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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: PETITION TO AMEND SUPREME COURT RULES 32(b) AND (c)	Supreme Court No. R-24-0030 **SECOND REPLY IN SUPPORT OF PETITION TO AMEND RULES 32(b) AND (c), RULES OF THE SUPREME COURT**

On January 10, 2024, Petitioners filed Petition R-24-0030 to amend Rule 32 of the Rules of the Supreme Court of Arizona (the "Initial Petition"). The Court considered the Petition, public comments, and Reply during its 2024 Rules Agenda. On August 22, 2024, the Court continued the Petition and issued an Order setting forth a proposed revision to Rule 32(c)(9) (the "Revised Proposal"). The Order permitted a second public comment period and this Reply.

During the second public comment period, four comments were submitted. Three comments, from academia and jurisdictions that have alternative bar structures, expressed qualified opposition to the Revised Proposal while supporting

the Initial Petition. One comment, from the State Bar of Arizona ("State Bar"), supported the Revised Proposal but provided no legal argument for its position.

For the reasons set forth in the Petition, Reply, and below, the Court should adopt the Initial Petition. Alternatively, the Court should adopt the Revised Proposal with the added definition suggested herein.

DISCUSSION

The Initial Petition would amend Rule 32 by defining "regulatory activities" in subparagraph (b) and by clarifying the limits of the State Bar's permissible activities in subparagraph (c). The Revised Proposal does not define "regulatory activities" and amends only subparagraph (c)(9) pertaining to the payment of dues. To that subparagraph, it adds the language from *Keller v. State Bar of California*, 496 U.S. 1 (1990), recognizing that lawyers cannot be required to subsidize state bar activities that are not "germane to regulating the legal profession and improving the quality of legal services." It also deletes the word "lobbying," which effectively clarifies that lawyers may request refunds for *any* objectionable State Bar activities, not just lobbying.[1] The Revised Proposal, although an improvement, is inadequate as a constitutional and policy matter for the following reasons.

[1] Petitioners do not oppose the edit to Rule 32(c)(9) in the last sentence of the Revised Proposal permitting a member who objects to State Bar activities to request a refund.

First, the Revised Proposal does not protect the free speech and association rights of lawyers. The Revised Proposal merely adds language from *Keller*—an opinion the current Rule already cites—and deletes the term "lobbying." Because they are made to the subparagraph pertaining to dues, these changes attempt to address only the compelled speech concern that *Keller* discusses, not the compelled association concern that *Keller* did not address.

More recent and instructive federal authorities, however, do address the compelled association claim. *See Crowe v. Oregon State Bar* ("*Crowe II*"), 112 F.4th 1218, 1239–40 (9th Cir. 2024) (bar's non-germane statements failed exacting scrutiny and violated associational rights); *Boudreaux v. Louisiana State Bar Ass'n*, 86 F.4th 620, 632–33 (5th Cir. 2023) (bar's social media posts about the benefits of eating broccoli and charity drives, and its promotion of "Pride Month," the "St. Thomas Moore Red Mass," and certain news articles failed exacting scrutiny and thus violated associational rights); *McDonald v. Longley*, 4 F.4th 229, 248 (5th Cir. 2021) (non-germane lobbying activity violated associational rights); *Schell v. Chief Just. & Justs. of Okla. Sup. Ct.*, 11 F.4th 1178, 1193–95 (10th Cir. 2021) (recognizing claim for violation of associational rights premised upon two articles in the bar's publication); *Crowe v. Oregon State Bar* ("*Crowe I*"), 989 F.3d 714, 727–29 (9th Cir. 2021) (recognizing claim for violation of associational right *Keller* did not address). Without comprehensive changes that address compelled

speech *and* association concerns, Rule 32 is incomplete and provides inadequate guidance to the State Bar as to its constitutional authority.

Second, the Revised Proposal essentially enshrines the status quo because the changes provide the State Bar with no guidance as to how to comply with the more recent authorities concerning associational claims, or even what conduct constitutes "regulating the legal profession and improving the quality of legal services." Consequently, the Revised Proposal tacitly authorizes the State Bar to maintain its capacious view of *Keller*. Indeed, the State Bar claims that all its activities and publications improve the quality of legal services, which would include activities like a news release in response to the killing of George Floyd, movie theater advertising to "raise awareness of the State Bar," and general wellness suggestions. *See, e.g.*, State Bar Comment to the Initial Petition ("Bar Cmt.") at 6–7.

