Jacob Huebert, # 17768
Scharf-Norton Center for Constitutional Litigation at the
GOLDWATER INSTITUTE
500 E. Coronado Road
Phoenix, Arizona 85004
Telephone: 602.462.5000
litigation@goldwaterinstitute.org
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

AMY POMEROY, Plaintiff, UTAH STATE BAR, et al., Defendants.	**PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS** Case No. 2:21-cv-00219-DBB-DAO Honorable David B. Barlow Magistrate Judge Daphne A. Oberg

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Plaintiff Amy Pomeroy has raised First Amendment challenges to Utah's requirements that attorneys join the Utah State Bar ("USB") and Utah Bar Foundation ("UBF"), and pay dues to the USB, as a condition of practicing law. She has standing to bring her claims because, as a Utah attorney, those requirements injure her, and an injunction against the Defendants would provide her with relief. The USB is a proper defendant because, as a private organization, it is not entitled to Eleventh Amendment immunity.

Further, Pomeroy's constitutional claims are well-founded. Pomeroy alleges that: (1) mandatory USB membership violates attorneys' right to freedom of association; (2) the USB has violated her rights to free speech and association by using dues for political and ideological speech without her affirmative consent; (3) regardless of whether mandatory dues and fees are inherently unconstitutional, the USB has insufficient safeguards to ensure that dues are not used for impermissible purposes; and (4) mandatory UBF membership violates attorneys' right to freedom of association. Contrary to Defendants' arguments, Supreme Court precedent does not foreclose Pomeroy's challenges to mandatory USB membership and dues, and it supports her challenge to the USB's lack of safeguards. And Plaintiff has stated a viable freedom-of-association claim against mandatory UBF membership because, contrary to Defendants' assertions, the UBF engages in expressive activity with which she does not wish to associate.

Also, Defendants' assertion that the "several [other] lawsuits across the nation seeking to enjoin the enforcement of rules mandating membership in and the payment of license fees to state bar associations as a condition of practicing law … have failed" is false. Defs.' Mot. to Dismiss [Doc. 68] ("MTD") at 1. To the contrary, the Fifth Circuit recently declared Texas's requirement that attorneys join and pay dues to the Texas Bar unconstitutional in *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021). And other recent Court of Appeals decisions have reversed dismissals of such constitutional challenges, in whole or in part. *See Schell v. Chief Justice & Justices of the Okla. Sup. Ct.*, 2 F.4th 1312 (10th Cir. 2021) (reversing dismissal of challenge to

mandatory Oklahoma Bar Association membership); *Boudreaux v. La. State Bar Ass'n*, 3 F.4th 748 (5th Cir. 2021) (reversing dismissal of challenge to mandatory Louisiana State Bar Association membership and dues); *Crowe v. Or. State Bar*, 989 F.3d 714 (9th Cir. 2021) (reversing dismissal of challenge to mandatory Oregon State Bar membership).

Because Pomeroy has stated viable First Amendment claims, the Court should deny Defendants' motion to dismiss.

FACTS

Plaintiff Amy Pomeroy is an attorney licensed to practice in Utah. Complaint [Doc 2] ("Compl.") ¶ 12. She is a member, and pays annual dues to, the Utah State Bar ("USB")—but only because the state requires every Utah attorney to do so as a condition of practicing law in the state. *Id.* ¶¶ 12, 30–34, 67; Utah CJA Rules 14-101, 14-102, 14-802, 14-107, 14-111(a), 14-207, 14-716. If she stopped paying dues, the USB would administratively suspend her law license, which would prohibit her from practicing. CJA Rule 14-111(a). Utah also requires all attorneys to be members of the Utah Bar Foundation ("UBF"). CJA Rule 14-209. In this lawsuit, Ms. Pomeroy challenges mandatory USB membership; the USB's use of attorneys' mandatory dues for political, ideological, and other speech without members' affirmative consent; and, in the alternative, the USB's collection of mandatory dues in the absence of safeguards the Supreme Court identified in *Keller v. State Bar of California*, 496 U.S. 1 (1990). She also challenges mandatory UBF membership.

A. The USB's use of mandatory dues for political and ideological speech

The USB uses its members' mandatory dues to engage in speech, including political and ideological speech. Compl. ¶ 37.

That speech includes lobbying and advocacy regarding legislation. CJA Rule 14-106(a) "authorize[s] and direct[s]" the Board of Commissioners of the Utah State Bar ("Board") "to study and provide assistance on public policy issues and to adopt positions on behalf of the

Board on public policy issues." Compl. ¶ 38. That rule also authorizes the Board to, among other things, "adopt a position in support of or in opposition to a policy initiative, to adopt no position on a policy initiative, or to remain silent on a policy initiative." *Id.* ¶ 39. Under Rule 14-106(a)(1), public policy issues on which the USB may take positions include "issues concerning the courts of Utah, procedure and evidence in the courts, the administration of justice, the practice of law, and matters of substantive law on which the collective expertise of lawyers has special relevance and/or which may affect an individual's ability to access legal services or the legal system." *Id.* ¶ 40. Under these rules, the USB has advocated for and against both procedural and substantive proposed state legislation. *Id.* ¶ 41. As the USB itself has stated, "[i]n recent years, the Bar has played an active role in major public policy debates." *Id.* ¶ 42.

In 2019, for example, the USB opposed a proposed "Tax Equalization and Reduction Act" (H.B. 441), which would have modified the state's tax system in various ways, because its proposed tax on services did not exempt legal services. *Id.* ¶ 43. In the July/August 2019 *Utah Bar Journal*, the USB's then-president stated that "the Bar took a strong stand" against the proposed tax, that the USB "is continuing to be actively involved in monitoring and opposing a sales tax on legal services," and that the USB "ask[s] all of you [USB members] to stay involved and that you encourage your clients to do the same." *Id.* ¶ 44.

