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A Peace Treaty for the Bar Wars: An Updated Framework to Determine Permissibility of Mandatory Bar Association Activity

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A PEACE TREATY FOR THE BAR WARS: AN UPDATED FRAMEWORK TO DETERMINE PERMISSIBILITY OF MANDATORY BAR ASSOCIATION ACTIVITY[†]

ABSTRACT

First Amendment challenges against the constitutionality of mandatory bar associations have frequented federal appellate courts. However, only two Supreme Court cases are directly applicable to these claims, neither of which provides a clear framework to adjudicate all of the issues involved. As a result, appellate courts have taken divergent routes to determine the constitutionality of whether (1) mandatory membership to the bar generally violates the freedom of association, and (2) certain activities undertaken by mandatory bar associations violate the freedom of speech and, in some circuit courts, association. The first issue has resulted in a rift between circuits. The Sixth and Seventh Circuits assert that, pursuant to Supreme Court precedent, mandating attorneys to join a bar association does not violate the First Amendment freedom of association; the Fifth, Ninth, and Tenth Circuits disagree. As for the second issue, lower courts are left only with the Supreme Court's vague description of what mandatory bar association activity is permissible.

*The first issue's circuit split has resulted in remarkable inconsistency among the states, thirty-one of which (and the District of Columbia) have mandatory—also known as integrated—bars. This Comment argues that the Sixth and Seventh Circuit Courts of Appeals, in *Taylor v. Buchanan* and *Jarchow v. State Bar of Wisconsin*, respectively, properly applied Supreme Court doctrine to the freedom of association issue, thus closing the door on such claims. As long as Supreme Court precedent remains binding, appellate courts are compelled to follow it. However, should the issue be determined in favor of the Fifth, Ninth, and Tenth Circuits, this Comment argues that freedom of association claims, along with freedom of speech claims, should be analyzed using a new proposed “germaneness” test.*

This Comment introduces a multifaceted sliding scale test to determine whether activities undertaken by integrated bar associations are sufficiently germane such that they do not violate the freedom of speech and, should the Sixth and Seventh Circuit approach be rejected by the Supreme Court, association. The test blends the approaches of the Fifth and Tenth Circuits to provide a comprehensive framework to determine the permissibility of bar

[†] This Comment received the Myron Penn Laughlin Award for Excellence in Legal Research and Writing.

association activity. Under this test, the challenged activity must satisfy a weak connection to pass the basic threshold—the standard for germaneness set forth by Chief Justice Rehnquist in South Dakota v. Dole. It then considers the strength of the connection between the activity and the stated goals of the bar association; the nature and public outreach of the activity; the societal dissonance of the challenged expression; and the bar’s level of funding toward the activity. This test synthesizes Supreme Court precedent and current appellate understanding of the germaneness test, creating an easily applied framework from existing caselaw.

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INTRODUCTION

Thirty-one states and the District of Columbia mandate attorneys to join the state bar association as a condition of practicing law.¹ Mandatory membership comes with benefits, such as increased capacity to improve access to legal services and the enforcement of disciplinary measures against unethical attorneys,² as well as detriments, namely dues or associated fees.³ These dues and bar association activities have been the subject of several controversies in the Supreme Court and appellate courts—challenges asserting violations of both the freedom of association and the freedom of speech.⁴ As of September 2022, there have been two Supreme Court decisions,⁵ five denials of certiorari,⁶ and decisions in each of the Fifth,⁷ Sixth,⁸ Seventh,⁹ Eighth,¹⁰ Ninth,¹¹ and Tenth Circuit¹² Courts of Appeals. This complex web of caselaw has aptly been referred to by one presiding judge as the “bar wars.”¹³

In 1961, a Wisconsin attorney by the name of Trayton Lathrop challenged the constitutionality of the Wisconsin State Bar under the First and Fourteenth Amendments, alleging, among others, violations of his freedoms of association and speech.¹⁴ The Court rejected the freedom of association argument but failed to address the freedom of speech as a majority.¹⁵ Nearly thirty years later, in

¹ Leslie C. Levin, *The End of Mandatory State Bars?*, 109 GEO. L.J. ONLINE 1, 2 (2020).

² See, e.g., TEX. CODE ANN. § 81.012 (West 2021) (describing the purposes of the Texas State Bar Association, including increasing the quality of legal services available to the public and maintaining the high ideals of the legal profession).

³ See, e.g., *Lathrop v. Donohue*, 367 U.S. 820, 822 (1961) (plurality opinion).

⁴ See generally *id.* (challenging the validity of a state Bar on both grounds); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) (same); *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021) (same), *cert. denied*, 142 S. Ct. 1442 (2022); *Crowe v. Or. State Bar*, 989 F.3d 714 (9th Cir. 2021) (same), *cert. denied*, 142 S. Ct. 79 (2021). Although the challenges under *Lathrop* and *Keller* asserted violations of both rights, the majority in *Lathrop* only addressed the freedom of association, 367 U.S. at 845–48, and the majority in *Keller* only addressed the freedom of speech, 496 U.S. at 9, 17.

⁵ *Lathrop*, 367 U.S. 820; *Keller*, 496 U.S. 1.

⁶ *Fleck v. Wetch*, 140 S. Ct. 1294 (2020); *Jarchow v. State Bar of Wis.*, 140 S. Ct. 1720 (2020); *Crowe v. Or. State Bar*, 142 S. Ct. 79 (2021); *Taylor v. Heath*, 142 S. Ct. 1441 (2022); *McDonald v. Firth*, 142 S. Ct. 1442 (2022).

⁷ *Boudreaux v. La. State Bar Ass’n*, 3 F.4th 748 (5th Cir. 2021); *Longley*, 4 F.4th 229.

⁸ *Taylor v. Buchanan*, 4 F.4th 406 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 1441 (2022).

⁹ *Jarchow v. State Bar of Wis.*, No. 19-3444, 2019 WL 8953257 (7th Cir. Dec. 23, 2019), *cert. denied*, 140 S. Ct. 1720 (2020).

¹⁰ *Fleck v. Wetch*, 937 F.3d 1112 (8th Cir. 2019).

¹¹ *Crowe v. Or. State Bar*, 989 F.3d 714 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 79 (2021).

¹² *Schell v. Chief Just. & Justs. of Ok. Sup. Ct.*, 11 F.4th 1178 (10th Cir. 2021).

¹³ This term was coined by the Honorable Don R. Willett in *Boudreaux v. Louisiana State Bar Ass’n*, 3 F.4th 748, 751 (5th Cir. 2021).

¹⁴ *Lathrop v. Donohue*, 367 U.S. 820, 820, 822–23 (1961) (plurality opinion).

¹⁵ *Id.* at 845–48.

1990, the Court addressed a similar freedom of speech claim.¹⁶ The Court promulgated a standard by which activities of the bar associations are to be judged by how germane they are to the legal profession and the goals of the bar.¹⁷ When prescribing this test, however, the Court failed to provide more than two harsh extremes as examples,¹⁸ leaving lower courts to decide amongst themselves what specific activities qualify as “germane.” Although the examples provided were, by all accounts, simple to follow, the challenges brought forth by dissenting attorneys are rarely so basic.¹⁹

As a result, each appellate court approaches the question of what activities are germane differently, with some finding that if any element of an activity is non-germane, all activities within that category are impermissible,²⁰ and others engaging in a piece-by-piece analysis of each activity of the same color.²¹ While these courts have managed to determine germaneness of activities of state bar associations, there is a ring of inconsistency around the country as determinations depend upon the state’s regional locality. As courts approach the question of germaneness differently, there is a stunning lack of predictability for challenging attorneys and defending bar associations.

This patchwork approach is an inefficient route through which to answer the question of germaneness. Rather, this Comment introduces an original balancing test by which to analyze the germaneness of bar association activities in the freedom of speech arena and, should the Supreme Court reopen the issue, the freedom of association arena as well.²² In response to the need for consistency and predictability in adjudicating these challenges, this novel test operates on a sliding scale based on a series of precedents and policy purposes that determines

¹⁶ Keller v. State Bar of Cal., 496 U.S. 1, 4 (1990).

¹⁷ *Id.* at 14. Under the standard, if the activity does not qualify as germane, it violates the attorney’s freedom of speech. *Id.*

¹⁸ *Id.* at 15–16. The ends of the spectrum were endorsement of a nuclear weapons freeze initiative and proposal of ethical codes. *Id.* at 16.

¹⁹ See, e.g., McDonald v. Longley, 4 F.4th 229, 250–51 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 1442 (2022). The challenges to the pro bono activities were based upon the choice of which organizations the Texas State Bar Association supported, requiring the court to parse through each activity and declare one non-germane due to lobbying for benefits of low-income Texans. *Id.*

²⁰ See *id.* at 251 (“To be sure, most of [the Access to Justice Commission’s (AJC)] are . . . directed [at making legal representation more available to low-income Texans], and to the extent the Bar is supporting AJC activities limited to helping low-income Texans access legal services, it is germane. But some of AJC’s activities include lobbying for changes to Texas substantive law designed to benefit low-income Texans. . . . Therefore, the Bar’s funding of the AJC is non-germane.”); *id.* at 252 (discussing the *Texas Bar Journal*’s activity as a whole).

²¹ See Schell v. Chief Just. & Justs. of Ok. Sup. Ct., 11 F.4th 1178, 1192–94 (10th Cir. 2021) (discussing each of the six challenged articles in the Oklahoma State Bar’s published journal to decide the germaneness of each).

²² See *infra* Part III.

whether an activity is sufficiently related to the legal profession. Due to the lack of clarity as to the threshold of the term “germaneness,”²³ this test uses Chief Justice Rehnquist’s definition from a separate legal field as the baseline to provide a clear standard by which courts may determine the acceptability of bar association activities.²⁴ When a bar association’s activity fails to meet Chief Justice Rehnquist’s liberal standard of germaneness set forth in *South Dakota v. Dole*, the activity is per se non-germane and the inquiry ceases. Nevertheless, this light standard on its own is not a strong position for the bar association and may easily be outweighed by factors cutting against germaneness. To maintain uniformity, this test is based on both Supreme Court and appellate precedent, and matches Supreme Court doctrine from other legal fields to promote definitional continuity.²⁵

This Comment is composed of four parts. Part I introduces the background and history of bar associations, the first challenges that reached the Supreme Court, and the recent challenges at the appellate level. Part II explores these decisions in the context of existing Supreme Court doctrine, arguing that the Fifth Circuit’s application of caselaw was improper whereas the Seventh Circuit’s was correct. Part III introduces a four-factored balancing test built from decisions of the Fifth²⁶ and Tenth Circuits,²⁷ which provides clarity and consistency in the adjudication of germaneness of bar association activities. Finally, Part IV applies the new test to the Ninth Circuit’s decision in *Crowe v. Oregon State Bar* and to the Eighth Circuit’s decision in *Fleck v. Wetch*.

I. THE BIRTH OF INTEGRATED BAR ASSOCIATIONS AND THE FRAGMENTATION OF CASELAW

Modern bar associations first appeared in the 1870s for different purposes than those today; indeed, they were exclusive groups created as a means to reduce the number of attorneys entering the profession under the guise of “rais[ing] the status and competence of lawyers.”²⁸ Over time, these bars have evolved into three separate categories: mandatory, or integrated; voluntary; and

²³ See *Keller*, 496 U.S. at 14.

²⁴ See *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

²⁵ See *infra* Section III.A.

²⁶ *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 1442 (2022).

²⁷ *Schell v. Chief Just. & Justs. of Ok. Sup. Ct.*, 11 F.4th 1178 (10th Cir. 2021).

²⁸ Levin, *supra* note 1, at 3–4 (“Elite lawyers formed exclusive bar associations such as the American Bar Association, the American Bar of the City of New York, and the Chicago Bar Association to raise the status and competence of lawyers.”); accord RICHARD L. ABEL, *AMERICAN LAWYERS* 44 (1989) (“Concern about the multiplication of lawyers unleashed by this proliferation of undemanding law schools was an important stimulus for the re-emergence of professional associations.”).

hybrid.²⁹ Mandatory bars suffered legal attacks in the latter half of the twentieth century,³⁰ but the challenges lost momentum. Nevertheless, in the late 2010s, attorneys in states with integrated bars again challenged the constitutionality of the mandatory membership of these bar associations under the First Amendment, triggering a circuit split.³¹ This Part proceeds in four sections. Section A discusses the creation of integrated bar associations and their history. Section B discusses the challenges in the latter half of the twentieth century and the Supreme Court's decisions relating to the issue. Section C discusses the recent challenges and the circuit split. Finally, Section D discusses the Court's reaction to petitions for certiorari.

A. *The Creation of Integrated Bar Associations*

For the first century of the country's existence, the few bar associations that mirrored the modern format were highly exclusive institutions, acting as gatekeeping entities for the profession.³² These associations frequently exercised exclusivity in favor of the urban-elite, as well as white, Protestant, and American-born men.³³ In the early twentieth century, proponents of mandatory bar associations emerged, arguing that such organizations were necessary on two grounds.³⁴ The first was that the integrated bar benefited lawyers economically, in that the organization could set fee schedules and restrict membership.³⁵ The second emphasized the benefits to the public, as mandatory bar associations provided legal regulation to discipline attorneys and generated a public voice of those in the legal field.³⁶ These bar associations toe the line of a legislative or judicial organization, but “[i]n most states . . . legislatures have left oversight of the mandatory state bars to state supreme courts.”³⁷ The by-product of

²⁹ *Longley*, 4 F.4th at 252. Hybrid systems mandate membership for some activities and are voluntary for all others. *Id.* at 237 n.1 (“California has switched to a hybrid model in which core functions are performed by a mandatory state bar, while other functions previously performed by its ‘sections’ are now done by a separate voluntary bar association.” (quoting CAL. BUS. & PRO. CODE §§ 6001, 6031.5(a), 6056)).

³⁰ *Lathrop v. Donohue* 367 U.S. 820 (1961); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990). Although these were the first legal challenges against bar associations in the Supreme Court, integrated bar associations have always had critics. Theodore J. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 1983 AM. B. FOUND. RES. J. 1, 1–2 (1983) (“Since the first call for a unified bar in 1913, lawyers have ceaselessly debated whether they should be compelled to belong to an official statewide bar organization, how such organizations should be governed, and what their activities should be.”).

³¹ Compare *Longley*, 4 F.4th at 244 (noting that *Keller* did not foreclose the freedom of association claim), with *Jarchow v. State Bar of Wis.*, No. 19–3444, 2019 WL 8953257, at *1 (7th Cir. Dec. 23, 2019) (summarily affirming the lower court's determination that *Keller* foreclosed the claim), *cert. denied*, 140 S. Ct. 1720 (2020).

³² Levin, *supra* note 1, at 3–4.

³³ ABEL, *supra* note 28, at 45, 85.

³⁴ Levin, *supra* note 1, at 4–5.

³⁵ *Id.* at 4.

³⁶ *Id.* at 4–5.

