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)(6)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Constitutional Provisions

INTRODUCTION

Plaintiff Randy Boudreaux, a Louisiana attorney, challenges the state's requirement that attorneys join and pay dues to the Louisiana State Bar Association ("LSBA") for violating his First and Fourteenth 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 bar's regulatory purpose.

Plaintiff's claims are well-founded. The Supreme Court has recently made clearer than ever that mandatory associations infringe on First Amendment rights, and that a mandatory association such as the LSBA must obtain individuals' affirmative consent before using their money for political speech. *See Janus v. AFSCME*, 138 S. Ct. 2448, 2463, 2486 (2018). Moreover, the LSBA has failed to provide procedural safeguards to protect First Amendment rights that Supreme Court precedent has required for decades.

Because Boudreaux has stated viable constitutional claims, the Court should deny Defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) (Doc. 12) ("MTD").

FACTS

Plaintiff incorporates by reference the statement of facts set forth in his Response in Opposition to Defendants' Motion to Dismiss Pursuant to Rule 12(b)(1), filed contemporaneously with this response brief.

LEGAL STANDARD

In reviewing a motion to dismiss under Rule 12(b)(6), the Court must accept every factual allegation in the complaint as true, drawing "all inferences in a manner favorable to the plaintiff" and resolving "every doubt … in the pleader's behalf." *Wilson v. Birnberg*, 667 F.3d 591, 595 (5th Cir. 2012). The Court does not determine whether a plaintiff's victory is probable, but only whether the facts pled, if true, would entitle the plaintiff to relief. *Id.* at 595, 600. "Dismissal is improper if the allegations support relief on any possible theory." *Id.* at 595 (internal quotation marks omitted).

ARGUMENT

I. Plaintiff has stated a claim against mandatory bar membership.

The Court should deny Defendants' 12(b)(6) motion with respect to Plaintiff's First Claim for Relief because it states a valid First and Fourteenth Amendment challenge to mandatory bar membership. Compl. ¶¶ 70-80.

A. The Supreme Court has expressly reserved this issue for consideration by lower courts.

Contrary to Defendants' assertions, the Supreme Court has *not* resolved this question. In *Keller v. State Bar of California*, 496 U.S. 1, 17 (1990), the Court expressly declined to address whether attorneys may "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* [*v. Donohue*, 367 U.S. 820 (1961)] and *Abood* [*v. Detroit Board of Education*, 431 U.S. 209 (1977)]." The Court stated that lower courts "remain[ed] free … to consider this issue." *Id.* To date, no

Supreme Court or Fifth Circuit decision has resolved the issue—which means that this Court may do so in this case.

Keller assumed, without deciding, that compulsory membership requirements are valid, citing *Lathrop*. *Keller* 496 U.S. at 7-9. *Keller* then decided a narrower question: whether an attorney's "free speech rights were violated by the [state] Bar's use of his mandatory dues to support objectionable political activities"—a question it answered in the affirmative. *Id.* at 9.

As for *Lathrop*, it did not resolve the mandatory-membership question, either. The plurality decision in that case stated that it was addressing "only … a question of compelled financial support of group activities, not … involuntary membership in any other aspect." *Lathrop*, 367 U.S. at 828. And *Keller* expressly recognized that *Lathrop* did not address the "much broader freedom of association claim" presented here. *Keller*, 496 U.S. at 17.

Therefore, *Keller* and *Lathrop* do not foreclose Plaintiff's First Claim for Relief.

B. Dismissal is improper because Defendants have not shown that mandatory bar membership satisfies exacting First Amendment scrutiny.

Because precedent does not foreclose Plaintiff's First Claim for Relief, the Court should subject Louisiana's membership requirement to the exacting First Amendment scrutiny the Supreme Court prescribed for laws mandating association for expressive purposes in *Janus*, 138 S. Ct. 2448. Under exacting scrutiny, Defendants must show that mandatory LSBA membership "'serve[s] a compelling state interest that cannot be

achieved through means significantly less restrictive of associational freedoms.'" *Id.* at 2465 (citation omitted).

