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

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When state officials are violating a person's fundamental constitutional rights, the Fourteenth Amendment and 42 U.S.C. § 1983 entitle that person to seek relief in the federal courts. And although the Eleventh Amendment generally bars federal lawsuits against state governments, individuals may nonetheless sue individual state officials in their official capacities to enjoin future violations of federal constitutional rights under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908).

Further, although federal courts sometimes abstain from hearing cases that seek to enjoin pending state judicial proceedings or that involve complicated questions of state law, those are narrow exceptions to the general rule that federal courts must resolve federal constitutional questions that are properly before them. The abstention doctrines do not apply where a plaintiff seeks to protect his federal constitutional rights, there are no pending state judicial proceedings through which the plaintiff might protect his rights, and there is no complicated question of state law. And that only makes sense: the Fourteenth Amendment and § 1983 exist so that federal courts may stop state officials from violating constitutional rights.

For these reasons, the motion to dismiss or to abstain filed by the justices of the Oklahoma Supreme Court (Doc. 43) ("Justices' MTD")—which asks the Court not to hear Plaintiff's First and Fourteenth Amendment challenge to Oklahoma's rules requiring attorneys to join and pay dues to the Oklahoma Bar Association—must fail. The Fourteenth Amendment, § 1983, and *Ex Parte Young* do not include an exception for state supreme court justices, and there is no abstention doctrine that prevents federal courts from hearing challenges to state supreme court rules. In other words, state supreme

court justices and are bound by the Fourteenth Amendment, just like everyone else, and this Court should therefore allow Plaintiff's claims against the justices to proceed.

FACTS

This lawsuit challenges the State of Oklahoma's requirement that attorneys join and pay dues to the Oklahoma Bar Association ("OBA"), the OBA's use of attorneys' mandatory dues for political and ideological activity without members' affirmative consent, and OBA's lack of procedures to protect members' First Amendment rights.

A. Oklahoma's mandatory bar membership and dues

Oklahoma law compels every attorney licensed in Oklahoma to be a member of the OBA in order to practice law in the state. Okla. Stat. tit. 5, ch. 1, app. 1, art. 2, § 1; Am. Compl. (Doc. 19) ¶ 40. It also compels attorneys licensed in Oklahoma to pay annual dues to the OBA. Okla. Stat. tit. 5, ch. 1, app. 1, art. 8, §§ 1–4; Am. Compl. ¶ 41.

The Oklahoma Supreme Court is responsible for enforcing laws requiring membership and funding of the OBA as a condition of practicing law in the state. Okla. Stat. tit. 5, ch. 1, app. 1, art. 8, § 2; Am. Compl. ¶ 12. If an attorney fails to pay mandatory dues, the Oklahoma Supreme Court shall suspend the attorney's membership, which prohibits the attorney from practicing law in Oklahoma unless reinstated by the court after paying the dues and a penalty. Okla. Stat. tit. 5, ch. 1, app. 1, art. 8, §§ 2, 4; Am. Compl. ¶ 42; *see also, e.g., In the Matter of the Suspension of Members of the Okla.*

Bar Ass'n for Nonpayment of 2018 Dues, No. SCBD-6659, 2018 OK 44 (suspending members from the practice of law for nonpayment of dues)[1].

The OBA Board of Governors ("Board") has the authority to remove attorneys from the OBA's membership rolls for nonpayment of dues. Am. Comp. ¶ 21. If an attorney does not file an application for reinstatement within one year for nonpayment of dues, he or she automatically ceases to be a member of the OBA, and the OBA Board shall cause his or her name to be stricken from the OBA's membership rolls. Okla. Stat. tit. 5, ch. 1, app. 1, art. 8, § 5; Am. Compl. ¶ 43.

B. OBA's use of mandatory dues for political and ideological speech

The OBA uses members' mandatory dues to engage in speech, including political and ideological speech. Am. Compl. ¶ 48.

