No. 24-4054

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AMY POMEROY,
Plaintiff/Appellant,
v.
UTAH STATE BAR, et al.,
Defendants/Appellees.

On appeal from the United States District Court, District of Utah,
Honorable Tena Campbell, No. 2:21-cv-00219-TC-JCB

BRIEF OF APPELLEES

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Oral Argument Is Requested

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Prior or Related Appeals

Pursuant to 10th Cir. R. 28.2(C)(3), there are no prior or related appeals.

Introduction

Pomeroy's opening brief repeatedly fails to address the district court's order that she challenges on appeal. The result is a brief riddled with arguments that are waived or inadequately briefed and issues that fail to address the reasoning and evidence upon which summary judgment was granted. On that basis alone, this Court can affirm. But this Court can affirm on the merits as well.

The Utah Supreme Court requires all licensed attorneys to join the Utah State Bar (the "USB") and pay a licensing fee. That type of structure is called an integrated bar. Pomeroy argues those rules violate her First Amendment rights. Longstanding U.S. Supreme Court precedent permits integrated bars, so long as the bar's conduct is "germane," meaning it is reasonably related to regulating the legal profession or improving the quality and availability of legal services in the state. Integrated bars must also have adequate procedural safeguards whereby attorneys can review and challenge expenditures they believe were not germane and receive a refund for portions of their fees used for any nongermane conduct.

Pomeroy asked the district court to apply different legal standards. The district court refused and applied the standards dictated by Supreme Court precedent. Pomeroy also argued that the USB engaged in nongermane conduct and that its procedural safeguards are inadequate. The district court carefully considered these arguments and correctly rejected them.

Statement of the Issues

Issue 1: Did the district court correctly conclude that Pomeroy's First Amendment challenges are governed by *Keller*'s germaneness standard and not the exacting scrutiny standard?

Issue 2: Did the district court correctly conclude that the USB's conduct and policies comply with the First Amendment?

Statement of the Case

The Utah State Bar

The USB is an integrated bar, meaning USB membership and the payment of licensing fees are required as a condition of practicing law in Utah. Utah Code Jud. Admin. Rs. 14-102(a)(1), 14-107(b)(1), 14-802. The U.S. Supreme Court has concluded that integrated bars do not run afoul of the First Amendment so long as they (1) engage in germane conduct—meaning conduct that is reasonably related to regulating the legal profession and improving the quality and availability of legal services in the state—and (2) provide adequate procedural safeguards, including a mechanism for refunding expenditures for nongermane conduct and an adequate explanation of the basis for its fees. *Keller v. State Bar of Calif.*, 496 U.S. 1, 14 (1990).

Relevant to this litigation, the USB publishes the *Utah Bar Journal* and lobbies on certain proposed legislation. But the USB limits this conduct to that which is germane. (SAPP.1.096-97.)[1]

The *Utah Bar Journal*'s purpose is to provide a forum fostering discourse about the practice of law and distributing official communications by the USB or the Utah Supreme Court, such as disciplinary statements by the Office of Professional Conduct or announcements about USB meetings and conferences. (SAPP.1.095-96.) Each issue provides a forum for attorneys to publish articles on a wide range of subjects and includes a disclaimer indicating that the views expressed in articles are those of the author and not of the USB. (App.260; SAPP.1.104, 173; SAPP.2.095; SAPP.3.007, 80; SAPP.4.007, 76; SAPP.5.007, 80; SAPP.6.007, 75; SAPP.8.006, 72; SAPP.9.007, 80; SAPP.10.007, 76.)

As for its legislative activity, the USB takes no position on most of the legislation proposed each year in Utah and confines expressing its views to roughly 10-20 bills that relate to regulating the practice of law or improving the quality and availability of services. Utah Code Jud. Admin. R. 14-106. (SAPP.1.097.) For example, the USB has taken positions on bills proposing amendments to the ethical rules governing attorneys in Utah and direct taxes on legal services.

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[1] Appellant's appendix is cited as "App.__." Appellant's supplemental appendix is cited as "SAPP.[vol. #].__." Appellee's supplemental appendix is cited as "USB App'x __."

If an attorney believes the USB has engaged in nongermane conduct, the attorney can request a refund of the pro rata portion of their licensing fee that was used for that conduct. The USB's refund policy has two components. First, for administrative ease, the USB offers a rebate each year that encompasses all expenditures for all of the USB's legislative activity (including germane activity) and is given to all who request it. Utah Code Jud. Admin. R. 14-106(c). (SAPP.1.098; SAPP.6.172-76.) Second, the USB also allows attorneys to seek a refund for any other nongermane expenditures that are not already included in the rebate for legislative activities. (SAPP.1.098, SAPP.6.172-76.)

The USB provides attorneys with significant information about its expenditures, allowing them to evaluate the USB's activities and request a refund. Each year the USB publishes its proposed budget detailing its anticipated expenditures. (SAPP.1.099; SAPP.6.178-207; SAPP.7.004-34, 036-66, 068-98, 100-29, 131-73, 175-215.)

Pomeroy Asserts First Amendment Violations

Amy Pomeroy is an attorney licensed to practice law in Utah. She filed this lawsuit, seeking declaratory and injunctive relief, asserting that (1) the Utah Supreme Court's rules violate her First Amendment rights by requiring her to join and pay licensing fees to the USB, and (2) the USB engaged in nongermane conduct and has inadequate procedural safeguards. (App.036-66.)

At the pleadings stage, the USB moved to dismiss on various grounds and the district court dismissed claims not at issue in this appeal. The court declined to dismiss claims concerning compelled speech and association arising from various USB publications and lobbying activities and claims concerning the adequacy of procedural safeguards.[2] (App.083.)

The District Court Granted Summary Judgment to USB

After discovery, the parties cross-moved for summary judgment. (App.243.)

Pomeroy argued that the court should evaluate her claims under the exacting scrutiny framework described in *Janus v. AFSCME*, 585 U.S. 878 (2018), instead of the germaneness standard provided in *Keller*. The district court disagreed, relying on this Court's decision in *Schell v. Chief Justice & Justices of the Oklahoma Supreme Court*, 11 F.4th 1178 (10th Cir. 2021), which had already rejected Pomeroy's argument and confirmed that *Keller*'s germaneness standard applies. (App.251-52.)

[2] Pomeroy has not identified any errors in the dismissal of her claim challenging the USB's compulsory licensing fees and has therefore waived any arguments regarding that claim. *See Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1369 (10th Cir. 2015). If she raises this issue in her reply brief, this Court should not consider it. *Wheeler v. Comm'r*, 521 F.3d 1289, 1291 (10th Cir. 2008). At a minimum, she has inadequately briefed any argument as to that claim. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998).

Pomeroy also argued that conduct is germane if it is "inherently tied" to the practice of law.[3] Again, the district court disagreed and applied the standard in *Keller*: conduct is germane if it is reasonably related to regulating the practice of law or improving the quality and availability of legal services in the state. (App.250, 261, 264.)

Pomeroy argued the USB had engaged in nongermane conduct, identifying many activities she had not pled in her complaint, including dozens of proposed bills over multiple years on which the USB had taken a position. (App.247-49; SAPP.7.227-32.) For most of the unpled legislative activity, Pomeroy neither developed any evidentiary record about proposed bills, including the specific positions taken by the USB, nor analyzed the germaneness of the USB's conduct relating to each proposal. (SAPP.7.231-32.) One proposed bill was still being actively debated while the parties were briefing the motions. (App.249.) The district court *sua sponte* evaluated the factors applicable to amendments under

[3] Pomeroy asserts this argument on appeal but her appendices do not show that she preserved it. The USB acknowledges that she raised this point in a notice of supplemental authority filed in the district court. (*See* USB App'x at 2-3.) Unlike other deficiencies in Pomeroy's appendices, this omission does not affect the substance of her arguments or impede meaningful appellate review. Accordingly, the USB is filing a supplemental appendix with Pomeroy's notice and the USB's response.

Federal Rule of Civil Procedure 15(a)(2) and declined to consider that conduct because doing so would require speculation. (App.247-48.)[4]

For the conduct properly before the district court, it concluded that all of the USB's conduct was germane. (App.257-67.)

The district court first evaluated the USB's lobbying efforts relating to two proposed bills. It concluded the USB's conduct relating to the first proposed bill was germane because it would have altered the conflict-of-interest and attorney-client privilege rules governing the Attorney General in the Utah Rules of Professional Conduct. (App.261-62.) The second proposed bill would have imposed a direct tax on legal services. (App.262-63.) The district court concluded that the USB's conduct was germane because the bill would have directly increased the cost of legal services in the state, thereby exacerbating access to justice issues and directly reducing the availability of legal services in the state. (App.262-63.) In reaching that conclusion, the district court relied on the USB's evidence that its efforts were targeted at only the direct tax on legal services and not other taxes proposed in the bill. (App.262-63; *see also* SAPP.1.052-53, 197-

[4] Pomeroy also identified for the first time 9 items published in the *Utah Bar Journal* and 3 social media posts. (App.247-49; SAPP.7.227-32.) The district court considered them on the merits because the USB had produced the publications in discovery and the USB had addressed them in its briefing.

199, 239-41; SAPP.2.003-86, 88, 90.) Pomeroy did not rebut that evidence. (*See* SAPP.10.203-04.)

The district court next analyzed the germaneness of the challenged publications. It relied on the disclaimer in each issue of the *Utah Bar Journal*, concluding that such a disclaimer alleviates freedom of association concerns, and noting that "Pomeroy's submissions left out the disclaimer in each issue." (App.256, 260.)

The district court concluded that articles discussing diversity and efforts to increase access to justice were germane because advocating for a "more fair, equal, productive, and intelligent legal profession in Utah" is reasonably related to improving the quality of legal services in the state. (App.259-60, 263.) It also concluded that articles calling on the judicial system to improve the administration of justice and discussing the rule of law and civility were germane because they relate to enhancing public trust in the judicial system and the legal services attorneys can provide. (App.263-64.) The district court acknowledged that one article published in the *Utah Bar Journal* "presents a closer question," but concluded it was germane because its discussion of the electoral college was reasonably related to "build[ing] and maintain[ing] the public's trust in the legal profession and the judicial process." (App.263, 266-67.)

After concluding that all of the USB's conduct was germane, the district court provided an alternative basis for summary judgment. (App.267.) It concluded that even if the electoral college article was not germane, it was a *de minimis* amount of nongermane speech that did not rise to the level of a constitutional violation. (App.253-57, 267.) The district court considered this Court's discussion of the *de minimis* rule in *Schell* and decided to adopt the rule, explaining that the rule is necessary to harmonize governing First Amendment standards and precedents, and noting the practical considerations of not adopting the rule. (App.254-57.)

Finally, Pomeroy argued the USB's procedural safeguards were inadequate. She argued the USB's refund policy does not permit licensees to challenge any nonlegislative conduct. The district court disagreed, relying on the USB's evidence that the refund policy encompasses nonlegislative conduct. (App.268.) Pomeroy failed to submit a copy of the refund policy that the USB had produced in discovery or to acknowledge its existence in her briefing, even after the USB submitted a copy of the policy and pointed out her omission. (*Compare* SAPP.7.255-56 (USB identifying omission), *with* SAPP.10.234 (asserting without explanation that the policy does not account for all nongermane expenditures).)

She also argued that the USB provides insufficient information for attorneys to evaluate and object to the USB's expenditures. Again, the district court

disagreed, explaining that the evidence demonstrates otherwise (App.270-72)—evidence that, once again, Pomeroy had failed to include in her motion for summary judgment (SAPP.1.037-41).

The district court's 31-page order carefully analyzed each claim, rejecting Pomeroy's arguments for legal standards that conflict with U.S. Supreme Court precedent and concluding that the USB did not engage in nongermane conduct and that its procedural safeguards are adequate. It denied Pomeroy's motion and granted summary judgment on all claims to the USB. (App.243-73.)

Summary of the Argument

Pomeroy argues that First Amendment claims challenging integrated bar associations are governed by the exacting-scrutiny standard, not the germaneness standard. The district court correctly recognized that this Court has considered and rejected that argument. *Schell v. Chief Just. & Justs. of Okla. Sup. Ct.*, 11 F.4th 1178, 1190 (10th Cir. 2021). Pomeroy suggests that *Schell* decided only what standard applies to compelled speech claims, not compelled association claims. But *Schell* decided that the germaneness standard applies to freedom of association claims. Perhaps now recognizing this, Pomeroy urges this Court to follow precedent from two sister circuits applying the exacting scrutiny standard, contrary to this Court's decision in *Schell* and the Supreme Court precedent upon which

Schell's decision was based. *Schell* was correctly decided, and this panel is bound by it.

Pomeroy also argues the district court applied the wrong standard for defining germane conduct, urging this Court to adopt the Fifth Circuit's formulation that conduct is germane if it is "inherently tied" to the legal profession. But the Supreme Court has held that conduct is germane if it is "reasonably related" to regulating the legal profession and improving the quality and availability of legal services in the state. *Keller v. State Bar of Calif.*, 496 U.S. 1, 13-15 (1990). And this Court is bound by *Keller*.

In Pomeroy's response to USB's motion to dismiss this appeal, Pomeroy represented that she is not challenging how the district court applied the germaneness standard and is instead challenging the standard applied by the district court. Even if the Court reviewed how the district court applied the germaneness standard, it did not err. The USB's decision to publish the *Utah Bar Journal* is germane. Creating a forum where attorneys can discuss issues related to the profession and where announcements about disciplinary matters are disseminated is reasonably related to both regulating the legal profession and improving the quality of legal services in the state. Moreover, each issue of the journal includes a disclaimer explaining that the views expressed in the articles are those of the author, not the USB, so the specific speech in each article is not

attributable to the USB. And even if the content of each article were attributable to the USB, the district court correctly determined that each challenged publication is germane, and Pomeroy has failed to show any error in its reasoning.

Pomeroy attacks the alternative ground for the district court's ruling that even if one of the USB's publications was not germane, it was *de minimis* and therefore did not rise to the level of a constitutional violation. The problem for Pomeroy is that the alternative ground has no bearing on this case unless the USB engaged in nongermane conduct. Pomeroy has failed to argue, much less demonstrate, that the district court erred in concluding all of the USB's conduct was germane. But even if this Court considered the *de minimis* rule, the district court did not err. Without the rule, as Pomeroy asserts, a single instance of nongermane conduct violates attorneys' associational rights. But *Keller*'s guidance—which remains binding on this Court—recognizes that nongermane conduct may occur and instructs state bars to implement adequate procedural protections to prevent violations, including a refund mechanism. That guidance presupposes a *de minimis* rule.

Pomeroy also argues the USB's procedural protections are inadequate because the USB has no refund mechanism for nongermane nonlegislative conduct. But the record says otherwise. The USB produced such a policy in discovery and presented it to the district court in its motion for summary judgment.

Pomeroy ignored the policy below and again on appeal. This Court, like the district court, should reject this argument.

Finally, Pomeroy argues the USB does not provide an adequate explanation for its refunds and expenditures. The district court correctly disagreed, concluding the USB's policy adequately describes how refunds are calculated, and the USB publishes a detailed annual budget each year, providing enough information for any attorney to evaluate the USB's expenditures.

Standard of Review

The district court's summary judgment decision is reviewed de novo to determine whether, viewing the evidence and inferences in favor of the nonmoving party, "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Burns v. Bd. of Cnty. Comm'rs of Jackson Cnty.*, 330 F.3d 1275, 1280-81 (10th Cir. 2003). Because this case involves the First Amendment, the Court also independently examines the record to ensure the district court's decision "does not constitute a forbidden intrusion on the field of free expression." *Couch v. Bd. of Trs. of Mem'l Hosp. of Carbon Cnty.*, 587 F.3d 1223, 1235 (10th Cir. 2009).

