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SOMETHING TO CROW ABOUT: *CROWE V. OREGON STATE BAR* AND THE CONSTITUTIONALITY OF INTEGRATED BAR ASSOCIATIONS

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I. INTRODUCTION

As reports of violent race-based crimes and emboldened white nationalist movements dominated national headlines, the Oregon State Bar ("the OSB") released a statement[1] in its April 2018 magazine, the *OSB Bulletin*, addressing these recent events.[2]

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1. *See* Vanessa Nordyke et al., *Statement on White Nationalism and the Normalization of Violence*, OR. STATE BAR, (Feb, 23, 2018), www.osbar.org/_docs/diversity/2018NonviolenceStatement.pdf [perma.cc/LAD6-9W9U] (speaking out against racism and white nationalism in response to the 2017 events in Charlottesville, noting that First Amendment Protections are not limitless). *See also* OSB, *Bulletin Information and Advertising Rates,* OR. STATE BAR, www.osbar.org/publications/bulletin/bulletin.html [perma.cc/4V49-Z3CS].

2. Sarah Rankin, *Officials: White nationalist rally linked to 3 deaths*, ASSOC.

Calling out the Unite the Right rally in Charlotte, North Carolina; racially-motivated attacks on a Portland, Oregon train; and other upticks in violence, the OSB statement condemned what its leaders saw as a rise in white nationalism and a normalization of violence in Oregon and across the United States:

> …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 . . . [W]e condemn the proliferation of speech that incites such violence.[3]

The February 2018 *OSB Bulletin* also included a joint statement by several Oregon Specialty Bar Associations condemning then-President Trump's actions.[4] In their *Bulletin* statement, the leaders of the Specialty Bar Associations stated that President Trump's statements "catered to this white nationalist movement, allowing it to make up the base of his support and providing it a false sense of legitimacy."[5]

Even within a profession that is politically more liberal than the population at large, the OSB's statements raised concerns among some of its members.[6] Daniel Crowe, a member of the OSB, along with several other OSB members, questioned whether the

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PRESS NEWS (Aug. 13, 2017), www.apnews.com/article/charlottesville-a-year-later-north-america-us-news-ap-top-news-virginia-b8560c3ebaac4deb9043bb695f2eb1db [perma.cc/68VQ-YEMF] (discussing the August 13, 2017 Unite the Right Rally and counterprotests); Adeel Hassan, *White Supremacist Guilty of Killing 2 Who Came to Aid of Black Teens*, N.Y. TIMES (Feb. 21, 2020), www.nytimes.com/2020/02/21/us/white-supremacist-guilty-of-killing-2-who-came-to-aid-of-black-teens.html [perma.cc/M2QK-XTVU] (discussing a May 26, 2017 stabbing of two passengers on a Portland, Oregon commuter train by a self-described white nationalist named Jeremy Joseph Christian).

3. Nordyke et al., *supra* note 1.

4. Derily Bechthold et al., *Joint Statement of the Oregon Specialty Bar Associations Supporting the Oregon State Bar's Statement on White Nationalism and the Normalization of Violence*, OR. STATE BAR, www.osbar.org/_docs/resources/SpecialtyBarStatementAgainstWhiteNationalism.pdf [perma.cc/H3QN-7SPJ] (last visited Nov. 23, 2022).

5. *Id*. (stating that the statement was signed by leaders of the Oregon Asian Pacific American Bar Association, the Oregon Women Lawyers, the Oregon Filipino American Lawyers Association, 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).

6. Debra Cassens Weiss, *Lawyers are more liberal than general population, study finds; what about judges?,* ABA J. (Feb. 2, 2015), www.abajournal.com/news/article/lawyers_are_more_liberal_than_general_population_study_finds_what_about_jud [perma.cc/3GLG-KX4L]; *see also* Christina Pazzanese, *Gauging the Bias of Lawyers*, HARV. GAZETTE (Aug. 10, 2017), www.news.harvard.edu/gazette/story/2017/08/analyst-gauges-the-political-bias-of-lawyers/ [perma.cc/2TDX-M6UD] (explaining that the legal profession was historically conservative up until "the 1960s and 1970s with a push toward more engagement with Civil Rights issues and the use of the law in more progressive and Civil-Rights-oriented ways.").

OSB's statements in the April 2018 *OSB Bulletin* were germane to the practice of law.[7] They also questioned whether Oregon attorneys should be forced to be part of the OSB as a prerequisite to practice law at all.[8] Ultimately, Mr. Crowe's complaint raised constitutional questions about how and when the government can regulate the requirements to practice law.[9] These questions hold great significance not only for lawyers, but also for members of any profession that requires licensing, membership in a labor union, or participation in a professional organization.[10]

This case note will discuss the Ninth Circuit Court's analysis of the First Amendment freedom of association and freedom of speech claims raised in *Crowe v. Oregon State Bar*.[11] Part II will begin by discussing the constitutional basis for Mr. Crowe's claims and analyzing how the Supreme Court has previously addressed the constitutionality of compulsory memberships in other organizations, such as labor unions. Part III will then analyze the Ninth Circuit Court's reasoning and decision on Mr. Crowe's First Amendment claims, discussing both the majority and the dissenting opinions of *Crowe*. Next, Part IV will discuss whether the Ninth Circuit Court applied the correct legal standards in analyzing the constitutionality of integrated bar associations. Part V of this note will conclude by analyzing how future courts might rule on similar freedom of association and freedom of speech claims, and how these subsequent court decisions might shape the future of the legal profession at large. Ultimately, this case note will argue that compulsory memberships in integrated bar associations (such as the OSB) are a violation of the First Amendment rights of their members.

II. BACKGROUND

This section will begin by discussing the underlying

7. E-mail from Daniel Z. Crowe, Att'y & Or. State Bar Ass'n Member, to Or. State Bar Ass'n (Apr. 12, 2018, 4:35 PM) (on file with the Oregon State Bar Meeting of the Board of Governors Open Session Minutes) [hereinafter *E-mail from Daniel Z. Crowe*] (questioning whether the OSB's statements in the *OSB Bulletin* were appropriate, considering the organization is an integrated one). Though he takes no position on the merits of the opinions expressed, Mr. Crowe's email states, "I am certain that the rhetoric espoused falls far outside of the OSB's lane and absolutely does not reflect the opinions of at least one member of the Bar Association to which I must pay dues as a condition of being able to fight for my indigent clients and for which the signatories have taken the liberty of speaking." *Id.*

8. *Id.*

9. Complaint at 2, Gruber v. Or. State Bar, No. 3:18-cv-1591-JR (D. Or. May, 24, 2019), *aff'd in part, rev'd in part sub nom.* Crowe v. Or. State Bar, 989 F.3d 714 (9th Cir. 2021).

10. Bradley A. Smith, *The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession*, 22 FLA. ST. U.L. REV. 35, 36 (1994).

11. Crowe v. Or. State Bar, 989 F.3d 714, 723 (9th Cir. 2021).

constitutional questions at issue in *Crowe,* which include the freedom of speech and the freedom of association. Next, it will evaluate how courts have addressed compelled associations with other organizations, such as labor unions. It will then evaluate other court cases involving challenges to membership in integrated bar organizations. This section will conclude by explaining the facts and procedural history of *Crowe.*

A. The Court's Freedom of Speech and Association Jurisprudence

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[12] Courts have consistently held that paying money to an organization is a form of speech entitled to protection under the First Amendment.[13] In addition to protecting an affirmative right to speak, the First Amendment also protects one's right to refrain from speaking.[14] Likewise, the Supreme Court has previously held that making a right contingent on speaking and/or refraining from speech is a violation of one's First Amendment right to freedom of speech.[15]

The First Amendment also protects the right to freely associate.[16] Freedom of association has been interpreted by courts to include both the choice "to enter into and maintain" relationships, as well as the choice to join or refrain from joining organizations for

12. U.S. CONST. amend. I.

13. *See* United States v. United Foods, Inc., 533 U.S. 405, 410 (2001) (holding that the money used to fund an advertising campaign was a form of speech entitled to First Amendment protections); *see also* Knox v. Serv. Employees Int'l Union, 567 U.S. 298, 309 (2012) (holding that the spending of labor union dues was a form of politically protected speech); Citizens United v. Fed. Elections Comm'n*,* 558 U.S. 310, 360 (2010) (holding that spending money on political advertisements is a form of speech entitled to First Amendment protections).

14. *See* W. Va. Bd. Of Ed. V. Barnette, 319 U.S. 624, 641 (1943) (holding that compelling public-school students to recite the Pledge of Allegiance was a form of compelled speech, and thus was a violation of their First Amendment rights); *see also* NAACP v. Ala. Ex rel. Patterson, 357 U.S. 449, 460 (1958) (holding that compelling an advocacy organization to release a list of its members was a violation of the First Amendment).

