutional concerns. *Id.*

Behind this explicitly acknowledged circuit split is a deeper disagreement about what constitutes an associational injury. The Ninth Circuit said that "in

many circumstances, membership in a state bar, standing alone, has no expressive meaning, and the public will not associate the bar's members with the bar's activities." App. 35a n.10. In other words, an associational injury in the Ninth Circuit only occurs if the public will associate the attorney with the bar's speech or if the association with the bar inhibits the member's speech. The Fifth Circuit, by contrast, has recognized that "part of [a bar association's] expressive message is that its members stand behind its expression," and for that reason, a mandatory bar is constitutionally limited to germane activities. *McDonald*, 4 F.4th at 245-46. In short, forced association *alone* is a constitutional injury. *See also Boudreaux*, 86 F.4th at 640.

In *McDonald*, Texas attorneys challenged the requirement that they be compelled to join the State Bar on the grounds that it "is engaged in political and ideological activities that are not germane to its interest in regulating the legal profession and improving the quality of legal services." 4 F.4th at 237. The Fifth Circuit held that "[c]ompelled membership in a bar association that engages in non-germane activities … fails exacting scrutiny," and that because the Texas Bar engaged in nongermane activity, it could "not continue mandating membership." *Id.* at 246, 252.

Two years later, in *Boudreaux*, the Fifth Circuit again explained that "compulsory bar membership is unconstitutional if a bar's speech is not germane to regulating lawyers or improving the quality of legal services." 86 F.4th at 624. The court held that a variety of activities of the Louisiana State Bar Association were nongermane, including the promotion of an article about student loans, a webpage icon celebrating pride month,

and tweets about the health benefits of broccoli. *Id.* at 640. These statements might seem inconsequential, but they were nongermane—and that made mandatory membership unconstitutional. *Id.*

Here, by contrast, the Ninth Circuit held that a mere disclaimer by OSB was sufficient—and, implicitly, that Petitioners have no associational right to be free from compulsory membership in an organization that compels them to join and fund speech that falls outside the two kinds of expenditures allowed under *Keller*. App. 37a-38a.

The Ninth Circuit's decision not only produces an acknowledged circuit split that only this Court can resolve, but it also offers this Court the opportunity to revisit *Keller* in the wake of *Janus v. AFSCME*, 585 U.S. 878 (2018). Both the Justices of this Court and several lower courts have acknowledged the irreconcilability of *Keller* and *Janus*. *See, e.g., Jarchow v. State Bar of Wis.*, 140 S. Ct. 1720, 1720 (2020) ("If the rule in *Keller* is to survive, it would have to be on the basis of new reasoning that is consistent with *Janus*." (Thomas and Gorsuch, JJ., dissenting from denial of certiorari)); *Janus*, 585 U.S. at 949-50 (Kagan, J., dissenting) (observing that *Keller*'s underpinnings were repudiated in *Janus*); *Taylor v. Buchanan*, 4 F.4th 406, 408-09 (6th Cir. 2021) (recognizing irreconcilability); *Schell v. Chief Just. & Justs. of Okla. S. Ct.*, 11 F.4th 1178, 1190 (10th Cir. 2021) (same); *Fleck v. Wetch*, 937 F.3d 1112, 1116-17 (8th Cir. 2019) (same).

Janus overruled *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), calling it "poorly reasoned" and "inconsistent with other First Amendment cases and has been undermined by more recent decisions." *Janus*,

585 U.S. at 886. But *Keller* was based overwhelmingly on the *Abood* framework. The *Abood* case held that public sector employees could be forced to pay fees to a union, but that the union could not spend fees on political speech without giving dissenters the opportunity to object and get a refund. *Keller* said "the principles of *Abood* apply equally" to attorneys, 496 U.S. at 10, and relied on the "substantial analogy" between a state bar association, such as was involved in that case (and this), and the labor union involved in *Abood*. *Id.* at 12. Thus the decision to overturn *Abood* cast significant doubt on *Keller*'s continued viability—as many judges and justices have recognized.

Absent this Court's intervention, an explicit and significant circuit split will continue—and an attorney's First Amendment rights will depend entirely on geography. This deviation will only worsen as cases presenting the same questions are now pending in other circuits. This Court's guidance is needed.

Finally, only this Court can overrule one of its precedents. *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997). Many circuit courts have cited that rule when asked to consider whether *Keller* survived *Janus*, and have asked this Court to resolve the matter. *See, e.g., Taylor*, 4 F.4th at 408-09; *File v. Martin*, 33 F.4th 385, 392 (7th Cir. 2022); *Fleck*, 937 F.3d at 1115. The court below did the same. *See* App. 100a. This case presents this Court with a clean vehicle to make that determination. This Court should therefore grant certiorari.

STATEMENT OF THE CASE

A. Factual history.

State bar associations generally come in two types: mandatory and voluntary. Mandatory bars—also known as integrated bars—require attorneys to join the association and pay dues as a condition of practicing law. *Keller*, 496 U.S. at 4-5. This compulsion burdens the First Amendment rights of attorneys. *McDonald*, 4 F.4th at 245.

Voluntary bar associations come with no such requirements and impose no such burden. *See Jarchow*, 140 S. Ct. at 1720. Thirty-one states and the District of Columbia have mandatory bars; most of the others have voluntary bar associations. *See* Leslie C. Levin, *The End of Mandatory State Bars?*, 109 Geo. L.J. Online 1, 2 (2020); *see also* Ralph H. Brock, *"An Aliquot Portion of Their Dues": A Survey of Unified Bar Compliance with Hudson and Keller*, 1 Tex. Tech J. Tex. Admin. L. 23, 24 & n.1 (2000). Voluntary bar states include such highly populous states as California, New York, and Illinois, where lawyers are regulated directly without requiring membership in a bar association. *See In re Petition for a Rule Change to Create a Voluntary State Bar of Neb.*, 841 N.W.2d 167, 171 (Neb. 2013).

Oregon law, however, compels every attorney to join the state's integrated bar. ORS § 9.160. OSB is a "public corporation and an instrumentality of … the State." *Id.* § 9.010(2). Its executive functions are overseen by its Board of Governors, which is tasked with "direct[ing] its power to serve the public interest by: (a) Regulating the legal profession and improving the quality of legal

services; (b) Supporting the judiciary and improving the administration of justice; and (c) Advancing a fair, inclusive and accessible justice system." *Id.* § 9.080(1). The Board has broad authority to "adopt, alter, amend and repeal bylaws and to adopt new bylaws containing provisions for the regulation and management of the affairs of the state bar not inconsistent with law," and is the final policy maker regarding how OSB functions. *Id.*

Under the oversight of the Oregon Supreme Court, OSB administers bar exams, investigates applicants' character and fitness, formulates and enforces rules of professional conduct, and establishes minimum continuing legal education requirements for Oregon attorneys. *Id.* §§ 9.114, 9.210, 9.490.

But OSB also engages in other activities. It publishes its *Bulletin* and engages in extensive legislative lobbying and public policy activities. Two statements OSB published in the *Bulletin* and a host of lobbying activities undertaken by OSB gave rise to this case.

At issue in the *Bulletin* are two statements from the April 2018 issue on "White Nationalism and [the] Normalization of Violence," which implicitly labeled President Trump and his supporters "white nationalists." App. 4a, 6a-7a. The two statements were placed on facing pages with one border around both statements—a border found on no other page of the issue. *Id.* The first statement was the official OSB statement; the second was a joint statement of seven Oregon Specialty Bar Associations. The Ninth Circuit concluded that "a reasonable observer would attribute meaning to [Crowe's] membership in OSB because … OSB endorsed the Specialty Bars' statement

criticizing then-President Trump and suggested that all members agreed with it." App. 29a-30a. It further determined that the statements were not germane and did not survive exacting scrutiny. App. 36a-37a.

Petitioner Crowe objected to these statements because they were nongermane. In his view, these statements labeling President Trump and his supporters racists and inciters of violence bore no connection to the regulation of lawyers or the improvement of the quality of legal services. When Petitioner filed his formal objection, OSB provided him a partial dues refund in the amount of $1.15. Under the theories of *Keller* and *Abood*, this "refund" cured Crowe's compelled speech injury, because he was returned the minuscule portion of his bar dues used to fund the publication. That refund, of course, did not purport to remedy the *associational* injury Crowe suffered.

OSB's lobbying activities are also at issue. Per its "Legislative Policy Guidelines," OSB grants itself authority to engage in legislative and public policy activities related to the following nine subjects:

> [R]egulating and disciplining lawyers; improving the functioning of the courts including issues of judicial independence, fairness, efficacy and efficiency; making legal services available to society; regulating lawyer trust accounts; the education, ethics, competence, integrity and regulation of the legal profession; providing law improvement assistance to elected and appointed government officials; issues involving the structure and organization of federal, state and local courts in or affecting Oregon; issues

> involving the rules of practice, procedure and evidence in federal, state or local courts in or affecting Oregon; or issues involving the duties and functions of judges and lawyers in federal, state and local courts in or affecting Oregon.

App. 64a.

OSB engages in substantial legislative activity, supporting and opposing bills before the Oregon legislature, and submitting its own bills. App. 64a-66a. OSB's Board of Governors approves all the bills OSB supports, including those advanced and supported by specific OSB "sections." App. 67a.

OSB has supported, opposed, or advanced proposed legislation that is not germane to "regulating the legal profession [or] improving the quality of legal services" specifically, *see Keller*, 496 U.S. at 13, but relate instead to changes in the state's substantive law. *Cf. McDonald*, 4 F.th at 247-48.

B. Procedural history.

On December 13, 2018, Petitioners sued OSB and OSB officials in their official capacities, bringing the following claims:

1. *Compelled Association*: mandatory membership in OSB alone violates Petitioners' First and Fourteenth Amendment rights, irrespective of OSB's conduct. But Petitioners' rights are particularly violated because OSB engages in nongermane conduct. App. 105a.

2. *Mandatory Dues*: compelled payment of annual dues to OSB violates Petitioners' First and Fourteenth Amendment rights because such payment is required without the "prior, affirmative consent" that *Janus* demands. App. 100a.

3. *Inadequate Procedure*: to the extent compelled bar dues are constitutional, Petitioners' First and Fourteenth Amendment rights are violated because OSB does not provide Petitioners with adequate notice of its activities—as required by *Keller*—to enable Petitioners to know that their dues are funding nongermane conduct and give them an opportunity to object. App. 98a.

Petitioners sought declaratory and injunctive relief—seeking to have Oregon's current mandatory bar scheme declared unconstitutional and enjoined from enforcement of the current mandatory bar scheme.

OSB moved to dismiss pursuant to Rules 12(b)(1) and 12(b)(6). The district court dismissed Petitioners' challenge to mandatory OSB membership, concluding that OSB "was immune from suit under the Eleventh Amendment; that [Petitioners'] free association and free speech claims were barred by precedent; and that the Bar's objection-and-refund procedures were constitutionally adequate." App. 88a.

On appeal, the Ninth Circuit reversed in part. *Id.* Petitioners had argued that *Janus*' overruling of *Abood* also effectively neutered that portion of *Keller* which allows state bars to force members to fund the bars' speech. But the court, while acknowledging that "*Abood*'s rationale that *Keller* expressly relied on has been clearly

'rejected in [*Janus*],'" nevertheless concluded that lower courts are still required to apply *Keller*. App. 100a (citation omitted). It therefore affirmed dismissal of Petitioners' free speech claims.

But it reversed with respect to Petitioners' argument that compulsory membership violates the freedom of association. It agreed with Petitioners that neither *Keller* nor *Lathrop v. Donohue*, 367 U.S. 820 (1961), resolves that question. It therefore remanded the claim for further proceedings. (This Court then denied certiorari. *Crowe v. Oregon State Bar*, 142 S. Ct. 79 (2021)).

On remand, both sides moved for summary judgment on the free association claim. On December 19, 2022, a magistrate recommended that the district court grant OSB's motion and deny Petitioners' motion. Petitioners objected, arguing (1) that OSB engaged in nongermane conduct; (2) that there is no "major activity" threshold for nongermane conduct; (3) that *Janus* clarifies the application of *Keller*, and requires the application of exacting scrutiny; and (4) that OSB's engagement in nongermane conduct violated Plaintiffs' right to freedom of association.

But the District Court largely adopted the magistrate's findings in a February 14, 2023, decision. App. 83a. Petitioners appealed, arguing (1) under *Janus*, laws that force people to subsidize a private organization's political or ideological speech must satisfy "exacting" First Amendment scrutiny—but the district court failed to apply exacting scrutiny; (2) even assuming *Keller*'s continuing viability, the statements in OSB's April 2018 *Bulletin* were nongermane and unconstitutional; and

(3) OSB's legislative activity was also nongermane and unconstitutional.

This time, the Ninth Circuit held that exacting scrutiny did apply,[1] and that the two *Bulletin* articles were nongermane. App. 23a, 36a. It said that "[a]lthough preventing violence and racism can relate to improving the legal system, the connection here was too tenuous." App. 36a. But because it resolved the case on that ground, it refrained from addressing the nongermaneness of OSB's extensive lobbying activities. App. 37a n.11.

The court then not only refused to direct the district court to grant Petitioners the relief they requested—i.e., a declaration that it is unconstitutional to force them to continue associating with a bar association that engages in nongermane conduct—but instead declared that "[t]he remedy for this violation need not be drastic." App. 37a. Although it acknowledged that the Fifth Circuit has held that being forced to associate with a bar association that engages in nongermane conduct is in itself unconstitutional, the Ninth Circuit held that a simple disclaimer by OSB would suffice to rectify the constitutional violation. App. 37a n.12.

The Ninth Circuit denied Petitioners' petition for *en banc* review on October 22, 2024.

Petitioners seek certiorari so this Court can review and reverse the lower court's grant of summary judgment

1. It also reversed its prior ruling that OSB lacked immunity, and allowed the action to proceed only against OSB officials in their official capacities. App. 21a-22a.

requiring that Petitioners remain members of OSB and the lower court's dismissal of their compelled speech challenge, given *Keller*'s obvious infirmities.

REASONS FOR GRANTING THE PETITION

This Court has never squarely resolved whether it is constitutional to force lawyers to join bar associations as a condition of practicing law. But *Keller*—which assumed without deciding that compulsory membership is constitutional—allowed a mandatory bar to compel attorneys to pay regular dues, only if it devoted the revenues to two legitimate (or "germane") state interests: "regulating the legal profession and improving the quality of legal services." 496 U.S. at 13.

It logically follows, as the Fifth Circuit held in *McDonald*, that when a bar association devotes such resources to things *not* germane to these interests, any rationale that might justify compulsory association vanishes, and the bar "may not continue mandating membership." 4 F.4th at 252.

Here, however, the Ninth Circuit rejected the *McDonald* and *Boudreaux* holdings, and created a new rule whereby an association that goes beyond the *Keller* limitations may *still* mandate membership, as long as it issues a disclaimer to dispel the public impression that member attorneys endorse the nongermane statement(s). App. 37a n.12. That rule is not grounded in this Court's precedent, creates confusion among the lower courts, and fosters unconstitutionally compelled association in ways that go far beyond the legal profession.

I. The Ninth Circuit split with the Fifth Circuit over whether an attorney can be required to join a bar association that engages in conduct not germane to the regulation of lawyers or the improvement of the quality of legal services.

The Ninth Circuit rejected Petitioners' argument that it's unconstitutional to force them to be members of a bar association that engages in speech and conduct not germane to the regulation of lawyers or the improvement of the quality of legal services. App. 34a-35a n.10. It held that OSB engaged in nongermane conduct through its publication, because these statements "did not relate to the justice system at all," App. 36a, but in an acknowledged split with the Fifth Circuit, it held that nongermane activity does *not* make compelled membership unconstitutional. App. 34a-35a n.10. Instead, a mere disclaimer by the organization can suffice. App. 37a n.12.

That results not only in disagreement among the courts of appeals, but it's a rule that permits an array of compulsory associations to pass muster based on a mere boilerplate disclaimer. That's every bit as much of an "anomaly" in First Amendment jurisprudence as *Abood* ever was. *Knox v. SEIU, Local 1000*, 567 U.S. 298, 311 (2012). Indeed, such an outcome would mark an extraordinary dilution of the "fundamental" rights to freedom of speech and association. *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 544 (1963) ("The First and Fourteenth Amendment rights of free speech and free association are fundamental."); *City of Dallas v. Stanglin*, 490 U.S. 19, 24 (1989) (same); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) (same).

A. The circuit split.

McDonald concerned a challenge to laws requiring Texas attorneys to join the State Bar of Texas, a compulsory state bar association. The plaintiffs argued that forcing them to join the State Bar violated their First Amendment rights because "the Bar . . . engaged in political and ideological activities that are not germane to its interests in regulating the legal profession and improving the quality of legal services." 4 F.4th at 237. The Fifth Circuit found that certain challenged activities, specifically its legislative program, were nongermane.

That, in turn, meant the state bar could not require attorneys to join. "Compelled membership in a bar association that engages in nongermane activities," it said, "fails exacting scrutiny"—and because the Bar engaged in nongermane activity, "*it may not continue mandating membership* in the Bar as currently structured or engaging in its current activities." *Id.* at 246, 252 (emphasis added).

Two years later, that circuit reaffirmed *McDonald*'s holding in *Boudreaux,* which involved Louisiana's mandatory bar association. There, a lawyer challenged the constitutionality of the Louisiana State Bar Association's publication of a handful of social media posts, including information about attorney wellness, community engagement, and student debt. The Fifth Circuit held that these were nongermane to the two legitimate interests that *Keller* addressed, *see Boudreaux*, 86 F.4th at 632-33, and again that meant that "compulsory bar membership [was] unconstitutional." *Id.* at 624.

The reasoning behind these decisions is straightforward: *Keller*—relying on *Abood*—held that the California State Bar could compel attorneys to pay annual dues to achieve the state's legitimate interests, in the same way that a labor union could require agency fees, *to accomplish certain legitimate interests*. Those interests were identified as "regulating the legal profession and improving the quality of legal services." *Keller*, 496 U.S. at 13. The Court said that the California Bar "may … constitutionally fund activities germane to those goals out of the mandatory dues of all members"—but "may not" use mandatory dues to "fund activities of an ideological nature which fall outside of those areas," such as "endors[ing] or advanc[ing] a gun control or nuclear weapons freeze initiative." *Id.* at 14, 16. In other words, where a state bar steps outside the two legitimate interests identified in *Keller,* it goes beyond the interests that could justify either compelled funding or compelled association—and therefore, as *McDonald* held, such compelled association must be unconstitutional.

That's true even if the nongermane activities appear harmless, because "[t]here is no *de minimis* exception" to the First Amendment. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001). That's why in *Boudreaux,* the court asked, "If a bar association may tout the health benefits of broccoli, may it also advise attorneys to practice Vinyasa yoga, adhere to a particular workout regimen, or get married and have children …[?]" 86 F.4th at 632. It answered no: if a bar association engages in conduct not germane to the regulation of lawyers or the improvement of the quality of legal services, then courts can, and should, remove the actual constitutional problem: the compelled association.

Yet the Ninth Circuit explicitly disagreed. It held that a bar *can* continue to compel membership, notwithstanding its engagement in nongermane speech and conduct, as long as it accompanies its constitutional violation with something as simple as a boilerplate disclaimer distancing itself from the beliefs of the attorneys who are forced to join. App. 37a n.12.

The result is disarray. An attorney in Texas, Louisiana, or Mississippi *cannot* be forced to join a bar association that engages in nongermane conduct, whereas attorneys in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, or Washington *can* still be required to be members of bars that engage in nongermane conduct, as long as the bars publish disclaimers.[2] Without this Court's intervention, constitutional rights—indeed, rights this Court has called "fundamental," *Gibson*, 372 U.S. at 544—will simply depend on location.

No such "disclaimer" rule can be found among this Court's freedom of association precedents. If it were, cases such as *303 Creative LLC v. Elenis*, 600 U.S. 670 (2023), or *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), or *California Democratic Party v. Jones*, 530 U.S. 567 (2000), would have come out quite differently: it would have been a simple matter for a website designer, or the Boy Scouts, or the California Democratic Party to simply publish disclaimers—and thus Colorado, New Jersey, or California could have gone ahead and deprived those

2. There are about 134,000 attorneys in the Fifth Circuit states, and about 443,000 in the Ninth Circuit States. *See 2023-24 National Lawyer Population Survey*, Am. Bar Ass'n (2024) at 6-7, https://www.americanbar.org/content/dam/aba/administrative/market_research/2024-aba-nlps.pdf.

plaintiffs of their free association rights. But this Court was not tempted by such arguments.

In fact, it rejected the idea in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 16 (1986), when it said businesses could not be forced to convey political messages to customers *even though* the regulation at issue allowed businesses to disclaim such messages: "Were the government freely able to compel corporate speakers to propound political messages with which they disagree," the Court said, "this protection would be empty, for the government could require speakers to affirm in one breath that which they deny in the next." The possibility of a disclaimer could not justify "forcing appellant to speak where it would prefer to remain silent." *Id.* at 18.

Indeed, in *Janus* itself, the Court might have said that the associational injury Mr. Janus suffered could be obviated by the union publishing a disclaimer—and nothing stopped Mr. Janus from publicly saying he disagreed with the union's positions. Instead, the Court found that the state had violated his "right to eschew association for expressive purposes." 585 U.S. at 892.

Even *Roberts*, 468 U.S. 609, which upheld compelled association under civil rights laws, did not employ such a rule. There, the Court found that the purpose of eliminating invidious discrimination was compelling enough to overcome the Jaycees' interest in excluding women. But far from saying that the infringement on associational rights could be obviated by allowing the Jaycees to disclaim women's membership, the Court said the opposite: the civil rights laws "impose[] no restrictions

on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." *Id.* at 627. Here, by contrast, OSB *is* inflicting an associational injury on individuals with ideologies and philosophies that differ from OSB's—which the Ninth Circuit excused based on its disclaimer rationale.

B. The Ninth Circuit's holding that a disclaimer remedies an association injury reflects a fundamental disagreement over what constitutes an association injury, causing a circuit split.

In the Ninth Circuit, a person's freedom of association rights are not violated when she is forced to join an organization and to fund its speech, as long as the organization publishes a disclaimer distancing her from its speech.

In other words, the Ninth Circuit has held that something *more* than just compelled association is necessary to show an injury. Instead, the government must *also* block the person from speaking, or society at large must believe the person is endorsing the association's speech, before a constitutional violation occurs. App. 28a-31a.

Not only does this conflict directly with the Fifth Circuit's holding that compelled association is itself an injury that can be justified only where exacting scrutiny is satisfied, but it also conflicts with the Third Circuit's holding in *Circle School v. Pappert*, 381 F.3d 172, 182 (3d Cir. 2004), that a mere disclaimer is *not* sufficient to remedy a violation of freedom of association.

Pappert involved a law forcing private schools to require students to recite the Pledge of Allegiance or the national anthem, except in cases of religious scruple, in which case the school had to notify parents in writing. *Id*. at 174. The schools argued that this violated their expressive association rights because it forced them to adhere to the dictated forms of speech. The state argued in defense that the schools remained free to say that they did not necessarily endorse the flag salute, and therefore there was no problem. *See id.* at 182. The court rejected that argument. The idea that the compulsion was constitutional because a school "can issue a general disclaimer along with the recitation," it said, was "contrary to the First Amendment[ ]," because "[o]therwise the state may infringe on anyone's First Amendment interest at will, so long as the mechanism of such infringement allows the speaker to issue a general disclaimer." *Id.*

In practice, the Ninth Circuit's new "disclaimer" exception to free association means just that: a bar association can compel membership and engage in nongermane activity with funds taken from members against their will, so long as it releases a boilerplate statement that not all members agree with the statement the organization is officially endorsing.