The OBA's bylaws authorize it to advocate for and against state legislation. Article VIII, Sections 2 and 3, of the OBA's bylaws authorizes the OBA to create a "Legislative Program" through which the OBA may propose legislation "relating to the administration of justice; to court organization, selection, tenure, salary and other incidents of the judicial office; to rules and laws affecting practice and procedure in the courts and in administrative bodies exercising adjudicatory functions; and to the practice of law." Am. Compl. ¶ 49. Article VIII, Section 9, of the OBA's bylaws authorizes the OBA to "make recommendations upon any proposal pending before [the] Legislature of the State of Oklahoma or any proposal before the Congress of the United States of

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

America, if such proposal relates to the administration of justice, to court organization, selection, tenure, salary or other incidents of the judicial office; to rules and laws affecting practice and procedure in the courts and in administrative bodies exercising adjudicatory functions; and to the practice of law." Am. Compl. ¶ 50. And Article VIII, Section 4, of the OBA's bylaws provides that the OBA may endorse "[a]ny proposal for the improvement of the law, procedural or substantive … in principle," with no restriction on subject matter. Am. Compl. ¶ 51.

Under these provisions of its bylaws, the OBA has advocated for and against both procedural and substantive proposed state legislation. *Id.* ¶ 52. For example, in 2009, the OBA publicly opposed a controversial tort reform bill. *Id.* ¶ 53. In 2014, the OBA created a petition to oppose legislation, SJR 21, that would change the way that members of the Oklahoma Judicial Nomination Commission were selected, sent emails to its membership urging them to oppose the measure, and staged a "rally" at the State Capitol to oppose the measure. *Id.* ¶ 54. And now the OBA continues to support and oppose state legislation, and its committees also draft and promote state legislation. *Id.* ¶¶ 55–56.

In addition, the OBA uses mandatory member dues to publish political and ideological speech in its *Oklahoma Bar Journal* publication. *Id.* ¶ 57. Examples include:

- A January 2016 article by the OBA's then-president criticizing the United States Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), for supposedly changing the United States "to 'a government of the corporations, by the bureaucrats, for the money," *id.* ¶ 58;

- A February 2016 article by the OBA's then-president criticizing "super PACs" for supposedly "threaten[ing] to corrupt the political process" with "virtually unlimited campaign contributions," *id.* ¶ 59;
- A March 2016 article by the OBA's then-president criticizing Oklahoma's legislature for not regulating the oil and gas industry to restrict the use of "injection wells" alleged to cause earthquakes, *id.* ¶ 60;
- An April 2016 article by Defendant John M. Williams criticizing proposed legislation that would change Oklahoma's method of judicial selection as one of many alleged legislative "attack[s on] the Oklahoma Bar Association or the courts," *id.* ¶ 61;
- Another April 2016 article entitled "We Don't Want to Be Texas," also criticizing efforts to change Oklahoma's method of judicial selection, *id.* ¶ 62;
- A May 2016 article by the OBA's then-president that: (1) criticized the United States Supreme Court's decisions in *Citizens United* and *McCutcheon v. FEC*, 572 U.S. 185 (2014), stating (falsely) that they "have allowed unlimited campaign contributions by political action committees that do not have to identify contributors"; (2) praised Jane Mayer's book *Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right* for its exposition of a supposed "takeover of our government by big money from the oil and gas industry"; (3) praised former Vice President Al Gore for "advocating that our environment and climate

suffered from a failure of our government to regulate the fossil fuel industry"; and (4) called on OBA members to "take action now" and "stand up for people and stop control of our government by the oil and gas industry," *id.* ¶ 63;

- A May 2016 article entitled "State Attorney General Argues Against Tribal and State Interests," criticizing an amicus brief filed by the State of Oklahoma (together with other states) in *Dollar General Corporation v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016), alleging that the state's arguments were (among other things) "disingenuous" and the product of "uninformed bias," *id.* ¶ 64;
- A September 2016 article by the OBA's then-president again praising Mayer's *Dark Money* book, describing it as "a snapshot of history of the United States at a time when money controls our government," and stating that the then-president wanted Mayer to speak at the OBA's annual meeting because "[w]e need to hear what she says about dark money and the future of American democracy," including "how corrupt our government has become and how big money is turning our government into a government of the corporations, by the bureaucrats, for the money," *id.* ¶¶ 65–66;
- A September 2016 advertisement for the OBA's Annual Meeting—held November 3, 2016, less than one week before the 2016 general election, with Mayer as keynote speaker—quoting Mayer as stating: "I will talk about the way money is becoming a growing factor in judicial races and

what the consequences are. … I see the money as a real threat to judicial integrity and independence… . The courts are very much part of their plan, and they[]"—meaning "wealthy conservative libertarians [*sic*]"—"[have] gone about swaying them by changing the way the law is taught in schools, paying for judicial junkets in which they push their viewpoint on the judges and by trying to use dark money to win judicial elections," *id.* ¶¶ 67–69;

