IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

RANDY J. BOUDREAUX, Plaintiff, v. LOUISIANA STATE BAR ASSOCIATION, et al. Defendants,	**CIVIL ACTION** Case No. 2:19-cv-11962 SECTION "I" (1) Judge Lance M. Africk Magistrate Judge Janis van Meerveld

PLAINTIFF RANDY BOUDREAUX'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PURSUANT TO RULE 12(b)(1)

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INTRODUCTION

Plaintiff Randy Boudreaux, a Louisiana attorney, challenges the State of Louisiana's requirement that attorneys join and pay dues to the Louisiana State Bar Association ("LSBA") for violating his First Amendment rights. He also challenges the LSBA's lack of procedural safeguards to ensure that attorneys' mandatory dues—to the extent they are constitutional at all—are not used to fund political and ideological speech and other activities that are not germane to the LSBA's regulatory purpose.

Defendants have presented no grounds for dismissing Plaintiff's claims under Rule 12(b)(1). Neither the Tax Injunction Act nor the related comity doctrine bar his claims because the mandatory dues he challenges are fees, not taxes. Plaintiff has standing to bring his claim, and his claims are neither moot nor unripe, because the requirements that he join the LSBA and fund its speech are injuring him on an ongoing basis. Abstention is not warranted under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), because this case does not require the Court to determine any complicated questions of state law. And the Eleventh Amendment and legislative immunity do not bar Plaintiff's claims because he seeks only prospective injunctive and declaratory relief against Defendants in their enforcement capacity, as allowed under *Ex Parte Young*, 209 U.S. 123 (1908).

FACTS

This lawsuit challenges the State of Louisiana's requirement that attorneys join and pay dues to the LSBA, as well as the LSBA's use of attorneys' mandatory dues for political and ideological activity without members' affirmative consent, and the LSBA's lack of procedures to protect members' First Amendment rights.

A. Louisiana's mandatory bar membership and dues

Louisiana law compels every attorney licensed in Louisiana to be a member of the LSBA in order to practice law in the state. Compl. (Doc. 1) ¶ 22; La. R.S. §§ 37:211, 37:213; La. S. Ct. R. XIX, § 8(C). It also authorizes the LSBA to charge annual membership fees to its mandatory members. Compl. ¶ 23; La. R. Prof. Cond. 1.1(c); *In re Mundy*, 11 So.2d 398 (La. 1942). Those dues are currently $80 for lawyers admitted three years or less and $200 for members admitted more than three years. Compl. ¶ 24. Lawyers who fail to pay LSBA dues are subject to discipline imposed exclusively by the Louisiana Supreme Court, through the Defendant Chief Justice and Associate Justices, including disbarment and revocation of the privilege to practice law in the State. *Id.* ¶¶ 25, 28; *In re Fisher*, 2009-1607 (La. 12/18/09); 24 So.3d 191; *In re Smith*, 2009-1141 (La. 9/25/09); 17 So.3d 927.

B. LSBA's role

According to Article III, § 1, of its Articles of Incorporation, the LSBA's purpose is "to regulate the practice of law, advance the science of jurisprudence, promote the administration of justice, uphold the honor of the Courts and of the profession of law, encourage cordial intercourse among its members, and, generally, to promote the welfare of the profession in the State." Compl. ¶ 30. The LSBA functions as an interest group or trade association, however, not as a regulatory body. *Id.* ¶ 31.

The LSBA does not handle disciplinary matters for the regulation of the profession. *Id.* ¶ 32. A separate body established by the Louisiana Supreme Court, the

Louisiana Attorney Disciplinary Board ("LADB") serves as the "statewide agency to administer the lawyer discipline and disability system," according to its website. *Id.* All attorneys licensed in Louisiana must pay an annual "Assessment" to the LADB—separate from and in addition to their LSBA member dues—currently set at $170 for attorneys admitted three years or less and $235 for attorneys admitted more than three years. *Id.* ¶ 33.

The LSBA also does not handle the admission or licensing of new attorneys, which is handled by the Louisiana Supreme Court Committee on Bar Admission. *Id.* ¶ 34. The LSBA only recently took over the handling of continuing legal education and specialization, which previously was handled by a separate entity under the Supreme Court of Louisiana called the Louisiana Board of Legal Specialization. *Id.* ¶ 35.

