

No. 21-779

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In The  
**Supreme Court of the United States**

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MARK E. SCHELL,

*Petitioner,*

v.

THE CHIEF JUSTICE AND JUSTICES OF  
THE OKLAHOMA SUPREME COURT, ET AL.,

*Respondents.*

—◆—  
**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Tenth Circuit**

—◆—  
**AMICUS CURIAE BRIEF OF  
PELICAN INSTITUTE FOR PUBLIC POLICY  
IN SUPPORT OF PETITIONER**

—◆—  
DANE S. CIOLINO  
LOUISIANA LEGAL  
ETHICS, LLC  
18 Farnham Place  
Metairie, LA 70005  
(504) 975-3263  
dane@daneciolino.com

SARAH HARBISON\*  
PELICAN INSTITUTE  
FOR PUBLIC POLICY  
400 Poydras St.  
Suite 900  
New Orleans, LA 70130  
(504) 952-8016  
sarah@pelicaninstitute.org

*\*Counsel of Record*

*Counsel for Amicus Curiae  
Pelican Institute for Public Policy*

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**IDENTITY AND INTEREST OF AMICUS CURIAE**

The Pelican Institute<sup>1</sup> is a nonpartisan research and educational organization—a think tank—and the leading voice for free markets in Louisiana. The Institute’s mission is to conduct research and analysis that advances sound policies based on free enterprise, individual liberty, and constitutionally limited government.

The Pelican Institute represents Louisiana attorney Randy Boudreaux. Mr. Boudreaux objects to the Louisiana State Bar Association’s use of his mandatory dues to fund political and ideological speech regarding issues of law and public policy. *Boudreaux v. La. State Bar Ass’n*, No. 19-11962, is pending in the Eastern District of Louisiana.

**SUMMARY OF THE ARGUMENT**

The 21,414 attorneys licensed to practice law in the state of Louisiana are harmed by forced association and compelled subsidization of the Louisiana State Bar Association’s (LSBA) political and ideological

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<sup>1</sup> Pursuant to this Court’s Rule 37.3(a), this amicus brief is filed with the consent of the parties, and the parties were timely notified. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than Amicus Curiae, its members, or its counsel made a monetary contribution to fund the preparation and submission of this brief.

speech. American Bar Association, *ABA Profile of the Legal Profession 2021*.<sup>2</sup>

Like Oklahoma attorneys, Louisiana attorneys are required to join the LSBA and pay dues as a condition of practicing law. And like the Oklahoma Bar Association, LSBA uses member dues to subsidize its political and ideological speech.

Amicus Curiae’s goal is to inform the Court of the political and ideological positions taken by the LSBA; specifically, the bar’s advocacy on political, ideological, and divisive legislation, to illustrate that bar advocacy violates the First Amendment rights of attorneys in states where bar membership is mandatory and is a nationwide problem that should be addressed by this Court.

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## ARGUMENT

### **The Louisiana State Bar Association: Compelled Membership and Use of Member Dues for Political and Ideological Advocacy**

Attorneys who wish to practice law in Louisiana are compelled to pay dues and become members of the LSBA. La. R.S. § 37:211 (citing Act 54 of 1940, which states, “[t]hat the membership of the [LSBA] shall consist of all persons now or hereafter regularly licensed to practice law in this State, and no person shall

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<sup>2</sup> <https://www.americanbar.org/content/dam/aba/administrative/news/2021/0721/polp.pdf>.

practice law in this State who is not a member thereof in good standing”); *see also* La. R.S. § 37:213 (“No natural person, who has not first been duly and regularly licensed and admitted to practice law by the supreme court of this state . . . shall: (1) Practice law.”); La. S. Ct. R. XIX § 8(C) (“Each lawyer required by this rule to pay an annual fee shall, on or before July 1st of each year, file with the [LSBA] a registration statement on a form approved by the Court.”).

LSBA’s purpose is “to regulate the practice of law, advance the science of jurisprudence, promote the administration of justice, uphold the honor of the Courts and of the profession of law, encourage cordial intercourse among its members, and, generally, to promote the welfare of the profession in the State.” LSBA Articles of Incorporation, Art. III, § 1. Annual membership dues are \$80 for attorneys practicing three years or fewer and \$200 for attorneys practicing for more than three years. LSBA Bylaws, Art. I, § 1.<sup>3</sup>

Additionally, members are required to pay a separate assessment of \$170 or \$235, depending on years of practice, to the Louisiana Attorney Disciplinary Board (LADB). LSBA, *Annual Fees*.<sup>4</sup> LADB was established by the Louisiana Supreme Court as a “statewide agency to administer the lawyer discipline and disability system.” LADB, *Welcome to the LADB*.<sup>5</sup>

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<sup>3</sup> LSBA Articles of Incorporation and Bylaws are available at <https://www.lsba.org/BarGovernance/ByLawsAndArticles.aspx>.

