Board of Commissioners

Agenda and Materials

September 19, 2024

STATE BAR OF MICHIGAN
BOARD OF COMMISSIONERS
DETROIT MARRIOTT TROY – DENNISON ROOM
THURSDAY, SEPTEMBER 19, 2024 - 9:00 A.M.
AGENDA

State Bar of Michigan Statement of Purpose

"…The State Bar of Michigan shall aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interests of the legal profession in this state."

Rule 1 of the Supreme Court Rules Concerning the State Bar of Michigan

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1. Call to Order.....Daniel D. Quick, President

CONSENT AGENDA

2. **Minutes**
   A. July 26, 2024 Board of Commissioners meeting*
   B. July 11, 2024 Executive Committee meeting*
   C. July 18, 2024 Executive Committee meeting*

3. **President's Activities**.....Daniel D. Quick, President
   A. Recent Activities*

4. **Executive Director's Activities**.....Peter Cunningham, Executive Director
   A. Recent Activities*

5. **Finance**..... Thomas H. Howlett, Chairperson
   A. FY 2024 Financial Reports through July 2024*

6. **Public Policy Committee**..... Joseph P. McGill, Chairperson
   A. Model Criminal Jury Instructions*

LEADERSHIP REPORTS

7. **President's and Executive Director's Report** .....Daniel D. Quick, President
   Peter Cunningham, Executive Director

   A. Michigan Supreme Court Commissions Update

8. **Open Discussion: Challenges & Opportunities for the Profession and Justice System**
   A. Recent Federal Court Opinions on Keller

9. **Strategic Planning Committee Report**.....Thomas P. Clement, Chairperson

10. **Representative Assembly Report** .....Yolanda M. Bennett, Chairperson
    A. September 19, 2024 Meeting Calendar*

11. **Young Lawyers Section Report**.....Tanya N. Cripps-Serra, Chairperson

COMMISSIONER COMMITTEES

12. **Finance**.....Thomas H. Howlett, Chairperson
    A. FY 2024 Financial Report

13. **Public Policy**.....Joseph P. McGill, Chairperson
    A. Court Rules**
    B. Legislation**

14. **Audit** .....Thomas H. Howlett, Chairperson

15. **Professional Standards** .....Erika L. Bryant, Chairperson

16. **Communications and Member Services** .....Lisa J. Hamameh, Chairperson

COMMISSIONER RECOGNITION

17. **Recognition of Outgoing Board Members**.....Daniel D. Quick, President
    A. Yolanda M. Bennett written and presented by John W. Reiser III
    B. Hon. Kameshia D. Gant written and presented by Hon. Kristen D. Simmons
    C. Colemon L. Potts written and presented by Tanya Cripps-Serra
    D. Valerie R. Newman written and presented by Takura N. Nyamfukudza
    E. Delphia T. Simpson written and presented by John W. Reiser III
    F. Hon. Erane C. Washington written and presented by Erika L. Bryant

18. **Recognition of President Daniel D. Quick** .....Joseph P. McGill, President-Elect

FOR THE GOOD OF THE PUBLIC AND THE PROFESSION

19. **Comments or questions from Commissioners**

20. **Comments or questions from the public**

21. **Adjournment**

*Materials included with agenda.
*Materials delivered or to be delivered under separate cover or handed out.

STATE BAR OF MICHIGAN
BOARD OF COMMISSIONERS MEETING MINUTES

President Quick called the meeting to order at 9:31 a.m. on Friday, July 26, 2024, in the Boardroom of the Michael Franck building in Lansing, Michigan.

Commissioners present:
David C. Anderson
Erika L. Bryant, Secretary
Aaron V. Burrell
Hon. B. Chris Christenson
Ponce D. Clay
Tanya N. Cripps-Serra
Sherriee L. Detzler
Robert A. Easterly
Nicole A. Evans
Hon. Kameshia D. Gant
Lisa. J. Hamameh, Vice President
Thomas H. Howlett, Treasurer
Suzanne C. Larsen
James W. Low
Silvia A. Mansoor
Gerard V. Mantese
Gerrow D. "Gerry" Mason
Joseph P. McGill, President-Elect
Thomas P. Murray Jr.
Valerie R. Newman
Takura N. Nyamfukudza
Nicholas M. Ohanesian
Colemon L. Potts
Daniel D. Quick, President
John W. Reiser III
Delphia T. Simpson
Danielle Walton

Commissioners absent:
Yolanda M. Bennett
Hon. B. Chris Christenson
Joshua A. Lerner
Hon. David A. Perkins
Hon. Kristen D. Simmons

Guests
Ashley Lowe, 2024-2025 Board member

State Bar Staff present:
Peter Cunningham, Executive Director
Drew Baker, General Counsel
Delaney N. Blakey, Ethics Counsel
Marge Bossenbery, Executive Coordinator
Sarah Brown, Brand Designer
Alecia Chandler, Professional Responsibility Programs Director
Gregory Conyers, Director of Diversity
Darin Day, Program Director, Outreach
Robin Eagleson, Director of Lawyer Services
Katherine Gardner, Assistant Executive Director
Tatiana Goodkin, Chief Financial Officer
Molly Ranns, Director, Lawyers & Judges Assistance Program
Marjory Raymer, Director of Communications
Kristin Sewell, Program Director, Research & Development
Jeanette Socia, Director of Human Resources
Kari Thrush, Assistant Executive Director
Nathan Triplett, Director, Governmental Relations

Consent Agenda
The Board received the minutes from the June 13, 2024 Board of Commissioners meeting.
The Board received the minutes from the May 22, 2024 Executive Committee meeting.
The Board received the recent activities of the president.
The Board received the recent activities of the executive director.
The Board received the FY 2023 draft financial reports through May 2024
The Board received the Client Protection Fund Claims.
The Board received the Unauthorized Practice of Law Claims.
The Board received the recommendations for the appointments to the ICLE Executive Committee.
The Board received the recommendations for the appointment to the MILS Board of Trustees.
The Board received the Model Criminal Jury Instructions.

Mr. Quick asked if any items needed to be removed from the consent agenda. There were none. A motion was offered to approve the consent agenda. The motion was seconded, and the motion passed.

Election of Officers
Mr. Quick informed the Board that five candidates submitted their names for consideration for the position of secretary for the 2024-2025 Board of Commissioners: Mr. Anderson, Ms. Larsen, Mr. Low, Mr. Mantese, and Mr. Mason. Mr. Quick asked if there were any nominations from the floor; hearing none, a motion was made to close the nominations. The motion was seconded, and the motion passed.

Mr. Quick asked for a motion that the vote be by secret written ballot and that the voting be announced and recorded as to the winner only, without the vote total and that the vote total will be known only to him, the tellers, and to any candidate who requests it. The motion was made, seconded, and the motion passed.

Mr. Quick appointed Mr. Clay, Ms. Detzler, and Mr. Nyamfukudza to serve as tellers.

Mr. Quick stated that a majority of votes from those present are needed for a candidate to be elected. He said that after the first round of voting if a majority was not reached, the top three candidates will continue to the second round, if a majority vote is not reached, the top two candidates will move on to the next round until a majority is reached for one candidate.

Mr. Quick stated that per board policy, each candidate will have five minutes to give remarks to the board followed by a 15-minute question and answer session. He stated that the candidates would move forward in alphabetical order. Mr. Anderson, Ms. Larsen, Mr. Mantese, and Mr. Mason addressed the board per policy. Mr. Low informed the Board that he was withdrawing his name from consideration. Mr. Quick asked if there were questions for the candidates. There were none. Ballots were distributed.

Mr. Quick announced that Mr. Anderson was elected as secretary of the State Bar of Michigan for the 2024-2025 bar year.

A motion was offered and supported to destroy the ballots of the election. The motion passed.

Mr. Quick offered a motion to nominate Ms. Bryant as vice president of the State Bar of Michigan and Mr. Howlett as treasurer of the State Bar of Michigan for the 2024-2025 bar year. The motion was supported and passed.

President and Executive Director's Report: Dan Quick, President and Peter Cunningham, Executive Director.

Mr. Cuningham stated that two of the three Michigan Supreme Court (MSC) Commissions, the Justice for All (JFA) and MSC Diversity Equity and Inclusion (DEI) did not meet since the June BOC meeting so there is nothing to report. He asked Ms. Ranns to provide and update on the third MSC commission, the Commission on Well-Being in the Law (WBIL).

Mr. Cunninham asked Mr. Conyers to report on upcoming diversity events and Ms. Raymer on the rollout of the eJournal.

Staff Introductions
Mr. Cunningham stated that Ms. Eagleson began her position as Director of Lawyer Services as did Ms. Thrush as one of the Assistant Executive Directors. Ms. Chandler introduced the new Ethics Counsel, Ms. Delaney N. Blakey.

Artificial Intelligence (AI) Work Group Update
Mr. McGill reported that the AI workgroup continues to meet and collect information for their year-end report. They are working with Ms. Eagleson and Ms. Gardner on designing what the report will look like. It is intended to be a resource and reference guide for members and will need to be continuously updated. Mr. McGill intends that workgroup members will be assigned specific sections of the resource guide to keep it updated. He hopes to have the report ready to present to the board by the end of 2024.

Board Vacancy
Mr. Quick informed the Board that Commissioner Matthew Van Dyk, submitted his letter of resignation dues to health issues in his family. He is a commissioner from District F and has one year left on his term. According to Rule 5 of the Michigan Supreme Rules Governing the State Bar, "The board shall fill a vacancy among the elected commissioners and the Supreme Court shall fill a vacancy among the appointed commissioners, to serve the remainder of an unexpired term."

The executive committee met on July 18 to discuss the process for filling this vacancy and possible options for appointment. The Executive Committee recommends to the Board the appointment of Mr. James Liggins III to fill the District F Board seat for a one-year term. A motion was offered and seconded to appoint Mr. Liggins as the commissioner for District F. The motion passed

Native American Engagement Report
Mr. Mason gave the Board an update on the tribal events that took place on June 20-21, 2024 with the Nottawaseppi Huron Band of the Potawatomi tribal leaders, specifically Judge Mellissa Pope.

Miscellaneous
Ms. Bossenbery stated that the Board should receive two-time sensitive emails from her next week. One for registering for the Presidential Inauguration and Awards luncheon and Board meeting and the other asking you to complete a survey indicating your preferences for commissioner committees and section liaisons appointments for the 2024-2025 bar year.

Representative Assembly (RA) Report: Yolanda M. Bennett, Chairperson
In Ms. Bennetts absence, Mr. Reiser gave the RA report. He informed the Board that the RA Clerk nominations were due July 25 and Ms. Alena Clark and Mr. Mark Jane submitted their names; proposals for the September RA meeting are due August 8, and that at the September meeting presentations on Tribal Courts by Judge Melissa Pope, and Legal Deserts will take place.

Mr. Reiser stated there are 26 vacancies on the RA, and that Mr. Clay helped to find candidates for 3rd and 6th Circuit vacancies and Mr. Easterly found a candidate for a 17th Circuit vacancy.

Young Lawyers Section (YLS) Report: Tanya N. Cripps-Serra, Chairperson
Ms. Cripps-Serra gave the Board an update on the activities and programs of the Young Lawyers Section, including an event on animal law held at the Detroit Zoo, which Mr. Quick attended and a YLS barbeque scheduled for August 27.

COMMISSIONER COMMITTEES

Finance: Thomas H. Howlett, Chairperson
FY2025 Budget
Mr. Howlett introduced the FY2025 budget process and Mr. Cunningham described what was included in the proposed FY 2025 budget. A motion was made to approve the budget. The motion was seconded and approved.

Mr. Howlett offered a motion to encourage bar staff in its ongoing efforts to increase non license fee operating revenue above the level set in the adopted budget and in development of the FY 2026 budget. The motion was seconded. Mr. Mantese offered a friendly amendment to add "and to find ways to save money." Mr. Howlett declined the proposed amendment. After discussion, the motion was passed.

Audit
No report was given.

Public Policy: Joseph P. McGill, Chairperson
Court Rules
ADM File No. 2022-38: Proposed Amendments of MCR 2.625, 7.115, 7.219 and 7.319
The proposed amendments of MCR 2.625, 7.115, 7.219 and 7.319 would: (1) require courts to stay enforcement of taxed costs while an appeal is pending or until time for filing an appeal has passed, (2) align the timeframe for filing a bill of costs in the Court of Appeals with the timeframe for filing an application for leave to appeal, (3) incorporate into MCR 7.219 the Court of Appeals internal operating procedure 7.219(B) that allows, upon reversal of a Court of Appeals decision, the new prevailing party to file a new bill of costs in the Court of Appeals, and (4) include in the lists of taxable costs those costs awarded in the lower court in accordance with MCL 600.2445(4).

A motion was offered and seconded to support the proposed amendments. The motion passed.

ADM File No. 2022-46: Proposed Amendment of MCR 3.305
The proposed amendment of MCR 3.305 would clarify where to file a mandamus action.

A motion was offered and seconded to support the proposed amendment. The motion passed.

ADM File No. 2024-06: Proposed Amendment of MCR 3.306
In accordance with MCL 600.4501(2), the proposed amendment of MCR 3.306(B)(3)(b) would prohibit a court from granting leave to a private individual who is bringing a quo warranto action that relates to the offices of electors of President and Vice President of the United States

A motion was offered and seconded to support the proposed amendment. The motion passed.

ADM File No. 2021-05: Proposed Amendment of MCR 6.302
The proposed amendment of MCR 6.302 would require a court that has engaged in a preliminary evaluation of the sentence to inform the defendant that the final sentencing range may differ from the original estimate, and if different, advise the defendant about whether they would be permitted to withdraw their plea, and include in the evaluation a numerically quantifiable sentence term or range.

A motion was offered and seconded to support the proposed amendment. The motion passed.

ADM File No. 2022-25: Proposed Amendment of MCR 7.103
The proposed amendment of MCR 7.103 would require that an appeal to circuit court be heard by a judge other than the judge that conducted the trial.

A motion was offered and seconded to support the proposed amendment. The motion passed.

ADM File No. 2022-12: Proposed Amendment of MCR 7.118
The proposed amendment of MCR 7.118 would allow the prisoner's attorney access to the parole eligibility report(s) and guidelines, require MDOC to provide the record on appeal within 14 days of being served with a prosecutor's application for leave to appeal the parole board's decision, require in all other appeals that MDOC provide the record on appeal within 14 days of the court granting the application for leave to appeal, and require confidential portions of the record to be filed under seal with access limited to certain people.

A motion was offered and seconded to support the proposed amendment. The motion passed.

ADM File No. 2022-56: Proposed Amendment of MRPC 3.7
The proposed amendment of MRPC 3.7 would clarify that in accordance with Const 1963, art 1, § 13, a lawyer can appear in pro per.

A motion was offered and seconded to support the proposed amendment. The motion passed.

Legislation

HB 5749 (Carter) Civil rights: public records; certain law enforcement disciplinary personnel records; require to be subject to freedom of information act requests. Amends sec. 13 of 1976 PA 442 (MCL 15.243).

A motion was offered and supported that this legislation is Keller permissible. The motion passed
A motion was offered and supported to support the legislation The motion failed.

Landlord-Tenants

HB 5758 (Paiz) Housing: landlord and tenants; form containing summary of tenant's rights; require state court administrative office to provide. Amends 1978 PA 454 (MCL 554.631 - 554.641) by adding sec. 4a.

HB 5759 (Hoskins) Housing: landlord and tenants; form containing summary of tenant's rights; require the department to make available to the public. Amends sec. 57i of 1939 PA 280 (MCL 400.57i).

HB 5760 (Hoskins) Housing: landlord and tenants; form containing summary of tenant's rights; require the authority to make available to the public. Amends 1966 PA 346 (MCL 125.1401 - 125.1499c) by adding sec. 22e.

A motion was offered and supported that this legislation is Keller permissible. The morion passed
A motion was offered and supported to support the legislation The motion passed.

HB 5788 (Hope) Civil procedure: civil actions; lawsuits for exercising rights to free expression; provide protections against. Creates new act.

A motion was offered and supported that this legislation is Keller permissible. The morion passed
A motion was offered and supported to support the legislation.

SB 810 (Shink) Civil procedure: personal protection orders; expiration date; prescribe. Amends sec. 2950 of 1961 PA 236 (MCL 600.2950).

A motion was offered and supported that this legislation is Keller permissible. The morion passed
A motion was offered and supported to oppose the legislation. The motion passed.

SB 914 (Shink) Criminal procedure: other; certain requirements for the use of informants in criminal proceedings; provide for. Amends 1927 PA 175 (MCL 760.1 - 777.69) by adding secs. 36a, 36b, 36c, 36d, 36e, 36f & 36g to ch. VIII.

A motion was offered and supported that this legislation is Keller permissible. The morion passed
A motion was offered and supported to support the legislation. The motion passed.

SB 916 (Santana) Criminal procedure: mental capacity; outpatient treatment for misdemeanor offenders with mental health issues; provide for. Amends sec. 461 of 1974 PA 258 (MCL 330.1461) & adds sec. 1021 & ch. 10A.
HB 4746 (Steele) Criminal procedure: mental capacity; outpatient treatment for misdemeanor offenders with mental health issues; provide for. Amends sec. 461 of 1974 PA 258 (MCL 330.1461) & adds sec. 1021 & ch. 10A.

A motion was offered and supported that this legislation is Keller permissible. The morion passed
A motion was offered and supported to support the legislation. The motion passed.

SB 936 (Irwin) Courts: reporters or recorders; prohibited conduct of court reporter, court recorder, stenomask reporter, or owner of firm; modify. Amends sec. 1491 of 1961 PA 236 (MCL 600.1491).

A motion was offered and supported that this legislation is Keller permissible. The morion passed
A motion was offered and supported to support the legislation.

Professional Standards: Erika L. Bryant, Chairperson
No report was given.

Communications and Member Services (CAMS): Lisa J. Hamameh, Chairperson
Ms. Hamameh stated that the reports from the 50-Year Golden Celebration and the Great Lakes Legal Conference were in the board packet for the Board's review.

FOR THE GOOD OF THE PUBLIC AND THE PROFESSION

Comments or questions from Commissioners
Mr. Mason stated that a flyer was at each commissioner's place inviting them to an event taking place in Port Huron this weekend called "Cars and Kettles Chairity Car Show, " which helps the Salvation Army.

Ms. Bryant offered her condolences to Commissioner Gant on losing her mother.

Comments or questions from the public
None.

Adjournment
The meeting was adjourned at 12:17 p.m.

State Bar of Michigan
Executive Committee Virtual Meeting
Thursday, July 11, 2024
4:00 p.m.

President Quick called the meeting to order at 4:01 p.m.

Members Present: President Daniel D. Quick, President Elect Joseph P. McGill, Vice President Lisa Hamameh, Secretary Erika L. Bryant, Treasurer Thomas H. Howlett, Representative Assembly Vice Chair John Reiser III, and Commissioners David Anderson, Aaron V. Burrell, and Robert Easterly

Members Absent: Representative Assembly Chair Yolanda Bennett

State Bar Staff Present: Peter Cunningham, Executive Director; Drew Baker, General Counsel; Margaret Bossenbery, Executive Coordinator; Assistant Executive Directors, Nancy Brown, Kathryn Gardner, and Kari Thrush

Minutes:
A motion was offered to approve the May 22, 2024 meeting minutes. The motion was seconded and approved.

President and Executive Director's Report
Mr. Cunningham reported that the Finance Committee met on June 27 for a full review of the FY2025 budget with the Strategic Management Team and voted to recommend the budget be sent to full board for consideration and approval at its July meeting.

Mr. Quick received a letter from the Genesee County Bar Association (GCBA) regarding ABA House of Delegates Resolution 400 which urges the Supreme Court of the United States to adopt a binding code of judicial ethics for the Supreme Court justices. The GCBA adopted a resolution supporting Resolution 400 and is asking the State Bar of Michigan to also adopt a supporting resolution on behalf of the entire SBM membership.

After discussion, the committee recommends that this item not be placed on the board agenda and that a response be sent to the GCBA saying they appreciate the overture, but that the State Bar will not weigh in on this issue.

Representative Assembly (RA) Report
Mr. Reiser said at the September RA meeting tribal nation members will be on hand to give a presentation on Michigan's tribal courts; a presentation about legal deserts is on the agenda, proposals are due on August 8, and the deadline for the RA clerk position is July 25.

July 26, 2024 Board of Commissioners meeting Agenda
A motion was made to approve the July 26, 2024 BOC agenda as amended. The motion was seconded and approved.

Other
There was none.

Adjournment – The meeting was adjourned at 4:40 p.m.

State Bar of Michigan
Executive Committee Virtual Special Meeting
Thursday, July 18, 2024
4:30 p.m.

President Quick called the meeting to order at 4:30 p.m.

Members Present: President Daniel D. Quick, President Elect Joseph P. McGill, Vice President Lisa Hamameh, Secretary Erika L. Bryant, Treasurer Thomas H. Howlett, Representative Assembly Chair Yolanda Bennett, Representative Assembly Vice Chair John Reiser III, and Commissioners David Anderson, Aaron V. Burrell, and Robert Easterly

State Bar Staff Present: Margaret Bossenbery, Executive Coordinator

President Report

Mr. Quick informed the committee that Commissioner Matthew Van Dyk, submitted a letter of resignation to him earlier this week. He is a commissioner from District F and had one year left on his term. According to Rule 5 of the Michigan Supreme Rules Governing the State Bar, "The board shall fill a vacancy among the elected commissioners and the Supreme Court shall fill a vacancy among the appointed commissioners, to serve the remainder of an unexpired term."

Mr. Quick stated that he would like to appoint someone at the July 26 board meeting if possible so that the person could begin his or her term in September. He and Mr. Cunningham discussed members in the counties that make up District F who are active in the Bar. Both knew Mr. James Liggins Jr. from the Warner Norcross + Judd law firm in Kalamazoo and thought that he might be interested in serving on the Board for the next year. Mr. Liggins serves as co-chair of the Judicial Qualifications Committee and has been involved in local bar activities and the community for several years.

Ms. Bryant suggested that Mr. Quick contact Judge Alisa Parker-LaGrone, a judge in Kalamazoo and co-chair of the Diversity and Inclusion committee, to get her thoughts on candidates. Mr. Quick will contact the Judge as soon as possible.