C. LSBA's use of mandatory dues for political and ideological speech

The LSBA uses members' mandatory dues to engage in speech, including political and ideological speech. *Id.* ¶ 36.

For example, the LSBA conducts legislative advocacy through a "Legislation Committee." *Id.* ¶ 37. Article XI, § 2, of the LSBA's Bylaws expresses the LSBA's desire to influence public policy through legislative advocacy. *Id.* ¶ 38. Its criteria for "legislative positions" include "[l]ikelihood of success within the legislative process" and whether the LSBA's issue lobbying will have "an impact on actions of decision-makers." *Id.*

The LSBA's Legislation Committee evaluates bills in part through "Policy Positions" adopted by the LSBA's House of Delegates. *Id.* ¶ 39. The LSBA has grouped

these "Policy Positions" into categories that include not only "regulation of the practice of law" but also, among others, "criminal law," "civil law," and "miscellaneous" areas of law. *Id.* ¶ 40.

The LSBA's "criminal law" Policy Positions include, among others, a resolution "urging [a] moratorium on executions in Louisiana until [the] state implements procedures providing for representation by counsel of all persons facing execution sufficient to ensure that no person is put to death without having their legal claims properly presented to the courts." *Id.* ¶ 41. The LSBA's "civil law" Policy Positions include a

> resolution opposing: 1. The granting of civil immunities, except in cases where the public policy sought to be favored is sufficiently important, the behavior sought to be encouraged is directly related to the policy, and the immunity is drawn as narrowly as possible to effect its purpose; and 2. The creation of special rules favoring subclasses of parties in certain types of cases in contravention of our Civil Code and Code of Civil Procedure, unless a clear case is made of the need for these rules.

Id. ¶ 42.

The LSBA's "miscellaneous" Policy Positions include, among others, a resolution "strongly supporting a requirement for a full credit of civics in high school curriculum in the State of Louisiana, while eliminating the free enterprise requirement and incorporating those concepts into the civics curriculum." *Id.* ¶ 43. The "miscellaneous" positions also include, among other things, a resolution "[u]rging the adoption of laws prohibiting discrimination in employment, housing and accommodations for LGBT persons." *Id.* ¶ 44.

The LSBA's Legislation Committee has taken positions on over 407 bills considered by the Louisiana legislature since 2007. *Id.* ¶ 45. In the last five years, the Committee offered positions on 10 bills in the 2019 regular session, 46 bills in the 2018 regular session, 18 bills in the 2017 regular session, 39 bills in the 2016 regular session, and at least 23 bills in the 2015 regular session. *Id.*

Further, the LSBA has used its legislative advocacy arm to lobby in Baton Rouge against legal reform efforts such as reducing the threshold amount required to request a jury in a civil matter in 2014 and 2016, against requiring judges to file financial statements with the Board of Ethics in 2008 and 2015, and against efforts to allow school professionals with training and concealed carry permits to concealed carry in schools in 2013. *Id.* ¶ 46.

According to its dues notices, the LSBA estimates that "3% of … LSBA Membership Dues" are devoted to "government relations" and "not deductible as a business expense for federal income tax purposes." *Id.* ¶ 47. But the LSBA does not inform members of whether any past expenditures of member dues on "government relations" were germane to improving the quality of legal services or regulating the legal profession. *Id.* ¶ 48.

The "Policy Positions" and legislative advocacy described here are inherently political and ideological and constitute political and ideological speech by the LSBA. *Id.* ¶ 49.

D. LSBA's dues refund procedures

The LSBA does not provide members with sufficient information about its activities and expenditures to allow members to ensure that their mandatory dues are not used for activities that are not germane to improving the quality of legal services or regulating the practice of law as required by *Keller v. State Bar of California*, 496 U.S. 1 (1990). Compl. ¶ 50.

The LSBA's Bylaws do allow a member to object to "the use of any portion of the member's bar dues for activities he or she considers promotes or opposes [*sic*] political or ideological causes" by filing a written objection with the LSBA's Executive Director "within forty-five (45) days of the date of the Bar's publication of notice of the activity to which the member is objecting." Compl. ¶ 51 (quoting LSBA Bylaws Art. XII, § 1(A)). But the LSBA Bylaws do not specify where or when the "publication of notice" is to occur. *Id*. ¶ 52. Nor is there any requirement for an independent audit or accounting of the reports produced by LSBA.

