UNITED STATES DISTRICT COURT
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

DEFENDANTS' PRETRIAL MEMORANDUM

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Defendants, the Louisiana State Bar Association ("LSBA") and, in their official capacities, the Justices of the Louisiana Supreme Court, through undersigned counsel, submit this pretrial memorandum for the June 21, 2022 trial of this matter.[1]

I. OVERVIEW

The Plaintiff, Mr. Randy Boudreaux, filed this lawsuit to end his mandatory membership in the LSBA. His Complaint was originally dismissed under Rules 12(b)(1) and 12(b)(6), but then reinstated on appeal and remanded for further proceedings. In its remand decision, the Fifth Circuit expressly stated: "Discovery may bear out that LSBA does not actually engage in any non-germane activity."[2] The Fifth Circuit was correct. Discovery has borne out that the LSBA does not engage in non-germane activity. The core of this case is the Plaintiff's belief that integrated bars should be unconstitutional. That extreme position conflicts with Supreme Court jurisprudence and the law developed concurrently with this case.[3]

The Plaintiff's primary claim is that compelled membership in the LSBA violates his First Amendment rights, even if the LSBA engages only in germane speech ("primary claim"). *McDonald* and Supreme Court precedent squarely reject this assertion, and the Supreme Court has consistently denied petitions for certiorari that attempt to challenge this precedent.[4] The Plaintiff's primary claim thus need not long delay the Court because it fails as a matter of law.

The Plaintiff alternatively argues that compelled membership in the LSBA violates his First Amendment rights because the LSBA has engaged in legislative activity that the Plaintiff alleges

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[1] The Defendants respectfully submit that the Court may consider this memorandum in lieu of an opening statement at trial.
[2] *Boudreaux v. Louisiana State Bar Ass'n*, 3 F.4th 748, 756 (5th Cir. 2021).
[3] *See McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021); *Lathrop v. Donohue*, 367 U.S. 820 (1961); *Keller v. State Bar of California*, 496 U.S. 1 (1990); and discussion *infra* § III.
[4] *See McDonald v. Firth*, 142 S. Ct. 1442 (2022); *Schell v. Darby*, 142 S. Ct. 1440 (2022); *Crowe v. Or. State Bar*, 142 S. Ct. 79 (2021); *Jarchow v. State Bar of Wis.*, 140 S. Ct. 1720 (2020).

is non-germane ("alternative claim"). The alternative claim fails for multiple independent reasons. To begin with, the claim is not justiciable. The Plaintiff lacks standing, and his claim is speculative and hypothetical, rather than ripe for determination. The alternative claim is also untimely and moot. The LSBA conduct he challenges—former legislative positions and now-rescinded policies of the House of Delegates—occurred in the past and is not ongoing. Relatedly, the Plaintiff's alternative claim does not fit within the *Ex parte Young* exception to Eleventh Amendment immunity because the conduct he challenges is not ongoing and the relief he seeks is retrospective.

Because his alternative claim in the Complaint relative to legislative activity is not justiciable, the Plaintiff has recently adopted a new alternative claim attacking assorted social media posts relative to topics like attorney wellness ("new alternative claim"). The evidence will show that the Plaintiff's new alternative claim also lacks any merit. The Plaintiff's attempt to cobble together a claim based on, *e.g.*, the LSBA's notice to attorneys that they can voluntarily participate in a Secret Santa program if they wish to do so, falls flat. Even if these activities are expressive activity, they are germane, *de minimis*, and do not implicate any concern of constitutional import. Moreover, these activities are not "the major activity" of the LSBA, and the LSBA's *Hudson* procedures are available as a backstop to remedy any alleged impingement.

Finally, and although the Court need not reach this step, the balance of equities does not favor relief on the new alternative claim. The LSBA has an integral role in Louisiana's regulation of the profession and improvement of legal services, and a few cents (if that) of dues expenditures to notify members of volunteer opportunities or remind them of wellness programming does not warrant dismantling the bar. The Defendants will demonstrate at trial that the Plaintiff is not entitled to relief.

II. STANDARD OF LAW

To obtain a permanent injunction, "a plaintiff must demonstrate: (1) that [he] has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Merritt Hawkins & Associates, L.L.C. v. Gresham*, 861 F.3d 143, 157–58 (5th Cir. 2017) (citations and quotations omitted) (quoting *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). "Injunctive relief is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries the burden of persuasion." *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985).

Even if a movant proves its case on the merits, a district court retains equitable discretion to deny injunctive relief. *Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 32 (2008) ("An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course."); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) ("[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law."). A court's equitable discretion "must be exercised consistent with traditional principles of equity . . . ." *eBay, Inc.*, 547 U.S. at 394. The court must "pay particular regard for the public consequences in employing the extraordinary remedy of injunction," *Winter*, 555 U.S. at 24, and "the balance of equities and consideration of the public interest . . . are pertinent in assessing the propriety of any injunctive relief, preliminary or permanent." *Id.* at 32.

III. THE PLAINTIFF'S PRIMARY CLAIM "MISSES THE MARK."

The Plaintiff's primary claim is that if the LSBA engages in any speech that could be construed as "political or ideological," then he is entitled to relief, whether the LSBA speech is germane or not. That extreme position, of course, is inconsistent with Supreme Court precedent and the law developed concurrently with this case. On appeal, the Fifth Circuit heard this case with *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021), another of the concerted litigation attacks on integrated bar associations. The Texas plaintiffs there argued that all "activities of a 'political or ideological' nature" necessarily are non-germane, but the Fifth Circuit held that such a viewpoint "misses the mark." *Id.* at 247. The Fifth Circuit held only the non-germane activities of the Texas Bar actionable because controlling precedent "contemplates that some political or ideological activities might be germane." *Id.* Indeed, both *Lathrop v. Donohue*, 367 U.S. 820 (1961), and *Keller v. State Bar of California*, 496 U.S. 1 (1990), stand for that proposition. Moreover, the U.S. Supreme Court has repeatedly denied petitions for certiorari that raise the same claim as the Plaintiff here. *See Firth v. McDonald*, 142 S. Ct. 1442 (Apr. 4, 2022); *Schell v. Darby*, 142 S. Ct. 1440 (Apr. 4, 2022); *Crowe v. Or. State Bar*, 142 S. Ct. 79 (2021); *Jarchow v. State Bar of Wis.*, 140 S. Ct. 1720 (2020).

