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 RESPONSE TO DEFENDANTS'

MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendants require attorneys to join and pay dues to the Oklahoma Bar Association ("OBA") as a condition of practicing law in Oklahoma. OBA uses these dues to fund its activities, including legislative engagement and periodical publications. As Plaintiff detailed in his Motion for Summary Judgment (PMSJ [Doc. 178]), these activities include conduct that is not germane to OBA's core functions of regulating the practice of law and improving legal services. Because Plaintiff must join, fund, and be associated with them—despite his objections to the bar's conduct—OBA has violated Plaintiff's First and Fourteenth Amendment rights of freedom of speech and association.

In its own Motion for Summary Judgment Motion (DMSJ [Doc. 181]),[1] OBA argues that the undisputed facts compel the opposite conclusion. But OBA misstates the legal standards for Plaintiff's claims. In doing so, Defendants claim that all challenged activities—those set forth in Plaintiff's pleading and his Motion for Summary Judgment—are "germane" to regulating lawyers or improving the quality of legal services. But OBA can make that claim only by giving that term an improperly expansive meaning, providing no limiting principle, and thereby allowing OBA to engage in any activities it thinks would be of interest to lawyers or result in its conception of better government. That's not the standard. The *only* constitutionally adequate justification for forcing Plaintiff to associate with OBA is to serve the government's interest in regulating him in his capacity as a lawyer. Accordingly, this Court should deny OBA's motion and grant summary judgment for Plaintiff.

RESPONSE TO STATEMENT OF UNDISPUTED MATERIAL FACTS

Plaintiff does not dispute most of the *factual* assertions OBA lists in its Statement of Undisputed Material Facts. Many of OBA's purported "factual" assertions, however,

[1] All Defendants have brought the motion jointly. Herein, "OBA" refers to the Oklahoma Bar Association itself and all Defendants collectively, as context dictates.

are legal conclusions or arguments masquerading as "facts." Of course, Plaintiff disputes OBA's characterizations of the law as applied to the facts.

Furthermore, most of OBA's legal and factual statements are irrelevant to the matter at issue, which is whether OBA violates Plaintiff's freedom of association by engaging in nongermane conduct. The history and governing authority of OBA, for example, is irrelevant to whether OBA violates Plaintiff's right of freedom of association through its actions. The only relevant facts are that Plaintiff is required to be a member of OBA and OBA engages in nongermane conduct. The proper analysis requires applying the appropriate constitutional test to OBA's undisputed conduct—here its decision to associate itself and its members with its legislative activities and materials it publishes in its magazine. That conduct is concisely set forth in Plaintiff's Motion for Summary Judgment [Doc. 178], which serves as his own opposition to OBA's motion.

Accordingly, Plaintiff responds to OBA's "facts" as follows:

1. This paragraph sets forth statements of law and is irrelevant.
2. This paragraph sets forth statements of law and is irrelevant.
3. This paragraph is irrelevant.
4. This paragraph sets forth statements of law and is irrelevant.
5. This paragraph sets forth statements of law and is irrelevant.
6. This paragraph sets forth statements of law and is irrelevant.
7. This paragraph sets forth statements of law and is irrelevant.
8. This paragraph sets forth statements of law and is irrelevant.
9. This paragraph sets forth statements of law and is irrelevant.
10. This paragraph sets forth statements of law and is irrelevant.
11. This paragraph sets forth statements of law and is irrelevant.
12. This paragraph sets forth statements of law and is irrelevant.
13. This paragraph sets forth statements of law and is irrelevant.
14. This paragraph is irrelevant.

15. This paragraph sets forth statements of law and is irrelevant.

16. This paragraph sets forth statements of law and is irrelevant.

17. No dispute.

18. This paragraph is irrelevant.

19. This paragraph is irrelevant.

20. This paragraph is irrelevant.

21. Plaintiff agrees that issues of the Oklahoma Bar *Journal* (the "*Journal*") contain statements and reports from OBA's President and Executive Director.

22. The conclusions set forth in paragraphs 22, 23, 25, and 26 lack foundation and are disputed. OBA supports its assertions with a declaration from its Executive Director, wherein she states, as Executive Director, that the messages from the OBA President and Executive Director published in the *Journal* are "*intended*" to be "personal statements." But these statements are not published under a "personal" byline. Instead, they are offered "From the President" or as "Reports" by the President or Executive Director. In any event, OBA's "intent" does not insulate OBA from a claim of associational harm. That's because Plaintiff is compelled to be a member of an organization that publishes such material, whether offered "officially" or "personally." Finally, although Defendants submit the declaration of its Executive Director in support of their motion, that declaration does not state whether it represents an "official," authorized statement of OBA or any Defendant, or that of the Executive Director herself. Nevertheless, the context makes it reasonable to assume her statements are authorized by them, just like it is reasonable for a reader of the *Journal* to expect that OBA approves of the statements from its

President, Executive Director, and any other official or member that it chooses to publish.

23. See response to Paragraph 22.

24. See response to Paragraph 21.

25. See response to Paragraph 22.

26. See response to Paragraph 22.

27. The quantity, timing, and nature of the articles and columns OBA publishes in its *Journal* is irrelevant. The relevant question is whether the material survives constitutional scrutiny as being "germane."

28. The number of continuing legal education programs OBA approved in a given timeframe is irrelevant. The relevant question is whether the program survives constitutional scrutiny as being "germane."

29. This paragraph is irrelevant. A "disclaimer" in the *Journal* does not license OBA to publish or otherwise amplify statements that are not "germane" to OBA's regulatory purpose.

30. See response to paragraph 29.

31. See response to paragraph 29.

32. This paragraph is irrelevant.

33. This paragraph is irrelevant.

34. No dispute but irrelevant.

35. This paragraph is irrelevant.

36. This paragraph is irrelevant.

37. This paragraph is irrelevant.

38. This paragraph is irrelevant.

39. No dispute but irrelevant.

40. No dispute but irrelevant.

41. No dispute but irrelevant.

42. No dispute but irrelevant.

43. No dispute but irrelevant.

44. No dispute but irrelevant.

45. No dispute but irrelevant.

46. No dispute but irrelevant.

47. No dispute but irrelevant.

48. No dispute but irrelevant.

49. No dispute but irrelevant. The authorship of any particular article is irrelevant; the fact that OBA published the article is. OBA also argues that an article published in 2010 is significant while at the same time arguing that articles it published before 2017 referenced in Plaintiff's pleading are time-barred and irrelevant. DMSJ at 14 n.5.

50. This paragraph sets forth statements of law that are irrelevant.

51. This paragraph is irrelevant.

52. This paragraph sets forth statements of law that are irrelevant.

53. This paragraph sets forth statements of law that are irrelevant.

54. This paragraph is irrelevant.

55. This paragraph is irrelevant.

56. This paragraph is irrelevant. The publication of a "disclaimer" does not insulate OBA from a claim of associational harm. That's because Plaintiff is compelled to be a member of an organization that officially approves continuing legal educational programs.