What the Rule is missing—and needs—is a limiting principle as to what constitutes "regulating the legal profession and improving the quality of legal services." Otherwise, the State Bar is free to ascribe any arguably salutary activity to this goal. A limiting principle is precisely what the Initial Petition offers, and what the Revised Proposal could offer by adding language that better defines *Keller*'s holding. The more recent authorities addressing lawyers who brought freedom of association claims against mandatory bars are helpful in that regard.

See Boudreaux, 86 F.4th at 633 (requiring the conduct to have an "inherent connection" the state's need to regulate lawyers *qua* lawyers); *McDonald*, 4 F.4th at 247–48 (activities directly related to lawyers in their capacity as lawyers can be germane, while activities, disputes, or cases that merely involve lawyers may not be germane). Short of adopting the Initial Petition, perhaps the simplest change to Rule 32 that borrows the best from both proposals would be to have the Revised Proposal also define the term "germane" in the context of *Keller* and the more recent federal authorities interpreting it. This addition is needed to guide the State Bar's understanding of its proper constitutional authority.

I. Rule 32 Should Protect Lawyer's Speech and Associational Rights.

Keller holds that a mandatory state bar association cannot use dues to engage in expressive conduct that does not serve the government's interest in compelling lawyers to join and pay dues. 496 U.S. 13–14. That interest is "regulating the legal profession and improving the quality of legal services," a standard the *Keller* opinion acknowledges is often difficult to apply. *Id*. If the Bar engages in conduct that is "non-germane," then the Bar violates a lawyer's rights under the First Amendment because it compels them to subsidize speech without justification.

Keller provides a remedy if that happens: a lawyer who objects to the non-germane conduct may request a refund of that lawyer's share of the dues spent on

the activity. This refund process supposedly "cures" the compelled speech injury, with the objecting lawyer receiving a few pennies or dollars after going through the refund process. This small sum is refunded only if the lawyer (a) becomes aware of the non-germane conduct (which often will not happen because a lawyer who objects to subsidizing the Bar's trade-association type behaviors will not typically be a consumer of the bar's output) and (b) decides to object and put herself through the refund process to recover those pennies. The refund simply allows the Bar to claim that rights were not violated because it gave back the money, supposedly curing the compelled speech injury in this trivial respect. But in reality, the refund does not even do that because the Bar has already used the lawyer's dues to fund the non-germane activity, refunding the lawyer her pennies after the fact. The lawyer still subsidized the speech and suffers a constitutional injury much greater than the few cents she might receive from the Bar in recompense. Despite these deficiencies, the current Rule 32 sets forth this refund process in subparagraph (c)(9) because it arguably complies with *Keller*.

Keller provides minimal, and admittedly amorphous, safeguards for a lawyer's right under the First Amendment in terms of compelled speech. But *Keller* was never understood—as the State Bar believes—to be a permission slip for state bars to engage in *any* activities that improve society and derivatively the quality of legal services, or to engage in political and ideological activities so long

as a refund mechanism exists. *See* Bar Cmt. at 10 ("The State Bar can, in fact, permissibly fund activities of an ideological nature, so long as those activities are germane to regulating the legal profession and/or improving the quality of legal services.") The current Rule 32 states that the State Bar must comply with *Keller*, and yet, as Petitioners have argued, it supplies only the constitutional minimum for a compelled speech concern and, standing alone, provides the State Bar with no guidance as to how to comport its activities under the First Amendment and the Arizona Constitution's free speech guaranty. Indeed, the minimal protection for the free speech rights of lawyers under *Keller* do not comport with the "Arizona Constitution['s] … broader protections for free speech … ." *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 281 ¶ 45 (2019).

What's more, compelled speech is only one way a lawyer's speech rights can be injured. A lawyer's associational right can also be violated, and that right does not depend on the expenditure of dues. Afterall, state bars can make non-germane statements or online posts that cost the bar nothing or virtually nothing. *See, e.g.*, *Crowe II*, 112 F.4th at 1227 *and Boudreaux*, 86 F.4th at 638. State bars can also engage in non-germane conduct and publish non-germane materials that are effectively funded through advertising or fees and not mandatory dues. But if a lawyer objects under the current Rule 32, or as modified by the Revised Proposal, the State Bar can simply state that it expended no dues related to the conduct and

therefore the Constitution and *Keller* are satisfied. As *Crowe II*,[2] *Boudreaux*, and *McDonald* recognize, this is incorrect.

