Case No. 20-30086

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RANDY BOUDREAUX,

Plaintiff-Appellant

v.

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

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana
Case No. 2:19-cv-11962, Hon. Lance M. Africk, presiding

REPLY BRIEF OF APPELLANT RANDY BOUDREAUX

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I. The Court cannot consider Defendants' arguments on the merits of Plaintiff's Second and Third Claims for Relief.

Defendants devote much of their brief to addressing the merits of Plaintiff Randy Boudreaux's claims, both directly, *see* Defs.' Br. at 40-52, and indirectly, as part of their arguments that Plaintiff lacks standing. But this Court cannot consider Defendants' arguments on the merits with respect to Plaintiff's Second and Third Claims for Relief, which concern, respectively, the Louisiana State Bar Association's ("LSBA's") use of mandatory dues for political and ideological speech and the LSBA's lack of safeguards for attorneys' First Amendment rights. The district court dismissed those claims *without* prejudice under Federal Rule of Civil Procedure 12(b)(1)—*not* with prejudice, based on their merits, under Rule 12(b)(6)—and Defendants did not cross-appeal the district court's *denial* of their 12(b)(6) motion with respect to those two claims. As a result, this appeal does not present the merits of those claims.

In general, an appellee may argue for affirmance of a judgment on any basis that the record supports without filing a cross-appeal. *Jennings v. Stephens*, 574 U.S. 271, 276 (2015). But an appellee who seeks not only to affirm the lower court's judgment but also to "enlarg[e] his own rights thereunder or [to] lessen[] the rights of his adversary" may only do so if he files a cross-appeal. *Id.*

Here, Defendants filed two motions to dismiss—one under Rule 12(b)(1), and one under Rule 12(b)(6)—each of which sought dismissal of all three of

Plaintiff's claims. The district court dismissed Plaintiff's Second and Third Claims for Relief *only* under Rule 12(b)(1), and expressly *without prejudice*. ROA.379. That dismissal had to be without prejudice because a dismissal under Rule 12(b)(1) is not a determination of a claim's merits. *See Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). By contrast, the district court's dismissal of Plaintiff's First Claim for Relief was under Rule 12(b)(6), and did constitute a ruling on the merits; it therefore was with prejudice. ROA.379.

The Defendants did not cross-appeal the district court's denial of their Rule 12(b)(6) motion with respect to Plaintiff's Second and Third Claims for Relief. As a result, Defendants may *only* seek affirmance of those claims' dismissal *without* prejudice for lack of subject-matter jurisdiction; they are not free to argue that these claims fail on their merits, or that they should have been dismissed under Rule 12(b)(6). "[C]onvert[ing] a without-prejudice dismissal below into a with-prejudice dismissal on appeal … would be inappropriate without a cross appeal," *United States v. $4,480,466.16 in Funds*, 942 F.3d 655, 665-66 (5th Cir. 2019), because that would "enlarg[e]" Defendants' rights and "lessen[]" Plaintiff's rights, *Jennings*, 574 U.S. at 276. *See also Lee v. City of Chi.*, 330 F.3d 456, 471 (7th Cir. 2003) (where district court dismissed claim under Rule 12(b)(1), appellee arguing for dismissal under Rule 12(b)(6) improperly sought "to enlarge its rights and

supplement the district court's decree with a ruling on the merits that was not reached below … without filing a cross appeal").

This Court therefore must disregard Defendants' merits-based arguments for dismissal of Plaintiffs' Second and Third Claims for Relief. If the Court concludes that the district court erred in dismissing those claims under Rule 12(b)(1), it must remand those claims so the district court can consider their merits in the first instance. *See Lee*, 330 F.3d at 470-71.

II. Plaintiff has standing to bring each of his claims.

Contrary to Defendants' arguments, Plaintiff has standing to bring each of his claims because, for each, he has alleged "(1) an actual or imminent injury that is concrete and particularized, (2) fairly traceable to the [Defendants'] conduct, and (3) redressable by a judgment in [his] favor." *Duarte ex rel. Duarte v. City of Lewisville*, 759 F.3d 514, 517 (5th Cir. 2014).

A. Plaintiff has standing to challenge mandatory LSBA membership.

The district court rightly rejected Defendants' argument that Plaintiff lacks standing to challenge Louisiana's requirement that attorneys join the LSBA. Plaintiff has standing to bring this First Amendment challenge because he is an attorney and Louisiana compels him to join and pay dues to the LSBA as a condition of practicing law in the state. "These requirements compel speech and

association in a way that Boudreaux alleges are unconstitutional. He has thus alleged concrete and particularized harm." ROA.351.