This Court has never said that. In *Roberts*, 468 U.S. at 618, it did not say a person's freedom of association is violated only where the person is both compelled to associate *and also* society at large views her membership as endorsement. On the contrary, it said freedom of association protects against state interference "with individuals' selection of those with whom they wish to join in a common endeavor," including political and ideological endeavors, and that this right "plainly presupposes a

freedom not to associate." *Id.* at 618, 623. And while some state interests might be compelling enough to justify overriding that freedom, the government may do so only when it satisfies exacting scrutiny. *See id.* at 623 (applying exacting scrutiny).

The "impression of endorsement" theory has been employed only in *free speech* cases, such as *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), and *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), where the Court considered whether dissenters might be wrongly associated with messages.[3] But freedom of *association* differs from freedom of speech in important ways. Constitutional protections for speech are primarily (though not wholly) concerned with "the power of reason as applied through public discussion," *Whitney v. California*, 274 U.S. 357, 375 (1927)—that is, with democratic values such as persuasion, cultural exchange, and "the marketplace of ideas." *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 188 (2007). But freedom of *association* is more concerned with the individual conscience. *See* Patrick Lofton, *Any Club That Would Have Me as A Member: The Historical Basis for A Non-Expressive and Non-Intimate Freedom of Association*, 81 Miss. L.J. 327, 357 (2011) ("there is a historical basis, deeply rooted in the American tradition of civil liberty, for a non-expressive and nonintimate associational right based on privacy."). Freedom of association is best understood as "associational

3. Indeed, this Court has rejected the disclaimer theory even in some compelled speech cases. Thus, in *Wooley v. Maynard*, 430 U.S. 705, 717 (1977), it held that the plaintiffs could not be forced to display a slogan on their license plates even though the dissent argued that they were free to disclaim the slogan through "a conspicuous bumper sticker." *Id.* at 722 (Rehnquist, J., dissenting).

autonomy," a right that is "neither expressive nor intimate, but one largely of privacy." *Id.* at 338, 342. People who simply wish to have nothing to do with an association have that right, even aside from concerns about speech. Thus, being required to join an organization is *itself* an injury, irrespective of whether any third party thinks Petitioners support OSB's activities or whether Petitioners are free to vocalize their own opinions.

That explains why *Janus* found a violation of freedom of association even though Mr. Janus was always free to publish his disagreement with the union.

Still, even setting aside the speech/association distinction, *McDonald* made clear that compulsory bar associations by *their very nature*—even if they only engage in germane activities—undertake *expressive* messaging, just like the public-sector union in *Janus*, and that part of their message "is that [their] members stand behind [these associations'] expression." 4 F.4th at 245-46. In other words, "[c]ompelling membership … compels support of that message," and "[i]f a member disagrees with that [message,] then compelling his or her membership infringes on the freedom of association." *Id.* at 246 (citation omitted).

The Ninth Circuit broke from this reasoning. It held instead that a person "cannot demonstrate that his freedom of association is infringed merely by pointing to the fact that he is required to interact with an organization in some sense." App. 25a. Instead, he "must show that the required association impairs his expression." *Id.* And for that reason, it said, a simple disclaimer by OSB would suffice. App. 37a-38a. OSB could continue forcing members

to fund its nongermane speech so long as it puts a basic disclaimer on the messaging. App. 37a.

That means OSB can speak officially on any number of controversial and nongermane political issues, with money taken from Petitioner against his will, and with his name involuntarily listed on its membership roster, as long as it accompanies its statement with a boilerplate notice that it is not necessarily on behalf of all bar members.

Keller said that "[c]ompulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative." 496 U.S. at 16. But under the Ninth Circuit's holding here, OSB *could* endorse a gun control bill or a nuclear freeze initiative without violating members' association rights, as long as it attaches fine print that says "not all members endorse this."[4] Such a simple "get out of the First Amendment free" card would allow OSB to disregard this Court's precedent and would empower states to impose a variety of compulsory associations on people, at the low cost of a simple disclaimer.

Not only does the Ninth Circuit's newly fashioned "disclaimer" rule open the door to a wide variety of compelled association that contradicts this Court's precedents, but it's likely that the split between the Ninth, Third, and Fifth Circuits will continue to widen.

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4. Although objecting members can have a portion of their dues refunded—$1.15 to Petitioner Crowe—that remedy concerns only the compelled speech problem *Keller* addressed. Refunds do not cure the compelled association harm, which indeed can result from no quantifiable expenditure of dues. *See Boudreaux*, 86 F.4th at 632 (wellness tweets about the benefits of walnuts, working out, and getting sunlight).

In a case now before the Tenth Circuit, involving a free speech and free association challenge to Utah's mandatory bar, the District Court relied on the Ninth Circuit's ruling in this case to hold that nongermane statements in the state bar's newsletter did not violate the plaintiff's associational rights because the newsletter contains a disclaimer. *Pomeroy v. Utah State Bar*, No. 2:21-cv-00219-TC-JCB, 2024 WL 1810229, at *7 (D. Utah, April 25, 2024).

Meanwhile, in *Suhr v. Billings*, No. 23-CV-1697-SCD, 2024 WL 3861143 (E.D. Wis. Aug. 19, 2024), the court acknowledged the circuit split, noting that *McDonald* "adopted a no-tolerance policy for nongermane activity by compulsory bar associations," *id.* at *6 n.3, and that it "remain[s] an open question in [the Seventh] circuit." *Id.* at *6.

II. This case presents the vital and unresolved issue of whether *Keller* remains good law after *Janus*.

This Court has never resolved whether attorneys can be forced to join bar associations as a condition of practicing law. The first time it was asked to do so was in *Lathrop*, but that case resulted in a fragmented plurality decision which did not squarely resolve the question. Rather, *Lathrop* decided "only … a question of compelled *financial* support of group activities, *not … involuntary membership in any other aspect*." 367 U.S. at 828 (plurality opinion) (emphasis added).[5] In fact, the precise

5. The sole paragraph in *Lathrop* that did address the "impingement upon freedom of association" caused by mandatory membership, *id.* at 842, sought to resolve it by quoting from *Railway Employees' Department v. Hanson*, 351 U.S. 225, 238 (1956).

holding in *Lathrop* is so elusive that Justices Harlan and Frankfurter complained of its "disquieting Constitutional uncertainty," *id.* at 848 (Harlan & Frankfurter, JJ., concurring), and Justice Black remarked, "I do not believe that either the bench, the bar or the litigants will know what has been decided in this case—certainly I do not." *Id.* at 865 (Black, J., dissenting).

What's more, the *Lathrop* plurality applied *rational basis* scrutiny to the question of associational rights, *see id.* at 843 (deciding the case based on what "Wisconsin might reasonably believe"), which is certainly at odds with more recent case law, particularly *Janus*, 585 U.S. at 919, which emphatically rejected that approach, saying that "deference to legislative judgments is inappropriate in deciding free speech issues," and that heightened scrutiny applies instead.

Thirty years after *Lathrop*, the Court also failed to resolve the question in *Keller*. There, the Petitioners argued that the compulsory membership was unconstitutional, but the lower courts had failed to address that question, and this Court said "we decline to do so in the first instance."

But *Hanson*—"a case in which the First Amendment was barely mentioned," *Harris v. Quinn*, 573 U.S. 616, 628 (2014)—was a union case, not a mandatory bar case, and its reference to mandatory bars consisted of only a single sentence, which was dictum. *See Hanson*, 351 U.S. at 238. What's more, "in his *Lathrop* dissent, Justice Douglas, the author of *Hanson*, came to the conclusion that the First Amendment *did not permit* compulsory membership in an integrated bar." *Harris*, 573 U.S. at 630. In short, the question of whether compulsory bar membership is permissible under the First Amendment appears to have been relegated to a game of "Telephone."

496 U.S. at 17. Thus, as the Ninth Circuit observed in *Crowe I*, the constitutionality of compulsory bar associations remains unsettled, even after all this time. 989 F.3d 714, 724-29.

Rather than address that broader question, *Keller* resolved the narrower issue of expenditures of annual dues. In doing so, it relied heavily on *Abood*, which employed deferential scrutiny, *see* 431 U.S. at 222, and which ruled that public sector employees could be forced to pay agency fees to a union, but not to finance political speech with which they disagreed—but also that the burden was on the dissenter to "affirmatively [make] known to the union their opposition to political uses of their funds" and seek relief. *Id*. at 238. *Keller* said there was "a substantial analogy between the relationship of the Bar and its members … and the relationship of employee unions and their members," and therefore adopted the *Abood* framework. 496 U.S. at 12.

Then, this Court overruled *Abood* in *Janus*, holding that the proper level of scrutiny is non-deferential exacting scrutiny, and that the burden *cannot* be placed on dissenters, but must instead be placed on the government: i.e., public sector employees must be given the opportunity to "clearly and affirmatively consent *before* any money is taken from them." 585 U.S. at 930.

Because *Keller* turned on the "substantial analogy" between mandatory bar associations and unions when it comes to First Amendment principles, it logically follows that the *Janus* rule must apply to mandatory bar associations just as it applied to public sector unions. That means OSB's requirement for attorneys to pay dues to

fund its lobbying and social commentary actions should be subject at least to exacting scrutiny. In short, the *Janus* decision leaves *Keller* in a precarious position.

Not only did the dissent in *Janus* acknowledge that fact, *see* 585 U.S. at 950 (Kagan, J., dissenting), but many courts of appeals have recognized that *Keller* is now in doubt. As the Seventh Circuit put it, "[t]he tension between *Janus* and *Keller* is hard to miss." *File*, 33 F.4th at 392. The Fifth Circuit agreed in *McDonald*, 4 F.4th at 243 n.14 ("*Janus* in particular, cast doubt on *Lathrop* and *Keller*."), as did the Tenth Circuit in *Schell*, 11 F.4th at 1190 ("*Janus* suggests *Keller* is vulnerable to reversal.").

In fact, in *Fleck,* this Court granted-vacated-and-remanded with express instructions to consider the effect *Janus* had on mandatory bar associations. 586 U.S. 1031. But on remand, the Eighth Circuit "decline[d] to consider these issues," because it held it was limited by the "evidentiary record" already before it, which had been developed prior to *Janus* and therefore lacked necessary information. 937 F.3d at 1117.

More recently, in *Jarchow*, this Court denied certiorari, but Justices Thomas and Gorsuch dissented from that denial on the grounds that the Court must resolve the continuing viability of *Keller* in light of *Janus.* 140 S. Ct. at 1720 ("Our decision to overrule *Abood* casts significant doubt on *Keller*."). In short, "[n]ow that *Abood* is no longer good law, there is effectively nothing left supporting our decision in *Keller*." *Id*. This case offers a clear, uncomplicated opportunity to answer that question. Specifically, it offers a chance to resolve whether *Janus*'s exacting scrutiny applies to compulsory bar associations,

given the "substantial analogy" between bars and unions on which *Keller* depends. 496 U.S. at 2.

Until it does so, courts of appeals will continue to adhere to *Keller* even though *Janus* has now made *it* the "anomaly" in First Amendment jurisprudence. Those courts are, of course, bound by the *Agostini* rule to continue applying *Keller* until this Court expressly overrules it, and that is what they have done so far. *See, e.g., File*, 33 F.4th at 392 ("Only the Supreme Court can answer that question."); *Schell*, 11 F.4th at 1190 ("Although *Janus* suggests *Keller* is vulnerable to reversal … at this time *Keller* remains binding precedent on this court."). The consequence is confusion in both doctrine and in practical outcomes. This Court should take this opportunity to revisit *Keller* post-*Janus*.

III. This case is a good vehicle for the Court to consider the constitutionality of compelled subsidies for bar association speech and compelled association with bar associations that engage in nongermane conduct.

This case is an excellent vehicle for the Court to consider the questions presented. The question of whether OSB has engaged in nongermane activity has already been answered by the Ninth Circuit and that determination is not being challenged by OSB. App. 36a. Thus, this case directly presents the question of whether individuals can be forced to associate with a bar association that does engage in nongermane activity. The case comes to the Court with a complete record, no outstanding issues to be resolved, and after two opinions by the Ninth Circuit that thoroughly address the legal disputes. It also comes to the

Court after several courts of appeals have discussed the matter, and reached an acknowledged split on a key issue.

CONCLUSION

The petition for a writ of certiorari should be *granted*.

Respectfully submitted,

Luke D. Miller
Military Disability
Lawyer, LLC
1567 Edgewater Street NW
PMB 43
Salem, OR 97304

Scott Day Freeman
Counsel of Record
Timothy Sandefur
Adam Shelton
Scharf-Norton Center for
Constitutional Litigation
at the Goldwater Institute
500 East Coronado Road
Phoenix, AZ 85004
(602) 462-5000
sfreeman@
goldwaterinstitute.org

Counsel for Petitioners

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED AUGUST 28, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-35193
D.C. No. 3:18-cv-02139-JR

DANIEL Z. CROWE,

Plaintiff-Appellant,

OREGON CIVIL LIBERTIES ATTORNEYS,
AN OREGON NONPROFIT CORPORATION,

Plaintiff-Appellant,

and

LAWRENCE K. PETERSON I,

Plaintiff,

v.

OREGON STATE BAR, A PUBLIC CORPORATION; OREGON STATE BAR BOARD OF GOVERNORS; VANESSA A. NORDYKE, PRESIDENT OF THE OREGON STATE BAR BOARD OF GOVERNORS; CHRISTINE CONSTANTINO, PRESIDENT-ELECT OF THE OREGON STATE BAR BOARD OF GOVERNORS; HELEN MARIE HIERSCHBIEL,

Appendix A

CHIEF EXECUTIVE OFFICER OF THE OREGON STATE BAR; KEITH PALEVSKY, DIRECTOR OF FINANCE AND OPERATIONS OF THE OREGON STATE BAR; AMBER HOLLISTER, GENERAL COUNSEL FOR THE OREGON STATE BAR,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Oregon
Michael H. Simon, District Judge, Presiding

Argued and Submitted April 2, 2024
Portland, Oregon

Filed August 28, 2024

Before: John B. Owens and Michelle T. Friedland
Circuit Judges, and William Horsley Orrick,*
District Judge.

Opinion by Judge Friedland

OPINION

FRIEDLAND, Circuit Judge:

Attorney Daniel Crowe sued the Oregon State Bar and its officers, arguing that the requirement that he join the Bar infringes his First Amendment right to freedom

* The Honorable William Horsley Orrick, United States District Judge for the Northern District of California, sitting by designation.

of association. We hold that the Oregon State Bar is an arm of the state entitled to sovereign immunity, so the Bar itself must be dismissed as a defendant. But we hold, as to the officer defendants, that Crowe has demonstrated an infringement on his freedom of association because he objects to certain communications by the Bar that would reasonably have been imputed to the Bar's members. We also hold that the infringement was not justified because the communications in question were not related to the Bar's regulatory purpose. We therefore reverse the district court's judgment for the officer defendants on Crowe's freedom of association claim and remand for further proceedings.

I.

A.

To practice law in Oregon, an attorney must be a member of the Oregon State Bar ("OSB"). Or. Rev. Stat. § 9.160(1). An attorney must also pay annual membership dues, which are used to fund OSB's activities. *Id.* §§ 9.191, 9.200. Those activities include administering bar exams, formulating and enforcing rules of professional conduct, and establishing minimum continuing legal education requirements for Oregon attorneys. *Id.* §§ 9.210, 9.490, 9.112. OSB also lobbies the state legislature and publishes a magazine called the *Bulletin*. *See* OSB Bylaws art. 10 (bylaws for OSB communications), 11 (bylaws for legislation and public policy activities).

In the April 2018 issue of the *Bulletin*, OSB published two statements on "White Nationalism and [the] Normalization of Violence." The two statements were

published on facing pages, surrounded by a single dark green border that was not present on the other pages of the magazine. The first statement had OSB's dark green logo on the top of the page, and it was signed by six OSB officers, including the President and the Chief Executive Officer. That statement said:

Statement on White Nationalism and Normalization of Violence

As the United States continues to grapple with a resurgence of white nationalism and the normalization of violence and racism, the Oregon State Bar remains steadfastly committed to the vision of a justice system that operates without discrimination and is fully accessible to all Oregonians. As we pursue that vision during times of upheaval, it is particularly important to understand current events through the lens of our complex and often troubled history. The legacy of that history was seen last year in the streets of Charlottesville, and in the attacks on Portland's MAX train. We unequivocally condemn these acts of violence.

We equally condemn the proliferation of speech that incites such violence. Even as we celebrate the great beneficial power of our First Amendment, as lawyers we also know it is not limitless. A systemic failure to address speech that incites violence emboldens those who seek to do harm, and continues to hold

historically oppressed communities in fear and marginalization.

As a unified bar, we are mindful of the breadth of perspectives encompassed in our membership. As such, our work will continue to focus specifically on those issues that are directly within our mission, including the promotion of access to justice, the rule of law, and a healthy and functional judicial system that equitably serves everyone. The current climate of violence, extremism and exclusion gravely threatens all of the above. As lawyers, we administer the keys to the courtroom, and assist our clients in opening doors to justice. As stewards of the justice system, it is up to us to safeguard the rule of law and to ensure its fair and equitable administration. We simply cannot lay claim to a healthy justice system if whole segments of our society are fearful of the very laws and institutions that exist to protect them.

In today's troubling climate, the Oregon State Bar remains committed to equity and justice for all, and to vigorously promoting the law as the foundation of a just democracy. The courageous work done by specialty bars throughout the state is vital to our efforts and we continue to be both inspired and strengthened by those partnerships. We not only refuse to become accustomed to this climate, we are intent on standing in support and solidarity with those

> historically marginalized, underrepresented and vulnerable communities who feel voiceless within the Oregon legal system.

The second statement was signed by the Presidents of seven Oregon Specialty Bar Associations, which are voluntary organizations separate from OSB. It said:

> **Joint Statement of the Oregon Specialty Bar Associations Supporting the Oregon State Bar's Statement on White Nationalism and Normalization of Violence**
>
> The Oregon Asian Pacific American Bar Association, the Oregon Women Lawyers, the Oregon Filipino American Lawyers Association, OGALLA-The LGBT Bar Association of Oregon, the Oregon Chapter of the National Bar Association, the Oregon Minority Lawyers Association, and the Oregon Hispanic Bar Association support the Oregon State Bar's Statement on White Nationalism and Normalization of Violence and its commitment to the vision of a justice system that operates without discrimination and is fully accessible to all Oregonians.
>
> Through the recent events from the Portland MAX train attacks to Charlottesville, we have seen an emboldened white nationalist movement gain momentum in the United States and violence based on racism has become

normalized. President Donald Trump, as the leader of our nation, has himself catered to this white nationalist movement, allowing it to make up the base of his support and providing it a false sense of legitimacy. He has allowed this dangerous movement of racism to gain momentum, and we believe this is allowing these extremist ideas to be held up as part of the mainstream, when they are not. For example, President Trump has espoused racist comments, referring to Haiti and African countries as "shithole countries" and claiming that the United States should have more immigrants from countries like Norway. He signed an executive order that halted all refugee admissions and barred people from seven Muslim-majority countries, called Puerto Ricans who criticized his administration's response to Hurricane Maria "politically motivated ingrates," said that the white supremacists marching in Charlottesville, [Virginia] in August of 2017 were "very fine people," and called into question a federal judge, referring to the Indiana-born judge as "Mexican," when the race of his parents had nothing to do with the judge's decision. We are now seeing the white nationalist movement grow in our state and our country under this form of leadership.

As attorneys who lead diverse bar associations throughout Oregon, we condemn

> the violence that has occurred as a result of white nationalism and white supremacy. Although we recognize the importance of the First Amendment of the United States Constitution and the protections it provides, we condemn speech that incites violence, such as the violence that occurred in Charlottesville. President Trump needs to unequivocally condemn racist and white nationalist groups. With his continued failure to do so, we must step in and speak up.
>
> As attorneys licensed to practice law in Oregon, we took an oath to "support the Constitution and the laws of the United States and of the State of Oregon." To that end, we have a duty as attorneys to speak up against injustice, violence, and when state and federal laws are violated in the name of white supremacy or white nationalism. We must use all our resources, including legal resources, to protect the rights and safety of everyone. We applaud the Oregon State Bar's commitment to equity and justice by taking a strong stand against white nationalism. Our bar associations pledge to work with the Oregon State Bar and to speak out against white nationalism and the normalization of racism and violence.

Daniel Crowe, an attorney and member of OSB, objected to the statements. OSB's bylaws provide a dispute resolution procedure by which a member of the Bar can

request a refund for "any portion of the member's bar dues [used] for activities he or she considers promotes or opposes political or ideological causes." OSB Bylaws § 11.3. Invoking that policy, Crowe demanded a refund of his dues. OSB gave Crowe and other objecting members refunds for their shares of the cost of publishing the April 2018 issue of the *Bulletin*, plus interest.

B.

1.

Still unsatisfied, Crowe filed a lawsuit against OSB and some of its officers (collectively, "Defendants") alleging violations of his First Amendment rights.[1]

The Complaint alleged, among other things, that OSB used its compulsory dues for activities that were not "germane" to OSB's purpose and that doing so violated Crowe's right to freedom of speech; that OSB's refund

1. Crowe also formed the Oregon Civil Liberties Attorneys ("ORCLA"), and ORCLA joined him as a co-plaintiff in this suit. ORCLA has asserted that it has organizational standing under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977), based on Crowe's injuries and Crowe's membership in ORCLA. We remand to the district court to consider in the first instance whether ORCLA has standing to pursue a freedom of association claim. *See id.* (explaining that, for an organization to have standing, "the claim asserted . . . [must not] require[] the participation of individual members in the lawsuit"). Because we focus in this opinion only on Crowe, we refer to him as the only relevant plaintiff.

process for objecting members was insufficient; and that compulsory membership in OSB violated his right to freedom of association. Crowe sought declaratory and injunctive relief, as well as damages in the amount of all the dues he previously paid to OSB.

Defendants moved to dismiss, and the district court granted the motion. Crowe appealed.

On appeal, our court affirmed in part and reversed in part. *Crowe v. Or. State Bar*, 989 F.3d 714, 720 (9th Cir. 2021) ("*Crowe I*"). Applying the then-controlling test, we held that OSB was not an arm of the state entitled to sovereign immunity. *Id.* at 730-33 (applying test from *Mitchell v. L.A. Cmty. Coll. Dist.*, 861 F.2d 198, 201 (9th Cir. 1988)).

We also held that Crowe had not stated a freedom of speech claim. *Id.* at 727. We explained that in *Keller v. State Bar of California*, 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990), the Supreme Court held that "a state bar may use mandatory dues to subsidize activities 'germane to th[e] goals' of 'regulating the legal profession and improving the quality of legal services' without running afoul of its members' First Amendment rights of free speech." *Crowe I*, 989 F.3d. at 724 (quoting *Keller*, 496 U.S. at 13-14). If a state bar engages in nongermane activities, that does not violate the members' freedom of speech so long as the bar has adequate safeguards to protect the rights of any objecting member, including a process for refunding the portion of the member's dues used for any nongermane activities. *See id.* at 725-26. Applying *Keller*,

we held that OSB's refund process was adequate and that Crowe's freedom of speech claim failed because any injury had been remedied by the refund he had received. *Id.* at 726-27. For purposes of the freedom of speech claim, we did not decide whether the two *Bulletin* statements were germane under *Keller* or whether the Specialty Bars' statement was attributable to OSB.[2] *Id.* at 724.

In contrast to the freedom of speech claim, we held that Crowe's freedom of association claim could be "viable" because it was not foreclosed by prior precedent. *Id.* at 729. We explained that *Keller* did not foreclose Crowe's claim because *Keller* evaluated only a freedom of speech claim and "expressly declined to address" the plaintiffs' freedom of association claim. *Id.* at 727.

