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 DEFENDANT JOHN M. WILLIAMS' MOTION TO DISMISS FIRST AMENDED COMPLAINT UNDER RULES 12(B)(1) and 12(B)(6), FED. R. CIV. P.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

Plaintiff Mark E. Schell challenges Oklahoma's requirement that attorneys join and pay dues to the Oklahoma Bar Association ("OBA") as a condition of practicing law for violating his First and Fourteenth Amendment rights. Defendant John M. Williams is a proper Defendant because he plays an integral role in enforcing these requirements, and injunction against him would effectively prevent the state from enforcing them.

Further, Plaintiff's constitutional claims are well-founded. Plaintiff alleges that: (1) mandatory OBA membership violates attorneys' right to freedom of association; (2) the OBA has violated his rights to free speech and association by using dues money for political and ideological speech without his affirmative consent; and (3) regardless of whether mandatory dues and fees are inherently unconstitutional, the OBA has insufficient safeguards to ensure that dues are not used for political and ideological activity that is not germane to the OBA's purpose of regulating lawyers and improving the quality of legal services. The Supreme Court has recently made clearer than ever that mandatory associations infringe on First Amendment rights, and that a mandatory association such as the OBA must obtain individuals' affirmative consent before using their money for political speech. *See Janus v. AFSCME*, 138 S. Ct. 2448, 2463, 2486 (2018). Moreover, the OSB has failed to provide procedural safeguards to protect First Amendment rights that Supreme Court precedent has required for decades.

Because Williams is a proper Defendant and Plaintiff has stated viable constitutional claims, the Court should deny Williams's motion to dismiss (Doc. 45) ("Williams MTD").

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. Williams is not immune from suit in his official capacity because Plaintiff seeks prospective declaratory and injunctive relief to prevent him from enforcing unconstitutional rules.

Williams is not immune under the Eleventh Amendment because Plaintiff has sued him in his official capacity, and Plaintiff seeks only prospective declaratory and injunctive relief to prevent Williams from enforcing the rules Plaintiff challenges. Eleventh Amendment immunity does not bar such suits. *Ex Parte Young*, 209 U.S. 123 (1908).

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). Plaintiff assumes *arguendo* that this includes the Oklahoma Bar Association ("OBA").

Plaintiffs can, however, sue state officials in federal court under the doctrine of *Ex Parte Young*, under which "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 state officials 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) (internal marks omitted).

In this case, Plaintiff's claim against Williams is plainly permissible under *Ex Parte Young*. Plaintiff has alleged that Williams is engaged in an ongoing violation of federal law, in his capacity as OBA's Executive Director and as a member of OBA's Board of Governors (the "Board"), by enforcing the laws requiring membership and funding of the OBA as a condition of practicing law in the state, in violation of the First and Fourteenth Amendments. Am. Compl. ¶¶ 21, 24. 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.

A. Williams is a proper defendant with respect to Plaintiff's first and second claims because he enforces the membership and dues requirements.

Williams is a proper defendant with respect to Plaintiff's first and second claims for relief because his official duties include enforcement of the membership and dues requirements Plaintiff challenges.

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, Williams has the requisite connection to enforcement of the requirements Plaintiffs challenge. The Rules Creating and Controlling the Oklahoma Bar Association charge Williams with "notify[ing] delinquent members"—i.e., members who have not paid their mandatory dues—and "certify[ing] the names of delinquent members to the Supreme Court as required by these rules." Okla. Stat. tit. 5, ch. 1, app. 1, art. 6 § 4. This is an essential, integral part of enforcement of the dues requirement; without it, members who do not pay OBA dues would suffer no consequence. Williams has not denied that he does, in fact, perform this role. True, Williams does not act alone; the Oklahoma Supreme Court ultimately suspends an attorney for nonpayment of dues.[1] *See* Okla. Stat. tit. 5, ch. 1, app. 1, art. 8 § 2. But that is immaterial. Again, to be a proper defendant, Williams need only have "some connection" to enforcement; he need only "*assist* in giving effect to the law," *Wagnon*, 402 F.3d at 1027 (emphasis added), and it is beyond dispute that Williams does—at least at this stage, where the allegations of the complaint must be accepted as true.