B. Plaintiff has standing to challenge the LSBA's use of his mandatory dues for speech without his affirmative consent.

Plaintiff has standing to bring his second claim, challenging the LSBA's use of mandatory LSBA dues for political and ideological speech without his affirmative consent, for essentially the same reason. It is undisputed that Louisiana requires him to pay LSBA dues as a condition of practicing law in the state, *see* Defs.' Br. at 4-5, and he alleges that the LSBA uses his dues money for political and ideological speech without his affirmative consent, ROA.25 ¶ 82, that he opposes the LSBA's use of his mandatory dues for political and ideological speech, ROA.21-22 ¶¶ 59, 61, and that this compelled support for the LSBA's political and ideological speech violates his First Amendment rights, ROA.25-27 ¶¶ 81-95.

Defendants assert that Plaintiff lacks standing to bring this claim because he has not alleged that the LSBA engages in speech that is not germane to regulating the legal profession or improving the quality of legal services and because he has not identified any bar association speech with which he disagrees.[1] Defs.' Br. at

[1] In fact, Plaintiff has alleged that the LSBA engages in non-germane speech, and he has identified particular examples that he does not wish to fund or associate with. ROA.18-19 ¶¶ 40-46; ROA.21-22 ¶¶ 59-60.

18-20. But these are not actually arguments about standing. Instead, they are an improper attempt to argue the merits of Plaintiff's claim despite Defendants' failure to file a cross-appeal. The question of whether the First Amendment allows the government to force people to pay for "germane" speech,[2] or speech with which they agree (or with which they have not announced their disagreement),[3] pertains to whether the facts Plaintiff has alleged establish a violation of his First Amendment rights—i.e., to the merits of his claim. That question has no bearing on whether he has alleged a concrete, particularized injury to himself, fairly traceable to Defendants, that a judgment in his favor would redress. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal …."). It is beyond dispute that he has alleged such an injury.

[2] Plaintiff's complaint alleges and explains that the First Amendment protects his right not to pay for *any* bar association speech, regardless of whether it is germane. ROA.25-27 ¶¶ 81-95.

[3] Compelled speech causes First Amendment harm regardless of whether the person compelled to speak agrees with the compelled message. The First Amendment protects a speaker's "choice … not to propound a particular point of view" and even the choice not to make "statements of fact the speaker would rather avoid." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573-75 (1995). "[W]hatever the reason" a speaker might have for choosing not to speak, "that choice is presumed to lie beyond the government's power to control." *Id.* at 575. *See also Keller v. State Bar of Cal.*, 496 U.S. 1, 13-16 (1990) (holding that an attorney cannot be forced to pay for non-germane bar association speech, without regard for whether the attorney disagrees with the speech).

C. Plaintiff has standing to challenge the LSBA's lack of safeguards for attorneys' First Amendment rights.

Plaintiff also has standing to challenge the LSBA's lack of safeguards for attorneys' First Amendment rights because, as explained in his opening brief, the collection of mandatory dues in the absence of sufficient safeguards violates his First Amendment rights. Plf.'s Br. at 34-39.

Here, too, Defendants' primary "standing" arguments are actually improper arguments about the merits framed (loosely) in terms of standing. Defendants' arguments about the information that the LSBA provides to attorneys, Defs.' Br. at 22-23, pertain to whether the LSBA has done what *Keller v. State Bar of California*, 496 U.S. 1 (1990), and the First Amendment require—i.e., the merits—not to whether Plaintiff has alleged a concrete, particularized, redressable injury to himself.[4]

Defendants' argument that Plaintiff's claim is foreclosed by *Air Line Pilots Association v. Miller*, 523 U.S. 866 (1998), improperly addresses the merits and is incorrect. *Air Line Pilots* reaffirmed the rule established in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), that a union must "provide [nonmember]

[4] Besides, Defendants' assertion that Plaintiff is "well-situated to identify any allegedly deficient or overly vague explanations for LSBA expenditures," Defs.' Br. at 22, asks the Court to conclude that Plaintiff's allegations to the contrary (ROA.20-21 ¶¶ 50-56) are false, or at least to construe those allegations in a manner that is unfavorable to Plaintiff, which the Court could not do even if it were considering the merits under Rule 12(b)(6). *See Ramming*, 281 F.3d at 161.

