

Elisa J. Dozono, OSB No. 063150
elisa.dozono@millernash.com
Taylor D. Richman, OSB No. 154086
taylor.richman@millernash.com
MILLER NASH GRAHAM & DUNN LLP
3400 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, Oregon 97204
Telephone: 503.224.5858
Facsimile: 503.224.0155

Attorneys for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

DANIEL Z. CROWE; LAWRENCE K.
PETERSON; and OREGON CIVIL
LIBERTIES ATTORNEYS, an
Oregon Nonprofit Corporation,

Plaintiffs,

Case No. 3:18-cv-02139-JR

DEFENDANTS' RESPONSE TO
PLAINTIFFS' OBJECTIONS TO
FINDINGS AND RECOMMENDATION

v.

OREGON STATE BAR, a Public
Corporation; OREGON STATE BAR
BOARD OF GOVERNORS; VANESSA
NORDYKE, President of the Oregon State
Bar Board of Governors; CHRISTINE
CONSTANTINO, President-elect of the
Oregon State Bar Board of Governors;
HELEN HIERSCHBIEL, Chief Executive
Officer of the Oregon State Bar; KEITH
PALEVSKY, Director of Finance and
Operations of the Oregon State Bar;
AMBER HOLLISTER, General Counsel
for the Oregon State Bar,

Defendants.

I. INTRODUCTION

In *Keller v. State Bar of Cal.*, 496 U.S. 1, 13-14, (1990), the U.S. Supreme Court affirmed that integrated state bars—such as the Oregon State Bar (the "Bar")—are justified by states' compelling interest in regulating the legal profession and improving the quality of legal services. Under this binding precedent, a state may require attorneys to join its state bar and pay membership dues, and an integrated state bar may use member dues to fund speech activities germane to the bar's purpose.

Plaintiffs' objections to Magistrate Judge Russo's April 1, 2019, Findings and Recommendation rehash their attempt to undermine *Keller* and extend the ruling in *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, ___ U.S. ___, 138 S. Ct. 2448, 2486 (2018), from public-sector labor unions to integrated state bars. But the Court is not at liberty to disregard *Keller*, which remains binding U.S. Supreme Court precedent. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (when U.S. Supreme Court precedent "has direct application in a case, . . . the Court of Appeals should follow the case which directly controls, leaving to [the U.S. Supreme] Court the prerogative of overruling its own decisions") (internal quotation marks and citation omitted).

Because plaintiffs' claims all fail under *Keller*, this Court should adopt Judge Russo's Findings and Recommendation, and dismiss plaintiffs' lawsuit.

II. RESPONSE TO PLAINTIFFS' OBJECTIONS

A. Defendants Have Established That the Bar Is an Arm of State Government for Purposes of the Eleventh Amendment.

The Eleventh Amendment to the U. S. Constitution bars citizens from bringing suit in federal court against a state or "an arm of the state." *Mitchell v. Los Angeles Cmty. Coll.*

Dist., 861 F.2d 198, 201 (9th Cir. 1988). Plaintiffs object to Judge Russo's finding that the Bar is an arm of state government and recommendation that the Bar be recognized as immune from suit in federal court. ECF No. 31, at 7.

1. Plaintiffs do not dispute that the District of Oregon has repeatedly and consistently ruled that the Bar is an arm of state government.