The committee recommended that Mr. Liggins name be brought to the full Board next week for consideration once Dan speaks to Judge LaCrone.

The meeting was adjourned at 5:05 p.m.

President Daniel D. Quick
President's Activities
July 27 through September 19, 2024

Date	Event	Location
August 1 - 4	American Bar Association meeting National Conference of Bar Presidents meetings	Chicago
August 1	Great Rivers Bar Leaders meeting	Chicago
August 4	Copper Country Bar Association meeting	Copper Harbor Houghton
August 5	Marquette County Bar Association meeting	Marquette
August 18	Professionalism in Action Michigan State University College of Law	East Lansing
September 5	Executive Committee meeting	Virtual
September 9	Justice for All meeting	Virtual
September 16	SBM Officer Retreat	Livonia
September 18	Michigan State Bar Foundation Meeting and Reception	Lansing
September 19	Board of Commissioners meeting	Lansing

Executive Director Peter Cunningham
Executive Director Activities
July 26 through September 19, 2024

Date	Event
July 29	Meeting with Dave Watson, Executive Director Institute for Continuing Legal education (ICLE)
July 30 - 31	National Association of Bar Executives
July 30	Legal Deserts Workgroup meeting
August 1 – 2	National Conference of Bar Presidents meetings
August 1	Great Rivers Bar Leaders dinner
August 7	Meeting with Danielle Hirsch, Managing Director, Court Services Access to Justice Court, National Center for State Court
August 12	Diversity, Equity, and Inclusion (DEI) Commission Workgroup meeting
August 13	Strategic Planning Committee meeting
August 14	Monthly Financials Dashboard meeting with Treasurer Tom Howlett, Tatiana Goodkin, and Marjory Raymer
August 15	Meeting with Chief Justice Clement
August 16	DEI Executive Team meeting
August 19	Commission on the Well-Being in the Law (CWBIL) meeting
August 20	All Staff meeting
August 21	Michigan Historical Society Education and Awards Committee meeting
August 22	Committee Appointment meeting with President-Elect, Joe McGill, Vice President Lisa Hamameh, Darin Day and Jenn Hatter
August 22	Justice for All (JFA) Executive Team meeting
September 3	Meeting with Treasurer Tom Howlett
September 5	JFA Executive Team meeting
September 5	Executive Committee meeting
September 9	DEI Commission Workgroup meeting
September 9	JFA Commission meeting
September 10	CWBIL Workgroup meetings
September 12	Meeting with Chief Justice Clement
September 13	DEI Executive Team meeting

Date	Event
September 16	Board Officer Retreat
September 17	Audit and Finance Commissioner Committee meetings
September 18	Strategic Planning Committee meeting
September 18	Public Policy Committee meeting
September 18	Michigan State Bar Foundation Meeting and Reception
September 19	Board of Commissioners meetings
September 19	Presidential Inauguration and Awards Luncheon
September 19	Representative Assembly meeting

State Bar of Michigan Financial Results Summary

For the Ten Months Ended July 31, 2024
Fiscal Year 2024

Administrative Fund - Summary of Results as of July 31, 2024

Operating Revenue	$10,930,187
Operating Expense	(9,468,961)
Operating Income (Loss)	1,461,225
Non-Operating Income (Loss)	1,277,121
Change in Net Position	2,738,346
Net Position, October 1, 2023	$12,751,125
Net Position, July 31, 2024	$15,489,471

As of July 31, 2024, Net Position *excluding* net assets restricted for retiree healthcare was $11,871,870, an increase of $2,211,333 since the beginning of the year and favorable to budget by $1,215,481.

YTD Operating Revenue variance – $316,078, favorable to budget (3%):

License fee and related revenue was lower than budget by $123,925 (1.3%); other operating revenue was higher than budget by $440,003 (27.8%) primarily due to higher C&F, LRS, IAP and pro-hac-vice fees.

YTD Operating Expense variance - $655,812, favorable to budget (6.6%):

Salaries and Employee Benefits/ Payroll Taxes – $84,532, favorable (1.2%)

- Under budget due to lower benefits and PR taxes ($17,304) and lower salary expenses ($67,229).

Non-Labor Operating Expenses - $581,279, favorable (18.3%)

- Legal - $45,654, favorable (25%) – Under budget with the largest variance in C&F, IAP, General Counsel, and HR.

- Public and Bar Services - $215,822, favorable (24.6%) – Under budget with the largest variances in IT, Diversity, and Outreach, some due to timing.

- Operations and Policy - $319,803, favorable (15.1%) – Under budget with the largest variances in Facilities, Bar Journal, Digital, Print & Design, BOC and Executive Office, Finance and depreciation, some due to timing.

YTD Non-Operating Revenue Budget Variance - $861,860 favorable to budget 157.9%:

- Interest income is favorable to budget by $249,998 (57.9%).
- Retiree Health Care Trust net investment gain of $611,862 (this amount is *not* budgeted).
- Loss on fixed asset disposal $16,406.

Cash and Investment Balance

As of July 31, 2024, the cash and investment balance in the State Bar Admin Fund net of *due to Sections, ADS, Client Protection Fund, and Retiree Health Care Trust* was $11,049,180, an increase of $1,596,797 from the beginning of the year primarily due to collection of license fees.

SBM Entities Retiree Health Care Trust

As of July 31, 2024, the SBM retiree health care trust investments were $4,640,138, an increase of $527,013 since the beginning of the year. The change is due to investment gains of $621,951, net of advisor and record keeping fees of $10,089, and trust distributions for retiree healthcare premiums of $84,849.

Capital Budget

Year-to-date capital expenditures totaled $224,737, or 87% of the FY 2024 capital expenditures budget of $259,680.

Client Protection Fund

The Net Position of the Client Protection Fund as of July 31, 2024, totaled $3,074,187, an increase of $552,193 from the beginning of the year. Claims expenses totaled $113,669, including $35,249 of authorized but not paid claims awaiting signed subrogation agreements.

SBM Membership

As of July 31, 2024, the active, inactive, and emeritus membership in good standing totaled 46,924 attorneys, an increase of 100 attorneys since the beginning of the year; the number of fee-paying attorneys decreased by 511. A total of 741 new attorneys joined SBM through July 2024 (for comparison, 698 new attorneys joined SBM through July 2023).

STATE BAR OF MICHIGAN
ADMINISTRATIVE FUND

Unaudited and For Internal Use Only

FINANCIAL REPORTS
July 31, 2024

FY 2024

Note: License fee revenue is recognized and budgeted as earned each month throughout the year.

State Bar of Michigan
Parent Company : State Bar of Michigan
SBM Statement of Net Position
July 31, 2024

Financial Row	Current Period (As of Jul 2024)	Prior Month (As of Jun 2024)	Variance	Variance %	Beginning of FY (As of Sep 2023)
ASSETS AND DEFERRED OUTFLOWS OF RESOURCES					
Assets					
Cash	$ 608,194	$ 485,676	$ 122,518	25.2%	$ 775,835
Investments	$ 13,763,290	$ 14,461,543	$ (698,253)	(4.8%)	$ 11,776,776
Due from (to) CPF	$ (829)	$ (271)	$ (558)	206.2%	$ 13,206
Due from (to) Sections	$ (3,310,861)	$ (3,399,047)	$ 88,186	(2.6%)	$ (3,113,434)
Due from (to) ADS	$ (10,614)	$ 37,957	$ (48,571)	(128.0%)	$ -
Net Administrative Fund Cash and Investment Balance	**$ 11,049,180**	**$ 11,585,857**	**$ (536,677)**	**(4.6%)**	$ 9,452,382
Accounts Receivable	$ 93,116	$ 57,576	$ 35,539	61.7%	$ 48,378
Prepaid Expenses	$ 370,778	$ 329,945	$ 40,833	12.4%	$ 490,364
Capital Assets, Net	$ 3,220,632	$ 3,231,453	$ (10,821)	(0.3%)	$ 3,228,115
SBM Retiree Health Care Trust	$ 4,640,138	$ 4,578,472	$ 61,667	1.3%	$ 4,113,125
Total Assets	**$ 19,373,843**	**$ 19,783,303**	**$ (409,460)**	**(2.1%)**	**$ 17,332,364**
Deferred Outflows of Resources					
Deferred Outflows of Resources Related to Pensions	$ 24,225	$ 24,225	$ -	-	$ 24,225
Deferred Outflows of Resources Related to OPEB	$ 1,081,363	$ 1,081,363	$ -	-	$ 1,081,363
Total Deferred Outflows of Resources	**$ 1,105,588**	**$ 1,105,588**	**$ -**	**-**	**$ 1,105,588**
TOTAL ASSETS AND DEFERRED OUTFLOWS OF RESOURCES	**$ 20,479,431**	**$ 20,888,891**	**$ (409,460)**	**(2.0%)**	**$ 18,437,953**
LIABILITIES, DERERRED INFLOWS OF RESOURCES AND NET POSITION					
Liabilities					
Accounts Payable	$ 3,620	$ 1,198	$ 2,422	202.1%	$ 463,715
Accrued Expenses	$ 668,939	$ 749,366	$ (80,426)	(10.7%)	$ 697,379
Deferred Revenue	$ 1,757,481	$ 2,607,412	$ (849,931)	(32.6%)	$ 2,052,690
GASB 96 Subscription Liability	$ 86,878	$ 86,878	$ -	0.0%	$ -
Net Pension Liability	$ 365,770	$ 365,770	$ -	0.0%	$ 365,770
Net OPEB Liability	$ 1,157,170	$ 1,157,170	$ -	0.0%	$ 1,157,170
Total Liabilities	**$ 4,039,857**	**$ 4,967,793**	**$ (927,936)**	**(18.7%)**	**$ 4,736,725**
Deferred Inflows of Resources					
Deferred Inflows of Resources Related to Pensions	$ 3,373	$ 3,373	$ -	0.0%	$ 3,373
Deferred Inflows of Resources Related to OPEB	$ 946,730	$ 946,730	$ -	0.0%	$ 946,730
Total Deferred Inflows of Resources	**$ 950,103**	**$ 950,103**	**$ -**	**0.0%**	**$ 950,103**
Total Liabilities and Deferred Inflows of Resources	**$ 4,989,960**	**$ 5,917,896**	**$ (927,936)**	**(15.7%)**	**$ 5,686,828**
Net Assets					
Invested in Capital Assets, Net of Related Debt	$ 3,133,754	$ 3,144,575	$ (10,821)	(0.3%)	$ 3,228,115
Restricted for Retiree Health Care Trust	$ 3,617,601	$ 3,555,934	$ 61,667	1.7%	$ 3,090,588
Unrestricted	$ 8,738,116	$ 8,270,486	$ 467,630	5.7%	$ 6,432,422
Total Net Position	**$ 15,489,471**	**$ 14,970,995**	**$ 518,476**	**3.5%**	**$ 12,751,125**
TOTAL LIABILITIES, DERERRED INFLOWS OF RESOURCES AND NET POSITION	**$ 20,479,431**	**$ 20,888,891**	**$ (409,460)**	**(2.0%)**	**$ 18,437,953**
Net Position Excluding Impacts of Retiree Health Care Trust	$ 11,871,870	$ 11,415,061	$ 456,809	4.0%	$ 9,660,537

State Bar of Michigan
Parent Company : State Bar of Michigan
Summary - Statement of Revenue, Expense and Net Assets
July 31, 2024

Financial Row	Actual YTD (Oct 2023 - Jul 2024)	Budget YTD (Oct 2023 - Jul 2024)	Variance	Percentage	Prior YTD Actual (Oct 2022 - Jul 2023)	Actual Variance YTD	Actual Variance YTD %
Operating Revenue							
License Fees, Dues and Related	$ 8,906,450	$ 9,030,375	$ (123,925)	(1.4%)	$ 9,082,085	$ (175,635)	(1.9%)
All other Op Revenue	$ 2,023,737	$ 1,583,734	$ 440,003	27.8%	$ 1,537,145	$ 486,591	31.7%
Total Operating Revenue	**$ 10,930,187**	**$ 10,614,109**	**$ 316,078**	**3.0%**	**$ 10,619,230**	**$ 310,956**	**2.9%**
Operating Expenses							
Labor Operating Expenses							
Salaries	$ 5,072,675	$ 5,139,904	$ (67,229)	(1.3%)	$ 4,803,873	$ 268,803	5.6%
Benefits and Payroll Taxes	$ 1,799,135	$ 1,816,439	$ (17,304)	(1.0%)	$ 1,649,972	$ 149,163	9.0%
Total Labor Operating Expenses	**$ 6,871,811**	**$ 6,956,343**	**$ (84,532)**	**(1.2%)**	**$ 6,453,845**	**$ 417,966**	**6.5%**
Non Labor Operating Expenses							
Legal	$ 136,817	$ 182,471	$ (45,654)	(25.0%)	$ 96,470	$ 40,347	41.8%
Operations and Policy	$ 1,797,218	$ 2,117,021	$ (319,803)	(15.1%)	$ 1,796,813	$ 405	0.0%
Public and Bar Services	$ 663,116	$ 878,938	$ (215,822)	(24.6%)	$ 644,092	$ 19,024	3.0%
Total Non Labor Operating Expenses	**$ 2,597,151**	**$ 3,178,430**	**$ (581,279)**	**(18.3%)**	**$ 2,537,375**	**$ 59,776**	**2.4%**
Total Operating Expenses	**$ 9,468,961**	**$ 10,134,773**	**$ (665,812)**	**(6.6%)**	**$ 8,991,219**	**$ 477,742**	**5.3%**
Operating Income (Loss)	**$ 1,461,225**	**$ 479,336**	**$ 981,889**	**204.8%**	**$ 1,628,011**	**$ (166,786)**	**(10.2%)**
Non Operating Revenue (Expenses)							
Investment Income	$ 681,665	$ 431,667	$ 249,998	57.9%	$ 485,780	$ 195,885	40.3%
Investment Income - Ret HC Trust	$ 611,862	$ -	$ 611,862	0.0%	$ 726,741	$ (114,879)	(15.8%)
Loss on Disposal on Capital Asset	$ (16,406)	$ -	$ (16,406)	0.0%	$ -	$ (16,406)	0.0%
Total Non Operating Revenue (Expenses)	**$ 1,277,121**	**$ 431,667**	**$ 845,454**	**195.9%**	**$ 1,212,520**	**$ 64,600**	**5.3%**
Increase (Decrease) in Net Position	**$ 2,738,346**	**$ 911,003**	**$ 1,827,343**	**200.6%**	**$ 2,840,531**	**$ (102,185)**	**(3.6%)**
Net Position Beginning of Year	**$ 12,751,125**	**$ 8,648,879**	**$ 4,102,246**	**47.4%**	**$ 9,813,122**	**$ 2,938,003**	**29.9%**
Net Position End of Period	**$ 15,489,471**	**$ 9,559,882**	**$ 5,929,589**	**62.0%**	**$ 12,653,653**	**$ 2,835,818**	**22.4%**
Change in Net Position Excluding Ret HC Trust Investment Income (Loss)	$ 2,126,484	$ 911,003	$ 1,215,481	133.4%	$ 2,113,791	$ 12,694	0.6%

State Bar of Michigan
Parent Company : State Bar of Michigan
Statement of Revenues, Expenses and Net Assets
July 31, 2024

Financial Row	Actual (Oct 2023 - Jul 2024)	Budget YTD (Oct 2023 - Jul 2024)	Budget Variance	Budget Variance %	Last YTD Actuals (Oct 2022 - Jul 2023)	Actuals Variance	Actuals Variance %
Revenues							
License Fees and Related	**$ 8,906,450**	**$ 9,030,375**	**$ (123,925)**	**(1.4%)**	**$ 9,082,085**	**$ (175,635)**	**(1.9%)**
Other Operating Revenues							
Operations and Policy							
Administration	$ 578,500	$ 525,018	$ 53,483	10.2%	$ 505,517	$ 72,983	14.4%
Bar Journal	$ 156,606	$ 135,633	$ 20,973	15.5%	$ 149,064	$ 7,542	5.1%
Digital	$ 45,294	$ 33,340	$ 11,954	35.9%	$ 47,878	$ (2,585)	(5.4%)
E Journal	$ 28,018	$ 25,830	$ 2,188	8.5%	$ 27,892	$ 126	0.4%
Print and Design	$ 28,319	$ 32,920	$ (4,601)	(14.0%)	$ 38,776	$ (10,457)	(27.0%)
Total Operations and Policy	**$ 836,736**	**$ 752,741**	**$ 83,995**	**11.2%**	**$ 769,127**	**$ 67,609**	**8.8%**
Public and Bar Services							
50 Year Event	$ 7,660	$ 5,600	$ 2,060	36.8%	$ 5,960	$ 1,700	28.5%
Diversity	$ 980	$ -	$ 980	0.0%	$ -	$ 980	0.0%
Great Lakes Legal Conference	$ 41,735	$ 35,000	$ 6,735	19.2%	$ 36,305	$ 5,430	15.0%
Inaugural and Awards Lunch	$ 1,320	$ 4,000	$ (2,680)	(67.0%)	$ 130	$ 1,190	915.4%
Lawyer Referral Services	$ 332,560	$ 133,330	$ 199,230	149.4%	$ 149,210	$ 183,351	122.9%
Lawyer Services	$ 197,107	$ 184,550	$ 12,557	6.8%	$ 180,585	$ 16,521	9.1%
Lawyers & Judges Assistance Program	$ 54,268	$ 50,000	$ 4,268	8.5%	$ 51,663	$ 2,604	5.0%
Practice Management Resource Center	$ 1,771	$ 2,500	$ (729)	(29.2%)	$ 2,580	$ (809)	(31.4%)
Total Public and Bar Services	**$ 637,401**	**$ 414,980**	**$ 222,421**	**53.6%**	**$ 426,433**	**$ 210,967**	**49.5%**
Legal							
Character & Fitness	$ 353,585	$ 323,933	$ 29,652	9.2%	$ 338,885	$ 14,700	4.3%
Ethics	$ 3,535	$ 2,080	$ 1,455	70.0%	$ 2,700	$ 835	30.9%
IAP	$ 192,480	$ 90,000	$ 102,480	113.9%	$ -	$ 192,480	0.0%
Total Legal	**$ 549,600**	**$ 416,013**	**$ 133,587**	**32.1%**	**$ 341,585**	**$ 208,015**	**60.9%**
Total Other Operating Revenues	**$ 2,023,737**	**$ 1,583,734**	**$ 440,003**	**27.8%**	**$ 1,537,145**	**$ 486,591**	**31.7%**
Non Operating Revenue							
Investment Income	$ 681,665	$ 431,667	$ 249,998	57.9%	$ 485,780	$ 195,885	40.3%
Investment Income - Retiree HC Trust (Net)	$ 611,862	$ -	$ 611,862	0.0%	$ 726,741	$ (114,879)	(15.8%)
Total Non Operating Revenue	**$ 1,293,527**	**$ 431,667**	**$ 861,860**	**199.7%**	**$ 1,212,520**	**$ 81,006**	**6.7%**
Total Revenues	**$ 12,223,714**	**$ 11,045,776**	**$ 1,177,938**	**10.7%**	**$ 11,831,751**	**$ 391,963**	**3.3%**
Expenses							
Legal							
Character & Fitness	$ 31,657	$ 48,660	$ (17,003)	(34.9%)	$ 27,237	$ 4,419	16.2%
Client Protection Fund	$ 15,700	$ 10,459	$ 5,241	50.1%	$ 9,580	$ 6,120	63.9%
Ethics	$ 3,414	$ 5,735	$ (2,321)	(40.5%)	$ 2,428	$ 986	40.6%
General Counsel	$ 21,622	$ 32,547	$ (10,924)	(33.6%)	$ 7,570	$ 14,052	185.6%
IAP	$ 10,127	$ 16,530	$ (6,403)	(38.7%)	$ 1,349	$ 8,778	650.8%
UPL	$ 3,200	$ 8,468	$ (5,268)	(62.2%)	$ 3,963	$ (763)	(19.3%)
Human Resources							
Payroll Taxes	$ 375,062	$ 396,440	$ (21,378)	(5.4%)	$ 358,330	$ 16,732	4.7%
Benefits	$ 1,424,073	$ 1,419,999	$ 4,074	0.3%	$ 1,291,642	$ 132,431	10.3%

