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IN THE SUPREME COURT

STATE OF ARIZONA

In the Matter of: **PETITION TO AMEND ARIZ. R. SUP. CT., RULE 32**	Supreme Court No. R-16-0013 **COMMENT OF THE GOLDWATER INSTITUTE**

The revisions to Rule 32 proposed on May 13, 2016, move away from the dark depths of coercion and toward the freedom of choice promised by the Arizona Constitution. But they could easily come closer to that sunlit upland. The Goldwater Institute therefore writes to urge you to consider adopting revisions to Rule 32 that will better protect the rights of Arizona attorneys.

First, while the State Bar plays a large role in regulating the practice of law, it is not subject to ordinary transparency measures such as public records laws. The proposed Rule 32(m) addresses this problem, but the State Bar should simply be

subject to the normal public records and open meeting requirements that already apply to other regulatory agencies in the State.[1]

Second, allowing members to opt-out of the State Bar's lobbying activities is an important step in the right direction. As you know, the First Amendment constrains the State Bar's ability to fund lobbying activities through involuntary dues, and an opt-out process is required under *Keller v. State Bar*[2] and similar cases. But the opt-out procedure does not go far enough to protect this vital constitutional freedom. Opt-out "nudges" individuals to acquiesce because "people have a strong tendency to go along with the status quo or default option."[3] Instead, the burden should be on the Bar, and attorneys should be asked to "opt-in" to lobbying activities—rather than placing the burden on dissenting attorneys to "opt-out."

Since *Keller*, the U.S. Supreme Court has subsequently recognized that opt-out "creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree."[4] The Court called the opt-out rule "an anomaly" in First Amendment law, because courts normally "'do

[1] *See, e.g.,* Ariz. Rev. Stat. § 39-121 *et seq*. (Arizona public records laws); Ariz. Rev. Stat. § 38-431 *et seq*. (Arizona public meeting laws).
[2] 496 U.S. 1 (1990).
[3] Richard H. Thaler & Cass R. Sunstein, *Nudge* 8 (2008).
[4] *Knox v. SEIU*, 132 S. Ct. 2277, 2290 (2012).

not presume acquiescence in the loss of fundamental rights.'"[5] An opt-out rule presumes acquiescence in the loss of fundamental rights, because it presumes that an attorney is willing to give up his right not to subsidize political speech with which he disagrees—unless and until he chooses to "opt out."

Opt-out procedures "shift the advantage of . . . inertia,"[6] away from individual citizens, and give a unique benefit to the State Bar, even though it has "no constitutional entitlement to the fees" that it compels members to pay.[7] That shift poses a serious risk to First Amendment rights, because people will tend to go along with the status quo—either because they assume the benefit from doing so will be smaller than the burden of seeking a refund, or because they are afraid to draw attention to themselves by opting out. Given the State Bar's power to regulate the practice of law and threaten an attorney's license and livelihood, putting the burden on an attorney to inform the Bar that she does not wish to fund its lobbying puts that attorney at odds with her regulator. These considerations led the Supreme Court to hold in *Abood* that forcing dissenters to disclose the specific causes they oppose violates their right to privacy, and "may subject [them] to economic reprisal, threat of physical coercion, and other manifestations of public hostility

[5] *Id.* (quoting *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.,* 527 U.S. 666, 682 (1999) (internal quotation marks omitted)).
[6] *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).
[7] *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 185 (2007).

and might dissuade [them] from exercising [their] right[s]."[8] By imposing a similar burden on attorneys' free speech rights, opt-out infringes the constitutionally protected right of free speech.

Opt-out thus undermines the laudable intentions of revised Rule 32(c)(8), and therefore falls short of the requirement that the rule be "carefully tailored to minimize the infringement of free speech rights."[9]

Only *affirmative consent,* or "opt-in," will satisfy the careful tailoring requirement.[10] Opt-in would ensure that the Bar could continue to engage in political activities as it chooses—but would ensure that it not do so with money taken from members against their will. The proposed revision to Rule 32(c)(8) could easily be modified to reflect the importance of affirmative consent:

> The annual member fee statement shall specify that a member may opt ~~not~~ to pay that portion of the annual fee allocated to the State Bar's lobbying activities. The executive director shall calculate that portion, and shall include on the fee statement the dollar amount of the annual fee ~~reduction~~ SUPPLEMENT if the member opts ~~not~~ to pay that portion.

A simple check-box would suffice to accomplish opt-in: if the box is checked, the member pays for lobbying; if the box is blank, the member does not contribute to speech with which she disagrees. Opt-in embodies a basic rule of

[8] *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 241 n.42 (1977) (internal quotations and citations omitted).
[9] *Knox*, 132 S. Ct. at 2291 (internal quotations and citation omitted).
[10] *Id*. at 2995.

fairness: before taking people's money for political activities, the State Bar should have to ask first.

