FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL Z. CROWE; LAWRENCE K. PETERSON I; OREGON CIVIL LIBERTIES ATTORNEYS, an Oregon nonprofit corporation,

Plaintiffs-Appellants,

v.

OREGON STATE BAR, a Public Corporation; OREGON STATE BAR BOARD OF GOVERNORS; VANESSA A. NORDYKE, President of the Oregon State Bar Board of Governors; CHRISTINE CONSTANTINO, President-elect of the Oregon State Bar Board of Governors; HELEN MARIE 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-Appellees.

No. 19-35463

D.C. No.
3:18-cv-02139-JR

DIANE L. GRUBER; MARK RUNNELS, *Plaintiffs-Appellants*, v. OREGON STATE BAR; CHRISTINE CONSTANTINO; HELEN MARIE HIERSCHBIEL, *Defendants-Appellees*.	No. 19-35470 D.C. No. 3:18-cv-01591-JR OPINION

Appeal from the United States District Court
for the District of Oregon
Michael H. Simon, District Judge, Presiding

Argued and Submitted May 12, 2020
Portland, Oregon

Filed February 26, 2021

Before: Jay S. Bybee and Lawrence VanDyke, Circuit Judges, and Kathleen Cardone,* District Judge.

Per Curiam Opinion;
Partial Concurrence and Partial Dissent by
Judge VanDyke

COUNSEL

Jacob Huebert (argued) and Timothy Sandefur, Scharf-Norton Center for Constitutional Litigation at the Goldwater Institute, Phoenix, Arizona; Luke D. Miller, Military Disability Lawyer LLC, Salem, Oregon; for

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* The Honorable Kathleen Cardone, United States District Judge for the Western District of Texas, sitting by designation.

Plaintiffs-Appellants Daniel Z. Crowe, Lawrence K. Peterson I, and Oregon Civil Liberties Attorneys.

Michael L. Spencer (argued), Klamath Falls, Oregon, for Plaintiffs-Appellants Diane L. Gruber and Mark Runnels.

Elisa J. Dozono (argued) and Taylor D. Richman, Miller Nash Graham & Dunn LLP, Portland, Oregon; Steven M. Wilker (argued) and Megan K. Houlihan, Tonkon Torp LLP, Portland, Oregon; Michael Gillette, Schwabe Williamson & Wyatt P.C., Portland, Oregon; for Defendants-Appellees.

Ellen F. Rosenblum, Attorney General; Benjamin Gutman, Solicitor General; Christopher A. Perdue, Assistant Attorney General; Department of Justice, Salem, Oregon; for Amicus Curiae State of Oregon.

Vanessa L. Holton, General Counsel; Robert G. Retana, Deputy General Counsel; Brady R. Dewar, Assistant General Counsel; Office of the General Counsel, State Bar of California, San Francisco, California; for Amicus Curiae State Bar of California.

Mary R. O'Grady and Kimberly Friday, Osborn Maledon P.A., Phoenix, Arizona, for Amicus Curiae State Bar of Arizona.

OPINION

PER CURIAM:

To practice in Oregon, every lawyer must join and pay annual membership fees to the Oregon State Bar

("the Bar" or "OSB"). In these cases, Plaintiffs[1] claim these compulsions violate their freedoms of speech and association as guaranteed by the First Amendment, made applicable to the states by the Due Process Clause of the Fourteenth Amendment.

The district court dismissed all of Plaintiffs' claims, concluding that the Bar was immune from suit under the Eleventh Amendment; that Plaintiffs' free association and free speech claims were barred by precedent; and that the Bar's objection and refund procedures were constitutionally adequate. We agree with the district court that precedent forecloses the free speech claim, but neither the Supreme Court nor this court has resolved the free association claim now before us. For the reasons that follow, Plaintiffs may have stated a viable claim that Oregon's compulsory Bar membership requirement violates their First Amendment right of free association. We accordingly affirm in part, reverse in part, and remand to the district court with instructions.

I. BACKGROUND

A. *The Oregon State Bar*

"The Oregon State Bar is a public corporation and an instrumentality of the Judicial Department of the

[1] "Plaintiffs" refers to Appellants in both No. 19-35463 (Daniel Crowe, Lawrence Peterson, and the Oregon Civil Liberties Attorneys (individually referred to as the "*Crowe* Plaintiffs")) and No. 19-35470 (Diane Gruber and Mark Runnels (individually referred to as the "*Gruber* Plaintiffs")).

government of the State of Oregon." OR. REV. STAT. § 9.010(2). OSB is an integrated bar, meaning lawyers must join it and pay an annual membership fee to practice law in Oregon. *Id.* §§ 9.160(1), 9.200. OSB is administered by its board of governors, who may "adopt, alter, amend[,] and repeal" the Bar's bylaws. *Id.* § 9.080. "[A]t all times," the board must "serve the public interest" by "[r]egulating the legal profession and improving the quality of legal services; [s]upporting the judiciary and improving the administration of justice; and [a]dvancing a fair, inclusive[,] and accessible justice system." *Id.* The State of Oregon is not responsible for OSB's debts. *Id.* § 9.010(6). Instead, OSB satisfies its own financial needs and obligations from the membership fees it collects. *Id.* § 9.191(3). Subject to oversight by the Oregon Supreme Court, OSB administers bar exams, investigates applicants' character and fitness, formulates and enforces rules of professional conduct, and establishes minimum continuing legal education requirements for Oregon attorneys. *Id.* §§ 9.210, 9.490, 9.114.

OSB also publishes a monthly Bar *Bulletin*, which is subject to the bylaws' general communications policy:

> Communications of the Bar and its constituent groups and entities, including printed material and electronic communications, should be germane to the law, lawyers, the practice of law, the courts and the judicial system, legal education and the Bar in its role as a mandatory membership organization. Communications, other than permitted advertisements,

> should advance public understanding of the law, legal ethics and the professionalism and collegiality of the bench and Bar.

OSB Bylaws § 11.1.[2] OSB's Chief Executive Officer "has sole discretion . . . to accept or reject material submitted to the Bar for publication." *Id.* § 11.203. "[P]artisan political advertising is not allowed[,]" and "[p]artisan political announcements or endorsements will not be accepted for publication as letters to the editor or feature articles." *Id.* § 11.4.

OSB's legislative and public policy activities must reasonably relate to any of the following nine subjects:

> Regulating and disciplining lawyers; improving the functioning of the courts including issues of judicial independence, fairness, efficacy and efficiency; making legal services available to society; regulating lawyer trust accounts; the education, ethics, competence, integrity and regulation of the legal profession; providing law improvement assistance to elected and appointed government officials; issues involving the structure and organization of federal, state and local courts in or affecting Oregon; issues involving the rules of practice, procedure and evidence in federal, state or local courts in or affecting Oregon; or issues involving the duties and functions of judges and lawyers in federal, state and local courts in or affecting Oregon.

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[2] The OSB Bylaws are available at http://www.osbar.org/_docs/rulesregs/bylaws.pdf.

Id. § 12.1. The Bar maintains that all its communications and activities are intended to adhere to the above-listed topics, and considers all these topics germane to its regulatory purpose.

B. *The April 2018* Bulletin *Statements*

At the heart of Plaintiffs' suits are two statements published alongside each other in the April 2018 edition of the *Bulletin*, reproduced below in full. The first was attributed to the Bar, signed by its leaders, and stated as follows:

> **Statement on White Nationalism and Normalization of Violence**
>
> As the United States continues to grapple with a resurgence of white nationalism and the normalization of violence and racism, the Oregon State Bar remains steadfastly committed to the vision of a justice system that operates without discrimination and is fully accessible to all Oregonians. As we pursue that vision during times of upheaval, it is particularly important to understand current events through the lens of our complex and often troubled history. The legacy of that history was seen last year in the streets of Charlottesville, and in the attacks on Portland's MAX train. We unequivocally condemn these acts of violence.
>
> We equally condemn the proliferation of speech that incites such violence. Even as we celebrate the great beneficial power of our

First Amendment, as lawyers we also know it is not limitless. A systemic failure to address speech that incites violence emboldens those who seek to do harm, and continues to hold historically oppressed communities in fear and marginalization.

As a unified bar, we are mindful of the breadth of perspectives encompassed in our membership. As such, our work will continue to focus specifically on those issues that are directly within our mission, including the promotion of access to justice, the rule of law, and a healthy and functional judicial system that equitably serves everyone. The current climate of violence, extremism and exclusion gravely threatens all of the above. As lawyers, we administer the keys to the courtroom, and assist our clients in opening doors to justice. As stewards of the justice system, it is up to us to safeguard the rule of law and to ensure its fair and equitable administration. We simply cannot lay claim to a healthy justice system if whole segments of our society are fearful of the very laws and institutions that exist to protect them.

In today's troubling climate, the Oregon State Bar remains committed to equity and justice for all, and to vigorously promoting the law as the foundation of a just democracy. The courageous work done by specialty bars throughout the state is vital to our efforts and we continue to be both inspired and strengthened by those partnerships. We not only refuse to become accustomed to this climate, we are intent on

> standing in support and solidarity with those historically marginalized, underrepresented and vulnerable communities who feel voiceless within the Oregon legal system.

Across the page, a "Joint Statement of the Oregon Specialty Bar Associations Supporting the Oregon State Bar's Statement on White Nationalism and Normalization of Violence" stated:

> The Oregon Asian Pacific American Bar Association, the Oregon Women Lawyers, the Oregon Filipino American Lawyers Association, OGALLA-The LGBT Bar Association of Oregon, the Oregon Chapter of the National Bar Association, the Oregon Minority Lawyers Association, and the Oregon Hispanic Bar Association support the Oregon State Bar's Statement on White Nationalism and Normalization of Violence and its commitment to the vision of a justice system that operates without discrimination and is fully accessible to all Oregonians.
>
> Through the recent events from the Portland MAX train attacks to Charlottesville, we have seen an emboldened white nationalist movement gain momentum in the United States and violence based on racism has become normalized. President Donald Trump, as the leader of our nation, has himself catered to this white nationalist movement, allowing it to make up the base of his support and providing it a false sense of legitimacy. He has allowed this dangerous movement of racism to gain momentum, and we believe this is

allowing these extremist ideas to be held up as part of the mainstream, when they are not. For example, President Trump has espoused racist comments, referring to Haiti and African countries as "shithole countries" and claiming that the United States should have more immigrants from countries like Norway. He signed an executive order that halted all refugee admissions and barred people from seven Muslim-majority countries, called Puerto Ricans who criticized his administration's response to Hurricane Maria "politically motivated ingrates," said that the white supremacists marching in Charlottesville, North Carolina in August of 2017 were "very fine people," and called into question a federal judge, referring to the Indiana-born judge as "Mexican," when the race of his parents had nothing to do with the judge's decision. We are now seeing the white nationalist movement grow in our state and our country under this form of leadership.

As attorneys who lead diverse bar associations throughout Oregon, we condemn the violence that has occurred as a result of white nationalism and white supremacy. Although we recognize the importance of the First Amendment of the United States Constitution and the protections it provides, we condemn speech that incites violence, such as the violence that occurred in Charlottesville. President Trump needs to unequivocally condemn racist and white nationalist groups. With his continued failure to do so, we must step in and speak up.

> As attorneys licensed to practice law in Oregon, we took an oath to "support the Constitution and the laws of the United States and of the State of Oregon." To that end, we have a duty as attorneys to speak up against injustice, violence, and when state and federal laws are violated in the name of white supremacy or white nationalism. We must use all our resources, including legal resources, to protect the rights and safety of everyone. We applaud the Oregon State Bar's commitment to equity and justice by taking a strong stand against white nationalism. Our bar associations pledge to work with the Oregon State Bar and to speak out against white nationalism and the normalization of racism and violence.

OSB maintains both *Bulletin* statements are germane to its role in improving the quality of legal services. When Plaintiffs and other OSB members complained about the statements, however, the Bar refunded $1.15 to Plaintiffs and other objectors—the portion of their membership fees used to publish the April 2018 *Bulletin*. On appeal, the Bar explains it paid the refunds because "it has always sought, in accordance with its Bylaws, to strictly adhere to the standards of 'germane' speech as set forth in *Keller*. . . . [T]he Bar sought to avoid even the appearance of funding non-germane speech, by refunding their proportional dues with interest."