The May/June 2018 *Utah Bar Journal* reported that the USB "had significant influence on the language and structure" of legislation regarding the state attorney general's ability to invoke a potential conflict of interest or the attorney-client privilege to withhold release of an opinion requested by the legislature. *Id.* ¶ 45. That issue also stated that "the 2018 General Session [of the state legislature] was successful for the Utah bar as our leaders influenced the language of legislation and enhanced the bar's relationship with lawmakers and staff." *Id.* ¶ 46.

The USB has also opposed measures that would alter the way Utah selects judges, including a 2019 proposed constitutional amendment that would have replaced the state's current

method (appointment by the governor from nominees certified by a nominating commission, subject to Utah Senate approval and retention elections) with nonpartisan elections. *Id.* ¶ 47.

The USB engages lobbyists to advocate for and against proposed legislation in the Utah State Legislature. *Id.* ¶ 48. In advocating for and against proposed legislation, the USB and its lobbyists purport to represent the USB's membership. *Id.* ¶ 49.

Also, recent issues of the *Utah Bar Journal*, funded with members' mandatory dues, include statements that take or publicize positions on current controversies, including but not limited to an article by the USB's president asserting the importance of pursuing "equity" as distinct from "equality"; an article calling for courtrooms to include a "safe space" in which allegations of unfairness will not be met with "defensiveness and denial"; an article reviewing a book proposing criminal penalties "up to and including incarceration" for any person "who is made aware of a sexual assault but focuses on protecting the institution in which it occurs rather than the survivor of the assault"; and articles invoking the concept of "implicit bias." *Id.* ¶ 50.

B. The USB's dues refund procedure

The USB allows members to receive a refund of the portion of their dues used for lobbying and legislative matters. *Id.* ¶ 113. But the USB makes it difficult for members to learn of their right to a refund: it occasionally publishes notices of that right, but it does so inconspicuously, burying them deep within the *Utah Bar Journal*. *Id.* ¶ 51. When the *Journal* includes such a notice, nothing on the cover or in the table of contents informs a reader of its presence, and nothing else calls it to readers' attention. *Id.* ¶ 52. Plaintiff's complaint includes images of examples of such discreetly placed notices. *See id.* ¶¶ 53–59.

Also, the USB does not tell members how it determines which expenditures should be classified as "lobbying and legislative-related activities." *Id.* ¶ 61. And it has not established procedures by which members may object to, or receive a rebate for, USB expenditures other than those deemed to be for "lobbying and legislative activities." *Id.* ¶ 63.

Further, the USB does not give members detailed information about its expenditures that would allow members to determine whether expenditures were for constitutionally permissible activities. *Id.* ¶¶ 65–66. The USB also does not put the dues of a member who objects to its expenditures in escrow. *Id.* ¶ 115. And refunds the USB issues to objecting members do not include interest. *Id.* ¶ 116.

C. Plaintiff's injury and claims

As a Utah attorney, Plaintiff Amy Pomeroy has been compelled to join and pay dues to the USB. *Id.* ¶¶ 12, 30–34, 67. She opposes the USB's use of any amount of her mandatory dues to fund any amount of political or ideological speech, regardless of its viewpoint, including but not limited to the examples set forth above, but she has been without effective means to prevent it. *Id.* ¶ 68.

Utah's requirements that attorneys join and pay dues to the USB injure her because she does not wish to associate with or fund the USB or its political or ideological speech; but for the requirements, she would not be a member or pay dues. *Id.* ¶¶ 71–72. She also does not wish to associate with the UBF and, but for the requirement that she do so, would not be a member. *Id.* ¶ 74. Further, the USB's lack of safeguards to ensure that members are not made to pay for political and ideological speech and other activities not germane to regulating the legal profession or improving the quality of legal services injures her because she does not wish to fund such activities in any amount. *Id.* ¶ 73.

In her First Claim for Relief, Ms. Pomeroy alleges that mandatory USB membership violates her First Amendment rights to free speech and association. *Id.* ¶¶ 81–93. In her Second Claim for Relief, she alleges that the USB's collection and use of mandatory dues to subsidize its speech without her affirmative consent violates her First Amendment rights to free speech and association. *Id.* ¶¶ 94–107. In her Third Claim for Relief, Ms. Pomeroy alternatively alleges that, to the extent that mandatory bar dues are constitutional at all, the USB violates attorneys' First

and Fourteenth Amendment rights by collecting mandatory dues without sufficient safeguards to ensure that members' dues are not used for political and ideological speech and other activities that are not germane to regulating the legal profession or improving the quality of legal services. *Id.* ¶¶ 108–122.

Defendants in this case include the USB, its Executive Director, its President and President-Elect, and the members of its Board of Commissioners, with all individuals sued in their official capacities.

LEGAL STANDARD

In considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court must accept as true all well-pleaded factual allegations and view those allegations in the light most favorable to the plaintiff. *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). The Court may not "weigh potential evidence that the parties might present at trial," but must only "assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Id*. (internal marks and citation omitted).

Likewise, in considering a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), the Court must accept the complaint's allegations as true. *Smith*, 561 F.3d at 1097. The Tenth Circuit has held that, where a defendant asserts lack of jurisdiction based on Eleventh Amendment immunity, the "onus is on [the plaintiff] to demonstrate that ... sovereign immunity does not bar his … claim." *Havens v. Colo. Dep't of Corr.*, 897 F.3d 1250, 1260–61 (10th Cir. 2018).[1]

[1] Circuit courts other than the Tenth have treated Eleventh Amendment immunity as an affirmative defense on which the defendant bears the burden of persuasion. *See Thomas v. Guffy*, No. CIV-07-823-W, 2008 WL 2884368, *4 & n.2 (W.D. Okla. July 25, 2008) (collecting cases). Plaintiff respectfully submits that the other circuits are correct and raises the issue here to preserve it.

