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UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

AMY POMEROY,

Plaintiff,

v.

UTAH STATE BAR, et al.,

Defendants.

DEFENDANTS' MOTION TO DISMISS

Oral Argument Requested

Case No. 2:21-cv-00219-DBB-DAO
Honorable David B. Barlow
Magistrate Judge Daphne A. Oberg

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Pursuant to rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, Defendants Utah State Bar; John C. Baldwin, Executive Director, Utah State Bar; Heather Farnsworth, President, Utah State Bar; Heather Thuet, President Elect, Utah State Bar; Marty Moore, 1st Division Commissioner, Utah State Bar; John W. Bradley, 2nd Division Commissioner, Utah State Bar; Chrystal Mancuso-Smith, 3rd Division Commissioner, Utah State Bar; Michelle Quist, 3rd Division Commissioner, Utah State Bar; Mark Morris, 3rd Division Commissioner, Utah State Bar; Mark Pugsley, 3rd Division Commissioner, Utah State Bar; Traci Gundersen, 3rd Division Commissioner, Utah State Bar; Andrew Morse, 3rd Division Commissioner, Utah State Bar; Tom Seiler, 4th Division Commissioner, Utah State Bar; Kristin Woods, 5th Division Commissioner, Utah State Bar; Rick Hoffman, Public Member Commissioner, Utah State Bar; and Shawn Newell, Public Member Commissioner, Utah State Bar (together, Defendants or Utah State Bar) respectfully move this court for an order dismissing Plaintiff Amy Pomeroy's complaint [Dkt. 2].

Introduction

This is one of several lawsuits across the nation seeking to enjoin the enforcement of rules mandating membership in and the payment of license fees to state bar associations as a condition of practicing law. The lawsuits have failed largely because controlling Supreme Court precedent interpreting the First Amendment to the United States Constitution forecloses them. This lawsuit is no different. Indeed, the uncommon structure of the Utah State Bar and the nature of the relief Pomeroy seeks provide additional reasons why this lawsuit fails as a matter of law.

The first reason Pomeroy's claims fail concerns immunity under the Eleventh Amendment. Under the Eleventh Amendment, an entity operating as an alter ego or

instrumentality of the state is immune from suit. Here, the Utah State Bar acts as the alter ego and instrumentality of the Utah Supreme Court. Therefore, it is immune from suit.

The second reason Pomeroy's claims fail concerns Article III standing. A plaintiff has constitutional standing only if they allege an injury likely to be redressed by a favorable ruling. Pomeroy alleges no such injury. She seeks to enjoin enforcement of rules mandating membership in and the payment of license fees to the Utah State Bar. But these rules are promulgated and enforced by the Utah Supreme Court, not the Utah State Bar or its commissioners. Accordingly, enjoining these defendants will not redress the injuries she alleges. Therefore, Pomeroy lacks standing and this court lacks jurisdiction.

The third reason Pomeroy's claims fail concerns the merits. Her claims are based on the freedom of speech and freedom of association. But under controlling Supreme Court precedent, attorneys can be required to become members of, and pay license fees to, an integrated state bar. And a state bar may spend those funds on speech germane to regulating the legal profession or improving the quality of legal services. That precedent defeats Pomeroy's claims.

Pomeroy seeks to avoid that precedent by alleging that the Utah State Bar has engaged in non-germane speech in its lobbying and legislative activities and in publishing the *Utah Bar Journal*. But these activities are germane. The lobbying activities concerned proposals to tax legal services, change the judicial selection process, and address a conflict of interest for the Utah Attorney General. These topics are germane to regulating the legal profession or improving the quality of legal services. And the *Utah Bar Journal* is a nonpublic forum for individuals to publish articles related to the practice of law, an activity germane to the practice of law. Because Pomeroy has not identified any non-germane activities, her claims fail as a matter of law.

But even if Pomeroy had identified something non-germane in the Utah State Bar's lobbying and legislative activities or in the *Utah Bar Journal* (she did not), her claims would still fail as a matter of law.

As to the lobbying and legislative activities, Pomeroy is correct that the Supreme Court requires integrated state bars to refund any portion of a complaining bar member's bar license fees spent on non-germane speech. But the Utah State Bar already does this. In fact, the Utah State Bar will, upon request, refund *all* of the requesting bar member's license fees spent relating to lobbying or legislative activities, regardless of whether those activities were germane. Because this refund policy is automatic and over-inclusive, it both protects against spending on non-germane speech and dispenses with any need for a precise accounting, as Pomeroy demands.

As to the *Utah Bar Journal*, Pomeroy's claims fail because it is a nonpublic forum in which individual contributors speak on topics related to the practice of law. The articles and book reviews are not the speech of the Utah State Bar, and therefore, Pomeroy's association with the Utah State Bar cannot give rise to a claim that she must associate with views to which she objects. Indeed, the Utah State Bar makes clear that opinions expressed by contributors are those of the authors and are not necessarily those of the *Utah Bar Journal* or the Utah State Bar. For these reasons, Pomeroy's claims based on the *Utah Bar Journal* fail as a matter of law.

Finally, Pomeroy asserts that her compelled membership in the Utah Bar Foundation violates her speech and association rights. But she has not alleged that the Utah Bar Foundation engages in any speech, a requirement for her claims directed at the Utah Bar Foundation.

This court should dismiss based on immunity, the lack of jurisdiction, or on the merits because Pomeroy has not alleged facts that give rise to a constitutional violation.

Background

Amy Pomeroy is an attorney and active member of the Utah State Bar. She seeks to enjoin the rule requiring membership in and payment of license fees to the Utah State Bar as a condition of active Bar membership. She bases her request on objections to the Utah State Bar's lobbying efforts and statements in the *Utah Bar Journal*, or alternatively, on alleged inadequacies in the procedure for obtaining a refund of expenditures relating to those activities, as well as her automatic membership in the Utah Bar Foundation.

The Utah State Bar is an “integrated bar,” which is an association of attorneys in which membership and license fees are required as a condition of practicing law in the State. *Keller v. State Bar of Calif.*, 496 U.S. 1, 4-5 (1990). The Utah Supreme Court conditions admission to practice law in the State of Utah on an applicant's membership in the Utah State Bar. (Compl. at 5 (citing Utah Code Jud. Admin. Rs. 14-101, 14-102, 14-802).) The Utah Supreme Court also imposes mandatory license fees on all members of the Utah State Bar. (*Id.* (citing Utah Code Jud. Admin. Rs. 14-107, 14-111(a), 14-207, 14-716).) Failure to pay license fees results in an administrative suspension of the member's license to practice law. (*Id.* (citing Utah Code Jud. Admin. R. 14-111(a).) Active members of the Utah State Bar are automatically members of the Utah Bar Foundation (*Id.* at 17-18 (referencing Utah Code Jud. Admin. R. 14-209).)

