IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MARK E. SCHELL, Plaintiff, v. NOMA GURICH, Chief Justice of the Oklahoma Supreme Court; et al., Defendants.	)	Case No. CIV-2019-281-H

DEFENDANT JOHN M. WILLIAMS'
MOTION TO DISMISS FIRST AMENDED COMPLAINT
UNDER RULES 12(B)(1) AND 12(B)(6), FED.R.CIV.P.,
AND BRIEF IN SUPPORT

Respectfully submitted,

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Defendant John M. Williams ("Williams"), in his official capacity as executive director of the Oklahoma Bar Association ("OBA"), respectfully moves to dismiss in its entirety the First Amended Complaint [Doc. 19] ("Amended Complaint") in this matter under Federal Rule of Civil Procedure 12(b)(1) and (b)(6).[1] In support thereof, Williams would show the Court:

INTRODUCTION AND BACKGROUND

Plaintiff asks this Court to declare mandatory membership in, and payment of dues to, the OBA unconstitutional under the First and Fourteenth Amendments of the United States Constitution, to enjoin the collection and use of member dues, and to obtain additional relief concerning other aspects of the OBA's operations.

In 1939, in exercise of its plenary powers over the state's courts, OKLA. CONST. arts. 4, 7, the Oklahoma Supreme Court ("OSCT") created the OBA, by adopting the "Rules Creating and Controlling the Oklahoma Bar Association" ("RCAC").[2] *See In re Integration*

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[1] The initial Complaint named only Williams. Complaint. [Doc. 1]. After Williams moved to dismiss demonstrating, among other things, that he was not a proper defendant as he lacked the nexus necessary to provide plaintiff effective relief, *see* Motion to Dismiss [Doc. 16], plaintiff filed the Amended Complaint [Doc. 19] adding additional defendants, but retaining Williams as a named defendant, without meaningful change in the allegations against him.

[2] OKLA. STAT. tit. 5, Ch. 1, App. 1, *et seq*. (2005). *See* Ex. 1, RCAC. While codified in the Oklahoma statutes, the RCAC are not statutes created by the legislature, but rules promulgated by the OSCT. *See In re Integration of State Bar of Oklahoma*, 95 P.2d at 116. Williams respectfully requests the Court take judicial notice of these and other public records referenced herein. *See Tal v. Hogan*, 453 F.3d 1244, 1264 n.24 (10th Cir. 2006) ("facts subject to judicial notice may be considered [in a Rule 12(b)(6) motion] without converting a motion to dismiss into a motion for summary judgment. This allows the court to take judicial notice of its own files and records, as well as facts which are a matter of

of State Bar of Okla., 1939 OK 378, 95 P.2d 113, 116. The Preamble broadly states the OBA's purpose and function:

> In the public interest, for the advancement of the administration of justice according to law, and to aid the courts in carrying on the administration of justice; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence and public service, and high standards of conduct; to provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence, and law reform; to carry on a continuing program of legal research in technical fields of substantive law, practice and procedure, and to make reports and recommendations thereto; to prevent the unauthorized practice of law; to encourage the formation and activities of local bar associations; to encourage practices that will advance and improve the honor and dignity of the legal profession; and to the end that the responsibility of the legal profession and the individual members thereof, may be more effectively and efficiently discharged in the public interest, and acting within the police powers vested in it by the Constitution of this State....

Preamble, RCAC.

The RCAC identifies the OBA as the OSCT's "official arm" when the OBA acts for and on behalf of the OSCT "in the performance of its governmental powers and functions." RCAC, Art. I, § 1. As the superintending body over the OBA, the OSCT retains "exclusive jurisdiction in all matters involving the licensing and discipline of lawyers in Oklahoma" and has sole control over rules governing admission to practice law in the State. *Doyle v. Okla. Bar Ass'n*, 998 F.2d 1559, 1563 (10th Cir. 1993) (citations omitted).

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public record. However, the documents may only be considered to show their contents, not to prove the truth of matters asserted therein.") (internal quotations, citations and brackets omitted).

ARGUMENT AND AUTHORITIES

I. Standard for Motion to Dismiss Under Rules 12(b)(6) and 12(b)(1).

To survive a motion to dismiss, the plaintiff cannot simply provide "labels and conclusions, and a formulaic recitation of the elements of a cause of action…." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citation omitted). Instead, the plaintiff must plead facts that at least make the claims plausible, and "raise a right to relief above the speculative level." *Id*. at 555, 570 (internal citations omitted). Moreover, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citation omitted).

Where, as here, "jurisdiction is challenged, the burden is on the party claiming jurisdiction to show it by a preponderance of the evidence." *U.S. ex rel. Hafter D.O. v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1160 (10th Cir. 1999) (citation omitted). Accordingly, plaintiff must allege "the facts essential to show jurisdiction and supporting those facts with competent proof. Mere conclusory allegations of jurisdiction are not enough." *Id.* (quotation and citation omitted).