employees sufficient information to enable them to identify the expenditures that, in their view, the union has improperly classified as germane [to representation and therefore chargeable to nonmembers]" so that they may then challenge those expenditures before an impartial arbitrator or court. 523 U.S. at 878. The Court also held that, *if* an employee received the notice of union activities that *Hudson* required, *then* the employee could not file a lawsuit alleging generally that the union engaged in non-germane activities and then expect the union to prove the germaneness of everything it does. *Id.* Instead, an employee who received sufficient notice would have to identify particular expenditures to which he or she objected, and the union would then have to justify those expenditures. *Id.* Here, Plaintiff does *not* seek to have the union prove the germaneness of all of its activities, as *Air Line Pilots* prohibited in the union context. Rather, he alleges that he did not receive the notice of the LSBA's activities to which he is entitled under *Hudson* and *Keller*, 496 U.S. at 16, and that lack of notice impairs his ability to challenge particular LSBA activities. ROA.28 ¶ 99. Again, that allegation does state a claim for violation of his First Amendment rights. Plf.'s Br. at 34-39.

Defendants' argument that Plaintiff lacks standing because he did not object or "submit to the challenged policy before pursuing an action to dispute it," *LeClerc v. Webb*, 419 F.3d 405, 413 (5th Cir. 2005) (quotation and citation omitted), also fails. Defs.' Br. at 24. There is no relevant "policy" to which

Plaintiff could have submitted before bringing his claim, except perhaps one: the state's policy that requires him to pay LSBA dues, to which he *has* submitted, which is causing him ongoing injury. ROA.16 ¶ 27; ROA.21-22 ¶¶ 57, 61; ROA.27-29 ¶¶ 96-106. Although the LSBA has procedures by which attorneys might object to particular LSBA activities, ROA.20 ¶ 51, those procedures do not provide an opportunity to object to the *lack of information* about LSBA activities on which Plaintiff bases his claim. So there is no reason why he should or would have "submitted" to those procedures before bringing his claim.

LSBA's argument appears to confuse standing with exhaustion. Standing requires only that a plaintiff suffer an injury—which Plaintiff here has suffered. Exhaustion requires that a litigant pursue available administrative remedies before suing—but, as discussed further below, administrative exhaustion is *not* required before a plaintiff may sue under 42 U.S.C. §1983. *See Brantley v. Surles*, 718 F.2d 1354, 1360 (5th Cir. 1983). Because Plaintiff is injured by the LSBA's failure to provide him with the information to which he is constitutionally entitled, he has standing; and because he is not required to pursue any administrative remedy before suing, his claim is ripe. Finally, Defendants' standing argument based on the district court's reasoning, Defs.' Br. at 23-24, is incorrect for the reasons presented in Plaintiff's opening brief. Plf.'s Br. at 34-39.

III. The Tax Injunction Act and the doctrines of comity, exhaustion of remedies, and *Burford* abstention do not bar Plaintiff's challenge to the LSBA's use of mandatory dues for political and ideological speech.

As Plaintiff has explained in his opening brief, the Tax Injunction Act ("TIA") does not bar his challenge to the LSBA's use of mandatory dues for political and ideological speech without his affirmative consent, because LSBA dues are a fee, not a tax. Plf.'s Br. at 23-31. For that same reason, the comity doctrine that Defendants have cited, Defs.' Br. at 35-37, likewise does not bar Plaintiff's claim, and Plaintiff was not required to exhaust administrative remedies, *see id.* at 21. The *Burford* abstention doctrine, *see id.* at 37-39, also does not bar Plaintiff's claim, as the district court rightly recognized, ROA.363.

A. The Tax Injunction Act does not bar Plaintiff's claim.

The TIA does not bar Plaintiff's claim because LSBA dues are a fee, not a tax, under the criteria set forth in *Home Builders Association of Mississippi v. City of Madison*, 143 F.3d 1006, 1011 (5th Cir. 1998).

1. LSBA dues are linked to a regulatory scheme and do not sustain the essential flow of revenue to the government.

LSBA dues are a "classic fee" in part because they are "linked to [a] regulatory scheme" and do not "sustain[] the essential flow of revenue to the government." *Id.* Defendants attempt to overcome this by asserting that the LSBA does not actually regulate the legal profession and that "LSBA dues sustain the

flow of essential revenue to essential functions of state government." Defs.' Br. at 28. Both assertions are false.

