UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

RANDY J. BOUDREAUX
Plaintiff,

v.

LOUISIANA STATE BAR ASSOCIATION, a Louisiana Nonprofit Corporation;
LOUISIANA SUPREME COURT;
BERNETTE J. JOHNSON, Chief Justice of the Louisiana Supreme Court;
JOHN DOE, successor to the Honorable Greg Guidry as Associate Justice of the Louisiana Supreme Court for the First District;
SCOTT J. CRICHTON, Associate Justice of the Louisiana Supreme Court for the Second District;
JAMES T. GENOVESE, Associate Justice of the Louisiana Supreme Court for the Third District;
MARCUS R. CLARK, Associate Justice of the Louisiana Supreme Court for the Fourth District;
JEFFERSON D. HUGHES, III, Associate Justice of the Louisiana Supreme Court for the Fifth District;
JOHN L. WEIMER, Associate Justice of the Louisiana Supreme Court for the Sixth District,
Defendants.

CIVIL ACTION

Case No. 19-cv-11962

SECTION "I" (1)

Judge Lance M. Africk

Mag. Judge van Meerveld

DEFENDANTS' MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF THEIR RULE 12(b)(1) MOTION TO DISMISS

The Defendants have filed a Motion to Dismiss Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure,[1] and the Plaintiff has filed an Opposition.[2] The Defendants submit that the attached reply memorandum would narrow and clarify the issues before the Court. Accordingly, the Defendants respectfully request leave of Court to file the attached reply.

[1] Doc. 10; *see also* Doc. 17 (memorandum in support).
[2] Doc. 19.

Respectfully submitted,

/s/ Eva J. Dossier
Richard C. Stanley, 8487
Eva J. Dossier, 35753
Kathryn W. Munson, 35933
STANLEY, REUTER, ROSS, THORNTON & ALFORD, L.L.C.
909 Poydras Street, Suite 2500
New Orleans, Louisiana 70112
Telephone: (504) 523-1580
Facsimile: (504) 524-0069
Counsel for the Louisiana State Bar Association, Louisiana Supreme Court, Chief Justice Johnson, Justice Crichton, Justice Genovese, Justice Clark, Justice Hughes, and Justice Weimer

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

RANDY J. BOUDREAUX
Plaintiff,

v.

LOUISIANA STATE BAR ASSOCIATION, a Louisiana Nonprofit Corporation;
LOUISIANA SUPREME COURT;
BERNETTE J. JOHNSON, Chief Justice of the Louisiana Supreme Court;
JOHN DOE, successor to the Honorable Greg Guidry as Associate Justice of the Louisiana Supreme Court for the First District;
SCOTT J. CRICHTON, Associate Justice of the Louisiana Supreme Court for the Second District;
JAMES T. GENOVESE, Associate Justice of the Louisiana Supreme Court for the Third District;
MARCUS R. CLARK, Associate Justice of the Louisiana Supreme Court for the Fourth District;
JEFFERSON D. HUGHES, III, Associate Justice of the Louisiana Supreme Court for the Fifth District;
JOHN L. WEIMER, Associate Justice of the Louisiana Supreme Court for the Sixth District,
Defendants.

CIVIL ACTION

Case No. 19-cv-11962

SECTION "I" (1)

Judge Lance M. Africk

Mag. Judge van Meerveld

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PURSUANT TO RULE 12(b)(1)

TABLE OF CONTENTS

Table of Authorities

Federal Cases

State Cases

State Statutes

I. Introduction

The Plaintiff's opposition does not explain his election to file a federal court lawsuit seeking an impermissible advisory opinion on the constitutionality of the LSBA rather than first proceeding through the State court system, as did the plaintiffs in *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *Lathrop v. Donohue*, 367 U.S. 820 (1961). Both the U.S. Court of Appeals for the Fifth Circuit and the Louisiana Supreme Court have confirmed that LSBA dues are taxes, precluding this Court from exercising federal subject matter jurisdiction pursuant to the Tax Injunction Act, the doctrine of comity, and the exhaustion requirement applicable to § 1983 claims challenging taxes. The Plaintiff, Randy Boudreaux, lacks Article III standing, and *Burford* abstention and the Eleventh Amendment also should lead to dismissal of this case. This Court lacks subject matter jurisdiction, and the Complaint should be dismissed without prejudice pursuant to Rule 12(b)(1).

