SB MT STATE BAR OF MONTANA

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January 15, 2025

VIA HAND DELIVERY
The Honorable Barry Usher
Chairman, Senate Judiciary Committee
Members of the Senate Judiciary Committee
Montana State Senate
P.O. Box 201706
Helena, MT 59620-1706

RE: Senate Bill 92

Dear Chairman Usher and Members of the Senate Judiciary Committee:

We write today on behalf of the State Bar of Montana in opposition to Senate Bill 92. Regrettably, this bill seeks to legislatively alter the structure of the State Bar of Montana, an organization created under the exclusive constitutional authority of the Montana Supreme Court and which, for fifty years, has worked to meet its court-ordered purposes, including:

> to aid the courts in maintaining and improving the administration of justice; to foster and maintain on the part of those engaged in the practice of law high standards of integrity, learning, competence, public service, and conduct; to safeguard proper professional interests of members of the bar… to provide a forum for the discussion of and effective action concerning subjects pertaining to the practice of law, the science of jurisprudence and law reform, and relations of the bar to the public; and to insure that the responsibilities of the legal profession to the public are more effectively discharged.

Application of the President of the Montana Bar Ass'n., 163 Mont. 523, 526-27, 524 518 P.2d 32, 34 (1974).

I. Senate Bill 92 contradicts the law of Montana.

Senate Bill 92 states: "The Montana constitution does not grant power to the

Montana supreme court to require lawyers to join the state bar of Montana as a condition of their law license." This statement contradicts nearly 100 years of Montana law concerning regulation of the legal profession.
The question as to whether Montana would have a so-called "unified" (also referred to as "mandatory") bar was debated and analyzed beginning nearly a century ago in the 1930s, and that fulsome and thorough debate continued for over forty years until 1974. *See Application of the Montana Bar Association for Unification and Integration of the Bar of the State of Montana*, 140 Mont. 101, 102, 368 P.2d 158, 159 (1962). Addressing the various efforts to unify the bar in 1962, the court made clear that "since its inception [it has] exercised its power over the practice of law." *Id*., 140 Mont. at 104, 368 P.2d at 160. Though it declined to make bar membership mandatory at the time, the court noted, "Therefore we reiterate this court's long-standing view that we do have the power to integrate [make mandatory] the Bar." *Id*. 140 Mont. at 109, 368 P.2d at 162 (emphasis added).

The Court again addressed this question in 1974, after passage of the 1972 Montana Constitution, reaffirming that power: "The power of this Court to order unification of the bar is clear." *Application of the President of the Montana Bar Ass'n*, 163 Mont. 523, 524 518 P.2d 32 (1974) (emphasis added). The Court unanimously ordered that "[p]ursuant to the powers of the Montana Supreme Court to govern and control the practice of law in Montana, all persons admitted the practice of law in this state are hereby unified into an organization…." *Id*. 163 Mont. at 526, 518 P.2d at 33-34. As the court has noted, "[d]ecisions construing the Constitution should be followed…." *In re McCabe*, 544 P.2d 825, 827, 168 Mont. 334, 338 (1976) (reaffirming the Montana Supreme Court's interpretation of striking down Senate Bill 630, purporting to legislatively alter the court's bar exam rules, as a violation of the court's exclusive authority over the profession of law and the separation of powers doctrine).

SB 92 plainly contradicts multiple provisions of the Montana Constitution and long-settled law placing authority over the profession of law solely within the purview of the Montana Supreme Court.

II. The Montana Supreme Court long ago provided a refund mechanism for State Bar active members who object to its legislative efforts.

The United States Supreme Court has concluded that mandatory bars can engage in legislative activities, and any question specifically as to whether the State Bar

of Montana could do so was squarely addressed thirty years ago. *See Keller v. State Bar of California,* 496 U.S. 1, 15 (1990) (affirming that mandatory bars can engage in legislative advocacy and other germane activities without offending the First Amendment); *see also Reynolds v. State Bar of Montana*, 524 F. Supp. 1003, 1009 (D. Mont. 1981), ("*Reynolds I*"); *Reynolds v. State Bar of Montana*, 660 P.2d 581 (Mont. 1983), ("*Reynolds II*").