Financial Row	Actual (Oct 2023 - Jul 2024)	Budget YTD (Oct 2023 - Jul 2024)	Budget Variance	Budget Variance %	Last YTD Actuals (Oct 2022 - Jul 2023)	Actuals Variance	Actuals Variance %
Human Resources - Other	$ 51,097	$ 60,072	$ (8,975)	(14.9%)	$ 44,342	$ 6,754	15.2%
Total Legal	**$ 1,935,952**	**$ 1,998,910**	**$ (62,958)**	**(3.1%)**	**$ 1,746,442**	**$ 189,510**	**10.9%**
Public and Bar Services							
50 Year Event	$ 10,825	$ 12,100	$ (1,275)	(10.5%)	$ 34,967	$ (24,142)	(69.0%)
Diversity	$ 21,131	$ 32,480	$ (11,349)	(34.9%)	$ 29,327	$ (8,196)	(27.9%)
Great Lakes Legal Conference	$ 3,661	$ 6,400	$ (2,739)	(42.8%)	$ 5,860	$ (2,198)	(37.5%)
IT	$ 494,551	$ 651,037	$ (156,486)	(24.0%)	$ 432,186	$ 62,364	14.4%
Inaugural and Awards Lunch	$ 13,009	$ 14,650	$ (1,641)	(11.2%)	$ 9,981	$ 3,028	30.3%
Lawyer Referral Services	$ 5,547	$ 4,700	$ 847	18.0%	$ 3,954	$ 1,594	40.3%
Lawyer Services	$ 25,489	$ 25,292	$ 197	0.8%	$ 23,000	$ 2,490	10.8%
Lawyers & Judges Assistance Program	$ 20,049	$ 22,415	$ (2,366)	(10.6%)	$ 16,733	$ 3,316	19.8%
Outreach	$ 64,683	$ 102,445	$ (37,762)	(36.9%)	$ 82,777	$ (18,095)	(21.9%)
Practice Management Resource Center	$ 4,173	$ 7,420	$ (3,248)	(43.8%)	$ 5,309	$ (1,136)	(21.4%)
Total Public and Bar Services	**$ 663,116**	**$ 878,938**	**$ (215,822)**	**(24.6%)**	**$ 644,092**	**$ 19,024**	**3.0%**
Operations and Policy							
Administration	$ 95,672	$ 102,647	$ (6,974)	(6.8%)	$ 93,740	$ 1,932	2.1%
Bar Journal	$ 286,180	$ 323,380	$ (37,200)	(11.5%)	$ 274,507	$ 11,673	4.3%
Board of Commissioners	$ 36,372	$ 85,250	$ (48,878)	(57.3%)	$ 49,066	$ (12,694)	(25.9%)
Digital	$ 85,504	$ 103,747	$ (18,242)	(17.6%)	$ 91,354	$ (5,850)	(6.4%)
E Journal	$ 12,151	$ 13,745	$ (1,594)	(11.6%)	$ 12,289	$ (138)	(1.1%)
Executive Office	$ 20,374	$ 47,122	$ (26,748)	(56.8%)	$ 13,770	$ 6,604	48.0%
Facilities	$ 313,735	$ 393,968	$ (80,234)	(20.4%)	$ 317,797	$ (4,062)	(1.3%)
General Communications	$ 9,099	$ 14,648	$ (5,549)	(37.9%)	$ 4,707	$ 4,392	93.3%
Governmental Relations	$ 58,325	$ 59,520	$ (1,195)	(2.0%)	$ 53,636	$ 4,690	8.7%
Justice Initiaties	$ 139,918	$ 131,614	$ 8,304	6.3%	$ 130,533	$ 9,385	7.2%
Print and Design	$ 34,156	$ 46,260	$ (12,104)	(26.2%)	$ 41,087	$ (6,931)	(16.9%)
Representative Assembly	$ 17,441	$ 22,200	$ (4,760)	(21.4%)	$ 4,482	$ 12,959	289.2%
Research	$ 2,799	$ 11,170	$ (8,371)	(74.9%)	$ 7,125	$ (4,326)	(60.7%)
Finance							
Depreciation	$ 334,202	$ 391,660	$ (57,458)	(14.7%)	$ 342,050	$ (7,847)	(2.3%)
Finance	$ 351,290	$ 370,090	$ (18,800)	(5.1%)	$ 360,670	$ (9,380)	(2.6%)
Total Operations and Policy	**$ 1,797,218**	**$ 2,117,021**	**$ (319,803)**	**(15.1%)**	**$ 1,796,813**	**$ 405**	**0.0%**
Salaries							
Legal	$ 1,329,916	$ 1,183,920	$ 145,996	12.3%	$ 1,140,849	$ 189,067	16.6%
Operations and Policy	$ 1,784,934	$ 2,116,620	$ (331,686)	(15.7%)	$ 1,911,713	$ (126,779)	(6.6%)
Public and Bar Services	$ 1,957,825	$ 1,839,364	$ 118,461	6.4%	$ 1,751,310	$ 206,515	11.8%
Total - Salaries	**$ 5,072,675**	**$ 5,139,904**	**$ (67,229)**	**(1.3%)**	**$ 4,803,873**	**$ 268,803**	**5.6%**
Non Operating Expenses							
Loss on Fixed Assets	$ 16,406	$ -	$ 16,406	0.0%	$ -	$ 16,406	0.0%
Total Non Operating Expenses	**$ 16,406**	**$ -**	**$ 16,406**	**0.0%**	**$ -**	**$ 16,406**	**0.0%**
Total Expenses	**$ 9,485,368**	**$ 10,134,773**	**$ (649,405)**	**(6.4%)**	**$ 8,991,219**	**$ 494,148**	**5.5%**
Increase (Decrease) in Net Assets	**$ 2,738,346**	**$ 911,003**	**$ 1,827,343**	**200.6%**	**$ 2,840,531**	**$ (102,185)**	**(3.6%)**

State Bar of Michigan
Administrative Fund
FY 2024 Capital Expenditures vs Budget
For the Ten Months Ending July 31, 2024

	YTD Actual	YTD Budget	YTD Variance	Notes and Variance Explanations	FY 2024 Forecast	FY 2024 Budget	Forecasted Variance
FACILITIES, FURNITURE & OFFICE EQUIPMENT							
Boardroom upgrade to three Apple-compatible presentation points	12,554	12,554	-		$ 30,000	$ 30,000	$ -
Ethernet Switches (expense delayed from FY 2023)	11,296	-	11,296	Carryover from FY 2023 ($27,753 remaining as of 09/30/23)	11,296	-	11,296
Additional Cameras for 1st Floor (expense delayed from FY 2023)	9,487	-	9,487	Carryover from FY 2023 ($10,000 remaining as of 09/30/23)	9,487	-	9,487
TOTAL FACILITIES, FURNITURE & OFFICE EQUIPMENT	**$ 33,337**	**$ 12,554**	**$ 20,783**		**$ 50,783**	**$ 30,000**	**$ 20,783**
INFORMATION TECHNOLOGY							
Application Software Development:							
Receivership /Interim Administrator Program data portal	$ 31,910	$ 31,910	$ -		$ 31,910	$ 31,600	$ 310
E-commerce Store	17,535	17,535	-		17,535	10,000	7,535
E-commerce Events	55,815	32,460	23,355		55,815	32,460	23,355
E-commerce License Fee Updates	35,090	35,090	-		40,600	40,600	-
e-Services Application to Court e-Filing (mi-File)	-	20,000	(20,000)		-	20,000	(20,000)
Firm Administration and Billing	15,950	15,950	-		15,950	11,000	4,950
Website Functionality Enhancements	15,950	15,950	-		15,950	12,680	3,270
Character & Fitness Module	9,580	9,580	-		18,970	34,800	(15,830)
Volunteer Application Updates	6,380	6,380	-		18,740	19,140	(400)
Consumer Portal (LRS)	3,190	3,190	-		14,210	17,400	(3,190)
TOTAL INFORMATION TECHNOLOGY	**$ 191,400**	**$ 188,045**	**$ 3,355**		**$ 229,680**	**$ 229,680**	**$ -**
TOTAL CAPITAL EXPENDITURES BUDGET	**$ 224,737**	**$ 200,599**	**$ 24,138**		**$ 280,463**	**$ 259,680**	**$ 20,783**

STATE BAR OF MICHIGAN
CLIENT PROTECTION FUND

Unaudited and For Internal Use Only

FINANCIAL REPORTS
July 31, 2024

FY 2024

Note: License fee revenue is recognized and budgeted as earned each month throughout the year.

State Bar of Michigan
Parent Company : State Bar of Michigan : Client Protection Fund
CPF Comparative Statement of Net Assets
July 31, 2024

Financial Row	As of Jul 2024	As of Jun 2024	Variance	Variance %	As of Sep 2023
Assets					
Cash-Checking	$ 18,190	$ 49,747	$ (31,557)	(63.4%)	$ 75,040
Savings	$ 278,191	$ 227,843	$ 50,348	22.1%	$ 72,303
Investments	$ 3,263,624	$ 3,283,250	$ (19,626)	(0.6%)	$ 2,546,363
Due From SBM	$ 829	$ 271	$ 558	206.2%	$ (13,206)
Total Assets	**$ 3,560,835**	**$ 3,561,111**	**$ (276)**	**(0.0%)**	**$ 2,680,499**
Liabilities and Fund Balance					
Liabilities					
Interpleader Funds	$ 346,850	$ 345,489	$ 1,361	0.4%	$ -
Claims Payable	$ 35,249	$ 12,964	$ 22,285	171.9%	$ 43,268
Deferred Revenue	$ 104,549	$ 156,770	$ (52,222)	(33.3%)	$ 115,238
Total Liabilities	**$ 486,648**	**$ 515,223**	**$ (28,575)**	**(5.5%)**	**$ 158,505**
Fund Balance Beginning of Year	$ 2,521,994	$ 2,521,994	$ -	0.0%	$ 2,121,791
Net Income (Expense) Year to Date	$ 552,193	$ 523,894	$ 28,299	0.05	$ 400,202
Total Fund Balance	**$ 3,074,187**	**$ 3,045,888**	**$ 28,299**	**0.9%**	**$ 2,521,994**
Total Liabilities and Fund Balance	**$ 3,560,835**	**$ 3,561,111**	**$ (276)**	**(0.0%)**	**$ 2,680,499**

State Bar of Michigan
Parent Company : State Bar of Michigan : Client Protection Fund
CPF Income Statement
July 31, 2024

Financial Row	CY (Oct 2023 - Jul 2024)	PY (Oct 2022 - Jul 2023)	Variance
Income			
42965 - Claims Recovery	$ 70,779	$ 21,926	$ 48,853
42970 - Contributions Received	$ 94,085	$ 23,863	$ 70,221
40050 - License Fee	$ 527,540	$ 538,750	$ (11,210)
40055 - Pro Hac Vice Fees	$ 12,975	$ 9,720	$ 3,255
Total Income	**$ 705,379**	**$ 594,259**	**$ 111,119**
Expenses			
65285 - Bank Service Fees	$ 365	$ 350	$ 15
71005 - Claims Payments	$ 113,669	$ 273,459	$ (159,790)
69060 - SBM Administrative/Service Fees	$ 167,500	$ 150,000	$ 17,500
Total Expenses	**$ 281,534**	**$ 423,809**	**$ (142,275)**
Investment Income			
49015 - Gain or Loss on Investment JPM Brokerage	$ 121,582	$ 80,661	$ 40,921
49010 - Interest & Dividends	$ 6,767	$ 4,649	$ 2,118
Total Investment Income	**$ 128,349**	**$ 85,310**	**$ 43,039**
Increase or Decrease in Net Posisiton	**$ 552,193**	**$ 255,760**	**$ 296,433**
Net Position, Beginning of Year	**$ 2,521,994**	**$ 2,121,791**	**$ 400,202**
Net Position, End of Period	**$ 3,074,187**	**$ 2,377,551**	**$ 696,635**

Summary of Cash and Investment Balances by Financial Institution

7/31/2024

Assets	Bank Rating	Financial Institution Summary		Interest Rates
		SBM Chase Checking	$187,688.08	
		SBM Chase Credit Card	$14,021.65	
		SBM Chase E Checking	$2,832.50	
		SBM Chase Payroll	($0.00)	
		SBM Chase Savings	$ -	0.02%
		ADS Chase Checking	$48,365.98	
		ADS Chase Petty Cash	$ 3,983.45	
		CPF Chase Checking	$18,189.80	
		CPF Chase Savings	$ -	0.02%
$3.5 Trillion	4 stars	**** Chase Total**	**$ 275,081.46**	
		SBM Horizon Bank Money Market	$ 9.06	
$7.8 Billion	4 stars	**Horizon Bank Total w/CD**	**$ 1,978,032.80**	
		SBM Fifth Third Commercial Now	$ 1,955.15	0.30%
$214 Billion	5 stars	**Fifth Third Total**	**$ 1,955.15**	
		MSUCU Savings	$ 952.95	
		MSUCU Checking	$ 13,553.43	
		MSU Credit Union Total	**$ 14,506.38**	
$7.8 Billion	5 stars	**MSU Credit Union Total w/CD**	**$ 1,604,154.91**	
		LAFCU Savings	$ -	
$1 Billion	5 stars	**LAFCU Total w/CD**	**$ -**	
		CASE Cr Un	$ -	
$394 Million	5 stars	**CASE Cr Un Total w/CD**	**$ -**	
		SBM Flagstar ICS Checking	$ 146,333.78	3.80%
		ADS Flagstar ICS Checking Account	$ 165,564.67	3.80%
		CPF Flagstar ICS Checking	$ 278,191.29	3.80%
$113 Billion	3.5 stars	**Flagstar Bank FDIC Insured**	**$ 590,089.74**	

Fund Summary		
Client Protection Fund	$	3,560,005
State Bar Admin Fund (including Sections)	$	14,371,484
Attorney Discipline System	$	4,519,800
SBM Retiree Health Care Trust	$	4,525,791
ADB Retiree Health Care Trust	$	1,541,815
AGC Retiree Health Care Trust	$	4,701,341
Total	**$**	**33,220,237**

State Bar Admin Fund Summary

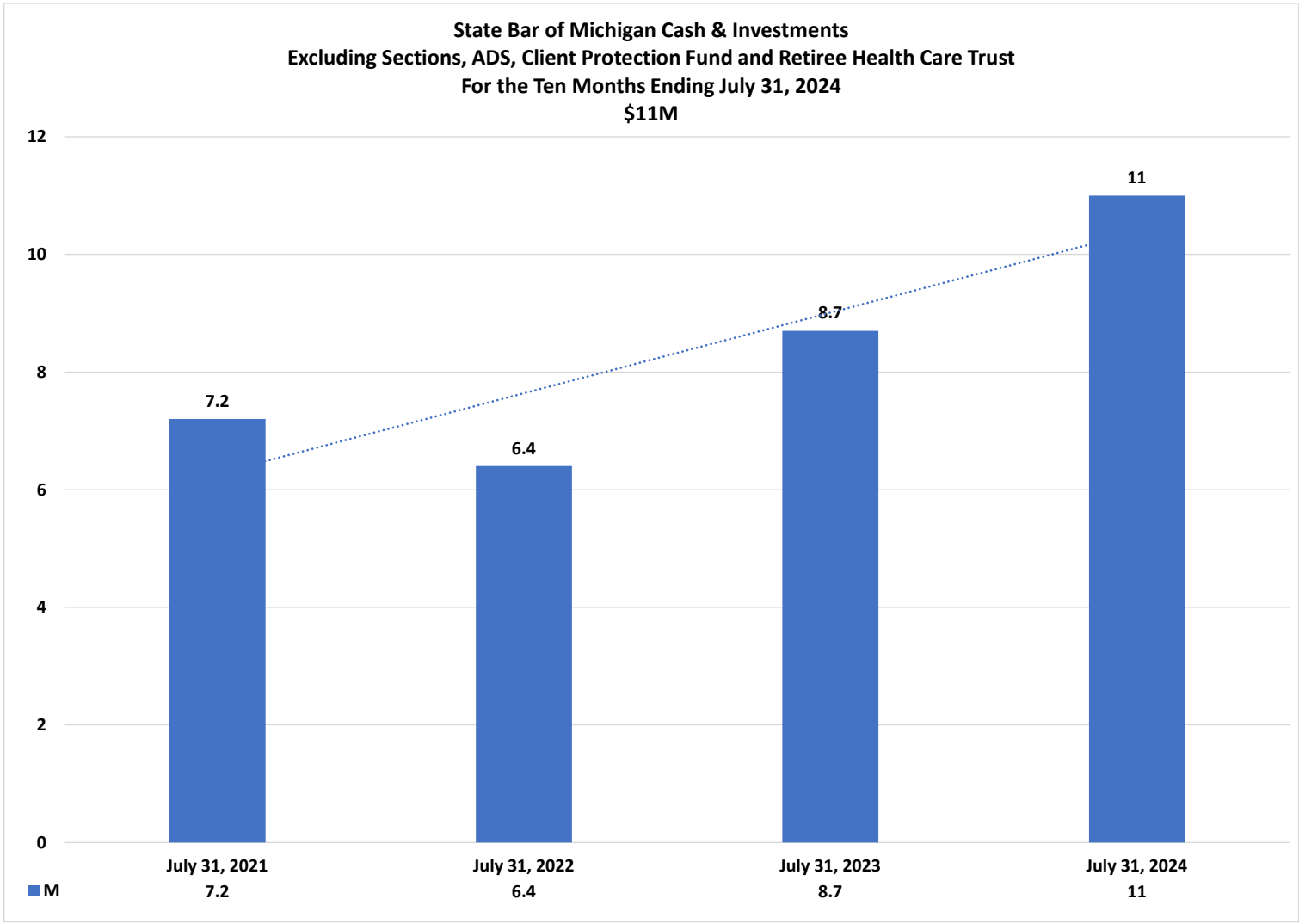
Cash and Investments	$	14,371,484
Less:		
Due (to)/from Sections	$	(3,310,861)
Due (to)/from ADS	$	(10,614)
Due (to)/from CPF	$	(829)
Due to Sections and CPF	$	(3,322,304)
Net Administrative Fund	$	11,049,180

SBM Average Weighted Yield: 4.76%
ADS Average Weighted Yield: 4.81%
CPF Average Weighted Yield: 4.76%

Notes:

- All amounts are based on reconciled book balance and interest rates as of 7/31/24.
- CDARS when used are invested in multiple banks up to the FDIC limit for each bank.
- Funds held in bank accounts are FDIC insured up to $250,000 per bank.
- Actual unreconciled Chase balance per statements was $380,273.77(**).
- Bank Star rating from Bauer Financial.
- Lockbox fees are offset by 0.30% p.a. on average monthly balance (*)
- Average weighted yields exclude retiree health care trusts.
- Funds held in SBM Entities Trust with Schwab are invested in Tbills and government money market funds (29%), bond mutual funds (20%), and equity mutual funds (51%).

Assets	Rating	Financial Institution Summary			Interest Rates	Maturity
N/A	N/A	**SBM US Treasuries**				
		JU2	$	1,300,000.00	4.99%	08/01/24
		LA3	$	298,550.48	5.20%	08/06/24
		KX4	$	274,515.77	5.22%	08/13/24
		GL5	$	397,947.90	4.77%	09/05/24
		HE0	$	917,937.29	4.66%	10/31/24
		LD7	$	369,430.99	5.19%	11/14/24
		HP5	$	1,474,687.82	4.77%	11/29/24
		JR9	$	1,024,937.69	4.68%	01/23/25
		LZ8	$	390,094.48	4.90%	01/30/25
		LB1	$	1,348,249.64	5.00%	05/15/25
		LN5	$	575,872.31	4.99%	06/12/25
		LW5	$	846,626.99	4.70%	07/10/25
		KS9	$	277,535.16	4.93%	05/31/26
		LB5	$	501,093.75	4.37%	07/31/26
		US Gov MM Fund-SXX	$	772,105.42	4.88%	-
		Pending Purchase	$	(1,273,967.97)		
		SBM US Treasuries Total	**$**	**9,495,617.72**		
		CPF US Treasuries				
		JU2	$	350,000.00	4.99%	08/01/24
		HP5	$	589,875.13	4.77%	11/29/24
		LR6	$	391,572.35	5.13%	01/02/25
		LB1	$	317,801.70	4.98%	05/15/25
		LN5	$	1,151,744.63	5.00%	06/12/25
		LB5	$	350,765.63	4.16%	07/31/26
		US Gov MM Fund - GXX	$	462,406.92	4.73%	
		Pending Purchase	$	(350,542.00)		
		CPF US Treasuries Total	**$**	**3,263,624.36**		
		ADS US Treasuries				
		GK7	$	324,667.53	5.03%	08/08/24
		KY2	$	698,048.35	5.22%	08/20/24
		LW5	$	444,837.91	4.78%	09/05/24
		GL5	$	397,947.90	4.77%	09/05/24
		LN5	$	407,909.56	4.99%	11/29/24
		HP5	$	737,343.91	4.75%	11/29/24
		ZV4	$	293,983.97	4.72%	12/26/24
		JR9	$	307,481.31	4.67%	01/23/25
		LB1	$	288,910.64	5.11%	05/15/25
		UG Gov MM Fund	$	400,755.14	4.88%	-
		ADS US Treasuries Total	**$**	**4,301,886.22**		
		US Treasuries Total	**$**	**17,061,128.30**		
		SBM Flagstar Savings	$	240,847.53	4.12%	
			$	**240,847.53**		
		SBM Flagstar CDARS	$	700,000.00	4.60%	02/06/25
		SBM-CD MSU Credit Union	$	252,036.00	5.00%	05/29/25
		SBM-CD MSU Credit Union	$	262,537.51	5.00%	05/29/25
		SBM-CD MSU Credit Union	$	262,537.51	5.00%	05/29/25
$7.8 Billion	5 stars	SBM-CD MSU Credit Union	$	262,537.51	5.00%	05/29/25
		SBM-CD MSU Credit Union	$	550,000.00	4.50%	08/02/25
		Horizon Bank	$	244,011.87	4.90%	10/28/24
		Horizon Bank	$	244,011.87	4.90%	10/28/24
		Horizon Bank	$	250,000.00	5.07%	11/30/2024
$7.8 Billion	4 stars	Horizon Bank	$	250,000.00	5.07%	11/30/2024
		Horizon Bank	$	250,000.00	5.07%	11/30/2024
		Horizon Bank	$	250,000.00	5.07%	11/30/2024
		Horizon Bank	$	250,000.00	5.07%	12/4/2024
		Horizon Bank	$	240,000.00	5.07%	12/4/2024
		Bank CD Totals	**$**	**3,567,672.27**		
		Total Cash & Investments (excluding Schwab)	**$**	**22,451,289.89**		
		SBM - Charles Schwab (Ret HC Trust)	$	4,525,791.31	Mutual Funds	
		ADB - Charles Schwab (Ret HC Trust)	$	1,541,814.54	Mutual Funds	
		AGC - Charles Schwab (Ret HC Trust)	$	4,701,340.80	Mutual Funds	
		Charles Schwab Totals	**$**	**10,768,946.65**		
		Grand Total (including Schwab)	**$**	**33,220,236.54**		
		Total amount of cash and investments not FDIC-insured (excluding Schwab and JPM held Tbills and Gov MM)	$	3,107,269.17	57.65%	



