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**IN THE SUPREME COURT  
STATE OF ARIZONA**

In the Matter of:

**PETITION TO AMEND ARIZ. R.  
SUP. CT., RULE 32 (C) (9)**

Supreme Court No. R-15-0003

**Comment to Pending Petition to  
Amend Ariz. R. Sup. Ct., Rule  
32(c)(9)**

Petitioner Peter Stutsman makes a simple two-part proposal. First, he asks the Supreme Court to adopt amendments mandating greater transparency to improve the State Bar of Arizona's accounting of the mandatory fees paid by active and inactive members. Second, he petitions for the appointment of a "truly independent task force" to comprehensively review whether or not the State Bar functionally performs its responsibilities without impinging on the Constitutional rights of its members. I urge this Court to grant his petition in its entirety.

The Petitioner readily acknowledges the current existence of a mission and governance task force. But his focus is on a different objective outside the scope contemplated and undertaken by the *Task Force on the Review of the Role and*

*Governance Structure of the State Bar of Arizona* established under Administrative Order No. 2014-79.

In addition, by petitioning for a new and different task force "comprised of individuals from all diverse membership groups of the State Bar and not be limited by the State Bar's own committee rules restricting membership solely to those in the active membership groups or disproportionately weighted like the current task force with members having past service on the Board of Governors," he is impliedly arguing for a less insular task force disinclined to the biased predilections of engrained stakeholders ensnared by institutional biases.

### **Keller-Purity**

The State Bar contends that since 1994, in accord with *Gibson vs. Florida State Bar*, 906 F.2d 624 (11th Cir. 1990), it has bathed in the waters of *Keller-purity*. But the mantra of being "Keller-pure" is more conclusion than confirmation, more catchphrase than corroboration.

The fact is that in *Keller v. State Bar of California*, 496 U.S. 1, at 3 (1990) the Court did not provide clear guidance on "precisely where the line falls between permissible and impermissible dues-financed activities." Consequently, what is deemed "ideological" or "political" is too often left to the eye of the beholder or here, simply to whatever the State Bar says it beholds.

There is considerable terrain covering the activities regulating the legal profession and improving the quality of legal services, especially when the State Bar self-interestedly subscribes to a rather expansive definition of its core functions.

Moreover, while the State Bar cavalierly presumes that by mere virtue of admission to the Bar, all members, whether active or inactive, are obligated to support its mission, this decree is hardly in line with *Keller's* attempted balancing of interests between lawyer freedom of speech and state interests in regulating the legal profession and improving the administration of justice.

Although the Supreme Court in *Keller* found that no dues rebate was needed for lobbying on matters related to improving the quality of justice, logically it is hard to see why a person should be compelled to fund an association's propagation of views with which she or he disagrees, merely because these views relate in some way to the quality of justice and the person happens to be a lawyer. As we have seen, apparently benign proposals often involve significant philosophical disputes over the role of states in our federal system of government, differing attitudes towards various types of business activity, or divergent beliefs about the economic effects and social wisdom of encouraging or discouraging different types of claims. Bradley A. Smith and Allan Falk, *The Future of the Unified Bar*, Mackinac Center for Public Policy, available at <http://www.mackinac.org/5454> (last visited May 20, 2015)

In addition, as the Petitioner points out noting the "settled line of cases," including more recently, *Kingstad v. State Bar of Wisconsin*, 622 F.3d 708, 712-13 (7th Cir. 2010), the State Bar's narrow focus on the "ideological" and the "political" ignores emerging Constitutional jurisprudence implicating a

"germaneness" analysis.

Citing *Knox v. Service Employees Intern. Union*, 628 F. 3d 1115 (2012), the Nebraska Supreme Court, for example, *In re Petition for Rule to Create Vol. State Bar Assn.*, 286 Neb. 1018, at 1033, (Dec. 6, 2013) declared, "However, the *Kingstad* analysis and its reliance on *United Foods, Inc.* appear to be reinforced by the U.S. Supreme Court's recent *Knox* opinion. The *Knox* Court explained its decision in *United Foods, Inc.* as follows:

We made it clear that compulsory subsidies for private speech are subject to exacting First Amendment scrutiny and cannot be sustained unless two criteria are met. First, there must be a comprehensive regulatory scheme involving a "mandated association" among those who are required to pay the subsidy. . . . Such situations are exceedingly rare because, as we have stated elsewhere, mandatory associations are permissible only when they serve a "compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms." . . . Second, even in the rare case where a mandatory association can be justified, compulsory fees can be levied only insofar as they are a "necessary incident" of the "larger regulatory purpose which justified the required association."