We then addressed *Lathrop v. Donohue*, 367 U.S. 820, 81 S. Ct. 1826, 6 L. Ed. 2d 1191 (1961), another Supreme Court case addressing mandatory state bar associations. In *Lathrop*, an attorney had argued that the requirement that he join a state bar infringed his right to freedom of association in part because the bar engaged in legislative activities like lobbying. 367 U.S. at 822. Although no opinion was joined by a majority, seven Justices ruled against the attorney. *See id.* at 848 (plurality opinion). A plurality of the Supreme Court explained:

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2. We also rejected Crowe's argument that, because of intervening changes in the Supreme Court's precedent on mandatory union dues, *Keller* was no longer good law. *Crowe I*, 989 F.3d. at 724-25. We explained that the Supreme Court has not expressly overruled *Keller*, so, as a lower court, we are still bound by it. *Id.* at 725.

> [I]n order to further the State's legitimate interests in raising the quality of professional services, [the State] may constitutionally require that the costs of improving the profession . . . be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity.

Id. at 843.

We held that *Lathrop* did not preclude Crowe's freedom of association claim for two reasons. First, "*Lathrop*'s 'free association' decision was limited to 'compelled financial support of group activities'"; it did not address "'involuntary membership in any other aspect.'" *Crowe I*, 989 F.3d. at 727 (emphasis omitted) (quoting *Lathrop*, 367 U.S. at 828). Second, although the attorney in *Lathrop* complained that the bar was engaging in legislative activities, "the *Lathrop* plurality presumed, on the bare record before it, that all the bar's activities, including lobbying, related to 'the regulatory program' of 'improving the profession.'" *Id.* at 727-28 (quoting *Lathrop*, 367 U.S. at 843). Thus, "[a]t bottom, *Lathrop* merely permitted states to compel practicing lawyers to pay toward the costs of regulating their profession," whereas Crowe took issue with more than just the payment of dues, and he asserted that OSB engaged in nongermane activities. *Id.* at 728.

We also held that there was no controlling Ninth Circuit authority and that it was therefore an open question

"whether the First Amendment tolerates mandatory membership itself—independent of compelled financial support—in [a state bar] that engages in nongermane political activities." *Id.* at 729. We remanded to the district court to determine the proper test for analyzing such a freedom of association claim and to apply it. *Id.*

2.

On remand, the parties conducted discovery and then filed cross-motions for summary judgment. Crowe argued that OSB's nongermane conduct included both the 2018 *Bulletin* statements and some of OSB's lobbying in front of the state legislature that had pushed for changes to the state's substantive laws.

The district court held that compelled state bar membership did not violate the freedom of association so long as the bar engaged in predominantly germane activities. It further held that all of the challenged lobbying and OSB's own statement in the *Bulletin* were germane and that, even if the Specialty Bars' statement was not germane, it would not establish a violation given OSB's predominantly germane activities. The court accordingly denied Crowe's motion for summary judgment and granted summary judgment in favor of Defendants. Crowe timely appealed.

3.

After this appeal was filed, we held in *Kohn v. State Bar of California*, 87 F.4th 1021 (9th Cir. 2023) (en banc),

that our prior test for determining whether an entity is an arm of the state for purposes of sovereign immunity was no longer consistent with Supreme Court authority, and we adopted a new test. *Id.* at 1027-1030. The parties in this case then submitted supplemental briefing on whether OSB is entitled to sovereign immunity under *Kohn*.

II.

"We review de novo the district court's decision on cross motions for summary judgment. We consider, viewing the evidence in the light most favorable to the nonmoving party, whether there are genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Marable v. Nitchman*, 511 F.3d 924, 929 (9th Cir. 2007) (citation omitted).

III.

We turn first to the question whether OSB is entitled to immunity from suit under the Eleventh Amendment. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[3] U.S. Const. amend. XI. "The Eleventh Amendment largely shields States from suit in federal court without their consent,

3. Longstanding Supreme Court precedent has interpreted this Amendment to immunize states from suit in federal court by citizens and noncitizens alike." *Kohn*, 87 F.4th at 1025.

leaving parties with claims against a State to present them, if the State permits, in the State's own tribunals." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39, 115 S. Ct. 394, 130 L. Ed. 2d 245 (1994). "This immunity extends not just to suits in which the state itself is a named party but also to those against an 'arm of the [s]tate.'" *Kohn*, 87 F.4th at 1026 (alteration in original) (quoting *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977)).

In *Kohn*, we adopted a new, three-factor test for determining whether an entity is an arm of the state. *Id.* at 1030. The test looks to "(1) the [s]tate's intent as to the status of the entity, including the functions performed by the entity; (2) the [s]tate's control over the entity; and (3) the entity's overall effects on the state treasury." *Id.* (alterations in original) (quoting *P.R. Ports Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868, 873, 382 U.S. App. D.C. 139 (D.C. Cir. 2008) ("*PRPA*")). Under the test, "an entity either is or is not an arm of the [s]tate: The status of an entity does not change from one case to the next based on the nature of the suit, the [s]tate's financial responsibility in one case as compared to another, or other variable factors." *Id.* at 1031 (alterations in original) (quoting *PRPA*, 531 F.3d at 873).

Applying that test in *Kohn*, we held that the California State Bar is an arm of the state. *Id.* at 1037. We noted that we were in "good company" because "all the other federal circuits to have considered the question [in recent decades] have agreed: State bars are arms of the state and enjoy sovereign immunity under the Eleventh Amendment." *Id.*

We then identified *Crowe I*'s holding that OSB was not an arm of the state as the one exception to that otherwise solid consensus. *Id.* We explained that "[a]ny future case brought against the Oregon State Bar [would] need to be analyzed under the new test." *Id.* We conduct that analysis now.

A.

1.

The first factor of the *Kohn* test assesses the "[s]tate's intent as to the status of the entity." 87 F.4th at 1030 (alteration in original) (quoting *PRPA*, 531 F.3d at 873). This factor turns on "[1] whether state law expressly characterizes the entity as a governmental instrumentality rather than as a local governmental or non-governmental entity; [2] whether the entity performs state governmental functions; [3] whether the entity is treated as a governmental instrumentality for purposes of other state law; and [4] state representations about the entity's status." *Id.* Oregon's intent here supports concluding that OSB is an arm of the state.

First, Oregon state law characterizes OSB as a state governmental instrumentality, not a local or non-governmental entity. By statute, OSB is "an instrumentality of the Judicial Department of the government of the State of Oregon." Or. Rev. Stat. § 9.010(2). Oregon state courts have also characterized OSB as an instrumentality of the state operating on behalf of the judicial department. *See State ex rel. Frohnmayer v. Or. State Bar*, 307 Ore.

304, 767 P.2d 893, 895 (Or. 1989). In *Kohn*, we held that the California Supreme Court's similar descriptions of the California State Bar "as its 'administrative arm' for attorney discipline and admission purposes cut[] decisively in favor of" immunity. 87 F.4th at 1032 (citations omitted).

Second, OSB "performs functions typically performed by state governments." *Id.* at 1033 (quoting *PRPA*, 531 F.3d at 875). In *Kohn*, we held that the California State Bar did so because the licensing, regulation, and discipline of lawyers are state functions. *Id.* at 1033-34. OSB performs those same functions. Or. Rev. Stat. §§ 9.080(1)(a) (providing that OSB's Board of Governors is tasked with "[r]egulating the legal profession"), 9.112 (providing that the Board of Governors may set requirements for continuing legal education, subject to approval by the Oregon Supreme Court), 9.210(1) (providing that the Board of Bar Examiners shall "carry out the admissions functions of the Oregon State Bar"), 9.490(1) (providing that the Board of Governors "shall formulate rules of professional conduct for attorneys," subject to approval by the Oregon Supreme Court).

Third, OSB "is treated as a governmental instrumentality for purposes of other state law." *Kohn*, 87 F.4th at 1030. In *Kohn*, we relied on the fact that the California State Bar is "subject to California public-records and open-meeting laws" and that its "property is tax-exempt." *Id.* at 1034. OSB is similarly subject to other state laws that apply to public entities, including the Oregon Tort Claims Act, the Oregon Public Records Law, and the Oregon Public Meetings Law. Or. Rev. Stat.

§ 9.010(3) (providing that "the [B]ar is subject to [certain] statutes applicable to public bodies" and listing those statutes).

Fourth, Oregon asserted in an amicus brief in this case that OSB is an arm of the state. *See Kohn*, 87 F.4th at 1030 (explaining that a court should consider "state representations about the entity's status" under this factor). Such a representation weighs in favor of sovereign immunity. *See PRPA*, 531 F.3d at 876 (relying on a similar amicus brief in analyzing this factor).

In sum, all four considerations demonstrate that Oregon intended OSB to be an arm of the state.

2.

The second *Kohn* factor assesses the state's control over the entity. 87 F.4th at 1030. This factor "depends on how members of the governing body of the entity are appointed and removed, as well as whether the state can 'directly supervise and control [the entity's] ongoing operations.'" *Id.* (alteration in original) (quoting *PRPA*, 531 F.3d at 877). Although Oregon has somewhat less control over OSB than California did over the California State Bar in *Kohn*, this factor still weighs in favor of concluding that OSB is an arm of the state.

In *Kohn*, we relied on the fact that the state government had "the power to appoint the [California] State Bar's governing structure"—the Board of Trustees and the Committee of Bar Examiners. *Id.* at 1035.

Here, the Oregon Supreme Court appoints one of OSB's equivalent bodies but not the other. As in *Kohn*, the state supreme court appoints the officers who oversee attorney admissions (OSB's Board of Bar Examiners). Or. Rev. Stat. § 9.210(1). But unlike in *Kohn*, the state has no role in appointing members of the Bar's board (OSB's Board of Governors), most of whom are elected by OSB's members. Or. Rev. Stat. §§ 9.080, 9.025(1)(a). The state also has no role in the removal of members of the Board of Governors. *See* Or. Rev. Stat. § 9.050; OSB Bylaws § 2.9.

Still, we must consider whether Oregon exercises other forms of control over OSB. Here, as in *Kohn*, the Bar is controlled by the state supreme court, and that control weighs in favor of concluding that the Bar is an arm of the state.

In *Kohn*, we observed that the California State Bar's admission rules, admission decisions, and disciplinary decisions were subject to the California Supreme Court's review. *Kohn*, 87 F.4th at 1035. We described that oversight as an exercise of "significant control over the State Bar's functioning." *Id.* Similarly, the Oregon Supreme Court "makes final decisions on admitting attorneys, disciplining attorneys, and adopting rules of professional conduct." *Crowe I*, 989 F.3d at 732; *see also* Or. Rev. Stat. §§ 9.490(1), 9.527, 9.529, 9.536, 9.542.

Oregon also exercises some control over OSB's budget. OSB submits an annual budget for its admissions, discipline, and continuing legal education programs to the Oregon Supreme Court for review and approval. OSB

Bylaws § 2.1(d). And the Oregon Supreme Court approves the fees that OSB sets for admission. *Id.* § 22.5.

On balance, the extent of Oregon's control over OSB weighs in favor of concluding that OSB is an arm of the state.

3.

The final *Kohn* factor looks to the entity's "financial relationship" with the state and the entity's "overall effects" on the state's treasury. 87 F.4th at 1036. "In analyzing this third factor . . . the relevant issue is a [s]tate's overall responsibility for funding the entity or paying the entity's debts or judgments." *Id.* (alterations in original) (quoting *PRPA*, 531 F.3d at 878).

In *Kohn*, we said that this factor was a "closer call" than the other two. *Id.* at 1037. We recognized that the California State Bar is "responsible for its own debts and liabilities, so California would not be liable for a judgment against the State Bar." *Id.* at 1036. But we acknowledged the California State Bar's argument that "if the State Bar were unable to satisfy a money judgment against it," California would likely step in to ensure that the Bar could continue to perform its "'vital governmental function.'" *Id.* at 1036-37 (quoting *Alaska Cargo Transp., Inc. v. Alaska R.R. Corp.*, 5 F.3d 378, 381 (9th Cir. 1993)). We did not fully resolve the extent to which the California State Bar affects or could affect the California treasury, explaining that this factor was not dispositive because "the intent

and control factors strongly favor[ed]" concluding that the California State Bar was an arm of the state. *Id.* at 1037.

Here, OSB is also responsible for its own debts and liabilities, so Oregon would not be liable for a judgment against OSB. Or. Rev. Stat. § 9.010(6). But, as in *Kohn*, if the Bar were to become insolvent, the state would likely step in with financial support so that the Bar could continue to perform its critical state functions. Given that the intent and control factors strongly weigh in favor of concluding that OSB is an arm of the state, we need not fully resolve the third factor. *See Kohn*, 87 F.4th at 1037.

Having evaluated the three *Kohn* factors, we hold that OSB is an arm of the state. The claims against OSB must therefore be dismissed on sovereign immunity grounds. *See id.* at 1025-26.

B.

OSB's immunity does not end this case. Sovereign immunity shields the state (and arms of the state) from suit. *Kohn*, 87 F.4th at 1025-26. But "[u]nder *Ex Parte Young* and its progeny, a suit seeking prospective equitable relief against a state official [sued in her official capacity] who has engaged in a continuing violation of federal law is not deemed to be a suit against the [s]tate for purposes of state sovereign immunity." *In re Ellett*, 254 F.3d 1135, 1138 (9th Cir. 2001) (citing *Ex Parte Young*, 209 U.S. 123, 159-60, 28 S. Ct. 441, 52 L. Ed. 714 (1908)). Here, in addition to suing OSB, Crowe has sued OSB's officers in their official capacities seeking prospective

declaratory and injunctive relief for violating his freedom of association right. Sovereign immunity does not prevent that part of his case from proceeding.[4]

IV.

We now turn to the merits of Crowe's freedom of association claim. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[5] U.S. Const. amend. I. The Supreme Court has held that the First Amendment implicitly recognizes "a right to associate for the purpose of engaging in those activities" that it explicitly protects. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). The freedom of association "plainly presupposes a freedom not to associate." *Id.* at 623. But the freedom of association (including the freedom not to associate) does not protect all "associations." Because the freedom of association is a corollary to other First Amendment rights, it only protects

4. Crowe also seeks to recover the dues he paid to OSB, but sovereign immunity precludes claims for retrospective relief against officer defendants sued in their official capacities. *Koala v. Khosla*, 931 F.3d 887, 894-95 (9th Cir. 2019). We therefore dismiss those claims.

5. The Fourteenth Amendment incorporates the First Amendment against the states. *Am. Beverage Ass'n v. City & County of San Francisco*, 916 F.3d 749, 755 n.1 (9th Cir. 2019) (en banc).

"associations to the extent that they are expressive." *IDK, Inc. v. Clark County*, 836 F.2d 1185, 1194 (9th Cir. 1988).

When a mandatory association infringes freedom of association, that infringement is permissible if it "serve[s] a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms." *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 310, 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012) (second and third alterations in original) (quoting *Jaycees*, 468 U.S. at 623). We have referred to that test as "exacting scrutiny." *Mentele v. Inslee*, 916 F.3d 783, 790 & n.3 (9th Cir. 2019).

In analyzing Crowe's freedom of association claim, we accordingly must ask whether the challenged governmental conduct infringes the right to freedom of association at all, and if it does, whether that infringement can survive exacting scrutiny.

A.

When a plaintiff challenges a requirement that he join an organization, the plaintiff can establish an infringement on his freedom of association by showing that his membership in the organization impairs his own expression. The plaintiff can make that showing if a reasonable observer would attribute some meaning to his membership—because, for instance, a reasonable observer would assume that the plaintiff agrees with the organization's articulated positions—and he objects to that meaning. We first explain how that test flows from

existing freedom of association caselaw. We then explain why Crowe has satisfied that test.

1.

Not all interactions with other people that "might be described as 'associational' in common parlance . . . involve the sort of expressive association that the First Amendment has been held to protect." *City of Dallas v. Stanglin*, 490 U.S. 19, 24, 109 S. Ct. 1591, 104 L. Ed. 2d 18 (1989). For example, in *IDK, Inc. v. Clark County*, 836 F.2d 1185 (9th Cir. 1988), we held that the relationships between escort services and their clients were not protected by the freedom of association because the relationships were part of a "primarily commercial enterprise[]" and expression was not a "significant or necessary component of their activities." *Id.* at 1195.

In the same vein, the "freedom not to associate"—which Crowe invokes here—is not implicated every time a person would prefer to avoid some interaction. For instance, in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006), law schools challenged a requirement that, to receive federal funding, they allow military recruiters onto their campuses and assist those recruiters as they would any others. *Id.* at 52-53. The law schools argued, among other things, that the requirement infringed their freedom of association because the law schools objected to the military's "Don't Ask, Don't Tell" policy. *Id.* Although the law schools argued that requiring them to interact with military recruiters "impair[ed]

their own expression," the Court held that a plaintiff could not establish an infringement on the freedom of association "'simply by asserting' that mere association 'would impair its message.'" *Id.* at 69 (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000)). The Supreme Court acknowledged that the law schools were required to "'associate' with military recruiters in the sense that they interact[ed] with them." *Id.* But the Court held that the requirement did not infringe the schools' freedom of association because the recruiters had only a passing presence on campus and because students and faculty were "free to associate to voice their disapproval of the military's message"—in other words, the schools were not required to accept the recruiters into the campus community in any meaningful sense. *Id.* at 69-70.

Taken together, those cases establish that a plaintiff cannot demonstrate that his freedom of association is infringed merely by pointing to the fact that he is required to interact with an organization in some sense. Instead, he must show that the required association impairs his expression. Other cases make clear that a plaintiff can make that showing if a reasonable observer would impute some meaning to membership in the organization and the plaintiff objects to that meaning.[6]

In *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000), the Supreme Court

6. We do not foreclose the possibility that a plaintiff could establish that a membership requirement burdens his expression in some other way; we conclude only that this is one way to establish an infringement.

held that a state antidiscrimination law that required the Boy Scouts to admit a gay scoutmaster violated the Boy Scouts' freedom of association. *Id.* at 644. The Court explained that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Id.* at 648. Under that test, the Court held that the antidiscrimination requirement at issue burdened the Boy Scouts' expression because the Boy Scouts objected to same-sex relationships, and the scoutmaster was a "gay rights activist," so his membership would "force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.* at 650, 653. Significantly, the Court thought that the scoutmaster's membership would send that message even though the Boy Scouts could presumably have made clear that it was not voluntarily choosing to admit the gay scoutmaster. The Court then held that this burden on the Boy Scouts' associational rights was not justified by the state's interests. *Id.* at 656-59. Although in *Dale* an organization challenged a law requiring it to admit a member, it follows from *Dale*'s reasoning that when an individual challenges a law that requires him to become a member, he can show that the requirement infringes his freedom of association if the membership "send[s] a message" to a reasonable observer about his own views and he objects to that message. *Id.* at 653.

By contrast, in *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984),

the Supreme Court rejected the Jaycees organization's argument that an antidiscrimination law that required it to admit women as full voting members violated its freedom of association. *Id.* at 612. The Court "decline[d] to indulge in the sexual stereotyping that underlie[d] [the Jaycees'] contention that, by allowing women to vote, application of the [antidiscrimination law would] change the content or impact of the organization's speech." *Id.* at 628. Moreover, the Jaycees already invited women to participate in the group as nonvoting members, so "any claim that admission of women as full voting members [would] impair a symbolic message conveyed by the very fact that women [were] not permitted to vote [was] attenuated at best." *Id.* at 627. Thus, the requirement did not impose "any serious burdens on the male members' freedom of expressive association." *Id.* at 626. In other words, because neither the Jaycees' actual speech nor any symbolic message sent by its membership choices would be meaningfully changed by complying with the antidiscrimination law, the Court concluded that the Jaycees' freedom of association claim failed. As relevant here, *Jaycees* further supports that an individual person can challenge a requirement that he become a member by showing that a reasonable observer would impute to him a message to which he objects.[7]

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7. It is not entirely clear whether the Court in *Jaycees* rejected the freedom of association claim because it determined that there was no infringement or because it determined that the infringement was constitutionally permissible. *See* Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 Nw. U. L. Rev. 839, 843-44 (2005) (discussing this ambiguity). Either way, *Jaycees* supports the principle we rely on here.

2.

We now turn to the application of that test to claims of compelled membership and then to Crowe's claim specifically.[8]

Whether a reasonable observer will attribute any meaning to "membership" alone depends on the nature of a group. Obviously, membership in a political party sends an expressive message. Even if a person takes no other action to support a political party, a reasonable observer understands that membership in the political party, standing alone, says something about the person's views. *Cf. Elrod v. Burns*, 427 U.S. 347, 355-56, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) (plurality opinion) (holding that a requirement that public employees join the Democratic Party infringed their freedom of association). But the word "membership" is used to refer to all sorts of relationships: A person might be a member of a public library, Costco, AMC, or, back in the day, Blockbuster. Those memberships may not send any message at all.

Whether a reasonable observer will attribute any meaning to such memberships will depend on context, and there may plausibly be circumstances where membership in a group becomes expressive. But as relevant here, the bare fact that an attorney is a member of a state bar does

8. Crowe has not argued that he is required to personally voice OSB's own views, attend OSB's meetings, or to refrain from joining other organizations or voicing his own opinions. We need not and do not address how such other types of requirements would be analyzed.

not send any expressive message. A state bar's primary function is to license, regulate, and discipline attorneys—activities that are essentially commercial in nature. *Cf. Rumsfeld*, 547 U.S. at 64 ("[A] law school's decision to allow recruiters on campus is not inherently expressive. Law schools facilitate recruiting to assist their students in obtaining jobs."). And a reasonable observer understands state bar membership to mean only that the attorney is licensed by the bar. Thus, even when the bar engages in expression, a reasonable observer ordinarily would not interpret the fact that the attorney is a member of the bar to mean that the bar's activities reflect the attorney's personal views.

That can be true even if some of the state bar's expression is not germane to the bar's regulatory purposes. In *Morrow v. State Bar of California*, 188 F.3d 1174 (9th Cir. 1999), the plaintiffs argued that the requirement that they join the California State Bar infringed their freedom of association because that Bar engaged in nongermane political activities—specifically, supporting four bills before the California legislature. *Id.* at 1175. We rejected the plaintiffs' argument that "membership alone may cause the public to identify plaintiffs with State Bar positions in violation of plaintiffs' First Amendment [freedom of association] rights." *Id.* at 1177. That holding rested on the notion that the public would not associate a state bar's occasional nongermane activities with its members merely by virtue of their membership.

But, in the particular circumstances of this case, Crowe has shown that a reasonable observer would

attribute meaning to his membership in OSB because of the *Bulletin* statements. OSB endorsed the Specialty Bars' statement criticizing then-President Trump and suggested that all members agreed with it.

Specifically, the formatting and content of the two statements made it appear as though OSB essentially adopted the Specialty Bars' statement. OSB made the editorial decision to publish the two statements side-by-side, surrounded by a single dark green border that was the same color as OSB's logo. And OSB's statement echoed the themes in the Specialty Bars' statement, using strikingly similar language. For example, the Specialty Bars' statement "condemn[ed] speech that incites violence" and made clear that it was referring to then-President Donald Trump's speech specifically, offering several examples. OSB's statement likewise criticized the "systemic failure to address speech that incites violence." In context, one would assume that OSB's reference to "speech that incites violence" was also referencing then-President Trump.

