UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MARK E. SCHELL, Plaintiff, v. JANET JOHNSON, Executive Director of the Oklahoma Bar Association, in her official capacity, et al. Defendants.	)	Civil Case No. 5:19-cv-00281-HE

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND SUPPORTING BRIEF

Dated: April 29, 2025

Respectfully submitted,

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Plaintiff Mark Schell moves for an order granting summary judgment in his favor providing the following relief: (a) a declaration that Oklahoma laws requiring him to be a member of the Oklahoma Bar Association ("OBA")[1] as a condition of practicing law violate his right of freedom of association under the First and Fourteenth Amendments and (b) a permanent injunction barring Oklahoma officials from enforcing those laws as to Mr. Schell. Fed. R. Civ. Proc. 56.

INTRODUCTION

Under color of state law, OBA requires attorneys to join OBA and pay membership dues as a precondition for practicing law in Oklahoma. OBA uses these mandatory dues for a variety of purposes, including to fund activities that are not germane to OBA's regulatory functions. Because OBA compels Plaintiff to be a member despite his objections to many OBA activities, OBA has violated Plaintiff's First and Fourteenth Amendment right of freedom of association, as alleged in his first claim for relief. Second Amended Complaint [Doc. 116] ¶¶ 112-122.[2]

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[1] Defendants are OBA and the office holders responsible for enforcing the state's requirement that attorneys join and pay dues to OBA to practice law in the state. They include the justices of the Oklahoma Supreme Court, OBA's board of directors, and OBA's executive director. Unless specifically named, they are collectively referred to herein as "OBA."

[2] Plaintiff's pleading, which was twice amended, asserts three claims for relief: (1) violation of right of freedom of association (compelled association), (2) violation of right of freedom of speech (compelled speech), and (3) violation of right of freedom of speech because of inadequate safeguards concerning misuse of compelled dues. This Court previously dismissed Plaintiff's first and second claims for relief for failure to state a claim [Doc. 61]. Plaintiff dismissed his third claim for relief [Doc. 82] to pursue an appeal. The Tenth Circuit Court of Appeals reversed the dismissal of Plaintiff's first claim for relief related to compelled association. *Schell v. Chief J. & J.J. of the Okla. Sup. Ct.*, 11 F.4th 1178, 1195 (10th Cir. 2021). After remand, Plaintiff amended his

Discovery has confirmed that the facts underlying Plaintiff's compelled membership are as Plaintiff alleged them in his pleading. Those facts are not in dispute because they consist of bar publications and activities. In addition, this Court can take judicial notice of these facts as other courts have done in similar cases involving attorneys challenging the conduct of mandatory bar associations.[3] Accordingly, Plaintiff is entitled to summary judgment.

STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to LCvR56.1(b), Plaintiff states that no genuine issue of fact exists as to the following material facts supporting this Motion.

1. Oklahoma law requires every attorney licensed in Oklahoma to join and pay fees to OBA to practice law in the state. Okla. Stat. tit. 5, ch. 1, app. 1, art. 2 § 1 ("The membership of [OBA] shall consist of those persons who are, and remain, licensed to practice law in this State."); *id*. at art. 8, §§ 1-4 (penalties, including suspension and disbarment for nonpayment of dues); Second Amended Complaint [Doc. 116] ("SAC") ¶¶ 41-45; OBA's Answer ("OBA's Ans.") [Doc. 135] ¶¶ 41-45. OBA publishes these requirements on its website

pleading for the second time. [Doc. 116]. Defendants again moved to dismiss. This Court denied the motion as to Plaintiff's freedom of association claim [Doc. 132].

[3] The Fifth Circuit did exactly that in *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021), and *Boudreaux v. Louisiana State Bar Association*, 86 F.4th 620 (5th Cir. 2023). 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*. *Id.* at 635; *see also Ariz. Free Enter. Freedom Club PAC v. Bennett*, 564 U.S. 721, 749 n.10 (2011) (noting website language before, at the time of, and after oral argument).

at https://www.okbar.org/wp-content/uploads/2018/09/RulesCreatingControling.pdf.

2. Plaintiff Mark Schell is an attorney licensed in Oklahoma, and he is compelled to be a member of OBA and to pay an annual fee to the OBA as conditions of engaging in his profession. *See* SAC ¶ 11; OBA's Ans. ¶ 11.

3. OBA uses member dues to engage in speech but denies that it engages in "constitutionally prohibited political or ideological speech." SAC ¶ 49; OBA's Ans. ¶ 49.

4. OBA's bylaws[4] authorize OBA to create "Legislative Program" through which OBA may propose legislation, art. VIII, §§ 2-3, make recommendations on legislative proposals, art. VIII, § 9, and endorse "[a]ny proposal for the improvement of the law, procedural or substantive … in principle," art. VIII, § 4. SAC ¶¶ 50-52; OBA's Ans. ¶¶ 50-53, 56.