C. *District Court Proceedings*

Plaintiffs filed these lawsuits against OSB officials and OSB itself, alleging the compelled membership and membership fee requirements violate their First Amendment rights. Plaintiffs contend that (1) the two statements from the April 2018 *Bulletin* are not germane; (2) compelling them to join and maintain membership in OSB violates their right to freedom of association; and (3) compelling Plaintiffs to pay—without their prior, affirmative consent—annual membership fees to OSB violates their right to freedom of speech. In addition, the *Crowe* Plaintiffs alone contend that the Bar's constitutionally mandated procedural safeguards for objecting members are deficient. And the *Gruber* Plaintiffs alone continue to argue on appeal that OSB is not entitled to sovereign immunity from suit.

Below, these cases were referred to a magistrate, who first determined that OSB (but not the individual OSB officials) was an "arm of the state" and immune from suit pursuant to the Eleventh Amendment. The magistrate then held the OSB statement "was made within the specific context of promotion of access to justice, the rule of law, and a healthy and functional judicial system that equitably serves everyone" and "[wa]s germane to improving the quality of legal services." Assuming the Specialty Bars' statement could "include[ ] political speech that is not germane to a permissible topic," the magistrate noted it was not technically attributed to OSB but rather a "routinely publishe[d] statement[ ]" in the *Bulletin*'s "forum for

the exchange of ideas pertaining to the practice of law." The magistrate alternatively concluded that, even assuming the statements contained nongermane speech, Plaintiffs would still have suffered no constitutional injury because of OSB's existing safeguards designed to refund membership funds misused for political purposes.

The magistrate recommended the district court grant the Bar's motions to dismiss and deny the *Gruber* Plaintiffs' motion for partial summary judgment. The district court fully adopted the magistrate's findings and recommendations and dismissed these cases. Plaintiffs timely appealed.

II. STANDARD OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343. We have jurisdiction under 28 U.S.C. § 1291, and "review de novo a dismissal on the basis of sovereign immunity or for failure to state a claim upon which relief can be granted." *Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 864 (9th Cir. 2016). Moreover, we must "accept the complaint[e] well-pleaded factual allegations as true, and construe all inferences in the plaintiff[s'] favor." *Id.*

III. DISCUSSION

Plaintiffs raise the same issues that were before the district court in their appeals. We will begin with Plaintiffs' free speech and free association claims. We

consider the parties' arguments with respect to the germaneness of the April 2018 *Bulletin* statements and the adequacy of OSB's procedural safeguards as they pertain to Plaintiffs' free speech and free association claims. Because we conclude that Plaintiffs have stated a claim based on their right to free association, which we must remand to the district court, we will then address the question of OSB's immunity from a suit for damages, a claim only raised by the *Gruber* Plaintiffs.

A. *Free Speech*

In *Keller v. State Bar of California*, 496 U.S. 1, 13–14 (1990), the Supreme Court concluded that a state bar may use mandatory dues to subsidize activities "germane to those goals" of "regulating the legal profession and improving the quality of legal services" without running afoul of its members' First Amendment rights of free speech. *Id.* As a preliminary matter, Plaintiffs argue that both April 2018 *Bulletin* statements constitute political speech nongermane to the Bar's role in regulating the legal profession. We need not decide whether the district court erred in concluding that the *Bulletin* statements are germane under *Keller* (or, in the case of the Specialty Bars' statement, not attributable to OSB) for purposes of this appeal because, even assuming both statements are nongermane, Plaintiffs' free speech claim fails.

In rejecting the plaintiffs' free speech claim in *Keller*, the Supreme Court subjected integrated bars to

"the same constitutional rule with respect to the use of compulsory dues as are labor unions." *Keller*, 496 U.S. at 13 (adopting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234–36 (1977) (holding that a union may not fund from mandatory fees political or ideological activities nongermane to its collective bargaining duties)). However, the Supreme Court recently overruled *Abood* because the "line between chargeable [germane] and nonchargeable [nongermane] union expenditures has proved to be impossible to draw with precision," and because even union speech germane to collective bargaining "is overwhelmingly of substantial public concern." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2477, 2481 (2018) Plaintiffs argue that, given *Keller*'s reliance on *Abood*, faithful application of *Keller* now requires that we consult *Janus* in analyzing their *Keller* claim and apply exacting scrutiny. *See id.* at 2477, 2486. According to Plaintiffs, OSB engages in political and ideological activities (e.g., the *Bulletin* statements), so forcing them to pay mandatory membership fees violates their free speech rights. Plaintiffs urge that, under *Janus*, OSB's membership fee requirement cannot survive exacting scrutiny, and therefore, membership fees may only be constitutionally assessed if attorneys provide prior, affirmative consent.

Given *Keller*'s instruction that integrated bars adhere to the same constitutional constraints as unions, 496 U.S. at 13, Plaintiffs' argument is not without support. But *Keller* plainly has not been overruled. *See Janus*, 138 S. Ct. at 2498 (Kagan, J., dissenting)

(noting that "today's decision does not question" cases applying Abood, including *Keller*). Although *Abood*'s rationale that *Keller* expressly relied on has been clearly "rejected in [another] decision[], the Court of Appeals should follow the [Supreme Court] case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)). We are a lower court, and we would be scorning *Agostini*'s clear directive if we concluded that *Keller* now prohibits the very thing it permitted when decided.[3]

In the alternative, the *Crowe* Plaintiffs alone insist that, assuming mandatory dues remain constitutionally permissible, the district court nevertheless erred in concluding that OSB provides adequate procedural safeguards. As discussed above, *Keller* subjected integrated bars to the same constitutional constraints as unions, allowing them to use compulsory dues only to regulate attorneys or improve the quality of their States' legal professions—but not for "activities of an ideological nature which fall outside of those areas of activity." 496 U.S. at 13–14. Having saddled integrated bars with this "*Abood* obligation," the Court concluded they could satisfy that obligation "by adopting the sort of procedures described in *Hudson*." *Id.* at 17

[3] Because we do not think the Supreme Court has clearly abrogated or altered *Keller*'s holding, our precedent likewise bars Plaintiffs' requested relief as to this *claim. See Gardner v. State Bar of Nev.*, 284 F.3d 1040, 1042–43 (9th Cir. 2002).

(referencing *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986)). At a minimum, *Hudson*'s safeguards "include an adequate explanation of the basis for the [compulsory] fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Hudson*, 475 U.S. at 310.

Here, OSB's bylaws provide a dispute resolution procedure for a "member of the Bar who objects to the use of any portion of the member's bar dues for activities he or she considers promotes or opposes political or ideological causes. . . ." OSB Bylaws § 12.600. The objecting member must notify OSB's Board of Governors, and "[i]f the Board agrees with the member's objection, it will immediately refund the portion of the member's dues that are attributable to the activity, with interest." *Id.* § 12.601. If the Board disagrees with the objecting member, it offers binding arbitration before a neutral decisionmaker who conducts a hearing and promptly decides "whether the matters at issue are acceptable activities for which compulsory fees may be used under applicable constitutional law." *Id.* § 12.602. If the objector prevails, OSB pays the same refund described above; conversely, if OSB prevails, the matter is closed. *Id.*

The *Crowe* Plaintiffs argue that OSB's procedures are deficient because (1) OSB does not provide an

independently audited report[4] explaining how mandatory dues are calculated; and (2) OSB does not provide the required escrow procedure. We disagree.

First, to the extent the *Crowe* Plaintiffs urge us to require wholesale application of the procedures in *Hudson* in this context, we decline to do so. Nowhere does *Keller* require state bars to adopt procedures identical to or commensurate with those outlined in *Hudson*. 496 U.S. at 17 ("[A]n integrated bar *could* certainly meet its *Abood* obligation by adopting the *sort of procedures* described in *Hudson*.") (emphasis added). Indeed, the Court in *Keller* explicitly recognized that it lacked the "developed record" available in *Hudson* and accordingly held that "[q]uestions [of] whether one or more alternative procedures would likewise satisfy that obligation are better left for consideration upon a more fully developed record." *Id.* Thus, we decline to require an independently audited report and escrow solely because *Hudson* required as much.

Nor are we persuaded that adherence to *Hudson* is necessary—or even effective—to minimize infringement here. With respect to the independent audit, *Hudson* required this high-level explanation in the context of a union that affirmatively planned to engage in activities unrelated to collective bargaining for which it could only charge its members. 475 U.S. at 298. The Court obligated the union to provide a detailed statement of fees in advance so that nonmembers

[4] Plaintiffs concede that OSB publishes information about its allocation of membership fees each year.

could object before being charged for impermissible activities. *Id.* at 305–07. *Hudson* fashioned the escrow requirement for the same reason—to "avoid the risk that [nonmembers'] funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." *Id.* at 305.

The *Crowe* Plaintiffs do not allege any similarly affirmative plans by OSB to use Bar members' dues for nongermane purposes. Indeed, OSB maintains a policy mandating that dues be used for germane activities and communications. *See*, *e.g.*, OSB Bylaws §§ 11.1,12.1. As a practical matter, then, advance notice would not have offered additional protection against the alleged constitutional violations because OSB would have characterized all of its activities as germane.[5] Similarly, an escrow requirement would not further minimize risk of infringement because, unlike in *Hudson*, the allegedly impermissible speech is only identifiable after the fact.

A refund, which Plaintiffs received here, is the only meaningful remedy for Plaintiffs' alleged injuries. Under the circumstances, OSB provides procedures adequately tailored to "minimize the infringement" of its members' First Amendment rights. *Hudson*, 475 U.S. at 303. Indeed, we have observed, albeit in dicta, that "allow[ing] members to seek a refund of the

[5] We recognize that there is an argument to be made regarding the propriety of permitting OSB to define for itself what is germane. That is not before us. Moreover, such an argument does not alter the fact that advance notice in this case would not have prevented Plaintiffs' asserted constitutional injury.

proportion of their dues that the State Bar has spent on political activities unrelated to its regulatory function" complies with *Keller*. *Morrow v. State Bar of California*, 188 F.3d 1174, 1175 (9th Cir. 1999). OSB clearly provides that process here.

In sum, nothing in *Keller* mandates a strict application of the *Hudson* procedures. Indeed, an application of such procedures here would not have provided greater protections for Plaintiffs. As alleged, the OSB's refund process is sufficient to minimize potential infringement on its members' constitutional rights. We therefore affirm the district court as to Plaintiffs' free speech claim and the adequacy of OSB's procedural safeguards with respect to protecting Plaintiffs' free speech rights.

B. *Free Association*

In Oregon, "a person may not practice law . . . unless the person is an active member of the Oregon State Bar." OR. REV. STAT. § 9.160(1). Plaintiffs claim that because OSB engages in nongermane political activity like the *Bulletin* statements, this membership requirement violates their freedom of association under the First and Fourteenth Amendments. We first must decide whether the district court erred by concluding this claim was foreclosed by existing precedent.

1. Does existing precedent foreclose Plaintiffs' Free Association claim?

In *Keller*, the Supreme Court expressly declined to address the "freedom of association claim" that attorneys "cannot be compelled to associate with an organization that engages in political or ideological activities beyond those for which mandatory financial support is justified under the principles of *Lathrop* and *Abood*." 496 U.S. at 17. *Keller* explained this unaddressed claim was "much broader . . . than [the claim] at issue in *Lathrop*." *Id.* (discussing *Lathrop v. Donohue*, 367 U.S. 820 (1961)). Plaintiffs here insist they have presented precisely this yet-to-be-resolved free association claim. The district court concluded that *Lathrop* and *Keller* foreclosed Plaintiffs' association claim, so we examine those cases in turn.

In *Lathrop*, a plurality of the Supreme Court held:

> [T]he 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 subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity.

