UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

(1) MARK E. SCHELL, Plaintiff, v. (2) NOMA GURICH, Chief Justice of the Oklahoma Supreme Court; *et al.* Defendants.	))))))))))	Civil Case No. 5:19-cv-00281-HE

MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION TO ABSTAIN OF THE CHIEF JUSTICE AND JUSTICES OF THE OKLAHOMA SUPREME COURT AND BRIEF IN SUPPORT THEREOF

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

(1) MARK E. SCHELL, Plaintiff, v. (2) NOMA GURICH, Chief Justice of the Oklahoma Supreme Court; (3) TOM COLBERT, Associate Justice of the Oklahoma Supreme Court; (4) DOUG COMBS, Associate Justice of the Oklahoma Supreme Court; (5) RICHARD DARBY; Associate Justice of the Oklahoma Supreme Court; (6) JAMES E. EDMONDSON, Associate Justice of the Oklahoma Supreme Court; (7) YVONNE KAUGER, Associate Justice of the Oklahoma Supreme Court; (8) JAMES R. WINCHESTER, Associate Justice of the Oklahoma Supreme Court; (9) JANE DOE, successor to John Reif as Associate Justice of the Oklahoma Supreme Court; (10) JOHN DOE, successor to Patrick Wyrick as Associate Justice of the Oklahoma Supreme Court; (11) CHARLES W. CHESNUT, President, Oklahoma Bar Association Board of Governors; (12) SUSAN B. SHIELDS, President-Elect, Oklahoma Bar Association Board of Governors; (13) LANE R. NEAL, Vice President, Oklahoma Bar Association Board of Governors; (14) JOHN M. WILLIAMS, Executive Director Oklahoma Bar Association, and Secretary/ Treasurer, Oklahoma Bar Association Board of Governors; (15) KIMBERLY HAYS, Past President, Oklahoma Bar Association Board of Governors; (16) BRIAN T. HERMANSON, Member, Oklahoma Bar Association Board of Governors, Defendants.	)	Civil Case No. 5:19-cv-00281-HE

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MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION TO ABSTAIN OF THE CHIEF JUSTICE AND JUSTICES OF THE OKLAHOMA SUPREME COURT AND BRIEF IN SUPPORT THEREOF

Defendants, Noma Gurich, Chief Justice of the Oklahoma Supreme Court; Tom Colbert, Justice of the Oklahoma Supreme Court; Doug Combs, Justice of the Oklahoma Supreme Court; Richard Darby, Vice Chief Justice of the Oklahoma Supreme Court; James E. Edmondson, Justice of the Oklahoma Supreme Court; Yvonne Kauger, Justice of the Oklahoma Supreme Court; and James R. Winchester, Justice of the Oklahoma Supreme Court, referred to collectively herein as the "Justices" for the reasons set forth below, hereby move the Court to dismiss the subject action pursuant to FED.R.CIV.P. 12 b.1. and FED.R.CIV.P. 12 b.6. or in the alternative to abstain from exercising jurisdiction in this matter. In support of their motions, the Justices would show the Court as follows.

SUMMARY OF THE CASE

In this case, at its core, Plaintiff asks this Court to invade the exclusive jurisdiction of the Oklahoma Supreme Court to regulate the practice of law in the state of Oklahoma, and impermissibly asks this Court to pass on the constitutionality of action of the Oklahoma Supreme Court. Plaintiff initiates this intrusion without first having so much as attempted to employ the mechanisms available to him under the applicable state procedures. Plaintiff seems to seek three things; (1) he asks this Court to declare mandatory membership in the Oklahoma Bar Association (the "OBA") unconstitutional under the First and Fourteenth Amendments of the U.S. Constitution, (2) to enjoin the collection and use of member dues, and (3) to declare that the safeguards put in place by

the Oklahoma Supreme Court pursuant to the mandate of *Keller v. State Bar of Calif.*, 496 U.S. 1 (1990) are insufficient.

ARGUMENT

INDIVIDUAL JUSTICES ARE NOT PROPER DEFENDANTS

In filing his Amended Complaint, Plaintiff has taken the age-old approach of tackling the entire backfield in the hope of finding someone with the ball. He sues every individual he can think of but avoids naming the one body that does in fact have the ball, the Oklahoma Supreme Court itself. This is no doubt in recognition that Plaintiff cannot sue the Oklahoma Supreme Court, as it enjoys complete and absolute immunity for such suit under the Eleventh Amendment of the United States Constitution.

Plaintiff sues the Chief Justice, the Vice Chief Justice and the Justices of the Oklahoma Supreme Court in their official capacity. In doing so, however, the Plaintiff ignores the fact that no individual justice can grant him the relief he seeks, and this Court cannot and should not order any individual justice to do or not do anything.

