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

9 In the Matter of:

Supreme Court No. R-24-0030

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

STATE BAR OF ARIZONA
COMMENT

13 Pursuant to Rule 28(e) of the Arizona Rules of Supreme Court, the State Bar
14 of Arizona (the “State Bar”) hereby submits the following as its comment to the
15 above-captioned Petition, requesting that the Court deny the Petition. While the State
16 Bar agrees that this Court is the proper forum to decide the structure and mission of
17 the State Bar, the State Bar opposes the proposed rule amendments for the reasons
18 set forth in this Comment. Adopting the proposed amendments would be detrimental
19 to the legal community and the public, as explained in more detail below. In short,
20 approving the Petition would undermine the State Bar’s ability to carry out its
21 mission as provided by the Court.
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24 **BACKGROUND**

25 The State Bar “exists to serve and protect the public with respect to the

1 provision of legal services and access to justice.” Rule 32(a)(2), Ariz. R. Sup. Ct.
2 This mission was given to the State Bar by this Court and the State Bar carries out
3 programs and activities, including but not limited to lawyer regulation, in
4 furtherance of this mission. The Petition exaggerates the amount and scope of the
5 lobbying activity the State Bar engages in and overlooks the many programs and
6 activities conducted in furtherance of our mission.
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9 This Petition follows prior similar petitions filed by the Goldwater Institute in
10 2017 and 2019—both of which were denied. Additionally, in 2014, this Court
11 convened by Administrative Order No. 2014-79, the Task Force on the Review of
12 the Role and Governance Structure of the State Bar of Arizona (“Task Force”). The
13 Task Force was charged with, *inter alia*, examining the structure of the State Bar.
14 On September 1, 2015, the Task Force submitted its final report (the “Task Force
15 Report”) to this Court. In the Task Force Report, the Task Force summarized the
16 important interplay between the services the State Bar provides as an integrated bar
17 and protection of the public as follows:
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20 An integrated bar benefits not only the Court and the bar, but the public
21 as well. The Court has adopted ethical rules for the protection of the
22 public, and the bar’s regulatory function assists the Court in enforcing
23 those rules. But what is equally important is that the bar works
24 proactively to assure that its attorney members comply with the rules.
25 The bar educates it [sic] members on professionalism and ethics and
provides an ethics hotline so that attorneys may receive advice on
specific ethics questions. It assists attorneys with trust account
regulations and law office management. It promotes the competence of

1 its members by establishing sections in specific areas of practice and
2 by educating members in substantive matters of law. The bar is not
3 required to provide these services to fulfill its regulatory function, yet
4 these services promote attorney competence, and they therefore play an
important role in consumer protection and serving public interest.

5 *See* Page 9, Report of the Task Force on the Review of the Role and Governance
6 Structure of the State Bar of Arizona, September 1, 2015, which can be found at:
7 [https://www.azcourts.gov/Portals/74/GOV/REPORT/WebFINALMandGReport%2](https://www.azcourts.gov/Portals/74/GOV/REPORT/WebFINALMandGReport%2008312015.pdf)
8 [008312015.pdf](https://www.azcourts.gov/Portals/74/GOV/REPORT/WebFINALMandGReport%2008312015.pdf).

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10 Petitioners' attempt to narrow the scope of membership fees and cut funding
11 to the State Bar based on Petitioners' ongoing mission to redefine annual dues would
12 come at the expense of Arizona's judicial system and the public. Moreover, the State
13 Bar continues to prove its fiscal responsibility and stewardship each year. The last
14 modest annual fee increase took place in 2017. *See* A.O. 2016-52
15 <https://www.azcourts.gov/Portals/22/admorder/Orders16/2016-52.pdf>. In 2018, the
16 State Bar's Board of Governors advised the Court that the membership fee increase
17 scheduled for 2019 was not necessary and the Court then ordered that there be no
18 increase in membership fees until further order from this Court. *See* A.O. 2018-67
19 <https://www.azcourts.gov/Portals/22/admorder/Orders18/2018-67.pdf>. There has
20 been no increase since 2017.
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24 Contrary to the assertions made in the Petition, the State Bar is a steward of
25 the annual fees that allow the practice of law and protection of the public to be a self-

1 sustaining profession in this state.

