No. _____

In the
Supreme Court of the United States

DANIEL Z. CROWE; AND OREGON CIVIL LIBERTIES ATTORNEYS,

Applicants,

and

LAWRENCE K. PETERSON,

Plaintiff,

v.

OREGON STATE BAR,

Respondent.

APPLICATION DIRECTED TO THE HONORABLE ELENA KAGAN FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

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TO: THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.2, applicants Daniel Crowe and Oregon Civil Liberties Attorneys ("ORCLA") respectfully request a 60-day extension of time, to and including March 21, 2025, within which to file a petition for writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case. The Ninth Circuit entered its judgment on August 28, 2024, and denied the petition for en banc review on October 22, 2024. Without an extension, the time for filing a petition for a writ of certiorari will expire on January 21, 2025. This application is being filed more than ten days before that date. *See* Sup. Ct. R. 13.5, 30.2.

The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1). Copies of the opinion of the court of appeals, the order denying rehearing and rehearing en banc, and the two relevant opinions of the district court are attached to this application.

BACKGROUND

This case concerns a free association challenge under the First Amendment to the U.S. Constitution to Oregon's requirement that lawyers join the Oregon State Bar Association ("OSB") as a condition of practicing law in Oregon. In this case, the Ninth Circuit held that under the test laid out in *Keller v. State Bar of California*, 496 U.S. 1 (1990), OSB engages in conduct not germane to the regulation of lawyers or the improvement of the quality of legal services. But the court also held that it was nevertheless constitutional for Oregon to continue to force lawyers, including

Applicants, to join OSB as a condition of practicing law in Oregon even though OSB engaged in nongermane conduct. In so doing, the Ninth Circuit split with the Fifth Circuit, which in *Boudreaux v. Louisiana State Bar Ass'n*, 86 F.4th 620, 632-34 (5th Cir. 2023), and *McDonald v. Longley*, 4 F.4th 229, 246 (5th Cir. 2021), held that forced association with a state bar association that engages in nongermane conduct violates the First Amendment's protections for freedom of association. Op. 33 n.10 ("But we disagree with the Fifth Circuit's holding that if a state bar engages in nongermane activities, compelled membership is necessarily unconstitutional.") This decision not only creates a circuit split, but it presents the Court with an opportunity to review its previous decision regarding forced association with state bars—a reconsideration members of this Court have called necessary. *See Jarchow v. State Bar of Wis.*, 140 S. Ct. 1720 (mem) (2020) (Thomas, J. dissenting).

1. Oregon law requires any attorney to become a member of OSB before being able to practice law in Oregon. Op. 5. OSB then engages in activities like administering the bar exam, enforcing the rules of professional conduct, lobbying, and publishing the *Bulletin*, OSB's magazine. This case has centered around OSB's lobbying activity and articles published in the *Bulletin*.

2. At issue in the *Bulletin* are two statements from the April 2018 issue on "White Nationalism and [the] Normalization of Violence." Op. 5-6. The statements were placed on facing pages with a common border around both statements—a border found on no other page of the issue. *Id*. The first statement was the official OSB statement:

As the United States continues to grapple with a resurgence of white nationalism and the normalization of violence and racism, the Oregon State Bar remains steadfastly committed to the vision of a justice system that operates without discrimination and is fully accessible to all Oregonians. As we pursue that vision during times of upheaval, it is particularly important to understand current events through the lens of our complex and often troubled history. The legacy of that history was seen last year in the streets of Charlottesville, and in the attacks on Portland's MAX train. We unequivocally condemn these acts of violence.

We equally condemn the proliferation of speech that incites such violence. Even as we celebrate the great beneficial power of our First Amendment, as lawyers we also know it is not limitless. A systemic failure to address speech that incites violence emboldens those who seek to do harm, and continues to hold historically oppressed communities in fear and marginalization.

As a unified bar, we are mindful of the breadth of perspectives encompassed in our membership. As such, our work will continue to focus specifically on those issues that are directly within our mission, including the promotion of access to justice, the rule of law, and a healthy and functional judicial system that equitably serves everyone. The current climate of violence, extremism and exclusion gravely threatens all of the above. As lawyers, we administer the keys to the courtroom, and assist our clients in opening doors to justice. As stewards of the justice system, it is up to us to safeguard the rule of law and to ensure its fair and equitable administration. We simply cannot lay claim to a healthy justice system if whole segments of our society are fearful of the very laws and institutions that exist to protect them.

In today's troubling climate, the Oregon State Bar remains committed to equity and justice for all, and to vigorously promoting the law as the foundation of a just democracy. The courageous work done by specialty bars throughout the state is vital to our efforts and we continue to be both inspired and strengthened by those partnerships. We not only refuse to become accustomed to this climate, we are intent on standing in support and solidarity with those historically marginalized, underrepresented and vulnerable communities who feel voiceless within the Oregon legal system.

Op. 6-7.

The second statement was a joint statement of seven Oregon Special Bar Associations supporting the official OSB statement on white nationalism and the normalization of violence. That statement read:

> The Oregon Asian Pacific American Bar Association, the Oregon Women Lawyers, the Oregon Filipino American Lawyers Association, OGALLA-The LGBT Bar Association of Oregon, the Oregon Chapter of the National Bar Association, the Oregon Minority Lawyers Association, and the Oregon Hispanic Bar Association support the Oregon State Bar's Statement on White Nationalism and Normalization of Violence and its commitment to the vision of a justice system that operates without discrimination and is fully accessible to all Oregonians.
>
> Through the recent events from the Portland MAX train attacks to Charlottesville, we have seen an emboldened white nationalist movement gain momentum in the United States and violence based on racism has become normalized. President Donald Trump, as the leader of our nation, has himself catered to this white nationalist movement, allowing it to make up the base of his support and providing it a false sense of legitimacy. He has allowed this dangerous movement of racism to gain momentum, and we believe this is allowing these extremist ideas to be held up as part of the mainstream, when they are not. For example, President Trump has espoused racist comments, referring to Haiti and African countries as "shithole countries" and claiming that the United States should have more immigrants from countries like Norway. He signed an executive order that halted all refugee admissions and barred people from seven Muslim-majority countries, called Puerto Ricans who criticized his administration's response to Hurricane Maria "politically motivated ingrates," said that the white supremacists marching in Charlottesville, [Virginia] in August of 2017 were "very fine people," and called into question a federal judge, referring to the Indiana-born judge as "Mexican," when the race of his parents had nothing to do with the judge's decision. We are now seeing the white nationalist movement grow in our state and our country under this form of leadership.
>
> As attorneys who lead diverse bar associations throughout Oregon, we condemn the violence that has occurred as a result of white nationalism and white supremacy. Although we recognize the importance of the First Amendment of the United States

> Constitution and the protections it provides, we condemn speech that incites violence, such as the violence that occurred in Charlottesville. President Trump needs to unequivocally condemn racist and white nationalist groups. With his continued failure to do so, we must step in and speak up.
>
> As attorneys licensed to practice law in Oregon, we took an oath to "support the Constitution and the laws of the United States and of the State of Oregon." To that end, we have a duty as attorneys to speak up against injustice, violence, and when state and federal laws are violated in the name of white supremacy or white nationalism. We must use all our resources, including legal resources, to protect the rights and safety of everyone. We applaud the Oregon State Bar's commitment to equity and justice by taking a strong stand against white nationalism. Our bar associations pledge to work with the Oregon State Bar and to speak out against white nationalism and the normalization of racism and violence.

Op. 8-10.

These statements, when taken individually and together constitute activity not germane to the regulation of lawyers or the improvement of the quality of legal services—as held by the Ninth Circuit. Op. 34.

3. The bar also has engaged in extensive lobbying activity, including on measures complexly divorced from the regulation of lawyers or the improvement of the quality of legal services. For example, OSB supported a bill that sought to add a half-credit of civics to the high school graduation requirements. It supported a bill that would terminate the authority of a spouse to act as an agent under certain estate planning documents upon annulment, separation, or dissolution of a marriage. It supported a bill that would have exempted OSB from the general statutory requirement to record and make public its telephonic or video meetings. It also supported bills that would have allowed nonprofit board members to act electronically

and a bill to create a taskforce to address racial disparities in the context of home ownership. In general, much of the lobbying activity Applicants cited to below concerned changes to the state's substantive law, and proceedings in which lawyers would be participants, rather than the regulation of lawyers qua lawyers. The Fifth Circuit has held this to be *per se* nongermane. *See McDonald*, 4 F.4th at 247–48.

4. The Ninth Circuit held that OSB engaged in conduct nongermane to the regulation of lawyers or the improvement of the quality of legal services. Specifically, the court held that "OSB engaged in nongermane conduct by adopting the Specialty Bars' statement." Op. 34. The court explained that "much of its criticism of then-President Trump did not relate to the justice system at all." Op. 34-35. The court concluded that "[b]ecause the Specialty Bars' statement was not germane, OSB's adoption of the Specialty Bars' statement was not germane either" and because "OSB has not offered any other justification for associating its members with the Bulletin statements," the infringement failed exacting scrutiny. Op. 35.

The court, however, did not resolve the constitutionality of this lobbying activity: "[b]ecause we conclude that OSB's adoption of the Specialty Bars' statement was not germane, we do not address any of the lobbying challenged in this case." *Id*. n.11. The court instead said that "[t]he district court may consider the lobbying on remand." *Id*. This is confusing, because the District Court already held that the lobbying *was* germane, and that was one of the issues Applicants appealed. In other words, the court did not answer an important issue directly before it on appeal—an issue that directly relates to the remedy that these Applicants have been seeking from

the beginning of this case: to be free from forced association with a bar association that engages in nongermane conduct.

5. Instead of following the Fifth Circuit, the Ninth Circuit chose to forge its own path—one that still acquiesces to the violations of constitutional rights. The court explicitly stated: **"We disagree with the Fifth Circuit's holding** that if a state bar engages in nongermane activities, compelled membership is necessarily unconstitutional." Explaining that "in many circumstances, membership in a state bar, standing alone, has no expressive meaning," the court said that "the membership requirement does not infringe the freedom of association—**even if the bar engages in nongermane activities** such as offering dietary advice or promoting a charity drive." Op. 33 n.10 (emphasis added).

This holding caused two circuit splits, one with the remedy required for a mandatory bar association engaging in nongermane conduct and another with how an associational injury is defined.

6. The Ninth Circuit explicitly created a circuit split over the remedy for the violation of a core constitutional right. An attorney in Texas, Louisiana, or Mississippi *cannot* be forced to join a bar association that engages in nongermane conduct, but attorneys in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, or Washington *can* be.

In *McDonald*, three attorneys challenged the requirement that they be compelled to join the State Bar of Texas on the grounds "that the Bar is engaged in political and ideological activities that are not germane to its interest in regulating

the legal profession and improving the quality of legal services." 4 F.4th at 237. The Fifth Circuit held that "[c]ompelled membership in a bar association that engages in non-germane activities … fails exacting scrutiny," and that because the Texas Bar engaged in nongermane activity, it could "not continue mandating membership in the Bar as currently structured or engaging in its current activities." *Id.* at 246, 252. Two years later in *Boudreaux*, the Fifth Circuit again explained that "compulsory bar membership is unconstitutional if a bar's speech is not germane to regulating lawyers or improving the quality of legal services." 86 F.4th at 624. The court held that a variety of seemingly inconsequential activities of the Louisiana State Bar were nongermane, including the promotion of an article about student loans, a webpage icon celebrating pride month, and tweets about the health benefits of broccoli—making mandatory membership unconstitutional. *Id.* at 640.

The Ninth Circuit refused to follow these decisions and instead allowed OSB to continue mandating membership. It held that a simple remedy would suffice: OSB could continue engaging in its conduct so long as it puts a basic disclaimer on the messaging. It left open the door for OSB to speak officially on any number of controversial political issues, so long as it accompanies that statement with a boilerplate notice that the statement or opinion is not on behalf of all bar members. This despite the fact that the bar speaks for the "legal community" that gives the bar's speech weight. *See McDonald*, 4 F.4th at 246. In *Keller*, this Court said that "[c]ompulsory dues may not be expended to endorse or advance a gun control or

nuclear weapons freeze initiative," 496 U.S. at 16, but under the Ninth Circuit's holding, OSB may make such endorsements, so long as it attaches fine print.

Such formalism is inadequate to satisfy the First Amendment because the only reason people care what a state bar says is that it represents the legal community of the state—as all lawyers must join it.

7. The Ninth Circuit also created a split in holding that an associational injury can only occur in this case if it can be shown that members of the public might impute OSB's speech to Applicants. Holding that forced association with a group that engaged in nongermane conduct is not an injury in and of itself, or that it depends on such a subjective factor as what the public thinks, *again* breaks with the Fifth Circuit's *Boudreaux* and *McDonald* decisions.

The freedom of association "plainly presupposes a freedom not to associate," which is more than just a freedom from the assumptions of others (as, for example, being assumed by others to belong to an organization). *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622–23 (1984). The issue is not merely whether some third party might think Applicants endorse OSB's activities; but rather, whether Applicants are forced to join, and be considered members of, a political organization they do not support. Being required to join is itself an injury irrespective of whether third parties think Appellants support OSB's activities or whether Applicants are free to vocalize their own opinions. Courts have never said that the possibility of a disclaimer can absolve a violation of the freedom of association. On the contrary, *Circle School v. Pappert*, 381 F.3d 172, 182 (3d Cir. 2004), rejected that argument, because it would allow "the

state [to] infringe on anyone's First Amendment interest at will, so long as the mechanism of such infringement allows the speaker to issue a general disclaimer." *Id*. To hold otherwise is not only to disregard the distinctive quality of a freedom-of-association violation, but also throws upon the Applicants the burden of having to disclaim OSB's statements.

8. In sum, this case presents a substantial and recurring question on which the federal circuit courts are divided: whether the First Amendment permits compelled association of attorneys in bar associations that engage in nongermane activity. The Ninth Circuit holds that the First Amendment's protections do not go that far, whereas the Fifth Circuit has held that once a bar association engages in nongermane conduct, it is necessarily unconstitutional to compel membership.