IV. THE PLAINTIFF'S ALTERNATIVE CLAIM IS NOT JUSTICIABLE.

To succeed on the merits, the Plaintiff must establish at trial that he has justiciable, timely claims based on alleged non-germane speech for which the LSBA's *Hudson* procedures provide an insufficient remedy, and which constitute the major activity of the bar. The Plaintiff's alternative claim fails to satisfy this standard for multiple independent reasons.

A. The Plaintiff's Alternative Claim Is Moot.

The Complaint identifies two categories of allegedly non-germane speech: actions of the Legislation Committee and the House of Delegates' legislative policy positions ("HOD Policies") previously used to assess potential legislation. The evidence at trial will show, however, that the Legislation Committee and the HOD Policies on which it relied have been rendered obsolete, and the Complaint is moot.[5]

"A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (some internal quotation marks omitted). Even if "the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit," the case is moot if the dispute "is no longer embedded in any actual controversy about the plaintiffs' particular legal rights." *Id.* (quotation omitted).

A defendant who voluntarily ceases allegedly unlawful conduct bears the burden of showing "that the challenged behavior cannot reasonably be expected to recur." *Id.* at 96. A plaintiff cannot avoid dismissal based on mootness, however, merely by invoking "conjectural or hypothetical speculation" about future events. *See id.* at 97. Relatedly, the fact that a defendant engaged in allegedly unlawful conduct in the past does not show that such conduct will recur. *See id.* The Supreme Court has "never held that a plaintiff has standing to pursue" non-monetary relief "merely on the basis of being 'once bitten.' Quite the opposite." *Id.* at 98 (citing *Los Angeles v.*

[5] Previously, the LSBA engaged in germane political speech through its Legislation Committee—a standing committee created by the House of Delegates—which in turn was guided by policies established through the House of Delegates. The Legislation Committee no longer exists, however, and the LSBA has rescinded the policies about which the Plaintiff complained.

Lyons, 461 U.S. 95, 109 (1983) (holding there was no justiciable controversy to support a declaratory judgment where plaintiff had once been subjected to a chokehold in the past)).

"Although voluntary cessation of a challenged activity does not ordinarily deprive a federal court of its power to determine its legality, courts are justified in treating a voluntary governmental cessation of potentially wrongful conduct with solicitude." *Turner v. Texas Dep't of Crim. Just.*, 836 F. App'x 227, 229 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 2681 (2021) (citing *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 325 (5th Cir. 2009)). "Such self-correction provides a secure foundation for a dismissal based on mootness so long as it appears genuine." *Id.* (citing *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988)). Thus, "without evidence to the contrary, courts assume that formally announced changes to official policy are not mere litigation posturing." *Id.* at 229.

In *McDonald*, the Fifth Circuit reconfirmed that integrated bar associations are constitutional and provided an extensive analysis of the types of speech that a bar association constitutionally may fund through mandatory dues (i.e., speech that is "germane" to the association's legitimate purposes). 4 F.4th at 229. Less than one week later, the LSBA's Board of Governors, using the emergency authority granted to it by the By-Laws, voted to suspend the Legislation Committee and all legislative activities until the House of Delegates convened for its January 2022 meeting. As LSBA President H. Minor Pipes, III, explained: "*McDonald* unless modified is governing law, and the LSBA intends to comply with it. Suspending all legislative activities allow[ed] the LSBA to review *McDonald* and ensure that any future activity complies with the guidance provided by the 5th Circuit."[6]

[6] Defense Exhibit 52. Exhibit numbers herein refer to those that will be used at trial, consistent with the Defendants' bench books.

Then, in September 2021, the Louisiana Supreme Court independently took further action by enacting Rule XVIII, § 6. That rule codifies the constitutional germaneness standard and shifts responsibility for legislative positions and policy from the Legislation Committee and House of Delegates respectively to the Board of Governors. The new rule further limits such activities to "constitutionally germane" issues related to the purposes stated in the Rule. Accordingly, the House of Delegates (and the Legislation Committee) are no longer responsible for the LSBA's legislative policy and advocacy. Instead, under Supreme Court Rule XVIII, § 6, the Board of Governors is the sole LSBA entity that can perform such functions, and its legislative activities are limited to constitutionally germane topics such as those identified as permissible in *McDonald*.[7]

Even more recently, the LSBA again has stated its intent to comply with *McDonald* and Rule XVIII, § 6 and has taken action consistent with that intent. Indeed, the LSBA, its President, its Board of Governors, and its Bar Governance Committee all have made abundantly clear that the prior legislative practices and HOD Policies addressed in the Complaint are no longer effective. The LSBA demonstrated this commitment by the passage of three resolutions:

- On October 19, 2021, the Board of Governors unanimously passed a resolution recognizing that the LSBA is bound by Rule XVIII, § 6, and suspending "any [LSBA] activity not within its scope, including but not limited to any action with respect to legislative policy provisions previously adopted by the House of