LSBA dues are plainly "linked" to Louisiana's scheme for regulating the legal profession. The LSBA's Articles of Incorporation list "regulat[ing] the practice of law" first among the LSBA's "objects and purposes." ROA.16 ¶ 30. The Articles also list the LSBA's other objects and purposes, all of which pertain to the regulation or interests of the legal profession: "advanc[ing] the science of jurisprudence, … uphold[ing] the honor of the Courts and of the profession of law, encourag[ing] cordial intercourse among its members, and, generally … promot[ing] the welfare of the profession in the State." *Id.* The most recent Annual Report available on the LSBA's website also identifies regulating the legal profession and the other items listed in the Articles of Incorporation as the LSBAs' only "objects and purposes." 2018 Louisiana State Bar Association Annual Report 9 (2018) ("LSBA 2018 Annual Report").[5]

The "essential functions" that Defendants allege that the LSBA carries out also all closely relate to regulation of the legal profession. These include "maintaining 'sections,' related to different areas of law, devoted to 'the improvement of professional knowledge and skill, and in the interest of the

[5] http://www.lsba.org/documents/Publications/2018AnnualReport.pdf.

profession and the performance of its public obligations"; the Judges and Lawyers Assistance Program, which assists judges and lawyers with substance abuse, mental health, and other issues; the client assistance fund, for clients wronged by their attorneys; and arbitration services for resolution of disputes between lawyers and clients. Defs.' Br. at 6, 26, 32.

The legislation recognizing the Louisiana Supreme Court's creation of the LSBA and its authority to charge LSBA dues likewise contemplates a regulatory role for the LSBA. *See In re Mundy*, 11 So. 2d 398, 400 (La. 1942); La. R.S. 37:211 & note. And in assessing whether a charge is a tax or a fee, this Court is "more concerned with the purposes underlying the [legislation or rule authorizing the charge]"—that is, its "language … and the circumstances surrounding its passage"—"than with the actual expenditure of the funds collected under it." *Home Builders*, 143 F.3d at 1011–12.

True, there are other entities that are *also* part of Louisiana's scheme for regulating the legal profession, including the Louisiana Attorney Discipline Board and the Louisiana Supreme Court Committee on Bar Admissions. ROA.17 ¶¶ 32-34. And, true, the LSBA engages in some activities that are more like those of an interest group or trade association than those of a regulatory body. ROA.16 ¶ 31. But, contrary to Defendants' arguments, those facts do not make LSBA dues more like a tax. If anything, they show that the LSBA is even less devoted to quasi-

governmental functions than a typical mandatory bar association, *cf. Keller*, 496 U.S. at 4-5, 11-13 (describing the responsibilities of the State Bar of California), which makes LSBA dues even less like a tax than typical mandatory bar association dues.

Further, although the LSBA might perform important functions, it does "not … participate in the general government of the State," *id.* at 13, and its dues do not "sustain[] the essential flow of revenue to the government," *Home Builders*, 143 F.3d at 1011. The TIA is concerned with avoiding disruption of the government's general revenue, including funding for core government functions; it is not concerned with maintaining revenue for a relatively narrow regulatory purpose, regardless of how important that purpose might be. *See, e.g.*, *Neinast v. Texas*, 217 F.3d 275, 278-79 (5th Cir. 2000) (noting that a tax is for "general revenue purposes," but a fee funds a particular program or "narrowly defined purposes"); *Am. Council of Life Insurers v. D.C. Health Benefit Exch. Auth.*, 815 F.3d 17, 20 (D.C. Cir. 2016) (challenge to a fee "will disrupt only the provision of the services that the charge finances, not the more general operations of government"); *cf. Cumberland Farms, Inc. v. Tax Assessor, State of Me.*, 116 F.3d 943, 946-47 (1st Cir. 1997) (milk handling surcharge was a tax where it went into "Maine's general fund and [was] thus spent for the benefit of the citizenry as a whole" and the "legislature described it as a means of raising general revenues"); *A Bonding Co. v.*

Sunnuck, 629 F.2d 1127, 1129 (5th Cir. 1980) (TIA barred challenge to license tax paid to city government, not to a particular regulatory body).

Defendants argue that the charge at issue in *Home Builders* was held to be a tax even though its "proceeds [were] earmarked for certain narrow purposes." Defs.' Br. at 31 (citing *Home Builders*, 143 F.3d at 1012). But the charge at issue there was used to fund a wide variety of core municipal services specified in a city ordinance, including streets, the fire department, police, parks and recreation, and general "protection and promotion of the public health, safety, and welfare." *Home Builders*, 143 F.3d at 1012. Here, in contrast, LSBA dues are not general government revenue or used for general governmental purposes; they are paid directly to the LSBA, *see* LSBA By-Laws Art. I § 3[6], to be used for the LSBA's "objects and purposes" as the LSBA's Board of Governors directs, LSBA Articles of Incorporation Art. XIII, § 1.[7]