[1] Plaintiffs have sued everyone involved in enforcing the OBA membership and dues requirements: Williams, the members of the OBA Board of Governors, and the Justices of the Oklahoma Supreme Court. No Defendant has suggested that any party besides these Defendants plays any role in enforcing the rules Plaintiff challenges. In other words, no Defendant has alleged that there is a more appropriate defendant than the officials Plaintiff has sued. And none of the Defendants has expressed any unwillingness to enforce the bar membership and dues requirements in the manner provided by the Rules and set forth in Plaintiff's Amended Complaint.

Williams's position receives no support from the primary case on which it relies, *Peterson v. Martinez*, 707 F.3d 1197 (10th Cir. 2013). In that case, the plaintiff challenged a Colorado law that prohibited sheriffs from issuing a concealed handgun license to anyone other than a Colorado resident. *Id.* at 1201. Under that scheme, the state also recognized licenses issued by other states that provided reciprocity to Colorado license holders, but only if the applicant was a resident of that state. *Id.* at 1201–02. The plaintiff alleged, among other things, that the Executive Director of the state's Department of Public Safety violated his constitutional rights by denying him reciprocity based on his license issued by the State of Florida, of which he was not a resident. *Id.* at 1202–03. The court concluded that the Executive Director was not a proper defendant, because he had no role in enforcing the challenged statute; rather, the statute expressly tasked *sheriffs* with enforcing the reciprocity system. *Id.* at 1206. The mere fact that the Executive Director "maintain[ed] a database of states with which Colorado maintain[ed] reciprocity," which "may provide a convenient source for sheriffs seeking information relevant to … reciprocity," was not enough to show that the Executive Director had a "particular duty" to enforce the statute. *Id.*

Here, in contrast, Williams, as the OBA's Executive Director, has a "particular duty" to enforce Oklahoma's requirement that attorneys pay bar dues, which is specifically prescribed by the rules establishing his job duties. He does not merely maintain information that might be "convenient" for someone else to consult in the course of enforcing the law. *Cf. Peterson*, 707 F.3d at 1206. Rather, he *actively* enforces the law by notifying attorneys that they must pay and notifying the Oklahoma Supreme

Court when attorneys do not pay. *See* Okla. Stat. tit. 5, ch. 1, app. 1, art. 6 § 4; Am. Compl. ¶ 24. Williams admits that he "exercises his administrative powers and duties to provide [this and other] information" to the Oklahoma Supreme Court. Williams MTD at 12-13.

Williams likewise receives no support from *Bronson v. Swenson*, 500 F.3d 1099 (10th Cir. 2007). *See* Williams MTD at 10. There, a plaintiff attempting to challenge a criminal prohibition of polygamy lacked standing to sue an official responsible for civil registrations of marriages because an injunction against that official would not bar enforcement of the criminal law. *Id.* at 1106-11. Here, in contrast, an injunction against Williams would effectively prevent enforcement of the rules Plaintiff challenges.

Contrary to Williams's argument, it does not matter that the Oklahoma Supreme Court has described its authority to license and regulate attorneys as "non-delegable." Williams MTD at 11 (citing *State ex rel. Okla. Bar Ass'n v. Mothershed*, 264 P.3d 1197, 1210 (Okla. 2011)). The non-delegability of the Oklahoma Supreme Court's authority over attorney licensure 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 Williams with the enforcement responsibilities just discussed. *See* Okla. Stat. tit. 5, ch. 1, app. 1, art. 6 § 4; *see also id.* app. 1-a, Rules 2.1, 2.8 (giving a commission consisting of lawyers and non-lawyers, including some appointed by state legislators, authority to investigate disciplinary matters); *id.* Rule 3.2 (giving the OBA general counsel authority to prosecute disciplinary proceedings). The non-delegability *Mothershed* referred to was *ultimate* responsibility. But the Court can, and does, delegate administrative enforcement

functions to officials such as Williams, who can therefore be subject to suit under *Ex Parte Young*. *See Peterson*, 707 F.3d at 1207 (the "[c]onnection to the enforcement of an act" required for *Ex Parte Young* "may come by … an administrative delegation" such as this.)

It likewise does not matter that Williams may only spend OBA funds as provided in the OBA's annual budget approved by the Oklahoma Supreme Court. *See* Williams MTD at 12 n.5, 14. His purported lack of a *policymaking* role is irrelevant to whether he plays an *enforcement* role, which is all that matters under *Ex Parte Young*. *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).