In fact, the LSBA does not publish notices of all of its activities, which means that members do not actually have an opportunity to object to the LSBA's various uses of their dues. *Id.* ¶ 53. Although the LSBA publishes an annual report that includes its spending for the previous year, this report does not identify any specific expenditures the LSBA has made or proposed to make; it only identifies general categories of expenditures. *Id.* ¶ 54.

The LSBA's Bylaws do require it to "timely publish notice of adoption of legislative positions in at least one of its regular communications vehicles and [to] send

electronic notice of adoption of legislative positions to Association Members." *Id.* ¶ 55 (quoting LSBA Bylaws Art. XI, § 5). But the LSBA's Bylaws and Articles of Incorporation do not otherwise require the LSBA to provide members with notice of the LSBA's political and ideological speech and other activities. *Id.* The LSBA therefore does not provide a meaningful, reasonable opportunity for members to determine the basis of the dues they are charged and/or to object to expenditures that they believe violate their First Amendment rights—including their right, under *Keller*, not to fund LSBA activities that are not germane to improving the quality of legal services and regulating the practice of law. Compl. ¶ 56.

E. Plaintiff's injury and claims

As a Louisiana attorney, Plaintiff Randy Boudreaux has been compelled to join and pay dues to the LSBA since approximately 1996 and will be required to pay annual dues in the future if he chooses to continue practicing law in Louisiana. *Id.* ¶¶ 26-27, 57. He opposes the State's laws, rules, and regulations that compel him to associate with other lawyers and to associate with an organization against his will. *Id.* ¶ 58. He also opposes the LSBA'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. *Id.* ¶ 59.

Louisiana's requirements that all attorneys join and pay dues to the LSBA injure him because he does not wish to associate with the LSBA, its other members, or its political and ideological speech, nor does he wish to fund the LSBA or its political and

ideological speech and other activities. *Id.* ¶¶ 60-61. But for the requirements that he join and pay dues to the LSBA, he would not do so. *Id.* Further, the LSBA'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 him because he does not want to fund such activities in any amount. *Id.* ¶ 62.

In his First Claim for Relief, Plaintiff alleges that mandatory membership in the LSBA violates his First Amendment rights to free association and free speech, particularly his right to choose which groups, and what political speech, he will and will not associate with. *Id.* ¶¶ 70-80. In his Second Claim for Relief, he alleges that the LSBA's collection and use of mandatory bar dues to subsidize its speech, including its political and ideological speech, without his affirmative consent violates his First Amendment rights to free speech and association. *Id.* ¶¶ 81-95. In his Third Claim for Relief, he alternatively alleges that, to the extent that mandatory bar dues are constitutional at all, the LSBA still violates attorneys' First and Fourteenth Amendment rights by failing to provide safeguards, as required by *Keller*, 496 U.S. 1, to ensure that members' dues are not used for political and ideological speech and other activities not germane to improving the quality of legal services and regulating the legal profession. Compl. ¶¶ 96-106.

Defendants in this case include the Louisiana State Bar Association, the Louisiana Supreme Court, and the Chief Justice and Associate Justices of the Louisiana Supreme Court, all sued in their official capacities. *Id.* ¶¶ 12-21.

LEGAL STANDARD

In general, where a party moves to dismiss for lack of jurisdiction under Rule 12(b)(1), the party asserting jurisdiction bears the burden to show that jurisdiction exists. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). Where a defendant seeks dismissal based on Eleventh Amendment immunity, however, it bears the burden to show that it is an arm of the state entitled to such immunity. *See Skelton v. Camp*, 234 F.3d 292, 297 (5th Cir. 2000).

ARGUMENT

I. The Tax Injunction Act does not bar Plaintiff's claims.

The Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, does not bar any of Plaintiff's claims. *See* Mem. in Support of Defs.' Mot. to Dismiss Pursuant to R. 12(b)(1) ("MTD") at 9-12. It is beyond dispute that the TIA does not bar Plaintiff's First Claim for Relief, which does not seek to enjoin the collection of money but instead seeks declaratory and injunctive relief against mandatory LSBA membership. Compl. ¶¶ 70-80. And the Act does not bar Plaintiff's other claims because, for purposes of the TIA, LSBA dues are a "fee," not a "tax."