OSB's statement also praised the Specialty Bars specifically. OSB said, "The courageous work done by specialty bars throughout the state is vital to our efforts and we continue to be both inspired and strengthened by those partnerships." By praising the "work" of the Specialty Bars, which would presumably include the immediately adjacent statement, and describing the relationships between OSB and the Specialty Bars as "partnerships," OSB again appeared to implicitly endorse the Specialty Bars' statement. The Specialty Bars, in

turn, "applaud[ed] the Oregon State Bar's commitment to equity and justice by taking a strong stand against white nationalism," and "pledge[d] to work with the Oregon State Bar." Reading those expressions of mutual praise, one would interpret the two statements to be a reflection of OSB's and the Specialty Bars' shared views.

If OSB had made clear that its own statement reflected the views of OSB's leadership—and not its members—then there would be no infringement. But OSB suggested the opposite. Although the statement said "[a]s a unified bar, we are mindful of the breadth of perspectives encompassed in our membership," it immediately implied that the contents of its statement were one thing on which all members agreed. It did so by saying that, given that breadth of perspectives, "we" would focus on "those issues that [were] directly within our mission," which was "gravely" threatened by the "current climate of violence, extremism and exclusion." That would seem to suggest that all members agreed with what was in the statement because it dealt with topics on which there was no "breadth of perspectives." The statement reinforced that idea by using "we" and "our" throughout in a way that purported to speak for all members of OSB. For instance, it said, "As lawyers, we administer the keys to the courtroom." That could only mean all OSB members, not the six OSB officers who signed the statement.

The implication that OSB was speaking on behalf of all the attorneys it regulates was accentuated by the fact that those attorneys are called "members," *see* Or. Rev. Stat. § 9.160(1), as opposed to something more neutral,

such as "licensees." As we have explained, the fact that a state bar refers to attorneys as "members," standing alone, does not mean that a reasonable observer would think that an attorney shares the views of the bar. But the word "member" does connote a stronger relationship than just a regulatory one, which makes it more likely that a reasonable observer would read a statement like OSB's to actually speak on behalf of the attorneys it regulates.

The *Bulletin* statements make this case analogous to *Carroll v. Blinken*, 957 F.2d 991 (2d Cir. 1992). There, students were required to pay an annual "activity fee" to their university, part of which was used to fund a policy advocacy organization called the New York Public Interest Research Group, Inc. ("NYPIRG"). *Id.* at 993-94. NYPIRG sought to advance "certain positions on issues of public policy," such as arms control and environmental protection, "through research, campus speakers, lobbying the legislature, intervening in lawsuits, community organizing, brochures, and other methods." *Id.* at 994, 997. According to NYPIRG's bylaws, any student who paid the activity fee was automatically a "member" of NYPIRG, and "on the strength of this by-law, NYPIRG claim[ed]" in its advocacy "to represent all students at the nineteen participating campuses." *Id.* at 995.

The Second Circuit held that the automatic membership policy infringed the students' freedom of association. *Id.* at 1003. The court explained that "NYPIRG expressly forge[d] . . . a link" "in the popular mind" between its views and the students' views "when it proclaim[ed] that its 'membership' include[d] all fee paying [university]

students" and when it "overtly and inaccurately claim[ed] to represent the interests of the [university] student body." *Id.* NYPIRG thus "irredeemably transgressed the proscription against forced association." *Id.*

Carroll counsels that if an organization trades on its membership in advancing its own views, a reasonable observer may come to (incorrectly) believe that the organization speaks for its members even though membership is mandatory, and in that circumstance, a membership requirement can infringe the freedom of association. Considering the totality of the circumstances here, OSB traded on its supposedly unified membership to bolster its own expression, fostering a misperception about the unanimity of its members' views.

Crowe has also established that the association impaired his own expression because he objects to the message sent by his membership. He testified at his deposition that he disagreed with the *Bulletin* statements and that he did not want to be associated with them. Crowe has thus established an infringement on his freedom of association.

B.

Such an infringement on the freedom of association is nonetheless permissible if it survives exacting scrutiny. *Mentele*, 916 F.3d at 790 & n.3. Under exacting scrutiny, the infringement must "serve a compelling state interest that cannot be achieved through means significantly less

restrictive of associational freedoms."[9] *Id.* at 790 (quoting *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 894, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018)). The Supreme Court has observed that *Keller*'s germaneness requirement "fits comfortably" within the exacting scrutiny framework in the state bar association context because states have a strong interest in "'regulating the legal profession and improving the quality of legal services, '" as well as in "allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices." *Harris v. Quinn*, 573 U.S. 616, 655-56, 134 S. Ct. 2618, 189 L. Ed. 2d 620 (2014) (quoting *Keller*, 496 U.S. at 13). That statement indicates that when a state bar requires attorneys to associate with germane activities, that requirement survives exacting scrutiny.[10]

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9. The Supreme Court has mused about whether strict scrutiny should replace exacting scrutiny in certain First Amendment contexts. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 894-95, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018). But we have already held that we are "obliged to apply 'exacting scrutiny' to decide whether [a compelled association] is constitutionally permissible" because the Court has not overruled its precedents applying that test. *Mentele*, 916 F.3d at 790 n.3.

10. On this point, we agree with the Fifth Circuit, which has held that "[c]ompelled membership in a bar association that is engaged in only germane activities survives [exacting] scrutiny." *McDonald v. Longley*, 4 F.4th 229, 246 (5th Cir. 2021). But we disagree with the Fifth Circuit's holding that if a state bar engages in nongermane activities, compelled membership is necessarily unconstitutional. *See id.*; *see also Boudreaux v. La. State Bar Ass'n*, 86 F.4th 620, 632-34 (5th Cir. 2023) (holding that a state bar

Consistent with that principle, we held in *Gardner v. State Bar of Nevada*, 284 F.3d 1040 (9th Cir. 2002), that even if the public might associate attorneys with a state bar's expressive activities, that association is permissible if the activities are germane. There, the State Bar of Nevada engaged in a public relations campaign that sought to "dispel any notion that lawyers are cheats or are merely dedicated to their own self-advancement or profit." *Id.* at 1043. The campaign instead promoted the notion that lawyers "strive to make the law work for everyone." *Id.* An attorney objected to the campaign in part because he believed lawyers "are supposed to serve their clients, not 'everyone.'" *Id.*

We acknowledged that the attorney was forced to associate with the campaign in two ways. First, his dues were used to fund the campaign. *Id.* at 1042. Second, he was associated with the State Bar of Nevada's activities in the public eye: The public relations campaign spoke about the ethics and activities of all of that Bar's members, so it was likely to be attributed to those members. *See id.* We recognized that such "[c]ompulsion to be associated with an organization whose very public campaign proclaims a

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violated its attorneys' right to freedom of association by, among other things, tweeting about the health benefits of eating walnuts and promoting a holiday charity drive). As we have explained, in many circumstances, membership in a state bar, standing alone, has no expressive meaning, and the public will not associate the bar's members with the bar's activities. In those circumstances, the membership requirement does not infringe the freedom of association—even if the bar engages in nongermane activities such as offering dietary advice or promoting a charity drive.

message one does not agree with is a burden." *Id.* But we concluded that the campaign was germane to the Bar's purposes, so the burden did not violate the attorney's freedom of association. *Id.* at 1042-43. The Bar had a compelling interest in advancing public understanding of the role of attorneys, and in doing so, it could purport to represent the state's attorneys without violating their freedom of association rights. *See id.* at 1043.

In this case, by contrast, OSB engaged in nongermane conduct by adopting the Specialty Bars' statement. The "guiding standard" in determining whether an activity is germane is whether it is "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). At least some of the Specialty Bars' statement was not germane. The statement opened by describing the Specialty Bars' "commitment to the vision of a justice system that operates without discrimination," but much of its criticism of then-President Trump did not relate to the justice system at all—for instance, it criticized Trump for describing Haiti and African countries as "shithole countries." Although preventing violence and racism can relate to improving the legal system, the connection here was too tenuous. *See Schneider v. Colegio de Abogados de P.R.*, 917 F.2d 620, 632 (1st Cir. 1990) (holding that a bar's activities that "rest[] upon partisan political views rather than on lawyerly concerns" are not germane). Because the Specialty Bars' statement was not germane, OSB's adoption of the Specialty Bars' statement was not germane either. OSB has not offered

any other justification for associating its members with the *Bulletin* statements. Thus, the infringement does not survive exacting scrutiny.[11]

C.

The remedy for this violation need not be drastic. Of course, if OSB engaged only in germane activities, it would not infringe the freedom of association. But even if OSB does engage in nongermane activities, in situations in which those activities might be attributed to its members it could include a disclaimer that makes clear that it does not speak on behalf of all those members.[12] *Cf. PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980) (holding that a requirement that a public shopping center allow leafleting did not violate the

11. Because we conclude that OSB's adoption of the Specialty Bars' statement was not germane, we do not address any of the lobbying challenged in this case. The district court may consider the lobbying on remand.

12. We recognize that First Amendment violations are not always cured by a disclaimer. If the state compels a speaker to actually speak (or otherwise disseminate the state's message), the state cannot avoid a First Amendment problem simply by providing a disclaimer that says the speech is compelled. *E.g., Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 12-16, 106 S. Ct. 903, 89 L. Ed. 2d 1 & n.11 (1986) (plurality opinion) (holding that a disclaimer did not avoid a First Amendment violation where the government required a company to disseminate the views of a third party). But, here, the only infringement Crowe has shown is that OSB, through its own speech, has suggested that Crowe shares OSB's views. A disclaimer would have prevented that infringement from occurring in the first place.

First Amendment in part because "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition . . . [would] not likely be identified with those of the [shopping center] owner"); *Lindke v. Freed*, 601 U.S. 187, 202, 144 S. Ct. 756, 218 L. Ed. 2d 121 (2024) ("Markers like [disclaimers] give speech the benefit of clear context."). OSB could also lessen the risk of misattribution by following the California State Bar's lead and referring to attorneys as "licensees," rather than "members." *See* Cal. Bus. & Prof. Code § 6002.

We leave it to the district court to determine on remand, with further input from the parties, the appropriate forward-looking relief. We hold only that Crowe has established an infringement on his freedom of association and that the infringement does not survive exacting scrutiny.

V.

For the foregoing reasons, we dismiss the claim against OSB and the claim for retrospective relief against the individual officer Defendants. We reverse the judgment of the district court as to the freedom of association claim for prospective equitable relief against the individual officer Defendants and remand for further proceedings.

DISMISSED in part; REVERSED in part and REMANDED for further proceedings.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON, FILED DECEMBER 19, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Case No. 3:18-cv-1591-JR;
Case No. 3:18-cv-2139-JR

DIANE L. GRUBER AND MARK RUNNELS,

Plaintiffs,

v.

OREGON STATE BAR, A PUBLIC CORPORATION; VANESSA A. NORDYKE, PRESIDENT OF THE, OREGON STATE BAR; HELEN HIERSCHBIEL, CHIEF EXECUTIVE OFFICER OF THE OREGON STATE BAR,

Defendants,

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

Plaintiffs,

OREGON STATE BAR, A PUBLIC CORPORATION; OREGON STATE BAR BOARD OF GOVERNORS; VANESSA NORDYKE, PRESIDENT OF THE OREGON STATE BAR BOARD OF GOVERNORS;

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CHRISTINE CONSTANTINO, PRESIDENT-ELECT OF THE OREGON STATE BAR BOARD OF GOVERNORS; HELEN HIERSCHBIEL, CHIEF EXECUTIVE OFFICER OF THE OREGON STATE BAR; KEITH PALEVSKY, DIRECTOR OF FINANCE AND OPERATIONS OF THE OREGON STATE BAR; AMBER HOLLISTER, GENERAL COUNSEL FOR THE OREGON STATE BAR,

Defendants.

Filed December 19, 2022

FINDINGS & RECOMMENDATION

RUSSO, Magistrate Judge:

Plaintiffs in both cases challenge the mandatory nature of the Oregon State Bar's (OSB) compulsory fee structure. In early 2019, defendants moved to dismiss these actions. On May 24, 2019, the Court granted defendants' motions and dismissed the cases finding the OSB entitled to Eleventh Amendment Immunity and that both the First Amendment free speech and freedom of association claims failed due to the Bar's procedural safeguards protecting against compelled speech that is not germane to the law. Findings and Recommendation (ECF 44) Order adopting (ECF 46).

On appeal, the Ninth Circuit affirmed dismissal of plaintiffs' free speech claim finding the OSB's refund process sufficient to minimize potential infringement

on members' constitutional rights if the OSB engages in political activity that is not germane to the Bar's role in regulating the legal profession. *Crowe v. Oregon State Bar*, 989 F.3d 714, 727 (2021). However, the Appeals Court found plaintiffs' free association claims viable because past Supreme Court and Ninth Circuit precedent failed to resolve this issue when previously confronted with it.[1] *Id.* at 729. The Ninth Circuit remanded to this Court to address the appropriate standard for assessing plaintiffs' free association claim and whether previous instruction regarding germaneness and procedurally adequate safeguards are relevant. Plaintiffs Daniel Crowe, Lawrence Peterson, and the Oregon Civil Liberties Attorneys (Crowe plaintiffs) seek summary judgment in Case No. 3:18-cv-2139-JR and defendants seek summary judgment in both cases. For the reasons stated below, defendants' motions should be granted, and the Crowe plaintiffs' motion should be denied.

BACKGROUND

Plaintiffs initiated these actions following publication of statements in the OSB April 2018 Bulletin entitled "White Nationalism and Normalization of Violence" and "Joint Statement of the Oregon Specialty Bar Associations Supporting the Oregon State Bar's Statement on White Nationalism and Normalization of Violence." *See, e.g.*, *Crowe*, 989 F.3d at 722-23. Plaintiffs complained about the statements and the OSB refunded $1.15 to plaintiffs

1. The Ninth Circuit also determined that OSB is not an arm of the state entitled to Eleventh Amendment Immunity. *Crowe*, 989 F.3d at 733.

and other objectors in an effort to adhere to the standards of germane speech as set forth in *Keller v. State Bar of California*, 496 U.S. 1, 13, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990) (a state bar may use mandatory dues to subsidize activities germane to the goals for regulating the legal profession and the quality of legal services without running afoul of members' rights to free speech). After the Court dismissed these actions on May 24, 2019, the Ninth Circuit remanded to address the questions noted above.

In Oregon, with few exceptions, active Bar membership is required to practice law. Or. Rev. Stat. § 9.160. A court shall enjoin any person from practicing law in violation of section 9.160 and may punish them with contempt. Or. Rev. Stat. § 9.166.

Generally, all Bar members must pay annual membership fees and a professional liability assessment. Or. Rev. Stat. § 9.191. Failure to pay the fee will result in suspension from practice. Or. Rev. Stat. § 9.200.

The Bar's Board of Governors is required to advance the science of jurisprudence and the improvement of the administration of justice. Or. Rev. Stat. § 9.080(1). To accomplish this mission, the Bar administers exams for admission to practice, examines a member's character and fitness, formulates and enforces rules of conduct, and requires continuing education and training of its members. Or. Rev. Stat. §§ 9.210; 9.490; 9.114. In addition, the Bar provides the public with general legal information and seeks to increase pro bono legal services. *See, e.g.*, https://www.osbar.org/public/; https://www.osbar.org/lsp; https://www.osbar.org/probono/.

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As part of its mission, the Bar publishes a monthly Bar Bulletin. The Bar's communications within the Bulletin:

> should be germane to the law, lawyers, the practice of law, the courts and the judicial system, legal education, and the Bar in its role as a mandatory membership organization. Communications, other than permitted advertisements, should advance public understanding of the law, legal ethics and the professionalism and collegiality of the bench and Bar.

Oregon State Bar Bylaws, Art. 11, Sec. 1 (http://www.osbar.org/_docs/rulesregs/bylaws.pdf) (Bylaws). In addition:

> Bar legislative or policy activities must be reasonably related to any of the following subjects: Regulating and disciplining lawyers; improving the functioning of the courts including issues of judicial independence, fairness, efficacy and efficiency; making legal services available to society; regulating lawyer trust accounts; the education, ethics, competence, integrity and regulation of the legal profession; providing law improvement assistance to elected and appointed government officials; issues involving the structure and organization of federal, state and local courts in or affecting Oregon; issues involving the rules of practice, procedure and evidence in federal,

> state or local courts in or affecting Oregon; or issues involving the duties and functions of judges and lawyers in federal, state and local courts in or affecting Oregon.

Id. at 12.1.

To the extent such communications fail to adhere to this policy, the Bylaws provide a framework for addressing those communications:

> Section 12.6 Objections to Use of Bar Dues
>
> Subsection 12.600 Submission
>
> A member of the Bar who objects to the use of any portion of the member's bar dues for activities he or she considers promotes or opposes political or ideological causes may request the Board to review the member's concerns to determine if the Board agrees with the member's objections. Member objections must be in writing and filed with the Chief Executive Officer of the Bar. The Board will review each written objection received by the Chief Executive Officer at its next scheduled board meeting following receipt of the objection. The Board will respond through the Chief Executive Officer in writing to each objection. The Board's response will include an explanation of the Board's reasoning in agreeing or disagreeing with each objection.

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Subsection 12.601 Refund

If the Board agrees with the member's objection, it will immediately refund the portion of the member's dues that are attributable to the activity, with interest paid on that sum of money from the date that the member's fees were received to the date of the Bar's refund. The statutory rate of interest will be used. If the Board disagrees with the member's objection, it will immediately offer the member the opportunity to submit the matter to binding arbitration between the Bar and the objecting member. The Chief Executive Officer and the member must sign an arbitration agreement approved as to form by the Board.

Subsection 12.602 Arbitration

If an objecting member agrees to binding arbitration, the matter will be submitted to the Oregon Senior Judges Association ("OSJA") for the designation of three active-status retired judges who have previously indicated a willingness to serve as volunteer arbitrators in these matters. The Bar and the objecting member will have one peremptory challenge to the list of arbitrators. The Bar and the objecting member must notify one another of a peremptory challenge within seven days after receiving the list of proposed arbitrators. If there are no challenges or only one challenge,

the OSJA will designate the arbitrator. The arbitrator will promptly arrange for an informal hearing on the objection, which may be held at the Oregon State Bar Center or at another location in Oregon that is acceptable to the parties and the arbitrator. The hearing will be limited to the presentation of written information and oral argument by the Bar and the objecting member. The arbitrator will not be bound by rules of evidence. The presentation of witnesses will not be a part of the hearing process, although the arbitrator may ask the state bar representative and the objecting member and his or her lawyer, if any, questions. The hearing may be reported, but the expense of reporting must be borne by the party requesting it. The Bar and the objecting member may submit written material and a legal memorandum to the arbitrator no later than seven days before the hearing date. The arbitrator may request additional written material or memoranda from the parties. The arbitrator will promptly decide the matter, applying the standard set forth in *Keller v. State Bar of California*, 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990), to the expenditures to which the member objected. The scope of the arbitrator's review must solely be to determine whether the matters at issue are acceptable activities for which compulsory fees may be used under applicable constitutional law. In making his or her decision, the arbitrator must

> apply the substantive law of Oregon and of the United States Federal Courts. The arbitrator must file a written decision with the Chief Executive Officer within 14 days after the hearing. The arbitrator's decision is final and binding on the parties.
>
> If the arbitrator agrees with the member's objection, the Bar will immediately refund the portion of the member's dues that are reasonably attributable to the activity, with interest at the statutory rate paid on the amount from the date that the member's fees were received to the date of the Bar's refund. If the arbitrator agrees with the Bar, the member's objection is denied and the file in the matter closed. Similar or related objections, by agreement of the parties, may be consolidated for hearing before one arbitrator.

Oregon State Bar Bylaws, Art. 12, Sec. 6 (http://www.osbar.org/_docs/rulesregs/bylaws.pdf).

The Crowe plaintiffs seek summary judgment as follows:

> 1. Declaring that Defendants violate Plaintiffs' rights to freedom of speech and association under the First and Fourteenth Amendments to the United States Constitution by enforcing Oregon statutes that make membership in the Oregon State Bar a prerequisite to practicing

> law in Oregon and by imposing mandatory dues as a condition of membership;
>
> 2. Permanently enjoining Defendants and all persons in active concert or participation with them from enforcing ORS 9.160, which mandates membership in the Oregon State Bar, and ORS 9.191, which requires payment of membership fees to the Oregon State Bar; and
>
> 3. Award Plaintiffs Crowe and Peterson damages equal to the dues each paid to the Oregon State Bar from December 13, 2016, to the present, plus interest.

Motion for Summary Judgment (ECF 80 in Case No. 3:18-cv-2139-JR) at p. 1.[2]

Defendants seek summary judgment contending plaintiffs' request for injunctive and declaratory relief is moot, OSB did not engage in nongermane activity, and plaintiffs have not presented sufficient evidence of associational harm.

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2. Plaintiffs Diane Gruber and Mark Runnels challenge the requirement that they must associate with an organization that they believe engages in political and ideological activities they do not agree with. Response (ECF 100 in Case No. 3:18-cv-1591-JR) at p. 1.

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DISCUSSION

Plaintiffs Diane Gruber and Mark Runnels (Gruber plaintiffs) sought summary judgment shortly after remand asserting that Oregon laws requiring them to be members of the OSB and pay dues, fees, and assessments violate their right to freedom of association protected by the First Amendment. ECF 65 (Case No. 3:18-1591). The Court determined that *Schell v. Chief Just. & Justs. of Oklahoma Supreme Ct.*, 11 F.4th 1178 (10th Cir. 2021) provided the appropriate standard for assessing free association claims:

> In *Schell*, the Tenth Circuit analyzed in detail the standard of review to apply in analyzing First Amendment claims based on compulsory membership in an integrated bar. *Id.*, at 1186-91. The Tenth Circuit reviewed the Supreme Court's holdings in *Lathrop v. Donohue*, 367 U.S. 820, 81 S. Ct. 1826, 6 L. Ed. 2d 1191 (1961); *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977); *Keller v. State Bar of California*, 496 U.S. 1, 110 (1990); and *Janus*. *Id.*, at 1186-90. The court discussed how an integrated bar generally does not violate associational rights but that the issue "for a free speech or freedom of association violation" is to consider "the germaneness of the alleged activities to the valid goals and purposes of the OBA [Oklahoma Bar Association]." *Id.*, at 1192. The Tenth Circuit concluded that *Janus* and its "exacting scrutiny" standard did not

> displace *Keller* and its germaneness standard, even for associational rights claims. *Id.*, at 1191.

Opinion and Order (ECF 84 in Case No. 3:18-1591) at p. 7.

The remaining question is whether the plaintiffs have presented any issues of fact as to whether the OSB has engaged in activities that are not germane to the accepted purposes of the Bar, and, if so, whether freedom of association claims may be asserted based on that activity. The Supreme Court has indicated, with respect to integrated bars, that compelled membership in a Bar is permissible even if the bar is also engaged in some legislative activity. *Lathrop*, 367 U.S. at 843. In addition, the *Lathrop* Court indicated if the bulk of State Bar activities serve legitimate functions of a bar association, those activities do not impinge on protected rights of association. *Id.* Accordingly, it stands to reason that *Keller*'s instructions regarding germaneness and procedurally adequate safeguards are relevant to plaintiffs' assertion of associational rights as well. *See Schell* 11 F.4th at 1195 ("the district court will need to apply the test from *Keller* to determine whether the articles are germane to the accepted purposes of the state bar. *See Keller*, 496 U.S. at 14, 110 S. Ct. 2228").[3]

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3. The *Keller* Court concluded a bar could satisfy the germaneness obligation "by adopting the sort of procedures described in *Hudson*." *Id.* at 17 (referencing *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S. Ct. 1066, 89 L. Ed. 2d 232, (1986)). At a minimum, *Hudson*'s safeguards "include an adequate explanation of the basis for the [compulsory] fee, a reasonably prompt opportunity to challenge the amount of the fee

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A. The Germane Inquiry

Plaintiffs continue to rely on *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018) to argue that exact scrutiny applies and that a refund procedure for dues attributable to nongermane conduct can never resolve a freedom of association injury. As noted above, this Court has previously determined that *Janus* did not displace the germaneness standard and given that *Lathrop* remains applicable, a freedom of association claim will not lie where nongermane activity is minor compared to an integrated bar's legitimate activity. Because it is unclear what constitutes "in purport and in practice the bulk of State Bar activities," such that associational claims are not infringed, *Lathrop*, 367 U.S. at 843, the Court's later adoption of the procedural safeguards in the First Amendment expression context in *Keller*, provides a logical answer. Nonetheless, as discussed below, the purported nongermane activities noted by plaintiffs are, at worst, incidental to the OSB's legitimate function and does not run afoul of *Lathrop* or *Keller*.