- A November 2016 article by the OBA's then-president urging readers to contact legislators to advocate for increased funding of the judicial branch, particularly greater funding to pay bailiffs and court reporters, *id.* ¶ 70;
- An April 2017 article by Defendant John M. Williams criticizing legislative proposals to change Oklahoma's method of judicial selection, suggesting that, if they passed, "big money and special interest groups [would] elect judges and justices and campaign contributions [would] buy court opinions," *id.* ¶ 71;
- A May 2017 article by the OBA's then-president stating that attorneys must "warn [the public] of the potential ill effects of reintroducing politics into our judicial selection process," *id.* ¶ 72;
- A May 2018 article by Defendant John M. Williams criticizing "attacks" on Oklahoma's system of "merit selection" of judges, *id.* ¶ 73;
- A November 2018 article entitled "Tort Litigation for the Rising Prison Population" arguing that Oklahoma's prison system was underfunded and

advocating that the legislature eliminate prisons' and jails' exemption from tort liability, *id.* ¶ 74;

- A February 2019 article by Defendant Chesnut criticizing claims that lawyers have too much influence in the state legislature and alleging that "having lawyers in the Legislature is a plus," *id.* ¶ 75;
- A March 2019 "Legislative News" column stating that "MORE LAWYERS ARE NEEDED" as members of the state legislature, *id.* ¶ 76.

As the members of the Board, Defendants Chestnut, Shields, Neal, John M. Williams, Hays, Hermanson, Fields, McKenzie, DeClerck, Hutter, D. Kenyon Williams, Beese, Oliver, Will, Hicks, Morton, Pringle, and Nowakowski withdraw and use mandatory member dues on behalf of the OBA, acting under color of state law. *Id.* ¶ 47.

C. OBA's dues refund procedures

Before submitting its annual budget to the Oklahoma Supreme Court, the OBA publishes a proposed budget in its *Bar Journal*. *Id.* ¶ 77. The OBA's proposed budget for 2019 included a list of categories of expenditures, the amount the OBA budgeted for each category in 2018, and the amount the OBA proposed to spend for each category in 2019. *Id.* ¶ 78 & Ex. 1 to Compl. (Doc. 1-2).

The OBA's proposed budget does not provide members with sufficient information to determine whether any past or proposed expenditures of member dues were or are germane to the purpose of improving the quality of legal services and regulating the legal profession. Am. Compl. ¶ 81. It does not state whether any past or proposed expenditures of members' dues were or are germane to those purposes. *Id.* ¶ 80.

Indeed, it does not identify any specific expenditures the OBA has made or proposed to make at all; it only identifies categories of expenditures. *Id.* ¶ 79.

According to a "Notice and Objection Procedure to OBA Budgetary Expenditures" adopted by the Board, "[a] member may object to a proposed or actual expenditure of monies by the OBA as not within the purposes or limitations set out in the [OBA's] Rules or Bylaws, and seek refund of a pro rata portion of his or her dues expended, plus interest, by filing a written objection with the Executive Director." *Id.* ¶ 82.

This Notice and Objection Procedure *expressly excludes* the opportunity to object to actual or proposed expenditures for political, ideological, or other speech that is made within the scope of the OBA's Rules or Bylaws. *Id.* ¶ 83.

The Notice and Objection Procedure requires a member to submit a separate "OBA Dues Claim Form" for each budgetary expenditure to which he or she objects, "postmarked not later than Sixty (60) days after the approval of the annual budget by the Oklahoma Supreme Court or January 31st of each year, whichever shall first occur." *Id.* ¶ 84.

The Notice and Objection Procedure does not provide an opportunity for a member to have an objection heard by a neutral decision maker; all rulings on objections are made by the OBA, its officials, or individuals chosen by its officials. *Id.* ¶ 89. The Notice and Objection Procedure requires the OBA's Executive Director to review an objection within 21 days, "together with the allocation of dues monies to be spent on the activity or action," and grants him or her discretion to issue a refund of a pro rata portion

of the member's dues, plus interest. *Id.* ¶ 85. Alternatively, the Executive Director may refer a member's objection for hearing before an "OBA Budget Review Panel" consisting of three OBA members selected from the OBA's Budget Committee by the OBA President Elect. *Id.* ¶ 86. The OBA Budget Review Panel must then conduct a hearing of the member's objection and provide a written decision within 30 days of that hearing. *Id.* ¶ 87. A member may appeal the Budget Review Panel's decision for consideration by the Board, whose "decision shall be final." *Id.* ¶ 88.