2. The LSBA imposes LSBA dues on attorneys.

As Plaintiff explained in his opening brief, LSBA dues resemble a "classic fee" because the LSBA, not the legislature, imposes them. Plf.'s Br. at 24-25. This is not "contrary to [Plaintiff's] briefing in the district court," as Defendants assert. Defs.' Br. at 30. Plaintiff made the same argument in his response to Defendants'

[6] https://www.lsba.org/documents/Executive/ByLawsJune2014.pdf
[7] https://www.lsba.org/documents/Executive/ArticlesIncorporation.pdf

Rule 12(b)(1) argument below. ROA.202. Defendants argue that Plaintiff previously "*cited legislative authority*" for the proposition that "LSBA dues 'are imposed exclusively on the LSBA's mandatory members,'" Defs.' Br. at 30 (citing ROA.202), but Plaintiff's opening brief explains why that legislation, La. R.S. 37:211, does not "authorize" LSBA dues and why, even if it did, the LSBA would still be the body that "imposes" dues on its members. *See* Plf.'s Br. at 24-25.

Further, the LSBA collects dues only from the individuals it regulates, not from the general public, which the district court correctly concluded "favors a finding that LSBA dues are a fee." ROA.336 (citing *Neinast*, 217 F.3d at 278). Defendants have not argued otherwise.

3. LSBA dues are designed to defray the LSBA's regulatory expenses.

Finally, LSBA dues are designed to defray the LSBA's regulatory expenses, not to provide broader benefits to the general public.

In arguing against this, Defendants assert that the LSBA uses member dues for "programming and services that benefit the people of Louisiana—including non-attorneys and attorneys alike." Defs.' Br. at 31. These "services that benefit the public" allegedly include:

> maintaining 'sections,' related to different areas of law, devoted to 'the improvement of professional knowledge and skill, and in the interest of the profession and the performance of its public obligations'; providing a mediation and arbitration service for the amicable resolution of disputes between clients and lawyers; and

> sponsoring a client assistance program for clients wronged by a lawyer who have no remedy."

Id. at 32.

All of those services, however, directly pertain to serving or regulating the legal profession. That they might also benefit the public does not make LSBA dues a tax. *All* legitimate regulations presumably exist to benefit the public, not just to serve the interests of the regulated group, but not all regulatory fees are taxes under the TIA. *See* Plf.'s Br. at 26-27.

Moreover, there is no evidence before the Court that the two supposed LSBA functions that involve non-lawyer members of the public—namely, arbitration and client assistance—constitute a significant portion of the LSBA's activities or expenses. The most recent Annual Report available on the LSBA's website does not suggest that the LSBA engages in those activities at all. That report says nothing about arbitration services, and its only reference to "client assistance" is a statement that the LSBA provided "*[n]o financial support*" to the Louisiana Client Assistance Foundation in the last two fiscal years. LSBA 2018 Annual Report at 18 (emphasis added). On the other hand, the annual report does show that the LSBA's major expenses include things one would expect an organization that serves and regulates members of the legal profession to spend money on, such as "Mandatory continuing legal education," "Professional Programs," and the "Louisiana Bar Journal, Bar Briefs, and LSBA.org." *Id.* at 6.

Further, to the extent that the LSBA does engage in arbitration or client-assistance activities, there is no evidence that it uses member dues to do so. The LSBA By-Laws say that the LSBA's "Client Assistance Fund" is to be funded "through voluntary contributions or otherwise." LSBA By-Laws Art. X, § 1(3).

Finally, the LSBA's Articles of Incorporation belie its argument that the LSBA exists to provide benefits to the general public. The Articles say that the LSBA's purpose is "generally, to promote the welfare of the profession in the State," and the Articles' list of the LSBA's "objects and purposes" includes nothing about providing benefits to the general public. ROA.16 ¶ 30.

B. Principles of comity do not bar Plaintiff's claim.

Defendants' argument for dismissal based on comity, Defs.' Br. at 35-37, fails because the comity doctrine on which Defendants rely only bars challenges to state *taxes*. *See, e.g.*, *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 429-32 (2010) (comity warranted dismissal of claim seeking to eliminate state tax exemption for certain entities rather than enjoin tax collection); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 101, 116 (1981) (comity barred "damages action … to redress the allegedly unconstitutional administration of a state tax system"); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 298 (1943) (comity barred claim for declaratory relief where TIA would bar injunctive relief); *Bland v. McHann*, 463 F.2d 21, 27-28 (5th Cir. 1972) (comity barred claim for refund of

state taxes already paid); *Normand v. Cox Commc'ns, LLC*, 848 F. Supp. 2d 619, 625 (E.D. La. 2012) (comity barred removal of action by parish to collect sales taxes).