The TIA only prohibits federal courts from enjoining collection of a state *tax*; it does not prevent courts from enjoining a state "regulatory fee." *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). The question of whether a charge constitutes a "tax" for purposes of the TIA is one of federal law; it is not controlled by the label given to the charge by state law. *Id.* at 1010 n.10 (citing *Robinson Protective Alarm Co. v. City of Phila.*, 581 F.2d 371, 374 (3d Cir. 1978)).

For purposes of the TIA, a tax "sustains the essential flow of revenue to the government, … is imposed by a state or municipal legislature, … [and] is designed to provide a benefit for the entire community." *Id.* at 1011. A fee, on the other hand, "is linked to some regulatory scheme, … is imposed by an agency upon those it regulates, … [and] is designed to raise money to help defray an agency's regulatory expenses." *Id.*

Mandatory LSBA dues are a "classic fee." *Id.* They are not designed to increase the state's general revenue but are part of the state's regulatory scheme for the legal profession. They are set by the LSBA, not the legislature. *See* LSBA Bylaws Art., I, §1. They are imposed exclusively on the LSBA's mandatory members. *See* La. R.S. § 37:211 (citing Act 54 of 1940, which states "[t]hat the membership of the [LSBA] shall consist of all persons now or hereafter regularly licensed to practice law in this State"). And they are designed to raise money to cover the LSBA's regulatory expenses. Indeed, under *Keller*, the LSBA's mandatory dues *must* be used to fund the LSBA's regulatory function and nothing else. 496 U.S. at 13-14.

Other courts have recognized that mandatory bar association fees are not "taxes" for purposes of the TIA or its equivalent. *See In re Justices of Sup. Ct. of P.R.*, 695 F.2d 17, 26-27 (1st Cir. 1982) (Butler Act—the TIA equivalent for Puerto Rico, read *in pari materia* with it—did not bar challenge to "revenue scheme … [that] devote[d] all of the funds that it generate[d] to a bar association rather than to the treasury"); *Levine v. Sup. Ct. of Wis.*, 679 F. Supp. 1478, 1488-89 (W.D. Wis. 1988) (TIA did not bar challenge to state bar dues).

The North Carolina district court decisions that Defendants cite do not support the conclusion that LSBA dues are taxes under the TIA. *See* MTD at 10. The earlier of the two cases did not concern bar association membership dues but a surcharge on lawyers imposed directly by the legislature, which was not used to regulate the legal profession but to fund election campaigns. *Jackson v. Leake*, 476 F. Supp. 2d 515, 517, 522 (E.D.N.C. 2006). The more recent case did concern mandatory bar dues, but merely cited *Jackson* and concluded, without analysis, that the dues were a tax based on "the entity that imposes [them], the population that is subject to [them], and the purposes served by the use of the monies obtained by [them]." *Livingston v. N.C. State Bar*, 364 F. Supp. 3d 587, 594 (E.D.N.C. 2019). Thus, the North Carolina decisions do not show that LSBA dues are taxes under the criteria the Fifth Circuit applies.

The state court decisions Defendants cite also do not support their argument. *See* MTD at 10. It is irrelevant that a 1942 state court decision, which did not address the distinction between a tax and a fee, referred to LSBA dues as a "license tax." *In re Mundy*, 11 So. 2d at 400. Again, the label given to a charge under state law in another context is not relevant to the federal question of whether it is a "tax" under the TIA. *Home Builders*, 143 F.3d at 1010 n.10; *Robinson*, 581 F.2d at 374 ("It is unlikely Congress meant for the federal courts to define the scope of the … Act and their own jurisdiction by adopting state labels from contexts inapposite to application of 28 U.S.C. § 1341."). As for the 1897 decision Defendants cite, it long predates both the TIA and the LSBA's creation, and it addressed a challenge to a license tax enacted to fund "the

expense of government, both state and municipal," not bar association dues. *See State ex rel. Paquet v. Fernandez*, 21 So. 591, 591-92 (La. 1897).

Moreover, if the distinction between taxes and fees for purposes of state law were relevant, it would support the conclusion that LSBA dues are a fee, not a tax. Under Louisiana law, an assessment is a tax if its primary purpose is to generate revenue but is a fee if it serves "to allocate the costs for the administration of a regulatory program." *Voicestream GSM I Op. Co. v. La. Pub. Serv. Comm'n*, 2005-2578 (La. 11/29/06), p. 19; 943 So. 2d 349, 361; *see also Audubon Ins. Co. v. Bernard*, 434 So. 2d 1072, 1074 (La. 1983) (assessment is a tax "if revenue is the primary purpose … and regulation is merely incidental, or if the imposition clearly and materially exceeds the cost of regulation or conferring special benefits upon those assessed"). Under this analysis, as under the TIA, LSBA dues are fees, not taxes, because they serve to cover the cost of regulating attorneys, not to raise revenue for the State.