<sup>4</sup> <https://www.lsba.org/Members/MemberDues.aspx>.

<sup>5</sup> <https://www.ladb.org/>.



The LSBA uses its members' dues to engage in political and ideological speech by supporting or opposing bills being considered by the Louisiana legislature.<sup>6</sup> Its legislative advocacy is conducted by a Legislation Committee consisting of twenty-five members. LSBA Bylaws, Art. X, § 1(5). This committee is tasked with recommending positions on legislation “involving issues affecting the profession, the regulation of attorneys and the practice of law, the administration of justice, the availability and delivery of legal services to society, [and] the improvement of the courts and the

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<sup>6</sup> On July 2, 2021, the U.S. Fifth Circuit Court of Appeals issued its decision in *McDonald v. Longley*, a challenge to mandatory bar membership for Texas attorneys. In *McDonald*, the Fifth Circuit found that the Texas Bar Association lobbied for legislation non-germane to law practice. 4 F.4th 229, 247-49 (5th Cir. 2021). The Fifth Circuit also ruled in *Boudreaux v. La. State Bar Ass'n* that very same day, reversing the district court's dismissal of his claim and remanding it to the Eastern District of Louisiana for further proceedings. 3 F.4th 748, 760 (5th Cir. 2021). Coincidentally, undersigned counsel filed an amicus brief with this Court in support of a challenge to Oregon's mandatory bar membership requirement on the same date. The brief filed in *Crowe* catalogued legislative positions taken by the LSBA. See [https://www.supremecourt.gov/DocketPDF/20/20-1678/183126/20210702120028629\\_7.2.21%20PIPP%20Crowe%20amicus%20brief.pdf](https://www.supremecourt.gov/DocketPDF/20/20-1678/183126/20210702120028629_7.2.21%20PIPP%20Crowe%20amicus%20brief.pdf). The LSBA's legislative and policy positions were available on its website on July 2, 2021, but have since been removed. The information formerly stored at LSBA's Legislative Advocacy page has been uploaded to a page on the Pelican Institute for Public Policy's website for this Court's ease of reference. For simplicity, all citations to LSBA's policy or legislative positions in this brief reference LSBA *HOD Policy Positions (through January 2021)* or LSBA *Legislative Advocacy* and can be found at <https://pelicanpolicy.org/lsba-bill-opposition-spotlights-organizations-free-speech-issues-and-pending-lawsuit>.

legal profession.” The Bylaws prohibit the committee from taking positions on legislation that is “ideological in nature, unrelated to the practice of law, or which is unnecessarily divisive.” LSBA Bylaws, Art. XI, § 1.

In addition to the directives provided by the Bylaws, the Legislation Committee also uses “Policy Positions” adopted by the House of Delegates as a tool for evaluating proposed legislation. These “Policy Positions” are grouped into categories that include, among others, “criminal law,” “civil law,” and, tellingly, “miscellaneous.” Among the “miscellaneous” policy provisions are resolutions “[u]rging the adoption of laws prohibiting discrimination in employment, housing, and accommodations for LGBT persons,” and a resolution “strongly supporting a requirement for a full credit of civics in the high school curriculum in the State of Louisiana, while eliminating the free enterprise requirement and incorporating those concepts into the civics curriculum.” LSBA, *LSBA HOD Policy Positions (through January 2021)*.<sup>7</sup> These “Policy Positions” provide administrative cover for the Legislation Committee to advocate for legislation that is ideological, divisive, and unrelated to the practice of law despite the Bylaws’ prohibition.

The LSBA has taken positions on more than 500 bills since 2007.<sup>8</sup> Between 2007 and 2018, the Legislation

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<sup>7</sup> <https://files.pelicanpolicy.org/wp-content/uploads/2021/12/LSBAHODPoliciesThroughJanuary2021.pdf>.

<sup>8</sup> <https://pelicanpolicy.org/lsba-bill-opposition-spotlights-organizations-free-speech-issues-and-pending-lawsuit/>.

Committee provided vague explanations for their support or opposition of bills. Since 2018, however, the Legislation Committee has not provided an explanation for their support or opposition of pending legislation.<sup>9</sup> LSBA, *Legislative Advocacy*, *supra*.<sup>10</sup> The most offensive uses of LSBA member dues to advocate for legislation that is political, ideological, or divisive in nature, or unrelated to the practice of law or the legal profession, are cataloged below for this Court.