II. Discussion

A. LSBA dues are a tax, making dismissal necessary pursuant to the Tax Injunction Act, based on principles of comity, and for failure to exhaust state court remedies.

The Tax Injunction Act ("TIA") and principles of comity and exhaustion foreclose this Court from exercising subject matter jurisdiction to interfere with Louisiana's procedure for assessing and collecting bar dues. The Plaintiff's opposition rests on his contention that LSBA dues should be considered a "regulatory fee" and not a "tax," but the Plaintiff cannot cite governing precedent to support this contention.[1] Since the LSBA's inception, the Louisiana Supreme Court

[1] *See* Doc. 19, pp.15–20 (citing *Home Builders Ass'n of Mississippi, Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998). Page numbers herein refer to those located in the CM/ECF document header.

has recognized that bar dues constitute a "license tax" upon the right to practice law.[2] In *Lewis v. LSBA*, the U.S. Court of Appeals for the Fifth Circuit agreed with the Louisiana Supreme Court that Louisiana's "bar association dues . . . are state license taxes, levied by express authority of the Louisiana state legislature in Act 54 of 1940."[3] The Plaintiff does not address *Lewis* and provides no other controlling authority that can override this determination. This is reason enough to dismiss the Complaint.

Even if this Court wished to examine the issue anew, the Plaintiff's invocation of the standard set forth in *Home Builders Ass'n of Mississippi, Inc. v. City of Madison, Mississippi*, supports the conclusion that LSBA dues are a tax. *See* 143 F.3d at 1006. In *Home Builders*, the Fifth Circuit affirmed the district court's dismissal pursuant to the Tax Injunction Act of a § 1983 suit challenging an impact fee imposed by the City of Madison, Mississippi. *Id.* at 1013. The City imposed the fee only on developers in certain residential areas, and the proceeds were earmarked for certain narrow purposes. *Id.* at 1009, 1012. The Fifth Circuit, in holding that the targeted impact fee was nevertheless a tax, outlined three characteristics of a "classic tax": (1) it sustains the essential flow of revenue to the government, (2) it is imposed by a state or municipal legislature, and (3) it is designed to provide a benefit for the entire community. *Id.* at 1011. Each

---

[2] *In re Mundy*, 11 So. 2d 398, 400 (La. 1942) ("The levying of dues by the Bar Association in a state which has adopted the so-called integrated bar is merely a form of levying a license tax upon the right to practice law."). The Plaintiff cites a footnote from *Home Builders* for the proposition that *In re Mundy* is "not relevant" because it did not involve the Tax Injunction Act. Doc. 10, p. 17 (citing 143 F.3d at 1010 n.10). The footnote relied on by Plaintiff simply observes that a charge may be a tax regardless of its label. Thus, "dues" may be a tax. In fact, *Home Builders* confirms that, when disposing of a case under the Tax Injunction Act, cases from other contexts may be "helpful." 143 F.3d at 1011 n.18.