367 U.S. at 843. On its own terms, *Lathrop*'s "free association" decision was limited to "compelled financial support of group activities," *id.* at 828; the Court emphasized that "[t]he only compulsion to which [Lathrop]

ha[d] been subjected by the integration of the bar [wa]s the payment of the annual dues of $15 per year." *Id.* at 828 ("We therefore are confronted . . . *only* with a question of compelled financial support of group activities, *not with involuntary membership in any other aspect*.") (emphasis added).[6]

Lathrop also complained that the Wisconsin Bar engaged in lobbying. *See Lathrop*, 367 U.S. at 827. But the *Lathrop* plurality presumed, on the bare record before it, that all the bar's activities, including lobbying, related to "the regulatory program" of "improving the profession." *Id.* at 843. In other words, from what little the *Lathrop* plurality could divine, even the bar's lobbying was germane to the regulatory purposes justifying compelled financial association in the first place. *Id. Lathrop*'s ultimate conclusion was deliberately limited: a state "may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program." *Id.* At bottom, *Lathrop* merely permitted states to compel practicing lawyers to pay toward the costs of regulating their profession. *See Keller*, 496 U.S. at 9 (discussing "the limited scope of the question [*Lathrop*] was deciding").

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[6] The Supreme Court framed its decision in this way even though Lathrop's actual free association claim was *similar* to the broader one Plaintiffs raise here. *Lathrop*, 367 U.S. at 827 ("The core of appellant's argument is that he cannot constitutionally be compelled to join . . . an organization which . . . utilizes its property, funds and employees for the purposes of influencing legislation and public opinion toward legislation.").

Decades later, the Court revisited the issue in *Keller*. As discussed above, *Keller*, like *Lathrop*, concluded that states could compel practicing attorneys to pay dues to an integrated bar but that those dues could only "constitutionally fund activities germane to those goals" of "regulating the legal profession and improving the quality of legal services." *Id.* at 13–14. *Keller* then augmented the constitutional analysis, prohibiting integrated bars from funding with mandatory dues "activities having political or ideological coloration which are not reasonably related to the advancement of [its regulatory] goals." *Id.* at 15. In a later compelled speech case, the Supreme Court explained that "[t]he central holding in *Keller* . . . was that the objecting members were not required to give speech subsidies for matters not germane to the larger *regulatory* purpose which justified the required association." *United States v. United Foods, Inc.*, 533 U.S. 405, 414 (2001) (emphasis added).

Crucially, *Keller* expressly declined to address the petitioners' separate free association claim: "that they cannot be compelled to associate with an organization that engages in political or ideological activities beyond those for which mandatory financial support is justified under the principles of *Lathrop* and *Abood*." *Keller*, 496 U.S. at 17. *Keller* acknowledged this was "a much broader freedom of association claim than was at issue in *Lathrop*." *Id.* (explaining that the *Keller* petitioners' free association claim challenged more than "their 'compelled financial support of group activities' (quoting *Lathrop*, 367 U.S. at 828)). *Keller* and *Lathrop*

thus speak for themselves: the Supreme Court has never resolved this broader free association claim based on compelled bar membership.

Nor have we. In *Morrow*, the "plaintiffs complain[ed] that by virtue of their mandatory State Bar membership, they [we]re associated in the public eye with viewpoints they d[id] not in fact hold . . . [which] violate[d] their First Amendment rights to free association." 188 F.3d at 1175 ("The issue is whether plaintiffs' First Amendment rights are violated by their compulsory membership in a state bar association that conducts political activities beyond those for which mandatory financial support is justified."). This is, essentially, the same claim Plaintiffs raise here. Just like the instant claim, the *Morrow* plaintiffs raised the "much broader freedom of association claim" that *Keller* and *Lathrop* left unresolved. *See Morrow*, 188 F.3d at 1177 ("Plaintiffs nevertheless contend that language in *Keller* leaves open the question whether membership alone may cause the public to identify plaintiffs with State Bar positions in violation of plaintiffs' First Amendment rights."). Nevertheless, we did not resolve that claim.

When we reached the *Morrow* plaintiffs' association claim, we essentially reformulated it: "[h]ere, plaintiffs do not allege that they are compelled to associate in any way with the California State Bar's political activities." *Id.* By reformulating the claim, *Morrow* held that the claim before it was "no broader than that in *Lathrop*," and noted "[t]he claim reserved in *Keller* was a broader claim of violation of associational rights

than was at issue in either *Lathrop* or in this case." *Id.* Our avoidance of this broader free association claim cannot preclude Plaintiffs' efforts to resolve it here.

Accordingly, Plaintiffs raise an issue that neither the Supreme Court nor we have ever addressed: whether the First Amendment tolerates mandatory membership itself—independent of compelled financial support—in an integrated bar that engages in nongermane political activities. In concluding that precedent foreclosed this claim, the district court erred.

2. Plaintiffs' free association claim is viable.

The First Amendment protects the basic right to freely associate for expressive purposes; correspondingly, "[t]he right to eschew association for expressive purposes is likewise protected." *Janus*, 138 S. Ct. at 2463 (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)). Freedom from compelled association protects two inverse yet equally important interests. First, it shields individuals from being forced to "confess by word or act their faith" in a prescriptive orthodoxy or "matters of opinion" they do not share. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Second, because "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958), freedom from compelled association checks the power of "official[s], high or petty, [to] prescribe what [opinions] shall be

orthodox." *Barnette*, 319 U.S. at 642. In short, like the "freedom of belief," freedom from compelled association "is no incidental or secondary aspect of the First Amendment's protections." *Abood*, 431 U.S. at 235.

Plaintiffs' freedom of association claim based on the April 2018 *Bulletin* statements is viable. Because the district court erred in dismissing this claim as foreclosed by our precedent, we reverse and remand.

On remand, there are a number of complicated issues that the district court will need to address. To begin, the district court will need to determine whether *Janus* supplies the appropriate standard for Plaintiffs' free association claim and, if so, whether OSB can satisfy its "exacting scrutiny standard." *Janus*, 138 S. Ct. at 2477; *see also*, *e.g.*, *Fleck v. Wetch*, 139 S. Ct. 590 (2018) (remanding a mandatory bar membership case for further consideration in light of *Janus*). Given that we have never addressed such a broad free association claim, the district court will also likely need to determine whether *Keller*'s instructions with regards to germaneness and procedurally adequate safeguards are even relevant to the free association inquiry. To avoid issuing an advisory opinion, we defer consideration of these issues at this stage of the case. *See Ball v. Rodgers*, 492 F.3d 1094, 1119 (9th Cir. 2007) (declining to address an issue "at this time" until after the district court has an opportunity to review on remand in light of the court's instructions related to separate issues).

C. *Sovereign Immunity*

As set forth above, the district court adopted the magistrate's recommendation, in which the magistrate determined that OSB is "an arm of the state entitled to Eleventh Amendment Immunity." Although the magistrate cited several district court decisions and unpublished Ninth Circuit dispositions[7] that have alluded to this conclusion, this is a matter of first impression before this court. The Eleventh Amendment bars, with a few exceptions (*see*, *e.g.*, *Ex parte Young*, 209 U.S. 123 (1908)), federal suits against unconsenting states, their agencies, and their officers "regardless of the nature of the relief sought." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). "[N]ot all state-created or state-managed entities are immune from suit in federal court . . . . an entity may be organized or managed in such a way that it does not qualify as an arm of the state entitled to sovereign immunity." *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1423 (9th Cir. 1991).

In *State ex rel. Frohnmayer v. Oregon State Bar*, the Oregon Supreme Court held that OSB is a state agency as defined by its public records law. 767 P.2d 893, 895 (Or. 1989); *see also* OR. REV. STAT. § 192.311(6) ("State Agency' means any state officer, department, board, commission or court created by the Constitution

[7] Of note, the district court cited to our unpublished disposition in *Eardley v. Garst*, 232 F.3d 894 (9th Cir. 2000). Our circuit rules prohibit citations to unpublished dispositions issued prior to January 1, 2007 except in limited circumstances, none of which are present here. *See* 9th Cir. R. 36.

or statutes of this state. . . ."). And we acknowledge that the Oregon Supreme Court "is the final authority on the 'governmental' status of the [Bar] for purposes of state law. But its determination . . . is not binding on [federal courts] when . . . [deciding] a federal question." *Keller*, 496 U.S. at 11. We think that *Frohnmayer* has answered, definitively, an important question: Is the Oregon State Bar a state actor? The Oregon Supreme Court has said "Yes," and that means that OSB is bound by those provisions of the U.S. Constitution that bind state actors, such as the First Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See*, *e.g.*, *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 717 (1961). Finding that an entity is the "state" for purposes of the First Amendment or the Due Process and Equal Protection Clauses, however, is not the same as concluding that the entity is the "state" for purposes of the Eleventh Amendment. *See*, *e.g.*, *Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.54 (1978) (explaining there is no "basis for concluding that the Eleventh Amendment is a bar to municipal liability" in § 1983 suits). We recently discussed the different tests for state action and, as we will see, they are quite different from our consideration of factors required for sovereign immunity. *See Pasadena Republican Club v. W. Just. Ctr.*, ___ F.3d ___, 2021 WL 235775, at *4 (9th Cir. Jan. 25, 2021) (listing various tests for state action). Accordingly, *Frohnmayer* does not answer the question before us: Whether OSB is an arm of the state entitled to immunity under the Eleventh Amendment.

To determine whether OSB, which is "an instrumentality of the . . . government of the State of Oregon," OR. REV. STAT. § 9.010(2), is an arm of the state entitled to immunity, we apply the *Mitchell* framework. *See Mitchell v. L.A. Cmty. Coll. Dist.*, 861 F.2d 198, 201 (9th Cir. 1988). The *Mitchell* factors are as follows:

> [1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has the power to take property in its own name or only the name of the state, and [5] the corporate status of the entity. To determine these factors, the court looks to the way state law treats the entity.

Id. (citation omitted). OSB "bear[s] the burden of proving the facts that establish its immunity under the Eleventh Amendment." *ITSI TV Prods., Inc. v. Agric. Ass'ns*, 3 F.3d 1289, 1292 (9th Cir. 1993). We conclude that, on the whole, the factors weigh against finding OSB an "arm of the state" entitled to immunity.

1. Vulnerability of the State's treasury

The first factor—whether a money judgment would be satisfied out of state funds—weighs strongly against immunity because Oregon law clearly answers this question in the negative. OR. REV. STAT. § 9.010(6) ("No obligation of any kind incurred or created under this section shall be, or be considered, an indebtedness or obligation of the State of Oregon.").

In this circuit, "the source from which the sums sought by the plaintiff must come is the most important single factor in determining whether the Eleventh Amendment bars federal jurisdiction." *Durning*, 950 F.2d at 1424 (citing *Rutledge v. Ariz. Bd. of Regents*, 660 F.2d 1345, 1349 (9th Cir. 1981); *Ronwin v. Shapiro*, 657 F.2d 1071, 1073 (9th Cir. 1981); *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982)). Unlike the district court, we are not inclined to discount the importance of this factor.[8] Although it is true that "[t]he Eleventh Amendment does not exist solely . . . to prevent federal-court judgments that must be paid out of a State's treasury," *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996) (cleaned up), "the vulnerability of the State's purse [i]s the most salient factor in Eleventh Amendment determinations." *Hess v. Port Auth. Trans-Hudson Corp.,* 513 U.S. 30, 48 (1994). Indeed, as the Supreme Court acknowledged in *Hess*, "the vast majority of Circuits . . . have generally accorded this factor dispositive weight." 513 U.S. at 49 (internal quotation marks omitted). We certainly have, *see Durning*, 950 F.2d at 1424 (citing cases).

Nor are we persuaded by the district court's observation that, "[d]espite the fact the Bar alone is responsible for any money damages it may incur. . . . [a]ny money judgment would come from the Bar's collection

[8] The district court suggested that this factor carries less weight in cases for primarily equitable relief. But even assuming such a distinction bears on the weight of this factor, it has little effect here as both complaints seek the return of OSB membership fees Plaintiffs have paid during the statute of limitations period.

of fees that is made possible because the State authorized the Bar to collect those fees." Rather, we find OSB's collection of dues weighs against immunity, for like the bar in *Keller*, OSB's "principal funding comes, not from appropriations made to it by the legislature, but from dues levied on its members by the board of governors." 496 U.S. at 11.[9]

In short, Oregon law expressly disavows State financial responsibility for OSB, which is funded by membership fees. Therefore, the first and most important *Mitchell* factor weighs strongly against immunity.

