

Fifth Circuit Says Compelling Lawyers to Join State Bar May Violate First Amendment Rights

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Do mandatory state bar associations violate the First Amendment? The U.S. Court of Appeals for the Fifth Circuit recently held in *McDonald v. Longley* that they do. The court sided with three attorneys who sued the Texas Bar, arguing that compelling them to join, associate with, and financially support the state bar violates their rights to free speech and association. They also argued that requiring them to subsidize political and ideological activities beyond the bar's core regulatory functions violates their right to free speech and that the bar's procedures for separating chargeable and non-chargeable expenses are inadequate to protect their First Amendment rights. The Fifth Circuit held that mandatory association is permissible only when it serves a compelling state interest that cannot be achieved through significantly less restrictive means. For bar associations, that means that associations engaged only in activities germane to "regulating the legal profession and improving the quality of legal services" survive this exacting scrutiny. Compelled membership in a bar association that engages in non-germane activities does not. The Fifth Circuit held that while some of the state bar's legislative lobbying is germane, most of those activities, including its support related to substantive Texas law, are not. On the other hand, the bar's diversity initiatives, even if purportedly "controversial and ideological" in nature, are germane to regulating the profession. And while most of the bar's pro bono activities are germane, some included lobbying for changes aimed at making substantive Texas law more favorable to benefit low-income Texans rather than regulating the legal profession. In light of these considerations, the Fifth Circuit held that because the Texas State Bar is engaged in some non-germane activities, compelling lawyers to join it violates their First Amendment rights. The court offered suggestions on how to structure an association that would pass muster: the bar could stop engaging in non-germane activities, Texas could directly regulate the legal profession and offer a voluntary bar association, or it could adopt a hybrid system. The Fifth Circuit also held that even if attorneys can be required to join the state bar, compelling them to subsidize the bar's non-germane activities violates their freedom of speech. Finally, the court held that the state bar's system of chargeable and non-chargeable expenses is constitutionally inadequate because it fails to give meaningful notice regarding how mandatory dues will be spent

and provides an inadequate procedure for an objecting attorney to express his or her disapproval. It is worth noting that on the same day, the Fifth Circuit issued a companion case, [Boudreaux v. Louisiana State Bar Association](#), which asserted similar First Amendment challenges to the Louisiana State Bar Association. The court held, among other things, that an attorney had standing to challenge the bar's procedure for contesting non-germane expenditures. The Fifth Circuit reversed the district court's conclusion that the attorney failed to allege a concrete injury because he had not identified any bar expenditures he would have challenged if he had been given proper notice, holding that his inability to identify non-germane expenditures itself is his injury. Read the full opinion: [McDonald v. Longley](#), No. 20-50448 (5th Cir. July 2, 2021).

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