Note: The State Bar of Michigan has no bank debt outstanding

Monthly SBM Attorney and Affiliate Report - July 31, 2024

FY 2024

Attorneys and Affiliates In Good Standing	September 30 2018	September 30 2019	September 30 2020	September 30 2021	September 30 2022	September 30 2023	July 31 2024	FY Increase (Decrease)
Active	42,342	42,506	42,401	42,393	42,395	41,985	41,477	(508)
Less than 50 yrs serv	40,973	41,036	40,559	40,504	40,680	40,115	39,441	(674)
50 yrs or greater	1,369	1,470	1,842	1,889	1,715	1,870	2,036	166
Voluntary Inactive	1,169	1,139	1,192	1,097	1,072	1,106	1,271	165
Less than 50 yrs serv	1,142	1,105	1,149	1,055	1,030	1,059	1,222	163
50 yrs or greater	27	34	43	42	42	47	49	2
Emeritus	2,204	2,447	2,727	3,033	3,306	3,733	4,176	443
Total Attorneys in Good Standing	**45,715**	**46,092**	**46,320**	**46,523**	**46,773**	**46,824**	**46,924**	**100**
Fees paying Attorneys (Active & Inactive less than 50 yrs of Serv)	**42,115**	**42,141**	**41,708**	**41,559**	**41,710**	**41,174**	**40,663**	**(511)**
Affiliates								
Legal Administrators	10	10	8	5	2	2	4	2
Legal Assistants	401	393	317	219	214	194	188	(6)
Total Affiliates in Good Standing	**411**	**403**	**325**	**224**	**216**	**196**	**183**	**(13)**

Total Attorneys and Former Attorneys in the Database

State Bar of Michigan Attorney and Affiliate Type	September 30 2018	September 30 2019	September 30 2020	September 30 2021	September 30 2022	September 30 2023	July 31 2024	FY Increase (Decrease)
Attorneys in Good Standing:								
ATA (Active)	42,342	42,506	42,401	42,393	42,395	41,985	41,477	(508)
ATVI (Voluntary Inactive)	1,169	1,139	1,192	1,097	1,072	1,106	1,271	165
ATE (Emeritus)	2,204	2,447	2,727	3,033	3,306	3,733	4,176	443
Total Attorneys in Good Standing	**45,715**	**46,092**	**46,320**	**46,523**	**46,773**	**46,824**	**46,924**	**100**
Attorneys Not in Good Standing:								
ATN (Suspended for Non-Payment of Dues)	6,072	6,246	6,416	6,472	6,588	6,824	7,082	258
ATDS (Discipline Suspension - Active)	439	440	445	449	454	456	464	8
ATDI (Discipline Suspension - Inactive)	19	24	25	25	25	25	27	2
ATDC (Discipline Suspension - Non-Payment of Court Costs)	15	16	16	14	14	15	15	-
ATNS (Discipline Suspension - Non-Payment of Other Costs)	95	98	100	102	106	104	111	7
ATS (Attorney Suspension - Other)*	1	1	2	-	-	-	-	-
ATR (Revoked)	583	596	613	623	634	645	648	3
ATU (Status Unknown - Last known status was inactive)**	2,070	2,070	2,070	2,070	2,047	2,047	2,047	-
Total Attorneys Not in Good Standing	**9,294**	**9,491**	**9,687**	**9,755**	**9,868**	**10,116**	**10,394**	**278**
Other:								
ATSC (Former special certificate)	155	157	158	164	167	170	172	2
ATW (Resigned)	1,689	1,798	1,907	2,036	2,143	2,282	2,412	130
ATX (Deceased)	9,287	9,524	9,793	10,260	10,664	10,958	11,191	233
Total Other	**11,131**	**11,479**	**11,858**	**12,460**	**12,974**	**13,410**	**13,775**	**365**
Total Attorneys in Database	**66,140**	**67,062**	**67,865**	**68,738**	**69,615**	**70,350**	**71,093**	**743**

* ATS is a new status added effective August 2012 - suspended by a court, administrative agency, or similar authority

** ATU is a new status added in 2010 to account for approximately 2,600 attorneys who were found not to be accounted for in the iMIS database
The last known status was inactive and many are likely deceased. We are researching these attorneys to determine a final disposition.

N/R - not reported

Notes: Through July 31, 2024 a total of 741 new attorneys joined SBM.

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

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The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by November 1, 2024. Comments may be sent in writing to Christopher M. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov .

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PROPOSED

The Committee proposes a new jury instructions, M Crim JI 17.26 (Unlawfully Posting a Message), for offenses charged under MCL 750.411s. The instruction is entirely new.

[NEW] M Crim JI 17.26 Unlawfully Posting a Message

(1) [The defendant is charged with unlawfully posting a message. / You may consider the lesser offense of unlawfully posting a message that (was not in violation of a court order / did not result in a credible threat / was not posted about a person less than 18 with the defendant being 5 or more years older).[1]] To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant posted a message through any medium of communication, including on the Internet, a computer, a computer program, a computer system, a computer network, or another electronic medium of communication.[2]

(3) Second, that the message was posted without [*name complainant*]'s consent.

(4) Third, that the defendant knew or had reason to know that posting the message could cause two or more separate non-continuous acts of unconsented contact with [*name complainant*] by another person.[3]

(5) Fourth, that the defendant posted the message with the intent that it would cause conduct that would make [*name complainant*] feel terrorized, frightened, intimidated, threatened, harassed, or molested.

(6) Fifth, that the conduct arising from posting the message is the type that would cause a reasonable person to suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

(7) Sixth, that the conduct arising from posting the message did cause [*name complainant*] to suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

[*For aggravated message posting, select any that apply from the following according to the charges and the evidence*:][4]

(8) Seventh, that the message

(a) was posted [in violation of a restraining order of which the defendant had actual notice / in violation of an injunction / in violation of (a court order / a condition of parole)]; [*or*]

(b) resulted in a credible threat being made to [*name complainant*], a member of [his / her] family, or someone living in [his / her] household. A credible threat is a threat to kill or physically injure a person made in a manner or context that causes the person hearing or receiving it to reasonably fear for his or her safety or the safety of another person;[5] [*or*]

(c) was posted when [*name complainant*] was less than 18 years of age and the defendant was 5 or more years older than [*name complainant*].

Use Note

MCL 750.411s(7) permits prosecution of this crime where some elements of the offense may not have occurred in the state of Michigan or in the same county. The "venue" instruction, M Crim JI 3.10 (Time and Place), may have to be modified accordingly.

1. This alternative sentence is for use as a lesser included offense where an aggravating factor is charged and the defendant challenges whether the prosecution has proven the aggravating factor.

2. Definitions for these terms can be found at MCL 750.411s(8).

3. *Unconsented contact* is defined at MCL 750.411s(8)(j) and is not limited to the forms of conduct described in that definition. If the jury requests a definition of the phrase, the court may read all of the types of contact mentioned in the statute or may select those that apply according to the charge and the evidence, or the court may describe similar conduct that it finds is included under the purview of the statute.

4. If the basis for aggravated message posting is a prior conviction, do not read this element.

5. *Credible threat* is defined at MCL 750.411s(8)(e). By this definition, a "credible threat" appears to meet the "true threat" standard of *Virginia v Black*, 538 US 343, 359 (2003).

Public Policy Position
M Crim JI 17.26

Support

Explanation:
The committee voted to support the proposed Model Criminal Jury Instruction 17.26.

Position Vote:
Voted For position: 11
Voted against position: 3
Abstained from vote: 0
Did not vote (absent): 10

Contact Persons:
Nimish R. Ganatra ganatran@washtenaw.org
John A. Shea jashea@earthlink.net

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

==========

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==========

PROPOSED

The Committee proposes two new instructions, M Crim JI 33.3 (Assaulting or Harassing a Service Animal) and 33.3a (Interfering with a Service Animal Performing Its Duties), for the offenses found at MCL 750.50a. The instructions are entirely new.

[NEW] M Crim JI 33.3 Assaulting or Harassing a Service Animal

(1) The defendant is charged with the crime of assaulting or harassing a service animal. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant intentionally assaulted, beat, harassed, injured, or attempted to assault, beat, harass, or injure a service animal.

> A "service animal" means a dog or miniature horse that is individually trained to do work or perform tasks for the benefit of a person with a physical, sensory, psychiatric, intellectual, or other mental disability. The work or tasks performed by a service animal must be directly related to the person's disability.[1]

(3) Second, that the defendant knew or should have known that the animal was a service animal.

(4) Third, that the defendant knew or should have known that the service animal was used by a person with a disability. The prosecutor alleges that [*name complainant*] is a person with a disability.

> A person with a disability is an individual who has a physical or mental impairment that substantially limits one or more major life activities, including, but not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. This includes an armed services veteran who has been diagnosed with post-traumatic stress disorder, traumatic brain injury, or another service-related disability.[2]

(5) Fourth, that when the defendant assaulted, beat, harassed, or injured the service animal, or attempted to so, [he / she] did so maliciously.

> "Maliciously" means that
>
> [*Provide any that may apply*:]
>
> (a) the defendant knew that [he / she] was assaulting, beating, harassing, or injuring the service animal, or the defendant intended to do so, or
>
> (b) the defendant knew that [his / her] conduct would or be likely to disturb, endanger, or cause emotional distress to [*name complainant*], or the defendant intended to do so.

(6) You may, but you do not have to, infer that the defendant acted maliciously if you find that [*name complainant*] asked the defendant to avoid or to quit assaulting or harassing the service animal but the defendant continued to do so.

> You should weigh all of the evidence in this case in determining whether the defendant acted maliciously, including this inference, if you choose to make it. The prosecutor still bears the burden of proving all of the elements beyond a reasonable doubt.

Use Note

1. See the Code of Federal Regulations, 28 CFR 36.104, stating:
> *Service animal* means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic,

trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individual's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. *The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.* (Emphasis added.)

2. This sentence does not need to be read where the person with a disability is not a veteran.

[NEW] M Crim JI 33.3a Interfering with a Service Animal Performing Its Duties

(1) The defendant is charged with the crime of interfering with a service animal performing its duties. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that [*name complainant*] was a person with disability who used a service animal for work or tasks directly related to [his / her] disability.

> A person with a disability is an individual who has a physical or mental impairment that substantially limits one or more major life activities, including, but not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. This includes an armed services veteran who has been diagnosed with post-traumatic stress disorder, traumatic brain injury, or another service-related disability.[1]
>
> A "service animal" means a dog or miniature horse that is individually trained to do work or perform tasks for the benefit of a person with a physical, sensory, psychiatric, intellectual, or other mental disability. The work or tasks performed by a service animal must be directly related to the person's disability.[2]

(3) Second, that the service animal was performing duties for [*name complainant*].

(4) Third, that the defendant knew or should have known that the animal was a service animal being used by [*name complainant*].

(5) Fourth, that the defendant intentionally impeded or interfered with the service animal when it was performing its duties or attempted to impede or interfere with the animal when it was performing its duties.

(6) Fifth, that when the defendant impeded or interfered with the service animal's duties, or attempted to so, [he / she] did so maliciously.

> "Maliciously" means that
>
> [*Provide any that may apply*:]

(a) the defendant knew that [he / she] was impeding or interfering with duties performed by the service animal, or the defendant intended to do so, or

(b) the defendant knew that [his / her] conduct would or be likely to disturb, endanger, or cause emotional distress to [*name complainant*], or the defendant intended to do so.

(7) You may, but you do not have to, infer that the defendant acted maliciously if you find that [*name complainant*] asked the defendant to avoid or to quit impeding or interfering with the service animal as it was performing its duties, but the defendant continued to do so.

You should weigh all of the evidence in this case in determining whether the defendant acted maliciously, including this inference, if you choose to make it. The prosecutor still bears the burden of proving all of the elements beyond a reasonable doubt.

Use Note

1. This sentence does not need to be read where the person with a disability is not a veteran.

2. See the Code of Federal Regulations, 28 CFR 36.104, stating:

> *Service animal* means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individual's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or

interrupting impulsive or destructive behaviors. *The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.* (Emphasis added.)

Public Policy Position
M Crim JI 33.3 and 33.3a

Support

Explanation:
The committee voted to support the proposed Model Criminal Jury Instructions 33.3 and 33.3a.

Position Vote:
Voted For position: 12
Voted against position: 2
Abstained from vote: 0
Did not vote (absent): 10

Contact Persons:
Nimish R. Ganatra ganatran@washtenaw.org
John A. Shea jashea@earthlink.net

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

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The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by November 1, 2024. Comments may be sent in writing to Christopher M. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

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PROPOSED

The Committee proposes amendments to M Crim JI 35.1a, formerly identified as (Malicious Use of Telecommunications Service), for the offense found at MCL 750.540e. The amendments (1) refine the title and first paragraph of the instruction to include the possible intents required under the statute, (2) add language addressing the "malicious" wording in the statute that had not been included when the instruction was originally adopted, and (3) reformat the second element to make it more user friendly than the single-paragraph original format. Deletions are in ~~strike-through~~, and new language is underlined. A "clean copy" without the struck language but including the added language is also provided.

.

[AMENDED] M Crim JI 35.1a Malicious Use of a Telecommunications Service to Frighten, Threaten, Harass, or Annoy

(1) The defendant is charged with the crime of malicious use of a telecommunications service to frighten, threaten, harass, or annoy another person. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant used [*identify service provider*] to communicate with [*identify complainant*].

(3) Second, that, when communicating with [*identify complainant*], the defendant, knowing it was wrong, intended to

~~[threatened physical harm or damage to any person or property / made a~~

~~deliberately false report that a person had been injured, had suddenly taken ill, had died, or had been the victim of a crime or an accident / deliberately refused or failed to disengage a connection between telecommunications devices or between a telecommunications device and other equipment provided by a telecommunications service[1] or device / used vulgar, indecent, obscene, or offensive language or suggested any lewd or lascivious act in the course of the conversation or message / repeatedly initiated telephone calls and, without speaking, deliberately hung up or broke the telephone connection when or after the telephone call was answered / made an uninvited commercial telephone call soliciting business or contributions that was received between the hours of 9 p.m. and 9 a.m., whether the call was made by a person or recording device / deliberately engaged or caused to engage the use of (*identify complainant*)'s telecommunications service or device in a repetitive manner that caused interruption in the telecommunications service or prevented (*identify complainant*) from using (his / her) telecommunications service or device].~~

[*Provide any of the following that apply according to the charges and evidence*:]

(a) threaten physical harm to a person or damage to property in the course of a conversation or message.

(b) make a false report that a person had [been injured / suddenly taken ill / died / been the victim of a crime or an accident].

(c) refuse or fail to disengage a connection between a [*identify communication device*] and another [*identify communication device*] or between a [*identify communication device*] and other equipment that sends messages through the use of a telecommunications service or device.

(d) use vulgar, indecent, obscene, or offensive language or proposed any lewd or lascivious act during a conversation or message.

(e) repeatedly initiate a telephone call and, without speaking, deliberately hung up or broke the telephone connection when or after the telephone call was answered.

(f) make an unsolicited commercial telephone call between the hours of 9 p.m. and 9 a.m.

> An unsolicited commercial telephone call is one made by a person or recording device, on behalf of a person, corporation, or other entity, soliciting business or contributions.

(g) cause an interruption in [*identify complainant* / another person]'s

telecommunications service or prevented [*identify complainant* / another person] from using [his / her] telecommunications service or device by the defendant's repeated use of [his /her] telecommunications service or device.

(4) Third, that the defendant did so with the intent to terrorize, frighten, intimidate, threaten, harass, molest, annoy, or disturb the peace and quiet of [*identify complainant*].[1]

Use Note

This is a specific intent crime.

1. If the jury has not been provided with the definition of a *telecommunications service provider*, a *telecommunications service*, or a *telecommunications access device* and the court finds that it would be appropriate to do so, the following are suggested based on the wording of MCL 750.219a:

A *telecommunications service provider* is a person or organization providing a telecommunications service, such as a cellular, paging, or other wireless communications company, or a facility, cell site, mobile telephone switching office, or other equipment for a telecommunications service, including any fiber optic, cable television, satellite, Internet-based system, telephone, wireless, microwave, data transmission or radio distribution system, network, or facility, whether the service is provided directly by the provider or indirectly through any distribution system, network, or facility.

A *telecommunications service* is a system for transmitting information by any method, including electronic, electromagnetic, magnetic, optical, photo-optical, digital, or analog technologies.

A *telecommunications access device* is any instrument, including a computer circuit, a smart card, a computer chip, a pager, a cellular telephone, a personal communications device, a modem, or other component that can be used to receive or send information by any means through a telecommunications service.

Public Policy Position
M Crim JI 35.1a

Support

Explanation:
The committee voted to support the proposed Model Criminal Jury Instruction 35.1a.

Position Vote:
Voted For position: 14
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 10

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FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

==========

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by November 1, 2024. Comments may be sent in writing to Christopher M. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov .

==========

PROPOSED

The Committee proposes a new instruction, M Crim JI 42.1 (Misconduct in Office) for the common law crime of misfeasance or malfeasance in office, punishable under MCL 750.505. The instruction is entirely new.

[NEW] M Crim JI 42.1 Misconduct in Office

(1) The defendant is charged with the crime of misconduct in office. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant was [a / an / the] [*identify public office held by the defendant*] [on / between] [*date(s) of offense*].

(3) Second, that the defendant [*describe wrongful conduct alleged by the prosecutor*].

(4) Third, that the defendant's conduct was [malfeasance / misfeasance]. [Malfeasance is illegal or wrongful conduct / Misfeasance is a legal act but done in an illegal or wrongful manner].

(5) Fourth, that the defendant was performing [his / her] duties as [a / an / the] [*identify public office held by the defendant*] or was acting under the color of [his / her] office. "Acting under the color of office" means that the defendant performed the acts in [his / her] role as a public officer or official, or was able to perform the acts because being a public officer or official gave the defendant the opportunity to perform the acts.

(6) Fifth, that the defendant acted with corrupt intent.

The word "corrupt" is defined as depraved, perverse, or tainted.[1] Corrupt intent includes intentional or purposeful misbehavior related to the requirements or duties of the defendant as a public officer, contrary to the powers and privileges granted to the defendant as a public officer, or against the trust placed in the defendant to perform as expected as a public officer. Corrupt intent does not include erroneous acts made in good faith or honest mistakes committed or made in the discharge of duties, and it does not require that the defendant receive money or property in profit for the conduct.

Use Note

1. These three terms are further defined in *People v Coutu (On Remand)*, 235 Mich App 695, 706-707; 599 NW2d 556 (1999).

Public Policy Position
M Crim JI 42.1

Support

Explanation:
The committee voted to support the proposed Model Criminal Jury Instruction 42.1.

Position Vote:
Voted For position: 12
Voted against position: 2
Abstained from vote: 0
Did not vote (absent): 10

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL Z. CROWE, *Plaintiff-Appellant*, OREGON CIVIL LIBERTIES ATTORNEYS, an Oregon nonprofit corporation, *Plaintiff-Appellant*, and LAWRENCE K. PETERSON I, *Plaintiff*, v. OREGON STATE BAR, a Public Corporation; OREGON STATE BAR BOARD OF GOVERNORS; VANESSA A. NORDYKE, President of the Oregon State Bar Board of Governors; CHRISTINE CONSTANTINO, President-elect of the Oregon State Bar Board of Governors; HELEN MARIE	No. 23-35193 D.C. No. 3:18-cv-02139-JR OPINION

HIERSCHBIEL, Chief Executive Officer of the Oregon State Bar; KEITH PALEVSKY, Director of Finance and Operations of the Oregon State Bar; AMBER HOLLISTER, General Counsel for the Oregon State Bar,

Defendants-Appellees.

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

Argued and Submitted April 2, 2024
Portland, Oregon

Filed August 28, 2024

Before: John B. Owens and Michelle T. Friedland, Circuit Judges, and William Horsley Orrick,[*] District Judge.

Opinion by Judge Friedland

[*] The Honorable William Horsley Orrick, United States District Judge for the Northern District of California, sitting by designation.

SUMMARY**

First Amendment/Bar Dues

In an action brought by attorney Daniel Crowe alleging that the requirement that he join the Oregon State Bar ("OSB") infringes his First Amendment right to freedom of association, the panel dismissed his claims against OSB and his claims against OSB officers for retrospective relief, reversed the district court's summary judgment for OSB officers on his claims for prospective equitable relief, and remanded.

Applying *Kohn v. State Bar of California*, 87 F.4th 1021 (9th Cir. 2023) (en banc), the panel held that OSB is an arm of the state entitled to sovereign immunity, and therefore dismissed Crowe's claims against OSB. Sovereign immunity also precludes Crowe's claims for retrospective relief against individual OSB officers sued in their official capacities. However, sovereign immunity does not bar Crowe's claims for prospective declaratory and injunctive relief against individual OSB officers.

The panel held that Crowe demonstrated an infringement on his freedom of association because he objected to certain statements by OSB in its magazine that would reasonably have been imputed to OSB's members. Considering the totality of the circumstances, OSB traded on its supposedly unified membership to bolster its own expression, fostering a misperception about the unanimity of its members' views.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Crowe established that OSB impaired his own expression because he objected to the message sent by his membership.

The panel held that the infringement on Crowe's freedom of association did not survive exacting scrutiny because OSB's communications were not related to the Bar's regulatory purpose. Accordingly, the panel reversed the district court's judgment as to Crowe's freedom of association claim for prospective equitable relief against individual OSB officers and remanded for further proceedings.

COUNSEL

Scott D. Freeman (argued) and Adam C. Shelton, Scharf-Norton Center for Constitutional Litigation at the Goldwater Institute, Phoenix, Arizona; Luke D. Miller, Military Disability Lawyer LLC, Salem, Oregon; for Plaintiffs-Appellants.

Kristin M. Asai (argued), Paul Matthias-Bennetch, and Abigail Gore, Holland & Knight LLP, Portland, Oregon, for Defendants-Appellees.

OPINION

FRIEDLAND, Circuit Judge:

Attorney Daniel Crowe sued the Oregon State Bar and its officers, arguing that the requirement that he join the Bar infringes his First Amendment right to freedom of association. We hold that the Oregon State Bar is an arm of

the state entitled to sovereign immunity, so the Bar itself must be dismissed as a defendant. But we hold, as to the officer defendants, that Crowe has demonstrated an infringement on his freedom of association because he objects to certain communications by the Bar that would reasonably have been imputed to the Bar's members. We also hold that the infringement was not justified because the communications in question were not related to the Bar's regulatory purpose. We therefore reverse the district court's judgment for the officer defendants on Crowe's freedom of association claim and remand for further proceedings.

I.

A.