Under Oregon law, the Bar is organized as "an instrumentality" of state government. ORS 9.010(2) ("The Oregon State Bar is a public corporation and an instrumentality of the Judicial Department of the government of the State of Oregon."). Plaintiffs do not dispute that judges in the District of Oregon have thus repeatedly ruled that the Bar is immune from suit under the Eleventh Amendment. *See Coultas v. Payne*, No. 3:12-cv-1132-AC, 2012 WL 6725845, at *3 (D. Or. Nov. 27, 2012) (Acosta, J.), *report and recommendation adopted*, 2012 WL 6726247, at *1 (D. Or. Dec. 27, 2012) ("Because the Oregon State Bar is an instrumentality of the State of Oregon's Judicial Department, . . . all of Plaintiff's claims for damages against Defendant Oregon State Bar are barred by the Eleventh Amendment.") (Simon, J.); *Hartfield v. Or. State Bar*, No. 3:16-cv-00068-ST, 2016 WL 9225978, at *1 (D. Or. Jan. 15, 2016) (Stewart, J.), *report and recommendation adopted*, 2016 WL 9226386 (D. Or. Feb. 16, 2016) (Hernández, J.); *Weidner v. Albertazzi*, No. 06-930-HO, 2006 WL 2987704, at *1 (D. Or. Oct. 13, 2006) (Hogan, J.); *Erwin v. Oregon ex rel. Kitzhaber*, 231 F. Supp. 2d 1003, 1007 (D. Or. 2001) (Frye, J.).

Plaintiffs argue that this is not binding precedent. While plaintiffs are correct that District of Oregon rulings are not binding on this Court, they cannot point to any case since the 1988 *Mitchell* decision in which the District of Oregon has ruled that the Bar is *not* entitled to sovereign immunity. Moreover, they offer no argument as to why this Court should not follow

the Ninth Circuit's lead in affirming three District of Oregon rulings since *Mitchell* that the Bar is immune under the Eleventh Amendment. *See Hartfield v. Or. State Bar*, 671 F. App'x 456 (9th Cir. 2016) (affirming Judge Hernandez' dismissal of claims against the Oregon State Bar under the Eleventh Amendment); *Erwin*, 43 F. App'x 122 (9th Cir. 2002) (affirming Judge Frye's decision that the Oregon State Bar is an arm of the State of Oregon and entitled to immunity from suit in federal court); *Eardley v. Garst*, 232 F.3d 894 (9th Cir. 2000) (unpublished) (affirming Judge Jelderks' decision that the Eleventh Amendment shielded directors of the Oregon State Bar from suit in their official capacity).

2. Judge Russo's Findings and Recommendation properly concluded that the *Mitchell* factors demonstrate that the Bar is an arm of state government.

The *Mitchell* factors demonstrate that the Bar is immune from plaintiffs' lawsuit because state law establishes that the Bar is an arm of the judicial branch of state government. ECF No. 29, at 11-16; *see also Mitchell*, 861 F.2d at 201 ("the court looks to the way state law treats the entity" to determine whether it is an arm of state government).

a. The Oregon Legislature has delegated central functions of the Judicial Department to the Bar.

Plaintiffs object to Judge Russo's finding that the Bar performs central—indeed, "quintessential"—state government functions. ECF No. 29, at 13-14; ECF No. 31, at 12. Plaintiffs argue that the Bar instead "performs independent corporate functions with minimal state control" and that "the ultimate governmental authority for regulating the legal profession lies with the Oregon Supreme Court." ECF No. 31, at 12, 15 (emphasis omitted).

But the Bar indisputably performs a central governmental function as defined by state law, by assisting the Oregon Supreme Court in regulating Oregon attorneys. In Oregon,

"[n]o area of judicial power is more clearly marked off and identified than the courts' power to regulate the conduct of the attorneys who serve under it." *Ramstead v. Morgan*, 219 Or. 383, 399, 347 P.2d 594 (1959); *see also Sadler v. Or. State Bar*, 275 Or. 279, 287, 550 P.2d 1218 (1976) ("The power to admit a person to the practice of law is judicial."). Through the State Bar Act, the Oregon Legislature has delegated essential aspects of this regulatory function to the Bar. *See, e.g.*, ORS 9.080, 9.114, 9.210, 9.490.

Plaintiffs, however, argue that the Bar serves a similar function as the State Bar of California, which the *Keller* Court determined "does not perform key governmental functions" for purposes of the government speech doctrine. ECF No. 31, at 13. Plaintiffs claim that this weighs against finding that the Bar serves a central government function for purposes of the Eleventh Amendment. But the *Keller* Court was not analyzing the functions of the California bar under the Eleventh Amendment, and plaintiffs' argument cannot hold up in light of *Hirsh v. Justices of Supreme Court of Cal.*, 67 F.3d 708, 715 (9th Cir. 1995)—a post-*Mitchell* decision in which the Ninth Circuit held that the California bar is entitled to sovereign immunity.