Defendants have not satisfied their burden; indeed, they have not even tried to show that the state cannot achieve the only purpose that mandatory LSBA membership might legitimately serve—"regulating the legal profession and improving the quality of legal services," *Keller*, 496 U.S. at 13—by significantly less restrictive means. Further, it is obvious that Louisiana *can* serve its interest in regulating the legal profession and improving the quality of legal services without forcing attorneys to join the LSBA.

On this point, *Janus*'s details are instructive. In *Janus*, the government argued that forcing government workers to subsidize a union with mandatory "agency fees" was necessary to serve the state's interest in "labor peace." The "labor peace" theory held that requiring public-sector workers to subsidize a union was necessary because of the union's designation as workers' exclusive bargaining representative. Without compulsory fees, the theory went, the union would not be able to act as the sole bargaining representative, and the result would be "pandemonium" caused by conflicts between different unions. *Janus*, 138 S. Ct. at 2465.

Janus rejected that assumption as "simply not true," *id.*, because, in fact, several federal entities and states designated public-sector unions as exclusive representatives *without* compelling workers to pay union fees, and no such "pandemonium" had resulted. Therefore, it is "undeniable that 'labor peace' can readily be achieved 'through means significantly less restrictive of associational freedoms' than the assessment of agency fees"—and those fees cannot survive exacting scrutiny. *Id.* at 2466 (citation omitted).

As Plaintiff has alleged, Louisiana's mandatory bar fails exacting scrutiny for the same reason: the state can achieve its goals for the legal profession without mandating bar membership or dues. Compl. ¶¶ 76-77. It is obvious as a theoretical matter how the state could do so: by acting as a regulator, penalizing those who break the rules, and providing educational services to ensure that practitioners know the rules—just as it already does for countless other trades. And, as a practical matter, some 20 states and Puerto Rico do, in fact, already regulate the practice of law without requiring membership in a state bar association that may use member fees for political and ideological speech. *Id.* at ¶ 77; Ralph H. Brock, *"An Aliquot Portion of Their Dues:" A Survey of Unified Bar Compliance with Hudson and Keller*, 1 Tex. Tech J. Tex. Admin. L. 23, 24 n.1 (2000).[1] This includes states with large populations of lawyers, such as Massachusetts, New York, California, and New Jersey, and states with some of the smallest bars, such as Vermont and Delaware. *Id.* If those states can regulate lawyers and improve the quality of legal services without violating attorneys' First Amendment rights with a mandatory bar, so can Louisiana.

[1] This article identifies 32 states with a mandatory bar association. Since its publication, however, California and Nebraska have adopted bifurcated systems under which lawyers only pay for purely regulatory activities are not forced to fund a bar association's political or ideological speech, eliminating most if not all of the First Amendment problems Plaintiff objects to here. *See In re Petition for a Rule Change to Create a Voluntary State Bar of Neb.*, 841 N.W.2d 167, 173 (Neb. 2013); Marilyn Cavicchia, *Newly Formed California Lawyers Association Excited to Step Forward*, ABA Journal (Apr. 30, 2018), https://www.americanbar.org/groups/bar_services/publications/bar_leader/2017-18/may-june/born-by-legislative-decision-california-lawyers-association-excited-to-step-forward/.

The Court should therefore deny Defendants' motion to dismiss with respect to Plaintiff's First Claim for Relief.

II. Plaintiff has stated a claim challenging the LSBA's use of mandatory dues for speech without members' affirmative consent.

The Court should deny Defendants' 12(b)(6) motion with respect to Plaintiff's Second Claim for Relief, which states a valid First and Fourteenth Amendment claim challenging the LSBA's use of mandatory member dues for speech and other non-regulatory activities without members' affirmative consent. Compl. ¶¶ 81-95. Contrary to Defendants' argument, *Keller* and *Lathrop* do not foreclose this claim, either.

In *Keller*, the Supreme Court concluded that, for First Amendment purposes, a mandatory bar association is more analogous to a public-sector union than to an ordinary government agency and therefore should be "subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees." 496 U.S. at 13. Therefore, just as "a union could not expend a dissenting individual's dues for ideological activities not 'germane' to … collective bargaining" under *Abood*, 431 U.S. at 235-36, so a state bar could "constitutionally fund activities germane to [regulating the legal profession and improving the quality of legal services] out of the mandatory dues of all members" but could not use mandatory dues to "fund activities of an ideological nature which fall outside" of the bar's regulatory purpose. *Keller*, 496 U.S. at 13-14.

