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Mandatory Dues Challenge Regarding State Bar Activities
Via Email Transmittal & Messenger Delivery

Dear Mr. Phelps,

Pursuant to the First Amendment, we, the undersigned, individually and collectively, write to challenge the use of our mandatory member dues for certain activities of the State Bar of Arizona. It is apparent that the State Bar is using mandatory bar dues for activities and expenditures that violate the First Amendment rights of dues-paying members, including the undersigned. It is also apparent that the procedural safeguards the State Bar has in place to attempt to prevent those First Amendment violations, set forth in the State Bar of Arizona Bylaws Article XIII, are inadequate and themselves unconstitutional. For these reasons, we demand:

1. A complete accounting of the State Bar's expenditures;
2. That the State Bar immediately refund our 2016 pro rata share of mandatory dues expended on all the activities listed in section VI below or otherwise justify the constitutionality of those expenditures and activities;
3. That the State Bar immediately cease collecting any mandatory dues for these activities now and in the future;
4. That the State Bar revise its bylaws to comply with the First Amendment.

I. The State Bar and the First Amendment Rights of Members.

Mandatory bar associations, like the State Bar, "implicate the First Amendment freedom of association, which includes the freedom to choose not to associate, and the First Amendment freedom of speech, which also includes the freedom to remain silent or to avoid subsidizing group speech with which a person disagrees." *Kingstad v. State Bar of Wis.*, 622 F.3d 708, 712-13 (7th Cir. 2010). Arizona's mandatory bar and attendant dues are constitutionally permissible only to the extent the Bar's activities are "germane" to allowable purposes. *Keller v. State Bar of Cal.*, 496 U.S. 1, 14 (1990). These allowable purposes are "regulating the legal profession and improving the quality of legal

services,” *id.*, or, as the Court explained more recently, “activities connected with proposing ethical codes and disciplining bar members,” *Harris v. Quinn*, 134 S. Ct. 2618, 2643 (2014) (citing *Keller*, 496 U.S. at 14).

Thus, under the First Amendment, the State Bar may expend mandatory dues only on those activities that are reasonably related to allowable purposes, whether or not those activities are also ideological or political. *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2285 (2012) (mandatory dues cannot be “used for political, ideological, and other purposes not germane” to the purpose of the organization being mandatory (emphasis added)); *United States v. United Foods*, 533 U.S. 405, 414 (2001) (compelled support challenges, as under *Keller*, are not about politics or ideology, but rather about germaneness to allowable purpose of mandated association); *Kingstad*, 622 F.3d at 718 (Wisconsin state bar dues cannot be used for non-germane activities, even if those activities are non-ideological and non-political); *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291, 301 (1st Cir. 2000) (“Simply stated, that an individual may be compelled to associate and financially contribute for some purposes does not mean she may be compelled to associate and financially contribute for all purposes. Without this germaneness check, once a person is compelled to join and support a bar association for legitimate reasons, she could be forced to pay for any bar activity for any reason or no reason, as long as it did not involve political or ideological expression.”). Said another way, State Bar members may object to any non-germane activity or expenditure of the State Bar that uses mandatory dues, regardless if that activity is political or non-political, ideological or non-ideological.

To ensure members are compelled to foot the bill only for germane expenditures, the State Bar must have safeguards “carefully tailored to minimize the infringement” of members’ First Amendment rights. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 303 (1986). These safeguards include “an adequate explanation of the basis for the [mandatory] fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.” *Keller*, 496 U.S. at 14. In addition, these safeguards must allow members a meaningful opportunity to object *before* expenditures are made. “[T]he First Amendment does not permit a union to extract a loan from unwilling nonmembers even if the money is later paid back in full.” *Knox*, 132 S. Ct. at 2292-93. Similarly, a mandatory bar may not extract a loan from members for non-germane activities and expenditures even if the money is later paid back to objecting members.

II. The State Bar’s bylaws purport to allow mandatory dues to be used for activities and expenditures that violate the First Amendment.

Article XIII of the State Bar Bylaws purports to limit how the State Bar may expend mandatory member dues, but fails to comply with the First Amendment. Section 13.01 of the bylaws provides that the State Bar may not, except in certain circumstances, “use the dues of its members to fund activities of a political or ideological nature that are not reasonably related to” a number of activities:

- (A) the regulation and discipline of attorneys;
- (B) matters relating to the improvement of the function of the justice system;
- (C) increasing the availability of legal services to the public;
- (D) regulation of attorney trust accounts;
- (E) the education, ethics, competence, integrity, and regulation of the legal profession; and
- (F) any other activity authorized by law.

Section 13.01 does not comport with the First Amendment for two separate and independent reasons.

