Case No. 24-4054

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AMY POMEROY,

Plaintiff-Appellant

v.

UTAH STATE BAR, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the District of Utah
Case No. 2:21-cv-00219-TC-JCB, Hon. Tena Campbell, presiding

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The Utah State Bar ("USB") engages in nongermane activity as defined by *Keller*, and clarified in *Janus*. USB does this through its publications and legislative advocacy. Because it engages in these activities, the legal requirement that Appellant join and fund USB fails exacting scrutiny and thereby violates her rights to freedom of association and speech.

Appellees (collectively "USB") argue that the district court applied the "correct germaneness standard," which they say is a rational basis standard. *See* Appellees' Brief ("Ans. Br.") at 20. And the court did indeed apply that test to Appellant's compelled speech and association claims, concluding that all of the bar's conduct was reasonably related to *Keller*'s twin goals of regulating lawyers and improving the quality of legal services. *Keller v. State Bar of Cal.*, 496 U.S. 1, 16 (1990).

But USB, and the district court, are wrong.

First, the applicable level of scrutiny is exacting scrutiny, not rational basis. The Supreme Court made that clear in *Janus v. AFSCME*, 585 U.S. 878, 916 (2018), and that Court and other circuit courts have consistently applied exacting scrutiny to cases involving freedom of association. *See, e.g., Knox v. SEIU*, 567 U.S. 298, 310 (2012); *Crowe v. Oregon State Bar*, 112 F.4th 1218, 1238-39 (9th Cir. 2024); *Boudreaux v. Louisiana State Bar Ass'n*, 86 F.4th 620, 636–38 (5th Cir.

2023); *McDonald v. Longley*, 4 F.4th 229, 248-49 (5th Cir. 2021); *see also Schell v. Chief J. and JJ. of Okla. Sup. Ct.*, 11 F.4th 1178, 1190, 1194 (10th Cir. 2021) (recognizing exacting scrutiny as the standard in *Janus* and *Knox* and that neither *Lathrop* nor *Keller* address the "broad freedom of association challenge to mandatory bar membership where at least some of a state bar's actions might not be germane to regulating the legal profession and improving the quality of legal services in the state").

Second, after conducting its own *de novo* review of the bar's conduct, this Court should conclude—like the Fifth Circuit did in *Boudreaux* and *McDonald*, *supra*, and as the Ninth Circuit did in *Crowe*, *supra*—that the bar's nongermane conduct means that it fails exacting scrutiny and cannot force Appellant ("Pomeroy") to join and fund USB.

Third, because Pomeroy's First Amendment rights have been violated, this Court should reverse the district court and prohibit the application of Utah laws requiring Appellant to be a member of USB.

ARGUMENT

I. *Janus* clarifies how to apply *Keller* in a freedom of association claim; it requires exacting scrutiny.

USB misunderstands the relationship between *Janus* and *Keller*. They also misunderstand what this Court said about those decisions in *Schell* and what standard applies in this case. They argue that "germaneness" alone, as determined

by a mere rationality analysis, is sufficient to assess the constitutional issues involved here. That is wrong. If it were true, USB could engage in any conduct it deems "reasonably related" to regulating lawyers and improving the quality of legal services. But not even *Keller* allows that; it said the California bar could require attorneys to pay "for activities *connected with* disciplining members of the Bar or proposing ethical codes for the profession," 496 U.S. at 16 (emphasis added)—not "rationally related to"—and it specified that the bar could not spend compulsory dues to "disapprove[]statements of a United States senatorial candidate regarding court review of a victim's bill of rights," or "oppose[] federal legislation limiting federal-court jurisdiction over abortions," *id.* at 15, even though these are arguably "rationally related" to legal practice.

The lenient rational basis test would provide virtually no safeguards for Pomeroy's constitutional rights because, as demonstrated in mandatory bar jurisdictions like Louisiana, Oregon, and Texas, the bar will *always* claim that everything it does is beneficent and "germane." *See Crowe*, 112 F.4th at 1237 (statements associating white nationalism and violence with President Trump and his supporters); *Boudreaux*, 86 F.4th at 637-38 (display of a "pride flag" and posts about eating right); *McDonald*, 4 F.4th at 251 (lobbying at the legislature about bills concerning subjects unrelated to regulating the legal profession). That is

probably why the Supreme Court has made clear that exacting scrutiny, *not* rational basis, applies.