In *Janus*, the Supreme Court overruled *Abood* because that decision "judged [mandatory public-sector union fees'] constitutionality … under a deferential standard

that finds no support in [the Court's] free speech cases" instead of subjecting the mandatory fees to exacting scrutiny. 138 S. Ct. at 2479-80. And, as discussed above, *Janus* concluded that mandatory union fees could not survive exacting scrutiny because the government did not show that they were necessary to serve its interest in labor peace. *Id.* at 2466. The Court then concluded that the only way to avoid violating workers' First Amendment rights is not to take union fees from them without their affirmative consent.

Keller, like *Abood*, never subjected mandatory fees to the exacting scrutiny the First Amendment requires. *Cf. Janus*, 138 S. Ct. at 2479-80. Now, with *Abood* overruled, there is no foundation for *Keller*'s toleration of bar associations using mandatory dues for political or ideological speech without an attorney's affirmative consent.

Contrary to Defendants' argument, the Supreme Court did not suggest, much less hold, in *Harris v. Quinn*, 573 U.S. 616 (2014), that *Keller*'s (limited) approval of bar associations' use of mandatory dues for political speech would stand even if the Court overruled *Abood*. *See* MTD at 5-6. In *Harris*, the Court concluded that the First Amendment forbids the government from requiring individuals who receive certain government subsidies, but who are not government employees, to pay union fees. 573 U.S. at 656. In reaching this conclusion, the Court questioned *Abood*'s foundations but nonetheless assumed that *Abood* remained good law. *Id.* at 633-38, 646 n.19. It then explained that its "refusal to extend *Abood*" to cover non-employees did not undermine *Keller*, which "fit[] comfortably within the framework applied in [*Harris*]." *Id.* at 655. That "framework" was the *Abood* framework, which the Court has since rejected in

Janus. And nothing in *Harris* suggests that the use of mandatory bar dues for political speech could survive the exacting First Amendment scrutiny that *Janus* calls for.

To be clear, the Court need not conclude that the Supreme Court has overruled *Keller*, nor disregard *Keller*, to consider whether the LSBA's use of mandatory dues for political and ideological speech violates the First Amendment. After *Janus*, if courts are to treat bar associations like public-sector unions—as *Keller* prescribes—then they must subject mandatory bar association dues—specifically, the use of dues for political or ideological speech, whether "germane" or not—to exacting scrutiny.

Those dues cannot survive exacting scrutiny because, as discussed above, the state can regulate the legal profession and improve the quality of legal services without forcing lawyers to join or pay a bar association. And, in any event, Defendants have not shown at this stage that the LSBA's use of dues for political or ideological speech without affirmative consent survives exacting scrutiny, and therefore they are not entitled to dismissal of Plaintiff's Second Claim for Relief.

III. Plaintiff has stated a claim challenging the LSBA's lack of safeguards to ensure member dues are not used for non-germane activities.

The Court should deny Defendants' 12(b)(6) motion with respect to Plaintiff's Third Claim for Relief, which challenges the LSBA's lack of safeguards to ensure that members' mandatory dues are not used for non-germane political and ideological speech and other non-germane activities (assuming, in the alternative to Plaintiff's other claims, that mandatory bar membership and dues are permissible at all). Compl. ¶¶ 96-106.

In *Keller*, the Supreme Court held that mandatory bar dues may only be used for activities "germane" to "regulating the legal profession and improving the quality of legal services." 496 U.S. at 13-14. The Court held that using mandatory dues to "fund activities of an ideological nature which fall outside of those areas of activity" violates members' First Amendment rights to freedom of speech and association. *Id.* at 14.