II. Because the Court lacks subject matter jurisdiction, it should dismiss the Amended Complaint as to Williams.

A. The OBA is Immune from Suit under the Eleventh Amendment, which Grants States Immunity from Actions by Individuals in Federal Court.

The Eleventh Amendment immunizes states from suit by individuals in federal courts unless the state consents in unequivocal terms or Congress, exercising its power,

unequivocally expresses its intent to abrogate immunity. U.S. CONST. amend. XI; *Hans v. Louisiana*, 134 U.S. 1, 13 (1890). Neither of those exceptions is present here.

Ex parte Young, 209 U.S. 123 (1908), provides an additional exception to immunity in certain circumstances where the plaintiff seeks only (1) declaratory or injunctive that is properly characterized (in substance) as forward looking relief rather than money damages; (2) for an ongoing violation of federal law; (3) aimed at state officers acting in their official capacities, not the state itself. *Hill v. Kemp*, 478 F.3d 1236, 1255-56, 1259 (10th Cir. 2007) (citations omitted). "*Ex parte Young* requires a nexus between the defendant and '*enforcement*' of the challenged statute." *Peterson v. Martinez*, 707 F.3d 1197, 1206 (10th Cir. 2013) (citation omitted) (emphasis in original).

The OBA is an arm of the OSCT and an instrumentality of the state. *Doyle v. Okla. Bar Ass'n*, 787 F. Supp. 189, 192 (W.D. Okla. 1992) *judgment aff'd*, 998 F.2d 1559 (10th Cir. 1993); RCAC, Art. 1 ("The [OBA] is an official arm of [the OSCT], when acting for and on behalf of [the OSCT] in the performance of its governmental powers and functions."). *See also Kerchee v. Smith*, Case No. 11-cv-00459-C, 2011 WL 5838425 (W.D. Okla. Nov. 21, 2011) (Order adopting Report and Recommendations and dismissing defendant OBA under Eleventh Amendment)[3] *aff'd as modified*, *Kerchee v. Smith*, 527

[3] *See Kerchee v. Smith*, 2011 WL 5838442, *1 (W.D. Okla. Oct. 24, 2011) (Report and Recommendation) ("the Western District of Oklahoma has held that the [OBA] enjoys immunity under the Eleventh Amendment. The Court should follow that decision and again conclude that the bar association is entitled to Eleventh Amendment immunity. With this conclusion, the Court should dismiss all claims against the bar association.").

Fed. Appx. 817 (10th Cir. 2013). As an arm of the State, the OBA is protected from suit under the Eleventh Amendment. *Id.*

The defense of sovereign immunity is a bar to jurisdiction. *Wyoming v. United States*, 279 F.3d 1214, 1225 (10th Cir. 2002). Because plaintiff cannot name the OBA as defendant, to establish jurisdiction, he must sue a state official who, in his or her official capacity, could provide effective relief.

B. Because Williams Cannot Provide Effective Relief Sufficient to Create an Article III Case or Controversy, and Because the *Ex parte Young* Requirements are not Met, the Court Lacks Subject Matter Jurisdiction.

Jurisdiction of federal courts is limited to cases or controversies. U.S. CONST. art. III, § 2, cl. 1. "To establish a case or controversy, a plaintiff bears the burden of demonstrating:

> (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Bronson v. Swensen, 500 F.3d 1099, 1106 (10th Cir. 2007) (quotation omitted). "The redressability prong is not met when a plaintiff seeks relief against a defendant with no power to enforce a challenged statute." *Bronson*, 500 F.3d at 1111 (citations omitted). The same nexus to enforcement power is required for a state official to a proper defendant under *Ex parte Young*. *See Peterson*, 707 F.3d at 1206. Here, plaintiff cannot show that Williams can redress his alleged injury. The Court accordingly lacks subject matter jurisdiction due

to the lack of an actionable case or controversy under Article III and because the *Ex parte Young* exception does not apply.

1. There is no Article III Case or Controversy as Williams does not have the enforcement power necessary to render effective relief or meet the requirements of *Ex parte Young*.

a. First and Second Claims for Relief - compelled membership and mandatory dues

With regard to plaintiff's first and second claims, he seeks declaratory and injunctive relief concerning his claim that "Defendants violate Plaintiff's rights…by enforcing Oklahoma statutes that make membership in the OBA and mandatory dues a condition of practicing law in Oklahoma." *See* Amended Complaint [Doc. 19] at 21, ¶ A. However, Williams lacks any authority to alter or enforce the challenged mandatory membership and dues requirements of licensure established by the OSCT.

