UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

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

PLAINTIFF MARK E. SCHELL'S RESPONSE IN OPPOSITION TO MOTIONS TO DISMISS OF OKLAHOMA BAR ASSOCIATION BOARD OF GOVERNORS DEFENDANTS AND DEFENDANT TIMOTHY E. DECLERCK

In moving to dismiss Plaintiff's claims against them (Docs. 46, 47), the Defendant members of the Oklahoma Bar Association Board of Governors mostly repeat arguments the Defendant Oklahoma Supreme Court Justices and Defendant John M. Williams made in their respective motions to dismiss (Docs. 43, 45).[1] The Board members' arguments fail for the same reasons that the Justices' and Williams's do. Like the Justices and Williams, the Board members play an integral role in enforcing the rules Plaintiff challenges, are not exempt from the First and Fourteenth Amendments, and are therefore proper defendants in this case. The Court should therefore deny the Board's motion.

[1] Plaintiff here responds to both the Oklahoma Bar Association Board of Governors Defendants' Motion to Dismiss First Amended Complaint Under Rules 12(b)(1) and 12(b)(6), Fed. R. Civ. P. (Doc. 46) ("Board MTD") and the motion filed separately by one Board member, Defendant Timothy E. DeClerck's Motion to Dismiss First Amended Complaint Under Rules 12(b)(1) and 12(b)(6), Fed. R. Civ. P. (Doc. 47), which adopts the arguments of the other Board members' motion by reference.

FACTS

Plaintiff incorporates by reference the statement of facts set forth in his Response in Opposition to Motion to Dismiss or in the Alternative Motion to Abstain of the Chief Justice and Justices of the Oklahoma Supreme Court, filed contemporaneously with this response brief.

LEGAL STANDARD

Plaintiff incorporates by reference the statement of the legal standards set forth in his Response in Opposition to Motion to Dismiss or in the Alternative Motion to Abstain of the Chief Justice and Justices of the Oklahoma Supreme Court, filed contemporaneously with this response brief.

ARGUMENT

I. The Board members' enforcement powers make them proper defendants.

The Board members argue that the Court lacks subject matter jurisdiction over Plaintiff's claims against them, mostly repeating Defendant John M. Williams's arguments as to why the Court supposedly lacks subject matter jurisdiction over the Plaintiff's claims against him. *See* Board MTD at 9–17. The Board's arguments fail just as Williams's do.

Like Williams, the Board members argue that they lack sufficient enforcement power to be proper defendants under *Ex Parte Young*, 209 U.S. 123 (1908). Board MTD at 11–14. To be an appropriate Defendant under *Ex Parte Young*, an individual sued in his or her official capacity "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." 209 U.S. at 157 (emphasis added). "Defendants are not required to have a '*special* connection' to the unconstitutional act or conduct," however. *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 828 (10th Cir. 2007) (emphasis added). "Rather, state officials must have a particular duty to 'enforce' the statute in question and a demonstrated willingness to exercise that duty." *Id.* The defendant's "connection does not need to be primary authority to enforce the challenged law," and it is not necessary for a defendant to have "full power to redress a plaintiff's injury." *281 Care Comm. v. Arneson*, 638 F.3d 621, 632–33 (8th Cir. 2011). It is enough that the defendant "clearly ha[s] assisted or currently assist[s] in giving effect to the law." *Prairie Band Potawatomi Nation v. Wagnon*, 402 F.3d 1015, 1027 (10th Cir. 2005) ("*Wagnon*"), *vacated on other grounds sub nom. Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 1072 (2005); *see also, e.g., L.A. Cnty. Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992) (where plaintiff challenged statute prescribing number of judges, officials who "g[ave] effect" to the law by appointing judges and certifying judges' elections were proper defendants).

Here, the Board has the requisite connection to enforcement of the requirements the Plaintiffs challenge. The Board plays an integral role in enforcing the dues requirement because it has the authority to remove attorneys who do not pay mandatory dues from the OBA's membership rolls and, in fact, identifies attorneys who have not paid their annual dues and reports their names to the Oklahoma Supreme Court, which in turn suspends them from the practice of law. Am. Compl. ¶ 21; *In re the Matter of the Suspension of Members of the Okla. Bar Ass'n for Nonpayment of 2018 Dues*, No.

SCBD-6659, 2018 OK 44 (granting the Board's application to have attorneys suspended for nonpayment of dues)[2]. The Board also plays an integral role in the procedures Plaintiff challenges in his Third Claim for Relief because it has final decision-making authority under that process. Am. Comp. at ¶ 88.

It is irrelevant that the Board supposedly lacks policymaking power and is subordinate to the Rules Creating and Controlling the OBA and the OBA House of Delegates. *See* Board MTD at 13. Under *Ex Parte Young*, the Board members' *enforcement* power is all that matters. *See Wagnon*, 402 F.3d at 1027 ("The essence of an *Ex parte Young* action is seeking relief against the state officials who are responsible for enforcing the violative state laws, not against the state officials who drafted the violative legislation.") (internal marks omitted).

It is also irrelevant that the Oklahoma Supreme Court's authority over attorney regulation has been described as "non-delegable." *See* Board MTD at 13. The non-delegability of the Oklahoma Supreme Court's authority over attorney licensure refers only to *ultimate* authority—it does not mean that the court cannot delegate *any task* connected to enforcement of its rules. In fact, it has expressly done so by charging the Board with the enforcement responsibilities just discussed. It was for precisely this reason that the Tenth Circuit allowed *Roe No. 2 v. Ogden*, 253 F.3d 1225, 1233–34 (10th Cir. 2001), to proceed. That case, too, was an *Ex Parte Young* lawsuit against state bar officials who exercised authority delegated to them by the state Supreme Court. It was

[2] https://law.justia.com/cases/oklahoma/supreme-court/2018/scbd-6659.html.

because the named officials had a specific duty to exercise that authority, and did in fact do so, that they were appropriate defendants under *Ex Parte Young*.