Like the TIA, comity does *not* prevent federal courts from reviewing constitutional challenges to regulatory *fees*. *See, e.g.*, *DIRECTV, Inc. v. Tolson*, 513 F.3d 119, 125-26 (4th Cir. 2008) (comity barred challenge to franchise charges because they were taxes, not fees); *Cashwell v. Town of Oak Island*, 383 F. Supp. 3d 584, 590 (E.D.N.C. 2019) ("[P]laintiffs' claims challenging the constitutionality of the charges in this case are barred by [the] comity doctrine if those charges are taxes."); *Healthcare Distrib. Alliance v. Zucker*, 353 F. Supp. 3d 235, 254 (S.D.N.Y. 2018) ("While it is true that comity sweeps more broadly than the TIA, it does not encompass regulatory fees or penalties."); *Tex. Entm't Ass'n v. Hegar*, No. 1:17-CV-594-LY, 2018 WL 718549, at *4 (W.D. Tex. Feb. 5, 2018) ("As with the TIA itself, the comity doctrine has no application where the charge at issue is a fee, not a tax."); *Hansen v. Moses Lake Irrigation & Rehab. Dist.*, No. 2:14-CV-0357-TOR, 2016 WL 6069973, *2 (E.D. Wash. Oct. 14, 2016) ("[T]he TIA and the principle of comity only apply if a challenged assessment constitutes a 'tax' as opposed to merely a 'regulatory fee.'"); *Zewadski v. City of Reno*, No. 3:05-CV-0173-LRH-RAM, 2006 WL 8441737, at *4 (D. Nev. Mar. 9, 2006) (To determine "whether the court has the power to decide … claims in light of the [TIA] and

principles of comity … the court must first decide if the fees sought ... are taxes as contemplated by the TIA."); *Wenz v. Rossford Ohio Transp. Improvement Dist.*, 392 F. Supp. 2d 931, 935 (N.D. Ohio 2005) ("The TIA and the principle of comity apply only if the challenged assessment is a 'tax,' as opposed to a 'regulatory fee,'…."); *Attorneys' Liab. Assurance Soc'y, Inc. v. Fitzgerald*, 174 F. Supp. 2d 619, 627 (W.D. Mich. 2001) ("[C]omity concerns, which might apply … if a 'tax' were at stake, are not similarly present when a mere 'fee' is at stake.").

As discussed above and in Plaintiff's opening brief, the LSBA dues Plaintiff challenges are fees, not taxes. Therefore, neither the TIA nor principles of comity bar Plaintiff's claims.

C. Plaintiff was not required to exhaust administrative remedies before bringing his claim.

Because Defendants' arguments based on the TIA and comity fail, Defendants' argument that Plaintiff must exhaust state court remedies also fails. *See* Defs.' Br. at 21 & n.48. A plaintiff generally need not exhaust state remedies before bringing a claim under 42 U.S.C. § 1983, but the Supreme Court has recognized an exception to that rule for claims challenging the constitutionality of a state tax. *See McNary*, 454 U.S. at 104-05, 116. Here, because Plaintiff challenges a fee, not a tax, the usual rule applies: Plaintiff was not required to exhaust state court remedies before bringing his constitutional claims under § 1983.

D. The *Burford* abstention doctrine does not bar Plaintiff's claim.

The *Burford* abstention doctrine also does not bar Plaintiff's claim. *See* Defs.' Br. at 37-39. A decision on whether *Burford* abstention applies requires balancing "the strong federal interest" in having cases involving federal constitutional rights adjudicated in federal court against the State's interest in "maintaining uniformity in the treatment of an essentially local problem" and "retaining local control over difficult questions of state law bearing on policy problems of substantial public import." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 728 (1996) (internal marks and citations omitted). This balancing test "only rarely favors abstention" because *Burford* abstention is an "extraordinary and narrow exception to the duty of the District Court to adjudicate a controversy properly before it." *Id.* (internal marks and citation omitted).

As the district court recognized, this case does not present a "difficult question of state law" that could warrant *Burford* abstention. ROA.360; *see also LeClerc v. Webb*, 270 F. Supp. 2d 779, 795 (E.D. La. 2003) (challenge to Louisiana Supreme Court rule did not involve "difficult questions of state law"), *aff'd* 419 F.3d 405 (5th Cir. 2005).