A. USB wrongly cast the test as a rational basis test.

USB argues that *Janus* is irrelevant because it did not expressly overrule *Keller* and that *Keller* alone is sufficient to resolve Pomeroy's freedom of association claim. *See* Ans. Br. at 14-18. But Pomeroy need not show that *Keller* was overruled to prevail.[1] *Janus* clarifies *Keller* and establishes the standard for the freedom of association claim *Keller* did not address. *See* Opening Br. at 32-35. It says exacting scrutiny applies. *Janus*, 585 U.S. at 916.

Although *Janus* did not expressly overrule *Keller*, it did overrule *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which was the case on which *Keller* relied. *Janus* called *Abood* "poorly reasoned" and "inconsistent with other First Amendment cases and has been undermined by more recent decisions." *Janus*, 585 U.S. at 886; *see also Schell*, 11 F.4th at 1189 (same). *Abood* held that public sector employees could be forced to pay fees to a union, but that the unions could not spend such fees on political speech without giving dissenters the

[1] *Janus* does, however, place *Keller* on shaky foundations. *See Jarchow v. State Bar of Wis.*, 140 S. Ct. 1720, 1720 (2020) (Thomas, J., dissenting from denial of certiorari) ("Our decision to overrule *Abood* casts significant doubt on *Keller*."); *McDonald*, 4 F.4th at 243 n.14, *cert denied*, *McDonald v. Firth*, 142 S. Ct. 1442 (2022) ("*Janus* . . . cast[s] doubt on *Lathrop* and *Keller*."); *File v. Martin*, 33 F.4th 385, 392 (7th Cir. 2022), *cert. denied*, *File v. Hickey*, 143 S. Ct. 745 (2023) ("The tension between *Janus* and *Keller* is hard to miss.").

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 *Janus* Court's decision to overrule *Abood* cast significant doubt on *Keller*'s continued viability.

Furthermore—and contrary to USB's assertion on page 16 of its Brief—this Court recognized in *Schell* that *Keller* did ***not*** address the freedom of association challenge, only the compelled speech challenge. *Schell*, 11 F.4th at 1194; *see also Crowe*, 112 F.4th at 1228-29; *Crowe v. Oregon State Bar*, 989 F.3d 714, 724-29 (9th Cir. 2021) (noting that *Keller* "expressly declined to address the … free association claim").[2] *Janus does* address that claim, as do later authorities relying on *Janus*, including other circuits addressing mandatory bars, like *Crowe*, *Boudreaux*, and *McDonald*. *Janus*, therefore, is authoritative..

[2] The Ninth Circuit recognized that *Lathrop v. Donohue*, 367 U.S. 820 (1961) (plurality opinion), provides no guidance. That case resulted in a fragmented plurality decision that did not squarely resolve the question. Rather, it decided "only … a question of compelled financial support of group activities, ***not … involuntary membership in any other aspect***." *Id.* at 828 (emphasis added). The precise 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).

Contrary to what USB argues (Ans. Br. at 15), Pomeroy has not asserted that a court cannot examine whether the bar's conduct is "germane" to the state's interest in regulating lawyers and improving the quality of legal services. Rather, she maintains that inquiry must be done through exacting scrutiny. Exacting scrutiny requires more than a reasonable relationship to *Keller*'s goals. *See McDonald*, 4 F.4th at 246 (citing *Knox*, 567 U.S. at 310).

B. Exacting Scrutiny means the "germaneness" examination must focus narrowly on conduct supporting a proven state interest, without regard to the bar's self-serving opinions.

As USB concedes, this Court applies *de novo* review, drawing every reasonable inference from the record in Pomeroy's favor. Ans. Br. at 13. Whether the bar's activities were germane ultimately is a question of law. *See Fell v. Indep. Ass'n of Cont'l Pilots*, 26 F. Supp.2d 1272, 1278-79 (D. Colo. 1998); *Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415, 1423-24 (D.C. Cir. 1997).

Moreover, when a mandatory bar's activities implicate the First Amendment, like through its speech and lobbying, "[t]he burden is on the [bar] to show that the expenditures were germane," *see Fell*, 26 F. Supp.2d 1278, not on Pomeroy to show they were not. That means this Court can examine the legal implications of the bar's conduct afresh, applying exacting scrutiny, without deference to the bar's self-serving opinion of the merits of its own behavior.