5. OBA continues to "engage[ ] with legislation." OBA's Ans. ¶ 56.

6. Clayton Taylor Jr. has been OBA's lobbyist from 2014 to the present. Transcript of Deposition of Clayton Taylor Jr., Pl.'s App. of Exhibits in Support of Pl.'s Mot. for Summ. J. ("App."), Ex. 1, ("Taylor Depo.") at 13:25-14:2; 16:7-14; 17:24-18:1; 21:9-20; 63:5-64:21.[5]

[4] https://www.okbar.org/bylaws/.

[5] With this Motion, Plaintiff is filing an Appendix containing the documents and transcripts cited in this section of his Motion for Summary Judgment.

7. In 2024, Mr. Taylor, on behalf of OBA, lobbied members of the Oklahoma legislature on a legislative proposal related to judicial nomination and selection process in Oklahoma. App. Ex. 1, Taylor Depo., at 31:7-34:24.

8. In the April 2017 and May 2018 editions of the Oklahoma Bar *Journal* (the "*Journal*"), OBA published statements of its Executive Director related to legislation concerning proposed changes to Oklahoma's judicial nominating commission. App. Exs. 2-3.

9. Mr. Taylor prepared a report for OBA dated February 5, 2018, about legislative activities noting the State Chamber 2030 Plan that included "a federal system of judicial selection." App. Ex. 4. The State Chamber Plan included changing Oklahoma's judicial nominating and selection process to be exactly like the federal system. Transcript of Deposition of John Williams, App. Ex. 5, ("Williams Depo.") at 7:1-9:16; 44:14-48:8; App. Ex. 6, Williams Depo. Exhibit 1 (deposition conducted pursuant to Fed. R. Civ. Proc. 30(b)(6)).

10. As OBA's lobbyist, Mr. Taylor prepared and distributed pamphlets bearing his name that contain language supporting Oklahoma's judicial selection commission and opposing "what some legislatures [sic] with an agenda will tell you," and urging a "no" vote on legislation that would change Oklahoma's system. Mr. Taylor distributed those pamphlets to members of the Oklahoma legislature on behalf of OBA. *See* App. Exs. 7-12; App. Ex. 1, Taylor Depo. 45:20-48:12, 58:2-25; App. Ex. 5, Williams Depo., at 88:19-92:20.

11. In March 2025, OBA sent its members an email stating that the Oklahoma legislature is considering a measure to change how Oklahoma nominates and selects judges, noting OBA's "continued endorsement of the JNC-based model of judicial selection." App. Ex. 13.

12. OBA uses mandatory member dues to publish information and articles in its *Journal* publication. SAC ¶ 64; OBA's Ans. ¶ 64.

13. OBA published each article referenced in paragraphs 78-89 of the SAC in its *Journal*.[6] App. Exs. 2, 3, 14-23.

14. OBA offers "Lexology" as a member benefit. Lexology is a London-based news aggregator service that delivers news articles by email to OBA members. The email sent to OBA members displays OBA's logo. OBA does not monitor the content of the Lexology email, including the news articles presented in those emails. App. Ex. 5, Williams Depo., at 123:17-126:9.

15. Under OBA's logo, Lexology has sent the following content to OBA members:

    a. Robin de Meyere, *The Skilled Person Uses "They/Them" Pronouns, and Why You Should Care*, Lexology (Mar. 1, 2024). App. Ex. 24.

[6] Articles referenced in these paragraphs were attached to the SAC. For convenience, these previously produced articles, plus the additional articles and testimony referenced in this Motion, are reproduced in the accompanying Appendix.

b. Steven Friel and Jordan Howells, *An interview with Woodsford discussing ESG[7] engagement & litigation in England and Wales*, Lexology (Nov. 27, 2023). App. Ex. 25.

c. Kate Bradbury, *Gender recognition certificates and divorce in Scotland*, Lexology (Mar. 29, 2004). App. Ex. 26.

d. Ervin Hall, Jr., *The Importance of LGBTQIA+ Visibility in The Legal Profession*, Lexology (Jun. 22, 2023). App. Ex. 27.

e. Alex Trodd, *Law Firms Must Improve DEI Efforts Through Objective Work Allocation or Risk Losing Clients*, Lexology (Nov. 20, 2023). App. Ex. 28.

f. Catherine Krow, *Are Law Firms Ignoring Their Most Critical Assets? Bridging the DEI Divide*, Lexology (Nov. 2, 2023). App. Ex. 29.

