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 REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Pursuant to LRvR 7.1(h), Plaintiff submits his Reply in support of his Motion for Summary Judgment [Doc. 178].

INTRODUCTION

As Plaintiff has demonstrated, the Oklahoma Bar Association ("OBA") compels its members to fund and associate with a vast range of speech and activities, many of which are not germane to the only two purposes "for which mandatory financial support is justified": regulating the practice of law and improving legal services. *Schell v. Chief J. & JJ. of Okla. Sup. Ct.*, 11 F.4th 1178, 1189 (10th Cir. 2021). Moreover, OBA gives its members no constitutionally adequate means of disassociating themselves from those activities.

In its response, Defendants (referred to herein as OBA) have not shown how any of the activities Plaintiff highlights are in fact germane such that they could justify the extraordinary measures of compelling Plaintiff to associate with OBA. Although OBA tries to argue that its activities are in fact germane, or that they are not "nongermane enough," it cannot do so without effectively "eviscerat[ing]" the germaneness test as a meaningful "limitation on the use of compulsory fees to support … controversial political activities." *Knox v. SEIU*, 567 U.S. 298, 320 (2012).

I. Reply to OBA's Response to Plaintiff's Statement of Undisputed Facts.

OBA attempts to recharacterize many of Plaintiff's Statement of Undisputed Facts, even though the facts Plaintiff offers come almost entirely from OBA's own statements or publications, and those speak for themselves without the OBA's self-serving "gloss." OBA also adds many of the irrelevant "facts" from its Motion for Summary Judgment as "additional undisputed facts," but they are largely irrelevant or legal conclusions. Specifically, Plaintiff objects to OBA's responses to Plaintiff's Statement of Undisputed Facts as follows.

A. OBA's irrelevant recharacterizations of undisputed facts.

Response to Statement of Undisputed Fact [Doc. 183] ("RSUF") 1–2: The fact that OBA might have limited exceptions to its dues requirement is irrelevant. OBA does not dispute that Plaintiff is required to pay dues to maintain his compulsory bar membership, OBA's Answer to Second Amended Complaint [Doc. 135] ¶ 45, and no exception is at issue in this case.

RSUF 3: OBA admits that it uses dues to engage in expressive conduct, but then adds the irrelevant fact that it may charge dues under *Keller*.

RSUF 4: OBA admits that it engages in legislative activities, but then argues that *Schell* and *Lathrop v. Donohue*, 367 U.S. 820, 826–27 (1961), foreclose Plaintiff's ability to maintain his freedom of association claim based upon those activities. But the legislative activities Plaintiff challenges here are unlike anything generally described in *Lathrop* because they involve highly contentious matters regarding how Oklahomans structure their government, where the "substantial unanimity" that was central to the *Lathrop* decision is lacking. *See id.* at 834.

RSUF 6: OBA admits that Mr. Taylor is a lobbyist and performs services for OBA, but then quibbles that OBA considers him a "liaison" who "converse[s]" with legislators about legislation on behalf of the bar, even while admitting that he worked on behalf of the bar to oppose legislative reforms to the JNC system for selecting appellate judges. *See* RSUF 10. But that's just a lobbyist by another name.

RSUF 7: OBA disputes this paragraph in part but does not state which part. Its response constitutes an admission that Mr. Taylor lobbied against legislative reforms to the JNC system for selecting judges. Failure to specify a disputed fact makes a purported dispute "too conclusory to create a genuine issue of material fact." *Derello v. Stickley*, 631 F. Supp.3d 758, 773 (D. Ariz. 2022); *Byers v. Comm'r of Internal Revenue*, 113 T.C.M. (CCH) 1130 (T.C. 2017); *Bogdahn v. Hamilton Standard*, 973 F. Supp. 52, 54 n.2 (D. Mass. 1997).

RSUF 8: OBA claims the April 2017 *Journal* article is irrelevant because *Schell* determined it to be so. But that is not true. *Schell* did not rule on the merits, but made a pleadings-stage determination of the sufficiency of the allegations in the Complaint. As Plaintiff explains in his own motion, OBA's article was part of a larger lobbying and public effort by OBA to oppose any legislative reforms to the JNC system, a highly contentious public policy issue on which many disagree with the bar's position, including Plaintiff.

RSUF 9: OBA disputes this paragraph in part but does not identify which part. Thus OBA fails to dispute the fact. *Derello, supra*; *Byers, supra; Bogdahn, supra*. Certainly, OBA does not dispute that its lobbyist took a position on the JNC system contrary to that taken by the Oklahoma Chamber of Commerce and its forward-looking plan. Again, OBA attempts to sidestep the merits issue by arguing that *Schell* foreclosed it. But again, *Schell* did no such thing, because it only addressed the sufficiency of the pleadings, not the merits.