**A. During the 2020 Legislative Session, the LSBA Used Member Dues to Lobby Against Popular Bills Unrelated to the Legal Profession and Intended to Strengthen Louisiana’s Business Climate**

Some context is necessary to appreciate how the LSBA’s legislative positions taken during the 2020 session amounted to, in the unforgettable words of Justice Antonin Scalia, “pure applesauce.” *King v. Burwell*, 576 U.S. 473, 507 (2015) (Scalia, J., dissenting). In the fall of 2019, all 144 seats in the Louisiana legislature were up for election. Many candidates campaigned on pledges of improving Louisiana’s economic climate and making the state a more attractive place for businesses.

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<sup>9</sup> The timing coincides with this Court’s decision in *Janus v. AFSCME* on June 27, 2018. 138 S. Ct. 2448 (2018).

<sup>10</sup> <https://pelicanpolicy.org/lsba-bill-opposition-spotlights-organizations-free-speech-issues-and-pending-lawsuit/>.

Conditions signaling to businesses that Louisiana is a hostile environment are well-documented. The American Tort Reform Foundation consistently ranks Louisiana among the “worst of the worst” in its annual report on Judicial Hellholes. American Tort Reform Foundation, *Judicial Hellholes 2020-2021* (28-32) (2020).<sup>11</sup> The organization cited an economic impact report prepared by Citizens Against Lawsuit Abuse (CALA) for its 2021-2022 rankings.<sup>12</sup> *Judicial Hellholes 2021-2022* (39) (2021). The CALA study concluded that excessive tort costs resulted in 22,500 lost jobs, \$3.87 billion in lost economic activity, \$1.12 billion annually in lost wages and a “tort tax” of \$451 per Louisiana citizen. Citizens Against Lawsuit Abuse, *Tort reform in Louisiana*, (2021).<sup>13</sup> Candidates who pledged to improve the state’s business climate and address the conditions resulting in the U.S.’s second-highest auto insurance rates gained majorities in the house and senate.

Despite overwhelming public support for improving the state’s business climate and lowering auto insurance rates, the LSBA’s Legislation Committee opposed legislation designed to address these problems. In total, the LSBA took positions on 65 bills during the 2020 session. Among the bills opposed by the LSBA

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<sup>11</sup> [https://www.judicialhellholes.org/wpcontent/uploads/2020/12/ATRA\\_JH20\\_layout\\_09d-1.pdf](https://www.judicialhellholes.org/wpcontent/uploads/2020/12/ATRA_JH20_layout_09d-1.pdf).

<sup>12</sup> [https://www.judicialhellholes.org/wp-content/uploads/2021/12/ATRA\\_JH21\\_layout\\_FINAL.pdf](https://www.judicialhellholes.org/wp-content/uploads/2021/12/ATRA_JH21_layout_FINAL.pdf).

<sup>13</sup> [https://9b794fac-a267-42dd-bd9c-8a93a1729f63.usrfiles.com/ugd/9b794f\\_9fcd61b5702544e78851f2117be06573.pdf](https://9b794fac-a267-42dd-bd9c-8a93a1729f63.usrfiles.com/ugd/9b794f_9fcd61b5702544e78851f2117be06573.pdf).

were bills to enact the Omnibus Premium Reduction Act of 2020; reduce the jury trial threshold; provide relative to the collateral source rule; and reduce commercial automobile insurance rates under certain circumstances. LSBA, *Legislative Advocacy*, *supra*.<sup>14</sup>

Testimony from a member of the LSBA’s Legislation Committee related to these bills caught lawmakers by surprise. Thomas Pressly of Shreveport is one of the newly elected representatives who ran on a pro-business, tort reform platform. He is also an attorney and a member of the Louisiana Bar. On May 12, 2020, Rep. Pressly tweeted, “Did you know that the Louisiana Bar Association is lobbying against tort reform? I’m a dues paying member to the bar and **ADAMANTLY OPPOSE** the organization lobbying for or against any bill. To oppose a bill that will make Louisiana competitive is unconscionable.” @TAPressly, Twitter (May 12, 2020, 4:23 P.M.).<sup>15</sup>

Other bills supported or opposed by the LSBA during the 2020 session can only be categorized as “miscellaneous” and are worth mentioning for want of anything to do with law practice or the legal profession. The LSBA took positions on bills creating a retired volunteer dental hygienist license; establishing the licensed profession of art therapist; providing relative to peer-to-peer car sharing; providing relative to funeral directors and embalmers; and providing

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<sup>14</sup> <https://files.pelicanpolicy.org/wp-content/uploads/2021/12/2020-Bill-Tracking-Report.pdf>.