Attorney licensure is a non-delegable power of the OSCT: "The regulation of licensure, ethics, and discipline of legal practitioners is a *nondelegable*, constitutional responsibility *solely vested in this Court* in the *exercise of our exclusive jurisdiction*. Our nondelegable and exclusive jurisdiction in Bar matters has been stated often by this Court…." *State ex rel. Okla. Bar Ass'n v. Mothershed*, 264 P.3d 1197, 1210, 2011 OK 84, ¶ 33 (quotation omitted) (emphasis added). Exercising this non-delegable power, the OSCT determined that mandatory OBA membership and dues are requirements of licensure. *See* RCAC Art. II, §§ 1, 2, 7(a); Art. VIII, § 1.

i. Williams lacks authority to determine or enforce licensure requirements.

In contrast to the OSCT's exclusive power, Williams' duties as executive director are ministerial. The executive director, selected by the Board of Governors ("BOG"),[4] RCAC Art. VI, § 1, is directed to:

> ....perform such duties and services *as may be required by these Rules or the Bylaws* and *as may be directed by the Board of Governors or the President of the Association*. He shall also keep a complete and accurate list of the members of the Association; notify delinquent members and *certify the names of delinquent members to the Supreme Court* as required by these Rules; certify to the Supreme Court records and other matters as provided by these rules.

RCAC, Art. VI, § 4 (emphasis added). The executive director is also required to cause preparation of a monthly financial report and any other financial reports requested by the BOG, all of which are to be provided to the BOG and the OSCT. RCAC, Art. VI, § 5. [5] Williams exercises his administrative powers and duties to provide information to the body which holds and wields the exclusive power to determine and enforce licensure requirements: the OSCT. *See, e.g., Doyle*, 998 F.2d at 1563 (citing RCAC 1.1).[6]

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[4] In turn, the elected BOG is composed of seventeen active members of the OBA. The executive director, who has no voting power, who serves by rule as recording secretary. RCAC, Art. IV, § 1(h).

[5] Williams also lacks policy-making powers; those are vested in the OBA's House of Delegates, although that power is *subordinate* to the RCAC and *any orders promulgated by the OSCT*. RCAC, Art. III, § 1.

[6] Williams has established that the RCAC did not give him power "to enforce the laws requiring membership and funding of the OBA as a condition of practicing law in the State of Oklahoma." Motion to Dismiss [Doc. 16] at 13-14. Nevertheless, plaintiff retained those

Plaintiff's failure to allege that the Williams has a "particular duty," and a willingness, to enforce the provisions complained of, establishes that Williams remains within the protection of Eleventh Amendment immunity. *Barrett v. Univ. of N.M. Bd. Of Regents*, 562 Fed. Appx. at 694 (citing *Chamber of Commerce of U.S. v. Edmondson*, 592 F.3d 742, 760 (10th Cir. 2010)). For instance, in *Peterson*, the plaintiff brought a § 1983 action challenging the State of Colorado's licensing laws for concealed handguns naming Davis in his official capacity as the executive director of the Colorado Department of Public Safety. 707 F.3d at 1201-02. Although Davis managed a database containing information regarding the handgun laws, Colorado statutes (which the court recognized via judicial notice) placed enforcement authority of the challenged statute squarely in the hands of the sheriff. *Id.* at 1205-06 (citation omitted). That the sheriff used the information that Davis collected, in his ministerial capacity as executive director, to enforce the gun laws did not provide the 'nexus to enforcement' necessary to make Davis a proper defendant under the Eleventh Amendment. *Id.* at 1206 (citing *Ex parte Young*).

Peterson requires the Court dismiss plaintiff's claims against Williams. Like the defendant in *Peterson*, Williams gathers membership information and prepares reports that are provided to the OSCT, which has exclusive jurisdiction over membership requirements and their enforcement. As in *Peterson*, Williams' activities lack a sufficient nexus to enforcement power to overcome Eleventh Amendment immunity. *Peterson*, 707 F.3d at

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allegations in the Amended Complaint. [Doc. 19] at ¶ 24; *compare* Complaint [Doc. 1] at ¶ 12.

1206-07. Therefore, because plaintiff fails to state an Article III case or controversy, and Williams is immune from suit under *Ex parte Young*, the Court must dismiss plaintiff's first and second claims for lack of jurisdiction. *Bronson*, 500 F.3d at 1111.

ii. Williams lacks power to determine application of OBA funds.