57. See response to paragraph 56.

58. No dispute but irrelevant.

59. No dispute but irrelevant.

60. No dispute but irrelevant.

61. No dispute but irrelevant

62. No dispute but irrelevant.

63. Disputed. Mr. Taylor also said his scope of services includes talking with legislators. (Dep. Tr. Clayton Taylor, Jr., attached as Ex. 1 [Doc. 178-2] to Appendix to PMSJ ("Taylor Tr.") at 42:4-12. He also admitted that his services include taking steps on behalf of OBA to "kill" or "work on" bills. *Id.* 44:10-25

64. See response to paragraph 63.

65. This paragraph is irrelevant.

66. This paragraph is irrelevant.

67. No dispute but irrelevant.

68. No dispute but irrelevant and argumentative.

69. No dispute but irrelevant and argumentative. Furthermore, Plaintiff explained his skepticism toward the independence of the judiciary by recounting instances where judges lobbied members of the Oklahoma legislature. (Dep. Tr. Mark Schell at 53:7-57:5; 79:9-80:17; 101:12-102:20; 105:24-111:15, attached hereto as Exhibit A.)

STATEMENT OF ADDITIONAL MATERIAL FACTS

Plaintiff references additional undisputed material facts throughout this brief, a full statement of which can be found in Plaintiff's Motion for Summary Judgment [Doc. 178] at 2-6. These facts are set forth herein as follows:

70. 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 ("SAC" [Doc. 116]) ¶¶ 41-45; OBA's Answer ("OBA's Ans." [Doc. 135]) ¶¶ 41-45. OBA publishes these requirements

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

71. 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.

72. 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.

73. OBA's bylaws[2] 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.

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

75. Clayton Taylor Jr. has been OBA's lobbyist from 2014 to the present. Taylor Depo, PMSJ App. Ex. 1 [Doc. 178-2] at 13:25-14:2; 16:7-14; 17:24-18:1; 21:9-20; 63:5-64:21.

76. 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. *Id.* at 31:7-34:24.

77. In the April 2017 and May 2018 editions of the *Journal*, OBA published statements of its Executive Director related to legislation concerning proposed changes to Oklahoma's judicial nominating commission. PMSJ App. Exs. 2-3 [Docs. 178-3, 178-4].

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

78. Mr. Taylor prepared a report for OBA dated February 5, 2018, detailing legislative activities noting the State Chamber 2030 Plan that included "a federal system of judicial selection." PMSJ App. Ex. 4 [Doc. 178-5]. 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, ("Williams Depo.") PMSJ App. Ex. 5 [Doc. 178-6] at 7:1-9:16; 44:14-48:8; PMSJ App. Ex. 6 [Doc. 178-7], Williams Depo. Exhibit 1 (deposition conducted pursuant to Fed. R. Civ. Proc. 30(b)(6)).

79. 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* PMSJ App. Exs. 7-12 [Doc. 178-8 – 178-13]; PMSJ App. Ex. 1 [Doc. 178-2] at 45:20-48:12, 58:2-25; PMSJ App. Ex. 5 [Doc. 178-6] at 88:19-92:20.

80. 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." PMSJ App. Ex. 13 [Doc. 178-14].

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

82. OBA published each article referenced in paragraphs 78-89 of the SAC in its *Journal*. PMSJ App. Exs. 2, 3, 14-23 [Docs. 178-3, 178-4, 178-15 – 178-24].

83. 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. PMSJ App. Ex. 5 [Doc. 178-6] at 123:17-126:9.

84. 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). PMSJ App. Ex. 24 [Doc. 178-25].

b. Steven Friel and Jordan Howells, *An Interview with Woodsford Discussing ESG[3] Engagement & Litigation in England and Wales*, Lexology (Nov. 27, 2023). PMSJ App. Ex. 25 [Doc. 178-26].

c. Kate Bradbury, *Gender Recognition Certificates and Divorce in Scotland*, Lexology (Mar. 29, 2004). PMSJ App. Ex. 26 [Doc. 178-27].

d. Ervin Hall, Jr., *The Importance of LGBTQIA+ Visibility in The Legal Profession*, Lexology (Jun. 22, 2023). PMSJ App. Ex. 27 [Doc. 178-28].

e. Alex Trodd, *Law Firms Must Improve DEI Efforts Through Objective Work Allocation or Risk Losing Clients*, Lexology (Nov. 20, 2023). PMSJ App. Ex. 28 [Doc. 178-29].

[3] 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. Catherine Krow, *Are Law Firms Ignoring Their Most Critical Assets? Bridging the DEI Divide*, Lexology (Nov. 2, 2023). PMSJ App. Ex. 29 [Doc. 178-30].

g. Lens Cozen, *How did we get here (and where it here)?*, Lexology (Jun. 7, 2022). SAC ¶ 91 & SAC Ex. 11.

ARGUMENT

I. Germaneness is for this Court to decide as a matter of law.

A. Germaneness is a legal question.

"Whether [OBA's activities] are germane or nongermane is a matter of law and is appropriately decided by this Court." *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). Moreover, when an integrated bar's activities implicate the First Amendment (for example through speech and lobbying), "[t]he burden is on the defendant to show that the expenditures were germane." *Fell*, 26 F. Supp.2d at 1278, not on the plaintiff to show they were not.

Contrary to these well-established principles, OBA's Motion for Summary Judgment often treats germaneness as a question of fact, about which OBA's own findings and opinions—or even Plaintiff's own statements or the perceptions of third parties—might somehow be determinative. To be sure, the legal question of whether OBA's activities are germane turns on factual questions about what activities OBA conducts. Those factual questions are essentially undisputed, however, particularly given that this challenge focuses on OBA's statements in widely accessible written publications like the *Journal* or its undisputed position on policy questions concerning the structure of Oklahoma's government through the selection of judicial officers. But the *legal*

significance of those undisputed facts—i.e., whether the activities were germane—is strictly a question of law for this Court to decide.[4]

B. Federal courts do not defer to state bars' opinions regarding germaneness.

Throughout its motion, OBA recites its own, self-interested opinions as to what it thinks is "reasonably related" to the purpose of regulating the legal profession, including references to Oklahoma statutes and rules that include broadly worded preambles and other terms that ostensibly authorize all of OBA's conduct. *See, e.g.*, DMSJ at 13-14. But enabling statutes and rules do not provide the constitutional standard, and certainly the Court should not simply accept OBA's self-serving *ipse dixit* that its actions are constitutional. Indeed, Plaintiff knows no other context in which a *federal* court would defer to a *state* agency's "assessment" on a matter of federal constitutional law. This Court owes no deference to OBA's opinions about the germaneness of its activities.

As the Tenth 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 … ."). And, more fundamentally, the notion of deferring to a state bar's own assessment of germaneness is antithetical to the approach that *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *Janus v. AFSCME*, 138 S.

