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8 **IN THE SUPREME COURT**  
9 **STATE OF ARIZONA**

10 In the Matter of:

Supreme Court No. R-24-0030

11 **PETITION TO AMEND RULES**  
12 **32(b) AND (c) OF THE ARIZONA**  
13 **RULES OF SUPREME COURT**

**COMMENT IN SUPPORT OF**  
**PENDING PETITION**

14 In accordance with Rule 28(d), Ariz. R. Sup. Ct., the undersigned submits the  
15 following Comment in support of the Petition.

16 **DISCUSSION**

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18 It's been 34 years since *Keller v. State Bar of California*, 496 U.S. 1 (1990), was  
19 decided. And notwithstanding the Court's ruling that mandatory dues could be used only  
20 to regulate the legal profession or improve the quality of legal services and not to  
21 subsidize non-germane political and ideological activities, the Arizona Bar has persisted  
22 in veering out of its lane. For this principal reason, I support the Goldwater Institute's  
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1 (GI) third bite<sup>1</sup> at the bifurcated bar apple. In addition to the reasons GI enumerates, the  
2 State Bar of Arizona repeatedly engages in non-germane political and ideological speech  
3 even more pronounced than laid out by Petitioners.

4 **Mandatory Diversity and Inclusion CLE Rule Change Petition.**

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6 In January 2021, the Bar filed a rule change petition R-21-0016 to “amend Sup.  
7 Ct. Rule 45(a)(2) to require active attorneys, not otherwise exempt, to dedicate one hour  
8 of CLE to training on diversity and inclusion as part of the three hours of professional  
9 responsibility mandatory CLE for each educational year.” As this court subsequently  
10 denied the Bar’s petition, there’s no need here to revisit the equal protection and  
11 compelled political and ideological speech arguments against the proposal. Suffice it to  
12 say that no matter how well-intentioned, the Bar’s decision to file the petition undermines  
13 its claims of *Keller*-purity. *Keller* 496 U.S. at 14 noted that a group “may not . . . fund  
14 activities of an ideological nature” that are “not ‘germane’ to the purpose for which  
15 compelled association was justified.” The *Keller* Court declared “the guiding standard  
16 must be whether the challenged expenditures are necessarily or reasonably incurred for  
17 the purpose of regulating the legal profession or improving the quality of the legal service  
18 available to the people of the State.” *Lathrop v Donohue*, 367 U.S. 820 (1961) at [843](#).”  
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23 <sup>1</sup> See R-17-0022, “Petition to Amend Rules 32(c) and (d), Rules of the Supreme Court filed January 10, 2017 by  
24 Gregory W. Falls “individually and on behalf of the Goldwater Institute” proposing “to maintain the current  
25 mandatory membership requirement for all lawyers but (1) eliminate mandatory membership dues for non-  
regulatory functions and (2) allow voluntary contributions for all non-regulatory functions.” Also see R-19-0005,  
“Petition to Amend Rules 32(c) and (d), Rules of the Supreme Court filed January 9, 2019 by Timothy Sandefur  
reiterating the same as R-17-0022’s intended purpose but adding a third component that “provides for an audit so  
that members can verify the use of mandatory dues.”

1 A cursory look at headlines then and now give testament to the heightened  
2 ideological and political divisions<sup>2</sup> represented by the notions of diversity, equity, and  
3 inclusion (DEI). The Bar’s decision to file such an ideologically and politically freighted  
4 rule change petition underscored the Bar’s insularity and how expansively it chooses to  
5 define its core functions of regulating the legal profession and improving the quality of  
6 legal services. DEI continues being litigated<sup>3</sup> and provides even more fuel for plaintiffs  
7 challenging mandatory bar conduct.<sup>4</sup> Not to be outdone, some lawmakers at the Arizona  
8 Legislature continue introducing legislation seeking to push back against the public  
9 funding of DEI.<sup>5</sup> In this discordant environment, how did the Bar conclude that engaging  
10 in an expressive activity compelling members under an ethical rule to mandatory training  
11 in such a controversial ideology was consistent with *Keller*?