Thus, all of Defendants' arguments regarding the TIA lack merit, and the TIA does not bar any of Plaintiffs' claims.

II. Principles of comity do not bar federal court jurisdiction over Plaintiff's claim.

Defendants' argument for dismissal based on comity likewise fails. It is true, as Defendants say, that principles of comity can bar certain claims from federal court independent of the TIA. *See* MTD at 12. But the cases Defendants cite for that point make clear that comity bars challenges to state *taxes*. *See Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 429-32 (2010) (comity warranted dismissal of claim seeking to

eliminate state tax exemption for certain entities rather than enjoin tax collection); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 101, 116 (1981) (comity barred "damages action … to redress the allegedly unconstitutional administration of a state tax system"); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 298 (1943) (comity barred claim for declaratory relief where TIA would bar injunctive relief); *Bland v. McHann*, 463 F.2d 21, 27-28 (5th Cir. 1972) (comity barred claim for refund of state taxes already paid); *Normand v. Cox Commc'ns, LLC*, 848 F. Supp. 2d 619, 625 (E.D. La. 2012) (comity barred removal of action by parish to collect sales taxes).

Comity does *not* prevent federal courts from reviewing constitutional challenges to regulatory *fees* to which the TIA would not apply. *See DIRECTV, Inc. v. Tolson*, 513 F.3d 119, 125-26 (4th Cir. 2008) (comity barred challenge to franchise charges because they were taxes, not fees); *Cashwell v. Town of Oak Island*, 383 F. Supp. 3d 584, 590 (E.D.N.C. 2019) ("[P]lainitffs' claims challenging the constitutionality of the charges in this case are barred by the comity doctrine if those charges are taxes."); *Healthcare Distrib. Alliance v. Zucker*, 353 F. Supp. 3d 235, 254 (S.D.N.Y. 2018) ("While it is true that comity sweeps more broadly than the TIA, it does not encompass regulatory fees or penalties."); *Tex. Entm't Ass'n v. Hegar*, No. 1:17-CV-594-LY, 2018 WL 718549, at *4 (W.D. Tex. Feb. 5, 2018) ("As with the TIA itself, the comity doctrine has no application where the charge at issue is a fee, not a tax."); *Hansen v. Moses Lake Irrigation & Rehab. Dist.*, No. 2:14-CV-0357-TOR, 2016 WL 6069973, at *2 (E.D. Wash. Oct. 14, 2016) ("[T]he TIA and the principle of comity only apply if a challenged assessment constitutes a 'tax' as opposed to merely a 'regulatory fee.'" (citation omitted)); *Zewadski v. City of*

Reno, No. 3:05-CV-0173-LRH-RAM, 2006 WL 8441737, at *4 (D. Nev. Mar. 9, 2006) (To determine "whether the court has the power to decide … claims in light of the [TIA] and principles of comity … the court must first decide if the fees sought ... are taxes as contemplated by the TIA."); *Wenz v. Rossford Ohio Transp. Improvement Dist.*, 392 F. Supp. 2d 931, 935 (N.D. Ohio 2005) ("The TIA and the principle of comity apply only if the challenged assessment is a 'tax,' as opposed to a 'regulatory fee,' … ."); *Attorneys' Liab. Assurance Soc'y, Inc. v. Fitzgerald*, 174 F. Supp. 2d 619, 627 (W.D. Mich. 2001) ("[C]omity concerns, which might apply … if a 'tax' were at stake, are not similarly present when a mere 'fee' is at stake.").

As discussed above, the LSBA dues Plaintiff challenges are fees, not taxes, under the TIA. Therefore, neither the TIA nor principles of comity bar Plaintiff's claims.