STANDARD OF REVIEW

Summary judgment is appropriate "if the movant shows that 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Blue Mountain Energy, Inc. v. United States*, 418 F. Supp.3d 901, 906 (D. Utah 2019) (quoting Fed. R. Civ. P. 56(a)); *Blocker v. ConocoPhillips Co.*, 380 F. Supp.3d 1178, 1181 (W.D. Okla. 2019). "An issue of fact is 'material' if[,] under the substantive law[,] it is essential to the proper disposition of the claim." *Adler v. Wal-Mart Stores, Inc.*, 144

[7] ESG stands for "Environmental, Social, and Governance." ESG management is a set of practices for business organizations to follow that prioritize environmental, social, and political considerations. *See, e.g.*, *Simeone v. Walt Disney Co.*, 302 A.3d 956, 969-70 (Del. 2023).

F.3d 664, 670 (10th Cir. 1998); *see also Ctr. for Excellence in Higher Educ., Inc. v. RSUI Indem. Co.*, 375 F. Supp.3d 1217, 1223 (D. Utah 2019) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "A dispute is genuine only 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Blue Mountain Energy*, 418 F.Supp.3d at 906 (quoting *Anderson*, 477 U.S. at 248). Summary judgment is appropriate where reasonable persons could not differ in drawing conclusions from the facts. *See, e.g., Wells v. Allergan, Inc.*, 2013 WL 389147, at *5 (W.D. Okla. 2013).

Thus, "the nonmoving party must present more than a scintilla of evidence in favor of [its] position." *Ford v. Pryor*, 552 F.3d 1174, 1178 (10th Cir. 2008). When considering a motion for summary judgment, "the court must 'view the evidence and draw all reasonable inferences therefrom in the light most favorable to the party opposing summary judgment.'" *Blue Mountain Energy*, 418 F. Supp.3d at 906 (citation omitted).

"Whether expenses are germane or nongermane" for purposes of a compelled membership claim "is a matter of law and is appropriately decided by this Court" at summary judgment. *Fell v. Indep. Ass'n of Cont'l Pilots*, 26 F. Supp.2d 1272, 1278–79 (D. Colo. 1998); *see also Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415, 1423–24 (D.C. Cir. 1997); *Cummings v. Connell*, 177 F. Supp.2d 1060, 1072 (E.D. Cal. 2001). Once a challenger has adduced evidence of expenditure activities that implicate the First Amendment, such as speech and lobbying, "[t]he burden is on the defendant to show that the expenditures were germane." *Fell*, 26 F. Supp.2d 1278 (citing *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 306 (1986)).

MEMORANDUM OF POINTS AND AUTHORITIES

I. Compelling membership in OBA violates Plaintiff's right to freedom of association.

Oklahoma law requires Plaintiff to maintain membership in OBA as a condition of practicing law in the state. *See, e.g.*, Okla. Stat. tit. 5, ch. 1, app. 1, art. 2 § 1. Plaintiff, a lawyer licensed in Oklahoma, objects to mandatory membership in OBA because it engages in activities beyond those that are necessary to fulfill any legitimate state interest in regulating the legal profession. That is because OBA engages in speech and lobbying activities that stray from that purpose and are thus "nongermane." This mandatory association with speech and activities Plaintiff disagrees with violates his right of freedom of association. The undisputed facts therefore entitle Plaintiff to summary judgment.

A. *Keller* and *Janus* establish the analysis of a freedom of association claim.

The First Amendment guarantees freedom of association. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). This includes the right *not* to associate. *Id.* at 623; *see Schell*, 11 F.4th at 1187. As explained below, it follows from *Keller* and *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), that an integrated bar association must satisfy exacting scrutiny to survive a freedom of association challenge. *Janus*, 138 S. Ct. at 2465; *see also McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021).

In *Keller v. State Bar of California*, 496 U.S. 1 (1990), the Supreme Court decided a challenge to California's integrated (i.e., mandatory) state bar association. The Court found that the State Bar could not constitutionally force members *to subsidize speech* that

was not germane to the regulation of lawyers and their role in improving the quality of legal services. *Id.* at 17. *Keller* explained that the "same constitutional rule" that applies in public-sector union cases also applies to compulsory bar associations. *Id.* at 13. When *Keller* was decided, the rule for public sector unions was provided by *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which was the origin of *Keller*'s "germaneness" requirement. But while *Keller* reinforced the "germaneness" concept, it expressly "*decline[d]" to address the question of whether a person can be forced to join a bar association in the first place*, 496 U.S. at 17 (emphasis added)—and, naturally, declined to specify what standard of scrutiny applies to such a claim.

Thus, *Keller expressly left unanswered* "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) (*Crowe I*); *Schell*, 11 F.4th at 1189. And since *Keller* was decided, the Supreme Court has never explicitly resolved the merits of this freedom of association claim in the context of compulsory bar associations. *Crowe I*, 989 F.3d at 728. Neither has the Tenth Circuit. *Schell*, 11 F.4th at 1191. Plaintiff's first claim for relief in his SAC asserts just such a claim, and this Motion brings that legal issue to this Court on the merits.