Argument

Pomeroy's opening brief is riddled with waived and inadequately briefed issues, as described in USB's motion to dismiss this appeal and as detailed below.

Given the opening brief's procedural failings, it is useful to take stock of what is and what is *not* at issue. Pomeroy's brief argues the district court should have applied the exacting-scrutiny standard instead of the germaneness standard and that conduct is germane only if it is "inherently tied" to the legal profession, not if it is "reasonably related" to it. Her brief does not contend the district court misapplied the germaneness standard, only that it employed the wrong standard.

That distinction matters because the majority of Pomeroy's arguments are premised on the incorrect conclusion that the USB engaged in nongermane conduct. The district court evaluated the conduct properly challenged by Pomeroy and concluded it was all germane. Because Pomeroy's opening brief does not acknowledge, much less analyze or demonstrate any error in, the district court's reasoning, she has waived any challenge to the district court's germaneness determinations. *Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1369 (10th Cir. 2015). Indeed, in response to the USB's motion to dismiss this appeal, Pomeroy conceded she is arguing that "a different and stricter standard should be applied than the one used by the court below," and not challenging "*how* it applied the . . . standard it adopted." (Resp. to Mot. to Dismiss at 15 (emphasis in original).)

Pomeroy's failure to challenge the district court's application of the germaneness standard also means this Court does not need to consider her argument that the exacting-scrutiny standard applies. That is because under Pomeroy's view, a state bar that only engages in germane conduct would satisfy both the exacting-scrutiny and germaneness standards. So where, as here, Pomeroy has failed to challenge the district court's germaneness determinations, there is no reason to address Pomeroy's exacting-scrutiny arguments.

Pomeroy's brief does not address the district court's reasoning—or the evidence upon which it relied—when rejecting her challenges to the sufficiency of the USB's procedural safeguards, including its refund policy and the adequacy of its disclosures about expenditures. Accordingly, those arguments are also waived.

In short, Pomeroy presents this Court with one exceedingly narrow question: whether this Court should adopt the Fifth Circuit's definition of germane conduct, even though it conflicts with this Court's decision in *Schell* and the Supreme Court's guidance in *Keller*.

1. The District Court Applied the Correct Standards

Pomeroy argues the district court erred because it applied the standards described by the U.S. Supreme Court in *Keller v. State Bar of California*, 496 U.S. 1 (1990). First, she argues the district court should have applied exacting scrutiny, despite *Keller*'s holding that germaneness is the controlling standard. Second, she

argues the district court should have concluded that conduct is germane if it is "inherently tied" to the legal profession, instead of following *Keller*'s guidance that conduct is germane if it is "reasonably related" to regulating the practice of law or improving the quality and availability of legal services. The district court correctly applied the standards from *Keller* and therefore did not err.

1.1 Pomeroy's Claims Are Governed by the Germaneness Standard, not Exacting Scrutiny

Pomeroy asserts "that an integrated bar association must satisfy exacting scrutiny to survive a freedom of association challenge." (Op. Br. at 33.) She insists that *Keller* requires the "same constitutional rule" to govern claims challenging integrated bar associations and public-sector unions, and that *Janus v. AFSCME*, 585 U.S. 878 (2018), recently announced that challenges relating to public-sector unions are subject to exacting scrutiny. (Op. Br. at 33-34, 47.)

The problem for Pomeroy, as the district court explained, is that this Court has already considered and rejected this argument. (App.251-52.) In *Schell v. Chief Justice & Justices of the Oklahoma Supreme Court*, 11 F.4th 1190 (10th Cir. 2021), this Court described Pomeroy's theory as "unconvincing" and concluded that First Amendment challenges to integrated bar associations continue to be governed by the germaneness standard articulated by the U.S. Supreme Court in *Keller*. *Id.* at 1190, 1193. *Schell* acknowledged that unions are analogous to integrated bar associations but explained that they are "meaningfully distinct"

because the constitutional analysis relating to the two types of entities is predicated on furthering different legitimate state interests. *Id.* at 1190. The distinction matters because the Supreme Court has not revisited its precedents requiring application of the germaneness standard to integrated bars. *Id.* at 1190-91. Indeed, since 2020, the Supreme Court has had eight opportunities to reconsider that precedent and has declined each time.[5]

Even so, Pomeroy insists that, at a minimum, her freedom of association claim—as opposed to her compelled speech claim—should be subject to exacting scrutiny based on *Keller* and *Janus*. She contends that the USB violated her associational rights, and that "the Supreme Court has never explicitly resolved the question of whether compulsory bar associations are compatible with the freedom of association, and neither has this Court." (Op. Br. at 3, 33-35.) Again, the district court correctly rejected this argument, citing *Schell*'s holding that the germaneness standard governs freedom of association challenges to integrated bars. (App.252-53 (quoting *Schell*, 11 F.4th at 1192 (explaining that when assessing "a claim for a . . . freedom of association violation, we consider the germaneness of the alleged activities")).) The Supreme Court has also held that a compulsory bar association is

[5] *File v. Hickey*, 143 S. Ct. 745 (2023); *Taylor v. Heath*, 142 S. Ct. 1441 (2022); *Firth v. McDonald*, 142 S. Ct. 1442 (2022); *McDonald v. Firth*, 142 S. Ct. 1442 (2022); *Schell v. Darby*, 142 S. Ct. 1440 (2022); *Gruber v. Oregon State Bar*, 142 S. Ct. 78 (2021); *Crowe v. Oregon State Bar*, 142 S. Ct. 79 (2021); *Jarchow v. State Bar of Wisconsin*, 140 S. Ct. 1720 (2020).

compatible with the freedom of association. *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961). Just as she did at summary judgment, Pomeroy's opening brief ignores *Lathrop*, where the Supreme Court held that compulsory bar associations do not violate the freedom of association.

In *Lathrop*, an attorney argued that the Wisconsin State Bar violated his freedom of association by compelling him to be a member and pay licensing fees. *Id.* at 822. The Supreme Court rejected that claim, concluding that the state bar's activities did not violate the plaintiff's associational rights even though the plaintiff found the activities objectionable, because "the bulk of State Bar activities serve the function, or at least so Wisconsin might reasonably believe, of . . . improving the quality of the legal service available to the people of the State . . . ." *Id.* at 843 (plurality opinion); *accord id.* at 849 (concurring opinion). *Lathrop* squarely rejected Pomeroy's argument that compelled membership and licensing fees are incompatible with the freedom of association. *See also Schell*, 11 F.4th at 1187 (summarizing *Lathrop*'s central holding as "the First Amendment right to *freedom of association* [does] not proscribe mandatory bar dues *or membership*." (emphasis

added)). On appeal, Pomeroy cites *Lathrop* once, but only a dissenting opinion, and only in her brief's conclusion.[6]

Pomeroy urges this Court to follow precedent from two sister circuits applying the exacting-scrutiny standard, contrary to *Lathrop* and this Court's decision in *Schell*. (Op. Br. at 29-30, 33.) This Court is, of course, bound by *Lathrop*. But *Schell* is also "binding circuit precedent constraining subsequent panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." *Haynes v. Williams*, 88 F.3d 898, 900 n.4 (10th Cir. 1996).

Finally, this Court need not reach this question. In Pomeroy's view, a state bar that engages in only germane conduct satisfies both the exacting-scrutiny and germaneness standards. The district court concluded that all of the USB's conduct was germane and Pomeroy waived challenges to that determination or otherwise failed to demonstrate any error in the district court's conclusion. Accordingly, even assuming that exacting scrutiny applies, it would not change the result of this case.

1.2 The District Court Applied the Correct Germaneness Standard

Pomeroy next argues that, even if exacting scrutiny does not apply, the district court applied the wrong standard for evaluating germaneness. (Op. Br. at

[6] If Pomeroy's reply brief raises new arguments addressing *Lathrop* or this Court's reliance on *Lathrop*, this Court should deem them waived. *See Wheeler*, 521 F.3d at 1291.

35.) She argues conduct is germane if it is "inherently tied to the practice of law or the legal profession." (Op. Br. at 36.) Pomeroy is wrong, and her position conflicts with the germaneness test announced in *Keller*.

Germane conduct is conduct "reasonably related" to the purposes of "regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" *Keller*, 496 U.S. at 13-15 (quoting *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961)); *accord Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291, 301 (1st Cir. 2000) (conduct is nongermane if it is "wholly unrelated" to permissible purposes); *Kingstad v. State Bar of Wisc.*, 622 F.3d 708, 717-18 (7th Cir. 2010) (conduct is nongermane if it is "completely divorced" from permissible purposes).

The district court properly identified and applied *Keller*'s standard when evaluating the USB's conduct. (*E.g.*, App.250-51 (reciting *Keller*'s definition of germaneness), 261 (concluding that speech about access to justice issues is "reasonably related to the advancement of the acceptable goals of the [USB]"), 264 (concluding that an article was "'reasonably incurred for the purpose of' regulating the legal profession and improving the quality of legal service available to the people of the state" (quoting *Keller*, 496 U.S. at 14).))

The Supreme Court acknowledged that it will not always be easy to discern when conduct becomes nongermane, but that "the extreme ends of the spectrum

are clear": "endors[ing] or advanc[ing] a gun control or nuclear weapons freeze initiative" is not germane, but "disciplining members of the Bar or proposing ethical codes for the profession" is. *Keller*, 496 U.S. at 15-16. Thus, although it may be difficult for courts to precisely define germaneness, the test does not demand precision. Instead, and for that reason, it requires courts to determine only whether conduct was "reasonably related" to regulating the practice of law or improving the quality or availability of legal services in the state. *Id.*

The Supreme Court has made clear that the range of germane conduct is broad. It includes helping courts improve the administration of justice; fostering the profession's "high ideals of integrity, learning, competence and public service;" protecting bar members' professional interests; encouraging local bar associations; and providing a forum for discussing subjects relating to the practice of law. *Lathrop*, 367 U.S. at 828-29.

Applying the Supreme Court's guidance, the First Circuit recognized the germaneness of "monitoring attorney discipline, ensuring attorney competence, [and] increasing the availability of legal services and improving court operations." *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620, 626-27, 640 (1st Cir. 1990). It concluded a variety of activities are germane, including "continuing legal education programs, legal aid services, public education on substantive areas of the law (e.g., landlord-tenant) that would help citizens recognize and enforce

their legal rights, and public commentary on such matters as rules of evidence and attorney advertising." *Id*. at 626–27.

Pomeroy asks this Court to adopt a narrower formulation of the germaneness standard, which requires that the conduct be "inherently tied to the practice of law or the legal profession." (Op. Br. at 36 (quoting *Boudreaux v. La. State Bar Ass'n*, 86 F.4th 620, 633 (5th Cir. 2023)).) But that formulation diverges from the Supreme Court's holding that conduct is germane if it is "reasonably related" to regulating the practice of law or improving the quality or availability of legal services in the state. *Keller*, 496 U.S. at 15. Indeed, in *Lathrop*, the Supreme Court rejected the First Amendment challenge even though the state bar engaged in conduct that would fail Pomeroy's proposed test, such as taking legislative positions on changes to the substantive law and conducting studies on proper office management practices. 367 U.S. at 837, 842 & n.15. Rather than considering whether each activity was inherently tied to the practice of law, the Supreme Court deferred to the state bar's "reasonabl[e] belie[f]" that its activities served the legitimate purpose of "improving the quality of legal service available to the people of the State." *Id.* at 843.

Consistent with *Lathrop*'s guidance, the Seventh Circuit defers to a state bar's assessment about whether conduct is reasonably related to regulating the practice of law or improving the quality and availability of legal services in the

State. *Kingstad v. State Bar of Wisc.*, 622 F.3d 708, 718-19 (7th Cir. 2010). For example, in *Kingstad*, the court deferred to the state bar's assessment that a public image campaign designed to improve the public's trust in lawyers was reasonably related to "improving the quality of legal services that those lawyers are able to provide." *Id.*

Unlike courts, state bar associations are well positioned to assess changes in the practice of law and take action to serve the state's legitimate purpose of regulating the practice of law or improving the quality and availability of legal services in the state. Restricting the USB's conduct to what is "inherently tied" to the practice of law could hamper its ability to further the state's legitimate interest. For example, innovations in artificial intelligence are not *inherently tied* to the practice of law, but it is a technological advancement that raises many issues that are *reasonably related* to regulating the legal profession and improving the quality and availability of legal services.

Instead of grappling with Supreme Court precedent, Pomeroy constructs a straw man. She argues that the germaneness standard would be "vastly overinclusive" if it were "a matter of simply drawing some connection, however tangential, to a legitimate purpose." (Op. Br. at 43; *see also id.* at 39-40.) In support, she cites *Knox v. SEIU, Loc. 1000*, 567 U.S. 298 (2012)—a pre-*Janus* public-union case applying the germaneness standard—where the Supreme Court

rejected a broad definition of germaneness that would treat all of a union's political expenditures as germane because they could have a positive effect on contracts for the union's workers. (Op. Br. at 44 (quoting *Knox*, 567 U.S. at 320-21).) *Knox* did not purport to alter the germaneness standard described in *Keller*. Instead, *Knox* applied a germaneness test consistent with *Keller*'s, albeit tailored to the public-union context. *Knox* suggests that the expenditures failed the germaneness test because they were not "reasonably related" to collective bargaining, given that the relationship between the expenditures and favorable contracts was speculative. 567 U.S. at 320-21. That holding does not call into question *Keller*'s germaneness standard. To the contrary, *Knox* confirms that the germaneness test's limiting principle is its requirement that the conduct be "reasonably related" to furthering the state's legitimate interests. *Knox*'s holding has no bearing on the USB's conduct here, because the USB's conduct has a close relationship with regulating the practice of law or improving the quality or availability of legal services in Utah.

Finally, Pomeroy suggests that some of USB's conduct is categorically nongermane because the subject matter of such conduct involves "embedded value judgments and opinions rather than facts." (Op. Br. at 39-40.) She does not explain why subjectivity and germaneness are mutually exclusive. They are not. Indeed, deciding how to regulate the practice of law and improve the quality and

availability of legal services almost always involves value judgments and subjective determinations. For example, the desirability of a merit-based process for selecting judges involves embedded value judgments and subjectivity, but this Court has held that conduct addressing that subject is germane. *Schell*, 11 F.4th at 1193. Pomeroy's position would render the germaneness test meaningless, because few subjects do not involve some degree of subjectivity or embedded value judgments.

2. The USB's Conduct and Policies Comply With *Keller*

As explained above, Pomeroy concedes that she has waived any challenge to how the district court applied *Keller*'s germaneness standard. Even so, Pomeroy's brief asserts "[i]t is undisputed that the USB has published a *substantial* amount of content that has little or no conceivable, let alone 'inherent,' connection to regulating the practice of law or improving legal services." (Op. Br. at 36.)

Pomeroy's position is meritless. First, it appears to turn on the Fifth Circuit's inapplicable germaneness standard. Second, it mischaracterizes the USB's position in this litigation and the district court's order. The USB has consistently asserted that its activities were all germane, and the district court agreed after carefully weighing the parties' evidence and analyzing each publication individually. (App.257-61, 263-67.)

2.1 The USB's Publications Are Germane

Pomeroy represented that she is not challenging the district court's application of the germaneness standard. And yet, Pomeroy's opening brief dedicates many pages to asserting that more than a dozen USB publications are not germane. (Op. Br. 8-14, 36-42.) The district court extensively and correctly analyzed the germaneness of those publications, and Pomeroy does not acknowledge, much less meaningfully address, its reasoning. Accordingly, she has waived any challenge to the district court's conclusion that the publications are germane. *Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1369 (10th Cir. 2015). At a minimum, those arguments are waived as inadequately briefed. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998).

But even if Pomeroy had not waived those arguments, they lack merit.

