APPENDIX

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARK E. SCHELL,

Plaintiff - Appellant.

v.

THE CHIEF JUSTICE AND JUSTICES OF THE OKLAHOMA SUPREME COURT; THE MEMBERS OF THE OKLAHOMA BAR ASSOCIATION'S BOARD OF GOVERNORS; JOHN M. WILLIAMS, Executive Director, Oklahoma Bar Association, all in their official capacities,

Defendants - Appellees.

FILED
United States
Court of Appeals
Tenth Circuit

August 25, 2021

Christopher M. Wolpert
Clerk of Court

No. 20-6044

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. 5:19-CV-00281-HE)

Anthony J. Dick, Jones Day, Washington, D.C. (Jacob Huebert and Timothy Sandefur, Scharf-Norton Center for Constitutional Litigation at the Goldwater Institute, Phoenix Arizona; and Charles S. Rogers, Oklahoma City, Oklahoma, with him on the briefs), for Plaintiff -Appellant.

Daniel Volchok, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, D.C. (Michael Burrage, Whitten Burrage, Oklahoma City, Oklahoma; Thomas G. Wolfe and Heather L. Hintz, Phillips Murrah P.C., Oklahoma City, Oklahoma; Kieran D. Maye, Jr. and Leslie M. Maye, Maye Law Firm, Edmond, Oklahoma, on the briefs), for Defendants – Appellees.

Before **HARTZ**, **EBEL**, and **McHUGH**, Circuit Judges.

McHUGH, Circuit Judge.

Mark E. Schell, an attorney, asked the district court to invalidate Oklahoma's requirement that practicing attorneys join the Oklahoma Bar Association ("OBA") and pay mandatory dues. In addition, Mr. Schell alleged that the OBA did not utilize adequate safeguards to protect against the impermissible use of funds.

Initially, the district court dismissed Mr. Schell's challenges to membership and dues but permitted Mr. Schell's challenge to the OBA's spending procedures to proceed. Then, the OBA adopted new safeguards consistent with Mr. Schell's demands. The parties agreed the revised safeguards mooted Mr. Schell's remaining claim and asked that the district court

dismiss the Amended Complaint. The district court obliged, and this appeal, limited to the membership and dues requirements, followed.

On appeal, Mr. Schell, primarily citing *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), disputes whether Supreme Court precedents upholding bar membership and mandatory dues remain good law. His view is that *Janus* transformed prior Supreme Court decisions upholding mandatory bar dues and membership such that what was once permitted by *Lathrop v. Donohue*, 367 U.S. 820 (1961), and *Keller v. State Bar of California*, 496 U.S. 1 (1990), is now precluded.

We affirm the district court's holding that mandatory bar dues do not violate Mr. Schell's First Amendment rights. Throughout that portion of our analysis, we apply an overarching principle: "If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989). As for Mr. Schell's First Amendment claim based on mandatory bar membership, we hold the majority of the allegations supporting this claim occurred prior to the controlling statute-of-limitations period. However, some of the allegations falling within the statute-of-limitations period allege conduct by the OBA not necessarily germane to the purposes of a state bar as recognized in *Lathrop* and *Keller*. Accordingly, the district court erred by relying upon *Lathrop* and

Keller to dismiss Mr. Schell's freedom of association claim based on mandatory bar membership. We therefore reverse the district court's dismissal of Mr. Schell's freedom of association claim based on mandatory bar membership, and we remand so that Mr. Schell may conduct discovery on that claim.

I. BACKGROUND

A. Factual Histoty

1. The OBA

The Supreme Court of Oklahoma created the OBA, dubbed it "an official arm" of the Court, and promulgated rules governing its operations. Okla. Stat. tit. 5, ch. 1, app. 1, art. I, § 1. The OBA is governed by a seventeen-person Board of Governors, all of whom must be OBA active members. *Id.* art. IV, § 1. The Board of Governors selects an Executive Director and approves the disbursement of OBA funds. *Id.* art. VI, § 1; art. VII, § 2.

As relevant here, the OBA's membership consists of "those persons who are, and remain, licensed to practice law in" Oklahoma. *Id.* art. II, § 1. Persons who are not OBA active members may not practice law in Oklahoma, subject to narrow exceptions. *Id.* §§ 5, 7. OBA members must pay annual dues. *Id.* art. VIII, § 1. If a member fails to pay dues, the Board of Governors is required to refer that person to the Supreme Court of Oklahoma for suspension from the practice of law. *Id.* § 2. Mr. Schell has paid annual dues to the OBA for decades.

2. OBA Speech

Mr. Schell, through his Amended Complaint, alleges "[t]he OBA uses members' mandatory dues to engage

in speech, including political and ideological speech." App. at 27. In accord with provisions of the OBA bylaws, the OBA formally engages in three types of legislative activity. First, the OBA operates a "Legislative Program" entity which "may propose legislation 'relating to the administration of justice; to court organization; selection, tenure, salary and other incidents of the judicial office; to rules and laws affecting practice and procedure in the courts and in administrative bodies exercising adjudicatory functions; and to the practice of law.'" *Id.* (quoting art. VIII, §§ 2, 3 of the OBA Bylaws). Second, the OBA is authorized to make recommendations on pending legislation impacting the same items on which the "Legislative Program" entity may draft proposed legislation. Third, the OBA is permitted to "endorse 'any proposal for the improvement of the law, procedural or substantive . . . in principle.'" *Id.* (quoting art. VIII, § 4 of the OBA Bylaws) (alteration in original).

Mr. Schell's Amended Complaint identifies two examples of the OBA's direct legislative activity. First, in 2009, "the OBA publicly opposed a controversial tort reform bill." *Id.* Second, in 2014, the OBA created a petition and organized a political rally at the Oklahoma State Capitol in opposition to proposed legislation changing the process for the selection of members to the Oklahoma Judicial Nomination Commission. The Amended Complaint further alleges the OBA, through its committees, continues to draft, support, and oppose legislation.

The OBA also publishes the *Oklahoma Bar Journal*. Mr. Schell alleges, "[t]he OBA uses mandatory member dues to publish political and ideological

speech in its *Oklahoma Bar Journal* publication." *Id.* at 28. Mr. Schell's Amended Complaint identifies several articles published in 2016 touching on matters such as the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), regulation of the oil and gas industry, the influence of monetary contributions on the judicial selection process, tribal law issues, and climate change. Mr. Schell contends these articles were political and ideological in nature, rather than merely informative. For instance, the article discussing *Citizens United* criticized the Supreme Court for "changing the United States 'to "a government of the corporations, by the bureaucrats, for the money."'" *Id.* at 28 (quoting the OBA article). Meanwhile, articles on the oil and gas industry (1) called for increased regulation of injection wells, (2) praised Al Gore for his stances on climate change and against fossil fuels, (3) praised an author who accused the industry of using "big money" to "takeover" government, and (4) urged OBA members to "take action" and stand up against the oil and gas industry's takeover of the government. *Id.* at 29. And an article discussing tribal law accused the state attorney general of advancing arguments before the United States Supreme Court that were "'disingenuous' and the product of 'uninformed bias.'" *Id.* (quoting May 2016 *Oklahoma Bar Journal* article entitled "State Attorney General Argues Against Tribal and State Interests"). Additionally, articles called pending legislation regarding the judicial selection process an attack on the OBA and the Oklahoma courts, with one article entitled "We Don't Want to Be Texas." *Id.*

Mr. Schell also alleges the September 2016 publication of the *Oklahoma Bar Journal* included an

announcement of a speech hosted by the OBA, a speech scheduled to take place one week before the 2016 general election. Mr. Schell avers the advertisement indicated the keynote speaker planned to speak about the influence of money in the judicial system and how "wealthy conservative libertarians" intended to use contributions to "chang[e] the way the law is taught in law schools" and to "pay[] for judicial junkets." *Id.* at 30.

Finally, the Amended Complaint contains several allegations about articles published in the *Oklahoma Bar Journal* from 2017 through 2019. First, it alleges an April 2017 article "criticized legislative proposals to change Oklahoma's method of judicial selection, suggesting that, if they passed, 'big money and special interest groups [would] elect judges and justices and campaign contributions [would] buy court opinions.'" *Id.* at 30–31 (alterations in original). Second, a May 2017 article encouraged OBA members to warn the public about the harms of politics in the judicial system. Third, a May 2018 article responded to criticism of Oklahoma's merit-based process for selecting judges. Fourth, a November 2018 article advocated for allowing prisoners to bring tort claims against prisons and jails. Fifth, and finally, articles in February and March of 2019 defended and advocated for the role of lawyers in the state legislature.

B. Procedural History

On March 26, 2019, Mr. Schell initiated this lawsuit in the United States District Court for the Western District of Oklahoma, naming only John Morris Williams, Executive Director of the OBA, as a defendant. Mr. Schell subsequently amended his

complaint, adding the Chief Justice and Associate Justices of the Oklahoma Supreme Court and members of the OBA's Board of Governors as defendants. Count I raised First and Fourteenth Amendments free speech and freedom of association challenges to Oklahoma's requirement that practicing attorneys join the OBA. On these claims, Mr. Schell sought declaratory and injunctive relief through 28 U.S.C. §§ 2201, 2202 and 42 U.S.C. §§ 1983, 1988. Count II raised First and Fourteenth Amendments free speech and freedom of association challenges to the OBA's use of mandatory bar dues to subsidize political speech, without obtaining OBA members' affirmative consent. Count II contended the OBA, in accord with *Janus*, needed to create an opt-in dues system for the subsidization of political and ideological speech not germane to the goal of regulating the practice of law. To enforce his constitutional rights asserted in Count II, Mr. Schell once again sought declaratory and injunctive relief through 28 U.S.C. §§ 2201, 2202 and 42 U.S.C. §§ 1983, 1988. Count III, relying on *Keller*, raised a First Amendment challenge to the OBA's failure to adopt constitutionally adequate safeguards to prevent the impermissible use of mandatory bar dues.

The defendants moved to dismiss in separate motions. The Chief Justice and Associate Justices of the Oklahoma Supreme Court sought dismissal under Federal Rule of Civil Procedure 12(b)(1) and (6), arguing (1) the individual Justices were not proper parties as no individual Justice could grant Mr. Schell relief; (2) the Justices were immune from suit; and (3) the federal court lacked jurisdiction over the action or, in the alternative, should abstain from reviewing a

matter of state law. The Justices also adopted the forthcoming arguments "regarding the constitutionality of the Oklahoma Integrated Bar and Dues" advanced by the other defendants. The Justices, however, did not advance or adopt any argument, in either their motion to dismiss or their reply brief on their motion to dismiss, based on the statute of limitations. Next, Mr. Williams moved to dismiss under Rules 12(b)(1) and (6), arguing (1) the OBA was immune from suit under the Eleventh Amendment; (2) the district court lacked Article III jurisdiction because Mr. Williams could not provide Mr. Schell any relief; (3) *Lathrop* and *Keller* upheld the constitutionality of mandatory bar membership and dues; and (4) the OBA offers procedures for segregating funds that comply with *Keller*. Within his lack-of-Article-III-standing argument, Mr. Williams contended the statute of limitations governing § 1983 actions barred considerations of most of Mr. Schell's allegations regarding the *Oklahoma Bar Journal* articles:

> 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[s], 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 determine[] applicable limitations period); OKLA. STAT. tit. 12, § 95(2) (two year limitation period for actions for injury to rights not arising from contract).