To practice law in Oregon, an attorney must be a member of the Oregon State Bar ("OSB"). Or. Rev. Stat. § 9.160(1). An attorney must also pay annual membership dues, which are used to fund OSB's activities. *Id.* §§ 9.191, 9.200. Those activities include administering bar exams, formulating and enforcing rules of professional conduct, and establishing minimum continuing legal education requirements for Oregon attorneys. *Id.* §§ 9.210, 9.490, 9.112. OSB also lobbies the state legislature and publishes a magazine called the *Bulletin*. *See* OSB Bylaws art. 10 (bylaws for OSB communications), 11 (bylaws for legislation and public policy activities).

In the April 2018 issue of the *Bulletin*, OSB published two statements on "White Nationalism and [the] Normalization of Violence." The two statements were published on facing pages, surrounded by a single dark green border that was not present on the other pages of the magazine. The first statement had OSB's dark green logo on the top of the page, and it was signed by six OSB officers,

including the President and the Chief Executive Officer. That statement said:

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

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

In today's troubling climate, the Oregon State Bar remains committed to equity and justice for all, and to vigorously promoting the law as the foundation of a just democracy. The courageous work done by specialty bars throughout the state is vital to our efforts and we continue to be both inspired and strengthened by those partnerships. We not only refuse to become accustomed to this climate, we are intent on standing in support and solidarity with those historically marginalized, underrepresented and vulnerable communities who feel voiceless within the Oregon legal system.

The second statement was signed by the Presidents of seven Oregon Specialty Bar Associations, which are voluntary organizations separate from OSB. It said:

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

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

As attorneys who lead diverse bar associations throughout Oregon, we condemn the violence that has occurred as a result of white nationalism and white supremacy. Although we recognize the importance of the First Amendment of the United States Constitution and the protections it provides, we condemn speech that incites violence, such as the violence that

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

Daniel Crowe, an attorney and member of OSB, objected to the statements. OSB's bylaws provide a dispute resolution procedure by which a member of the Bar can request a refund for "any portion of the member's bar dues [used] for activities he or she considers promotes or opposes political or ideological causes." OSB Bylaws § 11.3. Invoking that policy, Crowe demanded a refund of his dues. OSB gave Crowe and other objecting members refunds for their shares of the cost of publishing the April 2018 issue of the *Bulletin*, plus interest.

B.

1.

Still unsatisfied, Crowe filed a lawsuit against OSB and some of its officers (collectively, "Defendants") alleging violations of his First Amendment rights.[1]

The Complaint alleged, among other things, that OSB used its compulsory dues for activities that were not "germane" to OSB's purpose and that doing so violated Crowe's right to freedom of speech; that OSB's refund process for objecting members was insufficient; and that compulsory membership in OSB violated his right to freedom of association. Crowe sought declaratory and injunctive relief, as well as damages in the amount of all the dues he previously paid to OSB.

Defendants moved to dismiss, and the district court granted the motion. Crowe appealed.

On appeal, our court affirmed in part and reversed in part. *Crowe v. Or. State Bar*, 989 F.3d 714, 720 (9th Cir. 2021) ("*Crowe I*"). Applying the then-controlling test, we held that OSB was not an arm of the state entitled to sovereign immunity. *Id.* at 730-33 (applying test from

[1] Crowe also formed the Oregon Civil Liberties Attorneys ("ORCLA"), and ORCLA joined him as a co-plaintiff in this suit. ORCLA has asserted that it has organizational standing under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), based on Crowe's injuries and Crowe's membership in ORCLA. We remand to the district court to consider in the first instance whether ORCLA has standing to pursue a freedom of association claim. *See id.* (explaining that, for an organization to have standing, "the claim asserted . . . [must not] require[] the participation of individual members in the lawsuit"). Because we focus in this opinion only on Crowe, we refer to him as the only relevant plaintiff.

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

We also held that Crowe had not stated a freedom of speech claim. *Id.* at 727. We explained that in *Keller v. State Bar of California*, 496 U.S. 1 (1990), the Supreme Court held that "a state bar may use mandatory dues to subsidize activities 'germane to th[e] goals' of 'regulating the legal profession and improving the quality of legal services' without running afoul of its members' First Amendment rights of free speech." *Crowe I*, 989 F.3d. at 724 (quoting *Keller*, 496 U.S. at 13-14). If a state bar engages in nongermane activities, that does not violate the members' freedom of speech so long as the bar has adequate safeguards to protect the rights of any objecting member, including a process for refunding the portion of the member's dues used for any nongermane activities. *See id.* at 725-26. Applying *Keller*, we held that OSB's refund process was adequate and that Crowe's freedom of speech claim failed because any injury had been remedied by the refund he had received. *Id.* at 726-27. For purposes of the freedom of speech claim, we did not decide whether the two *Bulletin* statements were germane under *Keller* or whether the Specialty Bars' statement was attributable to OSB.[2] *Id.* at 724.

In contrast to the freedom of speech claim, we held that Crowe's freedom of association claim could be "viable" because it was not foreclosed by prior precedent. *Id.* at 729. We explained that *Keller* did not foreclose Crowe's claim

[2] We also rejected Crowe's argument that, because of intervening changes in the Supreme Court's precedent on mandatory union dues, *Keller* was no longer good law. *Crowe I*, 989 F.3d. at 724-25. We explained that the Supreme Court has not expressly overruled *Keller*, so, as a lower court, we are still bound by it. *Id.* at 725.

because *Keller* evaluated only a freedom of speech claim and "expressly declined to address" the plaintiffs' freedom of association claim. *Id.* at 727.

We then addressed *Lathrop v. Donohue*, 367 U.S. 820 (1961), another Supreme Court case addressing mandatory state bar associations. In *Lathrop*, an attorney had argued that the requirement that he join a state bar infringed his right to freedom of association in part because the bar engaged in legislative activities like lobbying. 367 U.S. at 822. Although no opinion was joined by a majority, seven Justices ruled against the attorney. *See id.* at 848 (plurality opinion). A plurality of the Supreme Court explained:

> [I]n order to further the State's legitimate interests in raising the quality of professional services, [the State] may constitutionally require that the costs of improving the profession . . . be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity.

Id. at 843.

We held that *Lathrop* did not preclude Crowe's freedom of association claim for two reasons. First, "*Lathrop*'s 'free association' decision was limited to 'compelled financial support of group activities'"; it did not address "'involuntary membership in any other aspect.'" *Crowe I*, 989 F.3d. at 727 (emphasis omitted) (quoting *Lathrop*, 367 U.S. at 828). Second, although the attorney in *Lathrop* complained that the bar was engaging in legislative activities, "the *Lathrop* plurality presumed, on the bare record before it, that all the

bar's activities, including lobbying, related to 'the regulatory program' of 'improving the profession.'" *Id.* at 727-28 (quoting *Lathrop*, 367 U.S. at 843). Thus, "[a]t bottom, *Lathrop* merely permitted states to compel practicing lawyers to pay toward the costs of regulating their profession," whereas Crowe took issue with more than just the payment of dues, and he asserted that OSB engaged in nongermane activities. *Id.* at 728.

We also held that there was no controlling Ninth Circuit authority and that it was therefore an open question "whether the First Amendment tolerates mandatory membership itself—independent of compelled financial support—in [a state bar] that engages in nongermane political activities." *Id.* at 729. We remanded to the district court to determine the proper test for analyzing such a freedom of association claim and to apply it. *Id.*

2.

On remand, the parties conducted discovery and then filed cross-motions for summary judgment. Crowe argued that OSB's nongermane conduct included both the 2018 *Bulletin* statements and some of OSB's lobbying in front of the state legislature that had pushed for changes to the state's substantive laws.

The district court held that compelled state bar membership did not violate the freedom of association so long as the bar engaged in predominantly germane activities. It further held that all of the challenged lobbying and OSB's own statement in the *Bulletin* were germane and that, even if the Specialty Bars' statement was not germane, it would not establish a violation given OSB's predominantly germane activities. The court accordingly denied Crowe's motion for

summary judgment and granted summary judgment in favor of Defendants. Crowe timely appealed.

3.

After this appeal was filed, we held in *Kohn v. State Bar of California*, 87 F.4th 1021 (9th Cir. 2023) (en banc), that our prior test for determining whether an entity is an arm of the state for purposes of sovereign immunity was no longer consistent with Supreme Court authority, and we adopted a new test. *Id.* at 1027-1030. The parties in this case then submitted supplemental briefing on whether OSB is entitled to sovereign immunity under *Kohn*.

II.

"We review de novo the district court's decision on cross motions for summary judgment. We consider, viewing the evidence in the light most favorable to the nonmoving party, whether there are genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Marable v. Nitchman*, 511 F.3d 924, 929 (9th Cir. 2007) (citation omitted).

III.

We turn first to the question whether OSB is entitled to immunity from suit under the Eleventh Amendment. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[3] U.S. Const. amend. XI.

[3] "Longstanding Supreme Court precedent has interpreted this Amendment to immunize states from suit in federal court by citizens and noncitizens alike." *Kohn*, 87 F.4th at 1025.

"The Eleventh Amendment largely shields States from suit in federal court without their consent, leaving parties with claims against a State to present them, if the State permits, in the State's own tribunals." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994). "This immunity extends not just to suits in which the state itself is a named party but also to those against an 'arm of the [s]tate.'" *Kohn*, 87 F.4th at 1026 (alteration in original) (quoting *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977)).

In *Kohn*, we adopted a new, three-factor test for determining whether an entity is an arm of the state. *Id.* at 1030. The test looks to "(1) the [s]tate's intent as to the status of the entity, including the functions performed by the entity; (2) the [s]tate's control over the entity; and (3) the entity's overall effects on the state treasury." *Id.* (alterations in original) (quoting *P.R. Ports Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868, 873 (D.C. Cir. 2008) ("*PRPA*")). Under the test, "an entity either is or is not an arm of the [s]tate: The status of an entity does not change from one case to the next based on the nature of the suit, the [s]tate's financial responsibility in one case as compared to another, or other variable factors." *Id.* at 1031 (alterations in original) (quoting *PRPA*, 531 F.3d at 873).

Applying that test in *Kohn*, we held that the California State Bar is an arm of the state. *Id.* at 1037. We noted that we were in "good company" because "all the other federal circuits to have considered the question [in recent decades] have agreed: State bars are arms of the state and enjoy sovereign immunity under the Eleventh Amendment." *Id.* We then identified *Crowe I*'s holding that OSB was not an arm of the state as the one exception to that otherwise solid consensus. *Id.* We explained that "[a]ny future case brought

against the Oregon State Bar [would] need to be analyzed under the new test." *Id.* We conduct that analysis now.

A.

1.

The first factor of the *Kohn* test assesses the "[s]tate's intent as to the status of the entity." 87 F.4th at 1030 (alteration in original) (quoting *PRPA*, 531 F.3d at 873). This factor turns on "[1] whether state law expressly characterizes the entity as a governmental instrumentality rather than as a local governmental or non-governmental entity; [2] whether the entity performs state governmental functions; [3] whether the entity is treated as a governmental instrumentality for purposes of other state law; and [4] state representations about the entity's status." *Id.* Oregon's intent here supports concluding that OSB is an arm of the state.

First, Oregon state law characterizes OSB as a state governmental instrumentality, not a local or non-governmental entity. By statute, OSB is "an instrumentality of the Judicial Department of the government of the State of Oregon." Or. Rev. Stat. § 9.010(2). Oregon state courts have also characterized OSB as an instrumentality of the state operating on behalf of the judicial department. *See State ex rel. Frohnmayer v. Or. State Bar*, 767 P.2d 893, 895 (Or. 1989). In *Kohn*, we held that the California Supreme Court's similar descriptions of the California State Bar "as its 'administrative arm' for attorney discipline and admission purposes cut[] decisively in favor of" immunity. 87 F.4th at 1032 (citations omitted).

Second, OSB "performs functions typically performed by state governments." *Id.* at 1033 (quoting *PRPA*, 531 F.3d

at 875). In *Kohn*, we held that the California State Bar did so because the licensing, regulation, and discipline of lawyers are state functions. *Id*. at 1033-34. OSB performs those same functions. Or. Rev. Stat. §§ 9.080(1)(a) (providing that OSB's Board of Governors is tasked with "[r]egulating the legal profession"), 9.112 (providing that the Board of Governors may set requirements for continuing legal education, subject to approval by the Oregon Supreme Court), 9.210(1) (providing that the Board of Bar Examiners shall "carry out the admissions functions of the Oregon State Bar"), 9.490(1) (providing that the Board of Governors "shall formulate rules of professional conduct for attorneys," subject to approval by the Oregon Supreme Court).

Third, OSB "is treated as a governmental instrumentality for purposes of other state law." *Kohn*, 87 F.4th at 1030. In *Kohn*, we relied on the fact that the California State Bar is "subject to California public-records and open-meeting laws" and that its "property is tax-exempt." *Id.* at 1034. OSB is similarly subject to other state laws that apply to public entities, including the Oregon Tort Claims Act, the Oregon Public Records Law, and the Oregon Public Meetings Law. Or. Rev. Stat. § 9.010(3) (providing that "the [B]ar is subject to [certain] statutes applicable to public bodies" and listing those statutes).

Fourth, Oregon asserted in an amicus brief in this case that OSB is an arm of the state. *See Kohn*, 87 F.4th at 1030 (explaining that a court should consider "state representations about the entity's status" under this factor). Such a representation weighs in favor of sovereign immunity. *See PRPA*, 531 F.3d at 876 (relying on a similar amicus brief in analyzing this factor).

In sum, all four considerations demonstrate that Oregon intended OSB to be an arm of the state.

2.

The second *Kohn* factor assesses the state's control over the entity. 87 F.4th at 1030. This factor "depends on how members of the governing body of the entity are appointed and removed, as well as whether the state can 'directly supervise and control [the entity's] ongoing operations.'" *Id.* (alteration in original) (quoting *PRPA*, 531 F.3d at 877). Although Oregon has somewhat less control over OSB than California did over the California State Bar in *Kohn*, this factor still weighs in favor of concluding that OSB is an arm of the state.

In *Kohn*, we relied on the fact that the state government had "the power to appoint the [California] State Bar's governing structure"—the Board of Trustees and the Committee of Bar Examiners. *Id.* at 1035. Here, the Oregon Supreme Court appoints one of OSB's equivalent bodies but not the other. As in *Kohn*, the state supreme court appoints the officers who oversee attorney admissions (OSB's Board of Bar Examiners). Or. Rev. Stat. § 9.210(1). But unlike in *Kohn*, the state has no role in appointing members of the Bar's board (OSB's Board of Governors), most of whom are elected by OSB's members. Or. Rev. Stat. §§ 9.080, 9.025(1)(a). The state also has no role in the removal of members of the Board of Governors. *See* Or. Rev. Stat. § 9.050; OSB Bylaws § 2.9.

Still, we must consider whether Oregon exercises other forms of control over OSB. Here, as in *Kohn*, the Bar is controlled by the state supreme court, and that control weighs in favor of concluding that the Bar is an arm of the state.

In *Kohn*, we observed that the California State Bar's admission rules, admission decisions, and disciplinary decisions were subject to the California Supreme Court's review. *Kohn*, 87 F.4th at 1035. We described that oversight as an exercise of "significant control over the State Bar's functioning." *Id.* Similarly, the Oregon Supreme Court "makes final decisions on admitting attorneys, disciplining attorneys, and adopting rules of professional conduct." *Crowe I*, 989 F.3d at 732; *see also* Or. Rev. Stat. §§ 9.490(1), 9.527, 9.529, 9.536, 9.542.

Oregon also exercises some control over OSB's budget. OSB submits an annual budget for its admissions, discipline, and continuing legal education programs to the Oregon Supreme Court for review and approval. OSB Bylaws § 2.1(d). And the Oregon Supreme Court approves the fees that OSB sets for admission. *Id.* § 22.5.

On balance, the extent of Oregon's control over OSB weighs in favor of concluding that OSB is an arm of the state.

3.

The final *Kohn* factor looks to the entity's "financial relationship" with the state and the entity's "overall effects" on the state's treasury. 87 F.4th at 1036. "In analyzing this third factor . . . the relevant issue is a [s]tate's overall responsibility for funding the entity or paying the entity's debts or judgments." *Id.* (alterations in original) (quoting *PRPA*, 531 F.3d at 878).

In *Kohn*, we said that this factor was a "closer call" than the other two. *Id.* at 1037. We recognized that the California State Bar is "responsible for its own debts and liabilities, so California would not be liable for a judgment against the State Bar." *Id.* at 1036. But we acknowledged the California

State Bar's argument that "if the State Bar were unable to satisfy a money judgment against it," California would likely step in to ensure that the Bar could continue to perform its "'vital governmental function.'" *Id.* at 1036-37 (quoting *Alaska Cargo Transp., Inc. v. Alaska R.R. Corp.*, 5 F.3d 378, 381 (9th Cir. 1993)). We did not fully resolve the extent to which the California State Bar affects or could affect the California treasury, explaining that this factor was not dispositive because "the intent and control factors strongly favor[ed]" concluding that the California State Bar was an arm of the state. *Id.* at 1037.

Here, OSB is also responsible for its own debts and liabilities, so Oregon would not be liable for a judgment against OSB. Or. Rev. Stat. § 9.010(6). But, as in *Kohn*, if the Bar were to become insolvent, the state would likely step in with financial support so that the Bar could continue to perform its critical state functions. Given that the intent and control factors strongly weigh in favor of concluding that OSB is an arm of the state, we need not fully resolve the third factor. *See Kohn*, 87 F.4th at 1037.

Having evaluated the three *Kohn* factors, we hold that OSB is an arm of the state. The claims against OSB must therefore be dismissed on sovereign immunity grounds. *See id.* at 1025-26.

B.

OSB's immunity does not end this case. Sovereign immunity shields the state (and arms of the state) from suit. *Kohn*, 87 F.4th at 1025-26. But "[u]nder *Ex Parte Young* and its progeny, a suit seeking prospective equitable relief against a state official [sued in her official capacity] who has engaged in a continuing violation of federal law is not deemed to be a suit against the [s]tate for purposes of state

sovereign immunity." *In re Ellett*, 254 F.3d 1135, 1138 (9th Cir. 2001) (citing *Ex Parte Young*, 209 U.S. 123, 159-60 (1908)). Here, in addition to suing OSB, Crowe has sued OSB's officers in their official capacities seeking prospective declaratory and injunctive relief for violating his freedom of association right. Sovereign immunity does not prevent that part of his case from proceeding.[4]

IV.

We now turn to the merits of Crowe's freedom of association claim. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[5] U.S. Const. amend. I. The Supreme Court has held that the First Amendment implicitly recognizes "a right to associate for the purpose of engaging in those activities" that it explicitly protects. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). The freedom of association "plainly presupposes a freedom not to associate." *Id.* at 623. But the freedom of association (including the freedom not to associate) does not protect all "associations." Because the freedom of association is a corollary to other First Amendment rights, it only protects

[4] Crowe also seeks to recover the dues he paid to OSB, but sovereign immunity precludes claims for retrospective relief against officer defendants sued in their official capacities. *Koala v. Khosla*, 931 F.3d 887, 894-95 (9th Cir. 2019). We therefore dismiss those claims.

[5] The Fourteenth Amendment incorporates the First Amendment against the states. *Am. Beverage Ass'n v. City & County of San Francisco*, 916 F.3d 749, 755 n.1 (9th Cir. 2019) (en banc).

"associations to the extent that they are expressive." *IDK, Inc. v. Clark County*, 836 F.2d 1185, 1194 (9th Cir. 1988).

When a mandatory association infringes freedom of association, that infringement is permissible if it "serve[s] a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms." *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 310 (2012) (second and third alterations in original) (quoting *Jaycees*, 468 U.S. at 623). We have referred to that test as "exacting scrutiny." *Mentele v. Inslee*, 916 F.3d 783, 790 & n.3 (9th Cir. 2019).

In analyzing Crowe's freedom of association claim, we accordingly must ask whether the challenged governmental conduct infringes the right to freedom of association at all, and if it does, whether that infringement can survive exacting scrutiny.

A.

When a plaintiff challenges a requirement that he join an organization, the plaintiff can establish an infringement on his freedom of association by showing that his membership in the organization impairs his own expression. The plaintiff can make that showing if a reasonable observer would attribute some meaning to his membership—because, for instance, a reasonable observer would assume that the plaintiff agrees with the organization's articulated positions—and he objects to that meaning. We first explain how that test flows from existing freedom of association caselaw. We then explain why Crowe has satisfied that test.

1.

Not all interactions with other people that "might be described as 'associational' in common parlance . . . involve

the sort of expressive association that the First Amendment has been held to protect." *City of Dallas v. Stanglin*, 490 U.S. 19, 24 (1989). For example, in *IDK, Inc. v. Clark County*, 836 F.2d 1185 (9th Cir. 1988), we held that the relationships between escort services and their clients were not protected by the freedom of association because the relationships were part of a "primarily commercial enterprise[]" and expression was not a "significant or necessary component of their activities." *Id.* at 1195.

In the same vein, the "freedom not to associate"—which Crowe invokes here—is not implicated every time a person would prefer to avoid some interaction. For instance, in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006), law schools challenged a requirement that, to receive federal funding, they allow military recruiters onto their campuses and assist those recruiters as they would any others. *Id.* at 52-53. The law schools argued, among other things, that the requirement infringed their freedom of association because the law schools objected to the military's "Don't Ask, Don't Tell" policy. *Id.* Although the law schools argued that requiring them to interact with military recruiters "impair[ed] their own expression," the Court held that a plaintiff could not establish an infringement on the freedom of association "'simply by asserting' that mere association 'would impair its message.'" *Id.* at 69 (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000)). The Supreme Court acknowledged that the law schools were required to "'associate' with military recruiters in the sense that they interact[ed] with them." *Id.* But the Court held that the requirement did not infringe the schools' freedom of association because the recruiters had only a passing presence on campus and because students and faculty were

"free to associate to voice their disapproval of the military's message"—in other words, the schools were not required to accept the recruiters into the campus community in any meaningful sense. *Id.* at 69-70.