The RCAC provide that "[t]he funds of the Association shall be used and expended for any expense of the Association provided for by …. [t]he annual budget as approved by the [OSCT], or as subsequently amended by order of the [OSCT]." RCAC, Art. VII, §§ 1, 2. Thus, even if Williams had ministerial authority to withdraw and apply funds, he nonetheless lacks the authority to apply funds in any manner not approved and directed by the OSCT. *Id.*[7] Accordingly, for several reasons, the Court cannot order the relief plaintiff requests – a declaration that the "OBA collects and uses mandatory bar fees to subsidize its speech, including its political and ideological speech as described above," [Doc. 19] at 17, ¶ 106, & 19, ¶ 118, or an order enjoining Williams from collecting and using fees.

Most important, enjoining Williams from performing his administrative duties – reporting to the OSCT – simply does nothing to provide effective relief to plaintiff going forward. *See* [Doc. 19] at 19, ¶ 118, & 21, ¶ C.[8]

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[7] Plaintiff's 'nexus' argument is not buoyed by his allegation that Williams is Executive Director of the OBA and Secretary/Treasurer of the Board of Governors. *See* [Doc. 19] at 24. While the RCAC provides that the OBA Executive Director "shall act as … Recording Secretary of the Board of Governors," RCAC Art. IV, § 1(h), he is a scrivener, not a voting member of the BOG.

[8] And if injunctive relief were effectively granted, all lawyer discipline and ethics enforcement would immediately end.

Additionally, the Amended Complaint's reference to "political and ideological speech as described above" at ¶ 106 clearly refers to the Oklahoma Bar Journal ("OBJ") excerpts and other past alleged instances of speech. *See* [Doc. 19] at ¶¶ 58-76. While Williams rejects any argument that these past publications violated federal law or impinged on plaintiff's First Amendment rights, plaintiff clearly seeks a remedy for statements already made and articles previously published in the OBJ. The Court lacks jurisdiction to award declaratory[9] and/or injunctive relief as to past practices. *Johns v. Stewart*, 57 F.3d 1544, 1554-55 (10th Cir. 1995) ("The Eleventh Amendment 'does not permit judgments against state officers declaring that they violated federal law in the past.'") (quoting *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993));[10] *Walling v. Shenandoah-Dives Min. Co.*, 134 F.2d 395, 397 (10th Cir. 1943) (observing that injunctive relief likewise cannot constrain past violations).

Additionally, plaintiff's allegations do not implicate forum analysis since he is not claiming the OBA denied him access to the forum – the OBJ – in violation of his First Amendment rights. Notwithstanding, even if the OBA refused to permit plaintiff to air his opinions via the OBJ, the OBJ is a nonpublic forum. *See Barnard v. Chamberlain*, 897 F.2d 1059, 1065 (10th Cir. 1990) (noting that because the nature and purpose of a forum

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[9] The Declaratory Judgment Act, 28 U.S.C. § 2201(a), does not provide jurisdiction, but simply offers a remedy where jurisdiction otherwise exists due to existence of an actionable case or controversy. *Columbian Fin. Corp. v. BancInsure, Inc.*, 650 F.3d 1372, 1376 (10th Cir. 2011).

[10] Further, as established *infra*, it is well settled that a mandatory bar association may constitutionally use dues to support speech that is germane to the purposes of the bar.

such as the Utah bar journal is not compatible with unrestricted public access by members of the public or the bar, the bar journal is a nonpublic forum); *Estiverne v. La. State Bar Ass'n*, 863 F.2d 371, 381 (5th Cir. 1989) (concluding that the Louisiana bar journal is a nonpublic forum because "it was not established as an open forum for the expressive activities of the public, or of the members of the Bar."). The state may restrict access to a nonpublic forum based on the subject matter of the speech and identify of the speaker so long as the decision is reasonable and viewpoint neutral. *Summum v. Callaghan*, 130 F.3d 906, 916 (10th Cir. 1997).

Even if the past articles could conceivably be construed to relate to any allowable equitable relief (which Williams disputes), all but six concern occurrences beyond the two year statute of limitation, and would be time barred. *See* Amended Complaint [Doc 19] at ¶¶ 58-70; *Garcia v. Wilson*, 731 F.2d 640, 651 (10th Cir. 1984) (Section 1983 actions are characterized as personal injury claims); *Baker v. Bd. Of Regents of the State of Kan.*, 991 F.2d 628, 630 (10th Cir. 1993) (state law to determines applicable limitations period); OKLA. STAT. tit. 12, § 95(2) (two year limitation period for actions for injury to rights not arising from contract).