Keller's reach and application is very limited in light of *Janus*, in which the Supreme Court dramatically undermined *Keller*'s legal foundations. *Janus* involved a public sector union and expressly overruled *Abood*. 585 U.S. at 886. But *Janus* did not

expressly overrule *Keller*. Thus, *Keller* remains, but with few legal underpinnings or value beyond the narrow confines of its holding.

Importantly, while *Keller* reinforced the "germaneness" concept from the now-reversed *Abood* decision, it declined to specify what standard of scrutiny applies, and did not resolve the freedom of association claim at all. *Janus* now supplies the answers as to the level of scrutiny to be applied to such claims: exacting scrutiny. 585 U.S. at 916.

Although *Keller* does not address or resolve the compelled membership issue, it does provide some guidance for resolving that question with its germaneness analysis. But the Supreme Court's more recent decisions in *Janus* and *Knox v. SEIU, Loc. 1000*, 567 U.S. 298 (2012), complete the picture in the context of a freedom of association claim. Now, it is clear that—at a minimum—*exacting scrutiny* must be applied to the freedom of association question presented here. To survive that test, not only must OBA confine itself to activities necessary to its regulatory role *vis-à-vis* lawyers, but it must also "narrowly tailor[ ] [those activities] to the government's asserted interest." *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 597 (2021). The government also bears the burden in an exacting scrutiny case. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 816 (2000); *Rio Grande Found. v. Oliver*, 727 F. Supp.3d 988, 1013 (D.N.M. 2024).

At a minimum, if OBA engages in *non*germane activity—which it does—then it violates the First Amendment's free association guarantees to compel attorneys to join and subsidize OBA as a precondition to practicing law. *See McDonald*, 4 F.4th at 249. But under exacting scrutiny, compelled association in OBA would be permissible "only" if it "serve[s] a 'compelling state interes[t] … that cannot be achieved through means

significantly less restrictive of associational freedoms.'" *Knox* 567 U.S. at 310 (*quoting Roberts*, 468 U.S. at 623). And while a mandatory bar association that only engages in *germane* activity *might* meet exacting scrutiny, "[c]ompelled membership in a bar association that engages in *non*-germane activities … *fails* exacting scrutiny." *McDonald*, 4 F.4th at 246 (emphasis added).

Thus, for OBA to survive a freedom of association challenge it must meet exacting scrutiny and prove it engages only in germane activities that cannot be achieved through means significantly less restrictive of associational rights. It cannot.[8]

The Fifth and Ninth Circuits have now applied *Keller* and *Janus* to freedom of association claims brought in bar challenge cases at the merits stage in *McDonald*, *supra* (nongermane lobbying activity violated associational rights); *Boudreaux*, *supra* (bar's social media posts about the benefits of eating broccoli and charity drives, and its promotion of "Pride Month," the "St. Thomas Moore Red Mass," and certain news articles failed exacting scrutiny and thus violated associational rights), and *Crowe v. Oregon State Bar*, 112 F.4th 1218 (9th Cir. 2024) (*Crowe II*) (bar's non-germane statements failed exacting scrutiny and violated associational rights).

[8] *See also* Leslie C. Levin, *The End of Mandatory State Bars?*, 109 Geo. L.J. Online 1, 18–19 (2020) (no evidence that states with voluntary bar associations result in subpar legal professions); *Holt v. Hobbs*, 574 U.S. 352, 368–69 (2015) (the fact that many states have voluntary bar associations suggests that means less restrictive than forced bar membership exist to regulate lawyers); *see also Janus*, 138 S. Ct. at 2466 (voluntary union membership in 28 states suggests a less restrictive means to compulsory public-sector union membership).

All this guidance recognizes compelled membership claims in circumstances like those here, and shows that applying a level of scrutiny that meets or exceeds exacting scrutiny is appropriate—pursuant to 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." *McDonald*, 4 F.4th at 246 (citation and internal marks omitted).

B. "Germaneness" must be assessed through the exacting scrutiny standard.

In examining whether the California Bar violated the First Amendment by using dues to promulgate messages that members might not agree with, *Keller* relied upon the "germaneness" analysis used in the now-overruled *Abood* case. 496 U.S. at 9. Bar activities that promote the regulation of lawyers and improvement of legal services were "germane" to "the State's interest in regulating the legal profession and improving the quality of legal services," the Court reasoned, and therefore, like in *Abood*, an attorney could be required to fund those activities. *Id.* at 13. But, the Court said, a compulsory bar may *not* use member dues to engage in conduct *not* germane to those two specified regulatory purposes.