RSUF 10: *See* RSUF 9, *supra*.

RSUF 11: OBA does not dispute that it sent its members a communication endorsing the current JNC system. Again, OBA's publications are part of its full-court press, legislatively and with the public, to advance its view on a debatable public policy matter.

RSUF 12: OBA again claims that Plaintiff's dues paying requirement is irrelevant because *Schell* foreclosed the compelled speech claims. But the requirement is still relevant to the freedom of association claim. As the court stated in *McDonald v. Longley*, 4 F.4th 229, 245–46 (5th Cir. 2021), "membership is the message." And for Plaintiff, membership requires that he financially support OBA's activities.

RSUF 13: OBA disputes the relevance of articles related to the JNC system and lawyer advocacy, claiming that *Schell* determined them germane. But again, *Schell* was decided at the pleading stage, and not in the context of OBA's overall efforts to oppose

reforms to the JNC system. OBA also argues *ipse dixit* that the article Plaintiff cites at paragraph 88 in his Second Amended Complaint [Doc. 116] is germane because it is merely a "book review." But that doesn't change the fact that it is a highly ideological article that scores numerous partisan points unrelated to any professed government interest in regulating the practice of law and improving legal services (*see* Pl.'s Mot. Summ. J. at 18–19). And it says the article at paragraph 89 is merely a "third-party advertisement"—even though it promotes the bar foundation's "gala" and support of Catholic charities (*see id.* at 19). Certainly advertisements and book reviews are not exempt from the *Keller* germaneness rule.

RSUF 14: OBA disputes this paragraph in part but does not identify which part. Thus, it fails to raise a dispute of fact. *Derello, supra*; *Byers, supra; Bogdahn, supra*. OSB refers to paragraph 31 of its "additional undisputed facts" (*see* OBA's Response at 8), wherein it explains the Lexology benefit it provides its members, but OBA's statement does not dispute the facts that are material here: OBA allows unvetted content to go to its members under its banner. And because the content is unvetted, it can be, and often is, highly ideological and nongermane. *See* Pl.'s Mot. Summ. J. at 19–20; *see also Boudreaux v. Louisiana State Bar Ass'n*, 86 F.4th 620, 635 (5th Cir. 2023) ("If a mandatory bar association can say or promote anything 'of concern to lawyers,' it is difficult to see any limit to what [it] could say or promote.")

RSUF 15: OBA objects to Plaintiff citing to news articles provided by its Lexology service because Plaintiff did not recall receiving or reviewing them. Response at 8. But OBA does not dispute the authenticity of those emails and the articles they link. Those emails and articles, which OBA admits are unvetted, come to OBA members under OBA logo. OBA admits it shares its members' email addresses with Lexology, which in turn lets those members subscribe at no cost. Whether Plaintiff received or reviewed any particular article delivered to an OBA member in this way is irrelevant. Plaintiff is not required to consume every bit of OBA content output to have his

associational rights violated. (Not every Louisiana bar member read every tweet by the Louisiana bar, yet the *Boudreaux* court found them nongermane and unconstitutional. 86 F.4th at 632–33. OBA permits Lexology to put its logo on emails it sends to OBA members, thereby conveying a message of endorsement of the unvetted content. The nongermane Lexology articles Plaintiff cites in his Motion were gathered during discovery—and as OBA tacitly acknowledges that only an Oklahoma-licensed attorney would receive those emails (in this case Plaintiff's Oklahoma counsel).

B. OBA's additional undisputed facts do not immunize it from Plaintiff's freedom of association claim.

Plaintiff does not dispute many of the *factual* assertions in OBA's Statement of Additional Undisputed Facts ("SAUF"). OBA asserted most, but not all, of these *facts* in its Summary Judgment Motion. But much of the rest is legal argument or irrelevant background information. *See* Response at 4–9. Plaintiff therefore responds as follows:

Response to Statement of Undisputed Additional Facts ("RSUAF") 1–9: These statements are identical to the corresponding number of Statement of Undisputed Facts in OBA's Motion for Summary Judgment [Doc. 179] at 2–3. Plaintiff incorporates his responses to these paragraphs as set forth in his Response to OBA's Motion for Summary Judgment [Doc. 182] at 2.

RSUAF 10–11: The RCAC and bylaws speak for themselves. Plaintiff does not dispute those statements, but they are irrelevant.

RSUAF 12–22: These statements are identical, except for minor, immaterial refinements, to paragraphs 17–27 in OBA's Motion for Summary Judgment at 4. Plaintiff incorporates his responses to these paragraphs set forth in his Response to OBA's Motion for Summary Judgment at 3–4.