2. Central government functions

Mitchell's second factor, "whether the entity performs central governmental functions," is a closer call, but we conclude that it weighs slightly against immunity. *Mitchell*, 861 F.2d at 201. To be sure, OSB, "an instrumentality of [Oregon's] Judicial Department," performs important government functions. OR. REV. STAT. § 9.010(2). The district court detailed how the Bar, subject to the review and direction of the Oregon Supreme Court, manages bar examinations and attorney admissions, discipline, resignations, and reinstatements; and how the Oregon Supreme Court approves

[9] The district court further opined, in a footnote, that if Plaintiffs succeeded in eliminating mandatory membership fees, the regulatory costs to the State would correspondingly increase. These concerns, however well-intentioned, exceed the proper scope of this first factor's inquiry: Whether a money judgment would be satisfied out of state funds.

changes to some OSB bylaws, adopts rules of professional conduct, reviews OSB's annual financials, and approves its budget for certain activities.

We agree that OSB "undoubtedly performs important and valuable services for the State by way of governance of the profession." *Keller*, 496 U.S. at 11. But like the integrated bar in *Keller*, "those services are essentially advisory in nature." *Id.* Integrated bars are "a good deal different from most other entities that would be regarded in common parlance as governmental agencies." *Id.* (internal quotation marks omitted). OSB "was created, not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession." *Id.* at 13. And although *Keller* never specifically addressed sovereign immunity, its analysis is pertinent and analogous to the immunity question here. *Keller* identified (after a lengthy discussion) constitutionally significant differences between an integrated bar and "traditional government agencies and officials." *Id.* On that basis, the Supreme Court rejected the argument that "the bar is considered a governmental agency" that is "exempted . . . from any constitutional constraints on the use of its dues." *Id.* at 10. Indeed, this was the principal basis on which the Supreme Court reversed the California Supreme Court in *Keller*. *Id.* at 11–13.

Moreover, the second *Mitchell* factor inquiry must be guided by "[t]he treatment of the entity under state law." *Durning*, 950 F.2d at 1426. The *Gruber* Plaintiffs point out that under Oregon law, the Oregon Supreme

Court—not OSB—makes final decisions on admitting attorneys, disciplining attorneys, and adopting rules of professional conduct. These same considerations convinced the Supreme Court in *Keller* that the California bar was not "the typical government official or agency," but rather a professional association that provided recommendations to the ultimate regulator of the legal profession. 496 U.S. at 11–12 (reversing the California Supreme Court's conclusion to the contrary). The Oregon Supreme Court exerts the same direct, regulatory control over Oregon attorneys. *See Ramstead v. Morgan*, 347 P.2d 594, 601 (Or. 1959) ("No area of judicial power is more clearly marked off . . . than the courts' power to regulate the conduct of the attorneys who serve under it."). Given OSB's similarity to the integrated bar in *Keller*, we find that the second *Mitchell* factor weighs slightly against immunity.[10] We note that even if we were inclined to discount *Keller*—which we cannot—and view OSB's functions as central government functions, the second *Mitchell* factor is, at most, a wash for OSB because the remaining four factors weigh against immunity.

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[10] Our *pre-Mitchell* decisions in *O'Connor v. State of Nevada*, 686 F.2d 749, 750 (9th Cir. 1982) and *Ginter v. State Bar of Nevada* 625 F.2d 829, 830 (9th Cir. 1980) do not require a contrary result. Neither opinion offers an explanation as to *why* the Nevada state bar is an arm of the state. More importantly, our present inquiry concerns Oregon's state bar—not Nevada's.

3. Power to sue or be sued

Oregon law unequivocally imparts to OSB the power to sue and be sued. OR. REV. STAT. § 9.010(5). This factor thus militates against immunity. The district court nevertheless reasoned to the contrary because Oregon law elsewhere provides civil immunity to the Bar and its officials in the performance of their duties related to admissions, licensing, reinstatements, disciplinary proceedings, and client security fund claims. OR. REV. STAT. §§ 9.537(2), 9.657. We are not persuaded that limited grants of immunity for specific functions cancel out the clear statutory grant of the power to sue or be sued. In any event, we have recognized that although this factor warrants "some consideration, [it] is entitled to less weight than the first two factors." *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 254 (9th Cir. 1992). As such, this factor weighs slightly against immunity.

4. Power to take property in its own name

It is clear that OSB may "enter into contracts and lease, acquire, hold, own, encumber, insure, sell, replace, deal in and with and dispose of real and personal property." OR. REV. STAT. § 9.010(5). This factor accordingly weighs against immunity.

5. Corporate status

"[OSB] is a public corporation and an instrumentality of . . . the State." *Id.* § 9.010(2). But because the Bar appoints its own leaders, amends most of its bylaws, and manages its internal affairs, OSB "is a

corporate entity sufficiently independent from the state." *Durning*, 950 F.2d at 1428. Our decision in *Durning* is illustrative here. There, the Wyoming Community Development Authority was "a *body corporate* operating as a state instrumentality operated solely for the public benefit" and its board was government appointed. *Id.* at 1427 (emphasis in original). Yet *Durning* concluded the fifth *Mitchell* factor weighed against immunity. *Id.* at 1428. We reach the same conclusion here, for OSB is even more independent than the Authority in *Durning*. OSB's Board of Governors, for instance, are not government appointed. OR. REV. STAT. § 9.025(1)(a). The Board appoints OSB's CEO. *Id.* § 9.055. And OSB "has the authority to . . . regulat[e] and manag[e] . . . [its own affairs]." *Id.* § 9.080(1).

* * *

In sum, three factors, including the first and most important, weigh against immunity and the other two still lean slightly against immunity. The *Mitchell* factors thus compel the conclusion that OSB is not an "arm of the state" entitled to immunity. We note that even viewing two factors as neutral, OSB has not met its burden to prove immunity.

IV. CONCLUSION

In light of the foregoing, the district court is **AFFIRMED IN PART, REVERSED IN PART**, and these cases are **REMANDED** for further proceedings consistent with this opinion.

VANDYKE, Circuit Judge, concurring in part and dissenting in part:

I agree with and concur in the entirety of the panel's opinion in these cases, except its resolution of the *Crowe* Plaintiffs' inadequate procedural safeguards claim based on *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

At first blush, it's not obvious to me that the Bar's existing after-the-fact safeguards, which no one disputes fail to comply with the Supreme Court's direction in *Hudson*, adequately "prevent[] compulsory subsidization of ideological activity by" objecting bar members. *Id.* at 302 (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 237 (1977)). As the panel's opinion correctly concludes, even though the Supreme Court seems to have moved on from the *Abood* rationale upon which its *Keller* decision relied, we must still follow *Keller* and thus reject Plaintiffs' free speech claims in these cases. But I don't think that requires us to go further and ignore that the Supreme Court has now concluded even *Hudson*'s minimal safeguards are not enough in other contexts. *See Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2482, 2486 (2018) (concluding that "the *Hudson* notice in the present case and in others that have come before us do not begin to permit" objectors to protect their First Amendment rights, and overruling *Abood*).

Given these developments in the law, it is hard for me to see how something less than *Hudson*'s safeguards could suffice in the context of compulsory bar

membership dues. *Keller* said that "an integrated bar could certainly meet its *Abood* obligation by adopting the sort of procedures described in *Hudson*," *Keller v. State Bar of California*, 496 U.S. 1, 17 (1990), which of course we are bound by until the Supreme Court tells us otherwise. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997). But *Keller* never addressed what procedures *less protective* than those required by *Hudson* would suffice. Even assuming some type(s) of less protective procedures might have been defensible before *Janus* overruled *Abood*, it doesn't strike me as very defensible now that the Supreme Court has told us *Hudson*'s procedures are no longer sufficient in other contexts. Following *Keller* and *Janus* and *Agostini*, it may be that *Hudson*'s requirements are now both a floor and a ceiling for integrated bars—at least until the Supreme Court gives us more guidance.

Ultimately, however, I would address the *Crowe* Plaintiffs' inadequate safeguards claim by not doing so in this appeal. We are remanding Plaintiffs' free association claim, and if on remand they prevail on that claim, the Bar will presumably need to change its bylaws, and maybe its entire structure. Because such alterations would likely change the procedures the *Crowe* Plaintiffs currently challenge, I don't think it is necessary that we review those procedures at this stage of the case. To avoid issuing an advisory opinion, I would defer consideration of this issue. *See Ball v. Rodgers*, 492 F.3d 1094, 1119 (9th Cir. 2007) (declining to address a claim "at this time," and waiting until after the district court on remand reviews the claim

anew in light of our court's instructions on separate issues that could affect that claim) Accordingly, I respectfully dissent on this singular claim.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DIANE L. GRUBER, *et al.*, Plaintiffs, v. **OREGON STATE BAR, *et al.*,** Defendants.	Case No. 3:18-cv-1591-JR
DANIEL Z. CROWE, *et al.*, Plaintiffs, v. **OREGON STATE BAR, *et al.*,** Defendants.	Case No. 3:18-cv-2139-JR

ORDER

(Filed May 24, 2019)

Michael H. Simon, District Judge.

On April 1, 2019, United States Magistrate Judge Jolie A. Russo issued a single Findings and Recommendation in these two related cases. Judge Russo recommended that the Court grant Defendants' motions to dismiss in each case.

Under the Federal Magistrates Act ("Act"), the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). If a party files objections

to a magistrate judge's findings and recommendations, "the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.*; Fed. R. Civ. P. 72(b)(3).

For those portions of a magistrate judge's findings and recommendations to which neither party has objected, the Act does not prescribe any standard of review. *See Thomas v. Arn*, 474 U.S. 140, 152 (1985) ("There is no indication that Congress, in enacting [the Act], intended to require a district judge to review a magistrate's report to which no objections are filed."); *United States. v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (holding that the court must review *de novo* magistrate judge's findings and recommendations if objection is made, "but not otherwise"). Although in the absence of objections no review is required, the Magistrates Act "does not preclude further review by the district judge[] *sua sponte* . . . under a *de novo* or any other standard." *Thomas*, 474 U.S. at 154. Indeed, the Advisory Committee Notes to Fed. R. Civ. P. 72(b) recommend that "[w]hen no timely objection is filed," the Court review the magistrate judge's recommendations for "clear error on the face of the record."

Neither party objected in Case No. 3:18-cv-01591-JR. In Case No. 3:18-cv-02139-JR, however, Plaintiffs timely filed an objection. In that objection, Plaintiffs argue that the Oregon State Bar is not entitled to Eleventh Amendment immunity and that Plaintiffs have stated cognizable claims for violations of their rights under the First and Fourteenth Amendments. The

Court has reviewed *de novo* those portions of Judge Russo's Findings and Recommendation to which Plaintiffs have objected, as well as Defendants' response. The Court agrees with Judge Russo that under the factors set forth in *Mitchell v. Los Angeles Cmty. Coll. Dist.*, 861 (9th Cir. 1998), the Oregon State Bar is immune from suit under the Eleventh Amendment. The Court also agrees with Judge Russo that Plaintiffs have failed to raise any plausible constitutional violations. The Court therefore ADOPTS those portions of the Findings and Recommendation. Further, for those portions of Judge Russo's Findings and Recommendation to which neither party has objected, this Court follows the recommendation of the Advisory Committee and reviews those matters for clear error on the face of the record. No such error is apparent.

The Court adopts Judge Russo's Findings and Recommendation in Case No. 3:18-cv-1591-JR (ECF 44) and Case No. 3:18-cv-2139-JR (ECF 29) and grants Defendants' motions to dismiss in each case. The Court denies Plaintiffs' motion for partial summary judgment (ECF 18) in Case No. 3:18-cv- 1591-JR.

IT IS SO ORDERED.

DATED this 24th day of May, 2019.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DIANE L. GRUBER and MARK RUNNELS, Plaintiffs, v. **OREGON STATE BAR, a public corporation. CHRISTINE CONSTANTINO, President of the Oregon State Bar, HELEN HIERSCHBIEL, Executive Officer of the Oregon State Bar,** Defendants.	Case No. 3:18-cv-1591-JR **JUDGMENT**

Michael H. Simon, District Judge.

