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

OKLAHOMA BAR ASSOCIATION BOARD OF GOVERNORS DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT UNDER RULES 12(B)(1) AND 12(B)(6), FED.R.CIV.P., AND BRIEF IN SUPPORT

Michael Burrage, OBA No. 1350
WHITTEN BURRAGE
512 N Broadway, Suite 300
Oklahoma City, OK 73102
Telephone: (405) 516-7800
Facsimile: (405) 516-7859
mburrage@whittenburragelaw.com

-And-

Thomas G. Wolfe, OBA No. 11576
Heather L. Hintz, OBA No. 14253
PHILLIPS MURRAH P.C.
Corporate Tower, Thirteenth Floor
101 N. Robinson Avenue
Oklahoma City, OK 73102
tgwolfe@phillipsmurrah.com
hlhintz@phillipsmurrah.com

ATTORNEYS FOR OKLAHOMA BAR ASSOCIATION BOARD OF GOVERNORS DEFENDANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Defendants Charles W. Chesnut, President, Oklahoma Bar Association Board of Governors; Susan B. Shields, President-Elect, Oklahoma Bar Association Board of Governors; Lane R. Neal, Vice President, Oklahoma Bar Association Board of Governors; Kimberly Hays, Past President, Oklahoma Bar Association Board of Governors; Brian T. Hermanson, Member, Oklahoma Bar Association Board of Governors; Mark E. Fields, Member, Oklahoma Bar Association Board of Governors; David T. McKenzie, Member, Oklahoma Bar Association Board of Governors; Andrew E. Hutter, Member, Oklahoma Bar Association Board of Governors; D. Kenyon Williams, Jr., Member, Oklahoma Bar Association Board of Governors; Matthew C. Beese, Member, Oklahoma Bar Association Board of Governors; Jimmy D. Oliver, Member, Oklahoma Bar Association Board of Governors; Bryon J. Will, Member, Oklahoma Bar Association Board of Governors; James R. Hicks, Member, Oklahoma Bar Association Board of Governors; Brian K. Morton, Member, Oklahoma Bar Association Board of Governors; Miles T. Pringle, Member, Oklahoma Bar Association Board of Governors; and Brandi N. Nowakowski, Member, Oklahoma Bar Association Board of Governors; all in their official capacities (collectively "Defendants" or "Members of the Board of Governors")[1] respectfully move to dismiss in its entirety the First Amended Complaint [Doc. 19] ("Amended Complaint") filed in this

[1] The individually named members of the Board of Governors, sued only in their official capacities, use the collective term "Members of the Board of Governors" solely for convenience, without waiver. The individual members named as defendants are immune from suit as they are under the exclusive control of the state, and plaintiff has not made sufficient allegations to connect them individually to the relief requested, as established, *infra*. *See Barrett v. Univ. of N.M. Bd. of Regents*, 562 Fed. App'x 692, 694 (10th Cir. 2014).

matter under Fed.R.Civ.P. Rule 12(b)(1) and (b)(6).[2] In support thereof, Defendants would show the Court:

INTRODUCTION AND BACKGROUND

Plaintiff asks this Court to declare mandatory membership in and payment of dues to the Oklahoma Bar Association ("OBA" or "Association") unconstitutional under the First and Fourteenth Amendments of the U.S. Constitution, to enjoin the collection and use of member dues, and to obtain additional relief concerning other aspects of the OBA's operations.

In exercise of its plenary powers over the state's courts, OKLA. CONST. arts. 4, 7, the Oklahoma Supreme Court in 1939 created the OBA, by adopting the Rules Creating and Controlling the Oklahoma Bar Association ("RCAC").[3] *See In re Integration of State Bar of Oklahoma*, 1939 OK 378, ¶¶ 12-14, 95 P.2d 113, 116. The Preamble states the Association's broad purpose and function:

---

[2] Defendant Timothy E. DeClerck, also named in his official capacity as a Member of the Oklahoma Bar Association's Board of Governors, is not a party to this Motion, but has filed his own response to the Amended Complaint.

[3] 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 Oklahoma Supreme Court. *See In re Integration of State Bar of Oklahoma*, 1939 OK 378, ¶¶ 12-14, 95 P.2d at 116. Defendants respectfully request that 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 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).

