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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JERRY O'NEIL, GENE KIRSCHBAUM, RUSSELL SIAS, BARBARA LEVITT (Assembled Voter), DARELL LEVIT (Assembled Voter), and OTHER ASSEMBLED VOTERS,

Plaintiffs,

v.

THE MONTANA SUPREME COURT, THE STATE BAR OF MONTANA, and THE MONTANA SUPREME COURT AND THE STATE BAR OF MONTANA, JOINED TOGETHER AS THE INTEGRATED BAR OF MONTANA, and MONTANA SECRETARY OF STATE CHRISTI JACOBSEN,

Defendants.

Cause No. CV 23-161-M-DLC-KLD

DEFENDANT STATE BAR OF MONTANA'S BRIEF IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Plaintiffs O'Neil and Kirschbaum challenge two requirements facing prospective candidates for judicial office in the State of Montana: (1) "[h]aving to be admitted to the practice of law in Montana for at least five years, as required by the Montana Constitution, Article VII, Section 9;" and (2) "[h]aving to be a member of the Integrated Bar of Montana as required by Montana Supreme Court rules." Plaintiffs seek a declaratory judgment establishing that these requirements are "unconstitutional denials of equal protection of the law."

Plaintiffs' dispute is not with the State Bar of Montana. The Montana Supreme Court has exclusive and inherent authority to regulate the practice of law and create rules for admission thereto. The State Bar of Montana did not establish either the constitutional requirements for office or the requirements for admission to the Bar, and has no authority to change or disregard either requirement. Plaintiffs have no standing to bring a claim against the State Bar where a declaration of rights as between Plaintiffs and the State Bar would not provide redress for Plaintiffs' alleged injuries.

Further, Plaintiffs' substantive challenges are resolved by application of long-settled law. The State has the inherent power to define the qualifications for its own elected officials, including requiring judicial candidates be admitted to

practice law in Montana, and the Montana Supreme Court has inherent authority to regulate the practice of law.

Plaintiffs' Amended Complaint should be dismissed in its entirety for the reasons stated here and in Defendant Montana Supreme Court's motion to dismiss (adopted as explained below).

LEGAL STANDARDS

A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) where the pleadings fail to state a claim upon which relief can be granted. In consideration of a motion under Rule 12(b)(6), the Court construes the allegations in the light most favorable to the non-moving party. *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986).

Dismissal under Rule 12(b)(1) is required where the court lacks subject matter jurisdiction, such as when the claims alleged are not justiciable. Fed. R. Civ. P. 12(b)(1).

DISCUSSION

I. PLAINTIFFS DO NOT HAVE STANDING TO BRING THEIR DECLARATORY JUDGMENT CLAIM AGAINST DEFENDANT STATE BAR OF MONTANA.

The doctrine of standing addresses "whether the litigant is entitled to have the court decide the merits of the dispute," and arises from constitutional and prudential limitations on the jurisdiction of the federal courts to actual cases or

controversies. *Warth v. Selding*, 422 U.S. 490, 498, 95 S. Ct. 2197, 2205 (1975). A plaintiff must demonstrate three elements to establish their standing: that they have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S. Ct. 1540, 1547 (2016)). To establish redressability, the plaintiff must show that the relief they seek is substantially likely to remedy their injuries. *Juliana v. United States*, 947 F.3d 1159, 1170 (9th Cir. 2020).

Here, Plaintiffs seek "a declaratory judgment or judgments that classifications based on educational or employment history, and/or membership in any professional organization, are unconstitutional denials of equal protection of the law." Am. Compl. at p. 3. Such a declaration as to Defendant Montana State Bar would not afford Plaintiffs any redress. The State Bar does not establish or control either the requirements for bar membership or for judicial candidacy, as explained below. Plaintiffs' complaint must therefore be dismissed as to Defendant State Bar of Montana for lack of standing.