[7] Defense Exhibit 3. The Complaint also is moot because the Plaintiff affirmatively declined the opportunity to amend his Complaint to add allegations relative to more recent conduct and the current Justices of the Louisiana Supreme Court. *See* R. Doc. 59. Rule 15(d) of the Federal Rules of Civil Procedure "is particularly apt for cases where an intervening change in administration renders ambiguous a complaint seeking prospective relief against public officers." *Am. C.L. Union of Mississippi, Inc. v. Finch*, 638 F.2d 1336, 1347 (5th Cir. 1981). When plaintiffs fail to allege in their complaint that a "new administration will continue the [unlawful] practices of the old," they should "be permitted to file [a] supplemental pleading. If they do not do so within a reasonable time, their claims for prospective relief must be dismissed as moot." *See id.*

Delegates (which provisions are now obsolete and no longer effective under the text of the Rule)."[8]

- On October 20, 2021, the Bar Governance Committee unanimously voted to propose a resolution to the House of Delegates confirming "that existing legislative policy positions be rescinded to more accurately reflect current procedures and remove obsolete policies that are no longer effective." The House of Delegates approved this resolution on January 22, 2022.[9]

- On October 20, 2021, the Bar Governance Committee unanimously voted to propose a resolution to the House of Delegates revising the LSBA's By-Laws "to more accurately reflect current operating practices and remove outdated and obsolete provisions that are no longer effective." The House of Delegates approved this resolution on January 22, 2022.[10]

Such resolutions only confirm what the Louisiana Supreme Court mandated in Rule XVIII, § 6: the conduct at issue in the Complaint (lobbying by the Legislation Committee and the Legislation Committee's reliance on HOD Policies) will not and cannot recur. And, eliminating any doubt, the Board of Governors—which is the governing body charged by Rule XVIII, § 6, with assessing legislative activity—has confirmed its commitment to these limitations. *See Sossamon*, 560 F.3d at 325 ("[The Fifth Circuit] will not require some physical or logical impossibility that the challenged policy will be reenacted absent evidence that the voluntary cessation is a sham for continuing possibly unlawful conduct."). The Legislation Committee's activities, including its reliance on the HOD Policies, cannot reasonably be expected to recur.

The LSBA's legislative activities, therefore, have changed materially to conform to *McDonald*. *McDonald* and Rule XVIII, § 6, render obsolete the Legislation Committee and the HOD Policies that guided it. In short, the Plaintiff "has received what he wanted." *Turner*, 836 F. App'x at 229. The LSBA's self-correction "simply accords all the relief demanded by the plaintiff"

[8] Defense Exhibit 53.
[9] *See* R. Doc. 71-2.
[10] *See* R. Doc. 71-1.

such that "there is no point in proceeding to decide the merits . . . ." *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 246 (5th Cir. 2006) (quoting 13C Wright & Miller, FED. PRAC. & PROC. CIV. § 3533.2 (3d ed.)). Put differently, "[T]here is no need to enjoin a defunct practice or policy." *See Boyd v. Stalder*, No. CIV.A. 03-1249-P, 2006 WL 3813711, at *6 (W.D. La. Dec. 27, 2006) (citing *Heath v. Brown*, 807 F.2d 1229, 1231 (5th Cir. 1987) (claims for declaratory and injunctive relief mooted by change in challenged bank policy); *Prison Legal News v. McDonough*, 200 F. App'x 873, 878 (11th Cir. 2006) (change in prison publication policy rendered injunctive claim moot); *Jaami v. Compton*, No. 00-5304, 2000 WL 1888696, at *2 (6th Cir. Dec. 19, 2000) ("This change in the prison policy renders Jaami's requests for declaratory and injunctive relief moot because no need exists for this court to issue an injunction when prison authorities have voluntarily changed the allegedly unconstitutional practice.")).

With respect to the allegations in the Complaint, "this case has lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract questions of law." *See Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (quotations omitted). The Plaintiff's request for injunctive relief rests on a hypothetical and facially implausible scenario where: (1) during a hypothetical future legislative session, a hypothetical LSBA member may suggest that the LSBA take a hypothetical position on a hypothetical piece of legislation; (2) that hypothetical legislative position will be non-germane; (3) the Board of Governors will disregard Supreme Court Rule XVIII, § 6 and *McDonald* and will vote to adopt that hypothetical legislative position; and (4) adopting that position will violate the Plaintiff's First Amendment rights because the hypothetical notice provided by the LSBA relative to the hypothetical legislative position allegedly will not comply with the requirements of *Hudson* and *McDonald*. To state the scenario shows that this conjecture is a bridge too far.

As explained above, mootness cannot be avoided on a "once bitten, twice shy" theory. *Already, LLC*, 568 U.S. at 98 (citing *Lyons*, 461 U.S. at 109). Moreover, the changes to Rule XVIII, the public commitment of the LSBA's president, the resolutions of the Board of Governors and Bar Governance Committees memorializing the obsolescence of the Legislation Committee and HOD Policies, the resolutions of the HOD, and the testimony of the LSBA's Executive Director are unrebutted evidence of material change, and they are more than enough to show that the changes are genuine. Thus, "self-correction provides a secure foundation" that requires dismissal. *Turner*, 836 F. App'x at 229; *see also Save Our Aquifer v. City of San Antonio*, 108 F. App'x 863, 865 (5th Cir. 2004) ("As the ordinance that the referendum petition sought to challenge was repealed, however, no live case or controversy concerning the City's procedure is currently before the court" when there was no reasonable expectation to believe that the City's procedure would be used to enact the same ordinance again).

The Louisiana Supreme Court's rule change and subsequent actions by the LSBA to implement this rule change demonstrate that the LSBA will not be engaging in activities that exceed the boundaries of germaneness identified in controlling precedent. *See also McDonald*, 4 F.4th at 253 n.41 (confirming that a plaintiff "*can* be compelled to join the Bar if it ceases its non-germane activities") (emphasis in original). There is no ongoing unconstitutional activity threatening the Plaintiff's First Amendment rights, and his Complaint is moot.