[4] On this point, Plaintiff does not question OBA's sincerity or good intentions with respect to its publications and influence at the state legislature. His lawsuit maintains that Defendants' actions often cross the line into nongermane activities, and consequently infringe on his speech and associational rights.

Ct. 2448 (2018), call for in an associational-rights challenge to an integrated bar.[5] 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).

To be sure, categories like "regulating the practice of law" and "improving the quality and availability of legal services" can be difficult to define, 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 reasonable relation. *Id.* at 14. But to go further, and defer to a bar's own, self-interested assessment of its authority on such a 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.").

C. OBA's boilerplate disclaimers do not license nongermane conduct.

OBA also makes much of the "disclaimers" it publishes in its *Journal*, arguing that the constitutional test hinges on whether a "reasonable observer" would believe that Plaintiff agrees with statements OBA publishes. *See* DMSJ at 14-15. This, too, is not the standard.

The central issue in this case is whether OBA can force Plaintiff to pay for the publication of matter—whether authored by the bar or someone else—that is not germane to (1) regulating the practice of law or (2) improving the quality of legal services, the *only* two legitimate state interests that the *Keller* Court said *might* justify compelled

[5] As Plaintiff argues in detail on pages 12 to 15 of his Motion for Summary Judgment, exacting scrutiny is the appropriate standard here.

association, 496 U.S. at 13—indeed, to force him to pay for publications he finds repugnant.

In *Boudreaux v. Louisiana State Bar Association*, 86 F.4th 620 (5th Cir. 2023), 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.'" *Id.* at 634 (emphasis in original). These goals cannot be viewed as "general" or "abstract," or else the scrutiny and tailoring required by *Keller* and *Janus* loses any effectiveness as a limiting principle. The subject matter must relate directly and necessarily to those specific subjects.

The *Boudreaux* court held the Louisiana bar to that high standard. It applied the 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 (X posts) with articles about lawyer wellness. *Id.* It said those were nongermane, and, consequently, that forcing Louisiana attorneys to fund such publications (or shares) violated their 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 [Louisiana bar] 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 solve the problem by just publishing a rote disclaimer.

Nor did the Ninth Circuit hold otherwise in *Crowe v. Oregon State Bar*, 112 F.4th 1218, 1240 (9th Cir. 2024). 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. *Id.* And, although *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021), 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 Plaintiff's associational right to be free from compulsory membership in an organization that forces him 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) 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)—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* Patrick Lofton, *Any Club That Would Have Me as A Member: The Historical Basis for A Non-Expressive and Non-Intimate Freedom of Association*, 81 Miss. L.J. 327, 357 (2011) ("there is a historical basis, deeply rooted in the American tradition of civil liberty, for a non-expressive and nonintimate associational right based on privacy."). Freedom of association is best understood as "associational 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 person with the organization or whether the person 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, however, 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).

The disclaimers OBA touts as immunizing itself from Plaintiff's freedom of association claim are red herrings. The perceptions of third parties, or even Plaintiff's opinion about the perception of others, are irrelevant. The question is whether the subject matter of the publication is targeted at the state's interest in regulating lawyers. In the examples Plaintiff cites in his pleading and MSJ, they are not.

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

OBA claims that the Tenth Circuit's opinion in this case recognized a *de minimis* exception to the constitutional rule that bar associations can only force membership if the bar engages in only germane activities. *See* DMSJ at 12-13, 28-30. But the Tenth Circuit's opinion in *Schell v. Chief Justice and Justices of Oklahoma Supreme Court*, 11 F.4th 1178 (10th Cir. 2021), determined that Plaintiff had properly pled a claim for violation of his associational rights, concluding that he had, based only on some of the conduct Plaintiff alleged in his pleading. *Id.* at 1194. If a *de minimis* exception had in fact had any meaning, the court certainly would have used it. But it didn't, and with good reason.

First, a *de minimis* exception would be unmanageable and easily manipulable. Under that theory, a bar association could support a bill that restricts abortion access, or publish articles calling for a repeal of the Second Amendment or endorsing 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* suggests that mandatory subsidization can survive constitutional scrutiny just because the bar does a lot of other, non-infringing things.[6] One reason why is because it would be

[6] On the contrary, every case from *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), 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

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 ("[W]e 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."). And *Lathrop v. Donohue*, 367 U.S. 820 (1961), 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"

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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. In *Wooley v. Maynard*, 430 U.S. 705 (1977), the state asked nothing more than that the plaintiffs not obscure a small portion of their license plate with tape. The Court nevertheless did not employ any *de minimis* theory; it held that the plaintiffs could not be forced to affirm the state's message.

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 Plaintiff properly pleaded his claims, and never found that he suffered only a *de minimis* injury. OBA 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* DMSJ at 13.

II. OBA compels Plaintiff to fund and associate with nongermane speech and lobbying.

OBA argues that the conduct Plaintiff challenges is germane, DMSJ at 16-27, but its circuitous defense of its conduct highlights the fact that OBA relies on an expansive germaneness standard, where the only "limiting principle" is that the subject matter is somehow "of interest" to lawyers or about the law generally. This extremely permissive interpretation of germaneness is inconsistent with the Supreme Court's precedent in compelled-speech cases involving mandatory membership in a union or bar association. *See Janus*, 138 S. Ct. at 2464; *Keller*, 496 U.S. at 13. "Because the compelled subsidization of private speech seriously impinges on First Amendment rights, it cannot

be casually allowed." *Janus*, 138 S. Ct. at 2464. Indeed, as Plaintiff details in his own MSJ, *Janus* and its progeny call for *at least* exacting scrutiny in such cases.

If there are to be *any* constitutional bounds on an integrated bar's powers to compel speech, then even a "germaneness" test must have limits. As detailed below, much of OBA's activities in recent years is so attenuated from OBA's core functions that it cannot be germane under any meaningful definition of "germaneness." To serve the only legitimate interest in forced association, the bar's conduct must be targeted at activities that (a) regulate lawyers in their capacity as lawyers (not promote "better government" or "better human beings or society" in general); and (b) improve the quality of legal services by regulating lawyers in a manner that permits them to interface with the judicial system more productively (not promote retrospective essays on topics laced with political, social, or public policy commentary that might be of interest to some lawyers or the public generally).

Here, OBA's undisputed conduct shows that it speaks on, or amplifies the views of others on, a vast range of topics, including matters of politics, ideology, and diverse areas of substantive law. It also engages in contentious and politically charged matters of public policy concerning how Oklahomans govern themselves through its advocacy for its preferred method for the selection of judicial officers. OBA does all of this at the expense of its members, who must fund and associate with its often-controversial publications and activities as a condition of practicing law in Oklahoma.

Courts have made clear that an integrated bar may compel its members to fund speech *only* when that speech is germane to two regulatory purposes: regulating the legal profession and improving legal services. *Keller*, 496 U.S. at 13. Under no reasonable, meaningful definition of "germaneness" are OBA's activities germane to these core functions.