<sup>15</sup> <https://twitter.com/TAPressly/status/1260319741601812480>.

relative to the practice of medicine. The LSBA did not provide reasons for its support or opposition of these bills. LSBA, *Legislative Advocacy, supra*.

**B. The LSBA has Used Compelled Membership Dues to Advocate for Legislation Unrelated to the Legal Profession Since at Least 2007**

Between 2007 and 2021, the LSBA took positions on 503 bills in the Louisiana legislature. The last year the Legislation Committee provided any reason, however vague, for its legislative positions was 2018.

One of the most-used justifications for an LSBA position on bills is a January 23, 2010, policy “opposing granting of civil immunities, except in cases where the public policy sought to be favored is sufficiently important, the behavior sought to be encouraged is directly related to the policy and the immunity is drawn as narrowly as possible to effect its purpose.” LSBA, *Legislative Advocacy, supra*.<sup>16</sup>

Citing this Policy Position, the LSBA has spent bar dues to advocate for or against bills that provide for the carrying of concealed handguns on school property by certain teachers or administrators (2018); authorize electronic delivery of insurance coverage notices (2018); provide relative to bullying (2018); provide for the return of certain Recovery School District<sup>17</sup>

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<sup>16</sup> <https://files.pelicanpolicy.org/wp-content/uploads/2021/12/LSBAHODPoliciesThroughJanuary2021.pdf>.

<sup>17</sup> The Recovery School District (RSD) is a Louisiana Department of Education intervention program for persistently

schools to the transferring school board (2016); provide a limitation of liability for landowners who grant a right of passage to cemeteries (2016); amend provisions relative to midwifery licensing (2012); provide for the administration of auto-injectable epinephrine by a school nurse (2012); provide relative to oyster leases (2011); provide relative to the rehabilitation of injured employees (2010); limit civil liability for persons using automated external defibrillators (2009); provide civil immunities for certain volunteers working in coordination with the state or its political subdivisions as relates to homeland security (2009); and, limit civil liability of health care providers and personnel during a declared emergency (2009). LSBA, *Legislative Advocacy, supra*.

Despite the LSBA Bylaws' ban on supporting or opposing legislation unrelated to the practice of law, or legislation that is political, ideological or divisive in nature, a "Policy Position" adopted in 2016 addresses discrimination in "employment, housing, and accommodations" against LGBT persons. LSBA, *LSBA HOD Policy Positions (through January 2021), supra*. The Legislation Committee cited this policy position to back one measure, a 2018 bill that sought to prohibit elementary and secondary schools that receive state funds from discriminating based on gender identity or

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struggling schools. Following the destruction of Hurricane Katrina in New Orleans, the Louisiana legislature handed over most New Orleans Public Schools to the RSD. Louisiana Department of Education, Recovery School District, <https://www.louisianabelieves.com/docs/default-source/recovery-school-district/rsd-defined.pdf>.

sexual orientation. LSBA, *Legislative Advocacy, supra*. One must be very generous to find a way for this bill to be germane to improving the quality of legal services or regulating the legal profession. Some attorneys identify as members of the LGBT community; children of attorneys attend elementary and secondary schools receiving state funds. It is otherwise impossible to connect this legislation to the legal profession.

Finally, one bill supported by the Legislation Committee truly defies categorization. The LSBA supported a 2018 bill that provides for out-of-state auto insurance coverage. The Legislation Committee explained that the bill would protect Louisiana citizens and accident victims from out-of-state drivers utilizing Louisiana roads. LSBA, *Legislative Advocacy, supra*. Except to the extent that Louisiana lawyers use Louisiana roads to drive to and from their offices, the courts, or depositions, a great deal of mental flexibility is required to see how the use of mandatory dues to support any advocacy on this bill is justified.