B. Williams is a proper defendant with respect to Plaintiff's third claim for relief because he administers the OBA's scheme for attorneys' objections to OBA expenditures.

Williams is also a proper defendant with respect to Plaintiff's third claim for relief—which challenges OBA's lack of safeguards to ensure member dues are not used for improper purposes—because he is responsible for administering the OBA procedures Plaintiff alleges to be inadequate.

Williams argues that he is not a proper defendant with respect to this claim because he supposedly lacks the requisite enforcement power. *See* Williams MTD at 16-17. In fact, however, Williams plays a central, essential role in administering the OBA procedures Plaintiff challenges. Under these procedures, a member's objection must be submitted to Williams as OBA's Executive Director. Am. Compl. ¶ 82. Williams must

then review the objection within 21 days, and he has discretion to either issue a refund to the member or refer the matter to an OBA "Budget Review Panel." *Id.* at ¶¶ 85–86. The members of that panel are chosen by the OBA's President-Elect, also named as a Defendant here. *Id.* at ¶¶ 22, 86. The panel's decisions may then be appealed to the full Board of Governors, the members of which are all named as Defendants as well. *Id.* at ¶¶ 21–38, 87–88. Further, the expenditures to which a member might object are made by the Board, the members of which, again, are named as Defendants. *Id.* at ¶ 21.

Thus, Plaintiff has properly named Williams and every other individual responsible for giving effect to the procedures he challenges and for committing any violations of First Amendment rights that might arise from inadequate procedures. *Cf. Wagnon*, 402 F.3d at 1027 & n.10 (individuals who "assist in giving effect" to a law have requisite connection to enforcement under *Ex Parte Young*); *Eu*, 979 F.2d at 704 (where challenged statute did not "give[] rise to enforcement proceedings," plaintiff properly sued officials who "g[ave] effect" to it).

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

The Court should deny Williams's motion to dismiss under Rule 12(b)(6)—and those of the other Defendants (Docs. 43, 46, 47)—because Plaintiff has stated valid First and Fourteenth Amendment claims challenging Oklahoma's mandatory bar membership, the OBA's use of fees for political and ideological speech without members' affirmative consent, and the OBA's lack of procedures to ensure that members' First Amendment rights are respected.

A. Plaintiff has stated a claim against mandatory bar membership.

The Court should deny Williams's motion to dismiss with respect to Plaintiff's First Claim for relief because it states a valid First and Fourteenth Amendment claim challenging mandatory bar membership. Am Compl. ¶¶ 94–104.

1. The Supreme Court has expressly reserved this issue for consideration by lower courts.

Contrary to Williams's assertions (Williams MTD 17–19), the Supreme Court has *not* resolved this question. In *Keller v. State Bar of California*, 496 U.S. 1, 17 (1990), the Court expressly declined to address whether attorneys may "be compelled to associate with an organization that engages in political or ideological activities beyond those for which mandatory financial support is justified under the principles of *Lathrop* [*v. Donohue*, 367 U.S. 820 (1961)] and *Abood* [*v. Detroit Board of Education*, 431 U.S. 209 (1977)]." The Court stated that lower courts "remain[ed] free … to consider this issue." *Id.* The Ninth Circuit, in a case Williams relies on (Williams MTD at 26), has since acknowledged that *Keller* "reserved" this issue for resolution in a future case. *Morrow v. State Bar of Cal.*, 188 F.3d 1174, 1177 (9th Cir. 1999). And, to date, no Supreme Court or Tenth Circuit decision has resolved the issue—which means that this Court may do so in this case.

Keller assumed, without deciding, that compulsory membership requirements are valid, citing *Lathrop*. *Keller* 496 U.S. at 7–9. *Keller* then decided a narrower question: whether an attorney's "free speech rights were violated by the [state] Bar's use of his mandatory dues to support objectionable political activities"—a question it answered in

the affirmative. *Id.* at 9. As for *Lathrop*, it did not resolve the mandatory-membership question, either. That plurality decision stated that it was addressing "only … a question of compelled financial support of group activities, not … involuntary membership in any other respect." *Lathrop*, 367 U.S. at 828. And *Keller* expressly recognized that *Lathrop* did not address the "much broader freedom of association claim" presented here. *Keller*, 496 U.S. at 17.