The Oklahoma Supreme Court acts only as a body. It is a creation of the Oklahoma Constitution. Article 7 Section 2 of the Oklahoma Constitution provides that the Oklahoma Supreme Court shall consist of nine justices. Plaintiff has sued all seven currently sitting justices, as there are two vacancies. Article 7 Section 5 makes it clear that the Oklahoma Supreme Court acts only as a body when it provides:

> "A majority of the members of the Supreme Court shall constitute a quorum and the concurrence of the majority of said Court shall be necessary to decide any question."

Thus, seeking any order against the individual justices is futile.

As fully discussed in the Motion to Dismiss the original complaint of co-defendant John Morris Williams it is the Oklahoma Supreme Court that has exclusive control over the regulation of the practice of law in the state of Oklahoma. And since the *Ex Parte Young,* 209 U.S. 123, S.Ct. 441, 52 L.Ed. 715 (1908) exception to the Eleventh Amendment immunity only applies when, among many other factors, the plaintiff sues a state official against whom effective relief can be granted, *Bronson v. Swensen*, 500 F.3d 1099 (10th Cir. 2007), the individual Justices are not proper defendants to this action.

INDIVIDUAL JUSTICES ARE IMMUNE

The Eleventh Amendment to the United States Constitution provides:

> "The Judicial power of the United States shall not be construed to extend to any suit law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Amendment affirms the fundamental principle of sovereign immunity which limits the grant of judicial authority in Article III of the Constitution. *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89, 98 (1984). A State's Eleventh Amendment protection from suit has been extended to suits brought by a State's own citizens, *Hans v. Louisiana,* 134 U.S. 1, 10 (1890), and suits invoking the federal question jurisdiction of Article III. *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 72-73 (1996).

The immunity of a court and its members was addressed by the United States Supreme Court in *Supreme Court of Virginia v .Consumers Union of the United States*, 446 U.S. 719, 100 S.Ct.1967, 64 L.Ed.2d 641 (1980). That case involved a challenge to the then existing ban on lawyer advertising. In Virginia, like Oklahoma, the Virginia Supreme Court holds the exclusive power to promulgate the rules that govern lawyer conduct. There, the U.S. Supreme Court noted the different ways the Virginia Court acted in its rule making function and equated it to legislating. The Court therefore held that when it makes rules, the Virginia Court was acting in its legislative capacity. As such, "the Virginia Court and its members are immune from suit when acting in their legislative capacity" *Id.* at 1976. Although the Court went on to note an exception to this immunity when the Virginia Court is acting in its enforcement capacity, this exception is inapplicable here because there is no enforcement action pending or threatened against the Plaintiff.

This case is particularly analogous to *Collins v. Daniels*, 916 F.3d 1302 (10th Cir. 2019). In *Collins*, a single criminal defendant, members of the bail bond business and several state legislators filed a federal court class action against the state court, state court judges and court executives, challenging New Mexico's bail system. They alleged that the rules promulgated by the New Mexico Supreme Court governing New Mexico's system of bail violated the Eighth Amendment and Due Process. Judge Briscoe, writing for the court held that when acting in its rule making capacity, the New Mexico Supreme Court was not acting in its judicial function, but as legislators. As such, the justices of the New Mexico Supreme Court were immune from suit. The Court held:

> "Absolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity.' " *Bogan v. Scott-Harris*, 523 U.S. 44, 54, 118 S.Ct. 966, 140 L.Ed.2d 79 (1998) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376, 71 S.Ct. 783, 95 L.Ed. 1019 (1951)). … A state "[c]ourt and its members are immune from suit when acting in their legislative capacity," such as by promulgating "rules of general application [that] are statutory in character." *Supreme Court of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 731–34, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980). … Therefore, the justices of the Supreme Court of New Mexico "act[ed] in their legislative capacity" when they amended the state's rules of criminal procedure in 2017. *Id.* at 734, 100 S.Ct. 1967."
> *Id.* at 1317

When the Justices enact the rules governing the practice of law in Oklahoma, they act in their legislative capacity. Therefore, they are immune from any suit relating to such activities.

THIS COURT LACKS JURISDICTION TO REVIEW THE ACTIONS OF THE OKLAHOMA SUPREME COURT

Plaintiff's Amended Complaint puts this Court in the untenable position of being asked to review the constitutionality of the Oklahoma Supreme Court's action in implementing and maintaining the Oklahoma Bar Association and its current dues structure.