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15 <sup>2</sup> See, for example, Alan Riquelmy, “Magistrate Judge Sides with Professor in First Amendment Suit over  
16 Bakersfield College Diversity Policies, Courthouse News Service, (November 14, 2023) at  
17 [https://www.courthousenews.com/magistrate-judge-sides-with-professor-in-first-amendment-suit-over-bakersfield-  
college-diversity-policies/](https://www.courthousenews.com/magistrate-judge-sides-with-professor-in-first-amendment-suit-over-bakersfield-college-diversity-policies/) and John, Hanna, “Kansas has a new anti-DEI law . . .” Kansas’ Democrat Governor  
18 Laura Kelly allowed restrictions on college diversity initiatives approved by the Republican-controlled Legislature  
19 to become law without her signature (April 19, 2024) at [https://www.pbs.org/newshour/politics/kansas-has-a-new-  
anti-dei-law-but-gov-kelly-has-vetoed-bills-on-abortion-and-even-police-dogs](https://www.pbs.org/newshour/politics/kansas-has-a-new-anti-dei-law-but-gov-kelly-has-vetoed-bills-on-abortion-and-even-police-dogs)

20 <sup>3</sup> See <https://www.goldwaterinstitute.org/goldwater-fights-for-free-speech-in-oregon-federal-court/> discussing the  
21 status of *Daniel Crowe v. Oregon State Bar*, including oral argument at the 9<sup>th</sup> Circuit this month, to wit, that  
22 “mandatory bars are ostensibly about “regulating lawyers,”—i.e., licensing, establishing ethical rules, and  
23 disciplining—mission creep inevitably leads to mandatory bars engaging in conduct unrelated to the regulation of  
24 lawyers. This can include activities like lobbying legislatures on bills that seek to change state law, disseminating  
25 and amplifying news and viewpoints of which the bar approves, and entertaining the latest ideological fads like  
“anti-racism” and diversity training.”

<sup>4</sup> See *McDonald v. Longley*, No. 20-50448 (5th Cir. Jul. 2, 2021) (holding that because the Texas Bar “is engaged in  
non-germane activities,” forcing lawyers “to join it violates their First Amendment rights”); *Boudreaux v. La. State  
Bar Assoc.*, No. 20-30086 (5th Cir. Jul. 2, 2021) (holding that Louisiana lawyer has viable claim that LSBA’s  
“political and legislative activity goes beyond what’s constitutionally permissible”). Summary and citation per Dane  
S. Cipolino at Louisiana Legal Ethics, [https://lalegaethics.org/fifth-circuit-rules-that-mandating-bar-association-  
membership-violates-lawyers-first-amendment-rights/](https://lalegaethics.org/fifth-circuit-rules-that-mandating-bar-association-membership-violates-lawyers-first-amendment-rights/) last accessed April 16, 2024.

<sup>5</sup> Caitlin Sievers, “AZ Republicans continue to take aim at DEI training with bill to outlaw it in government,”  
Arizona Mirror (February 28, 2024) last accessed at  
[https://azmirror.com/2024/02/28/az-republicans-continue-to-take-aim-at-dei-training-with-bill-to-outlaw-it-in-  
government/](https://azmirror.com/2024/02/28/az-republicans-continue-to-take-aim-at-dei-training-with-bill-to-outlaw-it-in-government/) on April 16, 2024.

1 **Persistent First Amendment problems are avoidable with a voluntary association.**

2       Defining what activities are “germane” to the purposes justifying compelled  
3 association has not gotten any easier since the court in *Keller* first said finding “precisely  
4 where the line falls between permissible and impermissible dues-financed activities will  
5 not always be easy to discern.”<sup>6</sup>

7       For example, despite the Bar’s oft-professed assertions that it weighs proposed  
8 continuing legal education and convention programming content in accord with its core  
9 purposes and functions and upon whether the proposed program is *Keller*-compliant with  
10 respect to politics or ideology, members are nevertheless left wondering about how the  
11 Bar satisfies *Keller*. Given the Bar’s inconsistency and nontransparency, members can  
12 only guess. As shown below, some programs that are clearly political or ideological on  
13 their face are nonetheless approved. And others that are just as arguably political or  
14 ideological are rejected.

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16       Notwithstanding the U.S. Supreme Court’s 2023 decision in *Students for Fair*  
17 *Admissions, Inc. v. President & Fellows of Harvard College*<sup>7</sup> that race-conscious  
18 affirmative action in admissions is unconstitutional and that the subject remains rife with  
19 controversy, the Arizona Bar has continued pursuing its own diversity and implicit bias  
20 initiatives and educational programming, whether members are on board with them or  
21 not. In the meantime, other mandatory bar jurisdictions have moved away from such  
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<sup>6</sup> *Keller* 496 U.S. 1, 13-16 (1990).

25 <sup>7</sup> *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 20-1199, 600 U.S. \_\_\_\_, 2023  
WL 4239254 (June 29, 2023).

1 programming in conformance with the U.S. Supreme Court’s ruling.