2.1.1 Comments in *Utah Bar Journal* Articles Cannot Be Attributed to the USB

Pomeroy challenges the germaneness of numerous articles in the *Utah Bar Journal.* (Op. Br. at 8-12, 36-42.) But none of the speech in those articles is attributable to the USB.

Despite the disclaimer published in each issue of the *Utah Bar Journal*, Pomeroy asserts that "[i]t does not matter whether the nongermane content was specifically attributed to USB members, or whether a reasonable reader would interpret . . . USB's views collectively versus merely the views of the author

individually," because the speech "appears in contexts closely associated with the USB," which "holds itself out as collectively representing 'lawyers' and the 'profession' as a whole." (Op. Br. at 40-41.) But as the district court correctly explained, disclaimers prevent freedom of association violations because "it is unlikely that a reasonable person would attribute the beliefs expressed by an article in a state bar journal containing such a disclaimer to the state bar's members." (App.256.) Indeed, as Justice Harlan observed in one of *Lathrop*'s concurring opinions, "Surely the [state bar association] is right when it says that petitioner can be expected to realize that 'everyone understands or should understand' that the views expressed are those 'of the State Bar as an entity separate and distinct from each individual.'" *Lathrop*, 367 U.S. at 859.

The district court correctly rejected Pomeroy's freedom of association claims by relying on the disclaimer published in each issue of the *Utah Bar Journal*, which stated that the views expressed were those of the author, not the USB. (App.260; SAPP.1.104, 173; SAPP.2.095; SAPP.3.007, 80; SAPP.4.007, 76; SAPP.5.007; SAPP.6.007, 80; 75; SAPP.8.006, 72; SAPP.9.007, 80; SAPP.10.007, 76.) The district court is not alone—the Fifth and Ninth Circuits agree that such a disclaimer prevents a constitutional violation. *Crowe v. Or. State Bar*, 112 F.4th 1218, 1240 & n.12 (9th Cir. 2024); *McDonald v. Longley*, 4 F.4th 229, 251-52 (5th

Cir. 2021). Pomeroy has not offered a persuasive reason to reach a different conclusion.

Nor has Pomeroy explained why the identity of the speaker has no bearing on her claims. The essence of her claims arises from the fact that someone other than Pomeroy is purporting to speak on her behalf. But none of the authors are speaking on behalf of Pomeroy, any more than any of the law firm advertisements published in the *Utah Bar Journal* are speaking on behalf of any attorney other than those at those law firms. Neither the articles nor the advertisements implicate other attorneys' associational rights.

To the extent Pomeroy suggests that the USB violates her rights simply by publishing the *Utah Bar Journal*—because doing so compels her to subsidize speech she does not wish to support—that argument fails too. (*See* Op. Br. at 42.) The USB's decision to create and maintain the *Utah Bar Journal*—a non-public forum—is germane. Creating that forum is reasonably related to improving the quality of legal services available in the state, by, for example, publishing educational articles about the practice of law. It also is reasonably related to regulating the legal profession because it provides a mechanism by which announcements about disciplinary matters are disseminated. It is well established that "provid[ing] a forum for the discussion of subjects pertaining to the practice of law"—such as a bar journal—is germane. *Lathrop*, 367 U.S. at 829; *McDonald*, 4

F.4th at 252, *Eugster v. Wash. State Bar Ass'n*, No. C15-0375JLR, 2015 WL 5175722, at *7 (W.D. Wash. Sep. 3, 2015).

By characterizing the bar journal as a forum, *Lathrop* suggests a potentially useful lens through which Pomeroy's claims could be viewed. In First Amendment cases involving speech in a forum, speech by individuals in the forum typically is not attributed to the entity sponsoring or facilitating the forum. For example, religious speech in a forum funded by a public school is not attributed to the school. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 842-43 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993). That is so even if the entity sponsoring or facilitating the forum also occasionally speaks in the forum. *Perry Educ. Ass'n v. Perry Loc. Educators Ass'n*, 460 U.S. 37, 50-51 (1983).

When evaluating whether to attribute speech in a forum to the entity facilitating that forum, let alone each of its members, a court's review "is not mechanical; it is driven by a case's context rather than the rote application of rigid factors." *Shurtleff v. City of Boston*, 596 U.S. 243, 252 (2022). Among other factors, courts consider "the history of the expression at issue; the public's likely perception as to who (the [forum's sponsor] or a private person) is speaking; and the extent to which the [forum's sponsor] has actively shaped or controlled the expression." *Id.*

The factors considered by this Court include the forum's central purpose, the degree of control exercised over the speech's content, the speaker's identity, the ultimate responsibility for the contents of the speech, and who an informed and objectively reasonable observer would believe is the speaker. *Wells v. City & Cnty. of Denver*, 257 F.3d 1332, 1141-43 (10th Cir. 2001).

Pomeroy produced no evidence suggesting that any of the foregoing factors would weigh in favor of attributing to the USB speech in the *Utah Bar Journal*. To the contrary, the evidence in the summary judgment record supports the opposite conclusion. The USB submitted seventeen complete issues of the *Utah Bar Journal* for the court's review. (SAPP.1.101-68, 170-237; SAPP.2.092-163; SAPP.3.003-75, 77-148; SAPP.4.003-71, 73-136; SAPP.5.004-75, 77-148; SAPP.6.004-71, 73-140; SAPP.8.004-67, 69-136; SAPP.9.004-75, 77-152; SAPP.10.004-71, 73-152.) The district court noted that the disclaimer is published in each issue. (App.260; SAPP.1.104, 173; SAPP.2.095; SAPP.3.007, 80; SAPP.4.007, 76; SAPP.5.007, 80; SAPP.6.007; 75; SAPP.8.006, 72; SAPP.9.007, 80; SAPP.10.007, 76.) A review of those issues reveals that the journal serves as a forum in which a wide range of attorneys and judges contribute articles on a wide range of topics relating to the legal profession, and not as a forum in which the USB purports to speak on behalf of its licensees. (*See, e.g.*, SAPP.1.095-96 (providing unrebutted evidence that the *Utah Bar Journal* is published to "foster

discussion among the legal community about the practice of law" and so its guidelines encourage articles by Utah legal professionals on topics that will be of practical interest to Utah attorneys).

Pomeroy also argues, without citing any legal authority, that her claims do not depend on the "context of the speech" about which she complains, but only whether it was germane. (Op. Br. at 42.) Accordingly, Pomeroy's brief quotes language out of context or cherry-picks discrete passages from lengthy articles and argues that the identified portion alone violates her constitutional rights, without accounting for the statement's context or the broader message conveyed by the article. (Op. Br. at 8-14, 36-38.)

This argument fails because evaluating the germaneness of speech cannot be done in a vacuum. Indeed, courts applying the First Amendment must evaluate the nature of the challenged speech, including its context. *Connick v. Myers*, 461 U.S. 138, 153, 157 (1983).

2.1.2 Articles Published in the *Utah Bar Journal* and the USB's Social Media Posts are Germane

Pomeroy's opening brief references twelve *Utah Bar Journal* articles, a notice of a bar convention published in the *Utah Bar Journal*, and five social media posts. As demonstrated above, speech in each article published in the *Utah Bar Journal* cannot be attributed to the USB and therefore cannot support

Pomeroy's claims. But even if this Court evaluates the content of each publication, the district court correctly concluded that they were all germane.

Utah Bar Journal articles

***We've Come a (Little) Way, Baby* by Heather Farnsworth is germane**. (App.259-60.) The article discussed the USB's dedication to and experience with diversity and inclusion efforts. (SAPP.4.016-18.) Pomeroy argues the article is not germane because it addresses "implicit bias [and] the concepts of equity versus equality." (Op. Br. at 11, 37.) The district court correctly disagreed, recognizing the article's discussion of how "diversity affects the quality of legal services and judicial decisions" because "a diverse legal profession is more just, productive, and intelligent because diversity, both cognitive and cultural, often leads to better questions, analysis, solutions, and processes." (App.259.) The court concluded that the article was "advocating for the creation of a more fair, equal, productive and intelligent legal profession in Utah," which is germane. (App.260.)

As the district court noted, the Fifth Circuit has held that "despite the controversial and ideological nature of . . . diversity initiatives, they are germane to the purposes identified by *Keller*." *McDonald*, 4 F.4th at 249. Diversity initiatives seek to "creat[e] a fair and equal legal profession for minority, women, and LGBT attorneys, which is a form of regulating the legal profession," and "those initiatives help to build and maintain the public's trust in the legal profession and the judicial

process as a whole, which is an improvement in the quality of legal services." *Id.* (internal quotation marks omitted). Similarly, the Western District of Oklahoma has observed that it is "[u]ndoubtedly" germane for an article to "address[] racial factors the authors thought to be involved in contributing to a lack of diversity in law firms or the profession generally." (Order at 4, *Schell v. Darby*, No. 5:19-CV-00281-HE (W.D. Okla. Mar. 1, 2023), *available at* SAPP.10.187.)

The Road to Solutions: Systemic Racism and Implicit Bias in Prosecution **by Margaret Olson and Ivy Telles is germane**. (App.260.) The authors describe their perspective on how they, as prosecutors, have ethical responsibilities to examine their role in the justice system to provide higher quality legal services to the people of Utah. (SAPP.4.028-29.)

Pomeroy argues that the article is not germane because it discusses implicit bias and the authors' belief that prosecutors should examine their role in institutionalized racism. (Op. Br. at 11, 37.) Here too the district court correctly disagreed, observing that "calling on the judicial system to improve the administration of justice and advance a fair, inclusive, and accessible justice system is germane," as is "[a]dvocating for conduct that enhances the public's trust in the judicial system and associated attorney services." (App.260 (applying *Schell*, 11 F.4th at 1193).)

Each licensee might not agree with the authors' observations about their responsibilities as prosecutors, but there is no question their statements are reasonably related to concerns about how to improve the quality of legal services in the state, which is squarely germane under *Keller*. Addressing systemic failings in how the legal system serves communities reasonably relates to improving the quality of legal services in the state. *McDonald*, 4 F.4th at 249.

Anna Rossi's book review of *Armies of Enablers* is germane. (App.260-61.) The review discusses a book published by Amos Guiora, a law professor at the University of Utah, that proposes criminal penalties for any person who learns of sexual assault but acts to protect the institution in which it occurs rather than the survivor. (SAPP.4.045-46.)

Pomeroy argues that the review is not germane because it analyzes and evaluates Professor Guiora's proposal. (Op. Br. at 37.) The district court disagreed, observing that "[t]he article reviewing the book does not condone its ideas," but even so, those "ideas and themes focus on access to justice for a particular group: sexual assault survivors." (App.261.) The district court was correct. The book review is commentary about a legal academic's book suggesting legal reform. It is germane because legal education and promoting the discussion of legal topics are reasonably related to improving the quality of legal services in the state.

The Utah Center for Legal Inclusion **by Robert O. Rice is germane.** **(App.263.)** The article discusses the formation of the Utah Center for Legal Inclusion, an organization dedicated to promoting diversity in the legal profession. (SAPP.8.015-17.)

Pomeroy argues the article is not germane because it promotes diversity initiatives. (Op. Br. at 8-9, 37.) Again, the district court correctly disagreed, explaining that "[a]rticles on diversity initiatives 'aimed at creating a fair and equal legal profession for minority, women, and LGBT attorneys' have been found to be germane." (App.259, 263 (quoting *McDonald*, 4 F.4th at 249).)

Pomeroy also complains that the article commented unfavorably on President Trump's executive orders banning certain immigrants from entering the country. (Op. Br. at 37.) But when viewing the article as a whole, those comments provide context for the larger message about the value of diversity for the legal profession in Utah. Pomeroy also fails to acknowledge that the commentary about President Trump was not made by the article's author. Rather, the article attributes those statements to former Utah Governor Gary Herbert, who was explaining the State's commitment to diversity: "Utah has always been a very welcoming state for refugees, for immigrants . . . . We appreciate the diversity they bring, and certainly they are part of our state." (SAPP.8.015.)

Script for Mock Board Meeting of Pure Play, Inc. **by James U. Jensen is germane.** (App.263.) The article discusses various legal issues that arise for private companies that accept outside capital, including those arising from legal requirements for female representation that have been adopted in certain jurisdictions. (SAPP.8.096-104.)

Pomeroy argues the article is not germane because it discusses diversity. (Op. Br. at 9-10.) But again, the district court correctly disagreed, citing the germaneness of diversity in the legal profession. (App.263.) Moreover, explaining emerging legal issues is a quintessential example of germane speech.

Judicial Independence and Freedom of the Press **by Paul C. Farr is germane.** (App.263-64.) The article was written by a Utah judge and summarizes a legal conference sponsored by the National Judicial College, which examined how attacks on judicial independence and the press have historically preceded the failure of democracies. (SAPP.9.029-33.)

Pomeroy argues the article is not germane because it criticizes some public officials' relationships with the media. (Op. Br. at 9, 37.) As the district court explained, the article is germane because it "advocates for protecting and strengthening democracy and the rule of law" and enhancing public trust in the judicial system. (App.263-64.) The district court was correct. Discussing threats to the judiciary's independence is germane "because the judicial system is designed

to be an apolitical branch of government, and promotion of the public's view of the judicial system as independent enhances public trust in the judicial system and associated attorney services." *Schell*, 11 F.4th at 1193.

***Civility in a Time of Incivility* by Frederic Voros, Jr. is germane.** (App.264.) The article discusses regulations governing attorneys in Utah: the Utah Standards of Professionalism and Civility. Among other things, those standards prohibit "attribut[ing] [without adequate factual basis] to other counsel or the court improper motives, purpose, or conduct," "disparag[ing] the integrity, intelligence, morals, ethics, or personal behavior of an adversary," and urging attorneys to "avoid hostile, demeaning, or humiliating words." (SAPP.10.025.)

Pomeroy argues the article is not germane because it criticizes President Trump's rhetorical style. (Op. Br. at 9, 37; SAPP.10.028.) Once again, Pomeroy is wrong. As the district court explained, promoting ethical conduct among attorneys enhances public trust in the judicial system and improves attorney services. (App.264.) The article also reasonably relates to improving the quality of legal services. It was authored by a sitting Utah appellate judge and discussed the kind of rhetoric that is unpersuasive to judges.

***Legal History in the Utah Desert, Reflecting on Topaz* by Steffen Thomas is germane**. (App.264.) The article reflects on one of the most notorious decisions issued by the U.S. Supreme Court, *Korematsu v. United States*, after the author

joined a group of attorneys visiting the site of a Japanese internment camp in central Utah and listening to a law professor speak about the case. (SAPP.5.097-100.) The article was written at the same time as the oral argument and decision in *Trump v. Hawaii*, 585 U.S. 667 (2018), where the Supreme Court vacated a preliminary injunction of an executive order restricting entry into the United States for residents of certain countries.

Pomeroy asserts the article is not germane because it "argued that 'some are currently trying to again elevate war powers to suppress the rights of vilified minorities,' such as 'the Trump administration's various travel bans.'" (Op. Br. at 10, 37.) The district court disagreed, recognizing that those comments were made by the law professor who spoke to the tour group and the article's author did not endorse them, but only provided them as context for the visit. (App.264.) The court added that the article "informs attorneys of the consequences of litigation and judicial opinions," acknowledging that attorneys and judges can rectify their mistakes, suggesting that legal professionals remain cognizant of how their work affects society, and urging Utah attorneys to visit and learn about Topaz. (App.264.)

Again, the district court was correct. The article discusses a landmark Supreme Court decision, including its historical context and subsequent backlash. It recounts comments about the case from a law professor who was a member of

the legal team that secured Mr. Korematsu's writ of coram nobis. (SAPP.5.098, 100.) The article's reflections on Utah's connection to the *Korematsu* decision provide an informative backdrop to legal issues that were being actively litigated in prominent and contemporaneous Supreme Court litigation. Such a discussion is reasonably related to improving the quality of legal services available in the state.