ARGUMENT

I. The Eleventh Amendment does not bar claims against the Utah State Bar.

The Eleventh Amendment does not bar Plaintiff's claims against the Utah State Bar. To argue otherwise, Defendants rely on case law that identifies factors courts apply to determine whether a *governmental entity* is an "arm of the state" (and thus enjoys Eleventh Amendment immunity) or is a "political subdivision" of a state, such as a county or municipality (and thus lacks Eleventh Amendment immunity). *See* MTD at 11 (citing factors enumerated in *Couser v. Gay*, 959 F.3d 1018, 1024 (10th Cir. 2020)). That analysis does not apply here, however, because the USB is simply *not a governmental entity at all*.

The Utah Supreme Court has made this clear, declaring that the USB "*is a private organization*." *Barnard v. Utah State Bar*, 804 P.2d 526, 530 (Utah 1991) (emphasis added). "It receives no public funds or tax revenues." *Id.* In fact, it "*pays taxes* on its real and personal property." *Id.* (emphasis added). Its "[e]mployees are not paid by the state and are not entitled to any benefits given state employees." *Id.* It has the capacity to sue and be sued, and in either event must hire private attorneys. *Id.* It purchased its "Law and Justice Center … entirely without governmental funds." *Id.* "It is not treated as a state agency by the [Utah] Attorney General, the State Auditor, or the Treasurer, nor is it under the control or supervision of the Administrative Office of the Courts." *Id.* The simple fact that the USB is a "nongovernmental organization," *id.* at 529, establishes that it is not entitled to invoke the Eleventh Amendment, which prohibits individuals from suing *states* in federal court.

Further, "[t]o make the determination whether an entity is an arm of the state [the Tenth Circuit] engage[s] in two general inquiries," considering (1) "the degree of autonomy given to the agency, as determined by the characterization of the agency by state law and the extent of guidance and control exercised by the state," and (2) "the extent of financing the agency receives independent of the state treasury and its ability to provide for its own financing." *Watson v. Univ.*

of Utah Med. Ctr., 75 F.3d 569, 574–75 (10th Cir. 1996) (internal marks and citation omitted). Both of those inquiries weigh against finding that the USB is an arm of the state.

The first factor—the degree of autonomy—weighs against immunity. "Although it is subject to the supervision of the Utah Supreme Court, [the USB] is in large part self-governed by Bar commissioners who are elected by Bar members," and, its employees are *not* state employees. *Barnard*, 804 P.2d at 530. In contrast, entities found to be arms of the state have had governing boards chosen by legislative or executive branch officials. *See, e.g.*, *Watson*, 75 F.3d at 575 (University of Utah an arm of the state, in part because 15 of 16 Board of Regents members were appointed by governor with the senate's consent, and 8 of 10 Board of Trustees members were appointed by the governor); *Prebble v. Brodrick*, 535 F.2d 605, 610 (10th Cir. 1976) (University of Wyoming an arm of the state in part because it was "governed by a Board of Trustees appointed by the Governor with the advice and consent of the Senate").

The second factor—whether the entity is financed "independent of the state treasury"—also weighs against immunity. Again, the USB receives *no* money from the state treasury; it "is funded completely by the dues and fees paid by its members and Bar applicants." *Barnard*, 804 P.2d at 530. Defendants argue that the Utah Supreme Court is the "ultimate source" of the USB's funds because its rules compel attorneys to pay USB dues. MTD at 14. But that has nothing to do with the state treasury, and the state's compulsion of payments by *private parties* to a *private organization* cannot make that organization an arm of the state entitled to Eleventh Amendment immunity. Otherwise, unions might have enjoyed Eleventh Amendment immunity before the Supreme Court declared compulsory public-sector union fees to be unconstitutional in *Janus v. AFSCME*, 138 S.Ct. 2448 (2018). But of course, as *Janus* and the many other federal cases against public-sector unions illustrate, they did *not* have Eleventh Amendment immunity.

The Ninth Circuit recently rejected this same argument in *Crowe*, 989 F.3d 714. The defendants in that case argued that the Eleventh Amendment protected the Oregon State Bar in

part because "[a]ny money judgment would come from the Bar's collection of fees that is made possible because the State authorized the Bar to collect those fees." *Id.* at 731. But the court concluded that the Bar's reliance on member dues rather than tax revenue "weigh[ed] strongly *against* immunity." *Id.* (emphasis added).

II. Plaintiff has standing because an injunction against Defendants would provide her with relief.

Defendants argue that Plaintiff lacks standing because "her alleged injury" supposedly "is not redressable by the named defendants." MTD at 16. To the contrary, however, she has named appropriate Defendants because an injunction against them will provide relief from her constitutional injuries.

To be proper defendants in a federal constitutional challenge to a state law, officials need only "have a particular duty to 'enforce' the statute in question and a demonstrated willingness to exercise that duty"; they "are not required to have a 'special connection' to the unconstitutional act or conduct." *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 828 (10th Cir. 2007). The defendant need not have "primary authority to enforce the challenged law" or "full power to redress a plaintiff's injury." *281 Care Comm. v. Arneson*, 638 F.3d 621, 631, 633 (8th Cir. 2011). It is enough that the defendant "clearly ha[s] assisted or currently assist[s] in giving effect to the law." *Prairie Band Potawatomi Nation v. Wagnon*, 402 F.3d 1015, 1027 (10th Cir. 2005), *vacated on other grounds*, 546 U.S. 1072 (2005).