2 Earlier this year, the Florida Supreme Court directed the Florida State Bar to stop  
3 funding diversity and inclusion initiatives in its forthcoming budget.<sup>8</sup> The Florida  
4 Supreme Court also earlier decided that Florida judges could no longer obtain continuing  
5 legal education credit for general ‘fairness and diversity’ courses. And in Wisconsin,  
6 Reuters reported this month the Wisconsin State Bar had reached a partial settlement in a  
7 lawsuit brought by The Wisconsin Institute for Law & Liberty that allowed the Bar’s  
8 Diversity Clerkship Program to continue with a new definition of diversity.  
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10 And yet the Arizona Bar has for the past several years at its annual convention  
11 included ideological and political programming about diversity and inclusion, including  
12 the related hot-button topic known as implicit bias.<sup>9</sup> Indeed, the theme of the 2019 State  
13 Bar Convention was “The Power of Inclusion” and featured a special “Diversity &  
14 Inclusion Programming” section that included seminars such as “Understanding Implicit  
15 Bias” and “Microaggression in the Legal Profession.” These are issues that remain  
16 “politically fraught”<sup>10</sup> and ideologically controversial.<sup>11</sup>  
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20 <sup>8</sup> Alex Ebert, “Florida Bar Diversity Funding Cut by State Supreme Court,” Bloomberg Law (January 31, 2024).

21 <sup>9</sup> See “Diversity and Inclusion” programs, 2021 State Bar of Arizona Annual Convention

22 <sup>10</sup> See, for example, Mich. Admin. Ord. Administrative Order No. 2021-8, as amended through April 3, 2024,  
23 Commission on Diversity, Equity, and Inclusion in the Michigan Judiciary, Viviano, J. (dissenting). “I dissent from  
today’s order establishing the Commission on Diversity, Equity, and Inclusion, a catchphrase that is politically  
fraught-and for that reason alone should be approached with extreme caution by the judicial branch.”

24 <sup>11</sup> See, for examples, David Randall, “The Implicit-Bias House of Cards,” City Journal (October 3, 2023);  
Christopher Ingraham, “Data Suggest Republicans have a race problem,” Washington Post (April 14, 2014); Samuel  
25 I. Robinson, “GOP bill that would ban lessons on implicit bias in Michigan schools passes House,” Michigan Live  
(November 2, 2021); SB 1694, State of Arizona Senate, Fifty-sixth Legislature, First Regular Session, 2023  
(prohibiting expenditure of public monies on among other prohibitions, the promotion of policy or procedure  
concerning implicit bias).

1 In the meantime, the Bar’s non-transparent methodology to determine what passes  
2 its definition of *Keller*-compliant programming has remained mystifying. In fact, earlier  
3 this year, a proposed 2024 Annual Convention seminar aimed at practice tips for lawyers  
4 defending Palestinians locally or under international law from various forms of legal  
5 attacks<sup>12</sup> was rejected on the grounds it ran afoul of *Keller* as it supposedly posed both  
6 political and ideological issues.  
7

8 The 2024 convention theme is “Balancing the Scales of Justice.” But despite the  
9 belief the proposed seminar was consistent with the convention theme it was nevertheless  
10 turned down. And it’s not the first time the Bar has rejected convention programming  
11 dealing with the greater Middle East.<sup>13</sup> Indeed, it can be said the Bar has a contentious  
12 history with educational programming dealing with local or international legal aspects of  
13 contemporary conflicts in that region. Granted, these are potentially polarizing topics  
14 that, especially now, are dividing communities and generating even more headlines  
15 because of the Israel-Gaza war. But why is one divisive political or ideological seminar  
16 topic permitted while another is denied?  
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19 Without transparency about the Bar’s supposed objective methodology to approve  
20 and reject programming in light of *Keller*, it is hard not to conclude that if a topic  
21 conflicts with the Bar’s political or ideological agenda, *Keller* becomes a sword to parry  
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23 <sup>12</sup> Telephone interview with Kevin Heade, Esq., (April 17, 2024) with Mauricio R. Hernandez.

24 <sup>13</sup> Stephen Zunes, “Banned in Phoenix: How the Arizona State Bar Association Considers Analysis of International  
25 Law in the Middle East Too Controversial,” Truthout, (June 25, 2013) at <https://truthout.org/articles/banned-in-phoenix-how-the-arizona-state-bar-association-considers-analysis-of-international-law-in-the-middle-east-too-controversial/> last accessed April 18, 2024.

