Case No. 19-35463

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL Z. CROWE; OREGON CIVIL LIBERTIES ATTORNEYS;
And LAWRENCE K. PETERSON,

Plaintiffs-Appellants,

vs.

STATE BAR OF OREGON,

Defendant-Appellee.

PLAINTIFFS-APPELLANTS' OPENING BRIEF

Appeal from the United States District Court for the District of Oregon
Case No. 3:18-cv-02139-JR, Hon. Michael H. Simon, presiding

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CORPORATE DISCLOSURE STATEMENT

Undersigned counsel of record for Oregon Civil Liberties Attorneys, certifies that Oregon Civil Liberties Attorneys does not have a parent corporation and that no publicly held corporation holds 10% or more of its stock.

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TABLE OF CONTENTS

Corporate Disclosure Statement i

Table of Contents ii

Table of Authorities iv

Jurisdictional Statement 1

Statement of Issues 1

Statement of the Case 3

A. Oregon's mandatory bar membership and fees 3

B. OSB's use of mandatory fees for political and ideological speech 3

C. Plaintiffs' injuries 6

D. Plaintiffs' claims and procedural history 7

Summary of Argument 9

Argument 13

I. This Court reviews motions to dismiss under Rule 12(b)(6) de novo. 13

II. This Court should reverse the lower court's dismissal because Plaintiffs have stated viable First and Fourteenth Amendment claims. 14

A. Plaintiffs have stated a viable claim challenging mandatory OSB membership. 14

1. Supreme Court precedent does not foreclose Plaintiffs' claim. 15

2. Dismissal is improper because Defendants have not shown that mandatory OSB membership satisfies exacting First Amendment scrutiny. 17

B. The district court erred in not subjecting mandatory OSB dues to at least exacting First Amendment scrutiny. 20

C. The district court erred in concluding that OSB provides the safeguards for First Amendment rights that *Keller* requires. 22

1. The district court erred in concluding that the OSB provides an adequate explanation of members' dues. 24

2. The district court erred in concluding that the OSB provides the escrow *Keller* requires. 26

III. The district court erred in concluding that the OSB's publication of statements criticizing the President was germane to improving the quality of legal services and regulating the practice of law in Oregon. 27

Conclusion 32

Certificate of Compliance 33

Certificate of Service 34

Statement of Related Cases 34

Addendum 35

TABLE OF AUTHORITIES

Cases

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 16, 20, 21

Broam v. Bogan, 320 F.3d 1023 (9th Cir. 2003) 13

Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986) 23, 24, 25, 26

Gardner v. State Bar of Nevada, 284 F.3d 1040 (9th Cir. 2002) 29

In re Petition for a Rule Change to Create a Voluntary State Bar of Neb., 841 N.W.2d 167 (Neb. 2013) 19

Janus v. AFSCME, 138 S. Ct. 2448 (2018) ..... passim

Keller v. State Bar of California, 496 U.S. 1 (1990) ..... passim

Lathrop v. Donohue, 367 U.S. 820 (1961) 15

Lee v. City of L.A., 250 F.3d 668 (9th Cir. 2001) 30

Morrow v. State Bar of Cal., 188 F.3d 1174 (9th Cir. 1999) 16

Penrod v. NLRB, 203 F.3d 41 (D.C. Cir. 2000).....24

Wessel v. City of Albuquerque, 299 F.3d 1186 (10th Cir. 2002)..... 24, 25

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 29

Statutes

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

28 U.S.C. § 1343 1

42 U.S.C. § 1983 .....1, 7

ORS 9.160 3

ORS 9.191 3

Other Authorities

Alex Blasdel, *How the Resurgence of White Supremacy in the US Sparked a War Over Free Speech*, Guardian (May 31, 2018) 28

Katherine Mangu-Ward, *'No Free Speech for Fascists' Is a Truly Terrible Idea*, Reason (Aug. 14, 2017) 28

Marilyn Cavicchia, *Newly Formed California Lawyers Association Excited to Step Forward,* ABA Journal (Apr. 30, 2018) 19

OSB's Legislative Policy Guidelines 3, 4

Ralph H. Brock, *"An Aliquot Portion of Their Dues:" A Survey of Unified Bar Compliance with Hudson and Keller*, 1 Tex. Tech J. Tex. Admin. L. 23 (2000) 19

Timothy E.D. Horley, *Rethinking the Heckler's Veto After Charlottesville*, 104 Va. L. Rev. Online 8 (2018) 28

Rules

Federal Rule of Civil Procedure 12(b)(6) ..... passim

Constitutional Provisions

U.S. Const., amend. I ..... passim

U.S. Const., amend. XIV ..... passim

JURISDICTIONAL STATEMENT

Plaintiffs-Appellants Daniel Z. Crowe, Lawrence K. Peterson, and Oregon Civil Liberties Attorneys brought this civil action against the Oregon State Bar and several of its officials, in their official capacities, under 42 U.S.C. § 1983, seeking relief for violations of Plaintiffs-Appellants' rights under the First and Fourteenth Amendments of the United States Constitution. The district court therefore had subject-matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 because Plaintiffs-Appellants seek review of a final decision of the district court that disposed of all the parties' claims.

This appeal is timely. The district court entered judgment and an order dismissing Plaintiffs-Appellants' claims in full on May 24, 2019. ER.001–4. Plaintiffs then filed this appeal on May 29, 2019, within the 30-day limit provided by Federal Rule of Appellate Procedure 4(a)(1). ER.032.