Here, Defendants have the requisite connection to enforcing the rules Plaintiff challenges. Defendants admit that, under CJA Rule 14-107(b)(2), "[i]f an admitted attorney fails to pay annual license fees, the attorney is administratively suspended *by the Utah State Bar*." MTD at 17 (emphasis added). Therefore, an injunction against Defendants—i.e., the USB and its officials—would prevent enforcement of Utah's USB membership and dues requirements against Plaintiff.

Defendants say the USB's decision to administratively suspend an attorney for nonpayment of dues is "not discretionary," *id.*, but that is irrelevant. What matters is that preventing the USB from suspending Plaintiff for nonpayment of dues would provide her with relief from her constitutional injuries.

Defendants also argue that "[e]njoining the named defendants would not discontinue the enforcement of the rules, [but] would merely require the Utah Supreme Court to choose another agent to enforce the challenged rules or enforce them itself." *Id.* But to take that action, the Utah Supreme Court would have to *change the rules*—from the scheme that Plaintiff challenges, in which the USB is responsible for enforcing the membership and dues requirements, to a new, different scheme. Hypothetical future rules that the Utah Supreme Court *might* enact are irrelevant; Plaintiff challenges the *current* scheme, which Defendants enforce. Further, Defendants' argument assumes, without any apparent basis, that the Utah Supreme Court would enact rules to defy a federal court order declaring mandatory USB membership or dues unconstitutional.

Thus, Plaintiff has sued exactly who she must to obtain the relief that she seeks.

III. Plaintiff has stated viable First Amendment claims.

A. Plaintiff has stated a claim against mandatory USB membership.

The First Amendment prohibits Utah from forcing attorneys to become members of the USB as a condition of practicing law. As a general matter, the Supreme Court has made clear that the First Amendment protects an individual's "right to eschew association for expressive purposes." *Janus*, 138 S.Ct. at 2463. Forcing Plaintiff to join the USB—which engages in political and ideological speech that she strongly opposes—seriously infringes on her First Amendment right to freedom of association.

Contrary to Defendants' arguments, the Supreme Court has not approved this infringement of First Amendment rights. Indeed, the Court has expressly reserved the issue for

consideration by lower courts. Under *Janus* and other cases, this type of compelled association triggers at least exacting scrutiny, which requires Defendants to show that it "serve[s] a compelling state interest that cannot be achieved by means significantly less restrictive of associational freedoms." *Id.* at 2465 (citation omitted). Defendants have not met that burden.

1. The Supreme Court has expressly reserved whether attorneys can be forced to join bar associations like the USB that engage in non-germane political and ideological speech.

In *Lathrop v. Donohue*, 367 U.S. 820, 842–44 (1961) (plurality), the Supreme Court held that a state does not violate attorneys' right to freedom of association when it requires them to pay dues to a bar association that exists to "elevat[e] the educational and ethical standards of the Bar [and] … improv[e] the quality of the legal service[s]." But the Court declined to address the separate question of whether a bar association's use of mandatory dues for political or ideological advocacy violates the First Amendment rights of attorneys who oppose that advocacy. *Id.* at 845–46. The Court also did not address whether attorneys could be forced to join a bar association that engaged in such advocacy, because the record in *Lathrop* did not reveal whether "the State Bar actually utilized dues funds for [those] specific purposes." *Id.* at 846.

Keller partially addressed the issues that *Lathrop* had declined to resolve. The *Keller* plaintiffs were attorneys who argued that "the use of their compulsory dues to finance political and ideological activities of the State Bar with which they disagree violates their rights of free speech." 496 U.S. at 9. Before the case reached the U.S. Supreme Court, the California Supreme Court rejected their claim by holding that bar dues are categorically "exempted" from First Amendment scrutiny. *Id.* at 10. On appeal, the Supreme Court disagreed and reversed. The Court held that mandatory bar dues are not exempt from First Amendment scrutiny but are "subject to the same constitutional rule" as mandatory union fees. *Id.* at 13.

At that time, employees could not be forced to join a union, but they could be forced to pay "agency fees" to unions. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Supreme Court had held that compulsory union fees violated the First Amendment if they were used for activities not "germane" to collective bargaining. *Keller*, 496 U.S. at 9–14. Following that example, *Keller* stated that mandatory bar dues could not be used for "ideological activities not 'germane' … [to] the State's interest in regulating the legal profession and improving the quality of legal services." *Id.* at 13. The Court thus ruled for the plaintiffs, reversed the California Supreme Court, and remanded the case. *Id.* at 17.

Keller also declined to resolve a separate issue related to mandatory bar membership: whether attorneys may "be compelled to associate with an organization that engages in political or ideological activities beyond those [germane activities] for which mandatory financial support is justified under the principles of *Lathrop* and *Abood*." *Id*. In other words, *Keller* did not decide whether states may force attorneys to join bar associations that engage in non-germane political and ideological speech. And *Keller* noted that *Lathrop* had not addressed that issue, either. *Id.* Thus, the Court stated that lower courts "remain[ed] free … to consider this issue." *Id.* Since then, neither the Supreme Court nor the Tenth Circuit has resolved it.