OBA argues that controversial or political conduct can still be germane. But even if that's true, OBA must also acknowledge that the risk of nongermane activity is

particularly acute when engaging in such conduct. *Schell*, 11 F.4th at 1194. But the test is always whether the conduct is outside the regulatory purposes "'for which mandatory financial support is justified,'" *id.* at 1189 (quoting *Keller*, 496 U.S. at 17), and therefore cannot be carried out at the expense of members' First Amendment rights. OBA fails that test.

A. OBA publishes extensive content that is nongermane.

OBA publishes a substantial amount of content in its *Journal* that is nongermane. PMSJ at 15-20.

1. The April 2017 *Journal* article: Executive Director's statement regarding judicial selection system.

This article criticizes legislative proposals to change Oklahoma's method of judicial selection, suggesting—using charged political tones—that if they passed, "big money and special interest groups [would] elect judges and justices and campaign contributions [would] buy court opinions." PMSJ at 16 & PMSJ App. Ex. 2 [Doc. 178-3] at 2. True, despite the rhetoric, the subject matter relates broadly to the state's judicial system and then to lawyers. But that's not enough. How Oklahoma's government is structured is a decision all Oklahomans get to make, not just lawyers. Reasonable people can disagree, as do members of Oklahoma's legislature who represent those people. Indeed, many states and the federal government structure their judiciaries differently. But the legislation OBA rails against has nothing to do with *the regulation of lawyers* and or the quality of *legal services*.

OBA argues that the article is germane because it was the "opinion" of its Executive Director and because it "encourages" bar members to express their opinions. But OBA's Executive Director speaks in the *Journal* from a privileged platform based on his official status with OBA. His opinion carries the weight of OBA (and all its compelled members). Even apart from that, what's important is that OBA chose to

publish and amplify a particular political message, with Plaintiff being compelled to be a part of that.

2. The November 2018 *Journal* article: "Tort Litigation for the Rising Prison Population."

OBA defends this article by arguing that it "guides lawyers who may represent inmates in tort actions to the applicable law." DMSJ at 19. But that's hardly what the article does. PMSJ at 16-17.

Instead, the article is laced with value judgments and political commentary, e.g., arguing that Oklahoma's prison system is "underfunded." It also advocates for political action through a change in public policy by changing the prison system's exemption from tort liability. That's not "guiding" lawyers to the law; it's advocating for a significant change in the law. Lawyers do not get to have an outsized voice on such matters of public policy: all Oklahomans get to weigh in on such matters, and they should be able to do so without OBA using its power through the message of its compelled membership, to exert an unfair influence on these decisions. Certainly, Plaintiff should not be forced to be associated with this effort.

3. The December 2020 *Journal* article: "A Resilient Mindset: Take Stock of What you Lost and What you Gained to Move Forward."

OBA claims that an article about "wellness" helps lawyers do their jobs better and thus improves the quality of legal services. But this is precisely the kind of highly attenuated "wellness" information that the Fifth Circuit found nongermane in *Boudreaux*. 86 F.4th at 632-33. Such pop-psychological advice—which includes political "dog-whistle" type references to "racism and upcoming election"—could arguably be of use to anyone in any profession.

The article is in no way targeted at regulating lawyers or their role in improving the quality of legal services except, perhaps, in the very broadest sense. But that sense is so broad that it goes beyond the limits of germaneness. As *Boudreaux* said, approving that kind of publication would also sanction the bar disseminating information about the

health benefits of eating broccoli, getting a good night's sleep, changing the batteries in one's smoke detector, etc.—all "wellness" subjects that have been rejected as nongermane. *Id.*

OBA claims that the article is nevertheless permissible because it simply relates to the opinion and personal experience of the author. But again, authorship is irrelevant; the fact that OBA published it is. OBA also claims that the article is permissible because it sanctions such subjects through its approval of CLE programming. But, as argued above, this is the bar granting itself deference and license to violate the constitutional rights of its members, which it cannot do. If anything, OBA's approval of CLEs on "wellness" subjects makes its approved CLE programs on wellness unconstitutional too.

4. The May 2021 *Journal* article: "*Guinn v. U.S.*: States' Rights and the 15th Amendment."

OBA simply concludes this article is germane because it broadly discusses voting rights. DMSJ at 21. But the article does far more than guide the reader to current state and federal voting laws. Instead, OBA chose to amplify an advocacy piece that weighs in on highly charged public policy issues that have nothing to do with the bar's regulatory purpose. PMSJ at 17-18. It criticizes states that amended voting integrity laws in reaction to the 2020 election, arguing that those laws were designed to disenfranchise Black voters. After the 2020 election, many states considered a variety of changes to voting laws. But what other states might have considered, or even acted on, is of no relevance to *Oklahoma* practitioners. The article effectively ridicules other states' reforms. The fact that it does this while referencing voting laws in no way immunizes it from violating Plaintiff's associational rights.

5. The May 2021 *Journal* article: "Oklahoma's Embrace of the White Racial Identity."

OBA again defends this article because it "expresses the author's opinion." But if the content is nongermane, whether it is someone's opinion is irrelevant. OBA also claims that the article is germane because it promotes diversity in law firms. To be sure,

Boudreaux and *McDonald* did say that programs specifically promoting diversity of lawyers at law firms could be germane, but otherwise the topic was highly problematic because "affirmative action—done in the name of 'diversity'—was itself race-based discrimination and unconstitutional." *Boudreaux*, 86 F.4th at 635 (citing *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230-31 (2023)).

Here, the "opinion" article goes beyond any pretense of a targeted promotion of diversity programs within law firms. Instead, it effectively scolds Oklahomans as the products of "Caucasian westward expansion," DMSJ at 22, blaming them for the fact that "very few nonwhites [are] at the partnership or director level" in the state's major firms—although it provides no evidence for this beyond the author's emotional view of the state's history. PMSJ at 18 & App. Ex. 20 [Doc. 178-21] at 4.

Essentially, OBA claims that if an article it publishes includes a statement that merely includes a sentence or phrase that alludes to a subject that might be germane, then the entire publication becomes germane. If that were true, the bar could publish *anything* as long as some part of the article references something "legal." In that case, the bar would be free to publish an article advocating repeal of the Second Amendment because it referenced laws related to firearms, or an article promoting reparations because it referenced the Civil Rights Act, or even outright pornography as long as it made mention of a First Amendment case involving obscenity. That would trivialize the meaning of "germaneness."

6. The February 2022 *Journal* article: "Vaccine Mandates and Their Role in the Workplace."

OBA claims this article concerns improving the quality of legal services because it "educates human resources practitioners of developments in vaccination mandates." DMSJ at 22. But just like the previous articles, it does not simply identify the law pertaining to vaccine mandates. Instead, it scores political points by praising the Biden

Administration for implementing them because a non-compliant public failed to "wear face masks in public and failed to socially distance." PMSJ at 18; PMSJ App. Ex. 7 [Doc. 178-22] at 5. Perhaps no other article better exemplifies the folly of wading into debatable public policy—rather than sticking to germane pronouncements—than this one, given that the current administration represents the complete opposite ethos.