The Utah Supreme Court has authorized the Board of Commissioners “to study and provide assistance on public policy issues and to adopt positions on behalf of the Board on public policy issues.” (*Id.* at 6 (citing Utah Code Jud. Admin. R. 14-106(a).) The Utah Supreme Court permits the Board to adopt positions on “issues concerning the courts of Utah, procedure and evidence in the courts, the administration of justice, the practice of law, and matters of

substantive law on which the collective expertise of lawyers has special relevance and/or which may affect an individual's ability to access legal services.” (*Id.* (citing Utah Code Jud. Admin. R. 14-106(a)(1).)

Pomeroy alleges that the State Bar uses the members' mandatory license fees to engage in political and ideological speech. (*Id.* at 5-6.) Pomeroy identifies examples of such speech, but she identified none that are not germane to the regulation of the profession or improving the quality of legal services available to Utahns. Specifically, Pomeroy alleges that the Utah State Bar has engaged in the following speech:

- Opposing a proposed tax on legal services. (*Id.* at 7.)
- Influencing legislation regarding the state attorney general's ability to withhold releasing an opinion requested by the legislature by invoking a potential conflict of interest or the attorney-client privilege. (*Id.*)
- Opposing measures that would have changed the judicial selection process, including instituting nonpartisan elections. (*Id.* at 8.)
- Publishing the *Utah Bar Journal*, which has included articles by contributors that (1) asserted the importance of pursuing “equity” as distinct from “equality”; (2) called for courtrooms to include a safe space where allegations of unfairness will not be met with defensiveness and denial; (3) reviewed a book that proposed criminal penalties for those who become aware of a sexual assault but focus on protecting the institution in which the assault occurred instead of the victim; and (4) referenced the concept of implicit bias. (*Id.* at 8-9.)

Pomeroy makes no allegations about the *Utah Bar Journal's* procedures relating to the content it publishes. Each issue of the journal contains an announcement soliciting contributions from readers and describes the guidelines governing the editorial board's decisions when selecting contributions for publication. (34 Utah Bar J., no. 2, Mar.-Apr. 2021, at 6, attached as Exhibit A; 34 Utah Bar J., no. 1, Jan.-Feb. 2021, at 6, attached as Exhibit B; 33 Utah Bar J., no. 3, May-June 2020, at 6, attached as Exhibit C; 33 Utah Bar J., no. 2, Mar.-Apr. 2020, at 6, attached as Exhibit D; 32 Utah Bar J., no. 4, July-Aug. 2019, at 6, attached as Exhibit E; 32 Utah Bar J., no. 2, Mar.-Apr. 2019, at 6, attached as Exhibit F; 31 Utah Bar J., no. 3., May-June 2018, at 6, attached as Exhibit G; 31 Utah Bar J., no. 2, Mar.-Apr. 2018, at 6, attached as Exhibit H; 30 Utah Bar J., no. 2, Mar.-Apr. 2017, at 6-7, attached as Exhibit I.)

The notice seeking contributions states, "The Editors of the *Utah Bar Journal* want to hear about the topics and issues readers think should be covered in the magazine," and encourages potential contributors to contact the journal. (*E.g.*, 34 Utah Bar J., no. 2, Mar.-Apr. 2021, at 6.) As for the subject matter, the notice "encourages the submission of articles of practical interest to Utah attorneys and members of the bench for potential publication. Preference will be given to submissions by Utah legal professionals. Submissions that have previously been presented or published are disfavored, but will be considered on a case-by-case basis." (*Id.*) It further explains, "Articles should address the *Utah Bar Journal* audience—primarily licensed members of the Utah Bar. Submissions of broad appeal and application are favored. Nevertheless, the editorial board sometimes considers timely articles on narrower topics. If an author is in doubt about the suitability of an article they are invited to submit it for consideration." (*Id.*) Although the notice explains that the editors retain discretion to edit

submissions for “citation style, length, grammar, and punctuation,” it also explains that the “content is the author’s responsibility.” (*Id.*) And for each submission, the contributor is required to identify their place of employment and are encouraged to submit a photograph, each of which are published alongside the submission if it is selected for publication. (*Id.*; *see, e.g., id.* at 20 (attributing authorship of an article, along with the author’s photograph and a description of his place of employment)).

The *Utah Bar Journal* also contains a similar notice regarding letters to the editor submitted for publication. (*Id.*) That notice instructs, “No letter shall be published that advocates or opposes a particular candidacy for a political or judicial office.” (*Id.*) Similarly, “No letter shall be published that (a) contains defamatory or obscene material, (b) violates the Rules of Professional Conduct, or (c) otherwise may subject the Utah State Bar, the Board of Bar Commissioners or any employee of the Utah State Bar to civil or criminal liability.” (*Id.*)

Importantly, at the beginning of each issue of the journal, the editors explain that “[s]tatements or opinions expressed by contributors are those of the authors and are not necessarily those of the *Utah Bar Journal* or the Utah State Bar.” (*E.g.*, 34 *Utah Bar J.*, no. 2, Mar.-Apr. 2021, at 4; 34 *Utah Bar J.*, no. 1, Jan.-Feb. 2021, at 4.)

Pomeroy also challenges the procedure instituted by the Utah State Bar whereby members can obtain a refund of the portion of their license fees that were used to fund the Utah State Bar’s lobbying and legislative activity. (Compl. at 9-16.)

Pomeroy alleges she does not wish to be associated with the Utah State Bar or its political or ideological speech. (*Id.* at 16.) She further alleges that she opposes the Utah State Bar’s using any amount of her mandatory license fee to fund any political or ideological speech. (*Id.*) She

further alleges that she opposes being associated with or subsidizing the Utah State Bar's factual speech even if it is not political or ideological. (*Id.*) Based on her opposition to the Utah State Bar's speech, Pomeroy asserts purported First Amendment violations arising from her compelled membership in the Utah State Bar and mandatory license fee. (*Id.*)

Finally, Pomeroy makes cursory allegations that she has been injured by the rule making her an automatic member of the Utah Bar Foundation, because she "does not wish to associate with the UBF or any political or ideological speech or other activities that it may engage in; she wishes to decide for herself which charitable and advocacy organizations she will and will not associate with and contribute to." (*Id.* at 17-18.) The complaint contains no allegations identifying any speech by the Utah Bar Foundation or describing the organization's activity for which she claims an injury.