15. *See* Ark. Times LP v. Waldrip, 988 F.3d 453, 461 (8th Cir. 2021) (holding that, "under the unconstitutional conditions doctrine, the Government may not deny a benefit to a person on the basis that infringes his constitutionally protected freedom of speech even if he has no entitlement to that benefit. The doctrine recognizes that constitutional violations may arise from the deterrent, or chilling, effect of governmental efforts that fall short of a direct prohibition against the exercise of First Amendment rights.").

16. Jacoby & Meyers, LLP v. Presiding Justs. Of the First, Second, Third & Fourth Dep'ts., 852 F.3d 178, 185 (2d Cir. 2017) (holding that "the right to associate freely is not mentioned in the text of the First Amendment, but has been derived over time as implicit in and supportive of the rights defined in that amendment.").

the purpose of engaging in protected First Amendment activities.[17] Just as there is a First Amendment right to associate, there is also a First Amendment right to refrain from associating.[18] In analyzing the constitutionality of compelled associations (such as membership in professional organizations and labor unions), courts often consider to what degree the speech and activities of the organization is traceable to its individual members.[19] In general, the more the organization's speech can be linked to its individual members, the more likely a court is to find that compelled membership is a violation of the constitutional rights of the organization's members.[20]

First Amendment freedom of speech and freedom of association rights have been incorporated against the states through the Fourteenth Amendment's Due Process Clause.[21] These protections apply to state actions as well as to federal actions.[22] Protections may also apply to the actions of private organizations under the state action doctrine (for example, if the private organization performs a regulatory function that has traditionally been left to the government to perform).[23]

B. Compulsory Memberships in Labor Unions and Other Professional Organizations

Previous court decisions on compelled association in other organizations, such as labor unions, provide the foundation for the

17. *See* Commonwealth v. McGhee, 35 N.E.3d 329, 418 (Mass. 2015) (holding "freedom of association encompasses a right to enter into and maintain certain human relationships, and a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."); *see also* NAACP v. Ala., 357 US 449, 461 (1958) (holding that the right to freely associate with an organization is an "indispensable right. . ."); *see also Jacoby & Meyers, LLP*, 852 F.3d at 187 (holding " . . . the so-called 'freedom of association' protected by the First Amendment has been generally understood to encompass two quite different types of associational activity: 'choices to enter into and maintain certain intimate relationships,' and 'association for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.").

18. Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

19. Rust v. Sullivan, 500 U.S. 173, 177 (1991).

20. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980).

21. U.S. CONST. amend. XIV; *see also* Gitlow v. N.Y., 268 U.S. 652, 666 (1925) (applying the First Amendment to the states via the Fourteenth Amendment Due Process Clause).

22. *Incorporation*, BLACK'S LAW DICTIONARY (4th ed. 2011) (defining incorporation as "the process of applying the provisions of the Bill of Rights to the states by interpreting the 14th Amendment's Due Process Clause as encompassing these provisions.").

23. Matthew P. Hooker, *Censorship, Free Speech & Facebook: Applying the First Amendment to Social Media Platforms via the Public Function Exception*, 15 WASH. J.L. TECH. & ARTS 36, 38-39 (2019).

Ninth Circuit's constitutional analysis of integrated bar associations in *Crowe*. Though labor unions and integrated bar associations differ in many ways, courts have compared the two because both require membership for workers to perform a certain job.[24] For example, just as some states require membership in an integrated state bar association to practice law, some professions require that workers belong to a labor union to hold certain jobs.[25] Moreover, these organizations are similar because both are primarily funded through dues paid by their members.[26]

For better or worse, many subsequent court decisions that discuss the constitutionality of compulsory bar association memberships rely on the Supreme Court's analysis of compulsory membership in labor unions as the basis for their conclusions.[27] Notably, the Court initially upheld the constitutionality of compelled associations for labor unions engaged in non-political activities. In *Abood v. Detroit Board of Education* (1977), the Court analyzed the constitutionality of a Michigan statute that required every employee represented by a labor union to pay dues to the union as a condition of their employment, even if the represented employee was not a member of the union.[28] Opponents of the law argued that compelling nonunion-member employees to pay union dues violated the nonunion-member employees' First Amendment right to freedom of association and freedom of speech by forcing them to support an organization with which they disagreed.[29] Specifically, the plaintiffs objected to the labor union's involvement in political causes that were unrelated to collective bargaining

24. James C. Thomas, *Right-to-Work: Settled Law or Unfinished Journey*, 8 LOY. J. PUBL. INT. L. 163, 208-09 (2007).

25. *Id.* (stating that ". . . persons not wishing to subject themselves to the Bar Associations' membership and dues requirements have the freedom to enter another profession. With respect to taking a job with or without a labor union, workers are no different and have the same freedom as the potential . . . attorney.").

26. *Id.*

27. *See, e.g.*, Romero v. Colegio de Abogados de P.R., 204 F.3d 291, 296-7 (1st Cir. 2000) (holding that "[i]t is well settled that conditioning the practice of law on membership in a state bar association does not itself violate the First Amendment . . . a state's interest in 'regulating the legal profession and improving the quality of legal services' similarly justifies compelled membership in an integrated bar.") (quoting *Keller*, 496 U.S. at 13); *see also* Kingstad v. State Bar of Wis., 622 F.3d 708, 713 (7th Cir. 2010) (holding that "'[m]andatory or 'unified' bars, under which dues-paying membership is required as a condition to practice law in a state, are also permitted . . ."); Kaimowitz v. Fla. Bar, 996 F.2d 1151, 1154 (11th Cir. 1993) (holding "the *Lathrop* decision controls Plaintiff's claim regarding compulsory bar membership" and that integrated bar associations are thus not unconstitutional."); Lathrop v. Donohue, 367 U.S. 820, 849 (1961) (holding that this case "lays to rest all doubt that a State may Constitutionally condition the right to practice law upon membership in an integrated bar association…").

28. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 211 (1977).

29. *Id.* at 213.

activities.[30]

The Court rejected the plaintiffs' argument and held that Michigan's law was constitutional.[31] In reaching this decision, the Court emphasized that the compulsory union dues were acceptable because the dues paid by the nonunion-member employees were used only for funding collective bargaining, contract administration, and grievance adjustment activities, none of which were political in nature.[32] By allowing labor unions to collect fees from nonmember employees for germane, non-political activities, the Court emphasized the strong interest that labor unions had in preventing "free riders," or employees who receive the benefits of union representation and collective bargaining without sharing in the costs.[33] *Abood* reflects the high amount of deference the Court has given to labor unions in order to protect workers, promote fairness, and prevent "free riders."[34]

However, in *Chicago Teachers Union, Local No. 1 v. Hudson* (1986), the Court found that a labor union's collection of fees from nonmember employees could violate the First Amendment under certain circumstances.[35] In this case, the plaintiffs objected to paying fees to the labor union of which they were not members.[36] In particular, the plaintiffs argued that the fees they paid to the union were being used to fund political activities unrelated to collective bargaining efforts.[37]

Unlike *Abood*, the *Hudson* Court found for the plaintiffs and held that labor unions must have procedural safeguards in place for preventing First Amendment violations.[38] These procedural

30. *Id.* at 214 (stating that the plaintiff's objection to the fact the Union engaged "in a number and variety of activities and programs which are economic, political, professional, scientific, and religious in nature of which Plaintiffs do not approve, and in which they will have no voice, and which are not and will not be collective bargaining activities…").

31. *Id.* at 242. *See also* MICH. COMP. LAWS §423.210(1)(c) (1970) (providing the relevant law, which is still in place today.).

32. *Id.* at 225.

33. NLRB v. GMC, 373 U.S. 734, 742 (1963) (holding that a union's adoption of an agency shop did not constitute an unfair labor practice).

34. Ry. Emp. Dept. v. Hanson, 351 U.S. 225, 238 (1956) (holding that union dues required of railway employees were not unconstitutional violations of free speech because the fees were used only to fund germane collective bargaining activities); *see also* Int'l Ass'n of Machinists v. St., 367 U.S. 740, 774 (1961) (holding that that a labor union may compel contributions from dissenting nonunion members, provided that the dues these individuals pay are only used for performing their duties as a collective bargaining agent).

35. Chi. Tchrs. Union, Loc. No. 1 v. Hudson, 475 U.S. 292, 299 (1986) (stating that plaintiffs objected to the procedures used by the Union to calculate the amount non-members owed in dues.).

36. *Id.* at 297.

37. *Id.* at n. 4.