D. Plaintiff's injury and claims

As an Oklahoma attorney, Plaintiff Mark E. Schell has been compelled to join and pay dues to the OBA since approximately 1984. *Id.* ¶¶ 11, 44–45. He opposes the OBA's use of any amount of his mandatory dues to fund any amount of political or ideological speech, regardless of its viewpoint, including but not limited to the examples set forth above, but he has been without effective means to prevent it and without effective recourse. *Id.* ¶ 90. Oklahoma's requirements that attorneys join and pay dues to the OBA injure him because he does not wish to associate with or fund the OBA or its political and ideological speech; but for the requirements, he would not be a member or pay dues. *Id.* ¶¶ 91–92. Further, the OBA's lack of safeguards to ensure that members are not made to pay for political and ideological speech and other activities not germane to regulating the legal profession or improving the quality of legal services injures him because he does not wish to fund such activities in any amount. *Id.* ¶ 93.

In his First Claim for Relief, Mr. Schell alleges that mandatory membership in the OBA violates his First Amendment rights to free association and free speech, particularly

his right to choose which groups, and what political speech, he will and will not associate with. *Id.* ¶¶ 94–104. In his Second Claim for Relief, he alleges that the OBA's collection and use of mandatory bar dues to subsidize its political speech, including its political and ideological speech, without his affirmative consent violates his First Amendment rights to free speech and association. *Id.* ¶¶ 105–118. In his Third Claim for Relief, Mr. Schell alternatively alleges that, to the extent that mandatory bar dues are constitutional at all, the OBA still violates attorneys' First and Fourteenth Amendment rights by failing to provide safeguards, as required by *Keller v. State Bar of California*, 496 U.S. 1 (1990), to ensure that members' dues are not used for political and ideological speech and other activities not germane to improving the quality of legal services and regulating the legal profession. Am. Compl. ¶¶ 119–128.

Defendants in this case include the Chief Justice of the Oklahoma Supreme Court and the other justices of the Oklahoma Supreme Court (collectively, the "Justices"), all sued in their official capacities. *Id.* ¶¶ 12–20, 39. Additional defendants include all members of the Board, also sued in their official capacities. *Id.* ¶¶ 21–39.

LEGAL STANDARD

In considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court must accept as true all well-pleaded factual allegations and view those allegations in the light most favorable to the plaintiff. *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). "The Court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the

plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Id.* (internal marks and citation omitted).

Likewise, in considering a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), the Court must accept the complaint's allegations as true. *Smith*, 561 F.3d at 1097. The Tenth Circuit has held that, where a defendant asserts lack of jurisdiction based on Eleventh Amendment immunity, the "onus is on [the plaintiff] to demonstrate that ... sovereign immunity does not bar his … claim." *Havens v. Colo. Dep't of Corr.*, 897 F.3d 1250, 1260–61 (10th Cir. 2018).[2]

ARGUMENT

I. The Justices are not immune from suit in their official capacities because Plaintiff seeks prospective declaratory and injunctive relief.

The Justices are not immune under the Eleventh Amendment because Plaintiff has sued them in their official capacities and seeks only prospective declaratory and injunctive relief.

In general, the Eleventh Amendment bars plaintiffs from suing states and their agencies in federal court without their consent. *See Hill v. Kemp*, 478 F.3d 1236, 1255 (10th Cir. 2007). Plaintiffs can, however, sue state officials in federal court under the doctrine the Supreme Court established in *Ex Parte Young*, 209 U.S. 123 (1908).

[2] Circuit courts other than the Tenth have treated Eleventh Amendment immunity as an affirmative defense on which the defendant bears the burden of persuasion. *See Thomas v. Guffy*, No. CIV-07-823-W, 2008 WL 2884368, *4 & n.2 (W.D. Okla. July 25, 2008) (collecting cases). Plaintiff respectfully submits that the other circuits are correct and raises the issue here to preserve it.