1. Federal courts do not defer to state bars' germaneness assessments.

USB argues that courts may "defer[] to the state bar's 'reasonable belief' that its activities served the legitimate purpose of 'improving the quality of legal service available to the people of the State.'" Ans. Br. at 22 (cleaned up). But this certainly is not true. Pomeroy knows of no other context in which a *federal* court would defer to a *state* agency's "assessment" of a question of federal constitutional law. This Court owes no deference to USB's opinions about the germaneness of its own activities.

As this Circuit has recognized, "an agency's litigating position is not entitled to *Chevron* deference because '[i]t would exceed the bounds of fair play to allow an institutionally self-interested advocacy position, which may properly carry a bias, to control the judicial outcome.'" *S. Utah Wilderness All. v. Dabney*, 222 F.3d 819, 828 (10th Cir. 2000) (quoting Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 Yale J. on Reg. 1, 60–61 (1990)); *see also Nat'l Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1571 (D.C. Cir. 1987) ("[I]f the agency itself were an interested party to the agreement, deference might lead a court to endorse self-serving views that an agency might offer."); *see also Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 401 (2024) ("Interpretive issues arising in connection with a regulatory scheme often 'may fall

more naturally into a judge's bailiwick' than an agency's." (internal citation omitted)).

The only case USB cites for its deference argument (other than the muddled plurality opinion that is *Lathrop*) is *Kingstad v. State Bar of Wisconsin*, 622 F.3d 708 (7th Cir. 2010). But *Kingstad* predates and conflicts with *Janus*. *Kingstad* held that a state bar's campaign to "improve the public image of lawyers" was "germane to improving the quality of legal services." *Id.* at 718-19. But this "highly attenuated" chain of reasoning "drains [the germaneness inquiry] of any real meaning." *Id.* at 724, 722 (Sykes, J., dissenting from denial of rehearing en banc).

More fundamentally, the notion of deferring to a state bar's own assessment of germaneness is antithetical to the approach *Keller* and *Janus* call for in an associational-freedom challenge. The bar cannot be the judge in its own case. That is why courts have repeatedly rejected the notion of a "deferential test" where core First Amendment rights are at stake. *See, e.g.*, *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988).

True, a category like "improving the quality of legal services" can sometimes be difficult to define precisely outside the context of the correlated goal of "regulating lawyers." And courts have recognized that it "will not always be easy to discern" "[p]recisely where the line falls." *Keller*, 496 U.S. at 15.

Recognizing these difficulties—in its pre-*Janus* decisions—the Supreme Court provided state bars some leeway by defining germaneness as a matter of what is "reasonably related." *Id.* at 15. But to go further, and defer to a bar's own, self-interested assessment of an already-lenient test, would essentially give double deference, and in a realm (First Amendment rights) where deference to the government is singularly inappropriate. *See Charles v. City of L.A.*, 697 F.3d 1146, 1157 (9th Cir. 2012) ("Deference to the 'reasonable' legal judgment of [agency] officials is thus particularly inappropriate in the First Amendment context.").

2. Exacting scrutiny provides a limiting principle to the germaneness question because it focuses the inquiry.

The germaneness inquiry, as used in *Keller*, clarified in *Janus*, and demonstrated in *McDonald*, *Boudreaux*, and *Crowe*, is rigorous. The "reasonableness" standard that *Lathrop* invoked and *Keller* reiterated was repudiated not only in *Janus*, 138 S. Ct. at 2465, but in earlier cases such as *Harris v. Quinn*, 573 U.S. 616, 647–48 (2014).

Even if that were not true, the pre-*Janus* and pre-*Keller* cases Appellees cite are neither helpful nor authoritative as to the germaneness analysis.

In *Romero v. Colegio de Abogados de Puerto Rico*, a pre-*Janus* decision, the First Circuit noted that "even germane, non-ideological activities [are] subject[] to additional First Amendment scrutiny," and found the bar's compulsory life

insurance benefit nongermane. 204 F.3d 291, 300-01 (1st Cir. 2000) (citations omitted).

And USB's use of the Seventh Circuit's pre-*Janus* opinion in *Kingstad*, *supra*, to claim that conduct can be nongermane only if it is "completely divorced" from permissible purposes is entirely misleading. There, the court was commenting upon a concurrence in a prior decision that clarified that nongermane activities ***should be identified because they cannot be supported by mandatory dues***. 622 F.3d at 717.