B. The Eleventh Amendment Bars the Plaintiff's Alternative Claim.

Even if the Plaintiff's alternative claim is not moot, the Eleventh Amendment bars it. *Freedom From Religion Found. v. Abbott*, 955 F.3d 417, 425-26 (5th Cir. 2020) (citing *Green*, 474 U.S. at 68-69, for the proposition that "the Eleventh Amendment barred a claim for declaratory relief once the claim for injunctive relief was rendered moot").

"In most cases, Eleventh Amendment sovereign immunity deprives federal courts of jurisdiction to hear private suits against states." *Id.* at 424 (citation omitted). The Plaintiff relies on *Ex parte Young*, under which a litigant may sue a state official in his official capacity if the lawsuit seeks prospective relief to redress an ongoing violation of federal law. "Merely requesting injunctive or declaratory relief is not enough; sovereign immunity does not turn entirely on the relief sought." *Green Valley Special Util. Dist. v. City of Schertz, Texas*, 969 F.3d 460, 471 (5th Cir. 2020). Accordingly, *"*[i]n order to determine whether relief is [prospective as required] under the *Ex parte Young* exception, the court should look to the substance rather than to the form of the relief sought, and consider the policies underlying the decision in *Ex parte Young*." *See Freedom From Religion Found.*, 955 F.3d at 425 (quotations omitted). When a declaratory judgment is "backwards-looking," it is "tantamount to an award of damages for a past violation of law, even though styled as something else." *Id.* Similarly, a claim for injunctive relief predicated solely on past conduct fails to meet *Ex parte Young*'s "ongoing violation" requirement. *Id.* at 424 (quotations omitted).

The Eleventh Amendment bars the Plaintiff's claim for a declaratory judgment on the LSBA's past lobbying activities. Any declaratory judgment on those claims would be impermissible retrospective relief. *See id.* at 424; *see also Hughes v. Johnson*, No. CV 15-7165, 2016 WL 6124211, at *4 (E.D. La. Oct. 20, 2016) (Vance, J.) ("In other words, plaintiffs seek declarations that Defendant Justices' *past* conduct violated federal law. These claims are therefore retrospective, and *Young* will not save them.") (emphasis in original). Further, the Plaintiff's argument that a declaratory judgment is necessary to guide the Defendants' future conduct fails because "deterrence" of hypothetical future First Amendment violations is "insufficient to overcome the dictates of the Eleventh Amendment." *Freedom From Religion Found.*, 955 F.3d at

426. The criticized conduct has ceased. Thus, "to the extent the controversy is not simply moot[,] the claim is barred by Eleventh Amendment immunity." *Hughes*, 2016 WL 6124211, at *5.

C. The Plaintiff Lacks Standing to Assert His Alternative Claim.

Although the Fifth Circuit ruled that the Plaintiff's *allegations*[11] supported the determination that he had standing at the inception of this lawsuit, later developments have deprived the Plaintiff of standing at this late stage of litigation.

"Most standing cases consider whether a plaintiff has satisfied the requirement when filing suit, but Article III demands that an 'actual controversy' persist throughout all stages of litigation." *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013). *Stringer v. Whitley*, 942 F.3d 715, 720-21 (5th Cir. 2019), summarizes the standing requirements for a plaintiff seeking injunctive and declaratory relief:

> Because injunctive and declaratory relief "cannot conceivably remedy any past wrong," plaintiffs seeking injunctive and declaratory relief can satisfy the redressability requirement only by demonstrating a continuing injury or threatened future injury. That continuing or threatened future injury, like all injuries supporting Article III standing, must be an injury in fact. To be an injury in fact, a threatened future injury must be (1) potentially suffered by the plaintiff, not someone else; (2) "concrete and particularized," not abstract; and (3) "actual or imminent, not 'conjectural' or 'hypothetical.'" The purpose of the requirement that the injury be "imminent" is "to ensure that the alleged injury is not too speculative for Article III purposes." For a threatened future injury to satisfy the imminence requirement, there must be at least a "substantial risk" that the injury will occur.

(footnotes and citations omitted). The Plaintiff fails to meet this standard.

[11] The Defendants recognize that the Fifth Circuit also ruled that the Plaintiff need not allege that he personally disagrees with the speech at issue. The Defendants respectfully reserve the right to re-urge the argument that the Plaintiff lacks standing to challenge activity with which he agrees (or with respect to which he takes no position) if this case is ever considered by the Fifth Circuit en banc or the U.S. Supreme Court.

As addressed above, after *McDonald*, the Louisiana Supreme Court issued Rule XVIII, § 6; the LSBA amended its By-Laws; and the LSBA repealed the HOD Policies to which the Plaintiff objected. The LSBA has not engaged in any legislative activity post-*McDonald* to which the Plaintiff objects. Given these developments, and as discussed *supra* § IV(A) the Plaintiff's claim relative to non-germane legislative activity is purely hypothetical. The Plaintiff's proffered injury is therefore too speculative to support standing. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 414 n. 5 (2013) ("[T]hreatened injury must be certainly impending to constitute injury in fact, and . . . allegations of possible future injury are not sufficient. . . . Plaintiffs cannot rely on speculation about the unfettered choices made by independent actors not before the court." (internal quotation marks, citations, and alterations omitted); *Friends of St. Frances Xavier Cabrini Church v. Fed. Emergency Mgmt. Agency*, 658 F.3d 460, 466 (5th Cir. 2011) ("Unless a party seeking a remedy can show direct injury, this court will deny standing.").