Addressing a First Amendment challenge to State Bar legislative activities in *Reynolds II*, the Montana Supreme Court ordered that "[the] State Bar of Montana may not use funds derived from compulsory dues for lobbying purposes unless the State Bar makes provision to refund to members dissenting to such lobbying an aliquot portion of compulsory dues paid by said members, said refund to be based on the proportion of the lobbying expenses incurred by the State Bar to the number of dues-paying members as of the previous July 1." *Reynolds*, 660 P.2d at 581; *see also Crowe v. Oregon State Bar*, 989 F.3d 714, 727-28 (9th Cir. 2021) ("*Crowe I*") (affirming use of a refund procedure as an adequate remedy for objection to expenditure of mandatory bar dues).

Following the Montana Supreme Court's controlling order in *Reynolds*, and for the past forty-plus years, the State Bar has provided a mechanism for members to receive a pro rata refund of mandatory dues expended on lobbying. The availability of that refund, including a list of all legislative bills on which the State Bar took a position for each session, is published in the *Montana Lawyer* magazine (which is sent to all active members in print and electronically) with detail on the expenditures, the calculated refund, and how to request a refund.

In the last two legislative sessions, during a time in which the legislative branch considered many bills on issues affecting State Bar, its members, and its purposes, a total of five active members of the State Bar (who pay mandatory dues) requested a refund—an average of 2.5 members per session. With a present active member count of 4,245 active members, that is a mere 0.1 percent of active members.

We believe that is precisely because the State Bar engages in legislative activity based upon the germaneness requirements from *Keller*, but we have viewed *Reynolds* as even more protective of our members, and we have rebated *any* request for a legislative refund.

Finally, and importantly, unlike the broad assertion in SB 92 that "consistent with Montana's constitution and the *Janus* decision, lawyers should not be

forced to join or pay dues to the state bar of Montana as a condition of practicing law in the state of Montana," it is settled law that "lawyers do not have a categorical First Amendment right to disassociate from their state bar…." *Keller v. State Bar of Cal.*, 496 U.S. 1, 13- 14, 110 S. Ct. 2228, 110 L.Ed.2d 1 (1990); *accord Boudreaux v. Louisiana State Bar*, 86 F.4th 620 (5th Cir. 2023) (noting any First Amendment violation is dependent not on the existence of a state bar but on the activities in which a state bar may engage).

In fact, "[t[he [United States] Supreme Court has observed that *Keller's* germaneness requirement 'fits comfortably' within the [First Amendment's free association and free speech] exacting scrutiny framework in the 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." *Crowe v. Oregon State Bar*, 112 F. 4th 1218, 1238 (9th Cir 2024), ("*Crowe II*"), *citing Harris v. Quinn*, 573 U.S. 616, 655-56, 134 S. Ct. 2618 (2014) (quoting *Keller*, 496 U.S. at 13, 110 S. Ct. 2228). And, again contrary to the assertion in SB 92 concerning *Janus v. AFSCME*, 585 U.S. 878 (2018), "*Janus* did not overrule *Keller*." *Fleck v. Wetch*, 937 F.3d 1112 (8th Cir. 2019) (specifically considering and rejecting application of *Janus* to a mandatory bar), *cert. denied*, 140 S. Ct. 1294 (2020); *Crowe I*, 989 F.3d at 725 ("*Keller* plainly has not been overruled.").

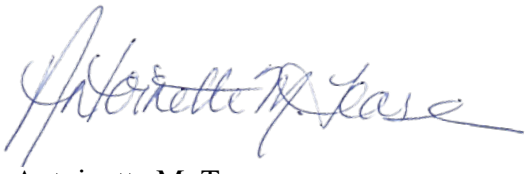
That *Keller* remains good law is evidenced by the fact that the majority of jurisdictions in the United States, including *all* of Montana's neighboring states—Wyoming, Idaho, North and South Dakota—continue to operate with a mandatory bar structure.

We understand that not all lawyers practicing today may agree with the Montana Supreme Court's decision to unify the bar in 1974 or with U.S. Supreme Court case law involving mandatory bars. And we also recognize that not all members will agree with every legislative position the State Bar takes and that some may request the refund to which they are entitled. But despite these reasonable disagreements, the law is clear. With due respect for its important work, we urge the Judiciary Committee to reject legislation with so many constitutional defects and *not* to pass Senate Bill 92.

Sincerely,

THE STATE BAR OF MONTANA

BY: The undersigned members of its Executive Committee



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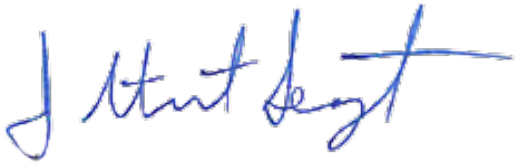

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