***Why Can't I Self-Check Out My Percocet?* by Cami Schiel is germane.** (App.265.) The article discusses proposals to reduce drug prices and alleviate the opioid crisis, including providing opioid crisis solutions for Utah attorneys. (App.265; SAPP.9.109-17.)

Pomeroy argues the article is not germane because it discusses the merits of various policy proposals regarding pharmaceutical pricing. (Op. Br. at 10-11, 37.) The district court correctly disagreed, concluding that the article "better equip[s] Utah Bar attorneys to use their professional skills to interpret and advise on legislation . . . and counsel clients on related matters." (App.265.) The author is a subject-matter expert—she is an attorney, has an MBA, and is a registered nurse. Her analysis helps to educate attorneys about issues that could affect their clients and is reasonably related to improving the quality of legal services in the state.

***Cryptocurrency – Cryptoscam – Why Regulation, Deposit Insurance, and Stability Matter* by George Sutton is germane**. (App.265.) The article explains

the developing cryptocurrency market, identifies critiques and defenses of it, and remarks on challenges cryptocurrency faces. (App.265; SAPP.10.090-98.)

Pomeroy argues the article is not germane because it advocates for regulation and criticizes cryptocurrency markets. (Op. Br. at 12, 38.) The district court correctly disagreed, concluding again that the article educates Utah attorneys about an emerging subject on which clients might seek legal advice. (App.265.) The author is a subject-matter expert on bank regulation and former Commissioner of the Utah Department of Financial Institutions. (SAPP.10.090.) He provides useful guidance about potential risks for legal liability given that cryptocurrency exists in a legal gray area. For example, the author describes the potential for cryptocurrency tokens to be treated as securities and the possibility of committing common-law fraud by engaging in a Ponzi scheme. (SAPP.10.093-94.) Explaining an emerging subject and associated risks for legal liability is reasonably related to improving the quality of legal services in the state.

***Silver Linings of the Pandemic* by the Honorable Gregory K. Orme is germane.** (App.265.) The article was written by a Utah appellate judge and discusses changes brought by the pandemic. It suggests that Utah attorneys should now be able to work from home or appear before the court virtually. (SAPP.4.019-21.)

Pomeroy argues the article is not germane because it opines on practices regarding face masks and shaking hands. (Op. Br. at 12, 38.) But as the district court correctly concluded, the article is germane because it promoted the idea of "providing flexibility to Utah Bar lawyers to improve their practice." (App.265.) While the article discusses the pandemic in general terms, including references to face masks and shaking hands, it explains that its intent is to "identify the silver linings that are somewhat unique to our profession." (SAPP.4.019.) Discussing the pandemic's effects on the legal profession is reasonably related to improving the quality and availability of legal services in the state.

***The Times They Are a Changin'* by Learned Ham is germane.** (App.266-67.) The article uses light-hearted and satirical analogies to college football and a corporate takeover to discuss the electoral college. (SAPP.8.025-27.) The author published the article under the name Learned Ham, a satirical name referencing the legendary jurist Learned Hand.

Pomeroy argues the article is not germane because it criticizes the electoral college system. (Op. Br. at 9, 37.) The district court acknowledged that this article "presents a closer question" than the others, but disagreed with Pomeroy, concluding the article is germane because it addresses issues underlying our democratic system and the rule of law, and a better understanding of that system helps promote trust in the legal system and judicial process. (App.266.)

The district court was correct. When considered as a whole, the article does not take a firm position on the electoral college. It uses good-natured comparisons to college football to illustrate the fairness principles built into the constitutionally dictated electoral process.

Advertisement for the 2021 State Bar Convention

Pomeroy also raises a meritless challenge to an advertisement for the USB's 2021 Summer Bar Convention. It is a basic notice about the dates on which the convention was scheduled, a list of lodging rates for attendees, and a form for requesting a lodging reservation. (SAPP.4.060.) Pomeroy argues the advertisement is not germane because it promoted "equity and inclusion dialogue sessions." (Op. Br. at 11, 37.)

The district court correctly concluded the advertisement is germane because, contrary to Pomeroy's assertion, "the advertisement itself does not mention equity and inclusion." (App.263.) The advertisement promoted the USB's annual convention, which is designed to improve the quality of legal services in the state by providing legal education through many CLEs, often including panels populated by members of the state's judiciary.

The USB's social media posts

Pomeroy asserts the USB published five nongermane posts on social media. Again, she misses the mark.

The USB retweeted a message celebrating a Utah attorney who received an award at the Living Color Gala, an event honoring people who foster diversity initiatives in Utah. (App.167-71.) Pomeroy asserts that promoting diversity award dinners is not germane. (Op. Br. at 13, 37.) The district court correctly disagreed, because, as discussed above, speech relating to diversity initiatives is germane. (App.263.)

The USB also retweeted a message by an attendee at a bar convention describing racism as a "public health crisis." (App.172.) Pomeroy has never articulated why this message is not germane. She simply identifies it with no further explanation. (Op. Br. 13; SAPP.1.009.) The district court correctly concluded the message focused on diversity, inclusion, and increasing access to justice and was therefore germane. (App.263.)

The USB tweeted its "strong public support for admitting DREAMers into the USB." (App.173.) Pomeroy argues the tweet is not germane but again does not explain why. (Op. Br. at 13, 38.) The district court correctly concluded it is germane. (App.263.) In addition to expressing a view relating to diversity and increasing access to justice, the statement is about how the practice of law should be regulated; specifically, who should be admitted to practice law in the State. Notably, the tweet was published in January 2020 during the public comment period for a rule proposed by the Utah Supreme Court that would permit bar

admission for DACA recipients, and which was adopted one week after the USB's tweet. *See* Utah Code Jud. Admin. R. 14-106.

The USB shared an American Bar Association post on LinkedIn about a 21-Day Native American Heritage Equity Habit-Building Challenge promoting a voluntary challenge created by the ABA's Diversity and Inclusion Advisory Council designed to raise awareness of Native American heritage among attorneys. (App.174-86.) Pomeroy appears to argue that this post is not germane because it references cultural appropriation and systemic racism. (Op. Br. at 13, 37-38.) The district court correctly disagreed, concluding it simply alerted the USB's licensees to an "optional event that fosters growth, learning, and community in the legal profession." (App.266.) That purpose is reasonably related to improving the quality of legal services available to that historically underserved community.

The USB also shared a LinkedIn post by Utah Governor Spencer Cox announcing that he had signed bills about law enforcement and mental health. (App.187.) Pomeroy does not explain how this post is not nongermane. (Op. Br. 14, 38.) Nor could she—the district court correctly concluded that announcements identifying newly enacted laws are germane because they educate the bar's licensees "about legislation they might be called to advise on or that affects them in their practice." (App.265.)

In sum, although Pomeroy has waived or inadequately briefed any challenge to the district court's determinations that the USB's publications are germane, the district court correctly concluded each was germane and granted summary judgment to the USB. This Court should affirm.

2.2 The USB's Lobbying Conduct is Germane

Pomeroy separately argues that the USB's legislative conduct is not germane, identifying more than 50 proposed bills on which the USB took a position. (Op. Br. at 14-25, 42-44.) These arguments also lack merit.

To begin with, all but two of the proposed bills are outside the scope of this appeal.

Pomeroy's opening brief includes, for the first time, a table of 14 proposed bills from the 2023 legislative session. (Op. Br. at 22-24.) She did not identify those bills in the district court and consequently has not preserved any challenge to them. "[A]bsent extraordinary circumstances, arguments raised for the first time on appeal are waived," including "a bald-faced new issue or a new theory on appeal that falls under the same general category as an argument presented at trial." *Little v. Budd Co., Inc.*, 955 F.3d 816, 821 (10th Cir. 2020).

Pomeroy's opening brief also includes tables identifying more than 40 other proposed bills that were not identified in her complaint but were instead raised for the first time at summary judgment. (Op. Br. at 16-22.) Pomeroy did not seek to

amend her complaint to add these proposed bills, but the district court *sua sponte* considered whether to allow Pomeroy to constructively amend it under Federal Rule of Civil Procedure 15(a). The district court correctly declined, because Pomeroy unduly delayed asserting her claims until after fact discovery had closed, which meant there was insufficient information in the record to evaluate them "without speculating about the content of the legislation and the Utah Bar's activities." (App.247-48.) For example, the district court noted that the summaries included in Pomeroy's tables are not found in any evidence before the court. (App.248.) Instead, they appear to be Pomeroy's characterization of the proposed legislation and not a description of the specific position taken by the USB.

In her opening brief, Pomeroy acknowledges that the district court declined to review this conduct. But she does not argue that the district court erred; she simply points out that the court in *McDonald* appeared to be willing to consider similarly vague claims, and she urges this Court to take judicial notice of the proposed legislation to evaluate the claims. (Op. Br. at 15 n.4.) Pomeroy has waived any challenge to the district court's decision limiting the scope of this litigation. *Nixon*, 784 F.3d at 1369.

Even if this Court reviewed the district court's decision, it reviews denials of motions for leave to amend for abuse of discretion and often affirms denials due to delay alone. *E.g.*, *Hayes v. Whitman*, 264 F.3d 1017, 1026 (10th Cir. 2001); *Birch*

v. Polaris Indus., Inc., 812 F.3d 1238, 1247 (10th Cir. 2015). Here, the deadline to seek leave to amend the complaint had passed and fact discovery had closed. The court therefore did not abuse its discretion by refusing to expand the scope of Pomeroy's claims.

Similarly, Pomeroy's opening brief references the USB's conduct relating to H.J.R. 2, which sought to amend the injunction standard in the Utah Rules of Civil Procedure to conform with the Tenth Circuit's standard. (Op. Br. at 25, 43; *see* App.249.) Pomeroy's brief does not acknowledge, however, that the district court declined to consider this claim because "the law was still being debated when Ms. Pomeroy filed her motion." (App.249.) Pomeroy waived any challenge regarding H.J.R. 2 because she makes no attempt to explain how the district court abused its discretion. *Nixon*, 784 F.3d at 1369.

But even if this Court considered the claim, it would fail. The USB commented on the proposed change based on its concerns relating to access to justice and the potential for upheaval in the courts, based in part on a provision that would have applied the amendments retroactively. (SAPP.7.262-63.) Indeed, the bill was eventually amended to address those concerns and passed without objection from the USB. (SAPP.7.262-63.) Commenting on a proposed legislative amendment to the rules of civil procedure is reasonably related to the administration of the justice system and is squarely germane.

That leaves the USB's lobbying relating to two proposed bills, H.B. 198 and H.B. 441. Pomeroy's challenges relating to those bills also lack merit.

As a threshold matter, Pomeroy has waived any argument that the district court erred in concluding that the USB's lobbying efforts are germane. Pomeroy points out that the district court denied the USB's motion to dismiss relating to lobbying activities in connection with H.B. 198 and H.B. 441. (Op. Br. at 43.) But she fails to acknowledge the different standard applicable to a motion for summary judgment and her brief omits any reference to the district court's careful analysis of the summary judgment evidence about that conduct and she does not identify any error with the district court's conclusions. *Nixon*, 784 F.3d at 1369.

Even if Pomeroy had not waived these challenges, the district court correctly concluded the USB's conduct was germane as to both proposed bills.

The first proposed bill, H.B. 198, sought to alter the ethical regulations governing the practice of law. It was proposed in the wake of former Congressman Jason Chaffetz's resignation, which required Utah to hold a special election for the first time in its history. (SAPP.1.051.) Pursuant to Utah Code section 67-5-1(7), the Legislature asked the Attorney General to prepare an opinion about how to conduct the special election. (SAPP.1.051.) But the Attorney General had already advised the Governor on that subject pursuant to article VII, section 16 of the Utah Constitution. (SAPP.1.052.) As a result, the Attorney General had been asked for

legal advice on the same matter from two clients whose interests were in conflict. (SAPP.1.052.) Accordingly, the Attorney General refused to disclose a memorandum to either party, citing conflict of interest and attorney-client privilege issues. (SAPP.1.052.)

In response, legislators introduced H.B. 198, which would have eliminated the Attorney General's ability to withhold an opinion requested by the Legislature based on a conflict of interest or attorney-client privilege. (SAPP.1.052.)

Pomeroy argues the USB's lobbying activities with respect to H.B. 198 are not germane because they go beyond regulating the legal profession. (Op. Br. at 15, 43.) The district court correctly disagreed, concluding that the legislation was "directly targeted at Utah's lead lawyer and sought to regulate him in his role *as a lawyer*," and would have altered ethical regulations governing the practice of law, the Utah Rules of Professional Conduct. (App.262.) It would be difficult to conceive of a matter that more directly involves regulating the practice of law than legislation seeking to change the ethical constraints regarding a attorney's ability to provide legal opinions to a client despite a conflict of interest or concerns about breaching attorney-client privilege. *Keller*, 496 U.S. at 16; *Harris v. Quinn*, 573 U.S. 616, 655–56 (2014).

The second proposed bill, H.B. 441, proposed a direct economic regulation of the legal profession. To be clear, H.B. 441 was a comprehensive tax bill that

included proposed taxes for many professions, including the legal profession. (SAPP.1.052.) The evidence before the court at summary judgment demonstrated that the USB limited its lobbying efforts to opposing the proposed tax on legal services because the USB believed the tax would exacerbate access to justice problems, directly reducing the quality and availability of legal services in the state. (App.262-63; SAPP.1.052-53, 197-199, 239-41; SAPP.2.003-86, 88, 90.) And Pomeroy does not dispute that the USB's efforts were limited to the proposed tax on legal services. (SAPP.10.246.) Relying on the unrebutted evidence, the district court correctly concluded the USB's conduct was germane, because it was limited to objecting to "direct increases in the costs of legal services," rather than lobbying based on indirect or potentially attenuated increases. (App.263.) Directly increasing the costs of legal services is not only a direct regulation of the legal profession, but also affects the quality and availability of legal services in the state.

Pomeroy argues that if the USB's lobbying about directly taxing legal services is germane, then the germaneness test would be "vastly overinclusive" and would lack a "limiting principle" because a broad array of political issues could conceivably affect the legal profession. (Op. Br. at 43-44.) The district court's decision here includes a self-evident limiting principle: the proposed tax would do more than conceivably affect the legal profession—it would have *directly* increased costs by taxing legal services.

2.3 Any Nongermane Conduct was De Minimis

Pomeroy separately contends that the district court erred by relying on a *de minimis* exception to excuse the USB's nongermane activities. (Op. Br. 44-46.) Pomeroy is wrong for at least three reasons.

First, Pomeroy mischaracterizes the district court's order. The district court did not suggest that constitutional analysis of the USB's activities was unnecessary under a *de minimis* exception to the First Amendment. To the contrary, its 31-page summary judgment order did not treat the constitutional analysis as unnecessary; it analyzed each challenged activity under *Keller*'s germaneness standard.

Second, the district court concluded that each challenged activity was germane, and as explained above, Pomeroy has waived any challenge to those determinations and has not identified any error in them.

Because the court concluded that all of USB's conduct was germane, any discussion of the *de minimis* rule, while correct, was merely an alternative ground for its order. And where, as here, Pomeroy has waived her challenges to the district court's germaneness determinations—its primary ground for granting summary judgment—there is no need for this Court to consider the district court's alternative ruling as to the *de minimis* rule.[7]

[7] Much of the amicus brief by the Wisconsin Institute for Law and Liberty rests on the incorrect conclusion that the district court decided the USB had engaged in nongermane conduct. Again, that is incorrect—the district court

Third, even if this Court reviews the district court's discussion of the *de minimis* rule, Pomeroy's arguments fail.