³⁷ *Id.* at 5.

mandatory membership is the required payment of dues or associated fees by the constituent attorneys³⁸—a matter of contention among lawyers in mandatory bar associations.³⁹

Upon establishing integrated bars, the governing body typically provides a series of goals for the organization, which often resembles the goals of the bar associations of other states.⁴⁰ For instance, at its conception, the Wisconsin State Bar Association was established for purposes including, but not limited to, aiding courts in the administration of justice; maintaining the high ideals of “integrity, learning, competence, and public service” in the legal field; and providing a means for attorneys to discuss issues which pertain to the practice of law—all of which facilitate the practice of law in the state of Wisconsin.⁴¹ These purposes mirror those set forth in the statute forming the Texas State Bar Association, which established goals of facilitating administration of justice, providing a means by which to discuss issues pertaining to the legal field, and fostering high ideals for those engaged in the practice of law, among other purposes.⁴² Throughout the country, mandatory bar associations reflect these ideals of creating a more perfect legal practice by assisting in adjudication, providing additional access to pro bono activities, and creating disciplinary measures for lawyers practicing in the state.⁴³

Notwithstanding recent challenges, the majority of states have retained the mandatory nature of their bar associations.⁴⁴ While commentators have argued against the effectiveness⁴⁵ and constitutionality of integrated bar associations,⁴⁶ only a small minority of state bars have completely altered their formats.⁴⁷ Despite the flexibility in bar association composition,⁴⁸ many state legislatures

³⁸ *Id.* at 7; *see also* *Lathrop v. Donohue*, 367 U.S. 820, 822 (1961) (plurality opinion) (noting that the plaintiff’s complaint asserted that the bar association had wrongfully extracted fifteen dollars in dues payments).

³⁹ *E.g.*, *Lathrop*, 367 U.S. at 822.

⁴⁰ Compare TEX. CODE ANN. § 81.012 (West 2021) (purposes of the Texas State Bar Association), with *In re Integration of the Bar*, 93 N.W.2d 601, 604 (Wis. 1958) (laying out the Wisconsin State Supreme Court rules relating to the purposes of the Wisconsin State Bar Association).

⁴¹ *In re Integration of the Bar*, 93 N.W.2d at 604.

⁴² TEX. CODE ANN. § 81.012 (West 2021).

⁴³ *E.g.*, *id.*; *see also* Levin, *supra* note 1, at 5–6 (noting that many bar associations claim to assist both attorneys and the public, handling a series of activities which vary in their specifics from state to state).

⁴⁴ *See* *McDonald v. Longley*, 4 F.4th 229, 237 (5th Cir. 2021) (noting that thirty-one states and the District of Columbia have mandatory bar associations), *cert. denied*, 142 S. Ct. 1442 (2022); *see also infra* Part II.

⁴⁵ Levin, *supra* note 1, at 5–6.

⁴⁶ *See generally* *Lathrop v. Donohue*, 367 U.S. 820 (1961) (challenging the constitutionality of integrated bar associations under the First Amendment).

⁴⁷ *Longley*, 4 F.4th at 237 n.1 (describing California’s change to the hybrid model) (citing CAL. BUS. & PRO. CODE §§ 6001, 6031.5(a), 6056).

⁴⁸ *Id.* at 252 (“Texas can directly regulate the legal profession and create a voluntary bar association, like New York’s; or Texas can adopt a hybrid system, like California’s.”).

and supreme courts have, by creating and upholding integrated bars, determined that their mandatory nature is both constitutional and in the best interests of their citizens.⁴⁹ Such is the majority understanding among the states, but the position is not without its dissenters.⁵⁰ These critics have recently become increasingly vocal and litigious,⁵¹ but such dissent may not be enough to topple the reign of integrated bar associations.

B. *The Supreme Court's Adoption of a Shaky Standard*

The recent challenges to the legality of integrated bar associations are not novel; such claims first reached national recognition when *Lathrop v. Donohue* was decided in 1961.⁵² There, a Wisconsin attorney asserted that the state bar association's requirement of dues violated his First Amendment freedoms of speech and association.⁵³ Twenty-nine years later, the Supreme Court supplemented *Lathrop* with *Keller v. State Bar of California*.⁵⁴ Now, thirty-two years after *Keller*, courts across the country are hearing challenges against their states' integrated bars.⁵⁵ New challenges attempt to litigate the freedom of association decided in *Lathrop*⁵⁶ by interpreting a portion of *Keller* to have reopened the issue.⁵⁷ These lawsuits have created a circuit split as to the viability of freedom of association claims, all while the doctrine's germaneness test remains ambiguous. Section one discusses the Supreme Court's freedom of association standard set forth in *Lathrop*. Section two explores the Supreme Court's freedom of speech standard as decided in *Keller*.

⁴⁹ See, e.g., *In re Integration of the Bar*, 93 N.W.2d 601, 603 (Wis. 1958) ("The integration of the Bar is no more undemocratic than the requirement of learning and good moral character of all who seek the privilege of practicing law. All members had the same opportunity and have freely chosen a profession subject traditionally to discipline and control by the courts. . . . The integrated Bar does not destroy either the independence of the Bar or of the individual lawyers."); *id.* at 605 ("These Rules and By-laws constitute a democratic process . . . by which minorities are protected . . .").

⁵⁰ E.g., *Lathrop*, 367 U.S. at 822; *Keller v. State Bar of Cal.*, 496 U.S. 1, 1 (1990); *Longley*, 4 F.4th at 241.

⁵¹ See, e.g., *Longley*, 4 F.4th at 237; *Boudreaux v. La. State Bar Ass'n*, 3 F.4th 748, 751 (5th Cir. 2021); *Crowe v. Or. State Bar*, 989 F.3d 714, 720 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 79 (2021); *Schell v. Chief Just. & Justs. of the Ok. Sup. Ct.*, 11 F.4th 1178, 1182 (10th Cir. 2021).

⁵² *Lathrop*, 367 U.S. at 822–23 (plurality opinion).

⁵³ *Id.*

⁵⁴ See generally *Keller*, 496 U.S. 1 (deciding the freedom of speech claim left undecided by the *Lathrop* Court).

⁵⁵ E.g., *Jarchow v. State Bar of Wis.*, No. 19-3444, 2019 WL 8953257, at *1 (7th Cir. Dec. 23, 2019), *cert. denied*, 140 S. Ct. 1720 (2020); *Fleck v. Wetch*, 868 F.3d 652, 653 (8th Cir. 2018), *vacated*, 139 S. Ct. 590 (2018), *remanded to* 937 F.3d 1112 (8th Cir. 2019).

⁵⁶ *Lathrop*, 367 U.S. at 848 (agreeing with the concurring Justices that the freedom of association claim should be denied).

⁵⁷ See *Keller*, 496 U.S. at 17 ("This request for relief appears to implicate a much broader freedom of association claim than was at issue in *Lathrop*.").

1. *Lathrop and Compelled Membership*

In 1961, the Supreme Court decided *Lathrop v. Donohue*, determining whether the state's mandatory bar association violated the First Amendment on two distinct grounds: freedom of speech and freedom of association.⁵⁸ *Lathrop*, the challenging attorney, complained that the mandatory nature of the bar association required payment of dues to practice law in the state.⁵⁹ He claimed that he paid under protest, asserting that he was coerced to support the ideological and political activities of the Wisconsin State Bar in violation of his rights.⁶⁰ The Court was fractured in its decision of the matter, with Justice Brennan penning a four-Justice plurality, three Justices concurring, and two Justices dissenting.⁶¹ The plurality declined to answer the question of "whether his constitutional rights of free speech are infringed if his dues money is used to support the political activities of the State Bar,"⁶² because the Court did not have the appropriate evidentiary basis to make a determination on the issue.⁶³ In declining to face this issue, the Court turned to the freedom of association claim.⁶⁴

Rooting its decision in policy and precedent, the plurality opinion asserted that no such freedom of association challenge could stand.⁶⁵ It first noted that the challenger's "compulsory enrollment imposes the duty only to pay dues,"⁶⁶ which amounted to a maximum of twenty dollars.⁶⁷ Quoting the Wisconsin Supreme Court's decision, the plurality recognized that "[t]he rules and by-laws of the State Bar . . . do not compel the plaintiff to associate with anyone. He is free to attend or not attend its meetings or vote in its elections as he chooses."⁶⁸ If this finding was not enough to dispose of the association claim, the plurality further addressed the political nature of the Wisconsin Bar Association's actions.

After addressing the five categories in which the Wisconsin State Bar had

⁵⁸ *Lathrop*, 367 U.S. at 827 n.4.

⁵⁹ *Id.* at 822.

⁶⁰ *Id.*

⁶¹ See generally *Lathrop*, 367 U.S. 820. However, the three concurring Justices all found that the freedom of association challenge was without merit, thus creating a majority holding that the Supreme Court of Wisconsin had properly dismissed the claim. *Id.* at 848 ("Since three of our colleagues are of the view that the claim which we do not decide is properly here and has no merit, and on that ground vote to affirm, the judgment of the Wisconsin Supreme Court is affirmed.").

⁶² *Id.* at 844.

⁶³ *Id.* at 845–46.

⁶⁴ This issue was eventually decided in *Keller*. See generally *Keller v. State Bar of Cal.*, 496 U.S. 1, 16–17 (1990).

⁶⁵ *Lathrop*, 367 U.S. at 847–48.

⁶⁶ *Id.* at 827–28.

⁶⁷ *Id.* at 828 n.5. *Lathrop* paid fifteen dollars per year in dues. *Id.* at 828.

⁶⁸ *Id.* (quoting *Lathrop v. Donohue*, 102 N.W.2d 404, 408 (Wis. 1960), *aff'd*, 367 U.S. 820 (1961)).

engaged in political activity,⁶⁹ the plurality considered it clear “that legislative activity is not the major activity of the State Bar. The activities without apparent political coloration are many.”⁷⁰ Justice Brennan further emphasized that the Supreme Court previously held that association claims in this sphere typically fail.⁷¹ Specifically, he highlighted that in *Railway Employees’ Department v. Hanson*, the legality of mandatory unions was at issue, where Court held that “there [was] no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar.”⁷² With these findings, the plurality agreed that the Supreme Court of Wisconsin could impose the burden of dues to “further the State’s legitimate interests in raising the quality of professional services,” despite the association’s limited political activity.⁷³

The concurrences felt that the Court should have gone further.⁷⁴ Justice Harlan, joined by Justice Frankfurter, agreed that there was no legitimate claim to the freedom of association, but felt that the freedom of speech claim ought to have been rejected as well.⁷⁵ Justice Harlan quickly disposed of the freedom of association claim, asserting that there was a “short and simple answer:” *Hanson* “[laid] at rest all doubt that a State may Constitutionally condition the right to practice law upon membership in an integrated bar association.”⁷⁶ Although he found no distinction between the freedoms of speech and association, he considered them separately to mirror the plurality opinion.⁷⁷

In addressing the freedom of speech claim, Justice Harlan focused on each of the Bar Association’s activities that Lathrop asserted to be politically

⁶⁹ *Id.* at 835–39. The five activities were: (1) registration of the bar association’s executive director as a lobbyist; (2) expression of the State Bar’s formal positions on a variety of issues, including, but not limited to, revision of federal tax lien law, security transfers by fiduciaries, amending current federal legislation, adjustment of the salaries of state supreme court justices, and extension of personal jurisdiction over non-residents; (3) the study and crafting of legislation by state bar association committees; (4) the formation of special subcommittees relating to legislation, some of which related to the issues described in activity two, as well as one in favor of world peace; and (5) the publication of a bulletin to express opinions, such as suggesting changes to both state and federal laws. *Id.*

⁷⁰ *Id.* at 839.

⁷¹ *Id.* at 843.

⁷² *Id.* (quoting *Ry. Emps.’ Dep’t v. Hanson*, 351 U.S. 225, 238 (1956)).

⁷³ *Id.*

⁷⁴ *Id.* at 850–51 (Harlan, J., concurring) (arguing that the Court should have decided on the freedom of speech claim as well).

⁷⁵ *See id.* at 848–65. Justice Whittaker was the seventh Justice to agree that these claims failed, writing an opinion stating that the ability to practice law is a special privilege and as such, conditions attached to the practice cannot violate the Constitution. *Id.* at 865 (Whittaker, J., concurring).

⁷⁶ *Id.* at 849 (Harlan, J., concurring) (citing *Hanson*, 351 U.S. 225).

⁷⁷ *Id.* at 850.

charged.⁷⁸ He first attacked the argument that it reduced individuals' economic capacity to engage in their freedom of speech by showing that such a proposition "would make every governmental exaction the material of a 'free speech' issue," including income tax.⁷⁹ Harlan then responded to the allegations that the Bar Association established governmental political views by considering it "hardly worthy of more serious consideration"⁸⁰ and emphasizing that the limited political function of the Bar Association could not be characterized as governmental support of specific political viewpoints.⁸¹ After disposing of the assertion that mandatory bars created a "guild system,"⁸² Harlan addressed the argument that the Bar Association was "Drowning Out the Voice of Dissent."⁸³ He claimed that the argument that the government cannot use someone's mandatory dues to support views with which they disagree had "little force."⁸⁴ Indeed, he highlighted that "[t]he dissenter is not being made to contribute funds to the furtherance of views he opposes but is rather being made to contribute funds to a group expenditure about which he will have something to say."⁸⁵ Moreover, he asserted that while "it is disagreeable to see a group, to which one has been required to contribute, decide to spend its money for purposes the contributor opposes, . . . the Constitution does not protect against the mere play of emotions."⁸⁶ Such a claim failed in other spheres as well; for instance, those who pay taxes may not be refunded when the government expresses its views.⁸⁷

Finally, Justice Harlan addressed the argument that mandatory dues payments compel the affirmation of the organization's beliefs.⁸⁸ This argument—that the government is compelling members of the Bar Association to fund (and, in doing so, affirm) the beliefs set forth by the Association—is inherent in freedom of association and speech claims. Justice Harlan attacked this argument with vigor, stating:

What seems to me obvious is the large difference in degree between, on the one hand, being compelled to raise one's hand and recite a belief as one's own, and, on the other, being compelled to contribute dues to

⁷⁸ *Id.* at 852–61.

⁷⁹ *Id.* at 852.

⁸⁰ *Id.*

⁸¹ *Id.* at 853 ("[I]t seems to me fanciful in the extreme to find in the limited functions of the Wisconsin State Bar those risks of governmental self-perpetuation that might justify the recognition of a Constitutional protection against the 'establishment' of political beliefs.").

⁸² *Id.* at 853–55 (asserting that no activity is of the type that was struck down in prior anti-guild cases).

⁸³ *Id.* at 855 (internal quotations omitted).

⁸⁴ *Id.* at 856.

⁸⁵ *Id.*

⁸⁶ *Id.* at 857.

⁸⁷ *Id.*

⁸⁸ *Id.*

a bar association fund which is to be used in part to promote the expression of views in the name of the organization (not in the name of the dues payor), which views when adopted may turn out to be contrary to the views of the dues payor.⁸⁹

He agreed with the Wisconsin Supreme Court that reasonable people understand that those views expressed by the State Bar Association are wholly separate from those of the individuals.⁹⁰ He extended his reasoning to taxpayers in the classroom who cannot object to paying for textbooks or instructions with which they disagree.⁹¹ In the end, Justice Harlan considered this particular issue to fall more within the association realm, which he asserted was closed with the decision in *Hanson*.⁹² Such arguments remain relevant in today's challenges to integrated bar associations.⁹³

2. Keller, *Compelled Speech*, and *Borrowing Union Law Precedent*

The Supreme Court addressed the freedom of speech issue twenty-nine years later in *Keller v. State Bar of California*.⁹⁴ *Keller* was the inverse of *Lathrop*: the Court adjudicated the freedom of speech claim for the first time,⁹⁵ but declined to handle the freedom of association claim.⁹⁶ Unlike the complicated series of opinions in *Lathrop*,⁹⁷ *Keller* was delivered by Chief Justice Rehnquist on behalf of a unanimous Court.⁹⁸ There, a group of California attorneys challenged the mandatory nature of their membership dues, alleging that the use of their dues to finance ideological and political activities with which they disagreed violated their First Amendment rights of speech and association.⁹⁹ The Court handled the freedom of speech claim as a matter of first impression, introducing a test by which to determine permissibility of bar association activities.¹⁰⁰

⁸⁹ *Id.* at 858.