Under *Ex Parte Young*, "the Eleventh Amendment generally will not operate to bar suits so long as they (i) seek only declaratory and injunctive relief rather than monetary damages for alleged violations of federal law, and (ii) are aimed against state officers acting in their official capacities, rather than against the State itself." *Hill,* 478 F.3d at 1255-56. Determining whether *Ex Parte Young* allows a given claim against a state official is not difficult: "a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (citation and internal marks omitted).

In this case, Plaintiff's claims against the Justices are plainly permissible under *Ex Parte Young*. Plaintiff has alleged that the Justices are engaged in an ongoing violation of federal law by enforcing Oklahoma's bar membership and dues requirements in violation of the First and Fourteenth Amendments. Am Compl. ¶¶ 12, 46, 103–04, 116–18, 126–28. And the relief Plaintiff seeks is prospective: a declaration that these ongoing practices violate the First and Fourteenth Amendment and an injunction against further enforcement of the membership and dues requirements. *Id*. at 21–22. Although Plaintiff's complaint includes examples of past expenditures of mandatory dues, *id*. ¶¶ 58–76, the *relief* plaintiff seeks is entirely prospective and therefore proper.

Moreover, the U.S. Supreme Court has recognized that state supreme court justices in particular may be sued in their official capacities in federal court when they act in an enforcement capacity rather than a legislative or judicial capacity. In *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 736 (1980), for

instance, it held that the chief justice of the Virginia Supreme Court was a proper defendant in an action seeking declaratory and injunctive relief in challenging a court rule prohibiting attorney advertising.

There is no merit in the Justices' argument that *Consumers Union*'s "exception [to Eleventh Amendment immunity] is inapplicable here because there is no enforcement action pending or threatened against the Plaintiff." Justices' MTD at 4. In fact, there was no pending or threatened enforcement action in *Consumers Union.* The plaintiff sought declaratory and injunctive relief because it wanted to publish a legal directory that the challenged rule appeared to prohibit. 446 U.S. at 724-25. And the Supreme Court expressly rejected the idea that plaintiffs should "have to await the institution of state-court proceedings against them in order to assert their federal constitutional claims." *Id.* at 737. A "pending or threatened" enforcement action is simply not a requirement under *Ex Parte Young*. The Justices cite no authority for that proposition, and none exists.

II. A judgment against the Justices can provide effective relief.

Contrary to the Justices' argument, it does not matter that prevailing against a *single* justice would not provide plaintiff with effective relief. *See* MTD 2–3. Plaintiff has sued all the justices, and an injunction prohibiting all of them from enforcing the challenged bar membership and dues requirements would give Plaintiff precisely the relief he seeks.

The Justices apparently take 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. *See* Justices MTD 2–3. But that is not the rule, and it 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 the Justices' view in *Verizon*, in which it allowed plaintiffs to challenge an order of the Public Service Commission of Maryland by suing its individual members. 535 U.S. at 645–46; *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). Moreover, federal courts have consistently allowed *Ex Parte Young* suits against multiple state supreme court justices where an injunction against all (or a majority) might be necessary to provide the plaintiff with effective relief. *See, e.g., LeClerc v. Webb*, 419 F.3d 405, 414 (5th Cir. 2005) ("When acting in its enforcement capacity, the Louisiana Supreme Court, and its members, are not immune from suits for declaratory or injunctive relief."); *Abrahamson v. Neitzel*, 120 F. Supp. 3d 905, 919–20 (W.D. Wis. 2015) (allowing one justice to seek an injunction requiring other justices to treat her as chief justice); *Nat'l Ass'n for Advancement of Multijurisdictional Practice v. Berch*, 973 F. Supp. 2d 1082, 1093–94 (D. Ariz. 2013) (allowing suit against justices to enjoin enforcement of bar admission rule); *Sodaro v. Sup. Ct. of Ariz.*, No. CV-12-0371-PHX-JAT, 2013 WL 1123384, *1-2 (D. Ariz. Mar. 18, 2013) (same); *Fieger v. Mich. Sup. Ct.*, No. 06-11684, 2007 WL 2571975 *22 (E.D. Mich. Sept. 4, 2007) (allowing suit against justices to enjoin enforcement of rule of professional conduct), *rev'd on other grounds*, 553 F.3d 955 (6th

Cir. 2009); *Rapp v. Disciplinary Bd. of Haw. Sup. Ct.*, 916 F. Supp. 1525, 1531 (D. Haw. 1996) (same); *Giannini v. Reed*, 711 F. Supp. 992, 996 (C.D. Cal. 1989) (allowing suit against justices for prospective injunctive relief); *Giglio v. Sup. Ct. of Pa.*, 675 F. Supp. 266, 269–70 (M.D. Pa. 1987) (same).