In addition, to the extent plaintiffs continue to challenge the OSB's mandatory membership and fee structure, the Court has previously foreclosed that claim. *See Gruber v. Or. State Bar*, 2022 U.S. Dist. LEXIS 87574, 2022 WL 1538645, at *5 (D. Or. May 16, 2022) (simply

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before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Hudson*, 475 U.S. at 310.

being compelled to be a member of an integrated bar does not violate associational rights).[4]

As described in the fee context related to an expression claim, to comply with *Keller*'s safeguard requirements, a state bar must include an adequate explanation of the basis for the fee, provide a reasonably prompt opportunity to challenge the fee amount before an impartial decisionmaker, and provide an escrow account for the amounts reasonably in dispute while such challenges are pending. *Keller* 496 U.S. at 16 (citing *Teachers v. Hudson*, 475 U.S. 292, 106 S. Ct. 1066, 89 L. Ed. 2d 232 (1986)). Because the Bar specifically mandates that all communications must be germane to the law, it has instituted the above procedure only when a member believes the Bar has violated that mandate. As *Keller* noted, an integrated bar could certainly meet its obligation by adopting the type of procedures described in *Hudson. Id.* at 17.

The question is whether the First Amendment tolerates mandatory membership itself—independent of compelled financial support—in an integrated bar that engages in nongermane political activities, *Crowe v. Oregon State Bar*, 989 F.3d 714, 729 (9th Cir. 2021).[5] The

4. In addition, to the extent defendants continue to seek Eleventh Amendment Immunity, that issue has also been foreclosed by the Ninth Circuit. *Crowe*, 989 F.3d at 731.

5. Thus, the refund procedure that satisfies the *Abood* requirements is less relevant. Nevertheless, the process still enables an OSB member to express his or her dissent with a particular OSB activity and thus permit the member to disassociate from purportedly forced association.

evidence of nongermane activity has now been developed and that activity is no broader than the activity in *Lathrop*. There a bar member challenged the requirement to be an enrolled dues paying member of the Wisconsin State Bar because:

> [I] do not like to be coerced to support an organization which is authorized and directed to engage in political and propaganda activities. * * * A major portion of the activities of the State Bar as prescribed by the Supreme Court of Wisconsin are of a political and propaganda nature.' His complaint alleges more specifically that the State Bar promotes 'law reform' and 'makes and opposes proposals for changes in * * * laws and constitutional provisions and argues to legislative bodies and their committees and to the lawyers and to the people with respect to the adoption of changes in * * * codes, laws and constitutional provisions.' He alleges further that in the course of this activity 'the State Bar of Wisconsin has used its employees, property and funds in active, unsolicited opposition to the adoption of legislation by the Legislature of the State of Wisconsin, which was favored by the plaintiff, all contrary to plaintiff's convictions and beliefs.'

Lathrop, 367 U.S. at 822. The issues challenged in *Lathrop* mirror the issues challenged here—purported political propaganda by the Bar that plaintiffs contend they should not be compelled to associate with.

Lathrop held:

> Both in purport and in practice the bulk of State Bar activities serve the function, or at least so Wisconsin might reasonably believe, of elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State, without any reference to the political process. It cannot be denied that this is a legitimate end of state policy.[footnote omitted] We think that the Supreme Court of Wisconsin, in order to further the State's legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity. Given the character of the integrated bar shown on this record, in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, we are unable to find any impingement upon protected rights of association.

Id. at 843.[6]

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6. It should be noted, however, that the *Lathrop* Court was only confronted with a question of compelled financial support of group activities, not with involuntary membership in any other aspect. *Lathrop*, 367 U.S. at 828. Nonetheless, the application for

Accordingly, the purported nongermane activities do not violate plaintiffs' right to freedom of association despite compelled membership—independent of compelled financial support.

B. Mootness

Defendants contend the Crowe plaintiffs' request for injunctive and declaratory relief is moot. Defendants assert plaintiffs Crowe and Peterson have no present intent to practice law in Oregon and plaintiff Oregon Civil Liberties Attorneys (ORCLA) has not identified any members with a present intention to practice law in Oregon.

Plaintiff Crowe transitioned to pro bono membership in the OSB in 2019 and is currently pursuing a seminary degree in Florida. *See* Deposition of Daniel Crowe (ECF 80-3 in Case No. 3:18-cv-2139-JR) at p. 24. Plaintiff Peterson resigned from the OSB in 2020 and currently lives in Arizona. *See* Deposition of Lawrence Peterson (ECF 80-4 in Case No. 3:18-cv-2139-JR) at p. 9.

Active members of OSB include active pro bono members. OSB Bylaws § 6.1(a) (ECF 80-2 in Case No. 3:18-cv-2139-JR at p. 16). Accordingly, plaintiff Crowe may practice law in Oregon. Or. Rev. Stat. § 9.160 ("a

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procedures to express a desire to dissociate with certain aspects of a state bar's activity that is not germane to its purpose provides sufficient protection of associational rights at least where the purported germane activity is incidental to a state bar's legitimate objectives.

person may not practice law in this state or represent that the person is qualified to practice law in this state, unless the person is an active member of the Oregon State Bar."). Active pro bono lawyers are subject to various OSB requirements including obtaining professional liability coverage and payment of membership fees. OSB Bylaws § 6.2(d-e) (ECF 80-2 in Case No. 3:18-cv-2139-JR at p. 17). Because plaintiff Crowe is still subject to membership requirements in OSB and the specific requirement to pay fees which he seeks to enjoin, his claims are not moot. Crowe's membership in ORCLA also negates any claim of mootness as to that organization. *See Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 342, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977) (an association may have standing solely as the representative of its members so long as any one of its members suffers immediate or threatened injury as a result of the challenged action).

Plaintiff Peterson, on the other hand, not only has resigned from the OSB, but has retired from the practice of law. *See* Deposition of Lawrence Peterson (ECF 80-4 in Case No. 3:18-cv-2139-JR) at p. 6. While plaintiff Peterson alleges, he would have maintained his membership if not for his frustration with the alleged political activity of the OSB, he still would have ceased practicing law. *Id.* at p. 9. A retired member must pay inactive fees to maintain membership. Plaintiff Peterson is not subject to any challenged provision of OSB membership as a result of his resignation. Accordingly, his claims are moot, and he lacks standing to challenge the OSB's mandatory membership. *See Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 868 (9th Cir. 2017) (to avoid mootness with respect to a

claim for declaratory relief on the ground that the relief sought will address an ongoing policy, the plaintiff must show the policy has adversely affected and continues to affect a present interest). As such, the Court should grant summary judgment in favor of defendants as to the claims asserted by plaintiff Peterson.

C. Alleged Nongermane Activities

1. Bar Bulletin Statements

As noted above, the primary assertion that the OSB engaged in nongermane activity relates to the April 2018 OSB Bulletin publication titled, "White Nationalism and Normalization of Violence." Plaintiffs assert the statements are not germane to the practice of law in Oregon. The statements read:

> **Statement on White Nationalism and Normalization of Violence**
>
> As the United States continues to grapple with a resurgence of white nationalism and the normalization of violence and racism, the Oregon State Bar remains steadfastly committed to the vision of a justice system that operates without discrimination and is fully accessible to all Oregonians. As we pursue that vision during times of upheaval, it is particularly important to understand current events through the lens of our complex and often troubled history. The legacy of that history was seen last year in the

streets of Charlottesville, and in the attacks on Portland's MAX train. We unequivocally condemn these acts of violence.

We equally condemn the proliferation of speech that incites such violence. Even as we celebrate the great beneficial power of our First Amendment, as lawyers we also know it is not limitless. A systemic failure to address speech that incites violence emboldens those who seek to do harm and continues to hold historically oppressed communities in fear and marginalization.

As a unified bar, we are mindful of the breadth of perspectives encompassed in our membership. As such, our work will continue to focus specifically on those issues that are directly within our mission, including the promotion of access to justice, the rule of law, and a healthy and functional judicial system that equitably serves everyone. The current climate of violence, extremism and exclusion gravely threatens all of the above. As lawyers, we administer the keys to the courtroom, and assist our clients in opening doors to justice. As stewards of the justice system, it is up to us to safeguard the rule of law and to ensure its fair and equitable administration. We simply cannot lay claim to a healthy justice system if whole segments of our society are fearful of the very laws and institutions that exist to protect them.

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In today's troubling climate, the Oregon State Bar remains committed to equity and justice for all, and to vigorously promoting the law as the foundation of a just democracy. The courageous work done by specialty bars throughout the state is vital to our efforts and we continue to be both inspired and strengthened by those partnerships. We not only refuse to become accustomed to this climate, we are intent on standing in support and solidarity with those historically marginalized, underrepresented, and vulnerable communities who feel voiceless within the Oregon legal system.

[Signed by OSB President and Other OSB officials]

Joint Statement of the Oregon Specialty Bar Associations Supporting the Oregon State Bar's Statement on White Nationalism and Normalization of Violence

The Oregon Asian Pacific American Bar Association, the Oregon Women Lawyers, the Oregon Filipino American Lawyers Association, OGALLA-The LGBT Bar Association of Oregon, the Oregon Chapter of the National Bar Association, the Oregon Minority Lawyers Association, and the Oregon Hispanic Bar Association support the Oregon State Bar's Statement on White Nationalism and Normalization of Violence and its commitment

to the vision of a justice system that operates without discrimination and is fully accessible to all Oregonians.

Through the recent events from the Portland MAX train attacks to Charlottesville, we have seen an emboldened white nationalist movement gain momentum in the United States and violence based on racism has become normalized. President Donald Trump, as the leader of our nation, has himself catered to this white nationalist movement, allowing it to make up the base of his support and providing it a false sense of legitimacy. He has allowed this dangerous movement of racism to gain momentum, and we believe this is allowing these extremist ideas to be held up as part of the mainstream, when they are not. For example, President Trump has espoused racist comments, referring to Haiti and African countries as "shithole countries" and claiming that the United States should have more immigrants from countries like Norway. He signed an executive order that halted all refugee admissions and barred people from seven Muslim-majority countries, called Puerto Ricans who criticized his administration's response to Hurricane Maria "politically motivated ingrates," said that the white supremacists marching in Charlottesville, North Carolina in August of 2017 were "very fine people," and called into question a federal

judge, referring to the Indiana-born judge as "Mexican," when the race of his parents had nothing to do with the judge's decision. We are now seeing the white nationalist movement grow in our state and our country under this form of leadership.

As attorneys who lead diverse bar associations throughout Oregon, we condemn the violence that has occurred as a result of white nationalism and white supremacy. Although we recognize the importance of the First Amendment of the United States Constitution and the protections it provides, we condemn speech that incites violence, such as the violence that occurred in Charlottesville. President Trump needs to unequivocally condemn racist and white nationalist groups. With his continued failure to do so, we must step in and speak up.

As attorneys licensed to practice law in Oregon, we took an oath to "support the Constitution and the laws of the United States and of the State of Oregon." To that end, we have a duty as attorneys to speak up against injustice, violence, and when state and federal laws are violated in the name of white supremacy or white nationalism. We must use all our resources, including legal resources, to protect the rights and safety of everyone. We applaud the Oregon State Bar's commitment to equity and justice by taking a strong stand against

> white nationalism. Our bar associations pledge to work with the Oregon State Bar and to speak out against white nationalism and the normalization of racism and violence.
>
> [Signed by Various heads of Oregon Specialty Bar Associations]

Ex. 6 to Motion for Summary Judgment (ECF 80-6 in Case No. 3:18-cv-2139-JR).

Arguably, the statements fall within a compelling and legitimate OSB mission.

"The right to associate for expressive purposes is not . . . absolute." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984), 104 S. Ct. 3244, 82 L. Ed. 2d 462. In its freedom-of-association cases, the Supreme Court has generally applied "exacting . . . scrutiny," under which "mandatory associations are permissible only when they serve a 'compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Knox v. Serv. Emps. Intl Union, Loc. 1000*, 567 U.S. 298, 310, 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012) (quoting *Roberts*, 468 U.S. at 623).

> compelling a lawyer to join a bar association engaged in non-germane activities burdens his or her First Amendment right to freedom of association. Such a bar association would invariably be engaged in expressive activities. Even bar associations that engage in only

> germane activities undertake some expressive activities; for example, proposing an ethical rule expresses a view that the rule is a good one, and commenting on potential changes to the state's court system, as the bar in *Lathrop* did, expresses a view that such a reform is a good or bad idea.

McDonald v. Longley, 4 F.4th 229, 245 (5th Cir. 2021).

Although the *McDonald* Court determined that compelled membership of a bar association that engages in non-germane activity infringes on the freedom of association and fails exacting scrutiny, *id.* at 246, *Lathrop* suggests some level of nongermane activity does not run afoul of associational rights. Moreover, the *McDonald* Court also examined whether procedural safeguards would negate an infringement upon associational rights. *Id.* at pp. 252-54. The challenged statements relate to improving the quality of the legal profession and advancing a fair, inclusive, and accessible justice system. Where the second statement may run afoul of these legitimate activities is in its opinion that the former President of the United States "catered to this white nationalist movement." Nonetheless, this opinion was tangential to the legitimate messages promoted in the statements and does not run afoul of the expressive rights of any member regardless of their compelled membership. *Cf. id.* at 249 (various diversity initiatives through the state bar, though highly ideologically charged, are germane to the purposes identified in *Keller*). To the extent the inclusion of the opinion regarding the former President is nongermane,

the OSB provides adequate safeguards to prevent associational harms by granting a process through which members can disassociate from the expression and indeed certain plaintiffs availed themselves of that process. Accordingly, the Court should find the statements in the April 2018 issue of the Bar Bulletin do not violate plaintiffs' right to freedom of association.

2. Legislative Activity

The Crowe plaintiffs assert the OSB engages in nongermane conduct through lobbying for changes in Oregon's laws.

As noted above, the OSB Bylaws provide that legislative activity must be reasonably related to: regulating and disciplining lawyers; improving the functioning of the courts including issues of judicial independence, fairness, efficacy and efficiency; making legal services available to society; regulating lawyer trust accounts; the education, ethics, competence, integrity and regulation of the legal profession; providing law improvement assistance to elected and appointed government officials; issues involving the structure and organization of federal, state and local courts in or affecting Oregon; issues involving the rules of practice, procedure and evidence in federal, state or local courts in or affecting Oregon; or issues involving the duties and functions of judges and lawyers in federal, state and local courts in or affecting Oregon. Plaintiff Crowe asserts that none of this is germane to the valid goals and purposes of the OSB "[a]s the Bar is functioning right now." *See* Deposition of Daniel Crowe (ECF 80-3 in Case No. 3:18-cv-2139-JR) at pp. 27-28.

Appendix B

As to specific legislative activity, the Crowe plaintiffs assert the OSB's support of the following pieces of 2021 legislation were nongermane: SB 297 (inclusion of judicial marshals in definition of police officers for purposes of the Public Employees Retirement System); SB 513 (adding civics credit to the statutory coursework requirements for a student to graduate high school); SB 180 (require insurers to notify a claimant directly in certain cases when paying more than $5,000 to settle a third-party liability claim); SB 182 (terminate the authority of a spouse to act as an agent under certain estate planning documents upon annulment, separation, or dissolution of a marriage); SB 185 (allow a nonprofit's board of directors or members to act electronically—including by email—so long as doing so is not prohibited by the articles of incorporation); SB 181 (require courts to consider whether access to justice would be promoted when awarding attorney fees, even when the attorney bringing the case did so pro bono); SB 183 (proposed a process to recognize tribal court judgments as "foreign judgments"); SB 768 (amend statutes related to the OSB, but in the process would exempt OSB and its committees from being required to record and make public its telephonic or video meetings, as is generally required of public bodies); SB 829 (allow under certain circumstances a tenant with an unexpired lease to remain in possession of the property even after the property is sold, and to clarify the eviction procedures for individuals who purchase property that was sold to satisfy a judgment); SB 295 (define terms related to "fitness to proceed" in criminal trials and clarified when a criminal defendant may be referred to the Oregon State Hospital).

Appendix B

The Crowe plaintiffs also identify the following bills from the 2019 legislative session as nongermane: SB 358 (permit the Department of Revenue to disclose an attorney's taxpayer information for certain disciplinary actions); SB 359 (create a process for the ratification of certain defective actions of shareholders or corporations); HB 2459 (allow lienholders to ask for payoff amounts from other lienholders); SB 360 (modify Oregon's Nonprofit Corporations Act); SB 361 (direct trustees to consider additional factors when managing a trust, including "the settlor's desire to engage in sustainable or socially responsible investment strategies"). Finally, plaintiffs identify HB 4008 and HB 4010 from the 2018 legislative session, which included a provision to prohibit courts from considering race or ethnicity when calculating protected future earning potential in a civil action, as nongermane.

The OSB is charged with serving the public interest by:

> (a) Regulating the legal profession and improving the quality of legal services;
>
> (b) Supporting the judiciary and improving the administration of justice; and
>
> (c) Advancing a fair, inclusive and accessible justice system.

Or. Rev. Stat. § 9.080.

Appendix B

The OSB develops legislative priority proposals before each legislative session that conforms with its mission and then submits those proposals to the Board of Governors for *Keller* review to assure that they are related to regulating the legal profession, improving the quality of legal services, supporting the judiciary, improving the administration of justice, or advancing a fair, inclusive and accessible justice system. *See* Declaration of Susan Grabe (ECF 88 in Case No. 3:18-cv-2139-JR) at ¶ 6. The OSB's Board of Governors meets every two weeks to continually evaluate the germaneness of any legislation for which it advocates. *Id.* at ¶ 8.

The seventeen instances of legislative advocacy identified by the Crowe plaintiffs falls within the OSB's mission.

SB 180, SB 182, SB 768 from the 2021 legislative session and SB 358 from the 2019 session relate to regulation of the profession or support the administration of justice. SB 181, SB 183, SB 185, SB 295, SB 297, SB 513, and SB 829 from 2021; SB 359, SB 360, SB 361, HB 2459 from 2019; and HB 4008 and HB 4010 from 2018 relate to improving the quality of legal services through removing technical problems or malpractice traps or improve access to justice in Oregon. Plaintiffs have not identified any legislative activity that is nongermane. Moreover, the process by which the OSB develops legislative priority proposals provides ample opportunity for members to utilize the procedural safeguards identified above to make any objections and seek appropriate relief. Accordingly, the Court should find the legislative activity noted

above does not violate plaintiffs' right to freedom of association. Because plaintiffs fail to identify a violation of their associational rights, summary judgment should be granted in favor of defendants.

CONCLUSION

Defendants' motions for summary judgment (ECF 76 in Case No. 3:18-cv-2139-JR) and (ECF 95 in Case No. 3:18-cv-1591-JR) should be granted. Plaintiffs Daniel Crowe, Lawrence Peterson, and the Oregon Civil Liberties Attorneys' motion for summary judgment (ECF 80 in Case No. 3:18-cv-2139-JR) should be denied. These actions should be dismissed, and a judgment should enter.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties shall have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any factual determination of the Magistrate Judge will be considered as a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to this recommendation.

Appendix B

DATED this 19th day of December, 2022.

/s/ Jolie A. Russo
Jolie A. Russo
United States Magistrate Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON, FILED FEBRUARY 14, 2023

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Case No. 3:18-cv-2139-JR

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

Plaintiffs,

v.

OREGON STATE BAR, *et al.*,

Defendants.

Filed February 14, 2023

ORDER

Michael H. Simon, District Judge.

Plaintiffs in this case are current and former members of the Oregon State Bar (OSB) and an organization consisting of such members. Membership in the OSB is required to practice law in the state of Oregon. Plaintiffs originally challenged the compulsory membership and fee structure of the bar, alleging that it violated their rights to freedom of speech and association under the First

Amendment, made applicable to the states by the Due Process Clause of the Fourteenth Amendment.

The Ninth Circuit affirmed dismissal of Plaintiffs' free speech claim but remanded the dismissal of Plaintiff's associational rights claim because neither the United States Supreme Court nor the Ninth Circuit has yet directly addressed a broad claim of freedom of association based on mandatory bar membership in "an integrated bar that engages in nongermane political activities." *Crowe v. Or. State Bar*, 989 F.3d 714, 729 (9th Cir. 2021). In that decision, the Ninth Circuit noted that the district court would need to resolve what standard governs an associational rights claim in this context, whether the "germaneness" standard articulated in *Keller v. State Bar of California*, 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990), for speech in the context of mandatory bar dues also applies to an associational rights claim, and how the OSB's activities fare under this claim. Before the Court resolved these questions on remand, Plaintiffs Diane L. Gruber and Mark Runnels in the related case of *Gruber v. Oregon State Bar*, Case No. 3:18-cv-1591-JR, filed an early motion for summary judgment, arguing that there are no material disputed issues of fact and that the OSB's compulsory membership requirement violates their associational rights. The Court followed the Tenth Circuit's reasoning in *Schell v. Chief Justice & Justices of Oklahoma Supreme Court*, 11 F.4th 1178 (10th Cir. 2021), *cert. denied sub nom. Schell v. Darby*, 142 S. Ct. 1440, 212 L. Ed. 2d 537 (2022), and concluded that the applicable standard of review for an associational rights claim in this context is the germaneness framework.

Gruber v. Or. State Bar, 2022 U.S. Dist. LEXIS 87574, 2022 WL 1538645, at *3 (D. Or. May 16, 2022). The Court also determined that a claim asserting that simply being required to participate in an integrated bar violates associational rights is insufficient and Plaintiffs must instead show nongermane activity that rises to the level of a constitutional violation. *Id.* 2022 U.S. Dist. LEXIS 87574, [WL] at *4-5. Thus, the Court denied Plaintiffs Gruber and Runnels' motion for summary judgment. *Id.* 2022 U.S. Dist. LEXIS 87574, [WL] at *5.

Plaintiffs in this case brought by Crowe and others then moved for summary judgment on their associational rights claim. Defendants filed their own motions for summary judgment on all claims in both lawsuits. U.S. Magistrate Judge Jolie A. Russo issued a Findings and Recommendation (F&R) on December 19, 2022, recommending that this Court deny Plaintiffs' motion and grant Defendants' motions.[1] Plaintiffs filed objections.

A. Standards

Under the Federal Magistrates Act (Act), the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate."

1. The F&R addresses Defendants' motions for summary judgment filed in this case and the related case, *Gruber v. Oregon State Bar*, Case No. 3:18-cv-1591-JR, as well as the motion for summary judgment filed by the plaintiffs in this case. Because the objections and arguments in *Gruber* are different than the objections and arguments filed in this case, the Court issues separate Orders in these two cases.

28 U.S.C. § 636(b)(1). If a party objects to a magistrate judge's findings and recommendations, "the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.*; Fed. R. Civ. P. 72(b)(3).

