

**UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA**

RANDY J. BOUDREAUX
Plaintiff,

v.

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

CIVIL ACTION

Case No. 19-cv-11962

SECTION "I" (1)

Judge Lance M. Africk

Mag. Judge van Meerveld

**DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)**

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I. INTRODUCTION

The parties' briefing relative to the Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) ("Motion")¹ shows that the foundation of the Plaintiff's Complaint rests upon a few conclusory factual allegations and is foreclosed by U.S. Supreme Court precedent. For the reasons set forth below, as well as in the Motion, the Louisiana State Bar Association ("LSBA"), the Louisiana Supreme Court, and each of its Justices (collectively, the "Defendants") respectfully request that the Complaint be dismissed.

II. DISCUSSION

The Plaintiff's three claims are identified herein as follows:

Claim 1: Compelled membership in the LSBA violates attorneys' First and Fourteenth Amendment rights to free association and free speech.

Claim 2: The collection and use of mandatory bar dues to subsidize the LSBA's speech, including its political and ideological speech, violates attorneys' First and Fourteenth Amendment rights to free association and free speech.

Claim 3: The LSBA violates attorneys' First and Fourteenth Amendment rights by failing to provide safeguards to ensure mandatory dues are not used for impermissible purposes.

A. **The Plaintiff cannot circumvent *Lathrop*, which requires the dismissal the Plaintiff's challenge to mandatory bar membership (Claim 1).**

As set forth in the Motion,² *Lathrop v. Donohue*, 367 U.S. 820 (1961), forecloses the Plaintiff's claim that mandatory bar association membership violates his right to free association (Claim 1). The Plaintiff's broad assertion that *Lathrop* "did not resolve the mandatory-membership question"³ is incorrect under any reading of that case. *See Keller v. State Bar of California*, 496 U.S. 1, 7 (1990) ("In *Lathrop v. Donohue*, 367 U.S. 820 [] (1961), a Wisconsin

¹ Doc. 12.

² Doc. 12-2, pp. 10-11. Page numbers herein refer to those located in the CM/ECF document header.

³ Doc. 20, p. 6.

lawyer claimed that he could not constitutionally be compelled to join and financially support a state bar association which expressed opinions on, and attempted to influence, legislation. Six Members of this Court, relying on *Railway Employees v. Hanson*, 351 U.S. 225 [] (1956), rejected this claim.”). *Keller*’s reiteration of *Lathrop*’s holding confirms that the Plaintiff’s challenge to mandatory membership must be dismissed. *See id.*

Keller did not address the narrower question of whether mandatory membership in an organization that engages in non-germane speech could impinge on freedom of association, leaving that question to the state court on remand:

[The Plaintiffs] urge that they cannot be compelled to associate with an organization that engages in political or ideological activities *beyond those for which mandatory financial support* is justified under the principles of *Lathrop* and *Abood*. The California courts did not address this claim, and we decline to do so in the first instance. The state courts remain free, of course, to consider this issue on remand.

Id. at 17 (emphasis added).⁴ Contrary to the Plaintiff’s contention, the above-quoted statement from *Keller* does not undermine the holding in *Lathrop* or otherwise support Claim 1, which is based solely on bar membership and not on any allegedly non-germane speech.⁵ Accordingly, *Lathrop* requires the dismissal of Claim 1. *See also Morrow v. State Bar of California*, 188 F.3d 1174, 1177 (9th Cir. 1999) (“Plaintiffs nevertheless contend that language in *Keller* leaves open the question whether membership alone may cause the public to identify plaintiffs with State Bar positions in violation of plaintiffs’ First Amendment rights. It is difficult for us to accept plaintiffs’ interpretation of this passage since the Court in *Keller* reaffirmed *Lathrop* on this very point.”).

⁴ The Plaintiff characterizes these statements as referring to “lower courts.” Doc. 20, p. 5 (“The Court stated that lower courts ‘remain[ed] free’”) (selectively quoting *Keller*, 496 U.S. at 17). As set forth in the Reply Memorandum filed in support of the Defendants’ Motion to Dismiss Pursuant to Rule 12(b)(1), the U.S. Supreme Court expressly endorsed that “state courts” would consider this issue. *See Keller*, 496 U.S. at 17 (emphasis supplied).

⁵ *See* Doc. 1, ¶¶ 70-80.

The Plaintiff also argues that if *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), rather than *Lathrop*, applied, mandatory LSBA membership would be unconstitutional because the Defendants could achieve LSBA's purposes using less restrictive means.⁶ The Court need not reach this argument because *Lathrop* applies to this case and *Janus* does not. Finally, the Plaintiff's fact-based argument that some other jurisdictions regulate attorneys through voluntary bar associations⁷ is irrelevant to Louisiana's choice to maintain an integrated bar, particularly in the light of Louisiana's history of attempting to obtain an effective state-wide bar association in the face of significant structural and systemic obstacles.⁸

B. The Plaintiff cannot circumvent *Keller*, which requires the dismissal of the Plaintiff's challenge to the mandatory subsidization of LSBA's speech (Claim 2).