The Court must disregard allegations regarding past acts as they cannot form the basis of any allowable relief against Williams.

b. Third Claim for Relief – failure to provide adequate safeguards

Plaintiff's third claim, which seeks to permanently enjoin "Defendant and all persons in active concert or participation with him from enforcing [the mandatory membership and membership dues provisions of the RCAC]," and correlative declaratory

relief, [Doc. 19] at 19, ¶ 128, & 21, ¶ (C), also fails due to Williams' lack of enforcement power. *Bronson*, 500 F.3d at 1111 (lack of enforcement power means lack of Art. III case or controversy); *Peterson*, 707 F.3d at 1206 (lack of enforcement power means no *Ex parte Young* exception to Eleventh Amendment immunity). Further, the entities "acting in concert" with Williams would plainly include the OSCT, which has exclusive enforcement powers over membership, licensure and dues provisions. *Mothershed*, 264 P.3d at 1210, 2011 OK 84, ¶ 33. However, as plaintiff realizes, the OSCT is unquestionably immune, and cannot be subject to an "acting in concert" injunction or declaratory judgment.

Each of plaintiff's claims fail for lack of jurisdiction under Article III and the Eleventh Amendment, and must be dismissed.

III. Compulsory Membership in, and Payment of Dues to, an Integrated Bar Association are Constitutional Under Controlling Precedent.

It is well settled that a state may constitutionally require lawyers seeking licensure to be a member of an integrated bar association and pay a compulsory membership fee. *Lathrop v. Donohue*, 367 U.S. 820, 833 (1961). In *Lathrop*, the Court held that statutes requiring compulsory membership in a centralized bar association, together with a compulsory duty to pay dues, are constitutional under the First Amendment. The Court expressly rejected appellant's argument that (1) the integrated Wisconsin Bar unconstitutionally infringed upon his constitutionally protected freedom of association, and (2) that his rights of free speech were violated by the use of his money for causes appellant opposed. *Id.* at 843.

The Court determined that appellant's claims that the State Bar "partakes of the character of a political party" and is "deliberately designed to further a program of political action" were unfounded. *Id.* at 833-34. Instead, the Court explained the State Bar "promotes the public interest to have public expression of the views of a majority of the lawyers of the state, with respect to legislation affecting the administration of justice and the practice of law, the same to be voiced through their own democratically chosen representatives comprising the board of governors of the State Bar." *Id.* at 844-45. Further, the public interest promoted via the Bar far outweighed any small inconvenience to the plaintiff resulting from his required payment of annual dues. *Id.* at 845. In sum, the Court held that "[b]oth in purport and in practice the bulk of State Bar activities serve the function . . . of elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State, without any reference to the political process." *Id.* at 843. As such, the Court upheld the constitutionality of the compulsory bar membership and compulsory bar fees. *Id.*

Reaffirming *Lathrop,* the Court in *Keller v. State Bar of Cal.*, 496 U.S. 1, 14 (1990), determined California's integrated bar was constitutional, stating "[w]e agree that lawyers admitted to practice in the State may be required to join and pay dues to the State Bar, …." *Keller*, 496 U.S. at 4. This conclusion rested on the "State's interest in regulating the legal profession and improving the quality of legal services." *Id.* at 13.

Together, *Lathrop* and *Keller* hold that a state may require membership in an integrated bar as a condition of practicing law and may require payment of bar dues for expenditures germane to the State's interests in regulating the legal profession and

improving the quality of legal services in the state. *Lathrop* and *Keller* "remain binding precedent until [the Court] see[s] fit to reconsider them, regardless of whether subsequent case have raised doubts about their continuing vitality." *Hohn v. United States*, 524 U.S. 236, 252-53 (1998) (citation omitted); *Tootle v. USDB Commandant*, 390 F.3d 1280, 1283 (10th Cir. 2004) (citations omitted).

Plaintiff's contention that "by its very nature, a mandatory bar association such as the OBA violates" rights of association and freedom of speech, *see* [Doc. 19] at 12, ¶¶ 95-97, plainly fails in the face of *Lathrop* and *Keller*. The OBA is "an association of attorneys in which membership and dues are required as a condition of practicing law in [the] State," created under state law to regulate the state's legal profession, *Keller*, 496 U.S. at 4, and is therefore constitutional under the First Amendment.

Conceding the state's legitimate goals in regulating, encouraging, and policing the state's lawyers, and in promoting the legal profession and the administration of justice, plaintiff nonetheless asks this Court to recognize an additional requirement – that the state use *the least restrictive means to achieve its goals*. Plaintiff posits that a mandatory bar association is not the least restrictive means to achieve the state's public policy goals, and is, therefore, unconstitutional. *See* [Doc. 19] at 16, ¶ 102. Neither *Lathrop* nor *Keller* require this extra gloss. Neither case conditioned constitutionality of mandatory state bar membership on a further examination of whether the state bar's goals could be achieved by less restrictive means. To the contrary, *Lathrop* and *Keller* outright authorize compulsory bar membership and dues.

Lathrop and *Keller* require that the Court dismiss plaintiff's First Claim for Relief challenging the constitutionality of mandatory membership in Oklahoma's integrated bar as a violation of plaintiff's free speech and association rights.