The Tenth Circuit has, however, held that *Keller* and *Lathrop* do not foreclose "a broad freedom of association challenge to mandatory bar membership where at least some of a state bar's actions might not be germane to regulating the legal profession and improving the quality of legal services in the state." *Schell*, 2 F.4th at 1328.[2] Indeed, every Court of Appeals to consider the issue has concluded that *Keller* and *Lathrop* do not foreclose a freedom-of-association challenge to mandatory membership in a bar association that engages in non-germane

[2] As discussed further below, the *Schell* plaintiff has filed a petition for rehearing, and the Tenth Circuit has not issued a mandate in that case, so the Tenth Circuit's decision currently is not binding precedent. The petition for rehearing does not, however, challenge the Tenth Circuit's decision on the mandatory-membership issue, so that holding is unlikely to be overturned.

speech. *See id*; *Boudreaux*, 3 F.4th at 755–56; *Crowe*, 989 F.3d at 727–29; *cf. Taylor v. Buchanan*, 4 F.4th 406, 410–11 (6th Cir. 2021) (Thapar, J., concurring) (plaintiff could have stated a freedom-of-association claim against Michigan's mandatory bar if she had alleged that it engaged in non-germane activity).

The Fifth Circuit has gone a step farther—as the only Court of Appeals to have had the opportunity—and held that mandatory membership in a bar association that engages in non-germane speech *does* violate the First Amendment. *McDonald*, 4 F.4th at 247.

In her challenge to mandatory USB membership, Plaintiff has raised exactly the First Amendment claim that *Keller* did *not* foreclose, alleging that "mandating membership in a bar association that engages in political and ideological speech that is not germane to improving the quality of legal services or regulating the legal profession violates the First and Fourteenth Amendment right to freedom of association, freedom of speech, or both." Compl. ¶ 86.[3]

Thus, Defendants' assertion that Plaintiff "argues that *Keller* and *Lathrop* have been displaced by *Janus*," MTD at 19, is false. Plaintiff's claim is based (in relevant part) on an issue that *Keller* left open and therefore does *not* depend on the (false) premise that *Janus* overruled *Keller*. *Janus* is relevant to her claim only because it prescribes the appropriate *level of scrutiny* for a mandatory association—i.e., exacting scrutiny. 138 S.Ct. at 2465.

2. Plaintiff has stated a viable First Amendment challenge to mandatory USB membership.

Because Plaintiff has raised the First Amendment claim that *Keller* did not foreclose, and which Tenth Circuit precedent expressly allows, she has stated a viable claim. Defendants argue

[3] Plaintiff also alleges that mandatory membership in *any* bar association—or at least any bar association that engages in political or ideological speech, whether "germane" or not—violates attorneys' First Amendment rights. Compl. ¶¶ 83–85. Plaintiff preserves that broader argument for review in the Supreme Court, recognizing that *Lathrop* binds this Court.

that she has not, however, because "the speech she identifies [in her complaint] is germane to the legal profession and legal services." MTD at 20.

But Plaintiff has identified non-germane USB speech. One example is the USB's opposition to a proposed "Tax Equalization and Reduction Act" (H.B. 441), which, among other changes to the state's tax system, would have imposed a new a tax on services, without exempting legal services. Compl. ¶ 43. Defendants insist that this advocacy was germane because, supposedly, "[t]axing legal services will directly affect consumers' ability to afford legal services and, consequently, lawyers' ability to generate fees." MTD at 22. But a broad tax on services that happens to include legal services is not "germane" under *Keller* because it does not pertain to regulating the legal profession or "the quality of legal services." 496 U.S. at 13–14. It is not enough that the tax would "affect consumers' ability to afford legal services" or "lawyers' ability to generate fees." That would be true of *any* tax, including a generally applicable tax on income or property. It could also be true of many other proposed laws that affect people's income or ability to do business. Such an indirect effect on people's ability to afford legal services cannot render advocacy of a proposal germane; otherwise, advocacy on virtually *any* issue of public policy would be germane.

The *Utah Bar Journal* articles identified in the complaint (¶ 50) are also non-germane. The USB argues that the *Journal* is a nonpublic forum "where practitioners can share their insights on subjects pertaining to the practice of law," that the publication of such a forum is germane, and that USB members are not "associated" with the articles' messages because the USB publishes a disclaimer stating that the authors' views are not the USB's, citing the Fifth Circuit's decision in *McDonald*, 4 F.4th at 252. MTD at 24–25. But the Tenth Circuit has taken a different view, concluding that the publication of non-germane advocacy in a journal *can* constitute non-germane bar association activity and potentially support a freedom-of-association challenge to mandatory bar membership. *See Schell*, 2 F.4th at 1326–28. That only makes sense:

by selecting which articles it publishes, the USB is able to promote some ideas, but not others, and thus advance particular viewpoints notwithstanding any disclaimers. Also, promotion of controversial ideas such as "equity" and "implicit bias" does not become germane simply because the USB says that lawyers in particular should embrace such concepts, *see* MTD at 25–26—otherwise, again, any political or ideological advocacy could become "germane" through such framing.

Further, even if Plaintiff had not identified examples of non-germane USB activity, she would still be entitled to pursue her claim. Construing her allegations liberally, she has alleged that the USB engages in non-germane activities. *See* Compl. ¶¶ 86, 102–03. She further alleges that the USB "does not provide members with detailed information about its expenditures that would allow members to determine whether … expenditures of member fees were or are germane to improving the quality of legal services and regulating the legal profession." *Id.* ¶ 66. Assuming that is true, Plaintiff is entitled to discovery to determine whether the USB is engaging in non-germane activities of which she has not been made aware.

3. Dismissal is improper because Defendants have not shown that mandatory USB membership survives exacting scrutiny.

Because Plaintiff has stated a First Amendment claim challenging mandatory USB membership, and Supreme Court precedent does not foreclose it, the Court should subject Utah's membership requirement to the exacting First Amendment scrutiny the Supreme Court has prescribed for laws mandating association for expressive purposes in *Janus*, 138 S.Ct. 2448. Under exacting scrutiny, Defendants must show that mandatory USB membership "serve[s] a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 2465 (citation omitted).