Pomeroy erroneously asserts there is no *de minimis* rule, pointing to other areas of First Amendment jurisprudence and arguing that a *de minimis* rule is incompatible with them. (Op. Br. at 45-46.) But as this Court has observed, there is an "open issue [as] to what degree, in quantity, substance, or prominence, a bar association must engage in non-germane activities in order to support a freedom-

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concluded that the USB had *not* engaged in nongermane conduct. Accordingly, the amicus brief provides no insight into the issues before this Court. Even if the Court were to review the *de minimis* rule, the amicus brief does not address the district court's observation that without a *de minimis* rule *Keller*'s refund mechanism is superfluous. Until the Supreme Court expressly reverses *Keller*, this Court is bound to avoid an interpretation that implicitly overrules it.

The amicus brief also addresses legal issues Pomeroy did not raise on appeal. These arguments should be disregarded because "this court disfavors amicus briefs 'presenting arguments forgone by the parties themselves or effectively and unilaterally expanding the word limits established by rule for a favored party'" and generally will "not consider lines of argument beyond those in the parties' briefing." *Animal Legal Defense Fund v. Kelly*, 9 F.4th 1219, 1226 n.6 (10th Cir. 2021) (quoting *United States v. Ackerman*, 831 F.3d 1292, 1299 (10th Cir. 2016)).

The amicus brief argues the district court erred in how it applied the germaneness standard—an argument Pomeroy has expressly disclaimed asserting in this appeal. (Resp. to Mot. to Dismiss at 15.) It also advances new arguments that the district court erroneously considered whether a reasonable observer would attribute an association's speech to a particular individual simply by virtue of that individual's membership in the association, including an unpreserved argument that factual disputes precluded summary judgment, even though Pomeroy conceded that there were no facts in dispute. (SAPP.10.196; *accord* Op. Br. at 31-32.)

of-association claim." *Schell*, 11 F.4th at 1195 n.11. The district court considered that question, including the Fifth Circuit's contrary conclusion that *any* nongermane conduct violates a licensee's associational rights. (App.253-54.)

The district court correctly rejected the Fifth Circuit's approach. Among other things, it expressed concern "about the burden that such a rigid standard would impose" on courts and bar associations. (App.254.) The court noted that the procedural history of this case illustrates its concerns: Pomeroy's claims continued to evolve based on recently published bar journals and social media posts. Without a *de minimis* rule, the court could be converted "into a perpetual monitor of every bar journal article and social media post." (App.254.) It further noted the absurdity of "[a] single tweet wishing attorneys a happy Memorial Day or posting a picture of a puppy dressed like a judge could render mandatory state bars unconstitutional—or at least result in lengthy legal proceedings." (App.254.) Most importantly, the court reasoned that a *de minimis* rule is necessary to avoid rendering meaningless *Keller*'s guidance regarding refund mechanisms.

Keller requires integrated bars to adopt procedural safeguards to prevent the use of fees for nongermane activities, including a mechanism for refunding expenditures for nongermane conduct. *Keller*, 496 U.S. at 16. As the district court correctly observed, *Keller* "presupposes the possibility that a state bar might engage in at least some non-germane activities: the refund mechanism is what

allows a state bar to cure these infringements on the freedom of speech." (App.254.) The district court concluded that *Keller*'s requirement for a refund procedure "(and several decades of jurisprudence evaluating the constitutionality of these procedures) would be superfluous if every instance of non-germane speech amounted to a violation of the freedom of association right." (App.255.)

The district court added that *Lathrop* did not adopt such a strict approach to the freedom of association, concluding there was no violation even though some of the bar's activities may not have been strictly germane. (App.255 (discussing *Lathrop*, 367 U.S. at 843).) Finally, the district court observed that even the Fifth Circuit purportedly rejected the *de minimis* rule, it evaluates bar activities holistically by, for example, declining to review individual articles published in the bar journal and instead evaluating those claims by considering the journal's purpose as a whole. (App.255-56.)

Finally, Pomeroy asserts that, even if a *de minimis* rule exists, it should not apply here because "evidence that the USB lobbied on *more than forty* nongermane bills over three years is not *de minimis*." (Op. Br. at 45.) But as explained above, there is no evidence in the record of those proposed bills. That omission is why the district court concluded that considering that conduct would require speculation about USB's activities. (App.248-49.) And for the claims

properly presented to the district court, the court concluded that the evidence demonstrated that all of the USB's conduct was germane.

2.4 The USB Provides Adequate Procedural Safeguards

Keller requires integrated bars to provide adequate procedural safeguards to prevent constitutional violations, including a mechanism for refunding expenditures relating to nongermane conduct and the disclosure of information to allow licensees to evaluate and object to those expenditures. *Keller*, 496 U.S. at 16.

Pomeroy argues the USB's refund policies are inadequate. (Op. Br. at 46-51.) The district court correctly disagreed. (App.267-73.) Once again, Pomeroy's opening brief does not address the district court's reasoning, so these arguments are waived. *Nixon*, 784 F.3d at 1369. Even so, her arguments lack merit.

First, Pomeroy asserts the refund mechanism contemplated by *Keller* is inadequate in light of *Janus*, rehashing her argument that *Janus* altered the landscape and *Keller*'s guidance is no longer controlling. (Op. Br. at 47.) As explained in section 1.1 above, this Court has already rejected that interpretation of *Janus* and *Keller*. *Schell*, 11 F.4th at 1190-91.

Second, Pomeroy argues the USB "categorically refuses to refund portions of fees it uses for some nongermane activities," because "[a]lthough it claims to have procedures for requesting refunds of fees that would support its legislative agenda, it does *not* refund portions of fees that support *other* nongermane

activities, like those in the *Journal* or other publications." (Op. Br. at 48.) As the record demonstrates, that is plainly false. The USB's policy permits refunds for nonlegislative nongermane conduct and fully complies with *Keller*'s requirements. A copy of the policy was presented to the court at summary judgment, but Pomeroy's briefing failed to acknowledge it. (SAPP.1.098; SAPP.6.172-76; SAPP.10.217-28, 234-35.) Relying on that evidence, the district court correctly concluded that Pomeroy's argument was moot because the USB does have the type of policy that Pomeroy claims is lacking. (App.270.) And now, on appeal, Pomeroy again fails to address the policy, much less the district court's conclusion that it rendered Pomeroy's argument moot.

Third, Pomeroy argues the USB does not provide an adequate explanation for its refund calculations. (Op. Br. 48-49.) The district court correctly disagreed, explaining that the USB provides a specific explanation for how it calculates its legislative rebate: "dividing the total amount spent on legislative activities into the total amount of license revenue collected to date and multiplying that dividend by the licensing fees paid by the member." (App.271.) As for refund calculations for nonlegislative conduct, the district court again noted that Pomeroy had failed to address the USB's nonlegislative refund policy, which meant she necessarily also failed to identify any inadequacy in the explanation for how refunds are calculated under that policy. (App.271.)

Relatedly, Pomeroy argues the USB does not adequately explain its expenditures, because although the USB will refund expenditures for all legislative activity, it "does not provide members with a basis to determine its . . . non-legislative activities." (Op. Br. 49.) As with so many of Pomeroy's arguments, the district court correctly concluded this argument "lacks support in the record." (App.270.) Every year the USB publishes its detailed budget on its website, allowing any licensee to evaluate the USB's expenditures. (SAPP.1.099.) The USB submitted several years of those budgets in support of its motion for summary judgment. (SAPP.6.178-207; SAPP.7.003-34, 035-66, 068-98, 100-29, 131-73, 175-215.)

The budget reports are extensive. Each is roughly 30 or more pages and includes granular detail about the USB's expenditures, including separate detailed accounting for each department. For example, the Licensing department's budget identifies distinct expenditures relating to salary and benefits, office supplies, postage, computer maintenance, copying and printing, and building overhead, among several others. (SAPP.6.181; SAPP.7.007, 39, 71, 102, 133-34, 177-78.) Similarly, the Admissions budget details expenditures relating to the use of bar exam software, investigating applicants, running credit checks, salaries and benefits, and many others. (SAPP.6.182; SAPP.7.008-9, 40-41, 72-73, 103-04, 135-36, 179-80.) Finally, the CLE budget details expenditures relating to facility

rentals, speaker fees, special events, equipment rental, food and beverage, and travel reimbursement, among others. (SAPP.6.192; SAPP.7.0018-19, 50-51, 82-83, 113-14, 149-50, 193-94.) The district court correctly concluded that the USB's budget reports provide an adequate basis for members to determine the USB's nonlegislative expenditures.

Conclusion

For these reasons, the USB respectfully asks this Court to affirm the district court's summary judgment order.

Statement of Counsel as to Oral Argument

The USB respectfully requests oral argument because counsel believes that oral argument will materially assist this Court in addressing the scope of issues properly presented and addressing the otherwise complex constitutional issues raised in this appeal.

DATED this 24th day of February, 2025.

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Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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DATED this 24th day of February, 2025.

/s/ *Dick J. Baldwin*
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I hereby certify that the foregoing, as submitted in digital form via this court's CM/ECF system, is an exact copy of any written document required to be filed with the Clerk, and has been scanned for viruses with the most recent version of Sophos Endpoint Agent and, according to the program, is free of viruses. I also certify that any required privacy redactions have been made.

DATED this 24th day of February, 2025.

/s/ *Dick J. Baldwin*
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Certificate of Service

I hereby certify that on the 24th day of February, 2025, I caused the foregoing *Brief of Appellees* to be filed via the CM/ECF System, which electronically served the following:

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Addendum:

Order and Memorandum Decision on Motions for Summary Judgment
(April 25, 2024)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

AMY POMEROY, Plaintiff, v. UTAH STATE BAR, et al., Defendants.	**ORDER AND MEMORANDUM DECISION ON MOTIONS FOR SUMMARY JUDGMENT** Case No. 2:21-cv-00219-TC-JCB District Judge Tena Campbell Magistrate Judge Jared C. Bennett

Plaintiff Amy Pomeroy sued Defendant Utah State Bar (Utah Bar) and officers and members of the Utah Bar under 42 U.S.C. § 1983 and 42 U.S.C. § 1988. Ms. Pomeroy contends that the Utah Bar has violated her First and Fourteenth Amendment rights to free speech and association by compelling her membership in the Utah Bar and engaging in activities that are not germane, that is, relevant or connected to, regulating the legal profession or improving the quality of legal services available in Utah. She also argues that the Utah Bar has violated her free speech rights for failing to provide safeguards to ensure members' mandatory dues are not used for impermissible purposes.

Both parties have moved for summary judgment. (Pomeroy Mot. Summ. J., ECF No. 127; Utah Bar Mot. Summ. J., ECF No. 128). For the reasons stated below, the court denies Ms. Pomeroy's motion for summary judgment and grants the Utah Bar's motion.

BACKGROUND

The Utah Bar is an integrated bar, meaning that attorneys must join and pay compulsory dues to the Utah Bar if they want to practice law in Utah. See Utah Sup. Ct. R. Prof'l. Prac. 14-102(d)(1) ("A person may only practice law in Utah if that person is a licensed lawyer and an active [Utah] Bar member in good standing[.]"). The Utah Supreme Court has authorized the

Utah Bar to "administer rules and regulations that govern the practice of law in Utah" and "assist the Court in governing admission to the practice of law." Rule 14-102(a)(1), (2). Purposes and responsibilities of the Utah Bar include: "advancing the administration of justice[,]" "fostering and maintaining integrity, learning competence, public service, and high standards of conduct among those practicing law[,]" "providing a service to the public, to the judicial system, and [Utah] Bar members[,]" and "assisting [Utah] Bar members in improving the quality and efficiency of their practice[.]" Rule 14-102(b)(1), (4), (8), (10).

The Utah Bar also has authority to engage in legislative activities. It may "study and provide assistance on public policy issues and … adopt positions on behalf of the [Utah Bar] Board on public policy issues." Rule 14-106(a). The Board of Commissioners to the Utah Bar is "authorized to review and analyze pending legislation, to provide technical assistance to the Utah Legislature … and to adopt a position in support of or in opposition to a policy initiative, to adopt no position on a policy initiative, or to remain silent on a policy initiative." Id.

Among its various activities, the Utah Bar uses member dues to publish the Utah Bar Journal six times each year and operate social media accounts. The Utah Bar's mission and vision is that "[t]he lawyers of the Utah … Bar serve the public and legal profession with excellence, civility, and integrity. [The Utah Bar] envision[s] a just legal system that is understood, valued, and accessible to all." Mission & History of the Bar, Utah State Bar, https://www.utahbar.org/about/.

The Utah Bar has established procedures through which members who object to the expenditure of their fees on activities—legislative or otherwise—can apply for a rebate and, possibly, receive a refund. Utah State Bar Keller Refund Request Policieis [sic] and Procedures, https://www.utahbar.org/wp-content/uploads/Keller-Refund-and-Objection-Procedures.pdf. Utah

Bar members who object to expenditures on legislative activities must apply for a rebate in writing to the Executive Director after the Utah Bar Journal publishes its annual notice of rebate. Id. "Any member of the Bar who objects to the expenditure of funds by the Board may apply for a license fee rebate in an amount representing that member's pro rata portion of the amount of the lawyer's licensing fees spent on legislative activities … for the preceding 12-month period." Id. Members objecting to "the use of any portion of the licensee's license fees for activities he or she considers promotes or opposes political or ideological causes which are not already included in the rebate may request the Board to review the licensee's objections." Id. Within 45 days of the publication of the notice of rebate, members must object in writing and submit their objections by mail to the Executive Director. Id. The Board will then review each written objection, respond to each, and, if the Board agrees with the objection, "immediately refund the portion of the licensee's dues that are attributable to the activity, with interest paid on that sum of money from the date the licensee's fees were received to the date of the refund." Id. "The Board's response[s] [to each objection] will include an explanation of the Board's reasoning in agreeing or disagreeing with each objection." Id.

Ms. Pomeroy, as a Utah lawyer, "is compelled to [be] a member of the [Utah Bar] and to pay an annual fee to the [Utah Bar] as a condition of engaging in [the legal] profession." (Compl., ECF No. 2 at ¶ 33.) She challenges those requirements because the Utah Bar has used her dues to engage in what she alleges are objectionable non-germane activities, including lobbying, publishing the Utah Bar Journal, and making statements on Utah Bar social media accounts. She also argues that "[b]ecause the U[tah Bar] refuses to implement adequate procedures to allow [her] to avoid funding objectionable non-germane activities with her

membership dues, [the Utah Bar] has violated its obligation to implement procedural safeguards as [required and laid out by] the Supreme Court[.]" (ECF No. 127 at 2.[1])

LEGAL STANDARD

A court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those that might affect the outcome of the case. See Birch v. Polaris Indus., Inc., 812 F.3d 1238, 1251 (10th Cir. 2015) ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.").

Once the movant shows there is an absence of a genuine dispute of material fact, Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (citation omitted), the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248. "[W]hile [courts] draw all reasonable inferences in favor of the non-moving party, 'an inference is unreasonable if it requires a degree of speculation and conjecture that renders [the factfinder's] findings a guess or mere possibility.'" GeoMetWatch Corp. v. Behunin, 38 F.4th 1183, 1200 (10th Cir. 2022) (quoting Pioneer Ctrs. Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin., N.A., 858 F.3d 1324, 1334 (10th Cir. 2017)).

"The standard for cross-motions for summary judgments is the same as for individual motions for summary judgment." Cannon v. State Farm Mut. Auto. Ins. Co., No. 2:13-cv-186,

[1] Record citations are to PDF pages rather than internal document pages.

2013 WL 5563303, at *1 (D. Utah Oct. 7, 2013) (citation omitted). "[The court] must view each motion separately, in the light most favorable to the non-moving party, and draw all reasonable inferences in that party's favor." Boyz Sanitation Serv., Inc. v. City of Rawlins, 889 F.3d 1189, 1195 (10th Cir. 2018).