Taken together, those cases establish that a plaintiff cannot demonstrate that his freedom of association is infringed merely by pointing to the fact that he is required to interact with an organization in some sense. Instead, he must show that the required association impairs his expression. Other cases make clear that a plaintiff can make that showing if a reasonable observer would impute some meaning to membership in the organization and the plaintiff objects to that meaning.[6]

In *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), the Supreme Court held that a state antidiscrimination law that required the Boy Scouts to admit a gay scoutmaster violated the Boy Scouts' freedom of association. *Id.* at 644. The Court explained that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Id.* at 648. Under that test, the Court held that the antidiscrimination requirement at issue burdened the Boy Scouts' expression because the Boy Scouts objected to same-sex relationships, and the scoutmaster was a "gay rights activist," so his membership would "force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.*

[6] We do not foreclose the possibility that a plaintiff could establish that a membership requirement burdens his expression in some other way; we conclude only that this is one way to establish an infringement.

at 650, 653. Significantly, the Court thought that the scoutmaster's membership would send that message even though the Boy Scouts could presumably have made clear that it was not voluntarily choosing to admit the gay scoutmaster. The Court then held that this burden on the Boy Scouts' associational rights was not justified by the state's interests. *Id.* at 656-59. Although in *Dale* an organization challenged a law requiring it to admit a member, it follows from *Dale*'s reasoning that when an individual challenges a law that requires him to become a member, he can show that the requirement infringes his freedom of association if the membership "send[s] a message" to a reasonable observer about his own views and he objects to that message. *Id.* at 653.

By contrast, in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the Supreme Court rejected the Jaycees organization's argument that an antidiscrimination law that required it to admit women as full voting members violated its freedom of association. *Id.* at 612. The Court "decline[d] to indulge in the sexual stereotyping that underlie[d] [the Jaycees'] contention that, by allowing women to vote, application of the [antidiscrimination law would] change the content or impact of the organization's speech." *Id.* at 628. Moreover, the Jaycees already invited women to participate in the group as nonvoting members, so "any claim that admission of women as full voting members [would] impair a symbolic message conveyed by the very fact that women [were] not permitted to vote [was] attenuated at best." *Id.* at 627. Thus, the requirement did not impose "any serious burdens on the male members' freedom of expressive association." *Id.* at 626. In other words, because neither the Jaycees' actual speech nor any symbolic message sent by its membership choices would be meaningfully changed by

complying with the antidiscrimination law, the Court concluded that the Jaycees' freedom of association claim failed. As relevant here, *Jaycees* further supports that an individual person can challenge a requirement that he become a member by showing that a reasonable observer would impute to him a message to which he objects.[7]

2.

We now turn to the application of that test to claims of compelled membership and then to Crowe's claim specifically.[8]

Whether a reasonable observer will attribute any meaning to "membership" alone depends on the nature of a group. Obviously, membership in a political party sends an expressive message. Even if a person takes no other action to support a political party, a reasonable observer understands that membership in the political party, standing alone, says something about the person's views. *Cf. Elrod v. Burns*, 427 U.S. 347, 355-56 (1976) (plurality opinion) (holding that a requirement that public employees join the Democratic Party infringed their freedom of association). But the word "membership" is used to refer to all sorts of

[7] It is not entirely clear whether the Court in *Jaycees* rejected the freedom of association claim because it determined that there was no infringement or because it determined that the infringement was constitutionally permissible. *See* Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association*?, 99 Nw. U. L. Rev. 839, 843-44 (2005) (discussing this ambiguity). Either way, *Jaycees* supports the principle we rely on here.

[8] Crowe has not argued that he is required to personally voice OSB's own views, attend OSB's meetings, or to refrain from joining other organizations or voicing his own opinions. We need not and do not address how such other types of requirements would be analyzed.

relationships: A person might be a member of a public library, Costco, AMC, or, back in the day, Blockbuster. Those memberships may not send any message at all.

Whether a reasonable observer will attribute any meaning to such memberships will depend on context, and there may plausibly be circumstances where membership in a group becomes expressive. But as relevant here, the bare fact that an attorney is a member of a state bar does not send any expressive message. A state bar's primary function is to license, regulate, and discipline attorneys—activities that are essentially commercial in nature. *Cf. Rumsfeld*, 547 U.S. at 64 ("[A] law school's decision to allow recruiters on campus is not inherently expressive. Law schools facilitate recruiting to assist their students in obtaining jobs."). And a reasonable observer understands state bar membership to mean only that the attorney is licensed by the bar. Thus, even when the bar engages in expression, a reasonable observer ordinarily would not interpret the fact that the attorney is a member of the bar to mean that the bar's activities reflect the attorney's personal views.

That can be true even if some of the state bar's expression is not germane to the bar's regulatory purposes. In *Morrow v. State Bar of California*, 188 F.3d 1174 (9th Cir. 1999), the plaintiffs argued that the requirement that they join the California State Bar infringed their freedom of association because that Bar engaged in nongermane political activities—specifically, supporting four bills before the California legislature. *Id.* at 1175. We rejected the plaintiffs' argument that "membership alone may cause the public to identify plaintiffs with State Bar positions in violation of plaintiffs' First Amendment [freedom of association] rights." *Id.* at 1177. That holding rested on the notion that the public would not associate a state bar's

occasional nongermane activities with its members merely by virtue of their membership.

But, in the particular circumstances of this case, Crowe has shown that a reasonable observer would attribute meaning to his membership in OSB because of the *Bulletin* statements. OSB endorsed the Specialty Bars' statement criticizing then-President Trump and suggested that all members agreed with it.

Specifically, the formatting and content of the two statements made it appear as though OSB essentially adopted the Specialty Bars' statement. OSB made the editorial decision to publish the two statements side-by-side, surrounded by a single dark green border that was the same color as OSB's logo. And OSB's statement echoed the themes in the Specialty Bars' statement, using strikingly similar language. For example, the Specialty Bars' statement "condemn[ed] speech that incites violence" and made clear that it was referring to then-President Donald Trump's speech specifically, offering several examples. OSB's statement likewise criticized the "systemic failure to address speech that incites violence." In context, one would assume that OSB's reference to "speech that incites violence" was also referencing then-President Trump.

OSB's statement also praised the Specialty Bars specifically. OSB said, "The courageous work done by specialty bars throughout the state is vital to our efforts and we continue to be both inspired and strengthened by those partnerships." By praising the "work" of the Specialty Bars, which would presumably include the immediately adjacent statement, and describing the relationships between OSB and the Specialty Bars as "partnerships," OSB again appeared to implicitly endorse the Specialty Bars' statement.

The Specialty Bars, in turn, "applaud[ed] the Oregon State Bar's commitment to equity and justice by taking a strong stand against white nationalism," and "pledge[d] to work with the Oregon State Bar." Reading those expressions of mutual praise, one would interpret the two statements to be a reflection of OSB's and the Specialty Bars' shared views.

If OSB had made clear that its own statement reflected the views of OSB's leadership—and not its members—then there would be no infringement. But OSB suggested the opposite. Although the statement said "[a]s a unified bar, we are mindful of the breadth of perspectives encompassed in our membership," it immediately implied that the contents of its statement were one thing on which all members agreed. It did so by saying that, given that breadth of perspectives, "we" would focus on "those issues that [were] directly within our mission," which was "gravely" threatened by the "current climate of violence, extremism and exclusion." That would seem to suggest that all members agreed with what was in the statement because it dealt with topics on which there was no "breadth of perspectives." The statement reinforced that idea by using "we" and "our" throughout in a way that purported to speak for all members of OSB. For instance, it said, "As lawyers, we administer the keys to the courtroom." That could only mean all OSB members, not the six OSB officers who signed the statement.

The implication that OSB was speaking on behalf of all the attorneys it regulates was accentuated by the fact that those attorneys are called "members," *see* Or. Rev. Stat. § 9.160(1), as opposed to something more neutral, such as "licensees." As we have explained, the fact that a state bar refers to attorneys as "members," standing alone, does not mean that a reasonable observer would think that an attorney shares the views of the bar. But the word "member" does

connote a stronger relationship than just a regulatory one, which makes it more likely that a reasonable observer would read a statement like OSB's to actually speak on behalf of the attorneys it regulates.

The *Bulletin* statements make this case analogous to *Carroll v. Blinken*, 957 F.2d 991 (2d Cir. 1992). There, students were required to pay an annual "activity fee" to their university, part of which was used to fund a policy advocacy organization called the New York Public Interest Research Group, Inc. ("NYPIRG"). *Id.* at 993-94. NYPIRG sought to advance "certain positions on issues of public policy," such as arms control and environmental protection, "through research, campus speakers, lobbying the legislature, intervening in lawsuits, community organizing, brochures, and other methods." *Id.* at 994, 997. According to NYPIRG's bylaws, any student who paid the activity fee was automatically a "member" of NYPIRG, and "on the strength of this by-law, NYPIRG claim[ed]" in its advocacy "to represent all students at the nineteen participating campuses." *Id.* at 995.

The Second Circuit held that the automatic membership policy infringed the students' freedom of association. *Id.* at 1003. The court explained that "NYPIRG expressly forge[d] . . . a link" "in the popular mind" between its views and the students' views "when it proclaim[ed] that its 'membership' include[d] all fee paying [university] students" and when it "overtly and inaccurately claim[ed] to represent the interests of the [university] student body." *Id.* NYPIRG thus "irredeemably transgressed the proscription against forced association." *Id.*

Carroll counsels that if an organization trades on its membership in advancing its own views, a reasonable

observer may come to (incorrectly) believe that the organization speaks for its members even though membership is mandatory, and in that circumstance, a membership requirement can infringe the freedom of association. Considering the totality of the circumstances here, OSB traded on its supposedly unified membership to bolster its own expression, fostering a misperception about the unanimity of its members' views.

Crowe has also established that the association impaired his own expression because he objects to the message sent by his membership. He testified at his deposition that he disagreed with the *Bulletin* statements and that he did not want to be associated with them. Crowe has thus established an infringement on his freedom of association.

B.

Such an infringement on the freedom of association is nonetheless permissible if it survives exacting scrutiny. *Mentele*, 916 F.3d at 790 & n.3. Under exacting scrutiny, the infringement must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms."[9] *Id.* at 790 (quoting *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 894 (2018)). The Supreme Court has observed that *Keller*'s germaneness requirement "fits comfortably" within the exacting scrutiny framework in the

[9] The Supreme Court has mused about whether strict scrutiny should replace exacting scrutiny in certain First Amendment contexts. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 894-95 (2018). But we have already held that we are "obliged to apply 'exacting scrutiny' to decide whether [a compelled association] is constitutionally permissible" because the Court has not overruled its precedents applying that test. *Mentele*, 916 F.3d at 790 n.3.

state bar association context because states have a strong interest in "'regulating the legal profession and improving the quality of legal services,'" as well as in "allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices." *Harris v. Quinn*, 573 U.S. 616, 655-56 (2014) (quoting *Keller*, 496 U.S. at 13). That statement indicates that when a state bar requires attorneys to associate with germane activities, that requirement survives exacting scrutiny.[10]

Consistent with that principle, we held in *Gardner v. State Bar of Nevada*, 284 F.3d 1040 (9th Cir. 2002), that even if the public might associate attorneys with a state bar's expressive activities, that association is permissible if the activities are germane. There, the State Bar of Nevada engaged in a public relations campaign that sought to "dispel any notion that lawyers are cheats or are merely dedicated to their own self-advancement or profit." *Id.* at 1043. The

[10] On this point, we agree with the Fifth Circuit, which has held that "[c]ompelled membership in a bar association that is engaged in only germane activities survives [exacting] scrutiny." *McDonald v. Longley*, 4 F.4th 229, 246 (5th Cir. 2021). But we disagree with the Fifth Circuit's holding that if a state bar engages in nongermane activities, compelled membership is necessarily unconstitutional. *See id.*; *see also Boudreaux v. La. State Bar Ass'n*, 86 F.4th 620, 632-34 (5th Cir. 2023) (holding that a state bar violated its attorneys' right to freedom of association by, among other things, tweeting about the health benefits of eating walnuts and promoting a holiday charity drive). As we have explained, in many circumstances, membership in a state bar, standing alone, has no expressive meaning, and the public will not associate the bar's members with the bar's activities. In those circumstances, the membership requirement does not infringe the freedom of association—even if the bar engages in nongermane activities such as offering dietary advice or promoting a charity drive.

campaign instead promoted the notion that lawyers "strive to make the law work for everyone." *Id.* An attorney objected to the campaign in part because he believed lawyers "are supposed to serve their clients, not 'everyone.'" *Id.*

We acknowledged that the attorney was forced to associate with the campaign in two ways. First, his dues were used to fund the campaign. *Id.* at 1042. Second, he was associated with the State Bar of Nevada's activities in the public eye: The public relations campaign spoke about the ethics and activities of all of that Bar's members, so it was likely to be attributed to those members. *See id.* We recognized that such "[c]ompulsion to be associated with an organization whose very public campaign proclaims a message one does not agree with is a burden." *Id.* But we concluded that the campaign was germane to the Bar's purposes, so the burden did not violate the attorney's freedom of association. *Id.* at 1042-43. The Bar had a compelling interest in advancing public understanding of the role of attorneys, and in doing so, it could purport to represent the state's attorneys without violating their freedom of association rights. *See id.* at 1043.

In this case, by contrast, OSB engaged in nongermane conduct by adopting the Specialty Bars' statement. The "guiding standard" in determining whether an activity is germane is whether it is "necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" *Keller*, 496 U.S. at 14 (quoting *Lathrop*, 367 U.S. at 843). At least some of the Specialty Bars' statement was not germane. The statement opened by describing the Specialty Bars' "commitment to the vision of a justice system that operates without discrimination," but much of its criticism of then-President Trump did not relate

to the justice system at all—for instance, it criticized Trump for describing Haiti and African countries as "shithole countries." Although preventing violence and racism can relate to improving the legal system, the connection here was too tenuous. *See Schneider v. Colegio de Abogados de P.R.*, 917 F.2d 620, 632 (1st Cir. 1990) (holding that a bar's activities that "rest[] upon partisan political views rather than on lawyerly concerns" are not germane). Because the Specialty Bars' statement was not germane, OSB's adoption of the Specialty Bars' statement was not germane either. OSB has not offered any other justification for associating its members with the *Bulletin* statements. Thus, the infringement does not survive exacting scrutiny.[11]

C.

The remedy for this violation need not be drastic. Of course, if OSB engaged only in germane activities, it would not infringe the freedom of association. But even if OSB does engage in nongermane activities, in situations in which those activities might be attributed to its members it could include a disclaimer that makes clear that it does not speak on behalf of all those members.[12] *Cf. PruneYard Shopping*

[11] Because we conclude that OSB's adoption of the Specialty Bars' statement was not germane, we do not address any of the lobbying challenged in this case. The district court may consider the lobbying on remand.

[12] We recognize that First Amendment violations are not always cured by a disclaimer. If the state compels a speaker to actually speak (or otherwise disseminate the state's message), the state cannot avoid a First Amendment problem simply by providing a disclaimer that says the speech is compelled. *E.g.*, *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 12-16 & n.11 (1986) (plurality opinion) (holding that a disclaimer did not avoid a First Amendment violation where the

Ctr. v. Robins, 447 U.S. 74, 87 (1980) (holding that a requirement that a public shopping center allow leafleting did not violate the First Amendment in part because "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition . . . [would] not likely be identified with those of the [shopping center] owner"); *Lindke v. Freed*, 601 U.S. 187, 202 (2024) ("Markers like [disclaimers] give speech the benefit of clear context."). OSB could also lessen the risk of misattribution by following the California State Bar's lead and referring to attorneys as "licensees," rather than "members." *See* Cal. Bus. & Prof. Code § 6002.

We leave it to the district court to determine on remand, with further input from the parties, the appropriate forward-looking relief. We hold only that Crowe has established an infringement on his freedom of association and that the infringement does not survive exacting scrutiny.

V.

For the foregoing reasons, we dismiss the claim against OSB and the claim for retrospective relief against the individual officer Defendants. We reverse the judgment of the district court as to the freedom of association claim for prospective equitable relief against the individual officer Defendants and remand for further proceedings.

DISMISSED in part; REVERSED in part and REMANDED for further proceedings.

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government required a company to disseminate the views of a third party). But, here, the only infringement Crowe has shown is that OSB, through its own speech, has suggested that Crowe shares OSB's views. A disclaimer would have prevented that infringement from occurring in the first place.

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
November 13, 2023
Lyle W. Cayce
Clerk

No. 22-30564

RANDY BOUDREAUX,

Plaintiff—Appellant,

versus

LOUISIANA STATE BAR ASSOCIATION,
a Louisiana Nonprofit Corporation;
LOUISIANA SUPREME COURT;
BERNETTE J. JOHNSON, *Chief Justice of the Louisiana Supreme Court*;
SCOTT J. CRICHTON,
Associate Justice of the Louisiana Supreme Court for the Second District;
JAMES T. GENOVESE,
Associate Justice of the Louisiana Supreme Court for the Third District;
MARCUS R. CLARK,
Associate Justice of the Louisiana Supreme Court for the Fourth District;
JEFFERSON D. HUGHES, III,
Associate Justice of the Louisiana Supreme Court for the Fifth District;
JOHN L. WEIMER,
Associate Justice of the Louisiana Supreme Court for the Sixth District;
UNIDENTIFIED PARTY, *successor to the Honorable Greg Guidry as Associate Justice of the Louisiana Supreme Court for the First District*,

Defendants—Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:19-CV-11962

Before KING, SMITH, and ELROD, *Circuit Judges*.

JERRY E. SMITH, *Circuit Judge*:

The First Amendment protects an individual's right both to speak and not to speak. Similarly, it protects one's right to associate and not to associate. *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018). Yet every lawyer in this circuit is required to join his or her state bar association to practice law. And those bar associations speak publicly on a variety of issues—some of them very controversial. That raises obvious constitutional concerns.

Although lawyers do not have a categorical First Amendment right to disassociate from their state bar, compulsory bar membership is unconstitutional if a bar's speech is not germane to regulating lawyers or improving the quality of legal services in the state. *Keller v. State Bar of Cal.*, 496 U.S. 1, 13–14 (1990). Two years ago, we made that clear when we held that the State Bar of Texas violated its members' rights to free speech and association by engaging in non-germane political advocacy. *See McDonald v. Longley*, 4 F.4th 229, 237, 245, 252 (5th Cir. 2021) (Smith, J.), *cert. denied*, 142 S. Ct. 1442 (2022).

In response to *McDonald*, the Louisiana State Bar Association (the "LSBA") changed its internal policies and stopped almost all of its legislative activity. But Randy Boudreaux—a lawyer in Louisiana—claims that the LSBA is still flouting that decision. He insists that the organization's ongoing expression is not germane and that his forced membership in the LSBA violates his speech and association rights.

To its credit, the LSBA has stopped much of its objectionable activity. But despite the LSBA's scruples, Boudreaux has still identified some examples of non-germane speech. We therefore reiterate what we said in *McDonald*—if mandatory bar associations are going to compel individuals to

associate and speak, they must stay in their constitutionally prescribed lane. Because the LSBA veers, we AFFIRM in part and REVERSE in part, REMAND, and RENDER an injunction with respect to Boudreaux only.

I.

A.

The LSBA is a mandatory bar association. Attorneys are required to join and pay fees to the organization as a condition of practicing law in the state.[1] Although the organization does not admit, license, or directly discipline lawyers in Louisiana, it still has a large regulatory and informational role. Among other things, it issues advisory opinions about the regulation of lawyers, offers continuing legal education ("CLE") programs, publishes the *Louisiana Bar Journal*, and promotes legal content through emails and social media. In everything, the LSBA's stated mission is "to regulate the practice of law" and "promote the welfare of the profession in the [s]tate."

Additionally, until July 2021, the LSBA engaged in a variety of political speech and advocacy. The House of Delegates (the LSBA's policymaking body) had a Legislation Committee, which adopted formal "policy positions" on proposed policies and pending bills in the state legislature. Though some of those bills implicated the legal profession, they primarily regulated the public at large. To name just a few, the LSBA took positions on anti-discrimination laws for LGBT individuals, compliance with a state equal pay act, a rewriting of the state's high school civics curriculum, a moratorium on

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[1] *See Articles of Incorporation*, LA. STATE BAR ASS'N (revised Dec. 14, 2021), https://www.lsba.org/documents/Executive/ArticlesIncorporation.pdf ("[N]o person shall practice law in this State unless he/she is an active member, in good standing, of this Association."); *see also* LA. STAT. ANN. § 37:213. The LSBA's Articles of Incorporation have been adopted as rules of the state supreme court. *Lewis v. La. State Bar Ass'n*, 792 F.2d 493, 495 (5th Cir. 1986).

executions in Louisiana pending certain criminal justice reforms, licensure of midwives, and concealed carry by school officials.

Boudreaux has been a member in good standing of the LSBA since 1996. Upset that he was forced to associate with and contribute to the aforementioned causes, Boudreaux sued the LSBA, the Louisiana Supreme Court, and its justices (collectively, "the LSBA") in 2019. He claimed that compulsory membership in the LSBA violated his rights to free speech and association.

The defendants moved to dismiss, and the district court granted the motion. The court found that Boudreaux's freedom of association claim was barred by Supreme Court precedent. It also found that any objection to the LSBA's mandatory fees was barred by the Tax Injunction Act, which prohibits challenges to state taxation based on federal law. And finally, the court found that Boudreaux lacked standing to bring a free speech claim because he had not actually objected to speech he disagreed with and had used the LSBA's available opt-out procedures. Boudreaux promptly appealed.

B.

The Fifth Circuit panel that heard Boudreaux's appeal also heard and decided *McDonald*. *McDonald* was a nearly identical challenge to the State Bar of Texas, which was also a mandatory bar association and also used compulsory member fees on a variety of controversial political advocacy. *McDonald*, 4 F.4th at 239. The plaintiffs brought freedom of speech and freedom of association claims, contending that they could not be compelled to fund speech that they did not support. They also averred that the state bar's "opt-out" procedures were constitutionally insufficient. *Id.* at 241, 252–53.