But the assessment of "germaneness" cannot be a mere determination that the bar's conduct is *related to* regulating lawyers and legal services. Otherwise, bar associations will claim that everything they do is, however tangentially or diffusely, relates to improving the quality of legal services, since there is nothing that cannot be somehow or other connected to those two goals.

That can't be correct. If it were, OBA could engage in any conduct it deems "reasonably related" to regulating lawyers and improving the quality of legal services. But not even *Keller*, a compelled speech case, allowed 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—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 the legal practice.

A lenient "rational basis" type of test would provide virtually no safeguards for member's constitutional rights because the bar will *always* claim that everything it does is "germane" to the practice of law, since the law is a seamless web, and everything relates to it in *some* way. That is probably why the Supreme Court has made clear that exacting scrutiny, *not* rational basis, applies.

Exacting scrutiny requires the activity to be narrowly tailored to the bar's regulatory purpose: the activity must be related directly to the regulation of lawyers and the improvement of the quality of legal services—not in abstract terms, but *specifically concerning* ***those*** subjects.

That's why the Fifth Circuit held that the Louisiana bar's dissemination of information designed to make lawyers healthier, more secure, and equipped with the latest office technology were nongermane. *Boudreaux*, 86 F.4th at 634. The Louisiana

bar encouraged attorneys to eat walnuts and work out three times a week. *Id.* at 632. Lawyers who took that information to heart might very well deliver better legal services to clients, but those subjects did not relate to the two regulatory subjects specified in *Keller*. As the *Boudreaux* court observed, "[h]ow remote or indirect can the purported benefit to legal services be? The [Louisiana bar] offers no clear answer, nor can we discern any principled line once we allow advice that is not inherently tied to the practice of law or the legal profession." *Id.* at 633.

The Fifth Circuit held that bars cannot be disseminators of information generally related to the subject of the law, for the same reason:

> The LSBA suggests that information about looming policy changes can itself be a benefit where lawyers care about the information or the information is relevant to their lives. … But they also care about myriad things, including healthcare, family policy, social issues, criminal justice reform, even interest rates and financial news. Can the LSBA share news articles about those topics too? We are 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. That is to say: *The germaneness test is not satisfied just because a particular personal matter might impact a person who is practicing law.*
>
> *Instead, speech must be reasonably related to the regulation or improvement of legal practice. That generally means that speech engaging with, promoting, or encouraging participation in wider public policy and social controversies is rarely, if ever, germane.*

Id. at 634-35 (emphasis added).

C. OBA engages in nongermane speech on controversial political and ideological issues and fails exacting scrutiny.

Per *Keller*, there are only two state interests that are constitutionally adequate to justify compulsory bar funding: regulating the legal profession and improving the quality of legal services. *Keller*, 496 U.S. at 13; *McDonald*, 4 F.4th at 246. For an activity to be "germane" to those purposes, it must be "necessarily or reasonably incurred" for either of them. *Id.* at 247 (citation omitted). Although political and ideological activity is not *necessarily* nongermane, *Keller*, 496 U.S. at 17, it *is* nongermane when it does not strictly relate to the subjects of 1) regulating lawyers or 2) improving legal services. If the conduct is both nongermane *and* political or ideological in nature, that compounds the constitutional violation. *See Janus*, 138 S. Ct. at 2463.

Undisputed evidence shows that OBA does engage in conduct not related to *Keller*'s dual regulatory purposes. Indeed, it frequently engages in activities that are both nongermane *and* political/ideological, which compounds Plaintiff's constitutional injury. OBA exemplifies this form of nongermane conduct in its *Journal* publications and legislative program.

1. OBA publishes extensive content that is nongermane to regulating the practice of law or improving legal services.

It is undisputed that OBA has published a *substantial* amount of content on issues that are nongermane. Much of this content appears in OBA's flagship publication, the *Journal*. For example, as identified in the statement of undisputed facts above, the nongermane content includes:

- The articles by OBA's Executive Director in the April 2017 *Journal* (App. Ex. 2) criticized legislative proposals to change Oklahoma's method of judicial selection, suggesting that if they passed, "big money and special interest groups [would] elect judges and justices and campaign contributions [would] buy court opinions." The articles attached as App. Ex. 3 and 16 advocate similar ideas. With each of them, OBA is improperly using its influence—and the message conveyed by compelled membership—to weigh in on a matter fundamental to a public policy decision about how Oklahomans want to govern themselves. Other jurisdictions have different systems for judicial selection. Although judges may be lawyers and serve in the legal system, and although lawyers may be interested in the subject matter, how Oklahomans decide who fills those offices does not concern the *regulatory function* of the state bar. OBA's efforts to promote the status quo with respect to Oklahoma's judicial nominating commission is particularly problematic given that OBA is itself supervised by the current Justices of the Oklahoma Supreme Court, products of that system.
- An article in the November 2018 *Journal* entitled "Tort Litigation for the Rising Prison Population" (App. Ex. 15) argued that Oklahoma's prison system was underfunded and advocated that the state legislature eliminate prisons' and jails' exemption from tort liability. Although the article might be of interest to lawyers, or even the public, it cannot be said to concern *regulating* lawyers or improving the *quality* of legal services lawyers provide. Rather, the article urges

Oklahomans *en masse* to make a significant change in public policy and governmental immunity law.