For those portions of a magistrate judge's findings and recommendations to which neither party has objected, the Act does not prescribe any standard of review. *See Thomas v. Arn*, 474 U.S. 140, 152, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985) ("There is no indication that Congress, in enacting [the Act], intended to require a district judge to review a magistrate's report to which no objections are filed."); *United States. v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (holding that the court must review de novo magistrate judge's findings and recommendations if objection is made, "but not otherwise"). Although in the absence of objections no review is required, the Act "does not preclude further review by the district judge[] *sua sponte* . . . under a *de novo* or any other standard." *Thomas*, 474 U.S. at 154. Indeed, the Advisory Committee Notes to Fed. R. Civ. P. 72(b) recommend that "[w]hen no timely objection is filed," the Court review the magistrate judge's recommendations for "clear error on the face of the record."

B. Analysis

1. Standard of Review for Plaintiffs' Claims

Plaintiffs argue that the F&R erred by applying the "germaneness" standard of *Keller* instead of the "exacting

scrutiny" standard of *Janus v. American Federation of State, County, Municipal, Employees, Council 31*, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018). The Court has already rejected this argument in its Opinion and Order resolving Plaintiffs Gruber and Runnels' motion for summary judgment, when the Court determined that *Keller's* germaneness standard applied to Plaintiffs' associational rights claim, relying on *Schell*. *See Gruber*, 2022 U.S. Dist. LEXIS 87574, 2022 WL 1538645, at *3. Plaintiffs now argue that the F&R (and therefore the Court in its previous Opinion and Order) misread *Schell*. The Court disagrees.

Schell reviewed relevant Supreme Court caselaw and concluded that the germaneness standard applies to the plaintiff's free speech and associational rights claim, and not the exacting scrutiny standard of *Janus*. *See Schell*, 11 F.4th at 1186-91. The Tenth Circuit in *Schell* then stated: "In assessing whether the non-time-barred allegations in Mr. Schell's Amended Complaint are sufficient to advance a claim for a free speech or freedom of association violation, we consider the germaneness of the alleged activities to the valid goals and purposes of the OBA." *Id.* at 1192. The Tenth Circuit next evaluated the specific allegations and determined that the plaintiff had failed to state an associational rights claim based on all of the alleged articles published by the integrated bar except two, which were not in the record and were unable to be reviewed to see if their content complied with the Supreme Court's requirements for germaneness. *Id.* at 1192-94. The court in *Schell* remanded the plaintiff's associational rights claim for further proceedings, including discovery

to determine if the two articles were nongermane and whether those two articles alone would be sufficient to state an associational rights claim, considering *Lathrop*, stating: "Once the discovery is complete, if defendants seek summary judgment, the district court will need to apply the test from *Keller* to determine whether the articles are germane to the accepted purposes of the state bar. And, if the articles are not germane, the district court will need to assess whether Mr. Schell may advance a freedom of association claim based on these two articles." *Id.* at 1194-95 (footnote discussing *Lathrop* omitted).

The Tenth Circuit's opinion in *Schell* is clear that it applied the germaneness standard, without exacting scrutiny, for its review of the plaintiff's associational rights claim and that it instructed the district court to apply the germaneness test upon remand. Based on this reading and the persuasive authority of *Schell*, the Court rejects Plaintiffs' argument that the Court misread *Schell* and that the Court should consider germaneness by also applying exacting scrutiny.

2. Nongermane Activity

Plaintiffs also object that the F&R incorrectly determined that they failed to show that the OSB engaged in nongermane behavior. Plaintiffs argue that the OSB's legislative activity is nongermane, as well as the April 2018 statements published in the *Bar Bulletin* by the OSB and by the specialty bar associations.

Appendix C

a. Legislative Activity

Plaintiffs argue that the F&R applied the incorrect standard in evaluating whether the challenged legislative activity was nongermane. Plaintiffs contend that under *Keller*, the legislative activity must be related to regulating the legal profession or improving the quality of legal services. Plaintiffs argue that the F&R considered that before lobbying any particular piece of legislation, the OSB has each piece of legislation reviewed for whether it meets OSB's statutory purposes. These purposes include, as relevant to the pending motion, supporting the judiciary, improving the administration of justice, and advancing a fair, inclusive, and accessible justice system.

The Supreme Court in *Keller* acknowledged that regulating the legal profession and improving the quality of legal services is a spectrum and not easy to delineate. *Keller*, 496 U.S. at 14-15. The acceptable types of activities are "acting essentially as professional advisers to those ultimately charged with the regulation of the legal profession" and the unacceptable are "those activities having political or ideological coloration *which are not reasonably related to the advancement of such goals*." *Id.* at 15 (emphasis added).

Plaintiffs do not explain how supporting the judiciary, improving the administration of justice, or advancing a fair, inclusive, and accessible justice system do not fall within the acceptable spectrum. Indeed, other federal appellate courts have concluded that specific articles and initiatives falling within these categories are germane. The Tenth

Circuit in *Schell* held that articles relating to warning the public about the harms of politics in the judicial system was germane because "promotion of the public's view of the judicial system as independent enhances public trust in the judicial system and associated attorney services." *Schell*, 11 F.4th at 1193. The court ruled that an article on how judges are appointed "involve[d] the structure of the court system" and was therefore germane. *Id.* The Tenth Circuit also explained that articles advocating for the role of attorneys in the legislature were germane because "they promote the important role of the OBA's attorney members in using their professional skills to interpret and advise on pending legislation" and they "are not inherently political or ideological in nature." *Id.*

The Fifth Circuit similarly ruled that diversity initiatives, "though highly ideologically charged" were germane because they were "aimed at creating a fair and equal legal profession for minority, women, and LGBT attorneys, which is a form of regulating the legal profession." *McDonald v. Longley*, 4 F.4th 229, 249 (5th Cir. 2021), *cert. denied sub nom. McDonald v. Firth*, 142 S. Ct. 1442, 212 L. Ed. 2d 538 (2022). That court also concluded that these initiatives "help to build and maintain the public's trust in the legal profession and the judicial process as a whole," which is an improvement in the quality of legal services." *Id.* The court additionally explained that the bar's activities aimed at helping the needy were germane because they increased access to justice for person who could not otherwise afford counsel, even for noncitizen immigrants, which is a politically-charged issue, particularly in Texas. *Id.* at 250. The Fifth Circuit

further noted that administrative duties, such as "the Bar's advocating a particular ethical rule is germane no matter how strenuously an attorney might disagree with its propriety." *Id.* at 250.

The OSB's statutory goals challenged by Plaintiffs as falling outside of the rubric of *Keller* generally fall within these types of issues accepted by the Fifth and Tenth Circuits as germane. They are issues involving the judiciary; a fair, inclusive, and accessible justice system; and improving the administration of justice. They relate to regulating the legal profession and improving the quality of legal services.

More importantly, the issue at summary judgment is not whether the OSB has a procedure in place (such as screening bills to ensure they comply with the OSB's statutory goals and therefore comply with *Keller*) that may hypothetically prevent associational harms, but whether Plaintiffs have provided *evidence* that the OSB has engaged in nongermane activity and, if so, whether that nongermane activity violates Plaintiffs' associational rights. Plaintiffs do not assert in their objection any particular legislative activity that they contend the F&R erroneously concluded was germane. Plaintiffs argue generally that the Court should follow the analysis of the Fifth Circuit in *McDonald* and conclude that any bill that was substantive and did not involve the role of attorneys is nongermane. Plaintiffs do not, however, identify any bill they contend would fall under such analysis.

Further, the Court does not find the reasoning of *McDonald* persuasive for its broad conclusion that

advocating for changes to a state's substantive law is nongermane. The Fifth Circuit stated that such lobbying has "nothing to do with regulating the legal profession or improving the quality of legal services. Instead, those efforts are directed entirely at changing the law *governing* cases, disputes, or transactions *in which attorneys might be involved*." *McDonald*, 4 F.4th at 247-48 (emphasis in original). The Fifth Circuit concluded that the only substantive bills for which lobbying would be germane would be "legislation regarding the functioning of the state's courts or legal system writ large" or "advocating for laws governing the activities of lawyers *qua* lawyers." *Id.* at 248. Many other types of substantive bills, however, may be relevant to improving the quality of legal services and regulating the profession. As the *McDonald's* court's discussion of other services by the bar demonstrated, there are issues that affect the public's trust in the justice system, the ability to provide services to the needy, and other issues that may not fall within this narrow definition of germaneness established for lobbying.

Additionally, the Fifth Circuit in *McDonald* provided a list of lobbying activities that would be acceptable, based on the Supreme Court's decision in *Lathrop*, and that list is inconsistent with the conclusion in *McDonald* of acceptable lobbying. The Fifth Circuit provided as general examples of the type of lobbying that *would* pass the germaneness test: the salaries of state court judges; amending statutes to compensate attorneys differently; court reorganization; extending personal jurisdiction over nonresidents; allowing the recording of unwitnessed conveyances; allowing use of deceased partners' names in

firm names; revising the law governing federal tax liens; addressing law clerks for State Supreme Court justices; addressing securities transfers by fiduciaries; addressing the jurisdiction of county courts over the administration of *inter vivos* trusts; and setting special appropriations for research for the State Legislative Council. *McDonald*, 4 F.4th 248 n.23. Some of these, however, do not fall within the Fifth Circuit's express holding, such as securities transfers by fiduciaries.

The Court also disagrees with the Fifth Circuit's ultimate conclusion in *McDonald* that the mere fact that an integrated bar engages in "some" nongermane activity means that the bar violates associational rights under the First Amendment, without considering whether there is a threshold, or *de minimus*, amount of nongermane activity that is acceptable. *See id.* at 251. The Supreme Court in *Lathrop* expressly relied on the fact that only some degree of the integrated bar's activity was potentially improper, and not the "bulk" or "major" portion of the bar's activity.[2] *See Lathrop*, 367 U.S. at 843 (relying on the fact that "the *bulk* of State Bar activities serve" the legitimate functions of the bar association in concluding that compelled membership in the state bar did not "impinge[ ] upon protected rights of association" (emphasis added)); *see also id.* at 839 (noting that the challenged activity is not "major" activity of the integrated bar).

Most importantly, however, the Court has reviewed *de novo* all the legislative activity challenged by Plaintiffs

2. Plaintiffs also object that *Lathrop* did not create any exception for some degree of nongermane activity, and the Court rejects this objection.

and finds that the entirety is within the spectrum of improving the quality of legal services or regulating the legal profession. They are not inherently political or ideological in nature. Thus, Plaintiffs' argument that they are nongermane is rejected. The Court adopts this portion of the F&R.

b. Statements in the *Bar Bulletin*

Plaintiffs object that two statements published in the April 2018 *Bar Bulletin* are nongermane. The first statement, "White Nationalism and Normalization of Violence," was issued by the OSB. The Court has reviewed this statement, and agrees with Judge Russo that it is germane. The statement emphasizes the rule of law, the equal protection of the laws, and the importance of a justice system that is accessible to all and does not include racial discrimination or the acceptability of violence. The statement was "aimed at creating a fair and equal legal profession . . . which is a form of regulating the legal profession" and "help[s] to build and maintain the public's trust in the legal profession and the judicial process as a whole." *McDonald*, 4 F.4th at 249-50; *see also Schell*, 11 F.4th at 1193 (finding that conduct that "enhances public trust in the judicial system and associated attorney services" is germane). The statement also is focused on access to justice, which is germane. *McDonald*, 4 F.4th at 250. The statement does not contain inherently political or partisan statements. Even if allusions to racism, white nationalism, and violence can be construed as inflammatory or ideological that does not mean they are nongermane, because they are still "reasonably related

to the advancement" of the acceptable goals of the bar. *See Keller*, 496 U.S. at 15; *see also McDonald*, 4 F.4th at 249-50 (recognizing that topics that are "controversial," "highly ideologically charged," involving "a sensitive political topic," and "politically charged" can be germane (cleaned up)).

Plaintiffs also object that the specialty bar section's "Joint Statement of the Oregon Specialty Bar Associations Supporting the Oregon State Bar's Statement on White Nationalism and Normalization of Violence" is nongermane. As the F&R acknowledged, this statement contains politically inflammatory statements regarding former President Donald Trump. Viewing the facts in the light most favorable to the nonmoving party, there is at least an issue of fact whether this statement was nongermane, and thus the Court does not adopt this discussion in the F&R. The Court, however, has rejected Plaintiffs' assertions regarding the other nongermane conduct. The Court therefore need not precisely delineate the acceptable threshold for nongermane activity contemplated by *Lathrop*, because whatever that threshold may be, a single statement (or even two statements) will not meet it.

3. Opt-out Procedures

Plaintiffs object that the opt-out procedures for a bar member to disassociate from speech to which they disagree is irrelevant to their associational rights claims, which are not based on the payment of dues. Because the Court finds that far more than the "bulk" of the OSB's

activities were germane and the OSB's conduct does not violate Plaintiffs' associational rights under the First Amendment, the Court declines to address this objection or adopt this portion of the F&R.

4. No Objections

For those portions of the F&R to which Plaintiffs did not object, the Court follows the recommendation of the Advisory Committee and reviews Judge Russo's F&R for clear error on the face of the record. No such error is apparent. Accordingly, the Court adopts those portions of the F&R.

C. Conclusion

The Court ADOPTS IN PART the Findings and Recommendation, ECF 94, as supplemented herein. The Court DENIES the Motion for Summary Judgment filed by Plaintiffs, ECF 80. The Court GRANTS the Motion for Summary Judgment filed by Defendants, ECF 76.

IT IS SO ORDERED.

DATED this 14th day of February, 2023.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED OCTOBER 22, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-35193
D.C. No. 3:18-cv-02139-JR
District of Oregon, Portland

DANIEL Z. CROWE,

Plaintiff-Appellant,

OREGON CIVIL LIBERTIES ATTORNEYS,
AN OREGON NONPROFIT CORPORATION,

Plaintiff-Appellant,

and

LAWRENCE K. PETERSON I,

Plaintiff,

v.

OREGON STATE BAR,
A PUBLIC CORPORATION; *et al.*,

Defendants-Appellees.

Filed October 22, 2024

Appendix D

Before: OWENS and FRIEDLAND, Circuit Judges, and ORRICK,* District Judge.

Judge Owens and Judge Friedland have voted to deny the petition for rehearing en banc, and Judge Orrick so recommends. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc, Dkt. No. 52, is DENIED.

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* The Honorable William Horsley Orrick, United States District Judge for the Northern District of California, sitting by designation.

APPENDIX E — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED FEBRUARY 26, 2021

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-35463
D.C. No.
3:18-cv-02139-JR

DANIEL Z. CROWE; LAWRENCE K. PETERSON I; OREGON CIVIL LIBERTIES ATTORNEYS, AN OREGON NONPROFIT CORPORATION,

Plaintiffs-Appellants,

v.

OREGON STATE BAR, A PUBLIC CORPORATION; OREGON STATE BAR BOARD OF GOVERNORS; VANESSA A. NORDYKE, PRESIDENT OF THE OREGON STATE BAR BOARD OF GOVERNORS; CHRISTINE CONSTANTINO, PRESIDENT-ELECT OF THE OREGON STATE BAR BOARD OF GOVERNORS; HELEN MARIE HIERSCHBIEL, CHIEF EXECUTIVE OFFICER OF THE OREGON STATE BAR; KEITH PALEVSKY, DIRECTOR OF FINANCE AND OPERATIONS OF THE OREGON STATE BAR; AMBER HOLLISTER, GENERAL COUNSEL FOR THE OREGON STATE BAR,

Defendants-Appellees.

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No. 19-35470
D.C. No.
3:18-cv-01591-JR

DIANE L. GRUBER; MARK RUNNELS,

Plaintiffs-Appellants,

v.

OREGON STATE BAR; CHRISTINE CONSTANTINO; HELEN MARIE HIERSCHBIEL,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Oregon
Michael H. Simon, District Judge, Presiding

Argued and Submitted May 12, 2020
Portland, Oregon

Filed February 26, 2021

Before: Jay S. Bybee and Lawrence VanDyke, Circuit Judges, and Kathleen Cardone,* District Judge.

Per Curiam Opinion;
Partial Concurrence and Partial Dissent
by Judge VanDyke

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* The Honorable Kathleen Cardone, United States District Judge for the Western District of Texas, sitting by designation.

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OPINION

PER CURIAM:

To practice in Oregon, every lawyer must join and pay annual membership fees to the Oregon State Bar ("the Bar" or "OSB"). In these cases, Plaintiffs[1] claim these compulsions violate their freedoms of speech and association as guaranteed by the First Amendment, made applicable to the states by the Due Process Clause of the Fourteenth Amendment.

The district court dismissed all of Plaintiffs' claims, concluding that the Bar was immune from suit under the Eleventh Amendment; that Plaintiffs' free association and free speech claims were barred by precedent; and that the Bar's objection and refund procedures were constitutionally adequate. We agree with the district court that precedent forecloses the free speech claim, but neither the Supreme Court nor this court has resolved the free association claim now before us. For the reasons that follow, Plaintiffs may have stated a viable claim that Oregon's compulsory Bar membership requirement violates their First Amendment right of free association. We accordingly affirm in part, reverse in part, and remand to the district court with instructions.

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1. "Plaintiffs" refers to Appellants in both No. 19-35463 (Daniel Crowe, Lawrence Peterson, and the Oregon Civil Liberties Attorneys (individually referred to as the "*Crowe* Plaintiffs")) and No. 19-35470 (Diane Gruber and Mark Runnels (individually referred to as the "*Gruber* Plaintiffs")).

Appendix E

I. BACKGROUND

A. *The Oregon State Bar*

"The Oregon State Bar is a public corporation and an instrumentality of the Judicial Department of the government of the State of Oregon." Or. Rev. Stat. § 9.010(2). OSB is an integrated bar, meaning lawyers must join it and pay an annual membership fee to practice law in Oregon. *Id.* §§ 9.160(1), 9.200. OSB is administered by its board of governors, who may "adopt, alter, amend[,] and repeal" the Bar's bylaws. *Id.* § 9.080. "[A]t all times," the board must "serve the public interest" by "[r]egulating the legal profession and improving the quality of legal services; [s]upporting the judiciary and improving the administration of justice; and [a]dvancing a fair, inclusive[,] and accessible justice system." *Id.* The State of Oregon is not responsible for OSB's debts. *Id.* § 9.010(6). Instead, OSB satisfies its own financial needs and obligations from the membership fees it collects. *Id.* § 9.191(3). Subject to oversight by the Oregon Supreme Court, OSB administers bar exams, investigates applicants' character and fitness, formulates and enforces rules of professional conduct, and establishes minimum continuing legal education requirements for Oregon attorneys. *Id.* §§ 9.210, 9.490, 9.114.

OSB also publishes a monthly Bar *Bulletin*, which is subject to the bylaws' general communications policy:

> Communications of the Bar and its constituent groups and entities, including printed material

> and electronic communications, should be germane to the law, lawyers, the practice of law, the courts and the judicial system, legal education and the Bar in its role as a mandatory membership organization. Communications, other than permitted advertisements, should advance public understanding of the law, legal ethics and the professionalism and collegiality of the bench and Bar.

OSB Bylaws § 11.1.[2] OSB's Chief Executive Officer "has sole discretion . . . to accept or reject material submitted to the Bar for publication." *Id.* § 11.203. "[P]artisan political advertising is not allowed[,]" and "[p]artisan political announcements or endorsements will not be accepted for publication as letters to the editor or feature articles." *Id.* § 11.4.

OSB's legislative and public policy activities must reasonably relate to any of the following nine subjects:

> Regulating and disciplining lawyers; improving the functioning of the courts including issues of judicial independence, fairness, efficacy and efficiency; making legal services available to society; regulating lawyer trust accounts; the education, ethics, competence, integrity and regulation of the legal profession; providing law improvement assistance to elected and

2. The OSB Bylaws are available at http://www.osbar.org/_docs/rulesregs/bylaws.pdf.

> appointed government officials; issues involving the structure and organization of federal, state and local courts in or affecting Oregon; issues involving the rules of practice, procedure and evidence in federal, state or local courts in or affecting Oregon; or issues involving the duties and functions of judges and lawyers in federal, state and local courts in or affecting Oregon.

Id. § 12.1. The Bar maintains that all its communications and activities are intended to adhere to the above-listed topics, and considers all these topics germane to its regulatory purpose.

B. *The April 2018* Bulletin *Statements*

At the heart of Plaintiffs' suits are two statements published alongside each other in the April 2018 edition of the *Bulletin*, reproduced below in full. The first was attributed to the Bar, signed by its leaders, and stated as follows:

> Statement on White Nationalism and Normalization of Violence
>
> As the United States continues to grapple with a resurgence of white nationalism and the normalization of violence and racism, the Oregon State Bar remains steadfastly committed to the vision of a justice system that operates without discrimination and is fully accessible to all Oregonians. As we pursue that vision during

times of upheaval, it is particularly important to understand current events through the lens of our complex and often troubled history. The legacy of that history was seen last year in the streets of Charlottesville, and in the attacks on Portland's MAX train. We unequivocally condemn these acts of violence.

We equally condemn the proliferation of speech that incites such violence. Even as we celebrate the great beneficial power of our First Amendment, as lawyers we also know it is not limitless. A systemic failure to address speech that incites violence emboldens those who seek to do harm, and continues to hold historically oppressed communities in fear and marginalization.

As a unified bar, we are mindful of the breadth of perspectives encompassed in our membership. As such, our work will continue to focus specifically on those issues that are directly within our mission, including the promotion of access to justice, the rule of law, and a healthy and functional judicial system that equitably serves everyone. The current climate of violence, extremism and exclusion gravely threatens all of the above. As lawyers, we administer the keys to the courtroom, and assist our clients in opening doors to justice. As stewards of the justice system, it is up to us to safeguard the rule of law and to ensure its fair

> and equitable administration. We simply cannot lay claim to a healthy justice system if whole segments of our society are fearful of the very laws and institutions that exist to protect them.
>
> In today's troubling climate, the Oregon State Bar remains committed to equity and justice for all, and to vigorously promoting the law as the foundation of a just democracy. The courageous work done by specialty bars throughout the state is vital to our efforts and we continue to be both inspired and strengthened by those partnerships. We not only refuse to become accustomed to this climate, we are intent on standing in support and solidarity with those historically marginalized, underrepresented and vulnerable communities who feel voiceless within the Oregon legal system.

Across the page, a "Joint Statement of the Oregon Specialty Bar Associations Supporting the Oregon State Bar's Statement on White Nationalism and Normalization of Violence" stated:

> The Oregon Asian Pacific American Bar Association, the Oregon Women Lawyers, the Oregon Filipino American Lawyers Association, OGALLA-The LGBT Bar Association of Oregon, the Oregon Chapter of the National Bar Association, the Oregon Minority Lawyers Association, and the Oregon Hispanic Bar Association support the Oregon

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State Bar's Statement on White Nationalism and Normalization of Violence and its commitment to the vision of a justice system that operates without discrimination and is fully accessible to all Oregonians.

Through the recent events from the Portland MAX train attacks to Charlottesville, we have seen an emboldened white nationalist movement gain momentum in the United States and violence based on racism has become normalized. President Donald Trump, as the leader of our nation, has himself catered to this white nationalist movement, allowing it to make up the base of his support and providing it a false sense of legitimacy. He has allowed this dangerous movement of racism to gain momentum, and we believe this is allowing these extremist ideas to be held up as part of the mainstream, when they are not. For example, President Trump has espoused racist comments, referring to Haiti and African countries as "shithole countries" and claiming that the United States should have more immigrants from countries like Norway. He signed an executive order that halted all refugee admissions and barred people from seven Muslim-majority countries, called Puerto Ricans who criticized his administration's response to Hurricane Maria "politically motivated ingrates," said that the white supremacists marching in Charlottesville, North Carolina in August of 2017 were "very fine people," and called into question a federal

judge, referring to the Indiana-born judge as "Mexican," when the race of his parents had nothing to do with the judge's decision. We are now seeing the white nationalist movement grow in our state and our country under this form of leadership.