In *Van Sickle v. Holloway*, 791 F.2d 1431 (10th Cir. 1986) the court explained the prohibition against a federal court purporting to review the actions of a state court. There the Tenth Circuit Court of Appeals stated:

> A federal district court does not have the authority to review final judgments of a state court in judicial proceedings; such review may be had only in the United States Supreme Court. 28 U.S.C. § 1257 (1982). *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, 103 S.Ct. 1303, 1314–15, 75 L.Ed.2d 206 (1983) . Federal district

> courts do not have jurisdiction "over challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional." *Feldman*, 460 U.S. at 486, 103 S.Ct. at 1317. The Supreme Court in *Feldman* held that although the district court had jurisdiction over general attacks on the constitutionality of state bar admission rules, it did not have jurisdiction over the plaintiff's arguably constitutional claims that the District of Columbia Court of Appeals erred in its application of the rules to the plaintiff. *Id.* at 486–87, 103 S.Ct. at 1317. The latter claims were said to have been "inextricably intertwined" with the state court decision. *Id.* To consider these claims, the district court would have been required "to review a final decision of the highest court of a jurisdiction in a particular case." *Id.* at 486, 103 S.Ct. at 1317. Because such review may be had only in the United States Supreme Court, the Court held that the district court did not have jurisdiction over those claims. *Id.* at 487, 103 S.Ct. at 1317.
>
> Although Van Sickle arguably presented constitutional claims, those claims are obviously "inextricably intertwined" with the state court decisions in a judicial proceeding. Consequently, Van Sickle in essence has asked the federal district court to review a final decision of Colorado's highest court. Because the district court does not have authority to exercise such review, the complaint also should have been dismissed for lack of subject matter jurisdiction. On this record, it appears to us that if dissatisfied with the Colorado Supreme Court decision, Van Sickle had as his only avenue of 1352 (10th Cir. relief an application for certiorari to the United States Supreme Court. *See* 28 U.S.C. § 1257(3)."
>
> *Id.* at 1436

It must be acknowledged that there is no state court "judicial proceeding" pending against Plaintiff. But the fundamental policy underlying the rule stated in *Van Sickle* is clear. U.S. District Courts do not sit as courts of review of action of state supreme courts. See also *Lane v Oklahoma Supreme Court*, 221 F.3d 1352 (10th Cir. 2000).

The Tenth Circuit has recognized many times that the Oklahoma Supreme Court is the final arbiter of issues relating to the practice of law in Oklahoma. In *Doyle v. Oklahoma Bar Association*, 998 F.2d 1559 (10th Cir. 1993) the court noted

> "The Oklahoma Supreme Court (the court) has exclusive jurisdiction in all matters involving the licensing and discipline of lawyers in Oklahoma. Okla.Stat.Ann. tit. 5, Ch. 1, App. 1–A, R. 1.1."
>
> *Id.* at 1563.

These policies taken together make it clear that this Court cannot sit as a court of review of the constitutionality of actions or inactions of the Oklahoma Supreme Court in areas which have been recognized as being the exclusive purview of the Oklahoma Supreme Court.

THE COURT SHOULD ABSTAIN FROM INTERFERING IN STATE COURT MATTERS

The doctrine of "Our Federalism" underpins all of the various abstention doctrines. Justice Black coined the phrase "Our Federalism" in the landmark case of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) when he explained:

> "What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."
>
> *Id.* at 44.

As fully explained in the Motion to Dismiss of John Morris Williams [Doc 16], the Oklahoma Bar Association has a budgetary process that it undergoes each fall. During that process, the proposed budget it published and members of the bar have the opportunity to object. Members also have the opportunity to opt-out of having their dues

spent on any speech or expenditures he or she believes are non-germane. The budgetary process for the next fiscal year will begin shortly.

While the various abstention doctrines admittedly do not fit squarely with the issues raised in this case, both *Younger v. Harris*, supra and *Burford v. Sun Oil Company*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed.2d 1424 (1943) are instructive. As the U.S. Supreme Court stated in *Pennzoil Co. v. Texaco. Inc.*, 481 U.S. 1, 107 S.Ct. 1529, 95 L.Ed.2d 1 (1987), "The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes." *Id.* at 11 n. 9. The Tenth Circuit Court of Appeals has noted that *Burford* abstention arises when a federal district court faces issues that involve complicated state regulatory schemes. *Lehman v. City of Louisville*, 967 F.2d 1474 (10th Cir. 1992)

In *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982) the U.S. Supreme Court extended *Younger* abstention to state bar disciplinary proceedings. There Justice Brennan wrote:

> "The importance of the state interest in the pending state judicial proceedings and in the federal case calls *Younger* abstention into play. So long as the constitutional claims of respondents can be determined in the state proceedings and so long as there is no showing of bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate, the federal courts should abstain."
>
> *Id.* at 435