- An article in the February 2019 *Journal* (App. Ex. 16) by OBA's President criticized claims that lawyers have too much influence in the state legislature and alleges that "having lawyers in the Legislature is a plus." Likewise, a "Legislative News" column in the March 2019 *Journal* (App. Ex. 17) advocated that "MORE LAWYERS ARE NEEDED" as members of the state legislature. Although Plaintiff recognizes that the Tenth Circuit's earlier review of this case found these articles to be germane, *Schell*, 11 F.4th at 1193, Plaintiff preserves his claims with respect to them here. OBA's regulatory purpose concerns the qualifications of *lawyers* to serve in the legal profession. It is not—and should not be—the business of OBA to opine as to the qualifications of *legislators*.
- The December 2020 *Journal* (App. Ex. 18) includes an article titled "A Resilient Mindset: Take Stock of What You Lost and What You Gained to Move Forward" that dispenses psychological advice related to COVID and concerns about "racism and the upcoming election." These subjects are about broader social issues, not about OBA's two legitimate state interests.
- The May 2021 *Bar Journal* (App. Ex. 19) includes an article titled "*Guinn v. U.S.*: States' Rights and the 15th Amendment," that attributes President Biden's victory in the 2020 election to the "high turnout of Black voters" and highlighted criticisms directed at states that amended voting laws in reaction to the 2020 election. Specifically, the article explains how such laws are presented as

"attempts to stop fraud and expand voting rights but are met with the same type of criticism as voting laws in *Guinn*," i.e., that the laws attempt to "disenfranchis[e] Black voters and creat[e] generations of distrust and pain." In essence, the article weighs in on a highly ideological and debatable matter, painting citizens seeking reforms to restore confidence in the voting systems as reactionaries. But none of this has to do with the two purposes authorized by *Keller*.

- An article in the May 2021 *Journal* (App. Ex. 20) entitled "Oklahoma's Embrace of the White Racial Identity" evokes emotional readings of Oklahoma's history to ultimately argue that Oklahoma's legal profession is responsible for "very few nonwhites at the partnership or director level" in the state's major firms, using no evidence to support such a claim. Obviously, this is a contentious political assertion, not directly related to regulating the profession or improving the practice of law.
- The February 2022 *Journal* (App. Ex. 21) includes an article titled "Vaccine Mandates and Their Role in the Workplace," that praises the Biden administration's vaccine mandates as a "last resort" after the public failed to "consistently wear face masks in public and failed to socially distance in those first weeks of the pandemic's United States spread two years ago." Here, OBA has amplified an ideological viewpoint with its retrospective on the COVID pandemic under the guise of an article about workplace vaccine mandates.
- The May 2022 *Journal* (App. Ex. 22) includes an article titled "A Silent History," which claims that Oklahoma has "a treacherous secret" and criticizes the federal

government for failing to "keep white settlers out of Indian lands." The article amplifies a provocative view of history, but it does not concern OBA's regulatory purposes. If being more knowledgeable about the state's history "improves the quality of legal services," then *Keller*'s germaneness construct has no limiting principle.

- OBA's *Journal* also includes articles about upcoming charitable events put on by the bar's foundation (App. Ex. 23). For example, in its May 2022 edition, the *Journal* promotes an upcoming "Diamonds & Disco Event" to "support OBF Grantee Partners" with the "grantee partner" in this instance being the Catholic Charities of the Archdiocese of Oklahoma City. As the *Boudreaux* court recognized, "if anything that purportedly promoted 'goodwill' were germane because it, in some attenuated fashion, improved the quality of legal services, there would be almost no limit to what bar associations could do in the name of goodwill." 86 F.4th at 634.
- OBA makes no pretense of ensuring that information distributed to its members through Lexology is germane, admitting that it performs no *Keller* review of this news aggregator service. Statement of Undisputed Facts, *supra*, ¶ 14. Much of it isn't:
    - In *The Skilled Person Uses "They/Them" Pronouns, and Why You Should Care* (App. Ex. 24), the author essentially surveys the use of gender-neutral language around the globe, which has nothing to do with regulating Oklahoma lawyers.

