

PETITION TO AMEND SCR 10.03(5)(b)1

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Petitioners Jon Kingstad, Steven Levine, James Thiel and 40 other State Bar members petition the Supreme Court to amend SCR 10.03(5)(b)1 as follows:

The State Bar may engage in and fund any activity that is reasonably intended for the purposes of the association. The State Bar may not use compulsory dues of any member who objects to that use for ~~political or ideological~~ activities that are not reasonably intended for the purpose of regulating the legal profession or improving the quality of legal services. The state bar shall fund those ~~political and ideological~~ activities by the use of voluntary dues, user fees or other sources of revenue.

Reasons for the petition are as follow:

1. On June 25, 2001, the United States Supreme Court decided the case of *United States v. United Foods*, 533 U.S. 405, 413-414 (2001), relying on the cases of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) and *Keller v. State Bar of California*, 496 U.S. 1 (1990).

2. In the *United Foods* case, the Supreme Court held that advertising supported by compulsory assessments was subject to First Amendment scrutiny even though the advertising was not political in nature. The Supreme Court stated "... the mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity. See, e.g., [Abood v. Detroit Bd. of Ed.](#), 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977); [Keller v. State Bar of Cal.](#), 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990)."

The court also stated, "We take further instruction, however, from [Abood's](#) statement that speech need not be characterized as political before it receives First Amendment protection. [Id.](#), at 232, 97 S.Ct. 1782." and "The central holding in [Keller](#), moreover, was that the objecting members

were not required to give speech subsidies for matters not germane to the larger regulatory purpose which justified the required association.”

3. In scrutinizing State Bar expenditures pursuant to SCR 10.03(5)(b)1 to determine whether they are for purposes of “regulating the legal profession or improving the quality of legal services,” the State Bar of Wisconsin considers only expenses for activities which are political or ideological in nature.

4. In a decision pursuant to SCR 10.03(5)(b)3 and 4, dated December 12, 2008, (included with this petition), arbitrator Christopher Honeyman determined that he need not decide whether State Bar public image advertising expenses were for purposes of “regulating the legal profession or improving the quality of legal services,” because those advertising expenses were not political or ideological.

5. Both the arbitrator’s decision and State Bar administration of SCR 10.03(5)(b)1 are contrary to *United States v. United Foods*, 533 U.S. 405 (2001), because they fail to evaluate whether nonpolitical State Bar expenditures are reasonably intended for purposes of “regulating the legal profession or improving the quality of legal services.” The Court should amend SCR 10.03(5)(b)1 as requested above, so that the rule is consistent with the *United Foods* decision.

Respectfully submitted,

Jon Kingstad
Steven Levine
James Thiel
And 40 other State Bar members

By Steven Levine

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August 24, 2009

Cc: State Bar of Wisconsin

MEMORANDUM IN SUPPORT OF PETITION FOR AMENDMENT OF SCR §10.03(5)(b)1

Integrated state bar associations are limited as to the activities on which they may spend mandatory dues to activities reasonably related to “regulating the legal profession or improving the quality of legal services.” *Keller v. State Bar of Wisconsin*, 496 U.S. 1, 13 (1990). Federal courts of appeal have split, however as to whether only “political and ideological” activities are subject to this *Keller* standard. Compare *Thiel v. State Bar of Wisconsin*, 94 F.3d 399, 404-05 (7th Cir. 1996) and *Gardner v. State Bar of Nevada*, 284 F.3d 1040, 1042-43 (9th Cir. 2001) (First Amendment protects only political or ideological activities.) with *Romero v. Collegio de Abogados de Puerto Rico*, 204 F.3d 291, 302 fn. 10 (1st Cir. 2000) (Activity need not be political or ideological to be protected by the First Amendment.) SCR 10.03(5)(b)1 agrees with *Thiel* and *Gardner* by containing the words “political or ideological.”

In 2001 the United States Supreme Court decided the case of *United States v. United Foods*, 533 U.S. 405, 413-414 (2001), involving the constitutionality of mandatory assessments which were used for nonpolitical/nonideological advertising purposes. In *United Foods* the Supreme Court stated: “... the mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity. See, e.g., [Abood v. Detroit Bd. of Ed.](#), 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977); [Keller v. State](#)

[Bar of Cal., 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 \(1990\).](#)” The Court further stated, “We take further instruction, however, from [Abood's](#) statement that speech need not be characterized as political before it receives First Amendment protection. [Id., at 232, 97 S.Ct. 1782.](#)” and “[t]he central holding in [Keller](#), moreover, was that the objecting members were not required to give speech subsidies for matters not germane to the larger regulatory purpose which justified the required association.” The Court held that the expenditure of mandatory assessments for nonpolitical/nonideological advertising was subject to First Amendment scrutiny.

In an arbitration decision dated December 12, 2008, arbitrator Christopher Honeyman determined that he need not decide whether State Bar public image advertising expenses were reasonably intended for purposes of “regulating the legal profession or improving the quality of legal services,” because SCR 10.03(5)(b)1 required scrutiny only of expenditures for “political or ideological” activities. In administering SCR 10.03(5)(b)1 each year, the State Bar also scrutinizes only political or ideological activities to see whether they are reasonably intended for purposes of regulating the legal profession or improving the quality of legal services. SCR 10.03(5)(b)1 is contrary to the United States Supreme Court’s decision in *United Foods* and should be amended to be consistent with it by removing the words “political or ideological.”

Respectfully submitted,

Jon Kingstad
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