First, Section 13.01 restricts the use of dues only in regard to non-germane expenditures that are also political or ideological. This wrongly suggests that the State Bar may use member dues to fund activities of a non-political or ideological nature without limitation. As explained above, however, the First Amendment permits the State Bar's mandatory dues only to the extent the dues are for expenditures that are reasonably related ("germane" in the language of *Keller*) to the regulation of the legal profession. The First Amendment prohibits the use of mandatory dues for *any* non-germane activity, not just non-germane political or ideological activities. To the extent that Section 13.01 permits the use of mandatory dues for non-germane activities that are not political or ideological, it violates the First Amendment.

Second, Section 13.01 wrongly suggests the State Bar is authorized to use member dues for any expenditure "reasonably related" to "any . . . activity authorized by law." But again, the State Bar cannot use dues for just "any" activity "authorized by law," that activity must *also* be germane to the regulation of the legal profession. In *Keller*, the California Supreme Court had determined that its state bar could use mandatory dues "for any purpose within the scope of its statutory authority." 496 U.S. at 7 (quoting the California Supreme Court). But the U.S. Supreme Court recognized that rule violated the First Amendment. *Id.* at 11-12. To the extent that Section 13.01(F) authorizes the use of mandatory dues for activities "authorized by law" but not germane to the regulation of the legal profession, it violates the First Amendment.

At a minimum, Section 13.01 must be rewritten to comply with the First Amendment. The State Bar's bylaws cannot purport to authorize expenditures that would violate the First Amendment rights of Bar members, and to the extent the bylaws do so they are unconstitutional and void. The State Bar must not use mandatory dues to fund *any* activity or expenditure not germane to the regulation of the legal profession. It does not suffice to avoid only non-germane political or ideological activities and expenditures.

III. The State Bar unconstitutionally requires members to loan it funds for non-germane activities and expenditures.

Article XIII of the State Bar Bylaws also purports to limit how and when State Bar members may object to the expenditure of mandatory member dues, but again fails to comply with the First Amendment. Section 13.03(A) allows members to challenge "funding [of] political or ideological activities." Section 13.03(A)(2) provides that

“challenges must be received . . . on or before February 1 of the year immediately following the calendar year in which the challenged activity occurred.” And Section 13.03(C) provides that no decision regarding a pro rata refund of dues used for the challenged expenditure or activity will be made until the deadline provided in Section 13.03(A)(2).

Section 13.03 does not comport with the First Amendment for at least three separate and independent reasons.

First, it limits challenges just to the funding of political or ideological activities. For the reasons set forth above, the First Amendment guarantees Bar members the right to challenge *any* expenditure or activity that is not germane to the regulation of the legal profession, not just political or ideological ones.

Second, this bylaw does not permit timely resolution of challenges to the use of mandatory dues. Among the safeguards mandated by the First Amendment for the privilege of extracting mandatory dues is that dues-payers have a meaningful opportunity to object *before* expenditures are made. *See Knox*, 132 S. Ct. at 2292-93. But Section 13.03 guarantees that Bar members will not be refunded their mandatory dues until (at best) *months after* an expenditure that violates their First Amendment rights. Such “extract[ed] loan[s]” violate the First Amendment “even if the money is later paid back in full.” *Id.*

Third, Section 13.03 is an “opt-out” mechanism for the use of mandatory dues. This means Bar members are required to affirmatively object to subsidizing non-germane expenditures and activities, rather than requiring that Bar members affirmatively consent to subsidizing such expenditures and activities before they happen. This is unconstitutional. Courts do not typically “presume acquiescence in the loss of fundamental rights.” *Knox*, 132 S. Ct. at 2290 (internal quotation marks and citation omitted). Nevertheless, the State Bar’s bylaws create an “opt-out” mechanism that places the burden of protecting members’ First Amendment rights on the members themselves, rather than on “the side whose constitutional rights are not at stake.” *Id.* at 2295.

Like Section 13.01, Section 13.03 of the State Bar Bylaws must be rewritten to comply with the First Amendment. The State Bar’s opt-out provision cannot limit members’ challenges to activities and expenditures of the State Bar that violate the First Amendment rights of Bar members, and to the extent the bylaws do so they are unconstitutional and void. State Bar members are permitted to challenge the use of mandatory dues to fund *any* activity or expenditure not germane to the regulation of the legal profession, not just political or ideological activities and expenditures. State Bar members are also permitted to meaningfully challenge activities and expenditures *before* they happen and not, as Section 13.03 provides, only months after the challenged activity or expenditure has happened. Finally, just the fact that Section 13.03 is an opt-out, rather than an opt-in, system, violates members’ rights. In sum, Section 13.03 results in precisely the kind of “extracted loan” the Supreme Court struck down in *Knox*, and is therefore unconstitutional.

