No. 20-6044

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARK E. SCHELL,

Plaintiff - Appellant.

v.

THE CHIEF JUSTICE AND JUSTICES OF THE OKLAHOMA SUPREME COURT; THE MEMBERS OF THE OKLAHOMA BAR ASSOCIATION'S BOARD OF GOVERNORS; JOHN M. WILLIAMS, Executive Director, Oklahoma Bar Association, all in their official capacities,

Defendants - Appellees.

APPELLANT'S OPENING BRIEF

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GLOSSARY

AFSCME	American Federation of State, County, and Municipal Employees, Council 31
FEC	Federal Election Commission
NAACP	National Association for the Advancement of Colored People
OBA	Oklahoma Bar Association
SEIU	Service Employees International Union, Local 1000

STATEMENT OF RELATED CASES

There are no prior or related appeals.

JURISDICTIONAL STATEMENT

Plaintiff-Appellant Mark E. Schell brought this civil action against each justice of the Oklahoma Supreme Court, each member of the Oklahoma Bar Association Board of Governors, and the Oklahoma Bar Association's Executive Director, all sued in their official capacities. Mr. Schell brought his claims under 42 U.S.C. § 1983, seeking relief for violations of his rights under the First and Fourteenth Amendments of the United States Constitution, and the district court therefore had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 because it seeks review of a final decision of the district court that disposed of all the parties' claims.

This appeal is timely. The district court entered judgment and an order dismissing Mr. Schell's claims in full on March 25, 2020. App.053–54. Plaintiff then filed this appeal on April 2, 2020, within the 30-day limit of Federal Rule of Appellate Procedure 4(a)(1). App.055.

INTRODUCTION

Thirty years ago, the Supreme Court held that mandatory bar dues are subject to "the same constitutional rule" that applies to "compulsory dues [for] labor unions." *Keller v. State Bar of California*, 496 U.S. 1, 13 (1990). In so holding, the Supreme Court reversed a lower court's decision that had subjected mandatory bar dues to a *different* constitutional rule. In the lower court's view, mandatory bar dues should be categorically "exempted" from First Amendment scrutiny because bar associations are like government agencies that can tax and spend at will. *Id*. at 10. The Supreme Court disagreed, holding that bar associations are akin to public-sector unions, and are thus subject to the same First Amendment constraints when it comes to taking people's money to subsidize political and ideological advocacy against their will. *Id*. at 11-12. The Court also flagged (and expressly reserved) the question of whether states may force attorneys to *join* a bar association that engages in political and ideological advocacy that is not germane to the bar's core regulatory purposes. *Id*. at 17.

In the present case, the State of Oklahoma is violating the First Amendment rights of Plaintiff-Appellant Mark E. Schell in two ways. First, it requires him to join the Oklahoma Bar Association as a condition of practicing law, even though the bar association engages in non-germane political and ideological advocacy that he strongly opposes. This compulsory-membership requirement presents precisely

the question that *Keller* reserved. And under basic First Amendment principles, it is clearly unconstitutional. As the Supreme Court has repeatedly recognized, this type of compelled association triggers exacting First Amendment scrutiny. And Oklahoma cannot possibly survive that scrutiny because it has many other ways of serving its regulatory interests without forcing attorneys to join a bar association against their will. Indeed, many other states respect attorneys' First Amendment rights by making bar membership optional, and there is no reason Oklahoma cannot do the same.

Second, Oklahoma is also violating Mr. Schell's First Amendment rights by forcing him to subsidize the bar association's political and ideological advocacy, which he strongly opposes. Under *Keller*, applying the "same constitutional rule" for compulsory union fees and bar dues requires exacting First Amendment scrutiny for both. As the Supreme Court recognized in *Janus v. AFSCME*, 138 S. Ct. 2448, 2466 (2018), such mandatory fees violate the First Amendment unless they serve a compelling state interest that cannot be served by any significantly less-restrictive means. And Oklahoma cannot survive that scrutiny because it has many other ways of serving its regulatory interests without forcing attorneys to subsidize political and ideological speech they oppose. Once again, multiple other states eschew any compelled subsidy for bar associations' political and ideological speech. The Constitution requires Oklahoma to do the same.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. In *Keller v. State Bar of California*, 496 U.S. 1, 17 (1990), the Supreme Court expressly reserved the question whether the First Amendment allows states to compel attorneys to join a bar association that engages in political or ideological activities that are not germane to improving the quality of legal services or regulating the practice of law. Did the district court therefore err in concluding that *Keller* foreclosed Plaintiff's First Amendment challenge to Oklahoma's requirement that attorneys join the Oklahoma Bar Association ("OBA")?

2. The Supreme Court has held that mandatory bar associations must be "subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees." *Keller*, 496 U.S. at 13. The Supreme Court has also held that laws requiring compulsory union fees to subsidize political or ideological speech are subject to "exacting" First Amendment scrutiny. *Janus v. AFSCME*, 138 S. Ct. 2448 (2018). Did the district court therefore err in dismissing Plaintiff's First Amendment challenge to the OBA's collection of mandatory dues to subsidize its political and ideological speech without applying exacting scrutiny?

STATEMENT OF THE CASE

Plaintiff-Appellant Mark E. Schell has been licensed to practice law in Oklahoma since 1984. App.023 ¶ 11, App.026 ¶ 45. During that time, he has been a member, and paid annual dues to, the Oklahoma Bar Association ("OBA")—but only because the state requires him, and every Oklahoma attorney, to do so as a condition of practicing law in the state. App.025–26 ¶¶ 40-45, App.034 ¶¶ 91-92; Okla. Stat. tit. 5, ch. 1, app. 1, art. 2, § 1; Okla. Stat. tit. 5, ch. 1, app. 1, art. 8 §§ 1-4. If he stopped paying dues, the Oklahoma Supreme Court would suspend and ultimately terminate his membership, which would prohibit him from practicing. App.026 ¶¶ 42-43; Okla. Stat. tit. 5, ch. 1, app. 1, art. 8 §§ 2, 4, 5. In this lawsuit, Mr. Schell challenges mandatory OBA membership and the OBA's use of attorneys' mandatory dues for political, ideological, and other speech without members' affirmative consent.

A. The OBA's Use of Mandatory Dues for Political and Ideological Speech

In his 36 years of practice, Mr. Schell has seen the OBA use his mandatory dues to fund advocacy—that he did not want to support—on a wide range of legal and political issues. *See* App.033 ¶ 90. For example, in 2009, the OBA publicly opposed a controversial tort reform bill. App.027 ¶ 53. In 2014, the OBA created a petition to oppose legislation that would have changed the way members of the Oklahoma Judicial Nomination Commission were selected, sent emails to its

members urging them to oppose the measure, and staged a rally against the measure at the State Capitol. App.028 ¶ 54.

The OBA's bylaws authorize it to advocate for and against state legislation, and it does so. App.027–28 ¶¶ 49-51, 55-56. Specifically, the bylaws authorize the OBA to create a "Legislative Program" to propose legislation "relating to the administration of justice; to court organization, selection, tenure, salary and other incidents of the judicial office; to rules and laws affecting practice and procedure in the courts and in administrative bodies exercising adjudicatory functions; and to the practice of law." App.027 ¶ 49. The bylaws also authorize that OBA to "make recommendations upon any proposal pending before [the] Legislature of the State of Oklahoma or any proposal before the Congress of the United States of America, if such proposal relates to the administration of justice, to court organization, selection, tenure, salary or other incidents of the judicial office; to rules and laws affecting practice and procedure in the courts and in administrative bodies exercising adjudicatory functions; and to the practice of law." *Id*. ¶ 50. And the bylaws separately authorize the OBA to endorse "[a]ny proposal for the improvement of the law, procedural or substantive … in principle," with no restriction on subject matter. *Id.* ¶ 51.