2 DISCUSSION

3 **A. The Current Fee Structure Supports the Mission Given to the State** 4 **Bar by the Court.**

5 **I. Protection of the Public**

6 The Petition asks the Court, albeit indirectly, to reevaluate the mission given
7 to the State Bar and move away from protection of the public, and instead yield to
8 what Petitioners believe they *should* have to pay for as attorneys practicing in this
9 state. This position is short-sighted, overlooking the State Bar’s role in aiding the
10 Court to “organize and promote activities that fulfill the responsibilities of the legal
11 profession and its members to the public.” Rule 32(a)(2)(A.) The State Bar’s mission
12 to serve and protect the public also aligns with the Court’s Goal 2: Protecting
13 Children, Families, and Communities, in its 2019-2024 Strategic Agenda, Justice for
14 the Future (“Strategic Agenda”).

15 [16 https://www.azcourts.gov/Portals/0/Communications/JusticeForTheFuture.pdf?ver](https://www.azcourts.gov/Portals/0/Communications/JusticeForTheFuture.pdf?ver=2019-06-28-165330-887)
17 [18 =2019-06-28-165330-887.](https://www.azcourts.gov/Portals/0/Communications/JusticeForTheFuture.pdf?ver=2019-06-28-165330-887)
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20 Petitioners’ proposed definition of “Regulatory Activity” exemplifies
21 Petitioners’ unawareness of how the State Bar’s programs and activities in
22 furtherance of public protection go beyond specialty certification, MCLE
23 compliance, and attorney discipline. For example:
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- 1 • The State Bar’s Fee Arbitration Program is often the first forum that
2 resolves a bar charge based on a fee dispute.
- 3
- 4 • The State Bar’s Conservatorship Program works with the Lawyer
5 Regulation Division to secure and return client funds and files when an
6 attorney facing discipline poses a risk to misappropriation of client funds
7 and/or files.
- 8
- 9 • The State Bar’s Ethics Hotline operates outside of the Lawyer Regulation
10 Division and addresses approximately 2,000 ethics inquiries a year. The
11 Ethics Hotline serves as a resource that disciplinary counsel can direct a
12 member to, to receive ethical guidance, and hopefully avoid the necessity
13 of further remedial action by the State Bar.
- 14
- 15 • The State Bar also operates Member Assistance and Law Office
16 Management Programs. These programs serve as critical resources for the
17 Lawyer Regulation Division to direct members who have been identified
18 with practice management or personal issues that could lead to ethical
19 violations. Disciplinary counsel will utilize these programs to explore
20 proactive assistance for members in lieu of harsher sanctions, where
21 appropriate.
- 22
- 23

24 **II. The Importance of Lawyer Wellness**

25 The Petition also takes issue with the State Bar providing messages related to

1 lawyer wellness. The State Bar and the Supreme Court have a joint interest in lawyer
2 wellness, especially with respect to attorney admissions, lawyer regulation, and
3 issues facing the aging lawyer population. The State Bar and the Court have
4 partnered on wellness education and initiatives. For example, in 2017, the State Bar
5 and the Court partnered and presented an award-winning seminar titled Hidden in
6 Plain Sight: Dementia and its Impact on Lawyers and Judges. The seminar faculty
7 included representatives from the bench, including this Court, attorneys, and mental
8 health professionals to discuss the impact of dementia on the practice of law.
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11 With respect to wellness, the Petition is silent on the role that State Bar
12 programs, like the Member Assistance Program, play in both attorney admissions
13 and discipline. The Court may take into consideration a lawyer's access to and
14 willingness to participate in the MAP program when making decisions with respect
15 to admissions and discipline.
16

17 Promoting lawyer wellness and programs that help identify issues and provide
18 resources to help lawyers falls squarely in line with Keller's second prong of
19 improving the quality of legal services. *Keller*, 496 U.S. at 3. ("The guiding standard
20 for determining permissible State Bar expenditures relating to political or ideological
21 activities is whether the challenged expenditures are necessarily or reasonably
22 incurred for the purpose of regulating the legal profession or improving the quality
23 of legal services"). A healthy, well-adjusted lawyer is less likely to miss important
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1 deadlines, fall ill unexpectedly, and misappropriate client funds. The view that one
2 or a few lawyers should not have to tolerate or contribute a trivial amount to promote
3 and support a healthy lawyer population is misguided.
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5 The duty to protect the public is not owed just by the attorneys who
6 become disabled, who mismanage a law office, or who cheat a client.
7 All attorneys bear a responsibility to protect the public. An integrated
8 bar assures that every attorney—not just half or even ninety percent of
9 attorneys, but every attorney— shares the cost of that responsibility.