7. The May 2022 *Journal* article: "A Silent History."

OBA justifies an article "setting out the theme and publication history" of a book published in 1940 that claims Oklahoma landowners are essentially coconspirators in land theft. OBA claims that publishing this opinion article "is a useful educational tool for an OBA member handling resulting issues such as land titles." DMSJ at 23. That's sophistry. OBA points to nothing in this moralizing article that relates to current laws that practitioners would use when facilitating the transfer title of real property. As Plaintiff argues in his MSJ, if being more knowledgeable about the state's history *in general* improves the quality of legal services, then *Keller*'s germaneness construct has no limiting principle. Under OBA's theory, Oklahoma attorneys could be forced to pay for the publication of a biography of the sixth-century Chinese polymath Li Daoyuan, who invented the process of refining crude oil, on the theory that it would be a "useful educational tool," since oil and gas law make up a substantial part of Oklahoma's legal business—or for the production of a video series by PETA, on the theory that Oklahoma lawyers are often involved with the beef industry.

8. The May 2020 *Journal* article: "Representing Transgender and Gender-Diverse Clients."

OBA defends this article in similar fashion to the preceding one, claiming that a general knowledge of "LGBT terminology and issues" and "historical notes" related to the same, will improve the quality of legal services. DMSJ at 23. In reality, the article reads as a 1960s teach-in, praising the like-minded as "brilliant," "energetic," and "thought provoking," and presenting the current laundry-list of fashionable gender

terminology. It also promotes watching "films, interviews[,] and performances by trans people," attending "community forums and conferences," imagining that "you identify as a gender different from the sex you 'were assigned' at birth," exploring "implicit bias," etc. DMSJ Decl. Ex. G [Doc. 181-1] . As a half-hearted effort to create *some* link to *any* actual "law," the article concludes by disgorging a list of cases (some unpublished and some trial court decisions) under the heading "cases that have shaped transgender rights." *Id.* But the article does not explain the relevance or applicability of any of them, nor what transgender rights means beyond what the author wants them to mean. The article is nongermane.

B. OBA amplifies nongermane publications through its Lexology member benefit.

As a member benefit, OBA provides the Lexology service to its members. Lexology is a news aggregator that periodically sends emails to bar members with links to news articles, ostensibly law-related, all under OBA's logo. PMSF at 19. But OBA makes no pretense of ensuring that the information aggregated, amplified, and distributed to its members through Lexology is germane, admitting that it performs no *Keller* review of the content. *Id.*

OBA's motion does not defend Lexology. Rather, it argues that Plaintiff lacks standing to challenge it because he does not use the service and therefore has no injury. DMSJ at 27-28. But whether Plaintiff recalls receiving information through Lexology in his email inbox—or even has knowledge of the Lexology service generally—he certainly has knowledge of it through discovery in this lawsuit. *See* SAC [Doc. 116] ¶ 91 & SAC Ex. 11 (Lexology article promoting restrictive firearms restrictions, noting what Democrats hope to achieve nationally and on the state level).

In any event, OBA provides no legal basis for the claim that Plaintiff must have contemporaneous knowledge of events giving rise to his constitutional injury to claim that his associational rights have been violated. Certainly, the opinion OBA cites, *Bear*

Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814, 821-22 (10th Cir. 1999), provides no basis. That case has nothing to do with associational rights whatsoever. It involved mountain climbers who complained that they were being asked to "voluntarily limit" their climbing on Devils Tower in Wyoming out of respect to Native American customs. *Id.* The court found no injury because the climbers climbed anyway. *Id.*

But here an actual injury exists because (a) Plaintiff is compelled to join, pay dues to, and be a member of OBA and (b) OBA is associating itself (and its members) with the unvetted articles and content Lexology delivers to members. That's a concrete injury to Plaintiff's associational rights. The timing of when Plaintiff became aware of the injury is irrelevant to the standing injury. For example, if Plaintiff does not attend a state bar convention, but learns about non-*Keller* bar activities months later, Plaintiff has standing to assert the claim so long has he files his lawsuit within the statute of limitations. That's because Plaintiff has been *objectively* injured. *See Janus*, 585 U.S. at 2462 (standing turned on Mr. Janus having to pay the agency, not awareness of all union activities); *see also Spokeo, Inc. v. Robins*, 578 U.S. 330, 337-38 (2016) (standing usually conferred by violation of a right).

Much of the unvetted Lexology information distributed under OBA's banner is nongermane. That constitutes a concrete injury to Plaintiff, one that is redressable through this lawsuit. These articles not only include the gun control advocacy piece Plaintiff cited in his pleading, but also the five articles he cites in his Motion for Summary Judgment. PMSJ at 19-20. These include articles that discuss (a) the use of gender-neutral language around the world, (b) ESG engagement and litigation in England and Wales, (c) gender recognition certificates and divorce in Scotland, (d) the "visibility" of LGBTQIA+ in the legal profession, and (e) inadequate DEI programing in the U.K. and U.S. *Id.*

C. OBA's legislative activities are nongermane to regulating lawyers and their role in delivering legal services.

OBA defends its legislative activities by claiming that all activities alleged in Plaintiff's pleading have been found to be germane. But this is not exactly true. As Plaintiff notes in his Motion for Summary Judgment, the Tenth Circuit's decision in *Schell* might seem to suggest that legislative activities broadly related to judicial selection procedures could be germane, the court was actually just deciding whether Plaintiff had properly pleaded his freedom of association claim. It was not deciding this issue on the merits.

As explained elsewhere (PMSJ at 23-24), OBA, through its publications and lobbyist, electioneers in favor of OBA's favored position on how Oklahomans should structure their government by advocating for the status quo regarding the nomination and appointment of judicial officers. The people of Oklahoma should make this decision, without OBA claiming an outsized and self-interested influence on which process should be used. *See McDonald*, 4 F.4th at 245-46 ("membership is … the message"). And how Oklahoma selects its judicial officers is of particular concern to Plaintiff given his past experiences with Oklahoma legislatures. *See* p.9, ¶ 69, *supra*.

CONCLUSION

In *Lathrop, supra*, Justice Hugo Black—well known for his staunch defense of the First Amendment—said: "[t]he mere fact that a lawyer has important responsibilities in society does not require or even permit the State to deprive him of those protections of freedom set out in the Bill of Rights for the precise purpose of insuring the independence of the individual against the Government." 367 U.S.at 876 (Black, J. dissenting). In *McDonald*, *Crowe*, and other cases, the Courts of Appeals—and, in *Janus*, the Supreme Court—have vindicated his words. This Court should do likewise, and deny OBA's Motion while granting Plaintiff's Motion for Summary Judgment.