Supp. App., Vol. I at 54. The members of the OBA's Board of Governors also moved to dismiss, raising arguments in line with Mr. Williams, including an identical argument regarding the statute of limitations.[1]

The district court granted in part and denied in part the motions to dismiss. The district court first rejected the defendants' various arguments as to their claimed immunity from suit. Next, the district court determined it had jurisdiction over the suit, and thus decided there was no reason to abstain from deciding this case.

Turning to the sufficiency of Mr. Schell's pleadings, the district court dismissed Counts I and II of the Amended Complaint for failure to state a claim. Specifically, the district court reasoned that the Supreme Court's decisions in *Lathrop* and *Keller* foreclosed Mr. Schell's challenges to membership and mandatory dues.[2] App. at 51 ("In light of the Supreme Court's decisions in *Lathrop* and *Keller*, plaintiff's claims directed to compelled membership in the OBA and to the collection and use of mandatory bar dues to fund activities germane to regulating the legal profession and improving legal services fail.") But the district court denied the defendants' motions to dismiss Count III—the OBA's alleged failure to adopt

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[1] In his responses to the motions to dismiss, Mr. Schell, although citing the pre-March 2017 article in support of his claim, did not address the statute of limitations argument raised by Mr. Williams and the members of the OBA Board of Governors.

[2] In reaching this conclusion, the district court did not address the statute of limitations argument raised by Mr. Williams and the members of the OBA Board of Governors.

constitutionally adequate safeguards to prevent the impermissible use of mandatory bar dues.

In March 2020, the OBA Board of Governors adopted a new "*Keller* policy" that enshrined the spending safeguards Mr. Schell had alleged were compelled by the First Amendment. Defendants then filed an unopposed motion to dismiss as moot Count III of the Amended Complaint. Mr. Schell did not oppose the motion. The district court granted the motion to dismiss Count III as moot, dismissed the Amended Complaint, and entered judgment. Mr. Schell timely filed a notice of appeal.

II. DISCUSSION

A. Standard of Review

"We review de novo the grant of a Rule 12(b)(6) motion to dismiss for failure to state a claim." *Emps.' Ret. Sys. of R.I. v. Williams Cos.*, 889 F.3d 1153, 1161 (10th Cir. 2018) (quotation marks omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Finally, "we may affirm on any ground[] supported by the record" so long as the plaintiff has had an opportunity to address the alternative ground. *Bixler v. Foster*, 596 F.3d 751, 760 (10th Cir. 2010) (quotation marks omitted).

B. Relevant Case Law

"The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgment of the freedom of speech." *Janus*, 138 S. Ct. at 2463. The freedom of speech includes "the right to refrain from speaking at all." *Id.* (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). When speech is compelled, "individuals are coerced into betraying their convictions," and the forced endorsement of objectionable ideas "is always demeaning." *Id.* at 2464. "Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns" to a law compelling speech. *Id.*

The right to refrain from speaking includes "[t]he right to eschew association for expressive purposes." *Id.* at 2463. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 460 (1958). Thus, the Supreme Court "has repeatedly held that rights of association are within the ambit of the constitutional protections afforded by the First and Fourteenth Amendments." *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 543 (1963). "[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234–35 (1977). "Freedom of association therefore plainly

presupposes a freedom not to associate." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

Oklahoma attorneys are required to pay dues to the OBA. Oklahoma attorneys are also not permitted to eschew association with the OBA, for expressive reasons or otherwise, while continuing the practice of law. At first glance, then, the requirement that Oklahoma attorneys be members of the OBA might appear problematic under the First Amendment. A closer examination of Supreme Court precedent teaches the question is more complex.

1. *Lathrop*

In *Lathrop*, a member of the Wisconsin Bar sued for a refund of dues because he did not "like to be coerced to support an organization which is authorized and directed to engage in political and propaganda activities." 367 U.S. at 822 (plurality opinion). He accused the Wisconsin Bar of being, in essence, "a political party." *Id.* at 833. The allegations suggested the Wisconsin Bar partook in six forms of legislative activity: (1) its executive director was a registered lobbyist and spent 5% of his time on legislative activities; (2) the Bar took positions on pending legislation involving matters such as compensation for judges and attorneys, making attorneys notaries public, court reorganization, allowing for personal jurisdiction over non-residents, laws governing federal tax liens, issues of curtesy and dower, and jurisdiction of county courts over inter vivos trusts; (3) a state legislative committee worked with legislators on some of the legislative matters on which the Bar took positions; (4) a federal legislative committee worked on legislation "'affecting the practice of law, or lawyers

as a class, or the jurisdiction, procedure and practice of the Federal courts and other Federal tribunals, or creation of new Federal courts or judgeships affecting [Wisconsin] and comparable subjects'"; (5) the formation of special committees to focus and hold discussions on some legislative items, as well as world peace initiatives; and (6) the publication of Wisconsin Bar Bulletins suggesting changes in state and federal law and discussing progress of legislative items. *Id.* at 835–39 (quoting Wisconsin Bar Board of Governors Minutes, Dec. 11, 1959).

Although the Court did not issue a majority opinion, seven Justices agreed the First Amendment right to freedom of association did not proscribe mandatory bar dues or membership. Four Justices disagreed with the plaintiff's characterization of the Wisconsin Bar's activities, in part because "[o]nly two of the [Bar's] 12 committees . . . are expressly directed to concern themselves in a substantial way with legislation" and the Bar took a position on legislation only where there was "substantial unanimity" among its members. *Id.* at 833–34. And the plurality found no meaningful distinction between mandatory bar membership and "union-shop agreements between interstate railroads and unions of their employees[,] conditioning the employees' continued employment on payment of union dues, initiation fees and assessments" that the Court had previously upheld. *Id.* at 842. Additionally, despite the significant legislative activities of the Wisconsin Bar, the *Lathrop* plurality noted, "legislative activity [was] not the major activity of the State Bar." *Id.* at 839. The plurality concluded the Supreme Court of Wisconsin and the Wisconsin Bar, "to further the State's legitimate interests in raising

the quality of professional services, may constitutionally require that the costs of improving the profession . . . be shared by the subjects and beneficiaries of the regulatory program . . . even though the organization created to attain the objective also engages in some legislative activity." *Id.* at 843. Thus, the plurality held mandating financial support for the Bar did not infringe an attorney's First Amendment, freedom of association right. *Id.* But, concluding the plaintiff's complaint lacked sufficiently specific allegations, the plurality declined to reach the question of whether the structure of the Wisconsin Bar violated an attorney's First Amendment right to free speech. *Id.* at 845–46.

Two Justices concurred in the judgment but criticized the plurality for not endorsing the Wisconsin Bar's right "to use, in whole or in part, the dues of dissident members to carry on legislative and other programs of law reform." *Id.* at 848 (Harlan, J., concurring). Those two Justices agreed, therefore, that the plaintiff s freedom of association claim failed. *Id.* at 850.

Justice Whittaker also concurred in the judgment, writing only for himself. His concurrence states, in its entirety:

> Believing that the State's requirement that a lawyer pay to its designee an annual fee of $15 as a condition of its grant, or of continuing its grant, to him of the special privilege (which is what it is) of practicing law in the State—which is really all that is involved here—does not violate any provision of the United States Constitution, I concur in the judgment.

Id. at 865 (Whittaker, J., concurring).

2. *Abood*

In *Abood*, state law permitted local governmental employers to enter "agency shop" agreements wherein a designated union would represent all employees, and each employee, regardless of whether she wished to be a member of the union, was required to pay union dues as a condition of employment. 431 U.S. at 211. A group of teachers who opposed union collective bargaining for public employees, raised a freedom of association challenge to "agency shop" agreements and mandatory dues. *Id.* at 212–13. Recognizing the state interest in the promotion of harmony and uniformity in contract negotiations, the Supreme Court upheld "agency shop" agreements for those portions of dues payments that financed a union's collective bargaining activities. *Id.* at 229, 232. However, the Supreme Court held that public employees who did not join the union could not be required to pay dues that funded non-collective-bargaining activities such as the union's expression of political views. *Id.* at 235–36.

3. *Keller*

In *Keller*, members of the California Bar raised First Amendment freedom of speech and freedom of association challenges to the "use of their membership dues to finance certain ideological or political activities to which they were opposed." 496 U.S. at 4, *see id.* at 5–6. Specifically, the plaintiffs challenged forced membership and mandatory dues in light of the California Bar's lobbying of the legislature and governmental entities, filing of amici briefs, engagement in educational programs, and holding of an annual conference at which issues of current

interest were debated and resolutions on those issues adopted. *Id.* at 5–6. "The Supreme Court of California rejected this challenge on the grounds that the State Bar is a state agency and, as such, may use the dues for any purpose within its broad statutory authority." *Id.* at 4.

The Supreme Court disagreed with that holding but nevertheless reaffirmed "that lawyers admitted to practice in the State may be required to join and pay dues to the State Bar." *Id.* The Supreme Court reasoned "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." *Id.* at 12. But the Supreme Court drew a balance, allowing state bar associations to "constitutionally fund activities germane to those goals" but not use mandatory dues to "fund activities of an ideological nature which fall outside of those areas of activity." *Id.* at 14. The Supreme Court did not draw a fine line between germane versus non-germane, ideological activities, but it did state a "guiding standard" for assessing that question: "[W]hether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" *Id.* (quoting *Lathrop*, 367 U.S. at 843). Along these lines, the Supreme Court noted

> [c]ompulsory dues may not be expended to endorse or advance a gun control or nuclear weapon freeze initiative [but,] at the other end of the spectrum[,] petitioners have no valid constitutional objection to their compulsory dues

> being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession.

Id. at 16. Thus, the Supreme Court generally applied the rule from *Abood* that mandatory dues could be used for activities central to goals and purposes germane to a bar association's legitimate functions but not for ideological purposes extraneous to the recognized goals and purposes of a bar. *Id.* at 17.

The Supreme Court's opinion, however, did not end there. Rather, the Court acknowledged the plaintiffs also had advanced "a much broader freedom of association claim than was at issue in *Lathrop*." *Id.* at 17. Specifically, the plaintiffs argued they could not "be compelled to associate with an organization that engages in political or ideological activities beyond those for which mandatory financial support is justified under the principles of *Lathrop* and *Abood*." *Id.* But the Court declined to address this claim because the California courts had not addressed it first.