> 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 Supreme Court has identified the Association as the Court's "official arm" when the Association acts for and on behalf of the Court "in the performance of its governmental powers and functions." RCAC, Art. I, § 1. In that regard, the Oklahoma Supreme Court 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).

ARGUMENT AND AUTHORITIES

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

In order 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 support[ ] 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 the Members of the Board of Governors.

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 of the United States Constitution grants states immunity 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 Oklahoma Supreme Court and an instrumentality of the state. *Doyle v. Okla. Bar Ass'n*, 787 F. Supp. 189, 192 (W.D. Okla. 1992) *judgment aff'd*, *Doyle, Okla. Bar Ass'n*, 998 F.2d 1559 (10th Cir. 1993); RCAC, Art. 1 ("The Oklahoma Bar Association is an official arm of [the Court], when acting for and on behalf of this Court 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),[4] *aff'd as modified*, *Kerchee v. Smith*, 527 F. App'x 817, 2013 WL 2399482 (10th Cir. 2013). As an arm of the State, the OBA is protected from suit under the Eleventh Amendment. *Id.* The Board of Governors is an arm of the State of Oklahoma. *See, e.g.*, *Barrett v. Univ. of N.M. Bd. Of Regents*, 562 F. App'x 692 (10th Cir. 2014).

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 a

[4] *See Kerchee v. Smith*, 2011 WL 5838442, *1 (W.D. Okla. Oct. 24, 2011) (Report and Recommendation of Magistrate Judge Bacharach adopted by the Court) ("the Western District of Oklahoma has held that the Oklahoma Bar Association 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.")

defendant, to establish jurisdiction, he must sue a state official against whom effective relief could be obtained in his or her official capacity. However, Defendants are not proper state officials with regard to the claims and relief sought. Accordingly, this action must be dismissed as to these Defendants.

B. Because the Members of the Board of Governors 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) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180–81 (2000)). "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 be a proper defendant under *Ex parte Young*. *See Peterson*, 707 F.3d at 1206. Here, plaintiff cannot show that the injury he claims is redressable by these defendants. The Court accordingly lacks subject matter jurisdiction due to the absence of an actionable case or controversy under Article III and because the exception to state immunity provided by *Ex parte Young* does not apply.

1. There is no Article III Case or Controversy as the Members of the Board of Governors do 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.[5] However, the individual Members of the Board of Governors lack any authority to alter or enforce the challenged mandatory membership and dues requirements of licensure established by the Oklahoma Supreme Court.

Attorney licensure is a non-delegable power of the Supreme Court: "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*, 2011 OK 84, ¶ 33, 264 P.3d 1197, 1210 (quotation omitted) (emphasis added). Exercising this non-delegable power, the

[5] It should be noted that plaintiff styles his first claim for relief "Compelled membership in the OBA violates *attorneys'* First and Fourteenth Amendment rights to free association and free speech." [Doc. 19] at 15 (emphasis added). However, plaintiff does not bring this or any claim in a representative capacity on behalf of Oklahoma "attorneys;" the claims are brought solely on his own behalf.

Supreme Court determined that mandatory Association membership and dues are requirements of licensure. *See* RCAC Art. II, §§ 1, 2, 7(a); Art. VIII, § 1.

i. Members of the Board of Governors lack authority to determine or enforce licensure requirements.

The Board of Governors' existence, function and power are provided for in the RCAC, Art. IV, §§ 1-8, promulgated by the Supreme Court. *See* Ex. 1. The Board of Governors is composed of seventeen members, which do not include the Executive Director.[6] The Board of Governors is defined as the governing body of the Association, but its authority "is subordinate to [the RCAC] and direction of the House of Delegates,"[7] and it lacks policy making power, which is vested in the House of Delegates.[8] The Board members are "non-voting ex officio members of the House of Delegates," who are "precluded from introducing resolutions, legislative proposals or motions or the casting of any ballot on any matter …."[9] Members of the Board of Governors are subordinate to the House of Delegates, lack policy making power, and cannot vote on matters considered by the House of Delegates. Further, the Supreme Court has **non-delegable** and **exclusive jurisdiction** and **authority** over the OBA membership and dues licensure requirements plaintiff challenges, and he has failed to allege facts to establish that these Defendants have enforcement power with regard to them. The Court lacks jurisdiction over these Defendants and they should be dismissed.