38. *Id.* at 302; *see also* Daniel Christian, *Janus v. AFSCME: The Canary in the Coalmine of Judicial Evolution*, 83 ALB. L. REV. 631, n.36 (2019) (discussing the sufficiency of procedural safeguards and their impact on the

safeguards can include providing employees with sufficient information to understand how their dues are being used, establishing a clear process for objecting to and challenging how dues are used, and putting contested dues in escrow until the dispute is resolved.[39] In this decision, the *Hudson* Court discussed the importance of such procedural safeguards by stressing that while there was a strong government interest in "labor peace," there was also a compelling need to protect nonunion-member employees' constitutional rights to freedom of speech and freedom of association.[40]

In *Hudson*, the procedural safeguards offered by the labor union were insufficient because they failed to (1) minimize the risk that nonmember employees' financial contributions to the union would be used for impermissible political purposes; (2) provide members with adequate information about how their dues were calculated; and (3) provide a prompt, impartial review of complaints.[41] However, even though the *Hudson* Court held that the labor union's collection of dues from nonmember employees was unconstitutional under the specific circumstances of this case, they emphasized that labor unions were not precluded from collecting fees from members, requiring people to join, or collecting fees from nonmember employees.[42] Additionally, they noted that *Abood* was still valid law.[43]

While *Abood* and *Hudson* both upheld the overall constitutionality of compulsory dues paid to labor unions, the Court dealt a significant blow to the power of labor unions in *Janus v. AFSCMEC*.[44] In this case, the Court reconsidered whether mandatory association within labor unions violated an employee's First Amendment rights.[45] This case involved a similar law to those in *Abood* and *Hudson*, wherein public employees were required to subsidize a labor union's collective bargaining activities, even if they chose not to be members of the union.[46]

The *Janus* Court found for the plaintiffs, holding that requiring nonunion-member employees to support the activities of a union, even non-political activities, violated an employee's First Amendment rights to free speech and free association.[47] The *Janus*

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constitutionality of compelled associations).

39. Kenneth W. Hartman, *Must Agency Shop Fee Challengers Exhaust Union-Provided Arbitration Procedures Before Bringing a Claim in Federal Court? The United States Supreme Court Clarifies Hudson in Air Line Pilots Ass'n v. Miller*, 32 CREIGHTON L. REV. 1845, 1854 (1999).

40. *Hudson*, 475 U.S. at 302-03.

41. *Id.* at 293.

42. *Id.*

43. *Id.* at 301.

44. Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2460 (2018).

45. *Id.* at 2460.

46. *Id.*

47. *Id.*

Court specifically rejected and overturned *Abood*, calling the decision "poorly reasoned" and arguing that it was inconsistent with other First Amendment cases.[48] Applying a standard of "exacting" scrutiny, the Court found that the mandatory union dues paid by nonmember employees did not serve a compelling state interest.[49] "Exacting" scrutiny requires that a policy must "serve a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'"[50] With *Janus* now the law of the land, labor unions and their members must grapple with the fact that nonmembers can reap the benefits of collective bargaining efforts, without being required to share in the associated costs.[51]

Courts have also evaluated memberships in other professional associations, such as medical associations, and have generally held that it is up to the individual organizations to set their own membership rules and policies about membership dues.[52] Though many professions have active professional organizations (such as the American Medical Association, the American Dental Association, the Association of International Certified Professional Accountants, etc.), membership in these groups is completely voluntary, in contrast to integrated bar associations.[53] Compulsory state bar associations are unique, as there are no other professions that condition one's ability to practice on membership in an organization.[54]

48. *Id.*

49. *Id.* at 2465.

50. *Knox*, 567 U.S. at 310. *See also* R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 UMKC L. REV. 207, 207 (2016) (discussing how exacting scrutiny serves as a standard between strict scrutiny, which requires that the policy serve a compelling state interest and that the policy is necessary to achieving that interest, and intermediate scrutiny, which requires that a policy be substantially related to an important government interest). It also states that while exacting scrutiny is meant to give greater flexibility to courts, this standard has also been criticized for its unpredictability. *Id.*

51. David D. Schudroff & Megann K. McManus, *The Practical Implications of Janus v. AFSCME Council 31*, ABA: BUS. L. TODAY (Sept. 28, 2018), www.americanbar.org/groups/business_law/publications/blt/2018/09/02_mcmanus/ [perma.cc/PUW6-HNJK] (discussing how the Court's decision in *Janus* may affect the strength of labor unions in the future).

52. Med. Soc. Of Mobile Cnty. v. Walker, 245 Ala. 135, 137 (1944) (holding that membership in a state medical association cannot be required as a condition to practice medicine).

53. Smith, *supra* note 10, at 36 (discussing how integrated bar associations are unique in the professional realm, as no other profession has the equivalent of integrated bar associations).

54. *Id.*

C. The Court's First Amendment Analysis of Compulsory Memberships in Integrated Bar Associations

With hundreds of thousands of members nationwide, bar associations are groups of attorneys that aim to help individual lawyers advance and improve the legal profession, and to serve the public at large.[55] In addition to the national American Bar Association (ABA), every state also has its own bar association.[56] Many states and localities also have specialty bar associations, which are voluntary organizations that concentrate their activities on one major segment of law, a special interest, or a particular group of lawyers, such as women or racial minorities.[57] While bar associations are not political organizations *per se*, they often do engage in political activities, such as lobbying, on a limited basis.[58]

For the purposes of analyzing the underlying constitutional issues raised by *Crowe,* bar associations can be divided into two categories: (1) integrated associations; and (2) non-integrated associations.[59] An integrated bar association is an association to which all practicing attorneys within a jurisdiction must be a member of in order to practice law.[60] By contrast, participation in non-integrated bar associations is voluntary—attorneys in states with non-integrated bar associations do not need to belong to the association in order to practice law.[61] Early proponents of integrated bar associations saw them as a way to increase the financial resources of bar associations, attract a more diverse membership, and allow for better governance of the legal profession, rather than having the bar be governed by a small clique of lawyers.[62] Currently, thirty states, including Oregon, have integrated bar associations.[63]

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55. Quintin Johnstone, *Bar Associations: Policies and Performance*, 15 YALE L. & POL'Y REV. 193, 196 (1996) (stating that bar associations help individual lawyers by providing them with the opportunity to "improve their professional skills and knowledge, to develop useful professional contacts, to expand their client base, and to increase their income."). The article states that bar associations "benefit the legal profession generally by helping to maintain a competent, respected, and ethically responsible body of lawyers and by protecting the profession from unqualified legal service competition." *Id.*

56. *Id.*

57. Quintin Johnstone, *An Overview of the Legal Profession in the United States, How that Profession Recently has been Changing, and its Future Prospects*, 26 QUINNIPIAC L. REV. 737, 782 (2008) (discussing the purpose and growth of specialty bar associations).

58. Johnstone, *supra* note 55, at 204.

59. Smith, *supra* note 10, at 38.

60. *Integrated Bar Associations*, BALLENTINE'S LAW DICTIONARY (3d ed. 2010).

61. *Id.*

62. Smith, *supra* note 10, at 38.

63. Brief for Pacific Legal Found. et al. as Amici Curiae Supporting Petitioners at 10, Crowe v. Oregon State Bar, 989 F.3d 714 (9th Cir. 2021) (No.

While the stated goals of bar associations are admirable, these organizations are not without criticism.[64] Just how workers have challenged labor unions' use of their membership dues for nongermane political action, so too have lawyers challenged compelled memberships and fees in integrated bar associations.[65] The plaintiffs in *Crowe* were not the first lawyers to raise this constitutional challenge to compulsory bar association memberships.[66] For example, members of integrated bar associations have raised concerns not only over how their membership fees are used by bar associations, but also whether being forced to join a bar association in the first place is a violation of their constitutional rights to freely associate.[67]

The Court addressed the constitutionality of integrated bar associations in its decision in *Lathrop v. Donohue* (1961).[68] In *Lathrop*, members of the Wisconsin State Bar Association (an integrated bar association), claimed that a state law requiring them to pay membership fees to the association violated their rights to freedom of speech and freedom of association.[69] In their complaint, the plaintiffs specifically objected to the bar association's political and lobbying activities.[70]

The *Lathrop* Court held that the state law requiring that all attorneys belong to the state bar association did not violate the plaintiff's right to free association because the bar's activities were

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20-1678) (stating that twenty states, including Ark., Cal., Colo., Conn., Del., Ill., Ind., Iowa, Kan., Me., Md., Mass., Minn., Neb., N.J., N.Y., Ohio, Pa., Tenn., and Vt. do not have integrated bar associations; in these states, membership in the bar association is voluntary). Attorneys may choose not to join the bar association without any effect on their ability to practice law. *Id.*

64. Smith, *supra* note 10, at 41 (discussing how, post-*Keller*, 48% of members of the State Bar of Michigan exercised their right to deduct dues paid to the State Bar for political activities); *see also* Johnstone, *supra* note 55, at 205 (stating "efforts to comply with *Keller* by many of the unified bar associations have caused confusion, expense, and increased dissatisfaction with the unified format. In sum, the major comprehensive bar associations, whether unified or not, are not organized in a way that maximizes their efficiency or efficacy.").