The Bar's role in the regulation of Oregon attorneys weighs heavily toward adopting Judge Russo's recommendation that the Bar is immune from suit in federal court. *See Rounds v. Or. State Bd. of Higher Educ.*, 166 F.3d 1032, 1035 (9th Cir. 1999) ("Under the control of the Board of Higher Education, the University performs the central governmental function of providing opportunities for deserving and qualified citizens to realize their aspirations for higher education Thus, the University is an arm of the State of Oregon for Eleventh Amendment immunity purposes.") (internal quotation marks and citations omitted).

b. The effect of a money judgment.

Plaintiffs object that the Bar is not entitled to sovereign immunity because "the impetus for the Eleventh Amendment is the prevention of federal-court judgments that must be paid out of a State's treasury," whereas "a money judgment against the Bar would not be satisfied out of state funds." ECF No. 31, at 9 (internal quotation marks and citations omitted).

But this argument fails to address Judge Russo's finding that plaintiffs' claims principally seek equitable relief, not monetary damages. ECF No. 29, at 12; *see also* ECF No. 1, at 14-15. Moreover, although the State of Oregon would have no obligation to satisfy a judgment against the Bar, ORS 9.010(6), any monetary damages against the Bar have the potential to affect the state treasury because of the state's "strong interest in keeping [a state instrumentality] operationally and fiscally sound." *Alaska Cargo Transp., Inc. v. Alaska R.R. Corp.*, 5 F.3d 378, 380-82 (9th Cir. 1993). Further, because courts "cannot divorce" their assessment of the first and second *Mitchell* factors, the Bar's essential role in assisting the Oregon Supreme Court in regulating Oregon attorneys weighs toward finding immunity. *Id.* at 380.

c. The ability to sue and be sued.

Plaintiffs object to Judge Russo's finding that the Bar's ability to sue and be sued in accordance with ORS 9.010(5) does not weigh against immunity. ECF No. 29, at 15; ECF No. 31, at 15. But Judge Russo correctly reasoned that the Bar's immunity from civil liability for performing certain central governmental functions offsets its ability to be sued under ORS 9.010(5) for purposes of the Court's Eleventh Amendment analysis. ECF No. 29, at 15; *see also* ORS 9.537 (immunity from liability for "proposed or pending admission, professional

licensing requirements, reinstatement or disciplinary proceedings"); ORS 9.568 (immunity from liability for "acts in connection with the state lawyers assistance committee or any personal and practice management assistance committee"); ORS 9.657 (immunity from liability for "proposed or pending client security fund claims"). This factor therefore does not demonstrate that the Bar is subject to suit in federal court.

d. The power to take and own property.

Plaintiffs object to Judge Russo's finding that although the Bar's ability to take property in its own name under ORS 9.010(5) "somewhat weighs against immunity," on the whole, "this factor . . . fails to demonstrate [a] lack of immunity." ECF No. 29, at 15-16; ECF No. 31, at 15. Judge Russo, however, properly reasoned that ORS 9.010(5) is not dispositive of the Bar's status under the Eleventh Amendment and is mitigated by other statutory limits on the Bar's ability to use its property. *See, e.g.*, ORS 98.386(2) (limiting the use of funds from lawyer trust accounts); ORS 9.572 (limiting the use of funds for the Bar's mandatory legal services program).

e. Corporate status.

Finally, plaintiffs object to Judge Russo's finding that the Bar's status as "a public corporation and an instrumentality of the Judicial Department of the [state] government" demonstrates that the Bar is an arm of state government under the last *Mitchell* factor. ECF No. 29, at 16; ECF No. 31, at 16-17. Plaintiffs argue that (1) under *Keller*, "a state's categorization of a bar association . . . is not conclusive for purposes of federal constitutional law," but (2) because the Bar is a "special government body" under Oregon law, it is not immune

from suit under the Eleventh Amendment, and (3) the Bar is not subject to all laws to which some other state agencies are subject. ECF No. 31, at 17-18.