Because of this split, there is a reasonable prospect that this Court will grant the petition, such that it warrants additional time for these important questions to be fully addressed.

REASONS FOR GRANTING THE APPLICATION

9. Applicants respectfully request a 60-day extension within which to prepare a petition for writ of certiorari in this case. Undersigned counsel both have medical situations that required immediate attention in the month of December, including a serious car accident involving lead counsel and a prenatal diagnosis of spina bifida for the wife of second chair counsel requiring in-utero surgery in the next week. Additionally, undersigned counsel are engaged with numerous other work-related matters over the coming weeks. A 60-day extension is warranted to permit

counsel to research and, as appropriate, refine the issues for this Court's review and prepare a petition that addresses the important questions raised by this case in the most direct and efficient manner for the Court's consideration. The additional time also will assist potential amici in considering this case.

CONCLUSION

Accordingly, Crowe and ORCLA request a 60-day extension of time, such that the petition for a writ of certiorari would be filed on or before March 21, 2025.

Respectfully submitted,

/s/ *Scott Day Freeman*

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Counsel for Applicants Daniel Z. Crowe and Oregon Civil Liberties Attorneys

January 10, 2024

No. _____

In the
Supreme Court of the United States

DANIEL Z. CROWE; AND OREGON CIVIL LIBERTIES ATTORNEYS,

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and

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APPLICATION DIRECTED TO THE HONORABLE ELENA KAGAN FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

CERTIFICATE OF SERVICE

I, Scott Day Freeman, a member of the Bar of this Court and counsel of record for Applicants, hereby certify that on January 10, 2025, I caused a copy of this Application Directed To The Honorable Elena Kagan For An Extension Of Time Within Which To File A Petition For A Writ Of Certiorari To The U.S. Court of

Appeals for the Ninth Circuit in the above-captioned case to be mailed, first-class postage prepaid, to:

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Additionally, in accordance with Supreme Court Rule 29.3, an electronic version of the Application Directed To The Honorable Elena Kagan For An Extension Of Time Within Which To File A Petition For A Writ Of Certiorari To The U.S. Court of Appeals for the Ninth Circuit was transmitted to the above-listed counsel at the referenced email address.

I further certify that all parties required to be served have been served.

/s/ *Scott Day Freeman*
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APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

DIANE L. GRUBER and MARK RUNNELS,

Plaintiffs,

v.

OREGON STATE BAR, a Public Corporation; VANESSA A. NORDYKE, President of the, Oregon State Bar; HELEN HIERSCHBIEL, Chief Executive Officer of the Oregon State Bar,

Defendants,

Case No. 3:18-cv-1591-JR

FINDINGS & RECOMMENDATION

Case No. 3:18-cv-2139-JR

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

Plaintiffs,

OREGON STATE BAR, a Public Corporation; OREGON STATE BAR BOARD OF GOVERNORS; VANESSA NORDYKE, President of the Oregon State Bar Board of Governors; CHRISTINE CONSTANTINO, President-elect of the Oregon State Bar Board of Governors; HELEN HIERSCHBIEL, Chief Executive Officer of the Oregon State Bar; KEITH PALEVSKY, Director of Finance and Operations of the Oregon State Bar; AMBER HOLLISTER, General Counsel for the Oregon State Bar,

Defendants.

RUSSO, Magistrate Judge:

Plaintiffs in both cases challenge the mandatory nature of the Oregon State Bar's (OSB) compulsory fee structure. In early 2019, defendants moved to dismiss these actions. On May 24, 2019, the Court granted defendants' motions and dismissed the cases finding the OSB entitled to Eleventh Amendment Immunity and that both the First Amendment free speech and freedom of association claims failed due to the Bar's procedural safeguards protecting against compelled speech that is not germane to the law. Findings and Recommendation (ECF 44) Order adopting (ECF 46).

On appeal, the Ninth Circuit affirmed dismissal of plaintiffs' free speech claim finding the OSB's refund process sufficient to minimize potential infringement on members' constitutional rights if the OSB engages in political activity that is not germane to the Bar's role in regulating the legal profession. Crowe v. Oregon State Bar, 989 F.3d 714, 727 (2021). However, the Appeals Court found plaintiffs' free association claims viable because past Supreme Court and Ninth Circuit precedent failed to resolve this issue when previously confronted with it.[1] Id. at 729. The Ninth Circuit remanded to this Court to address the appropriate standard for assessing plaintiffs' free association claim and whether previous instruction regarding germaneness and procedurally adequate safeguards are relevant. Plaintiffs Daniel Crowe, Lawrence Peterson, and the Oregon Civil Liberties Attorneys (Crowe plaintiffs) seek summary judgment in Case No. 3:18-cv-2139-JR and defendants seek summary judgment in both cases. For the reasons stated below, defendants' motions should be granted, and the Crowe plaintiffs' motion should be denied.

[1] The Ninth Circuit also determined that OSB is not an arm of the state entitled to Eleventh Amendment Immunity. Crowe, 989 F.3d at 733.

BACKGROUND

Plaintiffs initiated these actions following publication of statements in the OSB April 2018 Bulletin entitled "White Nationalism and Normalization of Violence" and "Joint Statement of the Oregon Specialty Bar Associations Supporting the Oregon State Bar's Statement on White Nationalism and Normalization of Violence." See, e.g., Crowe, 989 F.3d at 722-23. Plaintiffs complained about the statements and the OSB refunded $1.15 to plaintiffs and other objectors in an effort to adhere to the standards of germane speech as set forth in Keller v. State Bar of California, 496 U.S. 1, 13 (1990) (a state bar may use mandatory dues to subsidize activities germane to the goals for regulating the legal profession and the quality of legal services without running afoul of members' rights to free speech). After the Court dismissed these actions on May 24, 2019, the Ninth Circuit remanded to address the questions noted above.

In Oregon, with few exceptions, active Bar membership is required to practice law. Or. Rev. Stat. § 9.160. A court shall enjoin any person from practicing law in violation of section 9.160 and may punish them with contempt. Or. Rev. Stat. § 9.166.

Generally, all Bar members must pay annual membership fees and a professional liability assessment. Or. Rev. Stat. § 9.191. Failure to pay the fee will result in suspension from practice. Or. Rev. Stat. § 9.200.

The Bar's Board of Governors is required to advance the science of jurisprudence and the improvement of the administration of justice. Or. Rev. Stat. § 9.080(1). To accomplish this mission, the Bar administers exams for admission to practice, examines a member's character and fitness, formulates and enforces rules of conduct, and requires continuing education and training of its members. Or. Rev. Stat. §§ 9.210; 9.490; 9.114. In addition, the Bar provides the public

with general legal information and seeks to increase pro bono legal services. See, e.g., https://www.osbar.org/public/; https://www.osbar.org/lsp; https://www.osbar.org/probono/.

As part of its mission, the Bar publishes a monthly Bar Bulletin. The Bar's communications within the Bulletin:

> should be germane to the law, lawyers, the practice of law, the courts and the judicial system, legal education, and the Bar in its role as a mandatory membership organization. Communications, other than permitted advertisements, should advance public understanding of the law, legal ethics and the professionalism and collegiality of the bench and Bar.

Oregon State Bar Bylaws, Art. 11, Sec. 1 (http://www.osbar.org/_docs/rulesregs/bylaws.pdf) (Bylaws). In addition:

> Bar legislative or policy activities must be reasonably related to any of the following subjects: Regulating and disciplining lawyers; improving the functioning 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 the rules of practice, procedure and evidence in federal, state or local courts 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. at 12.1.

To the extent such communications fail to adhere to this policy, the Bylaws provide a framework for addressing those communications:

> Section 12.6 Objections to Use of Bar Dues
>
> Subsection 12.600 Submission
>
> A member of the Bar who objects to the use of any portion of the member's bar dues for activities he or she considers promotes or opposes political or ideological causes may request the Board to review the member's concerns to determine if the Board agrees with the member's objections. Member objections must be in writing and filed with the Chief Executive Officer of the Bar. The Board will review each written objection received by the Chief Executive Officer at its next scheduled

board meeting following receipt of the objection. The Board will respond through the Chief Executive Officer in writing to each objection. The Board's response will include an explanation of the Board's reasoning in agreeing or disagreeing with each objection.

Subsection 12.601 Refund

If the Board agrees with the member's objection, it will immediately refund the portion of the member's dues that are attributable to the activity, with interest paid on that sum of money from the date that the member's fees were received to the date of the Bar's refund. The statutory rate of interest will be used. If the Board disagrees with the member's objection, it will immediately offer the member the opportunity to submit the matter to binding arbitration between the Bar and the objecting member. The Chief Executive Officer and the member must sign an arbitration agreement approved as to form by the Board.

Subsection 12.602 Arbitration

If an objecting member agrees to binding arbitration, the matter will be submitted to the Oregon Senior Judges Association ("OSJA") for the designation of three active-status retired judges who have previously indicated a willingness to serve as volunteer arbitrators in these matters. The Bar and the objecting member will have one peremptory challenge to the list of arbitrators. The Bar and the objecting member must notify one another of a peremptory challenge within seven days after receiving the list of proposed arbitrators. If there are no challenges or only one challenge, the OSJA will designate the arbitrator. The arbitrator will promptly arrange for an informal hearing on the objection, which may be held at the Oregon State Bar Center or at another location in Oregon that is acceptable to the parties and the arbitrator. The hearing will be limited to the presentation of written information and oral argument by the Bar and the objecting member. The arbitrator will not be bound by rules of evidence. The presentation of witnesses will not be a part of the hearing process, although the arbitrator may ask the state bar representative and the objecting member and his or her lawyer, if any, questions. The hearing may be reported, but the expense of reporting must be borne by the party requesting it. The Bar and the objecting member may submit written material and a legal memorandum to the arbitrator no later than seven days before the hearing date. The arbitrator may request additional written material or memoranda from the parties. The arbitrator will promptly decide the matter, applying the standard set forth in Keller v. State Bar of California, 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990), to the expenditures to which the member objected. The scope of the arbitrator's review must solely be to determine whether the matters at issue are acceptable activities for which compulsory fees may be used under applicable constitutional law. In making his or her decision, the arbitrator must apply the substantive law of Oregon and of the United States Federal Courts. The arbitrator must file a written decision with the Chief Executive Officer within 14 days after the hearing. The arbitrator's decision is final and binding on the parties.

> If the arbitrator agrees with the member's objection, the Bar will immediately refund the portion of the member's dues that are reasonably attributable to the activity, with interest at the statutory rate paid on the amount from the date that the member's fees were received to the date of the Bar's refund. If the arbitrator agrees with the Bar, the member's objection is denied and the file in the matter closed. Similar or related objections, by agreement of the parties, may be consolidated for hearing before one arbitrator.

Oregon State Bar Bylaws, Art. 12, Sec. 6 (http://www.osbar.org/_docs/rulesregs/bylaws.pdf).

> The Crowe plaintiffs seek summary judgment as follows:
>
> 1. Declaring that Defendants violate Plaintiffs' rights to freedom of speech and association under the First and Fourteenth Amendments to the United States Constitution by enforcing Oregon statutes that make membership in the Oregon State Bar a prerequisite to practicing law in Oregon and by imposing mandatory dues as a condition of membership;
>
> 2. Permanently enjoining Defendants and all persons in active concert or participation with them from enforcing ORS 9.160, which mandates membership in the Oregon State Bar, and ORS 9.191, which requires payment of membership fees to the Oregon State Bar; and
>
> 3. Award Plaintiffs Crowe and Peterson damages equal to the dues each paid to the Oregon State Bar from December 13, 2016, to the present, plus interest.

Motion for Summary Judgment (ECF 80 in Case No. 3:18-cv-2139-JR) at p. 1.[2]

Defendants seek summary judgment contending plaintiffs' request for injunctive and declaratory relief is moot, OSB did not engage in nongermane activity, and plaintiffs have not presented sufficient evidence of associational harm.

DISCUSSION

Plaintiffs Diane Gruber and Mark Runnels (Gruber plaintiffs) sought summary judgment shortly after remand asserting that Oregon laws requiring them to be members of the OSB and pay dues, fees, and assessments violate their right to freedom of association protected by the First

[2] Plaintiffs Diane Gruber and Mark Runnels challenge the requirement that they must associate with an organization that they believe engages in political and ideological activities they do not agree with. Response (ECF 100 in Case No. 3:18-cv-1591-JR) at p. 1.

Amendment. ECF 65 (Case No. 3:18-1591). The Court determined that Schell v. Chief Just. & Justs. of Oklahoma Supreme Ct., 11 F.4th 1178 (10th Cir. 2021) provided the appropriate standard for assessing free association claims:

> In Schell, the Tenth Circuit analyzed in detail the standard of review to apply in analyzing First Amendment claims based on compulsory membership in an integrated bar. Id., at 1186-91. The Tenth Circuit reviewed the Supreme Court's holdings in Lathrop v. Donohue, 367 U.S. 820 (1961); Abood v. Detroit Board of Education, 431 U.S. 209 (1977); Keller v. State Bar of California, 496 U.S. 1, 110 (1990); and Janus. Id., at 1186-90. The court discussed how an integrated bar generally does not violate associational rights but that the issue "for a free speech or freedom of association violation" is to consider "the germaneness of the alleged activities to the valid goals and purposes of the OBA [Oklahoma Bar Association]." Id., at 1192. The Tenth Circuit concluded that Janus and its "exacting scrutiny" standard did not displace Keller and its germaneness standard, even for associational rights claims. Id., at 1191.

Opinion and Order (ECF 84 in Case No. 3:18-1591) at p. 7.