Defendants have not satisfied their burden; they have not even tried to show that the state cannot achieve the only purpose mandatory USB membership might legitimately serve—

"regulating the legal profession and improving the quality of legal services," *Keller*, 496 U.S. at 13—by significantly less restrictive means. Further, it is obvious that Utah *can* serve its legitimate interests without forcing attorneys to join the USB.

On this point, *Janus*'s details are instructive. In *Janus*, the government argued that compelling public-sector workers to subsidize a union with mandatory fees was necessary to serve the state's interest in "labor peace." The "labor peace" theory held that compelling public-sector workers to subsidize a union was necessary because of the union's designation as workers' exclusive bargaining representative. Without compulsory union fees, the theory went, the union would not be able to act as the sole bargaining representative, and the result would be "pandemonium" caused by conflicts between different unions. *Janus*, 138 S.Ct. at 2465.

Janus rejected that assumption as "simply not true," *id*., because, in fact, several federal entities and states designated public-sector unions as exclusive representatives without compelling workers to pay union fees, and no such "pandemonium" had resulted. Therefore, it is "undeniable that 'labor peace' can readily be achieved 'through means significantly less restrictive of associational freedoms' than the assessment of agency fees"—and those fees cannot survive exacting scrutiny. *Id*. at 2466.

As Plaintiff has alleged, Utah's mandatory bar fails exacting scrutiny for the same reason: the state can achieve its goals for the legal profession without mandating bar membership or dues. Compl. ¶¶ 89-90. It is obvious as a theoretical matter how the state could do so: by acting as a regulator, penalizing those who break the rules, and providing educational services to ensure that practitioners know the rules—just as it already does for countless other trades. And, as a practical matter, some 20 states and Puerto Rico already regulate the practice of law without requiring membership in a state bar association that may use member fees for political and ideological speech. *See* 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 n.1

(2000).[4] If those states can regulate lawyers and improve the quality of legal services without violating attorneys' First Amendment rights with a mandatory bar, so can Utah. *See McDonald*, 4 F.4th at 246-47 (mandatory Texas Bar membership failed exacting scrutiny in part because "[t]he Bar cannot reasonably suggest that those states [without a mandatory bar association] are unable to regulate their legal professions adequately").

The Court should therefore deny Defendants' motion to dismiss with respect to Plaintiff's First Claim for Relief.

B. Plaintiff has stated a claim against compelled subsidies for the USB's speech.

The Court should deny Defendants' motion to dismiss with respect to Plaintiff's Second Claim for Relief, which states a valid First Amendment claim challenging the USB's use of mandatory dues for speech without members' affirmative consent. Compl. ¶¶ 94–107.

1. *Keller* does not foreclose Plaintiff's claim.

Defendants observe that the Tenth Circuit affirmed dismissal of a substantially similar claim, based on its conclusion that *Keller* foreclosed it, in *Schell*, 2 F.4th 1312. That is true, *see id.* at 1324–25, but the *Schell* plaintiff has filed a petition for panel rehearing or rehearing en banc, and the Tenth Circuit has not issued a mandate in that case. Therefore, at least at this time, *Schell* is not binding precedent.[5]

[4] This article identifies 32 states with a mandatory bar association. After its publication, California and Nebraska adopted bifurcated systems under which lawyers pay only for regulatory activities and are not forced to fund the bar association's political or ideological speech, eliminating most if not all of the First Amendment problems Plaintiff objects to. *See In re Petition for a Rule Change to Create a Voluntary State Bar of Neb.*, 841 N.W.2d 167, 173 (Neb. 2013); Marilyn Cavicchia, *Newly Formed California Lawyers Association Excited to Step Forward*, ABA J. (Apr. 30, 2018), https://www.americanbar.org/groups/bar_services/publications/bar_leader/2017-18/may-june/born-by-legislative-decision-california-lawyers-association-excited-to-step-forward/.

[5] If the Tenth Circuit denies rehearing, then *Schell* will foreclose Plaintiff's Second Claim for Relief before this Court, and Plaintiff will only seek to preserve the issue for appellate review.

Contrary to Defendants' argument, *Keller* does not foreclose Plaintiff's challenge to the USB's use of mandatory dues for political and ideological speech, and Plaintiff's claim therefore does not depend on the (false) proposition "that *Keller* and *Lathrop* have been displaced by *Janus*." MTD at 19.

In *Keller*, the Supreme Court held that mandatory bar dues are "subject to the same constitutional rule" that applies to mandatory union fees. 496 U.S. at 13. In *Janus,* the Court held that mandatory union fees trigger "exacting scrutiny" and struck them down. 138 S.Ct. at 2486. Under *Keller*, the same rule must apply to mandatory bar dues. They trigger the same scrutiny, therefore, and must meet the same fate.

The *Keller* plaintiffs were attorneys who alleged that the California State Bar's use of their mandatory dues for "political and ideological activities" violated their First Amendment rights. 496 U.S. at 9. The California Supreme Court rejected their claim, holding that the Bar was a "state agency" and thus "exempted … from any constitutional constraints on the use of its dues." *Id.* at 10. On appeal of that issue, the U.S. Supreme Court reversed. *Id.* at 17. It held that bar associations are not like "traditional government agencies" funded by tax dollars, but are instead akin to labor unions funded by member dues. *Id.* at 10–13. For that reason, bar associations are not exempt from First Amendment scrutiny but must be "subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions." *Id.* at 13.

