No. 19-35463

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL Z. CROWE; OREGON CIVIL LIBERTIES ATTORNEYS;
and LAWRENCE K. PETERSON,

Plaintiffs-Appellants,

v.

STATE BAR OF OREGON,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Oregon, Portland Division
Case No. 3:18-cv-02139-JR
Hon. Michael H. Simon

DEFENDANT-APPELLEE'S SUPPLEMENTAL EXCERPTS OF RECORD VOLUME 1 OF 1

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DEFENDANT-APPELLEE'S SUPPLEMENTAL EXCERPTS OF RECORD

VOLUME 1 of 1

ECF NO.	DATE	DESCRIPTION	VOL.	PAGE
20	1/30/2019	Plaintiffs' Response to Defendants' Motion to Dismiss	1	SER 001-006
15	1/09/2019	Defendants' Motion to Dismiss	1	SER 007-012
23	2/13/2019	Defendants' Reply in Support of Their Motion to Dismiss	1	SER 013-016
33	4/29/2019	Defendants' Response to Plaintiffs' Objections to Findings and Recommendation	1	SER 017-020

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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

DANIEL Z. CROWE, et al.,

Plaintiffs,

v.

OREGON STATE BAR, et al.,

Defendants.

Case No. 3:18-cv-02139-JR

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

ORAL ARGUMENT REQUESTED

must explain its fee in advance. *Hudson*, 475 U.S. at 309. This is "required because the [mandatory fee] itself impinges on … First Amendment interests, and because the [member] has the burden of objection." *Id*. Requiring *advance* justification of the bar fee is "necessary to minimize both the impingement and the burden." *Id.* And placing at least a portion of an objecting member's dues in an interest-bearing escrow account is necessary to ensure that a member's dues are not "temporarily used for impermissible purposes." *Id.*

Contrary to Defendants' repeated assertions, the Ninth Circuit has *not* held that a bar association can satisfy its First Amendment obligations simply by offering members the opportunity to seek a refund after it misuses their dues. MTD 15, 17, 18. In the case Defendants rely on for this point, the court noted that the plaintiffs, who sued the State Bar of California, did "not complain about how the State Bar spen[t] their mandatory dues" and that, "[i]n compliance with the Supreme Court's decision in *Keller*, the State Bar allow[ed] members to seek a refund of the proportion of their dues that the State Bar has spent on political activities unrelated to its regulatory function." *Morrow*, 188 F.3d at 1175. These statements—which appear in *Morrow*'s background section and are not part of its legal analysis—are not even dicta for Defendants' position. *Morrow* suggests, in passing, that a refund is at least *part* of what *Keller* requires; it does not suggest, much less hold, that a refund is *all* that *Keller* requires. Again, *Keller* itself did not say that a refund alone would suffice, but rather pointed to *Hudson*'s procedures as satisfying the constitutional minimum. *See Keller*, 496 U.S. at 17.

Finally, Defendants' assertions about the OSB's supposedly adequate procedures for refunds and arbitration depend on facts outside the complaint and therefore cannot serve as a basis for dismissal under Rule 12(b)(6). *See* MTD 15-17. Defendants are correct that the Court may take judicial notice of the OSB's bylaws—i.e., the Court may take notice that the bylaws

exist and say what they say. *Id.* at 7 n.6. But the mere existence of those bylaws does not prove that Defendants actually *apply* them, or apply them in a manner that sufficiently protects members' First Amendment rights. And Plaintiffs have alleged that the OSB does not afford members an adequate opportunity to dispute the misuse of their dues. Compl. ¶ 67. At this stage, the Court must accept those allegations as true and cannot consider factual matters outside the Complaint.

Because the Plaintiffs' allegations, if true, would establish that Defendants are failing to provide adequate safeguards for OSB members' First Amendment rights, the Court should deny Defendants' motion to dismiss with respect to Plaintiffs' First Claim for Relief.