Based on the Court's Order,

IT IS ADJUDGED that this case is DISMISSED.

DATED this 24th day of May, 2019.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DIANE L. GRUBER and MARK RUNNELS,

Plaintiffs,

v.

OREGON STATE BAR, a public corporation; CHRISTINE CONSTANTINO, President of the Oregon State Bar, HELEN HIERSCHBIEL, Executive Officer of the Oregon State Bar,

Defendants.

3:18-cv-1591-JR

FINDINGS & RECOMMENDATION

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

Plaintiffs,

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 COSTANTINO, President-elect

3:18-cv-2139-JR

FINDINGS & RECOMMENDATION

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.

(Filed Apr. 1, 2019)

RUSSO, Magistrate Judge:

In these two related cases, members of the Oregon State Bar (Bar) challenge the mandatory nature of the Bar's membership and compulsory fee structure. Both cases name the Bar as well as the Bar's president and chief executive officer as defendants. Case number 18-2139-JR, also names the Oregon State Bar Board of Governors, the Bar's director of finance and operations, and the Bar's general counsel as defendants.

In case number 18-1591-JR, plaintiffs Bar members Diane Gruber and Mark Runnels seek a declaration that compulsory Bar membership dues violate the First and Fourteenth Amendments of the United States Constitution. Alternatively, these plaintiffs seek damages to the extent the Bar failed to reduce the dues which plaintiffs are compelled to pay for the

Bar's political or ideological activities in violation of the First and Fourteenth Amendments.

In case number 18-2139-JR, plaintiffs Bar members Daniel Crowe, Lawrence Peterson, and Oregon Civil Liberties Attorneys similarly assert claims that the Bar violates their constitutional rights by requiring membership in the Bar to practice law, using their membership fees for political speech without consent, and failing to implement safeguards to prevent the Bar from engaging in political advocacy.

Defendants move to dismiss the respective actions. Plaintiffs Gruber and Runnels move for partial summary judgment in case number 18-1591-JR. The Oregon Attorney General submitted an amicus curiae memorandum in support of the Bar's position that the cases should be dismissed. The court heard argument on March 13, 2019. The motions to dismiss should be granted and the motion for partial summary judgment should be denied.

ALLEGATIONS

A. Gruber v. Oregon State Bar (18-1591-JR)

Plaintiffs allege they are compelled to pay various fees, assessments, and dues as a condition of engaging in the State regulated legal profession. First Amended Complaint (doc. 39) at ¶ 5. Plaintiffs further allege the Bar engages in political and ideological activities with which they do not agree such as issuing the following

statement in the April 2018 Oregon State Bar Bulletin:

> **Statement on White Nationalism and Normalization of Violence**
>
> As the United States continues to grapple with a resurgence of white nationalism and the normalization of violence and racism, the Oregon State Bar remains steadfastly committed to the vision of a justice system that operates without discrimination and is fully accessible to all Oregonians. As we pursue that vision during trines of upheaval, it is particularly important to understand current events through the lens of our complex and often troubled history. The legacy of that history was seen last year in the streets of Charlottesville, and in the attacks on Portland's MAX train. We unequivocally condemn these acts of violence.
>
> We equally condemn the proliferation of speech that incites such violence. Even as we celebrate the great beneficial power of our First Amendment, as lawyers we also know it is not limitless. A systemic failure to address speech that incites violence emboldens those who seek to do harm, and continues to hold historically oppressed communities in fear and marginalization.
>
> As a unified bar, we are mindful of the breadth of perspectives encompassed in our membership. As such, our work will continue to focus specifically on those issues that are directly within our mission, including the promotion

> of access to justice, the rule of law, and a healthy and functional judicial system that equitably serves everyone. The current climate of violence, extremism and exclusion gravely threatens all of the above. As lawyers, we administer the keys to the courtroom, and assist our clients in opening doors to justice. As stewards of the justice system, it is up to us to safeguard the rule of law and to ensure its fair and equitable administration. We simply cannot lay claim to a healthy justice system if whole segments of our society are fearful of the very laws and institutions that exist to protect them.
>
> In today's troubling climate, the Oregon State Bar remains committed to equity and justice for all, and to vigorously promoting the law as the foundation of a just democracy. The courageous work done by specialty bars throughout the state is vital to our efforts and we continue to be both inspired and strengthened by those partnerships. We not only refuse to become accustomed to this climate, we are intent on standing in support and solidarity with those historically marginalized, underrepresented and vulnerable communities who feel voiceless within the Oregon legal system.

Id at ¶ 6 and p. 8.

The Bar also published in the same issue the following statement by the Oregon Specialty Bar Associations:

Joint Statement of the Oregon Specialty Bar Associations Supporting the Oregon State Bars Statement on White Nationalism and Normalization of Violence

The Oregon Asian Pacific American Bar Association, the Oregon Women Lawyers, the Oregon Filipino American Lawyers Association, OGALLA-The LGBT Bar Association of Oregon, the Oregon Chapter of the National Bar Association, the Oregon Minority Lawyers Association, and the Oregon Hispanic Bar Association support the Oregon State Bar's Statement on White Nationalism and Normalization of Violence and its commitment to the vision of a justice system that operates without discrimination and is fully accessible to all Oregonians.

Through the recent events from the Portland MAX train attacks to Charlottesville, we have seen an emboldened white nationalist movement gain momentum in the United States and violence based on racism has become normalized. President Donald Trump, as the leader of our nation, has himself catered to this white nationalist movement, allowing it to make up the base of his support and providing it a false sense of legitimacy. He has allowed this dangerous movement of racism to gain momentum, and we believe this is allowing these extremist ideas to be held up as part of the mainstream, when they are not. For example, President Trump has espoused racist comments, referring to Haiti and African countries as "shithole countries" and claiming

that the United States should have more immigrants from countries like Norway. He signed an executive order that halted all refugee admissions and barred people from seven Muslim-majority countries, called Puerto Ricans who criticized his administration's response to Hurricane Maria "politically motivated ingrates," said that the white supremacists marching in Charlottesville, North Carolina in August of 2017 were "very fine people," and called into question a federal judge, referring to the Indiana-born judge as Mexican," when the race of his parents had nothing to do with the judge's decision. We are now seeing the white nationalist movement grow in our state and our country under this form of leadership.

As attorneys who lead diverse bar associations throughout Oregon, we condemn the violence that has occurred as a result of white nationalism and white supremacy. Although we recognize the importance of the First Amendment of the United States Constitution and the protections it provides, we condemn speech that incites violence, such as the violence that occurred in Charlottesville. President Trump needs to unequivocally condemn racist and white nationalist groups. With his continued failure to do so, we must step in and speak up.

As attorneys licensed to practice law in Oregon, we took an oath to "support the Constitution and the laws of the United States and of the State of Oregon." To that end, we have a

> duty as attorneys to speak up against injustice, violence, and when state and federal laws are violated in the name of white supremacy or white nationalism. We must use all our resources, including legal resources, to protect the rights and safety of everyone. We applaud the Oregon State Bar's commitment to equity and justice by taking a strong stand against white nationalism. Our bar associations pledge to work with the Oregon State Bar and to speak out against white nationalism and the normalization of racism and violence.

Plaintiffs assert collection of compulsory fees, although authorized by Oregon statute, violates their rights under the First and Fourteenth Amendments to free speech, petition, and association. Id. at ¶¶ 16-18. In the alternative, plaintiffs assert defendants violated their First and Fourteenth Amendment rights by failing to reduce their dues for political or ideological activities of the Bar.

B. Crowe v. Oregon State Bar (18-2139-JR)

Plaintiffs Crowe, Peterson, and the Oregon Civil Liberties Attorneys allege the State of Oregon requires attorneys to join and pay fees to the Bar association in order to practice law in the State. Complaint (doc. 1) at ¶2. Plaintiffs further allege a mandatory bar association such as Oregon's must implement safeguards to ensure members' dues are used only for the narrow purpose of improving the quality of legal services through the regulation of attorneys and not for

political advocacy. Id. at ¶ 3. Plaintiffs further assert mandatory bars must fund their political advocacy with money paid by individuals who affirmatively consent to having their money used for that purpose. Id. at ¶ 4.

Plaintiffs allege the Bar uses mandatory member fees to fund political speech without first obtaining members' consent. Id. at ¶ 5. Plaintiffs assert the Bar does not publish information regarding the method for determining whether a given allocation of funds was used for purposes germane to "improving the quality of legal services and regulating attorneys." Id. at ¶34. Moreover, plaintiffs assert the Bar uses mandatory member fees to engage in legislative and policy advocacy which are not germane to the Bar's purpose. Id. at ¶¶ 35-40.

Plaintiffs specifically object to the Bar's April 2018 statement as noted above. Plaintiffs assert that statement constitutes political speech and they do not agree with the "explicit and implicit criticism of . . . President Trump" resulting from the inclusion of the Speciality Bars' subsequent statement. Id. at ¶¶ 41-44, 47. Plaintiffs assert they had no opportunity in advance to prevent their mandatory dues from being used to publish the April 2018 Bar Bulletin and if asked they would have declined to pay for publication of the statement. Id. at ¶ 45, 48. Plaintiffs Crowe and Peterson contacted the Bar's chief executive and objected to the use of their fees for that publication and received refunds in the amount of $1.15 each. Id. at ¶¶ 49-51. Plaintiffs assert other Bar members similarly received refunds but

the Bar has not informed plaintiffs how it calculated the amounts of these partial refunds. Id. at ¶¶ 52-53.

Plaintiffs also allege the mandatory nature of the Oregon State Bar violates their freedom of association and asserts mandatory membership is not necessary to ensure quality legal services or to regulate attorneys. Id. at ¶ 7. Plaintiffs also allege the Bar's mandatory fees impinge on their right to free speech because the Bar fails to provide:

> (a) notice to members, including an adequate explanation of the basis for the dues and calculations of all non-chargeable activities, verified by an independent auditor; (b) a reasonably prompt decision by an impartial decision maker if a member objects to the way his or her mandatory dues are being spent; and (c) an escrow for the amounts reasonably in dispute while such objections are pending.

Id. at ¶ 62, 64. Plaintiffs further allege that refunding fees after an objection is made is insufficient. Id. at ¶ 65.

Finally, plaintiffs allege violation of their First and Fourteenth Amendment rights to free speech because the Bar has not implemented an "opt-in" system for members to pay for non-germane speech. Id. at ¶¶ 73-78. In addition, plaintiffs allege violation of their First and Fourteenth Amendment rights to associate due to compelled membership in the Bar. Id. at ¶¶ 80-88.

DISCUSSION

Plaintiffs Gruber and Runnels filed their complaint in the 18-1591-JR case on August 29, 2018. Defendants moved to dismiss on October 22, 2018. Plaintiffs responded to the motion and filed their own motion for summary judgment on November 5, 2018. Before the parties completed briefing on the motions, on December 13, 2018, plaintiffs Crowe, Peterson, and the Oregon Civil Liberties Attorneys filed their complaint in the 18-2139-JR case Plaintiffs Gruber and Runnels then filed an amended complaint in the 18-1591-JR case and on January 9, 2018, defendants moved to dismiss in both actions. Accordingly, defendants first motion to dismiss (doc. 14) in 18-1591-JR case should be denied as moot.[1] The motions to dismiss in both cases involve the same issues and resolution of one motion necessarily resolves the other.

A. The Oregon State Bar

In 1935, the Oregon Legislature enacted the State Bar Act, Or. Rev. Stat. §§ 9.005-9.757. The Bar is a public corporation and an instrumentality of the Judicial Department of the State of Oregon. Or. Rev. Stat.

[1] Plaintiffs in the 18-1591-JR case did not respond to the second motion to dismiss. However, their First Amended Complaint only adds two defendants: the president and the chief executive officer of the Bar, but otherwise remains the same. The second motion to dismiss is made on the same grounds as the first. While the motion is technically unopposed, because the analysis is the same with respect to the motion to dismiss in the related 18-2139-JR case, the court applies that analysis in both cases for purposes of judicial economy.