When *Keller* was decided, governments could force their employees to subsidize unions' speech, as long as the speech was "germane" to collective bargaining on workers' behalf under *Abood*, 431 U.S. at 235. Now, however, *Janus* has overruled *Abood,* and held that forcing government employees to pay union fees triggers exacting First Amendment scrutiny. 138 S.Ct. at 2479–80. Accordingly, because *Keller* requires "the same constitutional rule" to apply to both union fees and bar dues, 496 U.S. at 13, exacting scrutiny must apply to both.

To be clear, *Keller* did *not* hold that states may force attorneys to pay for a bar association's "germane" political or ideological speech. It simply reviewed a decision that had held that mandatory bar dues were *categorically exempt* from First Amendment scrutiny. The plaintiffs sought to overturn that holding, arguing that bar fees should be subject to the same standard as union fees. Nobody argued that exacting scrutiny should apply, and the Court did not consider that question. There was no need to: deciding what *level* of scrutiny applied was not necessary to reverse the lower court's ruling that *no* scrutiny applied.

Thus, to understand *Keller*'s precedential force, it is necessary to separate its *holding*, which is binding, from the accompanying *dicta*, which are not. A "holding" comprises only the actual disposition of a case and the reasoning that was "necessary to th[e] result." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996). By contrast, "[d]icta are statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand." *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1184 (10th Cir. 1995) (internal marks and citation omitted).

Keller's *holding*—i.e., the rationale that was necessary to reverse the lower court—was that mandatory bar dues are governed by "the same constitutional rule" that applies to mandatory union fees. 496 U.S. at 13. The lower court had ruled that the state bar was a "state agency" and thus "exempted … from any constitutional constraints on the use of its dues." *Id.* at 10. The Supreme Court reversed that ruling and remanded the case. *Id.* at 17. It explained the reasoning necessary to the reversal: Contrary to the lower court's ruling, state bar associations are "different from … 'governmental agencies,'" and there is "a substantial analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of employee unions and their members, on the other." *Id.* at 11–12. For that reason, state bar associations are "subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions," which are bound by the First Amendment. *Id.* at 13. That equation between unions and

state bar associations was *Keller*'s essential rule of decision: It required reversal of the lower court's ruling that bar associations are "state agencies" whose mandatory dues are "exempted" from First Amendment scrutiny. *Id*. at 10.

Beyond that, *Keller* did not issue *any* holding regarding what level of First Amendment scrutiny applies to bar dues. Addressing that question was not "necessarily involved nor essential to determination" of whether the lower court erred in categorically *exempting* mandatory bar dues from First Amendment scrutiny. *Rohrbaugh*, 53 F.3d at 1184. Nor was deciding the level of scrutiny "necessary to th[e] result" of reversing the lower court, which had rejected the plaintiffs' claims based on its holding that *no* First Amendment scrutiny applied. *Seminole Tribe*, 517 U.S. at 67. Accordingly, any statements in *Keller* about whether or how the *Abood* standard should apply to bar dues were dicta. Indeed, the *Keller* plaintiffs did not argue that anything more stringent than the *Abood* standard should apply, so the Court had no occasion to address that question even in dicta, much less in a holding.

2. Dismissal is improper because Defendants have not shown that compelled subsidies for the USB's speech survive exacting scrutiny.

After *Janus*, if courts are to treat bar associations like public-sector unions—as *Keller* prescribes—then they must subject compelled bar dues to *exacting* scrutiny. Those fees cannot survive exacting scrutiny because, as discussed above, the government can regulate the legal profession and improve the quality of legal services without forcing lawyers to subsidize a bar association's political and ideological speech. And, in any event, Defendants have not shown at this stage that the USB's use of dues without affirmative consent survives exacting scrutiny, and therefore they are not entitled to dismissal of Plaintiff's Second Claim for Relief.

C. Plaintiff has stated a claim against the USB's collection of dues in the absence of sufficient safeguards for attorneys' First Amendment rights.

The Court should deny Defendants' motion to dismiss with respect to Plaintiff's Third Claim for Relief, which challenges the USB's collection of mandatory dues in the absence of

adequate safeguards to ensure that dues are not used for non-germane political and ideological speech (assuming, in the alternative to Plaintiff's other claims, that mandatory bar membership and dues are permissible at all). Compl. ¶¶ 108–122.

Plaintiff maintains that *Keller* did not approve of compelled subsidies for bar association speech, whether "germane" or not. But assuming in the alternative that *Keller* did approve of compelled subsidies for bar association speech, then it at least required that a bar association use dues only for activities "germane" to "regulating the legal profession and improving the quality of legal services," because using dues to "fund activities of an ideological nature which fall outside of those areas of activity" violates members' First Amendment rights to freedom of speech and association. 496 U.S. at 13–14.

Under *Keller*, a bar association can meet its constitutional obligation to ensure that members are not forced to pay for such non-germane activities by providing: (1) "an adequate explanation of the basis for the [mandatory] fee"; (2) "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker"; and (3) "an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* at 16 (internal marks and citation omitted). This is the same "minimum set of procedures" the Court mandated for public-sector unions—to ensure that non-members' mandatory union fees were not used for political or ideological activity not germane to a union's representation activities—in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

Plaintiff has alleged that the USB does not satisfy *any* of the three *Keller*/*Hudson* requirements. Compl. ¶ 112. Although the USB offers members a partial dues refund for amounts it purports to have spent on "lobbying or legislative-related expenditures," it does not offers members any means of objecting to, or receiving refunds for, other USB activities. *Id.* ¶ 113. Further, the USB does not provide an adequate explanation of the basis of its dues calculations or its calculations of amounts purportedly spent on "lobbying or legislative-related

expenditures" as *Keller* requires. *Id.* ¶ 114. Also, the USB does not place any amount of a member's fees in escrow before it determines whether the member wants to fund the USB's lobbying and legislative activities. *Id.* ¶ 115. And the refunds the USB provides to members who object to paying for lobbying and legislative activities do not include interest. *Id.* ¶ 116.