65. James B. Lake, *Lawyers, Please Check Your First Amendment Rights at the Bar: The Problem of State-Mandated Bar Dues and Compelled Speech*, 50 WASH & LEE L. REV. 1833, 1834 (1993) (discussing previous legal challenges to integrated bar associations).

66. Keller v. State Bar of Cal., 496 U.S. 1, 4 (1990); *see also* Lake, *supra* note 65, at 1857 (discussing whether the speech and political activities of a bar association are traceable to its individual members).

67. Lake, *supra* note 65, at 1857.

68. *Lathrop*, 367 U.S. at 821 (upholding the constitutionality of a state's integrated bar association).

69. *Id.*

70. *Id.* at 822 (alleging that their state's integrated bar association promoted "law reform" and "makes and opposed proposals for changes in . . . laws and constitutional provisions and argues to legislative bodies and their committees and to the lawyers and to the people with respect to the adoption of changes in . . . codes, laws and constitutional provisions.").

not largely political in nature.[71] Instead, the bar association's activities focused primarily on initiatives that were germane to the legal profession, such as the post-graduate education of its members and improving the quality of legal services.[72] Because the state had a legitimate interest in regulating the legal profession and improving the quality of legal services, the state had a right to require attorneys to share in the costs of these activities.[73] The Court also rejected the plaintiff's freedom of speech claim, holding that the plaintiff had not provided enough supporting facts.[74]

The Court's decision in *Keller v. State Bar of California* (1990) also provides important guidance for the Ninth Circuit's analysis in *Crowe*.[75] *Keller* involved a challenge to the State Bar of California's mandatory dues.[76] In this case, the plaintiffs, who were members of this integrated bar association, claimed that the membership dues they were required to pay to practice law were being used to finance political and ideological activities to which the plaintiffs were opposed.[77] The plaintiffs argued that this use of membership dues violated First Amendment rights to freedom of speech and freedom of association.[78]

In its decision, the *Keller* Court held that while attorneys could be compelled to belong to their state's integrated bar association in order to practice law, their mandatory dues could only be used for activities related to regulating the legal profession and improving the quality of legal services; engaging in political activities would violate the members' First Amendment rights to freedom of speech.[79] Interestingly, the Court analogized integrated bar associations to labor unions.[80] The Court held that in order to avoid violating the First Amendment rights of their members, integrated bar associations are required to implement procedural safeguards like those established in *Hudson*.[81] This included a means for

71. *Id.*
72. *Id.* at 832.
73. *Id.* at 843.
74. *Id.* at 846.
75. *Keller*, 496 U.S. at 4.
76. *Id.*
77. *Id.* (discussing how the plaintiffs complained about several specific political actions the State Bar had taken, including the association's lobbying activities regarding gun control, immigration, and criminal justice reform; filing amicus curiae briefs in politically charged court cases; and adopting resolutions endorsing certain political views and candidates).
78. *Id.* at n. 2.
79. *Id.* at 13.
80. *Id.* at 12 (analogizing that "[j]ust as it is appropriate that employees who receive the benefit of union negotiation with their employer pay their fair share of the cost of that process by paying agency-shop dues, it is entirely appropriate that lawyers who derive benefit from the status of being admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort.").
81. *Id.* at 17.

members to file a complaint, an independent review process for evaluating members' complaints, and a system for keeping funds in escrow while the complaint is reviewed.[82] The *Keller* Court also relied heavily on the Court's decision in *Abood*, which held that a labor union may compel contributions from dissenting nonunion-member employees, provided that the fees are only used for performing its duties as a collective bargaining agent.[83] Courts have relied on *Keller* to strike down subsequent First Amendment challenges to compulsory bar association memberships.[84]

In making its decision, the *Keller* Court tried to balance a lawyers' free speech rights with California's interests in regulating the legal profession, much like they balanced competing rights of unions and their members in *Abood*.[85] While the Court's decision in *Keller* provided some guidance on the constitutionality of compulsory membership in integrated bar associations, it did not address the issue of whether any political activity by the bar association, regardless of how such activities are funded, violate their members' constitutional rights to freedom of association.[86]

In sum, while the Court previously held that organizations could collect fees from nonmembers for germane activities, it has since explicitly overruled this decision.[87] The Court has not yet

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82. *Id.*

83. Smith, *supra* note 10, at 46 (quoting *Keller*, 496 U.S. at 12, 13-14) (stating that, "[r]ather than viewing the unified bar as a state agency, the Court saw, 'a substantial analogy between the relationship of the State Bar and its members . . . and the relationship of employee unions and their members . . . .' Borrowing from the holding of *Abood*, the Court held that mandatory dues could not be used for activities not 'germane' to the purpose for which compelled association was justified.").

84. Taylor v. Buchanan, 4 F.4th 406, 407 (6th Cir. 2021) (holding that the Court's decisions in *Keller* and *Lathrop* foreclosed the plaintiff's First Amendment challenge to her state's integrated bar association, and that she thus did not have a valid claim against her state's integrated bar association); *see also* Fleck v. Wetch, No. 15-CV-13, 2016 U.S. Dist. LEXIS 201034, at *17-18 (D.N.D. Jan. 28, 2016) (holding that North Dakota's integrated bar association did not violate its members' First Amendment rights because it allowed members to opt out of funding nongermane activities, as required by *Keller*).

85. Lake, *supra* note 65, at 1835.

86. Smith, *supra* note 10, at 46 (discussing how political activities undertaken by integrated bar associations impact the constitutionality of compelled associations with these organizations).

87. *Abood*, 431 U.S. at 211 (upholding Michigan law requiring all union employees represented by a labor union to pay union dues as a condition of employment even if the represented employee was not a member, so long as the fees collected are used for germane, non-political activities); *see also Keller*, 496 U.S. at 4 (holding that compulsory membership to a state's integrated bar association is not unconstitutional, so long as mandatory dues are only used for activities related to the legal profession and improving legal services and not for engaging in political activities such as lobbying or campaign donations); *Janus*, 138 S. Ct. at 2460 (holding that requiring nonunion-member employees to pay mandatory union dues violates their free speech and free associational rights even if non-political activities are involved).

applied this new precedent to compelled memberships in integrated bar associations.[88] *Crowe* brings this novel constitutional issue to light.

D. Factual Background of Crowe

In response to recent acts of politically and racially motivated violence, leaders of the OSB authored a statement condemning white supremacy.[89] It was featured in the April 2018 edition of the *OSB Bulletin*, a monthly magazine published and distributed by the OSB.[90] In their statement, OSB leaders expressed their disapproval of "a resurgence of white nationalism and the normalization of violence and racism," and reaffirmed the OSB's commitment to "the vision of a justice system that operates without discrimination and is fully accessible to all Oregonians."[91] Seeking to avoid explicit political statements or endorsements, the statement by the OSB leaders specifically acknowledged that,

> [a]s 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.[92]

In addition to the statement by OSB's leaders, the April 2018 edition of the *OSB Bulletin* included a joint statement from several of the state's non-integrated specialty bar associations.[93] In their *Bulletin* statement, titled "Joint Statement of the Oregon Specialty Bar Associations Supporting the Oregon State Bar's Statement on White Nationalism and Normalization of Violence," these specialty bar associations echoed many of the statements made by OSB

88. Schudroff & McManus, *supra* note 51 (discussing how the constitutionality of integrated bar associations remains an unanswered question following the Court's decision in *Janus*).

89. Nordyke et al., *supra* note 1 (condemning the 2017 Unite the Right rally in Charlottesville, Virginia, wherein white nationalists protested the removal of a statue of a confederate leader). The Unite the Right Rally resulted in the death of counter-protestor Heather Heyer. Rankin, *supra* note 2. The statement also condemned a May 2017 knife attack on a Portland MAX Light Rail train, wherein white supremacist Jeremy Joseph Christian fatally stabbed two people and injured another who confronted Christian for shouting anti-Muslim slurs. Hassan, *supra* note 2.

90. Bechthold et al., *supra* note 4 (stating that the *Bulletin's* publication costs are funded by dues from members of the Oregon State Bar and subscription fees).