III. This Court has jurisdiction to enjoin the Justices' violations of federal constitutional rights.

Contrary to the Justices' arguments, this Court has jurisdiction to review the Oklahoma Supreme Court's actions. *See* Justices' MTD at 5–7. *Consumers Union*, in which the U.S. Supreme Court concluded that a federal lawsuit challenging a Virginia Supreme Court rule prohibiting attorney advertising was proper, places that beyond dispute. 446 U.S. at 736–37. And the long string of cases cited in the preceding section shows that federal courts commonly review state supreme court rules alleged to violate federal constitutional rights. Indeed, the whole purpose of the *Ex Parte Young* analysis is to determine when federal courts do and do not have jurisdiction over claims against state officials, and, as discussed above, that analysis shows that the Court has jurisdiction over Plaintiff's claims against the Justices.

The Justices argue that review of the Oklahoma Supreme Court's actions is improper in light of "the fundamental policy underlying the rule" that federal courts may not review state court decisions, as stated in *Van Sickle v. Holloway*, 791 F.2d 1431 (10th Cir. 1986). Justices' MTD at 5–6. But *Van Sickle* itself expressly recognized that federal district courts *do* have "jurisdiction over general attacks on the constitutionality of state bar admission rules." 791 F.2d at 1436. *Van Sickle* cited *District of Columbia Court of*

Appeals v. Feldman, 460 U.S. 462, 486 (1983), which expressly *rejected* the Justices' position and said that "the policies prohibiting United States District Court review of final state court judgments are *not* implicated" in "general challenges to state bar rules, promulgated by state courts in non-judicial proceedings, which do not require review of a final state court judgment in a particular case." *Id.* (emphasis added); *see also Roe No. 2 v. Ogden*, 253 F.3d 1225, 1234 (10th Cir. 2001) (*Feldman* allowed "a general challenge to bar admission rules promulgated by the Colorado Supreme Court").

Thus, Supreme Court precedent conclusively establishes that this Court has jurisdiction to hear Plaintiff's challenge to Oklahoma's rules requiring attorneys to join and pay dues to the OBA.

IV. No abstention doctrine bars review of Plaintiff's claims against the Justices.

The Justices have presented no grounds for the Court to abstain from reviewing Plaintiff's claims against them. Indeed, they essentially acknowledge this, conceding that "the various abstention doctrines admittedly do not fit squarely with the issues raised in this case." Justices' MTD at 8. Nonetheless, the Justices maintain that the Supreme Court's decisions creating abstention doctrines in *Younger v. Harris*, 401 U.S. 37 (1971), and *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), are "instructive." Justices' MTD at 8. Apparently, then, the Justices are asking this Court to recognize a *new* abstention doctrine—an extraordinary step that their short argument does not begin to justify.

Nothing in *Younger* suggests that abstention is appropriate here. *Younger* calls for federal courts to abstain from enjoining certain types of pending state judicial proceedings. *See Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S.

423, 431–32 (1982). *Younger* abstention is inappropriate where, as here (*see* Justices' MTD at 10), there are *no* pending state proceedings to enforce a challenged law or rule against a plaintiff. *See Ogden*, 253 F.3d at 1232 (*Younger* abstention inappropriate in challenge to bar admission rules when there were no pending state proceedings). In *Middlesex*, the Supreme Court extended *Younger* abstention to cover state bar disciplinary proceedings, but it did not suggest that this abstention should apply where, as here, proceedings are not pending. *Cf. Rose v. Utah*, 399 Fed. Appx. 430, 435 (10th Cir. 2010) (first part of *Middlesex* analysis considers whether there is "an ongoing state judicial proceeding"). If any doubt on this score remained, *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69 (2013), eliminates it, because it makes clear that *Younger* abstention applies *only* to three types of ongoing state proceedings—criminal prosecutions, civil enforcement proceedings akin to criminal proceedings, and enforcement of a court's mandates, *id.* at 78–80—none of which exists here.