Pomeroy seeks declaratory relief that the rules she challenges violate the First Amendment and a permanent injunction preventing enforcement of the rule requiring membership in the Utah State Bar, and license fees paid to the Utah State Bar, as a condition of practicing law in the State of Utah. (*Id.* at 18-19, 28-29.)

Pomeroy's claims all fail as a matter of law. First, Pomeroy's claims against the Utah State Bar are barred by the Eleventh Amendment. Second, Pomeroy's claims against all defendants are barred by Article III's standing requirements because none of the defendants enforce the rules she seeks to enjoin. And third, Pomeroy's claims fail on the merits because they are barred by controlling United States Supreme Court precedent.

Argument

This court should dismiss the complaint on jurisdictional or substantive grounds.

First, this court lacks jurisdiction over the Utah State Bar because it is immune from suit under the Eleventh Amendment. Second, this court lacks jurisdiction because Pomeroy's asserted injury is not redressable by the named defendants. Third, Pomeroy has failed to state a claim for relief, so her complaint should be dismissed on the merits even if this court had jurisdiction.

This is a facial attack on the complaint. A party moving to dismiss under rule 12(b)(1) "mount[s] either a facial or factual attack. A facial attack assumes the allegations in the complaint are true and argues they fail to establish jurisdiction." *Baker v. USD 229 Blue Valley*, 979 F.3d 866, 872 (10th Cir. 2020). "[T]he burden is on the party claiming jurisdiction to show it by a preponderance of the evidence." *United States ex rel. Hafter D.O. v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1160 (10th Cir. 1999).

When considering a motion to dismiss under rule 12(b)(6), the court accepts all well-pleaded factual allegations as true and construes them in the plaintiff's favor. *Thomas v. Kaven*, 765 F.3d 1183, 1190 (10th Cir. 2014). The complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). But the court need not accept legal conclusions contained in the complaint as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

"In addition to the complaint, the district court may consider documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the

documents' authenticity." *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002).¹

Doing so does not convert the motion to one for summary judgment. *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007).

1. The Eleventh Amendment Immunizes the Utah State Bar Against Pomeroy's Suit

This court lacks subject matter jurisdiction over the claims asserted against the Utah State Bar because the Utah State Bar is an arm of the state and therefore immune from suit under the Eleventh Amendment. *Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002).

In the Tenth Circuit, "[t]he Eleventh Amendment is a jurisdictional bar that precludes unconsented suits in federal court against a state and arms of the state." *Wagoner Cnty. Rural Water Dist. No. 2 v. Grand River Dam Auth.*, 577 F.3d 1255, 1258 (10th Cir. 2009). The arm-of-the-state doctrine grants immunity to entities created by state governments that operate as alter egos or instrumentalities of the states. *Watson v. Univ. of Utah Med. Ctr.*, 75 F.3d 569, 574 (10th Cir. 1996). Political subdivisions of the state, such as counties and municipalities, however, are not protected by the Eleventh Amendment. *Elam Const. v. Regional Transp. Dist.*, 129 F.3d 1343, 1345 (10th Cir. 1997).

This court has already concluded that, for purposes of Eleventh Amendment immunity, "the Utah State Bar is an arm of the State because it is acting as an alter ego of the Utah Supreme Court." *Rose v. Utah State*, No. 2:09-CV-695-TC, 2009 WL 5066687, at *4 (D. Utah Dec. 16, 2009). Similarly, the Utah Supreme Court has described the Utah State Bar as an "arm of the court" in the attorney admissions process. *In re Arnovick*, 52 P.3d 1246, 1248 (Utah 2002). *Rose*

¹ Pomeroy's complaint specifically refers to nine issues of the *Utah Bar Journal*, and her allegations about those publications are central to her claims. She did not attach the issues to her complaint. They are each attached hereto so that the court may consider them.

and *Arnovick* should end the inquiry—the Utah State Bar is entitled to immunity under the Eleventh Amendment because it is an arm of the state.

But even if this court were to evaluate anew the Utah State Bar’s status under the Tenth Circuit’s test, the result is the same. The Tenth Circuit has provided the following factors for determining whether an entity is an arm of the state: (1) the entity’s character under state law; (2) the degree of control exercised by the State; (3) the entity’s finances; and (4) whether the entity is concerned primarily with local or state affairs. *Couser v. Gay*, 959 F.3d 1018, 1024 (10th Cir. 2020). Under these factors, the Utah State Bar is immune.

1.1 The Utah State Bar Is an Arm of a Statewide Body, the Utah Supreme Court

The first factor concerns the entity’s character under state law. When evaluating this factor, courts consider whether the entity is an extension of a statewide body or merely an extension of one of the state’s political subdivisions. *Id.* at 1026-27. Here, the Utah State Bar is an extension of a statewide body, the Utah Supreme Court.

The Utah Constitution requires the Utah Supreme Court to regulate the legal profession in Utah, including admission to practice law. Utah Const. art. VIII, § 4. To accomplish its constitutional duty, the Utah Supreme Court has promulgated the Supreme Court Rules of Professional Practice, which include each of the rules challenged in this suit.

The Rules of Professional Practice require the Utah State Bar to “assist the Court in governing admission to the practice of law and improving the quality of legal services in the state.” Utah Code Jud. Admin. R. 14-102(a)(2). For example, the Board of Commissioners assists the Utah Supreme Court by “recommend[ing] and certify[ing] to the [Utah] Supreme Court for admission to the Bar persons who possess the necessary qualifications.” *Id.* R. 14-

702(a). The Utah Supreme Court admits attorneys to the practice of law, not the Utah State Bar. *Id.* R. 14-104. Indeed, although the Utah State Bar (via the Board) is charged with administering the rules, the Utah Supreme Court retains ultimate enforcement authority, which derives from its constitutional power. *Id.* R. 14-102(a)(1). For example, the Utah Supreme Court has explained that “the authority to waive one of our admissions rules rests solely with this court.” *Kelly v. Utah State Bar*, 391 P.3d 210, 214 (Utah 2017); Utah Code Jud. Admin. R. 14-702(f).

The Utah Supreme Court’s description of its relationship with the Utah State Bar is consistent with the foregoing rules. In the context of attorney admissions, the Utah Supreme Court has explained that the Utah State Bar assists the court in fulfilling its constitutional duty to govern the admissions process and that in so doing, the Utah State Bar is “acting as an arm of the court in determining the qualifications and requirements for admission to practice law” in the state. *Arnovick*, 52 P.3d at 1248.

Thus, the statewide-body factor weighs heavily in favor of immunity.