In addition to its legislative advocacy, the OBA also uses members' mandatory dues to publish political and ideological speech in its *Oklahoma Bar Journal* publication. App.028 ¶ 57. Examples from recent years include:

- A January 2016 article by the OBA's then-president criticizing *Citizens United v. FEC*, 558 U.S. 310 (2010), for supposedly changing the United States "to 'a government of the corporations, by the bureaucrats, for the money," *id.* ¶ 58;
- A February 2016 article by the OBA's then-president criticizing "super PACs" for supposedly "threaten[ing] to corrupt the political process" with "virtually unlimited campaign contributions," *id.* ¶ 59;
- A March 2016 article by the OBA's then-president criticizing Oklahoma's legislature for not regulating the oil and gas industry to restrict the use of "injection wells" alleged to cause earthquakes, *id.* ¶ 60;
- An April 2016 article by the OBA's Executive Director criticizing proposed legislation that would change Oklahoma's method of judicial selection as one of many alleged legislative "attack[s on] the Oklahoma Bar Association or the courts," *id.* ¶ 61;
- Another April 2016 article entitled "We Don't Want to Be Texas," also criticizing efforts to change Oklahoma's judicial-selection method, App.029 ¶ 62;

- A May 2016 article by the OBA's then-president that: (1) criticized *Citizens United* and *McCutcheon v. FEC*, 572 U.S. 185 (2014), stating (falsely) that they "have allowed unlimited campaign contributions by political action committees that do not have to identify contributors"; (2) praised Jane Mayer's book *Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right* for exposing a "takeover of our government by big money from the oil and gas industry"; (3) praised former Vice President Al Gore for "advocating that our environment and climate suffered from a failure of our government to regulate the fossil fuel industry"; and (4) called on OBA members to "take action now" and "stand up for people and stop control of our government by the oil and gas industry," *id.* ¶ 63;
- A May 2016 article entitled "State Attorney General Argues Against Tribal and State Interests," criticizing an amicus brief filed by the State of Oklahoma (and other states) in *Dollar General Corporation v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016), alleging that the state's arguments were (among other things) "disingenuous" and the product of "uninformed bias," *id.* ¶ 64;
- A September 2016 article by the OBA's then-president again praising Mayer's *Dark Money* book, describing it as "a snapshot of history of the

United States at a time when money controls our government," and stating that he wanted Mayer to speak at the OBA's annual meeting because "[w]e need to hear what she says about dark money and the future of American democracy," including "how corrupt our government has become and how big money is turning our government into a government of the corporations, by the bureaucrats, for the money," App.029–30 ¶¶ 65-66;

- A September 2016 advertisement for the OBA's Annual Meeting—held less than one week before the 2016 general election, with Mayer as keynote speaker—quoting Mayer as stating: "I will talk about the way money is becoming a growing factor in judicial races and what the consequences are. … I see the money as a real threat to judicial integrity and independence…. The courts are very much part of their plan, and they[]"—meaning "wealthy conservative libertarians [*sic*]"—"[have] gone about swaying them by changing the way the law is taught in law schools, paying for judicial junkets in which they push their viewpoint on the judges and by trying to use dark money to win judicial elections," App.030 ¶¶ 67-69;
- A November 2016 article by the OBA's then-president urging readers to contact legislators to advocate for increased funding of the judicial branch, particularly "greater funding to pay bailiffs and court reporters," *id.* ¶ 70;

- An April 2017 article by the OBA's Executive Director criticizing legislative proposals to change Oklahoma's method of judicial selection, suggesting that, if they passed, "big money and special interest groups [would] elect judges and justices and campaign contributions [would] buy court opinions," App.030–31 ¶ 71;
- A May 2017 article by the OBA's then-president stating that attorneys must "warn [the public] of the potential ill effects of reintroducing politics into our judicial selection process," App.031 ¶ 72;
- A May 2018 article by the OBA's Executive Director criticizing "attacks" on Oklahoma's system of "merit selection" of judges, *id.* ¶ 73;
- A November 2018 article entitled "Tort Litigation for the Rising Prison Population" arguing that Oklahoma's prison system was underfunded and advocating that the legislature eliminate prisons' and jails' exemption from tort liability, *id.* ¶ 74;
- A February 2019 article by the OBA's then-president criticizing claims that lawyers have too much influence in the state legislature and alleging that "having lawyers in the Legislature is a plus," *id.* ¶ 75;
- A March 2019 "Legislative News" column stating that "MORE LAWYERS ARE NEEDED" as members of the state legislature, *id.* ¶ 76.

B. The OBA's Procedures for Objections to Uses of Mandatory Dues

In 1990, the Supreme Court considered a challenge filed by a group of California attorneys who argued that "the use of their compulsory dues to finance political and ideological activities of the State Bar with which they disagree violates their rights of free speech guaranteed by the First Amendment." *Keller v. State Bar of Cal.*, 496 U.S. 1, 9 (1990). The Court ruled in the attorneys' favor, reversing a decision of the Supreme Court of California that had rejected their claim by deeming mandatory bar dues categorically "exempted" from First Amendment scrutiny. *Id*. at 10-17. Contrary to the California court's view, *Keller* held that mandatory bar dues are subject to "the same constitutional rule" that applies to "compulsory dues [for] labor unions." *Id*. at 13.

At the time *Keller* was decided, compulsory union dues were subject to the rule of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). *Abood* held that compulsory union dues could not be used to fund union activities that were not "germane" to collective bargaining. *Id*. at 235–36. Accordingly, *Keller* stated that it would violate the First Amendment to use compulsory bar dues for purposes not "germane" to "regulating the legal profession and improving the quality of legal services." 496 U.S. at 13. *Keller* also stated that a bar association could "meet its *Abood* obligation by adopting the sort of procedures described in [*Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986)]," which implemented *Abood*.

Under those *Hudson* procedures, a bar association would be required to provide members with (1) "an adequate explanation of the basis for the [mandatory bar association] fee"; (2) "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker"; and (3) "an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* at 16.

When Mr. Schell filed this lawsuit in 2019, however—some 29 years after *Keller*—the OBA did not follow these procedures. It did not explain the basis of members' dues, provide any opportunity for members to have their objections heard by an impartial decision-maker, or place an objecting member's dues in escrow. App.039 ¶¶ 122-24.

Although the OBA annually published a proposed budget in its *Bar Journal*, that budget did not identify any specific expenditures that OBA had made or proposed to make; it only identified general categories of expenditures. App.031–32 ¶¶ 77-79. And its budgets did not state whether any past or proposed expenditures of member dues were germane to the purpose of improving the quality of legal services. App.032 ¶ 80. The OBA therefore did not provide members with sufficient information to determine whether any past or proposed expenditure of member dues was germane to those purposes. *Id.* ¶ 81.

The OBA did have a "Notice and Objection Procedure" that allowed members to object to certain OBA expenditures—if members were aware of them.

App.032–33 ¶¶ 84-85. But that procedure did not provide for a neutral third party to resolve member objections. Instead, the OBA's Executive Director was to review any objection and then either issue a partial dues refund to the objecting member or refer the objection to an "OBA Budget Review Panel" consisting of three members of the OBA's Budget Committee selected by the OBA's President Elect. App. ¶¶ 85-86. The member could appeal the OBA Budget Review Panel's ruling to the OBA Board of Governors, whose decision would be final. *Id.* ¶ 88. While a member's objection was pending, the OBA did not require any portion of the member's dues to be placed in escrow. *Id.* ¶ 124.

After Mr. Schell filed this lawsuit, the OBA's Board of Governors adopted a new "Keller Policy," with new notice and objection procedures. *See* OBA Keller Policy (adopted Mar. 2 and 9, 2020).[1] As a result, members now may at least request specific details of the OBA's expenditures. *Id.* ¶ 5(a)(iii). The new policy also provides that members may choose to opt out of funding the OBA's "legislative advocacy" by subtracting a specified pro rata amount from the total amount stated on their annual dues notices. *Id.* ¶ 7. And if a member objects to the OBA's use of mandatory dues for a particular activity and the Executive Director

[1] *See* https://www.okbar.org/wp-content/uploads/2020/03/OBA_KellerPolicy.pdf. The Court may take judicial notice of the OBA's adoption of the new policy. *See Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1212-13 (10th Cir. 2012) (Court may take judicial notice of facts "not subject to reasonable dispute," including the existence of "publicly filed documents").

does not grant a refund, the member may appeal to a neutral mediator selected by the Oklahoma Attorney General to determine whether the expenditure is truly "germane," with the member's dues placed in a separate fund while the dispute is pending. *Id.* ¶ 3, Appendix ¶ 1.