4. *Janus*

In *Janus*, public employees opposed to collective bargaining challenged forced subsidization of union collective-bargaining activities. 138 S. Ct. at 2459–60. The Supreme Court overruled *Abood*, concluding *Abood* was "poorly reasoned," and "countenanced . . . free speech violations." *Id.* at 2460, 2465. The Supreme Court held "the compelled subsidization of private speech seriously impinges on First Amendment rights [and] cannot be casually allowed." *Id.* at 2464. Concluding *Abood* overemphasized the importance of "labor peace" where that compelling state interest

could be advanced without imposing a mandatory dues system, the Supreme Court held public employees could not be forced to subsidize union collective-bargaining activities as a condition of employment. *Id.* at 2465–66, 2486. And since *Janus*, two Justices have stated they would reconsider *Keller* in light of *Janus*:

> Our decision to overrule *Abood* casts significant doubt on *Keller*. The opinion in *Keller* rests almost entirely on the framework of *Abood*. Now that *Abood* is no longer good law, there is effectively nothing left supporting our decision in *Keller*. If the rule in *Keller* is to survive, it would have to be on the basis of new reasoning that is consistent with *Janus*.

Jarchow v. State Bar of Wis., 140 S. Ct. 1720, 1720 (2020) (Thomas, J., dissenting from the denial of certiorari).[3]

C. The First Amendment Permits Mandatory Bar Dues

The Supreme Court has recently applied "exacting scrutiny" to mandatory dues, in the union context, without ruling out the possibility that strict scrutiny might be appropriate. *Janus*, 138 S. Ct. at 2465. A law compelling subsidies for private speech may survive exacting scrutiny only when it serves "a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 310 (2012) (alterations in original) (quoting *Roberts*, 468 U.S. at 623).

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[3] Justice Gorsuch joined Justice Thomas's dissent. *Jarchow v. State Bar of Wis.*, 140 S. Ct. 1720, 1720 (2020).

Although *Janus* suggests *Keller* is vulnerable to reversal by the Supreme Court, at this time *Keller* remains binding precedent on this court. And under that precedent, Mr. Schell's Amended Complaint failed to state a plausible claim that the OBA's mandatory dues are unconstitutional.

Mr. Schell's primary argument as to mandatory dues is to recast the holding of *Keller*. According to Mr. Schell, *Keller* "held that mandatory bar dues are subject to the same constitutional rule that applies to mandatory union fees." Appellant Br. at 28 (internal quotation marks omitted). In Mr. Schell's view, *Keller*'s discussion of *Abood* was dicta, meant only to illustrate how the constitutional rules then in effect would apply to a bar association. Mr. Schell asserts that if we were to apply *Keller* literally, now that *Abood* has been overturned, we would violate *Keller*'s core holding that the same rule applies to unions and bar associations. And he contends that applying *Janus*' rule here dictates the conclusion that the OBA's mandatory dues are unconstitutional.

Mr. Schell's reading of *Keller* is unconvincing. In his view, the second half of the Court's opinion was a recapitulation of *Abood* and *Hudson* for no reason other than additional explanation of their holdings. But there is a far more likely explanation for the Court's extended discussion concerning "useful guidelines for determining permissible expenditures." *Keller*, 496 U.S. at 14. In our view, the Court used the discussion of union expenditures in *Abood* and *Hudson* to provide context for its analysis of the analogous—but not identical—expenditures by bar associations. That discussion was not dicta. *Keller*'s holding is meaningfully distinct from *Abood*'s holding for the

same reason that bar associations are meaningfully distinct from unions, despite the "substantial analogy" between the two types of entities. *Keller*, 496 U.S. at 12. Specifically, the analysis conducted in *Janus*, which drew into question the furtherance of the state's interest in "labor peace" through "agency shop" agreements, is not directly in play for "regulating the legal profession" and "'improving the quality of the legal service available" were the interests identified in *Keller* in support of mandatory bar dues. *Keller*, 496 U.S. at 14 (quoting *Lathrop*, 367 U.S. at 843).

It follows that *Janus* did not overrule *Keller*'s discussion of *Abood*, or its related discussion of germaneness, as the test for the constitutionality of mandatory dues and expenditures.[4] To be sure, the Supreme Court may reexamine its precedent on mandatory bar dues, but it did not do so in *Janus*.

Even if Mr. Schell were correct that most of *Keller* is dicta, we would still be bound to follow it. "[W]e are bound by Supreme Court dicta almost as firmly as by the Court[']s[] outright holdings, particularly when the dicta is recent and not enfeebled by later statements." *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1125 (10th Cir. 2015) (internal quotation marks omitted). That is particularly true when the "dicta squarely relates to the holding] itself, and therefore is assuredly not gratuitous." *Id.* For the reasons already

[4] The defendants argue some or all of Mr. Schell's appeal is unripe and non-justiciable because he does not allege the OBA has engaged in political or ideological activities since the OBA adopted its new "*Keller* policy." Yet, there is no reason Mr. Schell must challenge the new policy to challenge the ongoing requirements of mandatory membership and dues still in effect.

explained, *Keller*'s discussion of germaneness is related to, but distinct from, its discussion of the analogy between unions and bar associations. And to the extent *Janus* enfeebled parts of *Keller* by overruling *Abood*, we are nevertheless bound to "follow the case which directly controls." *Rodriguez de Quijas*, 490 U.S. at 484. Here, that case is *Keller*, unless and until the Supreme Court tells us otherwise.

In conclusion, *Keller* established a germaneness test for the constitutionality of mandatory bar dues. *Janus* did not replace that longstanding test with exacting scrutiny, and the Supreme Court has yet to announce the impact of that decision on its holdings in *Keller* and *Lathrop*. Consequently, we affirm the district court's dismissal of Count II.

D. The First Amendment and Mandatory Bar Membership

We first consider the proper scope of Mr. Schell's Count I free speech and freedom of association claims based on mandatory bar membership under the applicable statute of limitations. We then conclude that the allegations occurring within the applicable statute of limitations advance a plausible freedom of association claim not foreclosed by *Lathrop* and *Keller* and warranting discovery.

1. Statute of Limitations

On appeal, defendants contend most of Mr. Schell's allegations are barred by the statute of limitations. "The statute of limitations period for a § 1983 claim is dictated by the personal injury statute of limitations in the state in which the claim arose." *McCarty v. Gilchrist*, 646 F.3d 1281, 1289 (10th Cir. 2011). Oklahoma law provides a two-year statute of

limitations for "an action for injury to the rights of another, not arising on contract." Okla. Stat. tit., 12 § 95(A)(3).[5] Where Mr. Schell initiated this action on March 26, 2019, only allegations occurring on or after March 26, 2017, fall within the statute-of-limitations period.[6] Based on this conclusion, neither of the direct

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[5] Although the appellees argue for application of a two-year statute of limitations, they incorrectly cite Section 95(2) of Title 12 of the Oklahoma Statutes as the governing provision of law. Because appellees identify the proper two-year time period, we overlook the typographical error in their citation to authority.

[6] In reaching this conclusion, we are aware that it remains an open question in this circuit whether the continuing violation doctrine applies in the § 1983 context. *See Vasquez v. Davis*, 882 F.3d 1270, 1277 (10th Cir. 2018) ("The continuing violation doctrine was developed in the Title VII employment law context . . . and this court has not yet decided whether it should apply to § 1983 claims."). Assuming the continuing violation doctrine applies, the burden was on Mr. Schell to raise an argument under that doctrine and show similar violations occurred both before and within the statute-of-limitations period. *See Bruno v. W. Elec. Co.*, 829 F.2d 957, 961 (10th Cir. 1987) (placing burden on plaintiff to show and establish continuing violation); *see also Aldrich v. McCulloch Props., Inc.*, 627 F.2d 1036, 1041 n.4 (10th Cir. 1980) ("While the statute of limitations is an affirmative defense, when the dates given in the complaint make clear that the right sued upon has been extinguished, the plaintiff has the burden of establishing a factual basis for tolling the statute."). By not responding to the statute-of-limitations argument raised by defendants/appellees before the district court and on appeal, Mr. Schell never attempted to satisfy the continuing violation doctrine standard. Furthermore, although the Chief Justice and Associate Justices of the Oklahoma Supreme Court failed to raise a statute of limitations defense in the district court, Mr. Schell, by not addressing the issue on appeal, has waived the waiver. *See United States v. Heckenliable*, 446 F.3d 1048, 1049 n.3 (10th Cir.

examples of the OBA engaging in legislative activity alleged in Mr. Schell's Amended Complaint falls within the statute-of-limitations period, for those instances occurred in 2009 and 2014. Further, we do not consider the publication of the 2016 *Oklahoma Bar Journal* articles.[7] Rather, only the six articles published after March 2017 fall within the applicable limitations period.

2. Sufficiency of Allegations Within the Applicable Statute of Limitations

In assessing whether the non-time-barred allegations in Mr. Schell's Amended Complaint are sufficient to advance a claim for a free speech or freedom of association violation, we consider the germaneness of the alleged activities to the valid goals and purposes of the OBA. *See Keller*, 496 U.S. at 13–14; *Lathrop*, 367 U.S. at 843. As stated earlier, the primary inquiry for assessing this matter is whether the challenged expenditures and activities "are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the

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2006) (failure of party to argue waiver results in waiver of initial waiver argument).

[7] These articles we do not consider based on the statute of limitations include (1) a January 2016 article about *Citizens United v. FEC*, 558 U.S. 310 (2010); (2) a February 2016 article about super PACs and the judiciary; (3) a March 2016 article about the regulation of the oil and gas industry; (4) April 2016 articles about the judicial selection process; (5) May 2016 articles touching on *Citizens United*, climate change, the oil and gas industry, and tribal law; (6) a September 2016 article about the influence of dark money in politics; and (7) a November 2016 article about judicial branch funding. We also do not consider the September 2016 advertisement in the *Oklahoma Bar Journal* for the keynote speech at the OBA's Annual Meeting.

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). In other words, Mr. Schell may not state a plausible freedom of association claim merely by identifying activities by the OBA such as discussion of reorganizing the judicial system or matters impacting the practice of law.

Of the six *Oklahoma Bar Journal* articles appearing within the appropriate time period, four articles, based on the descriptions provided by Mr. Schell in his Amended Complaint, appear germane to the goal of improving the quality and availability of legal services in Oklahoma. As a result, they are in line with those non-attorney-disciplinary activities permitted by the plurality opinion in *Lathrop* and the opinion in *Keller*.

First, the Amended Complaint identifies a May 2017 article encouraging members of the OBA to warn the public about the harms of politics in the judicial system. This article is germane because the judicial system is designed to be an apolitical branch of government, and promotion of the public's view of the judicial system as independent enhances public trust in the judicial system and associated attorney services.

Second, Mr. Schell highlights a May 2018 article responding to criticism of Oklahoma's merit-based process for selecting judges. Again, this article involves the structure of the court system and falls within those activities accepted in *Lathrop* and *Keller*. Further, while other allegations in Mr. Schell's Amended Complaint identify specific *Oklahoma Bar Journal* articles as advancing political or ideological

views, he advances no similar contentions with respect to the May 2018 article.