B. The Oregon State Bar is not entitled to Eleventh Amendment immunity.

The OSB is not an "arm of the state" entitled to Eleventh Amendment immunity and therefore is not entitled to dismissal under Rule 12(b)(1). *See* MTD 7.

Although state agencies are generally immune from suit in federal court, "an entity may be organized or managed in such a way that it does not qualify as an arm of the state entitled to sovereign immunity." *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1423 (9th Cir. 1991). To determine whether an entity is an arm of the state, courts in this Circuit apply the five-factor test first articulated in *Mitchell v. L.A. Cmty. Coll. Dist.*, 861 F.2d 198, 201 (9th Cir. 1988). [8] *See,*

[8] Cases Defendants have cited in which a bar association was described as an arm of the state (MTD 8-9) did not perform the required *Mitchell* analysis and in any event are not binding regarding OSB's entitlement to Eleventh Amendment immunity here. *See Hirsh v. Justices of Sup. Ct. of Cal.*, 67 F.3d 708, 715 (9th Cir 1995); *Ginter v. State Bar of Nev.*, 625 F2d 829, 830 (9th Cir 1980); *Eugster v. Wash. State Bar Ass'n*, No. C15-0375JLR, 2015 WL 5175722, at *9 (W.D. Wash. Sept. 3, 2015), *aff'd on other grounds* 684 Fed. App'x 618 (9th Cir 2017); *Hartfield v. Or. State Bar*, No. 3:16-cv-00068-ST, 2016 WL 9225978, at *1 (D. Or. Jan. 15, 2016), *report and recommendation adopted* 2016 WL 9226386 (D. Or. Feb. 16, 2016), *aff'd on other grounds* 671 F App'x 456 (9th Cir 2016); *Coultas v. Payne*, No. 3:12-cv-1132-AC, 2012 WL 6725845, at *3 (D. Or. Nov. 27, 2012), *report and recommendation adopted* 2012 WL 6726247, at *1 (D. Or. Dec. 27, 2012); *Weidner v. Albertazzi*, No. 06-930-HO, 2006 WL

9.080(4) ("Except as provided in this subsection, an employee of the state bar shall not be considered an 'employee' as the term is defined in the public employees' retirement laws.").[9]

Again, minimal state control over an entity points towards independence from the state. *See Beentjes*, 397 F.3d at 785 ("As the district court properly noted, the State exercises little control over the structure and operation of the districts, which suggests that districts function independently from the State") (internal quotations omitted)). And, as the Supreme Court has observed, a mandatory bar association may be more analogous to a labor union than to *any* kind of governmental unit. *See Keller*, 496 U.S. at 11.

Therefore, the final *Mitchell* factor—like all of the other *Mitchell* factors—weighs against a finding of Eleventh Amendment immunity for the OSB.

C. Defendants' qualified immunity argument is moot because Plaintiffs do not seek damages against the individual Defendants.

Defendants' argument that the individual Defendants are entitled to qualified immunity with respect to Plaintiffs' claims for damages (MTD 21-23) is moot because Plaintiffs do not intend to seek damages from the individual Plaintiffs. For their damages, Plaintiffs Crowe and Peterson simply seek to have the OSB refund their dues payments. Against the individual Defendants, Plaintiffs seek only declaratory and injunctive relief, which qualified immunity does not bar. *See Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 527 (9th Cir.1989).

[9] For example, the state does not list the individual Defendants in this case as state employees with respect to their positions with the OSB or its Board. *State Employee List (Alphabetical),* available at https://dasapp.oregon.gov/statephonebook/personnellisting.pdf.

D. Plaintiffs do not oppose dismissal of the Oregon State Bar Board of Governors.

Plaintiffs do not oppose dismissal of Defendant Oregon State Bar Board of Governors on the basis that it is not a legal entity separate from the Oregon State Bar and has no capacity to be sued. *See* MTD 23.

V. CONCLUSION

The Court should deny Defendants' motion to dismiss Plaintiffs' First and Fourteenth Amendment claims.