STATEMENT OF ISSUES

1. In *Keller v. State Bar of California*, 496 U.S. 1, 17 (1990), the Supreme Court expressly declined to consider whether the First Amendment forbids states to compel attorneys to join a bar association that engages in political or ideological activities that are not germane to improving the quality of legal services or regulating the practice of law. Did the district court

therefore err in concluding that *Keller* foreclosed Plaintiffs' First Amendment challenge to Oregon's requirement that attorneys join the Oregon State Bar ("OSB")?

2. In *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), the Supreme Court held that laws that require a person to subsidize a private organization's political or ideological speech are subject to "exacting" First Amendment scrutiny. Did the district court therefore err in failing to apply exacting scrutiny and instead dismissing Plaintiffs' First Amendment challenge to Oregon's requirement that attorneys pay dues to the OSB?
3. To the extent mandatory bar dues are constitutional, *Keller* requires as a First Amendment matter that bar associations provide "an adequate explanation of the basis" of member dues and put "amounts reasonably in dispute" in escrow while an attorney's objection to the use of those dues is pending. 496 U.S. at 16. The OSB, however, does not give attorneys detailed information about how their dues are used, nor does it put disputed amounts in escrow. Did the district court therefore err in concluding that the OSB provides the safeguards *Keller* requires?
4. Did the district court err in concluding that the OSB's use of mandatory dues to publish statements criticizing the President of the United States was

germane to improving the quality of legal services and regulating the legal profession in Oregon?

STATEMENT OF THE CASE

This lawsuit challenges the State of Oregon's requirement that attorneys join and pay fees to the OSB, as well as the OSB's use of attorneys' mandatory fees for political and ideological activity without members' affirmative consent, and OSB's lack of procedures to protect attorneys' First Amendment rights.

A. Oregon's mandatory bar membership and fees

Oregon law compels every attorney licensed in Oregon to join its integrated bar association, OSB, in order to earn a living practicing law in the state. ORS 9.160; ER.074 ¶ 26. State law also authorizes OSB to charge its mandatory members an annual membership fee. ORS 9.191; ER.074 ¶ 27. The OSB does not publish information about how or whether it determines whether a given use of member dues was for purposes germane to improving the quality of legal services and regulating attorneys. Instead, it publishes general information about how it spends members' fees, identifying only general categories of expenditures. ER.075 ¶ 34.

B. OSB's use of mandatory fees for political and ideological speech

In fact, the OSB uses members' mandatory fees for legislative and policy advocacy in accordance with "Legislative Policy Guidelines" approved by its

Board of Governors. *Id.* ¶¶ 35, 37. Those Guidelines ostensibly limit the OSB's "legislative or policy activities … to those reasonably related to any of the following subjects":

> regulating and disciplining lawyers; improving the function of the courts, including issues of judicial independence, fairness, efficacy and efficiency; making legal services available to society; regulating lawyer trust accounts; the education, ethics, competence, integrity and regulation of the legal profession; providing law improvement assistance to elected and appointed government officials; issues involving the structure and organization of federal, state and local courts in or affecting Oregon, issues involving rules of practice, procedure and evidence in federal, state or local court in or affecting Oregon; or issues involving the duties and functions of judges and lawyers in federal, state and local courts in or affecting Oregon.

Id. ¶ 36.

The OSB's Legislative Policy Guidelines do not distinguish between activities that are germane to improving the quality of legal services through the regulation of attorneys and those that are not. *Id.* ¶ 37. Nor do the Guidelines say what tests or procedures, if any, OSB employs to ensure that its classification of expenditures as germane is proper. ER.076 ¶ 38.

Further, the OSB lacks safeguards and procedures to ensure that members' fees are not used for non-chargeable activities such as political speech. ER.079 ¶ 67. In fact, the OSB has taken the position that it may use member dues for *non*-chargeable activities as long as it refunds a portion of dues back to members who object to a given non-chargeable activity. *Id.* ¶ 68.

As a result of its lack of safeguards and procedures, OSB has used mandatory member dues for non-chargeable activities, including political speech, without receiving members' affirmative consent. *Id.* ¶ 69. And through its legislative and policy activities, the OSB uses members' dues for political and ideological activities that are not germane to the purposes of improving the quality of legal services and regulating the legal profession. ER.076 ¶ 40.

The OSB has also used mandatory member fees to publish political speech in its *Bar Bulletin* magazine. *Id.* ¶¶ 41-44. In the April 2018 *Bar Bulletin*, the OSB published, on opposing pages, two statements on alleged "white nationalism," one of which criticized President Donald Trump for, among other things, allegedly "allowing [the white nationalist movement] to make up the base of his support" and signing an executive order restricting immigration and refugee admissions. *Id.* ¶¶ 42-43 & ER.085–86.

Plaintiffs Daniel Crowe and Lawrence Peterson—Oregon attorneys who have been compelled to join and pay dues to the OSB—learned of the OSB's publication of these statements when they received the *Bar Bulletin* in the mail in April 2018. ER.071 ¶ 14, ER.072 ¶ 17, ER.074 ¶ 28, ER.076 ¶ 46. Crowe and Peterson disagree with the statements' explicit and implicit criticism of, President Trump and, if given a choice, would not have voluntarily paid for the statements' publication. ER.076 ¶¶ 47, 48. On April 25, 2018, Peterson contacted Defendant-

Appellee Helen Hierschbiel, the OSB's Chief Executive Officer and Chief Executive Director, to inform the OSB of his objections to the use of his bar fees to publish the statements, and he requested a refund of his annual membership fees. ER.073 ¶ 23, ER.077 ¶ 49. The following day, Mr. Crowe did the same. ER.077 ¶ 50.

In response to their objections, Crowe and Peterson each received a payment of $1.15 from the OSB—which the OSB described as a partial dues refund of $1.12, plus $0.03 of statutory interest. *Id.* ¶ 51. Other OSB members also objected to the statements and then likewise received payments from the OSB. *Id.* ¶ 52. The OSB has not informed Crowe and Peterson how it calculated the amounts of these partial dues refunds. *Id.* ¶ 53.