10 *See Pg. 9 of the Task Force Report.*

11 Petitioners assert that there are outside resources to provide for health and
12 wellness recommendations. This assertion and Petitioners' focus on a few social
13 media posts overlooks the important role the State Bar plays with respect to lawyer
14 wellness. Not addressed in the Petition are State Bar programs and resources relied
15 upon by the Court in the admissions and disciplinary process that assist with the
16 lawyer wellness component of admission and discipline issues. Moreover, messages
17 that support and champion healthy practitioners falls squarely in line with Keller-
18 permissible messaging.
19

20 **III. Access to Justice**

21 Initiatives that support access to justice appear to fall outside of Petitioners'
22 definition of "Regulatory Activity" (Pet. at 8), and presumably could not be funded
23 with membership fees under the proposed amendments. Yet, promoting access to
24 justice not only falls under the State Bar's mission, Rule 32(a)(2)(B.), but also aligns
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1 with Goal 1 of the Court’s Strategic Agenda. Under Goal 1, the Court commits to
2 “[w]ork with the Foundation for Legal Services and Education and the State Bar of
3 Arizona to improve access to legal services and legal information for individuals
4 with modest incomes.”

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6 [https://www.azcourts.gov/Portals/0/Communications/JusticeForTheFuture.pdf?ver](https://www.azcourts.gov/Portals/0/Communications/JusticeForTheFuture.pdf?ver=2019-06-28-165330-887)
7 [=2019-06-28-165330-887.](https://www.azcourts.gov/Portals/0/Communications/JusticeForTheFuture.pdf?ver=2019-06-28-165330-887)
8

9 The Petition appears to suggest that allocation of funds deriving from
10 membership fees to support access to justice initiatives should cease. Yet, the
11 Petition leaves unanswered how the State Bar is to continue with this part of its
12 mission and support of the Court’s strategic goals after such proposed funding cut.
13

14 **IV. Other State Bar Responsibilities Overlooked in Petition**

15 The Petition leaves open how, if the proposed rule amendments were adopted,
16 the State Bar would be able to fund other important delegated functions. For
17 example, Rule 32(a)(2)(E) provides for the State Bar to:
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19 [C]onduct educational programs regarding substantive law, best
20 practices, procedure and ethics; provide forums for the discussion of
21 subjects pertaining to the administration of justice, the practice of law,
22 and the science of jurisprudence; and report its recommendations to this
23 Court concerning these subjects.

24 Petitioners’ proposal presumably asks that the Court cut funding to support
25 the State Bar’s delivery of CLE, administration of practice area committees, and
support to the Court on matters like proposed rule changes. State Bar committees

1 and staff play a vital role in helping practitioners and the Court in this respect. For
2 example, Arizona Revised Statute § 12-110(A) provides:

3 The state bar, or a representative group selected by the bar, shall act as
4 an advisory board and shall either voluntarily or upon request of a
5 majority of the judges of the supreme court, consult with, recommend
6 to or advise the court on any matter dealt with or proposed to be dealt
with in the rules.

7 The State Bar's practice area standing committees, each year, engage in
8 thoughtful study and discussion of rules related to their respective practice areas. In
9 coordination with these standing committees, the State Bar proposes rule changes
10 and comments to rule changes for the Court's consideration.

11 Additionally, the State Bar also administers both the civil and criminal Jury
12 Instructions Committee, which, under established guidelines, update, and revise jury
13 instructions to ensure that such instructions are current, correct, and concise.

14 These practice area committees, including the Civil Practice and Procedure,
15 Criminal Practice and Procedure, Family Law Practice and Procedure, and Jury
16 Instruction Committees, provide a tremendous amount of value to practitioners and
17 the bench through their study and work to update and refine the rules and practice
18 procedures. The State Bar, as a member-funded organization, provides the forum for
19 this contribution to our legal system.