⁹⁰ *Id.* at 859.

⁹¹ *Id.* at 860.

⁹² *Id.* at 860–61.

⁹³ *See, e.g.,* McDonald v. Longley, 4 F.4th 229, 245–46 (5th Cir. 2021) (implying that the expressions of the bar association are understood to be expressions of the members), *cert. denied*, 142 S. Ct. 1442 (2022).

⁹⁴ *Keller v. State Bar of Cal.*, 496 U.S. 1, 1–2 (1990).

⁹⁵ *Id.* at 9.

⁹⁶ *Id.* at 17. Dicta at the end of the opinion, suggesting that the associational claim is separate from that addressed in *Lathrop*, has sparked many of the recent challenges. *See Longley*, 4 F.4th at 244 (asserting that *Keller* reopened the freedom of association question).

⁹⁷ *See generally Lathrop*, 367 U.S. 820 (featuring a four-Justice plurality, two concurrences, and a dissent).

⁹⁸ *Keller*, 496 U.S. at 4.

⁹⁹ *Id.* at 4, 6.

¹⁰⁰ *Id.* at 15–17; *see Lathrop*, 367 U.S. at 845 (plurality opinion) (electing not to issue a decision on the freedom of speech).

Discussing the integrated bar association in the context of similarly situated union cases, Chief Justice Rehnquist noted that “[i]t is entirely appropriate that all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort.”¹⁰¹ He similarly differentiated the State Bar from a traditional government agency.¹⁰² Rather, Rehnquist found that labor unions were similar enough to bar associations to serve as a guide for how to handle such issues.¹⁰³ Consequently, the Court borrowed from union law, holding that “[t]he State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members,” while barring funding of those “activities of an ideological nature which fall outside of those areas of activity.”¹⁰⁴

In differentiating between activities which are sufficiently germane to be funded by mandatory dues and those which are not, Chief Justice Rehnquist failed to provide more than a vague standard.¹⁰⁵ The Court highlighted that the determination depended upon whether the challenged activities were sufficiently related to the legitimate state interests furthered by the bar association—namely regulation of the legal profession and improvement of the quality of legal services in the state.¹⁰⁶ However, the Court only provided outer boundaries, claiming that “[c]ompulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative,” while permitting dues to be used for “activities connected with disciplining members of the Bar or proposing ethical codes for the profession.”¹⁰⁷ Rehnquist emphasized that these were the extremes of the germaneness standard but produced no additional criteria or clarity for determining whether an activity is germane to the advancement of the legal profession.¹⁰⁸

¹⁰¹ *Keller*, 496 U.S. at 12.

¹⁰² *Id.* at 13.

¹⁰³ *Id.* In the controlling union law case, *Abood v. Detroit Board of Education*, the Court handled a similar issue with political and ideological activity of a union. 431 U.S. 209, 209 (1977). The Court held that those funds could be repaid to those who objected to the ideas expressed by the organization. *See id.* at 235–36 (stating that the non-germane expenditures must be financed from those who did not object to the purposes for which the money was to be used).

¹⁰⁴ *Keller*, 496 U.S. at 14. The idea that an activity must be germane to the bar association’s goals was borrowed from *Abood*. *See id.* at 13.

¹⁰⁵ *See id.* at 14–16.

¹⁰⁶ *Id.* (quoting *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961) (plurality opinion)).

¹⁰⁷ *Id.* at 16.

¹⁰⁸ *Id.* at 15. If an activity was found to be non-germane, then the activity was still permissible under *Keller* if the bar association provided sufficient procedural safeguards by which dissenting attorneys could receive refunds or rebates. *Id.* at 17. Since this element of the *Keller* decision and the bar association jurisprudence is not at issue in this Comment, it does not receive elaborate discussion.

Finally, at the end of its decision, the Court observed in dicta that the freedom of association claim was broader than that determined in *Lathrop*, but that it would not handle the issue.¹⁰⁹ Specifically, the complaint “requested an injunction prohibiting the State Bar from using its name to advance political and ideological causes or beliefs,” which the Court said “appear[ed] to implicate a much broader freedom of association claim than was at issue in *Lathrop*.”¹¹⁰ The challenger asserted “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” controlling Supreme Court doctrine.¹¹¹ In declining to rule on this matter, the Court welcomed state courts to speculate on the issue.¹¹² The ambiguity in the germaneness requirement and the possibility of the reopening of freedom of association claims has produced widespread confusion, leading to considerable dissonance among circuit courts.

Throughout *Keller*, the Supreme Court relied upon *Abood v. Detroit Board of Education*, a union law case, to regulate bar associations’ activities.¹¹³ In *Abood*, the Court handled a challenge against an “agency shop” provision in the union’s collective bargaining agreement, which mandated that teachers who chose not to join the union pay a fee equal in value to membership dues.¹¹⁴ The provision, however, did not require that these non-member teachers join the union.¹¹⁵ In determining the First Amendment question, the *Abood* Court found that while the Constitution did not prohibit the union from engaging in non-germane political speech, it was required to finance such expenditures “from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will.”¹¹⁶ The Court, as it later would in *Keller*, failed to define the germaneness standard in *Abood*.¹¹⁷

In 2018, in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, the Supreme Court again addressed the concept of agency-fee provisions.¹¹⁸ There, the Court overruled *Abood*, finding that these

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* As noted in the discussion of *Lathrop*, there, the Court wrote that the political activities of the State Bar Association were clearly not the dominant activity of the organization. *Lathrop*, 367 U.S. at 839.

¹¹² *Keller*, 496 U.S. at 17.

¹¹³ *See id.* at 13, 16–17. *Keller* borrowed the idea of a germaneness standard from *Abood*. *Id.* at 9, 13–14.

¹¹⁴ *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 211–12 (1977).

¹¹⁵ *Id.* at 212.

¹¹⁶ *Id.* at 236.

¹¹⁷ *Id.* (“We have no occasion in this case, however, to try to define such a dividing line.”).

¹¹⁸ *See Janus v. Am. Fed. of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2459–60 (2018)

provisions violated the First Amendment.¹¹⁹ The Court considered the germaneness standard unworkable as provided in *Abood*¹²⁰ and held that, if the association's fee requirement fails to pass exacting scrutiny,¹²¹ then the non-member must affirmatively waive their First Amendment rights.¹²² *Janus* sparked a series of new challenges to the constitutionality of bar associations with attorneys asserting that, by overruling *Abood*—upon which *Keller* relied—the Court had rendered *Keller* inapplicable.¹²³ While this view of *Janus* has not been adopted by the majority of the Court,¹²⁴ it has resulted in confusion at the appellate level which requires clarification.

C. Splitting Hairs on the Keller Decision

Nearly thirty years after *Keller* settled the general freedom of speech question as it relates to mandatory bar associations, challengers returned to appellate courts claiming that *Keller* reopened the freedom of association claim originally considered in *Lathrop*.¹²⁵ Due to the vagueness of the dicta in *Keller*, appellate courts have reached strikingly different decisions regarding the freedom of association claim.¹²⁶ The final paragraph in *Keller* has fractured the reliability of judicial decision-making in this area of the law, resulting in a rift between circuit courts.¹²⁷ This section will discuss this split by introducing, in

(holding that forcing public employees to subsidize a union that they choose not to join violates their freedom of speech).

¹¹⁹ *Id.* at 2486.

¹²⁰ *Id.* at 2481 (“*Abood*’s line between chargeable and nonchargeable union expenditures has proved to be impossible to draw with precision.”).

¹²¹ Exacting scrutiny falls between rational basis and strict scrutiny. *See id.* at 2465 (rejecting the dissent’s suggestion to apply rational basis review but refusing to rise to a heightened strict scrutiny standard).

¹²² *Id.* at 2486. If the non-member waives their First Amendment rights, then their dues may be used to pay for any activity, germane or non-germane. *See id.* (requiring a waiver of rights to make non-member fees constitutional, thus allowing the agency to spend those fees on any expressive activity).

¹²³ *See, e.g.,* *Jarchow v. State Bar of Wis.*, 140 S. Ct. 1720, 1720 (2020) (Thomas, J., dissenting from denial of certiorari) (noting that, by overturning *Abood*, the Court has cast doubt on *Keller*); *Taylor v. Buchanan*, 4 F.4th 406, 408 (6th Cir. 2021) (“Taylor argues that *Lathrop* and *Keller* no longer bind this court because of intervening precedent in the form of *Janus* . . .”), *cert. denied*, 142 S. Ct. 1441 (2022).

¹²⁴ *See Janus*, 138 S. Ct. at 2498 (Kagan, J., dissenting) (“[T]he Court has relied on [the *Abood*] rule when deciding cases involving compelled speech subsidies outside the labor sphere—cases today’s decision does not question.” (citing *Keller v. State Bar of Cal.*, 496 U.S. 1, 9–17 (1990))); *Jarchow*, 140 S. Ct. at 1720–21 (Thomas, J., dissenting from denial of certiorari) (“Our decision to overrule *Abood* casts significant doubt on *Keller*. . . . Short of a constitutional amendment, only we can rectify our own erroneous constitutional decisions.”).

¹²⁵ *E.g.,* *Boudreaux v. La. State Bar Ass’n*, 3 F.4th 748, 756 (5th Cir. 2021) (explaining that one of attorney’s claims was of a violation of the freedom of association, as reopened by *Keller*).

¹²⁶ *Compare* *Jarchow v. State Bar of Wis.*, No. 19-3444, 2019 WL 8953257, at *1 (7th Cir. Dec. 23, 2019) (holding that *Keller* and *Lathrop* remain binding precedent and that, as a result, no freedom of association claim may stand), *cert. denied*, 140 S. Ct. 1720 (2020), *with* *Boudreaux*, 3 F.4th at 756 (holding that the freedom of association claim was reopened by *Keller* and properly asserted in the case at hand).

¹²⁷ There are technically two splits: one over the legitimacy of the association claim in light of *Lathrop* and *Keller*, and the other relating to reimbursement procedures. This second split is only between courts which

order, the decisions of the Seventh, Sixth, Ninth, Fifth, and Tenth Circuit Courts of Appeals.

In 2019, the Federal District Court for the Western District of Wisconsin heard a challenge to the Wisconsin State Bar's constitutionality under the freedoms of association and speech.¹²⁸ The challenge primarily relied upon *Janus's* abrogation of *Abood*, which Jarchow argued undermined both the reasoning and holding of *Keller*.¹²⁹ With both sides agreeing that *Keller* remained binding precedent, the district court held that the State Bar could continue to charge mandatory dues without infringing upon claimant's First Amendment rights so long as the Supreme Court maintained that *Keller* was binding precedent.¹³⁰ In so holding, the court did not mention the final paragraph of *Keller* that reopened the freedom of association claim; rather, the court held that the claims were foreclosed by *Keller* and, for that reason, the challenge failed.¹³¹ On appeal, the Seventh Circuit Court of Appeals summarily affirmed the district court's decision in a one-paragraph decision, maintaining that *Keller* foreclosed the claims made by the attorneys who challenged the Bar Association's activities and ability to mandate dues payments.¹³²

Upon application to the Supreme Court, the petition for certiorari was denied.¹³³ However, Justice Thomas, joined by Justice Gorsuch, dissented from the denial of certiorari.¹³⁴ Justice Thomas stated that the Court should revisit the efficacy of *Keller*.¹³⁵ He emphasized that *Janus* "casts significant doubt on *Keller*" and that, absent new reasoning, "there is effectively nothing left to support *Keller*."¹³⁶ However, he conceded that "[s]hort of a constitutional amendment, only we can rectify our own erroneous constitutional decisions."¹³⁷ This denial of certiorari is one of five deflections by the Supreme Court since

have agreed that the freedom of association claim was reopened by *Keller*. Compare *Boudreaux*, 3 F.4th at 75859, with *Crowe v. Or. State Bar*, 989 F.3d 714, 726 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 79 (2021). Nevertheless, the second split is not the subject of this Comment and therefore will not be discussed at length.

¹²⁸ Jarchow v. State Bar of Wis., No. 19-cv-266-bc, 2019 WL 6728258, at *1 (W.D. Wis. Dec. 11, 2019), *aff'd*, No. 19-3444, 2019 WL 8953257 (7th Cir. Dec. 23, 2019).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at *2. Although the parties agreed that *Keller* still bound the court, no mention was made of the reopening of the freedom of association challenge, a different conclusion from those of the courts on the other side of the split. See *id.* at *1.

¹³² Jarchow v. State Bar of Wis., No. 19-3444, 2019 WL 8953257, at *1 (7th Cir. Dec. 23, 2019), *aff'g* No. 19-cv-266-bc, 2019 WL 6728258 (W.D. Wis. Dec. 11, 2019), *cert. denied*, 140 S. Ct. 1720 (2020).

¹³³ *Jarchow*, 140 S. Ct. at 1720.

¹³⁴ *Id.* (Thomas, J., dissenting from denial of certiorari).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 1721.

these issues have returned to the forefront of First Amendment jurisprudence.¹³⁸ Justice Thomas’s response (and the collective denials of certiorari) suggests that the issue will need to be resolved in the coming years.

The Sixth Circuit joined the Seventh Circuit in *Taylor v. Buchanan*, where it decided that, since *Lathrop* and *Keller* remained binding precedent, the freedom of association claim was foreclosed.¹³⁹ While the challenging attorney conceded that their claim would fail if *Lathrop* and *Keller* remained good law—especially since the bar association’s activities “[did] not cross the line set in *Keller*”—they claimed that *Keller* need not be followed since *Abood* was overruled.¹⁴⁰ In joining the Seventh Circuit, the court emphasized two points. First, *Janus* made no mention of either *Lathrop* or *Keller* and therefore did not overrule those decisions.¹⁴¹ Second, even those Justices asserting that *Keller* needed to be revisited conceded that it remains binding law until expressly abrogated by the Supreme Court.¹⁴² However, the Sixth Circuit was not unanimous in its opinion. In a concurrence, Judge Thapar asserted that “[t]he association claim could go forward even if the bar association allowed lawyers to opt out of funding ideological activity” on the basis that any ideological activity could make the mandatory membership unconstitutional.¹⁴³ Such an association claim seems inconsistent with the remainder of the concurrence, which contended that *Lathrop* and *Keller* remained precedential.¹⁴⁴ The basis of this concurrence stemmed from the final paragraph in *Keller*,¹⁴⁵ which referred to this issue as “a much broader freedom of association claim than was at issue in *Lathrop*.”¹⁴⁶

It is here, however, where the disagreement begins. In 2021, the Ninth Circuit Court of Appeals decided *Crowe v. Oregon State Bar*, handling freedom of speech and association challenges to the integrated bar association of Oregon.¹⁴⁷ In response to the argument that *Keller* reopened association challenges, the court stated that neither the Supreme Court nor the Ninth Circuit Court of Appeals had previously handled the issue of the expanded freedom of

¹³⁸ The other four deflections came in *Fleck v. Wetch*, *Crowe v. Oregon State Bar*, *McDonald v. Firth*, and *Taylor v. Heath*. See *infra* Section I.D.