The remaining question is whether the plaintiffs have presented any issues of fact as to whether the OSB has engaged in activities that are not germane to the accepted purposes of the Bar, and, if so, whether freedom of association claims may be asserted based on that activity. The Supreme Court has indicated, with respect to integrated bars, that compelled membership in a Bar is permissible even if the bar is also engaged in some legislative activity. Lathrop, 367 U.S. at 843. In addition, the Lathrop Court indicated if the bulk of State Bar activities serve legitimate functions of a bar association, those activities do not impinge on protected rights of association. Id. Accordingly, it stands to reason that Keller's instructions regarding germaneness and procedurally adequate safeguards are relevant to plaintiffs' assertion of associational rights as well. See Schell 11 F.4th at 1195 ("the district court will need to apply the test from Keller to determine

whether the articles are germane to the accepted purposes of the state bar. See Keller, 496 U.S. at 14, 110 S. Ct. 2228").[3]

A. The Germane Inquiry

Plaintiffs continue to rely on Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018) to argue that exact scrutiny applies and that a refund procedure for dues attributable to nongermane conduct can never resolve a freedom of association injury. As noted above, this Court has previously determined that Janus did not displace the germaneness standard and given that Lathrop remains applicable, a freedom of association claim will not lie where nongermane activity is minor compared to an integrated bar's legitimate activity. Because it is unclear what constitutes "in purport and in practice the bulk of State Bar activities," such that associational claims are not infringed, Lathrop, 367 U.S. at 843, the Court's later adoption of the procedural safeguards in the First Amendment expression context in Keller, provides a logical answer. Nonetheless, as discussed below, the purported nongermane activities noted by plaintiffs are, at worst, incidental to the OSB's legitimate function and does not run afoul of Lathrop or Keller.

In addition, to the extent plaintiffs continue to challenge the OSB's mandatory membership and fee structure, the Court has previously foreclosed that claim. See Gruber v. Oregon State Bar, 2022 WL 1538645, at *5 (D. Or. May 16, 2022) (simply being compelled to be a member of an integrated bar does not violate associational rights).[4]

[3] The Keller Court concluded a bar could satisfy the germaneness obligation "by adopting the sort of procedures described in Hudson." Id. at 17 (referencing Chicago Teachers Union v. Hudson, 475 U.S. 292, (1986)). At a minimum, Hudson's safeguards "include an adequate explanation of the basis for the [compulsory] fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." Hudson, 475 U.S. at 310.

[4] In addition, to the extent defendants continue to seek Eleventh Amendment Immunity, that issue has also been foreclosed by the Ninth Circuit. Crowe, 989 F.3d at 731.

As described in the fee context related to an expression claim, to comply with Keller's safeguard requirements, a state bar must include an adequate explanation of the basis for the fee, provide a reasonably prompt opportunity to challenge the fee amount before an impartial decisionmaker, and provide an escrow account for the amounts reasonably in dispute while such challenges are pending. Keller 496 U.S. at 16 (citing Teachers v. Hudson, 475 U.S. 292 (1986)). Because the Bar specifically mandates that all communications must be germane to the law, it has instituted the above procedure only when a member believes the Bar has violated that mandate. As Keller noted, an integrated bar could certainly meet its obligation by adopting the type of procedures described in Hudson. Id. at 17.

The question is whether the First Amendment tolerates mandatory membership itself—independent of compelled financial support—in an integrated bar that engages in nongermane political activities, Crowe v. Oregon State Bar, 989 F.3d 714, 729 (9th Cir. 2021).[5] The evidence of nongermane activity has now been developed and that activity is no broader than the activity in Lathrop. There a bar member challenged the requirement to be an enrolled dues paying member of the Wisconsin State Bar because:

> [I] do not like to be coerced to support an organization which is authorized and directed to engage in political and propaganda activities. * * * A major portion of the activities of the State Bar as prescribed by the Supreme Court of Wisconsin are of a political and propaganda nature.' His complaint alleges more specifically that the State Bar promotes 'law reform' and 'makes and opposes proposals for changes in * * * laws and constitutional provisions and argues 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.' He alleges further that in the course of this activity 'the State Bar of Wisconsin has used its employees, property and funds in active, unsolicited opposition to the adoption of legislation by the Legislature of the State of Wisconsin, which was favored by the plaintiff, all contrary to plaintiff's convictions and beliefs.'

[5] Thus, the refund procedure that satisfies the Abood requirements is less relevant. Nevertheless, the process still enables an OSB member to express his or her dissent with a particular OSB activity and thus permit the member to disassociate from purportedly forced association.

Lathrop, 367 U.S. at 822. The issues challenged in Lathrop mirror the issues challenged here – purported political propaganda by the Bar that plaintiffs contend they should not be compelled to associate with.

Lathrop held:

> Both in purport and in practice 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, without any reference to the political process. It cannot be denied that this is a legitimate end of state policy.[footnote omitted] We think that the Supreme Court of Wisconsin, in order to further the State's legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity. Given the character of the integrated bar shown on this record, in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, we are unable to find any impingement upon protected rights of association.

Id. at 843.[6]

Accordingly, the purported nongermane activities do not violate plaintiffs' right to freedom of association despite compelled membership - independent of compelled financial support.

B. Mootness

Defendants contend the Crowe plaintiffs' request for injunctive and declaratory relief is moot. Defendants assert plaintiffs Crowe and Peterson have no present intent to practice law in Oregon and plaintiff Oregon Civil Liberties Attorneys (ORCLA) has not identified any members with a present intention to practice law in Oregon.

[6] It should be noted, however, that the Lathrop Court was only confronted with a question of compelled financial support of group activities, not with involuntary membership in any other aspect. Lathrop, 367 U.S. at 828. Nonetheless, the application for procedures to express a desire to dissociate with certain aspects of a state bar's activity that is not germane to its purpose provides sufficient protection of associational rights at least where the purported germane activity is incidental to a state bar's legitimate objectives.

Plaintiff Crowe transitioned to pro bono membership in the OSB in 2019 and is currently pursuing a seminary degree in Florida. See Deposition of Daniel Crowe (ECF 80-3 in Case No. 3:18-cv-2139-JR) at p. 24. Plaintiff Peterson resigned from the OSB in 2020 and currently lives in Arizona. See Deposition of Lawrence Peterson (ECF 80-4 in Case No. 3:18-cv-2139-JR) at p. 9.

Active members of OSB include active pro bono members. OSB Bylaws § 6.1(a) (ECF 80-2 in Case No. 3:18-cv-2139-JR at p. 16). Accordingly, plaintiff Crowe may practice law in Oregon. Or. Rev. Stat. § 9.160 ("a person may not practice law in this state or represent that the person is qualified to practice law in this state, unless the person is an active member of the Oregon State Bar."). Active pro bono lawyers are subject to various OSB requirements including obtaining professional liability coverage and payment of membership fees. OSB Bylaws § 6.2(d-e) (ECF 80-2 in Case No. 3:18-cv-2139-JR at p. 17). Because plaintiff Crowe is still subject to membership requirements in OSB and the specific requirement to pay fees which he seeks to enjoin, his claims are not moot. Crowe's membership in ORCLA also negates any claim of mootness as to that organization. See Hunt v. Washington State Apple Advert. Comm'n, 432 U.S. 333, 342 (1977) (an association may have standing solely as the representative of its members so long as any one of its members suffers immediate or threatened injury as a result of the challenged action).

Plaintiff Peterson, on the other hand, not only has resigned from the OSB, but has retired from the practice of law. See Deposition of Lawrence Peterson (ECF 80-4 in Case No. 3:18-cv-2139-JR) at p. 6. While plaintiff Peterson alleges, he would have maintained his membership if not for his frustration with the alleged political activity of the OSB, he still would have ceased practicing law. Id. at p. 9. A retired member must pay inactive fees to maintain membership. Plaintiff Peterson is not subject to any challenged provision of OSB membership as a result of his

resignation. Accordingly, his claims are moot, and he lacks standing to challenge the OSB's mandatory membership. See Bayer v. Neiman Marcus Grp., Inc., 861 F.3d 853, 868 (9th Cir. 2017) (to avoid mootness with respect to a claim for declaratory relief on the ground that the relief sought will address an ongoing policy, the plaintiff must show the policy has adversely affected and continues to affect a present interest). As such, the Court should grant summary judgment in favor of defendants as to the claims asserted by plaintiff Peterson.

C. Alleged Nongermane Activities

1. Bar Bulletin Statements

As noted above, the primary assertion that the OSB engaged in nongermane activity relates to the April 2018 OSB Bulletin publication titled, "White Nationalism and Normalization of Violence." Plaintiffs assert the statements are not germane to the practice of law in Oregon. The statements read:

Statement on White Nationalism and Normalization of Violence

> As the United States continues to grapple with a resurgence of white nationalism and the normalization of violence and racism, the Oregon State Bar remains steadfastly committed to the vision of a justice system that operates without discrimination and is fully accessible to all Oregonians. As we pursue that vision during times of upheaval, it is particularly important to understand current events through the lens of our complex and often troubled history. The legacy of that history was seen last year in the streets of Charlottesville, and in the attacks on Portland's MAX train. We unequivocally condemn these acts of violence.
>
> We equally condemn the proliferation of speech that incites such violence. Even as we celebrate the great beneficial power of our First Amendment, as lawyers we also know it is not limitless. A systemic failure to address speech that incites violence emboldens those who seek to do harm and continues to hold historically oppressed communities in fear and marginalization.
>
> As a unified bar, we are mindful of the breadth of perspectives encompassed in our membership. As such, our work will continue to focus specifically on those issues that are directly within our mission, including the promotion of access to justice, the rule of law, and a healthy and functional judicial system that equitably serves everyone. The current climate of violence, extremism and exclusion gravely

threatens all of the above. As lawyers, we administer the keys to the courtroom, and assist our clients in opening doors to justice. As stewards of the justice system, it is up to us to safeguard the rule of law and to ensure its fair and equitable administration. We simply cannot lay claim to a healthy justice system if whole segments of our society are fearful of the very laws and institutions that exist to protect them.

In today's troubling climate, the Oregon State Bar remains committed to equity and justice for all, and to vigorously promoting the law as the foundation of a just democracy. The courageous work done by specialty bars throughout the state is vital to our efforts and we continue to be both inspired and strengthened by those partnerships. We not only refuse to become accustomed to this climate, we are intent on standing in support and solidarity with those historically marginalized, underrepresented, and vulnerable communities who feel voiceless within the Oregon legal system.

[Signed by OSB President and Other OSB officials]

Joint Statement of the Oregon Specialty Bar Associations Supporting the Oregon State Bar's Statement on White Nationalism and Normalization of Violence

The Oregon Asian Pacific American Bar Association, the Oregon Women Lawyers, the Oregon Filipino American Lawyers Association, OGALLA-The LGBT Bar Association of Oregon, the Oregon Chapter of the National Bar Association, the Oregon Minority Lawyers Association, and the Oregon Hispanic Bar Association support the Oregon State Bar's Statement on White Nationalism and Normalization of Violence and its commitment to the vision of a justice system that operates without discrimination and is fully accessible to all Oregonians.

Through the recent events from the Portland MAX train attacks to Charlottesville, we have seen an emboldened white nationalist movement gain momentum in the United States and violence based on racism has become normalized. President Donald Trump, as the leader of our nation, has himself catered to this white nationalist movement, allowing it to make up the base of his support and providing it a false sense of legitimacy. He has allowed this dangerous movement of racism to gain momentum, and we believe this is allowing these extremist ideas to be held up as part of the mainstream, when they are not. For example, President Trump has espoused racist comments, referring to Haiti and African countries as "shithole countries" and claiming that the United States should have more immigrants from countries like Norway. He signed an executive order that halted all refugee admissions and barred people from seven Muslim-majority countries, called Puerto Ricans who criticized his administration's response to Hurricane Maria "politically motivated ingrates," said that the white supremacists marching in Charlottesville, North Carolina in August of 2017 were "very fine people," and called into question

> a federal judge, referring to the Indiana-born judge as "Mexican," when the race of his parents had nothing to do with the judge's decision. We are now seeing the white nationalist movement grow in our state and our country under this form of leadership.
>
> As attorneys who lead diverse bar associations throughout Oregon, we condemn the violence that has occurred as a result of white nationalism and white supremacy. Although we recognize the importance of the First Amendment of the United States Constitution and the protections it provides, we condemn speech that incites violence, such as the violence that occurred in Charlottesville. President Trump needs to unequivocally condemn racist and white nationalist groups. With his continued failure to do so, we must step in and speak up.
>
> As attorneys licensed to practice law in Oregon, we took an oath to "support the Constitution and the laws of the United States and of the State of Oregon." To that end, we have a duty as attorneys to speak up against injustice, violence, and when state and federal laws are violated in the name of white supremacy or white nationalism. We must use all our resources, including legal resources, to protect the rights and safety of everyone. We applaud the Oregon State Bar's commitment to equity and justice by taking a strong stand against white nationalism. Our bar associations pledge to work with the Oregon State Bar and to speak out against white nationalism and the normalization of racism and violence.
>
> [Signed by Various heads of Oregon Specialty Bar Associations]

Ex. 6 to Motion for Summary Judgment (ECF 80-6 in Case No. 3:18-cv-2139-JR).

Arguably, the statements fall within a compelling and legitimate OSB mission.

"The right to associate for expressive purposes is not ... absolute." Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984). In its freedom-of-association cases, the Supreme Court has generally applied "exacting ... scrutiny," under which "mandatory associations are permissible only when they serve a 'compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'" Knox v. Serv. Emps. Intl Union, Loc. 1000, 567 U.S. 298, 310 (2012) (quoting Roberts, 468 U.S. at 623).

> compelling a lawyer to join a bar association engaged in non-germane activities burdens his or her First Amendment right to freedom of association. Such a bar association would invariably be engaged in expressive activities. Even bar associations that engage in only germane activities undertake some expressive activities; for example, proposing an ethical rule expresses a view that the rule is a

> good one, and commenting on potential changes to the state's court system, as the bar in Lathrop did, expresses a view that such a reform is a good or bad idea.

McDonald v. Longley, 4 F.4th 229, 245 (5th Cir. 2021).