[3] *See Lewis v. LSBA*, 792 F.2d 493, 498 (5th Cir. 1986) (citing *In re Mundy*, 11 So. 2d 398); *see also Lipscomb v. Columbus Mun. Separate School Dist.*, 269 F.3d 494, 500 n.13 (5th Cir. 2001) (Although federal law governs the determination of what is a "tax," federal courts can take note of determinations of a state's Supreme Court).

of these statements is true of LSBA dues. A variety of programs and services of benefit to the entire state of Louisiana are provided through the flow of revenue provided by LSBA dues,[4] and this mandatory payment of dues by attorneys was imposed by the Louisiana Legislature in 1940 when the Legislature "memorialized" the Supreme Court to create the LSBA, imposed a mandatory membership requirement, and authorized the collection of member dues.[5]

Contradictorily, the Plaintiff presents LSBA dues as a "regulatory fee" because they "cover the LSBA's regulatory expenses,"[6] but then simultaneously asserts that the LSBA does not function "as a regulatory body."[7] Given that the Complaint affirmatively alleges that the LSBA is not "a regulatory body,"[8] the Plaintiff's contention that jurisdiction exists because LSBA dues are actually a "regulatory fee" is both inconsistent and disingenuous.

The Plaintiff's contention that LSBA dues are not a tax is the sole basis for his opposition to the Defendants' arguments for dismissal under the Tax Injunction Act, comity, or exhaustion. Accordingly, if this Court, like the Louisiana Supreme Court and the Fifth Circuit, concludes that LSBA dues are a tax, the Complaint should be dismissed for lack of subject matter jurisdiction.

B. The Plaintiff has not presented this Court with an Article III case or controversy.

The Plaintiff's response to the Defendants' argument that he has not suffered a constitutionally cognizable injury is crystallized by his assertion: "It is none of Defendants' business *why* Plaintiff does not wish to associate with the LSBA or fund its speech."[9] To the contrary, it is the province of the Court to inquire whether the Plaintiff has suffered the invasion

[4] Among programs of benefit to the public are the LSBA's mediation and arbitration services, the client assistance fund, and the member insurance program, all as discussed in the Defendants' Memorandum in Support of their Motion to Dismiss under Rule 12(b)(1). Doc. 17, pp. 9–10.
[5] *See* La. R.S. 37:211 Reporter's Notes – 1950 (discussing Sections 2- 3 of Act No. 54 of 1940).
[6] Doc. 19, p. 16.
[7] Doc. 19, p. 8.
[8] Doc. 1, ¶ 31.
[9] Doc. 19, p. 22 (emphasis original).

of a legally protected interest that is both (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citations, quotations, and modifications omitted). "[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III." *Id.* Simply having paid bar dues does not give the Plaintiff Article III standing because he has suffered no concrete or particularized alleged injury, and any alleged future injury to him is not actual or imminent. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006).

"Not wishing" to pay dues to a mandatory bar association is not a constitutionally sufficient injury because it describes no actionable impingement of the First Amendment under *Lathrop*.[10] *See* 367 U.S. 820 (plurality); *accord id.* at 849 (Harlan, J., and Frankfurter, J., concurring); *id.* at 865 (Whittaker, J., concurring). In order to find that the Plaintiff has been injured merely by having to join a bar association and pay dues in order to practice law, this Court would need to depart from this sound precedent.

Neither does the Plaintiff suffer an actual, concrete injury whenever the LSBA engages in any speech whatsoever; the Plaintiff, in attempting to assert an objection to the LSBA's speech, must demonstrate that he has been met with procedures that were insufficient to protect his rights. In *Keller v. State Bar of California*, 496 U.S. 1, 17 (1990), the Supreme Court unanimously held that integrated bar associations can use mandatory dues to fund speech activities, as long as a mechanism exists by which members can object to the use of their dues for any speech-related purposes that are not germane the bar association's legitimate interests and then receive a refund. It is undisputed that the LSBA has *Keller* objection procedures in place. The Plaintiff, however, has never lodged a *Keller* objection, successfully or unsuccessfully. The Plaintiff can point to no

[10] Doc. 19, p. 21.

instance in which he or any other attorney was injured because the LSBA's *Keller* procedures were insufficient—which makes his "injury" speculative and not concrete. The Plaintiff in this case does not know that he "could not have presented his claims through the LSBA's *Keller* procedures" because he never tried to do so.