III. Plaintiff was not required to exhaust state court remedies before bringing his claims.

Because Defendants' arguments based on the TIA and comity fail, Defendants' argument that Plaintiff must exhaust state court remedies also fails. *See* MTD at 12. A plaintiff need not exhaust state remedies before bringing a claim under 42 U.S.C. § 1983, but the Supreme Court has recognized an exception to that rule for claims challenging the constitutionality of a state tax. *See McNary*, 454 U.S. at 104-05, 116. Here, as discussed above, Plaintiff challenges a fee, not a tax, so the usual rule applies: Plaintiff was not required to exhaust state court remedies before bringing his constitutional claims under § 1983.

IV. Plaintiff has standing to bring his claims.

Plaintiff has standing because he is being injured on an ongoing basis by the State's requirement that he join and pay dues to the LSBA and by the LSBA's failure to provide sufficient safeguards for his First Amendment rights.

A. Plaintiff has standing because he objects to associating with the LSBA and to funding its speech.

There is no merit in Defendants' argument that Plaintiff lacks standing because his complaint supposedly does not "identify any LSBA position with which he disagrees." MTD at 15. Whether Plaintiff disagrees with the LSBA's speech is irrelevant to whether the state may force him to fund it. What matters is that he does not wish to *associate* with the LSBA and does not wish to pay for *any* of the LSBA's political speech, regardless of its viewpoint, Compl. ¶¶ 58-59, but is nonetheless being compelled to do so.

True, being forced to subsidize speech with which one disagrees might be *especially* harmful. The Supreme Court has recognized that, as Jefferson put it, "'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.'" *Janus v. AFSCME*, 138 S. Ct. 2448, 2464 (2018) (quoting A Bill for Establishing Religious Freedom, in 2 *Papers of Thomas Jefferson* 545 (J. Boyd ed. 1950)). But the First Amendment prohibits compelled support for others' speech regardless of whether one agrees with it. "[C]ompelled subsidization of private speech seriously impinges on First Amendment rights" in any event, *id.*, because it infringes an individual's fundamental right to choose what one will and will not say. "[W]hatever the [individual's] reason, it boils down to the choice of a speaker not to

propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 575 (1995). Moreover, the right *not* to speak, and not to fund others' speech, "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Id.* at 573.

Keller confirms the irrelevance of Plaintiff's personal views. It protects attorneys from being forced to pay for *any* bar association speech that is not germane to regulating the legal profession and improving the quality of legal services. 496 U.S. at 13-14. An attorney's "[c]ompulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative," for example, regardless of the attorney's personal views on those issues. *Id.* at 16.

It is none of Defendants' business *why* Plaintiff does not wish to associate with the LSBA or fund its speech. Plaintiff does not bear a burden to justify his desire to defend his own First Amendment rights. Rather, Defendants bear the burden to justify their infringement of them. *See Janus*, 138 S. Ct. at 2465.

B. This is not a "taxpayer standing" case.

Defendants' argument on "taxpayer standing," MTD at 16, likewise misses the mark. Plaintiff does not seek standing based on his status as a taxpayer but rather based on the law's requirement that he join and pay dues to an organization.

C. Plaintiff was not required to exhaust administrative remedies and could not have presented his claims through the LSBA's *Keller* procedures.

Defendants' argument that Plaintiff should have exhausted administrative remedies fails as well. Again, there is no exhaustion requirement for cases brought, as this one is, under 42 U.S.C. § 1983. *See Patsy v. Bd. of Regents*, 457 U.S. 496 (1982). And there is no requirement that an attorney object to unconstitutional uses of mandatory dues through *Keller* procedures before filing suit in federal court. *See Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 876 (1998) (employee was not required to pursue procedures prescribed by *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986)—which the Supreme Court adopted for bar associations in *Keller*, 496 U.S. at 16—before suing to challenge union fee).

Moreover, Plaintiff *could not have* raised the issues presented in his complaint through the LSBA's *Keller* procedures. Those procedures are a means by which LSBA members may object to particular uses of their mandatory dues. Compl. ¶ 51; LSBA Bylaws Art. XII, § 1(A); *see also Keller*, 496 U.S. at 16. They are not a means by which an LSBA member can raise a First Amendment objection to mandatory LSBA membership and to *all* uses of dues for political and ideological speech—regardless of whether it is "germane" under *Keller*—as Plaintiff does in his First and Second Claims for Relief, respectively.