§9.010(2). To practice law in the State of Oregon, a lawyer must join the Bar and pay an annual membership fee. Or. Rev. Stat. §§ 9.160(1); 9.191; 9.200. The State of Oregon is not responsible for the debts of the Bar and the financial needs of the Bar are met through the collection of membership fees. Or. Rev. Stat. §§ 9.010(6); 9.191(3).

The Bar's Board of Governors is required to advance the science of jurisprudence and the improvement of the administration of justice. Or. Rev. Stat. § 9.080(1).[2] To accomplish this mission, the Bar administers exams for admission to practice, examines a member's character and fitness, formulates and enforces rules of conduct, and requires continuing education and training of its members. Or. Rev. Stat. §§ 9.210; 9.490; 9.114. In addition, the Bar provides the public with general legal information and seeks to increase pro bono legal services. See, e.g., https://www.osbar.org/public/; https://www.osbar.org/lsp; https://www.osbar.org/probono/.

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[2] In addition, the Bar's mission is "to serve justice by promoting respect for the rule of law, by improving the quality of legal services, and by increasing access to justice. https://www.osbar.org/docs/resources/OSBMissionStatement.pdf. The court takes judicial notice of the Bar's bylaws, Mission Statement, and other official statements and documents for purposes of the motions to dismiss. See Rhodes v. Sutter Health, 2012 WL 662462, at *3 (E.D. Cal. Feb. 28, 2012) (The court took judicial notice of a foundations bylaws because judicial notice of facts not subject to reasonable dispute is appropriate where they are either generally known within the territorial jurisdiction of the trial court, or are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.).

As part of its mission, the Bar publishes a monthly Bar Bulletin. The Bar's communications within the Bulletin:

> should be germane to the law, lawyers, the practice of law, the courts and the judicial system, legal education and the Bar in its role as a mandatory membership organization. Communications, other than permitted advertisements, should advance public understanding of the law, legal ethics and the professionalism and collegiality of the bench and Bar.

Oregon State Bar Bylaws, Art. 11, Sec. 1 (http://www.osbar.org/docs/rulesregs/bylaws.pdf) (Bylaws). In addition:

> Bar legislative or policy activities must be reasonably related to any of the following subjects: Regulating and disciplining lawyers; improving the functioning of the courts including issues of judicial independence, fairness, efficacy and efficiency; making legal services available to society; regulating lawyer trust accounts; the education, ethics, competence, integrity and regulation of the legal profession; providing law improvement assistance to elected and appointed government officials; issues involving the structure and organization of federal, state and local courts in or affecting Oregon; issues involving the rules of practice, procedure and evidence in federal, state or local courts in or affecting Oregon; or issues involving the duties and functions of judges and lawyers in

> federal, state and local courts in or affecting Oregon.

Id. at 12.1.

Defendants assert the complaints should be dismissed for the following reasons: the Bar is immune from suit under the Eleventh Amendment to the United States Constitution; integrated bars are constitutional and may use mandatory fees for political speech germane to regulating attorneys and improving legal services; affirmative consent is not necessary before a bar engages in speech germane to legal services; the individual defendants are entitled to qualified immunity from claims for damages; and the Oregon State Bar Board of Governors is not a legal entity capable of being sued.

B. Eleventh Amendment Immunity

The Eleventh Amendment provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Amendment affirms the fundamental principle of sovereign immunity which limits the grant of judicial authority in Article III of the Constitution. Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 98 (1984). A State's Eleventh Amendment protection

from suit has been extended to suits brought by a State's own citizens, Hans v. Louisiana, 134 U.S. 1, 10 (1890), and suits invoking the federal question jurisdiction of Article III. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72-73 (1996).

A suit against a State agency is considered to be a suit against the State, and is also barred by the Eleventh Amendment. Shaw v. California Dept. of Alcoholic Beverage Control, 788 F.2d 600, 603 (9th Cir. 1986). In addition, "[w]hen suit is commenced against state officials, even if they are named and served as individuals, the State itself will have a continuing interest in the litigation whenever State policies or procedures are at stake." Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 269 (1997).

Defendants assert the Bar is an arm of the State and thus is immune from suit.

> To determine whether a governmental agency is an arm of the state, the following factors must be examined: whether a money judgment would be satisfied out of state funds, whether the entity performs central governmental functions, whether the entity may sue or be sued, whether the entity has the power to take property in its own name or only the name of the state, and the corporate status of the entity. . . . To determine these factors, the court looks to the way state law treats the entity.

Mitchell v. Los Angeles Cmty. Coll. Dist., 861 F.2d 198, 201 (9th Cir. 1988).

The judges of this court have repeatedly and consistently held that the Bar is immune from suit under the Eleventh Amendment. See, e.g., Hartfield v. Or. State Bar, 2016 WL 9225978, at *1 (D.Or. Jan. 15, 2016), report and recommendation adopted, 2016 WL 9226386 (D.Or. Feb. 16, 2016), aff'd, 671 F.App'x 456 (9th Cir. 2016); Coultas v. Payne, 2012 WL 6725845, at *3 (D.Or. Nov. 27, 2012), report and recommendation adopted, 2012 WL 6726247, at *1 (D Or. Dec. 27, 2012); Weidner v. Albertazzi, 2006 WL 2987704, at *1 (D.Or. Oct. 13, 2006); Erwin v. Oregon ex rel. Kitzhaber, 231 F.Supp.2d 1003, 1007 (D.Or. 2001), aff'd, 43 F.App'x 122 (9th Cir. 2002)); see also Eardley v. Garst, 232 F.3d 894 (9th Cir. 2000) (claims against Oregon State Bar appropriately dismissed under Eleventh Amendment immunity). An analysis of the Mitchell factors again demonstrates the Bar is immune from suit in this case.

1. The Mitchell Factors

a. State Funds at Risk

As noted above, the Bar is a public corporation and an instrumentality of the Judicial Department of the State of Oregon. Or. Rev. Stat. §9.010(2). However, under the first Mitchell factor, a money judgment against the Bar would not be satisfied out of State funds. Or. Rev. Stat. § 9.010(6). Nonetheless, this factor is not necessarily critical in determining whether immunity applies in the cases at bar.[3] The "Eleventh Amendment

[3] Despite the Ninth Circuit has referring to this factor as "most important," cases so finding primarily involve claims for

does not exist solely to 'prevent federal court judgments that must be paid out of a State's treasury.'" Seminole Tribe of Fla, 517 U.S. at 58. As noted above, the Eleventh Amendment not only bars suits at law, but suits at equity as well and thus "the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment." Id. Here, plaintiffs primarily seek injunctive relief. Despite the fact the Bar alone is responsible for any money damages it may incur, the Bar performs essential governmental functions including the collection of fees to perform those functions. Any money judgment would come from the Bar's collection of fees that is made possible because the State authorized the

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money damages whereas the cases at bar primarily involve requests for equitable relief. See e.g., Durning v. Citibank, N.A., 950 F.2d 1419, 1426 (9th Cir. 1991); see also Savage v. Glendale Union High Sch., Dist. No. 205, Maricopa Cty., 343 F.3d 1036, 1039 (9th Cir. 2003) (seeking compensatory and punitive relief); Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 48-49 (1994) (in action seeking recovery under Federal Employers' Liability Act, recognizing majority of circuit courts find the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations). The Seventh Circuit in a suit involving the Wisconsin State Bar stated, "even without any impact on the state's treasury, the district court must consider whether the Bar occupies the position of a public agency or official, necessarily forbidding any suit in federal court." Crosetto v. State Bar of Wisconsin, 12 F.3d 1396, 1402 (7th Cir. 1993). The Seventh Circuit later determined that the effect on the state treasury was the least important factor. Thiel v. State Bar of Wisconsin, 94 F.3d 399, 401 (7th Cir. 1996), overruled on other grounds by Kingstad v. State Bar of Wis., 622 F.3d 708 (7th Cir. 2010).

Bar to collect those fees.[4] Accordingly, the money judgment sought by the plaintiffs, which is, the return of fees already paid, is not a dispositive element militating against a finding of immunity under the Mitchell factors.

b. Central Government Functions

The Oregon Legislature, through the State Bar Act, has delegated traditional functions of the judiciary to the Bar. See, e.g., Ramstead v. Morgan, 219 Or. 383, 399, 347 P.2d 594, 601 (1959) (noting the delegation of traditional function of the judiciary in disciplining the members of the bar serving under it through the former Or. Rev. Stat. § 9.550). As noted above, the State Bar Act broadly provides for the regulation of the practice of law in the State of Oregon.

The Bar regulates admission to the practice of law as well as the conduct of practicing attorneys in Oregon. See, e.g. Or. Rev. Stat. §§ 9.080; 9.114; 9.210; 9.490. The Oregon Supreme Court oversees the Bar's

[4] If the Bar were unable to collect mandatory fees, its ability to regulate attorneys would be impacted. As discussed in the next section, the Oregon Supreme Court would be left to carry out the regulatory function which would certainly impact the State's funding. Thus, as a practical matter, plaintiffs' success in these actions will impact the State treasury. See Alaska Cargo Transp., Inc. v. Alaska R.R. Corp., 5 F.3d 378, 381, 382 (9th Cir. 1993) (even though sued entity and not the State is liable for a judgment against it, the entity's finances are "in substantial respects . . . dependent upon and controlled by the will of the governor and the legislature," and the State has a "strong interest in keeping [the entity operational] and fiscally sound.").

regulatory activities, retaining original jurisdiction to review decisions concerning admissions, reinstatement, and attorney discipline. Or. Rev. Stat. § 9.536. The Supreme Court appoints the Bar's presiding disciplinary adjudicator, as well as members of the Bar's Disciplinary Board, State Professional Responsibility Board, Unlawful Practice of Law Committee, and the Board of Bar Examiners. See Or. Rev. Stat. §§ 9.210, 9.532; B.R. 1.1, 2.3, 2.4, 12.1 (https://www.osbar.org/docs/rulesregs/rulesofprocedure.pdf); Bylaws §§ 18.100, 28.1 (http://www.osbar.org/docs/rulesregs/bylaws.pdf). The Supreme Court approves any changes to the Bylaws that apply to admission to practice law in Oregon. See Or. Rev. Stat. § 9.542; Bylaws § 28.6. The Supreme Court also reviews all rules of procedure relating to the admission to practice law, discipline, resignation, and reinstatement of Bar members, and reviews the eligibility of candidates for the Board of Governors. Or. Rev. Stat. §§ 9.005(7); 9.042. The Chief Justice reviews annual statements of the Bar's financial position. Or. Rev. Stat. § 9.100. The Supreme Court also approves the Bar's budget for admissions, discipline, and continuing legal education programs in conjunction with the budgets of other Bar activities. Bylaws § 7.202.