It likewise does not matter that the individual Board members can only enforce the challenged rules when acting together with other members. *See* Board MTD at 14. The Board apparently takes the view that *Ex Parte Young* allows a plaintiff to sue a state official only if relief against that official *alone* would provide effective relief. But that rule would make little sense because government officials commonly must act in concert to enforce laws, and there is no reason why plaintiffs should be able to obtain relief against constitutional violations only where there happens to be a single individual against whom an injunction would provide complete relief. The Supreme Court implicitly rejected such an idea when it allowed a plaintiff to bring an *Ex Parte Young* action challenging an order of the Public Service Commission of Maryland by suing its individual members. *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645–46 (2002). The Tenth Circuit also implicitly rejected the Board's view when it allowed plaintiffs to sue the members of the Bar Committee of the Colorado State Board of Law Examiners to enjoin a bar admission rule in *Ogden*, 253 F.3d at 1233–34. *See also, e.g.*, *Osage Nation v. Okla. ex rel. Okla. Tax Comm'n*, 260 Fed. Appx. 13 (10th Cir. 2007) (allowing suit against individual members of Oklahoma Tax Commission); *Dubuc v. Mich. Bd. of Law Exam'rs*, 342 F.3d 610, 616 (6th Cir. 2003) (allowing claim against chairperson and executive director of Michigan Board of Bar Examiners); *Thiel v. State Bar of Wis.*, 94 F.3d 399, 403 (7th Cir. 1996) (allowing claim against individual members

of bar's board of governors in challenge to state rule regarding use of mandatory bar dues).

II. Plaintiff has stated claims for violations of his First and Fourteenth Amendment rights.

On the merits of Plaintiff's claims, the Board members mostly repeat the arguments of Williams's motion to dismiss verbatim, arguing that compulsory bar membership, the use of mandatory dues for "germane" political speech, and the OBA's procedures for members' objections to expenditures are all constitutional. *See* Board MTD at 17–27; Williams MTD at 17–26. The Board also echoes Williams's argument that the OBA's political and ideological speech is government speech that members can be forced to fund without limitation. *See* Board MTD at 27–30; Williams MTD at 26–29. To the extent the Board members' arguments simply repeat Williams's, Plaintiff will not address them again and instead incorporates his responses to Williams's arguments here by reference.

Plaintiff will, however, address the sole merits argument the Board members have raised that Williams did not: that Plaintiff should not be allowed to pursue his Third Claim for Relief, which challenges the OBA's lack of sufficient procedures to protect members' First Amendment rights, because he did not avail himself of the OBA's current procedures. Board MTD at 26.

Nothing in the law required Plaintiff to seek relief through the OBA's procedures before bringing his federal constitutional claim. Indeed, the point of Plaintiff's claim is that those procedures are inherently, inevitably *inadequate* because they lack the essential

safeguards that *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), prescribe. *See* Am. Compl. ¶¶ 119–128. The gravamen of Plaintiff's complaint is that existing procedures are constitutionally inadequate, and therefore it is both irrational and contrary to the law to require the Plaintiff to submit himself to that procedure before challenging it in court. *Cf. Pub. Utils. Comm'n of State of Cal. v. United States*, 355 U.S. 534, 540 (1958) ("[W]here the only question is whether it is constitutional to fasten [an] administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right."); *Staub v. City of Baxley*, 355 U.S. 313, 319 (1958) ("The Constitution can hardly be thought to deny to one subjected to the restraints of an [unconstitutional license application process] the right to attack its constitutionality, because he has not yielded to its demands."). Nor does any exhaustion requirement apply to a case brought, as this one is, under 42 U.S.C. § 1983. *See Patsy v. Bd. of Regents*, 457 U.S. 496 (1982).

The case law the Board has cited does not support dismissal on this point. In *Taylor v. Roswell Independent School District*, 713 F.3d 25, 40 (10th Cir. 2013), a plaintiff challenged "every [school] District policy that could potentially govern student speech," but the Court limited its review to "policies that pertain to the particular speech in which [the] Plaintiffs wish[ed] to engage." Here, in contrast, Plaintiff challenges procedures that indisputably affect his interests as a mandatory member of the OBA, as the Supreme Court explained in *Keller*, 496 U.S. at 16-17. In *United States v. Friday*, 525 F.3d 938, 952 (10th Cir. 2008), the Tenth Circuit did not allow the plaintiff who had not

applied for a certain permit to pursue an *as-applied* challenge to permitting procedures but did allow him to pursue a *facial* challenge—which shows, if anything, that Plaintiff's facial challenge to the OBA's procedures is appropriate.

III. The Court should not abstain from hearing Plaintiff's claims against the Board members.

The Board members argue that this Court should abstain from hearing Plaintiff's claims, adopting the arguments for abstention made in the Motion to Dismiss of the Chief Justice and Justices of the Oklahoma Supreme Court (Doc. 43). Board MTD at 30. In response, Plaintiff incorporates by reference his arguments on abstention in his response to the Justices' motion.

CONCLUSION

The Court should deny the Board members' motions to dismiss.

Dated: July 19, 2019

Respectfully submitted,

/s/ Jacob Huebert

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of July, 2019, I filed the attached document with the Clerk of the Court. Based on the records currently on file in this case, the Clerk of the Court will transmit a Notice of Electronic Filing to those registered participants of the Electronic Case Filing System as follows:

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