McDonald began by synthesizing a long line of prior caselaw. Around sixty years ago, a plurality of the Supreme Court stated that it did not violate

an individual's freedom of association for a bar association to charge mandatory fees to fund its core functions. *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961) (plurality). But later, in the context of public-sector unions, the Court held that unions could only require non-members to fund "germane" collective bargaining, not unrelated political advocacy. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235–36 (1977). Then, in *Keller*, the Court combined *Lathrop* and *Abood* to hold that a mandatory bar association did not violate the free speech rights of its members as long as the bar's speech was germane to (1) the regulation of lawyers or (2) the improvement of legal services in the state. 496 U.S. at 13–14.

The plaintiffs in *McDonald* suggested that lawyers could not be constitutionally required to join a bar association that engaged in *any* legislative activity. 4 F.4th at 247. That argument echoed the watershed *Janus* decision, which "overruled" *Abood* and held that members of a profession could not be required to fund a public-sector union at all or even to fund the union's generally applicable collective bargaining. *Janus*, 138 S. Ct. at 2459–60, 2486. But *McDonald* noted that *Janus* did not overrule *Keller sub silentio*, even if the latter case now rested on "moth-eaten foundations." *See* 4 F.4th at 243 n.14 (quotation omitted).

Bound by *Keller*, *McDonald* held that the constitutionality of mandatory bar associations still turned on "germaneness." *Id.* at 249; *see also id.* at 246, 252. If a bar association's only speech was germane, then a state could require lawyers to be paying members of a bar association. Conversely, if a bar association engaged in nongermane speech, then it failed heightened First Amendment scrutiny. *Id.* at 246, 252. Because the Texas Bar *did* engage in non-germane activity, its mandatory membership was subject to exacting scrutiny (which it necessarily failed). *Id.*

Finally, *McDonald* held that the procedures of the State Bar of Texas

for notifying members of its speech and giving them a chance to opt-out were constitutionally insufficient. *Id.* at 253. Those protective measures are also known as "*Hudson* procedures," named after *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986). *Hudson* arose after *Abood*, when unions were permitted to charge non-members fees for germane collective bargaining activity. *Id.* at 294. The Court thus held that unions were required to give non-members adequate explanation of how their money was being spent and an opportunity to get a refund if the union broke the rules. *Hudson*, 475 U.S. at 310. *Keller* suggested that a bar association could also satisfy its First Amendment obligations by "adopting the sort of procedures described in *Hudson*." *Keller*, 496 U.S. at 17.

But in *McDonald*, the Texas Bar's procedures "[did] not furnish Texas attorneys with meaningful notice regarding how their dues [would] be spent. Nor [did] it provide them with any breakdown of where their fees go." *McDonald*, 4 F.4th at 254. Therefore, the plaintiffs were entitled to relief on their free speech, free association, and inadequate notice claims.

C.

On the same day that we issued *McDonald*, we resolved Boudreaux's appeal. *Boudreaux v. La. State Bar Ass'n* (*Boudreaux I*), 3 F.4th 748 (5th Cir. 2021). Echoing *McDonald*, we made it clear that Boudreaux would have a valid free association claim if the LSBA engaged in non-germane speech. "Discovery may bear out that LSBA does not actually engage in any non-germane activity." *Id.* at 756. But we reversed and remanded for discovery on the nature of the LSBA's activities. *Id.* We also held that the Tax Injunction Act did not apply to professional fees, so the district court had jurisdiction over Boudreaux's speech claim. *Id.* at 758. And finally, we held that Boudreaux had standing to challenge opt-out procedures even if he had not used them—his alleged injury was the inability to adequately discover what

the LSBA was up to. *Id.* at 760. We ultimately remanded for the district court to follow *McDonald* and proceed to the merits.

D.

Just six days after *McDonald* and *Boudreaux I* were announced, the LSBA suspended its Legislation Committee and all of its legislative activities. The suspension was set to last from July 2021 until January 2022, when the House of Delegates was next slated to meet. In the meantime, the Louisiana Supreme Court adopted a new rule, codifying the germaneness requirement from *McDonald*. According to the new rule,

> [t]he LSBA shall limit its activities to those that are constitutionally germane to its purposes, and shall limit its legislative activities to issues involving practice and procedure, the judicial system, access to the courts, the compensation of judges or lawyers, or the legal profession, and to responding to any requests for information received from the legislature. Any legislative positions on issues within the scope of this rule shall be voted upon and approved in advance by the LSBA's Board of Governors and thereafter published to members of the LSBA.

LA. S. CT. R. XVIII, § 6.

Then, at the House of Delegates's January 2022 meeting, the LSBA (1) rescinded all its existing policy positions, (2) revised the LSBA's bylaws accordingly, and (3) suspended any activity "not within [the] scope" of Rule XVIII, § 6. And although LSBA previously paid for a lobbyist, its new budget allocated just $10,000 to monitor potential legislation that could be germane under *McDonald*. Indeed, Boudreaux concedes that since *McDonald*, "the LSBA has not engaged in legislative activity."

The LSBA's post-*McDonald* changes work in concert with the organization's preexisting notice and objection procedures. When the LSBA engages in speech, it notifies its members in a variety of ways. For one, it

publishes both prospective annual budgets and retrospective audited revenue reports. Members may always ask for more detail about expenditures by emailing the bar's treasurer. Any legislative positions are also emailed to members in so-called "Bar Briefs." Additional activities are regularly announced through email, Facebook, Twitter, and Instagram.

If an LSBA member objects to his funds being used to support a particular cause (legislative or otherwise), he has 45 days to notify the LSBA in writing. The *pro rata* amount of dues contributed to the activity in question is placed into escrow until the objection has been resolved.[2] The Board then reviews the objection and issues a refund within 60 days (or refers the matter to arbitration). The district court found that all timely objections have so far resulted in refunds. Nevertheless, Boudreaux has not used the formal objection procedures to protest any of the LSBA's activities since *McDonald*.

E.

Notwithstanding the LSBA's reforms, Boudreaux moved for a preliminary injunction in district court following *Boudreaux I*. The district court considered the motion as part of a bench trial on the merits. It ultimately entered judgment in favor of defendants, denying the motion for a preliminary injunction, and dismissing Boudreaux's complaint with prejudice.

The district court explained that it found most of Boudreaux's claims to be moot. Because the LSBA had ceased its legislative activity, disbanded the Legislation Committee, and limited future political speech to germane activity within the definition of *McDonald*, there was no live controversy between the parties—at least in regard to pre-*McDonald* speech. Similarly,

[2] For legislative activities, the *pro rata* amount is calculated as a percentage of *all* the LSBA's legislative activity, not just the particular position that the objecting member opposes.

any claims about future speech were speculative and unripe. The only justiciable disputes between the parties were the allegations that the LSBA had engaged in non-germane speech between *McDonald* and the trial.

Yet the district court still ruled against Boudreaux on the merits of his remaining First Amendment claims. Before trial, the parties stipulated to a list of the LSBA's speech that was in dispute. The district court went through those examples blow-by-blow, finding that the challenged speech was either germane under *McDonald* or not a "major activity" of the LSBA, and therefore not a constitutional violation. It also found that the LSBA's notice procedures were adequate.

Boudreaux appeals the judgment for the second time. "The standard of review for a bench trial is well established: findings of fact are reviewed for clear error and legal issues are reviewed de novo." *Lewis v. Ascension Par. Sch. Bd.*, 806 F.3d 344, 353 (5th Cir. 2015) (quotation omitted).

II.

A mandatory bar association can require lawyers in its jurisdiction to be members and pay dues to the bar only if its speech is "germane." *McDonald*, 4 F.4th at 245. Speech is "germane" to a bar association's purposes if it is "necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" *Keller*, 496 U.S. at 14 (quoting *Lathrop*, 367 U.S. at 843). If a bar's speech activities are germane, then there is no free association or free speech problem with compulsory membership. *McDonald*, 4 F.4th at 246. But if a bar engages in non-germane speech, then forced membership is subject to "exacting scrutiny," which it "fails." *Id.*[3]

[3] *McDonald*'s First Amendment analysis was identical for both the plaintiffs' freedom of association claim and their freedom of speech claim. *Compare* 4 F.4th at 245–46

That raises three questions for our review. *First*, what speech can we consider in this case? That is, which claims are justiciable after the LSBA's post-*McDonald* reforms? *Second*, is the LSBA's ongoing speech germane? And *third*, are the LSBA's notice and opt-out procedures constitutionally adequate? We will address each issue in turn.

A.

We begin, as we must, with justiciability. Article III limits our jurisdiction to "live" cases and controversies. *Freedom From Religion Found., Inc. v. Abbott*, 58 F.4th 824, 831 (5th Cir. 2023). A case is no longer live if "the parties lack a legally cognizable interest in the outcome,"[4] or it becomes "impossible for a court to grant any effectual relief whatever to the prevailing party."[5] If any set of circumstances eliminates the "actual controversy" during the duration of the lawsuit, the case becomes moot. *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 661 (5th Cir. 2006).

To determine whether Boudreaux's claims are moot, we proceed "claim-by-claim." *United States v. Vega*, 960 F.3d 669, 673 (5th Cir. 2020). The complaint lists three counts: a challenge to mandatory membership, a challenge to mandatory bar fees, and a challenge to the LSBA's notice and opt-out procedures. Yet, at no point in *McDonald* did the First Amendment analysis turn on the difference between membership and dues. *See* 4 F.4th at 246, 252, 255. Both *Lathrop* and *Keller* focused on compulsory dues, *see Keller*, 496 U.S. at 9 (citing *Lathrop*, 367 U.S. at 827–28), but *McDonald*

(freedom of association discussion), *with id.* at 252 (freedom of speech discussion). So too here. The speech and association claims rise and fall together.

[4] *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quotation omitted).

[5] *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012) (quotation omitted) (cleaned up).

applied those cases to the question of whether "lawyers may constitutionally be mandated to *join* a bar association." 4 F.4th at 244 (emphasis added). And in conclusion, *McDonald* made clear that compulsory bar membership and fees both implicate the First Amendment and both turn on "germaneness." *See id.* at 255.

Therefore, it is more helpful to distinguish among Boudreaux's specific post-*McDonald* contentions. *First*, he contends that his forced membership in the LSBA violates his First Amendment rights *even if* the LSBA engages only in germane speech. In effect, he asks us to go one step beyond *McDonald* and declare a *per se* ban on mandatory bar associations. *Second*, Boudreaux claims that the LSBA violates *McDonald* by engaging in non-germane speech. And *third*, he alleges that the LSBA's *Hudson* procedures are inadequate.

No one disputes that the first and third claims are justiciable. Louisiana still requires Boudreaux to be a member of the LSBA and pay dues, and the LSBA has not meaningfully changed its opt-out procedures since the case was filed. Those are "live" disputes. But the justiciability of Boudreaux's *McDonald* claim depends on the particular speech in question. Boudreaux targets three categories of LSBA speech: (1) its pre-*McDonald* activity, (2) its post-*McDonald* activity, and (3) any potential future activity. Only the second of those disputes is "live."

Boudreaux's claim that the LSBA's pre-*McDonald* activity violates the First Amendment is moot because the LSBA has ceased all the conduct that Boudreaux originally challenged. After *McDonald*, the LSBA terminated all legislative activity. It abolished its special political arm and consolidated all lobbying activity in its general governing board. And it incorporated Louisiana Supreme Court Rule XVIII, Section 6, into its bylaws, which prohibits the LSBA from engaging in any non-germane speech. In short, the LSBA's

official policy is that it will do no more than we declared was lawful in *McDonald*. Boudreaux even concedes that since *McDonald*, there have been no legislative activities of the kind he complained about before *McDonald*.

True, voluntary cessation does not normally moot a case. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). If a defendant willingly stops complained-of conduct, we can still adjudicate the dispute unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009) (quotation omitted), *aff'd*, 563 U.S. 277 (2011).

But where the defendant is a government actor, the presumption flips. We presume that state actors "act in good faith," *Freedom From Religion Found.*, 58 F.4th at 833, and that "formally announced changes to official governmental policy are not mere litigation posturing," *Sossamon*, 560 F.3d at 325. So, for example, when the state of New York amended a gun law that had been challenged on Second Amendment grounds, the Supreme Court dismissed the appeal as moot, even though the amendment might otherwise have been voluntary cessation. *See N.Y. State Rifle & Pistol Ass'n v. City of New York* (*NYSRPA*), 140 S. Ct. 1525, 1526 (2020) (per curiam).

Here, the LSBA—the state agency for regulating lawyers—changed its bylaws and procedures to accord with *McDonald*. That is the kind of formal change contemplated by *Sossamon*. "[N]othing in the record suggests that the Board will reimplement" its older, illegal policy positions. *Freedom From Religion Found.*, 58 F.4th at 833. To the contrary, the LSBA has avoided all non-germane legislative advocacy since *McDonald*.

Boudreaux points out that the LSBA has not renounced its prior political advocacy. But there is no requirement that a government actor renounce its prior conduct in order to moot a case. For example, in

NYSRPA, the State of New York did not renounce its prior limitations on concealed carry, but amended the law only to obviate the alleged injury. *See* 140 S. Ct. at 1526. That is effectively what the LSBA did here. To the extent Boudreaux wants the LSBA to stop its past conduct and follow *McDonald*, there is nothing we can do by court order that the LSBA has not done already. *See id.* Therefore, Boudreaux's pre-*McDonald* challenges to the LSBA's past conduct are nonjusticiable.

Boudreaux responds that the LSBA's past speech proves that there is always a risk of future non-germane speech. In effect, Boudreaux wants a prospective ruling barring the LSBA from any future non-germane conduct. Yet that is a textbook example of an unripe dispute. *See Nike*, 568 U.S. at 97. A plaintiff has no standing to seek prospective relief "merely on the basis of being 'once bitten.'" *Id.* at 98 (citing *Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983)). The possibility that the LSBA will engage in non-germane advocacy after *McDonald* is pure conjecture. If someday in the future the LSBA appears to violate Boudreaux's rights, he is more than welcome to bring a lawsuit. But until he is actively being aggrieved—or faces the imminent threat of illegal actions—his claim is not justiciable.

Nevertheless, Boudreaux still has his claims that the LSBA did speak and continues to speak in non-germane ways after *McDonald*. That is an ongoing dispute that we have the power to adjudicate. The district court rightly held that those claims were justiciable and considered them on the merits. We do the same.

B.

The LSBA violates Boudreaux's speech and association rights only if its speech is non-germane to the regulation of lawyers or the improvement of legal services. *McDonald*, 4 F.4th at 246.

1.

At the outset, Boudreaux contests that premise. He insists that his rights to free association and speech are harmed *even if* the LSBA only engages in germane speech. Recall that a state cannot compel non-union members to subsidize public-sector unions, even if the unions use those dues only on germane collective bargaining. *Janus*, 138 S. Ct. at 2459–60, 2464. Relying on that reasoning, Boudreaux effectively asks us to hold that mandatory bar associations violate the First Amendment, full stop.

But that contradicts *Keller*, which held that "[t]he State Bar may . . . constitutionally fund activities germane to [its] goals out of the mandatory dues of all members." *Keller*, 496 U.S. at 14. It also flies in the face of *McDonald*, where we held that "the plaintiffs *can* be compelled to join the Bar if it ceases its non-germane activities." *McDonald*, 4 F.4th at 253 n.41.

It is true that *Janus*, by overruling *Abood*, cast serious doubt on *Keller*'s premise that bar associations can require membership and fees to advocate for germane causes. At least two Justices are willing to reconsider "whether *Keller* is sound precedent" in light of *Janus*. *Jarchow v. State Bar of Wis.*, 140 S. Ct. 1720, 1721 (2020) (Thomas, J., dissenting from the denial of certiorari, joined by Gorsuch, J.). But as a lower court, we are bound by *Keller*. We are also bound to *McDonald* by this circuit's rule of orderliness.[6]

McDonald requires "exacting" First Amendment scrutiny of a mandatory bar association that engages in non-germane speech. 4 F.4th at 246, 252. But if a state bar engages only in germane speech, there is neither a free speech nor a free association violation. *See id.* at 246. We must therefore

[6] *United States v. Traxler*, 764 F.3d 486, 489 (5th Cir. 2014) ("It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our en banc court." (quotation omitted)).

decide whether the LSBA's challenged speech is germane.

2.

To be "germane," bar association speech must be reasonably related to the bar association's purposes of (1) regulating the legal profession or (2) improving the quality of legal services. *McDonald*, 4 F.4th at 244 (citing *Keller*, 496 U.S. at 13–14). Although the Supreme Court has not given precise guidance about what degree of relatedness is required, it has described a spectrum: Advocacy regarding gun control would be obviously non-germane, but activities related to lawyer discipline would be obviously germane. *Keller*, 496 U.S. at 16. Where the LSBA's activity falls on that spectrum depends on the particular speech at issue.

Before trial, Boudreaux stipulated to which activities of the LSBA he was challenging. Most of those were pre-*McDonald* legislative activities or policy positions, all of which the LSBA has ceased or rescinded. As described above, Boudreaux's challenges to that speech are moot. That leaves a very short list of activity that is allegedly illegal: seventeen tweets and emails that post-date the LSBA's July 2021 reforms. On appeal, he also contests the LSBA's remaining policy positions on law-related subjects. And finally, at oral argument, Boudreaux pointed out several messages that the LSBA released on its website related to LGBT "Pride Month." We consider each in turn.

i.

Boudreaux begins by suggesting that even after *McDonald*, the LSBA takes several "policy positions" on law-related policy proposals. For example, the LSBA takes positions on "taxation of legal services," and "access to justice" initiatives.

But Boudreaux forfeited any challenge to those policy positions. For

one thing, they are not included in his stipulated list of challenged activities. Nor, does it seem, were they raised at trial, even though Boudreaux had the opportunity to do so.[7] Even if we were to consider them, the LSBA's policy positions are directly related to the regulation of the legal profession and the provision of legal services. In *McDonald*, we held that lobbying about the "appointment of *pro bono* volunteers" and "the law governing lawyers" was germane. 4 F.4th at 248. The LSBA's extant legislative efforts are comparable and therefore lawful.

ii.

Next, Boudreaux challenges a group of "Wellness Wednesday" tweets relating to the health and wellbeing of lawyers. For example, the LSBA "tout[ed] the purported benefits of walnuts," "urg[ed] readers to . . . work out at least three times per week," and encouraged lawyers to get "sunlight."

Those statements fail the germaneness test from *McDonald* and *Keller* because they do not sufficiently relate to legal practice or the legal profession. Even assuming healthier lawyers are generally more effective lawyers, the LSBA is not an all-encompassing wellness service that may comment on every facet of lawyers' health and fitness. We generally give bar associations leeway in determining how best to improve legal services, as is appropriate given their expertise in regulating the legal profession. *See McDonald*, 4 F.4th at 249. But if bar associations may opine, advise, and inform on anything that they deem is generally conducive to attorney health and wellness, there is no limiting principle.

If a bar association may tout the health benefits of broccoli, may it also

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[7] *See Offshore Drilling Co. v. Gulf Copper & Mfg. Corp.*, 604 F.3d 221, 225 (5th Cir. 2010) ("Issues not raised in the district court . . . are not considered.").

advise attorneys to practice Vinyasa yoga, adhere to a particular workout regimen, or get married and have children, if it believes that those activities improved attorney wellness and therefore the quality of legal services in the state? How remote or indirect can the purported benefit to legal services be? The LSBA offers no clear answer, nor can we discern any principled line once we allow advice that is not inherently tied to the practice of law or the legal profession.

The germaneness standard therefore requires inherent connection to the practice of law and not mere connection to a personal matter that might impact a person who is practicing law. Promoting diversity efforts at law firms is germane, but opining on affirmative action is not. Raising awareness of the failure of firms to retain women is germane, but speech encouraging or discouraging abortion (or abortion insurance coverage for attorneys) is not. Similarly, advice about software designed for attorneys' use is germane, but recommending that all attorneys purchase new iPhones is not.

If a bar association provides advice, that advice must inherently relate to the legal profession or the practice of law. Advice is not germane just because, in the association's view, it improves "wellness" and therefore the practice of law indirectly. Although walnuts, exercise, and Vitamin D may be beneficial, they fall outside the LSBA's purview, at least when they are the basis of generic advice to attorneys about health and fitness.

Another set of tweets regarding technology and safety announcements are not germane for similar reasons. One tweet informed lawyers about an iPhone software update, as it would bring "new upgrades" to the Notes application. Those, too, are not inherently about the practice of law or the legal profession more generally. They therefore do not sufficiently relate to improving the practice of *law* in the state. *See id.* at 247.

iii.

Third, Boudreaux objects to tweets promoting community-engagement opportunities for lawyers. Specifically, the LSBA notified lawyers of the 69th Annual Red Mass at St. Louis Cathedral (a Catholic service celebrating all members of the legal profession, regardless of religious affiliation), and it informed members of holiday charity drives for Christmas and Halloween. The LSBA responds that it is important for lawyers in the state to participate in community events and *pro bono* work.[8] Those bring goodwill to the legal profession, which in turn improves the perception and practice of law in the state.

We agree with Boudreaux. We acknowledge that something "ideologically charged" may still be germane. *McDonald*, 4 F.4th at 249 n.28. Indeed, *McDonald* allowed the Texas Bar to host a "directory" that "merely provide[d] information for attorneys interested" in *pro bono* opportunities "to connect with related organizations." *Id.* at 251. But—critically—that directory centered on *legal* rather than *generic pro bono* and charitable opportunities and included activities such as supporting criminal defense, addressing improper attorney conduct, helping with tax issues, and making legal services accessible to low-income persons. *See id.* at 251 & n.34. Likewise, Louisiana's Code of Professionalism focuses on attorneys' "responsibility to the judicial system, the public, our colleagues, and the rule of law." *Code of Professionalism*, LA. STATE BAR ASS'N, *supra*.

With those examples in mind, we turn to the LSBA actions Boudreaux challenges. Generic Christmas and Halloween charity drives may be helpful

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[8] *See Code of Professionalism*, LA. STATE BAR ASS'N, https://www.lsba.org/Members/LegalLibrary.aspx (last visited July 27, 2023) (calling on lawyers to "work to protect and improve the image of the legal profession in the eyes of the public").

to the community, and they may even—in some diffuse sense—increase goodwill toward the legal profession. But unlike the *pro bono* provision of *legal* services, they are not sufficiently germane to the regulation of the legal profession or the improvement in quality of legal services. *See McDonald*, 4 F.4th at 250–51. If the LSBA wishes to engage in charitable activities and give back to the community, it should do so. But those efforts must be germane, and they generally are not germane unless they involve the LSBA's character as a legal organization rather than a generic organization or a collective of charity-minded individuals.