Plaintiffs' arguments fail to demonstrate that the Bar is subject to suit in federal court. First, *Mitchell* instructs the court to "look[] to the way state law treats the entity" to determine whether it is an arm of state government. 861 F.2d at 201. Here, the Oregon Legislature has unambiguously designated the Bar as an arm "of the Judicial Department," ORS 9.010(2), and the Oregon Supreme Court has held that the Bar is a "state agency" under Oregon's public records law. *State ex rel. Frohnmayer v. Or. State Bar*, 307 Or. 304, 309, 767 P.2d 893 (1989). Second, plaintiffs again ignore the inconvenient fact that other special government bodies that are also arms of the state are immune from suit under the Eleventh Amendment. *See, e.g., Rounds*, 166 F.3d at 1035 (holding that the University of Oregon, which is a special government body, "is an arm of the State of Oregon for Eleventh Amendment immunity purposes"). Moreover, the Bar's status as a special government body does not undermine its central role in assisting the Judicial Department. Third, despite plaintiffs' contrary statement, the Bar is subject to numerous laws that also apply to other arms of the state, including Oregon's public records laws and the Oregon Tort Claims Act—both of which place substantial legal burdens on the Bar. *See* ORS 9.010(3).

Accordingly, the Court should adopt Judge Russo's Findings and Recommendation that the Bar—like other integrated bars across the Ninth Circuit—is immune from suit under the Eleventh Amendment. *See, e.g., Hirsh*, 67 F.3d at 715 (California); *O'Connor v. State of Nev.*, 686 F.2d 749, 749-50 (9th Cir. 1982) (Nevada); *Eugster v. Wash.*

State Bar Ass'n, No. C15-0375JLR, 2015 WL 5175722, at *9 (W.D. Wash. Sept. 3, 2015) (Washington).

B. Plaintiffs' Objections Reaffirm That Their Claims Failed to Raise Any Plausible Constitutional Violations.

Judge Russo found that "[b]ecause the Bar has adequate procedural safeguards in place to protect against compelled speech and because mandatory Bar membership and compulsory fees do not otherwise violate the First Amendment, plaintiffs' claims necessarily fail as a matter of law." ECF No. 29, at 25-26. Plaintiffs object to Judge Russo's recommendation to dismiss all three of their First Amendment claims. ECF No. 31, at 18.

1. Keller Unambiguously Lays to Rest Any Claim That Compulsory Bar Membership Is Unconstitutional.

Plaintiffs assert that Judge Russo wrongly concluded that their compelled-membership claim fails because the U.S. Supreme Court has "affirmed . . . that lawyers . . . may be required to join and pay dues to the State Bar." ECF No. 29, at 17; ECF No. 31, at 19. Plaintiffs argue that (a) U.S. Supreme Court precedent does not foreclose their compelled-membership claim because, according to plaintiffs, neither *Lathrop* nor *Keller* "actually decide[d] the constitutionality of mandatory bar membership" and (b) compulsory bar membership does not survive exacting scrutiny. ECF No. 31, at 19-20.

But an unbroken chain of U.S. Supreme Court decisions affirm that compulsory bar membership is constitutional and survives exacting scrutiny:

- *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961). The Court ruled that "the Supreme Court of Wisconsin, in order to further the State's legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by . . . the lawyers, even though the organization created to attain the objective also engages in some legislative activity. . . [W]e are unable to find any impingement upon protected rights of association." *See also* 367 U.S. at 865 (Whittaker, J.,

concurring) ("the State's requirement that a lawyer pay to its designee an annual fee . . . [for] the special privilege (which is what it is) of practicing law in the State—which is really all that is involved here—does not violate any provision of the United States Constitution"); 367 U.S. at 849 (Harlan, J., concurring) (there is "[no] doubt that a State may Constitutionally condition the right to practice law upon membership in an integrated bar association").