The statutory structure of the State Bar Act and various implementing regulations demonstrate that the function of the Bar is to assume responsibilities otherwise within the domain of the Oregon Supreme Court. That statute further demonstrates that the Bar

serves quintessential government functions.[5] See, e.g., O'Connor v. State of Nev., 686 F.2d 749, 750 (9th Cir. 1982) (Nevada State bar is the investigative arm of the Supreme Court of Nevada, charged with investigating and disciplining the legal profession of the state, and as such an agency, it too is immune from suit in federal court under the Eleventh Amendment).

c. Sue or Be Sued

The third Mitchell factor, whether the purported arm of the state may sue or be sued, militates somewhat against immunity. The Bar may sue or be sued. Or. Rev. Stat. § 9.010(5). However, the State Bar Act limits the ability to sue the Bar in certain respects. See Or. Rev. Stat. § 9.537 (providing absolute immunity to the Bar, Bar officers, and other Bar entities from civil liability in the performance of their duties relative to proposed or pending admission, professional licensing requirements, reinstatement, or disciplinary proceedings); Or. Rev. Stat. § 9.657 (providing immunity from

[5] Plaintiffs assert the "advisory nature of the Bar's relationship with the State Supreme Court undercuts a finding that the Bar performs central government functions" citing Keller v. State Bar of California, 496 U.S. 1, 11 (1990) (noting the functions of the California State Bar are actually reserved by California law to the State Supreme Court). The fact that decisions of the Bar are reviewed by the Oregon Supreme Court does not make those functions any less governmental in form. State administrative agencies' decisions are often subject to review without stripping the agency of their governmental duties. Moreover, such argument neglects to consider the State Legislature's choice to relieve the Supreme Court of these functions which may otherwise impinge on its ability to perform its other duties.

civil liability for the performance of duties relative to proposed or pending client security fund claims). Thus, this factor does not argue against immunity from suit in federal court.

d. Power to Take Property in its Own Name

Pursuant to the fourth Mitchell factor, the court considers whether the Bar has the power to take property in its own name or in the name of the State. The Bar "may, in its own name, for the purpose of carrying into effect and promoting its objectives, enter into contracts and lease, acquire, hold, own, encumber, insure, sell, replace, deal in and with and dispose of real and personal property." Or. Rev. Stat. § 9.010. As such, this factor somewhat weighs against immunity. See Beentjes v. Placer Cty. Air Pollution Control Dist., 397 F.3d 775, 784 (9th Cir. 2005) (California law authorizes County Pollution Control District to "take by grant, purchase, gift, devise, or lease, to hold, use, and enjoy, and to lease or dispose of any real or personal property within or without the district necessary to the full exercise of its powers" weighed in favor finding district not an arm of the state). Nonetheless, the Bar's power to take property in its own name is in furtherance of its objectives which are classified as governmental functions to aid the Supreme Court in regulating attorneys. See Belanger v. Madera Unified Sch. Dist., 963 F.2d 248, 254 (9th Cir. 1992) (because beneficial ownership of public schools' property held in a district's own name enures to the State, this factor is entitled to little weight in the overall balance). Moreover, the

Bar's ability to hold property in its own name is limited in some respects. For instance, while the Bar may take possession of abandoned client funds held in trust accounts, those funds belong to the State. Or. Rev. Stat. §§ 98.386(2); 98.304. Accordingly, this factor also fails to demonstrate lack of immunity.

e. Corporate Status

As to the fifth Mitchell factor, "the Oregon State Bar is a public corporation and an instrumentality of the Judicial Department of the government of the State of Oregon." Or. Rev. Stat. 9.010. This again demonstrates the central governmental role the Bar plays in concert with the Oregon Supreme Court. Indeed, the Oregon Supreme Court has determined that this language establishes the Bar is itself a State agency. State ex rel. Frohnmayer v. Oregon State Bar, 307 Or. 304, 309, 767 P.2d 893, 895 (1989).

Despite the independent financial status vested in the Bar through the State Bar Act, the legislature intended it to perform central government functions in concert with the Oregon Supreme Court and as such it is an arm of the state entitled to Eleventh Amendment Immunity.

However, the individual defendants, to the extent plaintiffs seek prospective injunctive relief, do not enjoy similar immunity. See Coeur d'Alene Tribe of Idaho, 521 U.S. at 276-77 ("where prospective relief is sought against individual state officers in a federal forum based on a federal right, the Eleventh Amendment, in

most cases, is not a bar."). Nonetheless, as the law currently stands with respect to integrated bars, compulsory fees and mandatory membership do not violate the First and Fourteenth Amendments. This is true even if the Bar engages in political speech so long as the speech is germane to regulating the legal profession and improving the quality of legal services. In addition, to the extent the Bar has proper procedural safeguards in place to ensure members are not required to fund non-germane speech, the First Amendment is not violated.

C. Compulsory Bar Membership and Mandatory Fees

1. Integrated Bar Specific Case Law

In 1961, a plurality of the Supreme Court determined:

> 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 subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity. Given the character of the integrated bar shown on this record, in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, we are unable to find

> any impingement upon protected rights of association.

Lathrop v. Donohue, 367 U.S. 820, 843 (1961). However, the Court provided no opinion as to the correctness of the Wisconsin Supreme Court's conclusion that the appellant may be constitutionally compelled to contribute financial support to political activities which he opposes. Id. at 847-48.

In 1990, the Supreme Court affirmed the requirement that lawyers admitted to practice in a State may be required to join and pay dues to the State Bar. Keller v. State Bar of California, 496 U.S. 1, 4 (1990). However, the specific issue before Keller was the scope of permissible dues-financed activities in which the State Bar may engage. The Court noted that in Abood v. Detroit Board of Education, 431 U.S. 209, 235-36 (1977), a public union could not use a dissenting union member's dues for ideological activities not "germane" to the purpose for which compelled association was justified: collective bargaining. Keller, 496 U.S. at 9, 13. Accordingly, Keller determined that a State Bar

> may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity.

Id. at 14.

In 1994, the Ninth Circuit recognized that Lathrop and Keller upheld the constitutionality of integrated

bars and that an integrated bar may constitutionally fund activities germane to regulating the legal profession and improving the quality of legal services. O'Connor v. State of Nev., 27 F.3d 357, 361 (9th Cir. 1994).

In 2014, the Supreme Court determined non-union home health care workers (who were not full-fledged public employees) represented by a public union in collective bargaining could not be compelled to pay dues unless the fee provision passes exacting First Amendment scrutiny. Harris v. Quinn, 573 U.S. 616, 648 (2014). The Court then addressed whether:

> a refusal to extend Abood to cover the situation presented in this case will call into question our decisions in Keller v. State Bar of Cal., 496 U.S. 1, . . . (1990). . . . [It does not].
>
> In Keller, we considered the constitutionality of a rule applicable to all members of an "integrated" bar, i.e., "an association of attorneys in which membership and dues are required as a condition of practicing law." 496 U.S., at 5. . . . We held that members of this bar could not be required to pay the portion of bar dues used for political or ideological purposes but that they could be required to pay the portion of the dues used for activities connected with proposing ethical codes and disciplining bar members. Id. at 14. . . .
>
> This decision fits comfortably within the framework applied in the present case. Licensed attorneys are subject to detailed ethics rules, and the bar rule requiring the payment of dues was part of this regulatory scheme.

> The portion of the rule that we upheld served the "State's interest in regulating the legal profession and improving the quality of legal services." Ibid. States also have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices. Thus, our decision in this case is wholly consistent with our holding in Keller.

Harris at 655-56.

To date, neither the Ninth Circuit nor the Supreme Court has recognized that Lathrop or Keller have been abrogated and in fact, the Ninth Circuit has affirmed the continuing application of these cases as recently as March 13, 2018. See Caruso v. Washington State Bar Ass'n 1933, 716 F. App'x 650, 651 (9th Cir. 2018) (district court properly dismissed the action citing Keller and Lathrop). Nonetheless, plaintiffs assert the Supreme Court's recent decision in Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31, 138 S. Ct. 2448 (2018) now controls the analysis of First Amendment issues as applied to integrated bars.

2. The Janus Decision

On June 27, 2018, the Court issued its decision in Janus overruling Abood, 431 U.S. 209. Specifically, the Court held:

> Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be

> made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. . . . Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. . . . Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

Id. at 2486. The Court found the State's interest in "labor peace," while compelling, could be achieved through less restrictive means. Id. at 2465-66.

Accordingly, plaintiffs assert not only does mandatory bar membership and compulsory fees fail the exacting scrutiny standard described in Janus,[6] but because the Bar does not obtain members' affirmative consent before using their fees for political or ideological speech, the compulsory nature of the Bar's membership and fees further violates their First Amendment rights. However, because Keller has not been abrogated, this court is bound to follow its dictates as it is directly applicable to the cases at bar.

The Supreme Court has determined that exacting scrutiny is wholly consistent with the holding in Keller. Harris at 655-56. With respect to affirmative consent before using compulsory Bar dues for political speech,

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[6] Under exacting scrutiny, a compelled subsidy must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms. Janus, 138 S.Ct. at 2465.

the Supreme Court has made no such proclamation and therefore this court is prohibited from assuming that Janus impliedly overruled Keller:

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Agostini v. Felton, 521 U.S. 203, 237, 117 S. Ct. 1997, 2017, 138 L. Ed. 2d 391 (1997).

> The district court properly dismissed Eugster's claims relating to his compulsory membership in the WSBA because an attorney's mandatory membership with a state bar association is constitutional. See Keller v. State Bar of Cal., 496 U.S. 1, 13, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990) ("[T]he compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services."); Lathrop v. Donohue, 367 U.S. 820, 843, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961) (Brennan, J, plurality opinion) (state bar association may constitutionally require compulsory membership and payment of dues without impinging on protected rights of association). Contrary to Eugster's contentions, this court cannot overrule binding authority because "[a] decision of

> the Supreme Court will control that corner of the law unless and until the Supreme Court itself overrules or modifies it." Hart v. Massanari, 266 F.3d 1155, 1171 (9th Cir. 2001).

Eugster v. Washington State Bar Ass'n, 684 F. App'x 618, 619 (9th Cir.), cert. denied, 137 S. Ct. 2315 (2017).

Accordingly, this court should decline to apply Janus and must apply Keller to the cases at bar.[7] Applying Keller demonstrates that plaintiffs' claims fail as a matter of law and should be dismissed.

3. Keller Application

As noted above, Keller permits the use of compulsory membership dues to fund speech germane to regulating the legal profession and improving the quality of legal services. Arguably, the statement attributed to the Bar in the April 2018 Bar Bulletin is germane to that purpose. Plaintiffs assert the statement is non-germane political speech that condemns the proliferation of speech that incites violence and advocates taking action to stop such speech. But to the extent such an interpretation is reasonable, it was made within the specific context of promotion of access to justice, the

[7] The fact that the Supreme Court recently remanded to the Eighth Circuit a case involving mandatory bar membership for further consideration in light of Janus does not alter the requirement that this court follow direct Supreme Court precedent. See Fleck v. Wetch, 139 S. Ct. 590 (2018) (remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of Janus, 138 S.Ct. 2448). The remand does not indicate the Supreme Court will ultimately overrule Keller.

rule of law, and a healthy and functional judicial system that equitably serves everyone ("the [Bar] remains committed to equity and justice for all, and to vigorously promoting the law as the foundation of a just democracy"). This is germane to improving the quality of legal services. See Gardner v. State Bar of Nevada, 284 F.3d 1040, 1043 (9th Cir. 2002) (statements "to advance understanding of the law, the system of justice, and the role of lawyers, as opposed to nonlawyers, to make the law work for everyone" are germane to improving of the legal profession).

The Specialty Bars' Statement appearing along side the Bar's statement in the April 2018 Bar publication is not a statement by the Bar, but instead a statement authored by seven affinity bars announcing their support of the Bar's statement, among other statements. Although the Specialty Bars' Statement included rhetoric critical of the President, the Bar Bulletin routinely publishes statements from a variety of authors with differing political viewpoints and creates a forum for the exchange of ideas pertaining to the practice of law. This service also is germane to improving the quality of legal services. However, even assuming the Specialty Bars' Statement includes political speech that is not germane to a permissible topic, and it is a statement made on behalf of the Bar and consequently compelled speech of its members, it still would not violate the First Amendment because the Bar has adequate safeguards in place to protect members' use of dues in this manner.

As noted above, communications within the Bulletin:

> should be germane to the law, lawyers, the practice of law, the courts and the judicial system, legal education and the Bar in its role as a mandatory membership organization. Communications, other than permitted advertisements, should advance public understanding of the law, legal ethics and the professionalism and collegiality of the bench and Bar.

Bylaws, 11.1 (http://www.osbar.org/docs/rulesregs/bylaws.pdf).[8]

To the extent such communications fail to adhere to this policy, the Bylaws provide a framework for addressing those communications:

> Section 12.6 Objections to Use of Bar Dues
>
> Subsection 12.600 Submission
>
> A member of the Bar who objects to the use of any portion of the member's bar dues for activities he or she considers promotes or opposes political or ideological causes may request the Board to review the member's concerns to determine if the Board agrees with the member's objections. Member objections must be in writing and filed with the Chief Executive Officer of the Bar. The Board

[8] Plaintiffs also challenge the Bar's general legislative policy. However, the Bylaws also provide that the Bar's legislative or policy activities must be reasonably related to topics related to the legal profession. See Bylaws 12.1. Accordingly, this claim fails as a matter of law.

will review each written objection received by the Chief Executive Officer at its next scheduled board meeting following receipt of the objection. The Board will respond through the Chief Executive Officer in writing to each objection. The Board's response will include an explanation of the Board's reasoning in agreeing or disagreeing with each objection.