1.2 The Utah Supreme Court Exercises Substantial Control Over the Utah State Bar

The second factor concerns the degree of control exercised by the State. When evaluating this factor, courts consider whether the state-level officials or local authorities control the entity. *Couser*, 959 F.3d at 1028. Here, the court delegates its regulatory authority to the Utah State Bar while reserving substantial control over the Utah State Bar in its administration of the membership and license fees rules challenged in this suit. Utah Code Jud. Admin. R. 14-103(b)(1) (expressly reserving Supreme Court’s authority to approve Bar admission and license fees).

As explained above, the Utah State Bar's role in admitting applicants to the practice of law is ultimately governed by the Utah Supreme Court. When reviewing the Utah State Bar's recommending or certifying an applicant, the Utah Supreme Court "may exercise judgment independent of the Bar" whenever the court deems it appropriate. *Spencer v. Utah State Bar*, 293 P.3d 360, 363 (Utah 2012) (alteration omitted). Due to the Utah State Bar's agency relationship with the court, the court's review of the Bar's decisions is far less deferential than its review of the decisions of a trial court or administrative agency. *Id.* That is because the Utah Constitution provides the Utah Supreme Court with "the exclusive authority to regulate the practice of law in Utah." *Utah State Bar v. Summerhays & Hayden*, 905 P.2d 867, 870 (Utah 1995).

While the Utah State Bar serves an important function on behalf of the court, its role in relation to the Utah Supreme Court is "essentially advisory in nature." *Barnard v. Utah State Bar*, 804 P.2d 526, 529 (Utah 1991). The Utah State Bar assists the court in two regulatory functions: admissions and discipline. But "[t]he Bar has no final decision-making authority in these matters and acts only by recommending to the Court appropriate action in all cases involving admissions and public discipline." *Id.*

Thus, the control factor also weighs in favor of immunity.

1.3 The Utah State Bar's Finances are Akin to Public Funding From the State

The third factor concerns the entity's finances. When evaluating this factor, courts consider whether the entity's funding derives from the state or a political subdivision, such as a county or municipality. *Couser*, 959 F.3d at 1029. Here, the Utah State Bar's finances are similar to an entity receiving funding from the State and are unlike an entity funded by a political subdivision.

The Utah State Bar is funded entirely by the license fees paid by its members and applicants seeking admission. *Barnard*, 804 P.2d at 530. But those fee requirements exist only because the Utah Supreme Court has promulgated rules imposing them. The Utah Supreme Court compels all members to pay an annual license fee, the amount of which is fixed by the Bar Commission but ultimately approved by the court. Utah Code Jud. Admin. Rs. 14-104(c), 14-107(b). The ultimate source of the Utah State Bar's funds is therefore the Utah Supreme Court, a statewide entity that promulgated rules imposing a licensing fee for all admitted lawyers and directing those fees to be used to fund the Utah State Bar.

Thus, the funding factor also weighs in favor of immunity. And even if this court concludes that the Utah Supreme Court's role in collecting licensing fees does not make them akin to state funds, the other factors all weigh in favor of immunity, outweighing this factor.

1.4 The Utah State Bar is Primarily Concerned with State Affairs

The fourth factor concerns whether the entity is involved with state or local affairs. When evaluating this factor, courts consider the entity's "function, composition, and purpose." *Couser*, 959 F.3d at 1030. Each of those features demonstrate that the Utah State Bar is concerned with statewide affairs, not local ones.

Pomeroy concedes this factor when she alleges that the Utah State Bar "declares itself to be the official state organization of the entire legal profession." (Compl. at 16-17.) She alleges that the Utah State Bar identifies itself as "an organization of Utah's 12,000 lawyers and judges" and claims its mission is to represent Utah's lawyers. (*Id.* at 16.) This Court must assume these factual allegations are true.

Pomeroy accurately describes the Utah State Bar's function. The Utah Supreme Court delegated authority to the Utah State Bar to administer rules and regulations that govern the practice of law statewide. Utah Code Jud. Admin. R. 14-102(a)(1). The Utah Supreme Court delegated that authority based on its recognition of "using the Bar to assist the Court in governing admission to the practice of law and improving the quality of legal services in the state." *Id.* R. 14-102(a)(2). And the Utah Supreme Court expressly detailed the Utah State Bar's purpose and duties to include functions that are general and applicable statewide. *Id.* R. 14-102(b). For example, the Utah State Bar is empowered to advance the administration of justice, regulate admissions, foster and maintain integrity among those practicing law, promote competence through continuing legal education, and educate the public about the rule of law. *Id.*

The Utah State Bar's structure also demonstrates its statewide focus. The Board of Commissioners is comprised of commissioners representing territorial divisions from each of the State's judicial districts. *Id.* R. 14-103(c)-(d). And because the Utah State Bar's focus is on statewide issues, the bylaws expressly encourage the creation of local bar associations, as distinct from the Utah State Bar itself. *Id.* R. 14-210(c).

Thus, the statewide function factor also weighs in favor of immunity.

In sum, all four factors weigh in favor of concluding that the Utah State Bar is an arm of the state entitled to immunity under the Eleventh Amendment. Accordingly, the Utah State Bar is immune from this lawsuit, and this court should dismiss with prejudice all claims against all defendants.

2. Pomeroy Lacks Standing Because Her Claims Are Not Redressable by the Named Defendants

This court lacks jurisdiction because Pomeroy lacks Article III standing. She lacks standing because her alleged injury is not redressable by the named defendants.

“To seek relief in federal court, a party must show constitutional standing.” *Kane Cnty. v. United States*, 928 F.3d 877, 886 (10th Cir. 2019). To show standing, Pomeroy must demonstrate that she suffered an injury-in-fact that is fairly traceable to the challenged conduct and will likely be redressed by a favorable decision. *Bennett v. Spear*, 520 U.S. 154, 162 (1997). Where the named defendants lack adequate enforcement authority to redress the alleged injury, the plaintiff lacks standing to assert its claims and the court lacks Article III jurisdiction over the suit. *Bronson v. Swensen*, 500 F.3d 1099, 1111 (10th Cir. 2007).

Pomeroy alleges that the Utah State Bar and the members of its Board enforce the rules compelling bar membership and the payment of license fees as a condition of practicing law. (Compl. at 5-6, 20, 23, 26-27.) Those allegations are legal conclusions, which this court need not accept as true under the motion-to-dismiss standard. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Nor should it—the allegations incorrectly describe the defendants’ enforcement authority.

No named defendants, individually or collectively, have the ultimate authority to enforce the rules Pomeroy attacks. The named defendants merely administer the rules as agents of the Utah Supreme Court, which retains ultimate enforcement authority. Utah Code Jud. Admin. R. 14-102(a)(1).