In addition, as this Court recognized in *Schell*, *Keller* also "declined to address" the question of whether the state can compel an attorney to *join* a bar association as a condition of practicing law. *Schell*, 11 F.4th at 1194; *Crowe*, 989 F.3d at 727; *see also Keller*, 496 U.S. at 17. *Keller* also never discussed whether the tailoring of the germaneness inquiry with respect to compelled speech differs from, or is the same as, the tailoring required for the associational rights inquiry. *Id*.

The right answer is that the analysis should be *narrower*, because an associational injury *cannot be cured* through opt-out or refund procedures. *See Taylor v. Buchanan*, 4 F.4th 406, 410 (6th Cir. 2021) (Thapar, J., concurring) (explaining that unlike speech claim based on dues paying an "association claim could go forward even if the bar association allowed lawyers to opt out of funding

ideological activity."). A claim of compelled speech through mandatory *subsidization* can be remedied through a refund. But no such remedy is available for a free *association* claim.

Fortunately, *Janus* and other recent free-association cases answer these questions and require exacting scrutiny. Under exacting scrutiny, compelled association in an integrated bar is permissible only in the exceedingly rare situation "when [compelled association] serve[s] a 'compelling state interest … that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Knox*, 567 U.S. at 310 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)).

Applying that to the mandatory bar context, both compulsory membership *and* compulsory funding must serve a compelling state interest that could *not* be achieved through means significantly less restrictive of associational freedoms. *Janus*, 585 U.S. at 894.

Contrary to USB's claim on page 24 of their Brief, exacting scrutiny places the burden on *USB* to show much more than its activities are somehow "reasonably related" to *Keller*'s dual goals. *Citizens for Responsible Gov't State Pol. Action Comm. v. Davidson*, 236 F.3d 1174, 1199 (10th Cir. 2000); *Jones v. Jegley*, 947 F.3d 1100, 1105 (8th Cir. 2020).

3. There is no *de minimis* exception to the constitutional rule that bar associations can *only* force membership if the bar association engages *only* in germane activities.

Citing *Lathrop* and *Schell*, USB contends that the district court was correct to invoke a *de minimis* exception as an alternate ground for denying Pomeroy summary judgment. Ans. Br. at 51-53. But those cases do not support such an exception.

First, a *de minimis* exception would be unmanageable and easily manipulable. For example, a bar association could support a bill that restricts abortion access, or release a statement calling for a repeal of the Second Amendment, or endorse a nuclear weapons moratorium, or even a political candidate—as long as those activities did not make up the "bulk" of what the bar does. That, however, would directly contradict *Keller*, which 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. Nothing in *Keller* suggested that mandatory subsidization can survive constitutional scrutiny just because the bar does a lot of other, non-infringing things.[3] One reason why is because it would

[3] On the contrary, every case from *Abood* to *Keller* to *Janus* has recognized that people cannot be constitutionally forced to "affirm or support"—or to subsidize—"beliefs with which they disagree[]," even if the amount in question falls short of the "bulk" of the perpetrator's activities. *Janus*, 138 S. Ct. at 2471. For example, in *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 870 (1998), only about 19 percent of the union's actions were "nongermane." Yet the Court still held that objecting workers were entitled to a proportionate refund of their dues.

be impossible for a court to determine what constitutes a "bulk." And requiring a plaintiff to prove that the violations of his or her constitutional rights exceeded some unknown quantitative or qualitative threshold of the bar's overall activity would create an unreasonable, if not impossible, standard for a plaintiff to meet.

Second, and more importantly, there is no *de minimis* exception to the Constitution. *Boudreaux*, 86 F.4th at 636 ("we decline to recognize a *de minimis* exception to the rule from *Keller* and *McDonald*."); *McDonald*, 4 F.4th at 248-49; *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001) ("There is no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification"); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

Lathrop did not establish any *de minimis* threshold. It "merely permitted states to compel practicing lawyers to pay toward the costs of regulating their profession." *See Crowe*, 989 F.3d at 728. *Lathrop* did not even address the broad freedom of association claim at issue here. *See id.* at 727–28; *McDonald*, 4 F.4th at 244.