---

[6] RCAC, Art. IV, § 1 (a)-(f). The Executive Director is recording secretary. Id. at § 1(f).
[7] RCAC, Art. IV, § 1.
[8] RCAC, Art. III, § 1. The policy making powers of the House of Delegates is "subordinate to the [RCAC] and any orders that may be issued by the [Supreme] Court." *Id.*
[9] RCAC, Art. IV, § 4.

Plaintiff also fails to allege that the individual Members of the Board of Governors have a duty and a willingness to enforce the provisions of which he complains. *Barrett v. Univ. of N.M. Bd. Of Regents*, 562 F. App'x at 694 (citing *Chamber of Commerce of U.S. v. Edmondson*, 592 F.3d 742, 760 (10th Cir. 2010)). In fact, the Board of Governors can only act if it has a quorum of nine members, and a "recommendation for any amendment to [the RCAC] requires the affirmative vote of a majority of all members of the Board of Governors." RCAC Art. IV, § 1(g). Plaintiff's 'general allegation' that the Board has "the authority to withdraw and use mandatory Oklahoma Bar Association dues"[10] are insufficient to show a claim of viable relief against these individual defendants, as under the RCAC it "must act as 'a body corporate.'" *Barrett*, 562 F. App'x at 694 (citation omitted). Further, the Board of Governors can only act as a collective, so plaintiff's quest for relief against these individual Defendants is futile. Because plaintiff has not shown that Defendants have a "particular duty" to enforce these requirements, they are protected by 11th Amendment immunity. *Id.*

ii. Defendants lack 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, although the Board of Governors has ministerial authority to withdraw funds, RCAC, Art. VII, § 2, they nonetheless lack the authority to use funds in any manner not

[10] *See* [Doc. 19] at 5, ¶ 21.

approved and directed by the Supreme Court. RCAC, Art. VII, §§ 1, 2. Further, the Members of the Board of Governors are "non-voting ex-officio members of the House of Delegates," who are "precluded from introducing resolutions, legislative proposals or motions or the casting of any ballot on any matter …." RCAC Art. IV, § 4. Whatever authority they may have under the RCAC is subordinate to the House of Delegates and the Supreme Court.[11] 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 Defendants from collecting and using fees. *Id.* at 21, ¶¶ C, D.

Most important, enjoining Defendants from performing their administrative duties simply does nothing to provide effective relief to plaintiff going forward. *See* [Doc. 19] at 19, ¶ 118, & 21, ¶ C.[12]

b. Plaintiff fails to state an actionable claim based on Oklahoma Bar Journal publications

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 Defendants reject 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

[11] *See* n. 8, *supra*.

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

articles previously published in the OBJ. The Court lacks jurisdiction to award declaratory[13] 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));[14] *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 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

[13] 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).

[14] 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.

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 is disputed), 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.

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 California*, 496 U.S. 1, 4, 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, …." 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. As United States Supreme Court decisions, *Lathrop* and *Keller* "remain binding precedent until [the Court] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Hohn v. U.S.*, 524 U.S. 236, 252-53 (1998) (citation omitted); *Tootle v. USDB Commandant*, 390 F.3d 1280, 1283 (10th Cir. 2004).

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.

While 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 asks this Court to recognize an additional requirement that the state must use *the least restrictive means to achieve its goals*, positing that a mandatory bar association is not the least restrictive means, and therefore unconstitutional. *See* [Doc. 19] at 16, ¶ 102. This extra gloss on the requirements of lawyer and legal system governance is simply not required under *Lathrop* or *Keller*. 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.

This Court is bound to follow *Lathrop* and *Keller*, which require dismissal of 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. *Hohn*, 524 U.S. at 252-53; *Tootle*, 390 F.3d at 1283.

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. Defendants will establish below that the speech complained of is germane, however,

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 he posits 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. Noting the lack of a developed record, the Court did not mandate a particular procedure, but pointed to the *Hudson* procedures as a general guide. *Id.* In turn, *Hudson* itself adopted an *opt-out* structure, but also declined to mandate specific requirements. *Hudson*, 475 U.S. at 310. *See also*, *Morrow v. State Bar of Calif.*, 188 F.3d 1174, 1175 (9th Cir. 1999) (cert. denied, 528 U.S. 1156 (2000)) ("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."). [15]

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-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*.[16] The Supreme 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 opined 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." *Harris*, 573 U.S. at 655 (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.* 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

[15] The OBA's procedures exceed *Hudson's* because they allow participation, inquiry and protest before the budget is finalized. *See, e.g.*, RCAC Art VII, § 1.