In *Middlesex County*, an action was filed in federal court to enjoin pending state attorney disciplinary proceedings. The attorney, in response to the *Younger* abstention argument, suggested that there was no opportunity for him to raise his federal constitutional challenge in the state court proceedings. Plaintiff will likely make the same argument here. However, such argument is just as ineffective here as it was in *Middlesex County*. The Court in *Middlesex County* noted that the plaintiff did not even try to raise his constitutional challenge in the state proceedings. In fact, he did not even answer. Similarly here, Plaintiff has not employed the various tools available to him in the Oklahoma Bar Association rules for contesting an expenditure of dues. (See Proposition E of the Motion to Dismiss of defendant Williams [Doc. 16] pages 20 – 22). Plaintiff and the public in general have the opportunity to raise these, and any other issues, in the coming review of the annual budget of the Oklahoma Bar Association.

The Tenth Circuit Court of Appeals has frequently applied the holding of *Middlesex County* to attempts by lawyers to invoke federal court jurisdiction to prevent state bar proceedings. See *Rose v. Utah*, 399 Fed.Appx. 430 (10th Cir. 2010); *Landrith v. Hazlett*, 170 Fed.Appx. 29 (10th Cir. 2006); *Lyman v. San Juan County*, 588 Fed.Appx. 764 (10th Cir. 2014).

Abstention is particularly appropriate where, as here, the relief sought is declaratory judgment. In *Wilton v. Seven Falls Company*, 515 U.S. 277 (1995), the Supreme Court made clear that a federal court has discretion in deciding whether to stay a declaratory judgment action in favor of parallel state litigation. *Id.* at 281-90. This discretion is derived primarily from language in the Declaratory Judgment Act, 28 U.S.C.

§2201(a), which provides that "upon the filing of an appropriate pleading, [a federal court] may declare the rights and other legal relations of any interested party seeking such declaration...." As stated in *Wilton*, the Act creates an opportunity, rather than a duty, to grant declaratory relief to qualifying litigants. *Id*. at 288. While again it is acknowledged that there is no parallel state court action, there are processes in place and underway by which the Oklahoma Supreme Court, the body with exclusive jurisdiction over the regulation of the practice of law in Oklahoma, will be reviewing the budget of the Oklahoma Bar Association. The Oklahoma Supreme Court must be afforded the opportunity to complete that review.

Federalism mandates that this Court refrain from interfering with matters that are within the exclusive jurisdiction of the Oklahoma Supreme Court and for which the Oklahoma Supreme Court provides full and complete opportunities for Plaintiff's constitutional challenges to be heard.

OKLAHOMA'S INTEGRATED BAR AND DUES STRUCTURE ARE CONSTITUTIONAL

In the interest of brevity, the Justices adopt and incorporate herein the arguments of the Oklahoma Bar Association defendants regarding the constitutionality of the Oklahoma Integrated Bar and Dues structure as set out in the Motion to Dismiss of John Morris Williams field herein on April 24, 2019 [Doc. 16] and the Motion to Dismiss filed by the bar association defendants on June 21, 2019.

CONCLUSION

As the Tenth Circuit Court of Appeals stated in *Collins v. Daniels, supra.:*

> "Absolute immunity [undoubtedly] has its costs" for plaintiffs like Collins who seek to vindicate their constitutional rights. *Snell v. Tunnell*, 920 F.2d 673, 687 (10th Cir. 1990). "The rationale for according absolute immunity in the civil rights context is to incorporate traditional common law immunities and to allow functionaries in the judicial system the latitude to perform their tasks absent the threat of retaliatory § 1983 litigation." Id. at 686–87 (footnote omitted). "Though such suits might be satisfying personally for a plaintiff, they could jeopardize the judicial system's ability to function." Id. at 687. "[S]uits against judges [are not] the only available means through which litigants can protect themselves from the consequences of judicial error." *Forrester [v. White]*, 484 U.S. [219] at 227, 108 S.Ct. 538.

The same might be true for the Plaintiff. The absolute immunity that must be afforded the Justices, and the Plaintiff having to assert his claims either during the budgetary process or in a later filed action in state court, may not be the course Plaintiff would choose. However, this Court must defer to the Oklahoma Supreme Court's absolute and exclusive power to regulate the practice of law in Oklahoma.

This action must therefore be dismissed.

Dated: June 21, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

This certifies that on the 21st day of June, 2019, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing and transmitted a Notice of Electronic Filing to all ECF registrants in this case.

/S/ Kieran D, Maye, Jr.
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