Third, Mr. Schell identifies February and March 2019 articles as advocating for the role of attorneys in the state legislature. But these articles are not inherently political or ideological in nature. Rather, they promote the important role of the OBA's attorney members in using their professional skills to interpret and advise on pending legislation. And, the role of attorneys in legislatures is hardly a new concept as, according to the Congressional Research Service, 214 members of the 116th Congress held law degrees, with more than half the members of the United States Senate holding law degrees. SEE JENNIFER E. MANNING, CONG. RSCH. SERV., R45583, MEMBERSHIP OF THE 116TH CONGRESS: A PROFILE, at 5 (Dec. 17, 2020). Accordingly, the articles are germane to the OBA's core function to advance the interests of the profession.

Mr. Schell's claim, therefore, rests on two *Oklahoma Bar Journal* articles: (1) the April 2017 article criticizing "big money and special interest groups" making campaign contributions and "elect[ing] judges and justices"; and (2) a November 2018 article advocating for the ability of prisoners to bring tort suits against prisons and jails.[8] App. at 31. The district

[8] Mr. Schell's Amended Complaint also alleges that "[t]he OBA continues to support and oppose state legislation" and that "OBA committees also draft and promote state legislation." App. at 28. These allegations lack the level of specificity necessary to advance a First Amendment claim because they neither identify the type of legislation the OBA supports, opposes, and drafts, nor allege that Mr. Schell personally opposes any particular

court concluded *Lathrop* and *Keller* foreclosed Mr. Schell from advancing a freedom of association claim, particularly to the extent the OBA had engaged only in activities germane to the recognized purpose of a state bar. The district court erred in two respects.

First, it is not apparent the district court analyzed whether all of the OBA's activities were germane to regulating the legal profession and improving the quality of legal services in Oklahoma.[9] Nor was the district court in a proper position to conduct such an analysis. While Mr. Schell provided short and plain descriptions of the April 2017 and November 2018 articles so as to satisfy Federal Rule of Civil Procedure 8, he did not attach the articles to his Complaint or his Amended Complaint. And none of the defendants attached any of the articles in question to their motions to dismiss. Thus, the articles were not in the record before the district court, and subsequently are not in the record before us. Yet, Mr. Schell's allegations about the April 2017 and November 2018 publications make it plausible the articles strayed from the germane purposes of the OBA and discussed matters in an ideological manner.

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legislative activity undertaken by the OBA since commencement of the statute-of-limitations period in March 2017. *See Lathrop*, 367 U.S. at 845–46 (plurality opinion). Finally, the "Legislative Program" aspect of the OBA, as described by the Amended Complaint, is entirely in accord with those legislative activities discussed in *Lathrop* as insufficient to support a First Amendment claim. *Compare* App. at 27 (citing art. VIII, §§2, 3 of the OBA Bylaws), *with Lathrop*, 367 U.S. at 835–39.

[9] If the district court conducted such an analysis, it did not express why it believed all the OBA's activities were germane.

As to the April 2017 article, views on the appropriateness of "big money and special interest groups" in elections and the ability of donors to "buy court opinions," App. at 31, often break along political lines. And other allegations in Mr. Schell's Amended Complaint support the plausibility of this article having an ideological tinge, because a few months earlier the OBA allegedly hosted a program speaker who accused "wealthy conservative libertarians" of "paying for judicial junkets" through judicial elections. *Id.* at 30. Thus, without viewing the article, it is impossible to conclude the OBA did not advance a non-germane, ideological position through its April 2017 publication of the *Oklahoma Bar Journal*. The same is true for the November 2018 article about increasing the ability of prisoners to sue prisons and jails. While the article might have promoted the potentially germane purpose of encouraging attorneys to represent prisoners in such litigation, it is equally plausible the article advocated for policies eliminating bars on a prisoner's ability to advance suits against prisons and jails, *see Barrios v. Haskell Cnty. Pub. Facilities Auth.*, 432 P.3d 233, 235–41 (Okla. 2018) (holding the Oklahoma Governmental Tort Claims Act is an invocation of state sovereign immunity against constitutional tort claims against prisons). Bottom line, without the articles in the record, it is not possible to conclude whether the OBA only furthered speech germane to the recognized purposes of a state bar.

This leads us to the second error by the district court. Neither *Lathrop* nor *Keller* addressed a broad freedom of association challenge to mandatory bar membership where at least some of a state bar's

actions might not be germane to regulating the legal profession and improving the quality of legal services in the state. *See Keller*, 496 U.S. at 17 (remanding case for consideration of broader freedom of association claim than raised in *Lathrop* because California Supreme Court had not addressed claim). Thus, the district court was incorrect to conclude *Lathrop* and *Keller* necessarily foreclosed Mr. Schell's Count I claim. *See Crowe v. Oregon State Bar*, 989 F.3d 714, 727–29 (9th Cir. 2021) (concluding district court erred in relying on *Lathrop* and *Keller* to foreclose broad freedom of association claim based on mandatory bar membership where plaintiff alleged bar engaged in activities not germane to its purpose).

On remand, the district court shall allow for discovery into the April 2017 and November 2018 *Oklahoma Bar Journal* articles that Mr. Schell identifies in his Amended Complaint.[10] Once the discovery is complete, if defendants seek summary judgment, the district court will need to apply the test from *Keller* to determine whether the articles are germane to the accepted purposes of the state bar. *See*

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[10] Mr. Schell moves for rehearing en banc and panel rehearing, contending (1) *Keller* does not authorize mandatory bar dues and (2) the panel should clarify the scope of discovery permitted on remand. We grant the motion for the limited purpose of addressing Mr. Schell's second argument. "The district court has broad discretion over the control of discovery." *SEC v. Merrill Scott & Assocs., Ltd.*, 600 F.3d 1262, 1271 (10th Cir. 2010). Thus, in identifying the April 2017 and November 2018 *Oklahoma Bar Journal* articles as matters for discovery, we set a floor on the record the parties will need to develop before the district court can consider a dispositive motion.

Keller, 496 U.S. at 14. And, if the articles are not germane, the district court will need to assess whether Mr. Schell may advance a freedom of association claim based on these two articles.[11]

III. CONCLUSION

We affirm the district court's dismissal of Count II of Mr. Schell's Amended Complaint but reverse the district court's dismissal of Mr. Schell's Count I freedom of association claim. On remand, the district court shall permit Mr. Schell an opportunity to conduct discovery on that claim relative to the two potentially non-germane *Oklahoma Bar Journal* articles published within the statute-of-limitations period.

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[11] A potential open issue is to what degree, in quantity, substance, or prominence, a bar association must engage in non-germane activities in order to support a freedom-of-association claim based on compelled bar membership. The *Lathrop* plurality, in concluding that compelled membership in the state bar did not "impinge[] upon protected rights of association," thought it important that "the bulk of State Bar activities serve[d] the legitimate functions of the bar association. 367 U.S. at 843. The plurality concluded that "[g]iven the character of the integrated bar shown on th[e] record," compelled membership was constitutionally permissible "even though" the bar "also engage[d] in some legislative activity." *Id.* The plurality also observed that "legislative activity [was] not the major activity" of the bar. *Id.* at 839. But because this issue was not adequately argued before us, we do not address it now.

APPENDIX B

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

MARK E. SCHELL, Plaintiff, vs. NOMA GURICH, Chief Justice of the Oklahoma Supreme Court, et al., Defendants.	)	NO. CIV-19-0281-HE

JUDGMENT

For the reasons stated in the court's September 18, 2019, order and March 25, 2020, order, this case is **DISMISSED**.

IT IS SO ORDERED.

Dated this 25th day of March, 2020.

/s/ Joe Heaton
JOE HEATON
UNITED STATES
DISTRICT JUDGE

APPENDIX C

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

MARK E. SCHELL, Plaintiff, vs. NOMA GURICH, Chief Justice of the Oklahoma Supreme Court, et al., Defendants.	)	NO. CIV-19-0281-HE

ORDER

Defendants' Unopposed Motion to Dismiss Plaintiff's Third Claim for Relief Pursuant to Federal Rule of Civil Procedure 12(c) [Doc. #81] is **GRANTED**. Plaintiff's third claim for relief is **DISMISSED** as moot. Each party shall bear its own costs and fees related to plaintiff's third cause of action, as set out in the unopposed motion.

IT IS SO ORDERED.

Dated this 25th day of March, 2020.

/s/ Joe Heaton
JOE HEATON
UNITED STATES
DISTRICT JUDGE

APPENDIX D

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

MARK E. SCHELL, Plaintiff, vs. NOMA GURICH, Chief Justice of the Oklahoma Supreme Court, *et al.*, Defendants.	)	NO. CIV-19-0281-HE

ORDER

This case challenges the State of Oklahoma's requirement that attorneys join and pay dues to the Oklahoma Bar Association ("OBA") and the OBA's use of the attorneys' mandatory dues. Plaintiff asserts claims against the Justices of the Oklahoma Supreme Court ("Defendant Justices"), the OBA's Executive Director, John M. Williams ("Defendant Williams"), and the members of the OBA's Board of Governors ("Defendant Board Members"). All defendants have filed motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6).

Background

Oklahoma law requires every attorney to join and pay dues to the OBA in order to practice law in Oklahoma. Plaintiff contends the requirement for attorneys to join the OBA and the collection and use of mandatory bar dues to subsidize political and

ideological speech without his consent violates his First Amendment rights to free speech and association. He contends the requirements are not necessary to regulate the legal profession or to improve the quality of legal services in Oklahoma. He further contends that, even if mandatory bar membership and dues are otherwise constitutional, the Oklahoma structure fails to provide constitutionally required safeguards to ensure that an attorneys' dues are not used for activities unrelated to improving the quality of legal services and regulating the legal profession. Through this lawsuit, plaintiff:

> asks this Court to declare Oklahoma's bar membership requirement unconstitutional and order Defendants to stop forcing attorneys to subsidize the OBA's speech without their affirmative consent, or, alternatively, to order Defendants to adopt procedures to protect attorneys from being forced to subsidize OBA speech and activities that are not germane to improving the quality of legal services and regulating the legal profession.

First Amended Complaint [Doc. #19] at ¶ 6.

Discussion

Defendants assert they are immune from suit and should be dismissed from this case. Additionally, they contend compulsory membership in, and payment of dues to, an integrated bar association is constitutional and that the OBA's refund procedures for dues spent on non-germane speech meet constitutional standards.

A. Immunity

1. Legislative immunity

A state "[c]ourt and its members are immune from suit when acting in their legislative capacity." *Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 735 (1980). Defendant Justices correctly assert that when they enact the rules governing the practice of law in Oklahoma, they act in their legislative capacity and therefore are immune from any suit relating to such activities. However, legislative immunity does not absolutely insulate the Defendant Justices from the declaratory and injunctive relief sought in this case, as they also act in an enforcement capacity. The Supreme Court has concluded that circumstance permits a suit of the sort involved here to go forward notwithstanding legislative immunity. *Id.* at 737.

2. Eleventh Amendment immunity

Defendants contend the claims against them are also barred by Eleventh Amendment immunity. Under the Eleventh Amendment:

> [s]tates may not be sued in federal court unless they consent to it in unequivocal terms or unless Congress, pursuant to a valid exercise of power, unequivocally expresses its intent to abrogate the immunity. This prohibition encompasses suits against state agencies [and] [s]uits against state officials acting in their official capacities. But, [u]nder *Ex Parte Young*[, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)], a plaintiff may avoid the Eleventh Amendment's prohibition on suits against states in federal court by seeking to enjoin

> a state official from enforcing an unconstitutional statute.