[16] *Janus* is further distinguishable as plaintiff here does not claim that the OBA restricts member speech. *See* Amended Complaint [Doc. 19]. *Janus*, in contrast, concerned requirements that significantly restricted the speech of all impacted employees. *See Janus*, 138 S.Ct. at 2460-61, 2469.

obligations of integrated bars to their members - control, not *Janus*, which discussed *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.

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 Okla. Bar Ass'n*, Oklahoma Supreme Court Case SCBD No. 6721 (Order Approving 2019 OBA Budget, filed Nov. 19, 2018) (noting the 2019 proposed budget was *published* in the Oklahoma Bar Journal on September 22, 2018, together with a *notice of the public hearing* on the budget set for October 11, 2018 in the Oklahoma Bar Center, which was followed by a Board meeting which reviewed and approved the proposed budget, which was then submitted to the Supreme Court for review and approval under the Court's police power);

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, *see* n. 13, *supra*, a member can submit an opt-out form to the OBA seeking a refund of any fees he or 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").

In light of the foregoing, 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 simply false.

Plaintiff, apparently an avid Oklahoma Bar Journal 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. 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 Supreme Court 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. Plaintiff has not tested the OBA's policies or objected to its expenditures although opportunities to do so are noticed in the OBJ, and the procedures for doing so are spelled out in the RCAC and

Bylaws. The Second Claim for Relief must be dismissed as it does not 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 an alleged requirement imposed by *Keller* that the OBA "institute safeguards" to "ensure mandatory member fees are used only for chargeable expenditures." Amended Complaint [Doc. 19] at 19, ¶ 121. Plaintiff maintains that *Keller* mandates adoption of specific procedures and that any other procedure is *ipso facto* constitutionally infirm. However, *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 went on to hold 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" – but recognized that "[t]he difficult question, of course, is to define the latter class of activities." *Id.* Acknowledging the difficulty of determining the boundaries of germane speech, the Court did not adopt a rule that state bars must *guarantee* or *ensure* that no non-germane speech occurs, as plaintiff posits. Instead, the Court held that bar associations must put in place 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, as plaintiff claims, 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. He does not claim he was unable to determine what his dues were used for after attending a noticed budget hearing, or that he sought, and was unable to obtain, a refund. *See* Amended Complaint [Doc. 19]. Plaintiff's resulting facial challenge is "'disfavored for several reasons,' including the risk 'of premature interpretation' because such challenges

'often rest on speculation.'" *Taylor v. Roswell I.S.D.*, 713 F.3d 25, 40 (10th Cir. 2013) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008)). "'Facial challenges are strong medicine, and thus [courts] must be vigilant in applying a most exacting analysis to such claims.'" *Taylor*, 713 F.3d at 40 (quoting *Doctor John's, Inc. v. City of Roy*, 465 F.3d 1150, 1157 (10th Cir. 2006)). Plaintiff's failure to take advantage of any number of the opportunities the Association offers - to challenge or opt–out of dues application, participate in budgetary process procedures, participate in legislative debates at annual meetings, or one of many others – means he cannot show that the "process is improperly restrictive, burdensome, unresponsive or slow" – and the Court should refuse to consider this challenge. *U.S. v. Friday*, 525 F.3d 938, 960 (10th Cir. 2008). Plaintiff's Third Claim for Relief must be dismissed.

VI. The Amended Complaint Must Be Dismissed in Its Entirety Because It Concerns Protected, Government Speech That 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 Oklahoma Supreme Court over the OBA is significantly greater than that present in *Keller*, and leads to the conclusion that the speech complained of here, like that scrutinized in *Johanns*, is protected, government speech. As established above, the Supreme Court 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 Oklahoma*, 1939 OK 378, 95 P.2d 113. The Court requires the OBA to submit monthly financial reports to it and Board of Governors. 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 like that in *Johanns*, the speech complained of here is protected, government speech. *In re Integration of State Bar of Oklahoma*, 95 P.2d 113. (Syllabus by the Court, at 2.) ("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.")