II. THE MONTANA SUPREME COURT, NOT THE STATE BAR, HAS INHERENT AUTHORITY TO REGULATE THE PRACTICE OF LAW.

Article VII, Section 2 of the Montana Constitution establishes that the Montana Supreme Court "may make rules governing . . . admission to the bar and

the conduct of its members." Recognizing the constitutional authority of the judicial branch and the separation of powers, the legislative branch has long statutorily deferred to the Montana Supreme Court in matters of bar admissions, including the power to "appoint members of the bar of this state, in good standing, as an examining board to conduct and assist in conducting the examination of applicants for admission to the bar." Section 37-61-102(1), MCA. Furthermore, the examination of applicants "is governed and controlled by the rules that the court may prescribe." Section 37-61-102(3), MCA. As the court has noted: "The other coordinate departments have been generally free from attempts to impinge upon the rights, powers and prerogatives of this department, and the judicial department has consistently and uniformly avoided attempts to encroach upon the fields properly occupied by the other departments . . . ." *In re Unification of Montana Bar Ass'n*, 107 Mont. 559, 87 P.2d 172, 173 (1939).

The authority of the Montana Supreme Court to regulate the practice of law is also based upon the inherent authority of the Court to regulate the profession. The Montana Supreme Court has recognized, "The admission and regulation of attorneys in Montana is a matter peculiarly within the inherent power of this Court." *Goetz v. Harrison*, 153 Mont. 403, 405, 457 P.2d 911, 921 (1969) ("*Goetz I*"). The Court's "inherent jurisdiction" includes "all matters involving admission

of persons to practice law in this state." *Goetz v. Harrison*, 154 Mont. 274, 278, 462 P.2d 891, 893 (1969) ("*Goetz II*").

This inherent power was recognized prior to the adoption of the 1972 Constitution. *In re Matt*, 252 Mont. 345, 357, 829 P.2d 625, 632 (1992); *In re Unification of Mont. Bar Ass'n*, 107 Mont. 559, 562, 87 P.2d 172, 173 (1939). The Court "has since its inception [had] the power and authority to adopt, promulgate and enforce all necessary, proper and appropriate rules for its own government and for the admission and regulation of attorneys at law." *In re Montana Bar Association*, 140 Mont. 101, 104, 368 P.2d 158, 160 (1962). The authority of the Court regarding the admission and regulation of attorneys in the state is not only inherent, but exclusive. *Harlen v. Helena*, 208 Mont. 45, 49-50, 676 P.2d 191, 193 (1984). The governance and control of the practice of law in the State of Montana lies solely with the Supreme Court. *In re State Bar for Dues Increase*, 2001 MT 108, ¶ 19, 305 Mont. 279, 53 P.3d 854.

The United States Supreme Court has long recognized the power of a court to "control admission to its bar and to discipline attorneys who appear before it." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S. Ct. 2123, 2132 (1991) (citing *Ex Parte Burr*, 22 U.S. 529, 530 (1824). This power is "incidental to all Courts." *Burr*, 22 U.S. at 531. "Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of

Columbia within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct. *Leis v. Flynt*, 439 U.S. 438, 442, 99 S. Ct. 698, 700-01 (1979). As explained by Justice Frankfurter: "From the thirteenth century to this day, in England the profession itself has determined who should enter it. In the United States the courts exercise ultimate control . . . . Admission to practice in a State and before its courts necessarily belongs to that State." *Schware v. Bd. of Bar Examiners of New Mexico*, 353 U.S. 232, 248, 77 S. Ct. 752, 761 (1957) (concurring).

III. THE STATE BAR OF MONTANA ASSISTS THE COURT, WHICH HAS EXCLUSIVE GOVERNANCE AND CONTROL OF THE PRACTICE OF LAW.

In 1974, the Montana Supreme Court ordered unification of the bar. *In re President of Mont. Bar Ass'n*, 163 Mont. 523, 518 P.2d 32 (1974). Bar associations are of two types: voluntary or mandatory. *McDonald v. Longley*, 4 F.4th 229, 237 (5th Cir. 2021). A mandatory bar association, "meaning lawyers must join it and pay an annual membership fee to practice law" in the jurisdiction, is also called a unified or integrated bar.[1] *Crowe v. Or. State Bar*, 989 F.3d 714, 720 (9th Cir.