There is another, more fundamental way that the Proposed Rule does not go far enough: Membership in the Arizona State Bar should not be compulsory; it should be voluntary. The Goldwater Institute opposes conditioning the practice of law on bar membership because coerced membership violates the rights to free speech and free association guaranteed by the United States and Arizona Constitutions.

It is a "bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support."[11] The First Amendment and the Arizona Constitution forbid the government from forcing people to speak against their will—and "compelled funding of the speech of other private speakers or groups presents the same dangers as compelled speech."[12]

The State Bar's mandatory membership and dues are "a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.'"[13] In *Knox v. SEIU*, the Supreme Court said that compulsory

[11] *Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014).
[12] *Id.* at 2639 (quoting *Knox,* 132 S. Ct. at 2289 (internal quotation marks omitted)); *see also id.* at 2656 (Kagan, J. dissenting) ("[T]he 'difference between compelled speech and compelled silence' is 'without constitutional significance.'" (quoting *Riley v. National Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988)).
[13] *Knox*, 132 S. Ct. at 2289 (*quoting Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Emps.*, 466 U.S. 435, 455 (1984)).

subsidy schemes must satisfy "exacting First Amendment scrutiny."[14] But that is a test that coercive membership in the Arizona State Bar cannot satisfy.

Under exacting scrutiny, all coerced associations must serve a "'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'"[15] Also, even in the "rare case" where coerced association can be justified, compulsory fees can only be imposed if they are "a 'necessary incident' of the 'larger regulatory purpose which justified the required association.'"[16]

The only compelling state interest the Supreme Court has found to justify coercive bar association membership is improving the practice of law through the regulation of attorneys.[17] But that interest can be served through means that are significantly less restrictive of associational freedoms. The State can enforce rules to protect consumers against incompetent or dishonest attorneys without forcing attorneys to join the Arizona State Bar. In fact, 18 states—Arkansas, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Tennessee, and Vermont—regulate attorneys today without compelling

[14] *Knox,* 132 S. Ct. at 2289.
[15] *Id*. (*quoting Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)).
[16] *Knox*, 132 S. Ct. at 2289 (*quoting United States v. United Foods, Inc.*, 533 U.S. 405, 414 (2001)). Although *Keller* did find mandatory bar associations to be one of the rare cases that permit compelled association, the Court has not revisited that conclusion in light of its holdings in *Knox* and *Harris* that mandatory associations must meet exacting scrutiny.
[17] *Keller*, 496 U.S. at 14.

membership.[18] Arizona already regulates safety in restaurants without mandating membership in the Arizona Restaurant Association, and protects consumers from unsafe drivers without forcing them to join AAA. Mandating membership in the State Bar is simply not necessary, and therefore crosses "the limit of what the First Amendment can tolerate." [19] It should no longer be tolerated in Arizona.

Because forcing Arizona attorneys to join the State Bar is unconstitutional, compulsory membership fees are also not "a necessary incident of the larger regulatory purpose which justified the required association."[20]

Ending forced bar membership in Arizona is not a radical proposition. Look no further than our neighbor Colorado to find an exemplary model for attorney regulation. There, as in other states that maintain *voluntary* bars, attorneys are still held to high ethical standards, are still regulated by the state, and must still pay the cost of attorney regulation. They may join a bar association if they wish, but if their views differ from those of the bar association, they are free to disassociate themselves from its speech, without sacrificing their right to practice law. If 18 states find it unnecessary to violate attorneys' First Amendment rights in order to regulate the practice of law, why do it in Arizona?

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[18] *See In re Petition for a Rule Change to Create a Voluntary State Bar of Nebraska*, 286 Neb. 1018, 1022 (2013); Ralph H. Brock, *"An Aliquot Portion of Their Dues:" A Survey of Unified Bar Compliance with* Hudson *and* Keller, 1 Tex. Tech J. Tex. Admin. L. 23, 24 (2000).
[19] *Knox*, 132 S. Ct. at 2291.
[20] *Id*. at 2289 (quoting *United Foods*, 533 U.S. at 414 (internal quotation marks omitted)).

As Justice Black said, "[t]he mere fact that a lawyer has important responsibilities in society does not require or even permit the State to deprive him of those protections of freedom set out in the Bill of Rights."[21] Adopting a regulatory scheme that respects these rights would not prevent the State from properly regulating the practice of law, or deprive Arizonans of high quality legal representation. Given that the Arizona Supreme Court has repeatedly held that our Constitution affords greater protection for free speech than does the First Amendment,[22] we encourage the adoption of rules that will better protect freedom of choice and minimize coercion.

Respectfully submitted this 10th day of June, 2016.

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[21] *Lathrop v. Donohue*, 367 U.S. 820, 876 (1961) (Black, J., dissenting).
[22] *See, e.g., Coleman v. City of Mesa*, 230 Ariz. 352, 361 ¶ 38 (2012); *State v. Stummer*, 219 Ariz. 137, 143 ¶ 17 (2008); *Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 354-55 (1989).