C. Plaintiffs' injuries

Plaintiffs Crowe and Peterson have suffered irreparable harm from being required to join and pay dues to the OSB as a condition of practicing law in Oregon. ER.078 ¶ 59. They object to being required to join and pay dues to the OSB as a condition of practicing law. *Id.* ¶¶ 57–58. As long as they are forced to pay dues to the OSB, they do not wish to have those dues used to fund the OSB's legislative and political advocacy. ER.077 ¶ 54. If given a choice, they would not fund that activity. *Id.* Again, they did not wish to have their mandatory dues used to publish the statements in the April 2018 *Bar Bulletin* in particular, and, if given

a choice, would not have funded the statements' publication. *Id.* ¶ 55. Further, Crowe and Peterson do not wish to have their mandatory dues used for *any* political speech or activity and, if given a choice, would not fund any of the OSB's political speech or activity. *Id.* ¶ 56.

Plaintiff Oregon Civil Liberties Attorneys ("ORCLA") is a nonprofit organization whose members are all attorneys licensed to practice in Oregon and are therefore mandatory members of OSB. ER.072 ¶ 18. ORCLA is a plaintiff on behalf of its members, who are being injured in the same way that Crowe and Peterson are being injured: they do not wish to be required to join or pay the OSB, and do not wish to have their mandatory dues used to fund the OSB's political speech or activity. ER.077–78 ¶¶ 54–60.

D. Plaintiffs' claims and procedural history

Plaintiffs filed this lawsuit against the OSB and several of its officials, in their official capacities, under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution, to challenge the OSB's mandatory membership and fees and its use of mandatory fees for political and ideological activities.

In their third claim,[1] Plaintiffs allege that compulsory OSB membership and dues inherently violate attorneys' right to choose which groups they will and will not associate with. ER.081–82 ¶¶ 80–89. In their second claim, Plaintiffs allege that the OSBA has violated their First and Fourteenth Amendment rights by using mandatory dues for political and ideological speech without obtaining members' prior, clear, and affirmative consent. ER.080–81 ¶¶ 73–79. In their first claim, Plaintiffs allege—in the alternative to their other two claims—that the OSB has violated their First and Fourteenth Amendment rights by failing to provide minimum safeguards to ensure that member dues are not used for activities that are not chargeable under *Keller v. State Bar of California*, 496 U.S. 1 (1990). ER.078–80 ¶¶ 61-72.

In the district court, the Defendants moved to dismiss Plaintiffs' claims against the OSB under Federal Rule of Civil Procedure 12(b)(1) and moved to dismiss Plaintiffs' claims against all Defendants for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).[2] A magistrate judge recommended that the district court grant the Defendants' motion. Plaintiffs objected to the

[1] Plaintiffs' claims are best discussed in reverse order, which Plaintiffs do both here and in the Argument section below.

[2] The district court heard and decided this motion to dismiss together with a motion to dismiss filed in a separate case, *Gruber v. Oregon State Bar*, No. 3:18-cv-1591-JR, in which other plaintiffs challenged Oregon's mandatory bar membership and dues. An appeal of the *Gruber* decision is pending before this Court as case number 19-35470.

magistrate's findings and recommendation, raising all of the issues they now present on appeal: (1) that Plaintiffs stated a viable First and Fourteenth Amendment challenge to mandatory OSB membership, which is not foreclosed by Supreme Court precedent, ER.054–57; (2) that Plaintiffs stated a viable First Amendment challenge to OSB's use of mandatory for political and ideological speech and other non-germane activities without members' affirmative consent, ER.057–59; (3) that Plaintiffs stated a First and Fourteenth Amendment claims challenging OSB's lack of safeguards to protect attorneys' First Amendment rights,ER.059–62; and (4) that the *Bar Bulletin* statements to which Plaintiffs objected were not germane to improving the quality of legal services and regulating the practice of law, ER.062–66. The district court adopted the magistrate's findings and recommendation in full, however, and entered final judgment against Plaintiffs on all claims. ER.001–4.

SUMMARY OF ARGUMENT

The district court erred in dismissing Plaintiffs' claims under Rule 12(b)(6) because Plaintiffs have stated viable claims for violations of their First and Fourteenth Amendment rights.

The district court erred in dismissing Plaintiffs' Third Claim for Relief—challenging mandatory OSB membership—based on its conclusion that the Supreme Court foreclosed it in *Keller*. In fact, *Keller* expressly declined to decide

whether the First Amendment allows the government to compel attorneys to join a bar association that engages in political or ideological speech that is not germane to improving the quality of legal services and regulating the practice of law. And, to date, neither the Supreme Court nor this Court has resolved that question.

Because *Keller* does not control, the proper level of scrutiny for evaluating the constitutionality of Oregon's membership requirement is exacting scrutiny, under which the government must show that mandatory association "serve[s] a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Janus v. AFSCME*, 138 S. Ct. 2448, 2465 (2018). Also, as in other First Amendment contexts, the government, not the Plaintiffs, bear the burden of making this showing. *Id.* at 2472.

The only interest so far recognized as sufficient in this context is improving the quality of legal services by regulating the legal profession. *Keller*, 496 U.S. at 13. Although Plaintiffs do not dispute that a mandatory bar association might, under some circumstances, serve a compelling state interest, Defendants bear the burden of showing that this interest cannot be achieved in a way that is significantly less restrictive of First Amendment rights than mandatory bar membership. They have made no attempt to show this. And it cannot be shown: it is beyond question that the government *can* serve that interest *without* forcing lawyers to join a bar association that engages in political speech, just as 20 other

states do. The district court therefore erred in dismissing Plaintiffs' challenge to mandatory OSB membership.