[1] The Amended Complaint names as a defendant "The Montana Supreme Court and the State Bar [of] Montana, joined together as the Integrated Bar of Montana." The so-called "Integrated Bar of Montana" is not a distinct legal entity. It is a descriptive phrase indicating that the State Bar of Montana is a mandatory, not voluntary, bar association. There is no conjoined entity consisting of the State Bar and Montana Supreme Court. Plaintiffs may not sue a non-existent entity as explained in the Montana Supreme Court's brief.

2021). The Montana Supreme Court noted, "The power of this Court to order unification of the bar is clear," citing its both its inherent power and the authority granted by the Article VII, Section 2 of the Montana Constitution. *In re Mont. Bar Ass'n*, 163 Mont. at 524, 518 P.2d at 32 (citing *In re Unification of the Mont. Bar Ass'n*, 107 Mont. 559, 87 P.2d 172 (1939); *In re Unification of Bar of This Court*, 119 Mont. 494, 175 P.2d 773 (1947); *Application of the Mont. Bar Ass'n*, 140 Mont. 101, 368 P.2d 158 (1962); *Application of the Mont. Bar Ass'n*, 142 Mont. 351, 385 P.2d 99 (1963); *In re Pet. for the Unification of the Mont. Bar*, 156 Mont. 515, 485 P.2d 945 (1971)).

The Montana Supreme Court ordered unification of the bar to protect the public from unethical practitioners, encourage continuing legal education, provide for the availability of legal services to all, and promote needed legal reforms. *In re Mont. Bar Ass'n*, 163 Mont. at 526, 518 P.2d at 33. The Court noted the importance of requirements for admission to the bar including "required standards of character; required standards of education; knowledge and ability; and required standards of ethical conduct." *Id*., 163 Mont. at 525, 518 P.2d at 33. By subsequent order, the Montana Supreme Court adopted a constitution and by-laws for the State Bar of Montana. *In re Unified Bar of Mont*., 165 Mont. 1, 530 P.2d 765 (1975).

Several years later, the Court clarified the respective roles and responsibilities of the State Bar and the Court while addressing a petition by the

State Bar to increase the annual dues for members. *In re State Bar for Dues Increase*, 2001 MT 108, 305 Mont. 279. 53 P.3d 854. The Court concluded that the Bar's by-laws providing for shared control over dues revenue "[did] not comport with Article VII, Section 2, of the Montana Constitution, which places the governance and control of the practice of law solely with the Supreme Court." *Id*., ¶ 19. The Court held the role of the unified bar was to "assist in the governance and control of the practice of law." *Id*., ¶ 20. Pursuant to amended by-laws, dues are established "in the sole discretion of the Montana Supreme Court," and the Court "shall possess and retain original and exclusive jurisdiction in the enforcement of professional ethics and conduct of the members" of the State Bar. *Id*., ¶¶ 25-26.

As such, the State Bar of Montana does not have the authority to alter any of the requirements for admission to the Bar. This is the exclusive province of the Montana Supreme Court. For this reason, also, Plaintiffs lack standing and their claims against the State Bar of Montana should be dismissed.

IV. STATES HAVE THE POWER TO DEFINE THE QUALIFICATIONS OF THEIR OFFICEHOLDERS.

Although Plaintiffs' complaint should be dismissed based on standing alone, their claims also fail on the merits. The power of the states to prescribe qualifications for office is well-established. In addressing Missouri's constitutional requirements for its judicial officers, the United States Supreme Court noted the significance of this power to state sovereignty:

> This provision goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.

Gregory v. Ashcroft, 501 U.S. 452, 460, 111 S. Ct. 2395, 2405 (1991). Although the Fourteenth Amendment's guarantee of equal protection inherently creates limits on state authority, the "States' power to define the qualifications of their officeholders has force even as against the proscriptions of the Fourteenth Amendment." *Id*. The Court therefore held that Missouri needed only to assert a rational basis for its constitutional amendment imposing a mandatory retirement age for judges. *Id*.