Further, in deciding whether to approve an OBA budget proposal, the Oklahoma Supreme Court 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 Supreme Court to be *necessary in the administration of justice* - are also necessarily germane, and therefore constitutional. *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."). If the Oklahoma Bar Journal publishes an article that is germane to the OBA's function then it too is protected government speech.[17] *See Ellis v. Brotherhood of Railway, 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 Journal 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 set out in the RCAC Preamble. *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

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

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 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, or outside of *Keller's* scope.

VII. The Court Should Abstain From Intervening in this State Court Matter.

The Members of the Board of Governors serve pursuant to the RCAC under the superintending authority of the Supreme Court, and the Board is an arm of the Court. *Doyle v. Okla. Bar Ass'n*, 787 F.Supp. 189, 192 (W.D. Okla. 1992) (judgment aff'd, *Doyle v. Okla. Bar Ass'n*, 998 F.2d 1559 (10th Cir. 1993)); RCAC, Art. 1. For the same reasons stated in the Motion to Dismiss filed by the Chief Justice and Justices of the Oklahoma Supreme Court, [Doc. 43] at 12, this Court should exercise its discretion and decline to intervene in the affairs of the Oklahoma Supreme Court with regard to plaintiff's third claim (concerning its expenditures and *Keller* procedures), which, among other things, implicates the Association's budgeting and expenditures, which are reviewed and approved by, and remain in the complete control of, the Supreme Court, as established above.

WHEREFORE, these Defendants respectfully request 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 their reasonable attorney's fees and costs.

Respectfully submitted,

/s/ Michael Burrage
Michael Burrage, OBA No. 1350
WHITTEN BURRAGE
512 N Broadway, Suite 300
Oklahoma City, OK 73102
Telephone: (405) 516-7800
Facsimile: (405) 516-7859
mburrage@whittenburragelaw.com

And

Thomas G. Wolfe, OBA No. 11576
Heather L. Hintz, OBA No. 14253
PHILLIPS MURRAH P.C.
Corporate Tower, Thirteenth Floor
101 N Robinson
Oklahoma City, OK 73102
tgwolfe@phillipsmurrah.com
hlhintz@phillipsmurrah.com

ATTORNEYS FOR

Defendants Charles W. Chesnut, President, Oklahoma Bar Association Board of Governors; Susan B. Shields, President-Elect, Oklahoma Bar Association Board of Governors; Lane R. Neal, Vice President, Oklahoma Bar Association Board of Governors; Kimberly Hays, Past President, Oklahoma Bar Association Board of Governors; Brian T. Hermanson, Member, Oklahoma Bar Association Board of Governors; Mark E. Fields, Member, Oklahoma Bar Association Board of Governors; David T. McKenzie, Member, Oklahoma Bar Association Board of Governors; Andrew E. Hutter, Member, Oklahoma Bar Association Board of Governors; D. Kenyon Williams, Jr., Member, Oklahoma Bar Association Board of Governors; Matthew C. Beese, Member, Oklahoma Bar Association Board of Governors; Jimmy D.

Oliver, Member, Oklahoma Bar Association Board of Governors; Bryon J. Will, Member, Oklahoma Bar Association Board of Governors; James R. Hicks, Member, Oklahoma Bar Association Board of Governors; Brian K. Morton, Member, Oklahoma Bar Association Board of Governors; Miles T. Pringle, Member, Oklahoma Bar Association Board of Governors; and Brandi N. Nowakowski, Member, Oklahoma Bar Association Board of Governors; all in their official capacities

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day off 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:

Charles S. Rogers – Crogers740@gmail.com
Jacob Huebert – litigation@goldwaterinstitute.org
Timothy Sandefur – tsandefur@goldwaterinstitute.org
Anthony J. Dick – ajdick@jonesday.com
Attorneys for Plaintiff

Kieran D. Maye, Jr. – kdmaye@mayelawfirm.com
Leslie M. Maye – lmmaye@mayelawfirm.com
Attorneys for the Chief Justice and
Justices of the Oklahoma Supreme Court

Thomas G. Wolfe – tgwolfe@phillipsmurrah.com
Heather L. Hintz – hlhintz@phillipsmurrah.com
Attorneys for Defendant,
Timothy E. DeClerck

/s/ Michael Burrage