The Plaintiff can no longer rely on the allegations in his Complaint to establish standing. "Standing also does not follow from the conclusion that the injunctive relief sought by a plaintiff would prevent the plaintiff from suffering the same injury in the future, which is always true when a plaintiff seeks an injunction prohibiting a defendant from repeating an action that injured the plaintiff in the past." *See Stringer*, 942 F.3d at 721. The evidence at trial will reveal that, even if the Plaintiff may have had standing at this lawsuit's inception, the Plaintiff now lacks standing to challenge the LSBA's legislative activities.

D. The Plaintiff's Alternative Claim Is Not Ripe.

For reasons that overlap with the other justiciability deficiencies in this lawsuit, the Plaintiff's alternative claim is not ripe.

The Fifth Circuit has instructed:

> A court should dismiss a case for lack of "ripeness" when the case is abstract or hypothetical. The key considerations are "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required.

Orix Credit All., Inc. v. Wolfe, 212 F.3d 891, 895 (5th Cir. 2000) (quotation omitted). Under the ripeness inquiry, "[w]hether particular facts are sufficiently immediate to establish an actual controversy is a question that must be addressed on a case-by-case basis." *Id.* at 896. As shown above, the Plaintiff lacks any non-speculative facts that would support his challenge to legislative activity. The claim is therefore not ripe.

Further, the Plaintiff's claims relative to the now-rescinded HOD policies require special mention. When these policies existed, their function was to provide potential general criteria by which the now-obsolete Legislative Committee could assess whether to take a position on legislation. If the Plaintiff wishes to challenge a legislative position, it is that actual position that the LSBA has taken—and not the announcement of criteria that the LSBA may use to assess whether to take a position in the future—that constitutes expressive conduct. The HOD Policies by themselves, however, are not actionable speech—rather, they are a notification of potential future speech. This provides another reason that the HOD Policy criticisms are not justiciable.

E. The Plaintiff's Alternative Claim Is Untimely.

The Plaintiff's alternative claim is time-barred because the criticized activity identified in the Complaint occurred more than one year before it was filed. The Complaint was filed on August 1, 2019, and alleges violations of 42 U.S.C. § 1983. Section 1983 claims pending in federal courts in Louisiana are subject to a one-year limitations period, which "begins to run from the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know

that he has been injured." *See Helton v. Clements*, 832 F.2d 332, 335 (5th Cir. 1987); *Elzy v. Roberson*, 868 F.2d 793, 794 (5th Cir. 1989). The Complaint alleges that the LSBA engaged in non-germane speech through legislative activities and HOD Policies. The challenges to the LSBA legislative positions identified in Plaintiff's Complaint are untimely because each position was taken either during or before the 2018 legislative regular session. Similarly, the challenges to the HOD Policies identified in Plaintiff's Complaint are untimely because each policy was passed before August 1, 2018.[12] Accordingly, the Plaintiff's challenges to the legislative activity and HOD Policies identified in the Complaint are untimely.[13]

V. THE ALTERNATIVE CLAIM AND THE NEW ALTERNATIVE CLAIM BOTH FAIL ON THE MERITS.

A. The Criticized Conduct Is Germane.

1. The Criticized Legislative Activities Were Germane, But They Are Over.

The criticized legislative activities were germane to improving the quality of legal services and regulating the practice of law.[14] All of the criticized bill positions, however, occurred in the past, under a process that no longer exists. In particular, and as described above, the House of Delegates (and the Legislation Committee) are no longer responsible for the LSBA's legislative policy and advocacy. Instead, under Supreme Court Rule XVIII, § 6, the Board of Governors is the sole LSBA entity that can perform such functions, and its legislative activities are limited to constitutionally germane topics such as those identified as permissible in *McDonald*. Similarly, the criticized HOD Policies were germane, but the LSBA rescinded them. The HOD has adopted

[12] Following remand, the Court offered the Plaintiff a chance to amend his Complaint and he affirmatively chose not to do so. *See* R. Doc. 57; R. Doc. 59.
[13] *See* R. Doc. 87-1, Appendix A to the Defendants' Proposed Findings of Fact and Conclusions of Law (identifying when the criticized conduct took place).
[14] *See* Defense Exhibit 44 (summarizing bases for LSBA positions).

new general policies,[15] and the Plaintiff has not challenged their germaneness under *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021). Thus, although the Court need not reach the alternative claim, the evidence will confirm that it fails on the merits.

2. The Activities Criticized in the New Alternative Claim Are Also Germane.

In his new alternative claim, the Plaintiff raises various qualms relative to *de minimis* activities that have occurred post-*McDonald*. The post-*McDonald* activities criticized by the Plaintiff generally fit within three categories: attorney wellness, Red Mass notice, and Secret Santa notice.[16] All of the criticized activities are germane although, as explained below,[17] the First Amendment does not require this microscopic level of scrutiny.

First, the Plaintiff criticizes some of the LSBA's social media posts[18] about attorney wellness. The LSBA provides a "Wellness Wednesday" initiative that promotes CLE programming on wellness issues and reiterates the importance of wellness as a component of attorney competence and professionalism.[19] An attorney's mental and physical competence is relevant to regulating the profession and improving the quality of legal services. *See* Louisiana Rule of Professional Conduct 1.1 (competence); Rule 1.14(a) (acknowledging, in the context of

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[15] *See* R. Doc. 71-3.

[16] *See* R. Doc. 87-1, Appendix C to Defendants' Proposed Findings of Fact and Conclusions of Law (listing criticized messages and summarizing their topics). Together with criticizing Secret Santa, the Plaintiff also criticizes an analogous program ("Ween Dream"), through which volunteers donate Halloween costumes to needy children. Although the programs occur at different times of year, that difference is immaterial (other than, perhaps, to confirm that the LSBA's recognition of holidays is not limited to ones traditionally associated with the Christian faith). For ease of discussion, the LSBA will refer collectively to both initiatives as the "Secret Santa" program.