¹³⁹ *Taylor v. Buchanan*, 4 F.4th 406, 407 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 1441 (2022).

¹⁴⁰ *Id.* at 408. The test in *Keller* was borrowed from *Abood*. See *supra* Section I.B.2.

¹⁴¹ *Id.* at 409.

¹⁴² *Id.* (citing *Jarchow*, 140 S. Ct. at 1721 (Thomas, J., dissenting from denial of certiorari)).

¹⁴³ *Id.* at 410 (Thapar, J., concurring).

¹⁴⁴ See *id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Keller v. State Bar of Cal.*, 496 U.S. 1, 17 (1990).

¹⁴⁷ *Crowe v. Or. State Bar*, 989 F.3d 714, 720 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 79 (2021).

association claim described by *Keller*.¹⁴⁸ The Ninth Circuit framed the freedom of association issue as “whether the First Amendment tolerates mandatory membership itself—independent of compelled financial support—in an integrated bar that engages in nongermane political activities.”¹⁴⁹ Notwithstanding that the *Lathrop* Court acknowledged that the Wisconsin State Bar engaged in some secondary non-germane activities,¹⁵⁰ the Ninth Circuit found the claim to be viable.¹⁵¹ To reach this conclusion, the court emphasized two interests which ought to be protected under a freedom from compelled association.¹⁵² “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.”¹⁵³ Second, since the effectiveness of asserting viewpoints is improved by group association, freedom from compelled association precludes officials from deciding what views become orthodox.¹⁵⁴ The court remanded for further proceedings consistent with the Ninth Circuit’s decision.¹⁵⁵

The Fifth Circuit Court of Appeals joined the Ninth Circuit in its understanding of the viability of freedom of association claims in light of the final paragraph of *Keller* in *Boudreaux v. Louisiana State Bar Ass’n* and *McDonald v. Longley*.¹⁵⁶ First, in *Boudreaux*, the Fifth Circuit reversed the district court’s decision that the freedom of association claim was foreclosed by *Lathrop* and *Keller*.¹⁵⁷ The court found that, in viewing the allegations most favorably to the non-moving party, the allegations that the Louisiana State Bar Association participated in non-germane activity were viable enough to survive a motion to dismiss.¹⁵⁸ Although *Boudreaux* hinged on the procedural posture of the case,¹⁵⁹ the court noted that it agreed with *Boudreaux*’s argument that “his claim presents the (previously) open free association question from *Keller*,” which it asserted it closed in *McDonald v. Longley*.¹⁶⁰

¹⁴⁸ *Id.* at 728.

¹⁴⁹ *Id.* at 729.

¹⁵⁰ *Lathrop v. Donohue*, 367 U.S. 820, 839 (1961) (plurality opinion).

¹⁵¹ *Crowe*, 989 F.3d at 729.

¹⁵² *Id.*

¹⁵³ *Id.* (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* The court suggested that the district court must determine whether *Janus* alters the state of *Keller* and whether *Keller*’s germaneness standard applies to association claims. *Id.*

¹⁵⁶ *Boudreaux v. La. State Bar Ass’n*, 3 F.4th 748 (5th Cir. 2021); *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 1442 (2022).

¹⁵⁷ *Boudreaux*, 3 F.4th at 756. The claim had been dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *See supra* note 157 and accompanying text.

¹⁶⁰ *Boudreaux*, 3 F.4th at 756.

In *McDonald v. Longley*, the Fifth Circuit dove deeper into the freedom of association issue. After determining that *Lathrop* permitted mandatory bar associations which fund solely germane activities, it opined that “*Keller* identified that *Lathrop* did not decide whether lawyers may be constitutionally mandated to join a bar association that engages in other, non-germane activities.”¹⁶¹ To determine whether the requirement to join such a bar association violates the First Amendment, the court asked (1) whether such a requirement burdened the challenging member’s rights, and (2) if so, whether it was regardless justified by a sufficient state interest.¹⁶² In response to the first question, the court claimed that for those organizations involved “in expressive association, . . . individuals have a[] . . . right to ‘eschew association for expressive purposes.’”¹⁶³ Since the “government may not compel ‘individuals to mouth support for views they find objectionable[,]’ . . . compelling a lawyer to join a bar association engaged in non-germane activities burdens his or her First Amendment right to freedom of association.”¹⁶⁴ This is mostly because such a bar association would be, by definition, engaged in expressive activity.¹⁶⁵ In the court’s view, “when a bar association does so, part of its expressive message is that its members stand behind its expression,” thus compelling members to support such expression.¹⁶⁶

After answering the first question in the affirmative, the court explored whether any sufficient state interest justified such a burden on the freedom to associate.¹⁶⁷ Following union case law, the Fifth Circuit asserted that freedom of association cases followed at least exacting scrutiny, under which mandatory associations may engage in non-germane activity only where there is a compelling state interest and there exist no means that are less restrictive.¹⁶⁸ Despite its discussion of exacting and strict scrutiny, the court ultimately elected against deciding which level of judicial review ought to apply in this field of law.¹⁶⁹ The court further found that there are less intrusive ways of achieving the

¹⁶¹ *Longley*, 4 F.4th at 244.

¹⁶² *Id.* at 245.

¹⁶³ *Id.* (quoting *Janus v. Am. Fed. of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018)).

¹⁶⁴ *Id.* (quoting *Janus*, 138 S. Ct. at 2463).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 245–46 (5th Cir. 2021). This is in contrast to the argument set forth by Justice Harlan in his concurrence in *Lathrop*. *Lathrop v. Donohue*, 367 U.S. 820, 858 (1961) (Harlan, J., concurring).

¹⁶⁷ See *Longley*, 4 F.4th at 246.

¹⁶⁸ *Id.*; *Janus*, 138 S. Ct. at 2465 (“Under ‘exacting’ scrutiny, we noted, a compelled subsidy must ‘serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.’” (quoting *Knox v. Serv. Emps. Intl. Union, Loc. 1000*, 567 U.S. 298, 310 (2012))).

¹⁶⁹ *Longley*, 4 F.4th at 246. Since, according to the Fifth Circuit, the activity would fail the lesser of the scrutiny levels, there was no need to consider strict scrutiny. *Id.* The court determined that, pursuant to *Lathrop*, bar associations engaging in solely germane activities survive the standard. *Id.*

state interests alleged by the state bar—namely, a hybrid or voluntary bar association.¹⁷⁰ As such, the Fifth Circuit took the strong position that “plaintiffs are entitled to summary judgment on their freedom-of-association claim if the Bar is in fact engaged in non-germane activities.”¹⁷¹ The Fifth Circuit’s subtler holding is that in the event that *any* of the bar association’s activity is non-germane, mandatory membership is unconstitutional.¹⁷² Subsequently, the court analyzed whether each of the alleged activities were germane to the legal profession¹⁷³—a process during which each appellate court must engage in guesswork due to the ambiguity provided by the Court in *Keller*.¹⁷⁴

The Tenth Circuit later joined the Fifth and Ninth Circuits by handling this issue on rehearing in August of 2021.¹⁷⁵ After determining that *Keller* remained binding precedent in establishing a germaneness test regardless of whether that portion of the opinion was dicta,¹⁷⁶ the court addressed the viability of the freedom of association claim.¹⁷⁷ It found that the district court erred in holding that *Lathrop* and *Keller* foreclosed the freedom of association claim: “[n]either *Lathrop* nor *Keller* addressed a broad freedom of association challenge to mandatory bar membership where at least some of a state bar’s actions might not be germane to regulating the legal profession and improving the quality of legal services in the state.”¹⁷⁸ The appellate court remanded the case to the district court to determine if those activities challenged were non-germane and, in the event they were, to assess whether the challenger may assert a freedom of association claim on that basis.¹⁷⁹ These appellate decisions have resulted in numerous petitions to the Supreme Court to hear a third case to join *Lathrop* and *Keller*.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 247.

¹⁷² *See id.* at 249 (“In sum, some of the legislative program is non-germane, so compelling the plaintiffs to join an association engaging in it violates their freedom of association.”). *Contra* *Lathrop v. Donohue*, 367 U.S. 820, 839 (1961) (plurality opinion) (“The activities without apparent political coloration are many.”). The statement in *Lathrop* suggests that some activities are political, and therefore permits some political or ideological speech in association claims. *Id.*

¹⁷³ *Longley*, 4 F.4th at 247–52.

¹⁷⁴ *Keller v. State Bar of Cal.*, 496 U.S. 1, 16 (1990).

¹⁷⁵ *Schell v. Chief Just. & Justs. of Okla. Sup. Ct.*, 11 F.4th 1178, 1178 (10th Cir. 2021).

¹⁷⁶ *Id.* at 1191 (“Even if Mr. Schell were correct that most of *Keller* is dicta, we would still be bound to follow it. ‘[W]e are bound by Supreme Court dicta almost as firmly as by the Court[’s] outright holdings, particularly when the dicta is recent and not enfeebled by later statements. . . .’ That is particularly true when the ‘dicta squarely relates to the holding[] itself, and therefore is assuredly not gratuitous.’” (quoting *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1125 (10th Cir. 2015))).

¹⁷⁷ *Id.* at 1194.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 1194–95.

D. Denials of Certiorari and Unwillingness to Decide

Although the Supreme Court must provide clarity on these issues, all petitions for certiorari have been unsuccessful thus far. First, in 2018, the Supreme Court granted certiorari in *Fleck v. Wetch*.¹⁸⁰ The Court vacated the Eighth Circuit's judgment and remanded for further consideration in light of *Janus*.¹⁸¹ After the Eighth Circuit reached the same conclusions as it did before remand,¹⁸² the attorneys again appealed, but the Supreme Court rejected certiorari.¹⁸³ Soon thereafter, the challenging attorneys in *Jarchow v. State Bar of Wisconsin* challenged the Seventh Circuit's ruling in favor of the bar association.¹⁸⁴ The Supreme Court again denied certiorari, with Justices Thomas and Gorsuch dissenting.¹⁸⁵ The Court then denied a petition from the Ninth Circuit Court of Appeals in *Crowe v. Oregon State Bar*.¹⁸⁶ Finally, the Court recently denied petitions from the Sixth Circuit's case, *Taylor v. Buchanan*,¹⁸⁷ and one of the Fifth Circuit cases, *McDonald v. Longley*.¹⁸⁸ The Court's recent denials of certiorari magnify the importance of this issue at the appellate level. As this area of law develops, it is likely that the Supreme Court eventually accepts certiorari in pursuance of a clearer standard and consistency among the many disagreeing courts of appeals. Justices have dissented to the denial of certiorari, which suggests a willingness to hear an integrated bar association case.¹⁸⁹ In anticipation of this development, this Comment explores the greatest solution to the circuit split and introduces a new test for germaneness to provide clarity to lower courts in determining whether a bar association has violated dissenting attorneys' First Amendment rights.

II. PICKING SIDES

The recent appellate decisions have created a complex web of caselaw, resulting in limited predictability. Due to the similarity between the claims first introduced in *Lathrop* and *Keller* and those brought today,¹⁹⁰ the challenges

¹⁸⁰ *Fleck v. Wetch*, 139 S. Ct. 590 (2018). *Fleck* was an Eighth Circuit case which discussed the procedural side of *Keller*. *Fleck v. Wetch*, 868 F.3d 652 (8th Cir. 2017), *vacated*, 139 S. Ct. 590 (2018).

¹⁸¹ *Fleck*, 139 S. Ct. at 590.

¹⁸² *Fleck v. Wetch*, 937 F.3d 1112 (8th Cir. 2019).

¹⁸³ *Fleck v. Wetch*, 140 S. Ct. 1294 (2020).

¹⁸⁴ *Jarchow v. State Bar of Wis.*, 140 S. Ct. 1720 (2020).

¹⁸⁵ *See id.* at 1720–21 (Thomas, J., dissenting from denial of certiorari). The Justices asserted that the Supreme Court needed to revisit the viability of *Keller* to clarify the law in light of *Janus*. *Id.* at 1721.

¹⁸⁶ *Crowe v. Or. State Bar*, 142 S. Ct. 79 (2021).

¹⁸⁷ *Taylor v. Heath*, 142 S. Ct. 1441 (2022).

¹⁸⁸ *McDonald v. Firth*, 142 S. Ct. 1442 (2022).

¹⁸⁹ *Jarchow*, 140 S. Ct. at 1720–21.

¹⁹⁰ *Compare McDonald v. Longley*, 4 F.4th 229, 247–48 (5th Cir. 2021) (describing the plaintiffs' challenge against lobbying for substantive law), *cert. denied*, 142 S. Ct. 1442 (2022), *with Lathrop v. Donohue*,

should be analyzed within the Supreme Court's previous holdings. The divorce of the freedoms of association and speech is crucial to understanding the current structure: the violation of one is not a per se violation of the other. This Part analyzes the circuit split in light of existing Supreme Court doctrine, ultimately concluding that the Seventh Circuit Court of Appeals has adopted the proper analysis of First Amendment claims against state bar associations. Section A analyzes the freedom of association claim being litigated in each of the circuits. Section B discusses the freedom of speech claim. Finally, Section C explores the implications of adopting the Sixth and Seventh Circuits' approach.

A. *Compelling Membership*

As long as Supreme Court precedent has not been abrogated, lower federal courts must strictly adhere to its caselaw.¹⁹¹ Such is the case in freedom of association claims against state bar associations, regardless of the fact that appellate courts perceive that *Keller* reopened the freedom of association claim.¹⁹² The proper application of effective doctrine is to faithfully adhere to the holdings of *Lathrop* and *Keller*, neither of which has been overturned.¹⁹³ Although some appellate courts have considered the freedom of association claims while claiming to adhere to *Keller*,¹⁹⁴ such application is only proper if the analysis strictly follows the Court's decision. Indeed, after proclaiming that it would remain faithful to the Supreme Court's holdings in *Lathrop* and *Keller*,¹⁹⁵ the Fifth Circuit actively constricted the Court's holding in *Lathrop*

367 U.S. 820, 836–37 (1961) (plurality opinion) (mentioning that one of the challenged activities is the formal positioning of the Wisconsin State Bar as to substantive law).

¹⁹¹ *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”).

¹⁹² *E.g.*, *Crowe v. Or. State Bar*, 989 F.3d 714, 728 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 79 (2021); *Longley*, 4 F.4th at 244.

¹⁹³ *Jarchow v. State Bar of Wis.*, No. 19-cv-266-bbc, 2019 WL 6728258, at *1 (W.D. Wis. Dec. 11, 2019) (noting that *Keller* has yet to be overruled), *aff'd* No. 19-3444, 2019 WL 8953257 (7th Cir. Dec. 23, 2019); *Schell v. Chief Just. & Justs. of Ok. Sup. Ct.*, 11 F.4th 1178, 1191 (10th Cir. 2021) (highlighting that the Supreme Court, in *Janus*, did not mention an impact on the holdings of *Lathrop* and *Keller*); *see also Janus v. Am. Fed. of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2498 (2018) (Kagan, J., dissenting) (noting that the decision in *Janus* did not question the holding in *Keller*); *Jarchow*, 140 S. Ct. at 1721 (highlighting that the Court ought to reexamine whether *Keller* is sound precedent but noting that it remains binding until then).

¹⁹⁴ *See, e.g., Longley*, 4 F.4th at 243 n.14 (“So, despite their ‘increasingly wobbly, moth-eaten foundations,’ *Lathrop* and *Keller* remain binding. . . . With that said, *Lathrop*’s and *Keller*’s weakened foundations counsel against expanding their reach as we consider questions they left open.” (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (cleaned up))).