This analysis also exposes the inherent problem with the LSBA's defense of "goodwill," which suffers from the same line-drawing problem that its defense of "wellness" did. We generally defer to bar associations' policy decisions on how best to regulate the legal profession. *McDonald*, 4 F.4th at 249. But if anything that purportedly promoted "goodwill" were germane because it, in some attenuated fashion, improved the quality of legal services, there would be almost no limit to what bar associations could do in the name of goodwill, whether it be taking public stances on controversial issues to curry favor among certain segments of the electorate or advertising activities entirely unrelated to the law. The distinction is akin to the one between content and viewpoint: Today, we restrict content by requiring some direct relation to legal practice but leave it to the LSBA to determine how it should best operate within those constraints.

The same applies to advertisements of community events: Although they may increase goodwill abstractly, they are not inherently related to actual legal practice. The LSBA's charity drives and advertisement of the Red Mass were therefore not germane.

iv.

The LSBA's ventures into the realm of public policy and social issues

are also not germane. In August 2021, the LSBA shared a Reuters article with the caption: "An in-depth look at ways the [American Bar Association] . . . has focused on student loan debt over the past year, and the effects that debt has had on many young lawyers' life decisions."

Certainly, that article is specific to lawyers. The test from *McDonald*, however, is not about whether speech is "law-related," but whether it is related to "*regulating* the legal profession and *improving the quality* of legal services." *See* 4 F.4th at 250. That tweet falls short of that standard. It is not clear how merely reading the article would improve a lawyer's practice. The article just details the burden that debt can impose on a young lawyer and then highlights the Administration's and the American Bar Association's efforts to enact loan forgiveness.[9] If anything, the thrust of the article is backhanded support for student-debt relief, a nakedly political position.

The LSBA suggests that information about looming policy changes can itself be a benefit where lawyers care about the information or the information is relevant to their lives. And undoubtedly, young lawyers care about student debt.[10] But they also care about myriad things, including healthcare, family policy, social issues, criminal justice reform, even interest rates and financial news. Can the LSBA share news articles about those topics too? We are chary of any theory of germaneness that turns a mandatory bar

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[9] *See* Karen Sloan, *'Debt transformed my life': Lawyers weigh in on student loan reprieve*, REUTERS (Aug. 10, 2021), https://www.reuters.com/legal/government/debt-transformed-my-life-lawyers-weigh-student-loan-reprieve-2021-08-10/.

[10] A 2020 American Bar Association survey of law school graduates revealed that over 95% of students took out a loan to finance their J.D., and the average law school graduate had approximately $165,000 in total student loans. AM. BAR ASS'N, *2020 Law School Student Loan Debt: Survey Report* 7 (2020), https://www.americanbar.org/content/dam/aba/administrative/young_lawyers/2020-student-loan-survey.pdf.

association into a mandatory news mouthpiece. If a mandatory bar association can say or promote anything "of concern to lawyers," it is difficult to see any limit to what the LSBA could say or promote. That is to say: The germaneness test is not satisfied just because a particular personal matter might impact a person who is practicing law.

Instead, speech must be reasonably related to the regulation or improvement of legal practice. That generally means that speech engaging with, promoting, or encouraging participation in wider public policy and social controversies is rarely, if ever, germane. A tweet apprising lawyers of the difficulty of student loans and possible student-loan reform fails that standard.

v.

Finally, at oral argument, Boudreaux directed our attention to several documents published or promoted by the LSBA before and during June, which the federal government recognizes as "Pride Month."[11] We take judicial notice[12] of one of them: a link to a History.com article about gay rights, along with a large rainbow flag icon that read "LGBT Pride Month."[13]

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[11] Proclamation No. 10590, 88 Fed. Reg. 36447 (May 31, 2023).

[12] *Coleman v. Dretke*, 409 F.3d 665, 667 (5th Cir. 2005) (per curiam) (explaining that a Fifth Circuit panel can "tak[e] judicial notice of the state agency's own website"); *Funk v. Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011) (noting that courts may take judicial notice of matters of public record when ruling on a Federal Rule of Civil Procedure 12(b)(6) motion); *Dusterhoft v. City of Austin*, 2023 WL 6785842, at *2 n.6 (5th Cir. Oct. 13, 2023) (per curiam) (unpublished) (judicial notice of city's organizational chart) (citing *Funk*, 631 F.3d at 783). The LSBA does not dispute the existence of the Pride flag icon and link, but only their legal relevance.

[13] Boudreaux himself openly identifies as a gay man and claims that he does not disagree with the bar's messaging, but only that he is compelled to participate in it by dint of his forced membership.

Obviously, affirmative action programs and many LGBT causes are fraught with controversy. As we discussed in *McDonald*, what some consider to be inclusive language, attitudes, or hiring practices, others view as divisive or objectionable. *McDonald*, 4 F.4th at 249. Indeed, the Supreme Court just made clear that racial affirmative action—done in the name of "diversity"—was itself race-based discrimination and unconstitutional. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230–31 (2023). And many Americans still object to certain LGBT causes "based on decent and honorable religious or philosophical premises." *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015).

The *Keller/McDonald* test is not whether speech is *objectionable*, but whether it is *germane*. *McDonald*, 4 F.4th at 249. Speech germane to the regulation and improvement of legal services might be "highly objectionable, but it is unconstitutional only if it is unreasonably unrelated to the goals identified by *Keller* and *McDonald*. *Id.*

Thus, in *McDonald*, we held that the Texas Bar could engage in initiatives that sought to diversify the legal profession "for minority, women, and LGBT attorneys." *Id.* We stated that, "[d]espite the controversial and ideological nature of those diversity initiatives, they are germane to the purposes identified by *Keller*." *Id.* That was because the programs were tied to the diversity of *lawyers*, which in turn was tied to the quality of legal services. *Id.* at 249–50. Subjects such as health and abortion are personal matters, whereas diversity in an office has a more direct effect on workplace interactions, which are not so private.

The LSBA's pride flag icon, with its associated link, lacks the necessary hallmarks of germaneness. For starters, it is a general statement about "LGBT Pride Month" that offers neither advice nor opportunities, and it is not made specific to lawyers. Moreover, the article it links is a generic history

of gay rights in the United States, tinged with various normative claims about society.[14] Neither the article, the LSBA's icon promoting the article, nor the surrounding context draws a link between the interests of "LGBT causes" in society writ large and the improvement of legal practice in the state.

The LSBA tries to minimize the pride flag, saying that Pride Month is nationally recognized and related to diversity in the profession. But again, there is a difference between diversity in the profession and diversity in broader society, with which LSBA lawyers may be concerned. One is germane, the other not.

We addressed the same issue concerning the article on student loan debt. Just because lawyers are interested in a general social issue does not give a mandatory bar association blanket permission to promote content or speak about it. So too, the LSBA can promote inclusion of LGBT individuals in the legal profession—we held that Texas could do that, even if was controversial. *Id.* at 249–50. But the LSBA may not promote LGBT causes generally, with no connection to the legal profession.

* * * * *

In sum, the majority of speech Boudreaux objects to is germane. Speech can be germane even if it is "controversial and ideological." *Id.* at 249. But the LSBA crossed the line when it promoted purely informational articles absent any tailoring to the legal profession. That includes the LSBA's tweet about student-loan reform and its promotion of the History.com article through a pride flag icon. Advancing generic political and social messages in those ways violates the First Amendment rights of the LSBA's dissenting

[14] *See Pride Month 2023*, HIST. (May 8, 2023), https://www.history.com/topics/gay-rights/pride-month.

members.

3.

The LSBA responds that even if some of its speech was non-germane, it was *de minimis* and therefore lawful under *McDonald*. The district court agreed, finding that bar association speech does not create a First Amendment problem unless it is a "major activity."

But we decline to recognize a *de minimis* exception to the rule from *Keller* and *McDonald* for two reasons. *First*, our caselaw does not support it. *Keller* and *McDonald* categorically state that bar associations cannot engage in non-germane speech. *See McDonald*, 4 F.4th at 237; *cf. Keller*, 496 U.S. at 14. Although the plurality opinion in *Lathrop* ruled for the bar association in part because its challenged legislative activity was not "major," 367 U.S. at 839, neither *Keller* nor *McDonald* picked up on that stray adjective.[15] Instead, *Keller*'s and *McDonald*'s holdings center on the germaneness *vel non* of the bar association's speech. *See McDonald*, 4 F.4th at 237; *cf. Keller*, 496 U.S. at 14.

The LSBA points out that, even in *Keller* and *McDonald*, the bar associations openly engaged in major political advocacy. Yet, just because those decisions addressed major political speech by the respective bar associations does not mean their holdings are limited to cases where the bar's speech is "major." Indeed, in *McDonald* we held that "*some* of the [state bar's] legislative program [was] non-germane, so compelling the plaintiffs to join an

[15] *McDonald* does acknowledge that there was some question in *Lathrop* about whether all of the bar association's advocacy was germane. *See McDonald*, 4 F.4th at 248 n.23 (citing *Lathrop*, 367 U.S. at 836–37). But *Lathrop*'s ultimate rule, according to *McDonald*, is that "lawyers may constitutionally be mandated to join a bar association that *solely* regulates the legal profession and improves the quality of legal services." *Id.* at 244 (emphasis added).

association engaging in it violates their freedom of association." *Id.* at 249 (emphasis added). The same is true in this case.

Second, a *de minimis* standard is unworkable in the context of free speech. It would put judges in the position of deciding whether speech is objectionable *enough* to raise First Amendment problems.

The LSBA suggests that its speech is *de minimis* not because it is inoffensive, but because it is an insignificant proportion of the bar's overall speech (one tweet and one website posting over a multi-year period). Yet that rule is equally unwieldy. Judges would still have to decide the subjective point at which there is *enough* non-germane speech for the Constitution to kick in. Worse, it would give bar associations ominous freedom to characterize highly objectionable speech as "*de minimis*." Imagine, for example, that a bar association sends 1,000 anodyne tweets in a year but uses one tweet to support the repeal of all antidiscrimination laws. There is no doubt that some members would oppose their funds' being used for such a message, even if it was 0.1% of the organization's overall speech. Even minor amounts of speech—if forced on an unwilling speaker—are repugnant to the Constitution.

The LSBA protests that if every single tweet and email must be strictly "germane," then mandatory bar associations could not exist. The risk would be too great of making some statement that a court found insufficiently linked to the bar association's purposes. But that doomsday theory is unpersuasive. In effect, the LSBA asks us to say that even though the Constitution prohibits non-germane speech by mandatory bar associations, we should allow a *little* bit of non-germane speech because the wholesale eradication of mandatory bars is undesirable. Not so. *McDonald* lays down the constitutional rule, and bar associations must adapt accordingly. It is not an impossible burden for bar associations to speak only on topics germane to their purposes.

Eschewing a *de minimis* exception, we conclude that the LSBA was engaged in non-germane speech. "Compelled membership in a bar association that engages in non-germane activities . . . fails exacting scrutiny." *McDonald*, 4 F.4th at 246. "Although states have interests in allocating the expenses of regulating the legal profession and improving the quality of legal services to licensed attorneys, they do not have a compelling interest in having all licensed attorneys engage as a group in other, non-germane activeities." *Id.* The LSBA's mandatory membership and dues are therefore unconstitutional.

C.

Boudreaux also alleges that the LSBA's notice and opt-out mechanisms (i.e., its *Hudson* procedures) are insufficient. *Hudson* procedures are a "constitutional prerequisite to a state bar's collection of mandatory dues." *Boudreaux I*, 3 F.4th at 758. They are prophylactic "safeguards" designed to prevent the spread of non-germane activities. *Id.* at 759. At a minimum, a bar association must give members (1) adequate notice of the bar association's speech and activities, (2) a reasonably prompt opportunity to challenge the speech before an impartial decisionmaker, and (3) escrow for the amount reasonably in dispute while such challenges are pending. *See Hudson*, 475 U.S. at 310; *McDonald*, 4 F.4th at 253–54.

No one disputes that the second and third requirements of *Hudson* are met here. Members of the LSBA may object to a speech activity at any time, which causes the LSBA to put a *pro rata* share of that member's bar fee in escrow. And every timely objector has thus far received a refund. Instead, Boudreaux complains that he has inadequate notice of the bar's speech activities, the first and fundamental requirement of *Hudson*.

For starters, Boudreaux takes issue with the LSBA's proposed budget. He claims that he is unable to "identify" illicit "expenditures that . . . the

[LSBA] has improperly classified as germane." *Boudreaux I*, 3 F.4th at 760 (quotation omitted). He analogizes it to inquiry notice, because individual attorneys are responsible for investigating the bar's activities, noting objectionable speech, and protesting appropriately. He says that is what we found inadequate in *McDonald*. *See* 4 F.4th at 254.

But this case is readily distinguishable from *McDonald*. On the front end, the Texas Bar only gave members notice of how their money was being spent by publishing a generic budget with "itemize[d] expenditures" and giving members an opportunity to object at the budget meetings. *Id.* at 253. And on the back end, the Texas Bar gave "precious few worth-while options" to an attorney "to express his or her disapproval" of objectionable speech, as complaints could be "summarily overruled" in the "sole discretion of the Bar's Executive Director." *Id.* at 254.

On the first front, there are differences between the LSBA's budget and the Texas Bar's budget in *McDonald*. The LSBA also publishes an itemized prospective budget and gives members budget-level input. Yet based on its post-*McDonald* reforms, *no* expenditures in the budget are set aside for non-germane activities. Indeed, the LSBA cites *McDonald* on the cover sheet of its 2022–2023 budget to contextualize all its listed expenses. The LSBA also provides members with audited reports at the end of the year explaining how mandatory dues and other revenue were spent.

Admittedly, the LSBA's budget has mostly generic descriptions of expenditures. Things like "Lobbying" are listed under the heading "Governmental Relations" without any additional explanation (although, notably, the post-*McDonald* proposed budget cuts the governmental relations line items down to $0 in all categories). But in *Hudson*, the Court said that a union "need not provide nonmembers with an exhaustive and detailed list of all its expenditures," suggesting that "adequate disclosure" would "include the

major categories of expenses, as well as verification by an independent auditor." 475 U.S. at 307 n.18. A union was permitted to have a line item such as "payment [to] its affiliated state and national labor organizations," so long as there was a "showing that none of it was used to subsidize activities for which nonmembers may not be charged." *Id.* And here, the LSBA's generic budget categories are coupled with a disclaimer in the budget and the assurances in its bylaws that its speech activity will abide by *McDonald*'s germaneness rule.

Indeed, although *Hudson* applies with full force in the bar association context, *Boudreaux I*, 3 F.4th at 759, a prospective budget can only provide so much notice when a bar association can and must classify all of its speech activities as germane. Recall that *Hudson* was contrived after *Abood*, when unions were allowed to charge non-members for collective bargaining fees but not non-germane activity. *Hudson*, 475 U.S. at 294. Therefore, unions needed to differentiate between "chargeable" and "nonchargeable" expenses up front and explain the difference to non-members. *See McDonald*, 4 F.4th at 253–54. *McDonald* similarly prohibits mandatory bar associations from engaging in non-germane speech, but it does not create two classes of payers (members and non-members) and two classes of fees (chargeable and not). *No* member's dues can be used for non-germane activities without violating the First Amendment. *See id.* at 246.

And when it comes to non-legislative activities, a bar association cannot realistically predict in its budget what it will tweet or email about over the course of a year. It can promise to abide by *McDonald*, but the threat is back-end failures to comply with its own rules. In such cases, *Hudson* and *McDonald* require that bar associations give adequate notice of ongoing and developing speech activities. *See Boudreaux I*, 3 F.4th at 759.

On that front, the difference between *McDonald* and the instant case

is even more stark. In *McDonald*, the Bar failed to notify members of ongoing speech, and members had "precious few worth-while options to express his or her disapproval" to specific speech after the fact. *McDonald*, 4 F.4th at 254. But here, the LSBA gives members a summary of its legislative positions in emailed "Bar Briefs," updates members about its other activity through emails and the *Bar Journal*, and regularly updates members about its activities through social media. Indeed, all of the speech Boudreaux objects to was in widely disseminated communications or website postings. After extensive discovery, Boudreaux did not identify a single example of speech that he would have objected to but did not because of insufficient notice. What is more, both parties agree that the opt-out procedures here are meaningful, not illusory. Boudreaux merely chose not to use them.

Taking all of the LSBA's notice mechanisms together—its budget, its compliant bylaws, and its extensive public communications about its activities—a reasonable member of the LSBA would know about the speech activities of the bar. And the LSBA gives members a meaningful opportunity to object before an impartial decisionmaker and get a refund of their contribution to the objectionable speech. That satisfies *Hudson* and *McDonald*. To the extent Boudreaux is harmed in this case, it is not from a lack of notice. It is from the LSBA's decision to promote non-germane speech in the first place.[16]

III.

If a bar association is going to force individuals to associate with and

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[16] Although the LSBA's notice and objection procedures are constitutionally adequate, Boudreaux's decision not to use those procedures does not prevent him from bringing a § 1983 claim in federal court based on the violation of his First Amendment rights. Section 1983 includes no requirement that plaintiffs first exhaust state law remedies. *See Pakdel v. City and Cnty. of San Francisco*, 141 S. Ct. 2226, 2230 (2021).

pay for speech, that speech must be germane. Although judging germaneness is difficult, *see Janus*, 138 S. Ct. at 2481–82, we are bound to police the line that *Keller* and *McDonald* laid down. We have noted several instances of non-germane speech by the LSBA, including, *inter alia*, its promotion of the article about student loan policy and its icon and link celebrating Pride Month. Because the LSBA engages in non-germane speech, its mandatory membership policy violates Boudreaux's rights to free speech and free association. Additionally, Boudreaux is entitled to a limited preliminary injunction for the same reasons as were the plaintiffs in *McDonald*.[17]

We therefore AFFIRM the judgment in part and REVERSE in part. We REMAND to the district court for a determination of the proper remedy and for proceedings not inconsistent with this opinion, although we take no position on the proper injunctive or declaratory relief. We also RENDER a preliminary injunction preventing the LSBA from requiring Boudreaux to join or pay dues to the LSBA pending completion of the remedies phase.

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[17] Just like the *McDonald* plaintiffs, Boudreaux has succeeded on the merits and has suffered irreparable constitutional injury. *See McDonald*, 4 F.4th at 255. An injunction protecting his First Amendment rights is also in the public interest and supported by the balance of the equities. *Id.*

CALENDAR
STATE BAR OF MICHIGAN REPRESENTATIVE ASSEMBLY
Thursday, September 19, 2024
2:30 p.m. to 4:10 p.m.
(Detroit Marriott Troy / 200 W. Big Beaver Rd. / Troy, MI / 48084)

*Denotes Action Items

2:30 p.m. MEETING BEGINS

2:30 p.m. 1. Introductory Matters

A. Call to order by Chair Yolanda M. Bennett with Parliamentarian Hon. John M. Chmura
Ms. Yolanda M. Bennett, Chair, Representative Assembly
[Social Security Administration OHO, 1016 Boynton Dr., Lansing, MI 48917
email: yolanda.bennett426@gmail.com]

Hon. John M. Chmura, Parliamentarian
[37th District Court, 8300 Common Rd., # 104, Warren, MI 48093
phone: (586) 574-4925; email: jchmura@37thdistrictcourt.org]

B. Certification that a quorum is present by Assembly Clerk, Ms. Nicole A. Evans
[54B District Court, 101 Linden St., East Lansing, MI 48823
phone: (517) 336-8636; email: Nevans@54BDistrictCourt.com]

C. *Adoption of proposed calendar by Rules & Calendar Chair, Ms. Deborah K. Blair
[Wayne County Prosecutor's Office, 1441 Saint Antoine St. Fl. 11, Detroit, MI 48226
phone: (313) 224-8861; email: dblair@waynecounty.com]

D. *Approval of the April 20, 2024 Summary of Proceedings

2:30 p.m. 2. *Filling Vacancies
Mr. Phillip Louis Strom, Chair, Assembly Nominating & Awards Committee
[City of Grand Rapids, 300 Monroe Ave. NW, Unit 1, Grand Rapids, MI 49503
phone: (616) 456-4000; email: pstrom@grand-rapids.mi.us]

2:35 p.m. 3. Presentation of the Unsung Hero Award to Elizabeth A. Hohauser
Presenter:
Ms. Suzanne Hollyer
[Oakland County Friend of the Court, 230 Elizabeth Lake Rd., Pontiac, MI 48341
phone: (248) 858-0431; email: hollyers@oakgov.com]

2:45 p.m. 4. *Nomination and Election of Assembly Clerk

3:00 p.m. 5. Presentation on Michigan's Tribal Courts
Judge Melissa L. Pope, Chief Judge, Nottawaseppi Huron Band of the Potawatomi Tribal Court
[2221 1 ½ Mile Rd., Fulton, MI 49052; phone: (269) 704-8404]

3:35 p.m.	6.	Presentation on Michigan's Legal Deserts Presenters: Ms. Danielle Hirsch, Managing Director of the Court Consulting Division at the National Center for State Courts [National Center for State Courts, 300 Newport Ave., Williamsburg, VA 23185 phone: (303) 308-4318; email: dhirsch@ncsc.org] [Michigan Presenter To Be Determined]
4:05 p.m.	7.	Recognition of Assembly members completing their terms of service and Committee Chairs. Ms. Yolanda M. Bennett, Chair, Representative Assembly [Social Security Administration OHO, 1016 Boynton Dr., Lansing, MI 48917 email: yolanda.bennett426@gmail.com]
4:05 p.m.	8.	Swearing in of John W. Reiser, III as the 2024-2025 Chairperson of the Representative Assembly. John Reiser will be sworn in by Judge Melissa L. Pope.
4:10 p.m.	9.	Presentation of Recognition to the Immediate Past Assembly Chair.
4:15 p.m.	10.	Adjournment

SBM

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