Although the McDonald Court determined that compelled membership of a bar association that engages in non-germane activity infringes on the freedom of association and fails exacting scrutiny, id. at 246, Lathrop suggests some level of nongermane activity does not run afoul of associational rights. Moreover, the McDonald Court also examined whether procedural safeguards would negate an infringement upon associational rights. Id. at pp. 252-54. The challenged statements relate to improving the quality of the legal profession and advancing a fair, inclusive, and accessible justice system. Where the second statement may run afoul of these legitimate activities is in its opinion that the former President of the United States "catered to this white nationalist movement." Nonetheless, this opinion was tangential to the legitimate messages promoted in the statements and does not run afoul of the expressive rights of any member regardless of their compelled membership. Cf. id. at 249 (various diversity initiatives through the state bar, though highly ideologically charged, are germane to the purposes identified in Keller). To the extent the inclusion of the opinion regarding the former President is nongermane, the OSB provides adequate safeguards to prevent associational harms by granting a process through which members can disassociate from the expression and indeed certain plaintiffs availed themselves of that process. Accordingly, the Court should find the statements in the April 2018 issue of the Bar Bulletin do not violate plaintiffs' right to freedom of association.

2. Legislative Activity

The Crowe plaintiffs assert the OSB engages in nongermane conduct through lobbying for changes in Oregon's laws.

As noted above, the OSB Bylaws provide that legislative activity must be reasonably related to: regulating and disciplining lawyers; improving the functioning 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 the rules of practice, procedure and evidence in federal, state or local courts 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. Plaintiff Crowe asserts that none of this is germane to the valid goals and purposes of the OSB "[a]s the Bar is functioning right now." See Deposition of Daniel Crowe (ECF 80-3 in Case No. 3:18-cv-2139-JR) at pp. 27-28.

As to specific legislative activity, the Crowe plaintiffs assert the OSB's support of the following pieces of 2021 legislation were nongermane: SB 297 (inclusion of judicial marshals in definition of police officers for purposes of the Public Employees Retirement System); SB 513 (adding civics credit to the statutory coursework requirements for a student to graduate high school); SB 180 (require insurers to notify a claimant directly in certain cases when paying more than $5,000 to settle a third-party liability claim); SB 182 (terminate the authority of a spouse to act as an agent under certain estate planning documents upon annulment, separation, or dissolution of a marriage); SB 185 (allow a nonprofit's board of directors or members to act electronically—including by email—so long as doing so is not prohibited by the articles of incorporation); SB 181 (require courts to consider whether access to justice would be promoted when awarding attorney fees,

even when the attorney bringing the case did so pro bono); SB 183 (proposed a process to recognize tribal court judgments as "foreign judgments"); SB 768 (amend statutes related to the OSB, but in the process would exempt OSB and its committees from being required to record and make public its telephonic or video meetings, as is generally required of public bodies); SB 829 (allow under certain circumstances a tenant with an unexpired lease to remain in possession of the property even after the property is sold, and to clarify the eviction procedures for individuals who purchase property that was sold to satisfy a judgment); SB 295 (define terms related to "fitness to proceed" in criminal trials and clarified when a criminal defendant may be referred to the Oregon State Hospital).

The Crowe plaintiffs also identify the following bills from the 2019 legislative session as nongermane: SB 358 (permit the Department of Revenue to disclose an attorney's taxpayer information for certain disciplinary actions); SB 359 (create a process for the ratification of certain defective actions of shareholders or corporations); HB 2459 (allow lienholders to ask for payoff amounts from other lienholders); SB 360 (modify Oregon's Nonprofit Corporations Act); SB 361 (direct trustees to consider additional factors when managing a trust, including "the settlor's desire to engage in sustainable or socially responsible investment strategies"). Finally, plaintiffs identify HB 4008 and HB 4010 from the 2018 legislative session, which included a provision to prohibit courts from considering race or ethnicity when calculating protected future earning potential in a civil action, as nongermane.

The OSB is charged with serving the public interest by:

> (a) Regulating the legal profession and improving the quality of legal services;
> (b) Supporting the judiciary and improving the administration of justice; and
> (c) Advancing a fair, inclusive and accessible justice system.

Or. Rev. Stat. § 9.080.

The OSB develops legislative priority proposals before each legislative session that conforms with its mission and then submits those proposals to the Board of Governors for Keller review to assure that they are related to regulating the legal profession, improving the quality of legal services, supporting the judiciary, improving the administration of justice, or advancing a fair, inclusive and accessible justice system. See Declaration of Susan Grabe (ECF 88 in Case No. 3:18-cv-2139-JR) at ¶ 6. The OSB's Board of Governors meets every two weeks to continually evaluate the germaneness of any legislation for which it advocates. Id. at ¶ 8.

The seventeen instances of legislative advocacy identified by the Crowe plaintiffs falls within the OSB's mission.

SB 180, SB 182, SB 768 from the 2021 legislative session and SB 358 from the 2019 session relate to regulation of the profession or support the administration of justice. SB 181, SB 183, SB 185, SB 295, SB 297, SB 513, and SB 829 from 2021; SB 359, SB 360, SB 361, HB 2459 from 2019; and HB 4008 and HB 4010 from 2018 relate to improving the quality of legal services through removing technical problems or malpractice traps or improve access to justice in Oregon. Plaintiffs have not identified any legislative activity that is nongermane. Moreover, the process by which the OSB develops legislative priority proposals provides ample opportunity for members to utilize the procedural safeguards identified above to make any objections and seek appropriate relief. Accordingly, the Court should find the legislative activity noted above does not violate plaintiffs' right to freedom of association. Because plaintiffs fail to identify a violation of their associational rights, summary judgment should be granted in favor of defendants.

CONCLUSION

Defendants' motions for summary judgment (ECF 76 in Case No. 3:18-cv-2139-JR) and (ECF 95 in Case No. 3:18-cv-1591-JR) should be granted. Plaintiffs Daniel Crowe, Lawrence Peterson, and the Oregon Civil Liberties Attorneys' motion for summary judgment (ECF 80 in Case No. 3:18-cv-2139-JR) should be denied. These actions should be dismissed, and a judgment should enter.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties shall have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any factual determination of the Magistrate Judge will be considered as a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to this recommendation.

DATED this 19th day of December, 2022.

/s/ Jolie A. Russo
Jolie A. Russo
United States Magistrate Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

DANIEL Z. CROWE; **OREGON CIVIL LIBERTIES ATTORNEYS**; and **LAWRENCE K. PETERSON**, Plaintiffs, v. **OREGON STATE BAR, *et al***., Defendants.	Case No. 3:18-cv-2139-JR **ORDER**

Michael H. Simon, District Judge.

Plaintiffs in this case are current and former members of the Oregon State Bar (OSB) and an organization consisting of such members. Membership in the OSB is required to practice law in the state of Oregon. Plaintiffs originally challenged the compulsory membership and fee structure of the bar, alleging that it violated their rights to freedom of speech and association under the First Amendment, made applicable to the states by the Due Process Clause of the Fourteenth Amendment.

The Ninth Circuit affirmed dismissal of Plaintiffs' free speech claim but remanded the dismissal of Plaintiff's associational rights claim because neither the United States Supreme Court nor the Ninth Circuit has yet directly addressed a broad claim of freedom of association

based on mandatory bar membership in "an integrated bar that engages in nongermane political activities." *Crowe v. Or. State Bar*, 989 F.3d 714, 729 (9th Cir. 2021). In that decision, the Ninth Circuit noted that the district court would need to resolve what standard governs an associational rights claim in this context, whether the "germaneness" standard articulated in *Keller v. State Bar of California*, 496 U.S. 1 (1990), for speech in the context of mandatory bar dues also applies to an associational rights claim, and how the OSB's activities fare under this claim. Before the Court resolved these questions on remand, Plaintiffs Diane L. Gruber and Mark Runnels in the related case of *Gruber v. Oregon State Bar*, Case No. 3:18-cv-1591-JR, filed an early motion for summary judgment, arguing that there are no material disputed issues of fact and that the OSB's compulsory membership requirement violates their associational rights. The Court followed the Tenth Circuit's reasoning in *Schell v. Chief Justice & Justices of Oklahoma Supreme Court*, 11 F.4th 1178 (10th Cir. 2021), *cert. denied sub nom. Schell v. Darby*, 142 S. Ct. 1440 (2022), and concluded that the applicable standard of review for an associational rights claim in this context is the germaneness framework. *Gruber v. Oregon State Bar*, 2022 WL 1538645, at *3 (D. Or. May 16, 2022). The Court also determined that a claim asserting that simply being required to participate in an integrated bar violates associational rights is insufficient and Plaintiffs must instead show nongermane activity that rises to the level of a constitutional violation. *Id.* at *4-5. Thus, the Court denied Plaintiffs Gruber and Runnels' motion for summary judgment. *Id.* at *5.

Plaintiffs in this case brought by Crowe and others then moved for summary judgment on their associational rights claim. Defendants filed their own motions for summary judgment on all claims in both lawsuits. U.S. Magistrate Judge Jolie A. Russo issued a Findings and

Recommendation (F&R) on December 19, 2022, recommending that this Court deny Plaintiffs' motion and grant Defendants' motions.[1] Plaintiffs filed objections.

A. Standards

Under the Federal Magistrates Act (Act), the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). If a party objects to a magistrate judge's findings and recommendations, "the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.*; Fed. R. Civ. P. 72(b)(3).

For those portions of a magistrate judge's findings and recommendations to which neither party has objected, the Act does not prescribe any standard of review. *See Thomas v. Arn*, 474 U.S. 140, 152 (1985) ("There is no indication that Congress, in enacting [the Act], intended to require a district judge to review a magistrate's report to which no objections are filed."); *United States. v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (holding that the court must review de novo magistrate judge's findings and recommendations if objection is made, "but not otherwise"). Although in the absence of objections no review is required, the Act "does not preclude further review by the district judge[] *sua sponte* . . . under a *de novo* or any other standard." *Thomas*, 474 U.S. at 154. Indeed, the Advisory Committee Notes to Fed. R. Civ. P. 72(b) recommend that "[w]hen no timely objection is filed," the Court review the magistrate judge's recommendations for "clear error on the face of the record."

[1] The F&R addresses Defendants' motions for summary judgment filed in this case and the related case, *Gruber v. Oregon State Bar*, Case No. 3:18-cv-1591-JR, as well as the motion for summary judgment filed by the plaintiffs in this case. Because the objections and arguments in *Gruber* are different than the objections and arguments filed in this case, the Court issues separate Orders in these two cases.

B. Analysis

1. Standard of Review for Plaintiffs' Claims

Plaintiffs argue that the F&R erred by applying the "germaneness" standard of *Keller* instead of the "exacting scrutiny" standard of *Janus v. American Federation of State, County, Municipal, Employees, Council 31*, 138 S. Ct. 2448 (2018). The Court has already rejected this argument in its Opinion and Order resolving Plaintiffs Gruber and Runnels' motion for summary judgment, when the Court determined that *Keller's* germaneness standard applied to Plaintiffs' associational rights claim, relying on *Schell*. *See Gruber*, 2022 WL 1538645, at *3. Plaintiffs now argue that the F&R (and therefore the Court in its previous Opinion and Order) misread *Schell*. The Court disagrees.

Schell reviewed relevant Supreme Court caselaw and concluded that the germaneness standard applies to the plaintiff's free speech and associational rights claim, and not the exacting scrutiny standard of *Janus*. *See Schell*, 11 F.4th at 1186-91. The Tenth Circuit in *Schell* then stated: "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 OBA." *Id.* at 1192. The Tenth Circuit next evaluated the specific allegations and determined that the plaintiff had failed to state an associational rights claim based on all of the alleged articles published by the integrated bar except two, which were not in the record and were unable to be reviewed to see if their content complied with the Supreme Court's requirements for germaneness. *Id.* at 1192-94. The court in *Schell* remanded the plaintiff's associational rights claim for further proceedings, including discovery to determine if the two articles were nongermane and whether those two articles alone would be sufficient to state an associational rights claim, considering *Lathrop*, stating: "Once the discovery is complete, if defendants seek

summary judgment, the district court will need to apply the test from *Keller* to determine whether the articles are germane to the accepted purposes of the state bar. And, if the articles are not germane, the district court will need to assess whether Mr. Schell may advance a freedom of association claim based on these two articles." *Id.* at 1194-95 (footnote discussing *Lathrop* omitted).

The Tenth Circuit's opinion in *Schell* is clear that it applied the germaneness standard, without exacting scrutiny, for its review of the plaintiff's associational rights claim and that it instructed the district court to apply the germaneness test upon remand. Based on this reading and the persuasive authority of *Schell*, the Court rejects Plaintiffs' argument that the Court misread *Schell* and that the Court should consider germaneness by also applying exacting scrutiny.

2. Nongermane Activity

Plaintiffs also object that the F&R incorrectly determined that they failed to show that the OSB engaged in nongermane behavior. Plaintiffs argue that the OSB's legislative activity is nongermane, as well as the April 2018 statements published in the *Bar Bulletin* by the OSB and by the specialty bar associations.

a. Legislative Activity

Plaintiffs argue that the F&R applied the incorrect standard in evaluating whether the challenged legislative activity was nongermane. Plaintiffs contend that under *Keller*, the legislative activity must be related to regulating the legal profession or improving the quality of legal services. Plaintiffs argue that the F&R considered that before lobbying any particular piece of legislation, the OSB has each piece of legislation reviewed for whether it meets OSB's statutory purposes. These purposes include, as relevant to the pending motion, supporting the

judiciary, improving the administration of justice, and advancing a fair, inclusive, and accessible justice system.

The Supreme Court in *Keller* acknowledged that regulating the legal profession and improving the quality of legal services is a spectrum and not easy to delineate. *Keller*, 496 U.S. at 14-15. The acceptable types of activities are "acting essentially as professional advisers to those ultimately charged with the regulation of the legal profession" and the unacceptable are "those activities having political or ideological coloration *which are not reasonably related to the advancement of such goals*." *Id.* at 15 (emphasis added).