Dated: January 30, 2019

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Case No. 3:18-cv-02139-JR

DEFENDANTS' MOTION TO DISMISS
(Under Fed R Civ P 12(b)(1) and 12(b)(6))

ORAL ARGUMENT REQUESTED

ORS 9.010(2). Every lawyer in Oregon must join the Bar and pay an annual membership fee.[2] ORS 9.160; ORS 9.191; ORS 9.200.

The Bar's mission "is to serve justice by promoting respect for the rule of law, by improving the quality of legal services, and by increasing access to justice."[3] The Bar, through the BOG, is also responsible for advancing "the science of jurisprudence and the improvement of the administration of justice" in Oregon. ORS 9.080(1). The Bar carries out these duties in a number of ways. It recommends rules for adoption by the Oregon Supreme Court regarding standards for admission to the practice of law and rules of professional conduct. *See* ORS 9.080; ORS 9.114; ORS 9.210; ORS 9.490. Subject to the Oregon Supreme Court's oversight, the Bar administers the attorney disciplinary system. *See* Or State Bar RP ("BR") 2.3. And the Bar administers programs designed to improve the quality of legal services provided by Oregon lawyers and increase access to justice for underserved Oregonians.[4]

The Bar also publishes the monthly *Oregon State Bar Bulletin* (the "*Bulletin*").[5] The Bar's Bylaws provide that its statements in the *Bulletin* "should be germane to the law, lawyers, the practice of law, the courts and the judicial system, legal education and the Bar in its

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[2] An association of attorneys in which membership and dues are required as a condition of practicing law is commonly referred to as an "integrated bar." *See Keller v. State Bar of Cal.*, 496 US 1, 5, 110 S Ct 2228, 110 L Ed 2d 1 (1990). The Oregon State Bar is an integrated bar.

[3] Oregon State Bar, Mission Statement, https://www.osbar.org/_docs/resources/OSBMissionStatement.pdf (last visited Jan. 3, 2019).

[4] Consistent with this mission, the Bar's programs provide the public with general legal information about common legal topics and seek to increase pro bono legal services available to impoverished Oregonians, military families, and survivors of domestic violence. *See, e.g.*, Oregon State Bar, Volunteer Opportunities, https://www.osbar.org/probono/VolunteerOpportunities.html (last visited Jan. 3, 2019); Oregon State Bar, Legal Services Program, https://www.osbar.org/lsp (last visited Jan. 3, 2019).

[5] *See* Oregon State Bar, OSB Bulletin Archives, https://www.osbar.org/publications/bulletin/archive.html (last visited Jan. 3, 2019), for examples of the *Bulletin*.

role as a mandatory membership organization." Bylaws § 11.1. The Bar's statements should also "advance public understanding of the law, legal ethics and the professionalism and collegiality of the bench and Bar." *Id.*

In the April 2018 edition of the *Bulletin*, the Bar published a "Statement on White Nationalism and Normalization of Violence" (the "Bar's April 2018 Statement"). (Compl. ¶¶ 6, 42.) In this statement, the Bar reassured its members that, in the wake of recent national and local violence (including the killings in Charlottesville, Virginia, and on Portland's MAX train), it "remain[ed] steadfastly committed to the vision of a justice system that operates without discrimination and is fully accessible to all Oregonians." (Compl., Ex. A.) The Bar "unequivocally condemn[ed] these acts of violence" and "the proliferation of speech that incites such violence," which threatened "access to justice, the rule of law, and a healthy and functional judicial system that equitably serves everyone." (*Id.*) The Bar reminded its members that lawyers are "stewards of the justice system[ ] [and] it is up to us to safeguard the rule of law and to ensure its fair and equitable administration." (*Id.*) The Bar's April 2018 Statement ended with a pledge: "[W]e not only refuse to become accustomed to this climate, we are intent on standing in support and solidarity with those historically marginalized, underrepresented and vulnerable communities who feel voiceless within the Oregon legal system." (*Id.*)

A statement by seven affinity bars appeared on the adjacent page of the *Bulletin*. The statement was titled a "Joint Statement of the Oregon Specialty Bar Associations Supporting the Oregon State Bar's Statement on White Nationalism and Normalization of Violence" (the "Specialty Bar Statement"). (Compl., Ex. A.) The Specialty Bar Statement similarly "condemn[ed] the violence that has occurred as a result of white nationalism and white

subsidizing group speech" by enforcing state laws that require Oregon attorneys to join the Bar and pay membership fees. (Compl. ¶¶ 81-83.)