¹⁹⁵ *Id.*; *Boudreaux v. La. State Bar Ass’n*, 3 F.4th 748, 755 (5th Cir. 2021) (“As the parties agree, *Lathrop* and *Keller* remain controlling law. Even so, we recognize their weakened foundations, which counsels against expanding their application . . .”).

by adjudicating on the freedom of association. On the opposite end of the split, the Seventh Circuit, in summarily affirming the district court's opinion, properly analyzed and adhered to the controlling Supreme Court decisions.¹⁹⁶

As discussed at length above, *Lathrop* found that bar associations which engage in some political activity do not violate constituent attorneys' freedom of association by compelling membership dues.¹⁹⁷ The new associational claims find their roots in the final paragraph of *Keller*, in which a unanimous Court claimed that the "request for relief appear[ed] to implicate a much broader freedom of association claim than was at issue in *Lathrop*."¹⁹⁸ Plaintiffs and some appellate courts have used this paragraph of dicta to assert that any ideological activity which does not directly relate to the activities of the state bar association qualifies as warranting this separate associational claim.¹⁹⁹ This analysis misinterprets *Lathrop* and unnecessarily expands *Keller*'s non-binding dicta.²⁰⁰ If the Fifth Circuit's analysis were proper, courts could severely constrict the activities of bar associations to the point that they cease to exist.

To properly analyze the freedom of association claim, one must fully understand the breadth of the claim and holding of *Lathrop*. The challenging attorney claimed that the Wisconsin State Bar impermissibly engaged in ideological action through five activities.²⁰¹ Despite the extensive legislative activity undertaken by the Wisconsin State Bar, the plurality stated that "it seem[ed] plain that legislative activity [was] not the major activity of the State Bar."²⁰² The Court further emphasized that "[t]he activities without apparent political coloration [were] many."²⁰³ In his concurrence, Justice Harlan wrote that he "[did] not understand why it should become unconstitutional for the State Bar to use appellant's dues to fulfill some of the very purposes for which it was

¹⁹⁶ *Jarchow*, 2019 WL 8953257, at *1.

¹⁹⁷ *Lathrop v. Donohue*, 367 U.S. 820, 848 (1961) (plurality opinion). The concurrences asserted that the Court should have extended its holding to the freedom of speech, thus creating a majority. *Id.* at 849 (Harlan, J., concurring) (citing *Ry. Emps.' Dep't v. Hanson*, 351 U.S. 225 (1956)).

¹⁹⁸ *Keller v. State Bar of Cal.*, 496 U.S. 1, 17 (1990).

¹⁹⁹ *E.g.*, *Boudreaux*, 3 F.4th at 756 ("Boudreaux alleged that [the Louisiana State Bar Association (LSBA)] engages in legislative activity that is 'inherently political and ideological.' . . . With these allegations, Boudreaux plausibly pleads that LSBA's political and ideological activity goes beyond what is constitutionally permissible under *Lathrop*—that the activity is not justified by the state's interest in regulating and improving the legal profession. That is all that is required to present the free association claim that *Keller* left unresolved.").

²⁰⁰ Some courts consider dicta to be nearly as binding as precedent. *See Schell v. Chief Just. & Justs. of Ok. Sup. Ct.*, 11 F.4th 1178, 1191 (10th Cir. 2021) (quoting *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1125 (10th Cir. 2015)). Be that as it may, such dicta certainly is not binding enough to overrule currently binding Supreme Court precedent.

²⁰¹ *Lathrop*, 367 U.S. at 835–39 (plurality opinion). For a list of the activities, see *supra* note 69 and accompanying text.

²⁰² *Lathrop*, 367 U.S. at 839.

²⁰³ *Id.*

established.”²⁰⁴ The Court’s conclusion left little room for confusion in the way of analyzing whether a state bar association’s legislative activity violated the freedom of association. Despite the seemingly significant lobbying and legislative activity of the Wisconsin State Bar, seven Justices found that there was no issue in “compulsory dues-paying membership.”²⁰⁵

Although the Court displayed high tolerance for legislative and ideological activity in the realm of the freedom of association, there remain appellate courts which assert that any legislative or ideological activity that is not directly related to the regulation of the legal profession falls under the *Keller* expansion.²⁰⁶ In response to this interpretation, courts have engaged in the *Keller* germaneness test—an activity-by-activity analysis that determines whether each is sufficiently germane to the legal profession such that it does not violate the freedom of association of the member attorneys.²⁰⁷ Although the Fifth Circuit rejected a per se rule that any lobbying is non-germane under association claims,²⁰⁸ the court still overstepped its legal authority in its application of *Keller*. Applying *Keller*’s dicta as a means to overrule *Lathrop*, the court claimed that “advocating changes to a state’s substantive law is non-germane to the purposes identified in *Keller*. Such lobbying has nothing to do with regulating the legal profession or improving the quality of legal services.”²⁰⁹ The court rationalized this by stating that “those efforts are directed entirely at changing the law governing cases, disputes, or transactions in which attorneys might be involved.”²¹⁰

Notwithstanding that the germaneness test is flawed, the *Longley* court’s analysis ignores the language in *Lathrop*—the freedom of association analysis should never have reached the activity-by-activity analysis. The *Lathrop* Court made clear that even relatively significant legislative activity fails to infringe upon freedom of association rights.²¹¹ That the *Keller* Court found that certain activities may infringe upon the freedom of *speech* is irrelevant to their permissibility under the freedom of *association*, and *Keller*’s dicta does not overrule *Lathrop*.²¹² It would seem impossible that the question set forth in

²⁰⁴ *Id.* at 850 (Harlan, J., concurring).

²⁰⁵ *Id.*

²⁰⁶ *E.g.*, McDonald v. Longley, 4 F.4th 229, 249 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 1442 (2022).

²⁰⁷ *See id.* at 247–52 (analyzing each of the alleged activities under the *Keller* germaneness standard).

²⁰⁸ *See id.* at 247.

²⁰⁹ *Id.* at 247–48.

²¹⁰ *Id.* at 248.

²¹¹ *Lathrop v. Donohue*, 367 U.S. 820, 839 (1961) (plurality opinion) (“But it seems plain that legislative activity is not the *major activity* of the State Bar. The activities without apparent political coloration are many.” (emphasis added)).

²¹² *See* Tex. Democratic Party v. Abbott, 961 F.3d 389, 405 (5th Cir. 2020) (“[T]he Supreme Court

Longley is a “much broader freedom of association claim”²¹³ than that disposed of in *Lathrop* given that the legislative activity mirrors that which was litigated in *Lathrop* itself.²¹⁴ To make the Fifth Circuit’s opinion even more dubious, the Texas State Bar Association’s legislative activity was the sole activity which the court considered to be non-germane.²¹⁵ That is, the Fifth Circuit only found the Texas Bar’s activity to be violative of the constituent attorneys’ freedom of association as to the activity which *Lathrop* specifically held was *non-violative* of the attorneys’ associational rights.²¹⁶ This simply cannot be reconciled with the existing Supreme Court doctrine, especially considering that the Supreme Court affirmatively acknowledged the alleged non-germaneness of the State Bar’s legislative activity in *Lathrop* and dismissed it.²¹⁷

Assuming the Fifth and Ninth Circuits have properly analyzed the freedom of association issue, then a case-by-case observation of the germaneness of each of the activities undertaken by the bar association is proper.²¹⁸ Nevertheless, such an examination of the activities need not be observed under the freedom of association, since the inquiry is inappropriate pursuant to binding Supreme Court precedent.

On the opposite side of the split, the Seventh Circuit strictly adhered to Supreme Court doctrine. In *Jarchow*, the plaintiff challenged the Wisconsin State Bar’s mandatory nature on the grounds that it “engage[d] in advocacy and other speech on matters of intense public interest and concern,” asserting that “those requirements compel[led] Plaintiffs’ speech and compel[led] them into

abrogates its cases with a bang, not a whimper . . .”), *cert. denied*, 141 S. Ct. 1124 (2021).

²¹³ *Keller v. State Bar of Cal.*, 496 U.S. 1, 17 (1990).

²¹⁴ Compare *Longley*, 4 F.4th at 248 (“Many of the bills the Bar supported relate to substantive Texas law and are wholly disconnected from the Texas court system or the law governing lawyers’ activities.”), with *Lathrop*, 367 U.S. at 836–37, 839, 848 (noting that, despite the fact that the State Bar Association engaged in numerous legislative activities seeking to influence both state and federal law, “it seem[ed] plain that legislative activity is not the major activity of the State Bar,” and eventually holding that there was no violation of the freedom of association).

²¹⁵ See *Longley*, 4 F.4th at 247–52. The court also noted that some of the activities of the Bar in favor of needy communities was non-germane, but those related specifically to the association’s lobbying efforts within that field. *Id.* at 251.

²¹⁶ Compare *id.* at 249 (“In sum, some of the legislative program is non-germane, so compelling plaintiffs to join an association engaging in it violates their freedom of association.”), with *Lathrop*, 367 U.S. at 842–43 (“This examination of the purposes and functions of the State Bar shows its multifaceted character, in fact as well as in conception. In our view the case presents a claim of impingement upon freedom of association no different from that which we decided in *Railway Employes’ Dept. v. Hanson* . . . [where we] . . . held that [the union] . . . did not on its face abridge protected rights of association in authorizing union-shop agreements . . .”).

²¹⁷ *Lathrop*, 367 U.S. at 839 (“The activities without apparent political coloration are many.”).

²¹⁸ See, e.g., *Longley*, 4 F.4th at 247–52. Such an approach follows *Keller* and would provide continuity in this area of caselaw.

an unwanted expressive association with the State Bar . . . in violation of Plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution."²¹⁹ The Federal District Court for the Western District of Wisconsin found that, although the Supreme Court overruled *Abood* in 2018 in *Janus*, "[t]he majority in *Janus* did not discuss *Keller* nor respond to the dissent's citation of *Keller*."²²⁰ Because the parties understood that the claims failed under *Keller*, which remained binding precedent, the court dismissed the claim.²²¹ The Sixth Circuit Court of Appeals reached a similar conclusion.²²² The court noted that, "[t]o Taylor's credit, she acknowledges that *Lathrop* and *Keller* are an insurmountable hurdle if they remain good law."²²³ Such a statement demonstrates the proper approach to the freedom of association question: where binding Supreme Court doctrine exists, the appellate court lacks the authority to alter the law.²²⁴ The argument in favor of this interpretation is a simple one, and one which the American judiciary has faithfully followed since its inception.²²⁵ Unlike the striking dissonance regarding the freedom of association, courts have been more agreeable in handling the freedom of speech issue.

B. *Compelling Members to Speak*

In contrast to some courts' decisions on the freedom of association, the freedom of speech approaches advanced by each appellate court was proper. *Keller* was explicit in its holding: "[t]he State Bar may . . . constitutionally fund activities germane to [regulating the legal profession and improving the quality

²¹⁹ Complaint at 2, *Jarchow v. State Bar of Wis.*, 2019 WL 6728258 (W.D. Wis. Dec. 11, 2019) (No. 19-CV-266).

²²⁰ *Jarchow v. State Bar of Wis.*, No. 19-cv-266-bc, 2019 WL 6728258, at *1 (W.D. Wis. Dec. 11, 2019), *aff'd* No. 19-3444, 2019 WL 8953257 (7th Cir. Dec. 23, 2019).

²²¹ *Id.*

²²² *Taylor v. Buchanan*, 4 F.4th 406, 407 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 1441 (2022).

²²³ *Id.* at 408.

²²⁴ In fact, *Lathrop* suggests that the participation in non-germane activity provides some beneficial value. *Lathrop v. Donohue*, 367 U.S. 820, 844 (1961) (plurality opinion). In response to the plaintiff attorney's freedom of speech claim, the plurality quoted the Wisconsin Supreme Court's language, stating that "[t]he only limitation upon the state's power to regulate the privilege of the practice of law is that the regulations adopted do not impose an unconstitutional burden or deny due process." *Id.* (quoting *Lathrop v. Donohue*, 102 N.W.2d 404, 408 (Wis. 1960), *aff'd*, 367 U.S. 820 (1961)). The Court further quoted the Wisconsin Supreme Court's rejection of the challenge, which stated that "[t]he general public and the legislature are entitled to know how the profession as a whole stands on such type of proposed legislation. . . . [I]t promotes the public interest to have public expression of the views of a majority of the lawyers of the state, with respect to legislation affecting the administration of justice and the practice of law." *Id.* (quoting *Lathrop*, 102 N.W.2d at 409, 411). Although the Wisconsin Supreme Court's decision did not endorse activity wholly unrelated to the legal profession, it promoted some non-germane political activity which could pertain to the legal profession. *See id.*

²²⁵ *See* THE FEDERALIST NO. 78, at 232–33 (Alexander Hamilton) (Roy P. Fairfield ed., 1981) ("To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them").

of legal services] out of the mandatory dues of all members.”²²⁶ Chief Justice Rehnquist, understanding that “[t]he difficult question, of course, is to define” those activities which are non-germane,²²⁷ set forth the extreme ends of the germaneness spectrum.²²⁸ When it came to compelling speech, the Court held that mandatory dues may not fund activities including lobbying for issues such as gun control or a nuclear weapons freeze, but that there is no such infringement when activities concern disciplinary actions or proposals of ethical codes.²²⁹ In so defining the standards for “germaneness,” Chief Justice Rehnquist failed to guide the lower courts any further.²³⁰

In the recent surge of challenges against bar associations, appellate courts have applied the *Keller* standards to the best of their abilities.²³¹ Nevertheless, the results of germaneness determinations are scattered. In *Schell v. Chief Justice and Justices of the Oklahoma Supreme Court*, the plaintiff attorney challenged a series of articles in the *Oklahoma Bar Journal*.²³² Handling a limited record, the Tenth Circuit Court of Appeals recognized that without proper discovery, it could not conclude whether articles relating to those matters which “often break along political lines” were germane or non-germane.²³³ The Fifth Circuit handled a similar claim against the *Texas Bar Journal* in *Longley*.²³⁴ There, the attorneys challenged the mandatorily funded journal, which published materials that were unobjectionably germane to the regulation of the legal profession in Texas.²³⁵ The Fifth Circuit also hinted that a mandatory bar association’s journal may publish non-germane articles and comply with *Keller*, so long as it “includes a disclaimer clarifying that the Bar does not endorse any views expressed therein.”²³⁶ Though the Fifth and Tenth Circuit Courts of Appeals do not directly contradict one another, the Fifth Circuit’s opinion implies that any non-germane activity in a bar association’s journal would fail to infringe upon

²²⁶ *Keller v. State Bar of Cal.*, 496 U.S. 1, 14 (1990).

²²⁷ *Id.* at 14.

²²⁸ *Id.* at 16.

²²⁹ *Id.*

²³⁰ *See id.* at 15–16.

²³¹ *See, e.g., McDonald v. Longley*, 4 F.4th 229, 247–52 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 1442 (2022); *Schell v. Chief Just. & Justs. of Ok. Sup. Ct.*, 11 F.4th 1178, 1192–95 (10th Cir. 2021).

²³² *Schell*, 11 F.4th at 1193.

²³³ *Id.* at 1194.

²³⁴ *Longley*, 4 F.4th at 252.