91. Nordyke et al., *supra* note 1.

92. *Id.*

93. Bechthold, et al., *supra* note 4.

leaders.[94] However, in addition to denouncing the specific acts of racially-motivated violence, the specialty bar association statement also criticized statements and policies made by then-President Donald Trump.[95] In condemning these statements and policies, the specialty bar associations mentioned President Trump by name, calling on him to denounce acts of white supremacy and condemning him for emboldening white supremacists and exacerbating racism.[96]

E. Procedural History of Crowe

In response to the statements from OSB leaders and the specialty bar associations in the April 2018 *OSB Bulletin*, OSB member Daniel Crowe raised his concerns to OSB leaders.[97] Subsequently, Mr. Crowe filed a complaint against the OSB, where he argued that because the OSB is an integrated bar association, it violated its members' First and Fourteenth Amendment rights by engaging in political advocacy and speech that was not germane to the practice of law.[98] Specifically, Mr. Crowe argued that being required to maintain his membership in the OSB as a condition of practicing law was an unconstitutional form of compelled speech.[99] He filed a civil action with the United States District Court for the District of Oregon, seeking injunctive and declaratory relief.[100]

The OSB moved to dismiss Mr. Crowe's lawsuit, arguing that Mr. Crowe failed to state a valid claim.[101] Specifically, the OSB argued that "[l]ong-standing U.S. Supreme Court precedent permits compulsory bar membership, mandatory bar dues, and the use of

94. *Id.*

95. Glenn Thrush & Maggie Haberman, *Trump Gives White Supremacists an Unequivocal Boost*, N.Y. TIMES (Aug. 15, 2017), www.nytimes.com/2017/08/15/us/politics/trump-charlottesville-white-nationalists.html [perma.cc/8MLH-EGPU] (stating that the Unite the Right Rally was a white supremacist rally that took place in Charlottesville, Virginia in August 2017, after which President Trump drew heavy criticism for stating that there were "very fine people on both sides" of the rally, implying a moral equivalence between white nationalists and those protesting against them); *see also* Adeel Hassan, *White Supremacist Guilty of Killing 2 Who Came to Aid of Black Teens*, N.Y. TIMES (Feb. 21, 2020), www.nytimes.com/2020/02/21/us/white-supremacist-guilty-of-killing-2-who-came-to-aid-of-black-teens.html [perma.cc/MAE3-CECR] (stating that on May 26, 2017, white nationalist Jeremy Joseph Christian killed three people after he was confronted for shouting racial slurs on a train in Portland, Oregon).

96. Bechthold et al., *supra* note 4.

97. E-mail from Daniel Z. Crowe, *supra* note 7.

98. Complaint at 2, Gruber v. Or. State Bar, No. 3:18-cv-1591 (D. Or. May, 24, 2019), *aff'd in part, rev'd in part sub nom.* Crowe v. Or. State Bar, 989 F.3d 714 (9th Cir. 2021).

99. *Id.*

100. *Id.*

101. Defendant-Appellee's Answering Brief at 1, Gruber v. Or. State Bar, No. 3:18-cv-1591 (D. Or. May 24, 2019), *aff 'd in part, rev 'd in part sub nom.* Crowe v. Or. State Bar, 989 F.3d 714 (9th Cir. 2021).

mandatory dues for speech germane to the regulation of attorneys and improvement of legal services."[102] The OSB also argued that its process for refunding membership fees used for nongermane activities were adequate.[103]

The District Court granted OSB's motion to dismiss Mr. Crowe's constitutional claims against the organization.[104] Notably, the District Court deemed the Court's decision in *Keller,* rather than *Janus* was controlling.[105] Because *Keller* upheld the constitutionality of integrated bar associations, the District Court found that integrated bar associations were thus not a violation of lawyers' First Amendment right to freedom of speech.[106] Mr. Crowe then filed an appeal to the Ninth Circuit Court.[107]

III. THE COURT'S ANALYSIS

As will be discussed herein, the Ninth Circuit Court affirmed the dismissal of Mr. Crowe's complaint against the OSB.[108] This section will evaluate how the Ninth Circuit Court reached its decision in *Crowe*. Section A will begin examining the Ninth Circuit Court's reasoning in rejecting Mr. Crowe's freedom of speech claim against the OSB. Section B will then discuss the Ninth Circuit's reasoning and analysis regarding Mr. Crowe's freedom of association claim against the OSB. Section C will conclude by assessing the dissenting opinion.

A. The Ninth Circuit Affirms the Dismissal of Mr. Crowe's Freedom of Speech Claim

On appeal, Mr. Crowe relied primarily on the Supreme Court's decision in *Janus*, arguing the statements about white nationalism published in the April 2018 *OSB Bulletin* were political speech that were not germane to the practice of law.[109] He argued that under exacting scrutiny, the OSB's actions were improper.[110] Specifically, Mr. Crowe argued that the requirement that attorneys join the OSB

102. *Id.* at 8.

103. *Id.*

104. Order at 3, Crowe v. Or. State Bar, 989 F.3d 714 (D. Or. 2021) (No. 19-35463).

105. *Id.*

106. Gruber v. Or. State Bar, No. 18-cv-1591, 2019 U.S. Dist. LEXIS 88339, 38 (Or. May 24, 2019).

107. *Crowe*, 989 F.3d at 720.

108. *Id.*

109. Plaintiffs-Appellants' Opening Brief at 14, Crowe v. Or. State Bar, 989 F.3d 714 (9th Cir. 2021) (No. 19-35463); *see also Janus*, 138 S. Ct. at 2460 (overruling *Abood* and holding that a state may not require membership in a labor union).

110. Plaintiffs-Appellants' Opening Brief at 10, *Crowe*, 989 F.3d 714 (No. 19-35463).

should fail under exacting scrutiny because it was not narrowly tailored to serve any legitimate state interests; rather, there were significantly less restrictive ways for the state to achieve its goal of improving the legal system other than requiring membership in the bar association.[111]

Mr. Crowe also argued that the Court's decision in *Keller* did not preclude his claims against the OSB.[112] As discussed in the preceding section, the Court explicitly overruled *Abood* in *Janus*.[113] Mr. Crowe argued that because *Keller* relied very heavily on the Court's now-defunct reasoning in *Abood*, *Keller* should no longer be considered valid, and thus Mr. Crowe's claim should not be precluded.[114]

The Ninth Circuit rejected Mr. Crowe's First Amendment freedom of speech claim.[115] The Ninth Circuit emphasized that the Court did not expressly overrule *Keller*, even if the Court overruled *Abood*.[116] The Court pointed to *Agostini v. Felton*, which held that "the Court of Appeals should follow [the Supreme Court] case which directly controls, leaving [the Supreme Court] the prerogative of overruling its own decision."[117] In rendering its decision, the Ninth Circuit stated:

> Although *Abood*'s rationale that *Keller* expressly relied on has been clearly 'rejected in [another] decision[], the Court of Appeals should follow the [Supreme Court] case which directly controls, leaving to the [Supreme] Court the prerogative of overruling its own decisions.' We are a lower court, and we would be scorning *Agostini's* clear directive if we concluded that *Keller* now prohibits the very thing it permitted when decided.[118]

Alternatively, Mr. Crowe argued that the OSB violated his freedom of speech because the procedural safeguards the OSB had in place to protect against membership dues being used for political activities were insufficient.[119] Specifically, Mr. Crowe argued that the OSB did not provide an adequate explanation of the basis for their mandatory membership fees, a reasonable opportunity to

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111. *Id.*

112. *Id.*; *see also Keller*, 496 U.S. at 13 (holding that attorneys could be compelled to belong to their state's integrated bar association as a condition to practice law, so long as their mandatory membership dues were only used for activities related to the legal profession and improving the quality of legal services, not for nongermane political activities).

113. *Janus*, 138 S. Ct. at 2460.

114. Plaintiffs-Appellants' Opening Brief at 10, *Crowe*, 989 F.3d 714 (No. 19-35463); *see also Claim Preclusion,* BLACK'S LAW DICTIONARY (4th ed. 2011) (defining claim preclusion as "an issue that has been definitely settled by judicial decision.").

115. *Crowe*, 989 F.3d at 725.

116. *Id.*

117. *Id.*

118. *Id.* (quoting *Agostini*, 521 U.S. at 237).

119. Plaintiffs-Appellants' Opening Brief at 4, *Crowe*, 989 F.3d 714 (No. 19-35463).

challenge the amount of fees, nor an escrow account for holding any membership fees in dispute, as required by *Hudson*.[120]

In response, the OSB pointed to several of its specific bylaws that provide procedural safeguards for protecting the freedom of speech rights of their members, including requirements that the OSB's speech be "reasonably related to" the practice of law, as well as a dispute-resolution procedure available to all members.[121] The OSB also noted Mr. Crowe was ultimately provided with a full refund of the amount of his dues that were used to publish the April 2018 *OSB Bulletin*.[122] The OSB argued these safeguards were more than sufficient to protect the First Amendment rights of its members.[123]

The Ninth Circuit agreed with the OSB, finding that its procedural safeguards for addressing the free speech claims of its members were adequate.[124] The court pointed out the safeguards an organization has in place need not be identical to those described in *Hudson* to be sufficient.[125] The procedural safeguards in *Hudson* include providing a fair review of members' complaints, placing fees that are in dispute in an escrow account, and providing a refund to members as appropriate.[126] The Ninth Circuit found that the procedural safeguards, though not identical to those in *Hudson*, were sufficient.[127]

Moreover, the Ninth Circuit reasoned that even if the OSB did adopt the exact same procedural safeguards described in *Hudson*, the outcomes for Mr. Crowe (such as having his claim reviewed, receiving a full refund, etc.) would have been the exact same.[128] Because the OSB had properly reviewed Mr. Crowe's free speech claim, and provided him with a full refund, his First Amendment free speech rights had not been violated.[129]

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120. *Id.* at 22; *see also Hudson*, 475 U.S. at 309 (holding that union members' First Amendment rights are violated if procedural safeguards offered by labor unions are insufficient). Procedural safeguards are insufficient if they fail to minimize the risk that nonmembers' contributions would be used for impermissible purposes, fail to provide members with adequate information about the basis for which the proportionate share of their dues were calculated, and fail to provide a prompt, impartial review of complaints. *Id.*

121. Defendant-Appellee's Answering Brief at 30, Crowe v. Or. State Bar, 989 F.3d 714 (9th Cir. 2021) (No. 19-35463).

122. *Id.* at 12 (stating that Mr. Crowe was refunded $1.15 by the OSB).