As attorneys who lead diverse bar associations throughout Oregon, we condemn the violence that has occurred as a result of white nationalism and white supremacy. Although we recognize the importance of the First Amendment of the United States Constitution and the protections it provides, we condemn speech that incites violence, such as the violence that occurred in Charlottesville. President Trump needs to unequivocally condemn racist and white nationalist groups. With his continued failure to do so, we must step in and speak up.

As attorneys licensed to practice law in Oregon, we took an oath to "support the Constitution and the laws of the United States and of the State of Oregon." To that end, we have a duty as attorneys to speak up against injustice, violence, and when state and federal laws are violated in the name of white supremacy or white nationalism. We must use all our resources, including legal resources, to protect the rights and safety of everyone. We applaud the Oregon State Bar's commitment to equity and justice by taking a strong stand against

> white nationalism. Our bar associations pledge to work with the Oregon State Bar and to speak out against white nationalism and the normalization of racism and violence.

OSB maintains both *Bulletin* statements are germane to its role in improving the quality of legal services. When Plaintiffs and other OSB members complained about the statements, however, the Bar refunded $1.15 to Plaintiffs and other objectors—the portion of their membership fees used to publish the April 2018 *Bulletin*. On appeal, the Bar explains it paid the refunds because "it has always sought, in accordance with its Bylaws, to strictly adhere to the standards of 'germane' speech as set forth in *Keller* . . . . [T]he Bar sought to avoid even the appearance of funding non-germane speech, by refunding their proportional dues with interest."

C. *District Court Proceedings*

Plaintiffs filed these lawsuits against OSB officials and OSB itself, alleging the compelled membership and membership fee requirements violate their First Amendment rights. Plaintiffs contend that (1) the two statements from the April 2018 *Bulletin* are not germane; (2) compelling them to join and maintain membership in OSB violates their right to freedom of association; and (3) compelling Plaintiffs to pay—without their prior, affirmative consent—annual membership fees to OSB violates their right to freedom of speech. In addition, the *Crowe* Plaintiffs alone contend that the Bar's constitutionally mandated procedural safeguards

for objecting members are deficient. And the *Gruber* Plaintiffs alone continue to argue on appeal that OSB is not entitled to sovereign immunity from suit.

Below, these cases were referred to a magistrate, who first determined that OSB (but not the individual OSB officials) was an "arm of the state" and immune from suit pursuant to the Eleventh Amendment. The magistrate then held the OSB statement "was made within the specific context of promotion of access to justice, the rule of law, and a healthy and functional judicial system that equitably serves everyone" and "[wa]s germane to improving the quality of legal services." Assuming the Specialty Bars' statement could "include[] political speech that is not germane to a permissible topic," the magistrate noted it was not technically attributed to OSB but rather a "routinely publishe[d] statement[]" in the *Bulletin*'s "forum for the exchange of ideas pertaining to the practice of law." The magistrate alternatively concluded that, even assuming the statements contained nongermane speech, Plaintiffs would still have suffered no constitutional injury because of OSB's existing safeguards designed to refund membership funds misused for political purposes.

The magistrate recommended the district court grant the Bar's motions to dismiss and deny the *Gruber* Plaintiffs' motion for partial summary judgment. The district court fully adopted the magistrate's findings and recommendations and dismissed these cases. Plaintiffs timely appealed.

II. STANDARD OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343. We have jurisdiction under 28 U.S.C. § 1291, and "review de novo a dismissal on the basis of sovereign immunity or for failure to state a claim upon which relief can be granted." *Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 864 (9th Cir. 2016). Moreover, we must "accept the complaint[s'] well-pleaded factual allegations as true, and construe all inferences in the plaintiff[s'] favor." *Id.*

III. DISCUSSION

Plaintiffs raise the same issues that were before the district court in their appeals. We will begin with Plaintiffs' free speech and free association claims. We consider the parties' arguments with respect to the germaneness of the April 2018 *Bulletin* statements and the adequacy of OSB's procedural safeguards as they pertain to Plaintiffs' free speech and free association claims. Because we conclude that Plaintiffs have stated a claim based on their right to free association, which we must remand to the district court, we will then address the question of OSB's immunity from a suit for damages, a claim only raised by the *Gruber* Plaintiffs.

A. *Free Speech*

In *Keller v. State Bar of California*, 496 U.S. 1, 13-14, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990), the Supreme Court concluded that a state bar may use mandatory

dues to subsidize activities "germane to those goals" of "regulating the legal profession and improving the quality of legal services" without running afoul of its members' First Amendment rights of free speech. *Id.* As a preliminary matter, Plaintiffs argue that both April 2018 *Bulletin* statements constitute political speech nongermane to the Bar's role in regulating the legal profession. We need not decide whether the district court erred in concluding that the *Bulletin* statements are germane under *Keller* (or, in the case of the Specialty Bars' statement, not attributable to OSB) for purposes of this appeal because, even assuming both statements are nongermane, Plaintiffs' free speech claim fails.

In rejecting the plaintiffs' free speech claim in *Keller*, the Supreme Court subjected integrated bars to "the same constitutional rule with respect to the use of compulsory dues as are labor unions." *Keller*, 496 U.S. at 13 (adopting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-36, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977) (holding that a union may not fund from mandatory fees political or ideological activities nongermane to its collective bargaining duties)). However, the Supreme Court recently overruled *Abood* because the "line between chargeable [germane] and nonchargeable [nongermane] union expenditures has proved to be impossible to draw with precision," and because even union speech germane to collective bargaining "is overwhelmingly of substantial public concern." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2477, 2481, 201 L. Ed. 2d 924 (2018). Plaintiffs argue that, given *Keller*'s reliance on *Abood*, faithful application of *Keller*

now requires that we consult *Janus* in analyzing their *Keller* claim and apply exacting scrutiny. *See id.* at 2477, 2486. According to Plaintiffs, OSB engages in political and ideological activities (e.g., the *Bulletin* statements), so forcing them to pay mandatory membership fees violates their free speech rights. Plaintiffs urge that, under *Janus*, OSB's membership fee requirement cannot survive exacting scrutiny, and therefore, membership fees may only be constitutionally assessed if attorneys provide prior, affirmative consent.

Given *Keller*'s instruction that integrated bars adhere to the same constitutional constraints as unions, 496 U.S. at 13, Plaintiffs' argument is not without support. But *Keller* plainly has not been overruled. *See Janus*, 138 S. Ct. at 2498 (Kagan, J., dissenting) (noting that "today's decision does not question" cases applying *Abood*, including *Keller*). Although *Abood*'s rationale that *Keller* expressly relied on has been clearly "rejected in [another] decision[], the Court of Appeals should follow the [Supreme Court] case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989)). We are a lower court, and we would be scorning *Agostini*'s clear directive if we concluded that *Keller* now prohibits the very thing it permitted when decided.[3]

3. Because we do not think the Supreme Court has clearly abrogated or altered *Keller*'s holding, our precedent likewise bars Plaintiffs' requested relief as to this claim. *See Gardner v. State Bar of Nev.*, 284 F.3d 1040, 1042-43 (9th Cir. 2002).

In the alternative, the *Crowe* Plaintiffs alone insist that, assuming mandatory dues remain constitutionally permissible, the district court nevertheless erred in concluding that OSB provides adequate procedural safeguards. As discussed above, *Keller* subjected integrated bars to the same constitutional constraints as unions, allowing them to use compulsory dues only to regulate attorneys or improve the quality of their States' legal professions—but not for "activities of an ideological nature which fall outside of those areas of activity." 496 U.S. at 13-14. Having saddled integrated bars with this "*Abood* obligation," the Court concluded they could satisfy that obligation "by adopting the sort of procedures described in *Hudson*." *Id.* at 17 (referencing *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S. Ct. 1066, 89 L. Ed. 2d 232 (1986)). At a minimum, *Hudson*'s safeguards "include an adequate explanation of the basis for the [compulsory] fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Hudson*, 475 U.S. at 310.

Here, OSB's bylaws provide a dispute resolution procedure for a "member of the Bar who objects to the use of any portion of the member's bar dues for activities he or she considers promotes or opposes political or ideological causes. . . ." OSB Bylaws § 12.600. The objecting member must notify OSB's Board of Governors, and "[i]f the Board agrees with the member's objection, it will immediately refund the portion of the member's dues that are attributable to the activity, with interest."

Id. § 12.601. If the Board disagrees with the objecting member, it offers binding arbitration before a neutral decisionmaker who conducts a hearing and promptly decides "whether the matters at issue are acceptable activities for which compulsory fees may be used under applicable constitutional law." *Id.* § 12.602. If the objector prevails, OSB pays the same refund described above; conversely, if OSB prevails, the matter is closed. *Id.*

The *Crowe* Plaintiffs argue that OSB's procedures are deficient because (1) OSB does not provide an independently audited report[4] explaining how mandatory dues are calculated; and (2) OSB does not provide the required escrow procedure. We disagree.

First, to the extent the *Crowe* Plaintiffs urge us to require wholesale application of the procedures in *Hudson* in this context, we decline to do so. Nowhere does *Keller* require state bars to adopt procedures identical to or commensurate with those outlined in *Hudson*. 496 U.S. at 17 ("[A]n integrated bar *could* certainly meet its *Abood* obligation by adopting the *sort of procedures* described in *Hudson*.") (emphasis added). Indeed, the Court in *Keller* explicitly recognized that it lacked the "developed record" available in *Hudson* and accordingly held that "[q]uestions [of] whether one or more alternative procedures would likewise satisfy that obligation are better left for consideration upon a more fully developed record." *Id.* Thus, we decline to require an independently audited

4. Plaintiffs concede that OSB publishes information about its allocation of membership fees each year.

report and escrow solely because *Hudson* required as much.

Nor are we persuaded that adherence to *Hudson* is necessary--or even effective—to minimize infringement here. With respect to the independent audit, *Hudson* required this high-level explanation in the context of a union that affirmatively planned to engage in activities unrelated to collective bargaining for which it could only charge its members. 475 U.S. at 298. The Court obligated the union to provide a detailed statement of fees in advance so that nonmembers could object before being charged for impermissible activities. *Id.* at 305-07. *Hudson* fashioned the escrow requirement for the same reason--to "avoid the risk that [nonmembers'] funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." *Id.* at 305.

The *Crowe* Plaintiffs do not allege any similarly affirmative plans by OSB to use Bar members' dues for nongermane purposes. Indeed, OSB maintains a policy mandating that dues be used for germane activities and communications. *See, e.g.*, OSB Bylaws §§ 11.1, 12.1. As a practical matter, then, advance notice would not have offered additional protection against the alleged constitutional violations because OSB would have characterized all of its activities as germane.[5] Similarly,

5. We recognize that there is an argument to be made regarding the propriety of permitting OSB to define for itself what is germane. That is not before us. Moreover, such an argument does not alter the fact that advance notice in this case would not have prevented Plaintiffs' asserted constitutional injury.

an escrow requirement would not further minimize risk of infringement because, unlike in *Hudson*, the allegedly impermissible speech is only identifiable after the fact.

A refund, which Plaintiffs received here, is the only meaningful remedy for Plaintiffs' alleged injuries. Under the circumstances, OSB provides procedures adequately tailored to "minimize the infringement" of its members' First Amendment rights. *Hudson*, 475 U.S. at 303. Indeed, we have observed, albeit in dicta, that "allow[ing] 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" complies with *Keller*. *Morrow v. State Bar of California*, 188 F.3d 1174, 1175 (9th Cir. 1999). OSB clearly provides that process here.

In sum, nothing in *Keller* mandates a strict application of the *Hudson* procedures. Indeed, an application of such procedures here would not have provided greater protections for Plaintiffs. As alleged, the OSB's refund process is sufficient to minimize potential infringement on its members' constitutional rights. We therefore affirm the district court as to Plaintiffs' free speech claim and the adequacy of OSB's procedural safeguards with respect to protecting Plaintiffs' free speech rights.

B. *Free Association*

In Oregon, "a person may not practice law . . . unless the person is an active member of the Oregon State Bar." Or. Rev. Stat. § 9.160(1). Plaintiffs claim that because OSB engages in nongermane political activity like the *Bulletin*

statements, this membership requirement violates their freedom of association under the First and Fourteenth Amendments. We first must decide whether the district court erred by concluding this claim was foreclosed by existing precedent.

1. Does existing precedent foreclose Plaintiffs' Free Association claim?

In *Keller*, the Supreme Court expressly declined to address the "freedom of association claim" that attorneys "cannot be compelled to associate with an organization that engages in political or ideological activities beyond those for which mandatory financial support is justified under the principles of *Lathrop* and *Abood*." 496 U.S. at 17. *Keller* explained this unaddressed claim was "much broader . . . than [the claim] at issue in *Lathrop*." *Id.* (discussing *Lathrop v. Donohue*, 367 U.S. 820, 81 S. Ct. 1826, 6 L. Ed. 2d 1191 (1961)). Plaintiffs here insist they have presented precisely this yet-to-be-resolved free association claim. The district court concluded that *Lathrop* and *Keller* foreclosed Plaintiffs' association claim, so we examine those cases in turn.

In *Lathrop*, a plurality of the Supreme Court held:

> [T]he Supreme Court of Wisconsin, in order to further the State's legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries

> of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity.

367 U.S. at 843. On its own terms, *Lathrop*'s "free association" decision was limited to "compelled financial support of group activities," *id.* at 828; the Court emphasized that "[t]he only compulsion to which [Lathrop] ha[d] been subjected by the integration of the bar [wa]s the payment of the annual dues of $15 per year." *Id.* at 828 ("We therefore are confronted . . . *only* with a question of compelled financial support of group activities, *not with involuntary membership in any other aspect*.") (emphasis added).[6]

Lathrop also complained that the Wisconsin Bar engaged in lobbying. *See Lathrop*, 367 U.S. at 827. But the *Lathrop* plurality presumed, on the bare record before it, that all the bar's activities, including lobbying, related to "the regulatory program" of "improving the profession." *Id.* at 843. In other words, from what little the *Lathrop* plurality could divine, even the bar's lobbying was germane to the regulatory purposes justifying compelled financial association in the first place. *Id. Lathrop*'s

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6. The Supreme Court framed its decision in this way even though Lathrop's actual free association claim was *similar* to the broader one Plaintiffs raise here. *Lathrop*, 367 U.S. at 827 ("The core of appellant's argument is that he cannot constitutionally be compelled to join . . . an organization which . . . utilizes its property, funds and employees for the purposes of influencing legislation and public opinion toward legislation.").

ultimate conclusion was deliberately limited: a state "may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program." *Id.* At bottom, *Lathrop* merely permitted states to compel practicing lawyers to pay toward the costs of regulating their profession. *See Keller*, 496 U.S. at 9 (discussing "the limited scope of the question [*Lathrop*] was deciding").

Decades later, the Court revisited the issue in *Keller*. As discussed above, *Keller*, like *Lathrop*, concluded that states could compel practicing attorneys to pay dues to an integrated bar but that those dues could only "constitutionally fund activities germane to those goals" of "regulating the legal profession and improving the quality of legal services." *Id.* at 13-14. *Keller* then augmented the constitutional analysis, prohibiting integrated bars from funding with mandatory dues "activities having political or ideological coloration which are not reasonably related to the advancement of [its regulatory] goals." *Id.* at 15. In a later compelled speech case, the Supreme Court explained that "[t]he central holding in *Keller* . . . was that the objecting members were not required to give speech subsidies for matters not germane to the larger *regulatory* purpose which justified the required association." *United States v. United Foods, Inc.*, 533 U.S. 405, 414, 121 S. Ct. 2334, 150 L. Ed. 2d 438 (2001) (emphasis added).

Crucially, *Keller* expressly declined to address the petitioners' separate free association claim: "that they cannot be compelled to associate with an organization that engages in political or ideological activities beyond

those for which mandatory financial support is justified under the principles of *Lathrop* and *Abood*." *Keller*, 496 U.S. at 17. *Keller* acknowledged this was "a much broader freedom of association claim than was at issue in *Lathrop*." *Id.* (explaining that the *Keller* petitioners' free association claim challenged more than "their 'compelled financial support of group activities'" (quoting *Lathrop*, 367 U.S. at 828)). *Keller* and *Lathrop* thus speak for themselves: the Supreme Court has never resolved this broader free association claim based on compelled bar membership.

Nor have we. In *Morrow*, the "plaintiffs complain[ed] that by virtue of their mandatory State Bar membership, they [we]re associated in the public eye with viewpoints they d[id] not in fact hold . . . [which] violate[d] their First Amendment rights to free association." 188 F.3d at 1175 ("The issue is whether plaintiffs' First Amendment rights are violated by their compulsory membership in a state bar association that conducts political activities beyond those for which mandatory financial support is justified."). This is, essentially, the same claim Plaintiffs raise here. Just like the instant claim, the *Morrow* plaintiffs raised the "much broader freedom of association claim" that *Keller* and *Lathrop* left unresolved. *See Morrow*, 188 F.3d at 1177 ("Plaintiffs nevertheless contend that language in *Keller* leaves open the question whether membership alone may cause the public to identify plaintiffs with State Bar positions in violation of plaintiffs' First Amendment rights."). Nevertheless, we did not resolve that claim.

When we reached the *Morrow* plaintiffs' association claim, we essentially reformulated it: "[h]ere, plaintiffs

do not allege that they are compelled to associate in any way with the California State Bar's political activities." *Id.* By reformulating the claim, *Morrow* held that the claim before it was "no broader than that in *Lathrop*," and noted "[t]he claim reserved in *Keller* was a broader claim of violation of associational rights than was at issue in either *Lathrop* or in this case." *Id.* Our avoidance of this broader free association claim cannot preclude Plaintiffs' efforts to resolve it here.

Accordingly, Plaintiffs raise an issue that neither the Supreme Court nor we have ever addressed: whether the First Amendment tolerates mandatory membership itself—independent of compelled financial support—in an integrated bar that engages in nongermane political activities. In concluding that precedent foreclosed this claim, the district court erred.

2. Plaintiffs' free association claim is viable.

The First Amendment protects the basic right to freely associate for expressive purposes; correspondingly, "[t]he right to eschew association for expressive purposes is likewise protected." *Janus*, 138 S. Ct. at 2463 (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984)). Freedom from compelled association protects two inverse yet equally important interests. First, it shields individuals from being forced to "confess by word or act their faith" in a prescriptive orthodoxy or "matters of opinion" they do not share. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943). Second, because "[e]ffective

advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958), freedom from compelled association checks the power of "official[s], high or petty, [to] prescribe what [opinions] shall be orthodox." *Barnette*, 319 U.S. at 642. In short, like the "freedom of belief," freedom from compelled association "is no incidental or secondary aspect of the First Amendment's protections." *Abood*, 431 U.S. at 235.

Plaintiffs' freedom of association claim based on the April 2018 *Bulletin* statements is viable. Because the district court erred in dismissing this claim as foreclosed by our precedent, we reverse and remand.

On remand, there are a number of complicated issues that the district court will need to address. To begin, the district court will need to determine whether *Janus* supplies the appropriate standard for Plaintiffs' free association claim and, if so, whether OSB can satisfy its "exacting scrutiny standard." *Janus*, 138 S. Ct. at 2477; *see also, e.g., Fleck v. Wetch*, 139 S. Ct. 590, 202 L. Ed. 2d 423 (2018) (remanding a mandatory bar membership case for further consideration in light of *Janus*). Given that we have never addressed such a broad free association claim, the district court will also likely need to determine whether *Keller*'s instructions with regards to germaneness and procedurally adequate safeguards are even relevant to the free association inquiry. To avoid issuing an advisory opinion, we defer consideration of these issues at this stage of the case. *See Ball v. Rodgers*, 492 F.3d 1094, 1119 (9th

Cir. 2007) (declining to address an issue "at this time" until after the district court has an opportunity to review on remand in light of the court's instructions related to separate issues).

C. *Sovereign Immunity*

As set forth above, the district court adopted the magistrate's recommendation, in which the magistrate determined that OSB is "an arm of the state entitled to Eleventh Amendment Immunity." Although the magistrate cited several district court decisions and unpublished Ninth Circuit dispositions[7] that have alluded to this conclusion, this is a matter of first impression before this court. The Eleventh Amendment bars, with a few exceptions (*see, e.g., Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908)), federal suits against unconsenting states, their agencies, and their officers "regardless of the nature of the relief sought." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). "[N]ot all state-created or state-managed entities are immune from suit in federal court . . . . an entity may be organized or managed in such a way that it does not qualify as an arm of the state entitled to sovereign immunity." *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1423 (9th Cir. 1991).

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7. Of note, the district court cited to our unpublished disposition in *Eardley v. Garst*, 232 F.3d 894 (9th Cir. 2000). Our circuit rules prohibit citations to unpublished dispositions issued prior to January 1, 2007 except in limited circumstances, none of which are present here. *See* 9th Cir. R. 36-3.

Appendix E

In *State ex rel. Frohnmayer v. Oregon State Bar*, the Oregon Supreme Court held that OSB is a state agency as defined by its public records law. 307 Ore. 304, 767 P.2d 893, 895 (Or. 1989); *see also* Or. Rev. Stat. § 192.311(6) ("'State Agency' means any state officer, department, board, commission or court created by the Constitution or statutes of this state. . . ."). And we acknowledge that the Oregon Supreme Court "is the final authority on the 'governmental' status of the [Bar] for purposes of state law. But its determination . . . is not binding on [federal courts] when . . . [deciding] a federal question." *Keller*, 496 U.S. at 11. We think that *Frohnmayer* has answered, definitively, an important question: Is the Oregon State Bar a state actor? The Oregon Supreme Court has said "Yes," and that means that OSB is bound by those provisions of the U.S. Constitution that bind state actors, such as the First Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See, e.g., Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 717, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961). Finding that an entity is the "state" for purposes of the First Amendment or the Due Process and Equal Protection Clauses, however, is not the same as concluding that the entity is the "state" for purposes of the Eleventh Amendment. *See, e.g., Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.54, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978) (explaining there is no " basis for concluding that the Eleventh Amendment is a bar to municipal liability" in § 1983 suits). We recently discussed the different tests for state action and, as we will see, they are quite different from our consideration of factors required for sovereign immunity. *See Pasadena Republican Club v. W. Just. Ctr.*, 985 F.3d 1161, 2021 WL

235775, at *4 (9th Cir. 2021) (listing various tests for state action). Accordingly, *Frohnmayer* does not answer the question before us: Whether OSB is an arm of the state entitled to immunity under the Eleventh Amendment.

To determine whether OSB, which is "an instrumentality of the . . . government of the State of Oregon," OR. REV. STAT. § 9.010(2), is an arm of the state entitled to immunity, we apply the *Mitchell* framework. *See Mitchell v. L.A. Cmty. Coll. Dist.*, 861 F.2d 198, 201 (9th Cir. 1988). The *Mitchell* factors are as follows:

> [1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has the power to take property in its own name or only the name of the state, and [5] the corporate status of the entity. To determine these factors, the court looks to the way state law treats the entity.

Id. (citation omitted). OSB "bear[s] the burden of proving the facts that establish its immunity under the Eleventh Amendment." *ITSI TV Prods., Inc. v. Agric. Ass'ns*, 3 F.3d 1289, 1292 (9th Cir. 1993). We conclude that, on the whole, the factors weigh against finding OSB an "arm of the state" entitled to immunity.

1. Vulnerability of the State's treasury

The first factor—whether a money judgment would be satisfied out of state funds—weighs strongly against

immunity because Oregon law clearly answers this question in the negative. Or. Rev. Stat. § 9.010(6) ("No obligation of any kind incurred or created under this section shall be, or be considered, an indebtedness or obligation of the State of Oregon.").