The district court also erred in dismissing Plaintiffs' Second Claim for Relief, which challenges the OSB's use of members' mandatory dues for political and ideological speech without their affirmative consent, based on *Keller*. Under *Keller*, mandatory bar associations are "subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees." 496 U.S. at 13. After the Supreme Court's decision in *Janus*, that means mandatory bar dues should, like mandatory union fees, be subject to "exacting scrutiny," 138 S. Ct. at 2477—which they cannot survive because, again, it is beyond dispute that Oregon *can* regulate the legal profession without forcing lawyers to join and pay a bar association.

The district court also erred in dismissing Plaintiffs' First Claim for Relief, which challenges the OSB's lack of safeguards to ensure that members' mandatory dues are not used for non-germane political and ideological speech or other non-germane activities (assuming, in the alternative to Plaintiffs' other claims, that mandatory bar membership and dues are permissible at all).

Keller requires that a bar association provide an adequate explanation of the basis of a member's mandatory fee. 496 U.S. at 16. But the OSB does not provide members with any way to know how the OSB determines what portion of its

expenses are chargeable to members as part of their mandatory dues. *Keller* also requires that, when a member objects to the use of his or her dues, a bar association put the amount reasonably in dispute in escrow, *id.*—but the OSB does not do this.

Finally, the district court erred in concluding that the OSB's publication of the April 2018 *Bar Bulletin* statements to which Plaintiffs objected were germane to improving the quality of legal services and regulating the practice of law and were therefore properly chargeable to Plaintiffs under *Keller*.

The first *Bar Bulletin* statement included a call to restrict speech that supposedly tends to incite violence, notwithstanding the First Amendment—a controversial legal and political view that is not germane to the bar's regulatory function. The district court declared that the publication of this statement was properly chargeable because it was "made within the specific context of promotion of access to justice, the rule of law, and a healthy and functional judicial system that equitably serves everyone." ER.025. But the Bar Bulletin statement was a political statement both in its implicit judgment with regard to the beliefs of President Trump's supporters, and its explicit call for the restriction of certain types of speech. The OSB cannot force members to pay for such non-germane political and ideological advocacy, even if it surrounds that advocacy with (supposedly) germane material.

The district court also erred in concluding that publication of the second statement was germane because the *Bar Bulletin* provides a "forum for the exchange of ideas pertaining to the practice of law." ER.026. Nothing before the court supported a finding that the *Bar Bulletin* provides such a "forum." And nothing in the law suggests that providing a "forum" for the exchange of political views is germane to the bar's regulatory purpose or that it eliminates the First Amendment injury of forcing members to pay for others' non-germane political and ideological speech.

This Court should therefore reverse the district court's dismissal with respect to all of Plaintiffs' claims and reverse its finding that publication of the *Bar Bulletin* statements was a permissible use of OSB members' mandatory dues under the First Amendment.

ARGUMENT

I. This Court reviews motions to dismiss under Rule 12(b)(6) de novo.

This Court reviews a motion to dismiss under Rule 12(b)(6) de novo. *Broam v. Bogan*, 320 F.3d 1023, 1033 (9th Cir. 2003). That means the Court must construe the allegations in the complaint in the light most favorable to the Plaintiffs and draw all reasonable inferences in their favor.

II. This Court should reverse the lower court's dismissal because Plaintiffs have stated viable First and Fourteenth Amendment claims.

This Court should reverse the lower court's dismissal because Plaintiffs have stated viable First and Fourteenth Amendment claims challenging: (1) Oregon's requirement that attorneys' join the OSB as a condition of practicing law; (2) the OSB's use of mandatory dues for political and ideological speech without members' affirmative consent; and (3) assuming mandatory membership and dues are constitutional at all, the OSB's lack of safeguards to ensure that members' dues are not used for political and ideological activities that are not germane to improving the quality of legal services and regulating the practice of law is still unconstitutional.

A. Plaintiffs have stated a viable claim challenging mandatory OSB membership.

This Court should reverse the district court's dismissal of Plaintiffs' Third Claim for Relief because it states a valid First and Fourteenth Amendment claim against Oregon's requirement that attorneys join the OSB as a condition of practicing law. ER.081–82 ¶¶ 80–89. The Supreme Court has made clear that "[t]he right to eschew association for expressive purposes is … protected" by the First Amendment. *Janus*, 138 S. Ct. at 2463. Therefore, forcing Plaintiffs to join the OSB as a condition of practicing law infringes on their First Amendment right to freedom of association. Defendants bear the burden of justifying that

infringement by showing that it "serve[s] a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 2465 (citation omitted). They failed to make such showing. Therefore, the district court lacked any basis for dismissing Plaintiffs' claim. Its conclusion that Supreme Court precedent bars the claim is incorrect.

1. Supreme Court precedent does not foreclose Plaintiffs' claim.

Contrary to the district court's analysis, *see* ER.021, *Keller* does not foreclose Plaintiffs' challenge to mandatory OSB membership.

Keller held that a mandatory bar association violates an attorney's First Amendment rights when it uses mandatory dues for political and ideological speech that is not germane to improving the quality of legal services and regulating the practice of law. 496 U.S. at 13–14. In reaching that conclusion, the Court assumed, *without deciding*, that mandatory bar membership is constitutional—at least if the bar association uses member dues only for permissible "germane" purposes. *See id.* at 4, 13-14, 17.