The Utah State Bar’s role in the admissions process is simply to “recommend and certify to the Supreme Court for admission to the Bar persons who possess the necessary qualifications.” *Id.* R. 14-702(a). On behalf of qualified applicants, the Utah State Bar submits a

motion to the Supreme Court for admission. *Id.* R. 14-716(b). If the Utah State Bar denies an application, the applicant may appeal that determination only to the Utah Supreme Court. *Id.* R. 14-715(d). Only upon approval by the Utah Supreme Court—whether by granting the Utah State Bar’s motion or by deciding in the appellant’s favor on appeal—may an applicant practice law in the state. *Id.* Rs. 14-104(c), 14-716(b). And only the Utah Supreme Court—and not the Utah State Bar—can waive admissions requirements. *Kelly v. Utah State Bar*, 391 P.3d 210, 214 (Utah 2017); Utah Code Jud. Admin. R. 14-702(f).

The Utah State Bar plays a similar role in administering the Utah Supreme Court’s rule requiring members to pay license fees. The court requires applicants to pay bar license fees before admission. Utah Code Jud. Admin. R. 14-104(c). The court also approves the amount of the fee collected by the Utah State Bar. *Id.* Rs. 14-104(c), 14-107(b)(1). If an admitted attorney fails to pay annual license fees, the attorney is administratively suspended by the Utah State Bar. *Id.* R. 14-107(b)(2). But that decision is not discretionary for the Utah State Bar, because only the Utah Supreme Court can waive the compulsory license fee rule. *Id.* R. 14-702(f).

Enjoining the named defendants from enforcing the challenged rules would be a “meaningless gesture” because Pomeroy would remain subject to the rules. *Bronson*, 500 F.3d at 1111. That is because the Utah Supreme Court holds the ultimate enforcement authority over the rules Pomeroy seeks to enjoin. Enjoining the named defendants would not discontinue the enforcement of the rules, it would merely require the Utah Supreme Court to choose another agent to enforce the challenged rules or enforce them itself. Accordingly, Pomeroy cannot satisfy her burden to demonstrate Article III standing.

This court should dismiss with prejudice all claims against all defendants on this ground.

3. Pomeroy's Claims Are Barred by Supreme Court Precedent

If this court does reach the merits, it should dismiss with prejudice all of Pomeroy's claims under controlling Supreme Court precedent.

3.1 Under the First Amendment, a State May Condition the Right to Practice Law on Membership in the Utah State Bar and the Payment of License Fees

Pomeroy's first and second claims assert that conditioning her right to practice law on membership in the Utah State Bar and payment of license fees violate her First Amendment right of free speech and association. United States Supreme Court precedent says otherwise.

In *Lathrop v. Donohue*, 367 U.S. 820 (1961), the Supreme Court rejected a free-association challenge to Wisconsin's integrated bar. *Id.* at 843. The Court explained that the integrated bar "further[ed] the State's legitimate interests in raising the quality of professional services," and the State could "constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers," even though the bar "also engages in some legislative activity." *Id.* *Lathrop* did not, however, consider the related question of whether conditioning the right to practice law on bar membership and the payment of license fees constituted a free speech violation.

That question was addressed in *Keller v. State Bar of Calif.*, 496 U.S. 1 (1990). There, the Supreme Court extended the reasoning of *Lathrop* to conclude that conditioning the right to practice law on bar membership and payment of license fees did not constitute a free speech violation. *Keller*, 496 U.S. at 13-14. The Court explained that mandatory bar membership and license fees "are justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals of the mandatory dues of all members." *Id.* But the Court recognized the following

limitation: “It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity.” *Id.* at 14.

Pomeroy’s first two claims challenge the arrangement expressly permitted under *Lathrop* and *Keller*. Just as in those cases, the Utah Supreme Court has recognized “a compelling state interest in using the Bar to assist the Court in governing admission to the practice of law and improving the quality of legal services in the state.” Utah Code Jud. Admin. R. 14-102(a)(2). Thus, the Utah Supreme Court’s requirement mandating membership in the Utah State Bar and the payment of license fees does not violate the First Amendment.

Pomeroy also asserts the Utah State Bar runs afoul of the First Amendment because it engages in “political and ideological” speech. (*E.g.*, Compl. at 6.) But that is not the governing standard. The Utah State Bar may engage in political and ideological speech, so long as it is germane to regulating the legal profession and improving the quality of legal services. *Keller*, 496 U.S. at 13-14. Nor does the governing standard support Pomeroy’s puzzling claim that the Utah State Bar’s factual speech violates the First Amendment. Indeed, as to that claim, Pomeroy does not identify factual speech she finds objectionable, nor does she provide any basis for claiming injury from the State Bar engaging in factual speech. In any case, as demonstrated below, all speech at issue here is germane to the profession.

Pomeroy, like similar plaintiffs across the country, argues that *Keller* and *Lathrop* have been displaced by *Janus v. American Federation of State, County, & Municipal Employees*, 138 S. Ct. 2448 (2018). Pomeroy reasons that *Janus* overruled *Abod v. Detroit Board of Education*, 431 U.S. 209 (1977), upon which the *Keller* Court relied. This argument was recently considered and rejected by the Tenth Circuit. *Schell v. Chief Just. & Justs. of the Okla. Sup. Ct.*, ___ F.4th ___,

No. 20-6044, 2021 WL 2657106, at *7 (10th Cir. June 29, 2021) (“Although *Janus* suggests *Keller* is vulnerable to reversal by the Supreme Court, at this time *Keller* remains binding precedent on this court.”).

This court must follow the Tenth Circuit’s interpretation of Supreme Court precedent. But the Tenth Circuit is in good company—most courts considering the question have concluded that *Janus* did not overrule *Keller* or *Lathrop*. E.g., *McDonald v. Longley*, ___ F.4th ___, No. 20-50448, 2021 WL 2767443, at *15 (5th Cir. July 2, 2021); *Boudreaux v. La. State Bar Ass’n*, 433 F. Supp. 3d 942, 976 (E.D. La. 2020), *rev’d on other grounds*, ___ F.4th ___, No. 20-30086, 2021 WL 2767318 (5th Cir. July 2, 2021); *Taylor v. Barnes*, No. 1:19-CV-670, 2020 WL 10050772, at *1 (W.D. Mich. Sep. 8, 2020). And the United States Supreme Court recently denied a petition for certiorari seeking to overturn *Keller* based on the Court’s reasoning in *Janus*. *Jarchow v. State Bar of Wisconsin*, 140 S. Ct. 1720, 1720 (2020).

Of course, Pomeroy is entitled to challenge binding precedent as a vehicle to challenge that precedent in the Supreme Court. But for now, *Keller* and *Lathrop* (and the Tenth Circuit’s interpretation of those cases in *Schell*) control and require this court to dismiss Pomeroy’s first two claims as long as the speech at issue is germane to the legal profession and legal services.