As to *Burford* abstention, it applies "when a federal district court faces issues that involve complicated state regulatory schemes." *Lehman v. City of Louisville*, 967 F.2d 1474, 1478 (10th Cir. 1992). A decision on whether to abstain under *Burford* 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. 706, 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 only federal court to address this issue has recognized, a challenge to a state bar rule does not present the "difficult questions of state law" required for *Burford* abstention. *LeClerc v. Webb*, 270 F. Supp. 2d 779, 795 (E.D. La. 2003), *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 of whether they 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.*, *Consumers Union*, 446 U.S. at 724-25; *Keller*, 496 U.S. 1 (considering challenge to State Bar of California's use of mandatory dues).

There is no merit in the Justices' argument that abstention is warranted because Plaintiff seeks declaratory relief. Justices' MTD 9–10. Again, regardless of the relief Plaintiff seeks, his claims are not barred by the abstention doctrines the Justices have cited. And the only case the Justices have cited regarding declaratory relief involved abstention where a party sought a declaratory injunction to address an issue related to pending state litigation—a circumstance the Justices admit is not present here. *See Wilton v. Seven Falls Co.*, 515 U.S. 277, 281–90 (1995) (federal court has discretion in deciding whether to stay a declaratory judgment action in favor of parallel state litigation).

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

On the merits of Plaintiff's constitutional claims, the Justices' motion incorporates by reference the arguments made in Defendant John M. Williams's motion to dismiss Plaintiff's original complaint (Doc. 16) and in the motion to dismiss Plaintiff's amended complaint filed by the members of the Oklahoma Bar Association Board of Governors (Doc. 46). Justices' MTD at 10.

Plaintiff, in turn, here incorporates by reference his arguments on the merits in his responses (to be filed contemporaneously with this response) to Defendant John M. Williams' Motion to Dismiss First Amended Complaint (Doc. 45) and to the motions to dismiss filed by the Defendant members of the Oklahoma Bar Association Board of Governors (Docs. 46, 47).

CONCLUSION

The Court should deny the Justices' motion to dismiss.

Dated: July 19, 2019

Respectfully submitted,

/s/ Jacob Huebert
Jacob Huebert* (admitted *pro hac vice*)
Timothy Sandefur (admitted *pro hac vice*)
Scharf-Norton Center for Constitutional Litigation at the
GOLDWATER INSTITUTE
500 East Coronado Road
Phoenix, AZ 85004
Telephone: (602) 462-5000
Fax: (602) 256-7045
litigation@goldwaterinstitute.org
*Lead Counsel

Charles S. Rogers (Oklahoma Bar No. 7715)
Attorney at Law
3000 West Memorial Road
Ste. 123, Box 403
Oklahoma City, OK 73134
Telephone: (405) 742-7700
Crogers740@gmail.com
Local Counsel

Anthony J. Dick (admitted *pro hac vice*)
JONES DAY
51 Louisiana Ave. N.W.
Washington, DC 20001
Telephone: (202) 879-3939
Email: ajdick@jonesday.com

Attorneys for Plaintiff

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:

Michael Burrage
Patricia Sawyer
WHITTEN BURRAGE
512 N. Broadway, Ste. 300
Oklahoma City, OK 73102
mburrage@whittenburragelaw.com
psawyer@whittenburragelaw.com
Attorneys for Defendants J.M. Williams, Chesnut, Shields, Neal, Hays, Hermanson, Fields, McKenzie, Hutter, D.K. Williams, Jr., Beese, Oliver, Will, Hicks, Morton, Pringle, And Nowakowski

Heather L. Hintz
Thomas G. Wolfe
PHILLIPS MURRAH P.C.
Corporate Tower, Thirteenth Fl.
101 N. Robinson
Oklahoma City, OK 73102
hlhintz@phillipsmurrah.com
tgwolfe@phillipsmurrah.com
Attorneys for Defendants, Oklahoma State Bar Assoc. Board of Governors and Timothy DeClerck

Kieran D. Maye, Jr.
Leslie M. Maye
MAYE LAW FIRM
3501 French Park Dr., Ste. A
Edmund, OK 73034
kdmaye@mayelawfirm.com
lmmaye@mayelawfirm.com
Attorneys for the Chief Justice and Justices of the Oklahoma Supreme Court

/s/ Jacob Huebert
Jacob Huebert