Under *Keller*, a bar association can meet its constitutional obligation to ensure that members are not forced to pay for such non-germane activities by providing: (1) "an adequate explanation of the basis for the [mandatory bar association] fee"; (2) "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker"; and (3) "an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* at 16. This is the same "minimum set of procedures" the Supreme Court mandated for public-sector unions—to ensure that non-members' mandatory union fees were not used for political or ideological activity not germane to the union's representation activities—in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

Plaintiff alleges that the LSBA fails to satisfy the first *Keller*/*Hudson* requirement because it "does not provide [him] adequate information about its activities to allow him to determine whether his dues are being used appropriately and therefore does not provide an adequate explanation for the basis of his mandatory dues." Compl. ¶ 99. True, the LSBA's Bylaws provide that a member may 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." *Id.* ¶ 51; LSBA Bylaws Art. XII, § 1(A). But the Bylaws do not specify where or when this "publication of notice" is to occur and therefore do not ensure that members receive constitutionally sufficient notice. Compl. ¶ 52.

Moreover, 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. The LSBA publishes an annual report showing its expenditures for the previous year, but it does not identify any specific expenditures the LSBA has made or proposed to make; it only identifies general categories of expenditures. *Id.* ¶ 54. Article XI, § 5, of the Bylaws requires the LSBA to "timely publish notice of adoption of legislative positions … to Association members," but the LSBA's Articles of Incorporation and Bylaws do not otherwise require the LSBA to provide members with notice of the LSBA's political and ideological speech or its other activities. *Id.* ¶ 55. The LSBA therefore does not provide a meaningful, reasonable opportunity for members to determine the basis of the dues they are charged and to object to expenditures that they believe violate their First Amendment right not to fund non-germane LSBA activities. *Id.* ¶ 56.

In response to Plaintiff's claim, Defendants argue that the LSBA's failure to give members notice of all of its activities does not give rise to a constitutional claim because "Plaintiff does not allege that the LSBA has taken non-germane, unpublished positions to which he objects" and "does not identify any instance in which he would have objected to LSBA action but was unable to do so because of a constitutional deficiency in the

available *Keller* procedures." MTD at 13.[2] But that misses the point of Plaintiff's claim: He does not and cannot know what the LSBA is doing with his dues money—and whether its activities are germane under *Keller*—because the LSBA does not provide sufficient information.

Indeed, Defendants appear to fundamentally misunderstand the purpose of *Keller* procedures, stating that they "avoid exposing the bar association to a risk of litigation every time it decides to take a particular position." MTD at 9. That is *not* the purpose of *Keller* procedures.[3] *Keller* procedures do not exist for a bar association's convenience but to help lawyers protect their fundamental First Amendment rights. The first *Keller*/*Hudson* safeguard is required because "[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake, … dictate that … potential objectors be given sufficient information to gauge the propriety of the [mandatory] fee." *Hudson*, 475 U.S. at 306. "Leaving [potential objectors] in the dark about the source of the figure for the … fee—and requiring them to object in order to receive information—does not

[2] Plaintiff *has* identified non-germane LSBA activities based on the limited information the LSBA has published. *See* Compl. ¶¶ 41-44. LSBA makes a cursory argument that one of these—a call for a moratorium on the death penalty—is somehow germane to the Bar's regulatory purpose and asserts, without argument, that the rest are germane as well. MTD at 10. The Court need not pass on the issue at this stage; for now, suffice it to say that it is not obvious—and Defendants have not event attempted to show—how, for example, calling for removal of free-enterprise education from the state's high school curriculum, Compl. ¶ 43, bears any relationship to "improving the quality of legal services" or "regulating the legal profession," *Keller* 496 U.S. at 14.

[3] It also is simply untrue. An attorney is not required to seek relief through *Keller* procedures before suing to challenge misuse of mandatory bar dues. *See Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 876-77 (1998) (employee not required to pursue *Hudson* procedures before suing to challenge union fee).

adequately protect" them against being forced to subsidize non-germane political and ideological speech in violation of their First Amendment rights. *Id.*

If Defendants' position—that an attorney cannot challenge a bar association's *Keller* procedures unless he or she can identify specific undisclosed improper expenditures—were correct, then a bar association could completely shield its procedures from constitutional challenge by providing members *no* information about its activities. That, of course, turns *Keller* on its head. Again, the purpose of *Keller*'s first safeguard is to allow attorneys to *obtain* information so that they may *then* determine whether any of the bar's activities are objectionable. *See Air Line Pilots Ass'n*, 523 U.S. at 878. Failure to provide that information, by itself, violates an attorney's First Amendment rights. *See Keller*, 496 U.S. at 16-17; *Hudson*, 475 U.S. at 304-10.