But the U.S. Supreme Court has repeatedly held that mandatory state bars, and the assessment of membership fees, do not violate the Constitution. First, in *Lathrop v. Donohue*, 367 US 820, 843, 81 S Ct 1826, 6 L Ed 2d 1191 (1961), the U.S. Supreme Court held that mandatory bar membership does not "impinge[] upon protected rights of association." The *Lathrop* Court explained that a state bars could compel membership and assess fees: "[I]n order to further the State's legitimate interests in raising the quality of professional services, [the bar] may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers." *Id.*

Next, in *Keller*, 496 US 1, the U.S. Supreme Court held that an integrated bar's use of compulsory dues to finance political speech germane to improving the quality of legal services does not impinge on protected-speech rights. The *Keller* Court explained that this was consistent with its decision in *Abood v. Detroit Bd. of Educ.*, 431 US 209, 97 S Ct 1782, 52 L Ed 2d 261 (1977), that public-sector unions "could not expend a dissenting individual's dues for ideological activities not 'germane' to the purpose for which compelled association was justified." 496 US at 13. The *Keller* Court held that "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." 496 US at 13-14.

More recently, in *Harris v. Quinn*, ___ US ____, 134 S Ct 2618, 2638, 189 L Ed 2d 620 (2014), the U.S. Supreme Court affirmed its holding in *Keller*, distinguishing it

from "*Abood*'s questionable foundations." *See also* 134 S Ct at 2632-34 (explaining how "[t]he *Abood* Court's analysis is questionable on several grounds"). In holding that states could not compel home health care workers to pay union fees, the *Harris* Court explained that *Abood* "applies [only] to public employees," 134 S Ct at 2638—and expressly rejected any notion that *Harris's* ruling affected *Keller*. The Court said that *Keller* "fits comfortably within the framework applied in [*Harris*]" and reiterated (a) that integrated bars are justified by a state's compelling interest "in regulating the legal profession and improving the quality of legal services" and (b) that "[s]tates also have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices." 134 S Ct at 2643-44 (internal quotation marks and citation omitted).

U.S. Supreme Court precedent establishes that states have a compelling interest in regulating attorneys and may require membership in an integrated bar that assesses mandatory membership fees *without* violating the First Amendment. Accordingly, this court should dismiss plaintiffs' "Compelled Membership" claim, with prejudice.

2. An integrated bar may engage in political speech germane to improving the quality of legal services and affords adequate First Amendment safeguards by allowing members a reasonable opportunity to reclaim fees used to fund allegedly nongermane speech.

Plaintiffs' first claim (their "Compelled Speech and Association" claim) alleges that defendants are violating their First Amendment associational and speech rights by not providing "the minimum safeguards required * * * before collecting and expending mandatory member dues." (Compl. ¶ 70.) Plaintiffs acknowledge that the Bar has procedures for refunding membership fees used to fund speech with which the member objects—procedures that plaintiffs themselves used to receive a refund for the costs of publishing the April 2018 *Bulletin*.

V. CONCLUSION

As set forth above, plaintiffs' lawsuit does not and cannot assert viable claims against any defendant. Defendants therefore respectfully request that the court dismiss plaintiffs' lawsuit, without leave to replead.

DATED this 9th day of January, 2019.

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Defendants.