That second criterion set forth in *Knox* reinforces the *Kingstad* "germaneness" analysis and the significance of that factor in protecting "associational freedoms." The two-part *Knox* test focuses directly on the *United Foods, Inc.* characterization of *Keller* despite the "mundane commercial nature of [the] speech." [internal citations omitted]

Understandably, Nebraska's high court concluded there appeared to be "ample support for the view expressed in *Kingstad* that germaneness is central to a modern view of *Keller*." Meanwhile in Arizona, by continuing to rely solely on *Gibson* and by ignoring the recently changing post-*Keller* landscape, the State Bar

again demonstrates the merits of Petitioner's request calling for objective third-party intervention. The State Bar is blindly unable and stubbornly unwilling to undertake a critical self-assessment when it comes to addressing the associational freedoms of its compulsory members.

**A detailed accounting**

The fact remains that since mandatory bar associations "possess the facts and records, basic considerations of fairness compel that they" -- not the member bear the burden of proving that expenditures are germane and chargeable. *Chicago Teachers Union v. Hudson*, 475 U.S. 292, at 306 (1986). Unfortunately, Petitioner was compelled to file his Petition to amend Rule 32 and to request the creation of a task force only after his repeated requests from 2011 to 2014 for a detailed accounting of Bar expenditures were offhandedly and repeatedly ignored.

Moreover, with respect to the Bar's grievance procedure, although the Petitioner based his requests on *Keller*, not once in his various and protracted communications with Bar leadership, management and employees, was reference made by the State Bar to its supposed "Keller-pure" obligations or was advice given concerning the procedures available to Petitioner under Article XIII for possible resolution of his grievances.

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## Taxation without representation

As an inactive member of the State Bar, at \$265 per year, the Petitioner pays dues exceeding the annual inactive membership fees of all other jurisdictions and in some cases the fee surpasses what some jurisdictions charge their active members. *International Survey of Attorney Licensing Fees*, Compiled July 1, 2013 by Office of Attorney Ethics of New Jersey. See Exhibit A.

Despite this significant fee, Petitioner is not only precluded from accessing various programs and services, more importantly -- he is also disenfranchised. In the same way that active members who reside out-of-state are not permitted to vote in Board of Governor elections, inactive State Bar members are likewise deprived of their right to vote.

And whether active or inactive, all members of a compulsory bar association have the right to a complete accounting of how the State Bar spends its mandatory dues. This further includes providing active and inactive members with a detailed and transparent accounting of the Bar's lobbying activities notwithstanding the Bar's conclusory *Keller*-pure imprimatur.

For the foregoing reasons, I urge the Court to amend Rule 32 by adopting the proposed amendment. I also endorse Petitioner's request that this Court authorize a separate and "truly independent" task force to properly, disinterestedly, and thoroughly assess whether or not the State Bar is adhering to Constitutional

associational freedoms and the limits set by U.S. Supreme Court compelled-speech jurisprudence.

Respectfully submitted this 20th day of May, 2015

By /s/ Mauricio R. Hernandez  
Mauricio R. Hernandez (#020181)

# EXHIBIT "A"

# International Survey of Attorney Licensing Fees

*Ranked By Mandatory Annual Fee and Attorney Population*

Compiled July 1, 2013 by Office of Attorney Ethics of New Jersey

## A. UNITED STATES

Maximum Fee = \$3,722;

Average Fee = \$396;