1 programming it disagrees with such as Palestinian legal issues here and abroad. But if, on  
2 the other hand, a proposal fits its mission-creeping political or ideological framework,  
3 such as DEI, then *Keller* becomes a useful shield for quick approval.

4         In view of these perceived biases, the best way to discern “where the line falls  
5 between permissible and impermissible dues-financed activities”<sup>14</sup> is to avoid the  
6 difficulty altogether. A voluntary bar is the solution.

7         A voluntary bar is no longer constrained by First Amendment speech concerns  
8 over the ideological and political advocacy harms inflicted on resistant members.  
9 Members who disagree with a particular advocacy position or a political or ideological  
10 agenda adopted by their voluntary association can choose to leave. But that choice is  
11 foreclosed to Arizona lawyers. Willing or not, they are marched along to whatever  
12 political or ideological siren song the Bar’s board finds appealing.

13         And while I may personally agree that a society, and particularly, a legal  
14 profession with more immutable characteristic diversity is a good thing, I do not agree  
15 that a mandatory bar association funded by compulsory member funds is the means to get  
16 there. This is what voluntary affinity bar associations do best – not a mandatory bar.

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20 **No reason for compelled association.**

21         As explained above, the preferred solution is a purely voluntary bar association for  
22 Arizona, the next best alternative is what GI proposes, which is bifurcating the Arizona  
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<sup>14</sup> *Keller*, supra note 6.

1 Bar’s regulatory and non-regulatory functions. I do, though, continue to differ with the  
2 Petitioners who needlessly include in their petition to “maintain[s] the current mandatory  
3 membership requirement for all lawyers.”

4 I differ because 19 other jurisdictions,<sup>15</sup> both large and small, have successfully  
5 operated<sup>16</sup> without such a mandate. These voluntary bar jurisdictions have for generations  
6 protected the public from unethical lawyers<sup>17</sup> and preserved the First Amendment rights of  
7 their lawyers without compelling membership in a state lawyer trade association.

8 They offer programs and services that favorably compare<sup>18</sup> and even exceed those  
9 offered by mandatory state bar associations, including [law office management practice](#)  
10 [services](#); [insurance programs](#); reduced-cost and [free CLE](#); [Find-a-Lawyer](#) member  
11 [directories](#); [Access to Justice](#) initiatives; [job hunting resources](#); [Sections](#) and [Committees](#);  
12 [lawyer referral services](#); [Publications](#); [Young Lawyer Divisions](#); Legal Research like  
13 [Fastcase](#) and [Decisis](#); [Mentoring programs](#); [leadership development programs](#); [Annual](#)  
14 [Meetings](#); [high school mock trial programs](#); [community pro bono](#), e.g. [Wills for Heroes](#);  
15 [ethics opinions and practice resources](#) and even [online practice tools](#). Charitable state bar  
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20 <sup>15</sup> The voluntary bar states are: Arkansas, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Maine,  
21 Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New York, Ohio, Pennsylvania, Tennessee, and  
22 Vermont.

23 <sup>16</sup>The Iowa State Bar Association, for example, in 2024 will celebrate 150 years as the nation’s oldest voluntary bar  
24 association. <https://www.iowabar.org/?pg=History> The Minnesota State Bar Association, established in 1883, has  
25 been a voluntary bar for 141 years. <https://mnbar.org/about-msba>

<sup>17</sup> Ohio, a voluntary bar jurisdiction, has been singled out by one legal ethics specialist, [Michael Frisch](#), at The Legal  
Profession Blog, as “the top of the list of the most transparency discipline systems.” Adding, “The responsible  
administrators seem to have mastered the technology required to deliver a full picture of the arc of every bar  
discipline case.” See “Ode to Ohio: With a Coda,” Legal Profession Blog, (January 27, 2022).

<sup>18</sup> Also see Leslie C. Levin, The End of Mandatory State Bars? 109 GEO. L.J. ONLINE 1, (2020),  
[https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/04/Levin\\_The-End-of-Mandatory-State-Bars.pdf](https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/04/Levin_The-End-of-Mandatory-State-Bars.pdf) [<https://perma.cc/X2X4-C3S8>]

1 foundations are also not unique to Arizona. They are found in voluntary bar jurisdictions,  
2 too, including [Illinois](#), [Ohio](#), [Colorado](#), [Iowa](#), and [New Jersey](#) to name a few.

3  
4 **CONCLUSION**

5 For the reasons stated herein, the undersigned supports the Petitioner's  
6 proposal and urges the Court to approve the Rule 32 amendments.

7 RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of April, 2024.

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9 /s/ Mauricio R. Hernandez

10 Mauricio R. Hernandez  
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