The LSBA's procedures also would not have provided an opportunity for the Plaintiff to object to *the procedures themselves* for violating the First Amendment, as Plaintiff does in his Third Claim for Relief. Compl. ¶¶ 96-106. The gravamen of

Plaintiff's Third Claim for Relief is that existing procedures are constitutionally inadequate, and therefore it is both irrational and contrary to the law to require him to submit himself to that procedure before challenging it in court. *Cf. Pub. Utils. Comm'n v. United States*, 355 U.S. 534, 540 (1958) ("[W]here the only question is whether it is constitutional to fasten [an] administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right."); *Staub v. City of Baxley*, 355 U.S. 313, 319 (1958) ("The Constitution can hardly be thought to deny to one subjected to the restraints of such an [unconstitutional license application process] the right to attack its constitutionality, because he has not yielded to its demands." (internal quotations and citation omitted)).

D. Plaintiff's standing does not depend on the details of LSBA's future speech.

There is no merit in Defendants' argument that "Plaintiff cannot identify any future imminent injury that would give him standing." MTD at 18. Plaintiff is required to join and pay dues to the LSBA as a condition of practicing law in Louisiana. *See* Compl. ¶¶ 22-24, 57; La. R.S. §§ 37:211, 37:213; La. S. Ct. R. XIX § 8(C); La. R. Prof. Cond. 1.1(c). Defendants have presented no reason to believe that this might change. To the contrary, the LSBA's purpose in defending this lawsuit is to ensure that these requirements do *not* change. *See* Louisiana State Bar Association, Boudreaux v. Louisana State Bar Association, Louisiana Supreme Court et al., https://www.lsba.org/Challenge/.

That the LSBA has purportedly put its legislative activities on hiatus until January 2020—less than three months from now—is irrelevant. *See* MTD at 18. The LSBA has engaged in legislative advocacy in each of the past five years, including this year, Compl. ¶ 45, and does not deny that it will do so next year. Article XI, § 2, of the LSBA's Bylaws, currently in effect, expresses the LSBA's desire to influence public policy through legislative advocacy, as does its website. Compl. ¶ 38; Louisiana State Bar Association, Legislative Advocacy, https://www.lsba.org/Legislation. Thus, Plaintiff has been, and will continue to be, forced to fund the LSBA's political speech. Further, the LSBA has presented no reason to believe that the lack of safeguards he challenges has changed or will change. His ongoing First Amendment injuries are therefore not at all "conjectural or hypothetical," as Defendants would have it, and his claims may proceed. MTD at 18.

V. Plaintiff's claims are neither moot nor unripe.

Plaintiff's claims are neither moot nor unripe. *See* MTD at 19. Plaintiff is being injured on an ongoing basis: he is required to join and pay dues to the LSBA as long as he wishes to practice law in Louisiana. *See* Compl. ¶¶ 11, 22-25, 57-61. He seeks to enjoin these requirements and, alternatively, the collection of dues in the absence of sufficient safeguards to protect his First Amendment rights. *Id*. pp. 20-21. His claims are therefore not moot, nor are they speculative or unripe.

VI. The *Burford* abstention doctrine does not bar Plaintiff's claims.

Burford abstention does not bar Plaintiff's claims. *See* MTD at 20-23. A decision on whether *Burford* abstention applies requires balancing "the strong federal interest" in

having cases involving federal constitutional rights adjudicated in federal court against the State's interest in "maintaining uniformity in the treatment of an essentially local problem," and "retaining local control over difficult questions of state law bearing on policy problems of substantial public import." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996) (internal marks and citations omitted). This balancing test "only rarely favors abstention" because *Burford* abstention is an "extraordinary and narrow exception to the duty of the District Court to adjudicate a controversy properly before it." *Id.* (internal marks and citation omitted).

As a decision of this Court has recognized, a challenge to a state bar rule does not present the "difficult questions of state law" required for *Burford* abstention. *LeClerc v. Webb*, 270 F. Supp. 2d 779, 795 (E.D. La. 2003), *aff'd* 419 F.3d 405 (5th Cir. 2005). Indeed, this case does not require the Court to resolve *any* question of state law. That is because the bar membership and dues requirements Plaintiff challenges are clear, and their meaning is not disputed. This case only presents the important federal question whether those requirements violate the First and Fourteenth Amendments. Therefore, the balance of state and federal interests overwhelmingly favors federal court review. Moreover, the Supreme Court has repeatedly shown that it considers federal review of state rules governing the practice of law to be appropriate. *See, e.g.*, *Keller*, 496 U.S. 1 (considering challenge to State Bar of California's use of mandatory dues); *Sup. Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 724-25 (1980) (considering First Amendment challenge to Virginia Bar Code rule restricting attorney advertising).