[17] *Infra*, § V(C).

[18] The parameters of social media require that messages be brief and eye-catching. By design, these features allow the LSBA to engage members with the programming at minimal expense. If the Plaintiff believes that social media messages lack gravitas, that qualm is with the medium—not the message.

[19] Defense Exhibit 49.

client capacity, that the ability to make "adequately considered decisions" can be diminished by mental impairment); Rule 1.16 (a lawyer must withdraw from a representation if "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client"); *see also* Louisiana Supreme Court Rule XIX § 22 (providing for disability inactive status). And many disciplinary cases confirm the harm that results when an attorney disregards his or her mental and physical health to the detriment of the attorney and the client. Thus, taken in context, social media messages providing a wellness tip accompanied by "#WellnessWednesday" are an appropriate method of using social media to support germane programming.

Second, the Plaintiff criticizes Twitter messages advising attorneys of the date, time, and location of the "Red Mass" in New Orleans.[20] The St. Thomas More Catholic Lawyers Society hosts the Red Mass without LSBA funding, and attendance is purely voluntary. Traditionally, the Red Mass is attended by many members of the judiciary, including state and federal judges and justices of the Louisiana Supreme Court. Like a bar convention event, attorneys can choose to attend (or not). Notifying members of a traditional legal event hosted by another organization without funding from the LSBA falls far afield from the conduct that concerned the Fifth Circuit in *McDonald*.[21]

[20] The Red Mass is an event open to all members of the legal profession, regardless of religious affiliation or lack thereof, that dates back to the Middle Ages and is celebrated in more than 25 cities throughout the United States. *The History of the Red Mass*, ST. THOMAS MORE SOC'Y OF SANTA CLARA CNTY., https://www.stthomasmoresantaclara.org/the-red-mass/history-of-the-red-mass/ (last visited May 31, 2022).

[21] The Red Mass's date is also significant because it corresponds with a separate function carried out by the Louisiana Supreme Court. Generally speaking, although not in 2021, the Supreme Court holds its annual Memorial Exercises on the same date as the Red Mass. The Memorial Exercises take place at the Louisiana Supreme Court and honor members of the legal profession who have passed away. Attorneys can choose whether to attend the Red Mass, the Memorial Exercises, or to attend neither one. The Plaintiff has never contested the germaneness of the Memorial Exercises—nor can he.

Third, the Plaintiff criticizes the LSBA for notifying its members of the opportunity to participate in a voluntary Secret Santa program. Volunteers buy gifts for needy families, and the gifts are delivered on an anonymous basis. To be absolutely clear, the gifts to the children do not state or otherwise suggest that they are from the LSBA or sent on behalf of LSBA members. Thus, as with the Red Mass, the only expressive activity to which the Plaintiff appears to object is the LSBA's notification to its members that they can participate in this program if they are interested in doing so.

The LSBA does not violate the First Amendment by advising its members that they can choose to volunteer with a Secret Santa program. The Code of Professionalism confirms that public service is a small but legitimate part of professional practice. *See* Louisiana District Court Rules, Rule 6.2(k) ("Attorneys . . . should abide by the Louisiana Code of Professionalism"); Louisiana Code of Professionalism ("I will work to protect and improve the image of the legal profession in the eyes of the public"). The attorney volunteers' efforts provide a short-term but significant benefit to children identified through groups like CASA and family shelters. Even more important for present purposes, however, volunteer attorney participation in the Secret Santa program supports the civil legal aid network. The Secret Santa program builds and strengthens the relationships between attorneys who have an interest in volunteering, on the one hand, and groups like CASA and family shelters who work closely with individuals who are often in need of legal aid support, on the other.[22] *See* Louisiana Rules of Professional Conduct, Rule 6.1 (Voluntary Pro Bono Publico Service). Advising attorneys of an opportunity to participate in the Secret Santa

[22] Not every attorney who signs up to be a Secret Santa will instantaneously decide also to provide more pro bono services, but encouraging attorneys to provide pro bono services requires an incremental and multi-faceted approach.

program is a simple way by which the LSBA can facilitate the civil legal aid network without requiring participation by any LSBA member.[23]

B. The Criticized Activities Were Not the "Major Activity" of the LSBA.

Lathrop v. Donohue, 367 U.S. 820, 839 (1961), establishes that a mandatory bar is constitutional even if it engages in some non-germane activity, provided that this is not the "major activity" of the bar. *McDonald v. Longley* confirmed that *Lathrop*'s "major activity" test remains precedential. 4 F.4th at 244. Similarly, the Tenth Circuit has concluded that there must be some assessment of the relative amount of allegedly non-germane activity at issue: "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." *Schell v. Chief Just. & Justs. of Oklahoma Supreme Ct.*, 11 F.4th 1178, 1195 n.11 (10th Cir. 2021) (citing *Lathrop v. Donohue*, 367 U.S. 820, 839, 843 (1961)).

The alternative claim focuses on legislative activity that is both obsolete and *de minimis*. The LSBA no longer employs a lobbyist, and thus lobbying now constitutes 0% of LSBA's draft 2022-2023 budget. Monitoring for germane legislation (which is not lobbying), constitutes a mere 0.13% of the budget. Similarly, the new alternative claim focuses on social media posts that are a minuscule proportion of the LSBA's activities. The LSBA routinely posts on Facebook and Instagram, yet Plaintiff has not challenged any of this social media activity. The criticized activity

[23] Even the distribution of IOLTA funds recognizes the importance of organizations like CASA and family shelters to the civil legal aid network. *See* Louisiana Rule of Professional Conduct 1.15 (IOLTA Rules, role of Louisiana Bar Foundation); *see also* Louisiana Bar Foundation, *All About IOLTA*, https://www.raisingthebar.org/what-we-do/annual-sustaining/89-programs-and-projects/88-iolta ("The interest earned on these trust accounts is disbursed by the Louisiana Bar Foundation (LBF) to Louisiana's largest civil legal service programs, pro bono programs, battered women shelters, and numerous other community organizations that provide civil legal assistance to Louisiana's low-income citizens.").

does not impinge on the right of association because such activity is not the "major activity" of the LSBA. Further, any isolated or temporally stale instance of allegedly non-germane speech is a far cry from the ongoing conduct required to show that prospective relief is warranted—particularly given the mootness issues set forth above.