Take, for example, the first LSBA policy position discussed in the Complaint—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."[11] This resolution was approved in January 2000—over nineteen years ago. The Plaintiff never filed a *Keller* objection to this resolution. The Plaintiff is not presently injured by a position taken nineteen years ago to which he never objected.

The Plaintiff further conflates that he had to object to the LSBA's non-germane speech to establish injury with a requirement that he had to object to the "viewpoint" of that speech.[12] Regardless of whether a plaintiff could suffer a cognizable injury by being made to fund speech with which he agrees (and, to be clear, the Defendants assert that there is no concrete personal injury under these circumstances), it should be beyond argument that the Plaintiff is not injured when procedures exist for him to object to and obtain a refund for speech he finds "political or ideological" for whatever reason, but he has made no attempt to use these procedures.

Not only is there no past injury to the Plaintiff, there also is no future imminent injury that would give him standing. The Plaintiff presupposes that a resolution from the LSBA House of Delegates suspending the Legislation Committee and all related activities until January 2020

[11] Doc. 1, ¶ 41.
[12] Doc. 19, p. 21.

(which resolution was enacted prior to the filing of the Complaint in this action) will not prevent the LSBA from engaging in legislative advocacy after that date in the future. But any alleged injury based on future conduct is "conjectural or hypothetical." *Lujan*, 504 U.S. at 560.

Moving beyond standing, in opposing the Defendants' arguments on ripeness and mootness, the Plaintiff offers only three conclusory sentences that fail to either (a) explain how past conduct of the LSBA can present a present case or controversy;[13] or (b) identify a political or non-germane position being advanced by the LSBA that the Court is being called upon to enjoin.[14] Instead, the Plaintiff offers that he seeks to enjoin (in general) the collection of LSBA dues, and alternatively the collection of these dues "in the absence of sufficient safeguards to protect his First Amendment rights."[15] But payment of dues alone does not create an legally cognizable injury under *Lathrop*, and his alternative "absence of sufficient safeguards" claim is both speculative and unripe. Given that the Legislative Committee's activities have been suspended, the Plaintiff identifies no potentially non-germane position being advanced by the LSBA that would require "sufficient safeguards." The Plaintiff thus has not presented an Article III case or controversy for this Court's resolution, and his Complaint should be dismissed.

C. *Burford* abstention is appropriate because the Plaintiff's claims involve issues of substantial state interest.

Burford abstention is proper "where timely and adequate state-court review is available and where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public

[13] "Where the activities sought to be enjoined have already substantially occurred and the [court] can not undo what has already been done, the action is moot." *Fla. Wildlife Fed'n v. Goldschmidt*, 611 F.2d 547, 549 (5th Cir. 1980).
[14] "Ripeness separates those matters that are premature because the injury is speculative and may never occur from those that are appropriate for judicial review." *United Transp. Union v. Foster*, 205 F.3d 851, 857 (5th Cir. 2000).
[15] Doc. 19, p. 25.

concern." *Wilson v. Valley Elec. Membership Corp*., 8 F.3d 311, 314 (5th Cir. 1993) (citations and alterations omitted). "The *Burford* line of cases reveals several factors that are relevant in making this determination: (1) whether the cause of action arises under federal or state law (2) whether the case requires inquiry into unsettled issues of state law *or* into local facts (3) the importance of the state interest involved (4) the state's need for a coherent policy in that area and (5) the presence of a special state forum for judicial review." *Id.* (emphasis supplied) (citations omitted). The Plaintiff offers only cursory attention to each of the *Burford* abstention factors, presumably because they all weigh against him.

Plaintiff does not address or rebut the fact that, relative to the first factor, his core claim arises under state law because it "is inherently anticipatory" of a state court proceeding relative to his eligibility to practice law had he refused to comply with his obligation to pay dues. *See NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389, 395 (5th Cir. 2015). Instead, the Plaintiff argues in general terms that this Court should not abstain because this case presents a "federal question."[16] This argument misses the mark. *Burford*'s first factor looks to the nature of the claim, not its defenses. Federal courts should not seize litigation from state courts merely because a federal-law defense is brought before the state court begins the case under state law. *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 248 (1952).