20 **B. The Supreme Court Has Not Overruled *Keller v. State Bar of***
21 ***California*; and the Two-Pronged Germane Standard is Still the**
22 **Controlling Legal Standard for the State Bar's Expenditures.**
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2 The Petition mischaracterizes the current state of the law by asserting that
3 Petitioners’ proposed revisions to Rule 32 would “bring Rule 32 in compliance with
4 First Amendment precedent.” (Pet. at 2) The Keller standard remains upheld; the
5 State Bar can permissibly fund activities related to lawyer regulation *and* improving
6 the quality of legal services. Keller has not been overturned or interpreted by any
7 circuit court decision to mean that state bars may only use member fees for lawyer
8 regulation as Petitioners advocate for in the Petition. *See Schell v. Chief Justs. of*
9 *Okla. Sup. Ct.*, 11 F.4th 1178, 1190-1191 (10th Cir. 2021).
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12 The Petition asserts inaccurate legal conclusions. For example, in the second
13 paragraph of page 12 of the Petition, Petitioners assert “the State Bar cannot fund
14 non-germane activities *or those of an ideologic nature, period.*” [Emphasis added.]
15 This statement is inaccurate. The State Bar can, in fact, permissibly fund activities
16 of an ideological nature, so long as those activities are germane to regulating the
17 legal profession and/or improving the quality of legal services. *Keller*, 496 U.S. at
18 3. Even if an activity is controversial or ideological, like a diversity program may be
19 to some, it is germane if the activity is an improvement to the quality of legal
20 services. *McDonald v. Longely*, 4 F.4th 229 (5th Cir. 2021) (“The germaneness test
21 does not require that there be unanimity on the Bar’s position on what best regulates
22 the legal profession—that is typically for the Bar to decide”).
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1 Examples of permissible ideological advocacy include this Comment,
2 lobbying activity with respect to the law on the practice of law in Arizona, an amicus
3 brief supporting our position on the integrated bar model to the Ninth Circuit—
4 litigation of which could have a direct impact on how the State Bar can or cannot
5 regulate lawyers in this state. The recent circuit court decisions on the
6 constitutionality of the integrated bar model cited in the Petition, when provided in
7 proper context, all support the aforementioned activities as *Keller*-permissible,
8 germane activity. *See Boudreaux v. La. State Bar Ass’n*, 86 F.4th 620, 631-632 (5th
9 Cir. 2023) (citing to *Keller*, affirming that advocacy regarding activities related to
10 lawyer discipline were “obviously germane”); *McDonald* 4 F.4th at 247-248
11 (“Lobbying for legislation regarding the functioning of the state's courts or legal
12 system writ large, on the other hand, is germane. So too is advocating for laws
13 governing the activities of lawyers *qua* lawyers”).
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17 While this Court has the authority to decide changes to the structure, mission
18 and scope of the State Bar’s activities, whether or not *Keller* is someday overturned,
19 it is worth noting because Petitioners put so much emphasis on the proliferation of
20 anti-integrated bar litigation, that the United States Supreme Court has rejected such
21 attempts to review and overturn *Keller* six times in the last four years. *See Fleck v.*
22 *Wetch*, 140 S.Ct. 1294 (2020); *Gruber v. Oregon State Bar*, 142 S.Ct. 78 (2021);
23 *Crowe v. Oregon State Bar*, 142 S.Ct. 79 (2021); *Schell v. Darby*, 142 S. Ct. 1440
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1 (2022); *McDonald v. Firth*, 142 S. Ct. 1442 (2022); *Taylor v. Heath*, 142 S.Ct. 1441
2 (2022); and *File v. Hickey*, 143 S. Ct. 745 (2023).

3
4 **C. The State Bar is not a Labor Union.**

5 Petitioners also misrepresent the applicability of Article 25 of the Arizona
6 Constitution, which reads:

7 No person shall be denied the opportunity to obtain or retain
8 employment because of non-membership in a labor organization, nor
9 shall the State or any subdivision thereof, or any corporation, individual
10 or association of any kind enter into any agreement, written or oral,
11 which excludes any person from employment or continuation of
12 employment because of non-membership in a labor organization.

13 Petitioners assert that this state constitutional provision addresses a lawyer's
14 right to practice without being a member of the State Bar. (Pet. at 4) This
15 constitutional provision has nothing to do with the State Bar. The clause is silent on
16 professional associations and does not prohibit this Court exercising its authority to
17 require lawyers to belong to the State Bar as a condition to practice law in this state.