Thus, *Keller* and *Lathrop* do not foreclose Plaintiff's First Claim for Relief.

2. Dismissal is improper because Defendants have not shown that mandatory bar membership satisfies exacting First Amendment Scrutiny.

Because Supreme Court precedent does not foreclose Plaintiff's First Claim for Relief, the Court should subject Oklahoma's membership requirement to the exacting First Amendment scrutiny the Supreme Court prescribes for laws mandating association for expressive purposes in *Janus*, 138 S. Ct. 2448. Under exacting scrutiny, Defendants must show that mandatory OBA membership "serve[s] a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 2465 (citation omitted).

Defendants have not satisfied their burden; indeed, they have not even tried to show that the state cannot achieve the only purpose mandatory OBA membership might legitimately serve— "regulating the legal profession and improving the quality of legal services," *Keller*, 496 U.S. at 13—by significantly less restrictive means. Further, it is obvious that Oklahoma *can* serve its interest in regulating the legal profession and improving the quality of legal services without forcing attorneys to join the OBA.

On this point, *Janus*'s details are instructive. In *Janus*, the government argued that compelling public-sector workers to subsidize a union with mandatory fees was necessary to serve the state's interest in "labor peace." The "labor peace" theory held that compelling public-sector workers to subsidize a union was necessary because of the union's designation as workers' exclusive bargaining representative. Without compulsory union fees, the theory went, the union would not be able to act as the sole bargaining representative, and the result would be "pandemonium" caused by conflicts between different unions. *Janus*, 138 S. Ct. at 2465.

Janus rejected that assumption as "simply not true," *id.*, because, in fact, several federal entities and states designated public-sector unions as exclusive representatives *without* compelling workers to pay union fees, and no such "pandemonium" had resulted. Therefore, it is "undeniable that 'labor peace' can readily be achieved 'through means significantly less restrictive of associational freedoms' than the assessment of agency fees" —and those fees cannot survive exacting scrutiny. *Id.* at 2466.

As Plaintiff has alleged, Oklahoma's mandatory bar fails exacting scrutiny for the same reason: the state can achieve its goals for the legal profession without mandating bar membership or dues. Am Compl. ¶¶ 100–101. It is obvious as a theoretical matter how the state could do so: by acting as a regulator, penalizing those who break the rules, and providing educational services to ensure that practitioners know the rules—just as it already does for countless other trades. And, as a practical matter, some 20 states and Puerto Rico do, in fact, already regulate the practice of law without requiring membership in a state bar association that may use member fees for political and

ideological speech. *Id.* at ¶ 101; Ralph H. Brock, *"An Aliquot Portion of Their Dues:" A Survey of Unified Bar Compliance with Hudson and Keller*, 1 Tex. Tech J. Tex. Admin. L. 23, 24 n.1 (2000).[2] This includes states with large populations of lawyers, such as Massachusetts, New York, California, and New Jersey, and states with some of the smallest bars, such as Vermont and Delaware. *Id.* If those states can regulate lawyers and improve the quality of legal services without violating attorneys' First Amendment rights with a mandatory bar, so can Oklahoma.

The Court should therefore deny Defendant's motion to dismiss with respect to Plaintiff's First Claim for Relief.

B. Plaintiff has stated a claim challenging the OBA's use of mandatory fees for speech without members' affirmative consent.

The Court should deny Defendant's motion to dismiss with respect to Plaintiff's Second Claim for Relief, which states a valid First and Fourteenth Amendment claim challenging the OBA's use of mandatory member dues for speech and other non-regulatory activities without members' affirmative consent. Am Compl. ¶¶ 105–118.

[2] This article identifies 32 states with a mandatory bar association. Since its publication, however, California and Nebraska have adopted bifurcated systems under which lawyers only pay for purely regulatory activities and are not forced to fund a bar association's political or ideological speech, eliminating most if not all of the First Amendment problems Plaintiffs object to here. *See In re Petition for a Rule Change to Create a Voluntary State Bar of Neb.*, 841 N.W.2d 167, 173 (Neb. 2013); Marilyn Cavicchia, *Newly Formed California Lawyers Association Excited to Step Forward*, ABA Journal (Apr. 30, 2018), https://www.americanbar.org/groups/bar_services/publications/bar_leader/2017-18/may-june/born-by-legislative-decision-california-lawyers-association-excited-to-step-forward/.