Indeed, this case does not require the Court to resolve *any* question of state law. That is because the bar membership and dues requirements Plaintiff challenges are clear, and their meaning is not disputed. This case only presents the

important federal question whether those requirements violate the First and Fourteenth Amendments.

Therefore, the balance of state and federal interests overwhelmingly favors federal court review. Moreover, the Supreme Court has repeatedly shown that it considers federal review of state rules governing the practice of law to be appropriate. *See, e.g., Keller*, 496 U.S. 1 (considering challenge to State Bar of California's use of mandatory dues); *Sup. Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 724-25 (1980) (considering First Amendment challenge to Virginia Bar Code rule restricting attorney advertising).

IV. Plaintiff has stated a viable challenge to mandatory membership.

Finally, Plaintiff's First Claim for Relief states a viable First Amendment challenge to mandatory LSBA membership, and should not have been dismissed under Rule 12(b)(6), for the reasons Plaintiff stated in his opening brief. *See* Plf.'s Br. at 16-23.

A. Supreme Court precedent does not foreclose Plaintiff's claim.

Contrary to Defendants' arguments, Supreme Court precedent does not foreclose Plaintiff's claim. As Plaintiff has explained, *Keller*, 496 U.S. at 17, expressly left open the question whether the First Amendment allows compelled membership in a bar association that engages in political and ideological speech

that is not germane to regulating the legal profession or improving the quality of legal services. *See* Plf.'s Br. at 18-19.

Therefore, Plaintiff's challenge to mandatory LSBA membership does not depend on the "premise that … the Supreme Court implicitly overruled *Keller*" in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018). Defs.' Br. at 41. *Janus* is relevant to Plaintiff's claim only because it identifies the level of scrutiny that applies to mandatory membership in an organization that engages in expressive activity: exacting scrutiny, under which the government must show that its infringement of First Amendment rights serves a compelling interest and that there is no other way the government could serve that interest that would infringe significantly less on First Amendment rights. 138 S. Ct. at 2465.

Defendants argue that *Janus* is inapposite because "the First Amendment perils present in the context of unions are not present in integrated bars." Defs.' Br. at 43. But *Keller* held that there is a "substantial analogy" between mandatory union fees and mandatory bar association dues that warrants subjecting them to "the same [First Amendment] constitutional rule." 496 U.S. at 12-13. It is therefore Defendants, not Plaintiff, who are urging a departure from *Keller*. Further, Defendants have not presented any reason why mandatory bar associations should not be subject to the same First Amendment scrutiny that applies not only to

mandatory union fees but also to *any* compelled association. *See, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

Besides, Defendants' argument does not even identify significant differences in the "First Amendment perils" respectively threatened by unions and mandatory bar associations. Both inflict the same type of harm: forced association with, and compelled support for, an organization that engages in political and ideological speech.

Defendants argue that, in *Janus*, a union's power of exclusive representation was a "restriction on union members' ability to engage in alternative speech through other channels," but no similar restriction applies to lawyers who are forced to join a bar association. Defs.' Br. at 43-44. But *Janus* did not strike down public-sector union fees because of the union's power of exclusive representation, which the plaintiff in that case did not challenge. It struck down the fees because they inevitably compelled individuals to pay for an organization's political and ideological speech and were not necessary to serve the government's interest in maintaining labor peace. 138 S. Ct. at 2466. Likewise, mandatory LSBA membership compels association with an organization and its political and ideological speech and is not necessary to serve the government's interest in regulating the legal profession. *See* Plfs.' Br. at 20-23.

Defendants also argue that the LSBA, unlike the unions in *Janus* and other cases, "does not support or oppose political candidates in elections or engage in partisan activities." Defs.' Br. at 44. But that is irrelevant because individuals have a First Amendment right not to be compelled to associate with or fund *any* political or ideological speech, regardless of whether it is "partisan" or pertains to "political candidates." *See, e.g.*, *Keller*, 496 U.S. at 15-16 (First Amendment prohibits compelled support for bar associations' non-germane issue advocacy); *Hurley*, 515 U.S. at 573 (First Amendment protects right to "decide 'what not to say'" generally). Moreover, partisan and candidate-related activities were not at issue in *Janus*: under *Abood v. Detroit Board of Education*, 431 U.S. 209, 235 (1977), unions were already prohibited from using mandatory fees for such purposes.

The LSBA argues that bar association speech does not have the "political valence" of union speech because bar associations (supposedly) have not influenced public policy to the extent that public-sector unions have. Defs.' Br. at 44 (citing *Janus*, 138 S. Ct. at 2483). But even if bar associations' political or ideological speech has less influence over government policy than union speech, that does not make their speech any less political or ideological in character, nor does it diminish the First Amendment harm to an individual who is forced to fund that speech.