ANALYSIS

I. Scope of Challenged Utah Bar Activities.

Before reaching the merits of Ms. Pomeroy's claims, the court must first determine what material it should examine to decide the parties' motions. This issue is of particular importance because Ms. Pomeroy challenged many Utah Bar activities in her motion for summary judgment that she did not reference in her complaint. (See Defs.' Opp'n to Pomeroy Mot. Summ. J., ECF No. 134 at 1; see also ECF No. 2 at ¶¶ 42–50.)

"[T]he liberal pleading standard for … complaints under [Fed. R. Civ. P.] 8(a) … [typically] does not afford plaintiffs with an opportunity to raise new claims at the summary judgment stage." Navajo Nation Hum. Rights Comm'n v. San Juan Cnty., 281 F. Supp. 3d 1136, 1149 (D. Utah 2017) (citation omitted). But "failure to set forth in the complaint a theory upon which the plaintiff could recover does not bar a plaintiff from pursuing a claim." Rodriguez v. Cascade Collections LLC, 532 F. Supp. 3d 1099, 1112–13 (D. Utah 2021) (quoting McBeth v. Himes, 598 F.3d 708, 716 (10th Cir. 2010)). A court may allow a plaintiff to "constructively amend the [complaint] by means of [a] summary-judgment motion," by applying the same standard that governs motions to amend. Id. at 1113 (citation omitted). Federal Rule of Civil Procedure 15 directs that "[t]he court should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). "If the new theory prejudices the other party in maintaining its defense, however, courts will not permit the plaintiff to change her theory." McBeth, 598 F.3d

at 716. Courts finding "undue delay, bad faith, or dilatory motive" may also prevent the plaintiff from adding new claims. Rodriguez, 532 F. Supp. 3d at 1113 (citing Ahmad v. Furlong, 435 F.3d 1196, 1202 (10th Cir. 2006)).

The court finds that the new allegations are unduly delayed. Ms. Pomeroy filed her complaint on April 13, 2021. (See ECF No. 2.) She filed her summary judgment motion nearly two years later. (See ECF No. 127.) In Rodriguez, the court noted that "[b]ecause [the plaintiff] asserted the new claims relatively early in the litigation—and while fact discovery was still open—the court finds no undue delay." 532 F. Supp. 3d at 1113. Here, Ms. Pomeroy asserted the new allegations 21 months after filing her complaint, after fact discovery had closed.

But Ms. Pomeroy is not adding entirely new claims; instead, she points to additional examples to support her original claims. Furthermore, the Utah Bar has already addressed the additional Utah Bar Journal articles and social media posts in its briefing. (See ECF No. 134 at 25–34.) Finding no prejudice to the Utah Bar, the court will therefore consider this new material.

In contrast, there is insufficient information in the record for the court to review the pieces of legislation Ms. Pomeroy challenged for the first time in her motion for summary judgment. Ms. Pomeroy's source for this legislation is "www.utahbar.org.legislative" (see ECF No. 127-1), and she provides the court with the Title and Number of the Legislation, the Prime Sponsor, and the outcome and date of the vote taken on the legislation by the Utah Bar's governmental relations committee. (ECF No. 127 at 10–15; Table of Bills & Votes, ECF No. 127-26.) She also includes "Brief Summaries," but the origin of these summaries is unclear. (ECF No. 127 at 10–15.) With this limited information, it is not possible for the court to analyze the Utah Bar's lobbying on this legislation without speculating about the content of the legislation and the Utah Bar's activities. See GeoMetWatch, 38 F.4th at 1200 ("[A]n inference is

unreasonable if it requires a degree of speculation and conjecture that renders [the factfinder's] findings a guess or mere possibility." (citation omitted)).

There is more information in the record to analyze a proposal related to the injunctions standard in the Utah Rules of Civil Procedure, which is also tied to an abortion trigger law (H.J.R. 2). (Emily Anderson Stern, 'Expression of unchecked power': Court may be forced to reconsider hold on Utah's abortion ban soon, Salt Lake Trib. (Jan. 23, 2023, 3:59 PM), https://www.sltrib.com/news/politics/2023/01/23/expression-unchecked-power-court/, ECF No. 127-32; Memorandum on H.J.R. 2, ECF No. 127-30; Joint Resolution Amending Rules of Civil Procedure on Injunctions, ECF No. 127-31.) But, as the Utah Bar notes, the law was still being debated when Ms. Pomeroy filed her motion. (See ECF No. 134 at 26). Consequently, the court will not analyze Ms. Pomeroy's objection to this legislative activity and will only examine the legislation that Ms. Pomeroy challenged in the complaint.

II. First and Fourteenth Amendment Claims Based on Compelled Membership in the Utah Bar.

Ms. Pomeroy claims that by compelling her membership in the Utah Bar and engaging in non-germane activities, the Utah Bar has violated her rights to freedom of speech and association. The Supreme Court has twice addressed such challenges.

First, in Lathrop v. Donohue, the Court considered whether a state bar's "compelled financial support of group activities" violated freedom of association rights. 367 U.S. 820, 828, 843 (1961) (plurality). The plaintiff challenged the integration of the Wisconsin Bar, arguing that he was "coerced to support an organization which is authorized and directed to engage in political and propaganda activities." Id. at 822. Specifically, he challenged the bar's "promot[ion of] law reform" and its efforts to "make[] and oppose[] proposals for changes in laws and constitutional provisions and argue[] to legislative bodies and their committees and to

the lawyers and to the people with respect to the adoption of changes in codes, laws, and constitutional provisions." Id. Contrary to the plaintiff's "convictions and beliefs[,]" the Wisconsin State Bar also "used its employees, property and funds in active, unsolicited opposition to the adoption of legislation … which was favored by the plaintiff." Id. The plurality held that "legislative activity is not the major activity of the State Bar." Id. at 839. And because "the bulk of State Bar activities serve the function … of elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State," a "legitimate end of state policy[,]" the Wisconsin State Bar did not violate the freedom of association right by engaging in the challenged activities. Id. at 843. But noting the lack of a full record, the plurality of the court declined to address whether the use of the plaintiff's dues money "to support the political activities of the State Bar" was a violation of the plaintiff's free speech rights. Id. at 844–45.

The Court reached that question three decades later in Keller v. State Bar of California. 496 U.S. 1, 9, 14 (1990). The petitioners—California State Bar members—claimed that through various activities, including lobbying and holding conferences, the California State Bar "expends mandatory dues payments to advance political and ideological causes to which they do not subscribe, in violation of their First and Fourteenth Amendment rights to freedom of speech and association." Id. at 1. The Court held that a state bar may fund activities using mandatory member dues without violating free speech rights if the activities are germane. Id. at 14. An activity or expenditure is germane if it is "necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of the legal service available to the people of the State." Id. (citation omitted). The Court noted that "the extreme ends of the [germaneness] spectrum are clear: [c]ompulsory dues may not be used to endorse or advance a

gun control or nuclear weapons freeze initiative[,]" but may be spent on activities "connected with disciplining members of the Bar or proposing ethical codes for the profession." Id. at 16. But the Keller Court only addressed the petitioners' freedom of speech challenge and not their request for an "injunction prohibiting the State Bar from using its name to advance political and ideological causes or beliefs[,]" both because the lower courts did not address this claim and because the "request for relief appear[ed] to implicate a much broader freedom of association claim than was at issue in Lathrop." Id. at 17.

The Tenth Circuit recently pointed to this statement when it reversed a lower court's decision granting a motion to dismiss a challenge to the activities of the Oklahoma Bar, noting that "[n]either Lathrop nor Keller addressed a broad freedom of association challenge to mandatory bar membership where at least some of a state bar's actions might not be germane to regulating the legal profession and improving the quality of legal services in the state." Schell v. Chief Just. and Justs. of Okla. Sup. Ct., 11 F.4th 1178, 1194 (10th Cir. 2021). In Schell, the plaintiff argued that the Oklahoma Bar was using mandatory member dues to 1) publish articles in the Oklahoma Bar Journal that were non-germane and 2) engage in non-germane legislative activities. Id. at 1191–92. These arguments echoed the claims that litigants have made in several other challenges to compelled membership in integrated state bars.[2]

In its decision, the Tenth Circuit first considered whether the Keller decision remained good law after the Supreme Court's decision in Janus v. American Federation of State, County, and Municipal Employees, Council 31, 585 U.S. 878 (2018). Janus overturned Abood v. Detroit

[2] See McDonald v. Longley, 4 F.4th 229, 237 (5th Cir. 2021); Boudreaux v. La. State Bar Ass'n, 86 F.4th 620, 625 (5th Cir. 2023); Crowe v. Or. State Bar, 989 F.3d 714, 720–23 (9th Cir. 2021); Romero v. Colegio de Abogados de P.R., 204 F.3d 291, 293 (1st Cir. 2000); Taylor v. Buchanan, 4 F.4th 406, 407 (6th Cir. 2021); Kingstad v. State Bar of Wis., 622 F.3d 708, 709 (7th Cir. 2010); Gardner v. State Bar of Nev., 284 F.3d 1040, 1041 (9th Cir. 2002).

Board of Education, 431 U.S. 209 (1977),[3] the case on which Keller primarily relied, holding that "exacting scrutiny, if not a more demanding standard, generally applies" in the Court's First Amendment jurisprudence. Janus, 585 U.S. at 885, 925. The Tenth Circuit observed that Keller was meaningfully distinct from Abood and held that "Janus did not overrule Keller's discussion of Abood, or its related discussion of germaneness, as the test for the constitutionality of mandatory dues and expenditures." Schell, 11 F.4th at 1191. This ruling is consistent with the decisions of other Circuit Courts. See, e.g., Crowe v. Or. State Bar, 989 F.3d 714, 725 (9th Cir. 2021) (rejecting view that Janus must be consulted when analyzing the plaintiff's Keller free speech claim); Taylor v. Buchanan, 4 F.4th 406, 408 (6th Cir. 2021) (same); cf. Boudreaux v. La. State Bar Ass'n, 86 F.4th 620, 626 (5th Cir. 2023) (applying "heightened First Amendment scrutiny" but clarifying that "the constitutionality of mandatory bar associations still turned on 'germaneness.'"). The court is not persuaded by Ms. Pomeroy's argument that the court should apply exacting scrutiny to the challenged Utah Bar activities.

The Tenth Circuit also answered a question that was left open in Keller—namely, the standard by which a court should evaluate the broader freedom of association claim that the Keller Court mentioned but did not address. See Keller, 496 U.S. at 17. The Tenth Circuit applied the germaneness standard to both the freedom of speech and freedom of association claims: "In assessing whether the non-time-barred allegations in Mr. Schell's Amended Complaint are sufficient to advance a claim for a free speech or freedom of association violation, we consider the germaneness of the alleged activities to the valid goals and purposes" of the

[3] In Abood, the Supreme Court held that "agency shop" arrangements—"whereby every employee represented by a union even though not a union member must pay to the union, as a condition of employment, a service fee equal in amount to union dues"—were constitutional, so long as the union expended an objecting individual's dues for activities germane to collective bargaining. 431 U.S. at 211, 235–36.

Oklahoma Bar.[4] Schell, F.4th at 1192 (emphasis added); see also Boudreaux, 86 F.4th at 628 ("If a bar's speech activities are germane, then there is no free association or free speech problem with compulsory membership.").

The Tenth Circuit determined that the plaintiff's claims "rest[ed] on two Oklahoma Bar Journal articles" neither party put in the record, thereby preventing the court from analyzing them. Schell, F.4th at 1193–94. On remand, the Tenth Circuit instructed the district court "to apply the test from Keller to determine whether the articles [were] germane to the accepted purposes of the state bar" and, if the articles were not germane, "to assess whether Mr. Schell may advance a freedom of association claim based on these two articles." Id. at 1195. But the Tenth Circuit declined to decide to "what degree, in quantity, substance, or prominence a bar association must engage in non-germane activities in order to support a freedom-of-association claim based on compelled bar membership." Id. at 1195 n.11. In other words, the Tenth Circuit suggested a multifactored approach to the analysis of a freedom of association claim involving non-germane speech and left open the possibility that a de minimis amount of non-germane speech would not run afoul of an objecting member's associational rights.

The Fifth Circuit rejected this suggestion, ruling that a state bar violates the freedom of association right when it engages in any non-germane activities. Boudreaux, 86 F.4th at 636–37 (holding that Fifth Circuit caselaw did not support such an exception and that a de minimis standard would be "unworkable in the context of free speech"). The Fifth Circuit was

[4] The Ninth Circuit has suggested that Keller's germaneness standard does not necessarily apply to a freedom of association claim. Crowe, 989 F.3d at 728–29 ("Given that [the Supreme Court and the Ninth Circuit] have never addressed such a broad free association claim, the district court will also likely need to determine whether Keller's instructions with regards to germaneness and procedurally adequate safeguards are even relevant to the free association inquiry."). As discussed below, the Oregon District Court—citing the Tenth Circuit's decision in Schell—nevertheless applied the germaneness standard to the associational rights claim on remand.

unpersuaded by the argument that "mandatory bar associations could not exist" if "every single tweet and email must be strictly 'germane,'" noting that it was "not an impossible burden for bar associations to speak only on topics germane to their purposes." Id. at 637. The Fifth Circuit proposed a hypothetical tweet supporting "the repeal of all antidiscrimination laws" as an example demonstrating the potential dangers of a de minimis exception. Id.

This court declines to follow the Fifth Circuit's approach for several reasons. First, the court is concerned about the burden that such a rigid standard would impose—on the court, if not the bar association. The court's experience in this case, including Ms. Pomeroy's request at summary judgment to include additional content from recent bar journals and social media accounts, suggests that the lack of a de minimis exception could convert this court into a perpetual monitor of every bar journal article and social media post. A single tweet wishing attorneys a happy Memorial Day or posting a picture of a puppy dressed like a judge could render mandatory state bars unconstitutional—or at least result in lengthy legal proceedings.

Moreover, and as discussed in more detail below, the Supreme Court has required integrated bars to provide refund mechanisms for member dues that are used for non-germane activities. Keller, 496 U.S. at 16–17 (discussing requisite refund mechanisms, referred to as "Hudson procedures"). Such a system presupposes the possibility that a state bar might engage in at least some non-germane activities: the refund mechanism is what allows a state bar to cure these infringements on the freedom of speech. But an opt-out procedure cannot cure a freedom of association violation. See Taylor, 4 F.4th at 410 (Thapar, J., concurring) ("The speech claim would prevail if an integrated bar association used mandatory membership fees to fund non-germane political or ideological activity without providing adequate opt-out procedures … The association claim could go forward even if the bar association allowed lawyers to opt out of

funding ideological activity."); Crowe, 989 F.3d at 727, 729 (holding that the district court was correct to find that the adequacy of the Oregon State Bar's opt-out procedures protected the plaintiffs' free speech rights but that their freedom of association claim remained viable). Opt-out procedures (and several decades of jurisprudence evaluating the constitutionality of these procedures) would be superfluous if every instance of non-germane speech amounted to a violation of the freedom of association right.[5]

The Supreme Court did not adopt such a strict approach to the freedom of association claim in Lathrop, 367 U.S. at 843, but instead determined that there was no violation of the associational right because "the bulk of State Bar activities serve the function, or at least so Wisconsin might reasonably believe, of elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State …." 367 U.S. at 843. It is true that Lathrop did not refer to the germaneness framework later adopted by Keller, and that courts must now define and address the broader freedom of association claim that Keller left unresolved, but Lathrop suggests that a holistic approach is useful in the freedom of association context.