Contrary to Williams's argument (Williams MTD at 20–22), *Keller* and *Lathrop* do not foreclose this claim, either.

In *Keller*, the Supreme Court concluded that, for First Amendment purposes, a mandatory bar association is more analogous to a public-sector union than to an ordinary government agency and therefore should be "subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees." 496 U.S. at 13. Therefore, just as "a union could not expend a dissenting individual's dues for ideological activities not 'germane' to … collective bargaining" under *Abood*, 431 U.S. at 235–36, so a state bar could "constitutionally fund activities germane to [regulating the legal profession and improving the quality of legal services] out of the mandatory dues of all members" but could not use mandatory dues to "fund activities of an ideological nature which fall outside" of the bar's regulatory purpose. *Keller*, 496 U.S. at 13–14.

In *Janus*, the Supreme Court overruled *Abood* because that decision "judged [mandatory public-sector union fees'] constitutionality … under a deferential standard that finds no support in [the Court's] free speech cases" instead of subjecting the mandatory fees to exacting scrutiny. 138 S. Ct. at 2479–80. And, as discussed above, *Janus* concluded that mandatory union fees could not survive exacting scrutiny because the government did not show that they were necessary to serve its interest in labor peace. *Id.* at 2466. The Court then concluded that the only way to avoid violating workers' First Amendment rights is to not take union fees from them without their affirmative consent.

Keller, like *Abood*, never subjected mandatory fees to the exacting scrutiny the First Amendment requires. *Cf. Janus*, 138 S. Ct. at 2479–80. Now, with *Abood* overruled, there is no foundation for *Keller*'s toleration of bar associations using mandatory dues for political or ideological speech without affirmative consent.

But the Court need not conclude that the Supreme Court has overruled *Keller*, nor disregard *Keller*, to consider whether the OBA's use of mandatory fees for political and ideological speech violates the First Amendment. After *Janus*, if courts are to treat bar associations like public-sector unions—as *Keller* prescribes—then they must subject mandatory bar association fees to exacting scrutiny.

Those fees cannot survive exacting scrutiny because, as discussed above, the government can regulate the legal profession and improve the quality of legal services without forcing lawyers to join or pay a bar association. And, in any event, Defendants have not shown at this stage that the OBA's use of fees without affirmative consent survives exacting scrutiny, and therefore they are not entitled to dismissal of Plaintiff's Second Claim for Relief.

C. Plaintiff has stated a claim challenging the OBA's lack of safeguards to ensure member dues are not used for non-germane activities.

The Court should deny Defendants' motions to dismiss with respect to Plaintiff's Third Claim for Relief, which challenges the OBA's lack of safeguards to ensure that members' mandatory dues are not used for political and ideological speech and other non-germane activities (assuming, in the alternative to Plaintiff's other claims, that mandatory bar membership and dues are permissible at all). Am Compl. ¶¶ 119–128.

In *Keller*, the Supreme Court held that mandatory bar dues may only be used for activities "germane" to "regulating the legal profession and improving the quality of legal services." 496 U.S. at 13–14. The Court held that using mandatory dues to "fund activities of an ideological nature which fall outside of those areas of activity" violates members' First Amendment rights to freedom of speech and association. *Id.* at 14.

Under *Keller*, a bar association can meet its constitutional obligation to ensure that members are not forced to pay for such non-germane activities by providing: (1) "an adequate explanation of the basis for the [mandatory bar association] fee"; (2) "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker"; and (3) "an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* at 16. This is the same "minimum set of procedures" the Supreme Court mandated for public-sector unions—to ensure that non-members' mandatory union fees were not used for political or ideological activity not germane to the union's representation activities—in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

1. The OBA does not provide members with sufficient information about its expenditures.

Plaintiff has alleged that the OBA fails to satisfy the first *Keller*/*Hudson* requirement because it "does not provide members with sufficient information to determine whether its expenditures are chargeable, much less employ any independent auditor." Am Compl. ¶¶ 81, 122. The proposed 2019 budget that the OBA provided to its members did not identify any specific expenditures the OBA has made or proposed to

make but instead just identified general categories of expenditures. *Id.* ¶ 79 & Ex. 1 to Compl. (Doc. 1-2). The proposed budget also did not state whether any past or proposed expenditures of member dues were or are germane to improving the quality of legal services and regulating the legal profession. Am. Compl. ¶ 80 & Doc. 1-2.