- *Keller*, 496 U.S. at 13-14. A unanimous Court affirmed *Lathrop* and held that compulsory bar membership is "justified by the State's interest in regulating the legal profession and improving the quality of legal services" and that "[t]he State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members."
- *Harris v. Quinn*, 573 U.S. 616, 655 (2014). A five-justice majority described *Keller* as holding that "all members of an 'integrated' bar . . . could be required to pay the portion of the dues used for activities connected with proposing ethical codes and disciplining bar members" and explained that *Keller's* holding "fits comfortably within the [exacting scrutiny] framework applied in the present case."¹

The Ninth Circuit has also repeatedly affirmed that *Lathrop* and *Keller* hold "that a state may constitutionally condition the right of its attorneys to practice law upon the payment of membership dues to an integrated bar." *O'Connor v. State of Nev.*, 27 F.3d 357, 361 (9th Cir. 1994); *see also Eugster v. Wash. State Bar Ass'n*, 684 F. App'x 618, 619 (9th Cir. 2017) (affirming dismissal of the plaintiff's compulsory membership claim "because an attorney's mandatory membership with a state bar association is constitutional" under *Keller* and *Lathrop*); *Caruso v. Wash. State Bar Ass'n 1933*, 716 F. App'x 650, 651 (9th Cir. 2018) (dismissal of claim proper under *Keller* and *Lathrop*).

This Court is obligated to follow binding precedent that has "direct application" to this case. *Agostini*, 521 U.S. at 237 (internal quotation marks and citation omitted). Plaintiffs'

¹ The four dissenting justices also confirmed that *Harris* "reaffirm[ed]" *Keller* "as good law." *Harris*, 573 U.S. at 670.

compelled membership claim does not assert a plausible constitutional violation, and the Court should therefore adopt Judge Russo's recommendation to dismiss this claim as a matter of law.

2. *Keller* Also Forecloses Plaintiffs' Affirmative-Consent Claim.

Plaintiffs next object to Judge Russo's recommendation to dismiss their affirmative-consent claim. ECF No. 31, at 22. Plaintiffs argue that "with *Abood* overruled, there is no foundation for *Keller*'s toleration of bar associations using mandatory dues for political and ideological speech without [members'] affirmative consent." ECF No. 31, at 23-24.

But *Keller* has not been abrogated, and the Court is therefore bound by its holding. *Agostini*, 521 U.S. at 237. As explained above, *Keller* held that integrated state bars do not violate the Constitution by compelling membership and using mandatory dues to fund speech activities that are germane to "regulating the legal profession and improving the quality of legal services." 496 U.S. at 13-14. Thus, plaintiffs' attempt to extend *Janus*'s "affirmative consent" requirement for public-sector labor unions to integrated state bars directly contradicts the Court's holding in *Keller*.² *Keller* neither "prescribe[d]" that "courts are to treat bar associations like public sector unions," *cf.* ECF No. 31, at 24, nor requires that state bars receive attorneys' affirmative consent before compelling membership or using mandatory dues to engage in germane speech activities.

² The *Janus* majority, in fact, does not mention or cite *Keller* once. On the other hand, the *Janus* dissent affirmatively states that *Keller* remains good law: "And indeed, the Court has relied on [the First Amendment principle underlying *Abood*] when deciding cases involving compelled speech subsidies outside the labor sphere—cases today's decision does not question. See, e.g., *Keller v. State Bar of Cal.*, 496 U.S. 1, 9–17, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990) (state bar fees)." *Janus*, 138 S. Ct. at 2498 (emphasis added).

Plaintiffs' affirmative-consent claim cannot survive under *Keller's* binding precedent. This Court should therefore adopt Judge Russo's recommendation to dismiss plaintiffs' affirmative-consent claim as a matter of law.