Indeed, even the Fifth Circuit—though purporting to reject any de minimis exception—has evaluated certain bar activities in a holistic way. Finding that the publication of the Texas Bar Journal was germane to the practice of law, the Fifth Circuit did not analyze every article but rather considered the Journal's purposes as a whole:

> The Texas Bar Journal publishes information related to regulating the profession and improving legal services. Such information includes, among other things, (1)

[5] The Fifth Circuit has characterized Hudson procedures as "prophylactic 'safeguards' designed to prevent the spread of non-germane activities." Boudreaux, 86 F.4th at 638. But if engaging in any non-germane activity amounts to a violation of a bar member's right to freedom of association, then it is unclear how the opt-out procedures—utilized after a bar has engaged in said activity—could be prophylactic.

> notices regarding disciplinary proceedings against Bar members, see Tex. R. Disciplinary P. 6.07; (2) announcements of amendments to evidentiary and procedural rules, see Tex. Gov't Code § 22.108(c); id. § 22.109(c); (3) "public statements, sanctions, and orders" issued by the State Commission on Judicial Conduct, see id. § 33.005(e); and (4) articles "devoted to legal matters and the affairs of the [Texas] Bar and its members," Tex. State Bar R. art. IX. Moreover, the Journal purports to feature articles advancing various viewpoints, and, in any event, includes a disclaimer clarifying that the Bar does not endorse any views expressed therein.

McDonald v. Longley, 4 F.4th 229, 252 (5th Cir. 2021).[6]

For these reasons, this court follows the approach adopted by the District of Oregon in a recent case. Crowe v. Or. State Bar, No. 3:18-cv-2139, 2023 WL 1991529 (D. Ore. Feb. 14, 2023). On remand from the Ninth Circuit, the district court was faced with a challenge to mandatory membership in the Oregon State Bar. The district court applied the germaneness framework to the associational rights claim as suggested by the Tenth Circuit in Schell. Id., at *1. The court also disagreed with "the Fifth Circuit's ultimate conclusion in McDonald that the mere fact that an integrated bar engages in 'some' nongermane activity means that the bar violates associational rights under the First Amendment, without considering whether there is a threshold, or de minimis, amount of nongermane activity that is acceptable." Id., at *5. Without delineating a precise threshold for nongermane activity, the court held that "a single statement (or even two statements) will not meet it." Id.

[6] The Journal's disclaimer that the Texas Bar does not endorse specific views is more likely to alleviate freedom of association concerns than freedom of speech. A bar member may object to the use of their dues for the publication of various views regardless of whether the bar endorses those views, but it is unlikely that a reasonable person would attribute the beliefs expressed by an article in a state bar journal containing such a disclaimer to the state bar's members. See Lathrop, 367 U.S. at 859 (Harlan, J., concurring) ("Surely the Wisconsin Supreme Court is right when it says that [a mandatory state bar member] can be expected to realize that everyone understands or should understand that the views expressed are those of the State Bar as an entity separate and distinct from each individual." (citation omitted)).

The court therefore analyzes Ms. Pomeroy's claims as follows. For her freedom of speech claim, the court follows Keller and Schell by 1) analyzing the germaneness of the challenged articles and activities and 2) considering whether the Utah Bar has developed adequate opt-out procedures. For her freedom of association claim, the court begins by analyzing the germaneness of the challenged articles and activities. Should the court find that the Utah Bar has engaged in non-germane activities, the court will follow the Tenth Circuit's suggestion to analyze the "quantity, substance, [and] prominence" of the non-germane conduct. Schell, 11 F.4th at 1195 n.11. In other words, the court will assess 1) the amount of non-germane conduct; 2) the substance of that conduct, including whether the conduct is political or ideological; and 3) the prominence of that conduct, including whether a disclaimer would prevent a reasonable person from attributing the conduct to the beliefs of an objecting member.

With this framework in mind, the court first addresses the germaneness of the Utah Bar's challenged activities.

A. Utah Bar Journal Articles Challenged in the Complaint

Ms. Pomeroy challenges several Utah Bar Journal articles. The complaint first identifies a January/February 2021 Utah Bar Journal issue discussing a claim that the Utah Bar has played an active role in major public policy debates, including debates about the Utah Supreme Court's role in regulating the practice of law and what criteria should be considered when filling judicial vacancies.[7] (ECF No. 2 at ¶ 42.) This issue, to the extent it refers to these debates, is germane.

[7] The same issue mentions that the Utah Bar has played an active role in a major public policy debate about the taxation of legal services. (ECF No. 2 at ¶ 42.) Ms. Pomeroy specifically points to the Utah Bar's advocacy surrounding H.B. 441, the "Tax Equalization and Reduction Act." (Id. ¶ 43.) The court discusses whether the Utah Bar's advocacy on this bill is germane in Section B below.

The supreme court's role in regulating the practice of law impacts the regulation of the legal profession. The debate over what criteria should be considered when filling judicial vacancies affects who sits on the court, which in turn impacts the regulation of the legal profession and affects the structure and integrity of the judicial system and associated attorney services. See Schell, 11 F.4th at 1193.

Second, Ms. Pomeroy's complaint identifies the May/June 2018 Utah Bar Journal issue, which "state[s] that the 2018 General Session [of the Utah State Legislature] was successful for the Utah Bar, as [its] leaders influenced the language of legislation and enhanced the bar's relationship with lawmakers and staff." (ECF No. 2 at ¶ 46 (citation omitted).) This statement highlights the important role of the Utah Bar and its attorneys in using their professional skills to interpret and advise on pending legislation that may affect the legal profession. See Schell, 11 F.4th at 1193. Such a statement is germane. And it relates to the Utah Bar's "core function to advance the interests of the profession." Id.

Finally, the complaint alleges that recent Utah Bar Journal issues have included statements that opine on current controversies. Ms. Pomeroy points to three articles in the March/April 2021 issue. The first is an article by then-Utah Bar President Heather Farnsworth that asserts the importance of pursuing "equity" as distinct from "equality." (ECF No. 2 at ¶ 50.) The second is an article calling for courtrooms to include "safe space[s]" where unfairness allegations will not be treated with "defensiveness and denial." (Id.) The same article invokes the concept of "implicit bias." (Id.) And the third is an article reviewing a book that proposes criminal penalties for anyone who is made aware of a sexual assault but chooses to protect the institution over the assault survivor. (Id.)

These three articles involve political or ideological topics. See Schell 11 F.4th at 1193 (finding that the following materials are inherently political or ideological: 1) an article criticizing big money and special interest groups making campaign contributions and electing judges and 2) an article advocating for the ability of prisoners to bring tort claims against jails). But although these activities are of a political or ideological nature, they are not necessarily non-germane. See Keller, 496 U.S. at 14.

In her article, President Farnsworth reiterates the Utah Bar's commitment to improving diversity among the Board of Bar Commissioners and the bar membership. (Mar./Apr. 2021 Utah Bar Journal Issue, ECF No. 68-1 at 14.) She distinguishes between equality and equity to argue that both are necessary to promote inclusion and truly benefit from diversity. (Id.) "[E]quality does not take demographic related needs into account, while equity strives to identify the specific requirements of an individual's needs" based on their characteristics. (Id.) President Farnsworth also recognizes that there are benefits to increasing diversity and inclusion within the Utah Bar's leadership and among its members. "Beyond the public perception and confidence in our system[,] diversity affects the quality of legal services and judicial decisions." (Id. (citation omitted).) Further, "[t]he [American Bar Association (ABA)] finds [that] a diverse legal profession is more just, productive, and intelligent because diversity, both cognitive and cultural, often leads to better questions, analysis, solutions, and processes." (Id. (citation omitted).)

Articles on diversity initiatives "aimed at 'creating a fair and equal legal profession for minority, women, and LGBT attorneys'" have been found to be germane. McDonald, 4 F.4th at

249. President Farnworth's article advocating for the creation of a more fair, equal, productive, and intelligent legal profession in Utah is germane.[8]

The article calling for courtrooms to include "safe spaces" and invoking the concept of "implicit bias" is also germane. In this article, The Road to Solutions: Systemic Racism and Implicit Bias in Prosecution, the authors call for safe spaces in courtrooms to raise the issues of systemic racism and implicit bias. (ECF No. 68-1 at 26–27.) "Everyone in the courtroom should be free to be anti-racist, … and … shine a light on unconscious bias or racial inequities without the fear of backlash. Raising fundamental fairness issues must be normalized in our profession." (Id.) The article closes by inviting prosecutors, and fellow lawyers, to join in this commitment. (Id.) An article calling on the judicial system to improve the administration of justice and advance a fair, inclusive, and accessible justice system is germane, and Ms. Pomeroy fails to advance any persuasive arguments to the contrary. See Crowe, 2023 WL 1991529, at *3 ("Plaintiffs do not explain how … improving the administration of justice, or advancing a fair, inclusive, and accessible justice system do not fall within the acceptable spectrum. Indeed, other federal appellate courts have concluded that [speech] … falling within these categories [is] germane."). Advocating for conduct that enhances the public's trust in the judicial system and associated attorney services is also germane. Id. (citing Schell, 11 F.4th at 1193).

The book review about criminal penalties for anyone made aware of a sexual assault, but who chooses to protect the institution over the assault survivor, is also germane. As the book

[8] Relevant to Ms. Pomeroy's freedom of association challenge, this issue of the Utah Bar Journal has a disclaimer that reads: "Statements or opinions expressed by contributors are those of the authors and not necessarily those of the Utah Bar Journal or the Utah State Bar." (ECF No. 134 at 9.) This disclaimer is in all Utah Bar Journal issues. The Utah Bar presented the court with full Utah Bar Journal issues because Ms. Pomeroy's submissions left out the disclaimer in each issue. (See id.)

review states, the main topic raises many relevant questions, including: "Can we criminalize the behavior of someone who fails to act when they know someone is being harmed? And if so, should we?" (ECF No. 68-1 at 43.) The article reviewing the book does not condone its ideas. (See id. at 43–44 (discussing ideas the book brings up, including focusing on root causes and prevention for the lack of reporting of sexual assaults).) These ideas and themes focus on access to justice for a particular group: sexual assault survivors. See Crowe, 2023 WL 1991529, at *5. Even if these ideas and themes could "be construed as inflammatory or ideological that does not mean they are nongermane," so long as they are "reasonably related to the advancement of the acceptable goals of the [Utah Bar]." See id. (citation omitted). This article is therefore germane to the Utah Bar's permitted functions, which ultimately advance the interests of the profession. See Schell, 11 F.4th at 1193.

B. Lobbying Activities Challenged in the Complaint

The first piece of legislation Ms. Pomeroy identifies in her complaint is proposed legislation affecting the attorney general's ability to invoke a potential conflict of interest or attorney-client privilege (H.B. 198). (See May/June 2018 Utah Bar Journal Issue, ECF No. 68-7 at 27–28.) After a U.S. congressman resigned, Utah conducted its first special election for a vacancy in the U.S. House of Representatives, and the Utah Governor and legislature disagreed about how to implement the election. (Id.) The legislature requested an opinion from the attorney general, while the attorney general was already counseling the Governor on the issue, making both parties clients of the attorney general under Utah Code Subsection 67-5-1(7) and Utah Constitution article VII, section 16. (Id.) The proposed legislation would have prevented

the attorney general from invoking a potential conflict of interest, or the attorney-client relationship, to withhold the release of the opinion from the legislature. (Id.)

The court agrees with the Utah Bar that lobbying against the proposed legislation is germane. The legislation was "directly targeted at Utah's lead lawyer and sought to regulate him in his role as a lawyer." (ECF No. 128 at 21.) The proposed change would have altered the ethical regulations governing the practice of law. (Decl. Elizabeth Wright, ECF No. 129-1 at ¶ 6 ("The Utah State Bar opposed the bill because it believed … the bill attempted to regulate the practice of law, by amending the conflict of interest and attorney-client confidentiality rules in the Utah Rules of Professional Conduct.").) The legislation refers to the Utah Rules of Professional Conduct, demonstrating that the legislation sought to modify the ethical responsibilities of an attorney as an attorney rather than as a public official. Reflecting the states' "strong interest in allocating to the members of the bar, rather than the general public the expense of ensuring that attorneys adhere to ethical practices," Harris v. Quinn, 573 U.S. 616, 655–56 (2014), Utah Bar opposition to legislative interference with the ethical rules governing attorneys is germane.

The second piece of legislation that Ms. Pomeroy cites is H.B. 441, the "Tax Equalization and Reduction Act." (ECF No. 2 at ¶ 43.) "The Act proposed a new tax on services broadly in the state of Utah, which would include legal services." (Order & Mem. Decision, ECF No. 94 at 12.) The Utah Bar has clarified that while the Act itself was a comprehensive bill, the Utah Bar "limited its lobbying efforts to opposing the proposed tax on legal services because it believed the tax would exacerbate access to justice problems, directly reducing the quality and availability of legal services in the state." (ECF No. 128 at 22.) The Utah Bar explains that, in opposing the

bill, the Utah Bar objected to direct increases in the costs of legal services, instead of indirect increases. The court finds that this lobbying effort, too, is germane.

C. Utah Bar Activities Challenged for the First Time at Summary Judgment

As stated above, the court will review most of the additional Utah Bar activities that Ms. Pomeroy challenges for the first time at summary judgment. Specifically, the court will review the additional Utah Bar Journal articles and social media posts that Ms. Pomeroy alleges amount to violations of her rights. The court holds that these activities, too, are germane.

Ms. Pomeroy's motion for summary judgment identifies two articles, three tweets, and an advertisement focused on diversity, equity, inclusion, and increasing access to justice.[9] As stated above, "courts have concluded that articles and initiatives [with similar focuses] are germane." Crowe, 2023 WL 1991529, at *3; see also McDonald, 4 F.4th at 249 (finding diversity initiatives "aimed at creating a fair and equal legal profession" to be germane).

Ms. Pomeroy identifies two other articles about the rule of law and civility. The first is Judicial Independence and Freedom of the Press, which advocates for protecting and

[9] Then-Utah Bar Journal President Robert Rice wrote the first article: The Utah Center for Legal Inclusion. (See Mar./Apr. 2017 Utah Bar Journal Issue, ECF No. 134-2 at 13–15.) The theme of the article was diversity in Utah's legal community. (Id.) The second article—Script for Mock Board Meeting of Pure Play, Inc.—discussed "[b]oard diversity" and how some jurisdictions are adopting "minimum female representation" mandates for boards of directors. (Jan./Feb. 2018 Utah Bar Journal Issue, ECF No. 134-3 at 30.) University of Utah Law reposted the first of the three tweets on September 12, 2022, and it celebrated a graduate's "Living Color Award." (Retweet dated Sept. 12, 2022, ECF No. 127-15.) The second tweet is a July 30, 2021, tweet the Utah Bar reposted, which states: "Listening to @DrWilliamASmith at the @UtahStateBar summer convention. Racism is a public health crisis. Racism is an act of violence. What are the perceptions of African American men?" (Retweet dated July 30, 2021, ECF No. 127-17.) And the third is a tweet that says: "strong public support for admitting Dreamers into the [Utah Bar]" and includes a link to an article reporting the same. (Tweet dated Jan. 22, 2020, ECF No. 127-18.) Ms. Pomeroy claims that the Summer Convention Advertisement highlighted equity and inclusion dialogue sessions, but the advertisement itself does not mention equity and inclusion. (See ECF No. 68-1 at 58.)

strengthening democracy and the rule of law. (Mar./Apr. 2019 Utah Bar Journal Issue, ECF No. 134-4 at 27–31.) The second is Civility in a Time of Incivility, which encourages Utah lawyers to practice civility and comply with Utah Standards of Professionalism and Civility. (Civility in a Time of Incivility, ECF No. 127-13.) These articles are germane, as they enhance public trust in the judicial system and associated attorney services. See Schell, 11 F.4th at 1193.