The Plaintiff's second claim alleges that the use of LSBA dues for speech activities, including political or ideological speech, violates the Plaintiff's rights to free speech and free association. As set forth in the Motion,⁹ *Keller* requires the dismissal of this claim because the U.S. Supreme Court plainly held that an integrated bar association can use mandatory dues to fund its speech activities so long as a mechanism exists by which members can object to the use of their dues for purposes that are not "germane" to the bar association's legitimate interests.

The Plaintiff could concede that *Keller* bars his claim, but that he and his attorneys are pursuing the claim to obtain a U.S. Supreme Court decision overturning *Keller*. He does not. Instead, the Plaintiff argues incongruously that his claim is consistent with *Keller* provided that the Court replace the *Keller* standard with the *Janus* standard.¹⁰ The U.S. Supreme Court,

⁶ See Doc. 20, pp. 6-9.

⁷ See Doc. 20, p. 8.

⁸ This history was summarized in Defendants' Memorandum in Support of their Motion to Dismiss Pursuant to Rule 12(b)(1). Doc. 17, pp. 6-8.

⁹ Doc. 12-2, pp. 11-14,

¹⁰ Doc. 20, pp. 10-11.

however, has repeatedly instructed that “if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.” *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quotation omitted); *see also Bowcock v. Cont'l Airlines, Inc.*, 432 F. App’x 343, 346 (5th Cir. 2011) (Whether “today’s Supreme Court” would adopt an earlier case’s reasoning is “irrelevant.”). The only federal appellate court to consider the issue has rejected the extension of *Janus* to an integrated bar association. *See, e.g., Fleck v. Wetch*, No. 16-1564, 2019 WL 4126356, at *5 (8th Cir. Aug. 30, 2019). The *Keller* standard has not been replaced with the *Janus* standard, and the Plaintiff’s subsidized-speech claim should be dismissed.¹¹

Under *Keller*, if a bar association uses member dues to subsidize speech that is not germane to the bar’s purpose, then the bar association must provide *Keller* procedures relative to that speech. *Keller*, 496 U.S. at 16. With respect to his compelled speech claim (Claim 2), Plaintiff does not allege what (if any) of the LSBA’s speech identified in the Complaint was not germane to the LSBA’s legitimate purposes.¹² In contrast to the non-germane activities of the California

¹¹ The only other district court to rule on this issue post-*Janus* also had determined that it “should decline to apply *Janus* and must apply *Keller* to the cases at bar.” *Gruber v. Oregon State Bar*, No. 3:18-CV-1591-JR, 2019 WL 2251826, at *9 (D. Or. Apr. 1, 2019), report and recommendation adopted, No. 3:18-CV-1591-JR, 2019 WL 2251282 (D. Or. May 24, 2019).

¹² In a footnote relative to his third claim, the Plaintiff suggests that some of the LSBA activities identified in his Complaint are not germane, but he then disavows reliance on this argument, stating, “The Court need not pass on the issue at this stage” Doc. 20, p. 14 n.2. In any event, although the Plaintiff appears disinterested in litigating these issues under the *Keller* standard, it requires mention that he mischaracterizes the LSBA speech at issue as “calling for removal of free-enterprise education” from state high schools. Doc. 20, p. 14 n.2. The Complaint alleges that the LSBA supported legislation requiring high school students to take a full credit of civics, which would “incorporat[e]” concepts of free enterprise. Doc. 1, ¶ 43. Ensuring that every Louisiana student has the opportunity to understand “the way the nation and state operate,” including the operation of the third branch of government, is germane to the LSBA’s purpose. *See* La. R.S. 17:274.1, Civics and Free Enterprise; required; exceptions. Similarly, the broad statement that the

bar in *Keller* that included commenting on a “nuclear weapons freeze initiative,” 496 U.S. at 17, the LSBA policy positions discussed in the Complaint, including the LSBA’s policy position that persons facing execution in Louisiana should be provided with legal representation,¹³ are “germane to improving the quality of legal services” in the state. Moreover, as discussed *infra*, section II(C), even if these activities were not germane, the Plaintiff does not provide necessary facts to support his speculative allegation that the *Keller* procedures accompanying the activities were constitutionally inadequate. Accordingly, *Keller* requires the dismissal of Claim 2.

C. The Plaintiff’s third claim should be dismissed because the Plaintiff does not identify facts supporting his challenge to the adequacy of the LSBA’s *Keller* procedures (Claim 3).

The Plaintiff’s third claim attacks the sufficiency of the LSBA’s *Keller* procedures, but it does so without the supporting factual allegations necessary to survive a motion to dismiss.¹⁴ In their Motion to Dismiss, the Defendants correctly identified that, with respect to the various policy positions or resolutions identified in the Complaint, the Plaintiff (1) “does not allege that the LSBA has taken non-germane, unpublished positions to which he objects,” or (2) “identif[ied] any instance in which he would have objected to LSBA action but was unable to do so because of a constitutional deficiency in the available *Keller* procedures.”¹⁵

In response, the Plaintiff does not contest these points.¹⁶ Instead, he argues that, hypothetically, there could be other potentially objectionable LSBA activities, but he cannot

LSBA called for a “moratorium on the death penalty” oversimplifies Complaint, *See* Doc. 1, ¶ 41. In any event, insofar as the Plaintiff disagrees that this speech was germane, he was free to object and request a refund of his dues under existing LSBA procedures.