Collins v. Daniels, 916 F.3d 1302, 1315 (10th Cir. 2019) (internal quotations and citations omitted).

It appears to be undisputed that all defendants in this case are state officials or are viewed as such for Eleventh Amendment purposes, and that, unless the *Ex Parte Young* exception applies, they are immune from suit. When determining whether the *Ex Parte Young* exception applies, a court "need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Hill v. Kemp*, 478 F.3d 1236, 1259 (10th Cir. 2007) (internal quotations and citations omitted). Here, the First Amended Complaint alleges an ongoing course of conduct which violates the plaintiff's rights and seeks prospective relief through a declaratory judgment or an injunction.

Defendant Williams and the Defendant Board Members make the further argument that they do not come within the *Ex Parte Young* exception because they are not persons with the power to implement any relief the court may order. The applicable standard is that:

> in making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party. . . . Defendants are not required to have a "special

> connection" to the unconstitutional act or conduct. Rather, state officials must have a particular duty to "enforce" the statute in question and a demonstrated willingness to exercise that duty.

Peterson v. Martinez, 707 F.3d 1197, 1205 (10th Cir. 2013) (internal quotations and citations omitted). "Connection to the enforcement of an act may come by way of another state law, an administrative delegation, or a demonstrated practice of enforcing a provision. But when a state law explicitly empowers one set of officials to enforce its terms, a plaintiff cannot sue a different official absent some evidence that the defendant is connected to the enforcement of the challenged law." *Id.* at 1207.

It is undisputed that the Defendant Justices, acting together as the Oklahoma Supreme Court,[1] are responsible for enforcing the laws requiring membership in the OBA as a condition of practicing

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[1] *The Defendant Justices contend the* Ex Parte Young *exception does not apply because they cannot individually order anything, and can act only as a court collectively. In* Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645–46 (2002), the Supreme Court implicitly rejected this distinction by allowing the plaintiffs to challenge an order of the Public Service Commission of Maryland by suing its individual members. Further, numerous federal courts have allowed suits against individual supreme court justices to proceed where an injunction against all, or a majority, might be necessary to provide the plaintiff with effective relief See, e.g.,* LeClerc v. Webb*, 419 F.3d 405, 414 (5th Cir. 2005);* Abrahamson v. Neitzel*, 120 F. Supp. 3d 905, 919–20 (W.D. Wis. 2015);* Nat'l Ass 'n for Advancement of Multijurisdictional Practice v. Berch*, 973 F. Supp. 2d 1082, 1093–94 (D. Ariz. 2013);* Rapp v. Disciplinary Bd. of Haw. Sup. Ct.*, 916 F. Supp. 1525, 1531 (D. Haw. 1996).*

law in Oklahoma. *See* Okla. Stat. tit. 5, ch. 1, app. 1, art. 8 §1. Thus, to the extent this case is seeking to enjoin the Defendant Justices' enforcement of the mandatory membership in, and payment of dues to, the OBA, the *Ex Parte Young* exception to Eleventh Amendment immunity applies. In light of the relief sought here, the Defendant Justices are not immune from suit under the Eleventh Amendment.[2]

With respect to Defendant Williams' and the Defendant Board Members' argument that they lack necessary enforcement power to be proper parties, the court concludes otherwise. While they do not have ultimate authority over membership and dues-handling issues, they have a sufficient connection with the enforcement of the membership and dues requirements to make the *Ex Parte Young* exception applicable. Under the Rules Creating and Controlling the Oklahoma Bar Association, Defendant Williams is required to notify members who have not paid their mandatory dues and to certify the names of these members to the Oklahoma Supreme Court. *See* Okla. Stat. tit. 5, ch. 1, app. 1, art. 6 § 4. Further, the Board

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[2] *The Defendant Justices also contend the* Ex Parte Young *exception is not applicable because there is no enforcement action pending or threatened against plaintiff However, the Supreme Court has concluded that a threatened or pending enforcement proceeding is not required. See* Supreme Court of Va.*, 446 U.S. at 737 ("If prosecutors and law enforcement personnel cannot be proceeded against for declaratory relief putative plaintiffs would have to await the institution of state-court proceedings against them in order to assert their federal constitutional claims. This is not the way the law has developed, and, because of its own inherent and statutory enforcement powers, immunity does not shield the Virginia Court and its chief justice from suit in this case.").*

of Governors has the authority to remove attorneys who do not pay mandatory dues from the OBA's membership rolls and identifies attorneys who have not paid their annual dues and reports their names to the Oklahoma Supreme Court, which then suspends them from the practice of law. *See* Okla. Stat. tit. 5, ch. 1, app. 1, art. 8 § 2.

Additionally, both Defendant Williams and the Board play important roles in the process the OBA has established for attorneys to object to specific expenditures of their dues, the process that plaintiff challenges in his third claim for relief. A member's objection to an expenditure must be submitted to Defendant Williams, who reviews the objection and has the discretion to either issue a refund to the member or refer the matter to an OBA Budget Review Panel. That panel's decisions may then be appealed to the Board. *See* Notice and Objection Procedure to OBA Budgetary Expenditures. Further, the expenditures to which a member might object are authorized by the Board. *See* Okla. Stat. tit. 5, ch. 1, app. 1, art. 7 § 2.[3]

In any event, the defendants are not immune from suit based on the Eleventh Amendment, in light of the nature of the relief sought by plaintiff and the defendants' potential roles as to any relief that might be ordered.

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[3] *For substantially the same reasons as stated in footnote 2 with respect to members of the state supreme court, suits based on* Ex Parte Young *may be brought against individual members of the Board of Governors even though it acts collectively.*

B. Jurisdiction to Review the Actions of the Oklahoma Supreme Court

The Defendant Justices also assert this court lacks subject matter jurisdiction to review the actions of the Oklahoma Supreme Court. While federal district courts do not have jurisdiction to review final judgments of a state court in judicial proceedings, a federal court does have jurisdiction over general attacks on the constitutionality of state bar admission rules. *See D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 486 (1983); *Van Sickle v. Holloway*, 791 F.2d 1431, 1436 (10th Cir. 1986). Since this case involves a general challenge to Oklahoma's rules requiring attorneys to join and pay dues to the OBA, and does not involve any review of a final judgment, this court has jurisdiction over it.

C. Abstention

Defendants further assert this court should abstain from interfering in state court matters. However, they have not identified a persuasive basis for doing so. There are no pending state judicial proceedings addressing the questions at issue in this case, as would be necessary for *Younger*[4] abstention. The challenges to the Oklahoma bar admission rules do not present difficult questions of state law such as might warrant abstention under *Burford*.[5] And, as various of the cases cited above suggest, disputes of this sort are often addressed in federal court. The court concludes a basis for abstention has not been shown.

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[4] Younger v. Harris, *401 U.S. 37 (1971).*

[5] Buiford v. Sun Oil Co., *319 U.S. 315 (1943).*

D. Failure to state a claim

When considering whether a plaintiff's claim should be dismissed under Rule 12(b)(6), the court accepts all well-pleaded factual allegations as true and views them in the light most favorable to the plaintiff as the nonmoving party. *S.E.C. v. Shields*, 744 F.3d 633, 640 (10th Cir. 2014). All that is required is "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). The complaint must, though, contain "enough facts to state a claim to relief that is plausible on its face" and "raise a right to relief above the speculative level." *Bell Atlantic Com. v. Twombly*, 550 U.S. 544, 570, 555 (2007). "'A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Shields*, 744 F.3d at 640 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

The United States Supreme Court has addressed the question of bar membership twice. In *Lathrop v. Donohue*, 367 U.S. 820 (1961), the Supreme Court held that compulsory membership in, and payment of dues to, a state bar association was constitutional. While there was no majority opinion in *Lathrop*, a majority of the Justices agreed that mandatory paid membership in the bar did not violate an individual's freedom of association. In *Keller v. State Bar of Calif.*, 496 U.S. 1, 4 (1990), a unanimous Supreme Court "agree[d] that lawyers admitted to practice in the State may be required to join and pay dues to the State Bar". The Supreme Court further held:

> the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity. The difficult question, of course, is to define the latter class of activities.

Id. at 13–14. In light of the difficulty is determining the boundaries of germane speech, the Supreme Court held that bar associations must put in place "the sort of procedures described in [*Teachers v.*] *Hudson*[, 475 U.S. 292 (1986)]" for the collection of dues. *Id.* at 17.

Defendants assert that compulsory membership in, and payment of dues to, an integrated bar association are constitutional under controlling precedent and that the OBA has adopted the required *Keller* procedures. Defendants therefore contend that plaintiff's claims should be dismissed for failure to state a claim.

In light of the Supreme Court's decisions in *Lathrop* and *Keller*, plaintiff's claims directed to compelled membership in the OBA and to the collection and use of mandatory bar dues to fund activities germane to regulating the legal profession and improving legal services fail. To the extent that plaintiff contends the recent case of *Janus v. AFSCME*, 138 S.Ct. 2448 (2018) requires a different result, the court is unpersuaded. *Janus* involved the payment of agency fees by non-members of a public employee union.

While there are some parallels between *Janus* and the circumstances here, there are also differences. There is also no suggestion in *Janus* that either *Lathrop* or *Keller* were overruled or otherwise called into question. In such circumstances, the court is obliged to follow the cases which most directly control, and therefore declines to speculate as to whether the Supreme Court might reach some different result if it were to revisit either *Lathrop* or *Keller*. *See Agostini v. Felton*, 521 U.S. 202, 237 (1997); *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989).

Plaintiff's first and second claims will be dismissed.

The court reaches a different conclusion as to the third claim, which challenges whether appropriate safeguards are in place to meet *Keller* standards, i.e., whether the procedures appropriately protect the rights of members who do not wish to subsidize activities beyond those germane to improving legal services and regulating the profession. The complaint alleges that the OBA's proposed budget does not identify planned expenditures with sufficient specificity for members to make a meaningful decision as to whether or how to challenge a proposed expenditure or category of expenditures. It alleges that the OBA's procedures do not permit resolution of a member's objections by an impartial decision maker. It also alleges the OBA does not require any portion of an objecting member's dues to be placed in escrow. *See* First Amended Complaint at ¶¶ 77–89, 122–124. Those allegations potentially support a successful claim under the standards set out in *Keller*. The motions will be denied as to the third claim.

Conclusion

Defendants' motions to dismiss [Doc. Nos. 43, 45, 46, and 47] are **GRANTED in part and DENIED in part** as set forth above.

IT IS SO ORDERED.

Dated this 18th day of September, 2019.

/s/ Joe Heaton
JOE HEATON
UNITED STATES
DISTRICT JUDGE

APPENDIX E

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARK E. SCHELL,

Plaintiff - Appellant.

v.