C. Mr. Schell's Ongoing Injuries

Despite the recent changes in the OBA's procedures, Oklahoma's requirements that attorneys join and pay dues to the OBA continue to injure Mr. Schell. He does not wish to be a member of the OBA because he does not wish to associate with the organization or its political and ideological speech, regardless of whether he is forced to pay for that speech. App.034 ¶ 91. He also does not wish to pay for any of OBA's other political or ideological speech, including the articles it publishes in the *Bar Journal* and any other advocacy the OBA does not deem "legislative." App.028 ¶ 57, App.033 ¶ 90. Nor does he wish to bear the burden of "opting out" each year to avoid subsidizing the OBA's legislative activity or other non-germane advocacy, as the OBA's new rules require. *See* App.037 ¶¶ 111-12; OBA Keller Policy ¶ 7. Accordingly, the new objection procedures that allow him

to challenge the use of his dues for not being "germane" under *Keller* do not eliminate his injury. App.033–34 ¶¶ 90, 92, App.037 ¶¶ 111-12.

D. Procedural History

Mr. Schell's Amended Complaint includes three claims for relief. App.023–25 ¶¶ 11-39, App.034–40 ¶¶ 94-128. His first claim alleges that forcing him to join the OBA violates his First Amendment rights to free speech and association, particularly his right to choose which groups, and what political speech, he will and will not associate with. App.034–36 ¶¶ 94-104.

His second claim alleges that the OBA's collection and use of dues to subsidize its speech without members' affirmative consent violates his First Amendment rights to free speech and association. App.036–38 ¶¶ 105-118.

His third claim alleges that, to the extent mandatory bar dues are constitutional at all, the OBA violated attorneys' First Amendment rights by failing to provide the safeguards *Keller* required to ensure that member dues are not used for activities not germane to regulating the legal profession and improving the quality of legal services. App.038–40 at ¶¶ 119-128.

The Defendants moved to dismiss Mr. Schell's claims under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Dkt. 43, 45-47, App.014–15. The district court dismissed Mr. Schell's first and second claims (challenging mandatory bar membership and dues, respectively) under Rule 12(b)(6), concluding that Supreme

Court precedent foreclosed them. App.049–51. The Court denied the motions with respect to Mr. Schell's third claim, however, concluding that its "allegations potentially support[ed] a successful claim under the standards set out in *Keller*." App.051–52.

The court also rejected Defendants' other arguments for dismissal, which were based, respectively, on legislative immunity (App.044–45), the Eleventh Amendment (App.045–48), the court's alleged lack of jurisdiction to review the Oklahoma Supreme Court's actions (App.048–49), and abstention doctrines (App.049). After the OBA adopted its new "Keller Policy" in March 2020, the Defendants filed an unopposed motion to dismiss Mr. Schell's third claim as moot, which the court summarily granted. Dkt. 82, App.018.

Mr. Schell now appeals the dismissal of his First Amendment challenges to mandatory OBA membership and the OBA's use of mandatory dues for political, ideological, and other speech.

SUMMARY OF ARGUMENT

This Court should reverse the district court's dismissal of Mr. Schell's First Amendment challenges to mandatory OBA membership and dues.

I. The First Amendment does not allow Oklahoma to force attorneys to become members of the OBA as a condition of practicing law.

A. Contrary to the district court's decision, the Supreme Court has not categorically upheld mandatory bar-association membership. In fact, the Supreme Court has expressly reserved the question whether the First Amendment allows states to force attorneys to join a bar association that, like the OBA, engages in political and ideological speech that is not germane to the bar's core purpose of regulating the legal profession and improving the quality of legal services. *See Keller v. State Bar of Cal.*, 496 U.S. 1, 17 (1990). This Court therefore "remain[s] free … to consider this issue." *Id.*

B. Forcing attorneys to join the OBA triggers exacting First Amendment scrutiny, which requires Defendants to show that mandatory membership "serve[s] a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Janus v. AFSCME*, 138 S. Ct. 2448, 2465 (2018) (citation omitted). Defendants have not tried to meet that burden, nor can they. It is beyond doubt that Oklahoma can serve its interest in regulating the legal profession and improving the quality of legal services without requiring attorneys to join the OBA because (1) the state already regulates other trades and professions directly, without requiring anyone to join an organization that engages in divisive political and ideological advocacy, and (2) twenty states already regulate the legal profession without requiring attorneys to join a bar association that engages in such controversial speech.

II. The First Amendment also does not allow Oklahoma to force attorneys to pay mandatory bar dues to subsidize the OBA's political and ideological speech.

A. In *Keller*, the Supreme Court squarely held that mandatory bar associations must be "subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions." 496 U.S. at 13. In *Janus*, the Supreme Court held that forcing people to pay mandatory union fees triggers, and cannot survive, "exacting" First Amendment scrutiny. 138 S. Ct. at 2466, 2478-86. *Keller* requires the "same constitutional rule" for mandatory bar dues. 496 U.S. at 13. Accordingly, forcing Mr. Schell to pay dues to support the OBA's political and ideological speech triggers exacting scrutiny and violates the First Amendment for the same reasons recognized in *Janus*.

Although *Keller* explained in dicta how the Court believed the now-defunct *Abood* standard should apply to mandatory bar dues, that was ancillary to the Court's square holding that bar dues and union fees must be subject to "the same constitutional rule." *Id*. After *Janus*, the *Keller* dicta about following the *Abood* standard is no longer viable because it conflicts with the square holding of *Keller* that "the same constitutional rule" must apply to union fees and bar dues. Accordingly, exacting scrutiny applies to both. The Supreme Court's holdings trump its dicta.

B. The OBA's recent adoption of a new "*Keller* policy" does not moot Mr. Schell's challenge to mandatory dues. The new policy allows an attorney to opt out of paying for *some* of the OBA's political and ideological speech, but Mr. Schell does not wish to pay for *any* of it. Further, an "opt out" scheme is not constitutionally sufficient. To properly respect attorneys' First Amendment rights, the OBA may fund its political and ideological speech only with dues paid by those who have affirmatively consented by opting *in*.

Even if an opt-out regime were permissible, moreover, OBA's policy would still violate the First Amendment because its opt-out procedure is unduly burdensome under *Janus*. Instead of having an independent body reasonably identify the expenditures that attorneys may decline to support, the OBA's policy forces individual attorneys to bear the burden of identifying objectionable expenditures and then challenging OBA's own self-interested determination of whether those expenditures are chargeable. That is unduly burdensome, and it cannot survive First Amendment scrutiny after *Janus*.

This Court therefore should reverse the dismissal of Mr. Schell's claims.

STANDARD OF REVIEW

This Court reviews dismissal under Federal Rule of Civil Procedure 12(b)(6) de novo, accepting all well-pled factual allegations as true and construing them in

the light most favorable to the plaintiff. *Porter v. Ford Motor Co.*, 917 F.3d 1246, 1248 (10th Cir. 2019).

ARGUMENT

I. Under the First Amendment, Oklahoma Cannot Force Mr. Schell to Join the OBA.

The First Amendment prohibits Oklahoma from forcing attorneys to become members of the OBA as a condition of practicing law. App.034–36 ¶¶ 94-104. As a general matter, the Supreme Court has made clear that the First Amendment protects an individual's "right to eschew association for expressive purposes." *Janus v. AFSCME*, 138 S. Ct. 2448, 2463 (2018). For that reason, forcing Mr. Schell to join the OBA—an organization that engages in divisive political and ideological speech that he strongly opposes—seriously infringes on his First Amendment right to freedom of association.