¹³ Doc. 1, ¶ 41.

¹⁴ *See* Doc. 12-2, pp. 14-16. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (“Factual allegations must be enough to raise a right to relief above the speculative level.”).

¹⁵ Doc. 12-2, p. 16.

¹⁶ *See* Doc. 20, pp. 13-14; *see also id.* at p. 14 n.2 (suggesting that some of the LSBA activities may not be germane, but not suggesting that the Plaintiff lacked an opportunity to object to them).

identify them because “[h]e does not and cannot know what the LSBA is doing with his dues money . . . because the LSBA does not provide sufficient information.”¹⁷ The sole basis for this argument is the entirely speculative statement in the Complaint that: “the LSBA may also engage in other activities, in addition to its legislative advocacy, that a member could challenge as not germane to improving the quality of legal services and regulating the practice of law.”¹⁸ The allegations in the Plaintiff’s own Complaint rebut his argument that he is “in the dark”¹⁹ about the LSBA’s activities and expenditures. The Plaintiff does not allege (nor can he) with any specificity that the LSBA lacks financial transparency in a manner that would implicate *Keller*.²⁰

The bald speculation that the LSBA “may” engage in unnamed activities that a member “could challenge” under *Keller* fails to state a claim upon which relief may be granted. “The plaintiff’s factual allegations must support a claim to relief that is plausible on its face and rises above mere speculation.” *U.S. ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 266 (5th Cir. 2010). A “conceivable” claim is not enough to survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See Twombly*, 550 U.S. at 570 (“Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.”). For these reasons, the Plaintiff’s claim regarding the speculative insufficiency of the LSBA’s *Keller* procedures (Claim 3) also should be dismissed.

¹⁷ Doc. 20, p. 14.

¹⁸ Doc. 1, ¶ 100.

¹⁹ Doc. 20, p. 14 (quoting *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986)).

²⁰ The Plaintiff relies on *Hudson*, 475 U.S. 292, to support his contention that disclosures are inadequate. This case does not help him. *See id.* at 306 n.18 (“The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor.”). The LSBA website, which is cited in the Complaint, Doc. 1, ¶ 33, provides audited annual financial statements going back nearly twenty years. *See* Louisiana State Bar Association Annual Reports, available at <https://www.lsba.org/NewsAndPublications/AnnualReports.aspx> (last accessed October 29, 2019).

D. The Louisiana Supreme Court is not a juridical entity, and the Plaintiff cannot identify any authority to the contrary.

The Louisiana Supreme Court cannot be sued because it is not a juridical person. *See* Fed. R. Civ. Pro. 17(b); La. Civil Code art. 24. In their Motion to Dismiss, the Defendants identified multiple cases confirming this point.²¹ *See, e.g., Griffith v. Louisiana*, 808 F. Supp. 2d 929, 934 (E.D. La. 2011) (“District courts within the Eastern District of Louisiana have consistently held that Louisiana state courts are not juridical persons capable of being sued.”). In response, the Plaintiff relies on three cases. None of the cited cases holds that the Louisiana Supreme Court has the capacity to be sued pursuant to Rule 17(b) of the Federal Rules of Civil Procedure—or even discusses the issue. *See S. Christian Leadership Conference v. Supreme Court of State of La.*, 252 F.3d 781, 795 (5th Cir. 2001) (affirming dismissal of claims against Louisiana Supreme Court pursuant to Rule 12(b)(6) and not discussing capacity); *Price v. Supreme Court of Louisiana*, No. 11-1663, 2012 WL 520425, at *5 (E.D. La. Feb. 15, 2012) (dismissing claims against Louisiana Supreme Court pursuant to Rule 12 and not discussing capacity), *aff’d*, 488 F. App’x 817 (5th Cir. 2012) (affirming dismissal and not discussing capacity); *Hecker v. Plattsmier*, No. 08-4200, 2009 WL 4642014, at *5 (E.D. La. Nov. 25, 2009) (dismissing claims against Louisiana Supreme Court pursuant to Rule 12(b)(6) and not discussing the Louisiana Supreme Court’s capacity to be sued). Accordingly, for this additional reason, the claims against the Louisiana Supreme Court should be dismissed.

²¹ *See* Doc. 12-2, pp. 16-17.

III. CONCLUSION

The Plaintiff's claims are contrary to *Lathrop* and *Keller* and based on pure speculation. His opposition confirms that the relief he seeks can be obtained only through the overruling of these cases by the U.S. Supreme Court. The Defendants, therefore, respectfully request that the Complaint be dismissed with prejudice.

Respectfully submitted,

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