The Fifth Circuit squarely rejected the argument for a *de minimis* exception in *McDonald* and *Boudreaux*. In *McDonald*, the Texas Bar argued that "[l]egislative activities constitute a miniscule portion of the Bar's operations"

constituting "just 0.34% of the Bar's proposed budget," *McDonald v. Longley*, No. 20-50448, 2020 WL 4436953 at *22 (5th Cir., Jul. 30, 2020), but the Fifth Circuit explained that "[w]hat is important" for purposes of a freedom-of association claim "is that *some* of the [Bar's] legislative program is non-germane." 4 F.4th at 248 (emphasis in original). "Some" in this context does not mean "major activity," a term the Fifth Circuit did not use. It means simply that a person cannot be forced to join an association, or fund it, unless the state proves that its "compelling state interest[s] … cannot be achieved through means significantly less restrictive of associational freedoms." *Janus*, 138 S. Ct. at 2465 (citation omitted).

In *Boudreaux*, the Louisiana bar argued that even if it engaged in nongermane speech, that speech was *de minimis*. The Fifth Circuit again rejected that argument, and held there was no "*de minimis* exception to the rule from *Keller* and *McDonald*." 86 F.4th at 636.

Finally, *Schell* provides no support for a *de minimis* exception. *Schell* was an appeal from a dismissal for failure to state a claim. 11 F.4th at 1186. It did not weigh or quantify any evidence in determining whether Mr. Schell properly pleaded his claims, and never found that he suffered only a *de minimis* injury. USB grasps at a footnote in *Schell* that merely notes a "potential open issue" based on dicta from *Lathrop*, which, as stated above, provides no authoritative support

for such a singularly unique exception to the constitutional rule. *See* Opening Br. at 44-45; Ans. Br. 52-53.

II. USB's publications are nongermane and any "disclaimer" does not insulate them from constitutional scrutiny.

For reasons set forth in Appellant's Opening Brief, the district court erred in concluding that the *Utah State Bar Journal* articles were germane. Opening Br. at 36-42. But the notion that the district court could rely upon a boilerplate disclaimer to insulate that publication from the constitutional rule is also wrong.

A. USB's boilerplate disclaimer does not license the publication of nongermane material on Appellant's dime.

Central to this case is whether USB can force Pomeroy to pay for the publication of matter that is not germane to regulating the practice of law or improving the quality of legal services—indeed, to force her to pay for publications she finds repugnant. In *Boudreaux*, the Fifth Circuit emphasized that the constitutional test "is not … whether speech is 'law-related,' but whether it is related to '*regulating* the legal profession and *improving the quality* of legal services.'" 86 F.4th at 634. The court applied that test to articles that the Louisiana bar simply shared online from other publications—including an article about student loan debt forgiveness related to lawyers and Tweets with articles about lawyer wellness. *Id.* It said those were nongermane, and consequently that forcing Louisiana attorneys to fund such publications (or sharing) violated the

plaintiffs' free association rights. The court was "chary of any theory of germaneness that turns a mandatory bar association into a mandatory news mouthpiece. If a mandatory bar association can say or promote anything 'of concern to lawyers,' it is difficult to see any limit to what the LSBA could say or promote." *Id.* at 635. Thus, even though the publications in that case were relatively innocuous, the court still found them to be a violation. It did not say the Louisiana bar could just solve the problem by publishing a rote disclaimer.

Nor did the Ninth Circuit hold otherwise in *Crowe*. It did suggest that a disclaimer might cure a constitutional violation, but that was not the holding, and the court declined to direct any remedy in its opinion. 112 F.4th at 1240. And, although *McDonald* mentioned a similar disclaimer in the *Texas Bar Journal*, the challenge in that case concerned whether the bar could publish a periodical at all, not whether it could amplify certain viewpoints through the publication of specific articles, which is at issue here.

Moreover, a mere boilerplate disclaimer *cannot* cure Pomeroy's associational right to be free from compulsory membership in an organization that forces her to fund and be counted as supporting nongermane speech. This marks an important difference in freedom of association and freedom of speech. While *compelled speech* cases sometimes turn on whether the public believes the plaintiff endorses the speech at issue—because if the public doesn't think the person

endorses the speech, then the person's right not to speak hasn't been violated—but no court has ever said that *freedom of association* injuries turn on the perceptions of third parties. Such a holding would effectively create a new disclaimer exception to free association.