Keller expressly declined to address a separate freedom-of-association issue related to mandatory bar membership: whether attorneys may "be compelled to associate with an organization that engages in political or ideological activities beyond those [germane activities] for which mandatory financial support is justified under the principles of *Lathrop* [*v. Donohue*, 367 U.S. 820 (1961)] and

Abood [*v. Detroit Board of Education*, 431 U.S. 209 (1977)].” *Keller*, 496 U.S. at 17. In other words, *Keller* did not decide whether it violates an attorney’s First Amendment rights to require him or her to join a bar association that engages in non-germane political and ideological speech—regardless of whether the attorney is forced to pay for that non-germane speech. The Court said that lower courts “remain[ed] free … to consider this issue.” *Id.* This Court, in turn, has since acknowledged that *Keller* “reserved” this “broader” question for resolution in a future case. *Morrow v. State Bar of Cal.*, 188 F.3d 1174, 1177 (9th Cir. 1999). And, to date, no Supreme Court or Ninth Circuit decision has resolved the issue.

Here, Plaintiffs allege[3] that the OSB uses their mandatory dues for political and ideological speech that is not germane to regulating the legal profession and improving the quality of legal services, ER.076 ¶ 40, ER.079 ¶ 69, ER.080–81 ¶ 76, and that forcing them to join the OSB therefore violates their First Amendment right to freedom of association. ER.081–82 ¶¶ 80–89. Plaintiffs’ claim therefore presents precisely the question that *Keller* expressly reserved for resolution in a

[3] The district court rejected Plaintiffs’ allegation that certain statements in the OSB’s *Bar Bulletin* were not germane. *See* ER.025–26. As explained below in Section IV, that conclusion was in error. Plaintiffs’ claim should survive a motion to dismiss in any event, however, because Plaintiffs have also alleged that the OSB engages in other non-germane political and ideological speech. *See* ER.076 ¶ 40, ER.079 ¶¶ 69, 70.

future case, and the district court therefore erred in concluding that *Keller* foreclosed Plaintiffs' claim.[4]

2. Dismissal is improper because Defendants have not shown that mandatory OSB membership satisfies exacting First Amendment scrutiny.

Because Supreme Court precedent does not foreclose Plaintiffs' Third Claim for Relief, the Court should instruct the district court to apply the appropriate standard of "exacting" First Amendment scrutiny to Oregon's bar membership requirement. *Janus*, 138 S. Ct. 2477. Under exacting scrutiny, Defendants must show that mandatory OBA membership "serve[s] a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 2465 (citation omitted).

Defendants have not satisfied their burden; indeed, they have not even tried to meet it by showing that the state cannot achieve the only purpose mandatory OSB membership might legitimately serve—"regulating the legal profession and improving the quality of legal services," *Keller* 496 U.S. at 13—by significantly

[4] To be clear, Plaintiffs' Third Claim for Relief also presents the even broader question of whether mandatory membership in a bar association that engages in *any* political or ideological speech—"germane" or not—violates attorneys' First Amendment rights. *See* ER.048–49 ¶¶ 80–89. Plaintiffs argue here, however, that their claim should survive *at least* to the extent that it presents the narrower freedom-of-association issue that *Keller* expressly reserved for resolution in a future case.

less restrictive means. Further, it is obvious that Oregon *can* serve its interest in regulating the legal profession and improving the quality of legal services without forcing attorneys to join the OSB.

On this point, *Janus*'s analysis is instructive. In *Janus*, the government argued that forcing public-sector workers to subsidize a union with mandatory fees was necessary to serve the state's interest in "labor peace." The "labor peace" theory held that without compulsory union fees, the union would not be able to act as the employees' sole bargaining representative, and the result would be "pandemonium" caused by conflicts between different unions. 138 S. Ct. at 2465.

The *Janus* Court rejected that assumption as "simply not true," *id.*, because, in fact, several federal entities and states already functioned without mandatory fees even though they had designated public-sector unions as exclusive representatives. No such "pandemonium" ever resulted. Therefore, the Court concluded, it is "undeniable that 'labor peace' can readily be achieved 'through means significantly less restrictive of associational freedoms' than the assessment of [mandatory] agency fees"—and those fees therefore could not survive exacting scrutiny. *Id.* at 2466.

As Plaintiffs have alleged, Oregon's mandatory bar fails exacting scrutiny for the same reason: the state can achieve its goals for the legal profession without a mandatory association. ER.082 ¶ 86. It is obvious as a theoretical matter how the

state could do so: by acting as a regulator, penalizing those who break the rules and providing educational services to ensure that practitioners know the rules—just as it already does for many other trades. And, as a practical matter, some 20 states and Puerto Rico already do, in fact, regulate the practice of law without requiring membership in a state bar association that may use mandatory fees for political and ideological speech. *Id.* ¶ 87; Ralph H. Brock, *"An Aliquot Portion of Their Dues:" A Survey of Unified Bar Compliance with Hudson and Keller*, 1 Tex. Tech J. Tex. Admin. L. 23, 24 n.1 (2000).[5] This includes states with large populations of lawyers, such as Massachusetts, New York, California, and New Jersey, and states with some of the smallest bars, such as Vermont and Delaware. *Id.* If those states can regulate lawyers and improve the quality of legal services without violating attorneys' First Amendment rights with a mandatory bar, so can Oregon. ER.082 ¶¶ 86–87.

[5] This article identifies 32 states with a mandatory bar association. After its publication, however, California and Nebraska adopted bifurcated systems under which lawyers only pay for purely regulatory activities and are not forced to fund a bar association's political or ideological speech, eliminating most if not all of the First Amendment problems Plaintiffs object to here. *See In re Petition for a Rule Change to Create a Voluntary State Bar of Neb.*, 841 N.W.2d 167, 173 (Neb. 2013); Marilyn Cavicchia, *Newly Formed California Lawyers Association Excited to Step Forward*, ABA Journal (Apr. 30, 2018), https://www.americanbar.org/groups/bar_services/publications/bar_leader/2017-18/may-june/born-by-legislative-decision-california-lawyers-association-excited-to-step-forward/.