IV. The Imposition of Mandatory Dues, and their Use to Fund Speech Related to the Legal Profession and Its Improvement, are Constitutional.

A. The Imposition of Mandatory Bar Dues is Constitutional, as is the Application of Dues to Fund Germane Speech.

Lathrop and *Keller* hold that the compulsory payment of dues is constitutional under the First Amendment's associational guarantees, even if used to subsidize speech. *Lathrop*, 367 U.S. at 843 (The state supreme court "may 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 organization created to attain the objective also engages in some legislative activity"); *Keller*, 496 U.S. at 12 ("It is entirely appropriate that all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort."). So long as speech so funded is germane to the organization's purpose, it is constitutional. *Keller*, 496 U.S. at 13-14. Notwithstanding that the speech complained of is germane, plaintiff's argument that compulsory dues are facially unconstitutional is contrary to controlling authorities and must be rejected outright.

Also, plaintiff's argument that the mandatory bar fees are unconstitutional because the OBA could achieve its goals without requiring fees lacks any legal support and does

not state an actionable claim. *See* [Doc. 19] at 17, ¶¶ 109-111. The constitutionality of compulsory dues is not limited by a "least restrictive means" test. *See, id.*

B. There is No Requirement That a State Bar Provide an Affirmative Opt-In Procedure Regarding Allocation of a Portion of Bar Dues to Speech.

Keller does not require the OBA to adopt an "opt-in" feature for its dues regime to be constitutional. In fact, *Keller* did not impose a mandatory, litmus test procedure of any nature; rather, it requires a bar association to adopt procedures "of the sort" generally described in *Chicago Teachers Union, Loc. No. 1 v. Hudson*, 475 U.S. 292 (1986), to allow a bar member to elect that a portion of his or her dues not be paid toward non-germane speech to which a member objected. *Keller*, 496 U.S. at 17. That is, noting the lack of a developed record, the Court pointed to the Hudson procedures as a general guide. *Id*. In turn, *Hudson* adopted an "opt-out" structure, but also declined to mandate specific requirements. 475 U.S. at 310. *See also Morrow v. State Bar of Cal.*, 188 F.3d 1174, 1175 (9th Cir. 1999) ("In compliance with the Supreme Court's decision in *Keller*, the State Bar allows members to seek a refund of the proportion of their dues that the State Bar has spent on political activities unrelated to its regulatory function.").[11]

Plaintiff's insistence that bar associations must structure their *Keller* procedure as an *opt-in* one is seemingly based on *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018). *See* [Doc. 19] at 18, ¶ 114. But *Janus*, which concerned a *union shop*'s obligations to *non-*

[11] The OBA's procedures exceed those at issue in *Hudson* because they allow participation, inquiry and objection before the budget is finalized.

member dues payers, does not apply to bar associations and their members, whose relationship with regard to compulsory dues and non-germane speech is controlled by *Lathrop* and *Keller* (as plaintiff concedes elsewhere in his Amended Complaint). *See* [Doc. 19] at 13, ¶ 80, & 19, ¶ 120 (acknowledging the applicability of *Keller*).[12]

The Court in *Harris v. Quinn*, 573 U.S. 616, 655-56 (2014), distinguished integrated bars from other associations, such as unions, based on the unique nature of attorneys' relationship to their state bars. The Court explained that states have a particular "interest in regulating the legal profession and improving the quality of legal services," and "a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices." *Id*. at 655-56 (quotations omitted). The Court further determined that the bar dues requirement was a proper part of the licensure of "attorneys [who] are subject to detailed ethics rules, and the bar rule requiring payment of dues was part of this regulatory scheme." *Id.* at 655. Given that *Harris* sets bar members apart from other associations, it could not be more clear that *Lathrop* and *Keller* - two opinions that specifically address the First Amendment obligations of integrated bars to their members - control, not *Janus* a case about *unions* and their obligations to *non*-members. Neither *Lathrop* nor *Keller* mandate (or even discuss) the "opt-in" procedure plaintiff attempts to impose upon the OBA.

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[12] *Janus* also differs significantly from the present challenge as plaintiff here does not claim that the OBA restricts member speech. *See* [Doc. 19]. *Janus*, in contrast, concerned requirements that significantly restricted the speech of all affected employees. *See* 138 S. Ct. at 2460-61, 2469.