Plaintiffs do not explain how supporting the judiciary, 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 specific articles and initiatives falling within these categories are germane. The Tenth Circuit in *Schell* held that articles relating to warning the public about the harms of politics in the judicial system was germane because "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. The court ruled that an article on how judges are appointed "involve[d] the structure of the court system" and was therefore germane. *Id.* The Tenth Circuit also explained that articles advocating for the role of attorneys in the legislature were germane because "they promote the important role of the OBA's attorney members in using their professional skills to interpret and advise on pending legislation" and they "are not inherently political or ideological in nature." *Id.*

The Fifth Circuit similarly ruled that diversity initiatives, "though highly ideologically charged" were germane because they were "aimed at creating a fair and equal legal profession for minority, women, and LGBT attorneys, which is a form of regulating the legal profession."

McDonald v. Longley, 4 F.4th 229, 249 (5th Cir. 2021), *cert. denied sub nom. McDonald v. Firth*, 142 S. Ct. 1442 (2022). That court also concluded that these 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.* The court additionally explained that the bar's activities aimed at helping the needy were germane because they increased access to justice for person who could not otherwise afford counsel, even for noncitizen immigrants, which is a politically-charged issue, particularly in Texas. *Id.* at 250. The Fifth Circuit further noted that administrative duties, such as "the Bar's advocating a particular ethical rule is germane no matter how strenuously an attorney might disagree with its propriety." *Id.* at 250.

The OSB's statutory goals challenged by Plaintiffs as falling outside of the rubric of *Keller* generally fall within these types of issues accepted by the Fifth and Tenth Circuits as germane. They are issues involving the judiciary; a fair, inclusive, and accessible justice system; and improving the administration of justice. They relate to regulating the legal profession and improving the quality of legal services.

More importantly, the issue at summary judgment is not whether the OSB has a procedure in place (such as screening bills to ensure they comply with the OSB's statutory goals and therefore comply with *Keller*) that may hypothetically prevent associational harms, but whether Plaintiffs have provided *evidence* that the OSB has engaged in nongermane activity and, if so, whether that nongermane activity violates Plaintiffs' associational rights. Plaintiffs do not assert in their objection any particular legislative activity that they contend the F&R erroneously concluded was germane. Plaintiffs argue generally that the Court should follow the analysis of the Fifth Circuit in *McDonald* and conclude that any bill that was substantive and did not involve

the role of attorneys is nongermane. Plaintiffs do not, however, identify any bill they contend would fall under such analysis.

Further, the Court does not find the reasoning of *McDonald* persuasive for its broad conclusion that advocating for changes to a state's substantive law is nongermane. The Fifth Circuit stated that such lobbying has "nothing to do with regulating the legal profession or improving the quality of legal services. Instead, those efforts are directed entirely at changing the law *governing* cases, disputes, or transactions *in which attorneys might be involved*." *McDonald*, 4 F.4th at 247-48 (emphasis in original). The Fifth Circuit concluded that the only substantive bills for which lobbying would be germane would be "legislation regarding the functioning of the state's courts or legal system writ large" or "advocating for laws governing the activities of lawyers *qua* lawyers." *Id.* at 248. Many other types of substantive bills, however, may be relevant to improving the quality of legal services and regulating the profession. As the *McDonald's* court's discussion of other services by the bar demonstrated, there are issues that affect the public's trust in the justice system, the ability to provide services to the needy, and other issues that may not fall within this narrow definition of germaneness established for lobbying.

Additionally, the Fifth Circuit in *McDonald* provided a list of lobbying activities that would be acceptable, based on the Supreme Court's decision in *Lathrop*, and that list is inconsistent with the conclusion in *McDonald* of acceptable lobbying. The Fifth Circuit provided as general examples of the type of lobbying that *would* pass the germaneness test: the salaries of state court judges; amending statutes to compensate attorneys differently; court reorganization; extending personal jurisdiction over nonresidents; allowing the recording of unwitnessed conveyances; allowing use of deceased partners' names in firm names; revising the law

governing federal tax liens; addressing law clerks for State Supreme Court justices; addressing securities transfers by fiduciaries; addressing the jurisdiction of county courts over the administration of *inter vivos* trusts; and setting special appropriations for research for the State Legislative Council. *McDonald*, 4 F.4th 248 n.23. Some of these, however, do not fall within the Fifth Circuit's express holding, such as securities transfers by fiduciaries.

The Court also disagrees 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 minimus*, amount of nongermane activity that is acceptable. *See id.* at 251. The Supreme Court in *Lathrop* expressly relied on the fact that only some degree of the integrated bar's activity was potentially improper, and not the "bulk" or "major" portion of the bar's activity.[2] *See Lathrop*, 367 U.S. at 843 (relying on the fact that "the *bulk* of State Bar activities serve" the legitimate functions of the bar association in concluding that compelled membership in the state bar did not "impinge[ ] upon protected rights of association" (emphasis added)); *see also id.* at 839 (noting that the challenged activity is not "major" activity of the integrated bar).

Most importantly, however, the Court has reviewed *de novo* all the legislative activity challenged by Plaintiffs and finds that the entirety is within the spectrum of improving the quality of legal services or regulating the legal profession. They are not inherently political or ideological in nature. Thus, Plaintiffs' argument that they are nongermane is rejected. The Court adopts this portion of the F&R.

[2] Plaintiffs also object that *Lathrop* did not create any exception for some degree of nongermane activity, and the Court rejects this objection.

b. Statements in the *Bar Bulletin*

Plaintiffs object that two statements published in the April 2018 *Bar Bulletin* are nongermane. The first statement, "White Nationalism and Normalization of Violence," was issued by the OSB. The Court has reviewed this statement, and agrees with Judge Russo that it is germane. The statement emphasizes the rule of law, the equal protection of the laws, and the importance of a justice system that is accessible to all and does not include racial discrimination or the acceptability of violence. The statement was "aimed at creating a fair and equal legal profession . . . which is a form of regulating the legal profession" and "help[s] to build and maintain the public's trust in the legal profession and the judicial process as a whole." *McDonald*, 4 F.4th at 249-50; *see also Schell*, 11 F.4th at 1193 (finding that conduct that "enhances public trust in the judicial system and associated attorney services" is germane). The statement also is focused on access to justice, which is germane. *McDonald*, 4 F.4th at 250. The statement does not contain inherently political or partisan statements. Even if allusions to racism, white nationalism, and violence can be construed as inflammatory or ideological that does not mean they are nongermane, because they are still "reasonably related to the advancement" of the acceptable goals of the bar. *See Keller*, 496 U.S. at 15; *see also McDonald*, 4 F.4th at 249-50 (recognizing that topics that are "controversial," "highly ideologically charged," involving "a sensitive political topic," and "politically charged" can be germane (cleaned up)).

Plaintiffs also object that the specialty bar section's "Joint Statement of the Oregon Specialty Bar Associations Supporting the Oregon State Bar's Statement on White Nationalism and Normalization of Violence" is nongermane. As the F&R acknowledged, this statement contains politically inflammatory statements regarding former President Donald Trump. Viewing the facts in the light most favorable to the nonmoving party, there is at least an issue of fact whether this statement was nongermane, and thus the Court does not adopt this discussion in the

F&R. The Court, however, has rejected Plaintiffs' assertions regarding the other nongermane conduct. The Court therefore need not precisely delineate the acceptable threshold for nongermane activity contemplated by *Lathrop*, because whatever that threshold may be, a single statement (or even two statements) will not meet it.

3. Opt-out Procedures

Plaintiffs object that the opt-out procedures for a bar member to disassociate from speech to which they disagree is irrelevant to their associational rights claims, which are not based on the payment of dues. Because the Court finds that far more than the "bulk" of the OSB's activities were germane and the OSB's conduct does not violate Plaintiffs' associational rights under the First Amendment, the Court declines to address this objection or adopt this portion of the F&R.

4. No Objections

For those portions of the F&R to which Plaintiffs did not object, the Court follows the recommendation of the Advisory Committee and reviews Judge Russo's F&R for clear error on the face of the record. No such error is apparent. Accordingly, the Court adopts those portions of the F&R.

C. Conclusion

The Court ADOPTS IN PART the Findings and Recommendation, ECF 94, as supplemented herein. The Court DENIES the Motion for Summary Judgment filed by Plaintiffs, ECF 80. The Court GRANTS the Motion for Summary Judgment filed by Defendants, ECF 76.

IT IS SO ORDERED.

DATED this 14th day of February, 2023.

/s/ *Michael H. Simon*
Michael H. Simon
United States District Judge

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL Z. CROWE, *Plaintiff-Appellant*, OREGON CIVIL LIBERTIES ATTORNEYS, an Oregon nonprofit corporation, *Plaintiff-Appellant*, and LAWRENCE K. PETERSON I, *Plaintiff*, v. OREGON STATE BAR, a Public Corporation; OREGON STATE BAR BOARD OF GOVERNORS; VANESSA A. NORDYKE, President of the Oregon State Bar Board of Governors; CHRISTINE CONSTANTINO, President-elect of the Oregon State Bar Board of Governors; HELEN MARIE	No. 23-35193 D.C. No. 3:18-cv-02139-JR OPINION

HIERSCHBIEL, Chief Executive Officer of the Oregon State Bar; KEITH PALEVSKY, Director of Finance and Operations of the Oregon State Bar; AMBER HOLLISTER, General Counsel for the Oregon State Bar,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Oregon
Michael H. Simon, District Judge, Presiding

Argued and Submitted April 2, 2024
Portland, Oregon

Filed August 28, 2024

Before: John B. Owens and Michelle T. Friedland, Circuit Judges, and William Horsley Orrick,[*] District Judge.

Opinion by Judge Friedland

[*] The Honorable William Horsley Orrick, United States District Judge for the Northern District of California, sitting by designation.

SUMMARY[**]

First Amendment/Bar Dues

In an action brought by attorney Daniel Crowe alleging that the requirement that he join the Oregon State Bar ("OSB") infringes his First Amendment right to freedom of association, the panel dismissed his claims against OSB and his claims against OSB officers for retrospective relief, reversed the district court's summary judgment for OSB officers on his claims for prospective equitable relief, and remanded.

Applying *Kohn v. State Bar of California*, 87 F.4th 1021 (9th Cir. 2023) (en banc), the panel held that OSB is an arm of the state entitled to sovereign immunity, and therefore dismissed Crowe's claims against OSB. Sovereign immunity also precludes Crowe's claims for retrospective relief against individual OSB officers sued in their official capacities. However, sovereign immunity does not bar Crowe's claims for prospective declaratory and injunctive relief against individual OSB officers.

The panel held that Crowe demonstrated an infringement on his freedom of association because he objected to certain statements by OSB in its magazine that would reasonably have been imputed to OSB's members. Considering the totality of the circumstances, OSB traded on its supposedly unified membership to bolster its own expression, fostering a misperception about the unanimity of its members' views.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Crowe established that OSB impaired his own expression because he objected to the message sent by his membership.

The panel held that the infringement on Crowe's freedom of association did not survive exacting scrutiny because OSB's communications were not related to the Bar's regulatory purpose. Accordingly, the panel reversed the district court's judgment as to Crowe's freedom of association claim for prospective equitable relief against individual OSB officers and remanded for further proceedings.

COUNSEL

Scott D. Freeman (argued) and Adam C. Shelton, Scharf-Norton Center for Constitutional Litigation at the Goldwater Institute, Phoenix, Arizona; Luke D. Miller, Military Disability Lawyer LLC, Salem, Oregon; for Plaintiffs-Appellants.

Kristin M. Asai (argued), Paul Matthias-Bennetch, and Abigail Gore, Holland & Knight LLP, Portland, Oregon, for Defendants-Appellees.

OPINION

FRIEDLAND, Circuit Judge:

Attorney Daniel Crowe sued the Oregon State Bar and its officers, arguing that the requirement that he join the Bar infringes his First Amendment right to freedom of association. We hold that the Oregon State Bar is an arm of

the state entitled to sovereign immunity, so the Bar itself must be dismissed as a defendant. But we hold, as to the officer defendants, that Crowe has demonstrated an infringement on his freedom of association because he objects to certain communications by the Bar that would reasonably have been imputed to the Bar's members. We also hold that the infringement was not justified because the communications in question were not related to the Bar's regulatory purpose. We therefore reverse the district court's judgment for the officer defendants on Crowe's freedom of association claim and remand for further proceedings.

I.

A.

To practice law in Oregon, an attorney must be a member of the Oregon State Bar ("OSB"). Or. Rev. Stat. § 9.160(1). An attorney must also pay annual membership dues, which are used to fund OSB's activities. *Id.* §§ 9.191, 9.200. Those activities include administering bar exams, formulating and enforcing rules of professional conduct, and establishing minimum continuing legal education requirements for Oregon attorneys. *Id.* §§ 9.210, 9.490, 9.112. OSB also lobbies the state legislature and publishes a magazine called the *Bulletin*. *See* OSB Bylaws art. 10 (bylaws for OSB communications), 11 (bylaws for legislation and public policy activities).

In the April 2018 issue of the *Bulletin*, OSB published two statements on "White Nationalism and [the] Normalization of Violence." The two statements were published on facing pages, surrounded by a single dark green border that was not present on the other pages of the magazine. The first statement had OSB's dark green logo on the top of the page, and it was signed by six OSB officers,

including the President and the Chief Executive Officer. That statement said:

> **Statement on White Nationalism and Normalization of Violence**
>
> As the United States continues to grapple with a resurgence of white nationalism and the normalization of violence and racism, the Oregon State Bar remains steadfastly committed to the vision of a justice system that operates without discrimination and is fully accessible to all Oregonians. As we pursue that vision during times of upheaval, it is particularly important to understand current events through the lens of our complex and often troubled history. The legacy of that history was seen last year in the streets of Charlottesville, and in the attacks on Portland's MAX train. We unequivocally condemn these acts of violence.
>
> We equally condemn the proliferation of speech that incites such violence. Even as we celebrate the great beneficial power of our First Amendment, as lawyers we also know it is not limitless. A systemic failure to address speech that incites violence emboldens those who seek to do harm, and continues to hold historically oppressed communities in fear and marginalization.
>
> As a unified bar, we are mindful of the breadth of perspectives encompassed in our membership. As such, our work will continue to focus specifically on those issues

that are directly within our mission, including the promotion of access to justice, the rule of law, and a healthy and functional judicial system that equitably serves everyone. The current climate of violence, extremism and exclusion gravely threatens all of the above. As lawyers, we administer the keys to the courtroom, and assist our clients in opening doors to justice. As stewards of the justice system, it is up to us to safeguard the rule of law and to ensure its fair and equitable administration. We simply cannot lay claim to a healthy justice system if whole segments of our society are fearful of the very laws and institutions that exist to protect them.