123. *Id.*

124. *Crowe*, 989 F.3d at 726.

125. *Id*.

126. *Hudson*, 475 U.S. at 306.

127. *Crowe*, 989 F.3d at 727 (stating that the OSB procedural safeguards included "a dispute resolution procedure for a 'member of the Bar who objects to the use of any portion of the member's bar dues for activities he or she considers promotes or opposes political or ideological causes.'").

128. *Id.*

129. *Id*. at 726.

B. The Ninth Circuit Reverses and Remands the Dismissal of Crowe's Freedom of Association Claim

Mr. Crowe argued Oregon's requirement that all attorneys join the OSB in order to practice law in the state violates lawyers' First Amendment right to freedom of association.[130] Mr. Crowe claimed that even if the OSB did not engage in any sort of political advocacy or speech, "by its very nature, the OSB, as a mandatory bar association, violates these rights [to freedom of association]."[131]

Mr. Crowe contended that under exacting scrutiny, the OSB failed to show mandatory membership in the integrated bar "serve[s] a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms."[132] Mr. Crowe described several other less restrictive means by which the state could achieve its goals of regulating the legal profession without requiring membership in the bar association.[133] These less restrictive means included regulating the conduct of lawyers themselves, penalizing attorneys who break the rules, and providing educational services to legal practitioners.[134] Mr. Crowe pointed to the fact that the State had taken similar actions to regulate other professions, and that approximately twenty states do not have integrated bar associations.[135]

In response, the OSB argued Supreme Court precedent unambiguously establishes mandatory memberships in integrated bar associations do not violate attorneys' rights to freely associate.[136] The OSB cited several Supreme Court decisions that made such a finding, including *Lathrop* and *Keller*.[137] Likewise, the OSB pointed to several Ninth Circuit decisions upholding the

130. Plaintiffs-Appellants' Opening Brief at 16, *Crowe*, 989 F.3d 714 (9th Cir. 2021) (No. 19-35463).

131. Complaint at 2, Gruber v. Or. State Bar, No. 3:18-cv-1591 (Or. May, 24, 2019), *aff'd in part, rev'd in part sub nom.* Crowe v. Or. State Bar, 989 F.3d 714 (9th Cir. 2021).

132. Plaintiffs-Appellants' Opening Brief at 17, *Crowe*, 989 F.3d 714 (No. 19-35463) (quoting *Janus*, 138 S. Ct. at 2465).

133. *Id.* at 18-19.

134. *Id.*; *see also* Lake, *supra* note 65, at 1857.

135. Plaintiffs-Appellants' Opening Brief at 19, Crowe v. Or. State Bar, 989 F.3d 714 (9th Cir. 2021) (No. 19-35463).

136. Defendant-Appellee's Answering Brief at 17, Crowe v. Or. State Bar, 989 F.3d 714 (9th Cir. 2021) (No. 19-35463).

137. *Id.*; *see also Lathrop*, 367 U.S. at 821 (holding that mandatory memberships in an integrated bar association did not violate attorneys' right to free association because the bar's activities were not primarily political in nature. Because the state had a legitimate interest in regulating the legal profession and improving the quality of legal services, the state had a right to require attorneys to share in the costs of these activities); *Keller*, 496 U.S. at 4 (holding that an integrated bar's political speech did not violate attorneys' rights to freedom of association if the speech was germane to the practice of law).

constitutionality of compulsory memberships in bar associations.[138] The OSB argued that the Ninth Circuit should follow the precedents set in these cases, and thus dismiss Mr. Crowe's First Amendment claims.[139]

In their answering brief, the OSB also argued that conditioning one's ability to practice law on their continued membership in the state's integrated bar association does not violate a lawyer's First Amendment right to freely associate.[140] The OSB claimed upholding the constitutionality of integrated bar associations is a well-established precedent and cited several previous court decisions in support.[141]

The Ninth Circuit found that the District Court should not have dismissed Mr. Crowe's freedom of association claim against the OSB.[142] Specifically, the Ninth Circuit pointed out how the *Keller* Court expressly declined to address the plaintiff's freedom of association claim, leaving this an open issue for further consideration.[143] Notably, the court stated:

> *Keller* and *Lathrop* thus speak for themselves: the Supreme Court has never resolved this broader fee association claim based on compelled

138. *See, e .g.*, O'Connor v. State of Nev., 27 F.3d 357, 361 (9th Cir. 1994) (holding that a state may require all attorneys to belong to the integrated state bar association, and that doing so did not violate the First Amendment rights of attorneys); Gardner v. State Bar of Nev., 284 F.3d 1040, 1042 (9th Cir. 2002) (holding that the requirement that attorneys join an integrated bar association as a condition to practice law did not violate attorneys' freedom of association rights; also holding that the integrated bar association did not violate its members First Amendment rights by engaging in a public information campaign to improve its public image, as engaging in this information campaign so was directly tied to improving the quality of legal services provided to the people of Nevada); Morrow v. State Bar of Cal., 188 F.3d 1174, 1176 (9th Cir. 1999) (holding that "lawyers admitted to practice in the State may be required to join and pay dues to the State Bar."); *see also* Eugster v. Wash. State Bar Ass'n, 684 F. App'x 618, 619 (9th Cir. 2017) (holding that integrated bar associations were not unconstitutional violations of attorneys First Amendment rights); Caruso v. Wash. State Bar Ass'n, 716 F. App'x 650, 651 (9th Cir. 2018) (dismissing an attorney's claim that compulsory memberships in integrated bar associations violated their freedom of association rights).

139. Defendant—Appellee's Answering Brief at 20, *Crowe*, 989 F.3d 714 (No. 19-35463).

140. *Id.* at 21.

141. *See Romero*, 204 F.3d at 296-97 (holding that "[i]t is well settled that conditioning the practice of law on membership in a state bar association does not itself violate the First Amendment . . . a state's interest in 'regulating the legal profession and improving the quality of legal services' similarly justifies compelled membership in an integrated bar.") (quoting *Keller*, 496 U.S. at 13); *see also Kingstad*, 622 F.3d at 713 (holding that "[m]andatory or unified bars, under which dues-paying membership is required as a condition to practice law in a state, are also permitted."); *Kaimowitz*, 996 F.2d at 1154 (holding "the *Lathrop* decision controls Plaintiff's claim regarding compulsory bar membership.").

142. *Crowe*, 989 F.3d at 729.

143. *Id.* at 727.

> bar membership. Nor have we. . . . Our avoidance of this broader free association claim cannot preclude Plaintiff's efforts to resolve it here. Accordingly, Plaintiffs raise an issue that neither the Supreme Court nor we have ever addressed: whether the First Amendment tolerates mandatory membership itself—independent of financial support—in an integrated bar that engages in nongermane political activities.[144]

The Ninth Circuit found that Mr. Crowe presented enough facts to pursue a viable freedom of association claim and as such, the dismissal was reversed and remanded to the District Court.[145]

In reversing and remanding Mr. Crowe's freedom of association claim, the Ninth Circuit emphasized that the District Court should consider several novel constitutional issues, including whether exacting scrutiny is the correct standard of review and, if so, whether the OSB's actions meet this standard.[146] The Ninth Circuit also noted the District Court must address whether *Keller*'s instructions on germaneness and procedural safeguards are relevant to freedom of association questions.[147]

C. The Dissenting Opinion

Judge Lawrence VanDyke authored a dissenting opinion in this case.[148] He agreed with much of the majority opinion, but disagreed that the procedural safeguards established by the OSB were adequate.[149] Notably, Judge VanDyke stated that the Supreme Court found that the procedural protections set forth in *Hudson* were not sufficient in all cases—the protections offered by the OSB, he argued, offered even less comprehensive protection to its members.[150] As such, Judge VanDyke stated Mr. Crowe had a viable freedom of speech claim against the OSB because it made no sense that procedural safeguards even less robust than those in *Hudson* could be acceptable.[151]

According to Judge VanDyke, the Ninth Circuit should have deferred consideration of the issue of the sufficiency of the OSB's procedural safeguards to the lower courts.[152] This is because the OSB may be required to change their practices and procedural

144. *Id.* at 728-29.