18 The State Bar is not a labor organization. Labor organizations exist primarily
19 to bargain with employers for the benefit of the organization's members on things
20 such as working conditions, benefits, and compensation. By contrast, the State Bar
21 does not engage in union-type advocacy on behalf of our members, nor does the
22 State Bar purport to speak in a unified voice on behalf of our membership. Rather,
23 the State Bar is empowered by this Court to organize and promote activities that
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1 fulfill the responsibilities of the legal profession; to promote access to justice; to aid
2 in the administration of justice; to assist in the regulation and discipline of attorneys;
3 to conduct educational programs; and to provide forums for the discussion of
4 subjects pertaining to the practice of law. Rule 32(a)(2). The charges from the Court
5 to the State Bar, as spelled out in Rule 32, do not require the State Bar to heed the
6 political or ideological dispositions of our members or to speak as a voice for our
7 members. Instead, the State Bar's functions are performed under the guiding
8 centerpiece of protection of the public, in conformity with Rule 32.
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11 **D. The State Bar Carries Out Its Mission and Activities in Conformity**
12 **with *Keller*, With a Focus on Protection of the Public.**

13 The State Bar follows a "*Keller*-pure" policy and does not use membership
14 fees to fund activities of a political or ideological nature that are not reasonably
15 related to the legal profession or improving the quality of legal services. This
16 mandate is explicitly set forth in Rule 32(c)(9). Even though the State Bar uses
17 annual fees only for *Keller*-pure lobbying activities, under Rule 32, a member may
18 still object to and receive a refund of the annual fee allocable to those activities. *See*
19 Rule 32(c)(9).
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22 If the Court wishes to further restrict the State Bar's lobbying activities
23 beyond what it has instructed in Rule 32, the Court has the authority to do so without
24 having to institute the amendments proposed in the Petition.
25

1 **E. The Petition Discounts the Important Role and Activities the State Bar**
2 **Engages in to Support the Court and Protect the Public.**

3 The Petition dedicates pages 14-17 to set forth a list of activities that
4 Petitioners assert are non-germane, in addition to lobbying. First, the State Bar
5 engages in very little lobbying, primarily lobbying against bills brought in the
6 legislature to deunify the State Bar. A position on whether a state should have an
7 integrated bar or not is clearly intertwined with lawyer regulation and the practice of
8 law. This is *Keller* permissible lobbying activity. Furthermore, if the Court wishes
9 to set further restrictions on what the Court believes to be permissible lobbying
10 beyond what is held in *Keller*, the Court can certainly do so and modify that mandate
11 to the State Bar without reducing funding to other essential programs and activities
12 described in this comment.
13
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15 When taking a broader look at the important role that the State Bar serves in
16 this state and the important information it communicates to our members, the
17 Petitioners' focus on social media posts or magazine articles minimizes what
18 Petitioners are asking the Court to do, which is to defund all the important programs
19 and services the State Bar provides, except lawyer regulation. The State Bar believes
20 that it operates as a *Keller*-pure organization—however, the Court in *Keller*
21 acknowledged that it set somewhat of an amorphous standard with respect to
22 permissible and impermissible dues-financed activities. *Keller* 469 U.S. at 3.
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1 Recognizing that this Court may have its own ideas of what activities should deemed
2 permissible or impermissible, the State Bar submits that the Court can give directives
3 to the State Bar in that respect. To date, the Court has provided the specific mandate
4 that all the State Bar's lobbying must be in compliance with *Keller*. Rule 32(c)(9).
5 If this Court wishes to provide further directives to the State Bar regarding activities
6 such as advertising, social media posts, and what awards can be given by the State
7 Bar, the Court can certainly provide further mandates to the State Bar short of
8 upending the State Bar's entire financial structure.

11 CONCLUSION

12 The State Bar agrees with Petitioners that this Court is the proper forum to
13 decide the mission, structure, and governance of the State Bar. However, the State
14 Bar opposes the Petition in all other respects. For the reasons set forth in this
15 Comment, the State Bar respectfully requests that the Court deny the Petition.

16 RESPECTFULLY SUBMITTED this 1st day of May 2024.

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20 Lisa M. Panahi
21 General Counsel

22 Electronic copy filed with the
23 Clerk of the Supreme Court of Arizona
24 this 1st day of May 2024.

25 by: PSequin