The Ninth Circuit likewise applied rational basis scrutiny when addressing the constitutionality of a Nevada statute requiring candidates for the office of state supreme court justice to be licensed attorneys admitted to practice law in the State of Nevada. *O'Connor v. Nevada*, 27 F.3d 357, 360 (9th Cir. 1994). The Court noted that candidacy is not a fundamental right, and therefore barriers to ballot access do not compel higher levels of scrutiny, unless they burden a suspect class (such as race or sex.) *Id*. Nevada's requirement that candidates for the state's supreme court should be licensed attorneys was reasonably necessary to achieve several legitimate state interests:

> It maintains high standards of conduct in the administration of justice and guarantees that the State's justices will have the legal knowledge necessary to understand and apply the law. Furthermore, once an attorney is admitted to practice law, he or she is subject to continuing

> legal education requirements, to the rules of ethical conduct and to disciplinary proceedings, if justified. The State's legitimate interest in ensuring excellence in its judiciary outweighs any burden the attorney requirement has either on appellants' rights or on the voters' rights to choose their candidates.

Id. at 361.

So it is here. Article VII, Section 9 of the Montana Constitution provides that a United States citizen who has resided in Montana for two years immediately before taking office is eligible to serve as supreme court justice or district court judge if they have been admitted to the practice of law in Montana for at least five years prior to the date of election. This provision serves the same interests that were upheld by the Ninth Circuit in *O'Connor*.

Gregory and *O'Connor* establish that a state may exercise its sovereign powers to impose requirements for officeholders, provided that the classifications created by such qualifications bear a rational relationship to a legitimate state interest. The requirement that members of the judiciary should be admitted to the practice of law is rationally related to Montana's legitimate interest in ensuring high standards of conduct in the administration of justice. Article VII, Section 9 is constitutional.

V. THE REQUIREMENTS FOR ADMISSION TO THE STATE BAR OF MONTANA ARE CONSTITUTIONAL.

In addition to challenging the requirement of the Montana Constitution that candidates for judicial office be admitted to the practice of law, Plaintiffs challenge

the requirements for such admission. Specifically, they challenge the requirements to become a member of and pay dues to the State Bar of Montana, and to have graduated from a law school accredited by the American Bar Association. As explained, these requirements are established by the Montana Supreme Court, and thus fail to state a claim against the State Bar. In any case, the requirements are a permissible exercise of that Court's authority.

a. Mandatory bar membership is permissible, and Plaintiffs have not suffered any injury.

Plaintiffs assert that mandatory bar membership "amounts to the prohibited requirement to join a union and pay union dues," citing *Janus v. AFSCME, Council 31*, ___ U.S. ___, 138 S. Ct. 2448 (2018). Doc. 14, p. 2. *Janus* addressed the question of whether requiring public employees to subsidize a union where that union engaged in speech the employees found objectionable violated the employees' First Amendment right to the freedom of speech. 138 S. Ct. at 2460. Here, in contrast, Plaintiffs have not been forced to join, are not members of, and are not required to pay dues to the State Bar of Montana. *Janus* is therefore inapplicable. Plaintiffs have not suffered a First Amendment injury of the type contemplated in *Janus* and do not have standing to assert a claim under *Janus*.

Notwithstanding Plaintiffs' lack of injury, as a matter of established precedent, a state "may constitutionally condition the right to practice law upon membership in an integrated bar association . . . ." *Keller v. State Bar of Cal.*, 496

U.S. 1, 8, 111 S. Ct. 2228, 2233 (1990) (quoting *Lathrop v. Donohue*, 367 U.S. 820, 849 (1961)). "It is entirely appropriate that all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort." *Keller*, 496 U.S. at 12, 110 S. Ct. at 2235 (quoted in *In re State Bar for Dues Increase*, ¶ 21).

b. The requirement that licensed attorneys graduate from an accredited law school bears a rational relationship to the State's interest in ensuring the competence of legal services.