Defendants also assert that Plaintiff cannot challenge the Bylaws' failure to specify where publication of notices of legislative activities is to occur because "nothing in *Keller* requires an organization's bylaws to contain this type of specificity, and the Plaintiff has not alleged that the LSBA's notices are either untimely or inaccessible." MTD at 12. To the contrary, however, Plaintiff alleges that "requiring members to constantly monitor LSBA publications for possible notices of political and ideological activity—rather than presenting information about the LSBA's use of member dues in a consistent, accessible format on a regular basis—imposes an unreasonable burden on members who wish to protect their First Amendment rights." Compl. ¶ 101. Defendants have not shown, and cannot show at this stage, that the LSBA's sporadic notices do not impose an unreasonable burden on Plaintiff's First Amendment rights.

Thus, the Court should deny Defendants' 12(b)(6) motion with respect to Plaintiffs' Third Claim for Relief because it alleges facts that, if true, would support a claim under the First and Fourteenth Amendments.

IV. The Louisiana Supreme Court is a proper defendant.

Finally, the Louisiana Supreme Court is a proper defendant in this case. The Fifth Circuit has held that, "[w]hen acting in its enforcement capacity, the Louisiana Supreme Court, and its members, are not immune from suits for declaratory or injunctive relief." *LeClerc v. Webb*, 419 F.3d 405, 414 (5th Cir. 2005). The Fifth Circuit concluded that, where plaintiff sought declaratory and injunctive relief against enforcement of a Louisiana bar admission rule, both "the court and its individual members [were] subject" to being sued. *Id.*

It is the same in this case: Plaintiff seeks declaratory and injunctive relief against a rule enforced by the Louisiana Supreme Court. *See* Compl. ¶¶ 13, 28, 63-69, 78-80, 93-95, 104-106. Therefore, the Louisiana Supreme Court is a proper defendant here.

Further, it is demonstrably true that the Louisiana Supreme Court can sue and be sued in federal court because it has been a party to federal court litigation, represented by counsel, not only in this case, but also in multiple others. *See, e.g., S. Christian Leadership Conference v. Sup. Ct. of the State of La.*, 252 F.3d 781 (5th Cir. 2001) (ruling on merits of constitutional challenge to Louisiana Supreme Court rule governing law students' practice of law); *Price v. Sup. Ct. of La.*, No. 11-1663, 2012 WL 520425, *2-4 (E.D. La. Feb. 15, 2012) (dismissing claims against Louisiana Supreme Court on

other grounds); *Hecker v. Plattsmier*, No. 08-4200, 2009 WL 4642014, *4 (E.D. La. Nov. 25, 2009) (same).

CONCLUSION

Defendants' motion to dismiss under Rule 12(b)(6) should be denied.

Respectfully submitted October 25, 2019 by:

By: /s/ *Alex J. Peragine*
Alex J. Peragine, LSBA No. 19097
Pelican Center for Justice
Pelican Institute for Public Policy
400 Poydras St., Suite 900
New Orleans, LA 70130
Telephone: (504) 500-0506
james@pelicaninstitute.org
alex@plalaw.com

By: /s/ *Dane S. Ciolino*
Dane S. Ciolino, LSBA No. 19311, T.A.
DANE S. CIOLINO, LLC
18 Farnham Place
Metairie, LA 70005
dane@daneciolino.com
(504) 975-3263
https://daneciolino.com

By: /s/ *Jacob Huebert*
Jacob Huebert (admitted *pro hac vice*)
Timothy Sandefur (admitted *pro hac vice*)
Scharf-Norton Center for Constitutional Litigation at the
GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
Telephone: (602) 462-5000
litigation@goldwaterinstitute.org

Attorneys for Plaintiff

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