145. *Id*. at 729.

146. *Id. See* Wright, *supra* note 50, at 207 (describing the requirements of exacting scrutiny and its application in previous court cases); *see also Crowe*, 989 F.3d at 729.

147. *Crowe*, 989 F.3d at 729.

148. *See* Letter from William C. Hubbard, chair of the American Bar Association, to Senator Diane Feinstein and Chairman Lindsey Graham (Oct. 29, 2019) (regarding the nomination of Lawrence J.C. VanDyke to the United States Court of Appeals for the Ninth Circuit).

149. *Crowe*, 989 F.3d at 734 (VanDyke, J. dissenting).

150. *Id*.

151. *Id*.

152. *Id.*

safeguards after Mr. Crowe's freedom of association claim was resolved by the District Court.[153] Judge VanDyke dissented on this singular issue but concurred on the remaining issues.[154]

IV. PERSONAL ANALYSIS

The court's decision in *Crowe v. Oregon State Bar* raises novel and significant legal and public policy questions. Section A will begin by evaluating whether labor unions are relevant when evaluating the constitutionality of compulsory bar associations. Next, Section B will analyze whether integrated bar associations survive under exacting scrutiny and how the District Court should rule on Mr. Crowe's freedom of association claim. Section C will conclude by discussing the public policy implications of the court's decision and alternative ways the legal field can achieve its goals aside from integrated bar associations.

A. Evaluating the Constitutionality of Integrated Bar Associations—Why Labor Unions Are Not Comparable to Bar Associations

Much of the analysis about the constitutionality of integrated bar associations is based on previous decisions about the constitutionality of mandatory membership in labor unions. While comparing bar associations to labor unions may seem helpful at first glance, it is misguided. Integrated bar associations should not be evaluated using the same constitutional standards as labor unions. This is because bar associations and labor unions differ so greatly in their goals, structures, and outcomes that court decisions like *Janus* should not have any bearing at all. Rather, courts should use a completely different standard to weigh the constitutionality of integrated bar associations. Courts should evaluate integrated bar memberships using the same standard used to evaluate compulsory memberships in any other political, civics, or social organization: strict scrutiny.[155] Under strict scrutiny, the state must establish that its policy is necessary to achieve a compelling state interest.[156] Bar associations do not serve a compelling state interest.

First, the goals of labor unions and integrated bar associations are very different. Labor unions' goal is to attain better wages,

153. *Id*.

154. *Id*.

155. Kraham v. Lippman, 478 F.3d. 502, 506 (2d Cir. 2007) (explaining that, "when evaluating a First Amendment challenge to a limitation on associational freedom, courts apply […] strict scrutiny, in which case the restriction only survives if it is narrowly drawn to advance a compelling state interest…When a challenged regulation imposes 'severe burdens' on the right to associate […] it must survive strict scrutiny.").

156. *Strict Scrutiny*, BLACK'S LAW DICTIONARY (4th ed. 2011).

working conditions, and benefits for workers.[157] This includes advancing the interests of their dues-paying members, as well as the tangential interest of nonunion members so employees, as a whole, may benefit from their efforts.[158] Ultimately, unions focus on making material improvements to the lives and working conditions of employees.[159]

Bar associations, on the other hand, do not seek to make material improvements to lawyers' lives or their working conditions. Rather than serving the interests of lawyers directly, bar associations serve an abstract, ill-defined "legal profession."[160] For example, the stated Functions and Goals of the Oregon State Bar include, "regulat[ing] the legal profession and improv[ing] the quality of legal services . . . protect[ing] the public by ensuring competence and integrity . . . support[ing] the judiciary and improv[ing] the administration of justice . . . advance[ing] a fair, inclusive, and accessible justice system."[161] Unlike labor unions' goals, the goals described by the OSB are not directly focused on improving the wellbeing of practicing attorneys.[162] Out of the thirty integrated state bar associations, none have mission statements that focus directly on attaining better working conditions or outcomes for their members.[163]

By comparison, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of labor unions that represent more than 12.5 million workers,

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157. Anil Verma, *What do Unions do to the Workplace? Union Effects on Management and HRM Policies*, 21 J. OF LABOR RSCH. 3, 415 (2005).

158. *Id.* at n.8; *see also* Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV., 513, 517 (2011) (stating that the high rates of union participation also leads to higher wages for nonunion employees, as well as greater pay equality for women); Jenn Hagedom, et. al., *The Role of Labor Unions in Creating Conditions that Promote Public Health*, 106 AM. J. PUB. HEALTH 989, 989 (2016) (explaining how union membership promotes greater overall public health).

159. Verma, *supra* note 157, at 415.

160. Johnstone, *supra* note 55, at 196 (explaining that bar associations seek to help the public, the legal system at large, and individual lawyers).

161. *About the Oregon State Bar*, OR. STATE BAR, www.osbar.org/about.html [perma.cc/59NF-LVU9] (last visited Jan. 3, 2022).

162. *Id.*

163. *See, e.g.*, *About*, ALA. BAR ASS'N, www.alabar.org/about/ [perma.cc/2CCJ-P6J5] (last visited Nov. 5, 2022) (noting that the stated purpose of the Alabama State Bar, an integrated bar association, is to "[serve] the public and [improve] the judicial system . . . it is dedicated to promoting the professional responsibility and competence of its members, improving the administration of justice and increasing the public understanding of and respect for the law."); *About the Bar*, FL. BAR ASS'N, www.floridabar.org/about/ [perma.cc/855H-8ACX] (last visited Nov. 5, 2022) (stating the purpose of the Florida State Bar, an integrated bar association, is to "regulate the practice of law . . . ensure the highest standards of legal professionalism in Florida, and protect the public by prosecuting unethical attorneys and preventing the unlicensed practice of law.").

purported goals include "striv[ing] to ensure [that] all working people are treated fairly, with decent paychecks and benefits, safe jobs, dignity, and equal opportunities."[164] Because bar associations are not necessarily advocating for their members (but are instead working mostly for the benefit of a third party—the legal system), there is a much weaker case to be made that lawyers should be compelled to join them.[165] The "free-rider" problem the Court described in *Abood*, wherein members who did not pay dues were still able to attain the same personal benefits as their dues-paying peers, simply does not exist for bar associations—attorneys are not receiving direct benefits from bar associations in the same way nonunion-member employees are receiving direct benefits from labor unions making agreements at their workplace.[166]

Second, labor unions and bar associations are structured differently. The entire structure of labor unions centers around workers acting collectively to achieve their goals.[167] If employees were able to opt out of joining the labor union, the union would lose most, if not all, of its power.[168] However, no such problem exists for bar associations.[169] Bar associations do not engage in collective bargaining on behalf of their workers and thus do not require participation from all lawyers; all of the goals described above can be achieved by lawyers acting individually.[170] Even if the majority of lawyers chose not to join their states' bar association, the goals of integrated bar associations would likely still be met, as lawyers would still be bound by professional codes of conduct.[171] Because having lawyers opt out of joining the bar association would not completely undermine the bar association in the same way employees opting out of a labor union would undermine the union, the two organizations are not comparable.

Third, the outcomes sought by labor unions and bar associations are different from one another. Labor unions have proven to be an incredibly effective, powerful tool for helping their members.[172] For example, union membership is strongly linked to higher wages and better working conditions.[173] Integrated bar

164. *About Us*, AM. FED'N OF LABOR AND CONG. OF INDUS. ORG., www.aflcio.org/about-us [perma.cc/6VPV-5CP3] (last visited Jan. 3, 2022).

165. Johnstone, *supra* note 55, at 196.

166. *Abood*, 431 U.S. at 211.

167. Susan Hayter, *Unions and Collective Bargaining*, *in* LABOUR MARKETS, INSTITUTIONS AND INEQUALITY: BUILDING JUST SOCIETIES IN THE 21st CENTURY 95 (Janine Berg ed., 2015).

168. *Id.*

169. Smith, *supra* note 10, at 58.

170. *Id.*

171. *Id.*

172. *See also* JOHN W. BUDD, THE EFFECT OF UNIONS ON EMPLOYEE BENEFITS AND NON-WAGE COMPENSATION: MONOPOLY POWER, COLLECTIVE VOICE, AND FACILITATION (1st ed. 2007).

173. Western & Rosenfeld, *supra* note 158; BUDD, *supra* note 172.

associations have not achieved the same positive results for their members.[174] The fees bar associations collect are not used to achieve better conditions for lawyers, and in some cases, bar associations have been criticized for simply being a tool to keep people out of the legal profession.[175] While there is a clear positive correlation between wages and union membership, there is no such link between a state having an integrated bar association and having lower rates of malpractice or a more equitable legal system.[176] Because labor unions have been much more successful in achieving their goals, labor unions maintain a stronger basis for compelling dues from nonunion member employees than bar associations have for compelling attorney membership.