The district court erred in concluding that the Supreme Court has approved this infringement of First Amendment rights. To the contrary, the Court has expressly reserved the issue for consideration by lower courts. Under *Janus* and other cases, this type of compelled association triggers at least exacting scrutiny, which requires Defendants to show that it "serve[s] a compelling state interest that cannot be achieved by means significantly less restrictive of associational freedoms." *Id.* at 2465 (citation omitted). Defendants cannot meet that burden, and they have not even tried. The district court should be reversed.

A. The Supreme Court has expressly reserved whether attorneys can be forced to join bar associations like the OBA that engage in non-germane political and ideological speech.

The district court wrongly held that Supreme Court precedent forecloses Mr. Schell's challenge to mandatory OBA membership. App.050–51. In fact, the Supreme Court has expressly reserved the issue for lower courts to consider.

In *Lathrop v. Donohue*, 367 U.S. 820, 842-44 (1961) (plurality), the Supreme Court held that a state does not violate attorneys' First Amendment right to freedom of association when it requires them to pay dues to a bar association that exists to "elevat[e] the educational and ethical standards of the Bar [and] … improv[e] the quality of legal service[s]." But the Court declined to address the separate question of whether a bar association's use of mandatory dues for political or ideological advocacy violates the First Amendment rights of attorneys who oppose that advocacy. *Id.* at 845-46. Nor did the court address whether attorneys could be forced to join a bar association that engaged in such political or ideological advocacy, because the record in *Lathrop* did not reveal whether "the State Bar actually utilized dues funds for [those] specific purposes." *Id*. at 846.

In *Keller*, the Court partially addressed the issues that *Lathrop* had declined to resolve. The plaintiffs in *Keller* were attorneys who argued that "the use of their compulsory dues to finance political and ideological activities of the State Bar with which they disagree violates their rights of free speech guaranteed by the First

Amendment." 496 U.S. at 9. Before the case reached the U.S. Supreme Court, the California Supreme Court rejected their claim by holding that bar fees are categorically "exempted" from First Amendment scrutiny. *Id*. at 10. On appeal, the Supreme Court disagreed and reversed, ruling in favor of the plaintiffs. The Court held that mandatory bar dues are not exempt from First Amendment scrutiny but are "subject to the same constitutional rule" as mandatory union fees. *Id*. at 13.

At that time, employees could not be forced to join a union, but they could be forced to pay "agency fees" to unions. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Supreme Court had held that compulsory union fees violated the First Amendment if they were used for activities not "germane" to collective bargaining. *Keller*, 496 U.S. at 9-14. Following that example, the *Keller* Court stated that mandatory bar dues could not be used for "ideological activities not 'germane' … [to] the State's interest in regulating the legal profession and improving the quality of legal services." *Id*. at 13. The Court thus ruled for the plaintiffs, reversed the California Supreme Court, and remanded the case. *Id*. at 17.

Keller also declined to resolve a separate issue related to mandatory bar membership: whether attorneys may "be compelled to associate with an organization that engages in political or ideological activities beyond those [germane activities] for which mandatory financial support is justified under the principles of *Lathrop* and *Abood*." *Keller*, 496 U.S. at 17. In other words, *Keller*

did not decide whether states may force attorneys to join bar associations that (unlike in *Lathrop*) engage in non-germane political and ideological speech. And *Keller* noted that *Lathrop* had not addressed that issue, either. *Id.* Accordingly, the Court stated that lower courts "remain[ed] free … to consider this issue." *Id.* Since then, neither the Supreme Court nor this Court has resolved it.

Here, Mr. Schell alleges that the OBA engages in non-germane political and ideological speech (App.027–31 ¶¶ 51-76, App.037 ¶ 113), and that he does not wish to associate with that speech (App.034 ¶ 91). Based on those facts, he contends that forcing him to join the OBA violates his First Amendment right to freedom of association (App.034–36 ¶¶ 94-104). His claim thus presents precisely the question that *Keller* reserved: whether states may force an attorney to join a bar association that engages in non-germane political and ideological speech he opposes. Accordingly, the district court erred in concluding that *Keller* forecloses Mr. Schell's claim.[2]

B. Mandatory OBA membership must be struck down under exacting First Amendment scrutiny.

Because the Supreme Court has expressly reserved the question of whether attorneys can be forced to join a bar association that engages in political and

[2] To be clear, Mr. Schell also contends that mandatory membership in *any* bar association violates attorneys' First Amendment rights. App.034–35 ¶¶ 94-104. He preserves that broader argument for review in the Supreme Court, recognizing that *Lathrop* binds this Court.

ideological activity, this Court must address the issue in the first instance. The Court should hold that Oklahoma's requirement of mandatory OBA membership triggers exacting scrutiny under the First Amendment, which it cannot survive. It is well established that states cannot force people to join expressive associations that engage in controversial political and ideological speech unless such compulsion is necessary to advance a compelling state interest. And here, the state cannot come close to satisfying that standard. Forcing lawyers to join the OBA is completely unnecessary to any interest Oklahoma may have in regulating the legal profession or improving the quality of legal services. It is thus unconstitutional.

As the Supreme Court has repeatedly held, the "freedom of association" protected by the First Amendment "plainly presupposes a freedom not to associate." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *see also NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–461 (1958). Accordingly, "mandatory associations" are presumptively unconstitutional. *Knox v. SEIU*, 567 U.S. 298, 310 (2012). They "are permissible only when they serve a 'compelling state interes[t] ... that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Id*. (citation omitted).

Here, the OBA indisputably engages in political and ideological speech (*supra* at 7–10), and thus forcing attorneys to enroll as members triggers exacting scrutiny. Defendants cannot meet that standard, as they have not even tried to show

that the state lacks significantly less-restrictive means of "regulating the legal profession and improving the quality of legal services." *Keller*, 496 U.S. at 13. They have not tried to make that showing because they cannot. Oklahoma *can* serve its interest in regulating the legal profession and improving the quality of legal services in multiple different ways without impinging on the First Amendment by forcing attorneys to join the OBA.

On this point, the Supreme Court's recent decision in *Janus* is instructive. In *Janus*, the Court applied the same "exacting scrutiny" that applies here. 138 S. Ct. at 2465, 2483. Nobody in *Janus* thought employees could be forced to *join* a union, but the state argued that forcing them to pay mandatory union fees was necessary to serve the state's interest in "labor peace." The "labor peace" theory—which the Court had accepted in *Abood*, 431 U.S. at 223-37—held that requiring employees to subsidize a union was necessary because of the union's designation as employees' exclusive bargaining representative. Without compulsory fees, the theory went, the union would not be able to act as the sole bargaining representative; and, without a single exclusive representative, competing unions could cause "pandemonium" in the workplace. *Janus*, 138 S. Ct. at 2465.

Janus rejected that assumption as "simply not true" because several federal entities and states had long designated public-sector unions as exclusive representatives *without* compelling union fees, and no such "pandemonium" had

resulted. *Id.* Unions were, in fact, able to serve as exclusive representatives without compelling workers' support. Therefore, the Court found it "undeniable that 'labor peace' can readily be achieved 'through means significantly less restrictive of associational freedoms' than the assessment of agency fees." *Id.* at 2466. The Court thus concluded that the fees could not survive exacting First Amendment scrutiny and overruled *Abood*. *See id*. at 2466, 2478-86.

Here, mandatory OBA membership fails exacting scrutiny for the same basic reasons that mandatory union fees failed in *Janus*: the state can achieve its goals of regulating the legal profession and improving the quality of legal services without compelling anyone to join a bar association. App.035 ¶¶ 100-101. The state can simply act as a regulator by penalizing attorneys who break the rules—and by providing educational services to ensure that practitioners know the rules—just as it already does for numerous other professions and trades. *See* Okla. Stat. tit. 59, § 15.1 *et seq.* There is no reason compulsory bar membership is necessary to achieve these goals, and indeed the State has never even tried to argue otherwise.