Defendants also argue that an integrated bar "does not present the conceptual or practical challenges associated with union agency fees," citing the lack of "perpetual litigation resulting from LSBA speech" as evidence. Defs.' Br. at 44 (citing *Janus*, 138 S. Ct. at 2480-81). But the sort of practical challenges associated with mandatory union fees—particularly the difficulty of identifying inappropriate uses of fees, and the high cost and relatively low potential benefit of pursuing arbitration or litigation to challenge them—may be the very reason why there have not been more lawsuits challenging the LSBA's uses of dues. Indeed, *Janus* noted that similar problems in the union context likely explained why there had not been more Court of Appeals cases over uses of union fees. 138 S. Ct. at 2482 & n.26.[8]

Finally, Defendants' argument receives no support from *Harris v. Quinn*, 573 U.S. 616 (2014). *See* Defs.' Br. at 42. *Harris* only stated that *Keller* remained good law. 573 U.S. at 655-56. It did not address the issue that *Keller* declined to decide regarding mandatory membership in a bar association that engages in non-germane political and ideological speech, let alone suggest that mandatory

[8] Also, attorneys might not bring cases challenging the LSBA because they fear retaliation from an entity partially responsible for regulating them. That fear is warranted. *See* Dane S. Ciolino, *On Being Forced Into and Excluded from the Bar Association*, Louisiana Legal Ethics, Oct. 30, 2019, https://lalegalethics.org/on-being-forced-to-join-and-banned-from-the-bar-association/ (describing the experience of one of Plaintiff's attorneys after filing this lawsuit).

membership in such a bar association could survive exacting First Amendment scrutiny.

B. Plaintiff preserved his claim and argument below.

Plaintiff's appeal does not present a "recharacterize[d] and narrow[ed]" "articulation of [his] claim never presented to the district court." Defs.' Br. at 46. Plaintiff made the same argument below that he makes here: that Supreme Court precedent does not foreclose his challenge to mandatory LSBA membership to the extent that it raises the freedom-of-association issue that *Keller* left open. ROA.222-23.

Further, even if Plaintiff had not made the same argument below, he still would have preserved his claim that mandatory LSBA membership violates the First Amendment, and he would be entitled to make any argument in support of that claim on appeal. *See Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.").

Defendants argue that Plaintiff's complaint only "alleges broadly that mandatory membership in the LSBA standing alone violates the Plaintiff's freedom of association regardless of any allegedly non-germane speech." Defs.' Br. at 46. But Plaintiff's complaint alleges that the LSBA takes positions that are

not related to "regulation of the practice of law" (i.e., not germane), ROA.18-19 ¶¶ 40-46; that "he does not wish to associate with the LSBA, its other members, or its political and ideological speech," ROA.22 ¶ 60; and that compelling him to join the LSBA therefore violates his First Amendment right to freedom of association, ROA.23-25 ¶¶ 70-80. These allegations—construed liberally in Plaintiff's favor, as required under Rule 12(b)(6), *see Harrington v. State Farm Fire & Cas. Co.*, 563 F.3d 141, 147 (5th Cir. 2009)—encompass both the broader question of whether the First Amendment allows mandatory membership in a bar association that engages in *any* political or ideological speech and the narrower question that *Keller* reserved.[9]

CONCLUSION

With respect to Plaintiff's First Claim for Relief, challenging mandatory LSBA membership, the Court should conclude that Plaintiff had standing to bring it and should reverse the district court's dismissal under Rule 12(b)(6).

With respect to Plaintiff's Second Claim for Relief, challenging the LSBA's use of mandatory dues for political and ideological speech, the Court should conclude that Plaintiff had standing and that the claim is not barred by the Tax Injunction Act or by the doctrines of comity, exhaustion of remedies, or *Burford*

[9] If the Court were to conclude otherwise, however, Plaintiff would respectfully request leave to amend his claim on remand.

abstention, and the Court should reverse the district court's dismissal under Rule 12(b)(1).

And with respect to Plaintiff's Third Claim for Relief, alleging that the LSBA lacks sufficient safeguards for attorneys' First Amendment rights, the Court should conclude that Plaintiff had standing to bring it and reverse the district court's dismissal under Rule 12(b)(1).

RESPECTFULLY SUBMITTED this 22nd day of May 2020 by:

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of May 2020, the foregoing brief was filed and served on all counsel of record via the ECF system.

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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 6,223 words.

Submitted this 22nd day of May 2020,

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