IV. The State Bar unconstitutionally fails to give members adequate notice of activities and expenditures.

Compounding the State Bar's unconstitutionally broad view of its spending authority and its unconstitutionally narrow provision for member expenditure and fee challenges is the Bar's utter and unconstitutional failure to provide an adequate explanation of the basis for mandatory Bar dues. Without an adequate explanation of the basis of member dues, members are unable to meaningfully police the Bar's uses of mandatory dues. This too violates members' First Amendment rights.

Based on your comments to the Arizona House of Representatives Ad Hoc Study Committee on Mandatory Bar Associations ("the Study Committee") on November 16, 2015, the State Bar provides only three forms of explanation of the basis of member dues: the annual member fee statement, the annual budget, and the year-end financial statements. None of these are sufficient to comply with the dictates of *Keller* and the First Amendment.

First, and most importantly, the Annual Fee Statements provide no guidance to members about the uses of their member dues at the time those dues are paid. The Fee Statement includes no description of the uses of the base membership fee charged. Nor are any other materials provided by the Bar to explain the elements of the base membership fee charged. In short, the Bar provides no notice to members what specific uses mandatory fees will be put to at the time the Bar assesses the mandatory fee.

Second, the State Bar's annual budgets similarly provide no useful information about the uses of mandatory dues. The State Bar's 2015 budget, for example, projects \$14,517,225 in expenditures. State Bar of Arizona, 2015—Final Budget, http://www.azbar.org/media/954846/2015_budget_for_website.pdf (Feb. 3, 2016).¹ But the budget includes only two kinds of expenditures: "Personnel Costs," projected to be \$8,679,308, and "Other Expenses," projected to be \$5,837,917. *Id.* at 1. Both of these categories could easily (and very likely do) include expenses that are not germane to the regulation of the legal profession. Similarly, although the budget does include a detailed "Statement of Operations By Expense Category," most of these expense categories could include expenses that are not germane. *Id.* at 4-8.

Finally, the State Bar even fails to provide an adequate explanation of its expenditures and activities *after* those expenditures are made. As with its budgets, the State Bar's year-end financial statements contain only general explanations of expenses and activity by category, and at least some of these categories could include expenses that are not germane to the regulation of the legal profession.

For 2013 and 2014, for example, the State Bar reported the following expenses:

¹ As of the date of this letter, the State Bar's 2017 budget has not yet been released, even though the deadline for paying fees is February 1, 2017.

	2014	2013
Program services		
Discipline	\$6,660,548	\$6,610,767
Member services	\$5,521,351	\$5,473,857
Client protection fund claims	\$413,016	\$308,581
Total program services	<u>\$12,594,915</u>	<u>\$12,393,205</u>
Management and general	<u>\$1,801,493</u>	<u>\$1,931,412</u>
Total expenses	\$14,396,408	\$14,324,617

State Bar of Arizona and the Client Protection Fund of the State Bar of Arizona, Consolidated Financial Statements, December 31, 2014 and 2013, http://www.azbar.org/final_fs_state_bar_123561.pdf (Feb. 3, 2016). But whereas “discipline” and “client protection fund claims” are likely to only include germane expenses, “member services” and “management and general” could include any number of non-germane expenses.

By way of comparison, in 2013 the State Bar produced a more detailed analysis of its expenses to attempt to justify its need for greatly increased mandatory dues. At the time, the Bar “estimate[d] that \$350 of an active member’s [\$460] annual dues are used for mandatory functions. The remaining \$110 is used for various discretionary programs.”² *Dues Increase FAQ*, State Bar of Ariz., <http://www.azbar.org/faq> (June 2, 2015) [<http://perma.cc/5FMH-LRLX>].

The mandatory expenses were mostly—though not entirely—likely germane to the regulation of the legal profession. These included the regulation of lawyers and the unauthorized practice of law, MCLE compliance, conservatorships, and the client protection fund.

But the second category—“discretionary functions”—included significant expenditures on activities that lack an obvious connection to “regulating the legal profession and improving the quality of legal services,” in even the broadest sense of *Keller*, 496 U.S. at 14, much less “connected with proposing ethical codes and disciplining bar members” as stated in *Harris*, 134 S. Ct. at 2643:

- \$683,974 on 28 sections;
- \$683,738 on the resource call center;
- \$354,812 on member and public relations;
- \$308,846 on 28 standing committees;
- \$188,278 on Bar publications for members;
- \$175,433 on mental health assistance for members;
- \$144,616 on government relations (lobbying and outreach);
- \$140,433 on voluntary fee arbitration for lawyers and their clients;
- \$130,460 on a directory of members;
- \$105,349 on “member benefits,” *i.e.*, paying for member discounts.