This is especially clear because some 20 states and Puerto Rico already regulate the practice of law without requiring membership in a bar that uses dues for political and ideological speech.[3] This includes states with large populations of

[3] *See* Ralph H. Brock, *"An Aliquot Portion of Their Dues:" A Survey of Unified Bar Compliance with Hudson and Keller*, 1 Tex. Tech J. Tex. Admin. L. 23, 24 n.1 (2000). This article identifies 32 states with a mandatory bar association. Since its

lawyers (New York, California) and small ones (Vermont, Delaware). If those states can regulate lawyers and improve the quality of legal services without forcing attorneys to join a mandatory bar, then so can Oklahoma.

Even if mandatory bar membership were somehow necessary to Oklahoma's regulatory goals, the state could still achieve those goals through an obvious less-restrictive means: The state could create a bifurcated system in which the mandatory membership organization sticks to regulatory functions and does not "us[e] its name to advance political and ideological causes or beliefs." *Keller*, 496 U.S. at 17. To be sure, this would still impinge on First Amendment rights. *Roberts*, 468 U.S. at 623. But it would be significantly *less* restrictive than the current arrangement, which needlessly forces attorneys to join an organization that engages in divisive political and ideological advocacy.

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publication, however, California has adopted a bifurcated system under which lawyers pay only for purely regulatory activities and are not forced to fund the bar association's political or ideological speech, eliminating most if not all of the First Amendment problems. *See* Marilyn Cavicchia, *Newly Formed California Lawyers Association Excited to Step Forward*, ABA Journal (Apr. 30, 2018), *available at* https://bit.ly/2LEYNg0. Nebraska also adopted a bifurcated system in 2013 but then made its bar association fully voluntary this year. *See In re Petition for a Rule Change to Create a Voluntary State Bar of Neb.*, 841 N.W.2d 167, 173 (Neb. 2013); Neb. S. Ct. Rule 3-100(B) (amended effective February 12, 2020 to require payment of an annual assessment to the Nebraska Supreme Court rather than the Nebraska State Bar Association).

II. The First Amendment prohibits the collection of mandatory bar dues to subsidize political and ideological speech without affirmative consent.

The First Amendment also prohibits Oklahoma from forcing attorneys to pay mandatory bar dues to subsidize the OBA's political and ideological speech. App.036–38 ¶¶ 105-118.

A. Mandatory bar dues violate the First Amendment under "the same constitutional rule" that applies to compulsory union fees.

In *Keller*, the Supreme Court held that mandatory bar dues are "subject to the same constitutional rule" that applies to mandatory union fees. 496 U.S. at 13. In *Janus*, the Court held that mandatory union fees trigger "exacting scrutiny" and struck them down. 138 S. Ct. at 2486. Under *Keller*, the same rule must apply to mandatory bar dues. They trigger the same scrutiny, and must meet the same fate.

The contrary rule adopted by the court below—which treats mandatory bar dues *differently* from mandatory union fees—would require overruling *Keller*'s core holding that requires "the same constitutional rule" for both. App.051. Because this Court has no authority to overrule Supreme Court precedent, it must reverse the decision below. Mandatory bar dues and union fees are both subject to exacting First Amendment scrutiny because they both force people to subsidize political and ideological speech that they do not wish to support. And because states can serve their regulatory interests in many other ways with no compulsory speech subsidy, they cannot justify this infringement on First Amendment rights.

1. In *Keller*, the plaintiffs were attorneys who claimed that the state bar association's use of their mandatory dues for "political and ideological causes" violated their First Amendment rights. 496 U.S. at 6. The Supreme Court of California rejected their claim, holding that the California state bar association was a "state agency," and was therefore "exempted … from any constitutional constraints on the use of its dues." *Id.* at 10. On appeal of that issue, the U.S. Supreme Court reversed and ruled in favor of the plaintiffs. *Id*. at 17. The Court held that bar associations are not like "traditional government agencies" funded by tax dollars, but are instead akin to labor unions funded by individual member dues. *Id*. at 10-13. For that reason, bar associations are not exempt from First Amendment scrutiny, but must be "subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions." *Id*. at 13.

At the time *Keller* was decided, *Abood* allowed compulsory dues to subsidize political and ideological speech as long as it was "germane" to a legitimate regulatory purpose. 431 U.S. at 235. Now, however, that "deferential standard" no longer exists, because *Abood* has been overruled by *Janus*. 138 S. Ct. at 2479-80. Under *Janus*, forcing people to pay mandatory union fees triggers "exacting scrutiny" under the First Amendment. *Id*. at 2483. Accordingly, because *Keller* requires "the same constitutional rule" to apply to both union fees and bar dues, 496 U.S. at 13, the same exacting scrutiny must apply to both.

If this Court were to hold otherwise, by applying the now-defunct *Abood* standard to mandatory bar dues, it would overturn *Keller*'s core holding that bar dues and union fees are subject to "the same constitutional rule." *Id*. That would violate the principle that only the Supreme Court can overturn its own precedent. *Agostini v. Felton*, 521 U.S. 203, 237 (1997). It would also lead to the illogical result that compulsory bar dues and compulsory union fees would be governed by completely different First Amendment standards, despite the lack of any principled distinction between the two: Both types of mandatory fees involve precisely the same type of compelled speech subsidy. They should be subject to the same constitutional standard.

2. The decision below is wrong. *Keller* did not hold that attorneys can be forced to pay mandatory bar dues as long as they are germane to the bar association's regulatory purpose. In *Keller*, the Supreme Court was reviewing a decision that had held mandatory bar dues were categorically exempt from First Amendment scrutiny. The plaintiffs sought to overturn that holding by arguing that bar fees should be subject to the same standard as union dues. Nobody in the case argued that exacting scrutiny should apply, and the Court did not consider that question. There was no need to. Deciding what *level* of scrutiny applied was not necessary to reverse the lower court's ruling that *no* scrutiny applied. Anything the court said on the level of scrutiny was thus dicta, not a holding.

To understand *Keller*'s precedential force, it is necessary to separate the *holding* of that decision—which is binding—from the accompanying *dicta*, which are not. The "holding" of a decision comprises only the actual disposition of the case and the reasoning that was "necessary to th[e] result." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996). By contrast, "[d]icta are statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand." *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1184 (10th Cir. 1995) (internal quotation marks and citation omitted).

In *Keller*, the Court's clear holding was that mandatory bar dues must be governed by "the same constitutional rule" that applies to mandatory union fees. 496 U.S. at 13. The lower court had ruled that the state bar was a "state agency," and was thus "exempted … from any constitutional constraints on the use of its dues." *Id*. at 10. The Supreme Court disagreed, reversing that ruling and remanding the case. *Id*. at 17. The Court clearly explained the reasoning that was necessary to the reversal: Contrary to the lower court's ruling, state bar associations are "different from … 'governmental agencies.'" *Id*. at 11. Instead, there is "a substantial analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of employee unions and their members, on the other." *Id*. at 12. For that reason, state bar associations must be "subject to the

same constitutional rule with respect to the use of compulsory dues as are labor unions," which are bound by the First Amendment. *Id*. at 13. That equation between unions and state bar associations was *Keller*'s essential rule of decision: It required the reversal of the lower court's ruling that bar associations are "state agencies" whose mandatory dues are "exempted" from First Amendment scrutiny. *Id*. at 10.