Further, contrary to plaintiff's claim, the OBA provides both an opportunity to participate in the budgeting process and a means to opt-out if a member contends an expenditure is objectionable. The applicable RCAC budget provision states:

> There shall be a Budget Committee….[which] shall prepare a proposed annual budget of the financial needs of the Association for the following year. *On or before October 20th the proposed budget shall be* ***published*** *in one issue of the Bar Journal, together with a notice that a public hearing thereon will be held by the Budget Committee at the Oklahoma Bar Center on a date and at a time fixed in the notice* ….The budget shall be approved by the Board of Governors prior to being submitted to the Supreme Court. ***Members of the Association may appear to protest any items included or excluded from the proposed budget.*** On or before December 10, the finalized budget shall be submitted by the Budget Committee, with its recommendation, to the Supreme Court.….[which] shall review said proposed budget to determine if the proposed items of expenditure are within the Court's police powers and necessary in the administration of justice, and will act on said budget prior to December 25 of each year. No funds of the Association shall be used or expended for any items not included in the annual budget as approved by the Supreme Court, or as subsequently amended by order of the Supreme Court.

RCAC, Art VII, § 1 (emphasis added). *See, e.g.*, Ex. 2, *In re 2019 Budget of the Oklahoma Bar Association*, in the Supreme Court of the State of Oklahoma, Case SCBD No. 6721 (Order Approving 2019 OBA Budget, filed Nov. 19, 2018) (noting the 2019 proposed budget was *published* in the OBJ, together with a *notice of the public hearing* on the budget, which was followed by a BOG meeting which reviewed and approved the proposed budget, which was then submitted to the OSCT for review and approval under its police power); and Ex. 3 (Application for budget approval) filed Nov. 6, 2018 (noting no members appeared to protest the budget).

In addition to being provided the opportunity to participate in the annual budget process, a member can submit an opt-out form to the OBA seeking a refund of any fees

he/she believes will be spent on non-germane matters. *See* [Doc. 19] at 13-14, ¶¶ 82-89. *See also* RCAC, Art. VII, and Ex. 4 (excerpt from OBA webpage, containing the Notice and Objection Procedure and providing a link to "OBA Dues Claim Form"); Ex. 5 ("OBA Dues Claim Form"). Clearly, plaintiff's conclusory claim that the "[t]he OBA **provides no way** for attorneys to avoid having their dues used to subsidize its speech," [Doc. 19] at 17, ¶ 107 (emphasis added), is false.

Plaintiff, apparently an avid OBJ reader, fails to mention the RCAC's provision for multiple notices of hearings and opportunities for public participation in development of the OBA's annual budget, was published in the OBJ. He does not allege that he availed himself of the available procedures by attending OBA budget meetings or hearings, or that he submitted a dues refund form and was denied. He does not claim the OBA failed to follow the procedures mandated by the OSCT in the RCAC. The OBA is constitutionally allowed to assess mandatory dues and apply them to fund germane activities under *Keller*, and it provides a noticed process for bar members to participate in the budget process and seek a refund of any fees to which the member objects. The Court must dismiss plaintiff's Second Claim for Relief for failure to state an actionable claim.

V. Plaintiff's Third Claim must be Dismissed, Because the OBA has Adopted *Keller* Procedures.

This claim fails for the same reasons. Plaintiff asserts that the OBA has violated a requirement imposed by *Keller* that the OBA "institute safeguards" to "ensure mandatory member fees are used only for chargeable expenditures." [Doc. 19] at 19, ¶ 121. Plaintiff

maintains that *Keller* mandates adoption of *specific* procedures and that any other procedure is *ipso facto* constitutionally infirm. *Keller* says no such thing.

Rather, after holding that a state may constitutionally use member dues to fund germane speech, *Keller*, 496 U.S. at 13-14, the Court held that a state bar may not compel a member to fund "activities of an ideological nature which fall outside of those areas of [germane] activity." The Court recognized that "[t]he difficult question, of course, is to define the latter class of activities." *Id.* Even though it acknowledged the difficulty of determining the boundaries of germane speech, the Court *did not* adopt a rule requiring state bars to *guarantee* or *ensure* that no non-germane speech occurs. Instead, the Court held that bar associations must formulate procedures whereby members can 1) be informed what its dues are being used for, and 2) seek to remove a portion of their dues from the support of expenditures they may believe are "not 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.'" *Keller*, 496 U.S. at 14 (quoting *Lathrop*, 367 U.S. at 843). Far from mandating specific procedures to accomplish this goal, the Court stated that "adopting the sort of procedures described in *Hudson* [475 U.S. 292 (1986)]" would meet the obligations of an integrated bar, as might adopting "one or more" unspecified other procedures not before the Court, giving state bars flexibility. *Keller*, 496 U.S. at 17.