3. The Bar's Mandate to Engage Only in Germane Speech and Procedures for Members to Object to Its Speech Activities Provide Adequate First Amendment Safeguards.

Finally, plaintiffs object to Judge Russo's finding that "the Bar has adequate safeguards in place to protect members[]" from supporting "political speech that is not germane to a permissible topic," ECF No. 29, at 22; ECF No. 31, at 24, and reassert their arguments that the two statements published in the April 2018 *Oregon State Bar Bulletin* (the "*Bulletin*")—one a statement from the Bar (the "Bar's April 2018 Statement"); the other a statement from seven affinity bars (the "Specialty Bar Statement")—were not germane to a permissible topic. ECF No. 31, at 27-31.

a. The Bar's safeguards satisfy *Keller's* requirement to protect members from compelled speech.

Plaintiffs argue that for the Bar to "meet its constitutional obligation to ensure that members are not forced to pay for . . . non-germane activities," it must provide an advance explanation of the basis for its use of members' fees, a reasonably prompt opportunity for members to challenge its use of fees, and an escrow for disputed fees while a members' challenge is pending. ECF No. 31, at 19.

Plaintiffs do not contest that they were timely given an opportunity to challenge the Bar's use of membership dues. (In fact, they challenged the Bar's use of members' dues to fund the statements in the April 2018 *Bulletin*, received a refund, and elected not to avail

themselves of additional dispute-resolution procedures provided under the Bar's Bylaws. ECF No. 1, at 49-52; *see also* Bylaws § 12.6.)

Nor do plaintiffs contest that the Bar's Bylaws specifically mandate that its speech be germane to the law, which satisfies any obligation to provide an advance explanation for its speech activities. ECF No. 29, at 24; Bylaws § 12.1. Plaintiffs' argument to the contrary—asserting that the Bar must provide an additional advance justification of its speech activities despite its mandate to engage only in germane speech and procedures for members to object—is simply another attempt to argue that the Bar is required to receive members' affirmative consent before engaging in any speech activities.³ But as explained above, *Keller* expressly allows the Bar to engage in germane speech without members' affirmative consent. 496 U.S. at 13-14. And as Judge Russo correctly explained, this Court is not at liberty to disregard *Keller*. *See* ECF No. 29, at 20; *see also Agostini*, 521 U.S. at 237.

Accordingly, this Court should adopt Judge Russo's findings that "the Bar has adequate safeguards in place to protect against compelled speech." ECF No. 29, at 25.

- b. Plaintiffs' arguments concerning the April 2018 *Bulletin* are superfluous because the Bar provides constitutionally adequate First Amendment safeguards.

Plaintiffs also object to Judge Russo's findings regarding the April 2018 *Bulletin*. First, plaintiffs object to Judge Russo's finding that the Bar's April 2018 Statement was "germane

³ Also, plaintiffs' argument that the Bar must provide advance notice of what portion of members' dues are used for germane speech makes no sense because the Bylaws do not allow the Bar to intentionally engage in any nongermane speech. For this same reason, plaintiffs' argument that an escrow is required also makes no sense. As Judge Russo explained, a member's challenge to "[t]he basis for the fee does not present itself until" after the speech activity has occurred. Thus, the Bar's refund procedure—which provides a refund of any impermissibly used dues, with interest—satisfies any constitutional requirement that the Bar not benefit from the nongermane use of membership dues.

to regulating the legal profession and improving the quality of legal services" and, in any event, "made within the specific context of promotion of access to justice, the rule of law, and a healthy and functional judicial system that equitably services everyone." ECF No. 29, at 21; ECF No. 31, at 28. Second, plaintiffs object to Judge Russo's finding that the Specialty Bar Statement was published in a forum "create[d] . . . for the exchange of ideas pertaining to the practice of law." ECF No. 29, at 21-22. As plaintiffs previously asserted, they contend that the Bar's April 2018 Statement was not germane to its purpose because it "opined on a highly controversial legal and political issue." ECF No. 31, at 28. They also contend that Judge Russo's discussion of the *Bulletin* went beyond the allegations of the complaint. ECF No. 31, at 30.