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), *overruled on other grounds*, *Brandenburg v. Ohio*, 395 U.S. 44 (1969)—that is, with democratic values such as persuasion, cultural exchange, and "the marketplace of ideas." *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188 (2007). Thus the right not to speak is a form of expression important for public debate. But freedom of *association* is more concerned with the individual conscience. *See* Patarick 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 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 associates the member with the organization or whether the member is free to vocalize her own opinions.

That explains why *Janus* found a violation of freedom of association even though Mr. Janus and the union were free to distance themselves from each other with disclaimers. It also explains why the Third Circuit rejected the disclaimer theory in freedom of association cases in *Circle School v. Pappert*, 381 F.3d 172, 182 (3d Cir. 2004). That case concerned a law that forced private schools to require students to recite the flag salute, 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 *associational* rights. 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, because that theory would mean that "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.*

The Supreme Court has affirmed that the "impression of endorsement" theory lacks relevance in the *associational* rights context. It is used only in *free speech* cases such as *United States v. United Foods, Inc*., 533 U.S. 405 (2001), and

Glickman v. Wileman Brothers & Elliott, 521 U.S. 457 (1997), where the Court considered whether a dissenter might be wrongly associated with the message.

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).

Finally, Appellees' attempt to analogize this case to cases involving regulation of public forums is misplaced. Ans. Br. at 29.[4] This is not a public forum case at all. Pomeroy's argument is that compelled membership results in her subsidizing nongermane speech *and* that she is forced to be a member of the association that is engaging in nongermane conduct.

[4] *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995), and the other cases USB cites involved determining whether a government restriction was content neutral or failed to properly balance religious free exercise rights with establishment clause concerns. Pomeroy's case involves none of that. She has no desire to speak in USB's forum and raises no Establishment Clause issue.

B. USB's publications are nongermane.

Appellees largely repeat the district court's rationale for concluding that USB's challenged publications were germane under the (inapplicable) "reasonable relationship" test. Ans. Br. at 32-42. But nowhere did the district court or USB demonstrate that the subject matter concerned "regulating lawyers" and/or would "improve the quality of legal services" such that it would survive exacting scrutiny. The articles might relate to the law or be of interest to lawyers, but they are not germane. Opening Br. at 8-12. Consider:

1. *The Times They Are a Changin'* critiques the electoral college system by describing the absurd results that would follow if we scored football games in an analogous way. *See* APP.111-113 ("If you voted for Donald Trump or George W. Bush … you'll see the logic behind that and join me in petitioning Kevin J. Worthen to FedEx the 1980 Holiday Bowl Trophy to Dallas."). The author reveals his position when he admits, "I'm the one doing the whining"—that is, lamenting the outcome of the election and/or the alleged unfairness of the electoral college system. *Id.* The article's "light-hearted" nature and its author's "satirical" pseudonym, Ans. Br. at 41, are irrelevant. Satire, like other genres, is often used to make serious arguments. *See, e.g.*, *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1268 (11th Cir. 2001) (recognizing that "satire … broadly addresses the institutions and mores of a slice of society"); *cf.* Jonathan

Swift, *A Modest Proposal and Other Satirical Works* 52–59 (Dover, 1996) (1729) (satirically recommending eating the children as a way of urging attention to their plight). Even assuming the author was not taking any firm ***position*** on the electoral college, neither USB nor the district court have demonstrated how an extended discussion of the electoral college (or of BYU football, or anything else in the article) is germane.

2. *Legal History in the Utah Desert, Reflecting on Topaz,* is, by USB's own characterization, a "reflection[] on Utah's connection to the *Korematsu* decision provid[ing] [a] … backdrop to legal issues that were being actively litigated" in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). APP.123-126; Ans. Br. at 39. But neither of those cases is tailored to *Keller*'s twin goals. Even assuming some tenuous connection, the article focuses not on professional regulation or access to justice, but on topics like a film screening, "the rights of vilified minorities," and racism, along with (at best) some discussion of post-conviction relief and substantive due process. But merely connecting an article to "the law" in some attenuated sense is insufficient to render it germane under exacting scrutiny; if that were, virtually any speech could be germane. On that theory, USB could use mandatory dues to publish an edition of the pornographic novel *Memoirs of a Woman of Pleasure* because it happened to be the book at issue in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).