VII. The Eleventh Amendment does not bar Plaintiff's claims.

Defendants are not immune under the Eleventh Amendment because Plaintiff has sued them in their official capacities and seeks only prospective declaratory and injunctive relief.

In general, the Eleventh Amendment bars plaintiffs from suing states and their agencies in federal court without their consent. *See Hans v. Louisiana*, 134 U.S. 1, 13 (1890). Plaintiffs can, however, sue state officials in federal court under the doctrine the Supreme Court established in *Ex Parte Young*, 209 U.S. 123.

Under *Ex Parte Young*, the Eleventh Amendment does bar suits "brought against individual persons in their official capacities as agents of the state" where "the relief sought [is] declaratory or injunctive in nature and prospective in effect." *Saltz v. Tenn. Dep't of Emp't Sec.*, 976 F.2d 966, 968 (5th Cir. 1992). Determining whether *Ex Parte Young* allows a given claim against a state official is not difficult: "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." *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002) (citation and internal marks omitted).

In this case, Plaintiff's claims are plainly permissible under *Ex Parte Young*. Plaintiff has alleged that Defendants are engaged in an ongoing violation of federal law by enforcing Louisiana's bar membership and dues requirements in violation of the First and Fourteenth Amendments. *See* Compl. ¶¶ 70-106. And the relief Plaintiff seeks is prospective: a declaration that these ongoing practices violate the First and Fourteenth

Amendments and an injunction against further enforcement of the membership and dues requirements. *Id.* at pp. 20-21.

The U.S. Supreme Court has recognized that state supreme court justices may be sued in their official capacities in federal court when they act in an enforcement capacity rather than a legislative or judicial capacity. In *Consumers Union*, for instance, it held that the chief justice of the Virginia Supreme Court was a proper defendant in an action seeking declaratory and injunctive relief in challenging a state court rule prohibiting attorney advertising. 446 U.S. at 736; *see also LeClerc*, 419 F.3d at 414 (Louisiana Supreme Court justices not immune from suits for declaratory and injunctive relief when acting in their enforcement capacity).

There is no merit in Defendants' argument that the *Ex Parte Young* exception to Eleventh Amendment immunity is inapplicable here "because the Plaintiff has neither failed to pay his LSBA dues, nor filed a *Keller* objection with the LSBA," and "Defendants have not threatened and are not 'about to commence proceedings' against him to enforce any of the statutes or rules addressed in his Complaint." MTD at 25. There was no pending or threatened enforcement action in *Consumers Union*, either. The plaintiff sought declaratory and injunctive relief because it wanted to publish a legal directory that the challenged rule appeared to prohibit. 446 U.S. at 724-25. And the Supreme Court expressly rejected the idea that plaintiffs should "have to await the institution of state-court proceedings against them in order to assert their federal constitutional claims." *Id.* at 737. A pending or threatened enforcement action is simply

not a requirement under *Ex Parte Young*. Defendants cite no authority for that proposition, and none exists.

VIII. Legislative immunity does not bar Plaintiff's claims.

Defendants' argument that legislative immunity bars Plaintiff's claims is substantially identical to their Eleventh Amendment argument and fails for the same reason. *See* MTD at 25-26. Again, a pending or threatened enforcement action is not a requirement to bring a suit to enjoin enforcement of a rule or statute alleged to be unconstitutional. *See Consumers Union*, 446 U.S. at 737.

Plaintiff's challenge to Defendants' insufficient *Keller* safeguards is not, as Defendants suggest, a challenge to legislative action rather than enforcement action. *See* MTD at 26. Plaintiff does not seek an injunction directing the Defendants to adopt different *Keller* safeguards; he seeks an injunction to bar Defendants from collecting dues under the current rules, which lack sufficient safeguards. Compl. p. 20. Legislative immunity therefore does not bar Plaintiff's Third Claim for Relief, just as it does not bar his First and Second Claims for Relief.

CONCLUSION

Defendants' motion to dismiss under Rule 12(b)(1) should be denied.

Respectfully submitted October 25, 2019 by:

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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all parties.

/s/ *Jacob Huebert*
JACOB HUEBERT