The law requires that OBA's behavior be targeted directly at the only two legitimate interests that can justify mandating membership: the regulation of lawyers in

their capacity as lawyers, and the improvement of their legal services. *Keller*, 496 U.S. at 13. Given enough dots to connect, OBA will claim that *any* activity in which it engages is *somehow* related. But, as *Boudreaux* recognized, that would make the germaneness limit no limit at all. The actual germaneness limit is explained in Plaintiff's motion for Summary Judgment and should be applied here. *See, e.g.*, PMSJ at 24-25.

The Court should deny OBA's motion and grant summary judgment for Plaintiff.

Dated: May 20, 2025

Respectfully submitted,

By: /s/ Scott Day Freeman
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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of May 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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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
MARK E. SCHELL,
Plaintiff,
vs. No. 5:19-CV-00281-HE
JANET JOHNSON, et al.,
Defendants.

* *

DEPOSITION OF MARK SCHELL
TAKEN ON BEHALF OF THE DEFENDANTS
ON NOVEMBER 26, 2024, BEGINNING AT 10:07 A.M.
IN OKLAHOMA CITY, OKLAHOMA

* *

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(Appearances continued on next page.)

REPORTED BY: Jane McConnell, CSR RPR CMR CRR

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ALSO PRESENT: John Williams

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EXHIBITS

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STIPULATIONS

It is hereby stipulated and agreed by and between the parties hereto, through their respective attorneys, that the deposition of Mark Schell may be taken pursuant to notice and in accordance with the Federal Rules of Civil Procedure on November 26, 2024 at the offices of 512 N. Broadway, Oklahoma City, Oklahoma, before Jane McConnell, CSR RPR RMR CRR.

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Q Do you remember what kind of issues you raised on behalf of Unit at the legislature in your career?

A Certainly, work comp reform was a big one. Legislator -- I mean, judicial reform and tort reform, as well as drug testing.

Q You said you were lobbying for judicial reform. What kind of judicial reform were you lobbying for?

A To revise the way judges, Supreme Court judges, were appointed.

Q Are you unhappy with the way Supreme Court judges are presently appointed?

A I am.

Q How would you like for them to be appointed?

A Like the US Senate does.

Q So could you --

A I think they call it the Madison program.

Q Well, could you explain, please, what that means to you?

A I think that the -- there should be recommendations made as to who can be -- who should be a judge. They should be vetted in public by the Senate, and then the Governor can choose who he

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decides he wants to have it.

Q Is it your understanding the Governor cannot presently decide who -- he cannot make a choice presently?

A He has three people given to him to choose and that's it.

Q Do you think an independent judiciary is an important part of Oklahoma's governmental structure?

A Do I think it is? I think it would be.

Q My question was: Do you think an independent judiciary is an important part of Oklahoma's governmental structure?

A Your question assumes that it's independent.

Q Is it your testimony that you think the current judicial system in Oklahoma is not independent?

A That's correct.

Q In what way do you think the Oklahoma judicial system is not independent?

A Because they go down and advocate for changes in what I believe to be policy issues, that they should have no business getting involved in as an organization.

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Q The Oklahoma judicial system does that?

A No. I'm sorry. Maybe I misunderstood your question.

Q Do you think the Oklahoma judicial system is not an independent branch of government in Oklahoma?

A No. It's set up to be an independent branch, certainly.

Q Well, do you think -- my question was: Do you think an independent judiciary is an important part of Oklahoma's governmental structure?

A I think an independent judiciary is an important part, but the question and the answer assume that it's independent.

Q So my question was: Do you think Oklahoma's judicial -- judiciary is not an independent branch of government?

A I do not think they're independent, no.

Q And what's the basis for your thinking that the Oklahoma judiciary is not an independent branch of government?

A Because they involve themselves in legislative policy matters.

Q Which branch of the judiciary involves itself in legislative policy matters, in your

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opinion?

A Judges.

Q Which branch of the judiciary?

A Well, we have district court judges and we have appellate court judges and Supreme Court judges. Several of the Supreme Court judges have.

Q Several of the Supreme Court judges have done what?

A Have gone to the legislature and advocated against legislation that was pending in the legislature.

Q And you think that activity that you contend occurred makes the judiciary not independent?

A If they're supposed to be sitting judgment of any legislation in the past, but they went down and advocated against it, then I think they're not independent.

Q Which judges do you think went and advocated at the Oklahoma legislature?

A I know that Noma Gurich did.

Q What's your knowledge of that?

A Because one of the members of the committee told me that she did.

Q What committee?

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A It would have been the judicial committee.
Q When did that happen, that you were told that?
A I can't recall for sure. It's been several years.
Q Was it after 2019?
A I can't recall.
Q Are you familiar with the continuing legal education requirements of Oklahoma?
A I am.
Q Are you current on your continuing legal education?
A Yes, considering this year is not due yet.
Q Have you taken classes in 2024?
A I have carryover hours and I'm signed up to take seven more.
Q Do you recall any continuing legal education courses you've taken in the last five years?
A I should. I took some last year. I can't recall what they were, but I know I took them.
Q How do you choose the courses you decide to take?
A I look for courses that are offline so that I can do them without having to travel to go

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see them, and then I just pick the ones I need to get my hours.
Q You agree that you get to choose what courses you want to take?
A Sure. As long as they're accredited with Oklahoma, yes.
Q No one at the Oklahoma Bar Association has forced you to choose any particular CLE course?
A No.
Q Is it helpful to have the option of taking courses that interest you?
A Well, certainly. Since I have to do it, I'd like to have ones that interest me, yes.
(Exhibit 6 marked for identification.)
Q (BY MS. HINTZ) Exhibit 6, I'll just represent that this is your Oklahoma Continuing Legal Education Commission Attorney Credit Report.
A Okay.
Q That the most recent taken date is December 11, 2023. If you look at the second page, the earliest date is September 20, 2017. Do you see that?
A Yes.
Q Do you have any reason to doubt that this is your -- an accurate representation of the CLE

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classes you've taken?
A I do not.
Q So starting at the top of the first page of this Exhibit 6, it looks like last December you took Social Security Retirement and Survivors Benefits: Maximizing Outcomes for your Clients.
A Uh-huh.
Q And Corporate Counsel Seminar.
A Uh-huh.
Q Are those areas that are relevant to you personally or for your legal work?
A The first one is not. I don't remember what the Corporate Counsel Seminar was about.
Q Well, you've been a corporate counsel for 30 plus years; right?
A That's correct.
Q So that's a Corporate Counsel Seminar?
A But you don't know what was said in it.
Q True.
A So it could be stuff that I would think was a rehash of everything I knew or it could be something different.
Q But when you signed up for a CLE course, you can look at what the topics are going to be; right?

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A I believe that's the case, yes.
Q So at least the title there, Corporate Counsel Seminar, would relate to your work, your career work as a lawyer?
A Yes.
Q Then we have "CHATGPT and Generative AI: What Lawyers Need to Know."
A Uh-huh.
Q Do you remember taking that course?
A I do not.
Q Below that is "Part 1, Reg D Offerings and Private Placements, 2023." Do you see that?
A I do.
Q So presumably, that's relevant to your corporate work you've done since we've already established you did EDGAR filings and other corporate filings for Unit; correct?
A That's correct.
Q Then below that is "Preserving Privilege in the Corporate Setting." That, I imagine, is something that's important to you as a corporate lawyer?
A Uh-huh. It is.
Q "Ethical and Practical Risks of Using Technology: What You and Your Client Need to Know."