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DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

ORAL ARGUMENT REQUESTED

Accordingly, binding U.S. Supreme Court precedent—which, as it must be, has been consistently followed in the Ninth Circuit and other federal appellate courts—establishes that compulsory membership in the Bar does not violate the Constitution. There is no basis for this court to hold otherwise. *Agostini*, 521 U.S. at 237; *Eugster*, 684 F.App'x at 619. This court should therefore dismiss plaintiffs' third claim for relief as a matter of law.

B. The U.S. Supreme Court Has Already Explained That Compulsory Bar Membership Survives Exacting Scrutiny.

Plaintiffs next assert, by analogy to *Janus*, that compulsory bar membership is unconstitutional unless it survives exacting scrutiny. ECF No. 20, at 18. Plaintiffs argue that it cannot, contending that the state can adequately regulate and improve the quality of legal services in Oregon by merely "acting as a regulator, penalizing those who break the rules, and providing educational services." ECF No. 20, at 19-20.

But the U.S. Supreme Court has already reasoned that compulsory bar membership survives exacting scrutiny, in *Harris v. Quinn*, ___ U.S. ___, 134 S. Ct. 2618, 2643-44, 189 L. Ed. 2d 620 (2014). The *Harris* Court applied "exacting First Amendment scrutiny" to compulsory union fees for home health care workers, holding that the challenged fees did not survive exacting scrutiny because compulsory funding of the union did not "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." 134 S. Ct. at 2639 (internal punctuation and citations omitted).

The *Harris* Court then addressed whether its holding would "call into question" its ruling in *Keller*. *Harris*, 134 S. Ct. at 2643. As explained above, the *Keller* Court affirmed that compulsory bar membership was "justified by the State's interest in regulating the legal profession and improving the quality of legal services" and held that an integrated state bar may

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constitutionally fund activities germane to those purposes. 496 U.S. at 13-14. The *Harris* Court explained that its decision in *Keller* "fits comfortably within the framework applied in the present case"—exacting scrutiny. *Harris*, 134 S. Ct. at 2643.

Plaintiffs, however, contend that when the *Harris* Court affirmed that *Keller* "fits comfortably within the framework" of exacting scrutiny, it was referring only to whether a state bar could charge its members for "the expense of ensuring that attorneys adhere to ethical practice." ECF No. 20, at 18. But the *Harris* Court was actually affirming that the "State's interest in regulating the legal profession and improving the quality of legal services" justified the speech activities of the integrated bar. 134 S. Ct. at 2644 (internal quotation marks and citation omitted). The *Harris* Court went on to explain that "States *also* have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices." *Id.* (emphasis added). And it was the former interest—regulating and improving legal services—on which the *Keller* Court justified compulsory bar membership and the use of members' dues to fund germane speech activities. 496 U.S. at 13-14.

Plaintiffs' arguments fail to establish that compulsory membership in the Bar is unconstitutional. Binding U.S. Supreme Court precedent holds that compulsory bar membership does not violate members' First Amendment rights. *Lathrop*, 367 U.S. at 843; *Keller*, 496 U.S. at 13-14; *Harris*, 134 S. Ct. at 2643-44. This court should dismiss plaintiffs' third claim for relief as a matter of law. *See Agostini*, 521 U.S. at 237; *Eugster*, 684 F.App'x at 619.

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VI. CONCLUSION

For the reasons explained above, plaintiffs' response confirms that they have not asserted, and cannot assert, viable claims for relief against defendants. Defendants respectfully request that the court dismiss plaintiffs' lawsuit in its entirety, without leave to replead.

DATED this 13th day of February, 2019.

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DEFENDANTS' RESPONSE TO PLAINTIFFS' OBJECTIONS TO FINDINGS AND RECOMMENDATION

State Bar Ass'n, No. C15-0375JLR, 2015 WL 5175722, at *9 (W.D. Wash. Sept. 3, 2015) (Washington).