² As the State Bar has raised and continues to raise annual dues since this estimate, it is unclear what portions of today’s member dues are used for mandatory or discretionary programs.

In addition to or subsumed in these expenditures—lacking any detailed accounting makes it impossible to know—the State Bar donates member dues to a separate non-profit organization, the Arizona Foundation for Legal Services & Education. The Foundation, in turn, uses this money to make various grants to still other organizations Bar members may not themselves support.

Were all the above not enough to demonstrate that the State Bar does not provide sufficient detail to members about the uses of their dues, you essentially admitted as much at the November 16, 2015, Study Committee meeting. When asked about the process by which a member would object to a specific expenditure, you said the member would have to identify the specific bill the State Bar expended money to support and to which the member objected, and then you would estimate how much time each Bar employee or lobbyist spent working on that bill. This is not only insufficient notice to members to allow them to challenge (and again, is wrongly limited to political or ideological objections), it is insufficient record-keeping to allow meaningful challenges after-the-fact.

In short, even with the minimal information the State Bar provides to members about the basis of their mandatory dues, there is every reason to believe that the State Bar has spent, is spending, and is planning to spend, significant amounts of member dues on activities that exceed the Bar's warrant under the First Amendment. This makes particularly problematic the State Bar's failure to provide—before or after its expenditures—sufficient detail to inform any member as to what activities the State Bar is actually funding. Thus, the State Bar is violating members' rights by failing to provide meaningful notice and explanation of the basis of member dues in violation of *Keller*, *Knox*, and other cases.

V. The State Bar must immediately provide an accounting of expenditures on and constitutional justification for many of its activities that are not apparently germane to regulating the legal profession and/or improving the quality of legal services.

As members of the State Bar, we demand an immediate and complete accounting of all the State Bar's anticipated expenses for 2017. As set forth in part I, if the State Bar mandates dues, it may do so only on condition that it provides an explanation of use of dues adequate to provide opportunity to challenge the expenditures before they are made. As set forth in part IV, the State Bar is failing to provide these constitutionally-mandated safeguards. This failure is an ongoing violation of our First Amendment rights as well as the First Amendment rights of every other Bar member.

Despite the State Bar's failure to provide these safeguards, it is still apparent that the State Bar is spending member's mandatory dues on non-germane activities in violation of the First Amendment. This makes the State Bar's failure all the more galling. The State Bar must immediately address its inadequate and unconstitutional safeguards.

VI. We demand an immediate pro rata refund of our individual 2016 member dues.

As members of the State Bar, we demand an immediate refund of our 2016 member dues. Even though the State Bar is failing in its constitutional duty to provide notice to members of the State Bar's activities, it is apparent the State Bar is spending fees on non-germane activities. Based on the State Bar's prior analysis of its expenses—and lacking any further explanation of these expenses from the State Bar, we challenge all expenditures on—and therefore demand a pro rata refund for—the following categories of expenses: any reported as Member Services or Management and General in year-end financial statements; all contributions to other organizations; all 28 sections; the resource call center; all 28 standing committees; Bar publications for members; mental health assistance for members; member benefits; member directory; member and public relations, including but not limited to support for Arizona's "merit selection" system, such as support for www.thearizonaplan.org/; and all government relations and lobbying, but in particular expenses related to support for the continuation of the State Bar as a mandatory bar and opposition to de-unifying the Bar, including but not limited to opposition to HB2219, HB2221, HCM2002, and HCM2003 in 2016.

Because the Constitution requires that, at a minimum, we have the opportunity to object *before* these expenses are or were incurred, we demand this refund be given immediately. If the State Bar refuses to immediately refund our dues for all of the activities listed above, it must immediately provide sufficient explanation of why the activities are "germane" to a constitutionally legitimate purpose of the State Bar. Immediate resolution of this challenge is necessary because forcing us, or any other member of the Bar, to wait until after February 1 "of the year immediately following the calendar year in which the challenged activity occurred" to address these issues is itself a violation of the First Amendment.

VII. The State Bar must revise Article XIII of its bylaws.

Finally, it should go without saying, given all the above, that the State Bar must immediately revise Sections 13.01 and 13.03 of its bylaws. These sections establish an unconstitutional system for use of mandatory dues and unconstitutionally insufficient safeguards to allow opting out of non-germane uses of mandatory dues (even assuming opt-out systems are constitutional). So long as Sections 13.01 and 13.03 remain unrevised, continued violation of members' First Amendment rights—including our own—will occur.

Sincerely,

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