Next, Ms. Pomeroy's motion identifies an article in the November/December 2018 Utah Bar Journal issue about a World War II-era Japanese internment camp in Topaz, Utah. (ECF No. 127 at 4.) According to Ms. Pomeroy, the article argues that "some are currently trying to again elevate war powers to suppress the rights of vilified minorities[.]" (Id.) This is incorrect. The article discusses "a place in the central Utah desert that stands as a living memorial to … Korematsu v. United States." (Nov./Dec. 2018 Utah Bar Journal Issue, ECF No. 129-14 at 22–25.) In the article, a law student who joined attorneys visiting the former internment camp reflected on the experience. Seattle University School of Law Professor Lorraine Bannai joined attendees by Zoom to talk about her advocacy focused on correcting Korematsu. (Id. at 23–24.) In her remarks, Professor Bannai shared with the group that she worried the Supreme Court will repeat its mistakes in Korematsu, citing the Trump administration's travel bans. (See id. at 25.)

The article's author does not endorse these comments, but the author merely provides context for the visit. The article informs attorneys of the consequences of litigation and judicial opinions. It acknowledges that lawyers and judges make mistakes, but that they can rectify those mistakes. The article also calls for Utah attorneys to visit the Topaz site to learn about its history. For these reasons, this article is "reasonably incurred for the purpose of" regulating the legal profession and improving the quality of legal service available to the people of the state. Keller, 496 U.S. at 14.

Next, Ms. Pomeroy identifies two articles that better equip Utah Bar attorneys to use their professional skills to interpret and advise on legislation concerning various subjects and counsel clients on related matters. See Schell, 11 F.4th at 1193. These articles are germane. The first discusses proposals to reduce drug prices and alleviate the opioid crisis and issues facing the drug market. (Mar./Apr. 2020 Utah Bar Journal Issue, ECF No. 134-5 at 34–42.) It also includes opioid crisis solutions for Utah attorneys. (Id. at 41–42.) The second explains the cryptocurrency market, identifies critiques and defenses of it, and remarks on challenges the cryptocurrency industry faces. (Jan./Feb. 2023 Utah Bar Journal Issue, ECF No. 134-7 at 19–27.)

Next, Ms. Pomeroy's motion identifies an article titled Silver Linings of the Pandemic. (ECF No. 127 at 6.) This article advocates for the idea that, post-pandemic, Utah Bar lawyers should have the option to work from home or appear before the court virtually. (ECF No. 68-1 at 17–19.) Promoting this idea—providing flexibility to Utah Bar lawyers to improve their practice—is germane.

Ms. Pomeroy also identifies a USB LinkedIn post, in which the Utah Bar shared a post from Utah Governor Spencer Cox celebrating the passage of pieces of legislation.[10] (LinkedIn Post, ECF No. 127-20.) By sharing Governor Cox's post, the Utah Bar is keeping members informed about legislation they might be called to advise on or that affects them in their practice. See Schell, 11 F.4th at 1193. This LinkedIn post is germane.

[10] Neither party has briefed whether the Utah Bar's LinkedIn page contains a disclaimer similar to the disclaimer in all Utah Bar Journal issues. While the LinkedIn posts Ms. Pomeroy challenges are germane, the lack of a disclaimer on the Utah Bar's page might contribute to a freedom of association violation under Schell if the Utah Bar posted or reposted non-germane content. As mentioned above, the presence of a disclaimer that prevents a reasonable person from attributing the conduct to the beliefs of an objecting member is one factor a court may examine to decide whether the freedom of association right has been violated.

Ms. Pomeroy challenges another Utah Bar LinkedIn post, through which the Utah Bar shared a post from the ABA inviting people to participate in a 21-day Native American Heritage Equity Habit-Building Challenge syllabus. (ECF No. 127 at 7–8.) This is germane, as the Utah Bar is alerting its members to an optional event that fosters growth, learning, and community in the legal profession. See Boudreaux v. La. State Bar Ass'n, 620 F. Supp. 3d 440, 458 (E.D. La. 2022) (finding optional activity with similar purposes to be germane).

Finally, Ms. Pomeroy's motion points to a Utah Bar Journal article titled The Times They Are a Changin'. (ECF No. 127 at 4.) Ms. Pomeroy argues that the article criticizes the electoral college system (id.), but the court finds that a better characterization is that the article uses satire and sports analogies to explain arguments for and against the electoral college. (ECF No. 134-2 at 23–26.) The article compares the transition of power from one presidential administration to the next to a corporate takeover, presenting "lessons … for Donald Trump," who had recently been elected. (Id. at 25.)

This article presents a closer question about whether it is germane. From a wider perspective, lawyers must understand the electoral system and the Constitutional scheme for a presidential election. These principles relate to democracy and the rule of law, and a better understanding of this system "help[s] … build and maintain the public's trust in the legal profession and the judicial process ...." Crowe, 2023 WL 1991529, at *3. On the other hand, the electoral system is less directly related to the legal profession than other content discussed in the Utah Bar Journal. Also, the article was published after the 2016 presidential election, in which Donald Trump was elected President after losing the popular vote. Many people called for the

end of the electoral college system as a result.[11] Given this context, the article is politically charged. But even topics that involve "a sensitive political topic" can be germane. McDonald, 4 F.4th at 249. For these reasons, the court finds that reasonable minds could disagree about whether the article is germane.

Yet whether this single article is germane is not dispositive. It is one Utah Bar Journal article out of many Utah Bar activities that Ms. Pomeroy challenges in her complaint and at summary judgment. While politically charged to a degree, the article presents its ideas in a neutral way. The Utah Bar Journal issue containing this article, like all issues, has a disclaimer that would prevent a reasonable person from attributing the viewpoint expressed in the article to the beliefs of an objecting member. Consequently, when taking these factors into consideration, the court finds that the Utah Bar did not violate Ms. Pomeroy's freedom of association rights by publishing this article.

All the other activities Ms. Pomeroy challenges in her complaint and at summary judgment are germane. As a result, the Utah Bar has not violated Ms. Pomeroy's rights to freedom of speech and association.

III. First and Fourteenth Amendment Claim for Lack of Adequate Procedural Safeguards.

Ms. Pomeroy raises a facial challenge to the Utah Bar's refund procedures: "Even if the [c]ourt finds that Plaintiff is not entitled to summary judgment regarding the nongermane content in the Utah Bar Journal, the [Utah Bar] nevertheless has the ability to publish nongermane content in that journal in the future." (ECF No. 127 at 30.) By lacking procedural safeguards to

[11] See, e.g., Joseph P. Williams, Time for a Change?, U.S. News & World Rep. (Dec. 13, 2016), https://www.usnews.com/news/the-report/articles/2016-12-13/advocates-call-for-an-end-to-the-electoral-college-after-trumps-win.

refund non-germane activities, Ms. Pomeroy argues that the Utah Bar has violated the First and Fourteenth Amendment rights to free speech.

The court previously allowed this claim to proceed because the Utah Bar had conceded that, although it offered refunds for its legislative activities, it did not provide a refund mechanism for non-germane non-legislative activities. (ECF No. 94 at 14.) The Utah Bar is correct that "[a]s for legislative activity, there is no question that the [Utah Bar's] policy complies with Keller. That is because the [Utah Bar] does not attempt to distinguish between germane and nongermane legislative activities and simply refunds all of a member's pro rata fees used for those activities." (ECF No. 128 at 42.) But at issue now is the refund for non-germane non-legislative activities.

In Keller, the court held that because integrated bars cannot use mandatory member dues to fund non-germane activities, they must provide a refund mechanism for such activities. 496 U.S. at 16–17. Keller affirmed Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson, 475 U.S. 292, 310 (1986), which held that unions must adopt refund procedures that: (1) provide an adequate explanation of the basis for the fee; (2) a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker; and (3) an escrow for the amounts reasonably in dispute while such challenges are pending. 496 U.S. at 16 (citation omitted). The Supreme Court in Keller reserved the question whether, in the context of an integrated bar, each of these requirements was mandatory or whether alternative procedures would likewise satisfy the obligation of an integrated bar to protect against members' licensing fees being spent on non-germane activities. Id. at 17. The Tenth Circuit in Schell did not analyze the Oklahoma Bar's refund procedures because the Bar adopted procedures consistent

with the plaintiff's commands after the litigation began, which mooted the plaintiff's procedural safeguards claim. 11 F.4th at 1182.

Other courts have disagreed on whether the Hudson procedures are mandatory. Compare Crowe, 989 F.3d at 726 (holding that alternative procedures can satisfy an integrated bar's obligations under Keller), with McDonald, 4 F.4th at 254 ("[G]iven that Keller indicated that Hudson's procedures are sufficient, and Janus held even more protective procedures are necessary, Hudson's procedures are both necessary and sufficient."). This court is persuaded by the Ninth Circuit's reasoning in Crowe and holds that alternative procedures can satisfy an integrated bar's obligations under Keller. Importantly, the Keller Court did not hold that "state bars [must] adopt procedures identical to or commensurate with those outlined in Hudson." Crowe, 989 F.3d at 726. Moreover, as discussed further below, the court is not convinced that strict adherence to Hudson in the context of a state bar is "necessary—or even effective—to minimize infringement[.]" Id.

Ms. Pomeroy asserts that the Utah Bar's refund procedures are constitutionally deficient for four reasons: (1) the Utah Bar's refund procedures do not include portions of the fees spent on non-germane non-legislative activities; (2) the Utah Bar's information about the legislative activities refund is based on "slipshod calculations," lacks evidence that the refund amount is equal to the amount spent on non-germane activities, and therefore is not an adequate explanation for the basis of the fee; (3) the Utah Bar's budgets impermissibly make members "undertake an exercise in forensic accounting"; and (4) the Utah Bar only allows members to opt out of speech they disagree with through a refund after the fact, rather than employing an "opt-in" procedure and obtaining "clear, free, and affirmative consent … before an association can use

an individual's coerced fees or dues to support its political and ideological activities." (ECF No. 135 at 27–29); see McDonald, 4 F.4th at 253 (citation omitted).

Ms. Pomeroy's first argument is moot because the Utah Bar has presented evidence that it now has a refund mechanism for non-germane non-legislative activities. (See Utah Bar's Keller Refund Request Policies and Procedures, ECF No. 129-21.) As discussed in the Written Notice section, "[a] Bar licensee who objects to the use of any portion of the licensee's license fees for activities he or she considers promotes or opposes political or ideological causes[12] which are not already included in the rebate may request" a refund via the detailed procedures. (Id. (emphasis added).) This procedure allows an objecting attorney to opt out of the bar's expenditure of her fees on non-legislative activities with which she disagrees.

Ms. Pomeroy's second argument lacks support in the record. First, her assertions that the refund is not equal to the amount spent on non-germane activities and that the legislative activities refund is based on "slipshod calculations" (and not an adequate explanation of the basis for the fee) are misplaced. The Utah Bar's refund procedures not only explain how the Utah Bar calculates the pro rata fees spent on legislative activities, but the procedures effectively provide members who apply for the legislative activities rebate with automatic refunds of the pro rata fees spent on such activities (see ECF No. 129-21 at 2 (explaining legislative refund procedures)), so long as they meet the other conditions set forth in the procedures (i.e., applying for a rebate in writing to the Executive Director after the Utah Bar Journal publishes its annual

[12] It is unsurprising that the Utah Bar has labeled its activities in this way. Given the uncertainty about how courts should evaluate broad freedom of association claims, and the fact that at least one court (the Fifth Circuit) has held that any non-germane activity amounts to a freedom of association violation, it is unlikely that a state bar would classify any of its speech activities as non-germane. See Boudreaux, 86 F.4th at 639 ("[A] prospective budget can only provide so much notice when a bar association can and must classify all of its speech activities as germane.").

notice of rebate (see id.)). Ms. Pomeroy claims that instead of providing members an adequate explanation of the basis for the fee, "the [Utah Bar] simply asks members to trust its calculations" for pro rata fees. (ECF No. 127 at 31.) But the Utah Bar offers an explanation that the court finds sufficient: "That pro rata portion is determined by dividing the total amount spent on legislative activities into the total amount of license revenue collected to date and multiplying that dividend by the licensing fees paid by the member." (ECF No. 129-21 at 2.) To the extent Ms. Pomeroy is also arguing that the Utah Bar has not given an adequate explanation of the basis for the fees spent on non-germane non-legislative activities, Ms. Pomeroy has not presented the court with any examples of inadequate explanations the Utah Bar has given objecting members, nor has she explained what else the Utah Bar would need to provide members to comply with Hudson.

Ms. Pomeroy's third argument is that the Utah Bar's lengthy budgets fail to give members sufficient notice of the Utah Bar's activities.[13] The Utah Bar's budgets contain a breakdown of expenditures by department, giving mostly generic descriptions of expenditures. (See ECF Nos. 129-22–28.) The Utah Bar's budgets resemble the Texas Bar's budgets in McDonald, in which the Fifth Circuit held that the budgets impermissibly "place[d] the onus on objecting attorneys to parse the Bar's proposed budget—which only details expenses at the line-item level, often without significant explanation—to determine which activities might be objectionable." 4 F.4th at 254. That was "a far cry from a Hudson notice, which estimates the breakdown between chargeable and non-chargeable activities and explains how those amounts were determined." Id. (citing Hudson, 475 U.S. at 307 n.18).

[13] The Utah Bar's budgets were provided to Ms. Pomeroy and the court in the appendix to the Utah Bar's motion for summary judgment. (See Utah Bar Budgets, ECF Nos. 129-22–28.)

But the Utah Bar's generic descriptions of expenditures do not pose a constitutional problem because as discussed above, Keller did not hold that state bars are required to adopt procedures identical to those outlined in Hudson. "Hudson required [a] high-level explanation in the context of a union that affirmatively planned to engage in activities unrelated to collective bargaining for which it could only charge its members. The Court obligated the union to provide a detailed statement of fees in advance so that nonmembers could object before being charged for impermissible activities." Crowe, 989 F.3d at 726 (emphasis added). Ms. Pomeroy has not shown any affirmative plans by the Utah Bar to use members' dues for non-germane activities. A more detailed breakdown between germane and non-germane activities would also not be possible given that the Utah Bar anticipates each year that all its expenditures will be germane. (Defs.' Reply, ECF No. 141 at 19); see Crowe, 989 F.3d at 726 ("[A]dvance notice would not have offered additional protection against the alleged constitutional violations because [the] [Oregon Bar] would have characterized all of its activities as germane."); see also Boudreaux, 86 F.4th at 639 ("[A] prospective budget can only provide so much notice when a bar association can and must classify all of its speech activities as germane.").

Finally, the court finds that Schell forecloses Ms. Pomeroy's fourth argument. The plaintiff in Schell brought a claim that contended that the Oklahoma Bar, "in accord with Janus, needed to create an opt-in dues system for the subsidization of political and ideological speech not germane to the goal of regulating the practice of law." Schell, 11 F.4th at 1184–85. While the district court did not dismiss a claim about "the [Oklahoma Bar's] alleged failure to adopt constitutionally adequate safeguards to prevent the impermissible use of mandatory bar dues[,]" it did dismiss the opt-in claim. Id. at 1185–86. The Tenth Circuit affirmed the district court's dismissal of the claim. Id. at 1191.

None of Ms. Pomeroy's arguments about the Utah Bar's refund procedures are persuasive. Given the adequacy of its procedures, the Utah Bar has not violated any member's free speech rights.

ORDER

The Utah Bar has not violated Ms. Pomeroy's free speech and association rights by engaging in activities with which she disagrees, and its refund procedures do not violate its members' free speech rights. Accordingly, the court ORDERS as follows:

1. Ms. Pomeroy's motion for summary judgment (ECF No. 127) is DENIED.

2. The Utah Bar's motion for summary judgment (ECF No. 128) is GRANTED.

DATED this 25th day of April, 2024.

BY THE COURT:

Tena Campbell

TENA CAMPBELL
United States District Judge