The Court should therefore reverse the district court's dismissal of Plaintiffs' Third Claim for Relief.

B. The district court erred in not subjecting mandatory OSB dues to at least exacting First Amendment scrutiny.

The Court should also reverse the lower court's dismissal of Plaintiffs' Second Claim, which states a valid First and Fourteenth Amendment challenge to the OSB's use of mandatory member dues for political speech without members' affirmative consent. ER.080–81 ¶¶ 73–79. Contrary to the district court's analysis, *Keller* does not foreclose this claim, either.

In *Keller*, the Supreme Court concluded that, for First Amendment purposes, a mandatory bar association is more analogous to a public-sector union than to an ordinary government agency and therefore should be "subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees." 496 U.S. at 13. Therefore, just as "a union could not expend a dissenting individual's dues for ideological activities not 'germane' to … collective bargaining" under *Abood*, 431 U.S. at 235-36, so a state bar could "constitutionally fund activities germane to [regulating the legal profession and improving the quality of legal services] out of the mandatory dues of all members" but could not use mandatory dues to "fund activities of an ideological nature which fall outside" of the bar's regulatory purpose. *Keller*, 496 U.S. at 13–14.

In *Janus*, the Supreme Court overruled *Abood* because that decision "judged [mandatory public-sector union fees'] constitutionality … under a deferential standard that finds no support in [the Court's] free speech cases" instead of subjecting the mandatory fees to exacting scrutiny. 138 S. Ct. at 2479-80. And, as discussed above, *Janus* concluded that mandatory union fees could not survive exacting scrutiny because the government did not show that they were necessary to serve its interest in labor peace. *Id.* at 2466. The Court then concluded that the only way to avoid violating workers' First Amendment rights is not to take union fees from them without their affirmative consent. *Id.* at 2486.

Keller, like *Abood*, never subjected mandatory fees to the exacting scrutiny the First Amendment requires. *Cf. Janus*, 138 S. Ct. at 2479-80. Now, with *Abood* overruled, there is no foundation for *Keller*'s toleration of bar associations using an attorney's mandatory dues for political or ideological speech without first obtaining affirmative consent.

Contrary to the district court's assumption, however, ER.024, this Court need not conclude that the Supreme Court has overruled *Keller*, nor disregard *Keller* itself, to consider whether the OSB's mandatory fees violate the First Amendment. *Keller* stated that mandatory bar associations should be "subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees." 496 U.S. at 13. After *Janus*,

that means mandatory bar association fees must receive "exacting" First Amendment scrutiny.

The OSB's mandatory fees cannot survive exacting scrutiny because, as discussed above, it is beyond dispute that states *can*, and many *do*, regulate the legal profession and improve the quality of legal services without forcing lawyers to join or pay a bar association. And, in any event, Defendants have not shown at this stage that the OSB's use of fees for political speech without members' affirmative consent survives exacting scrutiny. Therefore they are not entitled to dismissal of Plaintiffs' Second Claim for Relief.

C. The district court erred in concluding that OSB provides the safeguards for First Amendment rights that *Keller* requires.

The district court also erred in dismissing Plaintiff's First Claim for Relief, which contends that—assuming mandatory bar membership and dues are permissible at all—the OSB's lack of safeguards to ensure that these dues are not used for non-germane political and ideological speech and other non-germane activities is unconstitutional. ER.078–80 ¶¶ 61–72. The district court erred in concluding that the OSB provides the safeguards *Keller* requires.

In *Keller*, the Court held that mandatory dues may only be used for activities "germane" to "regulating the legal profession and improving the quality of legal services." 496 U.S. at 13. It further held that, because using mandatory dues to "fund activities of an ideological nature which fall outside of those areas of

activity" violates members' First Amendment rights, *id.* at 14, mandatory associations must provide safeguards to ensure that dues are not used for improper purposes in violation of the First Amendment. The Court concluded that a bar association could meet its constitutional obligation by providing the same "minimum set of procedures" the Court had prescribed in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), for public-sector unions: safeguards designed to ensure that non-members' mandatory union fees were not used for impermissible political or ideological activities. *Keller*, 496 U.S. at 16–17.

Those "minimum procedures" include: (1) "an adequate explanation" of the basis of the mandatory bar association 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." *Id.* at 16.

Hudson explained that these safeguards are necessary "to minimize the infringement" of First Amendment rights inherent in mandatory fees, and to give objecting individuals "a fair opportunity to identify the impact of the government action on his interests and to assert a meritorious First Amendment claim." 475 U.S. at 302–03. In other words, because mandatory fees are themselves "a significant impingement on First Amendment rights," a mandatory association "ha[s] a responsibility to provide procedures that minimize that impingement and

that facilitate a [dissenter's] ability to protect his rights." *Id.* at 307 n.20 (internal quotations and citation omitted). That means not just a self-report by OSB, but an *independently audited* report, because "[v]erification by an independent auditor is required to give [attorneys] 'assurance'" that their fees are not being spent in an unlawful manner. *Wessel v. City of Albuquerque*, 299 F.3d 1186, 1193 (10th Cir. 2002) (citation omitted).