RSUAF 23–25, 26–29, 30: These statements are identical, except for minor, immaterial refinements, to paragraphs 29–31, 40–44, and 47 in OBA's Motion for

Summary Judgment at 5–7. Plaintiff incorporates his responses to these paragraphs set forth in his Response to OBA's Motion for Summary Judgment at 4–5.

RSUAF 31: Plaintiff does not dispute that OBA admits it (a) provides the Lexology service as a benefit to its members; (b) provides Lexology with the email addresses of its members, (c) licenses Lexology to display the OBA log in the emails it sends OBA members (a fact nowhere denied by OBA), and (d) does not vet any of the content Lexology provides to its members under the OBA logo. The remainder of OBA's assertions in this paragraph are irrelevant. *See* Plaintiff's Motion for Summary Judgment at 5-6, ¶¶ 14–15.

RSUAF 32–38 and 39: These statements are identical, except for minor, immaterial refinements, to paragraphs 63–69 and 8 in OBA's Motion for Summary Judgment at 9–10, 2. Plaintiff incorporates his responses to these paragraphs set forth in his Response to OBA's Motion for Summary Judgment at 6 and 2.

RSUAF 40–41: OBA argues that its conduct in 1967 and 2016 approving policy positions in favor of the JNC system is relevant to its Response to Plaintiff's Motion. At the same time, OBA argues that Plaintiff cannot challenge its conduct before 2017 (two years before Plaintiff filed this action)—even if that conduct, as an evidentiary matter, establishes the bar's repeated violations of its members associational rights. The fact that OBA took positions on a JNC system before 2017 is irrelevant to the issue of whether its conduct was then, and is now, germane. But if it is relevant, OBA has simply proven that it has a long history of violating its members' freedom of association rights.

II. Germaneness in the context of a freedom of association claim must have limits: it must be focused strictly on the state's interest in regulating lawyers as lawyers that interface with the judicial system, not as citizens generally.

A. Exacting scrutiny applies.

OBA misunderstands the relationship between *Janus* and *Keller* in the context of a freedom of association claim. It also misunderstands what the Tenth Circuit said about

those decisions in *Schell*, and the holdings of the Fifth Circuit in *Boudreaux* and *McDonald* and the Ninth Circuit in *Crowe*.

First, OBA argues that this Court should apply a mere rationality analysis to the question of "germaneness"—deferring to OBA's self-serving determinations of what is "germane"—and that this alone is sufficient to assess the constitutional issues involved here. That is wrong for reasons given in Plaintiff's Motion for Summary Judgement [Doc. 178] and Response to OBA's Motion for Summary Judgment [Doc. 182].

Of course, OBA's expansive view of germaneness is wrong. If it were true, OBA could engage in most any conduct it deems related to lawyers and the law. 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 promote political positions such as "disapprov[ing] statements of a United States senatorial candidate regarding court review of a victim's bill of rights," or "oppos[ing] federal legislation limiting federal-court jurisdiction over abortions," *id.* at 15, even though these are arguably "rationally related" to legal practice.

The lenient standard OBA advances would provide virtually no safeguards for Mr. Schell's constitutional rights because—as proven by mandatory bar jurisdictions like Louisiana, Oregon, and Texas—the bar will *always* claim that everything it does is "germane" in *some* way. *See Crowe v. Oregon State Bar*, 112 F.4th 1218, 1237 (9th Cir. 2024) (statements associating white nationalism and violence with President Trump and his supporters); *Boudreaux*, 86 F.4th at 636–38 (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 regulation of legal profession). That is probably why the Supreme Court has made clear that **exacting scrutiny**, not rational basis, applies to freedom of association claims. *See, e.g.*, *Janus v. AFSCME*, 585 U.S. 878, 916 (2018);

Harris v. Quinn, 573 U.S. 616, 648 (2014); *Knox*, 567 U.S. at 310; *see also Crowe*, 112 F.4th at 1240; *Boudreaux*, 86 F.4th at 629; *McDonald*, 4 F.4th at 246.

OBA also misconstrues *Crowe* by claiming it turned on whether "a reasonable observer would impute some meaning to membership in the organization and the plaintiff objects to that meaning." Response at 16. That wasn't the holding. *Crowe* determined that the bar's statement, which adopted a statement by a specialty bar, was nongermane when it interlaced a discussion of the rule of law and commitment to "the vision of a justice system that operates without discrimination" with veiled partisan attacks on then-President Trump and his supporters. Because that was not germane to the regulation of lawyers or the improvement of legal services, it failed exacting scrutiny. *Crowe*, 112 F.4th at 1239. The court then remanded for a remedy, without directing one, and suggested in dicta that imputation might be relevant to the remedy. *Id.* at 1240. OBA grasps at this dicta to argue that associational claims depend on whether third parties perceive an association between the bar member and the bar association's conduct. Response at 16. But that's not what the court held—and, as Plaintiff has already pointed out, *see* Pl.'s Mot. for Summ. J. at 12–16, freedom of association claims differ from compelled speech claims because of the personal privacy interest from which that right arises. *See United States v. United Foods, Inc.*, 533 U.S. 405 (2001) ("impression of endorsement" used only in free speech claims); *see also* cases cited in Pl.'s Resp. to Mot. for Summ. J. at 14-15.