Defendants do not deny any of this. Instead, they rely on *Keller*'s statement that there might be "one or more alternative procedures"—besides those prescribed by *Hudson*—that could satisfy a mandatory bar association's obligation to protect attorneys' First Amendment right not to be forced to pay for non-germane activities. MTD at 27 (quoting *Keller*, 496 U.S. at 17). But Defendants avoid quoting the entire sentence from *Keller*, which states: "Questions whether one or more alternative procedures would likewise satisfy that obligation are better left for consideration *upon a more fully developed record*." 496 U.S. at 17 (emphasis added). *Keller*'s statement does not provide a basis for upholding procedures other than those *Hudson* prescribed where, as here, there is *no* developed record.

Moreover, although *Keller* did not rule out the possibility that other procedures might suffice, the Supreme Court has not identified any satisfactory alternative in the 31 years since it decided *Keller*. And the Fifth Circuit has recently held that, in light of the "protective trend" in recent Supreme Court decisions regarding compelled association and subsidies for speech, *Hudson* procedures are the "constitutional floor"—the *minimum* safeguards a mandatory bar association must provide. *Boudreaux*, 3 F.4th at 758–59.[6]

Nonetheless, Defendants argue that their alternative procedure suffices because the USB calculates its expenditures for "lobbying and any legislation-related expenses" and allows members to request a refund of their proportionate share of those expenditures. MTD at 27.

[6] *Boudreaux* adopted the view of a partial dissent in a recent Ninth Circuit case that addressed this issue. 3 F.4th at 758 & n.62 (citing *Crowe*, 989 F.3d at 734 (VanDyke, J., dissenting in part)).

Defendants say this is "over-inclusive"—i.e., that it goes beyond what *Keller* requires—because it includes a refund for all legislative activity, whether germane or not. *Id.*

But even if the USB's scheme might be "over-inclusive" in that respect, it is also *under*-inclusive in important respects. Again, the USB gives members no means to object to uses of dues other than those the USB has deemed to be "lobbying" or "legislation-related." Compl. ¶ 113. So if a member disagrees with the USB's categorization of an activity as unrelated to "lobbying" or "legislation"—assuming the member somehow has that information, despite the USB's failure to provide it, *see id.* ¶¶ 61, 64-65, 114—the member has no way to challenge that. And non-germane activities can include things other than lobbying and legislation. *See, e.g.*, *Schell*, 2 F.4th at 1327–28 (publication of articles in bar association journal was potentially non-germane); *McDonald*, 4 F.4th at 248–49 (funding of agency that, in turn, engaged in non-germane lobbying was non-germane); *Romero v. Colegio de Abogados de P.R.*, 204 F.3d 291, 302–03 (1st Cir. 2000) (compelling lawyers to purchase group life insurance was non-germane). Yet the USB gives members no way to challenge the use of their dues for such non-germane activities.

Therefore—in the absence of a "fully developed record," *Keller*, 496 U.S. at 17— the Court cannot approve of the USB's procedures, which do not satisfy the requirements set forth in *Hudson* and *Keller*.

D. Plaintiff has stated a claim against mandatory UBF membership.

Finally, there is no merit in Defendants' argument that Plaintiff's First Amendment challenge to mandatory UBF membership "fails because [she] has not alleged any speech by the Utah Bar Foundation." MTD at 31.

It is beyond dispute that the UBF is a 501(c)(3) nonprofit organization, separate from the USB, that makes donations to various other organizations.[7] Such contributions are expressive activity (i.e., "speech") for First Amendment purposes. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799 (1985) (contribution to charity "functions as a general expression of support for the recipient and its views"); *cf. Buckley v. Valeo*, 424 U.S. 1, 21–22 (1976) (contributions to political candidates and committees "serve[] as a general expression of support"). Plaintiff has alleged that she does not wish to be associated with that expressive activity. Compl. ¶ 74. Thus, Plaintiff *has* alleged that the UBF engages in speech with which she does not wish to associate, and Defendants' argument for dismissal fails.

CONCLUSION

The Court should deny Defendants' motion to dismiss.

Respectfully submitted on August 18, 2021.

GOLDWATER INSTITUTE

/s/ *Jacob Huebert*
Jacob Huebert
Attorneys for Plaintiff

[7] *See About Us*, Utah Bar Foundation., https://www.utahbarfoundation.org/about-us; *Who We Fund*, Utah Bar Foundation, https://www.utahbarfoundation.org/grantees. The "Who We Fund" page of the UBF's website currently lacks examples of the organizations that the UBF has supported. And all past versions of the "Who We Fund" page are missing from the Internet Archive—even though past versions of *all other* pages on the UBF website apparently *are* available in the archive. *See, e.g.*, https://web.archive.org/web/20190125211913/https://utahbarfoundation.org/ (archive with working links to all pages of the UBF's website as of January 25, 2019—except the "Who We Fund" page). Plaintiff therefore requires discovery to identify specific examples of UBF contributions to other organizations.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Plaintiff's Response to Defendants' Motion to Dismiss on August 18, 2021 on Defendants' counsel via CM/ECF sent to:

Christine M. Durham
Troy L. Booher
Dick J. Baldwin
ZIMMERMAN BOOHER
341 South Main Street, Fourth Floor
Salt Lake City, Utah 84111
cdurham@zbappeals.com
tbooher@zbappeals.com
dbaldwin@zbappeals.com

Attorneys for Defendants

/s/ *Kris Schlott*
Kris Schlott, Paralegal