3.2 Pomeroy Alleges No Non-Germane Speech

Pomeroy asserts an as-applied challenge based on her contention that the Utah State Bar engages in non-germane political or ideological speech. But the speech she identifies is germane to the legal profession and legal services.

Again, integrated bars (such as the Utah State Bar) may engage in speech without violating the First Amendment so long as the speech is germane to the state interests that justify

the rules compelling bar membership and license fees. *Keller*, 496 U.S. at 13-14. Consequently, “the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or ‘improving the quality of the legal service available to the people of the State.’” *Id.* at 14 (quoting *Lathrop*, 367 U.S. at 843 (plurality opinion)). This court should dismiss Pomeroy’s claims because her complaint fails to allege any non-germane speech by the Utah State Bar.

Pomeroy’s claims fall into two categories. The first concerns the Utah State Bar’s lobbying and legislative activities. The second concerns articles authored by individuals that are published in the *Utah Bar Journal*. The defendants address each category.

Legislative Activities – The Utah State Bar’s legislative activities are germane as a matter of law. As the Fifth Circuit explained recently, “[l]obbying for legislation regarding the functioning of the state’s courts or legal system writ large,” as well as “advocating for laws governing the activities of lawyers *qua* lawyers,” is germane. *McDonald v. Longley*, ___ F.4th ___, No. 20-50448, 2021 WL 2767443, at *10 (5th Cir. July 2, 2021). Under these standards, lobbying for an “exemption regarding the appointment of *pro bono* volunteers” and for changes to trust laws that “affect lawyers’ duties when serving as trustees,” are germane because they concern the legal system generally and regulations that govern lawyers acting as lawyers. *Id.* at *11.

In addition, fundamental changes to the nature of the state’s judiciary directly implicates the state’s interest in regulating the legal profession, so speech involving “the structure of the court system . . . falls within those activities accepted in *Lathrop* and *Keller*.” *Schell v. Chief*

Just. & Justs. of the Okla. Sup. Ct., __ F.4th __, No. 20-6044, 2021 WL 2657106, at *10 (10th Cir. June 29, 2021).

Under these standards, lobbying and legislative activities alleged in the complaint are germane.

First, Pomeroy complains that the Utah State Bar opposed proposed legislation that would have imposed a state tax on legal services. (Compl. at 7.) But speech opposing a tax on legal services is quintessentially germane to the legal profession. Taxing legal services will directly affect consumers' ability to afford legal services and, consequently, lawyers' ability to generate fees. The lobbying therefore concerned laws governing the activities of lawyers qua lawyers.

Second, Pomeroy complains that the Utah State Bar took a position on proposed legislation affecting the attorney general's ability to invoke a potential conflict of interest or attorney-client privilege. (*Id.* at 7.) But the proposed legislation was a direct regulation of the legal profession, which is squarely germane to the legal profession and Utah State Bar's purpose. The proposed legislation concerned the functioning of the legal system.

Third, Pomeroy complains that the Utah State Bar opposed measures that would have changed Utah's merit-based judicial selection process to a system of nonpartisan elections. (*Id.* at 8.) But this legislation concerned the structure of the court system, and therefore, was germane to the legal profession and the quality of legal services.

Pomeroy has failed to identify any non-germane lobbying or legislative activities.

Utah Bar Journal – The *Utah Bar Journal* also provides no basis for Pomeroy's claims. The Tenth Circuit and the Fifth Circuit recently provided guidance on the standard governing

publications in bar journals under the test in *Keller*. In *Schell*, the Tenth Circuit explained that it was unclear whether the district court had considered whether individual articles satisfied the germaneness test, and remanded for further proceedings because the bar journal articles were not in the record before the court. 2020 WL 2657106, at *11.

But the Fifth Circuit was not constrained by its record and viewed the state bar journal as a whole—rather than by examining individual articles separated from the context in which they are published—when determining germaneness, and its analysis is instructive. Under the Fifth Circuit test, bar associations may provide a forum for publishing articles devoted to legal matters, even if the articles advance various viewpoints, particularly where the bar association “includes a disclaimer clarifying that the Bar does not endorse any views expressed therein.” *McDonald*, 2021 WL 2767443, at *14.

Put differently, statements in articles published in the *Utah Bar Journal* are not speech attributable to the Utah State Bar, because the journal is a nonpublic forum in which individual contributors speak. Each issue of the *Utah Bar Journal* contains the following disclaimer: “Statements or opinions expressed by contributors are those of the authors and are not necessarily those of the *Utah Bar Journal* or the Utah State Bar.” *See, e.g.*, 34 *Utah Bar J.*, no. 2, Mar-Apr. 2021, at 4. This is because the Utah State Bar does not author the Journal’s content.

The Journal’s submission guidelines “encourage[] the submission of articles of practical interest to Utah attorneys and members of the bench,” with preference given to authors who are “Utah legal professionals.” *Id.* at 6. Pomeroy’s objections to statements published in the *Utah Bar Journal* do not support her claims, because those statements were made by individual authors and are not fairly attributable to the Utah State Bar itself.

The *Utah Bar Journal* is a means by which the Utah State Bar fulfills some of its duties, as defined by the Utah Supreme Court. Specifically, the court has charged the Utah State Bar with “fostering and maintaining integrity, learning competence, public service, and high standards of conduct among those practicing law,” and “promoting professionalism, competence, and excellence through continuing legal education and other means.” Utah Code Jud. Admin. R. 14-102(b)(4), (7). The *Utah Bar Journal* is a forum where practitioners can share their insights on subjects pertaining to the practice of law, which helps to foster competence and professionalism.

In the context of speech claims, the *Utah Bar Journal* is treated as a nonpublic forum. *Barnard v. Chamberlain*, 897 F.2d 1059, 1065-66 (10th Cir. 1990) (holding that a precursor to the *Utah Bar Journal*—the *Utah Bar Letter*—was a nonpublic forum). Similarly, the Fifth Circuit has concluded that the Louisiana Bar Journal is a nonpublic forum. *Estiverne v. La. State Bar Ass’n*, 863 F.2d 371, 381 (5th Cir. 1989). Identifying a bar journal publication as a type of forum necessarily means that the speech contained in the publication is not attributable to the publisher. Instead, the speech must be attributed to the individual authors of each piece of content in the publication. Pomeroy has not alleged any speech in the *Utah Bar Journal* that is attributed to the Utah State Bar itself, let alone to all Bar members.