²³⁵ *Id.* The court listed four activities of the *Texas Bar Journal*: (1) notices of disciplinary proceedings against member attorneys; (2) announcements of amendments to rules governing court proceedings; (3) sanctions released by the committee governing judicial conduct; and (4) articles relating to the legal affairs of the Bar Association. *Id.* The court also recognized that where the *Journal* featured non-germane articles, it did not maintain a specific viewpoint. *Id.*

²³⁶ *Id.*

the rights of the attorneys if it included a disclaimer.²³⁷ Meanwhile, the Tenth Circuit recognized that some of these articles may implicate the rights of attorneys and made no such finding regarding a disclaimer.²³⁸

Moreover, the Fifth Circuit found that “lobbying for changes to [state] substantive law” in any capacity, regardless of whether such changes are made for a germane purpose, violates those standards set forth in *Keller*.²³⁹ Despite the fact that the substantive law for which the Bar Association lobbied debatably was to “improv[e] the quality of legal services” to low-income residents,²⁴⁰ the Fifth Circuit interpreted the activity to fall on the “activities of an ideological nature”²⁴¹ side of the line.²⁴² This interpretation, albeit strained, does not technically violate the holding in *Keller*.²⁴³ Nothing in *Keller* states that lobbying for substantive law is per se non-germane, but nothing implies that such a per se rule is inappropriate.²⁴⁴ Rather, under the current framework, so long as the reviewing court considers the activity to be of an ideological basis, the activity may be non-germane if it does not “regulat[e] the legal profession.”²⁴⁵ Such a standard—which is highly deferential to the lower court and even more dependent upon, at times, limited discovery records—is impossible to apply in a reliable manner.²⁴⁶ As appellate courts consider the germaneness of state bar association activities, a test which some courts have applied to both the associational and speech claims,²⁴⁷ predictability and reliability are paramount to effectively adjudicating First Amendment claims.

C. *Effects of Adopting the Sixth and Seventh Circuit Approach*

As evidenced, the current status of the freedoms of association and speech as they relate to mandatory bar associations is nebulous.²⁴⁸ The Sixth and

²³⁷ *See id.* (noting that a disclaimer is sufficient under *Keller*’s standards). The Fifth Circuit did not discuss whether such a disclaimer is always conclusive of the matter. *See id.*

²³⁸ *See Schell*, 11 F.4th at 1194.

²³⁹ *Longley*, 4 F.4th at 251. The activity at issue related to making representation more available to low-income Texas residents. *Id.*

²⁴⁰ *Keller v. State Bar of Cal.*, 496 U.S. 1, 13–14 (1990).

²⁴¹ *Id.* at 14.

²⁴² *Longley*, 4 F.4th at 251.

²⁴³ *See Keller*, 496 U.S. at 16.

²⁴⁴ *See id.*

²⁴⁵ *Id.* at 13.

²⁴⁶ *See, e.g., Schell v. Chief Just. & Justs. of Ok. Sup. Ct.*, 11 F.4th 1178, 1194 (10th Cir. 2021) (remanding for discovery purposes to allow the lower court to make a proper determination as to germaneness of two articles published by the bar association).

²⁴⁷ *See, e.g., McDonald v. Longley*, 4 F.4th 229, 247–52 (5th Cir. 2021) (determining whether the Bar Association’s activities were sufficiently germane as to avoid infringing upon the freedom of association rights of the constituent attorneys), *cert. denied*, 142 S. Ct. 1442 (2022).

²⁴⁸ *E.g., Keller*, 496 U.S. at 13–14.

Seventh Circuits' interpretations simplify the current jurisprudence in this area of the law. The adoption of this approach would officially foreclose freedom of association claims,²⁴⁹ producing predictability and promoting fair justiciability. As it currently stands, whether an attorney may bring an association claim depends upon the attorney's home state, since different appellate courts have interpreted and applied *Lathrop* and *Keller* in dissonant manners.²⁵⁰ Such lack of continuity around the country is avoidable with the adoption of a governing standard which complies with current caselaw. Moreover, adopting the Sixth and Seventh Circuit standards would not alter any past Supreme Court decisions. Rather, it would promote *Lathrop* and recognize the final paragraph of *Keller* as failing to reopen the association claim. Utilizing the Sixth and Seventh Circuits as a guiding standard can also provide the field of bar associations with its own settled field of law. Divorcing the union and bar association contexts is appropriate given the fundamental differences between the types of organizations, and the provision of a standard more firmly affixed to the context of bar associations is proper.

Further, this standard would not change the current freedom of speech jurisprudence, which complies with *Keller's* precedential standing. The germaneness test²⁵¹ would remain the standard by which courts determine the permissibility of bar association activity. This allows courts to maintain a similar analysis to that which they have engaged in for the past thirty years. The following Part sets forth a modified germaneness test which provides a guiding standard to clarify the ideas set forth in *Keller* and the recent appellate court decisions. This is designed to enhance workability and predictability to courts in the same sense that adopting the Seventh Circuit's interpretation of the caselaw does.

III. CLARIFYING THE GERMANENESS STANDARD

As Section II.B discussed, the standard set forth in *Keller* consists of two extremes with no underlying test by which to gauge the germaneness of the activities of integrated state bar associations.²⁵² Lower courts need a clarifying standard that promotes equal justiciability, clarity, and predictability across

²⁴⁹ *Jarchow v. State Bar of Wis.*, No. 19-3444, 2019 WL 8953257, at *1 (7th Cir. Dec. 23, 2019) (holding that *Janus* did not overrule *Keller*, thus barring a First Amendment claim against the Wisconsin State Bar), *aff'g* No. 19-cv-266-bbc, 2019 WL 6728258 (W.D. Wis. Dec. 11, 2019).

²⁵⁰ *Compare Longley*, 4 F.4th at 244–46 (finding that bar associations can violate the freedom of association), *with Taylor v. Buchanan*, 4 F.4th 406, 407–08 (6th Cir. 2021) (holding that the freedom of association claim failed), *cert. denied*, 142 S. Ct. 1441 (2022).

²⁵¹ *See infra* Part III.

²⁵² *Keller*, 496 U.S. at 16.

jurisdictions. This Part introduces a new framework built from opinions by the Fifth and Tenth Circuit Courts of Appeals by which to engage in the freedom of speech germaneness analysis and, should the Supreme Court find that the freedom of association claims are beyond the scope of that decided in *Lathrop*, freedom of association analysis. This test will introduce four factors that courts can use to analyze activities of bar associations in determining whether there is an infringement upon individual liberties. First, Section A describes the understanding of “germane” in other legal fields. Then, Section B introduces the threshold of the balancing test. Finally, Section C explores each of the suggested factors.

A. *Understanding Germaneness*

The first step in clarifying the germaneness standard set forth in *Keller* requires, of course, an understanding of the dispositive term. “Germane” is hardly a term of art, but it is defined in the legal sphere as “relevant; pertinent.”²⁵³ Such a definition, while marginally guiding, provides no additional clarity to the germaneness standard at hand. Typically, the Supreme Court has no difficulty introducing alternative terms when drawing a distinction between two concepts,²⁵⁴ so other uses of “germane” by the Supreme Court can guide its definition in this context. Since this field of First Amendment jurisprudence is not the Supreme Court’s first use of “germaneness,” prior uses can provide a glimpse of the intended meaning of the word when used by the Justices. This section explores the interpretation of the term “germane” in prior Supreme Court doctrine.

Up to this point, the Supreme Court has failed to define germaneness for the lower courts beyond the definition set forth in *Keller*.²⁵⁵ Although the term was borrowed from former union cases,²⁵⁶ those opinions routinely failed to address the term more than halfheartedly.²⁵⁷ However, the Court has defined the term in

²⁵³ *Germane*, BLACK’S LAW DICTIONARY (11th ed. 2019).

²⁵⁴ See, e.g., Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 U. PA. L. REV. 1, 10 (2000) (“[The current levels of judicial scrutiny] rang[e] from minimum rationality through intermediate and up to strict, varying in accord with the degree of supposed ‘suspectness’ or ‘invidiousness’ of the criterion of classification employed and in response to the level of ‘importance’ or ‘fundamentality’ of the right or interest distributed or affected.”); *Janus v. Am. Fed. of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2477 (2018) (applying “exacting scrutiny”).

²⁵⁵ *Keller*, 496 U.S. at 15–16.

²⁵⁶ *Id.* at 9 (quoting *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 235–36 (1977)).

²⁵⁷ See *id.* at 16 (providing only the extreme ends of the spectrum). Neither *Abood*, 431 U.S. 209 (1977), nor *Railway Employees’ Department v. Hanson*, 351 U.S. 225 (1956), defined the term. Rather, *Hanson* implied that, so long as the activity “enhance[s] and strengthen[s]” the goal for which the activity is undertaken, it is germane. *Hanson*, 351 U.S. at 235. There was no description of what constitutes enhancement or strengthening of the goal. *Id.* The term was similarly left undefined by the Supreme Court seven years later, when it stated that

one other field in which germaneness is a crucial consideration: tax and spend clause jurisprudence.²⁵⁸ The Supreme Court has permitted Congress to provide federal funds to states on the condition that the state implement legislation which Congress could not constitutionally pass on behalf of the nation,²⁵⁹ premised on the tax and spend clause of the Constitution.²⁶⁰

In *South Dakota v. Dole*, a tax and spend clause case, Chief Justice Rehnquist (who also authored *Keller*) applied a standard of germaneness.²⁶¹ *Dole* expanded Congress's use of the tax and spend clause to influence state-level legislation in its interpretation of the germaneness standard.²⁶² In laying out the restrictions upon the power to withhold funds, Rehnquist noted that the Court's previous "cases ha[d] suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'"²⁶³ This restriction, which the Chief Justice termed "germaneness," was not directly challenged by the state.²⁶⁴ Nevertheless, the Court's application of the germaneness standard is suspect, unless germaneness is to be understood as requiring a loose tether between the state policy and the federal funds which it is threatening to withhold.

In this case, the federal government withheld federal highway funds from states that did not require the legal drinking age to be twenty-one, citing that "the lack of uniformity in the States' drinking ages created 'an incentive to drink and drive' because 'young persons commut[e] to border States where the drinking age is lower.'"²⁶⁵ This connection is tenuous. It presumes that the accidents resulting specifically from different drinking ages among states are sufficiently related to highway maintenance and safety that withholding the state's grants for

"the courts below made no attempt to draw the boundary between political expenditures and those germane to collective bargaining, and it would be inappropriate for this Court to do so in the first instance and upon the present record." *Bhd. of R.R. & S.S. Clerks, Freight Handlers, Express and Station Emps. v. Allen*, 373 U.S. 113, 121 (1963).

²⁵⁸ U.S. CONST. art. I, § 8, cl. 1.

²⁵⁹ *E.g.*, *South Dakota v. Dole*, 483 U.S. 203, 205, 211–12 (1987) (holding that "encouragement of state action" by threatened withholding of federal funds is a constitutional practice). *But see Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 585 (2012) (finding that, although mild encouragement is a permissible means of influencing state legislation, the federal government may not threaten to withhold such a significant share of funds that it coerces the state into taking a particular legislative action).

²⁶⁰ U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .").

²⁶¹ *Dole*, 483 U.S. at 208; *Keller v. State Bar of Cal.*, 496 U.S. 1, 3 (1990).

²⁶² *See Dole*, 483 U.S. at 208–09.

²⁶³ *Id.* at 207 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)).

²⁶⁴ *Id.* at 208.

²⁶⁵ *Id.* at 209 (quoting PRESIDENTIAL COMM'N ON DRUNK DRIVING, FINAL REPORT 11 (1983)).

such maintenance is permissible.²⁶⁶ In dissent, Justice O'Connor argued that such a condition is only proper where there exists more than "an attenuated or tangential relationship" between the condition and the grant.²⁶⁷ A comparison between O'Connor's argument that the Court's germaneness standard fails a reasonable relationship and the standard set forth by the majority of the Court indicates that the germaneness standard, as understood by Chief Justice Rehnquist, does not mandate a strong tether.²⁶⁸ Such an understanding is critical to the understanding of the test that will follow in Sections B and C.

B. A Basic Threshold to Germaneness

As with any test, a threshold by which to determine whether a bar association's activities are germane is necessary. Such a threshold is vital to implementing a sliding scale test and assists courts in handling summary judgment motions. Given that the freedom of speech is among the "fundamental personal rights and liberties" as guaranteed to citizens by the Constitution,²⁶⁹ the proposed test does not terminate the inquiry simply by finding that an activity satisfies Chief Justice Rehnquist's germaneness standard.²⁷⁰ That is, if the challenger successfully proves that the bar association's activity is not sufficiently related to any of the goals set forth by the bar association, then the activity is impermissible.

Nevertheless, the fact that an activity is merely related under the Rehnquist standard is not sufficient for the bar association to per se succeed on the merits. Although Chief Justice Rehnquist's interpretation will usually be too weak on its own, it is not so weak that the activity is necessarily impermissible. In this sense, satisfying Justice O'Connor's understanding of germaneness is a stronger position for the bar association when considered in the totality of the

²⁶⁶ See *id.* at 214–15 (1987) (O'Connor, J., dissenting).

²⁶⁷ *Id.* at 215.

²⁶⁸ See *id.* at 208–09 (majority opinion).

²⁶⁹ *Schneider v. State of N.J., Town of Irvington*, 308 U.S. 147, 161 (1939).

²⁷⁰ Although Chief Justice Rehnquist wrote both *Dole* and *Keller*, it would be improper to consider the two cases as handling stakes of similar enough latitude to engage in an identical inquiry. That is, *Dole* related to the conditional grant of funds stemming from a Constitutional grant to Congress to provide for the general welfare, anchored by the legislative vesting clause. U.S. CONST. art. I, §§ 1, 8, cl. 1. Consequently, a weak germaneness standard may be more appropriate as it simply defers legislative power to Congress. On the other hand, a liberal germaneness standard in the bar association arena could permit the associations to engage in speech only tangentially related to the purposes for which the bar association was designed. *Cf. Dole*, 483 U.S. at 215 (O'Connor, J., dissenting) (expressing concerns that with a liberal germaneness standard, the federal government could trounce the rights of States to effectively exercise their police power). When the right at issue is of a personal nature and is as fundamental to citizens of the United States as the freedom of speech, a stricter standard is more appropriate than that which was adopted by *Dole*. Such is the purpose of the totality of the circumstances test introduced in this Comment. See *infra* Section III.C.

circumstances; however, it is not necessary for the purposes of the threshold test.²⁷¹ Therefore, this Comment adopts Chief Justice Rehnquist's interpretation as a threshold test.²⁷² While the threshold inquiry examines germaneness under the *Dole* definition, such a liberal standard is not of great concern when it comes to protecting the rights of the challenging attorneys because a mere finding that an activity is tethered to a legitimate goal of the bar association is not, on its own, sufficient to uphold the activity.²⁷³ In essence, the test determines not whether a particular activity is germane, but whether the challenging attorney can show that an activity is so non-germane that it is constitutionally invalid. If the standard is met by the bar association and the activity is at least as tethered as was understood in *Dole* (a tangential relationship is sufficient), then the rest of the analysis is appropriate.

C. *Weighing Whether an Activity is Germane*

This section introduces a test that clarifies the germaneness standard set forth in *Keller*. The test weighs four separate factors relating to the bar association's challenged activity. As in *Dole*, the requirement is that after consideration of each of the four factors, the activity is reasonably related to the stated goals of the bar association and those goals which were deemed acceptable by the Court in *Keller*.²⁷⁴ The test creates a presumption in favor of validity of the action unless proven otherwise by the challenging attorneys. Section one explores the first factor, the strength of the connection between the activity and the stated goals of bar associations, and the validity of that goal. Section two discusses the second factor, the nature and public outreach of the challenged activity. Section three analyzes the third factor, the societal dissonance of the issue within the challenged activity. Finally, Section four explores the fourth factor, the amount of associational funding devoted to a given activity.