In this circuit, "the source from which the sums sought by the plaintiff must come is the most important single factor in determining whether the Eleventh Amendment bars federal jurisdiction." *Durning*, 950 F.2d at 1424 (citing *Rutledge v. Ariz. Bd. of Regents*, 660 F.2d 1345, 1349 (9th Cir. 1981); *Ronwin v. Shapiro*, 657 F.2d 1071, 1073 (9th Cir. 1981); *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982)). Unlike the district court, we are not inclined to discount the importance of this factor.[8] Although it is true that "[t]he Eleventh Amendment does not exist solely . . . to prevent federal-court judgments that must be paid out of a State's treasury," *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996) (cleaned up), "the vulnerability of the State's purse [i]s the most salient factor in Eleventh Amendment determinations." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48, 115 S. Ct. 394, 130 L. Ed. 2d 245 (1994). Indeed, as the Supreme Court acknowledged in *Hess*, "the vast majority of Circuits . . . have generally accorded this factor dispositive weight." 513 U.S. at 49 (internal quotation marks omitted). We certainly have, *see Durning*, 950 F.2d at 1424 (citing cases).

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8. The district court suggested that this factor carries less weight in cases for primarily equitable relief. But even assuming such a distinction bears on the weight of this factor, it has little effect here as both complaints seek the return of OSB membership fees Plaintiffs have paid during the statute of limitations period.

Nor are we persuaded by the district court's observation that, "[d]espite the fact the Bar alone is responsible for any money damages it may incur. . . . [a]ny money judgment would come from the Bar's collection of fees that is made possible because the State authorized the Bar to collect those fees." Rather, we find OSB's collection of dues weighs against immunity, for like the bar in *Keller*, OSB's "principal funding comes, not from appropriations made to it by the legislature, but from dues levied on its members by the board of governors." 496 U.S. at 11.[9]

In short, Oregon law expressly disavows State financial responsibility for OSB, which is funded by membership fees. Therefore, the first and most important *Mitchell* factor weighs strongly against immunity.

2. Central government functions

Mitchell's second factor, "whether the entity performs central governmental functions," is a closer call, but we conclude that it weighs slightly against immunity. *Mitchell*, 861 F.2d at 201. To be sure, OSB, "an instrumentality of [Oregon's] Judicial Department," performs important government functions. Or. Rev. Stat. § 9.010(2). The district court detailed how the Bar, subject to the review and direction of the Oregon Supreme Court, manages

9. The district court further opined, in a footnote, that if Plaintiffs succeeded in eliminating mandatory membership fees, the regulatory costs to the State would correspondingly increase. These concerns, however well-intentioned, exceed the proper scope of this first factor's inquiry: Whether a money judgment would be satisfied out of state funds.

bar examinations and attorney admissions, discipline, resignations, and reinstatements; and how the Oregon Supreme Court approves changes to some OSB bylaws, adopts rules of professional conduct, reviews OSB's annual financials, and approves its budget for certain activities.

We agree that OSB "undoubtedly performs important and valuable services for the State by way of governance of the profession." *Keller*, 496 U.S. at 11. But like the integrated bar in *Keller*, "those services are essentially advisory in nature." *Id.* Integrated bars are "a good deal different from most other entities that would be regarded in common parlance as governmental agencies." *Id.* (internal quotation marks omitted). OSB "was created, not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession." *Id.* at 13. And although *Keller* never specifically addressed sovereign immunity, its analysis is pertinent and analogous to the immunity question here. *Keller* identified (after a lengthy discussion) constitutionally significant differences between an integrated bar and "traditional government agencies and officials." *Id.* On that basis, the Supreme Court rejected the argument that "the bar is considered a governmental agency" that is "exempted . . . from any constitutional constraints on the use of its dues." *Id.* at 10. Indeed, this was the principal basis on which the Supreme Court reversed the California Supreme Court in *Keller*. *Id.* at 11-13.

Moreover, the second *Mitchell* factor inquiry must be guided by "[t]he treatment of the entity under state law."

Durning, 950 F.2d at 1426. The *Gruber* Plaintiffs point out that under Oregon law, the Oregon Supreme Court—not OSB—makes final decisions on admitting attorneys, disciplining attorneys, and adopting rules of professional conduct. These same considerations convinced the Supreme Court in *Keller* that the California bar was not "the typical government official or agency," but rather a professional association that provided recommendations to the ultimate regulator of the legal profession. 496 U.S. at 11-12 (reversing the California Supreme Court's conclusion to the contrary). The Oregon Supreme Court exerts the same direct, regulatory control over Oregon attorneys. *See Ramstead v. Morgan*, 219 Ore. 383, 347 P.2d 594, 601 (Or. 1959) ("No area of judicial power is more clearly marked off . . . than the courts' power to regulate the conduct of the attorneys who serve under it."). Given OSB's similarity to the integrated bar in *Keller*, we find that the second *Mitchell* factor weighs slightly against immunity.[10] We note that even if we were inclined to discount *Keller* – which we cannot – and view OSB's functions as central government functions, the second *Mitchell* factor is, at most, a wash for OSB because the remaining four factors weigh against immunity.

10. Our pre-*Mitchell* decisions in *O'Connor v. State of Nevada*, 686 F.2d 749, 750 (9th Cir. 1982) and *Ginter v. State Bar of Nevada* 625 F.2d 829, 830 (9th Cir. 1980) do not require a contrary result. Neither opinion offers an explanation as to *why* the Nevada state bar is an arm of the state. More importantly, our present inquiry concerns Oregon's state bar – not Nevada's.

3. Power to sue or be sued

Oregon law unequivocally imparts to OSB the power to sue and be sued. Or. Rev. Stat. § 9.010(5). This factor thus militates against immunity. The district court nevertheless reasoned to the contrary because Oregon law elsewhere provides civil immunity to the Bar and its officials in the performance of their duties related to admissions, licensing, reinstatements, disciplinary proceedings, and client security fund claims. Or. Rev. Stat. §§ 9.537(2), 9.657. We are not persuaded that limited grants of immunity for specific functions cancel out the clear statutory grant of the power to sue or be sued. In any event, we have recognized that although this factor warrants "some consideration, [it] is entitled to less weight than the first two factors." *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 254 (9th Cir. 1992). As such, this factor weighs slightly against immunity.

4. Power to take property in its own name

It is clear that OSB may "enter into contracts and lease, acquire, hold, own, encumber, insure, sell, replace, deal in and with and dispose of real and personal property." Or. Rev. Stat. § 9.010(5). This factor accordingly weighs against immunity.

5. Corporate status

"[OSB] is a public corporation and an instrumentality of . . . the State." *Id.* § 9.010(2). But because the Bar appoints its own leaders, amends most of its bylaws, and

manages its internal affairs, OSB "is a corporate entity sufficiently independent from the state." *Durning*, 950 F.2d at 1428. Our decision in *Durning* is illustrative here. There, the Wyoming Community Development Authority was "a *body corporate* operating as a state instrumentality operated solely for the public benefit" and its board was government appointed. *Id.* at 1427 (emphasis in original). Yet *Durning* concluded the fifth *Mitchell* factor weighed against immunity. *Id.* at 1428. We reach the same conclusion here, for OSB is even more independent than the Authority in *Durning*. OSB's Board of Governors, for instance, are not government appointed. Or. Rev. Stat. § 9.025(1)(a). The Board appoints OSB's CEO. *Id.* § 9.055. And OSB "has the authority to . . . regulat[e] and manag[e] . . . [its own affairs]." *Id.* § 9.080(1).

* * *

In sum, three factors, including the first and most important, weigh against immunity and the other two still lean slightly against immunity. The *Mitchell* factors thus compel the conclusion that OSB is not an "arm of the state" entitled to immunity. We note that even viewing two factors as neutral, OSB has not met its burden to prove immunity.

IV. CONCLUSION

In light of the foregoing, the district court is **AFFIRMED IN PART, REVERSED IN PART**, and these cases are **REMANDED** for further proceedings consistent with this opinion.

Appendix E

VANDYKE, Circuit Judge, concurring in part and dissenting in part:

I agree with and concur in the entirety of the panel's opinion in these cases, except its resolution of the *Crowe* Plaintiffs' inadequate procedural safeguards claim based on *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S. Ct. 1066, 89 L. Ed. 2d 232 (1986).

At first blush, it's not obvious to me that the Bar's existing after-the-fact safeguards, which no one disputes fail to comply with the Supreme Court's direction in *Hudson*, adequately "prevent[] compulsory subsidization of ideological activity by" objecting bar members. *Id.* at 302 (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 237, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977)). As the panel's opinion correctly concludes, even though the Supreme Court seems to have moved on from the *Abood* rationale upon which its *Keller* decision relied, we must still follow *Keller* and thus reject Plaintiffs' free speech claims in these cases. But I don't think that requires us to go further and ignore that the Supreme Court has now concluded even *Hudson*'s minimal safeguards are not enough in other contexts. *See Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2482, 2486, 201 L. Ed. 2d 924 (2018) (concluding that "the *Hudson* notice in the present case and in others that have come before us do not begin to permit" objectors to protect their First Amendment rights, and overruling *Abood*).

Given these developments in the law, it is hard for me to see how something less than *Hudson*'s safeguards could suffice in the context of compulsory bar membership dues. *Keller* said that "an integrated bar could certainly meet its *Abood* obligation by adopting the sort of procedures described in *Hudson*," *Keller v. State Bar of California*, 496 U.S. 1, 17, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990), which of course we are bound by until the Supreme Court tells us otherwise. *See Agostini v. Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997). But *Keller* never addressed what procedures *less protective* than those required by *Hudson* would suffice. Even assuming some type(s) of less protective procedures might have been defensible before *Janus* overruled *Abood*, it doesn't strike me as very defensible now that the Supreme Court has told us *Hudson*'s procedures are no longer sufficient in other contexts. Following *Keller* and *Janus* and *Agostini*, it may be that *Hudson*'s requirements are now both a floor and a ceiling for integrated bars—at least until the Supreme Court gives us more guidance.

Ultimately, however, I would address the *Crowe* Plaintiffs' inadequate safeguards claim by not doing so in this appeal. We are remanding Plaintiffs' free association claim, and if on remand they prevail on that claim, the Bar will presumably need to change its bylaws, and maybe its entire structure. Because such alterations would likely change the procedures the *Crowe* Plaintiffs currently challenge, I don't think it is necessary that we review those procedures at this stage of the case. To avoid issuing an

advisory opinion, I would defer consideration of this issue. *See Ball v. Rodgers*, 492 F.3d 1094, 1119 (9th Cir. 2007) (declining to address a claim "at this time," and waiting until after the district court on remand reviews the claim anew in light of our court's instructions on separate issues that could affect that claim). Accordingly, I respectfully dissent on this singular claim.

APPENDIX F — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Appendix F

U.S. Constitution, amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix F

Oregon Revised Statute § 9.010
Attorneys deemed officers of court;
statutes applicable to Oregon State Bar

(1) An attorney, admitted to practice in this state, is an officer of the court.

(2) The Oregon State Bar is a public corporation and an instrumentality of the Judicial Department of the government of the State of Oregon. The bar is authorized to carry out the provisions of ORS 9.005 to 9.757.

(3) The bar is subject to the following statutes applicable to public bodies:

(a) ORS 30.210 to 30.250.

(b) ORS 30.260 to 30.300.

(c) ORS 30.310, 30.312, 30.390 and 30.400.

(d) The Oregon Rules of Civil Procedure.

(e) ORS 192.311 to 192.478.

(f) ORS 192.610 to 192.690.

(g) ORS 243.401 to 243.507.

(h) ORS 244.010 to 244.040.

(i) ORS 297.110 to 297.230.

(j) ORS chapters 307, 308 and 311.

(k) ORS 731.036 and 737.600.

(4) Except as provided in subsection (3) of this section, the bar is not subject to any statute applicable to a state agency, department, board or commission or public body unless the statute expressly provides that it is applicable to the Oregon State Bar.

(5) The Oregon State Bar has perpetual succession and a seal, and may sue and be sued. Notwithstanding the provisions of ORS 270.020 and 279.835 to 279.855 and ORS chapters 278, 279A, 279B and 279C, the bar may, in its own name, for the purpose of carrying into effect and promoting its objectives, enter into contracts and lease, acquire, hold, own, encumber, insure, sell, replace, deal in and with and dispose of real and personal property.

(6) No obligation of any kind incurred or created under this section shall be, or be considered, an indebtedness or obligation of the State of Oregon.

Appendix F

Oregon Revised Statute § 9.080
Duties of board; professional liability fund; quorum

(1) The state bar shall be governed by the board of governors, except as provided in ORS 9.136 to 9.155. The state bar has the authority to adopt, alter, amend and repeal bylaws and to adopt new bylaws containing provisions for the regulation and management of the affairs of the state bar not inconsistent with law. The board is charged with the executive functions of the state bar and shall at all times direct its power to serve the public interest by:

(a) Regulating the legal profession and improving the quality of legal services;

(b) Supporting the judiciary and improving the administration of justice; and

(c) Advancing a fair, inclusive and accessible justice system.

(2)(a)(A) The board has the authority to require all active members of the state bar engaged in the private practice of law whose principal offices are in Oregon to carry professional liability insurance and is empowered, either by itself or in conjunction with other bar organizations, to do whatever is necessary and convenient to implement this provision, including the authority to own, organize and sponsor any insurance organization authorized under the laws of the State of Oregon and to establish a lawyer's

professional liability fund. This fund shall pay, on behalf of active members of the state bar engaged in the private practice of law whose principal offices are in Oregon, all sums as may be provided under such plan which any such member shall become legally obligated to pay as money damages because of any claim made against such member as a result of any act or omission of such member in rendering or failing to render professional services for others in the member's capacity as an attorney or caused by any other person for whose acts or omissions the member is legally responsible.

> (B) The board has the authority to assess each active member of the state bar engaged in the private practice of law whose principal office is in Oregon for contributions to the professional liability fund and to establish the date by which contributions must be made.
>
> (C) The board has the authority to establish definitions of coverage to be provided by the professional liability fund and to retain or employ legal counsel to represent the fund and defend and control the defense against any covered claim made against the member.
>
> (D) The board has the authority to offer optional professional liability coverage on an underwritten basis above the minimum required coverage limits provided under the professional liability fund, either through the fund, through a separate fund or through any insurance

organization authorized under the laws of the State of Oregon, and may do whatever is necessary and convenient to implement this provision. Any fund so established shall not be subject to the Insurance Code of the State of Oregon.

(E) Records of a claim against the professional liability fund are exempt from disclosure under ORS 192.311 to 192.478.

(b) For purposes of paragraph (a) of this subsection, an attorney is not engaged in the private practice of law if the attorney is a full-time employee of a corporation other than a corporation incorporated under ORS chapter 58, the state, an agency or department thereof, a county, city, special district or any other public or municipal corporation or any instrumentality thereof. However, an attorney who practices law outside of the attorney's full-time employment is engaged in the private practice of law.

(c) For the purposes of paragraph (a) of this subsection, the principal office of an attorney is considered to be the location where the attorney engages in the private practice of law more than 50 percent of the time engaged in that practice. In the case of an attorney in a branch office outside Oregon and the main office to which the branch office is connected is in Oregon, the principal office of the attorney is not considered to be in Oregon unless the attorney engages in the private practice of law in Oregon more than 50 percent of the time engaged in the private practice of law.

(3) The board may appoint such committees, officers and employees as it deems necessary or proper and fix and pay their compensation and necessary expenses. At any meeting of the board, two-thirds of the total number of members then in office shall constitute a quorum. It shall promote and encourage voluntary county or other local bar associations.

(4) Except as provided in this subsection, an employee of the state bar shall not be considered an "employee" as the term is defined in the public employees' retirement laws. However, an employee of the state bar may, at the option of the employee, for the purpose of becoming a member of the Public Employees Retirement System, be considered an "employee" as the term is defined in the public employees' retirement laws. The option, once exercised by written notification directed to the Public Employees Retirement Board, may not be revoked subsequently, except as may otherwise be provided by law. Upon receipt of such notification by the Public Employees Retirement Board, an employee of the state bar who would otherwise, but for the exemption provided in this subsection, be considered an "employee," as the term is defined in the public employees' retirement laws, shall be so considered. The state bar and its employees shall be exempt from the provisions of the State Personnel Relations Law. No member of the state bar shall be considered an "employee" as the term is defined in the public employees' retirement laws, the unemployment compensation laws and the State Personnel Relations Law solely by reason of membership in the state bar.

Appendix F

Oregon Revised Statute § 9.160
Practice of law by persons other than active members prohibited

(1) Except as provided in this section, a person may not practice law in this state, or represent that the person is qualified to practice law in this state, unless the person is an active member of the Oregon State Bar.

(2) Subsection (1) of this section does not affect the right to prosecute or defend a cause in person as provided in ORS 9.320.

(3) An individual licensed under ORS 696.022 acting in the scope of the individual's license to arrange a real estate transaction, including the sale, purchase, exchange, option or lease coupled with an option to purchase, lease for a term of one year or longer or rental of real property, is not engaged in the practice of law in this state in violation of subsection (1) of this section.

(4) A title insurer authorized to do business in this state, a title insurance agent licensed under the laws of this state or an escrow agent licensed under the laws of this state is not engaged in the practice of law in this state in violation of subsection (1) of this section if, for the purposes of a transaction in which the insurer or agent provides title insurance or escrow services, the insurer or agent:

(a) Prepares any satisfaction, reconveyance, release, discharge, termination or cancellation of a lien, encumbrance or obligation;

(b) Acts pursuant to the instructions of the principals to the transaction as scrivener to fill in blanks in any document selected by the principals;

(c) Presents to the principals to the transaction for their selection any blank form prescribed by statute, rule, ordinance or other law; or

(d) Presents to the principals to the transaction for their selection a blank form prepared or approved by a lawyer licensed to practice law in this state for one or more of the following:

(A) A mortgage.

(B) A trust deed.

(C) A promissory note.

(D) An assignment of a mortgagee's interest under a mortgage.

(E) An assignment of a beneficial interest under a trust deed.

(F) An assignment of a seller's or buyer's interest under a land sale contract.

(G) A power of attorney.

(H) A subordination agreement.

(I) A memorandum of an instrument that is to be recorded in place of the instrument that is the subject of the memorandum.

(5) In performing the services permitted in subsection (4) of this section, a title insurer, a title insurance agent or an escrow agent may not draft, select or give advice regarding any real estate document if those activities require the exercise of informed or trained discretion.

(6) The exemption provided by subsection (4) of this section does not apply to any acts relating to a document or form that are performed by an escrow agent under subsection (4)(b), (c) or (d) of this section unless the escrow agent provides to the principals to the transaction a notice in at least 12-point type as follows:

YOU WILL BE REVIEWING, APPROVING AND SIGNING IMPORTANT DOCUMENTS AT CLOSING. LEGAL CONSEQUENCES FOLLOW FROM THE SELECTION AND USE OF THESE DOCUMENTS. THESE CONSEQUENCES AFFECT YOUR RIGHTS AND OBLIGATIONS. YOU MAY CONSULT AN ATTORNEY ABOUT THESE DOCUMENTS. YOU SHOULD CONSULT AN ATTORNEY IF YOU HAVE QUESTIONS OR CONCERNS ABOUT THE TRANSACTION OR ABOUT THE DOCUMENTS. IF YOU WISH TO REVIEW TRANSACTION DOCUMENTS THAT YOU HAVE NOT YET SEEN, PLEASE CONTACT THE ESCROW AGENT.

(7) The exemption provided by subsection (4) of this section does not apply to any acts relating to a document

or form that are performed by an escrow agent under subsection (4)(b), (c) or (d) of this section for a real estate sale and purchase transaction in which all or part of the purchase price consists of deferred payments by the buyer to the seller unless the escrow agent provides to the principals to the transaction:

(a) A copy of any proposed instrument of conveyance between the buyer and seller to be used in the transaction;

(b) A copy of any proposed deferred payment security instrument between the buyer and seller to be used in the transaction; and

(c) A copy of any proposed promissory note or other evidence of indebtedness between the buyer and seller to be used in the transaction.

(8) The notice and copies of documents that must be provided under subsections (6) and (7) of this section must be delivered in the manner most likely to ensure receipt by the principals to the transaction at least three days before completion of the transaction. If copies of documents have been provided under subsection (7) of this section and are subsequently amended, copies of the amended documents must be provided before completion of the transaction.

(9) Failure of any person to comply with the requirements of subsections (3) to (8) of this section does not affect the validity of any transaction and may not be used as a basis to challenge any transaction.

Appendix F

Oregon Revised Statute § 9.191
Annual fees; professional liability assessments

(1) Except as provided in subsection (2) of this section, the annual membership fees to be paid by members of the Oregon State Bar shall be established by the Board of Governors of the Oregon State Bar, and each year notice of the proposed fees for the coming year shall be published and distributed to the membership not later than 20 days before the annual meeting of the house of delegates. Any increase in annual membership fees over the amount established for the preceding year must be approved by a majority of delegates of the house of delegates voting thereon at the annual meeting of the house of delegates. The board shall establish the date by which annual membership fees must be paid.

(2) The board shall establish prorated membership fees payable for the year that a member is admitted to the practice of law in this state. If the new member is admitted on or before the date established by the board for the payment of annual membership fees under subsection (1) of this section, the new member must pay the full annual membership fees established under subsection (1) of this section.

(3) In establishing annual membership fees, the board shall consider and be guided by the anticipated financial needs of the state bar for the year for which the fees are established, time periods of membership and active or inactive status of members. Annual membership fees may include any amount assessed under any plan

for professional liability insurance for active members engaged in the private practice of law whose principal offices are in Oregon as provided in ORS 9.080(2).

AFFIDAVIT OF SERVICE

SUPREME COURT OF THE UNITED STATES

No. 24-

----------X

DANIEL Z. CROWE AND OREGON CIVIL LIBERTIES ATTORNEYS, AN OREGON NONPROFIT CORPORATION,

Petitioners,

v.

OREGON STATE BAR, A PUBLIC CORPORATION, *et al.*,

Respondents,

----------X

STATE OF NEW YORK)

COUNTY OF NEW YORK)

I, Ann Tosel, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by Counsel of Record for *Petitioners.*

That on the 21st day of March, 2025, I served the within *Petition for a Writ of Certiorari* in the above-captioned matter upon:

Kristin Asai
Holland & Knight, LLP
601 SW Second Avenue
Suite 1800
Portland, OR 97204
Firm: 503-243-2300
Direct: 503-517-2948
Email: kristin.asai@hklaw.com

by sending three copies of same, addressed to each individual respectively, through Priority Mail. An electronic version was also served by email to each individual.

That on the same date as above, I sent to this Court forty copies of the within *Petition for a Writ of Certiorari* and three hundred dollar filing fee

check through the Overnight Next Day Federal Express, postage prepaid. In addition, the brief has been submitted through the Court's electronic filing system.

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 21st day of March, 2025.

Ann Tosel

Ann Tosel

Sworn to and subscribed before me
this 21st day of March, 2025.

Mariana Braylovskiy

MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026

SUPREME COURT OF THE UNITED STATES

No. 24-

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DANIEL Z. CROWE AND OREGON CIVIL LIBERTIES ATTORNEYS, AN OREGON NONPROFIT CORPORATION,

Petitioners,

v.

OREGON STATE BAR, A PUBLIC CORPORATION, *et al.*,

Respondents,

----------X

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 7,259 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 21st day of March, 2025.

Ann Tosel

_____

Ann Tosel

Sworn to and subscribed before me
on this 21st day of March, 2025.

Mariana Braylovskiy

MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026