Beyond that, the Supreme Court in *Keller* did not and could not issue any holding as to what *level* of First Amendment scrutiny should apply to mandatory union fees and mandatory bar dues. Addressing that question was not "necessarily involved nor essential to determination" of whether the lower court erred in categorically *exempting* mandatory bar dues from First Amendment scrutiny. *Rohrbaugh*, 53 F.3d at 1184. Nor was deciding the level of scrutiny "necessary to th[e] result" of reversing the lower court's decision, which had rejected the plaintiffs' claims based on its categorical holding that *no* First Amendment scrutiny applied. *Seminole Tribe*, 517 U.S. at 67. Accordingly, any statements the Court made in *Keller* about whether or how the *Abood* standard should apply to mandatory union dues were clearly dicta. Indeed, the plaintiffs in *Keller* did not even argue that anything more stringent than the *Abood* standard should apply—which is what Mr. Schell argues here—so the Court had no occasion to address that question even in dicta, much less issue a holding on it.

The *Keller* Court simply assumed that *Abood* supplied the proper level of scrutiny for mandatory bar dues. As the Court noted, "*Abood* held that a union could not expend a dissenting individual's dues for ideological activities not 'germane' to … collective bargaining." 496 U.S. at 14. Thus, when it comes to mandatory bar dues, the court stated, "[w]e think … the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" *Id*. (citation omitted). But that tentative dicta about the Court's "think[ing]" was not part of *Keller*'s holding.

Ordinarily, of course, this Court would follow Supreme Court dicta, at least when it has not been "enfeebled by later statements." *See Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996). Here, however, this Court cannot follow any dicta from *Keller* about how *Abood* might apply to mandatory union dues, because that dicta has been worse than "enfeebled." *Id*. As a result of *Janus*, which overturned *Abood*, the dicta in *Keller* now conflicts with the square *holding* of *Keller*: bar dues and union fees must be "subject to the same constitutional rule." *Keller*, 496 U.S. at 13. When the Supreme Court's holdings conflict with its dicta, the holdings must prevail. *Hanson v. Wyatt*, 552 F.3d 1148, 1163 (10th Cir. 2008). And the holdings of *Janus* and *Keller* require mandatory bar dues to be subject to "the same" exacting scrutiny that applies to mandatory union fees.

Even apart from *Keller* and *Janus*, other binding Supreme Court precedent also requires mandatory bar dues to be subject to "exacting scrutiny." As the Supreme Court has explained, "generally applicable First Amendment standards" require "exacting scrutiny" for any "compelled funding of the speech of other private speakers or groups." *Harris v. Quinn*, 573 U.S. 616, 647 (2014) (citing cases) (internal quotations and citation omitted). That "generally applicable" First Amendment rule is based on the binding holdings of multiple different Supreme Court cases. *Id*. Accordingly, the binding principle of "exacting scrutiny" necessarily trumps any dicta in *Keller* about how the now-defunct *Abood* standard should apply to mandatory bar dues.

3. Forcing attorneys to pay mandatory bar dues to subsidize political and ideological speech that they oppose cannot survive exacting scrutiny. To satisfy that standard, compulsory dues would need to "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Janus*, 138 S. Ct. at 2465. And as *Keller* explained, the only conceivable interests served by mandatory bar dues are "regulating the legal profession" and "improving the quality of the legal service available to the people of the State." 496 U.S. at 14 (citation omitted).

Defendants cannot satisfy exacting scrutiny because Oklahoma has many other ways of effectively regulating the legal profession and improving the quality

of legal services without forcing attorneys to subsidize OBA's political and ideological speech. Indeed, there are many other states that effectively regulate the legal profession without forcing attorneys to subsidize the political and ideological speech of a bar association. *See supra* at 26–27. That alone is fatal to the OBA's mandatory fee regime. There is no reason Oklahoma cannot regulate its lawyers in the way that other states do, without any compulsory speech subsidy.

Most obviously, Oklahoma could simply create a state agency to regulate the legal profession without requiring mandatory dues, which is how the state regulates virtually every other profession. Or, if Oklahoma insists on delegating its regulatory authority to the OBA, it could create a bifurcated system with mandatory dues funding only the OBA's regulatory functions but not its political and ideological speech. The OBA could then do what every other advocacy group does to pay for its political and ideological advocacy: raise voluntary contributions without coercing dissenters to provide financial support. These alternatives would be significantly less restrictive of First Amendment rights, because they would ensure that nobody would be forced to support the OBA's political and ideological expression unless they "affirmatively consent." *Janus*, 138 S. Ct. at 2486.

At the very least, Defendants have not shown at the pleading stage that forcing attorneys to subsidize the OBA's political and ideological speech can

survive exacting scrutiny. The Court therefore should reverse the dismissal of Mr. Schell's challenge on this issue.

B. The OBA's revised notice-and-objection procedures do not moot Plaintiff's claim.

The OBA's new "*Keller* Policy"—adopted after the district court dismissed Mr. Schell's first and second claims for relief—does not moot Mr. Schell's claim.

As discussed above, the Court in *Keller* held that mandatory bar dues are subject to "the same constitutional rule" that applies to mandatory union dues. 496 U.S. at 13. Because *Abood* was the applicable constitutional rule at the time, the Court stated in dicta that "[w]e believe an integrated bar could certainly meet its *Abood* obligation by adopting the sort of procedures described in [*Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986)]," which implemented *Abood*. *Keller*, 496 U.S. at 17. That dicta was never part of the Court's holding, and it no longer carries any force. See *supra* at 30-32. And because the procedures discussed in the *Keller* dicta were designed to implement *Abood*, they protect attorneys only from having to pay for political and ideological speech that is not "germane" to "regulating the legal profession and improving the quality of legal services." 496 U.S. at 13-14.

Under the "exacting scrutiny" standard that now applies, however, Mr. Schell has a right to avoid paying for *any* bar association speech, especially political and ideological speech, even if it *is* "germane." That is the rule required

by *Janus*, which protects the right of public-sector workers to avoid paying for any union speech unless they "affirmatively consent." *Janus*, 138 S. Ct. at 2486. Attorneys must be subject to "the same constitutional rule." *Keller*, 496 U.S. at 13.

Under *Janus*, the new OBA policy violates the First Amendment for several reasons. First, as a substantive matter, the new policy still forces attorneys to pay for OBA speech, including political and ideological speech, that is "germane" to the bar's regulatory purpose. 138 S. Ct. at 2473. The policy allows people to opt out of paying for the OBA's "legislative program." Keller Policy, *supra* at § 2. But that is only one way the OBA can use (and has used) mandatory dues for political and ideological speech. A member who opts out of paying for the OBA's legislative activity still must pay for the OBA's other political and ideological speech, including the articles it publishes in the *Bar Journal* and any other advocacy the OBA does not deem "legislative." *See id.*; App.028 ¶ 57. Forcing attorneys to pay for this type of speech is flatly impermissible under *Janus*, even if the speech is "germane." 138 S.Ct. at 2486.

Second, the OBA policy impermissibly requires attorneys to opt *out* of paying for speech they do not wish to support. That violates the *Janus* rule that speech subsidies must be based on an opt *in*. Under *Janus*, individuals must "clearly and affirmatively consent" before any fee to subsidize an organization's speech may be taken from them. *Id.* Agreeing to subsidize someone else's speech

constitutes a waiver of the First Amendment right *not* to do so. *See id*. "[S]uch a waiver cannot be presumed," *id*., but rather must be knowing, voluntary, and intelligent, *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967); *see also Knox*, 567 U.S. at 312.

Third, even if an opt-out regime were somehow permissible, the OBA's opt-out process makes it unduly burdensome for attorneys to identify and opt out of objectionable expenditures. As the Supreme Court explained in *Janus*, it is a "laborious and difficult" process to identify and challenge non-germane expenditures under the procedures that the now-defunct rule of *Abood* required. 138 S. Ct. at 2482. If the OBA categorizes an expenditure as "germane," then it is "a daunting and expensive task" to challenge that determination. *Id*. In light of that reality, an attorney's passive failure to identify and opt out of a particular expenditure does not constitute clear evidence that he or she consents to subsidize it. Accordingly, forcing Mr. Schell to monitor the OBA's activity and avail himself of an objection and appeal process just to avoid paying for non-germane OBA activity imposes an undue burden on his First Amendment rights.[4]

[4] If *Keller* did somehow foreclose this claim, then it must be overruled for the same reasons that the Court overruled *Abood* in *Janus*, 138 S. Ct. at 2478-86. Again, Mr. Schell does not present that argument in detail here because only the Supreme Court can overrule *Keller*.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's dismissal of Plaintiff's claims.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant Mark E. Schell respectfully requests oral argument because this case presents important and complex questions of constitutional law, including the relationship between the Supreme Court's decisions in *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *Janus v. AFSCME*, 138 S. Ct. 2448 (2018).