THE CHIEF JUSTICE AND JUSTICES OF THE OKLAHOMA SUPREME COURT; THE MEMBERS OF THE OKLAHOMA BAR ASSOCIATION'S BOARD OF GOVERNORS; JOHN M. WILLIAMS, Executive Director, Oklahoma Bar Association, all in their official capacities,

Defendants - Appellees.

FILED
United States
Court of Appeals
Tenth Circuit

August 25, 2021

Christopher M. Wolpert
Clerk of Court

No. 20-6044
(D.C. No. 5:19-CV-00281-HE) (W.D. Okla.)

ORDER

Before **HARTZ**, **EBEL**, and **McHUGH**, Circuit Judges.

This matter is before the court on the Petition for Panel Rehearing or Rehearing En Banc ("Petition") filed by Appellant. We also have a response from Appellees.

Pursuant to Federal Rule of Appellate Procedure 40, the petition for panel rehearing is granted, in part, to the extent of the modifications in the attached revised opinion. It is denied in all other respects.

The court's June 29, 2021, opinion is withdrawn and replaced by the attached revised opinion, which will be filed as of today's date. Because the panel's decision to partially grant rehearing does not affect the outcome of this appeal, Appellant may not file a second or successive rehearing petition. *See* 10th Cir. R. 40.3.

The Petition was transmitted to all non-recused judges of the court who are in regular active service. As no member of the panel and no judge in regular active service requested that the court be polled, the request for rehearing en banc is denied. *See* Fed. R. App. P. 35(f).

Entered for the Court

/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT, Clerk

APPENDIX F

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Okla. Stat. tit. 5, ch. 1, app. 1, art. II, § 1

The membership of the Association shall consist of those persons who are, and remain, licensed to practice law in this State. All members of the Association shall provide the Association with a current address and shall promptly inform the Association of any changes in address.

Okla. Stat. tit. 5, ch. 1, app. 1, art VIII

Section 1. Annual Dues. The annual dues for each member of the Association shall be based upon the financial requirements of the Association including maintenance of an adequate reserve fund for contingencies and emergencies.

Until otherwise provided the annual dues for each active member shall be $275.00 per year; except that dues for active members who have been admitted to practice in any State less than three (3) years, as of the first day of January of the dues paying year, shall be $137.50 for each such year. All dues shall be due and payable, on or before January 2 of each year, to the Executive Director of the Association. Persons admitted to the Bar of this State after January 2 of any year shall not be liable for dues until January 2 of the following year. Nothing in these rules shall prevent the establishment of Sections with the approval of the Board of Governors, nor the charging of voluntary dues to members of any such section.

Active OBA Members who are in an active duty and deployed status serving outside of the United States or one of its territories with the Armed Forces of the United States in a combat zone or receiving "Imminent Danger Pay" (Combat Pay) or "hardship duty pay" in any given year may request that dues be waived for that year. A request for a waiver of dues, along with sufficient supporting documentation of service, shall be submitted to the Executive Director of the Oklahoma Bar Association as soon as reasonably practical. Members requesting such dues waiver shall have the right to appeal any administrative decisions made by the Executive Director to the Board of

Governors of the Oklahoma Bar Association and ultimately to the Oklahoma Supreme Court. In the event the member is not able to submit the request personally, such request can be made by a family member, law partner or other such person having authority to act on behalf of the member.

Section 2. Suspension for Nonpayment. If a member's dues to the Association remain unpaid after February 15 in any calendar year, there shall be added thereto an expense charge of $100. As soon as possible after February 15 in any calendar year, the Executive Director shall send by registered or certified mail, with return receipt requested, written notice to each member of the Association whose dues remain unpaid for that year, stating the amount due, with the expense charge, and demanding payment by a date specified therein, which shall be not less than thirty (30) days after mailing of the notice. The notice shall be addressed to the member at his last address shown on the records of the Association. If payment of dues and expense charge is not received from a member within the time specified in the notice sent him, the Board of Governors shall file application with the Supreme Court recommending suspension of the delinquent's membership and, upon order of the Court, he shall be so suspended, and shall not thereafter practice law in this state until reinstated as provided herein.

Section 3. Penalty. If a member's dues to the Association remain unpaid after July 1 in any calendar year, there shall be added thereto an amount equal to the annual dues.

Section 4. Reinstatement of Attorneys. A member suspended for nonpayment of dues may, at any time

before his name is stricken from the rolls, file with the Executive Director a written application for reinstatement. He shall be required to pay with the application all delinquent dues, penalties, and expense charges, including dues for the current year and a reinstatement fee of $250. When his dues, penalties, expense charges and reinstatement fee have been paid in full, the member will be restored to membership and the Executive Director will notify the Clerk and the Chief Justice of the Supreme Court and cause notice of reinstatement to be published in the Oklahoma Bar Journal.

APPENDIX G

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

(1) MARK E. SCHELL, Plaintiff, v. (2) NOMA GURICH, Chief Justice of the Oklahoma Supreme Court; (3) TOM COLBERT, Associate Justice of the Oklahoma Supreme Court; (4) DOUG COMBS, Associate Justice of the Oklahoma Supreme Court; (5) RICHARD DARBY, Associate Justice of the Oklahoma Supreme Court; (6) JAMES E. EDMONDSON, Associate Justice of the Oklahoma Supreme Court; (7) YVONNE KAUGER, Associate Justice of the Oklahoma Supreme Court; (8) JAMES R. WINCHESTER, Associate Justice of the Oklahoma Supreme Court; (9) JANE DOE, successor to John Reif as Associate Justice of the Oklahoma Supreme Court;	)	Civil Case No. 5:19-cv-00281-C

(10) JOHN DOE, successor to Patrick Wyrick as Associate Justice of the Oklahoma Supreme Court;
(11) CHARLES W. CHESNUT, President, Oklahoma Bar Association Board of Governors;
(12) SUSAN B. SHIELDS, President-Elect, Oklahoma Bar Association Board of Governors;
(13) LANE R. NEAL, Vice President, Oklahoma Bar Association Board of Governors;
(14) JOHN M. WILLIAMS, Executive Director, Oklahoma Bar Association, and Secretary/Treasurer, Oklahoma Bar Association Board of Governors;
(15) KIMBERLY HAYS, Past President, Oklahoma Bar Association Board of Governors;
(16) BRIAN T. HERMANSON, Member, Oklahoma Bar Association Board of Governors;
(17) MARK E. FIELDS, Member, Oklahoma Bar Association Board of Governors;
(18) DAVID T. MCKENZIE, Member, Oklahoma Bar Association Board of Governors;
(19) TIMOTHY E. DECLERCK, Member Oklahoma Bar Association Board of Governors;
(20) ANDREW E. HUTTER, Member, Oklahoma Bar Association Board of Governors;

(21) D. KENYON WILLIAMS, JR., Member, Oklahoma Bar Association Board of Governors; (22) MATTHEW C. BEESE, Member, Oklahoma Bar Association Board of Governors; (23) JIMMY D. OLIVER, Member, Oklahoma Bar Association Board of Governors; (24) BRYON J. WILL, Member, Oklahoma Bar Association Board of Governors; (25) JAMES R. HICKS, Member, Oklahoma Bar Association Board of Governors; (26) BRIAN K. MORTON, Member, Oklahoma Bar Association Board of Governors; (27) MILES T. PRINGLE, Member, Oklahoma Bar Association Board of Governors; (28) BRANDI N. NOWAKOWSKI, Member, Oklahoma Bar Association Board of Governors, all in their official capacities,

Defendants.

FIRST AMENDED COMPLAINT

1. This civil rights lawsuit seeks to protect the First and Fourteenth Amendment rights of Oklahoma attorneys who have been forced to join the Oklahoma Bar Association ("OBA") and to subsidize political and ideological speech by the OBA that they do not wish to support.

2. The State of Oklahoma requires attorneys to join and pay fees to a bar association, the OBA, to be allowed to practice law in the state. Okla. Stat. tit. 5, ch. 1, app. 1, art. 2 § 1; *id.* art. 8, §§ 1–4.

3. Oklahoma's requirement for attorneys to join the OBA violates their First Amendment rights to free speech and association, and is not necessary to regulate the legal profession or improve the quality of legal services in Oklahoma.

4. The collection and use of mandatory bar dues to subsidize political and ideological speech without attorneys' affirmative consent violates their First Amendment right to choose what private speech they will and will not support, and is not necessary to regulate the legal profession or improve the quality of legal services in Oklahoma.

5. Further, even if one assumes mandatory bar membership and dues are not inherently unconstitutional, the OBA fails to provide essential safeguards to ensure that attorneys' dues are not used for activities that are not germane to the OBA's purpose of improving the quality of legal services by regulating the legal profession.

6. This lawsuit therefore asks this Court to declare Oklahoma's bar membership requirement unconstitutional and order Defendants to stop forcing attorneys to subsidize the OBA's speech without their affirmative consent, or, alternatively, to order Defendants to adopt procedures to protect attorneys from being forced to subsidize OBA speech and activities that are not germane to improving the quality of legal services and regulating the legal profession.

JURISDICTION AND VENUE

7. This action is brought under 42 U.S.C. §§ 1983 and 1988.

8. This Court has subject matter jurisdiction over Plaintiff's claims under 28 U.S.C. §§ 1331 and 1343.

9. This Court has authority to grant declaratory and other relief under 28 U.S.C. §§ 2201 and 2202.

10. Venue is appropriate under 28 U.S.C. § 1391(b)(2) because a substantial part of the events giving rise to Plaintiff's claims occurred in this District.

PARTIES

11. Plaintiff Mark E. Schell is a citizen of the United States and resides in Tulsa, Oklahoma. Plaintiff Schell is a duly licensed attorney under the laws of Oklahoma and is a member of the OBA because membership is a mandatory prerequisite to practice law in the State of Oklahoma under Okla. Stat. tit. 5, ch. 1, app. 1, art. 2 § 1.

12. Defendant Noma Gurich is Chief Justice of the Oklahoma Supreme Court. The Oklahoma Supreme Court is responsible for enforcing laws requiring membership and funding of the OBA as a condition of practicing law in the State of Oklahoma. *See* Okla. Stat. tit. 5, ch. 1, app. 1, art. 8 § 2.

13. Defendant Tom Colbert is an Associate Justice of the Oklahoma Supreme Court.

14. Defendant Doug Combs is an Associate Justice of the Oklahoma Supreme Court.

15. Defendant Richard Darby is an Associate Justice of the Oklahoma Supreme Court.

16. Defendant James E. Edmondson is an Associate Justice of the Oklahoma Supreme Court.

17. Defendant Yvonne Kauger is an Associate Justice of the Oklahoma Supreme Court.

18. Defendant James R. Winchester is an Associate Justice of the Oklahoma Supreme Court.

19. Defendant Jane Doe is an individual whose identity is currently unknown, who will imminently succeed the recently retired Hon. John Reif as the Associate Justice of the Oklahoma Supreme Court from the state's first judicial district.

20. Defendant John Doe is an individual whose identity is currently unknown who will imminently succeed the Hon. Patrick Wyrick as the Associate Justice of the Oklahoma Supreme Court from the state's second judicial district.