Second, the Plaintiff does not deny that this case involves distinctly local facts and law relative to the history of the LSBA, the purposes for which it was established, the positions it has taken on state legislation, the nature of such legislation, and the relationships between these factual and legal issues. Instead, the Plaintiff summarily states that *Burford* abstention requires "difficult

[16] Doc. 19, p. 26.

questions of state law" that are absent here.[17] The Defendants disagree. Although the Plaintiff studiously avoids identifying a particular legislative position to which he objects, the complexity of the legislation at issue often will present difficult questions of state law. In any event, "difficult questions of state law" are not a requirement for *Burford* abstention. *See BT Inv. Managers, Inc. v. Lewis*, 559 F.2d 950, 955 (5th Cir. 1977) ("*Burford*-type abstention requires neither the presence of a state issue nor unclarity in pertinent state law. Rather, a court abstaining under *Burford* relegates a federal issue to state court adjudication because the federal issue touches some overriding state interest . . . .").

Third and fourth, the Plaintiff does not and cannot contest that bar governance has long been the province of State regulation and is recognized as an important State interest sufficient to support abstention. *See Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982); *Nationwide Mut. Ins. Co. v. Unauthorized Practice of Law Comm., of State Bar of Texas*, 283 F.3d 650, 655 (5th Cir. 2002); *Castellanos-Bayouth v. Puerto Rico Bar Ass'n,* 483 F. Supp. 2d 167, 173 (D.P.R. 2007). Fifth, with respect to the availability of a state forum for judicial review, the Plaintiff cites *Keller* for the proposition that the U.S. Supreme Court "considers federal review of state rules governing the practice of law to be appropriate."[18] This citation does not support the Plaintiff's position. In both *Keller* and in *Lathrop*, the plaintiffs sought relief in their respective state court systems before seeking review by the U.S. Supreme Court. To the extent

[17] Doc. 19, p. 26.

[18] *See* Doc. 19, p. 26 ("Moreover, the Supreme Court has repeatedly shown that it considers federal review of state rules governing the practice of law to be appropriate."). In his briefing on the merits, the Plaintiff similarly states that the Supreme Court instructed the lower courts that they could consider the constitutionality of the conduct at issue in his Complaint. Doc. 20, p. 5 (selectively quoting *Keller*, 496 U.S. at 17 (1990)). But the Supreme Court's statement specifically refers to *state courts*, not simply "lower courts." *See Keller*, 496 U.S. at 17 ("The state courts remain free, of course, to consider this issue on remand.").

the Court finds that it otherwise could exercise subject matter jurisdiction, the state's important interest in bar governance weighs heavily in favor of *Burford* abstention.

D. The Eleventh Amendment and legislative immunity bar the Plaintiff's claims.

The Plaintiff argues that the *Ex Parte Young* exception to the Eleventh Amendment applies to allow his claims even though the Defendants are not threatening or about to commence proceedings against him.[19] He is mistaken. The impending proceedings requirement comes directly from the text of *Ex Parte Young*, and the Defendants have not threatened and are not "about to commence proceedings" against the Plaintiff to enforce any of the statutes or rules addressed in his Complaint.[20] In *Consumers Union*, the plaintiff, who was attempting to publish an attorney directory, proceeded under *Ex Parte Young* against the Supreme Court of Virginia because the Court had actually considered the issue at hand and determined that it would be enforcing, and not changing, the challenged attorney advertising rule. *See Supreme Court of Virginia v. Consumers Union of U. S., Inc.*, 446 U.S. 719, 726 (1980) (describing how the defendants obtained a continuance of the federal suit to "permit the Virginia Court and the State Bar to consider amending the State Bar Code to conform to the ABA amendments" but "the court declined to adopt the amendments"). By contrast, the Plaintiff has never submitted his claims for the LSBA's or the Louisiana Supreme Court's consideration.[21] The Louisiana Supreme Court has, in the past, assessed the constitutionality of its own rules, and even overturned one of those rules

[19] *Ex Parte Young* permits a plaintiff to bring a suit for prospective injunctive relief only against "individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, *and who threaten and are about to commence proceedings*, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action." *Ex Parte Young*, 209 U.S. 123, 155–56 (1908) (emphasis supplied).