But plaintiffs' arguments fail to establish a plausible constitutional violation.

First, the Bar is not prohibited from speaking on topics considered by some to be controversial or political; under *Keller*, the Bar may speak on any topic germane to its purpose. *See Gardner v. State Bar of Nev.*, 284 F.3d 1040, 1042-43 (9th Cir. 2002) ("Undoubtedly every effort to persuade public opinion is political in the broad sense of that term. However, what *Keller* found objectionable was not political activity but partisan political activity as well as ideological campaigns unrelated to the bar's purpose."). And plaintiffs' argument that "[c]ompetent lawyers will *always* be able to argue that their own political views" are germane is inapplicable here, because the Bar's April 2018 Statement explicitly discussed issues "within the Oregon legal system" and advocated for "access to justice, the rule of law, and a healthy and functional judicial system that equitably serves everyone." These issues are germane to the Bar's purpose. *See, e.g., Gardner*, 284 F.3d at 1043.

Second, it was not impermissible for Judge Russo to observe that the *Bulletin* "routinely publishes statements from a variety of authors with differing viewpoints and creates a forum for the exchange of ideas pertaining to the practice of law." ECF No. 29, at 22. The *Bulletin* as a whole is incorporated by reference into the complaint and therefore properly before the Court. *See* ECF No. 1, ¶ 41; *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 US 308, 322, 127 S Ct 2499, 168 L Ed 2d 179 (2007) (on a motion to dismiss, courts may consider documents referenced in the complaint and matters of which a court may take judicial notice). In addition, plaintiffs have conceded that the court can take judicial notice of the Bar's Bylaws. *See* ECF No. 20, at 28. These Bylaws include the Bar's editorial policy and diversity statement, which are both applicable to the Bar's publication of the *Bulletin*. Bylaws § 11.2 (editorial policy); § 10 (diversity statement).

But more importantly, Judge Russo expressly found that "even assuming the Specialty Bars' Statement includes political speech that is not germane to a permissible topic, and it is a statement on behalf of the Bar . . . , it still would not violate the First Amendment because the Bar has adequate safeguards in place to protect members[]" against compelled speech. ECF No. 29, at 22; *see also Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 233, 120 S. Ct. 1346, 146 L. Ed. 2d 193 (2000) ("The University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall. If the University reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends."). Plaintiffs' arguments regarding the Specialty Bar Statement fail to demonstrate that the complaint states a plausible claim for relief.

Because the Bar provides its members with adequate protections against compelled speech, plaintiffs fail to state a plausible claim that their constitutional rights were violated by the Bar's publication of the April 2018 *Bulletin*.

III. CONCLUSION

Defendants respectfully request that the Court adopt Judge Russo's Findings and Recommendation and dismiss plaintiffs' lawsuit in its entirety, without leave to replead.

Dated this 29th day of April, 2019.

MILLER NASH GRAHAM & DUNN LLP

s/Taylor D. Richman

Elisa J. Dozono, OSB No. 063150

elisa.dozono@millernash.com

Taylor D. Richman, OSB No. 154086

taylor.richman@millernash.com

Telephone: 503.224.5858

Facsimile: 503.224.0155

TONKON TORP LLP

Steven M. Wilker, OSB No. 911882

steven.wilker@tonkon.com

Megan Houlihan, OSB No. 161273

meg.houlihan@tonkon.com

888 S.W. Fifth Avenue, Suite 1600

Portland, Oregon 97204

Telephone: 503.802.2040; 503.802.2184

Facsimile: 503.274.8779

SCHWABE, WILLIAMSON & WYATT, P.C.

Michael Gillette, OSB No. 660458

wmgillette@schwabe.com

1211 S.W. Fifth Avenue, Suite 1900

Portland, Oregon 97204

Telephone: 503.796.2927

Facsimile: 503.796.2900

Attorneys for Defendants

4847-1169-4741.1