3. USB argues that two articles, *Judicial Independence and Freedom of the Press* (APP.127-131) and *Civility in a Time of Incivility* (APP.152-156), are germane because they broadly relate to issues, like judicial independence and professional civility, that generally affect the legal system. Ans. Br. at 36-37. But again, some nominal hook to the legal system is insufficient to render them germane, particularly where they feature extended discussions of issues unrelated to regulation of the legal profession or improvement of legal services. By USB's theory, USB could force Pomeroy to pay for the publication of a book by Miss Manners on the theory that lawyers should be polite.

4. The articles on pharmaceutical pricing (APP.132-140) and cryptocurrency regulation (APP.152-156) are completely unrelated to regulating the legal profession or improving legal services. It is irrelevant whether the authors were "subject-matter expert[s]," or that the articles' topics might be of general interest to some lawyers. Ans. Br. at 39-40. If those were the standards, any and all topics would be germane. Critically, ***USB never proposed a workable test for germaneness that justifies these articles but would not also justify any article on any topic***, thus rendering germaneness a meaningless test contrary to Supreme Court precedent. *See Knox*, 567 U.S. at 320 ("If we were to accept this broad definition of germaneness, it would effectively eviscerate the limitation on the use of compulsory fees to support unions' controversial political activities.").

5. Generally, USB's attempt to justify its many publications regarding "diversity, equity, and inclusion," systemic racism, and social justice (including USB articles and social media posts) (*see* APP.109-111, 115-127, 142-147, 168-187) on the grounds that speech about "diversity initiatives" is "germane." Ans. Br. at 35. But while courts have upheld *some* statements relating to diversity as germane to regulating the legal profession and improving legal services, they have never said that *all* speech having to do with these topics is germane, regardless of how tenuous the connection to the two *Keller* purposes. "[T]here are limits" to germaneness, and the concept of "diversity initiatives" is not "*carte blanche* to engage in any ideological activities" USB pleases. *McDonald*, 4 F.4th at 249 n.28. As with all the challenged publications, much of USB's speech in this realm is on topics far removed from regulating lawyers or improving legal services: for example, the Standing Rock pipeline protests, alleged racism in the Gabby Petito press coverage, racism as a "public health crisis," support for mental health legislation, Tweets supporting the alleged public support for admitting noncitizens to the bar having nothing to do with lawyers. APP.167-186. If those things are germane, then speech advocating gun control or a nuclear freeze initiative would also be germane. *Cf. Keller*, 496 U.S. at 16.

C. USB's lobbying is nongermane.

Lobbying efforts that aim at "changing the law *governing* cases, disputes, or transactions *in which attorneys might be involved*" are *not* germane. *McDonald*, 4 F.4th at 248. Only laws that relate to regulating the *practice* of law and improving the *quality* of legal services count. As Pomeroy has shown, USB lobbies extensively on bills before Utah's legislature, publishing on its official website the year the bill was introduced, the designated number of the bill, and USB's position on the bill. Opening Br. at 15-24. Those bills are nongermane.

The district court declined to address most of USB's lobbying activities, claiming that the complaint should have been amended to include the examples, or that the bill was still being considered at the time the parties' summary judgment motions were being considered. Ans. Br. at 46-47. Those reasons constitute an abuse of discretion, however, because the bills—at least most of those through 2022, when discovery ended—were disclosed as part of the discovery process. There was no failure to provide notice and no denial by USB that it took the positions it did on the bills challenged below and in this appeal.

But this Count need not resolve the district court's abuse of discretion, because—as noted in the Opening Brief at 15 & n.4—it can take judicial notice of USB's positions on the identified bills. The Fifth Circuit did exactly that in

McDonald[5] and *Boudreaux*. Indeed, in *Boudreaux*, the Fifth Circuit took judicial notice of items on the Louisiana bar's website that were brought to the court's attention ***at oral argument***. *Boudreaux*, 86 F.4th at 635[6]; *see also Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 749 n.10 (2011) (noting website language before, at time of, and after oral argument).

As to the lobbying on bills Appellees were willing to defend in their Brief, they are nongermane.

1. USB's lobbying on H.B. 198 (Attorney General conflict-of-interest) went "far beyond regulating the legal *profession*, and instead affect[ed] the office of a separate public official." *Pomeroy v. Utah State Bar*, 598 F. Supp.3d 1250, 1261 (D. Utah 2022). Indeed, that bill (which arose out of a contentious political dispute over how to conduct a special election to fill a congressional vacancy, not a debate over the regulation of lawyers generally) does not regulate the legal profession *as* a profession; it deals with the powers and duties of one elected official.