RESPECTFULLY SUBMITTED this 18th day of May 2020 by:

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1) and Fed. R. App. P. 29(a)(5), I certify that this Brief:

(a) was prepared using 14-point Times New Roman font;

(b) is proportionately spaced; and

(c) contains 8,930 words.

Submitted this 18th day of May 2020,

/s/ *Anthony J. Dick*
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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hardcopies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, and according to the program are free from viruses.

/s/ *Anthony J. Dick*
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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May 2020, the foregoing Brief was filed and served on all counsel of record via the ECF system.

/s/ *Anthony J. Dick*
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ADDENDUM

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MARK E. SCHELL, Plaintiff, vs. NOMA GURICH, Chief Justice of the Oklahoma Supreme Court, *et al.*, Defendants.	)	NO. CIV-19-0281-HE

ORDER

This case challenges the State of Oklahoma's requirement that attorneys join and pay dues to the Oklahoma Bar Association ("OBA") and the OBA's use of the attorneys' mandatory dues. Plaintiff asserts claims against the Justices of the Oklahoma Supreme Court ("Defendant Justices"), the OBA's Executive Director, John M. Williams ("Defendant Williams"), and the members of the OBA's Board of Governors ("Defendant Board Members"). All defendants have filed motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6).

Background

Oklahoma law requires every attorney to join and pay dues to the OBA in order to practice law in Oklahoma. Plaintiff contends the requirement for attorneys to join the OBA and the collection and use of mandatory bar dues to subsidize political and ideological speech without his consent violates his First Amendment rights to free speech and association. He contends the requirements are not necessary to regulate the legal profession or to improve the quality of legal services in Oklahoma. He further contends

that, even if mandatory bar membership and dues are otherwise constitutional, the Oklahoma structure fails to provide constitutionally required safeguards to ensure that an attorneys' dues are not used for activities unrelated to improving the quality of legal services and regulating the legal profession. Through this lawsuit, plaintiff:

> asks this Court to declare Oklahoma's bar membership requirement unconstitutional and order Defendants to stop forcing attorneys to subsidize the OBA's speech without their affirmative consent, or, alternatively, to order Defendants to adopt procedures to protect attorneys from being forced to subsidize OBA speech and activities that are not germane to improving the quality of legal services and regulating the legal profession.

First Amended Complaint [Doc. #19] at ¶ 6.

Discussion

Defendants assert they are immune from suit and should be dismissed from this case. Additionally, they contend compulsory membership in, and payment of dues to, an integrated bar association is constitutional and that the OBA's refund procedures for dues spent on non-germane speech meet constitutional standards.

A. Immunity

1. Legislative immunity

A state "[c]ourt and its members are immune from suit when acting in their legislative capacity." Supreme Court of Va. v. Consumers Union of U.S., Inc., 446 U.S. 719, 735 (1980). Defendant Justices correctly assert that when they enact the rules governing the practice of law in Oklahoma, they act in their legislative capacity and therefore are immune from any suit relating to such activities. However, legislative

immunity does not absolutely insulate the Defendant Justices from the declaratory and injunctive relief sought in this case, as they also act in an enforcement capacity. The Supreme Court has concluded that circumstance permits a suit of the sort involved here to go forward notwithstanding legislative immunity. Id. at 737.

2. Eleventh Amendment immunity

Defendants contend the claims against them are also barred by Eleventh Amendment immunity. Under the Eleventh Amendment:

> [s]tates may not be sued in federal court unless they consent to it in unequivocal terms or unless Congress, pursuant to a valid exercise of power, unequivocally expresses its intent to abrogate the immunity. This prohibition encompasses suits against state agencies [and] [s]uits against state officials acting in their official capacities. But, [u]nder *Ex Parte Young*[, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)], a plaintiff may avoid the Eleventh Amendment's prohibition on suits against states in federal court by seeking to enjoin a state official from enforcing an unconstitutional statute.

Collins v. Daniels, 916 F.3d 1302, 1315 (10th Cir. 2019) (internal quotations and citations omitted).

It appears to be undisputed that all defendants in this case are state officials or are viewed as such for Eleventh Amendment purposes, and that, unless the Ex Parte Young exception applies, they are immune from suit. When determining whether the Ex Parte Young exception applies, a court "need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." Hill v. Kemp, 478 F.3d 1236, 1259 (10th Cir. 2007) (internal quotations and citations omitted). Here, the First Amended Complaint alleges an

ongoing course of conduct which violates the plaintiff's rights and seeks prospective relief through a declaratory judgment or an injunction.

Defendant Williams and the Defendant Board Members make the further argument that they do not come within the Ex Parte Young exception because they are not persons with the power to implement any relief the court may order. The applicable standard is that:

> in making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party. . . . Defendants are not required to have a "special connection" to the unconstitutional act or conduct. Rather, state officials must have a particular duty to "enforce" the statute in question and a demonstrated willingness to exercise that duty.

Peterson v. Martinez, 707 F.3d 1197, 1205 (10th Cir. 2013) (internal quotations and citations omitted). "Connection to the enforcement of an act may come by way of another state law, an administrative delegation, or a demonstrated practice of enforcing a provision. But when a state law explicitly empowers one set of officials to enforce its terms, a plaintiff cannot sue a different official absent some evidence that the defendant is connected to the enforcement of the challenged law." Id. at 1207.

It is undisputed that the Defendant Justices, acting together as the Oklahoma Supreme Court,[1] are responsible for enforcing the laws requiring membership in the OBA

[1] *The Defendant Justices contend the Ex Parte Young exception does not apply because they cannot individually order anything, and can act only as a court collectively. In Verizon Md. Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 645-46 (2002), the Supreme Court implicitly rejected*

as a condition of practicing law in Oklahoma. *See* Okla. Stat. tit. 5, ch. 1, app. 1, art. 8 §1. Thus, to the extent this case is seeking to enjoin the Defendant Justices' enforcement of the mandatory membership in, and payment of dues to, the OBA, the Ex Parte Young exception to Eleventh Amendment immunity applies. In light of the relief sought here, the Defendant Justices are not immune from suit under the Eleventh Amendment.[2]

With respect to Defendant Williams' and the Defendant Board Members' argument that they lack necessary enforcement power to be proper parties, the court concludes otherwise. While they do not have ultimate authority over membership and dues-handling issues, they have a sufficient connection with the enforcement of the membership and dues requirements to make the Ex Parte Young exception applicable. Under the Rules Creating and Controlling the Oklahoma Bar Association, Defendant Williams is required to notify members who have not paid their mandatory dues and to certify the names of these members to the Oklahoma Supreme Court. *See* Okla. Stat. tit. 5, ch. 1, app. 1, art. 6 § 4.

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this distinction by allowing the plaintiffs to challenge an order of the Public Service Commission of Maryland by suing its individual members. Further, numerous federal courts have allowed suits against individual supreme court justices to proceed where an injunction against all, or a majority, might be necessary to provide the plaintiff with effective relief. See, e.g., LeClerc v. Webb, 419 F.3d 405, 414 (5th Cir. 2005); Abrahamson v. Neitzel, 120 F. Supp. 3d 905, 919-20 (W.D. Wis. 2015); Nat'l Ass'n for Advancement of Multijurisdictional Practice v. Berch, 973 F. Supp. 2d 1082, 1093-94 (D. Ariz. 2013); Rapp v. Disciplinary Bd. of Haw. Sup. Ct., 916 F. Supp. 1525, 1531 (D. Haw. 1996).