C. The New Alternative Claim Lacks Constitutional Significance.

As discussed above, the new alternative claim alleges that various minor activities of the bar constitute nominal infractions of the germaneness standard. To succeed at trial, however, the Plaintiff must show that the LSBA violates the standards set in *Keller* and *Lathrop.* These cases impose, however, a limiting principle that confirms that the constitutionality of a bar association does not rest on microscopic audits of mundane daily expenditures.

- *Lathrop v. Donohue*, 367 U.S. 820, 839 (1961), clarified that "activities without apparent political coloration" do not raise the same constitutional concerns as legislative activities. *See also id.* at 842 & n.15 (distinguishing programs that, e.g., provide insurance to members, from "political action").

- *Keller v. State Bar of California*, 496 U.S. 1, 17 (1990), focuses on "political or ideological activities" that are non-germane. *See also id.* at 14 ("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.").

Moreover, *Janus*, the union case on which the Plaintiff relies for his primary claim, focuses on "matters of substantial public concern." *Janus v. AFSCME*, 138 S. Ct. 2448, 2460 (2018). None of these cases suggests that the First Amendment requires a federal court to scrutinize a state bar association's day-to-day expenditures and social media posts for any hint of opinion, no matter how minor or benign.

The Plaintiff's approach cannot be discounted as mere nitpicking. To the contrary, this strategy, if successful, would have the power to undo decades of precedent. The Plaintiff has made clear that his objective is the overruling of *Keller*, *Lathrop*, and *McDonald*. While the Fifth Circuit

rejected his primary claim, he seeks to accomplish the same objective by insisting in his new alternative claim that the LSBA is unconstitutional if it engages in any activity, no matter how minor, that could be characterized somehow as expressing a preference on any matter, no matter how mundane.[24] Under the Plaintiff's new strategy, even if the LSBA were to terminate its Secret Santa volunteer opportunity, the Plaintiff need only identify some other arguably non-germane act—perhaps a coffee hour at a bar convention—to once again embroil the Defendants in litigation. The Constitution does not require this result.

D. The LSBA's *Hudson* Safeguards Foreclose the Plaintiff's Claim.

Although the LSBA maintains that all its conduct is germane to regulating the legal profession or improving the quality of legal services, the LSBA's *Hudson* procedures serve as a backstop to allow a member to avoid subsidizing speech to which he or she objects, consistent with *McDonald* and *Keller*.

The LSBA's *Hudson* procedures are sufficient to remedy any alleged First Amendment violations implicated by the criticized conduct. Under *Keller* and *McDonald*, a state bar association must provide certain procedural safeguards (known as *Hudson* procedures)[25] to avoid compelled

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[24] To illustrate the point, a bar association may hypothetically opt to purchase seasonal refreshments for its programs—perhaps offering king cake during Mardi Gras. This would delight some participants, but it could strike others as frivolous or fiscally imprudent or even offensive given the holiday's religious underpinnings. The Plaintiff's argument would transform this minor expenditure into an actionable constitutional offense that could terminate the existence of the integrated bar.

[25] Though *McDonald* was critical of *Keller*, *Keller* stands as precedent and indeed in *Boudreaux* was recognized as a basis for one of the Plaintiff's claims in this case. 3 F.4th at 758 (describing Plaintiff's claim that the LSBA's *Hudson* procedures are deficient "because it publicizes only its legislative advocacy."). *Hudson* procedures are relevant to both speech and association challenges because, as *McDonald* observes, "*Keller* noted that an integrated bar could certainly meet its *Abood* obligation by adopting the sort of procedures described in *Hudson*." 4 F.4th at 253 (quoting *Keller*, 496 U.S. at 17). *Abood*, however, is an association case. *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 225 (1977) ("The same important government interests recognized in the *Hanson* and

subsidization of non-germane speech. 496 U.S. at 16. The LSBA's current rules and By-Laws meet these requirements to remedy potentially non-germane speech. Bar activities are published to members through multiple sources, including the LSBA website, emails to LSBA members, the *Louisiana Bar Journal*, Bar Briefs, Facebook, Twitter, and Instagram, and the LSBA publishes audited annual reports.[26] Any member of the LSBA "who objects to the use of any portion of the member's bar dues for activities he or she considers promotes or opposes political or ideological causes, including activities that are not constitutionally germane to the LSBA's purpose, may request the Board to review the member's concerns . . . ." LSBA By-Laws art. XII, § 1(A).[27] The LSBA's By-Laws and *Hudson* notices clearly state that members are free to object to any of LSBA's activities. Thus, the process encompasses everything from the legislative activity in the Complaint to the emails and Twitter messages criticized in the new alternative claim.

Following the receipt of a written objection, submitted within forty-five days of the Bar's publication of notice of the activity, the LSBA "shall promptly determine the pro rata amount of the objecting member's membership dues at issue, and such amount shall be placed in escrow pending determination of the merits of the objection." *Id.* If the Board of Governors does not approve a refund, the dispute can be settled in arbitration under a panel selected jointly by the member and the Association, with any amount subject to dispute placed in escrow pending a determination. *Id.* at § 1(C).