Williams argues that the OBA's procedures are sufficient because the OBA supposedly gives members "the opportunity to participate in the budgeting process which determines how funds are spent." Williams MTD at 23, 25–26. That purported "opportunity" apparently consists of: (1) publication of the proposed budget; (2) a public hearing held by the OBA's Budget Committee; and (3) the Board of Governors' review and approval of the budget. *Id.* at 23. Williams has not shown that this suffices to meet the OBA's obligation under *Keller*. Again, the proposed budget provides no information that would allow an attorney to determine exactly how the OBA is using his or her dues. *See* Doc. 1-2. Attorneys cannot make *specific* objections to expenditures, as the OBA's objection procedures demand, when they are only provided with such *general* information. And it does not appear that attorneys who attend the Budget Committee's public hearing receive more detailed information, let alone sufficient information. Defendants have not alleged, let alone shown, that they do. It also is not apparent that an ordinary member may participate in, or even attend, the meeting at which the Board of Governors approves the budget. *See* Okla. Stat. tit. 5, ch. 1, app. 1, art. 7 § 1 (stating that "[t]he budget shall be approved by the Board of Governors prior to being submitted to the Supreme Court," with no requirement that the budget approval meeting be open to

members); *id.* art. 4 § 2 (setting rules for Board meetings, with no requirement that such meetings be open to members).

In any event, requiring attorneys to attend a public hearing simply to receive information on how their mandatory dues are being spent is an unreasonable burden on First Amendment rights that neither *Keller* nor any other decision has approved. *Cf. Knox v. SEIU Local 1000*, 567 U.S. 298, 312, 317 (2012) (discussing burden of requiring workers to opt out of union political and ideological expenditures and holding that requiring workers to opt out of special assessments unduly burdened First Amendment rights); *Hudson*, 475 U.S. at 307 n.20 (because mandatory public-sector union "itself [was] a significant impingement on First Amendment rights," unions had affirmative obligation "to provide procedures that minimize that impingement" without requiring a worker to pursue judicial remedies).

2. The OBA does not provide an opportunity to challenge expenditures before an impartial decisionmaker.

Plaintiff has also alleged that the OBA fails to satisfy the second *Keller*/*Hudson* requirement because it does not provide a member with an opportunity to have his or her objection to an expenditure heard by an impartial decisionmaker. Am. Compl. ¶¶ 89, 123.

Hudson held that a "nonunion employee, whose First Amendment rights are affected by [mandatory union fees] and who bears the burden of objecting, is entitled to have his objections [to particular expenditures] addressed in an expeditious, fair, and *objective* manner." 475 U.S. at 307. Because forced union fees are themselves "a

significant impingement on First Amendment rights, the government and union [had] a responsibility to provide procedures that minimize that impingement and that facilitate a nonunion employee's ability to protect his rights." *Id.* at 307 n.20.

The objection procedure challenged in *Hudson* was not sufficient to protect First Amendment rights because "from start to finish it [was] entirely controlled by the union, which [was] an interested party, since it [was] the recipient of the … fees paid by the dissenting employees." *Id.* at 308. The Court explained:

> The initial consideration of the agency fee [was] made by Union officials, and the first two steps of the review procedure ([by] the Union Executive Committee and Executive Board) consist[ed] of Union officials. The third step—review by a Union-selected arbitrator—[was] also inadequate because the selection represents the Union's unrestricted choice from [a] state list.

Id.

The OBA's objection procedure has the same fatal flaw as the scheme *Hudson* condemned: the OBA controls it "from start to finish." *Id.* At every stage, a member's complaint is reviewed and adjudicated by the OBA's own officials: first by the OBA's Executive Director, then by an OBA "Budget Review Panel" selected from the OBA's Budget Committee by the OBA President-Elect, then by the OBA Board, whose decision is final. Am. Compl. ¶¶ 85–88; Williams MTD Ex. 4 (Doc. 45-4).