In today's troubling climate, the Oregon State Bar remains committed to equity and justice for all, and to vigorously promoting the law as the foundation of a just democracy. The courageous work done by specialty bars throughout the state is vital to our efforts and we continue to be both inspired and strengthened by those partnerships. We not only refuse to become accustomed to this climate, we are intent on standing in support and solidarity with those historically marginalized, underrepresented and vulnerable communities who feel voiceless within the Oregon legal system.

The second statement was signed by the Presidents of seven Oregon Specialty Bar Associations, which are voluntary organizations separate from OSB. It said:

> **Joint Statement of the Oregon Specialty Bar Associations Supporting the Oregon State Bar's Statement on White Nationalism and Normalization of Violence**
>
> The Oregon Asian Pacific American Bar Association, the Oregon Women Lawyers, the Oregon Filipino American Lawyers Association, OGALLA-The LGBT Bar Association of Oregon, the Oregon Chapter of the National Bar Association, the Oregon Minority Lawyers Association, and the Oregon Hispanic Bar Association support the Oregon State Bar's Statement on White Nationalism and Normalization of Violence and its commitment to the vision of a justice system that operates without discrimination and is fully accessible to all Oregonians.
>
> Through the recent events from the Portland MAX train attacks to Charlottesville, we have seen an emboldened white nationalist movement gain momentum in the United States and violence based on racism has become normalized. President Donald Trump, as the leader of our nation, has himself catered to this white nationalist movement, allowing it to make up the base of his support and providing it a false sense of legitimacy. He has allowed this dangerous

movement of racism to gain momentum, and we believe this is allowing these extremist ideas to be held up as part of the mainstream, when they are not. For example, President Trump has espoused racist comments, referring to Haiti and African countries as "shithole countries" and claiming that the United States should have more immigrants from countries like Norway. He signed an executive order that halted all refugee admissions and barred people from seven Muslim-majority countries, called Puerto Ricans who criticized his administration's response to Hurricane Maria "politically motivated ingrates," said that the white supremacists marching in Charlottesville, [Virginia] in August of 2017 were "very fine people," and called into question a federal judge, referring to the Indiana-born judge as "Mexican," when the race of his parents had nothing to do with the judge's decision. We are now seeing the white nationalist movement grow in our state and our country under this form of leadership.

As attorneys who lead diverse bar associations throughout Oregon, we condemn the violence that has occurred as a result of white nationalism and white supremacy. Although we recognize the importance of the First Amendment of the United States Constitution and the protections it provides, we condemn speech that incites violence, such as the violence that

> occurred in Charlottesville. President Trump needs to unequivocally condemn racist and white nationalist groups. With his continued failure to do so, we must step in and speak up.
>
> As attorneys licensed to practice law in Oregon, we took an oath to "support the Constitution and the laws of the United States and of the State of Oregon." To that end, we have a duty as attorneys to speak up against injustice, violence, and when state and federal laws are violated in the name of white supremacy or white nationalism. We must use all our resources, including legal resources, to protect the rights and safety of everyone. We applaud the Oregon State Bar's commitment to equity and justice by taking a strong stand against white nationalism. Our bar associations pledge to work with the Oregon State Bar and to speak out against white nationalism and the normalization of racism and violence.

Daniel Crowe, an attorney and member of OSB, objected to the statements. OSB's bylaws provide a dispute resolution procedure by which a member of the Bar can request a refund for "any portion of the member's bar dues [used] for activities he or she considers promotes or opposes political or ideological causes." OSB Bylaws § 11.3. Invoking that policy, Crowe demanded a refund of his dues. OSB gave Crowe and other objecting members refunds for their shares of the cost of publishing the April 2018 issue of the *Bulletin*, plus interest.

B.

1.

Still unsatisfied, Crowe filed a lawsuit against OSB and some of its officers (collectively, "Defendants") alleging violations of his First Amendment rights.[1]

The Complaint alleged, among other things, that OSB used its compulsory dues for activities that were not "germane" to OSB's purpose and that doing so violated Crowe's right to freedom of speech; that OSB's refund process for objecting members was insufficient; and that compulsory membership in OSB violated his right to freedom of association. Crowe sought declaratory and injunctive relief, as well as damages in the amount of all the dues he previously paid to OSB.

Defendants moved to dismiss, and the district court granted the motion. Crowe appealed.

On appeal, our court affirmed in part and reversed in part. *Crowe v. Or. State Bar*, 989 F.3d 714, 720 (9th Cir. 2021) ("*Crowe I*"). Applying the then-controlling test, we held that OSB was not an arm of the state entitled to sovereign immunity. *Id.* at 730-33 (applying test from

[1] Crowe also formed the Oregon Civil Liberties Attorneys ("ORCLA"), and ORCLA joined him as a co-plaintiff in this suit. ORCLA has asserted that it has organizational standing under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), based on Crowe's injuries and Crowe's membership in ORCLA. We remand to the district court to consider in the first instance whether ORCLA has standing to pursue a freedom of association claim. *See id.* (explaining that, for an organization to have standing, "the claim asserted . . . [must not] require[] the participation of individual members in the lawsuit"). Because we focus in this opinion only on Crowe, we refer to him as the only relevant plaintiff.

Mitchell v. L.A. Cmty. Coll. Dist., 861 F.2d 198, 201 (9th Cir. 1988)).

We also held that Crowe had not stated a freedom of speech claim. *Id.* at 727. We explained that in *Keller v. State Bar of California*, 496 U.S. 1 (1990), the Supreme Court held that "a state bar may use mandatory dues to subsidize activities 'germane to th[e] goals' of 'regulating the legal profession and improving the quality of legal services' without running afoul of its members' First Amendment rights of free speech." *Crowe I*, 989 F.3d. at 724 (quoting *Keller*, 496 U.S. at 13-14). If a state bar engages in nongermane activities, that does not violate the members' freedom of speech so long as the bar has adequate safeguards to protect the rights of any objecting member, including a process for refunding the portion of the member's dues used for any nongermane activities. *See id.* at 725-26. Applying *Keller*, we held that OSB's refund process was adequate and that Crowe's freedom of speech claim failed because any injury had been remedied by the refund he had received. *Id.* at 726-27. For purposes of the freedom of speech claim, we did not decide whether the two *Bulletin* statements were germane under *Keller* or whether the Specialty Bars' statement was attributable to OSB.[2] *Id.* at 724.

In contrast to the freedom of speech claim, we held that Crowe's freedom of association claim could be "viable" because it was not foreclosed by prior precedent. *Id.* at 729. We explained that *Keller* did not foreclose Crowe's claim

[2] We also rejected Crowe's argument that, because of intervening changes in the Supreme Court's precedent on mandatory union dues, *Keller* was no longer good law. *Crowe I*, 989 F.3d. at 724-25. We explained that the Supreme Court has not expressly overruled *Keller*, so, as a lower court, we are still bound by it. *Id.* at 725.

because *Keller* evaluated only a freedom of speech claim and "expressly declined to address" the plaintiffs' freedom of association claim. *Id.* at 727.

We then addressed *Lathrop v. Donohue*, 367 U.S. 820 (1961), another Supreme Court case addressing mandatory state bar associations. In *Lathrop*, an attorney had argued that the requirement that he join a state bar infringed his right to freedom of association in part because the bar engaged in legislative activities like lobbying. 367 U.S. at 822. Although no opinion was joined by a majority, seven Justices ruled against the attorney. *See id.* at 848 (plurality opinion). A plurality of the Supreme Court explained:

> [I]n order to further the State's legitimate interests in raising the quality of professional services, [the State] may constitutionally require that the costs of improving the profession . . . be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity.

Id. at 843.

We held that *Lathrop* did not preclude Crowe's freedom of association claim for two reasons. First, "*Lathrop*'s 'free association' decision was limited to 'compelled financial support of group activities'"; it did not address "'involuntary membership in any other aspect.'" *Crowe I*, 989 F.3d. at 727 (emphasis omitted) (quoting *Lathrop*, 367 U.S. at 828). Second, although the attorney in *Lathrop* complained that the bar was engaging in legislative activities, "the *Lathrop* plurality presumed, on the bare record before it, that all the

bar's activities, including lobbying, related to 'the regulatory program' of 'improving the profession.'" *Id.* at 727-28 (quoting *Lathrop*, 367 U.S. at 843). Thus, "[a]t bottom, *Lathrop* merely permitted states to compel practicing lawyers to pay toward the costs of regulating their profession," whereas Crowe took issue with more than just the payment of dues, and he asserted that OSB engaged in nongermane activities. *Id.* at 728.

We also held that there was no controlling Ninth Circuit authority and that it was therefore an open question "whether the First Amendment tolerates mandatory membership itself—independent of compelled financial support—in [a state bar] that engages in nongermane political activities." *Id.* at 729. We remanded to the district court to determine the proper test for analyzing such a freedom of association claim and to apply it. *Id.*

2.

On remand, the parties conducted discovery and then filed cross-motions for summary judgment. Crowe argued that OSB's nongermane conduct included both the 2018 *Bulletin* statements and some of OSB's lobbying in front of the state legislature that had pushed for changes to the state's substantive laws.

The district court held that compelled state bar membership did not violate the freedom of association so long as the bar engaged in predominantly germane activities. It further held that all of the challenged lobbying and OSB's own statement in the *Bulletin* were germane and that, even if the Specialty Bars' statement was not germane, it would not establish a violation given OSB's predominantly germane activities. The court accordingly denied Crowe's motion for

summary judgment and granted summary judgment in favor of Defendants. Crowe timely appealed.

3.

After this appeal was filed, we held in *Kohn v. State Bar of California*, 87 F.4th 1021 (9th Cir. 2023) (en banc), that our prior test for determining whether an entity is an arm of the state for purposes of sovereign immunity was no longer consistent with Supreme Court authority, and we adopted a new test. *Id.* at 1027-1030. The parties in this case then submitted supplemental briefing on whether OSB is entitled to sovereign immunity under *Kohn*.

II.

"We review de novo the district court's decision on cross motions for summary judgment. We consider, viewing the evidence in the light most favorable to the nonmoving party, whether there are genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Marable v. Nitchman*, 511 F.3d 924, 929 (9th Cir. 2007) (citation omitted).

III.

We turn first to the question whether OSB is entitled to immunity from suit under the Eleventh Amendment. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[3] U.S. Const. amend. XI.

[3] "Longstanding Supreme Court precedent has interpreted this Amendment to immunize states from suit in federal court by citizens and noncitizens alike." *Kohn*, 87 F.4th at 1025.

"The Eleventh Amendment largely shields States from suit in federal court without their consent, leaving parties with claims against a State to present them, if the State permits, in the State's own tribunals." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994). "This immunity extends not just to suits in which the state itself is a named party but also to those against an 'arm of the [s]tate.'" *Kohn*, 87 F.4th at 1026 (alteration in original) (quoting *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977)).

In *Kohn*, we adopted a new, three-factor test for determining whether an entity is an arm of the state. *Id.* at 1030. The test looks to "(1) the [s]tate's intent as to the status of the entity, including the functions performed by the entity; (2) the [s]tate's control over the entity; and (3) the entity's overall effects on the state treasury." *Id.* (alterations in original) (quoting *P.R. Ports Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868, 873 (D.C. Cir. 2008) ("*PRPA*")). Under the test, "an entity either is or is not an arm of the [s]tate: The status of an entity does not change from one case to the next based on the nature of the suit, the [s]tate's financial responsibility in one case as compared to another, or other variable factors." *Id.* at 1031 (alterations in original) (quoting *PRPA*, 531 F.3d at 873).

Applying that test in *Kohn*, we held that the California State Bar is an arm of the state. *Id.* at 1037. We noted that we were in "good company" because "all the other federal circuits to have considered the question [in recent decades] have agreed: State bars are arms of the state and enjoy sovereign immunity under the Eleventh Amendment." *Id.* We then identified *Crowe I*'s holding that OSB was not an arm of the state as the one exception to that otherwise solid consensus. *Id.* We explained that "[a]ny future case brought

against the Oregon State Bar [would] need to be analyzed under the new test." *Id.* We conduct that analysis now.

A.

1.

The first factor of the *Kohn* test assesses the "[s]tate's intent as to the status of the entity." 87 F.4th at 1030 (alteration in original) (quoting *PRPA*, 531 F.3d at 873). This factor turns on "[1] whether state law expressly characterizes the entity as a governmental instrumentality rather than as a local governmental or non-governmental entity; [2] whether the entity performs state governmental functions; [3] whether the entity is treated as a governmental instrumentality for purposes of other state law; and [4] state representations about the entity's status." *Id.* Oregon's intent here supports concluding that OSB is an arm of the state.

First, Oregon state law characterizes OSB as a state governmental instrumentality, not a local or non-governmental entity. By statute, OSB is "an instrumentality of the Judicial Department of the government of the State of Oregon." Or. Rev. Stat. § 9.010(2). Oregon state courts have also characterized OSB as an instrumentality of the state operating on behalf of the judicial department. *See State ex rel. Frohnmayer v. Or. State Bar*, 767 P.2d 893, 895 (Or. 1989). In *Kohn*, we held that the California Supreme Court's similar descriptions of the California State Bar "as its 'administrative arm' for attorney discipline and admission purposes cut[] decisively in favor of" immunity. 87 F.4th at 1032 (citations omitted).