Keller did not address the violation of attorneys' associational rights when a state bar engages in non-germane conduct. *See Crowe I*, 989 F.3d at 728. The recent authorities applying *Keller*'s precepts have. The Initial Petition builds upon those cases to provide a framework for Rule 32 to better guide the State Bar and provide comprehensive protection for lawyer's speech and association rights. The Revised Proposal does not, but perhaps could if it at least better defined "germane" in the context of *Keller*. Those more recent authorities provide helpful guidance in that regard.

Since *Keller*, and particularly since *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), where the Court overruled the rationale *Keller* relied upon, courts have clarified the constitutional protections that should be afforded attorneys compelled to join a state bar association. *Crowe II*, *Boudreaux*, and *McDonald* applied *Keller*, and refined the standard in the freedom of association context.

[2] Indeed, Plaintiff Crowe objected and received his small rebate from the Oregon State Bar, but the Ninth Circuit Court of Appeals nevertheless concluded that the bar violated his associational rights because the bar's statement in its monthly publication was non-germane. *Crowe II*, 112 F.4th at 1239. Thus, *Keller*'s refund procedure to redress the compelled speech harm was inadequate to cure the forced association harm.

In *Crowe I*, the Ninth Circuit noted that while *Keller* provided a framework for determining the germaneness of bar activities, *Keller* did not address the freedom of association claim. 989 F.3d at 727. But the Ninth Circuit used *Keller*'s framework to resolve the freedom of association claim in the plaintiffs' favor. There, the Oregon Bar insisted that statements it made and endorsed in its monthly publication were germane to "improving the quality of legal services" because they concerned upholding "the rule of law" and protested rising violence and white nationalism. In fact, the statements were a thinly veiled attack on then-President Trump and his supporters. *Id.* at 723. Although the Oregon Bar insisted the statements were germane, it also argued that it complied with *Keller* because it refunded dues to members who objected to the statement.[3] *Id.* The Ninth Circuit, however, disagreed and held that the statements violated the plaintiffs' right of freedom of association because they were not "necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality'" of legal services. *Crowe II*, 112 F.4th at 1239 (citation omitted). *Crowe* thus clarifies two key points relevant here: *first*, compulsory bar membership may violate the right of freedom of association; *second*, even a single instance of bar conduct may violate that right. *Id.* at 729.[4]

[3] The OSB sent plaintiff Crowe a refund of $1.14. *Id.*

[4] There is no *de minimis* exception to *Keller*. *See Boudreaux*, 86 F.4th at 636.

In *Boudreaux*, the Fifth Circuit built upon *McDonald*, to conclude that even a handful of seemingly innocuous bar activities that cost the bar nothing or practically nothing can result in a constitutional violation. *McDonald* concluded that the Texas bar's lobbying activities failed exacting scrutiny and thus violated the association rights of Texas lawyers because the activities were not germane to regulating lawyers *qua* lawyers. 4 F.4th at 246-47. The *McDonald* decision was filed while *Boudreaux* was pending and caused the Louisiana State Bar Association to terminate its legislative activity and political advocacy. But terminating legislative activities alone was insufficient to avoid a constitutional injury. The Fifth Circuit later concluded that the Louisiana State Bar Association nevertheless violated lawyer's associational rights by using its social media accounts and website to amplify certain news accounts, promote "wellness" and charitable activities, and recognize "Pride Month," among other activities.

The Fifth Circuit held, "[w]e generally give bar associations leeway in determining how best to improve legal services, as is appropriate given their expertise in regulating the legal profession. But if bar associations may opine, advise, and inform on anything that they deem is generally conducive to attorney health and wellness, there is no limiting principle." *Boudreaux*, 86 F.4th at 632 (internal citation omitted). *Boudreaux* gives a limiting principle, "[i]f a bar association is going to force individuals to associate with and pay for speech, that

speech must be germane." *Id.* at 640. Understanding that judging germaneness is difficult, the Court explained that germaneness requires an "inherent connection to the practice of law," not a mere "connection to a personal matter that might impact a person who is practicing law." *Id.* at 633 (emphasis added). *Boudreaux* provides the much-needed limiting principle that state bars have needed since interpreting *Keller* to give it wide authority.[5]

These cases clarify that *Keller* is the bare minimum of constitutional protections that state bars can offer their compelled members and that state bars must limit their activities to only those that are germane. Here, the Court must amend Rule 32 to ensure compliance with *Keller* **and its progeny** to provide minimal safeguards for the compelled attorneys' First Amendment rights.[6]

But the Court may—and should—choose to go beyond federal constitutional minimums of the First Amendment and employ more robust protections under our state constitution. Ariz. Const. art. II § 6 and art. XXV.