Thus, the OBA does not give its members an opportunity to have their objections heard by an impartial decisionmaker and does not adequately protect members' First Amendment rights. This by itself warrants allowing Plaintiff's Third Claim for Relief to proceed.

3. The Court cannot approve any alternative to the *Keller*/*Hudson* procedures without a developed record.

Williams makes much of *Keller*'s statement that there might be alternative procedures—besides those prescribed by *Hudson*—that would likewise satisfy a mandatory bar association's obligation to protect attorneys' First Amendment right not to be forced to pay for non-germane political and ideological speech. Williams MTD at 25, citing *Keller*, 496 U.S. at 17. But Williams avoids quoting the entire sentence from *Keller*, which states: "Questions whether one or more alternative procedures would likewise satisfy that obligation are better left for consideration *upon a more fully developed record*." 496 U.S. at 17 (emphasis added). *Keller*'s statement does not provide a basis for upholding procedures other than those *Hudson* prescribed where, as here, there is *no* developed record.

Moreover, although *Keller* did not rule out the possibility that other procedures might suffice, the Supreme Court has not identified any satisfactory alternative in the 28 years since it decided *Keller*. Further, *Keller* contemplated *alternative* procedures designed to protect rights; it did not condone a *lack* of procedures. And decisions since *Keller* suggest that *Hudson* simply set a *minimum* that alternative procedures may *exceed*. *See Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 185 (2007) (noting that *Hudson* "outlin[ed] a *minimum* set of procedures," which states could exceed with stronger protections for First Amendment rights) (emphasis in original). Thus, there is no basis to conclude, as Williams urges, that the Supreme Court would approve of procedures such

as the OBA's that neither provide members with specific information on how their dues are used nor provide for review by an impartial decisionmaker.

Contrary to Williams's suggestion (Williams at MTD 26), the Ninth Circuit did not approve of weaker safeguards in *Morrow*. That decision did not even consider whether alternative procedures would suffice, but simply stated—as a background fact—that "[i]n compliance with the Supreme Court's decision in *Keller*, the State Bar [of California] allow[ed] members to seek a refund of the proportion of their dues that the State Bar has spent on political activities unrelated to its regulatory function." *Morrow*, 188 F.3d at 1175. That statement is not even dicta for Williams's position. It only suggests, in passing, that a refund is at least *part* of what *Keller* requires. It does not suggest, much less hold, that a refund is *all* that *Keller* requires. Again, *Keller* itself did not say that a refund alone would suffice but rather pointed to *Hudson*'s procedures as satisfying the constitutional minimum. *See Keller*, 496 U.S. at 17.

Likewise, contrary to Williams's implication, the Eleventh Circuit did not approve a lack of safeguards similar to the OBA's in *Gibson v. Florida Bar*, 906 F.2d 624 (11th Cir. 1990). The procedures challenged there gave members notice of specific legislative positions the Bar had taken so that they would have an opportunity to object to each. *Id.* at 628. Those procedures also provided for objections to be heard by an arbitration panel consisting of one arbitrator chosen by the member, one arbitrator chosen by the Bar, and one arbitrator chosen by the other two arbitrators, *id.* at 629, and thus provided a more impartial decisionmaker than the OBA's procedures, under which final decisions

regarding member objections are made by the OBA's own Board—i.e., by the OBA itself. Am Compl. ¶ 88.

Therefore—in the absence of a "fully developed record," *Keller*, 496 U.S. at 17—the Court cannot approve of the OBA's procedures, which do not satisfy the requirements set forth in *Hudson* and *Keller*.

D. The OBA's political and ideological speech is not government speech.

Finally, there is no merit in Williams's argument that all of Plaintiff's claims must be dismissed because the OBA's political and ideological speech is government speech that members can be forced to fund without limitation. *See* Williams MTD at 26-29.

The Supreme Court held in *Keller* that a mandatory bar association's political and ideological speech is *not* government speech for purposes of the First Amendment. It noted that the State Bar of California was "a good deal different from most other entities that would be regarded in common parlance as 'government agencies.'" 496 U.S. at 11. For example, its "principal funding" came from member dues, not tax revenue; it consisted only of its mandatory members; and its services were "essentially advisory in nature" because it did not actually "admit anyone to the practice of law, … disbar or suspend anyone, [or] … ultimately establish ethical codes of conduct" because those "functions [were] reserved by California law to the State Supreme Court." *Id.* The Court then concluded that, for First Amendment purposes, the State Bar of California was more analogous to a public-sector union and that its use of mandatory dues should be restricted in the same way that unions' use of mandatory fees is limited. *Id.* at 12–14.