1. The district court erred in concluding that the OSB provides an adequate explanation of members' dues.

Plaintiffs have alleged that the OSB fails to satisfy the first *Hudson*/*Keller* requirement because it does not provide members with an explanation of how their mandatory dues amount is calculated. ER.079 ¶ 66. Indeed, Plaintiffs allege that not only does the OSB not provide an independently audited report, but it publishes *no* information at all about whether or how it determines whether a given allocation of funds was for purposes germane to improving the quality of legal services and regulating attorneys. ER.075 ¶ 34. The OSB therefore provides its members with no way to know how the OSB determines what portion of its expenses are chargeable; it "leav[es members] in the dark about the source of" their mandatory dues amount, *Hudson*, 475 U.S. at 306, and fails to give them "sufficient information to make 'their own judgment about whether to challenge the [OSB]'s determination'" regarding the lawfulness of its expenditures. *Wessel*, 299 F.3d at 1193–94 (quoting *Penrod v. NLRB*, 203 F.3d 41, 46 (D.C. Cir. 2000)).

In short, the OSB denies members information to which they are constitutionally entitled about how their dues are calculated and spent, and thus denies them a meaningful opportunity to protect their First Amendment rights. *See id.*

The district court erred in concluding that the OSB provides members with an adequate explanation of their fee. As the Magistrate's Recommendation itself recognized, "[t]he basis for the [OSB's mandatory] fee does not present itself until a Bar member objects." ER.029. *Hudson*, however, requires explanation of a mandatory fee's basis *before* a member objects because "[l]eaving the [fee payers] in the dark about the source of the figure for the … fee—and requiring them to object in order to receive information—does not adequately protect" their First Amendment rights. *Hudson*, 475 U.S. at 306. The OSB's "annual accounting of both projected and actual expenses," ER.029, does not suffice because it contains no specific information about the OSB's expenditures—only general categories—and no information about whether or how the OSB determined whether any given expenditures were chargeable. *See* ER.074–75 ¶¶ 32–34. The OSB's supposed "policy [that] already mandates that all communications must be germane," ER.029, is likewise inadequate to protect First Amendment rights; *Hudson* and *Keller* require safeguards so individuals can "make 'their own judgment'" *Wessel*, 299 F.3d at 1193 (citation omitted), instead of having to take their union's or bar association's word for it.

2. The district court erred in concluding that the OSB provides the escrow *Keller* requires.

The district court also erred in concluding that the OSB has "satisfie[d] the escrow requirement." ER.029. Defendants have not even alleged that the OSB puts disputed funds in escrow.

The OSB's provision of a refund with interest after a dispute is resolved, *see id.*, is necessary but not sufficient to protect members' First Amendment rights. *Keller* and *Hudson* specifically require *escrow*—nothing less—to *guarantee* that no amount of a member's money will be used for non-germane political or ideological speech for any length of time in violation of fundamental First Amendment rights. *See Keller*, 496 U.S. at 16; *Hudson*, 475 U.S. at 310. Indeed, *Hudson* specified that, if a union chooses to escrow only a portion, rather than all, of an objecting individual's annual fee, then "it must carefully justify the limited escrow on the basis of [an] independent audit, and the escrow figure must itself be independently verified." 475 U.S. at 310 n.23. That rule is incompatible with the district court's conclusion that escrow is not necessary *at all* as long as an organization has a refund policy.

Thus—accepting the allegations of the Plaintiffs' complaint as true, as Rule 12(b)(6) requires—the district court erred in concluding that the OSB provides the safeguards for First Amendment rights that *Keller* requires. This Court should therefore reverse the district court's dismissal of Plaintiff's First Claim for Relief.

III. The district court erred in concluding that the OSB's publication of statements criticizing the President was germane to improving the quality of legal services and regulating the practice of law in Oregon.

Finally, the district court erred in concluding that the OSB's publication of the April 2018 *Bar Bulletin* statements criticizing the President was "germane" to improving the quality of legal services and regulating the practice of law in Oregon and therefore was chargeable to objecting OSB members under *Keller*.[6]

The district court concluded that the first of the two statements was germane to improving the quality of legal services, and therefore a permissible use of mandatory dues, because it was "made within the specific context of promotion of access to justice, the rule of law, and a healthy and functional judicial system that equitably serves everyone." ER.025. In fact, however, the statement did not simply promote "access to justice, the rule of law, and a healthy and functional judicial system" in a politically and ideologically neutral manner. Rather, it also "condemn[ed] the proliferation of speech that [supposedly] incites violence," ER.025, such as the violence that occurred in Charlottesville, Virginia, in August

[6] Reversal of the district court's finding on this question is not essential to reverse its dismissal of Plaintiffs' claims. As Plaintiffs' arguments above show, none of their claims depends on the *Bar Bulletin* statements to survive a motion to dismiss. Nonetheless, Plaintiffs seek reversal of the district court's finding on this issue because the *Bar Bulletin* statements provide an example of the OSB engaging in non-germane political and ideological speech, which is relevant to (at a minimum) Plaintiffs' challenge to mandatory OSB membership, as discussed above in Section II.A.1.

2017, and suggested that, notwithstanding the First Amendment, something must be done "to address speech" that supposedly "incites violence." ER.085.

Of course the extent to which free speech should be restricted because of its supposed tendency to incite violence is a controversial legal and political issue and was a subject of much public debate in the wake of the Charlottesville events. *See, e.g.*, Alex Blasdel, *How the Resurgence of White Supremacy in the US Sparked a War Over Free Speech*, Guardian (May 31, 2018)[7] (describing the debate within the ACLU and among others); Timothy E.D. Horley, *Rethinking the Heckler's Veto After Charlottesville*, 104 Va. L. Rev. Online 8 (2018)[8] (stating that "current doctrine provides no clear answer" on when government may limit speech that may provoke a violent response and proposing a new First Amendment standard); Katherine Mangu-Ward, *'No Free Speech for Fascists' Is a Truly Terrible Idea*, Reason (Aug. 14, 2017)[9] (criticizing calls for speech restrictions in response to Charlottesville events). Further, it appears that the OSB intended the first statement to be read in conjunction with the second statement, which the OSB chose to publish next to it, which blames "the current climate of violence, extremism and

[7] https://www.theguardian.com/news/2018/may/31/how-the-resurgence-of-white-supremacy-in-the-us-sparked-a-war-over-free-speech-aclu-charlottesville.