True, the Attorney General falls within USB's regulatory charge insofar as he is a practicing attorney. As Attorney General, however, he is answerable to the electorate and subject to the Legislature, which has spelled out his powers and

[5] *McDonald v. Longley*, No. 20-50448 (5th Cir., Mar. 4, 2021).
[6] https://www.ca5.uscourts.gov/OralArgRecordings/20/20-50448_3-4-2021.mp3 at 44:45 ("JUDGE SMITH: It's all on your website, you know we can take judicial notice of all or most of it ….").

duties in detail. *See* Utah Code Ann. tit. 67, ch. 5. Notwithstanding its charge to regulate the legal profession generally, USB has no authority to regulate the Attorney General *as Attorney General*. Because this was essentially a political issue of interest to all Utahns, rather than a matter of professional regulation, it was not germane.

2. USB's lobbying on H.B. 441 (taxation of professional services) (APP.197) demonstrates the problems with its lax view of germaneness. Granted, a tax on professional services might increase the costs of legal services, but many other policy proposals, even more attenuated from USB's core functions, could have the same (or greater) effects on such costs: for example, laws mandating parental leave or other employee benefits would be just as likely to increase expenses for law firms and thereby increase the cost of legal services. Likewise, any tax or fiscal policy, or indeed *any* law that affects consumers' purchasing power, affects people's ability to hire a lawyer. By USB's logic, USB could endorse bills involving income tax, affordable housing, minimum wage, fair lending laws, student loan cancellation, and a host of other policy issues, because they all would have significant, quantifiable impacts on Utah consumers' ability to afford lawyers. Such a theory of germaneness is obviously too broad.

In arguing that its opposition to H.B. 441 was germane, USB mistakenly assumes that *whenever* a policy benefits lawyers, it improves access to legal

services. But such attenuated reasoning would allow for all kinds of self-serving activities in the name of "access to justice," which, again is obviously too broad. *See Kingstad*, 622 F.3d at 725 (Sykes, J., dissenting from denial of rehearing en banc).

III. USB's refund policy is constitutionally inadequate.

Given *Keller*'s protections and the much greater protections provided in *Janus*, "it is hard … to see how something less than *Hudson*'s safeguards could suffice in the context of compulsory bar membership dues." *Crowe*, 989 F.3d at 734 (VanDyke, J., dissenting). As the Fifth Circuit recognized—with the benefit of the Ninth Circuit's *Crowe* decision—"*Hudson* is the constitutional floor" below which states may not fall. *Boudreaux*, 3 F.4th at 758.

But USB's opt-out procedures fall below that floor. Members have no reasonable way to assess in advance how their dues will be spent or how much of those dues were subsequently used in nongermane activities unrelated to lobbying. Furthermore, the refund policy USB touts—as currently published on its website—is directed only at "Legislative Activities and Public Policy Actions Related to the Practice of Law and the Administration of Justice,"[7] which is limited to "political or ideological causes"—as opposed to a policy directed toward any nongermane

[7] Again, this Court can take judicial notice of the bar's official *Keller* refund policy as published on its website as of April 14, 2025: https://mcle.utahbar.org/wp-content/uploads/Keller-Refund-and-Objection-Procedures.pdf.

conduct, which can include *non*-ideological activities. *Cf. Boudreaux*, 86 F.4th at 632–33 (finding healthy-eating advice nongermane).

CONCLUSION

The Court should vacate the judgement dismissing Appellant's claims, reverse the district court's determination that the USB engaged in germane activities, and preliminarily enjoin enforcement of Utah's mandatory bar requirement as to Ms. Pomeroy while this matter is remanded for a remedy determination.

RESPECTFULLY SUBMITTED this 14th day of April 2025 by:

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B) and 32(g)(1), I certify that this Brief:

(1) Was prepared using 14-point Times New Roman Font;

(2) Is proportionately spaced and contains 6,492 words;

(3) all required privacy redactions have been made per 10th Cir. R. 25.5;

(4) if required to file additional hardcopies, that the ECF submission is an exact copy of those documents;

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/s/ *Scott Day Freeman*
Scott Day Freeman

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of April 2025, the foregoing motion was filed and served on all counsel of record via the ECF system.

/s/ *Scott Day Freeman*
Scott Day Freeman