In the exercise of their inherent authority to regulate admission to practice, courts may not "exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware*, 353 U.S. at 239. "Regulations on entry into a profession are constitutional if they 'have a rational connection with the applicant's fitness or capacity to practice' the profession." *Lowe v. SEC*, 472 U.S. 181, 228, 105 S. Ct. 2557, 2582 (1985) (quoting *Schware*, 353 U.S. at 239). States have a legitimate interest in ensuring the competence of attorneys practicing within their jurisdiction. *Goldfarb v. Sup. Ct. of Virginia*, 766 F.2d 859, 862 (4th Cir. 1985). Courts have recognized that a bar admission rule requiring graduation from an accredited law school does not violate equal protection. *Application of Urie*, 617 P.2d 505, 509 (Alaska 1980); *In re*

Blankenship, 3 N. Mar. I. 209, 218 (N. Mariana Isl. 1992). The requirement of graduation from an accredited law school bears a rational relation to a state's legitimate interest in maintaining the quality of legal services available to its residents. *See Goldfarb*, 766 F.2d at 862.

VI. THE STATE BAR OF MONTANA JOINS THE ARGUMENTS OF THE MONTANA SUPREME COURT.

The State Bar of Montana also joins in and adopts the arguments raised by the Montana Supreme Court in its Brief in Support of Motion to Dismiss, including:

a. Plaintiffs' challenge to the Montana Constitution provisions establishing qualifications for judicial candidates and establishing the authority of the Montana Supreme Court to regulate the practice of law raise non-justiciable political questions. *United States v. Mandel*, 914 F.2d 1215, 1222 (9th Cir. 1990).

b. The injuries asserted by O'Neil and Kirschbaum are at best conjectural, not actual or imminent. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564, 112 S. Ct. 2130, 2138 (1992).

c. The "Assembled Voters" have not appeared either through counsel or pro se, and therefore are not properly parties to this action. Local Rule 83.1(a)(2). Further, they have no standing to challenge the requirements of candidates for judicial candidates, as the Amended

Complaint does not allege any particularized injury on their behalf. *See Lance v. Coffman*, 549 U.S. 437, 439, 127 S. Ct. 1194, 1197 (2007).

d. Plaintiffs have failed to state a claim for violations of their federal rights including those alleged under the privileges and immunities clause and dormant commerce clause. The Constitution does not require that because a lawyer has been admitted to the bar in one state, he or she must be allowed to practice in another. *Leis v. Flynt*, 439 U.S. 438, 443, 9 S. Ct. 698, 701 (1979).

e. Plaintiffs have failed to state a claim for violation of the "Titles of Nobility" clauses because these clauses are not self-executing and do not give rise to a justiciable controversy. *Cohens v. Virginia*, 19 U.S. 264, 404-05 (1821).

f. The Montana Supreme Court, exercising its inherent authority to regulate the practice of law through the State Bar of Montana, is entitled to state-action immunity from antitrust liability. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 360, 97 S. Ct. 2691, 2697 (1977).

g. O'Neil's attempt to qualify for candidacy has already been addressed by the Court and rejected, *see O'Neil v. Montana State Supreme Court*, No. 90-35814, 1991 U.S. App. LEXIS 11968 (9th Cir. 1991),

and his claims are barred by the doctrines of res judicata and collateral estoppel.

CONCLUSION

Plaintiffs fail as a matter of law to show that declaratory relief against Defendant State Bar of Montana will afford redress to their alleged injury, because the State Bar can neither make nor change state constitutional requirements or Montana Supreme Court rules. Additionally, Plaintiffs' challenges to the State of Montana's sovereign right to declare qualifications for its own officeholders, and the inherent authority of the courts to regulate the practice of law, are without merit. The Court should dismiss the Amended Complaint.

DATED March 4, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1(d)(2)(E), Local Rules of the United States District Court, District of Montana, I hereby certify that the textual portion of the foregoing brief uses a proportionally spaced Times New Roman typeface of 14 points, is double-spaced, and contains approximately 3,412 words, excluding the parts of the brief exempted by L.R.7.1(d)(2)(E).

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