²⁷¹ Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1930 n.94 (1995) (noting that Justice O'Connor's reading of germaneness was "a more meaningful . . . requirement" with a reasonable relationship prong "hav[ing] more bite" than the majority's test).

²⁷² The proper evidentiary standard is a preponderance of the evidence. See William C. Bowers, Comment, *Does Due Process Require Clear and Convincing Proof Before Life's Liberties May Be Lost?*, 24 EMORY L.J. 105, 112 n.30 (1979) (highlighting that a preponderance of the evidence only requires that a fact is more probable than not). This evidentiary standard falls within Justice O'Connor's understanding of a "reasonable relationship." *Dole*, 483 U.S. at 215. That is, her stricter standard dictates no stronger evidentiary standard. Consequently, a preponderance standard by default also fits within Chief Justice Rehnquist's looser interpretation.

²⁷³ Such a standard is especially appropriate where the inquiry is merely whether there is *any* tether at all to determine whether the challenge approaches its next steps. *Dole* can be assumed to be the minimum required tether between an activity and the stated goals of a governmental action for germaneness to apply. As such, should the activity meet the same level of germaneness as was accepted in *Dole*, then the inquiry is not complete.

²⁷⁴ *Keller v. State Bar of Cal.*, 496 U.S. 1, 13–14 (1990). The acceptable purposes, as held in *Keller*, are "regulating the legal profession and improving the quality of legal services." *Id.*

1. *Strength of the Tether*

The first factor of the balancing test is the most vital—the strength of the tether between the activity and the stated goals of the bar association, and the validity of those goals in light of those deemed permissible in *Lathrop*²⁷⁵ and *Keller*.²⁷⁶ The analysis under this factor includes considering whether the statutory goal to which the activity is ascribed is valid on its face;²⁷⁷ how the particular activity furthers the legal profession in that state; and how related the activity is to the bar association’s goals.²⁷⁸ Notwithstanding the discussion above relating to the minimum requirement of this factor, the strength of the tether is undoubtedly the most important factor involved in the test, since the factor is based upon the “germaneness” name. Achieving the minimum standard of connection between an activity and a stated goal is not a strong position for the bar association; indeed, such a weak connection may weigh against a finding of germaneness. The test is, by definition, contingent upon germaneness,²⁷⁹ but the focus is more on the strength of the connection. That is, the less “attenuated” the connection between the activity and the goal,²⁸⁰ the more likely the activity will be considered constitutionally permissible. Consequently, the strength of the tether factor is, while not dispositive, the most important factor.

2. *Nature and Public Outreach of the Challenged Activity*

Once the strength of the tether has been evaluated, the second factor analyzes the specifics of the challenged activity—namely the nature and public outreach of the activity. The rationale of this factor is twofold: to determine whether the activity constitutes an official opinion endorsed by the bar association, and whether such a position is so public as to be reasonably interpreted as an opinion which member attorneys endorse.²⁸¹ When a bar association endorses an official

²⁷⁵ *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961) (plurality opinion) (stating that the Wisconsin State Bar could mandate dues payments “to further the State’s legitimate interests in raising the quality of professional services”).

²⁷⁶ *Keller*, 496 U.S. at 13–14 (“Here the compelled association and integrated bar are justified by the State’s interest in regulating the legal profession and improving the quality of legal services.”).

²⁷⁷ The same test applies when analyzing whether a stated goal of the bar association is valid under the *Keller* standards as that when determining the prima facie permissibility of the activity in relation to that goal.

²⁷⁸ For instance, if the complaint attacks lobbying or the publication of the journal in general, this inquiry would determine how much of the activity is related to the goals set forth in *Keller*. For an example of an activity with both related and unrelated claims, see *infra* Section IV.A.

²⁷⁹ *Keller*, 496 U.S. at 14.

²⁸⁰ *South Dakota v. Dole*, 483 U.S. 203, 215 (1987) (O’Connor, J., dissenting).

²⁸¹ Although not binding, some Justices have made clear that considering the speech of the organization to be considered as having received endorsement of each of the member attorneys is inherently unreasonable. See *Lathrop v. Donohue*, 367 U.S. 820, 858 (1961) (Harlan, J., concurring) (“What seems to me obvious is the large difference in degree between, on the one hand, being compelled to raise one’s hand and recite a belief as

opinion, it weighs against permissibility of the activity. Although it may be true that, as Justice Harlan forcefully stated, the views of the organization will not be considered the views of the constituent attorneys,²⁸² *Keller* makes clear that there are violations of the freedom of speech when the activity is non-germane.²⁸³ By virtue of the violation infringing upon the freedom of *speech* as opposed to *association*, it is reasonable to consider the compelled speech or endorsement of views to be problematic under the test.²⁸⁴ The second element of the rationale emphasizes that the more public the endorsement, the more likely the public is to consider the association's views to be indicative of the views of the members.

The nature of the activity dictates the magnitude of the bar association's endorsement, if any, with this inquiry considering both the type and goal of the activity. *Longley* provides an example of the distinction between activity type and goal: "to the extent the Bar is supporting [the Access to Justice Commission's (AJC)] activities aimed at helping low-income Texans access legal services, it is germane. But some of AJC's activities include lobbying for changes to Texas substantive law designed to benefit low-income Texans."²⁸⁵ Since the activities did not directly relate to the regulation of legal profession or improvement of legal services, the Fifth Circuit found that the promotion of substantive law was non-germane.²⁸⁶ The goal of the activity, however, should not be overlooked—it dictates whether the activity is related to the advancement of legal services or regulation of legal practice. In the above example, the promotion of substantive law in favor of low-income Texans, despite the fact that it involved lobbying, should still require an examination of the goal—in this case, to benefit low-income Texans by making legal assistance more accessible. The distinction is that the nature of the activity is the specific action taken by the bar association—lobbying, programs to advance a goal, or journal articles, for instance—while the goal is the purpose behind the activity.

The nature of the activity also plays a crucial role in determining whether the activity expressed a view of the bar association. For example, when a state

one's own, and, on the other, being compelled to contribute dues to a bar association fund which is to be used in part to promote the expression of views in the name of the organization (not in the name of the dues payor), which views when adopted may turn out to be contrary to the views of the dues payor. I think this is a situation where the difference in degree is so great as to amount to a difference in substance.").

²⁸² *Id.*

²⁸³ *Keller*, 496 U.S. at 14.

²⁸⁴ *E.g.*, *McDonald v. Longley*, 4 F.4th 229, 245–46 (5th Cir. 2021) ("[P]art of [a bar association's] expressive message is that its members stand behind its expression."), *cert. denied*, 142 S. Ct. 1442 (2022). *Contra Lathrop*, 367 U.S. at 858 (arguing that the expressions of the bar association are not compelled speech of the attorneys).

²⁸⁵ *Longley*, 4 F.4th at 251.

²⁸⁶ *Id.*

bar association lobbies for legislation or publishes an article,²⁸⁷ its views are explicit. When the bar association publishes a series of resources for citizens to access, it endorses the resources, but a disclaimer may suffice similar to those available in bar association journals.²⁸⁸ When the bar association engages in a pro bono activity, however, there is no explicit expression; there may be an implicit expression that the bar association endorses pro bono activity, but there is no expressive statement. The more explicit the endorsement, the more strongly tethered an activity must be to the stated goals of the bar association to be permissible. This multifaceted inquiry allows for a more nuanced analysis of activities.

The factor's second element analyzes the public outreach of the activity. While the public outreach and the nature of the activity operate conjunctively, they are distinguishable enough that it is appropriate to consider them separately. In considering public outreach, activities such as a journal article or online resources endorsing particular websites for use by state residents produce a clear public expression. Programs are, by their very nature, reliant upon public outreach. However, drafting new rules of ethics fails to have significant outreach. The most difficult to determine of the activities undertaken by state bar associations is lobbying, which will depend upon case-specific facts. While some lobbying efforts are inherently outward (for example, hosting or endorsing events promoting particular legislative policies), others (such as directly communicating with state representatives relating to the bar association's preferred legislative agenda) are not necessarily public. The more public an endorsement of the bar association, the more related the activity must be to the stated goals of the bar association.

This factor weighs publicity to understand the likelihood that the general public will consider the bar association's expressions to be those of the attorney. This is necessary considering that it is impossible to know whether laypersons consider the views of the organization to represent the views of the individual members.²⁸⁹ The mere fact that an activity is public will not necessarily outweigh the probative value of the germane activity, but this factor serves as a

²⁸⁷ The state bar association's published journal is not always an explicit endorsement of the views of the organization—a disclaimer emphasizing that the views endorsed in the journal are not those of the bar association may be sufficient to avoid ratification issues. *Id.* at 252 (“[T]he *Journal* . . . includes a disclaimer clarifying that the Bar does not endorse any views expressed therein. That structure suffices under *Keller*.”).

²⁸⁸ *See id.*

²⁸⁹ In all likelihood, neither extreme is a proper understanding of this issue. It is possible that some people consider the views of the bar association to be endorsed by member attorneys, especially where the bar association publishes articles without disclaimers in their journal supporting specific viewpoints. That said, there is merit to Justice Harlan's point that there is a divorce between legitimately compelled speech and merely paying dues to a bar association which actively endorses some viewpoints. *Lathrop*, 367 U.S. at 858.

counterweight to how germane an activity is—the more germane the activity, the more the bar association may publicly endorse its stance. The more weakly tethered, however, the less the bar association may endorse the activity publicly without stepping upon the rights of its member attorneys.

3. *Societal Dissonance of the Issue*

The third factor in determining whether a particular bar association activity infringes upon the First Amendment rights of the members is the societal dissonance of the issue. The more politically charged an issue is to society, the stronger the tether must be for the activity to be permissible. There will, of course, be occasions in which the activity or issue is neither unanimous nor so politically charged that it is taboo.²⁹⁰ In these situations, this factor becomes less important but, much like the second factor, it applies on a sliding scale. The extremes of the scale are near-societal unanimity (anti-terrorism, for instance) and harsh societal divide (gun control²⁹¹). The more politically divisive an issue, the stronger the tether must be to the permissible goals and interests of the bar association to avoid infringement upon the rights of member attorneys.²⁹² Take taxes, which typically divide citizens, as an example: if the connection between the endorsed expression and the interests of the bar association are weak, the views expressed by the bar association are more likely to offend individual attorneys and thus infringe upon their liberties. Nevertheless, some activities are germane despite dissonance among attorneys if the first factor is strong enough.²⁹³

This factor is borne out of *Keller*'s determination that “those activities having political or ideological coloration which are *not reasonably related to the*

²⁹⁰ Examples of such issues include environmental issues, defense funding, and education. Cf. *Important Issues in the 2020 Election*, PEW RSCH. CTR. (Aug. 13, 2020), <https://www.pewresearch.org/politics/2020/08/13/important-issues-in-the-2020-election/> (illustrating the issues most important to voters in the 2020 election, with defense funding and education not being named). Naturally, these issues inspire discourse among citizens who disagree with one another. These issues, however, fall under the category of issues in which the division is not as spirited, in which case it is not weighed as harshly against the bar association as if the issue inspired severe dissonance.

²⁹¹ *Keller* itself found that endorsement of such an issue would not fall within the germaneness sphere. *Keller v. State Bar of Cal.*, 496 U.S. 1, 16 (1990). While such an endorsement would never reach this stage in the analysis because it fails the first prong, this serves as an adequate example of highly spirited societal dissonance which would weigh against an organization. There are, however, times in which an endorsement may be germane and still be divided in public (initiatives assisting low-income populations through raised taxes could be, if tied to the legal profession, germane).

²⁹² There is no particular standard by which courts must determine societal dissonance. Parties may, of course, bring evidence to prove such divisiveness, but such is not necessary, especially in cases which are reasonably known to cause such disagreement.

²⁹³ See *Longley*, 4 F.4th at 249–50 (“To take a non-controversial example, the Bar’s advocating a particular ethical rule is germane no matter how strenuously an attorney might disagree with its propriety.”).

advancement of [the State Bar’s] goals” are impermissible.²⁹⁴ This implies that political or ideological affiliation is not dispositive; rather, it depends upon the level of relatedness to the organization’s legitimate interests.²⁹⁵ The statements in *Keller*, which noted the difficulty in deciding what was germane,²⁹⁶ have been interpreted in a similar manner to this factor in more recent appellate decisions. In *Schell*, the Tenth Circuit Court of Appeals remanded the issue of determining whether two of the six challenged *Oklahoma Bar Journal* articles were germane for need of a more advanced discovery record.²⁹⁷ In determining that it could not make a summary judgment decision based on the current evidentiary record, the court noted that, with regard to one article, the issues discussed “often break along political lines.”²⁹⁸ Further, the court noted that “other allegations in Mr. Schell’s Amended Complaint support the plausibility of this article having an ideological tinge”²⁹⁹ However, rather than assuming on these facts that such ideological or political coloration made the articles per se non-germane, the court noted that “without viewing the article, it is impossible to conclude the OBA did not advance a non-germane, ideological position through its April 2017 publication of the *Oklahoma Bar Journal*.”³⁰⁰ Such an analysis is similar to that advanced by this factor: while political or ideological coloration may hint that there is an infringement upon the personal liberties of the member attorneys, such a conclusion must be proven by the record. The more ideological or political the expressive activity is, the stronger the connection between the activity and the organization’s interests must be.

4. *Level of Organizational Funding*

The final element of the germaneness evaluation is the level of organizational funding by the bar association toward the activity. This factor is the least important of the four, and is only influential where the level of funding is so egregious as to warrant a stronger tether, or where it must operate as a tiebreaking factor in close cases.³⁰¹ Nevertheless, this final factor’s application

²⁹⁴ *Keller*, 496 U.S. at 15 (emphasis added).

²⁹⁵ *See Longley*, 4 F.4th at 247 (noting that not all activities of a political or ideological nature are automatically non-germane).

²⁹⁶ *Keller*, 496 U.S. at 15 (noting that determining which issues that are political or ideological are not sufficiently connected to the State Bar’s goals are “not always . . . easy to discern”).

²⁹⁷ *Schell v. Chief Just. & Justs. of Ok. Sup. Ct.*, 11 F.4th 1178, 1194–95 (10th Cir. 2021).

²⁹⁸ *Id.* at 1194.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ Although this Comment does not explore the Fifth and Ninth Circuit split in great detail, the Fifth Circuit considers any non-germane activity—even the smallest amount—to mandate implementation of stringent procedures to reimburse the dissenting attorney. *See Boudreaux v. La. State Bar Ass’n*, 3 F.4th 748, 759 (5th Cir. 2021). As such, the germaneness determination may have significant impacts, including potential findings

is straightforward: the more the bar association spends to endorse an activity, the more strongly tethered the activity must be to be a permissible exercise of the bar association's interests. However, as the bar association's expenditures decrease, the tether need not be so strong. If expenditures by the bar association are minimal, the likelihood of a violation of the constituent attorneys' rights are similarly low. Further, the level of organizational funding can, in a sense, work collaboratively with the second factor. The greater the expenditures of the bar association, the more likely it is that the activity has significant public reach. Consequently, this factor works as a sliding scale which, as the funding increases, operates against the bar association.