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Q Do you recall receiving emails from a Lexology service?
A I received emails from a Lexology service?
Q I'm asking if you recall ever having received one.
A Would they say Lexology?
Q I'm just asking what you recall.
A I received a lot of emails. Whether I received any from them or not, I don't know.
Q Is it your contention that when a person reads an article published in the Oklahoma Bar Journal, that person could reasonably believe it's your speech?
MR. FREEMAN: Form.
A When you say me, are you referring to the author of the article?
Q (BY MS. HINTZ) Is it your contention, that when a person reads an article published in the Oklahoma Bar Association, that person could reasonably believe it is your speech?
A I see.
MR. FREEMAN: Form.
A Yeah. I mean, I think it depends on the article.
Q (BY MS. HINTZ) Do you think that the

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article that you published back in the day is my speech?
A Do I think it's your speech? The article was nothing but an explanation of the law. So it's not really anybody's speech.
Q You indicated that you thought about filing this lawsuit before it was filed; is that accurate?
A Yes.
Q Did you talk about the issues related to the challenges that you're bringing in your lawsuit with anyone before you filed the lawsuit?
A Yes. I'm sure I did.
Q Do you remember who you talked to?
A I know I -- excuse me. I spoke with a number of people over a time period, legislators, lobbyists, other lawyers about various issues and then other businessmen that I knew and associated with. There were quite a few people, but to ask me if I remember specifically, I can't.
Q What issues did you talk about?
A We talked about a lot of things. We talked about how plaintiffs' lawyers were very active at the legislature and other -- if you wanted to assert a position, you needed to go down there

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and do it.
We talked about how I thought that the Bar was active in some of this stuff and shouldn't be, judges were active and shouldn't be, and what we could do about it and what we couldn't do about it, and whether some of the articles that the Bar was publishing were appropriate, etc. There were just a lot of things we talked about.
Q You just testified that you discussed that -- I believe the word you used was "judges were doing that."
A Uh-huh.
Q What do you mean by "doing that"?
A Like I previously testified, we had one Supreme Court judge apparently come down and advocate against a bill that was pending, and then I know that we had a district court judge call the head of the judiciary committee at that time and tell him he better not pass that thing.
Q And you recall discussing those with other people?
A I do. I recall the discussions. I can't recall all the specifics.
Q Who did you have the discussions with?
A Well, the one gentleman, he's a lawyer in

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Sapulpa, on the work comp thing. I can't recall his name right now, though. It's been too many years ago.
I don't recall which, whether it was the House or the Senate judiciary committee member that told me about Justice Gurich's involvement.
Q You said "the workers' comp thing" just a moment ago. What did you mean by that?
A The reform effort. I'm sorry. The work comp reform effort.
Q So you believe that there was activity before workers' comp was changed?
A Activity?
Q You said judges were doing it.
A While we were trying to get the reform bill passed, there was a lot of activity insofar as lobbying for and against the bill by various people.
Q And you personally were in favor of the workers' compensation bill?
A Very much so.
Q And you succeeded. It was revised, it was changed, right, in 2012 or thereabouts?
A Yes.
Q Have you ever communicated in writing, by letter or email, with anyone, other than your

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A No.
Q Are you funding your own lawsuit?
A I have an arrangement with my lawyers dealing with the funding of this lawsuit.
Q Does your arrangement involve you paying any fees?
A No, it does not.
Q Earlier you testified that you had a belief that a judge engaged in inappropriate activity of some kind. Do you recall that?
A In my opinion it was inappropriate, yes.
Q And can you please name every judge that you believe engaged in that activity that you, in your personal opinion, consider is inappropriate?
A I've already done that.
Q And who is that?
A One was Justice Gurich, and I don't know the name of the district court judge that I talked about. I do know that I have been told by the legislative leaders that they have received numerous calls from judges over the years advocating for or against legislation and, frankly, I consider that highly inappropriate.
Q And you got that information through a third party?

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A Yes.
Q You don't have any personal knowledge of that information?
A No, I do not.
Q Do you contend the Oklahoma Bar Association had any part in what you contend the judges were doing that you heard from a third party?
A As to the judges' behavior, not that I'm aware of. I am aware that they control the Bar.
Q You are aware that the Oklahoma Supreme Court controls the Bar?
A That's correct.
Q Who were the legislators that you contend provided you with that information?
A Well, they were members of the judiciary committee, either in the House or in the Senate, and that spans quite a long period of time, frankly.
I'm trying to remember their names now. It's of record, but I can't recall who exactly it was at this point in time.
Q Do you remember what years those conversations were?
A No. I don't remember that at all.
Q Did those conversations take place before, allegedly before you filed this lawsuit?

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A Could have. I mean, my experience down at the legislature spans quite a period of time off and on, and I really can't recall exactly when things happened and didn't happen.
Q And you can't recall or bring to mind the name of any legislator who you contend told you this information?
A What I can't recall is specifically which ones did. So that's my problem.
Q Do you have any contemporaneous notes of those conversations that you've kept?
A No. I do not.
Q Were any of them in writing by email?
A Any what?
Q Of your conversations.
A No. No. They were verbal.
Q Did they take place when you were at the legislature lobbying for something?
A Yes.
Q You were lobbying for workers' compensation reform?
A It could have been workers' comp, any of the tort reform stuff, the Judicial Nominating Committee stuff, energy litigation reform.
MS. HINTZ: I may have a few more

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questions, but I would like to let Mr. Maye ask his questions so he can cover my questions.
MR. FREEMAN: Sure.
(Discussion off the record.)
CROSS-EXAMINATION
BY MR. MAYE:
Q Mr. Schell, my name is Kerry Maye, and I represent the nine justices with the Oklahoma Supreme Court in this litigation, the chief justice, the vice chief justice and his other justices.
A Uh-huh.
Q So does that answer that?
A Yes, it does.
Q In that regard, do you make any claims in your litigation against any of the judges, justices in their individual capacities?
A No.
Q Do you know any of them?
A Yes.
Q Who do you know?
A I know Justice Winchester, Justice Kuehn, he calls himself "the kid from Tishomingo." I can't recall his name right now offhand. Then the justice from Bartlesville. I spoke with all of those individuals when they were -- not Justice

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Winchester, but the others when they were up for appointment.

Q Tell me the context of those conversations.

A I have been very involved in judicial reform efforts, and as part of that certain politicians, etc., ask that I and others interview candidates, just talk to them, see what we thought, so that was all part of it.

Q How did that take place? On the phone? Did you meet with them personally?

A Met with them personally.

Q I'm sorry. Say again.

A I met with them personally, along with others.