21. Defendant Charles W. Chesnut is President of the Oklahoma Bar Association Board of Governors ("Board"). The Board has the authority to withdraw and use mandatory Oklahoma Bar Association dues paid by attorneys and to remove attorneys from the OBA's membership rolls for nonpayment of dues.

22. Defendant Susan B. Shields is President-Elect of the Board.

23. Defendant Lane R. Neal is Vice President of the Board.

24. Defendant John M. Williams is the OBA's Executive Director and Secretary/Treasurer of the Board. As the OBA's Executive Director, he is responsible for enforcing the laws requiring membership and funding of the OBA as a condition of practicing law in the State of Oklahoma. *See* Okla.

Stat. tit. 5, ch. 1, app. 1, art. 6, § 4; *id.* art. 8, §§ 2, 4; Okla. Bar Ass'n Bylaws Art. IV, § 4.

25. Defendant Kimberly Hays is Past President and a member of the Board.

26. Defendant Brian T. Hermanson is a member of the Board.

27. Defendant Mark E. Fields is a member of the Board.

28. Defendant David T. McKenzie is a member of the Board.

29. Defendant Timothy E. DeClerck is a member of the Board.

30. Defendant Andrew E. Hutter is a member of the Board.

31. Defendant D. Kenyon Williams, Jr., is a member of the Board.

32. Defendant Matthew C. Beese is a member of the Board.

33. Defendant Jimmy D. Oliver is a member of the Board.

34. Defendant Bryon J. Will is a member of the Board.

35. Defendant James R. Hicks is a member of the Board.

36. Defendant Brian K. Morton is a member of the Board.

37. Defendant Miles T. Pringle is a member of the Board.

38. Defendant Brandi N. Nowakowski is a member of the Board.

39. All Defendants are sued in their official capacities.

FACTS

Oklahoma's Mandatory Bar Association Membership and Fees

40. Oklahoma law compels every attorney licensed in Oklahoma to be a member of the OBA in order to practice law in the state. Okla. Stat. tit. 5, ch. 1, app. 1, art. 2, § 1.

41. Oklahoma law also compels attorneys licensed in Oklahoma to pay annual dues to the OBA. Okla. Stat. tit. 5, ch. 1, app. 1, art. 8, §§ 1-4.

42. If an attorney fails to pay mandatory dues, the Oklahoma Supreme Court shall suspend the attorney's membership, which prohibits the attorney from practicing law in Oklahoma unless reinstated by the court after paying the dues and a penalty. Okla. Stat. tit. 5, ch. 1, app. 1, art. 8 §§ 2, 4.

43. If an attorney does not file an application for reinstatement within one year of suspension for nonpayment of dues, he or she automatically ceases to be a member of the OBA, and the OBA Board of Governors shall cause his or her name to be stricken from the OBA's membership rolls. Okla. Stat. tit. 5, ch. 1, app. 1, art. 8 § 5.

44. As an Oklahoma attorney, Plaintiff Mark E. Schell is compelled to join the OBA and to pay membership dues to OBA as a condition of engaging in his profession.

45. Plaintiff Schell has paid annual dues to the OBA since approximately 1984.

46. As the members of the Oklahoma Supreme Court, Defendants Gurich, Colbert, Combs, Darby, Edmondson, Kauger, Winchester, Jane Doe, and John Doe act under color of state law to enforce laws requiring membership in and funding of the OBA as a condition of practicing law in the State of Oklahoma.

OBA's Use of Mandatory Fees for Political and Ideological Speech

47. As the members of the Board, Defendants Chesnut, Shields, Neal, John M. Williams, Hays, Hermanson, Fields, McKenzie, DeClerck, Hutter, D. Kenyon Williams, Beese, Oliver, Will, Hicks, Morton, Pringle, and Nowakowski withdraw and use mandatory OBA member dues on behalf of the OBA, acting under color of state law.

48. The OBA uses members' mandatory dues to engage in speech, including political and ideological speech.

49. Article VIII, Sections 2 and 3, of the OBA's bylaws authorizes the OBA to create a "Legislative Program" through which the OBA may propose legislation "relating to the administration of justice; to court organization, selection, tenure, salary and other incidents of the judicial office; to rules and laws affecting practice and procedure in the courts and in administrative bodies exercising adjudicatory functions; and to the practice of law."

50. Article VIII, Section 9, of the OBA's bylaws authorizes the OBA to "make recommendations upon any proposal pending before [the] Legislature of the State of Oklahoma or any proposal before the Congress of the United States of America, if such proposal relates to the administration of justice, to

court organization, selection, tenure, salary or other incidents of the judicial office; to rules and laws affecting practice and procedure in the courts and in administrative bodies exercising adjudicatory functions; and to the practice of law."

51. Article VIII, Section 4, of the OBA's bylaws provides that the OBA may endorse "[a]ny proposal for the improvement of the law, procedural or substantive . . . in principle," with no restriction on subject matter.

52. Under these provisions of its bylaws, the OBA has advocated for and against both procedural and substantive proposed state legislation.

53. For example, in 2009, the OBA publicly opposed a controversial tort reform bill.

54. In 2014, the OBA created a petition to oppose legislation, SJR 21, that would change the way that members of the Oklahoma Judicial Nomination Commission were selected, sent emails to its membership urging them to oppose the measure, and staged a "rally" at the State Capitol to oppose the measure.

55. The OBA continues to support and oppose state legislation.

56. OBA committees also draft and promote state legislation.

57. The OBA uses mandatory member dues to publish political and ideological speech in its *Oklahoma Bar Journal* publication.

58. For example, the January 2016 *Bar Journal* included an article by the OBA's then-president criticizing the United States Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), for

supposedly changing the United States "to 'a government of the corporations, by the bureaucrats, for the money.'"

59. An article by the OBA's then-president in the February 2016 *Bar Journal* criticized lawmakers for supposedly attacking "[t]he independence of our judiciary" and criticized "super PACs" for supposedly "threaten[ing] to corrupt the political process" with "virtually unlimited campaign contributions."

60. An article by the OBA's then-president in the March 2016 *Bar Journal* criticized Oklahoma's legislature for not regulating the oil and gas industry to restrict the use of "injection wells" alleged to cause earthquakes.

61. An article by Defendant John M. Williams in the April 2016 Bar Journal criticized legislation that would change Oklahoma's method of judicial selection as one of many alleged legislative "attack[s on] the Oklahoma Bar Association or the courts."

62. Another article in the April 2016 *Bar Journal* entitled "We Don't Want to Be Texas" also criticized efforts to change Oklahoma's method of judicial selection.

63. An article by the OBA's then-president in the May 2016 *Bar Journal:* (1) criticized the United States Supreme Court's decisions in *Citizens United*, 558 U.S. 310, and *McCutcheon v. FEC*, 572 U.S. 185 (2014), falsely stating that they "have allowed unlimited campaign contributions by political action committees that do not have to identify contributors"; (2) praised Jane Mayer's book *Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right* for its exposition of a supposed "takeover of our

government by big money from the oil and gas industry"; (3) praised former Vice President Al Gore for "advocating that our environment and climate suffered from a failure of our government to regulate the fossil fuel industry"; and (4) called on OBA members to "take action now" and "stand up for people and stop control of our government by the oil and gas industry."

64. An article in the May 2016 *Bar Journal* entitled "State Attorney General Argues Against Tribal and State Interests" criticized an amicus brief filed by the State of Oklahoma (together with other states) in *Dollar General Corporation v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016), alleging that the state's arguments were (among other things) "disingenuous" and the product of "uninformed bias."

65. An article by the OBA's then-president in the September 2016 *Bar Journal* again praised Jane Mayer's *Dark Money* book, describing it as "a snapshot of history of the United States at a time when money controls our government."

66. The OBA's then-president stated in that same article that he wanted Mayer to speak at the OBA's annual meeting because "[w]e need to hear what she says about dark money and the future of American democracy," including "how corrupt our government has become and how big money is turning our government into a government of the corporations, by the bureaucrats, for the money."

67. Mayer then gave the keynote address on these topics at OBA's Annual Meeting on November 3, 2016, less than one week before the 2016 general election.

68. In the September 2016 *Bar Journal*, an advertisement for Mayer's keynote address quoted Mayer as stating: "I will talk about the way money is becoming a growing factor in judicial races and what the consequences are. . . . I see the money as a real threat to judicial integrity and independence. . . . The courts are very much part of their plan, and they've gone about swaying them by changing the way the law is taught in law schools, paying for judicial junkets in which they push their viewpoint on the judges and by trying to use dark money to win judicial elections."

69. The advertisement then made clear that, with the word "they," Mayer was referring to "wealthy conservative libertarians."

70. An article by the OBA's then-president in the November 2016 *Bar Journal* urged readers to contact legislators to advocate for increased funding of the judicial branch, particularly greater funding to pay bailiffs and court reporters.

71. An article by Defendant John M. Williams in the April 2017 *Bar Journal* criticized legislative proposals to change Oklahoma's method of judicial selection, suggesting that, if they passed, "big money and special interest groups [would] elect judges and justices and campaign contributions [would] buy court opinions."

72. An article by the OBA's then-president in the May 2017 *Bar Journal* stated that attorneys must "warn [the public] of the potential ill effects of reintroducing politics into our judicial selection process."

73. An article by Defendant John M. Williams in the May 2018 *Bar Journal* criticized "attacks" on Oklahoma's system of "merit selection" of judges.

74. An article in the November 2018 *Bar Journal* entitled "Tort Litigation for the Rising Prison Population" argued that Oklahoma's prison system was underfunded and advocated that the state legislature eliminate prisons' and jails' exemption from tort liability.

75. An article by Defendant Chesnut in the February 2019 *Bar Journal* criticized claims that lawyers have too much influence in the state legislature and alleges that "having lawyers in the Legislature is a plus."

76. A "Legislative News" column in the March 2019 *Bar Journal* stated that "MORE LAWYERS ARE NEEDED" as members of the state legislature.

OBA's Dues Refund Procedures

77. Before submitting its annual budget to the Oklahoma Supreme Court, the OBA publishes a proposed budget in its *Bar Journal*.

78. The OBA's proposed budget for 2019, a copy of which is attached as Exhibit 1, included a list of categories of expenditures, the amount the OBA budgeted for each category in 2018, and the amount the OBA proposed to spend for each category in 2019.

79. The OBA's proposed budget does not identify any specific expenditures the OBA has made or proposed to make; it only identifies categories of expenditures.

80. The OBA's proposed budget does not state whether any past or proposed expenditures of member

dues were or are germane to the purpose of improving the quality of legal services and regulating the legal profession.

81. The OBA's proposed budget does not provide members with sufficient information to determine whether any past or proposed expenditure of member dues were or are germane to the purpose of improving the quality of legal services and regulating the legal profession.

82. According to a "Notice and Objection Procedure to OBA Budgetary Expenditures" adopted by the Board, "[a] member may object to a proposed or actual expenditure of monies by the OBA as not within the purposes or limitations set out in the [OBA's] Rules or Bylaws, and seek refund of a pro rata portion of his or her dues expended, plus interest, by filing a written objection with the Executive Director."