[20] *See* Doc. 1, ¶¶ 22–23.

[21] *Consumers Union* also supports the argument that the Plaintiff lacks standing. *See* 446 U.S. at 734 n.12; *id.* at 737 n.15.

on First Amendment grounds. *See In re Warner*, 2005-1303 (La. 4/17/09), 21 So. 3d 218, 262. That it would not do so here, and instead would bring an enforcement action, is pure speculation.[22] The Eleventh Amendment, therefore, divests this Court of jurisdiction over the Plaintiff's claims, and the *Ex Parte Young* exception as to his claims for prospective injunctive relief does not apply.

Similarly, because the Plaintiff challenges only the *potential* enforcement of laws and rules related to the collection of LSBA dues, his Complaint is directed to Court (and the LSBA, as its agent) in its *legislative* capacity rather than its enforcement capacity. The Plaintiff states that "he seeks an injunction to bar Defendants from collecting dues under the current rules, which lack sufficient safeguards,"[23] but fails to acknowledge that this challenge is legislative in nature because the basis for the Plaintiff's action is the LSBA and the Court's issuance of, or failure to amend, the rules regarding bar dues. *See Consumers Union*, 446 U.S. at 734 ("If the sole basis for appellees' § 1983 action against the Virginia Court and its chief justice were the issuance of, or failure to amend, the challenged rules, legislative immunity would foreclose suit against appellants."). The Plaintiff's claims thus are barred by the Eleventh amendment and legislative immunity.

III. Conclusion

LSBA dues are a state-imposed tax, no Article III case or controversy has been presented, abstention is appropriate, and the Eleventh Amendment bars the Plaintiff's claims. The Defendants respectfully request that the Complaint be dismissed without prejudice for lack of subject matter jurisdiction.

---

[22] In *LeClerc v. Webb*, 419 F.3d 405, 413 (5th Cir. 2005), the Fifth Circuit "excused" certain plaintiffs from pursuing state remedies relative to a bar admission policy because: (1) one of the plaintiffs had done so unsuccessfully; (2) the policy's "flat prohibition" on the requested relief made state remedies futile; and (3) the Louisiana Supreme Court had recently rejected a challenge to the policy that was factually and legally similar. None of these factors is present here.

[23] Doc. 19, p. 29.

Respectfully submitted,

/s/ Eva J. Dossier
Richard C. Stanley, 8487
Eva J. Dossier, 35753
Kathryn W. Munson, 35933
STANLEY, REUTER, ROSS, THORNTON & ALFORD, L.L.C.
909 Poydras Street, Suite 2500
New Orleans, Louisiana 70112
Telephone: (504) 523-1580
Facsimile: (504) 524-0069
Counsel for the Louisiana State Bar Association, Louisiana Supreme Court, Chief Justice Johnson, Justice Crichton, Justice Genovese, Justice Clark, Justice Hughes, and Justice Weimer

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RANDY BOUDREAUX	**CIVIL ACTION**
VERSUS	**No. 19-11962**
LOUISIANA STATE BAR ASSOCIATION, ET AL.	**SECTION I**

ORDER

Considering the Defendants' motion[1] for leave to file a reply memorandum in support of their Motion to Dismiss Pursuant to Rule 12(b)(1),[2]

IT IS ORDERED that the motion is **GRANTED.**

New Orleans, Louisiana, November _____, 2019.

LANCE M. AFRICK
UNITED STATES DISTRICT JUDGE

[1] R. Doc. No. ___.
[2] R. Doc. No. 10.