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[5] The Tenth Circuit recognized a viable freedom of association claim premised upon the subject matter of two articles the bar published in its monthly publication. *Schell*, 11 F.4th at 1182.

[6] Indeed, this would not be the first instance where it was necessary to curtail the State Bar to comply with the First Amendment. *See Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977). In *Bates*, the State Bar believed that it was necessary to infringe upon lawyer's First Amendment rights or else the sky would fall by undermining professionalism and negatively affecting the administration of justice. This argument is the same argument the State Bar invokes here, but as proven by *Bates*, complying with the First Amendment does not cause the sky to fall.

II. Definitions are Necessary to Provide Meaningful Change to the State Bar.

Petitioners proposed a definition of regulatory activities in the Initial Petition. The Revised Proposal omits that definition or any other definition to guide the State Bar in understanding the meaning of *Keller* and the cases that have interpreted it. If the Court should adopt the Revised Proposal, it would be necessary to add one or more definitions to aid the State Bar's understanding of germaneness.

In other contexts, definitions start an analysis of understanding a word's original, natural meaning. *See, e.g.*, *Matthews v. Indus. Comm'n of Ariz.*, 254 Ariz. 157, 163 ¶ 29 (2022). That should also be the case here. As State Bar presidents and leadership change, these definitions will guide the State Bar's understanding that existed with this change.

As mentioned, the State Bar claims that its activities are germane because they "improve the quality of legal services," even if those activities are ideological in nature. Bar Cmt. at 10 ("Even if an activity is controversial or ideological … it is germane if the activity is an improvement to the quality of legal services.").

But the test for germaneness should require an "**inherent connection to the practice of law**." *Boudreaux*, 86 F.4th at 633 (emphasis added).[7]

Some examples that *Boudreaux* cited as non-germane activities included promotion of student loan policies, celebrating pride month, and wellness activities. Only a few examples of activities the State Bar deems germane were included in the Initial Petition, but they are of the same kind. Only a few more illustrations are included here, but this is not an exhaustive list of the non-germane activities that the State Bar engages in:

- *Arizona State Bar Website*. The State Bar website is regularly updated based upon the State Bar's determined priorities. Recently, the main page featured a promotion of the Lost Dutchman Marathon.[8]
- *Social Media*. The State Bar continually posts with very limited engagement. The most recent posts have filled members' social media feeds with reminders to pay dues but have also included posts about a

[7] *See also* Alexander Volokh, Comment in Opposition of the Revised Proposal (Oct. 1, 2024) (urging the Court to adopt the Fifth Circuit's standard for germaneness because "constitutional rights are at stake.").
[8] State Bar of Arizona, https://www.azbar.org/ (last visited Oct. 10, 2024).

"top consumer issue:": identity theft.[9] There was also information on celebrating National 401(k) day.[10]

- *Arizona Attorney Magazine*. The State Bar spends significant time and money on curating its monthly magazine that has many topics unrelated to the practice of law. In fact, the State Bar was proud of its communications accomplishments when it received an award for their coverage on the anniversary of the Vietnam War.[11]

Also troubling are statements the State Bar published in recent issues of Arizona Attorney Magazine. Those statements amount to solipsistic stories from the current State Bar president,[12] about his past alcohol abuses,[13] and a scheme to

[9] State Bar of Arizona, https://twitter.com/AZStateBar/status/1836888150955684348 (Sept. 19, 2024).
[10] State Bar of Arizona, https://twitter.com/AZStateBar/status/1832146966492467634 (Sept. 6, 2024).
[11] Taylor Tassler, *Arizona Attorney Magazine Wins National Award For Vietnam Anniversary Coverage*, State Bar of Arizona (Nov. 8, 2023), https://www.azbar.org/news-publications/news-releases-articles/arizona-attorney-magazine-wins-national-award-for-vietnam-anniversary-coverage/.
[12] Prior to his role as President, Mr. Schmidt filed a comment on behalf of several managing partners rejecting the Initial Petition because it sought "to limit the activities of the State Bar of Arizona to purely regulatory functions." *See* Ted A. Schmidt, Comment in Opposition (May 1, 2024).
[13] Tim Eigo, *New Bar President Ted Schmidt: Act, Don't Promise*, State Bar of Arizona (Aug. 2024), https://www.azattorneymag-digital.com/azattorneymag/library/item/20240708/4209116/.