Finally, OBA misconstrues the holding in *Schell* by conflating Plaintiff's two First Amendment claims. *See* Response at 13–14. OBA says exacting scrutiny does not apply, citing the Tenth Circuit's previous decision in this case. But that decision concerned Plaintiff's compelled *speech* claim; the court declined to apply exacting scrutiny to *that* claim. That claim is not at issue here, of course, because this Court dismissed it and the Tenth Circuit affirmed that. Instead, what's at issue here is the Plaintiff's compelled *association* claim. And it is indisputable that exacting scrutiny

applies to compelled association claims. *See Janus*, 585 U.S. at 907, 916. The Tenth Circuit itself recognized that neither *Lathrop* nor *Keller* resolved the "broad freedom of association challenge" involved here, and also that *Janus* and *Knox* establish exacting scrutiny as the appropriate standard for a freedom of association challenge. *Schell,* 11 F.4th at 1191, 1194. It is therefore simply not true that "the Tenth Circuit has already rebuffed" the application of exacting scrutiny here. Response at 14. OBA is confusing two different constitutional rights.

In fact, on the more limited, pleadings-stage record before it, the *Schell* court said that certain articles Plaintiff challenged (and which remain at issue here) plausibility advance a freedom of *association* claim, and that this Court should analyze them to ensure that they "*only* further[] speech germane to the recognized purposes of a state bar." *Schell,* 11 F.4th at 1194 (emphasis added). That's consistent with *Crowe*, where the challenged statements ostensibly were about the rule of law, but did not *only* further that germane end, and were therefore nongermane. *See* 112 F.4th at 1218. And that's just like many of the challenged publications here, many of which have a veneer of furthering one of the two recognized purposes justifying a state bar, but are not focused on those purposes, and wade into nongermane, ideological partisan point-scoring instead.

B. There is no *de minimis* exception for associational rights.

OBA claims that *Keller* and *Lathrop* establish a *de minimis* exception to the constitutional rule that bar associations can only force membership if the bar engages in only germane activities. Response at 16–17. But OBA again grasps at musings from the *Schell* decision that in no way support such an argument. *See Schell*, 11 F.4th at 1195 n.11.

Schell held that Plaintiff had stated a plausible claim for violation of his freedom of association right—based on only two articles OBA published in its *Journal*. *Id.* at 1194–95. If a *de minimis* exception existed, the court would have had to evaluate

whether Plaintiff had alleged enough of a violation to adequately plead a claim for relief, something the Tenth Circuit did not do.

As Plaintiff argues in his Response to OBA's Motion for Summary Judgment, no such exception exists as to associational rights. *See also* Pl.'s Mot. for Summ. J. at 16–18. Neither *Keller* nor *Lathrop* established such an exception, nor did *McDonald*, *Crowe,* or other cases somehow overlook it. Rather, there is no such exception. *See Boudreaux*, 86 F.4th at 636–37.

C. OBA's activities are nongermane and fail exacting scrutiny.

OBA[1] additionally argues that its Lexology member benefit is different than the social media posts (and re-Tweets) issued by the bar in *Boudreaux* because OBA is not the author or publisher of the Lexology news service. Response at 25. OBA even argues that its Lexology benefit is no different than OBA "facilitating access" to free subscriptions to *The Wall Street Journal* for its members, which OBA believes would be germane. This highlights how OBA misconstrues the associational right at issue. The bar association is not a news aggregator or amplifier. Nor is it a facilitator of good subscription deals for its members, whether it be *The Wall Street Journal* or *Mother Jones*. OBA is not Publishers Clearinghouse and Plaintiff's compulsory bar membership should not, and constitutionally cannot, subject him to an officious overseer seeking to hook him up with the latest fad products or services. The conduct is nongermane.

CONCLUSION

The Court should grant Plaintiff's Motion for Summary Judgment and grant the relief Plaintiff seeks in his Second Amended Complaint. The Court should also deny OBA's Motion for Summary Judgment.

Dated:

[1] OBA also essentially repeats its justifications for its challenged conduct from its Motion for Summary Judgment. Likewise, Plaintiff incorporates his arguments related to the bar activities challenged in his Motion for Summary Judgment and in his Response to OBA's Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of June, 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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