Ultimately, the Ninth Circuit should not have used previous court decisions regarding labor unions as a basis for its decision in *Crowe*. Because labor unions and bar associations differ so greatly in their goals, structures, and outcomes, they are not legally comparable. Instead, the Ninth Circuit should have analyzed the constitutionality of integrated bar associations the same way it would evaluate compulsory memberships in any other social or political organization.[177] Under this framework, the state would not be able to condition the practice of law on membership in a state bar association.[178]

B. Mr. Crowe's Freedom of Association Claims—Integrated Bar Associations Fail Under Exacting Scrutiny

The Ninth Circuit found that Mr. Crowe pled sufficient facts for his freedom of association claim and ruled that the District Court should not have dismissed his claim.[179] The dismissal was thus reversed and remanded to the District Court for further consideration.[180] As of publication of this note, the District Court has not yet resolved this issue. The District Court should find that

174. Smith, *supra* note 10, at 38.

175. Johnstone, *supra* note 57, at 783.

176. GERALD MAYER, CONG. RSCH. SERV., RL 32553 UNION MEMBERSHIP TRENDS IN THE UNITED STATES6 (2004). (describing the link between union membership and higher wages).; *see also* Smith, *supra* note 10, at 38 (stating, "few if any, seriously argue that legal services are more affordable or available, that lawyers are better trained, the public better protected from malpractice, that justice is better served, or that attorneys or the legal system have a higher degree of prestige, legitimacy, or professionalism, in mandatory bar states, than in states which operate with voluntary bar associations.").

177. *See Med. Soc. Of Mobile Cnty*., 245 Ala. at 140 (holding that membership in a medical association cannot be a prerequisite for practicing medicine).

178. *Id.*

179. *Crowe*, 989 F.3d at 729.

180. *Id*.

integrated bar associations are unconstitutional under exacting scrutiny.[181]

Under exacting scrutiny, the default test for evaluating freedom of association claims, a policy must have a "substantial relationship" to a "sufficient[ly] important[]" governmental interest.[182] Exacting scrutiny requires a policy to be "narrowly tailored" to meet a state interest; this is less stringent than strict scrutiny, which requires that a policy be the "least restrictive means" to achieve the government's goal.[183] Even under this more lenient standard, compulsory memberships are not narrowly tailored to meet the goals of bar associations.

First, although integrated bar associations purport to create a more equitable judicial system, they do not in practice.[184]In fact, some scholars argue that bar associations make the legal system worse.[185] For example, states with integrated bar associations are often slower to adopt progressive regulatory reforms.[186] Integrated bar associations may also stymie the growth of voluntary local and specialty bar associations, leaving them with fewer members and less power.[187] Local bar associations are likely better equipped to take on the challenges that their specific communities face than a state-wide bar organization, whereas integrated bar associations may result in inferior legal services.[188] Additionally, there is little if any evidence to suggest that integrated bar associations are better at promoting pro bono legal work than their voluntary counterparts.[189] In fact, some scholars suggest that lawyers may view the dues they pay to integrated bars as a tax relieving them of pro bono responsibilities, which could result in fewer services being available for indigent clients.[190]

Second, requiring membership in a bar association is not narrowly tailored to achieve the state's interest. Only thirty states have integrated bar associations—in the remaining states, attorneys may decide whether to join the bar association.[191] Rather

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181. *Id*.

182. Wright, *supra* note 50, at 207.

183. Am. for Prosperity Found. v. Bonta, 9 F.4th 1216, 1220 (9th Cir. 2021) (explaining the requirements of strict scrutiny and exacting scrutiny).

184. Theodore J. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 8 AM. B. FOUND. RES. J. 1, 1 (1983).

185. *Id.*

186. *Id.*

187. Smith, *supra* note 10, at 61.

188. *Id.*

189. *Id.* (stating "who could ever seriously suggest that pro bono legal services for the poor and indigent are more readily available in Michigan, with its mandatory bar, than in Ohio or other voluntary states surrounding Michigan?").

190. *Id.* at 62.

191. Brief for Pacific Legal Foundation, Cato Institute, and Atlantic Legal Foundation as Amici Curiae Supporting Petitioners at 3, Crowe v. Oregon State Bar, 989 F.3d 714 (2021).

than relying on an integrated bar association, attorneys in these states rely on self-policing or the state's court system, which oversees the legal profession directly.[192] States that use such techniques are able to regulate the legal profession just as effectively (if not more so) than states that rely on integrated bar associations.[193] Moreover, the fact that every other profession (such as doctors, engineers, and teachers) has been able to regulate itself without requiring its members to belong to a professional organization suggests that such organizations are unnecessary.[194]

C. Policy Considerations—The Impact of Crowe and Alternatives to the Integrated Bar

Integrated bar associations should be a violation of attorneys' freedom to associate under the First Amendment's exacting scrutiny standard. The legal profession has several alternative regulatory tools from which to choose, including self-policing, state court systems, and voluntary bar associations.

For example, states can rely on lawyers to hold themselves accountable.[195] Arguably, lawyers already have a strong interest in maintaining the integrity of the legal system, performing pro bono work, and advocating for positive reforms to the legal system.[196] . Lawyers do not need an integrated bar association to tell them to care about a profession and field about which they are already passionate.[197] Encouraging self-policing by lawyers would be just as effective as an integrated bar association.[198]

Moreover, tasks involving attorney misconduct and discipline could easily be handled by state court systems rather than by integrated bar associations. Aside from the fact that it can be problematic to place public matters, like attorney discipline, under the control of a private organizations such as the state bar association, state court systems are typically more efficient than bar associations at resolving these matters.[199]

Additionally, bar associations could offer incentives and benefits encouraging lawyers to join voluntarily, rather than

192. Smith, *supra* note 10, at 62.

193. *Id.* at 62.

194. *Id.* at 36.

195. *Id.* at 62.

196. Eli Wald, *An Unlikely Knight in Economic Armor: Law and Economics in Defense of Professional Ideals,* 31 SETON HALL L. REV. 1042, 1044 (2001).

197. Jerome Organ, *What do we Know About the Satisfaction/ Dissatisfaction of Lawyers? A Meta-Analysis of Research on Lawyer Satisfaction and Well-Being*, 8 U. ST. THOMAS L.J. 225, 264 (2011).

198. Arthur Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259, 261 (2003).

199. Smith, *supra* note 10, at 63 (discussing the efficiency of voluntary associations compared to integrated bar associations).

compelling membership.[200] Under an integrated model, bar associations have no incentive to listen to their members or provide them with any benefits. Even if lawyers are dissatisfied with their state's integrated bar, their only alternative is to move to a state without an integrated bar or to stop practicing law altogether. However, under a voluntary bar association, there would be a much stronger incentive to listen to members and improve bar programs to gain new members. Therefore, voluntary membership in a state bar association would not only resolve any potential constitutional issues, but may also encourage bar associations to better serve the needs of their members, thus inspiring innovation and more comprehensive programs for lawyers.

V. CONCLUSION

In sum, the Ninth Circuit's decision in *Crowe* held that integrated bar associations are not a violation of an attorney's First Amendment right to freedom of speech, regardless of the Supreme Court's decision in *Janus*.[201] However, the issue of whether integrated bar associations run afoul of attorney's rights to freely associate has yet to be addressed. As discussed above, courts should find that integrated bar associations violate attorneys' freedom of association rights. Courts consistently rely on case law regarding mandatory participation in labor unions while analyzing integrated bar associations, but this approach is misguided because the goals, outcomes, and structure of labor unions and bar associations greatly differ. Therefore, case law about labor unions is irrelevant to integrated bar associations.[202] Moreover, integrated bar associations fail under exacting scrutiny.[203] Rather than requiring membership in an integrated bar association, the legal profession can achieve its goals through significantly less restrictive means, for example, by self-policing, using the state judicial system, and offering incentives for attorneys to join.

For now, attorneys can still be compelled to join integrated bar associations.[204] But the Ninth Circuit's decision in *Crowe* is only the beginning of a series of challenges against compulsory membership in bar associations. This will be an especially challenging issue for courts to deal with due to the competing public polices and the

200. *Membership & Benefits*, ILL. STATE BAR ASS'N, www.isba.org/membership-benefits [perma.cc/B4EL-QDDD] (last visited Oct. 14, 2022) (stating how the Illinois State Bar Association is a voluntary bar organization and provides incentives to members such as research tools, access to legal publications, and networking events, among other benefits).

201. *Crowe*, 989 F.3d at 724.

202. Theodore J. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 8 AM. B. FOUND. RES. J. 1, 1 (1983).

203. Wright, *supra* note 50, at 207 (discussing the applicability of exacting scrutiny).

204. *Crowe*, 989 F.3d at 727.

variety of attorney regulation in different jurisdictions.