Minimum Fee = \$130

Rank By Attorneys	Rank By Fees	Jurisdiction		Total Attorneys	Maximum Mandatory Annual Fee	Earmarked For Discipline-	Earmarked For Client Protection	Mandatory Malpractice Fee	Inactive Fee
26	1	Oregon*	z	19,000	\$3,722		\$45	\$3,200	\$125
46	2	Alaska*		4,164	\$660		\$10		\$215
14	3	Connecticut-	yy	38,537	\$640		\$75		
25	4	Tennessee	w	21,000	\$570	\$140	\$10		\$70
41	5	New Hampshire*		7,235	\$520	\$195			\$200
7	6	Texas*	y	89,987	\$510				\$80
40	7	Hawaii*		7,497	\$504	\$220	\$30		\$153
23	8	Arizona*		22,407	\$480		\$30		\$285
22	9	Wisconsin*		24,097	\$480	\$155	\$25		\$112
32	10	Nevada*		11,200	\$450		\$25		\$125
24	11	Louisiana*		21,493	\$435	\$235			
43	12	Idaho*		5,808	\$425		\$20		\$150
39	13	Rhode Island*		7,996	\$425	\$200	\$15		\$50
33	14	Utah*		10,529	\$425	\$72	\$20		\$150
50	15	South Dakota*		3,100	\$415				\$100
2	16	California*		242,762	\$410	\$25	\$40		\$125
42	17	New Mexico*		8,829	\$400	\$150	\$15		\$80
45	18	Montana*		4,742	\$385	\$125	\$20		\$150
51	19	North Dakota*		2,570	\$380	\$75			
19	20	North Carolina*	x	32,174	\$375		\$25		
8	21	Illinois+		91,227	\$342	\$200	\$25		\$105
34	22	Nebraska*		9,808	\$335	\$80			\$125
29	23	Alabama*		17,200	\$325		\$25		
18	24	Washington*		35,190	\$325		\$30		\$200
27	25	Kentucky*		17,476	\$310		\$7		
35	26	Mississippi*		8,380	\$310				\$50
13	27	Michigan*-		41,222	\$305	\$110	\$15		\$218

Rank By Attorneys	Rank By Fees	Jurisdiction	Total Attorneys	Maximum Mandatory Annual Fee	Earmarked For Discipline--	Earmarked For Client Protection	Mandatory Malpractice Fee	Inactive Fee
17	28	Missouri*	35,546	\$305	\$101			\$50
48	29	Wyoming*	3,882	\$305				\$188
9	30	Massachusetts	67,735	\$300				\$150
28	31	Oklahoma*	17,232	\$275				
3	32	Dist. of Columbia*	89,030	\$285	\$88	\$3		\$130
4	33	Florida*	88,512	\$285		\$25		\$175
31	34	South Carolina*	14,735	\$280	\$50	\$20		\$140
20	35	Minnesota	27,889	\$254	\$122	\$12		\$211
11	36	Virginia†	46,314	\$250		\$25		\$113
37	37	West Virginia*+	8,798	\$250				\$100
12	38	Georgia*+	44,048	\$242				\$121
15	39	Colorado	38,871	\$225		\$40		\$85
36	40	Iowa	9,100	\$225	\$175	\$50		
49	41	Vermont	3,248	\$210				\$85
8	42	Pennsylvania	73,108	\$200	\$130	\$35		\$185
5	43	New Jersey	91,387	\$199	\$135	\$50		
30	44	Kansas	15,821	\$185				\$65
1	45	New York	279,881	\$188	\$60	\$30		
44	46	Maine	5,225	\$182		\$20		\$86
38	47	Arkansas	8,700	\$175		\$17		\$88
10	48	Ohio	61,713	\$175				
47	49	Delaware	4,048	\$150	\$50	\$45		\$50
21	50	Indiana	24,803	\$145	\$85			\$73
16	51	Maryland	36,000	\$130	\$110	\$20		

**TOTAL LAWYERS** 1,915,329

- \* Several disciplinary system budgets specifically earmark in advance the dollar amount of the annual fee allocated to discipline.
- \* Mandatory Bar State
- + Proposed future increase pending or approved
- v Bar Facility Assessment (\$50) and CPF Assessment (\$25) for 4 years.
- w State tax on attorney licenses (\$400).
- x \$50 of this amount is a mandatory Judicial Campaign Surcharge which the State Bar collects but receives no benefit from. Money is disbursed to State Board of Elections.
- y State tax on attorney licenses (\$265).
- yy State or local tax on attorney licenses (\$585).
- z \$3,200 average mandatory malpractice fee. Average Nationwide Annual Fee excluding Oregon malpractice charge is \$333.