Second, OSB "performs functions typically performed by state governments." *Id.* at 1033 (quoting *PRPA*, 531 F.3d

at 875). In *Kohn*, we held that the California State Bar did so because the licensing, regulation, and discipline of lawyers are state functions. *Id*. at 1033-34. OSB performs those same functions. Or. Rev. Stat. §§ 9.080(1)(a) (providing that OSB's Board of Governors is tasked with "[r]egulating the legal profession"), 9.112 (providing that the Board of Governors may set requirements for continuing legal education, subject to approval by the Oregon Supreme Court), 9.210(1) (providing that the Board of Bar Examiners shall "carry out the admissions functions of the Oregon State Bar"), 9.490(1) (providing that the Board of Governors "shall formulate rules of professional conduct for attorneys," subject to approval by the Oregon Supreme Court).

Third, OSB "is treated as a governmental instrumentality for purposes of other state law." *Kohn*, 87 F.4th at 1030. In *Kohn*, we relied on the fact that the California State Bar is "subject to California public-records and open-meeting laws" and that its "property is tax-exempt." *Id.* at 1034. OSB is similarly subject to other state laws that apply to public entities, including the Oregon Tort Claims Act, the Oregon Public Records Law, and the Oregon Public Meetings Law. Or. Rev. Stat. § 9.010(3) (providing that "the [B]ar is subject to [certain] statutes applicable to public bodies" and listing those statutes).

Fourth, Oregon asserted in an amicus brief in this case that OSB is an arm of the state. *See Kohn*, 87 F.4th at 1030 (explaining that a court should consider "state representations about the entity's status" under this factor). Such a representation weighs in favor of sovereign immunity. *See PRPA*, 531 F.3d at 876 (relying on a similar amicus brief in analyzing this factor).

In sum, all four considerations demonstrate that Oregon intended OSB to be an arm of the state.

2.

The second *Kohn* factor assesses the state's control over the entity. 87 F.4th at 1030. This factor "depends on how members of the governing body of the entity are appointed and removed, as well as whether the state can 'directly supervise and control [the entity's] ongoing operations.'" *Id.* (alteration in original) (quoting *PRPA*, 531 F.3d at 877). Although Oregon has somewhat less control over OSB than California did over the California State Bar in *Kohn*, this factor still weighs in favor of concluding that OSB is an arm of the state.

In *Kohn*, we relied on the fact that the state government had "the power to appoint the [California] State Bar's governing structure"—the Board of Trustees and the Committee of Bar Examiners. *Id.* at 1035. Here, the Oregon Supreme Court appoints one of OSB's equivalent bodies but not the other. As in *Kohn*, the state supreme court appoints the officers who oversee attorney admissions (OSB's Board of Bar Examiners). Or. Rev. Stat. § 9.210(1). But unlike in *Kohn*, the state has no role in appointing members of the Bar's board (OSB's Board of Governors), most of whom are elected by OSB's members. Or. Rev. Stat. §§ 9.080, 9.025(1)(a). The state also has no role in the removal of members of the Board of Governors. *See* Or. Rev. Stat. § 9.050; OSB Bylaws § 2.9.

Still, we must consider whether Oregon exercises other forms of control over OSB. Here, as in *Kohn*, the Bar is controlled by the state supreme court, and that control weighs in favor of concluding that the Bar is an arm of the state.

In *Kohn*, we observed that the California State Bar's admission rules, admission decisions, and disciplinary decisions were subject to the California Supreme Court's review. *Kohn*, 87 F.4th at 1035. We described that oversight as an exercise of "significant control over the State Bar's functioning." *Id.* Similarly, the Oregon Supreme Court "makes final decisions on admitting attorneys, disciplining attorneys, and adopting rules of professional conduct." *Crowe I*, 989 F.3d at 732; *see also* Or. Rev. Stat. §§ 9.490(1), 9.527, 9.529, 9.536, 9.542.

Oregon also exercises some control over OSB's budget. OSB submits an annual budget for its admissions, discipline, and continuing legal education programs to the Oregon Supreme Court for review and approval. OSB Bylaws § 2.1(d). And the Oregon Supreme Court approves the fees that OSB sets for admission. *Id.* § 22.5.

On balance, the extent of Oregon's control over OSB weighs in favor of concluding that OSB is an arm of the state.

3.

The final *Kohn* factor looks to the entity's "financial relationship" with the state and the entity's "overall effects" on the state's treasury. 87 F.4th at 1036. "In analyzing this third factor . . . the relevant issue is a [s]tate's overall responsibility for funding the entity or paying the entity's debts or judgments." *Id.* (alterations in original) (quoting *PRPA*, 531 F.3d at 878).

In *Kohn*, we said that this factor was a "closer call" than the other two. *Id.* at 1037. We recognized that the California State Bar is "responsible for its own debts and liabilities, so California would not be liable for a judgment against the State Bar." *Id.* at 1036. But we acknowledged the California

State Bar's argument that "if the State Bar were unable to satisfy a money judgment against it," California would likely step in to ensure that the Bar could continue to perform its "'vital governmental function.'" *Id.* at 1036-37 (quoting *Alaska Cargo Transp., Inc. v. Alaska R.R. Corp.*, 5 F.3d 378, 381 (9th Cir. 1993)). We did not fully resolve the extent to which the California State Bar affects or could affect the California treasury, explaining that this factor was not dispositive because "the intent and control factors strongly favor[ed]" concluding that the California State Bar was an arm of the state. *Id.* at 1037.

Here, OSB is also responsible for its own debts and liabilities, so Oregon would not be liable for a judgment against OSB. Or. Rev. Stat. § 9.010(6). But, as in *Kohn*, if the Bar were to become insolvent, the state would likely step in with financial support so that the Bar could continue to perform its critical state functions. Given that the intent and control factors strongly weigh in favor of concluding that OSB is an arm of the state, we need not fully resolve the third factor. *See Kohn*, 87 F.4th at 1037.

Having evaluated the three *Kohn* factors, we hold that OSB is an arm of the state. The claims against OSB must therefore be dismissed on sovereign immunity grounds. *See id.* at 1025-26.

B.

OSB's immunity does not end this case. Sovereign immunity shields the state (and arms of the state) from suit. *Kohn*, 87 F.4th at 1025-26. But "[u]nder *Ex Parte Young* and its progeny, a suit seeking prospective equitable relief against a state official [sued in her official capacity] who has engaged in a continuing violation of federal law is not deemed to be a suit against the [s]tate for purposes of state

sovereign immunity." *In re Ellett*, 254 F.3d 1135, 1138 (9th Cir. 2001) (citing *Ex Parte Young*, 209 U.S. 123, 159-60 (1908)). Here, in addition to suing OSB, Crowe has sued OSB's officers in their official capacities seeking prospective declaratory and injunctive relief for violating his freedom of association right. Sovereign immunity does not prevent that part of his case from proceeding.[4]

IV.

We now turn to the merits of Crowe's freedom of association claim. The First Amendment provides: "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."[5] U.S. Const. amend. I. The Supreme Court has held that the First Amendment implicitly recognizes "a right to associate for the purpose of engaging in those activities" that it explicitly protects. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). The freedom of association "plainly presupposes a freedom not to associate." *Id.* at 623. But the freedom of association (including the freedom not to associate) does not protect all "associations." Because the freedom of association is a corollary to other First Amendment rights, it only protects

[4] Crowe also seeks to recover the dues he paid to OSB, but sovereign immunity precludes claims for retrospective relief against officer defendants sued in their official capacities. *Koala v. Khosla*, 931 F.3d 887, 894-95 (9th Cir. 2019). We therefore dismiss those claims.

[5] The Fourteenth Amendment incorporates the First Amendment against the states. *Am. Beverage Ass'n v. City & County of San Francisco*, 916 F.3d 749, 755 n.1 (9th Cir. 2019) (en banc).

"associations to the extent that they are expressive." *IDK, Inc. v. Clark County*, 836 F.2d 1185, 1194 (9th Cir. 1988).

When a mandatory association infringes freedom of association, that infringement is permissible if it "serve[s] a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms." *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 310 (2012) (second and third alterations in original) (quoting *Jaycees*, 468 U.S. at 623). We have referred to that test as "exacting scrutiny." *Mentele v. Inslee*, 916 F.3d 783, 790 & n.3 (9th Cir. 2019).

In analyzing Crowe's freedom of association claim, we accordingly must ask whether the challenged governmental conduct infringes the right to freedom of association at all, and if it does, whether that infringement can survive exacting scrutiny.

A.

When a plaintiff challenges a requirement that he join an organization, the plaintiff can establish an infringement on his freedom of association by showing that his membership in the organization impairs his own expression. The plaintiff can make that showing if a reasonable observer would attribute some meaning to his membership—because, for instance, a reasonable observer would assume that the plaintiff agrees with the organization's articulated positions—and he objects to that meaning. We first explain how that test flows from existing freedom of association caselaw. We then explain why Crowe has satisfied that test.

1.

Not all interactions with other people that "might be described as 'associational' in common parlance . . . involve

the sort of expressive association that the First Amendment has been held to protect." *City of Dallas v. Stanglin*, 490 U.S. 19, 24 (1989). For example, in *IDK, Inc. v. Clark County*, 836 F.2d 1185 (9th Cir. 1988), we held that the relationships between escort services and their clients were not protected by the freedom of association because the relationships were part of a "primarily commercial enterprise[]" and expression was not a "significant or necessary component of their activities." *Id.* at 1195.

In the same vein, the "freedom not to associate"—which Crowe invokes here—is not implicated every time a person would prefer to avoid some interaction. For instance, in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006), law schools challenged a requirement that, to receive federal funding, they allow military recruiters onto their campuses and assist those recruiters as they would any others. *Id.* at 52-53. The law schools argued, among other things, that the requirement infringed their freedom of association because the law schools objected to the military's "Don't Ask, Don't Tell" policy. *Id.* Although the law schools argued that requiring them to interact with military recruiters "impair[ed] their own expression," the Court held that a plaintiff could not establish an infringement on the freedom of association "'simply by asserting' that mere association 'would impair its message.'" *Id.* at 69 (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000)). The Supreme Court acknowledged that the law schools were required to "'associate' with military recruiters in the sense that they interact[ed] with them." *Id.* But the Court held that the requirement did not infringe the schools' freedom of association because the recruiters had only a passing presence on campus and because students and faculty were

"free to associate to voice their disapproval of the military's message"—in other words, the schools were not required to accept the recruiters into the campus community in any meaningful sense. *Id.* at 69-70.

Taken together, those cases establish that a plaintiff cannot demonstrate that his freedom of association is infringed merely by pointing to the fact that he is required to interact with an organization in some sense. Instead, he must show that the required association impairs his expression. Other cases make clear that a plaintiff can make that showing if a reasonable observer would impute some meaning to membership in the organization and the plaintiff objects to that meaning.[6]

In *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), the Supreme Court held that a state antidiscrimination law that required the Boy Scouts to admit a gay scoutmaster violated the Boy Scouts' freedom of association. *Id.* at 644. The Court explained that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Id.* at 648. Under that test, the Court held that the antidiscrimination requirement at issue burdened the Boy Scouts' expression because the Boy Scouts objected to same-sex relationships, and the scoutmaster was a "gay rights activist," so his membership would "force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.*

[6] We do not foreclose the possibility that a plaintiff could establish that a membership requirement burdens his expression in some other way; we conclude only that this is one way to establish an infringement.

at 650, 653. Significantly, the Court thought that the scoutmaster's membership would send that message even though the Boy Scouts could presumably have made clear that it was not voluntarily choosing to admit the gay scoutmaster. The Court then held that this burden on the Boy Scouts' associational rights was not justified by the state's interests. *Id.* at 656-59. Although in *Dale* an organization challenged a law requiring it to admit a member, it follows from *Dale*'s reasoning that when an individual challenges a law that requires him to become a member, he can show that the requirement infringes his freedom of association if the membership "send[s] a message" to a reasonable observer about his own views and he objects to that message. *Id.* at 653.

By contrast, in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the Supreme Court rejected the Jaycees organization's argument that an antidiscrimination law that required it to admit women as full voting members violated its freedom of association. *Id.* at 612. The Court "decline[d] to indulge in the sexual stereotyping that underlie[d] [the Jaycees'] contention that, by allowing women to vote, application of the [antidiscrimination law would] change the content or impact of the organization's speech." *Id.* at 628. Moreover, the Jaycees already invited women to participate in the group as nonvoting members, so "any claim that admission of women as full voting members [would] impair a symbolic message conveyed by the very fact that women [were] not permitted to vote [was] attenuated at best." *Id.* at 627. Thus, the requirement did not impose "any serious burdens on the male members' freedom of expressive association." *Id.* at 626. In other words, because neither the Jaycees' actual speech nor any symbolic message sent by its membership choices would be meaningfully changed by

complying with the antidiscrimination law, the Court concluded that the Jaycees' freedom of association claim failed. As relevant here, *Jaycees* further supports that an individual person can challenge a requirement that he become a member by showing that a reasonable observer would impute to him a message to which he objects.[7]

2.

We now turn to the application of that test to claims of compelled membership and then to Crowe's claim specifically.[8]

Whether a reasonable observer will attribute any meaning to "membership" alone depends on the nature of a group. Obviously, membership in a political party sends an expressive message. Even if a person takes no other action to support a political party, a reasonable observer understands that membership in the political party, standing alone, says something about the person's views. *Cf. Elrod v. Burns*, 427 U.S. 347, 355-56 (1976) (plurality opinion) (holding that a requirement that public employees join the Democratic Party infringed their freedom of association). But the word "membership" is used to refer to all sorts of

[7] It is not entirely clear whether the Court in *Jaycees* rejected the freedom of association claim because it determined that there was no infringement or because it determined that the infringement was constitutionally permissible. *See* Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association*?, 99 Nw. U. L. Rev. 839, 843-44 (2005) (discussing this ambiguity). Either way, *Jaycees* supports the principle we rely on here.