IV. DISCIMUS AGERE AGENDO³⁰²

The multifaceted balancing test introduced above combats the problems established by the vague standard set forth in *Keller*.³⁰³ Namely, the test provides workability and predictability in determinations of the germaneness of activities of integrated bar associations. Despite the straightforward application of each of the factors, it is vital to understand how the factors work collaboratively in analyzing whether an activity is sufficiently germane. The most effective way of understanding the test is to apply it to current cases which have not yet determined the germaneness of the alleged impermissible activities.³⁰⁴ Each of the cases described in this Part, which is split into two sections, did not address the germaneness of the activities at issue.³⁰⁵ Section A applies this framework to the Ninth Circuit's decision in *Crowe v. Oregon State Bar*. Section B applies the test to the Eighth Circuit's decision in *Fleck v. Wetch*.

A. Applying the Framework to *Crowe*

In *Crowe*, the Ninth Circuit declined to address whether two articles in the Oregon State Bar's publication, the *Bulletin*, were sufficiently germane to

that the association itself, due to its mandatory nature, is unconstitutional.

³⁰² We Learn to Do by Doing.

³⁰³ See *Keller v. State Bar of Cal.*, 496 U.S. 1, 13–14 (1990).

³⁰⁴ Additionally, since the test is borne out of the decisions in *Longley* and *Schell*, applying the test to those cases would provide no additional clarity. This Comment agrees with each of the ultimate germaneness determinations made in *Longley*. For discussion of the Fifth Circuit's analysis, see *supra* Section II.B.

³⁰⁵ *Crowe v. Or. State Bar*, 989 F.3d 714, 724 (9th Cir. 2021) (“We need not decide whether the district court erred in concluding that the *Bulletin* statements are germane under *Keller* . . .”), *cert. denied*, 142 S. Ct. 79 (2021); *Fleck v. Wetch*, 937 F.3d 1112, 1116–17 (8th Cir. 2019) (“It may well be . . . that *Keller* and *Lathrop* did not consider, and therefore did not foreclose, [Fleck's] First Amendment associational claim. . . . We decline to consider these issues because . . . the claim must still be decided on an evidentiary record.”), *cert. denied*, 140 S. Ct. 1294 (2020).

survive a freedom of speech claim.³⁰⁶ The challenged articles were published alongside one another: one was an official statement of the Oregon State Bar and the other a statement of the voluntary bars.³⁰⁷ Each of the *Bulletin* articles denounced the rise of white nationalism in the country and within the state of Oregon.³⁰⁸ The official Bar Association statement pledged, in light of the climate of white nationalism, to remain committed to improving access to justice and “promot[ing] . . . a healthy and functional judicial system that equitably serves everyone.”³⁰⁹ The voluntary bar associations took a more critical tone of then-President Donald Trump, but used the platform to assert that they had “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.”³¹⁰ The voluntary bars pledged to utilize their resources “to protect the rights and safety of everyone.”³¹¹ In response to the allegation that the *Bulletin* articles were non-germane, the Bar asserted that each article was germane to improving the quality of legal services.³¹² This section discusses each of the articles in turn.

The first of the articles, the Bar’s official statement, passes the threshold for germaneness.³¹³ The Bar’s dedication to improving access to legal services is certainly within the goal of endorsing “a healthy and functional judicial system that equitably serves everyone” and advancing an inclusive legal profession.³¹⁴ After crossing the threshold, the article must be evaluated under each of the factors.

Under the first factor, the strength of the tether, the factfinder must determine the strength of the connection between the activity and the stated goal, taking into account the legitimacy of the goal. Improving access to legal services and endorsing an equitable judicial system are both legitimate objectives of a bar association.³¹⁵ This purpose has a strong connection to the Bar Association’s

³⁰⁶ *Crowe*, 989 F.3d at 724. The issue was not addressed as the freedom of speech claim failed on a separate technicality. *Id.* at 727.

³⁰⁷ *Id.* at 721–22.

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.* at 723.

³¹¹ *Id.*

³¹² *Id.*

³¹³ As mentioned above, the threshold is Chief Justice Rehnquist’s liberal interpretation of germane. *See supra* Section III.B.

³¹⁴ *Crowe*, 989 F.3d at 721–22. Such a dedication similarly relates to improving the quality of legal services by demonstrating a commitment to the promotion of access to legal services.

³¹⁵ *Lathrop* demands that the activities “further the State’s legitimate interests in raising the quality of professional services” *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961) (plurality opinion). *Keller* dictates that the activities can be “justified by the State’s interest in regulating the legal profession and improving the quality of legal services.” *Keller v. State Bar of Cal.*, 496 U.S. 1, 13–14 (1990). Here, the goals of improving access to legal services and fostering an equitable judicial system clearly fall within the standards set forth in

published article. The Bar provided context for the article in the beginning by discussing the rise of white nationalism in the country and its home state, and related it to the legal profession in reiterating its commitment to promoting access to justice—such falls squarely within its statutory goals of “[a]dvancing a fair, inclusive[,] and accessible justice system.”³¹⁶ The second factor requires an analysis of the article’s public outreach. As mentioned above, the publication of a journal article, especially one which expresses an official view of the Bar Association, is extremely public.³¹⁷ Due to the nature of the activity—publication of the Bar Association’s views—this weighs against permissibility.³¹⁸ The third factor, societal dissonance, cuts in favor of permissibility. This first article engages in no discussion of politics nor of gun rights in its condemnation of acts of white nationalism and violence, respectively.³¹⁹ Such a denunciation should not be considered partisan or ideological and, therefore, this factor cuts in favor of permissibility. The final factor, the amount of capital spent on the activity, is not discussed at length in *Crowe*, but it appears to be minimal—those attorneys who dissented to the publication of the two articles received a total refund of \$1.15.³²⁰ Despite being a weak factor, the fourth factor here does not weigh against permissibility. In the totality of the circumstances, this activity should be considered germane.

The second article is a closer case and leans non-germane. The voluntary bars’ joint statement successfully passes the threshold test of Rehnquist’s definition of germane—there is, at the least, a weak connection between the article’s commitment to “protect[ing] the rights . . . of everyone” and the Oregon State Bar’s stated goals.³²¹ As to the first factor, the connection satisfies the baseline as described above. There is also an argument that the commitment, similar to the case of the first article, is reasonably related to the goals of the Bar Association with greater than an “attenuated or tangential relationship,” as

each of *Lathrop* and *Keller*.

³¹⁶ *Crowe*, 989 F.3d at 720 (quoting OR. REV. STAT. § 9.080), *cert. denied*, 142 S. Ct. 79 (2021). Other goals of the Oregon State Bar include regulation and improvement of the legal profession, providing support to the judiciary, and “improving the administration of justice.” *Id.* Note, also, that in finding that it falls squarely within a legitimate goal, it satisfies Justice O’Connor’s more stringent definition of germane. *See supra* note 270 and accompanying text.

³¹⁷ This Comment has noted that a disclaimer that the articles published within a particular bar’s journal are not the views of that bar association may be sufficient, pursuant to *Longley*. Such is inapplicable here, where the Bar Association is publishing its official view.

³¹⁸ This finding is not, on its own, enough to overpower the finding of germaneness in the first factor.

³¹⁹ *See Crowe*, 989 F.3d at 721–22.

³²⁰ *Id.* at 723. For reference, North Dakota’s dues total \$380 for attorneys who have practiced for more than five years, their highest rate. *Fleck v. Wetch*, 937 F.3d 1112, 1117 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 1294 (2020).

³²¹ *Crowe*, 989 F.3d at 723.

required by Justice O'Connor.³²² However, a healthy portion of the article centers around criticism of then-President Trump's handling and exacerbation of racism in America.³²³ While there is a connection that satisfies the Rehnquist level of germaneness, such likely fails to meet O'Connor's standard and, if it does, it does so barely.³²⁴ As such, the article is not on the sturdiest footing. The second factor, nature and public outreach of the activity, is the same as that in the first article. By its very nature of being a journal, the activity has a wide public outreach. Further, the *Bulletin* is published by the Oregon State Bar, thus purporting to voice the views of the Bar Association itself.³²⁵ This factor cuts against the permissibility of the activity.

The third factor tips the scales in this case—societal dissonance of the issue. While condemnation of white supremacy should not be considered a political or ideological activity (and, even if it were, that expression is strongly tethered, as confirmed by the first article), the second article engages in criticism which may be viewed as having political coloration.³²⁶ Although the article quotes then-President Trump throughout the critical paragraph to legitimize the criticism and therefore serve as background information, the article also states that his base of support is composed of the white nationalist movement.³²⁷ Regardless of the veracity of the claim, the criticism, by the nature of its publication in the *Bulletin*, receives the endorsement of the Oregon State Bar, and is sure to create societal dissonance. As such, the third factor cuts against germaneness. As with the first article, the fourth factor does not play a major role in this case but does not cut against permissibility due to the minimal expenditures used to engage in the activity.³²⁸ Taking each of the factors into account, the case is close, but weighs against permissibility. Although the presumption is in favor of the Bar Association,³²⁹ the article, without a disclaimer, and the political criticism are sufficient to find that publication of the article violates the challenging attorneys' right to speech under *Keller*.

³²² *South Dakota v. Dole*, 483 U.S. 203, 215 (1987) (O'Connor, J., dissenting).

³²³ *Crowe*, 989 F.3d at 722–23.

³²⁴ As noted in Section III.A, Justice O'Connor's definition requires more than a tangential relationship between the entire statement and the purported goals of the Bar Association. Here, the generalized criticism of a political base is likely insufficient to fall within the stated goals of the Bar.

³²⁵ There is no evidence that the *Bulletin* possesses a disclaimer. See *Crowe*, 989 F.3d at 721–23.

³²⁶ See *id.* at 722–23.

³²⁷ *Id.* at 722 (“Trump, as the leader of our nation, . . . has . . . allow[ed] this white nationalist movement] to make up the base of his support”).

³²⁸ See *id.* at 723.

³²⁹ See *supra* Section III.B.

B. Applying the Framework to Fleck

In *Fleck v. Wetch*, a North Dakota attorney challenged the State Bar Association of North Dakota's (SBAND) ability to mandate membership on the grounds that it violated his First Amendment rights.³³⁰ The challenging attorney ardently supported a state legislative measure, spending personal time and money to support its passage.³³¹ Fleck later discovered, however, that the State Bar opposed the measure, spending a total of \$46,525.85 in opposition.³³² The measure in question, if passed, would create a presumption that each parent is fit to maintain custody, resulting in their entitlement to equal parental rights.³³³ Although the issue of germaneness was not litigated in this case,³³⁴ this section discusses whether this activity would be considered germane under the proposed framework if this type of activity were brought to the court.

The first question is whether the activity passes the threshold test. In this event, it likely does not. The measure addresses substantive law relating to the fitness of parents, and the lobbying for or against such a law does not facially relate to the stated goals of the Bar Association.³³⁵ Nevertheless, to engage in the exercise, this section assumes that it can be found that, under the stated goal of endorsing the fair "administration of justice,"³³⁶ the activity passes the threshold test.³³⁷

The threshold test has just demonstrated that the first factor, strength of the tether, is practically as weak as it can get. While one may argue that the presumption of custodial fitness may lead to inequity in family court (therefore hindering the fair administration of justice), the connection is tenuous at best. The second factor—nature and public outreach—is a difficult factor to determine when it comes to lobbying. However, in this lobbying effort, the SBAND permitted the "Keeping Kids First" committee to establish an email

³³⁰ See *Fleck v. Wetch*, 937 F.3d 1112, 1113 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 1294 (2020).

³³¹ *Fleck v. Wetch*, No. 1:15-CV-13, 2016 WL 9710086, at *2 (D.N.D. Jan. 28, 2016), *aff'd*, 937 F.3d 1112 (2019).

³³² *Id.*

³³³ *Id.*

³³⁴ *Fleck*, 937 F.3d at 1117 (declining to determine germaneness in the first instance on remand).

³³⁵ See *Fleck*, 2016 WL 9710086, at *1 ("The objectives of SBAND are to improve professional competence, promote the administration of justice, uphold the honor of the profession of law, and encourage cordial relations among members of the State Bar.").

³³⁶ *Id.*

³³⁷ This section engages in the germaneness analysis of this activity to demonstrate two elements which were not addressed by the case study in *Crowe*. First, it discusses the impact of lobbying on the germaneness test. Second, it showcases an example in which the fourth factor, organizational spending on the issue, becomes influential.

address on their domain name.³³⁸ This is, at the least, semi-outward and cuts against permissibility due to the nature of a public endorsement through the email address. Additionally, the amount spent on the lobbying—upwards of \$45,000³³⁹—suggests that the Bar Association’s stated position was at least somewhat public. The third factor, societal dissonance, is of less importance in this case. While Fleck ardently supported the measure,³⁴⁰ such disagreement between the challenging attorney and the Bar Association alone does not establish societal dissonance. While the amount expended by the Bar Association suggests that it may have been hotly debated,³⁴¹ it is impossible to know without a developed record. For the sake of the exercise, this Comment assumes that there was moderate societal dissonance on the issue. In that event, the third factor weighs slightly against permissibility. Finally, the fourth factor, the amount spent on the activity, while usually not a major factor, gains importance in this scenario when egregious amounts are spent on the activity. Here, nearly \$50,000 was spent in membership dues in opposition of the legislation.³⁴² This weighs against permissibility unless the activity has a stronger tether as determined under the first factor. In this case, the tether was found to be immensely weak. Taking each of these factors into consideration, if this activity passed the threshold test, the activity would still fail under this framework as non-germane.

CONCLUSION

When the Court promulgated the germaneness standard in *Keller* with limited guidelines,³⁴³ it destined lower courts to years of confusion and inconsistency. In recent years, although the germaneness test itself is a strong baseline for determining permissibility of integrated bar association actions, there has been a lack of uniformity in approaches and results in different appellate courts. In being left to their own devices, the Fifth and Tenth Circuits each have found ways to determine the germaneness of bar association activities. Combining these approaches into a comprehensive framework—one that is reasonably fact-intensive and produces equitable results—is the most effective way to promote fair administration of justice and uniformity across the country.

The test set forth by this Comment synthesizes elements which rationally relate to the determination of whether a bar association’s actions could violate

³³⁸ *Fleck*, 2016 WL 9710086, at *2 (explaining the email address read “keepingkidsfirst@sband.org”).

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ *See id.*

³⁴² *Id.*

³⁴³ *Keller v. State Bar of Cal.*, 496 U.S. 1, 15–16 (1990).

the First Amendment and addresses the criticism set forth in *Janus* that “*Abood*’s line between chargeable and nonchargeable union expenditures has proved to be impossible to draw with precision.”³⁴⁴ Namely, it analyzes factors which bring together both relevant caselaw and the general interpretation of individuals who are members of these organizations. The balancing of the factors allows for some leeway in the bar associations’ goals of administering fair justice, promoting equal access to the law, and regulating and disciplining lawyers while precluding them from overstepping their boundaries into supporting substantive legislation with no connection to their stated goals. This test is better shaped to the fact-intensive inquiries that each of the appellate courts have undertaken while providing clearer guideposts than those set forth in *Keller*.³⁴⁵ Finally, this new framework achieves both the consistency and predictability concerns discussed throughout this Comment, thus endorsing one objective of many bar associations—improving the fair administration of justice.

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³⁴⁴ *Janus v. Am. Fed. of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2481 (2018).

³⁴⁵ *Keller*, 496 U.S. at 15–16.

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