Identifying the *Utah Bar Journal* as a nonpublic forum does not mean that the *Utah Bar Journal* is incapable of infringing its members’ First Amendment rights. “[T]he fact that a bar publication is a nonpublic forum does not mean that its editors are vested with unfettered editorial discretion.” *Barnard*, 897 F.2d at 1066. When attributing speech in a forum, the actor who creates and facilitates the forum is attributed speech if it “determines the content” of the

speech in the forum. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995). And “restrictions on access to a nonpublic forum must be reasonable in light of the purposes of the forum and the state may not restrict access to the forum on the basis of the viewpoint of the proffered speech.” *Barnard*, 897 F.2d at 1066. But Pomeroy has not alleged that any decisions were made to restrict the content of the *Utah Bar Journal*.

While this dispenses of Pomeroy’s complaints concerning the *Utah Bar Journal* regardless of the ideological content of any articles, Pomeroy’s specific allegations confirm that the content also is germane under *Keller*.

Pomeroy complains that the *Utah Bar Journal* published articles containing “statements that take or publicize positions on current controversies.” (Compl. at 8.) Specifically, she points to four articles she found objectionable: (1) the Utah State Bar President publishing a statement asserting the importance of “equity” as distinct from “equality”; (2) articles referencing the concept of implicit bias; (3) an article in which the author called for courtrooms to be safe spaces where allegations of unfairness will not be met with defensiveness and denial; (4) a review of a book that proposed criminal penalties for individuals who learn of a sexual assault but protect the institution in which it occurs instead of the victim. (*Id.* at 8-9.)

The first two articles concerning equity, equality, and implicit bias are germane. As the Fifth Circuit has explained, “despite the controversial and ideological nature of [] diversity initiatives, they are germane to the purposes identified by *Keller*.” *McDonald*, 2021 WL 2767443, at *12. This is because “creating a fair and equal legal profession” will “‘help to build and maintain the public’s trust in the legal profession and the judicial process as a whole,’ which is an improvement in the quality of legal services.” *Id.*

The third article, concerning making courtroom safe spaces, is also germane. In fact, it is difficult to imagine a more germane topic than how lawyers and other behave in the courtroom.

And the fourth article, reviewing a book, is likewise germane. The reviewed book discussed the criminal justice system. Pomeroy does not allege any speech by the reviewer that is non-germane. Indeed, Pomeroy's allegations describe only some of the content of the book being reviewed, and not the position taken by the reviewer, if any. Pomeroy appears to take issue with the decision to review this particular book. But it is not plausible to attribute the reviewer's choice of subject matter to the Utah State Bar, let alone its members.

This court should dismiss with prejudice the first and second claims on this ground.

3.3 The Utah State Bar's Mechanism for Refunding Licensing Fees Complies with the Governing Standard

Even if Pomeroy could identify one or more instances where the Utah State Bar did engage in non-germane speech attributable to its members, Pomeroy's claims still fail. This is because the Utah State Bar has provided a refund procedure to safeguard against the risk that mandatory license fees would be used for impermissible legislative purposes. The Utah State Bar's refund procedure complies with the guidance from *Keller*.

In *Keller*, the U.S. Supreme Court rejected the suggestion that an integrated bar was required to conduct a "bill-by-bill, case-by-case" analysis every time it decides to engage in speech to ensure that the speech is germane. 496 U.S. at 16. Instead, the Court explained that integrated bars satisfy their obligation by adopting a procedure—consistent with the guidance from *Teachers v. Hudson*, 475 U.S. 292 (1986)—whereby the bar provides "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of

the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.” *Keller*, 496 U.S. at 16 (citation omitted).

But critically, *Keller* expressly reserved the question of whether “one or more alternative procedures would likewise satisfy” the obligation for an integrated bar to adequately protect against its members’ licensing fees being spent on non-germane speech. *Id.* at 17. Thus, nothing in *Keller* mandates that integrated bars adopt the exact procedure described in *Hudson*.

The Utah State Bar has implemented a procedure consistent with *Hudson* that provides adequate protection against expenditures for non-germane legislative speech. After each annual legislative session, the Utah State Bar must “calculate all reasonable administrative expenses attributable to the Bar’s legislative activities for the preceding 12 month period,” calculate each member’s pro rata share of those expenses, “and establish a fair and equitable rebate procedure of that amount for Bar members . . . who object to any legislative position taken by the Board.” Utah Code Jud. Admin. R. 14-106(c).

As Pomeroy’s allegations acknowledge, the Utah State Bar calculates its expenditures for “lobbying and any legislation-related expenses,” then publishes a notice in the *Utah Bar Journal* that any member is entitled to a refund of their proportionate share of those expenditures. (Compl. at 10-15.) Importantly, the Utah State Bar does not limit refunds to those expenditures that are later determined to be non-germane. Instead, the Utah State Bar refunds to any complaining member all of that member’s respective licensing fee that were spent on lobbying or legislation-related activities.

Because it is over-inclusive about the types of speech that will trigger a refund, the Utah State Bar’s policy provides complete protection against a member’s licensing fees being used for

non-germane speech related to legislation. Rather than parsing the expenditures on each individual issue upon which the Utah State Bar has spoken, it simply offers a refund as to all expenditures on all lobbying or legislation-related speech. Consequently, there is no need to provide a mechanism for disputing the Utah State Bar's assessment of individual instances of speech. Nor is there a reason to place the funds in escrow while those non-existent disputes are resolved. The Utah State Bar goes further than *Keller* requires and refunds to a complaining member all of its respective expenditures relating to lobbying or legislation. Pomeroy's claim that the Utah State Bar's policy is inadequate is therefore incorrect as a matter of law.

Similarly, Pomeroy complains that the Utah State Bar's policy does not include other mechanisms, yet those mechanisms are not required. For example, Pomeroy alleges that the refund notice is published "inconspicuously, buried deep within the *Utah Bar Journal*." (Compl. at 9.) First, of course, Pomeroy saw the notice, as demonstrated by her allegations describing it. Second, there is nothing inconspicuous about including a rebate notice in a bi-monthly publication sent to all active members of the bar. Third, as demonstrated by the images of the notices included in Pomeroy's complaint, the notices are not buried in fine print. The notices contain a large header and are typically published in the section announcing Utah State Bar news. Fourth, Pomeroy complains about the notice contained in the March-April 2017 issue, which is outside the statute of limitations. *Parker v. Bourdon*, 800 F. App'x 654, 656-57 (10th Cir. 2020) (holding four-year statute of limitations applies to § 1983 actions in Utah). And fifth, in any event, Pomeroy's allegations amount to nothing because she does not allege that the formatting or location of the notices' publication affected her awareness of the opportunity to

obtain a refund of her fees that were expended in connection with lobbying or legislation-related activities.