bribe Mexican judicial officers to help free a client.[14] While seemingly excusing his own past conduct, these published statements appear to transgress a number of ethical rules, thus flouting the regulatory purpose of the Bar; in other words, they are the opposite of "germane" conduct.[15]

Indeed, in the same issue of the Arizona Attorney Magazine, where the current State Bar President discloses confidential information about a former client including client names, the State Bar included an article that Arizona attorneys should not include even mundane details about a client when seeking help from online groups or resources—even when the client's name is never revealed.[16] By this the State Bar is not only engaging in non-germane activities, but sending a message to its members that the rules are for thee and not for me.[17]

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[14] Ted A. Schmidt, *President's Message: Where Mordida Replaces the Rule of Law*, State Bar of Arizona (Sept. 2024), https://www.azattorneymag-digital.com/azattorneymag/library/item/202409/4215283/.

[15] At minimum this would violate Ariz. St. Ct. Rule 42, EPC ER Rule 3.3(b), Rule 3.5(a), (b) and (d), and Rule 8.4(a)–(f), Rule 1.4(a)–(c). And by disclosing confidential and sensitive information about a former client, likely a violation of Rule 1.6.

[16] Patricia A. Sallen, *An Email Community is Not Your Law Firm*, State Bar of Arizona (Sept. 2024), https://www.azattorneymag-digital.com/azattorneymag/library/page/202409/8/.

[17] One activity that is germane that the State Bar should engage in—and is its own rule that it should comply with—is transparency. The State Bar is subject to the public records policy approved by the Court. Ariz. S. Ct. Admin. Order No. 2017-102. However, the State Bar too broadly applies exemptions as to swallow the rule. For example, Petitioners sent a records request seeking any studies or records conducted by the State Bar assessing the costs of the State Bar's regulatory and non-

The non-germane activities that the State Bar engages in are best left to other voluntary organizations. In fact, the State Bar itself admits that "Arizona's legal community is enriched by a variety of specialty and county bar associations."[18] As commenter Daniel Gutman noted, Nebraska was able to limit its mandatory bar dues for the regulation of the legal profession and allows for voluntary dues for the other purposes.[19] Thus, if the State Bar wishes to engage in these non-germane activities it can do so in a voluntary manner and, as Nebraska has successfully shown, this would not meaningfully affect programs and services in the state. This would also allow voluntary bar associations to flourish and innovate.

Petitioners propose one or more of the following definitions to be added to Rule 32(b):

"Germane" means conduct or expenditures with an inherent and direct connection to regulating the legal profession and improving the quality of legal services. [20]

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regulatory activities. The State Bar denied the request. The Petitioners sent the same records request to this Court and the Court promptly provided the documents.

[18] Partner Bar Organizations, State Bar of Arizona, https://www.azbar.org/for-legal-professionals/communities/partner-bar-organizations/.

[19] Daniel Gutman Comment in Opposition to the Revised Proposal (Oct. 1, 2024).

[20] *See* GERMANE, Black's Law Dictionary (12th ed. 2024); *Boudreaux*, 86 F.4th at 633.

"Regulating the legal profession and improving the quality of legal services" means conduct or expenditures related to the administration and enforcement of rules relating to licensing, continuing legal education, discipline, disability, and reinstatement of lawyers and legal paraprofessionals.[21]

The definitions provided will ensure compliance with the minimal requirements of *Keller* and the subsequent authorities that have applied *Keller* in the context of the right of freedom of association.

CONCLUSION

Petitioners respectfully request the Court adopt the amendments, as previously proposed in the Initial Petition to Rules 32(b) and (c). Alternatively, Petitioners request the Court adopt the Revised Proposal amending Rule 32(c)(9) only if it includes further revision to the definitions of "germane" and "regulating the legal profession and improving the quality of legal services" as recommended here.

[21] *See* Initial Petition. *See, e.g.*, IMPROVE, Merriam-Webster, https://www.merriam-webster.com/dictionary/improve; LEGAL SERVICES, Legal Information Institute, https://www.law.cornell.edu/wex/legal_services.

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