B. Plaintiffs' Objections Reaffirm That Their Claims Failed to Raise Any Plausible Constitutional Violations.

Judge Russo found that "[b]ecause the Bar has adequate procedural safeguards in place to protect against compelled speech and because mandatory Bar membership and compulsory fees do not otherwise violate the First Amendment, plaintiffs' claims necessarily fail as a matter of law." ECF No. 29, at 25-26. Plaintiffs object to Judge Russo's recommendation to dismiss all three of their First Amendment claims. ECF No. 31, at 18.

1. *Keller* Unambiguously Lays to Rest Any Claim That Compulsory Bar Membership Is Unconstitutional.

Plaintiffs assert that Judge Russo wrongly concluded that their compelled-membership claim fails because the U.S. Supreme Court has "affirmed . . . that lawyers . . . may be required to join and pay dues to the State Bar." ECF No. 29, at 17; ECF No. 31, at 19. Plaintiffs argue that (a) U.S. Supreme Court precedent does not foreclose their compelled-membership claim because, according to plaintiffs, neither *Lathrop* nor *Keller* "actually decide[d] the constitutionality of mandatory bar membership" and (b) compulsory bar membership does not survive exacting scrutiny. ECF No. 31, at 19-20.

But an unbroken chain of U.S. Supreme Court decisions affirm that compulsory bar membership is constitutional and survives exacting scrutiny:

- *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961). The Court ruled that "the Supreme Court of Wisconsin, in order to further the State's legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by . . . the lawyers, even though the organization created to attain the objective also engages in some legislative activity. . . [W]e are unable to find any impingement upon protected rights of association." *See also* 367 U.S. at 865 (Whittaker, J.,

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concurring) ("the State's requirement that a lawyer pay to its designee an annual fee . . . [for] the special privilege (which is what it is) of practicing law in the State—which is really all that is involved here—does not violate any provision of the United States Constitution"); 367 U.S. at 849 (Harlan, J., concurring) (there is "[no] doubt that a State may Constitutionally condition the right to practice law upon membership in an integrated bar association").

- *Keller*, 496 U.S. at 13-14. A unanimous Court affirmed *Lathrop* and held that compulsory bar membership is "justified by the State's interest in regulating the legal profession and improving the quality of legal services" and that "[t]he State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members."

- *Harris v. Quinn*, 573 U.S. 616, 655 (2014). A five-justice majority described *Keller* as holding that "all members of an 'integrated' bar . . . could be required to pay the portion of the dues used for activities connected with proposing ethical codes and disciplining bar members" and explained that *Keller*'s holding "fits comfortably within the [exacting scrutiny] framework applied in the present case."[1]

The Ninth Circuit has also repeatedly affirmed that *Lathrop* and *Keller* hold "that a state may constitutionally condition the right of its attorneys to practice law upon the payment of membership dues to an integrated bar." *O'Connor v. State of Nev.*, 27 F.3d 357, 361 (9th Cir. 1994); *see also Eugster v. Wash. State Bar Ass'n*, 684 F. App'x 618, 619 (9th Cir. 2017) (affirming dismissal of the plaintiff's compulsory membership claim "because an attorney's mandatory membership with a state bar association is constitutional" under *Keller* and *Lathrop*); *Caruso v. Wash. State Bar Ass'n 1933*, 716 F. App'x 650, 651 (9th Cir. 2018) (dismissal of claim proper under *Keller* and *Lathrop*).

This Court is obligated to follow binding precedent that has "direct application" to this case. *Agostini*, 521 U.S. at 237 (internal quotation marks and citation omitted). Plaintiffs'

[1] The four dissenting justices also confirmed that *Harris* "reaffirm[ed]" *Keller* "as good law." *Harris*, 573 U.S. at 670.

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Because the Bar provides its members with adequate protections against compelled speech, plaintiffs fail to state a plausible claim that their constitutional rights were violated by the Bar's publication of the April 2018 *Bulletin*.

III. CONCLUSION

Defendants respectfully request that the Court adopt Judge Russo's Findings and Recommendation and dismiss plaintiffs' lawsuit in its entirety, without leave to replead.

Dated this 29th day of April, 2019.

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