83. The Notice and Objection Procedure expressly excludes the opportunity to object to actual or proposed expenditures for political, ideological, or other speech that is made within the scope of the OBA's Rules or Bylaws.

84. The Notice and Objection Procedure requires a member to submit a separate "OBA Dues Claim Form" for each budgetary expenditure to which he or she objects, "postmarked not later than Sixty (60) days after the approval of the annual budget by the Oklahoma Supreme Court or January 31st of each year, whichever shall first occur."

85. The Notice and Objection Procedure requires the OBA's Executive Director to review an objection within 21 days, "together with the allocation of dues monies to be spent on the activity or action," and

grants him or her discretion to issue a refund of a pro rata portion of the member's dues, plus interest.

86. Alternatively, the Executive Director may refer a member objection for hearing before an "OBA Budget Review Panel" consisting of three OBA members selected from the OBA's Budget Committee by the OBA President Elect.

87. The OBA Budget Review Panel must then conduct a hearing of the member's objection and provide a written decision within 30 days of that hearing.

88. A member may appeal the Budget Review Panel's decision for consideration by the Board, whose "decision shall be final."

89. The Notice and Objection Procedure therefore does not provide an opportunity for a member to have an objection heard by a neutral decision-maker.

Plaintiff's Injury

90. Plaintiff Mark E. Schell opposes the OBA's use of any amount of his mandatory dues to fund any amount of political or ideological speech, regardless of its viewpoint, including but not limited to the examples set forth above, but he has been without effective means to prevent it and without effective recourse.

91. Oklahoma's requirement that all attorneys join the OBA injures Plaintiff Mark E. Schell because he does not wish to associate with the OBA or its political and ideological speech. But for the requirement, he would not be a member.

92. Oklahoma's requirement that all attorneys pay dues to the OBA injures Plaintiff Mark E. Schell

because he does not wish to fund the OBA's political and ideological speech and other activities. But for the requirement, he would not do so.

93. The OBA's lack of safeguards to ensure that members are not required to pay for political and ideological speech and other activities not germane to regulating the legal profession or improving the quality of legal services injures Plaintiff Mark E. Schell because he does not want to fund such activities in any amount.

FIRST CLAIM FOR RELIEF

Compelled membership in the OBA violates attorneys' First and Fourteenth Amendment rights to free association and free speech.

94. The allegations in the preceding paragraphs are incorporated by reference as if fully set forth here.

95. The First and Fourteenth Amendment protect not only the freedom of association but also the freedom not to associate.

96. The First and Fourteenth Amendment protect the freedom of speech, which includes the right to avoid subsidizing the speech of other private speakers.

97. By its very nature, a mandatory bar association such as the OBA violates these rights.

98. Mandatory associations, particularly mandatory associations for expressive purposes, are permissible only when they serve a compelling state interest that the government cannot achieve through other means significantly less restrictive of First Amendment freedoms.

99. The only state interests that a mandatory bar association can plausibly serve are regulating the

legal profession and improving the quality of legal services.

100. The state can readily use means significantly less restrictive of First Amendment freedoms to regulate the legal profession and improve the quality of legal services.

101. For example, the State of Oklahoma could regulate the legal profession directly, or through an agency under its jurisdiction, without requiring attorneys to join or pay a bar association, as at least 18 other states do.

102. By failing to utilize means significantly less restrictive of associational freedoms than a mandatory association, Defendant members of the Oklahoma Supreme Court and the OBA maintain and actively enforce a set of laws, practices, procedures, and policies that deprive Plaintiff Mark E. Schell of his rights of free speech and free association in violation of the First and Fourteenth Amendments.

103. This deprivation of constitutional rights is causing Plaintiff Mark E. Schell to suffer irreparable injury for which there is no adequate remedy at law. Unless this deprivation of rights is enjoined by this Court, Plaintiff will continue to suffer irreparable harm.

104. Plaintiff is entitled to declaratory and injunctive relief against Defendants' continued enforcement and maintenance of these unconstitutional laws, practices, procedures, and policies, and is entitled to an award of attorneys' fees. *See* 28 U.S.C. §§ 2201, 2202; 42 U.S.C. §§ 1983, 1988.

SECOND CLAIM FOR RELIEF

The collection and use of mandatory bar dues to subsidize the OBA's speech—including its political and ideological speech—violates attorneys' First and Fourteenth Amendment rights to free speech and association.

105. The allegations in the preceding paragraphs are incorporated by reference as if fully set forth here.

106. The OBA collects and uses mandatory bar fees to subsidize its speech, including its political and ideological speech as described above, without attorneys' affirmative consent.

107. The OBA provides no way for attorneys to avoid having their dues used to subsidize its speech, including its political and ideological speech.

108. The state could readily serve its interest in improving the quality of legal services and regulating the legal profession without forcing attorneys to subsidize the OBA's speech, including its political and ideological speech.

109. The state could improve the quality of legal services and regulate the legal profession without requiring attorneys to fund a bar association at all. It could adopt measures to improve the quality of legal services and regulate the legal profession directly, or through an agency under its jurisdiction, as at least 18 other states do.

110. Alternatively, Oklahoma could require that the OBA use mandatory bar dues only for regulatory activities, as Nebraska has done.

111. Because the state could readily serve its interest in improving the quality of legal services in

ways significantly less restrictive of free speech and association, the OBA violates the First and Fourteenth Amendments by collecting and using mandatory bar dues to subsidize *any* of its speech.

112. Alternatively, the OBA violates the First and Fourteenth Amendments by collecting and using mandatory bar dues to subsidize its political and ideological speech.

113. At the very least, the OBA violates the First and Fourteenth Amendments by collecting and using mandatory bar dues to subsidize its speech and other activities that are not germane to improving the quality of legal services and regulating the legal profession.

114. Accordingly, to protect members' First Amendment rights, the OBA must create an "opt-in" system for attorneys to subsidize its speech and non-germane activities; it cannot require attorneys to opt out. *See Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018). Unless an attorney provides affirmative consent, his or her dues cannot be used to subsidize the OBA's non-germane activities or its speech, including but not limited to its political and ideological speech.

115. Under existing law, Defendants maintain and enforce a set of laws, practices, procedures, and policies that are not adequate to ensure that mandatory dues will not be used for the impermissible purposes described above without affirmative consent.

116. Accordingly, Defendants are currently maintaining and actively enforcing a set of laws, practices, procedures, and policies that deprive Plaintiff Mark E. Schell of his rights of free speech and

free association in violation of the First and Fourteenth Amendments.

117. This deprivation of constitutional rights is causing Plaintiff Mark E. Schell to suffer irreparable injury for which there is no adequate remedy at law. Unless this deprivation of rights is enjoined by this Court, Plaintiff will continue to suffer irreparable harm.

118. Plaintiff Mark E. Schell is entitled to declaratory and injunctive relief against Defendants' continued enforcement of these unconstitutional laws, practices, procedures, and policies, and is entitled to an award of attorneys' fees. *See* 28 U.S.C. §§ 2201, 2202; 42 U.S.C. §§ 1983, 1988.

THIRD CLAIM FOR RELIEF

The OBA violates attorneys First and Fourteenth Amendment rights by failing to provide safeguards to ensure mandatory dues are not used for impermissible purposes.

119. The allegations in the preceding paragraphs are incorporated by reference as if fully set forth here.

120. To the extent mandatory bar fees are constitutional at all, the Supreme Court has required bar associations such as the OBA to ensure that such fees are used only for activities germane to improving the quality of legal services and regulating the legal profession. *See Keller v. State Bar of Cal.*, 496 U.S. 1, 14 (1990).

121. To protect the rights of OBA members and ensure mandatory member fees are used only for chargeable expenditures, *Keller* requires the OBA to institute safeguards that provide, at a minimum:

(1) notice to members, including an adequate explanation of the basis for the dues and calculations of all non-chargeable activities, verified by an independent auditor; (2) a reasonably prompt decision by an impartial decision-maker if a member objects to the way his or her mandatory dues are spent; and (3) an escrow for amounts reasonably in dispute while such objections are pending. *Keller*, 496 U.S. at 14. The OBA does not satisfy any of these requirements.

122. Because the OBA does not provide members with sufficient information to determine whether its expenditures are chargeable, much less employ any independent auditor, it fails to provide an adequate explanation for the basis of member dues as *Keller* requires.

123. The OBA does not provide members who object to its past and proposed expenditure an opportunity to present their objections to an impartial decision-maker as *Keller* requires.

124. The OBA does not require any portion of an objecting member's dues to be placed in escrow as *Keller* requires.

125. Therefore—even assuming mandatory bar membership and fees are constitutional at all—the OBA fails to provide the minimum safeguards required by the First and Fourteenth Amendments before collecting and expending mandatory member dues.

126. For these reasons, Defendants maintain and enforce a set of laws, practices, procedures, and policies that deprive Plaintiff Mark E. Schell of his First and Fourteenth Amendment rights.

127. This deprivation of constitutional rights is causing Plaintiff Mark E. Schell to suffer irreparable injury for which there is no adequate remedy at law. Unless this deprivation of rights is enjoined by this Court, Plaintiff will continue to suffer irreparable harm.

128. Plaintiff Mark E. Schell is entitled to declaratory and injunctive relief against Defendants' continued enforcement and maintenance of these unconstitutional laws, practices, procedures, and policies, and is entitled to an award of attorneys' fees. See 28 U.S.C. §§ 2201, 2202; 42 U.S.C. §§ 1983, 1988.

REQUEST FOR RELIEF

Wherefore, Plaintiff respectfully requests that this Court enter judgment in Plaintiff's favor and:

A. Declare that Defendants violate Plaintiff's rights to freedom of speech and association under the First and Fourteenth Amendments by enforcing Oklahoma statutes that make membership in the OBA and mandatory dues a condition of practicing law in Oklahoma;

B. Declare that Defendants may not require an attorney to pay mandatory dues or fees to subsidize the OBA's speech, including its political and ideological speech or any of its non-germane activities, unless the member has affirmatively consented to having dues or fees used for those purposes, as required by *Janus v. AFSCME*;

C. Permanently enjoin Defendants and all persons in active concert or participation with them from enforcing Okla. Stat. tit. 5, ch. 1, app. 1, art. 2, § 1, which mandates membership in the OBA, and Okla.

Stat. tit. 5, ch. 1, app. 1, art. 8, §§ 1–4, which requires payment of membership fees to the OBA;

D. In the alternative, declare that Plaintiff's rights to freedom of speech and association under the First and Fourteenth Amendments are violated by the OBA's failure to implement the minimum safeguards required by *Keller v. State Bar of California*, and preliminarily and permanently enjoin Defendants from collecting mandatory bar dues until the OBA adopts the minimum safeguards *Keller* requires;

E. Award Plaintiff Mark E. Schell his costs, attorneys' fees, and other expenses as provided by law, including 42 U.S.C. § 1988; and

F. Order such additional relief as may be just and proper.

Dated: May 15, 2019

MARK E. SCHELL

By: /s/ *Jacob Huebert*

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