[2] *The Defendant Justices also contend the Ex Parte Young exception is not applicable because there is no enforcement action pending or threatened against plaintiff. However, the Supreme Court has concluded that a threatened or pending enforcement proceeding is not required. See Supreme Court of Va., 446 U.S. at 737 ("If prosecutors and law enforcement personnel cannot be proceeded against for declaratory relief, putative plaintiffs would have to await the institution of state-court proceedings against them in order to assert their federal constitutional claims. This is not the way the law has developed, and, because of its own inherent and statutory enforcement powers, immunity does not shield the Virginia Court and its chief justice from suit in this case.").*

Further, the Board of Governors has the authority to remove attorneys who do not pay mandatory dues from the OBA's membership rolls and identifies attorneys who have not paid their annual dues and reports their names to the Oklahoma Supreme Court, which then suspends them from the practice of law. *See* Okla. Stat. tit. 5, ch. 1, app. 1, art. 8 § 2.

Additionally, both Defendant Williams and the Board play important roles in the process the OBA has established for attorneys to object to specific expenditures of their dues, the process that plaintiff challenges in his third claim for relief. A member's objection to an expenditure must be submitted to Defendant Williams, who reviews the objection and has the discretion to either issue a refund to the member or refer the matter to an OBA Budget Review Panel. That panel's decisions may then be appealed to the Board. *See* Notice and Objection Procedure to OBA Budgetary Expenditures. Further, the expenditures to which a member might object are authorized by the Board. *See* Okla. Stat. tit. 5, ch. 1, app. 1, art. 7 § 2.[3]

In any event, the defendants are not immune from suit based on the Eleventh Amendment, in light of the nature of the relief sought by plaintiff and the defendants' potential roles as to any relief that might be ordered.

B. Jurisdiction to Review the Actions of the Oklahoma Supreme Court

The Defendant Justices also assert this court lacks subject matter jurisdiction to review the actions of the Oklahoma Supreme Court. While federal district courts do not

[3] *For substantially the same reasons as stated in footnote 2 with respect to members of the state supreme court, suits based on Ex Parte Young may be brought against individual members of the Board of Governors even though it acts collectively.*

have jurisdiction to review final judgments of a state court in judicial proceedings, a federal court does have jurisdiction over general attacks on the constitutionality of state bar admission rules. *See* D.C. Court of Appeals v. Feldman, 460 U.S. 462, 486 (1983); Van Sickle v. Holloway, 791 F.2d 1431, 1436 (10th Cir. 1986). Since this case involves a general challenge to Oklahoma's rules requiring attorneys to join and pay dues to the OBA, and does not involve any review of a final judgment, this court has jurisdiction over it.

C. Abstention

Defendants further assert this court should abstain from interfering in state court matters. However, they have not identified a persuasive basis for doing so. There are no pending state judicial proceedings addressing the questions at issue in this case, as would be necessary for Younger[4] abstention. The challenges to the Oklahoma bar admission rules do not present difficult questions of state law such as might warrant abstention under Burford.[5] And, as various of the cases cited above suggest, disputes of this sort are often addressed in federal court. The court concludes a basis for abstention has not been shown.

D. Failure to state a claim

When considering whether a plaintiff's claim should be dismissed under Rule 12(b)(6), the court accepts all well-pleaded factual allegations as true and views them in the light most favorable to the plaintiff as the nonmoving party. S.E.C. v. Shields, 744 F.3d 633, 640 (10th Cir. 2014). All that is required is "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). The complaint

[4] *Younger v. Harris, 401 U.S. 37 (1971).*
[5] *Burford v. Sun Oil Co., 319 U.S. 315 (1943).*

must, though, contain "enough facts to state a claim to relief that is plausible on its face" and "raise a right to relief above the speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 555 (2007). "'A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" Shields, 744 F.3d at 640 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)).

The United States Supreme Court has addressed the question of bar membership twice. In Lathrop v. Donohue, 367 U.S. 820 (1961), the Supreme Court held that compulsory membership in, and payment of dues to, a state bar association was constitutional. While there was no majority opinion in Lathrop, a majority of the Justices agreed that mandatory paid membership in the bar did not violate an individual's freedom of association. In Keller v. State Bar of Calif., 496 U.S. 1, 4 (1990), a unanimous Supreme Court "agree[d] that lawyers admitted to practice in the State may be required to join and pay dues to the State Bar". The Supreme Court further held:

> the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services. 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. The difficult question, of course, is to define the latter class of activities.

Id. at 13-14. In light of the difficulty is determining the boundaries of germane speech, the Supreme Court held that bar associations must put in place "the sort of procedures

described in [*Teachers v.*] *Hudson*[, 475 U.S. 292 (1986)]" for the collection of dues. Id. at 17.

Defendants assert that compulsory membership in, and payment of dues to, an integrated bar association are constitutional under controlling precedent and that the OBA has adopted the required Keller procedures. Defendants therefore contend that plaintiff's claims should be dismissed for failure to state a claim.

In light of the Supreme Court's decisions in Lathrop and Keller, plaintiff's claims directed to compelled membership in the OBA and to the collection and use of mandatory bar dues to fund activities germane to regulating the legal profession and improving legal services fail. To the extent that plaintiff contends the recent case of Janus v. AFSCME, 138 S.Ct. 2448 (2018) requires a different result, the court is unpersuaded. Janus involved the payment of agency fees by non-members of a public employee union. While there are some parallels between Janus and the circumstances here, there are also differences. There is also no suggestion in Janus that either Lathrop or Keller were overruled or otherwise called into question. In such circumstances, the court is obliged to follow the cases which most directly control, and therefore declines to speculate as to whether the Supreme Court might reach some different result if it were to revisit either Lathrop or Keller. *See* Agostini v. Felton, 521 U.S. 202, 237 (1997); Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 484 (1989).

Plaintiff's first and second claims will be dismissed.

The court reaches a different conclusion as to the third claim, which challenges whether appropriate safeguards are in place to meet Keller standards, i.e., whether the

procedures appropriately protect the rights of members who do not wish to subsidize activities beyond those germane to improving legal services and regulating the profession. The complaint alleges that the OBA's proposed budget does not identify planned expenditures with sufficient specificity for members to make a meaningful decision as to whether or how to challenge a proposed expenditure or category of expenditures. It alleges that the OBA's procedures do not permit resolution of a member's objections by an impartial decision maker. It also alleges the OBA does not require any portion of an objecting member's dues to be placed in escrow. *See* First Amended Complaint at ¶¶ 77-89, 122-124. Those allegations potentially support a successful claim under the standards set out in Keller. The motions will be denied as to the third claim.

Conclusion

Defendants' motions to dismiss [Doc. Nos. 43, 45, 46, and 47] are **GRANTED in part and DENIED in part** as set forth above.

IT IS SO ORDERED.

Dated this 18th day of September, 2019.

JOE HEATON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MARK E. SCHELL,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. CIV-19-0281-HE
	)	
NOMA GURICH, Chief Justice of the Oklahoma Supreme Court, et al.,	)	
	)	
Defendants.	)	

ORDER

Defendants' Unopposed Motion to Dismiss Plaintiff's Third Claim for Relief Pursuant to Federal Rule of Civil Procedure 12(c) [Doc. #81] is **GRANTED**. Plaintiff's third claim for relief is **DISMISSED** as moot. Each party shall bear its own costs and fees related to plaintiff's third cause of action, as set out in the unopposed motion.

IT IS SO ORDERED.

Dated this 25th day of March, 2020.

JOE HEATON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MARK E. SCHELL,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. CIV-19-0281-HE
	)	
NOMA GURICH, Chief Justice of the Oklahoma Supreme Court, et al.,	)	
	)	
Defendants.	)	

JUDGMENT

For the reasons stated in the court's September 18, 2019, order and March 25, 2020, order, this case is **DISMISSED**.

IT IS SO ORDERED.

Dated this 25th day of March, 2020.

JOE HEATON
UNITED STATES DISTRICT JUDGE