- In *An interview with Woodsford discussing ESG engagement & litigation in England and Wales* (App. Ex. 25), the subject is as the title suggests, an article discussing ESG business policies in the United Kingdom.
- Under the imprimatur of OBA's logo, *Gender recognition certificates and divorce in Scotland* (App. Ex. 26) apprises OBA bar members of "gender recognition certificates" … in Scotland.
- In *The Importance of LGBTQIA+ Visibility in The Legal Profession* (App. Ex. 27), the author describes his personal experience being LGBTQIA+ within a law firm and advocates for greater visibility so "we can start actively correcting the biases and preconceived notions of the past." The social commentary and opinions of the author do not pertain to OBA's regulatory purposes.
- *Law Firms Must Improve DEI Efforts Through Objective Work Allocation or Risk Losing Clients* (App. Ex. 28), and *Are Law Firms Ignoring Their Most Critical Assets? Bridging the DEI Divide* (App. Ex. 29), are essentially advertisements for a marketing company disguised as articles about how law firms in the U.K. and the U.S. are not promoting enough "diverse" lawyers to partner. While perhaps interesting social commentary, the articles, which Lexology publishes under OBA's logo, are nongermane to its regulatory purposes.

OBA includes people with a wide range of viewpoints on the subjects it publishes in its *Journal*, and allows the same to occur through the Lexology service it offers its

members. Plaintiff, and likely other lawyers, disagree with the viewpoints OBA has chosen to amplify through its publications and news aggregator. Yet, as a condition of practicing law, Plaintiff must *fund* such activities—that is, he is "compel[led] … to furnish contributions of money for the propagation of opinions which he disbelieves," *Janus*, 138 S. Ct. at 2464 (quoting Thomas Jefferson)—and must *maintain membership* in an OBA that engages in or publishes this speech in its flagship magazine, regardless of how he feels about it.

To this point, the Tenth Circuit has recognized that the risk of nongermane activity is particularly acute when dealing with issues that "break along political lines" or involve "an ideological tinge." *Schell*, 11 F.4th at 1194 (explaining that "views on the appropriateness of 'big money and special interest groups' in elections and the ability of donors to 'buy court opinions'" could have "strayed from the germane purposes of the OBA and discussed matters in an ideological manner."). Much of the content in the *Journal* deals with matters that fit into this category.

This kind of ideological, value-laden content cannot be germane to the regulation of the practice of law or the improvement of legal services. These terms are fundamentally inseparable from embedded value judgments and opinions. *See, e.g.*, *Florio v. Gallaudet Univ.*, 619 F. Supp.3d 36, 46 (D.D.C. 2022) (explaining that a statement about "the face of systemic racism" was merely the speaker's "'subjective view' or 'interpretation' of [the situation]," involving "an inherently subjective assessment"). But if OBA publishes material or takes these concepts as a matter of subjective opinion and "embedded value judgments … rather than facts," how could

those subjects be germane, in any objectively meaningful sense, to (1) the regulation of the practice of law or (2) the improvement of legal services?

And it does not matter whether the nongermane content was specifically attributed to OBA's members, or whether a reasonable reader would interpret the above articles to represent OBA's views collectively versus merely the views of the author individually. To be sure, while some of the articles cited above were written by individual bar members or other contributors, much of the nongermane content appears in contexts closely associated with OBA itself: for example, statements from OBA Presidents, current and former, and its Executive Director. This would lead a reasonable reader to view these statements as representing the positions of OBA in an official, collective sense. Irrespective of the compelled speech concern, which is real, but not at issue in this Motion,[9] OBA's conduct infringes on Plaintiff's *associational* rights.

[9] In the *compelled speech* context, courts have looked to whether the general public would view the affected individual as endorsing the content of the speech. *See, e.g.*, *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 568 (2005) (Thomas, J., concurring) ("The government may not, consistent with the First Amendment, associate individuals or organizations involuntarily with speech by attributing an unwanted message to them, whether or not individuals fund the speech, and whether or not the message is under the government's control."). But they have not applied the same consideration to *compelled association* cases, because the rights there are different, although they frequently overlap. Freedom of speech is typically concerned with an open "marketplace of ideas," which is distorted by compelled speech. *Cf. Cressman v. Thompson*, 798 F.3d 938, 948 (10th Cir. 2015) (citation omitted). Freedom of association, by contrast, is concerned with the individual conscience—with respecting the individual's right not to be required to join with others in ways that undermine his or her autonomy. *Cf. Harris v. Quinn*, 573 U.S. 616, 629–30 (2014). Thus the "attribution" of others is not a significant concern in the latter context, where it is in the former.

But Plaintiff's compelled speech claim does not turn on the identity of the speaker or the context of the speech. It also does not depend on the amount or extent of the speech (although the amount of nongermane speech here is significant). It depends only on whether the speech was germane to OBA's purposes. *See Keller*, 496 U.S. at 13. By publishing nongermane content in the *Journal* and elsewhere, OBA has violated the "bedrock principle" that "no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris*, 573 U.S. at 656.