Subsection 12.601 Refund

If the Board agrees with the member's objection, it will immediately refund the portion of the member's dues that are attributable to the activity, with interest paid on that sum of money from the date that the member's fees were received to the date of the Bar's refund. The statutory rate of interest will be used. If the Board disagrees with the member's objection, it will immediately offer the member the opportunity to submit the matter to binding arbitration between the Bar and the objecting member. The Chief Executive Officer and the member must sign an arbitration agreement approved as to form by the Board.

Subsection 12.602 Arbitration

If an objecting member agrees to binding arbitration, the matter will be submitted to the Oregon Senior Judges Association ("OSJA") for the designation of three active-status retired judges who have previously indicated a willingness to serve as volunteer arbitrators in these matters. The Bar and the objecting member will have one peremptory challenge to the list of arbitrators. The Bar and the

objecting member must notify one another of a peremptory challenge within seven days after receiving the list of proposed arbitrators. If there are no challenges or only one challenge, the OSJA will designate the arbitrator. The arbitrator will promptly arrange for an informal hearing on the objection, which may be held at the Oregon State Bar Center or at another location in Oregon that is acceptable to the parties and the arbitrator. The hearing will be limited to the presentation of written information and oral argument by the Bar and the objecting member. The arbitrator will not be bound by rules of evidence. The presentation of witnesses will not be a part of the hearing process, although the arbitrator may ask the state bar representative and the objecting member and his or her lawyer, if any, questions. The hearing may be reported, but the expense of reporting must be borne by the party requesting it. The Bar and the objecting member may submit written material and a legal memorandum to the arbitrator no later than seven days before the hearing date. The arbitrator may request additional written material or memoranda from the parties. The arbitrator will promptly decide the matter, applying the standard set forth in Keller v. State Bar of California, 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990), to the expenditures to which the member objected. The scope of the arbitrator's review must solely be to determine whether the matters at issue are acceptable activities for which compulsory fees may be used under applicable

> constitutional law. In making his or her decision, the arbitrator must apply the substantive law of Oregon and of the United States Federal Courts. The arbitrator must file a written decision with the Chief Executive Officer within 14 days after the hearing. The arbitrator's decision is final and binding on the parties. If the arbitrator agrees with the member's objection, the Bar will immediately refund the portion of the member's dues that are reasonably attributable to the activity, with interest at the statutory rate paid on the amount from the date that the member's fees were received to the date of the Bar's refund. If the arbitrator agrees with the Bar, the member's objection is denied and the file in the matter closed. Similar or related objections, by agreement of the parties, may be consolidated for hearing before one arbitrator.

Oregon State Bar Bylaws, Art. 12, Sec. 6 (http://www.osbar.org/docs/rulesregs/bylaws.pdf).

To comply with Keller's safeguard requirements for the collection of fees, the Bar must include an adequate explanation of the basis for the fee, provide a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and provide an escrow account for the amounts reasonably in dispute while such challenges are pending. Keller 496 U.S. at 16 (citing Teachers v. Hudson, 475 U.S. 292 (1986)). Because the Bar specifically mandates that all communications must be germane to the law, it has instituted the above procedure only when a member

believes the Bar has violated that mandate. As Keller noted,

> We believe an integrated bar could certainly meet its Abood obligation by adopting the sort of procedures described in Hudson. Questions whether one or more alternative procedures would likewise satisfy that obligation are better left for consideration upon a more fully developed record.

Id. at 17.

The Bar's Bylaws procedure provides adequate safeguards as contemplated by Keller. The basis for the fee does not present itself until a Bar member objects and if the Bar agrees, it immediately refunds the fee attributable to the activity including any interest earned on that fee. Such procedure satisfies the escrow requirement of the safeguards and the opportunity to promptly challenge the fee. If the Bar member disagrees with the decision he or she may then seek arbitration where, if the Bar has not already explained its decision, the member will receive an explanation of the fee decision and have the opportunity to resolve the issue before an impartial decisionmaker.

Nothing in Hudson's procedures mandate affirmative consent prior to collecting the fee. This is especially true where the Bar's policy already mandates that all communications must be germane to the legal profession. Moreover, the Bar provides all members with an annual accounting of both projected and actual expenses, allowing a member an opportunity to object

if they believe an upcoming expense fails to comply with the Bylaws regarding germane communications. See Or. Rev. Stat. § 9.100 (requiring financial statement submission to the Chief Justice); Bylaws § 7.2 (Board of Governors' review of proposed budget during public meetings).

Certain plaintiffs challenge the lack of explanation concerning their refunds upon objecting to the statements in the April 2018 Bar Bulletin. However, plaintiffs did not avail themselves of the very procedures that would have provided that explanation and thus they cannot now allege a set of facts that would demonstrate the Bar, in its application of its Bylaws, violated their constitutional rights to procedural safeguards concerning the use of their fees for compelled speech.

Because 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 based on the face of the pleadings and judicially noticed facts. Accordingly, all claims should be dismissed.

E. Qualified Immunity

Plaintiffs concede the individual defendants are immune from suit for damages and thus the motion to dismiss based on qualified immunity is moot.

F. Board of Governors

Plaintiffs also concede the claims against the Board of Governors should be dismissed.

G. Motion for Partial Summary Judgment (18-1591, Doc. 18)

Plaintiffs' motion relies on Janus overruling Keller and as noted above, this court cannot make that determination. Accordingly, the motion for partial summary judgment should be denied.

CONCLUSION

A. Gruber v. Oregon State Bar, 18-cv-1591-JR

Defendants' motion to dismiss (doc. 14) should be denied as moot. Defendants' motion to dismiss (doc. 41) should be granted. Plaintiffs' motion for partial summary judgment (doc. 18) should be denied. The case should be dismissed and a judgment should be entered.

B. Crowe v. Oregon State Bar, 18-cv-2139-JR

Defendants' motion to dismiss (doc. 15) should be granted. The case should be dismissed and a judgment should be entered.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or

appealable order. The parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties shall have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any factual determination of the Magistrate Judge will be considered as a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to this recommendation.

DATED this 1st day of April, 2019.

/s/ Jolie A. Russo
JOLIE A. RUSSO
United States
Magistrate Judge

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Art. III - Sec. 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

28 U.S.C. §1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

OREGON REVISED STATUTES

9.010. Status of attorney and Oregon State Bar; applicability of statutes

(1) An attorney, admitted to practice in this state, is an officer of the court.

(2) The Oregon State Bar is a public corporation and an instrumentality of the Judicial Department of the government of the State of Oregon. The bar is authorized to carry out the provisions of ORS 9.005 to 9.755.

(3) The bar is subject to the following statutes applicable to public bodies:

(a) ORS 30.210 to 30.250.

(b) ORS 30.260 to 30.300.

(c) ORS 30.310, 30.312, 30.390 and 30.400.

(d) The Oregon Rules of Civil Procedure.

(e) ORS 192.410 to 192.505.

(f) ORS 192.610 to 192.690.

(g) ORS 243.401 to 243.507.

(h) ORS 244.010 to 244.040.

(i) ORS 297.110 to 297.230.

(j) ORS chapters 307, 308 and 311.

(k) ORS 731.036 and 737.600.

(4) Except as provided in subsection (3) of this section, the bar is not subject to any statute applicable to a state agency, department, board or commission or public body unless the statute expressly provides that it is applicable to the Oregon State Bar.

(5) The Oregon State Bar has perpetual succession and a seal, and may sue and be sued. Notwithstanding the provisions of ORS 270.020 and 279.835 to 279.855 and ORS chapters 278, 279A, 279B and 279C, the bar may, in its own name, for the purpose of carrying into effect and promoting its objectives, enter into contracts and lease, acquire, hold, own, encumber, insure, sell, replace, deal in and with and dispose of real and personal property.

(6) No obligation of any kind incurred or created under this section shall be, or be considered, an indebtedness or obligation of the State of Oregon.

9.160. Bar membership required to practice law; exceptions

(1) Except as provided in this section, a person may not practice law in this state, or represent that the person is qualified to practice law in this state, unless the person is an active member of the Oregon State Bar.

(2) Subsection (1) of this section does not affect the right to prosecute or defend a cause in person as provided in ORS 9.320.

(3) An individual licensed under ORS 696.022 acting in the scope of the individual's license to arrange a real estate transaction, including the sale, purchase, exchange, option or lease coupled with an option to purchase, lease for a term of one year or longer or rental of real property, is not engaged in the practice of law in this state in violation of subsection (1) of this section.

(4) A title insurer authorized to do business in this state, a title insurance agent licensed under the laws of this state or an escrow agent licensed under the laws of this state is not engaged in the practice of law in this state in violation of subsection (1) of this section if, for the purposes of a transaction in which the insurer or agent provides title insurance or escrow services, the insurer or agent:

(a) Prepares any satisfaction, reconveyance, release, discharge, termination or cancellation of a lien, encumbrance or obligation;

(b) Acts pursuant to the instructions of the principals to the transaction as scrivener to fill in blanks in any document selected by the principals;

(c) Presents to the principals to the transaction for their selection any blank form prescribed by statute, rule, ordinance or other law; or

(d) Presents to the principals to the transaction for their selection a blank form prepared or approved by a lawyer licensed to practice law in this state for one or more of the following:

(A) A mortgage.

(B) A trust deed.

(C) A promissory note.

(D) An assignment of a mortgagee's interest under a mortgage.

(E) An assignment of a beneficial interest under a trust deed.

(F) An assignment of a seller's or buyer's interest under a land sale contract.

(G) A power of attorney.

(H) A subordination agreement.

(I) A memorandum of an instrument that is to be recorded in place of the instrument that is the subject of the memorandum.

(5) In performing the services permitted in subsection (4) of this section, a title insurer, a title insurance agent or an escrow agent may not draft, select or give advice regarding any real estate document if those activities require the exercise of informed or trained discretion.

(6) The exemption provided by subsection (4) of this section does not apply to any acts relating to a document or form that are performed by an escrow agent under subsection (4)(b), (c) or (d) of this section unless the escrow agent provides to the principals to the transaction a notice in at least 12-point type as follows:

YOU WILL BE REVIEWING, APPROVING AND SIGNING IMPORTANT DOCUMENTS AT CLOSING. LEGAL CONSEQUENCES FOLLOW FROM THE SELECTION AND USE OF THESE DOCUMENTS. THESE CONSEQUENCES AFFECT YOUR RIGHTS AND OBLIGATIONS. YOU MAY CONSULT AN ATTORNEY ABOUT THESE DOCUMENTS. YOU SHOULD CONSULT AN ATTORNEY IF YOU HAVE QUESTIONS OR CONCERNS ABOUT THE TRANSACTION OR ABOUT THE DOCUMENTS. IF YOU WISH TO REVIEW TRANSACTION DOCUMENTS THAT YOU HAVE NOT YET SEEN, PLEASE CONTACT THE ESCROW AGENT.

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(7) The exemption provided by subsection (4) of this section does not apply to any acts relating to a document or form that are performed by an escrow agent under subsection (4)(b), (c) or (d) of this section for a real estate sale and purchase transaction in which all or part of the purchase price consists of deferred payments by the buyer to the seller unless the escrow agent provides to the principals to the transaction:

(a) A copy of any proposed instrument of conveyance between the buyer and seller to be used in the transaction;

(b) A copy of any proposed deferred payment security instrument between the buyer and seller to be used in the transaction; and

(c) A copy of any proposed promissory note or other evidence of indebtedness between the buyer and seller to be used in the transaction.

(8) The notice and copies of documents that must be provided under subsections (6) and (7) of this section must be delivered in the manner most likely to ensure receipt by the principals to the transaction at least three days before completion of the transaction. If copies of documents have been provided under subsection (7) of this section and are subsequently amended, copies of the amended documents must be provided before completion of the transaction.

(9) Failure of any person to comply with the requirements of subsections (3) to (8) of this section does not

affect the validity of any transaction and may not be used as a basis to challenge any transaction.