Q Meaning you were not one-on-one with them; there were others with you at the time?

A That's correct. And I have a high regard for each of those individuals, by the way.

Q Do you know whether any of those individual justices had conversations with any legislators about anything?

A I do not.

Q I want to talk about your conversation that counsel has explored with you where you

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suggested at least two incidents where a judge and Justice Gurich spoke to members of the legislature. Do you remember that conversation?

A I do.

Q Do you know what topics Justice Gurich was speaking to the legislators about?

A It was one of the -- for lack of a better word -- reform efforts that we were trying to accomplish, but which one I cannot tell you.

Q Do you know even in which decade that took place?

A It all runs together.

Q Let's see if we can work on the timeline a little bit.

A Give me a moment here to think about this.

Q Let me see if I can help you along on the timeline.

A It was a work comp because I remember -- I believe it was the work comp because I remember wondering this is going to go up to the Supreme Court and be decided and she's been in here arguing against it. How in the world does that make an independent judiciary?

Q The workers' compensation reform that you were lobbying -- sorry. I don't want to use that

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word. That maybe has meaning. That you were advocating about, is that better?

A Yes. Sure.

Q When did that take place?

A Well, the legislation, I believe, was passed in 2012.

Q That's what I was getting to.

A I may be off a year or two.

Q It can be plus or minus five years for our purposes. It won't matter. Now --

A But what I'm not -- I'm not trying to play games here, but I know that when we tried to run the judicial -- the Judicial Nominating Committee reform, we got a lot of push-back from a lot of people. That's what's causing me concern is whether her involvement was in that or the work comp. I honestly can't tell you which one.

Q That's fine. You've told us that you have no personal knowledge of that, but you were told that by somebody else.

A That's correct.

Q Can you tell us who that somebody else is?

A No. I was asked that question earlier.

Q And I think at that point you said it was probably a legislator that was on one of the

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committees?

A Yes. It was more than one. I heard these things from more than one person, but it would have been somebody who was involved in the legislation, all of that went through the legislative committees of the Senate and the House.

Q The workers' compensation bill, it might have been one committee. If it was judicial reform or the JNC issued it, it might have been someone else?

A It depended on where the leadership signed the effort.

Q Yes, sir.

A Because work comp went to the legislative committee, I mean, the legal committee.

Q Do you feel that when -- assuming it took place, you just know what a third party told you, if Justice Gurich did go to -- speak to legislators about something, that she was speaking on your behalf, is that your speech?

A She was speaking on behalf of the Court.

Q Well, that's your contention.

A Yes.

Q But not on behalf of you?

A Certainly. I advocated a position

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different than what she was arguing.
Q I understand that. My question is when she did that, was she violating your First Amendment free speech rights?
MR. FREEMAN: Form.
A I can answer the question, but it's not simple.
Q (BY MR. MAYE) I've got all day.
A Good. The Court controls the Bar. Everybody knows that. Everybody knows down there at the legislature and everywhere else, when the justice comes down and says something, she's speaking on behalf of the legal profession.
Who's going to go against them? Nobody. They're not going to tell her to go fly. It's not going to happen. They are not going to do that. They're scared to death of the Court and the Bar.
So, yeah, she came down there, and if she said what they said she said, I'm a lawyer, I'm bound to the Bar. I don't like it and I told them, "She's not speaking for me." But nevertheless, it doesn't matter. It carries the imprint of the Bar and the legal profession.
Q So you say you specifically told somebody that, "She's not speaking for me"?

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A They knew she wasn't because I was advocating a different position.
Q So the listener to whatever she was saying would in no way possibly construe that as your speech?
MR. FREEMAN: Form.
A As my personal opinion, no.
MR. FREEMAN: Form and foundation.
Q (BY MR. MAYE) Sure. The problem is I'm asking what somebody's --
A Right.
Q -- what's in somebody else's mind.
Each of those persons from whom you may have heard that would clearly know that that speech was not yours because you were advocating a contrary position?
A Yes.
Q You mentioned a specific district judge who you can't name.
A I don't know the judge.
Q It was not meant accusatorially. I just want to make sure I understand.
You also mentioned that other legislators told you that they had been contacted by other judges?

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A That's correct.
Q So we're talking multiples here, not just the same guy multiple times?
A Yes, different judges.
Q Do you have any idea what those issues would relate to?
A Only the ones that I worked on.
Q Because otherwise nobody would be bothering you with it?
A That's right.
Q And broadly speaking, those were workers' compensation, tort reform, JNC?
A JNC reform and then, for lack of a better word, the reform of the litigation in the oil and gas industry. Call that what you want.
Q I want to talk briefly about your claims about articles or CLEs or other things that the Bar Association does. Okay. I want to compare and contrast a little bit. I taught at the law school for too many years. So that's the way my mind thinks.
You were a member of the Federalist Society. You've told us that; right?
A I'm sorry?
Q You were a member of the Federalist

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Society?
A Yes.
Q It rolls right off the tongue.
Did you feel like you had to agree with every position the Federalist Society espoused?
A That I had to agree?
Q Yes.
A As opposed to did I agree? No, I didn't have to agree to anything.
Q And the Federalist Society speaks on a broad number of issues generally related to legal matters?
A And political.
Q Sure. Sure. Right.
A Sometimes they go hand-in-hand.
Q Yes, sir. In connection with OBA, either CLEs or articles, is it your contention in this litigation that if the OBA publishes an article with which you disagree, that violates your First Amendment rights?
A I think it is, if they publish certain articles that are not related strictly to the regulation of the legal profession, whether I agree or disagree, it violates my rights.
Q So applying what we're largely calling the

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JURAT

Schell vs. Janet Johnson, et al.

I, MARK SCHELL, do hereby state under oath that I have read the above and foregoing deposition in its entirety and that the same is a full, true and correct transcription of my testimony so given at said time and place.

_____

Signature of Witness

Subscribed and sworn to before me, the undersigned Notary Public in and for the State of Oklahoma by said witness, MARK SCHELL, on this _____day of_____, 2024.

_____

NOTARY PUBLIC

MY COMMISSION EXPIRES:_____

(JMc) JOB FILE #171857

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ERRATA SHEET

Schell vs. Janet Johnson, et al.

DEPOSITION OF MARK SCHELL

REPORTED BY: Jane McConnell, CSR RPR RMR CRR

DATE DEPOSITION TAKEN: November 26, 2024

JOB FILE NO. 171857

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CERTIFICATE

STATE OF OKLAHOMA)
) SS:
COUNTY OF OKLAHOMA)

I, Jane McConnell, Certified Shorthand Reporter within and for the State of Oklahoma, do hereby certify that the above-named MARK SCHELL was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, in the case aforesaid; that the above and foregoing deposition was by me taken in shorthand and thereafter transcribed; and that I am not an attorney for nor relative of any of said parties or otherwise interested in the event of said action.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal this 6th day of December, 2024.

Jane M. McConnell

Jane McConnell, CSR RPR RMR CRR