Street cases presumptively support the impingement upon associational freedom created by the agency shop here at issue."). The word "speech" does not appear in the majority opinion. Thus, an integrated bar also can "certainly meet its [free association] obligation" through *Hudson* procedures. *See* 4 F.4th at 253.

[26] Defense Exhibit 58.

[27] Defense Exhibit 60.

This *Hudson* objection procedure satisfies *Keller*. The procedures "include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *McDonald v. Longley*, 4 F.4th 229, 253 (5th Cir. 2021) (quoting *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 310 (1986)). The LSBA's *Hudson* procedures are significantly stronger than the procedures considered and found lacking in *McDonald*.[28] The LSBA's procedures have been used successfully by objecting members, and unlike the objection procedure considered in *McDonald*, the LSBA offers an arbitration procedure that ensures that "the matters at issue are constitutionally appropriate for funding from the membership dues and, if not, whether the pro rata refund was correctly computed."[29]

The LSBA's *Hudson* procedures are more robust than ever. Although the LSBA has always tried to engage only in germane activity, it has carefully reviewed its budget for conduct that may be subject to criticism post-*McDonald*. After *McDonald*—and to avoid criticism and promote transparency—the LSBA is publishing its draft budget expenditures further in advance and providing members with a more detailed breakdown of how their bar dues are used.[30] Publishing the budget in this format helps facilitate member review. The LSBA also has included additional

[28] *McDonald*, 4 F.4th at 240-41, 252-54.
[29] *Compare* Defense Exhibit 60, LSBA By-Laws, Art. XII, § 1; *with McDonald*, 4 F.4th at 254 ("Though attorneys may register their complaints with committees and sections or lodge an objection at the Bar's annual hearing on its proposed budget, those processes give cold comfort: Any objector's opposition can be summarily overruled, leaving that lawyer on the hook to fund ideological activities that he or she does not support. . . . Moreover, whether a refund is available is left to the sole discretion of the Bar's Executive Director, and refunds are issued only 'for the convenience of the Bar.' In the event a refund is denied, the objecting attorney is out of luck.").
[30] Defense Exhibit 73.

notices of its *Hudson* procedures on its website and 2022 dues notices for paper and electronic payments.[31]

The Plaintiff has no credible challenge to the adequacy of these procedures. He has been a member of the LSBA since 1996, but in over 25 years of membership, he has not sought a refund of any portion of his LSBA dues payment or filed any refund claim using the LSBA's *Hudson* procedures.[32] The Defendants anticipate that, consistent with his deposition testimony, the Plaintiff will concede that the LSBA's *Hudson* procedures are not "confusing" and that he would know how to learn more information on any legislative position if he wished.

Although the Plaintiff alleged in his Complaint that "the LSBA does not publish notices of all of its activities," the criticized activities were all public and the subject of LSBA notices. For example, the Secret Santa project is expressly identified on the LSBA's list of programs on its website, and the LSBA emailed all members notifying them of the opportunity to volunteer with the Secret Santa project. The Red Mass is a recurring annual event of which the LSBA has provided past notice, and the Red Mass was noted via an LSBA email before it occurred. Members could have objected to the LSBA's publication of a notice of the Red Mass or Santa volunteer opportunity (although none did) upon receiving these emails. The criticized "Wellness Wednesday" Twitter messages are also recurrent and refer to an ongoing wellness initiative publicized on the LSBA website and given its own hashtag on Twitter #WellnessWednesday. Moreover, any argument about inadequacy of notice is belied by the fact that much of the speech criticized by the Plaintiff was itself a form of notice. And the now-obsolete HOD Policies put members on notice of the criteria the LSBA may use to evaluate whether to take a legislative

[31] Defense Exhibit 59.
[32] Pretrial Order, Uncontested Material Facts, R. Doc. 83 ¶ 7(a), (r-t).

position. Despite being allowed extensive discovery, the Plaintiff cannot identify any LSBA speech for which notice was deficient such that he lacked an opportunity to object.

E. The Equities Do Not Favor Relief.

Even setting to the side the Plaintiff's failings on justiciability and merits grounds, equitable considerations provide another hurdle the Plaintiff cannot overcome. "An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course." *Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 32 (2008). Thus, even assuming *arguendo* that the LSBA, e.g., should not have advised its members of the opportunity to participate in a Secret Santa project, the Court "is not mechanically obligated to grant an injunction for every violation of law." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). Instead, the Court should "pay particular regard for the public consequences in employing the extraordinary remedy of injunction," *Winter*, 555 U.S. at 24. "[T]he balance of equities and consideration of the public interest . . . are pertinent in assessing the propriety of any injunctive relief, preliminary or permanent." *Id.* at 32. The evidence at trial will confirm that the equities and public interest are not served by disbanding an integrated bar because of a Twitter post about the Red Mass or an email about an opportunity to volunteer as a Secret Santa for disadvantaged children. Rather, the LSBA's *Hudson* procedures provide an adequate solution for any nominal impingement.

VI. CONCLUSION

The Plaintiff's primary claim that mandatory state bars are unconstitutional whether or not they engage in non-germane speech is foreclosed by precedent. The Plaintiff's alternative claim that the LSBA engages in non-germane speech likewise fails for multiple independent reasons. At its core, however, the Plaintiff's lawsuit fails because *McDonald* rejected his primary claim; the conduct to which he once objected is obsolete; the LSBA's *Hudson* procedures adequately remedy

any alleged impingement; and safeguards are in place to ensure that any future conduct will not engender litigation that could distract the LSBA from its mission of regulating the legal profession and improving the quality of legal services. The Defendants respectfully request that the Court enter judgment in their favor on the Plaintiff's primary claim and either dismiss the Plaintiff's alternative claim for lack of jurisdiction or enter judgment in Defendants' favor on that claim as well.

Respectfully submitted,

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