Pomeroy also complains that the Utah State Bar's policy does not allow members a means by which they can prevent their licensing fee from being used in the first place for lobbying or legislative activities. (Compl. at 14.) Pomeroy's complaint again ignores the controlling standard. The Utah State Bar is permitted to spend the funds from mandatory licensing fees on lobbying or legislative activity, so long as it is germane. There is no requirement that the Utah State Bar provide its members with an opportunity to challenge the germaneness of each of the Utah State Bar's activities beforehand. In fact, *Keller* expressly rejected that formulation, explaining that state bars are not required to perform a case-by-case analysis "prior to each instance in which it seeks to advise the Legislature or the courts of its views on a matter." 496 U.S. at 16 (citation omitted). The Utah State Bar need only provide a procedure that is adequate to ensure against members' licensing fees being spent on non-germane speech. *Id.* at 17. The bar's refund procedure provides adequate protection by erring on the side of refunding all fees spent on lobbying and legislative activities.

Pomeroy complains that the rebate notice does not provide information about how the Utah State Bar determines which expenditures should be classified as being eligible for the rebate. Again, the nature of the Utah State Bar's policy addresses Pomeroy's concern and the law does not require more. Pomeroy acknowledges that the rebate notice explains that the rebate encompasses "lobbying and any legislative-related expenses." (Compl. at 13.) The Utah State Bar does not withhold rebates on those expenses relating to germane speech. Instead, the rebate categorically includes all expenditures on lobbying and other legislative-related efforts.

Pomeroy complains that the Utah State Bar’s website provides only a summary of the legislative positions taken by the Utah State Bar rather than a detailed explanation of the Utah State Bar’s position and a financial accounting of the expenditures on each issue. Nothing in the Supreme Court’s guidance indicates that the Utah State Bar is required to provide that information on its website. *See Keller*, 496 U.S. at 16. That is especially so here because the Utah State Bar’s refund policy is over-inclusive and encompasses all expenditures relating to the positions taken on all legislation. Pomeroy’s complaint again demands what *Keller* rejected—a “bill-by-bill, case-by-case . . . analysis.” *Id.*

Finally, Pomeroy complains that the Utah State Bar provides inadequate information about its expenditures and budget. (Compl. at 15.) *Keller* does not require the Utah State Bar to provide the granular detail sought by Pomeroy. *Keller*, 496 U.S. at 16. Even if *Keller* did require the disclosure of detailed budget information, the Utah State Bar publishes its annual budget. First, before the Utah State Bar can adopt an annual budget, a draft of the budget must be published to allow for comment, including comments from members such as Pomeroy. Utah Code Jud. Admin. R. 14-207(a). Second, the Utah State Bar’s final budget is made publicly available. *See, e.g.,* Bar’s Financial Budget, Utah State Bar Member Services, <https://www.utahbar.org/member-services/>. Although the Utah State Bar’s over-inclusive refund policy obviates the need for detailed information about expenditures on potentially non-germane lobbying and legislative activity, the Utah State Bar’s budget is available to the public, including Pomeroy. Her demand for additional information therefore has no merit.

In the end, Pomeroy has not identified any speech by the Utah State Bar that is not germane, but even if she had, the Utah State Bar’s refund policy adequately protects against that

possibility by erring on the side of refunding more licensing fees than necessary. That is because the policy entitles Pomeroy to a refund for licensing fees expended on her behalf on all lobbying and legislative-related activities, regardless of whether the topic of the activity is germane. The First Amendment does not entitle Pomeroy to limit the Utah State Bar's speech on topics that are germane to regulating the practice of law and improving the quality of legal services. Instead, Pomeroy can participate in the Utah State Bar to voice her opinions about the positions that the Utah State Bar should take on germane topics.

This court should dismiss Pomeroy's third claim with prejudice and on the merits because the Utah State Bar's refund procedure is more than constitutionally adequate.

3.4 Under the First Amendment, the State May Condition the Right to Practice Law on Membership in the Utah Bar Foundation

Pomeroy's fourth claim complains that Rule 14-209 of the Supreme Court Rules of Professional Practice violates her right to free speech and association by providing that all active members of the Utah State Bar are automatically members of the Utah Bar Foundation. (Compl. at 26-28.) That claim fails because Pomeroy has not alleged any speech by the Utah Bar Foundation.

A key principle underlying all compelled speech and association cases is that the government cannot force an individual to agree with another's speech. *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 297 (1984) ("The basis of . . . the right to be free from compelled associations . . . is found in our conviction that individuals may not be forced to join or support positions or views which they find objectionable on moral, ideological, or personal grounds."). As Justice Jackson famously described it, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics,

nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Consequently, it is impermissible to force individuals to be associated with or “mouth support for views they find objectionable.” *Janus*, 138 S. Ct. at 2463. To state a compelled speech or association claim, plaintiffs must therefore identify speech with which the plaintiff objects to being forced to associate or support. *Barnette*, 319 U.S. at 642; *Janus*, 138 S. Ct. at 2463. The Complaint did not do this.

Pomeroy’s claim fails because she has not alleged that the Utah Bar Foundation engages in any speech whatsoever, much less objectionable speech. Nor has she explained how membership in such an organization could implicate her First Amendment rights. Pomeroy’s failure to allege any speech by the Utah Bar Foundation is fatal to her claim that she has been unconstitutionally compelled to speak through the Utah Bar Foundation or compelled to associate with speech contrary to her beliefs. This court should therefore dismiss Pomeroy’s fourth claim with prejudice and on the merits.

Conclusion

The court should dismiss Pomeroy’s complaint for several reasons. First, the court should dismiss the claims directed against the Utah State Bar because the bar is immune under the Eleventh Amendment. Second, the court should dismiss all of Pomeroy’s claims because they are not redressable against the named defendants, who individually and collectively lack adequate enforcement authority to provide the relief she seeks. Third, Pomeroy’s allegations do not state a claim upon which relief can be granted. Conditioning the right to practice law on membership in the Utah State Bar and mandating the payment of licensing fees is permitted

under controlling Supreme Court precedent. Pomeroy also does not identify any non-germane speech that could give rise to a constitutional violation. Her claim regarding the rebate procedure fails because the Utah State Bar's procedure complies with the Supreme Court's guidance. And Pomeroy fails to allege any speech by the Utah Bar Foundation that could give rise to her First Amendment claim regarding her automatic membership in that entity by virtue of being an active member of the Utah State Bar.

DATED this 7th day of July, 2021.

ZIMMERMAN BOOHER

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Certificate of Service

This is to certify that on the 7th day of July, 2021, I caused the foregoing to be served on the following via CM/ECF:

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