Williams's argument that the Oklahoma Supreme Court's control over the OBA is "significantly greater" than the California Supreme Court's control over the State Bar in *Keller* is baseless. Williams MTD at 27. In fact, the OBA's functions and operations appear to be substantially identical to those of the State Bar of California at the time *Keller* was decided. Like the State Bar in *Keller*, the Oklahoma State Bar is funded by member dues, *see* Okla. Stat. tit. 5, ch. 1, app. 1, art. 8 § 2; it has a membership consisting entirely of attorneys who are required by law to join, *see id.* art. 2 § 1; and it performs services that are essentially advisory because the Oklahoma Supreme Court retains exclusive non-delegable authority over attorney admission, discipline, disbarment, and regulation. *See Mothershed*, 264 P.3d at 1210 ¶ 33.

Williams tries to distinguish *Keller* by pointing out that the Oklahoma Supreme Court "retains *complete* control over licensing and regulation of attorneys and the manner in which the OBA spends money" and requires OBA to submit monthly financial reports and undergo an annual outside audit. Williams MTD at 27. But it is not apparent that the State of California exercised any less control over the State Bar of California than the State of Oklahoma exercises over the OBA. Under California law at that time, the State Bar was required to submit "detailed budgets" to the state legislature for approval. *See Keller*, 496 U.S. at 16. It was also required to provide the Chief Justice of the California Supreme Court and the judiciary committee of each house of the state legislature with an annual statement of receipts and expenditures, including details regarding funds designated for the provision of legal services to indigent persons, including "receipts of funds …, expenditures for administrative costs, and disbursements of the funds, on a

county-by-county basis." Cal. Bus. & Prof. Code §§ 6145, 6222 (1990). Several years before, a statute required the State Bar to submit detailed reports to the judiciary committee of each house of the state legislature regarding "procedural changes and improvements which have been made in the State Bar disciplinary system" and their effects. Cal. Bus. & Prof. Code § 6140.2 (1987).

Moreover, the Oklahoma Supreme Court's control over the OBA that Williams describes is not relevant for First Amendment purposes because it does not involve control over the OBA's *speech*. In the case Williams relies on, *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005), the Supreme Court found that the marketing speech of the Cattlemen's Beef Promotion and Research Board ("Beef Board") was government speech, not because the government exercised *a lot of* control over the Beef Board but because it specifically, directly *controlled the Beef Board's speech*:

> The message set out in the [Beef Board's] promotions [was] from beginning to end the message established by the Federal Government. … Congress and the Secretary [of Agriculture] ha[d] … specified, in general terms, what the promotional campaigns shall contain … and what they shall not, … and they ... left the development of the remaining details to an entity whose members are answerable to the Secretary (and in some cases appointed by him as well).

Id. at 560-61 (internal citations omitted). Further, "the Secretary exercise[d] final approval authority over *every word used in every promotional campaign*," and Department of Agriculture officials were involved at every stage of the messages' development. *Id.* at 561 (emphasis added).

Williams has not alleged, let alone shown, that the Oklahoma Supreme Court exercises similar control over the OBA's political and ideological speech. And *Johanns* itself specifically distinguished *Keller* by observing that "the state bar's communicative activities to which the plaintiffs objected were not prescribed by law in their general outline," were "not developed under official government supervision," and consisted in part of "lobbying the state legislature on various issues." *Id.* at 562 (citing *Keller*, 496 U.S. at 5 & n.2). It is the same here: although the Oklahoma Supreme Court might review and approve the OBA's budget—just as the California legislature reviewed and approved the California State Bar's budget—Defendants have not shown that the Oklahoma court has directed or exercised advance approval over the OBA's specific political and ideological speech in the way that the federal government controlled the Beef Board's speech.

Because the OBA's political and ideological speech is not government speech, compelled support for its speech is not exempt from First Amendment scrutiny, and the Court should consider the merits of Plaintiff's claims.

CONCLUSION

The Court should deny Williams's 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