2. OBA's legislative activities are nongermane to regulating lawyers and improving legal services.

As discussed above with regard to the articles at App. Ex. 2, 3, 16, 17, OBA's legislative conduct concerning Oklahoma's method for nominating and selecting judicial officers goes far beyond *regulating the legal profession*, and instead affects how the offices of certain public officials are filled.

To be sure, this Court previously read the Tenth Circuit's decision in *Schell* to mean that any activities broadly related to judicial selection procedures must be germane. *See* Order [Doc. 132] at 4. But *Schell* did not go that far. And to the extent this Court believes it did, then Plaintiff preserves the issue here.

Actually, the Tenth Circuit in *Schell* did not have all the information before it that this Court now has. *Schell*, 11 F.4th at 1194. And the articles related to Oklahoma's judicial selection process (App. Exs. 2, 3, 16, 17) are just one component of OBA's active response to any effort by Oklahoma lawmakers to alter the state's current judicial selection process. Those efforts include the retention of a lobbyist. The lobbyist does not

simply foster discussions on this contentious political matter, but actively pursues members of the Oklahoma legislature, with pamphlets in hand, seeking to persuade them to vote against changes to selection procedures. *See* Statement of Undisputed Facts, *supra*, ¶¶ 4-11. This isn't fostering open and evenhanded debate. This is attempting to tip the scales for its favored position on this political issue.

If OBA is permitted to advocate for or against legislative measures that seek to alter the judicial selection process simply because the subject matter generally concerns how judges are installed into office, then OBA would ostensibly be free to weigh in on many other political matters that affect office holders and the law generally. For example, this would include candidate endorsements, including candidates for judicial offices or those in retention elections. These too would be matters related broadly to the judiciary. Furthermore, there could be no principled opposition to OBA endorsing and advocating for a preferred kind of judicial philosophy, such as activist or strict construction.

The people of Oklahoma should decide their system of government free from electioneering by OBA with its mandatory members and membership dues. *See McDonald*, 4 F.4th at 245-46 (stating that "membership is the message").

CONCLUSION

OBA might draw some connection between the above-described activities and OBA's role in regulating the practice of law and improving legal services. But germaneness is not a matter of simply drawing *some connection, however tangential*. If that were the test, it would be vastly overinclusive. Instead, the Supreme Court has

placed key limits on germaneness. In *Knox*, it rejected the notion that political expenditures were germane to collective bargaining merely because they would result in a more friendly electorate or more friendly public officials:

> 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. Public-employee salaries, pensions, and other benefits constitute a substantial percentage of the budgets of many States and their subdivisions. As a result, a broad array of ballot questions and campaigns for public office may be said to have an effect on present and future contracts between public-sector workers and their employers. If the concept of "germaneness" were as broad as the [union] advocates, public-sector employees who do not endorse the unions' goals would be essentially unprotected against being compelled to subsidize political and ideological activities to which they object.

567 U.S. at 320-21.

These limits are particularly salient in the bar association context. Terms like "legal services" and "practice of law" can easily be construed to touch on virtually anything, and could be connected to practically any policy topic.[10] But *Keller* and *Janus* provide a limiting principle. All conduct must be subject to an exacting scrutiny analysis, with the burden on OBA to prove that its activities are germane and tailored to its regulatory purposes. It cannot satisfy this exacting scrutiny test.

For the foregoing reasons, the Court should grant Plaintiff's Motion for Summary Judgment, and grant the following relief:

[10] This can easily be seen in the vast breadth of most contemporary law reviews, which feature articles on virtually every subject one can imagine. If there are not meaningful limits on germaneness, *bar* reviews will be similarly able to speak on virtually anything connected with the law—and pay for the privilege with Plaintiff's involuntarily taken funds.

- Declare that Defendants violate Plaintiff's right to freedom of association under the First and Fourteenth Amendments by enforcing Oklahoma statutes that make membership in, and the payment of mandatory dues to, OBA a condition of practicing law in Oklahoma;
- Permanently enjoin Defendants, and all persons in active concert or participation with them, from enforcing all statutes and rules that mandate membership in OBA, e.g., Okla. Stat. tit. 5, ch. 1, app. 1, art. 2, § 1, and those statutes and rules that require payment of membership fees to OBA, e.g., Okla. Stat. tit. 5, ch. 1, app. 1, art. 8, §§ 1-4; and
- Award Plaintiff his costs, attorney fees, and other expenses, as provided by 42 U.S.C. § 1988.

Respectfully submitted on April 29, 2025.

GOLDWATER INSTITUTE

/s/ *Scott Day Freeman*
Scott Day Freeman
Adam C. Shelton

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of April 2025, I filed the attached document with the Clerk of the Court. Based on the records currently on file in this case, the Clerk of the Court will transmit a Notice of Electronic Filing to those registered participants of the Electronic Case Filing System as follows:

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