The OBA has adopted procedures, as the RCAC requires, to give its members notice of and the opportunity to participate in the budgeting process which determines how funds are spent, and under which a bar member can seek to opt-out of any speech or expenditures he or she believes are non-germane. *See also* Exs. 4-5 (OBA webpage and OBA Dues

Claim Form). This is all *Keller* requires. *See Keller*, 496 U.S. at 14, 17; s*ee also Morrow*, 188 F.3d at 1175 ("In compliance with the Supreme Court's decision in *Keller*, the State Bar allows members to seek a refund of the proportion of their dues that the State Bar has spent on political activities unrelated to its regulatory function," dismissing First Amendment association claim); *Gibson v. The Fla. Bar*, 906 F.2d 624, 632 (11th Cir. 1990) (the state bar complied with *Hudson* where objecting bar members were given the opportunity to raise an objection; that the review committee was partially composed of bar members did not unconstitutionally taint the process).

Tellingly, plaintiff does not claim he participated in the OBA's offered procedures. This failure is fatal to his claims

VI. The Complaint must be Dismissed in its Entirety Because it Concerns Protected, Government Speech which is Germane under *Keller*.

"The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) (citing *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005)). "Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech." *Johanns*, 544 U.S. at 562.

In *Johanns*, the Court applied a control test – the degree of control the federal government had over the committee publishing the complained of speech was pivotal to finding that its speech was government speech. Distinguishing *Keller* (in which the Court had determined that the California Bar's speech was not government speech under the facts presented), the *Johanns* Court determined the amount of control exercised by the

government over the beef marketing speech rendered it government speech. As such, it did not raise First Amendment concerns, even if it was funded by compelled contributions. *See Johanns*, 544 U.S. at 562 (in contrast to the challenged beef speech, the "communicative activities to which the plaintiffs objected [in *Keller*] *were* not prescribed by law in their general outline and not developed under official government supervision").

The control exercised by the OSCT over the OBA is significantly greater than that present in *Keller*, and supports a conclusion that the speech complained of here, like that scrutinized in *Johanns*, is protected, government speech. As noted, the OSCT created the OBA, adopted the RCAC, and retains complete control over licensing and regulation of attorneys and the manner in which the OBA spends money. *See In re Integration of State Bar of Okla*., 95 P.2d 113. The OSCT requires the OBA to submit monthly financial reports to it and BOG. RCAC, Art. VI, § 5. The OBA is subject to an annual outside audit to be provided the Court. *Id.* This level of control is comparable to that exercised in *Johanns*, and compels the conclusion that, as in *Johanns*, the speech complained of here is protected, government speech. *In re Integration of State Bar of Okla*., 95 P.2d 113 ("The practice of law and the determination of when the right to practice has ceased are so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to define and regulate is inherent to the judicial department and belongs to the Supreme Court.") (Syllabus by the Court, at 2).

Further, in deciding whether to approve an OBA budget proposal, the OSCT reviews it "to determine if the proposed items of expenditure are within the Court's police powers *and necessary in the administration of justice*," which findings are a condition of

approval. RCAC, Art. VII, § 1 (emphasis added). If an annual OBA budget is so approved, then its expenditures – having been determined by the OSCT to be *necessary in the administration of justice* - are also necessarily germane, and therefore constitutional under *Keller*. *See Keller*, 496 U.S. at 3 ("guiding standard for determining permissible Bar expenditures … is whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services."). And if the OBJ publishes an article that is germane to the OBA's function, then it, too, is protected government speech.[13] *See Ellis v. Bhd. of Ry., Airline & Steamship Clerks, Freight Handlers, Express and Station Employees*, 466 U.S. 435, 451 (1984) (union "surely [is allowed] to charge objecting employees for reporting to them about those activities it can charge them for doing."). Here, the six OBJ publications within the two year limitation period involve protected, germane speech under *Keller*, squarely within the expansive set of duties and objectives of the OBA stated in the RCAC Preamble, Ex. 1. *See* Amended Complaint [Doc. 19] at 11-12, ¶¶ 71-76 (respectively, the articles discuss protecting the fair and impartial administration of justice, ¶ 71; relate concerns over attacks on an impartial judiciary, ¶¶ 72-73; discuss Oklahoma's high incarceration rate, ¶ 74; note that the Oklahoma legislature is well-served by elected lawyer-legislators, and encourage lawyer participation in the legislative process, ¶ 75; and announce the legislature's Reading

[13] And if speech is germane, bar dues are properly expended for it. *Keller*, 496 U.S. at 14 ("State Bar may [] constitutionally fund activities germane to those goals out of the mandatory dues of all members").

Day, and describe new bills introduced, ¶ 76). Each of these topics fall squarely within the scope of the RCAC Preamble, and are therefore germane, and not actionable.

WHEREFORE, Defendant John M. Williams respectfully requests the Court dismiss plaintiff's Amended Complaint in its entirety, with prejudice, and for such further relief, whether legal or equitable, as may be just, including an award of his reasonable attorney's fees and costs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June, 2019, I filed the attached document with the Clerk of Court. Based on the records currently on file in this case, the Clerk of Court will transmit a Notice of Electronic Filing to the following:

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