### **C. The LSBA Continues to Engage in Non-Germane Speech Following the U.S. Fifth Circuit's *McDonald* Decision**

The U.S. Fifth Circuit Court of Appeals addressed a challenge to Texas' mandatory bar in *McDonald v. Longley*. In *McDonald*, the Fifth Circuit determined that the Texas Bar Association engaged in lobbying efforts that had nothing to do with the legal profession or improving the quality of legal services. 4 F.4th at



247-48. Following the *McDonald* ruling, the LSBA pulled its legislative and policy positions from its website. Instead, the Legislative Advocacy page now contains a statement from the LSBA president that “LSBA intends to comply with” *McDonald*, and that “future activity complies with the guidance provided by the 5th Circuit.”<sup>18</sup>

The LSBA continues to engage in non-germane speech despite this pledge. Just days after the *McDonald* ruling, the LSBA Tweeted, “Broccoli is one of the most powerful detoxifying agents in grocery stores. All veggies are beneficial, but broccoli stands out. Its sulphoraphane and glutathione are reported to help protect your brain from excessive inflammation. #WellnessWednesday.” #WellnessWednesday tips from the LSBA account continued through the remainder of 2021, touting the health benefits of walnuts,<sup>19</sup> thrice-weekly workouts,<sup>20</sup> testing the batteries in your smoke and carbon monoxide detectors,<sup>21</sup> short naps,<sup>22</sup> organizing your closet,<sup>23</sup> and changing your HVAC

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<sup>18</sup> <https://www.lsba.org/Legislation/>.

<sup>19</sup> @LouisianaBar, Twitter (July 28, 2021, 12:00 PM), <https://twitter.com/LouisianaBar/status/1420429068395335695>.

<sup>20</sup> @LouisianaBar, Twitter (August 4, 2021, 12:03 PM), <https://twitter.com/LouisianaBar/status/1422966502093950981>.

<sup>21</sup> @LouisianaBar, Twitter (September 22, 2021, 12:00 PM), <https://twitter.com/LouisianaBar/status/1440722690499756035>.

<sup>22</sup> @LouisianaBar, Twitter (October 6, 2021, 12:00 PM), <https://twitter.com/LouisianaBar/status/1445796074489200656>.

<sup>23</sup> @LouisianaBar, Twitter (November 17, 2021, 12:00 PM), <https://twitter.com/LouisianaBar/status/1461031381832716301>.

filter.<sup>24</sup> Health tips with a cute, alliterative hashtag are relatively benign content, but they are not germane to law practice.

In addition to the wellness Tweets, the LSBA uses its Twitter account to recruit lawyers to participate in religious programs. Lawyers were invited to attend an annual Red Mass at St. Louis Cathedral in New Orleans sponsored by the St. Thomas More Catholic Lawyers Association.<sup>25</sup> And on November 2, 2021, @LouisianaBar Tweeted, “Sign up today for the Secret Santa Project and help brighten the holidays for more than 400 children in need! The project serves families from organizations including women’s shelters, CASA programs, and agencies for children with special health needs.”<sup>26</sup> These are two more examples of the LSBA ignoring the *McDonald* decision’s prohibition of non-germane speech.

Encouraging healthy habits and making sure needy children receive a gift from Santa are not nefarious goals. In fact, some lawyers prefer this type of speech from their bar association to advocating against tort reform. However, it remains that these messages are not germane to law practice or improving the quality of legal services and the LSBA should not use member dues to make them. The LSBA’s pledge to respect

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<sup>24</sup> @LouisianaBar, Twitter (December 1, 2021, 1:00 PM), <https://twitter.com/LouisianaBar/status/1466119968777453569>.

<sup>25</sup> @LouisianaBar, Twitter (September 27, 2021, 10:06 AM), <https://twitter.com/LouisianaBar/status/1442505903735926790>.

<sup>26</sup> @LouisianaBar, Twitter (November 2, 2021, 12:00 PM), <https://twitter.com/LouisianaBar/status/1455580560835891204>.

the *McDonald* decision rings hollow so long as it continues to Tweet about eating vegetables. Louisiana attorneys' First Amendment guarantees will not be taken seriously without action from this Court.

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### CONCLUSION

For at least the last fourteen years, the LSBA has used its members' dues to advocate for legislation that is unrelated to the practice of law, and that is political, ideological, or divisive. Like attorneys in Oklahoma and in other states with mandatory bar memberships, Louisiana attorneys will continue to be harmed so long as membership dues are used to speak on their behalf. This Court should grant Petitioner's request for certiorari and affirm all attorneys' First Amendment guarantees of freedom of speech and freedom of association.

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DANE S. CIOLINO  
LOUISIANA LEGAL  
ETHICS, LLC  
18 Farnham Place  
Metairie, LA 70005  
(504) 975-3263  
dane@daneciolino.com

Respectfully submitted,

SARAH HARBISON\*  
PELICAN INSTITUTE  
FOR PUBLIC POLICY  
400 Poydras St.  
Suite 900  
New Orleans, LA 70130  
(504) 952-8016  
sarah@pelicaninstitute.org

*\*Counsel of Record*

*Counsel for Amicus Curiae  
Pelican Institute for Public Policy*