[8] http://www.virginialawreview.org/volumes/content/rethinking-hecklers-veto-after-charlottesville.

[9] https://reason.com/blog/2017/08/14/no-free-speech-for-fascists-is-a-bad-dan.

exclusion" on President Trump. ER.085–86. Most important, this controversial issue is not related to the only purposes for which the OSB may use mandatory dues: namely, improving the quality of legal services and regulating the legal profession.

Moreover, a rule that otherwise non-germane political and ideological speech is permissible if it is presented "within the specific context of promotion of access to justice, the rule of law, and a healthy and functional judicial system," ER.025, is unworkable. If a legal or political view is considered germane as long as it is placed in that "context," then virtually nothing is off limits. Competent lawyers will *always* be able to argue that their own political views are simply ways to promote "justice, the rule of law, and a healthy and functional judicial system."

If "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), then the Court certainly cannot uphold the use of mandatory dues to publish a political statement on the theory that it fits within an officially acceptable range of public opinion. The Court should decline to recognize this exception that would swallow *Keller*'s First Amendment rule.

Further, contrary to the district court's analysis, the first statement is not comparable to the dues-funded advertising campaign approved in *Gardner v. State*

Bar of Nevada, 284 F.3d 1040 (9th Cir. 2002). *See* ER.025–26. There, the Court concluded that a bar association could use mandatory dues to fund advertisements with the slogan "Nevada Lawyers—Striving to Make the Law Work for Everyone" because the campaign was aimed directly at "foster[ing] public understanding" of the legal system. *Id.* at 1041–43. Unlike the *Bar Bulletin* statements, that campaign did not include criticism of public officials or expression of viewpoints on controversial issues not directly related to the practice of law.

The district court also erred in concluding that the second *Bar Bulletin* statement, attributed to "seven affinity bars," was permissible because supposedly "the *Bar Bulletin* routinely publishes statements from a variety of authors with differing political viewpoints and creates a forum for the exchange of ideas pertaining to the practice of law." ER.026. There was no evidence to this effect, and nothing before the district court supported such a finding. In considering a 12(b)(6) motion, the court could only consider the facts alleged in the complaint, accepting them as true and construing them in the light most favorable to the plaintiffs. *Lee v. City of L.A.*, 250 F.3d 668, 688 (9th Cir. 2001) (reversing dismissal where the district court "assumed the existence of facts that favor defendants based on evidence outside plaintiffs' pleadings [and] took judicial notice of the truth of disputed factual matters"). Neither the allegations of

Plaintiffs' complaint, nor anything else presented to the Court, supported its "forum" finding.

Nor was there anything else before the court suggesting that the OSB has offered *anyone* the opportunity to present "differing political viewpoints" with respect to the April 2018 statements criticizing the President in particular. Of course, the existence of such an opportunity would not diminish the First Amendment harm caused by expenditure of mandatory dues to propagate political opinions without members' affirmative consent; on the contrary, it would *double* that harm. The district court's conclusion that the use of Plaintiffs' bar dues to publish political or ideological speech would be constitutional if it were in the context of a "forum" in which "differing political viewpoints" were expressed was therefore also in error. The district court cited no basis for this conclusion, nor did it provide any explanation of how providing such a form could avoid infringing the rights of members who do not wish to subsidize *any* of the viewpoints expressed—or who, like the Plaintiffs, ER.077 ¶ 56, do not wish to subsidize the expression of any viewpoint at all.

Even assuming, for the sake of argument, that the OSB's publication of political viewpoints in a "forum" could somehow be germane to its regulatory purpose, the district court had no basis for concluding that the OSB has actually provided any forum at all, let alone one sufficiently open to overcome any First

Amendment problem. Again, there is no record evidence on this point, which illustrates that dismissal under Rule 12(b)(6) before the parties could conduct discovery and develop a factual record was improper.

CONCLUSION

This Court should reverse the district court's dismissal of Plaintiffs claims under Rule 12(b)(6), and it should reverse the district court's conclusion that the OSB's April 2018 *Bar Bulletin* statements were chargeable to members who disagreed with the political and ideological viewpoints they expressed.

Dated: September 4, 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,295 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionately spaced typeface using Microsoft Word 2016 Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Jacob Huebert
Jacob Huebert

STATEMENT OF RELATED CASES

Other plaintiffs challenged Oregon's mandatory bar membership and dues in *Gruber v. Oregon State Bar*, No. 3:18-cv-1591-JR. An appeal of the *Gruber* decision is pending before this Court as case number 19-35470.

Submitted this 4th day of September 2019.

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Case No. 19-35463

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL Z. CROWE; OREGON CIVIL LIBERTIES ATTORNEYS;
And LAWRENCE K. PETERSON,

Plaintiffs-Appellants,

vs.

STATE BAR OF OREGON,

Defendant-Appellee.

PLAINTIFFS-APPELLANTS' ADDENDUM

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TABLE OF CONTENTS

U.S. Constitution, amend. I 37

U.S. Constitution, amend. XIV 37

42 U.S.C. § 1983 37

Fed. R. Civ. P. 12(b)(6) 38

U.S. Constitution, amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, amend. XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such

officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Fed. R. Civ. P. 12(b)(6)

HOW TO PRESENT DEFENSES. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

…

(6) failure to state a claim upon which relief can be granted; and

…

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.