[8] Crowe has not argued that he is required to personally voice OSB's own views, attend OSB's meetings, or to refrain from joining other organizations or voicing his own opinions. We need not and do not address how such other types of requirements would be analyzed.

relationships: A person might be a member of a public library, Costco, AMC, or, back in the day, Blockbuster. Those memberships may not send any message at all.

Whether a reasonable observer will attribute any meaning to such memberships will depend on context, and there may plausibly be circumstances where membership in a group becomes expressive. But as relevant here, the bare fact that an attorney is a member of a state bar does not send any expressive message. A state bar's primary function is to license, regulate, and discipline attorneys—activities that are essentially commercial in nature. *Cf. Rumsfeld*, 547 U.S. at 64 ("[A] law school's decision to allow recruiters on campus is not inherently expressive. Law schools facilitate recruiting to assist their students in obtaining jobs."). And a reasonable observer understands state bar membership to mean only that the attorney is licensed by the bar. Thus, even when the bar engages in expression, a reasonable observer ordinarily would not interpret the fact that the attorney is a member of the bar to mean that the bar's activities reflect the attorney's personal views.

That can be true even if some of the state bar's expression is not germane to the bar's regulatory purposes. In *Morrow v. State Bar of California*, 188 F.3d 1174 (9th Cir. 1999), the plaintiffs argued that the requirement that they join the California State Bar infringed their freedom of association because that Bar engaged in nongermane political activities—specifically, supporting four bills before the California legislature. *Id.* at 1175. We rejected the plaintiffs' argument that "membership alone may cause the public to identify plaintiffs with State Bar positions in violation of plaintiffs' First Amendment [freedom of association] rights." *Id.* at 1177. That holding rested on the notion that the public would not associate a state bar's

occasional nongermane activities with its members merely by virtue of their membership.

But, in the particular circumstances of this case, Crowe has shown that a reasonable observer would attribute meaning to his membership in OSB because of the *Bulletin* statements. OSB endorsed the Specialty Bars' statement criticizing then-President Trump and suggested that all members agreed with it.

Specifically, the formatting and content of the two statements made it appear as though OSB essentially adopted the Specialty Bars' statement. OSB made the editorial decision to publish the two statements side-by-side, surrounded by a single dark green border that was the same color as OSB's logo. And OSB's statement echoed the themes in the Specialty Bars' statement, using strikingly similar language. For example, the Specialty Bars' statement "condemn[ed] speech that incites violence" and made clear that it was referring to then-President Donald Trump's speech specifically, offering several examples. OSB's statement likewise criticized the "systemic failure to address speech that incites violence." In context, one would assume that OSB's reference to "speech that incites violence" was also referencing then-President Trump.

OSB's statement also praised the Specialty Bars specifically. OSB said, "The courageous work done by specialty bars throughout the state is vital to our efforts and we continue to be both inspired and strengthened by those partnerships." By praising the "work" of the Specialty Bars, which would presumably include the immediately adjacent statement, and describing the relationships between OSB and the Specialty Bars as "partnerships," OSB again appeared to implicitly endorse the Specialty Bars' statement.

The Specialty Bars, in turn, "applaud[ed] the Oregon State Bar's commitment to equity and justice by taking a strong stand against white nationalism," and "pledge[d] to work with the Oregon State Bar." Reading those expressions of mutual praise, one would interpret the two statements to be a reflection of OSB's and the Specialty Bars' shared views.

If OSB had made clear that its own statement reflected the views of OSB's leadership—and not its members—then there would be no infringement. But OSB suggested the opposite. Although the statement said "[a]s a unified bar, we are mindful of the breadth of perspectives encompassed in our membership," it immediately implied that the contents of its statement were one thing on which all members agreed. It did so by saying that, given that breadth of perspectives, "we" would focus on "those issues that [were] directly within our mission," which was "gravely" threatened by the "current climate of violence, extremism and exclusion." That would seem to suggest that all members agreed with what was in the statement because it dealt with topics on which there was no "breadth of perspectives." The statement reinforced that idea by using "we" and "our" throughout in a way that purported to speak for all members of OSB. For instance, it said, "As lawyers, we administer the keys to the courtroom." That could only mean all OSB members, not the six OSB officers who signed the statement.

The implication that OSB was speaking on behalf of all the attorneys it regulates was accentuated by the fact that those attorneys are called "members," *see* Or. Rev. Stat. § 9.160(1), as opposed to something more neutral, such as "licensees." As we have explained, the fact that a state bar refers to attorneys as "members," standing alone, does not mean that a reasonable observer would think that an attorney shares the views of the bar. But the word "member" does

connote a stronger relationship than just a regulatory one, which makes it more likely that a reasonable observer would read a statement like OSB's to actually speak on behalf of the attorneys it regulates.

The *Bulletin* statements make this case analogous to *Carroll v. Blinken*, 957 F.2d 991 (2d Cir. 1992). There, students were required to pay an annual "activity fee" to their university, part of which was used to fund a policy advocacy organization called the New York Public Interest Research Group, Inc. ("NYPIRG"). *Id.* at 993-94. NYPIRG sought to advance "certain positions on issues of public policy," such as arms control and environmental protection, "through research, campus speakers, lobbying the legislature, intervening in lawsuits, community organizing, brochures, and other methods." *Id.* at 994, 997. According to NYPIRG's bylaws, any student who paid the activity fee was automatically a "member" of NYPIRG, and "on the strength of this by-law, NYPIRG claim[ed]" in its advocacy "to represent all students at the nineteen participating campuses." *Id.* at 995.

The Second Circuit held that the automatic membership policy infringed the students' freedom of association. *Id.* at 1003. The court explained that "NYPIRG expressly forge[d] . . . a link" "in the popular mind" between its views and the students' views "when it proclaim[ed] that its 'membership' include[d] all fee paying [university] students" and when it "overtly and inaccurately claim[ed] to represent the interests of the [university] student body." *Id.* NYPIRG thus "irredeemably transgressed the proscription against forced association." *Id.*

Carroll counsels that if an organization trades on its membership in advancing its own views, a reasonable

observer may come to (incorrectly) believe that the organization speaks for its members even though membership is mandatory, and in that circumstance, a membership requirement can infringe the freedom of association. Considering the totality of the circumstances here, OSB traded on its supposedly unified membership to bolster its own expression, fostering a misperception about the unanimity of its members' views.

Crowe has also established that the association impaired his own expression because he objects to the message sent by his membership. He testified at his deposition that he disagreed with the *Bulletin* statements and that he did not want to be associated with them. Crowe has thus established an infringement on his freedom of association.

B.

Such an infringement on the freedom of association is nonetheless permissible if it survives exacting scrutiny. *Mentele*, 916 F.3d at 790 & n.3. Under exacting scrutiny, the infringement must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms."[9] *Id.* at 790 (quoting *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 894 (2018)). The Supreme Court has observed that *Keller*'s germaneness requirement "fits comfortably" within the exacting scrutiny framework in the

[9] The Supreme Court has mused about whether strict scrutiny should replace exacting scrutiny in certain First Amendment contexts. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 894-95 (2018). But we have already held that we are "obliged to apply 'exacting scrutiny' to decide whether [a compelled association] is constitutionally permissible" because the Court has not overruled its precedents applying that test. *Mentele*, 916 F.3d at 790 n.3.

state bar association context because states have a strong interest in "'regulating the legal profession and improving the quality of legal services,'" as well as 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) (quoting *Keller*, 496 U.S. at 13). That statement indicates that when a state bar requires attorneys to associate with germane activities, that requirement survives exacting scrutiny.[10]

Consistent with that principle, we held in *Gardner v. State Bar of Nevada*, 284 F.3d 1040 (9th Cir. 2002), that even if the public might associate attorneys with a state bar's expressive activities, that association is permissible if the activities are germane. There, the State Bar of Nevada engaged in a public relations campaign that sought to "dispel any notion that lawyers are cheats or are merely dedicated to their own self-advancement or profit." *Id.* at 1043. The

[10] On this point, we agree with the Fifth Circuit, which has held that "[c]ompelled membership in a bar association that is engaged in only germane activities survives [exacting] scrutiny." *McDonald v. Longley*, 4 F.4th 229, 246 (5th Cir. 2021). But we disagree with the Fifth Circuit's holding that if a state bar engages in nongermane activities, compelled membership is necessarily unconstitutional. *See id.*; *see also Boudreaux v. La. State Bar Ass'n*, 86 F.4th 620, 632-34 (5th Cir. 2023) (holding that a state bar violated its attorneys' right to freedom of association by, among other things, tweeting about the health benefits of eating walnuts and promoting a holiday charity drive). As we have explained, in many circumstances, membership in a state bar, standing alone, has no expressive meaning, and the public will not associate the bar's members with the bar's activities. In those circumstances, the membership requirement does not infringe the freedom of association—even if the bar engages in nongermane activities such as offering dietary advice or promoting a charity drive.

campaign instead promoted the notion that lawyers "strive to make the law work for everyone." *Id.* An attorney objected to the campaign in part because he believed lawyers "are supposed to serve their clients, not 'everyone.'" *Id.*

We acknowledged that the attorney was forced to associate with the campaign in two ways. First, his dues were used to fund the campaign. *Id.* at 1042. Second, he was associated with the State Bar of Nevada's activities in the public eye: The public relations campaign spoke about the ethics and activities of all of that Bar's members, so it was likely to be attributed to those members. *See id.* We recognized that such "[c]ompulsion to be associated with an organization whose very public campaign proclaims a message one does not agree with is a burden." *Id.* But we concluded that the campaign was germane to the Bar's purposes, so the burden did not violate the attorney's freedom of association. *Id.* at 1042-43. The Bar had a compelling interest in advancing public understanding of the role of attorneys, and in doing so, it could purport to represent the state's attorneys without violating their freedom of association rights. *See id.* at 1043.

In this case, by contrast, OSB engaged in nongermane conduct by adopting the Specialty Bars' statement. The "guiding standard" in determining whether an activity is germane is whether 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.'" *Keller*, 496 U.S. at 14 (quoting *Lathrop*, 367 U.S. at 843). At least some of the Specialty Bars' statement was not germane. The statement opened by describing the Specialty Bars' "commitment to the vision of a justice system that operates without discrimination," but much of its criticism of then-President Trump did not relate

to the justice system at all—for instance, it criticized Trump for describing Haiti and African countries as "shithole countries." Although preventing violence and racism can relate to improving the legal system, the connection here was too tenuous. *See Schneider v. Colegio de Abogados de P.R.*, 917 F.2d 620, 632 (1st Cir. 1990) (holding that a bar's activities that "rest[] upon partisan political views rather than on lawyerly concerns" are not germane). Because the Specialty Bars' statement was not germane, OSB's adoption of the Specialty Bars' statement was not germane either. OSB has not offered any other justification for associating its members with the *Bulletin* statements. Thus, the infringement does not survive exacting scrutiny.[11]

C.

The remedy for this violation need not be drastic. Of course, if OSB engaged only in germane activities, it would not infringe the freedom of association. But even if OSB does engage in nongermane activities, in situations in which those activities might be attributed to its members it could include a disclaimer that makes clear that it does not speak on behalf of all those members.[12] *Cf. PruneYard Shopping*

[11] Because we conclude that OSB's adoption of the Specialty Bars' statement was not germane, we do not address any of the lobbying challenged in this case. The district court may consider the lobbying on remand.

[12] We recognize that First Amendment violations are not always cured by a disclaimer. If the state compels a speaker to actually speak (or otherwise disseminate the state's message), the state cannot avoid a First Amendment problem simply by providing a disclaimer that says the speech is compelled. *E.g.*, *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 12-16 & n.11 (1986) (plurality opinion) (holding that a disclaimer did not avoid a First Amendment violation where the

Ctr. v. Robins, 447 U.S. 74, 87 (1980) (holding that a requirement that a public shopping center allow leafleting did not violate the First Amendment in part because "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition . . . [would] not likely be identified with those of the [shopping center] owner"); *Lindke v. Freed*, 601 U.S. 187, 202 (2024) ("Markers like [disclaimers] give speech the benefit of clear context."). OSB could also lessen the risk of misattribution by following the California State Bar's lead and referring to attorneys as "licensees," rather than "members." *See* Cal. Bus. & Prof. Code § 6002.

We leave it to the district court to determine on remand, with further input from the parties, the appropriate forward-looking relief. We hold only that Crowe has established an infringement on his freedom of association and that the infringement does not survive exacting scrutiny.

V.

For the foregoing reasons, we dismiss the claim against OSB and the claim for retrospective relief against the individual officer Defendants. We reverse the judgment of the district court as to the freedom of association claim for prospective equitable relief against the individual officer Defendants and remand for further proceedings.

DISMISSED in part; REVERSED in part and REMANDED for further proceedings.

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government required a company to disseminate the views of a third party). But, here, the only infringement Crowe has shown is that OSB, through its own speech, has suggested that Crowe shares OSB's views. A disclaimer would have prevented that infringement from occurring in the first place.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 22 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

DANIEL Z. CROWE,

Plaintiff-Appellant,

OREGON CIVIL LIBERTIES ATTORNEYS, an Oregon nonprofit corporation,

Plaintiff-Appellant,

and

LAWRENCE K. PETERSON I,

Plaintiff,

v.

OREGON STATE BAR, a Public Corporation; et al.,

Defendants-Appellees.

No. 23-35193

D.C. No. 3:18-cv-02139-JR
District of Oregon,
Portland

ORDER

Before: OWENS and FRIEDLAND, Circuit Judges, and ORRICK,* District Judge.

Judge Owens and Judge Friedland have voted to deny the petition for rehearing en banc, and Judge Orrick so recommends. The full court has been

* The Honorable William Horsley Orrick, United States District Judge for the Northern District of California, sitting by designation.

advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc, Dkt. No. 52, is DENIED.